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

CIVIL LAW

SUMMER CONFERENCE FOR CIRCUIT AND DISTRICT COURT JUDGES

August 1-3, 2016

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

INDEX

APPELLATE PROCEDURE –

(1) An Appellant must show error as to each legal ground cited by the trial court as the basis for its decision; and

(2) all arguments submitted by the appellant and each argument regarding error must be included in the appellant's initial brief.

Drake v. Ala. Republican Party, 2016 Ala. Civ. App. LEXIS 121 (May 13, 2016)

HOLDING:

(1) When a trial court enters conclusions of law stating alternative legal grounds for its judgment an appellant must show error as to each ground.

(2) The failure of the appellant to include each argument in the opening brief constitutes a waiver of any argument as to the omitted ground and results in an automatic affirmance of the judgment. *Austin v. Providence Hosp.*, 155 So.3d 1028, 1031 (Ala. Civ. App. 2014).

DISCUSSION:

This opinion was authored by Judge Donaldson

The Drakes filed a complaint against the Alabama Republican Party ("Party"), seeking the return of their qualifying fees. They alleged claims for breach of implied contract, unjust enrichment, and fraud.

Mr. and Mrs. Drake were disqualified as candidates by the Republican Candidate Committee. They did not appeal that decision to the "Executive Committee"; therefore, the Party contended that they did not exhaust their administrative remedies.

A. The Order Issued by the Trial Court.

The basis of the trial court's ruling was (1) that the Drakes did not exhaust their administrative remedies and (2) that the Court lacked jurisdiction over the

Drakes' claims pursuant to §17-16-44, Ala. Code 1975. The Code section at issue provides that:

> No jurisdiction exists in or shall be exercised by any judge or court to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute ….

Id. at *8.

B. The decision of the Court of Civil Appeals.

The only issue appealed by the Drakes was the reliance of the trial court on the Doctrine of The Exhaustion of Administrative Remedies. The Drakes did not appeal the decision of the trial court that it lacked jurisdiction pursuant to §17-16-44.

Therefore, the trial court's finding was as a result affirmed.

Judge Thompson and Moore concurred in the opinion authored by Donaldson and Judge Thomas concurred with the result. Judge Pittman recused himself.

ARBITRATION **AS A MATTER OF FIRST IMPRESSION, THE COURT FOUND THAT THE BANK'S ACCOUNT HOLDER DID NOT RECEIVE PROPER NOTICE OF A NEW ARBITRATION AGREEMENT THAT WAS POSTED ON THE BANK'S WEB PAGE AND WAS, THEREFORE, NOT BOUND BY ITS PROVISIONS.**

Moore-Dennis v. Franklin, 2016 Ala. LEXIS 25 (February 26, 2016)

HOLDINGS:

1. The bank and the account holder's financial advisor failed to prove that the account holder or his niece accessed either the specific Web page on which the arbitration agreement was located or a specific email containing the arbitration agreement itself;

2. The account holder did not receive proper notice of the amendment to the account agreement and was not bound by it.

DISCUSSION:

The opinion was authored by Chief Justice Moore.

The trial court denied the motion of the bank and the financial advisor to compel arbitration as to Franklin's claims against them. Franklin had three bank accounts with the predecessor bank to PNC, RBC Bank. In **January of 2012**, PNC allegedly mailed a welcome letter and a PNC bank account agreement to Franklin's home.

1. The provision of the account agreement did not contain an arbitration provision and Franklin denied ever seeing the account agreement until after the lawsuit was filed.

The account agreement **did not contain an arbitration provision** but provided, in part:

STATEMENTS

We will make available or send to you a monthly statement (whether in paper form, or if authorized by you, in electronic form) …

* * *

JOINT ACCOUNTS

… Notice provided by us to any one joint owner shall be considered notice to all joint owners. …

* * *

AMENDMENT, WAIVER

We reserve the right to amend this Agreement … from time to time … an amendment will become effective 30 days (or such later time if required by law) **after notice of the amendment is posted in our branches, or by such other method of notice as we may deem appropriate** or as may be specifically required by applicable law. If this is a joint Account, then notice of an amendment provided to one joint depositor shall be deemed to be notice to all joint depositors.

* * *

NOTICES

Any **written notice** that we give to you is effective when it is deposited in the United States mail and will be sent to your last known address which appears in our records.

* * *

GENERAL PROVISIONS

1. The signing of a signature card, your request for a card, the use of a card, the use of Online Banking services and/or the **use of Online Banking** through Quicken® shall mean that you agree to the content of this Agreement and to any modification thereof. Any such modification shall become effective and binding 15 calendar days (or such later time if required by law) after notice of the modification is **posted in our banking centers**, or **by such other method of notice as we may deem appropriate** or as may be specifically required by the applicable law.

Franklin denied ever seeing or receiving the account agreement until after the litigation began, and it was undisputed that the account agreement did not contain an arbitration provision.

2. Based on a notice received from PNC, Franklin and his niece, Tamara, believed that his financial advisor at PNC, Moore-Dennis, had been stealing money from his account and had set up an on-line banking profile for Franklin with her contact information.

Franklin received a notice from PNC bank which concerned his niece Tamara. Franklin told her to call his financial advisor, Sonja Moore-Dennis and Franklin alleges that Moore-Dennis was a PNC bank agent or employee.

Franklin and Tamara came to the conclusion that Moore-Dennis had been stealing funds from his account and had set up an on-line banking profile for Franklin with her contact information. Franklin who is elderly did not have internet access or an email address and did not know how to use on-line banking.

3. PNC suggested that Franklin add someone else to his account because he was elderly and he added Tamara.

The bank suggested that Franklin add someone else to his account and Tamara and Franklin signed an "**account registration and agreement**" which PNC referred to as a signature card. Shortly thereafter, PNC Bank sought to amend its agreement with Franklin to include a pre-dispute arbitration provision which read as follows:

> **READ THIS ARBITRATION PROVISION CAREFULLY: IT WILL IMPACT HOW LEGAL CLAIMS YOU AND WE HAVE AGAINST EACH OTHER ARE RESOLVED.** Under the terms of this Arbitration Provision, and except as set forth below, Claims (as defined below) will be resolved by individual (and not class-wide) binding arbitration in accordance with the terms specified herein, if you or we elect it.

4. A PNC employee testified that the bank sent Franklin three bank statements in February 2013 in which notified him of the arbitration provision; however, the statements affirmatively stated that no enclosures were included.

Franklin and Tamara denied that they received either the statements or the enclosure.

Franklin sued PNC and Moore-Dennis in **2013** alleging fraud, suppression, breach of fiduciary duty and various forms of negligence and wantonness.

5. A PNC employee testified by affidavit that the arbitration provision itself was allegedly forwarded to Franklin and that PNC sent Tamara emails in February of 2013 stating that Franklin's bank statements were available for review on-line and that the arbitration provision along with the statements were posted on Franklin's on-line banking profile.

PNC and Moore-Dennis moved to compel arbitration and submitted the affidavit of Bloss, a PNC Bank Loss Prevention Manager and the signature card, the PNC welcome letters, the account agreement, the three bank statements that were allegedly sent to Franklin notifying him of the arbitration provision and the arbitration provision itself that was allegedly forwarded to Franklin. Franklin submitted affidavits in opposition denying all of the factual allegations in Bloss' affidavit.

Another bank employee submitted an affidavit that testified that PNC Bank sent emails to Tamara in **February of 2013** stating that Franklin's bank statements were available for review on-line. She also stated that the arbitration provision along with the statements had been posted on Franklin's on-line banking profile.

Franklin countered with an affidavit from Tamara in which she said that she had made a mistake and had not signed up to receive electronic notifications and that she only changed the email address associated with the account from Moore-Dennis' email address to Tamara's email address. **Tamara testified that she did not gain electronic access to the bank statements until September 2013**. A PNC representative filed a supplemental affidavit. She claimed that Tamara had the ability in **February 2013** to access Franklin's on-line statements although according to the Court, the explanation of the employee, Ramsey, was "confusing." T**he employee, Ramsey, also corrected her previous affidavit and said that she erroneously referred to an email address for Tamara on AOL.com and instead should have referred to a Bellsouth.net email address.**

6. PNC admitted at the hearing that neither the account agreement nor the arbitration provision was mailed to Franklin but argued that the arbitration provision was "only a click away."

In a reply brief, PNC argued that if Tamara logged into the accounts that the arbitration provision was "only a click away."

At the hearing on the motion to compel arbitration, counsel for PNC admitted that neither the account agreement nor the arbitration provision was mailed to Franklin but contended that if Tamara had logged on to Franklin's account that "the arbitration provision was available 'only a click away.'"

7. The trial court denied the motion to compel arbitration due to lack of notice of the arbitration provision.

The trial court further found that PNC presented no evidence indicating that either Franklin or Tamara had requested on-line account statements and that to the contrary, the bank's argument was that the arbitration agreement was "only a click away." To the contrary, **the trial court noted that Tamara would have had to go through five steps to access the arbitration provision even if she did log onto the account**.

8. The "notices" provision of the account agreement said that notice was effective when it was mailed and sent to the customer's last known address.

Alternatively, the trial court held that emailing Franklin or allowing Franklin to access the accounts electronically did not constitute proper notice under the "Notices" provision of the account agreement. The Notices provision in PNC documentation stated that notice was effective when it was deposited in the United States mail and sent to the customer's last known address which appeared on the bank's records.

DECISION BY THE ALABAMA SUPREME COURT

A. The Court found that PNC Bank did preserve their argument that the arbitration provision was available on-line because although, those arguments were made in amendments to their motion to compel arbitration contrary to Franklin's position, PNC did present those arguments to the trial court prior to the time the trial court ruled.

B. PNC did not preserve the public policy argument because it was not made before the trial court.

In regard to the public policy argument, the Court found that PNC did not preserve that argument because they did not make the argument before the trial court.

C. The Court found that as a matter of first impression, posting notice of the arbitration provision to Franklin's on-line banking profile did not constitute sufficient notice to render the arbitration provision effective.

The Court distinguished the case of *American Bankers Ins. Co. of Florida v Tellis*, [Ms. 1131244, June 26, 2015], 2015 Ala. LEXIS 86 (Ala. 2015) because in *American Bankers* the stand alone arbitration provisions were listed on the declarations page of the policy which the Court reasoned "indicated that the forms were part of the policy" and imposed a "duty to investigate the contents of those forms because the declarations page indicated that the forms were part of the policy." *American Bankers* at *9. To the contrary, the Court found that Franklin received nothing.

D. The Court noted that it was presented with no cases where a court held that by merely sending an email alone or posting a notice on a Web page alone constituted sufficient notice that the recipient of the email or viewer of the Web page was entering into an arbitration agreement.

E. The Court rejected PNC's argument that the mailbox rule should be applied to electronic forms of notification finding that all the authority presented in the case led to the opposite conclusion and that further Franklin had not had an email address, did not have internet access and did not know how to use on-line banking.

The Court noted that although Tamara received emails, none of those provided any indication that the message was important and affected a customer's rights. The Court found that PNC did not prove that either Tamara or Franklin accessed an email containing the text of the arbitration provisions and that the emails alone were insufficient to notifying them of the existence of the arbitration provision.

F. PNC only offered evidence that Tamara could have accessed the the on-line statements, not that she did which is what the bank and Moore-Dennis had to prove.

The Court affirmed the decision of the trial court.

Justice Parker concurred in the decision of Chief Justice Moore.

Justice Murdock concurred in part and concurred in the result.

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

Concurrence by Justice Murdock.

Justice Murdock believed that Moore-Dennis and PNC Bank could address policy concerns in support of otherwise preserved arguments.

Justice Shaw's concurrence.

Shaw wrote specially regarding the required notice to the consumer of a change in the notice provisions and concluded that the bank could not adopt another "method of" notice without telling the consumer. Shaw wrote that the Court could not treat a modification of or an amendment to an agreement differently because it involved arbitration and that the Court had in fact specifically rejected the notion that some sort of special notice had to be given in relation to the existence of an arbitration provision.

Shaw emphasized that the contractual agreement did not encompass posting the provision on-line or via electronic notice.

Shaw noted that the agreement provided that PNC would give notice of a modification or amendment to the contract by posting the notice in its branches or by "such other method of notices as we may deem appropriate." The agreement provided one "other method" of notice – notice via mail. Shaw's concern was could PNC adopt another "method" of notice without telling the consumer and he concluded that it could not.

ARBITRATION **BECAUSE THE ARBITRATION AGREEMENT CLEARLY PROVIDED THAT THE ARBITRATOR DECIDED THE ISSUE OF ARBITRABILITY, AN ARBITRATOR HAD TO DECIDE WHETHER A SLIP AND FALL CASE WAS DUE TO BE ARBITRATED.**

Regions Bank v. Rice, 2016 Ala. LEXIS 67 (May 27, 2016)

HOLDINGS:

1. The trial court erred in denying a bank's motion to compel arbitration of a customer's slip and fall claim on the basis that it was not arbitrable because provisions in the deposit agreement's arbitration clause clearly and unmistakably delegated questions of substantive arbitrability to the arbitrator; and

2. As the customer had not challenged the delegation provision, it had to be treated as valid.

DISCUSSION:

Justice Bryan authored the opinion.

The Plaintiff opened a savings and a checking account and signed a one-page signature card indicating that she was agreeing to certain terms. **The deposit agreement referenced by the signature card contains a broad arbitration provision** giving either party the option of arbitrating "any controversy, claim, counterclaim, dispute or disagreement" between them. The arbitration provision also provided that the arbitrator decided any threshold dispute in regard to arbitrability.

Rice filed an action related to a premises liability action for a fall she suffered on Regions' premises. Rice contended first that her claim was beyond the scope of the arbitration provision. She further argued that the arbitration provision was invalid, void, or unenforceable because she did not have an opportunity to read the arbitration provision before she signed the signature cards and **the arbitration provision was only referenced in the signature card.**

The trial court denied the motion to compel arbitration and Regions appealed.

A. The Court found that the arbitrator had to decide the issue of arbitrability based on the language in the arbitration agreement.

The Court noted that the validity and scope of an arbitration provision are issues of substantive arbitrability that are generally decided by a court but that one important exception applied that if, as is the present case, the issue is delegated to the arbitrator.

B. If a party challenges the validity of the delegation provision itself, the Court "must consider the challenge before ordering compliance" the delegation provisions citing to *Rent-A-Center, West, Inc., v. Jackson,* 561 U.S. 63, 72 (2010).

The Court found that although Rice had challenged the validity of the arbitration provision as a whole, that she had not specifically challenged the delegation provision. The Court found that:

> Because Rice has not 'challenged the delegation provision specifically, [the court] must treat it as valid … and must enforce it … leaving any challenge to the validity of the [arbitration provision] as a whole for the arbitrator. *Rent-A-Center,* 561 U.S. at 72.

Regions Bank at *6.

The case was reversed and remanded.

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

JUSTICE MURDOCK'S DISSENT.

Justice Murdock dissented based on the cases of *Federal Ins., Co., v. Reedstrom,* [Ms. 111153, Dec. 18, 2015], 2015 Ala. LEXIS 158, *12 (Ala. 2015); and *Anderton v. Practice-Monroeville, P.C.,* 164 So.3d 104, 1103 (Ala. 2014) but did not reference any reasoning in the opinion as the basis of his dissent.

ARBITRATION **THE NURSING FACILITY PROVED THE EXISTENCE OF A VALID CONTRACT CALLING FOR ARBITRATION EVEN THOUGH THE PATIENT DID NOT SIGN THE AGREEMENT BUT WAS COMPETENT AT THE TIME HER REPRESENTATIVE SIGNED THE ADMISSION PAPERS.**

Kindred Nursing Ctrs. East, LLC v. Jones, 2016 Ala. LEXIS 26 (February 26, 2016)

HOLDINGS:

1. The trial court erred in denying the nursing facility's motion to compel arbitration because the facility proved the existence of a valid contract calling for arbitration.

2. Although the patient did not sign the agreement, the patient was competent at the time that her representative signed the admission papers and the representative had apparent authority to bind the patient at the time the admission papers were signed.

DISCUSSION:

The opinion was authored by Justice Main.

A. Whitesburg satisfied its burden of proving the existence of a contract calling for arbitration and the issues before the Court had been resolved in previous opinions authored by members of the Alabama Supreme Court; and if the patient was competent she effectively acquiesced to and/or ratified the decision.

Although a well-recognized general rule is that a non-signatory to an arbitration agreement cannot be forced to arbitrate her claims, there are exceptions if the nursing home resident on whose behalf the arbitration agreement was signed was mentally competent. In previous decisions, the apparent authority of the person signing the agreement was an issue; however, in cases where a nursing home resident was not competent but apparent authority only controlled in cases

where the resident was competent and effectively acquiesced to and/or ratified the decisions made by their respective representatives which made the application of the Apparent Authority Doctrine appropriate.

The Court noted that in cases in which the Court had held arbitration agreements non-binding on mentally incompetent residents of nursing homes, those residents were **substantially** mentally impaired. Examples of that are cases in which the residents suffered from life-long cerebral palsy and had the mental capacity of an infant or toddler, a case in which the resident had been hospitalized after suffering a stroke and heart attack symptoms, a case in which the resident suffered from dementia.

In this case, Jones contended that pain medication that she had taken rendered her incompetent which the Court found did not rise to the level of mental incompetence of nursing home residents in cases decided differently by the Court: *SSC Montgomery Cedar Crest Operating Co., v. Bolding*, 130 So.3d 1194, 1196 (Ala. 2013); *Diversicare Leasing Corp., v Hubbard*, [Ms. 1131027, Sept. 30, 2015], 2015 Ala. LEXIS 125 (Ala. 2015; *Tennessee Health Mgmt., Inc., v. Johnson* 49 So.3d 175 (Ala. 2010); *Noland Health Servs., Inc., v. Wright*, 971 So.2d 681 (Ala. 2007).

B. The Court rejected Jones' argument that the person signing the documents did not have any legal basis on which to sign the admission documents and that Jones did not authorize her to sign these documents.

Jones argued that Whitesburg did not submit any evidence indicating that even if the effect of the pain medication had diminished her mental capacity, and that Jones later became aware of the ADR agreement and ratified it. Citing to *Tennessee Health Mgmt., Inc., v. Johnson* 49 So.3d 175 (Ala. 2010), a case in which the Court addressed claims like the claims made by Jones.

The Court concluded that Jones was mentally competent when she was admitted and during her stay at the facility and found that Jones was bound by the arbitration agreement particularly in view of the evidence indicating that Jones passively permitted Barbara to act on her behalf in signing the admissions forms and the lack of evidence indicating that Jones ever objected.

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

Chief Justice Moore and Justice Murdock dissented.

DISSENT AUTHORED BY CHIEF JUSTICE MOORE

1. Chief Justice Moore reasoned that if Jones was mentally competent then the nursing home should have secured her signature on the agreement.

Chief Justice Moore distinguished the cases relied on by the Court and noted that in *Johnson* the patient was admitted following hip replacement surgery and although she was mentally competent she never signed an arbitration agreement and the agreement was signed by her daughter. Chief Justice Moore wrote that the *Johnson* case and the *Carraway* case were decided by finding that apparent authority existed because the patients did not object to the arbitration agreement after being admitted.

2. Moore contended that the patient's failure to object after admission was a departure from prior Alabama law that the Doctrine of Apparent Authority had to be based on actions of the principal and not the actions of the agent which included the principal's holding the agent out to a third party as having the authority upon which he acts, not upon what one thinks an agent's authority might be or what the agent holds out his authority to be.

Moore cited to *Malmberg v. American Honda Motor Co.,* 644 So.2d 888, 891 (Ala. 1994). Moore wrote that *Carraway* and *Johnson* were erroneously decided and should not be followed in this case. Moore wrote that the main opinion in the present case impermissibly stretched the Doctrine of Apparent Authority beyond its proper scope and placed the duty on Jones to inquire whether someone signed an arbitration agreement for her when the duty should have been placed on Whitesburg to procure Jones' signature.

JUSTICE MURDOCK'S DISSENT

Murdock agreed with Moore that the law regarding agency and apparent authority does not support the conclusion reached by the Court in this case and in other similar cases.

CIVIL PROCEDURE – DISMISSAL BASED ON FAILURE TO PROSECUTE

THE COURT FOUND THAT THE DISMISSAL SHOULD NOT HAVE BEEN GRANTED BECAUSE THERE WAS NO EVIDENCE OF WILLFUL DELAY OR CONTUMACIOUS CONDUCT.

Puckett v. Dunkle, 2016 Ala. Civ. App. LEXIS 62 (March 18, 2016)

HOLDINGS:

1. The trial court erred in dismissing a lessor's action against the lessee under ARCP 41(b) because there was no demonstrated record of willful delay or contumacious conduct;

2. The trial court declined to vacate its judgment based on the position of the plaintiff that the absence of the lessor and his attorney was both inadvertent and attributable to counsel's medical issues.

The Court found that based on those contentions that the dismissal should not have been granted.

DISCUSSION:

The case was authored by Judge Pittman.

The trial court ordered that the case was set for trial on March 23, 2015. Neither the Plaintiff nor his attorney appeared. The Defendants moved for a dismissal but the trial court stated that the judgment might be vacated if the attorney asserted a reason for the absence because "his child was in a horrible car crash or something."

Within 30 days, counsel for the Plaintiff filed a motion requesting that the Court vacate its judgment citing to eye surgery in **December of 2014** which he contended had prevented him from learning of the **March 23, 2015** trial setting.

The trial court did not rule on the motion within 90 days and Plaintiff petitioned the Court for a writ of mandamus.

On appeal, the Plaintiff submitted a brief and the Defendants did not.

A. The Court found that there was no demonstrated record of willful delay or contumacious conduct.

The Court reversed the judgment of the trial court dismissing the case and remanded the case for further proceedings.

DEFAULT JUDGMENT **THE JUDGMENT CANNOT BE SET ASIDE UNLESS THE DEFENDANT SUBMITS AN ANALYSIS OF THE *KIRTLAND* FACTORS.**

Poole v. Monteiro, 2016 Ala. Civ. App. LEXIS 60 (March 11, 2016)

HOLDINGS:

1. The appellant filed the motion to set aside the default judgment within 30 days of the entry of that judgment and the motion was in essence an ARCP 55(c) motion that was deemed to be denied by operation of law on September 17, 2015.

2. The Court would not reverse the trial court's purported denial of the motion to set aside without an analysis of the *Kirtland* factors; and because the appellant failed to argue the *Kirtland* factors before the trial court, that failure did not trigger the trial court's duty to analyze the *Kirtland* factors.

DISCUSSION:

The opinion was authored by Judge Moore.

On **March 20, 2015**, Monteiro filed a complaint against Poole alleging breach of contract, misrepresentation, deceit, and fraud. On **May 18, 2015**, Monteiro filed an application for the entry of a default judgment along with affidavits and other documents. On **June 3, 2015** the trial court entered a default judgment. On **June 19, 2015**, the Defendant filed a motion to set aside the default judgment asserting primarily that the failure to answer the complaint was due to excusable neglect and that he had a meritorious defense.

Poole contended that he was handed a manila envelope by a woman who was Monteiro's niece and secretary on **April 27, 2015;** and she did not identify herself as a process server but instead said that she was paid to bring the envelope to him. Poole contended that due to the fact that he was not aware that he had been sued because it was his belief that service had to be perfected by sheriff, deputy or constable that he did not file an answer due to a mistake, inadvertence, and/or inexcusable neglect.

A. The Court agreed that the motion to set aside the judgment was actually filed pursuant to Rule 55(c) and that the motion as a result was denied by operation of law after 90 days pursuant to Rule 59.1 on September 17, 2015; therefore, the Court found that Poole filed a timely appeal.

B. The Court rejected Poole's contention that the trial court erred by not considering the factors set forth in *Kirtland v. Fort Morgan Authority Sewer Service, Inc.*, 524 So.2d 600 (Ala. 1988) because Poole did not submit an analysis of the *Kirtland* factors to the trial court.

The three *Kirtland* factors are:

1) Whether the defendant has a **meritorious defense**;

2) Whether the plaintiff will be **unfairly prejudiced** if the default judgment is set aside; and

3) Whether the default judgment was a result of the **defendant's own culpable conduct**. 524 So.2d at 605.

To trigger the mandatory requirement that the trial court consider the *Kirtland* factors, the party filing a motion to set aside a default judgment must allege and provide arguments and evidence regarding all three of the *Kirtland* factors.

The judgment of the trial court was affirmed.

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

ECCLESIASTICAL AFFAIRS DOCTRINE –

WHETHER HOWARD COULD CONTINUE AS THE CHURCH PASTOR WAS SPIRITUAL AND ECCLESIASTICAL IN NATURE AND COULD NOT BE DECIDED BY THE COURT; HOWEVER, CLAIMS RELATED TO MISUSE OF CHURCH FUNDS WERE WITHIN THE COURT'S JURISDICTION.

St. Union Baptist Church, Inc., v. Howard, 2016 Ala. LEXIS 60 (May 13, 2016)

HOLDINGS:

1. The trial court properly dismissed claims by the church against its pastor as the dispute was spiritual and ecclesiastical in nature;

2. Although the pastor executed a contract formalizing his resignation that did not change the outcome in that his status to be rehired was also ecclesiastical rather than contractual; and

3. Dismissal of the pastor's counterclaims was error because his claims relating primarily to the misuse of church funds were within the court's jurisdiction because they did not involve ecclesiastical principals.

DISCUSSION:

A. The trial court properly dismissed the claims asserted by the church against the pastor because the dispute was ecclesiastical in nature; however, the trial court erred in dismissing the pastor's counterclaims for misuse of church funds.

1. Whether the pastor could continue to serve the church was a spiritual and ecclesiastical matter.

The articles of incorporation for the church identified five incorporating deacons that oversaw the temporal affairs of the church. The pastor subsequently purported to remove the deacons of some of their duties but recognized their involvement in financial governance. The deacons subsequently terminated the pastor's employment; however, in a meeting of the members, 37 members voted for the pastors and 10 members voted for the deacons.

Subsequently, the deacons stopped paying the pastor. The pastor offered to resign if he could be paid. He was paid but subsequently rescinded his resignation based on the alleged request of the members. The trial court issued a TRO Order barring the pastor from the premises. The pastor in a counterclaim asserted claims related to the deacons misuse of funds. The trial court entered an Order that in part resulted in the State Baptist Board to monitor church services and the deacons sought return of the monies paid to the pastor by all the parties based either on their lack of standing or the court's lack of jurisdiction.

The deacons locked the church and an altercation resulted where two church members suffered knife wounds. The deacons appealed the dismissal of their claims; however, it was delayed in that Howard had a pending post-judgment motion under Rule 4(a)(5), ARAP. The trial court denied the motion and then the pastor appealed.

2. Based on *Williams v. Jones,* 258 Ala. 59, 66-67, 61 So.2d 101, 107 – 108 (1952), the Court held that the dispute as to the pastor's status was beyond the jurisdiction of the Court; and even though the pastor had resigned and had been paid to do so, he could rescind his resignation.

The Court also cited to *In re Galilee Baptist Church,* 279 Ala. 393, 394, 186 So.2d 102, 103 (1966). The deacons contended that the contract executed by the pastor distinguished the previous decisions of the Supreme Court in regard to the jurisdiction of the Court and that the pastor could rescind his resignation.

B. As to the pastor's claims related to the financial misconduct of the deacons, the Court found as to the mismanagement of assets no spiritual conflicts or ecclesiastical doctrine was involved. Therefore the Court reversed the judgment dismissing the pastor's claims.

C. Special concurrences.

1. SPECIAL CONCURRENCE BY JUSTICE SHAW

Justice Shaw concluded that if the deacons had sought **recovery of the monies paid to the pastor that those claims would not involve ecclesiastical matters** and could be prosecuted.

2. SPECIAL CONCURRENCE BY JUSTICE MURDOCK

Justice Murdock concluded that the trial court's decision should be reversed both as to the claims asserted by the deacons and the counterclaims **based primarily on the contract regarding resignation** authored by the pastor.

IMMUNITY - PEACE OFFICER IMMUNITY UNDER ALA. CODE §§ 32-5A-7(A) AND 6-5-338.

Via a *Cranman* analysis, the Plaintiff proved that the police officer acted willfully, maliciously, fraudulently, in bad faith or beyond his or her authority sufficiently to prevent the entry of a summary judgment.

Kendrick v. City of Midfield, 2016 Ala. LEXIS 52 (April 15, 2016)

HOLDING:

The trial court erred in granting summary judgment in favor of the City and a police officer in a motorist's action arising from personal injuries she sustained when the police officer's vehicle collided with her vehicle while he was responding to an emergency call as there were genuine issues of material facts regarding whether the police officer had used his siren and whether he slowed down in the intersection for purposes of peace-officer immunity.

DISCUSSION:

The opinion was authored by Justice Murdock.

A. Whether a qualified police officer is due §6-5-338(a) immunity is now judged by the restatement of State Agent Immunity articulated by *Ex parte Cranman*, 792 So.2d 392 (Ala. 2000).

B. The Plaintiff did not dispute that her claim arose from a function that would entitle the police officer to immunity; however, she established and met her burden of proving that under *Cranman*, the police officer acted "willfully, maliciously, fraudulently, in bad faith, [or] beyond his or her authority." *Cranman* at 405.

Proceeding through red lights or stop signs: The Court noted that Ala. Code §32-5A-7 provides that the driver of an authorized emergency vehicle may "proceed past a red or stop signal or stop sign, **but only after slowing down** as may be necessary for safe operation."

Speeding: Further, the statute provides that the driver of an authorized emergency vehicle may "exceed the maximum speed limit so long as he does not endanger life or property" and may "disregard regulations governing directions of movement or turning in specified directions."

However, the statute further provides that **the exemption applies only when "such vehicle was making use of an audible signal."**

C. The Court agreed that genuine issues of fact existed as to whether the police officer violated the conditions of §32-5A-7 because there were disputed issues of fact concerning the use of the siren, concerning whether the police officer slowed down when traveling through the intersection and whether the police officer exceeded the speed limit in a manner that endangered life or property.

D. The Court rejected the officers reliance on *Ex parte Coleman,* 145 So.3d 751 (Ala. 2013), because in *Coleman,* the Court did not determine that a officer did not have to use and audible signal but instead determined that the operator of an emergency vehicle is not required to use a siren continuously to meet the condition of the use of an audible signal.

The Court distinguished *Coleman* based on the fact that in *Coleman* it was undisputed that the police officer made some use of his siren but that in this case, the testimony of the Plaintiff and a witness was that the police officer activated only his lights and not his siren. Therefore, **the Court concluded that the use of the siren was a factual dispute not proper for disposition by summary judgment**.

E. The Court found that speeding could be inferred both from the fact that the police officer's vehicle traveled across the median and across two lanes of on-coming traffic following the collision and from the severed damage sustained by all of the vehicles involved in the accident.

The Court found that it could be inferred that the police officer was traveling at a high rate of speed particularly in that the Plaintiff was going only 10 to 15 miles per hour at the time of the collision. The Court made that inference based on the damage to the vehicles and because the police officers traveled across the median and traveled over two lanes in oncoming traffic following the collision with the Plaintiff's vehicle.

The case was reversed and remanded.

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

IMMUNITY - STATE AGENT

THE ALABAMA STATE BAR WAS IMMUNE FROM SUIT AS AN ARM OF THE STATE OF ALABAMA.

Nichols v. Ala. State Bar, 815 F.3d 726 (11th Cir. 2016)

HOLDINGS:

1. The attorney's action against the Bar under 42 U.S.C.S. §1983 was barred by Eleventh Amendment immunity because the state bar was an arm of the State of Alabama and had not consented to suit pursuant to the Ala. Const. art. I., §15.

2. Alabama law delegated to the State Bar with supervision by the Supreme Court the power to investigate and discipline attorney misconduct and pass upon all petitions for reinstatement pursuant to Ala. Code §34-3-43(a)(3), and (a)(4).

3. The State Bar's delegated powers were public in nature and would otherwise be exercised by the Alabama Supreme Court and the actions of the Bar were reviewable by the Alabama Supreme Court pursuant to Ala. R. Disc. P. 12(f), 28(j).

The trial court's denial of the Rule 59(e) motion was affirmed.

DISCUSSION:

The opinion issued was a *Per Curiam* opinion.

Nichols appealed the trial court's dismissal of his 1983 claim against the Bar contending the dismissal was barred by the Eleventh Amendment to the Constitution and appealed the denial of his motion to alter or amend the judgment.

Nichols was admitted in **1982** and was suspended for more than 20 days in the early **2000's** and was required to petition for reinstatement after his suspension period ended.

At the reinstatement hearing, medical professionals testified that Nichols suffered from depression and attention deficit hyperactivity disorder and that he was now stable and medicated. The Disciplinary Board denied his petition. Nichols appealed and the Alabama Supreme Court affirmed the State Bar's finding that Nichols had not shown by clear and convincing evidence that he was fit to practice law.

Thereafter, Nichols performed some paralegal work and in **2014** advised the Bar that he was going to seek reinstatement. The Bar then ordered Nichols to end his paralegal work citing *Alabama Rule of Disciplinary Procedure 26*. Nichols responded that he was "no longer suspended" and the State Bar disciplined Nichols for the unauthorized practice of law.

In an amended complaint filed in the Federal District Court, Nichols alleged that the State Bar was an instrumentality or subdivision of the State of Alabama. However, in his appeal of the Federal District Court's decision, Nichols contended that the State Bar was **not** a state agency but a privately incorporated association that could be sued under §1983.

A. The Alabama State Bar is an "arm of the state;" and, as a result, Eleventh Amendment immunity bars Nichols' §1983 action.

B. The Alabama State Bar is an "arm of the state" based on the Court's consideration of four factors:

1) How the state law defines the entity;

2) The degree of state control over the entity;

3) Where the entity derives its funds; and

4) Who is responsible for judgments against the entity.

The Eleventh Circuit noted that it had previously concluded that the Florida State Bar was an arm of the state that enjoyed Eleventh Amendment immunity. See *Kaimowitz v. Fla. Bar,* 996 F.2d 1151, 1155 (11th Cir. 1993). The Court found that the Alabama State Bar is an arm of the State of Alabama that enjoys Eleventh Amendment immunity from Nichols §1983 claim. In part, Alabama law delegates to the State Bar with the supervision of the Alabama Supreme Court, the power to investigate and discipline attorney misconduct and "pass upon all petitions for reinstatement." For this proposition the Court cited to Ala. Code §34-3-43(a)(3), (a)(4).

Further, the Supreme Court of Alabama promulgated the Alabama Rules of Disciplinary Procedure governing the State Bar's investigation and discipline of attorney misconduct including suspensions and reinstatements.

The Court further noted that the Bar's collection of fees is authorized by the Alabama Legislature and the fees are deposited into the State Treasury and can only be spent as appropriated by the Alabama Legislature and the Alabama Department of Finance that supervises the State Bar's finances.

Therefore, any judgments against the State Bar would be paid out of its State Treasury Fund potentially affecting the Treasury as a whole. The Eleventh Circuit affirmed the decision of the District Court.

INSURANCE **A MYSTERIOUS-DISAPPEARANCE EXCLUSION WAS NOT AMBIGUOUS AND IT DID NOT CONTRADICT THE 30-DAY PROVISION OF THE POLICY.**

St. Paul Fire & Marine Ins., Co., v. Britt, 2016 Ala. LEXIS 10 (January 29, 2016)

HOLDINGS:

1. The mysterious-disappearance exclusion in a boat insurance policy was not ambiguous because if the boat could not be found and the circumstances surrounding the disappearance were so unknown, puzzling, or baffling as to make the disappearance inexplicable, a person of ordinary intelligence would determine that the disappearance was mysterious.

2. There was no evidence to support any theory as to what happened to the insured's sailboat.

3. The mysterious-disappearance exclusion did not completely contradict the 30-day provision so as to make coverage under the policy illusory and the two provisions could be read together as complementary clauses.

DISCUSSION:

Justice Bryan authored the opinion.

Michael, Britt's son, called his father and told him that he was going to drive to Oklahoma City to start a new job driving a commercial truck. Michael lived on the sailboat in West Palm Beach, Florida and told his father he would sail to Jacksonville, Florida and store the boat there. Michael set sail on **September 11, 2011.** In a "cold hit" inspection on **September 15, 2011**, the Coast Guard determined that the boat was seaworthy and there was no evidence of any severe weather in the area or in the days after **September 15, 2011.**

On **September 15,** Michael telephoned his father and informed him that due to a lack of wind that he would arrive in Jacksonville later than anticipated and would call his father; however, the call never occurred and no one has seen Michael or the sailboat since **September 15, 2011**.

Michael last used his cell phone on **September 17, 2011** to call a debt collection agency that had a lien on the sailboat. Based on the origin of the call, Michael was traveling in a southern direction away from Jacksonville.

The Coast Guard reported that Michael had a history of not contacting his family and in **July 2011**, Michael did not contact his family for some time but his father said that Michael reported that his cell phone had gotten wet. Michael had been missing for over two years when the lawsuit was filed but no Federal, State or Local Governmental agency had declared him dead.

Britt filed a claim with St. Paul for the lost sailboat. St. Paul denied the claim based on the exclusion for any loss or damage caused by or resulting from "mysterious disappearance." St. Paul further stated that it could find no evidence of accidental direct physical loss or damage that would trigger coverage.

Britt then filed a complaint asserting claims for breach of contract, bad faith, and fraud.

1. St. Paul filed a motion to dismiss the fraud claim and Britt did not respond so the trial court dismissed the fraud claim on August 7, 2014.

In **September of 2014,** St. Paul filed a motion for a summary judgment on the breach of contract and bad faith claims and Britt filed a motion for partial summary judgment on the breach of contract claim.

2. The trial court granted Britt's motion for partial summary judgment on the contract.

The trial court noted in its Order that the St. Paul policy provided that "**if your boat is totally destroyed or lost for more than 30 days, we will pay the amount of boat and boating equipment coverage shown on the declarations page**." As a result, the trial court granted Britt's motion for partial summary judgment on the contract.

The trial court found that the bad faith claim was moot and entered a judgment for Britt in the amount of $74,950.00.

St. Paul raised four issues on appeal:

1. Whether Britt carried his burden of showing that the insurance claim fell within the coverage;

2. Whether an exclusion in the policy precluded coverage for Britt's claim;

3. Whether the trial court erred in relying on what St. Paul alleged were inapplicable provisions of the policy to find coverage; and

4. Whether the trial court erred in calculating the interest due on any damages awarded.

A. The Court found that although the policy was an "*all risk policy,*" it did not provide coverage for any conceivable loss or damage to the property and the insurer can limit the scope of its liability under the terms of the policy.

Justice Bryan wrote that the trial court relied on the provision of the policy providing that "if your boat is totally destroyed or lost for more than 30 days we will pay the amount ... shown on the declarations page."

In regard to the exclusion for "mysterious disappearances" the policy did not define those terms. The policy also does not define "lost."

Due to the fact that the Court based its decision on another issue that it determined to be dispositive, the Court found that assuming without deciding that Britt carried his burden of proof showing that the loss of the sailboat was, absent an exclusion in the policy, covered by the policy.

B. The Court found that the mysterious-disappearance exclusion precluded coverage because there was no evidence indicating what happened to the sailboat.

Britt argued that the mysterious-disappearance exclusion was ambiguous and should have been construed against St. Paul. The Court noted that policies of insurance should be construed liberally in respect to persons insured and should be construed strictly with respect to the insurance company.

Justice Bryan noted that although the Alabama Supreme Court had not previously defined "mysterious-disappearance" within the context of an insurance policy that other Courts had addressed those provisions.

The Supreme Court of North Carolina defined "mysterious-disappearance" as "**any disappearance or loss under unknown, puzzling, or baffling circumstances which arouse wonder, curiosity, or speculation, or circumstances which are difficult to understand or explain**." Britt contended that the cases relied on by St. Paul did not involve all risk policies but instead involved **theft policies** and that many of those cases presumed that the mysterious disappearance had been the result of theft and thus **provided coverage** rather than

excluded coverage for the mysterious disappearance. Britt contended that those cases as a result, were inapplicable.

Citing to *Travelers Cas & Sur. Co., v. Alabama Gas Corp.,* 117 So.3d 695 (Ala. 2012)[1], the Court found that it was "reasonably certain" that there was only manner in which a person of ordinary intelligence would interpret the phrase "mysterious disappearance." The Court further reasoned that if insured property cannot be found and the circumstances surrounding its disappearance are so "unknown, puzzling, or baffling" as to make the disappearance inexplicable, a person of ordinary intelligence would determine that disappearance to be "mysterious." Citing to the North Carolina case of *Davis*, 227 N.C. at 83.

C. Although Britt argued that the mysterious-disappearance exclusion is open to multiple interpretations, he provided no alternative definitions for the phrase.

As a result, the Court found that the exclusion was not ambiguous. Since there was no evidence in the record as to what happened to Michael and the sailboat, the Court concluded that St. Paul had carried its burden of showing that Britt's claim on the policy fell within the mysterious-disappearance exclusion.

D. The Court found that the mysterious-disappearance exclusion was not in conflict with the 30-day provision which provided that St. Paul "will pay for accidental direct physical loss of or damage to your boat" and the policy also provided that "if your boat is totally destroyed or lost for more than 30 days, we will pay the amount of boat and boating equipment coverage shown on the declarations page."

St. Paul contended that the 30-day provision did not provide coverage but set forth the time in which payment for a loss will be made once the insured had established that the loss is covered under the policy; however, the Court disagreed finding that the 30-day provision required St. Paul to provide coverage when the boat had been lost for more than 30 days.

[1] A United States District Judge in the Northern District certified this question to the Alabama Supreme Court: "Was a 'potentially responsible party' (PRP), letter from the Environmental Protection Agency (EPA) under the provision of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) sufficient to satisfy a liability policy's 'suit' requirement?" The Alabama Supreme Court answered in the affirmative. In that case the Court reasoned that if a word or phrase is not defined in an insurance policy, then the Court should construe the word or phrase according to the meaning a person of ordinary intelligence would give it. The Court also found that in determining what a typical lay person would understand a particular term to mean, it is customary to turn to dictionary definitions.

E. The Court still found coverage noting that "it is the application of the word 'mysterious,' i.e., those disappearances that are inexplicable, that determines whether the missing sailboat will be covered or excluded." *22.

The Court reasoned that there would be circumstances where the disappearance of the loss of the sailboat for more than 30 days would be covered if the disappearance was not mysterious **e.g. the result of a storm**.

The Court reversed the trial court's judgment and remanded the case directing the court to enter a summary judgment in favor of St. Paul.

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

Chief Justice Moore and Justice Parker concurred in the result.

INSURANCE **A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER AN INDEPENDENT INSURANCE AGENCY HAD APPARENT AUTHORITY TO ACCEPT NOTICE OF CLAIMS ON BEHALF OF THE INSURERS WHERE THE POLICY IDENTIFIED THE AGENCY AS "AGENT" AND LISTED THE AGENCY'S ADDRESS WHILE PROVIDING NO OTHER CONTACT INFORMATION AS TO HOW A CLAIM COULD BE REPORTED.**

Southern Cleaning Serv., Inc., v. Essex Ins. Co., and Genesee General Agency, Inc., 2016 Ala. LEXIS 23 (Feb. 19, 2016).

HOLDINGS:

1. The trial court erred in granting summary judgment in favor of the insurers because a genuine issue of material fact existed as to whether an independent insurance agency had apparent authority to accept notice of claims on behalf of the insurers.

2. Where the policy identified the agency as "agent" and listed the agency's address while providing no other contact information or directions regarding how to provide notice of a claim, the insurers accepted and responded to other notices of claims forwarded to them by the agency and all communication from the insurers was routed through the agency.

DISCUSSION:

Justice Stuart authored the opinion.

Winn-Dixie entered into a contract with Southern Cleaning to provide floor care and general janitorial services. Southern Cleaning entered into a contract with Phase II by which Phase II provided those services and was required to carry a minimum level of liability insurance that covered both Southern Cleaning and Winn-Dixie as additional insureds. Phase II contacted an independent insurance

agency in Prattville that in turn contacted Genesee, a managing general agency located in Georgia.

Genesee sent the agent a quote for a commercial general liability policy issued by Essex, the agent provided that quote to Phase II and Phase II accepted the quote. Genesee had issuing authority for Essex and issued the policy to Phase II on behalf of Essex.

1. The policy included the duties in event of an occurrence, offense, claim, or suit that required the insured to provide notice "as soon as practicable."

A Winn-Dixie customer fell allegedly from slipping on a wet floor. Phase II's president, Wedgeworth reported the claim to Southern Cleaning and his agent in Prattville on **March 7, 2011** and further specifically asked his agent to notify Genesee of the incident.

2. Winn-Dixie notified its claims administrator, Sedgwick and Sedgwick sent Southern Cleaning a letter notifying it of the Plaintiff's claim and requested acknowledgment that Southern Cleaning would assume the handling of the matter. Southern Cleaning in turn forwarded the tender to Phase II.

In **May of 2012** the Plaintiff began sending pre-suit settlement demands to Phase II, Southern Cleaning and Winn-Dixie. Southern Cleaning was unable to contact the Prattville insurance agency but ultimately the insurance agent referred Southern Cleaning to Genesee which told Southern Cleaning that it had not received notice of the claim.

3. Essex denied a defense and indemnity based on late notice.

According to Southern Cleaning, Genesee directed them to contact Essex and Essex too said that it had no record of the claim related to the fall that occurred on **March 5, 2011.** The call to Genesee and Essex occurred in **June of 2012.** Essex denied a defense and indemnity based on late notice. Winn-Dixie, Southern Cleaning and Phase II settled the claim for $540,700.00 and asked the insurance defendants to approve the settlement but they refused to do so.

4. The trial court in an Order found that the judgment against Phase II was collectable only if it was ultimately determined that the Essex policy provided coverage for the Plaintiff's claims.

The insurance defendants and Southern Cleaning and Winn-Dixie moved the trial court to enter a summary judgment in their respective favor on the remaining claims and the insurance defendants moved the trial court to find that Southern Cleaning and Winn-Dixie's claims were "without substantial justification under §12-19-272(a), Ala. Code 1975 and were therefore in violation of the Alabama Litigation Accountability Act. The trial court dismissed the Plaintiff's claims against Southern Cleaning and Winn-Dixie and entered the agreed upon judgment against Phase II only.

In **June of 2014,** the trial court entered a partial summary judgment in favor of the insurance defendants in regard to Phase II's claims against them and entered another partial summary judgment in favor of the insurance defendants as to the claims asserted against them by Southern Cleaning and Winn-Dixie.

The trial court disposed of the remaining claims by entering a default judgment against the Prattville insurance agent in favor of Southern Cleaning and Winn-Dixie. Southern Cleaning appealed the summary judgment granted in favor of the insurance defendants.

5. Southern Cleaning argued that the summary judgment should be reversed because:

(1) the Prattville insurance agent was notified of the accident within days of its occurrence;

(2) the Prattville agency had either real or apparent authority to accept notice of the claims on behalf of the insurance defendants;

(3) the insurance defendants acknowledged receiving direct notice of the accident over three months before the lawsuit was filed; and

(4) the insurance defendants were not prejudiced by any delay in receiving notice.

In deciding whether the Prattville agent was able to receive notice of the claims that would be binding on Essex and Genesee, the Court analyzed the contract between Genesee and the Prattville agency.

These provisions in the agreement between Genesee and Alabama Auto were at issue:

> 2) [Alabama Auto] is an independent contractor and not an agent or employee of [Genesee] or any insurer represented by [Genesee].

* * *

14) It is understood that [Alabama Auto] is an agent and/or representative of the insured and not of [Genesee] or any insurance company or insurers represented by [Genesee].

The owner of the Prattville agency stated that he was not authorized to accept notice and only forwarded notice of claims for customers as a courtesy to those customers and not on behalf of the insurers.

A. The Court found that the evidence regarding the agreement between Genesee and Alabama Auto did not settle the issue whether the insurance defendants cloaked Alabama Auto with the apparent authority to accept notice of claims on their behalf.

Citing to *Protective Life Ins. Co., v. Arkins,* 389 So.2d 117, 119 (Ala. 1980) the Court found that a contract placing limits on an agency relationship "does not affect third persons relying upon the agent's apparent authority without notice of his limitations."

The Court noted that the Essex policy identified the Prattville agency as "agent" and listed the Prattville agency's address while providing no other contact information or directions regarding how to provide notice of a claim and the insurance defendants accepted and responded to notices of claims forwarded to them by the Prattville agency without ever notifying Phase II, Southern Cleaning or Winn-Dixie that it was inappropriate to provide such notice through the Prattville agency.

B. The Court found that Alabama Auto had the apparent authority to receive notices of claims under the policy at issue.

The Court pointed to substantial evidence submitted by Southern Cleaning that supported its argument that the insurance defendants' actions vested the Prattville agency with the apparent authority to receive notice of claims. The declarations page of the Essex policy listed the Prattville agency as the "agent." Further, the owner of the Prattville agency agreed in testimony that a policy holder might reasonably understand the language used in the Essex policy to mean that it was appropriate to contact the Prattville agency to make a claim on the Essex policy.

C. The Court found that when viewing this evidence in the light most favorable to Southern Cleaning, a fair minded person might reasonably conclude that the insurance defendants' acceptance of the notice provided by

Alabama Auto in subsequent cases led Southern Cleaning to believe that they had also accepted the notice provided by Alabama Auto in previous cases, such as the present case.

Essex admitted that it had received notice of other claims via the Prattville agency but that none of those instances occurred before May 2011 when Southern Cleaning copied the Prattville agency on its letter to Phase II discussing the Plaintiff's claims.

D. The Court emphasized that it was holding only that there was substantial evidence indicating that a genuine issue of material fact existed on the issue of whether the Prattville agency was acting as "agent" for the insurers when all communications from the insurance defendants was routed through Alabama Auto, the company that the Essex policy identified as "agent" and the policy listed the address of the Prattville agency as well without providing any other contact information or directions regarding how to provide notice of a claim.

Further, the Court cited to the fact that Essex had responded and accepted other notices of claims forwarded to them by Alabama Auto which did not conclusively establish that Alabama Auto had apparent authority to accept notice of the claims but rather did establish that there was substantial evidence indicating that a genuine issue of a material fact existed on that point.

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

JUSTICE SHAW AUTHORED A SPECIAL CONCURRENCE.

Justice Shaw concurred specially. Shaw wrote that the Court was modifying its opinion in the case released on **February 19, 2016** and that in that opinion he concurred in reversing and remanding this case. He wrote that "if I were casting my vote on the original submission today, I would concur in the result."

JUDGMENTS – SETOFF - **SCOTTSDALE PROVIDED PROPERTY INSURANCE AND FARM BUREAU PROVIDED LIABILITY COVERAGE; THEREFORE, SCOTTSDALE WAS NOT ENTITLED TO A SETOFF OF THE MONIES IT PAID IN SETTLEMENT OF THE CLAIMS AGAINST FARM BUREAU. THE NON-SETTLING INSURANCE COMPANY, SCOTTSDALE, WAS NOT ENTITLED TO A SETOFF BECAUSE SCOTTSDALE AND AUTO OWNERS OWED SEPARATE AND DISTINCT OBLIGATIONS TO THE INSURED.**

INSURANCE – **THE POLICY WAS PROPERLY REFORMED DUE TO A MUTUAL MISTAKE BY THE PARTIES IN REGARD TO THE DESCRIPTION OF THE NAMED INSURED.**

Har-Mar Collisions, Inc., v. Scottsdale Ins. Co., 2016 Ala. LEXIS 72 (June 3, 2016)

HOLDINGS:

1. The trial court properly reformed an insured's policy under Ala. Code § 8-1-2 based on mutual mistake in that it was intended for the policy to insure the auto shop, regardless of under what name the auto shop was incorporated and the policy listed a nonexistent corporation as the insured entity;

2. The insurer was not entitled to a setoff as based on the insured's settlement with another insurance company and an insurance broker because the insurance company that settled provided insurance coverage for the insured's liabilities and Scottsdale's policy covered the commercial property

and the broker did not assume any obligation to provide the insured with insurance coverage;

3. The broker had an obligation to procure coverage however once the insurance had been procured, the broker did not assume any obligation to provide the insured with insurance coverage;

4. The insured was not entitled to prejudgment interest under Ala. Code § 8-8-8;

5. The trial court should reconsider the insured's motion to tax costs; and

6. Setoff is an affirmative defense and the defendant has the burden of proof.

DISCUSSION:

Justice Bryan authored the opinion.

Har-Mar appealed a jury verdict of $101,054.40 on its breach of contract claim against Scottsdale. The trial court offset the jury verdict Har-Mar had recovered from Auto-Owners and Owners Insurance Company and from a settlement agreement it had entered into with CRC Insurance Services ("CRC"). The total amount recovered by Har-Mar from those parties exceeded the amount of the jury's verdict; therefore, the Court entered a judgment awarding Har-Mar zero dollars.

The auto shop was incorporated as Har-Mar but the shop was operated under a trade name, Marshall Paint & Collision. Hartung Commercial Properties ("Hartung") owned the four buildings occupied by Har-Mar and Wayne Hartung owned both entities. A representative of a certified insurance counselor (International), a company that assists businesses with procuring commercial insurance sought to procure coverage that included the wind damage coverage provided by his prior carrier and coverage that provided all of the coverage provided by his prior carrier as well. Wayne Hartung took this step because his prior carrier had notified him that it would no longer provide wind damage.

The company procuring coverage used the prior policy as a guide and listed the insured on the application as "Marshall" but listed the mailing address for "Har-Mar, Inc., d/b/a." The application was submitted to a surplus lines broker,

CRC, and the coverage was ultimately split between two insurance policies, an Auto-Owners CGL policy and a Scottsdale property policy.

Subsequently a fire destroyed the auto shop and a property loss notice was submitted to Scottsdale and an advance was requested for Har-Mar's lost business income. A $50,000 check was issued but it was made payable to Har-Mar d/b/a Marshall and the mortgage company. Har-Mar deposited the check and used the money to pay its ongoing expenses.

Subsequently Scottsdale notified Wayne that it was unclear how Har-Mar related to Marshall and sought information regarding the financial interest of Har-Mar in Marshall. Wayne responded that he had never incorporated the business under the name "Har-Mar, Inc. d/b/a Marshall Paint & Collision." Scottsdale refused to make any further payments to Har-Mar but notified the mortgage company that it had a right under the Scottsdale policy to receive a "loss payment" for the buildings regardless of whether Har-Mar's claim was denied.

Scottsdale issued a check to the mortgage company for an amount that was $39,000 less than the mortgage because it contended that it had already paid Wayne $50,000 which should have been applied to the mortgage.

The mortgage company converted a certificate of deposit which had been provided as additional collateral for the mortgage thereby satisfying the mortgage.

Har-Mar filed a suit against Scottsdale seeking a declaration that Har-Mar was insured under the policy and asserted breach of contract and bad faith claims and asserted negligence and misrepresentation/fraud claims against the broker, CRC, for its failure to procure insurance.

Auto-Owners intervened maintaining that there were "significant questions regarding coverage under the [Auto-Owners policy]." Auto-Owners contended that it did not provide insurance for Hartung's claims that Har-Mar had negligently/wantonly caused the fire that destroyed the auto shop.

Har-Mar then amended its complaint to add International, the company that completed the application and initially sought coverage for Har-Mar. Har-Mar entered into a pro-tanto settlement agreement with CRC in exchange for a payment of $12,500 and Har-Mar and Auto-Owners entered into a settlement as a result of Auto-Owners paying $135,000 with a stipulation that $130,000 of that settlement would be paid to Hartung on behalf of Har-Mar.

The case was tried and the settlement agreements were not revealed to the jury with the agreement that the setoff would be determined by the Court.

The trial court reformed the policy and found that the insured was, as the parties agreed, Har-Mar d/b/a Marshall. The trial court further found that the verdict would be offset by the $135,000 and $12,500 settlement which resulted in zero monies awarded to Har-Mar. Har-Mar filed a motion to amend or vacate the judgment and a motion to tax costs against Scottsdale and Scottsdale cross appealed.

A. In Scottsdale's appeal, it contended (1) that the trial court erred in reforming the contract and (2) that assuming the reformation was not error, Har-Mar lacked standing to maintain its breach of contract and bad faith claims.

1. The Court found that the trial court properly reformed the policy on the basis of a mutual mistake under §8-1-2 Ala. Code 1975 which adopted the definition of "mutual mistake" in the restatement (second) of contract §152(1981).

The Alabama Supreme Court noted that it had not found an Alabama case directly on point but cited to a decision of the Ohio Court of Appeals in *Gooslin v. B-Affordable Tree Serv.,* (No. S-10-045, Aug. 12, 2011) 2011-Ohio-4048.

The Court noted that *Gooslin* was an unpublished decision that had no precedential value in Alabama but did have precedential value in Ohio. The Court found that the undisputed evidence in the case indicated that Scottsdale and Har-Mar intended for the policy to insure the auto shop regardless of under what name the auto shop was incorporated. Scottsdale conceded that the corporation listed as the named insured did not exist.

The Court noted that there was no evidence that Scottsdale intended to provide insurance coverage for a non-existent corporation. Further **the Court noted that Wayne did not pay premiums for the policy with the understanding that the policy provided no insurance because the named insured did not exist.**

2. The Court rejected Scottsdale's "standing" argument based on the assumption that the trial court erred in reforming the Scottsdale policy.

The Court found no error in the reformation of the policy by the trial court; therefore, as a result, the Court found that the standing argument was moot.

B. Appeal filed by Har-Mar based on the setoff of settlement monies resulting in a verdict for zero.

The Court found that whether Scottsdale was entitled to a setoff is a legal question that would be reviewed *de novo* relying on *Nationwide Mut. Fire Ins. Co., v. Austin* 34 So.3d 1238, 1243 (Ala. 2009).

1. The Court agreed with Har-Mar's contention that when an insured enters into a settlement agreement with one of its insurers, the non-settling insurer is not entitled to a setoff if the two insurers "owe separate and distinct obligations" to the insured. *Alabama Farm Bureau Mutual Casualty Insurance Co., v. Williams,* 530 So.2d 1371 (Ala. 1988).

The Court noted that the Auto-Owners policy provided commercial general liability coverage and that the Scottsdale policy provided coverage for the property and that, therefore, Scottsdale and Auto-Owners did not undertake or assume any joint obligation toward Har-Mar.

2. The Court rejected Scottsdale's argument that the other insurance provisions of the policy supported the trial court's finding that setoff was proper.

The Court noted that the other insurance provision provided that "if there is other insurance covering **the same loss or damage** that the other insurance provisions would apply allowing setoff in this instance."

The Court concluded that property coverage and CGL coverage did not provide coverage for "the same loss or damage."

3. The Court concluded that "it is not the nature of the claims and allegations against separate insurers that determines whether a setoff is applicable; rather, it is the nature of the obligations to the insured undertaken by the separate insurers."

The Court cited to *Williams,* 530 So.2d at 1373 in which the Court found that Farm Bureau and First Federal did not undertake or assume any joint obligation toward the insureds.

C. The Court rejected Scottsdale's argument that Har-Mar suffered only one injury, the loss by fire of the auto shop based on its decision in *Williams.*

In *Williams,* the Court found:

> Furthermore, we do not accept [Farm Bureau's] argument that if the breach of different contractual obligations produces only one injury

then evidence of a pro tanto settlement agreement should be allowed into evidence. *Williams*, 530 So.2d at 1373.

The Court emphasized that setoff is not applicable based on whether the insured had suffered a single injury but instead was applicable where the insurers **undertook a joint obligation as to the insured.**

D. The Court found that setoff was not proper as to the monies paid by the insurance broker because the broker did not assume any obligation to provide insurance coverage for the auto shop or CGL coverage for Har-Mar in that the sole obligation of the broker was to procure insurance for Har-Mar.

E. The Court further found that the applicability of setoff arising from a settlement agreement is an affirmative defense and that Scottsdale did not meet its burden of proof.

F. Har-Mar was not entitled to pre-judgment interest under §8-8-8, Ala. Code (1975) because Har-Mar had not established that the "damages were reasonably certain at the time of the breach." ***Goolesby v. Koch Farms, LLC*****, 995 So.2d 422, 429 (Ala. 2006).**

The Court noted that it had no evidence that at the time that Scottsdale breached the contract that the damages were "reasonably certain." *Id.* at *34.

G. The Court remanded the case for the trial court to award Har-Mar the judgment entered which would result in the need for the trial court to reconsider Har-Mar's motion to tax costs in light of the fact that Har-Mar will then be the prevailing party.

Justices Stuart, Parker, Shaw, Main and Wise concurred.

Justice Bolin concurred in the result.

Justice Murdock dissented.

DISSENT BY JUSTICE MURDOCK

1. **Justice Murdock found that the issue was not one of standing but was instead one of whether the party was the real party interest to assert the claims**

Justice Murdock concurred in regard to the issue of whether Har-Mar was entitled to recover under the Scottsdale policy. Murdock dissented to address the issue of "standing" raised by Scottsdale. Justice Murdock reiterated prior decisions of the Court, e.g. in *Ex parte BAC Home Loans Servicing, LP*, 159 So.3d 31 (Ala. 2013), in which the Court found that **the issue was not one of standing but was instead was whether the party was the real party in interest to assert the claims.**

Justice Murdock noted that "even when an action pairs as defendants an insurer and an unrelated tortfeasor, the law provides the principle of equitable subrogation" citing to *McGuire v. Wilson*,372 So.2d 1297, 1300(Ala. 1979).

> Equitable subrogation is rarely necessary given the fact that most insurers include in their insurance policies express contractual provisions entitling them to subrogation rights vis-à-vis such a third party.

2. Justice Murdock concluded that the trial court correctly applied a setoff based on Har-Mar's failure to present the jury with evidence as to the damages that were duplicative of the loss of rents settlement paid by Auto-Owners.

Murdock noted that after the trial court informed Har-mar that it would allow a setoff, that Har-Mar was fully capable of protecting its interests by requesting a special verdict or general verdict accompanied by answers to interrogatories as to damages which it failed to do.

3. Justice Murdock concluded that Har-Mar had not shown enough to warrant a reversal of the trial court's judgment in that it directed the Court to "no part of the record that established a specific breakdown of the $101,054.40 verdict against Scottsdale or on what basis the Court could determine how much of the verdict could not be attributed to losses covered by the payment made by Auto-Owners."

JUDGMENT

A SUMMARY JUDGMENT WAS NOT APPROPRIATELY ENTERED IN THAT THERE WAS A DISPUTE OF FACT AND GENUINE ISSUES OF MATERIAL FACT REGARDING THE ELEMENTS OF AN ACCOUNT STATED CLAIM.

ACCOUNT STATED CLAIM –

AN ACCOUNT STATED CLAIM IS AS IF THE DEBTOR PROVIDED A PROMISSORY NOTE FOR THE BALANCE DUE POST TRANSACTION

Cook v. Midland Funding, LLC, 2016 Ala. Civ. App. LEXIS 118 (May 13, 2016)

HOLDINGS:

1. **The Court reversed the summary judgment entered in favor of Midland and remanded for further proceedings;**

2. **The Trial Court properly denied Cook's motion for a summary judgment and did not err by failing to grant Cook's motion to strike the affidavits relied on by Midland.**

DISCUSSION:

This opinion was issued by Judge Thomas on application for rehearing.

Midland sued Cook seeking over $16,000 allegedly due on a credit account. The debt was owed to Chase; however, Midland purchased from Chase a pool of charged off accounts which Midland contended included Cook's account.

The trial court entered a default judgment in favor of Midland on November 20, 2013. In his December 2013 response, Cook admitted that he had been served and had failed to file a timely answer in the Court but contended that he had served a timely answer on Midland and the default was set aside.

Midland then filed a motion for summary judgment.

Cook filed a motion for summary judgment in part because Midland had failed to produce his credit card application or any contract or agreement between Cook and Chase or between Cook and Midland.

Cook alleged that Midland lacked "standing" to pursue its claim. With his motion for summary judgment, Cook attached his affidavit stating that he did not enter into a contract with Midland and that he did not owe any debt to Midland. Cook further filed a motion to strike the affidavits of two employees of Midland because, according to Cook, the affidavit testimony was "meaningless" or "defective" because neither of them had personal knowledge regarding the account.

A. The Court denied Cook's Motion to Strike the Affidavits.

The Court held that the affidavits of Hale and Mixon complied with Rule 56(e) because they each testified that they had personal knowledge and the authority to maintain the business records attached to their affidavits and their affidavits were properly considered by the trial court.

B. The Court rejected Cook's argument that Midland's claim should be considered a claim on an open account and subject to a three-year statute of limitations because Cook did not have the ability to recast Midland's account stated claim as an open account claim.

C. As to Cook's contention that the Circuit Court erred by entering a summary judgment in favor of Midland on its breach of contract claim or on its account stated claim, because the trial court did not indicate what claims were the basis of the judgment, the Court reviewed the summary judgment evidence to determine if it established genuine issues of material fact.

D. Midland failed to establish an account stated claim and did not demonstrate that Chase/Midland rendered to Cook a statement of account of the outstanding balance and Cook thereafter admitted the correctness of the statement regarding the debt which would result in a new post transaction contract.

An account stated claim is a post-transaction agreement and is not founded on the original liability and it is as if a promissory note had been given for the balance due. The Court noted that Midland provided no copy of a new agreement to the trial court. The Court rejected Midland's argument that the meeting of the minds was implied by Cook's failure to object to the final statement of account and

as a result Midland was not required to put forth as evidence of some other agreement.

E. The Court noted that a debtor's admission to the correctness of a statement and to his liability thereon can be express or implied. *University of South Alabama v. Bracy,* 466 So.2d 148, 150 (Ala. Civ. App. 1985).

The Court concluded that the account stated claim was not appropriate for a summary judgment because genuine issues of material fact regarding the elements of an account stated claim existed.

F. The Circuit Court did not err by failing to grant Cook's motion to strike the affidavits and properly denied Cook's motion for a summary judgment.

LEGAL SERVICES LIABILITY-

WHEN THE CLIENT ALLEGED THAT AN ATTORNEY MADE FRAUDULENT MISREPRESENTATIONS TO HER THAT WERE INTENDED TO CONCEAL THE LEGAL MALPRACTICE CLAIMS THAT SHE HAD, THE ALLEGED FRAUD AND THE ACTS OF FRAUD OCCURRED WITHIN FOUR YEARS OF THE FILING OF THE LAWSUIT AND WAS AS A RESULT NOT TIME BARRED BY THE FOUR-YEAR PERIOD OF REPOSE IN §6-5-574(b).

Cockrell v. Pruitt, 2016 Ala. LEXIS 82 (June 30, 2016)

HOLDINGS:

1. Where a client sued the Defendant law firm and an attorney alleging they were vicariously liable for an associate's fraudulent misrepresentations that were intended to conceal the legal-malpractice claims, the Court found that the client who was defrauded by her attorney as to the status of her underlying claim had a claim under the Alabama Legal Services Liability Act separate and apart from a claim based on the attorney's failure to timely file a complaint on the underlying claim.

2. Although the limitations period on the underlying claims had run over two years before she filed suit, her claim was not time barred by the Ala. Code §6-5-574(a) two-year limitations period in that it was based on the Defendants' alleged fraud and that the acts of fraud allegedly occurred within four years of the filing of the suit, the claim was not time barred by the four-year period of repose in §6-5-574(b).

DISCUSSION:

The opinion was authored by Justice Wise.

This was a Rule 5 permissive appeal.

Pruitt testified that the associate at the Cockrell firm advised her to resign her job at Stillman College in **2001** but that she understood that the lawsuit asserting employment claims against Stillman had been filed and was still pending. In **2006**, the associate told her that he had settled the case for $212,500.00 at which time she executed a general release that purported to set forth the details of the

settlement. The settlement indicated that the money would be invested in an annuity and that the Plaintiff would receive an initial lump sum payment of $25,000.00 and would receive 59 monthly payments of $3,541.66.

The Plaintiff testified that thereafter she began to receive checks written on the Cockrell law firm's trust account. The payments started in **2006**; however, in **2009**, the associate told her that the company handling the annuity had failed financially and that she could either reduce her monthly payments by one-half or take a very small lump sum.

The Plaintiff agreed to reduce her monthly payment. The associate confirmed the details of this in a letter to a representative of First Federal Bank in which he stated that the Plaintiff had received five of the $3,541.66 payments. In a separate letter to Wells Fargo Bank, the associate stated that the Plaintiff was to receive $1,980.00 each month and that "said payments are made by representative of the settling party via this office."

The associate had agreed to represent the Plaintiff in four matters and she did not discover that he had not filed complaints with regard to any of them until **January 2012.**

Rulings by the Trial Court:

1. The Defendants contended that the legal malpractice claims would have accrued at the time the statute of limitations on the underlying actions expired because the Plaintiff did not file her claims against them until March 2012; and the Defendant attorneys argued that all of her malpractice claims except for the claim arising out of the claims against A Plus Photography were barred by the two-year statute of limitations set forth in §6-5-574(a).

2. The trial court dismissed all claims asserted by the Plaintiff except (a)the claims arising out of the automobile accident; (b) the claims for vicarious liability for the Associate's actions; and (c) vicarious liability as to the separate acts of fraud.

Plaintiff contended that the claims did not accrue until they were discovered. The Cockrell firm filed a motion for summary judgment and the trial court dismissed all claims asserted by the Plaintiff except claims regarding negligence as to the handling of the legal matters arising out of the automobile accident, vicarious liability for the actions of House, the associate, the associate's actions

and handling of those matters and vicarious liability as to the separate acts of fraud on the part of the associate.

Rulings by the Alabama Supreme Court.

A. The Court permitted the Cockrell Defendants petition for permissive appeal only as to the question regarding whether the fraud claim arising out of the alleged attempt to defraud the client as to the status of an underlying claim is actionable separate and apart from the attorney's failure to timely file this lawsuit.

The trial court entered an Order certifying that its judgment was appropriate for permissive appeal under Rule 5, ARAP and included five controlling questions of law. Pruitt and the Cockrell Defendants then filed in the Court petitions for permissive appeal.

The Court denied Pruitt's petition for permissive appeal but granted the Cockrell Defendants petition as to one of the questions certified:

> Whether acts of fraud committed by an attorney who defrauds the client as to the status of the client's underlying claim are actionable under the ALSLA separate and apart from the attorney's failure to timely file suit on the underlying claim?

The Court relied on this provision of §6-5-574, Ala. Code 1975:

> (a) All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and **could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery** of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that **in no event may the action be commenced more than four years after such act or omission or failure**; …

The Court relied on its findings in *Ex parte Seabol*, 782 So.2d 212, 215 (Ala. 2000)

B. The Court found that a fraud claim based on misrepresentations by an attorney solely for the purpose of concealing a potential legal malpractice cause of action is a separate and distinct claim under the ALSLA.

The Court distinguished a prior decision in regard to fraud and because it had not addressed the specific issue presented in this case – whether the ALSLA allowed a plaintiff to assert a fraud claim that is based on misrepresentations an attorney made solely for the purpose of concealing a potential legal malpractice cause of action against him or her and that is separate and distinct from claims based on the underlying legal malpractice.

The Court noted that the statute limited actions to those "based on an injury or damage caused by a breach of the standard of care applicable to the legal service provider." The Court found that fraudulent misrepresentations by an attorney for the purpose of concealing the attorney's malpractice that could likely result in a legal malpractice against the attorney would fit within the definition of a legal service liability action set forth in §6-5-572(1).

The Court noted that in *Ex parte Sonnier,* 707 So.2d 635 (Ala. 1997), the Court addressed a similar issue as to the claims against Cockrell with regard to medical malpractice claims brought pursuant to the Alabama Medical Liability Act. In that case, Ms. Talley alleged that the Defendant physicians performed an unnecessary hysterectomy on her and told her it was done to remove a supposed cervical cancer. The doctors made the same misrepresentations to her after the surgery.

In 1994, Ms. Talley secured her hospital records and discovered that she did not have cancer and filed her lawsuit four years and four days after the hysterectomy. The Talleys argued that the subsequent misrepresentation after the surgery were separate actionable incidents of malpractice and the Court agreed citing to *Benefield v. F. Hood Craddock Clinic,* 456 So.2d 52, 54 (Ala. 1984) in which the Court found that **misrepresentations made during the course of a doctor/patient relationship are claims of malpractice governed by the AMLA.**

C. As to the associate's intentional misrepresentations to Pruitt regarding the status of the cases until well after any legal malpractice case against him would have been barred by the statute of repose, those misrepresentations were malpractice claims distinct and separate from failing to file the lawsuits.

Applying the reasoning of the Court in *Benefield v. Craddock Clinic,* the Court found that after the statute of limitations had run on Pruitt's claims that were to be prosecuted by the Cockrell firm; however, the associate made intentional misrepresentations to Pruitt regarding the status of the cases until well after the time any legal malpractice case against him would have been barred by statute of repose.

The Court noted as was the case in *Sonnier II*, the misrepresentations during the course of House's representation of Pruitt would constitute claims of separate legal malpractice. Although the Court in *Sonnier II* found that a legal malpractice action based on allegations of fraud had to be commenced within two years after the discovery by the aggrieved party and that "however, no action may be commenced more than four years after the act or acts constituting the fraud" the Court found that any fraudulent misrepresentations that occurred after April 5, 1991, would not be barred by the four-year statute of repose.

E. In the present case, all of the alleged acts of fraud occurred within the four-year period preceding the filing of the complaint and were not time barred.

The Court noted that in its decision it did not resolve whether the Plaintiff's complaint adequately alleges a legal malpractice claim based on the separate alleged acts of fraud and whether the Plaintiff could establish that she suffered damage as a result of the specific alleged fraudulent misrepresentations that the associate made during the four-year period preceding the filing of the Plaintiff's complaint.

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

Justice Shaw concurred in the result.

Justices Parker and Murdock dissented.

JUSTICE MURDOCK'S DISSENT.

Justice Murdock dissented because he was not persuaded that an affirmative answer is appropriate to the separate cause of action question that is before the court and because the question of the extension of the rule of repose was not before the Court in this permissive appeal.

MALICIOUS PROSECUTION	**THE TRIAL COURT ERRED IN DISMISSING THE MALICIOUS PROSECUTION CLAIM BECAUSE OF THE GRAND JURY INDICTMENT BECAUSE IF SHE COULD DEMONSTRATE THAT IT WAS INDUCED BY FRAUD, SUBORNATION, SUPPRESSION OF TESTIMONY, OR OTHER LIKE MISCONDUCT SHE COULD OVERCOME THE PRESUMPTION THAT PROBABLE CAUSE EXISTED TO PROSECUTE HER.**
IMMUNITY	**THE DISTRICT ATTORNEY WAS NOT IMMUNE FROM SUIT IF HE ACTED MALICIOUSLY WHICH IS AN ELEMENT OF THE MALICIOUS PROSECUTION CLAIM ASSERTED BY McCONICO.**

McConico v. Patterson, 2016 Ala. Civ. App. LEXIS 61 (March 11, 2016)

HOLDINGS:

1. The trial court erred in dismissing a city employee's malicious prosecution claim because if the employee could prove that a grand jury indictment was induced by fraud, subornation, suppression of testimony, or other like misconduct, she could overcome the presumption that probable cause existed to prosecute her. Plaintiff was entitled to overcome that presumption.

2. The claim was not time barred because the employee filed her claim of malicious prosecution within two years of the earliest date the claim could have accrued.

3. The District Attorney was not entitled to state immunity under Ala. Const. Art. 1 §14 because a state officer or employee was not protected when he or she acted maliciously and an element of a malicious prosecution claim is that the judicial proceeding was instituted maliciously.

DISCUSSION:

Judge Thompson authored the opinion on application for rehearing.

McConico appealed from a judgment dismissing her claims against the former Mayor of the City of Leeds, Patterson, and the District Attorney for Jefferson County.

McConico worked as a municipal court magistrate for the City and was placed on administrative leave while the financial records of the municipal court were audited. McConico contended that the audit was commissioned by the Mayor and was conducted by an "unknown third party" that concluded that $94,861.72 had been taken from the court. A subsequent audit by the Alabama Public Accountants office too discovered that the amount had been taken or misappropriated by McConico.

McConico stated claims against the Defendants in their individual capacities for negligence/malice, for the wrongful death of her unborn child, for malicious prosecution, for libel/defamation and conspiracy.

The Defendants contended that the claims were time barred. **The trial court granted the motions with the possible exception of the malicious prosecution claim.**

The trial court later dismissed the malicious prosecution claim because a Jefferson County Grand Jury indicted McConico.

A. The Court noted that a dismissal under Rule 12(b)(6) ARCP required the Court to view the allegations of the complaint in the pleader's favor and the Court had to consider only whether the Plaintiff may possibly prevail, not whether the Plaintiff will ultimately prevail and that dismissal is proper only when it appears beyond doubt that the Plaintiff can prove no set of facts in support of the claim that would entitle the Plaintiff to relief.

B. A trial court's order of dismissal is afforded no presumption of correctness and the sufficiency of the complaint is reviewed de novo.

C. The Court noted that generally the indictment by a Grand Jury is prima facie evidence of the existence of probable cause and that an acquittal does not tend to show a want of probable cause.

The Court reiterated the elements of a malicious prosecution:

(1) A judicial proceeding was initiated by the Defendants;

(2) The judicial proceeding was instituted without probable cause;

(3) The judicial proceeding was instituted by the Defendants maliciously;

(4) The judicial proceeding was terminated in favor of the Plaintiff; and

(5) The Plaintiff suffered damage as a proximate cause of the judicial proceeding.

D. Cases requiring "reasonable and competent evidence" to rebut the presumption of probable cause was based on a jury verdict, not a grant of the motion to dismiss; and a dismissal was proper only if it appeared beyond doubt that no set of facts could be proved to support the claim.

Although the Defendants cited to law in which the Court found that the Plaintiff was required to provide "reasonable and competent evidence" to rebut the presumption of probable cause based on a Grand Jury indictment, the case cited was based on a jury verdict, not the grant of a motion to dismiss; and the Court found that dismissal of the malicious prosecution claim was **proper only if it "appears beyond doubt"** that she can prove no set of facts to support her claim that would entitle her to relief.

McConico alleged in her complaint that the Defendants knew no money had been misappropriated and prosecuted the claim against McConico because McConico had sued the City for wrongful termination and discrimination.

The Court noted that if McConico could prove that the indictment was "**induced by fraud, subornation, suppression of testimony or other like misconduct of the party seeking the indictment**" she could overcome the presumption that probable cause existed to prosecute her.

E. In regard to the Defendants' position that McConico's malicious prosecution claims were barred by the applicable limitations period, the Court found that the earliest possible date that the claim could have accrued was when the criminal action was nol-prossed on May 23, 2013 and the complaint was filed on September 30, 2014; therefore, McConico filed her clam of malicious prosecution within two years of the earliest date that the claim could have accrued.

F. The District Attorney in his application for rehearing argued for the first time that the malicious prosecution claim was due to be dismissed on the grounds of either state immunity under *Cranman* or prosecutorial immunity, and the Court rejected those arguments because they were not before the trial court and were not argued in the original appellant's brief.

G. The Court addressed the issue of state immunity despite the fact that it was not raised in the trial court nor in the initial brief because if Falls were immune from suit, the trial court's Order entered without subject matter jurisdiction would be void.

Citing to *Ex parte Carter,* 395 So.2d 65, 68 (Ala. 1980) the Court noted that state immunity did not prohibit actions for injunction or damages brought against state officials in their representative capacity and individually where it was alleged that they had acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law.

H. While state officials and state employees sued in their individual capacities may be entitled to qualified immunity, also known as state agent immunity, the Court found that the defense of state agent immunity would only be properly disposed of by dismissal in "rare cases" and they found that this was not the rare case in which state agent immunity could result in dismissal via a motion to dismiss.

I. Falls also contended for the first time on rehearing that the dismissal of the malicious prosecution claim against him should be granted under the ground of prosecutorial immunity; however, the Court noted that the official seeking absolute immunity bears the burden of proving that such immunity is justified but Falls had not presented that issue to the trial court and had not met that burden.

J. In regard to McConico's contentions that under the doctrine of equitable tolling, her claim of negligence/malice, libel/defamation, and conspiracy were timely filed, the Court found that McConico cited to no

authority to support her contentions; nor did she provide an explanation as to why the criminal case would prevent her from moving forward on the other claims other than the malicious prosecution claim.

McConico admitted that the limitations period for her other claims expired two years after the Grand Jury returned the indictment. The Court found that it was her burden to provide legal authority to support her argument of equitable tolling and she failed to do so.

K. In regard to McConico's contention that the limitation period should be tolled pursuant to §6-2-3, Ala. Code 1975 ("the savings clause") because the District Attorney fraudulently concealed that the underlying case against her should have been brought as a civil action, not a criminal prosecution, the Court noted that there was nothing in Ala. Code §41-5-22 that governs the procedure to be followed when a government employee cannot account for the money for which he or she is responsible and that the statute does not prohibit the parallel criminal prosecution of an employee that may have engaged in illegal conduct.

McConico was not entitled to equitable tolling. McConico did not sufficiently allege facts indicating that either Defendant concealed from her the causes of action of negligence/malice, libel/defamation, or conspiracy nor did she allege any facts or circumstances regarding what prevented her from "discovering" those claims.

K. In regard to her wrongful death claims, McConico contended that the fetus that she miscarried was a child which pursuant to §6-2-38 Ala. Code 1975 suspended the two year limitations "until the relief of disability or within 19 years" and that, therefore, the statute of limitations did not run until 22 years after the birth of the child. The Court found this issue to be without merit.

The Court found that a wrongful death action was two years whether the death was of a minor or an adult.

The application was granted and the Court's prior opinion of January 8, 2016 was withdrawn and substituted.

Judges Pittman, Thomas, Moore and Donaldson concurred in the opinion authored by Judge Thompson.

MANDAMUS – DENIAL OF MOTION FOR SUMMARY JUDGMENT

AN ATTORNEY WAS NOT DUE MANDAMUS REVIEW BECAUSE IT WAS NOT CLEAR FROM THE FACE OF THE COMPLAINT WHETHER THE CLAIM SOUNDED IN TORT OR IN CONTRACT OR IN BOTH.

Ex parte Watters, 2016 Ala. LEXIS 71 (June 3, 2016)

HOLDINGS:

1. An attorney was not entitled to a writ of mandamus for a review of the denial of his summary judgment motion on a legal malpractice claim as it was not abundantly clear from the face of the complaint whether Ala. Code §6-5-462 dictated dismissal because the issue of whether the claim sounded in tort, in contract, or in both was sharply disputed;

2. The issue of whether the claim sounded in tort or in contract did not fit within cases in which the Court held that from the face of the complaint the defendants were entitled to the relief sought. Therefore, the attorney was not entitled to mandamus review of the Order denying a summary judgment.

DISCUSSION:

The opinion was authored by Justice Bolin.

Long retained Watters to represent her in obtaining assets from the estate of her deceased father. The employment contract included a 33 1/3% fee if it was settled with or without suit, a 40% fee if the case had to be tried and a 50% fee if it had to be appealed.

The agreement further provided that if Long dismissed Watters as counsel that she agreed that each specific service rendered by Watters prior to that date would be billed at a rate of $125 per hour for out of court services and $150 per hour for appearances in court.

It further provided that if any work over and above the work agreed to in the contract that Long agreed the fees would be paid pursuant to a new fee arrangement. Further it provided that if Watters had to pursue Long for the fee that it would accrue interest at a rate of 18% per annum and the agreement provided that it could only be amended in writing.

On **January 20, 2004**, the trial court entered an Order declaring that Long owned a 1/6th interest in the estate. On **July 7, 2004**, Long notified Watters that she was discharging him. Shortly thereafter, Watters filed an attorney's lien against the property at issue. Long did not pay taxes on the property and the property was sold at a tax sale.

In regard to the redemption of the property, Watters claimed that he could find someone to loan her the money to redeem the property if Long executed a quitclaim deed to a partnership that would include Watters and that the deed would not be recorded if Long paid the loan within 30 days of redeeming the property.

The loan arrangement was never reduced to writing. Watters recorded the deed conveying the property to Langley & Watters, LLP.

Subsequently Long died and the Probate Court appointed Gamble as administrator of Long's estate. Gamble filed a complaint against Watters for **(1) legal malpractice, (2) vicarious liability, (3) aiding and abetting and (4) an equitable claim seeking quiet title**. In a subsequent amendment Gamble added equitable claims labeled (5) "**Legal Services Liability Action Against Defendant Watters … Breach of Fiduciary Duty**."

Watters filed a motion for summary judgment contending that the legal malpractice and the breach of fiduciary claim did not survive Long's death. Gamble argued that Watters' duty to Long arose from the 2002 employment contract and that it was an equitable claim alleging unjust enrichment which survived Long's death. The trial court granted Watters' summary judgment motion as to all counts in the amended complaint except the legal malpractice claim and the count seeking a quiet title to the property. Watters petition for a writ of mandamus.

A. Watters did not demonstrate a clear legal right to a writ of mandamus because the trial court refused to grant his motion for summary

judgment for legal malpractice noting that in all but the most extraordinary cases an appeal is an adequate remedy.[2]

Watters relied on the cases of *Ex parte Hodge* and *Ex parte J.E. Estes Wood Co.,* 42 So.3d 104 (Ala. 2010) but included no discussion of either case in his petition.

B. *Hodge* only narrowly expanded the scope of mandamus review because in that medical malpractice claim the action was due to be dismissed based on the four-year period of repose found in §6-5-482(a), Ala. Code 1975 and that Code section was an absolute bar to medical malpractice claims filed more than four years after the cause of action accrued.

The Court noted that Watters did not rely on any applicable statute of limitations that would be a complete bar and instead relied on *Gillian v. Federated Guar. Life Ins. Co.*, 447 So.2d 668, 674 (Ala. 1984), for the premise that a tort action did not survive the death in favor of the personal representative unless the claim was filed prior to the death.

C. The Court concluded that it was not abundantly clear from the face of the complaint whether the claim sounded in tort or in contract.

Watters contended that an unfiled claim alleging breach of fiduciary duty did not survive the death of the decedent based on *Brooks v. Hill*, 717 So.2d 759 (Ala. 1998).

Gamble contended that Count I alleged facts that would support a breach of contact claim in that they arose out of 2002 employment contract. Gamble cited to *Hamner v. Mutual of Omaha Insurance Co.,* 49 Ala. App. 214, 218, 270 So.2d 87, 90 (Ala. Civ. App. 1972).

The Court concluded that the case did not come within an exception to the general rule that a writ of mandamus will not issue to review the merits of an Order denying a motion for summary judgment.

Justices Stuart, Main and Bryan concurred.

[2] *Ex parte Jackson,* 780 So.2d 681, 684 (Ala. 2000); see also *Ex parte Hodge,* 153 So.3d 734 (Ala. 2014), and *Ex parte U.S. Bank Nat'l Ass'n.* 148 So.3d 1060 (Ala.2014)(discussing narrow exceptions to the general rule that mandamus will not issue to review the merits of an order denying a summary-judgment motion).

SPECIAL CONCURRENCE BY JUSTICE MURDOCK

Justice Murdock wrote a special concurrence in which he agreed with the holding but added that the application of the statute of limitations was not an issue in the case.

MEDICAL MALPRACTICE **THE CLAIM WAS BARRED BY THE FOUR-YEAR STATUTE OF REPOSE BECAUSE THE CASE WAS FILED IN OCTOBER 2015 AND THE FOUR-YEAR PERIOD ENDED IN JUNE 2009.**

Cutler v. Univ. of Ala. Health Servs. Found., P.C., 2016 Ala. LEXIS 85 (July 8, 2016)

HOLDINGS:

The trial court dismissed the medical malpractice case and concluded that it was time barred by the four-year period of repose in §6-5-482(a).

The Supreme Court affirmed the decision of the trial court in which the trial court denied the Motion to Dismiss because the Plaintiff specifically alleged that the tumor grew in the four years after June 2005 which caused the claim that was filed in October 2015 to be barred by the four-year rule of repose in Ala. Code §6-5-482.

DISCUSSION:

Justice Bolin authored the opinion.

The alleged medical negligence claim (a failure to inform the patients of the presence of a tumor) occurred in **June 2005.** The Plaintiff maintained that his cause of action did not accrue until **February 11, 2015** when he first suffered a legal injury – a seizure requiring surgical resection of the tumor.

The Court distinguished *Crosslin v. Health Care Auth. Of Huntsville*, 5 So.3d 1193, 1196 (Ala. 2008) in which the Court found that "when the wrongful act or omission and the resulting legal injury do not occur simultaneously, the cause of action accrues and the limitations period of §6-5-482 commences when the legal injury occurs."

A. Cutler contended that he did not suffer a legal injury until he had a seizure on February 11, 2015.

Cutler complained that the Defendants had been negligent and wanton in failing to inform him of a two-centimeter tumor/lesion in the right frontal region of

his brain that was discovered by an MRI scan of his brain taken on **June 28, 2005.** Instead, Cutler was told that the tumor/lesion was a bruise.

In regard to the accrual of the cause of action, Cutler in the complaint stated that "the process was started in the two years after this testing on June 28, 2005, but did not accrue into a legal injury until he suffered a seizure and automobile accident. … the same tumor/lesion that was evident to Defendants on June 28, 2005, grew and became malignant causing legal injury to [Cutler] and creating this cause of action."

The Defendants filed a motion to dismiss based on the four-year statute of repose set forth in §6-5-482(a), Ala. Code 1975.

B. The Court agreed with the trial court that Cutler's case was remarkably similar to the case of *Crosslin v. Health Care Auth. Of Huntsville,* 5 So.3d 1193, 1196 (Ala. 2008). In *Crosslin,* the radiologist reviewed a CT scan that indicated the presence of a tumor but failed to report to Crosslin the presence of a pituitary tumor.

In **September of 2005**, Crosslin lost vision in his left eye and decreased vision in his right eye and a CT scan indicated the presence of a pituitary tumor. Crosslin contended that this was the first time that he knew about the tumor. The hospital and physician in *Crosslin* argued that because the claim related to breach of a standard of care by a failure to inform the Plaintiff of the presence of the pituitary tumor, he was also damaged on the same date because he was already suffering from the tumor.

In *Crosslin*, the trial court granted the motion to dismiss of the hospital and the physician but the Alabama Supreme Court reversed.

In *Crosslin* the Court found that the Defendants were not entitled to a dismissal on the face of the complaint and concluded that although the complained of negligent act occurred beyond the four-year period of repose in §6-5-482(a) the Plaintiff may have been able to prove a set of facts indicating that the actual legal injury occurred within the four-year period of repose.

The Court in *Cutler* distinguished *Crosslin.* In Crosslin, the tumor was discovered on **February 23, 2002**; however, Crosslin alleged in his complaint **only** that his injury occurred at a point after **February 24, 2002** and that as a result Crosslin may have been able to prove a set of facts establishing that he suffered no actual injury until within the applicable four-year period at issue.

The Court noted that in *Cutler*, he alleged that the tumor/lesion culminated in a legal injury on **February 11, 2015.** Despite **"an adverse beginning of the growth process within the four-years following June 28, 2005**." As a result, the Court agreed with the trial court that regardless of the discovery of any injury by Cutler, the statute of repose would have begun to run at the latest by **June 28, 2009** and would have expired at the latest by **June 28, 2013**.

C. The Court concluded that the legal injury was within the four years following the 2005 MRI because it was within that time that Cutler alleged the tumor/lesion began its growth process and/or became malignant and that the latest date by which the statute of repose would have expired would have been in June of 2013.

Cutler argued on appeal that he never pleaded when the tumor grew or became malignant but instead pleaded that the "process of" growth and malignancy occurred during the interim between June 28, 2005 and February 11, 2015. The Court concluded that the legal injury was not the date that Cutler actually suffered harm via the accident, but it was instead within the [four years] following the 2005 MRI because it is within that time that Cutler alleges that the tumor/lesion began its growth process and/or became malignant.

D. The Court concluded that unlike *Crosslin*, Cutler would be unable to prove any set of facts to support his claim that his legal injury occurred before the expiration of the four-year period of repose.

Justices Shaw and Main concurred in Bolin's opinion.

Justice Murdock concurred specially and Justice Bryan concurred in the result.

SPECIAL CONCURRENCE BY JUSTICE MURDOCK

Justice Murdock found that the Court's review was limited to the dispositive issues framed by the parties as being when Cutler's cause of action accrued.

Murdock emphasized that in *Street v. City of Anniston*, 381 So.2d 26 (Ala. 1980) and *Grabert v. Lightfoot*, 571 So.2d 293 (Ala. 1990) the Court found that "in medical-malpractice actions a legal injury occurs at the time of the negligent act or

omission, regardless of whether the injury **is or could be** discovered within the statutory period."

PREMISES LIABILITY –

The owner of the property was not liable because the contractor hired by the Owner (1) was aware of the hazard; (2) the owner did not reserve control; (3) the owner had no superior knowledge of the hazard, and (4) the owner had no duty to warn.

South Alabama Brick Co., v. Carwie, 2016 Ala. LEXIS 36 (May 28, 2016)

HOLDINGS:

1. The trial court erred in granting summary judgment of a claim related to a worker's fall through a skylight on the roof because the owner was not legally responsible for warning the worker of risks related to working on the roof when the owner's duty to warn was discharged by the contractor's awareness of the hazard.

2. There is no evidence that the owner exercised or reserved the right to exercise any control over the manner in which the work was performed.

3. There was no evidence that the owner had knowledge superior to that of the contractor as to the danger posed by skylights in the roof.

4. The owner had no duty to the worker to ensure that the contractor was qualified.

5. The contractor had previous experience repairing the owner's roof.

DISCUSSION:

This opinion was authored by Justice Murdock.

The evidence recited by the Court demonstrated that SAB had no knowledge that any person employed by SAB had ever been on the warehouse roof. SAB was informed that some of the roofing contractor's crew would be working around some of the skylights and a representative of SAB testified that he knew that the skylights would not support the weight of a man.

SAB testified that it had never had any indication that the roofing company did not have knowledge of whatever hazards there might be while working on metal roofs. The members of the crew working on the roof were not employed by the roofing contractor and according to the subcontractor, Perez, the members of his crew were not his employees either.

The roofing contractor testified that he went on the flat roof with a representative of SAB and Perez and pointed out the twelve skylights and instructed Perez to follow OSHA regulations in dealing with the skylights which dictated covering the skylights with plywood and using harnesses with ropes while working on the roof.

Perez testified that he did not know that skylights could be dangerous and would not hold the weight of a man and that the roofing company did not provide them with safety guidelines or supplies. He further testified that the skylights were "practically identical" to the metal portion of the roof. During the performance of the work, one of the workmen fell through the skylight and suffered catastrophic injuries.

A. Rulings in the trial court

1. Based on the concession of the Plaintiff, the trial court entered a judgment in favor of SAB and the roofing contractor on the wantonness claims.

2. The trial court rejected SAB's argument that an injured workman was a business invitee and found that the contractor that employed the injured worker had superior knowledge of the dangers presented by the skylights and was required to provide any necessary warnings to its own employees.

3. The trial court concluded that SAB owed "an additional duty under the facts of the case" in addition to the traditional common law duty of a premises owner to a business invitee because SAB had *a duty of ensuring that the roofing contractor was a safe, qualified contractor*.

The trial court entered a judgment in favor of the Plaintiff and against SAB and the roofing contractor in the amount of $12,601,676.00.

B. Ruling by the Alabama Supreme Court

1. The Court concluded that the danger was obvious.

The Court found that the premise owner's duty to warn extended only to hidden defects or danger that are unknown or hidden to the invitee; however, the Plaintiff must establish:

(1) that the defect or danger was hidden;

(2) that it was 'known to the owner'; and

(3) that it was 'neither known to the contractor, nor such as he ought to know.'" *Roberts v. NASCO Equip. Co.*, 986 So.2d 379, 384 (Ala. 2007).

The Court noted that an invitor is not liable to an invitee for an injury resulting from a danger that was obvious or that should have been observed in the exercise of reasonable care. *Jones Food Co., v. Shipman,* 981, So.2d 355, 362 (Ala. 2006).

2. If the superior knowledge was lacking, then the invitor cannot be liable. *Id* at *16.

3. The Court emphasized that as to an independent contractor "there is no duty to warn 'an independent contractor' who has equal or superior knowledge of a potential danger.'" *Roberts,* 986 So.2d at 383-84.

4. The Court found that by applying the objective standard, not the subjective state of the invitee, SAB had no liability to the Plaintiff.

5. The Court concluded that SAB reasonably could have expected that the roofing contractor had at least as much knowledge as did SAB of the danger that would exist if one of the roofing contractor's employees were to fall onto a skylight especially from the elevated position at which the employee was stationed by the roofing contractor.

Citing to *Armstrong v. Georgia Marble Co.,* 575 So.2d 1051, 1053 (Ala. 1991), the Court noted when a premises owner is found to owe a duty to warn, that duty is satisfied as a matter of law, when the contractor or supervisory personnel have knowledge of the dangerous condition.

The constructive knowledge imputed to individuals working on the project, by virtue of the knowledge of a general contractor, is sufficient to discharge the premises owner of any duty to warn each individual worker of the condition of the premises.

6. The Court found that the trial court imposed a different, additional duty on SAB when it found that SAB had a duty to the roofing

contractor's employee to ensure that the roofing contractor was a qualified contractor.

7. The Court found that the cases relied on by the trial court regarding the duty to ensure that the roofing contractor was a qualified contractor were not applicable, because the cases relied upon established that a premises owner could be responsible for injuries to third parties resulting not from some preexisting condition of the premises known to the owner but from **"conditions created by the faulty workmanship or other negligence of an independent contractor committed by the contractor in the course of performing its contract."** *South Alabama Brick Co.*, at*26.

The Court concluded that:

> The issue of the responsibility of a premises owner for the negligence of its contractor that injures another is an altogether different issue than the issue of a premises owner's **duty to the contractor** (and by extension its employees) to warn or protect against **preexisting conditions of the premises** into which the premises owner invites the contractor.

8. The Court concluded that the issue was a preexisting condition of the roof and that SAB hired an independent roofing contractor with previous experience repairing the particular roof at issue and to make repairs determined by the roofing contractor to be necessary and appropriate. As a result, SAB was not legally responsible for warning the employees of the roofing contractor of the risk inherent of working on that roof.

The Court reversed and remanded.

Chief Justice Moore and Justices Bolin, Main, and Bryan concurred in the opinion offered by Justice Murdock.

STANDING- **Summerdale, Robertsdale, and the Baldwin County Sewer Service had standing to file this action against the East Central Baldwin County Water Sewer and Fire Protection authority.**

DECLARATORY JUDGMENTS –

An actual injury is not required for filing a Declaratory Judgment action but the threat of injury that is imminent and tangible is sufficient to establish a bona fide justiciable controversy.

Ex parte Town of Summerdale, 2016 Ala. LEXIS 61 (May 13, 2016)

HOLDINGS:

1. A town and city and a sewer service (Baldwin County Sewer Service) had standing to file actions against a county water, sewer, and fire protection authority where they sought a declaration that the expansion of the authority's geographical area was void as they sufficiently alleged an "injury in fact"; and

2. The city and town had standing because they were ready and able to provide sewer and water services in the expanded service area; therefore, a "bona fide justiciable controversy" was raised under Ala. Code § 6-6-221.

DISCUSSION:

The decision was authored by Justice Murdock.

A. Standing is a pure question of law and the lower court's ruling on that issue is not entitled to deference on appeal.

Robertsdale and Summerdale petitioned for a Writ of Certiorari seeking a review of the decision of the Court of Appeals in *East Central Baldwin County Water, Sewer & Fire Protection Authority v. Town of Summerdale,* [Ms. 2130708, Feb. 27, 2015] So.3d, 2015 Ala. Civ. App. LEXIS 49 (Ala. Civ. App. 2015).

The Supreme Court held that Summerdale and Robertsdale and the Baldwin County Sewer Service had standing and reversed the decision of the Court of Civil Appeals.

B. Murdock agreed that there was a "lack of clarity" in cases involving declaratory judgment cases that probably contributed to the error of the Court of Civil Appeals because actual injury is not required and *only the threat of injury that is imminent and tangible is required.*

Murdock noted that injury was not required to prosecute a declaratory judgment action but "it simply means that the threat of injury needs to be imminent and tangible rather than purely speculative in order for there to be a bona fide justiciable controversy." *23. The Court wrote that **standing concerns the actual legal interest at the time the action was filed** and whether or not the cities could provide water and sewer service in 2002 did not render them without standing when they filed this action in 2009.

At issue was whether the cities' legal rights were thwarted or affected by a 2002 amendment to the certificate of incorporation for the purpose of enlarging the East Central Baldwin County Authority service area to include additional territory.

The Court of Civil Appeals erroneously concluded that Summerdale did not plead injury as a result of the Board's placing water lines inside its corporate limits without the city's permission. Contrary to the position of the East Central Baldwin County Authority, the Court found instead that Summerdale did, in fact, include the violation of placing water lines inside its corporate limits without permission as part of its claims.

At issue in regard to Robertsdale was a 2008 amendment regarding the right of the East Central Baldwin County Authority to impose a franchise fee on Robertsdale's provision of sewer services in the expanded area. **The Court concluded that the cities and the Baldwin County Sewer Services had standing to challenge the 2002 amendment and that Robertsdale and the Baldwin County Sewer Service had standing to challenge the 2008 amendment.**

Justices Parker, Main and Bryan, concurred.

Justices Bolin and Shaw concurred in the result, and Justice Stuart recused herself.

TORTS – FRAUD	**THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A JUDGMENT AS A MATTER OF LAW IN THAT THE AGENT REASONABLY RELIED ON THE ORAL REPRESENTATIONS OF A FARMERS' AGENT.**
REMITTITUR	**THE TRIAL COURT PROPERLY DENIED THE INSURANCE COMPANY'S REQUEST FOR A REMITTITUR OF THE COMPENSATORY DAMAGE AWARD AND THE CASE WAS REMANDED FOR THE TRIAL COURT TO CONDUCT A *HAMMOND/GREEN OIL* HEARING ON THE REQUEST FOR REMITTITUR OF THE PUNITIVE DAMAGE AWARD.**

Farmers Ins. Exch., v. Morris, 2016 Ala. LEXIS 18; (February 2, 2016)

HOLDINGS:

1. The trial court properly denied the defendant insurance company's motion for a judgment as a matter of law with respect to the former employee's claim (the Plaintiff) that the insurance company fraudulently induced him to become its agent and he reasonably relied on the oral representations of an agent of the insurance company that he could continue working for his father's insurance agency after he accepted employment with the defendant insurance company despite the fact that the insurance company's conflict of interest policy required him to terminate that employment.

2. The trial court properly denied the insurance company's request for a remittitur with respect to the jury's $600,000.00 compensatory damage award because that award was supported by the evidence.

3. However, the insurance company requested a remittitur with respect to the $1.6 million punitive damage award, claiming it was excessive; therefore, the trial court erred in failing to hold a *Hammond/Green Oil* hearing on this issue pursuant to Ala. Code §6-11-23(b).

DISCUSSION:

This is a *Per Curiam* opinion.

Morris filed this lawsuit against eleven insurance companies that are described as legally distinct insurance entities but they are collectively referred to as "Farmers."

Plaintiff who is a licensed insurance agent was working for his father's independent insurance agency "Morris Insurance." Morris met with an employee of Dewey Insurance Agency which served as the district office for Farmers in Mobile and Baldwin Counties.

The person who met with Morris, Lowry, testified that she was not aware that Farmers had a written policy that made Morris' relationship with his father's insurance agency unacceptable and she testified that none of the information or training that she received nor the state office for Farmers gave her any information that Morris was not a suitable candidate based on his relationship with his father's insurance agency.

Lowry testified that she met with the district manager for Farmers, Dewey, and that she would have mentioned the fact that Morris worked with his father's independent agency.

A co-employee of Lowry then met with Morris and Dewey testified that he made the Farmers' state office aware of the proposed situation and that the representative of Farmers told him the arrangement was acceptable.

Morris testified that he repeatedly asked if he could continue to work with his father's agency and he repeatedly was told that he could. **None of the documents signed by Morris included information that would have alerted him** to the fact that he would have been prohibited from working with his father. The agent agreement provided that it may be terminated by either Morris or Farmers with a three month's notice.

In his testimony, the division marketing manager for Farmers testified about various reasons why Morris was terminated; however, in his memorandum stated:

> It is my recommendation, [after listing the exhibits] that we terminate the appointment of Kyle Morris **based on the fact that business was stolen from another agent and placed with Morris agency**.

Morris then sued Farmers arguing that Farmers had fraudulently induced him to become a Farmers agent.

The jury awarded Morris $600,000.00 in compensatory damages and $1.8 million in punitive damages.

A. Farmers' arguments on appeal were divided into two categories, (1) liability on the fraud claim itself and (2) damages.

1. Farmers failed to prove that Morris could not have reasonably relied on the assurances he received from representatives of Farmers.

As to the liability issue, the Court found that Farmers had to persuade the Court as a matter of law that Morris could not have reasonably relied upon the particular, direct, repeated assurances he received from representatives of Farmers in response to his pointed inquiries when there was a conflicting statement to be found in the Farmers' ethics manual that Morris was suppose to have read as a part of his orientation.

The Court found that it was unpersuaded by Farmers' argument and could not say that the trial court incorrectly concluded that the issue whether Morris could have reasonably relied on the repeated oral misrepresentations made to him in response to his repeated inquiries as opposed to the statement at issue in the Farmers' ethics manual, was a factual question for the jury.

2. The Court found that the provision relied on by Farmers prohibiting Morris from working with his father's agency was buried in a 200 page manual and that Morris, as a result, received no notice of the conflict of interest statement relied on by Farmers.

The Court noted that to even find the conflict of interest statement in the Farmers' ethics manual, Morris had to take the "constructing your business" on-line module which is one of dozens of on-line courses, go to page 19 under duties and responsibilities and then find the second paragraph which would then direct you to going to the company's server and clicking on agency dashboard, managing, my operations, and agent guide. You would then have to go to section 3 of 10 in the "agent guide;" you would then have to find the 7 of 13 categories listed in the table of contents for that section alone, you would then have to go to the category entitled "responsibility" and find subject one, and then if you looked at the third paragraph, you would note that it includes this sentence **"Accordingly, an agent who offices with an agent or broker of another insurance company, will be considered as maintaining a conflict of interest."**

3. The Court found that Morris presented sufficient evidence of fraudulent inducement for the matter to be decided by the jury.

The Court referenced the case of *Potter v. First Real Estate Co.,* 844 So.2d 540 (Ala. 2002) in which the Court held that the plaintiffs were not barred from suit by a difficult to read provision in a survey that contradicted the oral representations regarding the house that they purchased not being in a flood plain. Morris reasonably relied on the multiple assurances he received particularly in that the only information contrary to what he was told was buried in a 200 page manual among dozens of other documents.

B. As to Farmers' contention that the compensatory damages award was not supported by the evidence and that the punitive damage award should be remittited, the Court found that the compensatory damage award of $600,000.00 was supported by the evidence and that the trial court should have conducted a *Hammond/Green Oil* hearing in regard to the punitive damage award.

1. At trial, Morris argued that the measure of damages would be the opportunities that he had lost by becoming a Farmers' agent and specifically asserted that by becoming a Farmers' agent, he lost the opportunity to write policies through his father's insurance agency.

Morris called as a witness a man who was a certified public accountant who had been hired by Farmers as a business valuation expert. The expert agreed that Morris had incurred business expenses related to becoming a Farmers' agent, Morris' customers were loyal to him, not Farmers, that individuals who purchased policies did so based on their relationship with Morris, not Farmers and that if Morris had recommended other products from other companies, the customers would have purchased those products.

Morris offered testimony from another agent as a measure for determining the amount of commissions Morris could have earned if he had remained with his father's insurance agency instead of going to work for Farmers.

However, the Court agreed with Farmers that the case should be remanded for a *Hammond/Green Oil* hearing and emphasized that a trial court was required to put in writing its reasons for denying a motion to review a punitive damages award for excessiveness.

The Court affirmed the denial of Farmers' motion for a judgment as a matter of law and/or for a new trial as to Morris' fraudulent inducement claim. The Court also affirmed the trial court's denial of Farmers' request for a remittitur of the compensatory damages award of $600,000.00; however, the case remanded the case for the trial court to conduct a ***Hammond/Green Oil*** hearing.

Justices Parker, Murdock, Main and Wise concurred in the *Per Curiam* opinion.

Justice Bryan concurred in part and concurred in the result in part.

Chief Justice Moore and Justices Stuart, Bolin and Shaw dissented.

CHIEF JUSTICE MOORE'S DISSENT.

Moore wrote that the at-will language in the employment contract between Morris and Farmers defeated Morris' fraud claims. Moore recognized that an action based on alleged fraudulent inducement to enter employment is actionable even if the employment is at-will, *Kidder v. AmSouth Bank, N.A.,* 639 So.2d 1361 (Ala. 1994); however, Moore agreed with Justice Houston's dissent in *Kidder* that if the employee knows that he will be an at-will employee, he could not justifiably rely on any promise concerning the working conditions during his at-will employment.

JUSTICE SHAW'S DISSENT.

Shaw contended that Alabama law provides that one cannot reasonably rely on misrepresentations when facts and circumstances call those misrepresentations into doubt. Shaw wrote that the "facts and circumstances" need only be "reasonably apparent" and did not have to be written representations found in an executed contract. **Shaw wrote that "when an insurance agent is told by local representatives of his company that a business arrangement is ethical, he cannot 'close his eyes' to an ethics manual from the corporate office that defines what is ethical and shows the opposite."** Shaw contended that this decision turned the decision in *Foremost Insurance Co., v. Parham,* 693 So.2d 409 (Ala. 1997) "on its head."

Justices Stuart and Bolin concurred in the dissents.

TORTS – NEGLIGENCE **THE FAILURE TO IDENTIFY THE SOURCE OF A BURNING ODOR WAS NOT SUFFICIENT TO ESTABLISH NEGLIGENCE.**

Jim Bishop Chevrolet-Buick-Pontiac-GMC v. Burden, 2016 Ala. LEXIS 58 (May 6, 2016)

HOLDINGS:

1. The trial court erred in failing to grant a corporation's motion for judgment as a matter of law and in submitting the case to the jury because the only evidence presented to the jury to support Plaintiffs' claim that the corporation was negligent in failing to identify and repair the source of a truck's burning odor and to warn of a hazardous condition was the fact:

(a) that they had taken the truck to the corporation's dealership on several occasions complaining of the burning odor;

(b) that the dealership could not identify the source of the odor; and

(c) that the truck subsequently caught fire;

2. The failure to identify and repair the source of the burning odor standing alone, was insufficient to establish a *prima facie* case of negligent repair.

DISCUSSION:

The opinion was authored by Justice Bolin.

The Plaintiffs stated various claims against General Motors, Jim Bishop, and Lynn Layton Chevrolet, Inc., including a products liability claim under the AEMLD, a claim asserting negligence and wantonness in the design and manufacture of the truck, a claim for breach of express and implied warranties, a claim under the Magnuson-Moss Warranty Act, 15 U.S.C.§2301 et seq., and a claim alleging that the defendants had negligently and wantonly failed to repair the truck and to warn of the inherent danger in operating the truck.

In the case, Bishop asserted a cross claim against General Motors pursuant to §8-20-4(3)(o), Ala. Code 1975 alleging that GM had refused to indemnify Bishop.

1. The trial court dismissed the AEMLD claims and the negligent and wanton design and manufacture claim.

GM moved for summary judgment as to the AEMLD and negligent and wanton design and manufacture claims in that the Plaintiffs had failed to provide information regarding expert witnesses who would support that claim. Bishop and Layton moved for a summary judgment and also adopted GM's motion as to the AEMLD claim and the negligent and wanton design and manufacture claim. Pursuant to the consent of the Plaintiffs, the trial court entered an Order dismissing the AEMLD claims and the negligent and wanton design and manufacture claims.

The Plaintiffs entered into pro tanto settlements with GM for $20,000 and a pro tanto settlement with Layton for $32,000.

2. The trial court denied Bishop's Summary Judgment Motion as to the negligent failure to repair and failure to warn claims and those were the claims presented to the jury.

Bishop moved for a summary judgment on the remaining claims against it on their negligent failure to repair and failure to warn claims. Bishop argued that it had not undertaken the duty to repair the vehicle, that expert testimony was necessary to establish the cause of the fire, and that Plaintiffs had admitted that expert testimony establishing the cause of the fire was not available. The trial court denied Bishop's summary judgment motion.

At trial, only the Plaintiffs' claims against Bishop alleging negligent repair and failure to warn of the hazardous condition and the loss of consortium claim were tried. Bishop sought a JML that was denied.

The jury returned a verdict in favor of Mr. Burden for $100,000 and a verdict in favor of his wife for $32,500.

The smell developed shortly after the purchase of the truck. Plaintiff had the oil changed and asked the technician if he saw anything under the truck that could cause the odor. Shortly thereafter the smell returned and Plaintiff had the truck inspected at a Chevrolet dealership operated by Layton near to the site where Plaintiff experienced problems with the truck. An employee at Layton told Plaintiff that he was possibly smelling **the new burning off the truck.**

Later Plaintiff took his truck back to Bishop and a Bishop employee confirmed that the odor could be the **"new burning off."** Plaintiff returned to Bishop later that month and complained again about the odor and did so two times thereafter. Subsequently, the truck caught fire and Plaintiff was taken to the hospital and the tuck was a total loss. The actual cause of the fire could not be determined because of the extensive damage. The service department would make the decision as to whether the owner should leave the truck or take it with him.

A. The Court noted that Plaintiffs failed to present any expert testimony or any evidence whatsoever of the appropriate standard of care to be adhered to when a service department undertakes to diagnose the cause of such an intermittent burning odor.

B. The Court further found that the Plaintiffs failed to present any evidence, expert or otherwise, as to how the actions taken by Jim Bishop constituted a breach of duty owed them that proximately resulted in the vehicle fire.

The Court pointed out that Bishop testified that the customer would have the option of leaving the vehicle with the service or leave the service department with the vehicle and that the determination of what should be done was left to the service department representative. Therefore, the Court found that the Plaintiffs failed to establish a breach of a duty owed them.

C. The Court found that evidence that Bishop was negligent in failing to identify and repair the source of the burning odor and to warn of the hazardous condition was not presented to the jury in that the only evidence submitted was that the truck had been taken to the Bishop dealership on several occasions with complaints of the burning odor and that Bishop could not identify the source of the odor and that the truck subsequently caught fire.

The case was reversed and judgment rendered.

Justices Stuart, Parker, Murdock, Shaw, Main and Bryan concurred and Chief Justice Moore dissented without opinion.

VENUE - MANDAMUS – DENIAL OF VENUE CHANGE –

IN RULING ON A MANDAMUS PETITION, THE COURT FOUND THAT THE TRANSFER WAS REQUIRED UNDER THE INTEREST OF JUSTICE PRONG BECAUSE ALL OF THE EVENTS GIVING RISE TO THE CLAIMS OCCURRED IN A COUNTY TO WHICH THE CASE SHOULD BE TRANSFERRED.

Hicks v. Wayne Farms, LLC, 2016 Ala. LEXIS 64 (May 27, 2016)

HOLDINGS:

1. The Plaintiff's negligence suit was a lawsuit against Defendants, an LLC and its employee. The LLC was entitled to a writ of mandamus with respect to the trial court's Order denying its motion for a change of venue.

2. The interest of justice prong of Ala. Code § 6-3-21.1required transfer to the county where all of the events giving rise to the claims occurred.

3. The only connection to the county in which the lawsuit was filed was that the Wayne Farms' employee lived in that county and the LLC did business there which was only minimal contact.

DISCUSSION:

Justice Stuart authored the opinion.

Hicks operated a chicken farm in Pike County. Wayne Farms agreed to deliver flocks of chickens to the Hicks' Farm. The Hicks agreed to care for the chickens until they reached a marketable weight.

King, an employee of Wayne Farms, drove a tractor-trailer owned by Wayne Farms to the Hicks' farm to pick up a load of chickens. Before the employee left the property, the trailer detached from the tractor, overturned, and pinned Ben Hicks to the ground and caused him injury.

Hicks and his wife sued Wayne Farms and King, the employee of Wayne Farms, in Bullock County alleging negligence and wantonness.

A. Wayne Farms acknowledged venue was proper in Bullock County but maintained that pursuant to the Doctrine of *Forum Non Conveniens* (§6-3-21.1 Ala. Code 1975) the case should be transferred to Pike County both because of the interest of justice prong and for the convenience of the parties and witnesses.

These are the facts on which the Court relied:

1. The contract with Wayne's was executed in Pike County;

2. A Wayne Farms' employee traveled to Pike County almost every week to meet with the Hicks;

3. That employee worked at the Enterprise operation which is 24 miles from the Pike County courthouse and approximately 55 miles from the Bullock County courthouse;

4. The fire department that responded to the accident is in Pike County;

5. The fire department personnel lived and worked in Pike County or at least that is what the Court believed;

6. The ambulance company that responded was in Pike County;

7. Hicks was taken to an emergency room in Pike County;

8. All medical personnel who treated Hicks worked in Pike County;

9. The records related to the treatment are also **likely** located in Pike County;

10. Hicks' primary care physician is in Pike County;

11. After the accident, Wayne Farms' employees met with the Hicks in Pike County and offered to assist the Hicks with labor to do the work that Mr. Hicks did before the accident;

12. One of the employees who met with the Hicks post accident lives in Houston County but maintains an office in both Houston and Pike Counties;

13. Wayne Farms operation in Pike County is extensive and the only operation in Bullock County is a processing plant; and

14. The distance from the Hicks' home to Pike County courthouse is approximately 4 miles, and it is 35 miles from the Bullock County courthouse.

B. The co-defendant driver, King, contended that the case should not be transferred and that venue was proper in Bullock County where the lawsuit was filed and where he was a resident.

The Hicks responded in opposition with discovery responses provided by the driver of the truck showing that his residence was 7 miles from the Bullock County courthouse.

Subsequently, Wayne Farms filed additional affidavits from Wayne Farms' employees and the persons who treated Hicks after the accident that it would be more convenient for them if the case was tried in Pike County.

C. Due to the fact that the truck driver stated he wanted the case to remain in Bullock County and that Wayne Farms had a large presence in Bullock County, the trial court denied the motion for change of venue.

The trial court noted that the truck driver filed an affidavit stating that he wanted the case to remain in his home county and that his former employer, Wayne Farms, had a large presence in Bullock County and that it would be substantially more convenient for him if the trial was held in Bullock County.

The trial court found that Wayne Farms had not met its burden of proof, that there was a strong and therefore sufficient connection to Bullock County, that Wayne Farms had a large physical plant in Bullock County and a strong connection to the County, that the driver opposed the transfer and that there would be no burden on the judicial resources of Bullock County for the case to remain in Bullock County.

Subsequently Wayne Farms petitioned for a writ of mandamus.

D. Wayne Farms moved to strike certain exhibits to the Hicks' response to their petition because those exhibits were not before the Bullock County Court at the time the Bullock County Court denied the motion for change of venue.

The Hicks contended that although the exhibits were not before the Court, they were referenced in the pleadings and the Court had judicial knowledge of the exhibits.

E. The Court found that it would not consider exhibits presented to the Court after it denied transfer and struck arguments in regard to those exhibits and refused to consider those exhibits.

F. In deciding that the motion for change of venue should have been granted, the Court noted that the statute addressing the interest of justice prong refers to the word "shall" instead of the word "may."

The Court noted that it had further held that transfer under the *forum non conveniens* statute is compulsory as well. The Court further pointed to cases finding that litigation should be in the forum where the injury occurred.

G. The Court found that due to the weak connection with Bullock County that the trial court exceeded the scope of its discretion when it denied the motion for change of venue.

The petition was granted and a writ issued.

Justices Bolin, Wise and Bryan concurred.

Justice Parker concurred in the result.

Justices Murdock and Main dissented.

Justice Shaw recused himself.

JUSTICE MAIN'S DISSENT.

Justice Main found that the connection to Bullock County was not so weak that the "interest of justice" would be offended by trying the case there particularly when the co-Defendant wanted the case to remain in Bullock County. Main noted that when venue is appropriate in more than one county, the Plaintiff's choice of venue is generally given great deference.

WRONGFUL DEATH **A WRONGFUL DEATH CASE FILED BY A PERSONAL REPRESENTATIVE WHO HAD BEEN DISCHARGED WAS A NULLITY DESPITE THE FACT THAT SHE WAS REAPPOINTED AS THE PERSONAL REPRESENTATIVE BOTH AFTER THE LAWSUIT WAS FILED AND AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED.**

Northstar Anesthesia of Ala., LLC v. Noble, 2016 Ala. LEXIS 86 (July 8, 2016)

HOLDING:

A wrongful death case filed by a personal representative who had been discharged was a nullity despite the fact that she was reappointed as the personal representative after the lawsuit was filed and after the statute of limitations had expired.

The Supreme Court reversed and held that the action was a nullity when it was filed and that nothing could relate back to a nullity.

DISCUSSION:

The opinion was a *Per Curiam* opinion.

An estate was opened and a personal representative was appointed; however, later the estate was closed and the personal representative was discharged. The personal representative filed a wrongful death case within the two-year statute of limitations and moved the Probate Court to reopen the estate and to reappoint her as personal representative. The Probate Court granted the motion reopening of the estate and reappointing the personal representative after the limitations period expired.

The trial court denied the summary judgment filed by the Defendants in which they contended that the filing of the wrongful death action was a nullity because the personal representative lacked the capacity and standing to sue at the time that the suit was filed and that the reappointment did not relate back.

A. The Court reasoned that a wrongful death action in Alabama brought pursuant to §6-5-410 is purely statutory and the Court's role is to strictly enforce the Wrongful Death Statute as written and intended by the legislature.

B. The Court rejected the personal representative's argument that her discharge and release only released her from the administrative matters regarding Thomas' estate.

The Court rejected the argument noting that the Probate Court's Order broadly stated that "said personal representative be discharged and release." The Court found that nothing in the Order left the estate open for any reason nor did it limit the discharge and release. The Court agreed that "one who may act only upon authority of the court appointment may not continue to act after such authority has terminated, whether by death, resignation, or by order of discharge or removal." *Id.* at *10.

C. The Court found that the reappointment of the personal representative on December 16, 2013 occurred after the expiration of the two-year limitations period for wrongful death action set forth in §6-5-410(d) and that, therefore, when the action was filed, it was a nullity because the personal representative was not in fact the personal representative at the time the complaint was filed.

The Court noted that the reappointment would not relate back because there was nothing to relate back to since the filing of the original lawsuit was a nullity. The Court noted that it made the same finding in *Wood v. Wayman*, 47 So.3d 1212 (Ala. 2010) and in *Alvarado v. Estate of Kidd,* [Ms. 1140706, Jan. 29, 2016], 2016 Ala. LEXIS 13 (Ala. 2016) as well as in other cases cited by Defendants. The Court rejected the request of the personal representative to overrule two of the cases and the Court declined to do so.

D. The Court rejected the personal representative's argument that the Defendants waived any affirmative defense related to her alleged lack of capacity or standing by never asserting the claim as an affirmative defense. The Court rejected that argument in that the initial filing was a nullity.

JUSTICE SHAW'S CONCURRENCE:

Justice Shaw agreed that the wrongful death action was a nullity which was in accord with an opinion issued in March, *Ex parte Hubbard Props., Inc.*, [Ms. 1141196, March 4, 2016], 2016 Ala. LEXIS 29 (Ala. 2016) in which the Court found that a wrongful death action commenced by a person who was not the personal representative was a nullity.

Justice Shaw noted that in *Hubbard* the Court stated that there could not even be a substitution of another party because the action is a nullity in the first place.

JUSTICE MURDOCK'S DISSENT:

1. Justice Murdock found that the second appointment as personal representative related back to the date the lawsuit was filed.

Justice Murdock referenced his dissent in *Wood v. Wayman*, 47 So.3d 1212, 1220 (Ala. 2010); his dissent in *Richards v. Baptist Health Systems, Inc.*, 176 So.3d 179, 179 (Ala. 2014) and his dissent in *Alvarado v. Estate of Kidd*, [Ms. 1140706, Jan. 29, 2016] 2016 Ala. LEXIS 13 (Ala. 2016).

Murdock urged in those dissents and in this dissent as well that the straightforward and simple rule that the subsequent appointment of a person as the personal representative relates back so as to validate the timely commencement of a wrongful death action as the Court found in *Ogle v. Gordon*, 706 So.2d 707 (Ala. 1997).

2. Justice Murdock did not agree with Justice Bryan's conclusion that the result would be permitted by using Rule 15(c) and Rule 17(a), ARCP, "regardless of the application of §43-2-831."

3. Justice Murdock wrote that the Doctrine of Relation Back with respect to the powers of a personal representative has been in existence for approximately 500 years which was first recognized in *Blackwell v. Blackwell*, 33 Ala. 57 (1858).

JUSTICE BRYAN'S DISSENT:

1. Justice Bryan agreed that under current precedent a wrongful death action commenced by someone other than the personal representative is a nullity, but he believed that the precedent is out of line with the modern trend and should be overruled as the Plaintiff had requested.

Justice Bryan noted that he does not believe that the Court has never adequately explained why an action commenced by someone other than the personal representative is a nullity.

2. Justice Bryan rejected the argument that the Plaintiff lacked standing to sue citing to the Court's opinion in *Ex parte BAC Home Loan Servicing, LP,* 159 So.3d 31 (Ala. 2013), in which the Court found that "standing" is a concept that is relevant only in public law cases, not in private law cases like the present one.

3. Bryan criticized the nullity rule as a "remnant of an earlier era of strict pleading requirements" citing to *Trimble v. Engelking,* 130 Idaho 300, 302, 939 P. 2d 1379, 1381 (1997).

Justice Wise concurred in Justice Bryan's dissent.