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ALABAMA CONSTRUCTION LAW UPDATE

Below are recent court decisions affecting those dealing in the construction industry in Alabama. 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.

Walker Key Condominium Homeowners Ass'n, Inc. v.Washer-Hill & Libscomb, 2004 WL 2367957 (Oct 22, 2004).

In this case a condominium association brought an action against an architectural firm for negligence, wantonness, misrepresentation, breach of warranty, and breach of contract in connection with alleged defects in condominium units. The trial court granted the architectural firm's motion for summary judgment and the condominium association appealed. The Supreme Court, found that there was a genuine issue of material fact as to whether the architectural firm, which replaced the initial architect, was sufficiently involved in construction of first phase of condominium units and that precluded summary judgment. Therefore, the court determined that it would be for the jury to decide whether or not the architectural firm could be liable for the problems.

Anderson v. Amberson, 2004 WL 2201250, (Ala.Civ.App. 2004).

Homeowners brought a suit against the construction company that built their house, alleging breach of contract, fraud, and economic duress in connection with the contract to build the house. The contractor tried to have the case dismissed by claiming that the homeowners signed a mutual release and settlement agreement. The homeowners argued that they were induced by duress to sign the release and that the release should not be enforced. The dispute arose when the contractor filed a lien on the house related to amounts allegedly owed by the homeowner to the contractor. The parties agreed to a settlement to remove the lien which included payment of an amount by the homeowner in exchange for the contractor removing the liens and completing items on a punch list. The court found that the release would be enforced but that a jury would determine whether or not the defendant homebuilder had completed the items on the punch list.

Turner v. Westhampton Court, LLC, 2004 WL 2201933 (Ala. 2004).

This case involved a homeowners' claim involving synthetic stucco. The court considered and enforced a one year homeowner's warranty and limited the homeowner's warranty claims to problems that were discovered in the first year. That is, the court found that a contractor could limit the warranty it gave to purchasers by requiring purchasers to give written notice of any latent defect within the one year warranty period. Also, the court found as a matter of first impression, the purchasers effectively disclaimed implied warranty of habitability. Finally, the court appeared to recognize a cause of action for an implied duty of workmanship: The court found:

> The law implies a duty upon all contracting parties to use reasonable skill in fulfilling their contractual obligations. This obligation manifests itself in the implied warranty of workmanship. While improper or faulty construction constitutes a technical performance of the contract and may survive a pure breach-of-contract action, an action alleging the breach of an implied warranty, such as the implied warranty of workmanship, can overcome this obstacle.

Stovall v. Universal Constr. Co., Nos. 1021938 & 1021953 (Ala. Apr. 9, 2004)

(construction; personal injury or death to employee of subcontractor; duty; negligent inspection; In anticipation of the 30th anniversary of man's first landing on the moon, theU.S. Space and Rocket Center in Huntsville sought to construct and erect a replica of the Saturn V rocket, the rocket that carried the Apollo 11 astronauts ("the rocket"). The Alabama Space Leasing Corporation entered into an agreement with Universal Construction Company, Inc., d/b/a Turner-Universal ("Turner"), a Delaware corporation, pursuant to which Turner was to design and build the rocket replica. Turner subcontracted with Penwal Industries, Inc. ("Penwal"), a California corporation, for the assembly and erection of the rocket. The subcontract provided that Penwal was to "perform and furnish all the work, labor, services, materials, plant, equipment, tools, scaffolds, appliances, and other things necessary for ASSEMBLY AND ERECTION OF SATURN V ROCKET." (Capitalization in original.) The subcontract also stated that Turner, as the general contractor, would "furnish temporary lighting for night shifts sufficient to allow assembly." Finally, the subcontract listed several components and jobs for which Penwal was not responsible, including "[t]emporary lighting or electrical." Article XXIII of the subcontract is entitled "Liability for Damage and Personal Injury"; it reads in part: "The

Subcontractor [Penwal] hereby assumes entire responsibility and liability for any and all damage of any kind or nature whatever (including death resulting therefrom) to all persons, whether employees of any tier of [Penwal] or otherwise, and to all property caused by, resulting from, rising out of or occurring in connection with the execution of the Work .... [S]hould any claims for such damage or injury (including death resulting therefrom) be made or asserted, whether or not such claims are based upon [Turner's] or the Owner's [U.S. Space and Rocket Center's] alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of [Turner] or the [U.S. Space and Rocket Center], [Penwal] agrees to indemnify and save harmless [Turner] and the [U.S. Space and Rocket Center], their officers, agents, servants and employees from and against any and all such claims and further from and against any and all loss ... that [Turner] and the [U.S. Space and Rocket Center], their officers, agents, servants or employees may directly or indirectly sustain, suffer or incur as a result thereof ...." In addition, the subcontract required Penwal to obtain liability insurance. Penwal complied, obtaining insurance with Reliance Insurance Company ("Reliance"), a Pennsylvania corporation licensed to write policies in all 50 states. In order to fulfill its responsibilities under the subcontract, Penwal contracted with Labor Finders of Decatur, Inc., to supply Penwal with painters. One of thepainters Penwal hired through Labor Finders was Elee Stovall, the plaintiff's husband. On June 19, 1999, Elee's first day on the job, he, his first cousin Maurice Stovall, and Kendrick Fuqua (hereinafter collectively known as "the painters") arrived in the evening to begin work. After painting a particular section of the interior, the painters and some other men moved the ladder to another section of the interior. They did not secure the ladder with lashing once they moved it. It was around 10:00 p.m. when they moved the ladder, and the painters then took a break before starting work again. The painters allege that it was very dark when they arrived back at the rocket after their break. They had two lighting trees at their disposal with which to illuminate the inside of the rocket. Each lighting tree had one working and one dead bulb. The ladder was resting where the painters had left it; it had not been tied off or secured in any way. Maurice Stovall took charge of the lighting trees, shining them on the various places that needed additional painting. Fuqua climbed up one side of the replica, hooked his lanyard onto the safety cable, and began painting. Elee then climbed the untied ladder, attempting to hook his lanyard onto the safety cable. He missed the connection, and as he reached to rehook the lanyard, the ladder shifted and Elee fell from the ladder. The back of his head hit an interior cross beam, and he landed on the concrete floor. Elee subsequently died from the injuries he suffered in the fall. India Stovall, individually and on behalf of her minor children, David G. Stovall and Joel Stovall (hereinafter collectively referred to as "Stovall") sued Turner, alleging negligence/wantonness claims, a products-liability claim, and negligence/wantonness per se. On October 3, 2001, the Commonwealth of Pennsylvania declared Reliance to be insolvent. On May 9, 2002, Turner brought a third-party complaint against Penwal seeking indemnity and defense in the action filed by Stovall. Penwal filed a motion to dismiss, arguing that because Reliance was insolvent, Penwal had no obligation to indemnify or defend Turner. The trial court dismissed the third-party complaint against Penwal on December 17, 2002. On July 9, 2003, the trial court entered a summary judgment in favor of Turner on all counts in the action filed by Stovall. Because the summary judgment was a final judgment, see Rule 54(b), Ala. R. Civ. P., it also made appealable the trial court's December 17, 2002, dismissal of Turner's third-party complaint. Stovall appealed the summary judgment in favor of Turner; Turner appealed the dismissal of its third-party action against Penwal. HOLDING: The Supreme Court affirmed the judgment Stovall's appeal and reversed and remanded in Turner's appeal. (1) The Court held that Stovall failed to produce substantial evidence indicating that Turner reserved the right to control how Elee and his fellow painters used the lighting and failed to provide substantial evidence showing that Turner owed any duty to provide the painters adequate lighting. The Court noted that the very essence of the contractor/subcontractor relationship hinges on the contractor's allowing the subcontractor to do his work without interference. The Court concluded that the mere fact that Turner contracted to provide Penwal employees with lighting in no way translates into an automatic reservation of control over how that lighting is used. (2)_ The Court held that "general administrative responsibility for company-wide safety" is insufficient to find liability for failure to provide a safe workplace. The Court concluded that none of Stovall's allegations constitute substantial evidence indicating that Turner exercised any control over the painters' employment and, therefore, Turner owed Elee no duty to provide a safe workplace. (3) The Court denied that any work done by Elee on the night of his death constituted "intrinsically dangerous" work. The Court concluded that painting from a ladder is simply not dangerous work, so long as the most rudimentary care is taken. (4) The Court held that there was no substantial evidence indicating that Turner undertook to inspect the premises. (5) As to the third-party claim, the Court noted that it is possible that Turner could present a set offacts showing that it has incurred some out-of-pocket costs. It noted that under Alabama law, Turner is due to be indemnified for any legal costs it has incurred. The Court therefore reversed the trial court's judgment of dismissal.)
http://www.wallacejordan.com/decisions/Opinions2004/1021938.htm

Chandiwala v. Pate Constr. Co., No. 1021940 (Ala. Mar. 26, 2004)
(statute of limitations; construction; suppression, negligent installation, and negligent supervision; On August 11, 1992, Farook Chandiwala purchased a house constructed by Pate Construction Company ("Pate") and Dillard Plastering Company ("Dillard"). Dillard had applied an exterior insulation and finishing system ("EIFS") on the house when it was built. Dryvit Systems, Inc., manufactured the EIFS. EIFS, or "Dryvit," is a multilayered exterior wall system consisting of a finishing coat, a base coat, mesh, and insulation board, all of which are secured to plywood or substrate mechanically or with an adhesive. On April 20, 1998, Action Exterminators, Inc. ("Action Exterminators"),

the company that had issued a termite bond on the house, performed its annual inspection. Chandiwala received a report from the April 20 inspection that contained a notice stating: "ALL CUSTOMERS: If there is any water rot or earth/wood contact, it MUST be corrected or area IS EXCLUDED and possible non-renewal next year." Chandiwala's inspection report revealed that there was improper Dryvit-to-earth contact that needed correction. Upon receipt of this inspection report, Chandiwala telephoned Action Exterminators on April 25, 1998. Based upon his conversation with Action Exterminators, Chandiwala contacted numerous entities to inquire as to the details and costs of repairing the EIFS. One such person Chandiwala contacted was Ed Harris, who inspected the house on August 13, 1998, and reported that there were some moisture problems. On May 1, 2000, over two years after he had received the termite-inspection report, Chandiwala sued Pate; Dryvit Systems, Inc.; Apache Products, Inc., the distributor of the EIFS; and "Troy Dillard d/b/a Dillard Plastering Company." Thereafter, on June 23, 2000, at Chandiwala's request, an EIFS inspection performed upon his house revealed several areas with moisture readings from 40-100 percent. Dryvit Systems, Inc., subsequently settled with Chandiwala, and Apache Products, Inc., was voluntarily dismissed from the action. Pate and Dillard each filed motions for a summary judgment. Chandiwala consented to the entry of a summary judgment in favor of Pate and Dillard as to all claims except suppression, negligent installation, and negligent supervision, and as a third-party beneficiary to a contract. The trial court entered a summary judgment in favor of both defendants on all claims, based upon the two-year statute of limitations, Ala. Code §6-2-38(l). HOLDING: The Supreme Court affirmed. The Court concluded that the limitations period on Chandiwala's claims began to run on April 25, 1998, when Chandiwala discovered that the EIFS on his house was not properly sealed and needed to be cut back.

http://www.wallacejordan.com/decisions/Opinions2004/1021940.htm

Scott Bridge Co. v. Wright, No. 1021705 (Ala. Dec. 19, 2003)

(worker's compensation; retaliatory discharge; Scott Bridge Company hired Michael Wright on June 26, 1997, as a carpenter on a bridge-construction project in Georgia. When he was hired, Wright was a resident of Georgia. Wright claims that he suffered an on-the-job injury on March 18, 1998, while working on a bridge project in Augusta, Georgia. On or about September 28, 1998, Wright filed a claim for benefits with the Georgia State Board of Workers' Compensation. Wright never sought benefits under the Alabama Workers' Compensation Act. In October 1998, Scott Bridge assigned Wright to work at its office in Opelika, where he remained employed until he was discharged on April 21, 2000. Wright sued Scott Bridge in the Chambers Circuit Court on April 19, 2002, alleging that he was discharged in retaliation for having filed a claim for workers' compensation benefits. The action was transferred to the Lee Circuit Court. Scott Bridge filed a motion for a summary judgment on the ground that the prohibition set forth in Ala. Code §25-5-11.1 against terminating an employee solely because the employee has filed a workers' compensation claim does not apply to employees asserting claims under the workers' compensation laws of any other state. The trial court denied the motion. Scott Bridge then filed a motion asking the trial court to alter or amend the order, or, in the alternative, to certify the order for permissive appeal pursuant to Rule 5, Ala.R.App.P. The trial court entered an order stating that the case involved "a controlling question of law as to which there is a substantial ground for difference of opinion, specifically whether Ala. Code §25-5-11.1 recognizes a claim for retaliatory discharge where the plaintiff never sought workers' compensation benefits in Alabama, but rather sought workers' compensation benefits in Georgia pursuant to an injury occurring when the plaintiff worked and lived in Georgia." The trial court then amended that order, finding expressly that "Plaintiff never sought workers' compensation benefits in Alabama, but claims only that he sought workers' compensation benefits in Georgia." Continuing, the trial court observed that "Alabama law may recognize a claim for retaliatory discharge, pursuant to Ala. Code §25-5-11.1, based on the facts alleged by Plaintiff." Scott Bridge then filed with the Supreme Court a petition for permission to appeal pursuant to Rule 5, Ala.R.App.P. The Supreme Court granted the petition. HOLDING: The Supreme Court reversed the trial court's denial of the motion for summary judgment and rendered a judgment for Scott Bridge Company. The Court held that §25-5-11.1 quite plainly creates a remedy where an employee has been discharged solely for instituting or maintaining an action for workers' compensation benefits "under this chapter." The Court stated that the case for modifying §25-5-11.1 to embrace claims arising from an employee's discharge in Alabama as a result of the employee's asserting rights conferred by the workers' compensation laws of another state should be made in the Legislature.)

http://www.wallacejordan.com/decisions/Opinions2003/1021705.htm

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