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RECENT DEVELOPMENTS IN ALABAMA COMMERCIAL / BUSINESS TORT LAW

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1. Fraud

A. *Ex parte Life Insurance Co. of Georgia*, No. 1990932, 2001 WL 499313 (Ala. May 11, 2001), reversed the Alabama Court of Civil Appeals' holding that the plaintiff, MIS, a general agent/marketer of CHAMPUS health insurance policies, had presented substantial evidence that particular circumstances existed to impose a duty upon the defendant, Life of Georgia, to disclose information that it was planning to sell or dissolve its health insurance division. The Court acknowledged the fact that Life of Georgia had superior knowledge of the information pertaining to its intent to sell the division. However, the Court concluded that superior knowledge of a fact, without more,

does not impose upon a party a legal duty to disclose such information in the context of a fraudulent suppression claim.

Furthermore, the Court concluded MIS' specific inquiries to Life of Georgia concerning the potential sale of the division also did not create a duty to disclose because MIS had expressly agreed, in a written agreement between the parties, that Life of Georgia could withdraw a policy of sale at any time upon written notice to MIS. The Court found this agreement effectively foreclosed any duty Life of Georgia might have had to disclose the information upon direct inquiry prior to providing written notice to MIS. Additionally, the Court found the agreement outweighed expert testimony concerning trade customs related to the disclosure of potential sales of business entities.

B. *U.S. Diagnostic, Inc. and Advanced Medical Imaging Center, Inc. v. Shelby Radiology, P.C.*, 793 So 2d 714 (Ala. 2000), rehearing denied, upheld a jury verdict for the plaintiff, Shelby, on counts of fraud, promissory fraud, and fraudulent suppression. As to the fraud claim, Shelby had relied on an oral statement from the defendant, AMI, whereby AMI agreed to a three-year non-cancelable agreement and indicated that a written contract was forthcoming. Although AMI argued that Shelby's reliance was unreasonable, as a matter of law, because the three-year oral agreement violated the requirements of the statute of frauds, the Court held the statute of frauds

does not negate the element of reasonable reliance where substantial evidence of "inherent fraud" is offered. The Court defined "inherent fraud" as an intention not to perform operating from the inception of the transaction, i.e. promissory fraud.

Because Shelby provided substantial evidence of promissory fraud to support the jury's verdict, the statute of frauds did not operate to negate the reasonable reliance element of Shelby's fraud claim and Shelby's actions in reliance on AMI's oral promise to execute a three-year agreement were reasonable.

Chief Justice Hooper dissented, citing concerns over the unpredictable effects the case will have on Alabama contract law. He found Shelby's acts taken in reliance on AMI's oral statements presumptuous. He further noted the danger that the case might be cited for the proposition that one can be found liable for fraud by indicating an intent to contract with a prospective party and later deciding not to contract with that party. Chief Justice Hooper implied that Alabama courts should not hold parties to agreements that have not been made final.

C. *BellSouth Mobility, Inc. v. Cellulink, Inc.*, No. 1990082, 1990224, 2001 WL 564264 (Ala. May 25, 2001), rejected the claims of the plaintiff, Cellulink, for fraud and promissory fraud in its agency relationship with the defendant, BMI. As to

the fraud claim, the Court held that BMI's oral and written statements to its agent, Cellulink, indicating BMI's total commitment to a long-term business relationship and partnership with Cellulink constituted puffery and not material representations of fact. BMI's statements concerning a long-term relationship with Cellulink were not in the written agency agreement between the parties. The Court deemed the representations to be sales talk and mere statements of opinion, and insufficient to support a fraud claim as a matter of law.

In support of its promissory fraud claim, Cellulink relied on an alleged oral statement from BMI that Cellulink would be included in an upcoming marketing program with Wal-Mart. Although Cellulink cited this alleged statement in an affidavit, the Court found the alleged statement too speculative and vague to constitute substantial evidence of any **promise** made by BMI to Cellulink. Cellulink had the burden of showing that a promise was, indeed, made by BMI in order to successfully support its promissory fraud claim. Cellulink failed to make such a showing.

D. *Feil v. Wittern Group, Inc.*, 784 So. 2d 302 (Ala. Civ. App. 2000), rejected the fraud and fraudulent suppression claims of the plaintiff, Feil, related to Feil's purchase of vending machines from the defendant, Wittern. After deciding to create his own business, Feil purchased several vending machines from

Wittern and received, as promised by Wittern, several training sessions, operations manuals, and technical support and service from Wittern. Nevertheless, Feil alleged Wittern fraudulently promised to provide such services without carrying out that promise. But the court found clear evidence, including testimony from Feil himself, that Wittern kept its end of the deal and assisted Feil in all material ways that had been agreed to when Wittern sold the machines to Feil. Thus, Feil failed to present substantial evidence of any misrepresentation, fraudulent or otherwise, on the part of Wittern.

As to his fraudulent suppression claim, Feil contended that certain cold-food vending machines were initially represented to him as profitable and that a need existed for such products. After the cold-food machines failed to make a profit for Feil, he was informed by a Wittern employee that the cold-food machines were intended only as “drawing cards” for other machines and not independently profitable. Nonetheless, Feil purchased another cold-food machine after learning the machines were mere “drawing cards”; therefore, the court found Feil’s fraudulent suppression claim meritless because the alleged suppression was of an immaterial fact, given that Feil purchased an additional cold-food machine after discovering the machines were mere “drawing cards.”

E. *Fleetwood Enterprises, Inc. v. Hutcheson*, No. 1981624, 2000 WL 1716955 (Ala. Nov. 17, 2000) (per curiam), reversed a judgment for the plaintiff, Hutcheson, on his fraud claim relating to Hutcheson's termination as a Fleetwood mobile-home retailer. Hutcheson operated as a retailer of mobile homes for the defendant, Fleetwood, and was assigned a protected geographical sales territory consisting of four counties. After Hutcheson's customer-satisfaction-index (CSI) dropped 40%, Fleetwood reduced Hutcheson's protected sales area to only one county. Hutcheson alleged that Fleetwood misrepresented to Hutcheson that it would restore his original geographical sales territory once Hutcheson's CSI increased. However, this representation was made to Hutcheson orally after his last annual retail agreement had expired (Hutcheson continued to work for Fleetwood after the expiration of the last annual retail agreement). After Hutcheson moved five mobile homes into one of the counties that had been removed from Hutcheson's protected sales territory, without Fleetwood's approval, Fleetwood terminated their business relationship.

The Court held Hutcheson failed to present substantial evidence that he reasonably relied on Fleetwood's representations that it would regain his original sales territory if its CSI increased. Hutcheson had several conversations with at least two Fleetwood employees concerning

his desire to sell mobile homes in one of the counties in which he was formerly authorized to operate. These employees indicated Fleetwood would not give authorization to Hutcheson for such action, so Hutcheson could not have reasonably relied on prior representations. Furthermore, the Court concluded that Hutcheson failed to demonstrate that the alleged misrepresentation proximately caused his alleged damages. In this respect, the Court again cited Hutcheson's awareness and knowledge, beforehand, that he did not have Fleetwood's authorization to move the mobile homes into the county.

F. *Allstate Ins. Co. v. Eskridge*, No. 1981754, 2001 WL 1075366 (Ala. Sept. 14, 2001), reversed a jury verdict for a former Allstate employee ("Eskridge") on a fraud claim. Eskridge had taken a sick leave under disputed terms. The trial court entered summary judgment on all of Eskridge's claims except breach of contract and fraud. The jury returned a verdict for Allstate on the breach of contract claim and for Eskridge on the fraud claim, awarding $2.1 million in compensatory damages. Trial court denied Allstate's post-judgment motions requesting either judgment as a matter of law, a new trial, or remittitur of damages. The Alabama Supreme Court found that the trial court was in error, and that Allstate was entitled to judgment as a matter of law on the fraud claim. A successful claim of fraud requires that the party making the claim must prove that

he or she reasonably relied on the alleged misrepresentation. The court applied the reasonable-reliance standard formulated in *Torres v. State Farm Fire & Cas. Co.*, 438 So.2d 757 (Ala. 1983) and discussed in *Foremost Ins. Co. v. Parham*, 693 So.2d 409 (Ala. 1997). Using this standard, the court rejected the idea that Eskridge could have relied on his former employer's statements to mean that Eskridge was authorized to have a virtually unlimited sick leave with an unencumbered return to work. The court concluded that specifically Eskridge could not rely on the general statements of his employer as a basis for his fraud claim.

2. Punitive Damages

A. *Morgan Building and Spas, Inc. v. Gillett*, 762 So. 2d 366 (Ala. Civ. App. 2000) (per curiam), reversed an award of $10,000 in punitive damages to the plaintiff, Gillett, on his claims of reckless fraud and breach of implied warranty surrounding the purchase of a camper from the defendant, Morgan. Because Gillett's action accrued after passage of Alabama Code § 6-11-20(a) governing punitive damage awards, the court concluded that punitive damages could not be awarded for reckless fraud. Rather, except in the case of wrongful death, punitive damages may only be awarded where the plaintiff presents clear and convincing evidence that the defendant acted consciously or deliberately. The trial court erroneously instructed the jury

that it could award punitive damages for reckless conduct by Morgan. Because Gillett presented insufficient evidence for a claim of intentional fraud, he was not entitled to punitive damages even though the jury found Morgan liable for reckless fraud.

B. *Johns v. A.T. Stephens Enterprises, Inc.*, No. 1991710, 2001 WL 336450 (Ala. Apr. 6, 2001) (per curiam), ruled that the trial court improperly denied the request of the defendant, Johns, for a hearing on the reasonableness of a punitive damage award to the plaintiff, Stephens. Johns included the request in its "Motion to Set Aside Jury Verdict, Motion for a Judgment as a Matter of Law, or, alternatively, Motion for a New Trial and Other Matters." Johns argued there was not substantial evidence presented at trial to support the $150,000 punitive damage award and cited Ala. Code § 6-11-23(b) (1975) and *Hammond v. City of Gadsden*, 439 So. 2d 1374 (Ala. 1986) as support for its contention. The Court agreed Johns had properly invoked the trial court's authority to hold a *Hammond* hearing and remanded the case for such hearing to be held.

Concurring specially, Justice Houston noted that the $150,000 punitive damage award in the case fell below the "benchmark amount" he suggested in his concurring opinion in *Prudential Ballard Realty Co. v. Weatherly*, No. 1981671, 2000 WL

1038167 (Ala. July 28, 2000) (per curiam). This benchmark is the greater of $20,000 or three times the compensatory damage award. In *Johns*, the plaintiff was awarded $162,000 in compensatory damages and the Court upheld this award. Thus, the punitive damage award was less than the compensatory damage award. In such cases, Justice Houston noted the punitive damage award is automatically presumed reasonable except in the most extraordinary situations.

3. Intentional Interference with Business

A. *Ex parte Alabama Department of Transportation, et al.*, 764 So. 2d 1263 (Ala. 2000), ruled summary judgment for the defendant, ALDOT, was appropriate on the claim by the plaintiff, Blue Ridge,for intentional interference with business relations. Blue Ridge was a subcontractor that contended it was put out of business as a result of ALDOT's changing certain bulk-specific-gravity specifications for gravel used in state road construction. None of the general contractors for whom Blue Ridge worked had yet been awarded contracts from ALDOT after ALDOT changed its composite gravel specifications. Thus, the Court held Blue Ridge could not reasonably have expected that its chert gravel would have been needed by a general contractor that had not yet been awarded the primary contract, even if that contractor had prior business with ALDOT.

The Court distinguished Blue Ridge's claim from the claim of the plaintiff in *Spring Hill Lighting & Supply Co. v. Square D Co.*, 662 So. 2d 1141 (Ala. 1995), in that the subcontractor plaintiff in *Spring Hill* had placed a bid with a general contractor whose bid had already been accepted by the State. Spring Hill, unlike Blue Ridge, had a legitimate expectancy of the formation of a contract before the tortious interference occurred.

B. *Ex parte Discount Foods, Inc.*, 789 So. 2d 842 (Ala. 2001), (per curiam), held that the motion by the defendant, Supervalu, to compel arbitration should have been granted even though the alleged tortious interference with business relations pertained to a commercial transaction distinctly separate from the parties' "Retailers Agreement", which contained the arbitration clause. The Court reversed its plurality opinion rendered earlier in *Ex parte Discount Foods, Inc.*, 711 So. 2d 992 (Ala. 1998) ("*Discount Foods I*"), and concluded the arbitration provision in the "Retailers Agreement" required arbitration of "any controversy or claim" arising between the parties. Thus, the intentional interference with business relations claim, although concerning a commercial lease transaction not the subject of the "Retailers Agreement", fell within the sweep of the arbitration provision agreed to by the parties.

C. *Colonial Bank v. Patterson*, 788 So. 2d 134 (Ala. 2000), held that a bank could not be held liable to the shareholder of one of the bank's corporate customers for intentional interference with business relations based on its refusal to honor a check drawn by the shareholder on the corporate customer's account. Because the bank, the shareholder, and the corporation were all parties to a tripartite contractual agreement, none of the parties could be liable, as a matter of law, for tortious interference with that contract. The plaintiff, Patterson, failed to state a cause of action because the tort of intentional interference with business relations was recognized so as to provide a remedy in the situation where a **third party** intentionally interferes with the relationship of two contracting parties. The Court found the bank's conduct in refusing to honor the shareholder's check appropriate under the regulations set forth in the tripartite contract of which it was a party. The bank had a legal right to withhold payment pursuant to the contract, which governed its relationship with depositors, and, thus, did not have to present evidence to disprove any of the elements of the tort of intentional interference with business relations.

D. *Cobb v. Union Camp Corp.*, 786 So. 2d 501 (Ala. Civ. App. 2000), *reversed on other grounds by Ex parte Union Camp*

Corp., No. 1992122, 2001 WL 586935 (Ala. June 1, 2001), found summary judgment was appropriate for the defendant, Union Camp, against the claim by plaintiff, Cobb, for intentional interference with business relations because Union Camp was a party to the business relationship at issue. Although Cobb had contracted with another party, Evergreen, to cut and log wood for Evergreen, the wood was located on property owned by Union Camp. Thus, the court concluded that Union Camp was an essential party to the business relationship between Cobb and Evergreen. Accordingly, Union Camp, as a party to the business relationship, could not be held liable for tortious interference with such business relationship.

4. Malicious Prosecution

A. *Ex parte Tuscaloosa County,* No. 1982209, 2000 WL 1273686 (Ala. Sept. 8, 2000), held that a plaintiff, in a claim for malicious prosecution against a state agent, must present substantial evidence of **actual** malice, or malice in fact, in order to overcome the state agent's motion for a judgment as a matter of law. Tinsley, the defendant and Tuscaloosa County license inspector, issued a warrant for the arrest of plaintiff, Cosby, after Cosby failed to respond to a business license renewal request sent to him via mail. Because Cosby was no longer conducting business at the time he received the initial

renewal notice, and because the notice instructed the addressee to destroy it "if not applicable," Cosby discarded the notice.

After Cosby was arrested, Tinsley dismissed the charges against him. But Cosby filed suit against Tinsley, alleging, *inter alia*, malicious prosecution. A jury verdict was rendered for Cosby, but the trial court granted a new trial due to juror misconduct. At the second trial, Cosby again won a verdict on his malicious prosecution claim. The Alabama Supreme Court agreed with Tinsley that he enjoyed discretionary-function immunity for his actions with regard to Cosby's failure to respond to the business license renewal notice. Because of the immunity enjoyed by Tinsley, the Court found a showing of malice in law, or legal malice, was insufficient for Cosby to prevail; instead, Cosby was required to prove that Tinsley's conduct was "so egregious as to amount to willful or malicious conduct or conduct engaged in bad faith." Cosby failed to make such a showing of actual malice. Therefore, Tinsley's immunity from Cosby's malicious prosecution claim necessitated a judgment as a matter of law for Tinsley.

B. *Ex parte Tuscaloosa County*, 770 So. 2d 602(Ala. 2000), reversed the lower appellate court and held the claim by the plaintiff, Leak, for malicious prosecution failed because Leak was, in fact, actually guilty of the charged offense. Leak was arrested after failing to respond to a business license renewal

notice and three subsequent letters sent to her from the defendant, Tinsley, who is the Tuscaloosa County license inspector. Unlike Cosby, the plaintiff in the case discussed above, Leak continued to operate her business after her previous license expired and after receiving the license renewal notice.

Although Leak presented evidence that an employee of the Tuscaloosa license commissioner's office told her to disregard the renewal notice and that her business had been "deleted" from the office's computer files, and Tinsley requested and obtained a dismissal of the criminal charge, the Court found Leak's reliance on this statement did not change the fact that she was still operating her business without a valid license. Thus, Leak's actual guilt precluded any recovery under a malicious prosecution claim, even though the jury rendered a verdict in her favor. Furthermore, the Court held the policy disfavoring malicious prosecution claims when the plaintiff is guilty of the charged offense also disfavors "bringing claims arising out of facts within the ambit of malicious prosecution but couched in other terms." Thus, the Court also reversed the jury's verdict for Leak on her negligence and wantonness claims.

C. *Poff v. Hayes*, 763 So. 2d 234 (Ala. 2000), held that a malicious prosecution claim is not limited to the situation where the present defendant initiated the prior proceeding. Rather, the claim also arises in the situation where the present

defendant continued the prior proceeding without probable cause, and one can be liable for malicious prosecution when he "takes some active part in the instigation or encouraging of the prosecution." Hayes, an attorney, sued Poff, a former law clerk at Hayes' firm, for malicious prosecution because Poff represented one of Hayes' former clients in a legal malpractice action against Hayes. Poff's only defense to the claim was that he played no role in the former client's filing of the action against Hayes. The Court rejected this defense, finding that Poff's representation of Hayes' former client raised an inference that he actively assisted her in her suit and, thus, instigated or encouraged the prosecution. The Court stated that "taking some active part" includes advising or assisting another person to begin the proceeding and actively directing or aiding in the conduct of it. Poff's representation of Hayes' former client fell within this definition and satisfied the first element of a malicious prosecution claim – that a prior judicial proceeding was initiated by the present defendant.

D. Willis v. Parker, NO. 1991115, 1991116, 2001 WL 1021525 (Ala. Sept. 07, 2001), held that in a malicious prosecution action, when probable cause is shown to be lacking, malice is essential to recovery. Tenant (Parker) brought action against commercial landlord (Willis) for malicious prosecution and abuse of process after Landlord filed notice of eviction

against tenant. Parker claimed that Willis conspired with others and wrongfully filed and pursued an action for eviction against Parker. The lower court entered a judgment for tenant on conspiracy and process claims. The landlord appealed and the tenant cross-appealed. The Alabama Supreme Court held that since the landlord did not act with malice or lack of probable cause when the landlord brought eviction notice against tenant, he did not commit malicious prosecution nor abuse of process. The lower court's ruling was affirmed in part and reversed in part. Parker did not succeed on his malicious prosecution claim because he failed to prove that Willis pursued the first eviction of Parker with lack of probable cause and with the presence of malice.

5. Environmental Torts

A. *Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804 (Ala. 2000), affirmed a jury's verdict for the plaintiff on nuisance and trespass claims in all respects except the amount of punitive damages awarded. Although finding the punitive damage award excessive, the Court found no error in the trial court's jury instructions pertaining to contributory negligence and agency. Stevens, the plaintiffs, were neighboring landowners to one of the defendants, Burnett, who operated a hog farm for Tyson. Tyson's contract with Burnett classified their relationship as employer-independent contractor. But, the Court held Stevens presented sufficient evidence to create a jury

question as to the existence of an agency, specifically that Tyson had certain requirements for Burnett's operation, specified the size and location of Burnett's hog houses, inspected the operation weekly, and provided the necessary supplies to run the operation. Additionally, the Court found no error in the jury's rejection of Tyson and Burnett's contributory negligence defense. While Stevens' 250-acre farm contained approximately 70 head of cattle, which contributed to the smells Stevens complained of, Burnett's farm contained over 4,800 hogs. Thus, the jury could have found that Burnett's farm was the proximate cause of the negligence and nuisance alleged by Stevens.

B. *Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198 (Ala. 2000) (per curiam), reversed a $1,000,000 compensatory damage award for the plaintiff, Long, on nuisance and negligence claims related to carbon disulfide emissions by the defendant manufacturer, Courtaulds. The Court held Long presented insufficient evidence to support the nuisance claim and that Courtaulds' failure to install carbon-bed-absorption technology in its plant was not substantial evidence of negligence. Thus, Long failed to meet the requirements of Alabama Code § 6-5-127(a) as it pertains to alleged nuisances by manufacturing plants.

6. Joint Tortfeasors

A. *Acceptance Ins. Co. v. Brown*, No. 1991938, 1992026, 2001 WL 729283 (Ala. June 29, 2001), held that an insured's joint and several liability for a judgment rendered against her required her liability insurer to pay the entire amount of the verdict, even though the insurance policy did not cover the other joint tortfeasor's liability. The plaintiffs, Mr. and Mrs. Brown, were convenience store owners who were found liable for assault and battery of a man attempting to burglarize their store. The Browns sued Acceptance because of its refusal to defend and indemnify the Browns for the incident. The trial court granted summary judgment for Acceptance as to Mr. Brown's claims, but Mrs. Brown's claims resulted in a jury verdict in her favor. The Alabama Supreme Court rejected Acceptance's argument that Mrs. Brown's compensatory damage award should be halved because Acceptance had no duty to indemnify Mr. Brown for his liability related to the assault. Because a single judgment was entered against Mr. and Mrs. Brown, they were each jointly and severally liable for the entire amount of the assault judgment. Thus, Acceptance had a duty to indemnify Mrs. Brown for the full amount of the judgment.

B. *Creel v. Crim*, 2001 WL 1021001 NO. 2990907 (Ala.Civ.App., Sep 07, 2001), held that any person who employs another to perform an act with apparent authority to do so,

indemnifies that employee for those acts to the extent of the liability that the employer would have if the employer were lawfully able to authorize the acts as he purported. Defendant Lovelady directed Creel to cut down lumber on Plaintiff Crim's land with the representation that the land was Lovelady's. Crim brought suit against Lovelady and Creel for trespass. Thereafter, Creel filed a cross-claim against Lovelady to indemnify him for cutting the trees under her direction. The trial court found that acting on Lovelady's representations, Creel had cut timber on Crim's land and therefore was partially indemnified. Creel was directed to pay $5400 in damages to Crim. The trial court also directed Lovelady to pay $2700 to Creel on his cross claim. Creel appealed. The Court of Civil Appeals held that the lower court erred when they found Creel was entitled to partial indemnity based on Lovelady's representations, but not full indemnity. The judgment was affirmed in relation to a trespass claim, and reversed on the cross-claim against Lovelady in favor of Creel. At common law, indemnity shifts the entire burden from one party to another, not just part of the burden. Therefore, Lovelady was responsible for the burden of the loss.