

Recent

Civil Decisions



by David Marsh and Tom Powell

Each of the five disturbing decisions that we address below involved innocent plaintiffs who were unable to prevail before our Alabama Supreme Court. In two especially troubling outcomes, children whose own mothers' conduct deprived them of their property were denied so much as their day in court before a jury of their peers.



David Marsh



Tom Powell

PARKER BUILDING SERVICES CO. V. LIGHTSEY, MS. 1031377 (ALA. JUNE 17, 2005) –

Shiann Lightsey took her five-year-old son, Kace Lightsey, with her to a softball facility in Homewood to watch another child's batting practice. Kace crawled under the guardrail of an observation deck and stepped onto the ceiling of a bathroom, which caved in. Kace fell to the bathroom floor and sustained head injuries that left him perma-

nently paralyzed on his left side.

Two years earlier, the owner of the then-vacant softball facility had hired Parker to perform some repairs. Although those repairs did not include the guardrail where Kace was injured, the guardrail was in the area affected by the work performed by Parker. Parker failed to obtain a permit before it began the repair work and it also failed to have an inspection made after it

completed the repair work, although a City of Homewood ordinance required it to do both.

A City of Homewood inspector testified at trial that the guardrail met the building code requirements for a building used as a warehouse, but not for a building used for public assembly. The inspector also testified that, based on the condition of the guardrail, he would have rejected the work if he had known the building was to be

used for public assembly. His rejection would have required the owner or Parker to bring the guardrail into compliance with the building code.

Mrs. Lightsey entered into pro tanto settlements with the owner and others and then proceeded to trial against Parker. The jury returned a verdict that resulted in a net judgment against Parker of \$1.6 million. Parker moved for a new trial on the basis that the trial court should not have instructed the jury on negligence per se as to Parker's violation of the provisions of the building code relating to the permit fee, permit application and guardrails.

The trial court denied Parker's new trial motion and Parker appealed.

JUSTICE SEE's opinion, in which CHIEF JUSTICE NABERS and JUSTICES HARWOOD, STUART and BOLIN concurred, reversed and remanded the case for a new trial on the basis that the trial court committed reversible error in giving the negligence per se instruction. The opinion

concluded:

"The trial court's charge to the jury stated the wrong legal standard. The trial court instructed the jury that if it determined that the ordinances had been violated and that the violation proximately caused Kace's injury, then the jury must find that Parker Building was negligent per se.

However, if the trial court had properly instructed the jury on prima facie negligence, then the jury would have been instructed to determine (1) whether the ordinances had been violated and (2) whether that violation constituted negligence by Parker Building. [. . .] With the proper instruction, the jury could have found that the violations of the Building Code in this case did not constitute negligence."

In reaching that result, the opinion found that the court "has never addressed the issue of whether a violation of a standard building code adopted by a city ordinance constitutes negligence per se." Noting that the doctrine of negligence per se is applicable to a violation of an ordinance as

well as a violation of a statute, the court proceeded to address the building code here under the four-part test set out in *Fox v. Bartholf*, 374 So. 2d 294 (Ala. 1979). *Fox* held that, for such a violation to constitute negligence per se, (1) the statute must have been enacted to protect a class of persons of which the plaintiff is a member, (2) the injury must be of the type contemplated by the statute, (3) the defendant must have violated the statute and (4) the defendant's statutory violation must have proximately caused the injury. The court then held as follows:

"The purpose of the Building Code is to protect the public generally; the Building Code does not delineate a specific class of persons it seeks to protect distinguishable from the public. [. . .] The purposes to be served by the Building Code of 'public safety, health, and general welfare' refer to the public generally. [. . .] We also construe the phrase 'safety to life and property' in [a provision of the Building Code] to refer to the gener-

al public, and not to a particular subset of persons who may be in a building at a particular time. [. . .] If the purpose of the Building Code was to protect only a subset of persons inside a building or a 'built environment,' as Lightsey suggests, the Building Code would identify that group. Instead, the Building Code says that it is intended to protect the general welfare 'through' — that is, by means of — 'structural strength, stability, . . . and safety to life and property' [citing a Virginia Supreme Court decision]."

While the Parker Building opinion relied upon one Virginia decision in reaching its result, the opinion rejected decisions from Florida, Kentucky, — Montana, New Mexico, North Carolina, Virginia and Nevada — which had held that the violation of building-code provisions adopted by local ordinance may be negligence per se — because "some of these jurisdictions do not require that the building code protect a class of persons distinguishable from the general pub-

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lic for negligence per se to be applicable.”

COMMENT: *We are not sure from reading Parker Building who is included among the “general public” that our Supreme Court insists is protected from bad guardrails by the City of Homewood’s building code provisions. We might hope or assume that it would include someone living or playing within the city limits of Homewood – but that erroneous assumption would include Kace Lightsey.*

ALFA LIFE INS. CO. V. LEWIS, MS. 1031758 (ALA. APRIL 8, 2005) – In 2001, Alfa issued a life insurance policy to Viola Turner after Mrs. Turner and her daughters met with an Alfa agent, who asked questions and filled in the insurance application. Among the questions the agent asked were the standard questions concerning past diagnoses for various ailments, including diabetes and congestive heart failure,

which Mrs. Turner answered negatively.”

After Mrs. Turner died, Alfa investigated her medical history and found that one of Mrs. Turner’s physicians had diagnosed congestive heart failure, although the physician never had told Mrs. Turner that he had made that diagnosis. Alfa then filed a declaratory judgment action seeking to rescind the policy, on the basis that Mrs. Turner had materially misrepresented her health condition on the application. The trial court denied Alfa’s motion for summary judgment and Alfa appealed.

JUSTICE STUART’s opinion, in which CHIEF JUSTICE NABERS and JUSTICES SEE, HARWOOD and BOLIN concurred, reversed and remanded the case with instructions to enter the summary judgment sought by Alfa. The opinion said:

“The parties in this case do not dispute that Turner answered the question whether she had ever been diagnosed with congestive heart failure incorrectly. For purposes of this appeal | . .

. .] we accept as true the claim that Turner had no knowledge of her previous diagnosis. Thus, the question presented in this case is whether an incorrect answer to a question on the application for insurance, given innocently, provides a basis for rescission of the policy under § 27-14-7, Code of Alabama 1975, as a matter of law. [. . .] [W]e hold that Turner’s incorrect answer to the question whether she had ever been diagnosed with congestive heart failure, although innocently given, is a sufficient basis for Alfa’s rescission of the policy, if that answer was material to Alfa’s issuance of the policy.”

COMMENT: *We don’t know why anyone living in Alabama would even bother to buy life insurance any more, given the result in this case and the result in Baker v. Metropolitan Life Ins. Co., Ms. 1031803 (Ala. Jan. 14, 2005), which held that the fine print in an insurance policy was the only “representation” upon which an insurance applicant might “reasonably*

rely,” notwithstanding what the selling agent may have told him or her about the policy. We surmise that, if the applicant innocently gives bad information, or if the agent intentionally gives bad information, the insurance company is going to prevail.

EDWARD D. JONES & CO. V. VENTURA, MS.

1031752 (ALA. FEB. 25, 2005) – When Ventura was 14, he received more than \$500,000 in a settlement of an action arising out of his father’s wrongful death. Ventura’s mother, Patricia Dutton, was awarded letters of guardianship and conservatorship over Ventura’s trust estate. Dutton, as “custodian,” put the money into a “Daily Passport Cash Trust” account at Edward D. Jones & Company.

When Ventura reached the age of majority, he and Dutton asked the probate court to order a final settlement of the trust estate, which was done. Five months later, Ventura learned that his trust estate

had no remaining liquid assets. The probate court conducted a hearing in which an expert witness testified that, other than one real estate investment, "absolutely no legally permissible investment of [Ventura's] estate had been made" by Dutton. The probate court entered a judgment against Dutton in the amount of \$500,000.

Ventura brought suit in circuit court against Edward Jones & Company, its agent with whom Dutton had done business, and other "brokerage defendants," claiming that they had participated in Dutton's breach of her fiduciary duties and they were also guilty of fraud and suppression for inducing Dutton to place Ventura's trust estate funds in the Edward Jones account.

Edward Jones and its agent then filed a motion to compel Ventura to arbitrate his claims, based upon a customer agreement that Dutton had signed when she opened the Edward Jones account. The other brokerage defendants filed similar motions to compel arbitration. Ventura argued that

the agreements containing the arbitration clauses were void, because Dutton lacked the capacity or authority to enter into the investment agreements in the first place.

The trial court denied the arbitration motions and the brokerage defendants appealed. JUSTICE STUART's opinion, in which CHIEF JUSTICE NABERS and JUSTICES SEE, LYONS, HARWOOD, WOODALL and SMITH concurred, reversed the trial court's denial of the arbitration motions.

Although the Supreme Court recognized that it was for the trial court, rather than an arbitrator, to resolve whether Dutton lacked the authority to enter into the agreements on Ventura's behalf, the Supreme Court held that Dutton did possess that authority.

The Supreme Court rationalized its ruling, as follows:

"The letters of guardianship and conservatorship conferred upon Dutton the duties and powers found in § 26-2A-152, Ala. Code 1975. [. . .] Under § 26-2A-152, Dutton was granted the same powers of invest-

ment as those granted a trustee. The Comment to § 26-2A-152(b) [. . .] refers the reader to [Ala. Code] § 19-3-120 through § 19-3-132 [. . .] for a list of the powers of investment granted to a trustee. Based upon the language of those statutes, we conclude that Dutton, acting as Ventura's conservator, had the authority to enter into the investment agreement on Ventura's behalf.

"We acknowledge that Dutton's authority to invest the moneys in the trust estate was limited by a court order appointing her guardian and conservator of the trust estate, which referenced § 26-2A-152. Dutton had the authority to make only certain types of investments. However, in order to determine the validity of the investment agreements at issue here, for the purpose of reviewing the trial court's ruling on the motions to compel arbitration, we need not analyze each and every investment allowable under the investment agreements.

"As the brokerage defendants argue, Dutton had the authority to enter into investment agreements

on Ventura's behalf, and, in doing so, she agreed to arbitrate any disputes arising out of those agreements. Assuming Ventura's claims are encompassed within the language of the arbitration provisions contained in those investment agreements, this Court's analysis need go no further. [. . .]

"Because Ventura is a third-party beneficiary of the accounts and because his claims arise out of the manner in which the investment accounts were managed or should have been managed, he is seeking the benefits of the investment agreements entered into by Dutton.

"If a nonsignatory to a contract containing an arbitration provision has obtained or seeks to obtain the benefit of the contract, the nonsignatory may not avoid the application of the arbitration provision."

COMMENT: *As must be the case with Mr. Ventura, we fail to comprehend how Mr. Ventura is "seeking the benefits" of the investment agreements containing the arbitration*

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provisions. *Ventura* argued that the investment agreements were void! We also wonder what happened to the ancient notion that it is a court's duty to protect the property interests of minors. See, e.g., *Kavanaugh v. Thompson*, 16 Ala. 817, 827 (1849).

TITLE LOAN EXPRESS NO. 2, INC. V. HOOKS, MS. 1031389 (ALA. MAY 27, 2005) – Lakesia

Hooks inherited a sum of money when her father died and she used part of her inheritance to buy a car with cash from an automobile dealership. Because Hooks was younger than 19, the dealership required that Hooks's mother, Robin Feagin, be listed on the certificate of title as an owner of the vehicle.

Hooks went out of state to college and returned to Alabama one weekend to visit her grandmother. During that visit, Feagin sneaked into the glove compartment of Hooks's vehicle and removed the certificate of title, which she then

pawned for \$3,000 at Title Loan Express. Hooks did not learn of her mother's deceit until her vehicle was repossessed after Feagin defaulted on the loan. During the repossession process, the tow truck operator collided with two parked vehicles in a maneuver that Hooks claimed was an effort to run over her. Although Hooks then offered to repay the loan, Title Loan Express refused to return the vehicle to Hooks.

Hooks sued Title Loan Express and Randy Cantrell, who operated the repossession company, for wrongful repossession, assault and battery, breach of the peace, and other claims, including a violation of the Alabama Pawnshop Act. Title Loan Express moved to compel Hooks to arbitrate her claims, on the basis of an arbitration provision that Feagin had signed when she pawned Hooks's vehicle. The trial court denied the motion and Title Loan Express appealed.

JUSTICE LYONS's opinion, in which CHIEF JUSTICE NABERS and JUSTICES

STUART and BOLIN concurred and JUSTICES SEE, HARWOOD and SMITH concurred in the result, reversed and remanded the trial court's denial of the motion to compel Hooks to arbitrate her claims. In making that ruling, the court hung its hat on Hooks's "breach of the peace" claim:

"*Title Loan* argues that Lakesia's claim alleging wrongful repossession is in essence a claim alleging breach of the contract between Title Loan and Robin. Therefore, Title Loan contends, because Lakesia asserts a claim based on the contract containing the arbitration provision, she is bound by the provisions of that contract, including the arbitration clause.

"In support of its argument, *Title Loan* points out that Lakesia's claim of wrongful repossession is in part based on a contention that, in repossessing the vehicle, Title Loan breached the peace. Section 7-9A-609, Ala. Code 1975, gives a secured party the right to take possession of collateral after default of an underlying security agreement [. . .

.]. Debtors are included in the category of persons entitled to relief under § 7-9A-625, and Lakesia is considered a debtor under Article 9A. [. . .] Title Loan cites *Weaver v. American National Bank*, 452 So. 2d 469 (Ala. 1984), in support of its contention that, because Lakesia's claim of wrongful repossession is based on a remedy provided by Article 9A, it is in essence a breach-of-contract claim. [. . .]

"In the context of the instant case, the UCC provision requiring a secured party to proceed without breaching the peace when repossessing the collateral cannot be distinguished from the UCC requirements at issue in *Weaver*.

Therefore, based on the rationale of *Weaver*, Lakesia's claimed right to a peaceful repossession is a right given by the contract between Title Loan and Robin.

"[. . .] Title Loan and Robin, by operation of law, must be deemed to have intended to bestow a direct benefit upon Lakesia when they entered into a transac-

tion creating a security interest in the vehicle purchased by Lakesia. We therefore consider Lakesia a third-party beneficiary of the contact containing the arbitration provision.

"[. . .] The acts complained of in Lakesia's complaint occurred during Title Loan's attempt to exercise what it contends were its rights under the contract containing the arbitration clause. The fact that some of Lakesia's claims are intentional tort claims is not dispositive of whether Lakesia's claims against Title Loan are subject to arbitration. Because the arbitration clause is broad enough in scope to cover all of Lakesia's claims against Title Loan, Lakesia must submit those claims to binding arbitration."

JUSTICE WOODALL wrote a dissenting opinion in *Title Loan Express*, correctly noting that "Lakesia could receive no benefit, direct or incidental," from the pawn agreement of which she had no knowledge

JUSTICE PARKER wrote a dissenting opinion, pointing

out that there was no evidence to show that, when Title Loan and Feagin entered into the pawn agreement, they intended to bestow any third-party benefit upon Hooks:

"The text and the context of the agreement shows that Lakesia's mother intended only to gain \$3,000 in quick cash, exclusively for her own benefit, by encumbering her daughter's car. For its part, Title Loan intended only to provide a secured loan for a fee equal to an annual percentage rate of 126%, also for its exclusive benefit. In fact, the terms of the pawn agreement show such a clear intent to limit the benefits exclusively to the signatories that it is doubtful any benefit remains that could be intended for a third party."

COMMENT: *It is hard to ascertain whether the result that was reached in Title Loan Express v. Hooks is worse than the result that was reached in Edward D. Jones & Co. v. Ventura. These decisions stretch the bounds of logic in denying these innocent*

parties their constitutionally afforded rights to trial by jury and due process of law. We further invite you to compare the curious decision-making in Title Loan Express to that in Parker Building, discussed earlier. In Title Loan Express, the innocent young victim was deemed to be an intended beneficiary of an arbitration agreement entered into without her knowledge, between a wrongdoer and a pawn shop. But in Parker Building, the innocent young victim was not deemed to be an intended beneficiary of the provisions contained in a standardized building code.

FORTIS BENEFITS INS. CO. V. PINKLEY, MS. 1040125 (ALA. JULY 29, 2005) – In 1991, Jay Pinkley bought a \$100,000 life insurance policy and Fortis later assumed the obligations as insurer. The policy application listed Bertha Pinkley as primary beneficiary and Paul Sanford (Bertha's son and Jay's step-son) as the con-

tingent beneficiary. One provision of the policy stated:

"CHANGE OF BENEFICIARY: The beneficiary designation contained in the application will remain in effect until changed. The Owner may change the beneficiary at any time during your lifetime. A satisfactory written notice must be filed at the Home Office. The change will take effect only upon being recorded by [Fortis]."

In January 2000, a person identifying himself as Jay Pinkley telephoned Fortis and requested that a change of beneficiary form be sent to Jay Pinkley's home address and Fortis complied. In February 2000, Fortis received the completed change of address form, which designated Dianne Sanford (Paul Sanford's wife) as the primary beneficiary and "Bernice Pinkley" as the contingent beneficiary. The name "Jay D. Pinkley" was handwritten on the line immediately above the printed words, "policyowner's signature." Fortis stamped and acknowledged

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its receipt of the form and returned a copy to Jay D. Pinkley's home address.

Jay Pinkley died in April 2001 and Fortis paid the proceeds to Dianne Sanford, shortly after she filed a claim, in May 2001. In March 2003, Bertha Pinkley also filed a claim for the benefits owed under the policy, alleging that Jay Pinkley's signature on the beneficiary-change request form was forged. Fortis denied Bertha Pinkley's claim, on the basis that it already had paid the benefits under the policy. Bertha Pinkley sued Fortis for breach of contract, negligence, wantonness and bad faith failure to pay a claim. Fortis and Pinkley both filed motions for summary judgment and the trial court denied both motions, then certified its rulings for permissive appeals.

JUSTICE WOODALL's opinion, which was joined by CHIEF JUSTICE NABERS and JUSTICES SEE, STUART, SMITH, BOLIN and PARKER, reversed and remanded the denial of Fortis's motion for summary judgment. For purposes of the appeal, the

court assumed that Jay Pinkley's signature was forged. However, the court looked to the provisions of Ala. Code § 27-14-24 ("Payment on policy"), holding that this statute protects an insurer from double liability if in good faith it pays life-insurance benefits to an individual claiming the benefits on the basis of a forged change-of-beneficiary request.

In reaching that result, the *Fortis Benefits* opinion said:

"[N]either Pinkley, nor any case she cites, explains why the insurer has a duty to discover forgeries but not to discover other irregularities, such as undue influence. [. . .]

"[Ala. Code § 27-14-24] simply states that when 'the insurer makes payment ... in accordance with the terms of the policy' to 'the person then designated in the policy, ... such payments shall fully discharge the insurer,' absent written notice of competing claims. (Emphasis added.) [. . .]

"In summary, we hold that § 27-14-24 does not cast upon the insurer a duty

to investigate and discover whether a change of beneficiary has been procured by forgery, and that where an insurer in good faith pays life insurance benefits in reliance on a forged change-of-beneficiary request form, which appears regular in all respects, the insurer is fully discharged 'from all claims under the policy or contract.'"

JUSTICE LYONS wrote a dissenting opinion, stating in part:

"Whether it would be sound public policy for the legislature to protect an insurer under these circumstances is a question not before us. The only question is whether § 27-14-24, as written, affords an insurer such protection. [. . .]

"[The policy in this case] quite plainly provides that only the owner can change the beneficiary designation. For purposes of this appeal we have assumed that the owner — Jay Pinkley — never changed the designation of the beneficiary and that the change-of-beneficiary form was a forgery. [. . .]

"Section 27-14-24, as written, contemplates that under certain circumstances benefits might be paid to someone with a claim to those benefits inferior to the claim of another. [. . .]

"Nevertheless, as written, § 27-14-24 is simply not broad enough to protect the insurer under the circumstances here presented, where noncompliance with the literal terms of the policy is undisputed and compliance with the terms, merely apparent to the insurer at the time of payment, was not real."

COMMENT: *It is rather curious to see a majority of our Alabama Supreme Court discuss Fortis's "reliance" upon the indications that were made by an apparent forger on the face of the form without even mentioning whether Fortis's "reliance" was "reasonable," as would undoubtedly be the case if a human being's "reliance" were at issue.* ■