

## IN THIS ISSUE

### DECISIONS ISSUED ON FEBRUARY 5, 2010

#### RECENT ELEVENTH CIRCUIT ORAL ARGUMENT

On January 13, 2010, Balch & Bingham LLP lawyer Aaron Dettling presented oral argument before the U.S. Court of Appeals for the Eleventh Circuit in United States v. Jefferson County, No. 08-16604 (11th Cir.). This case, which has been ongoing for 35 years, consists of three consolidated lawsuits which challenge the employment practices of Jefferson County, the City of Birmingham, and the Personnel Board of Jefferson County, as racially discriminatory. This appeal dealt with the validity of Act 408 of the 2008 Alabama Legislature, which the district court had declared void under the Supremacy Clause because it conflicted with the district court's previous orders appointing two members of the Personnel Board. The district court's ruling was appealed by the City of Birmingham, which contended not only that Act 408 should have been allowed to go into effect, but also that two racial quotas in the Act did not violate the Equal Protection Clause. After the City filed its appeal, the district court entered a final judgment dismissing the Personnel Board of Jefferson County from the underlying case. Mr. Dettling argued for the Personnel Board that the district court's final order releasing the Personnel Board from the consent decree and ending 35 years of litigation should not be disturbed by this appeal of an prior interlocutory order. He argued that the order from which the appeal was taken was an interlocutory, non-appealable order that did not affect an injunction, and even if the order was appealable, the appeal was rendered moot by the subsequently-entered final judgment. Balch & Bingham LLP's Appellate Focus Team was actively engaged at every step of the appeal, from assisting with the initial brief, to organizing moot courts, and critiquing answers. After several discussion sessions and practice moot courts, Mr. Dettling was prepared to answer the Eleventh Circuit's questions in the format that the judges expected and in a manner that advanced his client's cause.

#### SUPREME COURT OF ALABAMA

**Ex Parte 3M Company, Inc., et al.**, Nos. 1081246, 1081254 & 1081265 [Venue: Only the residence of the putative class representative (not the unnamed class members) may be considered for purposes of venue prior to certification of the class; Rule 82, Ala. R. Civ. P., states that defendants may unilaterally select the court to which a case must be transferred when it is originally filed in an improper venue.] (Bolin, J., 9-0-0).

**Tyson v. Macon County Greyhound Park, Inc.**, No. 1090548 [Subject Matter Jurisdiction: With limited exceptions, a trial court does not have subject matter jurisdiction to enjoin, through civil proceedings, the State's enforcement of criminal statutes.] (Per curiam, 5-2-2).

#### ALABAMA COURT OF CIVIL APPEALS

**Bowers v. Bell**, No. 2080942 [Contract to Make a Will: Alabama Code § 43-8-50 enumerates the three exclusive methods for establishing the existence of a contract to make a will.] (Bryan, J., 5-0-0).

**Skerlick v. Gainey**, No. 2080673 [Evidence: To prove the permanent nature of injuries to support a jury charge regarding such injuries, a plaintiff must produce expert testimony on the issue, instead of merely relying on his or her own "subjective" testimony.] (Moore, J., 4-0-1).

**Grove Hill Homeowners' Association, Inc. v. Rice**, No. 2081093 [Restrictive Covenants: The use of gravel in a driveway violated subdivision covenants as a matter of law where the covenants both explicitly restricted gravel and predicated the use of any material other than concrete or asphalt on the preapproval of a committee.] (Moore, J., 3-0-2).

**Faulk v. Rhodes**, No. 2081005 [Appellate Jurisdiction: A judgment which does not dispose of all claims pending between all parties is not a final judgment and cannot support an appeal.] (Thomas, J. 5-0-0).

## CASE SUMMARIES

#### SUPREME COURT OF ALABAMA

**Ex Parte 3M Company, Inc., et al.**, Nos. 1081246, 1081254 & 1081265. In this consolidated opinion, the Supreme Court of Alabama granted three mandamus petitions requesting to have a case transferred to the Circuit Court of Morgan County. The case was originally filed as a putative class action in the Franklin Circuit Court by a Lawrence County resident who did not own property in Franklin County. The defendants moved to transfer the case to the Morgan Circuit Court based on two alternative arguments: (1) venue was improper in Franklin County; and (2) even if venue was proper in Franklin County, the case should be transferred to Morgan County pursuant to Alabama's *forum non conveniens* statute. In support of their motion, the defendants argued that the plaintiff was neither a resident of, nor landowner in, Franklin County. The defendants further argued that each of their principal places of business was located in Morgan County as were the relevant witnesses and documents located in Alabama. Plaintiff responded that venue of the case was proper in Franklin County. Alternatively, plaintiff argued that, if the trial court found that another county would be a more convenient forum, the case should be transferred to Lawrence County. The trial court agreed, holding that venue of the case was proper in Franklin County but transferring the case to Lawrence County pursuant to Alabama's *forum non conveniens* statute. Thereafter, defendants petitioned the Supreme Court for a writ of mandamus ordering the trial court to transfer the action to the Morgan Circuit Court. Defendants argued that venue was improper in Franklin County at the outset and under Ala. R. Civ. P. 82(d)(3), and defendants unanimously selected Morgan County as the court to which the case should be transferred. Therefore, defendants argued, the trial court did not have the authority to transfer the case to Lawrence County. Plaintiff responded that venue of the case was proper in Franklin County because members of the putative class own property in Franklin County. The Supreme Court disagreed, holding that only the residence and property of the putative class representative (not the putative unnamed class members) may be considered when analyzing venue of a putative class action. Because the plaintiff neither lived in nor owned property in Franklin County, the Court found that venue of the action was improper there. Therefore, pursuant to Rule 82(d)(3), the defendants had the right to select by unanimous agreement the court to which the action would be transferred. Because the defendants unanimously chose the Morgan Circuit Court, the trial court had no legal basis for transferring the case to the Lawrence Circuit Court. Accordingly, the Supreme Court issued a writ directing the Franklin Circuit Court to vacate its previous order and transfer the case to the Morgan Circuit Court. [Balch & Bingham's Steve Casey, Ed Haden, Chris Yeilding, Eric Getty, and David Lester successfully represented one of the petitioners in this matter.]

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**Tyson v. Macon County Greyhound Park, Inc.**, No. 1090548. Macon County Greyhound Park, Inc., d/b/a Victoryland, filed a complaint in the Macon County Circuit Court seeking injunctive and declaratory relief to prevent John Tyson, Jr., commander of the Governor's Task Force on Illegal Gaming, from seizing electronic bingo machines at VictoryLand in Macon County without a warrant. The Macon County Circuit Court entered a temporary restraining order and barred Tyson from taking further action to seize the machines until a hearing. Tyson filed an emergency motion asking the Alabama Supreme Court to stay or vacate the trial court's order, arguing that the trial court lacks subject-matter jurisdiction over an action seeking to enjoin enforcement of criminal statutes. The Supreme Court explained that the general rule is that a trial court may not interfere with the enforcement of criminal laws through a civil action; rather, the aggrieved party is able to make its case in defending the criminal action. The Supreme Court has recognized a limited exception to the general rule where the plaintiff acknowledges that its conduct violates a statute but contends that the statute is void. In such circumstances, the Court does not intrude on the powers of the executive branch to enforce the criminal laws because the conduct – enforcing a void law – exceeds the discretion of the executive branch in administering the laws. Here, however, Victoryland does not acknowledge that its conduct is prohibited by statute, but rather maintained its innocence. The Supreme Court recognized that in previous decisions it had not adhered to these limitations and had considered whether the conduct at issue was criminal. The Supreme Court determined, however, that those decisions were not controlling because the issue of subject-matter jurisdiction was not raised and, in any event, the Court should return to the "sounder course dictated by [its] established precedent." Accordingly, the Supreme Court vacated the Circuit Court's order, dismissed the action, and dismissed the appeal. Concurring specially, Justice Smith wrote separately to express her agreement with the main opinion insofar as the Court holds that a trial court lacks subject matter jurisdiction to consider a declaratory judgment action where the sole purpose of the action is to interfere with a criminal investigation. Justice Murdock concurred in the result but found it unnecessary to hold that a plaintiff must concede that its conduct violates the statute in order to seek equitable or declaratory relief on the different ground that the statute is void or that the actions sought to be prevented exceed the discretion of the executive. Here, according to Justice Murdock, any error in judgment by the executive as to whether Victoryland's conduct is criminal does exceed the discretion delegated to the executive – this concern is the basis for the rule against the use of civil actions to interfere with executive enforcement of criminal laws. He also found the decision in State ex rel. Tyson v. Ted's Game Enterprises, 893 So. 2d 355 (Ala. Civ. App. 2002), *aff'd*, Ex parte Ted's Game Enterprises, 893 So. 2d 376 (Ala. 2004), distinguishable because there, although the executive sought a declaratory judgment, the civil action followed the seizure of contraband by law enforcement and the filing of a forfeiture action by the executive. In dissent, Justice Woodall, joined by Chief Justice Cobb, found this case was not distinguishable from numerous other cases where the appellate courts have exercised jurisdiction to construe criminal statutes without questioning the subject-matter jurisdiction of the trial court. For example, in both State ex rel. Tyson v. Ted's Game Enterprises, supra, and Barber v. Jefferson County Racing Ass'n, Inc., 960 So. 2d 599 (Ala. 2006), the Court of Civil Appeals and Supreme Court, respectively, granted declaratory relief in favor of the State based on civil claims asserted by the executive; Justice Woodall believed that the same relief should be afforded to the target of the executive's actions. Justice Woodall believed that the relief sought by Victoryland was properly within the scope of Alabama's Declaratory Judgment Act and that the majority's departure from the Supreme Court's prior decisions is likely to turn what has been an orderly process into a "three-ring circus."

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#### ALABAMA COURT OF CIVIL APPEALS

**Bowers v. Bell**, No. 2080942. Bell and Bowers orally agreed that Bowers would operate his used automobile parts business on Bell's land rent-free in exchange for Bowers repairing Bell's automobiles for free for the remainder of Plaintiff's life. The oral agreement further provided that if Bell died first, he would devise his land to Bowers, and if Bowers died first, he would devise his business to Bell. Following a dispute, Bell sought to terminate the agreement and filed an ejectment action against Bowers, claiming that Bowers did not have any interest in the land under the oral agreement. At a bench trial, the parties' testimony coincided except that they disputed whether the two wills they had signed pursuant to their oral agreement were signed in the presence of witnesses or a notary public. When Bowers failed to produce copies of the wills signed by attesting witnesses or a notary public, the trial court ruled for Bell. The Court of Civil Appeals affirmed, holding that any interest Bowers had in the land was created by the oral agreement between the parties, which was a contract to make a will. Bowers was unable to prove a contract to make a will using one of the three exclusive methods of Alabama Code § 43-8-250. The first two methods involve referencing an existing will. Bowers, however, did not introduce any evidence, pursuant to Alabama Code § 43-8-50, that Bell had executed a will in the presence of two attesting witnesses or a notary public. Bowers could not rely upon the third method because he had not produced a writing signed by Bell evidencing the oral agreement. Thus, Bowers could not show any interest in the land, and a judgment for Bell on his ejectment action was proper.

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**Skerlick v. Gainey**, No. 2080673. In August 2007, Skerlick negligently caused her motor vehicle to collide with Gainey's vehicle. Skerlick stipulated as to fault, and a jury awarded Gainey \$30,000 after trial on the issue of damages. Skerlick filed a motion for a new trial, which the court denied. Skerlick appealed, arguing that: (1) the court erred in allowing charges for chiropractic treatment to be submitted to the jury without expert testimony as to necessity of treatment or reasonableness of those charges; and (2) the court erred in charging the jury regarding permanent injuries in the absence of testimony that a permanent injury existed. The Court of Civil Appeals declined to address the issue of expert testimony concerning chiropractic treatment. Although Skerlick raised this issue by moving for a directed verdict at the end of Gainey's case, she failed to renew the motion at the end of the case, thereby failing to preserve the issue for appeal. The Court concluded that the trial court's jury charge on permanent damages was erroneous because a plaintiff's own lay testimony regarding the permanent nature of his or her injuries is purely subjective. Without expert testimony, the issue of whether injuries are permanent cannot be proven. Because Gainey relied only on her own testimony, she failed to introduce proper evidence to support the given jury charge. Accordingly, the Court reversed the judgment of the trial court and remanded the cause for a new trial.

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**Grove Hill Homeowners' Association, Inc. v. Rice**, No. 2081093. The Rices purchased property in Grove Hill, a residential subdivision with restrictive covenants. In order to remediate problems with the property's concrete driveway, the Rices expanded the driveway with asphalt and covered the entire surface with gravel. In violation of the covenants, the Rices did not seek the approval of the subdivision's Architectural Review Committee ("ARC") before making the modification. Subsequently, the ARC approached the Rices claiming that their use of gravel violated the covenants. After their request for a variance was denied, the Rices refused to come into compliance. In response, the Grove Hill Homeowners' Association (the "Association") filed a complaint for injunctive relief and damages. After reviewing the covenants, the trial court concluded that a key provision contained a latent ambiguity and denied the Association relief. The Association appealed, and the Court reversed the trial court. The Court of Civil Appeals did not perceive any latent ambiguity in the covenant language: the covenants expressly mandated the use of concrete or asphalt while prohibiting the use of gravel in subdivision driveways. Further, even if the covenants had contained ambiguity and gravel was potentially permissible, a separate provision requiring the ARC's preapproval still prevailed. Notably, the Court did not consider whether the trial court should have simply applied the arbitrary-and-capricious standard of review to the ARC's determination because the Rices failed to preserve that issue for appeal.

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**Faulk v. Rhodes**, No. 2081005. Faulk filed a complaint alleging breach of contract against Rhodes and several other defendants. Rhodes moved the trial court, pursuant to Ala. R. Civ. P. 19 and 20, to add Blackmon and Hampton as necessary parties to the action. Rhodes also filed cross-claims against Blackmon and Hampton, alleging breach of contract. Following a hearing, the trial court entered a judgment for Faulk against Rhodes. The trial court did not dispose of Faulk's claims against other defendants or Rhodes' cross-claims against Blackmon and Hampton. Faulk appealed the judgment to the Court of Civil Appeals. The Court found that the judgment was not final because the trial court's judgment did not dispose of all claims pending between all the parties and because the record did not contain a Rule 54(b) certification. Thus, it could not support an appeal and was dismissed.

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