RECENT ALABAMA APPELLATE DECISIONS

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TUSCALOOSA COUNTY BAR ASSOCIATION
SPRING CLE SEMINAR
April 28, 2017
First United Methodist Church of Tuscaloosa, Chitwood Hall

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("Recent" meaning those decisions available subsequent to the Tuscaloosa County Bar Association Fall CLE Seminar.)

(1.) Stinnett v. Kennedy, [Ms. 1150889, Dec. 30, 2016] ___ So.3d ___ (Ala. 2016):

An action may be maintained under §6-5-391, Ala. Code 1975, entitled "Wrongful death of a minor," for physician negligence causing the death of an unviable fetus. The exception to criminal liability for death of an unborn child "at any stage of development," where the death was caused by "mistake, or unintentional error on the part of a licensed physician (§13A-6-1(a)(3) and (b), Ala. Code 1975), applies only to criminal prosecution, not civil actions. On May 13, 2012, the defendant OB/GYN performed a "D&C" and administered a cytotoxic drug to end patient's suspected ectopic pregnancy, which turned out to be an intrauterine pregnancy. On June 8, 2012, the patient, who had experienced prior miscarriages in 2005 and 2007, suffered a miscarriage of nonviable fetus. Patient's medical expert acknowledged there was no way to know what caused the miscarriage or whether the very early-stage pregnancy would have progressed to viability, but the likelihood of that happening was adversely impacted by the D&C and drug administration. The OB/GYN contended that this state of evidence prevented the patient from meeting her burden in a med-mal case of showing that the alleged malpractice "probably caused" the death of the previable fetus. The Supreme Court held that to be the wrong proximate cause inquiry. "Rather, we hold that, in order to establish proximate cause, [the patient] was required to show that [the OB/GYN's] actions probably caused the death of the fetus, regardless of viability." The Court further held that there was "ample evidence" that the administration of the drug "had the intended effect of ending [the patient's] pregnancy such that the question of proximate cause warrants submission to the jury." This was distinguished from the so-called "loss of chance" cases involving failure of physicians to make a timely diagnosis. The Court summed up by saying it was merely holding that the evidence indicating that the OB/GYN's "treatment caused the death of the fetus was sufficient to create a jury question."

(2.) <u>Ex parte VEL, LLC</u>, [Ms. 1150542, Dec. 30, 2016] ___ So.3d ___ (Ala. 2016):

- Where plaintiff expressly substitutes the true name of a defendant for a fictitious party name, "relation back" is analyzed exclusively under Rule 9(h) Ala. R. Civ. P., and plaintiff cannot rely on Rule 15(c)(2) and (3) providing for relation back where a plaintiff changes the name of a named party defendant and the newly named party had notice of the action and knew that but for a mistake concerning its identity, it would have been named originally

- The opinion discusses at length the Rule 9(h) concept of a party being "ignorant of the name of an opposing party" and the court-imposed requirement of "due diligence" in ascertaining true identity.

    - Delay of two months in propounding discovery to newly named corporate defendant concerning names of its involved employees, and one-month delay in substituting the employees once named, didn't constitute lack of due diligence.

- The opinion also defines and discusses the proper application of the concepts of "equitable tolling" and "equitable estoppel" as basis for avoiding bar of statute of limitations.

(3.) <u>FMR Corp., etc. v. Howard, etc.</u>, [Ms. 1151149, Jan. 13, 2017] ___ So.3d ___ (Ala. 2017):

Where trial court declined to grant motion to compel arbitration "at this time" but indicated it might do so at some point in the future, that did not prevent the order from constituting a "final judgment," as is necessary for an appeal. "By not granting [Defendant's] motion to compel arbitration, the trial court 'effectively and substantially' denied the motion, and [Defendant] is entitled to pursue appellate review of that decision."

Where a party opposing a motion to compel arbitration argues that the movant has waived the right to arbitration by substantially invoking the litigation process, that issue is a matter for the trial court to decide; but where the party opposing arbitration argues that the movant waived the right to arbitration based on

its failure move for it in a timely fashion, that's an issue for the arbitrator to decide, not a court.

(4.) Yarbrough v. Eversole, [Ms. 1150400, Jan. 27, 2017] ___ So.3d ___ (Ala. 2017):

Although a former client/legal malpractice plaintiff must ordinarily prove that "but for" the attorney's negligence the outcome of the legal matter would have been more favorable to the client, that is not required where the attorney accepts a fee to undertake something the attorney knows cannot be done and that attempting to do it will be futile.

(5.) Grimes v. Alfa Mutual Insurance Company, [Ms. 1150041, Jan. 27, 2017] ___ So.3d ___ (Ala. 2017):

Extensive discussion of the history of, and interaction between, the Alabama Motor Vehicle Safety Responsibility Act (§32-7-1 et seq., Ala. Code 1975) and the Mandatory Liability Insurance Act (§32-7A-1 et seq., Ala. Code 1975), leading to a holding by the Court that a voluntarily, regularly issued automobile liability insurance policy may limit permissive user coverage to that of a driver using the covered automobile with the express permission of the named insured or of the named insured's family members. However, if the policy is a "motor vehicle liability policy" required under the MVSRA to be filed after a motor-vehicle accident (see §32-7-22), in order that victims of the accident may be compensated, the permissive user coverage must extend to a drive using the vehicle with either express or implied permission. A regular policy of automobile liability insurance issued to an insured voluntarily procuring the same so as to be in compliance with the MLIA's requirement for such insurance before a person can operate, register or maintain registration of a vehicle, can validly restrict coverage to users who have express permission for the use. (Justice Murdock wrote a 16-page dissent in which he explained why in his opinion the principles of statutory construction called for a finding that any policy of automobile liability insurance must cover both express permission and implied permission users.) The opinion contains an extended discussion of the rules and principles of statutory construction; and the role of "public policy" in testing the enforceability of a statute (including the quotation of an English judge's felicitous observation that "public policy is an unruly horse astride of which one may be carried into unknown paths").

(6.) University Toyota and University Chevrolet Buick GMC v. Hardeman, [Ms. 1151204, Jan. 27, 2017] ___ So.3d ___ (Ala. 2017):

Arbitration agreement specified that the arbitration would be conducted by the Better Business Bureau. Plaintiffs sought to have a "class-wide" arbitration but the BBB would not oversee a class-action arbitration, as opposed to one involving individual claimants. The trial court ordered arbitration but substituted the American Arbitration Association as the arbitration forum, with the AAA arbitrator to decide whether class-action arbitration was to be allowed. If it was not, the AAA was to cease proceedings and the parties were to seek arbitration through the BBB on a case-by case basis. On appeal of that order by the defendant, the Court held that it was clear under U.S. Supreme Court precedent that a party could not be compelled to submit to class arbitration unless the arbitration agreement had a provision authorizing class-action arbitration. Because the parties' agreement contained no such provision, therefore, the BBB was a suitable arbitration forum all along and there was no occasion for the trial court to "fill the gap" in the forum selection by substituting the AAA. A trial court "can compel arbitration only in a manner consistent with the terms of the applicable arbitration agreement."

(7.) Ex parte Tenax Corporation, et al., [Ms. 1151122, Jan. 27, 2017] ___ So.3d ___ (Ala. 2017):

Plaintiff was injured on the job at the Tenax plant. He'd previously worked there for short periods in 2010 and 2013, but when he reapplied in 2014, he was directed by the plant manager to apply through Onin Staffing, LLC. Tenax had a relationship with Onin whereby Onin supplied it with temporary labor. Tenax paid Onin and Onin, after deducting for various items including workers' compensation premiums, would write a check to the employee. The agreement between Plaintiff and Onin stated "I understand that I am an employee of Onin Staffing." Tenax controlled all aspects of Plaintiff's work in the plant. Plaintiff sued Onin for W.C. benefits and Tenax for tort liability. The Supreme Court explained:

> Tenax seeks a writ of mandamus directing the trial court to enter a summary judgment in its favor because, Tenax says, it is immune from Dees's tort claims under the exclusive-remedy provisions of the Alabama Workers' Compensation Act. Specifically, Tenax contends that, although Onin was Dees's "general employer," Tenax was

Dees's "special employer" and, thus, that the exclusive-remedy provisions of the Workers' Compensation Act extend to Tenax.

After reviewing in detail the law concerning who qualifies as a "special employer" for purposes of the W.C. Act, the Court concluded that Plaintiff had an implied contract of hire with Tenax and it had made a prima facie showing that it was Plaintiff's special employer. The Court granted the writ and directed the trial court to enter summary judgment in favor of Tenax based on W.C. Act immunity.

(8.) <u>Hurst v. Sneed, etc.</u>, [Ms. 1151067, Feb. 3, 2017] ___ So.3d ___ (Ala. 2017):

A "Guest Statute" (§32-1-2, Ala. Code 1975) case. Ms. Hurst (Plaintiff) and Ms. Ray (who died subsequent to the events involved, and whose estate was therefore the Defendant) were 20-year friends and neighbors who regularly shopped together, alternating whose vehicle they used so as to reduce fuel cost and vehicle wear and tear. On the occasion in question, Ray, who suffered from various illnesses, asked Hurst to accompany her on a trip to take Ray's elderly aunt to Wal-Mart for some necessary shopping. Ray wanted Hurst to stay with the aunt after Ray let them out at the store entrance and went to park her car, and also to assist the aunt while the three were in the store. When they arrived at Wal-Mart, "Hurst then began to get out of the vehicle, but, before she had completely exited the vehicle, Ray pulled the vehicle forward, causing Hurst to fall to the ground. Hurst sustained injuries when the back tire of the vehicle ran over her leg." After Hurst sued Ray's estate alleging negligence, the trial judge granted a defense motion for summary judgment, reasoning that Hurst's negligence claim was barred by the Guest Statute. The Supreme Court reversed, after providing a thorough analysis of the case law dealing with what constitutes a "guest," barred by the Guest Act from recovering for negligence, as opposed to a "passenger for hire," not so barred, and, in particular, the sort of non-monetary "consideration" and relationships which can provide sufficient benefit to the driver from the passenger's presence, to constitute the passenger one "for hire." The Court explained that a proper analysis had three components:

> 1) if the transportation of a rider confers a benefit only on the rider, and no benefits, other than such as are incidental to hospitality, good will, or the like, on the driver, the rider is a guest; (2) if the transportation tends to promote the mutual interest of both the rider and the driver for their common benefit, thus creating a joint business

relationship between the motorist and his or her rider, the rider is a "passenger for hire" and not a "guest"; and (3) if the rider accompanies the driver at the instance of the driver for the purpose of having the rider confer a benefit or service to the driver on a trip the primary objective of which is to benefit the driver, the rider is a "passenger for hire" and not a "guest."

The Court reversed the summary judgment, reasoning that the circumstances of Hurst's presence on the trip in question satisfied the third component:

> "Hurst's accompaniment of Ray to the Wal–Mart store to assist Ray with Williams conferred more than an incidental benefit to Ray -- it conferred a material and tangible benefit because it relieved Ray, who herself was ill and suffering from congestive heart failure, of some of the burden of having to be the sole caretaker of her elderly aunt on the shopping excursion. It was this benefit to Ray that induced her to ask Hurst to accompany her to the Wal–Mart store. Accordingly, we conclude that Hurst's accompanying Ray to the Wal–Mart store to assist Ray with her elderly aunt conferred on Ray a material benefit so as to remove Hurst from 'guest' status under the Guest Statute."

(9.) <u>Collins v. Herring Chiropractic Center, LLC</u>, [Ms. 1151173, Feb. 17, 2017] ___ So.3d ___ (Ala. 2017):

Patient of a chiropractor sued for blisters and later scarring on her knee where a "cold pack" had been applied. As a part of her past treatment with cold pack applications, the pack (1) was already laid out before application but this time it was retrieved from the refrigerator; it was harder than previous times; and patient felt heat when the pack was removed, as opposed to feeling cold as on past occasions. The chiropractic clinic had been closed for seven days before the patient's morning appointment. Summary judgment was granted the defendant for want of the patient's presentation of expert testimony as to standard of care and causation. Held: the events involving the patient were such as to invoke an exception to the requirement in med-mal cases for expert testimony, to-wit: where the lack of skill is so apparent as to be understood by a lay person and require only common knowledge and experience to understand it. The Court's opinion surveys all of its prior cases where the circumstances had been held to fit within this exception. The Court opined that plaintiff's injury "is akin to frostbite" and that "blistering and subsequent scarring does not ordinarily occur following the

application of a cold pack, absent negligence." The causative relationship between the defendant's acts and the plaintiff's injury could likewise be readily understood. Summary judgment reversed.

(10.) Equity Trust Company, etc. v. Breland, [Ms. 1150302 and 1150876, Feb. 17, 2017] ___ So.3d ___ (Ala. 2017):

Yet another case in which the Court rejects a Rule 54(b), Ala. R. Civ. P. certification of finality of a judgment fully disposing of certain claims, on the basis that other claims which remained pending in the case could require the Court to review the same facts if there was a future appeal following eventual disposition of the remaining claims. Rule 54(b) certification "should be entered only in exceptional cases" because "appellate review in a piecemeal fashion is not favored." There thus not being a valid final judgment, the appeal was dismissed for want of appellate jurisdiction.

(11.) Ex parte Caremark Rx, LLC, [Ms. 1151160, Feb. 24, 2017] ___ So.3d ___ (Ala. 2017):

Trial judge approved a class action settlement and, in its order doing so stated that it "reserves and maintains continuing jurisdiction over" a described list of possible future aspects of the settlement. Sixteen years later, that trial court granted a motion by original class counsel requesting that it order the original defendant to provide information to class counsel identifying the class members and providing contact information so that class counsel could notify them of the opportunity for them to file claims in another settled class action. After the court ordered the production "under its retained jurisdiction," the defendant petitioned for a writ of mandamus, contending the trial court had no jurisdiction to enter the order in question. The Supreme Court noted that, absent the filing of a Rule 59 or Rule 60 Ala. R. Civ. P. motion, a court generally loses jurisdiction to amend a judgment 30 days after it has been entered. However, a trial court continues to hold "residual jurisdiction" even after the 30-day period has expired such that it can take certain action "necessary to enforce or interpret" its final judgment. Therefore, the issue was whether it was within the trial court's residual jurisdiction to order that the requested information be produced. "A court cannot broaden by mere declaration the residual jurisdiction it necessarily holds to allow it to interpret or enforce its judgments." A trial court's inherent enforcement power applies to

the judgment as originally rendered; it can't be exercised to modify the judgment. "Accordingly, there is no basis for the trial court to impose that requirement [for production of information] upon [the defendant] now and it, in fact, lacks the jurisdiction to do so." The order in question "is not merely interpreting or enforcing" its prior final judgment. Rather, "it essentially seeks to modify or amend that final judgment to impose new obligations upon [the defendant], even though the trial court's jurisdiction to modify or amend the judgment expired 30 days after the [original] judgment was entered." In that original judgment, the trial court "could not extend its jurisdiction over any matter somehow related to [that] final judgment in perpetuity by simply declaring it so." Therefore, the trial court was directed to vacate its order requiring production of the information.

(12.) <u>Ex parte Becky Ingram and Nancy Wilkerson</u>, [Ms. 1131228, Feb. 24, 2017] ___ So.3d ___ (Ala. 2017):

One exception to the "State-agent," a/k/a "Cranman" immunity afforded an eligible government employee sued in his or her "individual capacity" is where the employee has "acted beyond his or her authority." Over the course of a number of decisions, the Alabama Supreme Court had applied that exception where the employee failed "to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist." In this case, appealed from the Tuscaloosa Circuit Court, the Supreme Court reframed that exception to immunity so as to limit it to situations where the rules, regulations or policies were "sufficiently specific as to have removed from [the employee] the measure of professional judgment and discretion she used in the particular circumstance she faced." As to the teacher's aide defendant in the case, the Court decided that it could not say that the policy in question deprived her "of the authority to use her professional judgment to respond as she did to the <u>exigent</u> circumstances presented to her." (Emphasis added.) As to the other defendant, an eighth-grade science teacher, the Court concluded that conflicting evidence, and its obligation at the MSJ stage to view the record in a light most favorable to the nonmovant, precluded a reversal of the circuit court's decision to deny the MSJ. (The opinion, authored by Justice Murdock, garnered two concurring votes; two special concurrences, including one by Justice Murdock himself; two "concur in the result;" and a split "concur in the result in part and dissent in part.")

(13.) Newell v. SCI Alabama Funeral Services, LLC, [Ms. 1151078, March 17, 2017] ___ So.3d ___ (Ala. 2017):

A party challenging the enforceability of an arbitration provision on the basis that it is unconscionable bears the burden of proof. The party must establish both procedural and substantive unconscionability. The opinion discusses the nature of each of those categories of unconscionability, applies them to the circumstances involved, and finds the arbitration provision not unconscionable.

(14.) Blackmon v. Renasant Bank, [Ms. 1150692, March 17, 2017] ___ So.3d ___ (Ala. 2017):

Bank sued borrower asserting nine counts, including breach of contract, open account and account stated, and various equitable theories, such as unjust enrichment, money had and received and constructive trust. As to each count, the sole request for damages was the outstanding balance owed on the underlying loan. The trial court granted a partial summary judgment in favor of the bank on its claims of unjust enrichment and money had and received and awarded as damages the outstanding loan balance. The court specifically stated in its judgment that "all other counts asserted by the parties remain pending," but certified the partial summary judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. On appeal by the borrower, the Supreme Court held that the different counts did not constitute separate claims but rather simply different legal theories on which the bank could be permitted only the one recovery it sought. Therefore, the counts constituted just one claim, and the trial court's explicit statement that the remaining counts remained pending prevented the partial summary judgment from fully adjudicating that claim. "For a Rule 54(b) certification of finality to be effective, it must fully adjudicate at least one claim or fully dispose of the claims as they relate to at least one party." Even though neither party challenged the appropriateness of the Rule 54(b) certification, the Supreme Court was obliged to look into it because without a validly final judgment there would be no appellate jurisdiction. "We dismiss the appeal as being from a nonfinal judgment."

(15.) Simmons Group, LTD v. Caine O'Rear, Jr., Family Trust, [Ms. 1150475, March 24, 2017] ___ So.3d ___ (Ala. 2017):

Case involving competing claims of ownership of the mineral interest in a piece of property located in Walker County. The original owner was John W. Landon, who acquired the property by patent from the United States government in 1858. In 1877, a fire destroyed the Walker County courthouse along with the Walker County land records. Neither of the competing claimants could trace its chain of title to Landon because of the break in the chain of title caused by the destruction of the records. The Supreme Court's opinion discusses how someone may adversely possess a mineral interest that has been severed from the surface estate and also explains that when the mineral interest has not been severed, adverse possession of the surface is sufficient for adverse possession of the mineral interest. The Court based its decision, as to who had the superior title, on the rule adopted in Whitehead v. Hester, 512 So.2d 1297 (Ala. 1987), whereby "when all land records have been destroyed, the first conveyance recorded thereafter becomes the new beginning point of the chain of title." In that regard, "The Court looks to instruments that actually purport to convey an interest, rather than instruments merely concerning ownership of the land." Thus, in this case, a recorded instrument whereby a Nancy Landon committed to convey the subject parcel to her daughter in exchange for the daughter's agreement to take care of her for life, and three affidavits declaring that a certain person had been in adverse possession of both the mineral interest and surface of the parcel, all recorded prior to the 1883 recordation of a quit claim deed, could not serve to start a new chain to title. The quit claim deed was the first "conveyance" recorded after the fire.

(16.) Ex parte City of Homewood, [Ms. 1151310, March 24, 2017] ___ So.3d ___ (Ala. 2017):

Fuller and Mines, suspected shoplifters, attempted to elude responding police by speeding away from the scene in a vehicle driven by Fuller. The police pursued and Fuller's vehicle wrecked, killing him and injuring Mines, who later sued the police officers and the City of Homewood. The defendants moved to dismiss the suit based on various immunity grounds, non-cognizable claims and intervening criminal acts. The defendants "attached to the motion to dismiss a copy of a video recording of the pursuit and Fuller's accident made by the dashboard camera in Officer Clifton's vehicle." The trial court treated the motion as one for summary judgment and denied it, but stating it would again entertain the issues presented after the discovery phase was completed. The defendants

petitioned the Supreme Court for a writ of mandamus directing the trial court to grant them summary judgment. Mines argued in opposition that she needed a reasonable time to conduct discovery. "Mines did not attach an affidavit proffering what she expected discovery to reveal, and she did not challenge the authenticity of the video recording." In the process of analyzing the immunity issues, and issuing the writ, the Court observed that the video established that the officers were "exercising judgment and discretion," so as to make them eligible for State-agent immunity under the "Cranman" case. Moreover, "in light of . . . the evidence presented in the video recording, Mines's argument that additional discovery is required before she can address the summary-judgment motion is not supported by the record and is unpersuasive." "To the extent that Mines may have asserted that additional discovery will show [that officers] 'caused' Fuller to lose control of her vehicle, the video quite clearly establishes otherwise. The video recording demonstrates that the officers were exercising due care in the operation of their vehicles and were not responsible for Fuller's actions."

(17.) Thomas v. Heard, [Ms. 1150118, 1150119, March 24, 2017] ___ So.3d ___ (Ala. 2017):

(Per curiam with 3 concur, 1 concur in part, concur in result in part, 1 concur in result, and 3 dissents)

- Good discussion of wantonness in in a "rolling stop" at a stop sign case
- Taxation of costs
  - A trial court may tax all the costs of any deposition, regardless of whether used at trial, if the deposition was reasonably necessary
- Because the trial judge failed to include in its order denying post-trial motions its reasons for finding the punitive damages award excessive, case remanded for that purpose, in order that the Supreme Court, on return to remand, could assess the issue under the Hammond factors.

(18.) Woodfin v. Bender, [Ms. 1150797, March 31, 2017] ___ So.3d ___ (Ala. 2017):

Full discussion of when state officials can be sued for money damages.

(19.) Ex parte Walter B. Price, [Ms. 1151041, Apr. 14, 2017] ___ So.3d ___ (Ala. 2017):

A fact-intensive case, but one procedural issue was central: when do extraneous materials attached to a Rule 12(b)(6) Ala. R. Civ. P. motion to dismiss, or a Rule 12(c) motion for judgment on the pleadings, serve to convert the motion to a Rule 56 motion for summary judgment? The answer is important because of the very different standards of review which apply to a Rule 12(b)(6) or 12(c) motion, on the one hand, and a Rule 56 motion, on the other hand. It is clear from precedent that whether additional materials attached to a Rule 12(b)(6) will be considered by the trial court is entirely within its discretion. Both Rule 12(b)(6) and 12(c) declare that if in connection with the motion, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Emphasis supplied.) So how does the appellate court know whether the trial court excluded, or considered, the extraneous materials? As set out by Justice Bryan in his dissent in this case, a long and current line of decisions by the Alabama Supreme Court and the Alabama Court of Civil Appeals have stood for the proposition stated in Ex parte Novus Utilities, Inc., 85 So.3d 988, 995 (Ala. 2011): "Although Novus styled its motion as a motion to dismiss, the trial court had before it materials outside the pleadings, and it did not expressly decline to consider those materials in making its ruling. Therefore, the motion to dismiss was converted into a motion for a summary judgment." That rule of automatic conversation in the face of the trial court's silence was reiterated by the Supreme Court in Adams v. Tractor & Equipment Co., 180 So.3d 860, 864 (Ala. 2015): "There is no indication in the record that the circuit court excluded the affidavits attached to the motion to dismiss . . . . Accordingly, the motion to dismiss had been converted to a motion for a summary judgment."

In the present decision (issued per curiam, with only 7 justices participating and only 4 joining in the ruling on this procedural issue), the Court harkened back to three cases from 1979, 1992 and 2000, to hold that, where the trial court's order

doesn't state what it considered, Rule 12(b)(6) motions are not converted to Rule 56 motions. In his dissent, Justice Bryan criticizes the "new" rule: "Because the parties need to know what type of motion they are dealing with in the trial court, an 'automatic' conversion before the trial court makes more sense than allowing a reviewing court to construe the motion as one or the other after the fact." In his view, the approach adopted by the majority opinion effectively overrules the more recent line of cases, but "the parties have not asked us to overrule any of those cases, and I am therefore disinclined to do so."

(20.) Moore v. Judicial Inquiry Commission, [Ms. 1160002, Apr. 19, 2017] ___ So.3d ___ (Ala. 2017):

This 66-page opinion of the "special," seven-member Supreme Court, is worthwhile reading, if for no other reason than the meticulous time line explained of the underlying events, orders, etc. Embedded are discussions of the Rule 404(b) Ala. R. Evid. prescription against admissibility of character evidence, and the exceptions; the "mootness" doctrine and exception to it; and the "due process" issues implicated by the underlying proceedings.

On the pivotal issue of the extent of the sanction imposed by the Court of the Judiciary – there was not a unanimous vote of its nine members to remove Chief Justice Moore from office, but there was a vote of the majority to suspend him for the remainder of his term – The Special Court held itself bound by precedent establishing that, assuming the charges were proven by clear and convincing authority, the Supreme Court had no authority to disturb the sanction imposed by the Court of the Judiciary.

(21.) Complete Cash Holdings, LLC v. Powell, [Ms. 1150536, Apr. 21, 2017] ___ So.3d ___ (Ala. 2017):

- A denial motion for judgment as a matter of law preserves error in the denial despite no objection to instructions and verdict form allowing the issue challenged.

- A full discussion of the "good count – bad count" rule, including how the defendant preserves the error and the scope of the rule and its disastrous effect for an overreaching plaintiff's counsel: reversal of

compensatory damages required and, because of that, derivative reversal of punitive damages required. (See, "pigs get fat, hogs get slaughtered.")

(22.) Miller v. City of Birmingham, [Ms. 1151084, Apr. 21, 2017] ___ So.3d ___ (Ala. 2017):

- Discussion of what constitutes a non-joined party an "indispensable" party
- Opinion explains that, contrary to statements in some of the Court's earlier opinions, absence of an indispensable party does not deprive the trial court of subject matter jurisdiction
- Discussion of when a claim of misrepresentation "accrues" for purposes of (1) the time for presenting claim to the municipal clerk under §11-47-23, Ala. Code 1975 and (2) the statute of limitations of §6-2-38
    - Fraud is deemed to have been discovered when facts are known which would put a reasonable mind on notice that facts to support a claim of fraud might be discovered upon inquiry. That question can be taken away from the jury and decided as a matter of law only when the plaintiff actually knew of such facts, not just should have known.
- Discussion of a city or town's immunity under §11-47-190: Immunity exists for wanton or reckless conduct but not for negligence.
- Allegation of "gross negligence" means nothing more than simple negligence