

The Hunter Decision

J. Greg Allen
&
Leslie C. Ellis
Beasley, Allen, Crow, Methvin, Portis & Miles
Montgomery, Alabama

Recently, a decision of the Alabama Supreme Court sent resounding shockwaves throughout the practice of law in Alabama. The opinion was so broadly written that fear swept across State law enforcement agencies and the State Fire Marshal's office because of the impact the opinion could have on police officers' and fire marshals' ability to testify about their accident, crime scene and arson investigations. Initial reactions from the trial courts were to put trials on hold. The opinion presented a unique challenge to both trial lawyers and defense lawyers. Initially, it was thought that the decision would stifle the use of expert engineer testimony across the state. In actuality, it was a hurdle to be overcome by a statewide effort of both plaintiff and defense bars.

I. Hunter v. Board of Water and Sewer Commissioners.

In the Mobile County case of James Hunter v Board of Water and Sewer Commissioners, (Mobile Circuit Court CV-02-595) expert testimony was offered regarding engineering matters related to City of Mobile Board of Water and Sewer Commission activities. The plaintiffs, James Hunter and family, proffered the testimony of Roger Hicks, an "engineer intern", in support of their claims. Hicks was certified by the Licensure Board as an "engineer intern", had 17 years of experience in sewer related matters, and was trained as an engineer. The Water Board opposed Hicks' testimony and moved to strike it because Hicks was not a licensed "professional engineer." The Water Board supported its argument by pointing out that "the practice of engineering", as set forth by Title 34, Chapter 11, Alabama Code 1975 ("the Licensure Act") as amended by

Act No. 97-683, Ala. Acts 1997, includes “testimony.” Therefore, according to the Water Board, regardless of his experience, Hicks was not qualified to testify as to engineering matters because he needed to have an Alabama engineering license in order for him to present “testimony”. The trial court held that the use of the term “testimony” in §34-11-1(7) created an unconstitutionally vague statute. The Water Board appealed.

On July 28th, 2006, the Supreme Court of Alabama issued an opinion in Board of Water and Sewer Commissioners of the City of Mobile v. James Hunter, et. al., __So.2d__ 2006 WL 2089914 (Ala.) (rehearing denied October 20, 2006), which threatened to change the use of expert witness testimony statewide regarding engineering matters. In its opinion, the Supreme Court interpreted for the first time “The Licensure Act”. The Licensure Act sets forth what acts constitute “the practice of engineering.” The “practice of engineering” is defined in Ala.Code §34-11-1(7) as:

(7) PRACTICE OF ENGINEERING. Any professional service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, **testimony**, investigation, evaluation, planning, design and design coordination of engineering works and systems, planning the use of land and water, performing engineering surveys and studies, and the review of construction or other design products for the purpose of monitoring compliance with drawings and specifications; any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products; equipment of a control, communications, computer, mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property; and including other professional services necessary to the planning, progress, and completion of any engineering services.

(emphasis added).

As defined above, “**testimony**” is determined to be an act that constitutes “the practice of engineering.”

(19) The term “**testimony**” as used in Sections 34-11-1(7) and 34-11-1(8), Code of Ala. 1975, shall mean a declaration made by a witness under oath or affirmation related to engineering and surveying activities in the State of Alabama.

Alabama Administrative Code Regulation No. 330-X-2-.01(19) (2005).

According to the Court, the Legislature’s Amendment to §34-11-1(7) superimposed the licensing requirement onto Rule 702 of the Alabama Rules of Evidence which governed the admissibility of expert testimony. (Hunter, p.21.) The Court held that, after the adoption of Act No. 97-683, Ala. Acts 1997, the trial court “**no longer had the discretion to allow testimony on engineering matters unless the witness was a licensed engineer in this State.**” (*Id.* at p.21-22.) (emphasis added). Therefore, it held that any witness giving testimony regarding engineering matters that were contained within the definition of engineering under the Licensure Act must be a licensed engineer in the State of Alabama. Anyone giving testimony falling under that description who is not a licensed engineer commits a Class A misdemeanor under §34-11-15(a).

II. Why Hunter was a problem in the area of expert testimony.

Hunter created new hurdles for expert testimony use in the State of Alabama. It was unclear if police officers would be allowed to give testimony regarding vehicle speeds since those determinations dealt with engineering principles. Similarly, whether a Fire Marshal could testify about the cause of a fire was unknown. Under Hunter, a witness could be renowned nationwide for his expertise in a certain area, but if he was not also licensed in the State of Alabama as an engineer, he could not testify in Alabama about engineering issues.

Take a look at the following scenario as another example of the impact of Hunter. Mr. John Doe Johnson (“J.D.”) builds equipment trailers in Alabama and sells them to consumers. Builder J.D. has never attended college, has no formal engineering training, and nothing other than 40 years of experience building trailers to claim as a credential. J.D. does not employ an engineer at his place of business to design his trailers. He just builds trailers, according to his own plans, formed by years of experimenting, deduction and reasoning regarding the structure, sturdiness, and feasibility of the trailers themselves. Under the manufacturing exception created by §34-11-9(b), J.D. may testify in court about the “design” of his trailer, but, under Hunter, whoever presents contradictory testimony to J.D.’s testimony about design, must be a licensed professional engineer in the State of Alabama. Similarly, if J.D. testifies in Alabama regarding engineering matters related to a design created in Alabama, he is required to have an engineering license.

The evidentiary issues raised by this ruling and the statute it references are unresolved. Prior to Hunter, case law supported the overwhelming view that an expert witness could be qualified by his experience. Alabama Rule of Evidence 702 states that a witness “qualified as an expert by knowledge, skill, experience, training, or education” could testify as to his opinions regarding the issues. Now, arguably the exact same testimony that was previously valid will be excluded under Hunter if the expert does not hold an Alabama engineering license. In Hunter, the Alabama Supreme Court said that "Amended §34-11-1(7) had the effect of overruling Federal Mogul Corp. v. Universal Const. Co., 376 So. 2d 716 (Ala. Civ. App. 1979), superseding Rule 702 of the Alabama Rules of Evidence, and overruling many other cases holding that an expert witness is

qualified by experience, training, knowledge, and expertise, not by licensure."(Hunter, p.14). Alabama Code §34-11-1(7) does not mention Rule 702, nor does it present the possibility of a limitation upon the scope of Rule 702. Forgetting years of case law which supports the admissibility of expert testimony under Rule 702, the ruling simply flies in the face of fairness. Notably, compliance with Hunter does not negate the existing requirement that a witness also qualify under Rule 702.

III. The Engineering Board Advisory Opinion.

After being petitioned for clarification, the State of Alabama Board of Licensure for Professional Engineers and Land Surveyors Board issued an Advisory Opinion on August 28th, 2006 “in an effort to give guidance to the Courts of Alabama, the Office of the Attorney General, the Alabama Department of Safety, the State Fire Marshal’s Office, and attorneys handling cases in the State of Alabama” (Advisory Board Opinion, p.1). The Advisory Opinion affirmed the definition of “practice of engineering” as defined in §34-11-1(7), but clarified the meaning of “testimony”. The Board stated that, as it relates to testimony, the “practice of engineering” is limited to “testimony” related to engineering activities in the State of Alabama, and that a person who is not licensed in engineering would not be prevented from testifying in Alabama about work or design performed outside of Alabama, such as the design of an automobile part or other product designed outside of the State of Alabama. (*Id.* at p.6). The Board also stated that a person who is not licensed in engineering in Alabama, who is not holding themselves out as an engineer or testifying to engineering issues, would not be prevented from offering opposing testimony should the court declare the opposing expert otherwise qualified. (*Id.* at p.6).

Based on the advisory opinion, and sticking with our previous example of J.D. and his trailers, if J.D. was testifying about his trailer, and someone was contradicting his testimony, that person does not have to be a licensed engineer **as long as he does not hold himself out as an engineer, or testify to engineering issues.** Further, if J.D. was building his trailers in Georgia rather than Alabama and offering testimony in Alabama about trailers he built in Georgia, he would not be prevented from testifying about the design of his trailer. The visual of someone hopping over the state line to Georgia and back under a caption that reads “now I’m legal, now I’m not” would make a great satirical illustration to represent the utter comedy of this situation.

In an attempt to address the concerns of law enforcement agencies and the State Fire Marshal’s office, several categories of specialization were also set out by the Board that “may be adequately performed by persons that are not educated, trained, or experienced in the engineering field, or licensed to practice in Alabama.”

Under the given definitions, the Board is of the opinion that the areas of **ballistics, crime scene analysis, blood spatter analysis, vehicular accident investigation, human factors, biomedical/biomechanics, and fire investigations** clearly do not require engineering education, training, and experience to be adequately performed, and the Board does not identify these areas as “engineering” within the definition given by the Alabama Legislature unless the proposed expert is claiming to base his or her analysis strictly on their engineering education and engineering experience.

(Advisory Board Opinion at p.6.)(emphasis added.)

Throughout the special meeting of the State Board of Licensure for Professional Engineers and Land Surveyors where the opinion was written, attorneys from plaintiff and defense bars had the opportunity to discuss the implications of the wording of the opinion and to suggest phrasing and content. Even a cursory review of the notes of that

meeting shows the degree of earnest hard work and effort between the Board and the attorneys to find an amicable solution. The main goal was to provide guidance and clarity regarding the applicability of §34-11-1 to engineering testimony and when it would apply.

Anyone with questions about the applicability of §34-11-1 to proffered testimony can request an advisory opinion from the State Board of Licensure for Professional Engineers and Land Surveyors regarding said testimony. Counsel may also request a determination from the presiding judge in any case regarding the applicability of the prohibition of engineering testimony to specific testimony offered. So long as the testimony is consistent with that permitted in the Board's advisory opinion, it should be permitted. However, resolution of the problems created by Hunter is still not within our grasp.

After the Advisory Board Opinion was released, counsel for defendants and plaintiffs across the state began a campaign for clarification of Hunter's implications on the daily practice of law. They employed several tactics with mixed results. Orders from various trial courts interpreted the ruling in different ways. Some courts allowed expert testimony after making determinations that the proffered testimony was not in violation of §34-11-1, while other courts declined to make that determination under the same facts and circumstances.

In a Dekalb County case, counsel for both parties requested the trial court prior to trial to determine if certain expert witnesses testifying in the case would be held in violation of §34-11-1 or not. Based on evidence presented regarding the testimony, the Court held that the prohibition against engineering testimony found in §34-11-1(7) was

not applicable to the testimony as long as the testimony was consistent with that permitted in the advisory opinion. (See attached Order in Powell v Toyota, DeKalb County Circuit Court, CV-2004-172).

In contrast a similar request was made in a Cleburne County case. Defendants requested that the Court declare that certain expert witnesses testifying in the case would not be held in violation of §34-11-1 or §34-11-14 in light of the recent advisory opinion. The Court responded to that request with a powerful order detailing the controversy before the Court, and the Court's view on that controversy.

As much as the Court would like to accommodate the request, it is axiomatic that a court cannot, absent proper controversy before it, opine, advise or declare as to the nature and extent of a statute, especially one that carries criminal sanctions. Additionally this Court has serious reservations as to whether the State Licensure Board has like legal authority. It, the Court assumes, cannot immunize anyone from prosecution even though the possibility of such would be remote at best.

The legal system of Alabama has been served up with a controversy not of its own making that has the potential of bringing certain litigation in this state to an abrupt halt. How the controversy is resolved is yet to be fully seen.

The Court would suggest that any expert whose testimony appears to fall within the definition of engineering simply apply for temporary licensure in Alabama. If the application is rejected as not warranted, then the witness has done all he or she could do to comply with Alabama law; if issued, there is no question remaining. This Court is in the business of initially determining or passing upon the *bona fides* of an expert witness's testimony and not whether he/she is violating some ridiculous definition assigned to the definition of "engineering" by the Alabama Legislature clearly to protect the professional turf of its own citizen-engineers from "outsiders".

(See attached Order in Blackstock v Kia, Cleburne County Circuit Court, CV-2005-27).

As is stated so well in the order above, how this controversy will be resolved is yet to be seen.

IV. What does an expert have to do to become licensed in Alabama?

Currently, many out of state engineer witnesses, who have often testified previously in the State of Alabama, are seeking licensure as a solution to the Hunter problem. But, some of them, as you will see below, are having problems. In the example below, the Board provided a response to the request of an engineer licensed in the State of Mississippi who wanted temporary status to testify as an expert witness in Alabama. A good summary of the licensing requirements for professional engineers in the State of Alabama is included in the declaratory ruling that was issued to him.

Section 34-11-2(a), Code of Alabama, 1975 outlines the general requirements for licensure as a professional engineer. The requirements fall into the categories of education, experience, and examination. The number of months of acceptable engineering experience required is based on the type of engineering education the applicant has obtained. All applicants are required to have passed an eight-hour written examination in fundamental engineering subjects and an eight-hour examination in the principles and practice of engineering.

Section 34-11-4(1)b, Code of Alabama, 1975 grants the Board the authority to issue a certificate of licensure as a professional engineer to any person who holds a valid professional engineering certificate issued by any jurisdiction of the United States or of any country; provided, that the education, experience, and examination qualifications of the applicant meet the requirements of the licensure law and the rules established by the board (Administrative Code). The Board may authorize an applicant to practice engineering on a temporary basis ...until the board acts upon the application.

Section 330-X-3.01(6) of the Administrative Code identifies the licensure as a professional engineer by comity is granted provided the applicant's qualifications meet the requirement of Chapter 11, Title 34, Code of Alabama 197, as amended, effective at the time of the application, which includes the required education, experience, and the passing of two Board approved eight-hour written examinations given by Alabama or another jurisdiction and the applicant is currently licensed as a professional engineer and in good standing within another jurisdiction.

There is no capability identified in Chapter 11, Title 34, Code of Alabama 1975 to waive the examination requirements.

(See attached Declaratory Ruling dated November 29, 2006).

The engineer from Mississippi had only taken one of the two examinations required for licensure. Therefore, his request for a temporary status was denied for failure to meet all licensure requirements for contingent license or interim permit.

V. Conclusion.

The buzz from Hunter is not over. Currently, parties seeking determinations from the trial courts regarding the applicability of §34-11-1 to testimony of engineer witnesses in many cases across the state are still given inconsistent rulings. The vagueness of the statute coupled with the advisory opinion and the questionable authority of the Engineering Board regarding legal evidentiary matters prevents consistency in rulings. Until further clarification is given as to the effect of Hunter, these inconsistencies will continue.

ADVISORY OPINION OF
THE STATE BOARD OF LICENSURE FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS

The State Board of Licensure for Professional Engineers and Land Surveyors met at a special called meeting on August 28, 2006. The meeting addressed the recent Alabama Supreme Court opinion in *Board of Water and Sewer Commissioners of the City of Mobile v. Hunter*, 2006 WL 208 9914 (Ala.). In an effort to give guidance to the Courts of Alabama, the Office of the Attorney General, the Alabama Department of Public Safety, the State Fire Marshal's Office, and attorneys handling cases in the state of Alabama, the Board issues the following advisory opinion:

The practice of engineering is defined by the Alabama Legislature in section 34-11-1(7) of the Code of Alabama in part as follows:

(7) PRACTICE OF ENGINEERING. Any professional service or creative work, the adequate performance of which requires engineering education, training, and experience . . . to such services or creative work as . . . testimony . . . which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products; equipment of a control, communication, computer, mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property; and including other professional services necessary to the planning, progress, and completion of any engineering services.

ALA. CODE § 34-11-1(7) (2002). The Alabama Supreme Court was clear and unanimous in its opinion in the *Hunter* case that the above definition is constitutional and enforceable. Clearly, the practice of engineering, as it is defined in Alabama, includes the act of testimony in connection with related engineering functions.

The term "testimony" is defined under regulation 330-x-2-.01(19) as follows:

(19) The term "testimony" as used in Sections 34-11-1(7) and 34-11-1(8), Code of Alabama 1975, shall mean a declaration made by a witness under oath or affirmation related to engineering and surveying activities in the State of Alabama.

Admin. Reg. No. 330-x-2-.01(19) (2005). Therefore, engineering testimony, when offered inside the State of Alabama, whether general or specific, whether it is given or taken inside or outside of the State of Alabama, that is related to engineering activities as defined herein, within the State of

Alabama, shall be performed by a licensed engineer, and shall be a violation of the statute when not in compliance with Section 34-11-1(7) of the Code of Alabama.

It should be noted, however, that certain areas are exempt under the law. Section 34-11-14 of the Code of Alabama states:

This chapter shall not be construed to prevent or to affect any of the following:

- (1) The practice of any other legally recognized profession or trade.
- (2) The work of an engineer intern or land surveyor intern, employee, or a subordinate of any person holding a certificate of licensure under this chapter, or any employee of a person practicing lawfully under paragraph b of subdivision (1) of Section 34-11-4, if the work is done under the responsibility and supervision of a person holding a certificate of licensure under this chapter or a person practicing lawfully under paragraph b of subdivision (1) of Section 34-11-4.
- (3) The practice of officers and employees of the government of the United States while engaged within this state in the practice of engineering or land surveying for the government. This exception does not extend to any engineer or land surveyor engaged in the practice of professional engineering or land surveying whose compensation is based in whole or in part on a fee.
- (4) The practice of engineering or land surveying with respect to transportation or utility facilities by any transportation company or public utility subject to regulation by the Alabama Public Service Commission, the Federal Aviation Administration, the Federal Communications Commission, the Federal Energy Regulatory Commission, or the Nuclear Regulatory Commission, including its parents, affiliates, or subsidiaries; or by the officers and employees of any transportation company or public utility including its parents, affiliates, or subsidiaries. This exception shall not extend to any engineer or land surveyor engaged in the practice of engineering or land surveying whose compensation is based in whole or in part on a fee.
- (5) The practice of engineering or land surveying by any person who is employed by the Alabama Department of Transportation prior to January 1, 1997, in any engineering or engineering assistant classification series under the State of Alabama Personnel Board, merit system.
- (6) The mere execution as a contractor of work designed by a professional engineer or the supervision of the construction of such

work as a foreman or superintendent.

(7) The performance of engineering services which are purely incidental to the practice of architecture by registered architects, or their employees, or subordinates under their responsible supervising control.

(8) The performance of engineering services which are purely incidental to the practice of geology by registered geologists, their employees, or subordinates under their responsible charge.

ALA. CODE § 34-11-14 (2002). Nothing in this opinion should be read to require licensure of individuals in the categories deemed as exempt from licensure or individuals offered in opposition to those deemed exempt from licensure prior to testifying, provided that their testimony complies with the exemption and provided that the proposed expert is not claiming to base his or her opinion on engineering education and engineering experience. Furthermore, the Board was asked in October 2005 whether a professional engineer's license was required for a mechanical design engineer who will be working for one of the automotive industries located in Alabama. The opinion of the Board was that an unlicensed individual can offer engineering to or for his employer regarding an engineered product but cannot offer engineering to the public without first being licensed. Nothing in this advisory opinion should be interpreted as altering this earlier opinion.

The following definitions, reached through the combined efforts of the Board, its Counsel and members of both the plaintiff and defense bars in Alabama, are given to add some clarity to activities that have specifically been identified as areas that could potentially fall under the definition of the practice of engineering. These advisory definitions shall be restricted to the following and are not intended to cover subjects reaching beyond these specific topics. If further clarification is requested, the Board may amend, expand, or revisit these definitions.

ADVISORY OPINION DEFINITIONS

Automotive Design - A multi-disciplined process of applied science that includes elements of mechanical engineering, electrical engineering, safety engineering, structural engineering, etc., as applied to the design, testing, manufacture, and operation of motorized vehicles and their component parts.

Ballistics - The science dealing with the motion, behavior and dynamics of projectiles, the flight characteristics of projectiles relative to interior, exterior and terminal conditions, the study of the firing, flight, and effects of ammunition, and the matching of projectiles to weapons.

Fire Evaluation:

a. Fire Investigation - The investigation of a fire or explosion, including the examination, collection and interpretation of related evidence to determine the cause and origin of the fire or explosion, and the reaction and behavior of people to fire, and post-fire investigation, evaluation and feedback regarding cause and origin.

b. Fire Analysis - The application of scientific and engineering principles, code, and expert judgment to an understanding of the phenomena and the effects of fire. This may involve the assessment of the hazards and risks of fire and its effects; the mitigation of potential fire damage by proper design, construction, or arrangement and use of building materials; the design, installation, maintenance, and/or development of fire detection and fire suppression devices.

Human Factors - A science that focuses on how people interact with products, tools, procedures and any processes likely to be encountered in the modern world and a factor that should be considered in all engineering design. The human factors specialist assesses these interactions and attempts to improve efficiency, safety, and to reduce strain and discomfort.

Accident Evaluation

a. Vehicular Accident Investigation - A multi-disciplinary field that involves making a record of some or all of the physical evidence at an accident scene, collection and interpretation of evidence and influence of the environment on the vehicle.

b. Vehicular Accident Reconstruction - The application of the laws of physics to the vehicles and structures involved, including the driver or pedestrian's behavior, or the influences of the environment on the vehicles, designed to allow the accident reconstructionist to determine movement and placement of vehicles and pedestrians at different moments in time, using the laws of physics to determine vehicle movements, as well as to create visualizations and/or animations explaining and demonstrating those opinions.

c. Other Accident Reconstruction – The investigation and analysis of accidents involving mechanical, electrical, chemical, and

other products, processes and systems.

Blood Spatter Analysis - The evaluation of blood that has been dispersed as a result of force applied to a source of blood for the purpose of determining the characteristics of the nature of the forces which created them and the source and direction of the mechanism that caused the spatter.

Occupant Protection - The discipline involved in human and vehicle design and testing where the goal is to maximize the safety and protection of vehicle occupants in the event of the application of an external physical force to the vehicle.

Biomedical/Biomechanics - The mechanics of tissue, joints and human movement as well as the application of scientific laws to biological and physiological systems including injury causation.

Machine Design - An engineering science that includes various specialties of engineering such as mechanical engineering, electrical engineering, safety engineering, structural engineering, etc., as applied to the design, testing, manufacture, and operation involved in the development of any mechanical or organic device that transmits or modifies energy to perform or assist in the performance of tasks.

Crime Scene Investigation - The application of various areas of science to answer questions relating to examination and comparison of biological evidence, trace evidence, impression evidence, controlled substances, firearms and other evidence in legal investigations.

Analysis of Chemical Structures and Composition – A multidiscipline science of understanding the content of chemical structures or composition and how these structures or compositions react in different environments.

Chemical Processes and Equipment - A multi-disciplined area that includes the engineering design and development of processes and equipment for the manufacture of specific chemical related products.

Product, Systems or Process Design - An applied science that includes elements of chemical engineering, mechanical engineering, electrical engineering, safety engineering, structural engineering, etc., as applied to the manufacture, testing and applications that evolved from the idea

generation, concept development, testing and manufacturing or implementation of a consumer or industrial product, system, process or service.

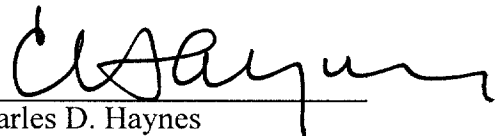
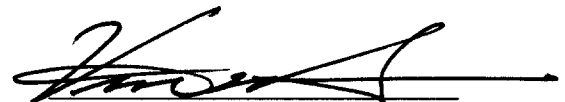
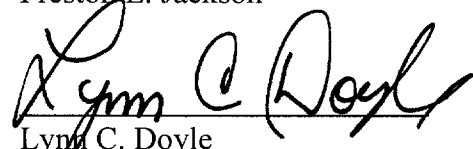
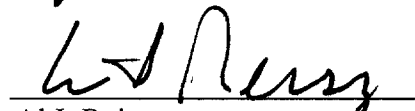
The definition of the practice of engineering as set forth above first limits what is to be considered as the practice of engineering to those areas that “. . .[require] engineering education, training, and experience. . . .” ALA. CODE § 34-11-1(7) (2002). As can be seen in the above definitions, there are areas of specialization that may be adequately performed by persons that are not educated, trained or experienced in the engineering field, or licensed to practice engineering in Alabama. Under the given definitions, the Board is of the opinion that the areas of ballistics, crime scene analysis, blood spatter analysis, vehicular accident investigation, human factors, biomedical/biomechanics and fire investigation clearly do not require engineering education, training, and experience to be adequately performed, and the Board does not identify these areas as “engineering” within the definition given by the Alabama Legislature unless the proposed expert is claiming to base his or her analysis strictly on their engineering education and engineering experience.

Additionally, the definition of the practice of engineering as set forth above further limits testimony and other acts considered to be the practice of engineering to those acts done “. . . in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products. . . .” Under the given definitions, the Board is of the opinion that the areas of fire analysis, analysis of chemical structures and composition, do not necessarily require an engineering background to perform and are not usually done “in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products”, and the Board does not identify these areas as “engineering” within the definition given by the Alabama Legislature.

The other areas identified require engineering education, training, and experience and involve work done in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, or industrial or consumer products. The above statement does not, however, necessarily mean that testimony in these areas automatically constitutes the practice of engineering. For example, in the area of vehicular and other accident reconstruction, there is nothing in this definition that the Board interprets as preventing a person the Court may deem as qualified in the field of physics or any other legally recognized profession or trade from testifying, provided that he or she is not holding himself or herself out as an engineer as stated above. It is the Board’s opinion that such an individual would be exempt from licensure under section 34-11-14(1) of the Code of Alabama. Furthermore, testimony that constitutes the practice of engineering is also limited by the Board’s administrative definition of testimony by being applicable only to testimony related to engineering activities in the State of Alabama. This opinion, for instance, would not prevent a person who is not licensed in engineering in Alabama from testifying in Alabama about engineering work or design performed outside of Alabama, such as the design of an automobile part or other product designed outside of the State of Alabama, nor would it prevent an unlicensed individual from offering opposing testimony should the court declare the opposing expert otherwise qualified.

The Board reiterates that engineering testimony, when offered inside the State of Alabama, whether general or specific, whether it is given or taken inside or outside of the State of Alabama, that is related to engineering activities as defined herein, within the State of Alabama shall be performed by a licensed engineer, and shall be a violation of the statute when not in compliance with Section 34-11-1(7) of the Code of Alabama.

Issued this 28th day of August 2006.


Charles D. Haynes
Veston W. Bush
Preston L. Jackson
Lynn C. Doyle
Al I. Reisz

Veston W. Bush, Jr., PLS
Abbeville
Chair

Preston L. Jackson, PE
Indian Springs
Vice-Chair

Al I. Reisz, PE
Huntsville
Secretary

Don T. Arkle, PE
Prattville

Charles D. Haynes, PE
Guntersville

Regina A. Dinger
Executive Director

State of Alabama

***Board of Licensure for
Professional Engineers and Land Surveyors***

The RSA Union
100 North Union Street, Suite 382
Montgomery, Alabama 36104-3762
November 29, 2006



Mailing Address:
P. O. Box 304451
Montgomery, Alabama 36130-4451

Telephone Number
(334) 242-5568

Fax Number
(334) 242-5105

Mr. Gerald D. Whitehouse
34 East Royal Mews
The Woodlands, TX 77384

Rule Number: 34-11-1(7) and
34-11-4(1)b

General Question: Will the Board grant
me a temporary status to give expert
testimony in Alabama?

Dear Mr. Whitehouse:

This declaratory ruling of the Board of Licensure for Professional Engineers and Land Surveyors is issued in response to your request.

QUESTION

Will the Board of Licensure for Professional Engineers and Land Surveyors grant a temporary status to an individual who holds a professional engineer's license in another jurisdiction but does not meet the licensing requirements of Alabama?

FACTS, LAW, AND ANALYSIS

Section 34-11-1(7), Code of Alabama, 1975 defines the practice of engineering in part as any professional service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering science to such services or creative work as ... testimony... which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment,

processes, work systems, projects, and industrial or consumer products; equipment of a control, communication, computer, mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, property; and including other professional services necessary to the planning, progress, and completion of any engineering services.

Section 34-11-2(a), Code of Alabama, 1975 requires persons in either public or private capacity who practice or offer to practice engineering shall first be licensed by the Board of Licensure for Professional Engineers and Land Surveyors unless the individual is specifically exempted from licensure as identified in Section 34-11-14.

Section 34-11-4(1), Code of Alabama, 1975 outlines the general requirements for licensure as a professional engineer. The requirements fall into the categories of education, experience, and examination. The number of months of acceptable engineering experience required is based on the type of engineering education the applicant has obtained. All applicants are required to have passed an eight-hour written examination in fundamental engineering subjects and an eight-hour examination in the principles and practice of engineering.

Section 34-11-4(1)b, Code of Alabama, 1975 grants the Board the authority to issue a certificate of licensure as a professional engineer to any person who holds a valid professional engineering certificate issued by any jurisdiction of the United States or of any country; provided, that the education, experience, and examination qualifications of the applicant meet the requirements of the licensure law and the rules established by the board (Administrative Code). The Board may authorize an applicant to practice engineering on a temporary basis ... until the board acts upon the application.

Section 330-X-3.01(6) of the Administrative Code identifies the licensure as a professional engineer by comity is granted provided the applicant's qualifications meet the requirement of Chapter 11, Title 34, Code of Alabama 1975, as amended, effective at the time of the application, which includes the required education, experience, and the passing of two Board approved eight-hour written examinations given by Alabama or another jurisdiction and the applicant is currently licensed as a professional engineer and in good standing within another jurisdiction.

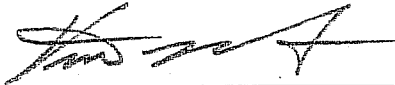
There is no capability identified in Chapter 11, Title 34, Code of Alabama 1975 to waive the examination requirements.

In your request, you identify that you are a licensed professional engineer in good standing in Louisiana; you have obtained a BS, Masters, and PhD in Mechanical Engineering; have over 40 years of engineering experience; and have passed a fundamentals of engineering examination. You identify that you have not taken a principles and practice examination.

Also in your request, you identify that the reason you are requesting a temporary permit is to provide mechanical engineering testimony.

CONCLUSION

The only temporary status that can be issued by the Board is a contingent license or interim permit both of which requires that the applicant meets all licensure requirements. Since you identify that you have only taken one of the two examinations required for licensure, the Board can not grant you your request for temporary status.

A handwritten signature in black ink, appearing to read 'Veston W. Bush, Jr.', written over a horizontal line.

Veston W. Bush, Jr., P.L.S.
Chair

SAZ

SEVENTH JUDICIAL CIRCUIT OF ALABAMA
Circuit Court of Cleburne County

THOMAS MARION BLACKSTOCK,	§	
as personal representative of the		
Estate of Billie Jean Blackstock,	§	
Plaintiff,	§	
VS	§	CASE NUMBER: CV 05-27
KIA MOTORS AMERICA, INC., et al.,	§	
Defendants,	§	

ORDER

The counsel for Defendant Kia Motors has requested an order of this Court declaring that certain expert witnesses testifying or expected to testify in this case by deposition or otherwise would not be in violation of §34-11-1 and/or §34-11-14(1), Code of Alabama 1975, in light of the advisory or declaratory opinion issued by the State Board of Licensure for Professional Engineers and Land Surveyors subsequent to the release of *Board of Water and Sewer Commissioners of Mobile v. Hunter*, ____ So.2d ____, 2006 WL 2089914 (Ala.).

As much as the Court would like to accommodate the request, it is axiomatic that a court cannot, absent a proper controversy before it, opine, advise or declare as to the nature and extent of a statute, especially one that carries criminal sanctions. Additionally, this Court has serious reservations as to whether the State Licensure Board has like legal authority. It, the Court assumes, cannot immunize anyone from prosecution even though the possibility of such would be remote at best.

The legal system of Alabama has been served up with a controversy not of its own

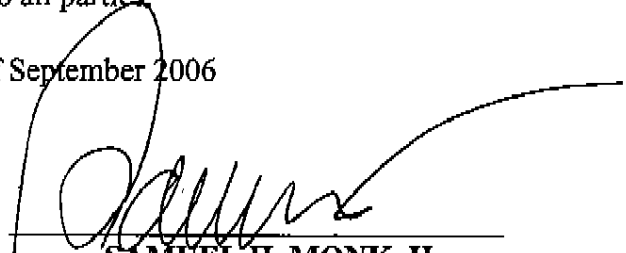
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making that has the potential of bringing certain litigation in this state to an abrupt halt. How the controversy is resolved is yet to be fully seen.

The Court would suggest that any expert whose testimony appears to fall within the definition of engineering simply apply for temporary licensure in Alabama. If the application is rejected as not warranted, then the witness has done all he or she could do to comply with Alabama law; if issued, there is no question remaining. This Court is in the business of initially determining or passing upon the *bona fides* of an expert witness's testimony and not whether he/she is violating some ridiculous definition assigned to the definition of "engineering" by the Alabama Legislature clearly to protect the professional turf of its own citizen-engineers from "outsiders".

A copy of this ORDER shall be forwarded to all parties.

DONE and ORDERED this the 11th day of September 2006



SAMUEL H. MONK, II
CIRCUIT JUDGE

) IN THE CIRCUIT COURT OF
)
) DEKALB COUNTY, ALABAMA

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decision. The Licensure Board's advisory opinion states that it is being issued as a means of giving guidance to the bench and bar in light of the *Hunter* decision.

The advisory opinion references the following definition of the term "testimony" as defined under Regulation 330-X-2.01(19):

(19) The term "testimony" as used in Section 34-11-1(7) and 34-11-1(8), Code of Alabama, 1975, shall mean a declaration made by a witness under oath or affirmation related to engineering and surveying activities in the State of Alabama.

Relying upon the above definition of "testimony," the Board concluded that the practice of engineering is limited to testimony related to engineering activities in the State of Alabama, and that a person who is not licensed in engineering would not be prevented from testifying in Alabama about engineering work or design performed outside of Alabama, such as the design of an automobile part or other product designed outside of the State of Alabama, nor would one be prevented from offering opposing testimony should the court declare the opposing expert otherwise qualified.

In *Hunter*, supra, the Supreme Court stated:

[I]f a person has any uncertainty as to whether his or her proposed testimony falls within the meaning of the "practice of engineering," the Licensure Act allows him or her to obtain an advisory opinion from the Licensure Board as to whether the statute had or will be triggered. See Regulation 330-X-1-.12, Ala. Admin. Code (Alabama State Board of Registration for Professional Engineers and Land Surveyors). Thus, a person wanting to testify to engineering matters within this State need not wait until after the testimony to determine whether it runs afoul of the Licensure Act.

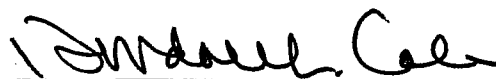
Although the prospective witnesses in this case have not sought an advisory opinion relative to the specific testimony that they expect to offer, it appears to this court

that the advisory opinion of the Licensure Board hereinabove referenced can be relied upon to permit their testimony within the parameters set by that opinion.

Accordingly, the court finds and IT IS ADJUDGED that the prohibition against engineering testimony found in Section 34-11-1(7) shall not be applicable to the testimony of prospective witnesses in this case so long as the testimony is consistent with that permitted in the Licensure Board's advisory opinion of August 28, 2006.

In view of this determination, it is further ORDERED that **this case is set for trial on February 12, 2007, at 9 a.m.**

DATED October 27, 2006.



Randall L. Cole
CIRCUIT JUDGE

COPIES TO:

J. Greg Allen
Robert K. Jordan

Eugene D. Martenson
H. Lanier Brown, II
S.A. Bradley Baker, III
Christopher C. Spencer
A. Joe Peddy
Joel H. Smith
E. Allen Dodd, Jr.

ATTORNEY FOR:

Plaintiff(s) Sherry Powell, et al

Defendant(s) Toyota Motor Corp., Toyota
Motor Sales, U.S.A., Inc., Southeast Toyota
Distributors, LLC and Takata Seat Belts, Inc.