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

CIRCUIT AND DISTRICT JUDGES WINTER CONFERENCE

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INDEX

I. ARBITRATION

he concluded that filing the Motion for Stay for compelling Arbitration was not a waiver of the Motion to Dismiss regarding personal jurisdiction.

II. CIVIL PROCEDURE

Discovery of trade secret information and protective orders regarding the production of information claimed to be trade secrets.

Limitation of Action - the applicable statute of limitations for the fraud case was two years, and Plaintiff's change in her testimony as to the date of discovery was not sufficient to avoid the entry of a Summary Judgment.

Judicial Estoppel – Plaintiff failed to list her lawsuit as an asset in her Bankruptcy proceeding and received a discharge; and, she was, therefore, judicially estopped from pursuing the claim against the hospital.

Motion to Intervene Pursuant to Rule 17(a) - the trial court properly found that the Bankruptcy Trustee filed his motion to intervene within a reasonable time.

Damages - the Bankruptcy trustee could only recover the amount of the debt that Plaintiff owed to creditors.

Injunctions - Plaintiffs were not due an injunction because the alleged injury absent an Injunction was no greater without the requested injunction than with it in that Alabama Code §17-17-5 explicitly banned payroll deductions for remittance to organizations for use in political activities.

Rule 60(b)(6) Motion – The Motion was due to be denied because Gillis did not meet his burden of proving "extraordinary circumstances and/or extreme hardship or injustice" sufficient to overcome his delay in filing the Motion.

Civil Procedure – Remittitur of the punitive damage award – The Court overruled *Boudreaux v. Pettaway*, 108 So.3d 486 (Ala. 2012) to the extent that it held that a potential bad faith claim and/or a negligent failure to settle claim could be considered as an asset for purposes of a *Hammond/Green Oil* review and remittitur analysis.

Rights of a UM carrier to opt out within a "reasonable time" - by opting out before the date that amended Answers had to be filed, the insurance company opted out within a reasonable time.

VII. JURISDICTION

The Probate Court in Lowndes County and the Lowndes County Circuit Court had sole jurisdiction to determine all issues in regard to the appointment of an Administrator.

Preemption by Federal Law – The claims asserted were not preempted by Federal Patent Law thereby depriving the Trial Court of jurisdiction

Torts – Plaintiff established all of the necessary elements to prove his claims for fraud.

Damages – The compensatory damage award was based on speculative evidence and therefore no punitive damages could be awarded.

VIII. LEGAL ETHICS

Rule 3.6 of the Alabama Rules of Professional Conduct govern extrajudicial statements by lawyers. While the rule enumerates certain items that can be discussed "*without elaboration"*, it specifically prohibits extrajudicial statements "*that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."*

Discovery - Protective Order - information obtained via discovery is not public information and is not subject to attacks under the First Amendment on the basis of prior restraint if the Court enters a Protective Order prohibiting the dissemination of that information.

IX. SOVEREIGN IMMUNITY

The absolute immunity of the State of Alabama extends to arms or agencies of the State which includes County Boards of Education.

X. TORTS

Healthcare providers - Under the provisions of the Medical Liability Act, expert testimony must be presented establishing the (1) 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 alleged breach and the identified injury.

The Plaintiff must prove through expert medical testimony that the alleged negligence probably caused, rather than only possibly caused the Plaintiff's injury.

27. ***Yanmar America Corp. v. Randy Nichols***,
2014 Ala. LEXIS 165 (September 30, 2014). **90**

Voluntary assumption of duty to warn -

1. The Court concluded that the duty to warn of potential hazards associated with operating the gray-market tractor extended to the Plaintiff and the Trial Court did not err as a matter of law in extending the duty to warn to the Plaintiff.

2. Plaintiff failed to establish by substantial evidence that Yanmar America participated in an activity that increased the risk of harm over any risk of harm that would have existed had Yanmar America chosen not to warn.

ARBITRATION

DESPITE THE FACT THAT RAMPEY CONTENDED THAT HIS SIGNATURE UNDER THE ARBITRATION AGREEMENT WAS FORGED, THE COURT FOUND THAT SINCE RAMPEY ADMITTED HE SIGNED ALL OTHER PROVISIONS OF THE CONTRACT AND INITIALED THEM AS WELL THAT RAMPEY SHOULD BE COMPELLED TO ARBITRATE HIS CLAIMS.

America's Home Place, Inc., v. Rampey, 2014 Ala. LEXIS 176 (October 24, 2014).

SUMMARY:

Plaintiff entered into an Agreement with a builder. The Agreement included an Arbitration provision. However, the Plaintiff contended that his signature immediately beneath the Arbitration provision was forged.

HOLDING:

The Court found that the Motion to Compel Arbitration was due to be granted and reversed and remanded with directions.

DISCUSSION:

1. **Rampey admitted that he had signed or initialed every other part of the contract and the Court found that as a result, he was obligated to Arbitrate the dispute.**

Rampey did not deny that he had signed the contract and that it was a valid and enforceable contract. The Plaintiff did admit that he wrote his initials in the line provided next to the Arbitration provision. Further one of the provisions in the contract stated as follows:

> [Rampey] acknowledges that each paragraph of this contract has been explained and initials acceptance of same. [Rampey] also acknowledges receipt of this Agreement.

Rampey wrote his initials beside that provision as well as the Arbitration provision.

The Agreement further provided that "This Agreement constitutes the sole and entire Agreement between the Parties hereto and no modifications of this Agreement shall be binding unless signed by all Parties to this Agreement. No representation,

promise, or inducement not included in this Agreement shall be binding upon any party hereto."

2. The Court pointed to the above cited provisions signed and initialed as well as others and found that a signature directly below the Arbitration provision was not required.

> The fact that Rampey's signature immediately beneath the arbitration provision was (allegedly) forged is of no consequence because his signature was not required immediately beneath the arbitration provision and, furthermore, Rampey assented to be bound by that provision when he admittedly wrote his initials on the line next to the arbitration provision.

3. The Alabama Supreme Court adopted the decision of the Middle District in *Stiles* in which they found that there was no requirement under the FAA that there be a separate signed Arbitration Clause.

The Court cited to *Stiles v. Home Cable Concepts, Inc.*, 994 F.Supp. 1410 (M.D. Ala. 1998) in which the Court found that "there is no requirement that every single provision of the contract, including the arbitration clause, must be signed in order to form a part of the agreement. Indeed, it is axiomatic that 'parties may become bound by the terms of a contract, even though they do not sign it, where their assent is otherwise indicated' … **The FAA has no separate requirement of a signed arbitration clause**."

4. A party claiming the benefit of a contract cannot repudiate its burdens and conditions – including Arbitration.

The Court further pointed out that pursuant to *Southern Energy Home, Inc., v. Ard*, 772 So.2d 1131 (Ala. 2000), Rampey could not claim the benefit of the contract and simultaneously repudiate its burdens and conditions. The Court noted that Rampey's claims against America's Homes were all predicated on breaches of and violations of the contract terms.

The Court found that the Motion to Compel Arbitration was due to be granted and reversed and remanded with directions.

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

Justices Murdock and Shaw concurred in the result and Justice Murdock wrote specially.

SPECIAL CONCURRENCE BY JUSTICE MURDOCK:

Murdock wrote specially to distinguish *Stiles* in which there was no signature line next to the Arbitration provision nor was the document initialed. Further, Murdock distinguished *Stiles* because it purported to allow a credit issuer to change any of the terms of the Agreement by unilateral notice.

Justice Murdock also believed that the main opinion should not have relied on the principle that a Plaintiff cannot seek the benefits of a contract and at the same time avoid the Arbitration provision "in the contract" because Rampey did not argue that even if the Arbitration provision was part of the contract that he would not be bound by it for some reason even if he seeks to benefit from the contract provisions.

Murdock contended that Rampey's initials next to the Arbitration provision was sufficient to compel arbitration of the dispute and he found it unnecessary to rely on *Stiles*. Murdock distinguished *Stiles* in that there was no signature line next to the Arbitration clause in the *Stiles* contract and the Arbitration provision itself was also not initialed by the party resisting Arbitration.

Murdock noted that the fact that in *Stiles* the Court stated that there was no requirement that every single provision of the contract, including an Arbitration clause, had to be signed, lacked probative value in the *Rampey* case since the Agreement signed by Rampey did have a signature line.

Further, Murdock disagreed with the finding of the District Court in *Stiles* to the extent that it imposed upon a consumer a requirement to arbitrate pursuant to a provision in an original contract that did not mention Arbitration but purported instead to allow a credit issuer to change any of the terms of the Agreement by unilateral notice.

ARBITRATION

BECAUSE THE ARBITRATION AGREEMENT INCORPORATED THE AAA RULES, THE QUESTION OF WHETHER A NON-SIGNATORY COULD ENFORCE THE ARBITRATION AGREEMENT WAS A QUESTION THAT HAD TO BE DECIDED BY THE ARBITRATOR.

BY FILING A SEPARATE LAWSUIT DEALING WITH MATTERS OTHER THAN THE CONTRACT AT ISSUE, THE DEFENDANTS SUED BY THE PRACTICE, JACKSON KEY AND ANDERTON, DID NOT WAIVE THE RIGHT TO ARBITRATE THE DISPUTE IN THIS SEPARATE LAWSUIT.

Eric Anderton and Jackson Key Practice Solutions v. Practice-Monroeville, P.C., 2014 Ala. LEXIS 146 (September 2014).

SUMMARY:

A software servicing company, Jackson Key, and its employee, Anderton, were sued by a buyer of medical software. The contract between the seller, Allscripts, and the Practice for the purchase of the software included an Arbitration Agreement. Neither Jackson Key nor Anderton were parties to the Allscripts contract.

In a separate lawsuit, the software servicing company, Jackson Key, sued the Practice for money owed for separate word processing software that was not covered by an Arbitration Agreement. The Practice contended that the software servicing company had waived its right to Arbitrate based on the company's prior suit for money owed for separate word processing software that was not covered by the Arbitration Agreement.

The trial court denied the Motion to Compel Arbitration.

Jackson Key and Anderton appealed from the trial court's Order denying their Motion to Compel Arbitration.

HOLDINGS:

1. **Jackson Key and Anderton did not waive their right to Arbitrate a dispute brought against them by a buyer of medical software because Jackson Key had previously sued the Practice for money owed for separate word processing software that was not covered by the Arbitration Agreement;**

2. **The question of whether Jackson Key could compel Arbitration of the dispute with the Practice over the medical software, even though Jackson Key was not a signatory to the Arbitration Agreement between the buyer and seller of the software, was a question of arbitrability for the Arbitrator because the Agreement incorporated the American Arbitration Association rule providing for the Arbitrator to have the power to rule on his or her own jurisdiction.**

DISCUSSION:

The medical practice and the seller of the software at issue, Allscripts, entered into an Agreement that included an Arbitration Agreement. Jackson Key, Anderton's employer, sells and services the Allscripts software. Although the sales contract was between the Practice and Allscripts, Jackson Key supported the transaction.

The Practice was unhappy with the software and successfully cancelled its contract with Allscripts.

The Practice then sued Jackson Key and Anderton, but not Allscripts. Jackson Key and Anderton moved to compel Arbitration.

In a separate lawsuit filed by Jackson Key against the Practice to collect monies due for Word software that was not part of the Allscripts contract, the District Court entered a judgment in favor of the Practice and Jackson Key appealed to the Circuit Court. The Circuit Court consolidated that appeal with the action initiated by the Practice.

The Trial Court denied the Motion to Compel Arbitration.

1. **The Practice opposed the Motion to Compel Arbitration arguing that the Trial Court should decide the threshold question of arbitrability, (a) because the dispute was not within the scope of the Arbitration provision, (b) because Jackson Key was not a party to the Arbitration Agreement, and (c) because Jackson Key had waived any right by substantially invoking the litigation process in the District Court.**

2. **The Court found that the issue of Arbitration had to be decided by the Arbitrator, not the Trial Court, due to the incorporation of the AAA Rule in the Arbitration Agreement.**

The Court citing to *First Options of Chicago, Inc., v. Kaplan,* 514 U.S. 938, 944 (1995) found that the Arbitrator rather than the Court should decide questions of arbitrability in that there was "**clear and unmistakable evidence**" of such an agreement.

Jackson Key and Anderton argued that the incorporation of the rules of the AAA clearly and unmistakably indicated that the Arbitrator, not the Court, should decide the waiver issue. However, that argument was made in a reply brief; therefore, the Court would not consider it.

3. As to Anderton's waiver, Anderton had not waived his right to compel Arbitration because he was not a party to the District Court lawsuit.

As to the issue of waiver by filing the District Court action, the Court noted that the party seeking to prove waiver has a "heavy burden." *Aurora Healthcare, Inc., v. Ramsey,* 83 So.3d 495, 500 (Ala. 2011). Jackson Key was the only party to the District Court action and Anderton was not. Promptly after being served, Anderton and Jackson Key filed a Motion to Compel Arbitration. Therefore, Anderton clearly did not invoke the litigation process.

4. As to Jackson Key, the Court found that the litigation in District Court was not a waiver of the right to Arbitrate in that the issues being litigated were not the same issues.

The Court noted that at issue in the District Court action was money owed for Microsoft Word software and that the claims did not relate to the MyWay software at issue in the present case.

5. As to the scope of the Arbitration provision, Jackson Key and Anderton were not signatories to the contract containing the Arbitration provision; however, the Court found that since the AAA Rules were incorporated in the Agreement that the threshold question of arbitrability had been delegated to the Arbitrator and that the Arbitrator, not the Court, had to decide that threshold question.

The Court noted that "Generally, a nonsignatory cannot compel arbitration." *Ex parte Stripline,* 694 So.2d 1281, 1283-84 (Ala. 1997). The Court found, however, that the equitable estoppel exception applied. The Court noted that whether or not a nonsignatory could compel Arbitration was an issue of substantive arbitrability.

The Court found that since the AAA rules were incorporated in the Agreement that the threshold question of arbitrability had been delegated to the Arbitrator and that the Arbitrator, not the Court, had to decide that threshold question.

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

Justice Shaw concurred in part and concurred in the result.

Chief Justice Moore and Justices Parker and Murdock dissented.

SPECIAL CONCURRENCE OF JUSTICE SHAW:

In his special concurrence while Shaw agreed with the result, he wrote that the Court must perform a necessary "gate-keeping function" before compelling Arbitration and must determine whether the party resisting Arbitration had agreed in its contract to allow the Arbitrator to decide whether a nonsignatory to the contract could enforce its Arbitration provision.

It was the function of the Court to determine whether the Practice agreed that an Arbitrator could decide whether Anderton and Jackson Key could take their claims against the Practice to Arbitration. However, Shaw noted that the Practice had the freedom to enter into a contract that called for the Arbitrator, instead of the Trial Court, to make the decision.

DISSENT OF JUSTICE MURDOCK: Murdock wrote that only a Court could play the gate-keeping function of determining if the Arbitration Agreement is one that governs the lawsuit between the party seeking Arbitration and the other party.

In his dissent, Justice Murdock wrote that before a party to a dispute could submit to an Arbitrator either the merits of the dispute or whether the subject of the dispute falls within the scope of disputes to be decided on the merits by the Arbitrator, the Trial Court must first determine whether that Arbitration Agreement is in fact one that governs as between that party and the opposing party.

Further, Murdock pointed to his dissent in *Auto Owners Ins., Inc., v. Blackmon Ins. Agency, Inc.,* 99 So.3d 1193 (Ala. 2012). As he wrote in *Auto Owners,* Justice Murdock said it was the Court that must answer the threshold question of whether the dispute falls within the universe of cases as to which the Arbitrator is to decide the question of arbitrability because until the Court did so and did so in the affirmative, it has no basis to send the case to the Arbitrator for any purpose.

ARBITRATION –
SUBSTANTIVE ARBITRABILITY

IN THIS CASE THE ARBITRATOR NOT THE COURT WAS TO DECIDE THE ISSUE OF SUBSTANTIVE ARBITRABILITY DUE TO THE INCLUSION OF THIS LANGUAGE IN THE AGREEMENT: "*BORROWER AND LENDER AGREE THAT ANY QUESTIONS AS TO THE SCOPE OF THIS AGREEMENT SHALL BE DETERMINED BY THE ARBITRATOR (INCLUDING, WITHOUT LIMITATION, ALL ISSUES OF … ARBITRABILITY …).*"

WHETHER OR NOT NEIGHBORS' SIGNATURE WAS FORGED HAD TO BE DECIDED BY THE ARBITRATOR, NOT THE TRIAL COURT.

Regions Bank v. Neighbors, 2014 Ala. LEXIS 181 (November 14, 2014).

SUMMARY:

Neighbors sued Regions regarding issues as to a loan modification. Neighbors contended that his alleged signature on the Loan Modification Agreement had been forged and that pursuant to his Divorce Agreement he had not made payments on the loan since 2006.

The prior transaction documents included an Arbitration Agreement; however, the recent document that was the subject of the lawsuit did not contain an Arbitration Agreement.

HOLDING:

In an Opinion authored by Justice Bryan, the Court held that with respect to Neighbors' claim that Regions allowed an imposter to forge his signature on a Loan Modification Agreement, the Trial Court improperly denied Regions' Motion to Compel Arbitration because the Arbitration Agreement clearly indicated that an Arbitrator, not a Court, was to decide substantive arbitrability issues concerning the scope of the Arbitration Agreement and the Arbitrator was to decide all issues of "arbitrability."

DISCUSSION:

1. Whether the scope of the Arbitration Agreement encompassed Neighbors' claims was the threshold question that under the terms of the Arbitration Agreement, should be decided by the Arbitrator.

The Court found that Regions' argument was dispositive and required Arbitration of that issue. Neighbors contended that the Arbitration Agreement did not apply because the case involved an alleged forgery, and also pursuant to his judgment of Divorce, he stopped making payments on the original mortgage in 2006.

2. While there are differences between "substantive arbitrability" and "procedural questions," "[a]s a threshold matter, a court decides issues of substantive arbitrability 'unless the parties clearly and unmistakably provide otherwise.'" *AT&T Techs., Inc., v. Communications Workers of America,* 475 U.S. 643, 649 (1986). *Id*. at 3.

Based on the following language in the agreement:

> "Borrower and Lender irrevocably agree to settle all disputes between them … by negotiation, mediation, and arbitration' "and the language that "'disputes' means all past, present, and future disagreements, controversies, claims, and counterclaims between Borrower and Lender and includes without limitation all matters relating to this Agreement, any extension of credit, any tort, any insurance, any service, or any product."

The Court also cited to this provision in the Arbitration Agreement for its conclusion that the issues were to be decided by the Arbitrator:

> "Borrower and Lender intend for this Agreement to cover the broadest range of disputes and legal issues that may be arbitrated under Federal law. **Borrower and Lender agree that any questions as to the scope of this Agreement shall be determined by the arbitrator (including, without limitation all issues of formation, consideration, capacity, fairness, unconscionability, mutuality, duress, fraud, adhesion, arbitrability, revocability, and waiver**."

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

Chief Justice Moore and Justice Murdock dissented.

DISSENT OF JUSTICE MURDOCK:

Murdock contended as he had done in prior dissents that whether the disputed issue fell within the scope of the Arbitration Agreement was for the Trial Court to decide and not for the Arbitrator to decide.

In the dissent, Justice Murdock contended that whether the disputed issue fell within the scope of the Arbitration Agreement was for the Trial Court to decide citing to his dissents in *Anderton v. The Practice-Monroeville, P.C.*, Ms. 1121417, (September 26, 2014) and his dissent in *Auto Owners Ins., Inc., v. Blackmon Ins. Agency, Inc.*, 99 So.3d 1193, 1199 (Ala. 2012).

ARBITRATION	**THE COURT FOUND THAT THE ARBITRATION AGREEMENT WAS NOT INDUCED BY FRAUD AND THAT THE ARBITRATION LANGUAGE WAS JUST AS CONSPICIOUS AS THE OTHER PROVISIONS OF THE CONTRACT.** **THE ARBITRATION AGREEMENT PROVIDED THAT "ANY AND ALL DISPUTES" BETWEEN THE PARTIES WERE SUBJECT TO ARBITRATION WHICH INCLUDED THE ALLEGED ORAL CONTRACT.**
JURISDICTION **PERSONAL JURISDICTION**	**IN THE SPECIAL CONCURRENCES FILED BY SHAW AND LYONS AS TO THE PETITION FOR WRIT OF MANDAMUS, SHAW FOUND THAT THE DEFENDANTS CONSENTED TO THE TRIAL COURT'S JURISDICTION WHEN THEY FILED THE MOTION TO COMPEL ARBITRATION AND LYONS FOUND THAT DESPITE THE FACT THAT THE MOTION TO COMPEL ARBITRATION SAID THAT IT WAS FILED ALTERNATIVELY SHOULD THE COURT DENY THE MOTION TO DISMISS, THAT WAS NOT SUFFICIENT TO PREVENT A WAIVER OF THE CLAIM THAT JURISDICTION WAS NOT PROPER.** **IN HIS DISSENT AS TO THE PETITION FOR WRIT OF MANDAMUS, MURDOCK NOTED THAT RULE 12 PROVIDES THAT A DEFENSE OF LACK OF PERSONAL JURISDICTION COULD BE MADE IN A SEPARATE MOTION AND IN THE ANSWER AND THAT FILING THE MOTION FOR STAY FOR COMPELLING ARBITRATION WAS NOT A WAIVER OF THE MOTION TO DISMISS REGARDING PERSONAL JURISDICTION.**

Ex parte Alaska Bush Adventures, LLC, 2014 Ala. LEXIS 186 (November 26, 2014).

SUMMARY:

Willis contracted for a guided hunting trip in Alaska. The contract contained an Arbitration Agreement. Willis sued Alaska Bush for fraud and breach of contract.

The Trial Court denied personal jurisdiction Motions filed by Alaska Bush and denied the Motions to Compel Arbitration filed by Alaska Bush.

Alaska Bush filed a Petition for Writ of Mandamus.

HOLDING:

The Petition for Writ of Mandamus was denied.

The Court's Order denying the Motion to Compel Arbitration was reversed and the matter was remanded to the Trial Court with instructions.

DISCUSSION:

Willis entered into a written contract with Alaska Bush for a guided hunting trip in Alaska and claimed that he also entered into a separate oral contract to hunt black bears during the trip.

The trip occurred in **September of 2012**. In **November of 2012**, Willis sued in Elmore County Circuit Court seeking damages for (1) breach of contract, (2) misrepresentation and (3) suppression.

Willis contended that the equipment provided by Alaska Bush was inadequate and unsafe and that he lost hunting time because Alaska Bush was providing services to other hunters who were not included in the guided hunting trip. He further claimed that he lost most of his personal hunting equipment because of problems with a motorized boat and that Alaska Bush misrepresented the quality of wild game that would be available on the hunt.

On **January 2, 2013**, the Defendants filed a Motion to Compel Arbitration and on **January 11, 2013**, the Defendants filed individual Motions to Dismiss for Lack of Personal Jurisdiction.

The Trial Court denied the Motions and the Defendants petitioned for a Writ of Mandamus as to the denial of the Motion to Dismiss for Lack of Personal Jurisdiction and appealed the denial of their Motion to Compel Arbitration.

The Court denied the Petition for Writ of Mandamus without opinion and reversed and remanded the Order denying the Motion to Compel Arbitration.

1. The Arbitration Agreement was not induced by fraud because it was unhighlighted, in small print, and at the bottom of the document particularly since it was in the same font as the rest of the contract terms and was at the bottom of a one-page contract.

Willis contended that the Arbitration clause was not enforceable because it "was induced by fraud." He further contended it was a "obscured in unhighlighted small print at the bottom of the document." He further contended that the oral agreement to hunt for black bears was not subject to arbitration.

The Court noted that Willis offered no evidence regarding any alleged fraudulent misrepresentations to procure his signature on the arbitration clause in the contract.

As to Willis' contention that the Arbitration Clause was induced by fraud because the language was in unhighlighted small print at the bottom of the document, the Court noted that the print was the same size and the same font as the other contract terms and it was at the bottom of a one-page contract.

In that the Arbitration language was just as conspicuous as the other provisions, the Court in reliance on *Southern Energy Homes, Inc., v. Ard*, 772 So.2d 1131, 1135 (Ala. 2000) for the proposition that the Arbitration Clause was not induced by fraud.

2. The alleged oral contract regarding black bears was also subject to Arbitration because the Arbitration clause provided that "any and all disputes" were to be resolved via Arbitration.

As to Willis' contention that the separate oral contract regarding black bears supported denial of the Motion to Compel Arbitration, the Court pointed out that the Arbitration Clause provided that "**any and all disputes**" between the parties were subject to Arbitration.

Further, the Court noted that the alleged oral agreement was actually found in the written contract which provided that Willis had "tentatively scheduled the following hunt: A one client to one guide hunt for Moose, Brown/Grizzly Bear and Fishing." The contract also stated that "Black Bear can be added to the hunt for an additional $800.00 each."

In addition, on a form submitted by Willis as to what would make his trip more "comfortable" Willis stated that he would be more comfortable **if he got "a Trophy**

Moose/Grizzly/Black Bear/Wolf/Wolverine," and caught lots of fish. As a result, the Court found that the Trial Court erred in denying the Motion to Compel Arbitration.

As to the Petition for Writ of Mandamus, the Justices ruled as follows:

Chief Justice Moore and Justices Stuart, parker, and Main concurred in the *Per curiam* Opinion.

Justices Shaw and Bryan and Lyons sitting as a Special Justice wrote a special concurrence.

Justices Bolin and Murdock dissented.

Justice Wise recused herself.

As to the appeal of the Order denying Arbitration, Justices Stuart, Parker, Shaw, Main, and Bryan and Special Justice Lyons concurred.

Chief Justice Moore and Justices Bolin and Murdock dissented.

Justice Wise recused herself.

JUSTICE SHAW'S CONCURRENCE REGARDING PETITION FOR WRIT OF MANDAMUS:

In Justice Shaw's concurrence regarding the Petition for Writ of Mandamus, he wrote specially because the main opinion denied the Petition without an opinion.

Shaw wrote that the Defendants consented to the Trial Court's jurisdiction when they sought affirmative relief via the Motion to Compel Arbitration.

JUSTICE LYON'S SPECIAL CONCURRENCE AS TO THE PETITION FOR WRIT OF MANDAMUS:

In his special concurrence, Justice Lyons noted that the proper procedure for the Defendants would have been to file their Motion to Dismiss for Lack of Personal Jurisdiction and secured a ruling prior to filing a Motion to Compel Arbitration.

Lyons noted that despite the fact that the Motion to Compel Arbitration stated that it was filed alternatively should the Court deny the Motion to Dismiss was not sufficient to prevent a waiver of the claim that dismissal was proper for lack of personal jurisdiction.

JUSTICE MURDOCK'S DISSENT AS TO THE PETITION FOR WRIT OF MANDAMUS:

In Justice Murdock's dissent, Justice Murdock said he disagreed with the suggestion by Justice Lyons that a Motion asserting the defense of lack of personal jurisdiction is not "proper" merely because that defense had already been asserted by a Defendant in a previously filed Answer.

Murdock noted that Rule 12 provides that a defense of lack of personal jurisdiction "may at the option of the pleader" be made in a separate Motion and that he did not read that language to mean that the defense of personal jurisdiction should not be also included in an Answer.

Murdock wrote separately to explain why he did not believe that the Defendants waived their defense of lack of personal jurisdiction grounded on the inability of the Plaintiff to satisfy the "minimum contacts" test. Murdock reasoned that lack of personal jurisdiction was asserted in an Answer on **December 21, 2012** and on **January 2, 2013**, the Defendants filed a Motion for Stay and for Arbitration stating that a separate Motion to Dismiss for Lack of Personal Jurisdiction was to be filed. **Nine days later**, the Defendants did in fact file the Motion to Dismiss. Murdock contended that this chain of events with intervening holidays was not a waiver by failing to "assert [the defense] seasonably." *Neirbo Co., v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939).

Therefore, because Murdock did not believe that the defense of lack of personal jurisdiction was waived, he dissented from the opinion of the majority denying the Petition for Writ of Mandamus.

Justice Bolin concurred in Murdock's dissent.

CIVIL PROCEDURE **DISCOVERY OF TRADE SECRET INFORMATION AND PROTECTIVE ORDERS REGARDING THE PRODUCTION OF INFORMATION CLAIMED TO BE TRADE SECRETS.**

Kilgo v. Smith, 2014 Ala. LEXIS 193 (December 12, 2014).

SUMMARY:

The underlying case arose out of an alleged malfunction of a control system for air bags in a motor vehicle. Plaintiffs sought discovery from the manufacturer which included a request for the algorithm used in the manufacture of the electronic control unit at issue.

The Trial Court denied the manufacturer's Motion for a Protective Order and ordered the production of the algorithm and specified that the information had to be protected after production.

The manufacturer filed a Petition for Writ of Mandamus.

HOLDING:

1. **The Court found that the Trial Court exceeded its discretion by entering a Protective Order that provided insufficient protection for the algorithm which was the manufacturer's trade secret.**

2. **A Writ was issued directing the Trial Court to vacate its Protective Order and to enter a more comprehensive and restrictive Protective Order.**

DISCUSSION:

1. **In support of its Motion for Protective Order, the manufacturer offered affidavit testimony that only certain employees of the manufacturer on the project team had access to the information and that the information had not been produced or disclosed to any federal, state, or local agency nor had it been produced or disclosed in any other court proceeding.**

The manufacturer contended that disclosure of the algorithm that it had spent over 25 years developing and hundreds of millions of dollars in the development and design process merited protection.

The Plaintiff responded in part that the design of the crash sensor algorithm and the specific calibration used to calibrate the sensors with the algorithm were reasonable inquiries necessary to determine whether the algorithm and crash sensing calibrations were defective.

2. In the Trial Court's Order, the Court stated that the information was in fact a trade secret that warranted protection but that it was necessary and relevant to the proof of the Plaintiffs claims. The Court specified that the information should be protected to the maximum extent practicable and allowed the manufacturer to submit within ten days additional safe guards that it would request.

The manufacturer submitted proposed amendments to the Protective Order to which the Plaintiff objected.

3. The Trial Court then entered an Order denying the manufacturer's Motion to Amend the Protective Order and required the Plaintiff to submit a proposed order regarding the safeguards it would employ.

The Trial Court entered an Amended Protective Order and the manufacturer petitioned for a Writ of Mandamus.

4. Justice Main noted that in that there was no dispute that the algorithm was a trade secret that there were only two issues for review:

1. Bosch argued that the Trial Court exceeded its discretion in not issuing a Protective Order that would prevent the Plaintiff from having any access to the algorithm; and

2. The manufacturer presented an alternative argument that the Trial Court exceeded its discretion in refusing to adopt a Protective Order drafted by Bosch and instead adopting a Protective Order that provided inadequate safeguards to protect the trade secret.

The Court found that the Trial Court had exceeded its discretion by entering a Protective Order that provided insufficient protection for the algorithm and granted the Writ.

5. The Court directed the Trial Court to vacate its Protective Order and to enter a more comprehensive and restrictive Protective Order with regard to the algorithm but also noted that "*this opinion, however, is not to be read as directing the Trial Court to enter the proposed Protective Order previously offered by Bosch as the governing Protective Order in this case*."

Justices Stuart, Bolin, Parker, and Wise concurred.

Justices Murdock, Shaw, and Bryan concurred in the result.

Chief Justice Moore dissented.

SPECIAL CONCURRENCE BY JUSTICE SHAW:

In his special concurrence, Justice Shaw wrote that he believed that the amendments to the Protective Order requested by Bosch were appropriate except as to two issues:

1. **Shaw suggested that the Trial Court should consider allowing more than a single expert, Caruso, to review the algorithm information. However, Shaw noted that it should be made clear in the Protective Order that the broad category in the order of "qualified persons" were not entitled to review the algorithm information.**

2. **Shaw wrote that the algorithm information that Bosch was ordered to produce should include information identified in Caruso's Affidavit as "crash discrimination thresholds."**

Shaw further wrote that he had concerns about Bosch's proposed limitations on the ability of the Plaintiff's experts to copy or otherwise record the algorithm in that the limitations may hamper their ability to effectively examine the materials.

3. **Shaw suggested that the Trial Court could, if possible, "craft a solution that would allow the experts to retain the minimum amount of information required to adequately examine this information.**

Justices Murdock and Bryan concurred in Shaw's special concurrence.

DISSENT OF CHIEF JUSTICE MOORE:

Chief Justice Moore in his dissent found that the Trial Court's Order included confidentiality safeguards designed to protect the manufacturer and that he did not believe that Bosch had a "**clear and certain right**" to even more protection. He further reiterated that he contended that Mandamus was improper in discovery matters except in the most extreme cases.

CIVIL PROCEDURE
LIMITATION OF ACTION

THE APPLICABLE STATUTE OF LIMITATIONS FOR THE FRAUD CASE WAS TWO YEARS, AND PLAINTIFF'S CHANGE IN HER TESTIMONY WAS NOT SUFFICIENT TO AVOID THE ENTRY OF A SUMMARY JUDGMENT.

Tender Care Veterinary Hosp. v. First Tuskegee Bank, 2014 Ala. LEXIS 187 (November 26, 2014)

SUMMARY:

Tender Care claimed it was injured by the Bank's requirement that it use an unlicensed general contractor whose performance was sub-par.

Tender Care asserted claims of breach of fiduciary duty and fraud against the Bank.

The Trial Court granted the Bank a Summary Judgment and Tender Care appealed.

HOLDINGS:

1. **The Court found that the breach of fiduciary duty and fraud claims were not timely filed because they were asserted more than two years after they accrued.**

2. **The claims accrued when Tender Care first learned that the Bank's alleged misrepresentation – that the general contractor was licensed and would do a good job – was false.**

3. **There was no issue in the present case as to a Trustee or Trust Property; therefore, the triggering event would have been the date the Plaintiff was damaged.**

DISCUSSION:

Tender Care sought financing to construct a clinic and animal hospital in **2004**. Tender Care and contended that it hired PJ Construction and Services as the contractor because the President of the Bank assured her that PJ would "do a good job."

By **April of 2005**, Tender Care was unhappy with the work done by PJ and would not authorize the Bank to disburse the monies requested by PJ.

PJ abandoned the project in **July of 2005**. Tender Care completed the building and opened the business in **August of 2006** and then filed for Bankruptcy protection in **September of 2007**.

In **January of 2008**, the Bank sued the owners of Tender Care and obtained a judgment of over $1.6 million.

In **April of 2009**, Tender Care filed an action in Montgomery County seeking an order enjoining a foreclosure sale and two years later in **2011**, Tender Care amended its Complaint asserting claims for breach of fiduciary duty and fraud.

Tender Care opposed the Bank's Motion for Summary Judgment based on the Statute of Limitations with an Affidavit from one of the owners of Tender Care in which she stated that she had not discovered that PJ was not licensed until **November of 2008**. Despite her earlier testimony during her deposition that she learned that PJ was not licensed in **July of 2005**.

1. Plaintiff could not demonstrate that the claims arose out of a breach of fiduciary duty because there was no issue in this case as to a Trustee or Trust Property.

As to the breach of fiduciary duty claim, Tender Care relied on the case of *Tonsmeire v. AmSouth*, 659 So.2d 601 (Ala. 1995) in which the Court found that the limitations period for breach of fiduciary duty did not begin to run until the fiduciary duty was terminated and the possession of trust property by the trustee became adverse.

The Court noted that there was no issue in the present case as to a trustee or trust property; therefore, the triggering event would have been when the aggrieved party, Tender Care, was damaged. *System Dynamics Int'l, Inc.*, 683 So.2d 419, 421 (Ala. 1996).

2. Although a breach of fiduciary duty claim will accrue when damage is sustained, the two-year statute of limitations can still be tolled based on the aggrieved party's ignorance. However, Plaintiff did not demonstrate the requisite fiduciary duty to establish a breach of fiduciary duty claim.

A breach of fiduciary duty claim will accrue when damage is sustained but the two-year statute of limitations can still be tolled based on the aggrieved party's ignorance. *Davis v. Dorsey*, 495 F.Supp.2d 1162, 1171 (M.D. Ala. 2007).

3. The Plaintiff testified that her damage occurred and her knowledge that the contractor was unlicensed both occurred in 2005. Plaintiff's

change in her testimony that the events occurred in 2008 did not support a reversal of the Trial Court's grant of the Motion for Summary Judgment.

The Court noted that Dr. Patterson testified that by **June of 2005** she had sustained damage and made this response during her deposition:

Q. Did you feel, as of June 2005, that these delays that failed to meet your expectations for [PJ Construction] had caused harm to [TCVH]?

A. Yes.

Q. That harm being financial?

A. Yes.

Q. And physical?

A. Yes.

Further, Patterson made it clear that she was aware that PJ was not licensed in July of 2005. The Court found that the cause of action for both the fraud claim and the breach of fiduciary duty claim accrued in 2005 and that the claims filed in 2009 for breach of fiduciary and fraud were time barred. Further, the Court emphasized that Tender Care relied on the Affidavit of Patterson that had been stricken by the Trial Court.

The Court affirmed the judgment of the Trial Court granting the Motion for Summary Judgment of the Bank.

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

CIVIL PROCEDURE
JUDICIAL ESTOPPEL — **PLAINTIFF FAILED TO LIST HER LAWSUIT AS AN ASSET IN HER BANKRUPTCY PROCEEDING AND RECEIVED A DISCHARGE; and, SHE WAS THEREFORE, JUDICIALLY ESTOPPED FROM PURSUING THE CLAIM AGAINST THE HOSPITAL.**

MOTION TO INTERVENE PURSUANT TO RULE 17(A) — **THE TRIAL COURT PROPERLY FOUND THAT THE BANKRUPTCY TRUSTEE FILED HIS MOTION TO INTERVENE WITHIN A REASONABLE TIME.**

DAMAGES — **THE BANKRUPTCY TRUSTEE COULD ONLY RECOVER THE AMOUNT OF DEBT THAT PLAINTIFF OWED TO CREDITORS.**

Ex parte Jackson Hosp. & Clinic, Inc., 2014 Ala. LEXIS 180 (November 7, 2014).

SUMMARY:

In **December of 2010**, the Plaintiff underwent bilateral amputation of both of her legs below the knee. On **December 8, 2011,** she filed for Chapter 7 Bankruptcy and listed no assets including no potential cause of action for malpractice and received a discharge in **March of 2012**. Plaintiff filed this lawsuit on **October 9, 2012.**

Defense counsel told Plaintiff's counsel that he intended to seek a Summary Judgment and agreed to delay filing for a few days.

1. The first objection to the Plaintiff's status as the real party in interest was on **May 28, 2013.**

2. The Trustee moved the Bankruptcy Court to reopen the Bankruptcy case on **May 30, 2013.**

3. The Trustee filed the Motion to Intervene on **November 5, 2013.**

The Defendants objected under Rule 17 arguing that the Motion was not filed within a reasonable time to intervene.

The Trial Court granted the substitution and allowed the Trustee to pursue the claims up to the amount of the creditors' claims but granted the Defendants' Summary Judgment Motions in all other respects.

The Plaintiff filed an appeal and the Defendant, Jackson Hospital, filed a Petition for Writ of Mandamus.

HOLDINGS:

1. **The Court deferred to the Trial Court in its finding that the Motion to Intervene filed by the Trustee was within a reasonable time under Rule 17(a) because the Trustee had not known of the action when it was filed and upon learning of the action had to move to reopen the Plaintiff's Bankruptcy case;**

2. **The Plaintiff was barred from prosecuting the action in her individual capacity under the doctrine of judicial estoppel because a reasonable person would have been aware of her claims and would have known that she would gain an unfair advantage if she was allowed to pursue the action since she had obtained a discharge in Bankruptcy without identifying the lawsuit as an asset.**

DISCUSSION:

Justice Stuart authored the Opinion.

The Court outlined these facts at issue. The first objection to the Plaintiff's status is the real party in interest was on **May 28, 2013**, when the amended Answer was filed and the Trustee filed the Motion to Intervene on **November 5, 2013**; however, the Trustee moved the Bankruptcy Court to reopen the Bankruptcy case on **May 30, 2013**.

1. **The Court rejected the Hospital's contention that a five-month delay was unreasonable as a matter of law and found that the Trial Court was best equipped to decide what constituted a "reasonable time" under Rule 17(a).**

The Court cited to the case of *Killmeyer v. Ogleboay Norton Co.,* 817 F.Supp. 2d 681 (W.D. Pa. 2011). In *Killmeyer,* the Court considered the same issue and the Court found that by filing a formal real party in interest challenge five months after the Trustee first learned of the action, the Trustee filed timely in light of the necessary delay in receiving notice and necessary delay in seeking the Bankruptcy Court's approval to have counsel appointed to prosecute the claim on behalf of the Trustee.

2. **The Court rejected the Plaintiff's argument that she should be able to prosecute her claim because the hospital did not establish the doctrine**

of judicial estoppel and the Trial Court's ruling unfairly prevented her from petitioning the Bankruptcy Court for permission to prosecute the action herself as the real party in interest.

As to Plaintiff's argument that she should be able to prosecute the action in her individual capacity, the Court rejected her arguments first that the Hospital did not establish the doctrine of judicial estoppel and second that the Trial Court's ruling unfairly prevented her from petitioning the Bankruptcy Court for permission to prosecute the medical malpractice action herself as the real party in interest.

3. The Court relied on *Hamm* in which although the Plaintiff moved the Bankruptcy Court to reopen the Estate and filed amended Schedules listing the cause of action, the Court found that the claims were barred based on judicial estoppel.

For the proposition that judicial estoppel barred the Plaintiff's claims, the Court cited to its decision in *Hamm v. Norfolk Southern Railway Co.,* 52 So.3d 484 (Ala. 2010). In *Hamm,* the Plaintiff moved the Bankruptcy Court to reopen his Bankruptcy Estate and he also filed amended schedules listing the cause of action. The Trial Court nevertheless granted the Defendant's Motion for Summary Judgment based on judicial estoppel.

4. In response to Plaintiff's contention that she did not know of the existence of her cause of action prior to the close of the Bankruptcy Court, the Court emphasized that the standard was not whether she "actually knew" but was instead whether *she should have known*.

To distinguish *Hamm* from her case, Plaintiff argued that she did not know of the existence of her cause of action until after her Bankruptcy case was closed and that, as a result, she had never knowingly asserted inconsistent positions so as to implicate the doctrine of judicial estoppel.

The Court emphasized that the question was not whether the Plaintiff "actually knew" of the potential claim but was instead whether a reasonable person "should have known." *Hamm,* 52 So.3d at 498.

5. The Court emphasized that Plaintiff alleged in her amendment to the Complaint that the substandard care could not have reasonably been discovered prior to December of 2010 which was a year prior to the filing of her Bankruptcy case and over a year prior to her obtaining a discharge and cited to *Noland* in which the Court found that factual assertions in pleadings are considered to be judicial admissions.

The Court pointed out that the Plaintiff alleged in her **January 2013** amendment to the Complaint that "Plaintiff's injury and Defendant's substandard care [were] not discovered and could not have reasonably been discovered prior to **December of 2010**."

The Court cited to *Noland Health Servs., Inc., v. Wright,* 971 So.2d 681, 685-86 (Ala. 2007) for the proposition that "[n]ormally, factual assertions in pleadings and pre-trial orders are considered to be judicial admissions conclusively binding on the party who made them."

6. Plaintiff contended that she would obtain no unfair advantage if the creditors were paid first; however, the Court noted that the Bankruptcy Court denied the Plaintiff's Motion to Set Aside the Judgment discharging her debts.

As to Plaintiff's argument that she would gain no unfair advantage if she is allowed to pursue her action against Jackson Hospital since the first $28,000.00 would go to pay her discharge debt, the Court noted that although the Bankruptcy Court granted her Motion to reopen the case, the Bankruptcy Court denied her Motion to set aside the judgment discharging her debts.

7. As to Plaintiff's argument that the Defendants concealed the mistake and had unclean hands, the Court pointed out that the doctrine of unclean hands must relate to facts of "willful misconduct" that is "morally reprehensible" and that Plaintiff had waived that argument by citing to no willful acts in her initial Brief.

As to Plaintiff's argument that Defendants had unclean hands in that they fraudulently concealed mistakes made during her surgery, the Court pointed out that the Plaintiff herself alleged that, at the latest, the mistakes were discovered by December 2010.

Further, the Court emphasized that the doctrine of unclean hands cannot be in a context of "nebulous speculation or vague generalities but rather it finds expression in specific acts of willful misconduct which is morally reprehensible as to known facts." Citing to *Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc.,* 985 So.2d 924, 932 (Ala. 2007).

The Court pointed out that the Plaintiff cited to no willful acts in her initial brief and had therefore waived the argument.

8. Plaintiff waived the argument that she should be given the opportunity to ask the Bankruptcy Court for relief because it was not asserted in the Trial Court.

As to Plaintiff's final argument that the Summary Judgment should be reversed because she should be given the opportunity to ask the Bankruptcy Court if she, instead of the Trustee could pursue the claim, the Court noted that it was clear that the Trustee did not have any intention of abandoning the claim and that the argument was waived because it was not asserted in the Trial Court.

Justices Bolin, Shaw, Main, Wise, and Bryan concurred in Stuart's Opinion.

Chief Justice Moore concurred in the result.

Justice Parker recused himself.

Justice Murdock concurred specially.

SPECIAL CONCURRENCE BY JUSTICE MURDOCK:

In Justice Murdock's special concurrence he wrote separately to address note 2 in regard to the discussion of *Lumpkin v. City of Gulf Shores*, 964 So.2d 1233 (Ala.Civ.App. 2006). Justice Murdock did not believe that the Court properly found that a de novo review was appropriate to describe the opinion of the Court of Civil Appeals.

CIVIL PROCEDURE INJUNCTIONS

PLAINTIFFS WERE NOT DUE AN INJUNCTION BECAUSE THE INJURY WITH WHICH THEY ALLEGED THEY WERE THREATENED WAS NO GREATER WITHOUT THE REQUESTED INJUNCTION THAN WITH IT IN THAT ALABAMA CODE §17-17-5 EXPLICITLY BANNED PAYROLL DEDUCTIONS FOR REMITTANCE TO ORGANIZATIONS FOR USE IN POLITICAL ACTIVITIES.

White v. John, 2014 Ala. LEXIS 144 (September 26, 2014).

SUMMARY:

The Plaintiff teacher organization sought a Preliminary Injunction barring the State Comptroller from implementing regulations prohibiting payroll deduction of AEA and ASEA dues on the ground that the regulations were not promulgated properly using notice and comments as required by the State Administrative Act.

The trial court granted the Preliminary Injunction and Defendant White, as Comptroller, appealed.

HOLDINGS:

1. **The lawsuit should have been dismissed as there was no such entity as the "Office of the State Comptroller" and even if there were, the Alabama Constitution Article I, § 14 immunized the State and State agencies from liability; and**

2. **The injury with which the Plaintiffs alleged they were threatened – their inability to receive payments by way of automated payroll deductions – was no greater without the requested injunction than with it because Alabama Code § 17-17-5 explicitly banned payroll deductions for remittance to organizations for use in political activities.**

The Preliminary Injunction was reversed.

DISCUSSION:

The Court found that the Office of State Comptroller was not properly a Defendant and that such a claim ran afoul of Section Fourteen of the Alabama Constitution.

As to the merits of the Preliminary Injunction, the Court noted that the alleged injury was the inability of the Appellees to receive payments by way of automated payroll deductions. The Court noted that the injury is no greater without the requested Injunction than with it.

The Court emphasized that the loss of dues payment by payroll deduction was mandated by the Act. Therefore, the Court found that the Injunction should not have been granted in that it would not have been no benefit to the person seeking it.

The Court noted it was not the rule that interfered with their right to receive dues but the underlying Statute itself.

The Court reversed the Trial Court's grant of a Preliminary Injunction.

Justice Stuart, Bolin, Parker, Shaw, Wise, and Bryan concurred in the Opinion authored by Murdock.

Chief Justice Moore concurred specially.

SPECIAL CONCURRENCE OF CHIEF JUSTICE MOORE:

In that the Trial Court's Preliminary Injunction effectively suspended the operation of the Statute as it applied to the AEA and ASEA, Justice Moore found that the Injunction was due to be reversed.

Chief Justice Moore wrote that the Complaint challenged guidelines as being improperly implemented but did not seek to enjoin the Statute.

CIVIL PROCEDURE — **THE RULE 60(b)(6) MOTION WAS DUE TO BE DENIED BECAUSE GILLIS DID NOT MEET HIS BURDEN OF PROVING "EXTRAORDINARY CIRCUMSTANCES AND/OR EXTREME HARDSHIP OR INJUSTICE" SUFFICIENT TO OVERCOME HIS DELAY IN FILING THE MOTION.**

CIVIL PROCEDURE – REMITTITUR OF THE PUNITIVE DAMAGE AWARD

THE COURT OVERRULED *BOUDREAUX v. PETTAWAY,* 108 So.3d 486 (Ala. 2012) TO THE EXTENT THAT IT HELD THAT A POTENTIAL BAD FAITH CLAIM AND/OR NEGLIGENT FAILURE TO SETTLE A CLAIM COULD BE CONSIDERED AS AN ASSET FOR PURPOSES OF A *HAMMOND/GREEN OIL* REVIEW AND REMITTITUR ANALYSIS.

Gillis v. Frazier, 2014 Ala. LEXIS 104 (August 1, 2014)

SUMMARY:

Frazier filed a wrongful death/medical malpractice complaint against Gillis and others. Gillis diagnosed the decedent with a heart condition and prescribed a blood thinner. The decedent's blood allegedly became too thin and she died of a massive brain hemorrhage.

The jury awarded Frazier $5 million in damages.

The parties engaged in post-trial discovery and Frazier saw financial information from Gillis. Specifically, Frazier saw information relating to a potential bad-faith claim against Gillis' liability insurance carrier.

The trial court conducted an evidentiary hearing and denied Gillis' post-judgment motion. Gillis appealed.

After the first appeal, Gillis filed a Rule 60(b) Motion in the trial court related to juror misconduct in that one of the jurors did not reveal that her husband was a former

patient of Dr. Gillis. The Alabama Supreme Court stayed the first appeal. After the trial court denied the Rule 60(b) Motion, Gillis filed a second notice of appeal.

HOLDING:

1. **The trial court properly denied the doctor's Rule 60 motion for relief from judgment because, given the conflicting evidence, the doctor failed to meet his burden of proving *extraordinary circumstances and/or extreme hardship or injustice* sufficient to entitle him to relief under Rule 60(b)(6). The basis of the Rule 60 motion was that a juror failed to reveal the doctor's treatment of her husband and there was conflicting evidence about whether the juror had spoken disparagingly about the doctor.**

2. **The judgment was reversed as to the issue of remittitur of the punitive damage award because, at the time of the *Hammond/Green Oil* hearing, the third-party action for bad faith had not yet accrued and was speculative in nature.**

3. **The Court overruled *Boudreaux* to the extent that it held that a potential claim against an insurance company could be a part of the remittitur analysis. Thus, it could not be considered as part of the doctor's net worth in determining his assets for purpose of *Hammond/Green Oil* and the remittitur analysis.**

4. **Further, the Court found that the assets of the doctor's wife could not be considered as a part of his net worth in the remittitur analysis.**

DISCUSSION:

Dr. Gillis sought a remittitur of the punitive damage award based on its alleged excessiveness. Dr. Gillis argued that his age, 76, and his inability to pay $3 million of the judgment – the amount above his liability insurance coverage of $2 million – supported a remittitur of the damages award. Gillis also filed a renewed motion to revive the $1 million cap on damages in Section 6-5-547 which the court found unconstitutional in 1995 and a motion seeking an order striking any damages in excess of the $1 million cap prescribed in Section 6-5-547.

1. **As to the remittitur issue, Gillis challenged the trial court's order denying his motion for a remittitur because, he says, in calculating Dr. Gillis' assets, the trial court improperly included among his assets a potential bad-faith claim against his liability insurance carrier; and the Court agreed and overruled *Boudreaux*.**

Gillis asked the Court to overrule *Boudreaux v. Pettaway*, 108 So.3d 486 (Ala. 2012) to the extent that it held that a potential bad-faith claim and/or negligent failure to

settle claim against a liability insurance carrier may be considered as an asset for purposes of a *Hammond/Green Oil* review and remittitur analysis.

In response to Gillis' request that the Court overrule *Boudreaux*, the Court stated that:

> We accept Dr. Gillis' invitation to overrule *Boudreaux* to the extent that it held that, in calculating a defendant's assets, the trial court may consider the contents of a claim file by defendant's liability insurance carrier and include among the defendant's assets a potential bad-faith and/or negligent failure to settle claim against the defendant's liability insurance carrier. We conclude that allowing a trial court to consider a defendant's potential third-party claim against its liability insurance carrier as an asset for purposes of a *Hammond/Green Oil* review and a remittitur analysis is subjective rather than objective. In a remittitur analysis, the actual assets and liabilities of the defendant are determinative of the defendant's net worth. A cause of action against a defendant's liability insurance carrier does not accrue until a final judgment has been entered against the defendant. Because at the time of a *Hammond/Green Oil* hearing the third-party action has not yet accrued and is speculative in nature, it cannot be considered as part of the defendant's net worth in determining a defendant's assets for purposes of *Hammond/Green Oil* and a remittitur analysis. Accordingly, we reverse the judgment as to this issue and remand this case for the trial court to conduct a *Hammond/Green Oil* hearing without taking into consideration Dr. Gillis' potential bad-faith and/or negligent failure to settle claim against his liability insurance carrier. We further direct that the trial court in calculating Dr. Gillis' assets under *Hammond/Green Oil*, should not consider Dr. Gillis' wife's portion of their jointly-owned assets.

2. As to the appeal of the denial of the Rule 60(b)(6) Motion, the Court affirmed the Trial Court's Order denying the Motion.

A. CASE NO.: 1121205 – REGARDING THE DENIAL OF THE RULE 60(b)(6) MOTION.

1. RULINGS OF THE JUSTICES AS TO CASE NO. 1121205, DR. GILLIS' APPEAL OF THE TRIAL COURT'S DENIAL

OF HIS RULE 60(B) MOTION, THE JUSTICES RULED AS FOLLOWS:

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

Justice Shaw concurred in the result.

Justice Murdock dissented.

Justice Bryan recused himself.

2. JUSTICE MURDOCK'S DISSENT IN CASE NO. 1121205 REGARDING THE APPEAL OF THE DENIAL OF THE RULE 60(B) MOTION:

Murdock dissented in that he believed that Gillis' Rule 60(b) Motion was due to be granted. Murdock wrote that he found no basis for the trial court's conclusion that Dr. Gillis failed to prove that he could not have discovered the information that was the basis for his Motion before the judgment became final.

Murdock noted that neither the Plaintiff nor the trial court nor this Court articulated what further action should have been taken by Dr. Gillis. Further, Justice Murdock noted that "my problem with the rationale upon which the main opinion ultimately rests its affirmance of the trial court's judgment is simply this: The trial court actually did not consider the conflicting affidavits referenced. That is, the trial court did not decide which of those affidavits was more persuasive or, in turn, reach the substantive issue of bias by the juror as to which those affidavits "conflict." Instead, the trial court's reason for rejecting Dr. Gillis' motion for relief under *Rule 60(b)(6)* was in fact the procedural/timing issue initially noted above."

Murdock cited at length from the affidavits submitted by Gillis finding them persuasive evidence that the Rule 60(b)(6) Motion should have been granted.

B. CASE NO.: 1121292 – REGARDING REMITTITUR.

1. RULINGS OF THE JUSTICES AS TO CASE NO.: 1120292 REGARDING REMITTITUR.

In regard to the remittitur issue in Case No. 1120292, the Court reversed and remanded with instructions.

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

Justice Murdock concurred specially.

Justice Parker and Justice Shaw concurred in part and dissented in part.

Justice Bryan recused himself.

2. JUSTICE MURDOCK'S SPECIAL CONCURRENCE AS TO THE REMITTITUR ISSUE:

Justice Murdock agreed that *Boudreaux* should be overruled. Murdock referenced his dissent in *Boudreaux.*

3. JUSTICE SHAW'S DISSENT IN CASE NO.: 1120292 REGARDING REMITTITUR:

Justice Shaw objected to the Court's decision to overrule *Boudreaux* and emphasized that he saw no "prior mistake" explained in the main opinion that would require the Court to back away from *Boudreaux* or *Mutual Assurance, Inc., v. Madden*, 627 So.2d 865 (Ala. 1993). Shaw wrote that "Instead of a wholesale overruling of *Boudreaux* (and, sub silento, *Madden*), I would review, as we have previously done in *Boudreaux* and *Madden*, whether the trial court erred in assigning any value to Dr. Gillis' potential claim."

Justice Parker joined in Shaw's dissent.

CIVIL PROCEDURE
A FOREIGN CORPORATION'S
LACK OF CAPACITY TO SUE

THE MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED BECAUSE THE ONLY PLEADINGS BEFORE THE COURT WERE THE COMPLAINT AND THE AMENDED COMPLAINT WHICH DID NOT STATE THAT THE PLAINTIFF, CAG, WAS A FOREIGN CORPORATION.

CAG MLG, LLC v. Smelley, 2014 Ala. LEXIS 140 (September 19, 2014).

SUMMARY:

CAG sued Smelley alleging counts of misrepresentation and/or fraud and a count of unjust enrichment and further sought in an amendment an Injunction to prevent Smelley from selling a piece of real property.

Smelley filed a Motion to Dismiss and alleged that CAG was a foreign limited liability company organized and formed in the State of Florida and not qualified to do business in Alabama.

Smelley attached a printout from the Alabama Secretary of State and a printout from the Wyoming Secretary of State.

CAG filed a Motion to Strike the objected to paragraphs of Smelley's Motion to Dismiss and the supporting evidence which the Trial Court granted. The Trial Court also found that the request for an Injunction was moot and directed the parties to file Briefs.

Smelley filed a Brief in support of its Motion to Dismiss and CAG filed a Brief in Opposition.

In the Brief filed by CAG, CAG admitted that it was not registered with the State of Alabama to transact business but argued that under *Freeman Webb Investments, Inc. v. Hale,* 536 So.2d 30 (Ala. 1988) that former § 10A-2-15.02 did not preclude its action because that section precluded only contract claims not tort claims such as the claims brought against Smelley.

HOLDINGS:

1. **The Trial Court erred in dismissing the CAG's claim because CAG's original and amended Complaints did not indicate that the LLC was a foreign entity or that it was not registered to transact business in Alabama;**

2. **Therefore, the CAG's alleged lack of capacity to sue the investors was not apparent from the face of its Complaint; and**

3. **A foreign entity's failure to comply with the registration requirements of a statute such as § 10A-2-15.01 was a capacity defense, and it did not per se implicate standing or subject matter jurisdiction.**

DISCUSSION:

Despite the fact that the LLC admitted in Brief that it was not an Alabama corporation, the Court reversed the Order of the Trial Court granting the Motion to Dismiss based on Alabama's door closing statute, §10A-1-7.21 because there was nothing in the Complaint as amended that said that the LLC was not an Alabama corporation and the Trial Court had struck the printouts from the Secretary of State's website showing that the LLC was not an Alabama corporation.

Chief Justice and Justices Stuart, Shaw and Wise concurred in the Opinion authored by Justice Parker.

CIVIL PROCEDURE

VENUE

VENUE WAS PROPER PURSUANT TO THE "INTEREST OF JUSTICE PRONG" OF ALABAMA'S *FORUM NON CONVENIENS* STATUTE IN THE COUNTY WHERE THE PLAINTIFF RESIDED, WHERE THE ACCIDENT OCCURRED, WHERE THE ACCIDENT WAS INVESTIGATED, AND WHERE PLAINTIFF WAS HOSPITALIZED.

Ex parte Manning, 2014 Ala. LEXIS 189 (December 5, 2014)

SUMMARY:

The case involved a motor vehicle accident that occurred in Montgomery. The Plaintiff was a resident of Montgomery County and the Defendant was a resident of Macon County. Law enforcement personnel investigating the accident also worked in Montgomery County.

The Defendant sought a transfer of venue to Montgomery County based of *forum non conveniens* which the Trial Court denied.

Defendant then filed a Petition for Writ of Mandamus.

HOLDINGS:

1. **The Court found that the Trial Court erred in denying the Defendant's Motion for Change of Venue based on the interest of justice prong of the *forum non conveniens* Statute, Ala. Code § 6-3-21.1, because the only connection with Macon County and the case was that the Defendant resided there;**

2. **The Defendant, Manning asserted that the interest of justice prong of Alabama's *forum non conveniens* Statute mandated a transfer to Montgomery County;**

3. **The accident occurred in Montgomery County;**

4. **Law enforcement personnel who responded worked in Montgomery County; and**

5. **The Plaintiff resided in and was hospitalized in Montgomery County.**

Venue was proper in Montgomery County rather than the County in which the Defendant resided.

DISCUSSION:

1. The "interest of justice" prong focuses on whether the "nexus" or "connection" between the Plaintiff's lawsuit and the original forum is strong enough to warrant burdening the Plaintiff's forum with the action. Further, the forum preferred is where the injury occurred.

Justice Wise cited to the 2008 Opinion of the Court in *Ex parte Indiana Mills & Mfg., Inc.*, 10 So.3d 536, 540 (Ala. 2008), in which the Court reasoned as follows:

> The 'interest of justice' prong of §6-3-21.1 requires 'the transfer of the action from a county with little, if any, connection to the action, to the county with a strong connection to the action.' *Ex parte National Sec. Ins. Co.*, 727 So.2d [788,] 790 [(Ala. 1998)]. Therefore, 'in analyzing the interest-of-justice prong of §6-3-21.1, this Court focuses on whether the 'nexus' or 'connection' between the plaintiff's action and the original forum is strong enough to warrant burdening the plaintiff's forum with the action.' *Ex parte First Tennessee Bank Nat'l Ass'n*, 944 So.2d 906, 911 (Ala. 2008). Additionally, this Court has held that 'litigation should be handled in the forum where the injury occurred.' *Ex parte Fuller*, 955 So.2d 414, 416 (Ala. 2006). Further, in examining whether it is in the interest of justice to transfer a case, we consider 'the burden of piling court services and resources upon the people of a county that is not affected by the case and … the interest of the people of a county to have a case that arises in their county tried close to public view in their county.' *Ex parte Smiths Water & Sewer Auth.*, 982 So.2d 484, 490 (Ala. 2007).

2. Justice Wise pointed out that in *Morton*, which was decided in August 29, 2014, the Court emphasized that the determining issue in that case was whether the "nexus" with the County in which the lawsuit was filed was "strong enough" to warrant burdening that County with the action.

Further, Justice Wise pointed to the recent case of *Ex parte Morton*, 2014 Ala. LEXIS 121 (August 29, 2014). In *Morton*, a resident of Jefferson County filed a

Complaint in Greene County because the Defendant was a resident of Greene County. The claims arose out of an automobile accident that occurred in Jefferson County, the Plaintiff was treated at a hospital in Jefferson County and received additional medical treatment at four other healthcare facilities in Jefferson County; therefore, Morton filed a Motion to Transfer the case to Jefferson County based on the doctrine of *forum non conveniens.*

The Trial Court denied the Motion and Morton petitioned for a Writ of Mandamus.

In *Morton*, the Court found that the dispositive question was whether the nexus between the lawsuit in Macon County was "strong enough to warrant burdening" Macon County with the action. The *Morton* Court relied on the decision of the Court in *Ex parte First Tennessee Bank Nat'l Ass'n,* 994 So.2d 906 (Ala. 2008) in which the Court stated that the focus should be on whether the "nexus" or connection between the Plaintiff's action in the original forum is strong enough to burden the Plaintiff's forum with the action.

3. In *Morton* and other cases cited by Justice Wise, the Court found that nothing material to the case occurred in the County where the lawsuit was pending.

As was true in some of the other cases cited, Justice Wise wrote that nothing material to the case transpired in Macon County. Wise concluded that Macon County had a very weak overall connection to the claim, the County of resident of the Defendant and that, as a result, the Trial Court exceeded its discretion in denying the Motion for Change of Venue.

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

Chief Justice Moore and Justice Murdock dissented without opinion.

CIVIL PROCEDURE

VENUE **THE COURT FOUND THAT BECAUSE THE PLAINTIFF WAS PERMANENTLY RESIDING IN TUSCALOOSA COUNTY AND ONLY OCCASIONALLY VISITED HIS FAMILY IN WILCOX COUNTY THAT VENUE WAS PROPER IN TUSCALOOSA COUNTY AND *FORUM NON-CONVENIES* HAD NO APPLICATION.**

Ex parte Progressive Direct Ins., Co., 2014 Ala. LEXIS 188 (December 5, 2014)

SUMMARY:

The case arises out of a motor vehicle accident that occurred in Tuscaloosa.

The residency of the Plaintiff, Robinson, was an issue and the Defendants were Clayton, a Tuscaloosa resident, and Progressive, Robinson's uninsured motorist carrier.

Robinson (1) worked in Tuscaloosa, (2) lived in an apartment in Tuscaloosa but (3) purportedly returned on weekends to Wilcox County.

The Court found that venue was proper in Tuscaloosa because:

(1) Robinson represented to multiple authorities that he was a resident of Tuscaloosa,
(2) Robinson represented in the accident report that he was a resident of Tuscaloosa, and

(3) Robinson represented to voting officials that he was a resident of Tuscaloosa County.

HOLDINGS:

1. **The Court found that because Robinson was permanently residing in Tuscaloosa County, he could not rely on Ala. Code §6-3-7(a)(3) to establish venue in Wilcox County.**

2. **The Court found that because venue was improper in Wilcox County, the doctrine of *forum non conveniens* had no application.**

DISCUSSION:

1. **Robinson argued that venue was proper in Wilcox County because he had always lived in Wilcox County and because Progressive did business in Wilcox County.**

Progressive contended that Robinson resided in Tuscaloosa County and that the accident occurred in Tuscaloosa and that Progressive did business both in Tuscaloosa and Wilcox Counties.

Therefore, Progressive contended that Wilcox County would only have been an appropriate venue for the action pursuant to §6-3-7(a)(3) if Robinson had resided there at the time of the accident.

2. The Court relied on *Coley* in which the Court found the focus is where the Plaintiff was "domiciled" and not where he "actually resided" at the time of the accident.

The Court noted that like the focus in *Ex parte Coley*, 942 So.2d 349 (Ala. 2006), the focus in the case is where Robinson was "domiciled, not on where [he] actually resided, at the time of the accident." 942 So.2d at 352. *Id.* at 5.

3. Robinson's only connection with Wilcox County was that he had always lived in Wilcox County, that his daughter lived in Wilcox County with his parents and that his daughter attended school in Wilcox County.

The Court noted that other than Robinson's assertion that he had always lived in Wilcox County, that his daughter resided in Wilcox County with his parents and that his daughter attended school in Wilcox County, Robinson had no other contacts with Wilcox County.

4. *Forum non conveniens* is only at issue when the lawsuit is filed in a County where venue is appropriate; therefore, since venue was not appropriate in Wilcox County due to the Plaintiff's residency, the doctrine of *forum non conveniens* had no application to this case.

The Court concluded that the doctrine of *forum non conveniens* §6-3-21.1, Ala. Code 1975, had no application nor field in this case. The Court noted that the doctrine of *forum non conveniens* has a field of operation only where the action is commenced in a county in which venue is appropriate and that *forum non conveniens* was not at issue because venue was not appropriate in Wilcox County where the action was commenced.

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

Justice Murdock concurred in the result.

Chief Justice Moore dissented without opinion.

CIVIL PROCEDURE

VENUE

THE INTEREST OF JUSTICE PRONG OF §6-3-21.1(a) COMPELLED THE TRANSFER OF A CASE TO THE JEFFERSON COUNTY COURT WHERE THE ACCIDENT OCCURRED, WHERE THE PLAINTIFF RESIDED, WHERE THE PLAINTIFF WAS TREATED AT HOSPITALS AND OTHER MEDICAL FACILITIES AND VENUE WAS NOT PROPER IN GREENE COUNTY IN THAT THE ONLY CONNECTION TO GREENE COUNTY WAS THAT THE DEFENDANT WAS A RESIDENT OF GREENE COUNTY.

Ex parte Morton, 2014 Ala. LEXIS 121 (August 29, 2014).

SUMMARY:

The Defendant, a resident of Greene County, Morton, and the Plaintiff, a resident of Jefferson County, Watkins, were involved in a motor vehicle collision in Jefferson County. Following the collision, the Jefferson County resident, Watkins, was treated at a hospital in Jefferson County then subsequently received medical treatment at four healthcare facilities located in Jefferson County.

Watkins filed a Complaint in Greene County asserting claims arising out of the vehicle collision. Morton filed a motion to transfer the case to Jefferson County pursuant to the doctrine of forum non-conveniens as codified in Section 6-3-21.1.

The Trial Court denied the motion for transfer of venue based on *Ex parte Coley*, 942 So.2d 349 (Ala. 2006).

Morton then filed a petition for a writ of mandamus.

HOLDINGS:

1. **The Trial Court erred in denying an injured motorist's motion to transfer venue to Jefferson County under Section 6-3-21.1 because (1) the injury occurred in Jefferson County, (2) Watkins was a resident of Jefferson County, (3) Watkins received treatment in four medical facilities in Jefferson County; and (4) the official investigation of the accident was conducted in Jefferson County.**

2. No material act or omission occurred in Greene County, and the only contact with Greene County is that the Defendant, Morton, is a resident of Greene County.

DISCUSSION:

1. The Court found that the case relied upon by the Trial Court, *Coley,* in denying the Motion to Transfer Venue was not applicable because *Coley* addressed on the convenience prong of §6-3-21.1(a) and did not address the interest of justice prong of §6-3-21.1(a).

The trial court in denying the motion to transfer venue relied on *Ex parte Coley*, 942 So.2d 349 (Ala. 2006). In *Coley*, the parents of a deceased passenger filed a wrongful death action in Jefferson County against the driver of the vehicle following an automobile accident in Perry County.

The Defendant filed a motion to transfer the case to Perry County arguing, among other things, that the case should be transferred under the doctrine of forum non-conveniens as codified in Section 6-3-21.2(a).

The *Coley* Court noted that the action could have been filed in Perry County because the accident occurred there. However, the Court noted that the defendant had the burden of showing the trial court that Perry County was a significantly more convenient forum than Jefferson County.

> The defendant must show that his inconvenienced and expense in defending the action in the selected forum outweigh the plaintiff's right to choose the forum; that is, the defendant must suggest transfer to a county that is "significantly more convenient" than the county in which the action was filed."… the defendant contends that the Perry County law enforcement personnel who investigated the accident and will be called to testify at trial likely reside in Perry County. At least two key witnesses expected to be called at the trial of this case … are thought to reside in Perry County.

Further, the Defendant in *Coley* contended also that the Plaintiffs resided in Florida and had no connection to Jefferson County.

2. Morton argued that *Coley* addressed only the convenience prong of Section 6-3-21.1(a) and is therefore not applicable to her argument that the interest of justice prong of Section 6-3-21.1(a) compels the transfer of the case to the Jefferson County Circuit Court.

The Court agreed that *Coley* is distinguishable on the basis of the interest of justice prong. To analyze the interest of justice prong, the Court focuses on whether the

"nexus" or connection between the plaintiff's action and the original forum is strong enough to warrant burdening the Plaintiff's forum with the action. Further, the Court should consider the burden of piling court services and resources upon the people of the county that are not affected by the case.

Watkins argued that the cases relied on by Morton, *Ex parte Autauga Heating and Cooling*, 58 So.3d 745 (Ala. 2010); *Ex parte Wachovia Bank*, 77 So.3d 570 (Ala. 2011) and *Ex parte Indiana Mills and Manufacturing, Inc.*, 10 So.3d 536 (Ala. 2008) were distinguishable because each of those cases involved multiple defendants residing both in the forum and transferee counties.

3. The Court found that Jefferson County had a significantly stronger connection to the case than did Greene County which was connected to the case only by the fact that the Defendant Morton resides there which the court previously had described as "weak."

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

Chief Justice Moore and Justice Murdock dissented.

JUSTICE MURDOCK'S DISSENT:

Murdock cited to his dissent in *Wachovia* and *Autauga Heating* and disagreed with the proposition that Morton was entitled to a transfer of the action to Jefferson County based on the "interest of justice prong." Further, Justice Murdock expressed concern that some portions of the main opinion could be read as further expanding the field of operation of the interest of justice prong to include certain convenience prong features and factors.

CONSTITUTIONAL LAW **THE AMENDMENT TO THE CONSTITUTION IN REGARD TO HOUSTON COUNTY WAS NOT SUFFICIENT TO AUTHORIZE THE USE OF ELECTRONIC MACHINERY WHICH THE COURT CHARACTERIZED AS ILLEGAL GAMING DEVICES.**

Houston County Econ. Dev. Auth., v. State, 2014 Ala. LEXIS 183 (November 21, 2014).

SUMMARY:

The Circuit Court condemned approximately 600 machines as being illegal gaming devices. The Houston County Economic Development Authority appealed from the judgment condemning 691 allegedly illegal gaming devices, $288,657.68 in cash, and various documents allegedly related to illegal gambling.

HOLDINGS:

1. **Although Amendment Number 569, Ala. Const. Amend. Houston Cty., §1, legalized bingo in Houston County, the electronic gaming devices at issue were properly seized by the State under Ala. Code §13A-12-30 because they did not play the game "commonly known as bingo," i.e. a game that involved *meaningful human interaction in a group setting*, not a game played within the circuitry of electronic machinery;**

2. **The Trial Court's finding that the currency seized by the State from a gaming facility was clearly attributable to illegal gambling was not contrary to the great weight of the evidence; and**

3. **As the Trial Court properly held that the activity at the gaming facility constituted illegal gambling and that the records that were seized related to illegal gambling and were subject to forfeiture.**

DISCUSSION:

1. **Although Amendment 569 did not define "bingo," the implementing legislation described it as "*the game commonly known as bingo, where numbers or symbols on a card are matched with numbers or symbols selected at random*."**

In the Per Curiam Opinion, the Court noted that Amendment Number 569 did not define "bingo." However, the implementing legislation for Amendment Number 569

provided that the term "bingo" referred to "*the game commonly known as bingo, where numbers or symbols on a card are matched with numbers or symbols selected at random*." §45-35-150 (1), Ala. Code 1975.

2. The Court reiterated its findings in *Barber v. Cornerstone* as the standard by which the gaming devices would be judged.

In finding that the games at issue were not traditional "bingo" the Court cited to *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So.3d 65, 86 (Ala. 2009) in which the Court defined bingo as:

(1) the use of one or more cards by players,

(2) random drawings and

(3) announcement of numbers,

(4) a physical act by the player i.e. marking a card,

(5) if the player did not pay proper attention the player would miss an opportunity;

(6) the player must have the ability to announce that he had won and prior to any announcement by other players; and

(7) a group activity with multiple players would be at issue.

3. The testimony was disputed as to whether the players of electronic machines competed against each other.

The Court discussed at length the type of machines at issue and noted that the testimony was disputed as to whether players of the electronic machines were required to compete against each other.

4. The tables seized were not used for the game commonly or traditionally known as bingo.

The Court agreed further that the tables seized also were not the game commonly or traditionally known as "bingo."

Justices Stuart, Bolin, Parker, Murdock, Main, Wise, and Bryan concurred in the Per Curiam Opinion.

Chief Justice Moore and Shaw concurred in the result.

DAMAGES **THE SUPREME COURT AFFIRMED PUNITIVE DAMAGE AWARDS THAT WERE GENERALLY A 3 to 1 RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES.**

Target Media Partners Operating Company LLC v. Specialty Marketing Corporation, 2014 Ala. LEXIS 126 (August 29, 2014).

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 that was decided on September 6, 2013, the Court issued an opinion with these 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.**

6. **The case was remanded for the Trial Court to conduct a hearing concerning the jury's punitive damage award against Target**.

On remand, the Trial Court addressed in a hearing the jury's punitive damages award against the company. After addressing the guidelines or factors for a Trial Court to consider regarding punitive damages in *BMW of North America, Inc., v. Gore*, 517 U.S. 559 (1996) and *Green Oil Company v. Hornsby*, 539 So.2d 218 (Ala. 1989) and the associated case of *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), the Trial Court affirmed the Award of punitive damages and Target appealed.

HOLDING:

The punitive damage awards of $630,000.00 on a claim of promissory fraud and $503,400.00 on a claim of fraudulent misrepresentation were fair, reasonable, and justified, given the plaintiff's lost profits and expenses, the reprehensibility of defendant's conduct in continuing a business relationship for four years with no intention of performing the promised services, and the financial health of the defendant Target, which, although losing money, generated several million dollars in revenue each year.

DISCUSSION:

The Alabama Supreme Court in this opinion essentially quoted from the Trial Court's order which resulted in a 3 to 1 ratio of punitive damages to compensatory damages.

The Court's per curiam opinion was concurred in by Chief Justice Moore and Justices Parker, Murdock, Shaw, Wise, and Bryan.

Justices Stuart, Bolin, and Main dissented without opinion.

DAMAGES	**THE $100,000.00 CAP ON DAMAGES FOR A MUNICIPALITY UNDER § 11-47-190 DOES NOT APPLY IF THE EMPLOYEE WAS ACTING OUTSIDE THE SCOPE OF HIS EMPLOYMENT.**
INSURANCE	**THE MUNICIPALITY CHOSE TO PURCHASE INSURANCE FOR POLICE VEHICLES THAT WERE USED BY OFFICERS FOR ACTIVITIES OUTSIDE THEIR EMPLOYMENT; THEREFORE, THE CAP DID NOT LIMIT THE AMOUNT THAT THE INSURANCE COMPANY WAS REQUIRED TO PAY.**

Alabama Municipal Ins. Corp., v. Willie Allen, 2014 Ala. LEXIS 142 (September 2014).

SUMMARY:

A police officer, Beard, who was driving to work with marijuana in his system at 103 miles per hour in a 45 mile per hour zone hit the vehicle in which the Plaintiffs were riding.

The Plaintiff, the Alabama Municipal Insurance Corporation, contended that the $100,000.00 limit and statutory cap on damages should apply.

The trial court refused to allow the City to deposit $100,000.00 with the Court as full satisfaction of the $1.1 million judgment.

The insurance company appealed.

HOLDINGS:

1. **The statutory cap of $100,000.00 found in Ala. Code § 11-47-190 did not apply when a police officer acting outside the scope of his employment was sued in his individual capacity. Section 11-47-190 was intended to protect municipalities, not employees, who were sued in their individual capacity;**

2. **The Trial Court properly refused to allow the City to deposit $100,000.00 as full satisfaction of the $1.1 million judgment; and**

3. **The insurer of the vehicle that the Officer was driving was not entitled to a judgment declaring that the recovery of the injured party against the Officer was limited to $100,000.00.**

DISCUSSION:

At issue was four appeals, all essentially centering on whether the $100,000.00 statutory cap of §11-47-190 applied when a Peace Officer, acting outside his employment, was sued in his individual capacity.

The car was insured by the Alabama Municipal Insurance Corporation and under the policy provisions "**who is an insured**" included "**anyone else while using with your [the municipality] permission a covered 'auto' you own, hire or borrow** …"

Holmes and Allen were injured in an auto accident when they were struck by a police patrol car driven by Beard. The trial court consolidated the cases in which Holmes sued Beard, the Police Officer, and Holmes sued her insurer, State Farm, with the lawsuit in which Allen sued Beard and Allen sued State Farm. Allen also sued his car insurer, Geico.

1. **The City contended that under §11-47-190 its liability for indemnification for an employee's acts was limited to $100,000.00. The Court disagreed noting that the provision was limited to a recovery against a municipality for an employee's actions that arose out of the performance of his official duties.**

2. **In support of its argument that the liability was limited to $100,000.00 pursuant to the cap, the City argued that it was the "real party in interest" Defendant.**

The Court pointed out that it was undisputed that Beard was the Defendant, not the City. The Court noted that even if the City had an obligation under §11-47-24 to indemnify Beard – which it did not, the City argued that it was the real party in interest because it had a duty to indemnify Beard. The Court noted that the City had not cited to any authority to support applying Rule 17 to an intervener seeking to satisfy the judgments against a Defendant.

3. **The City had no obligation to indemnify its employees who were acting outside the performance of their official duties.**

As to the City's argument that the Trial Court erred in not allowing it to deposit $200,000.00 to satisfy both the judgments entered in favor of Allen and Holmes because §11-47-24 required it to indemnify its employees, the Court noted that a municipality was not required to indemnify its employees who were acting outside the performance of official duties.

4. **The City also argued that it should have been allowed to deposit the money in order to stop the accrual of interest. The Court noted that**

the City did not raise the issue of interest at the trial level and could not assert it in this Court.

5. **AMIC argued that Beard was not actually sued in his "individual capacity" because those words were not in the Complaint. The Court disagreed in viewing the Complaint as a whole.**

6. **AMIC argued that §11-47-190 was a collection cap and limited the amount that Allen and Holmes could collect from AMIC as the City's insurance company, and argued that the Court's opinion in *St. Paul Fire & Marine Ins. Co., v. Nowlin,* 542 So.2d 1190 (Ala. 1988) controlled**.

In *Nowlin,* the Plaintiff recovered a $500,000.00 malpractice verdict against the Druid City Hospital Board. The Trial Court relying on §11-93-2 reduced the verdict to $100,000.00. The Supreme Court reinstated the verdict. After remand, the Trial Court reinstated the original verdict and entered a judgment.

The Plaintiff then, pursuant to §27-23-2 obtained a Writ of Garnishment to collect $400,000.00 in that the insurer had paid the reduced verdict of $100,000.00. The Trial Court ordered the garnishment to issue.

On appeal, the Court reversed the Trial Court's judgment and held that pursuant to §11-93-2, a statute that was not unconstitutional, the liability of the insurer as well as the Board was limited to $100,000.00.

7. **The Court found that *Nowlin* was distinguishable because in *Nowlin* the judgment was against a municipal agent to which the $100,000.00 cap would apply, the Druid City Hospital Board which was unlike the present case in which the statutory damages cap did not apply because the claims were asserted against Beard individually and were not asserted against the municipality.**

8. **The Court noted that the City opted to have its Police Officers' vehicles insured for activities outside the Officers' employment and AMIC accepted premiums for the coverage and has admitted that Beard was an insured under its policy with the City; therefore, the policy limits, not the $100,000.00 cap applied to satisfy any judgment.**

This Opinion was a Per Curiam Opinion and Chief Justice Moore and Justices Stuart, Bolin, Parker, Shaw, Main, Wise, and Bryan concurred.

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

CONCURRING OPINION BY JUSTICE MURDOCK:

In his concurring Opinion, Justice Murdock wrote that he concurred with the main opinion with the exception of the comment regarding the latter of the two issues addressed in the writing. **Justice Murdock contended that the $100,000.00 cap expressed in §11-47-190 would be inapplicable to a claim against Beard in his individual capacity even if the claim had arisen by acts or omissions by Beard while acting within the line and scope of his employment or, in the language of §11-47-24, "out of the performance of his official duties."**

Justice Murdock emphasized that the cap on municipal liability is only that – a cap on municipal governmental liability (whether for payment of damages to a third party or of indemnity to its own employee). A cap does not apply to a judgment against any other entity which includes a municipal employee sued in his or her individual capacity.

DAMAGES

GENERAL VERDICT	**DAMAGES FOR MENTAL ANGUISH WERE NOT PROPERLY AWARDED. IN THAT A GENERAL VERDICT WAS ENTERED, THE ENTIRE CASE HAD TO BE REMANDED FOR A NEW TRIAL DUE TO THE COURT'S INABILITY TO DETERMINE THE AMOUNT OF DAMAGES AWARDED BY THE JURY FOR THE CLAIMS OF MENTAL ANGUISH.**

CONTRACTS

BREACH OF WARRANTY	**NO EXPERT TESTIMONY WAS NECESSARY TO ESTABLISH A DEFECT IN THE PRODUCT AND TESTIMONY, ALTHOUGH DISPUTED, ESTABLISHING DEFECTS IN THE LOGGING EQUIPMENT WITHIN FOUR MONTHS OF PURCHASE WAS SUFFICIENT TO SUBMIT THE CLAIM TO THE JURY.**

Barko Hydraulics, LLC v. Shepherd, 2014 Ala. LEXIS 149 (September 2014).

SUMMARY:

A purchaser of commercial logging equipment sued the manufacturer for breach of express warranty. A jury awarded a verdict in favor of the purchaser and the manufacturer appealed.

HOLDINGS:

1. **A verdict in favor of the purchaser of commercial logging equipment on a breach of warranty claim that he asserted against the manufacturer was reversed and remanded because general damages were awarded and there was no way to determine the amount the jury attributed to each type of damages – some of which were properly awardable and some of which were not;**

2. **The Trial Court properly submitted the purchaser's breach of express warranty claim to the jury for resolution because the evidence showed that after four months of use a knuckle boom loader purchased by the individual began to overheat and to use excessive fuel and hydraulic fluid; and the parties submitted conflicting evidence on this issue.**

DISCUSSION:

1. The warranty specifically (a) excluded damage resulting from a failure to maintain the equipment; (b) it limited the manufacturer's liability to parts and labor; (c) it capped any claim for the manufacture or sale at an amount exceeding the cost of correcting the defects; and (d) all liability would terminate as of the date of the expiration of the warranty.

The warranty further provided that damages available under the warranty were limited to the product itself and no other damages.

The warranty provided for the equipment specifically excluded coverage for "damage due to failure to maintain or use the Barko product or part according to manuals, schedules, or good practice." The warranty limited Barko's potential liability to the following:

1. They were limited to obtaining the parts and the labor, where applicable, in accordance with terms of the warranty;

2. The Company's liability for losses arising from the design, manufacture, or sale no matter what the claim was limited to an amount not exceeding the cost of correcting the defects and at the expiration of the warranty period, all such liability would terminate; and

3. Barko was not liable for incidental, consequential, or special damages for losses of use of the product, a loss or damage to property other than the product, a loss of profits or other commercial loss, or any special or consequential damages – except liability for consequential damages which by law could not be disclaimed.

2. The testimony was disputed as to whether the seller was notified of problems that Shepherd began experiencing within four months of use.

G&S Equipment serviced the loader several times during the first year of ownership and the owner of G&S testified that the repairs were fairly minor and were unrelated to the hydraulic system.

A year after the purchase, Shepherd brought the loader to G&S for some outstanding warranty repairs and at that time, only one month or 100 hours remained before the warranty expired. Guy noticed that Shepherd's maintenance of the loader was lacking and not being done in accordance with the manufacturer's scheduled.

Shepherd disagreed and emphasized that the service records did not indicate that the loader was not being properly maintained.

In November of 2010, approximately two years after the purchase, Shepherd took equipment in for repairs after the hydraulic pumps began making noise. The pumps had failed and the cost to repair would be approximately $10,000.00 that would not be covered under the warranty. Shepherd said that he could not make the repairs and he left the loader with G&S and informed Wells Fargo of its location so that they could repossess it. Wells Fargo obtained a $124,184.00 deficit judgment against Shepherd.

Shepherd then sued Barko, G&S, and Cummins, the manufacturer of certain component parts and alleged (1) fraud, (2) negligence and/or wantonness, and (3) multiple breach of warranty claims.

He sought compensatory damages, mental anguish, and punitive damages.

G&S and Cummins were dismissed and the case was tried against Barko on only the express warranty claim.

The jury entered a $450,000.00 verdict and Barko appealed.

3. Barko contended that Shepherd failed to prove that there was any defect in the loader because he failed to establish the presence of a specific defect. The Court disagreed holding that the identification of an existing defect is not essential to recover upon an express warranty.

Citing to *Ex parte Miller*, 693 So.2d 1372 (Ala. 1997). The Court emphasized that the evidence would be sufficient if it showed **either directly or by permissible inference** that the loader was defective in its performance or function or that it otherwise failed to conform to the warranty. The Court noted that the evidence was that after four months of use the loader began to overheat and to use excessive fuel and hydraulic fluid. Subsequently, the hydraulic pump stopped working.

4. The application of an express warranty to the facts is a question that must be decided by the trier of fact.

The Court noted that the application of an express warranty is a question of fact for the trier of fact and cited to *Ex parte Miller*. The evidence was conflicting and therefore, it was for the jury to decide.

5. Whether or not the purchaser had maintained the equipment properly was also a question of fact that had to be decided by the jury.

As to the maintenance issues alleged by Barko, Shepherd testified that he had maintained this equipment as he had all of his other logging equipment used during the last twenty to thirty years and that the service records did not show any evidence of

improper maintenance. Again, the Court found that this was an issue for the jury to decide.

6. The Court found that the warranty period had not expired because the problem with the hydraulic pumps manifested after four months of use and that Barko breached its contract during the warranty period and mere passage of time did not cure or excuse the breach.

As to Barko's contention that the warranty period had already expired when the hydraulic pumps failed, the Court did not agree. The problem manifested after four months of use and after the equipment was repeatedly serviced, the pump stopped working. Barko failed to correct the problems after repeated complaints and servicing. The Court found that Barko breached its contract during the warranty period and that mere passage of time did not cure or excuse that breach or failure to perform.

7. The Court found that damages for breach of warranty pursuant to §7-2-714 are limited to the difference at the time and place of acceptance between the value of the goods accepted and the value the goods would have had if they had been as warranted. Further, the Court noted that incidental and consequential damages are sometimes awarded.

As to damages, Barko contended that Shepherd's recovery was limited to the cost of repair. Barko also argued that the Trial Court erred in instructing the jury on mental anguish damages. Shepherd contended that because the warranty failed of its essential purpose, he was entitled to an award of damages as allowed by the Uniform Commercial Code as well as damages for mental anguish. Shepherd further claimed that Barko failed to preserve its claim that the Trial Court erred in instructing the jury on mental anguish damages.

Pursuant to §7-2-714 and 715 of the Ala. Code, the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.

§7-2-715 provides for the recovery of incidental and consequential damages in appropriate cases. Incidental damages include expenses reasonably incurred, commercially reasonable charges, expenses or commissions and any other reasonable expense incident to the delay or breach.

Consequential damages include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know.

8. Damages for mental anguish were not available to the purchaser absent a limited mental concern or solicitude exception, and the purchaser's claims related to the loss of his business and the loss of his

marriage were not sufficient to establish the necessary mental concern or solicitude exception.

However, the Court noted that mental anguish damages are not recoverable generally in a breach of contract action citing to *Bowers v. Wal-Mart Stores, Inc.*, 827 So.2d 63, 68-70 (Ala. 2001). The Court in *Bowers*, however, recognized a limited mental concern or solicitude exception for the loss of the Plaintiffs' home via fire.

Shepherd alleged that he lost his business because of the problems with the loader and that his loss of business resulted in his divorce and inability to spend as much time with his daughter.

The Court found that Barko's contractual duty to Shepherd was not "so coupled with matters of mental concern or solicitude … that a breach of that duty will necessarily or reasonably result in mental anguish or suffering." *F. Becker Asphaltum Roofing Co., v. Murphy,* 224 Ala. 655, 657, 141 So. 630, 631 (1932).

9. The Court found that there was not substantial evidence to support the award of mental anguish damages. In that the verdict was a general verdict, the Court reversed and remanding for a new trial.

Chief Justice Moore and Justices Bolin and Main concurred in the Pre Curiam Opinion.

Justice Murdock concurred specially.

Justice Shaw concurred in the result.

Justices Parker and Bryan concurred in part and dissented in part.

Justice Stuart concurred in the result in part and concurred in part and dissented in part as to the rationale.

SPECIAL CONCURRENCE OF JUSTICE MURDOCK:

Murdock concurred in Shaw's discussion regarding consequential and incidental damages and he agreed that it was not necessary to present expert testimony to explain a specific defect that supported the claim.

In his special concurrence, Justice Murdock concurred in the main opinion as well as in Justice Shaw's special writing regarding consequential and incidental damages. As to the conclusion that the evidence showed either directly or by permissible inference that the loader was defective in its performance or function that it otherwise failed to conform to the warranty, Murdock agreed that it was not necessary to present expert testimony or other evidence to explain the specific defect giving rise to the claim.

CONCURRENCE IN THE RESULT BY JUSTICE SHAW:

Shaw believed that there was sufficient evidence demonstrating that the warranty failed of its essential purpose which would permit the recovery of incidental and consequential damages.

As to Justice Shaw's concurrence in the result, Justice Shaw wrote specially to explain while the Trial Court did not err in submitting to the jury the issue of incidental and consequential damages. Although the warranty limited recovery to the replacement of defective parts and barred incidental and consequential damages, Justice Shaw reasoned that he agreed that there was sufficient evidence from which the jury could conclude that the warranty failed of its essential purpose. As a result, Justice Shaw agreed that the limitations on remedies and damages were not applicable.

CONCURRENCE AND DISSENT BY JUSTICE BRYAN:

Bryan believed that the judgment as to liability should be affirmed and that the case should be reversed and remanded for a new trial only on the issue of damages.

Justice Bryan concurred in all aspects of the main Opinion except insofar as it reversed the judgment in its entirety and remanded for a new trial. Bryan would have affirmed the judgment as to liability and reversed the judgment as to damages and remand for a new trial on the issue of damages only citing to *LaFarge Bldg. Materials, Inc., v. Stribling,*880 So.2d 415 (Ala. 2003).

CONCURRENCE AND DISSENT BY JUSTICE STUART:

Stuart believed that the judgment should have been reversed and that the case should have been remanded directing the Trial Court to enter a judgment as a matter of law in favor of the manufacturer. She further contended that the warranty limited the damages to only defects in material and workmanship and that expert testimony was required to establish the defect.

Justice Stuart wrote regarding her concurrence in the result in part and concurring in part and dissenting in part as to the rationale. Justice Stuart believed that it was ultimately unnecessary to address the damages issue because in her view the Trial Court erred in denying the Motion filed by Barko seeking a Judgment as a Matter of Law on the breach of warranty claim. Therefore, although she agreed that the judgment should be reversed in *toto* she would have remanded the case not for a new trial, but for the Trial Court to enter a judgment as a Matter of Law in favor of Barko.

Stuart emphasized that an agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms citing to *Black Diamond Dev., Inc., v. Thompson,* 979 So.2d 47, 52 (Ala. 2007).

Stuart wrote that the only warranty at issue was the warranty that the equipment would be "free from defects and material and workmanship under normal use, maintenance, and service." This warranty was an expressed written warranty and there should have been no concern regarding implied warranties. Shepherd produced no evidence or testimony demonstrating that the loader suffered from "defects in material and workmanship." The mere fact that the hydraulic pumps failed is insufficient evidence that the loader was defective.

Stuart emphasized that in *Miller*, the case relied on in the Per Curiam, the language of the warranties were different. In *Miller*, the warranty itself bodily warranted against "failures" of the product. Stuart wrote that in the present case, the situation is different in that the warranty is limited only to defects in material or workmanship. Stuart pointed out that in *Ex parte Miller,* the Court wrote that "if a company … wishes to warrant only defects in material and workmanship, then it may do so" and that the main Opinion in this case effectively holds the exact opposite – that a company cannot warrant only defects in material and workmanship even if it has clearly and unambiguously done so.

Justice Stuart agreed with Barko that expert testimony was required and that the only evidence offered in this case was the fact that the piece of equipment failed which was insufficient to result in a verdict.

EDUCATION LAW
ADMINISTRATIVE PROCEDURES

ONCE A SCHOOL BOARD ADOPTS A POLICY SUCH AS THE REDUCTION IN FORCE POLICY AT ISSUE UNDER ALABAMA CODE SECTION 16-1-33(B), THE BOARD IS OBLIGATED TO FOLLOW IT.

THE TEACHERS COULD MAINTAIN A BREACH OF CONTRACT ACTION AGAINST THE MEMBERS OF A SCHOOL BOARD FOR BREACH OF CONTRACT.

Nelson v. Megginson, 2014 Ala. LEXIS 166 (September 30, 2014).

SUMMARY:

The teachers initialed filed an action in 2009 against the Board of School Commissioners and subsequently voluntarily dismissed it and then filed a separate lawsuit in 2012 naming the members of the Board and the Superintendent as Defendants.

They asserted a breach of contract against the members and the Superintendent for their violation of the reduction in force procedures adopted by the Board in 2007.

The procedure specified in part that if a reduction in force occurred but the principal of a particular school designated a non-tenured employee who would have been rehired but for the reduction in force, that employee would have a one-time recall right to a position for which he or she was qualified.

Non-tenured teachers who were terminated as a result of the reduction in force and who were not rehired sued claiming that the Board members and the Superintendent had breached their contract with the non-tenured teachers by not complying with the reduction in force procedures.

HOLDINGS:

1. **The teachers' claims against the school board and the superintendent of schools were not time-barred as the six-year statute of limitations**

under Ala. Code § 6-2-34(9) applied since they stated a breach of contract claim;

2. **The school board adopted a reduction in force policy that gave non-tenured and probationary employees a one-time recall right for one-calendar year from the effective date of his or her termination when a reduction in force was declared and *the principal of a particular school designated a non-tenured employee or a probationary employee as an individual who would have been rehired but for the reduction in force.* Therefore, once the school board adopted a policy such as the reduction in force policy adopted under Ala. Code § 16-1-33(b), it was bound to follow it.**

3. **Although the reduction in force procedures specifically provided as follows: "This policy in no ways gives non-tenured employees a contractual right to employment," the Court found that provision was not enforceable if a principal designated a non-tenured employee as a person who would have been rehired but for the reduction in force.**

DISCUSSION:

1. **The teachers dismissed their first action against the members of the Board of School Commissioners that was filed in 2009 based on the 2012 decision of the Supreme Court in *Board of School Commissioners of Mobile County v. Weaver.***

The teachers appealed from the dismissal of their case by the Trial Court. They asserted claims against the members of the Board of School Commissioners and against the Superintendent of the school system. The teachers initially filed an action in 2009; however, it was voluntarily dismissed without prejudice in 2012 in light of the Court's decision in *Board of School Commissioners of Mobile County v. Weaver,* 99 So.3d 1210 (Ala. 2012).

In *Weaver*, the Court concluded that while the individual members of the School Board and their representative or official capacity could be named as Defendants, the School Board as an agency of the State was entitled to absolute immunity.

2. **In 2012, the Plaintiffs re-filed their action naming the members of the Board and the Superintendent as Defendants. The Plaintiffs contended that although they were terminated pursuant to a reduction in force, they should have been rehired by the conclusion of the following school year and the fact that they were not was a violation of a written policy of the school system.**

The reduction in force procedures adopted by the Board in 2007 included, in part, as follows:

> Irrespective of a reduction in force, if a non-tenured or probationary employee is non-renewed in accordance with state law, this policy does not apply to those individuals and in such circumstances, there will be no right to recall pursuant to this policy. This policy applies to non-tenured and probationary employees only to the extent that the individual would have been rehired by the school the following year but for the reduction in force. Otherwise, non-tenured and probationary employees are not granted any retention or recall rights by this policy except as provided under state law.
>
> * * *
>
> **Again, this policy in no way gives non-tenured employees a contractual right to employment**. The state law right to non-renew remains with the board in all respects. **However, if a reduction in force is declared by the board and the principal of a particular school designates a non-tenured employee as an individual that would have been rehired but for the reduction in force, that employee shall have a one time recall right to a position for which he or she is certified and legally qualified for one calendar year from the effective date of his or her termination**.

The lawsuit arose because the Defendants retained and hired new teachers and non-teacher employees rather than rehiring the person who had been terminated due to the reduction in force.

3. **The Trial Court concluded that the Plaintiffs' claims failed under either §6-2-38(l) or §6-2-38(m) which provided for a two-year statute of limitations for the recovery of wages, overtime, damages, fees, or penalties.**

The Trial Court ruled in dismissing the Complaint, in part, as follows:

> All of the Plaintiffs herein were non-renewed from their employment at the end of the 2007-2008 school year. Even if they had a right of recall under the Board's Reduction-in-Force Policy the Plaintiffs' causes of action would have accrued, at the very latest, no more than one calendar year from the end of the 2007-2008 school year. That would have been at the end of May 2009 or the beginning of June 2009. This civil action was not brought

until July 13, 2012, over three (3) years from the last date of the possible accrual of the Plaintiffs' cause of action.

The Trial Court concluded that the Plaintiffs' claims fell under either §§ 6-2-38(l) or 6-2-38(m). Section 6-2-38(l) provided that all actions for injury not arising from contract had to be brought within two years and §6-2-38(m) provided that all actions for the recovery of wages, overtime, damages, fees, or penalties had to be brought within two years.

4. The Trial Court found that the Plaintiffs had no claim for breach of contract stating that "the [policy] echoes the long established law that probationary employees have no contractual right to continued employment, *Lawrence v. Birmingham Board of Education,* 669 So.2d 910 (Ala. Civ. App. 1995).

The Trial Court further found that the Plaintiffs had not alleged any offer, acceptance, or consideration necessary to assert a contract claim. *Steiger v. Huntsville City Board of Education,* 653 So.2d 975, 978 (Ala. 1995).

5. The Court found that the Plaintiffs' claims were not time barred in that they asserted a breach of contract claim and not a claim under §6-2-38(l) or §6-2-38(m).

In finding that the claims asserted by the Plaintiffs were contract claims with a six-year statute of limitations, the Court relied primarily on *Belcher v. Jefferson County Board of Education,* 474 So.2d 1063 (Ala. 1985) in which two non-tenured teachers contended that they had not been evaluated as required by the evaluation policy adopted by the Board. The teachers asserted a breach of contract claim as a result.

In *Belcher,* the Supreme Court reversed the dismissal of the breach of contract claim holding that the Board of Education did not have to legally follow any particular evaluation policy absent its own self-imposed procedures and that once the procedures were adopted, the Board was bound to follow it.

6. The Defendants contended that in the present case, the procedures adopted specifically did not give rise to a contract action because the procedure itself provided that: "Again, this policy in no way gives non-tenured employees a contractual right to employment." The Court found that the provision that the procedure did not provide a contractual right to employment was not applicable because the exception regarding when a principal of a particular school designated the teacher as an individual who would have been rehired applied.

The Defendants contended that the adoption of policy procedures may under appropriate facts give rise to a contract but that the appropriate facts were not presented

in this case. In fact, the policy itself specified that it in no way gave non-tenured employees a contractual right to employment.

The Court pointed to the exception applicable when the principal of a particular school designated a non-tenured employee or a probationary employee as an individual who would have been rehired but for the reduction in force.

7. There was no evidence that any principal designated the Plaintiffs as persons who would have been rehired. Although the Court agreed, the Court found that the allegations of the Complaint should have been strongly construed in the pleaders' favor and that a Motion to Dismiss was not the proper resolution of the dispute.

The Defendants, however, argued that there was no evidence that any principal designated the Plaintiffs as one who would have been rehired. The Court agreed but found that the allegations of the Complaint should have been strongly construed in the pleaders' favor and that a Motion to Dismiss was not the proper resolution of the dispute.

Chief Justice Moore and Justices Stuart, Parker, Shaw, and Main concurred in the Opinion authored by Murdock.

Justices Bolin, Wise, and Bryan dissented without opinion.

INSURANCE

THERE MUST BE A DISAGREEMENT BETWEEN THE INSURANCE COMPANY AND THE INSURED AS TO THE AMOUNT OF THE CLAIM BEFORE THE APPRAISAL OBLIGATION COULD ARISE, AND THE DISAGREEMENT CANNOT BE UNILATERAL.

BEFORE AN INSURED COULD DEMAND AN APPRAISAL, THE INSURED WAS REQUIRED TO COMPLY WITH THE PROVISIONS OF THE POLICY IN REGARD TO THE INSURED'S DUTIES IN THE EVENT OF A LOSS.

Baldwin Mutual Ins. Co., v. Adair, 2014 Ala. LEXIS 161 (September 30, 2014).

SUMMARY:

The Trial Court granted an insurer a preliminary injunction staying the appraisal process with respect to fourteen of its insureds.

The Trial Court later modified its Order finding that the appraisal process should be initiated.

At issue on appeal is whether the Trial Court erred in modifying its Order staying the appraisal process.

HOLDINGS:

1. **The insureds had to comply with their post-loss obligations under the policy before they could invoke the appraisal process, i.e., the insureds were required to provide the required notice of loss and permit the insurer to investigate and verify the loss which they failed to do. As a result, the Court found that the injunction staying the appraisal process should not have been lifted; and**

2. **Moreover, the policy required a disagreement between the parties as to the amount the insurer was required to pay in order to trigger an appraisal. As the insureds did not establish a duty on the part of the insurer to pay, there was no genuine "disagreement."**

DISCUSSION:

Baldwin filed an application for a temporary Restraining Order, a Motion for Preliminary Injunction and a Complaint for Declaratory Judgment against 122 individuals who were insured under various insurance policies issued by Baldwin.

According to the Complaint, the 122 insureds sent Baldwin a letter purportedly invoking the appraisal process and identified an appraiser and insisted that Baldwin identify its appraiser within twenty days.

The Plaintiffs further requested a copy of the policy file for each of the insureds and accused Baldwin of bad faith.

1. In support of their application for a TRO or a Preliminary Injunction, Baldwin noted that the 122 insureds provided no information about the claims, the loss, or any alleged disagreement.

Baldwin also pointed out that the attorneys for the Plaintiffs had filed nine separate lawsuits against Baldwin in different Courts, three of which asserted class claims.

Baldwin contended that proceeding with an appraisal process prior to a determination as to whether or not there was a real dispute or disagreement would result in immediate and irreparable injury to Baldwin.

2. In its initial Order granting an Injunction, the Trial Court found that it was preliminary to invoke the appraisal process prior to giving Baldwin an opportunity to investigate the claims and determine if it would accept or reject the various insureds' proof of loss, and the Trial Court transferred the case to the Court where the first filed class action was pending.

The Plaintiffs then filed a Motion to Alter, Amend or Vacate the Injunction and Baldwin contended that they failed to appeal from the original Order and further had made no showing that the Circuit Court entering the Order had exceeded its discretion.

3. The Trial Court to whom the case had been transferred entered an Order requiring the Plaintiffs to present the appropriate information to trigger the appraisal process. However, the Trial Court later amended its Order only as to fourteen (14) insureds whom the Trial Court found had presented sufficient evidence of a disagreement.

On appeal, Baldwin contended that the insureds had not complied with their post-loss obligations and had not established a failure to agree or disagreement.

4. **The Court emphasized that the 14 Plaintiffs had not complied with the provisions of the policy regarding duties in the event of loss or damage and had not provided the information that the insured was required to provide. The Court further emphasized that the insureds had refused to submit to an examination under oath.**

5. **The Court further agreed with Baldwin that absent an establishment of a duty to pay, there could be no genuine disagreement as to the proper amount.**

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

Chief Justice Moore dissented.

DISSENT OF CHIEF JUSTICE MOORE:

Chief Justice Moore contended that the policy did not require the insureds to satisfy the post-loss obligations before demanding an appraisal because the policy provisions regarding post-loss obligations and the appraisal provision did not reference each other.

Chief Justice Moore cited to the following policy provisions:

> **Appraisal**. If you and we fail to agree on the values of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to an umpire. A decision agreed to by any two will be binding. Each party will: Pay its chosen appraiser and bear the other expenses of the appraisal and umpire equally.

Chief Justice Moore contended that the appraisal provisions and the post-loss obligations do not reference each other and there was no condition in the policy that the post-loss obligations had to be satisfied before an appraisal could be demanded.

Further, Chief Justice Moore wrote that Baldwin relied on opinions from other jurisdictions and that in Alabama the Court was required to enforce the insurance policy as written if the terms were unambiguous.

As to the contention that the insureds had failed to establish a failure to agree or disagreement, Chief Justice Moore noted that the point of the appraisal, according to the Plaintiff, was to determine not whether a disagreement existed but the amount on which the parties disagreed. Chief Justice Moore pointed to ample evidence in the record to support the decision reached by the Circuit Court.

INSURANCE LAW
BURIAL INSURANCE

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REJECTED THE RECOMMENDATION OF THE ALABAMA DEPARTMENT OF INSURANCE'S RECEIVER AND FOUND INSTEAD THAT THE PROPOSAL OF ANOTHER GROUP THAT WAS NOT RECOMMENDED BY THE RECEIVER SHOULD BE ACCEPTED.

Corner Stone Funeral Chapel v. MVMG, LLC, 2014 Ala. LEXIS 190 (December 5, 2014)

SUMMARY:

Mountain View Memory Gardens sold "Preneed contracts" for funeral merchandise and other types of funeral services that would be provided upon a person's death pursuant to the Preneed Funeral and Cemetery Act, §27-17A-1 et seq., Ala. Code 1975.

After the death of the owner, the Alabama Department of Insurance determined that the corporation was insolvent and had underfunded certain trust funds required to be established by the Preneed Act.

At the request of the Department, the Trial Court entered a preliminary injunction and directed the Department to liquidate the assets.

During the receivership, individuals owning plots and vaults in the cemetery formed the MVMG Association which collected donations and made substantial repairs. MVMG intervened in the underlying case.

Two entities presented proposals to the receiver seeking transfer of the assets: Corner Stone and MVMG. The primary difference in the proposals was that Corner Stone agreed to provide at no extra cost markers and monuments that had already been purchased in outstanding Preneed Contracts and MVMG did not.

The receiver recommended that the Trial Court accept Corner Stone's proposal; however, the Trial Court instead accepted MVMG's proposal.

Corner Stone appealed.

HOLDING:

The Trial Court had discretion to choose the company to which the assets would be transferred and did not abuse its discretion in choosing the one that was

located close to the cemetery and had provided mowing and other services to the cemetery.

DISCUSSION:

1. **Contrary to the contention of Corner Stone, the evidence before the Trial Court was disputed and the review would be an ore tenus review, not a de novo review. The Court found that the Trial Court did not exceed its discretion in resolving the issues related to the disputed testimony.**

The Court determined that contrary to the contention of Corner Stone, the evidence before the Trial Court was disputed and the review would be an ore tenus review and not de novo.

The Court emphasized that MVMG agreed to restore $25,000.00 into the endowment care trust fund and Corner Stone agreed only to restore the fund over a four-year period. The Court discussed the testimony at length and concluded that based on the testimony it could not say that the Trial Court exceeded its discretion in ordering the transfer of the Corporation's assets to MVMG.

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

Justice Murdock concurred specially.

Justices Stuart and Bolin dissented.

SPECIAL CONCURRENCE BY JUSTICE MURDOCK: Murdock deferred to the decision of the Trial Court in that the Court observed the testimony of the witnesses.

In his special concurrence, Justice Murdock emphasized that the Trial Court observed the testimony of the witnesses and could have thereby after observing the witnesses determined that the Corner Stone proposal was not fiscally sound.

DISSENT BY JUSTICE STUART: Stuart and Bolin found that the Judge was required to maximize the financial value for the persons holding the outstanding Preneed Contracts and that the Judge failed to do so meriting reversal.

In her dissent, Justice Stuart wrote that under the Alabama Preneed Act, the Trial Court was required to maximize financial value for the persons holding outstanding Preneed Contracts.

In that Corner Stone's offer provided more financial value to Preneed Contract holders, Justice Stuart contended that the Trial Court exceeded its discretion.

Justice Stuart emphasized that MVMG focused on not just persons who had Preneed Contracts but persons who had family members who were already buried and were concerned about the economic ruling and the disrepair of the cemetery.

Justice Stuart contended that the persons who should be considered were the persons who had Preneed Contracts that would be used at some future date and not the family of persons who were already buried in the cemetery.

Justice Stuart also found that there was no evidence in the record indicating that the proposal made by MVMG would provide more financial benefits to the remaining Preneed Contract holders than the proposal made by Corner Stone and that there was no evidence other than speculation in the record that Corner Stone lacked the capability to fulfill the terms of its proposal.

Justice Stuart concluded that the Court was not deferring to the Trial Court's evaluation of the witnesses and evidence but was instead yielding to speculation.

INSURANCE
RIGHTS OF A UM CARRIER TO OPT OUT WITHIN A "REASONABLE TIME"

BY OPTING OUT BEFORE THE DATE THAT AMENDED ANSWERS HAD TO BE FILED, THE INSURANCE COMPANY OPTED OUT WITHIN A REASONABLE TIME.

Ex parte Electric Ins. Co., 2014 Ala. LEXIS 160 (September 26, 2014)

SUMMARY:

The issue in this case is whether an uninsured motorist insurer asserted its right to opt out of the insured's personal injury litigation within a reasonable time such that mandamus should issue directing the Trial Court to grant the insurer's request to opt out.

HOLDINGS:

1. **The insurer asserted its right to opt out of the litigation within a reasonable time given the fact that the insurer asserted its rights before the final day on which the Scheduling Order allowed it to amend its Answer;**

2. **For the insurance company to wait until after the insured's physicians had been deposed before determining if opting out would be in the insurer's best interest was reasonable;**

3. **It is inconsistent, to allow Electric freely to amend its Answer and on the other hand to forbid Electric from exercising its right under *Lowe* to opt out of the trial.**

DISCUSSION:

The lawsuit was filed on **April 4, 2012** against the tortfeasor, Wilson, and Electric. Electric answered the Complaint and served Interrogatories on the Plaintiff, the Plaintiff responded to the discovery and Electric deposed the Plaintiff on **September 26, 2012**.

In the latter part of 2013 and in early 2014, the Plaintiff deposed four physicians who had treated him following the accident. **The last of the depositions of the four physicians was taken on January 17, 2014**.

The Scheduling Order adopted by the parties was entered by the Trial Court on **February 4, 2014** and it established that the last day to amend Electric's Answer would be **March 15, 2014** and the case was set for trial on **May 12, 2014**.

One day before the last day to amend the Answer, Electric filed a Motion seeking to opt out of the trial under *Lowe v. Nationwide Ins. Co.,* 521 So.2d 1309 (Ala. 1988).

The Trial Court denied Electric's Motion and Electric petitioned the Court for a Writ of Mandamus.

1. Whether the insurance company's Motion to Withdraw is timely is left to the discretion of the Trial Court and should be judged according to the posture of the case; however, it is not unreasonable for the insurance company to participate in the case for a length of time sufficient to enable it to make a meaningful determination regarding whether or not it should opt out.

In *Lowe v. Nationwide Ins. Co.*, 521 So.2d 1309 (Ala. 1988), the Court found in part that "whether the insurer's motion to withdraw is timely made is left to the discretion of the trial court, to be judged according to the posture of the case. … We believe that it would not be unreasonable for the insurer to participate in the case for a length of time sufficient to enable it to make a meaningful determination as to whether it would be in its best interest to withdraw."

2. The Court found that considering the posture of this case that Electric asserted its right to opt out within a reasonable time.

The Court noted that by amending its Answer, Electric could have complicated the case by adding parties, defenses, or counterclaims which would have delayed the trial.

The Court found that by opting out rather than amending the Complaint, Electric streamlined the case and did not delay the trial.

3. The Court found that it was inconsistent to allow Electric freely to amend its Answer and, on the other hand, forbid Electric from exercising its right under *Lowe* to opt out of the trial.

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

Chief Justice Moore dissented without opinion.

JURISDICTION **THE PROBATE COURT IN LOWNDES COUNTY AND THE LOWNDES COUNTY CIRCUIT COURT HAD SOLE JURISDICTION TO DETERMINE ALL ISSUES IN REGARD TO THE APPOINTMENT OF AN ADMINISTRATOR.**

Ex parte C.B. Grant, 2014 Ala. LEXIS 194 (December 12, 2014).

SUMMARY:

An Administrator appointed by the Lowndes County Probate Court filed a wrongful death case in Montgomery County.

The wife of the Decedent moved to intervene in the pending lawsuit and contended that the Administrator was appointed through fraud and asked for a Stay of the case pending resolution of the dispute over the administration of the Estate by the Lowndes County Probate Court.

The Trial Court granted the intervention and declared the appointment of the Administrator void for fraud and stayed the case and the Administrator petitioned for a Writ of Mandamus.

HOLDINGS:

1. **The Court found that the Montgomery County Circuit Court had no jurisdiction over the administration of the Estate pending in Lowndes County and that jurisdiction was vested in the Probate and Circuit Court in Lowndes County under Ala. Code §§12-31-1 and 12-11-41.**

2. **The Court found that to the extent that the Trial Court declared the appointment of the deceased father as Administrator void, the Order was a nullity.**

3. **The proceedings in Lowndes County would decide whether the deceased's father or widow would control the wrongful death litigation.**

4. **Therefore, the father had no right to relief from the Stay of the proceedings entered by the Court in Montgomery County.**

DISCUSSION:

The Decedent's father, the Administrator, filed the wrongful death action in Montgomery County and the Decedent's widow moved to intervene. The Montgomery Circuit Court declared as void the appointment of the father and declared the widow to be the rightful Administrator. The case was Stayed pending appointment of the widow as the Administrator by the Lowndes County Court.

The widow had also filed a petition with the Lowndes County Probate Court to void the appointment of the father.

1. The Circuit Court had no jurisdiction to declare that the father was wrongfully appointed as Administrator.

The Montgomery Circuit Court held an evidentiary hearing where it took testimony from witnesses and a handwriting expert. Based on that testimony, the Court found that the father was wrongfully appointed as Administrator.

The father contended that the Montgomery County Court had no jurisdiction over the administration of the Estate and the Court agreed. Up to the time of the removal of the administration of the Estate to the Lowndes County Circuit Court, the Probate Court was the sole court with jurisdiction and since the removal, the sole jurisdiction was vested in the Lowndes County Circuit Court.

2. The Montgomery County Circuit Court had broad discretion to Stay the proceedings in the civil action pending the resolution of proceedings elsewhere.

As to the father's contention that the Montgomery County Circuit Court had no authority to stay the lawsuit because the widow did not have "standing" to request a Stay, the Court cited to *Landis v. North American Co.,* 299 U.S. 248 (1936) and found that the Montgomery County Circuit Court had broad discretion to Stay proceedings in a civil action pending the resolution of proceedings elsewhere. Therefore, the father failed to establish that he had a clear legal right to relief from the Stay entered by the Montgomery County Circuit Court.

Chief Justice Moore and Justices Bolin, Murdock, and Main concurred in the Opinion authored by Justice Bryan.

JURISDICTION - PREEMPTION BY FEDERAL LAW	**THE CLAIMS ASSERTED WERE NOT PREEMPTED BY FEDERAL PATENT LAW THEREBY DEPRIVING THE TRIAL COURT OF JURISDICTION**
TORTS	**PLAINTIFF ESTABLISHED ALL OF THE NECESSARY ELEMENTS TO PROVE HIS CLAIMS FOR FRAUD.**
DAMAGES	**THE COMPENSATORY DAMAGE AWARD WAS BASED ON SPECULATIVE EVIDENCE AND THEREFORE NO PUNITIVE DAMAGES COULD BE AWARDED.**

Deng v. Scroggins, 2014 Ala. LEXIS 192 (December 5, 2014).

SUMMARY:

Deng allegedly promised to put Scroggins' name on a patent application for an LED lamp tube. Deng failed to do so and Scroggins and Complete Lighting sued Deng for breach of contract and fraud.

A jury returned a verdict against Deng and his company for both breach of contract and fraud.

Deng appealed.

HOLDING:

1. **The fraud claim was not preempted by the Federal Patent Law because the company owner's alleged invention of the lamp tube was not essential to establish any of the elements of fraud.**

2. **The testimony created jury questions as to whether the company's owner reasonably relied on the corporation owner's alleged promise and whether the corporation's owner, Deng, intended to deceive.**

3. **The jury's award of compensatory damages and punitive damages was based on speculative evidence as to the value of potential future**

sales; therefore, neither compensatory damages nor punitive damages were properly awarded.

4. **The Trial Court erred in denying the corporation and Deng's Motion for a New Trial.**

5. **The Court affirmed the jury's verdict awarding $4,750.00 in compensatory damages on the breach of contract claim.**

6. **The case was remanded for a new trial of the fraud claims.**

SUMMARY:

The breach of contract case related to commissions allegedly due Scroggins and Complete Lighting. The jury awarded $4,750.00 on the breach of contract claim and $1.5 million in compensatory damages on the fraud claim and $1.5 million in punitive damages on the fraud claim.

Deng and DM appealed only the denial of the Motion for a JML or a new trial.

DISCUSSION:

Deng owned DM Technology ("DM"). For a time Scroggins worked for DM, Scroggins allegedly developed an idea for an LED lamp tube that could be used in aquariums and communicated the idea to Deng who developed three prototypes for the lamp tube.

Deng and Scroggins entered into an Exclusivity Agreement drafted by Scroggins. Deng applied for a patent in August of 2006 for the lamp tube and listed himself as the sole inventor.

In March of 2007, Deng notified Scroggins that he was terminating the Exclusivity Contract.

Deng first obtained a patent for the bulb in China and then applied for one in the United States.

The breach of contract case related to commissions allegedly due Scroggins and Complete Lighting. The jury awarded $4,750.00 on the breach of contract claim and $1.5 million in compensatory damages on the fraud and $1.5 million in punitive damages on the fraud claim. Deng and DM appealed only the denial of the Motion for a JML or a new trial.

On appeal, Deng contended as follows:

(1) the fraud claim was preempted by Federal Patent Law depriving the Court of jurisdiction;

(2) Scroggins and Complete Lighting changed the basis of their fraud claim during the course of the trial which constituted "trial by ambush";

(3) the fraud claim was based on contradictory testimony by Scroggins;

(4) Scroggins and Complete Lighting did not present evidence of several elements of their fraud claim;

(5) the compensatory damage award was based on speculative evidence;
(6) the punitive damage award was not supported by clear and convincing evidence; and

(7) the punitive damage award was the result of prejudice, bias, passion or other improper motive.

1. Scroggins alleged change in position as to his claims would not merit reversal as a result of an alleged "trial by ambush."

Deng contended that prior to the trial, Scroggins maintained that the lamp tube was his idea but testified that Deng agreed that the patent would be submitted in DM's name only in return for an Exclusive Agency Contract with Scroggins.

At trial, Scroggins and Complete Lighting told the jury that the case centered on who actually invented the lamp tube which attacked the validity of the patent.

2. Fraud claims are properly resolved without reliance on patent law; therefore, who invented the bulb and who allegedly was supposed to be on the patent application was not at issue.

The Court cited to *HIF Bio, Inc., v. Young Shin Pharmaceuticals Industrial Co.,* 600 F.3d 1347 (Fed. Cir. 2010), a case in which the Court found a Declaratory Judgment as to inventorship and slander of title were preempted by Federal Patent Law but that the remaining claims, including fraud claims, could be resolved without reliance on the patent law.

The Court found that Scroggins' status as an inventor of the lamp tube was not essential to proving the fraud claim i.e. Deng's allegedly false promise to put Scroggins' name on the patent application.

Deng contended that Scroggins reliance on the alleged promise to put him on the patent application was unreasonable as a matter of law because Scroggins drafted the Exclusivity Agreement in which Scroggins wrote that only Deng would be listed on the

patent. The Court noted that the Exclusivity Agreement did not address the acquisition of a patent nor did it state who would be listed on the patent.

3. The Court concluded that Scroggins testimony as to the value of the lamp tube was highly speculative and insufficient to justify the jury's award of $1.5 million in compensatory damages.

The only evidence submitted by Scroggins in regard to damages was that the opinion of Scroggins was that the product was **worth millions**. Although Scroggins anticipated many more sales, he had only one Wal-mart related sale to demonstrate the value of the product.

Scroggins contended that since no objection was made to the statement of Scroggins that the produce was worth "millions," that Deng could not argue on appeal that the compensatory damage award was speculative.

The Court disagreed. Further, the Court noted that in the JML Motions filed by Deng and DM, they argued that the damages testified about by Scroggins were pure speculation.

4. In that the Court found that the compensatory damage award for fraud was eliminated; therefore, the punitive damage award would also be vacated as a result.

The Court reversed the Judgment based on the jury's verdict on the fraud claim and remanded the case for the entry of an Order granting a new trial as to the fraud claim.

The Court affirmed the Circuit Court Judgment as to the breach of contract claim.

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

LEGAL ETHICS **RULE 3.6 OF THE ALABAMA RULES OF PROFESSIONAL CONDUCT GOVERN EXTRAJUDICIAL STATEMENTS BY LAWYERS. WHILE THE RULE ENUMERATES CERTAIN ITEMS THAT CAN BE DISCUSSED *"WITHOUT ELABORATION"*, IT SPECIFICALLY PROHIBITS EXTRAJUDICIAL STATEMENTS *"THAT A REASONABLE PERSON WOULD EXPECT TO BE DISSEMINATED BY MEANS OF PUBLIC COMMUNICATION IF THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT IT WILL HAVE A SUBSTANTIAL LIKELIHOOD OF MATERIALLY PREJUDICING AN ADJUDICATIVE PROCEEDING."***

DISCOVERY - PROTECTIVE ORDER

INFORMATION OBTAINED VIA DISCOVERY IS NOT PUBLIC INFORMATION AND IS NOT SUBJECT TO ATTACKS UNDER THE FIRST AMENDMENT ON THE BASIS OF PRIOR RESTRAINT IF THE COURT ENTERS A PROTECTIVE ORDER PROHIBITING THE DISSEMINATION OF THAT INFORMATION.

Ex parte Wright, 2014 Ala. LEXIS 170 (October 17, 2014).

SUMMARY:

The Trial Court entered an Order prohibiting extrajudicial references by the attorney for the Plaintiff to the circumstances of the lawsuit which alleged that a termite company engaged in fraud and other misconduct.

HOLDINGS:

1. **The Court found that the Trial Court's Orders were not narrowly tailored to protect the Defendant Termite Company's right to a fair trial while still protecting the Plaintiff Homeowner's rights under the First Amendment to the United States Constitution;**

2. **Further, the Orders were overly broad in that they did not provide any exceptions for making statements that were expressly permitted pursuant to Alabama Rule of Professional Conduct 3.6(c)(7); and**

3. **Statements included on the website for the attorney for the Plaintiff Homeowner and in Social Media that were false or misleading could be proscribed without violating the First Amendment.**

The Petition for Writ of Mandamus was granted and the Writ issued.

DISCUSSION:

In this Opinion authored by Justice Wise, two lawsuits were at issue in which A-1 Exterminating Company was named as a Defendant. It was alleged that A-1 entered into contracts with the Plaintiffs in which it agreed to protect the Plaintiffs' houses from termites. Subsequently, A-1 allegedly sprayed the houses which A-1 admitted would not prevent or control termites. It was alleged further that no effective barrier had been placed between the house and the soil and that the failure to do so was concealed from the Plaintiff.

Each of the cases was assigned to a different Judge. Each of the attorneys amended their Complaints to assert class-action claims. The cases were then consolidated.

1. **A-1 moved for a Protective Order contending that the attorneys' version of the facts placed by the attorneys on their websites and social media included errors of fact and used sensational and inflammatory terms and were designed to attract clients and influence perspective jurors. Further, the attorneys allegedly paid Google such that their website and media appeared first on the Google page if certain words regarding exterminating were searched.**

2. **Plaintiffs responded that the Motion violated their right to free speech and that other public records, e.g. the Complaints, detail the same information.**

Subsequently, a Birmingham television station aired a "sting operation" regarding A-1's work at houses which was allegedly done with the cooperation and collaboration of Plaintiffs' counsel.

3. **The Trial Court's Protective Order provided as follows:**

The Trial Court issued a Protective Order which stated in part as follows:

> Plaintiffs' counsel shall remove all mention of the above styled cases and the surrounding circumstances of the above styled case from its website, Facebook page, social media (including electronic social media), and related web search engines. **Plaintiffs and Plaintiffs' counsel are otherwise ordered to refrain from referencing this case and/or its surrounding circumstances outside of court**.

4. Rule 3.6 of the Alabama Rules of Professional Conduct govern extrajudicial statements by lawyers which prohibits a lawyer from making an extrajudicial statement "if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding" but permits a lawyer to make statements regarding certain items that are enumerated "without elaboration."

Subsequently, Plaintiffs filed a Petition for Writ of Mandamus. The Court found that Rule 3.6 of the Alabama Rules of Professional Conduct governed extrajudicial statements by lawyers which includes, in part, the following:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication <u>if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.</u>
>
> * * *
>
> (c) Notwithstanding paragraphs (a) and (b)(1-5), <u>a lawyer involved in the investigation or litigation of a matter may state without elaboration:</u>
>
> 1. the general nature of the claim or defense;
>
> 2. the information contained in a public record;
>
> 3. that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> 4. the scheduling or result of any step in litigation;
>
> 5. a request for assistance in obtaining evidence and information necessary thereto;
>
> 6. a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of

substantial harm to an individual or to the public interest; and

5. Information obtained in discovery is not public information and cannot be disseminated by means of public communication; however, the dissemination of the information if gained from other sources is not prohibited under the First Amendment.

In *Seattle Times Co., v. Rhinehart*, 467 U.S. 20 (1984), the United States Supreme Court granted a Writ of Certiorari to consider a Protective Order entered by a Trial Court in which that Court ordered as follows:

> Covering all information obtained through the discovery process that pertained 'to the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors of any of the various plaintiffs.' … The order prohibited petitioners from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. By its terms, the order did not apply to information gained by means other than the discovery process.

The Court reasoned that information obtained in discovery was not public information and was not subject to attacks under the First Amendment as classic prior restraint when a Court entered a Protective Order prohibiting the dissemination of that information. Ultimately the Supreme Court held as follows:

> **[**W]here, as in this case, a protective order is entered on a showing of good cause as required by *[Wash. Sup. Ct. Civil] Rule 26(c),* is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the *First Amendment*.

6. The United States Supreme Court has expressly prohibited "collaboration between counsel and the press as to information affecting the fairness of a criminal trial," and the Court found that to do so is "highly censurable and worthy of disciplinary measures."

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court found that a Defendant's conviction should be overturned because of extensive prejudicial pretrial publicity had denied the Defendant a fair trial and therefore a new trial was a remedy for the publicity.

The Court found that "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

7. The Court emphasized that the amended Order entered by the Trial Court would prevent the Plaintiff from discussing the case with potential clients, discussing the case with putative class members, discussing the case with the State regulators, discussing the case with anyone in an attempt to discovery evidence and discussing the case with any potential non-expert witness.

In this case, the Court noted that the amended Protective Order specifying that the Order would not "prevent any attorney, law firm, and/or that law firm's staff from discussing this case with their respective clients, internally with persons working at any such law firm, with other attorneys involved in this case including those attorney's staff and/or with any expert witnesses."

The Court noted, however, that the amended Protective Orders would still prevent the Plaintiff from discussing the case with potential clients, discussing the case with putative class members, discussing the case with State regulators, discussing the case with anyone in an attempt to discover evidence and discussing the case with any potential non-expert witnesses.

8. The Court emphasized that it did not intend to tie the Trial Court's hands in its attempt to prevent the jury venire from being tainted by the use of websites, social media, and pretrial publicity.

The Court noted that in finding the Trial Court's Protective Order was overbroad, it "did not intend to tie the trial court's hands in its attempt to prevent the jury venire from being tainted by the use of Web sites, social media, and pretrial publicity."

If as A-1 contended, Plaintiffs' counsel included statements on its website and on social media that were false or misleading and the Trial Court found that the Plaintiffs or their attorneys have made false or deceptive statements, the Trial Court had the authority to proscribe such statements.

In both cases the Petition was granted and the Writ issued.

Justices Stuart, Parker, and Shaw concurred.

Justice Murdock concurred in the result.

Chief Justice Moore recused himself.

SOVEREIGN IMMUNITY **THE ABSOLUTE IMMUNITY OF THE STATE OF ALABAMA EXTENDS TO ARMS OR AGENCIES OF THE STATE WHICH INCLUDES COUNTY BOARDS OF EDUCATION**

Ex parte Jackson County Bd. Of Educ., 2014 Ala. LEXIS 156 (September 26, 2014).

SUMMARY:

A contractor, Pruett, sued a county Board of Education for work done by the contractor in renovating the gymnasium.

The contractor sued seeking damages on theories of quantum meruit, work and labor done, open account, and account stated.

The Board moved to dismiss based on sovereign immunity.

Pruett contended that the case involved a protected property interest and on that same day, Pruett amended its Complaint naming as additional Defendants, the members of the Board in their official capacity and Harding in his official capacity as Superintendent of Education and asked for a Writ of Mandamus or an Injunction requiring the members of the Board or Harding to pay the monies due.

The Trial Court denied the Board's Motion to Dismiss. The Board Petitioned for a Writ of Mandamus.

HOLDINGS:

1. **The Board was entitled to a Writ of Mandamus directing the Trial Court to enter an Order dismissing the breach of contract claim against the Board because it was entitled to absolute immunity from liability under Alabama Constitution Article I, Section 14 (1901).**

2. **The Court found that the contractor did not present a persuasive reason to abandon a prior holding that County Boards of Education were local agencies of the State and as such they were entitled to sovereign immunity.**

3. **Additionally, the Court found that the Trial Court lacked subject matter jurisdiction to entertain an amendment to the original Complaint where it was filed solely against the Board and none of the exceptions to sovereign immunity applied.**

DISCUSSION:

1. County Boards of Education are immune from suit because they are local agencies of the State of Alabama.

The Court reiterated its position in *Ex parte Hale County Bd. Of Education*, 14 So.3d 844, 848 (Ala. 2009) in which the Court held that "because county boards of education are local agencies of the State, they are clothed in constitutional immunity from suit."

2. Boards of Education are immune from suit despite the fact that the lawsuit was an action to enforce the Board's contractual obligation.

The Court rejected Pruett's argument that sovereign immunity should not protect the Board from a suit to enforce its contractual obligations.

3. None of the four exceptions to immunity applied (1) the action was not one to compel state officials to perform their legal duties; (2) the action was not one to enjoin state officials from enforcing an unconstitutional law; (3) the action was not one to compel state officials to perform ministerial acts; and (4) the action was not brought as a Declaratory Judgment action seeking construction of a statute. Further, the action was not one involving a valid inverse condemnation action.

In *State Highway Department v. Milton Construction Co.*, 586 So.2d 872, 875 (Ala. 1991), the Court held that because an action seeking payment under a contract was "in the nature of an action to compel state officers to perform their legal duties," the action was not barred by the doctrine of sovereign immunity. In that case, the Court noted that certain causes of action are not barred by § 14.

> There are four general categories of actions which in *Aland v. Graham*, 287 Ala. 226, 250 So.2d 677 (1971), we stated do not come within the prohibition of § 14: (1) actions brought to compel State officials to perform their legal duties; (2) actions brought to enjoin State officials from enforcing an unconstitutional law; (3) actions to compel State officials to perform ministerial acts; and (4) actions brought under the Declaratory Act … seeking construction of a statute and its application in a given situation. *287 Ala., at 229-240, 250 So.2d 677*. Other actions which are not prohibited by § 14 are: (5) valid inverse condemnation actions brought against State officials in their representative capacity …"

However, Pruett could not rely on *Milton* because his attempt to add individuals to the lawsuit failed in that the trial court lacked subject matter jurisdiction to entertain the amendment to the original Complaint.

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

Justices Murdock and Shaw concurred in the result.

Chief Justice Moore dissented without opinion.

TORTS – HEALTHCARE PROVIDERS:

UNDER THE PROVISIONS OF THE MEDICAL LIABILITY ACT, EXPERT TESTIMONY MUST BE PRESENTED ESTABLISHING THE (1) 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 ALLEGED BREACHED AND THE IDENTIFIED INJURY.

THE PLAINTIFF MUST PROVE THROUGH EXPERT MEDICAL TESTIMONY THAT THE ALLEGED NEGLIGENCE PROBABLY CAUSED, RATHER THAN ONLY POSSIBLY CAUSED THE PLAINTIFF'S INJURY.

Kraselsky v. Calderwood, 2014 Ala. LEXIS 171 (October 17, 2014).

SUMMARY:

In this case, Plaintiffs contended that the administration of Demerol caused the death of Kraselsky who was allergic to Demerol. The Trial Court granted a Summary Judgment and the Plaintiff appealed.

HOLDINGS:

1. **Assuming the doctor breached the standard of care by ordering that a pain medication for a decedent – to which she was allergic – Summary Judgment was properly granted to the doctor and his employer under the Medical Liability Act, Ala. Code §6-5-480 et seq. and § 6-5-541 et seq. In so finding, the Court emphasized that there was no expert testimony that the decedent's health deteriorated as a result of being given Demerol but only that her health deteriorated after she was given Demerol;**

2. **It was clear from the testimony of the Plaintiff's expert that he did not consider the medication to have proximately caused the decline in the decedent's health leading to her death;**

3. **As to whether it was possible or probable or certain that Demerol had a causative role in the death, the Plaintiff's expert was comfortable stating only that it was <u>possible</u>.**

DISCUSSION:

The decedent was 80 years old at the time of her death and she fell and sustained a compression fracture to the T12 vertebra in her spine. She subsequently went into cardiopulmonary arrest and had to be resuscitated. In addition to the other symptoms she was experiencing, the decedent was experiencing pain such that she begged for something for pain.

During prior consultations, the decedent had indicated that she was allergic to over twenty medications, seven of which were pain medications. However, during her hospitalization she was given two of the medications to which she was allegedly allergic without any apparent reaction.

Due to problems with swallowing, the doctor then discontinued that medication and prescribed intravenous Demerol. The nurse administrating the drug saw that the patient was allergic to it and called the doctor to confirm the order which he confirmed. Prior to receiving the Demerol at 5:20 p.m., her vital signs were relatively normal; however, at 8:00 p.m. her vital signs had deteriorated such that she was moved to the intensive care unit and went into cardiopulmonary arrest. Due to the family's consent to a do not resuscitate order, the decedent died three days later.

1. **To prevail in a medical malpractice claim, a Plaintiff must establish:**

    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 alleged breach and the identified injury.**

2. **With regard to proximate causation in an AMLA case, "the plaintiff must prove, through expert medical testimony, that the alleged negligence probably caused, rather than only possibly caused the plaintiff's injury." *University of Ala. Health Servs., Found., v. Bush,* 638 So.2d 794, 802 (Ala. 1994); *Bradford v. McGee,* 534 So.2d 1076, 1079 (Ala. 1988).**

3. **The Plaintiff did not retain an expert witness and instead relied on the testimony of another physician who treated the decedent and testified that the Demerol (possibly) caused the death.**

On appeal, the Plaintiffs focused on the fact that the doctor in his deposition made the following response to this question:

> Q. But when we look at the temporal nature of her situation in the hospital in July of 2010, the tipping point appears to have occurred after having been given Demerol, doesn't it?
>
> A. It appears so.

The Court noted that that isolated excerpt from his deposition did not support causation and that the testimony had to be viewed in its whole citing to *Hines v. Armbrester*, 477 So.2d 302, 304 (Ala. 1985).

Chief Justice Moore and Justices Parker, Shaw, and Wise concurred in the Opinion authored by Justice Stuart.

TORTS
VOLUNTARY ASSUMPTION OF DUTY TO WARN:

1. **THE COURT CONCLUDED THAT THE DUTY TO WARN OF POTENTIAL HAZARDS ASSOCIATED WITH OPERATING THE GRAY-MARKET TRACTOR EXTENDED TO THE PLAINTIFF AND THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN EXTENDING THE DUTY TO WARN TO THE PLAINTIFF.**

2. **PLAINTIFF FAILED TO ESTABLISH BY SUBSTANTIAL EVIDENCE THAT YANMAR AMERICA PARTICIPATED IN AN ACTIVITY THAT INCREASED THE RISK OF HARM OVER ANY RISK OF HARM THAT WOULD HAVE EXISTED HAD YANMAR AMERICA CHOSEN NOT TO WARN.**

Yanmar America Corp. v. Randy Nichols, 2014 Ala. LEXIS 165 (September 30, 2014).

SUMMARY:

The jury awarded a judgment in favor of the Plaintiff in a case involving a rollover accident that occurred while he was operating a "gray market" tractor. The Defendant appealed.

HOLDINGS:

1. **The Court reversed the judgment entered by the jury on Plaintiff's claim against Yanmar America Corporation alleging a negligent failure to warn and denying the Corporation's post-verdict Motion for a JML.**

2. **The Court found that the Plaintiff failed to establish by substantial evidence that the Corporation participated in an activity that increased Plaintiff's risk of harm over any risk of harm that would have existed had the Corporation chosen not to warn potential users of gray market tractors. The Court found that as a result, the Trial Court erred as a Matter of Law in denying the Corporation's Motions for a JML on the negligent failure to warn claim;**

3. **The Corporation voluntarily assumed a duty to warn of the safety hazards associated with operating a gray market tractor, and the duty extended to Plaintiff. However, it was undisputed that the warnings never reached the Plaintiff but by issuing the safety warnings and failing to ensure that they were disseminated to the Plaintiff, Yanmar exposed the Plaintiff to no greater risk of harm than he would have been exposed to had Yanmar chosen not to act in order to warn the potential users of the gray market tractors.**

DISCUSSION:

The Yanmar tractor was manufactured by Yanmar Diesel Engine Company, Ltd. ("Yanmar Japan").

The tractor was built in Japan and according to Japanese standards and was built primarily for use in rice paddies. The manual for the tractor and the warning labels were all written in Japanese.

Subsequently, Yanmar manufactured tractors for use in the United States. The tractors manufactured for the Japanese market were never intended to be sold or used in the United States due to:

1. their relatively slow travel speed;

2. higher "lugs" on the tires specially suited for muddy rice paddies;

3. a rotary-tiller for tilling rice paddies; and

4. a four-speed "power take-off" to accommodate the varying tiller speeds required in rice-paddy tilling.

Yanmar's expert testified that:

1. the "drop off" on the slope,
2. the front-end loader being in a raised position,
3. a lack of ballast in the tires, and
4. the bush hog on the back contributed to the rollover which raised the center of gravity.

Yanmar America is a wholly owned subsidiary of Yanmar Japan. Yanmar America was established in 1981 and one of its functions is to distribute parts for Yanmar tractors that are authorized for sale in the United States. Yanmar Japan stopped manufacturing and distributing Yanmar tractors for sale in the United States market in 1991. Arnold Trimm owned Artec Tractor & Equipment, Inc., from 1994 to 2006. Artec

imported and sold the used Japanese farm tractors from 1988 until 2005. Artec sold parts for the used "gray-market" Yanmar tractors it imported. Artec became an authorized Yanmar America dealer in **July of 2005**. Artec sold the tractor at issue to Northside. Northside sold the tractor to Autrey Nichols, the Plaintiff's brother. The tractor was twenty-six years old at the time of the sale to Autrey Nichols.

Autrey purchased an English language version of the Operator's Manual which explained that it was a gray market tractor and explained that there were differences between the gray market tractors and the Yanmar tractors manufactured for use in the U.S. which included the fact that the gray market tractor was not equipped with a ROPS.

The manual also contained information and warnings on the risk of rollovers – particularly on slopes; stability issues and the need for ballast when operating with a front-end loader; the importance of a ROPS; and the need to inspect unfamiliar terrain before operating the tractor.

Autrey did not provide Randy with the manual and did not discuss with him any of the information in the manual. The bush hog and the front-end loader came with Operator's Manuals and warning decals that were printed in English and they warned of the possibility of rollover and recommended the use of a ROPS at all times.

In regard to whether he read warning labels, the Plaintiff testified that he "probably glanced at them, but … felt like [he] was a safe operator, and [he] just overlooked them." Randy testified that he did not need to read an Operator's Manual to know how to operate a tractor and a front-end loader and the bush hog. He further testified that he was not interested in reading any manuals because he was so familiar with operating heavy equipment.

Yanmar America first discovered that gray market tractors were being imported in 1990. Yanmar America was instructed not to provide parts for gray market tractors. In 1992 and thereafter, Yanmar America made many different efforts to provide warnings regarding the use of the gray market tractors. The actions taken included a lawsuit by Yanmar America for trademark infringement to stop the importation and sale of gray market tractors through eBay. After Yanmar America learned that Artec was continuing to sell gray market tractors, it terminated Artec as a dealer in **2010**, the year after the lawsuit was filed.

The Yanmar tractor at issue was equipped with a front-end loader and a bush hog attachment but did not include a rollover protection structure. The area being mowed was a hill. The right front tire encountered a slight "drop off" on the side of the hill which caused the tractor to roll over 360 degrees and come up to rest upright on its tires. The Plaintiff was thrown from the tractor and the bush hog ran over him. His injuries included an amputated right arm, a crushed hip and leg, and various other injuries.

The Plaintiff testified that he had operated the tractor fifteen to twenty times without incident and that **he had operated tractors with and without a ROPS**.

1. The testimony of Yanmar's experts.

One of Yanmar's experts testified that a ROPS would have more likely as not prevented a rollover past 90 degrees but given the slope of the hill, it may have not done so.

The expert testified that the tractor was designed for a tiller on the back which would have contributed to a lower center of gravity.

Another expert testified that the primary cause of the rollover was the lack of stability of the tractor caused by its narrow wheel spacing and the front-end loader being attached to the tractor.

2. The Court noted that the case was tried on the theory that Yanmar voluntarily assumed the duty to warn the Plaintiff of the safety issues by voluntarily undertaking activities to warn dealers as well as owners and potential purchasers of these safety issues and that as a result Yanmar had negligently performed that duty.

The Court noted that Yanmar America was not the supplier or manufacturer of the tractor and as a result owed no duty to warn citing to *Ex parte Chevron Chemical Co.,* 720 So.2d 922 (Ala. 1998). The Court stated that one who volunteers to act though under no duty to do so is thereafter charged with the duty of acting with due care. *United States Fid. & Guar. Co., v. Jones,* 356 So.2d 596, 598 (Ala. 1977). Yanmar America contended that although it did issue safety warnings, it did not voluntarily assume the duty to warn "every potential user" of the dangers.

3. The Court noted that as to whether the duty to warn undertaken extended to the Plaintiff, "'the ultimate test of duty to use [due] care is found in the foreseeability that harm may result if care is not exercised.'" *Bush v. Alabama Power Co.,* 457 So.2d 350, 353 (Ala. 1984).

4. The Court concluded that the duty to warn of potential hazards associated with operating the gray market tractor extended to the Plaintiff and that the Trial Court did not err as a Matter of Law in extending the duty to warn to the Plaintiff.

As to the Plaintiff's contention that Yanmar America breached its voluntarily undertaken duty to warn, Plaintiff contended that they were insufficient to warn of the safety hazard and that Yanmar America had failed to ensure that safety warnings were disseminated to reach all potential purchasers and users.

Citing to the *Restatement (Second) of Torts,* § 324A (1965), the Court noted that:

> Liability to third person for negligent performance of undertaking. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> > (a) his failure to exercise reasonable care increases the risk of such harm, or
> >
> > (b) he has undertaken to perform a duty owned by the other to the third person, or
> >
> > (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Beasley v. MacDonald Engineering Co., 287 Ala. 189, 193, 249 So. 2d 844 at 847 (1971).

5. The Court concluded that Yanmar America's failure to include more specific information regarding the hazards could not possibly have increased the risk to the Plaintiff over the risk that already existed in the absence of a notice.

Yanmar America argued that the test was not whether the risk was increased over what it would have been if the Defendant had not been negligent but rather a duty was impose only if the risk was increased over what it would have been had the Defendant not engaged in the undertaking at all. *Myers v. United States,* 17 F.3d 890, 903 (6th Cir. 1994).

The Court found that "by issuing the safety warnings and failing to ensure that they were disseminated to Randy, Yanmar America exposed Randy to no greater a risk of harm than he would have been exposed to previously had Yanmar America chosen not to act in order to warn the potential users of the gray market tractors." Citing to *Herrington v. Gaulden,* 294 Ga. 285, 288, 751 S.E.2d 813, 816 (2013).

6. The Court concluded that the Plaintiff had failed to establish by substantial evidence that Yanmar America participated in an activity that increased the risk of harm over any risk of harm that would have existed had Yanmar America chosen not to warn and that as a result, the Trial Court erred as a Matter of Law in denying Yanmar America's Motions for a JML on the Plaintiff's failure to warn claim.

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

Justice Parker concurred specially.

Justices Murdock and Main concurred in the result.

Chief Justice Moore recused himself.

SPECIAL CONCURRENCE OF JUSTICE PARKER:

Justice Parker wrote that he was not convinced that the "increases the risk of such harm standard" in the *Restatement* and applied by the majority applies to any and all voluntary-warning situations.

JUSTICE MURDOCK'S CONCURRENCE IN THE RESULT:

Justice Murdock wrote that nothing in the warnings nor in the physical notices increased the risk of harm to anyone who might have seen or received the same, much less someone in the position of the Plaintiff.

Murdock further wrote:

> As a threshold matter, however, I questions whether Yanmar America conceded that it understood a duty to warn any person (including Autrey and Randy) who did not happen upon its Web site postings or actually receive one of its mailings, and I am not persuaded that the evidence presented, including the testimony of Ryan Pott, supports a contrary conclusion. I therefore concur in the result.