

**SUPREME COURT OF ALABAMA CASE SUMMARIES****April 11, 2008**

DeFriece v. McCorquodale, No. 1061825 [*Statute of Frauds: Fraud claim based on an alleged promise to convey land is subject to dismissal where there is no writing evidencing such a promise as required by the Statute of Frauds.*] (Stuart, J., 5-0). Nell and Ernest McCorquodale, Sr. (“Ernest Sr.”) had three children: Nell DeFriece, Lee Durst, and Ernest McCorquodale, Jr. Before his death, Ernest Sr. executed a will that placed approximately 8,000 acres of timberland in trusts with equal one-third shares for the benefit of each of the children. Upon his death, the family learned that his will did not take advantage of the marital-tax deduction and probating it as written would create a significant tax liability. To avoid this result, DeFriece, Durst, and Ernest Jr. disclaimed their rights to take under the will and to receive any property by intestate succession such that all property passed to Nell. DeFriece and Durst allegedly did this only after being assured by Nell that she would give the children equal one-third shares during her life or upon her death, and also after being assured by Ernest Jr. that he would not accept more than a one-third share. At Nell’s death, the children discovered that she did not divide the property into thirds as allegedly promised and instead left the majority of it to Ernest Jr. DeFriece and Durst contested Ernest Jr.’s petition to have the will probated and also asserted several fraud claims against him and the estate, claiming that they only agreed to disclaim their interests in reliance on the promises made by Nell and Ernest Jr. The trial court entered summary judgment in favor of Ernest Jr. and the estate. DeFriece and Durst appealed. On appeal, the Supreme Court, in affirming the trial court, held that the Statute of Frauds, as codified under *Ala. Code* § 8-9-2, requires agreements conveying an interest in land to be in a writing, and DeFriece and Durst had failed to produce any writing memorializing such an agreement, thereby causing their claims of fraud based on such an oral agreement to fail as a matter of law. Further, the Court rejected DeFriece’s and Durst’s various attempts to prove that the Statute of Frauds was not applicable.

Wright Therapy Equipment, Inc. v. Blue Cross and Blue Shield of Ala., No. 1061074 [*Fraudulent Inducement, Economic Duress, and Continuance: Court affirmed summary judgment against one defendant despite argument that substantial evidence supported fraudulent inducement and economic duress defenses, but found trial court abused its discretion in denying remaining defendants’ motion for a continuance of bench trial.*] (See, J., 9-0). Wright Therapy Equipment, Inc. (“Wright”) was in the business of supplying physician-prescribed durable medical equipment (“DME”). Wright billed Blue Cross for the





DME pursuant to a Participating DME contract. After an audit, Blue Cross determined that it had been overbilled by \$759,401.62. Blue Cross notified Wright that it would withhold future payments until the overpaid amount was recouped. Thereafter, Blue Cross and Wright entered into an agreement under which Wright would make monthly payments of \$40,000 to Blue Cross for ten months and then would pay the remainder due in one lump sum. In exchange, Blue Cross would not withhold future payments. Wright made one payment under the agreement, and then, without notifying Blue Cross, ceased its operations and made no further payments. Further, the owners of Wright established a new DME business, doing the exact same thing as Wright, in Georgia. Blue Cross filed suit against Wright to recover the balance owed. Over the course of two years, Blue Cross amended its complaint several times to add claims against the owners of Wright Therapy and the new entity for piercing the corporate veil and successor liability. The trial court ultimately granted summary judgment in favor of Blue Cross on its breach of contract claim against Wright. At the conclusion of the summary judgment hearing, which was thirty-three days before trial, counsel withdrew from representation of the remaining defendants and simultaneously asked for a continuance. The trial court granted the motion to withdraw and denied the motion for a continuance. The remaining defendants, who were unrepresented at the bench trial, were found personally liable for the improper transfer and depletion of assets from Wright. Their new company was found liable as a successor corporation for the full amount of the summary judgment against Wright. They retained counsel to file a motion for a new trial, which the trial court denied. On appeal, the Alabama Supreme Court rejected the defendants' argument that they were fraudulently induced to enter the payment agreement with Blue Cross because the defendants did not establish that Blue Cross lacked the right to change the fee schedule for DME. The Court also held that the defendants did not enter the agreement under economic duress because there was no wrongful act by Blue Cross. However, the Court held that the trial court exceeded its discretion in denying the defendants' motion for a continuance to allow the defendants to retain new counsel. The trial court's judgment denying a new trial was reversed, and the case was remanded for a new trial on all claims except breach of contract.

Ex parte First Tennessee Bank National Association, No. 1061392, [*Forum Non Conveniens: The circuit court did not exceed its discretion in transferring the action pursuant to Alabama's forum non conveniens statute where the transfer satisfied the interest of justice prong.*] (See, J., 5-0). After Edith Landgrebe Russell died, her will was probated in Tallapoosa County. First Tennessee Bank





National Association (“First Tennessee”), successor personal representative of Mrs. Russell, brought suit in the Jefferson Circuit Court, seeking a declaration of the rights of Mrs. Russell’s estate with regards to a trust created by Mrs. Russell’s late husband for her benefit. The 16 defendants in the action were the trustees and residual beneficiaries of the trust. Upon motion of thirteen of the defendants, the Jefferson Circuit Court transferred the action to the Tallapoosa Circuit Court under the interest-of-justice prong of Alabama’s forum non conveniens statute, Ala. Code § 6-3-21.1(a). First Tennessee petitioned the Alabama Supreme Court for a writ of mandamus arguing that the Jefferson Circuit Court exceeded its discretion in transferring the action. Under § 6-3-21.1(a), the defendant moving for transfer has the burden of proving either that (1) the plaintiff’s choice of forum is “inconvenient” to the parties and witnesses or (2) the transfer is in the interest of justice because there is a greater nexus between the plaintiff’s action and the venue to which transfer is sought. The Court determined that Mr. Russell’s will was probated in Tallapoosa County, Mrs. Russell’s estate is in Tallapoosa County, the trust was domiciled in Tallapoosa County, the Tallapoosa Circuit Court had previously taken certain actions regarding the trust, and seven of the sixteen defendants resided in Tallapoosa County. In addition, the only connection of the action to Jefferson County was that three of the defendants resided there. Consequently, the Court held that the Jefferson Circuit Court did not exceed its discretion in transferring the case to the Tallapoosa Circuit Court under the interest-of-justice prong of § 6-2-21.1(a).

Ex parte Dekle, No. 1051659 [*Arguments on Appeal: appellate court cannot consider arguments raised for the first time on appeal.*] (Parker, J., 7-0). The plaintiffs sued the defendants in order to determine the easement rights associated with a boat ramp on the defendants’ property. The trial court entered judgment on the jury’s verdict that the plaintiffs had acquired a prescriptive easement over the defendants’ property to the boat ramp. On the initial appeal, the Alabama Court of Civil Appeals affirmed the trial court’s judgment without opinion, providing citations to multiple cases in support of its affirmance. The Alabama Supreme Court granted certiorari review to consider an apparent conflict concerning the precision with which grounds must be stated in a renewed motion for judgment as a matter of law or, alternatively, for a new trial, based on the insufficiency of the evidence. The Supreme Court quashed the writ, holding that there was no conflict between the no-opinion affirmance by the Court of Civil Appeals and controlling





precedent. The Supreme Court refused to consider evidence and arguments not initially presented to the trial court, determined that sufficient evidence was presented to the jury to support its verdict, and that the defendants failed to preserve for appellate review whether the 20-year prescriptive period can include a leasehold. The Court went on to state that although a no-opinion affirmance is sometimes subject to differing interpretations, this particular no-opinion affirmance was self-explanatory because of the use of pinpoint citations in the affirmance case cites.

Ex parte Alabama Department of Finance, No. 1061639 [*Sovereign Immunity: Department of Finance dismissed from suit; exceptions to Section 14 immunity do not apply to actions against State agencies.*] (Murdock, J., 5-0). GTSI won a contract to supply computer storage equipment to the Alabama Department of Finance. GTSI then shipped the purchased equipment to the Department. The Department refused to pay for a piece of equipment which arrived damaged and was unusable. GTSI filed a writ of mandamus in the Madison Circuit Court seeking an order requiring the Department to pay for the equipment. The Department filed a motion to dismiss, with alternative requests for summary judgment on the grounds that the Department was entitled to sovereign immunity. The Department also filed a motion to transfer the case to Montgomery Circuit Court, arguing that actions against State agencies must be filed in Montgomery County. All motions were denied. The Department filed a petition for writ of mandamus on the grounds that it is entitled to sovereign immunity. The Alabama Supreme Court agreed that the Department, as a state agency, was immune from suit under Section 14 of the Alabama Constitution. The Court rejected GTSI's argument that the Department's contractual agreement fell within an exception to Section 14 immunity because the exceptions apply to actions brought against state officials and do not apply to actions against the State or State agencies.

Ex parte Duncan, No. 1061393 [*Statutory Construction: at the summary judgment stage, defendant city's failure to rely on the language of municipal ordinance as written precluded summary judgment.*] (Cobb, C.J., 7-0-2). Without obtaining prior approval from Montgomery's Architectural Review Board (the "Board"), Roy Duncan and his company, Air Flow Awning Company, began replacing wooden windows in a house in the Old Cloverdale historic district with vinyl windows. The City ordered Duncan to cease installation of the vinyl windows until receiving a certificate of appropriateness from the Board as required by Municipal Ordinance 28-2004. That ordinance prohibits "change in the exterior appearance of ... any building ... within a Historic District ... unless and until a





certificate of appropriateness for such change ... is approved.” Duncan thus sought a certificate of appropriateness, but the Board rejected his application. Duncan filed an appeal of the Board’s decision in Montgomery Circuit Court seeking a preliminary injunction and a declaratory judgment, and alleging a count of negligence against the City, the Board, and the Montgomery Historical Commission (collectively “defendants”). Defendants filed a motion for summary judgment, arguing Ordinance 28-2004 requires a certificate before *any* change to the exterior. In response, Duncan argued that the vinyl windows did not constitute a change to the “exterior appearance” as that phrase is used in the ordinance. After a hearing, the trial court granted summary judgment in favor of the defendants. On the initial appeal, the Court of Civil Appeals affirmed with no opinion. The Alabama Supreme Court then granted Duncan and Air Flow’s joint petition for certiorari review. In its de novo review, the Supreme Court first noted that, in interpreting an ordinance, a court must give effect to the plain meaning of the language of the ordinance. Ordinance 28-2004 states plainly that a certificate is only required for changes to the “exterior appearance” of a building. Accordingly, to obtain summary judgment in the present case, the defendants were required to make a prima facie showing that the installation of vinyl windows affected the exterior appearance of the building. The defendants did not do so; instead, they ignored the word “appearance” and continued to argue that the ordinance is triggered by *any* change to the exterior. Consequently, the Court reversed the summary judgment and remanded the case. Justice Parker’s concurrence reiterated that application of an ordinance restricting the dominion of an owner over his property cannot be left to the arbitrary will of the governing authorities.

Gallagher Bassett Services, Inc. v. Phillips No. 1070416 [*Intervention: No party may intervene after the original parties to a controversy have entered a joint stipulation of dismissal.*] (Woodall, J., 5-0). Nelia Phillips was injured in a fall from a ladder in South Carolina and filed a workers’ compensation claim against Gallagher Bassett Services, the carrier for the South Carolina Workers Compensation Commission. Gallagher paid for substantial treatment for her injuries—including treatment by Dr. Couch. Phillips later sued Dr. Couch in Alabama for medical malpractice. Gallagher claimed subrogation rights in the malpractice action and asked Phillips to protect its interests in the litigation. Phillips ultimately settled her claims against Dr. Couch without consulting Gallagher. Gallagher moved to intervene in the lawsuit the day after Phillips and Dr. Couch filed their joint stipulation of dismissal. The trial court denied Gallagher’s motion to intervene, and Gallagher appealed. The Alabama Supreme Court explained that, although Gallagher may have had a theoretically valid





subrogation claim, the trial court could not allow intervention because the stipulation of dismissal was effective immediately and left the parties “as if the action had never been brought.” Therefore, even if the trial court were inclined to grant Gallagher’s motion, it was powerless to do so because it no longer had jurisdiction over the matter. Thus, the Alabama Supreme Court dismissed the appeal and affirmed the decision of the trial court denying Gallagher’s motion to intervene.

COURT OF CIVIL APPEALS CASE SUMMARIES

April 11, 2008

Ex parte Adams No. 2061164 [*Venue Pursuant to Workers’ Compensation Act: Specific venue provision in the Act controls venue over general venue provisions.*]. (Pittman, J., 5-0). Plaintiff employer filed a complaint in Franklin Circuit Court alleging that it was a corporation doing business in Franklin County and that the defendant employee claimed to have suffered an injury while working in New Mexico. Plaintiff alleged that the parties were subject to the Workers’ Compensation Act, that it had paid compensation to defendant employee, and that there was a dispute as to the extent of defendant’s injuries. Defendant filed a motion seeking to transfer venue to Choctaw County on the basis that venue did not lie in Franklin or, in the alternative, that the case should be transferred based on the doctrine of forum non conveniens. Plaintiff filed a response contending that defendant had signed an employment agreement agreeing that proper venue would exist in Franklin County. Defendant replied and moved to strike the alleged employment agreement claiming plaintiff’s response was untimely and that her signature had been forged. The trial court denied defendant’s request to transfer. Defendant petitioned for a writ of mandamus. The Act contains a specific venue provision for all cases brought pursuant to the Act. The Act requires that such cases be brought in the same court that, had the Act not been adopted, would have heard an employee’s tort claim for damages. Because plaintiff is a corporation, Ala. Code § 6-3-7 governs proper venue. The Court held that the application of § 6-3-7 yielded only one proper venue: Franklin County, the location of plaintiff’s principal office. Defendant contended that because plaintiff brought the action against her, an individual, the controlling venue statute is § 6-3-2(a)(3) which pertains to actions against individuals generally. However, the Court noted that under this section, venue would still be proper in Franklin County. The Court also noted that special venue provisions (as provided in the Act) supersede general venue provisions. The Court further held that defendant’s forum non conveniens argument failed because a case can only be transferred pursuant to the doctrine of





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forum non conveniens to a court in which the action might have been properly filed. The Court held that plaintiff properly brought its action under the Act in Franklin County and that defendant had no clear legal right to secure a transfer. Petition denied.

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