TORT LAW UPDATE

MONTGOMERY COUNTY BAR ASSOCIATION
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OUTLINE
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A. FRAUD

1. ***State Farm v. Owen,*** **No. 1961950 (Ala. Aug. 21, 1998)** (In fraudulent suppression claims, the determination of whether there exists a "duty to disclose" is a question of law, and not a question for the jury.)

Katherine Owen filed a lawsuit against State Farm for fraudulent suppression. Katherine Owen owned a diamond ring. In 1987, Owen spoke with George Jones, a State Farm agent, about a policy which would insure her diamond ring and another ring. Owen executed an application for a personal-articles policy. Jones told Owen that, to purchase the policy, she needed to have the jeweler appraise it to see how much insurance she needed. An appraiser valued the ring at $1,000. The next day, Owen returned the appraisal form to Jones' office.

State Farm subsequently issued to Owen a "replacement cost" policy. This type of policy provides that, in the event of a loss, either the insured item would be replaced or the policyholder would be paid the lower of the policy limits or the amount it would cost the insured to replace the item. Owen believed that State Farm's cost to replace the jewelry would be the same as the appraisal price of the jewelry.

Thereafter, Owen's diamond ring was stolen. When Owen filed a claim of loss, State Farm requested that she obtain another appraisal for the stolen ring. The same jeweler appraised the ring at approximately $1,400. However, the State Farm adjuster was able to find a replacement ring of the same quality for approximately $900. Owen, under the terms

of the policy, elected to be paid for her ring as opposed to receiving a replacement. State Farm tendered a check to Owen for approximately $900 which she refused. Thereafter, Owen filed suit against Jones and State Farm for fraudulent suppression. Owen claims State Farm had misled her into believing that, in the event of a loss, she would receive the ***appraisal value*** of the jewelry. Furthermore, she alleged that State Farm had failed to inform her that her premiums would be based on the appraisal value. She contended that this was a fraudulent practice by State Farm because State Farm would never pay her more than its discounted replacement cost. The trial court submitted the fraudulent suppression claim to a jury and the jury found in favor of Owen and awarded $1,399 in compensatory damages and $130,000 in punitive damages against the defendants.

Under fraudulent suppression, the first element that a plaintiff must establish in order to prevail is that the defendant had a duty to disclose the existing material fact. On appeal, the Court made it clear that the existence of a duty to disclose is a question of law to be determined by the trial judge. "Simply stated, the question of duty is a judgment whether the law will impose responsibility on a party for its conduct toward another. . . . [A] duty analysis is inherently a legal analysis that entails an intellectual process of identifying, weighing, and balancing a number of competing factors. . . . That is an analysis our legal system recognizes as best undertaken by a judge." The Court noted, in most cases, whether a duty exists is a mixed question of law and fact. Nevertheless, the Court found that the duty analysis does not become a jury function simply because fact questions are implicated in the analysis. In cases where there are disputed facts, the Court explained that the jury is allowed to determine only disputed facts upon which the alleged duty rests, not the existence of the

duty itself. If the judge finds that the circumstances as alleged would be enough to create a legal duty, then the judge can instruct the jury as to what that duty would be if those circumstances exist. The jury then decides whether those circumstances indeed existed. The court overruled all prior cases giving the jury the responsibility for determining of a duty to the plaintiff.

The Court suggested the following jury instruction be given in cases where there are disputed facts:

SUPPRESSION OF TRUTH - DUTY TO DISCLOSE

> The plaintiff contends that the defendant was guilty of a legal fraud because the defendant (concealed) (withheld) material facts from the plaintiff and without knowledge of such material facts the plaintiff acted to his injury. The defendant denies those allegations and, therefore, the burden is upon the plaintiff to reasonably satisfy you from the evidence of the truthfulness of each of the following claims:
>
> 1. That the defendant (concealed) (withheld) material facts from the plaintiff to induce the plaintiff to act; and
>
> 2. That without knowledge of such material facts the plaintiff acted to his injury.
>
> In determining whether the plaintiff has sustained the foregoing burden, you may consider the value of the particular fact(s) involved, the relative knowledge of the parties, any inequality of the condition of the parties, and whether the defendant has some particular knowledge or expertise not shared by the plaintiff.

After making this pronouncement, the Court then held that State Farm did not have a duty to disclose. The Court noted that Owen was an educated woman and did not come to the table "without any knowledge of insurance practices."

2. *Williamson v. Indianapolis Life Ins. Co.*, No. 1970998 (Ala. Dec. 4, 1998) (In this "vanishing premium" case, the Court holds that, even

> though the plaintiff had not had to make any out-of-pocket payments past the date that the premium was supposed to vanish, Williamson was not precluded from bringing suit because the premiums already paid on the policy were sufficient to support a finding that he had been damaged.)

In 1992, Williamson purchased two whole-life "vanishing-premium" insurance policies called "quick pay life" policies from the defendant, Indianapolis Life Insurance Company. A "vanishing-premium" policy is one where, after a certain number of premium payments have been made, the policy itself generates sufficient income through dividends and interest to pay any additional premiums. Williamson claimed that, before he purchased the policies, Indianapolis Life's agent, Byrne Abele, told him that if he made premium payments of approximately $92,000 a year for ten years, the policy would then go on "auto pilot" and he would not have to make any further premiums past ten years. The premiums would vanish in 2002. In actuality, the premiums never vanish. Premiums were due and payable for life of the policy. When Williamson received a document indicating that his payments would be due until 2006, Williamson filed suit for fraud.

The case was filed in the United States District Court for the Northern District of Alabama. Judge Propst questioned whether there was a justiciable controversy and certified the following questions to the Supreme Court of Alabama:

> (1) Whether a claim based on a "vanishing-premium" policy is justiciable before the due date of the first out-of-pocket premium payment that is due for a period that is beyond that which the insurer represented that premiums would be paid; and
>
> (2) Whether Williamson's claims are made nonjusticiable by the fact that he has not had to pay any out-of-pocket premium for the period beyond the year 2002 and will never have to make such an out-of-pocket payment if he dies before 2003.

In finding that a justiciable controversy existed, the Court reasoned that a person who is induced by fraud to purchase an insurance policy that is materially different from what the policy was represented to be has suffered damage by paying premiums on that policy. "Make no mistake, even if the insured files no claim, the loss of what the insured paid for constitutes legal damage or a legal injury. The insurer cannot be allowed to profit from its fraud simply because the insured is lucky enough never to have used the coverage." "Williamson relied on a world of certainty when he decided to purchase a vanishing-premium policy; he did not get what he bargained for--Indianapolis Life has conceded that Williamson is living in a world of maybe." The Court concluded that Williamson stated a presently valid claim; that he was damaged by not receiving the insurance product that was represented to him. Therefore, Williamson was not precluded from suing Indianapolis Life because the premiums that had already paid on the policy was sufficient to support a finding that he had been damaged.

Chief Justice Hooper, Maddox and See dissented. In his dissent, Justice Maddox stated that the majority's rationale required a finding based on "speculation" that the representations made to Williamson would ultimately be proved to have been false. He noted that there was absolutely no method of proving whether his representation was true or was false until the end of the year 2002. Maddox reasoned that, until Williamson has been required to pay any premiums beyond what he alleges he was told, Williamson cannot prove any actual damage.

3. ***Ex parte Horton*, 711 So. 2d 979 (Ala. 1998)** (The Court reaffirmed the principle that, in fraud cases, discovery must necessarily be broader than in other cases because of the heavy burden of proof imposed upon the one alleging fraud.)

The Hortons filed a Petition for Writ of Mandamus requesting the Court to direct the trial court to grant their motion to compel additional discovery from a client list provided to them by Alfa relating to one of its agents. In April, 1995, the Hortons filed suit against Alfa alleging that, through its agent, Alfa had made fraudulent misrepresentations to them regarding the policies they purchased with Alfa. Between 1982 and 1986, the plaintiffs bought a series of whole life policies from Alfa. They were told by the agent that the policies would be "paid up" after a certain number of years of premium. Then, in 1990, Alfa's agent sold the Hortons two more life insurance policies, both of which were term life policies. The Hortons alleged that they did not know at the time that they were buying insurance. The Hortons alleged that the agent told them that the forms they were signing were merely to update their whole life insurance policies, but in fact these term policies replaced the Hortons whole life policies and were paid for by the cash values of the whole life policies.

During the discovery process, the Hortons requested that Alfa produce the name and addresses of all persons to whom this agent had sold a life insurance policy to during the previous ten years. Alfa objected. The trial court then issued an order allowing the Hortons only limited discovery--the Court ordered Alfa to produce their client list, but allowed the Hortons to contact only every fourth person on the list. The trial court stated that it believed such discovery would provide the Hortons a representative sample of Alfa policyholders and said that if the Hortons believed they needed additional discovery, the Court would entertain further requests. The Hortons followed the Court's instructions. However, their response to the discovery was inadequate and the Hortons moved to compel

additional discovery from the client list. Alfa objected and the trial court denied the plaintiff's motion to compel. Horton then filed a Petition for Writ of Mandamus.

In granting the plaintiff's writ of mandamus, the Court noted that it had the responsibility to determine whether the Hortons, in light of the nature of their claim, had demonstrated a particular need for further discovery. The Court stated that, when the plaintiff alleges fraud, discovery must necessarily be broader than in other cases because of the heavy burden of proof imposed on the one alleging fraud. The Court held that, because the evidence the Hortons sought was relevant and admissible, it was therefore discoverable. The Court further stated that a restriction on the discovery as in this case is an abuse of discretion." When the discovery requests of a plaintiff alleging fraud is closely tailored to the nature of the fraud alleged, the discovery should be allowed in full, as long as the party approving discovery does not show that the requested discovery is oppressive or overly burdensome."

The Court noted that discovery in full has become increasingly important in light of ***BMW v. Gore***. The United States Supreme Court stated that the most important indicator of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct. The Alabama Supreme Court stated that since ***Gore*** gave that factor "greater significance," the plaintiff has a "concurrent need for broad pretrial discovery that might lead to evidence of similar misconduct by the defendant."

4. ***Ex parte O'Neal,*** **713 So. 2d 956 (Ala. 1998)** (It was not an abuse of discretion by the trial court in not compelling discovery when such discovery would place an undue burden on the defendant).

In this action, the plaintiff petitioned the Supreme Court for a writ of mandamus directing the circuit court to require Safeway to respond fully to certain interrogatories. O'Neal was involved in an automobile accident in February 1995. He immediately informed Safeway, his insurance carrier, of the accident. In June, 1995, a Safeway representative took O'Neal's statement regarding the accident. Thereafter, O'Neal was sued as a result of the automobile accident. Although Safeway contacted him about his claims against his insurance policy, Safeway failed to pay O'Neal and refused to provide him a defense in the lawsuit. O'Neal sued Safeway alleging breach of contract and bad faith. During discovery, O'Neal served Safeway with interrogatories requesting the following things: (1) lawsuits filed against Safeway claiming bad faith, and lawsuits filed against Safeway alleging fraud in Alabama since 1990; (2) the names of all former policyholders whose insurance claims were investigated by the adjuster who handled O'Neal's claim; and (3) the names of all former policyholders who complained in any way or manner about the way the adjuster handled their insurance claim from 1992 to present.

Safeway objected to the request stating that it was humanly impossible for the defendant to answer these questions because the files are neither kept nor maintained in a manner sought by the question. Apparently, in order to respond fully to the interrogatories, the defendant claimed it would literally have to shut down its operations to make the intensive search for the answers required by the interrogatories. The trial court then ordered Safeway to produce the information requested "if it exists in the form requested, but Safeway did not have to create a list or a method of identification if it did not currently exist." O'Neal filed a writ of mandamus.

Again, the Court noted that because of the heavy burden the plaintiff carries in proving fraud and bad faith, and because the defendant in these type actions are usually the sole possessor of the information needed to meet the burden of proof, wide latitude is given a plaintiff during the discovery process. Upon this principle, the court held that the trial court abused its discretion in placing limitations on Safeway's required response to interrogatory #1 regarding bad faith and fraud lawsuits filed against Safeway. The court rejected Safeway's argument that information was "unavailable" because records were not kept over the course of business. The court noted that this fact is neither an excuse nor a justification for refusing to comply with a reasonable and necessary discovery request.

However, the Court upheld the trial court's ruling with regards to interrogatories #2 and #3. The Court stated that these interrogatories were so broad that to require the defendant to respond in the manner requested by O'Neal would place an undue burden on the defendant. "These requests ask for information the retrieval of which would require an individual review of literally thousands of files and which is arguably not reasonably calculated to lead to admissible evidence. To force Safeway to answer these two interrogatories would result in a waste of time, money and effort, thus defeating one of the purposes of discovery." The court noted that Rule 33 allowed the defendants to produce the business records instead of having to compile any lists.

B. PERSONAL INJURY

1. ***Hogan v. State Farm Mutual Automobile Ins. Co.,*** **No. 1970775 (Ala. Sep. 4, 1998)** (In answering a certified question from the United States District Court for the Middle District of Alabama, the Supreme Court holds that an individual can recover under their uninsured/underinsured motorist coverage when the tort feasor who caused the injury is immuned by Alabama's Guest Statute.)

Allison Hogan was injured in an automobile accident. In that accident, she was the passenger in an automobile driven by Sandra Brunson. Brunson attempted to cross traffic at an intersection when her automobile was struck by an oncoming vehicle. Hogan alleged that Brunson's negligence caused the accident, but made no claim of wanton conduct.

At the time of the accident, Hogan had an automobile policy with State Farm which had uninsured motorist coverage of $100,000 per person and $300,000 per accident. Brunson also had a automobile insurance policy with State Farm. Therefore, Brunson had insurance at the time of the accident. However, the Hogans were prohibited from recovering under Brunson's liability insurance coverage due to the Alabama Guest Statute. Under this statute, since Hogan was considered a guest in Brunson's automobile, she was precluded from recovering against Hogan since Hogan only alleged negligent, not wanton conduct.

Thereafter, in December, 1997, the Hogans filed a lawsuit against State Farm claiming that State Farm breached the uninsured motorist provision in their contract with them by denying coverage for the accident. The Hogans contended that, even though Brunson was in fact insured, she was uninsured for purposes of Alabama's Uninsured Motorist Act because the Hogans were prohibited from recovering against Brunson due to Alabama's Guest Statute. The federal court then certified the following question to the Alabama Supreme Court:

> Is an automobile covered under a liability insurance policy considered an "uninsured motor vehicle" under the Alabama Uninsured Motorist Act. . . . for the purpose of the passenger in the same automobile recovering from her own separate uninsured motorist coverage when she is barred from recovering for negligence from the liability policy covering the driver of the automobile because of the Alabama Guest Statute?

The Supreme Court stated that "the basic question we are asked to answer is whether the Hogans can recover under the terms of their uninsured motorist policy even though they cannot recover from the alleged tort feasor because the tort feasor is immune from liability through the operation of the guest statute." The Court then compared the fact situation to the case of ***State Farm v. Jeffers*, 686 So. 2d 248 (Ala. 1996).** In ***Jeffers***, the court found that since the Doctrine of Substantive Immunity prevented a plaintiff from recovering damages from the tort feasor, a Houston County Sheriff's deputy, for injuries she suffered in an automobile accident, the plaintiff could recover from her uninsured motorist policy because the Sheriff's deputy was considered "uninsured" due to his immunity. When applying ***Jeffers*** to the instant case, the court held that "the passenger, even though she may be precluded from suing the owner or the operator of the vehicle in which she was a passenger, because of the provisions of the guest statute, may be legally entitled to recover damages under the Uninsured Motorist Statute.

2. ***Edgar v. Riley,* No. 2970646 (Ala. Civ. App., Dec. 4, 1998)** (The Court upheld a $30,000 jury verdict against the owner of a pit bull dog who had bitten an eleven-year-old boy.)

In this case, Zachary Riley, an eleven-year-old, rode his bicycle to a neighbor's house whereupon, getting off of his bike, he was bitten by the neighbor's pit bull dog. The parents of Zachary sued the Edgars, owners of the pit bull dog, for common law negligence in

failing to restrain or to prevent the dog from injuring Zachary. The jury returned a verdict in favor of the Rileys for $30,000. The Edgars appealed.

The Defendants claimed that they did not know that Zachary was on their property until after he had been bitten. Therefore, they claimed that Zachary was a trespasser and the only duty owed to him was not to wantonly or willfully injure him. The court noted that a person is a trespasser when he enters or remains on land in another's possession without privilege to do so, created by the possessor's consent or otherwise. The evidence reflected that Zachary visited the defendants' home on a regular basis. Zachary's father even expressed concern about Zachary's visitations to the Edgars' home, but the Edgars assured them that Zachary was welcome at their home any time. The court found that the evidence supported a finding that Zachary was a licensee at the time he was bitten, not a trespasser. Moreover, the court found that the owner or keeper of an animal will be charged with the knowledge of the propensity of the breed of animal he or she owns. In this instance, even though the defendants' dog had never expressed any violent tendencies in the past, the veterinarian testified that, as a breed, pit bull dogs are unpredictable and can be violent and dangerous. The defendants never investigated the propensities of this breed of dog and often permitted it to wander unrestrained. The court held that the jury could infer from this evidence that the Defendants breached their duty owed to Zachary to use his reasonable care to prevent injury to him. Therefore, the Court of Appeals affirmed the judgment of the trial court in this case.

3. ***Tanner v. Lee,*** **No. 2971010 (Ala. Civ. App., Dec. 4, 1998)** (The Court affirmed summary judgment against the plaintiff because the minor child was found to have knowledge and appreciation of the risk

when he was injured after falling from the second story of the defendant's partially constructed home.)

The Tanners sued the defendant Lee for damages based on personal injury. The Tanner's son, Sammy, was injured when playing in a partially constructed house that was being built by Lee. The complaint alleged that Lee had negligently and/or wantonly maintained the premises by creating or allowing a dangerous condition to exist and that the dangerous condition caused Sammy's injuries. Lee filed a motion for summary judgment. The Tanners in their response stated that they had returned the services of an expert witness to testify about the defendants' violation of the OSHA standards as those standards apply to new home construction, but that the expert had been unable to complete his affidavit. After a hearing, the trial court entered summary judgment in favor of Lee. The Tanners appealed. They argued that the trial court erred by not affording them the opportunity to secure an affidavit from the expert witness. In affirming summary judgment, the court stated that Sammy had testified that he knew there was a risk that he would be injured by playing on the second floor of the partially constructed home. The court reasoned that one of the requirements that the plaintiff would have to prove in their negligent action was that the plaintiff "has a lack of knowledge of the risk or lack of ability to appreciate the risk." The court held that since Sammy had testified that he knew the risk he was undertaking, the judgment of the trial court was due to be affirmed. The court stated that whether or not Lee violated OSHA standards became irrelevant since the plaintiff would not be able to meet one of the elements of their negligent cause of action, i.e., that the plaintiff lacked the ability to appreciate the risk or lacked knowledge of the risk.

4. ***Bacon v. Winn-Dixie,*** **Nos. 1971315 and 1971338 (Ala. Nov. 25, 1998)** (The Court holds that the plaintiff's failure to file a timely appeal was not "excusable neglect" even though plaintiff's counsel was never mailed a copy of the trial court's order on summary judgment.)

Bacon, a customer, sued Winn-Dixie alleging that it had negligently packaged for her a one-gallon container of cranberry juice in a single plastic bag; that the bag had burst; that the juice container had fallen on her foot; and that as a result, she was caused to be injured. On February 6, 1998, the trial court entered a summary judgment in favor of Winn-Dixie. However, Bacon did not learn of the summary judgment until April 3, 1998, after the 42 days for an appeal had expired. On Bacon's motion, the trial court extended the time to appeal, pursuant to Rule 77(b). On appeal, Winn-Dixie argued that the trial court erred in granting Bacon an extension of time to file a notice of appeal because Bacon failed to demonstrate the "excusable neglect" required by Rule 77(b) and/or failed to say that she had made the diligent effort as required by Rule 77(b) to learn whether a trial court had entered a judgment.

The record reflects that Bacon never received notice of the judgment. The case action summary sheet has no notation to indicate that the clerk mailed Bacon's counsel notice of the judgment and there is no written record of her counsel's having received notice of the judgment. Bacon asserted that, to an extent, her counsel was being neglectful, that neglect was excusable, since the docket sheet revealed that the clerk failed to fulfill her duties imposed by Rule 77(b). The Court, although noting that the clerk's office failure to notify Bacon of the judgment was "regrettable," held that Bacon had not made the requisite showing of "excusable neglect" required under Rule 77(b). Bacon's counsel made no discernible effort to "keep abreast of the status of the case," i.e., he made no attempts to

follow the status of the case by checking with the clerk's office. "When nothing can be shown beyond a party's simple reliance on the notification process of the clerk's office, the plain language of Rule 77(b) prohibits the granting of an extension of time in which to appeal." Therefore, the Court dismissed the plaintiff's appeal finding that it was untimely.

C. VENUE - FORUM NON CONVENIENS

1. *Ex parte First Family Financial Services,* 718 So. 2d 658 (Ala. 1998)

In this case, Margaret Ramsey filed a class action in Marengo County alleging that the defendant committed fraud by indulging in a practice known as "flipping." Flipping occurs when a lender requires a borrower in need of additional funds to refinance an existing loan rather than allowing the borrower to take out a new, separate loan. First Family moved to transfer the case to Dallas County pursuant to § 6-3-21.1 of the Alabama Code, commonly known as the Forum Non Conveniens Statute. The trial judge denied First Family's motion. First Family then filed this petition for writ of mandamus.

The Supreme Court granted First Family's writ and directed the trial judge to transfer the case to Dallas County. In doing so, the court noted that the plaintiff had never lived in the forum county; no transaction between the plaintiff and the defendant ever occurred in the forum county; and the defendant had no office, employees or documents in the forum county. Even though the trial judge has a degree of discretion in transferring venue of a

case, that discretion can be abused when the facts reflect that the case should be transferred due to the "interest of justice." The Court held that First Family had met the burden of showing that the private and public interests factors involved in this case weighed heavily against litigation in the forum the plaintiff selected. "Although we recognize that a plaintiff should be given great latitude in choosing a forum, we also recognize that one of the reasons the Unified Judicial System was established, and one of the reasons the Legislature adopted § 6-3-21.1, was to promote justice. We believe it clear, under the facts of this case, that the interest of justice requires that it be transferred."

2. *Ex parte Independent Life and Accident Insurance Co.*, No. 1971126 (Ala. Sep. 11, 1998)

In this case, following the precedent set in ***Ex parte First Family Financial Services*,** the court granted a defendant's writ of mandamus and ordered the trial court to transfer a fraud action from Lowndes County to Montgomery County under the forum non conveniens statute. White and her husband, Joe Young, bought several life insurance policies from Independent Life. One of those was a $10,000 policy insuring the life of White's father. Her father died 13 months later. Upon his death, White and Young filed a claim for benefits under the policy. Independent Life told them that Jordan's policy had lapsed due to failure to pay premiums, and, therefore, no benefits were due. The plaintiffs sued Independent Life and three of its agents in Lowndes Circuit Court alleging various counts, including fraud. Independent Life filed a motion to transfer the case to Montgomery County which the trial court denied.

In granting the defendant's writ of mandamus and ordering the transfer of this case to Montgomery County, the Supreme Court noted that all of the plaintiffs live in

Montgomery County; each of the policies at issue were sold in Montgomery County; all transactions involving these policies took place in Montgomery County; the three agents named as defendants worked out of Independent Life's office located in Montgomery County; Henry Jordan lived in Montgomery County and died in Montgomery County; and all nine party witnesses live in Montgomery County. However, one of the named defendants, Sonya Axle, lived in Lowndes County. Yet, the court found that Axle did not sell the plaintiff any other policies at issue and Axle did not handle any of the premiums related to this plaintiff's policies at issue. The Court determined that Sonya Axle played a minor role in events giving rise to the action. The court, applying its reasoning in ***Ex parte First Family Financial Services***, held that, under these facts, it was in the "interest of justice" to transfer the case to Montgomery County.

Justice Cook wrote a noteworthy dissent in this case. Justice Cook argued that the majority of the Supreme Court has seized upon the phrase "interest of justice" as the foundation of a new doctrine. Justice Cook asserts that the phrase will now be used by the Supreme Court as a "means to provide appellate courts an excuse to review trial court orders de novo;" no longer applying the abuse of discretion standard. Justice Cook also noted that the majority opinion failed to mention that one of the defendants lived in the forum county and that some of the defendants have "debit routes" that take them into the forum county. In addition, Justice Cook pointed out that the forum court county was only twenty miles from Montgomery and that this Court had previously held that a distance of 35 miles from the forum county to the city of transferee county was not so great that the trial court can be said to have abused its discretion.

3. *Ex parte National Security Insurance Co.*, No. 1970718 (Ala. Oct. 23, 1998)

In this action, the Supreme Court ordered the trial court to transfer an action pending in Lowndes County to Elmore County. The plaintiff filed her complaint in Lowndes County alleging fraud and breach of contract in regards to the purchaser of several insurance policies from the defendant. The plaintiff lived in Elmore County; the policies were applied for and purchased in Elmore County; premiums were collected in Elmore County. The plaintiff asserted that the case should not be transferred because the close geographical proximity of Lowndes County and Elmore County precluded a showing of the significant benefit of convenience that is necessary before the transfer could occur. The Supreme Court, however, rejected this argument saying that this argument ignores the words "interest of justice." In applying ***Ex parte First Financial*** and ***Ex parte Independent Life*****,** the Court held that it was in the "interest of justice" to transfer the case from Lowndes County to Elmore County.

D. ARBITRATION

1. *Ex parte Discount Foods, Inc.,* 711 So. 2d 992 (Ala. 1998)

(The Court holds that claims of intentional torts are not arbitrable when the claims do not arise from the parties' contractual dealings.)

Discount Foods petitioned the Court for a writ of mandamus directing the trial court to withdraw an order compelling the parties to arbitration. Discount Foods sued the defendants for tortiously interfering with contractual and business relations, unfair competition, and violation of trade secrets and anti-trust laws. The claim arose out of Discount Foods' transactions with a third party to acquire a lease of commercial real estate. Contained in the retail agreements between Discount Foods and the defendants was an arbitration clause which stated "any controversy or claim arises between the parties, including, but not limited to, disputes relating to this agreement, shall be resolved by binding arbitration . . . " Discount Foods argued that the claims involved in the lawsuit were in no way associated with its contractual relations with the defendant. Discount Foods contended that the arbitration provision found in the retail agreement between Discount Foods and Super Value was not intended to bind the parties to force arbitration with respect to intentional torts allegations that are unrelated to their contractual doings. The Supreme Court agreed with the plaintiff's argument noting that a party cannot be required to arbitrate a dispute that he or she did not agree to arbitrate. The Court reasoned that an arbitration provision, although broad, did not extend to a dispute over the intentional tort of a party to a contract when the tort did not concern the negotiations, terms, or any other aspect of the parties' contractual dealings. In this case, the Court found that the intentional tort of interference with business relations did not stem from the parties' contractual dealings, but from an alleged separate and distinct act by the defendants. "The parties' arbitration provision, although broad, cannot be construed to encompass intentional torts of the parties

that are separate and distinct from the dealings that give rise the signing of the document containing the arbitration provision in the first place.

2. *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33 (Ala. 1998) (The Court holds that the plaintiff is considered the "initiating party" under the arbitration rules and, therefore, must pay the arbitration "filing fee.")

In this case, an automobile buyer brought an action against an automobile dealership. The plaintiff, John Phelps, sued Dan Tucker Auto Sales over his purchase of a used automobile. The parties entered into an arbitration agreement during the sale of the vehicle in question. The circuit court granted the defendant's motion to compel arbitration. Phelps petitioned the Supreme Court for a writ of mandamus directing the trial court to rescind its order compelling arbitration. However, that writ was denied by the Supreme Court.

Thereafter, the plaintiff requested the trial court to direct the defendant to pay the arbitration/filing fee, claiming that the payment of the arbitration fee would pose a hardship on him. The circuit court ordered the defendant to pay the arbitration fee. At that point, the defendant mandamus the Supreme Court. The question raised on the petition of mandamus was which of these parties was the "initiating party" as contemplated by the Commercial Arbitration Rules. The plaintiff argued that the rules provided that the "initiating party" was to file and pay the fee and, in this instance, the defendant was the initiating party because it was the defendant who asked the Court to compel arbitration.

According to the Commercial Arbitration Rules relating to "administrative fees," the party initiating the arbitration pay was to pay the "filing fee." The Court reasoned that, in applying general definitions to the facts in the present case, it would be awkward to interpret these rules to mean that the defendant is the claimant or the initiating party. Such an

interpretation would force the defendant to state the nature of the claims against itself. Equally awkward, such an interpretation would then force the plaintiff to answer the very complaint that he filed against the defendant.

The Court then held that it was unreasonable to believe that the parties in this case intended to apply the term "initiating party" and "claimant" to the defendant, the party who is defending itself against the claims claimed by the plaintiff. "Judging from the plain meaning of these labels as they are used in the rules and from what the parties intended by the terms "claimant" and "initiating party," it is clear that the plaintiff is the claimant and the defendant is the respondent." Had the plaintiff initially honored the terms of his agreement to arbitrate, instead of filing a civil action, he would have been required to file with the AAA a written demand for arbitration accompanied with the appropriate prepaid filing fee. In that case, the plaintiff obviously would have been considered the initiating party. The logical outcome of the circuit court's order would be that any plaintiff could avoid paying the filing fee by going into court first and forcing the defendant to move to compel arbitration.

In addressing the plaintiff's argument that it would place a hardship upon him to force him to pay the filing fees, the Court noted that the arbitration rules contained a provision whereby AAA can defer or reduce fees "in the event of extreme hardship" on a party.

3. ***Ex parte McNaughton*, No. 1961708 (Ala. Aug. 28, 1998)** (The Court finds that an arbitration provision within an employee's handbook is binding on the employee.)

The plaintiff filed a writ of mandamus directing the circuit court to vacate its order compelling arbitration claims against the defendant. The Supreme Court denied the

mandamus. The plaintiff was hired by the defendant, United Health Care. The plaintiff was given an employee handbook and was required to sign a form acknowledging that she had received the handbook. The employee handbook incorporated an arbitration agreement requiring the plaintiff to submit any employee claim to arbitration. The acknowledgment form that the plaintiff signed stated "I understand that the provisions in this handbook are guidelines and, ***except for the provisions of the employment arbitration policy,*** do not establish a contract or any particular terms or conditions of employment between myself and United. I understand that the employment relationship is 'at will' . . . "

The plaintiff later sued the defendant claiming fraud based upon a promise by the defendant to transfer her from its Montgomery office to the Birmingham office. Plaintiff also claimed intentional interference with business relations. The plaintiff first argued that the acknowledgment form she signed did not create a binding agreement to arbitrate because her employment was an "at will" employment and because there was a provision in the employee handbook expressly stating that the policies contained in the employee handbook were not binding. The Court disagreed stating that "when one party proposes a standard of conduct to another party, the party may, of course, agree to be bound by certain of the qualities in the proposed contract and not to be bound by others." The Court pointed to the signed acknowledgment form by McNaughton stating that it indicates the parties agreed to be bound by one provision of the employee handbook, i.e., the arbitration policy. The court also held that an employer's providing continued "at will employment" is sufficient consideration to make the employee's promise to its employer binding.

Next, the plaintiff argued that the acknowledgment form binding her to arbitration was void under the doctrine of unconscionability\mutuality of remedy because the defendant retained the right to choose arbitration or another forum but the same was not afforded to the employee. The plaintiff relied heavily on dictum from two justices in ***Northcom, Ltd. v. James*, 694 So. 2d 1329 (Ala. 1997).** "In a case involving a contract of adhesion, if it is not shown that the party in an inferior bargaining position had a meaningful choice of agreeing to arbitration or not, and if the superior has reserved itself the choice of arbitration or litigation, the court may deny the superior party's motion to compel arbitration based on the doctrine of mutuality of remedy and unconscionability." The Supreme Court rejected this dictum stating that arbitration is not inherently unconscionable. The plaintiff entered into a legally binding agreement with the defendant to arbitrate her claims. The arbitration agreement was not void based upon the doctrine of unconscionability\mutuality of remedies.

4. ***Georgia Power Co. & Ledbetter v. Partin,* No. 1961192 (Ala. Sep. 4, 1998)** (The Court holds that a loss of consortium claim was derivative of the spouse's claims and, therefore, subject to the same arbitration clause of the spouse.)

Defendant Georgia Power and Jerry Ledbetter filed a motion to compel arbitration which was denied by the trial court. The Supreme Court reversed. The plaintiff was an employee of the Orba Corporation and was injured while working at a facility owned by Georgia Power. Defendant Ledbetter supervised the plaintiff. Orba operated the facility in conjunction with an operation agreement with Georgia Power. Within the operation agreement, there was an arbitration clause requiring any disputes arising under the agreement to be arbitrated. The plaintiff sued Georgia Power and Ledbetter alleging negligent

maintenance of the facility. The plaintiff's wife also sued the defendants claiming loss of consortium. Three years later, after substantial discovery had occurred, the plaintiff amended their complaint to include a claim against Georgia Power for breach of contract. The plaintiffs claim that the husband was a third-party beneficiary to the operation agreement between Orba and Georgia Power, and that as a third party beneficiary, he was injured as a result of a breach of that contract.

Upon the plaintiff's amendment, the defendants filed a motion to compel arbitration because the contract contained an arbitration clause. The trial court denied the motion. The Supreme Court held that the plaintiff in the present case could not assert a breach of contract claim as a third-party beneficiary while avoiding the arbitration provisions contained in the contract which he seeks to enforce. A third-party beneficiary cannot accept a contract's benefits and at the same time avoid its burdens or limitations. The court also held that the claims against Georgia Power's supervisor, Ledbetter, would be subject to arbitration as well because he was an agent of the defendant. Finally, the court held that the plaintiff's wife's loss of consortium claim was subject to arbitration. The Court reasoned that she could not assert claims arising out of the agreement executed between the parties and not be required to abide by the agreements herself. Although the wife's loss of consortium claim was separate from her husband's, since she alleged that her injuries was caused by the same breach of duty that her husband says resulted in injuries, she too was subject to the arbitration clause.

The plaintiffs also argued that the defendants have waived their right to arbitration because the defendants had substantially invoked a litigation process. The court disagreed

holding that Georgia Power had promptly moved to compel arbitration after the parties amended the complaint. The court reasoned that the amended complaint was the first time the plaintiffs' claims were subject to the arbitration clause and the operations agreement.

Justice Shores wrote an interesting dissent in the case. She stated:

> Under the holding in this case, the plaintiffs could have avoided arbitration by not amending their complaint to state a contract claim. I agree with this conclusion. However, it does not follow that the act of amending to state the contract claim makes the plaintiffs' non-contract claims also subject to arbitration. If, as the majority says, the contract goes to the "very heart" of the matter upon which the original complaint was based, then Georgia Power waived its right to compel arbitration after the non-contract claims by engaging in the litigation process for three years.

E. DAMAGES

1. ***Life Insurance Company of Georgia v. Johnson*, No. 19700737 (Ala. August 21, 1998)** (The Court holds that interest on a judgment begins to run from the date the trial court enters judgment, despite any subsequent remittiture of the award.)

The trial court held that the interest on the plaintiff's punitive damage award began accruing on the date the jury returned a verdict in favor of the plaintiff. The trial court held that the subsequent remittitur of that award did not effect the date of post judgment interest. The Supreme Court affirmed in part and reversed in part.

The trial court entered a judgment in favor of the plaintiff on June 2, 1994, in the amount of $250,000 in compensatory damages and $15,000,000 in punitive damages. On June 18, 1996, the defendant tendered a check in the amount of $306,142.60 to satisfy the $250,000 compensatory damages portion of the judgment, plus interest accrued on that amount. After post trial motions and appeals, the punitive damages award was remitted to $3,000,000. On August 20, 1997, the plaintiff accepted the remittitur. On August 21, 1997,

the defendant tendered a check to the plaintiff for $3,000,986.30, which represented the punitive damages award and interest from August 20 to August 21, 1997. The plaintiff filed a motion to calculate interest on the entered judgment, and to enforce surety's liability to pay $1,129,315.00 in accrued interest. The plaintiff claimed that the defendant still owed interest on the amount of the $3,000,000 in punitive damages award from the date the trial court entered its judgment. The court found that the defendant owed money as interest which was calculated from the date of the initial entry of judgment. The defendant appealed the trial court's order.

Under § 12-22-71, if a remittitur is ordered by the Court, the judgment will be entered for that amount and it will date back to the time of the entry of judgment in the lower court. It has long been the rule in Alabama that where, pursuant to this section, an appellate court affirms a judgment based upon an Appellee's accepting of a remittitur of excess damages, interest on the reduced amount is to be calculated from the date of the rendition of the judgment in the trial court. See, e.g., ***Louisville and N.R.R. v. Parker,*** *223 Ala. 626, 138 So. 231 (1931).* "Indeed, the Court has held that when an appellate court affirms a money judgment but alters the amount due, the total sum so fixed bears interest from the date of the trial court's judgment, even without an express provision to that effect, because that is the "legal effect" of the affirmance." ***Kenny v. Pollack,*** *225 Ala. 229, 231, 142 So. 390 (1932).* Based upon the Court's prior decisions, the Supreme Court held that the trial court correctly concluded that post judgment interest on the remitted $3,000,000 punitive damages award was to be calculated from July 2, 1994.

The Court agreed with the defendant's argument that the trial court incorrectly ruled regarding the application of the partial payment of $306,142.60 by the defendant. The trial court held that that amount should be applied to the entire $3,250,000 judgment, and not only to the compensatory damages. The court reversed that ruling stating that it was clear that it was the defendant's intention that that amount be applied specifically to the compensatory damages portion of the plaintiff's award.

2. *Life Insurance Company of Georgia v. Smith*, 719 So. 2d 797 (Ala. 1998)

Appeal from judgment on jury verdicts in favor of plaintiffs in five separate actions arising out of sale of insurance policies to plaintiffs. Plaintiffs sued the agent (Winsett) for fraudulent misrepresentation and sued Life of Georgia for negligence and wantonness in the hiring, retention and supervision of Winsett. Winsett misrepresented that Life of Georgia would enroll plaintiffs (employees of the Academy in a "cafeteria plan" that would result in a "savings plan" or "retirement plan" allowed by the IRS without additional taxes. In fact, Winsett sold plaintiffs a life insurance policy that was not subject to the IRS regulations. All five lawsuits were consolidated for trial.

The jury returned general verdicts against Winsett and Life of Georgia, awarding each plaintiff $0 in compensatory damages and $200,000 in punitive damages.

a. Statute of Limitations Defense

Defendants argued that four of the five plaintiffs failed to file their claims within the two year statute of limitations applicable to the fraud and negligence claims. With regard to the fraud claims, which were filed after the Court's opinion in ***Foremost,*** the Court held that the fraud claims were tolled in view of Winsett's active and repeated misrepresentations

subsequent to plaintiffs' discovery of documents that would have put reasonable persons on notice of the fraud and that this operated to toll the limitations period on the fraud claims. The Court also pointed out that, under certain circumstances, negligent/wanton supervision was an ongoing tort. Therefore, with regard to the negligence claim, the Court held that the negligence/wantonness claim against Life of Georgia is barred to the extent it involves actions occurring prior to two years before the complaints were filed, but not to the claims relating to actions of Life of Georgia subsequent to that time.

Because the negligence/wantonness claim went to the jury in full (rather than time-divided as to four of the five plaintiffs), there is a "good count-bad count" issue. The Court held that the ***Aspinwall*** doctrine (405 So. 2d 134) requires that the court cannot assume that the verdicts were based only on plaintiffs' claims that are not time-barred.

Accordingly, the court reversed the judgments and remanded these claims for a new trial as to the four plaintiffs whose claims were outside the two year statute of limitations.

b. No Punitive Damages Without Award of Compensatory or Nominal Damage

The judgment in favor of Green was not affected by the reversal of the other four cases on the basis of the statute of limitations defense. The Court was compelled to consider whether the jury could properly award Green $0 in compensatory damages and $200,000 in punitive damages. Thus, the Court was squarely faced with the issue of whether a jury can award punitive damages without awarding any compensatory or nominal damages. After recognizing that prior Alabama Supreme Court cases had allowed recoveries for punitive damages without an award of compensatory or nominal damages, the Court observed that the U.S. Supreme Court decision in ***BMW v. Gore*** (517 U.S. 559) required

closer scrutiny of the relationship between compensatory damages and punitive damages. The Supreme Court concluded that, "We now require, therefore, that a jury's verdict specifically award either compensatory damages or nominal damages in order for an award of punitive damages to be upheld."

The Court further ruled that "the rule announced today will require that the jury be properly charged on the issue of nominal damages in a case where only such damages are appropriate, and it will require that the form of verdict provide the jury with the opportunity to answer an interrogatory in a manner such as in the example set forth below:

Form of Verdict - Verdict for the Plaintiff

1. Check one:

( ) We find that the plaintiff is entitled to compensatory damages in the amount of $_____. (Here fix an amount other than zero).

( ) We find that the plaintiff is entitled to recover nominal damages only.

2. Check one:

( ) We find that the plaintiff is not entitled to recover punitive damages.

( ) We find that the plaintiff is entitled to recover punitive damages in the amount of $_____.

Verdict for the Defendant

( ) We find the issues in favor of the defendant.

Of course, the purpose of this verdict form is to provide a fool-proof method for an award of at least nominal damages so as to justify the award of punitive damages so that the foregoing rule announced in this case is not violated.

The Court also recognized that where the source of the plaintiffs being made whole is a co-defendant's pro tanto settlement or any other source of compensation for injury for which the defendant is liable, so that compensatory damages have been eliminated, the jury verdict, pursuant to proper instructions from the trial court, should indicate the jury's finding that the plaintiff is entitled to nominal damages.

Although the Court stated that it will not apply the new rule of law to the judgment in favor of Green, the Court held that it would not search the record for evidence of nominal damage or injury. This, in turn, compelled the Court's reversal of Green's judgment.

c. Admissibility of Extrinsic Evidence of Fraud

The court addressed the matter of the trial court's admission of extrinsic evidence, since this matter is likely to arise again. The trial court admitted evidence of Winsett's dealings with a Georgia resident wherein he forged documents. There, Winsett misrepresented that he invested money obtained from her in bonds and securities, when in fact, he placed the funds in his own account. He was indicted in Georgia for the felony offense. In addition, the Court admitted evidence that Winsett forged application of persons residing in Alabama in order to inflate his sale account. The court held that evidence of collateral fraudulent acts is appropriate "pattern and practice" evidence to support a claim for punitive damages. The collateral instances are related to the question of whether Winsett forged documents allegedly signed by the five plaintiffs in this case.

The court observed that "under well-established Alabama practice, '[e]vidence of similar fraudulent acts [is] admissible to prove an alleged fraudulent scheme." The court

further observed that "Alabama practice does not require that the collateral acts be functionally identical to the conduct or misrepresentation forming the basis of the action." [C]onduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. Thus, on the basis of these principles, the Supreme Court concluded that the trial court did not err in allowing the jury to consider Winsett's fraud--which he admitted--in connection with his handling of the Kathy Stewart account in Georgia.

With regard to forgeries involving Gulf Coast Therapy, the court held that the fact that these instances of fraud post-dated the events on which the plaintiffs' claims are based does not bar the evidence of these instances. Where it is material, evidence of collateral conduct may be admitted even though the collateral conduct occurred after the transactions forming the basis of the plaintiff's claims. See C. Gamble, McElroy's Alabama Evidence Sec. 69.01(1) 95th ed. 1996).