

Recent Civil Decisions

by David Marsh and Tom Powell



There have only been a few months since we last published a *Recent Decisions* column and the Alabama Supreme Court has released but a handful of widely significant decisions during that time. However, there are a few of that handful that bear close examination and we do so here. A couple of decisions dealing with arbitration agreements may carry some hope for human beings who wish to have their claims heard in a court of law. A couple of decisions indicate an unwillingness of a majority of the Court to find that any piece of paper can have a destructive effect upon the rights of people who are hoodwinked. And a bank that acted as a go-between in a Ponzi scheme in which Alabama citizens were cheated could not escape liability on the basis that the Alabama courts lack jurisdiction over the bank.



David Marsh



Tom Powell

Massey Automotive, Inc. v. Norris, Ms. 1021785 (July 2, 2004) – Johnnie Norris bought a truck from Massey Automotive and she later discovered that it had been damaged before it was sold to her. During the course of her purchase transaction, Massey's finance manager, Bob Drinkwater, had Norris sign a stack of documents that included an arbitration agreement. After Norris sued for breach of contract, breach of

warranty, fraud and fraud in the inducement, Massey moved to compel arbitration on the basis and Norris objected to the motion on the basis that she had been fraudulently induced by Drinkwater to sign the arbitration agreement.

Norris offered her own affidavit in opposition to the motion, in which she averred that she was a diabetic and taking Glucophage at the time of the transaction and that she

had suffered a sugar attack at that time. She further averred that, because her sugar attack caused her vision to blur, she relied upon Drinkwater to explain the papers he had asked her to sign and she asked him to do so. She further averred that she told Drinkwater she did not understand what an arbitration agreement was and he explained that "all it meant was if anything happened to

continued on page 46

the vehicle, it meant I had to bring it back to Massey to let them take care of it before I took it anywhere else. He never mentioned jury, courts, lawyers, nothing." Norris concluded in her affidavit that she would not have signed the agreement if Drinkwater had correctly advised her of its contents.

The trial court denied Massey's motion and it appealed. On appeal, Norris argued that she had presented substantial evidence of her reliance upon Drinkwater's representations, that her reliance was reasonable and that although Drinkwater initially owed no duty to explain the terms, once he undertook to do so he owed a duty to explain the terms honestly. Massey argued that Norris could not blindly rely [a curious term to use, given Norris's disability] on the oral assertions of Drinkwater to the exclusion of the written disclosures of the agreement.

JUSTICE HARWOOD's opinion for five members of the Court agreed with

Norris, but limited its holding to a specific situation where a party's vision is impaired to the point where he or she cannot read the text of a document and that impairment is beyond his or her control, and that party makes that impairment known to the other party and asks the other party to read or explain the contents of the document. The majority further explained that the other party is under no obligation, absent special circumstances, to comply with either request, but if the other party agrees to do so the reliance of the party with impaired vision is not unreasonable as a matter of law.

JUSTICES SEE, BROWN and STUART dissented, on the premises that all of the documents Norris signed formed a single contract and she could not "pick and choose by which provisions she is bound," and that the reasonable-reliance standard required Norris to read the agreement or have someone read it to her. Of further note is JUSTICE

SEE's repetition of "sugar attack" in separate quotes in his dissent, which appears to imply that Norris's diabetic impairment was feigned.

■ **COMMENTARY:** A central part of the majority's opinion is a discussion of the reasonable-reliance standard before and since *Foremost Insurance*. The majority noted that *Foremost Insurance* "returned" to the reasonable-reliance standard that was formulated in *Torres v. State Farm Fire & Cas. Co.*, 438 So. 2d 757 (Ala. 1983). The majority in *Massey Automotive v. Norris* explained that "reliance can be declared unreasonable, as a matter of law, 'where the undisputed evidence indicates that the party or parties claiming fraud in a particular transaction were fully capable of reading and understanding their documents, but nonetheless made a deliberate decision to ignore written contract terms' that clearly contradicted the alleged misrep-

resentation."

Brown v. Denson, Ms.
1020430 (June 25, 2004) – Sheila Denson, an employee of the St. Clair Board of Education, enrolled in a Unum Insurance group disability plan that was offered and sold through Brown, an independent broker who sold policies of various insurers. Although Brown signed Denson's enrollment form as Unum's "agent," his broker-licensing agreement contained Brown's written acknowledgment that he had no contractual relationship with any of the insurers and that he was not an employee, representative or associate of any of the insurers.

Unum denied Denson's claim for benefits on that the basis that her disability was caused by her preexisting condition of lupus. Denson sued Brown for fraud, claiming that she had disclosed her lupus to Brown before she purchased the Unum policy, and that Brown had told

her that it "didn't matter" if she had any health problems, "because within a year the policy would pay." Denson resolved her claims against Unum by way of arbitration proceedings that did not include her claims against Brown. Brown moved to compel arbitration of Denson's claims against him, on the basis that the arbitration provision in the Unum policy covered Brown, as well. The trial court denied the motion and Brown appealed.

On appeal, Denson argued, *inter alia*, that: (1) she did not sign an arbitration agreement with Brown and that there was no contract between her and Brown that required her to submit her claims against Brown to arbitration; and (2) Unum was not a party to the lawsuit and she did not seek benefits under the insurance contract with Unum in this lawsuit, only recovery for Brown's fraudulent conduct. Brown argued that he could compel arbitration under the Unum arbitration provision

because he was a "signatory agent" for Unum.

The Supreme Court's *per curiam* decision, in which JUSTICES HOUSTON, LYONS, HARWOOD and WOODALL concurred and JUSTICE JOHNSTONE specially concurred, affirmed the trial court's denial of Brown's motion. The majority specifically rejected Brown's "signatory agent" argument, finding as follows:

"We cannot agree with the characterization of Brown as Unum's agent because, according to his broker-licensing agreement [. . .], Brown specifically acknowledged that he had no contractual relationship with any of the insurance carriers for which he solicited applications from prospective insureds and that he was not an employee of any of those carriers. Under these circumstances, [Brown] cannot contend, contrary to Brown's [broker-licensing agreement], that [Brown has] a principal/agent with Unum."

Furthermore, the majority wrote, the fact that

Denson never denied that Brown was Unum's agent did not afford the opportunity to "rewrite the clear language" of the broker-licensing agreement so as to "create an agency relationship between Brown and Unum." Finally, the majority emphasized that "under the peculiar factual circumstances of this case, Denson does not rely upon the terms of the disability-insurance policy" to support her fraud claim against Brown and that "the existence of the policy is relevant background, but that circumstance alone cannot justify the conclusion that Denson relies upon the terms of the policy. It is because the policy avails Denson nothing that she has sued Brown."

JUSTICES SEE, BROWN and STUART dissented. Taking issue with the majority's rationale and ruling, JUSTICE SEE's dissenting opinion stated: "I do not believe that Sheila Denson may avoid performance under the arbitration provision in her disability-insurance policy by suing the insurance producer who

sold her the disability insurance instead of suing the insurance company that denied her disability-benefits claim."

■ **COMMENTARY:** The majority's ruling in this case illustrates the beneficial effects of proper discovery and clear analytical thinking on the part of Denson's lawyers. Had Brown's broker-licensing agreement (and Brown's explicit rejection of his later-invented agent theory) not come to light, Denson likely could not have prevailed.

Gilmore v. M & B Realty Company, Ms. 1021380 (July 2, 2004)

— The first sentence of the majority opinion authored by JUSTICE HARWOOD accurately likens the facts of this case to Shakespeare's play, "The Comedy of Errors." Kevin and Therese Gilmore bought a home in Mobile County after the VA had foreclosed on an earlier mortgage. Unbeknownst to the Gilmores, the home

continued on page 48

they were shown by M & B's agent, Abigail Panayiotou, and that they bought and later lived in for five and one-half years, was across the street from the VA-foreclosed property. The evidence showed that the documents provided by the VA's management brokers, Property Management and Hattie Clark, indicated that the house for sale "has several house numbers" and that both Clark and Panayiotou relied upon the incorrect house number that was supplied by the VA. Panayiotou showed the wrong-numbered house, which had been vacant for some time, to the Gilmores and they later entered into a purchase agreement and closed on the property. At closing, Panayiotou told the Gilmores that they needed to go by the John Archer Center (a county office facility) to see if the street address of the house they had purchased was correct.

The evidence showed that the house number of the house into which the Gilmores moved was 4361; all of the VA's paperwork

listed the house number it offered for sale as 4369; and the accurate house number of the house offered for sale by the VA was 4360. After the Gilmores had lived in the house for five years and five months, the true owner of the house, Mr. Crenshaw, appeared at the house and demanded that the Gilmores vacate the premises, which they did. The Gilmores then discovered that the house for which they held a deed was across the street, occupied by other persons, and in a such a state of disrepair that the Gilmores could not occupy it.

The Gilmores sued M & B Realty, Panayiotou, Property Management and Clark for negligence and wantonness, and also sued M & B and Panayiotou for fraudulent misrepresentation. The trial court entered summary judgment in favor of all defendants, on the bases of the statutes of limitations, and the Gilmores appealed.

JUSTICE HARWOOD's opinion affirmed with respect to the negligence

and wantonness claims against all of the defendants. The Gilmores argued that their claims did not accrue until Crenshaw arrived at their doorstep and asked them to move out of his house, but the Court rejected this argument on the basis that a negligence or wantonness action accrues as soon as the claimant is entitled to maintain an action, whether or not the full measure of damages was apparent at the time of the first legal injury. The opinion then held in this case, as follows:

"Had the Gilmores learned the true nature of the property mix-up after the transaction had closed and they began occupying the premises, they could have begun prosecution then of the same negligence and wantonness claims they asserted in August 2000. Their negligence and wantonness claims accrued in November 1993 [when they closed and moved in] and were time-barred when they filed their action in August 2000."

However, the Court reversed the summary judgment with respect to the Gilmores' fraudulent misrepresentation claims against M & B and Panayiotou, holding fast to the rule that the question of when a party discovered or ought to have discovered the fraud is for the jury to answer. In this case, the Court found that Panayiotou, a real estate agent with extensive experience in handling the sales of VA-foreclosed properties, "was not provoked to further inquiry despite the fact that she knew everything the Gilmores knew about the discrepancy in the street address."

Furthermore, the Court found, the VA had given the Gilmores a statutory warranty deed, which obviated any independent duty on the part of the Gilmores to conduct a title search of the property. Finally, there was nothing in the chain-of-title paperwork the Gilmores received that would have reflected a street address for the property. Based upon all of the evidence,

the Court could not find that the reasonable-reliance standard prevented the statute of limitations from running as of the date the Gilmore were asked to leave by Crenshaw and thereby discovered the fraud – which was less than two years before they filed suit.

The Court added that the same analysis with respect to the reasonable-reliance standard applicable to the statute of limitations “is dispositive of the separate issue concerning the reasonable-reliance element of the fraud claim itself. [...] We cannot say the Gilmores’ reliance on Panayiotou’s representation as to the status of the house she led them to and showed them through, which representation she continued through the closing, was unreasonable as a matter of law, given all of the attendant circumstances.”

JUSTICES LYONS, JOHNSTONE and WOODALL concurred in the lead opinion. JUSTICES HOUSTON and SEE concurred in part in the rationale and concurred in the result. JUSTICE STU-

ART concurred in the affirmation of the summary judgment with respect to the negligence and wantonness claims, but dissented from the reversal of the summary judgment with respect to the fraud claims.

■ **COMMENTARY:** The lead opinion in this case also contains a good discussion of the reasonable-reliance standard in *Foremost Insurance* and decisions before and since *Foremost*.

Ex parte Fidelity Bank, Ms. 1030483 (June 4, 2004) – Allen Austin brought a lawsuit in Shelby County Circuit Court after he realized he had been induced to enter into an investment plan that turned out to be a “Ponzi scheme” (a swindle in which some early investors are paid off with money put up by later victims in order to encourage more and bigger risks). Among those Austin sued in September of 2001 was Fidelity Bank, a Georgia corporation. The complaint named two Alabama plain-

tiffs who claimed to be damaged as a result of investing in self-directed individual retirement accounts “SDIRAs” held by Fidelity.

The case was removed to federal court in October of 2001 by defendants other than Fidelity and remanded to state court in January of 2002. A defendant other than Fidelity, Dill, moved in March of 2002 to dismiss the claims against Dill on the basis of lack of personal jurisdiction and it ultimately prevailed by way of a writ of mandamus issued in 2003. Eleven days after the Supreme Court granted Dill’s petition and a year and a half after Fidelity filed its original answer, Fidelity amended its answer to assert the affirmative defense of lack of personal jurisdiction. Austin did not move to strike the amended answer and Fidelity later moved to dismiss on the basis of lack of personal jurisdiction, which the trial court denied. Fidelity then sought a writ of mandamus.

JUSTICE LYONS, writing for a unanimous Court,

denied Fidelity’s petition. Although Austin argued that Fidelity had waived its affirmative defense of lack of personal jurisdiction by not raising it sooner, the Court found that Fidelity’s original answer had stated that Fidelity was “without knowledge or information to form a belief as to the truth of the averments [relating to jurisdiction],” which was sufficient to constitute a denial interposing the affirmative defense. Furthermore, the Court said, “[b]ecause Fidelity denied Austin’s assertion of jurisdiction over the person in its initial response and included specific allegations of lack of personal jurisdiction through a proper amendment without an objection from Austin, there has been no waiver in this case.”

Nevertheless, the Court found that Fidelity was subject to general personal jurisdiction in Alabama, based upon Fidelity’s continuous and systematic maintenance of separate accounts and vehicle loans for several thousand

continued on page 50

Alabama residents over the past several years. In reaching this conclusion, the Court rejected Fidelity's argument that these accounts and loans were not actively sought from Alabama residents but, rather, materialized out of Fidelity's relationships with automobile dealerships that referred their customers to Fidelity. The Court noted that "[t]he nexus between the contacts and the claims alleged does not have to be as concrete for a finding of general jurisdiction as it does for a finding of specific jurisdiction."

The Court concluded: "Fidelity cannot hide behind its use of third parties to facilitate accounts with Alabama residents to avoid personal jurisdiction in Alabama courts. [. . .] It would not be unreasonable for Fidelity, whose practice of accepting Alabama customers from third-party referrals was continuous and systematic, to anticipate facing litigation in Alabama."

SHORT TAKES

Ex parte Serio, Ms. 1021443 (June 18, 2004) – In this case, the plaintiffs sought to recover on a performance bond and a payment bond that were issued with respect to a construction contract. The insurer that issued the bonds, Frontier, became insolvent during the course of discovery in this case. The insurance superintendent and rehabilitator for the State of New York, Serio, sought a writ of mandamus that would (1) stay all claims against Frontier and (2) permit Serio to pursue Frontier's counterclaims in the same case. The Supreme Court's per curiam opinion granted the writ staying the claims against Frontier, under the authority of the Uniform Insurers Liquidation Act (which Alabama has adopted at Ala. Code § 27-32-1, et seq.). However, the Court also held that Frontier had failed to establish that it had a clear legal right to pursue its counterclaims while the other claims were stayed.

Ex parte Fort James Operating Company, Ms. 1030607 – Irby, who had been employed by Fort James for 32 years, was injured during a company fire drill. He underwent several surgeries and his doctors allowed him to return to work, but with certain restrictions. Fort James informed Irby that it had no jobs he could perform and Irby elected to retire. Between the date he applied for disability benefits under an Aetna plan paid for with Fort James funds and the date he actually retired, Irby received nearly \$3,000 in "sickness and accident benefits" under the Aetna plan. Irby later sued for workers' compensation benefits and was found to be permanently and totally disabled. The trial court found that Fort James was not entitled to a set-off for any sickness and accident benefits it may have provided to Irby. JUSTICE HOUSTON's opinion for a unanimous Supreme Court held that the payments made under the

Aetna plan to Irby were "sick pay" and not "sick leave," a distinction that would allow Fort James a set-off against the workers' compensation benefits.

SCI-Alabama Funeral Services, Inc., Ms. 1022002 (June 25, 2004) – In this case, JUSTICE SEE's opinion for six members of the Court held that the defendant funeral home could not use the vehicle of a Rule 60(b) motion to seek to compel arbitration, based upon the United States Supreme Court's ruling in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), because the Rule 60(b) motion is not a substitute for a timely filed appeal. The trial court denied SCI's motion in April of 2003 and SCI did not appeal at that time. SCI filed its Rule 60(b) motion in July of 2003. The Supreme Court said that allowing an out-of-time appeal, as SCI had sought to bring, "would subvert the principle of the finality of judgments." JUSTICES JOHNSTONE and

LYONS concurred, but limited their agreement to the timeliness issue and rejected the lead opinion's statements concerning "the nexus to interstate commerce necessary for the Federal Arbitration Act to apply."

American Home Ins. Co. v. Gaylor, Ms. 1021565 (June 25, 2004) – In this case, JUSTICE SEE's opinion for a unanimous Court held that the probate non-claim statute, Ala. Code 43-2-350, which ordinarily bars claims against an estate that are not filed within six months, does not apply where the administratrix of the estate is on notice that there is a reasonably ascertainable creditor. Here, the Court found, the fact of an accident that caused the deaths of three persons and approximately \$14,000 in damage to a tractor-trailer truck and the fact that the administratrix was aware of the accident "created a duty requiring [the administratrix] to inquire into the

possibility of a claim against" the estate by the truck driver.

Ex parte State Farm Mut. Auto. Ins. Co., Ms. 1021378 (June 4, 2004)

– This case arose over a two-car collision that occurred in Bibb County. Both drivers resided in Bibb County. The State Farm policy was issued to one of the drivers in Bessemer, in Jefferson County. The plaintiffs filed suit in the Bessemer Division of Jefferson County, basing their venue selection upon their underinsured motorist claims arising out of the State Farm policy. JUSTICE BROWN's opinion for six members of the Court held that the proper venue of an action for uninsured or underinsured motorist benefits is the county in which the collision occurred. JUSTICES JOHNSTONE and WOODALL dissented.

State Farm Mut. Auto. Ins. Co. v. Brown, Ms. 1030709 (June 25,

2004) – The Supreme Court's unanimous, per curiam opinion in this case, which arose out of a two-car collision, held that potential plaintiffs may not bring a declaratory judgment action that seeks to determine the extent of coverage available under the potential defendant's insurance policy. The rationale for this ruling? The Court said: "Like any other action, a bona fide justiciable controversy is essential to maintain a declaratory-judgment action. [. . .] A controversy is justiciable when present legal rights are affected, not when a controversy is merely anticipated. [. . .] We agree with State Farm's argument that § 27-23-2 prevents the Browns from bringing this action at this time and in this posture. There is no justiciable controversy because the Browns have yet to obtain a judgment against [State Farm's insured] that would obligate State Farm to the Browns in any way."

■ **COMMENTARY:** Maybe we're just confused, but it

appears that the ruling and rationale in *State Farm v. Brown* also would apply to bar a declaratory-judgment action brought by any insurer, unless a "judgment" against the insured had been obtained, thereby presenting a "bona fide justiciable controversy."

Ex parte City of Brundidge, Ms. 1030490 (June 4, 2004)

– JUSTICE LYONS's opinion for a unanimous Supreme Court held in this case that an employer may be entitled to a credit for workers' compensation benefits paid to its employee, where the employee obtained a third-party recovery through the Alabama Insurance Guaranty Association because the third party's insurer became insolvent. Here, the Court said, "[t]wo unusual features undergird this case. First, the tortfeasor's insurance carrier has become insolvent. Second, AIGA has already paid this claim."