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Diamond Concrete & Slabs, LLC v. Andalusia-Opp Airport Authority, No. 2100114 [*Prompt-Pay Claim: Trial court erred in entering a judgment as a matter of law in favor of the defendants regarding the plaintiff's prompt-pay claim when the plaintiff established that it had a contract with the defendants and that it was entitled to payment that the defendants failed to pay.*] (Bryan, J., 5-0-0).

Brantley v. Glover, No. 2100378 [*Default Judgment: Trial court properly denied defendant's motion to set aside default judgment because defendant failed to argue and/or present any evidence that plaintiff would not be unfairly prejudiced if the default judgment was set aside.*] (Thomas, J., 3-0-2).

CASE SUMMARIES

SUPREME COURT OF ALABAMA

Ex parte Ismail, No. 1100726. On May 20, 2006, Randy Paradise was treated in the emergency room at Highlands Medical Center. As part of his treatment, a chest x-ray was ordered, and Paradise fell and sustained injuries while in the radiology department. On May 16, 2008, Paradise and his wife ("Plaintiffs") filed suit against Highlands alleging negligence and wantonness. Plaintiffs also sued seventeen fictitiously named defendants that were allegedly liable for Paradise's injuries. Plaintiffs served discovery requests with the complaint, including an interrogatory to Highlands requesting that Highlands identify each person who was scheduled to be on duty in the emergency room on the date Paradise was injured. Highlands objected to this discovery request as overly broad but stated that it would not be opposed to identifying persons involved in Paradise's treatment. Approximately sixteen months after receiving the objection from Highlands, Plaintiffs' counsel wrote a letter to counsel for Highlands requesting that Highlands complete its discovery responses. On May 3, 2010, approximately two years after the discovery requests were first sent, Plaintiffs' counsel filed a motion to compel. Highlands then submitted a response to Plaintiffs' interrogatory which listed Dr. Yonus Ismail as one of the persons responsible for Paradise's treatment. Subsequently, Plaintiffs amended the complaint to substitute Dr. Ismail for one of the fictitiously named defendants. Dr. Ismail moved to dismiss the complaint, arguing that Plaintiffs' amended complaint was barred by the two-year statute of limitations applicable to medical malpractice claims. The trial court denied the motion, and Dr. Ismail appealed. The Alabama Supreme Court reversed, holding that Plaintiffs' claims against Dr. Ismail were barred by the statute of limitations. The Court noted that a plaintiff may file a complaint naming fictitious defendants and may later substitute a real party for a fictitious defendant only if the plaintiff has used due diligence to ascertain the true name of the fictitious defendant. The Court found that Plaintiffs did not exercise due diligence to identify Dr. Ismail because, prior to filing the claim, Plaintiffs were given copies of Paradise's medical records which included a notation that Dr. Ismail was his treating physician. Moreover, although Plaintiffs' counsel served discovery requests with the complaint, Plaintiffs' counsel failed for over sixteen months to follow-up on Highlands's statement that it would agree to produce a list of persons responsible for Paradise's treatment and did not file a motion to compel until nearly two years after the discovery requests were first issued.

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Ex parte Tellabs Operations, Inc., No. 1100393. Tellabs Operations, Inc. alleged that it overpaid sales tax to the City of Bessemer and petitioned for a refund. Its petition was denied, and this denial was upheld after an administrative appeal and hearing. Tellabs then appealed the denial to the Montgomery County Circuit Court pursuant to the Alabama Taxpayers' Bill of Rights and, in its complaint, invoked the jurisdiction of the court based on Alabama Code § 40-2A-9(g)(1)(a), which provides, in pertinent part: "If the taxpayer neither resides in Alabama nor has a principal place of business in Alabama, the appeal may be made to the Circuit Court of Montgomery County, Alabama." Bessemer then filed a motion to dismiss or, in the alternative, for a change of venue, arguing that venue was proper in Jefferson County Circuit Court rather than Montgomery County Circuit Court. The Montgomery County Circuit Court entered an order transferring the appeal to the Jefferson County Circuit Court. After filing a motion to reconsider and, under the understanding that the Montgomery County Circuit Court lost jurisdiction of the case when it was transferred, Tellabs petitioned the Alabama Supreme Court for a writ of mandamus. Tellabs contended that § 40-2A-9(g)(1)(a) governed venue. Bessemer argued that Alabama Code § 6-3-11 governed venue. Section 6-3-11 provides in pertinent part: "The venue for all civil actions for damages for personal injury, death, or property damage filed against a county or against a municipality shall be in the county or in the county within which the municipality is located . . ." Bessemer also argued that Tellabs did not timely appeal to the Montgomery County Circuit Court. The Court first confirmed that the Montgomery County Circuit Court had lost jurisdiction when the case was transferred and that the appeal Tellabs originally made to the Montgomery County Circuit Court was timely. The Court then held that § 6-3-11 did not govern venue because the Local Tax Simplification Act held that the provisions of the Taxpayers Bill of Rights are applicable to local taxing authorities such as Bessemer. Thus, the proper venue for a foreign corporation with no principal place of business in Alabama is the Montgomery County Circuit Court. The Court granted the petition for writ of mandamus and directed the Montgomery County Circuit Court to vacate its order that had transferred the appeal to the Jefferson Circuit Court.

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MPQ, Inc. v. Birmingham Realty Company, No. 1091582. Birmingham Realty Company ("BRC"), as landlord, and MPQ, Inc., as tenant, entered into a commercial lease agreement. BRC filed a complaint against MPQ in the Shelby County District Court for unlawful detainer. On January 19, 2010, the district court dismissed the claim. On February 2, 2010, BRC filed a motion to alter, amend or vacate the dismissal order, which was denied. On February 16, 2010, BRC appealed to the Shelby County Circuit Court. On March 12, 2010, the trial court entered an order affirming the district court's dismissal of the action. On appeal, the Alabama Supreme Court, *ex mero motu*, dismissed the case for lack of subject matter jurisdiction. The Court reasoned that Alabama law requires that an appeal from a final district court order regarding unlawful detainer be filed within seven days of such order, or within seven days of the entry of judgment on a motion to alter, amend, or vacate the judgment. The district court entered its order dismissing the unlawful detainer action on January 19, 2010. Birmingham Realty filed a motion to alter, amend, or vacate on February 2, 2010. Because Birmingham Realty did not file that motion within seven days of the court's dismissal order, it was not timely, and did not toll the time for filing a notice of appeal to the trial court. Because BRC's appeal was untimely, the trial court did not have jurisdiction and its March 12, 2010 order was void. Because a void judgment will not support an appeal, the Court dismissed the appeal.

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RCH IV-WB, LLC v. Wolf Bay Partners, LLC, No. 1091233. RCH IV-WB, LLC filed suit against a number of alleged debtors seeking to collect a deficiency on a judgment that RCH purchased at a foreclosure sale. Following a bench trial, the trial court entered a judgment in favor of Defendants, finding that RCH was unable to admit into evidence the mortgage assignment because the acknowledgment of the assignment did not comply with Alabama Code §§ 35-4-20 through 35-4-68. On appeal, the Alabama Supreme Court noted that the mortgage assignment was executed in Florida and that Alabama Code § 35-4-26(b) provides that the acknowledgment of any instrument executed outside Alabama and in compliance with the laws of the state where executed shall have the same force and effect as if properly executed in Alabama. Because the acknowledgment complied with Florida law and was therefore admissible at trial, the Court reversed the trial court's judgment and remanded the case.

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Ex parte Branson Machinery, LLC, No. 1100173. Hilltop Tractor, LLC, a company owned by Williams (together, "Defendants"), purchased equipment from Plaintiff on credit. On September 4, 2009, Plaintiff filed a complaint against Defendants, alleging breach of contract based on past due payments. In response, Williams wrote a letter to Plaintiff which included some informal defenses; however, Defendants remained *pro se* and did not file an answer in the trial court. On November 9, 2009, the trial court entered a default judgment on behalf of the Plaintiff. Shortly thereafter, Plaintiff engaged Defendants in settlement negotiations, presenting a "workout agreement" that left the default judgment intact. Defendants entered the agreement but failed to meet its terms. Consequently, Plaintiff sought to enforce the default judgment through garnishment. In response, Defendants hired counsel and filed a motion to set aside the judgment, arguing that the *pro se* Defendants had made inadvertent mistakes and that Plaintiff's counsel had failed to notify the court concerning the Defendant's letter. After a hearing on the matter, the trial court set aside the order. Plaintiff appealed. The Supreme Court concluded that the trial court exceeded its discretion in setting aside the default judgment. Treating the Defendants motion under Ala. R. Civ. P. 60(b), the Supreme Court concluded that Defendants' motion was untimely unless it was based on "extraordinary circumstances" and filed within a "reasonable" time pursuant to Rule 60(b)(6). Here, neither (a) counsel's failure to treat Defendants' letter as a filing and bring it to the attention of the trial court, nor (b) counsel's use of the default judgment to induce Defendants into entering the workout agreement were sufficient to be considered "extraordinary."

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ALABAMA COURT OF CIVIL APPEALS

McDaniel v. Harleysville Mutual Insurance Company, No. 2100622. In 2002, the McDaniels filed an action against Brian Homes, Inc. for negligence, breach of warranty, and other counts relating to Brian's construction of their home. The McDaniels asserted that Brian was covered by a liability insurance policy issued by Harleysville Mutual Insurance Company. In 2008, a judgment was entered in the McDaniels' favor against Brian. In 2010, the McDaniels brought suit against Harleysville after it refused to satisfy the 2008 judgment. Harleysville filed a motion to dismiss, stating that it had obtained a default judgment in a federal court proceeding finding that there was no insurance coverage available for the 2002 claim against Brian and that Harleysville was not required to indemnify Brian for the judgment entered in the McDaniels' favor. The trial court granted Harleysville's motion. On appeal, the Alabama Court of Civil Appeals reversed. The Court held that although Harleysville had titled its motion below as a "motion to dismiss" it was actually a motion for summary judgment because it constituted an assertion of the affirmative defense of collateral estoppel based on the federal court's ruling, but the McDaniels did not mention the federal court action in their complaint, and the trial court was thus required to consider matters outside of the pleadings, namely pleadings from the federal court action attached to Harleysville's motion. The Court also held that the federal court action was not binding upon the McDaniels, as they were not parties to that proceeding. Finally, the Court disagreed with Harleysville's contention that the trial court's judgment should be affirmed because it was entered as a result of the McDaniels' failure to prosecute their action; the trial court's order appeared to be based upon the merits of the case, there was no evidence of purposeful delay, willful default, or other contumacious conduct by the McDaniels in their counsel's failure to attend the motion to dismiss hearing, and the McDaniels did file a response to that motion to dismiss.

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McGuire v. White, No. 2100382. Plaintiff filed an action alleging that Defendant had negotiated a worthless check to him. The trial court granted summary judgment in favor of the Plaintiff on June 29, 2010. On November 4, 2010, Defendant filed a motion to set aside the judgment pursuant to Ala. R. Civ. P. 60(b), claiming that neither he nor his counsel had received notice of the entry of the judgment. On December 2, 2010, the trial court purported to grant Defendant's motion, but, shortly thereafter, purported to re-enter summary judgment. Defendant appealed. In response, Plaintiff argued that the appeal was untimely and, therefore, that the appellate court lacked jurisdiction. The Alabama Court of Civil Appeals agreed. The sole basis of Defendant's Rule 60(b) motion was a lack of notice of the entry of the judgment. Thus, his motion was controlled by Ala. R. Civ. P. 77(d), not 60(b). Under Rule 77(d), the trial court's jurisdiction to grant such a motion expired 72 days after the entry of the original summary judgment. Because the Defendant did not file his appeal within 72 days of the entry of the original summary judgment, the appellate court lacked jurisdiction and dismissed the appeal.

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Simmons v. Simmons, No. 2100017. John and Lori Simmons claim that they entered into an oral contract with Donald Simmons (John's father) and Annabelle Simmons (Donald's wife) for the purchase of a home in Prattville. According to John and Lori, Donald and Annabelle agreed to convey the home to them in exchange for a \$10,000 down-payment and the assumption of existing mortgage payments. After Donald died, Annabelle claimed that John and Lori were only renting the house and that they had no right to a conveyance of the title. John and Lori sued Annabelle for a declaration of the parties' rights and for damages related to breach of contract. At a bench trial, counsel for Annabelle moved for a directed verdict arguing that the statute of frauds, in general, barred such an oral contract for the sale of land and that "case law is very specific" that this situation does not fall within any exception to the statute. Annabelle's counsel did not cite that case law to the trial court. The trial court denied the motion, and ultimately ruled in favor of John and Lori. On Annabelle's appeal to the Alabama Court of Civil Appeals, the Court noted that it cannot consider arguments raised for the first time on appeal; rather, its review is restricted to evidence and arguments considered by the trial court. The Court then held that the "cryptic statement" by Annabelle's counsel about the statute of frauds was not sufficient to preserve the issue of the application of the statute of frauds for appeal. Accordingly, the Alabama Court of Civil Appeals affirmed the judgment of the trial court.

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Diamond Concrete & Slabs, LLC v. Andalusia-Opp Airport Authority, No. 2100114. The Andalusia-Opp Airport Authority contracted with Southern Structures Corporation to serve as the general contractor in the construction of an aircraft hangar. Southern Structures chose the subcontractors for the job. Diamond Concrete & Slabs, LLC bid on the job, indicating, among other things, that it would pour the concrete in two pours and apply one application of a shake-on hardener. After orally accepting the bid, Southern Structures notified Diamond that there would have to be three concrete pours instead of two and two applications of the shake-on hardener instead of three. Although, according to Diamond, Southern Structures agreed to pay for the additional costs, Southern Structures limited its payment only to the original bid cost and refused to pay anything more. Diamond gave Southern Structures a credit for the cost of the other subcontractor's work on the concrete floor but still sought \$14,055 that it claimed it was owed by Southern Structures. Diamond thus filed a lawsuit against Andalusia-Opp Airport Authority and Southern Structures, alleging conversion against both defendants and breach of contract against Southern Structures. Defendants asserted counterclaims of negligence. At trial, both Diamond's attorney and Southern Structures' attorney moved for judgment as a matter of law ("JML") regarding the prompt-pay claim in favor of their respective clients. The trial court did not rule on the motions at that time, but determined not to charge the jury regarding Diamond's prompt-pay claim. The jury returned a verdict in favor of Diamond and awarded damages in the amount of \$14,055. Diamond subsequently filed a motion to alter, amend or vacate the judgment, and the Airport Authority filed a motion to renew its motion for JML or for JNOV or for relief pursuant to Rule 59. The trial court ruled in favor of Defendants with respect to the prompt-pay claim. Diamond appealed to the Alabama Court of Civil Appeals. The Court first noted that, despite the lack of evidence that the Airport Authority originally contracted with Diamond and despite the fact that the breach of contract claim was only originally asserted against Southern Contractors, it became the law of the case that the Airport Authority did have a contract with Diamond when the Airport Authority failed to challenge a jury instruction that included the Airport Authority as a defendant in the breach of contract claim and when the jury returned a verdict finding such a contract. The Court then held that Diamond provided sufficient evidence in support of its prompt-pay claim to withstand the motions for JML, as it established that it had a contract with Defendants and that it was entitled to payment for Defendants failed to pay. The Court reversed and remanded to the trial judge to determine whether Diamond is entitled to interest, attorney's fees, and expenses under its prompt-pay claim.

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Brantley v. Glover, No. 2100378. Kenneth Brantley and Cathy Annette Glover entered into an agreement for Glover's purchase of a used manufactured home from Brantley. When Brantley claimed that Glover still owed money pursuant to the sale agreement, Glover filed a complaint requesting an accounting and declaratory relief. Thereafter, Glover filed an amended complaint asserting an Alabama Litigation Accountability Act claim against Brantley seeking to recover her attorneys' fees. After Brantley failed to attend a hearing before the trial court, the trial court entered a default judgment in favor of Glover. Brantley filed a motion to set aside the default judgment, which was denied by operation of law. Brantley appealed. On appeal, the Alabama Court of Civil Appeals affirmed. It held that Brantley failed to argue or present evidence that Glover would not be unfairly prejudiced by setting aside the default judgment—one of the three factors set forth in *Kirtland v. Fort Morgan Authority Sewer Service*, 524 So. 2d 600 (Ala. 1988) for determining whether a trial court abused its discretion when refusing to set aside a default judgment. Justice Moore concurred specially in writing. Justice Bryan concurred in the result in writing, noting that he believed the majority too narrowly interpreted the *Kirtland* holding in reaching its decision.

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