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DECISIONS ISSUED SEPTEMBER 2, 2011

## SUPREME COURT OF ALABAMA

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## ALABAMA COURT OF CIVIL APPEALS

**Bella Investments, Inc. v. Multi Family Services, Inc.**, No. 2100388 [*Appellate Jurisdiction: Where grant of summary judgment did not extinguish the pending claims of all parties, and certification would have been inappropriate pursuant to Alabama Rule of Civil Procedure 54 (b), plaintiff's appeal was dismissed.*] (Thomas, J., 5-0-0).

**Council of the City of Phenix City v. Phenix City Board of Education**, No. 2100346 [*Municipal Powers: City council has the right to subpoena city board of education during council's investigation involving municipal affairs.*] (Bryan, J. 5-0-0).

**Ex parte Mountain Pointe Development Group, LLC**, No. 2100892 [*Post-Judgment Practice: A trial court lacks jurisdiction to set aside a judgment when a party's post-judgment motions have been denied by operation of law, the party fails to appeal the judgment, and the party's Rule 60(b)(6) motion fails to present any exceptional circumstances warranting the trial court's discretion to set aside judgments.*] (Thomas, J., 5-0-0).

**Franklin v. Mitchell**, No. 2091053 [*Statute of Limitations/Negligence: Two year statute of limitations on homeowners' claim for negligent construction began to run upon discovery of damage to their home.*] (Pittman, J., 5-0-0).

**Musick v. Davis**, No. 2091212 [*Failure to Prosecute: Trial court's dismissal of action for failure to prosecute was reversed where it was based solely on the fact that the action had been pending for 15 months and that plaintiff's counsel inadvertently failed to attend a scheduling conference.*] (Pittman, J., 5-0).

## CASE SUMMARIES

## ALABAMA COURT OF CIVIL APPEALS

**Bella Investments, Inc. v. Multi Family Services, Inc.**, No. 2100388. Bella Investments, Inc. brought various claims against Multi Family Services, Inc. ("MFS") and one of its subcontractors relating to the allegedly inadequate work performed by MFS as the general contractor for the construction of a hotel on behalf of Bella. MFS denied all of the material allegations in the complaint and asserted a breach of contract counterclaim against Bella. Bella then amended its complaint to name as a defendant another one of MFS's subcontractors. Thereafter, MFS moved for summary judgment on all of Bella's claims against it, asserting among other things that Bella's claims were barred by the statute of limitations. The trial court agreed with MFS and granted summary judgment in its favor as to all of Bella's claims, however, Bella's claims against MFS's subcontractors remained. The Alabama Court of Civil Appeals dismissed Bella's subsequent appeal. The Court based its decision on two related reasons. First, various claims affecting the rights and liabilities of some of the parties remained pending in the action, such as MFS's counterclaim against Bella and Bella's claims against MFS's subcontractors. In addition, where the trial court did not certify the judgment as final under Alabama Rule of Civil Procedure 54(b), presumably due to concerns based on piecemeal appellate review of the still-pending claims, the trial court's entry of summary judgment was not a final judgment. Because the summary judgment order was not a final judgment and because Rule 54(b) certification of the order would not be appropriate, Bella's appeal was dismissed as having been taken from a nonfinal judgment.

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**Council of the City of Phenix City v. Phenix City Board of Education**, No. 2100346. The City Council of Phenix City formed a committee to investigate conduct of the Phenix City Board of Education. Pursuant to section 9.03 of the Phenix City charter, which is identical to section 9.03 of Act No. 71, Ala. Acts 1977, the Council issued a subpoena for information and documents to the Board. The Board sought an injunction preventing the Council from compelling the Board to comply with the subpoena. The trial court issued the injunction, and the Council appealed. The Alabama Court of Civil Appeals reversed. The Court noted that section 9.03 grants subpoena power to any committee authorized by the Council or the city manager to inquire into the conduct of any office, department, board or agency or officer of the City or to make investigations as to "municipal affairs." The Court stated that because the Board was established under state statute, it was a subdivision of the state and not the city; therefore, the Council lacked authority to subpoena the Board under the rationale that it was an office, department, board or agency of the city. The Court continued, however, explaining that although the Council and Board are separate entities, there is significant interrelation between the affairs of the two bodies. Therefore, the Court held that the Council does have the right to subpoena the Board during the course of an investigation into municipal affairs.

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**Ex parte Mountain Pointe Development Group, LLC**, No. 2100892. An escrow agent instituted an interpleader action concerning a dispute arose between potential buyers and the seller regarding who was entitled to the earnest money when the real estate purchase was not completed. The potential buyers moved for partial summary judgment. The trial court granted partial summary judgment in favor of the seller and certified it as final under Rule 54(b) of the Alabama Rules of Civil Procedure. The potential buyers filed a post-judgment motion requesting that the trial court set aside the partial summary judgment. After this motion was denied by operation of law and after the time for appeal had passed, the potential buyers filed a Rule 60(b)(6) motion for relief from the judgment. The trial court granted the motion and set aside the partial summary judgment in favor of the seller. The seller filed a petition for writ of mandamus with the Alabama Court of Civil Appeals, arguing that the trial court did not have jurisdiction to set aside the partial summary judgment because it was a final judgment that the potential buyers failed to appeal. The Court found that Rule 60(b)(6) could not be used as a substitute for appeal and that the potential buyers did not present exceptional circumstances warranting the exercise of the trial court's discretion under Rule 60(b)(6) to set aside the judgment. Therefore, the Court held that because the trial court lost jurisdiction over the partial summary judgment after the potential buyers' post judgment motion was denied by operation of law and because the potential buyers failed to timely appeal, the trial court improperly set aside the partial summary judgment. Thus, the Court granted the seller's petition for the writ and directed the trial court to vacate its order setting aside the partial summary judgment.

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**Franklin v. Mitchell**, No. 2091053. Plaintiffs hired Defendant to construct their new home in 2001. In 2006, Plaintiffs noticed problems with the bathroom and kitchen floors in the new house. After hiring a civil engineer and licensed home inspector to inspect the house, Plaintiffs learned that the flooring problems were caused by improperly sealed vents. Plaintiffs contacted Defendant concerning the problems, and Defendant informed Plaintiffs that the one year warranty on his work had expired. Defendant, however, offered to have the heating and air company that had previously installed Plaintiffs' air conditioning and ventilation system make repairs. Plaintiffs were dissatisfied with the repairs and sued Defendant asserting claims of negligent construction and subsequent negligent repairs. The trial court granted summary judgment in Defendant's favor because Plaintiffs claims were barred by the two years statute of limitations applicable to negligence claims and Defendant was not responsible for any repairs made by the heating and air company, an independent contractor. Plaintiffs appealed, arguing that Defendant was estopped from asserting the statute of limitations defense because Defendant fraudulently induced Plaintiffs to believe that the statute of limitations had already expired when Defendant told Plaintiffs that the one year warranty had already expired. On appeal, the Alabama Court of Civil Appeals, in affirming the trial court, held that Plaintiffs' negligence claim was barred by the two year statute of limitations because it began to run when Plaintiffs first noticed the damage to the floors. Defendant's assertion that the one year warranty on the home had expired did not amount to fraudulently inducing Plaintiffs to refrain from filing a lawsuit. The Court further held that Defendant could not be held responsible for negligent repairs because the heating and air conditioning company was as an independent contractor over whom Defendant had no control and because Plaintiffs suffered no additional damage as a result of the repairs.

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**Musick v. Davis**, No. 2091212 [*Failure to Prosecute: Trial court's dismissal of action for failure to prosecute was reversed where it was based solely on the fact that the action had been pending for 15 months and that plaintiff's counsel inadvertently failed to attend a scheduling conference.*] (Pittman, J., 5-0). Ryan Musick sued Gordon L. Davis in January 2009. On April 6, 2010, the trial court set the case for a status/scheduling conference to be held on April 13, 2010. Neither counsel for Musick nor Davis appeared at that conference. On April 28, 2010, the trial court entered a judgment dismissing the case *sue sponte* for lack of prosecution. Two days later, Musick filed a postjudgment motion to alter, amend, or vacate the judgment, which was denied. The Alabama Court of Civil Appeals reversed, reasoning that dismissal without prejudice for failure to prosecute is a drastic sanction that should be applied only in extreme circumstances supported by a clear record of delay, willful default, or contumacious conduct by the plaintiff. Here, there was no such record. Although the action had been commenced 15 months before, such a dormancy period without more was insufficient to justify dismissal for failure to prosecute. In addition, Musick's counsel's failure to attend the scheduling conference was not contumacious conduct where Davis also failed to appear, and where Musick's counsel filed a postjudgment motion stating that his failure to attend was inadvertent and based upon a calendaring error.

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APPELLATE  
FOCUS TEAM  
ATTORNEYSED R. HADEN—*CHAIR*

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

CHRISTOPHER L. YEILDING

*Co-Editor*  
[Profile](#) [Email](#)  
(205) 226-8728

JASON B. TOMPKINS

*Co-Editor*  
[Profile](#) [Email](#)  
(205) 226-8728

CHRISTOPHER L. ANULEWICZ

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

G. ALAN BLACKBURN

[Profile](#) [Email](#)  
(404) 962-3534

MICHAEL J. BOWERS

[Profile](#) [Email](#)  
(205) 226-3535

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) 226-3489

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

DORMAN WALKER

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

## CONTRIBUTORS

CONRAD ANDERSON IV

KIMBERLY M. BAWGUS

ROBIN FRANCO BROMBERG

LOUIS M. CALLIGAS

MARCUS R. CHATTERTON

JENNIFER HOOVER CLARK

THOMAS R. DEBRAY, JR.

SUSAN NETTLES HAN

ADAM K. ISRAEL

TYRELL F. JORDAN

G. LANE KNIGHT

JOE LEAVENS

NEAH L. MITCHELL

JOSEPH SEAWELL MOORE

STEVEN R. PARKER

J. HOUSTON SMITH, III

AMY STEINDORFF

GINNY B. WILLCOX

## BIRMINGHAM OFFICE

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

## MONTGOMERY OFFICE

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

## ATLANTA OFFICE

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

## GULFPORT OFFICE

1310 TWENTY FIFTH AVENUE  
GULFPORT, MS 39501

(228) 864-9900

## JACKSON OFFICE

188 EAST CAPITOL STREET  
SUITE 1400JACKSON, MS 39201  
(601) 961-9900

## D.C. OFFICE

601 PENNSYLVANIA AVE. NW  
SUITE 2225WASHINGTON, D.C. 20004  
(202) 347-6000BALCH & BINGHAM LLP  
[HOME PAGE](#)CLICK [HERE](#) TO VISIT THE  
APPELLATE WEBSITE

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