



# Recent Civil Decisions

by David Marsh and Tom Powell

*Our Alabama Supreme Court has been busy with statutory construction in recent months. In this issue, we discuss some of those decisions and how the Court's statutory interpretations might affect your clients' interests.*



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## **"LIMITATION-OF-LIABILITY" CLAUSES ARE VALID AND ENFORCEABLE**

Two recent decisions addressed and upheld the validity of so-called "limitation of liability" clauses. These clauses may appear most commonly in various types of service contracts, as these two recent decisions illustrate.

In *Saia Food Distributors v. SecurityLink from Ameritech, Inc.*, Ms. 1031127 (Ala. Dec. 3, 2004),

the owner of a nightclub brought suit against the company with which it had contracted to provide alarm and monitoring services. The "zone-error" message repeatedly malfunctioned and the owner was instructed to simply bypass that function when arming the system. After the club was burglarized and burned one evening without the system's ever sending an alarm signal, the owner recovered his property dam-

age from his insurer and then sued the security-services company for negligent, wanton and intentional failure to provide alarm and monitoring services and other claims. The trial court held that, except for the wanton and intentional conduct claims, a limitation of liability clause in the contract capped the amount for which the alarm service was liable at \$5,800 – the purchase price

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of the alarm-service equipment.

In a 5-0 opinion written by Justice Stuart, the Supreme Court affirmed the trial court's ruling that the limitation of liability clause was valid and enforceable. The Court noted that a similar limitation-of-liability provision was upheld in *American District Telegraph Co. of Alabama v. Roberts & Sons, Inc.*, 219 Ala. 595, 122 So. 837 (1929), where a sprinkler-service contract limited recovery to fifty dollars. In the Saia Food case, the club owner argued that enforcing the clause would allow the alarm service to limit its liability for negligence in the performance of the very duties it assumed under the contract. Rejecting the owner's argument, the Court said:

"We do not interpret this language as allowing SecurityLink to escape all liability for any breach of its contract with Saia Food or for SecurityLink's negligence, if any. SecurityLink

and Saia Food merely agreed to limit the amount of damages for which SecurityLink could be held responsible" (emphasis added).

In the second of these cases, *Fox Alarm Co. v. Wadsworth*, Ms. 1021031 (Ala. Jan. 14, 2005), the owner of an auto-parts store entered into an alarm-service contract and his store later was burglarized and burned. An on-duty alarm-service employee only notified the police and the owner of the first of several indications from the motion detectors inside the store during the course of the evening. The alarm-service employee testified that she assumed the later signals were caused by the police checking inside the store after the first signal. She notified the police a second time after the monitors detected the fire at the store. The owner sued Fox Alarm and the case went to trial on the owner's claims of negligence, wantonness and breach of contract. At

trial, the owner moved for a JML with regard to Fox Alarm's argument that a limitation of liability clause capped the owner's recovery at \$250, but the trial court did not rule on that motion. The case went to the jury on the owner's negligence claim, only. Although Fox Alarm argued that the contract limited the owner's recovery to \$250, the jury was instructed that it could determine the amount of compensatory damages. The jury returned a verdict in the owner's favor for \$200,000.

In an opinion authored by Justice See, in which Chief Justice Nabers and Justices Houston, Brown and Stuart concurred, the Court reversed the judgment except for the \$250 allowed by the limiting clause. Echoing the opinion in *Sears Termite & Pest Control, Inc. v. Robinson*, 833 So. 2d 153 (Ala. 2003), the majority found that limitation of liability clauses are not per se against public policy. Of fur-

ther note, the majority pointed out that, "[a]t issue in this case [ . . . ] is a limitation-of-liability clause, not an exculpatory clause."

Justice Lyons, joined by Justice Woodall, dissented on the basis that Fox Alarm never requested a jury instruction limiting its damages to \$250. Justice Johnstone, joined by Justice Harwood, dissented on similar grounds, noting that at the charge conference Fox Alarm not only failed to ask for a such an instruction but actually objected to "any charge on damages" and "any charge on the issue of damages." Justices Johnstone and Harwood pointed out that Fox Alarm's objections "were themselves illegal because '[i]t is error for the trial court to leave the jury without instructions as to the proper measure of damages to be used in arriving at its verdict.'"

• **COMMENTS:** *It will be only a matter of time before you and your clients are faced with similar limitation-of-liability*

clauses. You will note that these clauses do not really limit anyone's "liability;" rather, they limit the amount of damages that a party may recover upon a finding of liability.

### **MEDICAL-MALPRACTICE ACT'S "PERIODIC-PAYMENT" PROVISION IS UNCONSTITUTIONAL**

A provision of the Alabama Medical Liability Act, Ala. Code § 6-5-543(b), said that future damages awarded to an injured patient should be reconfigured by the trial court so that they may be made in periodic payments. In *Lloyd Noland Hospital v. Durham*, Ms. 1030422 (Ala. Jan. 7, 2005), the entire Court agreed that this statutory provision violates Section 11 – the right to jury trial guarantee – of the Alabama Constitution. The per curiam opinion relied upon the decision in *Clark v. Container Corp. of America, Inc.*, 589 So. 2d 184 (Ala. 1991), which found that the periodic-pay-

ment scheme in Ala. Code § 6-11-3 (a part of the 1987 Tort Reform Act) violated Section 11 because, at the time the Alabama Constitution was adopted, it was the jury's function to reduce future earnings to present value. The defendant in *Lloyd Noland* did not argue that Clark should be overruled, but simply asserted that it somehow ought not to be followed in this case. The *Lloyd Noland* opinion rejected that argument and concluded that "all of § 6-5-543 violates the right to trial by jury guaranteed by § 11 of the Constitution of Alabama."

### **CASE OF FIRST IMPRESSION: "MAILING" A NOTICE OF CLAIM TO A CITY IS NOT THE SAME AS "FILING" THE NOTICE**

In order to file a suit in tort against an Alabama municipality, Ala. Code §§ 11-47-23 and 11-47-192 together require that the injured party must file a sworn claim with the city

clerk within six months of the injury. In *Perry v. City of Birmingham*, Ms. 1030957 (Ala. Jan. 7, 2005), Mr. Perry sued the city for injuries he sustained when his wheelchair overturned on an allegedly defective sidewalk outside the Social Security office. The city submitted an affidavit from its clerk stating that she had no record of any claim or lawsuit filed by Perry within six months of his injury. Perry offered a countering affidavit from his lawyer's secretary in which she stated that she had mailed Perry's verified notice of claim three days before the six-month period expired; the secretary's affidavit was attached to a copy of the verified claim. The trial court entered summary judgment in favor of the city. The trial court later denied Perry's "motion to reconsider," on the basis that "mailing is not the same as filing" a claim.

Justice Johnstone's opinion for a 5-0 Court

affirmed, noting that neither the Supreme Court nor the Court of Civil Appeals previously had decided what constitutes the "filing of a claim" with a municipality. The Court in this case found that "neither § 11-47-23 nor § 11-47-192 provides for 'service by mail' or 'filing by mail'" and that those provisions do not (as is the case in some other states) include provisions "that allow a construction recognizing a mailing as a filing." In Alabama, the *Perry* decision concluded, §§ 11-47-23 and 11-47-192 "require the receipt of the claim by the city clerk within the specified six months as a condition precedent to further prosecution of the claim in court" (emphasis added).

• **COMMENTS:** *The Court's construction of these statutory provisions is strict but not unexpected.*

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### OFFICIAL CRIME-SCENE PHOTOS NOT BARRED FROM DISCOVERY

It is fairly routine for investigating police officers and sheriff's deputies to make photographs of crime scenes or collision sites. Usually, an injured person can obtain access to these photographs by simply making a proper request and agreeing to pay for copies. However, in *Ex parte Sexton*, Ms. 1031677 (Ala. Dec. 30, 2004), the Sheriff of Tuscaloosa County sought a writ of mandamus directing the Circuit Court of the Bessemer Division of Jefferson County to set aside an order compelling the sheriff to release to Cole, a defendant in a civil action pending in that court, photos and other materials relating to the sheriff's investigation of a shooting incident in which Cole allegedly participated. Writing for a 9-0 Court, Chief Justice Nabers rejected the sheriff's argument that Ala. Code § 12-21-3.1 – which bars subpoenas for

investigative reports under many circumstances – establishes an absolute statutory privilege against producing these materials. The Court found that subsection "(c)" of the statute provides for discovery by a civil litigant of such materials, "upon proof by substantial evidence that the moving party will suffer undue hardship and that the records, photographs or witnesses are unavailable from other reasonable sources." Because Cole had made the proper showing that the crime-scene photos he sought were unique and were not available from any other source, the Court denied the writ sought by the sheriff.

### BUILDER MUST SHOW IT WAS A "LICENSED CONTRACTOR" TO FALL WITHIN BUILDERS' STATUTE

In 1994, the Legislature passed Act Number 94-138, which since has been codified as Ala. Code §§ 6-5-220 through 6-5-228; the

stated purposes were to provide a two-year limitations period and a 13-year statute of repose for civil actions against builders, architects, and engineers.

Justice Woodall's opinion in *Burkes Mechanical, Inc. v. Ft. James-Pennington, Inc.*, Ms. 1031114 (Ala. Dec. 30, 2004), in which six members of the Court concurred and two members concurred in the result, held that in order for a defendant "builder" to benefit from the statute of limitations contained in Ala. Code § 6-5-221(a), the builder must have been "licensed as a general contractor in the State of Alabama" at the time of the construction at issue. In this case, the builder argued in its appellate brief: "Of course, Burkes Mechanical is a licensed Alabama general contractor." However, the Court found: "The record contains no evidence of Burkes's status. Because Burkes has failed to satisfy its burden of showing it is

entitled to the benefit of § 6-5-221(a), we hold that the claims of Ft. James are not barred by the statute of limitations."

### • COMMENTS:

*Remember that a statute of limitations is an affirmative defense, for which the defendant bears the burden of pleading and proving. Here, Burkes failed to get away with "making it so by saying it's so."*

### "CRANMAN" ANALYSIS APPLIES TO POLICE OFFICER'S CONDUCT

A divided Supreme Court in *Swan v. City of Hueytown*, Ms. 1031058 (Ala. Nov. 5, 2004), addressed a case where a city was sued for assault and battery, false arrest, negligence and other claims arising out of its police officer's treatment of the passenger in a vehicle after a traffic stop. The dispatcher informed the arresting officer that there were outstanding warrants for the passenger, Swan; in fact

there were no such warrants for this particular person. The trial court entered summary judgment in favor of the city, on the basis of the "peace-officer immunity" afforded by Ala. Code § 6-5-338.

Justice Lyons, joined by Chief Justice Nabers and Justices Houston, Johnstone and Woodall, reversed and remanded, finding that Ala. Code § 6-5-338 by its terms "gives municipal law-enforcement officers the same immunity afforded 'officers of this state.' The rules regarding such immunity were restated in *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000). [ . . . ] Section 4 of the Cranman analysis affords immunity to officers 'exercising judgment in the enforcement of the criminal laws of this State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons.'" Under the Cranman analysis, the majority in *Swan* said, the critical consideration was whether the

Hueytown officer was "exercising judgment" in gathering information to be run through the NCIC database to look for outstanding warrants on the passenger. The majority then found:

"How an officer should proceed when gathering and relaying information in order to run an NCIC check on a suspect and how the officer should proceed in comparing the results of the NCIC check with the characteristics of the suspect are not the sort of judgment contemplated by the Cranman standard" (emphasis added).

The majority concluded that the conduct at issue in this case was not the type of "split-second" decision-making for which police officers are sometimes given immunity from civil liability. "Because [the police officer's] actions did not involve the judgment contemplated by Cranman, Hueytown is not entitled to immunity from those actions under § 6-5-338."

• **COMMENTS:** *This decision is yet another enlargement of the reach of the easily understandable guidelines set out in Ex parte Cranman.*

#### **MEDICAL LIABILITY ACT ONLY APPLIES TO TREATMENT OF LIVING PATIENTS**

Most of us believe that other folks cannot hurt us after we are dead. In a recent decision, the Alabama Supreme Court held that the Alabama Medical Liability Act ("AMLA") does not provide any special protection to a health care provider once the patient is dead.

Justice Harwood's opinion in *George H. Lanier Memorial Hospital v. Andrews*, Ms. 1021885 (Ala. Nov. 19, 2004), in which Chief Justice Nabers and Justices Johnstone and Stuart concurred and Justice See specially concurred, affirmed a judgment of \$200,000 in compensatory damages that were awarded to the par-

ents of a boy whose corneas were wrongfully removed after he died in the defendant hospital's emergency room. In this case, the majority noted that the AMLA "does not apply to all injuries caused by health-care providers, but only to 'medical injuries.'" Here, the patient was dead before the defendant's conduct occurred and the majority held:

"Consequently, the standard of care in the AMLA continues to dictate that a health-care provider must offer reasonable care, skill, and diligence 'to a patient.' In this case, it is plain that the complained-of actions were not performed in the course of providing health-care services to a patient. Furthermore, common sense dictates that a health-care provider cannot inflict a 'medical injury' upon a person who is already deceased. For these reasons, we hold that the AMLA does not apply to a health-care provider's

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actions in dealing with a deceased person, even when the deceased was a patient up until his death” (emphasis added).

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#### SHORT TAKES

In *Adcock v. Adams Homes, LLC*, Ms. 1030813 (Ala. Jan. 14, 2005), the defendant builder won a rather hollow victory in a case where the Supreme Court found that arbitration could be “mandatory” without being “binding.” The peculiar language in the new-home “warranty agree-

ment” required that the buyers participate in a pre-suit “conciliation process” by which controversies “may be resolved by arbitration” as a condition precedent to litigation. (Read your contract closely!)

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In *University of South Alabama v. Progressive Ins. Co.*, Ms. 1030955 (Ala. Dec. 30, 2004), a tortfeasor’s insurance company that promised to protect a hospital’s lien of \$57,097, then settled with the injured patient for \$6,000, was

found to have “impaired” the hospital’s lien and was ordered to pay the full amount of the lien to the hospital.

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In *Ex parte Gadsden Regional Medical Center*, Ms. 1030911 (Ala. Dec. 30, 2004), the Court held that a doctor who filed suit against a hospital for restricting his practice privileges was not at liberty to attach to his complaint copies of the hospital’s “peer review” records concerning him. The Court held that such

disclosure violated Ala. Code §§ 6-5-333 and 22-21-8, which render such records “confidential.”

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*Baker v. Metropolitan Life Ins. Co.*, Ms. 1031803 (Ala. Jan. 14, 2005), which reiterated that the fine print in an insurance policy is the only “representation” upon which an insured may “reasonably rely,” renews our belief and understanding that the people of Alabama should never put any stock in anything an insurance agent tells them. ■

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