RECENT ALABAMA APPELLATE DECISIONS

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TUSCALOOSA COUNTY BAR ASSOCIATION
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("Recent" meaning those decisions available subsequent to the Tuscaloosa County Bar Association Spring CLE Seminar.)

(1.) Ex parte Southeastern Energy Corp., [Ms. 1150033, 1150294, April 15, 2016] ___ So.3d ___ (Ala. 2016):

Clatus Junkin sued Southeastern Energy Corp. in the Fayette Circuit Court. Southeastern moved to transfer the case to "Montgomery County, Alabama, or any other proper venue." Trial court denied the motion and on October 14, 2015, Southeastern petitioned the Alabama Supreme Court for a writ of mandamus directing the Fayette Circuit Court to order the transfer. On November 23, 2015, the Supreme Court ordered answers and briefs on the venue issue. On December 16, 2015, before submission of answers and briefs was complete, the Fayette Circuit Court, "sua sponte reconsidered" the motion for change of venue, and ordered the case transferred to Lowndes County. Southeastern then filed a second petition for mandamus, challenging that order. Held: Even though venue was in fact not proper in Fayette County, and the Fayette Circuit Court erred in denying the motion for transfer, "because the parties did not ask for a stay of the proceedings in the trial court while this Court considered Southeastern Energy's mandamus petition in [the first mandamus case], the trial court had jurisdiction to reconsider its order denying a change of venue and to enter an order transferring the case." Thus, Southeastern's first petition for mandamus relief "became moot." Venue having been transferred to "any other proper venue," as Southeastern had alternatively requested in its motion for a change of venue, the second petition for mandamus was without merit. Takeaway: Although filing a notice of appeal shifts jurisdiction from the trial court to the appellate court, leaving the trial court without continuing jurisdiction over only such ancillary or collateral matters as costs, filing a petition for a writ of mandamus doesn't divest the trial court of jurisdiction and that court can continue to act in the case until either (1) the appellate court issues a stay order or (2) issues a writ directing the trial judge to take certain action. Always file a motion for a stay with your mandamus petition if you need to "freeze" things while the matter is pending before the appellate court.

(2.) Synovus Bank v. Mitchell, [Ms. 1141046, April 29, 2016] ___ So.3d ___ (Ala. 2016):

If Plaintiff files a Rule 41(a)(1)(i) Ala. R. Civ. P. notice of dismissal before the defendant has filed an answer or motion for summary judgment, that filing in and of itself effects a dismissal of the case - automatically – and no subsequent order of the trial court is required; a prior defense "motion to dismiss" doesn't block a plaintiff's right unilaterally to dismiss the action. And the trial court is deprived of the power to proceed further once the notice of dismissal is filed (even where, as here, it is filed as a purported "stipulation of dismissal" phrased so as to be signed by both the plaintiff and the defendant, jointly, but only the plaintiff had signed when filed.

(3.) Ex parte CVS Pharmacy, L.L.C., [Ms. 1150355, May 27, 2016] ___ So.3d ___ (Ala. 2016):

Payment of a filing fee, or a pre-filing grant of indigent status, is jurisdictional. Failure to have one or the other in place at time of filing a complaint, or at least within the applicable statute of limitations period, is fatal, and can't be cured by a subsequent *nunc pro tunc* order of the trial court granting indigent status.

(4.) Ex parte Lucas, [Ms. 1150382, June 10, 2016] ___ So.3d ___ (Ala. 2016):

"Fictitious Party" practice – "due diligence" requirements a plaintiff must satisfy in order to be able to rely on fictitious party designations as a means to extend the statute of limitations.

(5.) Hinrichs v. General Motors of Canada, Ltd., [Ms. 1140711, June 20, 2016] ___ So.3d ___ (Ala. 2016):

Everything you ever wanted to know about "general" versus "specific" personal jurisdiction; waiver of challenge to personal jurisdiction by delay in raising; and the current Alabama Supreme Court view of the "stream of commerce" theory of personal jurisdiction.

(6.) Northstar Anesthesia of Alabama, LLC v. Noble, etc., [Ms. 1141158, July 8, 2016] ___ So.3d ___ (Ala. 2016):

A "conventional" wrongful death action can only be instituted by a legally appointed "personal representative." An action instituted by one who once was the personal representative, but whose administration had been concluded and the personal representative released and discharged, can't later, after expiration of the two-year period for filing a wrongful death action, be salvaged by having the former personal representative "reappointed" in an attempt to relate back to the earlier status. See also Ex parte Bio-Medical Applications of Alabama, Inc, [Ms. 1150362, 1150363, July 15, 2016] ___ So.3d ___ (Ala. 2016) (One son of decedent granted letters testamentary, but a different son filed a wrongful death action. More than two years after decedent's death, the two sons sought to have the personal representative son substituted as the plaintiff in the case. Held: filing of a wrongful death action by someone who is not the personal representative is a nullity and provides no valid pending action to which an attempted substitution of party plaintiff can relate back.

(7.) Ex parte Lincare, Inc., [Ms. 1141373, August 19, 2016] ___ So.3d ___ (Ala. 2016):

Lincare, Inc., employee Martin turned in her letter of resignation to her supervisor Stewart. Martin alleges that Stewart then so forcibly removed some paperwork from Martin's hand, as to assault her in the process. Martin sued Stewart and Lincare for assault and battery, and tort of outrage. Held, as to the tort claims against Lincare: the exclusivity provisions of the Worker's Compensation Act preclude those claims. Martin's allegations that Stewart engaged in willful and intentional conduct doesn't remove the tort claims against the employer from the ambit of the act. The resulting injury is deemed an accident arising out of and in the course of the employment where set in motion by the employment, and the injury wasn't expected or intended by the employer. The fact that Martin had resigned her position immediately before the altercation doesn't alter the analysis. A terminated employee must be given a reasonable time to leave the premises before the employer-employee relationship is considered severed and the Worker's Compensation Act rendered inapplicable. So, Martin deemed to have "sustained workplace injuries, even though she technically was not a Lincare employee at the time she was injured." The incident arose out of Martin's employment with Lincare because it was precipitated by her resignation, occurred while she was still on Lincare's premises, and concerned possession of Lincare documents.

(8.) Ex parte Williams, [Ms. 1140374, August 19, 2016] ___ So.3d ___ (Ala. 2016):

The Supreme Court denied the petition for a writ of certiorari to the Court of Civil Appeals in a "No Opinion" decision authored by Justice Murdock, but he then wrote specially and at length (concurred in by Justice Bolin) to explain that Rule 54(b) Ala. R. Civ. R. can only be used to certify as final an interlocutory judgment that disposes of a "claim." He discusses what constitutes a "claim" in the context of divorce actions and explains that a summary judgment declaring a prenuptial agreement to be valid, which ruling the trial judge certified as final pursuant to 54(b), did not dispose of a claim for a divorce, but, rather only a constituent part of a claim for divorce. Therefore, the ruling could not be finalized under Rule 54(b).

(9.) African Methodist Episcopal Church, Inc. v. Smith, [Ms. 1141100, 114101, 1150055, 1150156, August 19, 2016] ___ So.3d ___ (Ala. 2016):

An arbitration case dealing with such diverse arbitration issues as (1) the effect of an arbitration clause in an insurance policy form not approved by the Alabama Department of Insurance (federal law prohibits arbitration provisions from being singled out for special treatment); (2) the nature of "substantive unconscionability" versus "procedural unconscionability;" (3) a "confidentiality" clause in an arbitration provision doesn't render the provision unconscionable; (4) assent to an arbitration clause by a non-signatory is established where that party asserts claims that are dependent upon the existence of a contract that contains the arbitration clause; (5) who decides, as between an arbitrator and a court, whether contractual conditions precedent to arbitration have been met; and (6) when has a party to an arbitration provision waived the right to enforce the same by "substantially invoking the litigation process" to the prejudice of the other party.

(10.) ENT Associates of Alabama, P.A. v. Hoke, [Ms. 1141396, 1141401, September 2, 2016] ___ So.3d ___ (Ala. 2016):

If, measured by an objective standard, a plaintiff filing a complaint lacked the bona fide intent to have the complaint immediately served, the filing does not commence the action for purposes of satisfying the statute of limitations. (Complicated sequence of events involved in this case, but the bottom line is an

intentional failure to arrange for service at the time of filing a civil action can result in a continued running of the statute of limitations.)

(11.) Ex parte Johnson, [Ms. 2150835, September 9, 2016] ___ So.3d ___ (Ala. 2016):

Post-divorce modification of custody case. Father issued a document production subpoena to the clinical psychologist who had provided psychotherapy for the child for over two years before the modification proceeding was instituted. After trial judge denied the psychotherapist's motion to quash the subpoena, she filed a petition for a writ of mandamus with the Court of Civil Appeals. Held: the psychotherapist-patient privilege belongs to the child not the either of the parents under the Ala. Code 1975, § 34-26-2 and Alabama Rules of Evidence 503, and the psychotherapist is entitled to assert the privilege on behalf of the child. The exception to the privilege declared in Rule 503(d)(5), Ala. R. Evid. for "a child custody case in which the mental state of a party is clearly an issue and a proper resolution of the custody question requires disclosure," does not apply because a child is not considered a party to a custody-modification action. Writ issued.

(12.) Ex parte State of Alabama Board of Education, et al., [Ms. 1150366, September 9, 2016] ___ So.3d ___ (Ala. 2016):

Claim against State Board of Education claiming violation of federal due-process rights, barred by Eleventh Amendment immunity. Claims under § 1983 against State Superintendent of Education and State Intervention Financial Officer in their official capacities for "back pay" after plaintiff's jobs were eliminated as part of a reduction in force, barred by Eleventh Amendment immunity. Claims against them for injunctive relief ordering plaintiffs' reinstatement to their jobs, as a form of prospective equitable relief to end continuing violations of federal law, not barred. Those two officials not entitled to Eleventh Amendment immunity in their individual capacities, but were entitled to federal law qualified immunity where the procedural due process rights of plaintiff alleged to have been violated were not clearly established.

(13.) <u>The Gardens at Glenlakes Property Owners Association, Inc v. Baldwin County Sewer Service, LLC</u>, [Ms. 1150563, September 23, 2016] ___ So.3d ___ (Ala. 2016):

Another, and the most recent, of the Alabama Supreme Court's efforts to explain the concept of "standing" – a jurisdictional issue – and differentiate it from the related, non-jurisdictional concepts of a failure to state a cognizable cause of action, capacity, and real-party-in-interest.

(14.) <u>Wylie v. Estate of Derrell Cockrell, et al.</u>, [Ms. 1141405, September 30, 2016] ___ So.3d ___ (Ala. 2016):

Guardian ad litem properly appointed to represent certain heirs in a probate court estate proceeding which resulted in removal of the executor. The probate court awarded the GAL a fee of $18,045. On appeal, the Alabama Supreme Court held that because there was no evidence in the record (1) that the GAL had filed a fee petition with supporting documentation or (2) showing the time the GAL spent working on the case, the GAL award had to be reversed and the case remanded "to allow whatever further proceedings may be necessary to establish a proper record and to provide a decision that allows for a meaningful review of any award to the guardian ad litem." So, even though Rule 17(d), Ala. R. Civ. P. states that a duly appointed GAL "must" be awarded "a reasonable fee or compensation . . . to be taxed as part of the costs . . . ," there must still be proof provided of what a reasonable fee would be under the circumstances of the proceeding.

(15.) <u>Dolgencorp, LLC v. Spence</u>, [Ms. 1150124, September 30, 2016] ___ So.3d ___ (Ala. 2016):

Plaintiff, accosted in Dollar General store by the manager, accused of shoplifting, and arrested and jailed as a result, sued Dolgencorp, LLC and the manager for various tort claims. Plaintiff never perfected service on the manager and on the first day of trial moved to dismiss her as a defendant, which motion was "granted" without elaboration. Verdict, and judgment, against Dolgencorp for $100,000. It claimed on appeal that the dismissal of the manager, even though it would have been "without prejudice" pursuant to Rule 41(a)(2), Ala. R. Civ. P., operated as res judicata as to the claims against it based on respondeat superior. Held: "Nothing in our rules of procedure requires, under penalty of a res judicata

bar, that a plaintiff must try in the same action his or her claims against two different defendants arising out of the same transaction or occurrence." Here, the dismissal without prejudice did not represent any "adjudication of the factual merits of the nature required to undermine a claim against [the manager's] employer based on the doctrine of respondeat superior." The effect of the voluntary dismissal by the plaintiff was "not an adjudication of the facts of [the manager's] misconduct on behalf of Dolgencorp," and the plaintiff was entitled "to pursue her separate claims against Dolgencorp based on a theory of respondeat superior."

The case also deals with (1) when is an employer liable for the intentional torts of its employee; (2) the nature of a "negligent-training" claim against an employer; (3) the nature of a false-imprisonment claim in the context of detention of a suspected shoplifter; (4) the nature of a malicious-prosecution claim in the context of the arrest of a suspected shoplifter (including the holding that malice can be inferred from a lack of probable cause or from mere wantonness or carelessness only if the actor doing the act knows it to be wrong or unlawful); (5) the requirement for proof of "actual malice" under § 13A-11-161, Ala. Code 1975, to avoid the privilege provided by that code section for reports of suspected shoplifting to law enforcement authorities; and (6) application of the "good count/bad count" doctrine.

Under that doctrine, if various counts are allowed to go to the jury in the face of a motion for a judgment as a matter of law specifically directed to each of the claims, and one or more of the counts are "good" but one or more bad, and a general verdict is returned, the appellate court can't presume the verdict was based solely on a good count. In that situation, the court must order a new trial. Here, the Supreme Court held the malicious prosecution and defamation claims were "bad," so the case had to be reversed and remanded for a new trial on the claims that were properly submitted to the jury, i.e., negligent training, invasion of privacy, false imprisonment, and assault and battery.

(16.) <u>Johnson v. Ives</u>, [Ms. 2150613, November 4, 2016] ___ So.3d ___ (Ala. Civ. App. 2016):

Sanctions imposed by appellate court; see copy of opinion attached as Appendix A.

(17.) Bugs "R" Us, LLC v. McCants, [Ms. 1150650, November 18, 2016] ___ So.3d ___ (Ala. 2016):

The issue of "arbitrability, typically for the court to decide, will be decided by the arbitrator instead where the arbitration provision contains "clear and unmistakable evidence" of the parties' agreement for that to happen. Such intent is held in this case to be so evidenced by the inclusion in the arbitration provision of the statement that "any claim . . . shall be resolved by neutral binding arbitration by the American Arbitration Association, under the rules of the AAA in effect at the time the claim is filed," because Rule 7(a) and (b) of the AAA Commercial Rules grant that power to the arbitrator, and "this Court may take judicial notice of the commercial arbitration rules of the AAA even when they do not appear in the record." (See also The Hanover Insurance Company v. Kiva Lodge Condominium Owners' Association, Inc., [Ms. 1141331, October 21, 2016] ___ So.3d ___ (Ala. 2016): Whether claims are barred by the applicable statute of limitations is a matter for the arbitrator to decide, not the circuit court.)

(18.) Ex parte LERETA, LLC, [Ms. 1151054, December 2, 2016] ___ So.3d ___ (Ala. 2016):

Trial court reversed for failing to set aside default judgment, due to deficiency in certified mail service on the LLC defendant. Full discussion on how certified mail service on "Corporations and Other Entities" must be accomplished pursuant to Rule 4(i)(2)(B)(i) and 4(c)(6), Ala. R. Civ. P., including fact that the certified mail must be addressed specifically to an officer, partner, etc., of the organization, or an agent specifically authorized to receive the service; certified mail directed merely to the entity, though signed for, is not enough.

(19.) Ex parte Pittman, D.M.D., P.C., [Ms. 1150947, December 2, 2016] ___ So.3d ___ (Ala. 2016):

Under Rule 59.1 Ala. R. Civ. P., a post-judgment motion for relief filed pursuant to Rules 50, 52, 55 or 59 is automatically denied if still pending 90 days later, unless express consent of all of the parties for an extension appears of record. Fact that trial judge erroneously sets the hearing for a date beyond 90 days, and opposing party never objects to that timing, even at the hearing, provides no excuse or waiver; it's the movant's responsibility to do the "counting." Here, after the

hearing, the trial judge purported to grant plaintiff's Rule 59(e) motion to alter, amend, or vacate the summary judgment entered in favor of the defendant, but that ruling was held by the Supreme Court to be a nullity because it came after the trial judge had lost jurisdiction by lapse of the 90-day period. Defendant's petition for a writ of mandamus directing the trial judge to vacate his order overturning the summary judgment, granted. Lesson: If you file a post-judgment motion covered by Rule 59.1, keep up with the 90-day clock, and make sure any needed extensions are explicitly consented to by the parties on the record; or, where, as here, it turns out your motion would have been validly granted if so ordered within the 90-day time frame, be prepared to notify your malpractice carrier.

(20.) Ex parte Wayne Farms, LLC, [Ms. 1150404, May 27, 2016] ___ So.3d ___ (Ala. 2016); Ex parte Tier 1 Trucking, LLC, [Ms. 1150740, September 30, 2016] ___ So.3d ___ (Ala. 2016); and Ex parte Benton, [Ms. 1151181, December 2, 2016] ___ So.3d ___ (Ala. 2016):

Three more cases where the Alabama Supreme Court grants an "interest-of-judgment" grounded *forum non conveniens*, where motion sought to transfer venue from an otherwise proper venue to one where the underlying vehicular accident occurred. (Also, in Ex parte Tier 1 Trucking, LLC, the Court held that "a defendant may move the court for a change of venue based on the doctrine of *forum non conveniens* even when this ground is not raised in the initial pleading."

APPENDIX A

2016 WL 6543319
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Civil Appeals of Alabama.

Kenneth Roy Johnson
v.
Vicki Marie Ives

2150613
|
11/04/2016

Synopsis
Background: Litigant filed a motion to amend and clarify a settlement agreement nearly six years after the entry of judgment dismissing the underlying action with prejudice. The Circuit Court, Monroe County, No. CV-06-191, denied the motion for lack of jurisdiction. Litigant appealed.

Holdings: The Court of Civil Appeals held that:

[1] litigant's brief failed to comply with appellate brief requirements;

[2] the Circuit Court lacked jurisdiction to consider litigant's motion; and

[3] litigant's appeal was frivolous.

Affirmed.

Appeal from Monroe Circuit Court (CV-06-191)

Opinion

PER CURIAM.

***1** Kenneth Roy Johnson, who is represented by an attorney, appeals from an order of the Monroe Circuit Court ("the trial court") denying his purported "motion to alter, amend, or vacate." Johnson initially appealed to the Alabama Supreme Court, which transferred the appeal to this court pursuant to § 12–2–7(6), Ala. Code 1975.

[1] Johnson's appellate brief fails to comply with the requirements of Rule 28, Ala. R. App. P. The only issue raised on appeal is whether the trial court "had jurisdiction." Johnson fails to state anywhere in his brief the type of case that is involved in this appeal, the procedural history of the case, any facts from the case, or any other information that would be relevant to this court's determination of the issue presented. The summary of the argument, in its entirety, reads: "The Circuit Court was the original Court of jurisdiction, therefore, as a matter of law, retains jurisdiction in the enforcement and interpretation of all previous Orders." The argument portion of Johnson's brief, in its entirety, reads "THE CIRCUIT COURT HAS JURISDICTION [.]" In fact, the statement of the case, the statement of the issue,

the statement of the facts, the statement of the standard of review, the summary of the argument, the argument, the conclusion, and the attorney's signature take up only two pages of Johnson's brief.

There is nothing in Johnson's brief that enables this court to determine whether the trial court properly denied Johnson's purported postjudgment motion. "Rule 28(a)(10) requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position. If they do not, the arguments are waived." White Sands Grp., L.L.C. v. PRS II, LLC, 998 So.2d 1042, 1058 (Ala. 2008). Because of Johnson's utter failure to comply with Rule 28, Ala. R. App. P., his argument is waived and the order denying his purported postjudgment motion is due to be affirmed.

[2] **[3]** Pursuant to Rule 38, Ala. R. App. P., this court, ex mero motu, may determine that an appeal is frivolous and "award just damages and single or double costs to the appellee." We have seldom, if ever, seen an appellate brief—especially one prepared by an attorney—that so completely failed to comply with the requirements of Rule 28, Ala. R. App. P. Furthermore, the issue raised in Johnson's brief is clearly contrary to well-settled, black-letter law. Upon a review of the record, we have determined that Johnson is actually appealing from the trial court's order denying a "motion to amend and clarify settlement." That motion was filed nearly six years after the entry of the judgment dismissing the underlying action with prejudice, pursuant to a joint stipulation of dismissal. Clearly, the trial court correctly determined that it no longer had jurisdiction to consider the motion. See Rules 59 and 60, Ala. R. Civ. P. Accordingly, we conclude that Johnson's appeal is frivolous and that the appellee, Vicki Marie Ives, is entitled to recover damages pursuant to Rule 38, Ala. R. App. P. Thus, Ives is awarded $1,500. The cost is to be paid by Johnson's attorney, Leston C. Stallworth, Jr., and is not to be charged to his client, Johnson.

***2** AFFIRMED.

Thompson, P.J., and Pittman, Thomas, Moore, and Donaldson, JJ., concur.

All Citations

--- So.3d ----, 2016 WL 6543319

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