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Gregory v. Ferguson, No. 2070576 [Procedure: Trial court certification of a summary judgment as final pursuant to Rule 54(b) held inappropriate where counterclaims involving related issues had not been ruled upon.] (Thompson, J., 5-0).

Hamilton v. CSC Distribution, Inc., No. 2070813 [Final Judgment: Court of Civil Appeals lacks subject matter jurisdiction to review summary judgment as to fewer than all claims unless certified as final pursuant to Rule 54(b). Moreover, a judgment must be input into the State Judicial Information System to be effective.] (Moore, J., 5-0; Bryan, J., concurring specially).

CASE SUMMARIES

SUPREME COURT OF ALABAMA

Prattville Memorial Chapel and Memory Gardens, Inc. v. Parker, No. 1061756. Plaintiff W.E. Parker bought what he described as an "estate lot" from Prattville Memorial Gardens, Inc. ("PMG") in 1976. Parker alleged that he was told that the estate lot would contain sixteen gravesites, would have a walkway down the middle, and would have flowers planted between his lot and adjoining lots. Parker produced a drawing matching his description of the estate lot, which he claims was given to him when he purchased the lot. However, the contract that Parker was provided, but did not sign, did not specify that Parker was to receive an estate plot or reference any of the features shown on the drawing. PMG later sold the cemetery to Jefferson Memorial Companies, Inc. ("Jefferson"). The purchase agreement which governed Jefferson's purchase of the cemetery from PMG specified that it assumed none of PMG's liabilities, debts, or obligations. Jefferson was, however, assigned all of PMG's "pre-need contracts." Jefferson later sold the cemetery and an on-site funeral home it had constructed to Memorial Chapel, which operated the cemetery through the date of trial. Pursuant to the asset-purchase agreement by which Memorial Chapel purchased Jefferson's assets, Memorial Chapel assumed contractual liabilities of all previous owners related to pre-need services, but did not assume any other obligations or liabilities. Many years after Memorial Chapel purchased the cemetery, Parker made an inquiry to Memorial Chapel regarding his lot. During the ensuing conversation, Memorial Chapel denied knowledge of the existence of any estate plots in the cemetery. Parker showed Memorial Chapel the drawing he was given, but Memorial Chapel could not find any similar drawings in its records. Memorial Chapel's only records indicated that Parker had rights to sixteen gravesites, but that he had no right to a walkway or other features shown on the drawing. Thereafter, Parker filed suit against PMG for breach of contract and fraud. Parker subsequently added Memorial Chapel as a defendant. Parker's claims were tried to a jury. At trial, Parker introduced testimony from PMG's former president who said PMG did sell estate plots like the one shown on Parker's drawing. He further testified that he saw a Jefferson employee removing flowers from between family gravesites shortly after it purchased PMG. Memorial Chapel presented conflicting testimony indicating that plants had never been allowed between interment spaces. Memorial Chapel moved for judgment as a matter of law ("JML") at the close of Parker's evidence and at the close of all evidence on the grounds that Parker had not presented sufficient evidence to support his claims. Memorial Chapel also moved for JML as to whether Memorial Chapel was a continuation of PMG. The trial court denied all three JML motions and found that, as a matter of law, Memorial Chapel was a continuation of PMG. The jury returned a verdict awarding Parker compensatory and punitive damages. Memorial also filed post-judgment motions for remittitur and to supplement the record with a transcription of closing arguments after Parker's counsel allegedly made prejudicial statements during closing arguments. Those motions were denied. Memorial Chapel appealed, enumerating more than twenty errors. Memorial Chapel argued that, in order for it to be found to be a continuation of PMG, Parker was required to establish all four factors set forth in *Turner v. Wean United, Inc.*, 531 So. 2d 827, 830 (Ala. 1988). Parker argued that he was not required to establish each of the four factors so long as the totality of the transaction demonstrated that Memorial Chapel was a continuation of PMG. The Supreme Court of Alabama held that Parker was required to show substantial evidence of each of the four factors. Because Parker failed to introduce evidence at trial of one of the four factors, the Supreme Court held that Memorial Chapel had been entitled to JML on the continuation issue and, consequently on Parker's fraud claim. Memorial Chapel also argued that the trial court's denial of its post-judgment motion to supplement the record was grounds for a new trial. However, the record indicated that neither party requested that the court reporter transcribe closing arguments. After being asked to transcribe the closing arguments by Memorial Chapel, the court reporter attempted to generate a transcript using his backup tape. However, that transcript had thirty-two areas where the argument was unintelligible. The court reporter was therefore unable to certify that the transcript was a full, true, and correct transcript of closing arguments. Because of this, the trial court refused to allow it into the record and the partial transcript was not before the Supreme Court on appeal. The Supreme Court upheld the trial court's ruling because Memorial Chapel did not comply with Ala. R. Civ. P. 10(d), and the record did not show that the ruling was an abuse of discretion. Because the transcript of closing arguments was not contained in the appellate record, the Supreme Court could not consider whether Parker's counsel made prejudicial remarks during his closing argument. Memorial Chapel also argued that the trial court erred by refusing to instruct the jury that Parker never sought treatment for mental anguish. However, Memorial Chapel never requested that the trial court do so and never attempted to communicate the stipulation to the jury. The Supreme Court held that it is well settled in Alabama that a party may not induce an error by the trial court and then attempt to win a reversal based on that error. Accordingly, the Supreme Court reversed the trial court's judgment on Parker's fraud claim and affirmed the judgment as to Parker's breach of contract claims.

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Ex parte Saad's Healthcare Services, Inc., No. 1070080. Plaintiff employee brought a worker's compensation action against her employer seeking benefits for physical and psychological injuries sustained during her employment. The trial court found that plaintiff unreasonably refused psychological and psychiatric care before reaching maximum medical improvement ("MMI") and therefore was precluded from being classified as permanently and totally disabled under the exclusion in Ala. Code § 25-5-57(a)(4)d, which states that an employee who refuses to undergo "physical or vocational rehabilitation . . . shall not be deemed permanently and totally disabled." On appeal, the Court of Civil Appeals held the exclusion inapplicable because it only applies to refusals of treatment made after reaching MMI. Defendant employer sought certiorari review of whether the exclusion applies to refusals of treatment made before reaching MMI. The Alabama Supreme Court granted the petition for review; however, the Court later quashed the writ. While the case was on appeal, plaintiff again refused psychiatric treatment, this time after reaching MMI. Therefore, on remand to the trial court, defendant argued the § 25-5-57(a)(4)d exclusion applied. The trial court found that psychiatric treatment did not constitute physical or vocational rehabilitation; thus, the § 25-5-57(a)(4)d exclusion did not apply. After the Court of Civil Appeals affirmed, defendant sought certiorari review of whether the exclusion applies to the refusal of psychiatric treatment and whether the exclusion applies when an employee refuses treatment before reaching MMI. The Alabama Supreme Court held that the exclusion did not apply to plaintiff's refusal of psychiatric treatment because the treatment was not offered for the purpose of restoring her physical function or her ability to engage in gainful employment but was offered to treat her mental impairment. Therefore, the treatment did not qualify as physical or vocational rehabilitation under § 25-5-57(a)(4)d. The issue of whether the exclusion applies when an employee refuses treatment before reaching MMI was not properly before the Court because the Court previously dismissed defendant's petition for review of the same issue and the Court of Appeals did not address the issue. Judge Parker dissented opining that the judgment of the Court of Civil Appeals should be reversed because the phrase "physical and vocational rehabilitation" includes psychiatric services.

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Southside Community Development Corporation v. White, No. 1070989. The State took title to defendant's property for delinquent taxes. Plaintiff acquired title to the property by satisfying the tax lien and subsequently brought an *in rem* action to quiet title in his name. Defendant moved for judgment as a matter of law at the close of plaintiff's case and again at the end of the case, arguing that plaintiff had not adversely possessed the property for the statutory three-year period. The trial court denied the motions and entered judgment quieting title in plaintiff. The Supreme Court reversed, holding that the statutory three-year period "does not begin to run until the purchaser of the property at a tax sale has become entitled to demand a deed to the land." Nothing in the statute or the Court's precedents applied this rule differently when property is purchased from the State; that is, the statutory three-year period does not begin to run when the property is transferred to the State. Thus, plaintiff's action to quiet title was premature because "the owner's right of action is not extinguished until the tax purchaser has retained adverse possession for three years."

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Ex Parte Allianz Life Ins. Co. of N. Am., No. 1070114. In 2003, Plaintiff bought an annuity policy from Allianz through its agent. Thereafter, Plaintiff sued Allianz and its agent for fraudulent misrepresentation concerning the sale of the annuity policy. During discovery, Plaintiff filed a motion to compel Allianz to produce documents from two of those cases in other jurisdictions—both major class actions which together involved hundreds of thousands of class members and potentially millions of documents. Trial court granted Plaintiff's motion to compel and denied a subsequent motion for protective order filed by Allianz. Allianz petitioned the Supreme Court for a writ of mandamus directing the trial court to vacate its orders compelling production. In refusing to issue the Writ, the Court held that Allianz had not met its burden of demonstrating that the trial court exceeded its discretion. In particular, the Court determined that the Allianz had failed to present the Court with any evidence, including evidence that it had even responded to Plaintiff's motion to compel, which would tend to show that the trial court exceeded its discretion. Similarly, the Court found that the trial court did not exceed its discretion in denying Allianz's motion for protective order, and Allianz failed to provide any evidence that the motion for protective order was anything more than an unsupported request for a protective order.

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Ex parte Indiana Mills & Manufacturing, Inc., No. 1070229. The driver of a waste-disposal truck was killed in a single-vehicle accident when the truck struck a railroad trestle in Lee County. The driver's widow filed a lawsuit in Macon County against the truck manufacturer, the seatbelt manufacturer, and three individual defendants who were employees of the waste-disposal company. Venue was proper because one of the individual defendants resides in Macon County. The truck and seatbelt manufacturers moved to transfer the case to Lee County under the doctrine of *forum non conveniens*. After the trial court denied their motion to transfer, the manufacturers petitioned the Alabama Supreme Court for a writ of Mandamus ordering the trial court to transfer the case. On review, the Court explained that the "interest of justice" prong of Alabama's *forum non conveniens* statute requires that an action be transferred "from a county with little, if any, connection to the action, to the county with a strong connection to the action" and that "litigation should be handled in the forum where the injury occurred." The Court recognized that the case had some connection with Macon County and that none of the parties to the case actually reside in Lee County, but nevertheless held that "the overall connection between Macon County and this case is weak and that the connection between the case and Lee County is strong." In so holding, the Court found persuasive that: (1) the accident occurred in Lee County; (2) the Opelika police and fire departments responded to the accident; (3) the Lee County coroner's office investigated the death of the driver; (4) the records of the fire department were located in Lee County; (5) the truck was towed and stored in Lee County; (6) no parties, except for the one individual defendant, resides in Macon County; and (7) none of the relevant facts of the case actually involved Macon County. Accordingly, the Alabama Supreme Court issued the writ of mandamus and ordered the case transferred to Lee County. In Chief Justice Cobb's dissent, she argued that the Court should defer to a trial court's discretion, which should give deference to a plaintiff's choice of venue and that the movant should be required to demonstrate a significant likelihood of injustice in order to warrant a change of venue based on the interest of justice prong of Alabama's *forum non conveniens* statute. [Balch & Bingham's Bruce Barze and Steve Parker represented one of the successful petitioners in this appeal.]

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Birmingham Coal & Coke Company, Inc. v. Johnson, No. 1070303. The appellant, a surface coal mine operator, appealed the trial court's verdict for the plaintiff homeowners for the damages they sustained from the vibrations caused by the appellant's blasting operations. The trial court awarded damages to compensate the plaintiffs for the damage to their homes and also awarded damages to compensate the plaintiffs for their mental anguish and emotional distress. On appeal, the court affirmed the award for property damages, but reversed the award for emotional damages. In affirming the award of property damages, the court recognized that the use of explosives under abnormally dangerous conditions is actionable negligence if such conduct proximately causes damage to another. The appellant was not relieved from liability because it complied with state blasting regulations. The court also held that the plaintiffs were not required to present expert testimony linking the damage to their home to the blasting operations. The plaintiffs presented sufficient evidence to support an award for property damages by testifying that they could hear the blasts and could feel the vibrations from the blasting in their houses and that they noticed damage to their houses after the blasting. The court reversed the award of emotional damages, however, because emotional damages are only available in negligence actions to those plaintiffs who sustain a physical injury as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by the conduct. Although the law does allow emotional damages to be awarded in contract claims when the claim involves a person's home, no such exception applies to tort based actions. The plaintiffs lived between 2,875 feet to 4,779 feet from the blasting site and were not physically harmed by the blasting vibrations. Thus, they were neither physically harmed nor in the zone of danger; therefore, the trial court erred in awarding damages for mental anguish and emotional distress.

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ALABAMA COURT OF CIVIL APPEALS

State Dep't of Industrial Relations v. Campbell, No. 2070477. McKibbin Hotel Management employed Linda Mae Campbell, who requested a 30-day "emergency leave of absence" without advising McKibbin of the reason. McKibbin did not grant the leave of absence, but Campbell nonetheless abandoned her job to enroll in a 30-day inpatient treatment program for addiction to crack cocaine. After completing treatment, Campbell sought unemployment benefits indicating that she had been dismissed from her employment. The Department of Industrial Relations denied Campbell's claim based on testimony from McKibbin that Campbell had voluntarily quit her job. Campbell filed a notice of appeal with the trial court, which ultimately conducted a de novo trial and reversed the DIR decision. DIR appealed. The primary issue on appeal was whether Campbell was disqualified from receiving unemployment benefits because she voluntarily quit her job. Recognizing that a claimant bears the burden of proof that she is qualified to receive benefits, the Court of Civil Appeals found that Campbell presented no evidence that her drug addiction and need for rehabilitation was in any way connected to her employment so as to constitute "good cause" for voluntarily leaving her employment. Thus, the Court then focused on whether Campbell nonetheless qualified for benefits under an exception to the unemployment compensation statute because her absence was related to sickness or disability. The Court noted that the exception is three-pronged: a petitioner must (1) be forced to leave work because of sickness or disability; (2) notify her employer as soon as practicable; and (3) offer herself for work as soon as again able. Here, Campbell failed to notify McKibbin that she had left her work due to sickness or disability and failed to offer herself for work after completing her 30-day treatment, thereby failing to satisfy the second and third prongs of this exception. Accordingly, the Court reversed the trial court and rendered judgment in favor of DIR. Judge Bryan dissented, stating that the Court failed to appropriately apply an *ore tenus* presumption of correctness to the trial court's findings.

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Gregory v. Ferguson, No. 2070576. Gregory sued Ferguson alleging that he sold certain real property to Ferguson in exchange for Ferguson's agreement to hire him to construct a house for Ferguson on that property. Gregory alleged that after he had performed extensive work on the property, Ferguson failed to pay and terminated the parties' contractual agreement. Ferguson counterclaimed, alleging that Gregory had falsely represented that he was a licensed contractor, and that Gregory failed to pay subcontractors as required by the parties' contract. On January 16, 2007, Ferguson filed a motion for a summary judgment, arguing that Gregory lacked standing to assert his claims because Gregory was not a licensed contractor under Alabama Code § 34-14A-5. The trial court entered summary judgment in favor of Ferguson on Gregory's claims. The trial court purported to certify its summary judgment as final pursuant to Rule 54(b), and Gregory appealed. Neither party raised the issue of the appropriateness of the trial court's Rule 54 Certification of its summary-judgment order. The Alabama Court of Civil Appeals considered the issue on its own because the issue of whether a judgment or order is sufficiently final to support an appeal is jurisdictional. An appellate court may determine that a Rule 54(b) certification is invalid when issues are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results. Further, a Rule 54(b) certification is inappropriate when a counterclaim related to the claim the trial court had ruled upon remains pending in the trial court. Because the parties' contract claims required resolution of, among other things, the issue of the interpretation and the proper enforcement of their contract, the Court held that the parties' claims were dependent on each other and that a resolution of one claim would impact the determination of the other. Although the trial court had ruled on Gregory's claims in its summary-judgment order, Ferguson's counterclaims remained pending. Therefore, the summary-judgment order was not sufficiently final to support the purported Rule 54(b) certification. Accordingly, the appeal was dismissed as having been taken from a non-final judgment.

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Hamilton v. CSC Distribution, Inc., No. 2070813. Shirley Hamilton filed a retaliatory-discharge claim against her employer, CSC Distribution, Inc., in the Montgomery Circuit Court. She later amended her complaint to add the Alabama Department of Industrial Relations ("ADIR") as a party and to appeal the denial of her claim for unemployment-compensation benefits. On motion by both defendants to sever the appeal of the denial of unemployment-compensation benefits from the retaliatory-discharge claim, the trial court granted the motion "in part" but did not assign the unemployment-compensation appeal a new case number. The trial court subsequently granted summary judgment to ADIR as to the unemployment-compensation appeal but did not rule on a summary judgment motion of CSC as to the retaliatory-discharge claim. Following the trial court's denial of a motion by Hamilton to vacate the summary-judgment order, Hamilton appealed to the Alabama Court of Civil Appeals. On appeal, the Court held that it lacked subject matter jurisdiction to review the summary judgment because it was not a final judgment. The trial court's grant of the motion to sever "in part" without assigning a new case number to the unemployment-compensation appeal, was in effect only an order of separate trials. Adjudication of one claim via a summary judgment order where the court has merely ordered separate trials, the Court explained, is not a final and appealable judgment unless certified as final pursuant to Rule 54(b), Ala. R. Civ. P. CSC argued that the trial court actually entered summary judgment as to both claims because the case-action-summary sheet reflected that the case had been "disposed" on the date that the trial court entered its order granting summary judgment to ADIR. The Court disagreed, explaining that even if the trial court had intended this result, Rule 58(c), Ala. R. Civ. P., provides that a judgment may be entered only by input into the State Judicial Information System, which the trial court did not do. Judge Bryan concurred specially, stating only that the appeal must be dismissed because it was taken from a non-final judgment.

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