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ALABAMA LAW – JUDICIAL OPINIONS

In this paper, we will discuss and review several important opinions from the past year of Alabama law. Most of the cases included in this paper were highlighted in Alabama Law Weekly 2007-2008 weekly newsletters, Maynard, Cooper & Gale Weekly Law Report 2007-2008 editions, and "Recent Civil Decisions", ALAJ Journal, Spring 2008, Summer 2008, and Fall 2008.

1. SOL – EXPOSURE - Jan. 25, 2008
Griffin v. Unocal Corp., 990 So. 2d. 291, (Ala. 2008)

For over thirty years, Alabama law included a Catch-22, preventing recovery for those who were injured by exposure to harmful substances. In fact, Justice Harwood in his dissent in Cline v. Ashland, Inc., 970 So. 2d. 755 clearly summed up the problem with Alabama's legal precedent regarding exposure.

> As things now stand, and as left in place by the majority in this case, the law in this State would seem to be this: A person exposed to a toxic substance having the potential to cause disease on a delayed basis, but who has suffered no manifest, present injury within two years thereafter, may not file an action within that two-year period. Hinton, supra; Southern Bakeries, supra. If, after two years, that same person in fact suffers an injury from the exposure and files an action, the action will be dismissed on the basis that it should have been filed earlier. Thus, no matter when the person attempts to file the action, it is either too soon or too late. This is a classic Catch-22, and one that would seem to violate Art. 1, § 13, Ala. Const. 1901, which provides, in pertinent part, "that every person for any injury done him ... shall have a remedy by due process of law."

Cline at *771-772.

Thankfully, Griffin v. Unocal changed this legal injustice and set us on a path for a more fair and balanced look at statutes of limitation in exposure cases. In Griffin, Brenda Griffin sued Unocal, her late husband David's employer, among others, for the wrongful death of her husband. While working at a tire plant from 1973 to 1993, David was exposed to numerous chemicals which eventually resulted in acute myelogenous leukemia in September 2003. He died in February 2004 from the disease. In February of 2006, one day short of two years after David's death, Brenda filed suit. Defendants moved to dismiss at the trial court level based on Garrett v. Raytheon, 368 So. 2d 516 (Ala. 1979), which had held that a personal injury action based on exposure to a hazardous chemical accrues on the date of the last exposure and an action not filed within two years of the last exposure is barred by the two-year statute of limitations. The trial court granted the motion and Brenda Griffin appealed.

The Supreme Court reversed and remanded. The majority opinion stated:

> As the defendant chemical companies aptly state, the dispositive issue in this case is whether 'the date of last exposure rule [is] still the law in Alabama.' Defendant chemical companies' brief, at 2. Stated simply, it is not, because we hereby overrule Garrett and its progeny. We do so for the reasons set forth in Justice Harwood's scholarly dissent to this Court's no-opinion affirmance in Cline v. Ashland, Inc., 970 So. 2d 755, 761, (Ala. 2007) (Harwood, J., dissenting), which is attached as an appendix to this opinion. We hereby adopt the reasoning of that dissent as the opinion of the Court in this case. "In particular, as Justice Harwood stated, 'a cause of action accrues only when there has occurred a manifest, present injury.' Cline, 970 So. 2d at 773 (Harwood, J., dissenting)(emphasis added). We need not repeat Justice Harwood's accurate description of the meaning of the word 'manifest' in this context. Further, as Justice Harwood advocated in his dissenting opinion in Cline, the new accrual rule of toxic-substance-exposure cases will be applied prospectively, except in this case, where it will apply retroactively. Griffin, as the prevailing party in bringing about a change in the law, should be rewarded for her efforts."

Griffin at *293.

Justice Harwood's dissenting opinion in Cline, was adopted by the Supreme Court in Griffin.

> Garrett's last-exposure rule is purely a 'court made' rule, because § 6-3-20 then provided, and § 6-3-20(a) now provides, only that civil actions must be commenced within the applicable limitations period 'after the cause of action has accrued.' The Garrett Court simply declared, as a matter of policy rather than scientific fact, that a toxic-exposure cause of action accrues contemporaneously with the last exposure to the toxic substance, it being judicially deemed that an injury has occurred at that time as a matter of law."

Griffin at *304-305.

Thus, the Court in Griffin provided us with a more fair and balanced description of when a cause of action accrues.

2. FICTITIOUS PARTY PLEADING – Dec. 7, 2007
Ex parte Bowman, 986 So. 2d 1152 (Ala. 2007)

The Alabama Supreme Court, in Bowman took a much more practical stance regarding fictitious party practice. They took into consideration the fact that discovery is often required to find all Defendants, even when a Plaintiff is most diligent.

In Bowman, Clarence Heard and his wife Janice Heard sued APV North America, the manufacturer of a continuous fermenter tank, and fictitious parties, for injuries sustained by Clarence at his workplace, Ventura Foods, LLC. The Heards amended their complaint after the statute of limitations ran to substitute Phil Bowman for a fictitious defendant, as Bowman was one of the co-employees or supervisors who negligently installed the tank. Bowman was Ventura's quality assurance manager at the time the tank was installed. Bowman filed a motion to dismiss or for summary judgment. He argued that he could not be substituted for a fictitious party since the Heards knew of his true identity at the time they filed suit. The trial court denied his motion and he petitioned for a writ of mandamus directing the trial court to dismiss him as a defendant. The Supreme Court denied his petition.

In that opinion, the Court recognized that a plaintiff may not substitute a person for a fictitiously described defendant unless (1) the plaintiff was ignorant of the defendant's true

identity at the time the complaint was filed and (2) the plaintiff used due diligence to discover the defendant's true identity before filing the complaint. Bowman at *1156. Although the Heards were aware of Bowman's role as quality assurance manager before filing suit, they argued that they were ignorant of Bowman's role regarding removing or failing to install a safety device on the tank until another worker's deposition was taken. The Court said that the knowledge of Bowman as quality control officer was not related to the Heards' claim.

> There is no logical and necessary linkage between knowledge that an individual had responsibility for the quality of a product produced and knowledge that such individual was a participant in acquiring, installing, and modifying the machine that makes the product. Bowman has failed to show that he is entitled to mandamus relief on the ground that Clarence knew that Bowman was in charge of quality control.

Bowman at *1157.

Because Bowman failed to assert that he was prejudiced by the eleven month delay between the co-workers deposition and the amendment of the complaint, the Court held that, the petition could not be granted on the basis of delay in substitution.

3. MEDICAL MALPRACTICE - LEARNED INTERMEDIARY DOCTRINE – Feb. 29, 2008; Springhill Hospitals, Inc. v. Larrimore, 2008 WL 542090 Feb. 29, 2008

Luther Larrimore went to Springhill Memorial Hospital in 2001 complaining of severe pain in his knee. The attending physician diagnosed Mr. Larrimore with gout. After discussing treatment options with him, the physician prescribed colchicine. When the hospital's pharmacist received the prescription, he contacted the physician about the dosage and it was adjusted based on his recommendations. After Mr. Larrimore left the hospital, he filled a prescription for 16 tablets, which was more than he was supposed to take for the gout attack. When Mr. Larrimore went home, he took one pill per hour through the night. The next day, he ended up in the emergency room where he was diagnosed with a reaction to the drug, by an emergency room

physician. He died three days later. His estate brought a wrongful death action against the hospital, and several other defendants. After a mistrial, a second jury returned a verdict against the hospital for $4 million in punitive damages. The hospital appealed.

Mr. Larrimore's estate argued that the hospital's pharmacist assumed a duty of care when he discussed the dosage change with the attending physician. The jury that awarded $4 million in punitive damages agreed with that argument. However, the Alabama Supreme Court disagreed with the jury and took that award away by reversing the jury's verdict and rendering a verdict for the hospital. They Court rejected Larrimore's argument that Alabama's learned intermediary doctrine exists only as a defense in a product liability action and could not apply in this "simple medical negligence case." Relying on Walls v. Alpharma USPD, Inc., 887 So. 2d 881 (Ala. 2004), the court pointed out that neither a manufacturer nor a pharmacist possessed the medical education or medical history of a patient that would justify imposing a duty to intrude into the physician patient relationship; and that requiring a pharmacist to warn of potential risks associated with a drug would interfere with that relationship. Walls held that the duty and liability arising from such duty was best left with the physician. The duty at issue in this case was not a duty to warn Luther of potential risks as a customer, but a duty of care breached by Weeks when he gave the Dr. incomplete prescribing information for colchicine. The learned-intermediary doctrine addresses questions of liability in light of the relationships between the parties involved in the distribution, prescribing, and use of prescription drugs. Applying the rationale and policies stated in Walls to this case, the Supreme Court found that "the physician, not the pharmacist, has the medical education and training and the knowledge of a patient's individual medical history necessary for properly prescribing medication; therefore, it is the physician, and not the pharmacist, who should bear the liability for mistakes in prescribing or

dosing the medication." The court rejected Larrimore's argument that Weeks (and SMH) could be found to have owed a duty to Luther under the voluntary undertaking doctrine, because in the cases relied on by Larrimore the defendant pharmacist had voluntarily undertaken a duty directly to the customer, whereas here, Larrimore claimed a voluntary-undertaking duty based upon the pharmacist's interaction with the physician. The Court held that SMH was entitled to a judgment as a matter of law since the learned intermediary doctrine foreclosed any duty owed to Luther by Weeks.

4. SUBJECT MATTER JURISDICTION – Feb. 29, 2008
Ex parte Safeway Ins. Co. of Alabama, Inc., 990 So. 2d 344 (Ala. 2008)
"Recent Civil Decisions", ALAJ Journal, Summer 2008, David H. Marsh and Tom Powell

Michelle Galvin's automobile was struck by an automobile driven by Clifford Monday. Galvin sued Monday for negligence and wantonness. Galvin also sued her own insurance carrier, Safeway, for bad-faith failure to pay her claim and for uninsured motorist benefits under her Safeway policy. Galvin alleged in her complaint that she was injured in the collision, which occurred while Monday was uninsured and intoxicated, and that Safeway refused to negotiate in good faith to pay her UM benefits for her injuries. Safeway filed a Rule 12(b)(1) motion to dismiss, alleging that the trial court lacked subject-matter jurisdiction because Galvin's bad-faith claim was not ripe due to the fact that the amount of Galvin's damages had not been fixed. (Safeway did not dispute Galvin's allegation that Monday was uninsured.) The trial court denied Safeway's motion Safeway petitioned for a writ of mandamus ordering the trial court to dismiss the bad-faith claim. Justice Stuart's opinion for the Court, in which Chief Justice Cobb and Justices See, Lyons, Woodall, Smith, Bolin and Parker concurred (Justice Murdock concurred in the result), granted the petition and issued the writ. The Supreme Court noted that a defendant may present two types of challenges to subject-matter jurisdiction: (1) facial challenges, such as

lack of standing, which attack the factual allegations of the complaint; and (2) factual challenges, which address the underlying facts contained in the complaint. Where a defendant disputes the factual allegations of the complaint, the opinion found, a trial court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant. Instead, the trial court deciding a motion asserting a factual challenge """must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss.""" The Ex parte Safeway decision found that, in Pontius v. State Farm Mut. Auto. Ins. Co., 915 So. 2d 557 (Ala. 2005), "this Court provided a well-reasoned analysis of a facial challenge to a trial court's subject-matter jurisdiction over a bad-faith claim." In this case, although Galvin's complaint appeared to be facially sufficient to withstand the motion to dismiss, the fact that Safeway offered the affidavit of its claims manager, Mizell, as evidence that Galvin's damages were not fixed but contested presented a factual challenge to the court's subject-matter jurisdiction. Because Galvin did not offer any evidence to refute Mizell's affidavit, the Supreme Court held that Safeway had established a clear legal right to a dismissal without prejudice of Galvin's un-ripe bad-faith claim.

5. PROTECTIVE ORDER – March 7, 2008
Ex parte Nationwide Mut. Ins. Co., 990 So. 2d 355 (Ala. 2008)
"Recent Civil Decisions", ALAJ Journal, Summer 2008, David H. Marsh and Tom Powell

Jureda Windham, Derek Duffy and Laura Duffy filed separate actions against Alan Mortgage Company. Alan Mortgage obtained counsel to represent it, then notified its insurance carrier, Nationwide, of the actions and requested it defend and indemnify Alan Mortgage. An exchange of letters, beginning May 17, 2004, ensued and Nationwide's claims adjuster finally notified Alan Mortgage, on July 2, 2004, that it would neither defend nor indemnify. On July 8, 2004, Alan Mortgage filed a third-party claim (in the action brought by Windham and the

Duffys) against Nationwide, alleging breach of the insurance contract and bad faith. On March 23, 2005, the trial court entered a partial summary judgment in favor of Alan Mortgage on its breach of contract and duty-to-defend claims. Later, Alan Mortgage served a request for production of documents upon Nationwide that sought communications and documents relating to the relationship between Nationwide and its defense counsel that had rendered the coverage opinion, as well as other (including electronic, e-mail) communications between Nationwide and its defense counsel. The trial court granted Alan Mortgage's motion to compel production and later denied Nationwide's motion for a protective order with respect to the discovery requests. Nationwide then petitioned for a writ of mandamus directing the trial court to vacate its order. Justice Bolin authored an opinion, in which Justices See, Lyons, Stuart, Smith and Parker concurred, Chief Justice Cobb and Justice Woodall concurred in the result, and Justice Murdock concurred in part and dissented in part, that granted the writ in part and denied it in part. The Supreme Court found that Nationwide was entitled to a protective order with respect to any documents that were created on or after July 2, 2004, the date on which Nationwide denied coverage, but that Nationwide was not entitled to a protective order with respect to any documents that were created before Nationwide denied coverage. Furthermore, even though the trial court had entered an order striking Nationwide's "advice of counsel" defense, the Supreme Court found that Nationwide had failed to meet its burden for obtaining a writ for a protective order with respect to Alan Mortgage's request for "contracts, agreements, list of case assignments and requests for coverage opinions, and information regarding the amounts paid in compensation" to Nationwide's defense counsel. In this regard, the Supreme Court's opinion said: "The materials before us on this petition for the writ of mandamus establish that Nationwide has not met its burden of demonstrating that the requested discovery is 'patently irrelevant,' [. . .]

and that the production of the discovery is far out of proportion to the benefit received by Alan Mortgage. Although it appears that the requested discovery may not be relevant and admissible at trial, we cannot conclude that the documents are 'patently irrelevant' and, consequently, not discoverable. Such a determination of relevance and admissibility is proper for review on appeal, not by an extraordinary writ. [. . .] Nationwide has not demonstrated that the requested discovery is not easily accessible through its counsel of record and, therefore, readily available upon Nationwide's request that counsel produce the documents."

6. STATE AGENT IMMUNITY – April 25, 2008
Ex parte Kennedy, 2008 WL 1838311 (Ala. 2008)
"Recent Civil Decisions", ALAJ Journal, Summer 2008, David H. Marsh and Tom Powell

On an autumn afternoon, 83-year-old Pete Thompson – who was suffering from some form of mental illness – apparently got angry about the cars speeding past his home in Escambia County and fired a shotgun at a passing automobile, striking the windshield. Pete's brother, Burl Thompson, was mowing the grass near the home where both men lived. When Burl tried to retrieve the gun from Pete, Pete went into the house. Shortly thereafter, a number of Escambia County law enforcement officers came to an area 200 yards from the Thompsons' home, contacted Burl by telephone and asked him to convince Pete to speak with them. Pete refused and Burl then left the home and went to talk with the officers. An Alabama State Trooper tactical unit was called in to deal with the situation. Among the members of the tactical unit were Lt. Charles Ward, Sgt. Marty Griffin and Trooper Matthew Kennedy. The standoff at the Thompsons' home continued until some time around midnight, when the officers determined that Pete might have gone to bed and the officers decided to enter the home from the front in an attempt to apprehend Pete. When the officers entered, the found Pete's bed was empty and they began to leave. As they did so, Pete fired on the officers without injuring anyone. The tactical

unit then moved its van to the front of the home. Around 3:30 a.m., the tactical unit fired tear gas into the home, but Pete failed to leave, and they fired more tear gas into the home. After the last salvo of tear gas was fired, Pete walked out of the house and began firing at the officers. He reloaded his shotgun and fired some more. Trooper Kennedy swore in his affidavit that he heard Sgt. Griffin say, "If you have a shot, take it," and that he then fired one shot and hit Pete. Pete died from the single gunshot wound. Burl then brought a wrongful death and outrage action against Kennedy and numerous fictitious party defendants. Burl later substituted Ward and Griffin for two of the fictitious defendants. Kennedy, Ward and Griffin moved for summary judgment on the bases of state-agent immunity and the provisions of Ala. Code § 6-5-338(a), which with few exceptions affords immunity from liability to peace officers for their performance of discretionary functions within the line and scope of their law enforcement duties. Burl argued that the defendants were not entitled to immunity, because they failed to follow established guidelines while attempting to arrest Pete. The trial court granted the summary judgment, but only as to Burl's outrage claim, and denied it as to the wrongful death claim. The defendants then filed a petition for a writ of mandamus directing the trial court to enter summary judgment as to the wrongful death claim. Justice Murdock's opinion, in which Justices Lyons, Stuart, Bolin and Parker concurred (Chief Justice Cobb recused herself), granted the petition and entered the writ directing the trial court to enter the summary judgment as to Burl's wrongful death claim. The court had "no difficulty concluding" that Kennedy, Ward and Griffin had met their burden of showing that they were engaged in law enforcement functions for which statutory and state-agent immunity would be available, then turned to the question of whether Burl had met his burden of showing that one of the exceptions to such immunity applied. Burl argued on appeal, as he had in the trial court, that the officers acted beyond their authority (and thus were

not due immunity) with regard to the incident in question because "they violated binding rules and regulations." Those rules and regulations, Burl contended, were found in a training manual (known as the "Nighthawk manual") for tactical units used in the Department of Public Safety's academy for law-enforcement officers. Burl's evidence included the deposition of Captain Herman Wright, the Department of Public Safety's designated Rule 30(b)(6) deponent, in which he testified that the Nighthawk manual gave the trooper defendants "guidance or guidelines on what to do about certain situations," including "guidelines" that troopers in the defendants' positions should not aggravate the subject with whom they were negotiating. Kennedy, Ward and Griffin argued that the Nighthawk manual did not constitute "binding rules or regulations" that could fit the requirement for showing that a state-agent acted beyond his authority. In Giambrone v. Douglas, 874 So. 2d 1046 (Ala. 2003), the court had stated that a state-agent could be found to have acted beyond his authority if he failed "to discharge duties pursuant to detailed rules or guidelines, such as those stated on a checklist." The Court agreed with Kennedy, Ward and Griffin, finding that "Capt. Wright's testimony that the training manual set forth 'guidelines' and 'procedures' and that it indicated what the tactical team members 'should do' in particular circumstances does not mean that the training manual was adopted as a set of binding rules and regulations strictly governing the tactical unit. [. . .] [E]ach of those provisions is either aspirational in nature or leaves the actor with discretion as to whether the guidance should be followed in a given situation."

7. FRANCHISE ACT – MUTUAL RELEASE -May 16, 2008
Edwards v. Kia Motors of America, Inc., 2008 WL 2068088 (Ala. 2008)
"Recent Civil Decisions", ALAJ Journal, Summer 2008, David H. Marsh and Tom Powell

In 2002, Edwards bought a struggling Kia dealership in Huntsville, with the understanding that Kia Motors of America ("KMA") later would award a Kia dealership

franchise in Opelika to Edwards and find a buyer for the Huntsville dealership. The business relationship between Edwards and KMA soured during the next two years, due to disputes over inventory shipments, payments for warranty services and dealer incentives. The Huntsville dealership continued to lose money, and Edwards received no indication that KMA was going to award the Opelika dealership to Edwards. In 2004, Edwards found a potential buyer for the Huntsville dealership. The agreement between Edwards and KMA required Edwards to secure KMA's approval before transferring the dealership to any buyer. When Edwards asked KMA for its approval of the sale, KMA asked Edwards to sign a "mutual release agreement."

The mutual release agreement stated, in part, that Edwards and KMA agreed to "'release, acquit and forever discharge one another of and from all claims which have arisen or may ever arise, demands and causes of action arising from, related to, or in any manner connected with the sale and service of Kia Products, including, without limitation, the Dealer Agreement, and from any and all claims for damages, related to or in any manner connected with the Dealer Agreement or the parties' business relationship.'"

Because he was afraid KMA would not approve the sale unless he signed the agreement, Edwards did sign the agreement and the sale of the dealership was completed in December 2004. Edwards sued KMA in federal court in July 2005, alleging violations of the Alabama Motor Vehicle Franchise Act, Ala. Code § 8-20-1, et seq. KMA moved for a summary judgment, arguing that Edwards's claims were barred by the provisions of the mutual release agreement. The district court granted the summary judgment and Edwards appealed to the Eleventh Circuit, which then certified the following question to the Supreme Court of Alabama: "[W]hether the Franchise Act permits an automobile dealer to bring a claim under the Act, despite the fact that

both parties already executed a mutual release agreement in which the dealer relinquished all existing legal claims against the manufacturer in exchange for a valid consideration." Justice See's majority opinion, in which Justices Lyons, Woodall, Stuart, Smith, Bolin, Parker and Murdock concurred, answered the certified question with a "no." In reaching that result, the majority said:

> "The sole issue before us is whether the language of § 8-20-11, Ala. Code 1975, and the remedial purpose of the Franchise Act permit automobile dealers to bring claims under the Franchise Act against automobile manufacturers after they have executed a mutual release of, among other claims, those then existing claims. Section 8-20-11 reads as follows:
>
> "'Notwithstanding the terms, provisions, or conditions of any dealer agreement or franchise or the terms or provisions of any waiver, and notwithstanding any other legal remedies available, any person who is injured in his business or property by a violation of this chapter by the commission of any unfair and deceptive trade practices, or because he refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of this chapter, may bring a civil action in a court of competent jurisdiction in this state to enjoin further violations, to recover the damages sustained by him together with the costs of the suit, including a reasonable attorney's fee.'
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> "Edwards argues that § 8-20-11 is a remedial statute that must be interpreted broadly and that the release agreement Edwards and KMA signed thus falls within the statutory meaning of "any waiver." Edwards further argues that a broad interpretation of the phrase "any waiver" creates an exception for both prospective releases – those dealing with issues that have not arisen at the time the release is executed – and retrospective releases -- those dealing with issues known or accrued at the time the release is executed. Therefore, Edwards argues, it should be able to bring its claims notwithstanding the mutual release agreement it entered into with KMA.
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> "KMA argues in response that retrospective releases are favored under general Alabama law and under the Franchise Act in particular. KMA further asserts that § 8-20-11, Ala. Code 1975, does not encompass retrospective releases of existing claims and alleges that a construction of the Franchise Act that allows parties to bring an action under the Act despite having executed a mutual retrospective release would foster an absurd result.
>
> "[. . .]

> "[. . .] We first look to the language of the statute. Although the Franchise Act [. . .] defines 13 terms, neither 'waiver' nor 'release' appears in that definitional section. [. . .]
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> "[. . .] The Franchise Act proscribes certain practices, such as persuading dealers to absolve the manufacturer from liability arising from the unfair trade practices enumerated in the Franchise Act. However, there is no indication of a legislative intent to prohibit the parties to an automobile-dealership franchise agreement from reaching a good-faith settlement of existing claims after those claims arise and entering into a binding settlement agreement.
>
> "Section 8-20-11, Ala. Code 1975, authorizes the dealer or the manufacturer to bring a civil action notwithstanding the terms of the dealership agreements, franchise agreements, or waivers, and notwithstanding the availability of other legal remedies. However, there is no indication that § 8-20-11 does or was intended to prohibit the settlement of known claims as an alternative to taking them to trial and ultimately to judgment. If the legislature had wished to include the settlement and release of known claims in the language of § 8-20-11, Ala. Code 1975, it knew how to do so. The legislature lists prospective releases and waivers in describing specific unfair trade practices under the Franchise Act [. . .] The legislature did not similarly include a retrospective release as an unfair trade practice or include such a release in its list of ineffective provisions in § 8-20-11. Had the legislature meant to require the litigation of every disagreement between a manufacturer and a dealer, it could have said so.
>
> "[. . .]
>
> "[. . .] We decline to ignore the legislative intent expressed in the Franchise Act as a whole in favor of an isolated interpretation of the phrase 'any waiver' that is required to produce the result the dissent would have us reach."

Ex. Parte Kia at * 4-14.

Chief Justice Cobb's dissenting opinion in Edwards responded as follows:

> "I dissent. The term 'judicial activism' is susceptible to many meanings; it has been referred to as a "notoriously slippery term." Frank H. Easterbrook, Do Liberals and Conservatives Differ in Judicial Activism? 73 U. Colo. L. Rev. 1401 (2002). However, as this Court discusses the term in the context of the review of substantive law or statutes, see, e.g., Alabama Power Co. v. Citizens of Alabama, 740 So. 2d 371 (Ala. 1999), it implies a willingness on the part of the Court to invade, improperly, the province of the legislature by refusing to apply the plain meaning of the statute before us in favor of substituting language and meaning that are not otherwise present. Thus, the Court becomes a sort of 'superlegislature' that imposes its particular agenda on the citizens of our State without the benefit of the usual legislative process. Certainly this is a bad thing. Not only does the Court disregard its obligations under the state and federal constitutions, but it also

demonstrates an abandonment of principles that are absolutely critical to an effective system of justice. 'Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive.' People ex rel. Clancy v. Superior Court of Riverside County, 39 Cal. 3d 740, 746, 705 P. 2d 347, 351, 218 Cal. Rptr. 24, 28 (1985).

"When judicial activism is understood as the willingness of this Court to improperly substitute itself for the legislature, this case presents a picture of judicial activism that is worth a thousand words. Section 8-20-11, Ala. Code 1975, states:

"'Notwithstanding the terms, provisions, or conditions of any dealer agreement or franchise or the terms or provisions of any waiver, and notwithstanding any other legal remedies available, any person who is injured in his business or property by a violation of this chapter by the commission of any unfair and deceptive trade practices, or because he refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of this chapter, may bring a civil action in a court of competent jurisdiction in this state to enjoin further violations, to recover the damages sustained by him together with the costs of the suit, including a reasonable attorney's fee.'

"(Emphasis added.) In addition to this very plain language, this Court has also discussed the legislature's purpose in enacting the Franchise Act as 'to give balance to the inequality of bargaining power between individual dealers and their manufacturers.' Tittle v. Steel City Oldsmobile GMC Truck, Inc., 544 So. 2d 883, 887 (Ala. 1989)(emphasis added). That is, automobile dealers in this State are to receive some protection from the inequality of bargaining power that exists in their transactions with automobile manufacturers by having their claims of violations under the Franchise Act preserved for judicial adjudication, regardless of contractual releases or waivers the dealers may be compelled to sign in order to do business.

"That purpose is directly applicable to this case, a situation in which an automobile dealer has been pressured into signing a release in order to effectively transact business with a much more powerful automobile manufacturer. Here, as a result of the manufacturer's unfulfilled promises, Edwards had the choice of executing the release or suffering financial ruin, essentially a choice 'between a rock and a hard place.' In spite of the facts presented here, and in spite of the plain language of § 8-20-11 and this Court's previous statements of law concerning the legislature's intent as stated in § 8-20-2, the majority opinion embarks on a semantic voyage to ascertain the legislature's 'intent' by attempting to parse a meaningful distinction between concepts of 'release' and 'waiver,' a distinction the parties have conceded does not exist. See Edwards v. Kia Motors of America, Inc., 486 F.3d 1229, 1233 (11th. Cir. 2007) ('[D]uring oral argument, both parties conceded that the terms "waiver" and "release" can be synonymous.'). The result

of the majority's analysis is a conclusion that the emphasized language quoted above from § 8-20-11 does not mean what it says it means. Because I cannot, on any reasonable reading of the above statutory language – particularly in light of the legislative purpose in enacting the Franchise Act – conclude that it means other than what it says, I must conclude that the release agreement does not bar Edwards's action. In short, the majority opinion rewrites § 8-20-11 to say that certain releases and waivers do in fact operate to prevent a dealer from bringing a claim under the Franchise Act in the courts of our State. Not only does the opinion 'relegislate' § 8-20-11, but it also obviates the legislature's intent as expressed in § 8-20-2 and Tittle, supra, so as to remove the protections in the Franchise Act from the inequality in bargaining power that exists between dealers and manufacturers.

"In the past, this Court operated under a duty to adhere to legal precedent without regard to the outcome of the case, and it consistently concluded that the plain language of a statute required that this Court apply the language as stated. The rule has generally been stated as follows:

"'"When [a] statutory pronouncement is clear and not susceptible to a different interpretation, it is the paramount judicial duty of a court to abide by that clear pronouncement."'

"Macon v. Huntsville Utils., 613 So. 2d 318, 320 (Ala. 1992) (quoting Parker v. Hilliard, 567 So. 2d 1343, 1346 (Ala. 1990)). [. . .] I believe that the majority opinion flies in the face of this precedent and the many other cases that have espoused the principle that this Court's paramount duty is to interpret the plain language of the law to mean what it says.

"With respect to the contention that giving effect to the plain language of § 8-20-11 means that no preexisting claim can ever be settled, it is more accurate to say that giving effect to the plain language of the statute means that a manufacturer may not by weight of its greater bargaining position in compelling a franchise agreement force a dealer to give up its right to adjudicate its claims of violations of the Franchise Act. Claims may still be settled by adjudication and settlement, and claims may be forestalled by honest business practices that do not give rise to violations of the Franchise Act. The statute says what it says. Had the legislature intended to except the release of known claims from the operation of § 8-20-11, it could have done so. The plain language of the statute permits litigation alleging an unfair trade practice notwithstanding prior agreements. This language may not be convenient for an entity that is stronger economically and that seeks to force a weaker one into compliance with its terms by allowing a release of known claims in the context of contract negotiations, but I submit that disregarding the language and intent of the Franchise Act is the antithesis of the 'strict construction' to which judicial 'conservatives' give lip service. Rather, rewriting § 8-20-11 and discarding the intent of the legislature represents judicial activism, which this Court should never endorse. Because I believe that a consistent application of this

> Court's principles of statutory construction is a critical component of American justice and of this Court's credibility as an agent of that justice, I must dissent."

Ex. Parte Kia at *16-23.

8. LICENSING/CONSTRUCTION – May 23, 2008
Fausnight v. Perkins, et al., 2008 WL 2153347 (Ala. 2008)

Bryan Fausnight appealed from a partial summary judgment entered in favor of Ronald G. Perkins and Naomi Perkins. The Supreme Court of Alabama reversed and remanded. In this case, the Perkinses wanted a refund of payments made to Fausnight totaling $199,359.83 for the construction of their home. They requested a refund because Fausnight was not a licensed home builder as required by §34-14A-5 of the Alabama Code, and thus, they alleged he was not entitled to keep any of the payments made to him for the construction of the home. That section provides in relevant part, that "[a] residential homebuilder who does not have the license required, may not bring or maintain any action to enforce the provisions of any contract for residential home building which he or she entered into in violation of this chapter." That Section also makes the violation of the statutory licensing requirements a Class A misdemeanor. Although the statute prevents an unlicensed homebuilder, such as Fausnight, from bringing an action to enforce a contract for the construction of a house, the statute does not provide a homeowner, such as the Perkinses, with a right to sue to obtain a refund of payments already made to the unlicensed home builder. So, once the money was paid, the Perkinses had no cause of action under which to sue. In reaching this decision, the Supreme Court considered the law of several jurisdictions and an annotation from the American Law Reports, which articulates five separate reasons for not allowing restitution of the Perkinses' payments: 1) the law requiring the license does not specifically provide for such a right to recover back money paid; 2) the sanctions of such law are penal in nature and must be strictly construed; 3) the specification by

such laws of particular penalties, such as making violation a misdemeanor and prohibiting suits for compensation for the unlicensed services, preclude the construction of the statute as embracing a loss of the right to retain compensation which has been paid, under the rule of inclusio unius est exclusio alterius; 4) the allowance of recovery back is not necessary to effectuate the policy of the licensing statutes; and 5) equity and the principles of restitution do not require that the money be paid back. They held that to read a private cause of action into the licensing statutes would contradict the intent of the Legislature. So, the Supreme Court held that the trial court erred in awarding a partial summary judgment in favor of the Perkinses for the reimbursement of the fees paid to Fausnight for constructing their house.

9. IMMUNITY/QUALIFIED IMMUNITY – May 23, 2008; modified on denial of rehearing on October 10, 2008
Ex Parte Hale, 2008 WL2153526 (Ala. 2008)

It should be common sense that when an inmate has a swollen abdomen, requests medical treatment, has been constipated for three weeks, and hasn't voided in three days, that inmate needs and deserves medical attention. Here, that inmate, Ms. Hodge, died from sepsis rather than receiving the timely treatment she required.

This action arises out of allegations by Emma Jean Jenkins as personal representative of Belinda Denise Hodge that Jefferson County Sheriff Mike Hale violated Hodge's constitutional rights during her detention in the Jefferson County jail. Specifically, Hale denied Hodge of the right to adequate medical care which resulted in her death. Ms. Jenkins also asserted a breach of contract claim for failure to provide medical care, in an attempt to recover on Sheriff Hale's official bond. Hale asked for a dismissal of the complaint asserting that he was immune under the state constitution and under qualified immunity. After the trial court denied Hale's motion, he petitioned the Supreme Court for a writ of mandamus. On appeal, the Supreme Court

determined that Sheriff Hale was entitled to immunity on the breach of contract claim because that claim sought a judgment from Hale for actions taken while he was acting as an agent of the state. However, Jenkins pled her 42 U.S.C. §1983 claims in a manner that would not allow for dismissal at that stage on qualified immunity grounds. Jenkins pled the existence of a clearly established right and a violation of that right by Hale. Further, claims brought against Hale in his supervisory capacity were not to be dismissed because Jenkins pled a pattern abuse and a custom of policy that led to the violation alleged.

10. WANTONNESS/EVIDENCE – Aug. 29, 2008
Frederick v. Wallis, 2008 WL 3983846 (Ala. Civ. App. 2008)
"Maynard, Cooper & Gale Weekly Law Report", September 15, 2008 edition.

Vaughn Frederick and Mildred Frederick (the "Fredericks") sued Donald Wallis ("Wallis") alleging wantonness when Wallis's car collided with their vehicle as Wallis was turning across a lane of traffic from the center lane causing damage to their vehicle and injury to Vaughn Frederick's thumb and two broken ribs for Mildred Frederick. The Frederick's sought compensatory and punitive damages. The original trial resulted in a mistrial. At the retrial, the trial court granted judgment as a matter of law ("JML") in favor of Wallis on the Frederick's wantonness claim. The jury returned a verdict in the amount of $4000 each to Mildred and Vaughn. The trial court entered a judgment pursuant to the jury's verdict. On appeal, the Frederick's argued that the trial court erred in granting JML on their wantonness claim against Wallis. When reviewing a ruling on a motion for a JML, the appellate court considers whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for factual resolution. For a party to be found guilty of wantonness, a plaintiff must show that the defendant acted with reckless indifference to the consequences of his or her actions and consciously and intentionally did some wrongful act. The Alabama Supreme Court has noted that

absent impaired judgment, it is not expected that an individual will engage in self-destructive behavior and act in a manner rendering him indifferent to the risk of injury to himself. The Alabama Court of Civil Appeals found that the trial court did not err in entering a JML on the Frederick's wantonness claim because when Wallis crossed traffic, even though his vision was impaired, the potential of injury to Wallis as real as the potential of injury to the Fredericks, and there was no evidence that his judgment was impaired. The Fredericks also argued that the jury's verdict was not based on any competent evidence. During cross-examination of Vaughn, Wallis's attorney produced a copy of a repair estimate to refresh Vaughn's recollection as to the estimated repair amount and read aloud the total cost of the estimated repair. The Fredericks argued that the amount awarded by the jury was derived from this inadmissible evidence and that the only admissible testimony was Vaughn's opinion testimony regarding the amount of property damage. The Court of Appeals agreed that to the extent that the jury based its damages award on the $8000 estimate read by counsel, the award would be voidable because the statements of counsel are not evidence. However, because Vaughn's statement indicating the damage was $21,300 was opinion testimony and the jury could properly award property damages amounting to less than $21,300. The court must presume that a jury's verdict is correct unless shown to be plainly and palpably wrong. In this case, the amount of the award did not plainly and palpably show that the jury used Wallis's attorney's statements regarding the estimate as the basis for its award. Therefore the court could not reverse the judgment in this case. The trial court's judgment was affirmed.

11. WORKERS' COMPENSATION-SCOPE OF EMPLOYMENT – Sep. 5, 2008
Brunson v. Lucas, 2008 WL 4093793 (Ala. Civ. App. 2008)

This case arises from an accident in which David Brunson was injured when he was crossing the street from his employer, Georgia Pacific Corporation's parking lot to the plant entrance. He was struck by a vehicle driven by Bobby Lucas. David Brunson and his wife Charity sued the employer and Bobby Lucas. Mr. Lucas filed a motion for summary judgment alleging immunity from liability by virtue of the immunity extended to co-employees under Ala. Code 1975 §25-5-11 and 25-5-14. The trial court granted summary judgment and Mr. Brunson appealed. The judgment of the trial court was affirmed. In its opinion, the reviewing court stated: "Our supreme court has construed §§25-5-11, 25-5-14 and 25-5-53 to extend immunity to co-employees of injured employees who are entitled to receive workers' compensation benefits unless the injured employee can prove that the injury was caused by the willful conduct on the part of the co-employee." An employee can receive workers' compensation benefits if he or she is injured in a parking lot owned and maintained by his or her employer. Employer-owned parking lots are generally considered to be part of the employer's premises. "We conclude that the trial court properly considered Brunson's entitlement to and acceptance of workers' compensation benefits to trigger co-employee immunity for Lucas."

Thus the Court of Civil Appeals held that Brunson's acceptance of workers' compensation benefits triggered immunity for Lucas.

12. FEHBA/PREEMPTION – September 5, 2008
Blue Cross Blue Shield Health Care Plan of Georgia, Inc. v. Gunter, 541 F. 3d. 1320 (11th Cir. 2008)
"Maynard, Cooper & Gale Weekly Law Report", October 22, 2008 edition.

Blue Cross Blue Shield Health Care Plan of Georgia, Inc. ("Blue Cross") sued Brian Gunter seeking reimbursement of insurance benefits paid to him from his settlement with a third

party. The Federal Employees Health Benefits Act of 1959, 5 U.S.C. § 8901 et seq. (“FEHBA”) establishes a comprehensive health care plan for federal employees. In Georgia, this insurance coverage is provided by Blue Cross through the Service Benefit Plan (the “Plan”). While insured by the Plan, Gunter was injured in an automobile accident and received insurance payments from Blue Cross for his medical expenses. The Plan contains a provision requiring reimbursement in the event of the insured's third party recovery. After recovering from a third-party, Gunter refused Blue Cross’s request for reimbursement, and Blue Cross filed suit. The district court dismissed the claim based on a lack of subject matter jurisdiction, and Blue Cross subsequently filed this a ppeal. On appeal, the Eleventh Circuit affirmed the decision of the district court holding that Georgia's complete compensation rule and common fund doctrine do not conflict with the federal policies underlying the FEHBA, and absent a conflict of laws issue, the state courts should examine this issue and apply federal law as needed. FEHBA provides that absent a written agreement to the contrary, the plan's reimbursement will not be reduced because the insured did not receive the full amount of damages claimed. Under Georgia's complete compensation rule, an insurer is prohibited from obtaining reimbursement for amounts paid under medical coverage unless the insured has been completely compensated for her loss. Blue Cross argued that the complete compensation rule conflicts with the federal policy of full reimbursement, presenting a federal question. However, the Georgia Supreme Court expressly held that the complete compensation rule does not apply when FEHBA is applicable; there fore, there was no conflict of laws and the question was properly before the state court. Blue Cross also argued that Georgia’s common fund doctrine provides that a person who maintains a successful action for the creation of a common fund to which others may share in with him is entitled to reasonable attorney’s fees from the fund as a whole, which is in conflict with the

FEHBA provision that prohibits any reduction of the insurer's claim for payment of attorney's fees without prior approval. The Court reasoned that whether a claim for reimbursement should involve attorney's fees is not a basis for federal jurisdiction. The Court concluded that the state courts are capable of applying federal law when required, and are constitutionally bound to do so. The Eleventh Circuit therefore affirmed the district court holding that there was no federal question presented and therefore, the state court was the proper forum for this issue.

13. BREACH OF CONTRACT/MENTAL ANGUISH – September 19, 2008
Baldwin v. Panetta, 2008 WL 4277343 (Ala. Civ. App. 2008)
"Maynard, Cooper & Gale Weekly Law Report", October 23, 2008 edition

A husband and wife, doing business as Baldwin Construction Company ("the builders") appealed from a judgment in favor of Michael and Sharon Panetta ('the owners") involving the construction of the owners' lake house at Lewis Smith Lake in Winston County, Alabama. The dispute stemmed from the owners' dissatisfaction with the overall project, which they attributed to substandard work by the builders' subcontractors and ineffective management by the builders. After several complaints concerning the project, the owners sent the builders an e-mail message on October 27, 2003, which acknowledged that the project was near completion and which requested the builders not continue on the project until the owners were assured that their interests in the house were protected against any subcontractor liens. The owners sent several subsequent e-mails over the following weeks inquiring about the progress of the project. The builders, however, considered the October 27 e-mail an order to halt all work and abandon the unfinished project. The builders then filed a breach of contract claim against the owners. The owners responded with a breach of contract counterclaim; and, after uncovering certain evidence in the discovery process, the owners added a fraud counterclaim. The Alabama Court of Civil Appeals evaluated whether the circuit court's finding, which denied the builders breach of

contract claim, and granted the owners' breach of contact and fraud counterclaim, was "plainly and palpably wrong." The Court held that it could have been reasonably determined that the October 27 e-mail was not a repudiation of the contract, but a mere request and clarification of the situation; thus, the denial of the builders' breach of contract claim was not plainly and palpably wrong. Also, because it was reasonable to conclude that the builders were not justified in abandoning the project, and that the owners had upheld all of their obligations under the project, the owners' breach of contact counterclaim was upheld. The owners' fraud counterclaim was upheld in light of evidence indicating that the builders had submitted false and inflated invoices, that the owners paid the invoices believing them to be valid, and that the owners were damaged as a result. The Court additionally considered whether the owners' compensatory damages award was excessive for including mental anguish damages for the construction of a home. To establish mental anguish damages under Alabama law in a home construction project, the owners must establish (1) that the breach be egregious; (2) that those defects render the home virtually uninhabitable; and (3) that the breach necessarily or reasonably results in mental anguish damages. See, e.g. Liberty Homes, Inc. v. Epperson, 581 So. 2d 449, 454 (Ala. 1991); Hill v. Sereneck, 355 So.2d 1129, 1132 (Ala. Civ. App. 1978); F. Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932). Although the owners testified that they suffered emotional distress during the progress of the construction contract, the mental anguish was traceable either to their disagreements with each other over how to deal with the frustration of unmet expectations or to non-catastrophic financial pressures. In addition, all the defects were merely aesthetic; they did not render the house uninhabitable. Therefore, the Court remanded the compensatory damages issue back to the circuit court because it found that there was insufficient evidence to support the award of mental anguish damages.

14. FRAUD/REASONABLE RELIANCE – September 19, 2008
AmerUs Life Insurance Co. v. Smith, 2008 WL 4277861 (Ala. 2008)
"Maynard, Cooper & Gale Weekly Law Report", October 24, 2008 edition

Smith purchased a life insurance policy from Carl Jeffery, an independent agent. Smith alleged that Jeffery induced him to purchase a policy through Central Life Assurance Company, a predecessor to AmerUs. Smith claimed that Jeffrey represented to him that the policy would last for 42 years, that the annual premium would be $42,840, and that the annual premium would remain level for the entire 42 years. Smith completed an application dated January 6, 1987, for a policy with a death benefit of $3,500,000, which Jeffrey submitted to Central Life. Central Life agreed to issue the policy, but stated in a letter to Jeffrey that because of Smith's medical history, the policy would be issued with a class "C" rating. Jeffrey then amended the application for the policy to reduce the requested coverage to $500,000. Jeffrey submitted another application dated March 24, 1987, for a $3,000,000 policy. Central Life then issued two flexible-premium adjustable life-insurance polices, a $500,000 policy and a $3,000,000 policy, both with a class "C" rating. According to Smith, Jeffery did not provide an amended illustration. Central Life sent the policy and annual statements to Smith. The annual statements reflected, as early as 1988, that if only the planned premiums were paid, the policies would terminate well before Smith reached age 95. Smith did not read the policy or the annual statements. Smith's policies lapsed in 2002. He sued AmerUs and Jeffery alleged claims of fraudulent misrepresentation, fraudulent suppression, and breach of contract as to all defendants, and a claim of negligent and wanton hiring, training, or supervision of Jeffrey as to AmerUs. After trial, The jury returned a verdict in favor of the insureds, awarding compensatory damages of $2,500,000 and punitive damages of $4,000,000. AmerUs appealed the trial court's denial of its postjudgment JML. On appeal, AmerUs argued that Smith's relian ce on the representations by Jeffery was unreasonable as a

matter of law. The Court cited to a number of cases in affirming the rule that a plaintiff who is capable of reading documents, but who does not read them or investigate facts that should provoke inquiry, has not reasonably relied upon a defendant's oral representations that contradict the written terms in the documents. The Court noted the one exception to the rule – a special relationship exists between the party making the misrepresentation and the party making the purchase – but that it did not apply because there was no special relationship between Smith and Jeffery. The Court then described the information Smith received over the years and noted that Smith had not read the information. The Court held that the trial court erred in sending the case to the jury. The Court stated that in light of the language of the documents surrounding the insureds' purchase of the life insurance policies at issue in this case and the conflict between Jeffrey's alleged misrepresentations and the documents presented to Smith, it cannot be said that Smith reasonably relied on Jeffrey's representations. The Court further found that the insureds here took no precautions to safeguard their interests and at a minimum, the language in the policies and the cost-benefit statement should have provoked inquiry or a simple investigation of the facts by Smith. The Court concluded that AmerUs was entitled to a JML because no reasonable person could read the policies and the cost-benefit statement and not be put on inquiry as to the existence of inconsistencies, thereby making reliance on Jeffrey's representations unreasonable as a matter of law.

15. NEGLIGENCE- JMOL – September 26, 2008
Leonard v. Cunningham, 2008 WL 4368398 (Ala. Civ. App. 2008)

Linda Leonard sued John Cunningham under theories of negligence for injuries sustained when Cunningham's vehicle collided with Leonard's vehicle. Leonard moved for judgment as a matter of law at the close of a jury trial. The court denied her motion. The court also denied

Leonard's request for a jury instruction covering negligence per se. The jury returned a verdict in favor of Cunningham. Leonard then filed a timely renewed motion for judgment as a matter of law, or in the alternative, a new trial. That motion was denied by operation of law on December 19, 2001 and Leonard appealed. The court found that Cunningham had a duty to stop at a stop sign prior to turning onto Jay Bird Road, where the accident occurred. The reporting police officer, Isaac Ephraim, in his report, stated that Cunningham failed to stop at the stop sign. Because Cunningham failed to object to the police report as hearsay, the evidence was admitted. Cunningham did not dispute that Leonard had the right-of-way because she was travelling down Jay Bird Road and did not have a stop sign. He did not dispute that his vehicle had collided with Leonard's vehicle, or that the vehicle driven by Leonard had sustained damage a result of the accident. In fact, the record contained no evidence indicating that Leonard's actions contributed to the cause of the accident. Although Cunningham testified that he stopped prior to turning onto Jay Bird Road, which was contradictory to the police report, Cunningham's testimony was insufficient to create a factual dispute for resolution by the jury on the issue of negligence. The appellate court reversed the trial court's judgment and remanded the cause for further proceedings on the amount of damages.

16. MALICIOUS PROSECUTION – September 26, 2008
Ravenel v. Burnett, 2008 WL 4368422 (Ala. Civ. App. 2008)
"Maynard, Cooper & Gale Weekly Law Report", October 23, 2008 edition

Kenneth Ravenel brought a malicious prosecution action against Frederick L. Burnett, after Burnett charged Ravenel with criminal harassment. Burnett was a fellow churchmember who had agreed to serve as a mentor for Ravenel's wife in her attempts to start a business. Ravenel felt that the relationship between his wife and Burnett was unproductive to his marriage, and became very suspicious of an affair between the two. Over a period of several months,

Ravenel approached their pastor and other church members to with allegations of an illicit affair. The day after Ravenel attempted to instigate an altercation with Burnett and allegedly threatened to kill Burnett following a Sunday church service, Burnett executed an Alabama Uniform Incident Offense Report with local authorities. Four days later, Burnett gave a statement to the chief magistrate of the Huntsville Municipal Court, who filled out a criminal complaint form. The magistrate found probable cause to issue a warrant for Ravenel's arrest, based solely on Ravenel's alleged threat to kill Burnett. Ravenel was arrested on the warrant several months later, but remained free on a cash bond pending trial. The case was continued at least twice after being set for trial. Burnett did not appear for the actual trial date, and the criminal court entered a nolle prosecui on motion of the prosecutor. Thereafter, Ravenel filed a malicious prosecution action against Burnett, alleging, among other things, that Burnett had no probable cause to make his complaint to Culver and that he had made the complaint out of malice against Ravenel. Burnett filed a motion for a summary judgment, attaching evidentiary materials and a brief. After a hearing, the trial court granted summary judgment in favor of Burnett. On appeal, Ravenel argued that the trial court erred in entering the summary judgment, due to the existence of genuine issues of material fact as to whether Burnet had probable cause to file his criminal complaint against Ravenel, and whether Burnett filed the complaint out of malice. He supported his position by pointing out that though the warrant was issued based solely on the threat which allegedly occurred at the church, no independent witness had been offered by Burnett. Because Ravenel disputed the accusation, the Court found that there was substantial evidence from which a reasonable jury could infer that Burnett falsely accused Ravenel of making the threat. The Court noted that the existence of probable cause is an issue for the court, and not the jury, only if the facts relating to the issue of probable cause are undisputed. Lee v. Minute Stop, Inc., 874 So.

2d 505, 511 (Ala. 2003). Because the facts regarding the content of Ravenel's statement to Burnett were in dispute, summary judgment was not appropriate. While Burnett denied that he instituted the criminal-harassment proceeding with malice, the Court explained that mali ce may be inferred, and must rest on inferences and deductions decided by the trier of fact. On that basis, the Court found that there was also a question of material fact regarding the malice element. Accordingly, the Court reversed summary judgment and remanded the case for further proceedings consistent with its opinion.

17. FMLA – September 30, 2008
Martin v. Brevard Co. Public Schools, 543 F.3d 1261 (11th Cir. 2008)
"Maynard, Cooper & Gale Weekly Law Report", October 22, 2008 edition

Anthony Martin worked for the Brevard County Public Schools ("the School District") on a contractual basis subject to annual renewal. Martin's last contract with the School District expired on June 30, 2004. As a result of Martin's April 19, 2004 performance review, Martin's supervisor presented him with an improvement plan which afforded Martin the opportunity to demonstrate significant progress through June 1, 2004. On April 29, 2004, Martin submitted a request to the School District for 12 weeks of FMLA leave on the basis of in loco parentis status ("in the place of a parent"), in order to care for his infant granddaughter beginning on May 7, 2004 while his daughter was deployed oversees. Martin's supervisor approved his FMLA request. After granting Martin FMLA leave, Martin's supervisor informed Marin that his contract would not be renewed if FMLA leave prohibited him from fulfilling his improvement plan. Martin took FMLA leave as scheduled, but his daughter was never deployed. On June 21, 2004, Martin received a letter stating that the School District did not renew his contract because Martin failed to complete his improvement plan. Martin sued the School District for interfering with his FMLA rights and for retaliating against him for taking FMLA leave. The district court

granted the School District's motion for summary judgment concluding that no reasonable jury could find that Martin stood in loco parentis to his granddaughter and that the School District was not estopped from challenging Martin's in loco parentis status. Martin appealed. On appeal, the Court agreed with the district court's conclusion that the School District was not estopped from challenging Martin's entitlement to FMLA. However, the Court of Appeals found that summary judgment was not appropriate. First, the Court noted that there was a genuine issue of material fact regarding whether Martin stood in loco parentis to his granddaughter. The Department of Labor has defined in loco parentis under the FMLA to include people with the "day-to-day responsibility to care for and financially support a child . . . ." The Court reasoned that Martin provided his daughter and granddaughter with substantial financial support and played a significant role in caring for his granddaughter even though his daughter was never deployed. Second, the Court found that a genuine issue of material fact remained concerning whether the School District interfered with several of his substantive FMLA rights as the record did not establish beyond dispute that the School District would have discharged Martin had he not taken FMLA leave. Third, the Court also found that Martin easily demonstrated a prima facie case of retaliation. The Court reasoned that the close temporal proximity between Martin's termination and his FMLA leave -- Martin was terminated while on FMLA leave -- was more than sufficient to create a genuine issue of material fact of causal connection. As such, the Court vacated the district court's judgment and remanded the case for further proceedings.

18. PERSONAL JURISDICTION/CALDER EFFECTS TEST – October 10, 2008
Licciardello v. Lovelady, 2008 WL 4531668 (11th Cir. 2008)
"Maynard, Cooper & Gale Weekly Law Report", October 22, 2008 edition

Carman Licciardello ("Carman"), a nationally known Christian musician and entertainer, filed a lawsuit in the Middle District of Florida against his personal manager, Rendy Lovelady

("Lovelady"), under the Lanham Act for "trademark infringement and related claims arising out of Lovelady's allegedly unauthorized use of Licciardello's name, photograph, and apparent endorsement of Lovelady on a website." Lovelady, a resident of Tennessee, filed a motion to dismiss for lack of personal jurisdiction, which the district court granted. On appeal, the Eleventh Circuit reversed the district court's ruling, finding that Lovelady's creation of a website in Tennessee containing an allegedly infringing, deceptive use of Carman's trademark is a "tortious act" within Florida as contemplated by Florida's long-arm statute because the injury from the trademark infringement occurs where the holder of the trademark resides – in this case, Florida. Having found that Lovelady's actions fell within Florida's long-arm statute, the Eleventh Circuit next explained that the exercise of jurisdiction did not violate due process because Lovelady purposefully established significant contacts with the state of Florida such that he could have reasonably anticipated being sued in Florida in connection with those activities. In so finding, the Eleventh Circuit applied the Calder effects test, explaining that "[t]he Constitution is not offended by the exercise of Florida's long-arm statue to effect personal jurisdiction over Lovelady because his intentional conduct in his state of residence was calculated to cause injury to Carman in Florida." Finally, the Eleventh Circuit found that the exercise of jurisdiction over Lovelady comported with traditional notions of fair play and substantial justice because Florida's interest in the dispute and Carman's interest in obtaining relief were not outweighed by the burden on the defendant of having to def end himself in a Florida court.

19. SURVIVAL OF CLAIM FOR LOSS OF CONSORTIUM – October 10, 2008
Jenkins v. State Farm Mut. Auto. Ins. Co., 2008 WL4531800 (Ala. Civ. App. 2008)

In Jenkins v. State Farm, the Court held that a loss of consortium claim is a property right of the uninjured spouse and can be brought in a separate action.

Alexis Jenkins, whose husband Charles Jenkins was injured in an automobile accident, sued her insurer State Farm for its refusal to pay her loss-of-consortium claim made under the uninsured/underinsured-motorist provision of the Jenkins' automobile policy. Mr. Jenkins was injured in a car accident in July 2004 and sued the other driver, Manuel Ramirez who was insured by Allstate. Allstate offered policy limits on Ramirez' behalf and Mr. Jenkins settled his claims in October 2006. In September of 2007 Mrs. Jenkins brought suit. State Farm moved to dismiss. State Farm argued that Mr. Jenkins failed to notify State Farm of his intent to settle, required by Lambert v. State Farm Mutual Automobile Ins. Co., 575 So. 2d 160 (Ala. 1991), and that he therefore waived any right Mr. Jenkins had to UIM benefits under the policy. State Farm also argued that because Mr. Jenkins settled his claims with Ramirez, Mrs. Jenkins' derivative claim for loss of consortium had been extinguished. The trial court entered judgment for State Farm and Mrs. Jenkins appealed. The Court of Civil Appeals reversed and remanded, holding that the release of Mr. Jenkins' claim against Ramirez did not necessarily extinguish Mrs. Jenkins; independent claim. Although a loss-of-consortium claim is derivative of an injured spouse's tort claim, Alabama law does not necessarily require that settlement of the injured spouse's underlying tort claim extinguishes the derivative loss-of-consortium claim. The Court noted that a loss-of-consortium claim is a separate property right of the uninjured spouse and can be brought in a separate action. In fact, it distinguished between Mrs. Jenkins' potential claims against the underlying tortfeasor and her claims against State Farm, recognizing that a dismissal of Mr. Jenkins' tort claims could possibly have had an effect on any claim Mrs. Jenkins may have against Ramirez but did not necessarily affect her claims against State Farm. The Court noted that, for Mr. Jenkins' suit against Ramirez, the record contained only (1) an unsigned release (2) that did not purport to release Ramirez from liability for Mrs. Jenkins' loss-of-

consortium claim. The Court also held that Mrs. Jenkins' claim was not barred by Mr. Jenkins' failure to notify State Farm of his settlement with Ramirez. The Court noted that Mrs. Jenkins' loss-of-consortium claim "is her independent claim and was not released by Mr. Jenkins's settlement with and possible release of Ramirez."

20. BREACH OF CONTRACT – October 10, 2008
Progressive Specialty Ins. Co. v. Wilkerson, 2008 WL 4531797 (Ala. Civ. App. 2008)
"Maynard, Cooper & Gale Weekly Law Report", October 23, 2008 edition

Wilkerson, insured by State Farm, was injured in a motor-vehicle accident with Thomas Killeen who was insured by Progressive. State Farm paid Wilkerson for medical-payments benefits. Wilkerson settled her lawsuit against Killeen. In connection with the settlement, Wilkerson agreed to indemnify and hold harmless Killeen and Progressive against any further subrogation claims. State Farm sought to collect from Progressive the monies it paid to Wilkerson for medical-payment benefits. After receiving a demand from Progressive to remit reimbursement to State Farm for the medical-payments benefits, Wilkerson's attorney paid State Farm a portion of the amount State Farm demanded, deducting the insurance company's pro rata share of attorney fees and court costs Wilkerson incurred. After receiving another demand from State Farm, Progressive later paid the remaining balance to State Farm and sued Wilkerson for the remaining balance. The distr ict court entered a judgment in favor of Wilkerson and Progressive appealed to the Circuit Court of Mobile County. The Circuit Court affirmed the district court's judgment and Progressive appealed. The Court of Appeals reversed. Wilkerson argued that she was authorized to retain the remaining balance as State Farm's pro rata share of her attorney fees and costs pursuant to the common-fund doctrine. The Court held that the common-fund doctrine was immaterial to the dispute between Progressive and Wilkerson. The Court then held Wilkerson breached the terms of the settlement agreement by refusing to pay

Progressive. The Court held that State Farm had a valid subrogation claim and that Wilkerson's refusal to pay Progressive constituted a breach of the settlement agreement.

21. MEDICAL MALPRACTICE/WRONGFUL DEATH – October 10, 2008
Thompson v. Patton, 2008 WL 4531792 (Ala. 2008)
"Maynard, Cooper & Gale Weekly Law Report", October 24, 2008 edition

Ellis suffered from and had been treated for a serious psychiatric illness for approximately 30 years. She was admitted to Baptist Medical Center Montclair ("BMCM") on November 11, 1999, which was her fourth admission to BMCM in 1999. Dr. Patton was Ellis's physician each time she was admitted. Ellis was discharged on November 23, 1999 with a discharge plan formulated by Dr. Patton. The next day Ellis went to the Eastside Medical Center where she was evaluated by her therapist. The therapist noted that Ellis had been unable to fill her prescription for Seroquel, which Dr. Patton had prescribed due to Ellis's suicide attempts. Dr. Patton was unaware that Ellis was unable to fill her prescription. On November 26, Ellis was found dead of a drug overdose and the coroner determined that suicide was the manner of death. Thompson, the administrator of Ellis's estate sued Dr. Patton and the Clinic alleging wrongful death under the Alabama Medical Liability Act § 6-5-480 et seq and § 6-5-541 et seq (the "AMLA"). Thompson alleged that Dr. Patton had breached the standard of care by discharging Ellis from the hospital prematurely, failing to formulate an appropriate outpatient-treatment plan, failing to readmit Ellis to a psychiatric unit, and failing to implement proper suicide precautions. After a jury trial, the jury could not reach a verdict and the court declared a mistrial. Dr. Patton then filed a "Defendants' Rule 50(b) Renewed Motion for a Judgment as a Matter of Law, or, Alternatively Styled, Motion for Summary Judgment" arguing that Thompson failed to meet his burden of proving that Dr. Patton's alleged negligence was the proximate cause of Ellis's death. The trial court denied that motion concluding that Thompson had proffered sufficient evidence

that a genuine issue of material fact existed, so as to allow the case to proceed to trial. The court also held that Thompson's evidence regarding the forseeabilit y of Ellis's suicide was sufficient to create a genuine issue of material fact. The trial court then certified, for a permissive appeal to the Alabama Supreme Court the following question: "The controlling question of law is the degree of proof necessary to establish the essential element of proximate causation in a medical malpractice/wrongful death action against a psychiatrist for the suicide of that psychiatrist's patient and whether the plaintiff in this case has met that requisite degree of proof." The Supreme Court refused to answer this question in it entirety because Rule 5 "is not a vehicle by which to obtain review of significant and unresolved factual issues." The trial court finally entered a judgment against Thompson holding that expert testimony was required to establish proximate causation and that the expert testimony Thompson offered was not substantial evidence suggesting that Dr. Patton's negligence probably caused Ellis's suicide. The Supreme Court agreed and held that Thompson's expert testimony showed only that there was an "unquantatative probability that Ellis might possibly attempt suicide or self harm," which is insufficient to establish proximate causation in a medical malpractice action. Next, Thompson contended that the trial court erred in sustaining Dr. Patton's objection to his expert's testimony on proximate causation. However, Thompson made no offer of proof regarding the testimony at the trial and inclusion of the testimony in a reply brief did not preserve the issue for appeal. Accordingly, the court granted Dr. Patton's motion to strike and refused to consider the portions of Thompson's expert included in the brief. Finally, Thompson argued that expert testimony was not needed to prove proximate causation in this case. The court disagreed, holding that the alleged negligence at issue did not involve a matter of "routine hospital care," which is an exception to the expert rule. Instead, Dr. Patton's decision to discharge Ellis was one of a

number of decisions she made about the appropriate medical care for treating Ellis's psychiatric illness. Evaluating the reasonableness of medical decisions is not a matter for which a jury could use common knowledge and experience, and therefore, expert testimony is required. Accordingly, the court affirmed the trial court's ruling.

22. BREACH OF SETTLEMENT AGREEMENT - CONTRACTS – ENFORCEMENT - TORTS DEFAMATION – ALIENATION OF AFFECTION - October 17, 2008 Choksi v. Shah, 2008 WL 4603738(Ala. 2008)

Manan Shah and Janhkhana Sha sued Chandrakant Choksi after Choksi failed to fulfill the terms of a settlement agreement he entered into with the Shahs for $800,000. After a jury trial, the Shahs were awarded the full requested amount and the trial court added prejudgment interest equaling $110,729. The Supreme Court affirmed the award. The events leading to this award follow.

In May 2004, Choksi entered into a lease agreement with Shah whereby Shah agreed to lease and operate one of Choksi's gas and convenience stores located in Scottsboro. On several occasions while Sha's wife Jankhana was working at the store, Choksi made inappropriate advances toward her. After Shah installed a security system to capture the inappropriate behaviour, Choksi accosted Jankhana again and in fact attempted to pull her into a closet. Shah approached Choksi in December 2004 regarding the incidents. Choksi agreed to let Shah terminate the lease, but requested that Shah continue to operate the station until Choksi could find a new tenant. Choksi offered to let Shah operate the station rent free for five years in an attempt to right the situation. However, in February 2005 the parties entered into an agreement for $800,000 to be paid to Shah for "retribution for bodily and mental damage" and for Shah's agreement not to bring suit or "slander" Choksi. Choksi stopped payment on the initial checks

and failed to pay after that. Shah then filed suit in Jackson County Circuit Court against Choksi and his business for the failure to fulfill the terms of the agreement. After the jury verdict and award, the Supreme Court affirmed the jury's decision and denied all four of the issues Choksi raised on appeal. First, the court held that because Jankhana was an unwilling victim of assault, the claims were not claims for alienation of affection barred by Alabama Code §6-5-331. The second and third claims on appeal related to the enforceability of the settlement agreement. Choksi did not enter the settlement under duress as he claimed. He was a sophisticated businessman and the threat of a lawsuit did not constitute duress. It is a well settled rule that threatening to file suit does not create duress. Finally, the Court held that Shah did not breach the settlement agreement by showing photos and video to others because Choksi never fulfilled the payment of the $800,000. The Court also noted that the truth is an absolute defense to slander, and it would therefore be impossible for Shah to have slandered Choksi by discussing or sharing the facts of the case.

23. SPOLIATION OF EVIDENCE – October 17, 2008
Chancellor v. White, et al., 2008 WL 4603399 (Ala. Civ. App. 2008)

Viola Chancellor filed a complaint against Charles E. White, Jr. and Charles White Jr. Construction, LLC, alleging claims arising under a contract to construct a house and make improvements to Chancellor's yard. Mr. White and the LLC filed a motion for summary judgment arguing that Chancellor spoliated evidence. The LLC filed a separate motion for summary judgment arguing that it was not a party to the contract between White and Chancellor. The trial court granted both motions. Ms. Chancellor appealed from the summary judgment in favor of Mr. White and the LLC. The Court of Civil Appeals affirmed the trial court's decision with respect to the LLC's separate motion because Chancellor did not raise any arguments

related to the LLC not being a party to the contract until she filed her reply brief on appeal. With respect to White, the Court reversed and remanded the case for further proceedings, taking into consideration the following five factors related to spoliation of evidence: (1) the importance of the evidence destroyed;(2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the information obtainable from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal. The Court found that Chancellor had removed materials and repaired parts of her house and yard prior to the time Defendant's expert had an opportunity to inspect; had taken pictures of the house and yard prior to the repairs being made; and had her own expert inspect the same. This showed that she appreciated the importance of the evidence destroyed and in fact acted culpably. However, the Court found that Mr. White failed to present sufficient evidence of the prejudice these actions had on White and he failed to present sufficient evidence that the photographs taken and expert report prepared for White were not viable alternative sources of evidence. The Court of Civil Appeals stated that the trial court could have imposed a less severe sanction and had the option to simply restrict Chancellor's claims to those based on evidence that was not destroyed.

24. FORUM NON CONVENIENS – October 17, 2008
Ex parte Bama Concrete, 2008 WL 4603739 (Ala. 2008)

This action arose out of an automobile accident in Tuscaloosa County in which Michelle Mims' vehicle was impacted by a concrete truck driven by Terry Dewayne Edwards and owned by Bama Concrete. The accident occurred one mile from Bama Concrete's office. Michelle Mims resided in Tuscaloosa County; the investigator who worked the accident lived and worked in Tuscaloosa County; and the other witnesses lived in Tuscaloosa County. Terry Dewayne Edwards, the driver, resided in Greene County. The truck was returning to Bama's offices after

a delivery in Tuscaloosa County. Mims received her medical treatment in Tuscaloosa County as well. The action was pending in the Greene County Circuit Court. Bama and Edwards petitioned the Supreme Court of Alabama for a writ of mandamus directing the trial court to transfer the case to Tuscaloosa County on the basis of forum non conveniens. The Supreme Court granted the petition and issued the writ. The Supreme Court found that the only connection to Greene County was that Edwards resided there, even though he worked in Tuscaloosa County. Alabama's forum non conveniens statute, Ala. Code Section 6-3-21.1, provides that an action must be transferred if the convenience of the parties and witnesses, or the interest of justice, so requires. The party moving for the transfer has the initial burden of showing that the transfer is justified based on either of these two grounds. Since the only connection to Greene County was Edwards residence, the Court found that the tenuous nexus of the case with Greene County did not justify burdening Greene County with the trial of the case, which had a much more substantial nexus with Tuscaloosa County. Accordingly, the Court held that the interest of justice and the convenience of the parties and witnesses required the transfer of the action from Greene County to Tuscaloosa County.

25. FEDERAL TORT CLAIMS ACT – October 21, 2008
Nguyen, et al. v. United States of America, 2008 WL 4631719 (11th Cir. 2008)
"Alabama Law Weekly", Vol. 17, No. 44, October 31, 2008

In Nguyen, the Eleventh Circuit Court of Appeals held that Congress's limited waiver of sovereign immunity extends to claims of false arrest, false imprisonment, and malicious prosecution arising from the acts or omissions of federal investigative or law enforcement officers. The Court also pointed out that the plaintiff's story illustrates the value of living in a country where a citizen may pursue claims against the government in those circumstances.

Facts and procedural history. Andrew Nguyen was a Vietnamese physician who had served in the Vietnam War. Afterwards he was falsely accused of being a spy left behind by the CIA, imprisoned for a year, and forced to do hard labor. He attempted to escape from Vietnam more than once. After being jailed again, this time for nine months, he was able to escape on a boat with 81 other people. Dr. Nguyen finally made his way to the United States. In 1984, he purchased a retiring physician's medical practice in Trenton, Florida. In 1986, Dr. Nguyen became a citizen of the United States.

In 2000, a deputy sheriff came into Dr. Nguyen's office and arrested him without warning or explanation. The deputy was accompanied by Robert Yakubec, an agent of the Drug Enforcement Agency ("DEA") who removed from the wall a certificate that authorized Dr. Nguyen to prescribe controlled substances for his patients. Dr. Nguyen was not given a chance to explain whatever the officers thought he had done wrong and was told that he had no choice but to go to jail. He was issued an inmate uniform and held in custody until the end of the day. He later learned that he had been arrested for six counts of delivery of a controlled substance. The warrant accused Dr. Nguyen of issuing prescriptions for controlled substances to a confidential informant "without any type of physical examination or medical need."

The charges were nol prossed 55 days later due to insufficient evidence, but pharmacies informed him he could no longer prescribe anything, health insurance companies canceled their contracts with him, the arrest was headline news in the local media, and many patients called his office asking if he was a criminal. It was later learned that the confidential informant had been examined before each prescription and had complained of "nervousness," "insomnia," and "pain," which she told Dr. Nguyen she had been experiencing for months. All parties agreed that the evidence held by the law enforcement officers indicated that he was guilty of no crime and

that the warrant was based on a false statement. Dr. Nguyen sued the arresting deputy, the sheriff, and the United States as the employer of DEA agent Yakubec. The district court granted the United States' motion to dismiss it on sovereign immunity grounds. The jury found in favor of Dr. Nguyen against the sheriff and deputy.

The Eleventh Circuit's analysis and decision. The Court explained that all that remained of the lawsuit was Dr.Nguyen's claims against the United States for false arrest, false imprisonment, and malicious prosecution. The validity of the district court's dismissal, therefore, turned on whether the United States waived its sovereign immunity in the Federal Tort Claims Act ("FTCA"). The FTCA waives sovereign immunity at 28 U.S.C. Section 1346(b)(1), but takes back part of the waiver in the "exceptions" section of the FTCA at 28 U.S.C. Section 2680(a). Included in the exceptions paragraph is a discretionary function clause that covers decisions about whether and when to make an arrest, even if the officer abused the discretion he exercised. Section (h) of that same section, however, provides that the waiver of Section 1346 applies to claims of "false imprisonment, false arrest, [and] malicious prosecution" against law enforcement officers of the United States Government.

The Court held that Section 1346(b) is the general waiver of sovereign immunity and Section 2680(a) and (h) are exceptions to that waiver. The proviso in Section 2680(h) takes the claims it specifies out of the exceptions and makes the general waiver applicable to them. "The net result is that the United States has waived its sovereign immunity for the claims listed in the Section 2680(h) proviso. Those claims include 'false imprisonment, false arrest, . . . [and] malicious prosecution.' That means a lawsuit against the United States is permitted insofar as it asserts those claims." The Court noted that its conclusion was in line with the canons of statutory interpretation and prior precedent. *Brown v. United States*, 653 F.2d 196 (5th Cir. Unit A Aug.

1981)(concluding that Section 2860(h) waives sovereign immunity malicious prosecution claims, albeit without much analysis of that particular issue).

26. WILL CONTEST/UNDUE INFLUENCE – October 24, 2008
Furrow v. Helton, 2008 WL 4687089 (Ala. 2008)
"Maynard, Cooper & Gale Weekly Law Report", October 30, 2008 edition

Malone executed a will in 1995 devising her estate to her three daughters in equal shares. Furrow was named as the executrix of Malone's estate with Lott and Helton as co-executrixes in the event Furrow could not serve. Helton predeceased Malone and Malone executed a new will devising the entire estate equally between Furrow and Lott, her two remaining living daughters. The 2003 will made no provision for any of Malone's grandchildren; instead, it provided that if either Furrow or Lott preceded Malone in death, the surviving daughter would receive Malone's entire estate. Malone died in June 2006 and Furrow, the executrix, sought to have the 2003 will probated in the Mobile County Probate Court. Gregory, a grandchild, filed a will context alleging, among other things, that the 2003 will was the result of Furrow's undue influence. The will contest was tried before a jury, which returned a verdict in Gregory's favor on his claim of undue influence, and the probate court entered a judgment on the verdict in favor of Gregory and against the 2003 will. On appeal, Furrow contended that burden of proof never shifted to her and that the trial court erred in denying her motion for a JML on the undue-influence claim. The Supreme Court agreed. As the contestant, Gregory had the burden at trial of proving the elements of undue influence by showing "(1) that a confidential relationship existed between a favored beneficiary and the testator (2) that the influence of or for the beneficiary was dominant and controlling in that relationship; and (3) that there was undue activity on the part of the dominant party in procuring the execution of the will." Here, Gregory failed to offer substantial evidence suggesting that Furrow exercised a dominant or controlling influence over Malone or that

Furrow engaged in undue activity in procuring the execution of the will. Thus, Gregory failed to meet his burden of proof under at least two of the three elements of his undue-influence claim. The court noted that one alleging dominance of a child over a parent must prove that "time and circumstances have reversed the order of nature, so that the dominion of the parent has not merely ceased, but has been displaced, by subservience to the child." There was no evidence indicating that Furrow assumed a dominant role over Malone or that she denied others access to her. Further, even though there was testimony that Malone took over ten pills a day, there was no evidence as to the possible side effects of those medications or evidence indicating that Malone had taken any of the medications on the day she executed the 2003 will. Ultimately, the court determined that the undisputed evidence that Furrow visited her mother "three to four times every month", drove her to the lawyer's office to execute the 2003 will, and possibly sat in the office in which the will was executed did not show dominance or control. Therefore, the evidence did not suggest that Malone ever went "beyond compliance with the voluntary directions of the testator." Accordingly, the Court reversed the trial court's denial of Furrow's motion for JML on Gregory's claim for undue-influence.

27. WORKERS' COMPENSATION – ASSAULT - October 24, 2008
<u>Ex parte N.J.J. (In re: N.J.J. v. Wesfam Restaurants, Inc., d/b/a Burger King)</u>
2008 WL 4687088 (Ala. 2008)
Portions extracted from "Alabama Law Weekly", Vol. 17, No. 44, October 31, 2008

N.J.J. filed a complaint in the Madison Circuit Court, seeking worker's compensation benefits from Wesfam Restaurants, Inc., d/b/a Burger King ("Burger King").

> N.J.J. worked for Burger King for 19 years. She was a restaurant manager for 10 of those 19 years. During the early morning of August 11, 2002, N.J.J. was assaulted while attempting to unlock the Burger King restaurant on Memorial Parkway in Huntsville. N.J.J. was grabbed by two white males who pulled her

> behind the Burger King building. The two men physically and sexually assaulted N.J.J. A third man acted as a lookout during the assault. After she was discovered, N.J.J. was transported by ambulance to Huntsville Hospital, where she was treated for multiple injuries sustained during the attack, including abrasions and lacerations to her body, face, and genitals.
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> . . .
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> N.J.J. testified that, during the attack, the attackers repeatedly stated: "We'll show you what we do to nigger lovers."N.J.J., who is white, testified that shortly before the attack she had banned the man who acted as the lookout from the Burger King restaurant for setting a napkin holder on fire. N.J.J. testified that before the attack she had never seen the two men who attacked her. N.J.J. identified D.S. as the man who had acted as the lookout. N.J.J. testified that, during the attack, D.S. did not make any statements regarding his earlier ejection from the Burger King restaurant. No evidence was presented of any statements made during the attack that would indicate that the attack was related to N.J.J.'s employment. N.J.J. testified that D.S. asked the two attackers, who were burning her with a cigarette, not to do so and ultimately asked the two attackers to leave.

Ex Parte N.J.J., 2008 WL 4687088 at *1.

The trial court found that N.J.J. had not sustained a compensable injury under Ala. Code 1975, Section 25-5-1(9), because her injuries were caused by the racially motivated assault of third parties for reasons personal to her and not directed against her as an employee or because of her employment. N.J.J. appealed and the Court of Civil Appeals affirmed without an opinion. N.J.J. petitioned for certiorari review. **Writ of certiorari quashed.** The record indicated that N.J.J. was assaulted while she was attempting to unlock the restaurant. The attackers repeatedly stated during the attack: "We'll show you what we do to nigger lovers." No evidence was presented that any of the statements made during the attack would indicate that the attack was related to her employment. The Court explained that the Alabama Workers' Compensation Act excludes from its provisions an injury caused by the act of a third party who intends to injure the employee because of reasons personal to the employee and not directed against him or her as an employee or because of his or her employment or where the attack had no relationship to the

employment. Ala. Code 1975, Section 25-5-1(9); see also Jacobs v. Bowden Elec. Co., 601 So.2d 1021 (Ala. Civ. App. 1992). The Court held that where, as here, the criminal act is accomplished for reasons personal to the victim, though the employment may give the assailant a convenient opportunity for committing the crime, the injury does not arise out of the employment within the meaning of the Workers' Compensation Act. Chief Justice Cobb dissented.

28. NEGLIGENCE/INTERVENING CAUSE/CONTRIBUTORY NEGLIGENCE – October 24, 2008
Simmons v. Carwell, 2008 WL 4683567 (Ala. Civ. App. 2008)

On June 12, 2006 Henry Simmons and his wife Colida Simmons filed a complaint against Willie Carwell and Geico insurance in which they alleged that Carwell negligently and wantonly allowed his car to roll unoccupied down a sloped driveway toward Simmons home, creating a sudden emergency that prompted Henry Simmons to enter the vehicle to attempt to stop it. Henry did not succeed in his effort to stop the vehicle and was injured when the automobile plunged into a ravine. Henry's wife claimed loss of consortium also. The trial court granted defendant's motion for summary judgment on the grounds that Simmons' acts constituted intervening and superseding acts, Simmons was contributorily negligent, and he acted wantonly. Simmons appealed. The Court of Appeals found that Simmons' act of attempting to stop the car in order to prevent either personal or physical injury did not constitute an intervening or superseding act. The Court held that "whether Henry [Simmons's] actions in attempting to stop the runaway automobile constituted an intervening and superseding cause is a question of fact to be decided by a jury, not a question of law for the court." Further, if a plaintiff injures themselves while "reacting normally to an abnormal situation caused by the negligence of the defendant, then the court may not find as a matter of law that the plaintiff's

action constituted an intervening and superseding cause of his or her injury." It was improper for the trial court to grant summary judgment on the contributory negligence issue because, under the Alabama rescue doctrine Simmons's actions only bar recovery if "the act of the rescuer [Simmons] is manifestly rash and reckless to a man of ordinary prudence acting in emergency." Id., at 13. The court applied a subjective view to the rescue doctrine, finding it applies even if the person being rescued is not in actual peril but there exists a reasonable belief of imminent peril. The fact that the unattended car was rolling unoccupied down an incline satisfied this "reasonable belief" by creating an apprehension of imminent danger. Finally, the court affirmed the trial court's holding on wantonness because Simmons failed to argue wantonness in the lower.

29. PERSONAL JURISDICTION/INTERNET – October 24, 2008
Ex parte Harrison, 2008 WL 4684156 (Ala. Civ. App. 2008)

Plaintiff M. Smallwood purchased a vehicle from Defendants Josh Harrison and Josh Harrison d/b/a Western Motor Group after viewing an Ebay Motors advertisement for the vehicle. Plaintiff sued for fraud and a violation of the Alabama Deceptive Trade Practices Act because the car was advertised as having been a police squad car, when in fact it was used as a taxi cab. Defendants petitioned for a writ of mandamus compelling the trial court to grant Defendants' motion to dismiss based on lack of personal jurisdiction. Defendants alleged that sufficient contacts were lacking to warrant haling them into court in Alabama. They claimed that they did not purposefully avail themselves to the privileges of doing business in Alabama. The Court of Appeals agreed, holding that regardless of whether jurisdiction is alleged to be general or specific, defendants must have committed some act in which they purposefully availed themselves of the benefits of doing business in Alabama. The Court held that advertising in a

national media outlet does not satisfy sufficient contacts for the purpose of granting personal jurisdiction and the same is true for internet advertising over a website. Because Defendants' Ebay advertisement was passive in nature, much like an electronic billboard, it was not specifically directed at Alabama or Smallwood, and was not therefore an act of purposeful availment by Defendants. Further, Plaintiff Smallwood's purchase was an isolated contact with Alabama initiated at the request of Smallwood and any of Defendants' subsequent contacts were a result of Smallwood's requests. Therefore, the Court of Appeals rightfully found the defendants did not have sufficient contacts with Alabama to justify personal jurisdiction.

30. UCC/FRAUD/NEGLIGENCE – October 24, 2008
La Trace v. Webster, et al., 2008 WL 4684147 (Ala. Civ. App. 2008)

Richard La Trace sued the "Websters'," (several members of an auction house) for claims arising out of purchases that La Trace made at an auction in March of 2002. La Trace purchased five "Tiffany" lamps and a lamp shade (hereinafter referred to as the "lamps") that were not in fact authentic Tiffany lamps, but reproductions of Tiffany lamps. The trial court granted the Websters' summary judgment motions on all claims, which included counts for fraudulent suppression, fraudulent misrepresentation, breach of warranty, breach of contract, negligence, wantonness, and violation of Ala. Code § 8-14-23 (1975) (which provides that the description of goods sold at auction are considered to be warranties). The Court of Civil Appeals affirmed in part, reversed in part, and remanded the case to the Circuit Court of Marion County. The Court of Civil Appeals reversed the trial court as to the breach of warranty, breach of contract and fraudulent misrepresentation claims because, under the UCC, a written disclaimer signed before the auction did not preclude representations made during the auction from becoming part of the basis of the bargain. The Court also reversed judgment as to the negligence and wantonness claims as the Websters' summary judgment motion provided only a "general denial of liability"

on these claims and failed to establish a prima facie case for summary judgment. However, the Court did affirm the trial court's judgment on the fraudulent suppression claim. They found that there was no issue as to the Websters' duty to disclose their lack of experience dealing with Tiffany lamps, since there was no evidence of a confidential relationship or other circumstances imposing such a duty. Similarly, the court affirmed summary judgment on Plaintiff's § 8-14-23 claim, noting that Plaintiff failed to offer any authority to establish that § 8-14-23 provided a private right of action.