

## IN THIS ISSUE

**DECISIONS ISSUED ON AUGUST 20, 2010**

### ADVISORY OPINIONS

If your company is interested staving off state constitutional challenges to proposed legislation, you may be able to coordinate an advisory opinion request with the Governor or the Legislature. The Alabama Advisory Opinion Act of 1923 authorized the justices of the Supreme Court of Alabama to respond to certain requests by the Governor or by either house of the Legislature. The Act applies when proposed legislation concerning laws of statewide, not local, application are pending. The justices can request briefs from the attorney general and may receive briefs from other persons or entities as amici curiae. Each justice will render his individual opinion, as opposed to an opinion of the Court that would be binding on adverse parties. Although the advisory opinions are not binding precedent, they do provide protection to state government officials who act in accordance with the decisions. Moreover, advisory opinions constitute persuasive authority. The Governor's legal counsel, the attorney general, or a state legislator will often work with outside law firms to handle advisory opinion requests. If you have an interest in proposed legislation, you should make sure that your law firm has contacts in both the Legislature and the Governor's office to ensure coordination between the request and delay in signing the bill so that the advisory opinion request is not moot.

### SUPREME COURT OF ALABAMA

**Ex parte Maiers**, No. 1090626 [*Alabama Uniform Residential Landlord and Tenant Act: The question of whether a landlord-tenant relationship is created by the forfeiture provision of a bond-for-title agreement is a question of fact that must be resolved by the trier of fact.*] (Woodall, J., 8-0-1).

**Horne v. TGM Associates**, No. 1070766 [*Landlord-Tenant: Tenants whose leases were terminated after their apartment complex was partially destroyed by Hurricane Katrina presented enough evidence to survive summary judgment on claims against their landlord for breach of contract, breach of the covenant of quiet enjoyment, and conversion, but did not present sufficient evidence for claims for wrongful eviction, fraudulent suppression, or intentional infliction of emotional distress.*] (Murdock, J., 5-0-0).

### ALABAMA COURT OF CIVIL APPEALS

**White v. HB&G Building Products, Inc.**, No. 2090323 [*Workers' Compensation: Trial court must determine whether a second injury is a new injury, an aggravation of a prior injury, or a recurrence of an old injury in determining the application of the "last injurious exposure" rule.*] (Thompson, J., 3-1-1).

**Aman v. Gilley**, No. 2031166 [*Trial by Parties' Implied Consent: Where a claim is not asserted in a party's initial pleadings it may be tried by implied consent of the parties—even where not explicitly requested—if the party seeking the relief has met its burden of proving the elements of the claim.*] (Thompson, J., 3-1-1).

## CASE SUMMARIES

### SUPREME COURT OF ALABAMA

**Ex parte Maiers**, No. 1090626. Hubert and Melissa Maiers entered into a bond-for-title agreement with Bennie Gibbs that required an initial payment and regular monthly payments. A forfeiture provision of the agreement provided that Gibbs would void the agreement if the Maierses defaulted on their payments. In that instance, the Maierses would be deemed tenants of the property, and their initial payment would be converted to satisfy costs and reasonable rental payments. The Maierses defaulted, and Gibbs filed for eviction under the Alabama Uniform Residential Landlord and Tenant Act. The trial court entered a partial summary judgment in favor of Gibbs, which was affirmed without opinion by the Alabama Court of Civil Appeals. The Maierses then appealed to the Alabama Supreme Court, arguing that the Act does not govern their relationship with Gibbs. On appeal, the Court noted that the Act applies only to residential landlord-tenant relationships, and explained that the Maierses' initial occupancy of the residence under the bond-for-title agreement was not subject to the Act. Such a relationship could, however, be created by the forfeiture provisions of the bond-for-title agreement. The question of whether Gibbs complied with the requirements of the forfeiture provision, and successfully converted his relationship with the Maierses to a landlord-tenant relationship, is a question of fact that is unsuitable for summary judgment. Accordingly, the Court reversed the judgment of the Court of Civil Appeals and remanded the case.

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**Horne v. TGM Associates**, No. 1070766. Plaintiffs were tenants in an apartment complex owned by Defendants. Although Hurricane Katrina destroyed several buildings in the apartment complex, the buildings in which Plaintiffs lived were damaged but remained habitable. Following the hurricane, Defendants decided not to repair the buildings in which Plaintiffs lived and gave Plaintiffs ten days' notice to vacate their apartments. Plaintiffs vacated their apartments and then sued Defendants for breach of contract, breach of the covenant of quiet enjoyment, conversion, wrongful eviction, fraudulent suppression, intentional infliction of emotion distress claims (or outrage), and trespass. The trial court granted summary judgment in Defendants' favor on all of Plaintiffs' claims. Plaintiffs appealed the judgment on all claims except trespass. The Supreme Court affirmed in part and reversed in part. Plaintiffs based their breach of contract claim on Defendants' failure to give thirty days' notice of termination as required by the lease. Defendants argued that such a provision was overridden by the catastrophic nature of Hurricane Katrina; however, the Supreme Court held that it was not in the court's power to re-write the lease, which did not contain a provision allowing Defendants to terminate the lease in less than thirty days in the event of a natural disaster. The Court held that Plaintiffs had presented enough evidence on their breach of contract claim to withstand summary judgment. The Court further held that Plaintiffs had stated a cause of action for breach of the covenant of quiet enjoyment, citing evidence of Defendants' ten-day notice of termination and alleged ensuing threats of eviction and loss of property. Finally, the Court held that Plaintiffs had stated sufficient facts on their conversion claim because they showed that Defendants gained possession of personal property left behind by some of the Plaintiffs as a result of the early termination of the lease. The Court held, on the other hand, that Plaintiffs' claims for wrongful eviction, fraudulent suppression, and intentional infliction of emotion distress were due to be dismissed. The Court held that there could be no violation of the eviction statute where eviction proceedings were never initiated against any of Plaintiffs. Moreover, Plaintiffs' claim for fraudulent suppression depended upon Plaintiffs' ability to show that Defendants knew they were going to evict Plaintiffs prior to the ten-day notice. As Plaintiffs were unable to present any evidence that Defendants knew they were going to terminate the leases at an earlier point, Plaintiffs' claim for fraudulent suppression failed. Finally, Plaintiffs were unable to state a claim for intentional infliction of emotional distress because Defendants' conduct, including alleged threats towards some Plaintiffs, did not rise to the level of being so outrageous as to constitute a viable intentional infliction of emotional distress claim. Affirmed in part; reversed in part; and remanded.

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### ALABAMA COURT OF CIVIL APPEALS

**White v. HB&G Building Products, Inc.**, No. 2090323. Plaintiff White suffered an on-the-job knee injury while employed by defendant HB&G. HB&G authorized Dr. Chung to treat White's knee and paid for his medical expenses. By April 2007, Dr. Chung indicated that White's knee had healed to the point that he was able to return to work. Dr. Chung refused to perform any surgical procedures despite White's complaints that he was still experiencing knee problems. White scheduled an appointment with another doctor, but in the meantime, in June or July 2007, he began a new job at a restaurant. White saw Dr. Walcott for a second opinion in October 2007. Dr. Walcott suggested that White was a good candidate for surgery, but HB&G refused to cover White's treatment with Dr. Walcott. In White's subsequent action for workers' compensation benefits, the trial court applied the "last-injurious-exposure" rule to hold that White's new employment had aggravated a preexisting condition for which HB&G was no longer responsible. The Alabama Court of Civil Appeals reversed. The trial court's finding either that a second injury to White's knee arose out of his new employment or that White aggravated his previous injury was unsupported by the substantial evidence. Further, the Court of Civil Appeals determined that White's continuous knee pain, even after Dr. Chung determined that further treatment was unnecessary, constituted substantial evidence that White's current knee problems were a recurrence of his original injury.

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**Aman v. Gilley**, No. 2031166. Aman appealed the judgment of a trial court which found that the Gilleys owned an easement across a portion of Aman's property. The Court of Civil Appeals reversed, concluding, among other things, that (a) the Gilleys had not asserted a claim seeking a prescriptive easement in their initial pleadings, and (b) the Gilleys could not establish a right to a prescriptive easement because they had failed to prove an essential element for such a claim. The Gilleys then filed a petition for writ of certiorari to the Alabama Supreme Court. In granting the petition and reversing the Court of Civil Appeals, the Supreme Court concluded that the Court of Civil Appeals had failed to apply the *ore tenus* standard to the prescriptive easement claim and that there was undoubtedly "some evidence" in the record to support the trial court's holding. Accordingly, the Supreme Court remanded for a determination of whether the prescriptive easement claim was tried by the implied consent of the parties. On remand, the Court of Civil Appeals held that the evidence supported the trial court's conclusion that the issue had been tried by implied consent. Accordingly, the trial court was within its discretion, and the Court of Civil Appeals affirmed the judgment. In his dissent, Judge Moore argued that the prescriptive easement issue was not raised until after trial, and therefore, the trial court had no authority to consider the issue.

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