

## IN THIS ISSUE

### COURT OF CIVIL APPEALS DECISIONS ISSUED ON NOVEMBER 21 AND 26, 2008

**Jarrett v. Alabama Dept. of Indus. Relations** No. 2070624 [*Unemployment-Compensation Benefits: Competing affidavits create a factual dispute as to whether employee rescinded his resignation.*] (Moore, J., 5-0).

**Thomas v. Williams**, No. 2070512 [*Tort-of-Outrage & Intentional Interference with Business Relations: Tort of outrage only recognized in Alabama when conduct goes beyond all possible bounds of decency; an interference with business relations claim does not require allegation of fraud, force, or coercion.*] (Per Curiam, 4-0-1).

**Bishop State Community College v. Thomas**, No. 2070660 [*Employment Law: Although an employee is performing his job duties effectively, he or she may be properly terminated under the Fair Dismissal Act if the employee has become unfit or interferes with the effectiveness of the employer's business.*] (Moore, J., 5-0).

**Lee v. Alabama Board of Nursing**, No. 2070957 [*Certiorari: Common law writ of certiorari cannot be used as a substitute for appeal.*] (Moore, J., 5-0).

**Ashley's Seining v. JMK Farms**, No. 2070888 [*Notice Requirement for Summary Judgment Hearing: Trial court exceeded its discretion by conducting a hearing on a motion for a summary judgment on less than 10 days' notice as required by Rule 56(c)2.*] (Moore, J., 4-0).

## CASE SUMMARIES

**Jarrett v. Alabama Dept. of Indus. Relations** No. 2070624. Plaintiff filed notice of his resignation with his employer. Shortly before his last day of employment plaintiff indicated a desire to revoke the termination, however his employment was still terminated. After he was denied unemployment-compensation benefits by administrative hearing officer with the Department of Industrial Relations, plaintiff appealed to the circuit court. The trial court granted defendant's motion for summary judgment on the basis that plaintiff was not entitled to unemployment-compensation benefits because he had voluntarily resigned. On appeal to the Alabama Court of Civil Appeals, plaintiff argued that though he submitted a letter of resignation, he effectively rescinded that resignation and was therefore entitled to unemployment-compensation benefits. Plaintiff also argued that the trial court erred by failing to order the defendant to prepare a transcript of administrative proceedings as required by statute. The Court did not address the merits of either argument because it found that competing affidavits created a genuine issue of fact regarding the voluntariness of the resignation. Therefore, the Court reversed and remanded with instructions to the trial court to ensure that defendant complies with statutory requirements regarding the administrative proceeding transcript.

[Click here for Opinion](#)

**Thomas v. Williams**, No. 2070512. Plaintiff Teresa Thomas filed an earlier suit against Defendant John A. Williams alleging that Williams delivered negligent medical care to her husband, David Brian Thomas, which led to his death. Those allegations were tried to a jury, which returned a verdict in favor of Williams. Thomas alleges that after the jury returned a verdict in favor of Williams, Williams called her employer, Dr. Carpenter, with the malicious intent to have Dr. Carpenter terminate Thomas' employment. Thomas then filed suit against Williams alleging: (1) tortious interference with a business relationship; (2) the tort-of-outrage; and (3) intentional infliction of emotional distress. Williams filed a motion to dismiss Thomas' complaint pursuant to Ala. R. Civ. P. 12(b)(6), which the trial court granted. On appeal, the Alabama Court of Civil Appeals held that the tort-of-outrage is the same cause of action as intentional infliction of emotional distress. The Court held that even if all of Thomas' allegations were true, they were insufficient to support a tort-of-outrage claim because Alabama only recognizes tort-of-outrage claims when the alleged conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." The Court noted that Alabama courts have only allowed recovery for tort-of-outrage claims where there was misconduct in a burial, sexual harassment or assault, or barbaric methods of coercing an insurance settlement. Accordingly, the Court affirmed the trial court's dismissal of Thomas' tort-of-outrage claim. The Court then addressed a contradiction in Alabama case law regarding the elements of tortious interference with business relations. Williams alleged that "fraud, force, or coercion" was an essential element to tortious interference with business relations. The Court held that, while two Alabama cases had held that "fraud, force, or coercion" was an essential element to a tortious interference with business relations claim, the better reasoned line of cases simply require an allegation of "absence of justification." As such, the Court set forth the elements of intentional interference with business relations as: (1) the existence of a contract or business relation; (2) the defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the contract or business relation; (4) absence of justification for the defendant's interference; and (5) damage to the plaintiff as a result of the interference. The Court held that Thomas had alleged sufficient facts to support a valid claim of intentional interference with business relations and thus reversed the trial court's decision dismissing that claim.

[Click here for Opinion](#)

**Bishop State Community College v. Thomas**, No. 2070660. Petitioner was employed in various capacities by Bishop State Community College for approximately fifteen years. At the height of his tenure, he served as a campus director and director of the Division of Adult Education and Economic Development. He performed his duties at the highest levels according to his job evaluations. Near the end of his employment, however, Petitioner was convicted of leaving the scene of an accident while under the influence of alcohol, a Class C felony, and was impeached from his position as commissioner of the Mobile County School Board for using his official position to obtain public funds and services for personal use. The president of the college and the chancellor of the Department of Postsecondary Education initially opted not to terminate Petitioner's employment so long as he was performing his job satisfactorily, though he was demoted and reassigned to different positions. However, in 2007 the Alabama Board of Education appointed a new chancellor of the Department of Postsecondary Education, who instigated a new unwritten policy that all convicted felons should not be employed in the two-year college system. Petitioner's employment was terminated pursuant to this new policy. Petitioner exercised his right to a *de novo* hearing regarding his termination under the Fair Dismissal Act, Ala. Code § 36-26-101, *et seq.*, which provides, among other things, that an eligible employee cannot be fired without good or just cause. After finding that the college failed to establish that Petitioner had been ineffective in performing his job duties, the hearing officer overturned his termination. The college appealed, and the Court reversed the hearing officer's determination. The Court held that the college had just cause to terminate his employment if any cause exists that bears a relationship to his fitness or capacity to discharge the duties of his position. Just cause, therefore, is not limited to the employee's on the job effectiveness, but may also include off the job behavior, such as Petitioner's conviction or impeachment. The chancellor of the Department of Postsecondary Education has the authority to interpret the rules and regulations concerning junior colleges and trade schools, and his determination that just cause included any felony conviction presented a sufficient basis for Petitioner's dismissal. The Court held that the hearing officer's determination overturning his termination was arbitrary and capricious and, accordingly, reversed the determination.

[Click here for Opinion](#)

**Lee v. Alabama Board of Nursing**, No. 2070957 [*Certiorari: Common law writ of certiorari cannot be used as a substitute for appeal.*] (Moore, J., 5-0). Plaintiff was notified by defendant board that a complaint had been filed against her and that the board would meet with plaintiff regarding the complaint. The notices did not specify the nature of the complaint. At the meeting, the board gave plaintiff two options: (1) pay a fine and sign a consent order agreeing to public reprimand for failing to acquire a state nursing license prior to accepting employment as a professor of nursing; or (2) contest the complaint at a scheduled hearing. Because plaintiff had a scheduling conflict with the hearing date, she signed the consent order, but submitted a letter several days later explaining why she had not obtained a license. The board approved the consent order, which became final. Plaintiff paid the fine "under protest" and subsequently filed a petition for writ of certiorari in the trial court, alleging violation of due process for the board's failure to follow notice requirements and asking the trial court to set aside the public reprimand and fine. The trial court granted defendant's motion to dismiss the petition. On appeal, the Court of Civil Appeals affirmed the dismissal, noting that a writ of certiorari is not available when the petitioner has a right to appeal. Under Ala. Code § 41-22-20, a nurse subjected to discipline has the right to appeal within 30 days of the board's order. Plaintiff, however, not only waived her right to appeal by signing the consent order, but also waived any objections to procedural irregularities.

[Click here for Opinion](#)

**Ashley's Seining v. JMK Farms**, No. 2070888. Ashley Eaton, Eddie Eaton and Sharon Eaton (the "Eatons") doing business together as Ashley's Seining agreed to purchase catfish from JMK Farms ("JMK") and to submit payment for the purchase within 30 to 35 days of the delivery date. When Ashley's Seining did not pay for several deliveries, Jim Kuykendall, owner of JMK (collectively "JMK"), requested payment. Ashley Eaton denied that the Eatons ever agreed to pay JMK for the catfish, but that the processor who ultimately received the catfish was to make the payments in accordance with the ordinary business practices in the seining trade. JMK filed a complaint alleging breach of contract. JMK subsequently filed a summary judgment motion on Sept. 30, 2004 and an amended motion on Oct. 12, 2004. On Oct. 26, 2004 the trial court notified the parties that a hearing on the amended summary judgment motion would be held on Nov. 4, 2004. Notice was sent to the Eatons, but not to their attorney. On Nov. 4, 2004, the Eatons filed a motion to continue the hearing along with affidavits of the defendants. On Nov. 8, 2004, the trial court denied the motion to continue and entered a summary judgment in favor of plaintiffs. The Eatons filed a postjudgment motion on Nov. 16, 2004, which was denied by operation of law on Feb. 14, 2005. On appeal to the Alabama Court of Civil Appeals, the Eatons argued that the trial court erred in failing to provide them with 10 days' notice of the summary-judgment hearing and in entering the summary judgment. The Court noted that strictly speaking, the trial court did not violate the terms of 56(c)(2) since it only requires the summary judgment motion and supporting materials be served at least 10 days before the time fixed for a summary judgment hearing. However, the Supreme Court has held that Rule 56(c)2 is subject to Rule 6 and has construed Rule 56(c)2 to require 10 days' notice of the hearing. When it issued the notice on October 26, 2004, the trial court was required to set the hearing at least 10 days, excluding intermediate Saturdays and Sundays from that date. The earliest date the hearing could have been set in compliance with Rule 56(c)2 and Rule 6 was Nov. 9, 2004. The Court concluded that the trial court violated the 10-day-notice requirement set out in Rule 56(c)2 by setting the hearing on the motion for a summary judgment on Nov. 4, 2004. The Court noted that while compliance with the notice provision may be excused by the consent of the parties, the Eatons did not waive their right to insist on 10 days' notice of the hearing, as they filed a motion to continue and a Rule 59 motion objecting to the scheduling of the hearing after the entry of the summary judgment. Additionally, the trial court has the discretion to hold a summary judgment hearing on less than 10 days' notice when no actual prejudice results. However, here, the Eatons claimed in their Rule 59 motion that they were actually prejudiced because their counsel was unable to generate and file opposing evidentiary materials in time for the hearing. The Court reversed the summary judgment, remanded the cause and instructed the trial court to reissue a notice of hearing and to consider all evidentiary materials timely filed by the parties.

[Click here for Opinion](#)

[CLICK HERE TO VISIT THE APPELLATE WEBSITE](#)

*NOTE: The information contained in this document is provided for informational purposes only and is not intended to provide legal advice to any person or entity and should not be used as a substitute for the advice of a qualified lawyer. When using this document, be aware that the information may be out of date and/or may not apply or be appropriate to your particular set of circumstances or your judicial jurisdiction. As legal advice must be tailored to the specific circumstances of each case and the law is constantly changing, you should not rely solely on the information set forth in this document. Anyone with a legal question or legal problem should always consult with and seek the advice of a qualified lawyer. Balch & Bingham LLP does not make any representations, warranties, claims, promises or guarantees about the completeness, accuracy or adequacy of the information in this document. The information in this document does not necessarily represent the opinion of Balch & Bingham LLP, any of its lawyers, or any clients of the firm.*

## APPELLATE FOCUS GROUP ATTORNEYS

**ED R. HADEN—CHAIR**

[Profile](#) [Email](#)  
(205) 226-8795

**CHRISTOPHER L. YEILDING –  
EDITOR**

[Profile](#) [Email](#)  
(205) 226-8728

**CHRISTOPHER L. ANULEWICZ**

[Profile](#) [Email](#)  
(404) 962-3562

**MICHAEL J. BOWERS**

[Profile](#) [Email](#)  
(404) 962-3535

**DAVID R. BOYD**

[Profile](#) [Email](#)  
(334) 269-3132 Mont.  
(205) 226-3485 B'ham

**MATTHEW F. CARROLL**

[Profile](#) [Email](#)  
(205) 226-3451

**THOMAS L. CASEY, III**

[Profile](#) [Email](#)  
(205) 226-3480

**GREGORY C. COOK**

[Profile](#) [Email](#)  
(205) 226-3426

**R. PEPPER CRUTCHER, JR.**

[Profile](#) [Email](#)  
(601) 965-8158

**MICHAEL L. EDWARDS**

[Profile](#) [Email](#)  
(205) 226-3401

**P. STEPHEN GIDIERE, III**

[Profile](#) [Email](#)  
(205) 226-8735

**DANIEL E. HARRELL**

[Profile](#) [Email](#)  
(205) 226-3480

**LEIGH ANNE HODGE**

[Profile](#) [Email](#)  
(205) 226-8724

**W. JOSEPH MCCORKLE, JR.**

[Profile](#) [Email](#)  
(334) 269-3134

**KELLY F. PATE**

[Profile](#) [Email](#)  
(334) 269-3130

**JOHN D. PICKERING**

[Profile](#) [Email](#)  
(205) 226-8752

**JOSHUA Z. ROKACH**

[Profile](#) [Email](#)  
(202) 661-6345

**JASON B. TOMPKINS**

[Profile](#) [Email](#)  
(205) 226-8743

**DORMAN WALKER**

[Profile](#) [Email](#)  
(334) 269-3138

## CONTRIBUTORS

CONRAD ANDERSON IV  
DAVID R. BURKHOLDER  
LOUIS M. CALLIGAS  
MARCUS R. CHATTERTON  
JENNIFER HOOVER CLARK  
BRUCE J. DOWNEY, IV  
ROBIN A. FRANCO  
CHRISTOPHER F. HEINSS  
TYRELL F. JORDAN  
DAVID A. LESTER  
M. TODD LOWTHER  
NEAH L. MITCHELL  
JOSEPH SEAWELL MOORE  
STEVEN R. PARKER  
LINDSAY S. REESE  
J. PATRICK RUNGE  
J. HOUSTON SMITH, III  
PATRICK H. STRONG  
TYRUS B. STURGIS

## BIRMINGHAM OFFICE

1901 SIXTH AVENUE NORTH  
SUITE 1500  
BIRMINGHAM, AL 35203  
(205) 251-8100

## MONTGOMERY OFFICE

105 TALLAPOOSA STREET  
SUITE 200  
MONTGOMERY, AL 36104  
(334) 834-6500

## ATLANTA OFFICE

30 IVAN ALLEN, JR. BLVD., NW  
SUITE 700  
ATLANTA, GA 30308  
(404) 261-6020

## GULFPORT OFFICE

1310 TWENTY FIFTH AVENUE  
GULFPORT, MS 39501  
(228) 864-9900

## JACKSON OFFICE

401 EAST CAPITOL STREET  
SUITE 200  
JACKSON, MS 39201

## D.C. OFFICE

801 PENNSYLVANIA AVE. NW  
SUITE 325  
WASHINGTON, D.C. 20004  
(202) 347-6000

BALCH & BINGHAM LLP

[HOME PAGE](#)