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APPELLATE VICTORIES DECISIONS ISSUED ON JUNE 12, 2009

Jones v. Regions Bank, No. 1060896 [*Costs of Appeal*] Language in Supersedeas Bond Does Not Entitle Winning Appellee to Attorney Fees. (Bolin, J., 7-0-1). Balch & Bingham LLP attorneys **Clark Watson** and **Paul Greenwood** successfully represented Regions Bank in persuading the Supreme Court to overrule precedent. **Hudson v. Hudson**, 595 So. 2d 1084 (Ala. Civ. App. 1989), held that an unsuccessful appellant who executed a supersedeas bond that secured the “costs of appeal” and was liable for the appellee’s attorney fees. In this case, Regions Bank foreclosed on commercial real estate, and Advanced Realty Company, Inc. purchased the property. Edward Jones and Donald Chasteen foreclosed on the same property. A trial court ruled that Jones and Chasteen had superior title. Regions Bank and Advanced Realty appealed -- the first appeal in this case. Advanced Realty continued to control the property during the appeal. Regions signed as surety on the supersedeas bond. The bond stated that the surety would be liable for “costs of appeal.” The Supreme Court explained the trial court’s ruling on title to the property. Advanced Realty gave up the keys to the property, and Regions Bank paid the face amount of the supersedeas bond into the trial court’s registry. Chasteen and Jones then asked for attorney fees based on **Hudson**. Chasteen and Jones also asked for judgment interest as set forth in the original judgment, post-judgment rentals for the period that Advanced Realty held the property after the trial court’s original judgment, and post-judgment interest. The trial court denied all relief. Chasteen and Jones appealed -- the second appeal in this case. After oral argument, the Supreme Court overruled **Hudson**, explaining that § 794 of the Alabama Code of 1940 had required the appellant to supersede a judgment for “costs and damages as any party aggrieved may sustain by reason of the wrongful appeal.” Several old Alabama cases had held that the “and damages” language included attorney fees. The promulgation of Rule 8 of the Alabama Rules of Appellate Procedure, however, superseded § 794. Rule 8 does not include the “and damages” language. Thus, the Supreme Court held that a supersedeas bond that secured “costs of appeal” (not “damages”) did not make an unsuccessful appellant liable for attorney fees. The Supreme Court explained that a similar holding in **Osborn v. Riley**, 331 So. 2d 268 (Ala. 1976), dealt with a supersedeas bond executed while § 794 was still binding law. The Supreme Court also explained that a statement in **Ex parte Home Indemnity Insurance Co.**, 374 So. 2d 1356 (Ala. 1979), that § 794 was “incorporated into Rule 8” was not accurate given the absence of the “and damages” language from Rule 8. The Supreme Court also held that Regions Bank’s payment of the bond amount eliminated any further liability against Regions Bank. Advanced Realty, however, was liable for pre-judgment interest included in the original judgment, rental value for the period that it had held the judgment, after the judgment, and post-judgment interest. Justice Murdock concurred in part and in the result to say that attorney fees should not be considered “damages” in any event and that imposing attorney fees based on a supersedeas bond, as opposed to the American rule of awarding attorney fees only when they are provided for by contract or statute, creates an unlevel playing field to the advantage of plaintiffs. Ed Haden argued the case for Regions Bank.

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QORE, Inc. v. Bradford Building Co., No. 1061825 [*Negligence: A party to a contract may be liable to a non-party for negligence where injury to the non-party is foreseeable.*] (Cobb, C.J., 8-0-1). Balch & Bingham’s **Chuck Burkhardt** and **Todd Lowther** successfully represented the plaintiff, Bradford Building Company, Inc., throughout this litigation, including at trial and during the following described appeal. RKM Leeds, LLC had purchased a parcel of property to construct a Walgreens pharmacy. The property had previously been used as a gas station. RKM hired QORE, Inc. to perform construction-materials testing (“CMT”) services to verify the suitability of the soil after the underground gas tanks were removed. RKM also hired Bradford Building Company as general contractor for the construction project. QORE was aware that the site had been used as a gas station and that a structural engineer’s report recommended certain procedures for backfilling and compacting the soil before the Walgreens was built. Bradford constructed the concrete slab for the Walgreens, but it subsequently settled and broke because the soil had not been properly backfilled and compacted. Bradford brought suit against QORE for the cost of its repairs. Following the trial court’s entry of judgment on a jury verdict in favor of Bradford, and denial of a motion by QORE for judgment as a matter of law, QORE appealed. On appeal to the Alabama Supreme Court, QORE argued that, because its contract was with RKM (the owner) and not with Bradford, Bradford did not submit substantial evidence of any duty owed to Bradford. After explaining that one can be liable for negligent performance of a contract to a party not in privity (where injury to the non-party is foreseeable), the Court found that the evidence was sufficient to submit the issue to the jury. QORE also argued that Bradford’s injury – the cost of repairs – were independently caused by Bradford’s decision to incur these costs which were not contractually required and not the proximate cause of any action by QORE. The Court refused to consider that argument, stating that QORE cited no authority in support. Finally, the Court rejected QORE’s argument that Bradford failed to prove its damages because it presented no evidence of what it would have paid to correct the soil problems if QORE had detected the unsuitability of the fill before the slab was constructed. The Court therefore affirmed the trial court’s judgment. Justice Murdock concurred in the result but wrote specially to disagree with the majority’s opinion that QORE failed to reference authority in support of the argument that Bradford’s decision to incur repair costs was an independent cause of its damages relieving QORE of liability. Justice Murdock considered QORE’s argument and rejected it.

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DECISIONS ISSUED ON JUNE 12, 2009

SUPREME COURT OF ALABAMA

Mobile OB-GYN, P.C. v. Baggett, Nos. 1071020 & 1071081 [*Medical Malpractice: Where two of five counts submitted to the jury were not supported by substantial evidence, the court could not presume that the jury’s general verdict was based on one of the three good counts.*] (Stuart, J., 8-1).

Dolgener Corp., Inc. v. Taylor, No. 1070900 [*Premises Liability: Business owners do not owe invitees a duty to eliminate open and obvious hazards. An open and obvious hazard is one which the invitee is aware of, or should be aware of in the invitee’s exercise of reasonable care.*] (Smith, J., 7-1).

Ex parte Brian Nelson Excavating, LLC, No. 1071473 [*Mandamus: Mandamus review is not proper to decide a statute of limitations defense because the petitioner has an adequate remedy by appeal.*] (Parker, J., 9-0).

Ex parte Greenetrack, No. 1061768 [*Venue: Isolated act of providing limited free bus transportation from Pickens County to Greene County did not constitute doing business by agent in Pickens County for venue purposes.*] (Parker, J., 6-3; Stuart, Smith, and Shaw, JJ., concur specially; Cobb, C.J., Lyons, and Murdock, JJ., dissent).

ALABAMA COURT OF CIVIL APPEALS

Daniel Richard Smith v. Robbie Gaston, No. 2080005 [*Real Property: A trial court’s judgment declaring the location of a boundary line must clearly describe the location of the boundary line.*] (Bryan, J., 5-0).

Ross v. Rogers, No. 2080248 [*Real Property: Defendants bore the burden of proving the affirmative defenses of payment and satisfaction in action for redemption of property.*] (Thompson, J., 4-0).

CASE SUMMARIES

SUPREME COURT OF ALABAMA

Mobile OB-GYN, P.C. v. Baggett, Nos. 1071020 & 1071081. Plaintiff sued defendant medical group alleging that one of its physicians had committed malpractice which led to the death of the plaintiff’s baby. At the close of all the evidence, the trial court charged the jury on five counts of negligence. The jury returned a general verdict in favor of the plaintiff. In response, the defendant moved the trial court for either a judgment as a matter of law or a new trial arguing that plaintiff had failed to present sufficient evidence to allow all five counts to be submitted to the jury. The trial court denied the defendant’s motion, and the defendant appealed. On appeal, the Court reviewed each count to determine if it met the evidentiary standard appropriate for medical malpractice cases: substantial evidence indicating both 1) that the defendant failed to comply with the standard of care and 2) that such a failure probably caused the injury or death in question. The Court determined that the plaintiff had failed to present such evidence for two of the five counts. The Court then explained that if both good and bad counts are submitted to a jury which returns a general verdict, a court cannot presume that the verdict was based solely on the good counts. Applying this “good count/bad count rule,” the Court reversed the trial court and remanded the case for a new trial. In her dissent, Chief Justice Cobb elaborated on the deficiencies of general verdicts and suggested special verdicts or general verdicts accompanied by interrogatories in all medical-malpractice cases.

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Dolgener Corp., Inc. v. Taylor, No. 1070900. While shopping in a Dollar General store, Arlie Taylor tripped and fell over unopened cases of merchandise that were stacked on top of each other in the store aisle. Taylor was injured as a result of her fall and sued the store’s owner for negligently and wantonly failing to maintain its store in a safe condition. At trial, the store owner moved for judgment as a matter of law on the grounds that the alleged hazardous condition was open and obvious, which motion the trial court denied. The jury rendered a verdict in Taylor’s favor and awarded compensatory and punitive damages against the store owner. On appeal, the court held that the store owner should have been granted judgment as a matter of law on both the negligence and wantonness counts. The court recognized that owners of premises have no duty to warn an invitee of an open and obvious danger of which the invitee is aware, or should be aware, in the exercise of reasonable care. The undisputed evidence established that the nearly two foot high and over two foot wide cases of merchandise in the aisle of the store were in plain view and that Taylor should have seen the cases prior to her fall. In fact, the evidence established that Taylor had maneuvered around several other cases that same day and that Taylor, a regular shopper at the store, had noticed its cluttered condition for some time. Thus, the court held that the cases of merchandise presented an open and obvious hazard of a fall and, therefore, the store did not owe Taylor a duty to eliminate the hazard. In the absence of a duty to Taylor, the court held that Taylor’s negligence and wantonness claims failed as a matter of law. Chief Justice Cobb dissented, writing that the question whether a danger is open and obvious is almost always a question of fact for determination by a jury and that, in this case, Taylor presented substantial evidence to support the jury’s finding that the affirmative defense did not preclude Taylor’s recovery.

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Ex parte Brian Nelson Excavating, LLC, No. 1071473. Plaintiffs filed an action for damage to their homes allegedly caused by vibrations from a vibratory compactor used for construction on adjacent property. Plaintiffs substituted defendant subcontractor, whose employee operated the compactor, for a fictitiously described defendant almost four years after the incident. Defendant moved for summary judgment based on the two-year statute of limitations applicable to nuisance claims. The trial court denied the motion because “[t]here remains a question as to whether [defendant’s] action constituted nuisance or trespass,” which is subject to a six-year statute of limitations. Defendant petitioned the Supreme Court for a writ of mandamus on the basis that plaintiffs’ substitution of defendant for a fictitiously-described defendant does not relate back to the original complaint, and, therefore, is barred by the two-year statute of limitations. The Supreme Court denied the writ because the fictitious party/relation-back issue was not ripe for mandamus review since the fictitious party/relation-back issue would be irrelevant if the six-year statute of limitations applied. The Court refused to decide whether the two-year or six-year statute of limitations was appropriate where the trial court had not addressed it. “The fact that a statute of limitations defense is applicable is not a proper basis for issuing a writ of mandamus, due to the availability of a remedy by appeal.”

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Ex parte Greenetrack, No. 1061768. Joe Estano sued Greenetrack, Inc. in Pickens County on behalf of himself and a putative class of others for money they lost at the Greenetrack facility in Greene County. Greenetrack moved to transfer the case to Greene County where it operates, arguing that venue was not proper in Pickens County. After its motion was denied, Greenetrack petitioned the Alabama Supreme Court for a writ of mandamus directing the trial court to transfer the case to Greene County. On review, the Court explained that for venue to be proper in Pickens County, Greenetrack must be found to “do business by agent” in Pickens County. The Court interpreted the “doing business by agent” requirement to require that a corporation be “performing some of the business functions for which it was created” in that county. The Court distinguished those corporate business functions for which a corporation was created from the exercise of corporate powers incidental to those corporate business functions. The Court noted that the only evidence tending to support a finding that Greenetrack does business by agent in Pickens County was the fact that Greenetrack operated a bus that ran on a regular schedule from its facility in Greene County to Columbus, Mississippi, with scheduled stops in Pickens County. Ultimately, the Court held that the bus route through Pickens County was “incidental to its corporate business functions” and was not a necessary function for the successful operation of its facilities. The Court distinguished its holding in *Ex parte Scott Bridge Co.* where a corporation was found to be “doing business by agent” in a county where it purchased building supplies that were necessary for the operation of its business. Accordingly, the Court issued the writ of mandamus and directed the trial court to transfer the case to Greene County. Justices Stuart (concurring) and Murdock (dissenting) argued that *Scott Bridge* had been wrongly decided, but differed about the proper result in this matter. Justices Shaw (concurring) and Lyons (joined by Chief Justice Cobb in dissenting) argued that *Scott Bridge* was correctly decided, but differed on its application to this case.

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ALABAMA COURT OF CIVIL APPEALS

Daniel Richard Smith v. Robbie Gaston, No. 2080005. Gaston sued Smith to establish that he owned a disputed tract of land by adverse possession and to establish the location of the boundary line between his property and Smith’s property. The trial court entered judgment in the case. The Court reversed the trial court’s first judgment because it was unclear where the trial court established the boundary line(s) and remanded with instructions that the trial court clarify the boundary line(s). On remand, the trial court entered an amended judgment and attempted to clarify the boundary line(s). However, the amended judgment was also unclear. Accordingly, the Court once again remanded the case to the trial court with instructions to clarify the location of the boundary line(s). Reversed and remanded.

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Ross v. Rogers, No. 2080248 [*Real Property: Defendants bore the burden of proving the affirmative defenses of payment and satisfaction in action for redemption of property.*] (Thompson, J., 4-0). Plaintiff sold a tract of property located in Madison County (the “Madison County property”) to the Pierces who made a down payment, assumed the mortgage, and executed two promissory notes in favor of the Plaintiff. One of the promissory notes was secured by a second mortgage on the Madison County property. The other note was secured by a second mortgage on a tract of property in Marshall County (the “Marshall County property”) owned by the Pierces. It provided that no interest would accrue and no payments were to be made on the note until the Pierces sold or conveyed the Marshall County property or defaulted on the note secured by the Madison County property. After the Pierces failed to make payments to Plaintiff for the Madison County property, Plaintiff foreclosed on the mortgage covering that property and bought the property at the foreclosure sale. Plaintiff, however, did not foreclose on the mortgage covering the Marshall County property. The first mortgage holder of the Marshall County property eventually foreclosed on that mortgage, and the Defendants purchased the Marshall County property at a foreclosure sale. Plaintiff notified Defendants that he intended to redeem the Marshall County property. Plaintiff later filed an action against the Defendants to redeem the Marshall County property. Defendants asserted the affirmative defense that the promissory note executed by the Pierces in favor of Plaintiff and secured by the mortgage on the Marshall County property had been extinguished when Plaintiff purchased the Madison County property at the foreclosure sale. The trial court found that Plaintiff failed to prove that the promissory note, secured by the mortgage on the Marshall County property, had not been satisfied as a prerequisite to exercising his right of redemption under the note. Plaintiff appealed this decision to the Alabama Court of Civil Appeals contending that the Defendants failed to carry the burden of proving the affirmative defense of payment and satisfaction of the promissory note. The Court found that Defendants bore the burden of proving the affirmative defenses of payment and satisfaction and that there was no evidence submitted of payment on the promissory note secured by the mortgage on the Marshall County property, as Plaintiff’s payment for the Madison County property was applied to the promissory note secured by the mortgage on the Madison County property. The Court therefore reversed and remanded the case for further proceedings consistent with its opinion.

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