WJR&B

Wallace, Jordan, Ratliff & Brandt, LLC

ALABAMA CONSTRUCTION LAW UPDATE

Below are recent court decisions affecting those dealing in the construction industry in Alabama. A full text of these and other decisions are available on the Wallace, Jordan, Ratliff & Brandt, LLC web site at **www.wallacejordan.com**. If you have any questions or comments about this or other matters, please contact **Larry S. Logsdon** by telephone at (205) 870-0555 or by e-mail to ll@wallacejordan.com.

Steele v. Walser, No. 1020652 (Ala. Oct. 31, 2003)
Arbitration; construction of a new house; interstate commerce; unconscionability; Maxine Walser sued Robert L. Steele, president of S.S. Steele and Company, Inc. (hereinafter "the company"), alleging fraud, mental anguish, and emotional distress arising from the construction of a new house. Steele filed a "Motion to Dismiss and Compel Arbitration," with supporting evidentiary submissions. Walser filed a response in opposition. The trial court entered an order denying Steele's motion.
HOLDING: The Supreme Court reversed. The Court concluded that Steele showed that the aggregate effect of the transaction evidenced by the construction and sales contract satisfied the Federal Arbitration Act's "involving commerce" test. The Court noted that although Walser argues that the scope of the arbitration agreement in the construction and sales contract is overly broad, she made no showing that it assigned the threshold issues of arbitrability to the arbitrator, that there was a lack of mutuality of remedies, that it set a limit on the amount the arbitrator could award, or that any other terms of the agreement were "grossly favorable" to the company. The Court further noted that Walser presented no evidence showing that the company had overweening bargaining power. Therefore, the Court rejected Walser's unconscion-ability argument.
http://www.wallacejordan.com/decisions/Opinions2003/1020652.htm

Clement Contracting Group, Inc. v. Coating Sys., L.L.C., No. 1021337 (Ala. Sept. 5, 2003)
Arbitration; Clement Contracting Group, Inc. is a general contractor. Coating Systems, L.L.C. is a painting subcontractor. According to Coating Systems' articles of organization, Mark Underwood is the sole member and the manager of the company. In February 2000, Clement and Coating Systems entered into a contract pursuant to which Coating Systems would be responsible for painting a building Clement was constructing. Underwood signed the contract with Clement, writing the word "member" under his signature. A dispute arose concerning the work performed by Coating Systems and the amount of payment due under the contract, and Clement initiated arbitration proceedings against Coating Systems and Underwood pursuant to an arbitration clause in the contract. Clement sought to have Coating Systems and Underwood held liable for breach of the contract. Coating Systems and Underwood then filed a complaint for a judgment declaring the parties' rights under the arbitration provision in the contract and an ex parte motion to stay the arbitration proceedings while the declaratory-judgment action was pending. They also asked the trial court to find that Underwood "is not personally liable and individually subject to the arbitration clause of said [contract] and that the dispute and arbitration is between Clement and Coating Systems." The trial court issued an order granting Coating Systems and Underwood's motion to stay the arbitration proceedings pending a resolution of the declaratory-judgment action. Clement then filed a motion to compel arbitration, a motion to dissolve the stay, and a motion for a summary judgment in the declaratory-judgment action. In response to Clement's motions, Coating Systems and Underwood filed a motion for a summary judgment. Clement filed a response and a brief in opposition to Coating Systems and Underwood's motion for a summary judgment. After a hearing on the motions, the trial court denied Clement's motions for a summary judgment and to compel arbitration. The trial court also entered a summary judgment in favor of Coating Systems and Underwood, concluding that "Underwood is not subject to arbitration in his individual capacity." The trial court further stated that "arbitration may proceed between [Clement] and [Coating Systems]." Clement appealed.
HOLDING: The Supreme Court affirmed.
http://www.wallacejordan.com/decisions/Opinions2003/1021337.htm

Harbar Construction Company et al. v. Robert Marion Willis and Catherine Willis., 2020372. July 25, 2003.
House purchasers brought breach of contract, breach of warranty, negligence, and wantonness action against building contractor. The Shelby Circuit Court, No. CV-02-527, denied contractor's motion to compel arbitration, and contractor filed notice of appeal. After appeal was transferred by the Supreme Court, the Court of Civil Appeals, Yates, P.J., held that purchase of house involved interstate commerce, for purposes of determining whether purchasers could be compelled to arbitrate their claims pursuant to the Federal Arbitration Act (FAA).

Board of Water & Sewer Comm'rs v. Bill Harbert Constr. Co., No. 1012198 (Ala. June 27, 2003)

Arbitration; Bill Harbert Construction Company ("Harbert") sued the Board of Water & Sewer Commissioners of the City of Mobile ("the Board"), Federal Insurance Company ("Federal"), and Sika Corporation ("Sika"). Harbert's various claims arose from its termination as contractor on two public works projects in Mobile involving the construction of water mains, sanitary sewers, and sewage pump stations. Harbert amended its complaint to add as defendants various project design engineers, subcontractors, and related insurers and to assert further claims against the Board. After further pleadings and extensive discovery, the Board filed motions "To Confirm and Enforce the Arbitrator's Decisions," and, in the alternative, to "Enforce Arbitration Concerning Contracts" ("the arbitration motions"). The Board asserted that the construction contracts it had entered into with Harbert, both of which incorporated paragraph 5.01 of the Standard Specifications for Water Mains, Sanitary Sewers, and Sewage Pump Stations ("the standard specifications"), vested authority in the project engineer to arbitrate the matter. The arbitration motions were briefed to a special master appointed by the trial court, and the special master issued a detailed report determining that the contracts did not contain an arbitration clause. The trial court entered an order adopting the findings of the special master, and the Board appealed.

HOLDING: The Supreme Court affirmed and held that the trial court did not err in denying the arbitration motions on the basis that the construction contracts, and specifically paragraph 5.01 of the standard specifications incorporated into those contracts, did not contain an arbitration clause. The Court noted that an agreement to arbitrate must be plainly expressed in the contract between the parties and that a contract may appropriately vest final authority to determine facts in a third party with technical expertise, but such an agreement ordinarily does not displace the authority of the courts to decide legal questions. The Court also noted that the standard specifications include section 7, titled "Legal Relations and Responsibility to Public," which contains a number of provisions discussing the responsibilities of the contractor, its surety, and the owner concerning legal actions (paragraph 7.10), discussing the legal liability of the Engineer and public officials specified in the contract (paragraph 7.15), and disclaiming any waiver of legal rights (paragraph 7.16). The Court concluded that such provisions are inconsistent with the argument of the Board.)

http://www.wallacejordan.com/decisions/Opinions2003/1012198.htm

Huntsville Utilities. v. Consolidated Constr. Co., No. 1020195 (Ala. May 23, 2003)

Arbitration; interstate commerce; Consolidated Construction Company ("CCC") and Huntsville Utilities entered into an agreement entitled "Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum." Pursuant to that agreement, CCC was to serve as the general contractor for renovations totaling $7,722,200 to the offices of Huntsville Utilities. The agreement contained an arbitration provision. CCC, a corporation organized under the laws of Delaware, subcontracted the roofing work to Andrew W. Tjelmeland d/b/a Stahl Sheet Metal ("Stahl"), a Tennessee sole proprietorship doing business in Alabama. Stahl did not perform any work in Alabama, however; it immediately subcontracted the roofing work to Phil Morgan Roofing Company, an Alabama sole proprietorship. CCC also hired a Florida firm, Conway Enterprises ("Conway"), to perform waterproofing at the project site. According to the record, all other subcontractors retained by CCC were based in Alabama. According to CCC, it encountered substantial construction problems, design errors, and poor site conditions, which required CCC to perform substantial additional work and for which CCC says it is entitled to additional compensation. CCC sued the architects. In January 2002, CCC amended its complaint to add as defendants Stahl (the original roofing subcontractor), Stahl's insurer, Bituminous Casualty Corporation ("BCC"), and Phil Morgan d/b/a Phil Morgan Roofing Company (Stahl's Alabama sub-subcontractor). Stahl is a Tennessee resident who was doing business in Alabama. BCC is a corporation organized under the laws of Illinois with its principal place of business in Illinois. Morgan is an Alabama resident. In May 2002, CCC added Huntsville Utilities and two of its employees, John Thomas and Jimmy Stanley, as defendants (hereinafter referred to collectively as "the Huntsville Utilities defendants"). A few months later, the claims asserted against all of the out-of-state defendants were settled or dismissed with prejudice. On June 19, 2002, the Huntsville Utilities defendants filed a motion to compel arbitration, relying upon the arbitration provision contained in the agreement between Huntsville Utilities and CCC. On July 29, 2002, CCC filed another complaint. In that complaint, CCC clarified its allegations against the architects, Huntsville Utilities, Thomas, and Stanley. On September 6, 2002, the Huntsville Utilities defendants filed the affidavits of Thomas and Stanley and various invoices from out-of-state suppliers in support of their motion to compel arbitration. On October 1, 2002, the trial court denied the motion to compel arbitration, relying upon the five factors adopted by this Court in Sisters of the Visitation v. Cochran Plastering Co., 775 So.2d 759 (Ala. 2000).

HOLDING: The Supreme Court affirmed the denial of the motion to compel arbitration. The Court declined to revisit Sisters of the Visitation's "substantial-effect" standard. The Court held that the circuit court did not err in holding that a renovation project involving a contractor incorporated in Delaware, three out-of-state subcontractors, two out-of-state insurers, and the purchase and shipment of materials from twenty different states did not substantially affect interstate commerce. The Court noted that interstate commerce was affected as a direct result of this transaction, but noted that materials ordered from out-of-state suppliers and shipped directly to the Huntsville project site from locations outside of Alabama accounted for only 3.4% of the total contract price of $7,722,200.)

http://www.wallacejordan.com/decisions/Opinions2003/1020195.htm

Lyons v. River Road Construction, Inc., No. 1012092 (Ala. Mar. 14, 2003)

Immunity; Ala. Const. art. I, §14; The Alabama State Port Authority contracted with Ben Radcliff Contractor, Inc. ("Radcliff") to construct a liquid-bulk terminal at the Theodore Ship Turning Basin located at the Port of Mobile. Radcliff entered into a subcontract with River Road Construction, Inc. ("River Road"), for the dredging portion of the project. River Road alleges that in developing its bid to Radcliff for the dredging it relied upon the soil-boring data in a report prepared by Southern Earth Sciences, Inc. The report was commissioned by the port authority, and it indicated that the material involved in the dredging work consisted of sand and clay. However, after River Road began dredging, it encountered a substantial presence of rock, which made the dredging work more difficult and more expensive. River Road alleges that when it became aware of the presence of rock in the area to be dredged it gave notice of the unforeseen conditions to Radcliff and the port authority. River Road completed the dredging work; it alleges that it incurred additional expenses of $1,108,944 in dredging the unanticipated rock. The port authority refused to pay River Road the additional expenses. River Road filed a complaint against the port authority with the State Board of Adjustment ("the Board") demanding payment of its additional expenses. The port authority filed with the Board a motion to dismiss the complaint for lack of jurisdiction. In its response to the port authority's motion to dismiss, River Road acknowledged that its action against the port authority could not be submitted to a court because it was constitutionally barred by the doctrine of State immunity. While its claim before the Board was pending, River Road sued James K. Lyons, in his official capacity as director of the port authority. River Road requested a declaration of its rights and further requested the court to compel Lyons to perform his "legal duty" to pay River Road for the additional expenses of $1,108,944. The Board subsequently dismissed River Road's claim against the port authority on the basis that it lacked jurisdiction of the claim. Lyons filed a motion in the circuit court to dismiss the complaint against him, arguing that River Road's action was barred by the doctrine of State immunity. The trial court entered an order denying Lyons's motion to dismiss.

HOLDING: The Supreme Court held that River Road's action is precluded by the doctrine of State immunity. Thus, the Court reversed the trial court's order denying Lyons's motion to dismiss.

http://www.wallacejordan.com/decisions/Opinions2003/1012092.htm

Dixon v. Board of Water & Sewer Comm'rs, No. 1012131 (Ala. Mar. 14, 2003)

Negligence; summary judgment; On November 21, 2000, raw sewage from a sewer system operated by the Board of Water & Sewer Commissioners of the City of Mobile ("the Board") was discharged through plumbing fixtures in Janice Dixon's home, flooding the house, running out the front door, and forcing her to evacuate the premises. Consequently, on March 9, 2001, Dixon sued the Board, alleging, among other things, that the Board was negligent in the design, maintenance, and operation of its sewage system, including a "lift station adjacent to [her home], so as to allow ... raw ... sewage to escape from the ... sewer system" and flood her home. The Board filed a motion for a summary judgment, and the trial court entered a summary judgment in favor of the Board.

HOLDING: The Supreme Court reversed the summary judgment. The Court conclude that Dixon presented substantial evidence in support of her theory that the backup was caused by a sewer-system malfunction at the lift station rather than a grease blockage as claimed by the Board.

http://www.wallacejordan.com/decisions/Opinions2003/1012131.htm

Ex parte Hudson, No. 1011148 (Ala. Mar. 14, 2003)

Immunity; In 1994, Russell Hudson was the purchasing foreman in the Mobile County School System's renovations department. In March 1994, the Mobile County School System solicited bids for the delivery and installation of bleachers in the gym at C.F. Vigor High School. The bleachers were not to be stationary; they were to pull out when necessary for seating and to close against the wall when more floor space was needed in the gym. The school system ultimately contracted with Garner & Associates, Inc., to deliver and install bleachers manufactured by Interkal, Inc. Once the school system had received bids from vendors, Hudson checked to ensure that the bids complied with the bid specifications and then made a recommendation to the school board as to which bid should be accepted. The school board made its decision, and once Hudson, or someone in his office, issued the purchase orders relating to the bleacher project,Hudson's work on the project ended. Hudson did not supervise the actual installation or maintenance of the bleachers at Vigor High School. Garner & Associates claims that in October 1994, in connection with the Vigor bleacher project, it sent Hudson a bleacher maintenance manual. Hudson stated in his deposition that he did not recall having received the manual, but that if he had received it, he would have passed it on to the project site foreman, Clayton Haggett. Hudson stated that, though no one has ever told him that it was part of his job to forward maintenance manuals to job sites, if he received a manual or other similar documentation relating to a project, he usually would pass it along to the site foreman as part of his job. On December 12, 1997, at the request of their gym teacher, Duane Haston and two other Vigor High School students tried to close the bleachers by pushing them towards the wall. The bleachers slipped off track and fell onto Haston, breaking his back. Haston, by and through his father and next friend Duane Haston, Sr., sued Russell Hudson and others alleging, among other claims, that Hudson had negligently inspected and maintained the bleachers at Vigor High School. Hudson and the other individual-school-system-employee defendants moved fora summary judgment on the ground that they were protected by State-agent immunity. The trial court entered a summary judgment in favor of all of the individual-school-system-employee defendants except Hudson.

HOLDING: The Supreme Court held that Hudson's activities are comparable to the activities referred to in Ex parte Cranman as a state agent's "exercising his or her judgment ... [in] ... allocating resources [or] negotiating contracts." The Court concluded that Hudson is entitled to State-agent immunity as to the claims that Hudson failed to properly

evaluate he bids for the bleachers and failed to inspect the bleachers. The Court held that Hudson was not entitled to immunity on the claim that Hudson's job included passing along the maintenance manual he received from Garner & Associates for the bleachers to the project foreman, that doing so was a ministerial duty, and that Hudson's failure to carry out this duty is negligent or wanton behavior.
http://www.wallacejordan.com/decisions/Opinions2003/1011148.htm

Lee v. YES of Russellville, Inc., No. 1011691 (Ala. Mar. 14, 2003)
Construction; voidness of contract with unlicensed contractor; A complaint was filed by YES of Russellville, Inc. ("YES") and Narendra Sheth against "Joseph Hemingway, individually, and d/b/a American Quality Service" ("AQS") (case no. CV-99-224) and a complaint was filed by "Joseph Hemingway, d/b/a American Quality Service," against YES and Sheth "to establish a lien" on property owned by YES and/or Sheth and seeking to recover $852,000 "for work and improvements done on the property of the defendant[s]," in counts for breach of contract and money "due on open account" (case no. CV-99-240). Community Spirit Bank ("the Bank") intervened. The actions were treated as though they were consolidated. YES and Sheth filed a joint motion for a summary judgment, arguing that Hemingway had failed to comply with the licensing requirements of Ala. Code §34-8-1 et seq., relating to general contractors, and, consequently, that the construction contract was unenforceable. Helen Lee moved to amend the complaint to substitute herself as plaintiff. She contended that AQS was a trade name under which she operated a sole proprietorship and that Hemingway had acted as her agent in dealing with YES and Sheth. It is undisputed that at all relevant times, Lee possessed a valid general contractor's license. The trial court granted Lee's motion to substitute herself as plaintiff and denied the summary-judgment motion. The trial court found "that Joseph Hemingway acted as the 'principal' and [was] in fact that individual acting as the general contractor responsible for the construction of the hotel in question in Russellville, Alabama." Consequently, the court held that the contract between YES/Sheth and AQS was void. The court entered a judgment in favor of YES, Sheth, and the Bank (the "Owners") and made the judgment final, pursuant to Ala.R.Civ.P. 54(b).
HOLDING: The Supreme Court held that the record amply supports the finding that Joseph Hemingway was doing business as American Quality Service in the construction of the hotel. Thus, the Court affirmed the judgment.
http://www.wallacejordan.com/decisions/Opinions2003/1011691.htm

Ex parte Stonebrook Development, L.L.C., No. 1010722 (Ala. Feb. 21, 2003)
Construction; statute of limitations for actions against professional architects, contained in Ala. Code §6-5-221; third-party indemnity claim; breach-of-warranty claim; Stonebrook Development, L.L.C. is a corporation that was formed by Bill N. Sanford for the purpose of establishing a new residential neighborhood. Sanford and Sanford, Bell & Associates, Inc. ("SBA") prepared a set of blueprints or plans for the construction of the project. Matthews Brothers Construction used those plans to prepare its bid for the construction of roadways and other improvements for Stonebrook's new residential-neighborhood project. Stonebrook awarded Matthews Brothers the contract and the two parties signed a contract dated June 1, 1994. Matthews Brothers' performance of its part of the construction of Stonebrook's residential neighborhood was delayed. Matthews Brothers completed its performance of the contract sometime in December 1994 and Stonebrook paid Matthews Brothers the contract amount in January 1995. In November 1995, Matthews Brothers performed additional work at the Stonebrook residential neighborhood in order to repair some portions of the roads it had constructed. Stonebrook argued that that work was 'warranty work' related to the original contract. Matthews Brothers considered the additional work necessary because of faulty road design by Sanford and SBA and other factors, and maintained that it was due an additional $42,049.96 for the additional work. Matthews Brothers filed an action seeking damages from Stonebrook, alleging open account, account stated, and work and labor done. Stonebrook answered and denied liability. Stonebrook also filed a counterclaim, alleging counts of breach of contract and breach of warranty. Matthews Brothers claiming negligent design of the roadway specifications and seeking indemnification later moved to add both Sanford and SBA as third-party defendants; the trial court granted that motion. Sanford and SBA moved to dismiss Matthews Brothers' claims against them. The trial court granted that motion and entered an order dismissing Sanford and SBA. Stonebrook moved for a partial summary judgment on its counterclaim alleging breach of contract. The trial court also granted that motion, entered a partial summary judgment in favor of Stonebrook, and awarded Stonebrook damages of $155,966.73. The remaining claims were then tried before the trial court. After receiving evidence ore tenus, the trial court entered a judgment finding in favor of Stonebrook on Matthews Brothers' claims. In that judgment, the trial court also found in favor of Stonebrook on its remaining counterclaim of breach of warranty against Matthews Brothers, and it awarded Stonebrook $27,604.50 as damages. Matthews Brothers appealed. The Court of Civil Appeals reversed the dismissal of Matthews Brothers' indemnity claim against Sanford and SBA, the partial summary judgment in favor of Stonebrook on its breach-of-contract (liquidated-damages) claim, and the trial court's judgment in favor of Stonebrook on its breach-of-warranty claim.
HOLDING: The Supreme Court affirmed the trial court with regard to the third-party indemnity claim and held that it was not time-barred. The Court held that the trial court's factual findings relating to the breach-of-warranty claim were against the great weight of the evidence presented at trial because the great weight of the evidence at trial demonstrated that the deficiencies in Matthews Brothers' work were the result of defects in the design specifications provided by Sanford and SBA.
http://www.wallacejordan.com/decisions/Opinions2003/1010722.htm

Ex parte Mountain Heating & Cooling, Inc., No. 1011835 (Ala. May 2, 2003) (plurality opinion)

Arbitration; ambiguous contract; Van Tassel-Proctor, Inc. ("VTP"), an Arkansas corporation, is the primary contractor for a Carmike Cinema construction project located at Springdale Mall in Mobile, Alabama. VTP contracted with Mountain Heating and Cooling, Inc. ("MHC"), a subcontractor, to do the heating, ventilation, and air conditioning work for the project. MHC is an Alabama corporation. The contract signed by the parties contained an arbitration provision that states, in pertinent part: "ARBITRATION: Subcontractor [MHC] agrees that all questions arising under this Subcontract shall be resolved in the first instance by Contractor's [VTP's] Project Manager. ... And if said dispute cannot be settled through direct discussions the parties agree to settle the dispute by arbitration under the Construction Industry Mediation Rules of the American Arbitration Association. Subcontractor agrees that it will reimburse, hold harmless and/or indemnify any attorney's fees and costs incurred by Contractor in connection with any dispute related to this contract, whether or not suit is filed. IN THE EVENT OF ANY LITIGATION ARISING HEREUNDER, THE CONTRACTOR AND SUBCONTRACTOR UNCONDITIONALLY AND ABSOLUTELY WAIVE ANY AND ALL RIGHTS TO TRIAL BY JURY." The parties struck through the last sentence, and Ted Van Tassel, president of VTP, and Paul James, president of MHC, initialed the change in the margin adjacent to that sentence, signifying agreement to the change at the time the contract was executed. MHC was not paid the final draw under its subcontract; it sued VTP to recover that amount. MHC filed a motion for a summary judgment based upon the contract. VTP then filed a motion to compel arbitration based upon the contract. The trial court entered an order compelling the parties to arbitrate. The Court of Civil Appeals affirmed.

HOLDING: The Supreme Court reversed. The plurality held that because the "arbitration" agreement was ambiguous as to whether the parties agreed
to arbitrate their disputes, a jury trial was required to resolve the issue of whether the parties agreed to arbitrate. The plurality opinion noted that the most glaring instance of ambiguity in the arbitration provision is the statement that "the parties agree to settle the dispute by arbitration under the Construction Industry Mediation Rules of the American Arbitration Association." The plurality opinion also states that it is curious that this sentence includes the statement that "the parties agree to settle the dispute by arbitration ...." The plurality opinion also wondered why the parties would bother striking the jury-waiver sentence if they had agreed to arbitrate disputes anyway. The plurality opinion also noted that a change in the contract from having Arkansas law apply to having Alabama law apply may indicate an intent not to arbitrate, because Arkansas law strongly favors arbitration, while Alabama law does not favor predispute arbitration agreement.

http://www.wallacejordan.com/decisions/Opinions2003/1011835.htm

Star Elec. Contractors, Inc. v. Stone Bldg. Co., Nos. 1012101 & 1012190 (Ala. May 2, 2002)

Indemnity; construction; This is the second time this case has been before us. See Stone Bldg. Co. v. Star Elec. Contractors, Inc., 796 So.2d 1076 (Ala. 2000) ("Stone I"). Stone, a contractor, asserted cross-claims against Star, its subcontractor, in an action filed against Stone by one of its employees, Dennis Cline, and his wife, for injuries Dennis suffered on the job site. Upon learning of the Clines' claims, Stone notified Star and requested that Star provide Stone a defense, pursuant to an indemnity agreement contained in the parties' contract. Star and its insurer, Pennsylvania National Insurance Company, refused to provide Stone a defense. Stone eventually entered into settlement negotiations with the Clines and notified Star of those negotiations; Star declined to participate in those negotiations. Stone settled the Clines' claims for $495,000. In its cross-claims, Stone contended that Star had breached three duties it undertook in its subcontract with Stone: the duty to obtain liability insurance covering Stone; the duty to indemnify Stone for sums it might pay (and, in fact, subsequently paid), in settlement of, or as damages for, claims for job-site injuries suffered by third parties like Cline; and the duty to indemnify Stone for the expenses of its defense of such claims. While the Clines' action against Stone was pending, the Clines sued Star directly, asserting claims of negligence and wantonness. Those claims were tried before a jury. At trial, the court granted Star a judgment as a matter of law on the wantonness claim and the jury returned a verdict in favor of Star on the negligence claim. Based on that verdict, the trial court entered a summary judgment for Star on Stone's claims for indemnification. Stone appealed from the trial court's summary judgment in favor of Star. The Stone I Court affirmed the summary judgment as to Stone's claim that Star had breached its duty to obtain liability insurance covering Stone, finding that Stone had waived the contractual requirement that Star obtain such liability insurance. Stone I, 796 So. 2d at 1089. However, the Stone I Court reversed the summary judgment as to Stone's claim that Star had breached its duty to indemnify Stone for the sums it had paid in settlement of the Clines' claims. The Stone I Court also reversed the summary judgment as to Stone's claim that Star had breached its duty to indemnify Stone for the defense of the Clines' claims. On remand Stone moved the trial court to enter a partial summary judgment in its favor on its claims for indemnity of the settlement amount and on its claims for indemnity of the costs and expenses of conducting its defense. In support of that motion, Stone submitted a copy of the opinion in Stone I, and an affidavit verifying the attorney fees and expenses incurred by Cincinnati Insurance Company, Stone's insurer, after Stone demanded indemnification from Star. the trial court entered a summary judgment in favor of Stone, awarding Stone the amount of its settlement with the Clines and the attorney fees and expenses incurred by Stone's insurer as documented in the affidavit submitted by Stone. The trial court adopted the proposed order drafted by Stone's counsel. The conclusions of law stated in that order purported to quote from and rely upon Stone I.

HOLDING: The Supreme Court held that the trial court erred in entering a summary judgment for Stone. The Court held

that the jury's finding that Star was not liable to the Clines under a theory of negligence could not resolve the issue whether Star was liable under the indemnity agreement, as the trial court had held in its original summary-judgment order. The Court held that because the trial court has not addressed whether Star's duty to indemnify Stone, under the language of the indemnity agreement and the facts of this case, has been triggered, genuine issues of material fact remain as to that issue. The Court further held that the trial court erroneously relied upon a misstatement of the law in entering a summary judgment in favor of Stone. In Stone I, the Court wrote that "when an indemnitor has refused to defend the claim and participate in the settlement of that claim, "the indemnitor [in this case, Star is bound by any good faith reasonable settlement, and the indemnitee [in this case, Stone] need only show potential liability." 796 So.2d at 1090. However, the trial court inadvertently changed the word "indemnitee's" to "its," and where the trial court should have concluded that "Star [the indemnitor] [was] precluded from contesting [Stone's, the indemnitee's] liability" for the claims settled with the Clines, the trial court improperly concluded that Star was precluded from contesting its own liability under the indemnification agreement. The Court reversed the trial court's summary judgment for Stone on its claims for indemnification. On Stone's cross-appeal asserting that the trial court improperly dismissed Stone's claims against Pennsylvania National Insurance Company, because the trial court dismissed the claims against Pennsylvania National based solely upon the summary judgment entered in favor of Stone, and because the Court have concluded that that summary judgment must be reversed, the Court also reversed that portion of the trial court's order dismissing Stone's claims against Pennsylvania National. The Court expressed no opinion on the merits of Stone's claims asserted against Pennsylvania National.
http://www.wallacejordan.com/decisions/Opinions2003/1012101.htm

Dickinson v. Land Developers Constr. Co., Nos. 1021276 & 1021277 (Ala. Nov. 7, 2003)
Statute of limitations; discovery rule; claims of breach of contract, fraud, mental anguish and emotional distress, negligent and/or wanton inspection, breach of the warranty of habitability, and breach of the implied warranty of merchantability arising from the construction of a house; claims of breach of contract, fraud, negligence, and negligence per se arising out of termite damage to a house; Douglas and Barbara Dickinson and Land Developers Construction Company, Inc. entered into a contract for the construction of a house. Cook's Pest Control, Inc. issued the Dickinsons a "Subterranean Termite Control Damage Replacement Guarantee" for this house on February 25, 1993. This guarantee was effective for one year and was renewable annually. Pursuant to this guarantee, Cook's provided an initial inspection and pretreatment of the Dickinsons' house against termites and conducted annual inspections thereafter. Those annual inspections checked, among other things, the moisture level of the house. The Dickinsons moved into their house on December 20, 1993. Shortly after moving in, the Dickinsons began to notice a number of problems with their house. In early January 1994, the Dickinsons provided Land Developers with a "punch list" of items that needed to be completed. On October 2, 1994, the Dickinsons sent Land Developers another list of items that still needed to be addressed. Six to nine months after moving into their residence, the Dickinsons discovered seals on certain of the windows were broken. On November 17, 1994, the Dickinsons' architect prepared a list of problems with the French doors in the house. In early 1995, the Dickinsons documented a leak in their "pool bath." On May 1, 1995, the Dickinsons wrote a letter to Land Developers stating that they would like Land Developers to address the noted problems as soon possible and listing seven areas of concern with the house. On May 13, 1995, the Dickinsons sent a memorandum to Land Developers concerning cracks in the driveway and a water leak under their driveway and asking when it would address the previously noted problems. The inspection report prepared by Cook's in 1995 noted that there was some water in the crawl space under the house and that somewood material was "below grade," i.e., below the ground level. However, the reports prepared by Cook's in 1996 through 2000 failed to note any water seepage; the 1996 report stated that everything "Looks good!" Furthermore, the 1996, 1998, and 1999 reports prepared by Cook's concurred with the 1995 report in stating that there was wood in the Dickinsons' house that was below the outside grade level, but the 1994, 1997, and 2000 reports indicated that there was no wood below the outside grade level. On April 26, 1996, the Dickinsons sent Land Developers a letter by certified mail; the letter outlined 11 residual problems with the house. Land Developers never responded to this letter. On October 30, 1999, the Dickinsons sent another letter via certified mail to Land Developers requesting that it fix several problems with the house. After Land Developers failed to respond to the October 30, 1999, letter, the Dickinsons hired a structural engineer, Joel Wehrman, to inspect their house. In his report, Wehrman found that there was a separation between the brick veneer and the doorframes of the French doors at the rear of the house. Wehrman opined that the separation was caused by the rotting of the wooden basement wall, which had resulted from the use of untreated wood in constructing the basement wall. Wehrman stated that the decay of the belowground wooden wall was inevitable. Wehrman also found that the use of the wooden wall resulted in a lack of lateral support for the house and could contribute to the separation of the superstructure from the foundation. In addition, Wehrman found that the driveway, walkway, and patio were cracking. Wehrman stated that this resulted from their having been constructed on fill soils, which had settled since construction. At Wehrman's suggestion, and with his oversight, the Dickinsons began the demolition and reconstruction of part of their house in February 2000. The cost of the demolition and reconstruction was $731,833.50. Before the demolition and reconstruction, no termite activity was reported and the moisture-content levels measured by Cook's in its annual inspections were never at or above 20% (a level of 20% or above would have indicated a greater chance of wood decay and insect infestation). During the demolition and reconstruction of the Dickinsons' house, however, Cook's discovered termite activity in the belowground wooden wall, which was located at the rear of

the house. After being informed by Cook's of the termite infestation, the Dickinsons hired a termite consultant to inspect their home. This consultant observed the termite infestation in the rear of the house and, after evaluating Cook's pretreatment of the Dickinsons' house, concluded that Cook's should have applied 600 to 700 gallons of the insecticide Dursban to the Dickinsons' house. The records maintained by Cook's reflect that it applied only 444 gallons of Dursban. On December 21, 1999, following receipt of the Wehrman report, the Dickinsons sued Land Developers in the Shelby Circuit Court, seeking damages for breach of contract, fraud, mental anguish and emotional distress, negligent and/or wanton inspection, breach of the warranty of habitability, and breach of the implied warranty of merchantability arising from the construction of the Dickinsons' house. On October 27, 2000, the Dickinsons sued Cook's in the same court, seeking damages for breach of contract, fraud, negligence, and negligence per se arising out of termite damage to their house. The actions were consolidated following a motion filed by the Dickinsons. Land Developers and Cook's both filed motions for a summary judgment; the trial court granted both motions, holding that the Dickinsons' claims against Land Developers and Cook's were time-barred.

HOLDING: The Supreme Court noted that the Dickinsons discovered a number of problems with their house at an early stage, including roof leaks, problems with the French doors and window seals, a leaking pool bath, water damage in parts of their home, and cracks in and moisture on the driveway. The Court held that insofar as the Dickinsons' claims against Land Developers arise out of these problems, they are barred by the two-year statutory limitations period of Ala. Code §6-5-221. The Court held that Land Developers failed to show that the problems the Dickinsons experienced with their house shortly after construction was completed would cause a reasonable person to discover the existence of the rotten belowground wooden wall or the allegedly improperly compacted fill soil. The Court held that the question of when the Dickinsons should have discovered the serious structural defects in their house, such as the rotten belowground wall and the allegedly improperly compacted fill soil, may not be decided as a matter of law, and a jury question exists as to when the Dickinsons discovered facts sufficient to maintain their claims against Land Developers. The Court affirmed the summary judgment in favor of Cook's.

http://www.wallacejordan.com/decisions/Opinions2003/1021276.htm

Wallace, Jordan, Ratliff & Brandt, LLC
Post Office Box 530910
Birmingham, Alabama 35253
Phone: (205) 870-0555 Fax: (205) 871-7534