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**SUPREME COURT DECISIONS ISSUED ON
 NOVEMBER 21 AND 26, 2008**

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Fenn v. Ozark City Schools Board of Education, No. 1070821 [Justiciability: Where both parties argued that the personnel file of the plaintiff teacher should not be released to a local newspaper, there was no genuine conflict between the parties and thus no justiciable controversy.] (Bolin, J., 5-0).

Fox v. City of Huntsville, No. 1051276 [Writ of Certiorari from Administrative Decision: Where the City Council’s decision substituted its judgment for the city Personnel Board’s, the circuit court was required to quash the decision of the City Council.] (Murdock, J., 5-0).

Martin v. Battistella, No. 1070394 [Ripeness: Court dismissed appeal regarding breach of contract counterclaim because it was not ripe for adjudication as plaintiff had not yet violated the agreement.] (Bolin, J., 8-1).

Nationwide Mutual Fire Insurance Company v. Estate of Jack Files, No. 1071288 [Insurance: Where policy requires insured to provide carrier with notice of underlying occurrence as soon as is practicable, such notification must occur within a reasonable time for there to be coverage under the policy.] (Woodall, J., 8-0-1).

Johnson v. Strain, No. 1071028 [Procedure–Right to a Hearing: Trial court’s denial of motion for new trial without a requested hearing deemed reversible error where basis for motion is alleged juror impropriety.] (Woodall, J., 5-0).

CASE SUMMARIES

Howard v. Allstate Insurance Company, No. 1071215. Christopher and Linda Howard and their children, Lacy and Katlin, were injured when their automobile was struck by a vehicle driven by Tomas Gonzales. The Howards brought suit in the Mobile Circuit Court asserting claims of negligence and wantonness against Gonzales, Preston Thompson, Perry Thompson, Rachel Thompson and South Alabama Property Services, Inc. (“SAPS”). Preston Thompson owned the truck driven by Gonzales, and Preston and his wife, Rachel, were owners of SAPS, a cleaning company that occasionally employed Gonzales. The Howards alleged that on the date of the accident, Gonzales and his housemate, Juan Elizondo, had been helping Perry and Preston Thompson move furniture in Baldwin County. They alleged that Preston permitted Elizondo to take the truck to Mobile that evening and return it the next day, and that Elizondo was instructed not to permit Gonzales to drive the truck due to his poor vision. Allstate intervened in the case, noting that it had an insurance policy on the truck and there were outstanding issues regarding coverage. The Howards dismissed Rachel Thompson following her deposition. Preston, Perry, SAPS, and Allstate all moved separately for summary judgment, arguing that Gonzales was not acting as an agent or employee of Preston or SAPS at the time of the accident and that nobody had given Gonzales permission to use the truck. The Howards amended their complaint to add Elizondo as a defendant. The trial court granted the pending summary-judgment motions and subsequently certified the judgments as to those parties as final, while the claims against Gonzales and Elizondo remained pending. On appeal by the Howards, the Alabama Supreme Court stated that it would be contrary to the interests of justice for the trial court to adjudicate the claims as to whether Gonzales was acting in the line and scope of his employment with Preston and SAPS and whether Elizondo was acting as an agent, servant, or employee for Preston, Perry or SAPS after having granted summary judgment with respect to these same issues. The Court concluded that because these common issues were intertwined, the trial court exceeded its discretion in certifying the summary judgments as final and dismissed the appeal.

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Killings v. Enterprise Leasing Company, No. 1070816. After suffering injury in a van, plaintiff sued manufacturer and entities that had performed maintenance on the van. Plaintiff added spoliation claims against defendant leasing company, owner of the van, after it sold the van for scrap, claiming that defendant destroyed evidence crucial to his case. After dismissing the other defendants, the trial court granted summary judgment for defendant leasing company. On appeal, the Supreme Court reviewed the requirements for spoliation claims against third parties: In addition to proving the duty to a foreseeable plaintiff, breach of that duty, proximate causation, and damage, the plaintiff must also demonstrate that (1) the spoliator had actual knowledge of pending or potential litigation; (2) a duty was imposed through a voluntary undertaking, agreement, or specific request; and (3) the missing evidence was vital to the action. If all three elements exist, a rebuttable presumption of spoliation arises. The Supreme Court concluded that genuine issues of material fact existed as to each additional element for third-party spoliation. First, evidence indicated that defendant had knowledge of potential litigation because the plaintiff’s attorney sent defendant two letters informing defendant that the van was the subject of an accident and that plaintiff needed to inspect and test the van. Second, there was evidence that the defendant voluntarily agreed to, and therefore assumed a duty to, preserve the van during a telephone conversation with plaintiff’s attorney, in which the representative “assured [him] that the van would stay right where it was and would not be moved without calling first.” Finally, a genuine issue of fact existed as to whether the van was crucial to the plaintiff’s case. Although plaintiff removed and presumably retained the right rear wheel, tire, and brake assembly, plaintiff’s expert concluded that the cause of the accident could only be determined by further testing of the van. The Supreme Court reversed summary judgment for defendant leasing company.

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Ex parte Davis, No. 1060734. David Cutchen, as personal representative of the estate of deceased former inmate Natasha Lee, sued two sheriff’s deputies, Cynthia Davis and Susan Isaacs, for the wrongful death of Lee while she was a prison inmate. The trial court held that the sheriff’s deputies were immune under Article I, § 14, of the Alabama Constitution from the state law claims asserted against them. The trial court dismissed the complaint but gave the plaintiffs twenty-one days to file an amended complaint. Cutchen then filed an amended complaint, which included a 42 U.S.C. § 1983 claim. The sheriff’s deputies moved for a dismissal, arguing that the amended complaint, filed more than two years after Lee’s death, was time-barred and could not relate back to the initial complaint. The trial court denied the motion to dismiss. On appeal, the Supreme Court held that the trial court erred in allowing plaintiff to file an amended complaint after the original complaint had been dismissed on the ground of sovereign immunity where the statute of limitations on the claims asserted in the amended complaint had expired. Because the sheriff’s deputies were entitled to sovereign immunity, the trial court did not acquire subject-matter jurisdiction when the original complaint was filed. The trial court had no authority to do anything with the initial complaint other than to dismiss it. Accordingly, when the amended complaint was filed, the newly asserted § 1983 claims were time-barred by the applicable two-year statute of limitations.

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Orix Financial Services, Inc., v. Murphy, No. 1070996. Plaintiff sued defendant in New York for defaulting on a promissory note. After obtaining a default judgment, plaintiff attempted to enforce that judgment in Alabama pursuant to the Alabama Uniform Enforcement Act. Defendant filed a motion to stay the domestication of that judgment on the grounds he had not been properly served in New York. The trial court declared the default judgment void for lack of personal service and denied plaintiff’s motion to reconsider. On appeal, the Alabama Supreme Court reversed and remanded holding that defendant’s agent as designated in the promissory note had been properly served, and the promissory note contained a valid forum-selection-clause designating New York as the appropriate venue for any disputes related to the promissory note.

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City of Birmingham v. Major, No. 1070944. In 2004, Shamanda Joseph approached Officer Anger, a Birmingham police officer, and reported an assault by Eric Major. Anger investigated, finding that Major and Joseph had previously been engaged and that they had been in an argument in Major’s car. Furthermore, Anger specifically noted discoloration on the left side of Joseph’s face and around her left eye. Accordingly, Anger arrested Major, who ultimately was charged with third-degree domestic violence. Major was found guilty of the charge in Birmingham municipal court, but appealed to Jefferson County Circuit Court, where he was found not guilty by a jury. Major subsequently filed a civil suit against the City of Birmingham, Officer Anger, and Joseph, alleging nine counts, including a count against the City for a civil-rights violation under 42 U.S.C. § 1983. Regarding the § 1983 claim, after presentation of all evidence, the City moved for judgment as a matter of law. This motion was denied. After a verdict in favor of Major, the City renewed its motion for judgment as a matter of law, but this renewed motion also was denied. The City appealed. Applying a de novo standard, the Supreme Court of Alabama first noted that the City is entitled to judgment as a matter of law if it can demonstrate that Major failed to produce substantial evidence of a constitutional injury. Here, Major alleged that he was arrested without probable cause in violation of the Fourth Amendment. Accordingly, the Court turned to the question of whether probable cause for Major’s arrest existed. Noting that probability, not a prima facie showing, of criminal activity is the standard for determining whether probable cause exists, the Court assessed the facts and circumstances as known by Anger prior to the arrest of Major and found that probable cause for arrest for third-degree domestic violence existed. Not only had both Major and Joseph admitted that they previously had been engaged, but the evidence of an altercation, including the discoloration on Joseph’s face, was sufficient to support Major’s arrest. Consequently, the Court reversed the trial court’s denial of the motion for judgment as a matter of law regarding the § 1983 claim against the City and rendered judgment in favor of the City.

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Fenn v. Ozark City Schools Board of Education, No. 1070821. Melinda Fenn, a teacher, filed suit against the Ozark City Schools Board of Education (the “Board”) seeking a judgment declaring that the disciplinary information in her personnel file sought by the Dothan Eagle newspaper was not subject to disclosure under the Alabama Open Records Act and ordering the Board not to release the information. The trial court entered an order holding that the requested information was subject to disclosure, and Fenn appealed. The Alabama Supreme Court dismissed the appeal because no real controversy existed between the parties. The Court reasoned that, for a controversy to be justiciable, there must be some real controversy or adversity between the parties. However, there was no controversy present because both Fenn and the Board had consistently taken the position that the information in Fenn’s personnel file was exempt from disclosure. Thus, there was no party before the Court arguing that the information should be disclosed. The Court, therefore, vacated the judgment of the trial court and dismissed the appeal.

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Fox v. City of Huntsville, No. 1051276. Nine Huntsville police officers filed a grievance asserting that the City of Huntsville violated City of Huntsville Ordinance No. 97-216, § 8.7(A). That section states that police officers that serve at the direction of the Chief of Police in a special assignment capacity to certain specialized divisions, or other comparable assignments as determined by the Chief of Police, are to receive a five-percent pay raise. The officers argued that their assignment to certain traffic-patrol duties constituted a special assignment mandating a five-percent pay raise. The Chief of Police of Huntsville issued a written denial of the officers’ grievance. The officers appealed to Huntsville’s Personnel Committee, which issued an opinion stating that there was sufficient evidence to support the officers’ grievances. However, the committee stated that it did not have the authority to grant the officers special assignment pay. The officers then appealed to the Huntsville City Council, which issued a decision purporting to modify the decision of the Personnel Committee, but stating that the officers’ grievance was barred because it contested the validity of an adopted, approved ordinance in contradiction of § 14.1(B)(1) of the Huntsville Personnel Policies and Procedures Manual. The officers thereafter sought a writ of certiorari in the Madison Circuit Court, asserting that the City Council had invalidly substituted its judgment for that of the Personnel Committee in violation of § 14.2 of the Policies and Procedures Manual. The circuit court held that it lacked the authority to quash the decision made by the City Council because the City Council had affirmed the decision of the Personnel Committee. The officers thereafter appealed to the Supreme Court of Alabama. That Court held that the circuit court erred in reasoning that because the City Council reached the same result as the Personnel Committee, the City Council had adopted the judgment of that committee. That is because the City Council’s decision never addressed the Personnel Committee’s determination that the officers had presented sufficient evidence to support their grievance. In addition, it was legal error for the City Council to categorize the officers’ grievance as a challenge to the validity of an ordinance, because the officers were actually trying to enforce the special assignment pay ordinance, and not challenge it. Therefore, the Court reversed and remanded the case with instruction that the circuit court grant the writ to allow the City Council to further consider the officers’ grievance.

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Martin v. Battistella, No. 1070394. Plaintiff sold her veterinary practice to Defendant. The sales agreement contained a covenant not to compete and also indicated that a portion of the purchase price was for the sale of goodwill. After the sale was completed, Plaintiff filed a declaratory judgment action seeking a determination of the enforceability of the covenant not to compete because she wanted to open a veterinary health resort. Defendant filed a counterclaim alleging that Plaintiff would be in breach of the sale agreement if she opened a new practice because Defendant would no longer receive the goodwill of the business. The trial court entered an order declaring the noncompete clause unenforceable and granted Plaintiff’s motion for summary judgment on Defendant’s breach of contract counterclaim. Defendant appealed. Defendant did not appeal the trial court’s determination that the noncompete provision was unenforceable. Instead, Defendant argued he was entitled to recover for breach of the sales agreement because Plaintiff would breach the contract with regard to the goodwill paid if the competing business was opened. The Alabama Supreme Court dismissed the appeal because the breach of contract claim was not ripe for adjudication and, therefore, the trial court was without jurisdiction to review the counterclaim. The Court reasoned that the claim was based on the expectation of a future event, and Defendant could only speculate as to damages.

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Nationwide Mutual Fire Insurance Company v. Estate of Jack Files, No. 1071288. Jack Files and Herbert Sanford were involved in a fight that resulted in injuries to Files. At the time of the fight, Sanford was covered by a homeowner’s insurance policy issued by Nationwide Mutual Fire Insurance Company (“Nationwide”) that included personal liability coverage. Sanford failed to inform Nationwide of the fight. Five months after the fight, Files’ attorney advised Nationwide of Files’ possible claims against Sanford. Nationwide attempted to investigate the altercation, but Sanford refused to cooperate. Thereafter, Nationwide advised Sanford that it would not defend or indemnify him against Files’ claims, based partly on language in the policy that required Sanford to notify Nationwide of an underlying occurrence as soon as practicable. Files filed suit against Sanford, which Sanford failed to answer. The trial court entered a default judgment of \$75,000 in favor of Files. Soon thereafter, Sanford filed for bankruptcy protection. The bankruptcy court determined that Files could only collect on his judgment against Sanford to the extent of any available insurance proceeds. Files then filed suit against Nationwide seeking to apply the personal liability coverage in Sanford’s homeowner’s policy to satisfy the judgment against Sanford. Nationwide defended the suit on the grounds that it was not obligated to make any payment because Sanford failed to satisfy conditions precedent to coverage under the policy—namely that Sanford failed to inform Nationwide of the fight as soon as was practicable. The trial court entered judgment in favor of Files for \$75,000. Nationwide appealed. The Court of Civil Appeals reversed the trial court’s judgment and rendered judgment in favor of Nationwide. In doing so, the Court noted that where a policy requires notice “as soon as practicable”, the insured must provide notice within a reasonable time. The Court further noted that if there is a delay, the Court looks to the length of the delay and reasons for the delay in determining whether the late notice precludes coverage. Here, the Court held that the 5 month delay required that Sanford provide some reason or justification for the delay. Sanford did not; therefore, the Court held that the notice was late as a matter of law, thereby precluding coverage. Accordingly, Files was not entitled to proceeds from the insurance policy to satisfy the judgment he obtained against Sanford.

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Johnson v. Strain, No. 1071028. The Johnsons sued the Strains for injuries suffered in a house fire. A jury returned a verdict in favor of the Strains. The Johnsons filed a motion for a new trial and requested a hearing claiming “a juror impropriety issue.” Specifically, the Johnsons argued that after sitting through all testimony and prior to deliberations a juror was removed without reason and without consent of the Johnsons’ counsel. The Johnsons claimed that this violated their right under Section 11 of the Alabama Constitution to have the case decided by the selected jury. The trial court denied the motion without granting the requested hearing. The Johnsons appealed. The issue before the Court was whether the trial court erred in denying the motion for a new trial without granting the requested hearing. In reversing, the Alabama Supreme Court explained that, under Alabama Rule of Civil Procedure 59(g), if a party requests a hearing on a motion for a new trial the court must grant the request. Although it is error for the trial court not to grant such a hearing, the error is not reversible unless it “probably injuriously affected substantial rights of the parties.” If an appellate court determines that there was no probable merit to the motion it may affirm based on the harmless-error rule. Based on the record, the appellate court could not conclude that there was no probable merit to the motion and, therefore, could not affirm the judgments based on the harmless error rule.

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