



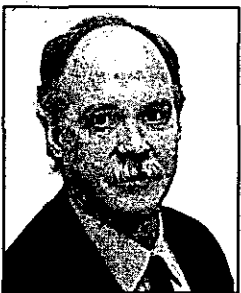
Recent Civil Decisions

by David Marsh and Tom Powell

In this issue we examine an excellent decision in which our Alabama Supreme Court reversed a summary judgment that was entered in a retaliatory-discharge case brought by an injured worker. In another decision that we urge you to read closely, the Supreme Court seems to place a tighter set of reins on uninsured motorist claims. We also look at two decisions involving insurance policies and a couple of decisions that offer some guidance on procedural matters.



David Marsh



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FORD V. CARYLON CORP., CASE NO. 1040554 (ALA. NOV. 10, 2005) (MARSHALL COUNTY) – Ford, who worked for Video-Industrial Services (a subsidiary of Carylton), was injured while he and his supervisor, Eady, were cleaning a water treatment tank with an industrial vacuum. The vacuum, which was the most powerful one used by Video, was manufactured by Clean Earth Manufacturing. Video had instituted a mandatory safety rule which required that an inline

relief valve known as a “safety T” be used in performing its vacuum cleanup jobs. On the day that Ford was injured, Eady assembled the vacuum without installing the “safety T” and Ford’s arm was pulled into the hose up to his shoulder. Eady took some time to turn off the machinery and, by that time, Ford’s arm had become engorged with blood and it tripled in size. Ford underwent three surgeries, physical therapy and psychological treatment.

Nearly nine months after

his injury, Ford returned to work at Video and for more than a month he performed the work assigned to him by Video, with the exception of the one time he was assigned to vacuum another tank – which he declared he was unable to do. On his last day of work, Ford was told there would be no work for him the next day and, in accordance with Video policy, Ford telephoned Video each subsequent evening to determine whether there would be work for him to perform the

following day. Twelve days after his last day of work, Ford's mother telephoned Video on Ford's behalf and spoke with Keith, a superintendent, who informed Ford's mother that there would be no work for Ford the next day and that "he would call Ford when he had something, otherwise not to worry about it." Consequently, Ford did not thereafter telephone Video about potential work.

Eleven days after his mother's telephone conversation with Keith, Ford received a letter from Kulbitskas, Video's president, which informed Ford that his failure "to contact this office regarding any availability for work [. . .] constitutes a voluntary resignation on your part." In that same letter, Kulbitskas noted that "your mother, not you, called to see if work was available. This was the last contact Video has had with you." The next month, Ford sued Carylton, Video and Eady for retaliatory discharge, intentional trespass, trespass and the tort of outrage. Ford also sued Wausau Insurance Company on a workers' compensation claim and that claim was resolved in Ford's

favor. The trial court entered a summary judgment on all of the claims against the other defendants and Ford appealed, but only as to the retaliatory-discharge claim and the intentional-trespass claim.

JUSTICE HARWOOD'S opinion for eight members of the Supreme Court (JUSTICE PARKER specially concurred) reversed the summary judgment with respect to Video as to the retaliatory-discharge claim and affirmed as to the intentional-trespass claim. In reaching that result, the majority found that Ford presented sufficient evidence to show that he was terminated solely in retaliation for filing his workers' compensation claim, finding Video's argument that Ford had "voluntarily resigned" to be "meritless." The court noted that, in its brief:

"Video employs the term 'voluntary resignation' to describe two separate incidents. Initially, the term is used to refer to Ford's failure to telephone Video to check on the availability of work [. . .]. Video later uses the same phrase to refer to Ford's

failure to challenge in any way the content of the letter he received from Kulbitskas."

The Supreme Court noted that Kulbitskas's "third affidavit" stated that when he issued the letter to Ford concerning his purported voluntary resignation, "Ford had not called to report in as required from January 25, 2002 through February 4, 2002 [and that] neither I, nor any other representative of Video had relieved Ford of this requirement." The Supreme Court found that there was no company record made describing the phone call made by Ford's mother and "for all that appears, Kulbitskas could have had the knowledge of Ford's mother's call he acknowledged in his February 4 letter only by having been told about that call by Keith. [. . .] [W]e could reasonably infer from the evidence that when Kulbitskas learned of the telephone call placed by Ford's mother, he also learned what Keith told Ford's mother." The Supreme Court also found Video's argument that Ford's failure

to respond to Kulbitskas's letter indicated his agreement that he had resigned, to be "meritless, if for no other reason that it implies that Ford's failure to respond to the letter caused his actual termination." In the court's view, there was nothing for Ford to contest.

As to proof of the causal connection between Ford's workers' compensation claim and his discharge, the Supreme Court found that Ford was discharged within three months of returning to work, after even fewer days of actual work, which was a relatively small period of time between the filing of his claim and his firing; and that Kulbitskas's testimony indicated that Video typically did not discipline an employee for failing to telephone to check on the availability of work until perhaps two or three such failures.

Ford's "intentional trespass" claim was, in actuality, a claim under Ala. Code § 25-5-11(c)(2), for the removal of a safety device – the "safety T" that Eady failed to install on the day Ford was injured. The Supreme Court

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found that the evidence failed to show that the "safety T" in this case was a safety device that was "provided by the manufacturer of the machine," as the statute requires in order for the worker to recover. The evidence here showed that Video purchased the "safety T" from the manufacturer of the plastic hose, rather than from Clean Earth (the manufacturer of the vacuum machine) and there was no evidence to show that when Video first bought the vacuum machine from Clean Earth, there was a "safety T" on the hose that came with the machine.

COMMENT: *This excellent decision should provide some comfort, and a lot of guidance, for those who might have feared that retaliatory discharge claims no longer could successfully be brought in Alabama.*

CONTINENTAL NATIONAL INDEMNITY CO. V. FIELDS, CASE NO. 1040379 (ALA. OCT. 21, 2005) (JACKSON

COUNTY) – Tamms was injured when her vehicle allegedly was struck by a vehicle driven by Coultas, an uninsured motorist. Tamms did not file a suit based on this collision before she died of an unrelated cause a year and a half later. Fields, who was Tamms's personal representative, sued Continental and Progressive to recover uninsured motorist benefits for the injuries that Tamms sustained in the collision with Coultas. In the trial court, Continental and Progressive filed a motion for summary judgment on the ground that Tamms's tort cause of action against Coultas did not survive her death and thus, Tamms's estate could not establish that it was "legally entitled to recover" against Coultas as the UM statute requires under the rationale of *Ex parte Carlton*, 867 So. 2d 332 (Ala. 2003).

The trial court denied the insurers' motion and they were granted permission to appeal. CHIEF JUSTICE NABERS's opinion, in which JUSTICES SEE, STUART AND BOLIN concurred and JUSTICE HARWOOD specially

concurring, reversed and remanded with instructions for the trial court to enter the summary judgment sought by the insurers. In making that ruling, the Supreme Court said:

"We hold that Fields, as personal representative of Tamms's estate, cannot recover UM benefits under the Continental policy or the Progressive policy because she cannot establish that the estate is 'legally entitled to recover damages' against the uninsured motorist, a condition precedent to the recovery of UM benefits under Alabama's uninsured-motorist statute.

[" . . .]

"With our holding in Carlton, we overruled a series of cases in which we had created exceptions to the uninsured-motorist statute and had allowed the recovery of UM benefits even when the uninsured motorist had a defense to recovery and the insured was not 'legally entitled to recover damages' from the uninsured motorist as required by the statute.

[" . . .]

"We base our decision

in the present case on the plain language of Ala. Code 1975, § 32-7-3, and the clearly stated rationale in Carlton. Under Carlton, Fields's claim against Continental and Progressive depends entirely on the merits of the claim against Coultas, an uninsured motorist. In Carlton, the exclusivity-of-remedy provision in the Workers' Compensation Act prevented Carlton from proceeding against the negligent uninsured motorist because the provision precluded any other recovery and provided a defense for the negligent co-employee. In the same manner, the laws of this State, which provide that a tort action does not survive the death of the injured party, preclude Fields, the personal representative of Tamms's estate, from proceeding against the allegedly negligent uninsured motorist.

[" . . .]

"Causes of action in contract, however, do survive the death of the claimant under Ala. Code 1975, § 6-5-462. [. . .] Because the cause of action

asserted in this case under the uninsured-motorist statute is contractual [. . .] Fields asserts that Tamms's cause of action seeking UM benefits survives her death.

"We agree that Tamms's contractual cause of action survives her death; the fact that her cause of action survives does not, however, answer the ultimate question of whether her estate is 'legally entitled to recover' under the uninsured-motorist statute. [. . .]

The failure of Tamms's tort cause of action to survive her death provides a complete defense for the uninsured motorist, Coultas, against an action filed by Tamms's estate after her death. As a result, the insured is not 'legally entitled to recover' from the uninsured motorist through her estate[.]"

The Chief Justice's opinion insisted that "we refuse to return to the days of judicially created exceptions to the plain language of the uninsured-motorist statute."

COMMENT: One positive point about this decision is

its clarification that an uninsured-motorist claim is a "contractual" cause of action – a statement that will have its own field of operation. We foresee that an abundance of fencing will ensue over the term, "legally entitled to recover."

SINGLETON V. STATE FARM FIRE & CASUALTY CO., CASE NO. 1040919 (ALA. NOV. 10, 2005) (COOSA COUNTY) – State

Farm issued a homeowner's policy to Mr. and Mrs. Singleton, who had re-roofed their garage in May 2001 with rolled asphalt material. In June 2001, a windstorm damaged the garage's roof and the Singletons provided two estimates, from roofers who proposed to replace the entire roof, to a State Farm adjuster who examined the damage. According to Mrs. Singleton's deposition testimony, the Singletons had obtained those two estimates in May 2001, before the wind damage occurred. The adjuster later informed the Singletons that she believed the roof could be patched for

\$500, the amount of the deductible on the policy, and that State Farm would not pay the Singletons' claim.

State Farm and the Singletons' attorney exchanged letters and the Singletons later sued State Farm, alleging breach of contract and bad-faith refusal to pay their claim. The basis of the bad-faith claim was State Farm's alleged failure to adequately investigate the claim. The trial court entered summary judgment in favor of State Farm on the bad-faith claim and the Singletons appealed.

JUSTICE LYONS's opinion, which was joined by CHIEF JUSTICE NABERS AND JUSTICES WOODALL, SMITH AND PARKER, affirmed, rejecting the Singletons' argument that the summary judgment was improper because they had presented evidence indicating that State Farm did not properly investigate their claim and/or that State Farm failed to conduct a cognitive evaluation or review of their claim. In short, the Singletons argued that State Farm had "manufactured" a rationale in order to deny the claim.

In assessing the Singletons' bad-faith claim, the Supreme Court focused on the activities of the State Farm adjuster, Worth, and her communications with a roofer named Deason, whom Worth called after she received a letter from the Singletons' attorney asking her to reevaluate her conclusion. Worth's notes concerning that phone call indicated that Deason said he had estimated he could have re-roofed the garage with a mop-down, 3-ply, built-up roof for \$1200, but he would not do that kind of roof because it would not last. Deason also told Worth that he could have repaired the roof for less than \$250 if the roof was new and had wind damage. The Singletons had countered with an affidavit from Deason, who averred that because of the nature and location of the damage to the roof, that section of the roof actually would have to be replaced in order to function properly. Viewing that evidence, the Supreme Court said:

"While Deason's actual belief regarding what need-

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ed to be done in order to repair the roof properly may be material to the Singletons' breach-of-contract claim, the issue presented on this appeal is whether Worth's telephone conversation with Deason, when combined with her other efforts, constitutes an adequate investigation sufficient to withstand the Singletons' claim of bad faith. [. . .] Fair-minded persons in the exercise of impartial judgment could not reasonably infer from the evidence in this record that Worth did not understand Deason to believe that the roof could be fixed without completely replacing it."

The opinion concluded that the Singletons had failed to present evidence of a "dishonest purpose" or "breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill will" on the part of State Farm.

HARTFORD CAS. INS. CO. V. MERCHANTS & FARMERS BANK, CASE NO. 1031883 (ALA. SEPT.

2, 2005) (TUSCALOOSA COUNTY) – Hartford filed a declaratory judgment action seeking a determination that it was not obligated to defend and indemnify its insured, Merchants, in an underlying action arising out of a disputed security interest of a furniture retailer, Barnett. The trial court determined that Hartford was obligated to defend and indemnify Merchants and Hartford appealed.

The Supreme Court's per curiam opinion found and held as follows:

"Barnett's complaint asserted three causes of action: (1) conversion; (2) detinue; and (3) negligence, willfulness, and wantonness. In substance, Barnett alleged that Merchants had improperly seized inventory and money belonging to Barnett and that in so doing Merchants had breached a duty it owed Barnett.

"[. . .]

"Where fact are alleged in the complaint to support a cause of action, it is the facts, not the legal phraseology, that determines whether an insurer has a

duty to defend its insured in the action. [. . .]

"[. . .] [T]he facts stated in the complaint in this case flatly contradict the allegation of negligence, which was simply dropped into the complaint.

"We therefore conclude that when the complaint supplies descriptive facts and those facts are irreconcilable with a legal theory, such as 'negligence,' asserted in the complaint, the facts, not the mere assertion of a legal theory, determine an insurer's duty to defend."

The Supreme Court agreed with Hartford's argument that the trial court's holding that Hartford owed a duty to indemnify Merchants was premature and in error because a proper determination of that issue would depend upon the facts adduced at the trial of the underlying action.

COMMENT: *The Court's discussion of the wording of the complaint in the underlying case is worth noting well. The plaintiff's lawyer in the underlying case can easily plead his client's*

claims in or out of coverage by the defendant's insurance policy.

HOLLY V. HUNTSVILLE HOSPITAL, CASE NO. 1031824 (ALA. SEPT. 16, 2005) (MADISON COUNTY) – Mr. and Mrs. Holly brought a medical malpractice action against Huntsville Hospital and Dr. John Markushewski for the wrongful death of their 11-month-old child. The first trial resulted in a defendants' verdict, which was reversed on appeal due to the trial court's improper ruling that excluded the testimony of the Hollys' expert witness. The second trial resulted in a verdict for the Hollys. The trial court granted the defendants' motion for a new trial, because one of the jurors failed to answer a question on voir dire.

The question posed to the jury venire included this portion that was issue on the Hollys' appeal: "Have any of you ever had a dispute with Huntsville Hospital about anything, a bill, a statement or anything about it? You had

any dispute with them about anything?"

JUSTICE LYONS's opinion, in which CHIEF JUSTICE NABERS AND JUSTICES WOODALL, SMITH AND PARKER concurred, affirmed, finding that the juror who failed to respond to that question "had been involved in what the defendants now describe as 'collection disputes' with Huntsville Hospital [and] had at least ten delinquent accounts with Huntsville Hospital, totaling \$1,268.51 [and] Huntsville Hospital sued the juror [. . .] seeking payment on seven of the juror's past-due accounts, although the juror did not receive notice of the filing of that action until at least May 12, the day the jury returned its verdict in favor of the Hollys." The evidence further showed that the juror at issue had received 39 letters and 13 phone calls from various collection agencies concerning his debts to Huntsville Hospital.

The Hollys argued on appeal that, because the hospital had filed its suit against the juror on May 4, the hospital's agents had notice of the juror's dispute at the time

the jury was selected and, therefore, the hospital had waived this issue because it was on notice of that dispute. The defendants argued in response that the hospital's co-defendant, Dr. Markushewski, could not be charged with any such notice. The Supreme Court found that, because the hospital's liability was necessarily based upon the doctor's liability, then if the doctor was entitled to a new trial the hospital was, as well.

The Supreme Court rejected the Hollys' argument that the trial court exceeded its discretion in ordering the new trial, because the evidence overwhelmingly showed that the juror had been engaged in an ongoing account dispute with the hospital during a period of five years.

COMMENT: *We don't know what the juror at issue was thinking about when the "dispute" question was asked of the venire. We do know that it is unfortunate that the plaintiffs will have to pursue yet a third trial because of the juror's failure to properly respond to*

the question.

**ROSSER V. AAMCO TRANSMISSIONS, INC.,
CASE NO. 1040056 (ALA.
SEPT. 2, 2005)**

(JEFFERSON COUNTY) – Rosser was injured when the transmission of the car in which she was riding malfunctioned and caused it to collide with another vehicle that was occupied by the Maddoxes. Three months earlier, the transmission had been diagnosed and repaired by the local AAMCO franchisee, Swift, who had a business named Swift Enterprises. Swift had undertaken the repair work at the behest of Dixie Nissan, the dealer that had sold the used vehicle.

On January 11, 2001, Rosser sued Swift, Swift Enterprises and AAMCO in the Birmingham Division ("Rosser I"), alleging that Swift and Swift Enterprises had negligently and wantonly failed to properly repair the transmission. Swift and Swift Enterprises, who had filed for bankruptcy in June 2000, filed a suggestion of bank-

ruptcy in Rosser's case in March 2001. The trial court "separated" the claims against Swift and Swift Enterprises pending the outcome of the bankruptcy proceedings, but also ordered that all liability and fact discovery concerning AAMCO's agency liability was to be completed by August 30, 2001. AAMCO later moved to extend the discovery deadline for 90 days and the trial court reset the discovery deadline for April 30, 2002.

On April 19, 2002, Rosser sued Dixie Nissan and Ford Motor Company in the Bessemer Division ("Rosser II"), seeking recovery for the same injuries she claimed in "Rosser I." At that time, the Maddoxes also filed suit in the Bessemer Division, against Dixie Nissan, Ford and AAMCO. The trial court in "Rosser I" entered a new discovery deadline order, for September 1, 2002, and that deadline was later extended to December 10, 2002. On October 29, 2002, Rosser moved to have "Rosser I" and "Rosser II" and the Maddoxes case consolidated for pretrial discovery, which

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the trial court granted.

Rosser then noticed depositions of certain AAMCO personnel, but later postponed them. At the request of the Maddoxes, the trial court gave all of the plaintiffs until May 16, 2003, to take the depositions of the defendants.

On April 14, 2003, the trial court in Bessemer transferred "Rosser II" to the Birmingham Division and Rosser moved the "Rosser I" trial court to allow her to dismiss "Rosser I" without prejudice, so she could refile it in Bessemer. AAMCO opposed the motion to dismiss, arguing that it had incurred attorney's fees of \$39,000 and expenses of \$3,244 during the two and a half years "Rosser I" had been pending. On December 2, 2003, the trial judge handling "Rosser I" entered an order consolidating it with "Rosser II," which by that time had been transferred back to Bessemer.

On January 16, 2004, AAMCO moved for summary judgment and, on February 20, 2004, Rosser filed a Rule 56(f) motion, with a supporting affidavit of

her attorney which stated that only four depositions had been taken in the case and that "the plaintiff in Maddox has a severe brain injury. Accordingly, the Rosser plaintiffs want counsel for Maddox to take the lead." Rosser's 56(f) motion also stated that she needed to have the summary judgment hearing postponed so that she could take the depositions of AAMCO's two employees who provided affidavits for AAMCO's motion. The trial court denied Rosser's request for additional time to conduct discovery, but it did reset the hearing date on AAMCO's motion and Rosser filed a response to AAMCO's motion which included an affidavit of a salesman from Dixie Nissan who stated that he had accompanied the Rosser vehicle to the Swift shop when it was taken for repairs and he believed it to be "AAMCO owned."

On August 19, 2004, the trial court entered a detailed order granting summary judgment in favor of AAMCO, based upon its finding of no agency. Rosser appealed on two bases, one of which was the trial court's

denial of her Rule 56(f) motion. On this issue, JUSTICE HARWOOD's opinion for the court, which was joined by CHIEF JUSTICE NABERS AND JUSTICES SEE, STUART AND BOLIN, did not find that the trial court had exceeded its discretion in denying further discovery on the issue of actual agency. In making that ruling, the Supreme Court noted:

"[T]hose cases that have held that the trial court exceeded its discretion in not allowing the requested continuance have involved situations where the party moving for summary judgment 'has failed or refused to provide information requested by the opposing party.' Only rarely will an appellate court find that the trial court has exceeded its discretion in not allowing a requested continuance for the purpose of conducting further discovery. [. . .] [T]he non-moving party has the burden of specifically informing the trial court why the discovery is significant to the party's effort to rebut the summary judgment motion."

Furthermore, the Supreme Court held, there was no reason to allow further discovery on the issue of apparent agency, because even if the AAMCO affiants had been deposed to develop the names of witnesses who might be able to testify concerning the indicia of apparent authority, "that indicia would be irrelevant in light of the undisputed fact that Lacey Rosser, Kim Rosser and Sylvia Milstead [the co-owners of the vehicle] would have been ignorant of it. Thus, such evidence could not qualify as evidence 'crucial' to the aspect of Rosser's case predicated upon the theory of apparent authority."

COMMENT: *This sound decision highlights the reality that the proper role of a Rule 56(f) motion is not to postpone discovery in every circumstance or for purposes of convenience, but only in those exceptional circumstances where discovery has been made difficult or impossible to complete by reasons beyond the parties' and lawyers' control. ■*