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DECISIONS ISSUED ON OCTOBER 31, 2008

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George v. Alabama Power Company, No. 1070389 [*Res Ipsa Loquitur*: *Res ipsa loquitur precludes summary judgment on a negligence claim where (1) defendant had full management and control of the instrumentality which caused the injury, (2) the circumstances are such that according to common knowledge and the experience of mankind the accident could not have happened if those having control and management had not been negligent, and (3) the plaintiff's injury must have resulted from the accident; res ipsa loquitur cannot be invoked to support a wantonness claim.*] (Woodall, J., 9-0).

Ex parte Dolgencorp, Inc., No. 1060428 [*Workers' Compensation*: *When the duration of employment is less than 52 weeks, the trial court must compute the average weekly compensation by dividing the employee's earnings by the number of weeks worked, unless it determines that the result will be unfair and unjust.*] (Parker, J., 7-1).

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Price v. Clayton, Nos. 2070728 & 2070755 [*Rule 60(b)*: *Trial court's judgment affirmed because Appellant failed to demonstrate that trial judge exceeded his discretion in denying Defendant's post-trial motion for recusal.*] (Thompson, J., 3-2).

Hokes Bluff Welding and Fabrication v. Cox, No. 2070253 [*Workers' Compensation*: *Trial court overturned when it made impermissible medical conclusions and its decision was not supported by the preponderance of the evidence.*] (Moore J., 2-0-3).

American Heritage Life Ins. Co. v. Blackmon, No. 2070266 [*Insurance Applications*: *Applicant is bound by information provided in insurance application whether or not insurance agent provides contrary advice.*] (Pittman, J., 5-0).

CASE SUMMARIES

SUPREME COURT OF ALABAMA

George v. Alabama Power Company, No. 1070389. Plaintiff sued defendant after allegedly contacting an energized neutral wire, alleging negligence and wantonness. The trial court granted defendant partial summary judgment as to plaintiff's wantonness claim. After a hung jury and mistrial on plaintiff's negligence claim, plaintiff hired two new experts to offer causation opinions. Defendant moved *in limine* to exclude the experts' opinions and for summary judgment as to plaintiff's negligence claim. The trial court granted both motions and subsequently denied plaintiff's motion to alter, amend, or vacate that judgment based on the doctrine of *res ipsa loquitur*. On appeal, the Supreme Court reversed summary judgment as to plaintiff's negligence claim but affirmed as to plaintiff's wantonness claim. With respect to the negligence claim, the Court held that *res ipsa* applied to the facts of the case, thus a presumption of negligence arose and whether that presumption is rebutted is a question for the jury. With respect to plaintiff's wantonness claim, the Court noted that *res ipsa* cannot support a wantonness claim; therefore, the plaintiff must present substantial evidence that defendant's breach resulted from "conscious action that proximately caused ... damage." The Court held that plaintiff's expert testimony regarding defendant's grounding system was not substantial evidence, stating that "[t]here is no evidence of [defendant's] knowledge that 'injury [would] likely or probably result' from its placement of the grounding rods. No evidence was adduced of injuries from such a placement on any electrical-distribution system."

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Ex parte Dolgencorp, Inc., Case No. 1060428. Plaintiff worked for Defendant for 33 weeks until she suffered a work related injury. She started with Defendant as an hourly employee but was later promoted to store manager, given a raise, and converted to a salaried employee. In calculating the amount of her disability payments, the trial court applied the amount of her weekly salary instead of averaging the amount of her weekly payments over the duration of her employment. Defendant appealed. The Court of Civil Appeals affirmed without an opinion, but the Supreme Court reversed. The Supreme Court held that Ala. Code Section 25-5-57(b) of the Workers' Compensation Act, § 25-5-1, *et seq.*, requires that the trial court average the weekly earnings when the employee's duration of employment is less than 52 weeks, unless the trial court determines in its discretion that doing so would produce an unfair and unjust result. In this case, the trial court abused its discretion by failing to present any basis for its implied determination that the result would be unjust. If the trial court determines that a reason exists to depart from the statutorily preferred method of averaging the weekly earnings, the court must present its reasoning. The Court of Appeals erred in deferring to the trial court's unsubstantiated finding. Accordingly, the Supreme Court reversed the Court of Appeals and the trial court and remanded for reconsideration in accordance with its opinion.

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ALABAMA COURT OF CIVIL APPEALS

Gold Kist v. Porter, No. 2060662. Denise Porter was employed in the evisceration department at a chicken processing plant owned by Gold Kist. While working in that capacity, she developed a case of carpal tunnel syndrome and ultimately sued Gold Kist for workers compensation benefits. The trial court granted her motion for summary judgment and awarded her permanent and total disability benefits. Gold Kist appealed. On appeal, the Alabama Court of Civil Appeals first affirmed that the undisputed evidence showed that Porter's injuries were caused in the course and scope of her employment with Gold Kist and that she is entitled to workers compensation benefits. The Court then explained that injuries to discrete parts or members of the body are generally limited to a "schedule" that sets their compensation at something less than those for a permanent and total disability. However, there is a narrow exception that allows a court to award compensation at a higher level when an injury to a scheduled member entails a debilitating pain that impairs the body as a whole in a manner not contemplated by the schedule. Here, the court noted that Porter did not suffer "abnormally severe" pain from her injury—she experienced pain that she rated as a 7 or 8 on a scale of 10, and treated that pain with over-the-counter medication. Thus, her benefits should be limited to the amount allowed by the schedule. Accordingly, the Court of Civil Appeals affirmed the judgment with respect to the determination that Porter's injuries were compensable but reversed and remanded the judgment with instructions to award her benefits in accordance with the schedule. Concurring in the result, Judge Moore questioned the validity of the pain exception analyzed by the Court, noting that it was established in a plurality opinion and has never been applied to award benefits outside the schedule. Judge Bryan acknowledged the pain-exception as a distinct test.

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Price v. Clayton, Nos. 2070728 & 2070755. In April 2000, Plaintiff sued defendant, Price, and his co-defendant alleging a number of tort claims. Thereafter, the trial court entered final judgment for the plaintiff on February 12, 2007. The defendant appealed, and the Alabama Court of Civil Appeals affirmed the trial court's judgment. In March 2008, the defendant filed a motion for rehearing with the Court and a *Ala. R. Civ. P. 60(b)* motion to set aside the trial court's judgment based on a "recently discovered" personal relationship between the plaintiff and the trial judge which purportedly called the trial judge's impartiality into question – specifically, the defendant cited an affidavit executed by the trial judge which vouched for the plaintiff's character to the Alabama State Bar. Thereafter, the defendant filed an additional Rule 60(b) motion alleging that the trial judge should have recused himself from this matter. The trial court denied the post-judgment motions, and the defendant appealed. On appeal, the Court, in affirming the trial court, held the trial court did not abuse its discretion in not recusing himself and in denying Price's requested Rule 60(b) relief. The Court determined that, because the defendant probably obtained the affidavit during discovery in late 2001, the defendant either failed to do due diligence or he knew of the affidavit and did not consider it problematic. Further, the Court noted that the defendant failed to put forth any evidence that his Rule 60(b) (6) motion was filed "within a reasonable time" when the evidence central to his motion—the affidavit—was in Price's possession six years before filing the same. The Court further found that Price failed to demonstrate that the trial judge erred in refusing to recuse himself over a year after entry of the final judgment. Judge Bryan dissented arguing that the trial judge exceeded his discretion in denying Price's motion for recusal. Judge Moore dissented arguing that the trial court had no evidence to justify that Price had knowledge of the affidavit in 2001 and that there was substantial evidence presented in the affidavit to question the trial judge's impartiality.

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Hokes Bluff Welding and Fabrication v. Cox, No. 2070253. Cox, an employee for Hokes Bluff, asserted that he injured his lower back in two work-related accidents in 2000 and in 2004. Cox was barred by the statute of limitations from recovering disability benefits for the 2000 injury. Thus, he had to prove that the 2004 accident resulted in either a new injury or an aggravation of the 2000 injury. The trial court found that the 2004 accident resulted in a new injury and thus awarded Cox disability benefits. Hokes Bluff appealed the decision. On appeal, the Court held that the trial court erroneously reached medical conclusions by deciding matters lying exclusively within the peculiar knowledge of medical experts. The Court found that based on their review of all the lay, circumstantial, and medical evidence, the trial court could not have reasonably determined that a preponderance of the evidence proved that the 2004 accident caused a new injury or an aggravation of an old injury because according to the medical evidence, the 2004 accident caused only a recurrence of the prior injury and did not contribute to the causation of the injury. The Court reversed and rendered judgment concluding as a matter of law that the 2004 injury was merely a recurrence of the 2000 injury, and thus Cox's claim for compensation was barred by the statute of limitations.

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American Heritage Life Ins. Co. v. Blackmon, No. 2070266. In November 2002, representatives of American Heritage Life Insurance Company ("American Heritage") visited Tchernavia Blackmon's place of employment to solicit insurance-policy applications. Mrs. Blackmon completed an application for a policy of life insurance that would be payable upon the death of her husband or the death of their children or step-children. The application required that Mrs. Blackmon list the names of insureds proposed for coverage. Mrs. Blackmon listed the names of two of their six children, but failed to list the name of her son, Jeffery. Mrs. Blackmon testified that she was told that all children would be covered by the policy, regardless of whether they were listed on the application. She testified that, based on that statement, she never added the remaining children's names to the application. The application also required Mrs. Blackmon to answer questions related to the health of the proposed insureds, including a question asking whether any of the proposed insureds suffered from a chronic disease in the three years preceding the date of the application. Mrs. Blackmon testified that American Heritage's representative told her that such questions were only seeking information related to the primary insured's health. Mrs. Blackmon responded "No" to those questions. Mrs. Blackmon's son, Jeffery, died in November 2003 after a twelve-year battle with cerebral palsy. In 2004, Mrs. Blackmon filed a claim for death benefits related to Jeffery's death. That claim was denied on the basis that Jeffery had not been listed on the application, and coverage would not have been issued for him had his medical history been known. The Blackmons then sued American Heritage for breach of contract, bad faith, and negligence. The trial court entered judgment in favor of the Blackmons on the grounds that the application's language was ambiguous as to whether it requested information related to the health of the applicant's children or just the applicant himself. American Heritage appealed, arguing that Ala. Code § 27-14-7 authorized it to deny the claim based on Mrs. Blackmon's failure to disclose Jeffery's chronic illness. American Heritage argued that such information was material to its acceptance of the risk of the insurance policy. The Alabama Court of Civil Appeals reversed the trial court's finding that the language of the application was ambiguous and directed that judgment be entered in favor of American Heritage. The Court held that the language clearly requested health information related to any person to be covered by the policy. The Court further held that the Blackmons were bound by the answers Mrs. Blackmon provided on the application even if American Heritage's representative misinterpreted what information was being sought by the application.

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