RECENT ALABAMA APPELLATE DECISIONS

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("Recent" meaning those decisions available subsequent to the Tuscaloosa County Bar Association Spring 2017 CLE Seminar.)

(1.) Aderholt v. McDonald, [Ms. 1150878, Dec. 16, 2016] ___ So.3d ___:

'[D]ivorce, by itself, had no impact on one spouse's status as the beneficiary of the other spouse's life insurance policy." (This pre-§30-4-17 Ala. Code 1975 (Act No. 2015-312), "which provides for the revocation of certain transferable interests in property in the event of a divorce or annulment," and neither party cited it to the Court.)

(2.) Ex parte City of Homewood, [Ms. 1151310, March 24, 2017] ___ So.3d ___:

Video recording of police officer's pursuit of fleeing suspected shoplifter's vehicle, made by the dashboard camera in the officer's patrol car, in case where Plaintiff passenger in fleeing vehicle was injured when it wrecked, which video was attached to Defendant's motion for summary judgment, was sufficient to demonstrate that the pursuing officers were exercising discretion and judgment during the pursuit, entitling them to "peace officer" immunity.

(3.) Ex parte Walter B. Price, [Ms. 1151041, Apr. 14, 2017] ___ So.3d ___:

Acknowledging two lines of its authority which were in conflict on point, the five-member majority in a 5-2 divided court (Justice Wise recused herself) held that when a motion to dismiss includes materials outside the pleadings, but the trial court's order granting the motion does not indicate whether it considered those materials, there is no bright-line rule requiring the appellate court to assume the trial court did consider the materials, which assumption would require the motion

to be deemed to have been converted to a motion for summary judgment, and importantly changing the standard of review.

(4.) Ragland v. State Farm Mut. Auto. Ins. Co., [Ms. 1160140, May 19, 2017] ___ So.3d ___:

Generally, an order dismissing a complaint "without prejudice" does not constitute a final judgment that will support an appeal. An exception to that rule has been recognized for situations where the dismissal without prejudice based on lack of subject matter jurisdiction conclusively determined the issues before the court.

(5.) Ex parte Przybysz, [Ms. 1160381, Sept. 1, 2017] ___ So.3d ___:

Settlement agreement for a case pending in the Jefferson County Circuit Court called for payments to be made over a 30-month period. Because of that feature of the settlement, the circuit judge did not enter a final judgment, but placed the case on its administrative docket with the intention of leaving it there until the payments to Plaintiff Smith were satisfied. A month later, the defendants filed suit against Smith in federal court, alleging he had breached the settlement agreement. Smith and his company filed an amended complaint in the Jefferson Circuit Court claiming the defendants had breached the settlement agreement. Subsequently, that court, based on its retained jurisdiction to oversee implementation of the settlement agreement, ordered the defendants in the case before it to dismiss the action they had filed in federal court. The Alabama Supreme Court held, on appeal from that order, that the rule that state and federal courts will not interfere with or try to restrain each other's proceedings, included the prohibition that a state court could not do that indirectly by ordering the parties before it to dismiss a federal court action they had filed, rather than directly attempting to order the federal court to dismiss it.

(6.) Saarinen v. Hall, [Ms. 1160066, Sept. 1, 2017] ___ So.3d ___:

Plaintiff injured while operating a power saw at his place of employment sued two managerial co-employees under §25-55-11, Ala. Code 1975, which allows such an action where the co-employee has been guilty of willful conduct in the form of "the willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine," provided other circumstances are shown. Here, after Plaintiff's injury, his employer replaced the saw with one manufactured by a different company than the company which manufactured the injury-producing saw. That replacement saw had been delivered at least a month before the injury but had not been installed because the employer was too busy at the time to change out saws. The Supreme Court held:

> Under the facts in this case, the failure to install another, presumably safer, saw that was present on the premises but that had not been put into operation and that was manufactured by a different manufacturer than the saw that injured the plaintiff is not the equivalent of the removal of a safety guard so as to constitute willful conduct under § 25–5–11(c)(2). Cf. Wadsworth v. Jewell, 902 So.2d 664, 669 (Ala. 2004) (failure to provide an employee with an ergonomic keyboard, even though the employer had access to ergonomic keyboards, did not constitute the removal of a safety device provided by the manufacturer of the computer the employee was using when the injury occurred).[2]
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> [2]The Court does not express an opinion as to whether the failure to install an allegedly safer machine that is present on the premises and made by the same manufacturer as the machine that injured an employee might come within the operation of § 25–5–11(c)(2).

(7.) Hinote, et al. v. Owens, et al., [Ms. 1160268, Sept. 8, 2017] ___ So.3d ___:

Discussion of differences in the elements and application of a statute of limitations defense and a rule of repose defense in the context of opposing claims of title to real estate.

(8.) Ivey v. Estate of R.E. Ivey, [Ms. 1160280, Sept. 8, 2017] ___ So.3d ___:

Section 43-8-90, Ala. Code 1975 (the "omitted-spouse" statute) provides:

> "(a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision be reasonably proven.

In this case, Husband's only will was executed in 1975 while he was married to First Wife, and left everything to her, or, if she predeceased him, their children. First Wife died in 2001 and in 2004 Husband married Second Wife. He then died in 2014, survived by her and the children of his first marriage. There was substantial evidence to support the notion that Husband had intentionally disinherited Second Wife because they had mutually agreed that their separate estates upon marriage would stay separate, and he had provided certain benefits to her during the marriage. The Supreme Court framed the issue presented, and the answer to it, as follows:

> In an omitted-spouse case, where there is no evidence indicating that either exception in § 43–8–90 applies, but there is nevertheless evidence indicating that the testator intentionally disinherited the omitted spouse, does § 43–8–90 operate to preclude the omitted-spouse claim? The plain and unambiguous language of § 43–8–90 requires us to answer that question in the negative. See Ex parte Ankrom, 152 So.3d 397, 409–10 (Ala. 2013) (noting that " ' "[w]hen the language of a statute is plain and unambiguous, ... courts must enforce the statute as written" ' " (quoting Ex parte Pfizer, Inc., 746 So.2d 960, 964 (Ala. 1999), quoting in turn Ex parte T.B., 698 So.2d 127, 130 (Ala. 1997))).
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> Section 43–8–90 plainly provides that if a testator's will does not provide for the testator's surviving spouse who married the testator after the execution of the will, the omitted spouse "shall receive the same share of the estate he would have received if the decedent left no will," i.e., an intestate share, unless the party opposing the omitted-spouse claim proves, in one of two specific ways enumerated in § 43–

8–90, that the testator intentionally disinherited the omitted spouse. See Hellums, supra (regarding the burden of proof). By fashioning § 43–8–90 to provide that the party opposing an omitted-spouse claim must prove that the testator intentionally disinherited the omitted spouse and that it can do so only by proving that one of the two enumerated exceptions applies, the legislature essentially created a presumption that the testator unintentionally disinherited the omitted spouse if neither exception applies.

(9.) Easterling, etc. v. Progressive Specialty Ins. Co., [Ms. 1150833, Sept. 15, 2017] ___ So.3d ___:

The requirement in the UM statute that the insured seeking UM benefits from his own liability carrier must show that he is "legally entitled to recover damages" against the tortfeasor, is satisfied where fault and extent of damages are established but the tortfeasor filed for bankruptcy under Chapter 7 of the Bankruptcy Code.

(10.) Walker Brothers Investment, Inc. v. City of Mobile, et al., [Ms. 1160203, Sept. 15, 2017] ___ So.3d ___:

A Rule 41(a)(1)(i) Ala. R. Civ. P. notice of dismissal filed by a plaintiff in a case where the defendant has filed a Rule 12(b)(6) motion to dismiss but not yet an answer or motion for summary judgment, is effective immediately upon filing and no subsequent order of the court is required to implement the dismissal. Where, as here, defendant filed an answer later in the same day as when the notice of dismissal was filed, that didn't alter the situation. Nor did the fact that the plaintiff had styled his notice a motion to dismiss, and asked the trial court to dismiss the action, because the filing clearly provided notice to the circuit court of the plaintiff's desire to dismiss the action. Where the notice of dismissal was "without prejudice," which type of dismissal is not deemed a final judgment that would support an appeal, it would nonetheless be deemed "sufficiently final" to support a motion to set aside the dismissal under Rules 59(a) and 60(b) Ala. R. Civ. P., even though such motions may be filed only in reference to a final judgment. However, even though a circuit court has jurisdiction to entertain a motion filed by the plaintiff seeking to set aside a dismissal it requested, so as to reinstate the action, that court has no jurisdiction to entertain such a motion filed by the defendant.

(11.) <u>Wilkes v. PCI Gaming Authority, etc.</u>, [Ms. 1151312, Sept. 29, 2017] ___ So.3d ___:

Employee of Wind Creek Casino and Hotel Wetumpka (owned by Poarch Band of Creek Indians), while driving a vehicle belonging to Wind Creek on a state road away from the casino, lost control and crossing into oncoming traffic, colliding head on with vehicle occupied by two persons. The employee had been on an errand for Wind Creek but was off course from any return route and professed no post-accident memory of why. The employee had a BAC of .293 one hour and 45 minutes after the collision. Plaintiffs sued Wind Creek and the Poarch Band in Elmore Circuit Court for negligence and wantonness. The circuit court granted defendants' MSJ on the basis that it lacked subject-matter jurisdiction because of tribal sovereignty. Acknowledging that its holding was contrary to the holdings of several United States Courts of Appeals, the Alabama Supreme Court held on appeal that "the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members."

(12.) <u>Rape v. Poarch Band of Creek Indians, et al.</u>, [Ms. 1111250, Sept. 29, 2017] ___ So.3d ___:

Jerry Rape alleged in his complaint (and those facts control since the case was dismissed on defendants' motion to dismiss) that he was playing an electronic bingo game machine at Wind Creek Casino, owned by the Poarch Band of Creek Indians, when several noises, lights and sirens were activated on the machine and it displayed a payout amount of $1,377,015.30; that initially casino officials acknowledged the win but much later took the position that the machine had malfunctioned. Rape sued the Casino and the Poarch Band, along with others, alleging breach of contract and various tort claims. The defendants moved to dismiss, arguing that the claims were barred by the doctrine of sovereign immunity and that the tribal court had exclusive subject matter jurisdiction of any claim. On appeal, after the circuit court granted the motion to dismiss, the Alabama Supreme Court concluded that Rape couldn't maintain his claims in state court because, as a Catch-22 proposition, if the casino was located on "Indian lands," the claims would have to be adjudicated in the tribal court; and if there were no sovereign immunity protection and a requirement to be in tribal court, the claims in state court would be barred because they would be based on an illegal gambling contract.

(13.) <u>Ghee, etc. v. USAble Mut. Ins. Co., etc.</u>, [Ms. 1160082, Oct. 27, 2017] ___ So.3d ___:

What constitutes a "claim," the adjudication of which can allow for a certification of finality under Rule 54(b) Ala. R. Civ. P. An order purporting to adjudicate a plaintiff's claims by dismissing same, but which state that "Plaintiff is granted leave to file an amended complaint within 30 days of the date of this order," does not constitute a final adjudication and an appeal of it will be dismissed even though parties do not challenge the "certified" finality.

(14.) <u>Johnston v. Castles and Crowns, Inc.</u>, [Ms. 1160171, Nov. 3, 2017] ___ So.3d ___:

Plaintiff sued Defendant for conversion, conspiracy and unjust enrichment. Defendant counterclaimed for defamation and tortious interference with business and contractual relations. The trial judge instructed the jury to first answer Plaintiff's conversion and conspiracy claims and to proceed to consideration of the unjust enrichment claim (an equitable remedy) <u>only if</u> it found in favor of the defendant on the conversion and conspiracy claims. The verdict form also expressly directed the jury to proceed to the unjust enrichment claim only if the jury did not find against defendant on either of the other two counts. The jury returned a verdict finding in favor of Plaintiff and against Defendant on the conversion and conspiracy claims and awarding $800,000 in compensatory damages and $1.00 in punitive damages but the jury also found in favor of Plaintiff on the unjust enrichment claim, and awarded $75,000 in compensatory damages under it. The jury found in favor of Plaintiff on Defendant's counterclaims. After the jury was discharged, the judge caught the inconsistency in the verdicts for Plaintiff. His "cure" was to set aside the verdict on the unjust enrichment claim and then render judgment in favor of the Defendants as to it. On appeal by Defendant, the Supreme Court held that in the face of such inconsistent verdicts, Defendant was entitled to a new trial, and the inconsistency couldn't be cured by entry of the judgment that would have been proper if the verdict had found against the Defendant on the first two claims but disregarded the third claim, because the attempted cure would be based on mere speculation about the jury's intent. Moreover, Rule 50(a) Ala. R. Civ. P. provides that "a new trial may be granted to all or any of the parties and (1) on all of the issues in an action where there has been a trial by jury . . . ." Therefore, Defendant was entitled to a new trial not only on all three of Plaintiff's claims but also as to Defendant's two counter claims.

(15.) <u>Ex parte The Maintenance Group, Inc.</u>, [Ms. 1160914, Nov. 22, 2017] ___ So.3d ___:

Thorough discussion of the two personal jurisdiction concepts of "general jurisdiction" and "specific jurisdiction," and, as to the latter, what circumstances will subject a non-resident who itself has no minimum contacts with Alabama, to its jurisdiction on the basis that it was a co-conspirator with a party which did have such contacts.

(16.) <u>Coleman v. Anniston HMA, LLC</u>, [Ms. 1151212, Dec. 1, 2017] ___ So.3d ___:

Summary Judgment entered for Defendant hospital in a medical malpractice death case. On appeal it was "Affirmed. No Opinion," but the Court split 5-4. The underlying facts, as set out in the dissent and a special concurrence, were these: Plaintiff's claim against the hospital was that during an almost 11-hour overnight stretch, its nurses failed to notify the attending physician for Plaintiff's decedent patient, of her deteriorating condition, such that when he saw her the next morning and ordered new treatment, it was too late to prevent her death. Plaintiff's expert opined that other treatments than the one resorted to that morning could have been employed much earlier and for want of them, the patient's condition was adversely affected. The summary judgment was primarily based on the affidavit of the attending physician, asserting that had he been notified of the patient's changed condition earlier than he was, he would not have ordered any different treatment than he did when he finally saw the patient. If so, that would block a theory of "causation" relating to a failure of communication by the nurses. The dissent argued that this simply created a credibility issue, for a jury to resolve, as between the testimony of Plaintiff's exert that a physician in the attending's shoes would have done differently, lest he commit malpractice, and the attending's testimony that he would not have done differently. The special concurrence agreed that ordinarily the affidavit of the attending, given years after the incident, might be considered self-serving or the product of bias, and thus present a credibility issue, but for two factors unique to the case: the attending in fact ordered only the one treatment when he did see the patient, not any of the others that Plaintiff's expert proposed would have been called for, and, moreover, Plaintiff did not argue the potential credibility issue to the trial court or on appeal.

(17.) <u>Mitchell's Contracting Services, LLC v. Gleason</u>, [Ms. 1160376, Dec. 8, 2017] ___ So.3d ___:

Wrongful death case where Plaintiff's theory was that his decedent motorist had been forced off the road and caused fatally to collide with a tree, by a dump truck driven by an employee of Defendant. Prior to trial, all of the evidence developed on causation was circumstantial. At trial, Plaintiff called to the stand a Mr. Agee Smith who claimed he'd been driving the same road and witnessed the truck force the car driven by the descendant off the road. Defense counsel asked the trial court to continue the trial to allow him to depose this surprise witness and otherwise prepare to confront his testimony. Defendant had propounded interrogatories to Plaintiff asking him to identify "any witnesses to the accident known to Plaintiff or his attorney" and to identify each person with knowledge of the accident and state the nature of that knowledge. Plaintiff's answers did not identify Smith or any eyewitness. "One year later, in June 2015, [Plaintiff] supplemented his responses after the trial court entered an order compelling him to do so. In his supplemental responses, [Plaintiff] stated that he was unaware of any eyewitnesses to the accident and that he would further supplement his responses as more information was obtained." A couple of months later, at a time about six weeks before trial, Plaintiff submitted a witness list of 21 individuals by name and address, including Smith. The list did not indicate Smith had actually witnessed the accident and Plaintiff did not supplement his interrogatory answers to reveal that. When Defendant objected to Smith testifying and requested a continuance, Plaintiff's counsel informed the court that "he had learned of the substance of Smith's testimony approximately two months before the trial." Noting the duty imposed on a party by Rule 26(e) Ala. R. Civ. P. to supplement and amend responses to discovery requests when new information is obtained, including, specifically, the duty under 26(e)(1) to reveal "the identity and location of persons having knowledge of discoverable matters," the majority opinion (of a 5/4 divided Court) held that when the Plaintiff "discovered two months before trial that Smith was an eyewitness to the accident (in fact the only eyewitness), he had an immediate and affirmative duty to disclose to [Defendant] that Smith had witnessed the accident." Plaintiff's listing Smith among possible trial witnesses, done only after Plaintiff had previously stated he was unaware of the existence of any eyewitnesses, was not enough. Therefore, the majority concluded that "the trial court exceeded its discretion in refusing [Defendant's] request for a continuance," in order to depose Smith, necessitating a new trial. (Thus, wiping out a $2.5 million Plaintiff's verdict!) The dissent took the position that Defendant's failure to depose Smith or otherwise attempt to learn the nature of his testimony, and Defendant's failure to "explain what such additional discovery could reveal in this case or what portion of Smith's testimony additional discovery

could have rebutted or called into question," weighed against a finding that the trial court "exceeded its considerable discretion in denying [Defendant's] motion for a new trial."