



# Alabama Appellate Review


A Weekly review of decisions from the Alabama Supreme Court,  
Court of Civil and selected 11th Circuit decisions

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### SUPREME COURT

#### APPEAL & ERROR

##### Final Judgment

[13 AAR 11-1] 1081092 *New Acton Coal Mining Company, Inc. v. Woods*. Appeal from Walker County. Opinion by Smith, unanimous, 10 pages.

The trial court entered a judgment granting a new trial in an action alleging damage to property. **Judgment vacated; appeal dismissed April 9, 2010.**

Numerous individuals sued the defendant alleging damage to their properties caused by the blasting operations of the defendant. The defendant moved for separate trials of the individual plaintiffs' claims, which the trial court granted. The first trial resulted in a judgment for the defendant. The second trial resulted in a judgment for several plaintiffs but the trial court granted a motion for new trial on the basis that the damages awarded were unsupported by the evidence. The defendant has appealed. A final judgment is necessary to give jurisdiction to this Court on appeal, and it cannot be waived by the parties. *North Alabama Elec. Coop. v. New Hope Tel. Coop.*, 7 So.3d 342 (Ala. 2008). The defendant asserts that this Court has jurisdiction over the action under Ala. Code 1975, §12-22-10, which provides that either party in a civil case may appeal to the appropriate appellate court an order granting or refusing a motion

for a new trial by the Circuit Court. The Court disagrees, however, because an appeal under §12-22-10 may be filed only in reference to a final judgment, a final judgment was not entered in this case. In *Galloway v. Arnold*, 374 So.2d 1350 (Ala. 1979), this Court held that §12-22-10 does not authorize a party to appeal from an order granting a motion to reconsider an interlocutory order. The judgment from which the appellees moved for a new trial is a non-final judgment because the appellees' trial was only the second of thirteen separate trials in the single action. The record indicates that under Rule 42(b), A.R.Civ.P., the trial court granted the defendant's motion for thirteen separate trials. Importantly, the trial court ordered separate trials under Rule 42(b); it did not sever the plaintiffs' claims under Rule 21, A.R.Civ.P. A significant distinction exists between an order separating trials under Rule 42(b) and one severing claims under Rule 21 because severed claims are independent actions with judgments entered independently while separate trials lead to one judgment. *Universal Underwriters Insurance Company v. Essential Cent. Alabama Ford Mercury, Inc.*, 574 So.2d 716 (Ala. 1990). Because the trial court never entered a final judgment, the order granting a new trial is due to be vacated and the appeal dismissed.

#### CIVIL PROCEDURE

##### *Arbitration*

[13 AAR 11-2] 1080763 *Timothy Health Management, Inc. v. Johnson*. Appeal from Madison County. Opinion by Lyons; Woodall dissents, 16 pages.

The trial court denied a motion to compel arbitration. **Reversed April 9, 2010.**

The plaintiff sued a rehabilitation facility asserting claims of personal injury while a patient at the facility. The evidence indicates

that the plaintiff's daughter admitted the plaintiff to the facility and signed all the related admission paperwork, including an arbitration agreement. The defendant moved to compel arbitration, asserting that the plaintiff was bound by the agreement signed by her daughter. The trial court denied the motion. The defendant relies on *Carraway v. Beverly Enterprises Alabama, Inc.*, 978 So.2d 27 (Ala. 2007) in which this Court held that a decedent's estate was bound by an arbitration agreement signed by the decedent's brother in admitting the decedent. The facts in this case concerning the execution of the arbitration agreement are similar. The daughter signed all the documents admitting the plaintiff to the defendant's facility, including the ABR agreement, in various representative capacities. Notwithstanding the absence of evidence indicating that the plaintiff instructed the daughter to sign the admission documents on her behalf, there is no evidence indicating that upon entering the facility or at any time after admission the plaintiff ever signed any document obligating herself to pay for the services, that she ever objected to the daughter having signed the admission documents, or that she understood that the defendant was treating her without charge, dispensing with the necessity of an agreement. Under these circumstances, the defendant proved the existence of a valid contract calling for arbitration and proved that the contract evidenced a transaction affecting interstate commerce. Thus, the trial court erred in denying the motion to compel arbitration and that judgment is due to be reversed.

#### CIVIL PROCEDURE

##### *Final Judgment*

[13 AAR 11-3] 1071204 *Ex parte Green*. Appeal from Elmore County. *Per curiam* opinion; Lyons, Parker, and Murdock concur specially; Stuart and Bolin concur in result; Cobb dissents, 80

pages.

The Court of Civil Appeals reversed a trial court's judgment in part with regard to an action seeking to quiet title to several parcels of real estate. **Judgment vacated in part; petition for writ of certiorari quashed remanded April 9, 2010.**

The trial court entered a judgment quieting title to a number of parcels of real estate. The Court of Civil Appeals reversed part of that judgment. With some exceptions not applicable here, this Court is without jurisdiction to hear an appeal in the absence of a final judgment. *Championcomm.net of Tuscaloosa, Inc. v. Morton*, 12 So.3d 1197 (Ala. 2009). The trial court's order quieting title does not evidence an intention to finally adjudicate the claims with respect to the land awarded. The trial court, finding no just reason for delay, availed itself of the provisions of Rule 54(b), A.R.Civ.P., to direct the entry of a final order on its determination regarding the defendants and against any and all other persons and entities who may claim any interest in or to the subject property. The trial court did not purport to enter a final judgment as to any other issue. Because the trial court reserved the issue of apportioning the interests of the plaintiffs to the property awarded, the trial court's judgment is not a final judgment with respect to the real property awarded. Because that judgment was not a final judgment, it was the duty of the Court of Civil Appeals to dismiss the appeal *ex mero motu* with regard to those claims. Therefore, insofar as it purported to reverse the trial court's ruling that the plaintiffs were entitled to a judgment quieting title to a portion of the property, that judgment is due to be vacated. The defendant seeks a reversal of the judgment of the Court of Civil Appeals insofar as that court affirmed the trial court's judgment awarding certain real estate to the heirs of a decedent. The defendant sought to quiet title to the parcels awarded pursuant to Ala. Code 1975, §6-6-560. That Section authorizes any person who claims to own any lands or any interests thereto, and is in the actual, peaceable possession of the land, to commence an *in rem* action to establish the right or title to such lands or interests and to clear all doubts for disputes concerning the same. Because the Court concludes that the defendant was not in the actual peaceable possession of the property at

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the time the action was filed, this party's petition for a writ of certiorari is due to be quashed as to all issues contesting the affirmance by the Court of Civil Appeals of that part of the trial court's order awarding the subject property to the decedent's heirs.

#### CIVIL PROCEDURE

##### Injunctions

[13 AAR 11-4] 1081379 *Spinks v. Automation Personnel Services, Inc.* Appeal from Shelby County. Opinion by Smith, unanimous, 14 pages.

The trial court entered a preliminary injunction prohibiting a person from continuing employment allegedly in violation of a non-competition agreement. **Reversed April 9, 2010.**

The plaintiff sued the defendant, alleging that the defendant had violated a non-competition agreement by becoming employed by a competitor. The plaintiff sought a preliminary injunction prohibiting the defendant from continuing in the employment of the competitor which the trial court granted. The defendant first argues that because the employment agreement between the parties contained an arbitration provision, the trial court lacked jurisdiction to enter a preliminary injunction. However, this Court held in *Holiday Isle, LLC v. Adkins*, 12 So.3d 1173 (Ala. 2008) that a binding arbitration clause does not bar a plaintiff from seeking emergency injunctive relief or other provisional remedies in court. Accordingly, the Court concludes that the trial court had jurisdiction to issue a preliminary injunction to preserve the status quo pending completion of the arbitration proceeding. The defendant also argues that the trial court erred by issuing the preliminary injunction without requiring a bond from the plaintiff for the payment of costs, damages, and attorney fees should it be found that the defendant was improperly enjoined, and the order makes no specific findings based upon competent evidence that an exception to the bond requirement exists. Rule 65(c), A.R.Civ.P., states that no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, with several exceptions. The plaintiff does not contend that any of the exceptions apply in this case but argues that there is authority for the fact that this requirement of posting bond is not

absolute. Alabama law clearly provides that it is mandatory that security be given under Rule 65(c) unless the trial court makes a specific finding based upon competent evidence that one or more of the exceptions, stating them, do exist. *Anders v. Fowler*, 423 So.2d 838 (Ala. 1982). Under the clear mandate of Rule 65(c), the Court has no alternative but to reverse and remand the case.

#### COMMERCIAL LAW

##### Promissory Notes

[13 AAR 11-5] 1060109 *Hughes v. The Mitchell Company*. Appeal from Mobile County. *Per curiam* opinion; Murdock concurs in result, 28 pages.

The trial court entered a summary judgment in favor of a plaintiff, awarding \$1,677.01 in an action regarding a dispute concerning a promissory note. **Affirmed in part; reversed in part April 9, 2010.**

The plaintiff sold stock in a real estate company to two individuals and took back a promissory note. The defendant later entered into a contract with those individuals which included assumption of the promissory note. The defendant later determined that the individuals owed the defendant a purchase price adjustment. When the individuals refused to pay the purchase price adjustment, the defendant obtained a judgment against them which remains unpaid. The defendant then refused to pay installments on the promissory note. After the death of one of the original makers of the note, his wife sued individually as a third party beneficiary, seeking payment of the note. The trial court ultimately determined that the wife had no interest in the note but entered a judgment in favor of the decedent's estate. This judgment was later satisfied. When the defendant failed to make any further payments, the plaintiff sued again. The trial court determined that the defendant was entitled to setoff certain balances as a result of the judgment against the original guarantor and awarded the plaintiff the sum of \$1,677.01. The plaintiff argues that the trial court erred by allowing the defendant to apply the unpaid balance of its judgment against the original guarantor as an offset against the indebtedness. The plaintiff relies on *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364

(1985) and argues that where the language of a contract, or the circumstances under which it was executed, establish that the parties had provided that the right of the beneficiary is not to be affected by any defenses that the promisor might have against the promisee, the general rule of contract construction regarding third party beneficiaries is inapplicable. The plaintiff cites certain language contained in the purchase and sale agreement between the defendant and the original guarantor to insulate the plaintiff from any defenses the defendant may have asserted against the guarantor by requiring that any purchase-price adjustment was to come from the guarantors. However, the Court finds the plaintiff's argument to be without merit. The plaintiff also argues that the defendant is equitably estopped from asserting the offset defense because the defendant failed to notify her and her husband of the action against the original guarantor. However, the plaintiff has failed to cite any evidence in the record indicating that she reasonably relied on the failure to notify her and how that reasonable reliance could have caused her material harm. The Court concludes that the trial court properly granted the defendant the right to offset. Although the defendant cross-appeals, asserting that the trial court erred in finding that its prepayment to the original guarantor of the purchase note resulted in a partial waiver of its right to offset against the indebtedness, the Court finds this argument to be without merit. The plaintiff also argues that the trial court erred in finding that she was barred by the doctrine of judicial estoppel from claiming more than a one-half interest in the indebtedness. The trial court determined that the plaintiff was barred from claiming more than one-half of the indebtedness because the decedent had successfully claimed a one-half interest in the indebtedness in a bankruptcy proceeding. Noting that the defendant was seeking to assert an inconsistent position in this litigation that the decedent had owned only a one-half interest in the debt whereas it had asserted in the previous litigation that the decedent was the sole owner of the debt, the Court concluded that the trial court had improperly applied the doctrine of judicial estoppel. Thus, the plaintiff is not barred from claiming more than one-half interest in the indebtedness and that portion of the trial court's judgment is due to be reversed.

## ESTATES & TRUSTS

### *Antilapse*

[13 AAR 11-6] 1061806 *Ex parte Byrom*. Appeal from Madison County. Opinion by Murdock, unanimous, 13 pages.

The Court of Civil Appeals reversed a trial court's judgment holding that Ala. Code 1975, §43-8-225(b) applied to a trust. **Affirmed April 9, 2010.**

The evidence indicates that the decedent and his wife entered into a trust agreement. Following the decedent's death, a dispute arose as to whether the decedent's share of the trust passed to his wife or to his estate in the absence of a provision specifically addressing the issue. The trial court held that pursuant to Ala. Code 1975, §43-8-225(b), a part of the Probate Code dealing with wills, the decedent's interest in the trust passed to his wife. The Court of Civil Appeals held that §43-8-225(b) had no application to trusts and reversed. In *Baldwin v. Branch*, 888 So.2d 482 (Ala. 2004), this Court considered the issue whether another antilapse statute, §43-8-224, and which is also included within Article 8 of the Probate Code, should apply to a revocable trust. This Court held that §43-8-224 did not apply to trusts. This Court explained that there is no similar statutory provision to prevent a lapse of a gift made an irrevocable trust, that §43-8-22 mention wills, not trusts, and that the plain language of §43-8-224 indicates that it does not apply to trusts. The reasoning of *Baldwin* applies with equal force in the present case. By its terms, §43-8-225 is applicable to wills, not trusts, and is thus inapplicable, absent a Legislative act that directs its application to trusts. The appellant argues that Ala. Code 1975, §19-3B-112 applies in support of the trial court's judgment. However, noting that that Section became effective after the trial court's judgment, the Court found its application to the present case to be inappropriate. Accordingly, the judgment of the Court of Civil Appeals is due to be affirmed.

## TORTS

### *Assumption of Risk*

[13 AAR 11-7] 1081351 *Robertson v. Gaddy Electric and Plumbing*. Appeal from Marengo County. Opinion by Bolin, unanimous, 16 pages.

The trial court entered a judgment on a jury verdict in favor of the defendant in an action alleging negligence and wantonness. **Affirmed in part; reversed in part April 9, 2010.**

The plaintiff was injured as a result of an electrical shock while performing maintenance at a business. The plaintiff sued the defendant, who had originally installed the equipment, asserting negligence and wantonness in the installation of the existing equipment. The trial court entered a judgment as a matter of law in favor of the defendant on the wantonness claim. The jury returned a verdict in favor of the defendant. The defendant asserts that because the defendant did not raise the propriety of the judgment as a matter of law as to the wantonness claim in a motion for new trial, it is precluded from consideration. *See Carter v. Treadway Trucking, Inc.*, 611 So.2d 1034 (Ala. 1992). However, in *Clark v. Black*, 639 So.2d 1012 (Ala. 1993), this Court held that a plaintiff's failure to allege in a motion for new trial that a trial court had erred in directing a verdict for the defendant on a wantonness claim did not bar review of the wantonness issue on appeal. Noting the reasoning set forth in *Clark*, the Court overruled *Carter* to the extent that it conflicts with *Clark*. However, a thorough review of the record reveals no substantial evidence that would warrant submission of the wantonness issue to the jury. Accordingly, that portion of the trial court's judgment is due to be affirmed. The plaintiff also argues that the trial court erred in submitting the affirmative defenses of contributory negligence and assumption of risk to the jury. Assumption of the risk applies to factual situations in which it is alleged that the plaintiff failed to exercise due care by placing himself or herself in a dangerous position with an appreciation of the risk. *Harris v. Food Equip. Specialists, Inc.*, 559 So.2d 1066 (Ala. 1990). The affirmative defense of assumption of risk requires that the defendant prove (1) that the plaintiff had knowledge of, and an appreciation of, the danger the plaintiff faced; and (2) that the plaintiff voluntarily consented to bear the risk posed by that danger. *Ex parte Potmesil*, 785 So.2d 340 (Ala. 2000). Based on the plaintiff's testimony that he did not see the allegedly disconnected conduit which was electrified, the Court concludes that the plaintiff did not voluntarily proceed with knowledge of the danger posed by the

disconnected conduit that should have grounded the unseen short in the wire and prevented an electrical shock. Accordingly, the trial court committed reversible error in instructing the jury on the affirmative defense of assumption of the risk and the trial court's judgment is due to be reversed for a new trial.

## COURT OF CIVIL APPEALS

### APPEAL & ERROR

#### *Mandate on Remand*

[13 AAR 11-8] 2080801 *Honda Manufacturing of Alabama v. Alford*. Appeal from Etowah County. Opinion by Pittman, unanimous, 10 pages.

On remand from this court, the trial court entered a judgment finding an employee to be permanently and totally disabled under the Alabama Workers' Compensation Act. **Reversed April 9, 2010.**

In the original appeal, this court reversed a finding of permanent and total disability based on *Boise Cascade Corp. v. Jackson*, 997 So.2d 1026 (Ala. Civ. App. 2007). In *Ex parte Jackson*, 997 So.2d 1038 (Ala. 2007), which was decided while the original decision in this case was on certiorari review, the Alabama Supreme Court reversed this court's determination that prior decisions created a requirement for a permanent physical injury to other parts of the body in order to take an injury out of the schedule. On remand, based on the decision in *Ex parte Jackson*, the trial court again entered an order finding the employee to be permanently and totally disabled. When a case is remanded to a trial court after a decision on appeal, issues decided by the Appellate Court become law of the case and the trial court's duty is to comply with the appellate mandate. *Erbe v. Eady*, 447 So.2d 778 (Ala. Civ. App. 1984). A trial court is not free to consider issues finally decided in the mandate. *Id.* In the original remand, this court directed the trial court to proceed in a manner "consistent with our opinion" – an option in which this court determined that the trial court's earlier conclusion that the employee's knee injury had affected his back so as to render the schedule in the Act inapplicable was not "supported by substantial evidence" – and the court specifically instructed the trial court to calculate scheduled disability benefits without

consideration of any evidence of vocational disability that might be pertinent to an injury outside the schedule. The trial court's judgment entered on remand from this court, after a reexamination of the facts previously presented, by no means fulfills the trial court's duty to comply strictly with this court's mandate according to its true intent and meaning. It may prove to be true that, in a different case, the holding in the original decision in this case will be examined and found to be inconsistent with the later decision of the Alabama Supreme Court in *Jackson*. However, as this court noted in *Erbe*, if circumstances arise that cast doubt on the correctness of the law of the case as established on appeal, arguments in support of departure from the mandate must be addressed to the Appellate Court. The employee had the opportunity to seek rehearing in this court, or *certiorari* review in the Alabama Supreme Court, as to the correctness of this court's determination regarding the extent of his injury while *Jackson* was being reviewed by the Alabama Supreme Court, but he did not take that opportunity, and the trial court erred in thereafter undertaking its own reexamination of the issues, which had been previously authoritatively decided, in violation of the mandate of this court. Thus, the trial court's judgment is reversed and the cause is again remanded for the trial court to enter a judgment based on the existing record, that awards benefits under the Act to the employee based upon an injury to a scheduled member.

#### CIVIL PROCEDURE

##### *Post-Judgment Motions*

[13AAR 11-9] 2080897 *Wicks v. Wicks*. Appeal from Colbert County. Opinion by Thomas, unanimous, 7 pages.

The trial court denied a husband's motion to set aside a divorce agreement as obtained by fraud. **Reversed April 16, 2010.**

The wife filed a complaint for divorce from the husband. The parties later reached an agreement which was affirmed before the trial court. However, prior to entry of the judgment, the husband filed a motion to stay execution of the judgment, asserting that the wife had fraudulently failed to disclose substantial assets in her responses to his interrogatories and requests for production. The trial court later

entered the judgment of divorce. The husband then filed a motion pursuant to Rule 59, A.R.Civ.P., and specifically requested a hearing. Without conducting a hearing, the trial court denied the husband's motion. This court has held that generally, a movant who requests a hearing on his or her post-judgment motion is entitled to such a hearing. *DuBose v. DuBose*, 964 So.2d 42 (Ala.Civ.App. 2007). However, if an appellate court determines that there is no probable merit to the motion, it may affirm based on the harmless error rule, but when there is probable merit to the motion, the error cannot be considered harmless. *Id.* In *DuBose*, the wife had sought an uncontested divorce and had filed documentation, including an agreement allegedly signed by the husband. The husband asserted that the signature on the documentation was forged and requested a hearing on his motion to set aside the judgment. The trial court allowed the motion to be denied by operation of law without conducting a hearing and this court concluded that such denial was not harmless error. Similarly, in this case, the husband alleges that the wife fraudulently failed to disclose substantial assets. Like the husband's allegations of fraud in *DuBose*, the husband's allegation that the wife fraudulently concealed assets, if proven, may be a ground to set aside the final judgment. *See Barganier v. Barganier*, 669 So.2d 933 (Ala.Civ.App. 1995). Therefore, the trial court's failure to hold a hearing on the post-judgment motion was not harmless error and the trial court's order denying the post-judgment motion is due to be reversed.

#### CIVIL PROCEDURE

##### *Service of Process*

[13AAR 11-10] 2081195 *Bogus v. Bank of New York*. Appeal from Shelby County. Opinion by Bryan, unanimous, 7 pages.

The trial court denied a motion to set aside a default judgment in an ejectment action. **Reversed April 16, 2010.**

The plaintiff was assigned a foreclosed interest in a parcel of real estate and sued the prior mortgagor for possession in an ejectment action. The plaintiff made no attempt to personally serve the defendants but posted notice of the action on the property. The plaintiff later obtained a default judgment against the

defendants and the trial court denied a motion to set aside that default. The defendants argue that the trial court erred in refusing to set aside the default, asserting that they were not personally served with process and, therefore, the trial court lacked jurisdiction to enter the default judgment. The plaintiff argues that Title 62, Section 129, Ala. Code 1940 (as recompiled in 1958), allows service by posting on the property. Although Title 62, Section 129, was not specifically included in the Alabama Code of 1975, the plaintiff argues that it remains in force by virtue of Ala. Code 1975, §1-1-10. Assuming without deciding that Title 62, Section 129, remains in force, the plaintiff, which bore the burden of proving that service of process was performed correctly and legally, failed to prove that it complied with the service-of-process provisions in Title 62, Section 129. That statute requires that a defendant who is a resident of the State of Alabama be served personally unless he or she cannot be found. The record indicates that the plaintiff did not make any attempt to serve the defendants personally. Thus, the plaintiff did not validly serve the defendants even if Title 62, Section 129, remains in force and the trial court erred in refusing to set aside the default judgment.

#### GOVERNMENT

##### *Zoning*

[13AAR 11-11] 2080276 *The Baldwin County Planning and Zoning Commission v. Montrose Ecorrouge*. Appeal from Baldwin County. Opinion by Bryan; Thompson, Thomas, and Moore concur in result, 26 pages.

The trial court entered an order finding certain portions of the Baldwin County Subdivision Regulations to be void and unenforceable and issued a writ of mandamus compelling the defendant to approve a preliminary plot for property development. **Affirmed in part; reversed in part April 9, 2010.**

The opinion of October 2, 2009, is withdrawn and the following is substituted therefore. [Editor's note: The substituted opinion did not alter the court's affirmance of the trial court's judgment holding certain provisions of the Subdivision Regulations void.] In its cross-appeal, the developer argues that the trial court erred in denying its claim seeking an award of damages against the Commission for its

disapproving the plat. The Alabama Supreme Court's holding in *Town of Gulf Shores v. Lamar Advertising of Mobile, Inc.*, 518 So.2d 1259 (Ala. 1987), indicates that there is a legal basis for awarding the developer damages. Because the trial court did not state its rationale for denying that claim, that portion of the trial court's judgment is due to be reversed.

#### LEGAL PROFESSION

##### Contempt

[13 AAR 11-12] 2091051 *Howard v. Wood*. Appeal from Autauga County. Opinion by Thomas, unanimous, 5 pages.

A trial court found an attorney in contempt and ordered her to spend the night in jail. **Reversed April 9, 2010.**

The trial judge found the attorney's conduct to be overly argumentative and summarily found her in contempt of court and ordered her to spend the night in jail. The attorney argues that the contempt judgment should be reversed because the Judge did not comply with Rule 70A, A.R.Civ.P., which requires a signed, written order and an order on the record. The Judge concedes that he did not follow the requirements of Rule 70A(b)(1) and agrees with the attorney that the contempt judgment against the attorney should be reversed on that ground. This court agrees that because the Judge did not prepare a signed, written order and then enter that order on the record as required by Rule 70A(b)(1), the contempt judgment is due to be reversed.

#### TORTS

##### Fraud

[13 AAR 11-13] 2080721 *Mike Brooks Car World, Inc. v. Sudduth*. Appeal from Madison County. *Per curium* opinion; Thomson concurs specially, 16 pages.

Following a bench trial, the trial court entered a judgment in favor of the plaintiffs awarding approximately \$12,000 in a fraud claim. **Reversed April 9, 2010.**

The plaintiffs sued the defendant, alleging that the defendant has misrepresented the mileage on a used automobile. Following a bench trial, the trial court awarded the plaintiffs approximately \$7,000 as compensatory

damages and \$5,000 as punitive damages. The evidence indicates that a representative of the defendant misrepresented to the plaintiffs that the odometer reading on the automobile represented the actual mileage of the automobile. However, the paperwork prepared in connection with the sale indicates that the odometer reading does not accurately reflect the mileage of the automobile. The defendant argues that the plaintiffs failed to prove that their reliance on the oral representation that the odometer showed the actual mileage of the automobile was reasonable. To recover in a fraud action filed after March 14, 1997, a plaintiff must prove that he or she reasonably relied on the defendant's alleged misrepresentation. *Foremost Insurance Company v. Parham*, 693 So.2d 409 (Ala. 1997). The defendant argues that because the odometer disclosure statement given to the plaintiffs indicates that the odometer did not show the actual mileage of the automobile, the plaintiffs could not, as a matter of law, have reasonably relied on the oral representation that the odometer showed the actual mileage of the automobile. This court agrees. The odometer disclosure statement clearly indicated that the odometer did not show the actual mileage of the automobile. Given that disclosure, the plaintiffs could not have reasonably relied on the oral representation that the odometer showed the actual mileage of the automobile. Accordingly, the trial court's judgment is due to be reversed.

#### TORTS

##### Legal Malpractice

[13 AAR 11-14] 2090063 *Guñon v. Hunt*. Appeal from Marion County. *Per curium* opinion, unanimous, 13 pages.

The trial court entered a summary judgment in favor of the defendant in an action alleging legal malpractice. **Affirmed April 9, 2010.**

The plaintiff sued the defendant, alleging that the defendant committed legal malpractice in representing the plaintiff in a criminal case. Specifically, the defendant was hired to file a post-trial motion for a new trial. The plaintiff alleges that the defendant failed to notify him that the motion had been denied. The trial court entered a summary judgment in favor of the defendant. In addition to the claim of legal malpractice, the plaintiff alleged fraud

against the defendant. However, the Alabama Legal Services Liability Act provides that there shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the Legal Service Liability Action and shall have the meaning as defined in the statute. *See* Ala. Code 1975, §6-5-573. Accordingly, the plaintiff's fraud claim is subsumed by the legal malpractice claim and, to the extent the plaintiff argues that the summary judgment was improper as to the fraud claim, the argument was without merit. In support of the motion for summary judgment, the defendant submitted his own affidavit indicating that he did breach the appropriate standard of care. The plaintiff did not submit any expert testimony in response. Generally, a plaintiff alleging a legal malpractice claim must prove that claim through expert testimony. *Tonsmeire v. AmSouth Bank*, 659 So.2d 601 (Ala. 1995). However, in *Valentine v. Watters*, 896 So.2d 385 (Ala. 2004), the Alabama Supreme Court recognized the "common knowledge" exception to the general rule. This court agrees with the plaintiff that an attorney's failure to notify a client of a ruling on a motion in time for a client to timely file an appeal constitutes a breach of the standard of care that is so apparent that expert testimony is not required for a lay person to understand that breach. However, to prevail in a legal malpractice action, the plaintiff must prove that, but for the attorney's negligence, the legal matter concerning which the attorney is alleged to have been negligent would have been resolved more favorably to the plaintiff. *Bonner v. Lyons, Pipes & Cook*, 26 So.3d 1115 (Ala. 2009). In this case, the record indicates that the plaintiff did appeal from the conviction, and the Court of Criminal Appeals affirmed the conviction. Any delay, if indeed there was a delay, in filing the notice of appeal that may have been caused by the defendant's failure to "timely" notify the plaintiff of the denial of his post-judgment motion obviously did not preclude him from timely filing his notice of appeal or prevent the Court of Criminal Appeals from considering the appeal. Thus, the plaintiff has not demonstrated that the defendant's delay, if any, caused the plaintiff harm and the trial court's entry of summary judgment is due to be affirmed.