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**DECISIONS ISSUED ON MARCH 12, 2010
 BY THE SUPREME COURT OF ALABAMA**

PART ONE

APPEAL OF INJUNCTION BY NON-PARTY

Occasionally, a trial court order will command or prohibit action by a non-party. Appellate review of such orders may be available to the non-party, but only if pursued by proper means. Last week, in [Ex parte State Personnel Board](#), Nos. 1081436 and 1081462, the Alabama Supreme Court dismissed a petition for writ of mandamus that sought review of a trial court order prohibiting the Personnel Board, a non-party, from issuing subpoenas. The Court held that “[t]he proper means of obtaining appellate review . . . where the trial court has enjoined the activity of a nonparty, is by means of an appeal” pursuant to Rule 4 of the Alabama Rules of Appellate Procedure. Fortunately, the Personnel Board had filed an appeal in addition to its mandamus petition. Had it not done so, it may have discovered too late (after the appeal time period) the appropriate avenue for appellate review. Not knowing the proper means of seeking review of an order may terminate your appeal before the Court ever reaches the merits. If you are affected by a trial court’s order, consult an attorney familiar with the appellate rules and decisions.

[Ex parte Bitel](#), No. 1081783 [*State-Agent Immunity: A state agent is not entitled to dismissal of individual claims against him or her if complaint sufficiently alleges that the state agent acted beyond his or her authority by failing to discharge duties pursuant to detailed rules or regulations.*] (Bolin, J., 5-0).

[Kennedy v. Boles](#), No. 1080607 [*Door Closing Statute: Seller knowingly waived his right to declare an agreement void when he entered the agreement knowing that the purchaser was not qualified to do business in Alabama and included a default provision in the agreement in light of this fact.*] (Smith, J., 8-0-1).

[Stephens v. First Commercial Bank](#), No. 1080648 [*Best Evidence Rule and Hearsay Prohibition: Affidavit supporting summary judgment motion which contained statement that affiant had personal knowledge of the facts contained therein did not violate best evidence rule or hearsay prohibition.*] (Stuart, J., 4-0-1).

[Ex parte State Personnel Board](#), Nos. 1081436 and 1081462 [*Injunction Against State Agency: A trial court lacks jurisdiction to enjoin a non-party State agency where venue is improper.*] (Lyons, J., 8-0 and 7-1).

[Ex parte Loube Consulting International, Inc.](#), No. 1081317 [*Discovery: Defendant was entitled to protective order where it demonstrated that producing the information sought by plaintiff was overly broad and the burden of production on the defendant outweighed any benefit to the plaintiff.*] (Smith, J., 5-0).

[Purser v. Solid Ground Development, LLC](#), No. 1081615 [*Real Property: Owner of a private non-navigable lake that extends beyond their property only has surface water rights to that portion of lake on his property; within corporate limits, an owner has an unqualified right to divert surface waters without incurring legal consequences to affected landowners; affected landowners have a right to protect themselves from the diversion.*] (Stuart, J., 5-0).

[Intergraph Corp., et al. v. Bentley Systems, Inc., et al.](#), Nos. 1080300 & 1080405 [*Contractual Damages: Lost profits must be the direct result of a breach and be reasonably ascertainable; lost profits must also include costs incurred by the injured party had the contract been performed, thus preventing an award of lost revenues.*] (Murdock, J., 5-0).

CASE SUMMARIES

[Ex parte Bitel](#), No. 1081783. Plaintiff sued State Trooper Kerry Horton and several of Horton’s supervisors in their individual and official capacities. Plaintiff alleged that Horton sexually assaulted her after Horton made a traffic stop of her vehicle. She claimed the supervisors were liable based on claims of negligence, outrage, assault, and the theory of respondeat superior. After the trial court dismissed all the claims against Horton’s supervisors in their official capacities, they filed a motion to dismiss all claims against them in their individual capacities on the grounds of state-agent immunity. The trial court denied the motion except as to the claims against one supervisor. The remaining supervisors filed a petition for a writ of mandamus with the Alabama Supreme Court. The Court denied the petition. The Court noted that a party is not entitled to state-agent immunity if he or she acted beyond his or her authority. Because the Plaintiff’s complaint included allegations that the supervisors failed to discharge duties pursuant to detailed rules or regulations, the Court held that it was conceivable that Plaintiff could show that the supervisors acted beyond their authority by failing to discharge these duties. The Court declined to address the respondeat superior claim because “[a] writ of mandamus is not available to review the denial of a motion to dismiss based on the defense that the plaintiff’s claim cannot be premised on a theory of respondeat superior.” [Click here for Opinion](#)

[Kennedy v. Boles](#), No. 1080607. Ian Boles entered an agreement to purchase beachfront property from Gregory Kennedy for \$3.7 million. Before the closing, Boles assigned the contract to newly formed Boles Investment, Inc. (“BI”), a Delaware corporation solely owned by Boles. Because BI was not qualified to do business within Alabama on the day of closing, Kennedy and BI entered into a post-closing agreement stipulating that BI must qualify to do business in Alabama by a certain date or be in default. When BI received an offer to purchase the property from a third-party for \$16 million, it secured financing to pay off Kennedy. When Kennedy learned of the deal, he refused to accept payment and filed suit against BI and Boles, alleging that BI breached the post-closing agreement by failing to qualify to do business in Alabama; fraudulent inducement to enter into the purchase agreement; and failure to keep the property in good repair and condition. Kennedy also filed a notice of *lis pendens*. BI and Boles answered and asserted nine counterclaims. Kennedy amended his complaint and added, *inter alia*, a claim for breach of the promissory note. The trial court ruled in favor of BI and Boles on the parties’ claims and returned to them all accrued interest, awarded a judgment against Kennedy for \$3.65 million dollars in damages, and declared the notice of *lis pendens* void. The trial court denied Kennedy’s post-judgment motions. On appeal, the Alabama Supreme Court held (1) that the trial court’s order was a final judgment because it adjudicated all pending claims and determined all issues before it, and consequently, the Court had subject matter jurisdiction over the appeal; (2) BI owed no interest payments to Kennedy after Kennedy rejected BI’s prepayment tender because a tendering of the whole amount due at any time after the debt falls due, but before suit is brought, stops accrual; (3) BI did not breach the note and Boles did not breach his guaranty to pay the note, however, Kennedy breached the note by rejecting BI’s prepayment tender; (4) Kennedy could not claim the benefit of Alabama’s “door closing statute” because he knowingly waived his right to declare the agreement void by entering into the agreement with full knowledge of BI’s status and including a default provision based on this knowledge; and (5), that the trial court did not err in awarding \$3.65 million to BI and Boles for the loss of the resale value of the property as a consequence of Kennedy’s breach. [Click here for Opinion](#)

[Stephens v. First Commercial Bank](#), No. 1080648. First Commercial Bank (“FCB”) sued Charles H. Stephens in the Jefferson Circuit Court, alleging that Stephens had defaulted on a promissory note that he had executed in favor of FCB. FCB moved for summary judgment, and in support thereof, proffered the promissory note in question, as well as an affidavit from an assistant vice-president of FCB, Andrew Brown, stating that based upon the books, records, and accounts of FCB, the promissory note at issue was due and unpaid. The affidavit also stated that Brown had personal knowledge of the matters set forth in the affidavit. Stephens filed a response to FCB’s summary-judgment motion, arguing therein that FCB had failed to establish through competent evidence that there were no disputed issues of material fact because Brown’s affidavit violated the best evidence rule and the hearsay rule. However, Stephens submitted no evidence with his response. The trial court granted FCB’s summary judgment motion. On appeal to the Alabama Supreme Court, Stephens argued that the court below erred in granting FCB’s summary judgment motion because Brown’s affidavit violated the “best evidence” rule and hearsay prohibition, in that, he alleged, it simply repeated statements and facts contained within FCB’s books and records. The Court stated that while Stephens was correct that the best evidence rule or the hearsay prohibition would render Brown’s affidavit inadmissible if he were simply reciting facts he learned through examination of FCB’s books and records, Brown also swore in his affidavit that he had personal knowledge of the facts set forth therein. In past cases, the court has held testimony inadmissible under the best evidence rule and hearsay prohibition where it was readily evident that the witness had no personal knowledge of the facts he or she testified to. However, the Court found that that was not the case here, reasoning that Brown unequivocally stated in his affidavit that he had personal knowledge of the matters set forth therein. Although Stephens disputed that statement, he proffered no evidence indicating that the statement was false. The Court therefore affirmed the lower court’s grant of summary judgment in favor of FCB. [Click here for Opinion](#)

[Ex parte State Personnel Board](#), Nos. 1081436 and 1081462. The plaintiff state employees brought action against defendant managers of deferred-compensation plan. The State Personnel Board (the “Board”) moved to intervene on its own behalf and on behalf of the State. The trial court entered a protective order requiring confidential treatment of discovery materials and prohibiting disclosure to third parties. The trial court never ruled on the Board’s motion to intervene, and the Board then withdrew its motion to intervene. Thereafter, upon motion of a defendant, the trial court enjoined the Board from issuing administrative subpoenas regarding matters related to the litigation. The Board filed both an appeal under Rule 4, Ala. R. App. P., and a petition for a writ of mandamus. Because the trial court never granted the Board’s motion to intervene, the Board was never a party. An appeal is the appropriate means for a non-party to seek review of an injunction such as the trial court’s order prohibiting the Board from issuing subpoenas. Accordingly, the Supreme Court dismissed the Board’s mandamus petition (No. 1081436). In the appeal (No. 1081462), the Court reversed the trial court’s order. The Court has recognized six categories of actions that do not fall within Alabama Constitution § 14’s prohibition of actions against State agencies such as the Board. Venue for such proceedings is in the county of official residence of the State official. Because the Board had not waived venue -- and indeed was not even a party -- the trial court lacked jurisdiction over the Board and could not enjoin its actions. Chief Justice Cobb dissented in the reversal of the trial court’s order, stating the issue should be remanded for a determination by the trial court of whether or not the Board is a necessary party to the litigation. [Click here for Opinion](#)

[Ex parte Loube Consulting International, Inc.](#), No. 1081317. Partridge Smith, P.C., a Mobile law firm, filed a class-action complaint against Loube Consulting International, Inc. alleging that Loube sent unsolicited facsimile advertisements to the firm’s office in violation of the Telephone Consumer Protection Act of 1991. With the filing of the complaint, the law firm sent discovery requests seeking, *inter alia*, a list of every facsimile sent by Loube over a three-year period, the number to which it was sent, the identity of the entity or individual to whom it was sent, the number of times it was sent, and whether Loube had obtained express permission prior to sending the facsimile. Loube responded that providing such information would be virtually impossible, would take months to assemble, and would require unauthorized disclosure of client information. When the trial court denied Loube’s motion for a protective order, Loube petitioned the Alabama Supreme Court for a writ of mandamus. The Court explained that to be entitled to a protective order, a movant must show good cause why production of the documents would be unduly burdensome or expensive, oppressive, embarrassing or annoying, or that the material sought is privileged. The Court noted that the law firm’s purported justification for the material was not related to the merits of its own claims against Loube but rather to identify potential members of the class. While courts are authorized in certain circumstances to require defendants to help identify class members to whom notice must be sent, the law firm’s request was not based on such grounds. The Court further determined that even if the material sought was relevant to the law firm’s claims, the requests were overly broad, and the burden and expense imposed on Loube to produce the information far outweighed any benefit to the law firm. Accordingly, the Court granted the petition and issued a writ directing the trial court to enter the protective order. [Click here for Opinion](#)

[Purser v. Solid Ground Development, LLC](#), No. 1081615. Plaintiff owns the lakebed of a private, man-made lake within the corporate limits of Alabaster, Alabama. Plaintiff’s lake was connected to Defendant’s lake on adjoining property by underground pipes that allowed water to flow between the two lakes. Plaintiff’s lake was dependent upon water from Defendant’s lake to maintain its water level. Defendant opened the dam to his lake, allowing it to drain. As a result, the water level in Plaintiff’s lake dropped significantly. Plaintiff filed suit and alleged that Defendant had irrevocably impaired her use and enjoyment of her lake and asked the court to order Defendant to restore the lake on its property to its original condition. The trial court granted summary judgment for Defendant, and Plaintiff appealed. On appeal, the court held that Plaintiff only had surface water rights to that portion of lake above her land and did not have any rights to the lake on neighbor’s land. The Court further held that Defendant was within its rights to drain its lake, without regard to the effect that diversion had on Plaintiff’s land. [Click here for Opinion](#)

[Intergraph Corp., et al. v. Bentley Systems, Inc., et al.](#), Nos. 1080300 & 1080405. Defendant purchased three software product lines from the plaintiff pursuant to an asset purchase agreement. Under the agreement, part of the purchase price was to be paid by the defendant by executing a promissory note in favor of the plaintiff. The value of the note was to be adjusted based on the defendant’s retaining certain of the plaintiff’s former customers. Following a dispute, the plaintiff filed a declaratory judgment action seeking a determination of the value of the note, and the defendant counterclaimed for breach of the asset purchase agreement resulting in lost profits. The trial court, adopting the report of a special master, held that the defendant owed an additional \$1,539,744 on the note, but that the plaintiff had breached the asset purchase agreement, and thus owed the defendant \$2,226,846 in lost profits. The trial court also held that both parties were entitled to indemnification from the other for their legal fees with the net result being that the defendant owed the plaintiff \$279,733. On appeal, the Supreme Court affirmed in part and reversed in part. As to the plaintiff’s appeal, first, the Court held that the defendant presented sufficient evidence to support its lost profits claim. Second, the Court reversed and remanded the trial court’s awarding the defendant lost revenues rather than lost profits by failing to account for the fact that if the plaintiff’s former customers had been retained, the value of the amount owed to the plaintiff on the promissory note would have increased – thus off-setting the defendant’s lost profits. Third, the Court held that the trial court properly calculated the amount owed to the plaintiff on the promissory note. As to the defendant’s appeal, first, the Court affirmed the trial court’s determination that the plaintiff was entitled to indemnity from the defendant for legal fees. Second, the Court reversed and remanded the trial court’s limiting the defendant’s damages to those that occurred the year after the agreement was signed because although the agreement limited damages to those caused by a breach within the first year, it did not limit damages suffered outside of the one year limit, but caused by a breach within the time limit. Third, the Court held that the trial court properly calculated the amount owed to the plaintiff on the promissory note. [Click here for Opinion](#)

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