A Reference Manual
For Alabama County Engineers

Fourth Edition

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AN INTRODUCTION TO A REFERENCE MANUAL FOR ALABAMA COUNTY ENGINEERS

"A Reference Manual for Alabama County Engineers" is designed as a legal resource tool for county engineers, covering many of the issues they encounter on a day-to-day basis. It is divided into two general sections – a written overview of the various issues and laws impacting the work of county engineers, with references to applicable statutes, cases and attorney general's opinions; and an appendix, which contains the case law referenced throughout the text. In an effort to make the manual more navigable, there is also a general subject index to help users identify the location of text and applicable references for the subjects covered in the manual.

As has been the case with the previous editions, it is intended that the manual will be updated periodically to include changes in the statutory law as well as relevant cases and attorney general's opinions interpreting or clarifying issues of importance to engineers. Any revisions will be forwarded to county engineers by the ACCA staff with instructions for placement in the manual. Whereas previous editions have included multiple volumes, we have made an effort to streamline the information into a more user-friendly form. As a result, the Fourth Edition is a single volume manual that includes a table of cases and a single appendix.

This manual was first introduced in 2000 under the leadership of then ACCA President Roger Hayes and ACEA President Randy Tindell. Like many of this organization's best accomplishments, the manual came to fruition due to the collaborative efforts of the Association of County Engineers of Alabama and the Association of County Commissions of Alabama. Its initial development was guided by many people – including Greg Bodley and Randy Tindell – who continue to be fixtures in the shaping and improvement of county engineering throughout state. Most notably, the text portion of the original manual was written by Mary Pons. I am proud to say she also led the development and completion of this newest edition. Her hard work, dedication, and knowledge of county law continues to be an asset for the Association, and we are thankful that, even in her retirement, she remains willing to lend her expertise to Alabama's 67 counties.

Sonny Brasfield
Executive Director
Association of County Commissions of Alabama

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CHAPTER ONE

THE COUNTY ROAD DEPARTMENT

I. GENERAL ORGANIZATION OF THE COUNTY ROAD DEPARTMENT

There is no general law in Alabama governing the structure of the county highway or road department, although *Ala. Code § 23-1-80* does grant counties general authority over the establishment, change, and maintenance of county roads and bridges and provides that:

> The county commissions of the several counties have general superintendence of the public roads, bridges and ferries within their respective counties . . . [and] may establish, promulgate, and enforce rules and regulations, make and enter into such contracts as may be necessary or as may be deemed necessary or advisable by such commissions to build, construct, make, improve and maintain a good system of public roads, bridges, and ferries in their respective counties, and regulate the use thereof.

See, also, Ala. Code § 11-3-10.

The structure of the county road department, which in many instances is determined by local law, varies considerably from county to county. However, in several counties the structure of the county and its system for supervising roads and bridges has been set by court order or resolution of the county commission.

There are three basic structures for county road supervision:

A. The district system, where each county commissioner receives a portion of the available county road funds and maintains his or her own road crews, equipment, etc. Under this system, each county commissioner plans, supervises, and controls the road activities for his or her individual district.

B. The unit system, where planning, purchasing, construction, and maintenance relative to the county road system is administered on the basis of the county as a whole, usually with the county engineer supervising and overseeing all projects and activities in the county highway department under the direction of the county commission.

C. The modified unit system, where a portion of the road and bridge work is performed on a unit basis and a portion maintained under the district system.

In an opinion issued to Rep. Randy Hinshaw, *AG's Opinion # 96-276*, the attorney general's office stated that it could not find anything that would not allow a county to adopt the unit system of road administration by resolution pursuant to its general powers for road superintendence. However, that office warned that there may be court orders impacting on this authority in a particular county.

The attorney general has also held that in a county which operates under the unit system, the county commission may set priorities for projects to be handled by the county highway department and its county engineer. *AG's Opinion # 2001-134*.

- However, a local law establishing a unit or district system may restrict this.

II. THE COUNTY ENGINEER

Ala. Code § 11-6-1 to § 11-6-6 addresses the office of county engineer. However, the process set out in the statute is not mandatory. See, *Ala. Code § 11-6-6.* In fact, many counties have local laws which provide specifically for the county engineer and/or the duties of that employee. Therefore, the provisions outlined herein may not apply in every county.

A. APPOINTMENT OF COUNTY ENGINEER

Ala. Code § 11-6-1 provides that the county commission is authorized to appoint a county engineer who shall serve full time. While employment contracts are not required for the employment of a county engineer, the county may enter into a contract of employment with the county engineer for a period of time not to exceed five years.

- Consulting engineers acting in the capacity of county engineer are not permitted.

Ala. Code § 11-6-5 states that the provisions of a civil service or merit system law governing employees of a county shall remain in full force and effect, meaning generally that any personnel rules or policies of the county will apply to the county engineer.

- Keeping in mind that the Code sections addressing the county engineer are not mandatory, a county may provide otherwise by local law, contract, or policy. See, *Hurley v. Marshall County Commission, 614 So.2d 427 (Ala. 1993)*.

B. QUALIFICATIONS OF COUNTY ENGINEER

Under *Ala. Code § 11-6-2*, the county engineer shall be a registered professional engineer in Alabama, with a minimum of three years experience in the maintenance and construction of highways and bridges. This experience requirement may be met with experience gained either before or after registration. *AG's Opinion # 2001-010*.

- For the qualifications and licensure requirements for a registered professional engineer in the State of Alabama, see, *Ala. Code § 34-11-1 et seq.*

C. COUNTY ENGINEER'S SALARY

1. Setting Salary

The county commission fixes the salary of the county engineer. See, *Ala. Code § 11-6-1.*

- The county engineer is exempt from the overtime provisions of the Fair Labor Standards Act, but the county commission may include such compensation in his or her salary if the payments are definite. *AG's Opinion # 89-451*.

2. State Contribution to Salary

The Alabama Department of Transportation may contribute 70% of the county engineer's salary pursuant to *Ala. Code § 11-6-4.* While not mandatory, this contribution is routinely made in all counties.

- The contribution shall not to exceed 70% of the state salary schedule under the professional civil engineer II classification, which is not a limitation on what the engineer's salary can be, but only on the amount the state will contribute.
- Pursuant to *Ala. Code § 36-27-9,* this contribution includes the employer contribution to the Retirement Systems of Alabama in counties participating in that system.
- The Department may discontinue payments after 30 days' notice in writing to the county commission and the county engineer unless otherwise agreed to in a written contract with the county entered upon the records of the county commission.
- There is no requirement that the county engineer be qualified as a land surveyor in order to receive state participation in his or her salary. *Ala. Code § 11-6-2*.

D. COUNTY ENGINEER'S DUTIES

The general duties of the county engineer are found in *Ala. Code § 11-6-3*, and, subject to the approval and direction of the county commission, include the following:

1. Employ, supervise, and direct assistants as are necessary to construct and properly maintain the county's roads and bridges.
2. Perform such engineering and surveying services as may be required to prepare necessary maps, plans, and records.
    - Certain surveys can only be performed by a licensed surveyor under *Ala. Code § 34-11-1 et seq.*, and the county engineer must be a licensed land surveyor to perform these surveys. *AG's Opinion # 99-59*.
3. Perform such other duties as are necessary and incident to the operation of the county highway system as directed by the county commission.

In addition to the duties set out in *Ala. Code § 11-6-3*, the county engineer has other statutory duties – some of which will be discussed in more detail in other chapters of this manual. Some examples are:

1. Where the municipal planning commission is responsible for the regulation of subdivision development within their jurisdiction, the county engineer shall certify that the municipal planning commission has approved the plat for recording. *See, Ala. Code § 11-52-30(g).*
2. Where the county regulates subdivision development, the county engineer oversees the development for compliance, reviews all plats and plans, and makes recommendations to the county commission regarding approval. *See, Ala. Code § 11-24-1 et seq.*

3. The county engineer shall approve all aerial photographs or maps of land areas in the county prior to recordation in the probate office. *See, Ala. Code § 35-2-80 to § 35-2-81.*

4. Where the county has adopted a logging notice ordinance pursuant to *Ala. Code § 23-1-80.1*, the county engineer shall oversee for compliance with the requirements of the law.

Many counties have local laws which further provide for the duties of the county engineer.

III. ENGINEER INTERNS

Alabama's law also provides for employment of engineer trainees by the county commission. See, *Ala. Code § 11-6-20 to § 11-6-25.* These personnel are now generally known as engineer interns in line with the law dealing with the licensure and regulation of professional engineers and land surveyor. *See, Ala. Code § 34-11-1 et. seq.*

A. APPOINTMENT AND QUALIFICATIONS

Under *Ala. Code § 11-6-20*, the county commission is authorized to appoint an engineer trainee as an assistant to the county engineer, who shall devote his or her full time to the duties of that office.

- The engineer trainee is considered a county employee in all respects. *Ala. Code § 11-6-24.*

Ala. Code § 11-6-21 provides that the trainee shall be a graduate engineer and a certified engineer intern in good standing, which is defined in *Ala. Code § 34-11-1(2)* as:

> A person who has qualified under [Section 34-11-4(2)], and who, in addition, has successfully passed a board approved examination in the fundamental engineering subjects as provided in Section 34-11-6, and who has been certified by the board as an engineer intern.

Ala. Code § 11-6-21 does provide that if no such candidate is available, the county may appoint a non-graduate certified engineer-in-training in good standing.

B. SALARY

Ala. Code § 11-6-23 provides for the Alabama Department of Transportation to contribute up to 50% of the annual salary of an engineer trainee upon application of the county commission and upon approval of the Transportation Director.

- The amount paid by the state may not exceed 50% of the state salary schedule under the graduate civil engineer classification.

- However, in the case of an assistant who has served at least one year as an engineer trainee and has qualified as a registered engineer, the state may pay 50% of the state salary schedule under the graduate registered engineer classification.

- The amount paid by the Department of Transportation shall not include retirement contributions, social security, unemployment, or other benefits.

C. DUTIES OF THE ENGINEER TRAINEE

Ala. Code § 11-6-22 provides that, subject to the approval and direction of the county commission, it shall be the duty of the engineer trainee to assist the county engineer in all duties of the county engineer as prescribed by law or as directed by the county commission. He or she shall also perform such other duties as necessary and incident to the operation of the county highway system.

CHAPTER TWO

CREATION, VACATION, AND ANNEXATION OF COUNTY ROADS

There are several methods by which a county road is created or vacated. The determination of whether a road is a county road is frequently essential when considering such issues as whether or not the county is liable for damages, whether the county has the authority or duty to maintain a road, and whether or not use of the road can be regulated by the county governing body.

This chapter deals with the procedures and requirements for the creation and vacation of county roads and outlines the distinction between public roads, private roads, and county (or county-maintained) roads. Subsequent chapters will discuss the construction and maintenance of county roads and other related issues, such as county work on private roads, regulation of public roads, and the construction of roads within subdivisions regulated by the county.

I. CREATION OF PUBLIC OR COUNTY-MAINTAINED ROAD

The question of whether a road is public or private is a common issue of dispute and/or concern. And not all public roads are county-maintained roads. Resolution of the issue of who "owns" the road is often critical, such as when a county is considering whether it can or must maintain a road. There is little statutory law specifically addressing what constitutes a county road. However, there are some cases discussing this issue and there are several attorney general's opinions which set out the general guidelines for making the factual determination of whether a road is public or private and whether it is a county road which the county commission is responsible to maintain.

As discussed in more detail below, a county road is established in one of three ways:

- By a regular proceeding for that purpose (as where the county has constructed or built the road for public use).
- By a dedication and acceptance of the road by the county commission.
- By prescription.

See, e.g., Auerbach v. Parker, 544 So.2d 943 (Ala. 1989). See, also, AG's Opinion ## 2002-146; 89-338; and 89-299.

Whether a road is a public road and/or a county road is a factual determination to be made by the county commission. *AG's Opinion ## 2005-120 and 94-148*. However, this question frequently becomes a matter of litigation. See, *Tucker v. Moorehouse, 58 So.3d 1261 (Ala.Civ.App. 2010)*, for a good discussion of evidence to consider in making the determination of whether a road is a public road.

The Supreme Court has held that the county must be joined as a party where determination of whether a road is public or private might affect not only the rights of litigants but also the rights of members of the public to use the road, the duty of the county to maintain it, and the liability of the county for failure to maintain it. *Allbritton v. Dawkins, 19 So.3d 241 (Ala.Civ.App. 2009); Boles v. Autery, 554 So.2d 959 (Ala. 1989). See, also, Burnett v. Munoz, 853 So.2d 963 (Ala.Civ.App.2002).*

- In *Boles* and similar cases, the Court has held that if the county is not joined as a party in the lawsuit, neither the county nor other members of the public are bound by the court's ruling.

- This principle has also been applied in some cases involving efforts to vacate a road by abutting landowners. See, e.g., *Holland v. City of Alabaster, 566 So.2d 224 (Ala. 1990).*

A. PUBLIC/COUNTY ROAD ESTABLISHED BY COUNTY

As noted above, one method for establishing a county road is the construction of the road by the county for public purposes. There are many factors that impact and affect the construction of county roads. A detailed discussion of these issues and the statutory provisions addressing construction of roads is found in Chapter Three of this manual.

B. DEDICATION OF ROADS

Black's Law Dictionary defines "dedication" as, "The donation of land or creation of an easement for public use." Dedication does *not* create a county road, but merely a road that may be used by the public even if it remains privately owned. *See, e.g., Blair v. Fullmer, 583 So.2d 1307 (Ala. 1991). See, also, AG's Opinion ## 97-77 and 88-173.*

The most typical circumstance where this occurs today is newly-constructed roads in a subdivision development. The developer will construct the roads (hopefully pursuant to county subdivision regulations) in conjunction with the construction of homes in the development. The developer generally then asks the county commission to accept the road into the county road system.

It is important to keep in mind that dedication of a road to public use does ***not*** by itself create a county road. There must be an acceptance of the road by the county commission, which has broad discretionary authority under *Ala. Code § 23-1-80* to determine which roads it will accept and use as "county roads". *See, e.g., AG's Opinion ## 2003-254 and 88-173.* As the Supreme Court of Alabama explained very well in *Chalkley v. Tuscaloosa County Commission, 34 So.3d 667 (Ala. 2009),* since acceptance of a dedication constitutes the assumption of responsibility for the property in question, a grantor (e.g., a developer) cannot automatically impose such responsibility on the public through his or her dedication of the property.

- The acceptance of the road by the county governing body is not necessary to establish dedication to the public if the statutory procedures are followed. *Harper v. Coats, 988 So.2d 501 (Ala. 2008).*

- And approval of a recorded subdivision plat does ***not*** amount to acceptance of the roads as county roads nor impose upon the county a duty to maintain the road. *See, e.g., Chalkley v. Tuscaloosa County Commission, supra; Blair v. Fullmer, supra.*

Legally, the county commission may decline to accept a road that has been "dedicated" to public use as a public road even if the road is built to proper standards.

- Keep in mind that, once accepted, the county has a duty to maintain that road in a reasonably safe condition for travel.
- Where the county has subdivision regulations or "road acceptance" policies, roads should only be accepted into the county road system if those regulations or policies have been followed in the construction and maintenance of the road.

There are two legally-recognized methods for the establishment of public roads through dedication by landowners – statutory dedication and common law dedication. Each method is outlined below.

1. Statutory Dedication

Statutory dedication of roads is addressed in *Ala. Code § 35-2-50 to § 35-2-52*, which provide, in general, the following:

a. Anyone desiring to subdivide his or her lands into lots must have the lands surveyed, and "shall cause a plat or map thereof to be made."

b. The plat must be certified by a land surveyor and a certificate must be signed by the owner or his agent.

c. The plat, with the certificate and acknowledgement, shall be recorded in the probate office.

After there has been a proper dedication, that dedication is irrevocable and cannot be altered or withdrawn except by statutory vacation proceedings. *Gaston v. Ames, 514 So.2d 877 (Ala. 1987). See, also, Pritchett v. Mobile County, 958 So.2d 349 (Ala.Civ.App. 2006).*

And where there are questions about whether a road has been dedicated to public use, the burden of proof lies with the party asserting dedication and the dedication must be demonstrated by affirmative evidence. *See, Montabano v. City of Mountain Brook, 653 So.2d 947 (Ala. 1995).*

- Substantial compliance with the statutory requirements constitutes a valid dedication. See, e.g., *Harper v. Coats, supra.*; *Montabano v. City of Mountain Brook, supra.*

2. Recording of Plats

It is important to note that no map or plat of any subdivision shall be recorded, and no property sold until and unless it has been submitted to and approved by the proper entity, either the municipal planning commission for subdivision development under its regulations or the county engineer for development regulated by the county. *See, Ala. Code § 11-52-30(g) and Ala. Code § 11-24-1 et. seq*. Additionally, in counties which regulate subdivisions, the owner(s) of land to be subdivided must comply with the county's regulations prior to recording the plat. (See, Chapter Nine re: subdivision regulations.)

- The acknowledgment and recording shall be held as a conveyance of the portions donated or granted to the public. In other words, once the plat or map is recorded in the probate office, the streets included are held to be dedicated to the public. *McClendon v. Shelby County, 484 So.2d 459 (Ala.Civ.App. 1985). See, also, Harper v. Coats, supra.*

- The mere approval of the plat is not an acceptance of the proffered dedication and imposes no burden on the governmental body. *See, e.g., Chalkley v. Tuscaloosa County Commission, supra; Cottage Hill Land Corp. v. City of Mobile, 443 So.2d 120 (Ala. 1983*). *See, also, AG's Opinion # 2014-042.*

- The Alabama Court of Civil Appeals has held that where a record map is used in conjunction with a deed of conveyance and there is discrepancy between the map and the deed, it is the terms of the deed which control, even though the map may have been recorded prior to the deed. *Bradley v. City of Trussville, 527 So.2d 1303 (Ala.Civ.App. 1988).*

3. Common Law Dedication

The Supreme Court of Alabama has authorized the inclusion of a road into the county road system by common law dedication. *Hall v. Polk, 363 So.2d 300 (Ala. 1978). See also AG's Opinion # 83-396.*

Common law dedication consists of acts indicative of the owner's intent to dedicate property to public use and an acceptance by the public.

- The owner must unequivocally intend to create a public right exclusive of his or her own.

- The intent to dedicate may be shown by a deed to an individual where the owner declares part of his or her land reserved to a public use.

C. ACCEPTANCE OF ROADS

As discussed above, a dedicated road does not become a county road until and unless it is accepted by the county commission. *See, e.g., Chalkley v. Tuscaloosa County Commission, supra; Blair v. Fullmer, supra.*

1. The county may, within its discretion, accept dedicated roads into the county road system pursuant to its statutory authority over the county's roads. *See, AG's Opinion ## 89-338 and 89-299.*

2. There must be a clear acceptance and assent, as by resolution, before a road dedicated by a private landowner (such as a subdivision developer) can be considered a county road. *AG's Opinion ## 96-61; 89-338; and 83-396.*

- The mere fact of dedication does not impose a duty on the county to maintain the road and a grantor cannot automatically impose such responsibility on the public through his or her dedication. *See, Blair v. Fullmer, supra.; Chalkley v. Tuscaloosa County Commission, supra.*

- Acceptance of a dedication is equally as important as the dedication, and a dedication is incomplete without acceptance. *Baldwin County Commission v. Jones, 344 So.2d 1200 (Ala. 1977). See, also, AG's Opinion # 2014-042.*

- This same principle would apply to a "dedicated" easement included in a plat or deed. *AG's Opinion # 97-249.*

3. The county is not required to accept roads which do not meet their minimum standards. *See, e.g., AG's Opinion ## 2003-254; 89-338 and 88-173.*

    - This is true regardless of whether or not the county has adopted written subdivision regulations.

    - It is recommended that the county establish specific policy and standards for the acceptance of roads. *See, AG's Opinion # 83-396.*

    - If the county has established guidelines for acceptance of a road, those guidelines must be met before the road is accepted by the county. *AG's Opinion # 2001-231.*

    - The state may take over a private road if the county chooses not to accept it and the state determines that the greater good would be served. *AG's Opinion # 2003-254.*

4. It is also important that the county not maintain any road until and unless it has been formally accepted as a county road.

    - A county may pave a road if it has been dedicated and accepted, but it is a violation of *Section 94 of Alabama's Constitution* to pave or make repairs on a private roadway or drive. *AG's Opinion # 2002-130.*

D. CREATION OF PUBLIC OR COUNTY ROAD BY PRESCRIPTION

A road can also become a public road (or county road) by prescription. This can be a very difficult determination to make, and must be looked at on a case-by-case basis. The attorney general frequently states that this determination must be made by the county. Unfortunately, it is often decided by the courts.

See, *Smyth v. Bratcher, 962 So.2d 842 (Ala.Civ.App. 2006)* for a very good discussion of evidence to consider in determining whether a road has become a public road by prescription.

Some things to consider in determining whether a road has become a public or county road by prescription are:

1. Length of Time Road Used by the Public

As a general rule, an open, undefined roadway continuously used by the public without let or hindrance for a period of 20 years becomes a public road by prescription. *Suttle v. Tucker, 398 So.2d 266 (Ala. 1981). See, also, AG's Opinion ## 2005-120; 94-185 and 89-338.*

- Where these circumstances exist, there is a presumption of dedication. *Osborn v. Champion et al., 892 So. 2d 882 (Ala. 2004).*

- However, this presumption does not apply to wooded or unimproved lands. *Osborn v. Champion et al., supra.*

2. Use of the Road by the Public

In determining whether a public road has been created by prescription, the consideration is the character of the use rather than the frequency that controls. *AG's Opinion # 2005-120. See, also, Laney v. Garmon, 66 So.3d 766 (Ala.Civ.App. 2010).* Some examples include:

- Is the road used as a mail or school bus route?

- Is the road used by the general public or only adjoining landowners?

3. Maintenance and Condition of the Road

Whether or not the county has provided maintenance of the road over the years will be a strong consideration, but not necessarily determinative.

- County maintenance is strong evidence that a road is a public road, but maintenance is not essential to this determination. *See, e.g., Davis v. Linden, 340 So.2d 775 (Ala. 1976). See also AG's Opinion ## 2005-120; 2002-146; 89-338 and 94-148.*

4. Maps and Deeds

Evidence from maps and deeds showing the road as public or private can be important.

- However, one should not rely on a tax assessor's map to the extent that it overlooks other compelling evidence. *Williams v. Nearen, 540 So.2d 371 (Ala. 1989). See also, AG's Opinion ## 94-185 and 91-379.*

5. Position of Property Owners

The use of the road must be unobstructed. Therefore, if a property owner attempts to limit or prohibit use of the road, or if he or she authorizes use but makes clear that it is with permission and he or she is not relinquishing ownership, the road would not likely be viewed as a public road created by prescription.

- Roads are frequently used as matter of convenience without any intention on the part of landowners to dedicate or give up their lands for public use. *AG's opinion # 2005-120.*

6. Location of Road

Where the road runs over unimproved or turned out lands, there is a presumption that the use is permissive rather than adverse, regardless of the time of use. *Osborn v. Champion, supra.*

E. PRIVATE ROADS

The law provides for the county commission to recognize a private road up to 15 feet in width upon a person's application. *Ala Code § 23-1-130 to § 23-1-131.* The person applying is responsible for keeping the road open and in repair. There is no specific definition of a "private road".

- In *Thompson v. Champion, 500 So.2d 1048 (Ala. 1986)*, the Supreme Court stated that this law was passed "to allow an individual to establish a private road across the land of another by applying to the county commission" and that such road is not required to meet statutory standards of a public road or highway.

II. ROAD CLOSINGS

There are several Code provisions addressing road closures.

A. CLOSING BY COUNTY COMMISSION

Ala. Code § 23-1-3 authorizes counties, acting through the county commission and duly authorized employees, to close public roads and, where possible, to make detour roads when deemed necessary or advisable due to road work. The state, acting through Alabama Department of Transportation, has the same authority.

Counties (and the state) may also, by resolution, prohibit or restrict the operation of vehicles upon any roads "whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights reduced." *Ala. Code § 32-1-3.*

- All restrictions must be posted with appropriate signs, and the resolution "shall not be effective until or unless such signs are erected and maintained".

- Since this procedure requires a resolution, it would appear that the county engineer does not have authority to impose such restrictions without action by the county commission.

The county governing body is also granted extraordinary power and authority during an emergency to act as necessary to protect the public peace, health, and safety, and to preserve the lives and property of the people. *See, Ala. Code § 31-9-10.*

- This section does not speak specifically to road closings. However, such authority can certainly be implied where deemed necessary for the protection of citizens.

B. ARE YOU REALLY "CLOSING" THE ROAD?

It is important to distinguish between road "closings" and advising citizens of weather-related or other emergency conditions making the road temporarily "impassable". As noted above, "closing" a county road requires affirmative action by the county commission, along with signage – and barricades – making clear that use of the road is prohibited. These actions are generally not realistic when a road becomes

dangerous because of weather conditions or other emergency circumstances. In these instances, the county typically does not take action to prohibit access to the road or roads through the placement of barricades or signage, but should take action to publicly discourage use of the road or roads during or after the storm.

To address these issues, a group of county engineers, emergency management directors, and attorneys developed a suggested procedure for counties to utilize when there are weather-related or other conditions resulting in the county commission making a blanket announcement to the public regarding the imminent dangers in traveling on county roads. This suggested policy (found at the end of this chapter) has been approved by the ACCA and ACEA Boards of Directors as a recommended procedure for counties to utilize during emergency conditions where travel on county roads should be discouraged.

C. ROAD CLOSING BY STATE

State troopers may close roads immediately by barricading them when they become dangerous on account of weather, road damage, or other cause. *Ala. Code § 32-5-16*. Under this section, the state trooper shall immediately notify the Alabama Department of Transportation of the danger and the road remains closed until the hazard has been corrected and the road is ordered reopened by the state transportation department.

III. VACATION AND ABANDONMENT OF ROADS

Ala. Code § 23-4-1 et seq. sets out the procedure for the vacation of a public road by the county or by petition of abutting landowners. *See also AG's Opinion # 89-338.* The Alabama Legislature rewrote this law in 2004 to eliminate a hearing in probate court when the vacation is initiated by the county commission and to make procedures for vacation virtually identical whether initiated by the governing body or adjoining landowners. *See Act No. 2004-323.* The law was further amended in 2014 to establish some special rules for a few special and non-typical circumstances. *See, Act 2014-333*, discussed in more detail below.

In addition to *Ala. Code § 23-4-1 et seq.*, *Ala. Code § 35-2-54 to § 35-2-55* addresses vacation of platted streets or alleys by abutting landowners. Also, *Ala. Code § 11-3-10* provides that counties possess the authority to establish, change, or discontinue roads, bridges, causeways, and ferries within the county.

The courts have generally disfavored vacation of roads and have required strict compliance with the statutory procedures. *Holland v. City of Alabaster, supra; Fordham v. Cleburne County Commission, 580 So.2d 567 (Ala. 1991); Bownes v. Winston County, 481 So.2d 362 (Ala. 1985). See also AG's Opinion # # 96-61 and 89-338.*

- A public road cannot be lawfully disposed of unless it is properly vacated or abandoned. *Perkins v. Shelby County, 985 So.2d 952 (Ala.Civ.App. 2007).*

- The interests of adjoining or nearby landowners will be carefully scrutinized by the courts to ensure that they have convenient and reasonable egress and ingress to and from their property. *Ala. Code § 23-4-20. See also, Jackson v. Moody, 431 So.2d 509 (Ala. 1983); Booth v. Montrose Cemetery Association, 386 So.2d 774 (Ala. 1980).*

- Public necessity is a strong consideration in upholding a vacation approved by the governing body. *City of Mobile v. Pinto Island Land Co., 5 So.3d 1248 (Ala.Civ.App. 2007).*

The attorney general's office has held that vacation procedures should be followed when a street is being changed to a dead end street if private landowners have property abutting the portion of the street to be closed. *AG's Opinion # 99-191*.

- However, citing *Holland v. City of Alabaster, supra*, that opinion also states that, although vacation of roads is disfavored, the private rights of abutting owners is subordinate to the public right and the closing of a road may be justified on the ground of public necessity. *AG's Opinion # 99-191. See, also, City of Mobile v. Pinto Island Land Co., supra.*

The attorney general has also held that once the county has assented to the vacation of a road, it has no authority to rescind its resolution. Therefore, if after closure, the county desires to "reestablish" the road, it must do so by dedication and acceptance or by statutory procedures. *AG's Opinion # 94-195*.

A. VACATION BY COUNTY

Ala. Code § 23-4-1 provides that streets, alleys or other highways (in other words, county roads) may be closed and vacated "upon the application of the county in which they are situated" where the street, alley, or highway is not located within a municipality.

The procedures for vacation are found in *Ala. Code § 23-4-2* and outlined below:

1. When the county commission proposes to vacate a public road, it must schedule a public hearing prior to taking final action on the issue.

    - There is no requirement that the public hearing be scheduled separately from a county commission meeting.

    - However, the decision on the proposed vacation must be made at a regularly scheduled county commission meeting.

2. The county commission must give at least 30 days prior notice of the scheduled hearing on vacation in each of the following ways:

    a. Publication in a newspaper of general circulation "in the portion of the county where the street lies" once a week for four consecutive weeks.

    b. Posting notice on a bulletin board at the courthouse.

    c. Mailing notice to any abutting landowners.

    d. Mailing notice to any entity known to have facilities or equipment (such as utility lines) within the road's public right-of-way.

3. The notice from the governing body shall describe the road it proposes to vacate and provide the date, time, and location of the meeting on the issue.

- The Supreme Court has held that the 30-day time period to appeal vacation of a road or alley does not apply where any abutting landowner is not given proper notice. *Barry v. Drennen, 982 So.2d 478 (Ala. 2007).*

4. Any citizen alleging to be affected by the proposed vacation may file a written objection to the vacation or request to be heard at the public hearing.

5. With one exception discussed below, where commissioners are elected by single-member districts, the motion to approve vacation must be by the district commissioner where the road lies.

6. If the commission votes to vacate the road, it shall adopt a resolution to be filed in probate court. The resolution shall:

   a. Describe with accuracy the road to be vacated.

   b. Give the names of abutting landowners affected by the vacation.

   c. Set forth that the vacation is in the public interest.

7. Notice of the vacation shall be published once in a newspaper in the county no later than 14 days after the resolution to vacate is adopted.

8. The vacation divests all public rights and liabilities in the road (including any prescriptive rights).

   - Title to the road vests in the abutting landowners, ***but*** entities with utility lines, equipment, and facilities in place at the time of vacation may continue to maintain, extend, and enlarge their lines, equipment, and facilities as if the vacation had not occurred.

   - The general rule is that the land reverts to the original owner. *See, e.g., Keeton v. Kelly Co., 47 So.3d 1262 (Ala.Civ.App. 2010).*

The vacation of a public road shall not deprive other property owners of any right they have to convenient and reasonable means of ingress and egress to and from their property. If necessary to avoid this, the county must dedicate another road affording that right. *Ala. Code § 23-4-2(b).*

- Ownership of abutting property is not a requirement for standing to appeal a vacation under *Ala. Code § 23-4-5. Crossfield v. Limestone County Commission, 164 So.3rd 547 (Ala. 2014).*

- Reasonable means of ingress and egress does not necessarily mean the preferred route of certain persons when there are other roads available. *See, Elmore County Commission v. Smith, 786 So.2d 449 (Ala. 2000).*

And the vacation will not be deemed perfected if there is not strict compliance with all of these statutory procedures. See, *Fordham v. Cleburne County Commission, supra.*

B. VACATION BY ABUTTING LANDOWNERS UNDER ***ALA. CODE § 23-4-20***

As noted above, *Ala. Code § 23-4-20*, as amended in *2004*, provides that the notice and hearing procedures for vacating a road at the request of abutting landowners are now the same as procedures used when vacation is initiated by the governing body. To initiate action, the abutting owner or owners file a written petition with the county commission requesting vacation of the road.

1. Public Hearing Requirement

There is no legal requirement for the county commission to take action on a petition for vacation submitted by abutting landowners. However, following passage of *Act 2014-333*, *Ala. Code § 23-4-20(a)* now requires that the county commission set a public hearing on the request for vacation within 100 days from the date the petition is received.

- Notice of the hearing shall be provided in the manner required for notice of meetings under the Open Meetings law.
- The notice must describe the road or portion of the road the petitioners are requesting be vacated.
- A copy of the notice shall be mailed to any abutting landowner at least 30 days prior to the scheduled hearing.
- A copy of the notice shall also be mailed at least 30 days prior to the hearing to any entity known to have facilities or equipment (such as utility lines) within the public right-of-way of the road or portion of the road where vacation is requested.

2. Procedures and Effect of Vacation

As noted above, the county commission is ***not*** required to take action on the petition following the public hearing. However, if the commission elects to take action, it shall follow the procedures it would follow in the event the vacation was initiated by the commission.

- If the county commission approves the vacation, it shall adopt the resolution as required in *Ala. Code § 23-4-2*, file it in probate court, and publish notice of the vacation in the newspaper.
- And the vacation divests all public rights and liabilities in the road, vesting title in the abutting landowners.
- Utilities have continued access to maintain, extend, and enlarge their lines, equipment, and facilities as if the vacation had not occurred.

As with vacation initiated by the county commission, a vacation granted in response to a petition by abutting landowners shall not deprive other property owners of their right to convenient and reasonable means of ingress and egress to and from their property.

3. Special Procedures when Petition Filed by Family Members

As mentioned above, *Ala. Code § 23-4-20(c)* requires that, in counties where the commissioners are elected by single member districts, any motion to vacate a road or a portion of a road pursuant to a petition filed by abutting landowners must be made by the district commissioner in the district where the road lies. However, *Act 2014-333* creates a special procedure for such motions if the petition is filed by ***all*** members of the same immediate family.

- For the purposes of this section, "immediate family" means spouse, parent, child, sibling, or grandparent.

Under these special procedures, if the county commissioner from the district in which the road or portion of the road is located does not move to vacate within 100 days following the public hearing, the issue may be placed on a regular county commission meeting agenda if, within 30 days:

a. A written request to place the issue on the agenda is submitted to the county commission chair by a majority of other members of the county commission ***and***

b. A copy of the written request is delivered to the commissioner in whose district the road or portion of the road is located at the same time that the written request is submitted to the chair.

This procedure may only be used to place the issue on the agenda of a ***regular county commission meeting***. However, when the issue is placed on the agenda under this procedure, a motion to approve the vacation may be made at the meeting at which the issue is debated by one of the members of the commission who requested the matter be placed on the agenda.

C. VACATION BY ABUTTING LANDOWNERS UNDER ***ALA. CODE § 35-2-54 et seq.***

The owner or owners of lands abutting any street or alley shown by any map, plat or survey, whether or not executed and recorded, may vacate the street or alley through written instrument recorded in the same manner as conveyances of land.

- The requirements and procedures are virtually identical to those set out in *Ala. Code § 23-4-20.*
- The petition and hearing may not be necessary since the county commission's assent is not granted pursuant to *Ala. Code § 23-4-2*, but under this section.
- The assent of the county commission is only required if the street or alley has been or is being used as a public road. *Booth v. Montrose Cemetery Association, supra.*

D. GENERAL PROCEDURE FOR APPEAL OF VACATION

Ala. Code § 23-4-5 authorizes any party affected by the vacation of a public road to appeal the county commission's decision to Circuit Court.

1. The appeal must be filed within 30 days of the governing body's decision to vacate the road.

- The 30-day time period to appeal vacation of a road or alley does not apply where any abutting landowner is not given proper notice of the governing body's consideration of vacation. *Barry v. Drennen, supra.*

2. The appeal will not suspend the effect of the vacation unless the appealing party posts bond in an amount determined by the circuit judge.

3. Either party may appeal the circuit court's decision to the appellate courts.

   - And ownership of abutting property is not a requirement for standing to appeal a vacation. *Crossfield v. Limestone County Commission, supra.*

E. SPECIAL APPEAL RULES FOR VACATING CERTAIN UNPAVED ROADS

There is no general right of appeal where the county commission takes no action or fails to act on a petition to vacate a road submitted by abutting landowners. However, *Act 2014-333* sets out a special right to appeal to the circuit court if the county commission denies or fails to act within 100 days on a petition to vacate an unpaved road or alley filed by ***all*** owners of property abutting ***all*** sides of an unpaved road or alley from its beginning to the place where the road or alley ends. *Ala. Code § 23-4-20(d).*

- The petition must be filed by ***all*** property owners abutting ***all*** sides of the unpaved road or alley from its beginning to the place where the unpaved road or alley ends.

- This special right of appeal does not apply when the unpaved road or alley ends along a body of water.

Where an appeal has been filed under these circumstances, the county commission shall be granted an opportunity to present evidence establishing why the unpaved road should not be vacated prior to any order for vacation being issued by the court.

The court may only issue an order for vacation upon an affirmative finding that:

1. ***All*** owners of the property abutting ***all*** sides of the unpaved road from its beginning to its end have joined as plaintiffs; ***and***

2. Vacation of the unpaved road or alley will not deprive other property owners of any right they may have to convenient and reasonable means of ingress and egress to their property.

In the event the court grants the petition for vacation, the order shall include a specific finding that the county is divested of all public rights and liabilities in the unpaved road or alley.

- The plaintiffs shall be required to post signs along the unpaved road or alley providing notice that the unpaved road or alley is privately owned and ***not*** maintained by the county.

- Vacation of the unpaved road or alley shall not take effect until and unless the signs are posted.

F. VACATION BY CIRCUIT COURT

Ala. Code § 35-2-58 to § 35-2-61 authorizes the circuit court to vacate a road, and set out the procedures for such an action. Any person owning lands abutting the street or alley to be vacated may file the civil action, but all owners of land abutting the street or alley shall be made a party. In fact, the Supreme Court of Alabama has held that this method still requires consent of all abutting landowners. *Turner v. Hoehn, 494 So.2d 28 (Ala. 1986)*.

- The municipality (or the county if the street is not within municipal limits) shall be made a party defendant.

The proceedings are handled like all civil actions, and appeals may be filed under the rules of civil procedure. If the final judgment grants the petition, the petition and final order shall be recorded in the office where the map, plat, or survey showing the roads, streets or alleys are recorded, and the order shall not be final until this is done. The party filing the petition is responsible for the recording fees.

G. VACATION OF ROADS WITHIN MUNICIPALITY

Municipalities are governed by the same statutory procedures as counties for vacating streets within their jurisdiction. *Ala. Code § 23-4-1 et seq.*

- These procedures may not be used to vacate a county road which lies partially within the corporate limits of a municipality. *AG's Opinion # 94-160*.

- If the road is partially a city street and partially a county road, vacation can only be accomplished by procedures involving both governing bodies. *AG's Opinion # 94-236*.

H. VACATION OR ABANDONMENT OF ROADS BY PRESCRIPTION

In addition to statutory vacation of roads, it is possible for a road to be vacated or abandoned by prescription. This is frequently a difficult case to prove and will be carefully scrutinized by the courts. Unfortunately, there are no hard-and-fast rules regarding how a road is abandoned by prescription and the appellate courts are frequently split on the issue. For a good review of the cases and issues involved in determining whether a road has been abandoned by prescription, see *AG's Opinion # 2002-146*.

The Supreme Court, in *Walker v. Winston County Commission, 474 S.2d 1116 (Ala. 1985)*, noted that a public road may be abandoned in one of several ways:

1. Through statutory vacation procedures.

2. Through nonuse for a period of twenty years.

3. Where one road replaces another.

    - In this instance, abandonment can take place by nonuse for a period of less than 20 years. *See, e.g., Floyd v. Industrial Development Board of Dothan, 442 So.2d 927 (Ala. 1983).*

- Decrease in use due to a new road is probably not sufficient alone. *Fox Trail Hunting Club v. McDaniel, 785 So.2d 1151 (Ala.Civ.App. 2000). See, also, Andrews v. Hatten, 794 So.2d 1184 (Ala.Civ.App. 2001).*

The county should be very careful in attempting to assert that a county road has been abandoned by prescription. In fact, it is recommended that, where the county desires to be relieved of responsibility for a public road, it satisfy the statutory procedures for vacation of the road to eliminate any doubt regarding the county's position with regard to the road. *See, AG's Opinion # 96-246*.

Generally, a road may be abandoned by nonuse for a continuous period of 20 years. *See, e.g., Bownes v. Winston County, supra*. However, the Supreme Court of Alabama has also held that there can be abandonment by nonuse for a shorter period of time, such as when there has been construction of a new highway replacing the road. *Floyd v. Industrial Development Board of Dothan, supra. See, also, Bownes v. Winston County, supra*.

As noted above, the courts look at vacation with disfavor, and will strictly construe efforts to vacate. In the case of vacation by prescription or abandonment, the burden of showing abandonment is on the party who asserts that the public has lost or surrendered their rights to use of the road. *Floyd v. Industrial Development Board of Dothan, supra*.

There are many different factual circumstances that may be considered by courts reviewing this issue – many of which are similar to the determination that a road has become a public road by prescription. *(See, Section I, D above.)* Some examples are:

- Whether or not the county has maintained the road. The failure of county authorities to keep a road in repair or the fact that it is unsafe for travel are not, taken alone, sufficient to show the road has been abandoned. *Auerbach v. Parker, supra. See also AG's Opinion ## 2002-146 and 94-148. See also, Fox Trail Hunting Club v. McDaniel, supra.*

- Evidence of a deed, conveyance, plat, or map indicating that the road has been abandoned (even if not properly recorded). *See, e.g., Bownes v. Winston County, supra*.

- Regularity with which a road is used by the general public or by owners of land in the area. However, decrease in travel does not work as an abandonment so long as it is open for public use generally and is being used by those who desire or have occasion to use it. *Fox Trail Hunting Club v. McDaniel, supra*.

- Construction of a new highway replacing the road. *See, e.g., Fox Trail Hunting Club v. McDaniel, supra; Floyd v. Industrial Development Board of Dothan, supra; Bownes v. Winston County, supra*.

- Whether or not a gate or blockade has been erected across the road. In *Auerbach v. Parker, supra*, the Supreme Court rejected this fact as controlling where there was evidence that there was no interruption of its use by those travelling the road. See, also, *Walker v. Winston County Commission,supra*.

- Fact that the county does not consider the road a county road and has not maintained it is insufficient to prove abandonment of the road. *Laney v. Garmon, supra.*

IV. COUNTY ROADS ANNEXED INTO MUNICIPALITY

The question of who controls a county road once it is annexed into a municipality is complicated and has been the issue of much controversy and litigation. The statute addressing this issue was amended in 1995 in an effort to clear up some of the problems and relieve the county of some responsibility for roads annexed into a municipality. And there were additional technical amendments to the law passed in 2015, aimed mostly at making the language in the statute more "user-friendly". *See, Act 2015-53.* However, many issues remain unanswered and it is important to understand and follow the statutory requirements and procedures regarding annexed roads.

The 1995 amendments to *Ala. Code § 11-49-80* were enacted in part in response to the Supreme Court of Alabama's holding in *Yates v. Town of Vincent, 611 So.2d 1040 (Ala. 1992).* In that case, the plaintiff in a negligent maintenance case had argued that both the county and the town were responsible for the annexed road and that the city could be sued for damages resulting from negligent maintenance. However, the Supreme Court held that there is no provision in Alabama's law allowing for "joint control" of a road, and that since the statutory procedures designed to allow a municipality to assume control of a county road annexed into its jurisdiction had not been followed, the county retained full responsibility for the road. In effect, the Court ruled that the procedures set out in *Ala. Code § 11-49-80 and § 11-49-81* must be strictly followed before a county is relieved from responsibility for the road.

A. ANNEXATIONS AFTER JULY 7, 1995

Ala. Code § 11-49-80 and § 11-49-81 set out specific procedures for the municipality to assume control and responsibility of an annexed road. Under *Ala. Code § 11-49-80* as amended in 1995, the municipality generally assumes control and responsibility of a county road annexed into its corporate limits for any annexations that have or will take place ***after July 7, 1995***,, provided any of the following apply:

- The county controlled and maintained the road for a period of one year prior to the annexation.

- The municipal planning commission approved the construction of the road.

    -- And this applies even if the road has been maintained by the county for less than a year.

In addition to roads within the annexed property, if annexation results in a county road being outside the corporate limits of the municipality but bounded on both sides by the corporate limits, the county commission shall consent to the annexation of that road by the municipality. Once consent is given, the municipality shall annex that road and assume responsibility for the road.

The municipality does not assume responsibility for any roads which were not the responsibility of the county prior to the annexation. And nothing shall require the county to assume responsibility for any public road in the annexed area that was not a county-maintained road prior to the effective date of the annexation. See, *Ala. Code § 11-49-80(c)*.

B. ANNEXATIONS PRIOR TO JULY 7, 1995

Unfortunately, for roads annexed ***prior to July 7, 1995***, the entity responsible for the road prior to annexation retains full responsibility for the road until and unless the statutory procedures for assuming responsibility and control have been satisfied. *See, AG's Opinion ## 2000-07 and 93-298.* This generally means that counties are still responsible for some roads within a municipality.

C. AGREEMENT BETWEEN THE COUNTY AND ANNEXING MUNICIPALITY

In *McCool v. Morgan County Commission, 716 So.2d 1201 (Ala.Civ.App. 1997),* the Alabama Court of Civil Appeals carved out what is, in effect, a narrow exception to the requirement for strict compliance with the above-referenced statutory procedures discussed in *Yates.* In *McCool*, the statutory procedures had not been satisfied, but it was undisputed that the municipality had exercised sole authority for the road since annexation, and both the municipality and the county acknowledged that the road had been the municipality's responsibility since annexation. In this instance, the Court found that the entities had exercised consecutive, rather than concurrent control over the road, and ruled that the county was not responsible for maintenance of the road. ***Keep in mind that this holding will have very narrow applicability and should not be relied upon heavily***.

McCool does make clear that a municipality may assume responsibility for a road in ways other than by resolution – as by agreement with the county or by assuming exclusive control through actions.

- In opinions finding that under the facts presented, a municipality had not assumed responsibility for a road annexed prior to 1995, the attorney general has acknowledged (but not necessarily applied) this principle. See, *AG's Opinion ## 2003-034 and 2002-277.*

Ala. Code § 11-49-80(f) specifically provides for the county and municipality to enter into agreements regarding road responsibility following an annexation, stating that:

> Nothing contained in Sections 11-49-80 and 11-49-81 shall prohibit a county and municipality from entering into a mutual agreement providing for an alternative arrangement for responsibility of public streets lying within the corporate limits of an incorporated municipality.

D. ATTORNEY GENERAL'S OPINIONS

There are several attorney general's opinions discussing issues related to road responsibility following annexation. See, for example:

- *AG's Opinion # 93-298* which overrules all opinions released prior to the Supreme Court's holding in *Yates.*

- *AG's Opinion # 94-89* holding that these road responsibility procedures apply to roads *and* bridges.

- *AG's Opinion # 96-206* discussing a municipality's possible responsibilities even where the county bears principal responsibility.

- *AG's Opinion # 97-02* discussing the statute's applicability after the 1995 amendments.

E. ANNEXATION EFFECT ON POLICE JURISDICTIONS

While the alteration of a police jurisdiction does not directly affect the county's responsibility for county-maintained roads, there have been changes relating to police jurisdictions as a result of recently-enacted laws. These changes may affect the county commission's role in these areas and could impact activities of the county engineer.

Act 2015-361, passed during the 2015 Legislative Session, provides that, effective August 1, 2015, any alterations to a police jurisdiction based upon the annexation or de-annexation of property shall be effective only once a year on the first day of January for any annexation or de-annexation finalized on or before the preceding October 1. *See, Ala. Code §§ 11-40-10 and 11-52-30.*

- This same change applies to alterations of the jurisdictional territory of a municipal planning commission. *(See, Chapter Nine, Section I, A, 6.)*

Act 2016-391, which took effect on May 10, 2016 makes three significant changes to *Ala. Code § 11-40-10*, the general law related to police jurisdictions.

1. Effective May 10, 2016, a change in the boundaries of a municipality (as through annexation) will not automatically alter the municipality's police jurisdiction. Pursuant to *Act 2016-391,* any extension of the police jurisdiction now requires an affirmative vote of the municipality before taking effect.

2. Prior law provided that all municipalities with a population of 6,000 or more had a 3 mile police jurisdiction beyond the boundaries of the municipality. With the passage of *Act 2016-391*, a municipality with a population of 6,000 or more may now adopt an ordinance reducing the police jurisdiction to 1½ miles beyond the boundaries of the municipality.

    - Once a municipality has adopted this ordinance, it cannot be amended, altered or repealed except by local law.

3. *Act 2016-391* also in effect eliminates the police jurisdiction when any noncontiguous property has been or is annexed into a municipality (an island annexation). The amended law provides that the municipal governing body shall not exercise any jurisdiction or authority in any portion of the police jurisdiction extended as a result of the annexation.

V. NOTICE AND EFFECTIVE DATE OF ANNEXATION

In 2006, the Alabama Legislature enacted a law which requires a municipality to notify the Legislative Reapportionment office within seven (7) days of any annexation or deannexation. *See, Ala. Code § 11-42-7.* This was intended to provide counties with a good resource for knowing what property actually lies

within a municipality and what roads have been "taken over" by the municipality pursuant to *Ala. Code § 11-49-80.* It is unclear whether municipalities have routinely complied with this statutory requirement.

Act 2015-361, discussed in the previous section, should provide better information regarding annexations by requiring the municipality to submit a map showing the boundaries of the municipal limits -- including annexations and police jurisdictions -- to the Atlas Alabama state website (www.atlasalabama.gov) no later than January 1 of each year.

As discussed above, this law also provides that, effective August 1, 2015, any alterations to a police jurisdiction or municipal planning commission based upon the annexation or de-annexation of property shall be effective only once a year on the first day of January for any annexation or de-annexation finalized on or before the preceding October 1. *See, Ala. Code §§ 11-40-10 and 11-52-30.*

VI. COUNTY ROADS FOLLOWING INCORPORATION

The attorney general's office held that the 1995 amendments to *Ala. Code § 11-49-80* deal only with annexation, not incorporation. Therefore, a municipality incorporated after July 7, 1995 is not required to assume responsibility for public streets where responsibility has been vested in the county commission. *AG's Opinion ## 2000-07 and 97-02*.

However, in 2004, the Alabama Legislature amended the statute setting out procedures for incorporation of a new municipality, and included a provision that, effective August 1, 2004, any newly incorporated municipality shall assume responsibility for all roads within its corporate limits within two years of the incorporation being final. *Ala. Code § 11-41-1*.

- This act has prospective application only, meaning there is still no statutory responsibility for a municipality incorporated prior to August 1, 2004 to ever assume responsibility for county roads that were included in the boundaries of the municipality at the time of incorporation.

MODEL ROAD CONDITIONS POLICY

Following the winter storms of 2014, the Association asked its attorneys, county engineers and emergency management directors to take a look at the common practice of making public announcements that county roads are "closed" during ice and/or snow storms. The focus of the review was whether the terminology of "closing" county roads presents both a misunderstanding by the public as well as possible liability exposure for the county.

The major concern is vested in the provisions of Alabama law that establish a formal procedure to be followed when the county wishes to actually "close" a county-maintained road. This process involves the holding of a public hearing and the posting of notice at the road. Obviously, during times of inclement weather the county commission is not following this procedure because it is impractical. It could be argued, however, that the county's use of the term "closed" somehow attaches an obligation to follow the legal procedures established in the law.

For this reason, the groups developed a suggested procedure for counties to utilize when there are weather or other conditions resulting in the county commission making a blanket announcement regarding the use of county roads. The policy focuses on announcing that the county-maintained roads are "impassable" rather than using the confusing legal term of "closed."

This policy has been vetted through the Association of County Engineers of Alabama, Alabama Association of Emergency Managers and approved by the Board of Directors of the Association of County Commissions of Alabama. It is recommended that counties review the attached policy with your county attorney and strongly consider adopting and utilizing this procedure when weather conditions dictate that motorists should stay off the county roads.

The policy also provides an announcement that should be made when the weather conditions have improved. This announcement also contains a specific warning that the county cannot guarantee that all the conditions on all county roads are safe.

Policy on Public Notice Regarding Blanket Conditions of County Roads and Bridges

PURPOSE:

This policy shall be utilized by the ________ County Commission in order to effectively communicate the blanket conditions of county roads and bridges resulting from extreme weather conditions or other disaster events. The policy does not apply to other circumstances.

PROCESS:

Should conditions warrant blanket communication regarding the conditions of roads and bridges, the _______ County Commission shall distribute such information through its County _________ (Engineer or Chairman).

ROAD and BRIDGE CONDITIONS:

When conditions warrant, the public shall be notified of the following information:

IMPASSABLE TRAVEL ADVISORY:** Effective **_______ all roads and bridges in ________ County should be considered IMPASSABLE until further notice. Members of the general public are advised that when roads and bridges become IMPASSABLE all travel should be suspended or delayed. Only emergency vehicles should travel on county roads and bridges until further notice.

When conditions improve, the public shall be notified of the following information:

RESUMPTION OF TRAVEL:** Effective **________ conditions have improved and the previous IMPASSABLE TRAVEL ADVISORY for _______ County roads and bridges has been lifted. Because county officials cannot guarantee the conditions everywhere, drivers are reminded to use caution while traveling.

CHAPTER THREE

CONSTRUCTION, MAINTENANCE, AND REGULATION OF COUNTY ROADS AND BRIDGES

Ala. Code § 23-1-80 grants counties general superintendence of the public roads, bridges, and ferries so as to render travel on them as safe and convenient as practicable. *See, e.g., Holt v. Lauderdale County, 26 So. 3d 401 (Ala. 2008). Ala. Code § 11-3-10* also provides counties with the general authority "in relation to the establishment, change, or discontinuance of roads, bridges, causeways and ferries within the county, except where otherwise provided by law, . . ."

- *See, Barber v. Covington County Commission, 466 So.2d 945 (Ala. 1985)*, for an excellent discussion of the county commission's legislative powers and discretionary authority over the county's road system.

There are several statutory provisions addressing more specifically certain areas relating to county roads and bridges, and there are cases and attorney general's opinions which help interpret the laws and identify the county's proper roles and responsibilities regarding the roads and bridges in the county.

I. ROAD AND BRIDGE CONSTRUCTION GENERALLY

A. GENERAL POWERS AND DUTIES

Ala. Code § 23-1-80 to § 23-1-95 deal specifically with the county's authority in regard to the construction, location, and maintenance of roads and bridges. An overview of pertinent Code sections is set out below.

1. *Ala. Code § 23-1-81* grants counties the authority to purchase or establish bridges, causeways, and ferries within their jurisdiction and to levy a special tax to purchase or build them when, in the county commission's opinion, the public good requires it. *(See Chapter Six for a more detailed discussion of funding issues.)*

2. *Ala. Code § 23-1-81* also authorizes counties to license others to establish or operate toll roads and bridges.

    - This section was amended in 2000 to grant the Alabama Department of Transportation the same right and to provide that once a license is issued either by the county or the state, no other license shall be required to construct, own, or operate the toll road or bridge and no further license tax or fee may be imposed by any governmental body or agency.

3. *Ala. Code § 23-1-82* grants counties the right of eminent domain for the purpose of establishing and changing roads, bridges, and ferries in their respective counties, except where the Alabama Department of Transportation has jurisdiction. *(See Section II below for discussion of eminent domain.)*

4. *Ala. Code § 23-1-86* authorizes counties to build or maintain roads or bridges within the corporate limits of a municipality with consent from that municipality. *See, AG's Opinion # 98-014. See, also, Ala. Code § 23-1-90 and Section IV below.*

    - A municipality does not have the authority to build or maintain county roads and bridges; however, a county and municipality may enter into an agreement on road maintenance pursuant to the Joint Powers Act found at *Ala. Code § 11-102-1 et seq. AG's Opinion # 2004-182.*

5. *Ala. Code § 23-1-87 to § 23-1-90* address construction, maintenance and funding of roads and bridges in adjoining counties.

6. *Ala. Code § 23-1-83* authorizes the county to transfer any surplus from the county general fund to the county's road fund when, in the judgment of the county commission, it will promote the interest of the county. Any transferred funds shall only be used for public roads or bridges. *(See Chapter Six for discussion of funding issues.)*

7. *Ala. Code § 23-1-84* authorizes counties to expend funds derived from fees, excise, or license taxes relating to the registration, operation, or use of motor vehicles and from motor fuels for constructing, reconstructing, maintaining, and repairing public roads and bridges. *(See Chapter Six for discussion of funding issues.)*

    - These funds cannot be used to supplement the county general fund. *AG's Opinion # 2000-216.*

B. SPECIAL PROVISIONS RELATING TO BRIDGES

In addition to the general powers set out above, there are several Code sections relating specifically to bridges.

1. *Ala. Code § 11-3-15 to § 11-3-17* address the counties' authority with regard to bridges over navigable or other streams.

2. *Ala. Code § 23-1-87 to § 23-1-91* deal with the expense and authority to build, maintain, and operate bridges, ferries, and public highways between adjoining counties and municipalities.

3. *Ala. Code § 23-1-93* provides an exception to bid advertising requirements in the event of destruction of a bridge, or damage thereto or other emergency if the public good requires it. *See, also, Ala. Code § 31-9-10.*

    - This does not apply where the Alabama Department of Transportation has jurisdiction over such bridges.

C. OTHER GRANTS OF AUTHORITY

There are other provisions of law which also address the county's authority regarding roads and bridges.

1. *Ala. Code § 23-2-120 to § 23-2-161* provide for toll roads, bridges, and ferries.

2. *Ala. Code § 11-102-1 et seq.* (the "Joint Powers Act") authorizes any county or incorporated municipality to enter into a written contract with any one or more counties or municipalities for the joint exercise of any power or service that state or local law authorizes each of the contracting entities to exercise individually.

    - Counties and municipalities can use the Joint Powers Act to enter into agreements related to maintenance of county and municipal roads and bridges. *AG's Opinion # 2004-182*.

II. ACQUISITION OF LANDS FOR ROAD AND BRIDGE CONSTRUCTION OR MAINTENANCE

A. CONDEMNATION/EMINENT DOMAIN

As noted above, *Ala. Code § 23-1-82* grants counties the right of eminent domain for the purpose of establishing and changing roads, bridges, and ferries in the county. Alabama's Constitution also addresses the governmental power of eminent domain, and provides that no property shall be taken without just compensation. *Constitution of Alabama of 1901, Section 23 and Section 235*. The general procedures for condemnation, found in Alabama's eminent domain law at *Ala. Code § 18-1A-1 et seq.*, also apply.

- The attorney general's office has held that an entity should not acquire property by condemnation where it has no need for the property or where the sole purpose is for property exchange. *AG's Opinion # 94-64*.

- However, a county commission can condemn and take over a private road as a county road to provide residents with access to their homes as long as the owner is justly compensated and the condemnation is for a public use. *AG's Opinion # 2001-230.*

Other sections addressing the authority to condemn properties are set out below:

1. *Ala. Code § 11-80-1* authorizes counties to condemn lands for public roads or streets or for material for the construction of public roads or streets.

    - This can include property for a connector road and bridge to be constructed and operated by a private company if it is for a public use. *Gober v. Stubbs, 682 So.2d 430 (Ala. 1996).*

2. *Ala. Code § 11-80-2* allows counties to provide relocation assistance to persons displaced by such acquisition. See also, *Ala. Code § 23-1-210 to § 23-1-212* regarding relocation assistance.

3. *Ala. Code § 11-14-23* authorizes counties to acquire by purchase or condemnation, at reasonable market value, lands necessary for drainage ditches and borrow pits, lime and stone

quarries, clay and clay pits, sand and sand pits, chert and chert pits, gravel and gravel pits, and any and all other materials that may be necessary, essential, or desired in the construction and maintenance of highways and bridges.

- *Ala. Code § 11-14-24* provides that the condemnation proceedings for such land and materials "shall be as is now provided by law for condemnation of land for public use."

- In other words, the procedures used for condemnation which are those set out in *Ala. Code § 18-1A-1 et seq*. and the other Code sections cited above.

- The Board of Education has no statutory duty to contribute to the cost of acquiring property for a road by a school, but it may if it finds it necessary to so contribute. *AG's Opinion # 2005-122.*

For a good discussion of the procedures for a condemnation action under the powers of eminent domain, see *AG's Opinion # 97-120*.

The Alabama Relocation Assistance and Real Property Acquisition Policies of 1999 requires the payment of relocation expenses to "displaced persons" under certain circumstances. *See, Ala. Code § 18-4-1 et seq.* This law only applies to state projects involving federal or state funds, and specifically excludes local governments. However, it may have application in some county projects with the state. The law also does not apply to the Alabama Department of Transportation where the Department is required to provide relocation assistance under other sections of the law.

B. RIGHTS OF WAY

There are special statutory provisions regarding acquisition of rights of way for road and bridge construction and maintenance. And it is possible to obtain a right of way by prescription *(see Chapter Two, Section I, D)*.

1. Statutory County Rights of Way

Under *Ala. Code § 23-1-45,* the Transportation Director has authority to acquire rights of way deemed necessary for construction of a state highway, either by purchase or by right of eminent domain.

- The county shall acquire such rights of way when requested to do so by the Director.

And *Ala. Code § 11-14-23 and § 11-14-24* authorize counties to acquire through condemnation such road right of way as necessary for ingress or egress to land necessary for drainage ditches and borrow pits, and materials necessary, essential, or desired in the construction and maintenance of highways and bridges

2. Right of Way Established by Prescription

A prescriptive right of way may be established by general use of the public for 20 years. *Auerbach v. Parker, supra.* In determining whether a right of way has been acquired by prescription, the same principles apply as those discussed in Chapter Two regarding creation of a public road by prescription. *(See Chapter Two, Section I, D.)*

- In a case in which the landowner is challenging a claim that a right of way has been established by prescription, the burden is on the landowner to show that he has only granted permission to use the road without relinquishing his title and possession to the land. *Suttle v. Tucker*, *supra*.

- There is no specified width of a right of way established by prescription. The right of way established is governed, measured, and limited by actual use, and is not necessarily limited to "the beaten path". *Williams v. Nearen*, *supra*; *Grubb v. Teale, 265 Ala. 257, 90 So.2d 727 (1956).* See, also, *AG's Opinion # 91-361.*

The right of way is governed by the extent of the actual usage for road purposes, taking into accounts things such as:

- The actual width of the public road.

- The width reasonably necessary for the safety and convenience of the traveling public.

- The need for repairs or improvements.

3. Special Rights of Way or Use Rights Granted to Others

Some entities are granted certain special rights of way or special rights to use public rights of way under Alabama law.

a. *Ala. Code § 11-88-14* grants water, sewer, and fire protection authorities the use of rights of way of public roads with consent of the county governing body subject to regulations established by the county and applied uniformly to all such authorities.

   i. The authority has the duty to restore all roads, highways, and public rights-of-way in which it has made excavations or other work in laying pipe, etc. at its expense.

   - The authority must post bond in the amount required to restore it as determined by the county engineer.

   - However, there is no statutory requirement that the authority pay for relocation or other damage.

   ii. The authority must comply with the state permit provisions and regulations when working on state-controlled roads. *Ala. Code § 23-1-4*.

b. *Ala. Code § 18-3-1 et seq.* provides private landowners the right to acquire a right of way not exceeding 30 feet in width over lands intervening and lying between the owner's land and the nearest and most convenient public road.

- This is only available to an owner landlocked and is viewed by the courts as an "easement by necessity", and not mere convenience. *See, Key v. Ellis, 973 So.2d 359 (Ala.Civ.App. 2008); Bluff Owners Association v. Adams, 897 So.2d 375 (Ala. Civ. App. 2004); DeWitt v. Stevens, 598 So.2d 849 (Ala. 1992); Gowan v. Crawford, 599 So.2d 619 (Ala. 1992); Loveless v. Joelex Corporation, 590 So.2d 228 (Ala. 1991).*

- A cause of action is available under this section if the landowner does not have either private or public access to a public road which is unobstructed and unquestioned. *Key v. Ellis, supra: Crabtrey v. Tew, 485 So.2d 726 (Ala.Civ.App. 1985).*

- Although the statute does not specifically speak to lands outside of a municipality, the appellate courts have held that this section applies to landlocked property owners in the county as well. See, *Lockridge v. Adrian, 638 So.2d 766 (Ala. 1994); Hawkins v. Griffin, 512 So.2d 109 (Ala.Civ.App. 1987).*

c. *Ala. Code § 23-1-85* provides that the right-of-way is granted to entities having the right to construct electrical transmission, telegraph or telephone lines, subject to removal or change by the county commission except where the Alabama Department of Transportation has jurisdiction over the highway.

- The statute does not address who is responsible for the cost of removal or change.

- This section provides that the right of way granted is that "along the margin of the right of way of public highways."

- The Supreme Court has held that this means "the space between the traveled part of the roadway and the edge of the right of way." *Studdard v. South Central Bell, 356 So.2d 139 (Ala. 1978).*

- The Supreme Court has also held that because *Ala. Code § 23-1-85* specifically addresses use of the county's right of way, the county's regulatory authority under *Ala. Code § 23-1-80* extends only so far as to allow it to regulate the use of the rights-of-way so that there will not be unreasonable or unnecessary interference with the use of the road. *Lightwave Technologies, L.L.C. v. Escambia County, 804 So.2d 176 (Ala. 2001).*

- Telecommunication service provider that obtained a statewide franchise under the predecessor to *Ala. Code § 23-1-85* may use, modify, or install new facilities within a municipality without municipal approval. *AG's Opinion # 2008-021.*

4. Right of Way Maintenance

Ala. Code § 23-1-80 grants the county commission specific authority to establish, promulgate, and enforce rules and regulations to maintain a good road system.

- The attorney general's office has held that this statutory power is broad enough to allow the county commission to prohibit placement of political advertisements along the county right of way. *AG's Opinion ## 2002-134 and 88-415*.

- This includes the power to decide whether private entities may install sewer lines in the county right of way provided the decision is not arbitrary and capricious. *ECO Preservation Services v. Jefferson County Commission, 933 So.2d 1067 (Ala. 2006).*

- The attorney general's office has held that the responsibility for the care of trees on a right of way belongs to the entity holding the right of way upon which the trees are located. *AG's Opinion # 82-67*.

III. COUNTY RESPONSIBILITY FOR ROAD MAINTENANCE

A. DUTY TO MAINTAIN

The county is exclusively and affirmatively responsible for the maintenance and control of its roadways. *Ala. Code § 23-1-80*. In fact, the appellate courts have stated that the county has a duty to maintain its streets in a reasonably safe condition for travel and to remedy defects in the roadway upon receipt of notice of such defect. *Jefferson County v. Sulzby, 468 So.2d 112 (Ala. 1985).* See, also, *AG's Opinion # 2002-130*.

- The attorney general has held that, although *Ala. Code § 23-1-80* grants the county general superintendence of its roads and bridges, giving maintenance or repair priority to roads abutting property whose owners are willing to make payments for the improvements would constitute discrimination under the 14th Amendment of the U.S. Constitution. *AG's Opinion # 93-023.*

- However, *AG's Opinion # 93-023* also states that the office is unaware of any prohibition against a private property owner contributing funds for road maintenance.

- Board of Education may contribute to the cost of a traffic study to address traffic congestion around schools if it determines that the expenditure is beneficial to its interests or serves a public purpose related to education. *AG's Opinion # 2005-122.*

B. COUNTY'S LIABILITY FOR FAILURE TO MAINTAIN

Unfortunately, counties do not enjoy immunity from liability, although there is a statutory cap on recovery of judgments. *Ala. Code § 11-93-1 et seq.* This cap also applies to a county commissioner and to the county engineer acting within the line and scope of employment. *Smitherman v. Marshall County Commission, 746 So.2d 1001 (Ala. 1999).*

- There is also a statutory prohibition against awarding punitive damages in a suit against a county. *Ala. Code § 6-11-26.*

Counties can be sued for negligent maintenance and repair of roads and bridges, and have been held liable for damages when the legal standard of care has not been met. See, e.g., *Cook v. County of St. Clair, 384 So.2d 1 (Ala. 1980).* Therefore, it is incumbent upon counties to make all diligent efforts to maintain their roads in a reasonably safe condition and remedy defects upon notice (i.e., by promptly replacing stop signs when down or stolen). County commissioners and county engineers can and are sued in their official capacity. However, they cannot generally be sued individually for actions taken in the line and scope of their employment or office. *Smitherman v Marshall County Commission, supra.*

Frequently in cases involving county roads, the factual determination of whether the county has control and responsibility for the road is a crucial issue in the case. Counties have escaped liability by proving that they did not have control of a road or bridge.

- There are several cases discussing the county's control and responsibility for roads within its jurisdictional boundaries or within a municipality. *See, e.g., McCool v. Morgan County Commission, supra; Garner v. Covington County, 624 So.2d 1346 (Ala. 1993); Yates v. Town of Vincent, supra; Harris v. Macon County, 579 So.2d 1295 (Ala. 1991); Perry v. Mobile County, 533 So.2d 602 (Ala. 1988); Jefferson County v. Sulzby, supra; Cook v. County of St. Clair, supra.*

- There are also several AG's opinions on this subject, although that office generally declines to specifically decide a question of fact. *See, e.g., AG's Opinion ## 96-206 and 93-298.*

C. ROAD SIGNAGE

Proper placement and maintenance of road signage is an important part of road and bridge maintenance. Many lawsuits against counties are based upon negligent maintenance of road signs or other traffic-control devices. *See, e.g., McCool v. Morgan County Commission, supra.* Unfortunately, many counties have been found liable in this regard.

1. General Authority/Duty to Erect and Maintain Road Signs

Ala. Code § 32-5A-113 authorizes counties to erect and maintain stop signs, yield signs, or other traffic-control devices in reference to highways under their jurisdiction.

Moreover, *Ala. Code § 32-5-31(c)* requires that local authorities place and maintain necessary traffic-control devices in their respective jurisdictions.

- However, *Ala. Code § 32-5A-30* prohibits counties from placing or maintaining any traffic-control devices upon any highway under the jurisdiction of Alabama Department of Transportation.

2. Specific Code Provisions Relating to Road Signage

In addition to the general provisions cited above, there are Code provisions addressing specific areas of road signage and traffic-control devices. Many are related to the unauthorized placement of signs and traffic-control devices and the enforcement thereof. Some examples are:

- *Ala. Code § 23-1-8.1* which prohibits using state funds for the erection and maintenance of signs designating roads, bridges, or buildings in honor or memory of individuals.

  -- The Alabama Department of Transportation may prepare and erect such signs as long as the actual cost of preparation and maintenance is paid by private funds or municipal or county government funds.

- *Ala. Code § 23-1-10* which provides for blue reflective markers for fire and water hydrants.

- *Ala. Code § 23-5-2* which prohibits driving around or destruction of detour or warning signs, barricades, or fences.

- *Ala. Code § 32-5A-36* which declares the display of unauthorized signs, signals, or markings a public nuisance.

- *Ala. Code § 37-8-200* which prohibits the erection or maintenance of advertising signs resembling railroad signs.

- *Ala. Code § 13A-8-71* which provides that it is unlawful to possess any traffic signs erected by the state, a county, or a municipality or to intentionally destroy, knock down, remove, deface, or alter any traffic sign or traffic control device.

  -- Penalties are set out in *Ala. Code § 13A-8-72*.

- *Ala. Code § 11-98-6(d)*, relating to emergency telephone service and 911 boards, states that the governing body and the 911 board are jointly responsible for purchasing and installing the necessary signs to properly identify all roads and streets in the 911 district.

  -- The 911 board is not responsible for maintaining street signs, but the governing body and the 911 board are jointly responsible for replacing street signs. *AG's Opinion # 2006-051.*

- Ala. Code § 11-80-14 authorizes but does not require a county or municipality, upon request, to install deaf or blind child area signs to warn drivers that a deaf or blind child lives on the road.

  -- The cost of the sign may be paid by the requesting party, an individual or a neighborhood association.

  -- The county or municipality shall annually review placement of the sign to ensure it is still applicable.

D. CITIZEN'S LIABILITY FOR DAMAGE TO COUNTY ROADS

Alabama law makes some provision for misuse of and damage to county roads and bridges.

1. Pursuant to *Ala. Code § 32-5-4*, it is a misdemeanor to unload lumber, logs, or any other article upon a highway or within the limits of a right-of-way of any public highway.

   - Fines run from $25.00 to $100.00 and/or 10-30 days in jail.

2. It is also illegal to load from any ramp, platform or other loading device. *Ala. Code § 32-5-3.*

3. *Ala. Code § 23-1-59(b)* authorizes the Alabama Department of Transportation to promulgate rules and regulations to prevent unnecessary trespass or injury to any public roads, bridges, or right of ways where state money may be expended or appropriated.

4. *Ala. Code § 32-5-9* provides that any person driving any vehicle shall be liable for all damage to the highway resulting from any illegal or careless operation of the vehicle or as a result of driving in excess of the maximum weight permitted by law.

   - *See, also, Tuscaloosa County v. Jim Thomas Forestry Consultants, Inc., 613 So.2d 322 (Ala. 1992) and Hall v. North Montgomery Materials, 39 So.3d 159 (Ala.Civ.App. 2008).*

   - If the driver is not the owner, but is operating the vehicle with the express or implied consent of the owner, the driver and owner are jointly and severally liable.

   - The Supreme Court of Alabama has held that damages in this area are to be determined based upon repair or replacement cost. *Tuscaloosa County v. Jim Thomas Forestry Consultants, Inc., supra.*

   - The attorney general has held that the county may enter into an agreement with the party responsible for the damage to hire contractors to make repairs so long as the contractors comply with state road specifications. *AG's Opinion # 91-24.*

5. *Ala. Code § 13A-8-71* makes it unlawful to possess a traffic sign erected by the state, a county, or a municipality, and to deface, destroy, or remove any traffic signs or traffic-control devices. Criminal penalties are set out in *Ala. Code § 13A-8-72*.

    - Possession of a traffic sign is punishable by fine of not more than $50.00.

    - Fines for other violations range from $250 to $1000, and depending on the act, are ranked from a Class A misdemeanor to a Class C felony.

    - In addition to the fines, the parents of a minor shall be liable for actual damages and court costs for the destruction or defacement of any public road sign by the intentional acts of the minor.

    - All fines collected shall be deposited into the county general fund, and one-half of the fines shall be designated to the county road and bridge fund. *Ala. Code § 13A-8-73.*

6. *Section 13A-8-71* also provides that it is unlawful to intentionally deface any public building or public property.

    - While this Code section is intended to apply to vandalism of public buildings, if the definition of "public property" is broad enough to include a public road or bridge, it may be that penalties could be assessed under this section for the willful or reckless damage to a road, such as by carelessly loading logs or intentionally carrying overweight loads.

As discussed in *Section II,B,3,a* above, *Ala. Code § 11-88-14* authorizes water, sewer, and fire protection authorities to use the right of way of all public roads in the state. However, they are responsible to restore roads damaged by work done at their expense, and to post bond. Additionally, if the work is to be done on a state-controlled road, the authority must obtain a permit and must perform the work in accordance with regulations prescribed by the transportation department.

E. LITTERING AND HIGHWAY BEAUTIFICATION

There are several Code provisions addressing highway beautification and assessing crimes and penalties for littering Alabama's roads.

1. Littering Provisions

The following sections deal specifically with littering:

- *Ala. Code § 13A-7-29* -- Criminal littering statute

    -- This section creates a rebuttable presumption that trash bearing a person’s name was knowingly deposited by that person and allows for a county license inspector to enforce the law under procedures set out in the law.

- *Ala. Code § 23-5-6 et seq.* -- Trash and litter on public thoroughfare

- *Ala. Code § 32-5-76* -- Loads which must be fastened down

- *Ala. Code § 32-5-76* -- Spilling loads or litter

  -- The attorney general has held that concrete truck owners and operators can be charged under this section for spilling concrete. *AG's Opinion # 91-14*.

  -- And *Black Belt Wood Co. v. Sessions, 514 So.2d 1249 (Ala. 1986)*, holds that this section applies to improperly loaded log trucks.

- *Ala. Code § 32-5A-60* -- Throwing glass or litter on roadway

  -- This section provides that no person shall deposit any substance on the roadway likely to injure any person or vehicle on the highway.

  -- This would prohibit a sign so large that it is likely to injure a person or vehicle that might strike it. *AG's Opinion # 2002-134*.

2. Highway Beautification

Code sections addressing highway beautification are:

- *Ala. Code § 23-1-220 et seq*. -- Highway Beautification

- *Ala. Code § 23-1-240 et seq*. -- Junkyard Control

- *Ala. Code § 23-1-270 et seq*. -- Outdoor Advertising

In addition to the above, *Ala. Code § 11-80-10* authorizes counties to license junkyards located outside the police jurisdiction of any municipality in the county, and to establish criteria to issue or revoke such licenses.

The attorney general has held that under the county's general authority over county roads and bridges pursuant to *Ala. Code § 23-1-80*, the county commission can prohibit placement of political advertisements along the county right of way. *AG's Opinion ## 2002-134; 88-415*.

IV. COUNTY/MUNICIPALITY ROAD ISSUES

There is frequently interplay between counties and municipalities with regard to county and municipal roads and bridges. An outline of some of the more important issues is set out below.

A. MAINTENANCE OF COUNTY ROADS WITHIN MUNICIPALITIES

The attorney general's office has held that a municipality may not make improvements (such as installing street lights) on county roads within the police jurisdiction. *AG's Opinion # 2000-23.*

- However, the county and a municipality may enter into an agreement under the "Joint Powers Act" (*Ala. Code §11-102-1 et seq.)* whereby each entity will maintain roads in the jurisdiction of the other. *AG's opinion # 2004-182.*

This subject is more fully discussed in Chapter Two, Section IV of this manual.

B. REGULATION OF TRAVEL WITHIN MUNICIPALITIES

Although the county may retain responsibility for maintaining a road within the corporate limits of a municipality, and this may include the duty to provide traffic control signals, the attorney general's office has held that the municipality has the authority to set speed limits within its corporate limits. *AG's Opinion ## 2012-050; 97-002.*

- These opinions are based upon *Ala. Code § 11-49-4*, which provides that municipalities shall fix speed limits within their corporate limits.

Ala. Code § 32-5A-171 prohibits a municipality from enforcing speed limits set under that Code section outside its corporate limits. See, e.g., *AG's Opinion # 96-247.*

- However, the attorney general has held that municipalities may enforce speed limits set pursuant to *Ala. Code §§ 32-5A-172 and 32-5A-173* within their police jurisdictions. *AG's Opinion # 98-72.*

See, Section V below for further discussion of speed limits.

C. COUNTY ASSISTANCE IN THE CONSTRUCTION OR MAINTENANCE OF MUNICIPAL ROADS

1. Construction and Maintenance of Municipal Roads

Ala. Code § 23-1-86 authorizes the county commission to establish, construct, and maintain any road or bridge within the corporate limits of a municipality with the consent of that municipality. *See, also, AG's Opinion # # 98-14 and 87-307.*

- The attorney general's office has stated that such roads remain under the control of the municipality. *AG's Opinion # # 91-133 and 86-87.*

Other Code sections dealing with agreements between counties and municipalities with regard to roads and bridges are as follows:

- *Ala. Code § 11-14-6 to § 11-14-7* – County payments to cities or towns for improvements to sidewalks and streets around county buildings.
- *Ala. Code § 11-49-100 to § 11-49-106* – Vacation of municipal roads for the construction of county buildings.
- *Ala. Code § 23-1-91* – Aid for development of access roads or bridges to certain facilities by contiguous counties or municipalities.
- *Ala. Code §11-102-1 et seq.* – The Joint Powers Act

2. Funding Sources for County Work in a Municipality

The county may use 7¢ gasoline tax proceeds, and may use money derived from fees, excises and license taxes as authorized in *Ala. Code § 23-1-84(a)* for projects within the municipality. *AG's Opinion ## 98-14 and 91-133.*

However, the county cannot use the 4¢ gasoline tax proceeds (now 6¢) for municipal roads since *Ala. Code § 40-17-362* provides that these funds shall be for resurfacing, restoration, and rehabilitation of paved county roads and bridges or bridge replacement on the county road system. *AG's Opinion # 91-133.*

3. Construction or Maintenance of Roads in County and Municipality

Whenever the county constructs or improves a public road which is partly within a city or town, the city or town may contract with the county as to its proportionate share of the improvement. *Ala. Code § 11-49-60 to § 11-49-63.*

Additionally, *Ala. Code § 23-1-90* provides that a municipality may extend aid to the establishment, construction, or maintenance of any bridges, causeways, highways or ferries in a county or counties if the municipality would benefit from the purchase, establishment, construction or maintenance of same.

4. County Funding for Municipal Road Projects

Ala. Code § 11-83-2 requires counties to pay each municipality in the county one-half of any money collected from a road ad valorem tax levy on property located in the municipality. This section applies wherever the levy is "for or devoted to the purpose of constructing, repairing or maintaining roads and highways of any description in the county, except the special tax authorized by *Section 215 of the Constitution*".

Under *Ala. Code § 11-83-3*, the sums paid to the municipality shall be used exclusively for maintaining the streets in the corporate limits of the municipality. If the tax levied is for a particular class of roads, the funds shall be used for roads of a similar character.

V. COUNTY REGULATION OF TRAVEL ON AND USE OF COUNTY ROADS

Counties are granted certain specific statutory authority to regulate travel on county roads. These range from establishing rules of the road, restricting travel of certain vehicles, and closing roads where necessary.

A. SPEED LIMITATIONS AND TRAFFIC REGULATIONS

1. Setting Speed Limits on County Roads

Ala. Code § 32-5A-171 establishes maximum speed limits for particular types of roads within the state -- including unposted county roads. These speed limit laws were established in part as a protection for counties against liability in the event speed limit signs are down or have not been placed by the county.

a. Unpaved Roads

The maximum speed limit on any unposted unpaved road is 35 miles per hour. The definition of an unpaved road under this section is:

"any highway under the jurisdiction of any county, the surface of which consists of natural earth, mixed soil, stabilized soil, aggregate, crushed sea shells, or similar materials without the use of asphalt, cement, or similar binders."

b. Paved Roads

The maximum speed on any unposted county-maintained paved road in an unincorporated area is 45 miles per hour.

- The county commission may establish a different speed.
- The speed limit cannot exceed 55 miles per hour unless the Governor alters the speed to receive federal funds for highway maintenance and construction.

c. Maximum Speed Limits on other Roads

Other speed limits set under *Ala. Code § 32-5A-171* are as follows:

- 30 miles per hour in an urban district.
- 70 miles per hour on an interstate highway.
- 65 miles per hour on four-lane roads or highways.
- 55 miles per hour for other roads or highways.

The Governor may alter some maximum limits under proper circumstances set out in the law.

- Pursuant to *Ala. Code § 32-5A-172,* the Transportation Director and Director of the Alabama Law Enforcement Agency also have authority to alter speed limits when determined appropriate based upon engineering and traffic investigations under procedures set out for same.

2. Minimum Speed Limits

Ala. Code § 32-5A-174 authorizes state and local authorities to establish minimum speed limits. They can also set special speed limits for bridges under *Ala. Code* § *32-5A-176.*

3. Altering Speed Limits on County Roads

Ala. Code § 32-5A-173 authorizes the county commission to alter speed limits on its roads on the basis of an engineering and traffic investigation that the statutory maximum speed is greater or less than is reasonable and safe under the conditions existing on the road.

- Any altered speed limits are only effective when appropriate signs are erected.
- There can be no more than six alterations per mile, except for reduced limits at intersections.

- The difference between adjacent limits cannot be more than 10 miles per hour.

The attorney general has held that the city, not the county, sets speed limits within its corporate limits pursuant to *Ala. Code § 11-49-4*, even if the county is responsible for maintenance of the road and traffic devices. *See, AG's Opinion ## 2012-050; 97-002.*

4. Speed Limits in Construction Zones

Ala. Code § 32-5A-176.1 authorizes the Alabama Department of Transportation and the county commission to set speed limits in urban and rural construction zones along roads and highways.

- The speed limits shall be posted at least 100 feet in advance of the entrance of the construction zone and may be enforced by law enforcement authorities.
- Fines for speeding are doubled if construction personnel are present and that fact is posted with appropriate signs.

5. Traffic Control

In addition to speed limit provisions, state law also grants counties the authority to regulate traffic on its roads. For example:

a. *Ala. Code § 32-5A-86* grants the authority to determine no passing zones.

b. *Ala. Code § 32-5A-87* grants the authority to designate one-way roadways and rotary traffic islands.

6. County and Municipal Reduced Speed School Zone Act

Ala. Code § 32-5A-180 et seq., establishes the County and Municipal Reduced Speed School Zone Act, which establishes a reduced speed school zone for any school in the unincorporated areas of the county, including schools along state-maintained roads. *Ala. Code § 32-5A-182.*

- Appropriate signs shall be erected warning of the approaching reduced speed and designating where regular speed may resume.
- All signs and placement shall be in accordance with the Current Manual of Uniform Traffic Control Devices.
- Pursuant to *Ala. Code § 32-5A-183*, the county commission shall maintain signs on a county-maintained road and the Alabama Department of Transportation shall maintain signs on state-maintained roads.

Fines for violation shall be double the amount for speeding outside a school zone. *Ala. Code § 32-5A-185.* Proceeds from the fines payable to the county shall be paid into the county's public road and bridge fund. *Ala. Code § 32-5A-186.*

B. PROHIBITING OR RESTRICTING TRAVEL

In addition to regulating speed, county commissions have the authority to, by resolution, prohibit or impose restrictions as to vehicles traveling county roads whenever, by reason of deterioration or weather conditions, travel upon highways under the county's jurisdiction will be seriously damaged or destroyed unless the use of vehicles is prohibited or the permissible weights are reduced. *Ala. Code § 32-1-3. See, also, Ala. Code § 23-1-80. Section 32-1-3* requires the county to erect and maintain signs designating the restrictions at each end of the portion of any highway affected, and the resolution shall not be effective until and unless the signs are erected and maintained. *(See a more detailed discussion of road closings in Chapter Two, Section II.)*

Ala. Code § 32-5A-92 authorizes local authorities to regulate or prohibit the use of any controlled-access roadway within their jurisdiction by any class or kind of traffic found to be incompatible with the normal and safe movement of traffic. Again, this Code section requires that any restrictions be posted.

- The attorney general has held that under *Ala. Code § 23-1-80*, along with *Ala. Code §11-3-11(a)(1) and §11-3-10*, counties may regulate road use by appropriate means such as permit, and may impose a fee and bond requirement for that permit. *AG's Opinion # 2004-021.*

    -- While the principles discussed in this opinion would still generally apply to regulation of county roads and bridges, counties may no longer require permits and bonds from logging operations. *See, Ala. Code § 23-1-80.1.* Instead, counties may adopt a logging notice ordinance under *§ 23-1-80.1* (*See Section V, E below for a detailed discussion of the logging notice ordinance statute.)*

C. WEIGHT RESTRICTIONS

As noted above, *Ala. Code § 32-1-3* authorizes the county commission, by resolution, to prohibit or impose weight limitations upon the operation of trucks or other commercial vehicles on county roads. These restrictions must also be "designated by appropriate signs". *See, also, Hall v. North Montgomery Materials, supra.*

There is another important provision authorizing counties to set maximum weights for trucks, trailers, and semi-trailers at a limit lower than authorized by state law. *Ala. Code § 32-9-20 to § 32-9-32* are the general law provisions relating to size and weight of trucks, trailers, and semi-trailers. Axle weight and spacing requirements, and authorized exemptions and tolerances, are also addressed. *See, in particular, Ala. Code § 32-9-20.*

Additionally, *Ala. Code § 23-1-59(c)* grants the Alabama Department of Transportation rule-making authority for weight or tonnage of vehicles using any public roads where state money may be expended or appropriated.

For discussion on weighing trucks, statutory tolerances, and imposing fines, see, *Curry v. State, 506 So.2d 346 (Ala.Cr.App. 1986)*. See, also, *State Department of Public Safety v. Scotch Lumber Co., 302 So.2d 844 (Ala. 1974)*, on exemptions.

- Size and weight limitations set out in the law cannot exceed federal provisions and regulations governing limitations on federal highways. *Ala. Code § 32-9-20(4). See, also, Perry v. State, 441 So.2d 127 (Ala.Cr.App. 1983).*

- Violations of weight restrictions apply to the owner or operator of the vehicle, not the shipping company. *Fike v. Peace, 964 So.2d 651 (Ala. 2007)*.

- *Ala. Code §* 32-9-20(4)e exempts dump trucks, concrete mixing trucks, fuel trucks, and trucks designated and constructed for special work or use from axle spacing requirements.

  -- Logging trucks do not qualify for this exemption. *AG's Opinion # 2003-152.*

- Under *Ala. Code § 32-9-22*, federal, state, county, and municipal trucks, semitrailer trucks, or trailers are exempt from these size and weight restrictions.

  -- AG's Opinion # 95-241 states that the weight exemptions for government vehicles do apply on federal highway system.

- *Ala. Code § 32-9-22* also exempts "implements of husbandry" (farm equipment).

  -- But only when "temporarily propelled or moved upon the highways", not when travelling a highway for an extended period. *Pugh v. Taylor, 507 So.2d 428 (Ala. 1987).*

- See, *Ala. Code § 32-9-23 to § 32-9-26* for other exemptions.

The Code provisions setting state weight and size limits also apply to vehicles traveling on county roads. However, *Ala. Code § 32-9-20(h)* provides that the governing body of a county may, by appropriate resolution, authorize limitations less than those prescribed in state law for vehicles operated upon the county's highways. *See also, AG's Opinion ## 2004-021 and 84-95*.

- As noted in *Section V, D* below, *Ala. Code § 32-9-20(i)* grants the Alabama Department of Transportation the authority to lower weight limitations on bridges.

*Ala. Code § 32-9-5 and § 32-9-*6 prescribe penalties and fine distribution for violations of weight and size restrictions.

- Counties do not receive a portion of the fines.

- *Ala. Code § 32-5-9* addresses liability for damage to a road created by vehicles travelling Alabama's roads in excess of legal weight limitations. (*See, also, Section III, D above.)*

Ala. Code § 23-1-59(c) provides that the Alabama Department of Transportation "may prescribe rules and regulations as to the weight or tonnage of vehicles to be used upon any of the public roads, bridges or highways of the state upon which state money may be expended or appropriated, except as otherwise provided by law."

D. SPECIAL PROVISIONS RELATING TO BRIDGES

Ala. Code § 32-5-92 authorizes the Alabama Department of Transportation to conduct an investigation of any public bridge, causeway, or viaduct on its own initiative or upon request from local authorities (i.e., the county commission), and if found that the structure cannot withstand traveling at speeds set by law, it shall determine and declare the maximum speed for the structure and cause or permit suitable signs setting out the maximum speed to be erected and maintained.

- There is also authority for posting weight limitations on bridges found in *Ala. Code § 32-9-20(i).*

Ala. Code § 32-5A-176 authorizes the Alabama Department of Transportation and local authorities to conduct similar investigations of their bridges relating to speed and if warranted, establish special speed limitations over such bridges or elevated structures. The entity establishing the limitations shall post and maintain signs stating the maximum speed.

Ala. Code § 32-9-20(e) exempts certain trucks from axle spacing requirements under some circumstances. However, this section provides that it shall be a violation if the vehicles entitled to axle spacing exemptions travel on bridges posted as incapable of carrying such loads.

E. LOGGING NOTICE ORDINANCE

Act No. 2012-257, now codified at *Ala. Code § 23-1-80.1*, authorizes the county commission to adopt an ordinance requiring all persons or firms that own timber in any unincorporated area of the county to provide notice of intent to utilize county roads for delivery of any type timber to any wood yard or processing plant.

Under the statute, "timber owner" means, "[A]ny person or firm that has entered into a contract with a landowner for the purposes of severing that timber and delivering pulpwood, logs, poles, posts, or wood chips to any wood yard or processing plant". *Ala. Code § 23-1-80.1(a)*.

- Where the landowner harvests his or her own timber and delivers it to any wood yard or processing plant, the landowner is the timber owner.
- The term timber owner is intended to mean the person or firm who has legal title to the timber when it enters the county road.

Adoption of an ordinance under this statutory provision is the county's only option for regulating logging activities on county roads and rights-of-way. *Ala. Code § 23-1-80.1(o)* specifically provides that except as provided in this section, a county may not require any timber owner that plans to utilize county roads to provide any other notice of the activity, acquire any other specific permit or license for such purpose, or except as provided in this law, post any security as a condition of using the county roads.

- Any existing county rules, ordinances, or resolutions in conflict with this section were repealed in this law to the extent of such conflict.

- However, nothing in this law repeals or amends any laws related to the county's general superintendence of the roads and bridges within its jurisdiction, including its driveway or access management policy, or its authority to regulate and supervise the use of its rights-of-way or roads and bridges.

- And the county's acceptance of the notice from the timber owner shall in no way limit or affect the county's authority to regulate and enforce any laws governing the use of or damage to a county-maintained road or bridge or a county right-of-way.

In an effort to provide assistance to counties interested in implementing a logging notice ordinance as authorized in the law, the Association of County Engineers of Alabama formed a Logging Policy Advisory Committee working with Association staff and county attorneys to develop a model ordinance and suggested forms for use by counties implementing the new law. The model ordinance and forms were carefully developed to ensure proper procedures are followed and to avoid actions not permitted by the law.

A copy of the ordinance, with suggested forms and guidance on procedures for adopting and implementing the ordinance, is available through the ACCA website: www.alabamacounties.org.

1. When Notice Required

Pursuant to *Ala. Code § 23-1-80.1(b)*, any ordinance or resolution adopted shall require the timber owner to provide prior written notice for each separate tract utilizing the county roads as follows:

- If a new access point is required for the tract, the timber owner is required to provide the county four business days' notice.

- If an existing access point is to be utilized for the tract, the timber owner is required to provide the county two business days' notice.

Ala. Code § 23-1-80.1(c) defines an existing access point as either:

- A location which has previously been approved, permitted, or grandfathered through the county's driveway or access management policy and has been previously used to access the tract.

  -- In the event the county has a driveway or access management policy and an access point has not been previously approved or permitted, but has been previously used to access the tract, there is a presumption that the access point shall be considered an existing access point for the purposes of this subsection.

- If the county does not have a driveway or access management policy, whether the location has been previously used to access the tract.

    -- A county is not required to adopt a driveway or access management policy if it does not already have one.

The notice shall be effective for a period of 12 months and may be extended by the county commission for an additional six-month period upon request from the timber owner. *Ala. Code § 23-1-80.1(f).*

The requirement to provide notice shall apply to any use of county roads by a timber owner, his or her representatives or employees, or a contractor responsible for harvesting the timber in furtherance of its operations on or after the effective date of the county's ordinance or resolution. *Ala. Code § 23-1-80.1(h).*

2. Notice Requirements

Ala. Code § 23-1-80.1(d) provides that the notice shall be as prescribed by the county commission and shall consist of ***only*** the following:

a. A map or legal description of the area which identifies the location of the tract and the access point or points to the tract from a county road.

b. Whether the access point or points are new or existing, including details outlining how access will be accomplished while maintaining the normal drainage features on the public road.

c. The expected routes upon county roads related to the operations.

d. The estimated acreage of the tract.

e. The estimated date that access to the county roads will commence.

f. The name, address, and phone number of the timber owner and the contractor responsible for harvesting the timber, if not the same.

    - If the contractor is not known at the time of notice submission, the person giving notice shall provide this information prior to accessing the county roads.

g. The name and address of the liability insurance carrier of the person providing the notice and the contractor responsible for harvesting the timber.

    - If the contractor is not known at the time of notice submission, the person giving notice shall provide the information prior to accessing the county roads.

Ala. Code § 23-1-80.1(e) requires that the notice be submitted to the county commission office in person, by fax or email, by regular mail, or by other means as approved by the county commission.

3. Review of Submitted Notice

While *Ala. Code § 23-1-80.1* does not specifically address review of the notice by the county engineer or county commission, *Ala. Code § 23-1-80.1(o)* specifically provides that acceptance of the notice, "shall in no way limit or affect the county's authority to regulate and enforce any laws governing the use of or damage to a county-maintained road or bridge or a county right-of-way."

To ensure that the timber owner's proposed use of the road will not violate the county's regulations regarding proper use of roads and rights-of-way (including its access management policy) or cause damage to its roads or rights-of-way, the county engineer should carefully review each submitted notice before timber activities are initiated, and provide the timber owner with a written response to the submitted notice that either:

- Confirms that the content of the notice complies with county policy and Alabama law and that the logging operation is responsible for compliance with the content of the notice during the harvest of timber or

- Sets out deficiencies with the submitted notice and provides an opportunity to correct problems with the notice.

The model ordinance that was created by the Logging Policy Advisory Committee sets out a suggested procedure for conducting this review and response.

4. Issuance of Warnings for Noncompliance

The county shall provide a warning and opportunity to comply to any timber owner who fails to provide notice or fails to comply with the terms of the notice. *Ala. Code § 23-1-80.1(i).*

- Upon receipt of the warning and the failure to comply with this section, the person owning the timber may be fined $500.00 for each day a violation continues to take place.

- All fines collected shall be payable to the county and deposited into its road and bridge fund.

- Additionally, the county may bring a civil action to enjoin the timber owner, his or her representatives or employees, or a contractor responsible for harvesting the timber from utilizing county roads.

5. Enforcement of Ordinance

Section 23-1-80.1 may be enforced by the county license inspector appointed pursuant to *Ala. Code § 40-12-10*, including the issuance of citations for failure to comply with the notice requirements or with the terms of the notice. *Ala. Code § 23-1-80.1(j).*

As noted above, under *Ala. Code § 23-1-80.1(j)*, the timber owner may be fined $500.00 a day for each violation which continues following receipt of a warning and opportunity to comply.

Ala. Code § 23-1-80.1(k) provides that once a citation has been issued, no subsequent notice application shall be effective until all fines and penalties have been collected.

- Additionally, if any timber owner, his or her representatives or employees, or a contractor has been cited on three separate occasions within a 24-month period, the county may require that security be posted as a condition of using the county roads.

6. County Protection from Liability

Pursuant to *Ala. Code § 23-1-80.1(g)*, the county's receipt of the notice shall not constitute an act on behalf of the county which shall result in the county commission, the county engineer, or any employees of the county commission being held liable in any matter arising from the actions or inactions of the timber owner, or his or her representatives, employees, or contractors.

Additionally, compliance with notice provisions shall not operate to relieve such persons or firms from liability for damages which may arise from their use of public roads, bridges, or rights-of-way in the county. *Ala. Code § 23-1-80.1(l).*

7. Emergencies Declared by Governor

Ala. Code § 23-1-80.1(m) provides that when the Governor declares a state of emergency as a result of an event that causes damage to timber within a county, the notification requirements set forth in this law are suspended for that county for the period of time consistent with the Governor's proclamation.

8. Utilities

Pursuant to *Ala. Code § 23-1-80.1(n)*, this law shall not apply to any utility maintaining or establishing clearances from timber or vegetation for its facilities and equipment nor shall it apply to the employees, contractors, agents, or representatives of such a utility where the employees, contractors, agents, or representatives are acting within the course and scope of their employment, contract, or agency.

CHAPTER FOUR

COUNTY WORK ON PRIVATE PROPERTY

I. GENERAL RULE PROHIBITING WORK ON PRIVATE PROPERTY

A. CONSTITUTIONAL PROHIBITION

Section 94 of Alabama's Constitution includes a strict prohibition against the county performing work on private property, expending public monies for non-public purposes, or otherwise granting any "public money or thing of value in aid of" any private interest.

This constitutional prohibition is the basis for the long-held view that counties are prohibited from performing work on private property, from providing labor or materials to individuals, from contributing to private enterprises, or expending any monies for "nonpublic" purposes. And this prohibition applies in some instances where Alabama's Ethics Law may not actually be in play.

Section 94, Constitution of Alabama 1901, as amended by Amendment 112, provides that:

> The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company by issuing bonds or otherwise. It is provided, however, that the legislature may enact general, special, or local laws authorizing political subdivisions and public bodies to alienate, with or without a valuable consideration, public parks and playgrounds, or other public recreational facilities and public housing projects, conditional upon the approval of a majority of the duly qualified electors of the county, city, town, or other subdivision affected thereby, voting at an election held for such purpose.

B. ETHICS LAW

There are also Ethics Law considerations. *Ala. Code § 36-25-5* prohibits use of public office or employment for personal gain. *Ala. Code § 36-25-5*(c) prohibits a public official or employee from using public equipment, facilities, time, materials, human labor, or property under his or her discretion or control for the private benefit or business benefit of any other person. Additionally, *Ala. Code § 36-25-5(d)* provides that no person shall solicit such an activity "which would materially affect his or her financial interest, except as otherwise provided by law."

- For Ethics Opinions specifically addressing the use of public equipment or personnel for work on private property, see, *Ethics Opinion ## 95-111 and 95-109*.

C. ATTORNEY GENERAL INTERPRETATIONS OF LAW

There are numerous attorney general's opinions addressing specific questions raised in regard to the constitutional prohibition set out in Section 94. Some of the holdings are as follows:

- County cannot dump surplus dirt onto private property unless the dirt is without value and it is shown that dumping the dirt on nearby private property will cost less than hauling it some distance for disposal. *AG's Opinion ## 93-299 and 83-261. See also, Ethics Opinion # 95-111.*

- County cannot sell pipe to individuals at its cost. *AG's Opinion # 84-031.*

- County cannot perform work on water and sewer lines located on private property beyond main water and sewer lines. *AG's Opinion ## 2001-188 and 95-029.*

- County cannot maintain school bus parking pads or turnarounds on private property. *AG's Opinion ## 2005-176; 96-214; 94-245; and 92-172.*

- County (or city) cannot pave around a funeral home housed in a county building leased to an individual. *AG's Opinion # 93-311.*

- County has no authority to perform private work at no cost to a church. *AG's Opinion ## 2010-081; 96-037 and 93-145.*

- County cannot perform excavating work for a private college at no charge. *AG's Opinion # 81-126.*

- County road department may not clear debris from private property. *AG's Opinion # 83-299.*

  -- But see, *AG's Opinion # 2005-029*, holding that debris removal can be performed following a hurricane if there is a public purpose or the debris constitutes a health hazard, the property owner is assessed, and no private source can be located for removal.

- County employees cannot load chert onto private vehicles. *AG's Opinion # 97-001.*

- County may not use its equipment and employees to open and close graves even where there is full reimbursement. *AG's Opinion # 98-130.*

- Maintenance of a church cemetery would violate Section 94 of Alabama's Constitution. *AG's Opinion # 2010-081.*

- County cannot remove culvert/drainage ditch located on private property where the county has no liability for its installation and its removal would be of no benefit to the county even though the ditch floods and backs water onto property of residents (and even though the county had installed the original drainage ditch in violation of the constitutional prohibition). *AG's Opinion # 99-290*. See, also, *AG's Opinion # 2005-077.*

- Town has no authority to pave a private roadway or private drive, but may pave a street if it has been dedicated and accepted by the town. *AG's Opinion # 2002-130*.

II. EXCEPTIONS TO GENERAL RULE

A. LOCAL LEGISLATION

The attorney general's office has consistently held that the county may perform work on private property where there is local legislation authorizing such work to be done, provided:

1. The legislation provides that the county will be fully reimbursed for the labor, materials, and equipment used in the work, and

2. There is a provision of certainty in the legislation that the county will be paid.

See, e.g., AG's Opinion ## 2001-188; 96-061, 94-245, 90-257, 89-089, and 84-393.

The requirement for reimbursement has been strictly construed by the attorney general's office. *AG's Opinion ## 93-139, 84-031, and 81-004*. In other words, even with a local law authorizing work on private property, the owner of the property must pay for any work performed or materials used.

At least three circuit courts in Alabama have struck down local laws authorizing county work on private property, declaring that it violates *Section 94 and Amendment 112 of Alabama's Constitution*. And while the attorney general's office does not address issues of constitutionality, it has hinted in several opinions that such a local law might be struck down in a court of law.

As set out above, *Amendment 112* does authorize local legislation to provide assistance for certain public purpose projects such as parks or housing projects, if approved by the electorate. However, this would have very limited application.

B. STATUTORY EXCEPTIONS

The attorney general's office has also recognized exceptions to the general prohibition against counties performing work on private property based upon statutory provisions authorizing certain actions. Some examples are:

- The county may use county equipment and labor in the construction of a football field on property owned by the county school system. *AG's Opinion # 82-374.*

  -- This exception is based on *Ala. Code § 11-3-11(a)(21)* which authorizes counties to use county equipment and expend funds for the improvement, beautification, or decoration of any county school or schools under the control of the county board of education.

- The attorney general has also held that the county commission can maintain a private road for school buses to transport special education students entitled to transportation services if the board of education pays for the maintenance. See, *AG's Opinion ## 2004-159; 2004-056 and 99-145.*

  -- These opinions are based in part on the federal requirement for public school systems to provide this transportation where needed for special education students.

- The county may perform free grading, filling, graveling, and pavement work at rural volunteer fire department locations. *AG's Opinion # 87-028.*

  -- This is based upon *Ala. Code § 9-3-18*, which authorizes the county (and other governmental entities) to donate money, property, equipment or other thing of value to volunteer fire departments and rescue squads.

- The county may provide funds, labor, and/or equipment for agricultural and industrial development purposes pursuant to *Ala. Code § 11-3-11(a)(19). See, e.g., AG's Opinion ## 98-094 and 94-264*.

  -- This statutory provision and the statute authorizing the creation of industrial development boards and county assistance thereof (*Ala. Code § 11-20-30 et seq.*) have generally been broadly applied.

- *Ala. Code § 11-3-11(a)(19)* has also been cited as authority for appropriating funds and contracting for services with an economic development authority. *See, e.g., AG's Opinion ## 2006-137, 94-233 and 89-449.*

  -- *See, also, Amendment 772 of Alabama's Constitution*, which allows the county to use public funds and resources for the promotion of economic and industrial development, provided the procedures in the amendment, including public hearing, are followed and a public purpose is established.

- *Ala. Code § 23-1-86* authorizes counties to maintain roads and bridges within a municipality with the consent of the municipality. *AG's Opinion # 87-307*.

When the county does work under one of the exceptions noted above, it is important to keep in mind the funding sources for the project. As discussed in *Chapter Six, Funding Sources for County Roads and Bridges*, counties are restricted to certain uses for proceeds from gasoline taxes. There are other limitations on uses from the various funds of the county that are beyond the scope of this manual.

SPECIAL CIRCUMSTANCES

Other exceptions have been recognized because of a special circumstance, such as a showing that there is a genuine benefit to the county and/or public. Some examples of these are listed below:

- The attorney general has also held that a town can perform debris removal following a hurricane if (1) the property owners are assessed, (2) the debris constitutes a health hazard, and (3) the landowners were unable to secure a private source to perform the service. *AG's Opinion # 2005-029.*

- The county may perform work on the county rights-of-way*. AG's Opinion ## 91-251 and 89-089.*

- The county may contract with a private landowner to dump debris onto the landowner's property using county equipment and personnel, where the county is receiving a benefit in that it needs land for dumping debris from storms. *AG's Opinion # 96-083.*

  -- This opinion should be read ***very narrowly***.

- A municipality may use community development block grant (CDBG) funds to install sewer lines on private property. *AG's Opinion # 91-406*.

  -- This opinion, which would likely apply to a county as well, is based upon the attorney general's conclusion that "use of CDBG funds to rehabilitate privately-owned property does not violate *§ 94 of the Constitution of Alabama, 1901*, as amended."

  -- But see also, *AG's Opinion # 2003-074*, holding that a local government can only expend public funds to improve private property if it concludes that a public purpose will be met by the public expenditure.

- The attorney general's office has held that the Constitutional prohibition is not applicable to work done by a county on a roadway belonging to a public water authority because it is a public corporation and a road belonging to that corporation would be a public road. *AG's Opinion # 82-072*.

  -- However, the county may not perform maintenance and repairs on a private road leading to a water authority. *AG's Opinion # 2001-231*.

- The county may also perform work where damage to private property resulted from improvements to county property. *AG's Opinion # 95-018*. *See, also, AG's Opinion # 2014-062.*

- As part of its maintenance of the county road system, a county may clean drainage areas located on private property if the county has an easement and the county will receive some benefit from the work performed. *AG's Opinion ## 90-317 and 87-307.*

- The county may also maintain driveway bridges and install driveway pipe located on county rights-of-way and connecting private property to a public road at its expense where necessary "for the safety and convenience of the traveling public". *AG's Opinion # 91-251.*

- The attorney general has repeatedly held that the county ***cannot*** perform work on private property for the purposes of parking or turnaround. *AG's Opinion # 94-245.*

  -- A private driveway is not considered a public road simply because it is used by a school bus or mail carrier. *AG's Opinion ## 96-214 and 82-072.*

These exceptions should be very narrowly applied. For example, there are several opinions authorizing work on private property to correct a health problem or nuisance, where the county health department certifies to the county commission that there is a public health or safety hazard (such as an abandoned well). *See, e.g., AG's Opinion ## 88-223, 2001-188; 96-061, 94-221, and 93-303.* The county health department traditionally made this determination routinely, but many years ago, the Alabama Department of Public Health began discouraging this practice because of concern this was utilized as a way "around" the Constitutional prohibition. Counties should have the same concerns, and as noted in *AG's Opinion # 93-303*, where the county does perform work in these situations, it may (and should) assess the expense or cost of work to the property owner.

In addition to the exceptions based upon a genuine benefit to the public, the attorney general has held that transfers among governmental agencies are not subject to the limitations of Section 94 of the Constitution. *See, e.g., AG's Opinion # 2010-010.*

D. PUBLIC PURPOSE DOCTRINE

The Supreme Court has held that public entities may donate public money or other things of value where there is a "public purpose", which has as its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community. The test should be whether the expenditure confers a direct public benefit of a reasonably general character (i.e. a significant part of the public). *Slawson v. Alabama Forestry Commission, 631 So.2d 953 (Ala. 1994). See, also, AG's Opinion # 2005-073.*

The Supreme Court and the attorney general's office have generally held that this is largely a decision to be made by the governing body. However, counties should be very careful in applying this doctrine, and ensure that there will be a direct public benefit of a general character. The attorney general has written numerous decisions discussing this principle. A few of the most recent opinions are:

- A city may assist in the removal of siltation from a private lake if it determines that this removal effort would serve a "public purpose". *AG's Opinion # 2002-211.*

- A city may assist the county program on aging in the renovation of a building for the activities of the program. *AG's Opinion # 2002-039*.

- A city may only pave a roadway adjacent to a public street if it acquires the roadway for a public purpose by dedicating transfer of deed or by prescription. A*G's Opinion # 2004-143.*

- City may expend public funds to pay for debris removal following hurricane if it determines that the work serves a legitimate public purpose or absent such finding, it may assess property owners for the clean up where the debris is a health hazard and the owners cannot find a private source to perform the clean up. *AG's Opinion # 2005-029.*

- County may assist a city in preparing a roadway on private property to promote industry or prevent job loss if it determines that a public purpose will be served and that a public benefit is provided. *AG's Opinion # 2005-041.*

    -- The creation or increase in tax revenue alone is not sufficient to show public purpose.

- The county may perform work on a private road providing access to a site housing communications equipment used by county volunteer fire departments if it determines that a public purpose is served, provided either the county or the volunteer fire department association obtain an easement from the private property owners before making any improvements. *AG's Opinion # 2013-033.*

In many of the "public purpose doctrine" opinions, the attorney general's office recommends the governmental entity execute a contract with the entity to which it is providing an appropriation or some county service setting out the mutual benefits of each party and the consideration on both sides. *See, e.g., AG's Opinion # 96-065,* where that office held that the restrictions of Section 94 do not apply where a governmental entity enters into a contract "with mutual benefits to each party and consideration on both sides." *See, also, AG's Opinion # 2012-041.* In essence, such an agreement makes clear there is a "public purpose" involved which will confer a direct public benefit to citizens of the county.

In recent years, the Attorney General's office has begun to look more closely at whether there is some statutory authority to support the use of public monies, even when applying the "public purpose doctrine". For example, in *AG's Opinion # 2012-044,* that office held:

> Absent statutory authority to promote the general welfare and development of citizens who are mentally and developmentally disabled, the Geneva County Commission may not use and appropriate county funds to the Geneva County Association for Retarded Citizens for the payment of fire and hazard insurance on a building owned by the Association.

See, also, AG's Opinion # 2013-005.

E. AMENDMENT 772

Amendment 772 of Alabama's Constitution was ratified in 2004. This amendment grants counties fairly broad powers to use county resources for the acquisition and establishment of economic and industrial development projects, which may include transportation infrastructure, maintenance, and improvement. *See e.g., AG's Opinion # 2009-068*. Under this amendment, the county may do any of the following without violating the constitutional provision prohibiting counties from using public funds for private purposes:

- Acquire, sell, or lease real property and equipment using public funds.
- Lend its credit or grant public funds or things of value for the promotion of economic and industrial development.
- Become indebted and issue bond.

Prior to taking any action under this amendment, the county commission must:

- Provide seven days notice of the public meeting at which expenditure of public funds will be considered.
- Adopt a resolution making the determination that the expenditure of specified use public funds will serve a valid and sufficient public purpose.

As noted above, this amendment gives counties broad powers to provide for economic and industrial development which may well include participation in the infrastructure needs of any given project. Counties should consider all prospects very carefully to determine whether they fit within the definition of the public purpose doctrine as discussed above. *See, AG's Opinion # 2006-137.*

CHAPTER FIVE

THE ALABAMA DEPARTMENT OF TRANSPORTATION

I. GENERAL ORGANIZATION OF THE ALABAMA DEPARTMENT OF TRANSPORTATION

The Alabama Department of Transportation (sometimes referred to herein as "Department") is established pursuant to *Ala. Code § 23-1-20.* This agency was originally called the Highway Department, but the name was changed by legislation in 1993. All references in the Code to the "highway department" are now deemed to be a reference to the Alabama Department of Transportation.

A. POWERS AND RESPONSIBILITIES

Ala. Code § 23-1-20 to § 23-1-63 (Code of Alabama 1975, Title 23, Article 2), sets out the general statutory authority of the Department.

- The general duties and powers of the Department are enumerated in *Ala. Code § 23-1-40*.
- The agency's broad rule-making authority is set out in *Ala. Code § 23-1-59*.

There are other Code sections addressing the role and powers of this agency, which are worthy of note. For example:

1. Highway Beautification (Scenic Enhancement, Junkyard Control, Outdoor Advertising)

a. *Ala. Code § 23-1-220 to § 23-1-223* deals with "scenic enhancement" and provides that the Transportation Director is authorized to acquire land necessary for the restoration, preservation, and enhancement of scenic beauty and establishment of rest areas within and adjacent to state and federal-aid highways.

b. *Ala. Code § 23-1-240 to § 23-1-251* addresses "junkyard control" and empowers the Department, through its Director, to issue licenses and regulate junkyards adjacent to state or interstate highways.

c. *Ala. Code § 23-1-270 to § 23-1-288* addresses "outdoor advertising" and again grants the Department authority for permitting and regulation.

2. Controlled Access Facilities

Ala. Code § 23-3-1 to § 23-3-8 addresses controlled access facilities. *Ala. Code § 23-3-2* declares that it is the policy of the state "to facilitate the flow of traffic and promote public safety by controlling access to highways included in the national system of interstate highways as selected by joint action of [the Department] and the United States Bureau of Public Roads." The Transportation Director has broad powers in this area "acting alone or in cooperation with counties, cities, towns, or any federal, state or local agency or any other state". *Ala. Code § 23-3-3.*

B. DIRECTOR OF TRANSPORTATION

The Transportation Director is appointed by the Governor and holds office at his or her pleasure. *Ala. Code § 23-1-21.* The specific duties and authority of this office are found throughout the above-referenced Code sections, as well as in other sections of Alabama's law. See, in particular:

1. *Ala. Code § 23-1-21.2 and § 23-1-21.3* setting out the Director's authority with regard to public transportation.

2. *Ala. Code § 23-1-45* granting the Director authority to acquire rights of way deemed necessary for construction of a state highway, either by purchase or by right of eminent domain and to request that the county acquire such rights of way, which the county shall do, if requested.

3. *Ala. Code § 23-1-56* addressing the Director's role in the contracting and bidding process.

4. *Ala. Code § 11-6-4 and § 11-6-23* authorizing the Director to approve partial payment by the state of the salaries of the county engineer and county engineer interns. *(See, Chapter One, Sections II, C and III, B for further discussion of this issue.)*

5. *Ala. Code § 23-1-60*, setting out the Director's authority with regard to alteration of plans or character of highway projects.

6. *Ala. Code § 40-12-270* requiring the Director's (or his designee's) approval of plans for use of certain road funds distributed to counties. *(See, Section II below and Chapter Six, Section II, E, 2 for further discussion of this issue.)*

7. *Ala. Code § 23-1-212* authorizing the Director to issue regulations and procedures necessary to carry out relocation assistance following the acquisition of property which results in displacing persons from their homes.

8. *Ala. Code § 23-1-332* requiring the Director to approve projects under the Rural Access Program and granting him or her sole authority to promulgate rules and regulations for the operation of that program. *(See, Section III below for further discussion of this issue.)*

C. CHIEF ENGINEER

Ala. Code § 23-1-22, as amended in 2016, provides for the position of chief engineer and states that this position "shall be filled by appointment by the [Transportation] Director, with the approval of the Governor."

- The chief engineer shall serve at the pleasure of the Director and shall be an exempt employee under the state's merit system. *Ala. Code § 23-1-22(b).*

- The duties of the chief engineer, subject to and under the control and supervision of the Director, include the administration of technical phases of the Department, and direction and coordination of its engineering activities. *Ala. Code § 23-1-24.*

- Additionally, the chief engineer "shall affix his signature to the title sheets of all plans let to contract by the [Department]." *Ala. Code § 23-1-24.*

D. PUBLIC TRANSPORTATION

Ala. Code § 23-1-21.2 and *§ 23-1-21.3* delegate to the Director, acting alone or in cooperation with local entities, the authority to:

1. Enter into agreements to provide public transportation and to administer any programs relative to public transportation resulting from federal legislation.

2. Enter into agreements with the United States for federal assistance for public transportation.

3. Enter into agreements with local entities to perform and/or cooperate in the performance of transportation planning for public transportation improvements, provided the local entities affected enter into an agreement with the director to carry out a planning process.

4. Provide technical assistance to local entities for formulating a program of public transportation projects.

5. Administer any state funds authorized by the legislature for public transportation.

6. Promulgate rules and regulations to ensure compliance with federal laws and regulations relating to public transportation.

In addition to the above, the Alabama Legislature transferred the Alabama Department of Aeronautics to the Department of Transportation during the 2000 Regular Session. See *Ala. Code § 23-1-350 et seq.*

E. GENERAL SUPERVISION OVER ROAD PROJECTS

There are several Code sections – and in particular, *Ala. Code § 23-1-40* -- which specifically address the Department's general supervision over road projects across the state, including county or municipal projects.

1. *Ala. Code § 23-1-40(d)* provides that the Department shall collect information and prepare statistics relative to the mileage, character and condition of the roads and bridges in the state.

2. *Ala. Code § 23-1-40(e)* requires the Department to investigate and determine the methods of road construction best adapted to the various sections of the state and to establish standards for the maintenance of roads and bridges which have been constructed with state aid.

3. *Ala. Code § 23-1-40(f)* states that the Department may be consulted by county officials relative to any matter relating to the construction of roads, bridges, and culverts.

   -- Additionally, the Department may call on all county officials for information or assistance it may require and the county has a duty to supply same.

4. *Ala. Code § 23-1-40(g)* enumerates the general duties and powers of the Department and provides that it shall have general supervision over the construction and maintenance of all public roads, bridges, and culverts (including county roads, bridges, and culverts) where state funds are used.

5. *Ala. Code § 23-1-49* requires the Department to furnish a competent engineer, when needed, to supervise county projects and to oversee compliance with the plans and specifications.

6. *Ala. Code § 23-1-5* authorizes the Department to require relocation of any utility facility necessitated by interstate highway construction, including extensions within urban areas. The cost of relocation for utilities with a gross income of $250,000,000 is paid as part of the construction costs.

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F. RULEMAKING AUTHORITY

Several sections outline the Department's broad powers to promulgate rules and regulations relating to the agency's different areas of responsibility. The rules of the agency are codified in Chapter 450 of the Alabama Administrative Code.

1. *Ala. Code § 23-1-59* grants the Department the right and power to adopt all reasonable and necessary rules and regulations for the better construction, repair, and maintenance of public roads and bridges in Alabama. This authority extends to rules regarding the construction or maintenance of utility poles, wires, etc. to ensure the safety of the travelling public.

    - The Supreme Court has held that standard specifications established for highway construction need not be adopted through the Administrative Procedures Act, but are instead specifications for details and materials that may be incorporated by reference into requests for bids. *Alabama Department of Transportation v. Blue Ridge Sand & Gravel, 718 So.2d 27 (Ala. 1998).*

    - Counties must comply with Department standards when utilizing state or federal funds. *AG's Opinion # 96-172.*

2. *Ala. Code § 23-1-59* also grants the Department authority to prescribe rules and regulations regarding the weight or tonnage of vehicles using public roads or unnecessary trespass or injury to any roads or right-of-ways upon which state money may be expended or appropriated.

3. In addition to the specifically-enumerated rule-making authority, *Ala. Code § 23-1-59(d)* grants the Department the right, authority, and power to make all reasonable rules and regulations necessary to carry out the provisions of the laws on Alabama highways.

4. *Ala. Code § 23-1-1* grants the Department rulemaking authority for the effective implementation and cooperation with the provisions of acts of Congress relating to road and bridge projects.

5. *Ala. Code § 23-1-56(e)* authorizes the Department to promulgate rules and regulations relating to qualification of bidders.

6. *Ala. Code § 23-1-64(b)* authorizes the Department to promulgate administrative rules and regulations relating to the disposal of surplus property.

7. *Ala. Code § 23-1-332(j)* provides that the Transportation Director shall have sole authority to promulgate rules and regulations for the operation of the Rural Access Program. *(See, Section III below for further discussion of this issue.)*

G. CONTRACTING AND BIDDING POWERS AND RESPONSIBILITIES

The Alabama Department of Transportation also has very broad contracting powers and responsibilities. Some of those statutory powers are listed below.

1. *Ala. Code § 23-1-1* provides that the Department is authorized to enter into all necessary contracts and agreements with the U.S. government or other agency in accordance to acts of Congress relating to the construction, maintenance, and beautification of highways, bridges, tunnels, or ferries and to do all other things necessary to secure that the state and its counties and municipalities receive the full benefits provided by such acts.

2. *Ala. Code § 23-1-40(b)* authorizes the Department to cooperate or contract with any municipality or county in the paving or improving of any streets, highways, or walkways upon which a state educational or eleemosynary institution or property may front or abut.

3. *Ala. Code § 23-1-53* authorizes the Department to contract with counties (or municipalities) to do any work in the construction, repair, and maintenance of roads, bridges, or highways in the state.

4. *Ala. Code § 23-1-57* authorizes the Department to enter into contracts and agreements with adjoining states and the federal government relative to the acquisition, construction, maintenance, and repair of bridges across any river or stream forming the boundary between Alabama and an adjoining state, subject to terms and conditions set out in the section.

5. *Ala. Code § 23-1-54* states that every contract for road or bridge construction, repair, or maintenance under *Code of Alabama 1975, Title 23, Chapter 1* shall be made in the name of the State of Alabama, and approved by the Department and the Governor.

   - Under *Ala. Code § 23-1-55*, no contract for construction, repair, or renewal of highways, bridges or culverts shall be let without approval of the Governor.

6. *Ala. Code § 23-1-55* provides that no contract shall be let until after all necessary right-of-way and right for material for construction and right-of-way for ingress and egress to said material have been legally procured with documents covering such procurement on file with the Department.

7. *Ala. Code § 23-1-56* addresses the Department's special rules for prequalification of bidders seeking to contract with the state for road and bridge projects.

   - See, *Alabama Department of Transportation v. Blue Ridge Sand & Gravel, supra,* wherein the Department successfully argued that its standard specifications are specifications to be incorporated by reference in its proposals for bid and contracts.

8. In addition to these specific contracting powers and responsibilities, the Department has special provisions for many aspects of bidding and contracting pursuant to Title 23 and Alabama's public works law, found in *Code of Alabama 1975, Title 39*. *(See, Chapter 8 on Alabama's public works law for further discussion of these special provisions.)*

    - Additionally, *Ala. Code § 23-1-40* was amended during the 2016 Regular Session of the Legislature to allow the Department to utilize the design-build process for contracting certain public works projects of not less than $100,000,000. *See, Act 2016-257.*

H. SURPLUS PERSONAL PROPERTY

Ala. Code § 23-1-64 to § 23-1-66 deal with the Department's authority to dispose of surplus personal property. Sections of particular interest to counties are:

1. *Ala. Code § 23-1-64(c)* which authorizes the Department to sell surplus personal property at fair market value and to set out its published rules to counties and other agencies on how to purchase such property from the Department.

    - All purchases must be paid for within 30 days or the purchase shall be declared void.

2. *Ala. Code § 23-1-64(d) and (e)* provide that the governing body of any municipality or county shall be given preference on the disposal of all surplus motor vehicles owned by the Department except those sold to other state agencies.

    a. The county shall notify the Department, in writing, of the type vehicle needed, and the Department shall maintain a list of needs on a first-come, first-served basis.

    b. Once notified the county will have seven working days to respond.

II. THE ROLE OF THE DEPARTMENT IN COUNTY ROAD AND BRIDGE PROJECTS

The Department of Transportation plays a major role in many county road and bridge projects, particularly when such projects are funded, in whole or in part, with state and/or federal funds. In fact, as set out above, many of the Code sections addressing the Department's duties and responsibility deal with its regulatory authority over county projects.

In *AG's Opinion # 96-172*, the attorney general's office held that the design standards that a county must follow in its road and bridge projects depend on the source of funding for each project, and that if funding is provided by the state or federal government, the county must adhere to standards that must be approved by the Department.

A. WORK ON STATE ROADS WITHIN THE COUNTY

Ala. Code § 23-1-48 provides that when a county commission desires that a state road or bridge in the county be constructed or maintained with state aid, it shall make written application to the Department under rules and regulations that the Department may prescribe.

1. If the application is approved, the county commission shall direct an engineer to prepare surveys, plans, specifications, and cost estimates and the Department may then appropriate out of state funds such part of the cost "as it may deem proper".

2. The Department shall proceed to do such work by contract or with its own forces.

3. The Department may accept appropriations from the county which shall be paid into the state's fund before the work begins.

4. Whenever a county fails to make application or the Department deems it best for such work to be done, it may proceed to construct or maintain any part of the state road or bridge and pay part or all of the cost out of the state highway fund.

B. DISTRIBUTION OF ROAD AND BRIDGE FUNDS TO COUNTIES

There are several different sources of funding for county roads and bridges, many of which are derived from state-levied taxes and fees and from federal funding. In some instances, the use of funds requires approval from the Department. Chapter Six of this manual deals specifically with funding sources for county roads and bridges. However, the role of the Department in the distribution and use of funds is addressed here.

1. General Supervision over Projects Using State Funds

As noted above, *Ala. Code § 23-1-40(g)* provides that the Department shall have general supervision of any state funds apportioned to any county of the state for the construction and maintenance of all public roads, bridges, and culverts in each county.

- *Ala. Code § 23-1-40(e)* provides that the Department shall establish standards for the maintenance of roads and bridges which have been constructed with state aid. *See, also, AG's Opinion # 96-172.*

2. Motor Vehicle License Taxes and Registration Fees

Ala. Code § 40-12-240 et seq. imposes a license tax and registration fee for motor vehicles. Distribution of these funds, which includes a portion to counties, is set out in *Ala. Code § 40-12-270.* The statute prescribes the appropriate uses for funds distributed to counties and requires that all plans be submitted to and approved by the Transportation Director or his or her designee. The review and approval of all plans shall be based on the criteria and standards developed by the Secondary Road Committee, discussed below.

- The same requirement used to apply with regard to use of inspection fee proceeds. However, this requirement was repealed with regard to use of those funds in *Act 2015-54*. *(See Chapter Six, Section II, D for further discussion of this issue.)*

3. Secondary Road Committee

Pursuant to *Ala. Code 40-12-270(d)(2)*, there is a "secondary road committee" comprised of the following members who serve at the pleasure of the appointing authority:

a. The chief of the bureau of secondary roads of the Department;

b. Two county engineers appointed by the Transportation Director; and

c. Two county commissioners appointed by the Governor.

The purpose of this committee is to develop and publish criteria for the designation of high density roads and bridges and eligible recreational access roads and to develop and publish minimum design standards, including cost items, for the construction, reconstruction, surfacing, resurfacing, restoration, and rehabilitation of high density roads and bridges and recreational access roads.

- The committee may amend the criteria and standards as necessary upon 60 days notice to the chairman of each county commission.

As noted above, this committee used to govern projects paid for with proceeds from the inspection fee, but that provision was repealed in *Act 2015-54*. *(See Chapter Six, Section II, D for further discussion of this issue.)*

4. Distribution of Federal Funds

As noted above, *Ala. Code § 23-1-1* authorizes the Department to enter into necessary contracts and "to do all things necessary to secure to the state and its counties and municipalities the full benefits" of acts of Congress relating to road and bridge projects.

The Department distributes a portion of federal highway funds to counties on an annual basis, and sets out rules and regulations for the distribution of these funds.

III. RURAL ACCESS PROGRAM

In addition to the above-referenced programs administered by the Department, in 1995 the Alabama Legislature created a program known as the "Rural Access Program (RAP)" and allocated specific revenues to this program. *Ala. Code § 23-1-330 to § 23-1-333*.

The program was designed to provide funds for counties to use to improve existing paved roads, to pave dirt roads, and for bridge replacement. See, *Ala. Code § 23-1-332(d),* which also provides that funds from the program cannot be used for routine maintenance. *Ala. Code § 23-1-332* sets out the general rules and procedures for projects funded under the Rural Access Program. However, to date, the threshold for monies to be paid into this program has never been met, and no funds from this program have ever been appropriated or distributed to counties.

IV. CAPTIVE COUNTIES

Prior to 1979, ten counties, known as "captive counties", did not maintain a county road or highway department. The road and bridge work in each of these counties was performed by the State and its employees. Those counties were: Cherokee, DeKalb, Jackson, Colbert, Cullman, Lauderdale, Lawrence, Winston, Franklin, and Baldwin.

In 1979, the Alabama Legislature passed Act 79-688, codified at *Ala. Code § 23-1-100 to § 23-1-107*, which in effect, transferred the responsibility for the construction, repair, and maintenance of the county roads and bridges in the respective counties to the county commission of each county. The law required the Department to transfer any unexpended monies maintained for road and bridge projects in these counties to each of the counties. It also required the Department to transfer adequate facilities and equipment for the counties to carry out its duties and functions in relation to roads and bridges.

Counties were authorized to employ up to 75% of state employees working in the respective counties, and the state was responsible for accumulated leave and other benefits. *Ala. Code § 23-1-105* provided that all contracts entered into by the Department prior to the adoption of this law would remain in effect. However, *Ala. Code § 23-1-106* provided that all outstanding financial obligations became the obligations of the respective captive counties.

This law went into effect on October 1, 1979 or October 1, 1980, "at the discretion of the individual county commissions." *Ala. Code § 23-1-107*.

CHAPTER SIX

FUNDING SOURCES FOR COUNTY ROADS AND BRIDGES

I. CONSTITUTIONAL PROVISIONS FOR ROAD AND BRIDGE FUNDING

Alabama counties have no inherent power to tax, and derive any taxing authority from the Legislature through general and/or local laws. The Constitution of Alabama of 1901 does address possible funding of county roads and bridges through the levy of local ad valorem taxes. However, it also places strict limitations on the procedures for levying such taxes and on total county tax levies and rates. In many counties these restrictions have been altered by a local constitutional amendment increasing the county's total tax limit. Nonetheless, the availability of ad valorem tax revenues for roads and bridges must be determined in conjunction with tax levies for other purposes, such as education and public health.

The procedures and limitations applicable to levying local taxes for roads and bridges or for other purposes is complicated and beyond the scope of this handbook. However, the relevant constitutional and statutory sections specific to road and bridge funding are set out below.

A. SPECIAL AD VALOREM TAX FOR COUNTY ROADS AND BRIDGES

1. Constitution of Alabama of 1901, Section 215

Constitution of Alabama of 1901, § 215 provides generally that no county shall be authorized to levy an ad valorem tax of more than 5 mills in any one year. However, it does authorize an additional special tax of no more than 2½ mills to pay any debt or liability incurred for the erection, construction, or maintenance of public roads, bridges, or buildings. The imposition of such tax must be approved by referendum of the voters in the county, and as mentioned above, can only be levied if within the constitutional limit of county taxation.

Section 215 originally limited the use of the special 2½ mill tax to the purposes for which they were levied and collected, but pursuant to *Amendment No. 208*, which was ratified on November 11, 1962, the proceeds of such taxes in excess of amounts payable on bonds, warrants, or other securities issued by the county may now be spent for general county purposes in such manner as determined by the county commission.

The Supreme Court of Alabama has held that *Section 215* is ***not*** a grant of power to the counties to levy taxes, but is a limitation upon the power of the legislature to authorize counties to levy taxes. *Jefferson County v. City of Birmingham, 248 Ala. 319, 27 So.2d 584 (1946).* Furthermore, the legislature must first authorize the special 2½ mill levy. *Rollings v. Marshall County, 263 Ala. 317, 82 So.2d 428 (1955); Jefferson County v. City of Birmingham, supra.*

2. Statutory Provisions for Ad Valorem Tax

The Alabama Legislature has provided for the levy of this ad valorem tax. See, *Ala. Code § 11-14-11.* See, also, *Ala. Code § 11-3-11(a)(2)*, which authorizes the county commission "to levy a general tax for general county purposes and a special tax, for special purposes".

B. RESTRICTION ON USE OF FEES, EXCISES, AND LICENSE TAXES

1. Amendment Nos. 93 and 354

Amendment No. 93 to the Constitution of Alabama of 1901 provides in pertinent part that, except for fees, excises, and license taxes levied for school purposes, no moneys derived from fees, excises, or license taxes for vehicles or fuels shall be expended for any purposes other than the cost of administering such laws, for construction, reconstruction, maintenance and repair of public highways and bridges, or for traffic regulation. This provision has been amended by *Amendment No. 354*, which sets out some exceptions to this restriction, such as special or distinctive car tags, where the Legislature may prescribe a use for the additional charge. *Amendment No. 354* also exempts any vehicle use tax imposed instead of sales tax and pump taxes from the provisions of *Amendment No. 93*.

The Supreme Court has held that *Amendment No. 93* applies only to such fees and taxes as are levied directly by the Legislature and not to those levied by counties and municipalities pursuant to authority granted by the state. *In re Opinion of Justices, 266 Ala. 363, 96 So.2d 634 (1957).*

2. Statutory Implementation of Amendment No. 93

Ala. Code § 23-1-84 authorizes counties to use funds derived from fees, excises, or licenses taxes on vehicles or fuels for road and bridge projects, and states that the legislative intent of this section is to implement *Amendment No. 93*.

- This Code section does not authorize counties to use these funds for traffic regulation as provided for in the Constitution.

- The attorney general's office has held that, because the Legislature has restricted the use of these funds, counties cannot use public highway and traffic fund monies for the purpose of enforcing state traffic and motor vehicle laws absent local legislation authorizing such use of funds. *AG's Opinion ## 93-256 and 93-304*. In both of these opinions, the county had asked whether public highway and traffic fund monies could be used for hiring deputy sheriffs and/or for the maintenance of deputy sheriffs' vehicles.

- The attorney general has held that these funds cannot be used to supplement the county general fund. *AG's Opinion # 2000-216.*

II. STATE REVENUE SOURCES

Alabama general law levies several state gasoline and diesel fuel taxes. Counties receive a portion of most of the gas tax levies, and 4.69% of the $.06 per gallon excise tax of the diesel tax proceeds. And there are limitations on the use of monies distributed to counties – depending in part on the levy from which the monies are paid to counties.

The gasoline and diesel fuel tax laws were rewritten in 2011 to provide a new system of collecting the taxes "at the rack". *See, Act No. 2011-565.* Unfortunately, this resulted in changes in Code sections related to the tax levies and distribution. However, the substance of the law related to distribution and use of monies was not generally altered in any substantive ways.

The law was again amended in 2015 to make changes in the levy, collection, and distribution of inspection fees and the additional 4¢ excise tax effective October 1, 2016. *See, Act 2015-54.* This outline details the law as it reads effective October 1, 2016.

The state gasoline tax is found in *Ala. Code § 40-17-325(a)(1).* The tax is 18¢ which includes a 7¢ excise tax, a supplemental 5¢ excise tax, and an additional 6¢ excise tax. While all of the gas tax proceeds are earmarked for state, county, or municipal road and bridge use, each tax has special restrictions for how the monies can be spent. See, *Ala. Code § 40-17-359 and § 40-17-362.*

A. NET TAX PROCEEDS (7¢ EXCISE TAX PROCEEDS)

Ala. Code § 40-17-359(a)(9) defines "net tax proceeds" of the gasoline taxes levied pursuant to *Ala. Code § 40-17-325(a)(1) as:*

> The entire proceeds from the highway gasoline tax, except the proceeds from the supplemental excise tax of five cents ($.05) per gallon and additional six cents ($.06) imposed by [Section 40-17-325(a)(1)], less the cost of collection and less any refunds pursuant to the [law].

In essence, this defines the 7¢ excise tax.

1. Local Subdivisions' Portion

The "local subdivisions' share of the net tax proceeds" is 55% of the net tax proceeds, with 25% distributed equally to all 67 counties and 30% distributed by population based upon each county's pro rata portion of the state's population. *See, Ala. Code, § 40-17-359(a)(7).*

Ala. Code § 40-17-359(e)(1) requires that 10% of net tax proceeds (7¢ monies) paid to a county be distributed to the municipalities of the county on a pro rata basis of the total population of all municipalities in the county.

- Some counties have local legislation requiring that a larger portion of the proceeds be distributed to municipalities in the county.
- The attorney general has held that in the absence of an agreement, a county cannot insist that a municipality's share of the gas tax proceeds be used for upkeep of county roads within the municipality. *AG's Opinion # 2000-007.*

Ala. Code § 40-17-359(b)(2) sets out the permissible uses of the 7¢ excise tax, providing that proceeds shall not be used for any purpose other than construction, improvement, maintenance, and supervision of highways, bridges, and streets, including the retirement of bonds for the payment of which such revenues have been or may be pledged.

Ala. Code § 40-17-359(g) provides that counties may pay a portion of the county commissioners' salaries out of county gasoline tax revenues proportionate to time spent supervising, inspecting, accepting, building, or repairing county roads or bridges.

Ala. Code § 40-17-359(h) authorizes counties to pay up to 75% of the clerk's compensation out of the road and bridge fund or gasoline tax funds of the county.

Ala. Code § 40-17-359(j)(2), similar to § 40-17-359(b)(2), also provides that county monies "shall be for transportation planning, the construction, reconstruction, maintenance, widening, alteration, and improvement of public roads and bridges . . . including payment of the principal of and interest on any securities at any time issued by the county pursuant to law for payment of which all or any of the net tax proceeds were or may be lawfully pledged".

Ala. Code § 40-17-359(k) authorizes counties to use gasoline tax proceeds for the construction and maintenance of streets within a municipality located in the county.

Ala. Code § 40-17-359(l) provides that counties may use proceeds for construction, reconstruction, maintenance and repair of public highways and traffic control areas located on public school property or state school property within the county.

2. Attorney General's Opinions RE: Use of Funds

The attorney general's office has issued a number of opinions addressing appropriate uses of the 7¢ gasoline tax. Most of these were written before passage of *Act 2011-565* meaning that Code section references in the opinions are to the "old law" repealed in *Act 2011-565*. However, since the substance of the law did not change in the new act and the appropriate uses remain the same, these opinions still apply as a controlling interpretation of the law. The following are some examples:

- There is no requirement that the proceeds be distributed within the county on the basis of road mileage within each commission district. The county commission may determine by majority vote how the proceeds from the tax should be distributed within the districts in the county. *AG's Opinion # 84-238*.

- Counties may use 7¢ gas tax monies to maintain flood structures on county roads including bushhogging. *AG's Opinion # 86-387*.

- 7¢ gas tax monies may be used for salaries of members of the county governing bodies and for county clerks. *AG's Opinion # 87-259*.

  -- But see *AG's Opinion # 99-100* set out below.

- The portion of county gasoline tax revenues used to pay commissioners' salaries cannot be used for insurance premiums, dues, and attending seminars related to their road and highway responsibilities. *AG's Opinion # 99-100.*

- Counties may use 7¢ gas tax monies for the construction and maintenance of streets in a municipality. *AG's Opinion ## 98-14, 91-133, and 87-307.*

- Counties may use 7¢ gas tax monies for equipment and labor associated with drainage improvements and cleaning or digging out drains. *AG's Opinion # 87-307.*

- Counties may ***not*** use 7¢ gas tax monies to pay the costs of litigation. *AG's Opinion # 87-279*.

- Counties may ***not*** use 7¢ gas tax monies to purchase scales and hire personnel to enforce weight limits on county roads. *AG's Opinion # 89-442*.

- Labor costs for employees working directly on roads and bridges may be paid from 7¢ gas tax monies. *AG's Opinion # 91-267*.

- County may use 7¢ gas tax monies for the construction and maintenance of streets within a municipality. *AG's Opinion # 98-014.*

- 7¢ gas tax monies may ***not*** be used for restoration and repair of an airport runway. *AG's Opinion # 98-179.*

- 7¢ gas tax monies may be used to repair, maintain, and construct ditches and culverts along the right of way. *AG's Opinion # 98-189*.

- City (or county) may use 7¢ gas tax monies for a one-time cleaning of a street and adjoining state right-of-way, because this is considered maintenance and improvement. *AG's Opinion # 2001-078.*

- 7¢ gas tax monies may be used to purchase a leaf vacuum truck to be used for maintenance of streets, alleys, and rights-of-way. *AG's Opinion # 2006-083.*

- 7¢ gas tax monies can be used for the purchase of reflective street signs. *AG's Opinion # 2016-002.*

B. SUPPLEMENTAL NET TAX PROCEEDS (5¢ EXCISE TAX PROCEEDS)

Ala. Code § 40-17-359(a)(13) defines supplemental net tax proceeds as:

> That portion of the highway gasoline tax remaining after the deduction of the net tax proceeds and one-third of all revenues received or collected by the department remaining after the payment of refunds from the additional six cents ($.06) tax levied on gasoline under Section 40-17-325(a)(1) and two-thirds revenues received or collected by the department after the payment of refunds and the expense of administration and enforcement of this article from the additional six cents ($.06) tax levied on gasoline under Section 40-17-325(a)(1), less the cost of collection and less any refunds of the highway gasoline tax applicable to the supplemental gasoline excise tax imposed in subdivision (1) of subsection (a) of Section 40-17-325.

This is a long-winded definition for the supplemental 5¢ excise tax levied under *Ala. Code, § 40-17-325(a)(1).*

1. Distribution of Proceeds

The county portion of this tax is equal to 55% of two-fifths of the proceeds from this supplemental tax. These monies are distributed in the same manner as the tax proceeds of the 7¢ tax. *Ala. Code § 40-17-359(f).*

2. Use of Proceeds

These monies are used for resurfacing, restoration, and rehabilitation and may be used for vegetation management in the same way as monies from the 6¢ excise tax. See, *Ala. Code § 40-17-359(f)*.

Pursuant to *Ala. Code, § 40-17-359(f)* these monies can also be used to match federal aid on any projects that meet the requirements for federal funding.

Additionally, pursuant to *§ 40-17-359(f)*, these funds can be used "for new construction ***without regard*** to the provision that 90% of the county's paved road system has achieved a grade of 85% based on the [transportation department's] annual maintenance report of county roads and bridges."

3. Attorney General's Opinions re: Use of Funds

The following is a sampling of attorney general's opinions on the proper use of 5¢ tax monies:

- These funds may not be used for landscaping, because that is not restoration or rehabilitation, but they may be used for one-time street cleaning if work is part of resurfacing, restoration, and rehabilitation. *AG's Opinion # 2001-078.*

- Where at least 60% of the use of a backhoe is for projects authorized as expenditures from the $.05 and $.04 gasoline tax funds, these funds may be used for a proportionate share of monthly cost and maintenance, although a better option would be to pay for the backhoe and maintenance with unrestricted funds followed by reimbursement from the restricted gasoline tax funds based on invoices and project costs. *AG's Opinion # 2014-084*.

- 5¢ tax monies cannot be used to fund the purchase or installation of the emergency street signs. *AG's Opinion # 2016-002.*

C. ADDITIONAL 6¢ EXCISE TAX

Counties also receive a portion of the additional 6¢ excise tax on gasoline levied in *Ala. Code § 40-17-325(a)(1)*. This tax, amended by *Act 2015-54*, replaces the 4¢ excise tax effective October 1, 2016. The distribution of monies is altered in the amended law, but as is detailed below, the use of funds by the counties is unchanged.

Effective October 1, 2016, *Ala. Code § 40-17-359(o)(2)* provides that two-thirds of the revenues collected from this tax are distributed for highway purposes and the remaining one-third is distributed in the same manner as inspection fees are distributed under *Ala. Code § 8-17-91* (discussed in more detail later in this chapter).

1. Local Subdivisions' Portion

As with the 7¢ monies, the Alabama Department of Transportation receives 45% of these monies and counties receive 55% of the proceeds. The "local subdivisions' share" of the two-third distribution of proceeds is paid to counties as follows:

- 25% is distributed equally to the 67 counties
- 30% is distributed based upon each county's pro rata portion of the state's population
- And as with the 7¢ monies, 10% of these proceeds are distributed to municipalities in the county.

Pursuant to *Ala. Code § 40-17-362*, the proceeds from this tax levy are to be utilized by the county for resurfacing, restoration, and rehabilitation – the "RRR" monies.

Ala. Code § 40-17-362 defines" resurfacing, restoration, and rehabilitation" as:

> Work undertaken primarily to preserve an existing facility. Restoration and rehabilitation is work required to return the existing pavement or bridge deck, including shoulders, to a condition of adequate structural support or to a condition adequate for placement of an additional state of construction. Resurfacing consists of the placement of additional surface material over the existing, restored, or rehabilitated roadway or bridge deck to improve serviceability or to provide additional strength. Resurfacing, restoration, and rehabilitation work may include changes to geometric features, such as minor widening, flattening curves, or improving sight distances.

Ala. Code § 40-17-362 also allows these monies to be used for vegetation management on the right-of-way through the use of herbicides, heavy equipment, and other means. However, these funds cannot be used for purchasing herbicides or equipment. *Ala. Code § 40-17-362(b)(2).*

And these funds cannot be used for new construction unless 90% of the county's paved road system has achieved a grade of 85% based on the Department of Transportation's annual county roads and bridges maintenance report. *Ala. Code § 40-17-362(b)(2).*

The 6¢ monies cannot be commingled with other funds of the county, including any other gasoline tax revenues. Pursuant to *Ala. Code § 40-17-362(b)(2),* these monies shall be disbursed from a special fund kept only for its purposes. *See also, AG's Opinion # 86-314.*

2. Attorney General's Opinions Re: Use of Funds

There are several attorney general's opinions addressing use of funds from the 4¢ excise tax in effect prior to October 1, 2106. These opinions will likely also apply to the use of 6¢ monies now addressed in *Ala. Code § 40-17-362*:

- Pursuant to authority granted under *Ala. Code § 23-1-80*, the county may sell and issue warrants in anticipation of and payable solely out of its share of the 4¢ gas tax receipts. However, the expenditure of the proceeds from the sale of warrants is

restricted to the same purposes for which the tax funds themselves could be expended. *AG's Opinion # 80-433*.

-- *See Section III, B, 3 for further discussion of warrants in anticipation of gasoline taxes.*

- Counties may spend 4¢ tax monies for renting equipment to be used on RRR projects. *AG's Opinion # 81-254*. (But see, *AG's Opinion # 85-241* below re: purchase of equipment.)

- 4¢ tax monies may be used to repair and restore culverts as well as bridges and highways. *AG's Opinion # 82-030*. See also, *AG's Opinion # 98-189.*

- 4¢ tax monies ***cannot*** be used to pay for shaping and placing base and pavement on an existing graded (but unpaved) road. *AG's Opinion # 84-012*.

- 4¢ tax monies may be used for restripping and resigning of county roads incident to a RRR project, but ***cannot*** be used to purchase equipment for this project. *AG's Opinion # 85-241*.

- 4¢ tax monies may be used to widen the shoulder of a Federal Aid Secondary Route in advance of a resurfacing project. *AG's Opinion # 85-409*.

- 4¢ tax monies may be used for repairing storm drains, but not for constructing new drains. *AG's Opinion # 86-020*.

- 4¢ tax monies may be used to repair flood structures but cannot be used for general bushhogging. *AG's Opinion # 86-387*.

- 4¢ tax monies ***cannot*** be used for paying the salaries of county commissioners and county clerks. *AG's Opinion # 87-259*.

- Counties may use 4¢ tax monies for drainage improvements and cleaning or digging out drains. *AG's Opinion # 87-307.*

- 4¢ tax monies ***cannot*** be used to purchase scales and hire personnel to enforce weight limits on county roads. *AG's Opinion # 89-442*.

- County cannot use 4¢ tax monies to do work on streets within a municipality, but may use such proceeds for work on county roads within a municipality. *AG's Opinion # 91-133*.

- 4¢ tax monies may be used to remove debris from county roads resulting from a winter storm. *AG's Opinion # 93-172*.

- 4¢ tax monies may not be used for restoration and repair of an airport runway. *AG's Opinion # 98-179.*

- 4¢ tax monies cannot be used for "daily or routine removal that is not considered part of the rehabilitation or restoration of the road". *AG's Opinion # 99-270*.

- 4¢ tax monies may be used for lighting public streets – this fits in with the definition of resurfacing, restoration, and rehabilitation in that it would improve sight distances (which is specifically stated in definition). *AG's Opinion # 99-252.* However, such funds cannot be used for streetlight operation and maintenance. *AG's Opinion # 99-270*.

- 4¢ tax monies cannot be used to pay a claim against the county. *AG's Opinion # 2000-018.*

- 4¢ tax monies ***cannot*** be used for landscaping, because that is not restoration or rehabilitation, but may be used for one-time street cleaning if the work is part of resurfacing, restoration, and rehabilitation. *AG's Opinion # 2001-078*.

- A matching fund using RRR gas tax monies may be created for road paving, but the fund must be kept in a separate account from grant funds because co-mingling of gas tax monies with other funds is prohibited. AG's Opinion # 2010-090.

- Where at least 60% of the use of a backhoe is for projects authorized as expenditures from the $.05 and $.04 gasoline tax funds, these funds may be used for a proportionate share of monthly cost and maintenance, although a better option would be to pay for the backhoe and maintenance with unrestricted funds followed by reimbursement from the restricted gasoline tax funds based on invoices and project costs. *AG's Opinion # 2014-084*.

- 6¢ excise tax monies cannot be used to fund the purchase or installation of the emergency street signs. *AG's Opinion # 2016-002. See, also, AG's Opinion # 2014-016.*

D. PETROLEUM INSPECTION FEES

Act 2015-54 substantially revised the law on inspection fees, with most changes taking effect on October 1, 2016. Under the revised law, *Ala. Code § 8-17-87* imposes a 2¢ inspection fee on the ultimate consumer of gasoline or undyed diesel fuel if the excise tax imposed on the supplier is refunded by the Alabama Department of Revenue – unless the consumer is specifically exempted. The inspection fee is also imposed on other petroleum purchases such as dyed diesel, dyed kerosene, and lubricating oil under certain circumstances. The inspection fee is 2¢ per gallon on dyed diesel fuel, 1¢ per gallon on dyed kerosene, and 15¢ per gallon on lubricating oil. There is also a reduced rate of $.00025 per gallon on dyed diesel and dyed kerosene for boats, tractors, railroads, and preservation of wood products.

1. Distribution of Proceeds

The distribution of these proceeds, along with one-third of the 6¢ excise tax discussed above, is addressed in *Ala. Code § 8-17-91.* The first $175,000 or 5%, whichever is greater, of the proceeds received each month is paid to the Agriculture and Industries Fund. Of the balance of those proceeds, 13.87% is distributed equally among each of the 67 counties.

$408,981 monthly is allocated to the Alabama Department of Transportation. 2.76% of the balance of the proceeds is allocated to incorporated municipalities, using population ratios as set out in the Code section. The Department of Agriculture and Industries receives an additional 5% of the balance of the proceeds after the distribution to the counties and cities. The Department of Revenue receives 2½% of the balance of the proceeds after the distributions to the Department of Agriculture and Industries, the Department of Transportation, the counties and the cities. The balance of the proceeds is distributed to the Department of Transportation.

2. Use of Funds

Ala. Code § 8-17-91 provides that funds paid to the county shall be deposited into its RRR fund for use on those projects.

- *Act 2015-54* repealed many of the restrictions on use of funds for counties and eliminated participation by the Secondary Road Committee, previously charged with developing criteria for projects utilizing these funds.

3. Attorney General's Opinions Re: Use of Funds

The attorney general's opinions issued prior to the 2016 changes in the law should still be relevant as relates to proper use of RRR funds. A sampling of those opinions is set out below:

- These funds cannot be used for paying salaries of county commissioners and county clerks. *AG's Opinion # 87-259.*

- These funds cannot be used for purchasing scales and hiring personnel to enforce weight limits on county roads. *AG's Opinion # 89-442*.

- These funds can be used to match federal secondary road funds for a road project which otherwise qualifies for funds under *§ 8-17-91*. *AG's Opinion # 88-187*.

- These funds may be used for a one-time cleaning of a street and adjoining state right-of-way, because this is considered maintenance and improvement. *AG's Opinion # 2001-078*.

- These funds cannot be expended for the construction and repair of sidewalks. *AG's Opinion # 2003-068*.

- These funds may not be used for restoration and repair of an airport runway. *AG's Opinion # 98-179.*

- These funds can be used for the purchase of reflective street signs. *AG's Opinion # 2016-002.*

E. MOTOR VEHICLE LICENSE TAXES AND REGISTRATION FEES

1. Distribution of Proceeds

Ala. Code § 40-12-240 et seq. provides for license taxes and registration fees for motor vehicles. Counties receive a portion of the proceeds from motor vehicle and truck and tractor taxes and fees, but the distribution of monies -- and proper uses – which are set out in *Ala. Code § 40-12-248 and § 40-12-270,* is complicated. The fees assessed and the distribution of proceeds from trucks and tractors has been altered several times in recent years, which may have resulted in a reduction of monies generated from license taxes and registration fees on those vehicles. However, the authorized uses of the proceeds from these fees have not been changed.

2. Use of Proceeds

As in the case of other tax revenues, Alabama law specifies how these tax proceeds can be used by counties. *See, Ala. Code § 40-12-270.* However, the uses vary somewhat depending on the particular source of the tax revenues.

There are two schedules of license taxes and registration fees paid for trucks and tractors under *Ala. Code § 40-12-248(b)* and the different "schedules" impact the use of monies by counties. The two schedules are "Schedule of Base Amounts" and "Schedule of Additional Amounts".

a. Funds collected under the "Schedule of Additional Amounts" shall be used for the following purposes:

i. Construction of certain high density unpaved roads, including draining, grading, basing, paving, signing, and erosion items.

ii. Reconstruction, resurfacing, restoration, and rehabilitation of county paved roads and bridges or bridge replacement on the county road system.

iii. Construction, including draining, grading, basing, and paving of certain unpaved roads.

iv. Reconstruction of certain paved roads accessing certain public and private recreational facilities and areas.

The county must comply with certain requirements set out in the law when using these funds:

i. Plans must be submitted to the transportation director or his or her designee for approval.

ii. Funds cannot be commingled with other funds except the county's portion of the inspection fee distributed under *Ala. Code § 8-17-91.*

iii. Funds shall be kept and disbursed from a special fund only for proper purposes.

iv. County may deposit proceeds into its RRR fund.

Ala. Code § 40-12-270(e)(2) sets up a Secondary Road Committee to develop and publish criteria for the designation of high density roads, bridges, and eligible recreational access roads and to perform other duties as set out in that Code section. The Committee performed similar duties with regard to use of proceeds from the inspection fee outlined in Section D above, but that language was repealed for inspection fees in *Act 2015-54*.

b. Funds collected under "Schedule of Base Amounts" and other License and Registration Taxes and Fees used as follows:

Ala. Code § 40-12-270(e)(1) provides that all license and registration taxes and fees for motor vehicles and trucks and tractors except those proceeds paid under the "Schedule of Additional Amounts" shall be used for construction, improvement, and maintenance of public highways or public streets, including administrative expenses and the retirement of securities evidencing obligations incurred for payment of same.

- These funds can be used for the purchase of reflective street signs. *AG's Opinion # 2016-002.*

F. ALABAMA TRANSPORTATION SAFETY FUND

Act 2016-150 creates the Alabama Transportation Safety Fund, which provides for distribution of new gas and diesel fuel tax revenues enacted after January 1, 2016. The Act also provides strict rules for how monies distributed to counties can be utilized and requires regular reporting to the public on county road and bridge projects paid for with monies in the Fund. The Act has similar restrictions and requirements for use of monies paid to the Alabama Department of Transportation (the Department) and to municipalities.

1. Distribution of Revenues

Pursuant to *Act 2016-150*, revenues deposited in the Fund will be distributed as follows:

a. The first $32 million derived from any diesel fuel tax designated as a revenue source for the Fund will be allocated for county infrastructure projects authorized under a bond issue program established in the Act.

Section 6 of the Act creates a new Alabama Transportation Rehabilitation and Improvement Program ("ATRIP") Advisory Committee charged with the responsibility of establishing procedures for utilization of these funds and for issuing bonds for authorized projects.

- These monies shall be distributed in the first quarter of each year.
- If designated diesel fuel tax monies are not sufficient to produce $32 million, other proceeds shall be allocated to ensure the total amount of $32 million is set aside for county infrastructure projects.
- Each county will receive at least $2.5 million from this bond issue.

- If there are growth factors or additional revenues designated to the Fund after January 1, 2016, an additional $32 million will be paid into the fund for county projects.

- These funds will not be subject to federal restriction.

- Counties with significant bridge deficiencies are required to address those issues with these funds.

  -- The first $2.5 million paid to a county shall be used for bridge replacement where deficient bridges exist.

b. $500,000 of revenue designated to the Fund will be paid annually to each of the 67 counties.

- This replaces the existing $533,000 of federal money paid annually to counties.

- These monies can be spent on roads that do not qualify for federal funds.

- These projects must be let to contract by the county when utilizing these funds.

- Counties must utilize the Department's list of contractors and material suppliers for letting contracts on these projects.

  -- And the Department's list of approved contractors and suppliers shall include its Certified Disadvantaged Business Enterprise List.

- The Act specifically provides that the Department may continue to allocate federal funds to county projects in its discretion or as required by federal law.

c. The remaining proceeds of revenues designated to the Fund shall be distributed to the Department and the 67 counties utilizing the current distribution of gas tax revenues.

- Ten percent of monies paid to counties shall be distributed to municipalities in the county on the same pro rata basis as other gas tax revenues are distributed.

2. Deposit of Funds

All monies paid to the Department, the counties, and the municipalities shall be segregated and kept separate from other federal, state, or local road and bridge funds.

- All funds shall be audited by Examiners of Public Accounts as are all other funds.

3. Utilization of Funds

All Fund monies shall ***only*** be expended for maintenance, improvement, replacement, and construction of roads and bridges.

- Funds may be used for payment of debt or as matching funds.

Except in accordance with generally accepted accounting principles for job cost accounting or federal cost allocation regulations, monies from the fund ***cannot*** be utilized for any of the following:

- Salaries or benefits.
- The purchase, lease, or maintenance of equipment.
- The maintenance or construction of public buildings or non-road/bridge structures.

Counties and municipalities may utilize funds for joint projects.

County projects on roads or bridges with less than a 2,500 traffic count must be designed utilizing the Department's design policy for low volume roads.

4. Reporting Requirements for Counties and Municipalities

Act 2016-150 sets out extensive reporting requirements for the Department and for counties and municipalities. The reporting requirements for counties and municipalities are set out below:

a. Counties and municipalities must each adopt and publish an annual plan for utilization of funds for the current fiscal year.

- The plan must be adopted at the governing body's first meeting in October.
- The plan must be approved by affirmative vote of a majority of members of the governing body.
- The plan must include an estimate of the anticipated revenues for the fiscal year.
- The plan must consider the needs of each district in the county or municipality.
- The plan must be posted at various places in the county or municipality.

b. The governing body's engineer shall present the governing body with an annual written report detailing expenditures of Fund monies.

- The report shall be given at the governing body's first meeting in January of each year.
- The report shall be included in the minutes of the governing body and posted on the body's website, if available.

5. Reporting Requirements for the Department

As referenced above, the reporting requirements for the Department are similar to those set out in the Act for counties and municipalities. The Department must publicly announce projects funded or anticipated to be funded on or before October 1 of each year.

The Department must also post on its website at all times:

- A current list of projects.
- A list of current bid offerings.
- Quarterly progress reports.

Additionally, the Department must submit an annual report to the Legislature.

G. MISCELLANEOUS STATE REVENUE SOURCES

1. Driver's License Fees

Ala. Code § 32-6-5 provides that the probate judge shall retain $1.50 of all fees collected for driver's licenses. If the probate judge is compensated by fees, he or she shall keep two-fifths of the $1.50 and the balance shall be paid over to the county. Otherwise, the county retains the entire $1.50.

- All fees paid to the county from driver's licenses shall be paid into the "public highway and traffic fund of the county".
- The statute does not mandate specific uses for these funds.

2. National Forest Receipts

Ala. Code § 9-13-2 provides that any monies the state receives from the federal government from receipts from national forests within the state shall be distributed among the several counties proportional to the area of national forests located therein. The county shall pay 50% of the proceeds to the county board of education and shall expend the other 50% "for the benefit of the public roads of the county".

- The county commission and county school board cannot enter an agreement for all proceeds to go to the county commission. *AG's Opinion # 2001-061.*

The federal monies distributed under this program have decreased significantly in recent years and Congress considers eliminating distribution of funds to states and counties under this program on an almost annual basis. Under these circumstances, it is unclear how long this revenue source will be available to counties receiving these funds.

3. County Government Capital Improvement

Ala. Code § 11-29-1 provides for counties to receive 10% of the trust income from the Alabama Trust Fund once that fund exceeds $60,000,000. Counties first received revenue from this fund in 1997. In 2002, the Heritage Trust Fund merged into the Alabama Trust Fund, significantly

increasing the trust income, and therefore, the county proceeds. *Ala. Code § 11-29-4* sets up the County Government Capital Improvement Fund for the receipt of all monies distributed from the Alabama Trust Fund.

In 2000, the language in this statute was placed in Alabama's Constitution as part of "Amendment One", which provided counties with funding for bridge repair and replacement. See, *Constitution of Alabama of 1901, Amendment 666*. The same protection was also placed in a separate Amendment. See, *Constitution of Alabama of 1901, Amendment 668.*

Ala. Code § 11-29-6 specifies the proper use of these funds. Authorized uses of particular interest to the county highway department are:

- Up to 50% for the construction, maintenance, reconstruction, restoration, or resurfacing of county roads and bridges.

- Construction, furnishing, equipping, and renovation of public buildings including the purchase of land for public buildings.

- Solid waste programs.

- Public water and waste water treatment facilities and drainage facilities, including the purchase of land and rights-of-way, and equipment and supplies necessary for the installation and maintenance of such public facilities.

There are very few attorney general's opinions addressing proper use of these funds, but those discussing use of funds for public works project purposes are set out below:

- *Ala. Code § 11-29-6* does not authorize the expenditure of funds for the rehabilitation and upgrade of a fuel management system located at the county road department. *AG's Opinion # 2015-063.*

- The county may not use capital improvement funds to satisfy payments on bonds incurred to construct hangars owned by a Regional Airport Authority because it is not a county or public building or structure. *AG's Opinion # 2015-052.*

- *Ala. Code § 11-29-6* authorizes the use of capital improvement funds to reimburse other county accounts for the use of equipment and materials in the general maintenance of county roads. Once the funds are transferred, the county may utilize those funds for the broader purposes applicable to the reimbursed account. *AG's Opinion # 2014-045.*

- *Ala. Code § 11-29-6* authorizes using capital improvement fund monies for the installation of water and sanitary sewer lines on county property. *AG's Opinion # 2004-066*.

III. LOCAL REVENUE SOURCES

As mentioned above, the county can levy a special ad valorem tax for roads and bridges, but only up to 2½ mills, and only provided the tax levy is within the constitutional limits for the county. Some counties have local constitutional amendments increasing the constitutional limit for ad valorem taxation. Additionally, many counties have local legislation authorizing sales and use taxes, gasoline taxes, license and registration fees, etc.

Keep in mind that, as discussed in *Chapter Three, Section IV, C, 4, Ala. Code § 11-83-2* requires counties to pay each municipality in the county one-half of any money collected from a road ad valorem tax levy on the property located in the municipality when the levy is for constructing, repairing, or maintaining roads and highways in the county.

A. LOCAL TAX LEVIES

There is no general county tax for roads and bridges. However, there is statutory authority for levying certain ad valorem taxes.

1. *Ala. Code § 11-3-11(a)(2)* authorizes the county commission to levy a general tax for general county purposes and a special tax for special purposes.

2. As mentioned above, *Ala. Code § 11-14-11* authorizes a special 2½ mill tax for the erection, construction, or maintenance of necessary roads and bridges.

   - The Supreme Court has made clear that this section only authorizes the levy of an ad valorem tax, not a sales or other tax. See, *Ex parte Coffee County Commission, 583 So.2d 985 (Ala. 1991).*

3. *Ala. Code § 23-1-81* authorizes the county commission to levy a special tax to purchase or establish toll bridges, free bridges, causeways and ferries or free ferries when, in the opinion of the county commission, the public good requires it.

B. OTHER COUNTY FUNDS FOR ROADS AND BRIDGES

1. Surplus of General Funds – ***Ala. Code § 23-1-83***

The county commission may transfer any surplus of the general funds of the county to the county road fund when, in the judgment of the commission, it will promote the interest of the county to make such transfer. When funds are transferred to the road and bridge fund, they may only be used for road and bridge purposes.

2. Fees, Excises, or License Taxes – ***Ala. Code § 23-1-84***

Counties may expend funds derived from fees, excises, or license taxes levied by the state relating to the registration, operation or use of motor vehicles or relating to fuels used for propelling such vehicles for the cost of constructing, reconstructing, maintaining, and repairing public roads and bridges.

3. Warrants in Anticipation of Taxes – ***Ala. Code § 11-11-1 et seq.***
Ala. Code § 11-11-3 provides for issuing warrants in anticipation of and payable solely out of gasoline taxes to be distributed to the county under certain circumstances. The procedures for issuing such warrants are set out in *§ 11-11-3* and the other sections in Chapter 11 of Title 11.

a. *Ala. Code § 11-11-2* states that issuing such warrants is only available to the county in a fiscal year following a year in which it collected at least $40,000 from the special ad valorem tax levied by the county under *Section 215 of Alabama's Constitution*.

b. The proceeds from the sale of warrants shall be used for the construction, surfacing, resurfacing, grading, and draining of roads, streets, bridges and causeways in the county and for expenses in issuing the warrants.

- The attorney general has held that the expenditure of the proceeds from the sale of warrants is restricted to the same purposes for which the tax funds themselves could be expended. *AG's Opinion # 80-433*. In other words, if the tax funds are RRR money, warrants may only be issued for RRR projects.

- The Supreme Court has held that gasoline tax anticipation warrants are not a charge on the general revenue of the county or on the proceeds of any county levy, and thus do not constitute debt within the meaning of the constitutional debt limitation found in *Section 224 of the Constitution of Alabama of 1901*. See, *Taxpayers and Citizens of Lawrence County v. Lawrence County, 273 Ala. 638, 143 So.2d 813 (1962); Isbell v. Shelby County, 235 Ala. 571; 180 So. 567 (1938).*

CHAPTER SEVEN

THE COMPETITIVE BID LAW

The competitive bid law applicable to county government and most other local governing bodies is found at *Ala. Code § 41-16-50 et seq.* There have been several amendments to the law in the last few years, including increasing the threshold amount to $15,000, increasing local preferences, and expanding the exemptions for governmental cooperative purchasing programs. One significant change in the law in recent years is that school boards and other local educational entities now have their own sections on competitive bidding and do not fall under the same Code provisions as other local governments.

There are actually three different competitive bid laws in Alabama's Code.

- *Ala. Code § 41-16-20 et seq.* applies to any state department, board, bureau, commission, committee, institution, corporation, authority, or office.
- *Ala.* Code *§ 16-13B-1 et seq.* applies to county and city boards of education.
- *Ala.* Code *§ 41-16-50* applies to most other local governmental entities.

For the most part, the rules for competitive bidding under these three statutes are the same or similar. However, there are important differences in some instances, so it is important to know which law applies. *See, e.g., AG's Opinion # 2007-137.*

The Supreme Court has repeatedly held that the most important requirement of the competitive bid law is the good faith of the officials charged in executing the law. See, e.g. *White v. McDonald Ford Tractor Co., 287 Ala. 77; 248 So.2d 121 (1971).* The attorney general frequently echoes this principle of law.

I. APPLICABILITY

A. APPLICABLE PURCHASES

1. Materials, Equipment, Labor, and Services

Ala. Code § 41-16-50(a) provides that all expenditures of funds made by county commissions (and other local governmental entities) for any of the following purchases involving $15,000 or more "shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder":

a. Labor, services, work,

b. Purchase of materials, equipment, supplies, or other personal property, and

c. Lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually bound to pay a total of $15,000 or more.

Known or contemplated "like-item" purchases must be considered in the aggregate, and if purchases in a year will exceed $15,000, all such purchases must be bid. *AG's Opinion # 2003-098.*

- However, when "like-item" purchases exceed $15,000 in a year due to unforeseen circumstances, there is no violation of the bid law. *AG's Opinion #2003-098.*

2. Real Property

The competitive bid law does not apply to the sale or lease of real property. See, *Cotton Bayou Association v. Department of Conservation, 622 So.2d 924 (Ala. 1993); AG's Opinion # 88-323.*

3. Public Works Contracts

The competitive bid law does not apply to public works contracts (i.e., contracts for the construction, renovation, or repair of roads, bridges, buildings, or other public structures). Those projects are governed by the public works law found in *Code of Alabama 1975, Title 39* and discussed in detail in Chapter Eight of this manual.

It is important to determine whether the purchase being considered falls under the competitive bid law or the public works law because the rules and procedures for compliance are very different – including the threshold amount requiring bidding. Unfortunately, it is not always easy to determine which law applies. For example:

- Cutting grass in a public cemetery is a service which falls under the competitive bid law, but maintenance, repair, and upkeep of markers, headstones, etc. are public works projects. *AG's Opinion # 2007-030.*

4. Public Funds

Where there is no expenditure of public funds, the bid law does not apply. See, *AG's Opinion ## 2004-223; 2000-003; and 93-038.*

- However, where funds are transferred to a governmental entity from a private source, they become public funds. *AG's Opinion # 2004-223.*
- And the granting of an exclusive right (such as to sell concessions) constitutes an exchange of consideration by the parties involved and must be let by competitive bid even where there is no apparent expenditure of public funds. *AG's Opinion # 99-158* and *Kennedy v. City of Prichard, 484 So.2d 432 (Ala. 1986).*

5. Exclusive Franchise Contracts

Section 22 of Alabama's Constitution prohibits granting an exclusive franchise to a business or entity. The Supreme Court of Alabama has held that this prohibition is avoided by competitive bidding. *See, Kennedy v. City of Prichard, supra.* Therefore, competitive bidding is sometime required even if not required under Alabama's competitive bid law. *See, e.g., AG's Opinion # # 2015-014; 2013-012 and 2000-219.*

B. EXEMPTIONS

1. Exemptions from Bidding

Ala. Code § 41-16-51(a) provides a list of specific exemptions to the competitive bidding requirements of the law. Those exemptions most relevant to county government are as follows:

a. Utility services where the rates are fixed by law, regulation, or ordinance. See, also, *Alabama-Tennessee Natural Gas Co. v. Southern Natural Gas et al, 694 So.2d 1344 (Ala. 1997).*

b. Contracts for securing services of individuals possessing a high degree of professional skill – such as attorneys, architects, engineers, consultants, CPAs, and public accountants -- where the personality of the individual plays a decisive part.

- For a good discussion of "professional services", see *AG's Opinion # 2002-078*, which held that administrative services are not exempt from bidding.

  -- See also, *Anderson v. Fayette County Board of Education et al., 738 So. 854 (Ala. 1999).*

- If the professional services are incidental to the purchase of equipment, the purchase of equipment is subject to the bid law. See, *AG's Opinion ## 95-303 and 84-262*.

  -- However, if the purchase of equipment is incidental to the professional services, it is exempt. *AG's Opinion # 96-046*.

  -- And, if non-professional services are incidental to and integrated with professional services, they are exempt. *AG's Opinion # 2005-192.*

- Security services are not professional services under the bid law. See, *Layman's Security Co. v. Water Works and Sewer Board of City of Prichard, 547 So.2d 533 (Ala. 1989).*

- Consultants in the field of mapping or other related emergency telephone services are professional services. *AG's Opinion # 92-084*.

- Professional services includes training or maintenance contracts where particularized expertise is "inextricably intertwined" with the purchase of equipment and software that are exempt from bidding. *AG's Opinion ## 2015-044 and 2005-197.*

- Computer engineers fall under the professional-services exception when performing complex computer services. *AG's Opinion # 90-121. See, also, AG's Opinion # 2016-015.*

c. The purchase of insurance.

d. Contracts for fiscal or financial advice or services. *AG's Opinion # 94-076.*

e. Existing contracts up for renewal for sanitation or solid waste collection, recycling, and disposal.

   - Contracts may be renewed without bidding provided the terms are not changed and the original contract provides for renewal. *AG's Opinion # 96-142*.

   - County may not renew waste disposal contract which increases the price without competitive bidding. *AG's Opinion ## 2003-197 and 96-252*.

f. Purchases of computer and word processing hardware when the hardware is the only type that is compatible with hardware already owned by the entity taking bids. See, *AG's Opinion ## 99-245; 99-139; and 91-282.*

g. Custom computer software.

   - The attorney general's office defines custom software as "software that will require substantial creative work by a professional/vendor to comply with unique specifications". *AG's Opinion ## 94-023 and 99-245*.

   - Software is "custom" if it is built or made according to specifications of the buyer. *AG's Opinion ## 2002-206; 99-139; 94-023; and 91-371*.

   - *See, also, AG's Opinion ## 2015-044 and 2005-197, referenced above.*

h. Contractual services and purchases of commodities for which there is only one vendor or supplier. See, *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., 657 So.2d 857 (Ala. 1995) and General Electric Co. v. City of Mobile et al., 585 So.2d 1311 (Ala. 1991); AG's Opinion # 91-282.*

   - See Section II, A, 2 below for further discussion of "sole source".

i. Purchases of dirt, sand, or gravel by a county governing body from in-county property owners in order to supply a county road or bridge project in which the materials will be used.

   - The material shall be delivered to the project site by county employees and equipment used only on projects conducted exclusively by county employees.

j. Contractual services and purchases of personal property which by their very nature are impossible to award by competitive bidding.

   - In order to have a competitive bid, the owner must be able to prepare plans and specifications that are sufficiently definite to allow potential bidders to prepare bids intelligently and on a comparison basis. When that is not possible, competitive bids are not possible. *AG's Opinion # 2009-052. See, also, AG's Opinion # 2016-015.*

k. Purchases related to, or having an impact on, security plans or the security or safety of persons, structures, facilities, or infrastructures.

  - Although the routine purchase of office supplies by a public safety entity would not be related to or have an impact upon the safety of persons, the purchase of software that locates emergency callers with pinpoint accuracy may have an impact upon public safety, but this is a factual determination that the awarding authority must make taking into consideration definitions and the fact that such a determination is reviewable by the courts and may not be arbitrary, unreasonable, or capricious. *AG's Opinion # 2014-047.*

  - *See, also, AG's Opinion # 2009-081.*

l. Purchases of goods or services, other than wireless communication services, made through NACo's U.S. Communities if:

   i. the bid process is acceptable to the Examiners of Public Accounts.
   ii. the item is not available from the state bid list at a lower price.
   iii. the item is purchased from an Alabama vendor if one is available.

m. Purchases of goods or services, other than wireless communication services, from a national or regional governmental cooperative purchasing program if the bidding process is conducted by a governmental entity and has been approved by the Examiners Office.

  - *See, AG's Opinion # 2014-050 for good discussion of this exemption.*

  - A list of approved cooperative programs is available from the website of the Department of Examiners of Public Accounts.

n. Purchases of goods or services from a GSA contract other than wireless communication services.

2. Exemptions from the Act

Ala. Code § 41-16-51(b) exempts certain purchases from all provisions of the competitive bid law. Some of these that may be applicable to counties are:

a. Any purchases of products where the price of the product is already regulated and established by state law.

b. Contracts for the purchase, lease, sale, construction, installation, acquisition, improvement, enlargement, or extension of plants or other facilities or any machinery, equipment, or furnishings designed or intended for lease or sale for industrial development. See, *AG's Opinion # 85-380*.

c. Contracts for the construction and equipment of buildings for municipal public building authorities under *Ala. Code § 11-56-1 et seq.*

- There is no such exemption for county building authorities created under *Ala. Code § 11-15-1 et seq.*

- Under *Ala. Code § 39-2-1(1)*, these contracts would also be exempt from the public works law. See, *AG's Opinion ## 99-218 and 99-224. (See also, Chapter Eight, Section I, B, 2.)*

d. Purchase of equipment or supplies needed, used, and consumed in the normal and routine operation of any waterworks, sewer, gas, or electric system owned by counties or other governmental instrumentalities where no part of the operating expenses have, during the then current fiscal year, been paid from tax revenues.

- For a good discussion of how this exemption is properly applied, see *AG's Opinion # 2016-009*. See, also, *AG's Opinion # 95-096.*

- A backhoe is not a piece of equipment that is needed, used, and consumed in the normal and routine operation of a utility system and its purchase must be bid. *AG's Opinion # 2016-009.*

- See, *AG's Opinion # 2002-097*, which notes that this is not a general exemption, but only an exemption from purchases in the normal and routine operation of the authority. See, also, *AG's Opinion # 2001-139*.

e. Some public corporations and entities have statutory exemptions from the requirements of the bid law found in the statute authorizing the creation of such corporations and entities.

- For example, *Ala. Code § 11-20-49* exempts county industrial development boards from the competitive bid law. See, *AG's Opinion # 82-394*.

- However, the competitive bid law applies to public corporations where public funds are expended unless there is a specific exemption. *AG's Opinion # 2005-045.*

- An "exempt" entity must comply with the bid law when it is submitting a bid in response to an invitation for bid from a governmental entity subject to the competitive bid law. *AG's Opinion # 2005-119.*

3. Emergencies

Ala. Code § 41-16-53 provides that in case of an emergency affecting public health, safety, or convenience, contracts may be let to the extent necessary to meet the emergency without public advertisement.

a. The emergency must be declared in writing by the awarding authority, and must set forth the nature of the danger involved in delaying the award (see, *AG's Opinion # 2000-75)* and

b. The action and the reasons therefore shall immediately be made public by the awarding authority.

This is not an exemption from the bid law, but only from public advertisement. *General Electric Co. v. City of Mobile et al., supra; AG's Opinion # 2000-75.*

- And it is still suggested that the awarding authority seek proposals for finishing these projects from several contractors to ensure that the work will be performed at the lowest possible price to the taxpayer. *AG's Opinion # 85-35.*

Whether circumstances exist that authorize application of the emergency exception to the bid law requires a finding of fact that only the awarding authority can make. *AG's Opinion # 2000-75. See, also, Anderson v. Fayette County Board of Education et al., supra; Union Springs Telephone Co. v. Rowell, 623 So.2d 732 (Ala. 1993).* Some guidance in making that determination is set out below:

- The Supreme Court rejected a claim that a contract fell under the emergency conditions exception due to: (i) the length of time of the negotiations; (ii) the fact that there was no compliance with the requirement to declare the emergency in writing and make the agency's actions public; and (iii) the fact that the provision for emergencies under the bid law dispenses with the requirement of public advertising, ***not*** competitive bidding. *General Electric Co. v. City of Mobile et al., supra.*

- Where the awarding authority has terminated a construction contract for default, the surety has failed to honor its obligations under the performance bond, and the wall cavities on the projects (where roofs are not completed) are exposed and contain water, the awarding authority can make a good faith judgment to exercise the emergency provisions found in the bid law. *AG's Opinion # 85-35.* See, also, *AG's Opinion # 96-113.*

- A previous purchase cannot be treated as an emergency purchase at the present time in order to save a contract which would be void because of noncompliance with the competitive bid law. *AG's Opinion # 83-426.*

- Contracts to repair damage to state property caused by a hurricane may be let on an emergency basis where immediate action is required to prevent deterioration to property (i.e., roofs, broken windows, damaged exterior walls, out of order utilities). *AG's Opinion # 80-122.*

- Oil and hazardous material discharges or spills would constitute an emergency affecting the public health, safety, or convenience. *AG's Opinion # 79-427.*

In addition to this provision, *Ala. Code § 31-9-10* requires each political subdivision of the state to establish a local emergency management organization, and provides special powers and authority to a political subdivision, such as the county commission, in the event of a disaster. *Ala. Code § 31-9-10(b)(5)* provides that, in the event of a disaster, the governing body is authorized "to waive procedure and formalities otherwise required by law" for public works projects, contracts, etc. This is much broader power than that allowed under *Ala. Code § 41-16-53*, but also has much more limited application.

4. Contracts and Purchases between Governmental Entities

Although this issue is not specifically addressed in the statute, the attorney general has consistently held, in opinions dating back at least as far as the late 1960's, that the competitive bid law does not apply to contracts for goods or services between governmental entities of the state, including counties and municipalities. *See, e.g., AG's Opinion ## 2015-014; 2011-007; 2008-093; 96-271, and 91-131*.

- However, this would not apply to the purchase of items available under a federal contract except where the contract is through the General Services Administration (GSA). *AG's Opinion # 2004-111.*

In *AG's Opinion # 2011-007*, that office addressed the issue of a county selling materials such as gravel or gasoline to other governmental entities, holding that a county commission may sell material to a federal agency, a state agency, or another county commission under *Ala. Code § 11-1-10*, which allows these entities to contract with one another.

- The attorney general's office held in this opinion that this Code section did not allow for contracts between counties and municipalities. However, *Ala. Code § 11-1-10* was amended in 2015 to include the ability to contract with municipalities so this opinion would no longer apply in that regard. *(See Act 2015-53.)*

5. Purchasing from State Bid List

The attorney general has also held that counties and other local governmental entities may purchase off the state bid list without competitively bidding if the purchase is made from the vendor to whom the state awarded the contract and the state bid included political subdivisions and instrumentalities of political subdivisions on the state bid. *See, e.g., AG's Opinion # 2011-011.*

6. Construction Equipment Repair and Leases

Ala. Code § 41-16-52 provides a limited exception to the provisions of the bid law for the repair and/or lease of certain heavy-duty off-highway construction equipment with a gross vehicle rating of 25,000 pounds or greater, as outlined below:

a. The exemption applies to machinery used for grading, drainage, road construction and compaction for the exclusive use of county and municipal highway, street, and sanitation departments.

b. The exemption applies to all expenditures of funds involving not more than $15,000 for repair and repair parts.

- The exemption applies to each repair incident. *AG's Opinion # 2003-098.*

c. Pursuant to *Ala. Code § 41-16-52(b)*, this option may only be exercised by the governing body and not by an employee unless the employee has received official prior approval of the governing body or exercises the option pursuant to a formal policy adopted by the governing body.

d. This exemption also applies to the leasing of heavy equipment involving a rental of not more than $5,000 a month per vehicle or piece of equipment but not to exceed $15,000 a month for all such vehicles or equipment leased by the governing body.

II. BIDDING REQUIREMENTS

A. PREPARING FOR BIDS

1. Bid Specifications

There is no Code provision specifically addressing preparation of bid specifications. However, there are cases and attorney general's opinions on this subject.

- The awarding authority may properly designate a special product covered by patent or only manufactured by one bidder, but where the specifications are so worded that they are in reality a particular bidder's specifications, the bidding is invalid and unlawful. *White v. McDonald Ford Tractor Co., supra.* See, also, *Mobile Dodge, Inc. v. Mobile County and Treadwell Ford, Inc., 442 So.2d 56 (Ala. 1983).*

- If specifications are so framed as to preclude free and full competition, the contract is void whether or not there was a bad motive or intent. *White v. McDonald Ford Tractor Co., supra.*

- A bad motive, fraud, or gross abuse of discretion will impair an award whether made with specifications which are quite general or very precise. *Mobile Dodge, Inc. v. Mobile County and Treadwell Ford, Inc., supra.*

- While an awarding authority may not draw bid specifications narrowly just to ensure that only one bidder will meet those specs, it may impose any specifications that are reasonably related to the job, program, or function to be performed by the bid items. *AG's Opinion # 91-282.*

- The awarding authority may use a particular brand name in specifications to indicate a level of quality provided a bidder may submit a bid equal to or better than the brand name used in the specifications. *AG's Opinion # 91-124.*

-- See, also, *AG's Opinion ## 86-070* and *AG's Opinion # 86-359* stating that the brand name may be used when followed by the words "or equal".

- It is permissible to request alternative bids based on different specifications and determine which alternative is in the awarding authority's best interest regardless of which alternative produces the lowest bid. *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., supra.*

2. Request for Proposals

Since the competitive bid law requires that award be made to the lowest responsible bidder, a "request for proposal" allowing for negotiation with bidders on specific details of a bid cannot be utilized in place of bid specifications. *See, AG's Opinion # 2013-012*.

3. Sole Source

Ala. Code § 41-16-57(b) prohibits specifying use of materials or systems by a sole source unless:

a. The awarding authority can document that the sole source goods or services are of an indispensable nature, that all other viable alternatives have been explored, and that only these goods or services will fulfill the function for which the product is needed;

b. No other vendor offers substantially equivalent goods or services that can accomplish the purpose for which the goods or services are required; ***and***

c. All information substantiating the use of the sole source specification is documented and in the project file.

For a good discussion of "sole source" see, *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., supra, and General Electric Co. v. City of Mobile et al., supra*.

4. Life Cycle Costs

Pursuant to *Ala. Code § 41-16-57(c)*, the awarding authority may consider "life cycle costs" in making its determination of who is the lowest responsible bidder – in other words, the expected life of the items that can be ascertained from industry recognized and accepted resources.

- Notice that "life cycle costs" may be utilized in determining the lowest responsible bidder must be included in the bid specifications.

- The awarding authority must follow procedures established by the Department of Examiners of Public Accounts.

5. Advertising

Ala. Code § 41-16-54(a) requires that all proposed purchases in excess of $15,000 shall be advertised by:

a. Posting notice on a bulletin board maintained outside the purchasing office;

b. Sending notice by mail to all persons, firms, or corporations who have filed a request in writing that they be listed for solicitations on bids for the particular items that are set forth in the request; and

c. In any other manner determined appropriate.

- *Ala. Code § 41-16-54* provides that anyone on the bidders list who fails to respond to any solicitation for bids after receipt of three solicitations may be removed from the list.

- The awarding authority cannot limit the number of vendors to whom it will send a notice of bid offering. *AG's Opinion # 2005-008*.

- If a bidder participates in collusion as defined in *Ala. Code § 41-16-55*, he or she will be disqualified from submitting bids on future purchases. *(See, Section IV, A below for further discussion on this issue.)*

- Bids may be requested -- ***but not received --*** by telephone. *AG's Opinion # 83-199*.

- The awarding authority cannot mail invitations to bid on a crawler dozer only to Caterpillar dealers. *AG's Opinion # 86-359*.

- All bids must be in writing. *AG's Opinion # 2000-239*.

6. Time Frames

Ala. Code § 41-16-54(a) provides that the awarding authority can establish reasonable time frames for submitting bids.

B. BIDDERS REQUIREMENTS

1. Sealed Bids

Ala. Code § 41-16-54(b) requires that all bids be sealed when received.

- Bids cannot be received or accepted by telephone. *AG's Opinion # 83-199*.

- A faxed bid does not meet the requirements of the statute because it is not sealed. *AG's Opinion # 91-016*.

- A written proposal on the outside of a sealed bid made prior to the opening can be considered part of the bid proposal. *AG's Opinion # 2005-160*.

2. Bid Bond

Under *Ala. Code § 41-16-50(c)*, a bid bond may be required by the awarding authority, but it is not required by law. The following opinions from the attorney general's office apply where a bid bond is requested in the bid specifications:

- Failure to submit proper bond is a ground for disqualifying the bid where it is required in specifications. *Steeley v. Nolen, 578 So.2d 1278 (Ala. 1991).* See also *AG's Opinion # 2003-196.*

- The bidder must be the principal on the bond. *Steeley v. Nolen, supra.*

- The bid bond remains in effect until the contract is executed. *AG's Opinion # 82-220*.

- The bid bond should be for an amount which would protect the county against a change of status involving substantial damages, loss, or detriment. *AG's Opinion # 82-220*. See also, *Steeley v. Nolen, supra.*

- An irrevocable letter of credit may be accepted as the bid bond. *AG's Opinion # 92-053*.

- The awarding authority may not require a certified check in lieu of a bid bond but it may accept one if it chooses and the bidder wishes to use a certified check. *AG's Opinion # 85-032*.

- If the bid specifications state the bond must be included with the bid, a bid without a bid bond is nonresponsive and cannot be considered. *AG's Opinion # 2003-196.*

- If the bid specifications do not specify when the bid bond is to be furnished, failure to include it at bid opening can be waived as a minor informality. *AG's Opinion #2003-196*.

- The awarding authority may permit the lowest responsible bidder to correct a technical deficiency in a bid bond if it determines that it is in the best interest of the entity to do so and such determination is not arbitrary or capricious. *AG's Opinion # 2014-011.*

3. Compliance with Bid Requirements

There is no statutory provision specifically addressing compliance with bid requirements. There are a few attorney general's opinions.

- Whether failure to comply with the terms and conditions of an invitation to bid is only a minor irregularity (such as the omission of license information on the outside envelope of a bid) is a factual determination to be made by the awarding authority. *AG's Opinion # 97-281*.

- A company that is the low bidder may be given an opportunity to comply with specifications in the awarding of the contract. However, there should not be any material alterations in the bid after it is opened to comply with bid specifications. *AG's Opinion # 92-397.*

- A bidder who previously withdrew his or her bid may rebid on the same contract if all bids on the original contract are subsequently rejected and the contract rebid, provided that there is no fraud or collusion. *AG's Opinion # 2002-246*.

- If the bid specifications do not state when the bid bond must be presented, failure to include the bond with the bid can be waived as a minor informality (assuming it is presented later). *AG's Opinion # 2003-196.*

- In a federally-funded project, since federal regulations prohibit requiring a contractor to obtain a license prior to submission of a bid, the specifications may not require that the general contractor provide his license number on the bid documents. However, the awarding authority may require proof of licensure upon or subsequent to the award of the contract. *AG's Opinion # 2004-099*.

C. OPENING BIDS

Pursuant to *Ala. Code § 41-16-54(b)*, all bids shall be opened in public at the hour stated in the notice. There is no requirement that bids be opened at a county commission meeting and bids should never be awarded at the time of bid opening.

All original bids and all documents pertaining to the award of the contract shall be retained for seven years from the date opened and shall be open to public inspection. See, *AG's Opinion # 95-010*.

III. AWARD OF CONTRACT

A. LOWEST RESPONSIBLE BIDDER

1. Statutory Requirement

Pursuant to *Ala. Code § 41-16-57(a)*, the contract award shall be made to the lowest responsible bidder, determined by taking into consideration the following:

a. The qualities of the commodities proposed to be supplied,

b. Their conformity with specifications,

c. The purposes for which required,

d. The terms of delivery,

e. Transportation charges, and

f. Dates of delivery.

2. Cases and Opinions

For a good discussion of "lowest responsible bidder", see, *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., supra; Crest Construction Corp. v. Shelby County Board of Education, 612 So.2d 425 (Ala.1992)*.

See, also, the following cases and attorney general's opinions:

- The county may take into consideration the bidder's integrity. See, *AG's Opinion # 2007-063; 82-305*.
- Quality is a consideration when determining responsibility of the bidder, and it is appropriate to look at size, experience, lack of equipment, and other resources. *Crest Construction Corp. v. Shelby County Board of Education, supra*.
- In determining who the lowest responsible bidder is, the awarding authority may take into consideration the quality of the materials as well as their adaptability to the particular use required. *White v. McDonald Ford Tractor Co., supra*.
- The use of insider information, as well as the possibility or perception of use of insider information, is a factor that the awarding authority may use in determining the responsibility of a vendor. *AG's Opinion # 2002-030*.
- The Supreme Court has held that courts will not interfere with the discretion of the awarding authority in determining who was the lowest responsible bidder unless the decision was based upon a misconception of the law, was the result of improper influence, was made in violation of the law, or was based upon ignorance through lack of inquiry. *TFT, Inc. v. Warning Systems, Inc., 751 So.2d 1238 (Ala. 1999)*.
- A bid accepted in error as the lowest responsible bid is null and void and the awarding authority, upon discovery of the error, may accept the lowest bid and award the contract to that bidder. *AG's Opinion # 2002-071.*
- A conviction and bar by a federal agency are factors which may be considered in determining if a bidder is responsible. *AG's Opinion # 2007-063.*

B. PREFERENCES

1. Alabama Preference

The county shall give preference to commodities produced in Alabama or sold by Alabama companies provided there is no sacrifice or loss in price or quality. See, *Ala. Code § 41-15-57(b)*. The statute does not define the term "preference" in this instance.

2. Local Preference

The competitive bid law includes a local preference provision that allows the awarding authority to award the bid to a local vendor provided his or her bid is within five percent (5%) of the lowest responsible bidder. *Ala. Code § 41-16-50(a)*. Under the law, the awarding authority may establish a local preference zone prior to advertising for bids.

The local preference zone shall consist of either:

a. the legal boundaries or jurisdiction of the awarding authority,

b. the boundaries of the county in which the awarding authority is located, ***or***

c. the boundaries of the Core Based Statistical Area (CBSA) in which the awarding authority is located.

If no preference is established, the boundaries of the local preference zone shall be deemed to be the same as the legal boundaries or jurisdiction of the awarding authority.

As noted above, if a bid is received from a company within the local preference zone that is no more than five percent (5%) greater than the bid of the lowest responsible bidder, the awarding authority ***may*** award the contract to the resident responsible bidder.

- Awarding the local preference is permissive, not mandatory. *AG's Opinion # 92-076*.

- In determining whether a bidder is entitled to the preference, the awarding authority may determine if a place of business was opened solely for the purpose of obtaining the preference, but may not, in making such a determination, use criteria which unfairly favors any category of business (i.e., large v. small company). *AG's Opinion # 92-076*.

- The preference applies to bidders who maintain one or more stores in the county even if the "home office" is not in the county. *AG's Opinion # 2002-070*.

The local preference originally only applied to purchases of tangible personal property. However, the statute was amended in 2015, and the preference now applies to both the purchase of tangible personal property and services. See, *Act 2015-293*.

3. Preferences when Lowest Bidder is "Foreign Entity"

Act 2015-293 also provides several "in-state" preferences when the lowest responsible bidder is a "foreign entity", meaning that the company does not have a place of business within the state. *See, Ala. Code § 41-16-50(d).* The following rules apply:

a. The county may award the contract to a local business that is a responsible bidder if its bid is within ten percent (10%) of the foreign entity's bid.

b. The county may also award the contract to any of the following in-state responsible bidders that are within ten percent (10%) of the foreign entity lowest bidder.

- A woman-owned enterprise
- A small business enterprise
- A minority-owned business enterprise
- A veteran-owned business enterprise
- A disadvantaged-owned business enterprise

As with the other local preferences, this new preference applies to purchases of personal property and services. And the preference is granted at the option of the county commission.

C. REJECTION/NEGOTIATION

1. Price or Quality

The awarding authority may reject any bid if the price is deemed excessive or the quality of the product inferior. *Ala. Code § 41-16-57(c).*

- Once a bid is rejected, it ceases to exist, and the awarding authority cannot accept the rejected bid and award the contract. *AG's Opinion ## 96-317 and 99-008*.

2. One Bidder

In the event that only one bidder responds to an invitation to bid, the awarding authority may reject the bid and negotiate the purchase or contract, provided the negotiated price is lower than the bid price. *Ala. Code § 41-16-50(a).* See, also, *AG's Opinion # 98-140.*

3. Negotiation

An awarding authority may negotiate a lower price with a successful bidder provided there is no change in bid specifications. *AG's Opinion # 95-002*. See, also, *AG's Opinion # 96-240*.

4. Substituting Second Lowest Bidder after Default

When the successful bidder defaults during the term of the contract, *Ala. Code § 41-16-57(a)* authorizes an awarding authority to award the bid to the second lowest bidder for the remainder of the original contract term if the second lowest bidder agrees to all terms and conditions set out in his or her original bid. This option is only available to the awarding authority if:

- The lowest responsible bidder notifies the awarding authority in writing that he or she will no longer comply with the contract terms or the awarding authority documents the default and
- The second lowest bidder agrees to all terms and conditions in his or her original bid.

D. PUBLIC INSPECTON

Ala. Code § 41-16-57(d) requires that each record regarding the award of the contract be open to inspection. The record shall:

1. Indicate the successful bidder, and

2. State the reasons for the award if not made to the lowest bidder.

E. CONTRACT REQUIREMENTS

1. Contract Term Limitations

Ala. Code § 41-16-57(e) provides that contracts for the purchase of personal property or contractual services shall not be for periods greater than three years. Additionally, lease purchase contracts cannot be for periods longer than ten years.

- The Supreme Court has held that *Ala. Code § 41-16-57(e)* only applies to contracts which are competitively bid. *Alabama-Tennessee Natural Gas Co. v. Southern Natural Gas and City of Huntsville, supra*. See, also, *AG's Opinion ## 2005-192; 2001-049; and 89-173.*

- A public works contract is not subject to contract term limits. *AG's Opinion # 2002-072.*

2. Contract Bond

Ala. Code § 41-16-58 provides that a bond for faithful performance of the contract may be required in an amount specified in the advertisement for bids. This is a separate bond from the bid bond under *Ala. Code § 41-16-50(c)* discussed in *Section II, B*, 2 above.

3. Assignment of Contract

Ala. Code § 41-16-59 prohibits assignment of the contract by the successful bidder without the written consent of the awarding authority. This section also provides that a contract cannot be assigned to an unsuccessful bidder whose bid was rejected because he was not a responsible bidder.

4. Contract Statement on Unauthorized Aliens

Under Alabama's immigration law, all business entities must enroll in and utilize the e-Verify Program as a condition of an award of a contract that has been competitively bid. Additionally, *Ala. Code § 31-13-9* includes a requirement that all contracts governed by the immigration law include the following provision:

> By signing this contract, the contracting parties affirm, for the duration of the agreement, that they will not violate federal immigration law or knowingly employ, hire for employment, or continue to employ an unauthorized alien within the state of Alabama. Furthermore, a contracting party found to be in violation of this provision shall be deemed in breach of the agreement and shall be responsible for all damages resulting therefrom.

5. Change Orders

The competitive bid law does not specifically provide for change orders, but they have consistently been allowed by the attorney general's office pursuant to guidelines it has articulated in interpreting the intent of the bid law. *AG's Opinion ## 2000-098 and 93-105*. Change orders should only be used in the most extreme situations. Change orders generally apply to public works contracts and are more fully discussed in *Chapter 8, Section V, C*, the chapter addressing that law.

IV. PROHIBITIONS/VIOLATIONS

A. COLLUSION

Ala. Code § 41-16-55 prohibits any agreement or collusion among bidders or prospective bidders to bid at a fixed price or to refrain from bidding in restraint of freedom of competition. Any such activity shall:

1. Render the bids void.

2. Cause the bidders to be disqualified from submitting further bids on future purchases.

3. Be a Class A misdemeanor punishable by up to one year and/or $2000 fine.

B. ADVANCE DISCLOSURE

Ala. Code § 41-16-56 provides that any disclosure in advance of the terms of a bid submitted in response to an advertisement for bids shall render the proceedings void and require re-advertisement and award. See *AG's Opinion # 94-112*.

C. SPLITTING CONTRACTS

Ala. Code § 41-16-54(d) prohibits dividing a purchase or contract into parts involving $15,000 or less for the purpose of avoiding the competitive bid law.

- All such partial contracts shall be void.

- For a good discussion on application of this provision, see *AG's Opinion # 82-343.*

- It is violation to enter into multiple contracts with a single entity to avoid reaching the threshold amount. *AG's Opinion # 2007-030*.

D. CONFLICTS

The "conflict" language which used to appear in the competitive bid law no longer prohibits county commissioners from entering into contracts with the county. However, *Act No. 2015-53* addresses county commission conflict of interests through amendment's to *Ala. Code § 11-3-5*, the county nepotism law. This new law took effect on July 1, 2015.

The amended version of *Ala. Code § 11-3-5* does allow for a county commissioner to contract with the county, but only under limited and specific circumstances outlined here.

Pursuant to *Ala. Code § 11-3-5(a)*, in order for a commissioner or a business with which he or she is associated to be allowed to enter into a contract with the county, the contract must be the result of competitive bid regardless of whether bidding is required under Alabama's competitive bid law.

- This requirement also applies where the commission is considering a contract with a family member of a commissioner.
- Under no circumstances shall the commissioner participate in bid preparation or review of the bid.
- The commissioner shall not deliberate or vote on acceptance of the submitted bid.

For the purposes of this section, the definition of "family member" is the same as the definition in *Ala. Code § 36-25-1(15)* for the family member of a public official:

> "The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse's parents, a sibling and his or her spouse, of the public official."

Violation of *Ala. Code § 11-3-5* is a Class A misdemeanor, which carries penalties of up to $6000 in fines and/or up to one year in the county jail.

Ala. Code § 11-3-5(c) specifically provides that a commissioner entering into a contract with the county must be in compliance with *Ala. Code § 36-25-11*, the Ethics Law section requiring that any contract executed with a public official or business with which he or she is associated be filed with the Ethics Commission within 10 days after the contract is executed. Additionally, any contract executed in violation of *Ala. Code § 11-3-5* shall be void by operation of law.

E. AUCTIONS

The attorney general's office has held that a county cannot purchase items subject to the competitive bid requirements from an auction. *AG's Opinion # 91-037.* A county may sell items by auction.

Reverse Auctions

Ala. Code § 41-16-54(d) provides that an awarding authority may make purchases through a reverse auction process under procedures established by the Department of Examiners of Public Accounts.

- Under this procedure, anonymous suppliers submit bids to provide designated goods or services through a designated Internet location.
- This process is only allowed where (1) the item to be purchased is not available on the state bid list under the same terms or (2) the price available through reverse auction is less than the price on the state bid list.
- All items purchased through reverse auction are subject to audit by the Department of Examiners of Public Accounts.

F. CONTRACTS VIOLATING COMPETITIVE BID LAW

1. Contract Void

Any contract entered into in violation of the competitive bid law is void. *Ala. Code § 41-16-51(d).* See, also, *Ex parte Ballew, 771 So.2d 1040 (Ala. 2000); Layman's Security Co. v. Water Works and Sewer Board of City of Prichard, supra*.

- Awarding authority cannot agree to "correct" any problems with the bid after the contract has been entered into, and any attempt to correct is void. *Bd of School Commissioners v. Coastal Builders, 945 So.2d 1059 (Ala.Civ.App. 2005)*.

2. Felony

Ala. Code § 41-16-51(d) also provides that anyone who violates the competitive bid law shall be guilty of a Class C felony, which is punishable by a sentence of one to ten years (*Ala. Code § 13A-5-6(3))* and/or up to a $5,000 fine (*Ala. Code § 13A-5-11(a)(3))*.

3. Substantial Compliance

Both the appellate courts and the attorney general's office have held that in reviewing whether the competitive bid law has been followed, the contract will not be illegal and void if the awarding authority has "substantially complied" with the law. See, *AG's Opinion # 2004-018*.

V. AVAILABLE LEGAL ACTIONS

A. INJUNCTION

Ala. Code § 41-16-61 provides that a civil action to enjoin the execution of a contract entered into in violation of the competitive bid law may be brought by:

1. Any taxpayer within the jurisdiction of the awarding authority or

2. Any bona fide unsuccessful bidder.

However, an unsuccessful bidder cannot bring an action to enjoin the awarding authority from rejecting all bids and rebidding the contract or to compel the awarding authority to award the contract to him or her. *Vinson Guard Service, Inc. v. Retirement Systems of Alabama, 836 So.2d 807(Ala. 2002)*.

B. COMPENSATORY DAMAGES

The Supreme Court and the attorney general's office have consistently held that legal action cannot be brought for compensatory damages (such as loss of profits) under the competitive bid law. See, e.g., *Jenkins, Weber & Associates v. Hewitt, 565 So.2d 616 (Ala. 1990); Crest Construction Corp. v. Shelby County Board of Education, supra; AG's Opinion # 93-297.*

However, in *Springhill Lighting & Supply Company, Inc. v. Square D Company, Inc., 662 So.2d 1141 (Ala. 1995)*, the Supreme Court refused to state affirmatively that damages for intentional wrongful conduct in the bidding process could not be recovered and overruled the summary judgment of a trial court holding that no such action was available under the competitive bid law.

VI. SPECIAL PURCHASING/CONTRACTING PROVISIONS

A. JOINT BIDDING OR PURCHASING

1. Authority for Joint Bidding or Purchasing

Ala. Code § 41-16-50(b) allows two or more local governing bodies to "provide by joint agreement for the purchase of labor, services, or work or for the purchase or lease of materials, equipment, supplies, or other personal property for use by the respective agencies." *See. e.g., AG's Opinion # 2014-053.*

- This Code section is the authority for the Association's County Joint Bid Program.

2. Procedures for Joint Bidding or Purchasing

Under *Ala. Code § 41-16-50(b)*, each entity shall enter into similar resolutions setting forth:

a. The categories of purchases or leases to be included;

b. The manner of advertisement for bids and awarding of contracts;

c. The method of payment by each participating contracting agency; and

d. Any other matters deemed necessary to carry out the purposes of the agreement.

Each county's share of the expenditures shall be appropriated and paid in the manner set forth in the agreement and in the same manner as for other expenses of the county.

The counties entering into a joint agreement may designate a joint purchasing agent and that the agent shall have the responsibility to comply with the competitive bid law.

Purchases, contracts, or agreements made pursuant to a joint purchasing agreement shall be subject to all terms and conditions of the competitive bid law.

B. GOVERNMENTAL LEASING

Ala. Code § 41-16A-2 states a declaration by the Legislature of Alabama that it is in the public interest to have flexibility to finance the acquisition, installation, equipping, and/or improvement of certain property through the use of lease, lease-purchase, or installment-purchase financing. To this end, *Code of Alabama 1975, Title 41, Chapter 16A* provides for "alternative financing" for purchases of eligible property by governmental entities in the state.

- Counties are included in the definition of "governmental entity". *Ala. Code § 41-16A-3(b)*.

1. Eligible Property

Ala. Code § 41-16A-3(d) allows for the lease, lease-purchase, or installment-purchase financing of "eligible property", which is defined as, "Any tangible personal property, or any interest therein, including without limitation any goods, supplies, materials, appliances, equipment, furnishings, and/or machinery, whether or not such items constitute fixtures."

- This definition does not include real property. See, *AG's Opinion # 99-224*.

2. Alternative Financing Contracts

An alternative financing contract is defined in the statute as "A lease, lease-purchase, lease with option to purchase, installment-sale agreement or arrangement, or other similar agreement or arrangement." *Ala. Code § 41-16A-3(a).*

Ala. Code § 41-16A-4 authorizes the governmental entity to execute, perform, and authorize payments under an alternative financing contract.

This statute has very broad contracting powers, and specifically states that it is to be liberally construed to achieve its goal of allowing governmental entities to enter into lease or lease purchase agreements of personal property. *Ala. Code § 41-16A-5.*

- See, also, *AG's Opinion # 99-224*.
- However, this section does not create an exception to the competitive bid law.

C. SURPLUS PERSONAL PROPERTY

Ala. Code § 41-16-120 et seq. provides for the sale and disposal of surplus personal property owned by the state through the Alabama Department of Economic and Community Affairs (ADECA). Counties are permitted to participate in these purchases as an "eligible entity" under *Ala. Code § 41-16-120(a)(3)*. And this is in addition to the ability to purchase surplus property from the Alabama Department of Transportation as discussed in *Chapter Five, Section I, H.*

Some of the provisions in this law that are important to counties are outlined below.

1. Procedures for Sale of Surplus Property

Ala. Code § 41-16-120(e) grants ADECA the authority to sell surplus property at fair market value to eligible entities under its established and published rules.

a. Under *Ala. Code § 41-16-123(2),* proposals for sale shall be advertised for at least two weeks in advance of the date fixed for receiving bids according to the procedures set out in that section.

b. Bids shall be publicly taken or opened. *Ala. Code § 41-16-123(3).*

c. The award of the contract shall be made to the successful bidder within 72 hours after taking of bids. *Ala. Code § 41-16-123(4).*

2. Procedures for Purchase of Surplus Property

Payment for purchases shall be made within 30 days after purchase. *Ala. Code § 41-16-120(e).*

a. If payment is not made within 60 days after a purchase, the purchase shall be declared void and in default, and the property shall be immediately returned to ADECA by the defaulting purchaser. *Ala. Code § 41-16-120(e).*

b. If a successful bidder fails to accept the award of a contract, he or she shall be prohibited from bidding at a future sale unless reinstated by the director of ADECA.

c. ADECA shall be authorized to collect shipping and handling charges from the purchaser. *Ala. Code § 41-16-122(a).*

CHAPTER EIGHT

ALABAMA'S PUBLIC WORKS LAW

Pursuant to *Ala. Code § 39-2-2,* Alabama's public works law applies to any public works project in excess of $50,000 involving an expenditure of public funds. *Ala. Code § 39-2-1(1)* makes the public works law applicable to counties by defining an "awarding authority" as, "any governmental board, commission, agency, body, authority, instrumentality, department, or subdivision of the state, its counties and municipalities . . ."

Many of the provisions in the public works law are similar or identical to the provisions of the competitive bid law. Therefore, many of the cases and attorney general's opinions cited in Chapter Seven will apply to public works projects as well. However, the rules for public works projects, outlined below, are in many respects more restrictive and burdensome than those for purchases made under the competitive bid law.

Because of the different rules and procedures – including the threshold amount requiring bidding -- it is important to determine whether the purchase being considered falls under the competitive bid law or the public works law. Unfortunately, it is not always easy to determine which law applies.

I. APPLICABILITY OF STATUTE

A. PUBLIC WORKS PROJECT

The public works law applies to any public works project in excess of $50,000 involving an expenditure of public funds. *Ala. Code § 39-2-2.*

- Public funds include federal funds, as well as state, county, and municipal funds. *AG's Opinion # 98-031*.
- Where funds for a public works project are transferred to a governmental entity from a private source, they become public funds. *AG's Opinion # 2004-223.*

And *Ala. Code § 41-16-50* (in the competitive bid law) specifically provides that only the public works law applies to public works projects. *See, AG's Opinion # 2007-089.*

- In other words, the competitive bid law does not apply to a public works project even if the project is under $50,000. However, the competitive bid law would apply to the purchase of materials or services in excess of $15,000. See *AG's Opinion ## 98-39 and 98-52.*

Ala. Code § 39-5-6 states that the provisions of the public works law are mandatory and shall be construed to require strict competitive bidding. However, see *AG's Opinion # 2004-018* for a good discussion of the "substantial compliance" principle.

There is a two-prong test to determine whether the public works law applies:

(1) is the work on public property (or property which will become public) and

(2) is the work to be paid for, in whole or in part, by public funds.

See *AG's Opinion ## 2007-007 and 2004-026*.

1. Public Works and Public Property Defined

"Public Works" is defined in *Ala. Code § 39-2-1(5)* as:

> The construction, repair, renovation, or maintenance of public buildings, structures, sewers, waterworks, roads, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, repaired, renovated, or maintained on public property and to be paid, in whole or in part, with public funds or with financing to be retired with public funds in the form of lease payments or otherwise.

"Public Property" is defined in *Ala. Code § 39-2-1(4)* as:

> Real property which the state, county, municipality, or awarding authority thereof owns or has a contractual right to own or purchase, including easements, rights-of-way, or otherwise.

There are several appellate cases and attorney general's opinions which provide guidance on when the public works law applies. Some examples are set out below:

- Cutting grass in a public cemetery is a service which falls under the competitive bid law, but maintenance, repair, and upkeep of markers, headstones, etc. are public works projects. *AG's Opinion # 2007-030.*

- Interior and exterior painting are public works projects. *AG's Opinion # 2007-089.*

- Where the county will acquire easements for the project, but will not expend public funds on private property of any entity, and will not use county materials, equipment, supplies, or personnel, the improvement or construction of a water transportation facility is not subject to the public works law. *AG's Opinion # 2002-052.*

- Agreement granting public water service easements necessary to install water mains and provide water service meets "public works" definition. *Bessemer Water Service v. Lake Cyrus Development Co.*, 959 So.2d 643 (Ala. 2006).

- Construction of a fire station would be a public works project and would have to be bid under the public works law even if a private company initially pays for and performs construction, when the municipality later pays for construction and has an option to purchase through annual lease payments. *AG's Opinion # 2002-223*.

- Where work is performed on public property, or property that will become public, but is paid for entirely with private funds, the competitive bid requirements of the public works law do not apply. *AG's Opinion ## 2004-223 and 2004-026.*

- Where the awarding authority has a contractual right to purchase private property once the project is built, the construction thereof is a public works project subject to bidding pursuant to the public works law. *AG's Opinion # 2015-019.*

- The purchase and placement of sod by a contractor for the construction of a softball complex is a public works project. *AG's Opinion # 2014-048.*

- The definition of "public works" in the public works law includes the "maintenance" of structures and other improvements maintained on public property. "Maintenance" is "'[t]he care and work put into property to keep it operating and productive; general repair and upkeep.'" *AG's Opinion ## 2009-033 and 2007-089.*

- The purchase of cameras, lighting, and security fencing for installation at the courthouse is a public works project. *AG's Opinion # 2014-031.*

- A private entity is not subject to the public works law. *AG's Opinion # 2012-089.*

- The purchase of a public address system to be installed in a public building is a public works project. *AG's Opinion # 2010-079.*

2. Monetary Threshold $50,000

Ala. Code § 39-2-2(a) states that the awarding authority shall advertise for sealed bids before entering into any contract for a public works involving an amount in excess of $50,000.

Ala. Code § 39-2-2(b) specifically states that contracts involving $50,000 or less may be let with or without advertising or sealed bids. *See, e.g., AG's Opinion # 2014-031.* And *Ala. Code § 39-1-1(e)* provides that no bond is required to secure contracts in an amount less than $50,000.

- It is violation to enter into multiple contracts with a single entity to avoid reaching the threshold amount. *AG's Opinion # 2007-030.*

- The cost of work performed by employees of the awarding authority is not included in determining whether the monetary threshold requiring bidding is met. *AG's Opinion # 2004-083.*

- Painting contracts of $50,000 or less may be entered with or without bids, but the awarding authority cannot enter multiple $50,000 or less contracts with a single entity. *AG's Opinion # 2007-089. See, also, AG's Opinion ## 2004-083 and 2002-126.*

- If the purchase of equipment, supplies, or materials is included in a contract for construction, repair, renovation, or maintenance, it is subject to the public works law. *AG's Opinion # 2001-139.*

B. EXEMPTIONS/EXCLUSIONS

1. Professionals

Pursuant to *Ala. Code § 39-2-2(d),* contracts with persons who shall only perform architectural, engineering, construction management, or project management services are exempt from the public works law. See, *AG's Opinion ## 2012-089 and 99-056.*

However, *Ala. Code § 41-16-70 et seq.*, establishes specific procedures for the procurement of professional services for any contract with the state. See, in particular, *Ala. Code § 41-16-72.*

- This act does not apply to counties. *Ala. Code § 41-16-78. See, also, AG's Opinion # 2005-192.*
- However, it may affect any county contracts involving the Alabama Department of Transportation or other state agency.

2. Exempt Public Authorities

Ala. Code § 39-2-1(1) exempts from the definition of an awarding authority any entity exempt from the competitive bid law by statute.

- Municipal public building authorities created pursuant to *Ala. Code § 11-56-1 et seq.* are exempt from the competitive bid law, and as such, from the public works law. *AG's Opinion ## 99-218 and 99-224.*

  -- This exemption would ***not*** apply to a county building authority created under *Ala. Code § 11-15-1 et seq.*

  -- However, *Ala. Code § 11-56-2* specifically provides that a municipal building authority may provide buildings and facilities for lease and use to the county.

- Industrial development boards are exempt from the competitive bid law, and as such, from the public works law. *AG's Opinion ## 98-051 and 82-394.*
- An "exempt" entity must comply with the bid law when it is submitting a bid in response to an invitation for bid from a governmental entity subject to the competitive bid law. *AG's Opinion # 2005-119.*
- Public park and recreation boards are exempt from the competitive bid law, and as such, from the public works law. *AG's Opinion # 99-056.*
- Public corporations which do not have a specific exemption are subject to the public works law where public funds are expended. *AG's Opinion # 2005-045.*

3. Convict Labor

Ala. Code § 39-2-6(e) states that nothing in the public works law shall preclude the use of convict labor by the awarding authority.

- A contract between the county commission and Alabama Correctional Industries does not violate the public works law and the competitive bid law. *AG's Opinion # 97-202*.

4. Employee Projects

Ala. Code § 39-2-6(e) also provides that the public works law does not apply to routine maintenance and repair jobs or road or bridge construction work performed by county employees with equipment of the awarding authority.

- And the cost of work performed by employees is excluded in determining the cost of the project and whether the public works law applies. *AG's Opinion # 2004-083*.

5. Emergencies

Ala. Code § 39-2-2(e) provides that, in an emergency "affecting public health, safety, or convenience", contracts may be let to the extent necessary to meet the emergency ***without advertisement***. This provision is identical to the emergency exemption found in the competitive bid law and the same rules apply. *(See Chapter Seven, I, B, 3 for examples of applicable attorney general's opinions on this issue.)*

a. The emergency must be declared in writing by the awarding authority, and must set forth the nature of the danger involved in delay (see, *AG's Opinion # 2000-75)* ***and***

b. The action and reasons shall immediately be made public by the awarding authority.

As with the competitive bid law, this is ***not*** an exemption from the bid law, but only from public advertisement. *General Electric Co. v. City of Mobile et al., supra*.

- It is still suggested that the awarding authority seek proposals for finishing these projects from several contractors to ensure that the work will be performed at the lowest possible price to the taxpayer. *AG's Opinion # 85-35.*

- Whether an "emergency" authorizing application of the exception to the bid law exists requires a finding of fact that only the awarding authority can make. *AG's Opinion # 2000-75. See, also, Anderson v. Fayette County Board of Education et al., supra; Union Springs Telephone Co. v. Rowell, supra.*

In addition to this provision, *Ala. Code § 31-9-10* grants local governing bodies special powers and authority in the event of a disaster such that the governing body is authorized "to waive procedure and formalities otherwise required by law" for public works projects, contracts, etc. This is much broader power than that allowed under *Ala. Code § 39-2-2(e)*, but also has much more limited application.

6. Homeland Security Exemption

Ala. Code § 39-2-2(g) provides that certain contracts affecting homeland security may be let by informal bid and without public advertisement.

- The Homeland Security Director must acknowledge in writing that the proposed public works project has a direct impact on safety or security of persons and requires confidentiality.

II. BIDDING OPTIONS

A. PREQUALIFICATION

1. Procedures and Criteria

Ala. Code § 39-2-4 authorizes, but does not require, prequalification of bidders if proper procedures are applied. The procedures in this section do not apply to the Alabama Department of Transportation, which has its own prequalification procedures pursuant to *Ala. Code § 23-1-56*.

To prequalify bidders, the awarding authority must establish written prequalification procedures and criteria under the following statutory rules:

a. Procedures are published in the same manner as bid advertisements sufficiently in advance of contract to allow bona fide bidders to obtain prequalification prior to preparing bid.

   - Prequalification publication may run concurrently with bid advertisement publication provided it produces required advance notice.

b. The procedures are related to the purpose of the contract or contracts affected.

c. The procedures are related to contract requirements or the quality of the product or service in question.

d. The procedures are related to the responsibility of the bidder, including his or her competency, experience, and financial ability.

e. The procedures permit reasonable competition at a level that serves the public interest.

2. Prequalification Determination and Revocation

Under *Ala. Code § 39-2-4(d),* any bidder who has prequalified shall be deemed “responsible” for purposes of award unless prequalification is revoked by the awarding authority under the following procedures:

a. Written notice of intent to revoke with grounds for revocation is issued within five working days or the next regular meeting after opening of bids.

b. The bidder is provided an opportunity to be heard on the intended revocation.

c. The awarding authority makes a good faith showing of:

- A material inaccuracy in the prequalification application or
- A material change in the responsibility of the bidder since submitting his or her prequalification application.

d. Revocation must be determined no later than 10 days after written notice of intent to revoke unless the bidder agrees in writing to an extension of time.

Under *Ala. Code § 39-2-4(c)*, the awarding authority has the right to determine whether prequalification procedures and criteria are met, but the determination must be "within the bounds of good faith".

B. SOLE SOURCE

Ala. Code § 39-2-2(f) provides that no awarding authority may specify the use of materials, products, systems, or services by a sole source unless all of the following requirements are met:

1. ***Except in contracts involving roads, bridges, or water and sewer facilities***, the awarding authority can document to the satisfaction of the State Building Commission that:

   a. The sole source product, material, system, or service is of an indispensable nature for the improvement, ***and***

   b. There are no other viable alternatives, ***and***

   c. Only this product fulfills the function for which needed.

2. The sole source specification has been recommended by the architect or engineer as an "indispensable item" for which there is no viable alternative.

3. All information substantiating use of a sole source specification, including architect or engineer recommendation, is documented and made available for examination at the time of advertisement.

For a good discussion of "sole source" see, *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., supra, and General Electric Co. v. City of Mobile et al., supra.*

III. BIDDING REQUIREMENTS

A. ADVERTISING

Ala. Code § 39-2-2(a) provides that the county must advertise for sealed bids once each week for three consecutive weeks in a paper of general circulation in the county.

- A newspaper of general circulation for advertising public works projects is a paper meeting the requirements of *Ala. Code § 6-8-60*, which requires, among other things, that the paper have its principal editorial office in the county. *AG's Opinion # 2015-046.*

The advertisement must meet the following conditions:

1. Briefly describe the project;

2. State the procedure for obtaining plans and specifications *(discussed in more detail in Section III, B, 2 below);*

3. State the time and place for bids to be received and opened; and

4. State whether prequalification is required and where prequalification information is available. *(See, Section II, A above for discussion of prequalification.)*

5. Include a copy of *Ala. Code § 39-3-5* on resident contractors preference as a part of the advertised specifications of all projects affected by it. *See, Ala. Code § 39-3-5. (This preference is discussed in more detail in Section V, B, 6.)*

6. For contracts in excess of $500,000, the county must also advertise at least once in three newspapers of general circulation throughout state.

    - For a good discussion of "newspaper of general circulation throughout the state", see *AG's Opinion # 97-247.* See also, *AG's Opinion # 2004-018.*

    - An awarding authority that obtained a good-faith estimate that the project was less than $500,000 was not required to advertise in three newspapers of general circulation throughout the state. *AG's Opinion # 2008-106.*

The attorney general's office has issued several opinions discussing the advertisement requirement. A sampling is set out below:

- Advertising must take place a reasonable period of time before the time scheduled for acceptance of bids. *AG's Opinion # 97-247.*

- In *AG's Opinion # 2004-018*, the attorney general's office found that the awarding authority had "substantially complied" with the advertising requirements where, after the contract had been awarded, it was determined that one of the newspapers used for advertising was not a paper of general circulation in the state. In this instance, there was broad advertising of the project through the Internet and trade papers and the awarding authority was at risk of losing federal funding if the contract was declared void. *See, also AG's Opinion # 2011-058.*

- A similar holding was reached in *AG's Opinion # 2005-136*, where after the bid had been awarded and contracts signed, the awarding authority learned that one of the newspapers used for advertising the bid offering failed, through newspaper error, to run the ad.

  -- This opinion modified an earlier opinion in which that office held that a project should be rebid after opening where the bid advertisement did not run for a third consecutive week due to computer problems at the newspaper. See, *AG's Opinion # 2002-287.*

- Where a project was only advertised in the newspaper twice but was also advertised in other places like trade websites, a court may find that the awarding authority substantially complied with the advertisement of bids based upon the substantial number of bids received and the number of states involved in the bidding process. *AG's Opinion # 2011-100. See, also AG's Opinion # 2011-058.*

B. BID DOCUMENTS

1. Bid Specifications

As with the competitive bid law, there is no specific provision in the public works law addressing preparation of bid specifications, but there are cases and attorney general's opinions on the subject. *(See, Chapter Seven, Section II, A for further discussion and case and opinion citations.)*

And as with the competitive bid law, Alabama's public works law contemplates that the awarding authority will utilize bid specifications rather than "request for proposals" in soliciting bids for a public works projects, and that bids will be awarded based upon the lowest responsible and responsive bidder and not the most attractive proposal negotiated based upon proposals received. See, e.g., *AG's Opinion # 2013-012*.

2. Obtaining Bid Documents for Review and Inspection

The public works law does include detailed procedures regarding obtaining bid proposals and making bid documents available for review and inspection. *Ala. Code § 39-2-3(b) and (c).* Those procedures are set out below:

a. An adequate number of sets of bid documents may be obtained by prime contractor bidders upon payment of a deposit for each set.

   i. The deposit shall not exceed twice the cost of printing, reproduction, handling, and distribution of each set.

ii. The deposit shall be refunded, less the cost of printing, reproduction, handling, and distribution, upon the return of documents in reusable condition within 10 days after the bid opening.

- All refunds are due from awarding authority within 20 days after the bid opening.

iii. Additional sets of bid documents for prime contractor bidders, subcontractors, vendors, or dealers may be obtained upon payment of the same deposit.

b. Building exchanges and similar agencies are furnished plans and specifications without charge.

There are separate procedures for the Alabama Department of Transportation contracts, which are set out in *Ala. Code 39-2-3(a)*.

C. SPECIAL REQUIREMENTS FOR GRANT-FUNDED PROJECTS

The Alabama Legislature passed legislation in 2014 providing that, where a project is to be funded by a grant, the awarding authority cannot begin the bidding process unless it has received confirmation of funding and any required matching funds have been secured or are available. *See, Ala. Code § 39-2-12(i), as amended by Act 2014-404.*

- Where the funds will not become available until after the contract is executed, the bid specifications – and the contract -- must specifically state that fact. *See, Ala. Code § 39-2-12(l).*

  -- The Association has developed sample bid and contract language to comply with this provision, which can be found at the end of this chapter.

IV. BIDDERS REQUIREMENTS

A. SEALED BIDS

Ala. Code § 39-2-2(a) requires that the awarding authority advertise for "sealed bids" and further provides that all bids be opened publicly at the advertised time and place.

- *Ala. Code § 39-2-6(h)* provides that any advance disclosure of the terms of a bid shall render the proceedings void and require readvertisement and award.

B. BID GUARANTY

1. Bond Form

Ala. Code § 39-2-4(a) provides that all bidders must file either:

a. A cashier's check drawn on an Alabama bank or

b. A bid bond executed by a surety authorized to make such bonds in Alabama.

2. Bond Amount

The check or bond shall be in an amount not less than five percent (5%) of the estimated cost but not to exceed $50,000. *Ala. Code § 39-2-4(a). (See, Act 2016-260 increasing the amount from $10,000 to $50,000.)*

3. Bond as Qualification/Guarantee

Ala. Code § 39-2-4 also provides that the bid bond or check shall constitute all of the qualification or guarantee required as a prerequisite to bidding except as required by the State Licensing Board for General Contractors and as provided in any prequalification requirements of the awarding authority. *(Prequalification is discussed in Section II, A above.)*

4. Return of Bid Guaranty

Pursuant to *Ala. Code § 39-2-5*, except for the bid guaranties from the three lowest bona fide bidders, all bid guaranties shall be returned immediately after bids have been checked, tabulated, and the relation of the bids established.

Guaranties of the three lowest bidders shall be returned as soon as the contract bonds and contract of the successful bidder are properly executed and approved by the awarding authority. *(See, Section V, B for discussion of executing contracts and contract bonds.)*

- When an award is deferred for more than 15 days, all guaranties except those of potentially successful bidders shall be returned.

- If no award is made within 30 days after the opening of bids, or other time specified in bid documents, all guaranties shall be returned except for any potentially successful bidder that agrees in writing to a stipulated extension in time for consideration of bid.

    -- In this instance, the awarding authority may permit a potentially successful bidder to substitute a satisfactory bidder's bond for a cashier's check submitted with bid.

C. MISTAKE OF BIDDER

Ala. Code § 39-2-11 provides that a low bidder who discovers a mistake in his or her bid rendering the price substantially out of proportion to other bidders may seek withdrawal of the bid without forfeiture.

1. The bidder must provide written notice to the awarding authority within three working days after opening of bids, and

2. Offer clear and convincing documentary evidence that the mistake is due to calculation or clerical error, an inadvertent omission, or a typographical error.

If withdrawal is allowed, the low bidder is prohibited from doing any work on the contract or from bidding on same project if it is re-advertised.

V. AWARD OF CONTRACT

A. AWARDING AUTHORITY OPTIONS

1. Lowest Responsible and Responsive Bidder

Under *Ala. Code § 39-2-6*, the contract shall be awarded to the lowest responsible and responsive bidder unless the awarding authority finds that all bids are unreasonable or that it is not in the awarding authority's interest to accept any of the bids.

a. Responsible Bidder

As defined in *Ala. Code § 39-2-6(a)*, a "responsible bidder" is "one who, among other qualities determined necessary for performance, is competent, experienced, and financially able to perform the contract".

- A conviction and bar by a federal agency are factors which may be considered in determining if a bidder is responsible. *AG's Opinion # 2007-063.*

b. Responsive Bidder

A "responsive bidder" is "one who submits a bid that complies with the terms and conditions of the invitation for bids." Minor irregularities in the bid shall not defeat responsiveness. *Ala. Code § 39-2-6(a).*

2. Assignment of Contract

No contract awarded to the lowest responsible and responsive bidder shall be assignable by the bidder without written consent of the awarding authority. *Ala. Code § 39-2-6(f).* And in no event shall the contract be assigned to an unsuccessful bidder whose bid was rejected because he was not responsible or responsive.

3. When Bidder Fails to Complete Contract

Ala. Code § 39-2-6(a) provides that if the successful bidder fails or refuses to sign the contract, make bond, or provide the required evidence of insurance, the contract may be awarded to the second lowest responsible and responsive bidder.

- If the second lowest bidder fails or refuses to comply with the above requirements, the contract may be awarded to the third lowest responsible and responsive bidder.

4. Rejection of Bids

Ala. Code § 39-2-6(b), (c), and (d) address the rejection of bids received in response to an invitation to bid under the public works law.

a. No Bids or Only One Bid

If no bids or only one bid is received, the awarding authority may do any of the following:

i. Advertise for and seek other competitive bids,

ii. Direct that work be done by force account *(discussed below)*, ***or***

iii. Negotiate work through informal bids not subject to bid requirements, provided that, where only one responsible and responsive bid is received, any negotiation must be for a price lower than that bid.

- Where work is negotiated through informal bids, *Ala. Code § 39-2-6(d)* requires that the plans, specs, changes, estimated and actual costs of the project, and any informal bids shall be made available for review by the Department of Examiners of Public Accounts and shall be made public upon request.

b. Unreasonable Bids

If the awarding authority finds that all bids are unreasonable or that it is not in its best interest to accept any of the bids, it may direct work done by force account as set out below.

c. Bids in Excess of Budget

Where all bids exceed the project budget and there were several bidders, the awarding authority cannot negotiate with companies who submitted bids to bring construction costs within available funding, but must alter specifications and rebid. *AG's Opinion # 2002-006*.

5. Force Account

Under *Ala. Code § 39-2-6(c)*, if the county rejects all bids as unreasonable or not in its interest, it may provide that work be done by force account under its direction and control. "Force account work" is defined in *Ala. Code § 39-2-1(2)* as:

> Work paid for by reimbursing the actual costs for labor, materials, and equipment usage incurred in the performance of the work, as directed, including a percentage for overhead and profit, where appropriate.

There are several attorney general's opinions addressing force account. A few examples are set out below:

- The attorney general has held that "force account" and "in-kind services" have the same meaning. *AG's Opinion # 98-039*.

- *Ala. Code § 39-2-6(d)* provides that if a project is carried out by force account, the plans, specs, changes, estimated and actual costs of the project, and any informal bids shall be made available for review by the Department of Examiners of Public Accounts and shall be made public upon request. See, also, *AG's Opinion # 98-039*.

- *Ala. Code § 39-2-6(d)* also provides that the awarding authority may let any subdivision or unit of work being performed by force account by "informal bids". See, also, *AG's Opinion # 2000-218*.

- The attorney general has held that under the public works law, an agency may decide to carry out a project by force account when it has the resources, facilities, and personnel available, and finds that it would be the most efficient use of same. *AG's Opinions # 98-39 and # 98-52.*

- Since no contract would be signed where a project is carried out by force account, the public works law has no effect. However, the competitive bid law would still apply for the purchase of materials, supplies, and equipment in excess of the bidding threshold amount (now $15,000). *AG's Opinions ## 99-065; 98-039 and 98-052.*

- In-kind services that will serve as a match for ADECA grant funds are not required to be competitively bid. *AG's Opinion # 98-052*.

- Where work is done by force account, engineering drawings, specifications, and estimates must be prepared by a professional engineer and the construction must be executed under the direct supervision of a professional engineer as required by *Ala. Code § 34-11-10*, part of the law regulating engineers and land surveyors. *AG's Opinion # 99-065.*

- Laborers under force account must be employees of the awarding authority and not contract employees or employees of a contractor. *AG's Opinion # 2000-218.*

- The attorney general has held that the cost of "force account" work performed by county employees is not included in determining whether a public works project exceeds $50,000 and falls under the public works law. *AG's Opinion # 2004-083*.

B. PROCEDURES FOR AWARDING CONTRACT

1. Award Time Frame

Ala. Code § 39-2-5 provides that if no award is made within 30 days of opening of bids:

a. All bids shall be rejected and

b. All guaranties shall be returned except for any potentially successful bidder that agrees in writing to a stipulated extension in time for consideration of the bid.

2. Notification to Successful Bidder

Under *Ala. Code § 39-2-6(a)*, the awarding authority shall notify the successful bidder of the award by telegram, confirmed fax, or letter at the earliest possible date.

3. Awarding Authority's Responsibility in Completing Contract

a. Execution of Contract

Ala. Code § 39-2-9 provides that within 20 days after presentation of bonds and evidence of insurance by the contractor, the awarding authority must approve them and complete execution of the contract unless the contractor agrees in writing to a longer period. *(See Section V, B, 5 regarding successful bidder's responsibilities on this issue).*

b. Proceed Order

Ala. Code § 39-2-10 provides that within 15 days after final execution of the contract (and execution by Governor, if required), the awarding authority shall issue a proceed order unless both parties agree in writing to a stipulated extension.

c. Failure to Complete

Ala. Code § 39-2-11(c) provides that the awarding authority's failure to complete execution of the contract and issue a proceed order is just cause for withdrawal of the contractor's bid without forfeiture of check or bond unless the contractor agrees in writing to a longer period.

d. Certificate of Compliance

Ala. Code § 39-5-1(b) provides that prior to execution of final contracts and bonds, the awarding authority must certify that the contract was awarded in compliance with law. The certificate of compliance constitutes a rebuttable presumption that the contract was let in accordance with the law.

i. In an action brought by a contractor for payment under an illegal contract, the certificate is rebutted only by clear and convincing evidence that the certification was false or fraudulent and that the contractor knew the certification was false or fraudulent before execution of the contract.

ii. Under *Ala. Code § 39-5-2*, an awarding authority or its agent who willfully issues a false or fraudulent certificate shall be guilty of a felony punishable upon conviction by a fine of not less than $5,000 nor more than $50,000 or imprisonment for one to three years.

4. Required Contract Provisions

a. Statement Regarding Availability of Funds

Act No. 2012-379, which took effect on August 1, 2012, requires the awarding authority to include a provision in all public works contracts outlining the source of sufficient funds for its obligations under the contract. Under *Ala. Code § 39-2-12(k)* as amended by this act, the contract must state whether funds are held by the awarding authority at contract execution or will become available following execution of the contract.

- If the source of funds for payment will be a grant, award or other direct reimbursement which will not be available until after the execution of the contract, this shall be disclosed in the bid document and contract.

  -- *As discussed in more detail in Section VI, E below, in this instance prompt payment provisions in the law shall not apply until the awarding authority is in receipt of such funds*

The Association has developed sample bid and contract language to comply with this provision. These samples are found at the end of this chapter.

b. Contract Statement on Unauthorized Aliens

Under Alabama's immigration law, all business entities must enroll in and utilize the e-Verify Program as a condition of an award of a contract that has been competitively bid. Additionally, *Ala. Code § 31-13-9* includes a requirement that all contracts governed by the immigration law include the following provision:

> By signing this contract, the contracting parties affirm, for the duration of the agreement, that they will not violate federal immigration law or knowingly employ, hire for employment, or continue to employ an unauthorized alien within the state of Alabama. Furthermore, a contracting party found to be in violation of this provision shall be deemed in breach of the agreement and shall be responsible for all damages resulting therefrom.

5. Responsibilities of Successful Bidder

Ala. Code § 39-2-8 provides that within 15 days of awarding the contract and presenting forms for signature, the successful bidder must:

i. Enter into a contract,

ii. Furnish a performance bond equal to 100% of the contract price as provided in *Ala. Code § 39-1-1*,

iii. Furnish a payment bond of not less than 50% of the contract price as provided in *Ala. Code § 39-1-1* for payments of all labor and materials, and

iv. Provide evidence of insurance as required by the bid documents.

The county may grant a five day extension for any of these requirements if there are extenuating circumstances.

Ala. Code § 39-1-4 prohibits the awarding authority and its employees or agents from requiring the bidder to obtain a bond or insurance from a particular company. Under this provision, no awarding authority or its employees or agents may negotiate or procure any bond or insurance for a bidder, contractor, or subcontractor, except insurance for builder's risk or owner's liability.

- There are some exceptions set out in this Code section that are not generally applicable to counties.

Ala. Code § 39-2-11 provides that if the successful bidder fails to comply with these requirements, the county shall retain or recover from the bid guaranty the difference between the contract amount as awarded and the amount of the next lowest proposal. If there are no other bids, the full amount of the guaranty shall be retained as liquidated damages.

6. Out of State Contractors

Ala. Code § 39-2-14 provides that every nonresident contractor shall register with the Alabama Department of Revenue prior to engaging in performance of a contract and shall deposit with that Department five percent (5%) of the contract amount or a surety bond. Within 30 days after registration, the nonresident contractor shall file a statement itemizing materials, equipment, etc. that will be or is being used on the job.

- See *Ala. Code § 39-2-12(d)* for other special requirements of the nonresident contractor.

A nonresident contractor is defined in *Ala. Code § 39-2-12(a)(2*) as:

> A contractor which is neither a. organized and existing under the laws of the State of Alabama, nor b. maintains its principal place of business in the State of Alabama. A nonresident contractor which has maintained a permanent branch office within the State of Alabama for at least five continuous years shall not thereafter be deemed to be a nonresident contractor so long as the contractor continues to maintain a branch office within Alabama.

7. Preferences

a. Domestic Products

Ala. Code §39-3-1 provides that when contracting for public works projects financed entirely by the State of Alabama or any of its political subdivisions (which would include counties), the awarding authority must agree to use materials manufactured in the United States or its territories if available at a reasonable and competitive price and not contrary to any sole source specifications.

i. The awarding authority must stipulate to this agreement in the contract.

ii. If the contractor breaches the agreement, and domestic products are not used, there shall be a downward adjustment in the contract equal to any realized savings or benefits to the contractor.

b. Domestic Steel

Ala. Code § 39-3-4 provides that any contractor for a public works project must use steel produced in the United States when specifications require the use of steel and do not limit its supply to a sole source.

i. If the awarding authority decides that the procurement of domestic steel products becomes impractical as a result of a national emergency, strike, or other cause, it shall waive the restriction.

ii. If the contractor violates this requirement, and domestic steel is not used, there shall be a downward adjustment in the contract equal to any realized savings or benefits to the contractor.

c. Resident Contractors

Ala. Code § 39-3-5 provides that preference shall be given to "resident contractors". There is no definition of "resident contractor", but it appears that this applies to residency in the state and not in a particular county.

Ala. Code § 39-3-5 further provides that a nonresident bidder from a state which has laws granting preferences to local contractors shall be awarded Alabama contracts "only on the same basis as the nonresident bidder's state awards contracts to Alabama contractors". As noted above, "nonresident contractor" is defined in *Ala. Code § 39-2-12(a)(2).*

- The attorney general's office, in AG's Opinion # 2010-040 explained that this preference to resident contractors applies if (1) the contract is under the public works law; (2) the contract utilizes any state, county, or municipal funds, except if funded in whole or in part with federal funds; and (3) the law of the state of the out-of-state contractor gives preference to its resident contractors.

  -- The AG's office held in this opinion that the preference could not be given to an Alabama bidder over a Florida bidder, because Florida does not have a preference to resident bidders in its law.

8. Splitting Contracts

As is the case with a contract subject to the competitive bid law, no public works contract in excess of $50,000 shall be split into parts involving $50,000 or less for the purpose of evading the public works law. *Ala. Code § 39-2-2.*

- Where work is added to a project originally under $50,000 without bidding or approval of the awarding authority, the additional amount cannot be paid. *AG's Opinion # 2002-126*.

- A public works contract cannot be split by contract term length (i.e. cost for three years) to avoid reaching $50,000 threshold. *AG's Opinion # 2002-072*.

- All separate "pieces" of a public works project must be bid if the total cost of the project exceeds $50,000. *AG's Opinion # 2004-083*.

- The awarding authority cannot award multiple $50,000 contracts to a single entity without bidding. *AG's Opinion # 2007-089.*

- A maintenance contract for multiple water tanks cannot be divided into parts to avoid the $50,000 threshold amount requiring competitive bid. *AG's Opinion # 2015-008.*

9. Term of Public Works Contract

Unlike the competitive bid law, the public works law does not have any provision setting a limitation on the term of a public works contract. *See, AG's Opinion # 2015-008.*

- However, a public works contract cannot be renewed without rebidding. *AG's Opinion # 2015-008.*

C. CHANGE ORDERS

The public works law does not specifically provide for change orders, but they have consistently been allowed by the attorney general's office pursuant to guidelines it has articulated in interpreting the intent of competitive bid laws. *AG's Opinion ## 2000-098 and 93-105*.

In *AG's Opinion # 79-313*, the attorney general authorized "Changes of relatively minor items not contemplated when the plans and specifications were prepared and the project was bid which are in the public interest and which do not exceed 10% of the contract price."

Since that opinion was issued, the attorney general has consistently held that change orders were appropriate under certain circumstances, and has condoned changes in excess of 10% where "extraordinary circumstances" exist, particularly where funds are provided through a community development block grant (CDBG funds). See, e.g., *AG's Opinion ## 2001-182; 2000-098; 93-105; 92-388; 91-279; 87-197; and 87-153*.

- The allowance of "change orders" ***should not*** be construed to authorize alteration or addition to the original item or project bid. See, *AG's Opinion # 2002-126.*

In almost all of the opinions addressing change orders, the attorney general points out that the most important requirement of competitive bid laws is the good faith of the officials charged in executing the law. Additionally, that office has held that a signed statement from the project engineer should be in the file setting out each of the following:

- A statement of what the change order covers, who instituted it, and why.
- A statement of the reasons for using the change order method rather than bids.
- A statement that all prices have been reviewed and found reasonable, fair, and equitable and recommending the approval.

Counties should be extremely careful in agreeing to and authorizing change orders. This process – which is not found in the law – has been abused over the years to alter projects in ways not contemplated in the original bid specifications, and where such dramatic changes are allowed, counties are not only vulnerable to audit findings and/or litigation, but generally end up adding significantly to the cost of the project.

VI. RETAINAGE AND PAYMENT PROCEUDRES

A. DEFINITION OF RETAINAGE

Retainage is defined in *Ala. Code § 39-2-12(a)(3)* as, "That money belonging to the contractor which has been retained by the awarding authority conditioned on final completion and acceptance of all work in connection with a project or projects by the contractor."

B. PROCEDURE FOR RETAINAGE PAYMENT

Ala. Code § 39-2-12(b) and (c) provide for retainage procedures as follows:

1. Payments are made at end of each month as work progresses.

2. No more than five percent (5%) of the estimated work done and the value of materials shall be retained.

3. No further retainage shall be held after 50% of work is completed.

4. There shall be no retainage withheld on contracts entered into by the Alabama Department of Transportation for construction or maintenance of public highways, bridges, or roads.

The attorney general has concluded that the retainage language found in *Ala. Code § 39-2-12(c)* is mandatory and cannot be altered in bid specifications. *AG's Opinion # 97-256*.

C. RESPONSIBILITY FOR MATERIALS AND WORK

Under *Ala. Code § 39-2-12(g)*, all material and work covered by partial payments becomes the sole property of the awarding authority. However, the contractor is not relieved of the sole responsibility for the care and protection of materials and work upon which payments have been made and for the restoration of any damaged work.

D. ALTERNATIVES TO RETAINAGE

Ala. Code § 39-2-12(d) provides that, in lieu of retainage, the awarding authority may provide in specifications and contracts for the maintenance of:

1. An escrow account as provided in *Ala. Code § 39-2-12(e)* or

2. Security as provided in *Ala. Code § 39-2-12(f)*.

E. PROMPT PAYMENT REQUIREMENTS

The law regarding prompt payment of public works contracts was substantively amended in 2012 and 2014. See *Act 2012-379* and *Act 2014-404*. With the passage of those two laws, the procedures for partial payment on public works contracts are now as follows:

1. Partial Payment Procedures

For partial payments in ongoing projects ***other than those funded by grants***, a person designated in the contract to review the progress of completed work and invoices for the awarding authority shall have 10 days to review a submission for payment and respond in writing either acknowledging acceptance of the invoice or outlining errors or disputes.

- If errors or disputes are transmitted to the contractor, the invoice may be resubmitted once those errors or disputes are resolved.
- Where there is no error or dispute, the awarding authority has ten (10) days to pay the invoice.

2. Final Payment Procedures

Final payment on a project shall be made within 35 days after work has been completed and accepted, or interest is charged. *(See, Section VIII for discussion of advertising and other requirements for final payment.)*

- Interest shall be computed based on the underpayment rate established by the Secretary of the Treasury under the authority of 26 U.S.C. §6621 as provided in Ala. Code § 40-1-44(a).
- This procedure does not apply in grant projects which are discussed below.

Pursuant to language added in *Act 2012-379*, contractual arrangements increasing the 35 day payment period for payment are unenforceable. *See, Ala. Code § 39-2-12(i)(2).*

3. Procedures for Grant Projects

Pursuant to *Act 2014-404*, the following procedures apply for projects funded with a grant, award or direct reimbursement from the state, federal government or other source.

- The awarding authority cannot begin the bidding process unless it has received confirmation of funding and any required matching funds have been secured or are available. *See, Ala. Code § 39-2-12(i).*
- Where the funds will not become available until after the contract is executed, the bid specifications – and the contract -- must specifically state that fact. *See, Ala. Code § 39-2-12(l).*

The Association has developed sample bid and contract language to comply with this provision. These samples are found at the end of this chapter.

In addition to the above, the invoice review process outlined above applies to grant projects as well, ***except that*** once an invoice for partial payment is approved, the awarding authority shall forward the request to the entity or agency that is the source of funding for the project.

Additionally – and most importantly – payment on the project shall not be due until the awarding authority is in receipt of the funds.

- Once funds are received, the awarding authority shall process payment to the contractor within ten days.

4. Overpayments

Under *Ala. Code § 39-2-12(j)* as amended by *Act. No. 2012-379*, any overpayment made to a contractor shall be repaid to the awarding authority within 60 days of notification of the overpayment.

- Interest as provided in *Ala. Code § 40-1-44(a)* shall be assessed on any unpaid amount.

- A contractor who fails to repay within 60 days shall be disqualified from future biddings until payment has been made.

VII. COMPLETION AND FINAL PAYMENT PROVISIONS

A. ADVERTISEMENT UPON PROJECT COMPLETION

1. Contracts of $50,000 or More

For contracts of $50,000 or more, the contractor must give notice of completion of a project by advertising for four consecutive weeks in a newspaper of general circulation published within the city or county where the work has been done. *Ala. Code § 39-1-1(f).*

a. If there is no newspaper published in the county, notice may be given by posting at the courthouse for 30 days.

b. Final settlement on the contract shall not be made until the expiration of 30 days after completion of the notice.

c. The contractor must provide proof of publication of the notice to the awarding authority.

2. Contracts Less than $50,000

Ala. Code § 39-1-1(f) provides that for contracts of less than $50,000, "the governing body of the contracting agency" shall give notice of completion by:

a. Publishing it once in a newspaper of general circulation in the county and

b. Posting notice on the agency's bulletin board for one week.

B. PAYMENT UPON PROJECT COMPLETION

1. Contracts of $50,000 or More

As discussed in *Section VI, E, 2, Ala. Code § 39-2-12(h)* provides that upon completion and acceptance of all work required, the contractor will be paid upon presentation of the following:

a. A properly executed and duly certified voucher for payment.

b. A release of all claims and claims of liens against the awarding authority arising by virtue of the contract.

c. Proof of advertisement of project completion.

Payment is due 35 days after all of the above requirements are met, and if the awarding authority fails to make payment, interest at the current amount charged by the state shall accrue. *(See Section VI, E, 2 for more detailed discussion of final payment procedures.)*

2. Contracts Less than $50,000

Under *Ala. Code § 39-1-1(g),* for contracts under $50,000, the contractor shall be required to certify under oath that all bills have been paid in full. Final settlement may be made at any time after notice of completion of the project has been posted for one week.

VIII. LEGAL ACTIONS AND PENALTIES

A. AUTHORITY TO BRING DAMAGE SUIT

1. Suit by Bidder

A bidder who was awarded a public works contract cannot bring a civil action to force the awarding authority to pay out public funds for work and labor, materials supplied, or performance of the contract if the contract was let or executed in violation of the law. *Ala. Code § 39-5-1.* See, also, *AG's Opinion # 2002-126*.

- The certificate of compliance signed by the awarding authority prior to execution of the contract creates a rebuttable presumption that the contract was let in compliance with the law. *(See Section V, B, 3, d for further discussion of certificate of compliance.)*

2. Suit by Attorney General or Interested Citizen

Pursuant to *Ala. Code § 39-5-3*, the public works law authorizes civil actions brought by the attorney general or an interested citizen to recover public funds paid under a public works contract let in violation of law.

- The action must be brought within three years of final settlement of the contract.

- No monetary recovery is allowed unless suit is brought by the attorney general or an interested citizen. *Bessemer Water Service v. Lake Cyrus Development Co., supra.*

B. AUTHORITY TO BRING INJUNCTIVE ACTION

An action to prevent letting or executing a public works contract in violation of the law may be brought within 45 days of an award of the contract under *Ala. Code § 39-5-4* by:

a. The attorney general,

b. A bona fide unsuccessful or disqualified bidder, or

c. Any interested citizen.

- In an action brought by the unsuccessful bidder, he or she may recover reasonable bid preparation costs.

- Injunction is the sole remedy available under public works law. An unsuccessful bidder cannot pursue a claim for money damages other than bid preparation costs if he or she succeeds in the injunction. *Ala. Municipal & Environmental Engineers v. Slaughter Construction Co., 961 So.2d 889 (Ala.Civ.App. 2007).*

C. EFFECT OF ILLEGAL CONTRACT

1. Contract Void

Under *Ala. Code § 39-2-2(c)*, any contract entered into in violation of the public works law shall be null, void, and violative of public policy. See, *AG's Opinion # 2002-126.*

- The entire contract is void and no portions can be enforced. *Bessemer Water Service v. Lake Cyrus Development Co., supra.*

2. Willful Violations

A willful violation of the public works law is a Class C felony under *Ala. Code § 39-2-2(c)*.

Additionally, *Ala. Code § 39-5-3* provides that suit may be brought to recover paid public funds from the contractor, its surety, or any person receiving funds under any public works contract let in violation of the law, "if there is clear and convincing evidence that the contractor, its surety, or such person knew of the violation before execution of the contract."

- The action shall be commenced within three years of final settlement of the contract.

- See, *Lake Cyrus Development Company, Inc. v. State of Alabama ex rel. Bessemer Water Service, 143 So.3d 771 (Ala. 2014)* regarding "clear and convincing evidence".

3. Collusion/Restraint of Free Competition

Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition shall render bids void and cause bidders or prospective bidders to be disqualified from submitting further bids on future lettings. *Ala. Code § 39-2-6(g).*

a. Any bidder or prospective bidder who willfully participates in such an agreement or collusion shall be guilty of a felony and, upon conviction, fined not less than $5,000 nor more than $50,000 or imprisoned for not less than one nor more than three years.

4. Advance Disclosure

Ala. Code § 39-2-6(h) provides that any disclosure in advance of the terms of a bid submitted in response to an advertisement for bids shall render the proceedings void and require readvertisement and award.

5. Fraudulent Certification

As discussed in *Section V, B, 3, d above*, *Ala. Code § 39-5-2* provides that an awarding authority or its agent (which could be the county engineer) who willfully issues a false or fraudulent certificate of compliance shall be guilty of a felony punishable upon conviction by a fine of not less than $5,000 nor more than $50,000 or imprisonment for one to three years.

6. No Right to Payment

Ala. Code § 39-5-6 provides that the courts shall not invoke or apply any legal or equitable principle which would allow a contractor to recover for work and labor done or materials furnished under a contract let in violation of the competitive bidding requirements of the law.

- An awarding authority is prohibited by the public works law from paying an invoice for unapproved work performed which is in addition to original project price. *AG's Opinion # 2002-126.*

SAMPLE BID AND CONTRACT LANGUAGE FOR PUBLIC WORKS PROJECTS WITH GRANT OR OTHER OUTSIDE FUNDING

For Bid Document

The public works project which is the subject of this invitation to bid shall be funded (*in whole or in part)* from a *(grant or other funding source*) awarded to the county by _________________ (*insert entity providing the project funding*). A copy of the *(grant or other funding source*) award letter *(or other award documentation)* is *(attached or shall be provided upon request)*. Pursuant to the terms of the *(grant or other funding source agreement)*, the county will be responsible for payment of _____________ (*insert percentage or dollar amount county required to pay*), which funds have been secured by or are available to the county. *(Delete this sentence if there is no county match.)* Additionally, under the terms of the *(grant or other funding source agreement)*, the funds to be paid by the grantor will not be made available to the county until completion of the project *(or other contingency, if applicable)*. Therefore, pursuant to Ala. Code § 39-2-12(l), as amended by Act 2014-404, payment for work invoiced by the successful bidder and approved by the county shall be processed by the county within 10 days of receipt of the funds from the *(grantor or other payor).*

For Contract

The parties to this contract understand and acknowledge that this project is funded *(in whole or in part*) from a grant (*or other funding source, if applicable*) in the amount of _____________ (*insert project cost percentage or dollar amount of grant*), and that under the terms of the grant *(or other funding agreement),* the funds to be paid by the *(grantor or other payor)* will not be made available to the county until completion of the project *(or other contingency, if applicable).* The parties further understand and agree that, due to these circumstances, payment for work invoiced by _______ *(contractor*) and approved by the county shall be processed by the county within 10 days of receipt of the funds from the *(grantor or other payor)* as provided in Ala. Code § 39-2-12(l), as amended by Act 2014-404.

CHAPTER NINE

LAND USE REGULATION IN THE COUNTY

Counties in Alabama do not have any land use regulation authority under general Alabama law. Several counties have created some form of planning and zoning authority by local law [see, e.g., Baldwin (Act 91-719 and 93-668), Russell (Act 95-573), and Shelby (Acts 1965, 1523)]. Jefferson County has established planning and zoning authority through general act. See, *Ala. Code § 11-52-30*.

There is some statutory authority for regional planning and development through regional commissions established for this purpose (discussed in more detail in *Chapter Ten, Section VI*). See, *Ala. Code § 11-85-1 et seq*. However, these commissions, which are not governmental entities, are advisory only.

Despite the resistance to granting counties full authority to control land uses within the unincorporated areas of the state, as discussed in this chapter the Legislature has granted limited authority to the governing bodies of the counties to address certain special circumstances.

I. SUBDIVISION REGULATION

A. AUTHORITY TO REGULATE

While there is no requirement in Alabama that the county commission adopt subdivision regulations, *Ala. Code § 11-24-1 et seq.* provides strong statutory authority for each county to regulate subdivision development within its territorial jurisdiction. The adoption and enforcement of subdivision regulations does serve as an effective tool to ensure that new development in the unincorporated areas of the county will have properly-constructed infrastructure which provides a significant benefit to citizens purchasing property in the area. Subdivision regulations also provide the county commission with some assurance that any roads in the development accepted into the county road system will have been constructed to the standards established by the county commission upon advice and recommendation of the county engineer.

In *Swann v. Hunter, 630 So.2d 374 (Ala. 1993)*, the Supreme Court of Alabama noted that state and local regulations regarding subdivisions "were promulgated for the protection and benefit of the public, especially those members of the public purchasing real property for residential purposes."

If the county does elect to adopt such regulations, those regulations must comply with the statutory procedures and requirements for implementation and enforcement. Moreover, once the county has adopted subdivision regulations, it is imperative that the governing body strictly and uniformly enforce those regulations.

Alabama's subdivision regulation law has been amended several times in recent years, generally to improve the county's ability to enforce its subdivision regulations. Following statutory changes passed in 2006, a committee of county engineers formed through the Association of County Engineers of Alabama (ACEA) developed "model subdivision regulations" to serve as a guide for counties to use in implementing subdivision regulations or revising existing regulations to comply with the changes in the law. The model regulations were amended in 2014 following a change in law allowing for "pre-sale agreements" under limited circumstances. A copy of these model regulations is available through the ACEA web site

(www.acea-online.org). While counties are not required to adopt these model regulations as drafted, they were carefully designed to comply with the requirements in the law and counties should be careful to ensure that any regulations developed and adopted by the county commission include and follow the statutory requirements found in *Ala. Code § 11-24-1 et seq.*

1. Scope of Authority

Ala. Code § 11-24-1(a)(4) defines a "subdivision" as the "development and division of a lot, tract, or parcel of land into two or more lots, plats, sites, or otherwise for the purpose of establishing or creating a subdivision through the sale, lease, or building development."

- This definition does not include the construction or development of roads or buildings on agricultural property.
- This definition does ensure that the county's authority extends to the development of land for the purpose of leasing lots, such as in a mobile home park.
- The definition also includes multifamily development such as apartments or condominiums. *See, Dyess v. Bay John Developers, 13 So.3d 390 (Ala.Civ.App. 2007).*

Under *Ala. Code § 11-24-1(a)(4)*, "development" includes, but is not limited to:

- The design work of lot layout
- The construction of drainage structures
- The construction of buildings or public use areas
- The planning and construction of public roads
- The placement of public utilities

Under *Ala. Code § 11-24-1(b)*, the county commission can regulate:

- The minimum size of lots
- The planning and construction of all public roads
- The planning and construction of drainage structures and
- The proper placement of public utilities

    -- The placement of utilities shall not be inconsistent with the requirements of the Southern Standard Building Code or state and federal laws and regulations.

-- If the county commission requires the placement of public utility facilities in a manner other than the most economical method available from an engineering standpoint, the developer shall reimburse the utility for the difference in cost between the method required by the county and the most economical method available.

The authority to enforce subdivision regulations extends to both new developments and additions to existing subdivisions. *Ala. Code § 11-24-1(b).* However, subdivision regulations do not apply to construction or development of roads or buildings on agricultural property. *Ala. Code § 11-24-1(a)(4).* Additionally, *Ala. Code § 11-24-4* provides that the subdivision regulation law shall not be interpreted to impair any right of eminent domain or other authority granted to public or private utilities by statutes, franchises, certificates of convenience and necessity, licenses or easements.

- The county's authority exists even if the roads in the subdivision will remain private roads. *See, e.g. AG's Opinion # 97-077.*

- The county's subdivision regulations apply in an industrial park. AG's Opinion # 2012-047.

- The county's approval of a subdivision is not subject to restrictive covenants, which are the responsibility of private parties. *See, AG's Opinion # 2006-063.*

As discussed in more detail below, the county commission has authority to require the developer to file and post a reasonable surety bond with the county commission to guarantee that the actual construction and installation are in accordance with approved plans before actual sale, offering for sale, transfer, or lease of any lots. *Ala. Code § 11-24-2(a).* Additionally, the county commission may charge inspection fees not to exceed the actual costs of inspection. *Ala. Code § 11-24-3(c).*

2. Family Property

Ala. Code § 11-24-2(d) clearly states that plat approval shall not apply to the sale, deed, or transfer of land by the owner to an immediate family member. *See, also, AG's Opinion # 2006-082.* However, if there is a sale, deed, or transfer by the owner or immediate family member to someone other than an immediate family member, the subdivision regulations ***will*** apply.

- "Immediate family member" includes a person's spouse, parent, child, stepchild, adopted child, and sibling. *AG's Opinion # 2007-010.*

3. Utilities

Ala. Code § 11-24-4 provides that the law authorizing county regulation of subdivisions shall not be interpreted to impair any right of eminent domain granted by law to public or private utilities, nor the right to exercise authority conferred by statutes, franchises, certificates of convenience and necessity, licenses or easements.

4. Board of Developers

Ala. Code § 11-24-1(c) authorizes, but does not require, the county commission to establish a board of developers to make suggestions to the commission regarding the development and division of subdivisions. The board may advise the commission on the contents of the regulations and/or revisions that need to be made to the regulations, and may assist in resolving disputes between the commission and developers.

5. Territorial Jurisdiction of County's Authority to Regulate

Ala. Code § 11-24-1(b) provides that counties may regulate the subdivision of lands "outside the corporate limits of the municipality". However, until the law was amended in 2012, *Ala. Code § 11-52-30* prohibited the county from regulating the development of subdivisions within the jurisdiction of any municipal planning commission organized and functional at the time the county assumes jurisdiction or within six months of the date the county assumes jurisdiction. As discussed in detail below, *Act 2012-297* amended this Code section to provide for the county to regulate development in this area under most circumstances. This is an important improvement in the law, because it allows the county to ensure proper development of subdivisions (and construction of roads) in areas that otherwise fall under the jurisdiction of the county commission until and unless the area is annexed into the municipality.

6. Regulation within Municipal Planning Commission Territory

As mentioned above, under legislation enacted in 2012 *(Act 2012-297)*, new rules for regulation of subdivisions within the jurisdictional area of a municipal planning commission took place effective October 1, 2012. The amended law, in effect, grants counties the responsibility for regulation and enforcement of subdivision regulations within the municipal planning commission territory if the county has adopted subdivision regulations. There are exceptions, discussed in more detail below.

a. Municipal Planning Commission Territorial Jurisdiction

Pursuant to *Ala. Code § 11-52-30*, the territorial jurisdiction of a municipal planning commission includes:

> [A]ll land located in the municipality and all land lying within five miles of the corporate limits of the municipality and not located in any other municipality; except that, in the case of any nonmunicipal land lying within five miles of more than one municipality having a municipal planning commission, the jurisdiction of each municipal planning commission shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities.

- The territorial jurisdiction of a municipal planning commission also includes all lands lying within the police jurisdiction. *City of Robertsdale v. Baldwin County, 538 So.2d 33 (Ala.Civ.App. 1988).*

- The municipal governing body sets the jurisdiction and can reduce it from the five mile radius set by statute. *AG's Opinion # 2003-126.*

- The authority to reduce the territorial jurisdiction is granted to the municipal governing body, not the municipal planning commission. *AG's Opinion # 2005-111*.

While the territorial jurisdiction of a municipal planning commission is altered by annexations, an amendment to the law enacted in 2015 (*Act 2015-361)* provides that any alterations to a municipal planning commission based upon the annexation or de-annexation of property shall be effective only once a year on the first day of January for any annexation or de-annexation finalized on or before the preceding October 1. *See, Ala. Code §§ 11-40-10 and 11-52-30.* This law makes the same change with regard to alterations of police jurisdictions as discussed in *Chapter 2, Section IV, E.*

Act 2015-361 also requires the municipality to submit a map showing the boundaries of the municipal limits --including annexations and police jurisdictions -- to the Atlas Alabama state website (www.atlasalabama.gov) no later than January 1 of each year.

b. County Regulation within the Municipal Planning Commission's Jurisdiction

Under the law as amended by *Act 2012-297*, *Ala. Code § 11-52-30* now provides that, ***subject to exceptions discussed below***, if the county commission has adopted subdivision regulations, those regulations will generally apply within the territorial jurisdiction of the municipal planning commission and the county commission will be responsible for regulation and enforcement pursuant to those regulations.

- The county's regulation and enforcement will be as provided in the county's subdivision regulations adopted pursuant to *Ala. Code § 11-24-1 et seq.*
- All penalties assessed will also be as provided in the county's regulations.
- If the county commission has not adopted subdivision regulations, the municipal planning commission shall have sole jurisdiction for subdivision development regulation and enforcement.

c. Exceptions

Ala. Code § 11-52-30(c), outlined below, creates several exceptions to the general rule that the county will regulate subdivision development within municipal planning commission territory.

First of all, the county commission and the municipal planning commission may enter into a written agreement providing for the municipal planning commission to be responsible for regulation and enforcement.

- This agreement must be approved by resolution of the county commission, the municipal governing body, and the municipal planning commission.

However, if the municipal planning commission desires to be responsible for the regulation of subdivision development within its territorial jurisdiction but is unable to reach an agreement

with the county commission, the municipal governing body and municipal planning commission may override the county's regulation but only if ***all*** of the following requirements are met:

1. Both the municipal governing body and the municipal planning commission adopt separate resolutions expressing intent to exercise jurisdiction over the construction of subdivisions after the effective date of the resolutions.

2. The municipal planning commission at all times employs or contracts with a licensed professional engineer who shall do each of the following:

    i. Notify the county commission of the initiation of subdivisions.

    ii. Conduct inspections of the construction of subdivisions.

    iii. Certify in writing that development is in compliance with subdivision regulations.

3. The county commission retains authority to require a performance and maintenance bond from the developer made payable to the county.

4. The county retains the authority to execute on the bond to make necessary improvements to the roads and drainage structures of the subdivision while it remains in the unincorporated area of the county.

d. Road Responsibility within Municipal Planning Commission Territory

If the municipal planning commission is responsible for the development of subdivisions within its territorial jurisdiction, the county commission shall ***not*** accept any roads or bridges within the development unless the county engineer certifies to the county commission that the road or bridge meets the minimum road and bridge standards of the county. See, *Ala. Code § 11-52-30(e)*.

e. Municipal Planning Commission Withdrawal from Subdivision Regulation

Under *Ala. Code § 11-52-30(c)(2)(e)*, the municipal governing body and municipal planning commission may withdraw their exercise of jurisdiction over future subdivision development after six months' notice to the county commission.

- Once withdrawn, the municipal planning commission may not reinstate authority for 24 months after the effective date of its withdrawal.

f. Agreement between County and Municipality

Counties and municipalities still have the authority to reach an agreement regarding the exercise of jurisdictional authority over proposed subdivision developments. *See, Ala. Code § 11-24-6.*

- However, any agreement must be with the municipality and not the municipal planning commission. *See, AG's Opinion # 2005-111.*

- The agreement must be published once a week for two consecutive weeks in a newspaper of general circulation in the county and the affected municipality before it takes affect.

B. STATUTORY REQUIREMENTS AND PROCEDURES

1. Proposed Plat Approval and Permit to Develop

Ala. Code § 11-24-2(a) provides that, prior to beginning any construction or development, the owner or developer shall submit the proposed plat to the county commission for approval and obtain a permit to develop following approval.

a. The permit to develop must be obtained prior to the actual sale, offering for sale, transfer, or lease of any lots from the subdivision to the public and shall only be issued upon approval of the plat by the county.

   - Once the permit to develop has been issued, all construction must be completed in conformity with the statute and the county's regulations.

   - A contract to sell lots prior to plat approval is void and will be unenforceable by the courts. *See, Limestone Creek Developers v. Trapp, 107 So.3d 189 (Ala. 2012).*

   - The fine for failure to properly obtain the permit to develop is $1000 per lot sold, leased, or offered for sale or lease.

   - There is a limited exception to this rule where a developer receives authority from the county to obtain "pre-sale agreements" prior to submission of the proposed plat. *See, Ala. Code § 11-24-2.1 and Section I, B, 3 below.*

b. The county commission may require any of the following for approval of the proposed plat:

   i. Filing and posting of a surety bond to guarantee that the actual construction and installation are in accordance with approved plans.

   ii. Names and addresses of each adjoining landowner and utility subject to notice of the application.

   iii. A permit fee, not to exceed $25.

c. No proposed plat shall be approved or disapproved by the county commission without first being reviewed by the county engineer or his or her designee, who shall certify to the commission whether the plat meets the county's regulations.

d. If the county engineer determines that the proposed plat does meet the regulations, it ***shall*** be approved by the county commission.

- The county engineer's approval of a subdivision plat evidences that it meets the county's regulations, and is due to be approved by the county commission. *AG's Opinion # 2005-077.*

- If the county engineer certifies that the plat meets the county's regulations, the county commission has no authority to deny approval, and must approve the plat. *AG's Opinion # 98-127.* See, also, *Ex parte Pine Brook Lakes, Inc., 617 So.2d 1014 (Ala. 1992).*

e. If the county engineer determines that the plat is deficient in any regard, he or she shall detail the deficiency to the county commission along with a recommendation that the development be disapproved.

- It is important that the county commission set forth sufficient standards to give applicants notice of what is required of them, and it cannot arbitrarily alter standards as applied to an applicant. See, *Providence Park, Inc. v. Mobile City Planning Commission, 824 So.2d 769 (Ala.Civ.App. 2001).*

f. As discussed above, plat approval shall not apply to the sale, deed, or transfer of land by the owner to an immediate family member. *Ala. Code § 11-24-2(d). See, also, AG's Opinion # 2006-082*.

- However, that if there is a sale, deed, or transfer by the owner or immediate family member to someone other than an immediate family member, the subdivision regulations will apply.

- "Immediate family member" includes a person's spouse, parent, child, stepchild, adopted child, and sibling. *AG's Opinion # 2007-010.*

g. The approval of a subdivision plat does not constitute acceptance of the roads. *Baldwin County Commission v. Jones, supra*. (*See, Chapter Two, Section I, C for detailed discussion of acceptance of roads by the county commission.)*

2. Notice Requirements

Ala. Code § 11-24-2(b) provides that notice of the engineer's recommendation regarding approval of a proposed plat shall be sent to the owner or developer at least ten (10) days before it is presented to the county commission.

- The notice shall be sent by registered or certified mail.

A similar notice shall be mailed to the owners of land immediately adjoining the platted land as their names appear on the plats in the tax assessor's office and as their addresses appear in the directory or tax records of the county.

- The attorney general has held that this notice is to apprise adjoining property owners of the recommendation of the engineer, and that the intent is to send notice of a favorable ***or unfavorable*** recommendation. *AG's Opinion # 98-127*.

- The attorney general has also held that a municipal planning commission's failure to provide statutory notice to adjoining landowners invalidates the approval of a subdivision plat. *AG's Opinion # 2001-045*. It is likely that a similar finding would be made under the county's subdivision regulation law.

Notice shall also be mailed to each utility affected.

- Each utility notified in writing by the commission shall be given at least ten (10) days to review the proposed plat and submit a written report to the commission as to whether all provisions affecting the service to be provided by the utility are reasonable and adequate.

- If a utility affected by the plat is not properly notified, the approval or disapproval of the plat shall not be valid until the utility has been given at least ten (10) days' notice.

3. Requirements of the Developer

Ala. Code § 11-24-2(a) provides that the owner/developer must have all construction completed in conformity with the statute and the county's regulations.

- Construction must be in accordance with current regulations in effect and not previously enacted regulations. *AG's Opinion # 2003-089.*

4. Final Plat Approval

Pursuant to *Ala. Code § 11-24-2(c)*, once the owner/developer has met all of the county's requirements for the development, he or she shall submit the final plat to the county engineer for signature verifying that the subdivision meets the county's regulations.

5 Plat Approval within Municipal Planning Jurisdiction

Act 2012-297 altered the process for the county engineer to "approve" maps or plats of subdivisions developed within the municipal planning commission's jurisdiction prior to recording. Under *Ala. Code § 11-52-30(g)*, if the county commission is responsible for regulating and enforcing subdivision development, the recording of any map or plat shall be governed by the county's subdivision regulations and *Ala. Code § 11-24-1 et seq.*

However, if the municipal planning commission is responsible for such regulation and enforcement, no map or plat shall be recorded (and no property shall be sold) until and unless approved by the municipal planning commission. Following this approval, the county engineer or his or her designee shall simply certify that the municipal planning commission has approved the plat for recording using specific language set out in *Ala. Code § 11-52-30(g)*. This certification by the county engineer shall ***not*** constitute approval in lieu of or on behalf of any municipality.

6. Recording of Plat

After the final plat has been signed by the county engineer, it shall be filed in the probate office. *See Ala. Code § 11-24-2(c).*

- It is a violation of the subdivision regulations law for the developer to file or have filed any plat, deed, property description, or document of property transfer without full compliance with *Ala. Code § 11-24-2*.

7. Pre-sale Agreements

The Alabama Legislature amended the subdivision regulation law in 2014 to allow a developer to obtain "pre-sale agreements" from prospective buyers under very limited circumstances. See *Act 2014-332* and *Ala. Code § 11-24-2.1*. Under this provision, the county commission may authorize the developer to obtain "pre-sale agreements" prior to submitting a proposed plat for approval if the developer can establish to the satisfaction of the county engineer that:

a. The developer has a preliminary plan for the subdivision development that is likely to be approved under the county's subdivision regulations ***and***

b. The developer has explained to the satisfaction of the county engineer the reasons for requesting authorization to secure pre-sale agreements.

All pre-sale agreements executed under the authority of this section shall make clear that there can be no final sale until a permit to develop is obtained by the developer. *Ala. Code § 11-24-2.1.*

The general purpose for granting the developer authority to obtain "pre-sale agreements" is to aid him or her in efforts to obtain financing for or investments in the proposed development. *Ala. Code § 11-24-2.1(b)* requires that once the developer has received authorization to secure pre-sale agreements, he or she shall notify the county engineer in writing when financing has been obtained.

- If no such notification is received within six months of the date the authority is granted, the authority shall be revoked by the operation of law and

- Once revoked, any further efforts to secure pre-sale agreements shall be a violation of the law punishable by fines as set out in *Ala. Code § 11-24-3.*

The county engineer may grant the developer an extension to enter into pre-sale agreements under special circumstances.

The law also clearly states that failure to comply with *§ 11-24-2.1* shall result in the county engineer revoking the authority granted to secure pre-sale agreements for the proposed development.

Additionally, the authorization to secure pre-sale agreements from prospective buyers of property included in a proposed subdivision development:

"shall in no way affect the developer's requirement to comply with the county's subdivision regulations and, in particular, to obtain the permit to develop as provided in *§ 11-24-2* prior to the actual sale, offering for sale, transfer, or lease of any lots from the subdivision except as specifically authorized in *[§ 11-24-1.1*]".

D. ENFORCEMENT OF REGULATIONS

1. Inspectors and Enforcement Officers

Ala. Code § 11-24-3(c) provides that the county commission may employ inspectors to see that its rules and regulations are not violated and that the developer's plans and specifications are not in conflict with those rules and regulations.

- As noted above, this section provides that inspection fees covering the actual costs of inspection may be assessed against the owner/developer.

The county commission may also appoint county license inspectors to enforce the law and county regulations using the same authority granted to license inspectors to enforce revenue laws. See, *Ala. Code § 40-12-10* regarding the appointment and authority of license inspectors.

2. Issuance of Citations

The county license inspector has authority under *Ala. Code § 11-24-3(d)* to issue citations for the failure to properly obtain the permit to develop or for other violations of the law.

- The fine for any violation is $1000 per lot sold, offered for sale, transferred, or leased to the public. *Ala. Code § 11-24-3(a).*

- Subsequent citations may be issued if after 30 days the developer has still not properly applied for the permit to develop.

- All applicable fines shall be doubled and separately assessed against the owner/developer for each subsequent citation issued.

3. Injunctive Relief

The county commission may file a lawsuit to enjoin the developer or owner from action in violation of the county's regulations and may recover the penalties in court. *See, Ala. Code § 11-24-3(b).*

- As noted above, the fines are set at $1000 per lot sold, offered for sale, transferred, or leased to the public.

- The county may bring suit to compel the owner/developer to comply with the law even if work on the subdivision has been completed.

II. FLOOD PRONE AREAS

The Legislature has declared in *Ala. Code § 11-19-2* that there is a "clear and definite public need for a program to provide flood insurance coverage in flood-prone areas in the state." To this end and as discussed below, the Legislature has granted the county commission broad powers to control and regulate land use in flood-prone areas outside the corporate limits of a municipality. See, *Ala. Code § 11-19-1 et seq*.

A. STATUTORY PURPOSE AND DEFINITIONS

1. Purpose of Statute

Ala. Code § 11-19-2 states that the declared purpose of this Code chapter to provide each county a comprehensive land-use management plan for flood-prone areas by:

a. Constricting the development of land exposed to flood damage in flood-prone areas,

b. Guiding development of proposed construction away from locations threatened by flood hazards,

c. Assisting in reducing damage caused by floods, and

d. Improving long-range management and use of flood-prone areas.

2. Definitions

The following definitions set out in *Ala. Code § 11-19-1* apply to this statute on flood-prone areas:

a. Flood or flooding

The general and temporary condition of partial or complete inundation of normally dry land areas:

(i) from the overflow of streams, rivers and other inland waters, or

(ii) from tidal surges, abnormally high tidal waters, tidal waves, or

(ii) from rising coastal waters resulting from tsunamis, hurricanes or other severe storms.

b. Flood-prone area

Any area with a frequency of inundation of once in 100 years as defined by qualified hydrologists or engineers using methods that are generally accepted by persons engaged in the field of hydrology and engineering.

c. Land-use and control measures

Zoning ordinances, subdivision regulations, building codes, health regulations and other applications and extensions of the normal police power to provide safe standards of occupancy for prudent use of flood-prone areas.

B. COUNTY COMMISSION AUTHORITY

1. Broad Discretionary Powers

Ala. Code § 11-19-3 provides that the county commission shall have broad authority to adopt zoning ordinances and building codes for flood-prone areas outside the corporate limits of any municipality in the county, and specifically authorizes it to:

a. Establish comprehensive land-use control measures based on probable exposure to flooding.

- These include prohibiting inappropriate new construction or improvements in flood-prone areas and controlling land uses and elevations of all new construction within the flood-prone areas. *Ala. Code § 11-19-4.*

- The regulations may require that all improvements and developments in flood prone areas provide adequate sewer and water systems that will not be adversely affected by flooding. *AG's Opinion # 2000-039*.

- See, *Ala. Code § 11-19-4* regarding land-use control measures.

The Supreme Court of Alabama has held that planning commissions are specifically authorized to prohibit inappropriate construction in the flood-prone areas through implementation of the land-use and control measures established under the broad authority conferred on county commissions. According to the Court, this means that while some development in flood-prone areas may be permitted as appropriate, development in such areas shall be denied where it is deemed by the relevant planning authority to be inappropriate. *Ex parte Baldwin County Planning and Zoning Commission, 68 So.3d 133 (Ala. 2010).*

b. Establish building codes and health regulations covering all public and private construction and development as set out in *Ala. Code § 11-19-6*.

- See, also, *AG's Opinion # 2000-039.*

- It is not necessary that the building code be that specified in *Ala. Code § 41-9-166. AG's Opinion # 2002-161.*

c. Provide standards of occupancy for the prudent use of flood-prone areas.

d. Provide for the preparation of maps clearly delineating flood-prone areas and floodways in the county.

e. Make necessary studies.

f. Employ technical and advisory personnel, including a county planning commission. *(See, Section II, C below for further discussion of county planning commissions.)*

g. Adopt ordinances for the enforcement of regulations.

- The attorney general has held that the broad authority granted to the county includes the authority to require a utility to deny service until the applicant presents a building permit from the county commission. *AG's Opinion # 81-281*.

- However, the county has no authority until and unless it has adopted or established comprehensive land-use and control measures or building codes for flood-prone areas. *Jefferson County v. Johnson, 333 So.2d 143 (Ala. 1976)*.

- The authority is limited to imposing regulations for purposes of preventing flood damage. *AG's Opinion # 83-400*.

2. Required Actions

Pursuant to *Ala. Code § 11-19-7*, in addition to the authority granted under *Ala. Code §11-19-3*, any county commission participating in this program ***shall:***

a. Require all persons and corporations to submit plans and specifications for proposed construction and development in flood-prone areas. *(See, Section II, D below for further discussion on this issue.)*

b. Issue permits where the plans and specifications meet the rules and regulations adopted by the county commission.

- No permits shall be required for placement of utility poles, lines, etc. or any utility facilities constructed pursuant to authority conferred by statutes, franchises, certificates of convenience and necessity, licenses, and easements.

c. Charge reasonable issuance fees to be placed in a special fund for the enforcement of the county's flood-prone area management program.

d. Provide for the appointment of a board of adjustment to hear grievances, appeals, and requests for exceptions.

- The procedures for appointment and operation of the board of adjustment and for appeals from the board are set out in *Ala. Code § 11-19-19.*

3. Enforcement of Law

Ala. Code § 11-19-21 authorizes appropriate legal action to prevent the violations of the county's subdivision regulations, building codes, or zoning ordinances adopted pursuant to the *Code of Alabama 1975, Title 11, Chapter 19*.

The action may be filed to restrain, correct, or abate such violation, or to prevent the occupancy of any such building, structure, or subdivision of land or to prevent any illegal act, conduct, business, or misuse in or upon any premises regulated under the authority conferred by this chapter.

Ala. Code § 11-19-22 provides that any person, company, or agency who fails to obtain required permits or who violates any other regulation, ordinance, or code shall be guilty of a misdemeanor and, upon conviction, may be fined not more than $500.00 and/or imprisoned in the county jail for not more than one year.

C. COUNTY PLANNING COMMISSION

1. Purpose and Creation

Ala. Code § 11-19-8 provides that the purpose of the county planning commission is to:

a. Make and maintain comprehensive surveys and studies of existing conditions and probable future developments in flood-prone areas, and

b. To prepare comprehensive plans for physical, social, and economic growth as will best promote the public health, safety, and general welfare as well as efficiency and economy in the development of flood-prone areas in the county.

The county commission may create the county planning commission by resolution and shall appoint the members of the commission.

- There shall be not less than five nor more than eleven members.
- The chairman of the county commission shall serve as an ex-officio member of the planning commission.
- The county commission is specifically authorized to appoint one or more of its members to serve as members of the county planning commission.
- Appointments shall be for four-year terms.

2. Powers and Duties of the County Planning Commission

Pursuant to *Ala. Code § 11-19-10*, the county planning commission is granted powers as appropriate to enable it to fulfill its functions and duties and has authority to:

a. Promote public interest and understanding of the necessity for long-term coordinated county planning.

b. Confer and cooperate with federal, state, municipal, and other county and regional authorities for proper coordination of county development.

c. Prepare and recommend a zoning ordinance and map for flood-prone areas to the county commission as provided in *Ala. Code § 11-19-18.* (*See, Section II, E for further discussion of zoning ordinances.)*

d. Prepare and recommend to the county commission subdivision regulations as set out in *Ala. Code § 11-19-12.* (*See, Section II, D for further discussion of subdivision regulations.)*

D. SUBDIVISION REGULATIONS

1. Purpose of Regulations

Ala. Code § 11-19-5 provides that, in addition to land-use restrictions commensurate with the degree of the flood hazards in various parts of the flood-prone area, there shall be subdivision regulations as necessary to:

a. Prevent the inappropriate development of flood-prone lands;

b. Encourage the appropriate location and elevation of streets, sewers and water systems, and the reservation of adequate and convenient open space for utilities;

c. Provide for adequate drainage so as to minimize exposure to flood hazards and to prevent the aggravation of flood hazards; and

d. Require as necessary the minimum elevation of all new developments.

2. Procedures for Adoption

Ala. Code § 11-19-11 provides that the county planning commission shall prepare and submit proposed subdivision regulations to the county commission for adoption.

- The requirements for development of the subdivision regulations are set out in *Ala. Code § 11-19-12.*
- Prior to adoption of the regulation, there shall be a public hearing.
- Notice of the hearing shall be published in a newspaper of general circulation once a week for two consecutive weeks prior to the hearing.
- A copy of the proposed regulations shall be made available to interested persons prior to the hearing.
- A copy of the adopted regulations shall be certified to the office of the judge of probate.

3. Approval of Plats

Pursuant to *Ala. Code § 11-19-13*, following adoption of the subdivision regulations, no plat shall be filed or recorded until it has been submitted to and approved by the county planning commission

and such approval is entered in writing on the plat by the chairman and secretary of the planning commission.

a. Under *Ala. Code § 11-19-14*, the planning commission has 30 days from submission to approve or disapprove a subdivision plat, and must state any grounds for disapproval.

   i. No action can be taken on a subdivision plat without notice and hearing as set out in *Ala. Code § 11-19-14*.

   ii. Approval does ***not*** constitute acceptance by the public of any street or open space on the plat.

   iii. If the planning commission fails to act on an application within 30 days, it shall be deemed approved unless there is waiver and consent to an extension.

E. ZONING

Ala. Code § 11-19-16 authorizes the county commission to divide the county into districts and provide standards relating to location, bulk, height, minimum elevation, size of buildings and other structures and spaces, density and distribution of population, and uses of buildings and land. See, *AG's Opinion # 2000-039*.

The county commission may include adjacent non-flood prone areas in its territorial unit for a comprehensive zoning plan when necessary to accomplish the purposes and provisions of the statute. *AG's Opinion # 87-201*.

1. Preparation and Adoption of Zoning Plan

Ala. Code § 11-19-18 addresses the development and adoption of zoning ordinances. The planning commission is charged with preparing a zoning plan, including written ordinances and a map or maps showing district boundaries.

Ala. Code § 11-19-17 authorizes the planning commission to develop and certify a single zoning plan for all the territory of the area which lies within the jurisdiction of the county planning commission or separate and successive zoning plans for parts of the flood-prone area for which technical information is available or which for other reasons it deems appropriate as set out in that Code section.

Ala. Code § 11-19-18(a) provides that the planning commission may hold public hearings regarding the zoning plan and shall certify the zoning ordinance and map to the county commission.

- However, once the county commission receives the zoning ordinance and map from the planning commission, it ***shall*** hold a public hearing on the proposed ordinance and map after which it may adopt the plan as recommended, adopt it with modifications, or reject it.

2. Amendment of Plan

Ala. Code § 11-19-18(b) provides that the adopted zoning plan may be amended, modified, or repealed, but only after submission to the county planning commission and a public hearing.

a. The public hearing on amending the plan shall be advertised in a newspaper published in the county for two weeks, with the first notice published not less than 15 days prior to the date of the hearing.

b. Pursuant to *Ala. Code § 11-19-18(c),* the notice shall include the date, time, and location of the hearing and the location where the proposed amendments may be reviewed by the public.

c. *Ala. Code § 11-19-18(c)* also states that if the planning commission makes no recommendation within 30 days after the amendment is referred to it, the amendment or modification is deemed to be recommended. . *See, AG's Opinion # 2006-139.*

3. County Board of Adjustment

Ala. Code § 11-19-19 authorizes the county commission to appoint a board of adjustment consisting of five members appointed to a three year term. The appointments shall be made from residents of the county.

The board of adjustment shall, in appropriate cases, make special exceptions to the zoning ordinance or regulations in harmony with its general purposes and interests and rules adopted pursuant to the law. The board of adjustment shall have the following powers:

a. To hear appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative body or official in the enforcement of the law or zoning ordinance;

b. To hear and decide on requests for special exceptions to the terms or provisions of a zoning ordinance; and

c. To authorize upon appeal in special cases such variance from the yard, open space, bulk and height requirements of the ordinance as will not be contrary to the public interest, where appropriate as set out in the law.

Ala. Code § 11-19-20 provides for circuit court appeal of decisions of the Board of Adjustment.

III. AIRPORT ZONING

Ala. Code § 4-6-1 et seq. provides for airport zoning by counties and municipalities in "airport hazard areas". *Ala. Code § 4-6-3* states that the prevention and removal of airport hazards are public purposes for which political subdivisions, such as the county commission, may raise and expend public funds and acquire land or property interests therein.

"Airport hazard" is defined in *Ala. Code § 4-6-2(2)* as "Any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at any airport or is otherwise hazardous to such landing or taking-off of aircraft. "

An "Airport hazard area" is "Any area of land or water upon which an airport hazard might be established if not prevented as provided in [the law]." *Ala. Code § 4-6-2(3).*

A. COUNTY AUTHORITY

Ala. Code § 4-6-4 authorizes counties and municipalities to adopt airport zoning regulations in order to prevent airport hazards within an airport hazard area within its zoning jurisdiction.

1. The zoning jurisdiction of the county is all unincorporated areas in the county, except within the police jurisdiction of any municipality and the area within two miles of an airport owned or operated by a municipality when said municipality exercises or declares its intention to exercise zoning control over these areas unless provided otherwise by local law.

    - *Ala. Code § 4-6-13* authorizes the county to acquire air rights or easements where necessary to effectuate the purposes of this law.

2. The provisions of this section shall not apply to counties having a population of not less than 54,500 nor more than 56,000 according to the most recent (1970) federal decennial census.

    - The attorney general's office has held that this language eliminates only counties with a population between 54,500 and 56,000, and that counties with a population of less than 54,500 or more than 56,000 do have the authority to adopt airport zoning regulations. *AG's Opinion # 2001-271.*

3. *Ala. Code § 4-3-10* exempts all airport authorities organized pursuant to *Ala. Code § 4-3-1 et seq*. from all zoning laws, ordinances, and regulations. *See, AG's Opinion # 2006-148.*

    - Airport authorities have the same zoning powers conferred under *Ala. Code § 4-6-1 et seq.* with respect to zoning of airports. *See, Ala. Code § 4-3-10.*

B. ADOPTION AND ENFORCEMENT OF REGULATIONS

The procedures for the adoption and enforcement of airport zoning regulations are set out in *Ala. Code §§ 4-6-4 through 4-6-15*.

1. The county commission may create an airport zoning commission or utilize an existing planning commission to recommend boundaries.

    - The county commission cannot act until the planning commission submits its final report.

2. The procedures for adoption of the regulations, including notice and public hearing, are set out in *Ala. Code §4-6-6.*

    - The regulations must be reasonable. *Ala. Code § 4-6-7.*

    - *Ala. Code § 4-6-8* provides for permitting and variances.

3. *Ala. Code § 4-6-9 and § 4-6-10* provide for administration and enforcement of regulations through an administrative agency.

    - *Ala. Code § 4-6-11* provides for appeals from decisions of the administrative agency.

    - *Ala. Code § 4-6-12* provides for correction or abatement of violations.

IV. BUILDING CODES

There are two general statutory provisions authorizing counties to adopt building codes: the Home Builders Licensure Law found at *Ala. Code § 34-14A-1 et seq.* and the law on the state minimum building standards code found at *Ala. Code § 41-9-160 et seq.*

A. AUTHORITY UNDER HOME BUILDERS LICENSURE LAW

Ala. Code § 34-14A-1 et seq., was enacted to provide for the licensure of persons engaged in home building and private dwelling construction and to provide home building standards due to the recognition that "home builders may pose significant harm to the public when unqualified, incompetent, or dishonest home building contractors and remodelers provide inadequate, unsafe, or inferior building services." *Ala. Code § 34-14A-1.*

The Home Builders Licensure Board, charged with the responsibility of licensing and enforcement of the standards and requirements for licensing and home building, is created under *Ala. Code § 34-14A-3.*

The Home Builders Licensure Board statute was amended in 2006 (*Act 2006-105*). While most of the changes did not affect the county's authority under the law, it did repeal the law allowing counties with a population of less than 30,000 to be exempt from the provisions of this law. Washington County was the only remaining county exempt at the time of passage of this act.

1. Scope of County's Authority

Ala. Code § 34-14A-12 provides that the county commission is authorized and empowered to adopt building laws and codes by ordinance to apply in the unincorporated areas of the county.

a. The building laws and codes shall not apply within any municipal police jurisdiction in which the municipality is exercising its building laws and codes without the express consent of the municipality.

b. The building laws and codes may apply within the corporate limits of a municipality with the express consent of the governing body of the municipality.

c. The county may employ building inspectors to see that its laws or codes are not violated and that plans and specifications for buildings are not in conflict with the county's building code.

d. The county may also exact fees to be paid by owners of property inspected.

e. The county may condemn buildings or structures dangerous to the public, may prohibit the use of such buildings, and may abate such buildings as a nuisance.

- Counties can abate nuisances using the same authority and procedures municipalities utilize pursuant to *Ala. Code § 11-53A-20 to § 11-53A-26*.

- The attorney general has held that the term "structure" as used in the nuisance abatement statute for municipalities includes mobile homes and trailers. This would likely apply here as well. *AG's Opinion # 2004-162.*

f. The county may enter into agreements, compacts, and contracts for the administration and enforcement of building laws and codes.

In *Ridnour v. Brownlow Homebuilders, 100 So.3d 554 (Ala.Civ.App. 2012)*, the Alabama Court of Civil Appeals spoke to the county's authority in adopting building codes, holding that the legislature has expressly granted county commissions and municipalities the authority to adopt general residential building codes and laws and it would be inconsistent with this express statutory scheme to conclude that the state fire marshal also holds the power to adopt general building codes that would be applicable statewide.

The Court determined that only county commissions and municipalities have the power to adopt general residential construction and building codes but the state fire marshal may adopt residential construction and building codes relating to fire prevention and protection applicable statewide that supersede the municipal and county codes to the extent they are inconsistent with the code adopted by the state fire marshal.

2. Permit Issuance

Pursuant to *Ala. Code § 34-14A-13*, the building official charged with the duty of issuing building permits in the county has a duty to:

a. Refuse to issue a permit for any undertaking requiring a license under *Ala. Code § 34-14A-1 et seq.* unless the applicant has furnished evidence that he or she is either licensed or exempt.

b. Report any person violating the law to the Home Builders Licensure Board.

- The licensing requirements and exemptions are set out in *Ala. Code § 34-14A-5 to § 34-14A-8*.

- Local governments do not have the authority to charge state agencies permit and inspection fees. *AG's Opinion # 2002-119*.

B. MINIMUM BUILDING STANDARDS CODE

Ala. Code § 41-9-166 provides that any county commission may, by resolution, adopt and enlarge the applicability of any model building code published by the Southern Building Code Congress International

and the National Electrical Code published by the National Fire Protection Association. Municipalities are granted the same authority under this section.

Prior to adoption, the county commission shall publish notice that it proposes to adopt a code. The notice shall be posted in a county newspaper once a week for four weeks and posted at the courthouse door.

- There is no requirement for the county to advertise or post the code itself.

- The attorney general's office has held that counties and municipalities are not limited to adoption of the building code specified in *Ala. Code § 41-9-166. AG's Opinion # 2002-161*.

Changes in the building code by the state building commission may similarly be adopted by the county.

The county cannot apply the building code to state buildings and construction of public schoolhouses.

- See, *AG's Opinion ## 2004-165 and 2002-119*.

Model building codes adopted by the county shall only apply to structures and facilities on the customer's side of the electric meter and not to any electric power generation, transmission, or distribution facilities on the electric service provider's side of the electric meter.

The attorney general's office has offered guidance on adoption and enforcement of building codes by local governments. Some examples are set out below:

- In opinions addressing regulations of the State Fire Marshall, the attorney general has held that a municipal ordinance can be enhanced and more restrictive than the regulations of the Fire Marshall, but it cannot conflict with or be less restrictive than those regulations. *AG's Opinion ## 92-305 and 89-340.*

  -- Although these opinions deal with municipal ordinances, the same opinion would likely be issued to a county, particularly in light of the fact that municipalities have broader authority than counties to regulate in this and other land use areas.

- The county can enlarge the applicability of the state's building code to coastal structures, but cannot promulgate or adopt additional regulations. AG's Opinion # 99-176.

- Counties have general authority to adopt building codes under *Ala. Code §§ 34-14A-12, 11-19-3, and 11-19-6*, and are not limited to the adoption of the building codes specified in *Ala. Code § 41-9-166. AG's Opinion # 2002-161*.

- The attorney general has held that the county may enact codes related to inside plumbing and may assume inspections related to inside plumbing, but where county regulations conflict with those of the health department, the health department's regulations control. *AG's Opinion # 2005-170.*

- See, also, *Ridnour v. Brownlow Homebuilders, supra*, discussed in *Section IV ,A, 1* above.

V. THE ALABAMA LIMITED SELF GOVERNANCE ACT

The Alabama Limited Self Governance Act (found at *Ala. Code § 11-3A-1 et seq.*) authorizes the county commission to establish programs to abate certain health and safety nuisances in the unincorporated areas of the county if the power to adopt such ordinances is approved by voters in the unincorporated areas of the county at a referendum held in conjunction with a primary, general or special election called for another purpose. *See, Ala. Code § 11-3A-5.* If the county obtains these powers through local referendum, *Ala. Code § 11-3A-2(a)* provides that it can establish programs for the abatement of the following nuisances pursuant to procedures set out in the law:

- Weeds
- Junkyards
- Litter and rubbish
- Noise
- Pollution
- Unsanitary sewage
- Animal control

A. LOCAL REFERENDUM PROCEDURE

Pursuant to *Ala. Code § 11-3A-2(b)*, the local referendum to grant the county commission these powers may be called in one of two ways:

1. Upon resolution adopted by a majority of the county commission members or

2. Upon verification of a petition signed by 10% of the qualified voters of the county who reside in the unincorporated areas of the county.

Ala. Code § 11-3A-5 states that an election authorized under the Limited Self-Governance Act can only be held once every 48 months, which means that if the referendum fails, the county will not be able to try again for four years.

B. ADOPTION AND ENFORCEMENT OF ORDINANCES

If the referendum passes in a county, the county commission may adopt ordinances to abate these nuisances under procedures set out in *Ala. Code § 11-3A-3.* The county is not required to adopt any ordinances and can pass ordinances on some but not all issues authorized in the law.

Some of the most important provisions related to the adoption and administration of ordinances under the Limited Self Governance Act are as follows:

- Notice of consideration of any proposed ordinance must be posted at least 30 days before being considered at a county commission meeting.

- The county may hold a separate public hearing prior to adoption of any ordinance.

- All ordinances must be passed at a regularly-scheduled commission meeting.

- The county commission may establish and enforce administrative and civil penalties, including fines, for the enforcement of ordinances.

  --The fines shall not exceed one hundred fifty dollars ($150) per day.

  -- Each day the violation continues shall constitute a separate offense but the total fine shall not exceed five thousand dollars ($5,000).

- All ordinances must include an appeals process allowing review before the county commission prior to a matter going to any court of law.

C. REPEAL OF SELF GOVERNANCE POWERS

The Limited Self Governance Act includes a process for the voters to petition for a vote on repealing the powers granted in a previous referendum. As with the passage of the referendum to authorize the powers, the referendum on appeal can only be held in conjunction with a primary, general, or special election called for another purpose.

- And since *Ala. Code § 11-3A-5* provides that an election authorized by law cannot be held more often than once every 48 months, a referendum for repeal cannot be held until the powers have been in place for at least four years.

CHAPTER TEN

GOVERNMENTAL AGENCIES, BOARDS, AND AUTHORITIES

There are several agencies in Alabama that have a direct or indirect relationship to county government and impact to some extent the work of the county engineering department. Additionally, there are many statutes that specifically provide for and address various county boards and authorities that serve a quasi-governmental purpose and/or involve or affect county government in areas overseen to some extent by the county engineer.

A detailed discussion of these agencies and boards is beyond the scope of this manual. However, a listing of some of the agencies and statutory provisions with which the county engineer may have some contact – except the Alabama Department of Transportation which is outlined separately in Chapter Five -- are set out below.

I. INDUSTRIAL AND ECONOMIC DEVELOPMENT

Ala. Code § 11-3-11(a)(19) authorizes the county commission to set aside, appropriate and use county funds or revenues for the purpose of locating and promoting agricultural, industrial and manufacturing plants, factories, and other industries in the county. It is also authorized to enter into contracts with any person, firm, corporation, or association to carry out these purposes.

The attorney general's office has consistently interpreted this Code section as granting very broad powers to the county commission in the area of industrial and economic development. See, e.g., *AG's Opinion ## 2006-137; 98-094; 94-264; and 86-087*.

There are also several statutory provisions specifically providing for and setting out the powers of industrial and economic development boards aimed at the promotion and retention of industrial and economic development in the state.

A. STATE AGENCIES

1. Alabama Department of Economic and Community Affairs
Ala. Code § 41-23-1 et seq.

2. Alabama Department of Commerce
Ala. Code § 41-29-1 et seq. (formerly the Alabama Development Office)

   - See, also, *Ala. Code, § 11-85-40 et seq.*, authorizing this Department, along with regional planning commissions and municipal and county planning commissions to perform comprehensive advisory planning, research, and other services for urban areas in the state, counties, and municipalities.

3. State Industrial Development Authorities
Ala. Code § 41-10-20 et seq. provides for the creation of state industrial development authorities which shall have as their general purpose the promotion of industrial development in the state.

B. COUNTY BOARDS AND AUTHORITIES

1. Industrial Development Boards

There are several Code sections authorizing the creation of industrial parks and boards in the county:

a. *Ala. Code § 11-20-1 et seq.* provides for the incorporation and powers of an industrial development board in the county to promote industry, develop trade, and further the use of agricultural products and natural and human resources of the state.

- County cannot incorporate one entity to serve as both an industrial development board and a public building authority. *AG's Opinion # 99-119*.

b. *Ala. Code § 11-92A-1 et seq.* is similar, authorizing the formation of county industrial development authorities, referred to in *§ 11-92A-2* as "independent public corporations having as their general purposes the promotion of industrial development and having the power to issue bonds."

c. Municipal industrial development boards are provided for in *Ala. Code, § 11-54-80 et seq.*

2. Industrial Parks

a. *Ala. Code § 11-23-1 et seq.* allows any person, firm, or corporation to petition the county commission to have an industrial park designated wholly within the boundaries of the county and outside of any municipality.

- The industries within the industrial park are responsible for maintaining the facilities.
- Once an industrial park has been designated, nothing that is not industrial in nature can be located in the area.
- The county's subdivision regulations apply within an industrial park. *AG's Opinion # 2012-047.*
- *Ala. Code § 11-23-6(b)* provides that a county industrial park cannot be subject to municipal annexation nor part of a municipal police jurisdiction.

b. *Ala. Code § 11-92-1 et seq.* authorizes a county or municipality to acquire and develop an industrial park by itself or together with other participants.

II. UTILTIES AND SERVICES

A. WATER, SEWER, AND FIRE PROTECTION

1. Water, Sewer, and Fire Protection Authorities

Ala. Code § 11-88-1 et seq. provides for the creation and operation of independent water, sewer, and fire protection authorities within the county in areas where there are not adequate services for water, sewer, and/or fire protection.

- Of particular interest to the county engineer, and as discussed in *Chapter Three, Section II, B, 3,* these authorities are granted use of the county right of way under *Ala. Code § 11-88-14*, with certain restrictions.

2. Water, Sewer, Solid Waste Disposal, and Fire Protection Districts

Ala. Code § 11-89-1 et seq. authorizes the creation of water, sewer, solid waste disposal, and fire protection districts to provide these services in member counties and/or municipalities.

- *Ala. Code § 11-89-14* grants these districts the use of public rights of way without prior approval of the county (or other) governing body, but does require the district to restore all roads and rights of way where work is done at its expense.

- A sewer district does not have general regulatory authority over sewers in subdivisions. Its regulatory power is limited to rules governing the use of any sewer system owned or controlled by the authority. *AG's Opinion # 2009-049.*

- These districts do not have the power to compel use of their sewer services. Counties are specifically authorized to require that properties be connected to their sewer systems under *Ala. Code § 11-3-11(a)(15)*. *AG's Opinion # 2009-049*.

- These districts do not have the power to require a developer installing a sewer system in a subdivision to dedicate the system to the Authority. *AG's Opinion # 2009-049*.

- A water authority's jurisdiction is not exclusive. *AG's Opinion # 2009-035.*

- A water authority may extend its services to the service area of another water authority if the county commissions of the areas proposed to be served make findings that there is no public water system adequate to serve the area. *AG's Opinion # 2009-035.*

B. WATERWORKS PLANTS OR DISTRIBUTION SYSTEMS

Ala. Code § 11-21-1 et seq. authorizes a county to purchase or acquire and operate a waterworks plant or distribution system located in the county.

C. UTILITY SERVICE FACILITIES

Ala. Code § 11-97-1 et seq. provides for additional and alternative methods of providing for the construction and improvement of certain utility services, which are defined in the statute as any services for:

1. The collection, treatment, and delivery of water, and

2. The collection, treatment and disposal of sewage, wastewater, industrial effluent or other fluid waste.

D. SOLID WASTE AUTHORITIES

Ala. Code § 11-89A-1 et seq. authorizes the creation of solid waste authorities by counties and municipalities under the procedures set out in the statute. The "legislative findings" setting out the need and purpose for these authorities states, in part, the following:

> [I]n order to provide for the collection and disposal of solid waste and to encourage planning of solid waste collection and disposal service and resource recovery through the development of systems for the recovery of material or energy from solid waste, it is necessary and desirable to authorize the creation by counties and municipalities (or any two or more thereof) in the state of authorities which will have the power to issue and sell bonds and notes and using the proceeds of such bonds and notes to acquire and construct such facilities.

See also, the Solid Waste Disposal Act at *Ala. Code § 22-27-1 et seq*, which authorizes counties to provide solid waste programs for its citizens, including the authority to require mandatory participation in such programs. *See, in particular, Ala. Code § 22-27-3*.

III. ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

The Alabama Department of Environmental Management (ADEM) is created and governed by the provisions of *Ala. Code § 22-22A-1 et seq*. In enacting this law, the Legislature found that the resources of the state need to be managed in a manner compatible with the environment, and the health and welfare of the citizens of the state and that in order to respond to the needs of its environment and citizens, the state must have a comprehensive and coordinated program of environmental management. *Ala. Code § 22-22A-2.*

The agency is headed by a director appointed by the Environmental Management Commission established in *Ala. Code § 22-22A-6.* The director serves at the pleasure of the Commission. *See, Ala. Code § 22-22A-4.*

A. GENERAL AGENCY POWERS AND AUTHORITY

The general powers and responsibilities of the agency are set out in *Ala. Code § 22-22A-5.* ADEM duties that are of particular interest to county engineers are to:

1. Administer appropriate permitting, regulatory and enforcement functions.

2. Promulgate rules, regulations, and standards in order to carry out the provisions and intent of the environmental management laws, coordinating with the Alabama Department of Public Health where necessary and prescribed by law.

3. Serve as the state agency responsible for administering federally approved or federally delegated environmental programs.

4. Serve as the state's clearinghouse for environmental data.

5. Develop, conduct, and disseminate education and training programs.

6. Establish and maintain regional or field offices in order to provide more effective and efficient services to the citizens of the state.

7. Issue, modify, suspend, or revoke orders, citations, notices of violation, licenses, certifications, or permits.

8. Hold administrative hearings relating to any provision of the law or its administration.

9. Enforce all provisions of the law.

10. Apply for, accept, receive, and administer grants or other funds from public and private agencies, including the federal government, for the purpose of carrying out any of the functions, purposes, or provisions of the law.

11. Adopt rules and regulations relating to charging and collecting fees sufficient to cover the reasonable anticipated costs incurred by the department and directly related to the issuance, reissuance, modification, or denial of any permit, license, certification, or variance.

The Department is divided into four main divisions: Air, Coastal Area Management, Land, and Water. County engineers have regular involvement with ADEM, particularly in the areas of pollution control and waste management and remediation programs.

B. SOLID WASTE PLANS

One area in which ADEM and county government work very closely is the development and periodic revision of the county's "10-year" solid waste plan, required under *Ala. Code § 22-27-40 et seq*. See, in particular, *Ala. Code § 22-27-47,* regarding local plans. These plans – originally required to be submitted to and approved by ADEM in 1991 -- are supposed to be revised and submitted to ADEM:

1. At least three years prior to the time all remaining available permitted capacity for the jurisdiction will be exhausted, or

2. When otherwise required by the department.

ADEM has generally required a revised or updated plan every ten (10) years. County engineers (and the regional planning commissions discussed in *Section VI, B* below) are typically involved in the development of the revisions to these county plans.

IV. EMERGENCY MANAGEMENT

A. ALABAMA EMERGENCY MANAGEMENT ACT

Ala. Code § 31-9-1 et seq. creates the state emergency management agency (AEMA), and sets out the powers of the agency, its director, and the governor in relation to emergencies within the state.

In addition, this act authorizes and directs each political subdivision in the state (which would include the county commission) to establish a local organization for emergency management in accordance with the state emergency management plan and program. See, *Ala. Code, § 31-9-10*.

Among the duties of the Governor (as carried out by the agency) under this statute, *Ala. Code § 31-9-6(2)* requires:

> A comprehensive plan and program for the emergency management of this state, such plan and program to be integrated and coordinated with the emergency management plans of the federal government and of other states to the fullest possible extent, and to coordinate the preparation of plans and programs for emergency management by the political subdivisions of this state, such plans to be integrated into and coordinated with the emergency management plans and programs of this state to the fullest possible extent.

County engineers, working with the county emergency management agency director play an important role in developing and implementing these comprehensive emergency plans for the county and provide front-line aid in the aftermath of a disaster affecting the county road system and other infrastructure. The county engineer also works closely with AEMA and FEMA in ensuring disaster recovery and response is conducted under the federal and state requirements for reimbursement of costs.

B. 9-1-1 DISTRICTS

Ala. Code § 11-98-1 et seq. authorizes the creation of an emergency communications district (9-1-1 districts) by resolution of a municipality or county. The act provides for the creation of a 9-1-1 board and sets out the procedures for establishing and providing 9-1-1 service in the designated district.

One of the more significant sections of this law for counties, and in particular, for the county engineer is *Ala. Code*, *§ 11-98-6(d)*, which provides that the 9-1-1 board and the governing body of the county or city affected by the district "shall be jointly responsible for purchasing and installing the necessary signs to properly identify all roads and streets in the district." See, *AG's Opinion # 2001-079*.

- 9-1-1 funds may be used to establish a common address and location identification program, which may include the development of appropriate maps. *AG's Opinion # 93-136*.

- Replacement of street signs is the joint responsibility of the county commission and the 9-1-1 Board, although the 9-1-1 Board is not responsible for maintenance of the signs. *AG's Opinion # 2006-051.*

C. DEPARTMENT OF HOMELAND SECURITY
The Alabama Department of Homeland Security is responsible for coordinating homeland security activities, response, and funding. This agency oversees and directs all governments and emergency agencies in homeland security preparedness and emergencies. See, *Ala. Code, § 31-9A-1 et seq.*

D. ALABAMA LAW ENFORCEMENT AGENCY
In 2013, the Legislature created the Alabama Law Enforcement Agency (ALEA) to coordinate public safety in the state. *Ala. Code § 41-27-1 et seq.* The agency consists of the Alabama Department of Public Safety and the Alabama Bureau of Investigations. The statutory duties and responsibilities of the Department of Public Safety (including traffic control and accident investigation) are generally found in *Ala. Code § 32-2-1 et seq.* The director of the Department of Public Safety is now appointed and supervised by the ALEA director and that agency's programs now fall under the direction of ALEA. *Ala. Code 41-27-6.*

V. PARKS AND RECREATION
Ala. Code, § 11-22-1 et seq. authorizes counties to create a public park and recreation board to acquire, enlarge, improve, expand, own, operate, lease and dispose of properties to promote public interest and participation in sports, athletics and recreational activities and to provide or improve public parks in this state, including all buildings, facilities and improvements.

Ala. Code, § 11-86-1 et seq. also provides for the creation of a recreation board in any county or in any municipality with a population of not more than 100,000 to direct, supervise, and promote recreation programs "as will contribute to the general welfare of the residents of the county or municipality."

- The population limitation applies only to municipalities. Any county may create a recreation board. *AG's Opinion # 92-183.*

VI. REGIONAL PLANNING AND DEVELOPMENT
Ala. Code § 11-85-1 et seq. provides for the creation and operation of regional planning and development commissions upon petition to the Governor by a municipal planning commission, a county commission, or 100 citizens. If the commission is authorized, it shall be empowered to make, adopt, amend, extend, and add to a master regional plan for the physical development of its region. There are currently twelve regional planning and development commissions within the state that provide a variety of services to local governments and regional areas of the state.

A. GENERAL POWERS AND DUTIES
Ala. Code § 11-85-23 set out the powers and duties of regional planning commissions, which are as follows:

1. To perform comprehensive advisory planning and research for the region, including those areas extending into adjoining states in instances and situations where such planning and related activities for such bi- or multi-state areas may be authorized by compact or otherwise;

2. To provide planning assistance, upon request duly evidenced by ordinance or resolution, to

   a. Any city, other municipality or county;

   b. Any group of adjacent communities, incorporated or unincorporated, having common or related urban planning or development problems; or

c. Any other regional planning agency.

3. To apply for and accept and utilize grants and assistance from the federal government or from any other public or private source which may now or hereafter legally make such grants or afford such other assistance and

4. To contract with the federal government or with private or public sources which may now or hereafter legally contract as to such planning to receive advances or progress payments.

B. SOLID WASTE PLANS

In addition to the general powers and authorities set out above, the regional planning commissions play a statutory role in the review and development of county solid waste plans. *Ala. Code § 22-27-46* required regional planning commissions to "prepare and adopt a regional needs assessment evaluating solid waste management needs in their respective regions" prior to the development of the first local solid waste plan required in 1991 pursuant to *Ala. Code § 22-27-47*. While it is not routinely done, *Ala. Code § 22-27-46* also requires that this assessment be revised and submitted to the department and local governments in the region annually.

Additionally, regional planning commissions play a role in the local approval process for any application for a new or modified landfill permit. *Ala. Code § 22-27-48* requires the regional planning commission to provide a "statement of consistency" following the county's review and approval of such application. Pursuant to this Code section, the regional planning commission shall "evaluate the proposal as it relates to available existing capacity within the region and the projected lifetime of such capacity" and identify any proposed capacity in excess of expected regional needs." *See Section III, B above for further discussion of solid waste plans.*

More information about available programs can be found from the website of the Alabama Association of Regional Councils: alarc.org.

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Alabama Department of Transportation et al. v. Blue Ridge Sand and Gravel, Inc.; and Bob Estes

1961920

SUPREME COURT OF ALABAMA

718 So. 2d 27; 1998 Ala. LEXIS 175

June 26, 1998, Released

SUBSEQUENT HISTORY: [**1] As Corrected October 9, 1998. Released for Publication October 6, 1998.

PRIOR HISTORY: Appeal from Montgomery Circuit Court. (CV-97-515).

DISPOSITION: INJUNCTION DISSOLVED AND CASE REMANDED.

CORE TERMS: specification, highway, gravel, injunction, bridge, transportation, rulemaking, asphalt, chert, bid, contractor, construction contract, bridge decks, supplemental, pavement, preliminary injunction, highway department's, hot mix, specific gravity, specific-gravity, surface, federal rule, applicability, declaratory, dissolved, premature, modify, repair, bulk, prescribes law

COUNSEL: For Appellants: Jim R. Ippolito, Jr., chief counsel, Alabama Department of Transportation

For Appellees: David Cromwell Johnson and J. Flint Liddon of Johnson, Liddon & Tuggle, Birmingham.

JUDGES: ALMON, JUSTICE. Hooper, C. J., and Maddox, Shores, Houston, and See, JJ., concur.

OPINION BY: ALMON

OPINION

[*28] ALMON, JUSTICE.

The Alabama Department of Transportation and a number of its officials and employees, who were defendants in the circuit court, appeal from a preliminary injunction. The circuit court's injunction has the effect of prohibiting the use of the Department's "Standard Specifications for Highway Construction" unless and until those specifications are adopted as rules pursuant to the Alabama Administrative Procedure Act ("AAPA"), Ala. Code 1975, § 41-22-1 to -27. We conclude that the injunction should be dissolved and the case remanded.

The plaintiffs, Blue Ridge Sand and Gravel, Inc., and Bob Estes, sought, among other relief, a preliminary injunction against the Department's implementation of amendments to §§ 801.01(a), 801.03(a), and 802.06 of the standard specifications and supplemental specification 4-92(2). These amendments and the supplemental specification require that gravel [**2] for use in hot mix asphalt for roads and in the superstructure of bridges "shall have a bulk specific gravity greater than 2.550." The plaintiffs contend that each of these amendments to the standard specifications is a "Rule" as that term is defined in § 41-22-3(9), so that the rulemaking provisions of the AAPA, especially §§ 41-22-4, -5, and -23, apply to the promulgation of the amendments. The plaintiffs contend that, because the Department did not comply with those provisions, it cannot use the amended standard specifications in any highway construction contract. Blue Ridge quarries and sells gravel made from chert, which has a specific gravity less than 2.550.

The Department presented evidence indicating that it adopted the 2.550 standard after experiencing premature failures of road surfaces and bridges with gravel made from chert. Larry Lockett, a materials and test engineer with the Department who had authority in this matter, testified:

> "Q. Do you know why the Department of Transportation adopted the bulk specific gravity specification for coarse gravel?
>
> "A. To prevent the use of chert gravels in hot asphalt and bridge decks.

[*29] "Q. All right. Do you know [**3] why the Department of Transportation wanted to eliminate the use of chert gravel in hot mix asphalt and bridge decks?

"A. Poor pavement performance in hot mix and poor bridge performance in bridge decks.

"Q. When you say 'poor performance,' would you please explain what you mean?

"A. A large, a very high, an unusually high occurrence of failure due to stripping of the asphalt off the aggregates in the hot mix and we would have -- when the gravel would absorb moisture and freeze in bridge decks, we would have pop-outs. It would look like a divot on a golf course in the bridge deck.

"Q. You mean a chunk coming out? Is that what you mean?

"A. Yes.

"Q. Is rutting a problem also?

"A. When stripping starts at the underlying layers, you lose some support, and the surface ruts -- you have permanent deformation due to that lack of support.

"....

"Q. Do you know why [the 2.550 specific-gravity specification was used]?

"A. It was made at the direction of the Federal [Highway] Administration to be able to obtain federal funds."

Lockett also testified that the Department had experienced failures [**4] of asphalt pavements with chert gravel within 6 to 24 months, while the average life span of asphalt pavements is 12 years. Lockett said that he had been studying the problem for years and that the Department had done testing before it arrived at the 2.550 specific-gravity specification. Thus, the Department's evidence showed that its adoption of the 2.550 specific-gravity specification was an attempt to improve road and bridge longevity and to reduce maintenance costs.

The question is whether the standard specifications are "rules" within the meaning of § 41-22-3(9), Ala. Code 1975. The Department argues that they are not, but that they are only, as they purport to be, specifications for engineering details and materials that may be incorporated by reference into a request for bids for highway construction contracts. Section 41-22-3(9) defines "Rule" as "Each agency regulation, standard or statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency ...."

The standard specifications do not "describe[] the organization, procedure, or practice requirements of" [**5] the Department. Pursuant to the AAPA, the Department has adopted administrative rules that describe its organization, procedure, and practice requirements. See Alabama Administrative Code, Chapter 450-1-1 et seq.

Nor do the standard specifications constitute an "agency regulation, standard or statement of general applicability that implements, interprets, or prescribes law or policy." Rather, each of the specifications, including the amended specifications directly at issue here, is simply a term that may be incorporated into a contract between the Department and some other party. See generally § 41-16-27, Ala. Code 1975, which provides that, in accepting or rejecting competitive bids, an awarding authority may take into consideration "the qualities of the commodities proposed to be supplied, *their conformity with specifications*, the purposes for which required," and so forth. Ala. Code 1975, § 41-16-27(a) (emphasis added). If an unsuccessful bidder or another interested party [1] considers specifications for a given contract to be inappropriate, the competitive bid law provides a means for challenging the inclusion of those specifications. See § 41-16-31; *White v. McDonald* [**6] *Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971). The fact that the Department has established standard specifications that it may incorporate by reference rather than setting forth all specifications in each highway construction contract does not elevate those specifications to the status of "rules." All interest-

ed parties seriously involved in highway [*30] contracting and supplying materials know of these standard specifications, because the Department makes them available to the public. [2] See § 23-1-34; Chapter 450-1-1-.09 and 450-1-2-.06, Ala. Admin. Code.

1 Blue Ridge Sand and Gravel does not bid on contracts; it provides price quotes to contractors for supplying gravel to the contractor. The contractor, if it plans to buy from Blue Ridge, then uses that quote to formulate its bid for the contract.

2 This Court requested and received a copy of the Standard Specifications because the record did not include a full set of those specifications. The bound volume the Court received contains more than 600 pages of detailed specifications.

[**7] The Supreme Court of Michigan, in affirming the lower courts' holding that the Michigan highway department's standard specifications were not an agency rule subject to the Michigan Administrative Procedures Act, stated:

> "The 1970 Standard Specifications for Highway Construction are found in a bound volume of 735 pages. The specifications include definitions of terms, allocation of duties between the contractor and the state, payment terms, and hundreds of pages of highly technical and detailed information concerning construction methods and techniques, soil composition requirements, metal heat treating methods, and technical details touching almost every conceivable aspect of highway construction work for which the State of Michigan might contract. Relevant portions of the standard specifications ... are routinely incorporated by reference in the Highway Department construction contracts not only to avoid the cumbersome necessity of reproducing the highly detailed information in every separate contract, but to enable prospective bidders upon state construction contracts to know in advance the bid requirements and construction specifications which will apply if they bid [**8] upon a state owned highway construction project.
>
> "It is undisputed that no part of the 1970 Standard Specifications for Highway Construction have ever been promulgated as agency rules within the meaning of ... the Administrative Procedures Act ... as a condition of their validity. It is likewise undisputed that the statutory steps preliminary to the adoption of agency rules, including publication of the proposed rule, and publication and transmission of notice of public hearing were never undertaken with respect to Sec. 1.04.03(c) or any of the standard specifications.
>
> "We agree with the trial court and the Court of Appeals that Sec. 1.04.03(c) of the 1970 Standard Specifications for Highway Construction is not an agency rule within the meaning of Sec. 7 of the Administrative Procedures Act. It is, as its title suggests, one of hundreds of standard contract terms and specifications governing the contractual relationship between the state and contractors engaged in highway work."

Greenfield Constr. Co. v. Michigan Dep't of State Highways, 402 Mich. 172, 190-91, 261 N.W.2d 718, 722-23 (1978). Section 7 of the Michigan APA cited in *Greenfield Constr.* [**9] *Co.* is very similar to the first part of § 41-22-3(9) of the AAPA.

To like effect is *Department of Transportation v. Blackhawk Quarry Co. of Florida*, 528 So. 2d 447 (Fla. Dist. Ct. App.), rev. denied, 536 So. 2d 243 (Fla. 1988), which held that a standard specification similar to the one here was not a "rule" within the meaning of § 120.52(16) of the Florida Statutes, which sets out an APA definition virtually identical to that in our § 41-22-3(9):

> "Section 915 simply sets out specifications for acceptable coquina material as part of the comprehensive standards for state road and bridge construction. It is more in the nature of a contract term between the contractor and DOT as opposed to a rule."

528 So. 2d at 450.

We agree with the Michigan Supreme Court and the Forida District Court of Appeal that such standard

specifications are not "rules" within the purview of the Administrative Procedure Act.

Moreover, even if the Department of Transportation's Standard Specifications for Highway Construction might be considered "rules," the evidence presented to the circuit court brings the amended and supplemental specifications within one or more exceptions to [**10] the AAPA's definition of "Rule." The definition in § 41-22-3(9) of "Rule" states that a rule, for purposes of the AAPA, "includes [*31] any form which imposes any requirement or solicits any information *not specifically required* ... by an existing rule or by federal statute or *by federal rule or regulation.*" The Department introduced evidence indicating that the adoption of the 2.550 specific-gravity requirement was required for the state to continue receiving federal highway money. In addition to the testimony quoted above, the Department submitted, in support of its motion to stay enforcement of the injunction, a copy of a letter from Joe D. Wilkerson, division administrator of the Federal Highway Administration, to the director of the Alabama Department of Transportation. That letter stated, in part:

> "We have expressed concern for some time regarding the poor performance of pavement utilizing porous gravels with high internal moisture. ... I have given this problem serious consideration and have concluded that changes need to be made in the specifications before further authorization of projects for pavement construction utilizing these gravels."

By the terms [**11] of § 41-22-3(9), the standard incorporated into § 801.01(a) and the other amended and supplemental specifications is not a "rule" governed by the AAPA, because it is "specifically required ... by federal rule or regulation."

In the chapters of the Code governing the operation of the Department of Transportation, there are many instances where the Department is given the authority to make agreements with, or otherwise to cooperate with, the Federal Government so as to facilitate the receipt of federal money for the construction of highways and bridges and for other reasons. See, e.g., § 23-1-1, authorizing the Department to "enter into all necessary contracts and agreements with the United States government or any agency or officer thereof ... and to do all other things necessary to secure to the state and its counties and municipalities the full benefits provided by [Congressional] acts"; § 23-1-57(4), regarding compliance with federal regulations when the Department enters an agreement regarding the construction of a bridge across a river forming a state boundary; § 23-1-170 et seq., especially -175(13), regarding the Alabama Finance Corporation; and § 23-1-300 et seq., creating [**12] the Federal Aid Highway Finance Authority. If the Department were required to implement rulemaking procedures each time the Federal Government changed its requirement for some aspect of road-building, the attendant delays, expense, and use of the time of Department employees could completely strangle the entire process of highway construction in this state. This shows that the exception in § 41-22-3(9) for requirements imposed by federal rule or regulation is a reasonable exception to the definition of "Rule"; this further supports our conclusion that the injunction is due to be dissolved.

The Department of Transportation (formerly the Highway Department, see § 23-1-20, as amended) has maintained its standard specifications for many years. Indeed, a 1969 act of the legislature incorporated a portion of the standard specifications into the Alabama Code. Section 23-1-60, Ala. Code 1975, incorporates the portion of the standard specifications that give the director of transportation "authority to make, at any time during the progress of any construction on any highway project under his jurisdiction, such changes or alterations of construction details ... as may be necessary or desirable [**13] for the successful completion of the project." From this section, it is clear both that the legislature was aware of the standard specifications well before it enacted the AAPA and that the legislature has given the director of transportation authority to modify the terms and conditions of highway construction even during the progress of a particular project. It would be contradictory to conclude that the director can modify construction specifications during the work on a particular project without engaging in rulemaking procedures, but can modify such specifications before a contract is awarded only by rulemaking procedures.

The AAPA was adopted in 1981; see 1981 *Ala. Acts*, Act No. 81-855, p. 1534. The Department has adopted rules according to the provisions of the AAPA, pursuant to its rulemaking authority; see § 23-1-59. Those rules are incorporated into the Alabama Administrative [*32] Code at Chapter 450-1-1 et seq., but they do not include detailed highway engineering requirements such as are included in the standard specifications. The record indicates that it has not been suggested until now that the Department's standard specifications should be adopted pursuant to rulemaking [**14] procedures of the AAPA. The AAPA gives the legislature oversight of administrative rulemaking, see §§ 41-22-2, -6, -22, and -23, but, in spite of its familiarity with the standard specifications, as evidenced by its enactment of § 23-1-60, and in spite of the significance of highway expenditures (one of the largest expenditures in the State budget), there is no indication that the

legislature has ever questioned the absence of the standard specifications from the rules in the Administrative Code. This indicates a legislative intent that the standard specifications are not "rules" within the contemplation of § 41-22-3(9) and the AAPA.

Chapter 450-1-2-.01(1) of the Department's Administrative Code states that "Any interested person may petition the Alabama Highway Department requesting the adoption, amendment, or repeal of a rule." See § 41-22-8, which requires each agency governed by the AAPA to adopt such a rule. The plaintiffs here have not shown that they requested the adoption of the amended specifications (or a less-strict version that would allow the use of their gravel) as "rules" within the contemplation of the AAPA. Furthermore, the plaintiffs did not avail themselves of [**15] the procedure for petitioning for a declaratory ruling provided by Chapter 450-1-2-.02. Because the Department has used its standard specifications for many years, both before and since the adoption of the AAPA, without any suggestion that they be adopted as rules, and because Estes and Blue Ridge Sand and Gravel made no request for a change in the amended specifications [3] or for a declaratory ruling by the Department, we conclude that they failed to exhaust their administrative remedies. See, e.g., *Mobile & Gulf R.R. v. Crocker*, 455 So. 2d 829 (Ala. 1984); *Fraternal Order of Police, Strawberry Lodge No. 40 v. Entrekin*, 294 Ala. 201, 314 So. 2d 663 (1975).

3 Instead, they relied on § 41-22-10, which provides for a declaratory judgment action to determine "the validity or applicability of a rule" and for injunctive relief.

The circuit court's preliminary injunction purports to reach only the 1997 amendments at issue here, but its reasoning would reach the entire manual of standard specifications. The [**16] Department has published a 1992 edition and a 1995 edition of its standard specifications. The Department has, admittedly, made these revisions without engaging in rulemaking procedures. For all that appears, the entire set of standard specifications would be rendered void by the trial court's injunction.

A trial court "will balance the probable resulting damages to the respective parties" when considering whether to issue a preliminary injunction. *Woodstock Operating Corp. v. Quinn*, 201 Ala. 681, 682, 79 So. 253, 254 (1918); *Martin v. First Federal Sav. & Loan Ass'n of Andalusia*, 559 So. 2d 1075, 1079 (Ala. 1990). "Loss of profits does not justify the issuance of an injunction." *State Dep't of Public Safety v. Scotch Lumber Co.*, 293 Ala. 330, 333, 302 So. 2d 844, 846 (1974). The harm that Blue Ridge and Estes would suffer without the injunction is the loss of profits they might receive from selling chert to highway contractors for use in the construction of state roads and bridges. By contrast, the injunction harms the Department by requiring it to accept for highway and bridge construction a material that it has determined causes premature failure. The injunction may [**17] result in excessive costs in the repair or replacement of defective roads and bridges [4] and in the loss of federal highway [*33] money. Balancing the hardship the injunction imposes on the Department against the injury to the plaintiffs if the injunction is denied, we conclude that the balance of equities favors the defendants.

4 In support of its motion asking the circuit court to dissolve the injunction and its later motions in that court and this one for a stay, the Department submitted the September 4, 1997, affidavit of Dykes T. Rushing, the office engineer for the Department. Mr. Rushing stated that for the remainder of the year 1997 the Department planned to engage in bid lettings totalling $ 197,000,000. He stated: "A major portion of these projects involves plant mixed asphalt and bridge superstructures to which the Department's enjoined bulk specific gravity special provisions applied. Given the premature failure of road wear surfaces containing chert gravel, the Department will expend additional resources to repair or replace those surfaces contained within the above lettings if chert gravel is used in the plant mixed asphalt or concrete bridge decks. A conservative estimate of the cost of repair is 50% of the original cost of the projects or $ 98,500,000.00."

[**18] For the reasons stated, we conclude that the Department of Transportation's Standard Specifications for Highway Construction are not "rules" within the purview of the Alabama Administrative Procedure Act. The circuit court erred in entering the injunction prohibiting the defendants from incorporating the amended and supplemental standard specifications into highway and bridge construction contracts.

INJUNCTION DISSOLVED AND CASE REMANDED.

Hooper, C. J., and Maddox, Shores, Houston, and See, JJ., concur.

Alabama Municipal and Environmental Engineers, Inc. v. Slaughter Construction Company, Inc.

2050007

COURT OF CIVIL APPEALS OF ALABAMA

961 So. 2d 889; 2007 Ala. Civ. App. LEXIS 30

January 12, 2007, Released

SUBSEQUENT HISTORY: [**1] Released for Publication July 13, 2007.

PRIOR HISTORY: Appeal from Baldwin Circuit Court. (CV-04-1282). Robert E. Wilters III.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: bid, specification, bidder, manhole, Competitive Bid Law, installed, lowest, rehabilitation, certification, epoxy, cause of action, unsuccessful, disappointed, liners, responsible bidder, present case, enjoin, resin, awarding, provide evidence, bid-preparation, contractor, competitive bidding, tort claim, money damages, monetary damages, subcontractor, preparation, injunctive, bidding

COUNSEL: For Appellant: Michael S. Jackson and R. Wesley Shaw of Beers, Anderson, Jackson, Patty & Van Heest, P.C., Montgomery.

For Appellee: Robert A. Wills of Wills & Simon, Bay Minette.

JUDGES: MURDOCK, Judge. Pittman and Bryan, JJ., concur. Crawley, P.J., and Thompson, J., concur in the result, without writing.

OPINION BY: MURDOCK

OPINION

[*890] MURDOCK, Judge.

Alabama Municipal and Environmental Engineers, Inc. ("AME"), appeals from a judgment of the Baldwin Circuit Court in favor of Slaughter Construction Company, Inc. ("Slaughter"), following a bench trial. We reverse.

Pursuant to Ala. Code 1975, Title 39, the Utilities Board of the City of Bay Minette ("the Board") solicited bids for a one-year contract for the rehabilitation of existing manholes ("the contract"). [1] The Board hired AME to prepare the specifications for the contract ("the contract specifications"), and to gather, rank, and forward bids to the Board, along with a recommendation as to which company submitting a bid should be awarded the contract. The ultimate decision regarding which company should receive the contract rested solely with the Board.

> 1 Because the contract for which the Utility Board sought bids was for a "public work" as defined by Ala. Code 1975, § 39-2-1(5), the bidding process was controlled by Title 39 of the Code of Alabama 1975. *See* Ala. Code 1975, §§ 39-1-5, 41-16-50(a). Title 39, combined with § 41-16-20 et seq., shall hereinafter be referred to as "the Competitive Bid Law".

[**2] The contract specifications did not call for the rehabilitation of a specific number of manholes; instead, the contract specifications allowed for the Board to determine if and when manholes required rehabilitation. The contract specifications allowed the contract period to be extended to up to three years from the bid date. The contract specifications called for the rehabilitation of manholes using a cementitious process, an epoxy process, or a fiberglass process, with the Board making the decision as to the process to be used on a manhole-by-manhole basis, after the award of the contract. Thus, the contract specifications required that companies submitting bids be able to work with all three types of materials, and the bids submitted had to include costs for all three.

Section 12 of the contract specifications concerned the rehabilitation of manholes using the epoxy process. Section 12.02 provided:

> "12.02 *QUALITY ASSURANCE*
>
> "....
>
> "C. The manhole rehabilitation contractor

> shall provide evidence and preferences for having successfully installed resin based liners in at least 750 manholes and must have [*891] at least five (5) years experience in using the products [**3] specified in this specification. The product must also have been installed in at least 10,000 manholes during the last ten (10) years and have had at least 3000 manholes successfully installed for a period of five (5) years or longer. Certification of compliance with these requirements shall be included with the bid proposal."

On May 25, 2004, the day bids were due, AME received three bids. Staggs Environmental Construction ("Staggs") submitted a bid in the amount of $ 82,464; Slaughter submitted a bid in the amount of $ 89,200.04; and Suncoast Infrastructures, Inc., submitted a bid in the amount of $ 107,749.

On May 27, 2004, Slaughter sent a letter of protest to AME in which it complained that Staggs's bid did not comply with the contract specifications. Slaughter's letter stated:

> "We write in regard to the bids which were received on the above referenced project in Bay Minette, AL on May 25th, 2004.
>
> "Paragraph 12.02.C of the contract specifications which is under the heading of *Manhole and Wet Well Rehabilitation (Epoxy/Resin Based)* states as follows 'The manhole rehabilitation contractor shall provide evidence and references for having successfully installed [**4] resin based liners in at least 750 manholes and must have at least five (5) years experience in using the products specified in this specification. The product must also have been installed in at least 10,000 manholes during the last ten (10) years and have had at least 3000 manholes successfully installed for a period of five (5) years or longer. *Certification of compliance with these requirements shall be included with the bid proposal (emphasis added)'.*
>
> "Staggs Environmental Construction, Inc. (Staggs) submitted in its bid a certification letter written by Stephen's Technologies, Inc. (Stephens) which is somewhat vague and confusing as to whether Stephens actually meets the manufacturers product requirements of 10,000 manholes installed during the last ten (10) years. Stephens clearly indicates though in it's letter (and also Staggs by submitting the letter) that Staggs as the rehabilitation contractor does *not* meet the performance requirement of having installed liners in 750 manholes and five (5) years of experience as an applicator of the epoxy products.
>
> "Staggs bid is therefore non-responsive because:
>
> > "1.) Staggs clearly will not be able to provide [**5] evidence and references for having successfully installed resin based liners in at least 750 manholes and having at least five (5) years experience. No other conclusion can be reached from Stagg's attempt via Stephen's letter to circumvent the experience requirements by substituting the presence of a factory supplied representative in lieu of the actual experience required of Staggs under the project specifications.
> >
> > "2.) The Stephen's letter is inadequate as a certification of compliance of meeting the requirements of the bid specifications. It is vague in its declarations and doesn't specifically address meeting the re-

> quirements of paragraph 12.02C.
>
> "The bid submitted by our firm, Slaughter Construction Company, Inc. includes a certification clearly referencing paragraph 12.02.C and certifies unambiguously [*892] that our product, SprayWall has been installed in at least 10,000 manholes during the last ten (10) years and has been installed in at least 3000 manholes during the last five (5) years. Additionally we stand ready as the contractor to provide evidence that we have successfully installed resin based liners in at least 750 manholes and that we have at least five (5) [**6] years experience in using the product as is required by specification paragraph 12.02C.
>
> "The bid documents state that 'The award of the Contract, if it be awarded, will be by the Owner to the lowest responsible Bidder whose Proposal shall comply with all the requirements necessary to render it formal.' Stagg's bid contains material deficiencies which are not informalities which can or should be waived. It is clearly non-responsive. The bid by our firm does comply in every aspect with the requirements of the bid and we request that we be awarded the contract as the lowest responsible bidder on this bid."

AME was not satisfied with the certification letter that Staggs submitted with its bid. AME undertook to determine whether Staggs did, in fact, possess the experience with epoxy-based liners for which the contract specifications called, as well as to obtain information on the epoxy product Staggs intended to use if awarded the contract. AME became satisfied that Staggs met the experience requirements of section 12.02C after reviewing a letter from Staggs dated June 22, 2004, indicating that it would use a subcontractor for the epoxy-based liners that met the experience requirements [**7] of section 12.02C. AME became satisfied that Staggs met the product requirements of section 12.02C after it became aware that Staggs would be using an epoxy that was manufactured by New Life Coatings.

Thereafter, AME sent the bid materials to the Board and recommended to the Board that it award the contract to Staggs as the lowest responsible bidder. The Board, after reviewing AME's recommendations, met on June 28, 2004, and decided to award the contract to Staggs. A representative of Slaughter appeared at the Board's August meeting to express its objections to the awarding of the contract to Staggs. The contract with Staggs was executed on August 20, 2004.

On November 10, 2004, Slaughter sued AME. Slaughter alleged that AME had improperly recommended Staggs as the lowest responsible bidder to the Board, in spite of the fact that Staggs's bid did not comply with the contract specifications. Pursuing a tort claim, Slaughter alleged that it had been damaged as a proximate result of its reliance on AME's representations and its contract specifications, and by AME's failure to follow the contract specifications that it had prepared when it recommended Staggs as the lowest responsible [**8] bidder. [2] Slaughter claimed damages based on lost profits, bid-preparation expenses, and the cost of litigation.

> 2 Although the complaint does not delineate the species of tort alleged, both parties, in their appellate briefs, agree that, through its complaint, Slaughter sought recovery on the basis of the tort of fraudulent misrepresentation. Both parties agree that the theory of Slaughter's cause of action was that AME misrepresented in its contract specifications that bidders' certifications of the quality-assurance criteria set forth in section 12.02 of the contract specifications were required to be submitted with each bid.

The trial court held a bench trial on July 6, 2005. At trial, Slaughter submitted an exhibit that set forth the bases of the compensatory damages it sought. Through that exhibit, Slaughter argued that it was entitled to $ 11,630 for lost profits, $ 4,662.50 in bid-preparation expenses, [*893] $ 80 for the purchase of the bid documents, and $ 180 in travel expenses. AME objected to the exhibit [**9] because, it argued, lost-profit damages are too speculative to be awarded and neither lost profits nor bid-preparation expenses are recoverable in actions brought under the Competitive Bid Law. The trial court overruled AME's objection.

Bobby Slaughter, Slaughter's president and owner, testified that Slaughter relied on the contract specifications that AME prepared and adhered to the requirements of the contract specifications. He testified that, had it not done so, it could have submitted a lower bid. He also testified that, had AME enforced all of the requirements of the contract specifications, Slaughter would have been awarded the contract, unless the Board decided to reject all of the bids.

After Slaughter rested its case, AME moved for a judgment as a matter of law, arguing that Slaughter could not pursue a tort claim against it because the only relief allowed under the Competitive Bid Law is an injunction prohibiting the execution of a contract that is awarded in violation of the Competitive Bid Law. Slaughter responded that its action was brought pursuant to the tort of fraud, and that, under Alabama Supreme Court precedent, such an action is allowed in circumstances such [**10] as those presented in this case. Thus, it argued, its action was not barred by the fact that the Competitive Bid Law provides only for an injunctive remedy. The trial court denied AME's motion.

Greg Thompson, one of AME's employees, testified at trial on AME's behalf. He indicated that, when drafting the contract specifications, AME knew that prospective bidders would rely on the contract specifications when preparing their bids. He admitted that the language of section 12.02C of the contract specifications was mandatory and that he had not been satisfied by the certification letter that Staggs submitted with its bid pursuant to that section. He also admitted that the New Life Coatings epoxy material that Staggs intended to use in performing the contract did not meet two of the physical requirements listed in the contract specifications and was not an approved product under the contract specifications. Although the contract specifications provided a process by which a bidder could obtain approval to use an alternative product before submission of its bid, Staggs did not follow that process to obtain approval for the epoxy material it intended to use.

AME renewed its motion for a [**11] judgment as a matter of law at the close of the evidence, stating the same basis as its previous motion for a judgment as a matter of law. The trial court denied AME's motion.

On August 18, 2005, the trial court entered a judgment in Slaughter's favor, awarding it $ 3,071.25 in compensatory damages and $ 2,000 in attorney fees. The trial court did not set forth any findings of fact in its order. AME appeals.

AME argues that Ala. Code 1975, § 39-5-4, prescribes the sole remedies available to an unsuccessful bidder under the Competitive Bid Law, and that, except as allowed by § 39-5-4, an unsuccessful bidder cannot pursue a claim for money damages. We agree.

Section 39-5-4 states as follows:

> "The Attorney General, a bona fide unsuccessful or disqualified bidder, or any interested citizen may maintain an action to enjoin the letting or execution of any public works contract in violation of or contrary to the provisions of this title or any other statute and may enjoin payment of any public funds under any such contract. In the case of a successful [*894] action brought by a bidder, reasonable bid preparation costs shall be recoverable by that bidder. The action shall be commenced within [**12] 45 days of the contract award."

"The purpose of statutory or charter provisions requiring municipal corporations to let contracts on competitive bidding after notice, is to secure economy and protect the citizens and taxpayers of the municipality from fraudulent favoritism in letting such contracts." *Carson Cadillac Corporation v. City of Birmingham*, 232 Ala. 312, 316, 167 So. 794, 798 (1936) (internal quotation marks and citations omitted). Thus, "*[t]he Competitive Bid Law was enacted for the benefit of the public, not for the benefit of the unsuccessful bidder*," *TFT, Inc. v. Warning Systems, Inc.*, 751 So. 2d 1238, 1247 (Ala. 1999) (emphasis added), and it "does not confer on a bidder any right enforceable at law or in equity," *Townsend v. McCall*, 262 Ala. 554, 558, 80 So. 2d 262, 265 (1955).

In keeping with the Competitive Bid Law's purpose, the remedy available to disappointed bidders is one that vindicates the public interest in protecting the public coffers, not one that is focused on the vindication of private interests and the interests of disappointed bidders. In *Jenkins, Weber and Associates v. Hewitt*, 565 So. 2d 616, (Ala. 1990), the plaintiff company [**13] was the second lowest bidder on a contract for the sale and installation of a computer processing system. The contract, however, was awarded to the fourth lowest bidder. The plaintiff company and two individuals brought an action, purportedly under the Competitive Bid Law, seeking monetary relief. [3] On appeal, following the entry of a summary judgment against the plaintiffs, our Supreme Court held that the Competitive Bid Law does not provide for the remedy that the plaintiffs sought:

> "[The plaintiffs'] complaint, as amended three times, did not seek injunctive relief pursuant to § 41-16-31, but rather claimed monetary damages.
>
> "We find nothing in the legislative history of § 41-16-31 nor in the cases interpreting that statute that allows an unsuccessful bidder to sue for monetary damages. In *Urban Sanitation Corp. v. City of Pell City*, 662 F. Supp. 1041,

1044 (N.D. Ala. 1986), a federal district court interpreting that statute stated:

> "'There is no indication in this statute, however, that an unsuccessful bidder has any right or expectancy to insist upon the award of a contract. To the contrary, the statute is carefully crafted to limit the remedy to "enjoin[ing] [**14] execution of any contract entered into in violation of the provisions of this article." When the statute is unambiguous, its expressed intent [*895] must be given effect and there is no room for construction.'

"(Citation omitted.)"

Jenkins, Weber and Associates, 565 So. 2d at 617-18 (footnote omitted).

> 3 The portion of the Competitive Bid Law at issue in *Jenkins, Weber & Associates* is found in Chapter 16 of Title 41, which deals with public contracts other than those dealt with in Title 39, which is applicable to the present case. The remedial provisions in Title 41 (§ 41-16-31 and § 41-16-61) are identical to one another and are substantially similar to the remedial provision applicable to the present case, § 39-5-4. Sections 41-16-31 and 41-16-61 state:
>
> > "Any taxpayer of the area within the jurisdiction of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of this article."
>
> The one notable difference in §§ 41-16-31 and 41-16-61, on the one hand, and § 39-5-4, on the other, is that the latter specifically allows for recovery of limited monetary damages in the form of "bid preparation costs" if the plaintiff is successful in obtaining injunctive relief.

[**15] In the present case, as in *Jenkins*, the underlying basis of Slaughter's cause of action against AME is Slaughter's contention that it was the lowest responsible bidder and that it, rather than Staggs, should have been awarded the contract by the Board. Although Slaughter couches its cause of action as sounding in tort rather than as a violation of the Competitive Bid Law, the gravamen of its argument rests firmly on the Competitive Bid Law's requirement that certain public contracts, such as the one at issue in this case, be awarded only to the lowest responsible bidder.

For this reason, we find that the Competitive Bid Law governs Slaughter's cause of action in the present case against AME. As a disappointed bidder that believed the contract at issue in this case should not have been awarded to Staggs, Slaughter's statutorily-prescribed remedies were to "maintain an action to enjoin the letting or execution" of the contract and, if successful in obtaining that injunction, to seek an award of its bid-preparation costs.

Spring Hill Lighting & Supply Co. v. Square D Co., 662 So. 2d 1141 (Ala. 1995), upon which Slaughter relies, is distinguishable. In *Spring Hill* [**16] , the plaintiff was a parts supplier that had agreed to supply an electrical substation to a subcontractor of the successful bidder on a large project for the Alabama State Docks Department. *Spring Hill*, 662 So. 2d at 1143. After several individuals and entities, including an employee of the Alabama State Docks Department, allegedly caused the subcontractor to cancel its order with the plaintiff, the plaintiff sued the individuals and entities for money damages, alleging tort claims for fraud, intentional interference with business relations, and conspiracy. *Id.* at 1143-45. The trial court entered a summary judgment in favor of the defendants, finding that the Competitive Bid Law did not allow causes of action seeking money damages. *Id.* On appeal, our Supreme Court reversed, holding that the plaintiff parts supplier was entitled to pursue intentional tort claims against the defendants. *Id.* at 1147-51.

The plaintiff in *Spring Hill* was not a disappointed bidder and its cause of action did not arise from an alleged circumvention of the competitive bidding process. In the present case, however, Slaughter *is* a disappointed bidder, and its cause of action *does* [**17] derive from an alleged circumvention of the competitive bidding process.

If our holding today were to be otherwise that it is, the limitation of remedies prescribed by the Competitive Bid Law, could, and, no doubt regularly would be, circumvented through the use of allegations by disappointed bidders that decisions by bidding authorities and/or their agents in violation of the Competitive Bid Law amounted to intentional tortious conduct. When the gravamen of the offense is a violation of the bid law, the limitation of remedies imposed by statute must be applicable regardless of whether the disappointed bidder uses evidence of the violation to contend that the bidding authority decided to act in violation of the Competitive Bid Law in advance (i.e., before or during the solicitation of bids, as is alleged here) or after the receipt and opening of bids.

Because we conclude that Slaughter's action was governed by the Competitive Bid Law and that its remedy was limited to filing an action seeking to enjoin the awarding of the contract at issue to Staggs [*896] (and, if successful, to recover its bid preparation expenses), we reverse the judgment of the trial court and remand the cause for the [**18] entry of a judgment consistent with this opinion. [4]

4 Because we resolve this appeal in this manner, we do not reach AME's other contentions.

REVERSED AND REMANDED.

Pittman and Bryan, JJ., concur.

Crawley, P.J., and Thompson, J., concur in the result, without writing.

Alabama-Tennessee Natural Gas Company v. Southern Natural Gas Company and City of Huntsville

1960250

SUPREME COURT OF ALABAMA

694 So. 2d 1344; 1997 Ala. LEXIS 147

May 23, 1997, RELEASED

SUBSEQUENT HISTORY: [**1] Released for Publication June 27, 1997.

PRIOR HISTORY: Appeal from Jefferson Circuit Court. (CV-96-876). Thomas A. Woodall, TRIAL JUDGE.

DISPOSITION: AFFIRMED.

CORE TERMS: bid, natural gas, competitive, pipeline, regulated, transportation service, competitively, summary judgment, attorney general, exempt, exemption, service contracts, contractual, long-term, savings

COUNSEL: For Appellant: Henry I. Frohsin and Susan S. Wagner of Berkowitz, Lefkovits, Isom & Kushner, P.C., Birmingham; and Euel A. Screws, Jr., and J. Fairley McDonald III of Copeland, Franco, Screws & Gill, P.A., Montgomery.

For Appellees: George G. Lynn and Carl S. Burkhalter of Maynard, Cooper & Gale, P.C., Birmingham, for Southern Natural Gas Company. E. Cutter Hughes, Jr., and Carolyn Reed Douglas of Bradley, Arant, Rose & White, Huntsville, for City of Huntville.

JUDGES: SHORES, JUSTICE. Hooper, C.J., and Maddox, Almon, and Kennedy, JJ., concur. Butts, J., recuses. *

> * Attorney/firm in this case is also involved in sale/merger transaction with company in which spouse is director/stockholder.

OPINION BY: SHORES

OPINION

[*1345] SHORES, JUSTICE.

The Alabama-Tennessee Natural Gas Company ("ATNG") sued the City of Huntsville and the Southern Natural Gas Company ("SNGC"), seeking a judgment declaring void a contract for natural gas transportation entered into between Huntsville and SNGC, or seeking to enjoin performance of that contract. ATNG based its complaint on the contention that the contract was subject to Alabama's competitive bid law, § 41-16-50 et seq., which had not been complied with. The trial court entered a summary judgment for the defendants; ATNG appealed. We affirm.

ATNG had transported or sold natural gas, without competition, to the cities of Huntsville and Decatur for over 40 years. It lost its business to a competitor, [**2] SNGC, when the Huntsville City Council accepted SNGC's proposal to provide natural gas transportation service upon the expiration of Huntsville's contract with ATNG. [1] ATNG's complaint raised the following issues, which ATNG again raises on appeal:

> 1 An analysis done by the Huntsville Utilities Gas System indicated that the building of an additional pipeline from Tuscaloosa to Huntsville, by which SNGC would transport the gas to Huntsville, would lead to a savings for the System of $ 7.6 million through the year 2005 and a savings of $ 31.6 million through the year 2017.

> "1. Whether the contract for gas transportation services should have been competitively bid pursuant to § 41-16-50 and § 41-16-54, Code of Alabama, or whether such services fall within the exemption for regulated utilities provided for by the Alabama Legislature in the Alabama competitive bid law, § 41-16-51(a).

> "2. Whether Huntsville's 20-year contract with the SNGC violates § 41-16-57(e), which provides: 'Contracts for the [**3] purchase of personal property or contractual services shall be let for periods not greater than three years.'"

A third issue raised by the complaint is not raised on appeal.

In May 1996, the City of Huntsville and SNGC filed motions for summary judgment. ATNG filed a cross motion for summary judgment. The trial judge heard oral argument and considered the pleadings; the documents filed in support of, and those filed in opposition to, the pleadings; and the briefs of the parties. The judge concluded that the contract between Huntsville and SNGC is exempt from the competitive bid law under the provisions of § 41-16-51(a), and it so held in its summary judgment.

The trial judge held correctly that the contract for gas transportation services was not required to be competitively bid, because service contracts of that nature fall within the exemption for contracts of regulated utilities provided for by the Alabama Legislature in § 41-16-51(a), a portion of the competitive bid law. Courts in other states have interpreted statutes similar to § 41-16-51(a) to exempt regulated utilities from competitive bid laws. See: *County of Riverside v. Whitlock*, 22 Cal. App. 3d 863, 99 [**4] Cal. Rptr. 710, 719 (1972); *Maffit v. City of Decatur*, 322 Ill. 82, 152 N.E. 602 (1926); *Telcom Systems, Inc. v. Lauderdale County Board of Supervisors*, 405 So. 2d 119 (Miss. 1981).

[*1346] ATNG contends that the Huntsville-SNGC contract does not fall within the § 41-16-51(a) exemption, because, it argues, under the "plain meaning rule" of statutory construction the statutory requirement "fixed by law, regulation, or ordinance" is not met. ATNG points out that in 1985 the Federal Energy Regulatory Commission ("FERC") adopted Order No. 436 [2] and it argues that as a result of this order the FERC now approves a range of rates, rather than a single tariff rate. ATNG argues that now, under the FERC, rates are "regulated, but not fixed" and thus cannot be held to be "fixed by ... regulation," within the meaning of § 41-16-51(a). We reject this argument, because SNGC is a utility whose rates are regulated by the FERC under the authority of the Natural Gas Act, 15 U.S.C. § 717 et seq. The construction and operation of a second natural gas pipeline to Huntsville and the rates charged by the pipeline operator are strictly governed by FERC regulations. *See* 18 C.F.R. § 284.7(d)(5)(ii). [**5]

2 50 Fed. Reg. 42,408 (1985).

We agree with the trial judge that the SNGC-Huntsville contract does not violate § 41-16-57(e), which prohibits the letting of certain competitively bid contracts for periods greater than three years. We reject ATNG's argument that the three-year limit in § 41-16-57(e) applies whether or not the contract is competitively bid; that three-year limit applies only to contracts that are competitively bid. This is the only construction consistent with custom and practice. ATNG itself entered into a contract of 20 years or longer with Huntsville to support its initial construction of a pipeline system in 1949. Apparently, no municipality or gas district in Alabama has ever put its natural gas service contracts out for bidding under the competitive bid law.

As a practical matter, a three-year limit on natural gas pipeline contracts would not be sound public policy, because no company would be willing to invest the capital required to lay a pipeline (in this case $ 53 million) without [**6] a long-term contractual commitment. The United States Supreme Court has recognized this fact, stating: "In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964).

Finally, we note that the state attorney general issued an opinion stating that this contract for natural gas transportation services is exempt from the competitive bid law. [3] The attorney general's opinion stated:

3 Opinion dated December 13, 1995, from Attorney General Jeff Sessions.

> "Natural gas transportation services, regulated by the Natural Gas Act, 15 U.S.C. § 717 et seq., are exempt from competitive bid pursuant to Code of Alabama 1975, § 41-16-51(a) and § 41-16-51(a)(13)."

While an opinion of the attorney general is not binding, it can constitute persuasive authority. *Poe v. Grove Hill Memorial Hospital Bd.*, 441 So. 2d 861, 863 (Ala. 1983).

For the reasons [**7] stated above, the judgment of the trial court is due to be affirmed.

AFFIRMED.

Hooper, C.J., and Maddox, Almon, and Kennedy, JJ., concur.

Butts, J., recuses. *

* Attorney/firm in this case is also involved in sale/merger transaction with company in which spouse is director/stockholder.

Mark Allbritton and Kristie Allbritton v. Robert Dawkins, Jr.

2080063

COURT OF CIVIL APPEALS OF ALABAMA

19 So. 3d 241; 2009 Ala. Civ. App. LEXIS 84

March 27, 2009, Released

SUBSEQUENT HISTORY: Released for Publication October 1, 2009.

PRIOR HISTORY: [**1]

Appeal from Walker Circuit Court. (CV-08-24). Jerry Selman.
Allbritton v. Dawkins, 2008 Ala. Civ. App. LEXIS 1562 (Ala. Civ. App., Dec. 29, 2008)

DISPOSITION: REVERSED AND REMANDED WITH INSTRUCTIONS.

CORE TERMS: indispensable parties, easement, property owned, public road, property owners, joinder, joined, prescription, void, restraining order, interest in real property, ownership, issuance, tenus, ore, judgment declaring, preliminary injunction, interfering, reside, temporary

COUNSEL: For Appellants: Ronald R. Crook of Smith & Alspaugh, P.C., Birmingham.

For Appellee: Russell B. Robertson of Laird & Robertson, P.C., Jasper.

JUDGES: MOORE, Judge. Thompson, P.J., and Pittman, Bryan, and Thomas, JJ., concur.

OPINION BY: MOORE

OPINION

[*242] MOORE, Judge.

Mark Allbritton and Kristie Allbritton ("the Allbrittons") appeal from a judgment declaring that "Allbritton Lane" is not a public road, denying their request for a restraining order and/or an injunction, and denying their claims that they held an easement by prescription or by necessity across property owned by Robert Dawkins, Jr. We reverse the trial court's judgment and remand the case to allow the joinder of indispensable parties.

Procedural Background

On January 23, 2008, Mark Allbritton and his wife, Kristie Allbritton, filed a "Petition for Temporary Restraining Order and/or Preliminary Injunction," naming Robert Dawkins, Jr., as the defendant. The Allbrittons alleged that a dirt road, referred to as "Allbritton Lane," runs across property owned by Dawkins and serves as the only means of ingress and egress to the property on which the Allbrittons reside, that Allbritton Lane is a public road, and that Dawkins or his tenant had blocked the Allbrittons' access to the property on which they reside by interfering [**2] with their passage over Allbritton Lane. The Allbrittons also alleged that they had acquired an easement by prescription or by necessity across the property owned by Dawkins. The Allbrittons requested the issuance of a preliminary injunction and/or a temporary restraining order to prevent Dawkins from interfering with the Allbrittons' use of Allbritton Lane.

[*243] The Allbrittons and Dawkins reached an "Agreement on Issues Pendente Lite." In that agreement, the parties agreed that whether Allbritton Lane was a public or private road was an issue central to the resolution of this action. The trial court adopted the parties' agreement as to the issues presented in the case. Dawkins answered the complaint and counterclaimed, seeking damages for trespass to private property and seeking a judgment declaring the rights of the parties as to Allbritton Lane.

On September 4, 2008, the trial court conducted a bench trial, at which it received ore tenus evidence. The trial court subsequently entered its judgment finding that Allbritton Lane was not a public road as defined by the laws of Alabama; that the Allbrittons' use of Allbritton Lane had not been shown to be adverse to Dawkins and/or his predecessors [**3] in title for a period of 20 years and that, as a result, the Allbrittons were not

entitled to an easement by prescription across Dawkins's property; and that the Allbrittons had not established that they were entitled to an easement by necessity across Dawkins's property. The trial court concluded that Dawkins was the sole owner of his property and ordered Dawkins to refrain from taking any action to block or obstruct the Allbrittons' use of Allbritton Lane for 60 days after the issuance of the court's judgment. The trial court further stated that, after the 60-day period, Dawkins was entitled to exercise full and complete dominion over his property. All remaining claims and counterclaims were dismissed with prejudice. The Allbrittons appealed to the Alabama Supreme Court; that court transferred the appeal to this court, pursuant to § 12-2-7, Ala. Code 1975.

Factual Background

Although the trial court received extensive ore tenus evidence at the September 2008 bench trial, we need consider only limited facts. It was established at trial that neither Mark Allbritton nor Kristie Allbritton owned any legal interest in any of the property at issue. When they filed their petition and at trial, [**4] the Allbrittons were living on property owned by Mark's mother. The Allbrittons, however, did not join Mark's mother or any other persons as plaintiffs in the action.

Additionally, other evidence established that, although Dawkins owns a portion of the property over which Allbritton Lane runs, he does not own the entire length of Allbritton Lane. Carl Allbritton, a third party who was not joined in this action, also owns a portion of the property over which Allbritton Lane runs. In traveling along Allbritton Lane in order to access the property owned by Mark's mother, the Allbrittons must pass across Carl Allbritton's property; moreover, to access his property, Dawkins also must pass across Carl Allbritton's property. However, Carl Allbritton was not made a party to the action; the Allbrittons named only Dawkins as a defendant.

Analysis

The absence of an indispensable party is a jurisdictional defect that renders the proceeding void. *See Gilbert v. Nicholson*, 845 So. 2d 785, 790 (Ala. 2002). Although no party to this appeal has raised the issue of indispensable parties, the absence of an indispensable party can be raised for the first time on appeal by the appellate court *ex mero motu*, [**5] even if the parties failed to present the issue to the trial court. *Id.*

Our supreme court has stated:

> "Rule 19, Ala. R. Civ. P., provides for joinder of persons needed for just adjudication. Its purposes include the promotion of judicial efficiency and the final [*244] determination of litigation by including all parties directly interested in the controversy. Where the parties before the court adequately represent the absent parties' interests and the absent parties could easily intervene should they fear inadequate representation, no reason exists why the trial court could not grant meaningful relief to the parties before the court. Also, joinder of absent parties is not absolutely necessary where determination of the controversy will not result in a loss to the absent parties' interest or where the action does not seek a judgment against them. ...
>
> "[The supreme court] has also held, however, that in cases where the final judgment will affect ownership of an interest in real property, all parties claiming an interest in the real property must be joined."

Byrd Cos. v. Smith, 591 So. 2d 844, 846 (Ala. 1991) (citations omitted). *See also Johnston v. White-Spunner*, 342 So. 2d 754 (Ala. 1977) (when [**6] a trial court is asked to determine property rights of property owners not before the court, the absent property owners are indispensable parties and any judgment entered in the absence of those parties is void).

In this case, the Allbrittons requested that the trial court determine whether Allbritton Lane is a public or private road or, alternatively, to determine whether easements existed in favor of the property on which the Allbrittons live. Because any determination of those issues could impact the ownership interests in real property of Carl Allbritton, Mark's mother, and any other person owning an interest in property over which Allbritton Lane runs, those absent property owners are indispensable parties to this action. *Byrd Cos., supra*; and *Johnston, supra*. The absence of the other affected property owners renders the trial court's judgment on those issues void.

Additionally, the county is an indispensable party to an action seeking to determine whether a road is public or private. *Boles v. Autery*, 554 So. 2d 959, 962 (Ala. 1989). *See also* Ala. Code 1975, § 23-1-80 ("The county commissions of the several counties of this state have general superintendence of the public roads ... [**7] within their respective counties ....").

> "The trial court's determination of whether the road was public or was pri-

> vate might affect not only the rights of the individual litigants but also the rights of members of the public to use the road, the duty of the county to maintain it, and the liability of the county for failure to maintain in. If the county is not joined as a party, then neither it nor other members of the public are bound by the trial court's ruling. Accordingly, if the county and other persons are not bound, then the status of the road as public or private is subject to being litigated again, and the results of later litigation may be inconsistent with the results of the initial litigation."

Boles, 554 So. 2d at 961. As recognized in *Boles*, the fact that a county employee is called to testify as a witness at trial -- as occurred in this case -- does not negate the requirement that the county be joined as a party to the action. *Id.*

"The absence of a necessary and indispensable party necessitates the dismissal of the cause without prejudice or a reversal with directions to allow the cause to stand over for amendment." *J.C. Jacobs Banking Co. v. Campbell*, 406 So. 2d 834, 850-51 (Ala. 1981). [**8] *See also Brewton v. Baker*, 989 So. 2d 1137, 1140 (Ala. Civ. App. 2008) (quoting and relying on *J.C. Jacobs Banking Co., supra*). We, therefore, reverse the judgment of the trial court, and we remand the case to allow joinder of all [*245] necessary and indispensable parties and for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Bryan, and Thomas, JJ., concur.

Mark Anderson v. Fayette County Board of Education and The Trane Company, Inc.

1980194

SUPREME COURT OF ALABAMA

738 So. 2d 854; 1999 Ala. LEXIS 168

June 11, 1999, Released

SUBSEQUENT HISTORY: [**1] As Corrected July 7, 1999. As Corrected September 29, 1999. Released for Publication September 24, 1999.

PRIOR HISTORY: Appeal from Fayette Circuit Court. (CV-96-98). Before Roger D. Halcomb, TRIAL JUDGE.

DISPOSITION: AFFIRMED.

CORE TERMS: bid, engineering, energy, professional services, customer, Competitive Bid Law, competitive, engineer, abuse-of-discretion, monitoring, guaranteed, incidental, exempted, savings, summary judgment, personality, emergency, audit, Bid Law, attorney general's, misrepresentation, decisive, heating, professional skill, high degree, installation, injunction, architect, Alabama Competitive Bid Law, matter of law

COUNSEL: For Appellant: Clatus Junkin and Charles E. Harrison of Junkin & Harrison, Fayette.

For Appellees: Donald B. Sweeney, Jr., Rhonda Pitts Chambers, and David P. Condon of Rives & Peterson, P.C., Birmingham, for Fayette County Board of Education and Bobby Hathcock.

Walter J. Sears III and Douglas E. Eckert of Bradley, Arant, Rose & White, L.L.P., Birmingham, for The Trane Company.

JUDGES: HOUSTON, Justice. Hooper, C.J., and Maddox, Kennedy, Cook, and Brown, JJ., concur. See and Lyons, JJ., concur in the result. Johnstone, J., dissents.

OPINION BY: HOUSTON

OPINION

[*855] HOUSTON, Justice.

The plaintiff Mark Anderson appeals a summary judgment against various claims he made stemming from an alleged violation of the Alabama Competitive Bid Law by the Trane Company and the Fayette County Board of Education. We affirm.

When reviewing a summary judgment, we examine the evidence in the light most favorable to the nonmovant. *Scott v. Villegas*, 723 So. 2d 642, 643 (Ala. 1998). In this case, however, the facts are not in dispute. Therefore, the only question before us is whether the defendants, Trane and the Board, were entitled to a judgment as a matter of law. Rule 56, Ala. R. Civ. P.; *Ex parte Coleman*, 705 So. 2d 392, 394 (Ala. 1997).

In December 1995, Fayette County Superintendent of Education Bobby Hathcock and members of the Fayette County Board of Education met with representatives from Trane, a provider of [**2] air-conditioning, heating, and ventilation equipment. The purpose of the meeting was to discuss the sale of air-conditioning and heating equipment and services to Fayette County. During the meeting, Trane told the Board that other customers had obtained opinions from attorneys that indicated contracts such as the one Trane uses would not be subject to the Alabama Competitive Bid Law ("the Bid Law"), codified at Ala. Code 1975, § 41-16-20 et seq.

In February 1996, the Board entered into a contract with Trane whereby the Board would pay Trane $ 35,750 to perform an "energy audit." In performing this "energy audit," Trane 1) analyzed the existing consumption of energy by the Fayette County School System's facilities; 2) made detailed reports of all the findings; and, based on those findings, 3) made recommendations as to what actions, including the installation of new equipment, could be taken to reduce, or make more efficient, the energy consumed. Included in the "energy audit" agreement was the understanding that if the Board entered into the "larger agreement" with Trane described below, then the $ 35,750 would be rolled into the total cost, which would then be financed; otherwise,

[**3] the Board would be immediately liable to Trane for the full $ 35,750.

In June 1996, the Board decided to enter into that "larger agreement," known as a "Performance Agreement for Comfort from Trane" ("PACT"). The PACT provided, in pertinent part:

> "The parties acknowledge and agree that the essence of this Agreement is to procure the professional services of Trane to design and, as a necessary component, install systems and equipment to achieve specified operational and energy savings. Trane's professional services shall include, without limitation, the following: survey of all specified schools for HVAC equipment, lighting, controls; prepare computer models of the schools based on the buildings' current operation and their respective operation subsequent to the retrofit; consultation with Alabama Power Company to seek reduced utility rates; consult with architect for design approval; consult with Customer's facilities manager, consultation with mechanical contractor; prepare engineered [*856] drawings for installment of controls, and HVAC equipment; monitoring of all relevant utility bills for the Term and such applicable Renewal Option exercised by Customer; weekly visits [**4] to Customer to review building automation system event logs for each system; semi-annual visits to the school to check calibration and proper operation; semi-annual visits to the school to monitor HVAC equipment; preparation and presentation of annual reports to Customer on the effect of energy conservation measures; and monthly meetings with Customer's facilities manager to discuss operations of the buildings over the Term and such applicable Renewal Option exercised by Customer.
>
> "No later than November 26, 1996 ('Substantial Completion'), Trane shall have designed and performed such of the foregoing professional services and work as appropriate to substantially complete installation of the Equipment and such other work as Trane deems appropriate to achieve the Savings guaranteed Customer (hereinafter, collectively, the 'Work') as defined in this Agreement. Trane's obligation hereunder is limited to the Work as defined herein. Excluded from the Work are any modifications or alternations to the Premises (not expressly included within the Work as defined) that may be required by operation of the Americans With Disabilities Act or any other law or building code(s)."

In accordance [**5] with the PACT, the Board entered into a Maintenance Agreement with Trane on August 8, 1996. Pursuant to this agreement, Trane would provide monitoring and monthly bill analysis, for approximately $ 20,880 per year. Both the PACT and the Maintenance Agreement were for a 3-year term, renewable for up to 10 years.

Anderson, a taxpayer in Fayette County, filed this action in the Fayette Circuit Court, against Trane and the Board, alleging that the contracts between Trane and the Board violated the Bid Law. Anderson requested not only injunctive relief, but also damages based on claims of fraud, misrepresentation, and conspiracy. The trial court entered a summary judgment for the defendants, basing it on a conclusion that the Board did not abuse its discretion in determining that the contracts with Trane were not subject to the Bid Law. While we affirm the summary judgment, we hold that "abuse of discretion" is not the appropriate standard for determining whether the contract violates the Bid Law.

Both Trane and the Board argue that the Board did not abuse its discretion in not letting out for bid the contracts it eventually signed with Trane. They argue that an "abuse-of-discretion" [**6] standard is the only appropriate standard to be used when reviewing *any* decision of the Board concerning the Bid Law. In support of this argument, Trane and the Board cite several cases, including *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elec., Inc.*, 657 So. 2d 857 (Ala. 1995); *Crest Constr. Corp. v. Shelby County Bd. of Educ.*, 612 So. 2d 425 (Ala. 1992); and *International Telecomm. Sys. v. State*, 359 So. 2d 364 (Ala. 1978).

However, those cases refer only to the Board's discretion in awarding a contract that has already been let out for bid. According to the Bid Law, the Board clearly has the discretion to determine the "lowest responsible bidder." See Ala. Code 1975, § 41-16-20. This does not mean that the Board's decision that a contract meets one of the exceptions found in § 41-16-51 will be given

some presumption of correctness and thus will be reviewed under an abuse-of-discretion standard.

The only case mentioned by the defendants wherein this Court has used an abuse-of-discretion standard when reviewing a Board's determination that a contract fits an exception to the Bid Law is *Union Springs Tel. Co. v. Rowell*, 623 So. 2d [**7] 732 (Ala. 1993). In that case, the Union Springs Telephone Company ("USTC") sued the Alabama Department of Finance, seeking to enjoin the Finance Department [*857] from giving effect to a contract entered into between the Alabama Department of Corrections and Talton Communications (a competitor of USTC) to provide pay-telephone services. USTC alleged that the contract violated the Bid Law because it had not been let out for bid. The Finance Department defended by claiming that this contract did not have to be let out for bid because it was entered in response to an "emergency"; see Ala. Code 1975, § 41-16-23, which this Court stated in *Union Springs*, "allows a state agency to enter into a contract without first seeking competitive bids 'in case of emergency affecting public health, safety, or convenience,' provided that the state agency declares in writing the nature of the emergency." 623 So. 2d at 733 (quoting the trial court's order). This Court wrote in *Union Springs*:

> "USTC contends that the trial court erred [in entering a judgment for the Finance Department] because it believed that it could not 'look behind' the Department's determination that the lack of a viable [**8] contract for pay-telephone services at BCCF constituted an emergency. This Court wishes to emphasize that these determinations are reviewable by the courts; if they were not, the Competitive Bid Law would become practically useless, because the State could declare an emergency anytime it wanted to and thus dispense with the bidding process. See *Reynolds Construction Co. v. Twin Falls County*, 92 Idaho 61, 437 P.2d 14 (1968). The scope of review is limited, however, because a proclamation of a state agency is clothed with a presumption of correctness and may not be overturned unless it is shown to be unreasonable, arbitrary, or capricious. *Benton v. Alabama Board of Medical Examiners*, 467 So. 2d 234 (Ala. 1985)."

623 So. 2d at 734.

Although in *Union Springs* we did apply an abuse-of-discretion standard to the state agency's determination that it faced an "emergency," *Union Springs* should not be used to apply that standard to any exception to the Bid Law that someone may claim exists.

The exception at issue in the present case is found at § 41-16-51(a)(3); it provides an exception to the competitive-bid requirement for

> "contracts for the securing [**9] of services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, consultants, certified public accountants, public accountants, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part."

Determining whether a situation is an "emergency," within the meaning of that word as it is used in § 41-16-23, is essentially different from making a "determination" whether an individual is an attorney, a physician, an architect, or an engineer, etc., as listed in § 41-16-51(a)(3). While the former issue would inherently vest a state entity with substantial discretion, which would prompt the use of an abuse-of-discretion standard on review, the latter would not. In fact, none of the exceptions listed in § 41-16-51(a) would vest a state entity with discretion. Rather, those exceptions involve situations where the nature of the exception's subject is already determined, such as contracts for: the purchase of insurance [(a)(1)]; the purchase of election ballots [(a)(2)]; the purchase of products made by the blind under the supervision of the Alabama Institute [**10] for Deaf and Blind; the purchase of maps from a federal agency [(a)(7)]; and the purchase of manuscripts [(a)(8)]. It would be foolish to maintain that an Alabama court must be highly deferential when reviewing a state entity's "determination" of whether a contract is one concerning "sanitation or solid waste collection ... and disposal" [(a)(10)], because a contract either is or is not one of that nature, independent of a Board's determination.

Therefore, we see no reason to apply an abuse-of-discretion standard to the exceptions [*858] listed in § 41-16-51, and we hold that the trial court erred in applying an abuse-of-discretion standard in this case. However, even examining the facts under a de novo standard of review, we conclude that the trial court properly entered the summary judgment for the defendants.

Anderson concedes that the "energy audit" contract might be considered a contract for engineering services or a contract requiring a "high degree of professional skill." § 41-16-51(a)(3). With regard to the Maintenance Agreement, we think that it is inexorably intertwined with the PACT. This is because the Maintenance Agreement concerns the upkeep of the equipment, most [**11] of which is Trane's, that was installed under the PACT.

The main area of contention, then, surrounds the nature of the PACT. Anderson contends that the PACT is basically a contract under which Trane removed old equipment, installed new equipment, and did some paving and electrical work. There is no doubt that Trane performed those tasks. However, there is much more to the PACT (which is the central agreement between Trane and the Board) than Anderson suggests. The language from the PACT, as quoted above, details not just physical labor, but also various activities designed to achieve one particular goal that would require a "high degree of professional skill where the personality of [Trane] would play[] a decisive part" (§ 41-16-51(a)(3)): operational and energy savings. Some of these activities include: 1) extensive surveying of the facilities to determine what equipment should be used and where it should be located; 2) preparing computer models of the schools to demonstrate the efficiency of the facilities' heating and air conditioning systems "before and after" the installations; 3) consulting with Alabama Power Company, architects, mechanical contractors, and the Board's [**12] facilities manager; 4) continued monitoring of all of the facilities' utility bills for the entire term of the contract; 5) continued monitoring of the system event logs for every installed system; and 6) continuing to prepare and present reports to the Board regarding the effect of "energy conservation measures."

In short, we believe that the Board purchased more than just equipment; rather, the Board purchased what its members claimed in deposition to have purchased: a "comprehensive energy-savings plan" under which they would rely on Trane's expertise and would turn over to Trane the job of making and keeping the Board's facilities' heating and air-conditioning systems efficient. This reading of the PACT is bolstered by the fact that Trane *guaranteed* that its design would work; that is, Trane agreed that if the operational and energy savings did not reach $ 167,498 per year for up to 10 years, then Trane would pay to the Board an amount equal to the deficiency.

In support of our holding, we note that we are persuaded by an attorney general's opinion cited by the defendants. We have recognized that "while an opinion of the attorney general is not binding, it can constitute [**13] persuasive authority." *Alabama-Tennessee Natural Gas Co. v. Southern Natural Gas Co.*, 694 So. 2d 1344, 1346 (Ala. 1997) (citing *Poe v. Grove Hill Mem. Hosp. Bd.*, 441 So. 2d 861, 863 (Ala. 1983)).

In Op. Att'y Gen. No. 84-00262 (1984), the attorney general dealt with a situation very similar to the one we have before us:

> "In a recent letter addressed to this office you requested an opinion regarding an interpretation of the Alabama Competitive Bid Law found in *Code of Alabama 1975*, § 41-16-20 through § 41-16-32. Your letter reads, in pertinent part, as follows:
>
> "'Please accept this letter as a request for an Attorney General's Opinion as to whether a five-year public contract for professional services involving the purchase of integrated sophisticated scientific equipment and services requiring a high degree of professional skill is exempt from the Competitive Bid Law....
>
> [*859] "'The contract involved in this request is proposed by ERIC Engineering. It is described in detail in the enclosed memorandum and presents a unique bundle of highly sophisticated professional services to customers including guaranteed utility cost savings to the customer [**14] over a five-year term, engineering services, scientific monitoring, implementation of a utility cost containment program, and financial services for the customer to pay for the program. The financial services include a purchase by the customer of all monitoring and control equipment incidental to the utility cost containment program over the five-year term through a lease-purchase installment contract between the customer and Continental Leasing Corporation....
>
> "'The specific issue which we request the Attorney General to address is whether a five-year public contract for professional services, which includes as part of the service the purchase of highly sophisticated monitoring and control

equipment incidental to and inextricably integrated with the service, is exempt from the Competitive Bid Law....' (Emphasis added [in the attorney general's opinion].)

"*Code of Alabama 1975*, § 41-16-21(a), provides that competitive bids shall not be required for contracts for the securing of services of engineers. *Therefore, based on the representations contained in your request letter it is my opinion that the proposed contract between Alabama A & M University and* [**15] *ERIC Engineering is exempt from competitive bid pursuant to § 41-16-21, supra.* However, it should be noted that public agencies must solicit competitive bids in those instances where the primary purpose of the contract is to purchase equipment which could be supplied by more than one vendor and the professional services are merely incidental to the purchase of said equipment. In addition competitive bids are required on equipment in those instances where it is possible to purchase the equipment in a separate contract from the professional services. The mere fact that it is inconvenient to purchase the equipment under a separate contract does not exempt the purchase of the equipment from the competitive bid law. This office does not have the expertise needed to determine if the equipment in question is capable of being purchased by bid or not. This decision is a factual one which must be made by the purchasing authority."

(Emphasis added except as indicated otherwise.)

With regard to Anderson's other claims, our holding that the agreements between Trane and the Board meet the § 41-16-51(a)(3) exception renders these claims invalid. However, Anderson contends that even [**16] if the contracts can be considered contracts for "engineering services," the contracts are still void because Trane was not licensed or certified to perform "engineering services" in Alabama at the time the contracts were performed. See Ala. Code 1975, § 34-11-2(a).

Trane correctly points out that engineers are required to be registered, but not corporations; a corporation needs only a certificate of authorization assuring that those in charge of engineering for that corporation are registered engineers. Ala. Code 1975, § 34-11-9. In this case, Trane subcontracted the engineering work to Sain Engineering, a firm that utilizes registered engineers. While it is true that Trane did not have a certificate of authorization when it entered into the contracts with the Board, Trane later obtained one. Like the trial court, we do not see the requirement of this certificate as being a protective measure akin to an engineer's registration required under § 34-11-2(a) or a corporation's qualification to do business in Alabama, required under § 10-2B-15.02(a). Therefore, we decline to hold that the contracts between Trane and the Board were void on the basis that Trane did not hold a certificate [**17] of authorization [*860] at the time it entered into the contracts with the Board.

AFFIRMED.

Hooper, C.J., and Maddox, Kennedy, Cook, and Brown, JJ., concur.

See and Lyons, JJ., concur in the result.

Johnstone, J., dissents.

CONCUR BY: SEE

CONCUR

SEE, Justice (concurring in the result).

I agree with that part of the majority opinion that holds that the trial court erred by applying an "abuse-of-discretion" standard in this case. I disagree with that part of the majority opinion that holds that the contracts here at issue are exempted from the Alabama Competitive Bid Law, Ala. Code 1975, § 41-16-20 *et seq*. Nonetheless, because injunctive relief is no longer available, and because Mark Anderson's tort claims fail as a matter of law, I concur in the result.

In 1996, the Fayette County Board of Education (the "Board") entered into a series of contracts with the Trane Company ("Trane"). Under the first contract (the "Audit Contract"), Trane agreed to analyze the existing energy consumption of the Fayette County School System's facilities and to make recommendations as to what could be done to reduce energy consumption at those facilities. In return, the Board agreed to pay Trane $ 35,750. [**18] Under the second contract (the "Performance Contract"), Trane agreed to carry out the recommendations it made under the Audit Contract, including the removal of old heating, air-conditioning, and lighting equipment, and the installation of new heating, airconditioning, and lighting equipment. Trane also guaranteed that the Board would save at least $ 167,498 per year in energy costs. In return, the Board agreed to pay Trane $ 1,246,773. Under the third contract (the "Maintenance Contract"), Trane agreed to

provide monthly performance monitoring, monthly utility-bill analysis, and various quarterly reports and recommendations. In return, the Board agreed to pay Trane $ 20,880 annually for 10 years, adjusted upwards at 4% each year. Mark Anderson is a taxpayer of Fayette County, and, he says, a competitor of Trane; he sued Trane and the Board, seeking to have the Performance Contract declared null and void and seeking damages to compensate for harm he says the county taxpayers had incurred as a result of the Board's failure to competitively bid out the Performance Contract. Specifically, Anderson asserted claims of fraud, misrepresentation, and conspiracy, all based on Trane's statements [**19] to the Board indicating that the contract was exempted from the requirements of the Competitive Bid Law. Anderson later amended his complaint to seek a permanent injunction against enforcement of the Performance Contract.

The Competitive Bid Law contains several exceptions to its general requirement that contracts for the purchase of goods or services in excess of $ 7,500 be awarded on the basis of competitive bids. The majority relies on the exception provided by Ala. Code 1975, § 41-16-51(a)(3), in holding that the contracts entered into in this case are exempted from the Competitive Bid Law. I disagree. Section 41-16-51(a)(3) provides that the Competitive Bid Law does not apply to

> "contracts for securing services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, consultants, certified public accountants, public accountants, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part."

Although the plain language of the exception is limited to the purchase of specific services only, the exception arguably extends to the purchase of [**20] nonexempted services or equipment that are both "incidental to and inextricably integrated" with a purchase of exempted services. See Op. Att'y Gen., No. 84-00262 (1984) (expressing the opinion that a contract securing [*861] professional services was exempted from the Competitive Bid Law even though it included the purchase of equipment that was "incidental to and inextricably integrated with the service"); see also *Alabama-Tennessee Natural Gas Co. v. Southern Natural Gas Co.*, 694 So. 2d 1344, 1346 (Ala. 1997) ("While an opinion of the attorney general is not binding, it can constitute persuasive authority."). However, the exception does not extend to purchases "where the primary purpose of the contract is to purchase equipment which could be supplied by more than one vendor and the professional services are merely incidental to the purchase of said equipment." Op. Att'y Gen., No. 84-00262 (1984). Nor does the exception extend to purchases "where it is possible to purchase the equipment in a separate contract from the professional services." *Id.*

The contracts in this case involve purchases of nonexempted services and equipment that are not merely incidental to the purchase of any [**21] exempted services. An examination of Trane's own itemization of expenditures under the Performance Contract reveals that $ 249,355, at most, was spent on exempted engineering services. [1] The rest of the nearly $ 1 million in expenses was expressly allocated to nonexempted purchases, including the purchase of Trane equipment ($ 242,729), the purchase of non-Trane equipment ($ 12,398), mechanical work ($ 344,667), electrical work ($ 78,241), lighting work ($ 305,381), and work on air-lock doors ($ 16,000). Instead of being incidental to the purchase of the engineering services, the nonexempted purchases appear to be the primary purpose for the Performance Contract.

> 1 The itemization provided by Trane contains an entry for $ 249,335 for "Engineering and 'Mobilization Down Payment.'" It is unclear how much, if any, of this amount was actually for engineering services. In fact, Trane's project manager testified that this entry actually represented a 20% down payment on the contract and that the only engineering involved in any of the contracts was pursuant to the Audit Contract, which cost the Board $ 35,750.

[**22] The majority ignores Trane's own itemization of expenses, characterizing the Performance Contract as a "comprehensive energysaving plan" under which Trane guaranteed that the Board would save $ 167,498 a year in energy expenses. So. 2d at . The majority concludes that such a plan falls under the exemption provided by § 41-16-51(a)(3) as a contract for professional services "where the personality of the individual plays a decisive part." However, it is clear that Trane's personalities, or the personality of its employees, played no decisive part in the Board's decision to enter into these contracts. Neither the Board nor Trane asserts that anything separates Trane equipment or services from those provided by other similar companies. In fact, it appears that Trane actually subcontracted out the engineering services, thus negating any suggestion that "the personality of the individual [engineer] played a decisive part." § 41-16-51(a)(3); see Op. Att'y Gen., No. 84-00262 (1984). Moreover, nothing in the record indicates that the Board could not "purchase

the equipment in a separate contract from the professional services." Op. Att'y Gen., No. 84-00262 (1984).

Instead, Trane, [**23] the Board, and the majority of this Court point to the financial consideration of "guaranteed savings" as the rationale supporting the Performance Contract. Such a consideration, however, falls squarely within the primary purpose of the Competitive Bid Law to assure quality and economy. See *Arrington v. Associated Gen. Contractors of America*, 403 So. 2d 893 (Ala. 1981) (holding that the legislature's intent in passing the Competitive Bid Law was to ensure that governmental entities secured the best-quality equipment at the lowest possible price). Thus, the Board should have bid out the Performance Contract, to determine whether a responsible bidder would offer either greater guaranteed savings at a similar cost or the same guaranteed savings at a lower cost.

[*862] Although I disagree with the majority's rationale, I concur in the result because the legislature has provided the public with only one remedy to prevent a public agency from violating the provisions of the Competitive Bid Law. "A taxpayer or a 'bona fide unsuccessful bidder' may sue 'to enjoin execution of any contract entered into in violation of the provisions of [Article 3, § 41-16-50 through 41-16-63].' Ala. Code 1975, [**24] § 41-16-61. This language is unambiguous." *Crest Constr. Corp. v. Shelby County Bd. of Educ.*, 612 So. 2d 425, 431 (Ala. 1992) (alteration in original). Once a contract has been entered into and performance actually begun, this remedy is no longer available. See *Masonry Arts, Inc. v. Mobile County Commission*, 628 So. 2d 334 (Ala. 1994) (dismissing Competitive-Bid-Law challenge as moot after contract was executed and performance begun). The Performance Contract was effective on May 31, 1996, and was signed by the parties in early June of that year. Anderson admitted during his deposition that he was aware of the Performance Contract long before the contract was entered into. Despite this knowledge, Anderson did not object at any of the public meetings held on the subject, and did not file his lawsuit until several months after Trane had begun its performance of the contract. Anderson never requested a preliminary injunction, and did not even request a permanent injunction until he amended his complaint in October 1996. The trial court denied Anderson's request for a permanent injunction, and the trial court's order was not superseded by Anderson's appeal. See *Masonry Arts*, [**25] 628 So. 2d at 335 (holding that a similar denial was not superseded because the appellant did not seek a stay of the trial court's order). Trane has now completed the installation of the energy-saving measures provided under the Performance Contract, and the injunctive relief Anderson sought is no longer available. Accordingly, Anderson's appeal, insofar as it relates to the trial court's denial of an injunction, is moot and should be dismissed.

Anderson also argues that the trial court erred by entering a summary judgment with respect to the derivative claims of fraud, misrepresentation, and conspiracy he brought as a county taxpayer. Anderson correctly notes that the Competitive Bid Law does not preclude claims based on intentional wrongful conduct by persons involved in a bidding process. See *Spring Hill Lighting & Supply Co. v. Square D Co.*, 662 So. 2d 1141 (Ala. 1995). Anderson's tort claims, however, fail as a matter of law. [2] All three tort claims seek damages for Trane's representing to the Board that the Performance Contract was exempted from the Competitive Bid Law. However, a misrepresentation of the law is actionable only if there is a confidential relationship between [**26] the parties or if the representing party is an attorney. See *Epps Aircraft Co. v. Exxon Corp.*, 859 F. Supp. 533, 538 (M.D. Ala. 1993). It is undisputed that Trane is not an attorney, and Anderson presented no evidence indicating that Trane had a confidential relationship with the Board. Accordingly, the trial court properly entered the summary judgment in favor of Trane and the Board on these claims.

2 The trial court held that Anderson lacked standing to maintain his tort claims against the Board and Trane because Trane's alleged misrepresentation was made not to Anderson but to the Board. My conclusion that the alleged misrepresentation was, as a matter of law, not actionable makes unnecessary any discussion of whether Anderson had standing to assert these claims.

Lyons, J., concurs.

Jerry E. Andrews and Patricia Ann Andrews v. James R. Hatten

2991220

COURT OF CIVIL APPEALS OF ALABAMA

794 So. 2d 1184; 2001 Ala. Civ. App. LEXIS 134

March 30, 2001, Released

SUBSEQUENT HISTORY: [**1] Released for Publication August 15, 2001.

PRIOR HISTORY: Appeal from Clarke Circuit Court. (CV-98-201).

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: easement, prescription, heirs, undisputed, public road, predecessors, private easement, permission, conveyed, lived, cable, dominant estate, prescriptive easement, abandonment, conveyance, abandoned, claimant, tenement, servient, locked, nonuse, unpaved, erected, judgment declaring, claim of right, burden of proving, subject property, prescriptive, presumptive, terminated

COUNSEL: For Appellants: Ronnie E. Keahey, Grove Hill.

For Appellee: J. Stuart Wallace, Mobile.

JUDGES: THOMPSON, Judge. Yates, P.J., and Pittman and Murdock, JJ., concur. Crawley, J., concurs in the result.

OPINION BY: THOMPSON

OPINION

[*1185] THOMPSON, Judge

Jerry Andrews and his wife Patricia Andrews appeal from the trial court's judgment declaring that they had not acquired a private easement by prescription across the land of James R. Hatten, a neighbor whose land is coterminous with their land.

Hatten acquired a parcel of unimproved property in 1990. Shortly after he acquired the property, he noticed tire tracks and other evidence indicating that people were traveling along two [1] unpaved roads that crossed his property. Hatten erected a cable across one of the roads to stop the traffic. (Because the roads were distinguished at trial by use of a map showing this road in green ink, we will refer to this road as "the green road.") Upon discovering that the first cable he had erected across the road had been torn down, Hatten erected another cable across the road. When he found the second cable had been torn down, [**2] Hatten placed spikes and tacks across the green road to destroy the tires on the vehicles of persons using that road. This measure effectively stopped people from crossing Hatten's land.

1 While testimony was presented concerning two unpaved roads, it is undisputed that the Andrewses were seeking an easement only across one of the roads, a road known as "the green road."

In 1995, the Gordons, coterminous landowners to the north of Hatten's property, arranged for a temporary right to use the green road in exchange for payment of [*1186] $ 500. The Gordons used the road to remove timber from their property.

The Andrewses purchased their land in 1996, from the various heirs of John Stewart, who had owned the land directly adjacent to the parcel of land that is now owned by Hatten. [2] When the Andrewses purchased their land, the green road on Hatten's property was gated and locked. It is undisputed that the Andrewses never used the green road or any roads on Hatten's property and that Hatten had never permitted anyone [**3] to use either of the unpaved roads on his property without payment. Further, Hatten had effectively kept people from using the green road after he acquired the property in 1990. In September 1996, the Andrewses' attorney contacted Hatten on their behalf, seeking to acquire an easement over the property. Hatten testified that he offered the Andrewses an easement in exchange for hunting rights on their property, but stated that the Andrewses did not agree to this exchange.

2 Six separate deeds of conveyances executed by the heirs of John Stewart evidence the transfer to the Andrewses of the property directly adjacent to the land owned by James Hatten.

In October 1998, the Andrewses sued Hatten, seeking a judgment declaring a private easement over the green road located on Hatten's property. The Andrewses waived their right to a trial by jury, and the court held a bench trial in October 1999. The court entered a judgment holding that the Andrewses were not entitled to a private easement across the road. The Andrewses [**4] appealed to the supreme court. That court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

The Andrewses claim that the trial court erred in finding that they had not acquired a private easement by prescription over the green road on Hatten's property, particularly in light of the fact that the green road was the only access to a public road.

In order to establish an easement by prescription, the claimant must use the property over which the easement is claimed, for a period of 20 years or more, in a manner adverse to the owner of the property, under a claim of right, and the use must be exclusive, continuous, and uninterrupted, with the actual or presumptive knowledge of the owner. *Hereford v. Gingo-Morgan Park*, 551 So. 2d 918 (Ala. 1989). The law presumes that the use is permissive, and the claimant has the burden of proving that the use was adverse to the owner. *Bull v. Salsman*, 435 So. 2d 27 (Ala. 1983).

The trial court stated in its judgment that the Andrewses had not acquired an easement by prescription because they had never come into possession of the property; it is undisputed that [**5] the gate restricting entrance to the green road was present and was locked when the Andrewses purchased their property. In addition, the trial court noted in its judgment that the September 17, 1996, letter written on behalf of the Andrewses and addressed to Hatten, had sought to acquire an easement across Hatten's property. The trial court apparently interpreted this letter as an acknowledgment by the Andrewses of Hatten's superior title in the land and as a tacit admission that they were not entitled to an easement by prescription.

The Andrewses moved to set aside the judgment, or, in the alternative, for a new trial, challenging, among other things, the trial court's interpretation of the September 17, 1996, letter as an acknowledgement of Hatten's superior title. After conducting a hearing on the motion, the trial court [*1187] entered an amended judgment that denied the Andrewses an easement by prescription across Hatten's property, but changed the rationale on which it was based. The amended judgment was not based on the interpretation of the September 17, 1996, letter as an acknowledgment of superior title. Further, although the court recognized that there was authority to the contrary, [**6] it ruled that the Andrewses had not acquired an easement by prescription because they had never come into possession of the subject property. In addition, the court noted that the Andrewses had not sought to have the subject road declared a public road, but stated that the evidence indicated the existence of a public road and not an easement by prescription.

Willie Pugh and J.D. Leonard, as heirs of Stewart, had conveyed their property to the Andrewses. They testified that they were 62 and 76 years old, respectively, and had lived in the community all their lives. They testified that they and all the people in their community had used the green road, for as long as they could remember, to reach to property now owned by the Andrewses, until Hatten bought his property. E.J. Chapman, a 70-year-old man who resided in the area, testified that as a boy he had used the road to ride on horseback and in wagons to reach the property now owned by the Andrews. He also testified that he recalled that people had lived along the green road and that the public had used it for more than 20 years. Walter Lee Griffen, a 72-year-old man, testified that he had lived on the green road during his childhood, [**7] that he had walked along it to get to school, and that he had taken a wagon along the green road all the way to a place he referred to as "Blue Mountain." [3] All of these witnesses testified that they had never sought permission from anyone to use the road and that it had been commonly used by persons in the community.

3 The record does not clearly indicate the exact location of "Blue Mountain."

Gary Butler, a consulting forester, had, in 1995, assisted the Gordons, Hatten's neighbors to the north. He testified that he had been informed that there was no easement available through the Hatten property on which to haul timber harvested from the Gordons' land. Mr. Gordon testified that he had negotiated with Hatten for the use of an easement across the green road in exchange for a payment of $ 500 and a written agreement to make any necessary repairs to the road after he had finished using it.

The evidence is undisputed that the green road had been used freely by the public, without anyone's seeking permission, [**8] for a period exceeding 20 years, before Hatten purchased his property in 1990. This evidence leads us to conclude that the Stewart heirs, the prior owners of the property the Andrewses now own, had acquired an easement by prescription [4] in the green road. Hatten argues that permission was implied by the

conduct of his predecessors in ownership and that the burden was on the Andrewses to prove that the use of the green road was adverse to the owner of the property. We are unpersuaded by this argument. The facts of the present case are similar to those of *Belcher v. Belcher*, 284 Ala. 254, 224 So. 2d 613 (1969). The *Belcher* court noted that the evidence indicated that those claiming an easement, and their predecessors in title, had used the road in question to haul [*1188] their belongings to and from their property for a period of over 20 years. That court stated:

> 4 The evidence also would have supported a finding that the green road was a public road, but the Andrewses did not seek to have the green road declared a public road and did not argue that issue before the trial court or in their brief on appeal.

[**9]

> "We cannot agree that there was no claim of right when all of the above-mentioned activity took place on the only roadway leading to and from dwellings for over twenty years. Certain it is that the owners of appellants' land through the years had actual or presumptive knowledge of the use and that the use had been made for more than twenty years prior to the purchase of the land by appellants."

284 Ala. at 257, 224 So. 2d at 615. Like the claimants in *Belcher*, the Andrewses have demonstrated frequent use of a road over a period of more than 20 years. As in *Belcher*, testimony established that people had once lived along the road and that the road was the only access to a public road. Hatten presented no evidence to refute the testimony regarding how the green road had been used before he purchased the subject property. Cf. *Smith v. Gamble*, 344 So. 2d 749 (Ala. 1977)(the party opposing the easement presented conflicting testimony as to whether the predecessors in interest had had knowledge of any adverse use of the easement). *See also, Stewart v. Shook Hill Road Prop. Owners' Ass'n*, 726 So. 2d 694 (Ala. Civ. App. 1998). [**10] The ore tenus presumption of correctness in favor of the trial court's findings does not apply when, as here, the facts are undisputed. *Hereford*, 551 So. 2d at 920. Relying on *Belcher*, we conclude that the trial court erred in determining that the Andrewses had not presented sufficient evidence to prove that an easement by prescription in the green road had been created in favor of their predecessors in interest. The undisputed evidence in the record would require a finding that the Stewart heirs and their predecessors in interest, by using the green road adversely for more than 20 years, had acquired an easement by prescription over that road. The Stewart heirs conveyed that easement to the Andrewses when they conveyed their land to them. An easement by prescription passes with the conveyance of the land, even when it is not specifically mentioned in the instrument of conveyance. *Fesperman v. Grier*, 294 Ala. 163, 313 So. 2d 525 (1975).

We now consider whether the easement by prescription acquired by the Stewart heirs was effectively abandoned after the property was conveyed by the heirs. An easement by prescription involves two distinct tenements. [**11] One tenement is dominant and is the estate to which the right belongs. The other tenement is servient and is the estate upon which the obligation rests. *Wallace v. Putman*, 495 So. 2d 1072 (Ala. 1986). Hatten owns the servient estate and the Andrewses own the dominant estate. An easement may be terminated or abandoned if the owner of the dominant estate performs an act that renders the use of the easement impossible or treats the easement in a manner inconsistent with its further enjoyment. *Byrd Companies, Inc. v. Smith*, 591 So. 2d 844 (Ala. 1991). Hatten, the owner of the servient estate, exhibited conduct inconsistent with the further enjoyment of the easement, but the Andrewses, the owners of the dominant estate, have exhibited no conduct giving rise to an inference of abandonment of the easement. Further, Alabama law provides that, once created, an easement by prescription will not be terminated by mere nonuse. Any period of nonuse must extend for the entire prescriptive period in order to terminate the prescriptive easement. *Auerbach v. Parker*, 544 So. 2d 943 (Ala. 1989). Further, the burden of proving that a prescriptive easement [**12] has been abandoned rests on the party seeking to prove the abandonment. *Id.* It is undisputed [*1189] that when Hatten acquired the property, he prevented anyone from using the green road without his permission. Butler, the forester who testified on behalf of Hatten, confirmed this fact. Hatten demonstrated that he had enforced a firm policy against use of the road, during an 8-year period while he was in possession of his land. This falls 12 years short of the prescriptive 20-year period required to prove abandonment. Moreover, we conclude that the 8-year nonuse of the green road, considered along with the locked gate and Hatten's strict policy against use of the road for that 8-year period, is insufficient to support a finding of termination of an easement that had been created by prescription. We therefore reverse the judgment denying the Andrewses' request for a declaration of a prescriptive easement and remand the case for the trial court to enter a judgment consistent with this opinion.

REVERSED AND REMANDED.

Yates, P.J., and Pittman and Murdock, JJ., concur.

Crawley, J., concurs in the result.

Edwin H. Auerbach and Elva Auerbach v. Richard Parker

No. 87-1268

Supreme Court of Alabama

544 So. 2d 943; 1989 Ala. LEXIS 266

April 28, 1989, Filed

PRIOR HISTORY: [**1] Appeal from Montgomery Circuit Court, No. CV-87-767.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: abandonment, public road, erected, gate, abandoned, public highway, locked, property line, prescription, highway, nonuser, travel, map, gap, land owned, public way, prescriptive easement, discontinuance, traveling, declaring, disturbed, favorable, replaced, cattle, repair, permission, rural

COUNSEL: John T. Alley, Jr., and William B. Alverson, Jr., of Webb, Crumpton, McGregor, Sasser, Montgomery, Alabama, Attorneys for Appellant.

Stephen M. NeSmith of Riggs, NeSmith & Halstrom, Montgomery, Alabama, Attorneys for Appellee.

JUDGES: Adams, Hornsby, C.J., and Maddox, Almon, and Shores, JJ., concur.

OPINION BY: ADAMS

OPINION

[*944] Edwin H. Auerbach and Elva Auerbach appeal from the trial court's judgment that a rural Montgomery County road running over land owned by Richard Parker to land owned by the Auerbachs is not a public road and that the Auerbachs have not acquired an easement by prescription for the road's use.

The old "farm market wagon road" at issue, which appears on a 1901 map, connects Hillabee Road with Mount Zion Road in rural Montgomery County and was used by families in the early 1900's to reach Mount Zion Road without traveling the two to three miles necessary to otherwise reach Mount Zion Road from Hillabee Road. In 1938, the Auerbachs purchased land behind land owned by Parker's predecessor in title (Mrs. F.M. Gibson) and began using the road to reach their property. The road ran over the Gibson property and beside the Gibson [**2] home before reaching the Auerbach property and eventually joining Mount Zion Road. Over a number of years, however, the Auerbachs purchased all of the property behind the Gibson property, so that only the Gibson property and the Auerbach property were served by the road.

The record indicates that the Auerbachs traveled to their property to hunt, ride horseback, pick flowers, and tend to their fruit trees and that in doing so they used the road to come and go to their house, without seeking permission from Mrs. Gibson; in fact, testimony indicates that the Auerbachs frequently stopped to visit with Mrs. Gibson, and that no one seeking access to the Auerbach property (either family members or employees) requested permission from Mrs. Gibson before using the road. Further, the Auerbachs used the road to bring equipment onto their property to cut and bail hay, as the record indicated that a "boggy bottom" prevented the equipment from reaching the hay field when brought in from Mount Zion Road.

Both the Auerbachs and Mrs. Gibson erected barriers on the road: Mrs. Gibson erected a "gap" across the road near her home to control her cattle, and the Auerbachs erected a locked gate at their [**3] property line. Although the testimony is disputed as to whether Mrs. Gibson controlled access to the road, a gate over the "gap" was never locked, and the Auerbachs, when driving to their property, would open it, drive through, and close it behind them. [*945] But after purchasing the remaining property behind the Gibson home in 1957, the Auerbachs were the only family other than the Gibsons (Mrs. Gibson and her husband) to use the road. The record reflects that the completion of Mount Lebanon Road to Hillabee Road alleviated the need to travel the Gibson-Auerbach road to reach Mount Zion Road; the county stopped maintaining the road, and by 1967 it no longer appeared on a map of the area.

After Mrs. Gibson's death in 1984, Parker (who inherited the property) erected a gate over the road to protect the Gibson home from theft, and the record indicates that he gave the Auerbachs a key to gain access to the road. A dispute arose between Parker and the Auerbachs as to the number of people given access to the

road by the Auerbachs, and Parker placed a second lock on that gate. Testimony reflects that Parker was willing to unlock the gate upon notice from the Auerbachs that they required access [**4] to the road, but the Auerbachs testified that such an arrangement was not feasible for hay farming. The Auerbachs filed their lawsuit on May 12, 1987, seeking the declaration of a prescriptive easement for the use of the road.

The issues on appeal are whether the trial court erred in declaring the road to be a private road and in denying the Auerbachs a prescriptive easement to use the road across Parker's property. The trial court's judgment, being based on ore tenus testimony, will not be disturbed on appeal unless it is unsupported by the evidence or is palpably wrong. This Court, therefore, "will indulge all favorable presumptions to sustain that court's conclusion, and it will be disturbed on appeal only if shown to be plainly erroneous or manifestly unjust." *CRW, Inc. v. Twin Lakes Property Owners Ass'n, Inc.*, 521 So. 2d 939, 941 (Ala. 1988). (Citations omitted.)

The threshold issue is whether the trial court erred in declaring the road to be private. A public way or road is established in one of three ways: first, by a regular proceeding for that purpose; second, by a dedication of the road by the owner of the land it crosses and subsequent acceptance by the proper authorities; [**5] or, third, by virtue of its being generally used by the public for 20 years. *CRW, Inc. v. Twin Lakes Property Owners Ass'n, Inc.*, 521 So. 2d at 941. The record is replete with evidence that the Gibson-Auerbach road was used by the public to reach Mount Zion Road from Hillabee Road for more than 20 years, that it was travelled by families who lived on the road beyond the Gibson property, and that it was mapped as a public highway. Thus, the Gibson-Auerbach road was public; in order for the trial court to hold that the road is now private, it must have found that the road had been abandoned.

The parties agree in their briefs that the road was a public road as it appeared on the 1901 map; the Auerbachs contend that the road remains a public road today, but Parker contends that the road was abandoned and is now private. A public road may be abandoned and thus lose its public character in one of several ways:

> "One example is nonuser for a period of twenty years which will operate as a discontinuance of a public road. See *Harbison v. Campbell*, 178 Ala. 243, 252, 59 So. 207, 210 (1912). Likewise, an abandonment of a public road may be effected by a formal, statutory action. See Code [**6] 1975, §§ 23-4-1 through 23-4-6. There is also authority for the proposition that the construction of a new highway replacing an old road may, under the right circumstances and after an appropriate length of time, result in an abandonment of the old road. See 39A C.J.S. *Highways*, § 134 (1976). In the case of *Purvis v. Busey*, 260 Ala. 373, 71 So. 2d 18 (1954), this Court alluded to this last proposition:
>
> > "'In *Harbison v. Campbell*, 178 Ala. 243, 59 So. 207, it was said that nonuser short of the time of prescription does not operate as a discontinuance of a public road. We have not rested our conclusion here on that statement for here, unlike the *Harbison* case, supra, there has been a substitution of one road for another and *there is respectable authority for the proposition that* [*946] *when such is the case there can be abandonment by nonuse for a period short of the time of prescription.* But we leave a decision of that question to await a case where such a decision is necessary.' (Emphasis added.)"

Floyd v. Indus. Development Bd. of City of Dothan, 442 So. 2d 927, 929 (Ala. 1983). See, also, *Bownes v. Winston County*, 481 So. 2d 362 (Ala. 1985).

The statutory method [**7] of abandonment of Ala. Code 1975, §§ 23-4-1 et seq., is inapplicable; Montgomery County did not apply to close and vacate the road, and the failure of county authorities to keep the road in repair did not work an abandonment. See *Purvis v. Busey*, 260 Ala. 373, 71 So. 2d 18 (1954). Further, we cannot say that the road has not been used for a period of 20 years. The fact that travel on the road may have decreased does not work an abandonment so long as it is open for use by the public generally and is being used by those who desire, or have the occasion, to

use it. 39A C.J.S. *Highways*, § 131(a) (1976). Although testimony indicates that the Auerbachs in recent times have used the road mainly on weekends for recreation, the game warden and Auerbach employees also use the road to reach the Auerbach property. Thus, the road is open for use, albeit infrequently.

We must now determine whether the evidence supports a conclusion that the new Mount Lebanon Road replaced the Gibson-Auerbach road and, if so, whether enough time has passed to indicate an abandonment. Abandonment is a fact that must be proved, and the burden is on the one who asserts abandonment to prove it by clear and [**8] satisfactory evidence. *Purvis v. Busey, supra*. That holding is consistent with the general rule that once it is shown that a road is a public highway, "the burden of showing abandonment . . . is upon the party who asserts that the public . . . [has] lost or surrendered their rights." 2 B. Elliott & W. Elliott, *The Law of Roads and Streets*, § 1173 (4th ed. 1926).

There is nothing in the record to indicate that the Mount Lebanon Road was intended as a substitute for the Gibson-Auerbach road in gaining access to Mount Zion Road. And neither the fact that part of a public highway is unusable for travel, nor the fact that the county failed to keep it in repair, is sufficient to show that it has been abandoned. In addition, the facts that the Auerbachs erected a locked gate across the road at their property line; that Mrs. Gibson erected a "gap" across the road near her home to control her cattle; and that Parker erected a locked gate across the road at his property line, will not cause the road to lose its character as a public way, because it is evident that there was no interruption of its use by those traveling it. *Walker v. Winston County Comm'n*, 474 So. 2d 1116 (Ala. 1985). [**9]

Parker has failed to show by clear and convincing evidence that the road was statutorily abandoned, abandoned by nonuser for 20 years, or replaced by another public highway and not used for an appropriate period of time. Consequently, even indulging all favorable presumptions in support of the trial court's judgment, we hold that it is not supported by the evidence and that it is due to be reversed. *Mangina v. Bush*, 286 Ala. 90, 237 So. 2d 479 (1970).

REVERSED AND REMANDED.

BALDWIN COUNTY COMMISSION et al. v. Walter C. JONES et al.

No. SC 1994

Supreme Court of Alabama

344 So. 2d 1200; 1977 Ala. LEXIS 2089

April 22, 1977

DISPOSITION: [**1] REVERSED AND REMANDED.

CORE TERMS: developers, public roads, minutes, engineer, resident, plat, furnish, culverts, grade, repair, ditches, pipe, recorded, grading, county roads, estoppel, populated, estopped to deny, ruined, asking, people living, specifications, completion, conferred, occupancy, election, seconded, courtesy, scraping, driveway

COUNSEL: T. M. Brantley, Bay Minette, for Baldwin Cty. Commissioners.

Lucian L. Smith, Jr., and John W. Hartley, Jr., Montgomery, for Director of State Highway Dept.

Robert A. Wills, Owen & Ball, Bay Minette, for Appellees.

JUDGES: Shores, Justice, wrote the opinion. Torbert, C.J., and Maddox, Faulkner and Beatty, JJ., concur.

OPINION BY: SHORES

OPINION

[*1201] Walter C. Jones and George H. Skipper recorded a subdivision plat of Wildwood Estates in Baldwin County in the early part of 1973. Planning of the subdivision had begun in 1971. The plat was not offered for approval by the County Commission because approval of subdivisions was not required at that time. Baldwin County is one of some ten counties in the state described as captive counties which have limited authority over roads within the county. Act No. 142 of the 1951 Legislature relates to Baldwin County and provides in Section 1 that the State Highway Department shall, subject to the provisions and limitations contained in the act, be responsible for construction, maintenance and repair of existing roads in the county; Section 2 states that the authority of the Baldwin County Commission shall be to [**2] levy tax, borrow money, eminent domain and determine what roads will be built, subject to the approval of the Highway Department; Section 3 states that Baldwin County shall have no authority (a) to control personnel for maintenance or repair of roads, (b) to purchase equipment for maintenance or repair of roads, and (c) to pay any person for services rendered in the maintenance or repair of roads; Section 6 provides that Baldwin County ". . . shall continue to have under its present road laws the right, power, duty, authority and jurisdiction to establish new county roads and bridges . . . and the State at its election may take over the same for construction and maintenance . . ."

Because of this Act, the county has the authority to "establish" new county roads and the State, at its election, may assume maintenance of the same.

The testimony in this case indicates that the developers conferred with an engineer for the State before they laid out the subdivision. He told them what the State requirements were, which were set out in Regulations of the Highway Department, insofar as width of roadbed, depth of ditches, and drainage pipes were concerned. The developers testified that [**3] the roads were constructed to conform to State requirements. Another State engineer inspected the roads upon completion and advised his superior by letter on September 4, 1973, that all State requirements appeared to have been met. This letter said: "The Commission asked that we look at the streets to see if there is a possibility of maintaining them, and give them a report so they may make a decision on this matter."

On September 4, 1973, the same day this letter was written, the developers applied to the County Commission for acceptance of the roads. The minutes of the meeting of the County Commission held on October 2, 1973, are as follows:

> "'Motion by Commissioner McMillan, seconded by Commissioner Still, that the Commission not accept the Wildwood Estate [*1202] Subdivision for the Maintenance Program as the roads to [sic] meet State Highway specifications but the Subdivision is not populated

> enough to take over for maintenance. Voting yea: Bishop, Still and McMillan - Nay: Hankins. . . .'"

These minutes indicate that a majority of the commissioners voted not to accept the roads for maintenance because the subdivision was not yet populated enough, [**4] although the roads at that time did meet State Highway Department specifications.

Shortly thereafter, the State began to "flat blade" the roads from time to time. It was the testimony of witnesses for the State that these roads had never been put on the regular maintenance program, that the county had never accepted them for maintenance; the State had, however, as a courtesy to the people living on these roads, scraped them every three or four months, but that such scraping with a flat blade is not a regular maintenance program. The State continued to do this from late 1973 until early 1976.

One of the residents of the area testified that the roads were beautiful roads and the ditches "good" when she bought her property in early 1974, but the State's scraping them had just "ruined the roads - just flattened them."

The minutes of the County Commission meetings and the record of the proceedings before us reflect that residents of the subdivision complained to the Governor, the Highway Department and the County Commission about the condition of these roads beginning as early as 1974. The minutes of the County Commission meetings show the following:

> Meeting of January [**5] 6, 1976:
>
> "'Lonnie Walker and delegation appeared before the Commission to request the roads in the Wildwood Estates, South of Loxley, be accepted and maintained by the County Road Department. After a lengthy discussion and determining that twenty-one families were living in the subdivision and that the roads had not been accepted in 1973 due to the low occupan[c]y, the Commission suggested to Mr. Walker that a meeting be established with Jones & Skipper, the State Highway Department and the County Commission as soon as possible in order that Jones & Skipper may reapply to the County for the possible acceptance of the road in question. Mr. Walker also presented a petition from approximately fifty people requesting the same.'"
>
> Meeting of February 17, 1976:
>
> "'George Skipper and Jones appeared before the Commission to request acceptance of the Wildwood Subdivision for maintenance. A letter was read from the State Highway Department giving their report on a recent investigation and the deficiencies that the subdivision has according to the April 15, 1975 Subdivision regulations. [1] . . .'"

The record shows that the Commission asked the Highway Department to investigate [**6] the matter and report on any deficiencies in the roads based upon subdivision regulations adopted after the first request for acceptance of the roads had been disapproved. The Highway Department reported a number of discrepancies on February 2, 1976, and stated that no further action would be taken by the Department until a formal letter from the Commission was received stating that the conditions of noncompliance had been waived by the Commission or that the deficiencies would be corrected. That letter indicated that the Highway Department would accept the maintenance of the roads if the Commission waived the conditions not in compliance with the then existing subdivision regulations.

> 1 Baldwin County Commission adopted Subdivision Regulations on that date pursuant to Act No. 1094, enacted by the Legislature on September 17, 1973, after the Wildwood Subdivision plat was recorded.

On April 5, 1976, Mr. Risher, Division Maintenance Engineer, Highway Department, addressed a letter to Engineer. Bureau of Maintenance, [**7] Highway Department, in which he said:

> [*1203] "Several years ago, the developers, George Skipper and W. C. Jones, made a request to the Baldwin County Commission that the subdivision be accepted for maintenance. This request was rejected by the Commission because of very little or no occupancy. As a matter of courtesy to the people living on this road, we have tried to keep the road passable by an occasional blading.
>
> "On Thursday, April 1, I met with Mr. Skipper and Mr. Jones, the developers, along with several members of the Baldwin County Commission and reiterated our position that the subdivision

would have to be improved to meet our minimum subdivision standards before it could be accepted for maintenance. The subdividers agreed to grade, drain and base the project if the Baldwin County Commission would furnish the required wide drain pipe. The Commissioners agreed to bring this up for consideration at their next meeting on Tuesday, April 6. . . ."

On April 6, 1976, the developers wrote to the Commission and stated their position:

They had conferred with the Highway Department's resident engineer prior to building the roads; they were built according [**8] to the then existing regulations and were so certified by the Highway Department's engineer upon completion. The developers asserted that the roads were dedicated to Baldwin County in March 1973 (when the plat was recorded); they applied for acceptance of the roads in September, but the Commission did not officially accept them at that time, but only because the subdivision was not yet sufficiently populated and not because the roads were not in compliance with State standards; the State, at the request of the Commission, did commence to grade the roads as needed; and there are twenty-five families living in the subdivision, but as a result of heavy traffic and the "leveling" type grading done by the State for the past two years, the roads are in "terrible" shape.

The developers agreed at a meeting held on April 1, at which 2 commissioners and 2 representatives of the Highway Department were present, to furnish the dirt, pull the ditches, base the roads and cover the culverts. The county would furnish the culverts, if the other commissioners would agree, and the Highway Department agreed to lay the culverts to grade.

This letter ended:

". . . In order to permanently end [**9] the problem, we have stated what we will do. Our offer as above, concerning pulling ditches, basing, and covering culverts, will remain good until 12:00 Noon today, Tuesday, April 6, 1976 . . ."

Minutes of the April 6, 1976, meeting contain the following:

"'The Commission discussed the proposal by Mr. Jones & Mr. Skipper concerning the Wildwood Subdivision. Motion by Bishop, seconded by McMillan, to authorize the Chairman to write the State Highway Department stating that an agreement has been made between the developers of Wildwood Estates and the County Commission and ask that the State Highway Department go along with the agreement for Skipper & Jones to pull the ditches in said subdivision, to base the roads and to cover the metal driveway pipes, and the property owners in the subdivision furnish the necessary metal culverts. The Commission at this time shall accept or recommend acceptance of the roads for maintenance. Variances shall be waivered [sic] in respect to width of right-of-way, five miles radius of Loxley, and that the road be paved. Voting yea: Bishop, McMillan and Lauder - Nay: Hankins. Hankins stated his objection to the motion was that the [**10] majority of the people in the subdivision are already on the pipe list and he feels the County is obligated to furnish the necessary driveway culverts at no expense. The Chairman asked the Attorney if the subdivision has not been accepted for maintenance was it legal for the County to furnish the pipe that had been requested by the property owners - in the opinion of the County Attorney it was not legal.'"

[*1204] Thereafter, on April 19, 1976, the developers and one of the residents of the subdivision filed a petition for writ of mandamus against the Baldwin County Commissioners and the Highway Director of the State of Alabama setting out, in substance, the above facts and asking the circuit court to direct the respondents to maintain the roads. After a hearing, the trial court entered an order which included a finding that engineers employed by the State Highway Department maintained the roads or streets from September 1973 until about September 1975 and that ". . . Respondents are estopped from denying acceptance of the roads in the subdivision known as Wildwood Estates . . ." The court then ordered all respondents to ". . . forthwith be responsible for the maintenance [**11] and repair of the existing public county roads shown on the map or plat of Wildwood Estates . . ."

The respondents appeal from this order.

The facts in this case are not disputed. The issues are legal ones, i.e., whether the County Commission has accepted these roads as public roads by act or deed and, if not, is the Highway Department now estopped to deny that it has an obligation to maintain them as public roads, because it undertook to grade them for a two-year period.

The County Commission in this case did not approve the subdivision plat before it was recorded. Approval was not required at that time. Even had it done so, however, such approval does not amount to an acceptance of the roads as public roads. *Tuxedo Homes, Inc. v. Green*, 258 Ala. 494, 63 So.2d 812 (1953). When the County Commission was requested by the developers to accept the roads, it refused. The minutes of the meetings show the county persisted in refusing to accept these roads up until its April 6, 1976, meeting, at which time they were conditionally accepted.

The developers and residents of this subdivision concede that the county never expressly accepted these roads as public roads, but assert [**12] that the action of the Commission in asking the Highway Department to grade the roads, and the Highway Department having undertaken to do so, amount to an estoppel to deny that the roads have been accepted as public roads, requiring the Highway Department to maintain them as such. The facts as supplied by the petitioners themselves defeat this argument. It was their evidence that the Highway Department graded these roads some fifteen or twenty times or more over a two-year period. It was this grading which they claimed ruined the roads. All during the period in which the State was doing the grading, the residents and Developers continued to try to get the roads accepted as public roads. They obviously did not look upon the grading by the State as maintenance of the roads, but, to the contrary, continued to press for maintenance; but the roads were never, at any time, put on the maintenance program. The petitioners were aware of this. Under the undisputed facts, we cannot agree with the trial court in its conclusion that the respondents are estopped to deny that these roads have been accepted for maintenance. An equitable estoppel is to be determined upon the facts of each particular [**13] case. *Madison County v. Williams*, 236 Ala. 470, 183 So. 452 (1938).

This record discloses that the County Commission refused to accept these roads as public roads to be maintained as such until its meeting of April 6, 1976. At that time, it agreed to accept them upon the conditions set out in those minutes. The evidence fails to support the theory of estoppel relied on by the petitioners. Until the conditions of acceptance are met as set out by the County Commission at its meeting of April 6, mandamus will not lie to compel the appellants here to maintain the roads involved in this litigation.

The judgment of the trial court is therefore, reversed and remanded.

REVERSED AND REMANDED.

TORBERT, C.J., and MADDOX, FAULKNER and BEATTY, JJ., concur.

Ex parte Baldwin County Planning and Zoning Commission; (In re: Baldwin County Planning and Zoning Commission v. Montrose Ecor Rouge, L.L.C. and Montrose Ecor Rouge, L.L.C. v. Baldwin County Planning and Zoning Commission)

1091042

SUPREME COURT OF ALABAMA

68 So. 3d 133; 2010 Ala. LEXIS 206

October 22, 2010, Released

SUBSEQUENT HISTORY: As Corrected October 6, 2011.

Released for Publication August 23, 2011.
On remand at, Remanded by Baldwin County Planning & Zoning Comm'n v. Montrose Ecor Rouge, L.L.C., 68 So. 3d 147, 2011 Ala. Civ. App. LEXIS 55 (Ala. Civ. App., 2011)

PRIOR HISTORY: [**1]
(Baldwin Circuit Court, CV-08-900122; Court of Civil Appeals, 2080276). Trial Judge: Robert Earl Wilters.
Baldwin County Planning & Zoning Comm'n v. Montrose Ecor Rouge, L.L.C., 68 So. 3d 121, 2010 Ala. Civ. App. LEXIS 95 (Ala. Civ. App., 2010)

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: ordinance, flooding, flood, planning commission, plat, general welfare, flood-prone, tidal, parcel, county commission, land-use, rated, vague, drainage, residents, zoning, topography, plurality, vagueness, street, waves, residential, subdivided, unsuitable, elevation, tropical, cyclone, harmful, hazard, cliff

COUNSEL: For Petitioner: J. Scott Barnett, E. Erich Bergdolt, Baldwin County Legal Department, Bay Minette; Kendrick E. Webb, Frank E. Bankston, Jr., Fred L. Clements, Jr., Webb & Eley, P.C., Montgomery.

For Respondent: Daniel G. Blackburn, Rebecca A. Gaines, Blackburn & Conner, P.C., Bay Minette.

JUDGES: WOODALL, Justice. Cobb, C.J., and Lyons, Smith, Parker, Murdock, and Shaw, JJ., concur. Bolin, J., concurs in the result.

OPINION BY: WOODALL

OPINION

[*135] PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

WOODALL, Justice.

The Baldwin County Planning and Zoning Commission ("the Commission") sought certiorari review of an opinion of the Court of Civil Appeals, upholding the trial court's issuance of a writ of mandamus sought by Montrose Ecor Rouge, L.L.C. ("Montrose"), to compel the Commission to grant Montrose's application for a proposed residential subdivision. We reverse and remand.

I. Factual and Procedural Background

Montrose owns a 7.98-acre parcel of land fronting on Mobile Bay. Montrose proposed to subdivide the parcel into 8 numbered lots, with lots 1 through 4 fronting Mobile Bay ("the bay lots"). Just behind the bay lots are lots 5 and 6, which are mainly composed of a cliff ("the cliff lots"). Just behind and above the cliff lots are lots 7 and 8. The parcel is subject to a rating scheme devised "[f]or purposes of flood insurance" by the Federal Emergency Management Agency ("FEMA"), reflecting the [**2] susceptibility of property to damage from "flooding and exposure to velocity-driven waves in a storm." *Baldwin County Planning & Zoning Comm'n v. Montrose Ecor Rouge, L.L.C.,* [Ms. 2080276, April 4, 2010] 68 So. 3d 121, 124, 2010 Ala. Civ. App. LEXIS 95, *2 (Ala. Civ. App. 2010) (Per Bryan, J., with one judge concurring and three judges concurring in the result). More specifically,

> "FEMA has rated a portion of the ... parcel as VE, has rated a portion of it as [*136] AE, and has rated a portion of it as X. The portion of the ... parcel that is rated VE is coastal land that is subject to

a high risk of flooding and is also subject to velocity-driven waves in a storm. [The bay lots] and the portion of [the cliff lots] closest to the bay ... [are] rated VE. The portion of the ... parcel that is rated AE is subject to a high risk of flooding but is not subject to velocity-driven waves in a storm. ... [P]ortions of [the cliff lots] [are] ... rated AE. The portion of the ... parcel that is rated X is neither subject to a high risk of flooding nor subject to velocity-driven waves in a storm. ... [P]ortions of [the cliff lots] and lots 7 and 8 [are] ... rated X.

"The FEMA ratings for the developer's parcel are typical of the FEMA ratings for the eastern [**3] shore of Mobile Bay as a whole. FEMA regulations *do not prohibit* residential construction in areas rated VE or AE; however, they do impose special requirements on residential construction in such areas."

Baldwin County, 68 So. 3d at 124, 2010 Ala. Civ. App. LEXIS 95 at *2 (emphasis added).

In addition to these FEMA ratings, the parcel is subject to the Subdivision Regulations of Baldwin County ("the regulations"), which were adopted by the Baldwin County Commission pursuant to Ala. Code 1975, §§ 11-19-1 to -24, and Ala. Code 1975, §§ 11-24-1 to -7. The regulations "govern each and every subdivision of land in all unincorporated areas of Baldwin County." Reg. § 2.2.

In November 2007, Montrose sought the Commission's preliminary-plat approval for the subdivision and development of the parcel for residential purposes. The plat contemplated the construction of a roadway, which would serve as the sole means of ingress and egress for the bay lots. Although the road was to be elevated according to the specifications set forth Reg. § 5.3.18, [1] non-native fill material was to be imported to the site to serve as the roadway bed.

1 Reg. § 5.3.18 ("Street Elevations") provides:

"The Planning Commission may require, where necessary, profiles [**4] and elevations of streets for areas subject to flood. No street shall be approved for construction within an area subject to flood that is proposed to be constructed more than 2 feet below the elevation of the base flood, as defined in these regulations. Fill may be used for streets. Drainage openings shall be so designed as not to restrict the flow of flood waters or increase upstream flood heights."

On January 17, 2008, at a Commission meeting ("the meeting"), Montrose presented its plat for approval. At the meeting, Baldwin County permit engineer, Gregory Smith, reported to the commissioners that the plat satisfied the "black and white technical requirements" for submission. Nevertheless, there was subsequent discussion at the meeting regarding the elevations of the roadway and the bay lots, and the susceptibility of the bay lots to flooding, particularly during landfalling tropical cyclones. A number of residents of the neighborhood in which the parcel was located attended the meeting. One or two of them presented photographs showing that the bay lots or adjacent areas had been thoroughly inundated twice in 2005 by two tropical cyclones of widely disparate intensity. Ultimately, [**5] the Commission denied approval of the plat on the ground that the plat failed to conform to certain of the regulations, including Reg. §§ 1.2.2, 5.1, and 5.2.2, inasmuch as the bay lots lie "in an area prone to severe flooding." Those sections provide:

§ 1.2.2: "Land to be subdivided shall be of such character that it can be used [*137] safely for building purposes without danger to health or peril from fire, *flood*, or other menace. Land shall not be subdivided until proper provision has been made for drainage, water, sewerage disposal and streets, and approval has been granted in accordance with the procedures prescribed in these regulations."

§ 5.1. (*Minimum Standards*): "The following planning and standards shall be complied with, and no higher standard may be required by the County Commission, except where, because of exceptional and unique conditions of topography, location, shape, size, drainage, wetlands or other physical features of the site, minimum standards specified herein would not reasonably protect or provide for public health, safety, or welfare. *Any higher standard required shall be reasonable* and shall be limited to the minimum additional improvements neces-

sary to protect the [**6] public health, safety, or welfare."

§ 5.2.2 (Character of the Land): "Land which the ... Commission finds to be unsuitable for subdivision or development *due to flooding*, improper drainage, steep slopes, rock formations, adverse soil formations or topography, utility easements, or other features which will *reasonably be harmful to the safety, health, and general welfare of the present or future inhabitants* of the subdivision and/or its surrounding areas, *shall not be subdivided or developed* unless adequate methods are formulated by the applicant and approved by the ... Commission, upon recommendation of the County Engineer, or his/her designee, to solve the problems created by the unsuitable land conditions; otherwise such land shall be set aside for uses as shall not involve such a danger. It is therefore recommended that the applicant perform any necessary site investigations related to items such as soils, wetlands, flooding, drainage, and natural habitats prior to submitting a Preliminary Plat for review.

"....

"Land within any floodway shall not be platted for residential occupancy or building sites. Land outside the floodway but subject to flood may be platted for residential occupancy [**7] provided each lot contains a building site that may reasonably lend itself to construction of a minimum floor level of one (1) foot above base flood elevation, or for such other uses which will not increase the danger to health, life, and property. Fill may not be used to raise land in the floodway. In other areas subject to flood, fill may be used providing the proposed fill does not restrict the flow of water and unduly increase flood heights."

(Emphasis added.)

Montrose subsequently petitioned the Baldwin Circuit Court for a writ of mandamus directing the Commission to vacate its denial; to declare §§ 1.2.2., 5.1, and 5.2.2 unenforceable because, Montrose argued, the provisions are unconstitutionally vague; and to approve the preliminary plat. It also sought compensatory damages for alleged "lost profits, lost opportunity for the sale of subdivided lots, a decrease in market value, increased interest charges, [and] additional engineering costs." The trial court denied Montrose's request for damages, but, citing *Smith v. City of Mobile*, 374 So. 2d 305 (Ala. 1979), granted the petition in all other respects. The Commission appealed to the Court of Civil Appeals, and Montrose cross-appealed [**8] on the issue of damages.

[*138] In a plurality opinion authored by Judge Bryan and joined by Judge Pittman, the Court of Civil Appeals, also citing *Smith v. City of Mobile*, affirmed the trial court's issuance of the writ of mandamus. Judge Bryan's opinion held:

> "The challenged portions of the Subdivision Regulations are not reasonably definite and fixed in their requirements; to the contrary, *they accord the Commission the discretion to treat similarly situated landowners differently*. Accordingly, we conclude that *they are void because they are impermissibly vague*. See *Smith v. City of Mobile*[, 374 So. 2d 305 (Ala. 1979)]."

Baldwin County Planning & Zoning Comm'n, 68 So. 3d at 131, 2010 Ala. Civ. App. LEXIS 95 at *22 (emphasis added). However, on the cross-appeal, the Court of Civil Appeals reversed the damages portion of the judgment and "remand[ed] the action for the circuit court to determine the amount of damages [Montrose] is entitled to recover." *Baldwin County Planning & Zoning Comm'n*, 68 So. 3d at 132, 2010 Ala. Civ. App. LEXIS 95 at *27. As its sole authority for Montrose's recovery of damages, the plurality cited *Town of Gulf Shores v. Lamar Advertising of Mobile, Inc.*, 518 So. 2d 1259 (Ala. 1987). The Commission sought certiorari review of both aspects [**9] of the plurality opinion. We granted the petition to consider (1) whether the plurality opinion of the Court of Civil Appeals conflicts with our precedent concerning the standard of review in a case such as this, and (2) whether *Lamar Advertising* should be overruled.

II. Discussion

A. Standard of Review

The broad, substantive issue, as acknowledged by a plurality of the Court of Civil Appeals, is whether § 1.2.2, § 5.1, and § 5.2.2 are unconstitutionally vague.

"'The legislature has given the [Baldwin County Commission] the authority to regulate the development of subdivisions through its planning commission. [§§ 11-19-1 to -24; §§ 11-24-1 to -7]. "Subdivision legisla-

tion is part of planning legislation, as is zoning; they are all predicated on the police power of the state.""" *Beachcroft Props., LLP v. City of Alabaster*, 949 So. 2d 899, 904 (Ala. 2006) (quoting *City of Dothan v. Eighty-Four West, Inc.*, 822 So. 2d 1227, 1236 (Ala. Civ. App. 2001) (emphasis omitted)). "The governing body of a municipality, in considering a zoning ordinance, acts in a legislative capacity. ... Because zoning ordinances are legislative acts, they are presumed valid unless they are shown to be arbitrary and [**10] capricious." *Woodard v. City of Decatur*, 431 So. 2d 1173, 1175 (Ala. 1983).

> "The standard of review in a zoning case is highly deferential to the municipal governing body. See *American Petroleum Equip. & Constr., Inc. [v. Fancher,]* 708 So. 2d [129,] 132 [(Ala. 1997)] ('Because the adoption of an ordinance is a legislative function, the courts must apply a *highly deferential standard* in zoning cases.').
>
> > ""'[P]assage of a zoning ordinance is a legislative act, and it is well established that municipal ordinances are presumed to be valid and reasonable, to be within the scope of the powers granted municipalities to adopt such ordinances, and are not to be struck down unless they are clearly arbitrary and unreasonable." *Cudd v. City of Homewood*, 284 Ala. 268, 270, 224 So.2d 625, 627 (1969).'
>
> "*Pollard v. Unus Props., LLC*, 902 So. 2d 18, 24 (Ala. 2004)."

Ex parte Nathan Rodgers Constr., Inc., 1 So. 3d 46, 49 (Ala. 2008). In reviewing an ordinance against a challenge of unconstitutional [*139] vagueness, "[w]e [**11] must be certain that the ordinance is so plainly and palpably inadequate and incomplete as to be convinced beyond reasonable doubt that it offends the constitution or we will not strike it down." *Walls v. City of Guntersville*, 253 Ala. 480, 485, 45 So. 2d 468, 471 (1950). Courts should declare such an act to be void for vagueness only if the act is so indefinite that "a person of ordinary intelligence, exercising common sense [could] derive no rule or standard at all from the ... language," or if it is so vague as to "authorize or encourage arbitrary and discriminatory enforcement." *Northington v. Alabama Dep't of Conservation & Natural Res.*, 33 So. 3d 560, 567 (Ala. 2009).

"When a challenged ordinance involves land use regulation, the ordinance is judged *as applied*, not evaluated for facial vagueness." *Swoboda v. Town of La Conner*, 97 Wash. App. 613, 618-19, 987 P.2d 103, 106-07 (1999) (emphasis added). "Because the vagueness challenge is not based on the First Amendment, this Court examines '"whether the statute is vague as applied to the conduct allegedly proscribed in this case,"' instead of *hypothetical concerns*." *Cadle Co. v. City of Kentwood*, 285 Mich. App. 240, 259, 776 N.W.2d 145, 159 (2009) [**12] (quoting *People v. Knapp*, 244 Mich. App. 361, 374 n. 4, 624 N.W.2d 227 (2001), quoting in turn *People v. Vronko*, 228 Mich. App. 649, 652, 579 N.W.2d 138 (1998)(emphasis added)). "To make a successful facial challenge in a non-First Amendment context, a litigant 'must establish that no set of circumstances exists under which the Act would be valid.'" *Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1253 n.13 (3d Cir. 1996) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)).

Montrose's theory of the case is that the three regulations on which the Commission relied in rejecting the preliminary plat -- §§ 1.2.2, 5.1, and 5.2.2 -- are impermissibly "vague as applied to Montrose because they [1] allow for the *exercise of discretion* [on the part of the Commission] and [2] fail to indicate to Montrose or any other applicant what is required in order to lawfully subdivide real property." Montrose's brief, at 43 (emphasis added). According to Montrose, the regulations are particularly offensive because they purport to regulate development in areas subject to "flooding." Montrose's position is that, because the Baldwin County Commission has not yet promulgated a regulation *absolutely* [**13] *prohibiting* development in areas subject to flooding, it must *absolutely permit* Montrose to develop its property in such an area.

The Commission contends, however, that "Baldwin County Subdivision Regulations §§ 1.22, 5.1, and 5.2.2 *necessarily allow for discretion* by the ... Commission regarding the extent the regulations apply to exceptional and unique conditions of ... flooding." The Commission's brief, at 8 (emphasis added). We agree. Caselaw from Alabama and elsewhere compels us to reject the "all or nothing" approach to subdivision regulation urged by Montrose.

For example, in *Ex parte City of Orange Beach Board of Adjustment*, 833 So. 2d 51 (Ala. 2001), this Court reaffirmed the principle that an ordinance may validly delegate some discretion in its enforcement where ""discretion relates to the administration of a police regulation and is essential to the protection of the public morals, health, safety, welfare, etc."" 833 So. 2d at 54 (quoting *Walls v. City of Guntersville*, 253 Ala. at 485, 45 So. 2d at 471). This reaffirmation was made in the context of our consideration of the constitutionality [*140] of a nonconforming-use provision of an ordinance of the City of Orange Beach pertaining [**14] to signage. The ordinance authorized a "code-enforcement officer" for the City of Orange Beach Board of Adjustment to determine whether a billboard was "dilapidated" or "structurally unsound." 833 So. 2d at 52-53. The owner of two billboards contended that the use of those terms rendered the ordinance "unconstitutionally vague, overbroad, ambiguous, and arbitrary; and that the arbitrary and capricious enforcement of the ordinance ... deprived [the owner] of its constitutionally protected property rights." 833 So. 2d at 53. This Court disagreed, stating:

> "In *Walls v. City of Guntersville*, [253 Ala. 480, 45 So. 2d 468 (1950)], this Court addressed the constitutionality of a zoning ordinance that provided, in pertinent part:
>
> > ""Any use whatsoever, not in conflict with any other ordinance of the City, is allowed in an Industrial District, provided that no use shall be permitted which would be offensive because of injurious and obnoxious noise, vibrations, smoke, gas, fumes, odors, dust or other objectionable features, or would be hazardous to the community on account of danger of fire or explosion."'
>
> "253 Ala. at 484, 45 So. 2d at 471. The ordinance further provided that its provisions would [**15] 'be administered and enforced by the Mayor or the building inspector and or other person delegated by the Mayor to carry out this function for him.' 253 Ala. at 484, 45 So. 2d at 470-71. The challenger of the ordinance asserted that the ordinance was an unlawful delegation of power that vested in the delegated agency 'an uncontrolled and arbitrary discretion ... to say what is or is not "offensive" within the meaning of the ordinance.' 253 Ala. at 484, 45 So.2d at 471. This Court accordingly framed the relevant inquiry as 'whether or not [the terms "injurious and obnoxious noise, vibrations, smoke, gas," etc.] are so vague and indefinite as to furnish no standard of conduct by which the official in charge under the ordinance may be guided.' 253 Ala. at 485, 45 So.2d at 471. In upholding the ordinance against the constitutional challenge and determining that its language did not contain 'unusual or ambiguous expressions,' this Court reasoned:
>
> > ""....
> >
> > ""... [O]rdinances need not always prescribe a specific rule of action ... *some situations require the placing of some discretion in municipal officials, as in cases where it is difficult or impracticable to lay down a definite or comprehensive* [**16] *rule for guidance, or where the discretion relates to the administration of a police regulation and is essential to the protection of the public morals, health, safety, welfare, etc.*["]
> >
> > "'....
> >
> > "'Provisions of such general nature as [in this ordinance] are not uncommon, but are usual in setting out the uses to which property in industrial zones may be restricted. These provisions are uniform in application, the standards set up are not so indefinite as to confer unlimited power and they relate directly to

> the health and public welfare.'

"253 Ala. at 485, 45 So.2d at 471 (citations omitted)."

Ex parte Orange Beach, 833 So. 2d at 54 (emphasis added). We concluded that, "*in the context of the ordinance*, the terms 'structurally unsound' and 'dilapidated' [were not] impermissibly vague and ambiguous so that the ordinance [was] 'plainly [*141] and palpably inadequate and incomplete.'" 833 So. 2d at 56 (emphasis added).

A number of courts have reviewed ordinances functionally equivalent to § 5.2.2 and rejected challenges similar to those made here by Montrose. See, e.g., *Jackson, Inc. v. Planning & Zoning Comm'n of the Town of Avon*, 118 Conn. App. 202, 982 A.2d 1099 (2009); *Burrell v. Lake County Plan Comm'n*, 624 N.E.2d 526 (Ind. Ct. App. 1993); [**17] *Busse v. City of Madison*, 177 Wis. 2d 808, 503 N.W.2d 340 (Wis.Ct. App. 1993).

Burrell involved "the denial of approval by the Lake County Plan Commission [('the Plan Commission')] to the preliminary subdivision plan submitted by Donald and Alice Burrell." 624 N.E.2d at 528. The area of the proposed subdivision was said to be subject to "substantial surface water runoff and flooding during normal rains," and "excessive water runoff and flooding" during periods of heavy rain, while the soil was subject to the possibility of leaching and sewage elimination difficulties. 624 N.E.2d at 533 n.8.

"The Burrells' application was denied, consistent with the requirements of ... [Ordinance, § IV(B)], based on the [Plan] Commission's conclusion that the subdivision would have an adverse effect on the health, [*142] safety, and general welfare of the community." 624 N.E.2d at 528. More specifically, § IV(B) of the Ordinance directed the Plan Commission to "deny preliminary plan approval ... 'where a proposed subdivision would adversely affect the health, safety, or general welfare of the County.'" 624 N.E.2d at 528 (emphasis omitted). The Burrells challenged § IV(B) on the same grounds asserted by Montrose [**18] here, namely, that the regulation was "*so vague and uncertain as to be unconstitutional* and that it represent[ed] an illegal delegation of legislative authority because it purport[ed] to give the [Plan] Commission *unlimited discretion*." 624 N.E.2d at 528 (emphasis added).

The Court of Appeals of Indiana rejected both these contentions. With regard to the unlimited-discretion argument, the court said:

> "[T]he Ordinance specifically requires the [Plan] Commission to reject the application for preliminary plan approval when the proposal is not in compliance with the applicable ordinances or where the proposed subdivision would have an adverse effect on health, safety, or general welfare. *Most importantly, this health, safety, and general welfare language does not stand alone.* Another section of the Ordinance instructs the [Plan] Commission and property owners alike on the *sorts of adverse effects* that would properly serve as a basis for denial:
>
> > "'1. *Suitability of Land.* No land shall be subdivided which is unsuitable for subdivision by reason of flooding, collection of ground water, bad drainage, adverse earth or rock formation or topography, or any feature likely to be harmful to the health, [**19] safety, or welfare of the future residents of the subdivision or of the community. Such lands shall not be considered for subdivision until such time as the conditions causing the unsuitability are corrected.'
>
> "Ordinance § V(B)(1) (Record, p. 413). ...
>
> "....
>
> "It is well settled that discretion in the formulation of standards is to be exercised when an ordinance is created, rather than when an ordinance is applied. ... Accordingly, we agree with the Burrells that the [Plan] Commission may not exercise the sort of discretion reserved to a legislative body enacting a law or ordinance to protect the health, safety, and general welfare of the community, and that any attempt to delegate such broad

authority would be improper. The question before us, then, is whether the health, safety, and general welfare language in [§ IV(B)] improperly attempts to imbue the [Plan] Commission with legislative discretion or, instead, directs the [Plan] Commission to deny preliminary approval based on adverse effect to health, safety, and general welfare *upon a determination that specified conditions exist.* We believe the latter interpretation is the better view.

"Within the area of administrative law generally, the [**20] courts of this state have held that although a legislative body may not delegate the power to make a law, it may delegate to an administrative body the power to determine facts upon which the law's action depends. *State ex rel. Standard Oil Company v. Review Board of Indiana Employment Security Division* (1951), 230 Ind. 1, 101 N.E.2d 60; *Financial Aid Corp. v. Wallace* (1939), 216 Ind. 114, 23 N.E.2d 472. In other words, 'a legislative body may enact a law, the operation of which depends upon the existence of a stipulated condition, and ... it may delegate to a ministerial agency power to determine whether the condition exists.' *Campbell v. Heiss* (1944), 222 Ind. 297, 302, 53 N.E.2d 634, 636. *A planning commission's review of a subdivision plan to determine if the plan is in compliance with the applicable statutes and ordinances is a form of exercising delegated authority to make factual determinations within the guidelines established by a legislative body.*

"We reiterate that the Ordinance involved here does not give the [Plan] Commission unguided discretion to determine what conditions are adverse to the health, safety, and general welfare of the community. Instead, § V(B)(1) ..., reproduced [**21] *supra,* provides that property subject to specified adverse conditions may not be subdivided. The function of reviewing evidence in connection with an application for preliminary plan approval for the purpose of determining whether those adverse conditions exist does not constitute an improper delegation of legislative authority to the [Plan] Commission. We view [§ IV(B)] as merely directing the [Plan] Commission to make a factual determination on whether specific conditions exist that render property unsuitable for subdivision (*e.g.*, flooding, bad drainage, adverse topography) and to deny subdivision plan approval based on health, safety, and general welfare where those conditions are found to exist. Accordingly, we find that the health, safety, and general welfare standard of which the Burrells complain *does not represent an improper delegation of legislative authority because the Ordinance provides guidelines regarding those characteristics considered adverse to the community.*"

624 N.E.2d at 530-32 (emphasis added). In short, that court concluded that any impermissible vagueness or potential for arbitrary discretion that might have inhered in § IV(B) *was cured by the guidelines* in [**22] § V(B)(1). [2]

2 Regarding the Burrells' lack-of-notice argument, the Court of Appeals of Indiana concluded that, *because of the guidelines* contained in § V(B)(1), namely, "'flooding, collection of ground water, bad drainage, adverse earth or rock formation or topography, or any feature likely to be harmful to the health, safety, or welfare of the future residents of the subdivision,'" the regulations "provid[ed] ample notice to landowners of those conditions that [would] be evaluated by the [Plan] Commission." 624 N.E.2d at 530.

[*143] Section § 5.2.2 is similar to § V(B)(1) of the Ordinance at issue in *Burrell*: it vests in the Commission the authority to "find" that development on land in certain flood-prone areas could "*reasonably be harmful* to the safety, health, and general welfare of the present or future inhabitants of the subdivision and/or its surrounding areas." (Emphasis added.) It is undisputed that the bay lots are in a "flood-prone" area, as that term is defined by Ala. Code 1975, § 11-19-1(3) ("Any area with a frequency of inundation of once in 100 years as defined by qualified hydrologists or engineers using methods that are generally accepted by persons engaged in the field of [**23] hydrology and engineering."). The Commission contends that legislature has granted it "broad authority to regulate development in unincorporated flood-prone areas of Baldwin County" and that "[d]iscretion is a necessary component [of such authority] due to the multitude of factors that affect whether

developing in a [flood-prone area] would create an unacceptable risk." The Commission's brief, at 18.

Indeed, the purpose and intent of the Alabama legislature in enacting Title 11, Chapter 19, of the Code of Alabama 1975, entitled "Comprehensive Land-use Management in Flood-prone Areas" (hereinafter referred to as "the Act"), is clearly set forth:

> § 11-19-2, Ala. Code 1975: "It is the declared purpose of this chapter to provide in each county of this state a comprehensive land-use management plan by:
>
> > "(1) *Constricting the development* of land which is exposed to flood damage in the flood-prone areas;
> >
> > "(2) Guiding the development of proposed construction *away from locations* which are threatened by flood hazards;
> >
> > "(3) Assisting in reducing damage caused by floods; and
> >
> > "(4) Otherwise improving the long-range management and use of flood-prone areas."
>
> § 11-19-3, Ala. Code 1975: "The county commission [**24] in each county of this state is hereby authorized and may adopt zoning ordinances and building codes for flood-prone areas which lie outside the corporate limits of any municipality in the county.
>
> "Each such county commission shall have *broad authority* to:
>
> > "(1) Establish or cause to be established comprehensive land-use and control measures which shall specifically include the control and development of subdivisions in flood-prone areas;
> >
> > "....
> >
> > "(6) Employ such technical and/or advisory personnel, including the establishment of a county planning commission, as is deemed necessary or expedient; and
> >
> > "(7) Adopt ordinances for the enforcement of all such regulations."
>
> § 11-19-4, Ala. Code 1975: "Land-use and control measures shall provide land-use restrictions *based on probable exposure to flooding*. Measures specified in this section shall:
>
> > "(1) *Prohibit inappropriate* new construction or substantial improvements in the flood-prone areas;
> >
> > "... [and]
> >
> > "(6) Prescribe such additional standards as may be necessary to comply with federal requirements for making flood insurance coverage under the [*144] National Flood Insurance Act of 1968 available in this state."
>
> § 11-19-5, Ala. Code 1975: "In addition to land-use [**25] restrictions commensurate with the degree of the flood hazards in various parts of the area, there shall be such subdivision regulations as may be necessary:
>
> > "(1) To prevent the inappropriate development of flood-prone lands;
> >
> > "(2) To encourage the appropriate location and elevation of streets, sewers and water systems and the reservation of adequate and convenient open space for utilities; [and]

> "(3) To provide for adequate drainage so as to minimize exposure to flood hazards and to prevent the *aggravation of flood hazards ....*"

(Emphasis added.)

Contrary to the "all or nothing" approach espoused by Montrose, the legislature specifically authorized planning commissions to *"[p]rohibit inappropriate* ... construction ... in the flood-prone areas" (§ 11-19-4), through implementation of the "land-use and control measures" established under the "broad authority" conferred on county commissions (§ 11-19-3). In other words, although some development in flood-prone areas may be *permitted as appropriate*, development in such areas *shall be denied* where it is deemed by the relevant planning authority to be *"inappropriate."* That is precisely the scenario contemplated by §§ 1.2.2, 5.1, and 5.2.2.

As we [**26] explained previously in this opinion, """some situations require the placing of some discretion in [enforcement] officials, as in cases where it is ... impracticable to lay down a definite or comprehensive rule for guidance, or where the discretion relates to the administration of a police regulation and is essential to the ... health, safety, welfare, etc.""" *Ex parte City of Orange Beach Bd. of Adjustment*, 833 So. 2d at 54 (quoting *Walls*, 253 Ala. at 485, 45 So. 2d at 471). The Commission contends, and we agree, that it would be impracticable, if not impossible, for the Baldwin County Commission to promulgate regulations that could address "the multitude of variables [involved] in determining whether development in a flood zone presents an unreasonable risk to public health and safety." The Commission's brief, at 21. Such an approach was not mandated by the legislature or attempted by the Baldwin County Commission.

Instead, §§ 1.2.2, 5.1, and 5.2.2 direct the "Commission to make a factual determination [as to] whether specific conditions exist that render property unsuitable for subdivision." 624 N.E.2d at 532. This determination is circumscribed further by the requirement that prohibited [**27] development be such as could *"reasonably be harmful* to the safety, health, *and* general welfare of the present or future inhabitants of the subdivision." § 5.2.2 (emphasis added). In other words, the regulation -- written as it is in the conjunctive -- inextricably links considerations of "general welfare" to the more objectively reviewable concepts of safety and health. Thus, it is not clear beyond a reasonable doubt that §§ 1.2.2, 5.1, and 5.2.2. vest in the Commission the type of arbitrary discretion to deny Montrose's preliminary plat that is prohibited under Alabama law.

Neither do those sections deprive Montrose of notice as to "what is required in order to lawfully subdivide [its] real property." See Montrose's brief, at 43. The Act authorizes the Baldwin County Commission to address the "great financial and economic loss [and] human suffering, caused by floods and flooding" through [*145] regulatory action designed to "guide" and "constrict" development of land-use and development in the unincorporated, flood-prone areas of the county. § 11-19-2. Section 11-19-1(2) of Act defines "flood or flooding" as "[t]he general and temporary condition of partial or complete inundation of normally [**28] dry land areas [] ... a. [f]rom the overflow of streams, rivers, and other inland waters, or b. [f]rom *tidal surges*, abnormally high tidal waters, tidal waves, or rising coastal waters resulting from tsunamis, hurricanes, or other severe storms." (Emphasis added.) Similarly, § 3.2 of the regulations defines "flood or flooding" as "[a] general and temporary condition of partial or complete inundation of normally dry land areas from [] (a) the overflow of inland or *tidal waters*; [or] (b) the unusual and rapid accumulation of runoff of surface waters from any source." (Emphasis added.)

Both the Act and the regulations thus specifically address the overflow of "tidal waters," which commonly accompanies the landfall of tropical cyclones. The susceptibility of the bay lots to flooding from tidal waters was well known to residents of the locality and was a matter of considerable discussion at the Commission's meeting on Montrose's development plan. In connection with the overflow of tidal waters, the bay lots were -- as indicated by FEMA's VE classification -- subject to *wind-driven waves*.

Montrose attempts to make much of Smith's statements that the plat satisfied the "black and white technical [**29] requirements" for submission to the Commission. However, Smith also stated at the meeting -- and correctly so -- that ultimate decisions as to suitability based on § 5.2.2. were reserved for the *Commission*, not a county engineer. See, e.g., Reg. § 4.1 ("no subdivision plat of land ... shall be filed or recorded ... until the plat shall have been submitted to and approved by the County Planning Commission").

Indeed, Smith stated without contradiction in the trial court that he had always had misgivings about the structural integrity of the proposed elevated roadway that was to serve the subdivision because of the composition of the non-native fill material Montrose proposed to use to elevate the roadbed. Specifically, he explained that such material would likely not withstand the

wind-driven waves that the area was known to experience. With the roadway thus washed out, the residents' only means of escape from rising tidal surge would be lost.

This concern was expressed by at least one of the zoning-board commissioners at the meeting. Even before the meeting, the County's concern over the structural integrity of the roadway as platted had prompted the County to decline to accept responsibility [**30] for its maintenance. This declination was known to Montrose before it submitted its preliminary plat. In the trial court, Montrose's engineer expressed the view that tidal surge would not pose a danger to subdivision residents, because, he "assume[d]," the residents would evacuate. This Court, however, takes judicial notice of the fact that residents in the paths of tropical cyclones often fail to heed evacuation orders in a timely manner.

Under the circumstances here presented, Montrose could reasonably have known that "exceptional and unique conditions of topography," § 5.1, would render the bay lots "unsuitable for subdivision ... due to flooding," absent the formulation of "adequate methods ... to solve the problems," § 5.2.2, associated with an uncertain exit route. It could reasonably have anticipated that, "because of [the] exceptional and unique topography" of the bay lots, "minimum standards specified [in the regulations] would not reasonably," § 5.1, assure [*146] that the residents of the proposed subdivision would not be stranded in the path of a hurricane or other tropical cyclone.

Indeed, Montrose has always known that one of the Commission's main concerns about its proposed subdivision [**31] centered on the danger to the bay lots of flooding, in particular that species of flooding known as *tidal surge*. There was no confusion at the meeting that tidal surge was at issue. Thus, it is not clear beyond a reasonable doubt that §§ 1.2.2, 5.1, and 5.2.2., construed together, do not apprise Montrose [3] of notice as to "what is required in order to lawfully subdivide [its] real property." [4]

> 3 Because we review these land-use regulations for vagueness only as applied to Montrose, and because this case is primarily about the possible flooding from tidal surge, Montrose may not challenge non-flood aspects of the regulations, definitions of flooding in general, or flooding from *hypothetical* potential sources.
>
> 4 We also note that "[i]f *one* of the [Commission's] reasons for rejecting the plat is adequate, whether the other reasons are valid is irrelevant." *Busse v. City of Madison*, 177 Wis. 2d 808, 813, 503 N.W.2d 340, 342 (Wis.Ct. App. 1993) (emphasis added). See also *Wolff v. Mooresville Plan Comm'n*, 754 N.E.2d 589, 592 (Ind. Ct. App. 2001) ("The Commission's decision will be sustained if it was correct on any grounds stated for disapproval of the [plat].").

Smith v. City of Mobile, 374 So. 2d 305 (Ala. 1979), [**32] on which the lower courts relied, is clearly distinguishable and does not counsel a different result. Indeed, that case did not directly involve the issue, here presented, regarding the deference to be exercised in reviewing subdivision regulations for vagueness. There, the Mobile City Planning Commission ("the Planning Commission") denied an application for a proposed subdivision on the ground "that 'the lots would be out of character with the other lots in the area.'" 374 So. 2d at 306. As support for its denial, the Planning Commission cited "Section V(D)(1) of the Planning Commission Subdivision Regulations," which stated: "'The size, width, depth, shape and orientation of lots and the minimum building setback lines shall be appropriate to the location of the subdivision and the type of development and use contemplated. Every lot shall contain a suitable building site.'" 374 So. 2d at 307. The Planning Commission, however, was ignoring more particularized sections of its subdivision regulations, which set forth "specific criteria regarding minimum lot size, maximum depth, position of lots in relation to streets, etc." 374 So. 2d at 309.

After a general discussion of the well recognized [**33] need for specificity in land-use regulations, this Court declined the Planning Commission's invitation to ignore the more specific sections of the regulations, stating:

> "To construe the provisions of Section V(D)(1), as appellees urge, as being synonymous with 'out of character with other lots in the area' would be to ignore the specific criteria which follow it and vest a discretion in the Planning Commission which is unguided by uniform standards, and capable of arbitrary application. ...
>
> "The Planning Commission's denial of approval of [the subdivision] on the grounds that it was 'out of character with other lots in the area' was unrelated to its conformance with the Planning Commission's own regulations and exceeded its statutory grant of power."

374 So. 2d at 309.

This case is actually the *converse* of *Smith*. While the Planning Commission in *Smith* sought to *ignore*

specific regulatory provisions that would circumscribe its discretion, the Commission in this case *embraces* such limiting provisions, namely, [*147] the particularized type of flood hazard involved, as defined in § 11-19-1(2)(b), Ala. Code 1975, and Reg. § 3.2; with the further limitation that the hazard "reasonably be harmful to [**34] the safety, health, and general welfare of the present or future inhabitants of the subdivision." Section 5.2.2. Although the reason for disapproval involved in *Smith* bore no relationship to "safety" or "health," the Commission's position is that any development of the bay lots must incorporate a reliable means of ingress and egress from the property in the event of a tropical cyclone. For these reasons, we hold that Montrose was not entitled to a writ of mandamus compelling the Commission to approve its preliminary plat.

B. Damages Pursuant to Lamar Advertising

This holding obviates the need to address the issues whether Montrose is entitled to damages and whether *Lamar Advertising*, on which the plurality opinion of the Court of Civil Appeals based its remand for a determination as to damages, should be overruled.

III. Conclusion

The manner in which the plurality opinion of the Court of Civil Appeals reviewed §§ 1.2.2., 5.1, and 5.2.2. conflicts with the "highly deferential standard" required by Alabama caselaw. Consequently, the judgment of that court is reversed, and the cause is remanded to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Cobb, [**35] C.J., and Lyons, Smith, Parker, Murdock, and Shaw, JJ., concur.

Bolin, J., concurs in the result.

Roy P. Barber and Carol Barber v. Covington County Commission, et al.

No. 83-1306

Supreme Court of Alabama

466 So. 2d 945; 1985 Ala. LEXIS 3565

March 1, 1985

PRIOR HISTORY: [**1] Appeal from Covington Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: public roads, county commissioners, unfair dealing, corruption, bridge, obstruction, mandamus, county commissions, county road, public need, general superintendence, discretionary powers, judicial review, governing body, discretionary, highway, writ of mandamus, powers vested, allegation of fraud, adequate remedy, respective counties, discontinuance, convenience, obstructed, convenient, reopened, nuisance, travel, repair, lawful

COUNSEL: Benton H. Persons for Murphy, Murphy, Persons and Bush, Andalusia, for Appellant.

J. Fletcher Jones, Andalusia, for Appellee.

JUDGES: Shores, Justice. Torbert, C.J., and Maddox, Jones, and Beatty, JJ., concur.

OPINION BY: SHORES

OPINION

[*946] Roy Barber and Carol Barber appeal from the circuit court's dismissal of their petition for a writ of mandamus. We affirm.

Roy Barber and his wife Carol Barber filed a petition for a writ of mandamus against the Covington County Commission and the individual members thereof, seeking to require the Commission to remove certain obstructions from, and prevent the further blocking of, a road leading to their property. The Commission filed a motion to dismiss the petition, stating that it failed to state a claim upon which relief could be granted. This motion was granted, and the Barbers appeal.

The Barbers alleged in the petition that the road in question has been a recognized public county road for over fifty years and provides the only access to their property. They further alleged that the road is being blocked and obstructed by Huron Anderson and that the Commission has failed [**2] to remove the obstructions, thereby denying them and the public access to their property. The Barbers also alleged that the Commission attempted to abandon the road, and they argue that, in so doing, it acted arbitrarily, capriciously, without good cause, and in violation of § 23-4-1, et seq., Ala. Code 1975.

The Barbers insist that the petition states a claim upon which relief can be granted. They argue that the Commission has general superintendence of the public roads within its jurisdiction, under § 23-1-80, Ala. Code 1975, and, pursuant to that section, has the power to reopen and maintain a public road that has been wrongfully obstructed and closed. They further argue that mandamus is proper in this case to compel the Commission to so act.

[*947] The Commission contends that the exercise of its powers pursuant to § 23-1-80 is discretionary and, in the absence of an allegation of fraud, corruption, or unfair dealing in relation thereto, is not subject to judicial review. We agree.

Mandamus is a drastic and extraordinary writ to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent [**3] to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court. *Martin v. Loeb & Co.*, 349 So. 2d 9 (Ala. 1977).

Section 23-1-80, Ala. Code 1975, reads as follows:

> "The county commissions of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end, they have legislative and executive powers, except as limited in this chapter. They may establish,

> promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary or as may be deemed necessary or advisable by such commissions to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than 20 years."

This section confers upon the county commissions of this [**4] state the general superintendence of the public roads within their respective jurisdictions so as to render travel over the same safe and convenient. To this end, they have certain discretionary powers as enumerated in this section. In *Wright v. Pickens County*, 268 Ala. 50, 55, 104 So. 2d 907, 912 (1958), the Court stated:

> "The powers of courts of county commissioners with regard to public roads are prescribed in § 43, Tit. 23, Code 1940 [the predecessor of § 23-1-80]. . . .
>
> "It has been held that the exercise of the discretionary power given to the boards mentioned in § 43 cannot 'be restrained or reviewed, unless it has been in a fraudulent, corrupt, or unfair conduct of the business of the county.' *Ensley Motor Car Co. v. O'Rear*, 196 Ala. 481, [485], 71 So. 704, 705; *Bentley v. County Commission for Russell County*, 264 Ala. 106, 109, 84 So. 2d 490, 493.
>
> "In the O'Rear case it is said:
>
> "'In the location, erection, repair, or removal, or in the furnishing of the county's buildings, bridges, and roads, the court of county commissioners or board of revenue have a discretion that cannot be exercised for them by any other county official, or directed by [**5] any court, except only when their acts are such as amount to fraud, corruption, or unfair dealing. In the performance of these statutory duties, boards of revenue and courts of county commissioners exercise a function that is quasi legislative. * * * In *Town of Eutaw v. Coleman*, [189 Ala. 164, 66 So. 464], this court said: "We are not dealing with any question of the advisability of what the commissioners have done. There is no charge of fraud, corruption, or unfair dealing, and, in the absence of some such charge, this court is committed to the doctrine that in no case involving the exercise of discretionary power by the court of county commissioners will their action be controlled by any judicial tribunal."'
>
> "From the Bentley case is the following:
>
> "'* * * Our cases are to the effect that the action of a county governing body in the exercise of discretionary powers vested in it is not subject to judicial review except for fraud, corruption, or unfair dealing. * * *'"

In *Alabama Great Southern R. Co. v. Denton*, 239 Ala. 301, 305, 195 So. 218, 221 (1940), the Court stated:

> [*948] "The plenary power of the state to provide a system of rural highways, [**6] to readjust them by relocation and discontinuance of old roads, is well settled.
>
> "As to county roads, not under the State Highway Department, this power has been conferred upon the county governing body.
>
> "The Court of County Commissioners is given general jurisdiction, with legislative, executive and judicial powers, over the matter of providing a system of county roads. . . .
>
> "When the question of the need for a public road is involved, the law commits this to the county authorities. The matter of the creation or discontinuance of a public road is legislative. The legislative body may and should consider all factors, the public need and convenience, the expense of the road system, the hazards and expense of frequent grade crossings over railroads, etc.
>
> "These matters are of legislative, not of judicial cognizance. A court of equity is without jurisdiction to determine the

question of the public need for a highway.

"The jurisdiction of the Court of County Commissioners to order this road reopened and repaired as in *Rudolph v. City of Birmingham* [188 Ala. 620, 65 So. 1006] is not to be questioned.

"Under the facts of this case, we are of the opinion the jurisdiction [**7] to determine whether this road should now be reopened, reconstructed and maintained is in that governing body. A primary consideration is whether there is now a public need for such road. If a court of equity orders this done because the obstruction in the beginning was without lawful right, that body could at once by lawful order discontinue such road."

In the present case, there is no allegation of fraud, corruption, or unfair dealing on the part of the Commission. In the absence of some such allegation, the Commission's exercise of the discretionary powers vested in it is not subject to judicial review by mandamus. Furthermore, mandamus is not proper where another adequate remedy exists. The obstruction of a public road, depriving the public of the use of a public convenience, is a public nuisance, and an action to abate such a nuisance may be maintained by an individual on behalf of the public, if he or she has a special interest in the road. *Alabama Great Southern R. Co. v. Denton*, 239 Ala. 301, 195 So. 218 (1940).

The requirements for the issuance of a writ of mandamus not having been satisfied, the petition was properly dismissed.

AFFIRMED.

Torbert, [**8] C.J., and Maddox, Jones and Beatty, JJ., concur.

Ex parte Seth Ballew; (In re: Seth Ballew v. Town of Priceville)

1990521

SUPREME COURT OF ALABAMA

771 So. 2d 1040; 2000 Ala. LEXIS 145

April 14, 2000, Released

SUBSEQUENT HISTORY: [**1] Released for Publication July 21, 2000.

PRIOR HISTORY: (Morgan Circuit Court, CV-98-248; Court of Civil Appeals, 2980852). Sherrie W. Brown, TRIAL JUDGE.

DISPOSITION: AFFIRMED.

CORE TERMS: Competitive Bid Law, estoppel, void, formalities, doctrine of estoppel, bid, summary judgment, original contract, municipal, detrimental reliance, municipality, competitive, renewal, expired, breach of contract, competitive bidding, solid waste, failure to comply, failed to follow, noncompliance, contractual, sanitation, estopped, disposal, voiding, times, expiration

COUNSEL: For Petitioner: E. Britton Monroe of Lloyd, Schreiber & Gray, P.C., Birmingham.

For Respondent: Gregory S. Martin of Lanier Ford Shaver & Payne, P.C., Huntsville.

JUDGES: HOUSTON, Justice. Hooper, C.J., and Maddox, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.

OPINION BY: HOUSTON

OPINION

[*1040] PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CIVIL APPEALS

HOUSTON, Justice.

Seth Ballew, d/b/a Ballew Sanitation, filed an action in the Morgan Circuit Court to recover damages against the Town of Priceville for breach of contract. The trial [*1041] court entered a summary judgment for Priceville, holding that the contract between Ballew and Priceville violated Alabama's Competitive Bid Law, Ala. Code 1975, § 41-16-50, and was therefore void. Ballew appealed to the Court of Civil Appeals, which affirmed. *Ballew v. Town of Priceville*, [Ms. 2980852, October 1, 1999] So. 2d , 1999 Ala. Civ. App. LEXIS 726 (Ala. Civ. App. 1999). We granted Ballew's petition for certiorari review. We affirm.

In 1987 Ballew and Priceville entered into a contract for Ballew to provide garbage-collection services for the residents of Priceville from March 1987 through February 1990. The contract had no renewal [**2] term, but at its expiration the parties continued to operate under the terms of the original contract, except at an increased rate of compensation for Ballew. The rate was increased three more times before this conflict arose, sometime in early 1998. However, at no point after the expiration of the original contract was the contract submitted for competitive bids.

The sole issue before this Court is whether Priceville may be equitably estopped from using the Competitive Bid Law as a defense to the enforcement of the contract.

This Court reviews a summary judgment de novo, and in doing so it applies the same standard as the trial court. *Bussey v. John Deere Co.*, 531 So. 2d 860 (Ala. 1988). A summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P.

The opinion of the Court of Civil Appeals correctly pointed out that this case is governed by four earlier decisions of this Court: *Alford v. City of Gadsden*, 349 So. 2d 1132 (Ala. 1977); *Maintenance, Inc. v. Houston County*, 438 So. 2d 741 (Ala. 1983); *City of Guntersville v. Alred*, 495 So. 2d 566 (Ala. 1986); [**3] and *Layman's Sec. Co. v. Water Works & Sewer Bd. of the City of Prichard*, 547 So. 2d 533 (Ala. 1989). *Ballew*, So. 2d at , 1999 Ala. Civ. App. LEXIS 726, *4. In each of those cases, this Court addressed the question whether the doctrine of estoppel may be used against a municipal corporation.

Neither *Alford* or *Alred* dealt with the Competitive Bid Law; instead, each involved a situation where the

contract between the parties was void because the formalities of executing the contract had not been complied with. More specifically, in each of those cases the city used a resolution to approve the contract, instead of using an ordinance, as the law required. This Court stated in each case that the doctrine of estoppel is rarely applied against a municipal corporation, but held in each case that the doctrine was appropriate. *Alford*, 349 So. 2d at 1135-36; *Alred*, 495 So. 2d at 568.

This Court distinguished the *Alford* case in *Maintenance, Inc. v. Houston County*, 438 So. 2d 741. [1] There, Maintenance, Inc., and Houston County entered into a contract for the disposal of solid waste. When the contract expired, the parties renegotiated [**4] and signed a second contract that did not comply with the Competitive Bid Law. The County later canceled the contract, and Maintenance, Inc., sued, alleging breach of contract. In its defense, the County asserted that the contract was void because it did not comply with the Competitive Bid Law, and Maintenance, Inc., made an estoppel argument. This Court stated:

> 1 *Maintenance* did not distinguish *Alred*; that case was decided three years after *Maintenance*. However, we note that because it involved a contract that was void for failure to follow the formalities of execution, this Court had no reason in *Alred* to discuss *Maintenance* and, therefore, it did not.

> "Maintenance cannot, however, by way of estoppel, endow with validity a transaction which is illegal and against public policy. *Cochran v. Ozark Country Club, Inc.*, 339 So. 2d 1023 (Ala. 1976). Where the [second] contract between Maintenance and the County was void [*1042] for noncompliance with the bid law, the principle of [**5] estoppel could not be utilized to create the contract anew. *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903 (Ala. 1982).

> "Where, moreover, the legislature has expressed its public policy of voiding contracts which do not comply with the competitive bid law, we decline to expand the scope of our holding in *Alford v. City of Gadsden*, 349 So. 2d 1132 (Ala. 1977), which upheld an estoppel argument against city officials who merely failed to follow the formalities of contract execution."

Maintenance, 438 So. 2d at 744. Therefore, this Court expressly limited the use of the estoppel doctrine against a municipality to a situation where the contract was void as a result of a failure to comply with the formalities of execution, such as the situations in *Alford* and *Alred*.

However, the law appears to have been confused by our opinion in *Layman's Security Co.* That case involved a contract between Layman's Security Company and the Prichard Water Works and Sewer Board; the contract was void because it had not been entered into in compliance with the Competitive Bid Law. This Court faced the issue whether Layman's [**6] Security Company could raise the defense of estoppel. We held:

> "The use of estoppel to prevent a municipality from voiding a contract was [analyzed after the *Maintenance* decision] by this Court in *City of Guntersville v. Alred*, 495 So. 2d 566 (Ala. 1986). Although the Competitive Bid Law was not involved in that case, the discussion is, nonetheless, useful in the present appeal. In affirming a judgment based on a jury verdict, which had found the City estopped to deny the validity of a lease that had been entered into without compliance with the statutorily prescribed procedures, the Court stated:

> "'The doctrine of estoppel may apply against a municipal corporation when justice and fair play demand it. *Alford v. City of Gadsden*, [349 So. 2d 1132 (Ala. 1977)]; *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Board of Adjustment*, 470 So. 2d 1234 (Ala. Civ. App. 1985).'

> 495 So. 2d at 568.

> "Applying those prior decisions to this case, we hold that the judgment of the trial court is due to be affirmed. Because Layman's presented no proof that it materially and detrimentally changed its

> [**7] position in reliance on the contract, estoppel will not apply. While we do not condone the use of the Competitive Bid Law as a means for a party to escape liability for a contract it voluntarily entered into, we are, nonetheless, under the facts of this case, compelled to affirm the trial court's judgment. Where a city or state agency seeks to use the Competitive Bid Law to escape contractual liability, the burden is on the opposing party, in defending against a summary judgment motion, to present evidence of material and detrimental reliance on the contract to support the application of the equitable remedy of estoppel."

Layman's, 547 So. 2d at 535-36. While never explicitly overruling the *Maintenance* decision, *Layman's* did appear to question its reasoning, by citing *Alford* and *Alred* and discussing the merits of the question whether there was detrimental reliance on the part of Layman's. It would appear that Layman's would not be able to assert estoppel under the *Maintenance* rationale, for the sole reason that the contract violated the Competitive Bid Law, and *Alford*, *Alred*, and the question of detrimental reliance would never be [**8] discussed. We reaffirm the holding in *Maintenance* that refused to extend the use of the doctrine of estoppel to preclude the defense of noncompliance with the Competitive Bid Law. Therefore, to the extent that *Layman's* conflicts with *Maintenance*, it is overruled, and an estoppel argument may be made only against "city officials who merely failed to follow the [*1043] formalities of contract execution." *Maintenance*, 438 So. 2d 741 at 744. In the present case, Priceville has defended Ballew's breach-of-contract claim by asserting that any contract between the parties made after February 1990 -- when the original contract expired -- is void because it was not open to competitive bidding, as is required by the Competitive Bid Law. Alabama's Competitive Bid Law requires that a contract that provides for the expenditure of county or municipal funds "shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder." § 41-16-50(a), Ala. Code 1975. Section 41-16-51(a)(10) provides an exception to the requirement of § 41-16-50(a) for "existing contracts up for renewal for sanitation or solid waste [**9] collection, recycling, and disposal between municipalities or counties, or both, and those providing the service." However, this exception would not apply here, because the contract between Ballew and Priceville had no renewal clause, and one of the terms of the original contract, the rate, changed four times between the time when the original contract expired and the time when this conflict arose. Therefore, the contract is void for the parties' failure to comply with the Competitive Bid Law. See § 41-16-50.

Furthermore, because the problem with this contract does not involve the formalities of contract execution, the doctrine of estoppel is not available to Ballew.

We affirm the judgment of the Court of Civil Appeals.

AFFIRMED.

Hooper, C.J., and Maddox, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.

Michael Barry d/b/a Michael Barry Properties, Inc. v. The D.M. Drennen and Emma Houston Drennen and Drennen Memorial Trust of Saint Mary's Church et al.

1060752

SUPREME COURT OF ALABAMA

982 So. 2d 478; 2007 Ala. LEXIS 189

September 14, 2007, Released

SUBSEQUENT HISTORY: Released for Publication April 4, 2008.

PRIOR HISTORY: [**1]

Appeal from Jefferson Circuit Court. (CV-06-4645) Caryl P. Privett.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

CORE TERMS: alley, vacation, abutting, street, landowner, governing body, ordinance, vacated, notice, summary judgment, attorney general, vacating, highway, council members, municipality, time-barred, challenging, franchise, mail, map, official capacities, common law, judgment insofar, abutting owner, ultimately prevail, citations omitted, required to serve, notice requirements, county courthouse, declaration

COUNSEL: For Appellant: Donald H. Brockway, Jr. Birmingham.

For Appellees: Edward S. Allen, James L. Noles, Jr., and Christopher L. Yeilding of Balch & Bingham, LLP, Birmingha, for D.M. Drennen and Emma Houston Drennen Memorial Trust of Saint Mary's Church and Saint Mary's-on-the-Highlands Episcopal Church.

Fredric L. Fullerton II and Michael Melton, asst. city attys., City of Birmingham, Law Department, Birmingham, for City of Birmingham, Carol Smitherman, William Bell, Miriam Witherspoon, Joel Montgomery, Carol Reynolds, Valerie Abbott, Maxine Parker, Steven Hoyt, and Roderick Royal.

JUDGES: LYONS, Justice. Cobb, C.J., and Stuart, Bolin, and Murdock, JJ., concur.

OPINION BY: LYONS

OPINION

[*479] LYONS, Justice.

Michael Barry, doing business as Michael Barry Properties, Inc. (hereinafter "Barry"), appeals from a final judgment dismissing his action against The D.M. Drennen and Emma Houston Drennen and Drennen Memorial Trust of Saint Mary's Church (hereinafter "the Trust"), Saint Mary's-on-the-Highlands Episcopal Church (hereinafter "the Church"), Rubaiyat Trading Company, Ltd. (hereinafter "Rubaiyat"), the City of Birmingham (hereinafter "the City"), and the following individuals in their official capacities as members of the City Council of the City of Birmingham: Carol Smitherman, Miriam Witherspoon, Joel [1] Montgomery, Carol Reynolds, Valerie Abbott, Maxine Parker, William Bell, Steven Hoyt, and Roderick Royal. We affirm in part, reverse in part, and remand.

> 1 On the complaint a line was drawn through the name "Witherspoon" and "Walker" was written in its place. We are unable to determine who made this change. The request for service in the complaint refers to "Miriam Walker." However, the motion to dismiss [**2] by the City and the City Council members refers only to "Miriam Witherspoon."

I. *Factual Background and Procedural History*

This case involves the vacation of the 20-foot-wide alley running north and south from 12th Avenue South to 11th Avenue South of block 770 in Birmingham (hereinafter "the alley"). The Trust, the Church, and Rubaiyat each own property abutting the alley, and on or about February 18, 2005, they executed a declaration of vacation as to the alley. The vacation of the alley was approved by the City Council of the City of Birmingham by the adoption of resolution no. 1131-05 on May 31, 2005. The resolution states that the Trust, the Church, and Rubaiyat are the "owner[s] of all lands abutting the portion of public ways or ways hereinafter declared vacated."

On August 10, 2006, Barry filed an action seeking a judgment declaring that the vacation of the alley is void because of "the City's failure to strictly comply with the applicable law." Barry alleges that he owns property on 13th Avenue South in Birmingham that is "adjacent and in close [*480] proximity" to the alley and that he has "an easement for ingress and egress of handicap [sic] persons that has existed and been used [**3] for more than 20 years and that abuts the alley."

The Trust, the Church, Rubaiyat, the City, and the City Council members filed motions to dismiss or, in the alternative, for a summary judgment. They argued that [2] Barry's action was time-barred under § 23-4-5, Ala. Code 1975, which requires that an appeal of a vacation order be filed within 30 days of the decision of the governing body vacating the street or alley. Barry then filed a request for the production of the City's files relating to the vacation of the alley. Barry, through an affidavit of counsel, asserted pursuant to Rule 56(f), Ala. R. Civ. P., that the necessity for further discovery precluded disposition of the defendants' motions insofar as they sought a summary judgment. Barry also filed an affidavit attempting to establish his status as an abutting landowner. The trial court granted the motions to dismiss on the basis that the appeal to that court was untimely because it had not been filed within 30 days of the City's decision vacating the alley. Barry now appeals the trial court's decision to this Court.

2 Three motions were filed: The Trust and the Church filed one motion; Rubaiyat filed a motion; and the City and the [**4] individual council members filed a motion.

II. *Standard of Review*

> "In *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993), this Court set forth the standard of review applicable to an order granting a motion to dismiss:
>
> > "'The appropriate standard of review under Rule 12(b)(6)[, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'"

Beckerle v. Moore, 909 So. 2d 185, 186-87 (Ala. 2005) (citations omitted).

III. *Analysis*

The dispositive issue presented is whether the trial court erred in dismissing Barry's action based on its conclusion that Barry's claim is time-barred under § 23-4-5, Ala. Code 1975.

A. *Jurisdiction*

The Trust, the Church, Rubaiyat, the City, and the City Council members argue [**5] that this Court lacks jurisdiction over Barry's constitutional challenge to the "ordinance" because Barry failed to serve the attorney general with a copy of the proceeding as required by § 6-6-227, Ala. Code 1975. In [3] pertinent part, § 6-6-227 states that "[i]n any proceeding which involves the validity of a municipal ordinance, or franchise, ... if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard." Barry argues that he was not required to serve the attorney general because [*481] he does not allege that the vacation resolution, resolution no. 1131-05, is unconstitutional. Instead, Barry contends that the trial court's application of the 30-day appeal provision in § 23-4-5 to dismiss his action resulted in a denial of his constitutional right to due process.

3 We are unsure what "ordinance" the appellees are referring to because there is no ordinance at issue in this case. Section 6-6-227, Ala. Code 1975, applies only to statutes, ordinances, and franchises. We assume that they are arguing that resolution no. 1131-05, vacating the alley, is an ordinance for [**6] purposes of § 6-6-227.

This Court has clearly stated that § 6-6-227 does not apply to an action challenging the enforcement of a

statute or an ordinance. *Ex parte Squires*, 960 So. 2d 661, 2006 Ala. LEXIS 327 at *6 (Ala. 2006) (citing *Bratton v. City of Florence*, 688 So. 2d 233 (Ala. 1996)). Furthermore, the Court of Civil Appeals accurately held that the attorney general need not be served when "[t]he gravamen of th[e] action concerned the actions of officials in interpreting and enforcing the statute and regulations, not the constitutionality of the statutes or regulations themselves." *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22, 26 (Ala. Civ. App. 1995). Because Barry is not challenging the constitutionality of a statute, ordinance, or regulation itself, Barry was not required to serve the attorney general with his complaint in this matter, and, thus, this Court has jurisdiction over Barry's claim.

B. *Notice Requirements*

The Alabama Code provides that an alley can be vacated either (1) by a county or municipality, § 23-4-2, Ala. Code 1975, or (2) by the landowners abutting the subject alley, § 23-4-20, Ala. Code 1975. Specifically, §§ 23-4-2 and 23-4-5 apply when a [**7] county or municipality instigates the vacation of an alley, and § 23-4-20 applies when abutting landowners instigate the vacation. However, § 23-4-20 expressly incorporates the notice, hearing, voting, and appeal procedures set forth in §§ 23-4-2 and 23-4-5. Section 23-4-20 provides:

> "(a) Subject to the conditions set out in this subsection, any street or alley may be vacated, in whole or in part, by the owner or owners of the land abutting the street or alley or abutting that portion of the street or alley desired to be vacated by following the procedures set out herein. The owner or owners of the land abutting the street or alley to be vacated shall join in a written petition requesting that the street or alley be vacated and shall file the petition with the governing body with jurisdiction over the street or alley, or portion thereof, requesting the governing body's approval of the vacation. Following receipt of the written request for assent, *the governing body shall act upon the request applying the same notice, hearing, voting, and appeal procedures as set forth in Sections 23-4-2 and 23-4-5*, and if the governing body approves the vacation, it shall have the same effect as provided [**8] therein, including that the vacation shall not deprive other property owners of any right they may have to convenient and reasonable means of ingress and egress to and from their property, and if that right is not afforded by the remaining streets and alleys, another street or alley affording that right must be dedicated.
>
> "(b) The provisions of this section shall not be held to repeal any existing statute relating to the vacation of roads, streets, or alleys, or parts thereof, and shall not be held to limit or expand any civil causes of action available under the law."

(Emphasis added.)

Section 23-4-2(a) provides:

> "Whenever the governing body of a municipality or county proposes to vacate a public street, alley, or highway, or portion thereof, the governing body shall schedule a public hearing prior to taking final action and *shall publish notice of the proposed hearing on the vacation in* [*482] *a newspaper* of general circulation in the portion of the county where the street, alley, or highway lies once a week for four consecutive weeks in the county prior to deciding the issue at a regularly scheduled meeting of the governing body. *A copy of the notice shall be posted on a bulletin board at* [**9] *the county courthouse and shall also be served by U.S. mail at least 30 days prior to the scheduled meeting on any abutting owner* and on any entity known to have facilities or equipment such as utility lines, both aerial or buried, within the public right-of-way of the street, alley, or highway to be vacated. ..."

(Emphasis added.)

C. *Whether Dismissal of the Complaint for Untimeliness Was Appropriate*

Section 23-4-5(a) provides that "[a]ny party affected by the vacation of a street, alley, or highway pursuant to this chapter may appeal within 30 days of the decision of the governing body vacating the street to the circuit court of the county in which the lands are situated." The Trust, the Church, Rubaiyat, the City, and the City Council members rely on § 23-4-5 to argue that Barry's complaint is time-barred because Barry failed to file his complaint challenging the vacation of the alley

within 30 days of the City's approval of the vacation. Barry contends that application to him of the 30-day limitation in an appeal from the decision vacating the alley is a denial of due process and that he has "a right to have a declaration of the rights of the parties in and to the alley" under § 23-4-20(b). [**10] [4] (Barry's brief, at 21.) Barry contends that he is an abutting landowner and, therefore, that he was entitled to notice by United States mail pursuant to § 23-4-2.

4 We need not decide whether Barry's remedy would be foreclosed absent the savings clause of § 23-4-20(b).

Because there was a prohibition against vacation of a public road at common law, statutes authorizing such a vacation are in derogation of the common law and therefore must be strictly construed. *Holland v. City of Alabaster*, 624 So. 2d 1376, 1378 (Ala. 1993); *Bownes v. Winston County*, 481 So. 2d 362 (Ala. 1985). Applying this principle, we conclude that the 30-day appeal limitation in § 23-4-5 cannot be applied to an abutting landowner who never received the notice required by § 23-4-2 to be given to abutting landowners by United States mail.

Barry alleged in his complaint that his property is adjacent to the alley. The Trust, the Church, Rubaiyat, the City, and the individual council members, however, contend that Barry is not an abutting landowner. The Trust and the Church, in their response to Barry's Rule 59, Ala. R. Civ. P., motion to alter, amend, or vacate the judgment of dismissal and in support of their motion [**11] to strike Barry's second amended complaint, attached a tax map purporting to show that Barry's property does not abut the alley. As previously noted, Barry attempted before the ruling on the motions to dismiss to obtain a continuance of the hearing on those motions on the basis that he had had inadequate time to conduct discovery. Barry also filed an affidavit attempting to establish his status as an abutting owner by adverse possession.

Use of materials beyond the allegations in a complaint to support a motion to dismiss, as a general rule, converts the motion to dismiss into a motion for a summary judgment. *Dobbs & Sons, Inc. v.* [*483] *Northcutt*, 819 So. 2d 607, 609 (Ala. 2001) ("Dobbs's attaching exhibits to its motion to dismiss effectively converted it to a summary judgment motion."); see also *Donoghue v. American Nat'l Ins. Co.*, 838 So. 2d 1032, 1035 (Ala. 2002) ("In general, exhibits provided in support of motions to dismiss under Rule 12(b)(6) are considered 'matters outside the pleading' and effectively convert the motion into a motion for a summary judgment. Ala. R. Civ. P. 12(b)."); *Wesson v. McCleave, Roberts, Shields & Green, P.C.*, 810 So. 2d 652, 656 (Ala. 2001) (stating that [**12] conversion of a motion to dismiss to a motion for a summary judgment under Rule 12(b) occurs "'regardless of what the motion has been called or how it was treated by the trial court'" (quoting *Hornsby v. Sessions*, 703 So. 2d 932, 937-38 (Ala. 1997))).

The Trust, the Church, and Rubaiyat rely on *Newson v. Protective Industrial Insurance Co. of Alabama*, 890 So. 2d 81 (Ala. 2003), in which this Court recognized an exception to the rule precluding reliance upon matters beyond the face of the complaint in disposing of a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In *Newson*, we stated:

> "The exception is that ""if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss."" *Donoghue v. American Nat'l Ins. Co.*, 838 So. 2d 1032, 1035 (Ala. 2002) (citations omitted) (quoting *Wilson v. First Union Nat'l Bank of Georgia*, 716 So. 2d 722, 726 (Ala. Civ. App. 1998), quoting in turn *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-85 (10th Cir. 1997))."

890 So. 2d at 83-84. [**13] The tax map, which purportedly defeats Barry's status as an abutting landowner, is not referred to in the complaint and is not central to the plaintiff's claim, as was a provision in the insurance policy made the basis of the action in *Newson*. The map does not fall within the recognized exception.

As this Court stated in *Patton v. Black*, 646 So. 2d 8, 10 (Ala. 1994), in reviewing a motion to dismiss: "It is not for this court to determine, based on the complaint, whether the plaintiff will ultimately prevail, but only if he may possibly prevail." After reviewing the allegations in Barry's complaint and construing them in his favor, we conclude that it is conceivable that Barry could prove that he is an abutting landowner and, therefore, that he was entitled to the statutory notice of the hearing on the proposed vacation of the alley required by § 23-4-2. The fact that two of the defendants--the Trust and the Church--deemed it necessary to resort to evidentiary materials after an order had been entered granting their motion to dismiss is sufficient indicia that the trial court erred in not granting Barry's request for a continuance and in failing to dispose of the matter under

Rule 56, Ala. R. Civ. P. [**14] Consequently, we cannot affirm the trial court's dismissal based on the failure to appeal within the time prescribed by § 23-4-5(a); the trial court improperly dismissed the action on the basis that Barry's appeal to the trial court was untimely. [5]

> 5 In view of our holding, we do not reach the question whether, assuming Barry is not an abutting landowner, relief might be justified for failure to comply with the other notice requirements of § 23-4-2, i.e., publication in a newspaper and posting at the county courthouse.

[*484] D. *Whether Dismissal Was Appropriate as to the City Council Members*

The members of the City Council argue that they are immune from Barry's action because the complaint names them as defendants in their official capacities and not in their individual capacities. Barry concedes in his reply brief that the members of the City Council are entitled to be dismissed from this action. Therefore, we affirm the trial court's judgment insofar as it dismisses the members of the City Council, who were sued in their official capacities only.

IV. *Conclusion*

The trial court's order dismissing the action as to the Trust, the Church, Rubaiyat, and the City was premature; a fact-intensive analysis [**15] is required to determine whether the vacation procedures set forth in § 23-4-2 were complied with. We therefore reverse the judgment of the trial court insofar as it dismisses the action against the Trust, the Church, Rubaiyat, and the City. We affirm the trial court's judgment insofar as it dismisses the action against the members of the City Council: Carol Smitherman, Miriam Witherspoon, Joel Montgomery, Carol Reynolds, Valerie Abbott, Maxine Parker, William Bell, Steven Hoyt, and Roderick Royal. We remand the case for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Cobb, C.J., and Stuart, Bolin, and Murdock, JJ., concur.

Bessemer Water Service, a department of the City of Bessemer v. Lake Cyrus Development Company, Inc.

1040956

SUPREME COURT OF ALABAMA

959 So. 2d 643; 2006 Ala. LEXIS 337

December 8, 2006, Released

SUBSEQUENT HISTORY: [**1] Released for Publication May 4, 2007.
Appeal after remand at, Remanded by Lake Cyrus Dev. Co. v. Ag of Ala. ex rel. Bessemer Water Serv., 2014 Ala. LEXIS 1 (Ala., Jan. 10, 2014)

PRIOR HISTORY: Appeal from Jefferson Circuit Court, Bessemer Division. (CV-97-378) Dan C. King, III.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: bid, public works, void, public-works, competitive, waterworks, awarding, public funds, water line, bidding, sealed, water main, invalid provisions, residential, customer, tendered, ratepayer, obligated, reimbursement, tap, water service, general fund, water-service, transferring, cross-claim, constructed, undisputed, waterlines, install, water works

COUNSEL: For Appellant: Frank G. Alfano and Denise Blue Poe of Vines & Waldrep, LLC, Bessemer.

For Appellee: V. Edward Freeman II of Stone, Patton, Kierce & Freeman, Bessemer.

Amicus curiae State of Alabama, in support of the appellant: Troy King, atty. gen., Kevin C. Nesom, deputy atty. gen., and Olivia W. Martin, asst. atty. gen.

JUDGES: NABERS, Chief Justice. See, Lyons, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

OPINION BY: NABERS

OPINION

[*645] NABERS, Chief Justice.

The Bessemer Water Service ("BWS"), a department of the City of Bessemer, appeals from the trial court's order enforcing a contract entered into by the mayor of the City of Bessemer on BWS's behalf with the Lake Cyrus Development Company, Inc. ("LCDC"). The contract, BWS alleges, violated § 39-2-2, Ala. Code 1975, which requires all contracts for public-works projects to be advertised and bid upon. BWS also alleges that the mayor of Bessemer, who executed the contract on behalf of BWS, lacked the authority to bind BWS to the contract. We reverse and remand.

I.

In 1997 John C. Rockett, Jr., a BWS ratepayer, and other BWS ratepayers sued BWS and other parties, alleging that BWS had misused public funds and had thereby harmed the ratepayers by inflating the amounts they were charged for their water consumption. [**2] The trial court initially certified the case as a class action; however, this Court directed that the order certifying the class be vacated. *Ex parte Water Works & Sewer Bd. of Birmingham*, 738 So. 2d 783 (Ala. 1998). Thereafter, the case was delayed for several years for a variety of reasons; it eventually evolved into what the trial court described as "a declaratory-judgment action against [BWS] concerning its pricing policies and the manner in which it distributes its revenue."

On May 19, 2004, the trial court entered an order holding that BWS had likely been violating the law in regard to its practice of transferring substantial funds each year to the general fund of the City of Bessemer "without any legal or industry standard being utilized to determine whether the rates being charged or funds transferred were reasonable." The trial court stated that BWS's practice of transferring funds without using any standard conflicts with the legal requirement that utility customers be charged a reasonable and nondiscriminatory rate. See *Water Works Bd. of Parrish v. White*, 281 Ala. 357, 361, 202 So. 2d 721, 724 (1967) ("The law

will not and cannot tolerate [**3] discrimination in the charges of a water works company. There must be equality of rights and special privileges to none; and, if this is violated or unreasonable rates are charged, the humblest citizen has the right to invoke the protections of the laws equally with another.").

The trial court noted that BWS's practice of transferring funds to the general fund of the City of Bessemer was particularly suspect inasmuch as BWS also provided water to, and received income from, customers in Hueytown, Midfield, Brighton, Hoover, and Lipscomb. The ratepayers in those cities did not receive services from the City of Bessemer but were, in effect, subsidizing its general fund.

Accordingly, the trial court, in its May 19, 2004, order, enjoined BWS from transferring any further sums to the general fund of the City of Bessemer except for certain approved expenses and reimbursements, until BWS completed a water-rate study that would allow it to implement a rate structure that provided a reasonable and legal rate of return to the City of Bessemer for operating BWS, in line with accepted industry standards. The trial court further stated that it would retain jurisdiction over the case until such [**4] a rate structure was implemented and that it [*646] would "always be open to [the parties] in the event it is found that any associated entity, through action or inaction, in any way impedes or hampers [BWS] in the implementation of the requirements of this order."

On December 6, 2004, BWS and Rockett, the only remaining plaintiff in the case, jointly moved the trial court to add LCDC to the action as a necessary party pursuant to Rule 19(a), Ala. R. Civ. P. BWS and Rockett alleged that LCDC was hampering BWS's ability to comply with the trial court's May 19, 2004, order inasmuch as LCDC was refusing to renegotiate an allegedly invalid contract it had entered into with BWS in 1998 ("the 1998 water agreement"). The trial court granted the motion and added LCDC as a necessary party in the case. That same day, BWS filed a cross-claim for declaratory relief, asking the trial court to relieve it of the allegedly invalid provisions in the 1998 water agreement and to determine whether LCDC was obligated to return to BWS any of the funds it had previously received from BWS under the 1998 water agreement.

The 1998 water agreement was entered into on April 30, 1998. The contract was signed by [**5] the then mayor of Bessemer, Quitman Mitchell, who by statute also served as the manager of Bessemer Utilities, [1] and by Charles Givianpour, the president of LCDC. It was the product of two months of negotiations that began when Mayor Mitchell and Charles Nivens, operations manager for Bessemer Utilities, approached Givianpour and asked him to use BWS, instead of Birmingham Water Works, as the provider of water to the new Lake Cyrus residential development in Hoover. [2] BWS was interested in providing water to Lake Cyrus not only to increase its customer base, but also to further its reach. Toward that end, BWS expressly negotiated for LCDC to increase the size of the main water line within the development (running from Highway 150 to Parkwood Road) from a 12-inch line to a 16-inch line to allow for future expansion.

1 Bessemer Utilities includes BWS and the Bessemer Electric Service. Section 11-43D-14, Ala. Code 1975, provides that the mayor of Bessemer "shall be the chief executive officer, and shall have general supervision and control of all other officers, employees and affairs of the city, which shall include the management of the public utilities ...."

[**6]

2 Lake Cyrus is located in Ho over on approximately 600 acres adjacent to the Bessemer city limits. There are approximately 700 houses in the Lake Cyrus development.

The 1998 water agreement obligated BWS

> "to provide potable water to all residential, industrial and commercial areas within the [Lake Cyrus] development at the same rates and upon the same terms and conditions (*as modified by the terms and provisions of this agreement*) as BWS provides water service to all other residential, industrial and commercial customers, respectively, of BWS."

(Emphasis added.) The terms and provisions of the 1998 water agreement had been modified; they were not the terms and provisions of the typical BWS water-services contract. Nivens and Terry Hinton, water-distribution superintendent at BWS, testified that it was BWS's standard procedure to fund the cost of a water-main extension for a residential development to the point of the entrance to the development and that the developer customarily paid all costs associated with bringing water from that point into the development, including [**7] the construction of the interior main extension, the submain, and the lateral lines. However, under the 1998 water agreement, BWS agreed to pay LCDC [*647] $ 273,000 as "a partial deferment" of the costs LCDC incurred in installing the interior 16-inch main extension, the submains, and the associated water valves. Moreover, BWS agreed to reimburse LCDC on a monthly basis for all costs and expenses LCDC in-

curred in installing the lateral water lines within the development.

It was also standard BWS practice to charge a "tap fee" to each new customer that requested water service. The tap fee was used to offset the cost of extending the water main to the entrance of a new development and the cost of maintaining the water lines in the development after the lines were installed and tendered by the developer for BWS's acceptance. However, the 1998 water agreement required BWS to remit to LCDC, on a monthly basis, 100% of the tap fees collected in the development.

Aside from the provisions mandating a $ 273,000 payment to LCDC, the reimbursement of LCDC's lateral-line construction costs, and the transmittal to LCDC of 100% of the collected tap fees, BWS also identified the following requirements [**8] in the 1998 water agreement as deviating from the terms and conditions of its standard water-services contract: 1) BWS was to provide and install all fire hydrants; 2) LCDC was to retain an option to repurchase all of the waterworks in the development after they were tendered to BWS; 3) BWS was required to keep the contents of the 1998 water agreement confidential; and 4) all late payments by BWS accrued interest at the rate of 18%.

In 2002, Edward May was elected mayor of Bessemer. May replaced Mayor Mitchell and began his term on October 7, 2002. Mayor May initially continued to sign the reimbursement checks being sent to LCDC under the 1998 water agreement. However, in approximately May 2004, after reviewing a copy of the contract, Mayor May began to doubt the legality of the 1998 water agreement. After consulting with the City's attorney, Mayor May sent LCDC a letter, dated August 9, 2004, informing it of the City's position that the 1998 water agreement was void and requesting that legal counsel for the City and for LCDC meet and discuss the options.

The relationship between LCDC and BWS rapidly disintegrated. Because BWS would not pay LCDC $ 202,990 in reimbursements LCDC was [**9] claiming under the 1998 water agreement for finishing the interior 16-inch water-main extension through the back of the subdivision to complete the connection with the main BWS line at Parkwood Road, LCDC refused to complete the work. BWS was anxious to have the extension completed because the connection at Parkwood Road would "loop" the system. In response, BWS delayed approving water lines connecting the remaining sector of the Lake Cyrus development, causing delays in residential construction.

On December 6, 2004, BWS filed its cross-claim seeking, among other relief, relief from the allegedly invalid provisions in the 1998 water agreement that required it: 1) to remit to LCDC $ 71,540, the outstanding balance of the $ 273,000 partial-deferment payment; 2) to further reimburse LCDC for costs and expenses associated with constructing lateral lines; 3) to turn over to LCDC 100% of the tap fees that were collected in the development; 4) to sell LCDC all the water lines in the development if LCDC elected to exercise the purchase option; and 5) to keep the terms of the 1998 water agreement confidential. BWS also asked the trial court to enforce the valid portions of the 1998 water agreement [**10] so as to allow BWS to continue to provide water to the Lake Cyrus development. Finally, BWS asked the trial [*648] court to determine if it could recover any of the funds previously paid to LCDC under the 1998 water agreement and to declare that BWS was the owner of all of the waterworks within the Lake Cyrus development that had previously been tendered by LCDC and accepted by BWS.

LCDC thereafter filed a "motion for emergency expedited and injunctive relief," asking the trial court to order BWS to supply water to the final sector of the Lake Cyrus development as promised and to pay LCDC the money LCDC was claiming under the 1998 water agreement. LCDC further asked the court to enjoin BWS from future breaches of the contract.

The trial court held a bench trial on all pending matters in the case from February 28, 2005, through March 3, 2005. On March 7, 2005, the trial court entered an order finding the entire 1998 water agreement to be valid and entering a judgment in favor of LCDC. On March 8, 2005, the trial court entered an amended order, ordering BWS to pay LCDC $ 224,979.83 in damages. [3] BWS appeals.

3 On March 14, 2005, the trial court ordered BWS to pay immediately the $ 224,979.83 specified in the trial court's March 8, 2005, order. On March 15, 2005, BWS requested a stay pursuant to Rule 62(a), Ala. R. Civ. P.; however, the trial court denied its request. Accordingly, BWS deposited $ 224,979.83 with the clerk of the circuit court that same day. On March 16, 2005, the trial court ordered those funds to be disbursed to LCDC. After filing its appeal, BWS moved this Court to stay disbursement of the funds pursuant to Rule 8(b), Ala. R. App. P. This Court granted BWS's motion and, on March 23, 2005, ordered LCDC to restore the $ 224,979.83 to the clerk of the circuit court no later than March 30, 2005. Because LCDC had already spent the money, the clerk of the circuit court accepted a property bond in lieu of cash.

[**11] II.

"[W]hen evidence is presented ore tenus in a nonjury case, a judgment based on that ore tenus evidence will be presumed correct and will not be disturbed on appeal unless it is plainly and palpably wrong or against the great weight of the evidence. *Eagerton v. Second Econ. Dev. Coop. Dist. of Lowndes County*, 909 So. 2d 783, 788 (Ala. 2004). Nevertheless, this rule is not applicable where the evidence is undisputed or where the material facts are established by undisputed evidence. *Salter v. Hamiter*, 887 So. 2d 230, 233-34 (Ala. 2004). Additionally, when the trial court 'improperly applies the law to the facts, the presumption of correctness otherwise applicable to the trial court's judgment has no effect.' *Ex parte Bd. of Zoning Adjustment of Mobile*, 636 So. 2d 415, 418 (Ala. 1994)."

Hartford Cas. Ins. Co. v. Merchants & Farmers Bank, 928 So. 2d 1006, 1009 (Ala. 2005). In the present case, the evidence was presented to the trial court ore tenus. However, because the material facts are undisputed, the trial court's decision is entitled to no presumption of correctness and this [**12] Court will review it de novo.

III.

BWS argues that the trial court erred in holding the 1998 water agreement valid for two reasons. First, BWS argues that, because the 1998 water agreement obligated BWS to at least partially fund the construction of the water lines inside Lake Cyrus, that construction was a public-works project pursuant to § 39-2-1(5), Ala. Code 1975, and BWS's payments to LCDC to complete the construction therefore violated § 39-2-2, Ala. Code 1975, which requires that all public-works projects be advertised and bid upon.

Second, BWS argues that Mayor Mitchell had no authority to enter into the [*649] 1998 water agreement because § 11-43-56, Ala. Code 1975, vests sole management and control of city finances in the Bessemer city council. BWS argues that Mayor Mitchell, in his capacity as the manager of Bessemer Utilities, had only the limited authority to enter into "standard" water-service contracts. BWS argues that any contracts that significantly departed from the terms of the standard contract, as the 1998 water agreement unquestionably did, would have to be approved by the city council [**13] to be valid. [4]

4 We note that the State has filed an amicus curiae brief generally supporting BWS's arguments and making the additional argument that the favored treatment LCDC received by virtue of the 1998 water agreement violates a public utility's duty not to discriminate among its ratepayers. However, although BWS may have raised that argument below, it has not advanced that argument on appeal, and this Court cannot, therefore, consider it now. See *Lloyd Noland Hosp. v. Durham*, 906 So. 2d 157, 174 (Ala. 2005) (stating that to the extent an amicus curiae advances different arguments from the actual parties to the suit, those arguments cannot be considered).

We first consider BWS's argument that the 1998 water agreement violates the mandatory bidding and advertising provisions of § 39-2-2. Section 39-2-2 provides, in pertinent part:

"(a) Before entering into any contract for public works involving an amount in excess of fifty thousand dollars ($ 50,000), the awarding authority shall [**14] advertise for sealed bids. ...

"(b) An awarding authority may let contracts for public works involving fifty thousand dollars ($ 50,000) or less with or without advertising or sealed bids.

"(c) All contracts for public works entered into in violation of this title shall be null, void, and violative of public policy. ..."

In § 39-5-6, Ala. Code 1975, and § 39-5-1(a), Ala. Code 1975, the legislature evinced its intent that entities strictly comply with § 39-2-2. Section 39-5-6 states:

"The provisions of this title are mandatory, and shall be construed to require strict competitive bidding on contracts for public works. The courts shall not invoke or apply any principle of quantum meruit, estoppel, or any other legal or equitable principle which would allow recovery for work and labor done or materials furnished under any contract let in violation of competitive bidding requirements as prescribed by law."

Section 39-5-1(a) states:

"No civil action shall be brought or maintained by a contractor in any court

> in this state to require any awarding authority to pay out public funds for work and labor [**15] done, for materials supplied, or on any account connected with performance of a contract for public works, if the contract was let or executed in violation of or contrary to this title or any provision of law."

The purpose of these statutes is plain. Competitive bidding by sealed bids guards against opportunities for corruption in the procurement of contracts for public-works projects. These statutes make it clear that the legislature intended to erect impregnable barriers to prevent the misuse of public funds inherent in awarding public-works contracts covered by § 39-2-2 without competitive bidding.

In order to determine whether the 1998 water agreement was entered into in violation of § 39-2-2, we must determine: 1) whether the 1998 water agreement is, in fact, a contract for public works; 2) whether the amount involved exceeds $ 50,000; and 3) whether the awarding authority advertised for sealed bids. The latter two determinations are easily made because [*650] the 1998 water agreement on its face required an initial payment from BWS to LCDC of $ 273,000, and it is undisputed that there were no advertisements seeking sealed bids for the project. Thus, the relevant inquiry is whether [**16] the 1998 water agreement constitutes a contract for public works.

Section 39-2-1(5) defines "public works" as:

> "The construction, repair, renovation, or maintenance of public buildings, structures, sewers, *waterworks*, roads, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, repaired, renovated, or maintained on public property and to be paid, in whole or in part, with public funds ...."

(Emphasis added.) Section 39-2-1(4) defines "public property," as that term is used in § 39-2-1(5), as "[r]eal property which the state, county, municipality, or awarding authority thereof owns or has a contractual right to own or purchase, *including easements*, rights-of-way, or otherwise." (Emphasis added.) The 1998 water agreement granted BWS "all permanent, non-exclusive easements necessary for BWS to install water mains and otherwise provide water service to all areas of the [Lake Cyrus development]"; therefore, the waterworks constructed to serve the Lake Cyrus development meet the definition of "public works" in § 39-2-1(5).

In its brief filed with this Court, LCDC nevertheless argues that the definition of "public works" [**17] in § 39-2-1(5) does not encompass the work done by BWS in the Lake Cyrus development:

> "Lake Cyrus was not a 'public works' [project] as defined under the bid law, § 39-2-1(5), Ala. Code 1975. Lake Cyrus was already being developed in the City of Hoover with plans to purchase water from Birmingham when Mayor Mitchell and Charles Nevins came to Charles Givianpour's office and asked that Lake Cyrus use BWS for water instead of Birmingham. If BWS wanted to sell water, rent fire hydrants, and loop the main line at Parkwood Road and Highway 150, Lake Cyrus had to be purchased as a package, if at all. A purchase of an ongoing project is not a public work to be let for bid."

(LCDC's brief at 29.) From LCDC's standpoint, all the special financial terms and other nonstandard provisions in the 1998 water agreement may be seen as reasonable requirements to which BWS had to agree before LCDC would change its plans and use BWS instead of Birmingham Water Works as the water provider for the Lake Cyrus development. From LCDC's perspective, the entire arrangement thus constituted a "package" for BWS to accept or reject in order to acquire access to the residential [**18] customers in the Lake Cyrus development. BWS, however, as a public utility, was required to comply with the competitive bid law. That law "require[s] strict competitive bidding on contracts for public works." § 39-5-6. The 1998 water agreement obligated BWS to pay, at least in part, for the construction and installation of waterworks, i.e., water lines, valves, and hydrants, in the Lake Cyrus development. The property on which the waterworks were built was public property because LCDC had granted BWS an easement to it. Therefore, regardless of how LCDC viewed the project, the construction and installation of waterworks in the Lake Cyrus development constituted a public-works project under § 39-2-1(5).

The fact that the Lake Cyrus waterworks project was not a typical public-works project, inasmuch as the payments to LCDC were structured as reimbursements [*651] and deferments instead of payments, does not change the fact that it was a public-works project. For example, LCDC argues that the $ 273,000 payment it

was to receive under the 1998 water agreement was negotiated because BWS wanted LCDC to install as the main extension for the development a 16-inch water main, larger and more [**19] expensive than the 12-inch main that was otherwise planned, to allow for possible future expansion by BWS. LCDC claims the $ 273,000 was to defer its expense in installing the larger main. However, that $ 273,000 payment violates the competitive bid law. The larger 16-inch water main undoubtedly serves a public purpose in that it was constructed to benefit BWS, not LCDC. The contract for the construction of the line -- the 1998 water agreement -- was unilaterally awarded to LCDC without any advertisement. The fact that LCDC likely could have constructed the water main at the lowest cost anyway because it already was planning to install a smaller water main in the space is immaterial; the competitive bid law demands strict compliance.

Because the 1998 water agreement involved a public-works project (in an amount in excess of $ 50,000), BWS was required by § 39-2-2 to advertise for sealed bids before entering into the contract calling for it to expend public funds on the project. BWS did not do so. By way of the 1998 water agreement, BWS and LCDC effectively bypassed the bidding process entirely so as to award the contract directly to LCDC. This violated § 39-2-2 and, pursuant to [**20] § 39-2-2(c), the 1998 water agreement is accordingly "null, void, and violative of public policy." The trial court therefore erred in holding that it was a valid binding contract. Moreover, because § 39-5-6 and § 39-5-1(a) forbid a party from receiving any payment in connection with a contract awarded in violation of the competitive bid law, regardless of the party's culpability, the trial court also erred in awarding LCDC $ 224,979.83 for BWS's alleged breach of contract. Because the 1998 water agreement was entered into in violation of the mandatory provisions of § 39-2-2, LCDC is not entitled to recover any payment for the work it performed under that contract.

IV.

Having determined that LCDC is not entitled to any more payments under the 1998 water agreement, we now consider BWS's argument that the trial court erred by not ordering LCDC to reimburse BWS for payments that it previously made to LCDC under the 1998 water agreement. BWS argues that the law allows a party who pays money under a mistake of fact to recover that money. *Russell v. Richard & Thalheimer*, 6 Ala. App. 73, 60 So. 411 (1912). However, the legislature has set forth a specific statutory [**21] framework by which to recover public funds expended on a public-works contract that was not properly bid. Section 39-5-3, Ala. Code 1975, provides:

> "An action shall be brought by the Attorney General or may be brought by any interested citizen, in the name and for the benefit of the awarding authority, to recover paid public funds from the contractor, its surety, or any person receiving funds under any public works contract let in violation of or contrary to this title or any other provision of law, if there is clear and convincing evidence that the contractor, its surety, or such person knew of the violation before execution of the contract. The action shall be commenced within three years of final settlement of the contract."

BWS asserted its claim that it is entitled to recovery of payments previously made to LCDC in a cross-claim filed on December [*652] 6, 2004. Because such a cross-claim is not "[a]n action ... brought by the Attorney General or ... by any interested citizen, in the name and for the benefit of the awarding authority," BWS is not entitled to the relief it seeks.

V.

We have held that the 1998 water agreement violated § 39-2-2 and [**22] is accordingly void. BWS argues, however, that this Court should sever the invalid provisions of the 1998 water agreement and enforce the remaining provisions. BWS states that the end result of such action would be a standard water-services contract, fair to both parties. LCDC argues that if the 1998 water agreement is void, it is void in its entirety.

The 1998 water agreement contains the following severance clause:

> "If any term, covenant or condition of this agreement or the application thereto to any person or circumstance shall, to any extent, be invalid or unenforceable, then the remainder of this agreement or the application of such term, covenant or condition to other persons or circumstances shall not be affected thereby and each term, covenant and condition of this agreement shall be valid and enforceable to the fullest extent permitted by law."

BWS argues that this clause, especially when considered in light of this Court's stated policy that it will preserve as much of a contract as can survive its invalid provisions, *Ex parte Celtic Life Ins. Co.*, 834 So. 2d

766, 769 (Ala. 2002), requires this Court to uphold the valid portions of the 1998 [**23] water agreement.

However, BWS fails to recognize that the 1998 water agreement does not merely contain invalid provisions; rather, the 1998 water agreement itself is void. Section 39-2-2(c) provides that "[a]ll contracts for public works entered into in violation of this title shall be null, void, and violative of public policy." Where the legislature has by statute declared a contract void, this Court cannot attempt to salvage it by pruning certain provisions, in spite of our general policy in favor of preserving as much of a contract as can survive its invalid provisions.

VI.

The last remaining issue relates to ownership of the waterlines that are currently in place in the Lake Cyrus development. The 1998 water agreement contained a purchase option purporting to allow LCDC to repurchase all the waterlines previously tendered to BWS if it elected to do so. BWS has asked this Court to declare BWS the owner of those waterlines. Because we have held that the 1998 water agreement is void pursuant to § 39-2-2(c), LCDC does not hold a valid option to repurchase the waterlines previously tendered to BWS pursuant to the 1998 water agreement; those lines are thus the property of BWS. [**24] However, all lines that LCDC has not yet tendered to BWS remain the property of LCDC. LCDC may hereafter elect to tender those lines to BWS; however, because we have held that the 1998 water agreement is void, LCDC is under no legal obligation to do so.

VII.

The 1998 water agreement obligated BWS to use public funds to pay for the construction of waterworks inside the Lake Cyrus development; therefore, it was, pursuant to statute, a public-works project. Because it involved an amount in excess of $ 50,000, BWS was required by § 39-2-2 to advertise for sealed bids for the project; it did not do so. Instead, BWS awarded the contract to LCDC without advertising or soliciting bids. In doing [*653] so, BWS violated § 39-2-2, and the 1998 water agreement is therefore void. Based on this holding, it is unnecessary for this Court to consider BWS's argument that Mayor Mitchell was not authorized to enter into the 1998 water agreement.

For these reasons, the trial court erred by entering a judgment in favor of LCDC and ordering BWS to pay LCDC $ 224,979.83. The judgment of the trial court is accordingly reversed, and this matter is remanded for further proceedings consistent with this opinion.

[**25] REVERSED AND REMANDED.

See, Lyons, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

Black Belt Wood Company, Inc. v. Leonard Earl Sessions, as Administrator of the Estate of James Karl Sessions, deceased

No. 84-1222

Supreme Court of Alabama

514 So. 2d 1249; 1986 Ala. LEXIS 4081

October 3, 1986, Filed

SUBSEQUENT HISTORY: [**1] On Return after Remand, Reported at: 514 So.2d 1249 at 1257.

PRIOR HISTORY: Appeal from Jefferson Circuit Court.

DISPOSITION: AFFIRMED IN PART; AND REMANDED, WITH DIRECTIONS.

LexisNexis(R) Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview
Civil Procedure > Appeals > Standards of Review > General Overview
[HN1] The standard for testing a motion for directed verdict is identical to that for testing a motion for judgment notwithstanding the verdict. Both motions test the sufficiency of the evidence. These motions should be denied if there is any conflict in the evidence for the jury to resolve, and the existence of such conflict is to be determined by the scintilla rule.

Torts > Negligence > Causation > Proximate Cause > General Overview
[HN2] Negligence alone does not afford a cause of action. Liability will be imposed only when negligence is the proximate cause of injury; injury must be a natural and probable consequence of the negligent act or omission which an ordinarily prudent person ought reasonably to foresee would result in injury. If, between the alleged negligent act or omission and the injury, there occurs an independent, intervening, unforeseeable event, the causal connection between the alleged negligence and the injury is broken.

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN3] The decision of whether to grant or deny a motion for a new trial rests within the sound discretion of the trial court. A denial of a motion for new trial strengthens the presumption of correctness afforded a jury verdict, and the decision of the trial court will not be disturbed unless the verdict is against the preponderance of the evidence, or is clearly wrong or unjust.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Nuisances > Travel Route Obstructions > Penalties
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview
[HN4] Ala. Code § 32-5-76 (1975), states: (a) Whoever willfully and knowingly operates, owns or causes to be operated on any public highway, road or street a motor vehicle so loaded with gravel, rock, slag, bricks, sawdust, chips, wood products or other like substances, in such manner or in such condition that the contents of the vehicle spill out and endanger the safety of the persons or property of motorists and pedestrians, is guilty of a misdemeanor and upon conviction shall be fined not more than $ 100.00. (b) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Procedure > Appeals > Standards of Review > Reversible Errors

[HN5] The failure of a trial court to give an abstract charge, one hypothesized on facts which had no support in the evidence, does not constitute reversible error.

Civil Procedure > Trials > Jury Trials > Jurors > Misconduct
Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN6] An appeal to the jury to stand in the shoes of the litigant is considered improper. The courts, however, have not been overly restrictive in their application of this rule. In a case where an objection to improper argument is made and sustained, with the trial court instructing the jury that the argument was not correct, the test on appeal is whether the argument was so harmful and prejudicial that its influence was not or could not be eradicated by the action of the court. An appellate court should not encroach on the trial court's discretion in these cases. Much must be left in such matters to the enlightened judgment of the trial court, with presumptions in favor of the ruling.

Civil Procedure > Trials > Closing Arguments > General Overview
[HN7] A party cannot comment in argument upon the failure of his opponent to call a particular witness if the witness is equally accessible to both parties. This is not an automatic rule; cases exist where a potential witness favors one party over another and the witness is not "equally accessible."

Civil Procedure > Trials > Jury Trials > Jurors > Qualifications
Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > Judicial Discretion
Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Bias
[HN8] The test to be applied for determining whether a juror should be disqualified for bias or prejudice is probable prejudice. Probable prejudice for any reason disqualifies a prospective juror. Qualification of a juror is a matter within the discretion of the trial court and, on appeal, an appellate court will look to the questions propounded and the answers given by the prospective juror to see if this discretion was properly exercised. The trial court is vested with broad discretion in determining whether to sustain challenges for cause, and the trial court's decision will not be interfered with unless clearly erroneous.

COUNSEL: Jack B. Porterfield, Jr. and William T. Mills II, Porterfield, Scholl, for Appellant.

Alex W. Newton of Hare, Wynn, Newell & Newton and R. Gordon Pate of Pate, Lewis, Lloyd, for Appellee.

JUDGES: Torbert, C.J., Jones, Almon, Shores, Adams, and Steagall, JJ., concur. Maddox, J., concurs specially. Beatty and Houston, JJ., not sitting.

OPINION BY: PER CURIAM

OPINION

[*1250] This action involves an accident which occurred on February 7, 1980. On that day, James Karl Sessions, a young man 19 years of age, was driving his automobile on a street in York, Alabama. A log truck traveling in the opposite direction met the car Sessions was driving. Just as the vehicles were in the process of meeting each other, a log, which weighed between 300 and 500 pounds, came off the truck and crushed the automobile which young Sessions was driving, killing him instantly. S and T Trucking Company (S & T) owned the truck and Robert T. Poole, an employee of S & T, was driving the truck. Black [*1251] Belt Wood Company, Inc. (Black [**2] Belt) loaded the pulpwood trailer.

This is the second time that this case (and the issue of Black Belt's negligence in loading the truck) has been before this Court. *See, Black Belt Wood Co. v. Sessions*, 455 So. 2d 802 (Ala. 1984). Leonard Earl Sessions, plaintiff/appellee, originally filed suit against American Can Company, Black Belt, S & T, Robert Poole, and John Tidmore, principal owner of S & T, a corporation. At the conclusion of the first trial, the court granted Tidmore's motion for directed verdict and the jury returned a verdict in favor of Black Belt, American Can Company, and Robert Poole. A verdict was returned against S & T and in favor of Sessions in the amount of $250,000.

Sessions filed a motion for judgment notwithstanding the verdict, as to American Can Company, Black Belt, and Robert Poole, or, in the alternative, for a new trial against all defendants. The trial court granted a new trial in favor of Sessions and against Robert Poole, S & T, and Black Belt, but not against American Can Company.

Black Belt appealed the trial court's order. This Court originally held that the trial court erred as a matter of law and reinstated the jury verdict in favor of [**3] Black Belt. On Sessions's application for rehearing, this Court reversed its holding and affirmed the trial court's order granting a new trial. Black Belt's application for rehearing was denied.

The case was tried a second time. Black Belt filed a motion for a directed verdict, which was denied. The jury returned a verdict against Robert Poole, S & T, and Black Belt in the amount of $3,500,000. Black Belt filed a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, which was denied. This appeal followed.

Black Belt presents seven issues on appeal. We will first address Black Belt's contention that the trial court erred when it failed to grant Black Belt's motion for directed verdict, or, in the alternative, its motion for judgment notwithstanding the verdict.

The law of Alabama is clear as to the standards for testing a motion for directed verdict and a motion for judgment notwithstanding the verdict (JNOV). [HN1] The standard for testing a motion for directed verdict is identical to that for testing a motion for JNOV. *Casey v. Jones*, 410 So. 2d 5 (Ala. 1981). Both motions test the sufficiency of the evidence. *Wright v. Fountain*, 454 So. [**4] 2d 520 (Ala. 1984). These motions should be denied if there is any conflict in the evidence for the jury to resolve, and the existence of such conflict is to be determined by the scintilla rule. *Hanson v. Couch*, 360 So. 2d 942 (Ala. 1978).

We are of the opinion that a scintilla of evidence was presented by the appellee to support his position that Black Belt negligently loaded the logs. The evidence reveals that the logs belonged to Black Belt and that Black Belt employees loaded the logs. Black Belt knew that the logs were going to be transported a distance of approximately 60 miles. There was also testimony presented that logs loaded in the same manner by Black Belt had fallen off trucks on previous occasions. After examining the pictures of the particular load in this case, Mr. Tidmore, one of the owners of S & T, testified that the logs were improperly loaded. He also testified that complaints had previously been made to Black Belt that some of its trucks had been improperly loaded.

Black Belt also argues that negligence in the loading of the logs in an improper manner could not have been the proximate cause of the accident because it was the duty of the driver to keep [**5] the logs properly secured by chains. Black Belt relies on *Vines v. Plantation Motor Lodge*, 336 So. 2d 1338 (Ala. 1976). In *Vines* this Court stated:

> [HN2] "Negligence alone does not afford a cause of action. Liability will be imposed only when negligence is the proximate cause of injury; injury must be a natural and probable consequence of the negligent act or omission which an ordinarily prudent person *ought reasonably to foresee* would result in injury. If, between [*1252] the alleged negligent act or omission and the injury, there occurs an independent, intervening, *unforeseeable event*, the causal connection between the alleged negligence and the injury is broken. *Mobile City Lines, Inc. v. Proctor*, 272 Ala. 217, 130 So. 2d 388 (1961); *Mahone v. Birmingham Electric Co.*, 261 Ala. 132, 73 So. 2d 378 (1954)."

Vines, at 1339 (emphasis added.)

In this case, Black Belt should have reasonably foreseen an injury occurring. The evidence in this case is that these big logs frequently fall off trucks and that complaints had previously been made to Black Belt that some of the trucks had been improperly loaded. Black Belt did nothing to change its practices [**6] before this accident occurred and, by the time of the trial, had made no changes in its method of operation.

We are of the opinion that the trial court did not err when it denied Black Belt's motion for a directed verdict, or, in the alternative, JNOV.

Black Belt's second contention on appeal is that the trial court erred when it failed to grant its motion for a new trial. Black Belt argues that the great preponderance of the evidence was that the loading was proper.

[HN3] The decision of whether to grant or deny a motion for a new trial rests within the sound discretion of the trial court. *Hill v. Cherry*, 379 So. 2d 590 (Ala. 1980). A denial of a motion for new trial strengthens the presumption of correctness afforded a jury verdict, *Osborne v. Cobb*, 410 So. 2d 396 (Ala. 1982), and the decision of the trial court will not be disturbed unless the verdict is against the preponderance of the evidence, or is clearly wrong or unjust. *Shiloh Construction Co. v. Mercury Construction Corp.*, 392 So. 2d 809 (Ala. 1980).

This Court stated in its original opinion in this case:

> "The evidence plainly and palpably supports a finding that Black Belt negligently loaded the truck. [**7] Indeed, in addition to the evidence relating to the allegedly negligent loading process, the evidence is without dispute that S & T's driver stopped the truck more than once before the accident in an effort to tighten the chains and better secure the load of logs, all of which evidence raised a reasonable inference of improper loading -- the function of Black Belt, with

> knowledge that the truck would be operated upon a public highway."

After re-examining the record, and from the evidence set forth above, we conclude that the evidence supports the verdict in favor of Sessions and against Black Belt.

Black Belt's third contention to this Court is that the trial judge erred in his instructions to the jury. Black Belt argues that Code 1975, § 32-5-76(a), was inapplicable and that the reading of it was inappropriate and constituted reversible error.

The trial court, in its instructions, stated:

> "I am going to read to you from the next following section or a portion thereof that says this: [32-5-76(b)] 'No vehicle shall be driven or moved on any highway unless and until such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking [**8] or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway.'
>
> "Now, that (b) part refers back to a portion of (a). And I am going to say to that part that you should consider as a total of section 76 says this, that anyone 'whoever willfully and knowingly operates, owns or causes to be operated on any public highway, road or street a motor vehicle so loaded with gravel, rocks [sic], slag, bricks, sawdust, chips, wood products or other like substances,' then that's the type of vehicle they are talking about in (b) when it says no vehicle, that's the one they are talking about. You may consider this section in arriving at a decision in this case but I say to you this, that I charge you that a violation of section 76 is not negligence per se or as a matter of law."

[HN4] Code 1975, § 32-5-76, states:

> "(a) Whoever willfully and knowingly operates, owns or causes to be operated [*1253] on any public highway, road or street a motor vehicle so loaded with gravel, rock, slag, bricks, sawdust, chips, wood products or other like substances, [**9] in such manner or in such condition that the contents of the vehicle spill out and endanger the safety of the persons or property of motorists and pedestrians, is guilty of a misdemeanor and upon conviction shall be fined not more than $ 100.00.
>
> "(b) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway. (Acts 1927, No. 347, p. 348; Code 1940, T. 36, § 39; Acts 1949, No. 517, p. 754, § 9; Acts 1971, No. 1419, p. 2423)."

Black Belt argues that § 32-5-76(a) applies only to vehicles and to the owner and/or operator of a vehicle, and that Black Belt was neither. Black Belt also asserts that it did not "cause" the truck "to be operated."

The trial court properly instructed the jury on the applicability of § 32-5-76(b) to Black Belt. This case was tried on the theory of Black Belt's negligence in loading the logs with knowledge that the truck had to travel a distance [**10] of sixty miles over rough roads. The trial court correctly set forth the substantive law applicable to Black Belt, and the trial court's charge to the jury regarding this section does not appear to be prejudicial. *See, Rannells v. Graham*, 439 So. 2d 12 (Ala. 1983).

The fourth issue presented is whether the trial court erred when it refused to instruct the jury from the Alabama Pattern Jury Instructions, (A.P.J.I.) namely: 3.16, 3.17, and 1.12. Black Belt contends that the trial court erred when it failed to instruct the jury as to independent contractors. Black Belt also argues that the failure to give the pattern jury instructions misled the jury as to the responsibility of the various defendants with regard to the transportation of the pulpwood.

A.P.J.I. 3.16 and 3.17 deal with the definition and rule regarding the liability of independent contractors. There was no contention in the trial of this case that Black Belt was an independent contractor of S & T or that S & T was an independent contractor of Black Belt. At the first trial, this contention was made, but it was abandoned and never referred to or made an issue in the second trial. [HN5] The failure of a trial court to give

[**11] an abstract charge, one hypothesized on facts which had no support in the evidence, does not constitute reversible error. *Coulter v. Holder*, 287 Ala. 642, 254 So. 2d 420 (1971). Furthermore, the trial court made it clear in its instructions that the jury could find either against Black Belt because of its negligence in the loading of the logs and securing them on the truck or, against S & T for its negligence alone in operating the truck, or against both of them.

Black Belt requested that the trial court give A.P.J.I. 1.12 which involves sympathy. This request was also abstract and, therefore, correctly denied. The trial court covered 1.12 when it instructed the jurors that they were to use their good sound judgment in making a determination, after considering the credibility of the witnesses, the enormity of the wrong, and the necessity for preventing similar wrongs. In addition, both attorneys, in their closing arguments, argued to the jury that sympathy should not play a part in their deliberations. We are of the opinion that the trial court did not err when it refused to give A.P.J.I. 3.16, 3.17, and 1.12.

The fifth issue presented by Black Belt is whether the trial court [**12] erred when it refused to grant a mistrial or a new trial when counsel for Sessions requested the jurors to place themselves in the place of the litigants and further commented on the failure of certain people to testify. Black Belt first argues that Mr. Newton (Sessions's counsel), in his closing argument, asked the jury to place themselves in the position of a party to the action. That [*1254] portion of the argument to which Black Belt objected is set forth below:

> "MR. NEWTON: . . . I will approach this task as I have tried to seriously just as you would want it if you were on the front row in this courtroom.
>
> "MR. PORTERFIELD: Now, just a minute, if it please the Court. That's an illegal comparison to place this jury in the position of these parents and I will object to it and ask for a mistrial.
>
> "THE COURT: I will sustain the objection and overrule your motion for a mistrial but I must caution the jury that you are not to put yourself in the position of the litigants. You do have to remain objective in deciding the outcome of this case and with that caution we'll proceed.
>
> "MR. PORTERFIELD: Except.
>
> "MR. NEWTON: Just as if you were in litigation. That's the way you [**13] would want it. And I don't know if --
>
> "MR. PORTERFIELD: Now, just a minute. He is saying the same thing just another way.
>
> "MR. NEWTON: I am not saying that.
>
> "MR. PORTERFIELD: Yes, he is. Let the Court rule.
>
> "THE COURT: Well, I am going to sustain, Alex, and I think the jurors are not to be considered as litigants or put themselves in the position of a litigant in this matter. All right."

Black Belt also contends that plaintiff's counsel made improper arguments about Black Belt's failure to call certain witnesses to testify. Newton stated in his closing argument:

> "Because with all the connections that you will take under this evidence that Black Belt would have the best evidence that they can bring you about the proper loading is right there sitting in the courtroom. And he says they are equally available to us. And, now, listen, do you think Johnny Allen, the man that I am suing, is equally available to me? Who is he trying to fool?"

[HN6] An appeal to the jury to stand in the shoes of the litigant is considered improper. The courts, however, have not been overly restrictive in their application of this rule. *Fountain v. Phillips*, 439 So. 2d 59 (Ala. [**14] 1983). In a case where an objection to improper argument is made and sustained, with the trial court instructing the jury that the argument was not correct, the test on appeal is "whether the argument was so harmful and prejudicial that its influence was not or could not be eradicated by the action of the court." *Estis Trucking Co. v. Hammond*, 387 So. 2d 768 (Ala. 1980). We have stated that this Court should not encroach on the trial court's discretion in these cases. "Much must be left in such matters to the enlightened judgment of the trial court, with presumptions in favor of the ruling." *British General Insurance Co. v. Simpson Sales Co.*, 265 Ala. 683, 93 So. 2d 763 (1957).

We have carefully considered the record of the argument, the evidence, and the actions taken by the court. After considering these factors, we are of the opinion that the argument was not so harmful and prejudicial that its influence was not or could not be eradicated by the action of the trial court.

The general rule, as to the availability of witnesses, is that [HN7] a party cannot comment in argument upon the failure of his opponent to call a particular witness if the witness is equally accessible to [**15] both parties. *Donaldson v. Buck*, 333 So. 2d 786 (Ala. 1976). This is not an automatic rule; cases exist where a potential witness favors one party over another and the witness is not "equally accessible." *Harrison v. Woodley Square Apartments*, 421 So. 2d 101 (Ala. 1982).

Mr. Newton, in his closing argument, referred only to the failure of Johnny Allen to testify. Allen was the manager of the wood yard at the time of the accident and his father owned Black Belt. Plaintiff presented evidence at trial regarding complaints made to Allen concerning improper loading, and the comment on Black Belt's failure to refute this evidence, we believe, was not improper. Because Allen's father owned Black Belt, it is not unreasonable to believe that Allen, if called [*1255] as a witness, would have testified favorably for Black Belt. Under these circumstances, we cannot find that Johnny Allen was "equally accessible" to both parties, as that principle normally applies. We do not find that the trial court abused its discretion in overruling the objection.

The sixth issue raised on appeal is whether the trial court erred in failing to grant Black Belt's challenge for cause with regard [**16] to juror Melton.

During the voir dire examination of the panel of potential jurors, the following questions and answers arose with regard to juror Melton.

> "MR. PATE: You have suggested something that I need to ask about, so I appreciate that. Have any of you ever experienced the loss of a close family member in a -- I don't know a better way to put it, in a tragic situation or a tragic accident, an unexpected event? I am not limiting it to automobile accidents, any sort of tragic event where you lost a member of your family? I have to ask that. . . .
>
> "MS. MELTON: My grandson was killed in an automobile accident.
>
> "MR. PATE: Your grandson?
>
> "MS. MELTON: About three years ago.
>
> "MR. PATE: About three years ago?
>
> "MS. MELTON: Yes. . . .
>
> "MR. PATE: Let me finish with this, and I told you maybe some of my questions wouldn't be clear to you and this may be one of them, but bear with me. Lawyers can't go into your mind and we shouldn't be able to, but yet I want to know if there is any reason, knowing what you know about this case, knowing that it's going to deal with the death of a young man and what we, of course, ascertain as a tragic, senseless accident; knowing those facts, [**17] do any of you have any reason which you are thinking to yourself I really would rather not serve on this case. This is not the kind of case that I want to be involved in or make a decision about? Ms. Melton?
>
> "MS. MELTON: I would rather not.
>
> "MR. PATE: You would rather not?
>
> "MS. MELTON: Yes."

Black Belt's attorney later returned to juror Melton and asked these questions:

> "MR. PORTERFIELD: Two. A lawyer can't ask one question. I want to apologize to Ms. Melton because I should ask this because you made a statement and nobody -- you said you didn't want to serve in this case on this jury.
>
> "MS. MELTON: I feel I couldn't be objective.
>
> "MR. PORTERFIELD: Now, would you tell us why? I think you are entitled that.
>
> "MS. MELTON: Because of my grandson being killed in this accident and there was a case.
>
> "MR. PORTERFIELD: And you think the fact that he died as a result of an accident, you think that you might be prejudiced against the person who was operating the vehicle that may have been responsible?
>
> "MS. MELTON: I feel that I am too emotional about that and this was a case that he was not the driver.
>
> "MR. PORTERFIELD: I believe that she should be excused for [**18] cause."

The test for determining whether a juror should be disqualified for bias or prejudice was set forth by the Court in *Village Toyota Co. v. Stewart*, 433 So. 2d 1150, 1156 (Ala. 1983), quoting from *Alabama Power Co. v. Henderson*, 342 So. 2d 323, 327 (Ala. 1976), as follows:

> [HN8] "The test to be applied is probable prejudice. Probable prejudice for any reason disqualifies a prospective juror. Qualification of a juror is a matter within the discretion of the trial court and, on appeal, this court will look to the questions propounded and the answers given by the prospective juror to see if this discretion was properly exercised."

The trial court is vested with broad discretion in determining whether to sustain challenges for cause, and the trial court's decision will not be interfered with unless [*1256] clearly erroneous. *Brown v. Woolverton*, 219 Ala. 112, 121 So. 404 (1928).

In this case, the record reveals that juror Melton never said that she could not be fair. She, at one time, stated that she would rather not serve, but in answer to the direct question as to whether she would be prejudiced, she simply said that she felt she was too [**19] "emotional." The trial judge, after conferring with the lawyers, and being in a position to observe the demeanor of juror Melton, the manner in which she answered the questions, and her appearance, overruled the challenge for cause and stated: "I think that all Mrs. Melton said was that she didn't want to sit on this case." After reviewing the record, we cannot say that the trial court abused its discretion in disallowing the challenge of Mrs. Melton for cause.

Seventh, and finally, Black Belt contends that the $3.5 million damage award was excessive. Black Belt, in its motion for a new trial, argued that the verdict was excessive and a result of bias and passion. Here, Black Belt argues that the $3.5 million verdict is excessive, particularly in light of the fact that the first jury found in favor of Black Belt and returned a verdict of only $250,000 against S & T.

We do not at this time decide this issue, but we remand the cause to the trial court to review its judgment in accordance with the guidelines set out in our recent decisions in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Harmon v. Motors Insurance Corp.*, 493 So. 2d 1370 (Ala. 1986); and *Alabama* [**20] *Farm Bureau Mutual Cas. Ins. Co. v. Griffin*, 493 So. 2d 1379 (Ala. 1986) (on rehearing). The trial court, in its discretion, may or may not order a further hearing to reconsider the claim that the verdict is excessive. In any event, the trial court is directed to report its findings and conclusions within 28 days of this opinion.

We remand this case to the trial court for further consideration consistent with this opinion.

AFFIRMED IN PART; AND REMANDED, WITH DIRECTIONS.

Torbert, C. J., Jones, Almon, Shores, Adams, and Steagall, JJ., concur.

Maddox, J., concurs specially.

Beatty, and Houston, JJ., not sitting.

CONCUR BY: MADDOX

CONCUR

MADDOX, JUSTICE (Concurring specially).

On the first appeal of this case, I was of the opinion that the trial court improperly ordered a new trial in the case as to Black Belt, and I authored the opinion which so held. On application for rehearing, however, the Court issued a new opinion, in which a majority of this Court held that the original opinion was in error, and opined as follows:

> "While the trial court's granting of a new trial, where the verdict is plainly and palpably supported by the evidence, is an abuse of its discretionary [**21] prerogative, we are obliged to indulge a presumption of correctness in favor of a new trial order where, as here, it is highly probable that the verdict under review is the result of confusion or misunderstanding or is inconsistent in law or in fact. *Cobb v. Malone*, 92 Ala. 630, 9 So. 738 (1891). Therefore, because we believe the trial judge properly perceived his discretionary role in preventing an unfair and unjust result under the circumstances, we affirm his order granting a new trial as to all three defendants."

I dissented from that on-rehearing opinion, stating that "I would deny rehearing because I am of the opinion that the law is correctly stated in the majority opinion as originally written." Joining me in my dissent were Justices Faulkner and Beatty. Nevertheless, plaintiff was given the right, at that time, by a majority of this Court, to try the case again before another jury. Because that

judgment was final, and plaintiff obtained the right to try the case again, I am of the opinion that the plaintiff legally obtained the right to obtain a judgment against Black Belt in another proceeding. Consequently, it is my opinion that plaintiff, having obtained [**22] a right to a [*1257] new trial, is entitled to a review of the new trial without regard to my dissenting views on the first appeal, and that the judgment in this new trial must be based upon the principles of law as they exist today.

Gary D. Blair v. Harold M. Fullmer

No. 89-1613

Supreme Court of Alabama

583 So. 2d 1307; 1991 Ala. LEXIS 621

June 21, 1991

SUBSEQUENT HISTORY: [**1] Released for Publication August 8, 1991.

PRIOR HISTORY: Appeal from Talladega Circuit Court; CV-89-20089; William C. Sullivan.

DISPOSITION: REVERSED AND REMANDED; MOTION TO REMAND DENIED AS MOOT.

CORE TERMS: plat, dedication, lake, public road, street, dedicated, map, recorded, public use, recordation, acres, deed, vacation, summary judgment, purchaser, municipal, easement, planning, probate, alley, auction, public highway, statutory requirements, developer, estoppel, platted, zoning, situated, conveyed, surveyor

COUNSEL: For Appellant: George C. Douglas, Jr., of Gaines, Gaines & Gaines, Talladega.

For Appellee: Ray F. Robbins II of Robbins, Owsley & Wilkins, Talladega; and Angela F. O'Connell, Rockville, Maryland.

JUDGES: Almon, Justice. Hornsby, C.J., and Adams, Steagall, and Ingram, JJ., concur.

OPINION BY: ALMON

OPINION

[*1308] Gary Blair appeals from a summary judgment entered in favor of the defendant, Harold Fullmer, in an action seeking to enjoin Fullmer from obstructing a public road that Blair alleges exists on Fullmer's property.

In 1958, G. B. Caudle and Mary Sue Caudle sought to subdivide their property in Talladega County. The Caudles drafted a plat of the proposed Caudle Lake Subdivision and filed it in the office of the probate judge of Talladega County. The Caudles then held an auction to sell all of the subdivision lots. Four purchasers, including Gary Blair's parents, bought lots at the auction, receiving deeds in July 1958. The plat apparently [1] showed a road beginning [**2] at a public highway, crossing the Caudle Lake Subdivision, circling a lake on the property, and connecting to the two lots purchased by the Blairs. Gary Blair now seeks to have that platted road declared a public road. It appears that all of the lots sold were situated on the outer perimeter of the Caudles' property and that all had ingress to and egress from existing public highways by way of easements independent of the road shown on the recorded plat. Although Gary Blair stated in an affidavit that G. B. Caudle bulldozed a road around the lake at the time of the sale of the lots, he admitted that it was never maintained. Mary Sue Caudle and others gave affidavits stating that there was never a road circling the lake, and there was no evidence that any of the purchasers of the lots had ever used any road across the land retained by the Caudles for access to their lots.

1 Neither the plat nor any other map of the property is included in the record before us.

Following the auction, the Caudles withdrew the remainder [**3] of the estate from sale and retained ownership of that acreage, approximately 384 acres, until 1973, when they conveyed their entire estate to Goodwin Realty and Investment Company. Goodwin Realty also acquired two lots, totalling 96.5 acres, that had been purchased by other parties in 1958. In 1977 Goodwin Realty conveyed these parcels, approximately 480 acres, to Harold and Marjorie Fullmer.

[*1309] Gary Blair's parents were the owners of a large farm that was adjacent to the Caudles' original estate. At the 1958 auction, they purchased lots A and B, 37.25 and 27.3 acres respectively. These lots were contiguous to the Blair farm. Access to the land that comprised these lots has always been gained by way of an improved road that is situated on the Blairs' property.

In 1975, the Blair parents divided their farm and conveyed a portion to Gary Blair and a portion to his brother, Linder O. Blair. The land that comprised the Caudle Lake Subdivision lots is included in that portion

now owned by Gary Blair. The Blairs divided their property in such a way that the improved road on the Blair property was located primarily on the land that was deeded to Linder Blair. Thus, Gary Blair had to travel [**4] across his brother's property to reach his own property. A dispute arose between the brothers concerning access to the road, and in 1982 Gary Blair filed an action against his brother and their parents in Talladega Circuit Court, seeking an easement by necessity across his brother's property. In 1989 the circuit court granted an easement to Gary Blair. Shortly thereafter, Gary Blair brought this action, alleging the existence of a public road, as shown in the recorded plat of the Caudle Lake Subdivision, and seeking to enjoin Harold Fullmer from interfering with his use of this road.

In entering a summary judgment for Fullmer, the trial court relied on *CRW, Inc. v. Twin Lakes Property Owners Association, Inc.,* 521 So. 2d 939 (Ala. 1988), and *Cottage Hill Land Corp. v. City of Mobile,* 443 So. 2d 1201 (Ala. 1983), held that "acceptance of a proffered dedication is necessary," and stated that it found "there was never an acceptance of this strip of land as a public road." Blair contends that the trial court erred in relying on these cases. He seeks to have this Court follow *Gaston v. Ames,* 514 So. 2d 877 (Ala. 1987), and hold [**5] that there has been an irrevocable dedication of the road shown in the recorded plat for the Caudle Lake Subdivision and that such dedication, alone, makes the road shown on the plat a public road.

In *Cottage Hill Land Corp. v. City of Mobile, supra,* the Court said:

"The filing of a map or plat 'in substantial compliance with the statutory requirements constitutes a valid dedication to the public of all streets, alleys, and other public places.' *Johnson v. Morris,* 362 So. 2d 209, 210 (Ala. 1978). Under early Alabama statutory authority, streets indicated on a recorded and acknowledged plat were considered to be dedicated to the public use without awaiting acceptance or use by the public. *See* Code 1907, § 6030; *Manning v. House,* 211 Ala. 570, 100 So. 772, 774 (1924). *This is no longer true, however. See* Code 1975, § 11-52-32(b). *Acceptance of a proffered dedication is necessary.* McQuillin, [*Municipal Corporations* (3d ed. revised 1971)], § 33.43; *Tuxedo Homes v. Green,* 258 Ala. 494, 497-498, 63 So. 2d 812, 814 (1953)."

Cottage Hill, supra, at 1203 [**6] (emphasis added). The holding in *Cottage Hill* was followed in *CRW, supra.*

The language in *Cottage Hill* stating that acceptance is required is dictum in any event, because the city planning commission, as a condition of its approval of the subdivision plat, *required* a 100-foot right-of-way to be added at the southern end of the plat for a proposed thoroughfare that had been placed on the commission's master plan in the late 1940's. 443 So. 2d at 1202. Thus, the question of *acceptance* of the dedicated right-of-way was not even at issue. Moreover, the Court said:

"In determining what property is dedicated to the public, the map or plat is to be construed in its entirety. *Johnson v. Morris, supra,* 362 So. 2d at 210. From the specific circumstances of this case, the Court concludes that the circuit court was authorized to find that 'every line of the survey which served to mark those parts of the site which were intended to be reserved from sale for use of the public became unalterably fixed, dedicated to the public for all time' once lots were sold with reference to the Bridlewood Estates subdivision plat. *Snead v. Tatum,* 247 Ala. 442, 443, 25 So. 2d 162, 163 (1946); [**7] *Webb v. City of Demopolis,* 95 Ala. 116, 126, [*1310] 13 So. 289, 292 (1891). Furthermore, this dedication has been perfected despite the fact that the city has not yet constructed a public roadway on the property platted and dedicated as a future thoroughfare."

443 So.2d at 1203.

The following statement appears in *CRW, Inc., supra*:

"CRW argues at length in its brief that recordation of the Twin Lakes plat in the Probate Court of St. Clair County constitutes a dedication of the road to public use. Code 1975, § 11-52-32(b). We do not agree that recordation, standing alone, constitutes a dedication. Dedication of a public road may be accomplished by a statutory proceeding or by common law dedication."

521 So. 2d at 941. The Court then cited *Cottage Hill* for its statement that "Acceptance of a proposed dedication is necessary." The evidence in *CRW* would have supported a finding that by filing the plat for record the developers of the Twin Lakes Subdivision did not intend to dedicate the roads therein to public use, or that, if they had so dedicated them when the plat was filed in 1970, that dedication [**8] had been vacated by a consent judgment in 1977 by which a "Twin Lakes Trust" was established and the developer's interest in the Twin Lakes roads was transferred to the trust. Furthermore, when the Twin Lakes property was annexed into the City of Moody, the city council "approved a zoning ordinance allowing the Twin Lakes roads to remain private subsequent to the annexation." *Id.,* at 940. Thus, the Court affirmed a judgment that CRW could not connect *its* subdivision to the Twin Lakes roads and thereby reach a public highway.

Alabama Code 1975, § 35-2-50, provides in pertinent part:

"Any person . . . desiring to subdivide his lands into lots shall cause the same to be surveyed by a competent surveyor . . . and shall cause a plat or map thereof to be made."

Section 35-2-51 provides in pertinent part:

"(a) The plat or map having been completed shall be certified by the surveyor, which certificate must also be signed by the owner . . . and acknowledged by such owner . . . in the same manner in which deeds are required to be acknowledged. The plat or map, together with the certificate of the surveyor and acknowledgement, shall be recorded in the office of the [**9] judge of probate in the county in which the lands are situated, . . . and such acknowledgement and record shall have like effect . . . as in the case of deeds.

"(b) The acknowledgment and recording of such plat or map shall be held to be a conveyance in fee simple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public, and the premises intended for any street, alleyway, common or other public uses, as shown in such plat or map, shall be held in trust for the uses and purposes intended or set forth in such plat or map."

Section 35-2-51(b) is identical to Code 1907, § 6030, referred to in *Cottage Hill, supra,* as "early Alabama statutory authority."

Section 35-2-52 prohibits a probate judge from accepting a plat of lands lying within a city having a population of more than 10,000 inhabitants unless the governing body or the city engineer has noted its approval on the plat; significantly, no such requirement is made regarding plats of rural land. [2] Section 35-2-53 provides for vacation of a plat before the sale of any lots or, after the sale of lots, by all the owners of lots. Fullmer purported to execute [**10] the latter type of vacation shortly before this action was filed but, without Blair's approval, that document obviously does not comply with § 35-2-53. Similarly, § 35-2-54 provides for the vacation of streets by abutting landowners, but Fullmer's document [*1311] can have no effect under this section without Blair's participation. Compare § 35-2-55, which requires in some instances city or county approval of vacation of public roads, and § 35-2-58, which provides for a circuit court action for vacation of a plat or a street or road.

2 The mere fact of dedication does not necessarily impose upon the county a duty to maintain the road. Cf. *Lybrand v. Town of Pell City,* 260 Ala. 534, 538, 71 So. 2d 797, 801 (1954), in which it was noted that a dedication of a street in a city "does not impose any duty upon the city until it has accepted the dedication."

Tuxedo Homes, Inc. v. Green, 258 Ala. 494, 63 So. 2d 812 (1953), simply held that approval of a plat by a city [**11] engineer as provided in what is now § 35-2-52 is a ministerial duty to be performed if the offered plat conforms to all pertinent laws and regulations, and that such approval does not constitute acceptance by the city of a proposed dedication of the streets set out in the plat. *Tuxedo Homes* cites *Ivey v. City of Birmingham,* 190 Ala. 196, 67 So. 506 (1914), which held that recordation of a plat and subsequent annexation of the land by the city did not impose on the city a duty to maintain the streets shown therein and that, therefore, the city was not liable for injuries on such a street simply because the plat had been recorded. The Court there said that the owner, by platting the street and recording the plat, "thereby made it a way, irrevocable as to purchasers; but to devolve upon the public the duty of maintaining the way as a public road or street it was necessary that there should be an acceptance by the public of the dedication." 190 Ala. at 204, 67 So. at 509. The principle of *Ivey* can thus be traced through *Tuxedo Homes* and *Cottage Hill* to *CRW,* with the above-described changes in the effect of [**12] the holding.

Section 11-52-32(b), also relied on in *Cottage Hill,* reads:

"Every plat approved by the commission shall, by virtue of such approval, be deemed to be an amendment of or an addition to or a detail of the municipal plan and a part thereof. Approval of a plat shall not be deemed to constitute or effect an acceptance by the public of any street or other open space shown upon the plat."

The "commission" mentioned therein is a municipal planning commission or a county planning and zoning commission in a county having a population of 600,000 or more inhabitants. No such commission existed in 1958 with jurisdiction over this rural Talladega County land.

Blair seeks to have this Court follow *Gaston v. Ames,* 514 So.2d 877 (Ala. 1987); *City of Fairfield v. Jemison,* 283 Ala. 462, 218 So. 2d 273 (1969); *Stack v. Tennessee Land Co.,* 209 Ala. 449, 96 So. 355 (1923); and other cases that, he says, do not require acceptance of roads dedicated in recorded plats. In *Gaston,* the county had approved a subdivision plat but had not otherwise accepted the roads shown thereon. The Court treated the recordation [**13] as sufficient, with no requirement of acceptance:

"Having met those two requirements [of §§ 35-2-50 and § 35-2-51(a)], [the developer] is deemed to have made a conveyance in fee simple of all areas granted or dedicated to the public. § 35-2-51(a), *Code of Alabama* (1975). 'Substantial compliance with the statutory requirements constitutes a valid dedication to the public of all streets, alleys, and other public places.' *Johnson v. Morris,* 362 So. 2d 209, 210 (Ala. 1978). *Cottage Hill Land Corp. v. City of Mobile,* 443 So. 2d 1201, 1203 (Ala. 1983)."

514 So. 2d at 879.

Whatever the effect of *Cottage Hill* and *CRW* on the other cases and the statutes on point, those two cases clearly do not deprive a purchaser of a lot in a subdivision of the right to the roads shown in the subdivision plat. It is certainly the case that a city or county must accept such a dedication (perhaps by the general public's use of the roads) before there arises a duty on the governing body to maintain the roads, and it may be that those two cases require an acceptance by a public body before the general public can be given the right to use [**14] the roads. We hold, however, that the trial court erred in relying on those two cases to enter summary judgment for Fullmer.

Fullmer does not challenge the compliance of the Caudle Lake Subdivision plat with the statutory requirements except to say that, because the plat showed only a "proposed" subdivision and roads, no clear [*1312] intention to dedicate the roads to public use was shown. Such an argument would defeat any dedication through a plat, because the plat is recorded before the subdivided lots are sold. Thus, any plat shows a "proposed" subdivision. Furthermore, although the plat is not before us and there is no statement of the total size of the subdivided land, it appears from the deeds in the record that the Caudles sold 12 lots totalling 403.65 acres to four grantees and retained approximately 384 acres.

Fullmer cites §§ 11-3-10 and 23-1-80 as grounds for requiring acceptance by a county of a proposed dedication of a public road not within the jurisdiction of a municipal or county planning or zoning commission. Those sections, however, provide general authority of county commissions over roads and do not repeal the specific provision of § 35-2-51(b) by virtue of which recordation [**15] of a plat constitutes a dedication of the roads therein with no requirement of acceptance by any county governing authority.

Fullmer also argues that, if there was a proper dedication, any public road created thereby has been abandoned by the complete lack of use thereof for more than 20 years. He cites *Barber v. Anderson,* 527 So. 2d 1296 (Ala. 1988); *Walker v. Winston County Comm'n,* 474 So. 2d 1116 (Ala. 1985); *Floyd v. Industrial Dev. Bd. of the City of Dothan,* 442 So. 2d 927 (Ala. 1983); and *Harbison v. Campbell,* 178 Ala. 243, 59 So. 207 (1912).

None of those cases, however, involved the question of the effect of nonuse of a road or other land dedicated to the public. That very question was presented in *Hebert v. Trinity Presbyterian Church of Montgomery,* 289 Ala. 455, 458, 268 So. 2d 736, 738 (1972), involving a dedicated alley, in which it was said:

"Neither nonuser, nor the rule of prescription, nor the statute of limitations, nor the doctrine of equitable estoppel can be invoked to nullify a public dedication. Harn v. [Common Council of] Dadeville, 100 Ala. 199, 14 So. 9 [**16] [1893]; Alexander City U.W. & S. Co. v. Central of Ga. Railway Co., 182 Ala. 516, 62 So. 745 [1913]."

See also *Hood v. Neil,* 502 So. 2d 749 (Ala. 1987); *City of Fairfield v. Jemison,* 283 Ala. 462, 218 So. 2d 273 (1969); *Garland v. Clark,* 264 Ala. 402, 88 So. 2d 367 (1956); *Talley v. Wallace,* 252 Ala. 96, 98, 39 So. 2d 672, 674 (1949) ("The extent of its use as an alley in no manner affects the question of its dedication. . . . Nor was this unrestricted dedication lost to the public by the delay or entire failure of the county authorities to prepare it for the public use."); *City of Florence v. Florence Land & Lumber Co.,* 204 Ala. 175, 85 So. 516 (1920); *Smith v. City of Opelika,* 165 Ala. 630, 51 So. 821 (1910).

For the foregoing reasons, the summary judgment cannot be affirmed on either the basis that a dedication of a public road must be accepted or the basis that any public road dedicated in the Caudle Lake Subdivision has been abandoned. Fullmer also argued at trial that [**17] Blair cannot now assert that there is a public road because, in his action against his brother, Blair obtained an easement by necessity by testifying that he had no access to his property by any public road. See, e.g., *Russell v. Russell,* 404 So. 2d 662, 665 (Ala. 1981). Aside from the question of whether Fullmer has pleaded or is entitled to raise such an issue of estoppel, [3] we decline to affirm on this basis, because the trial court did not rule on it and Fullmer has not raised it on appeal.

> 3 We note that the theory of dedication by plat recordation and sale pursuant thereto stems from the principle of estoppel by deed. See *Stack, supra,* 209 Ala. at 452, 96 So. at 358; *City of Demopolis v. Webb,* 87 Ala. 659, 6 So. 408 (1889).

Blair has filed a motion for the cause to be remanded for Talladega County to be added as a necessary party, citing *Boles v. Autery,* 554 So. 2d 959 (Ala.

1989). In view of our reversal of [**18] the judgment, the motion is moot. If, on remand, Blair were to argue that the road should be accepted and maintained by the county, the county would obviously be a necessary party.

[*1313] REVERSED AND REMANDED; MOTION TO REMAND DENIED AS MOOT.

The Bluffs Owners Association, Inc. v. Curtis L.V. Adams II

2030110

COURT OF CIVIL APPEALS OF ALABAMA

897 So. 2d 375; 2004 Ala. Civ. App. LEXIS 739

October 1, 2004, Released

SUBSEQUENT HISTORY: [**1] Released for Publication February 2, 2005.

PRIOR HISTORY: Appeal from Baldwin Circuit Court. (CV-02-707).

DISPOSITION: Reversed and remanded.

CORE TERMS: common area, easement, bluff, river, frontage, landowner, summary judgment, riverfront, wetlands, genuine issue of material fact, parcel, movant, route, restrictive covenants, reasonably necessary, favorable, nonmovant, ownership, swamp, lane, access road, tending, pier, matter of law, judgment awarding, own land, parcel of property, subject property, failed to prove, entitlement

JUDGES: PITTMAN, Judge. Yates, P.J., and Crawley and Thompson, JJ., concur. Murdock, J., concurs in the result, without writing.

OPINION BY: PITTMAN

OPINION

[*376] PITTMAN, Judge.

The Bluffs Owners Association, Inc., ("the Association"), appeals from a summary judgment entered in favor of Curtis L.V. Adams II in an action arising from a dispute over Adams's access to his property.

Adams owns a parcel of undeveloped riverfront property situated in a residential development known as "The Bluffs," which is located on Patrick's Landing Road in Baldwin County. The property located within The Bluffs development is subject to certain restrictive covenants. [1] The Bluffs originally contained 418 acres owned by George R. Irvine, Jr., who developed the residential area along the river and intended that a designated "common area" would be used by all residents of The Bluffs for picnics and other outdoor recreational activities. When the last parcel was sold, Irvine deeded the common area, which contains a pavilion, a boat launch, and a pier, [**2] to the Association. The Association is a nonprofit corporation whose members are owners of the land located within The Bluffs.

1 One of the pertinent restrictive covenants states that no easements may be granted other than for construction or maintenance purposes until January 1, 2015. *See Armbrust v. Golden*, 594 So. 2d 64 (Ala. 1992).

In July 1999, Adams acquired approximately 39 acres of land that is bordered to the south by Patrick's Landing Road, and the common area owned by the Association at the point where the common area abuts the Tensaw River. The Tensaw River runs along the western boundary of Adams's land, and the north border of Adams's land contains a fairly extensive area of wetlands and swamp. The eastern boundary of Adams's property abuts a separate lot owned by another member of the Association. The southern border of Adams's property contains a steep bluff; at the top of that bluff is nearly 1,500 feet of frontage to Patrick's Landing Road, the main access road for all landowners [**3] in The Bluffs. Much of the interior of Adams's property is occupied by wetlands and swamps.

During the spring of 2002, Adams hired a contractor to build a pier on a portion of his land. Until this time, Adams had accessed the riverfront portion of his land by driving through the common area. In 2002, Irvine was made aware that the workers hired by Adams's contractor had been "camping" in the common area and had created a drive across the common area while working for Adams. One of the applicable restrictive covenants governing the use of the common area prohibited anyone from camping or living in a tent in the common area. Brenda and Gene Harris, who are both members and officers of the Association, telephoned Adams to complain about the workers' improper use of the common area.

On June 6, 2002, the Association held a landowners' meeting during which the use of the common area of The Bluffs was discussed. A majority of the landowners voted to require all landowners to access their

parcels in the future only from Patrick's Landing Road. After Adams objected to the vote held at the June 2002 meeting, another meeting was held in January 2003; at that meeting, a majority of the landowners [**4] adopted a similar motion.

On July 15, 2002, Adams filed a complaint against the Harrises and the Association [*377] seeking an injunction to prevent interference with access to his land. The trial court entered a temporary restraining order, which the parties later agreed would remain in effect until a final hearing. The Association and the Harrises then answered the complaint. Pursuant to a motion by Adams, the trial court made a physical inspection of Adams's parcel of property and the Association's common area. Adams filed a motion for a summary judgment on July 7, 2003. The following month, the Association and the Harrises filed a number of affidavits and portions of depositions in response to Adams's motion for a summary judgment. On September 29, 2003, the trial court entered a summary judgment in favor of Adams. That judgment states, in pertinent part:

> "8. This Court has personally viewed the subject property, walked along the bluffs on the interior portion of Adams'[s] property, viewed the cypress swamp, the wetlands and the 'river lane' bordering the Tensaw River. The topography of the subject property is such that Adams has no reasonable alternative access to the waterfront [**5] portion of his lot [except] to access [it] across the common area. The river frontage is of significant value for the reasonable use and enjoyment of the property by Adams. The 'river lane' frontage along the Tensaw River would otherwise be of no use or value to Adams without reasonable access to it.
>
> "9. It is this Court's opinion that to require Adams to construct a road down or across the relatively steep face of the bluff on his property, to seek the requisite permits and to fill in the natural wetlands which exist between the bluff and his river frontage, both of which are important natural features of the property, is unreasonable and unsupported by the evidence presented to the Court.
>
> "10. It is the opinion of this Court that Adams has established [an] easement both by necessity and by implication from Patrick's Landing Road, across the common area to the river frontage of his property."

The Association filed a timely appeal. [2]

> "An appellate court reviews a summary judgment by the same standard the trial court uses in determining whether to grant a summary-judgment motion. *Pryor v. Brown & Root USA, Inc.*, 674 So. 2d 45, 47 (Ala. 1995); *Bussey v. John Deere Co.*, 531 So. 2d 860, 862 (Ala. 1988). [**6] A summary judgment is appropriate if there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The movant has the burden of making a prima facie showing that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law. *Bass v. SouthTrust Bank of Baldwin County*, 538 So. 2d 794, 797-98 (Ala. 1989). If the moving party makes that prima facie showing, then the burden shifts to the nonmoving party, who then has the burden of presenting substantial evidence creating a genuine issue of material fact. *Id.* In determining whether the evidence creates a genuine issue of material fact, this court must review the record in the light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. *Wayne J. Griffin Elec., Inc. v. Dunn Constr. Co.*, 622 So. 2d 314 (Ala. 1993). Evidence is 'substantial' if it is of 'such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably [*378] infer the existence of the fact sought to be proved.'"

Millican v. McKinney, 886 So. 2d 841, 843, 2003 Ala. Civ. App. LEXIS 720, *5 (Ala. Civ. App. 2003) (quoting *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989)). Additionally, "our review is further subject to the caveat that [we] must review the record in a light most favorable to the nonmovant and resolve all reasonable doubts against the movant." *Brewer v. Woodall*, 608 So. 2d 370, 372 (Ala. 1992).

2 The Harrises are not parties to this appeal.

Easements in Alabama have traditionally been created in one of three ways: by conveyance, by prescription, or by adverse possession. *See Cleek v. Povia*, 515 So. 2d 1246, 1247 (Ala. 1987). Our Supreme Court recognized several other methods of creating easements in *Helms v. Tullis*, 398 So. 2d 253 (Ala. 1981): by reservation or exception, by implication, by necessity, by contract, or by reference to maps and boundaries. *Helms*, 398 So. 2d at 255. In this case, Adams claimed and the trial court specifically determined [**8] that Adams had proven the existence of an easement by necessity and by implication. The Association asserts that Adams did not prove the existence of either type of easement and that the trial court, therefore, erred in entering a summary judgment in favor of Adams.

Our Supreme Court has stated:

> "'If one has a way through his own land, he cannot impose a "way of necessity" through his neighbor's land, unless his own way is not reasonably adequate or its cost is prohibitive. Mere inconvenience or mere cost, as the basis for using another's land to get access to one's own property, falls short of meeting this test.'"

Ex parte Cater, 772 So. 2d 1117, 1119 (Ala. 2000) (quoting *Oyler v. Gilliland*, 382 So. 2d 517, 519 (Ala. 1980) (citations omitted)). Under Alabama law, in determining whether to grant an easement by necessity, the issue is not whether the right-of-way sought is, of all possible routes, the nearest and most convenient means to access to the property; instead, the landowner seeking the easement must show that any other alternate-access route would require unreasonable expense disproportionate to the value of the property. *Cater*, 772 So. 2d at 1121-22. [**9] In *Cater*, our Supreme Court concluded that the trial court erred in rendering a judgment declaring an easement by necessity when the appropriate showing had not been made. *Compare Walker v. Maddox*, 708 So. 2d 197 (Ala. Civ. App. 1997) (holding that landowner who undisputedly lacked frontage on any publicly traveled roadway had established entitlement to an easement by necessity).

Adams offered neither evidence tending to prove that building a road across his own land was prohibitively expensive nor evidence tending to show that the only means of access to the riverfront portion of his property was through the common area. In fact, he testified by deposition that he had not even considered the possibility of building an access road on his property. Based on the facts presented to the trial court, we conclude that Adams did not demonstrate that he was entitled to a judgment awarding him an easement by necessity.

To prove entitlement to an easement by implication, a landowner must show that his or her parcel of property had original unity of ownership with the land through which the easement is sought. *Helms*, 398 So. 2d at 255. Additionally, the [**10] use must be open, visible, continuous, and reasonably necessary to the estate granted. *Id.* "The implication is that the parties implied such an easement because the grantee, having seen the use the grantor made of the property, can reasonably expect [*379] a continuance of the former manner of use." *Helms*, 398 So. 2d at 255-56. Although Adams stated that during his four years of ownership before this action was initiated, he had driven across the common area to reach the riverfront portion of his property and testified that the 1999 sales brochure indicated that an old river lane ran alongside and parallel to the riverfront portion of his property, Adams offered no evidence to show that the route he used through the common area was reasonably necessary.

Specifically, in this case, Adams failed to show that there was no other route to reasonably access his river frontage. Adams admitted that his parcel of property contained nearly 1,500 feet of frontage along Patrick's Landing Road, which is the main access road for all other landowners in The Bluffs. Adams also stated that he had never considered building a road or driveway on his property because it "was not something [**11] I want to do [or] care to do." On the other hand, Adams stated that he had spent at least $12,000 building piers on his riverfront and $8,000 building an elevated walkway through a portion of the wetlands on his property. The Association proffered evidence tending to show that Adams could connect the river frontage of his property to The Bluffs' main road by simply building a driveway down the side of his property for a cost of about $10,000. Additionally, although Adams stated that he had always accessed his property by driving across the common area, he admitted that he had owned the property for only four years at the time he filed his complaint and that he had no knowledge of any past use of that method of accessing the land.

Although Adams proved that his use of the common area as a means of accessing his property's river frontage had been open and continuous during his four-year ownership of the property, he failed to prove that his use of the common area was reasonably necessary to access his property. Under Alabama law, an easement by implication is only created when a genuine necessity exists; mere convenience is not enough. *See Helms*, 398 So. 2d at 255. [**12] Reviewing the record in a light most favorable to the nonmovant, as we are required to do, we conclude that Adams failed to prove

the existence of a genuine necessity so that an easement by implication was established and, therefore, that the trial court erred in entering a summary judgment awarding Adams an easement by implication.

The trial court improperly applied the law of easements to the facts presented to it. We therefore reverse the judgment and remand the cause for further proceedings or a judgment consistent with this opinion.

REVERSED AND REMANDED.

Yates, P.J., and Crawley and Thompson, JJ., concur.

Murdock, J., concurs in the result, without writing.

Board of School Commissioners of Mobile County v. Coastal Builders, Inc.

2040560

COURT OF CIVIL APPEALS OF ALABAMA

945 So. 2d 1059; 2005 Ala. Civ. App. LEXIS 751

December 16, 2005, Released

SUBSEQUENT HISTORY: Released for Publication Janaury 17, 2007. [**1]
Rehearing overruled by Bd. of Sch. Comm'rs v. Coastal Builders, 2006 Ala. Civ. App. LEXIS 387 (Ala. Civ. App., June 23, 2006)

PRIOR HISTORY: Appeal from Mobile Circuit Court. (CV-02-1742). Ferrill D. McRae.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: Competitive Bid Law, package, summary judgment, bid, matter of law, competitive, preconstruction, opposing party, expenditure, announced, lowest, void, taking evidence, undisputed, construct

COUNSEL: For Appellant: Robert C. Campbell III and Barry C. Prine of Campbell, Duke & Prine, Mobile.

For Appellee: W.A. Kimbrough, Jr., and Marc E. Bradley of Turner, Onderdonk, Kimbrough & Howell, P.A., Mobile.

JUDGES: THOMPSON, Judge. Pittman, J., concurs. Crawley, P.J., and Murdock and Bryan, JJ., concur in the result, without writing.

OPINION BY: THOMPSON

OPINION

[*1060] THOMPSON, Judge.

Coastal Builders, Inc. ("Coastal"), sued the Board of School Commissioners of Mobile County ("the Board"), seeking to recover $ 38,329 in damages. Coastal claimed that it had entered into a contract with the Board for the construction of an elementary school, that in computing its bid for that contract it had inadvertently omitted the cost of a "control package," and that the Board had promised to pay for the control package or add the cost of the control package to Coastal's contract. The Board answered and denied liability. The Board filed a motion for a summary judgment, and the trial court denied that motion. Later, the Board again moved for a summary judgment.

On January 18, 2005, the parties appeared before the trial court for the scheduled trial in this matter. At the beginning of that proceeding, the trial court denied the Board's second motion [**2] for a summary judgment, and it asked counsel for Coastal why Coastal had not moved for a summary judgment. The trial court then announced its intention to enter a judgment in favor of Coastal without taking evidence in the matter.

On February 16, 2005, the trial court entered a judgment in favor of Coastal. In that judgment, the trial court stated that,

> "after having fully considered all matters in the Court file, including the two (2) motions for Summary Judgment filed by the Board and all attachments thereto filed by both the Board and Coastal Builders, [the court] deems that further testimony and evidence would not add to the Court's understanding of the facts and issues in this matter ...."

The Board appeals.

Initially, we note that the Board first argues that the trial court erred in refusing to allow it to present evidence at the January 18, 2005, hearing. We conclude, however, that the Board's failure to object to the trial court's decision to enter a judgment without taking evidence precludes it from now raising that issue on appeal.

In *Green v. Dixon*, 727 So. 2d 781 (Ala. 1998), our supreme court held that a trial court could enter a [**3] summary judgment in favor of a party even though the motion for a summary judgment had been filed by the opposing party. The court explained:

> "'Even though it would be better practice for an opposing party to file a cross motion, ... we hold that in the absence of a timely and meritorious objection, there is no reason why, upon the motion of one of the parties, the court cannot dispose of the whole matter by granting [*1061] a judgment to the other party if it finds that there is not [substantial evidence] supporting the moving party's position, thus showing the non-moving party to be entitled to a judgment as a matter of law.'"

Green v. Dixon, 727 So. 2d at 783 (quoting *Adam v. Shelby County Comm'n*, 415 So. 2d 1066, 1068 (Ala. 1982)).

The trial court's February 16, 2005, judgment was, in essence, a summary judgment, or a judgment as a matter of law, in favor of Coastal. The trial court announced at the beginning of the January 18, 2005, hearing that Coastal was entitled to a judgment as a matter of law. The Board did not object to the trial court's failure to conduct an ore tenus proceeding. *Wright v. State Dep't of Indus. Relations*, 470 So. 2d 1246, 1248 (Ala. Civ. App. 1985) [**4] ("In order to preserve a matter for appeal or cross-appeal, a party must call the matter to the attention of the trial court by way of objection or other appropriate methods."). Therefore, we reach the arguments pertaining to the merits of this appeal. *See Green v. Dixon*, supra.

A brief recitation of the facts is all that is necessary for the disposition of this appeal. The record indicates that Coastal submitted a bid to construct a school for the Board and that, on June 27, 2001, the Board awarded the contract to construct the school to Coastal. On June 29, 2001, the parties met for a "preconstruction meeting." At the preconstruction meeting, Coastal alerted the Board to the fact that it had failed to include in its bid the $ 38,329 cost of the control package that was required under the contract. It is undisputed that that error was discussed at the meeting and that the parties discussed either adding the cost of the package to Coastal's bid, executing a "change order" to alter the bid, or having the Board make a direct payment to the supplier of the control package. It is undisputed that John Case, the owner of Coastal, and four of his subcontractors left the [**5] preconstruction meeting with the understanding that the problem would be remedied.

In early July 2001, Coastal signed the contract that had been submitted to it by the Board on June 27, 2001. The Board executed that contract in late July 2001. In late September 2001, the Board notified Coastal that it would not cover the cost of the control package.

The Board argues that the trial court erred in entering a judgment in favor of Coastal. [1] The Board argues that the trial court erred in concluding that the Board and Coastal had reached an agreement with regard to the control package because, it contends, such an agreement would violate the Competitive Bid Law, § 41-16-50 through -62, Ala. Code 1975. The Competitive Bid Law "requires that a contract [involving $ 7,500 or more] that provides for the expenditure of county or municipal funds 'shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.' § 41-16-50(a), Ala. Code 1975." *Ex parte Ballew*, 771 So. 2d 1040, 1043 (Ala. 2000).

> 1 In its brief, the Board maintains that the trial court erred in denying its motion for a summary judgment. However, the denial of a motion for a summary judgment is not appealable. *Superskate, Inc. v. Nolen*, 641 So. 2d 231, 233 (Ala. 1994); and *Blanton v. Liberty Nat'l Life Ins. Co.*, 434 So. 2d 773, 776 (Ala. 1983). We interpret the Board's argument as contesting the propriety of the trial court's judgment in favor of Coastal.

[**6] The Board relies on *Ex parte Ballew*, supra, in making its argument on this issue. In that case, our supreme court held that the doctrine of estoppel could not be used by a party who has a contract dispute [*1062] with an entity subject to the Competitive Bid Law "to preclude the defense of noncompliance with the Competitive Bid Law." *Ex parte Ballew*, 771 So. 2d at 1042.

The Board argues that any agreement it purported to make with regard to paying for the control package would have been subject to the Competitive Bid Law and, therefore, that such an agreement would be void and unenforceable. The evidence indicates that the Board agreed to allow Coastal to remedy its bid to encompass the cost of the control package. However, the parties failed to modify the contract awarded to Coastal, and the amount at issue was sufficient to trigger the application of the Competitive Bid Law. *See* § 41-16-50(a), Ala. Code 1975 (specifying that the Competitive Bid Law applies to all expenditures of $ 7,500 or more).

"The legislative intent in passing the Competitive Bid Law was to get the best quality equipment at the lowest possible price, [**7] and the executive authorities should carry out this intent of the legislature." *Arrington v. Associated General Contractors of America*, 403 So. 2d 893, 898-99 (1981) (quoting *White v.*

McDonald Ford Tractor Co., 287 Ala. 77, 86, 248 So. 2d 121, 129 (1971)). "Alabama's competitive bid provisions are designed for the public's benefit, and not for the benefit of those vying for public funds." *Spring Hill Lighting & Supply Co. v. Square D Co.*, 662 So. 2d 1141, 1151 (Ala. 1995) (Houston, J., dissenting). Even so, the courts "'do not condone the use of the Competitive Bid Law as a means for a party to escape liability for a contract it voluntarily entered into.'" *Ex parte Ballew*, 771 So. 2d at 1042 (quoting *Layman's Sec. Co. v. Water Works & Sewer Bd. of the City of Prichard*, 547 So. 2d 533, 536 (Ala. 1989)). However, this court is bound to apply the Competitive Bid Law and the precedents of our supreme court. *See* § 12-3-16, Ala. Code 1975; *Ex parte Ballew*, supra; *see also Maintenance, Inc. v. Houston County*, 438 So. 2d 741, 744 (Ala. 1983) [**8] ("The legislature has expressed its public policy of voiding contracts which do not comply with the competitive bid law."). Therefore, we must conclude that any agreement by the Board to pay for the control package is void for its failure to comply with the Competitive Bid Law. *Ex parte Ballew*, supra. Accordingly, we must reverse the trial court's judgment in favor of Coastal.

REVERSED AND REMANDED.

Pittman, J., concurs.

Crawley, P.J., and Murdock and Bryan, JJ., concur in the result, without writing.

Kenneth Boles and Hazel N. Boles v. James T. Autery, et al.

No. 88-221

Supreme Court of Alabama

554 So. 2d 959; 1989 Ala. LEXIS 662

September 22, 1989, Filed

SUBSEQUENT HISTORY: Rehearing Denied December 1, 1989.

PRIOR HISTORY: [**1] Appeal from Autauga Circuit Court, CV-84-152, John B. Bush, Judge.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

CORE TERMS: seller, buyer, landowners, counterclaim, joined, public road, insurance proceeds, joinder, street, lane, mortgage, roadway, private road, county commissions, contract claim, award of damages, failure to maintain, indispensable party, reversible error, dedicated, preserved, engineer, decree, join, contract action, pro tanto, subject property, substantial evidence, governmental entity, wrongfully

COUNSEL: G. Houston Howard II of Howard, Dunn, Howard & Howard, Wetumpka.

J. Robert Faulk, Prattville, for Appellees James T. Autery, Sr., Willene Autery, Cecil Charlton Buford, Barbara Lamar Buford, William O. Pace, and Myrtle D. Pace.

George P. Walthall, Jr., and Cynthia T. Funderburk, Prattville, for Appellees Levi B. Welch and Ella L. Welch.

JUDGES: Adams, Justice, Maddox, Shores, and Steagall, JJ., concur. Hornsby, C. J., concurs in the result.

OPINION BY: ADAMS

OPINION

[*959] James and Willene Autery, Cecil and Barbara Buford, and William and Myrtle Pace (the "landowners") filed an action against Levi and Ella Welch and Alabama Sports Society, Inc. (the "buyers"). The landowners alleged that the buyers were allowing persons to hunt on the landowners' property, had shot at Autery's child, were wrongfully using the landowners' private road, and had wrongfully widened that road. The buyers filed a third-party complaint against Aronov Realty Company, Traywick Dickson, and Kenneth and Hazel Boles ("sellers"). That third-party complaint concerned the buyers' purchase from the sellers of approximately 47 acres of rural real estate in Autauga County [**2] and alleged, among other claims, that the sellers had breached a contract with the buyers to "convey proper access" to the property, because the sellers had allegedly represented that a road providing access to the property was a public road, when, instead, the road was private. The sellers filed a counterclaim against the buyers, seeking to recover $ 25,000 in insurance proceeds and punitive damages. The sellers state in their counterclaim that they held a purchase-money mortgage on the property and that, pursuant to the terms of [*960] that mortgage, the buyers were required to maintain fire insurance for their benefit on a house on the property. The house burned, and the sellers and buyers jointly recovered $ 25,000 in insurance proceeds. Although the buyers allegedly agreed to rebuild the house with the insurance proceeds if the sellers would release their share of the proceeds to them, which the sellers did, the buyers never rebuilt the house.

The trial court ordered separate trials on the original complaint and on the third-party complaint and counterclaim. The court held a hearing on the original complaint and entered an order awarding the landowners nominal damages on various claims [**3] and holding "that the road in question is a private and not public road." Several months later, the buyers' third-party complaint and the sellers' counterclaim were tried, although Aronov and Dickson had already reached a pro tanto settlement of the case. The trial court entered an order that:

> 1. Found in the buyers' favor on their "breach of contract claim regarding the road" and assessed damages against the

> sellers in the amount of $ 31,000, but provided that this amount would be reduced by the amount of the pro tanto settlement with Aronov and Dickson;
>
> 2. Found in the buyers' favor on the sellers' counterclaim for the $ 25,000 proceeds, but provided that "in the event that Welch [buyer] does not pay Boles [seller] the amount due under the mortgage on the subject property, Boles shall be paid $ 25,000, said sum representing insurance proceeds . . . ."

The trial court entered a final judgment, and the sellers appeal.

The sellers argue that, pursuant to Rule 19, A.R.Civ.P., Autauga County should have been joined as a party to the action for the purpose of determining whether the road was public or private and, that, because the trial court's award of damages on the breach of [**4] contract claim was based on its prior finding that the road was private, the judgment against the sellers should be reversed. To support their argument, the sellers cite *Johnston v. White-Spunner*, 342 So. 2d 754 (Ala. 1977). *Johnston* involved a boundary line dispute between owners of contiguous lots in a subdivision. One of the issues concerned whether Johnston Lane was a public road or a private road, and another issue was the proper location of the lane. The appellants argued that the City of Mobile should have been joined as a party to the action. The Court wrote:

> "The record does not tell us the precise nature of the title or interest the City of Mobile holds to Johnston Lane. Some of the rights, title, and interests of abutting lot owners in, and to, streets dedicated to public use; and some of the rights, title, powers and obligations of municipalities as to their streets are discussed and defined in: *McCraney v. City of Leeds*, 239 Ala. 143, 194 So. 151 (1940); *Thetford v. Town of Cloverdale*, 217 Ala. 241, 115 So. 165 (1927); *City of Montgomery v. Orpheum Taxi Co.*, 203 Ala. 103, 82 So. 117 (1919). A city has extensive power to control and regulate the use of [**5] its streets as the above authorities show. The City of Mobile has no less interest in the outcome of an action involving the true location of Johnston Lane than any of the property owners in the subdivision.
>
> "If, as the record indicates, the City is exercising authority over a strip of land not actually dedicated to use as a public street, then any decree that finds to that effect, expressly or by implication, is void if the City is not a party to this action. In any event, the interest of the City is of such a nature that the court decree 'relocating' the road directly affects that interest and the trial court must have jurisdiction over the City before proceeding to adjudicate any issues affecting such interest."

342 So. 2d at 760.

At the hearing to determine whether the road was public, Mr. Autery, one of the landowners, testified that the county had put pipe under the road, had put gravel on the road, had graded the road, and had generally maintained it. Present and former [*961] county commissioners and commission employees also testified that the county had maintained the road since the late 1960's. Furthermore, evidence indicated that school buses and the postal service use the road, [**6] and that members of the public have used the road for 20 or 30 years. The Autauga County engineer testified that the county treated the road as a public road.

A public road may be vacated only with the consent of the governing body in whose jurisdiction the road lies. Ala. Code 1975, §§ 23-4-1, 23-4-20. "The county commissions of the several counties of this state have general superintendence of the public roads," § 23-1-80, and they have "authority in relation to the establishment, change or discontinuance of roads," § 11-3-10. Furthermore, a county may be liable to individuals injured because of its negligence in maintaining its roads. See, *Jefferson County v. Sulzby*, 468 So. 2d 112 (Ala. 1985).

The trial court's determination of whether the road was public or was private might affect not only the rights of the individual litigants but also the rights of members of the public to use the road, the duty of the county to maintain it, and the liability of the county for failure to maintain it. If the county is not joined as a party, then neither it nor other members of the public are bound by the trial court's ruling. Accordingly, if the county and other persons are not bound, [**7] then the status of the road as public or private is subject to being litigated again, and the results of later litigation may be inconsistent with the results of the initial litigation. We note the following as a possible example: Suppose the landowners, over the course of time, allow

the road to fall into disrepair, and a school bus carrying children has an accident because of the road's deterioration. Would the county be liable for its failure to maintain the road? Coupled with the other problems discussed, that possibility of contradictory rulings about the status of the road as public or private is a sufficient reason to require the joinder of Autauga County as a party. See also *Johnston*, supra. "The desirability of judicial economy must give way to the orderly administration and demands of justice," *Mead Corp. v. City of Birmingham*, 350 So. 2d 419 (Ala. 1977).

The landowners argue that Autauga County knew about this lawsuit because representatives of the county were witnesses at trial and that, accordingly, the joinder of the county as a party is unnecessary; the landowners state that "the county engineer, tax assessor, and a member of the county commission were called [**8] as witnesses at trial with no indication of wanting to be made a party to the cause." That a witness is present in court and testifies in the proceedings does not necessarily mean that the witness should not be joined as a party. See *Davis v. Burnette*, 341 So. 2d 118 (Ala. 1976). The presence of county employees as witnesses does not correct those problems caused by the failure to join Autauga County as a party; accordingly, the landowners' argument fails.

The landowners further argue that the joinder of Autauga County pursuant to Rule 19, A.R.Civ.P., would be unnecessary and improper under the Court of Civil Appeals' holding in *Geer Brothers, Inc. v. Walker*, 416 So. 2d 1045 (Ala. Civ. App. 1982). In *Geer*, the court wrote that when a party was seeking only to protect itself with a Rule 19, A.R.Civ.P., argument, and was not seeking vicariously to protect the absent party against a prejudicial judgment, the court could consider the defendant's delay in seeking to have the party joined. *Geer*, at 1050. The landowners seem to be arguing either that the issue of joining Autauga County has not been preserved for review or else that the sellers, seeking only to protect themselves, [**9] waited too long to raise the issue.

The sellers first raised the issue in their post-trial motions. Failure to join an indispensable party is subject to review on appeal even if it is raised for the first time on appeal and even though the issue was not called to the attention of the trial court. *Davis v. Burnette*, supra, at 120. The sellers' issue, accordingly, was preserved for appeal.

Considering our prior discussion, we refuse to hold that the sellers were seeking [*962] only to protect themselves when they raised the issue of the joinder of Autauga County pursuant to Rule 19, A.R.Civ.P. The determination of whether the road was public or was private was a determination related to the public interest and to Autauga County in particular, as we have discussed. Further, considering the entire record, we do not accept the landowners' argument that the sellers delayed too long to be able to raise the issue.

For the reasons previously discussed, we hold that Autauga County should have been joined as a party to the action determining whether the road was a public road. Because Autauga County was not joined as a party, and because the trial court's determination that the road was private [**10] was made a basis for the trial court's award of damages in the buyers' breach of contract action against the sellers, the judgment is due to be reversed as to the buyers' breach of contract action, and the cause remanded.

As to the sellers' counterclaim, the trial court wrote:

> "The Court finds the issues in favor of third-party plaintiffs and against third-party defendants Kenneth and Hazel Boles and Boles's counterclaim. However in the event that Welch does not pay Boles the amount due under the mortgage on the subject property, Boles shall be paid $ 25,000, said sum representing the insurance proceeds received by Welch for the purpose of reconstructing the house located on the property which burned."

The sellers argue that this judgment indicates that the "trial court recognized the sellers were entitled to the money" but that nevertheless "it refused to enter judgment for them." Apart from this conclusory statement, the sellers do not explain in any way what the trial court did that might constitute reversible error. As appellants, the sellers have the affirmative duty of showing error on the record. *Smith v. Equifax Services, Inc.*, 537 So. 2d 463, 465 (Ala. 1988). The sellers [**11] have shown nothing that constitutes reversible error in relation to their counterclaim and, accordingly, the judgment is due to be affirmed as to the Boleses' counterclaim.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Adams, Justice, Maddox, Shores, and Steagall, JJ., concur. Hornsby, C. J., concurs in the result.

CONCUR BY: HORNSBY

CONCUR

HORNSBY, CHIEF JUSTICE (concurring in the result).

I concur in the result reached by the main opinion. However, I wish to emphasize that my concurrence is based on the specific facts presented by this case. I see three critical elements in this case. First, there is substantial evidence before the trial court that the appropriate governmental entity is in fact exercising authority over the roadway in question. Second, there is substantial evidence that the public is regularly using the roadway. Third, the case presents a substantial likelihood that its judicial determination will result in the roadway's no longer being used by the public.

Given these factors, I agree that the rationale of the main opinion requires that the governmental entity involved be joined as an indispensable party. I do not view the Court's holding to be applicable to [**12] different fact scenarios wherein landowners are litigating whether a roadway is public or private.

Barry L. Booth v. Montrose Cemetery Association, a non-profit Corporation

No. 78-807

Supreme Court of Alabama

387 So. 2d 774; 1980 Ala. LEXIS 3094

August 8, 1980

SUBSEQUENT HISTORY: [**1] Rehearing Denied September 12, 1980.

PRIOR HISTORY: Appeal from Baldwin Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: street, vacation, assent, declaration, vacated, public streets, remoteness, summary judgment, property owners, municipality, dedicated, genuine, public ways, issue of material fact, abutting, public roads, declarant's, purchaser, developer, platted, alley, county commission, owns property, field of operation, thoroughfares, requisite, recorded, issues of fact

COUNSEL: T. K. Jackson, III and James J. Ward for Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, Mobile, for Appellant.

James L. Shores, Jr. for Shores & Moore, Fairhope, for Appellee.

JUDGES: Maddox, Jones, Almon, Embry and Beatty, JJ., concur. Torbert, C.J., concurs in the result. Faulkner, J., dissents. Bloodworth, J., not sitting. Shores, J., recuses herself.

OPINION BY: PER CURIAM

OPINION

[*775] This is an appeal from a summary judgment granted Montrose Cemetery Association setting aside the declaration of vacation of certain portions of streets in the Montrose subdivision of Baldwin County. We affirm. On April 28, 1978, Barry Booth and the other defendants below, each of whom owns property abutting portions of Chapman, Taylor, Ledyard, and Third Streets in Montrose, filed in the Office of the Probate Judge of Baldwin County a declaration of vacation pursuant to § 35-2-54, Code 1975, vacating the portions of those platted streets abutting their property. Montrose Cemetery Association, owner of Block 23 and Lot 3 of Block 3, filed suit to set aside the vacation. Montrose was [**2] granted a summary judgment that was later set aside because the hearing and ten-day service requirements of ARCP 56(c) were not met. Montrose then filed a second motion for summary judgment and supporting affidavits indicating that the vacated portions of Chapman, Taylor, Ledyard, and Third Streets had been used as public roads. Booth and the other defendants filed affidavits in opposition to the motion, asserting that the vacated streets were not now, and never had been, used as public thoroughfares.

After hearing arguments, the trial court found that Montrose was not within the boundary of any municipality in Baldwin County and the assent of the Baldwin County Commission to the vacation had not [*776] been procured; that the Cemetery Association had acquired an easement appurtenant in the streets of Montrose which could not be divested by the unilateral action of the defendants; and that there was no genuine issue of material fact involved in the case. Thus, the trial judge set aside the declaration of vacation and enjoined interference with the use of the streets to be vacated. From the denial of the defendants' ARCP 59 motion, Barry Booth appeals.

Both asserted errors [**3] are appropriately posed in the summary judgment posture of the final order appealed from:

(1) The validity of the trial court's initial ground for setting aside the declaration of vacation--lack of consent of the Baldwin County commission--rested on a factual question of whether the portions of the streets involved were being, or had ever been, used as public roads; and

(2) The trial court's invalidation of the declaration of vacation foreclosed genuine issues of fact relating to "reasonable access" and "remoteness."

We agree in part with Booth's first contention. It is true that § 35-2-54, the statute here invoked, distinguishes between those dedicated public streets "within the limits of any municipality" and those "outside of any

municipality," the latter requiring "assent of the county commission" only "if such street or alley has been or is being used as a public road." The statute requires "assent of the . . . governing body of the municipality" if the proposed vacation of a dedicated street or alley is "within the limits of any municipality" without regard to its present or past use.

While neither the statute nor case law sheds any light on the basis for this distinction, [**4] we surmise that policy considerations regarding the normal differential in density of population prompted the legislature to vest in cities a greater interest in dedicated public ways. At any rate, even if this were the only ground asserted by the trial court for its summary judgment, we would not be compelled to reverse; and this for the reason that, though the county's requisite assent is dependent upon the use of the streets in question, whether these streets are, or have been, used as public streets is not a genuine issue of material fact. It is immaterial, except for the statutory requisite assent of the county to vacate its dedication, whether a dedicated public way is used, or has been constructed or used, as a public street. *Stack v. Tennessee Land Co.*, 209 Ala. 449, 96 So. 355 (1923).

Consequently, although the trial court erred in granting summary judgment adversely to declarant on the ground of the lack of assent of the county (there being an issue of fact as to the use of the streets in question), Booth could not prevail, as a matter of law, on the ultimate issue of whether these streets are, or have been, used as public streets.

In other words, this factual [**5] issue of public use speaks only to the necessity *vel non* of obtaining the county's assent to the declaration of vacation and not to the propriety of the trial court's final determination that no genuine issue of material fact is presented on the instant question of Booth's right to unilaterally close the subject streets. *Stack* mandates that the result would be the same even assuming the county's assent had been sought and obtained or even assuming Booth's evidence of nonuse of the streets by the public had been uncontroverted.

We now turn to the "reasonable access" and "remoteness" issues. Because a recent influx of cases, invoking § 35-2-54, evidences a common misunderstanding of this vacation statute's limited field of operation in the context of a constitutional attack by a nonassenting owner, we restate the salient legal principles that govern the disposition of these cases.

Case law in this State reflects that the statute authorizing a platted street to be vacated by "the owner or owners of the lands abutting the street," is interpreted to protect the interests of other property owners in the subdivision, who may not necessarily own property abutting the street [**6] or portions thereof sought to be vacated. Every purchaser of a lot shown on the recorded [*777] map of the subdivision has the right, as against the dedicator of the streets and the purchasers of the other lots, to have the designated scheme of public thoroughfares maintained in its integrity, as it existed when he purchased the property, and all persons whosoever may use these public ways as the occasion requires. *Whitten v. Ferster*, 384 So. 2d 88 (Ala. 1980); *Thetford v. Town of Cloverdale*, 217 Ala. 241, 115 So. 165 (1927); *Highland Realty Co. v. Avondale Land Co.*, 174 Ala. 326, 56 So. 716 (1911); *East Birmingham Realty Co. v. Birmingham Machine & Foundry Co.*, 160 Ala. 461, 49 So. 448 (1909). [1]

> 1 In the recent case of *Daniel v. Evans*, 384 So. 2d 88 (Ala. 1980), this Court, following the cited authorities, summarily rejected declarant's contention, supported by the original developer, that the Court should transpose a dedicated public street into a private way pursuant to the alleged intent of the developer at the time he recorded the subdivision plat. Our case law is clear to the effect that the unequivocal intent shown by the developer in recording a platted subdivision with unrestricted public streets and alleys indicated thereon, and in selling lots by reference thereto, cannot be vacated by subsequent parol evidence of a contrary intention.

[**7] The vacation statute is in derogation of the common law prohibition against the vacation of public ways and is interpreted by the Court, as mandated by constitutional due process standards, to protect the property interests of nonconsenting property owners affected by the proposed vacation, *subject only to the rule of remoteness. Gwin v. Bristol Steet & Iron Works, Inc.*, 366 So. 2d 692 (Ala. 1978). The remoteness limitation is also mentioned by the *Thetford* Court, where, in discussing the rights of the property owners adjacent to the street sought to be vacated, it states, "The interest of the purchasers of lots more or less remote from the street in question may be more or less theoretical, depending on circumstances."

This limitation on a nonadjacent property owner's capacity to oppose and set aside a declaration of vacation has not been directly addressed by our decisions; nor are we called upon here to set the precise limits of its field of operation. Where, as here, Montrose Cemetery currently owns lots in the subdivision in the immediate proximity to the street sought to be closed, no fact question can possibly be presented to invoke the rule of remoteness. This [**8] Court's decision establishing more exact standards for the operative effect of this rule should await the appropriate case.

Booth insists that the statutory language, "Convenient means of ingress and egress to and from their property shall be afforded to all other property owners owning property in the tract of land . . .," renders "reasonable access" a material factual issue. This point was also spoken to in *Gwin*, relying on *Thetford*, in which Mr. Justice Sayre said that "it does not lie in the mouth of [Declarant] to say that [other attingent owners] should now be satisfied with one way only."

Finding no genuine issue of material fact presented under either the "remoteness" or "reasonable access" rules, we find no error to reverse.

AFFIRMED.

Maddox, Jones, Almon, Embry and Beatty, JJ., concur.

Torbert, C.J., concurs in the result.

Faulkner, J., dissents.

Bloodworth, J., not sitting.

Shores, J., recuses herself.

Eugene A. Bownes v. Winston County, a Political Subdivision of the State of Alabama

No. 84-695

Supreme Court of Alabama

481 So. 2d 362; 1985 Ala. LEXIS 4213

November 8, 1985

PRIOR HISTORY: [**1] Appeal from Winston Circuit Court.

CORE TERMS: abandonment, abandoned, highway, deed, public road, public way, vacation, quitclaim deed, conveyance, landowner, streets, county commission, public highway, governing body, obstructer, repair, alleys, right-of-way, chairman, common law, public character, public authorities, trial briefs, clear and convincing evidence, lawfully, disposed, vacated, non-use, enjoin, seldom

COUNSEL: Finis E. St. John for St. John & St. John, Cullman, for Appellant.

Hobson Manasco, Jr., Haleyville, for Appellee.

JUDGES: Houston, Justice wrote the opinion. Faulkner, Jones, Shores, and Beatty, JJ., concur. Torbert, C. J., and Maddox and Almon, JJ., dissent.

OPINION BY: HOUSTON

OPINION

[*362] From a judgment declaring that Winston County Road 12-B is a public road and ordering Dr. Eugene A. Bownes to remove any and all obstructions from that road, Dr. Bownes appeals. We reverse and remand.

On February 28, 1964, a quitclaim deed was given to Leonard Farley (Dr. Bownes's predecessor in title) to "All that part of the old right of way of Arley-Trade Road across the SW of the SW in Section 26, Township 11, Range 6. Said road has now been abandoned and this conveyance is for the purpose of conveying said right of way back to the adjoining landowner."

The grantor in the deed was the "The Board of Revenue of Winston County." [*363] The deed was signed by the chairman (Malcolm Clyde Teas) and two members (Erbie E. Stephens and Claude F. Watts) of the Winston County Board of Revenue. Under the signatures was typed "The Winston County Board [**2] of Revenue, Governing Body of Winston Co."

The pertinent part of the acknowledgment was: "that Clyde Teas, Chairman, Erbie Stephens and Claude Watts, members, whose names are signed to the foregoing conveyance and who are known to me acknowledged before me on this day that being informed of the contents of the conveyance they executed the same voluntarily on the day the same bears date."

The deed was filed for record and recorded in the Probate Office of Winston County on February 28, 1964.

On March 30, 1982, this suit was filed by "Winston County, a political subdivision of the State of Alabama," alleging in essence that the right-of-way described in the foregoing deed had not been abandoned and had continuously been used as a public road and seeking an injunction to keep Dr. Bownes from placing an obstruction in the form of a gate across this road.

Farley had conveyed to Dr. Bownes and his wife that portion of the SW 1/4 of the SW 1/4, Section 26, Township 11, Range 6, west of the 510-foot elevation contour line of Lewis Smith Lake by a warranty deed in 1971. The above described right-of-way was not excepted from this conveyance, nor was the conveyance made subject to such [**3] right-of-way. In 1975, Farley executed a quitclaim deed to Dr. Bownes and his wife to the exact property which had been quitclaimed to Farley by the quitclaim deed hereinbefore described.

At the time the 1964 quitclaim deed was executed by the Chairman and members of the Board of Revenue of Winston County, Act No. 326, Acts of Alabama 1959, was the local act governing the authority of the Board of Revenue of that county. The pertinent part of this Act provided: "The Board of Revenue shall have and exercise all of the jurisdiction, power, and authority which are now or may hereafter be invested in the

Courts of County Commissioners, Boards of Revenue, and other like County Governing Bodies in Alabama." This was subject to certain limitations insofar as construction, maintenance, and repair of roads, bridges, and ferries were concerned.

"The ancient maxim, 'once a highway, always a highway,' which has frequently been quoted by the Courts, is subject to the qualification that a highway, once established, continues until it ceases to be such by the action of the general public in no longer traveling upon it, or by action of the public authorities in formally closing it. Accordingly, [**4] a highway once in existence is presumed to continue until it ceases to be such, owing to abandonment or some other lawful cause." 39 Am. Jur. 2d *Highways, Streets and Bridges*, § 139 at 512-13 (1968).

In Alabama, public streets, alleys, or highways can be closed and vacated by counties or municipalities in accordance with §§ 23-4-1 through 23-4-6, Code 1975, or by "abutting landowners" in accordance with § 23-4-20, Code 1975. These sections have been expanded by § 11-49-6, Code 1975, (1985 Cum. Supp.) which authorizes the governing body of the governmental entity in which the public way is located to require the landowner who will benefit by the vacation of such public way to pay the fair market value of the land which will be added to the holdings of such landowner.

There is a common law prohibition against the vacation of public ways. *Booth v. Montrose Cemetery Association*, 387 So. 2d 774 (Ala. 1980). Therefore, the vacation statutes are in derogation of the common law prohibition against the vacation of public ways and must be strictly construed. *Gwin v. Bristol Steel & Iron Works, Inc.*, 366 So. 2d 692 (Ala. 1978).

Section 11-14-2, Code 1975, does not give to [**5] the county commission an additional method of vacating streets, alleys, or highways. *Smith v. Duke*, 257 Ala. 86, 57 So. 2d 550 (1952). It provides only that the county commission may "direct the disposal of any real property which can be lawfully [*364] disposed of." Streets, alleys, and highways cannot be lawfully disposed of unless they are closed or vacated in accordance with the vacation statutes previously cited.

A public way or easement of passage which the public has in respect to a highway may be abandoned and thus lose its public character in one of two ways. Non-use for a period of 20 years will operate as a discontinuance of a public road. Likewise, there can be an abandonment by non-use for a period short of the time of prescription when there has been the construction of a new highway replacing an old road. *Floyd v. Industrial Development Board of Dothan*, 442 So. 2d 927 (Ala. 1983).

This case was submitted to the trial court without an evidentiary hearing, but on trial briefs which contain some facts which were agreed to by the parties and some facts which were in dispute. Where the evidence is stipulated, and no testimony is presented orally before the [**6] trial court, this Court will review without any presumption in favor of the trial court's findings and sit in judgment on the evidence. *Perdue v. Roberts*, 294 Ala. 194, 314 So. 2d 280 (1975); *Sheehan v. Liberty Mutual Fire Insurance Co.*, 288 Ala. 137, 258 So. 2d 719 (1972).

The 1964 quitclaim deed from the Board of Revenue of Winston County to Leonard Farley, which was submitted by Dr. Bownes, established that the Arley-Trade Road (Winston County Road 12-B) was, at one time, a public road. Although he introduced no evidence tending to show that the County Commission complied with the statutory method of vacation, the 1964 deed did contain an acknowledgment by the Board of Revenue that "Said road has now been abandoned." The County merely argued in its trial brief, without supporting evidence, that the road in question had not been abandoned. Therefore, we hold that the evidence which was stipulated to by the parties (i.e., the quitclaim deeds from the Board of Revenue of Winston County to Leonard Farley and from Farley to Dr. Bownes) fails to support the material allegations upon which the suit is based.

The judgment of the trial court is reversed and the cause remanded.

[**7] REVERSED AND REMANDED.

Faulkner, Jones, Shores, and Beatty, JJ., concur.

Torbert, C. J., and Maddox and Almon, JJ., dissent.

DISSENT BY: TORBERT

DISSENT

TORBERT, CHIEF JUSTICE (dissenting).

Winston County brought suit to enjoin Bownes from obstructing what was conceded to have been a public road. This is not a declaratory judgment action to determine if in fact the road in question was a public road. Bownes contends that while the road may have been public at one time it is no longer a public road. It is clear that the statutory prerequisites for vacation of a public way have not been met. The only question is whether the public way has lost its public character because of abandonment.

In *Floyd v. Industrial Development Bd. of Dothan*, 442 So. 2d 927 (Ala. 1983), and *Purvis v. Busey*, 260 Ala. 373, 71 So. 2d 18 (1954), the Court was confronted

with factually similar cases. In each case a public road was alleged to have been obstructed. Suit was filed to enjoin the obstructer from continuing to obstruct it. The obstructer's defense was abandonment. The Court held that the obstructer has the burden of showing abandonment by clear and convincing evidence. See also, *Ayers v.* [**8] *Stidham* 260 Ala. 390, 71 So. 2d 95 (1954). That holding is consistent with the general rule that once it is shown that a road is a public highway, "the burden of showing abandonment . . . is upon the party who asserts that the public . . . [has] lost or surrendered their rights." 2 B. Elliott & W. Elliott, *The Law of Roads and Streets*, § 1173 (4th ed. 1926).

The only competent evidence on the issue of abandonment was the statement in the deed from the Board of Revenue of Winston County to Bownes's predecessor in title that the "road has now been abandoned." [*365] The County argued in its brief that in fact there had been no abandonment, but there is nothing in the record to disclose that the County actually presented any evidence on that issue. The question, simply put, then is this: Is the statement in the deed that the road is abandoned, standing alone, clear and convincing evidence of abandonment? I think not.

The statement that the road was abandoned is conclusory. There are no facts given to support that conclusion. A reading of the cases in this area convinces me that much more is necessary to establish that a public highway has been abandoned. Neither the [**9] fact that part of a public highway is unusable for travel, nor the fact that the county failed to keep the highway in repair, nor the fact that it forms a cul-de-sac is sufficient to show that it has been abandoned. *Purvis*, 260 Ala. at 378, 71 So. 2d at 22, citing cases. Even the combination of facts that the road was seldom used, was in a bad state of repair, and was not maintained by public authorities was not enough to show abandonment. *Ayers*, supra. A casual observer of the roads involved in these cases may well conclude that the roads were abandoned, but the law requires a much stronger showing of facts in order to establish abandonment. The purpose of placing such a heavy burden on the person attempting to prove abandonment is to protect the public. "It is to be remembered, too, that the rights of the public are seldom guarded with the vigilant care with which owners of private property guard their own rights, and acts or omissions which might weigh heavily against individual owners cannot always be assigned much force against the public." Elliott & Elliott, supra, at § 1175.

I do not believe that the statement in the deed is sufficient to clearly and convincingly [**10] prove that the road was abandoned. Therefore, the judgment of the trial court should be affirmed.

Maddox and Almon, JJ., concur.

W. E. Bradley, et al. v. City of Trussville,, et al.

Civ. No. 6385

Court of Civil Appeals of Alabama

527 So. 2d 1303; 1988 Ala. Civ. App. LEXIS 60

March 16, 1988

SUBSEQUENT HISTORY: Certiorari Denied July 1, 1988.

PRIOR HISTORY: [**1] Appeal from Jefferson Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: developer's, deed, zoning, map, municipal, classification, conveyed, rezone, public purposes, public road, public park, dedicated, adjacent, street, recorded prior, palpably erroneous, impermissible, recorded, tenus, civic, plat, ore, public use, housing project, federal government, recreational activities, residential, beneficial, unlawfully, abdicated

COUNSEL: Douglas Corretti, Mary Douglas Hawkins and Jesse P. Evans, III, Attorneys for Plaintiff.

Carl E. Johnson, Thomas E. Baddley, Jr. and Marshall Sims, Attorneys for Defendant.

JUDGES: Holmes, Judge. Bradley, P.J., and Ingram. J., concur.

OPINION BY: HOLMES

OPINION

[*1304] This is a zoning and land use case.

The plaintiffs filed suit against the City of Trussville (City) and its officials, as well as the developer of a subdivision within the City. The plaintiffs sought to restrain and enjoin the construction of a road to the subdivision across property which is a public park.

Following an *ore tenus* trial of the case, the trial court denied the plaintiffs' requested relief and dissolved a temporary restraining order which it had earlier issued to halt construction of the road.

The plaintiffs, through able and distinguished counsel, appeal. We affirm.

I

To fully understand the nature of this case, a summary of the history of the park property is necessary. In the 1940's the United States government conveyed to the City the park property as part of a housing project developed by the federal government. That the property was intended to be used as a public park is evident [**2] both from the Deed of Dedication by which the property was conveyed to the City and by the recorded map to which the deed refers.

It appears that the City has never developed the park as such, and the property has remained in its natural state. Nevertheless, it has been used by the public over the years for various types of recreational activities, such as hiking and camping, and has generally become known as Rock Park.

The defendant developer owns approximately 39.9 acres adjacent to Rock Park which he desires to develop as a residential subdivision. This property had lain outside the city limits of Trussville and was zoned as county property.

Apparently following extensive negotiations between the City and the developer, the latter petitioned the City to annex his property. The City by ordinance annexed the property and agreed therein that, if the property was not subsequently rezoned by the City's Planning and Zoning Commission to the classification sought by the developer, the City would grant the developer's petition to de-annex the property.

The City also agreed to provide the developer a right of way through Rock Park, the street to be constructed at the developer's expense. [**3] This road would provide the public with access to the subdivision through the park.

The City's Planning and Zoning Commission subsequently rezoned the developer's property to the classification he sought, which would permit the construction of single family detached residences and garden homes.

The developer then began work on the road or street which would run through Rock Park to his subdivision.

The plaintiffs filed the instant suit to halt construction of the road through Rock Park. Plaintiffs own the residences adjacent to the proposed subdivision. Some of the plaintiffs' residences are adjacent to the park as well.

II

The plaintiffs' primary contention is that the construction of a road or street across Rock Park to give access to the developer's subdivision is an unlawful diversion of land that has been dedicated as a public park.

After a careful study of the record and what little bit of Alabama law may be applied to this matter, we are of the opinion that, under the circumstances of this particular case, the trial court did not err in denying the plaintiffs' relief.

In the first instance the building of a road through the park property appears to be consistent with the terms [**4] of the Deed of Dedication by which the federal government conveyed the park property to the City. The deed provides that the park property "is dedicated and conveyed by the Grantor to the Grantee [City] for use solely for public or civic purposes in connection with the [housing project] and the *general municipal undertakings* of the Grantee." (Emphasis supplied.)

The Alabama Supreme Court has noted the difference between the use of the terms "park purposes" and "public purposes" in a deed of property to be used for [*1305] a park. In *Fairhope Single Tax Corp. v. City of Fairhope*, 281 Ala. 576, 206 So. 2d 588 (1968), the supreme court's holding was clearly to the effect that use of the term "park purposes" was much narrower than use of the term "public purposes" and prevented the construction of a civic center building on the park property.

In the instant case, however, the deed specifies that the City may use the park property in connection with its "general municipal undertakings." The laying of a public road through the park property is clearly a general municipal undertaking, or "public purpose," of the City. *See* Ala. Code (1975), §§ 11-47-19 and 11-48-4 (1).

The plaintiffs apparently [**5] contend that the rather broad language contained in the deed is not controlling as to the uses to which the park property may be put. Rather, they contend, the map or plat of the property, to which the deed refers and which simply designates the land as a park and mentions nothing about general municipal uses, controls because the map was recorded prior to the execution of the deed. *See* Ala. Code (1975), §§ 35-2-50 and -51.

We disagree. It appears to be the law in this state that, notwithstanding the effect which Ala. Code (1975), § 35-2-50, gives to a duly recorded map or plat, where such map is used in conjunction with a deed of conveyance it is the terms of the deed which control, even though the map may have been recorded prior to the deed. *See Williams v. Oates*, 212 Ala. 396, 102 So. 712 (1924). *See also Witherall v. Strane*, 265 Ala. 218, 90 So. 2d 251 (1956).

In addition to other language in the Deed of Dedication which may be construed to authorize the City to lay a public road through the park, there is also evidence that the road would be beneficial to the park and further its public use and development.

The evidence reflects that, though the public has used the [**6] property to some extent over the years for various recreational activities, the City has never developed the property as a park, such as by constructing park facilities. Parts of the property are apparently overgrown and practically inaccessible.

There was evidence that the road would enhance the park property by aiding its accessibility and thus its public use. Moreover, the evidence indicated that the road had been designed to be a divided parkway so that it would be aesthetically pleasing within the park and designed to permit off-street parking and other improvements.

We have found no Alabama cases directly on point, but analogous cases in some jurisdictions have indicated that the construction of a road through a park may be permissible where it is shown to contribute to the use and enjoyment of the park. *See, e.g., Ocean Beach Realty Co. v. City of Miami Beach*, 106 Fla. 392, 143 So. 301 (1932). *See also King v. City of Dallas*, 374 S.W.2d 707 (Tex Civ. App. 1964).

The plaintiffs make much of the fact that the road is being built to benefit a private developer by providing access to his subdivision through the park. We find this fact to be of little import where there was [**7] no evidence of fraud or bad faith and where there was evidence that the City determined that construction of the road would be beneficial to the park and the public.

It should be remembered that the City did not convey to the developer any interest in the dedicated park property. It simply allowed him a right-of-way across the park by exercising its municipal function, as allowed by the Deed of Dedication, to provide for the construction of a public road through the park.

Under the specific circumstances of this case, we do not think that the City exceeded its authority or unlawfully diverted the park property or that the trial court

erred in refusing to enjoin construction of the road through the park.

III

The plaintiffs also contend on appeal that, "in the deal it cut with the developer," the City unlawfully delegated its legislative discretion with regard to zoning. They contend that the rezoning of the developer's property was impermissible contract zoning in that the City agreed to rezone the developer's property to the classification he sought in exchange for his building the road through the park.

[*1306] We find this contention to be wholly without merit. The evidence in the record does not indicate that there was an agreement between the City and the developer to rezone [**8] the developer's property. Rather the agreement appears to be simply that, if the Zoning and Planning Commission did not rezone the property to the classification sought by the developer--and there appears to be no assurance that it would then the City would agree to de-annex the property.

In our opinion, this agreement does not constitute impermissible contract zoning. *Cf. Haas v. City of Mobile*, 289 Ala. 16, 265 So. 2d 564 (1972).

Moreover, the evidence does not reflect that the City abdicated its legislative responsibility with regard to the annexation and rezoning of the developer's property. Rather, the evidence indicates that the City was extensively involved in the development of the subdivision. There was apparently much negotiating between the City and the developer both as to the type of residential subdivision that would be built and the type of road that would be laid through the park. In addition, public hearings were held on the developer's petition to rezone his 39.9 acre tract.

The evidence regarding this matter was presented to the trial court *ore tenus*, and its decision regarding the same will not be set aside by this court unless it is palpably erroneous. [**9] *See Haas*, 289 Ala. 16, 265 So. 2d 564. *See also Clardy v. Capital City Asphalt Co.*, 477 So. 2d 350 (Ala. 1985).

The record does not reflect that the trial court's determination that the City had not abdicated its discretion with regard to zoning the developer's land or engaged in contract zoning was palpably erroneous.

This case is due to be affirmed.

AFFIRMED.

Bradley, P.J., and Ingram, J., concur.

Milford W. Burnett and Evelyn Burnett v. Miguel A. Munoz and Bernice Blackwell Munoz

2010890

COURT OF CIVIL APPEALS OF ALABAMA

853 So. 2d 963; 2002 Ala. Civ. App. LEXIS 1195

December 20, 2002, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication July 23, 2003.

PRIOR HISTORY: Appeal from Baldwin Circuit Court. (CV-01-1096).
Burnett v. Munoz, 2002 Ala. Civ. App. LEXIS 1606 (Ala. Civ. App., Aug. 13, 2002)

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: public road, necessary parties, municipality, joined, buyer, join, parcel, complete relief, sellers, tenus, ore, judgment declaring, private road, failure to maintain, incur liability, landowners, vacation, vacated, evidence presented, parties' properties, feet wide, practical matter, ability to protect, predecessors, culvert, impair, impede, strip, drive, feet

COUNSEL: For Appellants: Linda L. Howard of Laurence P. Sutley & Associates, P.C., Foley.

For Appellees: Bayless E. Biles of Wilkins, Bankester, Biles & Wynne, Bay Minette.

JUDGES: THOMPSON, Judge. Yates, P.J., and Crawley, Pittman, and Murdock, JJ., concur.

OPINION BY: THOMPSON

OPINION

[*963] Miguel A. Munoz and Bernice Blackwell Munoz sued coterminous landowners Milford W. Burnett and Evelyn Burnett. In their complaint, the Munozes sought a judgment declaring a strip of land located between their property and that of the Burnetts to be a public road. For the purposes of this decision, we will refer to the strip of property at issue as a "road"; in doing so, we are not deciding whether the road was a public or a private road.

The Burnetts answered the Munozes' complaint and denied that the road was a public road. The trial court conducted a hearing at which ore tenus evidence was presented. On April 4, 2002, the trial court entered a judgment declaring the road to be a public road. The Burnetts filed a postjudgment motion; the trial court denied that motion. The Burnetts appealed. The case was transferred to this court by the supreme court, pursuant to § 12-2-7(6), Ala. Code 1975 [**2] .

The parties' properties are located in Baldwin County; the record does not indicate whether the road and the parties' properties are located in a municipality. [*964] The Burnetts have owned their property for 40 years and have lived on the property for 11 years. The Munozes have owned and resided on their property for 27 years. The road at issue in this appeal runs between two parcels of real property owned by the parties and provides access for the Munozes to that part of their property on which the house in which they reside is located. The road also allegedly provides access to two additional parcels of real property, one of which is owned by the Burnetts and the other by the Munozes.

The ore tenus hearing primarily focused on evidence presented by the parties regarding their dispute over the width of the road. The Munozes contend that the road is 30 feet wide. The Burnetts contend that the road is actually only 15 feet wide and that the additional 15 feet claimed by the Munozes constitutes an encroachment on their property.

The record indicates that the road is unpaved. Miguel Munoz testified that he has maintained the road for 27 years. Also, Munoz testified that the [**3] county has installed a "culvert" under the road and that the culvert is 30 feet long.

At one point on the road, a large oak tree stands in what the Munozes contend is the middle of the 30-foot-wide road. Munoz testified that one may drive a vehicle on the road to either the left side or the right side

of the tree. The Burnetts disputed whether it has always been possible to drive around the left side of the tree.

The record does not clearly indicate the length of the road. However, the road extends past the property on which the Munozes' house is located, past a parcel owned by the Burnetts that is located directly behind the property on which the Munozes' house is located, and ends at a parcel of farmland owned by the Munozes. The Munozes presented evidence indicating that they or their predecessors in interest had used the road to access their properties since at least the 1960's; some evidence was presented indicating that the Munozes' predecessors in interest had used the road to access the property for approximately 50 years. The record also contains some vague testimony indicating that at some point, two "Jim Walter homes" [1] were located on the Munozes' property and [**4] that the residents of those houses used the road to access those houses. Those houses are no longer located on the property; it is unclear from the record when those houses were removed from the property.

> 1 Jim Walter Homes, Inc., builds houses to an agreed-upon percentage of completion (up to 90%), and the buyer finishes the house.

In its judgment, the trial court found that the evidence presented at the ore tenus hearing established that the road had been used as a public road for more than 50 years.

"A public road is established in one of the following three ways: (1) by a regular proceeding for that purpose; (2) by a dedication of the road by the owner of the land it crosses and a subsequent acceptance by the proper authorities; or (3) by the road's being used generally by the public for a period of 20 years."

Fox Trail Hunting Club v. McDaniel, 785 So. 2d 1151, 1154 (Ala. Civ. App. 2000) (citing *Auerbach v. Parker*, 544 So. 2d 943 (Ala. 1989)). On appeal, the Burnetts contend that the trial court's determination that the road was a public road is not supported by the evidence. However, another issue is dispositive of this [**5] appeal.

Rule 19(a), Ala. R. Civ. P., provides in part:

[*965] "(a) Persons to Be Joined if Feasible. A person who is subject to jurisdiction of the court shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

It is well settled that the failure to join necessary parties is an issue that may be raised for the first time on appeal by the parties or by an appellate court *ex mero motu*. *Boles v. Autery*, 554 So. 2d 959 (Ala. 1989); *Long v. Vielle*, 549 So. 2d 968 (Ala. 1989); *J.C. Jacobs Banking Co. v. Campbell*, 406 So. 2d 834 (Ala. 1981); *Mead Corp. v. City of Birmingham*, 350 So. 2d 419 (Ala. 1977); *Box v. Box*, 253 Ala. 297, 45 So. 2d 157 (1950); [**6] *Amann v. Burke*, 237 Ala. 380, 186 So. 769 (1939). The failure to join a necessary party is a jurisdictional defect. *Long v. Vielle*, supra (citing *Rogers v. Smith*, 287 Ala. 118, 248 So. 2d 713 (1971)).

Our supreme court has discussed the issue of necessary parties in actions involving a dispute regarding a public road. In *Holland v. City of Alabaster*, 566 So. 2d 224 (Ala. 1990), the City of Pelham vacated a public road that was located within its city limits. That road was abutted on both sides by land owned by Holland; after the City of Pelham vacated the road, Holland blocked access to the road. The City of Alabaster and a person who had used the road sued Holland, seeking access to the road. The trial court, among other things, set aside the City of Pelham's vacation of the road and restrained Holland from blocking access to the road. On appeal, Holland maintained that the trial court erred in failing to join the City of Pelham as a necessary party to the action. Our supreme court agreed. The court held that the trial court should have joined the City of Pelham as a necessary party under Rule 19(a), Ala. [**7] R. Civ. P., because the trial court was required to have jurisdiction over the City of Pelham before it could enter any ruling that affected the City of Pelham's interest in the property at issue in that case. *Holland v. City of Alabaster*, 566 So. 2d at 228. In the absence of the City of Pelham as a party to the action, the trial court lacked that jurisdiction to enter a ruling affecting the City of Pelham's rights. In reaching its holding in *Holland*, the supreme court discussed whether the trial court could grant complete relief where the City of Pelham had not been joined as a necessary party:

"Can complete relief be afforded among those already parties? We do not believe so. The City of Pelham is required under the trial court's order to assume duties of policing and maintaining a road that it wished to vacate. The City of Pelham is also now required to maintain a public thoroughfare, which the evidence shows may or may not be suitable for traffic, without any hearing on the matter. Moreover, the City of Pelham will now incur liability to the public for any failure of maintenance with respect to this road. While ordering Holland to refrain from obstructing [**8] the road will provide Hill with a possible route to travel, it does so at

the expense of the City of Pelham. We cannot see that Alabaster should be afforded relief of the opening of a road that is not within its city limits, and lies within the city limits of Pelham in the absence of the City of Pelham's presence in the [*966] judicial proceedings that afford Alabaster this remedy. ...

"Does the City of Pelham claim an interest relating to the subject of the action so that the disposition of the case without the City, as a practical matter, will impair or impede its ability to protect that interest? We believe so. Although Holland is the party actually claiming that the City of Pelham has an interest, the City of Pelham cannot properly protect its interest in vacating roads within its municipal limits unless it is given a fair hearing before a vacation of such a road is set aside."

Holland v. City of Alabaster, 566 So. 2d at 227.

In *Boles v. Autery*, supra, our supreme court used similar reasoning in a case involving whether a road was a public or a private road. In *Boles v. Autery*, buyers of certain real property located in Autauga County [**9] sued the sellers of that property alleging that the sellers had breached the parties' contract by failing to advise them that a road accessing the property was a private, rather than a public, road. The trial court found in favor of the buyers. On appeal, the sellers argued that Autauga County was a necessary party to the action. Our supreme court agreed, and it reversed the trial court's judgment in favor of the buyers and remanded the case to the trial court. The court explained that:

"The trial court's determination of whether the road was public or was private might affect not only the rights of the individual litigants but also the rights of members of the public to use the road, the duty of the county to maintain it, and the liability of the county for failure to maintain it. If the county is not joined as a party, then neither it nor other members of the public are bound by the trial court's ruling. Accordingly, if the county and other persons are not bound, then the status of the road as public or private is subject to being litigated again, and the results of later litigation may be inconsistent with the results of the initial litigation. We note the following as a possible [**10] example: Suppose the landowners, over the course of time, allow the road to fall into disrepair, and a school bus carrying children has an accident because of the road's deterioration. Would the county be liable for its failure to maintain the road? Coupled with the other problems discussed, that possibility of contradictory rulings about the status of the road as public or private is a sufficient reason to require the joinder of Autauga County as a party. See also *Johnston [v. White-Spunner*, 342 So. 2d 754 (Ala. 1977)]. 'The desirability of judicial economy must give way to the orderly administration and demands of justice.' *Mead Corp. v. City of Birmingham*, 350 So. 2d 419 (Ala. 1977)."

Boles v. Autery, 554 So. 2d at 961.

In this case, the parties did not join Baldwin County or any municipality in which the road is located (if it is located within a municipality) in the action to determine whether the road was a public road. It is clear from the authorities discussed above that a county or municipality in which a road is located incurs liabilities if the road is declared to be a public road. *See Holland v. City of Alabaster*, supra; [**11] *Boles v. Autery*, supra. We conclude that before the trial court may declare a road to be a public road, and thereby impose on a county or a municipality liabilities such as the responsibility to maintain and police the road, the affected county or municipality must be made a party to the action before the trial court. In this case, neither the county nor the municipality, if any, in which the road at issue is located [*967] was not a party to the action before the trial court; that county or municipality is a necessary party to any action seeking to have the road declared to be a public road. Therefore, we reverse the trial court's judgment and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Yates, P.J., and Crawley, Pittman, and Murdock, JJ., concur.

C & G Development, a general partnership, and Charles R. Saunders v. Planning Commission of the City of Homewood, et al.

No. 88-218

Supreme Court of Alabama

548 So. 2d 451; 1989 Ala. LEXIS 524

July 21, 1989, Filed

SUBSEQUENT HISTORY: Released for Publication October 2, 1989.

PRIOR HISTORY: [**1] Appeal from Jefferson Circuit Court, No. CV-87-3354, P. Wayne Thorn, Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: plat, alley, street, planning commission, writ of mandamus, ordinances, mandamus, approve, layout, process of law, property rights, individually, vacate, lawful, amend, advantageous, conformity, ingress, egress

COUNSEL: Jesse P. Evans III and Douglas Corretti of Corretti & Newsom, Birmingham, Alabama, for Appellant.

Michael G. Kendrick of Gorham, Waldrep, Stewart, Kendrick & Bryant, Birmingham, Alabama, for Appellee.

JUDGES: Almon, J. Hornsby, C. J., and Maddox, Adams, and Steagall, JJ., concur.

OPINION BY: ALMON

OPINION

[*452] C & G Development ("C & G"), an Alabama general partnership, and Charles Saunders filed an action against the Planning Commission of the City of Homewood ("Commission") and the Commission members individually, requesting a writ of mandamus ordering the Commission to approve a subdivision plat that C & G had submitted to the Commission and claiming damages under 42 U. S. C. § 1983 for an alleged deprivation of their right to due process of law. The trial court dismissed the complaint and later denied C & G and Saunders's motion to alter, amend, or vacate the judgment.

In February 1987, Saunders submitted a subdivision development application to the Commission. That application proposed a subdivision of the "parcel of land West of Shadesview Terrace and East of Saulter Road with frontage on Shadesview Terrace." Saunders [**2] apparently filed the application on behalf of Shades Valley Land Company, as well as on his own behalf. The briefs (for both parties) indicate that Shades Valley Land Company and C & G had entered into a contract whereby Shades Valley Land Company agreed to sell C & G the land where the proposed subdivision would be and that C & G had agreed to buy the land if the Commission approved Saunders's application.

The Commission discussed Saunders's application in its March 1987 and April 1987 meetings. At the May 5, 1987, meeting, the Commission denied the application. On May 15, 1987, Saunders and C & G filed this action.

The complaint sought the writ of mandamus and also claimed $ 500,000 in damages pursuant to 42 U. S. C. § 1983, because the Commission had allegedly denied C & G and Saunders due process in relation to their alleged property rights to the development of the proposed subdivision.

In addition to the Commission, C & G and Saunders named the following people as defendants, individually and in their respective capacities as members of the commission: Mary Frances Farley, Howard E. Fields, J. Steven Dorough, Larry McLeod (chairman), Wade Bradley, William T. Gaskell, Robert [**3] G. Waldrop, Cliff Farrell, and Jerry Crowe. The trial court dismissed the complaint and denied the plaintiffs' motion to alter, amend, or vacate the judgment. C & G and Saunders no longer have the contractual option to purchase the property they sought to subdivide. This appeal thus principally concerns their 42 U. S. C. § 1983 claim for damages; the appeal concerns the denial of the writ of mandamus only to the extent that a determination concerning the writ of mandamus affects the damages claim.

Mandamus is a drastic and extraordinary writ to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court. *Barber v. Covington County Comm'n*, 466 So. 2d 945, 947 (Ala. 1985); *Martin v. Loeb & Co.*, 349 So. 2d 9 (Ala. 1977).

While Alabama's subdivision control statutes, Ala. Code 1975, § 11-52-30 et seq., are but infrequently the subject of litigation, the Court has held that "the authority of the Planning Commission to exercise control over subdivision of lands within [**4] the municipality is derived from the legislature. . . . [The planning commission] is authorized to adopt regulations not inconsistent with the statutes." *Smith v. City of* [*453] *Mobile*, 374 So. 2d 305, 307 (Ala. 1979), quoting *Boulder Corp. v. Vann*, 345 So. 2d 272, 275 (Ala. 1977). "Once a planning commission has properly exercised its authority in drafting ordinances regulating subdivision development, it is bound by those ordinances." *Smith*, at 307.

The Commission had enacted subdivision regulations, which were in effect during all the times relevant to this appeal. Article 3, Section 22.1, of the subdivision regulations states:

> "Street Layout: conformity with a plan for the most advantageous neighborhood development. The street layout shall be in conformity with a plan for the most advantageous development of the entire neighboring area. *All proposed streets shall be in alignment with existing planned or platted streets with which they are to connect.* The street layout shall include secondary and minor streets of considerable continuity approximately parallel to and on each side of each major street, highway or parkway. . . ."

(Emphasis added.)

Our review of the plat [**5] indicates that the trial court could have found that the plat, on its face, violated the above-quoted regulation and, accordingly, that the Commission had a lawful basis for holding that the plat was due to be denied. The plat contained 22 lots, with the only proposed means of ingress to and egress from the subdivision requiring construction of a road through an existing alley. That plat proposed that the building site for lot 22 be located over that same existing alley; the plat also proposed that that existing alley be vacated. The record indicates that the Commission inquired at length about the effect the proposed subdivision would have on the existing alley. From the record it appears that, not only was it proposed that a house be built over a portion of the existing alley, but also that building the plat's proposed entrance road, the only means of ingress to and egress from the subdivision, would require cutting a channel approximately 10 feet deep through the existing alley and constructing a large retaining wall on both sides of the road, all of which would bisect and destroy the existing alley.

C & G and Saunders contend that the Commission's concern about the alley is a [**6] sham, a smokescreen to detract from the Commission's true concerns. Undeniably, "mandamus will lie to compel the approval of a subdivision plan where a council, vested with the authority to approve, gives reasons for its refusal to approve that are unrelated to the question of conformance of the plan with applicable ordinances." *Smith, supra*, at 308. C & G and Saunders argue that "the denial of the subdivision application was a mere device by which the Commission attempted to control density and square footage through the subdivision approval process rather than through the zoning process." The record does not support that argument; rather, the record indicates that the Commission's denial of the subdivision plat was based on its own regulations, which the Commission was obligated to follow. The trial court held that the Commission could lawfully deny approval of the subdivision, "based on the Homewood Planning Commission subdivision rules and regulations." The record will not support a holding that the trial court erred when it denied C & G and Saunders's petition for mandamus.

C & G and Saunders's claim pursuant to 42 U.S.C. § 1983 was based on the allegation that the Commission [**7] deprived them of their alleged property right to the development of the proposed subdivision without due process of law. The Commission's denial of Saunders's application for a proposed subdivision did not violate the plaintiffs' due process rights, because the Commission had a lawful basis for not approving the plat. Accordingly, the trial court did not err when it dismissed the 42 U.S.C. § 1983 count of the plaintiffs' complaint.

The judgment is due to be affirmed.

AFFIRMED.

Hornsby, C. J., and Maddox, Adams, and Steagall, JJ., concur.

Shirley Shepard Chalkley v. Tuscaloosa County Commission

1070767

SUPREME COURT OF ALABAMA

34 So. 3d 667; 2009 Ala. LEXIS 230

September 30, 2009, Released

SUBSEQUENT HISTORY: Released for Publication April 8, 2010.

PRIOR HISTORY: [**1]
Appeal from Tuscaloosa Circuit Court. (CV-06-1371). W. Scott Donaldson, Trial Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: dedication, street, plat, sewer system, easement, developer's, drainage, dedicated, storm-drainage, public use, ditch, dominant estate, sewer line, repair, storm, sewer', summary judgment, government entity, municipality, underneath, storm drain, public policy', duty to maintain, offer of dedication, undisputed, proprietor, recording, accepting, engineer, platting

COUNSEL: For Appellant: Isaac P. Espy, Espy, Nettles, Scogin & Brantley, P.C., Tuscaloosa.

For Appellee: Dennis Steverson, Tuscaloosa.

JUDGES: MURDOCK, Justice. Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, and Shaw, JJ., concur. Parker, J., concurs in the result.

OPINION BY: MURDOCK

OPINION

[*669] MURDOCK, Justice.

Shirley Shepard Chalkley appeals from a summary judgment entered in favor of the Tuscaloosa County Commission ("the Commission") on her complaint seeking a declaratory judgment, injunctive relief, and damages related to Tuscaloosa County's refusal to maintain a storm sewer that runs underneath her property. We affirm the judgment of the trial court.

I. Facts and Procedural History

The parties agree that, for the purposes of this appeal, the facts are undisputed. Chalkley is the owner of an interest in lot 98 of the Mallard Creek subdivision ("the subdivision"), located in an unincorporated area of Tuscaloosa County ("the County"). The plat of the subdivision was approved by the County engineer on September 28, 1987, and was filed for record on November 2, 1987. A note on the plat provided:

> "All easements on this plat are for public utilities, sanitary sewers, storm sewers, and storm ditches, and may be used for such purposes to serve property both within and without this subdivision. [**2] No permanent structure or other obstruction shall be located within the limits of a designated easement."

A 20-foot-wide drainage easement designated in the plat extends across lot 98 and also across lots 97, 99, 100, and 101. A concrete storm sewer was installed in the drainage easement by the developer of the subdivision. The storm sewer runs through a part of lot 98.

On February 24, 1993, the Commission adopted a resolution that provided, in pertinent part:

> "1. That the County accept the streets, together with drainage structures in, and which are a part of, said streets which are located in dedicated street rights-of-way, for maintenance by the Tuscaloosa County Commission. The drainage structures described herein are those structures which are a part of or are located in the streets (curbs and gutter, catch basins, flumes and pipes) and does not include any natural waterway which drains surface water in the area."

The parties agree that on the face of the resolution the Commission accepted for maintenance only those parts of the storm-drainage [*670] system that are located within the street rights-of-way in the subdivision.

A large sinkhole developed in Chalkley's property, which Chalkley [**3] alleges was cased by the failure of the storm drain running underneath the property. Chalkley notified the County of the problem, but it declined to investigate or to repair the damaged storm drain on the basis that the County did not accept the responsibility for maintaining the parts of the storm drain located on private property.

Chalkley subsequently sued the Commission, alleging that the failure of the storm drain created a dangerous condition on her property and asking that the trial court declare that the County was responsible for repairing the storm drain and for damage to her property. The Commission filed a motion for a summary judgment on the basis of the February 24, 1993, resolution; Chalkley opposed the motion.

On February 25, 2008, the trial court entered a summary judgment in favor of the Commission and against Chalkley, concluding that Chalkley's request that the trial court find "as a matter of 'public policy'" that the County should be responsible for maintenance of the entire storm-drainage system was a decision that "requires fact-finding and an analysis of the costs/benefits to the public that is appropriately made, under our system, by the legislative branch." [**4] The trial court reasoned that

> "[a]dopting Ms. Chalkley's argument in this case would mean that a court, based on its own policy considerations of what is in the best interest of the public, would require a legislative entity to acquire responsibility and liability for structures under private land. It may well be wise, expedient, and appropriate to require entire subdivision drainage systems to be under the control of the approving governmental entity, but that is a decision to be made by the County, not the judiciary. Therefore, judgment is entered in favor of [the Commission]."

II. Standard of Review

> "An order granting or denying a summary judgment is reviewed de novo, applying the same standard as the trial court applied. *American Gen. Life & Accident Ins. Co. v. Underwood*, 886 So. 2d 807, 811 (Ala. 2004). ... Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review. *Carter v. City of Haleyville*, 669 So. 2d 812, 815 (Ala. 1995)."

Continental Nat'l Indem. Co. v. Fields, 926 So. 2d 1033, 1034-35 (Ala. 2005).

III. Analysis

Chalkley contends that the storm-drainage [**5] system was installed when the subdivision was built and that it should be viewed as a single, continuous structure for public benefit. She argues that because the storm-drainage system is one structure, the Commission, as a matter of public policy, should not be allowed to accept responsibility for parts of the system rather than the system as a whole. Chalkley contends that the law and existing precedent require this result.

Specifically, Chalkley first argues that the County is the proprietor of a "dominant tenement" in relation to the easement that runs through her property and that, therefore, the County has the duty to maintain and to repair the drainage system built on the easement. In support of this proposition, Chalkley cites *Mountain Brook Estates, Inc. v. Solomon*, 247 Ala. 157, 23 So. 2d 1 (1945), and, specifically, a portion of that opinion in which the Court stated:

> [*671] "The duty to maintain and repair, if it exists at all, arises out of proprietorship of the dominant estate, and its appurtenances, and where the easement exists for the sole benefit, use and enjoyment by the proprietor of the dominant estate, the proprietor of such estate ordinarily is liable for the cost of [**6] maintenance and repair."

247 Ala. at 162, 23 So. 2d at 4.

In *Solomon*, Mountain Brook Estates, Inc. ("the developer"), at one time owned all the property upon which the Mountain Brook Estates subdivision was built. The developer divided the property into lots for the purpose of building residential estates and selling them for a profit. Pursuant to this goal, the developer built a drainage ditch across the entire property and reserved an easement on each lot on which the drainage ditch was located. The developer then sold the lots,

eventually selling one to David Solomon 13 years after the drainage ditch had been installed. When water from the drainage ditch backed up on Solomon's property, he filed an action for injunctive relief against the developer, contending that the drainage ditch was inadequate for draining the amount of water the area received and asking the trial court to order the developer to repair the drainage ditch.

This Court, in the course of explaining the law of easements, stated the above-quoted rule concerning the responsibility of the dominant estate of an easement. The Court went on to explain, however:

> "It is very clear from the facts alleged in the bill that the [**7] easement and drainage ditch did not exist solely for the benefit of the dominant estates, but it was created and established as well to preserve the property which the complainant purchased, and upon which he erected his home. But for said ditch, the property purchased and owned by [Solomon] would have suffered the ravages of the drainage system [from higher elevation lots]. When [Mountain Brook Estates, Inc.,] sold and conveyed all of said dominant estates in the sector, it ceased to be the proprietor of said dominant estates, and the responsibility of repair and maintenance, if it ever existed, passed to the grantees or ceased to exist."

247 Ala. at 162, 23 So. 2d at 4-5.

Thus, *Solomon* itself explains why Chalkley's argument that the County holds a dominant estate that would make it responsible for maintaining and repairing the storm-drainage system fails. First, it is debatable that a "dominant estate" exists in the situation presented here. Further, there is no doubt that the easement does not exist "solely" for the benefit of the County; it clearly benefits Chalkley and every other owner of a lot in the subdivision. Consequently, the duty to maintain and repair the storm-drainage [**8] system does not fall upon the County merely because the County also benefits from the easement.

Chalkley also contends that this Court's precedent supports the idea that the County cannot accept only in part a dedication of property for public use and that, if the County accepted part of the property, it must be said to have constructively accepted the responsibility for the whole of the property. [1] In so arguing, Chalkley misreads our cases.

1 Chalkley does not contend that the County need not accept the dedication of the easement in question in order to have responsibility for its maintenance.

Chalkley is correct that the approval of the subdivision plat by the County engineer, along with the notation in the plat stating that "[a]ll easements on this [*672] plat are for public utilities, sanitary sewers, and storm ditches, and may be used for such purposes to serve property both within and without the subdivision," constituted a dedication of property for public use. See, e.g., *Montabano v. City of Mountain Brook*, 653 So. 2d 947, 949 (Ala. 1995) (noting that "[t]he recording of a plat or map ... constitutes a valid dedication to the public of all public places designated in the plat or map."). [**9] "A 'dedication' is a donation or appropriation of property to the public use by the owner." *City of Fairfield v. Jemison*, 283 Ala. 462, 464, 218 So. 2d 273, 275 (1969).

It also is true that a grantor is limited in the types of restrictions that can be placed on a dedication of property for public use.

> "'An owner may grant whatever estate he sees fit, and may annex conditions and limitations to his grant at his pleasure, provided that such limitations and conditions are not inconsistent with the dedication and will not defeat the operation of the grant. A condition or limitation which would render the dedication ineffectual cannot be annexed; thus a man cannot reserve possession to himself, nor reserve a right to do anything in the way which will destroy its character as a public way.'"

Greil v. Stollenwerck, 201 Ala. 303, 306, 78 So. 79, 82 (1918) (quoting 1 Elliott, *Roads and Streets* § 163).

The acceptance of the dedication is equally as important as the dedication, however. ""'The acceptance of a dedication, or what may be more accurately called an offer of dedication, has many of the incidents of the acceptance of a contract and of a deed, and is what makes the dedication complete.'"" [**10] *Vestavia Hills Bd. of Educ. v. Utz*, 530 So. 2d 1378, 1383 (Ala. 1988) (quoting the trial court's order, quoting in turn 23 Am. Jur. 2d *Dedication* §§ 41 (1983)). Similar to a contract, "'the language set forth in the deed [or plat] is considered merely an offer of dedication by the grantors until such time as the dedication has been accepted by the grantee.'" *Id.*

In *Ivey v. City of Birmingham*, 190 Ala. 196, 204, 67 So. 506, 509 (1914), this Court considered the issue of the public's responsibility for the maintenance of a dedicated street. [2] The Court in that case held:

> "The owner of the property through which this street was originally laid off could not impose his dedication of the street upon the public by platting the territory and disposing of lots according to the plat. He thereby made it a way, *irrevocable as to purchasers; but to devolve upon the public the duty of maintaining the way as a public road or street it was necessary that there should be an acceptance* by the public of the dedication."

(Emphasis added.) The principle recognized in *Ivey*, which has been recognized repeatedly in other jurisdictions, is that because acceptance of a dedication constitutes the assumption of [**11] responsibility for [*673] the property in question, a grantor cannot automatically impose such responsibility on the public through his or her dedication of the property. See, e.g., *Brown v. Moore*, 255 Va. 523, 529-30, 500 S.E. 2d 797, 800 (1998) (explaining that "[b]ecause a dedication imposes the burden of maintenance and potential tort liability on the public, a dedication is not completed until the public or competent public authority manifests an intent to accept the offer").

> 2 The land in question in *Ivey* was the subject of a dedication that occurred by means of the public recording of a plat before the annexation of the property into the City of Birmingham. Although not cited in the opinion, the statute applicable to such dedication read as follows:
>
> > "The acknowledgment and recording of such plot shall be held in law and equity to be a conveyance, in fee simple, of such portion of the premises plotted as one marked or noted on such plot as donated or granted to the public, and the premises intended for any street, alleyway, common or other public use, as shown in said plot shall be held in that trust for the uses and purposes intended or set forth in said plot."
>
> Act No. 52, § 3, p. 93, Ala. Acts 1886-87. [**12]

Citing *Ivey*, this Court stated in *Tuxedo Homes, Inc. v. Green*, 258 Ala. 494, 497, 499 63 So. 2d 812, 814, (1953):

> "It is thoroughly well settled in this State and elsewhere that an owner of land cannot impose his dedication of a street upon the public by platting the tract and disposing of lots according to the plat; and that in order to have a dedication there must be an acceptance of it by the city if the property is located in a city. *Ivey v. City of Birmingham*, 190 Ala. 196, 67 So. 506."

In a case involving land located in Baldwin County, the Court in *Baldwin County Commission v. Jones*, 344 So. 2d 1200, 1204 (Ala. 1977), citing *Tuxedo Homes*, stated that approval of a recorded subdivision plat "does not amount to an acceptance of the roads as public roads."

In *Blair v. Fullmer*, 583 So. 2d 1307, 1310 n.2 (Ala. 1991), this Court stated:

> "The mere fact of dedication does not necessarily impose upon the county a duty to maintain the road. Cf. *Lybrand v. Town of Pell City*, 260 Ala. 534, 538, 71 So. 2d 797, 801 (1954), in which it was noted that a dedication of a street in a city 'does not impose any duty upon the city until it has accepted the dedication.'"

Relying on both [**13] *Ivey* and *Tuxedo Homes*, the *Blair* Court noted that in the former "the owner, by platting the street and recording the plat, 'thereby made it a way, irrevocable as to purchasers; but to devolve upon the public the duty of maintaining the way as a public road or street it was necessary that there should be an acceptance by the public of the dedication.' [*Ivey*,] 190 Ala. at 204, 67 So. at 509." *Blair*, 583 So. 2d at 1311 (noting that principle established in *Ivey* can thus be traced through *Tuxedo Homes* and *Cottage Hill Land Corp. v. City of Mobile*, 443 So. 2d 1201 (Ala. 1983), to *CRW, Inc. v. Twin Lakes Property Owners Association, Inc.*, 521 So. 2d 939 (Ala. 1988)). The *Blair* Court concluded its analysis as follows:

> "Whatever the effect of *Cottage Hill* and *CRW* on the other cases and the statutes on point, those two cases clearly do not deprive a purchaser of a lot in a subdivision of the right to the roads shown

in the subdivision plat. *It is certainly the case that a city or county must accept such a dedication (perhaps by the general public's use of the roads) before there arises a duty on the governing body to maintain the roads*, and it may be that those two cases require an acceptance [**14] by a public body before the general public can be given the right to use the roads." [3]

583 So. 2d at 1311 (emphasis added).

3 In *Harper v. Coats*, 988 So. 2d 501, 508 (Ala. 2008), this Court considered a dispute between individuals, who were adjacent landowners; *Harper* did not involve the obligation of either a municipal corporation or a county to take responsibility for the maintenance of dedicated property without first having accepted the dedication. It was in this context that the *Harper* Court held that "[r]oads in a subdivision located outside the city limits or police jurisdiction of a municipality are deemed dedicated to the public by way of proper recordation of a plat, with no requirement of acceptance by any county governing authority." *Harper* did not discuss or purport to overrule *Tuxedo Homes*, In *Tuxedo Homes*, the Court concluded that "the mere approval of the plat or map" by a city engineer "is not an acceptance of the proffered dedication and imposes no burden on the city" because such approval "does not invoke a discretionary act of the city commission." 258 Ala. at 499, 63 So. 2d at 816. The principle underlying the holding in *Tuxedo Homes* was that the ministerial function [**15] of a city or county engineer in approving a plat cannot "bind the city [or county] to maintain such streets" or other portions of the plat dedicated to the public. 258 Ala. at 498, 63 So. 2d at 814.

In this case, the developer of the subdivision dedicated all the easements on the [*674] subdivision property -- including the easements for the storm-drainage system -- for public use. As Chalkley concedes, the Commission accepted only those parts of the storm-drainage system that existed within the street rights-of-way. [4] Chalkley cites *Greil* for the proposition that the County could not accept only part of the dedication. *Greil* states, in pertinent part:

> "'[T]he dedication must, as the law phrase runs, be accepted secundum formam doni [according to the form of the gift or grant]. It is stated in general terms in some of the cases that there may be a partial acceptance, but it seems to us that this doctrine must be taken with some qualification. If the donor should consent that the public might accept part and reject part, then, doubtless, the acceptance, if for the public generally, would be valid; but if he should insist on a full acceptance, we think that on principle he would be sustained [**16] by the courts since to hold otherwise would be in effect to compel him to part with his property on terms different from those prescribed in his grant.'"

201 Ala. at 306, 78 So. at 82 (quoting 1 Elliott, *Roads and Streets* § 163).

4 Chalkley does not argue that the Commission accepted the entire storm-drainage system by way of a public use of that system for a certain period or by other act by which acceptance might be deemed to have occurred implicitly or by estoppel.

The above-quoted passage from *Greil* does not help Chalkley, however, because there is no restriction in the developer's dedication that the County had to accept the entire dedication in order to take control of the property. Indeed, on the facts before us, the grantor did not object to the County's partial acceptance of the dedicated property. Thus, *Greil* does not indicate that the County was prohibited from accepting the dedication in the manner it chose.

In fact, the law on the subject generally is that "[a]n offer of dedication need not be accepted in its entirety; the property offered for dedication may be accepted in part and the remainder rejected." 23 Am. Jur. 2d *Dedication* § 43 (2002) (footnotes omitted). This is so [**17] because "[t]he public is not compelled to assume the burdens imposed by accepting every part of the offered dedication." *Id.* Several other jurisdictions agree with this conclusion. See, e.g., *Corbin v. Cherokee Realty Co.*, 229 S.C. 16, 25, 91 S.E. 2d 542, 546 (1956) ("[The City of Florence] was not required to accept the offer of dedication in its entirety. Any street shown on said plat could be accepted in part and the remainder rejected. The public could not be compelled to assume the burdens imposed by accepting every part of the offered dedication." (citations omitted)); *Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach*, 216 N.C. 778, 788, 7 S.E. 2d 13, 20 (1940) (explaining that "the board of aldermen, acting under the charter and pertinent laws, has the discretionary power as to the

extent to which the street as dedicated to public use will be accepted, and may thereby limit the responsibility of the town for maintenance"); and *Moore v. City of Chicago*, 261 Ill. 56, 59, [*675] 103 N.E. 583, 584 (1913) ("The law is well settled that, when a person plats property into a subdivision and maps out streets thereon, the authorities may accept them in whole or in part. The public is [**18] not compelled to assume the burdens imposed by accepting every part of an offered dedication. An acceptance of a part is not an acceptance of the whole ....").

Chalkley counters that "public policy" and common sense require the County assume responsibility for the whole storm-drainage system because that is the only way it can effectively manage and operate the system. The entire system is necessary for the storm drainage to operate properly, Chalkley argues, so the County cannot pick and choose which parts of the system to accept. Chalkley contends that *Beachcroft Properties, LLP v. City of Alabaster*, 949 So. 2d 899 (Ala. 2006), confirms that public policy requires this result.

Beachcroft concerned a dispute between the owners of two contiguous platted subdivisions in the City of Alabaster. Beachcroft Properties, LLP ("Beachcroft"), owned the Forest Highlands subdivision, and BW § MMC, LLC ("BW"), owned the Lake Forest subdivision. A sewer system was installed in Lake Forest in accordance with the preliminary plat approved by the City of Alabaster's planning and zoning board ("the board"). The sewer system included a sewer line capable of serving both Lake Forest and Forest Highlands. [**19] When Beachcroft presented its preliminary plat for Forest Highlands to the board, it requested permission to connect sewer lines in its subdivision to the sewer line that was part of the sewer-system installation in Lake Forest. BW informed Beachcroft and the board that it would not allow Forest Highlands to connect to the Lake Forest sewer system, and the board stated that it did not believe it had the authority to force BW to let Forest Highlands connect to Lake Forest's sewer system. When BW presented its final plat to the board, it dedicated the streets of the subdivision to the public, but it purported to specifically exempt from public dedication the sewer system running underneath those streets.

Beachcroft filed a complaint against BW and Alabaster seeking a judgment declaring that the streets of Lake Forest and the sewer system that ran underneath them had been dedicated to the public, and, therefore, that BW could not prevent Forest Highlands from connecting the sewer lines in to the sewer system. It also sought an order enjoining BW from preventing Beachcroft from connecting the sewer lines in Forest Highlands to the sewer system. Subsequently, the board accepted the final [**20] plat for Lake Forest and the preliminary plat for Forest Highlands subject to the judicial resolution of the issue of control of the sewer system. The trial court entered a summary judgment in favor of BW and Alabaster, concluding that BW "'lawfully withheld from dedicating the sanitary sewer'" and that "Alabaster properly approved a reservation to allow [BW's] withholding from public dedication a portion of the subdivision...." *Beachcroft Props., LLP v. City of Alabaster*, 901 So. 2d 703, 706 (Ala. 2004) (emphasis omitted).

In the initial appeal, this Court concluded that the trial court, in finding that Alabaster had approved the reservation of the sewer system by BW, had failed to settle the dispositive issue of "whether a real-estate developer, in platting a subdivision for approval by a municipal planning board, may impose on the municipality an express reservation prohibiting the municipality from asserting control over the sewer lines beneath the platted streets or from effecting a sanitary-sewer connection between two adjoining subdivisions." 901 [*676] So. 2d at 709-10. Accordingly, we remanded the case to the trial court for resolution of that issue. On remand, the trial court again [**21] entered a summary judgment in favor of BW and Alabaster.

In the second appeal, Alabaster filed a brief agreeing with Beachcroft that the sewer system, like the streets of Lake Forest, is public property because it is connected to the city sewer system. See *Beachcroft Props., LLP*, 949 So. 2d at 902 ("*Beachcroft II*"). It also agreed with Beachcroft's contention that "'[a] developer ... cannot ... determine what members of the public shall have access to public improvements to the exclusion of a municipality.'" 949 So. 2d at 901-02. BW, on the other hand, contended that it owned the sewer lines and the pump station accompanying them and would own them until it chose to deed them to Alabaster.

This Court reversed the judgment of the trial court, noting that

> "it is undisputed that the sewage from Lake Forest flows to facilities owned and operated by the City, and it is uncontroverted that BW does not purport to own or treat the sewage discharged by Lake Forest. In other words, when the Lake Forest sewer system was connected to the City's system, the City acquired the effluent, and the concomitant duty to dispose properly of the sewage flowing from Lake Forest to other points within the City's [**22] system.
>
> "It must be, therefore, that the pipes under Lake Forest and the pump station on lot 599 have become an integral part

> of the public sewer system with the right of control consequently vested in the City. Were it otherwise, the developer of one subdivision could hold another development hostage on a whim, thereby improperly interfering with the orderly development of a municipality."

949 So. 2d at 905-06 (footnote and emphasis omitted).

Chalkley contends that *Beachcroft II* stands for the proposition that if the sewer system of a subdivision is connected to the public sewer system, then the developer has no right to reserve a portion of the sewer system. According to Chalkley, "[a]ll of the system must be dedicated to the government entity so that the government entity can properly manage and control the system." Chalkley's brief, p. 21. Chalkley then insists that the converse must also be true, i.e., "that the government entity cannot pick and choose which portions of the system to accept, when all of the system is absolutely necessary for its proper operation." *Id.*

This argument fails to recognize the distinction between dedication and acceptance. *Beachcroft II* simply reinforces [**23] the rule that "[a] condition or limitation which would render the dedication ineffectual cannot be annexed .... Nor can there be a valid dedication to a part only of the public, since this would be repugnant to the purpose of the dedication ...." *Greil*, 201 Ala. at 306, 78 So. at 82 (quoting 1 Elliott, *Roads & Streets* § 163). In other words, the system in question could not be partly dedicated to the public because otherwise the public system is at the whim of private control.

Whether the public must accept the entirety of a dedication of property to public use is another matter. Chalkley is essentially arguing that the public can be forced by a private donor's dedication to accept responsibility for property the government entity does not wish to assume. As the trial court here correctly observed, in *Beachcroft II* the government entity, Alabaster, claimed responsibility and control over the sewer system. In this case, however, the County specifically disclaimed responsibility for those portions of the [*677] storm-drainage system that run underneath private property in the subdivision. The developer in this case did not restrict its dedication and therefore did not interfere with the County's [**24] control over development of the subdivision. Instead, the County exercised its control by electing to accept only part of the developer's dedication. Nothing in our law prevents such a partial acceptance, and we will not rewrite the law to impose an obligation upon the County that it does not wish to accept. See *Ivey*, 190 Ala. at 204-05, 67 So. at 509.

Based on the foregoing, the judgment of the trial court against Chalkley and in favor of the Commission is affirmed.

AFFIRMED.

Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, and Shaw, JJ., concur.

Parker, J., concurs in the result.

Ex parte: Coffee County Commission, et al.; Re: Coffee County Commission, et al. v. Dale T. Townsend, et al.

No. 89-1479

Supreme Court of Alabama

583 So. 2d 985; 1991 Ala. LEXIS 650

June 14, 1991

SUBSEQUENT HISTORY: [**1] Released for Publication August 8, 1991.

PRIOR HISTORY: Appeal from Coffee Circuit Court, No. CV-89-172.

DISPOSITION: AFFIRMED.

CORE TERMS: levy, county commission, special tax, county tax', erection, jail, sales tax, public buildings, bridge, ad valorem taxes, county purposes, county jails, county commissioners, taxation, levied, ordinance, financing, authorize, jail facilities, pari materia, courthouse, repairing, collected, repair, fine, Ala Acts, enabling act, county buildings, local legislation, ordinance imposing

COUNSEL: For Petitioner: James W. Webb and Daryl L. Masters of Webb, Crumpton, McGregor, Sasser, Davis & Alley, Montgomery, Alabama.

For Respondent: Paul A. Young, Jr., Enterprise, Alabama.

JUDGES: Adams, Justice. Hornsby, C.J., Maddox, Almon, Shores, Houston, Steagall and Kennedy, JJ., concur. Ingram, J., recused.

OPINION BY: ADAMS

OPINION

[*986] *PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS*

The Coffee County Commission ("Commission") petitions this Court for a writ of certiorari to review a judgment of the Court of Civil Appeals that affirmed a judgment invalidating a local ordinance providing for a county sales tax. We affirm.

On June 2, 1989, a class action suit was filed in the United States District Court for the Middle District of Alabama on behalf of inmates incarcerated in the Coffee County jail. The complaint alleged that the condition of the jail facilities resulted in a deprivation of the prisoners' constitutional rights. Acknowledging the need for better facilities, the Commission voted to build a new jail. In order to augment its sources of financing for the construction, the Commission, on July 24, 1989, passed an ordinance [**2] imposing a "privilege or license tax . . . against all business activities in the county, the amount to be determined by the application of rates against the gross sales or gross receipts." Coffee County Commission v. Townsend, [Ms. Civ. 7607, May 23, 1990] So. 2d (Ala. Civ. App. 1990).

On November 1, 1989, the effective date of the ordinance, a group of taxpayers brought an action in the Circuit Court of Coffee County seeking a declaration that the sales tax ordinance was invalid. On January 3, 1990, the circuit court held the ordinance to be void and unenforceable [1] and the Commission appealed. [2]

1 Following the decision of the Commission to impose the sales tax, the defendants named in the prisoners' class action suit consented to judgment. After the judgment of the trial court, which invalidated the ordinance imposing the sales tax, the consent judgment was withdrawn.

2 While the appeal was pending, the Alabama Legislature approved legislation authorizing Coffee County to submit for a referendum an increase in court costs and fines in specified cases to augment funding for the jail construction. Act No. 90-435, 1990 Ala. Acts. On July 5, 1990, the proposed increases were approved by the voters of Coffee County.

[**3] On May 23, 1990, the Court of Civil Appeals affirmed the judgment of the circuit court. The Commission, contending that the disposition of this case turns on a conclusion as to the "particular tax or taxes that may be deemed a 'special' or 'county tax' for purposes of [Ala. Code 1975, §§ 11-14-10 to -17]," sought certiorari review of the validity of its sales tax. We

granted certiorari review in order to determine the proper construction of those sections.

It is well settled in this state that the power to tax does not inhere in county governmental bodies. Jefferson County v. City of Birmingham, 248 Ala. 319, 325, 27 So. 2d 584, 589 (1946); State v. Street, 117 Ala. 203, 23 So. 807 (1898); Phoenix Carpet Co. v. State, 118 Ala. 143, 22 So. 627 (1897). Consequently, authority for the imposition of county taxes must proceed from an express legislative grant. Newton v. City of Tuscaloosa, 251 Ala. 209, 36 So. 2d 487 (1948); State ex rel. Chilton County v. Butler, 225 Ala. 191, 142 So. 531 (1932). [**4] One author describes the sources of county taxation authority as follows:

"Alabama counties obtain the authority to raise revenue and to distribute it to the various county functions in two basic forms: (1) general authorities found in the Constitution and general laws that apply to all counties, and (2) local legislation that may modify general laws or, more frequently, allow the county covered by the act to obtain revenue from other sources."

T. Dickson, Jr., Trends in Legal Authority to Raise Revenue Alabama Counties 2 (1977); see also Alabama Law Institute, Handbook for Alabama County Commissioners 82-83 (6th ed. 1989).

The Commission concedes that its sales tax was not passed pursuant to any local legislation or special enabling act. However, it contends that Ala. Code 1975, § 11-14-14 constitutes a general legislative grant of taxation authority for the limited purpose of building or repairing a jail. Section 11-14-14 provides: "It is the duty of the county commission, if there is not a sufficient jail in its county, to levy a county tax for the erection thereof and cause [*987] proposals to be issued for building or repairing the same within 12 months thereafter." [**5] (Emphasis added.) Consequently, it insists that it needs no special legislation or enabling act in order to authorize the tax.

In support of its argument that § 11-14-14 provides general authority for the levy of a sales tax, the Commission asserts that § 11-14-14 stands in contrast to §§ 11-14-10, -11, -16, and -17, which specifically authorize the assessment of a "special tax." Sections 11-14-10, -11, -16, and -17 provide as follows:

"[§ 11-14-10]. The county commission shall erect courthouses, jails and hospitals and other necessary county buildings, and such county commission shall have authority to levy a special tax for that purpose. Each county within the state shall be required to maintain a jail within their county."

"[§ 11-14-11]. The county commission may levy and collect such special taxes as it may deem necessary, not to exceed one fourth of one percent per annum, for the purpose of paying any debt or liability against any county incurred for the erection, construction or maintenance of the necessary bridges or public buildings prior to March 23, 1915, or incurred for the erection of public roads since November 28, 1901, or that may be created [**6] for the erection, repairing, furnishing or maintenance of public buildings, bridges or roads after March 23, 1915.

"The proceeds of special taxes authorized by section 215 of the Constitution, as amended, and levied for public building, road or bridge purposes in excess of amounts payable on bonds, warrants or other securities issued by the county may be spent for general county purposes in such manner as the county commission may determine."

"[§ 11-14-16]. Whenever it shall be deemed necessary by the county commission of any county in this state to pay any debt or liability now existing against any county incurred for the erection, construction or maintenance of the necessary buildings or bridges or that may hereafter be created for the erection of necessary public buildings, bridges or roads, such court shall have the power and authority to levy and collect a special tax upon the taxable property of such county, not to exceed in one year one fourth of one percent for such purposes; and such tax, when collected, shall be applied exclusively for the purposes for which the same was so levied and collected."

"[§ 11-14-17]. In all cases in which the county commission [**7] is directed or empowered to levy a special tax for county purposes, such levy shall be made by the county commission itself upon the assessment last made for state taxes."

Id. (emphasis added).

Sections 11-14-10, -11, -14, -16, and -17 all refer expressly to the means of financing county buildings, of which county jails are a subspecies; therefore, those sections must be "construed together to ascertain the meaning and intent of each." Locke v. Wheat, 350 So. 2d 451, 453 (Ala. 1977) ("Sections of the code dealing with the same subject matter are in pari materia"); see also Kelly v. State, 273 Ala. 240, 139 So. 2d 326 (1962).

All parties agree that the special taxes authorized in §§ 11-14-10, -11, -16, and -17 for the building and repair of public buildings refer to ad valorem taxes on the value of property in the county. Reply Brief of Petitioners, at 3. They are, therefore, subject to the restrictions of Ala. Const. § 215, which prohibits the legislature from authorizing an assessment of county taxes in excess of 7 1/2 mills for the purposes authorized in §§ 11-14-10, -11, -16, and -17. [3]

3 Section 215 of the Constitution, as amended by Amendment 208, provides:

"No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one percentum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law. . . ."

Id.; see also Alabama Law Institute, Handbook for Alabama County Commissioners 77 (6th ed. 1989).

[**8] [*988] The Commission contends, however, that the "county tax" authorized in § 11-14-14 is not the "special tax" authorized by §§ 11-14-10, -11, -16, and -17. Thus, the Commission argues, in effect, that the "special" taxes authorized in §§ 11-14-10, -11, -16, and -17 constitute a species of tax separate and distinct from the "county" tax for which § 11-14-14 provides. Therefore, it insists, the taxation authority granted to counties by the legislature in § 11-14-14 as a county tax is not confined to ad valorem taxes and the consequent restrictions imposed by § 215 of the Constitution. We disagree.

Whether a tax is general or special depends on the purpose for which it is levied or assessed. Special taxes are those that are imposed for a "special purpose" or which are "imposed in addition to the general levy." 71 Am. Jur. 2d State and Local Taxation § 21 (1973). Thus, in McDaniel v. State, 31 Ala. 390 (1858), we explained:

"All assessments of taxes by the court of county commissioners, under section 704 (subdivision 2) of the Code [1852], are county taxes, whether levied for general or particular purposes. The special tax for the purpose of erecting a [**9] courthouse and jail, authorized by [the predecessor of § 11-14-10], is but a special county tax. Each of these species of taxes is embraced under the generic term, county taxes."

Id. at 391 (emphasis added). A tax for the special county purpose of erecting a jail is merely a special county tax. As such, it falls squarely within the ambit of §§ 11-14-10, -11, -16, and -17.

Viewing these sections in this light, we conclude that in the absence of local or special enabling legislation, counties are restricted by § 215 of the Constitution and by §§ 11-14-10, -11, 16, and -17 to the imposition of ad valorem taxes for the special county purpose described in § 11-14-14. Section 11-14-17, which authorizes only ad valorem taxes "in all cases in which the . . . commission is . . . empowered to levy a special tax for county purposes," should, therefore, be read as defining the perimeters of the taxation authority conferred in § 11-14-14. Any other construction of these sections allows § 11-14-14 to sweep too broadly.

Statutes in pari materia must be "resolved in favor of each other to form one harmonious plan and give uniformity to the law." League of Women Voters v. Renfro, 292 Ala. 128, 131, 290 So. 2d 167, 169 (1974). [**10] Sections so related should be construed so as to accord to each a "field of operation." B. F. Goodrich Co. v. Butler, 56 Ala. App. 635, 647, 324 So. 2d 776, 787 (Civ. App. 1975), cert. quashed, 295 Ala. 401, 324 So. 2d 788 (1976). In this case, if § 11-14-14 constituted such a general grant of power as that proposed by the Commission, a county could conceivably levy virtually any kind of tax, other than ad valorem taxes, at any rate, for the purpose described in the section. Such a result is inconsistent with the limited grant of authority for county jail financing expressed in §§ 11-14-10, -11, -16, and -17. The legislature could not have intended such a result.

This conclusion is also consistent with the principle generalibus specialia derogant, that is, that where sections in pari materia are general and specific, the more specific controls the more general. See Ivey v. Railway Fuel Co., 218 Ala. 407, [*989] 118 So. 583 (1928). While § 11-14-14 sets forth in general terms the duty of county commissioners to provide suitable jail facilities, §§ 11-14-11, -16, and -17 specify the [**11] amount of the tax and the source from which it may derive. It follows, therefore, that the broad description of the Commission's duty in § 11-14-14 is further refined by the specific directions and limitations imposed in §§ 11-14-16 and -17. In short, the Commission has cited no authority or precedent for such power and our independent research in that respect has proven equally unfruitful.

In this connection, we note that the legislature, following the proposal and subsequent ratification of Ala. Const. amends. 442 and 444, enacted Act No. 84-30, 1984 Ala. Acts 33. That act authorized Randolph County to levy a "privilege or license tax . . . in the

amount to be determined by the application of rates against gross sales or gross receipts . . . upon every person, firm or corporation . . . engaged . . . in the business of selling at retail any tangible personal property." The tax was authorized for the construction and financing of facilities for a courthouse and for the "housing, confinement, detention, . . . and training of persons held in . . . custody." If § 11-14-14 authorizes Coffee County to do unilaterally what Randolph County essentially accomplished only after extensive legislation, [**12] it may well be said that the actions taken by the Alabama legislature on behalf of Randolph County involved an injudicious use of its resources. We have concluded, however, that this is not the case.

The Commission does not, in fact, contend that it has reached the statutory limit on ad valorem taxes or that it will be unable to finance the new jail without resort to the sales tax. It does argue, however, that in the event existing tax resources, as augmented by the recent increases in court costs and fines, are insufficient, it may incur criminal liability under § 11-14-15 for failure to furnish adequate jail facilities. Section 11-14-15 provides:

"If any county commission fails to levy a tax to erect or repair a county jail when necessary, the persons composing such county commission are severally guilty of a misdemeanor and must, on conviction, be fined not less than $ 50.00, but any member thereof may exonerate himself from such fine by proving that he was in favor of levying a tax sufficient for the erection or repair of the county jail, but was overruled by his colleagues."

Id. The Commission thus contends that if the mechanisms now in place fail to supply the needed [**13] revenue, it could find itself "statutorily trapped with absolutely no means or route of escape" from criminal liability.

The Commission cites no authority in support of such a proposition, and our research has likewise produced none. On the contrary, in McDaniel v. State, 31 Ala. 390 (1858), this Court reversed convictions of the Cherokee County commissioners under Ala. Code 1852, § 771, the predecessor of § 11-14-15. In that case, the commissioners found themselves "statutorily trapped" between § 771 and Act No. 104, 1854 Ala. Acts, which placed a limit on the amount of taxes that might be assessed by a county for "general or particular purposes." This Court held that where the statutory limit is "insufficient to pay for the erection of a county jail, it follows, that the . . . county commissioners . . . are not liable to the penalties prescribed by section 771." McDaniel, 31 Ala. at 391.

We have carefully considered all the arguments and contentions of the Commission, and we find no error in the judgment of the Court of Civil Appeals. For the foregoing reasons, the judgment is affirmed.

AFFIRMED.

Bobby D. Cook, as Administrator, etc. v. County of St. Clair, et al. and Corinda Bradshaw, et al. v. Houston County, Alabama, etc., et al.

Nos. 78-623, 78-776

Supreme Court of Alabama

384 So. 2d 1; 1980 Ala. LEXIS 2757

April 4, 1980

SUBSEQUENT HISTORY: [**1] Rehearing Denied, May 23, 1980, Reported at: 384 So.2d 1 at 7.

PRIOR HISTORY: Appeal from St. Clair Circuit Court. Appeal from Houston Circuit Court.

DISPOSITION: REVERSED AND REMANDED as to the Houston County action. AFFIRMED IN PART; and REVERSED IN PART and REMANDED as to the St. Clair County action.

CORE TERMS: county commissions, governmental entities, statutory authorization, immunity, county commissioners, governmental immunity, county hospital, school boards, tort actions, body corporate, immune, official capacities, majority opinion, corporate-governmental, county boards, tort liability, governing body, individually, municipalities, public roads, individual capacities, power to sue, bodily injury, occurrence, specially, abolished, street, entity, intersection, Acts of Alabama

COUNSEL: Douglas Burns for Burns, Shumaker & Davis (for Appellant Bobby D. Cook), Gadsden.

G. M. Harrison, Jr. for Merrill & Harrison (for Appellants Corinda Bradshaw and Pat Bradshaw), Dothan, for Appellants.

F. Michael Haney and James C. Inzer, Jr. for Inzer, Suttle, Swann & Stivender (for Appellee County of St. Clair, etc.) Gadsden.

Herman Cobb for Buntin & Cobb (for Appellees Houston County, Alabama, etc., et al.), Dothan, for Appellees.

JUDGES: Faulkner, Justice. Jones, Almon, Shores and Beatty, JJ., concur. Maddox, J., concurs specially. Torbert, C.J., concurs in part, and dissents in part. Bloodworth and Embry, JJ., not sitting.

OPINION BY: FAULKNER

OPINION

[*2] These consolidated appeals are from judgments by the Circuit Courts of St. Clair and Houston Counties, dismissing claims against St. Clair County and Houston County, and their respective county commissions and commissioners individually [**2] for injuries resulting from the alleged negligent and wanton maintenance of public roads. We reverse, except as to that portion of the St. Clair Circuit Court's order dismissing the actions as to the county commissioners individually.

I.

Case No. 78-623

On April 12, 1977, Bobby Cook's wife, Dianne, and son, John, were passengers in a pick-up truck being driven by Darlene Corbin on County Road No. 22 (Shoal Creek Road) near its intersection with County Road No. 26 outside Ashville in St. Clair County. At this intersection the stop sign stopping traffic on County Road No. 22 had been knocked down, and therefore, was not visible from the road. It was alleged that the county commissioners had known for a long time that the sign was down. Ms. Corbin did not see the stop sign and drove into the intersection, colliding with a school bus driven by Peggy Sanders. Mrs. Cook and John were killed. Mr. Cook filed the required claim for damages with St. Clair County. The county commissioners failed to act on the claim and this suit was filed against the County, the county commission, and the county commissioners in their official and individual capacities, and Darlene Corbin. All [**3] of the defendants except Darlene Corbin filed a motion to dismiss, which the court treated in the alternative as a motion for summary judgment. The motion asserted that the County and its agents were protected by governmental immunity from

actions ex delicto. The motion to dismiss and/or the motion for summary judgment was granted. Mr. Cook appeals.

II.

Case No. 78-776

On July 15, 1978, Corinda Bradshaw was driving a car owned by her husband, Pat Bradshaw, on Fortner Street Extension, a street owned and maintained by Houston County. Mrs. Bradshaw allegedly struck a pothole in the road, causing her vehicle to collide with a dirt embankment, resulting in injuries to her. Mr. and Mrs. Bradshaw filed a claim against Houston County pursuant to Code 1975, §§ 11-12-5 and 11-12-8. The Houston County Commission did not act on this claim, and the Bradshaws filed suit alleging negligent and wanton failure to maintain the street in a reasonably safe condition. Houston County, the county commission, and the county commissioners in their official capacities, filed an ARCP 12(b)(6) motion to dismiss. The motion was granted by the trial court. The Bradshaws appeal.

III.

These [**4] cases present the issue of the general tort liability of a county, its county commission, and county commissioners. Mr. Cook, and the Bradshaws, contend that the county, its governing body and officials cannot assert governmental immunity as a bar to actions against them for defectively maintained roads, either expressly or implicitly as the result of this Court's decision [*3] in *Lorence v. Hospital Board of Morgan County*, 294 Ala. 614, 320 So. 2d 631 (1975). The respective counties, commissions, and commissioners assert that the effect of *Lorence* was not to abolish the counties' general immunity from tort actions where there is no express language allowing suit against the county in the specific statute dealing with the county function involved. They contend in this instance that there is no "may be sued" language in Code 1975, § 23-1-80, providing that the county commission is charged with superintendence of public roads.

The judicially developed doctrine of governmental immunity for counties and municipalities has existed in Alabama for many years. Although the courts of this State formulated the corporate-governmental distinction as the basis for allowing cities [**5] and counties to be sued for their tortious conduct, this distinction was applied to municipalities permitting them to be sued for torts committed in the performance of their proprietary or corporate functions but never applied to counties. A county, an involuntary political subdivision of the state having state powers and duties, was liable for negligence in the performance or non-performance of these governmental duties only where a statute expressly provided for such liability, and where the county employee acted within the scope of his authority in discharging a duty expressly, and specially conferred on that county by the legislature. *See* Copeland and Screws, *Governmental Responsibility for Tort in Alabama*, 13 Ala. L. Rev. 296 (1961). This State, however, has had a statute continuously since 1852, presently codified as Code 1975, § 11-1-2, that provides, "Every county is a body corporate with power to sue or be sued in any court of record."

The demise of the doctrine of governmental immunity in tort proceedings was instigated in *Jackson v. City of Florence*, 294 Ala. 592, 320 So. 2d 68 (1975), where this Court abolished the doctrine of municipal immunity quasi-prospectively, [**6] recognizing that the legislature had provided for tort actions against cities and towns in 1907, and that the corporate-governmental distinction was purely court-created and could be removed by the court. In *Lorence v. Hospital Board of Morgan County*, the holding of which is the crux of the dispute between the parties in the present case, governmental immunity in the context of a county hospital was presented. Justice Jones, speaking for the Court, discussed not only Tit. 22, § 204(24), Code of Ala. 1940 (Recomp. 1958), that allowed a county hospital board "to sue and be sued and to defend suits against it; . . ." but also Tit. 12, §§ 3 and 115, and Tit. 7, § 96, Code of Ala. 1940 (Recomp. 1958), permitting the county "to sue or be sued" and providing for the claim procedure before suit was brought. He stated, however, that the issue of a county's general liability was not before the Court, that what was before it was the immunity of a county hospital board, and held that because the statute authorizing the creation of the boards expressly provided for suits against them, county hospital boards no longer had immunity from tort actions.

Hudson v. Coffee County, 294 Ala. [**7] 713, 321 So. 2d 191 (1975), submitted after *Lorence*, concerned a personal injury complaint filed against the county, the probate judge, the commissioners as individuals and officials, and agents, for negligence in the loading of a bulldozer onto a low-boy leased by the county to the Hudsons, and operated by county employees. In that case the Court remarked that the defense of governmental immunity in tort actions against counties had been abolished in *Lorence*, but that the decision was limited to that case and causes of action arising thereafter; thus it had to consider pre-Lorence law, and held that dismissal of the Hudson claim was proper.

The status of the general immunity of a county from tort actions was somewhat unclear as a result of certain language in *Lorence* and *Hudson*. Although subsequent cases dealing with immunity for governmental entities have not presented us squarely with the issue of whether

the general sovereign immunity of a county still exists, an analysis like that of *Lorence* has [*4] been used in the cases involving county boards of education.

In *Sims v. Etowah County Board of Education*, 337 So. 2d 1310 (Ala. 1976), a suit by [**8] a spectator at a high school football game, for injuries sustained when the stands where she was seated collapsed, Justice Beatty, speaking for the Court, distinguished the language of the statute governing county hospital boards interpreted in *Lorence* from Tit. 52, § 99, Code of Ala. 1940 (Recomp. 1958), creating the powers of a county board of education, stating that "It may sue and contract, ..." The premise of tort liability in *Lorence* was statutory authorization, while in Tit. 52, § 99 there was no express legislative authorization for actions against the county board of education - no "may be sued" language; thus, whether tort actions could be brought against the board was a matter for judicial decision. The majority in *Sims* determined that without the additional statutory language, a negligence action could not be maintained, but counts based on the board's contractual undertaking to furnish a safe place to watch athletic contests could be maintained. The dissenting justices stated that county boards of education had been held to have the implied right to be sued within the scope of their corporate powers.

In *Board of School Commissioners of Mobile County* [**9] *v. Caver*, 355 So. 2d 712 (Ala. 1978), a student injured by a county school bus while standing in the school yard brought a suit for negligence, and the trial court entered an interlocutory order that the Mobile County School Board was not immune from tort proceedings. Section 270 of Article XIV of the Alabama Constitution indicated that the Mobile County school system was to be treated differently from other school boards in the state. Act No. 480 (the most recent amendatory act regulating Mobile County public schools at the time of the case) provided that the Mobile County School Board was a body corporate and "may sue and be sued." Justice Bloodworth, writing for the Court, stated that *Sims* and *Enterprise City Board of Education v. Miller*, 348 So. 2d 782 (Ala. 1977), held that sovereign immunity for boards of education would be based on the statutes involved. If there was only "may sue" language and no "be sued" language, there was immunity from suits in tort. Act No. 480 contained the language "may sue and be sued"; thus, the Mobile County School Board could be sued in tort. On the basis of the holding in *Jackson* and language in *Lorence*, the Court held whether [**10] the act causing the injury was performed in the board's corporate or proprietary capacity, as opposed to its governmental capacity, was immaterial.

Section 11-1-2, Code 1975, provides, "Every county is a body corporate, with power to sue or be sued in any court of record." This provision contains the words "be sued" which this Court has stated in *Lorence, Sims*, and *Caver* to be essential to a determination of statutory authorization of suits against a governmental entity. By its inclusion of such language in this provision and in predecessor statutes as early as 1852, the legislature has indicated that counties are not to be immune from suit because they are governmental entities. This was reaffirmed by legislation limiting liability in tort cases against counties and municipalities enacted May 23, 1977, and contained in Act 673, page 1161 of Volume 2, Acts of Alabama 1977.

> "Section 2. The recovery of damages under any judgment against a governmental entity shall be limited to $100,000.00 for bodily injury or death for one person in any single occurrence. Recovery of damages under any judgment or judgments against a governmental entity shall be limited to $300,000.00 [**11] in the aggregate where more than two persons have claims or judgments on account of bodily injury or death arising out of any single occurrence. Recovery of damages under any judgment against a governmental entity shall be limited to $100,000.00 for damage or loss of property arising out of any single occurrence. No governmental entity shall settle or compromise any claim for bodily injury, death or property damage in excess of the amounts hereinabove set forth."

[*5] We refer to this statute because of its showing of a legislative intent, and for that reason only.

There is no restriction to the type of suit that may be brought against the county - tort or contract. The only requirements that must be met regarding a suit against a county are set out in §§ 6-5-20(a), 11-12-5, 11-12-6, and 11-12-8, Code 1975 requiring presentment of an itemized, verified claim, to the county commission within twelve months of accrual, and acted on within ninety days prior to commencement of the suit. This Court has determined in *Jackson, Lorence*, and *Caver* that the corporate-governmental function distinction is no longer a viable requirement for actions against counties and [**12] municipalities.

The county as a corporate entity, like any other corporation, may act only through its officers, the county's governing body, the county commission.

We hold that § 11-1-2 allows suits against counties, and their governing bodies - the county commissions and

commissioners - in their official, but not in their individual capacity in tort irrespective of any corporate-governmental function distinction. Therefore, we reverse the trial courts' orders granting the defendants' motions to dismiss, except as to that portion of the St. Clair Circuit Court's order dismissing the action against the county commissioners individually.

REVERSED AND REMANDED as to the Houston County action. AFFIRMED IN PART; and REVERSED IN PART and REMANDED as to the St. Clair County action.

Jones, Almon, Shores and Beatty, JJ., concur.

Maddox, J., concurs specially.

Torbert, C.J., concurs in part, and dissents in part.

Bloodworth and Embry, JJ., not sitting.

CONCUR BY: MADDOX; TORBERT (In Part)

CONCUR

MADDOX, JUSTICE (Concurring specially).

I was strongly inclined to register my dissent in this case, but had I dissented, I would have stood alone, and I see no useful purpose in continuing [**13] to express a dissenting view when I know that the other members of this Court are committed to a contrary opinion. My views on the extent and scope of "governmental immunity" in Alabama were clearly stated in *Hutchinson v. Board of Trustees of University of Alabama*, 288 Ala. 20, 256 So.2d 281 (1971), and in the dissenting opinions of Justice Merrill in *Jackson v. City of Florence*, 294 Ala. 592, 320 So.2d 68 (1975), and *Lorence v. Hospital Board of Morgan County*, 294 Ala. 614, 320 So.2d 631 (1975). I refer the reader to those opinions.

My prior views of "governmental immunity" were based upon a sincere belief that if "governmental immunity" was to be abolished, the legislative branch was the appropriate branch to abolish it. In *Lorence, supra*, Justice Merrill suggested that the legislature could change the effect of that decision. Because the legislature did not change the effect of *Lorence*, and because I feel compelled to follow the precedent this Court, as presently constituted, has now established, I concur in the result. See Mr. Justice Black's special concurrence in *Morgan v. Virginia*, 328 U.S. 373, 90 L. Ed. 1317, 66 S. Ct. 1050 (1946), where he said: [**14] "In view of the Court's present disposition to apply that formula, I acquiesce."

DISSENT BY: TORBERT (In Part)

DISSENT

TORBERT, CHIEF JUSTICE (concurring in part, dissenting in part).

The majority holds "that § 11-1-2 allows suits against counties, and their governing bodies -- the county commissions and commissioners -- in their official, but not in their individual capacity in tort irrespective of any corporate-governmental function distinction." I concur in the majority holding insofar as it applies to the counties themselves. I dissent from the opinion of the majority insofar as it applies to the county commission and commissioners in their official capacity.

[*6] The majority opinion places special emphasis on the words "to be sued," and holds that this Court has stated that the "to be sued" language is essential to a determination of statutory authorization of suits against governmental entities. *Board of School Commissioners of Mobile County v. Carver*, 355 So. 2d 712 (Ala. 1978); *Lorence v. Hospital Board of Morgan County*, 294 Ala. 614, 320 So. 2d 631 (1975); *Jackson v. City of Florence*, 294 Ala. 592, 320 So. 2d 68 (1975). I fail to see the magic in the term "to [**15] be sued," and I would hold as per my special concurrence in *Carver, supra*, that the right to sue carries with it the implied right to be sued.

> We now find ourselves committed to this statutory interpretation: If the statute provides that the public body "may sue and be sued" then there is no immunity for tort liability; however, if the statute provides only that the body "may sue" then the body is immune from tort liability. I find this reasoning difficult because this court is also committed to the proposition *that the right to sue carries with it the implied right to be sued, Kimmons v. Jefferson County Board of Education*, 204 Ala. 384, 85 So. 774 (1920) . . . .

Board of School Commissioners of Mobile County v. Carver, 355 So. 2d 712 at 714 (Ala. 1978) (emphasis in original).

The inherent inconsistency in the majority opinion is that, although the majority writes that the magic words "may be sued" are essential for a determination of statutory authorization of suits against a governmental entity, nowhere in the majority opinion is there reference to the statutory authorization for suits against county commissions or county commissioners in their official [**16] capacity. In *Lorence v. Hospital Board of Morgan County*, 294 Ala. 614, 320 So. 2d 631 (1975), this Court held that a county hospital board was not immune from suit. That decision was based in part on the fact that Code of Alabama of 1958, Tit. 22, Art. 5, § 204(24),

expressly gives the county hospital boards the powers of a corporation including the statutory authorization to "sue and be sued." In *Board of School Commissioners of Mobile County v. Caver*, 355 So. 2d 712 (Ala. 1978), this Court held the Board of School Commissioners of Mobile County is not immune from suit in tort. That decision was based on Acts of Alabama of 1969, Act 480 at § 5, where the legislature has expressly given the powers of a corporation to the school board including the statutory authorization that the school board "may sue and be sued." In *Enterprise City Board of Education v. Miller*, 348 So. 2d 782 (Ala. 1977), this Court held that the Enterprise City Board of Education was immune from suit because there was no express statutory authorization for suits against the City Board of Education.

> It is quite clear that *Jackson* and *Lorence v. Hospital Board of Morgan County*, 294 Ala. [**17] 614, 320 So. 2d 631 (1975) are based upon legislative interpretation.......
>
> There is no mention in the statutes under which city school boards are created of the ability to be sued.

Enterprise City Board of Education v. Miller, 348 So. 2d 782 (Ala. 1977).

In the instant case, the majority has simply failed to base its decision holding county commissions and commissioners subject to suit on a provision containing the words "be sued" which this Court has stated in *Lorence, Sims* and *Caver* to be essential to determination of statutory authorization of suits against the governmental entity. It is true, as the majority points out, that Code 1975, § 11-1-2, provides: "Every county is a body corporate with the power to sue or be sued in any court of record." It is significant that § 11-1-2 makes no reference to the county commission as a legal entity capable of being sued nor to the county commissioners in their official capacity. The majority attempts to bolster its holding by citing Code 1975, §§ 23-1-80 and 11-3-10, which entrust the county commission with superintendence of public roads. Neither of these sections invests the county commission with [**18] the powers of a body corporate capable of suing and being [*7] sued. Code 1975, § 11-3-11, sets forth the powers and duties of the county commission generally. A close examination of that section reveals that nowhere in that Code section is the county commission given the status of a body corporate capable of suing and being sued. Because of the internal inconsistency in the majority opinion (*i.e.*, the lack of a statutory authorization of suits against county commissions or commissioners individually), I dissent from the majority opinion insofar as it holds that the county commissions and commissioners in their official capacities are legal entities capable of being sued.

Cottage Hill Land Corporation and Riley Smith v. City of Mobile

No. 82-656

Supreme Court of Alabama

443 So. 2d 1201; 1983 Ala. LEXIS 4886

November 4, 1983

SUBSEQUENT HISTORY: [**1] Rehearing Denied December 22, 1983.

PRIOR HISTORY: Appeal from Mobile Circuit Court.

DISPOSITION: AFFIRMED.

LexisNexis(R) Headnotes

Governments > Courts > Common Law
Real Property Law > Ownership & Transfer > Transfer Not By Deed > Dedication > Elements
[HN1] Dedications may be classified as either express or implied and can be either of the common law or the statutory variety. Statutory dedications are necessarily express, while common law dedications may be either express or implied.

Real Property Law > Ownership & Transfer > Transfer Not By Deed > Dedication > Elements
Real Property Law > Ownership & Transfer > Transfer Not By Deed > Dedication > Procedure
Transportation Law > Bridges & Roads > Dedication
[HN2] The filing of a map or plat in substantial compliance with the statutory requirements constitutes a valid dedication to the public of all streets, alleys, and other public places. However, acceptance of a proffered dedication is necessary.

Real Property Law > Ownership & Transfer > Transfer Not By Deed > Dedication > Elements
[HN3] Acceptance of a dedication of land may be shown by long public use, or by acts, either formal or otherwise, of corporate or other public officers recognizing and adopting the property for the public's use.

Real Property Law > Ownership & Transfer > Transfer Not By Deed > Dedication > Elements
[HN4] In determining what property is dedicated to the public, the map or plat is to be construed in its entirety.

Civil Procedure > Judicial Officers > Masters > General Overview
Real Property Law > Zoning & Land Use > State & Regional Planning
[HN5] Ala. Code § 11-52-31 specifically authorizes a planning commission to adopt regulations providing for the proper arrangement of streets in relation to other existing or planned streets and to the master plan. A planning commission's bylaws, which were specifically authorized by Code, have the same force and effect as properly enacted statutes.

Environmental Law > Zoning & Land Use > Constitutional Limits
Environmental Law > Zoning & Land Use > Statutory & Equitable Limits
Real Property Law > Zoning & Land Use > Constitutional Limits
[HN6] Subdivision legislation is part of planning legislation, as is zoning; they are all predicated on the police power of the state. Consequently, questions concerning the requirements for public improvements depend on the same criteria as are found in cases involving the exercise of the police power through zoning restrictions. A particular requirement or application of the general rules and regulations in a particular manner to a specific application for approval will not be invalidated unless, like a particular zoning restriction, it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.

COUNSEL: Robert M. Montiel for Montiel, White & Grogan, Mobile, for Appellant(s).

William R. Lauten, Mobile, for Appellee.

JUDGES: Maddox, Justice. Torbert, C.J., Jones, Shores and Beatty, JJ., concur.

OPINION BY: MADDOX

OPINION

[*1202] The dispositive issue in this appeal is whether or not there was a dedication and acceptance of the right of way for a *future thoroughfare* that appeared on a recorded subdivision plat.

The appellants, Cottage Hill Land Corporation (Cottage Hill) and Riley Smith, one of Cottage Hill's corporate officers, filed a complaint naming as defendant the City of Mobile. In the complaint, as amended, plaintiffs alleged an unlawful taking of Cottage Hill's property without compensation and prayed for appropriate damages. The circuit court granted the city's motion for summary judgment and this appeal followed. We affirm. The facts of the case are basically as follows:

Cottage Hill owned a piece of property located within the city limits and made the necessary arrangements to have the land subdivided. A plat of the land, designated as Bridlewood Estates, was submitted [**2] by Cottage Hill to the Mobile City Planning Commission for approval. Before giving its approval, however, the planning commission required Cottage Hill to designate on the plat the southernmost border of Bridlewood Estates, approximately four subdivision lots, as "Future Thoroughfare 100' R/W." (See Appendix A.) This right of way for a proposed major thoroughfare for the city had been originally placed on the city's master plan in the late 1940's.

With the right of way, as shown in Appendix A, clearly delineated, the plat was approved and Cottage Hill commenced selling lots and building single family dwellings on the individual homesites in Bridlewood Estates. All forty-six lots listed on the plat were sold during 1958 and 1959.

The developers assert that they have at no time received any compensation or payment from the appellee city for the taking, reservation, or use of the land designated on the plat as a future thoroughfare. They further assert that the reserved land in question is neither an ingress to nor an egress from Bridlewood Estates, and that it is not otherwise used by the owners of lots in the subdivision to gain access to their lots, and that the city has not [**3] built a road on the reserved right of way. Although the developers claim the land is presently nothing more than raw, undeveloped land which, but for the reservation, the corporation could have developed and sold, no legal action was commenced prior to 1981 by either Cottage Hill or its officers.

The city contends that the developers have no further interest in the property or right to recover any compensation from it because the land designated in the plat as a future thoroughfare was irrevocably dedicated to the public when the plat was recorded in the probate office on February 7, 1958, and the lots comprising the subdivision were later sold.

[HN1] Dedications may be classified as either express or implied, and can be either of the common law or the statutory variety. McQuillin, *Municipal Corporations*, § 33.03 (3d ed. revised 1971); *Sam Raine Construction Co., Inc. v. Lakeview Estates*, [*1203] 407 So. 2d 542, 544 (Ala. 1981); *Stack v. Tennessee Land Company*, 209 Ala. 449, 451, 96 So. 355, 357 (1923). Statutory dedications are necessarily express, while common law dedications may be either express or implied. McQuillin, *supra*, § 33.03.

[HN2] The filing of a map [**4] or plat "in substantial compliance with the statutory requirements constitutes a valid dedication to the public of all streets, alleys, and other public places." *Johnson v. Morris*, 362 So. 2d 209, 210 (Ala. 1978). Under early Alabama statutory authority, streets indicated on a recorded and acknowledged plat were considered to be dedicated to the public use without awaiting acceptance or use by the public. *See* Code 1907, § 6030; *Manning v. House*, 211 Ala. 570, 573, 100 So. 772, 774 (1924). This is no longer true, however. *See* Code 1975, § 11-52-32(b). Acceptance of a proffered dedication is necessary. McQuillin, *supra*, § 33.43; *Tuxedo Homes v. Green*, 258 Ala. 494, 497-498, 63 So. 2d 812, 814 (1953).

In the instant case, there was nothing on the face of the plat from which the circuit court could have concluded that Cottage Hill intended to condition the dedication of the right of way or otherwise reserve its dedication. *See e.g. City of Birmingham v. Graham*, 202 Ala. 202, 79 So. 574 (1918); *Sims v. City of Birmingham*, 256 Ala. 540, 55 So. 2d 833 (1951). Consequently, the recorded plat is its own full and complete evidence of the dedication by [**5] Cottage Hill of the right of way encompassed by the proposed thoroughfare. *Manning v. House, supra*, 211 Ala. at 573, 100 So. at 774.

This Court has ruled that [HN3] acceptance of a dedication of land may be shown by long public use, or by acts, either formal or otherwise, of corporate or other public officers recognizing and adopting the property for the public's use. *Oliver v. Water Works & Sanitary Sewer Bd.*, 261 Ala. 234, 236, 73 So. 2d 552, 553 (1954); *Stringer Realty Co. v. City of Gadsden*, 256 Ala. 77, 80, 53 So. 2d 617, 619 (1951). The developers admit that the three streets designated on the plat as Rand Court, Jan-

wood Drive, and Angus Drive have been dedicated and accepted by both the city and public for public use; thus, the unresolved question is whether there has been an acceptance of the proposed thoroughfare right of way.

[HN4] In determining what property is dedicated to the public, the map or plat is to be construed in its entirety. *Johnson v. Morris, supra*, 362 So. 2d at 210. From the specific circumstances of this case, the Court concludes that the circuit court was authorized to find that "every line of the survey which served to mark those parts of the [**6] site which were intended to be reserved from sale for use of the public became unalterably fixed, dedicated to the public for all time" once lots were sold with reference to the Bridlewood Estates subdivision plat. *Snead v. Tatum*, 247 Ala. 442, 443, 25 So. 2d 162, 163 (1946); *Webb v. City of Demopolis*, 95 Ala. 116, 126, 13 So. 289, 292 (1891). Furthermore, this dedication has been perfected despite the fact that the city has not yet constructed a public roadway on the property platted and dedicated as a future thoroughfare.

In *Smith v. City of Opelika*, 165 Ala. 630, 51 So. 821 (1910), the Court stated:

> ". . . If the land in question, on which the building in question is located, is a part of the street, it became such alone by the original dedication of the original owner -- his mapping and platting it. The evidence undisputably, if not beyond conflict, shows that it is not now used, and never has been used, by the city, or the public as a street. It was never opened, nor kept open, by the city or by the public, as a street, and has never been used by the public as such. But if there was a complete dedication of it to the public as a street, and an acceptance [**7] of it as such by the city or by the public, this would not prevent the relief prayed in this bill or awarded in the decree. If the dedication by the owner was complete and irrevocable, it was not necessary that it be improved or opened and kept so, by the city, within a given time. The [*1204] city could now accept, adopt, and improve it as a part of its street system, even against the owner, if the dedication was originally complete and irrevocable."

165 Ala. at 633, 51 So. at 822. Indeed, it is unnecessary that a street so designated on a plat be open at the time of the sale and conveyance of lots, because municipal authorities possess the authority to open the street, if at all, whenever it is deemed necessary and proper to do so. *Sherer v. City of Jasper*, 93 Ala. 530, 531-532, 9 So. 584, 585 (1890), and *Stack v. Tennessee Land Company, supra*, 209 Ala. at 452, 96 So. at 358 (1923).

The developers argue that in requiring land be set aside for athe future thoroughfare, the city should have adhered to §§ 11-52-50 through 11-52-54, which prescribe procedures for the reservation of lands in subdivisions for future acquisition for public streets. The city [**8] admitted that the provisions of these sections were not followed in this instance and that the city planning commission does not use the powers enumerated under §§ 11-52-50 through 11-52-54, but relies instead upon the powers granted under § 11-52-31.

In *City of Mobile v. Waldon*, 429 So. 2d 945 (Ala. 1983), the Court recognized that:

> [HN5] "Section 11-52-31 specifically authorizes a planning commission to adopt regulations providing 'for the proper arrangement of streets in relation to other existing or planned streets and *to the master plan*.' This court has previously held that the Planning Commission's bylaws, which were specifically authorized by Code, have the same force and effect as properly enacted statutes. *Lynnwood Property Owners Ass'n v. Lands Described in Complaint*, 359 So. 2d 357 (Ala. 1978)." (Emphasis added.)

429 So. 2d at 947.

Section V.B. 2 and section 13 of the subdivision regulations adopted pursuant to § 11-52-31 by the Mobile Planning Commission provide:

> "2. *Major Street*. Wherever a subdivision embraces a major street, as shown on the Major Street Plan component of the Master Plan, such Major Street shall be platted in [**9] the general location and of the width called for by the Major Street Plan.
>
> "* * *
>
> "13. *Right-of-Way Widths*. The minimum right-of-way widths for streets, alleys and crosswalks shall be:

"Major Street . . . 100 feet."

Section VII. A. 2 provides:

> "*Major Streets*. The rights-of-way for existing and for new major streets shown on the Major Street Plan shall be platted to the minimum widths called for by these regulations or by the Major Street Plan and reserved. The rights-of-way for secondary streets for which marginal access streets are required shall be similarly platted and reserved. At the option of the subdivider, any rights-of-way may be dedicated instead of reserved."

The city contends that these regulations, together with the authority granted by § 11-52-31, allowed the planning commission to require the reservation of this planned major street as a condition of approval and that there is no difference between the designation of the other Bridlewood Estates subdivision streets, *i.e.*, Rand Court, Janwood Drive and Angus Drive, as public streets and the designation of the proposed thoroughfare.

With regard to subdivision ordinances, [**10] this Court has held:

> [HN6] "Subdivision legislation is part of planning legislation, as is zoning; they are all predicated on the police power of the state. Consequently, questions concerning the requirements for public improvements depend on the same criteria as are found in cases involving the exercise of the police power through zoning restrictions. A particular requirement or application of the general rules and regulations in a particular manner to a specific application for approval will not be invalidated unless, like a particular zoning restriction, it is clearly arbitrary and unreasonable, having no substantial relation to [*1205] the public health, safety, morals or general welfare.
>
> "* * *
>
> "We opine that regulations requiring the dedication of property for service roads or marginal access roads in subdivisions where such subdivision abuts a major street are well within the powers granted to municipalities under § 11-52-31. A municipality, among its many duties, is responsible for formulating a safer flow of traffic within its jurisdiction; included in this responsibility is control of ingress and egress to its streets and highways.
>
> "*By the foregoing, we* [**11] *are not to be understood as allowing a planning commission to require dedication of property anytime it is of the opinion that such dedication is needed; there are limitations on the powers of such commissions*. It has those powers alluded to, provided however, that the exercise of same does not run afoul of the enabling act and the constitutional requirements of due process." (Citation omitted.) (Emphasis added.)

City of Mobile v. Waldon, supra, 429 So. 2d at 947-948.

The Court agrees with the city that the planning commission may require the reservation of a major planned street as a condition for approval of a subdivision plat; but, anytime the planning commission requires a developer to *reserve property in a proposed subdivision for future streets*, the city should be aware that "there are limitations on the powers of such commissions" when they are acting pursuant to powers granted them under § 11-52-31, especially when the need for the future street will be substantially generated by public traffic demands rather than by the proposed development. On those occasions, the guidelines and procedures set forth in §§ 11-52-50 through 11-52-54 should be followed; [**12] otherwise, the reservation could amount to an unconstitutional taking of property without due process of law. *City of Mobile v. Waldon, supra; see Board of Supervisors of James County v. Rowe*, 216 Va. 128, 216 S.E. 2d 199 (1975).

The Court finds it unnecessary to address the remaining issues raised on appeal, except to say that the legal action taken by the developers concerning the land in question was commenced long after the ten-year statute of limitations had run. § 6-2-33. Consequently, the Court concludes that *under the facts of this case* and our Alabama Rules of Civil Procedure, the trial court properly granted summary judgment. *See Silk v. Merrill Lynch, Pierce, Fenner & Smith*, [MS. August 19, 1983], 437 So. 2d 112 (Ala. 1983).

AFFIRMED.

Torbert, C.J., Jones, Shores and Beatty, JJ., concur.

Cotton Bayou Association, Inc. v. Department of Conservation, et al.

1920714

SUPREME COURT OF ALABAMA

622 So. 2d 924; 1993 Ala. LEXIS 625

June 18, 1993, Released

SUBSEQUENT HISTORY: [**1] Released for Publication September 3, 1993. Counsel Segment Corrected.

PRIOR HISTORY: Appeal from Montgomery Circuit Court. Charles Price, Judge. -92-2439)

DISPOSITION: AFFIRMED.

CORE TERMS: lease, bid, competitive, real property, leased, real estate, declaratory relief, final order, general policy, transferred, negotiated, injunctive, leasing

COUNSEL: For Appellant: Howell Roger Riggs, Jr., Orange Beach.

For Appellees: David J. Dean, asst, atty. gen., for State of Alabama, Department of Conservation and Natural Resources, for Governor Guy Hunt, and James Martin, commissioner of Alabama Department of Conservation and Natural Resources.

G. David Chapman III, Gulf Shores, for Jim Brown, Inc.

JUDGES: SHORES, Hornsby, Maddox, Houston, Kennedy

OPINION BY: SHORES

OPINION

[*924] **SHORES, JUSTICE.**

This appeal presents the single issue of whether a State of Alabama agency has [*925] the authority to negotiate for the lease of real property or must lease real property pursuant to the competitive bid law, Ala. Code 1975, § 41-16-1 et seq. The trial court held that the State may lease real estate by negotiated lease. We affirm.

The evidence is undisputed that the Alabama Department of Conservation and Natural Resources owns real property in Baldwin County, known as the "Alabama Point Property." After advertising in the *Mobile Press Register* newspaper for four consecutive weeks for proposals for the lease of the property, and having received proposals from five applicants, the Department leased it to Jim Brown, Inc., who agreed to make certain capital improvements on the property.

On October 26, 1992, Cotton Bayou Association, Inc., filed a complaint against the Department, Jim Brown, Inc., and other named defendants, [1] alleging that [**2] the competitive bid law required the Department to obtain bids before leasing the property. The complaint sought a temporary restraining order, a permanent injunction, and declaratory relief against the defendants. The case was transferred to Montgomery County. After preliminary motions, Judge Charles Price held a final hearing on the merits on December 16, 1992, in the circuit court. Judge Price issued his final order on December 21, 1992, in which he ruled in favor of the defendants, as follows:

1 Additional defendants named were the State of Alabama; Governor Guy Hunt; and James Martin, Commissioner of the Alabama Department of Conservation and Natural Resources.

"*FINAL ORDER*

"This matter having come before the Court on the Plaintiffs' Verified Complaint for Injunctive and Declaratory Relief, originally filed in the Circuit Court for Baldwin County, Alabama, on or about October 26, 1992, venue having been transferred to Montgomery County Circuit Court by order of the Court of November 4, 1992; the Court [**3] hereby rules in favor of the Defendants, as set out below.

"FINDINGS OF FACT

"The Court finds that the State of Alabama, Department of Conservation and Natural Resources, by instrument dated April 10, 1992, leased a portion of certain real property which it owned, known as the 'Alabama Point Property,' to Jim Brown, Incorporated. This lease was executed pursuant to negotiations between the State of Alabama, Department of Conservation and Natural Resources, and Jim Brown, Incorporated.

"CONCLUSIONS OF LAW

"This Court holds that there are no legal requirements requiring this property to be leased by competitive bid. There are no requirements to be found in Section 41-16-1 et seq., of the *Code of Alabama 1975*, which require the State of Alabama, Department of Conservation and Natural Resources, to lease this property pursuant to competitive bids. The law in Alabama is clear that the State may lease real estate by a negotiated lease. As the Alabama Supreme Court said in the case of *Finch v. State*, 271 Ala. 499, 124 So. 2d 825 (1960):

"'Within constitutional limitations, the legislature has the power to provide for [**4] the leasing of State property, the length of the term for which leases may be made, and the general policy relating thereto.

". . . .

"'. . .It is also within the legislative prerogative to spell out the consideration for which such property may be leased and the general policies relating to such leases. The courts cannot do these things.'

"*Id.*, 271 Ala. at 501, 504, 124 So. 2d at 827, 830. See also *Alabama ex rel. Flowers v. Kelley*, 214 F. Supp. 745, affirmed, *Tri-State Corp. v. Alabama*, 339 F. 2d 261 (1964).

"Therefore, it is ORDERED, ADJUDGED, and DECREED that the Plaintiffs' request for injunctive relief is DENIED, [*926] and this Court issues a DECLARATORY JUDGMENT that the State of Alabama, Department of Conservation and Natural Resources, fully complied with all requirements of law.

"JUDGMENT is therefore rendered in favor of Defendants, with all costs to be assessed against the Plaintiffs.

"DONE and ORDERED this 21 day of Dec. 1992.

"/s/ CHARLES PRICE, CIRCUIT COURT JUDGE"

We have carefully examined the record and the law in this matter, and [**5] we hold that the judgment of the trial court is due to be affirmed and that the order of the trial court dated December 21, 1992, is adopted as the holding of this Court. The competitive bid law does not apply to these facts. The statute requires that contracts for "labor, services or work or . . . the purchase or lease of materials, equipment, supplies or other personal property, involving $ 5,000.00 or more" be let by competitive bids. § 41-16-20.

AFFIRMED.

Hornsby, C. J., and Maddox, Houston, and Kennedy, JJ., concur.

Gerald E. Crabtrey and wife, Mary L. Crabtrey, and XYZ, Heirs of Joe Crabtrey v. James E. Tew

Civ. No. 4793

Court of Civil Appeals of Alabama

485 So. 2d 726; 1985 Ala. Civ. App. LEXIS 1384

October 30, 1985

SUBSEQUENT HISTORY: [**1] Rehearing Denied December 4, 1985.

PRIOR HISTORY: Appeal from Houston Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: condemnation, right-of-way, route, public road, jury trial, convenient, notice of appeal, nearest, grantor's, roadbed, evidence presented, ample evidence, trier of fact, intentionally, unobstructed, unquestioned, landlocked, manifestly, stranger's, acquire, unjust, tract, property owned, conveyed, probate, paved

COUNSEL: Richard H. Ramsey, III, Dothan, Alabama, for Appellant.

Edward Jackson, Dothan, Alabama, for Appellee.

JUDGES: Bradley, Judge. Wright, P.J., and Holmes, J., concur.

OPINION BY: BRADLEY

OPINION

[*727] This is a private condemnation case.

On May 17, 1984 the plaintiff, James E. Tew, filed a petition for private condemnation to acquire a convenient right-of-way. The petition was heard before the Probate Court of Houston County. On July 31, 1984 the probate court entered an order of condemnation and appointed appraisers to set a value for the easement. The commissioners fixed the compensation for the right-of-way at $1,000.

On August 22, 1984 the defendants, the Crabtreys, filed a notice of appeal to the Circuit Court of Houston County. The case was tried before the court without a jury and the circuit court granted the condemnation petition. The defendants' motion for a new trial was denied and the defendants appealed.

On December 20, 1983 Lochie Tew, James Tew's mother, divided her property among her children. Each of the children, except James Tew, was conveyed parcels of [**2] land that fronted on a public road referred to at trial as Hodgesville Road.

The property owned by James Tew adjoins the property owned by the Crabtreys. The Tew property is neither adjacent to nor contiguous to any public road or right-of-way. The Crabtrey property lies between the Tew property and an unnamed paved county road, referred to as the Jeff's Store Road.

At the trial there were photographs admitted into evidence that showed evidence of an old roadbed that went from the paved road to Tew's land. From the testimony of Tew and Elijah Branton, a surveyor, it was indicated that this roadbed was across the Crabtrey property.

Tew testified that to have access to his land over the land conveyed to his brothers and sisters he would have to go over land belonging to two different brothers. He further testified that this route of access would take him through a locked gate, over a pasture and some cultivated land, and over two ditches. This route would be approximately one-half mile in length, where no actual road existed. In the deeds given to the Tew children there was no right-of-way reserved for James, and, therefore, the route of access described above could be cut [**3] off at any time.

The defendants' first contention is that section 18-3-1, Code 1975, does not apply in the instant case because Tew intentionally landlocked himself. The evidence presented at trial indicated that Lochie Tew, James Tew's mother, divided the property according to the express wishes of her husband, who was then deceased. Therefore, Tew could not be said to have intentionally landlocked himself.

A property owner may institute a proceeding under the statute if he does not have a way of access to a public road, [*728] either public or private, which is unobstructed and unquestioned. *Starnes v. Diversified Operations, Inc.*, 47 Ala. App. 270, 253 So.2d 330 (Ala. Civ. App. 1971).

In the present case the route of access which Tew might have over his brothers' property could be cut off at any time, which made this route of access questionable and subject to being obstructed. Such a situation authorizes a proceeding by Tew to gain access to the nearest public road.

The Crabtreys contend that Tew should be given access over his brothers' land and should not be allowed access over the lands of a stranger, since both Tew's property and that of his brothers comes [**4] from a common grantor.

The statute provides in pertinent part that an owner of a tract: "may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto . . . ." § 18-3-1, Code 1975. The evidence indicated that the route of access over the Crabtrey property was the nearest and most convenient.

In *McGowin Investment Co. v. Johnstone*, 54 Ala. App. 194, 306 So. 2d 286 (Ala. Civ. App. 1974), *cert. denied*, 293 Ala. 766, 306 So. 2d 290 (1975), this court upheld the granting of a right-of-way over a stranger's land, rather than over the grantor's land. The court stated, "There was ample evidence from which the trial court could determine that appellees had no right of way over their grantor's remaining land which was unobstructed and unquestioned, or adequately reasonable." *McGowin, supra.*

We find that there was ample evidence to support the trial court's decision to grant the 420 foot long right-of-way along the old roadbed located on the Crabtrey property.

The defendants' second contention is that the trial court's judgment should be [**5] rendered void due to the fact that defendants were denied a trial by jury.

Rule 38(b) of the Alabama Rules of Civil Procedure requires that a written demand for a jury trial be made within ten days after filing the notice of appeal in a case brought to the circuit court from an inferior court. Rule 38(d), A.R. Civ. P., provides that if the party fails to serve a demand meeting the requirements of this rule and fails to file the demand as required by rule 5(d), then such a failure constitutes a waiver of his right to a jury trial.

The record fails to show that timely demand for a jury trial was made within ten days of the filing of the notice of appeal, or in the defendants' answer. We, therefore, find no error in the circuit court's refusal to grant defendants a jury trial.

The defendants' third contention is that it is an absolute abuse of discretion for a trial court to enter an order of private condemnation when the professional testimony is in direct conflict as to whether the legal description of the petition is accurate.

In most cases there are conflicts in the evidence presented by each side. The responsibility of resolving such conflicts lies with the trier of fact. [**6] When a trial court sits without a jury, the findings of that court will not be disturbed on appeal unless clearly erroneous or manifestly unjust. *Florence v. Williams*, 439 So. 2d 83 (Ala. 1983). Moreover, in a condemnation case the determination of the trier of fact is entitled to great weight. *State v. Central of Georgia Railroad*, 293 Ala. 675, 309 So. 2d 452 (1975).

In the case at bar the trial court heard the testimony of the witnesses and was able to look at the maps, surveys, and aerial photos offered into evidence. Based on this evidence, we cannot say that the court's condemnation order is clearly erroneous or manifestly unjust; consequently, we affirm the trial court's decision.

AFFIRMED.

Wright, P.J., and Holmes, J., concur.

Crest Construction Corp. v. Shelby County Board of Education

1910973

SUPREME COURT OF ALABAMA

612 So. 2d 425; 1992 Ala. LEXIS 1550

December 23, 1992, Released

SUBSEQUENT HISTORY: [**1] Released for Publication February 9, 1993.

PRIOR HISTORY: Appeal from Shelby Circuit Court. (CV-92-147)

DISPOSITION: AFFIRMED.

CORE TERMS: bidder, bid, lowest, prequalification, responsible bidder, Competitive Bid Law, prequalified, construction contract, specifications, contractor, public agencies, awarding, expressly reserved, qualification, preparation, preparing, commodities, estoppel, compensatory damages, public interest, predetermine, prescribed, architect, bidding, Alabama's Competitive Bid Law, question presented, board of education, school board, construction project, refusing to permit

COUNSEL: For Appellant: Macbeth Wagnon, Jr., E. Mabry Rogers,, and John J. Park, Jr., of Bradley, Arant, Rose & White, Birmingham.

For Appellee: Hewitt L. Conwill of Conwill, Justice & Johnson, Columbiana, for Shelby County Board of Education. Michael G. Kendrick and Graham L. Sisson, Jr., of Gorham & Waldrep, P.C., Birmingham, for McCrory Building Co., Inc.

Amici Curiae: James H. Starnes of Starnes & Atchison, Birmingham, For amicus curiae Associated General Contractors of America, Alabama Branch, Inc. A. Lee Miller III of Finance-Legal Division, Montgomery, for amicus curiae Alabama Building Commission.

JUDGES: MADDOX, Hornsby, Shores, Adams, Houston, Steagall, Ingram

OPINION BY: MADDOX

OPINION

[*427] MADDOX, JUSTICE.

This case involves an interpretation of the Competitive Bid Law, specifically Ala. Code 1975, § 41-16-50 et seq. The basic question presented is whether a county board of education, having required a bidder on a school construction project to be *prequalified*, could award the contract to a contractor who submitted a higher bid, on the basis that the higher bidder was "the lowest *responsible* bidder." § 41-16-50(a) (emphasis added). In short, did the school board, by requiring prequalification and then allowing a bidder to bid, predetermine the question of the bidder's *responsibility*

Two other questions are also presented:

> (1) Did the trial court err in refusing to permit a witness to testify concerning the interpretation given to the term "lowest responsible bidder" by the Alabama Building Commission when a prequalification procedure was used and
>
> (2) Was the lowest bidder, in any event, entitled to compensatory [**2] damages for the expenses it had incurred in preparing to bid?

The trial court, after conducting a hearing, held that the school board could award the contract to the company it determined to be the "lowest responsible bidder," even though it had required all bidders to show that they were qualified before the bids were submitted.

FACTS

The Shelby County Board of Education solicited bids for the construction of a new school building, to be known as the Oak Mountain Middle School. The Board delegated the task of preparing the bidding documents and getting the project ready to be presented for bidding to its facilities and maintenance coordinator, Allen Fulton, who acted as liaison between the Board and G. Alvon Dampier and Associates, which the Board had hired

as the architect. G. Alvon Dampier prepared the specifications and all bidding documents, which included detailed criteria that prospective bidders had to meet to be prequalified to submit bids. Among other things, prospective bidders had to submit a qualification statement on an American Institute of Architects ("AIA") Form A305, financial statements, prior job listings, and resumes of those persons proposed as the project [**3] manager and the superintendent. The specifications stated that only bidders submitting the AIA forms and qualifications, and who met the prescribed provisions, would be considered for an award. The Board expressly reserved the right to reject any bid and to select the lowest responsible bidder who met the requirements. Dampier and Fulton approved Crest Construction Company ("Crest") as being qualified to bid. Crest [*428] prepared and submitted a bid, which was, in fact, the lowest bid, but the Board awarded the contract to the second lowest bidder, McCrory Building Company, with which the Board had had prior satisfactory dealings. In refusing to award the contract to Crest, the Board cited concerns that Crest, a one-man operation with hardly any equipment and with no work in progress or any income from work in 1991, might be unable to finish the project before the 1993-94 school year. The Board further noted that it had had problems with bonding companies finishing projects on time when contractors failed to perform.

Crest sued the Board, alleging in its amended complaint that the Board had breached its duty of good faith and fair dealing. Crest sought to enjoin the execution of the contract [**4] between the Board and McCrory, and also sought a declaration that the contract, if executed, would be void. Crest also requested that the court order the Board to award the contract to it. Crest also asked for compensatory damages as reimbursement of bid preparation expenses. Crest also included McCrory as a defendant. The trial court, sitting without a jury, found that both Crest and McCrory were qualified to submit bids, but held that the Board had legitimate reasons to award the contract to McCrory. The effect to that holding was that the Board, even though it had required Crest to be prequalified, nevertheless could award the contract to the "lowest responsible bidder." The trial court denied the injunction and dismissed the claims. Crest appeals. We affirm.

I. Crest's main argument is that the trial court erred in holding that the Competitive Bid Law authorizes an agency "to get the best *quality* at the lowest possible price." R. 41 (emphasis by the trial court). Crest argues that public agencies cannot award the contract on the basis of a bidder's being the *most* responsible bidder, and that the inquiry regarding a bidder's responsibility should end once that bidder [**5] is prequalified, as Crest was. In short, Crest says that the prequalification procedure exhausted the Board's discretion to award the construction contract to any other than the *lowest* bidder.

Crest's argument obviously has appeal, because the trial court expressly found that Crest had qualified under the Board's qualification procedure. We hold, however, that the trial court did not err, for the reasons we will set forth in this opinion.

Of course, public agencies covered by the Competitive Bid Law must award contracts to "the lowest responsible bidder." § 41-16-50(a). Although the Competitive Bid Law does not provide for awards based on relative degrees of "responsibility," quality is a consideration when determining responsibility. *Mitchell v. Walden Motor Co.*, 235 Ala. 34, 177 So. 151 (1937); *see also Arrington v. Associated General Contractors of America*, 403 So. 2d 893 (Ala. 1981), *cert. denied*, 455 U.S. 913 (1982).

Most of the decisions of this Court involving the application of the term "lowest responsible bidder" have construed the provisions of § 41-16-57(a), [**6] that part of the Competitive Bid Law involving contracts for the purchase of "commodities." See, e.g., *Mobile Dodge, Inc. v. Mobile County*, 442 So. 2d 56 (Ala. 1983); *International Telecommunications Systems v. State*, 359 So. 2d 364 (Ala. 1978); *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971). Insofar as we can ascertain, this Court has not previously considered the question in a setting involving a construction contract where the public agency has determined that the bidder is qualified, pursuant to its prequalification procedure, but then determines, after the bid is submitted, that the bidder, even though it is the low bidder, is not the lowest *responsible* bidder.

Although it appears that this Court has not previously addressed the specific question presented here, the United States Court of Appeals for the Eleventh Circuit, applying and interpreting Alabama's Competitive Bid Law, has considered a case involving a factual situation analogous to the one presented here. In *Advance Tank & [*429] Construction Co. v. Arab Water Works*, 910 F.2d 761 (11th Cir. 1990), [**7] the Court of Appeals held that, in determining the "lowest responsible bidder" an awarding authority could consider some of the same factors this Court has set out in decisions involving commodities contracts. Crest argues that "the Eleventh Circuit decision in *Advance Tank* has greatly weakened the Competitive Bid Law of Alabama and has caused considerable consternation within the building industry since it was published," and Crest argues that this present case provides this Court the opportunity to undo the damage caused by *Advance Tank* and, in the process, to put reasonable limits on the discretion which may be

exercised by public authorities in selecting the lowest responsible bidder for construction contracts."

Crest seeks to distinguish between a commodities contract and a construction contract, arguing that the considerations governing an award of a construction contract are different from those governing an award of a commodities contract, because all bidders for construction contracts offer to build according to the same plans and specifications. We disagree. Most of the factors listed in § 41-16-57(a) (quality, conformity to specifications, purpose, etc.) are factors [**8] commonly considered in regard to construction contracts awarded pursuant to § 41-16-50(a). Furthermore, both statutes are part of the same Article and should be construed together. *See, e.g., Ex parte Mutual Savings Life Insurance Co.*, 536 So. 2d 1378, 1382 (Ala. 1988); *Florence v. Williams*, 439 So. 2d 83, 87 (Ala. 1983); *Advance Tank*, 910 F.2d at 764.

Although the case did not involve a construction contract, and even though a prequalification procedure was not involved, this Court in *Inge v. Board of Public Works of Mobile*, 135 Ala. 187, 33 So. 678 (1903), construing the words "lowest responsible bidder," said:

> "In the letting of public contracts to the lowest responsible bidder, the duty of the officer is not merely ministerial, but partakes of a judicial character, requiring the exercise of discretion. A discretion, however, which should always be exercised to the end of subserving the public interest, and never in the interest of the bidder. In deciding upon the responsibility of bidders it is the duty of the board or officers not [**9] only to take into consideration the pecuniary ability of bidders to perform the contract, but also to ascertain which ones, in point of skill, ability and integrity would be most likely to do faithful, conscientious work, and to fulfill the terms of the contract."

135 Ala. at 198, 33 So. at 681.

This Court has consistently held that when letting contracts covered by the Competitive Bid Law, public agencies have discretion to determine who is the lowest responsible bidder. *Mobile Dodge, Inc. v. Mobile County*, 442 So. 2d 56 (Ala. 1983); *International Telecommunications Systems v. State*, 359 So. 2d 364 (Ala. 1978); *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971). Courts will not interfere with that discretion "unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence." *White*, 287 Ala. at 86, 248 So. 2d at 129.

"The [**10] Competitive Bid Law does not require that the lowest bid be accepted," *International Telecommunications Systems*, 359 So. 2d at 366, but only that the officials charged with the responsibility of determining the lowest responsible bid act in good faith. *White*, 287 Ala. at 86, 248 So. 2d at 129. This Court has applied some of these principles to services contracts, *see Horne Wrecker Service, Inc. v. City of Florence*, 567 So. 2d 1285 (Ala. 1990), and, as stated previously the Eleventh Circuit Court of Appeals has applied them to construction contracts. *See Advance Tank*; *see also Urban Sanitation Corp. v. City of Pell City*, 662 F. Supp. 1041 (N.D. Ala. 1986).

Based on the foregoing, we reject Crest's argument that *Advance Tank* incorrectly interpreted Alabama's Competitive Bid Law. If we accepted Crest's argument, we would hold that the judicial discretion [*430] vested in an awarding authority would be exhausted when that authority, using a prequalification procedure, determined that a bidder was qualified to bid. The fact that a contractor has been [**11] prequalified does not necessarily represent a finding of responsibility. *Cf. Rollings Construction, Inc. v. Tulsa Metropolitan Water Authority*, 745 P.2d 1176 (Okla. 1987). Prequalification is a voluntary process, but determining responsibility is not. [1] Prequalification saves time, money, and effort by eliminating obviously unqualified bidders, and it is generally based on tangible and objective criteria, such as work experience, size, net worth, equipment, etc. Determining responsibility is different, because it involves more qualitative and less quantitative considerations, such as determining which bidders "in point of skill, ability and integrity would be most likely to do faithful, conscientious work, and to fulfill the terms of the contract." *Inge*, 135 Ala. at 198, 33 So. at 681.

1 Violation of the provisions of the Competitive Bid Law is a felony. § 41-16-51(d).

The parties dispute whether the Board intended by its prequalification [**12] procedure to deplete its discretion. Dampier testified that he had no authority to approve the qualifications of bidders. Dampier developed the prequalification criteria and consulted with Fulton. The Board's attorney reviewed some of the criteria, which were promulgated over the signature of the superintendent, Dr. Norma Rogers. Nevertheless, the Board apparently had not previously used prequalification and did not vote to use it in this case. Moreover, *the specifications expressly reserved the Board's right to reject any bid.* For these reasons, we conclude that the Board did not affirmatively chose to deplete its discre-

tion through the prequalification process used in this case. Cf. *Advance Tank*, 910 F.2d at 768.

The question then becomes whether the Board's decision to award the contract to McCrory was arbitrary or capricious under the principles of law this Court set forth in *White*, 287 Ala. at 86, 248 So. 2d at 129. We hold that the trial court did not err in determining that the Board acted in accordance with the law. There was evidence that before awarding the contract, the Board questioned Ben [**13] Miree, Crest's president and sole employee, about Crest. The evidence tended to show that, instead of acting arbitrarily or out of ignorance, the Board awarded the contract to McCrory based on legitimate concerns about Crest's size, experience, and lack of equipment and other resources.

Crest claims alternatively that the Board's award of the contract to McCrory deprived Crest of due process because, it argues, Crest did not receive adequate notice of the Board's concerns. This argument appears not to have been made to the trial court; therefore, we will not consider it on appeal. *E.g., Wang v. Bolivia Lumber Co.*, 516 So. 2d 521 (Ala. 1987); *Smiths Water Authority v. City of Phenix City*, 436 So. 2d 827 (Ala. 1983).

Crest further argues that the Board was estopped to declare Crest nonresponsible. The elements of equitable estoppel are:

"(1) The person against whom estoppel is asserted, who usually must have knowledge of the facts, communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on; (2) the person seeking to assert estoppel, [**14] who lacks knowledge of the facts, relies upon that communication; and (3) the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct."

General Electric Credit Corp. v. Strickland Division of Rebel Lumber Co., 437 So. 2d 1240, 1243 (Ala. 1983) (citation omitted). Crest contends that the Board misled it by communicating -- through the invitations for bids and through Fulton's telephone call to Miree encouraging Crest to bid -- the idea that Crest would be given the award if it was prequalified and then submitted the lowest bid; Crest contends that it relied on that communication; and it contends that in reliance it was harmed by [*431] incurring expenses in preparing a bid. We disagree. We conclude that the trial court did not err in holding that Fulton's encouraging Miree to pursue the contract was not assurance that Crest would receive the award if its bid was lowest. The specifications expressly reserved the right to reject any bid. More than once, the documents mentioned that compliance with the prescribed provisions was a condition *for consideration* for an award. The trial court [**15] did not err in denying Crest any relief on the estoppel theory.

Fourth, Crest claims that the Board did not follow its own rules, under which, Crest says, it met the stated criteria for an award. Particularly, Crests argues that none of the Board's reasons for rejecting Crest's bid were listed as disqualifying factors in the published invitation for bids. The problem with this argument is that it assumes that prequalification is synonymous with a finding of responsibility, which, as we have discussed above, is not necessarily so. Furthermore, the specifications provided that meeting the prescribed provisions was a prerequisite to being *considered* for an award. The Board did consider Crest for an award. When planning a construction project, it would be difficult at best to conceive and list every possible factor that would disqualify contractors. The decision to disqualify a low bidder must be made in good faith, however, in the public interest and not in the interest of the successful bidder. *See, e.g., White*, 287 Ala. at 86, 248 So. 2d at 129.

II.

The second issue is whether the trial court erred in refusing to permit Philip [**16] Sharpe, the director of the technical staff of the Alabama Building Commission, to testify about the public policy considerations behind the prequalification procedure the Building Commission's use of prequalification, and its practice of awarding contracts based on the lowest prequalified bid. Citing *White* and *J.F. Pate Contractors v. Mobile Airport Authority*, 484 So. 2d 418 (Ala. 1986), Crest argues that interpretation of regulations or specifications by agencies, architects, attorneys, public officials, or other connected persons is relevant in a bid protest action.

Many factors indicate that the trial court did not err in excluding Sharpe's proffered testimony. First, a trial court's ruling on the materiality, relevancy, and remoteness of evidence are matters within the discretion of the trial court, and a ruling in that regard will not be disturbed by this Court unless it is shown to have been an abuse of discretion. *Moseley v. Lewis & Brackin*, 583 So. 2d 1297, 1300 (Ala. 1991). The Building Commission did not supervise the award of the contract; thus, this case is distinguishable from *White* and *J.F. Pate* [**17] *Contractors*, in which persons connected to the awarding agency testified regarding interpretation and practice. The statute referring to prequalification by the Building Commission, Ala. Code 1975, § 39-2-4, does not apply to county boards of education. *See* Ala. Code 1975, § 39-2-1(2). The Building Commission's policies and practices are not at issue in this case. Arguably, its interpretation of its own prequalification process is irrelevant; therefore, we find no abuse of dis-

cretion. *E.g.*, *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723 (Ala. 1990).

III.

The third and final issue is whether the trial court erred in refusing to allow evidence of costs Crest incurred in preparing its bid. Crest asks us to adopt the rationale of *Keco Industries, Inc. v. United States*, 192 Ct. Cl. 773, 428 F.2d 1233 (Ct. Cl. 1970), the leading case allowing a disappointed bidder to recover bid preparation expenses. We refuse to adopt such a rationale or procedure in Alabama. The legislature has provided a remedy to prevent an agency from violating the provisions of the Competitive Bid Law. A taxpayer or a "bona fide unsuccessful bidder" may [**18] sue "to enjoin execution of any contract entered into in violation of the provisions of [Article 3, § 41-16-50 through 41-16-63]." Ala. Code 1975, § 41-16-61. This language is unambiguous. *City of Montgomery v. Brendle* [*432] *Fire Equipment, Inc.*, 291 Ala. 216, 279 So. 2d 480 (1973). We have held that an identical provision in § 41-16-31, found in another Article of Chapter 16 of Title 41, and dealing with another portion of the Competitive Bid Law, prevents awards of compensatory damages. *See Jenkins, Weber & Associates v. Hewitt*, 565 So. 2d 616 (Ala. 1990); *see also Urban Sanitation Corp. v. City of Pell City*, 662 F. Supp. 1041 (N.D. Ala. 1986). Bid preparation expenses would be classified as compensatory damages, and we hold that the construction this Court placed on another provision included in the same Chapter, and containing identical language, should be adopted here and applied to § 41-16-61. The legislature obviously intended these two sections to have the same meaning. *See St. George Island, Ltd. v. Rudd*, 547 So. 2d 961 (Fla. Dist. Ct. App. 1989), [**19] *approved in part; disapproved in part*, *Brown v. St. George Island, Ltd.*, 561 So.2d 253 (Fla. 1990).

Crest recognizes that a disappointed bidder's remedies are limited under Alabama law, because the Competitive Bid Law benefits the public and creates no enforceable rights in the bidders. *Townsend v. McCall*, 262 Ala. 554, 80 So. 2d 262 (1955). Because the legislature has provided a remedy, albeit a limited one, we hold, in light of a settled maxim of statutory construction, *expressio unius est exclusio alterius*, [2] and in light of the purpose of the Competitive Bid Law, which we hold has not been violated in this case, that the trial court did not err in excluding evidence of bid preparation expenses. We decline to adopt the *Keco Industries* rule.

2 "The expression of one thing is the exclusion of another." *Black's Law Dictionary* 521 (6th ed. 1990).

Under the facts of this case, we hold that the board did not predetermine responsibility. [**20] We should not be understood as holding that a public agency can not predetermine the responsibility of a bidder. We accept the proposition that a public agency can provide for a prequalification procedure. [3] Here, however, the Board expressly reserved in the specifications the right to reject any bid by a prequalified bidder.

3 The Alabama Building Commission filed an amicus curiae brief in which it asked us to hold that "prequalification procedures serve important public interests in (a) assuring the public that only responsible contractors will bid, and (b) assuring contractors that, if they are prequalified for a procurement, they will be awarded the contract if they are low bidder"; and that "prequalified bidders should be awarded the contract if the low bidder unless new post-qualification information puts that conclusion in doubt," and that 'where such post-qualification information comes to light, the bidder involved should be given notice of the information and an opportunity to respond." Apparently, the Alabama Building Commission has established a pre-qualification procedure that is binding on the Commission. *Cf. Lord Electric Co. v. Litke*, 122 Misc. 2d 112, 469 N.Y.S.2d 846 (N.Y. Sup. Ct. 1983).

[**21] Based on the foregoing, we affirm the judgment of the trial court.

AFFIRMED.

Hornsby, C.J., and Shores, Adams, Houston, Steagall, and Ingram, JJ., concur.

Sara Johnson Crossfield v. Limestone County Commission

1130440

SUPREME COURT OF ALABAMA

164 So. 3d 547; 2014 Ala. LEXIS 154

September 26, 2014, Released

SUBSEQUENT HISTORY: As Corrected August 6, 2015.

Released for Publication June 15, 2015.

PRIOR HISTORY: [**1] Appeal from Limestone Circuit Court. (CV-13-0058). Robert M. Baker, Trial Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: vacation, convenient, abutting, vacated, summary judgment, special injury, landowner, vacate, street, standing to appeal, ingress, egress, property owners, general public, genuine, feet, reasonable means, vacating, waterway, drainage, deprive, alley, river, matter of law, proposed road, public hearing, governing body, standing to contest, issue of material fact, obstructed

COUNSEL: Sara Johnson Crossfield, Appellant, Pro se.

For Appellee: T. Mark Maclin of Wilmer & Lee, PA, Athens.

JUDGES: MOORE, Chief Justice. Stuart, Bolin, Parker, and Main, JJ., concur. Murdock, Shaw, Wise, and Bryan, JJ., dissent.

OPINION BY: MOORE

OPINION

[*548] MOORE, Chief Justice.

Sara Johnson Crossfield appeals from a summary judgment entered by the Limestone Circuit Court in favor of the Limestone County Commission ("the Commission") in Crossfield's action to reverse the Commission's decision to vacate a portion of Dogwood Flats Road[1] in Limestone County. We affirm.

1 The name of the road appears both as "Dogwood Flat Road" and "Dogwood Flats Road" in the record and in the parties' briefs. We refer to the road as "Dogwood Flats Road."

I. Facts and Procedural History

In early 2013, the Commission proposed to vacate a portion of Dogwood Flats Road pursuant to § 23-4-1 et seq., Ala. Code 1975 (which addresses vacating streets and highways). The relevant section of Dogwood Flats Road lies near Tanner and runs north and south for a distance of approximately 2,230 feet. In April 2013, the Commission advertised the proposed road vacation for four consecutive weeks in a local newspaper. The Commission notified [*549] the abutting property owners of that portion of Dogwood Flats Road proposed to be vacated and scheduled [**2] a public hearing pursuant to § 23-4-2, Ala. Code 1975. Crossfield's property does not abut the portion of Dogwood Flats Road proposed to be vacated; it abuts Dogwood Flats Road approximately 400 feet north of the portion of the road that the Commission proposed to vacate.

On May 6, 2013, the Commission held a public hearing concerning the proposed road vacation. Crossfield attended the hearing and voiced her objections to the proposed road vacation pursuant to § 23-4-2(a) ("Any citizen alleging to be affected by the proposed vacation may submit a written objection to the governing body or may request an opportunity to be heard at the public hearing held as required herein.").

After the hearing, the Commission adopted a resolution vacating the relevant portion of the road. The Commission found that the portion of the road sought to be vacated was no longer in use by the general public and that it was in the public interest to vacate that portion of Dogwood Flats Road. The Commission found that the vacation of the road would not deprive any owner of any right to convenient and reasonable means of ingress and egress.

On June 5, 2013, Crossfield filed an appeal of the Commission's vacation of the road in the Limestone

Circuit [**3] Court ("the trial court") pursuant to § 23-4-5, Ala. Code 1975 ("Any party affected by the vacation of a street, alley, or highway pursuant to this chapter may appeal within 30 days of the decision of the governing body vacating the street to the circuit court of the county in which the lands are situated ...."). Crossfield alleged that she was a "party affected by the vacation of a portion of Dogwood Flat[s] Road" and asked the trial court to set aside the vacation of the road. Crossfield alleged, among other things, that the Commission had obstructed her access to Piney Creek, which lies to the east and south of Crossfield's property.

On June 21, 2013, the Commission moved the trial court to dismiss Crossfield's appeal on the grounds that "Crossfield is not a person affected by the vacation and lacks standing to appeal the decision of the [Commission] to vacate the subject portion of Dogwood Flats Road." The Commission's motion to dismiss included copies of public records relevant to the vacation of the road and an affidavit from Richard Sanders, Limestone County's engineer who coordinates the Commission's vacation of county roads. Sanders's affidavit states:

> "[Crossfield] is not an owner of land abutting the portion [**4] of Dogwood Flats Road to be vacated.
>
> "The portion of Dogwood Flats Road the County vacated is approximately 400 feet south of property owned by [Crossfield].
>
> "The [Commission] determined that the vacation of the subject portion of Dogwood Flats Road would not deprive any owner of any right to convenience [sic] and reasonable means of ingress and egress, including [Crossfield]. ...
>
> "... Dogwood Flats Road is not accessed by a public thoroughfare from the south. Upon my knowledge and belief, prior to the vacation of the subject portion of Dogwood Flats Road, [Crossfield] did not use the vacated portion of Dogwood Flats Road for ingress and egress to and from her property.
>
> "Further, upon my knowledge and belief, neither [Crossfield] nor any other abutting landowners or the general public has been deprived of any convenient and reasonable ingress and egress to a nearby waterway. The vacated portion [*550] of Dogwood Flats Road was not being used by the general public to access any waterway or body of water."

On September 23, 2013, the Commission moved the trial court to convert its motion to dismiss into a motion for a summary judgment, which motion the trial court granted. On October 8, 2013, Crossfield [**5] filed a response to the Commission's motion. On November 20, 2013, Crossfield filed an affidavit on her own behalf in opposition to the Commission's motion for a summary judgment. Crossfield's affidavit states, in pertinent part:

> "Roy (Crossfield) and I were both stunned when the [Commission] chose to close Dogwood Flat[s] Road and bar us with a chain and padlocks from the Piney Creek. I have read cases ... that state clearly that if a landowner is barred from a body of water that he does have the right for the vacation to be set aside. A landowner suffers a special injury if he is denied convenient access to a nearby body of water. Williams v. Norton, 399 So. 2d 828 (Ala. 1981). McPhillips v. Brodbeck, 289 Ala. 148, 266 So. 2d 592 (Ala. 1972). Holz v. Lyles, 287 Ala. 280, 251 So. 2d 583 (Ala. 1971). We ask the good judge to set aside the vacation of Dogwood Flat[s] Road and reunite us again with our Piney Creek. ...
>
> "In my case, as the owner of Farm 8556, the vacation of Dogwood Flat[s] Road affects the value of my property, the safety of my property, the drainage of it, and the survival of it. There are many people who used the public way to visit the Piney Creek who are ardent supporters and cherish the Piney Creek, but no one cheers more loudly than the owner in the vicinity."[2]

2 Crossfield's affidavit also recites events occurring in 2011 following a tornado and a [**6] flood.

On November 25, 2013, the trial court held a hearing on the Commission's motion for a summary judgment at which testimony was presented. At the hearing, the Commission argued that Crossfield did not have standing to appeal the vacation of Dogwood Flats Road because she was not an abutting landowner. Crossfield argued that she had standing to appeal because the vaca-

tion of the road denied her convenient access to Piney Creek and because the value of her property would be diminished as a result of the back-up of water in the ditches along Dogwood Flats Road, which would no longer be maintained by the County.

On December 12, 2013, the trial court granted the Commission's motion for a summary judgment and dismissed Crossfield's appeal. The trial court's order states:

> "Upon a full and fair consideration of the matters pled and oral arguments made to the Court at said hearing, the Court finds there is no genuine issue as to any material fact and [the Commission] is entitled to the judgment of having [Crossfield's] appeal dismissed as a matter of law."

On January 17, 2014, Crossfield filed her notice of appeal to this Court pursuant to § 23-4-5 ("From the judgment of the circuit court, an appeal [**7] may be taken within 42 days by either party to ... the Supreme Court ....").

II. Standard of Review

Summary judgment is proper if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56(c), Ala. R. Civ. P.

> [*551] "'The standard of review applicable to a summary judgment is the same as the standard for granting the motion....'
>
> "'... The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of that party. To defeat a properly supported summary judgment motion, the nonmoving party must present "substantial evidence" creating a genuine issue of material fact--"evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved."'"

Pritchett v. ICN Med. Alliance, Inc., 938 So. 2d 933, 935 (Ala. 2006)(quoting Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994))(internal citations omitted). "Questions of law are reviewed de novo." Alabama Republican Party v. McGinley, 893 So. 2d 337, 342 (Ala. 2004).

III. Discussion

The issue before this Court is whether [**8] Crossfield was a "party affected by the vacation" of Dogwood Flats Road and thus has standing to contest the Commission's decision pursuant to § 23-4-5, which provides:

> "Any party affected by the vacation of a street, alley, or highway pursuant to this chapter may appeal within 30 days of the decision of the governing body vacating the street to the circuit court of the county in which the lands are situated, and upon such appeal, the proceeding shall be tried de novo, either party having the right to demand trial by jury .... From the judgment of the circuit court, an appeal may be taken within 42 days by either party to the Court of Civil Appeals or the Supreme Court in accordance with the Alabama Rules of Appellate Procedure."

(Emphasis added.) Section 23-4-2, Ala. Code 1975, provides that vacation of a road "shall not deprive other property owners of any right they may have to convenient and reasonable means of ingress and egress to and from their property, and if that right is not afforded by the remaining streets and alleys, another street or alley affording that right must be dedicated." (Emphasis added.)[3]

> 3 Crossfield correctly notes that vacation statutes are to be strictly construed. See Bownes v. Winston Cnty., 481 So. 2d 362, 363 (Ala. 1985) ("There is a common law prohibition [**9] against the vacation of public ways. ... Therefore, the vacation statutes are in derogation of the common law prohibition against the vacation of public ways and must be strictly construed.").

The Commission maintains that Crossfield has not provided substantial evidence showing that she is an affected party with standing to appeal. According to the Commission, Crossfield is not an affected party because (1) she is not an abutting landowner and (2) she has not

been denied access to a waterway. Crossfield maintains that she does not have to be an abutting landowner in order to appeal the vacation of the road. She asserts that she can bring an action to prevent the vacation of Dogwood Flats Road because, she says, she has a special interest in the road and suffers "damages different in kind and degree from those suffered by the public."

A. Ownership of abutting property is not a requirement for standing under § 23-4-5.

Ownership of land abutting the portion of the road to be vacated is not a [*552] requirement for standing to appeal the government's decision to vacate the road. See Jackson v. Moody, 431 So. 2d 509, 513 (Ala. 1983)("[P]laintiffs do possess standing to contest the vacation, notwithstanding the fact that they are not abutting property owners."); Gwin v. Bristol Steel & Iron Works, Inc., 366 So. 2d 692, 694 (Ala. 1978) [**10] ("[I]t is no consequence that they were not abutting owners to that specific portion proposed to be closed ...."). Crossfield correctly asserted that she is not required to be an abutting landowner to the vacated portion of the road in order to have standing to appeal the Commission's decision under § 23-4-5.

B. To have standing under § 23-4-5, an individual must assert a special injury closely connected to the vacation of the road.

Section 23-4-5 does not define the phrase "party affected" used therein. However, § 23-4-2(b) protects "other property owners of any right they may have to convenient and reasonable means of ingress and egress to and from their property." In addition, we have held that individuals who suffer "a special injury" from the vacation of a road have standing to contest the vacation. An individual suffers a special injury when he or she has suffered damage "different in kind and degree from [that] suffered by the public in general." Hall v. Polk, 363 So. 2d 300, 302 (Ala. 1978). For example, a special injury could be "an obstruction [that] forces the owner of land abutting on the obstructed road into a circuitous route to the outside world or denies convenient access to a waterway." Id.

However, a claimed injury is too remote to support standing when there is a "lack of a close connection between the wrong and the injury." Moody, 431 So. 2d at 513. We have referred to the requirement of a close connection as the "rule of remoteness," id.; see also Gwin, 366 So. 2d at 694.

In Hall v. Polk, we held that the petitioner, who lived directly east of a river, had standing when the roadway that was [**11] obstructed was the only "direct, convenient access" to the river from the petitioner's property. 363 So. 2d at 302. Although a more circuitous route to the river was available, we held that the petitioner suffered a special injury because of his proximity to the river and the obstruction of convenient access. 363 So. 2d at 303. We also have held that property owners had standing as the result of a right derived from owning property in a subdivision. See Jackson v. Moody, 431 So. 2d 509, 513 (Ala. 1983)(holding that the interest in an access road to the dedicated beach area for those residing in the subdivision is not remote); Gwin, 366 So. 2d at 694 (holding that petitioners had standing because they purchased land in a subdivision as laid out by the subdivision map).

Crossfield stated that the vacation of Dogwood Flats Road affects the value, safety, drainage, and survival of her property and that the vacation of the road bars her "with a chain and padlocks from the Piney Creek." However, Crossfield failed to provide substantial evidence demonstrating that the road vacation affected her legal rights, her convenient access to Piney Creek, or the value, safety, and drainage of her property. Unlike the petitioner in Hall, Crossfield has not shown that the portion of the road vacated is her [**12] only direct and convenient means of access to Piney Creek. Evidence of a chain and a padlock on one road does not show that there is no other convenient way to get to Piney Creek. Crossfield has not demonstrated any other non-remote special injury, [*553] such as a property interest, as the petitioners in Gwin and Jackson did.

Crossfield has not shown that she would suffer a specific injury different in kind and degree from that suffered by the general public and that passes muster under the rule of remoteness; therefore she is not an "affected" party pursuant to § 23-4-5.

IV. Conclusion

Crossfield's evidence, even when viewed in the light most favorable to her as the nonmovant, does not create a genuine issue of material fact that would preclude a summary judgment for the Commission. Therefore, the summary judgment in favor of the Commission is affirmed.

AFFIRMED.

Stuart, Bolin, Parker, and Main, JJ., concur.

Murdock, Shaw, Wise, and Bryan, JJ., dissent.

DISSENT BY: MURDOCK

DISSENT

MURDOCK, Justice (dissenting).

I dissent. The Limestone County Commission's decision to vacate over 2,000 feet of Dogwood Flats Road may be due to be upheld on the merits, but I cannot

agree that Sara Johnson Crossfield does not have standing to [**13] challenge that decision.

As the main opinion notes, one who establishes that he or she has a "special injury" resulting from the vacation of a road has standing to challenge that vacation. The main opinion further observes that "[a]n individual suffers a special injury when he or she has suffered damage 'different in kind and degree from [that] suffered by the public in general.'" ___ So. 3d at ___ (quoting Hall v. Polk, 363 So. 2d 300, 302 (Ala. 1978)).

Crossfield's home and property abut Dogwood Flats Road at a point only 400 feet north of the vacated section. That fact alone gives Crossfield an interest in the roadway different from that of the general public. Furthermore, the rendition of the facts provided by the main opinion makes it clear that the vacation of Dogwood Flats Road will deprive Crossfield of a relatively direct means of access to Piney Creek. Moreover, Crossfield testified by affidavit that the vacation of Dogwood Flats Road will affect the value of her property, safety, and drainage. Thus, both Crossfield's allegations and the undisputed facts establish that she suffered the kind of "special injury" required to allow her to challenge the vacation of Dogwood Flats Road.

Shaw, Wise, and Bryan, JJ., concur.

Leon Curry v. State

No. 2 Div. 519

Court of Criminal Appeals of Alabama

506 So. 2d 346; 1986 Ala. Crim. App. LEXIS 6506

August 12, 1986

PRIOR HISTORY: [**1] Appeal from Marengo Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: truck's, pounds, weighing, weighed, inspection, station, certificate, crew, weigh, morning, accuracy, load, axel, agriculture, overweight, maximum, highway, tolerance, portable, loaded, department of agriculture, prescribed, trooper, observe, hearsay, legal weight, ticket, fine, hearsay rule, legal limit

COUNSEL: John W. Cooper, for Appellant.

Charles A. Graddick, Attorney General, and J. Elizabeth Kellum, Asst. Atty. Gen., for Appellee.

JUDGES: Tyson, Judge. All the Judges concur.

OPINION BY: TYSON

OPINION

[*347] Leon Curry was charged with and convicted of operating an overweight vehicle, in violation of the laws of the State of Alabama. The trial judge imposed a fine on the appellant of $500.

Donald Ralph Berry, Jr. testified that he is an Alabama State Trooper assigned to the enforcement division of the Department of Public Safety, and he runs the weight detail for six counties, including Marengo County. On the morning of March 29, 1985, he and his weight crew set up a portable weigh station at the intersection of Third Avenue and Arcola Road in Demopolis, Alabama. The other members of the weight crew were: the weight crew chief, James Edmonds, and Barry Mitchell and Dale Mitchell.

As the trucks passed by the station, each was stopped and weighed, except those that were obviously underweight. Those trucks were allowed to pass.

As the trucks that were to be weighed pulled onto the scales, Berry and Barry Mitchell would observe [**2] the digital readings on the left or driver's side of the truck, and Edmonds and Dale Mitchell would observe the readings on the right or passenger's side of the truck. Then Barry and Dale Mitchell would call out the number readings from the scales on their respective side of the truck and Edmonds would write down the numbers.

Sometime during the morning in question, this appellant drove up in a tarped dump truck. Berry stated that trucks with tarps were always weighed because the load in the truck can not be seen due to the tarp. Berry testified that the tires on the appellant's truck were "bulged out," which indicated to him that the truck was "probably loaded in excess of the legal weight." (R. 16) Each of the five axels on the appellant's truck were weighed and then the weights were totaled. After this result was determined, Berry issued the appellant a ticket for operating an overweight vehicle. Berry stated that approximately twenty or thirty trucks were weighed at this particular location on the morning in [*348] question and he gave out a total of five tickets.

Edmonds testified that he records and maintains all weight figures that are called out by his weight crew. [**3] He stated that the portable scales that are used in weighing the trucks are inspected, adjusted, and certified periodically. The scales that were used on the morning of March 29, 1985, had been inspected and certified on December 18, 1984. He stated that the scales must be certified at least every 120 days. The period from December 18, 1984 to March 29, 1985 was less than the 120 day period.

As the appellant's truck was being weighed on the morning in question, he wrote down all the figures that were called out to him. The weight figures on the appellant's truck were recorded as follows:

1st axel	10,100 pounds
2nd$=$<<PQ6>axel	21,900 pounds
3rd axel	21,300 pounds
4th axel	23,400 pounds
5th axel	26,200 pounds
Total weight	102,900 pounds

Edmonds testified that the maximum weight limit for a truck with five axles is 80,000 pounds. A ten percent scale tolerance is allowed, and if a truck is only ten percent overweight, a ticket is not issued. The weight of the appellant's truck exceeded the maximum weight including the ten percent scale tolerance.

The appellant testified that, on the morning in question, he was transporting a load of limestone from Allied [**4] Products to the Citadel Plant. When his truck was loaded at Allied Products, his load was weighed by computer scales on the front end loader. His truck is filled until the load reaches the legal weight. The usual load is 84,000 or 85,000 pounds. When the appellant pulled his truck up to the scales on this particular morning, Berry asked if he was loaded and how much he was hauling. The appellant told Berry he had 84,000 or 85,000 pounds in the truck. Berry then instructed his crew to weigh the truck. The appellant did not think he had a load of 102,000 pounds. When the appellant took his truck to the Citadel Plant, it was weighed. The appellant did not know the results of the weighing at the Citadel Plant.

I

The appellant contends the weighing of his truck constituted an illegal search and seizure and was contrary to the laws of the State of Alabama.

In *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), the United States Supreme Court held that random spot checks of vehicles for documents by the police were in violation of the Fourth Amendment to the United States Constitution.

However, the Supreme Court stated that the States were free to develop [**5] other "methods for spot checks that involve less intrusion or do not involve the unconstrained exercise of discretion." *Delaware v. Prouse*, 99 S. Ct. at 1401. "Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Delaware v. Prouse*, 99 S. Ct. at 1401. In footnote 26 of this opinion, the Supreme Court stated that their holding does not ". . . cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others."

All four members of the weight crew testified that all trucks that passed by their location were stopped and weighed unless they were obviously underweight.

The stopping and weighing of the appellant's truck did not involve the unconstrained or unbridled discretion of Trooper Berry and his crew, and thus, did not constitute the type of impermissible intrusion contemplated by the Fourth Amendment.

Section 32-9-32, Code of Alabama 1975, provides in pertinent part:

> "The director of the highway department is authorized to designate, furnish instructions to, prescribe rules and regulations [**6] for the conduct of and to supervise official stations for determining the weight of motor vehicles at such points as it may be deemed necessary. Such [*349] designated weighing devices shall be checked by the weights and measures division of the department of agriculture and industries and certified to be correct within the tolerance prescribed under the rules and regulations established by the state department of agriculture and industries, and checks shall be made at such points as is deemed necessary by the weights and measures division of the department of agriculture and industries."

Berry testified that he is in charge of the weight crew for six counties, and his instructions are to set up weigh stations where he feels the necessity to act. The fact that Berry is instructed to decide where to set up weigh stations does not affect the validity of the weigh stations. Obviously, he is instructed to determine whether to set up these stations because he is in charge

of these particular counties and is in the best position to determine where they should be located. The fact that these stations are portable and not permanent does not mean they do not constitute "official [**7] stations."

Furthermore, § 32-9-31, Code of Alabama 1975 permits an officer (which includes a State trooper according to § 32-9-3, Code of Alabama 1975), who has reason to believe that the weight of a truck is in excess of the legal limit, to weigh that vehicle by portable or stationary scales.

Berry testified that the "bulging of the tires" on the appellant's truck indicated to him that the truck was "probably loaded in excess of the legal weight." (R. 16) Thus, Berry had reason to believe the appellant's truck was overweight and had the authority to weigh this truck.

The stopping and weighing of the appellant's truck was not in violation of any provision of the United States Constitution or the laws of the State of Alabama.

II

A

During Edmonds's testimony, he stated he was present and observed the inspection of the scales by the Department of Agriculture and Industries of Alabama. This testimony was admitted over a hearsay objection. In *Leonard v. State*, 38 Ala. App. 138, 79 So. 2d 803, *cert. denied*, 262 Ala. 702, 79 So. 2d 808 (1955), this court held that an officer's testimony as to the inspection of weighing scales by the Department of Agriculture and Industries [**8] was not hearsay because the officer testified that he was present and observed the inspection and testing of the scales. Thus, Edmonds's testimony concerning the inspection of the scales was properly admitted at trial.

B

The certificate of accuracy of the scales issued by the Department of Agriculture and Industries was admitted into evidence. Section 32-9-32, Code of Alabama 1975, provides in part:

> "A certificate issued by the chief of the division of weights and measures of the department of agriculture and industries, signed by such official, under oath, and countersigned by the commissioner of agriculture and industries, in which the chief of the division of weights and measures certifies that scales, or weighing devices, have been checked and approved as required under the provisions of this section and section 32-9-31 and found to be correct, within prescribed tolerance, shall be received in any court as prima facie evidence of the fact that the scales or weighing devices designated and identified in such certificate have been checked and approved for accuracy in accordance with the requirements of this section and section 32-9-31; provided, that such certificate [**9] must show that the scales or weighing devices were checked for accuracy within a period of four months (120 days) prior to the date on which the motor vehicle was weighed to determine whether such vehicle was being operated in violation of this chapter."

The appellant contends the above section violates his right to cross-examine the person who conducted the inspection of the scales. He also contends the certificate of [*350] accuracy was inadmissible on hearsay grounds.

Edmonds testified that a certificate of accuracy is issued in the regular count of his operations and that the certificate is normally issued after an inspection is done. The requirements of § 12-21-43, Code of Alabama 1975, and Rule 44, ARCP pertaining to business records were met in this instance. The certificate of accuracy was properly admissible under the business records exception to the hearsay rule. This exception is applicable in criminal cases. *Neal v. State*, 372 So. 2d 1331 (Ala. Cr. App.), appeal after remand, 372 So. 2d 1348 (Ala. Cr. App.), cert. denied, 372 So. 2d 1348 (Ala. 1979).

Furthermore, the appellant's rights were not violated by his inability to cross-examine the person [**10] who conducted the inspection of the scales. "The very essence of the admissibility of a business record is its probability of trustworthiness." *Neal*, supra at 1343.

C

The appellant's contention that the entry into evidence of the weight sheet was in violation of the hearsay rule is without merit. The fact that Edmonds did not personally observe the figures that were called out to him by Barry Mitchell affects the weight but not the admissibility of those figures on the weight sheet in question. *Meriwether v. Crown Investment Corporation*, 289 Ala. 504, 268 So. 2d 780 (1972).

III

The appellant contends the trial judge erred in imposing the maximum fine of $500. He asserts the fine in this case should have been imposed based on his culpa-

bility rather than the number of pounds the truck was in excess of the maximum weight limit.

Section 32-9-5, Code of Alabama 1975, provides:

> "The operation of any truck, semi-trailer truck or trailer in violation of any section of this chapter or of the terms of any permit issued under this chapter, shall constitute a misdemeanor, and the owner thereof, if such violation was with his knowledge or consent, and the operator thereof [**11] shall, on conviction, be fined not less than $100.00 nor more than $ 500.00 and may also be imprisoned or sentenced to hard labor for the county for not less than 30 days nor more than 60 days."

The statute above does not state that the penalty imposed upon an operator of a truck for the violation of § 32-9-20 should be calculated on the basis of the operator's degree of culpability in violating the truck weight restrictions.

In fact, § 32-9-20, Code of Alabama 1975, can be committed without regard to the intent or knowledge of the operator of the truck. *Leonard*, supra.

> "'The obvious purposes for enacting truck weight laws is for the safety of the public, and keeping highways in good condition for the traveling public. Travel upon the highways must be as safe as it can reasonably be made consistent with their efficient use. Any overloaded truck creates a safety hazard upon the public highway as well as contributing to a bad state of repair.' *State Department of Public Safety v. Scotch Lumber Co., Inc.*, 293 Ala. 330, 302 So. 2d 844, 846 (1974)."

Heathcock v. State, 415 So. 2d 1198, 1203 (Ala. Cr. App.), cert. denied, 415 So. 2d 1198 (Ala. [**12] 1982).

It is obvious that the more a truck is overweight, the more it endangers the safety of the public and contributes to the bad repair of our highway system. Thus, the imposition of a penalty based on the extent to which a truck's weight exceeds the maximum legal limit is logical in view of the legislature's purpose in enacting § 32-9-20.

Furthermore, the penalty imposed by the trial court was within the statutory limits prescribed by the legislature and this court has no authority to review a sentence which is imposed within the limits of a statute. *Moreland v. State*, 469 So. 2d 1305 [*351] (Ala. Cr. App.), cert. denied, 469 So. 2d 1305 (Ala. 1985).

The judgment of the trial court is, therefore, due to be, and is hereby, affirmed.

AFFIRMED.

All the Judges concur.

Dale H. DAVIS v. Robert T. LINDEN et al.

No. SC 1817

Supreme Court of Alabama

340 So. 2d 775; 1976 Ala. LEXIS 1582

December 17, 1976

DISPOSITION: [**1] AFFIRMED.

CORE TERMS: public road, east side, south side, lived, gate, private road, prescription, west side, cross-examination, hunting, acquire, trail, mail, fish

COUNSEL: Francis A. Poggi, Jr., Fairhope, for Appellant.

Lloyd E. Taylor, Fairhope, for Appellees.

JUDGES: Almon, Justice, wrote the opinion. Heflin, C.J., and Bloodworth, Jones and Embry, JJ., concur.

OPINION BY: ALMON

OPINION

[*776] The Circuit Court of Baldwin County sitting without a jury held that the appellant-defendant was unlawfully obstructing a public road. The court gave the appellant thirty days to remove the obstructions.

Appellant contends that the evidence was insufficient to support the judgment of the court. We disagree and affirm.

The road in question is a rural road bordered by farmland. The road follows a section line south from County Road 54 for approximately one-half mile.

The appellant's land lies along the entire east side of the road and along the northern half of the west side. The land of Robert Linden (an appellee) borders the southern half of the west side. As the road terminates, it abuts the land of Lloyd E. Taylor and Alan Dale Taylor (appellees), which lies south of that part of the appellant's land situated on the east side of the road.

The sole question is whether the road became public because of general use by the public for [**2] twenty years or more. "The case presents purely a question of fact - whether the road is in fact a public road or only a private . . . road . . . ." *Williams v. Prather*, 239 Ala. 524, 526, 196 So. 118, 119 (1940). We would not reverse the trial judge's findings based on testimony taken ore tenus without a showing that they are plainly wrong or manifestly unjust. *Hinds v. Slack*, 293 Ala. 25, 299 So.2d 717 (1974).

Lester D. Linden, age seventy-one, testified that in 1905 his father purchased what is now the Davis property; the record is not entirely clear whether this included the Davis property west of the road or just the Davis property east of the road. Lester later acquired the property from his father, lived on it, and farmed it until approximately 1947 when he sold it. According to Lester the road was used for approximately five years as a regular mail route together with an "old trail road" along the south side and east side of the Davis property. (Robert T. Linden, Lester's brother, later testified that the road was used by the mail man beginning in 1914.) The trail road on the south side and the east side is not in question and apparently was abandoned long ago.

[**3] On cross-examination Lester Linden testified as follows:

"Q. Did the general public use it?

"A. If they wanted to.

"Q. Anybody?

"A. Anybody, yes sir.

"Q. Where were they going?

"A. Where do people go? - Hunting and fishing.

"Q. Where do they fish?

"A. They went quail hunting.

"Q. The general public?

"A. Anybody that wanted to go.

"Q. You never objected to people going up and down your road?

"A. That wasn't my road."

Later, on cross-examination, Lester Linden also testified as follows:

> "Q. When they got down here they were trespassing on your property?
>
> "A. No.
>
> "Q. You didn't own this property?
>
> "A. No, there was a section line road there are [sic] always been a public road."

Mr. Milton J. Gustafson, age seventy-four, testified that he was a friend of the Linden family when they lived on the property. He arrived in the area in 1904 with his parents, lived there until 1936, and returned to the area in 1953.

> "Q. Do you recall whether or not there was a road to the Linden home place?
>
> "A. There was a road, not only to the place but past it.
>
> "Q. Was it on the south side of the Linden place?
>
> "A. Yes, [**4] sir.
>
> "Q. Where did you go when you went beyond the Linden place?
>
> [*777] "A. Well, beyond Fish River we had friends and acquaintances of my parents' family named Rickman that were friends and we visited them and another family named Newport, and in addition to that, that was our main road to Daphne which was our access to Mobile."

The road has been fenced on both sides during part of its history. The testimony indicated there were gates across the road on occasion to control livestock, but that the gates were either open or unlocked with the exception of a few months within the past few years when the Taylors and Davis placed a gate across the road by mutual agreement. Other testimony indicated that the road as it now exists has been open to anyone who wanted to use it, though as a practical matter the road was used primarily, if not solely, by the landowners bordering the road, and rarely by anyone else.

At the close of all the evidence, the trial judge made the following statement:

> "I don't think there is any doubt that this road has been a public road for 60 or 70 years and here is the whole thing that I think Mr. Poggi and his client forget: When you [**5] acquire a road by prescription, it takes 20 years using it by the public; the mere fact the public moves out and did not use it much doesn't destroy it. The only way you can change it is by following the Statute by going to the County Commission and getting the adjoining land owner and the other way is fences up, but it takes the same length of time to take it away from the public as it did for the public to acquire it. . . ."

We conclude there was sufficient evidence presented to support the trial judge's findings that the road is a public road. Furthermore, the evidence supports the finding that the road has not reverted to a private road. "Nonuser short of the time of prescription does not operate as a discontinuance of a public road . . . ." *Harbison v. Campbell*, 178 Ala. 243, 252, 59 So. 207, 210 (1912). The fact that at one time the road had an extension which no longer exists does not change the nature of that part which has continued to be used. *Purvis v. Busey*, 260 Ala. 373, 71 So.2d 18 (1954). Testimony existed indicating that at one time or another the county *may* have graded the road; however, county maintenance is not essential to the status of [**6] public road, though it would be strong evidence thereof. *Carter v. Walker*, 186 Ala. 140, 65 So. 170 (1914).

The judgment is affirmed.

AFFIRMED.

HEFLIN, C.J., and BLOODWORTH, JONES and EMBRY, JJ., concur.

William E. DeWitt v. Julian Ray Stevens and Barbara Stevens

1901336

SUPREME COURT OF ALABAMA

598 So. 2d 849; 1992 Ala. LEXIS 428

April 24, 1992, Released
April 24, 1992, Filed

SUBSEQUENT HISTORY: [**1] As Corrected May 18, 1992.

PRIOR HISTORY: Appeal from St. Clair Circuit Court. (CV-90-61)

DISPOSITION: AFFIRMED.

CORE TERMS: right-of-way, route, highway, driveway, convenient, public road, feet, drive, condemn, inconvenience, landowner, distance, convenience, probate, tenus, ore, shortest, body of land, nearest, tract, strip of land, easement, roadway, inconveniece, physically, palpably, nonparty, plainly, evidence to support, land owned

COUNSEL: For Appellant: Larry O. Putt and F. Braxton Wagnon of Smyer, White & Putt, Birmingham.

For Appellee: Michael L. Roberts of Floyd, Keener, Cusimano & Roberts, Gadsden; and Charles E. Robinson, Ashville.

JUDGES: ALMON, Hornsby, Adams, Steagall, Ingram

OPINION BY: ALMON

OPINION

[*850] ALMON, JUSTICE.

William E. DeWitt appeals from a judgment denying his petition for condemnation of a right-of-way across the property of Julian Ray Stevens and Barbara Stevens. DeWitt argues that the trial court erred in admitting evidence of other potential access to DeWitt's property, in applying the law to the facts, and in its findings of fact.

DeWitt initially filed an action in the circuit court seeking to have an easement established across the Stevenses' property, but the court denied that request. He then initiated this action by petitioning the probate court for a right-of-way. DeWitt argued that his property was landlocked and that he had no means of ingress and egress because the Stevenses' land was between his land and the nearest public road, Highway 231.

The probate court refused to condemn the property and held, after viewing the [**2] properties, including the immediate area and the area DeWitt sought to condemn as a right-of-way, that there were nearer and more convenient ways for DeWitt to get to his property. DeWitt appealed to the circuit court and that court also, after receiving *ore tenus* evidence, denied DeWitt's application for condemnation of the right-of-way.

Under the *ore tenus* rule, the trial court's decision, "where supported by the evidence, is presumed correct and should be reversed only if the judgment is found to be plainly and palpably wrong, after a consideration of all of the evidence and after making all inferences that can logically be drawn from the evidence." *Martin v. First Federal Savings & Loan Ass'n of Andalusia*, 559 So. 2d 1075, 1078 (Ala. 1990). Although there is a presumption in favor of the findings of fact of the trial court where the testimony is presented *ore tenus*, such a presumption does not apply where the trial court has incorrectly applied the law to those facts. *Collier v. Brown*, 285 Ala. 40, 228 So. 2d 800 (1969).

In the present case the trial court made the following findings of fact: [**3] The Stevenses own property that lies between DeWitt's property and Highway 231, a public roadway. Dewitt's land is landlocked, because there is no existing public road, easement, or right-of-way for ingress to and egress from his property. The Stevenses' property does not touch Highway 231, but [*851] a private drive or roadway leads from Highway 231 to the Stevenses' property. The Stevenses use this drive as an access to and from their property, and it continues all the way through their property to DeWitt's property. Dewitt had previously used this drive to get to his property, but, after a dispute between the parties, the Stevenses would no longer allow DeWitt to

use the drive. The Stevenses also own a 100-foot-wide strip of land that connects their property to Highway 231, but the driveway described above is not on that strip of land. The driveway has been maintained and improved by the Stevenses over the years at their personal expense. It passes within 40 to 50 feet of their personal residence.

The trial court further found that using the driveway to get to his property was not DeWitt's closest route from Highway 231. The distance from Highway 231 along the driveway to DeWitt's [**4] property is 2,730 feet. DeWitt owns an easement across the first 1,130 feet of this distance, from Highway 231 to the beginning of the Stevenses' property. This portion of the driveway crosses property owned by St. Clair County. Therefore, the distance sought to be condemned across the Stevenses' property is 1,600 feet.

The court noted that two alternatives to the route along the Stevenses' driveway were available to DeWitt for access to his property. These alternative routes included: 1) from DeWitt's property across land owned by St. Clair County, and continuing across an additional 80- to 100-foot strip of land belonging to a landowner, not a party to this action, to Highway 231, for a total distance of 1,400 feet; or 2) from DeWitt's property, along the south boundary of the Stevenses' property, and continuing to Highway 231 along the 100-foot-wide strip owned by the Stevenses. This second route would not require DeWitt to use the private drive; however, any roadway across either of these routes would have to be built by DeWitt. The trial court did not determine the distance of the route using the 100-foot strip of land owned by the Stevenses, but it appears on the map to be [**5] shorter than the route along the Stevenses' driveway.

The trial court held that although the Stevenses' driveway is a convenient route for DeWitt, it is not the shortest route to a public road and would cause substantial inconvenience to the Stevenses. Specifically, the driveway passes within 40 to 50 feet of the Stevenses' house; the Stevenses raise cattle, and public access along the driveway would make it difficult to move the cattle from the field to the barn; the Stevenses are in the towing and salvage business, and public access to the driveway would create security problems with regard to the stored vehicles, as well as to their house. The Stevenses testified that they had had problems with burglaries and that those problems had prompted them to erect a gate at the entrance to their property; this gate, according to the Stevenses, eliminated the problem of persons stealing the cars.

DeWitt raises three issues in this appeal: 1) Whether the trial court committed reversible error by admitting at trial evidence showing that a way across the land of another, not a party to the litigation, would result in less inconvenience and damage to the nonparty than would result to the Stevenses [**6] if their property was condemned; 2) Whether the trial court missapplied the law to the facts of this case; and 3) Whether the judgment of the trial court, refusing to grant the right-of-way, was supported by the evidence.

Section 18-3-1, Ala. Code 1975, provides relief for a landowner who has no access to a public road from his land because the land is enclosed on all sides by the land of others. Section 18-3-1 provides:

> "The owner of any tract or body of land, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from [*852] the municipal government and the planning board of such municipality."

With regard to Dewitt's first argument, he cites this court to *Romano v. Thrower*, 261 Ala. 361, 74 So. 2d 235 (1954), for the proposition that it is no defense to § 18-3-1 that there exists a way across the land of another, not a party to the litigation, [**7] that would result in less inconveniece and damage to the nonparty than would result to the defendant if the way were established over the defendant's land. Prior to trial, DeWitt had filed a motion to preclude the evidence of an alternative route across the land of a landowner not a party to this action. The trial court admitted the evidence.

The trial court held that *Romano* was not applicable to the present case because in *Romano* the defendants admitted that the proposed right-of-way was the shortest way from Thrower's land to the nearest public road and the evidence sought to be introduced showed a way across the land of another person, not a party to the litigation, that was longer than the right-of-way Thrower was seeking to condemn.

In the present case, the alternative route that the trial court spoke of across the land of a person not a party to the litigation was shorter, not longer, than the right-of-way across the Stevenses' private drive. Furthermore, the trial court also noted another route that did not involve the land of a landowner who was not a party to the action. This route involved land that was owned by the Stevenses, and the Stevenses testified that they [**8] had no objection to DeWitt's using this portion of their property.

The *Romano* court also held that a person seeking to condemn a right-of-way over the land of another does not have the right to arbitrarily select a route that that

person considers to be the most convenient. *Romano*, 261 Ala. at 365, 74 So. 2d at 238. The Court quoted *Harvey v. Warren*, 212 Ala. 415, 417, 102 So. 899, 901 (1925), for the proposition that "'the triers of the facts [have] the right to consider all the physical facts of both properties as to the proper location of the right-of-way and the damage resulting to defendant by reason thereof.'" 261 Ala. at 365, 74 So. 2d at 239-39.

The probate judge physically examined the properties involved and the surrounding areas and denied the proposed right-of-way. The circuit judge also examined the property, heard *ore tenus* evidence, and denied the requested right-of-way. Under the circumstances, this Court will afford great weight to the trial court's conclusion that the route chosen by DeWitt was not the most convenient to both [**9] parties. *See Tenison v. Forehand*, 281 Ala. 379, 202 So. 2d 740 (1967).

DeWitt also argues that the trial court missapplied the law to the facts of this case, saying that the court failed to consider the convenience or inconvenience that would result to DeWitt if the right-of-way across the Stevenses' property was denied. DeWitt specifically argues that the trial court failed to take into account the expense and physical obstructions that would result if he had to construct a road across the alternative route to his property. He also argues that there was no evidence to show that allowing him the right-of-way would cause inconvenience to the Stevenses.

This court has held that the physical convenience of both landowners is a material consideration in determining whether to condemn a right-of-way over a person's property. *See Romano, supra*. DeWitt's contention that no evidence showed that any inconvenience would result to the Stevenses if the right-of-way was granted is without merit. The trial court in its findings of fact listed several factors that it took into account in determining the convenience or inconveniece that the requested [**10] right-of-way would cause the Stevenses. These have been set out above and we find it unnecessary to discuss them any further. In *Southern Ry. Co. v. Hall*, 267 Ala. 143, 100 So. 2d 722 (1957), the Court held:

"The statute [§ 18-3-1] does not comtemplate granting one citizen or corporation a right-of-way through the property of another citizen or corporation as a matter of mere convenience or as a mere [*853] matter of saving expense. There must be real necessity before private property can be invaded by a citizen for private purposes, if that can be done at all."

267 Ala. at 147, 100 So. 2d at 725, quoting *Roberts v. Prassenos*, 219 Miss. 486, 69 So. 2d 215 (1954). *See also Otto v. Gillespie*, 572 So. 2d 495 (Ala. Civ. App. 1990).

Finally, DeWitt argues that the judgment of the trial court was not supported by the evidence. We disagree. Both the probate court and the circuit court had ample evidence to support a finding that the right-of-way sought was not the most convenient route or the shortest route to DeWitt's [**11] property. Also, both of those courts had the advantage of physically examining the locations.

We can not conclude that the trial court's findings and conclusions were plainly and palpably wrong when it determined that the right-of-way DeWitt sought to condemn across the Stevenses' property should be denied. The trial court determined that the route chosen by DeWitt was convenient for him, but that it was not the most convenient, considering both parties, and was not the shortest route to a public road.

We find ample evidence to support the judgment denying DeWitt to a right-of-way across the Stevenses' private drive. Therefore, the judgment is affirmed.

AFFIRMED.

Hornsby, C. J., and Adams, Steagall, and Ingram, JJ., concur.

Wayne Dyess et al. v. Bay John Developers II, L.L.C.

2050857

COURT OF CIVIL APPEALS OF ALABAMA

13 So. 3d 390; 2007 Ala. Civ. App. LEXIS 783

December 21, 2007, Released

SUBSEQUENT HISTORY: Writ of certiorari quashed Dyess v. Bay John Developers II, L.L.C., 13 So. 3d 397, 2009 Ala. LEXIS 11 (Ala., Jan. 16, 2009)

PRIOR HISTORY: [**1]

Appeal from Baldwin Circuit Court. (CV-05-1103). Dyess v. Bay John Developers II, L.L.C., 2007 Ala. Civ. App. LEXIS 351 (Ala. Civ. App., May 25, 2007)

DISPOSITION: OPINION SUBSTITUTED; APPLICATION OVERRULED; REVERSED AND REMANDED WITH INSTRUCTIONS.

CORE TERMS: zoning, planning, condominium, summary judgment, unincorporated area, proposed development, condominium development, authorize, drainage, Ala Acts, local acts, declaratory judgment, flood-prone, designated, municipal, flood, prone, building permit, justiciable controversy, general police power, corporate limits, public streets, multifamily, empower, movant, parcel, build, plat, zone, planning commission's

JUDGES: PITTMAN, Judge. Thompson, P.J., and Thomas and Moore, JJ., concur. Bryan, J., concurs in the result, without writing.

OPINION BY: PITTMAN

OPINION

[*391] *On Application for Rehearing*

PITTMAN, Judge.

This court's opinion of May 25, 2007, is withdrawn, and the following is substituted therefor.

The director of the Baldwin County Planning and Zoning Department, Wayne Dyess; the Baldwin County Planning and Zoning Commission; and the Baldwin County Commission (jointly, "the defendants") appeal from a summary judgment entered in an action brought in the Baldwin Circuit Court by Bay John Developers II, L.L.C. ("Bay John"), to force approval [*392] of plans for a condominium complex Bay John proposes to build in an unincorporated area near Gulf Shores in southern Baldwin County. According to the record, the parties agree that the proposed development is to be located in a designated "flood prone" area in the county.

In September 2005, Bay John filed in the Baldwin Circuit Court a petition for a writ of mandamus compelling the defendants to approve condominium-construction plans that Bay John had submitted [**2] to the Baldwin County Planning and Zoning Department in July 2005. In its petition, Bay John asserted that its proposed development was not subject to any regulations promulgated by the defendants. In February 2006, Bay John amended its pleading, replacing its petition for a writ of mandamus with a complaint seeking a declaratory judgment and injunctive relief. At the same time, Bay John filed a summary-judgment motion in which Bay John reiterated its earlier allegations and submitted affidavits and a copy of the Baldwin County Subdivision Regulations ("the subdivision regulations"). The defendants filed an answer and a brief in opposition to Bay John's summary-judgment motion. The defendants asserted that because Bay John had filed the development plans without an application for a building permit, and because the defendants had requested more information before making a decision to deny or approve the development, Bay John's claims were not ripe for review. In addition, the defendants submitted evidence tending to show that the county's subdivision regulations were not zoning regulations and, therefore, were properly enforceable under Alabama law as to any proposed development in [**3] Baldwin County that would be located in a designated flood-prone area. *See generally* Ala. Code 1975, §§ 11-19-1 through 11-19-24.

Subsequently, the trial court entered a summary judgment in favor of Bay John. The trial court opined that Bay John's proposed condominium development was not a "subdivision" and, therefore, that the county's subdivision regulations did not apply to that proposed development. Moreover, the trial court concluded that

the pertinent subdivision regulations were, in fact, zoning regulations that could not be enforced by the defendants in an area that had not yet voted to be subject to the county's zoning ordinance. *See* Act No. 91-719, Ala. Acts 1991 (as amended by Act No. 98-665, Ala. Acts 1998). The trial court also awarded Bay John injunctive relief restraining the defendants from imposing or attempting to impose any provisions of the county's subdivision regulations, including any density limitations, on Bay John's property. In addition, the defendants were enjoined from interfering with the construction of Bay John's condominium project, including but not limited to Bay John's acquisition of a building permit.

The defendants have appealed and assert that the [**4] trial court erred in several respects in entering the summary judgment. The defendants first assert that Bay John's claim was not ripe for adjudication because, they contend, Bay John never submitted a building-permit application for review by the defendants. The Declaratory Judgment Act, §§ 6-6-220 through -232, Ala. Code 1975, "does not '"empower courts to ... give *advisory opinions*, however convenient it might be to have these questions decided for the government of future cases."'" *Bruner v. Geneva County Forestry Dep't*, 865 So. 2d 1167, 1175 (Ala. 2003) (quoting *Stamps v. Jefferson County Bd. of Educ.*, 642 So. 2d 941, 944 (Ala. 1994), quoting in turn *Town of Warrior v. Blaylock*, 275 Ala. 113, 114, 152 So. 2d 661, 662 (1963)) (emphasis [*393] added in *Stamps*). Our Supreme Court has emphasized that declaratory-judgment actions "must settle a '*bona fide* justiciable controversy.'" *Baldwin County v. Bay Minette*, 854 So. 2d 42, 45 (Ala. 2003) (quoting *Gulf South Conference v. Boyd*, 369 So. 2d 553, 557 (Ala. 1979)). The controversy must be "'definite and concrete,'" must be "'real and substantial,'" and must seek relief by asserting a claim opposed to the interest of another party "'"upon a state [**5] of facts which must have accrued."'" *Baldwin County*, 854 So. 2d at 45 (quoting *Copeland v. Jefferson County*, 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969)). "'[D]eclaratory judgment proceedings will not lie for an "anticipated controversy."'" *Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C.*, 828 So. 2d 285, 288 (Ala. 2002) (quoting *City of Dothan v. Eighty-Four West, Inc.*, 738 So. 2d 903, 908 (Ala. Civ. App. 1999)). Thus, if a declaratory judgment would not terminate any uncertainty or controversy, the court should not enter such a judgment. *Bruner*, 865 So. 2d at 1175; *see also Bedsole v. Goodloe*, 912 So. 2d 508, 518 (Ala. 2005). On the other hand, our Supreme Court has recognized that a purpose of the Declaratory Judgment Act is "to enable parties between whom an actual controversy exists or those between whom litigation is *inevitable* to have the issues speedily determined when a speedy determination would prevent unnecessary injury caused by the delay of ordinary judicial proceedings." *Harper v. Brown, Stagner, Richardson, Inc.*, 873 So. 2d 220, 224 (Ala. 2003).

In the present case, the defendants contend that Bay John must first submit the plans and specifications for the proposed [**6] condominium development to the Baldwin County Planning and Zoning Commission and then wait for a final decision approving or denying that building application before a justiciable controversy will exist. However, Bay John counters that because it has contended that the regulations propounded and enforced by the defendants do not apply to Bay John's proposed development, Bay John will never file and should not be required to file an application with the defendants. The controversy between Bay John and the defendants is justiciable because "present 'legal rights are thwarted or affected [so as] to warrant proceedings under the Declaratory Judgment statutes.'" *Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C.*, 828 So. 2d at 288 (quoting *Town of Warrior v. Blaylock*, 275 Ala. at 114, 152 So. 2d at 662). In the present case, the defendants contend that Bay John cannot proceed to build its condominium development without a county building permit; however, Bay John insists that it need not submit itself to the requirements of the county's subdivision regulations, which control density, road size, and other general considerations relating to building developments in the unincorporated areas [**7] of Baldwin County. Because Bay John's plan to improve its property is being "thwarted or affected" by the defendants' refusal to issue a building permit without compliance with the county's subdivision regulations, we agree with the trial court's determination that a justiciable controversy is presented in this case.

The appellate standard of review of summary judgments is well settled:

> "We review a summary judgment de novo. *Williams v. State Farm Mut. Auto. Ins. Co.*, 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that there exists no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; *Blue Cross & Blue Shield of Alabama v. Hodurski*, [*394] 899 So. 2d 949, 952 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. *Wilson v. Brown*, 496 So. 2d 756, 758 (Ala. 1986). Once the movant

> makes a prima facie showing that he is entitled to a summary judgment, the burden shifts to the nonmovant to produce 'substantial evidence' creating [**8] a genuine issue of material fact. Ala. Code 1975, § 12-21-12; *Bass v. SouthTrust Bank of Baldwin County*, 538 So. 2d 794, 797-98 (Ala. 1989). 'Substantial evidence' is 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' *West v. Founders Life Assurance Co. of Fla.*, 547 So. 2d 870, 871 (Ala. 1989)."

Turner v. Westhampton Court, L.L.C., 903 So. 2d 82, 87 (Ala. 2004).

Bay John's declaratory-judgment claim challenged the propriety and application of certain provisions of the subdivision regulations adopted by the Baldwin County Commission and administered by the Baldwin County Planning and Zoning Commission. The defendants assert that the county's subdivision regulations were adopted pursuant to Ala. Code 1975, §§ 11-19-1 through 11-19-24 (which apply to buildings erected on flood-prone land); Ala. Code 1975, §§ 11-24-1 through 11-24-6 (which authorize counties to enact and to enforce comprehensive subdivision regulations throughout the county but outside municipal corporate limits); and two local acts that authorized Baldwin County to exercise certain police powers over subdivisions [**9] within the county.

The first of these local acts, Act No. 91-719, Ala. Acts 1991 (as amended by Act No. 98-665, Ala. Acts 1998), establishes the Baldwin County Planning and Zoning Department, provides for the adoption and enforcement of planning and zoning regulations by the county, and authorizes the exercise of general police power over the placement and development of subdivisions within the county. The second local act, Act No. 1094, Ala. Acts 1973, authorizes the Baldwin County Commission "to regulate the minimum size of lots located or to be located in subdivisions of land" within the county situated outside the corporate limits of any municipality in Baldwin County. In addition, Act No. 1094 empowers the Baldwin County Commission "to regulate the planning and construction of all public streets, public roads, and drainage structures located or to be located in subdivisions of land" in the unincorporated areas of the county. Moreover, that act also authorizes the Baldwin County Commission to "require [that] the developers of all proposed subdivisions of lands" to be located in the unincorporated areas of the county "submit [**10] the plat of such proposed subdivision to the County Commission" for approval before such development may commence.

Particularly significant to a proper consideration of this appeal is the statutory authority codified at § 11-19-1 et seq., Ala. Code 1975, which grants counties broad authority over subdivisions that are located outside municipal boundaries within each county. That grant of planning authority specifically instructs each county to enact and enforce general land-use regulations, subdivision regulations, and even zoning regulations in "flood prone" areas. *See* § 11-19-7, Ala. Code 1975. As noted previously, no party to this appeal has contested the fact that Bay John plans to locate its development within a designated "flood prone" area of Baldwin County. After a careful review of the record and the relevant statutes, we can find nothing irregular or improper in the adoption or enforcement of subdivision regulations pertaining to the unincorporated areas in [*395] Baldwin County; to the extent that the trial court based any portion of its summary judgment upon a determination that Baldwin County had improperly adopted its subdivision regulations, that decision was erroneous.

The defendants [**11] next assert that the county's subdivision regulations are not an improper attempt to apply zoning restrictions to Bay John's property. Our Supreme Court has noted that "'[z]oning' and 'planning' are not synonymous." *Roberson v. City of Montgomery*, 285 Ala. 421, 425, 233 So. 2d 69, 72 (1970). In Alabama, the field of zoning "is primarily concerned with the regulation of the use of property, to structural and architectural designs of buildings, and the character [or type] of use to which the property or buildings *within classified or designated districts* may be put." *Id.* (emphasis added). In contrast, in *Roberson, supra*, our Supreme Court noted that "'planning' relates to the systematic and orderly development of a community." *Id.*

The county's subdivision regulations do not attempt to designate certain districts or areas or to restrict the kind, character, or use of structures on property set out in specific zones or districts. The pertinent subdivision regulations generally set forth the minimum size of lots; the layout and construction of public streets, roads, and drainage structures; and the proper placement of public utilities. In addition, the subdivision regulations specifically [**12] address the character of flood-prone land; Article 5 of the regulations notes that land found "to be unsuitable for subdivision or development due to flooding, improper drainage, ... or other features which will reasonably be harmful to the safety, health, and general welfare of present or future inhabitants of the subdivision ... shall not be developed unless adequate methods are formulated by the applicant and approved by the

County Planning Commission." As noted by the defendants, the regulations at issue do not seek to limit the actual use of the land. Moreover, the subdivision regulations at issue do not mandate certain types of land usage based upon categories, zones, or districts.

Based upon the definitions of "zoning" and "planning" as articulated in *Roberson*, we conclude that the county's subdivision regulations are not within the scope of *zoning* regulations, but fall instead within the generally authorized police power of "planning." As noted by the Georgia Supreme Court, "'[t]he regulation of certain types of businesses [and property] due to their inherent character is not general and comprehensive like zoning. ... [I]t "is [**13] not zoning law merely because it touches the use of land."'" *City of Walnut Grove v. Questoco, Ltd.*, 275 Ga. 266, 266, 564 S.E.2d 445, 446 (2002) (quoting *Fairfax MK, Inc. v. City of Clarkston*, 274 Ga. 520, 521-22, 555 S.E.2d 722, 722 (2001)). In light of the recognized distinction between zoning and planning, we conclude that the subdivision regulations at issue in this case do not purport to zone Bay John's property or the property of other extramunicipal landowners within the county, and we conclude that the trial court erred in determining that the county's subdivision regulations were "zoning" restrictions. Because we have concluded that the regulations at issue in this case and the application of those regulations to Bay John's proposed condominium development are a statutorily authorized and proper exercise of the general police power to plan "orderly development" within the unincorporated areas of Baldwin County, the trial court's characterization of the subdivision regulations as zoning regulations is erroneous. To the extent that the summary judgment is based upon that erroneous conclusion, that judgment must be reversed.

The defendants also assert that the trial court erred [**14] in its alternative conclusions [*396] that the county's subdivision regulations either do not apply to the proposed condominium project by their terms or that those regulations violate § 35-8A-106(b), Ala. Code 1975, a portion of Alabama's Uniform Condominium Act. Article 3 of the county's subdivision regulations defines a "subdivision" as "[t]he development and division of a lot, tract, or parcel of land into two or more lots, plats, sites, or otherwise;" in addition, a "major subdivision" is defined as any development that requires "any new street, drainage, or other public improvements." That definition is substantially similar to definitions of "subdivision" appearing in several sections of the Alabama Code, including § 11-24-1(a)(4), Ala. Code 1975, which defines a subdivision as "[t]he development and division of a lot, tract, or parcel of land into two or more lots, plats, sites, or otherwise" in order to sell or lease the property. The subdivision regulations do not distinguish between various types of multifamily developments, such as apartments, duplexes, or condominiums.

In the official commentary to the Alabama Uniform Condominium Act, § 35-8A-102 et seq., Ala. Code 1975, the definition [**15] of a "condominium" is generally discussed. Of particular interest is a portion of the Alabama Commentary pertaining to § 35-8A-106, in which it is stated that "[b]ecause it involves the division of land into two or more parcels, technically a condominium involves a subdivision of real estate."

Alabama Code 1975, § 35-8A-106(b), states that "[n]o zoning, subdivision, or other real estate use law ... may prohibit the condominium form of ownership or impose any requirement upon a condominium *which it would not impose upon a physically identical development* under a different form of ownership." (Emphasis added). We have already concluded that the subdivision regulations were properly promulgated by Baldwin County pursuant to statutory authority and that they apply to Bay John's proposed development to be located in a "flood-prone" area of Baldwin County. The record contains an affidavit signed by Dyess stating that Article 10 [1] of the county's subdivision regulations applies to *all* multifamily construction in the unincorporated areas of the county. Because the subdivision regulations make no distinction between condominiums and other multifamily developments, such as apartments, in their [**16] application, we conclude that the trial court erred to the extent that it concluded that those regulations violate § 35-8A-106(b), Ala. Code 1975.

1 In its application for a rehearing, Bay John asserts that a reversal of the summary judgment would in some manner violate our Supreme Court's directive in *City of Tuscaloosa v. Bryan*, 505 So. 2d 330 (Ala. 1987). We disagree; that decision focused entirely upon the construction of the planned-unit-development section of a municipal *zoning ordinance*. This case centers upon the proper application of a county planning commission's subdivision regulations.

As we have noted, Act No. 91-719, Ala. Acts 1991, as amended by Act No. 98-665, Ala. Acts 1998, provides for the exercise of general police power over subdivisions within Baldwin County; moreover, Act No. 1094, Ala. Acts 1973, authorizes the Baldwin County Commission "to regulate the minimum size of lots" and "to regulate the planning and construction of all public streets, public roads, and drainage structures located or to be located in subdivisions of land situated outside the corporate limits of any municipality in said county." Those local acts empower the county to establish subdivision [**17] regulations to provide for safe and efficient growth in areas of the county located outside mu-

nicipal territorial [*397] limits. Because Bay John intends to build its condominium in a "flood prone" area within an unincorporated area in Baldwin County, §§ 11-19-1 through 11-19-24 and §§ 11-24-1 through 11-24-6 permit the defendants to require Bay John to submit an application for consideration of Bay John's building plans before beginning the development. We conclude that the trial court erred in entering a summary judgment that prohibited the defendants from applying the county's subdivision regulations to the proposed Bay John condominium development. Therefore, we reverse that judgment and remand the cause to the trial court with instructions to dissolve its injunction and to enter a judgment or to conduct further proceedings consistent with this opinion.

OPINION OF MAY 25, 2007, WITHDRAWN; OPINION SUBSTITUTED; APPLICATION OVERRULED; REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Thomas and Moore, JJ., concur.

Bryan, J., concurs in the result, without writing.

ECO Preservation Services, LLC v. Jefferson County Commission and Wayne Sullivan

1040965

SUPREME COURT OF ALABAMA

933 So. 2d 1067; 2006 Ala. LEXIS 9

January 13, 2006, Released

SUBSEQUENT HISTORY: [**1] Released for Publication June 19, 2006.

PRIOR HISTORY: Appeal from Jefferson Circuit Court. (CV-98-2904).

DISPOSITION: AFFIRMED.

CORE TERMS: rights-of-way, county commission's, summary judgment, sewer line, install, county road, general superintendence, public roads, crossing, sewer, discretionary, capricious, sanitary, sewer system, arbitrary and capricious, arbitrary-or-capricious, perpendicular, mandamus, partial, decision to deny, installation, customer, unfair dealings, legal right, declaratory, injunctive, corruption, license, notice, evidence indicating

COUNSEL: For Appellant: Billy R. Weathington, Jr., of Weathington & Moore, P.C., Moody.

For Appellees: Charles S. Wagner, asst. county atty., Birmingham.

JUDGES: NABERS, Chief Justice. See, Harwood, Stuart, and Bolin, JJ., concur.

OPINION BY: NABERS

OPINION

[*1068] NABERS, Chief Justice.

This case involves the authority of the Jefferson County Commission ("the Commission") to deny a permit that would allow a private company to install a sewer line along a county road and within a county right-of-way. That company, ECO Preservation Services, LLC ("ECO"), sought declaratory, injunctive, and mandamus relief to compel the Commission to issue the permit. [1] The Jefferson Circuit Court entered a summary judgment for the Commission. We affirm.

1 The complaint originally named Jerry Drake, a former director of the Roads and Transportation Department of Jefferson County, as the second defendant. Mr. Drake has since died, and his successor, Wayne R. Sullivan, was substituted as a defendant on March 21, 2000. *See* Rule 25(d), Ala. R. Civ. P.

[**2] *I. Facts and Procedural History*

ECO is an Alabama limited liability company that provides sanitary sewage-treatment and disposal services. [2] ECO operates a sewage-treatment facility in Tuscaloosa County; treated waste from that facility is discharged into Mud Creek in Bibb County. ECO serves customers primarily in Tuscaloosa County and has no customers in Jefferson County.

2 ECO's brief to this Court refers to two plaintiffs-intervenors, Knobloch, Inc., and Petro Stopping Centers, L.P., as "appellants." However, ECO's notice of appeal and docketing statement make no reference to those parties. ECO is the sole appellant in this case. *See* Ala. R. App. P. 3(c) ("The notice of appeal shall specify the party or parties taking the appeal ..."); Ala. R. App. P. 3(e)("The appellant ... shall complete and sign the docketing statement before it is filed with the court.").

To facilitate its operations in Tuscaloosa County, ECO sought permission from the Commission to install a sewer line in a county right-of-way [**3] in Jefferson County. ECO's stated purpose in installing its line within the county right-of-way was to connect its current sewer system in Tuscaloosa County to a potential commercial customer [*1069] in eastern Tuscaloosa County through a portion of Jefferson County contiguous with Tuscaloosa County. [3] ECO also contends that if the Commission allows it to install the sewer line in and along the county right-of-way, ECO could offer services to potential customers in western Jefferson County.

3 During a hearing before the circuit court on April 19, 2000, portions of a transcript of related proceedings before the Commission were read into the record. That transcript shows that, under questioning from one of the commissioners, Frazier Christy, a civil engineer employed by ECO on the project, testified that ECO sought the permit to use the Jefferson County right-of-way "to get from point A [in Tuscaloosa County] around to point B which is the Petro station.... The [Petro] station is in Tuscaloosa County[,] but ... the cheapest way is to go through Jefferson County to get there."

[**4] This Court has already decided one case involving ECO and the Commission. *Jefferson County Comm'n v. ECO Preservation Servs., LLC*, 788 So. 2d 121 (Ala. 2000)("*ECO I*"). The instant case, however, involves different facts and different issues and produced a different result in the circuit court.

The events giving rise to *ECO I* began in 1997, when ECO applied for a permit seeking a perpendicular crossing to construct a sewer line under Kimbrell Cutoff Road in western Jefferson County. The Commission denied the permit, and ECO sued, seeking declaratory, injunctive, and mandamus relief. The Jefferson Circuit Court entered a partial summary judgment for ECO and ordered the Commission to issue the permit, finding that the Commission's decision to deny the crossing permit was arbitrary and capricious. The Commission appealed, and this Court affirmed.

In December 1999, while *ECO I* was pending in the circuit court, ECO applied for a second permit, proposing to run a sewer line parallel to Old Tuscaloosa Highway, in the county right-of-way, between Kimbrell Cutoff Road and the Tuscaloosa County line. This proposed line would travel 2,050 feet along the county right-of-way [**5] and involve an 8-inch "force main" sewer. It is this permit application that is at issue here.

The Commission refused to issue the second permit. On April 11, 2000, ECO moved to amend its then pending complaint to compel the Commission to issue the second permit. By that time, however, the Commission had already appealed the summary judgment in *ECO I* to this Court. After conducting a hearing on the request for a preliminary injunction, the circuit court stayed the motion to amend pending resolution of *ECO I*. The circuit court eventually granted the motion to amend, although it is not clear when it did so.

This Court decided *ECO I* on August 18, 2000. The Commission subsequently issued ECO a permit for the perpendicular crossing of Kimbrell Cutoff Road. At the same time, however, the Commission denied ECO's request for the second permit -- the request to use the county right-of-way parallel to Old Tuscaloosa Highway.

After we affirmed the partial summary judgment, the Jefferson Circuit Court, with Judge Jack Carl presiding, [4] held a status conference regarding the case on March 9, 2001. On April 11, 2001, the Commission moved for a summary judgment on all of ECO's claims [**6] regarding the denial of the second permit, and ECO countered with its own motion for a partial summary judgment.

4 The case was assigned to Judge Carl following Judge Thomas Woodall's election to the Supreme Court of Alabama.

[*1070] On June 2, 2001, Judge Carl entered an order denying ECO's summary-judgment motion but withheld judgment on the Commission's motion. In his order, Judge Carl gave ECO 14 days in which to submit evidence indicating "that the County Commission acted in an arbitrary and capricious manner when it denied [ECO's] request to install a sewer line along the County's right-of-way." The order also provided the Commission seven days to respond to ECO's submission of evidence. ECO, however, failed to offer any evidence.

On October 15, 2004, more than three years after ECO had been given an opportunity to provide evidence to support its claims, the circuit court, in an order issued by Judge Houston L. Brown, [5] dismissed the action for want of prosecution. On November 12, 2004, ECO moved to vacate [**7] the order of dismissal, and on November 23, 2004, the circuit court granted ECO's motion and the action resumed, now focused solely on whether the Commission had unlawfully denied the second permit. At that point, the circuit court scheduled a hearing for January 7, 2005, on the Commission's motion for a summary judgment, which had been pending since April 11, 2001.

5 The case was assigned to Judge Brown following Judge Carl's retirement.

On December 17, 2004, the Commission filed a motion for involuntary dismissal, asking the circuit court to set aside its ruling reinstating the action on the grounds that ECO had failed to comply with the court's order of June 7, 2001, giving ECO 14 days to submit evidence in support of its claims. The circuit court, however, held the hearing on the Commission's motion for a summary judgment on January 7, 2005, as scheduled. In an order issued on the same day, the circuit court continued the hearing on the Commission's motion for a summary judgment until February 11, 2005, and [**8] gave the parties until January 21, 2005, "to submit any additional authority in support of their respective positions." Following this order, the Commission

once again moved for involuntary dismissal based on the delay in the case. [6]

6 The Commission has not preserved for appellate review any issues relating to the circuit court's refusal to grant its motions for involuntary dismissal.

Finally, on February 18, 2005, after the parties had presented oral arguments and submitted evidence , the circuit court entered a summary judgment for the Commission, concluding that the Commission had acted within its discretion in denying the permit. ECO appeals.

II. Standard of Review

A. Summary Judgment

A party is entitled to a summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Ala. R. Civ. P. 56(c)(3). This Court reviews a summary judgment *de novo*, subject to the caveat that it must review the record in the light most [**9] favorable to the nonmoving party and resolve any reasonable doubts against the moving party. *University of South Alabama v. Progressive Ins. Co.*, 904 So. 2d 1242, 1246 (Ala. 2004); *Southeast Cancer Network, P.C. v. DCH Healthcare Authority, Inc.*, 869 So. 2d 452, 456 (Ala. 2003). The moving party has the burden of making a prima facie showing that the movant is entitled to a summary judgment. *American Gen. Life & Accident Ins. Co. v. Underwood*, 886 So. 2d 807, 811 (Ala. 2004). If the movant satisfies this burden of production, the nonmovant then bears the burden of producing substantial evidence creating a genuine [*1071] issue of material fact. 886 So. 2d at 811. "'Substantial evidence' is 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.'" *Hess v. Market Inv. Co.*, 917 So. 2d 140, 2005 Ala. LEXIS 94 (Ala. 2005) (quoting *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989)).

B. Discretionary Action by [**10] *a County Commission*

In this action, ECO contends that the Commission acted improperly in denying the second permit. To determine whether the summary judgment for the Commission was appropriate, we must first define the standard applicable to a court's review of a county commission's discretionary decision when, as here, the county commission acts to grant or to deny a permit to use a right-of-way. ECO argues that the relevant inquiry is whether the Commission's decision to deny the permit was "arbitrary or capricious." [7] We agree.

7 ECO also argues that because we applied the arbitrary-or-capricious standard in *ECO I*, *see* 788 So. 2d at 128, the "law of the case" doctrine requires that we do the same here. We disagree. Under the law-of-the-case doctrine, "whatever is once established between the same parties in the same case continues to be the law of that case, whether or not correct on general principles, *so long as the facts on which the decision was predicated continue to be the facts of the case*." *Blumberg v. Touche Ross & Co.*, 514 So. 2d 922, 924 (Ala. 1987)(emphasis added). The facts on which *ECO I* was decided are not the facts of this case. *ECO I* concerned a permit for a single perpendicular road crossing. The second permit, which is at issue here, relates to an entirely different (and significantly more extensive) project.

[**11] Our cases have consistently held that local governments may not arbitrarily exercise their discretionary powers, including the power to grant or to deny a permit to use a right-of-way. In *Mobile County v. City of Saraland*, 501 So. 2d 438 (Ala. 1987), we issued a writ of mandamus to compel a city council to grant such a permit to Mobile County. We based that decision on our conclusion that the city's denial of the permit was arbitrary and capricious. 501 So. 2d at 440. A county commission is subject to the same standard. *See Etowah County Comm'n v. Hayes*, 569 So. 2d 397, 398 (Ala. 1990)(judicial review of county commission's decisions extends to "conduct so arbitrary or capricious as to contravene lawfully constituted authority"); *Black v. Pike County Comm'n*, 375 So. 2d 255 (Ala. 1979)(analyzing denial of liquor license under arbitrary-or-capricious standard). [8] Although our cases have not always used the words "arbitrary or capricious," we have consistently applied that standard in practice when reviewing a county's decision to grant or deny a license or permit. [9]

8 The arbitrary exercise of governmental power may also violate the Equal Protection Clause of the United States Constitution. *Vieth v. Jubelirer*, 541 U.S. 267, 310, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004)(Fourteenth Amendment empowers courts to determine whether state action is arbitrary or capricious).

[**12]

9 The Commission argues that our review of its decision is limited to whether that decision resulted from "fraud, corruption, or unfair dealings." In its order, the trial court concluded that ECO had "failed to meet [its] heavy burden of proving that the discretionary decision of the

Commission amounts to arbitrary and capricious conduct so gross as to amount to fraud, corruption or unfair dealing." Although the trial court's order indicates that the court mixed the arbitrary-or-capricious standard with that relating to fraud, corruption, or unfair dealing, and although we have sometimes used the language on which the Commission relies, *e.g.*, *Darden v. Macon County*, 413 So. 2d 1137, 1140 (Ala. 1982), the arbitrary-or-capricious standard is the appropriate standard to apply where the denial of a license or a permit is at issue.

[*1072] *III. Analysis*

In denying ECO's request for the permit, the Commission concluded, among other things, "that the Plaintiffs, ECO Preservations Services L.L.C. et al. have no clear legal right to use the right-of-way of Old Tuscaloosa Highway [**13] and further presented no evidence or argument at the hearing on their applications that they possessed any such right." Before the Commission and before the circuit court, ECO was given every opportunity to provide evidence indicating that the Commission acted improperly in denying its request for the second permit, including the opportunity to demonstrate that it has a legal right to the second permit under either Alabama law or the Commission's practices and procedures. ECO, however, has failed to offer any such evidence.

By statute, the Commission has general superintendence over the roads in Jefferson County, including rights-of-way. Section 23-1-80, Ala. Code 1975, provides, in pertinent part:

> "The county commissions of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end, they have legislative and executive powers, except as limited in this chapter. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary or as may [**14] be deemed necessary or advisable by such commissions to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof...."

Our cases have held that this right of general superintendence includes the power to decide whether private entities may install sewer lines in county rights-of-way that run parallel to those rights-of-way. In *Water Works & Sewer Board of City of Birmingham v. Shelby County*, 624 So. 2d 1047 (Ala. 1993), the Birmingham Water Works wanted to run a 12" water main along a county right-of-way in Shelby County to serve a subdivision in that county. When the Shelby County Commission did not grant it a permit, the Birmingham Water Works petitioned the Shelby Circuit Court for a writ of mandamus to compel the county commission to issue the permit. After evidence was taken, the circuit court denied the petition, and an appeal to this Court followed. We affirmed, stating:

> "Birmingham Water Works did not establish a clear right to this remedy. No statutory or case law establishes an imperative duty on Shelby County to grant an excavation permit to Birmingham [**15] Water Works to install its lines within the right-of-way of a Shelby County road. Birmingham Water Works argues that its 'right' arises from its authorization to provide services outside the municipal limits of Birmingham; *Atkinson v. City of Gadsden*, 238 Ala. 556, 561, 192 So. 510 (1939), and its ability to expand or extend its system pursuant to § 11-50-235(a)(4), Ala. Code 1975 (1992 Repl. vol). We recognize the authority and ability provided by those statutes, but they do not convey upon Birmingham Water Works the right to install water lines within the right-of-way of Highway 41. The clear legal right to regulate public roads rests with Shelby County, based on § 23-1-80. We have stated many times that the general superintendence over county roads is with the county commissions. *Barber v. Covington County Commission*, 466 So. 2d 945, 947-48 (Ala. 1985)."

624 So. 2d at 1050.

Water Works & Sewer Board of Birmingham makes it clear that Alabama law [*1073] does not *require* the Commission to allow a private sewer company to install parallel pipelines in its existing right-of-way. The Commission could, [**16] however, grant such access by its own regulations and practices.

ECO argues that the Commission has in fact created a general right of access for private utilities to all county rights-of-way. To support that position, ECO

presented to the trial court a document entitled "Jefferson County Subdivision, Land Development, and Construction Regulations." The scant portion of the document available in the record states: "Utilities have the right to install their lines and facilities on the rights-of-way of public roads and streets and like the County, their authority depends on State laws and regulations." The regulations also indicate that they apply to "all public and private utilities," including those providing sewage services.

Relying on these provisions, ECO asserts that the Commission's decision to deny the second permit violated its regulations. Moreover, ECO contends that other similarly situated private utilities have been permitted under the regulations to use the rights-of-way to install sewer lines parallel to those rights-of-way.

The Commission responded by offering evidence indicating that it has not permitted other private sewer companies to use its rights-of-way for general [**17] sewer service to the public, but rather "all ... private sanitary sewer lines that may have crossed County rights-of-way in the past served specific sites by agreement with the County Commission." After being given every opportunity for more than three years to present evidence rebutting the Commission's evidence, ECO failed to do so.

When presented with this evidence and ECO's arguments regarding the regulations, the trial court concluded that "the reasons cited by the Commission in denying the permit form a solid and sound basis for its denial of [ECO's] request to install its private for[-]profit sewer line within and 2,050 feet along the County's right-of-way line ...." The trial court found that the regulations apply only to the development of subdivisions and not to existing rights-of-way that do not involve the development of a subdivision, such as the right-of-way at issue in this case. The trial court stated, in part:

> "Jefferson County has put evidence in the record before this Court that no similar for[-]profit sanitary sewer line installation has ever been allowed in any Jefferson County road right-of-way. [ECO] has had over three years to produce contrary evidence, [**18] but has failed to do so despite argument of counsel that he thought he knew of or has heard of other installations, one possibly in Shelby County associated with a plant in Shelby County and the other to a trailer park, the location of which was never presented to the Court. These statements were made by counsel during argument and do not constitute evidence....
>
> "[ECO] contends that the County Commission has violated its own subdivision rules and regulations. [ECO] relies on the provisions for installing utilities within proposed residential subdivision as authority for [its] claim that the County Commission violated its own rules and regulations in denying [its] permit to run a parallel sanitary sewer line within Jefferson County road rights-of-way. This argument is without merit since the subdivision rules and regulations apply to proposed subdivisions. There is no evidence before the Court that [ECO] proposed to build a subdivision requiring approval through the normal County Commission procedures for construction of houses and appurtenant utilities within a subdivision. [ECO's] application is solely for the use of County [*1074] road rights-of-way, not subdivision streets [**19] as laid out on some plat of a proposed subdivision which is entirely distinguishable from the County's discretionary authority governing its power to regulate County roadways."

Although the record indicates that the trial court had before it the entire text of the regulations, ECO, the appellant, has failed to make the complete text a part of the record on appeal; instead, we are presented with selected excerpts from those regulations. Because this Court will not take judicial notice of county regulations, *State ex rel. Edmunds v. Moses*, 231 Ala. 215, 218, 164 So. 562, 565 (Ala. 1935), and because ECO has failed to provide the full text of the regulations, we cannot conclude that the trial court's interpretation of the regulations was erroneous. *See Eaton v. Shene*, 282 Ala. 429, 430, 212 So. 2d 596, 598 (1968) ("Over and over this court has held that where there was evidence before the trial court, and not before us, which may have influenced it at arriving at the conclusion it reached, we cannot disturb that finding.").

ECO also contends that it has a legal right to the second permit under our decision in *ECO I*. ECO's reliance on *ECO I* [**20] , however, is misplaced. In *ECO I*, we stated:

> "The Commission argues that ... it has the exclusive right to operate a sewer

system in Jefferson County. It also argues that it can deny [ECO] ... the requested permit to use a right-of-way on county roads based on its general superintendence over public roads in the county. *See* § 23-1-80, Ala. Code 1975. While the county commission does have general superintendence authority over public roads, *see Water Works & Sewer Board of the City of Birmingham v. Shelby County*, 624 So. 2d 1047, 1050 (Ala. 1993), and *Barber v. Covington County Commission*, 466 So. 2d 945, 947-48 (Ala. 1985), this regulatory authority is not unlimited, and we find no authority for the proposition that the Jefferson County Commission has the *exclusive* right to maintain a sewer system in Jefferson County.

"After considering the pleadings, the oral arguments of the parties, and the legal principles involved, the trial court granted [ECO] ... declaratory and injunctive relief. In doing so, the trial judge found that the Commission had failed to 'convince [the court] that Alabama law grants [**21] Jefferson County the exclusive right to provide sanitary sewer service in Jefferson County.' The trial judge also found that the Commission had failed to provide 'any evidence that the single crossing in question' would, in any way, damage the right-of-way, create any hazard on the right-of-way, or interfere with the use of the right-of-way by any other entity.

"We conclude that the trial judge did not err. The partial summary judgment is affirmed."

788 So. 2d at 127.

Thus, *ECO I* held (1) that Jefferson County does not have the right to maintain a monopoly on a sewer system in that county, and (2) that ECO was entitled to an excavation permit for a single perpendicular crossing of its private sewer line under a county road right-of-way. *ECO I* did not hold, however, that the Commission must allow any private utility to run pipelines parallel to county roads within the county rights-of-way. *ECO I*, therefore, does not establish that ECO has a legal right to the second permit.

We conclude that ECO has failed to demonstrate that it has a legal right to use the county right-of-way as proposed in its application for a permit. It is clear under Alabama law [**22] that the Commission is not required by statute to grant ECO access [*1075] to county road rights-of-way for the installation of parallel private sewer lines, and ECO has not established that the Commission's decision to deny it a permit for such installation was arbitrary or capricious in light of the Commission's regulations or practices.

AFFIRMED.

See, Harwood, Stuart, and Bolin, JJ., concur.

Elmore County Commission and Elmore County v. Ray Smith et al. Richard Payson et al. v. Ray Smith et al.

1981750 and 1981935

SUPREME COURT OF ALABAMA

786 So. 2d 449; 2000 Ala. LEXIS 316

July 21, 2000, Released

SUBSEQUENT HISTORY: [**1] Released for Publication June 8, 2001.

PRIOR HISTORY: Appeals from Elmore Circuit Court. (CV-98-394). TRIAL JUDGE: Sibley G. Reynolds.

This Opinion Substituted on Grant of Rehearing for Withdrawn Opinion of March 24, 2000, Previously Reported at: 2000 Ala. LEXIS 107.

DISPOSITION: OPINION OF MARCH 24, 2000, WITHDRAWN; OPINION SUBSTITUTED; APPLICATIONS GRANTED; 1981750 -- REVERSED AND REMANDED; 1981935 -REVERSED AND REMANDED.

CORE TERMS: vacation, abutting, street, landowner's, alley, vacated, convenient, municipality, highway, recorded, ingress, egress, public road, county commission, declaration, vacate, governing body, summary judgment, present case, public necessity, written instrument, deprived, probate, notice, route, reasonable means, plain language, declaring, deprive, assent

COUNSEL: For Appellants: Craig S. Dillard of Webb & Eley, P.C., Montgomery, for Elmore County Commission and Elmore County.

For Appellees: Jacqueline E. Austin and Paul Christian Sasser, Jr., Wetumpka.

Amicus curiae Association of County Commissions of Alabama: Mary E. Pons, Montgomery.

JUDGES: HOOPER, Chief Justice. Maddox, Houston, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.

OPINION BY: HOOPER

OPINION

[*451] *On Applications For Rehearing*

HOOPER, Chief Justice.

The opinion of March 24, 2000, is withdrawn and the following is substituted therefor.

These appeals involve a question regarding the procedure to be used when abutting landowners seek to vacate a public road. Richard Payson and other owners of land abutting Payson Road sought to close a portion of that road. Payson Road has been used as a public road and has been maintained as such by Elmore County for over 30 years. Payson appeared at a meeting of the Elmore County Commission in late 1997 or early 1998, orally requesting that a [**2] portion of Payson Road be closed. Payson and the other abutting landowners then retained an attorney to prepare a "declaration of vacation," pursuant to Ala. Code 1975, § 23-4-20, which was presented to the Commission. On March 23, 1998, the Commission passed a resolution assenting to the vacation of a portion of Payson Road. This resolution was signed by the county administrator; was signed and certified by the chairman of the Commission; was attached to the declaration of vacation; and was filed and recorded in the Probate Office of Elmore County. Ray Smith, as well as other owners and/or occupiers of real property in the vicinity of Payson Road (hereinafter the "Smith plaintiffs"), filed a complaint for declaratory and injunctive relief against Elmore County, the Elmore County Commission, Richard Payson, and the other abutting landowners (hereinafter Payson and the other abutting landowners are referred to as the "Payson defendants"). The Smith plaintiffs alleged that the proper statutory procedures for vacating a road had not been followed. The trial court entered a summary judgment for the Smith plaintiffs. Elmore County and the Elmore County Commission (hereinafter the "Elmore [**3] County defendants") appealed; likewise, the Payson defendants appealed. We reverse and remand.

In its summary judgment, the trial court held that the requirements of Ala. Code 1975, § 23-4-20, had not been fully complied with; therefore, it held, the Commission did not have the jurisdiction or authority to close Payson Road. Section 23-4-20 provides:

> "(a) Any street or alley may be vacated, in whole or in part, by the owner or owners of the land abutting the street or alley or abutting that portion of the street or alley desired to be vacated joining in a written instrument declaring the same to be vacated, such written instrument to be executed, acknowledged and recorded in like manner as conveyances of land, which declaration being duly recorded shall operate to destroy the force and effect of the dedication of said street or alley or portion vacated and to divest all public rights, including any rights which may have been acquired by prescription, in that part of the street or alley so vacated; provided, that if any such street or alley is within the limits of any municipality, the assent to such vacation of the city council or other governing body of the municipality [**4] must be procured, evidenced by a resolution adopted by such governing body, a copy of which, certified by the clerk or ministerial officer in charge of the records of the municipality must be attached to, filed and recorded with the written declaration of vacation; and if any such street or alley has been or is being used as a public road and is not within the limits of any municipality, the assent to such vacation of the county commission of the county in which such street or alley is situated must be procured, evidenced by resolution adopted by such board or court, a copy of which, [*452] certified by the head thereof, must be attached to, filed and recorded with the declaration of vacation. Such vacation shall not deprive other property owners of such right as they may have to convenient and reasonable means of ingress and egress to and from their property, and if such right is not afforded by the remaining streets and alleys, another street or alley affording such right must be dedicated.
>
> "(b) The provisions of this section shall not be held to repeal any existing statute relating to the vacation of streets or alleys or parts thereof."

A summary judgment should be entered [**5] only upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c)(3), Ala. R. Civ. P. When the moving party makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the nonmoving party to rebut that showing by presenting substantial evidence creating a genuine issue of material fact. *Bass v. SouthTrust Bank of Baldwin County*, 538 So. 2d 794, 797-98 (Ala. 1989). Evidence is "substantial" if it is "of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989). "In reviewing a summary judgment, this Court will view the evidence in a light most favorable to the nonmovant and will resolve all reasonable doubts against the movant." *Culbreth v. Woodham Plumbing Co.*, 599 So. 2d 1120, 1121 (Ala. 1992).

Both the Payson defendants and the Elmore County defendants contend that the requirements of § 23-4-20 were complied with in the vacation [**6] of Payson Road and that § 23-4-20 provides the only procedures that must be followed when abutting landowners vacate a road. In contrast, the Smith plaintiffs argue that the provisions of § 23-4-2 also apply when § 23-4-20 is invoked. Section 23-4-2 provides:

> "(a) The governing body of the municipality where the street, alley or highway, or portion thereof, to be closed and vacated is situated in a municipality and, in other cases, the county commission of the county in which the street, alley, highway, or portion thereof, is situated shall, after causing to be published in a newspaper once a week for three consecutive weeks in the county a notice which shall describe the street, alley, highway or portion thereof proposed to be closed and vacated and also give the date of the hearing, first adopt a resolution to the effect that it is in the public interest that such street, alley, highway or portion thereof be closed and vacated;

and thereafter, such governing body may file in the office of the judge of probate in the county in which such street, alley or highway, or portion thereof, is located, its petition requesting the closing and vacating of such street, alley or highway, [**7] or such portion thereof.

"(b) The petition shall describe with accuracy the street, alley or highway, or portion thereof, to be closed and vacated and shall give the names of the owner or owners of the abutting lots or parcels of land and also the owner or owners of such other lots or parcels of land, if any, which will be cut off from access thereby over some other reasonable and convenient way. The petition shall further set forth that it is in the interest of the public that such street, alley or highway, or portion thereof, be closed and vacated, and that a resolution to that effect has been adopted by the governing body of the municipality or county, as hereinbefore set forth.

[*453] "(c) Thereupon, the probate court shall set the petition for hearing and shall issue notice of the pendency of the petition to the persons named in the petition. Such notice shall be served upon the said abutting owner or owners and also the person or persons, if any, named in the petition whose access will be affected, resident in this state as civil process is now served, not less than 10 days prior to the hearing of the petition. In case of a nonresident owner or owners or parties in [**8] interest or unknown defendants, the probate court shall cause to be published in a newspaper published in the county said notice, which shall contain the nature of the petition and in which shall be described the street, alley or highway, or portion thereof, proposed to be closed and vacated, and all such persons shall be required to appear upon the hearing thereof and to either assent to the granting of the petition or contest the same as they may see fit. Such notice shall be published once a week for three consecutive weeks prior to the date set for the hearing of the petition and shall give the date on which the hearing is to be had."

The Smith plaintiffs also contend that the Payson defendants are required to prove that the vacation of Payson Road is a public necessity. The Smith plaintiffs further argue that the manner in which the road was closed deprived them of procedural due process and that the provisions of § 23-4-20 were not met because the vacation of Payson Road deprives them of reasonable and convenient access.

I. We first address the issue whether § 23-4-2 applies when a vacation is undertaken pursuant to § 23-4-20. This Court noted in *Gwin v. Bristol Steel & Iron Works, Inc.*, 366 So. 2d 692, 694 (Ala. 1978): [**9] "[T]his area of the law (vacation of public streets in a non-eminent domain context) has been confusing and unsettled for at least the past 50 years." (Footnote omitted.) Indeed, more than 20 years after *Gwin* the law regarding the vacation of public streets by abutting landowners is still confusing and unsettled.

In *Fordham v. Cleburne County Commission*, 580 So. 2d 567, 569 (Ala. 1991), this Court stated: "The proper procedures required to enforce § 23-4-20 are found in § 23-4-2." However, that statement, because it was not necessary to the holding in that case, is mere dicta. In *Fordham*, the landowners abutting Beaver Lane Road sought to vacate that road pursuant to § 23-4-20. The landowners attended a meeting of the Cleburne County Commission and proposed that the road be closed. After an announcement of the proposed road closing had appeared in a local newspaper each week for three weeks, a requirement of § 23-4-2, the Commission adopted a resolution calling for the road to be closed. The Commission later adopted another resolution evidencing its intent to vacate the road. However, this Court held that the Cleburne County Commission "did not meet the [**10] strict standards set out in §§ 23-4-2 and 23-4-20" (580 So. 2d at 570) because it did not adopt a clear and unequivocal resolution closing Beaver Lane Road.

While the Court in *Fordham* stated in dicta that a vacation pursuant to § 23-4-20 must follow the procedure set out in § 23-4-2, the Court also stated that "public streets, alleys, or highways can be closed and vacated by counties or municipalities in accordance with Ala. Code 1975, §§ 23-4-1 through -6, *or* by 'abutting landowners' in accordance with § 23-4-20." 580 So. 2d at 569 (emphasis added). It is unclear whether the vacation sought in *Fordham* was initiated pursuant to [*454] § 23-4-20 or § 23-4-2 because, although the abutting landowners proposed the closing of the road to the county commission, the landowners did not join in a

written instrument declaring the road to be vacated, as required by § 23-4-20. However, it is clear that the road in *Fordham* was not properly vacated, because the abutting landowners did not follow the provisions of § 23-4-20 and the commission did not follow the provisions of § 23-4-2. Thus *Fordham* is not strong support for the proposition that in seeking [**11] to vacate a road pursuant to § 23-4-20 the abutting landowners must also comply with § 23-4-2. In *McPhillips v. Brodbeck*, 289 Ala. 148, 266 So. 2d 592 (1972), this Court examined the vacation of a road by an abutting landowner pursuant to Title 56, § 32, Code of Alabama (1940), the predecessor to § 23-4-20, Ala. Code 1975; the earlier statute contains the same requirements as § 23-4-20. In that case, this Court noted a distinction between the vacation of a road by a public authority and the vacation of a road by abutting landowners as follows:

> "[We are not] here dealing with a vacation of a street initiated by public authority to better serve the public interest where the rule of public necessity must override public convenience, but on the contrary we deal with a statutory provision whereby private interests may under prescribed circumstances deprive others of the use of a portion of an existing street in order to further the personal desires of such private interests. Such a statute should be strictly construed so that it not be an agency for oppression or misuse."

289 Ala. at 154, 266 So. 2d at 597. This statement [**12] indicates this Court's recognition that, by enacting Title 56, § 32, the Legislature intended to allow the private interests of abutting landowners to override the public interest in the use of a roadway, so long as those landowners strictly followed the provisions of the statute.

In *Chichester v. Kroman*, 221 Ala. 203, 128 So. 166 (1930), which was criticized but not overruled in *Gwin*, this Court examined § 10361, Code of Alabama (1924), as amended by Acts 1927, p. 105, a predecessor to Title 56, § 32. In that case, the Court described the factual issues presented as follows:

> "Did all the 'owners of the land abutting the street or alley (or that portion of the street or alley desired to be vacated)' join 'in a written instrument declaring the same to be vacated,' properly acknowledged and recorded, and did the city give its assent, 'evidenced by a resolution adopted by such governing body, a copy of which, certified by the clerk or ministerial officer in charge of the records of the municipality attached to, filed and recorded with the written declaration of vacation,' and was a 'convenient means of ingress and egress to and from this property [**13] afforded' by any other street or alley?"

221 Ala. at 206, 128 So. at 168. In other words, if the landowners joined in a written declaration of vacation, to which the city assented, and the public had another means of ingress and egress, no more was required before the road could be vacated. The question before the Court in *Chichester* was whether a convenient means of ingress and egress to the complainant's property was otherwise afforded.

The Smith plaintiffs cite *Holland v. City of Alabaster*, 624 So. 2d 1376 (Ala. 1993), in support of their argument that the Payson defendants cannot vacate the road unless they can show that the vacation is justified on the ground of public necessity. In *Holland*, this Court stated that "any private right of abutting owners is entirely and [*455] completely subordinate to the public right, and any invasion of the street in the way of private use can be justified only on the ground of public necessity." 624 So. 2d at 1378. *Holland* also involved the vacation of a road by abutting landowners pursuant to § 23-4-20; however, *Holland* held that there was no public necessity for closing the road [**14] and it did not address whether an abutting landowner seeking to have a road closed must comply with § 23-4-2. *Holland* is thus distinguishable from the present case because the holding in *Holland* was based on a finding by the trial court that the vacation of the road created a public nuisance.

In previous cases where this Court has been called on to interpret a statute, this Court has stated:

> "'Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the

> clearly expressed intent of the legislature must be given effect.'"

Blue Cross & Blue Shield v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998) (quoting *IMED Corp. v. Systems Eng'g Assocs. Corp.*, 602 So. 2d 344, 346 (Ala. 1992)). The language of §§ 23-4-20 and 23-4-2 is unambiguous and each statute must be given its plain meaning. The plain language of § 23-4-20 provides the procedures that must be followed when an abutting landowner [**15] seeks to vacate a public road. Section 23-4-20 makes no reference to the procedure set forth in § 23-4-2, which by its plain language applies only to those vacations initiated by a municipality or county. We will not read into a statute what the Legislature has not written.

We also find persuasive the fact that the subject of the vacation of public roads by abutting landowners and by governing bodies appears in separate articles in the Code. Chapter 4 of Title 23, entitled "Closing and Vacating Streets, Alleys and Highways," contains both Article 1 (entitled "Counties or Municipalities," in which § 23-4-2 is found) and Article 2 (entitled "Abutting Landowners," in which § 23-4-20 is found). The fact that these provisions appear in separate articles indicates that the Legislature did not intend for the procedures in one Article to apply to the subject matter governed by the other Article. Thus, the provisions of § 23-4-20, which relate to "abutting landowners," were not meant to also be subject to the procedures set forth in § 23-4-2, which relate to counties and municipalities.

We must conclude from the plain language of the statutes that in order for an abutting landowner [**16] to vacate a road pursuant to § 23-4-20, it is not necessary to comply with the procedures set forth in § 23-4-2. To the extent it is inconsistent with our holding today, *Fordham* is overruled.

II. We must now determine whether Payson Road was properly vacated, pursuant to § 23-4-20. The trial court's order did not state which provision or provisions of § 23-4-20 it found the Payson defendants to have failed to fully comply with. The record indicates, and the Smith plaintiffs do not dispute, that the Payson defendants, acting pursuant to § 23-4-20, joined in a written instrument declaring a portion of Payson Road to be vacated. That instrument was executed, acknowledged, and recorded in the Probate Office of Elmore County. Acting pursuant to § 23-4-20, the Commission adopted a resolution assenting to the vacation of Payson Road, [*456] and a copy of that resolution was certified by the chairman of the Commission and was attached to, and filed and recorded with, the declaration of vacation. Thus, the only requirement of § 23-4-20 at issue is whether the vacation "deprives other property owners of such right as they may have to convenient and reasonable means of ingress and egress [**17] to and from their property."

The Smith plaintiffs contend that the closing of Payson Road forces them to take an alternative road, County Road 7. They argue that County Road 7 is more congested than Payson Road and is impractical to use during early morning and late afternoon rush hours. They also claim that they have difficulty transporting farm equipment on County Road 7 because it is more heavily traveled than Payson Road.

In support of this argument, the Smith plaintiffs cite *Williams v. Norton*, 399 So. 2d 828 (Ala. 1981). In *Williams*, this Court held that the vacation of a public road by abutting landowners denied others the right of the "convenient enjoyment" of their property. The road that was vacated led to a recreational lake; after its vacation the other landowners, to get access to the water, were forced to take a more circuitous route through a private marina, which charged a fee for the use of its facilities. This Court, in *Williams*, noted that "an individual, as an owner of land which abuts a public road, suffers a special injury if an obstruction of that road denies him convenient access to a nearby waterway or forces him to take a more [**18] circuitous route to the outside world." 399 So. 2d at 829. The Smith plaintiffs contend that the closing of Payson Road forces them to take "a more circuitous route to the outside world." We note that in *Williams* the owners who were denied access owned land abutting the public road that was vacated. In the present case, none of the Smith plaintiffs owns land abutting the vacated portion of Payson Road. The Payson defendants argue that the Smith plaintiffs have not been deprived of reasonable and convenient means of ingress to and egress from their property. In fact, they contend that the alternative means of ingress and egress available to each of the Smith plaintiffs includes at least one paved road, unlike Payson Road, which is in certain places a one-lane dirt road. The Payson defendants contend that *Williams* is distinguishable from the present case because the vacation of the road in *Williams* effectively restricted the landowners' access to a body of water, the only alternative access to the water being a few miles away through a private marina that charged a fee. In contrast, the Payson defendants argue, the alternative route in the present case is a wider, [**19] paved road that is convenient to the property.

The Payson defendants also contend that *McPhillips, supra*, is distinguishable from the present case. In that case this Court reversed the trial court's judgment upholding the vacation of a portion of a street because the vacation deprived the plaintiff of his only means of access to Mobile Bay without providing an alternative means of access. In *McPhillips* the landowner's *only*

means of access to Mobile Bay was eliminated. In the present case, however, the landowners continue to have alternative routes for access to their property. "It is not a question of comparing conveniences or desirability, but whether there is left or provided some other reasonably convenient way." *Chichester*, 221 Ala. at 206, 128 So. at 169.

It appears that the trial court entered the summary judgment in favor of the Smith plaintiffs based on a finding that the vacation had deprived the Smith plaintiffs of convenient and reasonable means of ingress [*457] to and egress from their property and had thereby violated § 23-4-20. However, when viewed in the light most favorable to the Payson defendants, as the nonmovants, the evidence suggests [**20] that the Smith plaintiffs were not deprived of a "convenient and reasonable means of ingress and egress to and from their property." Therefore, we reverse the summary judgment in favor of the Smith plaintiffs and remand the case for further proceedings consistent with this opinion.

OPINION OF MARCH 24, 2000, WITHDRAWN; OPINION SUBSTITUTED; APPLICATIONS GRANTED; 1981750 -- REVERSED AND REMANDED; 1981935 -REVERSED AND REMANDED.

Maddox, Houston, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.

Ericsson GE Mobile Communications, Inc., etc. v. Motorola Communications & Electronics, Inc., et al. Certified Questions from the United States District Court for the Northern District of Alabama

1931189

SUPREME COURT OF ALABAMA

657 So. 2d 857; 1995 Ala. LEXIS 132

March 17, 1995, Released

SUBSEQUENT HISTORY: [**1] Released for Publication June 27, 1995.

PRIOR HISTORY: APPEALED FROM: Certified Question for The United States District Court for the Northern District of Alabama. William M. Acker, TRIAL JUDGE.

CORE TERMS: bid, responsible bidder, competitive, lowest, purchasing, specifications, bidding, bid specifications, bidder, vendor, consultant, technology, selecting, interim, public safety, oral argument, formulating, requesting, qualify, tractor, select, communications system, injunction, radio, truck, coupling, advice, void, certified questions, functional

COUNSEL: For Plaintiffs: William G. Somerville III and Paul E. Toppins, of Powell & Frederick, Birmingham.

For Defendants: Michael D. Knight and Allen S. Reeves, of Hand, Arendall, Bedsole, Greaves & Johnston, Mobile, for Motorola Communications & Electronics, Inc. Demetrius C. Newton and William M. Pate, City Attorney's Office, Birmingham; Donald V. Watkins, Birmingham; Joe R. Whatley, Jr., and Peter H. Burke, of Cooper, Mitch, Crawford, Kuykendall & Whatley, Birmingham, for Mayor Richard Arrington and the City of Birmingham.

JUDGES: ALMON

OPINION BY: ALMON

OPINION

[*858] ALMON, JUSTICE.

The United States District Court for the Northern District of Alabama, the Honorable William M. Acker, Jr., presiding, has certified questions in a dispute under Alabama's competitive bid law in which a dissatisfied bidder, Ericsson GE Mobile Communications, Inc. ("EGE"), has challenged the City of Birmingham's contract with Motorola Communications & Electronics, Inc. ("Motorola"), for a new public safety radio communications system. This Court has agreed to answer questions concerning the appropriateness of requesting alternative bids, whether this contract qualifies as a "sole source" contract (and therefore is exempt from the bid law), and the relevance of the City's outside consultant's close cooperation with Motorola.

Because the certified question procedure does not place this Court in a position of making factual findings, we set forth the following primary facts, as provided by the district court and the materials submitted by the parties, merely to provide a context within which our answers may be understood. The City of Birmingham [**2] decided to replace [*859] its old public safety communications system, and on May 27, 1993, issued a request for bids for a "Digital 800 MHZ Trunked Simulcast Radio System." The request for bids included four alternatives: [1]

1 The parties have not provided information as to the extent to which alternative bidding may be presently employed statewide in Alabama. However, Floyd Dyar, Birmingham's purchasing agent, stated that it was common practice for Birmingham to take alternative bids.

> "Alternative #1 - A system compatible with APCO [2] project 25 interim standards.

2 "APCO" is an acronym for the Association of Public Communication Officers, an interna-

tional organization whose function is to evaluate and approve proposed communications systems for use within the public sector.

"Alternative #2 - A system compatible with APCO 16 standards.

"Alternative [**3] #3 - A system compatible with present APCO 16 standards with a capability to migrate to APCO 25 standards.

"Alternative #4 - A Mobile Data Terminal System.

"A vendor may bid on any or all of these Alternatives."

The APCO project 25 standards are entitled "interim" because the project 25 is an evolving system still in the development stages, with certain targets and expectations but with no final written specifications or guarantees of future performance in certain of its aspects. APCO, however, has approved the APCO 16 standards.

The two bids received were opened August 2, 1993. Motorola bid for the APCO 25 Interim Standard System under Alternative #1, and EGE bid for the APCO 16 Standard System under Alternative #2. The mayor and the city council were the City's decision-makers on the project. A special committee of four City employees recommended that the City accept EGE's bid as the lowest responsible bid. Floyd Dyar, the City's purchasing agent, was among those who recommended that the APCO 16 system offered by EGE be accepted. The mayor, however, decided that the City's needs would be better served by the APCO 25 Interim Standard System and recommended it to [**4] the City Council.

After obtaining advice from Alton Hambric, the City's outside consultant on the project, and upon instruction from the mayor, the City rejected both bids on October 27, 1993. The City thereafter entered into negotiations with Motorola and entered into a contract with Motorola in March 1994. The contract states on its face that it is for an APCO 25 Radio System.

EGE filed a complaint in the Federal district court, seeking to enjoin execution of the contract as violating the Alabama competitive bid law, Ala. Code 1975, § 41-16-50 et seq. The bid law provides:

"All expenditure of funds of whatever nature for ... the purchase of ... equipment ... involving seven thousand five hundred dollars ($ 7,500) or more, ... made by or on behalf of ... the governing bodies of the municipalities of the state ..., except as hereinafter provided, shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder."

§ 41-16-50(a). The statute applies to municipalities and to various other political subdivisions and agencies of the state, collectively referred to hereinafter as the "purchasing authority." [**5] "Any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of this article." § 41-16-61. "Contracts entered into in violation of this article shall be void...." § 41-16-51(d). EGE petitioned for preliminary and permanent injunctions to stop the implementation of the contract, and the defendants moved for a summary judgment.

Question 1: "Did the City's request for bids constitute a binding concession by the City that the APCO 16 and the APCO 25 alternatives are functional equivalents for purposes of applying the Competitive Bid Law?"

EGE contends in its briefs to this Court that the answer to the first certified question should be yes, but conceded the issue in oral [*860] argument, stating that the request for bids was not a binding concession by the City. However, because this question is related to the second certified question, we will briefly address the issue.

The defendants argue that the most reasonable interpretation of the request for bids is that APCO 16 and APCO 25 were not presented as functional equivalents and that the City [**6] at least implicitly reserved the right to choose between alternatives. The City's request for bids stated that, in preparing the request, the City had "determined that two (2) major technologies exist in the public safety communications industry." The request closes as follows: "In the interest of fairness, these specifications provide for both technologies. Vendors are encouraged to propose either APCO 16 or APCO 25, or both." The "Preface" to the request for bids states: "The first phase of the project shall consist of an in-depth review of the latest technologies on the market and how those technologies may benefit the City of Birmingham." The request continues: "Each bid should demonstrate the vendor's best technical approach to re-

solving the public safety communication needs of the city."

We conclude that such an "in-depth review" and request for the vendor's "best technical approach" would be pointless if the City anticipated basing its decision solely on the prices of the bids. EGE has not presented any arguments, based upon a construction of the City's request for bids or otherwise, that support the conclusion that the request constituted "a binding concession by the City that [**7] the APCO 16 and the APCO 25 alternatives are functional equivalents for purposes of applying the Competitive Bid Law." Judge Acker states in the order certifying these questions that EGE and Motorola both acted in a manner indicating their understanding that the issue in the City's selection process was a comparison between competing technologies and systems as well as between prices. We conclude that the most reasonable interpretation of the request for bids is that it incorporates distinct alternatives without a concession of functional equivalency.

Question 2: "Under the facts, when a municipality issues a request for bids in the form of alternatives without therein stating a preference as between alternatives, does it thereafter retain the authority to determine which alternative is in its best interest and to select that alternative regardless of whether a lower bid is submitted by a responsible bidder on another alternative?"

EGE stated at oral argument that the City "clearly" retained the authority to determine which system best met its needs, but argued that the EGE system met the City's objectives and that the City's decision was tainted by its reliance on what EGE [**8] alleges to be biased advice of the City's outside consultant. It was not clear at oral argument whether EGE also conceded the second component of the question, whether the City may select an alternative where there is a lower bid submitted by a responsible bidder on another alternative. Because both components of the question present an issue of first impression, the resolution of which is critical to this case, it is necessary to analyze the issue.

EGE contends in its briefs to this Court that, once it was determined to be a responsible bidder and to have submitted the lowest bid, the City did not have the authority to select Motorola's higher bid under another alternative. EGE cites no authority for this specific proposition or for the more general proposition that alternative bidding is prohibited or disfavored under Alabama's competitive bid law or is contrary to the purpose of the law; nor does EGE submit that the bid law should or could be interpreted to prohibit alternative bidding.

EGE relies upon Poyner v. Whiddon, 234 Ala. 168, 174 So. 507 (1937), and *Ward Int'l Trucks, Inc. v. Baldwin County Bd. of Educ.*, 628 So. 2d 572 (Ala. 1993). [**9] Neither of these cases, however, addresses a request for bids that expressly sets out alternatives allowing a vendor or supplier to bid on any or all of the alternatives. In *Poynor* this Court held that the bid law would void a contract "let to the highest, not the lowest responsible bidder." 234 Ala. at 171, 174 So. at 509-10. In the present case, it is clear that the bid law would void any contract entered into by the City for a particular alternative where [*861] there was a lower bid submitted by a responsible bidder on the same alternative, but *Poynor* is not relevant to whether the City may select a particular alternative where there is a lower bid submitted by a responsible bidder on another alternative. In *Ward Int'l*, this Court reversed a summary judgment for the defendants, the Baldwin County Board of Education and Moyer Ford Company, holding that the plaintiff, Ward International Trucks, Inc., had submitted substantial evidence that the Board violated the competitive bid law and that it had acted arbitrarily in contracting with Moyer Ford; the evidence tended to show that the Board ignored the advice of its attorney and staff [**10] members in accepting the plaintiff's bid. *Ward Int'l*, 628 So. 2d at 574. We find that that case may be relevant herein to the question whether the City abused its discretion in selecting a particular alternative among those included in the request for bids, but that case does not address the underlying question, that of the appropriateness under the bid law of the practice of requesting alternative bids.

We hold that the practice of requesting alternative bids, as the City has done in this case, is consistent with the Alabama competitive bid law. [3] It is a well-established proposition in our law that competitive bidding does not require an award to go simply to the lowest bidder, but to the lowest *responsible* bidder. Ala. Code 1975, § 41-16-50(a); *see White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971). The factors to be considered in determining the lowest responsible bidder are prescribed by statute. The bid law states: "When purchases are required to be made through competitive bidding, awards shall be made to the lowest responsible bidder taking into consideration the qualities [**11] of the commodities proposed to be supplied, their conformity with specifications, the purposes for which required, the terms of delivery, transportation charges, and the dates of delivery." Ala. Code 1975, § 41-16-57(a). Thus, the statute itself provides a measure of discretion within which the purchasing authority may discriminate among products and vendors. One general means of discriminating among products that has been upheld under the bid law is for the purchasing authority to formulate bid specifications that are reasonable and appropriate, although narrowly tailored to qualify a product with particular characteristics. *See White v. McDonald Ford, supra.* We discern no mean-

ingful distinction between the practice of determining the lowest responsible bidder or the practice of formulating reasonable bid specifications around a particular type of product predetermined by the purchasing authority to meet its needs and the practice of selecting among bids on expressly defined alternative specifications. [4]

> 3 We note that other jurisdictions have upheld the validity of alternative bidding under applicable competitive bid laws. *See L.G. DeFelice & Son, Inc. v. Argraves*, 19 Conn. Supp. 491, 118 A.2d 626 (1955); *Otter Tail Power Co. v. Village of Wheaton*, 235 Minn. 123, 49 N.W.2d 804 (1951); *Mayer Bros. Constr. Co. v. Erie Parking Auth.*, 189 Pa. Super. 1, 149 A.2d 495 (1959); *Automatic Merchandising Corp. v. Nusbaum*, 60 Wis. 2d 362, 210 N.W.2d 745 (Wis. 1973); *see generally* L.C. Warden, Annotation, *Differences in Character or Quality of Materials, Articles, or Work as Affecting Acceptance of Bid for Public Contract*, 27 A.L.R.2d 917 (1953).

[**12]

> 4 While the practice of determining the lowest responsible bidder is explicitly prescribed in the bid law, the practice of formulating bid specifications around a particular type of product is not. However, the latter practice has been held under certain circumstances by this Court to be consistent with the bid law. Accordingly, our holding that the practice of selecting among bids on expressly defined alternative specifications is consistent with the bid law, even though the practice is not explicitly prescribed in the bid law, is not unprecedented.

Our cases make it clear that the purchasing authority's determination of the lowest responsible bidder and its formation of bid specifications may be exercised with a wide margin of discretion. In *Carson Cadillac Corp. v. City of Birmingham*, 232 Ala. 312, 167 So. 794 (1936), the plaintiff brought an action against the City, seeking an injunction to compel the City to modify its bid specifications for water pipe couplings for an industrial water supply project. The plaintiff claimed that it could not meet [**13] the specifications and that if they were allowed to stand then only one company could successfully bid on the project. The trial court denied the injunction, and this Court affirmed, stating:

> [*862] "From the averments of the bill, it is apparent that the appellant ... seeks to compel the commission to modify its specifications so that complainant may submit bids or prices for the sale of its bolted joint couplings for the steel pipes, ... on the theory that appellant's coupling is the equal or superior of any such coupling obtainable.
>
> "To grant such relief would be to substitute the judgment of the court and its process for the judgment and discretion of the Engineering Commission as to technical matters within the field of engineering."

232 Ala. at 317, 167 So. at 798.

In *Mitchell v. Walden Motor Co.*, 235 Ala. 34, 177 So. 151 (1937), Henry County had selected a bid for Chevrolet trucks over the lower bid for Ford trucks. This Court concluded that the local competitive bid law did not apply, but, if it had applied, that there would have been no violation. The Court noted: "In determining [**14] who is the lowest responsible bidder, the proper authorities may take into consideration the quality of the materials as well as their adaptability to the particular use required." 235 Ala. at 38, 177 So. at 154. Therefore, the Court concluded that, absent a showing that the county did not honestly exercise its discretion in selecting a particular make of truck, the contract would not be invalid, even where there was a lower bid for trucks of another make. *Id.*

In White v. McDonald Ford, *supra*, the Alabama Highway Department had solicited bids for tractors to cut grass along state highways. The specifications had been drawn around the Massey-Ferguson turf tractor, because the Department's engineers "agreed that this type tractor was best suited for the purposes for which the tractors were required." 287 Ala. at 79, 248 So. 2d at 123. An unsuccessful bidder who had submitted a lower non-conforming bid based upon a Ford tractor brought an action to enjoin execution of the contract. The specific question before the Court was whether, under the bid law, [**15] "specifications [could] be drawn to fit a particular article or piece of equipment which has been determined to be suitable for the needs and purposes required prior to the time the equipment is requisitioned." 287 Ala. at 80, 248 So. 2d at 123. The trial court granted the injunction, but this Court reversed, stating:

> "[The] appellee contends that the admission by the State that the Massey-Ferguson turf tractor was used to write the specifications is sufficient in and of itself to void the contract without

> reference to the intent with which the act was done. We cannot agree that our legislature intended such a result. The wording of the statute itself follows very closely some of the language used by this Court in [*Mitchell v. Walden Motor Co.*, 235 Ala. 34, 177 So. 151 (1937)], wherein this Court said that in determining who is the lowest responsible bidder the proper authorities may take into consideration the quality of the materials as well as their adaptability to the particular use required."

287 Ala. at 84, 248 So. 2d at 127-28. The Court [**16] emphasized that "State authorities should have discretion in determining who is the lowest responsible bidder." 287 Ala. at 86, 248 So. 2d at 129.

In *International Telecommunications Systems v. State*, 359 So. 2d 364 (Ala. 1978), the State solicited bids for replacement crystals for radios installed in State Trooper automobiles. The request for bids "specified GE parts of different serial numbers 'or equal.'" The plaintiff submitted the lowest bid, but both of the types of crystals it offered were determined to be inferior, according to the tests performed by the chief radio engineer for the Department of Public Safety. GE was determined to be the lowest responsible bidder and was awarded the contract. In affirming the trial court's denial of injunctive relief, this Court relied upon *White v. McDonald Ford*, and held that the testing procedures employed by the State constituted a nonarbitrary basis upon which the State could legitimately discriminate among the respective products. 359 So. 2d at 366-68.

Finally, in *Mobile Dodge, Inc. v. Mobile County*, 442 So. 2d 56 (Ala. 1983), [**17] the sheriff's department requested bids on new patrol cars. The specifications required heavy-duty full length frames and front and rear coil-spring suspension systems. An unsuccessful [*863] bidder, who submitted a nonconforming lower bid, brought an action for injunctive relief, alleging that the specifications had been intentionally drawn to exclude it from the bid process. The trial court denied the injunction, and this Court affirmed, stating:

> "While it is true that, due to the fact that all Chrysler products are manufactured with unitized bodies and torsion bar suspension systems, Mobile Dodge is effectively excluded from bidding on patrol cars for the Mobile County Sheriff's Department, we cannot upon the record conclude that the specifications calling for full frames and coil spring suspension systems are ... arbitrary and capricious. ... Nor are we able to find any evidence ... contrary to the trial court's finding that the county officials engaged in a reasonable and rational process in selecting the requirements most suitable to meet their needs...."

442 So. 2d at 60-61 (citation omitted).

The practices employed by a purchasing authority in [**18] determining the lowest responsible bidder and in formulating narrow bid specifications, which the previous cases hold may be exercised within the authority's discretion, are very similar to the process that the City alleges it employed with the use of alternative bidding in this case. A purchasing authority's determination of the lowest responsible bidder is to be, in part, based upon consideration of "the qualities of the commodities" and "the purposes for which required," *see* Ala. Code 1975 § 41-16-57(a), factors that should be, along with price, also essential considerations in selecting among alternative bids. Here the request for bids makes it clear that the City intended to review the competing technologies reflected in the bid alternatives in relation to resolving the public safety communication needs of the City. The City alleges that, based upon its review, APCO 25 was determined to be best suited to the City's needs.

In the cases upholding the practice of formulating bid specifications around a particular type of product, this Court has consistently deferred to the honest exercise of discretion by purchasing authorities in determining that the products meeting such specifications [**19] are those that will best fulfill the authority's needs. The process of formulating alternative specifications, taking bids, and selecting the alternative that will best fulfill the authority's needs should be entitled to no less deference. The City alleges that in this case it requested bids on various products meeting alternative specifications that could potentially meet its needs, and then, with the various qualities, capabilities, and prices in mind, decided that the higher-priced APCO 25 alternative would better suit its objectives. The principal difference between the practice of formulating narrow bid specifications, previously upheld by this Court, and the practice of using alternative bids appears to be that, in alternative bidding, the purchasing authority would have more detailed product information and would have received competitive bid prices before determining the product characteristics that will best suit its objectives.

That the access to price information is an advantage to the purchasing authority is reflected in the defendants'

argument here that alternative bidding is supportable as a policy matter. The defendants note, for instance, that if the City had decided, [**20] before requesting bids, that its preference was for technology meeting the APCO 25 Interim Standard, bid specifications could have been drawn based upon that standard alone; a request for bids would have been issued; Motorola would have known that it alone could respond; and Motorola would have had an opportunity to inflate its profit margin in responding to the bid. The defendants contend that the request for alternative bids widened the options available to the City while also maintaining price competition, and that the City benefited from the knowledge of respective prices and features when deciding among the alternative systems.

Arguments against the validity of alternative bidding stem from concern that the process could be used as a subterfuge to select a preferred vendor's product by means of bid specifications specifically drawn to a particular vendor's product, or by requesting bids among alternatives that are not in fact unique in a manner related to the use of the product and to the objectives of the purchasing [*864] authority for which it is to be acquired. It is evident from the discussion of the cases discussed above that narrow bid specifications or even specifications based [**21] upon a specific vendor's product do not *ipso facto* violate the competitive bid law. *See Mobile Dodge*, 442 So. 2d at 60; *International Telecommunications Systems*, 359 So. 2d at 366. However, this Court has warned that bid specifications may not be drawn in bad faith:

> "If the specifications were intentionally drawn so as to exclude others in order to purchase from a favored bidder because of some bad or improper motive, on the part of State officials, then the practice could not be condoned. ...
>
> "....
>
> "... The single most important requirement of the Competitive Bid Law is the good faith of the officials charged in executing the requirements of the law."

White v. McDonald Ford, 287 Ala. at 82, 86, 248 So. 2d at 125, 129. Our cases interpreting the bid law also note that a purchasing authority's determination of the lowest responsible bidder or use of narrow specifications may violate the competitive bid law if the authority acts irresponsibly, impulsively, or without reason, and, therefore, arbitrarily and capriciously. *Mobile Dodge, supra; International* [**22] *Telecommunications Systems, supra; White v. McDonald Ford, supra.*

It is clear that a purchasing authority must have an articulable and reasonable basis upon which to determine that a particular bidder is the lowest responsible bidder or upon which to employ narrow bid specifications to qualify a product with particular characteristics, and we think it also clear that that basis must be related to the use of the product and to the objectives of the purchasing authority for which it is to be acquired. No less is required where the purchasing authority selects among bids on alternative specifications. Thus, the acceptance of alternative bidding does not introduce any truly new phenomena or risks into the competitive bid process and our current bases of review of a purchasing authority's decisions are already suited to correct any abuse of the process. Accordingly, the question whether the process employed here by the City violated the competitive bid law should be resolved with reference to this opinion and the precedents discussed herein. [5]

5 We note that, after requesting and receiving alternative bids, the City rejected both bids and proceeded to negotiate a contract with Motorola for a price lower than the bid price. If the City had initially requested bids based on the APCO 16 Standard and subsequently rejected all bids, then had requested bids based on the APCO 25 Interim Standard and received only Motorola's bid, the City could have availed itself of the following provision of the bid law: "In the event only one bidder responds to the invitation to bid, the awarding authority may reject the bid and negotiate the purchase or contract, providing the negotiated price is lower than the bid price." Ala. Code 1975, § 41-16-50(a). We find, given the nature of the alternative bid process, that the actual procedure followed by the City is consistent with this provision of the bid law. But if, for example, the City had requested alternative bids, had selected APCO 16 technology, and had received more than one bid on that alternative, the bid law would require that the contract be awarded to the lowest responsible bidder.

[**23] *Question 3: "Under the facts, is the City's negotiated contract with Motorola exempt from Alabama's Competitive Bid Law under Ala. Code (1975), § 41-16-51[(a)(13)], as a purchase for which there is only one vendor or supplier?"*

Question 4: "If competing bids meet the same stated 'objectives,' does the mere 'uniqueness' of features within a higher bid create a basis for a 'sole source purchase' from the higher bidder?"

Section 41-16-51(a), Ala. Code 1975, provides that "the competitive bidding requirements of this article shall not apply to: ... (13) Contractual services and purchases of commodities for which there is only one vendor or supplier." The leading case in Alabama defining the "sole source" exception to the bid law is General Electric Co. v. City of Mobile, 585 So. 2d 1311 (Ala. 1991). The district court essentially asks this Court for a determination of whether this contract meets the mandate of *General Electric* and is therefore exempt from the bid law. The parties allotted considerable time at oral argument to addressing the merits of this exception and the applicability of *General Electric*, but [*865] no reason was given, even [**24] when specifically asked for, why this Court is required to, or otherwise should, reach this issue if we were to answer the first two questions in favor of the defendants.

The Motorola contract is a "sole source" contract only if the system based on the APCO 25 Interim Standard is unique in a manner "substantially related to the intended purpose, use, and performance" of the communications system, and if other similar communications systems "cannot perform the desired objectives" of the City. 585 So. 2d at 1315-16. Thus, an answer to questions 3 and 4 would require a resolution of the technical debate between the parties regarding the achievability, features, and capabilities of systems complying with the respective APCO standards, the resolution of which is for the trier of fact. Even if we were to answer that the contract did not qualify under the sole source exemption to the bid law, the issue would then be whether the City's contract with Motorola violated the competitive bid law. EGE's arguments that the bid law was violated are, first, that alternative bidding is not allowed by the bid law, an argument abandoned by EGE at oral argument and decided in [**25] the defendants' favor here; and, second, that the conduct of the City's outside consultant tainted the bidding process, an argument addressed below. Thus, even if questions 3 and 4 were answered in EGE's favor, the effective result would be to implicate questions 1, 2, and 5 which we answer herein; there is no reason to address the questions concerning the sole source exception to the bid law. [6]

> 6 We note, without deciding the issue, that where alternative bidding is employed and only one bid is received on the alternative selected by the purchasing authority, the authority may be entitled to proceed to negotiate with that bidder without ever ascertaining whether the bidder qualifies under the sole source exception. See footnote 5, and § 41-16-50(a), Ala. Code 1975.

Question 5: "Is the fact that the independent consultant employed by the City cooperated closely with Motorola to the extent of their mutually participating in the drafting of crucial documents, relevant in deciding any of the previous questions?"

[**26] We interpret this question broadly, as asking whether the full range of the conduct of Alton Hambric, the City's outside consultant, is relevant in deciding the critical issues in this case. We have held that the use of alternative bidding does not violate the bid law; thus, the overriding issue is whether for any other reason the City's contract with Motorola violates the competitive bid law. The issue turns on whether the City abused its discretion in selecting a system based upon the APCO 25 Interim Standard, the alternative upon which Motorola based its bid. This Court has held:

> "State authorities should have discretion in determining who is the lowest responsible bidder. This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence."

White v. McDonald Ford, 287 Ala. at 86, 248 So. 2d at 129. The conduct of the City's consultant is relevant in the review of the discretion exercised by the City. [7]

> 7 Other facts alleged by EGE, such as the City's failure to follow the advice of its evaluation committee, may also be relevant in the review to determine whether the City abused its discretion. *See Ward Int'l, supra.*

[**27] Because we have decided that alternative bidding is consistent with the competitive bid law, and that the practice should be governed by established precedent, we hold that judicial review of a purchasing authority's selection among bidding alternatives should be according to a standard commensurate with the review of a purchasing authority's determination of the lowest responsible bidder or its use of narrow bid specifications to qualify a product with particular characteristics. Therefore, the answer to question 5 is that the conduct of the City's outside consultant is relevant in determining whether the City's exercise of discretion was based upon "ignorance through lack of inquiry," or was "the result of improper influence," or was otherwise arbitrary or capricious. These are primarily questions of fact, [*866] and we express no opinion as to whether any violation of the competive bid law has occurred.

QUESTIONS ANSWERED.

Maddox, Shores, Houston, Ingram, Cook, and Butts, * JJ., concur.

* Although Justice Butts was not a member of this Court when this case was orally argued, he has listened to the tape of oral argument and has studied the record.

[**28]

Steven Allan Fike et al. v. John Earl Peace et al.

1051391

SUPREME COURT OF ALABAMA

964 So. 2d 651; 2007 Ala. LEXIS 15

January 12, 2007, Released

SUBSEQUENT HISTORY: [**1]
Released for Publication August 15, 2007.
Rehearing denied by Fike v. Peace, 2007 Ala. LEXIS 186 (Ala., Mar. 16, 2007)
Related proceeding at Fike v. Peace, 2007 U.S. Dist. LEXIS 81669 (N.D. Ala., May 1, 2007)

PRIOR HISTORY: Certified Questions from the United States District Court for the Northern District of Alabama, Middle Division. (CV-03-PT-2783-M) Robert B. Propst.

DISPOSITION: QUESTION NO. 1 ANSWERED; QUESTION NO. 2 DECLINED.

CORE TERMS: load, truck, trucking, independent contractor, tractor-trailer, contractor, dangerous activity, hauling, steel, inherently, precaution, oversized, highway, intrinsically, pesticide, width, trailer, carrier's, brakes, subject to liability, secured party, kiln, certified questions, collateral, general contractor, inherently dangerous, subcontractor's, abnormally, vicariously liable, nondelegable duties

COUNSEL: For Plaintiffs: Robert B. French, Jr., and Tommy Allen French of Robert B. French, Jr., P.C., Fort Payne, for Steven Allen Fike et al.

S. Joshua Briskman of Baxley, Dillard, Dauphin, McKnight & Barclift, Birmingham, for Jerry Westbrook, as executor of the estate of Billie Nadine Bigham.

For Defendants: David S. Elliott and Geoffrey S. Bald of Burr & Forman, LLP, Birmingham, for General Shale Products, LLC.

For Amicus curiae Alabama Defense Lawyers Association, in support of the defendants:

Doy Leale McCall III of Hill, Hill, Carter, Franco, Cole & Black, P.C., Montgomery.

JUDGES: STUART, Justice. Nabers, C.J., and Woodall, Bolin, and Parker, JJ., concur. See, Lyons, Harwood, and Smith, JJ., concur specially.

OPINION BY: STUART

OPINION

[*652] STUART, Justice.

The United States District Court for the Northern District of Alabama, Middle Division, certified to this Court the following questions pursuant to Rule 18, Ala. R. App. P.:

> "1. Under Alabama law, does the mere contracting for the hauling of an oversize load make the shipper vicariously liable for the negligence of the independent contractor trucking company?
>
> "2. If there is some general liability for negligence of an independent contractor merely because of the oversize load, does the liability of the shipper extend to causes unrelated to the oversize load per se, such as improper brakes or driving?"

We answer the first question in the negative. Because of our resolution of the first question, we need [**2] not address the second question.

Facts

This Court has no record from which to determine its own statement of the facts presented by the certified questions; we rely on the following statement of the facts as provided by the federal district court:

> "On July 14, 2003, Steven Allan Fike ('Fike'), Billie Nadine Bigham ('Bigham'), Andrea Raiford Doxtator ('Doxtator'), April Gowen ('Gowen') -- Doxtator's minor daughter -- and two

other minor children of Doxtator, not party to this suit, were driving in a 1997 Ford pickup truck on Alabama State Highway 35 in Cherokee County, Alabama. As traffic began backing up because of a slow vehicle, Fike, the driver of the truck, [*653] pulled into the left hand lane to pass. A tractor-trailer being driven by John Earl Peace ('Peace') pulled into the left lane at about the same time, behind the truck being driven by Fike. The brakes on the tractor-trailer failed to function properly, and the tractor-trailer began to pick up speed. Noticing that the tractor-trailer appeared to be out of control, Fike pulled his truck as far left off of the road as he could. Peace, not wanting to run his tractor-trailer off the road, attempted to squeeze through the [**3] gap made by Fike on the far left and the lane of slowed traffic on the right. The tractor-trailer's load was oversized, and Peace was unable to navigate the gap. The load struck Fike's truck on the right side, instantly killing Bigham, and injuring Gowen, Doxtator, and Fike, as well as destroying the pickup truck.

"Defendant General Shale Products, LLC ('General Shale') is in the business of manufacturing brick. In the summer of 2003, General Shale hired Defendant DG Trucking [and Equipment Sales, Inc.,] to haul equipment from the General Shale plant in Kentucky to its new plant in Georgia. The cargo in question was large steel kiln cars used in the manufacture of brick. Due to the size of the kiln cars, they are considered to be an oversized load. General Shale, though a licensed motor carrier, generally does not haul oversized loads; DG Trucking is a licensed motor carrier that specializes in hauling such loads. General Shale has had a fifteen-year relationship with DG Trucking, using them to haul oversize loads when necessary. There is no evidence that General Shale has ever had any problems with DG Trucking and its methods, safety history, or observation of legal requirements [**4] for a commercial motor carrier. At the time of the Fike accident, Peace was driving a DG Trucking tractor-trailer loaded with General Shale's kiln cars. After the accident, an inspection of the tractor-trailer by the Alabama State Troopers revealed several violations of the federal safety regulations applicable to motor carriers, including brakes that were out of adjustment.

"On August 28, 2003, Fike, Bigham, Doxtator, and Doxtator as next friend of Gowen, filed suit against Peace, DG Trucking, and General Shale in the Circuit Court of DeKalb County, Alabama. In Count I of the complaint, titled 'Negligence or Willful and Wanton Misconduct,' the plaintiffs allege that Peace negligently, or willfully and wantonly, operated a tractor-trailer that was overloaded, without the required escort of a pilot vehicle, and attempted to navigate down the middle of the road, instead of risking injury to himself by pulling his own truck off the road. The plaintiffs further allege that DG Trucking negligently, or willfully and wantonly, entrusted the tractor-trailer into the hands of Peace in a defective and substandard condition -- not having been properly inspected and maintained. The plaintiffs [**5] also allege that both DG Trucking and General Shale were negligent or willful and wanton when they contracted with each other to haul the oversized load, that DG Trucking was negligent or willful and wanton in allowing Peace to drive an overloaded tractor-trailer, and that General Shale breached its duty to operate in a safe manner when it 'accepted without objection' goods that had been unsafely transported by DG Trucking.

"In Count II of the Complaint, titled 'Wrongful Death,' the plaintiffs allege that the defendants' behavior resulted in the death of Billie Nadine Bigham. Fike, as administrator of the estate of Bigham, his mother, claims to bring the [*654] action pursuant to Alabama Code § 6-5-410 (1975). The plaintiffs demand money damages in an amount to be determined by a jury. On October 9, 2003, the defendants removed this action to the Northern District of Alabama, Middle Division, based on diversity jurisdiction as outlined in 28 U.S.C. § 1332." [1]

1 In its brief filed with this Court, General Shale Products, LLC, indicates that the district court entered a summary judgment in favor of General Shale as to all claims asserted directly against it. (See General Shale's brief at p. 19.) Although the district court's recitation of the facts does not expressly include this statement, the court's statement of the facts does intimate that General Shale is subject to liability only if it may be held liable for DG Trucking's negligence, if any. We will not address the question of General Shale's liability based on alleged negligent selection of DG Trucking.

[**6] *Relevant Caselaw*

Although this Court has not had an occasion to address the precise question presented by the first certified question, we have, in previous cases, concluded that an entity or person may be liable for the negligence of an independent contractor under limited circumstances. In *Boroughs v. Joiner*, 337 So. 2d 340 (Ala. 1976), this Court stated:

> "The general rule in this state, and in most others, is that:
>
> > "'... one is not ordinarily responsible for the negligent acts of his independent contractor. But this rule, as most others, has important exceptions. One is that a person is responsible for the manner of the performance of his nondelegable duties, though done by an independent contractor, and therefore, that one who by his contract or by law is due certain obligations to another cannot divest himself of liability for a negligent performance by reason of the employment of such contractor. [Citations Omitted].'
>
> "....
>
> "It is also generally recognized that one who employs a contractor to carry on an inherently or intrinsically dangerous activity cannot thereby insulate himself from liability."

337 So. 2d at 342. [**7]

This general rule was applied by this Court in *General Finance Corp. v. Smith*, 505 So. 2d 1045 (Ala. 1987), which held a secured party vicariously liable for a breach of the peace by its independent contractor, which resulted when the independent contractor attempted to repossess the collateral used to secure the debt. This Court recognized that § 7-9-503, Ala. Code 1975 (now repealed), allowed a secured party to avoid judicial process by repossessing its collateral, but only if that repossession could be done without a breach of the peace. [2] The Court concluded that, even if the secured party relied on an independent contractor to repossess the collateral, the secured party could not disclaim liability for any breach of the peace resulting from that attempted repossession. The Court in *General Finance Corporation* stated:

> "The legislature, in enacting § 7-9-503, *supra*, did not attempt to set out with specificity the safeguards or precautions which a secured party must [*655] take in order to effect a peaceful repossession. By implication, however, a secured party is under a duty to take those precautions which are necessary at [**8] the time to avoid a breach of the peace. It is axiomatic that this duty is based on sound public policy.
>
> "Assuming, without deciding, that the status of H & B Recoveries as an independent contractor was undisputed by the evidence, the defendant could not delegate to H & B Recoveries its liability for the wrongful manner in which the repossession was accomplished."

505 So. 2d at 1048. In reaching its conclusion, the Court in *General Finance Corporation* relied on, among other things, the *Restatement (Second) of Torts* § 424 (1965), which provides:

> "'One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by

> the failure of a contractor employed by him to provide such safeguards.'"

505 So. 2d at 1048.

> 2 Section 7-9-503, Ala. Code 1975, which has since been repealed, stated, in pertinent part: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." The Court in *General Finance Corporation* defined "breach of the peace" to mean "without risk of injury to the secured party, the debtor, or innocent bystanders." See 505 So. 2d at 1048.

[**9] In *Jones v. Power Cleaning Contractors*, 551 So. 2d 996 (Ala. 1989), this Court recognized that the use of a highly caustic paint remover was an inherently dangerous activity and that the general contractor could not disclaim liability for its subcontractor's negligence in the use of the remover. In *Jones*, the University of North Alabama ("UNA") contracted with Sequoia Construction Company, a general contractor, to refinish one of its buildings. In order to perform the job it had contracted to do, Sequoia had to remove the old paint from the building. Sequoia subcontracted the entire project to another contractor, who, in turn, subcontracted the entire job to Quality Waterproofing, another contractor.

As Quality proceeded to remove the paint, one of Quality's employees was injured when "PC X-25" -- the highly caustic paint remover Quality selected to use for the project -- splashed in his eye. The worker was blinded in that eye as a result. The injured worker sued Sequoia, Quality, and the supplier of the paint remover.

In analyzing whether the worker had a viable claim against Sequoia, this Court reviewed the law of negligence, stating that "[a]s a general [**10] rule, a contractor must accept responsibility for the negligent acts of his independent contractor if the independent contractor is engaging in inherently or intrinsically dangerous acts." 551 So. 2d at 998. The *Jones* Court noted that all parties had admitted that the chemical selected for use by Quality was extremely dangerous; as a result, the Court concluded that "[t]here is no doubt that the application of PC X-25 would fall within the ambit of" an intrinsically dangerous act. 551 So. 2d at 999. The Court also observed that the contract between UNA and Sequoia specified that Sequoia would be responsible for the "acts and omissions of subcontractors" and that Sequoia would "take all necessary precautions" to provide a safe workplace for the workers. 551 So. 2d at 999. For these reasons, the Court in *Jones* concluded that Sequoia, the general contractor, was liable for the negligence of Quality, the subcontractor.

In *Boroughs v. Joiner*, supra, this Court recognized that the use of pesticides and insecticides was an inherently dangerous activity. In reaching this conclusion, the Court noted:

> "The Legislature of [**11] Alabama has recognized that insecticides and pesticides are intrinsically dangerous and has adopted statutes regulating the sale, distribution and application of those products in this state. The legislature stated its purpose in enacting the Alabama [*656] Pesticide Act of 1971 (Title 2, § 337(9a), et seq.). § 337 (12a) is as follows:
>
> > "'The purpose of this article is to regulate, in the public interest, the application of pesticides. ... [S]uch materials when misused may seriously injure health, property, crops, wildlife, bees, and fish. Pesticides may also injure man and animals, either by direct poisoning or by gradual accumulation of poisons in the tissues. ... A pesticide applied by aircraft or ground equipment for the purpose of controlling diseases, insects or weeds in a crop which is not itself injured by the pesticide may drift, sometimes for miles, and injure or contaminate other crops and other things with which it comes in contact. Therefore, it is deemed necessary and in the public interest to provide some means of regulating the application of pesticides.'
>
> "Under the statutory scheme adopted by the legislature, such products must be registered with the Department [**12]

of Agriculture and Industries. Each must bear a label describing the degree of toxicity, and each must bear warnings of the dangers inherent in the use thereof. One must have a permit to purchase such products. Aviators must be licensed to engage in crop dusting or spraying and must pass an examination satisfactory to the Commissioner of Agriculture demonstrating knowledge of the dangers involved in the application thereof.

"We hold that aerial application of insecticides and pesticides falls into the intrinsically or inherently dangerous category and, therefore, the landowner cannot insulate himself from liability simply because he has caused the application of the product to be made on his land by an independent contractor.

"....

"The test of liability on the part of the landowner is one of reasonableness. Liability is not absolute but is imposed on the landowner for his failure to exercise due care in a situation in which the work being performed is sufficiently dangerous that the landowner himself has a duty to third persons who may sustain injury or damage from the work unless proper precautions are taken in the performance thereof."

337 So. 2d at 343. [**13] For these reasons, the Court held that a landowner who contracted for the spraying of pesticides or insecticides was subject to liability if the contractor failed to use proper precautions in connection with the spraying. [3]

3 Additionally, this Court has held that the use of dynamite as an explosive is an inherently dangerous activity. See *Bankers Fire & Marine Ins. Co. v. Bukacek*, 271 Ala. 182, 123 So. 2d 157 (1960). The opinion in *Bankers Fire* addressed insurance-coverage issues in the context of a constable who used dynamite to destroy an illegal still and thereby damaged the house in which the still was located. Because of the issues presented in *Bankers Fire*, the analysis and reasoning used by the Court in that opinion are not relevant here, and no further discussion of that case is necessary.

Conversely, this Court has applied these general rules in other contexts to find the employer not vicariously liable for the negligence of an independent contractor. For example, in *Stovall v. Universal Construction Co.*, 893 So. 2d 1090 (Ala. 2004), [**14] this Court recognized that the painting of the interior of a "rocket replica" at night was not an inherently dangerous activity when the issue before the Court was whether the general contractor should be held liable for the injuries sustained by an employee of the subcontractor who died after falling off a ladder. The Court stated:

"[A] general contractor is liable for injuries to a third person where the work [*657] is '"of such kind or class that the doing of it, however carefully or skillfully performed, will probably result in damage, or is necessarily and intrinsically dangerous."' ...

"We explained the concept of 'intrinsically dangerous' work in *Boroughs v. Joiner*, 337 So. 2d 340 (Ala. 1976). The risk posed by such an activity '"inheres in the performance of the contract and results *directly* from the work to be done, *not* from the collateral negligence of the contractor."' *Boroughs*, 337 So. 2d at 342 (quoting 41 Am. Jur. 2d *Independent Contractors* § 41) (emphasis added). Such work involves a '"special danger"' that is '"inherent in or normal to the work."' *Boroughs*, 337 So. 2d at 342 [**15] (quoting *Restatement (Second) of Torts* § 427 (1965)). Intrinsically dangerous work is work fraught with danger, 'no matter how skillfully or carefully it is performed.' 41 Am. Jur. 2d *Independent Contractors* § 54.

"....

"We cannot say that any work done by [the employee] on the night of his death constituted 'intrinsically dangerous' work. First, common sense dictates that painting from a ladder is simply not dangerous work, so long as the most rudimentary care is taken. Thus, this is not the sort of work where there is some risk of injury even when the worker exercises the utmost care and attention."

893 So. 2d at 1099.

In *Pope v. City of Talladega*, 602 So. 2d 890 (Ala. 1992), the City of Talladega hired an independent contractor to perform construction work; this construction work required the contractor to excavate certain sites.

Under his contract with the City, the independent contractor was liable for all "conditions of the job site, including safety of all persons and property ...." The independent contractor hired another contractor to assist him. [**16] This subcontractor was killed when the wall of an excavation sight caved in.

The decedent's widow sued, among others, the City of Talladega, claiming that the excavation work was inherently dangerous and that the City was therefore vicariously liable. However, the Court rejected that argument, holding that the cave-in would not have happened if the contractors had shored or sloped the walls as required by OSHA regulations. Because the danger could have been avoided by the use of reasonable care, the Court refused to find the excavation work at issue in *Pope* to be inherently dangerous. *Pope*, 602 So. 2d at 893.

In *Williams v. Tennessee River Pulp & Paper Co.*, 442 So. 2d 20 (Ala. 1983), this Court concluded that a logging company that had hired an independent contractor to haul logs could not be held liable for damage proximately caused by the contractor's failure to properly maintain his truck. The Court noted that an accident involving the log truck and a vehicle was caused when a hub and a wheel of the truck fell off as a result of improper maintenance and repairs. The Court specifically noted that the accident was not caused by the manner in [**17] which the logs had been loaded onto the trailer portion of the truck.

After considering other theories of liability, the Court addressed the plaintiff's claim that the hauling of logs presented a "peculiar risk of physical harm" and, therefore, that the general contractor could be held liable for damages caused by the subcontractor's negligence in performing that act. In support of this argument, the plaintiff relied upon the *Restatement (Second) of Torts* § 416 (1965). [4]

> 4 The *Restatement (Second) of Torts* § 416 provides:
>
> > "One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."

[*658] [**18] The Court in *Williams v. Tennessee River Pulp & Paper Company* rejected this theory, stating:

> "No Alabama case has formally adopted § 416 and we do not need to reach the issue in this case. [5] Rather, we hold, as a matter of law, that the faulty maintenance of wheels and the hauling of pulp timber do not constitute a peculiar risk of physical harm which requires special precautions. Comment d. of § 416 illustrates our view:
>
> > "'[I]f a contractor is employed to transport the employer's goods by truck over the public highway, the employer is not liable for the contractor's failure to inspect the brakes on his truck, or for his driving in excess of the speed limit, because the risk is in no way a peculiar one, and only an ordinary precaution is called for.'
>
> "Tennessee Paper [the logging company] may be responsible for special precautions to anchor a load of giant trees which constitute a peculiar risk, but it is not responsible for the independent contractor's compliance with simple maintenance procedures and load factors. ... Hence, appellants cannot impose liability under § 416 upon Tennessee Paper under the facts in this case.
>
> "We hold that the trial [**19] court correctly granted summary judgment [to Tennessee Paper] on the grounds of Mauldin's independent contractor status and liability under *Restatement (Second) of Torts* § 416 (1965)."

442 So. 2d at 23 (footnote omitted).

5 The Court in *Williams v. Tennessee River Pulp & Paper Co.*, indicated in a footnote that "[e]ven though we have not embraced § 416, we have adopted its general principles in an earlier case." See 442 So. 2d at 23 n. 2 (citing and quoting from *Thomas v. Saulsbury & Co.*, 212 Ala. 245, 246-47, 102 So. 115, 116 (1924)).

Analysis of the Instant Case

We must determine whether General Shale Products, LLC, is subject to liability for the damage caused to the third parties as a result of DG Trucking's negligence to properly maintain its truck. [6] Applying the principles stated above to the facts presented in these certified questions, in order to find General Shale subject to liability for DG Trucking's [**20] negligence, we must find (1) that General Shale owed a nondelegable duty to those third parties injured as a result of DG Trucking's negligence; or (2) that General Shale caused DG Trucking to engage in an inherently dangerous activity.

6 In the facts provided to this Court by the federal district court, the district court observed that "[t]he brakes on the [DG Trucking] tractor-trailer failed to function properly, and the tractor-trailer began to pick up speed. ... After the accident, the inspection of the tractor-trailer by the Alabama State Troopers revealed several violations of the federal safety regulations applicable to motor carriers, including brakes that were out of adjustment." Certification of question of law, at pp. at 2-3.

We first consider the nondelegable-duty theory. We note that the legislature has enacted statutory limits applicable to the hauling of an oversized load by motor carrier. Chapter 9 of Title 32 of the Alabama [*659] Code 1975 addresses "Trucks, Trailers and Semi-Trailers." Specifically, [**21] § 32-9-20, Ala. Code 1975, provides, in pertinent part:

> "It shall be unlawful for any person *to drive or move on any highway* in this state any vehicle or vehicles of a size or weight except in accordance with the following:
>
> > "(1) Width. Vehicles and combinations of vehicles, operating on highways with traffic lanes 12 feet or more in width, shall not exceed a total outside width, including any load thereon, of 102 inches, exclusive of mirrors or other safety devices approved by the State Transportation Department. The Director of the State Transportation Department may, in his or her discretion, designate other public highways for use by vehicles and loads with total outside widths not exceeding 102 inches, otherwise; vehicles and combinations of vehicles, operating on highways with traffic lanes less than 12 feet in width, shall not exceed a total outside width, including any load thereon, of 96 inches, exclusive of mirrors or other safety devices approved by the State Transportation Department. No passenger vehicle shall carry any load extending beyond the line of the fenders. No vehicle hauling forest products or culvert pipe on any highway [**22] in this state shall have a load exceeding 102 inches in width."

Section 32-9-29, Alabama Code 1975, is also applicable to this case; that section reads as follows:

> "(1) The Director of the Department of Transportation or the official of the department designated by the director may, in his discretion, upon application and for good cause being shown therefor, issue a permit in writing authorizing the applicant *to operate or move* upon the state's public roads *a vehicle* or combination of no more than two vehicles, *and loads* whose weight, width, length or height, or combination thereof, exceeds the maximum limit specified by law; provided, that the load transported by such vehicle or vehicles is of such nature that it is a unit which cannot be readily

> dismantled or separated; provided however, that bulldozers and similar construction equipment shall not be deemed readily separable for purposes of this chapter; and further provided, that no permit shall be issued to any vehicle whose operation upon the public roads of this state threatens to unduly damage a road or any appurtenances thereto."

Finally, the penalties imposed for violation of Chapter 9 are set [**23] forth in § 32-9-5, Ala. Code 1975. That section provides:

> "*The operation* of any truck, semi-trailer truck or trailer in violation of any section of this chapter or of the terms of any permit issued under this chapter, shall constitute a misdemeanor, and *the owner thereof*, if such violation was with his knowledge or consent, and *the operator thereof* shall, on conviction, be fined not less than $ 100.00 nor more than $ 500.00 and may also be imprisoned or sentenced to hard labor for the county for not less than 30 days nor more than 60 days."

(Emphasis added.)

In *Heathcock v. State*, 415 So. 2d 1198 (Ala. Crim. App. 1982), the Court of Criminal Appeals discussed the purposes underlying these statutes:

> "We have no doubt that one intention of the Legislature in enacting the law as now found in Code of Alabama 1975, § 32-9-20, a lengthy section governing the size and weight of trucks, trailers, and semi-trailers traveling on highways of Alabama, was, as appellant says, 'to [*660] prevent injury to the roads,' but we do not agree with appellant that this was the only intention of the Legislature: [**24]
>
> > "'The obvious purposes for enacting truck weight laws is for the safety of the public, and keeping highways in good condition for the traveling public. Travel upon the highways must be as safe as it can reasonably be made consistent with their efficient use. Any overloaded truck creates a safety hazard upon the public highway as well as contributing to a bad state of repair.'"

415 So. 2d at 1203, quoting *State Dep't of Public Safety v. Scotch Lumber Co.*, 293 Ala. 330, 302 So. 2d 844, 846 (1974). See also *Leonard v. State*, 38 Ala. App. 138, 142, 79 So. 2d 803, 807 (Ala. 1955) ("'The purpose of statutes prohibiting the use of public highways by motor vehicles of excessive weight is to prevent injury to the public property in the form of damage to roads, bridges, etc., and further to insure the safety of persons traveling such highways.'")

Thus, as did the legislature in *Boroughs v. Joiner* and *General Finance Corp. v. Smith*, supra, the legislature found it appropriate to regulate the activity at issue in this case: the transport of oversized loads by motor carrier. However, the express language of the statutes [**25] does not impose any duty upon the shipper of that oversized load. The relevant statutes impose a duty of compliance upon *the operator* of the truck, semitrailer truck, or trailer, and possibly upon *the owner* of such truck or trailer. See § 32-9-5, § 32-9-20, and § 32-9-29, Ala. Code 1975. Thus, we conclude that General Shale was not subject to a nondelegable duty as a result of Chapter 9 of Title 32 of the Alabama Code 1975. Because we find no other duties imposed upon General Shale by statute, caselaw, or common law that are relevant to the issues before us, we must conclude that General Shale is not subject to liability for the negligence of its independent contractor on the basis of a nondelegable duty. [7]

> 7 We recognize that the duty to exercise due care was applicable to General Shale under the common law. However, the facts as stated by the district court indicate that General Shale complied with that duty. We also interpret the questions certified to us to require the presumption that General Shale has not acted in a negligent manner.

[**26] We next consider whether this case involves an inherently dangerous activity, thereby imposing liability upon General Shale for the negligence of DG Trucking in the performance of that inherently dangerous activity. An "intrinsic danger" or "inherent danger" in an undertaking "'is one which inheres in the performance of the contract and results directly from the

work to be done, not from the collateral negligence of the contractor, and important factors to be understood and considered are the contemplated conditions under which the work is to be done and the known circumstances attending it.'" *Boroughs v. Joiner*, 337 So. 2d at 342 (quoting 41 Am. Jur. 2d, *Independent Contractors* § 41).

When considering the other activities previously recognized in this State as inherently dangerous -- the aerial spraying of pesticides and insecticides, the use of a highly caustic chemical, and the use of dynamite as an explosive -- we must conclude that the shipping of an oversized load does not rise to the same level. We agree with the statement in the brief submitted by the amicus curiae in support of Peace: "There is nothing [**27] to suggest that if the proper precautions are in fact taken in regard to [the shipping of an oversized load], that this activity is hopelessly fraught with danger, no matter how skillfully [*661] or carefully it is performed." (Brief of amicus curiae Alabama Defense Lawyers Association at p. 9.)

We find the analysis and reasoning of *Inland Steel v. Pequignot*, 608 N.E.2d 1378 (Ind. Ct. App. 1993), particularly on point. In that case, Inland Steel contracted with a motor carrier to ship a 48,000-pound coil of steel from Illinois to Ohio. While hauling the steel coil, the motor carrier's driver ran a red light and collided with Pequignot, who was on a motorcycle. Pequignot was seriously injured. Pequignot sued Inland Steel, asserting, among other theories, that because of the size and weight involved, the hauling of the steel coil was an inherently dangerous activity for which Inland Steel was vicariously liable.

In analyzing the liability issue, the Indiana Court of Appeals stated:

> "Although the parties use the terms 'inherently dangerous or intrinsically dangerous' interchangeably, it is apparent to us they are alluding to what the First Restatement of Torts § 519 [**28] (1938) referred to as 'ultra-hazardous' activity and which the Restatement (Second) §§ 519 & 520 (1977), calls 'abnormally dangerous' activity to impose strict liability. ... This doctrine, which evolved from *Rylands v. Fletcher* (1868), L.R. 2 H.L. 330, provides:
>
> > "'(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
> >
> > "'(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.'
>
> "Restatement (Second) § 519.
> "Section 520 of the Second Restatement provides:
>
> > "'In determining whether an activity is abnormally dangerous, the following factors are to be considered:
> >
> > "'(a) Existence of a high degree of risk of some harm to the person, land or chattels of another;
> >
> > "'(b) Likelihood that the harm that results from it will be great;
> >
> > "'(c) Inability to eliminate the risk by the exercise of reasonable care;
> >
> > "'(d) Extent to which the activity is not a matter of common usage;
> >
> > "'(e) Inappropriateness of the activity [**29] to the place where it is carried on;
> >
> > "'(f) Extent to which its value to the community is outweighed by its dangerous attributes.'
>
> "Restatement (Second) § 520. 'The general principle derived from *Rylands* is that where a person chooses to use an abnormally dangerous instrumentality, that person is strictly liable without a showing of negligence for any injury

proximately caused by that instrumentality.' 57A Am. Jur. 2d *Negligence* § 396 (1989).

"....

"We find that § 520(c) as well as our reasoning in *Erbrich Products [Co. v. Wills*, 509 N.E.2d 850 (Ind. Ct. App. 1987),] is dispositive of this question. Hauling steel, or any other heavy load, is not 'inherently dangerous,' 'intrinsically dangerous,' 'ultra-hazardous' or 'abnormally dangerous' as these terms are used in strict liability. It is readily apparent that if the driver of the truck, Hinds, had used reasonable care, this tragic accident would not have happened. It is undisputed that Hinds ran a red light at 40 [miles per hour.] It is also clear to us that the coil of steel was not the proximate cause of Pequignot's injuries. While riding a motorcycle, [**30] he hit a tractor-trailer carrying 48,000 [*662] pounds of steel and traveling at 40 mph. He hit the trailer -- the coil of steel did not fall off the trailer and hit him. It would make no difference if the tractor-trailer was carrying 48,000 pounds of steel or sand or even wood chips. When a motorcycle strikes or is struck by a tractor-trailer running a red light, especially one traveling at 40 mph, the motorcyclist is going to come out the loser -- if at all."

608 N.E.2d at 1384-85. For these reasons, the Indiana Court of Appeals held that Inland Steel was entitled to a summary judgment on Pequignot's claims of liability.

Like the accident in *Inland Steel*, supra, the accident in this case was not caused by the oversized load but by the "collateral negligence" of the owner and/or operator of the tractor-trailer. See *Boroughs v. Joiner*, 337 So. 2d at 342 (quoting 41 Am. Jur. 2d, *Independent Contractors* § 41); see *Inland Steel*, 608 N.E.2d at 1385 (referring to the independent contractor's failure to use reasonable care). It is undisputed that the brakes on Peace's truck [**31] failed and that an inspection of Peace's truck after the accident revealed numerous violations of the applicable Federal Department of Transportation regulations, including a failure to properly adjust the brakes. The fact that Peace was hauling an oversized load played no role in the accident, and there is no evidence to indicate that this accident would have occurred if Peace or DG Trucking had maintained the brakes on the tractor-trailer, as they had a duty to do. Thus, the hauling of this heavy load does not meet the definition of an "inherently dangerous" activity because the major risk of harm from the oversized load could have been alleviated if Peace and DG Trucking had used reasonable care.

Conclusion

Under the facts as presented to us by the district court, we conclude that General Shale did not owe a nondelegable duty to the third parties injured as a result of DG Trucking's negligence. We also observe that the hauling of the kiln cars did not constitute an inherently dangerous activity. Therefore, we find no basis upon which to impose vicarious liability upon General Shale for the alleged negligence of DG Trucking. For these reasons, we answer the first certified [**32] question in the negative. Because of our resolution of the first certified question, we need not address the second certified question; we therefore decline to answer the second question.

QUESTION NO. 1 ANSWERED; QUESTION NO. 2 DECLINED.

Nabers, C.J., and Woodall, Bolin, and Parker, JJ., concur.

See, Lyons, Harwood, and Smith, JJ., concur specially.

CONCUR BY: HARWOOD

CONCUR

HARWOOD, Justice (concurring specially).

I concur specially. Rule 18(d), Ala. R. App. P. specifies that when a federal court certifies a question of law to this Court, the certification should contain "a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered." The main opinion points out that this Court has no record from which it can determine the underlying facts and necessarily must rely on the statement of facts as provided by the federal district court. The main opinion sets those facts out completely, and it is to be noted that the facts contain no reference whatsoever to the width of the oversized load of steel kiln cars being carried on the tractor trailer. [*663] The particulars of the load, so [**33] far as its size is concerned, do not form a part of the certified questions. Rather, the district court phrases its two questions entirely in the abstract, and asks in the first one only about the legal implications of "the mere contracting for the hauling of an oversize load." The main opinion properly responds to this generic, generalized question, expressly stating that the conclusion reached is premised "[u]nder the facts as

presented to us." So. 2d at . I agree that under the facts as provided by the district court, "the hauling of the kiln cars did not constitute an inherently dangerous activity." So. 2d at .

However, the parties volunteer additional facts in their briefs, and they *agree* that the width of the kiln cars as loaded on the tractor trailer was 17 feet 8 inches, or 212 inches, and that the two-lane road on which the collision occurred was not more than 24 feet wide. Further, they agree that General Shale Products, LLC, loaded the kiln cars onto the tractor-trailer using its own crane, so that it was aware of the configuration of the load, including its width, when the tractor-trailer left [**34] its premises carrying the load. If the district court had included these facts in its certification, thus particularizing the situation, I would be inclined to answer the question thus shaped in a somewhat different fashion.

See, Lyons, and Smith, JJ., concur.

J.L. Floyd v. Industrial Development Board of the City of Dothan, et al.

No. 82-747

Supreme Court of Alabama

442 So. 2d 927; 1983 Ala. LEXIS 5091

December 2, 1983

PRIOR HISTORY: [**1] Appeal from Houston Circuit Court.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

CORE TERMS: preliminary injunction, highway department, abandonment, dissolve, paved, public road, summary judgment, highway, right-of-way, injunction, abandoned, unpaved, abutting, deed, material fact, counterclaim, prescription, industrial, nonuser, matter of law, rule of law, genuine issue, full hearing, discontinuance, inappropriate, obstructing, cul-de-sac, formally, nonuse, access road

COUNSEL: John E. Byrd for Byrd & Carter, Dothan, for Appellant.

William G. Hause for Hardwick, Hause & Segrest, Dothan, Wade H. Baxley for Ramsey & Baxley, Dothan, Robert H. Harris and J. Lister Hubbard for Capell, Howard, Knabe & Cobbs, Montgomery, for Appellee(s).

JUDGES: Maddox, Justice. Torbert, C.J., Jones, Shores and Beatty, JJ., concur.

OPINION BY: MADDOX

OPINION

[*927] The Industrial Development Board of the City of Dothan (Development Board), James D. Russell, Jr., and MRW, Inc., are plaintiffs-appellees in this case, and J. L. Floyd is the defendant-appellant.

The facts indicate that sometime in 1971 or 1972, the New Beverlye Road was constructed. It commenced at Alabama Highway 52, in Dothan, and ran from there in a southerly direction. (See Appendix A. [1]) [*928] At the time New Beverlye Road was built, Beverlye Road, an unpaved road, intersected Highway 52 some distance to the east, and ran from there in a southwesterly direction. (See Appendix A.) All parties agree that prior to 1971 or 1972, Beverlye Road was a public road.

1 Appendix A is not drawn to scale and is merely intended to aid the reader's understanding of the facts of this case.

[**2] In May of 1972, the Highway Department of the State of Alabama purchased land abutting the east side of Beverlye Road. (See Appendix A.) Although the deed defined the property's western boundary as "Old Kinsey Road," this name was synonymous with Beverlye Road. By deeds dated January 1974, appellant Floyd was conveyed property abutting Beverlye Road. The deeds define the boundaries of appellant's property in a metes and bounds description by reference to the sides of Beverlye Road. The deeds, however, explicitly exclude the right-of-way for Beverlye Road.

The highway department was issued, in February 1974, a building permit by the City of Dothan for the construction of the state highway department building on property fronted by Beverlye Road. In March of the same year, appellant Floyd granted the highway department permission by a letter to "alter the intersection at Old Beverlye Road and Alabama No. 52 east in Dothan." When the highway department altered this intersection, a portion of Beverlye Road was paved as a part of the access road to the state highway department complex. (See cross-hatching as indicated in Appendix A.)

The highway department is a complex and access [**3] to the complex is gained by traveling along the paved road which includes stretches of Beverlye Road that were formerly unpaved. On October 24, 1977, the Houston County Commission formally recognized that only the portion of Beverlye Road below the highway department property, *i.e.*, that portion below the fence indicated in Appendix A, which remains unpaved, was abandoned, thereby leaving the paved portion of Beverlye Road as a cul-de-sac leading from Highway 52 to appellees' property.

There is testimony to the effect that appellee Russell and the public have used the paved portion of Beverlye Road since at least 1977, to gain access to property purchased by Russell. Tenants who farm the abutting property have likewise used the paved portions of Beverlye Road.

In 1982, appellee MRW started construction of a warehouse on property in the Sam Houston Industrial Park which it had purchased from appellee Russell. Because of the increased traffic on Beverlye Road, appellant posted signs and barricaded the road in the summer of 1982. Consequently, plaintiffs sought to enjoin Floyd from obstructing access to and from the industrial park by way of Beverlye Road. The trial court, [**4] following a hearing, granted the preliminary injunction, whereupon Floyd filed his answer and counterclaim. In a motion for summary judgment, the plaintiffs stated that there was:

> ". . . No genuine issue as to any material fact that the Old Beverlye Road, which intersects defendant's property, is a public right-of-way and has never been abandoned; and, therefore, plaintiffs are entitled to judgment as a matter of law on Count 1 and Count 2 of the counterclaim as appears from the testimony and documents presented at the hearing on motion for preliminary injunction held August 30, 1982."

The trial court granted summary judgment and dismissed counts 1 and 2 of Floyd's counterclaim. Floyd then filed a motion to dissolve the injunction, and also a motion that was styled as a motion to reconsider, vacate or set aside the summary judgment. The court denied both motions on May 2, 1983. Floyd filed a timely notice of appeal on May 13, 1983. *See* Code 1975, § 12-22-6; Rule 4(a)(1), Ala. R. App. P.

I

We first address Floyd's contention that the trial court erred in refusing to dissolve the preliminary injunction.

Floyd asserts that the road to which the injunction [**5] applies is what was once known as "old" Beverlye Road, but that the road [*929] was built on new and different land belonging to him and the highway department and is only an access road to the state highway department complex. He states that what was once known as Beverlye Road is now his backyard, with a lawn covering it, and that the balance of Beverlye Road is not, and has not been, used by the public as a road since 1971 or 1972. Floyd contends, therefore, that Beverlye Road was abandoned and the title of the roadbed reverted to the landowners abutting the road when New Beverlye Road (See Appendix A) was opened for public use.

A public road may be abandoned and thus lose its public character in one of several ways. One example is nonuser for a period of twenty years which will operate as a discontinuance of a public road. *See Harbison v. Campbell*, 178 Ala. 243, 252, 59 So. 207, 210 (1912). Likewise, an abandonment of a public road may be effected by a formal, statutory action. *See Code* 1975, §§ 23-4-1 through 23-4-6. There is also authority for the proposition that the construction of a new highway replacing an old road may, under the right circumstances and [**6] after an appropriate length of time, result in an abandonment of the old road. *See* 39A C.J.S. *Highways*, § 134 (1976). In the case of *Purvis v. Busey*, 260 Ala. 373, 71 So. 2d 18 (1954), this Court alluded to this last proposition:

> "In *Harbison v. Campbell*, 178 Ala. 243, 59 So. 207, it was said that nonuser short of the time of prescription does not operate as a discontinuance of a public road. We have not rested our conclusion here on that statement for here, unlike the *Harbison* case, supra, there has been a substitution of one road for another and *there is respectable authority for the proposition that when such is the case there can be abandonment by nonuse for a period short of the time of prescription.* But we leave a decision of that question to await a case where such a decision is necessary." (Emphasis added.)

We hold that the trial court did not err in denying Floyd's motion to dissolve the preliminary injunction. The applicable rule in this instance is found in § 6-6-501, to-wit: "A motion to dissolve will lie to the granting of a preliminary injunction *only for matters subsequently occurring.*" (Emphasis added.) Thus, when a [**7] preliminary injunction has been issued after a full hearing on the matter, as in this case, a motion to dissolve is inappropriate unless circumstances have changed since the granting of the preliminary injunction so as to warrant a reconsideration of the merits. *See Berman v. Wreck-A-Pair Bldg. Co.*, 234 Ala. 293, 296, 175 So. 269, 272 (1937).

In response to the Board's complaint seeking a preliminary injunction, Floyd filed a motion to dismiss raising numerous grounds opposing the granting of a preliminary injunction. On August 30, 1982, after a full

hearing on the request for a preliminary injunction, which included the taking of testimony, the trial court issued a preliminary injunction barring Floyd from obstructing Beverlye Road. On April 29, 1983, Floyd filed his motion to dissolve the injunction which essentially restated the grounds raised in his motion to dismiss filed prior to the hearing on the preliminary injunction. In fact, paragraphs 4, 5 and 6 of Floyd's motion to dissolve the injunction are verbatim with paragraphs 2, 3, and 4 of his motion to dismiss. The remaining paragraphs of the motion to dissolve the injunction merely restate Floyd's legal theories [**8] and raise no matters which occurred subsequent to the granting of the preliminary injunction. We find no error in the refusal of the trial court to dissolve the preliminary injunction.

II

We now discuss Floyd's argument that the trial court erroneously granted the plaintiffs' motion for summary judgment. Floyd contends that this Court should adopt the rule of law that nonuser of a public way for a period of less than twenty years can constitute an abandonment, and [*930] that he is entitled to a trial on the question of abandonment in this case.

The plaintiffs contend the Houston County Commission formally recognized that portion of Beverlye Road which remained unpaved to be abandoned, but claims that this fact does not constitute an abandonment of the portion of Beverlye Road still in use, *i.e.*, the paved portion, even though the paved portion is now a cul-de-sac. *See* 39A C.J.S. *Highways*, § 131 at 850 (1976); *Purvis v. Busey, supra*. The right-of-way agent for the City of Dothan indicated that a map prepared by the United States Department of the Interior in 1969, and updated in 1981, shows the existence of both New Beverlye Road and "old" Beverlye Road. [**9] Also, the plaintiffs contend that the evidence is undisputed that the City of Dothan continues to maintain a waterline in the right-of-way of "old" Beverlye Road. In short, the plaintiffs contend that there was no abandonment as a matter of law.

On the other hand, Floyd contends that much of the "old" Beverlye Road is now covered with grass, is cultivated or is otherwise not being used as a public road. Floyd also contends that he granted permission only to the state highway department for a right-of-way to the highway department complex and that new Beverlye Road was constructed to replace "old" Beverlye Road. We are of the opinion that there is a material fact whether there was an abandonment of the "old" Beverlye Road in this case.

Because we adopt the rule of law that "there can be abandonment by nonuse for a period short of the time of prescription," we hold that a genuine issue of material fact exists in this case, and that granting of summary judgment was inappropriate, but at trial, Floyd will have the burden of showing abandonment by clear and convincing evidence. *Purvis v. Busey, supra.*

III

We conclude that the judgment granting a preliminary injunction is [**10] due to be affirmed, but that the granting of summary judgment is due to be reversed and the case remanded.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Torbert, C.J., Jones, Shores and Beatty, JJ., concur.

[*931] [SEE APPENDIX IN ORIGINAL]

James W. Fordham v. Cleburne County Commission, et al.

No. 89-1575

Supreme Court of Alabama

580 So. 2d 567; 1991 Ala. LEXIS 358

April 5, 1991

SUBSEQUENT HISTORY: [**1] Released for Publication May 18, 1991.

PRIOR HISTORY: Appeal from Circuit Court; Cleburne County; No. CV-89-13; George C. Simpson, Dist. Judge.

DISPOSITION: *AFFIRMED.*

CORE TERMS: street, alley, vacated, vacation, highway, municipality, abutting, governing body, notice, public roads, county commission, announcement, declaration, recorded, traffic, newspaper, situated, common law, public ways, noncompliance, declaring, parcel of real estate, parcels of land, dirt road, written instrument, consecutive, convenient, resolving, evidenced, attended

COUNSEL: Candice J. Shockley of Holliman, Shockley, Kelly & Acker, Bessemer, for Appellant.

Gregory N. Norton of Burnham, Klinefelter, Halsey, Jones & Cater, Aniston, for Appellees.

JUDGES: Steagall, Justice. Hornsby, C.J., and Almon, Adams, and Ingram, JJ., concur.

OPINION BY: STEAGALL

OPINION

[*567] In March 1982, James W. Fordham purchased a parcel of real estate in Cleburne County, Alabama. A dirt road extended across that property to an adjoining parcel of real estate owned by Percy L. Owen. The dirt road, known as "Beaver Lane Road," connects with another road known as "Lambert Road" or "Owen Road"; both are considered public roads.

Within a year of the purchase, Fordham made improvements on the land, such as clearing both sides of the road, placing gravel on the road, fencing both sides of the road, and planting cedar trees along the sides of the road. Soon after Fordham made these improvements, he began to notice an increase in traffic on the road, followed by incidents of people gathering [**2] to "drink" and "shoot bottles." Fordham soon discovered that certain items on his property were missing, including approximately "ten head of cattle"; some of the missing cattle were subsequently found dead, having been shot.

Because of the problems caused by the traffic, Fordham discussed closing Beaver Lane Road with Owen. Both men agreed that Beaver Lane Road should be closed [*568] because of the problems that had occurred, and they agreed to take their proposal to close the road before the Cleburne County Commission.

Fordham, Owen, and Owen's son attended the April 1, 1983, Commission meeting and proposed that Beaver Lane Road be closed. The Commission adopted a resolution that day calling for the road to be closed after an announcement of the road closing had appeared in The Cleburne News each week for three weeks. The newspaper advertisement was to serve as notice to all who may have had objections to the road closing to voice their objections to the Commission by May 4, 1983. As of May 13, the Commission had not received any objections, and on that date it adopted another resolution, resolving that Commission Chairman Mac Smith "get with the postmaster about closing the road on [**3] Fordham's property."

On June 4, 1983, Owen filed an objection to the closing of Beaver Lane Road. The road remained open and continued to be serviced by the county until February 1989, when Fordham physically blocked Beaver Lane Road at both ends of his property. On February 6, Owen and his son attended another Commission meeting and requested that the Commission require Fordham to open the portion of Beaver Lane Road that crossed Fordham's property. The Commission then adopted another resolution, resolving that Sheriff Jack Norton speak to Fordham about reopening the road and stating that the road had been closed without the approval of the Commission. However, on February 13, the Commission rescinded that resolution and announced that it

was the Commission's position that the closing of that portion of Beaver Lane Road on Fordham's property would have to be decided by the courts. The Commission filed a declaratory judgment action on March 30, 1989, seeking a determination on the status of Beaver Lane Road. On December 1, 1989, Fordham filed a "Declaration of Vacation" of the road.

On February 9, 1990, the court conducted a nonjury trial and on April 6, 1990, entered a judgment declaring [**4] that the road was a public road and that the Commission had not vacated the road, based on a finding that the Commission had not complied with the requirements of Ala. Code 1975, §§ 23-4-2 and 23-4-20. In addition, the trial court ordered Fordham to remove all barriers, to repair the road, and to refrain from interfering with vehicular or pedestrian traffic on the road.

Fordham appeals, raising a single issue: Whether the trial court erred in finding that the Commission had failed to comply with §§ 23-4-2 and 23-4-20. Fordham concedes that Beaver Lane Road is a public road, but argues that he and the Commission fully met the requirements under § 23-4-20.

First, we note that our review of the trial court's ruling in this matter is governed by the familiar ore tenus rule. Under that rule, the decision of the trial judge, sitting without a jury, based upon disputed facts presented orally to the court, is presumed to be correct and will be affirmed on appeal as long as that decision "'is fairly supported by credible evidence under any reasonable aspect and is not palpably wrong or manifestly unjust.'" Charles Israel Chevrolet, Inc. v. Walter E. Heller & Co., 476 So.2d 71, 73 (Ala. 1985), [**5] quoting Whitt v. McConnell, 360 So.2d 336, 337 (Ala. 1978). With this standard in mind, we address the merits of Fordham's claim.

Section 23-4-20 provides the following:

"(a) Any street or alley may be vacated, in whole or in part, by the owner or owners of the land abutting the street or alley or abutting that portion of the street or alley desired to be vacated joining in a written instrument declaring the same to be vacated, such written instrument to be executed, acknowledged and recorded in like manner as conveyances of land, which declaration being duly recorded shall operate to destroy the force and effect of the dedication of said street or alley or portion vacated and to divest all public rights, including any rights which may have been acquired by prescription, in that part of the street or alley so vacated; provided, that if any [*569] such street or alley is within the limits of any municipality, the assent to such vacation of the city council or other governing body of the municipality must be procured, evidenced by a resolution adopted by such governing body, a copy of which, certified by the clerk or ministerial officer in charge of the records of the municipality [**6] must be attached to, filed and recorded with the written declaration of vacation; and if any such street or alley has been or is being used as a public road and is not within the limits of any municipality, the assent to such vacation of the county commission of the county in which such street or alley is situated must be procured, evidenced by resolution adopted by such board or court, a copy of which, certified by the head thereof, must be attached to, filed and recorded with the declaration of vacation. Such vacation shall not deprive other property owners of such right as they may have to convenient and reasonable means of ingress and egress to and from the property, and if such right is not afforded by the remaining streets and alleys, another street or alley affording such right must be dedicated."

The proper procedures required to enforce § 23-4-20 are found in § 23-4-2, which provides:

"(a) The governing body of the municipality where the street, alley or highway, or portion thereof, to be closed and vacated is situated in a municipality and, in other cases, the county commission of the county in which the street, alley, highway, or portion thereof, is situated shall, after [**7] causing to be published in a newspaper once a week for three consecutive weeks in the county a notice which shall describe the street, alley, highway or portion thereof proposed to be closed and vacated and also give the date of the hearing, first adopt a resolution to the effect that it is in the public interest that such street, alley, highway or portion thereof be closed and vacated; and thereafter, such governing body may file in the office of the judge of probate in the county in which such street, alley or highway, or portion thereof, is located, its petition requesting the closing and vacating of such street, alley or highway, or such portion thereof.

"(b) The petition shall describe with accuracy the street, alley or highway, or portion thereof, to be closed and vacated and shall give the names of the owner or owners of the abutting lots of parcels of land and also the owner or owners of such other lots of parcels of land, if any, which will be cut off from access thereby over some other reasonable and convenient way. The petition shall further set forth that it is in the interest of the public that such street, alley or highway, or portion thereof, be closed and vacated, [**8] and that a resolution to that effect has been adopted by the governing body of the municipality or county, as hereinbefore set forth.

"(c) Thereupon, the probate court shall set the petition for hearing and shall issue notice of the pendency of the petition to the persons named in the petition. Such notice shall be served upon the said abutting owner or

owners and also the person or persons, if any, named in the petition whose access will be affected, resident in this state as civil process is now served, not less than 10 days prior to the hearing of the petition."

In addition, we have stated before that public streets, alleys, or highways can be closed and vacated by counties or municipalities in accordance with Ala. Code 1975, §§ 23-4-1 through -6, or by "abutting landowners" in accordance with § 23-4-20. Bownes v. Winston County, 481 So.2d 362 (Ala. 1985). However, there is a common law prohibition against the vacation of public ways. Id. at 363; Booth v. Montrose Cemetery Association, 387 So.2d 774 (Ala. 1980). Thus, the vacation statutes are in derogation of the common law prohibition against the vacation of public ways [**9] and must be strictly construed. Gwin v. Bristol Steel & Iron Works, Inc., 366 So.2d 692 (Ala. 1978); see, also, Bownes v. Winston County, supra. All procedural requirements under the statutes must be met. Hammond v. Phillips, 516 So.2d 707 (Ala. [*570] Civ.App. 1987) (citing Bass v. Sanders, 282 Ala. 546, 213 So.2d 391 (1968)).

The facts present a clear case of noncompliance by the Commission. The record shows that in 1983 the Commission adopted a resolution indicating its intent to close Beaver Lane Road after a published announcement had appeared in the local newspaper once a week for three consecutive weeks. The announcement was published as requested. No objections to the Commission's proposals had been received as of May 4, 1983, the date stated in the announcement by which objections were to be received. On May 13, 1983, the Commission again adopted a resolution related to closing the road. On June 4, 1983, Owen filed an objection to the road closing. For nearly six years, the matter remained dormant.

In February 1989, when Fordham closed the road, the Commission adopted a resolution that included [**10] a statement that Fordham had closed the road "without approval of the county commission."

The evidence shows numerous and obvious incidents of noncompliance with the applicable statutes. A particular fact stands out: The Commission did not adopt a clear and unequivocal resolution closing Beaver Lane Road. On several occasions, the Commission made reference to an intent to close the road, but the Commission did not complete the process and did not meet the strict standards set out in §§ 23-4-2 and 23-4-20. Thus, the trial court's holding that the Commission had not vacated the road and its injunction against Fordham's interference with the road were based on findings that were well supported by the record. The judgment is, thus, due to be affirmed.

AFFIRMED.

Fox Trail Hunting Club et al. v. Howard McDaniel et al.

2990961

COURT OF CIVIL APPEALS OF ALABAMA

785 So. 2d 1151; 2000 Ala. Civ. App. LEXIS 758

December 15, 2000, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication May 22, 2001.

PRIOR HISTORY: Appeal from St. Clair Circuit Court. (CV-97-187). TRIAL JUDGE: William A. Shashy.

DISPOSITION: REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CORE TERMS: interstate, public road, timber, hunters, roadway, abandoned, prescription, decreased, landowner, abandonment, constructed, undisputed, harvesters, highway, nonuse, split, property located, traveling, property owners, general public, de novo, impassable, disrepair, disputed, travel, nearby, fallen, tenus, ore, map

COUNSEL: For Appellants: Erskine R. Funderburg of Trussell & Funderburg, P.C., Pell City.

For Appellees: Charles E. Robinson, Sr., of Robinson & Robinson, P.C., Ashville.

JUDGES: YATES, Judge, Robertson, P.J., and Monroe, Crawley, and Thompson, JJ., concur.

OPINION BY: YATES

OPINION

[*1152] YATES, Judge

The Fox Trail Hunting Club ("the Hunting Club"), an unincorporated association, and Kenneth E. Battles and Larry Larue, members of the Hunting Club, sued Howard McDaniel and Carolyn McDaniel on November 26, 1997, seeking the declaration of a public roadway by prescription and seeking an injunction prohibiting the defendants from blocking or obstructing the roadway. The Hunting Club, Battles, and Larue also sought, on that same day, an ex parte restraining order preventing the McDaniels from blocking access to the road. The court entered the restraining order on December 18, 1997.

On March 24, 1998, the Hunting Club, Battles, and Larue amended their complaint to add a count for adverse possession and to add Paul Bowlin and Julia Henderson as defendants. On September 14, 1998, the Hunting Club, Battles, and Larue again amended their complaint to add Luther S. Gartrell [**2] III as a real party in interest, because he owns the property that is leased by the Hunting Club, Battles, and Larue.

Following an ore tenus proceeding, the trial court entered the following order:

> "1. The old roadway in dispute is located in St. Clair County near Ashville, [*1153] Alabama and goes from Old Bowlin Bridge Road (now Pinedale Road) to Interstate 59 and is known as the Old Partlow Road and in some places is ... impassable.
>
> "2. Prior to the construction of Interstate 59 and U.S. Highway 231, this roadway known as Partlow Road was used to some extent to travel from Ashville to Whitney by some members of the general public.
>
> "3. Since the split of the roadway by the Interstate, the character of its use has changed and the amount of its use by the public has been limited mainly to hunters and some nearby property owners.
>
> "4. The said road is not shown on a geodetic survey map nor is it shown on the most current tax map.

"5. When the construction of Interstate 59 was completed, it split the old road. However, the portion lying south of Interstate 59 has been abandoned and is used sparingly only by hunters and property owners.

[**3]

"6. The use and access of the road was not restricted until 1996 when the Defendants placed obstructions at two (2) separate locations on the road.

"7. A portion of the road crosses the Timber Company property, and the Timber Company denies that the road is a public road, and the Timber Company had to rework the road because it was impassable.

"8. The Defendants have proven non-use or abandonment of the Old Partlow Road for twenty (20) consecutive years and have shown no use by the public except for hunters and nearby land owners.

"It is therefore ORDERED that the old road made the basis of this suit, having once been used as a public road, is now found to have been abandoned for a period of more than twenty (20) years and is declared to be a nonpublic road."

The plaintiffs appealed, following the denial of their postjudgment motion. This case was transferred to this court by the supreme court, pursuant to § 12-2-7(6), Ala. Code 1975.

The trial court noted that the facts presented by the parties were largely undisputed. Where evidence is presented ore tenus, a presumption of correctness attaches to the trial court's judgment based on that evidence, [**4] and that judgment will not be disturbed on appeal unless it is palpably wrong or manifestly unjust. *Hereford v. Gingo-Morgan Park*, 551 So. 2d 918 (Ala. 1989). However, where the evidence presented to the court is undisputed, "this court [on appeal] 'shall consider the evidence *de novo*, indulging no presumption in favor of the trial court's determinations.'" *Arp v. Edmonds*, 706 So. 2d 736, 738 (Ala. Civ. App. 1997), quoting *Sasser v. Spartan Food Sys., Inc.*, 452 So. 2d 475, 477 (Ala. 1984). We will review this case de novo.

Before 1960, the Partlow Road was used by the general public for traveling from Ashville northwest to Whitney and to Highway 11. When Interstate 59 was constructed, about 1960, it split the Partlow Road in half. The section of Partlow Road on the north side of Interstate 59 is paved and was renamed "Sweat Road" for purposes of Emergency 911 services. The section of Partlow Road to the south of Interstate 59 is the section of the road now in dispute.

Gartrell owns property on both the north side and the south side of Interstate 59. He leases some of this property to the Hunting Club. Gartrell testified that [**5] his property on the south side of Interstate 59 is accessed by turning off Pinedale Road onto the disputed section of Partlow Road [*1154] and traveling north to his property. The property is also accessible by traveling across the adjoining property owned by Shirley Satterfield. Gartrell stated that the road across Satterfield's property is a private road and that Satterfield would not always permit it to be used. The defendants own property located between Pinedale Road and Gartrell's property. Partlow Road runs through the defendants' property to Gartrell's property.

Once the interstate highway was constructed, the use of Partlow Road by the public decreased drastically; however, the evidence indicates that the road was still used by hunters, landowners, and timber harvesters to access the properties located along the road. The evidence also indicates that some sections of the road had fallen into a state of disrepair; however, an employee of a timber company that had harvested timber on property located off of Partlow Road testified that the road was discernible and "had a bed to it." He also testified that someone had placed some 2" x 6" boards in mud holes for traction and that it appeared [**6] that the road had been used by hunters driving four-wheel-drive vehicles. The defendants restricted the use and access of Partlow Road by placing a gate and a cable across the road in two locations in the early and mid 1990s. This litigation resulted.

A public road is established in one of the following three ways: (1) by a regular proceeding for that purpose; (2) by a dedication of the road by the owner of the land it crosses and a subsequent acceptance by the proper authorities; or (3) by the road's being used generally by the public for a period of 20 years. *Auerbach v. Parker*, 544 So. 2d 943 (Ala. 1989). Our supreme court has stated:

> "As a general rule, an open, defined roadway in continuous use by the public, without let or hindrance for a period of 20 years becomes a public road by prescription. The burden is on the landowner to show permissive use only in recognition of his title, and his right to reclaim possession."

Suttle v. Tucker, 398 So. 2d 266, 267 (Ala. 1981). We conclude that the trial court correctly determined that the Partlow Road had been a public road. The record supports a finding that at one point the Partlow [**7] Road had been generally used by the public for a period of 20 years and was, therefore, a public road by prescription.

We must now determine, however, whether the trial court's determination that the Partlow Road had been abandoned is supported by the evidence. A public road may be abandoned in one of several ways: (1) by a formal, statutory action; (2) by nonuse for a period of 20 years; and (3) where one road replaces another, by an abandonment of the public road caused nonuse for a period short of the time of prescription. *Kennedy v. Hines*, 660 So. 2d 1335 (Ala. Civ. App. 1995). The undisputed evidence shows that once Interstate 59 was constructed the use of the disputed section of Partlow Road decreased substantially; nevertheless, it continued to be used by local landowners, hunters, and timber harvesters. We note that "it is the character rather than the quantum of use that controls whether a road is public." *Tucker*, 398 So. 2d at 267. "The fact that travel on the road may have decreased does not work an abandonment so long as it is open for use by the public generally and is being used by those who desire, or have the occasion to use it." [**8] *Parker*, 544 So. 2d at 946. Further, although sections of a public road have fallen into a state of disrepair, we note that it is not essential to the status of a public road that it be maintained by the county in which the road is located. *Hines, supra.*

[*1155] After carefully reviewing the record, we conclude that the trial court misapplied the law to the facts of the case. Although the use of Partlow Road by the public has decreased since the construction of Interstate 59, local landowners, hunters, and timber harvesters have continued to use it. Because the road has not been in "nonuse" for a period of 20 years, the trial court erred in determining that Partlow Road had been abandoned and was no longer a public road. Accordingly, the judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Robertson, P.J., and Monroe, Crawley, and Thompson, JJ., concur.

Gina Garner, as the mother of Jonathan Garner, a deceased minor v. Covington County and City of Opp; City of Opp v. Gina Garner, as the mother of Jonathan Garner, a deceased minor; City of Opp v. Ruth Owens; City of Opp v. Sharon Davis

1911100, 1911105, 1911150, 1911151

SUPREME COURT OF ALABAMA

624 So. 2d 1346; 1993 Ala. LEXIS 586

June 25, 1993, Released

PRIOR HISTORY: [**1] Appeals from Covington Circuit Court. Bradley E. Byrne. (CV-89-103; CV-90-165; and CV-90-164)

DISPOSITION: 1911100 -- AFFIRMED. 1911105 -- AFFIRMED. 1911150 -- AFFIRMED. 1911151 -- AFFIRMED.

CORE TERMS: intersection, municipal, stop sign, municipality, street, cause of action, right to sue, duty to maintain, governmental entities, legislative power, delegates, gentleman, matter of law, organic law, hotel, question of law, jury trial, recovery of damages, causation, cap, subject to suit, driveway, proximate cause, governmental functions, right to control, power to regulate, different result, entire field, deems necessary, submitting

COUNSEL: For Appellants: J. Keith Givens and J. Farrest Taylor of Cherry, Givens, Peters, Lockett & Diaz, P.C., Dothan, for appellant/cross-appellee Gina Garner.

For Appellees: John B. Givhan and William B. Alverson, Jr., of Albrittons, Givhan, Clifton & Alverson, Andalusia, for appellee/cross-appellant City of Opp. Peter A. McInish of Lee & McInish, Dothan; and W. Sidney Fuller, Andalusia, for Covington County. James H. Evans, atty gen., and Marc Givhan, duputy atty. gen. Frank J. Tipler, Jr., and James Harvey Tipler of Tipler and Tipler, Andalusia, for Ruth Owens and Sharon Davis.

For Amici Curiae: James W. Webb and Bart Harmon of Webb, Crumpton, McGregor, Davis & Alley, Montgomery, for amicus curiae The Association of County Commissions of Alabama. Jack Drake of Drake & Pierce, Tuscaloosa; and Bruce McKee of Hare, Wynn, Newell & Newton, Birmingham, for amicus curiae The Alabama Trial Lawyers Association. Ken Smith, League counsel, Alabama League of Municipalities, amicus curiae in support of the appellees.

JUDGES: ALMON, Shores, Adams, Kennedy, Ingram, Maddox, Houston, Steagall

OPINION BY: ALMON

OPINION

[*1347] **ALMON, JUSTICE.**

These appeals arise from wrongful death and personal injury actions filed by Gina Garner, Sharon Davis, and Ruth Owens against the City of Opp and Covington County. The plaintiffs alleged that the defendants had negligently maintained a stop sign at an intersection and had thereby caused an automobile accident in which Davis and Owens suffered injuries and Garner's minor son was killed. The jury returned verdicts in favor of Covington County in all three actions, and returned verdicts against Opp awarding Davis $ 42,000 and Owens $ 100,000 in their personal injury actions, and awarding Garner $ 750,000 in her wrongful death action based on the death of her minor son. The trial court reduced the $ 750,000 verdict to $ 100,000 pursuant to Ala. Code 1975, § 11-93-2, and entered judgments for the plaintiffs.

Opp, in the appeals [**2] numbered 1911105, 1911150, and 1911151, appeals from the trial court's denial of its motion for j.n.o.v. Opp specifically argues that the trial court erred because, it says, the plaintiffs failed to prove that the actions of Opp were the proximate cause of the injuries and the death. Opp also argues that the trial court erred in instructing the jury that Opp, as a matter of law, had a legal duty to maintain the intersection.

Gina Garner also raises several issues in her appeal, number 1911100. Garner first argues that the trial court erred in submitting to the jury the question of whether

Covington County had a duty to maintain the intersection. Garner also argues that the trial court erred in failing to give her requested jury instruction as to the duty of the county. Last, Garner challenges the constitutionality of the $ 100,000 "cap" imposed by Ala. Code 1975, § 11-93-2, on the recovery of damages against governmental entities.

The facts leading up to the institution of these actions are as follows:

On August 12, 1988, Sharon Davis and her mother, Ruth Owens, travelled by automobile from Luverne to Opp to pick up Davis's niece and nephew and bring them back to Luverne. Because [**3] Davis had never been to Opp before, she met her brother on Highway 331 and followed him into town. Davis's brother travelled southward on Maloy Street; both he and Davis stopped at the intersection of Maloy Street and Old Perry Store Road. After picking up the children, Davis returned by the same route, approximately one hour later, this time heading northward on Maloy Street.

[*1348] As Davis approached the intersection of Maloy Street and Old Perry Store Road, she slowed her automobile but failed to come to a complete stop. There was a stop sign at the intersection, but it was covered by a red crape myrtle bush and was not visible. As Davis entered the intersection, her car was struck by a truck heading westward on Old Perry Store Road. Davis's 19-month-old nephew--who was Gina Garner's son--was thrown from the car and suffered fatal injuries. Davis and Ruth Owens also suffered substantial injuries from the accident. Neither Davis nor Owens has any memory of the accident.

At trial, Davis testified that she never saw a stop sign at the intersection. The plaintiffs introduced photographs of the intersection taken by a witness who appeared on the scene immediately after the accident. These [**4] photographs illustrate that the stop sign was not visible to Davis when she entered the intersection, and this fact is substantially undisputed. The plaintiffs also questioned Keith Wilson, a witness who had followed Davis as she drove northward on Maloy street toward the intersection. Wilson testified that Davis slowed down considerably before entering the intersection, but that her brake lights never came on and she never completely stopped.

The defendants introduced deposition testimony in which Davis stated that she had seen the back of the stop sign and had recognized it as a stop sign when she had stopped at the Maloy Street/Old Perry Store Road intersection on the way into town. The defendants also questioned John Bryan, a policeman who spoke with Davis at the hospital soon after the accident. Bryan testified that Davis told him that she thought she had run a stop sign immediately before being struck by the truck.

After the close of the evidence, the jury returned verdicts in favor of the plaintiffs against Opp; the jury found in favor of Covington County. The trial court subsequently reduced Garner's verdict of $ 750,000 to $ 100,000, pursuant to § 11-93-2.

Opp argues that [**5] its motion for j.n.o.v. should have been granted because, it argues, the plaintiffs failed to prove that the failure of Opp to maintain the intersection was the proximate cause of the injuries and the death. Opp asserts that Davis knew of the stop sign before she entered the intersection and merely failed to stop. Opp also contends that testimony of Davis or Owens as to the cause of the accident is necessary to the maintenance of the action. Because neither Davis nor Owens could testify as to causation, Opp contends that any attempt to establish causation is mere conjecture. Opp relies heavily on *Smoyer v. Birmingham Area Chamber of Commerce*, 517 So. 2d 585 (Ala. 1987), and *Peoples v. Town of Ragland*, 583 So. 2d 221 (Ala. 1991), to support this argument.

The facts of *Smoyer* and *Peoples* are, however, distinguishable from those in this case. In *Smoyer*, the plaintiff's car was struck by a car leaving a hotel driveway and entering the highway. He brought an action alleging that the hotel driveway had been negligently designed and maintained. This Court held that there was simply no causal connection between any [**6] negligence of the hotel and the plaintiff's injury. We specifically pointed out that *no one* could testify that the person leaving the hotel did not stop; therefore, it was impossible to infer that the condition of the driveway contributed to the accident. Here, Wilson did testify that Davis did not come to a complete stop before entering the intersection. Also, there is evidence from which the jury could reasonably conclude that the obstructed stop sign was the immediate cause of the injury, while in *Smoyer* the accident occurred well after the driver had exited the hotel driveway.

In *Peoples*, this Court held that the plaintiff failed to establish that the lack of a traffic control device at an intersection proximately caused her injuries. Although we did find it significant that the plaintiff was unable to testify as to the cause of the wreck because of memory loss, the issue ultimately turned on the actions of the plaintiff: she accelerated into the oncoming traffic after "creeping out" into the intersection to see beyond a wall that blocked her view. Therefore, neither *Peoples* nor *Smoyer* compels a holding that the plaintiffs here failed to establish proximate [**7] cause as a matter of law. Also, [*1349] neither case stands for the proposition that one injured in an accident *must* testify as to causation to be entitled to recover.

The question of proximate causation is ordinarily one for the jury, if reasonble inferences from the evidence support the plaintiff's theory. *Marshall County v. Uptain*, 409 So. 2d 423 (Ala. 1982). Here the question is particularly suited for the jury because of the conflicting nature of the evidence. While the defendants did produce evidence tending to show that Davis knew of the existence of the sign, the jury was justified in inferring that Davis did not know of the sign. For example, the fact that Davis slowed down considerably before entering the intersection does not, ipso facto, establish that she knew the stop sign was there. Motorists who are unfamiliar with particular routes may merely have a tendency to slow down before entering *any* unmarked intersection. Furthermore, the fact that, after the accident, she stated to Officer Bryan that she thought she had run a stop sign does not establish as a matter of law that she knew the stop sign was there as she entered the intersection. [**8] Therefore, we hold that the trial court did not err by denying Opp's motion for j.n.o.v.

Opp next argues that the trial court erred in instructing the jury that Opp, as a matter of law, had a duty to maintain the intersection, while submitting to the jury the question of Covington County's duty. Opp contends that this instruction unfairly prejudiced it in the jury's consideration and that it is entitled to a new trial.

Opp's argument is without merit. The trial court instructed the jury pursuant to Instruction 27.01, Alabama Pattern Jury Instructions (Civil). That instruction charges that municipalities have the duty of maintaining their streets in reasonably good condition; this has long been the law in Alabama. *See* Ala. Code 1975, § 11-47-190; *Hale v. City of Tuscaloosa*, 449 So. 2d 1243 (Ala. 1984); *Jacks v. City of Birmingham*, 268 Ala. 138, 105 So. 2d 121 (1958). Here, it is undisputed that the intersection is within the Opp city limits. Also, there was evidence that, before the accident occurred, Opp knew of the dangerous condition of the intersection. Based on these considerations, we hold that the [**9] trial court did not err in charging the jury as it did.

In appeal number 1911100, Garner raises several issues concerning the duty of Covington County to maintain the intersection. [1] Initially, Garner argues that the question of duty in a negligence action is always a question of law for the court, and that therefore the trial court committed reversible error by submitting to the jury the question of whether Covington County had a duty to maintain the intersection.

1 This Court held in *Yates v. Town of Vincent*, 611 So. 2d 1040 (Ala. 1992), that a city and a county cannot concurrently exercise control over the same roadway. The parties here have not argued this case on this basis, so we address the case as it is presented by the parties. Under *Yates*, however, the instruction that Opp had a duty to maintain the intersection was obviously correct, because Maloy Street and the Old Perry Store Road were clearly under Opp's control. Moreover, under *Yates*, the submission to the jury of the issue of whether Covington County had a duty would at most be harmless error, because *Yates* would support a directed verdict for the county and because the jury returned a verdict for the county.

[**10] Garner is correct in saying that some of our cases have held that the duty issue is solely a question of law for the trial court. The strongest statement of this rule is in *Sungas, Inc. v. Perry*, 450 So. 2d 1085 (Ala. 1984), where Justice Jones, writing for the majority, stated:

> "The determination of any question of duty--that is, whether the defendant stands in such relation to the plaintiff that the law will impose upon him an obligation of reasonable conduct for the benefit of the plaintiff--has been held to be an issue of law for the court and never one for the jury."

450 So. 2d at 1089 (quoting 57 Am.Jur.2d *Negligence* § 34 (1971)). [2] Other Alabama cases, however, have held that "where the facts upon which the existence of a duty [*1350] depends, are disputed, the factual dispute is for resolution by the jury." *Alabama Power Co. v. Brooks*, 479 So. 2d 1169, 1175 (Ala. 1985) (quoting *Alabama Power Co. v. Alexander*, 370 So. 2d 252, 254 (Ala. 1979)). We believe that the *Brooks/Alexander* formulation of this rule is preferable to the "bright-line" rule [**11] enunciated in *Sungas*. [3] Although the existence *vel non* of a duty is *ordinarily* a question of law for the court, it is not error to submit the question to the jury if the factual basis for the question is in sufficient dispute: to allow the trial court to determine such questions would undermine the traditional factfinding function of the jury. This is particularly true here, because the facts upon which a determination of Covington County's duty rests are in substantial dispute. We hold, therefore, that the trial court properly submitted the duty issue to the jury.

2 At least one other case, *Alabama Power Co. v. Dunaway*, 502 So. 2d 726 (Ala. 1987), has held that the duty question is solely a question of law for the trial court.

3 We note that the language in 57 Am. Jur. 2d *Negligence* § 34, which was relied on by Justice Jones in *Sungas*, has been somewhat diluted in the latest version of the treatise. Although 57A Am. Jur. 2d *Negligence* § 86 (1989)--which is very similar to § 34 of the 1971 version--states that some jurisdictions hold that the duty issue is for the court, the language is no longer cast in the absolute; the words "never ... for the jury" do not appear in the new section.

[**12] Garner next argues that the trial court erred in refusing to grant her motion for a new trial as to Covington County. Garner's argument is essentially that the jury's determination of the duty question in favor of Covington County is against the great weight of the evidence.

The test for determining whether a county or a municipality has a duty to maintain a roadway is whether it has a right to control, or to participate in the control, of the roadway. *Maharry v. City of Gadsden*, 587 So. 2d 966, 968 n.1 (Ala. 1991); *Harris v. Macon County*, 579 So. 2d 1295 (Ala. 1991). [4] Here, the issue of Covington County's right to control, or to participate in the control of, the Maloy Street/Old Perry Store Road intersection was sharply disputed. There was evidence tending to show that Covington County did exercise a right of control. For example, the stop sign was on a right-of-way owned by Covington County; Covington County engaged in maintenance projects around the intersection; Covington County installed safety devices at the intersection after the accident; and portions of the testimony of Bill McClain, the Covington County engineer, [**13] suggested that the maintenance of the intersection was a joint undertaking.

4 These two cases were distinguished or limited in *Yates, supra*, n. 1.

McClain also testified, however, that Covington County had no understanding with Opp as to the maintenance of the intersection. He also testified that Maloy Street was not a county road; that all remedial measures undertaken by Covington County were undertaken solely at the request of Opp; and that Covington County had no notice before the accident of the dangerous condition of the intersection. In light of the contradictory evidence concerning Covington County's right to control the intersection, we hold that the trial court did not err in denying Garner's motion for new trial. [5]

5 Garner also argues that the trial court's failure to give the jury an affirmative charge concerning Covington County's duty, based on Instruction 27.01, A.P.J.I., was error. This argument is meritless: the facts upon which the existence of Covington County's duty depended were disputed; therefore, a charge placing a duty upon Covington County as a matter of law would have not been proper.

[**14] Garner's final argument is that the trial court erred in reducing the $ 750,000 verdict to $ 100,000. She argues that Ala. Code 1975, § 11-93-2, contravenes the right to jury trial as guaranteed by Art. I, § 11, Alabama Constitution of 1901.

In pertinent part, § 11-93-2 provides:

> "The recovery of damages under any judgment against a governmental entity shall be limited to $ 100,000.00 for bodily injury or death for one person in any single occurrence." [6]

Section 11 of the Constitution provides "That the right of trial by jury shall remain inviolate."

6 The term "governmental entity" includes municipalities and counties. Ala. Code 1975, § 11-93-1.

[*1351] This Court, in *Home Indemnity Co. v. Anders*, 459 So. 2d 836 (Ala. 1984), rejected arguments that § 11-93-2 "violates the remedy provisions of Article I, § 13, and denies equal protection as guaranteed in Article I, § 1," of the Constitution. The Court quoted the following with approval from *Stanhope v. Brown County*, 90 Wis. 2d 823, 842, 280 N.W.2d 711, 719 (1979): [**15]

> "We are unwilling to say that the legislature has no rational basis to fear that full monetary responsibility entails the risk of insolvency or intolerable tax burdens. *Funds must be available in the public treasury to pay for essential governmental services; taxes must be kept at reasonable levels; it is for the legislature to choose how limited public funds will be spent.* It is within the legitimate power of the legislature to take steps to preserve sufficient public funds to ensure that the government will be able to continue to provide those services which it believes benefits the citizenry. We conclude that the legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while per-

> mitting victims of public tortfeasors to recover their losses up to that limit."

459 So. 2d at 841 (emphasis added).

This Court, in *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 165 (Ala. 1991), [7] noted:

> "We have never addressed a challenge to the validity of § 11-93-2 based on § 11. In *Home Indemnity Co. v. Anders*, 459 So. 2d 836 (Ala. 1984), [**16] we upheld § 11-93-2 against allegations that the section violated the open courts provision of § 13. We specifically declined to address the contention that the statute impaired the right to a jury trial, because that ground had not been pressed in the trial court. *Id.* at 840."

Garner's argument that § 11-93-2 violates § 11 must be addressed in the context of the unique status of counties and cities as governmental entities. Because they are creations of the sovereign, the State of Alabama, and because they exercise certain governmental functions that are dependent upon tax dollars, actions against them have always been subject to reasonable regulation by the legislature on a basis not applicable to actions against individuals and other entities.

7 *Moore* held unconstitutional under § 11 a cap on "noneconomic" damages in medical malpractice actions.

This legislative power over municipalities and counties can be seen from the debates in the Constitutional Convention of 1901 regarding [**17] a provision that would have limited that power. The debates show that the delegates considered the regulation of municipal liability to be a matter particularly within legislative control. The committee on municipal corporations proposed a separate article on the subject. [8] In bringing the proposed article to the floor, Mr. Weakley, a member of the committee, made the following statement: "It has become manifest to the people of Alabama in the last two years that the question of municipal government is one of greatest public concern." *Official Proceedings of the Constitutional Convention of the State of Alabama* (1901), vol. III, p. 3688. Section 1 of the proposed article would have read, "All municipal corporations shall have the right to sue and shall be subject to be sued in all courts in like manner as natural persons." After objections were raised, this section was tabled. *Id.*, pp. 3689-95.

8 The proposed sections that were adopted by the Convention became a division of Article XII, "Corporations," rather than a separate article.

[**18] On the following day, further debates were held on the proposed section. We reproduce a significant portion of those debates, because they materially affect the question before us:

> "Mr. Boone--The committee authorizes me to offer this substitute for Section 1 of the report which was tabled yesterday, and I offer it.
>
> "The substitute read as follows:
>
> "Substitute for Section 1 of the Article on Municipal Corporations so that Section 1 will read as follows:
>
> "Municipal Corporations shall have the right to sue and shall be subject to suit in the courts of this State.
>
> [*1352] "Mr. Boone--The committee--
>
> "Mr. Dent--I rise to a point of inquiry. As I understand it, the Convention tabled Section 1. I do not see how you can very well offer a substitute for a section that is on the table.
>
> "The President--It could not be done. The only proper parliamentary motion would be to take Section 1 from the table, with the notice that the gentleman proposes to offer as a substitute this section, if the Convention takes it from the table.
>
> "Mr. Boone--Then I make the motion to take Section 1 from the table, and will offer this substitute for it.
>
> "A reading of the substitute [**19] was called for and the substitute read.

"The President--Now the motion of the gentleman from Mobile is to take from the table Section 1, and he gives notice that if the Convention takes it from the table, he will offer as a substitute the section which has just been read, and which is recommended by the committee.

"Upon a vote being taken, a division was called for, and by a vote of 46 ayes and 25 noes, the motion to take Section 1 from the table prevailed.

"Mr. Boone--Mr. President, the substitute of the Committee is introduced for the simple purpose of making it plain in the fundamental law of this State that a municipal corporation can be sued and shall be subject to suit, and why do we think that that is material? Because if you will turn to the Declaration of Rights, you will find a provision in there that the State of Alabama shall never [be] made a defendant in any suit at law or in equity. We think this is material to put in the Constitution because the converse of this proposition appears in the declaration of rights in reference to the State, which may be said to be the parens patriae of these, its children, the municipal corporations of the State; they are [**20] all subject to the State; the State brought them into being, and the State can abolish them. Now, we think that this does not create any new cause of action. It was in the Constitution before that all corporations should be sued and should be subject to suit in all the courts of this State, and we just simply say that municipal corporations shall have the right to sue, and shall be subject to suits in the courts of this State.

"Mr. O'Neal (Lauderdale) -- That does not apply to municipal corporations.

"Mr. Boone--But sir--

"Mr. Hood--Haven't the courts of this State held that the word 'corporation,' as used in the present Constitution, had not reference to municipal corporation?

"Yes, sir; and that is the very reason, gentlemen of the Convention, that we want to put it in the Constitution, that Municipal corporations can be sued.

"....

"Mr. Hood--We have nothing in the present Constitution authorizing suits against municipal corporations, have we?

"Mr. Boone--Not expressly, and that is why we want it in there. *We don't want it to put [sic] in the power of the General Assembly to say that no municipal corporation shall be sued, because we think that* [**21] *in carrying out the governmental functions, if they trespass upon the rights of a citizen, or wrong a citizen, they should be liable to suit.*

"Mr. Walker (Madison)--Would not a provision of this kind raise the very serious question as to the power of the Legislature to limit the right of bringing any kind of suit by garnishment or otherwise against a municipal corporation, and isn't it dangerous on that account?

"Mr. Boone--I would ask the gentleman if he thinks it dangerous for the Legislature to provide that a suit shall not be brought against a county unless it shall have been first filed with the Board of County Commissioners. There are other sections which authorize the bringing of a suit against a county.

"Mr. Walker--My answer to that is, under the present law, regulations of that sort are left to the Legislature. *I do not want to put in the Constitution, that such regulation will not be left to the Legislature.*

"?.

" [*1353] Mr. Hood-- ... Mr. President, it certainly does leave the question in doubt as to whether the Legislature could regulate suits against cities, should this provision be placed in the Constitution. ...

"Mr. Boone--May I ask a [**22] question? *Could the Legislature take away the right to sue and be sued now?*

"Mr. Hood--*Not if this provision is placed in the Constitution.*

"Mr. Boone--*But if we do not put it in there?*

"Mr. Hood--*Probably it could ....*

"Mr. Coleman--Mr. President and delegates of the Convention, *this is an untried innovation upon existing law, and to my mind, it is attended with very serious consequences*. The question propounded by the member of the committee demonstrates itself the danger to be encountered by the adoption of this section. He asks the question, could not the Legislature pass a law prohibiting suits against a city, were it not for this section that he proposes to introduce in the organic law. Now if this section prohibits the Legislature from passing a law which will prevent suits being instituted against cities, where is the line to be drawn, where the Legislature can prescribe what suits shall be brought and what shall not be brought. The very proposition and the very question of the gentleman who represents the committee demonstrates on its face the danger of putting in the organic law such a provision as this. Under existing laws, cities [**23] may be sued in all proper cases regulated by statute.

"....

"Mr. White--I heartily approve of the section proposed by the Committee, and I have heard no good reason advanced why that section should not be adopted. Under the law of Alabama today, towns and cities may sue and be sued. Well under that law, giving them the right to sue and be sued, you cannot take from them the revenues necessary to carry on the municipal government. In other words, placing this in the organic laws does not give any other rights than those which are now possessed either by the city or those having claims against the city, *the only difference is that it makes it permanent.*

"Mr. Coleman--Don't you know that where a city may be sued, is provided by statute?

"Mr. White--No, I don't know anything of the kind.

"Mr. Coleman--I would like to know then, where you get the power?

"Mr. White--By law.

"Mr. Coleman--What law?

"Mr. White--The law of the State.

"Mr. Coleman--Isn't that statutory law?

"Mr. White--Of course, I had not understood you. The right to sue and be sued is given not by the Constitution, but by statute. If it is right by statute, why is it not [**24] right by the Constitution?

"Mr. Coleman--Will you permit another question?

"Mr. White--I have not the time, but never mind, I will answer you.

"Mr. Coleman--Does the statute provide for the instances in which a city may be sued?

"Mr. White--No, it says may sue and be sued, and leaves it to the common law to say wherein they are liable. That is, the law of the land. They simply may be sued in cases where there is a cause of action and this does not create any cause of action, [it] simply gives a right to sue in cases where there is a cause of action, and *it takes away from the Legislature the right to deprive a citizen of the right to bring suit against a city where he has a cause of action.* We are just entering upon an era when they own the water works, lighting plants, sewers, and a vast amount of other things. In other words, they are taking the place of other corporations and individuals in supplying the public with public utilities. ... *It is proper and right that in the organic law of the State, we shall implant a principle which cannot be destroyed by legislative action, that whenever a cause of action exists against a city, that the citizen shall have* [**25] *the right to maintain a suit thereon. ... I say it ought to be written in the organic law of Alabama, and written there to stay,* [*1354] *and I hope the section will be adopted. I regard it as the most important section that has been reported by that committee and I now move the previous question upon it.*

"President Pro Tem--The gentleman from Jefferson moves the question upon the substitute, as I understand now before the House. The question is shall the main question be now put?

"The main question was ordered.

"The President Pro Tem--The question is upon the adoption of the substitute.

"Upon a vote being taken, a division was called for, and a further vote being taken, there were 40 ayes and 43 noes, and the substitute was lost.

"....

"Mr. Coleman--That brought Section 1 before the Convention, and the substitute was defeated, and that leaves Section 1 before the Convention.

"President Pro Tem--The gentleman is right.

"Mr. Coleman--I move to lay Section 1 on the table.

"Upon a vote being taken the motion to table prevailed."

Official Proceedings, *supra*, vol. III, pp. 3755-62 (emphasis added). Section 1 was not again taken from [**26] the table and its provisions were not adopted into the Constitution.

It was clearly the delegates' understanding that, absent the incorporation into the Constitution of the proposed section, the Legislature would have power to regulate actions against municipalities. The delegates obviously viewed actions against municipal corporations as being different from actions against private corporations or individuals. This view is sustained by a reading of the cases on the subject, both before and after the Convention. Because the constitutional framers deliberately and specifically declined to add any constitutional preservation of the then-existing limited statutory provision for actions against municipalities, such actions were (and are) subject to legislative control.

This conclusion is supported not only as a matter of constitutional history but also as a matter of policy. Having considered § 11-93-2 in the context of a § 11 challenge, we conclude that the principles discussed in *Anders* correspond to the views of the delegates to the

1901 Constitutional Convention and that those principles apply to an analysis under § 11.

Similar arguments hold true for actions against counties; [**27] in fact, actions against counties have been even more sparingly allowed than actions against cities, and have been even more rigorously controlled by the legislature. Indeed, it was long held that unless the legislature specifically granted a right of action against a county, no such action would lie. See *Hudson v. Coffee County*, 294 Ala. 713, 321 So. 2d 191 (1975).

Thus, the liability of cities and counties has been imposed, if at all, only with due regard for the competing needs of conserving public funds and of compensating injured parties and with deference to the legislature in regulating and balancing these matters. In *Jackson v. City of Florence*, 294 Ala. 592, 320 So. 2d 68 (1975), the Court held that the governmental/proprietary function test would no longer be used in determining whether an action would lie under Alabama Code 1975, §§ 11-47-190 through -192. In *Lorence v. Hospital Board of Morgan County*, 294 Ala. 614, 320 So. 2d 631 (1975), the Court held that the rationale of *Jackson* applied to counties. In so changing the doctrines [**28] of municipal and county liability, however, the Court acknowledged the legislature's power to pass laws regulating municipal and county liability:

> "We recognize the authority of the legislature to enter the entire field, and further recognize its superior position to provide with *proper* legislation any limitations or protections it deems necessary in addition to those already provided in [§§ 11-47-23, -191, and -192, Ala. Code 1975]."

Jackson, 294 Ala. at 600, 320 So. 2d at 75 (emphasis added).

In light of the foregoing discussion, we hold that § 11-93-2 does not violate the right to jury trial guaranteed by § 11 of the Constitution. If a plaintiff's cause of action carries a right to jury trial, a jury may be demanded in an action against a city or county. Because cities and counties are exercising [*1355] governmental functions, however, and because judgments against them must be paid out of public moneys derived from taxation, the reasonable limitation of § 11-93-2 on awards against them must be sustained. If the Constitutional Convention had adopted the proposed limitation on the legislative power to regulate actions against municipalities, [**29] we would probably reach a different result. Given this constitutional history, however, we cannot say that § 11-93-2 violates the constitution.

For the foregoing reasons, we affirm the judgment awarding Garner $ 100,000 from the City of Opp. As stated earlier in the opinion, we hold against the appellant Garner on the issues concerning the duty of Covington County to maintain the intersection, and we affirm the judgment on the verdict in favor of Covington County. We also reject, for the reasons stated above, the arguments by the City of Opp on the issues raised in its appeals.

1911100 -- AFFIRMED.

1911105 -- AFFIRMED.

1911150 -- AFFIRMED.

1911151 -- AFFIRMED.

Shores, Adams, Kennedy, and Ingram, JJ., concur.

Maddox, J., concurs specially.

Houston and Steagall, JJ., concur in the result.

CONCUR BY: MADDOX; HOUSTON

CONCUR

MADDOX, JUSTICE (concurring specially).

In *Jackson v. City of Florence*, 294 Ala. 592, 320 So. 2d 68 (1975), when a majority of this Court abolished municipal immunity, the majority said:

> "In deciding, as we do, that municipal immunity for tort is abolished in this state after the date of this opinion, *we recognize the authority of the* [**30] *legislature to enter the entire field, and further recognize its superior position to provide with proper legislation any limitations or protections it deems necessary* in addition to those already provided in Title 37, §§ 503 and 504, and in Title 37, § 476, Code [of 1940]."

294 Ala. at 600, 320 So. 2d at 75. [9] (Emphasis supplied.)

> 9 The opinion in *Jackson* was written by Justice Shores, with whom Justices Faulkner, Jones, Almon, and Embry, concurred; Chief Justice Heflin dissented, without opinion; Justice Merrill dissented, with an opinion in which Justice Maddox concurred.

The act being challenged was adopted by the Legislature after the opinion in *Johnson* was released. In view of that strong statement about legislative power, there should be no question about the Legislature's power to put a cap on damages in actions against municipalities. Consequently, I concur with the portion of the majority opinion upholding the constitutionality of the statute that puts [**31] a cap on damages in actions

against municipalities, and I write specially only to address statements in the opinion that seem to suggest that legislative power to limit the recovery of damages, whether compensatory or punitive, might be limited to actions against governmental entities, [10] and to state again, as I have on other occasions, [11] what I believe is the role of this Court when faced with a constitutional challenge to a legislative enactment.

10 The majority states that the result reached is based, at least in part, upon "the unique status of counties and cities as governmental entities," and upon the fact that "the delegates [to the 1901 Constitutional Convention] *viewed actions against municipal corporations as being different from actions against private corporations or individuals*." So. 2d at . (Emphasis added.)

11 See, *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991) (Maddox, J., dissenting); *Fireman's Fund American Insurance Co. v. Coleman*, 394 So. 2d 334 (Ala. 1980) (Beatty, J., dissenting, and joined by Maddox, J.); and *Grantham v. Denke*, 359 So. 2d 785 (Ala. 1978) (Maddox, J., dissenting).

[**32] The majority's statements about the difference between governmental entities and individuals or private corporations seem to suggest that the Legislature, because of the provisions of §§ 11 and 13 of the Constitution, might be prohibited from regulating the recovery of damages in civil actions against individuals and private corporations. I clearly do not believe that either § 11 or § 13 prohibits legislative action, if there is a valid [*1356] legislative purpose to support the legislation, of course. For example, in *Gentry v. Swann Chemical Co.*, 234 Ala. 313, 174 So. 530 (1937), an employer challenged the original worker's compensation law on the ground that the legislature could not require an employer to pay damages for an injury without proving fault on the employer's part. This Court, finding a sufficient *quid pro quo* for the exercise of legislative power, upheld the legislative alteration of the common law. In *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939), this Court held that the Legislature could adopt the so-called "guest statute" and by it immunize certain persons from a lawsuit. [**33] In *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988), this Court upheld a legislative act that immunized co-employees from suit in certain factual settings. I realize, of course, that during the past 20 years more and more challenges have been made to legislative power on the ground that legislative enactments violate either § 11 or § 13 of the Alabama Constitution, and this Court, unfortunately, has found that such violations have occurred. I believe that those cases failing to recognize legislative power were incorrectly decided, and I have spelled out my reasons in dissenting opinions. See footnote 3.

The result reached in this case is consistent with that strong statement of legislative power in *Jackson v. City of Florence*, where this Court specifically "recognized the authority of the legislature to enter the entire field [of municipal tort immunity], and further recognized [the Legislature's] superior position to provide with proper legislation any limitations or protections it deems necessary in addition to those already provided [by law]"; consequently, I agree with the result, but because the opinion contains statements that seem to suggest that [**34] when this Court is faced with a similar challenge in a case involving a nongovernmental defendant, the result will probably be different, I wanted to state why I think the Legislature's power to enact the statute at issue here does not rest upon such a slender reed as who the defendant might be, but rests upon a much more substantial and lasting base -- the plenary power of the Legislature.

HOUSTON, JUSTICE (concurring in the result).

I have a problem with the following sentence in the majority opinion: "If the Constitutional Convention had adopted the proposed limitation on the legislative power to regulate actions against municipalities, we would probably reach a different result." So. 2d at . Because I consider this sentence dictum, I have not sufficiently researched this; and, therefore, I am not comfortable in saying at this time that we "would probably reach a different result." I concur with the rest of the majority opinion.

Jodie M. Gaston, et al. v. John B. Ames

No. 85-1340

Supreme Court of Alabama

514 So. 2d 877; 1987 Ala. LEXIS 4508

September 4, 1987, Filed

PRIOR HISTORY: [**1] Appeal from Dallas Circuit Court.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: plat, dedication, fence, dedicated, gate, protective, recorded, covenants, declaration, presumption of correctness, statutory requirements, agricultural, irrevocable, complied, streets, lock, map

COUNSEL: John E. Pilcher of Pilcher & Pilcher, for Appellants.

William T. Faile, for Appellee.

JUDGES: Adams, J. Torbert, C.J., Jones, Shores, and Steagall, JJ., concur.

OPINION BY: ADAMS

OPINION

[*878] This is an appeal from a judgment in favor of the defendant, John B. Ames, against the plaintiffs, Jodie M. Gaston, Gabriel W. Osborn, Royal C. Burns, and Georgia Burns (hereinafter all plaintiffs are sometimes referred to as "Gaston"). Gaston filed suit against Ames on September 6, 1983, asking for a declaratory judgment determining that Ames had improperly prevented the plaintiffs from enjoying access to subdivision lots owned by the plaintiffs located in Ocmulgee Estates. They allege that Ames prevented access to their property by maintenance of a fence and locked gate across the only point of access to the subdivision. Plaintiffs also sought actual and punitive damages and a permanent injunction enjoining and restraining Ames from restricting or limiting their access to their subdivision. On June 27, 1986, the court, without a jury, issued its ruling denying all relief requested by the plaintiffs, concluding that the [**2] subdivision was no longer "viable." On appeal, plaintiffs argue that the trial court's judgment was erroneous and against the great weight of the evidence. We agree and reverse.

On August 30, 1973, J. Bruce Pardue and his wife, as owners, and Central Bank and Trust Company, as mortgagee, filed a map or plat of Ocmulgee Estates Subdivision in the Probate Office of Dallas County. The Dallas County Health Department and the Alabama Department of Public Health approved the subdivision plat. On July 22, 1974, Pardue and Central Bank filed a map of plat two of Ocmulgee Estates in the Probate Office of Dallas County. Dallas County approved the subdivision plat on July 22, 1974. On September 9, 1974, Pardue and Central Bank made, executed, and recorded a "declaration of protective covenants," which expressly adopted the plat of Ocmulgee Estates Subdivision. The declaration was filed in the Dallas County Probate Office on September 11, 1974. The plats were made, executed, and recorded to set forth dedicated uses and purposes as stated in the subdivision plat and as stated in the declaration of protective covenants.

On September 10, 1974, all the plaintiffs acquired title to their subdivision [**3] lots from Pardue. Subsequently, Central Bank foreclosed on Pardue's mortgage and held a foreclosure sale. On June 10, 1977, Ames purchased the remaining subdivision property through a trust. At the time of his purchase, none of the lots had been developed. Pardue had been using the unsold land for agriculture purposes, with established fences and gate. Since the purchase of the property, Ames has operated a farming and cattle operation on the land and has changed the locks on the gate several times. He testified that after each lock change, he made keys available for all lot owners. He further testified that he has maintained only the existing fences and has not constructed any new fences. He has also operated a gravel business and at one point made the main road of the subdivision impassable. By trial, the road had been repaired to its original state.

This case was heard by the trial court sitting without a jury. Where evidence is presented to the trial court *ore tenus*, a presumption of correctness exists as to the court's conclusions on issues of facts; its determination will not be disturbed unless clearly erroneous, without supporting evidence, manifestly unjust, or against [**4]

the great weight of the evidence. *Cougar Mining Co. v. Mineral Land & Mining Consultants, Inc.*, 392 So. 2d 1177 (Ala. 1981). However, when the trial court improperly applies the law to the facts, no presumption of correctness exists. *Smith v. Style Advertising, Inc.*, 470 So. 2d 1194 (Ala. 1985); *League v. McDonald*, 355 So. 2d 695 (Ala. 1978).

Ames introduced undisputed evidence that the plaintiffs' lots were located within a subdivision established in accordance with Alabama law. The subdivision plats and protective covenants were filed in the Probate Office of Dallas County. The plaintiffs' deeds were executed and delivered with reference to the plats of the subdivision. Pardue complied with the statutory requirements for the establishment of the subdivision. He first prepared the plats, pursuant to § 35-2-50, *Code of* [*879] *Alabama* (1975), and recorded the plats in the Probate Office, pursuant to § 35-2-51 (a), *Code of Alabama* (1975). Having met those two requirements, he is deemed to have made a conveyance in fee simple of all areas granted or dedicated to the public. § 35-2-51(b), *Code of Alabama* (1975). "Substantial compliance with the statutory [**5] requirements constitutes a valid dedication to the public of all streets, alleys, and other public places." *Johnson v. Morris*, 362 So. 2d 209, 210 (Ala. 1978). *Cottage Hill Land Corp. v. City of Mobile*, 443 So. 2d 1201, 1203 (Ala. 1983).

After there has been a proper dedication to the public, that dedication is irrevocable and it cannot be altered or withdrawn except by statutory vacation proceedings. *Booth v. Montrose Cemetery Ass'n*, 387 So. 2d 774 (Ala. 1980); *Smith v. City of Opelika*, 165 Ala. 630, 51 So. 821 (1910). Once the act of dedication is complete and made irrevocable, it is not affected by the present use of the property or the failure to use the property for the dedicated purposes. *Cottage Hill Land Corp. v. City of Mobile, supra.* In the present case, Ames argues that although the lots were sold within the subdivision, it was never fully developed. He argues that because the fence and gate were present when he purchased the property and the land was used for agricultural purposes, he should have the right to continue that use. The trial court followed that logic when it ruled that the subdivision was not "liable;" therefore, the plaintiffs' claim [**6] must fail. Although it is true that agricultural use has been occurring at the subdivision and that the plaintiffs have not built homes on their lots, their rights, according to the law, must prevail. As pointed out in the record and the briefs, the plaintiffs cannot sell their property as lots within a subdivision because of the present encumbrance on their property. The law is clear that plaintiffs are entitled to legal access to their lots. Because Pardue substantially complied with a statutory dedication, the plaintiffs have a right of access. To rule otherwise would be to vacate the dedication of the property in the subdivision. "The vacating of dedicated streets is not lightly to be viewed when it deprives others, and especially abutting land owners, of their use." *McPhillips v. Brodbeck*, 289 Ala. 148, 153, 266 So. 2d 592 (1972).

For the reasons set forth, the judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

Torbert, C. J., Jones, Shores, and Steagall, JJ., concur.

General Electric Company v. City of Mobile and Motorola Communications and Electronics, Inc.

Nos. 89-590, 89-1446

Supreme Court of Alabama

585 So. 2d 1311; 1991 Ala. LEXIS 865

August 16, 1991

SUBSEQUENT HISTORY: [**1] Released for Publication September 18, 1991.

PRIOR HISTORY: Appeal from Mobile Circuit Court, No. CV-89-3714; Ferrill D. McRae, Judge.

DISPOSITION: 89-590 REVERSED AND REMANDED.

89-1446 REVERSED AND REMANDED.

CORE TERMS: channel, tower, radio-communications, radio, competitive bidding, competitive bidding, specifications, emergency, bid, radio communication, fire-alerting, partitioning, injunction, trunked, awarding, services provided, lengths of time, qualify, capability, telephone, lease, user, preliminary injunction, good faith, advertisement, competitively, solicitation, negotiations, electronics, addressing

COUNSEL: Appellant: Kirk C. Shaw and Grover E. Asmus II of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, Mobile.

Appellees: John R. Lockett of Aldridge, Peters, Lockett & Diaz, Mobile; and Connie Morrow-Fundin, Mobile, for Appellee City of Mobile, Michael D. Knight of Hand, Arendall, Bedsole, Greaves & Johnston, Mobile, for Appellee Motorola Communications and Electronics, Inc.

JUDGES: Kennedy, Justice. Hornsby, C.J., and Maddox, Adams, Houston, Steagall, and Ingram, JJ., concur.

OPINION BY: KENNEDY

OPINION

[*1313] General Electric Company filed an action for equitable relief, seeking both to enjoin the performance of certain contracts entered into by the City of Mobile (the "City") and Motorola Communications and Electronics, Inc. ("Motorola") and to have those contracts voided as violating Ala. Code 1975, § 41-16-61 et seq., which address competitive bidding for contracts entered into by the City. The trial court denied General Electric's request for a preliminary [**2] injunction and other relief; it also denied a permanent injunction and the other relief sought by General Electric. General Electric appealed both the denial of the preliminary injunction and the denial of the permanent injunction; we have consolidated the two cases for appeals.

General Electric challenges three sets of provisions in two contracts. One contract, entered into September 27, 1989, included provisions (1) for the City to purchase from Motorola a fire alerting system for $ 126,873; the system would be operated at an additional cost of $ 50 monthly; and (2) for an equipment lease-purchase agreement for the sum of $ 619,520, payable over seven years in installments of $ 110,264. [1] The second contract, entered into October 1, 1989, gave Motorola a one-year service contract for the maintenance of all the City's Fire and Police Department radio-communications equipment; the value of that contract, including a one-time equipment-renovation charge, was $ 99,486.

1 Because of our disposition of this case, we do not address whether the lease-purchase agreement violates § 41-16-57(e).

[**3] Chapter 16 of Article 41, Alabama Code 1975, addresses "Public Contracts," and under Article 3 of Chapter 16, which addresses "Competitive Bidding on Contracts of Certain State and Local Agencies, etc.," two provisions are pertinent:

"§ 41-16-50 Contracts for which competitive bidding required . . . .

"(a) All expenditure of funds of whatever nature for labor, services or work, or for the purchase of materials, equipment, supplies or other personal property involv-

ing $ 5,000.00 or more, and also the lease of materials, equipment, supplies or other personal property where the lessee is or becomes legally and contractually bound under the terms of the lease, to pay a total amount of $ 5,000 or more, made by or on behalf of . . . county commissions and the governing bodies of the municipalities of the state and the governing boards of instrumentalities of counties and municipalities, including waterworks boards, sewer boards, gas boards and other like utility boards and commissions, except as hereinafter provided, shall be made under contractual agreement entered into by free and open competitive bidding on sealed bids, to the lowest responsible bidder . . . ."

"§ 41-16-54 [**4] *Advertisement and Solicitation of bids*

"(a) All proposed purchases in excess of $ 5,000 shall be advertised by posting notice thereof on a bulletin board maintained outside the purchasing office and in any other manner and for such lengths of time as may be determined; provided, however, that sealed bids shall also be solicited by [*1314] sending notice by mail to all persons, firms or corporations who have filed a request in writing that they be listed for solicitation on bids for such particular items as are set forth in such request . . . ."

At the hearing on General Electric's motion for a permanent injunction, Motorola and the City stipulated that the contracts were not entered into pursuant to the competitive bidding requirements of the provisions quoted above. Motorola and the City have both filed briefs on appeal.

The challenged contracts are obviously subject to the competitive bidding requirements of §§ 41-16-50(a) and 41-16-54(a), unless there is an exception by which the contracts can escape the coverage of those provisions. Motorola argues that the contracts are subject to the so-called "sole source" exception of § 41-16-51(a)(11), which provides:

"The competitive bidding [**5] requirements of this article shall not apply to:

"(11) Contractual services and purchases of commodities for which there is only one vendor or supplier . . . ."

We first address whether Motorola was the sole source of the goods and any services provided for in the September 27 contract; then we address whether Motorola was the sole source for the services provided in the October 1 contract. There is no Alabama caselaw addressing the "sole source" exception. The cases cited by the parties are not sufficiently similar factually to provide guidance. See, e.g., Inter-Island Transport Line, Inc. v. Government of Virgin Islands, 539 F.2d 322 (3d Cir. 1976); General Engineering Corp. v. Virgin Islands Water & Power Authority, 636 F.Supp. 22 (D.V.I. 1985), affirmed, 805 F.2d 88 (3d Cir. 1986); Hylton v. Mayor & City Council of Baltimore, 268 Md. 266, 300 A.2d 656 (1972).

The specifications provided by the City's sheriff's office, Fire Department, and Department of Public Works requested an "800 MHz trunked radio communication system" for the fire-alerting system and for radio-communications equipment. The [**6] record indicates that "800 MHz trunking" represents a technological breakthrough in the field of radio communications. In conventional or traditional radio communications, a system user must manually select the channel on which he wishes to speak; if that channel is then in use, he must wait for the channel to clear or else manually tune to another channel. In a "trunked" system, when someone desires to speak on the radio, a computer searches through a group of pooled channels and automatically funnels users to an open channel on a "first come, first served" basis. The result is a much more efficient use of any given set of frequencies, so that five trunked channels are roughly equivalent to 8 or 10 channels in conventional operation. The designation "800 MHz" simply refers to a band of radio frequencies. The system allows radio communication between the different government agencies (e.g., a fireman can radio a police officer), whereas before getting this system the employees of an agency could communicate only by radio with other employees of the same agency. The system prioritizes use of the radio channels.

General Electric presented undisputed evidence that it could provide an [**7] 800 MHz trunked radio communication system with the fire alerting system and radio-communications equipment requested in the specifications. The briefs of the parties and the record provide excellent technical descriptions of how both General Electric and Motorola can provide such systems, but we will not unduly lengthen this opinion by reproducing those descriptions. Instead, we note that Motorola contends that two factors make it, under the unique facts of this case, the sole source for the 800 MHz trunking system for the purpose of the competitive bidding laws: (1) it owns a tower from which it can broadcast the 800 MHz system and (2) it has computer technology to "partition" the radio communications. A fair reading of the trial court's order denying the permanent injunction indicates that it held that Motorola was the sole source because of those two reasons.

[*1315] Motorola owns a 600-foot tower that it originally built for commercial use; on that tower Motorola has installed equipment that will allow it to broadcast the 800 MHz radio communications and fire-alerting system. Motorola argues, and the trial court

held, that GE could not provide a facility to house the equipment related [**8] to the system.

Witnesses for General Electric testified that Mobile's General Electric franchise, Bibbins & Rice, has had an 800 MHz trunked commercial user system in Mobile since 1982; that it is operated from the WABB radio tower in west Mobile; that Bibbins & Rice leases the tower from WABB under a five-year renewable contract; that Bibbins & Rice would allow General Electric to use the 800 MHz antenna if General Electric wished to provide the City with an 800 MHz communications system; and that the equipment necessary to the system can be housed in a building owned by Bibbins & Rice at the base of the WABB tower. That testimony was undisputed. Bibbins & Rice is in the marine and industrial electronics and radio-communications sales and service business.

The evidence further indicated that the City could obtain a radio-communications capability comparable to that of General Electric and Motorola's towers by using the tower located at the "Emergency Operations Center," which is a site in Springhill jointly owned by the City and Mobile County. The Police, Fire, and Public Works Departments currently operate radio-communications systems from that tower and house related equipment [**9] in the building at the base of the tower.

Considering the evidence discussed, we hold that the trial court improperly determined that Motorola's tower made it the sole source for the radio-communications and fire-alerting systems of the September 27 contract. Motorola, nevertheless, maintains that its equipment's "partitioning" capability makes it a sole source. The record indicates that the partitioning capability is indeed unique to Motorola. It allows the City to have three radio channels dedicated to its use, which others can also provide, but, uniquely, it allows the City to share the use of four commercial channels in two specific situations. The first situation involves a feature called "telephone interconnect," which allows one to make and receive calls on a radio to and from a telephone land line. In the September 27 contract, the City and Motorola agreed that the telephone interconnect feature was not to be included in the initial radio units purchased by the City, however. Second the City could use the four additional channels for its fire-alerting system.

The specifications provided by the City's sheriff's office, Fire Department, and Department of Public Works for the [**10] fire-alerting system and radio-communications equipment do not require the "partitioning" feature of Motorola's system. Accordingly, the "partitioning" feature is an option that is additional to the City's specifications. The record indicates that General Electric could provide the system described in the specifications.

We are thus presented with this question: At what point does an additional feature, such as "partitioning," that is not required in the specifications, make a good or service, such as Motorola's system, so unique that its producer can be considered the sole source of the good or service for the purpose of Alabama's competitive bidding laws? Most goods and services are to some extent "unique"; indeed, the evidence indicates that large portions of the system that General Electric proposed in the place of Motorola's system are patented and work in a "unique" fashion. Accordingly, we will not hold that a good or service's "uniqueness" alone can qualify the producer or supplier of the good or service as a "sole source" of a good or service under Alabama's competitive bidding laws. Instead, to so qualify under § 41-16-51(a)(11), the good or service offered must [**11] be unique; and that uniqueness must be substantially related to the intended purpose, use, and performance of the good or service sought; and the entity seeking to be declared a "sole source" must show that other similar goods or services cannot perform [*1316] the desired objectives of the entity seeking the goods or services.

Motorola perhaps meets the first two portions of the test above, but it fails the third. The trial court did not appropriately consider the availability of systems other than Motorola's system that could provide the fire-alerting system and radio-communications equipment described in the City's specifications. "Partitioning" alone, although it is unique to Motorola, does not qualify Motorola as a sole source under § 41-16-51(a)(11).

We must also consider whether Motorola is a sole source for the maintenance services in the October 1 contract. In relation to that issue, the trial court held:

> "While under the facts and circumstances of this case the maintenance agreement appears to the Court not to be technically a sole source item, in view of the facts and circumstances that existed at the time and given the rather critical need of the City for maintenance it, [**12], likewise, did not need to be competitively bid."

Although Motorola insists that the October 1 contract was exempt from competitive bidding because of the sole source exception, the trial court did not so hold, at least not expressly. Furthermore, the evidence clearly indicates that not only General Electric through its franchisee Bibbins & Rice, but also other businesses, could have provided the maintenance services provided for in the October 1 contract.

It is not clear on what legal basis the trial court determined that the October 1 contract should not be competitively bid. The trial court seems to have meant to hold that as a matter of equity, even though Motorola was not the sole source, the need for maintenance of the equipment was so critical that competitive bidding was not necessary. Section 41-16-53, Ala. Code 1975, comes the closest of any law that we can find to addressing such a holding:

"In case of emergency affecting public health, safety or convenience, so declared in writing by the awarding authority, setting forth the nature of the danger to public health, safety or convenience involved in delay, contracts may be let to the extent necessary to meet the emergency [**13] without public advertisement. Such action and the reasons therefor shall immediately be made public by the awarding authority."

If the trial court meant to uphold the October 1 contract based on § 41-16-53, it erred in three ways. First, the sheer length of time of the negotiations involved in this transaction plus the length of time over which the supposed "emergency" would have occurred indicates that there was no emergency; the negotiations involved years of work and the "emergency" involved, at worst, a decades-long City-wide atrophy of the equipment, by which the equipment became "gradually obsolete," in the words of one witness. Second, the City did not comply with the § 41-16-53 requirement of declaring such an emergency in writing, explaining in the writing "the nature of the danger," and immediately making public the agency's action and the reasons therefor. Finally, the provision dispenses with the requirement of public advertising, not competitive bidding.

As a final argument, Motorola contends that the contracts should be upheld, because, it says, they were made in "good faith." In support of that argument, it cites International Telecommunications Systems v. State, 359 So.2d 364 (Ala. 1978); [**14] White v. McDonald Ford Tractor Co., 287 Ala. 77, 248 So.2d 121 (1971); Carson Cadillac Corp. v. City of Birmingham, 232 Ala. 312, 167 So. 794 (1936). Those cases are inapposite, because they involve fact situations in which there was competitive bidding and the question was whether the bidding authorities had engaged in a good faith exercise of discretion in the process of bidding and awarding contacts.

The trial court erred in determining that the challenged contracts fell within the exception of 41-16-51(a)(11) and therefore were not subject to the competitive bidding requirements of § 41-16-50. Before awarding the contracts on the bids involved in this action, the City should have complied with the competitive bidding procedures [*1317] established in 41-16-51 et seq. The injunctions were due to be granted. The contracts are void, pursuant to Ala. Code 1975, § 41-16-51(d), which provides, "Contracts entered into in violation of this article shall be void . . . ."

The judgment of the trial court is due to be reversed [**15] and the cause remanded.

89-590 REVERSED AND REMANDED.

89-1446 REVERSED AND REMANDED.

Henry Wade Gober v. Jimmy Stubbs, Judge of Probate of Elmore County, Alabama

1951374

SUPREME COURT OF ALABAMA

682 So. 2d 430; 1996 Ala. LEXIS 494

September 13, 1996, RELEASED

SUBSEQUENT HISTORY: [**1] As Amended. Released for Publication October 28, 1996.

PRIOR HISTORY: Appeal from Elmore Circuit Court. (CV-96-145). Sibley G. Reynolds, TRIAL JUDGE.

DISPOSITION: AFFIRMED.

CORE TERMS: bridge, toll bridge, public use, eminent domain, abutment, private property, construct, private use, build, toll, privately owned, right-of-way, roadway, condemnation, connecting, condemn, condemned property, sovereign, municipal, assign, river, new bridge, public roads..., public body, public money, right of eminent domain, municipality, franchises, easement, flowing

COUNSEL: For Appellant: Douglas Corretti and Charles Cleveland of Corretti, Newsom, Cleveland, Hawkins & Cleveland, Birmingham.

For Appellee: John E. Enslen of Enslen, Johnston & Pinkston, L.L.C., Wetumpka.

Amici curiae Cities of Montgomery, Prattville, Millbrook, and Wetumpka; Town of Coosada; and Montgomery County, in support of the appellee: G. William Noble, Gardendale.

JUDGES: HOUSTON, JUSTICE. Hooper, C. J., and Maddox, Shores, Kennedy, Ingram, and Butts, JJ., concur.

OPINION BY: HOUSTON

OPINION

[*431] HOUSTON, JUSTICE.

Henry Wade Gober, pursuant to Ala. Code 1975, § 12-22-6, appeals from the order of the Circuit Court of Elmore County denying his petition for the writ of mandamus. In his petition for the writ of mandamus, Gober requested that the circuit court order the Elmore County probate judge to set aside his order granting Elmore County's application to condemn a portion of Gober's property; he based his petition on the grounds that the proposed condemnation was not authorized by Alabama law and that it violated the Alabama Constitution of 1901, Article I, § 23, and Article IV, § 94, as amended by Amendment 112.

This controversy has its origin in two contemporary dilemmas facing the people of Alabama: a growing need for an improved and expanded transportation infrastructure and the ever-present lack of sufficient governmental funds to meet that need while at the same time meeting other public needs. In recent years, tremendous [**2] population growth in the Millbrook-Coosada area of Elmore County has created an urgent need for an additional bridge across the Alabama River in order to accommodate the thousands of persons from that area who daily commute to and from their work in the City of Montgomery; however, neither the State of Alabama nor Elmore County or Montgomery County currently has the financial resources needed to build such a bridge. In order to solve this seemingly intractable problem, the governing bodies of Elmore County and Montgomery County agreed to study the feasibility of permitting a private corporation to build the needed additional Alabama River bridge and [*432] to operate it as a for-profit toll bridge. Eventually, Sea Star, Inc., an Alabama corporation, owned by Jim Allen, an Elmore County businessman already experienced in successfully operating toll bridges, was chosen to construct and operate the bridge.

The agreement entered into between Sea Star, Inc., Elmore County, and Montgomery County states that for its part Sea Star agreed as follows:

"[Sea Star] agrees to construct and develop the New Bridge substantially in accordance with Alabama Department of Transportation specifications....

[**3]

"....

"[Sea Star] hereby represents and warrants that it will provide all funding for the design and construction of the bridge and required roadway fill necessary for the construction of the New Bridge abutment and toll plaza. [Sea Star] further agrees to assume all maintenance for the items it constructs."

In exchange, Elmore County and Montgomery County agreed as follows:

"[Montgomery County and Elmore County hereby agree] to design roadways, relocate utilities, acquire rights-of-way and construct all necessary Project roadways within [their respective jurisdictions. Montgomery County and Elmore County also agree] to maintain all Project roadways lying within [their] boundaries as public roads....

"[Montgomery County and Elmore County also agree] to use [their] powers of condemnation and/or eminent domain to acquire any parcels of real property for which a right-of-way cannot be negotiated by [Sea Star] and which are considered by the parties to be necessary for the construction of the Project and, with respect to the roadway necessary to construct and maintain the New Bridge, toll plaza and bridge abutment, and to assign permanent [**4] rights-of-way to [Sea Star] or its assigns with respect to such property.

"....

"[Sea Star] or its affiliates and its assigns shall have perpetual right to collect tolls and determine toll fares for the New Bridge."

It is undisputed that with the exception of the Gober property all the rights-of-way necessary to complete the project were obtained without the necessity of resorting to involuntary condemnation. In fact, some landowners actually donated tracts of their land in support of the project. Furthermore, the record shows that the project has been approved by all necessary governmental authorities, including the Army Corps of Engineers. Gober owns the last needed tract of land on the Elmore County side of the Alabama River. [1]

1 Almost all of the Gober property that Elmore County seeks to condemn will be used to complete the last leg of the county road connecting Millbrook with the new bridge. The record does show that the last 30 to 40 feet of the tract leading to the edge of the Alabama River will be used to construct the bridge abutment for the toll bridge. Title to the entire tract, including the land on which the bridge abutment is to be built, however, will remain with Elmore County.

[**5] Gober's appeal raises three issues, each of which will be considered in turn:

I. Whether Elmore County's condemnation of Gober's land for the purpose of building the connecting road and bridge abutment for a privately owned and operated toll bridge which is intended for use by the public violates the constitutional restrictions placed on the exercise of the power of eminent domain by Article I, § 23, of the *Alabama Constitution.*

II. Whether Elmore County's condemnation of Gober's land for the purpose of building the connecting road and bridge abutment for a privately owned and operated public toll bridge was statutorily authorized.

III. Whether Elmore County's participation in the proposed toll bridge project impermissibly "lends [the county's] credit, or ... grants public money or thing of value in aid of, or to any ... corporation" in violation of Article IV, § 94, of the *Alabama Constitution*, as amended by Amendment 112.

I.

The concept of respect for private property is part of the very fabric of a free and [*433] democratic society. The importance of the right of private ownership of property is evident in the organic law of our nation [**6] and our state. See, e.g., Amendment V ("*No person shall be ... deprived of* life, liberty, or *property*, without due process of law") and Amendment XIV ("*nor shall any state deprive any person of* life, liberty, or *property*, without due process of law"), Constitution of the United States. See also Article I, § 6 ("*he shall not ... be deprived of* life, liberty, or *property*, except by due process of law"); and Article I, § 35 ("the sole object and only legitimate end of government is *to protect the citizen in the enjoyment of* life, liberty, and *property*"), *Constitution of Alabama of 1901* (emphasis added). The framers of both the Federal Constitution and the Alabama Constitution clearly sought to create a governmental system that not only respected, but also affirmatively protected, the property rights of individuals. See *Magna, Inc. v. Catranis*, 512 So. 2d 912 (Ala. 1987).

Like most rights though, the right to private property is not limitless. [2] In one of Alabama's earliest eminent domain cases, Chief Justice Lipscomb wrote:

> 2 In *Aldridge v. Tuscumbia, C. & D.R.R.*, 2 Stew. & P. 199, 204 (Ala. 1832), this Court observed:
>
> > "The sovereign authority is frequently exerted over personal rights and private property. It is done in the enforcement of all quarantine regulations -- for the prevention of monopolies; and it is necessary, to prevent a correspondence with the public enemy. It is exercised by governments, as well in peace, as amidst the tumult of war -- in time of peace, in opening harbors, dock yards, and channels of peaceful commerce, productive of the general prosperity of the country -- in time of war, private property is more frequently subjected to the public use -- for provisioning armies, supplying the means of transportation, and in the erection of fortifications. And, sometimes, it has been considered necessary to destroy every article of subsistance [sic], and every thing that could, in any way, be subservient to the support and comfort of an invading army, for the purpose of arresting its progress. In such cases, infinite distress is produced by the destruction of private property; but the government acts on the principle of a right to sacrifice a part of the good of the many."

[**7]

> "There is no maxim sounder, or of more universal application, than 'that individual right must yield to the public good.'"

Aldridge v. Tuscumbia, C. & D.R.R., 2 Stew. & P. 199, 204 (Ala. 1832). In the United States, the law of eminent domain is the product of the perpetual struggle between the competing concepts of individual right and public good. In Article I, § 23, of the *Alabama Constitution*, an almost perfect balance between these oftentimes opposing interests was struck:

> "The exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the [**8] lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent do-

main shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association."

The power of eminent domain does not originate in Article I, § 23. Instead, it is a power inherent in every sovereign state. Section 23 merely places certain limits on the exercise of the power of eminent domain. This Court stated in *Steele v. County Commissioners*, 83 Ala. 304, 305, 3 So. 761, 762 (1887):

> "The right of eminent domain antedates constitutions, and is an incident of sovereignty, inherent in, and belonging to every sovereign State. The only qualification of the [inherent] right is, that the use for which private property may be taken shall [*434] be public. ... The constitution [of our State] did not assume to confer the power of eminent domain, but, recognizing its existence, [**9] [further] limited its exercise by requiring that just compensation shall be made." [3]

3 This Court in *Steele* interpreted and applied Article I, § 24, of the 1875 Constitution of Alabama, the language of which is identical to Article I, § 23, of Alabama's current 1901 constitution.

In order for an exercise of eminent domain to be valid under § 23, two requirements must be met. See *Johnston v. Alabama Public Service Commission*, 287 Ala. 417, 419, 252 So. 2d 75, 76 (1971). First, the property must be taken for a public use and, with one exception inapplicable here, it cannot be taken for the private use of individuals or corporations. [4] This first restriction is no more than a restatement of a requirement inherent in a sovereign's very right to exercise eminent domain. See *Steele*, 83 Ala. at 305, 3 So. at 762. Second, "just compensation [must be paid] for any private property taken." *Johnston*, 287 Ala. at 419, 252 So. 2d at 76. [5]

4 Unlike a partnership, "[a] corporation can be created only by or under authority from the state." William L. Clark, Jr., *Clark on Corporations*, 2d ed., p. 10 (1907). Because of this, the framers of the *Constitution of Alabama of 1875* considered corporations to be quasi-governmental entities, rather than strictly private entities. This confusion over the legal nature of corporations caused the drafters of § 24 of the 1875 Constitution (which is identical to § 23 of the *Constitution of Alabama of 1901*) to add the following language to the beginning of the eminent domain provision found in the *Constitution of Alabama of 1868*:

> "The exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected ...."

The phrase in question in the present appeal -- "nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner" -- reflects this same confusion as to the legal nature of corporations. In order to make it perfectly clear that private use by a corporation is to be considered "private use" within the meaning of § 24, the drafters of the 1875 constitution included the "for the use of corporations" language in § 24. That language did not, as the appellant argues, create a third restriction on the exercise of the power of eminent domain.

[**10]

5 Before the establishment of the post-Revolutionary War governments of the various United States, just compensation for property taken pursuant to the power of eminent domain had never been constitutionally guaranteed. In *Aldridge v. Tuscumbia, C. & D.R.R.*, 2 Stew. & P. 199, 205 (Ala. 1832), this Court stated:

> "The sovereign power with us, has imposed a limitation on itself, unknown to other sovereignties, except those of the American Union. It is declared [in Alabama's original 1819 Constitution], that, this right of using private property for public use, shall not be exercised, 'without a just and fair compensation;' ...."

The basis of Gober's claim that Elmore County's proposed condemnation of a portion of his property violates § 23 is his assertion that the taking is not for a public use. Gober asserts that Elmore County is seeking to impermissibly condemn his property for private use, because the county intends to allow Sea Star, a private corporation, to construct a bridge abutment for its privately owned and operated toll bridge on a portion of the condemned property [**11] and intends to use the rest of the condemned property to build a road connecting to Sea Star's toll bridge. Gober's assertion is incorrect.

It is well settled in Alabama that the determination of whether a use is public or private is dependent upon the nature of the use, not the manner in which the use is accomplished. See *Columbus Water Works Co. v. Long*, 121 Ala. 245, 247-48, 25 So. 702, 703 (1898):

> "It is not the instrumentality employed for operating the public use, but the use itself, that satisfies the constitution."

See also *Parrish v. City of Bayou La Batre*, 581 So. 2d 1101 (Ala. Civ. App. 1990) (holding that an agreement to build a new sewer line entered into between the city and the corporations to be benefitted by the new sewer line did not constitute a private use even though the benefitted corporations agreed to finance and construct the line). In *Aldridge*, 2 Stew. & P. at 203, this Court eloquently and succinctly defined a "public use," holding that "whatever is beneficially employed for the community, is of public use." Furthermore, our case law establishes that:

> [*435] "'Once it is determined that the taking is for a public purpose the fact [**12] that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose.'"

Florence v. Williams, 439 So. 2d 83, 89 (Ala. 1983) (quoting *Redevelopment Agency of City & County of San Francisco v. Hayes*, 122 Cal. App. 2d 777, 804, 266 P.2d 105, 122, *cert. denied*, 348 U.S. 897, 99 L. Ed. 705, 75 S. Ct. 214 (1954)).

Applying these principles to this case, we must conclude that the purpose for Elmore County's application to condemn the land in question is a public use, that use being the creation of an indisputably much needed alternative route between the Millbrook-Coosada area of Elmore County and the City of Montgomery. The fact that a privately owned and operated toll bridge will be part of that new public roadway does not change the nature of the use in question. Nor does the fact that Sea Star will be allowed to build a bridge abutment upon a portion of the condemned property change the nature of the taking from a public use to an impermissible private use. See *Parrish v. City of Bayou La Batre*, 581 So. 2d 1101 (Ala. Civ. App. 1990); see also *Blankenship v. City of Decatur*, 269 Ala. 670, 115 So. 2d 459 (1959) (which went as far [**13] as to hold that the taking of the petitioner's land pursuant to an urban redevelopment plan that provided that the condemned property would be later resold to private individuals and corporations after it had been cleared of dilapidated buildings constituted a taking for a public use and therefore did not violate § 23).

Our conclusion is supported not only by the application of Alabama case law, but also by the leading treatise in this area of the law, Sackman and Rohan, *Nichols' The Law of Eminent Domain* (3d ed. 1990):

> "A bridge which is to be an integral part of a public highway has been held to be as much for a public use as is the highway itself and the power of eminent domain may properly be exercised in its behalf. Approaches to the bridge are likewise proper objects for the exercise of the power.
>
> "The mere fact that use of the bridge is to be conditioned upon payment of tolls does not destroy its character as a public use."

§ 7.27, pp. 7-212 through 7-213.

> "*It is well settled that the incidental benefit to the stockholders* in the profits arising from tolls, fares and other charges *does not render the taking for a private use, if* [**14] *the tolls, fares and charges are to be derived from serving the public.*"

Id. at § 7.08[1], p. 7-68. (Emphasis added.)

II.

Gober also contends that there is no statutory authorization for Elmore County to condemn his land for the purpose of building a connecting road and bridge abutment for a privately owned and operated toll bridge

that is intended for use by the public. However, Ala. Code 1975, § 11-80-1, provides:

> "*Counties* and municipal corporations *may condemn lands* for public building sites or additions thereto, or for enlargements of sites already owned, or *for public roads* or streets or alleys, or for material for the construction of public roads or streets *or for any other public use.*"

(Emphasis added.)

Having determined in Part I of this opinion that Elmore County's condemnation of Gober's land was for a "public use," we find no merit in this contention.

III.

Gober asserts that the agreement entered into by Sea Star, Inc., Elmore County, and Montgomery County violates Article IV, § 94, as amended by Amendment 112, of the *Constitution of Alabama of 1901* (hereinafter referred to as " § 94"). He contends that [**15] Elmore County is impermissibly "lending its credit, or ... granting public money" (§ 94) to Sea Star. This contention is premised upon two arguments. First, Gober argues that Elmore County's grant of a right-of-way or easement over the property in question to allow Sea Star access to the bridge site and to allow Sea Star to build a bridge abutment on a portion of the condemned property violates § 94. Second, [*436] Gober argues that the expenditure of public funds by both Elmore County and Montgomery County to build and maintain a roadway connecting to Sea Star's toll bridge furthers the interests of Sea Star and therefore violates § 94.

The pertinent portion of § 94 states:

> "The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever ...."

In *Mobile Wrecker Owners Ass'n, Inc. v. City of Mobile*, 461 So. 2d 1303, 1306 (Ala. 1984), this Court stated:

> "Section 94 'was designed to prevent the expenditure of public funds in aid of private individuals or corporations by reason of [**16] which a pecuniary liability, a debt of the municipality, is incurred.' (Citation omitted). *Opinion of the Justices No. 215*, 294 Ala. 555, 567, 319 So. 2d 682, 694 (1975). There is no lending of credit by a public body when it enters into an ordinary commercial contract, with benefits flowing to both parties and a consideration on both sides. *Ramer v. City of Hoover*, 437 So. 2d 455 (Ala. 1983); *Rogers v. City of Mobile*, 277 Ala. 261, 169 So. 2d 282 (1964)."

The mere fact that a county enters into a mutually beneficial agreement with a private individual or corporation does not violate Article IV, § 94 of our constitution. To rule that it does would arbitrarily prevent cities and counties from attempting to find innovative solutions to the problems they face, by foreclosing any opportunity for cooperation between the public and private sectors for the public good. Recognizing that this result was not intended by the framers of our constitution, this Court has repeatedly stated:

> "'When a contract of a public body is an ordinary commercial contract, with benefits flowing to both parties and a consideration on both sides, it is not a lending of credit by the [**17] public body.'"

Florence v. Williams, 439 So. 2d 83, 91 (Ala. 1983) (quoting *Rogers v. City of Mobile*, 277 Ala. 261, 278, 169 So. 2d 282, 288 (1964)). All the benefits flowing to Sea Star arise from a mutually beneficial agreement between Sea Star and the counties. Under the contract, no governmental money at all will be spent in building the privately owned toll bridge. [6] Sea Star, for its part, has agreed not only to pay all the expenses necessary for the construction of the toll bridge and bridge abutments, but also to be responsible for all future maintenance costs associated with the toll bridge. In exchange, the counties have agreed to allow Sea Star an easement to build bridge abutments on a portion of the land in question and have agreed to grant Sea Star an easement or right-of-way across the condemned land in order to fulfill its contractual obligations. [7]

6 If the counties were financing the construction of the toll bridge, the project's constitutional validity would be in question. See *Opinion of the Justices No. 215*, 294 Ala. 555, 567, 319 So. 2d 682, 694 (1975), in which this Court held that a bill that allowed municipalities to enter into joint projects with private electrical companies did

not violate Article IV, § 94, of our constitution. In that opinion we stated:

> "The bill specifically provides for the cost of such Projects to be financed solely out of revenues derived from the Projects. No part of the Project costs are to be a charge on the general credit or tax revenues of any municipality. For these reasons § 94 is not violated."

Id. (citing *Newberry v. City of Andalusia*, 257 Ala. 49, 57 So. 2d 629 (1952)).

[**18]

7 The right-of-way granted to Sea Star is not exclusive. The roads built will be public roads. Arguably, it was not necessary for Sea Star to be given a right-of-way at all.

In considering, for purposes of § 94 analysis, the question whether "a contract of a public body is an ordinary commercial contract, with benefits flowing to both parties and a consideration on both sides," *Florence v. Williams*, 439 So. 2d at 91, this Court will not "presume bad faith nor will we inquire into the adequacy of the consideration." *Newberry v. City of Andalusia*, 257 Ala. 49, 57 So. 2d 629 (1952) (refusing to question the motives behind a contract, or the adequacy of the consideration of that contract, between the City of Andalusia and a private manufacturer in which the city agreed to lease a portion of its industrial park to the manufacturer on very favorable terms). We must [*437] therefore conclude that the easement rights granted to Sea Star, Inc., pursuant to the agreement between Sea Star and the counties did not constitute an impermissible "lend[ing of Elmore County's] ... credit, or ... granting public [**19] money" to Sea Star (§ 94).

Gober's reliance upon *Griffin v. Jeffers*, 221 Ala. 649, 130 So. 190 (1930), is misplaced. The facts underlying the present controversy are very different from the facts this Court faced in *Griffin*. The facts of that case are as follows:

> "This bill is filed by a resident taxpayer against the county of Etowah and its board of revenue, and seeks to enjoin performance by the county of a contract entered into by it, ... by which the county engaged to lease and operate a toll bridge, for a term of thirty years, to be constructed by Kershaw or his assigns, across the Coosa river ....
>
> "....
>
> "The averments of the bill show that the estimated cost of the bridge is $ 138,000, and by the contract ... the county leases the bridge before it is constructed, and engages to operate it for a term of thirty years, paying, as a part of the annual rent therefor, $ 9,600 in monthly installments, this sum being referred to and treated in a subsequent stipulation of the contract as interest on the investment.
>
> "By another stipulation the county agrees to pay out of the proceeds of the tolls collected for the use of the bridge, an additional [**20] sum of $ 4,600 per annum as rent, with further provisions that, if the funds accruing from the tolls are not sufficient to pay said additional rent, the same shall be allowed to accumulate and draw 6 per cent. interest per annum.
>
> "By another stipulation in the contract the county agrees to pay as rent an additional amount equal to all taxes, state, county, municipal, school, or district, and to pay this on demand. The county also assumes the obligation to maintain and keep the bridge in repair, and to pay and hold the lessor harmless from all damage that may arise from the use of the bridge.
>
> "In addition ..., the county agrees to keep the bridge insured and pay the premiums thereon, the insurance to be payable to the lessor or his assigns or mortgagees ....
>
> "As appears from the allegations of the bill and a copy of the contract, ... it was clearly within the contemplation of the parties and their controlling purpose

> that the lease should be so assigned that the obligations and undertakings of the county would stand as security for money obtained to construct the bridge."

Griffin, 221 Ala. at 650, 130 So. at 190-91. *Griffin* does not stand [**21] for the proposition that all agreements between counties and private toll bridge operators violate § 94. Instead, *Griffin* merely holds that a county or municipality may not enter into a contract guaranteeing that the operation of a privately owned toll bridge will be profitable. While the contract in question in *Griffin* was, in the words of this Court, "clearly a loan of [Etowah County's] credit to aid [the toll bridge owner] and his associates to construct a privately owned toll bridge," *Griffin*, 221 Ala. at 651, 130 So. at 192, the agreement in question in this case clearly is not.

Gober's second argument is premised upon his contention that Elmore County and Montgomery County have entered into an agreement with the intention of spending millions of dollars to build roads connecting with Sea Star's toll bridge, with the primary object being to benefit Sea Star. If this allegation were correct, there could be a potential violation of § 94. Elmore County and Montgomery County are not building roads with the primary intention of benefiting Sea Star, Inc. Instead, they are building, for the benefit of the commuting public, a roadway between the Millbrook-Coosada area [**22] and the City of Montgomery that happens to have a private toll bridge as a part of it. The fact that Sea Star is incidentally benefiting from the counties' efforts to satisfy a public necessity does not violate § 94.

For the foregoing reasons, the Elmore Circuit Court's order denying Henry Wade Gober's petition for a writ of mandamus is due to be affirmed.

AFFIRMED.

[*438] Hooper, C. J., and Maddox, Shores, Kennedy, Ingram, and Butts, JJ., concur.

Mary Jo Vance Gowan, et al. v. Terry Kelley Crawford and Joy Anne Crawford

1910588

SUPREME COURT OF ALABAMA

599 So. 2d 619; 1992 Ala. LEXIS 628

May 29, 1992, Released

SUBSEQUENT HISTORY: [**1] Released for Publication June 19, 1992.

PRIOR HISTORY: Appeal from Cullman Circuit Court. Jack C. Riley. (CV-90-5094)

DISPOSITION: REVERSED AND REMANDED

CORE TERMS: easement, driveway, public road, adjacent, landowners, drive, feet, oral contracts, corner, parcel, creek, tract of land, right to use, ownership, mutual, width, unity, built, common law, easements of necessity, right of way, final order, creek bed, dwelling house, presumption of correctness, present case, counterclaimed, prescription, enforceable, trespass

COUNSEL: For Appellant: Billy W. Jackson, Cullman.

For Appellee: Thomas A. Smith, Jr., Cullman.

JUDGES: MADDOX, Hornsby, Shores, Houston, Kennedy

OPINION BY: MADDOX

OPINION

[*620] **MADDOX, JUSTICE.**

The issue presented here is whether the trial court erred in granting the owners of a tract of land an easement over an adjacent tract. Our resolution of the issue requires an examination of the law of Alabama relating to easements by necessity and easements by implication.

The plaintiff initially sued to enjoin the defendants from using a driveway across the plaintiffs' property. The defendants counterclaimed for a declaration that they had a right to use the driveway for ingress to and egress from their property. The parties stipulated the facts of the case, and the trial judge viewed the property before entering his final order. [1] In his order, the trial judge made written findings of fact, and stated that he had "taken careful note of the opinion in *Cleek v. Povia*, 515 So.2d 1246 (Ala. 1987)" (a [**2] case dealing with an easement by implication). He found that because a creek extended east across the defendants' property, access from the defendants' house to the adjacent public road [*621] was "extremely difficult." Noting that "the defendants had used [the] private driveway since 1978 as the sole means of access to . . . their property," he granted an easement to the defendants.

1 The trial judge's final order reads:

> "This cause was submitted on the pleadings of the parties and on stipulations provided to the Court under an agreement of the parties entered on May 9, 1991, after an extended conference with the attorneys. In addition, the Court viewed the property with the attorneys for the parties on July 2, 1991, and carefully reviewed the pleadings, stipulations, and facts disclosed by the view of the premises. On the visit to the property, the Court was shown that a paved public road extends along the South boundary of the defendants' property and the South boundary of the plaintiffs' property. From a point approximately 290 feet West of the Southeast corner of the plaintiffs' property, there is a rough single lane driveway extending North and then East to a point on the East line of the plaintiffs' property at a point approximately 125 feet North of the Southeast corner. From that point, the driveway extends East and then North to the dwelling house of the defendants. The small parcel of property of the plaintiffs which lies South and East of said

driveway is covered with trees and underbrush and is traversed by a creek. This creek extends East across the defendants' property and makes any access from the defendants' dwelling house directly South to the public road extremely difficult because of the depth and width of the creek bed.

"From the stipulations of the parties, the Court finds that the defendants have used said private driveway since 1978 as the sole means of access to . . . their property. The Court has also taken careful note of the opinion in *Cleek v. Povia*, 515 So.2d 1246 (Ala. 1987), as to the various ways to create an easement.

"It is, therefore, ORDERED AND ADJUDGED by the Court that the relief requested in the complaint filed by the plaintiffs be and the same is hereby denied.

"It is further ORDERED AND ADJUDGED by the Court that the defendants be and they are hereby granted an easement over and across the Southwest [Southeast?] portion of the Southwest Quarter of the Southwest Quarter of Section 27, Township 9 South, Range 5 West. Said easement shall be 15 feet in width and extend from a point on the South line of said forty (located in the paved public road), being approximately 290 feet West of the Southeast corner of said forty; thence generally North and thence East along the existing driveway to a point on the East boundary of said forty, said point being approximately 125 feet North of the Southeast corner of said forty.

"It appears to the Court that said driveway provides the sole means of access to . . . the property of the defendants, which is described as the West Half of the Southeast quarter of the Southwest Quarter of Section 27, Township 9 South, Range 5 West. A copy of a portion of an aerial photograph is attached to and made a part of this judgment as an aid to the understanding of the provisions herein.

"Costs herein are taxed to the plaintiffs.

"ENTERED this 16th day of August, 1991.

"s/Jack C. Riley, Circuit Judge"

[**3] FACTS

Cora Lee Vance, mother of the plaintiffs, upon the death of her husband on March 26, 1969, was granted a life estate in his property, and upon her death, the remainder was to go to his children and their heirs.

In 1978, Cora Lee Vance orally gave to Ethel Crawford and her successors, Terry and Joy Anne Crawford, permission to construct and use a driveway across the southeastern part of Cora Lee Vance's property. In consideration for this right to use the driveway, the Crawfords cut firewood for Cora Lee Vance out of the trees cleared for the driveway.

In September 1984, almost a year after Cora Lee Vance's death, one of the remaindermen, Martha Audie Vance, wrote the Crawfords and asked that they discontinue use of the driveway. In September 1990, the Crawfords were once again told to discontinue using the easement. Shortly thereafter, the remaindermen sued the Crawfords, alleging trespass. The Crawfords answered, alleging that they had a contract with Cora Lee Vance for permanent use of the driveway. They also claimed that to build a driveway directly off the public road and onto their property would be expensive. The Crawfords counterclaimed for a judgment declaring [**4] that they had the right to use the driveway.

The trial judge based his judgment upon the parties' stipulations and a visit to the property:

> "From the stipulations of the parties, the Court finds that the defendants have used said private driveway since 1978 as the sole means of access to . . . their property. The Court has also taken careful note of the opinion in *Cleek v. Povia*, 515 So. 2d 1246 (Ala. 1987), as to the various ways to create an easement."

There is a presumption of correctness of a trial court's findings of fact based on ore tenus evidence, and in property disputes this presumption is enhanced when the trial court personally views the property in dispute, *Howell v. Bradford*, 570 So.2d 643 (Ala. 1990), but the evidence in this case was not presented ore tenus and the trial judge set out in his judgment many of the facts he found based on his personal view of the property. Consequently, we will not accord the usual presumption of correctness to the trial court's findings, because the basic and controlling facts are not disputed.

From a reading of the judgment, it is apparent to us that the trial judge granted the easement [**5] because he found that a creek running eastward across the defendants' property made any access from their dwelling house directly south to the public road "extremely difficult because of the depth and width of the creek bed." It seems apparent that the trial judge granted the easement to the defendants on the ground of "necessity."

In *Bull v. Salsman*, 435 So.2d 27 (Ala. 1983), this Court set out the law relating to easements of necessity:

> "A common law way of necessity is a type of easement by implication and 'rests on the implication that the parties intended and agreed to provide for such a way.' *Sayre v. Dickerson*, 278 Ala. 477, 491, 179 So.2d 57 (1965). For such an implication to arise, there must have been an original grantor who impliedly granted an easement across his remaining lands to the purchaser of the land-locked parcel. Therefore it has been stated that 'original unity of ownership of the dominant and servient tenements is always required for an easement of necessity.' *Helms v. Tullis*, 398 So.2d 253, 255 (Ala. 1981); see also, *Burrow v. Miller*, 340 So.2d 779 (Ala. 1976); [**6] *Sayre v. Dickerson*, supra; *Hamby v. Stepleton*, 221 Ala. 536, 130 So. 76 (1930).
>
> "This requirement of original unity of ownership is somewhat qualified, however, by the provisions of Code 1975, §§ 18-3-1 through 18-3-3, which allow the owner of a tract of land not within a municipality to acquire a right of way if [*622] his land is not adjacent to any public road. The procedure in such actions is the same as in cases of condemnation of lands for public uses, § 18-3-3, and the applicant must pay the owner for the value of the land taken, § 18-3-2. See *Cotton v. May*, 293 Ala. 212, 301 So.2d 168 (1974); *Romano v. Thrower*, 261 Ala. 361, 74 So.2d 235 (1954)."

435 So.2d at 29.

We hold here, as we did in *Bull v. Salsman*, that the trial court could not grant an easement by necessity, because there is no proof in the record of unity of ownership of the two parcels. Furthermore, in this case the defendants' property is adjacent, on the south side, to a public road. See § 18-3-1, Ala. Code 1975.

The trial judge noted in his judgment that he [**7] was familiar with the various ways an easement could be established, as set out in *Cleek v. Povia*, 515 So. 2d 1246 (Ala. 1987). [2] The defendants argue that *Cleek* is controlling; they argue that the facts of *Cleek* are very similar to those of the present case and that the trial judge granted the easement based on the *Cleek* decision. In *Cleek*, the plaintiff, Mrs. Cleek, and the defendant, Francis Povia, lived on contiguous lots with a private drive that provided ingress and egress for both homes. The two original landowners, Mr. Cleek, the plaintiff's late husband, and Mr. Malone, the defendant's predecessor in title, split the cost of the drive, but most of it was built on Mr. Cleek's lot. Nineteen years after the drive was built, Mrs. Cleek sued Povia for damages based on an alleged trespass.

2 In *Cleek*, this Court recognized that there were several ways of creating an easement:

> "Traditionally, easements could be created only by deed, by prescription, or by adverse use for a statutory period. Necessity has also been recognized as a valid basis for the creation of an easement.
>
> "This Court, while not expressly overruling precedent, outlined several additional means of establishing an easement in *Helms v. Tullis*, 398 So. 2d 253 (Ala. 1981). [Seven] ways of creation were outlined in *Helms*: (1) By express conveyance, (2) by reservation or exception, (3) by implication, (4) by necessity, (5) by prescription, (6) by contract, and (7) by reference to boundaries or maps."

515 So.2d at 1247 (citations omitted).

[**8] This Court held that there was "the implication" that "an easement by contract had been created, "because the drive was constructed for the mutual benefit of the two parcels and because there was an agreement between the original owners as to the use. Because there was no precedent in Alabama concerning contract easements, this Court looked to R. Powell, *Powell on Real Property*, § 408 (Abr. ed. 1968), for guidance and adopted the following statement as authority:

> "'Equitable relief has been extended not only to contracts containing a promise to transfer an easement in the future, but also to contracts found to manifest a present intent to create an easement. The most usual of these cases concerns 'reciprocal easements' where adjacent landowners contract (sometimes orally) for the use of a common stairway, common driveway, or other common areas. Even a receipt evidencing the payment of money for a right of way can constitute [evidence of] the required contract.'"

Cleek, 515 So. 2d at 1247-48.

In Alabama, oral contracts concerning land are enforced "where the purchase price or a portion thereof is paid and the buyer is put in possession of the [**9] land." Id., citing the Statute of Frauds, Ala. Code 1975, § 8-9-2(5). This Court held in *Cleek* that "under the facts of [that] case" there was sufficient compliance with the "partial performance" requirements of § 8-9-2(5) to make an oral agreement enforceable. Id.

Although the *Cleek* case and the present case are factually similar in that they both involve adjacent tracts of land and both involve an oral contract, they are dissimilar in several respects. The drive in the *Cleek* case was built for the "mutual benefit" of both landowners and was paid for by both landowners. Furthermore, the oral contract granting an easement was made by landowners who held a fee simple interest in the land and not merely a life estate.

[*623] In this case, however, there was no mutual benefit to the properties and the easement was made solely for the benefit of the Crawfords' property. Furthermore, Cora Lee Vance was only a life tenant on the property and any contract she made concerning the land was enforceable only during her life. See *Duncan v. Johnson*, 338 So. 2d 1243 (Ala. 1976); *Pendley v. Madison*, 83 Ala. 484 (1880), 3 So. 618; *Pope v. Pickett*, 65 Ala. 487 (1880). [**10] Therefore, any oral contract for an easement terminated on her death.

Based on the foregoing, we hold that the Crawfords did not prove that they were entitled to an easement by necessity either at common law or by statute. Furthermore, any contract the life tenant might have made with the Crawfords would not be binding after her death. We, therefore, must reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C.J., and Shores, Houston, and Kennedy, JJ., concur.

W. I. GRUBB, Jr., et al. v. L. H. TEALE

No. 6 Div. 618

Supreme Court of Alabama

265 Ala. 257; 90 So. 2d 727; 1956 Ala. LEXIS 505

November 15, 1956

DISPOSITION: [***1] Affirmed.

CORE TERMS: drive, roadway, vacation, pavement, width, feet, highway, right-of-way, user, map, edge, easement, travel, paved, prescription, county road, prescriptive period, northerly, public road, traveled, foot, evidence to support, feet wide, south boundary, settling, drainage, unpaved, decree, strip, track

COUNSEL: Burr, McKamy, Moore & Tate, Maurice F. Bishop and Mark L. Taliaferro, Birmingham, for appellants.

While there was no attempted vacation, if the effect was a vacation as alleged in the bill, § 18, Title 56, Code, takes care of the matter. Huntsville v. City of Gross, 223 Ala. 205, 135 So. 462. There is no presumption as to the width of highways in this State. Gen.Acts 1915, p. 623, repealing Code, 1907, § 5768. Slight deviations from an existing highway are presumed to be permissive. McCasland v. Walworth Tp., 132 Minn. 460, 157 N.W. 715; Town of Randall v. Rovelstad, 105 Wis. 410, 81 N.W. 819. The county has full authority to change the location of a highway. McRea v. Marion County, 222 Ala. 511, 133 So. 278. Prescriptive right is not looked on with favor. 28 C.J.S., Easements, § 10, p. 645; Wright v. Rice, 38 Ala. 593.

Parsons, Wheeler & Rose, Birmingham, for appellee.

Where evidence is heard ore tenus by the trial court and is conflicting as to whether uninterrupted use of road for more than twenty years made it a public road, the court on appeal will not disturb a decree declaring it to be a public road unless palpably wrong. Keener v. Brice, 253 [***2] Ala. 95, 43 So.2d 8. Where roadway has been used by the general public openly, continuously and adversely under claim of right and not by permission of any person for more than twenty years, rights of the public to the road way have accrued by prescription. Huggins v. Turner, 258 Ala. 7, 60 So.2d 909; Central of Ga. R. Co. v. Faulkner, 217 Ala. 82, 114 So. 686. Where a road is shown to be a public road, a private individual is entitled to injunction against encroachment or obstruction thereon when he has sustained special damages different, not merely in degree, but in kind from that suffered by the public generally. Sandlin v. Blanchard, 250 Ala. 170, 33 So.2d 472; Chichester v. Kroman, 221 Ala. 203, 128 So. 166.

One who is an abutting property owner upon a street has a special right and vested interest to use the whole of the street for ingress and egress, light, view and air. Fry v. O'Leary, 141 Wash. 465, 252 P. 111, 49 A.L.R. 1252. Hence, a portion of the width of the street cannot be vacated on the side opposite his property without compensation to him. Fry v. O'Leary, 141 Wash. 465, 252 P. 111, 49 A.L.R. 1249; Huntsville v. Gross, 223 Ala. 205, 135 So. 462.

JUDGES: Goodwyn, [***3] Justice. Livingston, C. J., and Simpson and Spann, JJ., concur.

OPINION BY: GOODWYN

OPINION

[*259] [**728] W. I. Grubb, Jr., an appellant here and a respondent below, is the owner of lot 9 of G. M. Matthews' Addition to Huffman, according to the map thereof which was filed for record in the office of the Judge of Probate of Jefferson County on June 15, 1923, and is recorded therein in Map Book 13, at page 36. According to said map this lot is in the shape of a parallelogram, 59.65 feet by 150 feet, with the long side on the north being shown as abutting a 30-foot "County Road", generally known as Roebuck Drive. It appears that this road was paved about 1928 with a strip of brick pavement 18 to 20 feet wide. A survey of lot 9 made in 1951 revealed that part of the pavement encroached on the north side of said lot as platted. In an effort to settle the conflicting interests thus made apparent, the following agreement was entered into by Mr. Grubb and Jefferson County, viz.:

"State of Alabama)

Jefferson County)

"This Agreement made and entered into by and between W. I. Grubb, Jr., Party of the First Part, and Jefferson County, Alabama, Party of the Second Part;

"Witnesseth:

[***4] "Whereas, W. I. Grubb, Jr., Party of the First Part, is the owner of Lot 9, according to G. M. Matthews' Addition to Huffman, according to map thereof recorded in the office of the Judge of Probate of Jefferson County, Alabama, in Map Book 13, page 36; and,

"Whereas, Along the northerly boundary of said Lot 9 there is a thirty (30) foot county road, shown by said map hereinabove referred to, said road being commonly known as and referred to as Roebuck Drive; and,

"Whereas, Said Roebuck Drive has been paved and the paved portion of said Roebuck Drive extends three (3) feet over the northerly boundary of said Lot 9; and,

"Whereas, Jefferson County, Alabama, Party of the Second Part, claims to have a thirty (30) foot right-of-way, which said right-of-way is measured fifteen (15) feet from the center line of the public road known as Roebuck Drive, which would, in effect, extend as the county's right-of-way over an additional five (5) feet of the northerlyboundary of said Lot 9, said paved portion of Roebuck drive being twenty (20) feet in width; and under such a state of facts, the house as commenced by W. I. Grubb, Jr., would be in violation of the zoning regulations of Jefferson [***5] County, Alabama; and,

[*260] "Whereas, W. I. Grubb, Jr., claims that the County has already encroached three (3) feet on and over the northerly boundary of said Lot 9; and,

"Whereas, The parties hereto are desirous of settling said controversy;

"Now, Therefore, Said parties mutually agree that in consideration of the stipulations and agreements herein contained, that the southern boundary of Roebuck Drive, at the point where it lies along the northerly boundary of said Lot 9, shall be the southern edge of the pavement as it now exists, and without in any manner extending the right-of-way for the road beyond this point, W. I. Grubb, Jr., does by these presents grant, bargain, sell and convey, for the consideration of the establishing of said boundary, an easement to Jefferson County, Alabama, for drainage purposes, five (5) feet in width, said easement to be parallel with said Roebuck Drive and to have its northerly boundary as the edge of the present pavement of Roebuck Drive at this place and to extend from the edge of said paved portion of Roebuck Drive in a southerly direction for five (5) feet.

[**729] "In Witness Whereof, W. I. Grubb, Jr., and wife, Margaret Grubb, [***6] have hereunto set their hands and seals, and Jefferson County, Alabama, by and through its duly authorized officers, has caused this instrument to be executed, all on this the 29th day of January, 1952.

"W. I. Grubb, Jr. (Seal)

Margaret Grubb (Seal)

"Approved: C. J. Rogers,

County Engineer

"Jefferson County, Alabama

By W. D. Kendrick

President"

L. H. Teale, appellee here and complainant below, is the owner of about 6 acres of land with a frontage of 552 feet along the north side of Roebuck Drive, a portion of which is directly opposite the Grubb property. Teale, claiming that the above agreement, in effect, is an unauthorized vacation of a portion of a public road to his special damage, filed a bill of complaint in the Circuit Court of Jefferson County, in Equity, against Grubb and Jefferson County seeking cancellation of the agreement. The bill alleges that said agreement was entered into for Grubb's "private benefit and gain"; that "Roebuck Drive has been a public road in Jefferson County, Alabama, in its present location, for more than 40 years next preceding the filing of this bill of complaint, and has during all of this period been used by the public continually [***7] and uninterruptedly for travel and convenience; that the public generally for more than 40 years has used and had the actual, peaceable and adverse use of said 30-foot county road, and no one to his (complainant's) knowledge and until the agreement above referred to was entered into, claimed any part of said road; that Jefferson County has recognized the existence of said 30-foot county road known as Roebuck Drive during all of these years"; that the effect of the agreement is to give to Grubb "a 5-foot strip of land off the south side of said county road, and which runs the length of lot 9 adjoining Roebuck Drive, and that said agreement results in taking away from the complainant his vested right of ingress and egress on the full width of Roebuck Drive, and deprives him of his portion of the light, air, view and access along said road"; "that the County Commission * * * was without authority in deeding or giving the above strip of property to the other respondent, and that said purported conveyance was without consideration and void, and that such instrument, if allowed to stand, would cause irreparable injury to complainant and would cause a stricture or bottleneck in said Roebuck [***8] Drive in front of his said property, and would cause it to be greatly depreciated in

value". In answering the bill, Grubb takes the position that the agreement is not a "vacation or attempted vacation of any part of any highway or right-of-way belonging to Jefferson County" but "an agreement settling the boundaries" between his property and the right-of-way owned by the County; that no part of Roebuck Drive was conveyed [*261] to him; and that there is "a clearly dedicated thirty foot right-of-way for a road which was dedicated by the recording of the map of Matthews' Addition to Huffman, and which thirty foot right-of-way lay entirely north of the northern boundary line of said lot 9".

As we see it, the determinative question is one of fact as to the actual location, on the ground, of the 30-foot roadway, that is, whether, as contended by Grubb, the north boundary of lot 9 as platted is in fact the south line of Roebuck Drive as that roadway has been established by public user for the prescriptive period of twenty years or more, or whether, as contended by Teale, a part of Roebuck Drive as established by prescription extends into and over the northern portion of lot 9 south [***9] of the south edge of the pavement. On this point the evidence is not without some conflict. However, there is substantial evidence supporting the trial court's finding, based on testimony given ore tenus, that "regardless of differences in maps or surveys there has been a well-established road some thirty (30) feet wide used by the public and [**730] maintained by the County at the location in question for more than fifty (50) years"; that "there is no evidence of any substantial change in the location of the road"; and that the attempted conveyance of "a part of this road to an individual for his own benefit * * * is detrimental to the public and complainant appears to have suffered a special injury".

It is the settled rule of review that the finding of the trial court, when testimony is taken orally before it, has the effect of a jury's verdict and will not be disturbed on appeal unless plainly and palpably wrong. Hinson v. Byrd, 259 Ala. 459, 66 So.2d 736; Dorsey v. Dorsey, 259 Ala. 220, 66 So.2d 135; Haden by Boykin, 259 Ala. 504, 66 So.2d 708; Huggins v. Turner, 258 Ala. 7, 60 So.2d 909. The question being fairly debatable and neither conclusively proved nor disproved, [***10] "this court, under our settled rule, will not substitute its own judgment for that of the trier of facts at nisi prius, who heard the witnesses testify and who is charged with the primary duty and responsibility of determining the matter." Forest Hill Corporation v. Latter & Blum, 249 Ala. 23, 29, 29 So.2d 298, 302. There being ample evidence to support the trial court's findings, we perceive no basis, in the light of the stated rule of review, to disturb them.

We find no merit in appellants' insistence that relief should be denied because the agreement has for its purpose the "settling of boundaries" and not the "vacation or attempted vacation" of a public roadway. The obvious effect of the agreement, if valid and operative, is to vacate a portion of Roebuck Drive by establishing the southern edge of the pavement as the south boundary of said road.

It is not altogether clear whether the trial court undertook, by its decree, to define the precise location of the south boundary of the roadway, that is, exactly how far south of the pavement the right-of-way extends. Mention is made in the decree of "a well-established road some thirty (30) feet wide used by the public and maintained [***11] by the county at the location in question for more than fifty (50) years" and that "there is no evidence of any substantial change in the location of the road." And, there is evidence that the roadway's boundaries have been considered by the county authorities as being 15 feet north and south of the center line of the pavement. But we do not think there is sufficient evidence to support a definite fixing, on the ground, of the south boundary of the right of way, although there is ample evidence to support a finding that some area south of the south edge of the pavement has been used for road purposes for the prescriptive period so as to establish it as a part of the public roadway. The purpose of the bill is to cancel the agreement between Grubb and the county because it is, if valid, an effectual vacation of a part of a public road. It is not an effort to precisely define the roadway's boundaries. We think the evidence clearly establishes [*262] a user by the public for roadway purposes of an unpaved area south of the south edge of the pavement so as to create a prescriptive right to continue such use. Since the agreement operates as a vacation of such area, whatever might [***12] be its exact extent, it was not essential that the south boundary line be definitely established in order to justify the granting of relief.

Although the evidence does not show that the unpaved area south of the pavement has been used principally for actual travel, as has the paved portion, it is clearly established that the adjoining unpaved area has been used for the prescriptive period, and particularly since the pavement was placed in 1928, as a shoulder for the roadway and also for drainage purposes. It seems to us that essential incidents to the establishment of any improved country roadway are the shoulders and drainage ditches on either side of the portion normally used for travel. Where it is shown that such area has been used for the prescriptive period it becomes, by virtue [**731] of such user, an integral part of the roadway as effectually as if a part of the traveled way itself. Such areas are essential to the proper care and maintenance of the part actually used for travel and are

for roadway purposes the same as the part actually used for travel. The general rule is thus stated in 25 Am.Jur., Highways, § 36, pp. 359-360:

> "As a general proposition, the [***13] width of a highway established solely by user is determined by the extent of such user, and the width of the road as used at the end of the period of prescription fixed by the statute of limitations is the established width of the highway in such cases, provided, of course, that it has been used to such extent throughout the prescriptive period. This does not mean, however, that the public easement is necessarily confined strictly to the actual beaten path or traveled track in every instance. The right acquired carries with it such width as is reasonably necessary for the public easement of travel, which is to be determined by a consideration of the facts and circumstances peculiar to each particular case. * * *."

From 39 C.J.S., Highways, § 20, pp. 938-939, is the following statement of the rule:

> "Width and extent generally. Generally speaking, the width and extent of a highway established by prescription or user are governed, measured, and limited by the extent of the actual user for road purposes. The easement is not, however, necessarily limited to the beaten path or traveled track, or to such path and the ditches on either side, but carries with it the usual width [***14] of highways in the locality, or such width as is reasonably necessary for the safety and convenience of the traveling public, and for ordinary repairs and improvements. In other words, a highway established by user or prescription includes the traveled track and whatever land is necessarily used as incidental thereto for highway purposes; but this does not mean that the prescriptive right carries with it a right in the public to lay out and construct an extended and enlarged highway."

Appellants urge on us that if the agreement is held to be a vacation or attempted vacation of a portion of the public roadway, such vacation or attempted vacation has been validated by virtue of the provisions of Code 1940, Tit. 56, § 18. That section has no application to this case. The obvious purpose of that statute (originally enacted in 1923, Act No. 15, appvd. Feb. 5, 1923, Gen.Acts 1923, p. 10) was to validate changes in location or vacations or attempted vacations which had theretofore taken place. It has no application to changes and vacations occurring, as in the instant case, after the law went into effect.

We here note that the establishment of a roadway by prescription gives to [***15] the [*263] public an easement only and that the owner is not divested of the fee. Purvis v. Busey, 260 Ala. 373, 377, 71 So.2d 18.

The decree appealed from is due to be affirmed.

Affirmed.

Reuben D. Hall et al. v. North Montgomery Materials, LLC, and Andrea Wood Katsarsky

2060946

COURT OF CIVIL APPEALS OF ALABAMA

39 So. 3d 159; 2008 Ala. Civ. App. LEXIS 370

June 13, 2008, Released

SUBSEQUENT HISTORY: Released for Publication June 18, 2010.

PRIOR HISTORY: [**1]

Appeal from Elmore Circuit Court. (CV-03-253). Sibley G. Reynolds.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: nuisance, mining, truck, local residents, quarry, mining operation, traffic, site, noise, public nuisance, injunction, public road, travel, route, highway, enjoin, county commission, mile, feet, anticipated, traveling, private nuisance, right of action, unclean-hands, pollution, heavy, special injury, obstruction, shoulder, engineer

COUNSEL: For Appellants: J. Robert Faulk, McDowell, Faulk & McDowell, L.L.C., Prattville; Randall V. Houston, district atty., Wetumpka.

For Appellees: Dennis R. Bailey, Bethany L. Bolger, Rushton, Stakely, Johnston & Garrett, P.A., Montgomery.

JUDGES: Thomas and Moore, JJ., concur. Thompson, P.J., and Pittman and Bryan, J.J., concur in the result without writings.

OPINION

[*163] PER CURIAM.

On June 12, 2003, Reuben D. Hall and 45 other residential real-property owners in Elmore County (hereinafter collectively referred to as "the local residents") sued North Montgomery Materials, LLC ("the mining company"), and Andrea Wood Katsarsky, requesting the Elmore Circuit Court to declare the mining company's proposed granite quarry a public and/or private nuisance and to enjoin the mining company from operating the quarry. On July 24, 2003, the mining company moved to dismiss the complaint. The circuit court denied that motion, after which the mining company answered the complaint and the parties engaged in discovery.

On June 2, 2005, the State of Alabama [1] filed a complaint against the mining company in a case numbered CV-05-254, requesting the circuit court to declare the proposed quarry a public nuisance and to enjoin its operation. On motion of the local residents, the circuit court consolidated the State's action with the instant case. It is apparent that the cases were consolidated [**2] for the purpose of trial only and that each case retained its separate identity. See Rule 42(a), Ala. R. Civ. P. The cases were jointly tried on December 14-15, 2006. From a judgment in favor of the mining company, the local residents appealed to the Alabama Supreme Court. This case was transferred to this court by the supreme court, pursuant to § 12-2-7(6), Ala. Code 1975.

1 The complaint was filed by Randall Houston, district attorney for the 19th Judicial Circuit of Alabama, acting as special deputy attorney general.

[*164] The evidence established that the mining company owns 80 acres and leases from Andrea Wood Katsarsky the mineral rights to an additional 140 acres of land at the intersection of county road 428, known as Providence Road, and county road 462, known as Jackson Trace Road, in Elmore County. The mining company plans to conduct a granite-mining operation on the site.

The site of the proposed mining operation is not visible from the road. It is situated "down in a hollow" at the lowest point on the mining company's property, surrounded by a 50-foot no-mining buffer. The site is located in an unzoned, rural area of north Elmore County known as the Buyck community. There are no [**3] other businesses in the area. The area is primarily residential, with 48 dwellings, a church, and a cemetery within a mile of the site. The nearest school is 16 miles away; the nearest convenience store/gasoline station is 2 or 3 miles away. Most of the local residents are retired;

many are people whose families have lived in the area for generations.

The evidence established that the mining company proposes to produce 450,000 tons of gravel per year from its mining operation and that, once production begins, the mining operation will have 100 to 120 trucks, each 8 1/2 feet wide and weighing 88,000 pounds fully loaded, being driven by independent haulers traveling into and out of the quarry site every day. The local residents testified that they believed the operation of the quarry would destroy the peace, tranquillity, and unspoiled nature of the area. They objected to the air pollution, water pollution, noise, heavy-truck traffic, and deterioration of the local roads that, they claimed, would inevitably occur when the mining operation commenced.

The mining site is located several miles from U.S. Highway 231. The site may be accessed from Highway 231 via three routes. The first route [**4] involves exiting Highway 231 onto county road 429, known as Buyck Road, driving northwest approximately five miles, then turning east onto Providence Road for about half a mile to the point where the entrance of the quarry lies. The second route travels from Highway 231 northwest onto Buyck Road, turns north onto Jackson Trace Road, and then west onto Providence Road, a total distance of about three and one-half miles. The third route travels almost due west from Highway 231 on Providence Road for about four and one-half miles. A vehicle traveling on Highway 231 north from Montgomery, the nearest large city, would encounter the Buyck Road exit first and then the Providence Road exit a few minutes later.

All three county roads are referred to as farm-to-market roads. They were not designed for heavy-vehicle use. In the 1930s and 1940s these roads were composed entirely of dirt. In the 1950s or 1960s, the county paved the roads using unknown base materials. The paved driving portions of the roads are at all points 21 feet wide or less and at some points, including the entrance to the quarry, are only 17 feet wide. Providence Road and Jackson Trace Road, which have not been substantially [**5] improved since they were first paved, have little to no shoulders. The pertinent portions of Buyck Road were resurfaced in 2004 or 2005, and the shoulders of that road were widened to meet Department of Transportation specifications for county roads. Providence Road has a posted weight limit of 25 tons; the other roads do not have any posted weight limit.

The roads are used primarily by the local residents to access their homes, but they are also traveled by residents of Coosa County heading to and from Highway 231 and are sometimes used by bicyclists. [*165] In addition, school buses and a garbage truck regularly use the roads. Occasionally, but not often, logging trucks and gas trucks travel the roads. When the county improved Buyck Road, its asphalt trucks used Jackson Trace Road, which rutted and damaged the road. Although the county patched the road afterwards, the garbage truck servicing the area has undone some of the patch work. The local residents who testified at trial all agreed that the current conditions of the roads, though poor in places, adequately meet their driving needs.

Reuben Hall testified that he had lived in the area for the first 28 and the last 18 years of his life. [**6] He explained that, in the interim, he had worked for a Mississippi chemical company and had owned a fertilizer business. He testified without objection that he was familiar with the type of trucks -- tri-axle, semi-trailer, open dump trucks -- and the common practices of the independent haulers who drive the trucks that would be used in the mining company's quarry operations because, he said, they are the same as in the fertilizer industry. Hall stated that the truckers typically haul a minimum of three loads per day. He testified, without objection, that these trucks would line up near the entrance to the quarry site each morning to pick up their first loads well before the quarry opened, blocking one lane of traffic at and near the intersection of Providence Road and Jackson Trace Road. Hall calculated that, in order for the mining company to meet its projected goal of producing 450,000 tons of granite per year, on an average 8-hour work day 60 trucks would enter and leave the quarry along the roads, a rate of about 1 every 5 minutes. [2]

2 In subsequent questioning, Hall's attorney referred to 100 to 120 trucks per day. It is evident that he was counting the 60 unloaded trucks entering [**7] the quarry and 60 loaded trucks leaving the quarry to reach that number.

Hall stated that the trucks are equipped with a compression braking system, or what are called "jake brakes," that, he said, sound like a machine gun. He predicted that the noise of the trucks would awaken everyone in the area in the predawn hours. He testified that tri-axle dump trucks are harder on paved roads than standard semi-trailer trucks because their load center is "right over the three axles."

Hall identified a number of photographs that were admitted into evidence. The photographs depict the condition of Providence Road, Jackson Trace Road, and Buyck Road. Some of the photographs show the narrow or nonexistent shoulders on those roads; some illustrate drop-offs or embankments beyond the paved surface of the roads; some depict little or no clearance between

two tri-axle dump trucks meeting each other side-by-side on various sections of the roads.

David Bufkin, the county engineer for Autauga County, testified that Providence Road and Jackson Trace Road are not wide enough to handle 2 gravel trucks, each 8 1/2 feet wide, meeting on a road that is only 18 feet wide. Bufkin testified that Providence Road would [**8] deteriorate under the expected heavy use if it were not rehabilitated. He stated that the resurfacing of Buyck Road did not strengthen the base of the road, so it was also susceptible to similar damage. Bufkin testified that the continuing use of the roads by the trucks would first cause potholes and then, he said, the roads would eventually degenerate into dirt roads. He gave his opinion that the number of trucks that would travel the county roads every day as a consequence of the mining operation greatly [*166] increased the chance of accidents and presented a danger to the motoring public.

Richie Byard, the county engineer for Elmore County, testified that Providence Road has no shoulders in many places where there are embankments or drop-offs beyond the paved edge. Byard acknowledged that substantial heavy-truck traffic would cause both Providence Road and Jackson Trace Road to deteriorate quickly. He testified, however, that it was feasible to reclaim Providence Road in order to make it suitable for 120 heavy trucks per day. He explained that when the Alabama Department of Environmental Management ("ADEM") issued the permit to the mining company, the Elmore County Commission had "tr[ied] [**9] to be proactive to address the condition of the roads" before the quarry opened for business. He said that, at the request of the county commission, he had developed a plan to upgrade Providence Road. Byard stated that the mining company had approached the county commission with an offer to provide free material for widening the shoulders of Providence Road and had indicated that, if the county could obtain any grant funds for road maintenance, it would be willing to pay the matching funds on the grant. Byard testified that Providence Road, as a farm-to-market road, was not eligible for federal grants but that the county did apply for a grant from the state's Industrial Access Road and Bridge Corporation, *see* § 23-6-1 et seq., Ala. Code 1975, which would not require matching funds.

Byard identified an application that he had submitted on behalf of the county commission to the corporation board, setting out a plan to widen Providence Road to 24 feet, to widen the shoulders to 3 feet, to reclaim and reconstruct the base of the road, and to "repave the road with a buildup that would have a better chance of standing up to [the] truck traffic." Byard testified that several of the local residents [**10] and a local senator had attended the hearing on the grant application and had objected to it. The board of directors of the corporation denied the application. No one testified as to the reason the application was denied, but Hall testified that he doubted that the denial was based on the objection of the local residents. Due to the rejection of the grant application, the county did not have the funds to reclaim Providence Road. According to Byard and Bufkin, if the application had been approved and the plan had been implemented, Providence Road would have been sufficiently rehabilitated to handle the expected truck traffic. [3]

3 Hall testified that in his opinion the plan set out in the grant application would have been inadequate to support the quarry traffic.

Patsy Cardwell testified that she drives an eight-footwide school bus on the roads every weekday, carrying special-education students. [4] During her morning route, Cardwell normally encounters no other traffic except two other school buses. Because she expects to meet these school buses, she is prepared to pass them without incident; however, Cardwell testified that if she were to encounter an oversized vehicle she would have to [**11] slow or stop and move part of her bus off the paved road. Cardwell testified that this maneuver would pose a tipping hazard because of the shoulder conditions along the roads. Jim Gwin, a local landowner, testified that he believed emergency vehicles would also encounter [*167] difficulty along the roads when meeting the quarry trucks.

4 At the time of trial, Cardwell did not stop and pick up any children on the roads at issue, but she testified that the roads remain part of her route and that in the future she may have to make stops on the roads to load and unload passengers. At the time of trial, at least one other school bus did stop and pick up two children on Providence Road.

Winifred Harris, a retired Huntingdon College English professor, testified that she grew up in the area, lived in Montgomery during her working life, and inherited from her father 72 acres on Jackson Trace Road, directly across from the mining site. She testified that she was familiar with the history of the Buyck community, a place she described as "quiet and beautiful." The area was settled in the 1830s and remained a thriving farming community until after World War II. Now, she said, the community is primarily residential, [**12] with some recreational second homes used for hunting and fishing. She testified that her property was currently valued at $ 400,000 to $ 500,000, but she estimated that, if the quarry were allowed to operate, the value of her property would drop to $ 100,000 to $ 120,000. She

gave her opinion that the quarry would degrade the lifestyle of the community by causing noise, truck traffic, water pollution to Weoka Creek, and air pollution in the form of fine silica dust. She admitted that she had taken an active role in opposing the industrial-access grant to improve Providence Road because, she said, "as a member of this community and as a taxpayer [she] felt there were many more roads that needed improving and .. [she] felt that if the grant was awarded, [she] ... would be subsidizing an industry that was going to destroy [her] way of life, [her] community."

Two witnesses testified for the mining company -- Bradford O'Dell, a co-owner of the mining company, and Larry Speaks, an engineer who had contracted with the mining company to design the layout of the mining operation and to apply for the necessary permit from ADEM. In order to obtain the permit, the mining company had been required [**13] to submit information concerning, among other things, its plan for controlling water runoff and particulate discharge. O'Dell stated that the permit had been issued in 2003 and that at the time of trial in 2006 all the necessary plant equipment -- a ramp, a hopper, a feeder, a jaw crusher, two conveyors, a shaker screen, a stacker and a crusher -- was in place and two test blasts had been conducted. With the exception of some electrical work yet to be completed, the mining company was ready to begin operations. He stated that at the time of trial he and his co-owner had invested approximately $ 900,000 in preparing for the mining operation.

O'Dell testified that the mining company early on identified the inadequate roads as a problem. The mining company therefore contacted the Elmore County Commission, the governmental entity primarily responsible for the county roads, to determine if Providence Road could be "set up" to be the "main route" for the haulers. At that time, the mining company agreed to donate material to widen the shoulders of Providence Road and to match any funds the county received from grants to improve the road.

In response to the following question on cross-examination [**14] by the district attorney: "Do you agree that the roads as they currently exist will be insufficient for transporting the slag on a daily basis," O'Dell testified: "[N]o, sir, they are not acceptable." When the district attorney asked O'Dell if he knew what it would cost to "resurface or bring those roads up to spec[ifications] so that they could safely manage the traffic that would result [from the operation of the quarry]," the following occurred:

> "MR. BAILEY [counsel for the mining company]: I object. The evidence is in the record that this county engineer prepared those documents, prepared that [*168] application, and these plaintiffs opposed it. They opposed it. For them to come into court and take the position that that is a reason to stop a project because they didn't want a road widened so it would hurt the project is disingenuous at best. And it is -- they have unclean hands to make that argument.
>
> "MR. HOUSTON: The State of Alabama never opposed anything."

Larry Speaks explained that the mining company's particulate-discharge plan called for the installation of sprinkler systems at four or five locations -- every site from which dirt and dust could escape -- in order to control dust [**15] incident to the rock-crushing operation. With respect to the plan for controlling water runoff, Speaks said that the mining company had designated five permitted discharge points, each with a sedimentation pond that allowed the sediment to settle before any water left the site. He explained that the permit required the mining company to send a sample of the water discharge to a laboratory every two weeks in order to monitor the pH and total suspended soluble count of the water. Speaks said that ADEM would receive the laboratory test results on a quarterly basis but that it had the authority to inspect the site at any time. He said, however, that the mining company could not wait three months to address a permit violation; if a test sample were in violation of the permit terms, the mining company would have to address the violation immediately.

Speaks testified that, in addition to information concerning air-quality and water-quality plans, ADEM had required the mining company to address other issues in its permit application. Specifically, Speaks said that in order to address the other issues, the mining company had contacted the following entities: the Army Corps of Engineers, which [**16] sent a representative to the site to assess issues with respect to protected wetlands; the United States Fish and Wildlife Service, which determined that the mining operation would not affect any endangered animal species; a botanist from Auburn University Montgomery, who found no endangered plant life; and the Alabama Historical Commission, which decided that the mining operation would not disturb any known historical artifacts. Finally, Speaks testified that he had developed a reclamation plan for the quarry site and submitted the plan to the Alabama Department of Industrial Relations. The mining company had posted a bond of $ 2,500 per disturbed acre at the mining site and had agreed to the re-vegetation of all areas not covered by water.

Speaks acknowledged that, immediately before the trial of this case, ADEM had cited the mining company for a permit violation. He explained that one of the sedimentation ponds had not been large enough to prevent some sediment from escaping into a tributary of Weoka Creek, and, he said, the mining company had begun to address that problem even before ADEM issued the citation. When Speaks was asked whether the citation indicated that the local residents' [**17] concerns about water pollution in this case were valid, counsel for the mining company objected and stated that the company had just received the citation, that it had seven days to respond to ADEM, and that Speaks was preparing the response. The circuit court sustained the objection on the ground that the question called for speculation on the part of the witness.

Speaks testified that ADEM regulations for the mining site would allow less sediment to wash off the site than the sediment that would typically wash off the property if it were used for farming, logging, or residential construction. He gave [*169] his opinion that a granite-mining operation could be conducted on the site without causing undue harm to the surrounding environment or the local residents if the operation were conducted in accordance with the terms of the permit.

Speaks acknowledged that neither he nor ADEM had addressed any road-structure issues in the permit-application-and-issuance process. He said the condition of Providence Road ranged from "decent" to "pretty bad." He described Jackson Trace Road as "awful" and said, "You can't get a truck down through there." The following occurred on cross-examination:

> "Q. [By [**18] counsel for the mining company]: You design roads. Are you familiar with roads of this type and quality?
>
> "A. Yes, sir.
>
> "Q. Do you have a judgment and opinion if you put 120 tri-axle trucks, some weighing empty 30,000 pounds, some weighing full 88,000 pounds, how long Providence Road would last?
>
> "A. About the same thing [the] county engineer told you yesterday, even though I would probably say it would be a little bit less that what they said.
>
> "Q. Are you familiar with Jackson Trace Road?
>
> "A. Yes, sir.
>
> "Q. Would you have the same answer there?
>
> "A. It is already torn up.
>
> "Q. .... [W]hat is your judgment and opinion as to how long those roads would last?
>
> "A. You can't tell. You can't tell truthfully. They may last a day. They may last a month. They are not going to last long."

On June 5, 2007, the circuit court entered the following judgment in case number CV-03-253, the local residents' action alleging that the mining operation was both a public and a private nuisance:

> "This cause coming on before this court upon the consolidated trial on the merits for declaratory relief and injunctive relief, on December 14 and 15, 2006, and the parties appearing through counsel of record, the court received testimony [**19] at length, ore tenus and the court additionally making a road inspection of the subject area of the quarry site as well as the area of the residences of the parties, and the two identified Elmore County roads and upon hearing the testimony, the court hereby finds as follows:
>
> "1. This court specifically does not find that the operation of the subject quarry is a public nuisance nor is the same found to be a private nuisance under § 6-5-120 et seq., Code of Alabama, 1975.
>
> "2. This court specifically denies the relief of an injunction for the operation of the subject quarry and finds that the same further does not fall within the definition of a public or private nuisance under § 6-5-120, et seq., Code of Alabama 1975." [5]

5 The record does not indicate that the circuit court entered a judgment in case number CV-05-254, the state's action alleging that the mining operation was a public nuisance. "'Where several actions are ordered to be consolidated for trial, each action retains its separate identity and thus requires the entry of a separate judgment.'

League v. McDonald, 355 So. 2d 695, 697 (Ala. 1978) (quoting Rule 42 (a), Ala. R. Civ. P., and Committee Comments on 1973 Adoption, and *Teague v. Motes,* 57 Ala. App. 609, 330 So. 2d 434 (1976))." [**20] *Alabama Classic Homes, Inc. v. Wickes Lumber Co.,* 836 So. 2d 885, 887 (Ala. Civ. App. 2002).

On July 11, 2007, the local residents appealed to the Alabama Supreme Court. [*170] The supreme court transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Standard of Review

In *Southwestern Construction Co. v. Liberto,* 385 So. 2d 633 (Ala. 1980), the Alabama Supreme Court set out the applicable standard of review of a trial court's judgment in an action to abate a nuisance:

> "A determination made by the trial court, when evidence is taken *ore tenus,* is favored with a presumption of correctness and will not be disturbed on appeal unless plainly erroneous or manifestly unjust, especially where, as was done in this case, the trial judge has made a personal inspection of the premises."

385 So. 2d at 635. *See also Baldwin v. McClendon,* 292 Ala. 43, 49, 288 So. 2d 761, 766 (1974). Our supreme court has noted in at least one nuisance case that the ore tenus rule is subject to the same exceptions that are applicable in other types of cases. *See Borland v. Sanders Lead Co.,* 369 So. 2d 523, 526 (Ala. 1979) (noting that the ore tenus standard of review does not apply when a trial court erroneously [**21] applies the law to the facts). Thus, the ore tenus standard of review, which is usually applicable in nuisance cases, is not "'applicable where the evidence is undisputed, or where the material facts are established by the undisputed evidence.'" *Barber v. Jefferson County Racing Ass'n, Inc.,* 960 So. 2d 599, 603 (Ala. 2006) (quoting *Salter v. Hamiter,* 887 So. 2d 230, 234 (Ala. 2004)).

The circuit court's June 5, 2007, judgment does not contain specific findings of fact. "'It is ... well established that in the absence of specific findings of fact, appellate courts will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous.'" *Ex parte Fann,* 810 So. 2d 631, 633 (Ala. 2001)(quoting *Ex parte Bryowsky,* 676 So. 2d 1322, 1324 (Ala. 1996)).

Discussion

The following statutory provisions guide our analysis:

> "A 'nuisance' is anything that works hurt, inconvenience or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful or such as would affect only one of a fastidious taste, but it should be such as would affect an ordinary [**22] reasonable man."

§ 6-5-120, Ala. Code 1975.

> "Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. Generally, a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name of the state. A private nuisance gives a right of action to the person injured."

§ 6-5-121, Ala. Code 1975.

> "If a public nuisance causes a special damage to an individual in which the public does not participate, such special damage gives a right of action."

§ 6-5-123, Ala. Code 1975.

> "A private nuisance may injure either the person or property, or both, and in either case a right of action accrues."

§ 6-5-124, Ala. Code 1975.

> "Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages and such consequences are not merely possible but to a reasonable degree certain, a [*171] court may interfere to arrest a nuisance before it is completed."

§ 6-5-125, Ala. Code 1975.

The burden of proof cast upon one seeking to enjoin a [**23] proposed enterprise as an anticipated nuisance is higher than the burden of proof cast upon one seeking to enjoin an existing enterprise as a nuisance. *See McCord v. Green,* 555 So. 2d 743 (Ala. 1989), overruled on other grounds by *Parker v. Ashford,* 661 So. 2d 213 (Ala. 1995). In *McCord,* the Alabama Supreme Court stated:

> "[T]he injunction of anticipated nuisances ... [is an] extraordinary power[] that must be cautiously and sparingly exercised. Because of the great degree of caution that must be utilized, this Court has been exceedingly unwilling to enjoin a proposed enterprise until it has been proven at trial to be a nuisance.
>
> "Although § 6-5-125 authorizes the injunction of anticipated nuisances, such injunctions should be denied unless the plaintiff shows to a reasonable degree of certainty that the anticipated act or structure will, in fact, constitute a nuisance.
>
>> ""'It is a general rule that an injunction will be denied in advance of the creation of an alleged nuisance, when the act complained of may or may not become a nuisance, according to the circumstances, or when the injury apprehended is doubtful, contingent or merely problematical. And so where an injunction is sought merely [**24] on the ground that a lawful erection will be put to a use that will constitute a nuisance, the court will ordinarily refuse to restrain the construction or completion of the erection, leaving the complainant free, however, to assert his rights thereafter in an appropriate manner if the contemplated use results in a nuisance.'""

555 So. 2d at 745 (quoting *Parker v. City of Mountain Brook,* 286 Ala. 241, 246, 238 So. 2d 868, 873 (1970), quoting in turn *Brammer v. Housing Auth. of Birmingham Dist.,* 239 Ala. 280, 283-84, 195 So. 256, 259 (1940)) (citations omitted).

The local residents argue that the circuit court's conclusion that the proposed quarry did not constitute a public or private nuisance was plainly erroneous. They maintain that they met their burden of proving "to a reasonable degree of certainty" that the proposed mining operation would have consequences -- noise, diminution of property values, air and water pollution, and increased traffic with attendant road deterioration and driving hazards -- that, they say, would be irreparable and could not be compensated by money damages. We will address those arguments in the order presented.

Noise

Citing *Parker v. Ashford,* 661 So. 2d 213 (Ala. 1995), [**25] and *Morgan County Concrete Co. v. Tanner,* 374 So. 2d 1344 (Ala. 1979), the local residents assert that the blasting and rock-crushing processes of the mining operation, as well the number of loud trucks traveling to and from the quarry every day, will unreasonably interfere with the peace and quietude of their community and hinder the enjoyment of their property so as to constitute a nuisance. *Parker* dealt with an injunction against an alleged anticipated nuisance, whereas *Morgan Concrete* dealt with an injunction against an alleged existing nuisance.

In *Parker,* the Alabama Supreme Court affirmed a trial court's determination that the defendant's proposed operation of a dirt-racing track in a rural area would be a nuisance because, among other things, the noise levels of the unmuffled cars on the track would be excessive and would pose a [*172] health hazard for residents adjacent to the track. The *Parker* plaintiffs presented the expert testimony of an audiologist who had analyzed the noise at an existing dirt-racing track nearby and had concluded that the elevated decibel levels there could cause hearing loss as well as changes in blood pressure and heart rate. The court held that the plaintiffs [**26] had "demonstrated that it is not reasonably possible for the proposed racetrack to be constructed and operated in a manner that would not create a nuisance." 661 So. 2d at 218 (emphasis added).

In *Morgan Concrete,* 98 residential homeowners sought to have an ordinance rezoning an area from "light industrial" to "general industrial" declared void and to enjoin the operation of a ready-mix concrete plant on the rezoned property. By the time of trial, the

plant had been operating for several months, and the plaintiffs produced the following evidence:

> "[W]itnesses ... testified that the plant produced loud and bothersome noises sounding like 'jackhammers' and 'large rocks beating against tin.' They stated these noises would commence early in the morning and were loud enough to be heard indoors. Some witnesses also testified that they were bothered by noises from frontend loaders and cement trucks entering the plant for their loads which often entailed banging the tailgates to dislodge sand residues."

374 So. 2d at 1345. The supreme court affirmed the trial court's judgment declaring the ordinance void and determining that the plant was a nuisance on the basis of, among other things, noise.

Although [**27] our supreme court determined, in both *Parker* and *Morgan Concrete,* that the parties seeking an injunction had satisfied their burdens of proof, it is significant that the plaintiffs' burden in *Parker* was higher than the plaintiffs' burden in *Morgan Concrete.* The local residents in this case had the same burden as the plaintiffs in *Parker,* who were seeking to enjoin an anticipated nuisance. Unlike the plaintiffs in *Parker,* however, the local residents in the present case presented no evidence indicating exactly what injuries they were reasonably certain to suffer as a consequence of the noise that, they anticipated, would occur from the blasting or rock-crushing operations at the mining site. *Compare Parker,* supra (holding that elevated decibel levels at dirt racetrack could cause hearing loss as well as changes in blood pressure and heart rate) *with Connecticut Bank & Trust Co. v. Mularcik,* 22 Conn. Supp. 415, 419, 174 A.2d 128, 131 (Super. Ct. 1961) (noting, in a suit to enjoin the owners of a sand and gravel bank from operating a rock crusher and a stone screener, that "[p]laintiffs merely allege that they will be 'necessarily' subjected to unreasonable noise, without alleging, let [**28] alone proving, any facts to indicate that they would be disturbed"). Accordingly, we cannot hold that the circuit court's implicit factual finding that the mining operation was not a nuisance by reason of the noise incident to blasting or rock-crushing operations was plainly erroneous.

The local residents did, however, present evidence with respect to the noise that, they anticipated, would be caused by the trucks traveling to and from the quarry every day. The local residents' proof indicated that the trucks, which were equipped with "jake brakes" that sounded "like a machine gun," were likely to awaken the nearby residents in the early morning hours as they lined up outside the quarry site to take on their first loads of the day. *See Benton v. Kernan,* 127 N.J. Eq. 434, 469, 13 A.2d 825, 843 (N.J. Super. Ct. Ch. Div. 1940) (noting that at the defendant's stone quarry the "parade of trucks begin[s] at or before 7 A.M. ... [*173] [and] that from about 7 A.M. to 4:30 P.M. approximately 200 trucks went in and out of the quarry. Most of them were heavy-duty trucks"), modified in part and affirmed, 130 N.J. Eq. 193, 21 A.2d 755 (N.J. 1941). In addition, the local residents presented evidence indicating [**29] that the sheer volume of heavy-truck traffic on the roads -- one truck every five minutes -- would be disruptive to the calm and quietude of the area.

"Whether or not noise in itself, constitutes a nuisance is a question of fact dependent on the nature and character of the noise, its constancy or frequency, and the extent of the inconvenience caused by it." *Connecticut Bank & Trust Co. v. Mularcik,* 22 Conn. Supp. at 419, 174 A.2d at 131; *Krueger v. Mitchell,* 106 Wis. 2d 450, 317 N.W.2d 155 (Ct. App. 1982), affirmed, 112 Wis. 2d 88, 332 N.W.2d 733 (1983). *See generally J.H. Crabb, Annotation, Quarries, Gravel Pits, and the Like as Nuisances,* 47 A.L.R.2d 490 (1956).

> "'What may be a nuisance in one locality may not in another. Noises may be a nuisance in the country which would not be in a populous city. A person who resides in the center of a large city must not expect to be surrounded by the stillness which prevails in a rural district. He must necessarily bear some of the noise and occasionally feel slight vibrations produced by the movement and labor of its people and by the hum of its mechanical industries.'"

Morgan Concrete, 374 So. 2d at 1346 (quoting *Alabama Power Co. v. Stringfellow,* 228 Ala. 422, 425, 153 So. 629, 632 (1934)).

Although [**30] the local residents presented evidence supporting their noisy-truck nuisance theory, the circuit court determined this factual question in favor of the mining company. Because the circuit court made a visual inspection "of the area of the residence of the parties" in relation to the roads, it could have concluded that the local residents' homes were set back far enough from the roads that the noise level of vehicles on the roads would not constitute a nuisance. Based on our standard of review, *see Southwestern Construction Co. v. Liberto,* 385 So. 2d at 635, we cannot hold that the

circuit court's implicit factual finding on this issue was plainly erroneous or manifestly unjust.

Diminution of Property Values

Both Reuben Hall and Winifred Harris testified that, in their estimation, the value of their real property would diminish if the mining operation were allowed to proceed. However, "[i]t is settled ... that the mere fact of diminution in value of complainants' property ..., without more, is unavailing as a ground [to enjoin a private nuisance]." *Nevins v. McGavock,* 214 Ala. 93, 94, 106 So. 597, 598 (1925). Moreover, an injunction will not issue against a nuisance when the injury that may [**31] result from the nuisance is not irreparable and may be compensated by money damages. *See Rosser v. Randolph,* 7 Port. 238 (Ala. 1838).

Air Pollution and Water Pollution

The mining company's engineering expert testified in some detail about the steps taken by the company to comply with state and federal air-quality and water-quality regulations in order to receive a permit from ADEM. The expert also testified that ADEM has the authority to inspect the site at any time and that the mining company would be required to address any permit violation immediately. Accordingly, in view of the highly regulated nature of the mining industry, the circuit court was authorized to find that the local residents' fears concerning air and water pollution were "doubtful, contingent or merely problematical," *see McCord v.* [*174] *Green,* 555 So. 2d at 745, and to conclude that they had not proved the injuries they alleged with a reasonable degree of certainty, *see* § 6-5-125. *Cf. Johnson v. Bryant,* 350 So. 2d 433, 435 (Ala. 1977) (in an opinion reversing an order enjoining a beachfront property owner from extending her pier and adding a boathouse on the ground that the construction would create a nuisance, the supreme [**32] court noted that the property owner had obtained a permit from the Corps of Engineers to construct the addition); *Shell Oil Co. v. Edwards,* 263 Ala. 4, 8, 81 So. 2d 535, 538 (1955)(reversing a judgment enjoining the construction of a filling station in a residential subdivision and noting that the construction had been "approved by the chief building inspector, chief of the fire department, the city engineer and the traffic officer of the police department").

Suitability and Safety of the Roads

The local residents argue that the circuit court ignored the danger that would be caused to them and the driving public generally by the increased heavy-truck traffic on Providence Road, Jackson Trace Road, and Buyck Road. Increased traffic alone cannot be regarded as a substantial invasion of a property owner's rights to the enjoyment of his property, *see Fugazzoto v. Brookwood One,* 295 Ala. 169, 325 So. 2d 161 (1976) (holding that property owners' allegation that proposed construction of private access road would increase traffic on public road abutting their property was an insufficient basis for granting an injunction to abate the alleged nuisance).

The local residents contend, however, that [**33] they established that the quarry would cause more than just a mere increase in the amount of traffic. Instead, they say, the evidence indicated that there would be a fundamental alteration in the quantity and quality of the traffic on the three roads -- that once the quarry opened for business, Providence Road, Jackson Trace Road, and Buyck Road would change from little-used byways in a rural residential area to the routes of necessity for 120 overweight trucks per day -- one every 5 minutes -- with each truck weighing 15 tons unloaded and 44 tons loaded. The local residents point out that the evidence, which was unrefuted by the mining company's two witnesses, indicated (1) that the roads are unable to handle such traffic safely; (2) that the road surfaces will certainly and quickly deteriorate; and (3) that the motoring public will be endangered.

In opposition to the local residents' arguments regarding the allegedly unsafe condition and inevitable deterioration of the county roads, the mining company made four arguments at trial: (1) that it had no control over the trucks because they would be operated by independent haulers; (2) that maintaining the roads in a reasonably safe condition [**34] is the duty of the county; (3) that, notwithstanding its first two arguments, it had, nevertheless, offered not only to provide free materials for upgrading Providence Road but also to pay a portion of the cost of the upgrades; and (4) that the local residents, who had opposed an industrial-access grant to upgrade Providence Road, were barred by the unclean-hands doctrine from arguing that the condition of the roads was a basis for finding the mining operation a nuisance.

In its appellate brief, the mining company relies primarily on its second argument -- that maintaining the roads in a reasonably safe condition is the duty of the county -- pointing out that the evidence indicated that it was feasible to reclaim and rebuild Providence Road so that it would be able to withstand heavy-truck traffic. It is true that "[a] county has the duty to [*175] keep its roads in a reasonably safe condition for travel and to remedy defects in the roadway on receipt of notice of those defects." *Macon County Comm'n v. Sanders,* 555 So. 2d 1054, 1057 (Ala. 1990). *See* § 23-1-80, Ala. Code 1975, which provides, in pertinent part:

> "The county commissions of the several counties of this state have general superintendence [**35] of the public roads ... within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end, they have legislative and executive powers, except as limited in this chapter. They may establish, promulgate, and enforce rules and regulations, make and enter into such contracts as my be necessary or as may be deemed necessary or advisable by such commissions to build, construct, make, improve and maintain a good system of public roads ... in their respective counties, and regulate the use thereof ...."

The evidence was undisputed that the operation of the quarry will necessarily require the continuous use of heavy trucks on Providence Road, Jackson Trace Road, and/or Buyck Road that will certainly endanger the motoring public and damage the roads. The mining company presented no evidence to contradict Hall's description of the dimensions and weight of the vehicles that will be used to haul the quarry's product from the site or the frequency with which they will use the roads leading to and from the site. The mining company actually agreed with the evidence presented by the local residents that the trucks will impede traffic and cause severe [**36] damage to, and deterioration of, the roads in question.

Section 32-9-20, Ala. Code 1975, governs the width, length, height, and weight of vehicles traveling Alabama highways. Subsection (1) of § 32-9-20(1), about which one of the witnesses was questioned at trial, expressly states:

> "[V]ehicles and combinations of vehicles, operating on highways with traffic lanes less than 12 feet in width, shall not exceed a total outside width, including any load thereon, of 96 inches, exclusive of mirrors or other safety devices approved by the State Transportation Department."

Obviously, this section was enacted to protect against injuries on the public roads. *See Heathcock v. State,* 415 So. 2d 1198 (Ala. Crim. App. 1982). The legislature evidently recognized, as a matter of law, that vehicles wider than 8 feet traveling on roads with traffic lanes less than 12 feet wide present an unreasonable hazard.

Similarly, subsection (4) of § 32-9-20 establishes maximum weight formulas for various spacings of axle groupings, and subsection (4)(h). specifically authorizes county commissions to post stricter weight limits on county roadways as one of their powers under § 23-1-80. *See* Ala. Atty. Gen. Op. No. 2004-021, 2003 Ala. AG LEXIS 226. [**37] The Elmore County Commission posted a weight limit of 25 tons on Providence Road, a road that will have to be used regardless of the route chosen to reach the quarry. The purpose in establishing weight limitations is to ensure the safety of the public and to keep the roads in good condition for the traveling public. *See State Dep't of Pub. Safety v. Scotch Lumber Co.,* 293 Ala. 330, 302 So. 2d 844 (1974). As the following cases illustrate, a business whose operation requires the use of heavy vehicles that damage the roadways and render them unsafe is a nuisance.

In *McCarter v. Ludlum Steel & Spring Co.,* 71 N.J. Eq. 330, 346, 63 A. 761, 767 (N.J. Sup. Ct. Ch. Div. 1906), the court concluded that a locomotive used by a steel company to haul coal to and from its business could not be accommodated by a road [*176] that was not intended for heavy travel so it enjoined the business from using that road without the municipality's consent on the ground that the use was a nuisance. In *Hancock v. Terry Elkhorn Mining Co.,* 503 S.W.2d 710 (Ky. 1973), the court concluded that a coal-mining company's overloading its trucks before placing them on public roads, thereby causing damage to the roads, which had [**38] not been designed for such heavy use, constituted a nuisance.

In *Duff v. Morgantown Energy Associates,* 187 W.Va. 712, 421 S.E.2d 253 (1992), the court overturned a judgment enjoining a cogeneration power facility from instituting its plan to operate heavy trucks 67 times a day to haul coal, gob, limestone, and ash into and out of its plant along the public roads of Morgantown, West Virginia. The court held that the plaintiffs in that case did not carry their heavy burden of proving an anticipated nuisance as defined by West Virginia law. 187 W.Va. at 721, 421 S.E.2d at 262. Based on its review of competing expert testimony, the court concluded that the *Duff* plaintiffs did not prove that the use of the trucks would necessarily cause damage so that "'the fact that it will be a nuisance if so used [is] made clearly to appear, beyond all ground of fair questioning.'" 187 W.Va. at 717, 421 S.E. 2d at 258 (citing *Chambers v. Cramer,* 49 W.Va. 395, 38 S.E. 691 (1901)); nor did the *Duff* plaintiffs prove that the danger from the trucks posed "impending and imminent" danger of "serious" harm. *Id.*

Unlike the plaintiffs in *Duff,* the local residents in this case proved without contradiction that the [**39]

intended heavy-truck use violated applicable weight and width limitations; that the use of the trucks would necessarily damage the roads; that this damage would be severe and fairly immediate; and that the damage would unduly increase the risk of accidents and injuries to the motoring public. These undisputed facts establish all the elements of an anticipatory nuisance under Alabama law. *See Parker v. Ashford,* supra.

Alabama law defines a "nuisance" as "anything that works hurt, inconvenience or damage to another." § 6-5-120. Although no Alabama case has so held, it seems obvious that if, in its usual operation, a business routinely places oversized vehicles on a narrow road that impedes passing traffic and unduly increases the risk of accidents in violation of § 32-9-20(1), the business should be considered a nuisance.

In *Commonwealth v. Allen,* 148 Pa. 358, 23 A. 1115 (1892), a stone quarry operated along a narrow public road three miles from a railroad station. The quarry began using a steam engine to carry its product from the mine to the station along the road. That engine, along with its load, made a train 50 to 55 feet long weighing 13 to 14 tons. The engine took an hour to an [**40] hour and a half to make the trip. During that time, it hindered and obstructed travel on the road such that other travelers had to leave the road to allow the train to pass or had to use a different route miles away. In finding that this abuse of the public highways amounted to a nuisance, the court said: "At common law, any obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public is a nuisance." 148 Pa. at 363, 23 A. at 1116. Although the court recognized that the quarry had a right to reasonable use of the public highways, the court observed, "[i]t is quite another matter to occupy a particular road continuously, for such purpose, to the inconvenience of the public, and peril to persons using such road." 148 Pa. at 364, 23 A. at 1116. As *Allen* illustrates, the continuous use of a public road in such a manner as to deprive the traveling public of their full [*177] and intended use of the road amounts to a nuisance. *Cf. People v. Linde,* 341 Ill. 269, 275, 173 N.E. 361, 363 (1930) (taking judicial notice of the fact that "the use of public roads ... by vehicles of excessive weight is calculated to result, not only in injury to [the roads], but also in danger [**41] to all who travel such thoroughfares"); *Hancock v. Terry Elkhorn Mining Co.,* 503 S.W.2d at 719 (affirming the issuance of an injunction requiring a mining company to maintain highways that had been destroyed by overweight coal trucks that "constituted an extremely serious hazard to the traveling public in its attempt to use the damaged roads"); *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment,* 125 Wis. 2d 387, 398, 373 N.W. 2d 450, 455 (1985)(in refusing to substitute its judgment for that of a county board of zoning adjustment, the court noted that the board had "heard extensive testimony on the truck and equipment traffic that would be generated by a [poultry] operation -- as many as fifty-nine trips per day would be made by tractors, trucks and manure spreaders over narrow, hilly, curving, shoulderless roads -- and concluded that such traffic could create a health and safety hazard in the area").

In determining whether to enjoin an anticipatory nuisance, a court may not """ignore the ... *inevitable consequences to follow upon the conduct of the business* which [the] defendant proposes to carry on, however well conducted.""" *Parker v. Ashford,* 661 So. 2d at 218 [**42] (quoting *Jackson v. Downey,* 252 Ala. 649, 652, 42 So. 2d 246, 248 (1949), quoting in turn *Bloch v. McCown,* 219 Ala. 656, 658, 123 So. 213, 215 (1929)) (emphasis added). If, as the evidence in this case established, the roads will be defective and dangerous once the mining company begins operations, then the mining company's business is a nuisance -- irrespective of the fact that the mining company has no responsibility for the trucks that will be owned and operated by independent contractors and irrespective of the fact that maintaining the roads is the county commission's responsibility -- because the heavy-truck traffic is an inevitable consequence of the mining company's business. Given the undisputed evidence that Providence Road, Jackson Trace Road, and Buyck Road will be unsafe for the motoring public when the trucks that are a necessary incident of the mining operation begin to travel those roads, it is clear that the local residents proved to a reasonable degree of certainty that the mining operation is a public nuisance.

The determination that the mining operation is a *public* nuisance, however, does not end the inquiry in this case. Two additional questions are presented as [**43] a consequence of the fact that the circuit court entered no judgment in case number CV-05-254 -- the state's public-nuisance action -- and that the state is not a party to this appeal. First, it must be determined whether the local residents established that they had a right of action, pursuant to § 6-5-123, to abate a public nuisance and, second, if so, it must be determined whether their opposition to the grant application intended to improve Providence Road implicated the unclean-hands doctrine and thereby estopped the local residents from claiming that the condition of the roads was a basis for determining the mining operation to be a nuisance.

Section 6-5-123

Section 6-5-121 states the general rule that "a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name

of the state." Section 6-5-123 states the exception to that general rule: "If a public [*178] nuisance causes a special damage to an individual in which the public does not participate, such special damage gives a right of action." In *Strickland v. Lambert,* 268 Ala. 580, 582, 109 So. 2d 664, 665 (1959), our supreme court explained that "'[a]n individual complaining of a [**44] public nuisance must show some special injury to himself different from the common injury to the public.'" (Quoting *Scruggs v. Beason,* 246 Ala. 405, 407, 20 So. 2d 774, 775 (1945).) The injury must be different in kind, as well as degree, from the injury suffered by the public at large. *See, e.g., Horton v. Southern Ry. Co.,* 173 Ala. 231, 248, 55 So. 531, 535 (1911). However, "[t]he law does not require that before a party can abate a nuisance he must show an injury which is unique to him." *Strickland v. Lambert,* 268 Ala. at 584, 109 So. 2d at 667.

Of all the Alabama "special injury" cases, *Barnes v. Kent,* 292 Ala. 508, 296 So. 2d 881 (1974), *Scruggs v. Beason,* 246 Ala. 405, 20 So. 2d 774 (1945), and *Sloss-Sheffield Steel & Iron Co. v. Johnson,* 147 Ala. 384, 41 So. 907 (1906), are the most nearly analogous to the facts of the instant case because those decisions address the question whether individual plaintiffs established "special injury" as a consequence of the public nuisance created by a defendant's obstruction of a public road. Although the present case does not deal with the obstruction of a public road, the effect on the traveling public is the same when a business continuously [**45] operates oversized vehicles on the road as when a business erects a permanent obstruction on the road. In both cases, travelers using the road can expect to encounter an impediment to travel and the associated inconvenience and interference with their lawful use of the road. The fact that the impediment is moving only makes it more of a nuisance because the traveler cannot predict at what point on the road he will encounter the impediment.

In *Barnes v. Kent,* the court held that, although Barnes's obstruction of a public road interfered with the rights of all members of the public who wished to travel on that road, it specially interfered with Kent's rights because, to reach his property from the south, Kent had to travel two or three extra miles to avoid the obstruction. The court determined that Kent's special injury was not mitigated by the fact that he had unobstructed access to his property from the north.

In *Scruggs v. Beason,* the court held that the defendant's obstruction of a public road caused the individual plaintiffs a special injury different from the common injury to the public because the road was the only entrance to a cemetery where the plaintiffs' family members were [**46] buried. The court stated:

> "A cemetery is a place not only for the burial of the dead, but for an expression of love and respect by the living for the dead. Hence there must be accorded to complainants not only the right of burial but also the right to visit, maintain and beautify the graves of relatives interred therein, without obstruction in the public road."

Scruggs, 246 Ala. at 408, 20 So. 2d at 775. In *Sloss-Sheffield,* the court held that the owner of property abutting a public road who was compelled to take a circuitous route to his property because of the dumping of slag in the road had established special damage from a public nuisance.

Reading *Barnes v. Kent, Scruggs v. Beason,* and *Sloss-Sheffield* together, we discern the following principles: An individual who cannot reach his home (or any other destination, such as a family cemetery, that holds a significance that society is prepared to recognize as compelling) [*179] without having to take a circuitous alternate route in order to avoid a public nuisance has established special injury different in kind as well as degree from the injury suffered by the public at large. A fortiori, an individual who cannot avoid a public nuisance by [**47] taking an alternate route to his home -- because there *is* no alternate route -- has established a special injury.

Applying those principles to the facts of the present case leads to the following conclusion: The local residents, who cannot travel to or from their homes without encountering the inherent danger of driving on Providence Road, Jackson Trace Road, and Buyck Road because those roads provide the only means of ingress and egress to their homes, established special injury different in kind as well as degree from the injury suffered by the public at large. Accordingly, they had a right of action, pursuant to § 6-5-123, to abate a public nuisance.

Unclean Hands

Nuisance is a legal -- not an equitable -- action. *See generally Wootten v. Ivey,* 877 So. 2d 585 (Ala. 2003) (explaining the propriety of submitting a nuisance claim to a jury and, depending on the jury's verdict, reserving to the trial court the decision on equitable relief). Injunction is an equitable remedy, *see Nunley v. State,* 628 So. 2d 619 (Ala. 1993), that is subject to equitable defenses such as the unclean-hands doctrine. *See Ex parte HealthSouth Corp.,* 978 So. 2d 745 (Ala. 2007). The unclean-hands doctrine is not [**48] a "defense" to a nuisance action; that is, it is not a basis for concluding

that the mining operation is not a nuisance. Instead, the unclean-hands doctrine would have come into play only if the circuit court had declared the mining operation to be a nuisance and the court had then been required to decide the propriety of imposing an equitable remedy -- issuing an injunction -- to abate the nuisance. Because the circuit court decided that the mining operation was *not* a nuisance, it simply had no reason to consider the unclean-hands doctrine -- or any other equitable principle such as the "comparative injury rule" or a "balancing of the equities." *See Southwestern Construction Co. v. Liberto,* 385 So. 2d at 636, in which our supreme court stated:

> "Defendants contend the trial court erred in failing to apply the comparative injury rule to find there was not a nuisance. As is well known, the comparative injury rule employs a balancing test to weigh the injury that may accrue to one or to the other of the parties, and to the public, by granting or refusing the injunction. *Pritchett v. Wade,* 261 Ala. 156, 73 So. 2d 533 (1954). Defendants contend the service they are providing to the public [**49] at large ... and the detriment to them from enjoining their activity outweigh any detriment to plaintiffs.
>
> "However, plaintiffs correctly rebut this argument by pointing out that *the comparative injury rule does not arise until after there has been a finding that a nuisance exists.* Once the trier of fact determines that a nuisance does indeed exist, a balancing test must be employed to determine whether injunction is a proper remedy. *The comparative injury rule is not employed, as defendants suggest, to determine whether a nuisance does, in fact, exist.*"

(Emphasis on "not" original; other emphasis added.)

The unclean-hands doctrine does not bar injunctive relief in this case. The doctrine contemplates that the party against whom it is asserted has been guilty of "morally reprehensible, willful misconduct," *Retail Developers of Alabama, LLC* [*180] *v. East Gadsden Golf Club,* 985 So. 2d 924, 932, 2007 Ala. LEXIS 249, *17 (Ala. 2007), or fraudulent purpose, *see Le Furgey v. Beck,* 244 Ala. 281, 284, 13 So. 2d 179, 182 (1943). The local residents who opposed the county's application for a road-improvement grant were acting within their constitutional rights as citizens to petition their local [**50] government about a matter of interest to them, *see* U.S. Const. Amend I; Ala. Const. 1901, Art. I, § 26; their conduct cannot be considered wrongful, morally reprehensible, or fraudulent. "[T]he doctrine of unclean hands requires something more egregious than mere litigation strategy" or "procedural maneuvering." *Medtronic, Inc. v. Advanced Bionics Corp.,* 630 N.W.2d 438, 450 (Minn. Ct. App. 2001).

Moreover, the local residents' actions before the county commission were only indirectly connected with the nuisance suit they later filed. Our supreme court has stated that "'[t]he misconduct which falls within the clean hands maxim must relate directly to the transaction concerning which complaint is made or the subject matter in litigation.'" *Powell v. Mobile Cab & Baggage Co.,* 263 Ala. 476, 480, 83 So. 2d 191, 194 (1955)(quoting 30 C.J.S. *Equity* § 98 at 491-92) (holding that a taxicab company was not guilty of unclean hands by its failure to have obtained a business license in the city where, it alleged, a rival taxicab company had subjected it to unfair business competition). In *Powell,* the court explained:

> "'The misconduct which falls within [the unclean-hands] maxim must have infected [**51] the cause of action, so that to entertain it would be violative of conscience. It is not sufficient that the wrongdoing is remotely or indirectly connected with the matter in controversy.'"

Id.

Finally, not all the local residents opposed the road-improvement grant, and the acts of some of them are not chargeable against the others. *See Deitrick v. Leadbetter,* 175 Va. 170, 174, 8 S.E.2d 276, 277 (1940) (holding that, in an action to enforce a "residential-use" restrictive covenant in a deed and to enjoin the defendant from using her residence as a tourist home, the fact that one plaintiff had unclean hands because she had also used her residence as a tourist home could not be charged against the other plaintiffs who had not violated the residential-use restriction).

Conclusion

The evidence at trial conclusively established that Providence Road, Jackson Trace Road, and Buyck Road will be unsafe for the motoring public when the heavy trucks that are a necessary incident of the mining operation begin to travel those roads. Accordingly, the mining operation is a public nuisance by reason of the fact that one inevitable consequence of its operation will be de-

fective and dangerous roads. The [**52] circuit court's determination otherwise is plainly erroneous and manifestly unjust. The local residents established that they had a right of action, pursuant to § 6-5-123, to abate the public nuisance because they proved a special injury to themselves different from the common injury to the public. Finally, the local residents who had earlier opposed the road-improvement grant before the county commission were not precluded by the unclean-hands doctrine from seeking to enjoin the mining operation on the ground that it would cause the roads to be defective and dangerous.

On remand, the circuit court has the inherent discretion to "balance the equities" in deciding how to abate the anticipated nuisance established by the local residents. *See Patterson v. Robinson,* 620 So. 2d 609, 612 (Ala. 1993) (stating that the [*181] comparative-injury doctrine "serves to channel [a court's] inherent discretion [in fashioning an equitable remedy] by requiring the court, if feasible under the circumstances, to place restrictions on a business rather that to completely enjoin its operation").

The judgment of the Elmore Circuit Court is reversed, and the cause is remanded for further proceedings consistent with [**53] the principles outlined in this opinion.

REVERSED AND REMANDED.

Thomas and Moore, JJ., concur.

Thompson, P.J., and Pittman and Bryan, JJ., concur in the result, without writings.

J. Graydon HALL v. C. R. POLK and Sybil Polk

No. 77-91

Supreme Court of Alabama

363 So. 2d 300; 1978 Ala. LEXIS 2201

September 29, 1978

DISPOSITION: [**1] AFFIRMED.

CORE TERMS: special injury, river, public road, roadway, obstruction, strip, obstructed, abut, plat, deed, circuitous route, proximity, dedicate, creek, public use, abutting, hearsay, street, general public, inconvenience, reservation, dedication, injunction, convenient, reserved, conveyed, disputed, common law dedication, public nuisance, property owner

COUNSEL: Charles C. Partin, III, Bay Minette, for Appellant.

Robert A. Wills of Owen, Ball & Wills, Bay Minette, for Appellees.

JUDGES: Torbert, Chief Justice. Wrote The Opinion. Bloodworth, Maddox, Jones, Almon and Shores, JJ., concur. Beatty, J., with whom Faulkner, J., joins, dissents. Embry, J., not sitting.

OPINION BY: TORBERT

OPINION

[*301] This is an appeal by Graydon Hall, defendant below, from a decree of the Baldwin County Circuit Court declaring certain land to be a public road and enjoining Hall from obstructing the same.

The land at issue is a thirty-foot strip of property located in Baldwin County, Alabama, which lies between Lot 10 of the Steele Subdivision and Lot 1 of the Piney Woods Subdivision. Both subdivisions lie in a part of what is known as Lot 1 of the Marone Cook Division of the Lamey Grant.

On June 14, 1926, Thomas A. Steele conveyed the southern portion of Lot 1 of the Marone Cook Division to H. J. Champion. In this conveyance Steele reserved title to the thirty-foot strip in controversy for a "public road." In 1932 Steele filed for record the plat of the Steele Subdivision. This plat shows the disputed roadway running from the west side of [**2] Lot 10 to the Bon Secour River.

Champion conveyed title to the acreage south of the Steele Subdivision to Claude Peteet. In 1949, Peteet conveyed this land and Lots 8, 9, and 10 of the Steele Subdivision to C.P. Taylor and John G. Evans, who later subdivided this property into Piney Woods Subdivision. The deed reflects the reservation of the thirty-foot strip for public road purposes as does the plat for Piney Woods Subdivision filed in 1953. Taylor and Evans attempted unsuccessfully to vacate the road in 1950. In 1967, they sold the property to Hubert Pair and gave him a quitclaim deed to the thirty-foot strip, because they were not sure whether they owned the road or not. Appellant Hall then purchased Lot 1 of Piney Woods and the thirty-foot strip from Pair in 1976. Hall maintains a barricade across the western end of the roadway which obstructs public access.

Appellees C. R. and Sybil Polk own land abutting Camellia Del Road west of the intersection of Camellia Del and the disputed roadway. They sought to enjoin Hall from obstructing their access to the Bon Secour River by way of this road. Appellees claim a special interest in the availability of access across the disputed [**3] strip due to the proximity of their property to the river. Without the road in question, the Polks will have to take a more circuitous route to reach the Bon Secour River.

After a careful consideration of the record, we affirm the decision of the court below.

Hall contends that the thirty-foot strip of property was not sufficiently dedicated as a public road. In Alabama, dedication of a public way may be accomplished by a statutory proceeding or common law dedication. *Witherall v. Strane*, 265 Ala. 218, 90 So.2d 251 (1956). A common law dedication consists of acts indicative of the intent of the owner to dedicate property to a public use and acceptance by the public. *Trustees of Howard College v. McNabb*, 288 Ala. 564, 263 So.2d 664 (1972); *Moragne v. City of Gadsden*, 170 Ala. 124, 54 So. 518 (1911); *Smith v. City of Dothan*, 211 Ala. 338, 100 So. 501 (1924); *Manning v. House*, 211 Ala. 570, 100 So. 772 (1924); *Still v. Lovelady*, 218 Ala. 19, 117 So. 481 (1928). The owner must unequivocally intend to

create a public right exclusive of his own. *O'Rorke v. City of Homewood*, 286 Ala. 99, 237 So.2d 487 (1970). Further, intent to dedicate may be shown by [**4] a deed to an individual where the owner declares part of his land reserved to a public use. *Davidson v. City of Birmingham*, 212 Ala. 123, 101 So. 878 (1924).

The evidence below is sufficient to justify a finding of intent to dedicate on the part of the owner of land. Not only did Thomas A. Steele reserve the roadway for public use in his 1926 deed, but he included it on the plat of Steele Subdivision in 1932, although the surveyor's certificate did not refer to it as such. The plat clearly shows the road which runs west from the river for the length of the waterfront lots.

In addition to a finding of intent to dedicate, public acceptance by use must be shown. *McNabb, supra, Moragne, supra.* There was testimony by Dwight Steele to the effect that the public had used the road [*302] to get to the river since 1906, and due to this, his father Thomas Steele reserved it for the public in a 1926 conveyance. Harry Weeks, a neighboring property owner testified that he had been familiar with the property since 1945 and that he was aware that the road was used by the public. Jasper Heaton and C. R. Polk stated that they had both used the road since the early 1950's. The [**5] evidence shows that the public has used the thirty-foot strip as access to the Bon Secour River for well over fifty years. The evidence as to the reservation of the road for public use by deed and the actual use by the public, supports a finding of effective dedication.

An individual may bring an action to prevent the obstruction of a public road where he has suffered damages different in kind and degree from those suffered by the public in general. *Holz v. Lyles*, 287 Ala. 280, 251 So.2d 583 (1971); *Ayers v. Stidham*, 260 Ala. 390, 71 So.2d 95 (1954); *Sandlin v. Blanchard*, 250 Ala. 170, 33 So.2d 472 (1947). Hall claims that the Polks failed to prove special injury as a result of the obstruction of the thirty-foot strip that would entitle them to an injunction. The law clearly states that if an obstruction forces the owner of land abutting on the obstructed road into a circuitous route to the outside world or denies convenient access to a waterway, he has suffered special injury. *Holz, supra; McPhillips v. Brodbeck*, 289 Ala. 148, 266 So.2d 592 (1972); *Purvis v. Busey*, 260 Ala. 373, 71 So.2d 18 (1954). Hall maintains that since the Polks' property does not abut [**6] the obstructed roadway, they have not suffered special injury, citing *Ayers v. Stidham, supra.* Ayers is distinguishable from our case on its facts. There plaintiff's land did not abut on the obstructed road and was some distance from it. He was prevented from using a road as a means of getting to a cemetery where members of his family were buried. The evidence showed that the road was no longer used for access to the cemetery and further, that three other roads provided access. The court held that under the facts, the plaintiff failed to prove special injury.

There is evidence in the record that the Polks own and live on land that abuts some 1500 feet on the west side of a county road, known as Camellia Del Road, opposite the intersection of the west end of the roadway in dispute. The location of this land is shown by the following testimony:

> Q. Okay. And approximately where on the Camellia Del Road in relationship to this strip do you live?
>
> A. Well, this road here-this public access road runs east & west. When you come off of the river up through here on this access and cross the county road you enter my drive and continue on west about 300 feet exactly adjacent.

[**7]

The Bon Secour River lies directly east of the Polks' land, and there is evidence that the obstructed roadway is the only direct, convenient access from their property to the river. Without it they will be forced to use the nearest access which is four or five miles away. This access offers them a valuable right as landowners in close proximity to the river.

In *Holz v. Lyles, supra*, this court found special injury by obstruction of an access to a waterway which entitled a property owner to an injunction. There, appellee owned two lots, one fronting on Magnolia Street in Baldwin County and one directly behind the front lot. Magnolia Street provided direct access for the two lots to Palmetto Creek although only one of the lots abutted the street. The court enjoined obstruction of Magnolia Street saying:

> We do not think appellee or his occupants should be required to take a more circuitous route to reach the creek because of the arbitrary and unlawful acts of appellants. This inconvenience, we think, is peculiar and special to appellee in view of the proximity of his lots and premises to Palmetto Creek. He is entitled conveniently to enjoy the recreational advantages [**8] of his lots in their geographical proximity to Palmetto Creek.

This reasoning is applicable in our case. One of the lots in *Holz* did not abut the [*303] blocked roadway and another, though more circuitous, route to the creek existed. Nevertheless, the court found special injury to appellee, different from that of the general public. Similarly in our case, the Polks' land does not directly abut the blocked roadway and a more circuitous route is available. However, in view of the proximity of the Polks' land to the Bon Secour River and the lack of convenient access, we would not be justified in reversing the lower court's finding of special injury.

Hall asserts that because part of the evidence was submitted to the trial court in the form of deposition, the usual rule that a verdict will not be disturbed unless plainly erroneous is not applicable. The rule has long been established to the contrary that where the trial court's determination is based on evidence, part of which was offered orally, and part by deposition, its finding has the effect of a jury verdict and will not be disturbed on appeal unless plainly and palpably erroneous and contrary to the great [**9] weight of the evidence. *Jones v. Moore*, 295 Ala.31, 322 So. 2d 682 (1975); *Kendall v. Kendall,* 268 Ala. 383, 106 So.2d 653 (1958); *St. Paul Fire & Marine Ins. Co. v. Johnson*, 259 Ala. 627, 67 So.2d 896 (1953). In answer to Hall's contention that the decision is against the great weight of the evidence, our examination of the record reveals that the evidence is sufficient to warrant a finding of dedication of the thirty-foot right of way as a public road.

Finally, Hall contends that the admission of certain hearsay statements made by Dwight Steele constitutes reversible error. Steele was asked the following question concerning his father's intent in reserving the road for the public, which was objected to as calling for hearsay:

> Q. All right. I'm going to ask you did your father ever inform you of the purpose of that right of way?

The trial court permitted the following response:

> A. He said he was getting tired of folks coming into his house.
>
> THE COURT: No, the purpose of it.
>
> A. So people could get to the water without them coming in and waking him up in the morning. So he give it to the public for a public road in there.

Even [**10] if the admission of a hearsay statement is technical error, the error is rendered harmless by other evidence to the same effect received without objection. *Rosen v. Lawson*, 281 Ala. 351, 202 So. 2d 716 (1967); *Schoen v. Schoen*, 271 Ala. 156, 123 So.2d 20 (1960); *Randolph v. Kessler*, 275 Ala. 73, 152 So.2d 138 (1963); *Dillard v. Alexander*, 277 Ala. 202, 168 So.2d 233 (1964). The reservation of a thirty-foot public road in his deed and the appearance of the road on the plat are competent evidence to the effect that Thomas Steele intended to dedicate a public road. The hearsay evidence was received elsewhere in this case, and unless the error complained of has injuriously affected the substantial rights of the parties, this court will not reverse a judgment on appeal.

The decision of the Baldwin County Circuit Court is hereby affirmed.

AFFIRMED.

BLOODWORTH, MADDOX, JONES, ALMON and SHORES, JJ., concur.

BEATTY, J., with whom FAULKNER, J., joins, dissents.

EMBRY, J., not sitting.

DISSENT BY: BEATTY

DISSENT

BEATTY, Justice (dissenting).

The majority is correct in its initial statement of the law pertaining to special injury in obstructed roadway cases. In *Ayers* [**11] *v. Stidham*, 260 Ala. 390, 71 So.2d 95 (1954) it was stated:

> When a road is shown to be a public road, a private individual is entitled to an injunction against . . . obstruction thereon when he has sustained special injury different, *not merely in degree, but in kind* from that suffered by the public at large. (emphasis added)

The reasoning behind this limitation is apparent. An obstruction to a public road is an injury to an infinite number of people; [*304] it is in effect a public nuisance which the government should initiate action against for the benefit of the public. To allow each individual who experienced inconvenience in access to a desired destination to successfully prosecute his own action would quite possibly lead to justice for no one.

Only, then, when there is a special injury to an individual is that individual correct in bringing an action against such a nuisance.

Until today the cases have found the element of special injury satisfied only when the roadway abutting the complainant's property was obstructed, and reasonable access to and from that property was denied as a result. These cases are correct because the owner of non-abutting [**12] property sustains an injury no different *in kind* from that of the general public. The majority, in fact, rely on these cases to show special injury, yet from its opinion it appears without dispute that the Polk property *did not* abut the obstructed road, and was not even within the same subdivision in which the obstruction occurred.

In *Markstein v. City of Birmingham*, 286 Ala. 551, 243 So.2d 661 (1971) an individual brought suit against the City of Birmingham for an obstruction to roadways serving her property. On demurrer her complaint was held bad in that she had not alleged that she was an abutting owner and that on its face her complaint showed she had reasonable access. We affirmed the trial court and in our discussion cited, among other cases, *State ex rel. State Highway Commission v. Silva*, 71 N.M. 350, 378 P.2d 595 (1963) which said:

> If one has the same access to the road or highway upon which his property abuts as before the closing of a portion thereof and there remains a reasonable, even though more circuitous, access to the general highway system, his injury is the same in kind, even though greater in degree, as that suffered by the general [**13] public and is damnum absque injuria.

In the present case however the complainant's property did not abut the obstructed road, hence the sole fact that they would have to take a more circuitous route to the river does not set them apart from the indefinite number of other individuals who may have likewise been inconvenienced. Therefore, complainants did not show the special injury which the law requires of an individual who brings an action against the obstruction of a public road. For this reason I am unable to agree with the majority and would reverse.

If it is the intent of the majority to change the law regarding special injury, and extend it beyond the boundary line our cases have previously marked, then it should squarely say so. But the effect of such a holding will be to allow any person who can show some inconvenience an action against a public nuisance. I do not believe that this is what the law has allowed up to now and I find no reason in the majority opinion for changing the law at this time.

FAULKNER, J., concurs.

William C. Harper v. Charles A. Coats III and Ginger K. Coats

1050145

SUPREME COURT OF ALABAMA

988 So. 2d 501; 2008 Ala. LEXIS 8

January 18, 2008, Released

SUBSEQUENT HISTORY: Released for Publication July 28, 2008.

PRIOR HISTORY: [**1]

Appeal from Monroe Circuit Court. (CV-03-70). Samuel H. Welch, Jr.

DISPOSITION: AFFIRMED.

CORE TERMS: plat, dedication, street, map, recordation, water line, municipality, recording, public roads, dedicated, fee simple, conveyance, municipal, recorded, marked, dictum, public use, property outside, proper authorities, corporate limits, platted, donated, general rule, private property, summary judgment, statutory authority, statutory requirements, governing body, acknowledgment, undisputed

COUNSEL: For Appellant: Jack B. Weaver, Weaver & King, P.C., Monroeville.

For Appellees: Broox G. Garrett, Jr., Amanda C. Hines, Thompson, Garrett & Hines, LLP, Brewton.

JUDGES: PARKER, Justice. Cobb, C.J., and See, Woodall, and Smith, JJ., concur.

OPINION BY: PARKER

OPINION

[*502] PARKER, Justice.

I. Background

The issue in this dispute concerning the public or private nature of streets in a subdivision located outside a municipality is whether the recording of the plat for the subdivision, which properly identified the streets in question, constituted a dedication of those streets to the public. We hold that it did, and we affirm.

Sun Ridge Valley Road and Blue Ridge Drive run through and next to the Blue Ridge subdivision, located in Monroe County, outside the city limits of Monroeville. William C. Harper created the subdivision [*503] by recording a plat in the Monroe County Probate Court. The complaint alleges that the plat was recorded in February 1991.

Charles A. Coats III and Ginger K. Coats own property outside the subdivision, abutting both Sun Ridge Valley Road and Blue Ridge Drive. William Harper claims that the roads are not for public use and has erected a fence to prevent the Coatses from using the roads for ingress and egress to their property. There is also a dispute regarding whether the Monroe County Water Board can serve [**2] the Coatses' property from the water line that currently serves the Blue Ridge subdivision. However, for reasons stated later in this opinion, that issue has been waived, and we do not decide it.

The Coatses filed this action in the Monroe Circuit Court. The crux of the dispute is whether the recording of the subdivision plat, which appropriately signified the dimensions and locations of Sun Ridge Valley Road and Blue Ridge Drive, constituted a completed dedication of those roads to the public. The trial court entered a summary judgment in favor of the Coatses, declaring that the roads are public roads and that the water line serving the subdivision is a public utility and can be used to provide water to the Coatses' property. Harper appealed. We affirm.

II. Standard of Review

"[O]n appeal a summary judgment carries no presumption of correctness," *Hornsby v. Sessions*, 703 So. 2d 932, 938 (Ala. 1997). "'In reviewing the disposition of a motion for summary judgment, we utilize the same standard as that of the trial court in determining whether the evidence before the court made out a genuine issue of material fact' and whether the movant was entitled to a judgment as a matter of law." [**3] *Ex parte General Motors Corp.*, 769 So. 2d 903, 906 (Ala. 1999) (quoting *Bussey v. John Deere Co.*, 531 So. 2d 860, 862 (Ala. 1988)). "Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable

doubts against the movant." *Hobson v. American Cast Iron Pipe Co.*, 690 So. 2d 341, 344 (Ala. 1997).

The parties have presented no factual disputes; instead, their arguments are based entirely on statutory interpretation.

III. Issues and Legal Analysis

A. Are the Roads Public Roads?

The subdividing of land into lots for a residential community is governed by Ala. Code 1975, §§ 35-2-50 through -62. Section 35-2-50 requires persons wishing to subdivide their land into lots to have the land surveyed and then draw a plat or map indicating the length and bearings of the boundaries of each lot. In addition, the plat or map must "give the bearings, length, width and name of each street." It is undisputed that Harper complied fully with this Code section in creating the Blue Ridge subdivision. Alabama Code 1975, § 35-2-51(b), provides that "[t]he acknowledgment and recording of such plat or map shall be held [**4] to be a conveyance in fee simple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public," and the areas indicated as streets on the map "shall be held in trust for the uses and purposes intended or set forth in such plat or map."

The question, therefore, is whether Sun Ridge Valley Road and Blue Ridge Drive were "donated or granted to the public" by the recordation of the subdivision plat. If so, under the provisions of § 35-2-51(b), the recording of the plat constituted a "conveyance in fee simple" to the public, [*504] and Harper has no right to prevent the Coatses, or any other member of the public, from using the roads. If not, however, the roads are for the private use of Harper and the owners of property in the subdivision. As owners of property outside the subdivision, the Coatses would have no legal right to use the roads to access their property, unless by some claim of adverse possession or prescriptive easement, and no such claim has been raised or argued in this case.

A road can be made public in one of three ways: """1) by a regular proceeding for that purpose; 2) by a dedication of the road by the owner of the land [**5] it crosses, with acceptance by the proper authorities; or 3) the way is generally used by the public for twenty years.""" *Arnett v. City of Mobile*, 449 So. 2d 1222, 1224 (Ala. 1984)(quoting *Sam Raine Constr. Co. v. Lakeview Estates, Inc.*, 407 So. 2d 542, 544 (Ala. 1981), quoting in turn *Powell v. Hopkins*, 288 Ala. 466, 472, 262 So. 2d 289, 294 (1972)). There is no question that these roads have not been used by the public for over 20 years, although the record indicates that the public has enjoyed unrestricted use of them for several years. There has also not been a regular proceeding for the purpose of establishing the roads as public roads. For these roads to be public roads, then, it must be shown that there has been a dedication of the roads, with the requisite acceptance by the proper authorities.

The Coatses point to this Court's holding *Gaston v. Ames*, 514 So. 2d 877 (Ala. 1987), as providing the applicable rule for this case. In *Gaston*, the Court was dealing with a dispute similar to the one here. The plaintiffs were seeking to enjoin John Ames from maintaining a locked gate in front of a road used by the plaintiffs to access property in a subdivision and were seeking a declaration [**6] that the road was a public road. The subdivision had been properly created by Bruce Pardue and his wife. Although some of the lots had been sold, the Pardues retained a large portion of the subdivision and used it for agricultural purposes. None of the subdivided land was ever developed by any of the purchasers of the lots, including the plaintiffs. Ames subsequently purchased the remaining subdivision property and restricted access to a road indicated on the plat by means of a locked gate. The trial court found that the gate could be maintained because the subdivision was not viable. This Court reversed the trial court's judgment, finding as follows:

> "Pardue complied with the statutory requirements for the establishment of the subdivision. He first prepared the plats, pursuant to § 35-2-50, *Code of Alabama* (1975), and recorded the plats in the Probate Office, pursuant to § 35-2-51(a), *Code of Alabama* (1975). Having met those two requirements, he is deemed to have made a conveyance in fee simple of all areas granted or dedicated to the public. § 35-2-51(b), *Code of Alabama* (1975). '[S]ubstantial compliance with the statutory requirements constitutes a valid dedication to the public [**7] of all streets, alleys, and other public places.' *Johnson v. Morris*, 362 So. 2d 209, 210 (Ala. 1978). *Cottage Hill Land Corp. v. City of Mobile*, 443 So. 2d 1201, 1203 (Ala. 1983).
>
> "After there has been a proper dedication to the public, that dedication is irrevocable and it cannot be altered or withdrawn except by statutory vacation proceedings. *Booth v. Montrose Cemetery Ass'n*, 387 So. 2d 774 (Ala. 1980); *Smith v. City of Opelika*, 165 Ala. 630, 51 So. 821 (1910)."

514 So. 2d at 879.

Here, it is undisputed that Harper met those same statutory demands. Like Pardue, [*505] he prepared the plat for the subdivision, pursuant to § 35-2-50, Ala. Code 1975, and recorded it pursuant to § 35-2-51(a), Ala. Code 1975. Thus, the Coatses argue, *Gaston* demands the same result: Like Pardue, Harper should be "deemed to have made a conveyance in fee simple of all areas granted or dedicated to the public," which cannot now be revoked. 514 So. 2d at 879.

Harper responds that other cases from this Court have narrowed that general rule established by *Gaston*. Specifically, he argues that *Cottage Hill Land Corp. v. City of Mobile*, 443 So. 2d 1201 (Ala. 1983), and *CRW, Inc. v. Twin Lakes Property Owners Association, Inc.*, 521 So. 2d 939 (Ala. 1988), [**8] expressly hold that recordation of a plat, standing alone, does not constitute a completed dedication of the streets on the plat to the public and that acceptance by the proper governmental authority is also required. Harper thus contends that because the Coatses failed to show any acceptance of the purported dedication by the appropriate governmental authority in addition to recordation, the Coatses should not have prevailed on their summary-judgment motion.

We disagree. A closer look at the two cases Harper relies on reveals that they are distinguishable from the present case. We acknowledge that this Court in *Cottage Hill* did state that

> "[u]nder early Alabama statutory authority, streets indicated on a recorded and acknowledged plat were considered to be dedicated to the public use without awaiting acceptance or use by the public. *See* Code 1907, § 6030; *Manning v. House*, 211 Ala. 570, 573, 100 So. 772, 774 (1924). This is no longer true, however. *See* Code 1975, § 11-52-32(b)."

443 So. 2d at 1203. However, that statement is at most dictum, because acceptance was not truly at issue in *Cottage Hill*. [1] The actual issue in that case was whether a valid dedication is revocable if the road [**9] is never subsequently completed. The disputed land was a thoroughfare expressly reserved by the city before the subdivision was approved, thus making acceptance by the city clear. However, even if we consider this Court's statement in *Cottage Hill* regarding acceptance as more than mere dictum, it still does not stand entirely for the proposition Harper uses it for. Two points are important to note. The first is that the early statutory authority mentioned in *Cottage Hill* -- Ala. Code 1907, § 6030 -- contains essentially the same language as Ala. Code 1975, § 35-2-51. [2] In addition, the Code section cited as changing the general rule under the "early statutory authority," Ala. Code 1975, § 11-52-32(b), is limited to municipal corporations. That Code section is found in Subtitle 2 of Title 11 of the Code of Alabama entitled "Provisions Applicable to Municipal Corporations Only." Because the Blue Ridge subdivision is outside the city limits of Monroeville, that provision has no effect [*506] here. [3]

1 In fact, the statement was dismissed as dictum in a subsequent decision by this Court. See *Blair v. Fullmer*, 583 So. 2d 1307, 1309 (Ala. 1991) ("The language in *Cottage Hill* stating that acceptance [**10] is required is dictum in any event ....").

2 Alabama Code 1907, § 6030, provided: "The acknowledgment and recording of such plat or map shall be held in law and in equity to be a conveyance in fee simple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public ...."). Alabama Code 1975, § 35-2-51(b), provides: "The acknowledgment and recording of such plat or map shall be held to be a conveyance in fee simple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public ....").

3 Because neither party has raised the issue whether this provision applies to property outside the city limits of a municipality but within its police jurisdiction, we do not address that issue in this case.

Harper also cites *CRW, Inc. v. Twin Lakes Property Owners Association, Inc.*, supra, asserting that the facts in that case "are the same as the facts of this case." Harper's brief, at 5. In *CRW*, CRW was constructing a subdivision next to an existing subdivision, Twin Lakes. It began constructing a road that was to connect to the only road that ran through the Twin Lakes subdivision, and it advised [**11] potential purchasers of lots in the new subdivision to enter the new neighborhood through the Twin Lakes subdivision. In holding that the road in the Twin Lakes subdivision was a private road, the Court stated: "We do not agree that recordation, standing alone, constitutes a dedication." 521 So. 2d at 941.

However, the facts here are *not* the same as those in *CRW*; *CRW* is readily distinguishable. The Twin Lakes subdivision was accessible by only one road, and at the entrance to that road were signs stating "Twin Lakes/Private Property/No Trespassing/Members Only" and "No Trespassing/Private Property/Members Only." 521 So. 2d at 940. The City of Moody expressly al-

lowed the streets of the Twin Lakes subdivision to remain private when it annexed the area, and it was agreed that the roads were not the city's responsibility unless they were subsequently deeded to the city. 521 So. 2d at 940. The county also disavowed ownership and responsibility for the streets in the Twin Lakes subdivision. 521 So. 2d at 940. Far from being a case where the streets were dedicated to the public but never accepted by the proper authorities, the Twin Lakes Property Owners Association expressly and repeatedly [**12] refused dedication of the road to the public. Furthermore, the Twin Lakes subdivision was also in the city limits of a municipality, and the Court again relied on Ala. Code 1975, § 11-52-32(b), in affirming the trial court's judgment finding the road to be a private road.

More applicable here is *Blair v. Fullmer*, 583 So. 2d 1307 (Ala. 1991), which follows the general rule laid down in *Gaston*. In *Blair*, a lot owner was seeking a declaration that a road indicated on the subdivision plat was a public road, even though the road apparently had never been completed. No acceptance by any authority beyond recordation of the subdivision plat was shown. *In Blair*, the Court acknowledged *Cottage Hill* and *CRW*, but it distinguished those cases from the facts presented there by noting that, unlike the subdivisions in those cases, the subdivision in *Blair* was outside the city limits. 583 So. 2d at 1310. In response to the contention that other provisions of the Alabama Code require acceptance by county authorities similar to the municipal acceptance noted in those cases, the Court concluded that those sections "do not repeal the specific provision of § 35-2-51(b) by virtue of which recordation of [**13] a plat constitutes a dedication of the roads therein with no requirement of acceptance by any county governing authority." 583 So. 2d at 1312. [4]

> 4 Harper never raises for our review the provisions of the Alabama Code applicable to counties.

Further support for the conclusion that any acceptance requirement is limited to streets within municipalities can be found in Ala. Code 1975, § 35-2-52, which states:

> "It shall be the duty of every probate judge in this state to decline to receive for record in his office any map or plat [*507] upon which any lands lying within the corporate limits or police jurisdiction of any city of this state having a population of more than 10,000 inhabitants are platted or mapped as streets, alleys or other public ways, unless such map or plat shall have noted thereon the approval of the governing body or city engineer of such city."

No similar provision exists for plats or maps outside "the corporate limits or police jurisdiction of any city of this state ...." *Id.* The canon of statutory construction that "expressio unius est exclusio alterius" -- the expression of one thing implies the exclusion of the other -- dictates that the acceptance requirement of § 35-2-52 [**14] is expressly stated to apply to maps or plats of property within the corporate limits or police jurisdiction of a municipality of this State; the requirement does not apply to plats or maps of property outside the corporate limits or police jurisdiction of any municipality of this State. [5] See *Ex parte Cove Props., Inc.*, 796 So. 2d 331, 334 (Ala. 2000)("*Expressio unius est exclusio alterius*. The express inclusion of the words '*in front of their respective riparian lands*' excludes an interpretation that a riparian landowner has a right to erect a pier in front of the riparian lands of another.").

> 5 Because neither party has alleged that the Blue Ridge subdivision is within the police jurisdiction of the city, we will treat this case as though the subdivision is outside the police jurisdiction as well as outside the municipal limits.

Harper attempts to limit the holding of *Blair* by referencing the following statement in that opinion:

> "It is certainly the case that a city or county must accept such a dedication (perhaps by the general public's use of the roads) before there arises a duty on the governing body to maintain the roads, and *it may be* that those two cases require an acceptance [**15] by a public body before the general public can be given the right to use the roads."

583 So. 2d at 1311 (emphasis added). However, this statement was dictum, and the actual holding of *Blair* was that under § 35-2-51(b) "recordation of a plat constitutes dedication of the roads therein." 583 So. 2d at 1312. To the extent *Blair* left open the door for the possibility that acceptance by a county governing body is required for dedication of a street in a subdivision outside the municipal limits or police jurisdiction of a city, we now close that door. By completing the plat of the subdivision in compliance with the statutory requirements of Ala. Code 1975, § 35-2-50, and recording it pursuant to § 35-2-51, Harper dedicated Sun Ridge Valley Road and Blue Ridge Drive to the public. No acceptance of those roads by any governmental entity

beyond recordation of that plat is necessary for those roads to be dedicated for public use. The Coatses, as members of the general public, are entitled to use those roads without any interference.

B. Is the Water Line Public or Private?

The other issue on appeal, whether the water line adjoining Sun Ridge Valley Road and Blue Ridge Drive is public or private, [**16] is mentioned only in passing in the parties' briefs. Harper states: "[C]learly, a question of fact has been presented by [Harper] through his response to [the Coatses'] Request for Admission, wherein [Harper] aver[s] that [he is] the owner[] of said water line[]." Harper's brief, at 7. Harper provides no legal authority or argument for the proposition that the water line belonged to him despite his admission that the Monroeville Water Board uses the water line to service the subdivision. It is not the duty of this [*508] Court to make arguments or perform the legal research to supplement an inadequate brief. *Dykes v. Lane Trucking, Inc.*, 652 So. 2d 248, 251 (Ala. 1994)("We have unequivocally stated that it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument."). The issue whether the water line is Harper's private property is therefore not properly before this Court. *Pardue v. Potter*, 632 So. 2d 470, 473 (Ala. 1994) ("Issues not argued in the appellant's brief are waived.").

IV. Conclusion.

We need not decide whether the cases cited by [**17] Harper require, in addition to recordation of the subdivision plat, acceptance by the proper authorities for a road to be a public road within a municipality. The subdivision here was outside the city limits; therefore, the rule adopted by this Court in *Blair* controls. Roads in a subdivision located outside the city limits or police jurisdiction of a municipality are deemed dedicated to the public by way of proper recordation of a plat, with no requirement of acceptance by any county governing authority. Thus, there is no genuine issue of material fact. It is undisputed that Harper recorded the plat with the streets properly marked off. This, in and of itself, was a "valid dedication to the public" of the streets marked in the plat.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

Cobb, C.J., and See, Woodall, and Smith, JJ., concur.

Robert E. Harris, as executor of the estate of Marvella B. Harris, and as father of Robbin S. Harris, a deceased minor v. Macon County

No. 89-1791

Supreme Court of Alabama

579 So. 2d 1295; 1991 Ala. LEXIS 193

March 1, 1991

SUBSEQUENT HISTORY: [**1] Rehearing Denied April 11, 1991.

PRIOR HISTORY: Appeal from Macon Circuit Court, No. CV-89-165; Howard F. Bryan, Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: intersection, summary judgment, highway, roadway, exclusive control, traffic, control devices, dangerous condition, state highway, safe condition, right-of-way, warn, state-controlled, engineer, duty to maintain, duty to keep, substantial evidence, present case, constructed, notice, highway department, negligently, investigate, wantonly, install, signal, feet

COUNSEL: Frank H. Hawthorne and G. William Gill of McPhillips, Hawthorne & Shinbaum, Montgomery.

H. E. Nix, Jr., and Alex L. Holtsford, Jr., Montgomery and Edwin L. Davis, Tuskegee.

JUDGES: Shores, Justice. Hornsby, C.J., and Maddox, Houston, and Ingram, JJ., concur. Kennedy, J., concurs in the result.

OPINION BY: SHORES

OPINION

[*1296] This wrongful death case arises out of an automobile accident that occurred on May 7, 1988, in Macon County, Alabama. Robert E. Harris sued Macon County, alleging that Macon County had a duty to maintain the highways and roadways within its borders; that the county had breached this duty by negligently or wantonly allowing a dangerous condition to exist at the intersection of U.S. Highway 80 and County Road 69; and that his wife, Marvella B. Harris, and his daughter, Robbin S. Harris, sustained fatal injuries in the accident as a proximate result of Macon County's alleged negligence or wantonness.

Macon County answered with a general denial. On December 14, 1989, Macon County moved for summary judgment, claiming [**2] that the intersection in question had not been under the direction, control, or maintenance of Macon County, but had been under the exclusive direction, control, and maintenance of the State of Alabama. Harris subsequently amended his complaint to aver that Macon County had negligently or wantonly designed or constructed Highway 80 and had failed to warn persons of the danger of that intersection.

On August 2, 1990, the trial court entered a summary judgment in favor of the county as to all claims. The question before us is whether the trial court erred in holding that the intersection in question had been under the exclusive jurisdiction of the state highway department and, consequently, that Macon County has no liability in this case.

In support of its motion for summary judgment, Macon County presented the affidavit of James Horace, an assistant county engineer for Macon County. This affidavit read in part as follows:

"It is my personal knowledge that the State of Alabama controls that entire intersection. The State of Alabama designed and built that section of the roadway and the State of Alabama has entire control for the maintenance of that intersection. Because the State of [**3] Alabama controls the entirety of U.S. Highway 80, including the part which creates the intersection in this case, the intersection is under the exclusive control of the State of Alabama

"The State of Alabama controls all of U.S. Highway 80 and at least 40-50 feet of right-of-way in each direction from the center of the roadway of Highway 80. In other words, the State of Alabama controls not only U.S. Highway 80, but also at least 25-35 feet [of] right-of-way off of the actual roadway. This is true at the point where the intersection is located, so the State of Alabama controls not only the intersection but also a portion of County Road 69 which has the stop lines leading into the intersection.

"It is the responsibility of the State of Alabama to put up traffic control devices at this intersection. Macon County does not have any right to create or maintain traffic control devices for this intersection. That responsibility is exclusively with the State of Alabama."

(C.R. 26-27)

Harris filed a brief in opposition to the motion for summary judgment, attaching the affidavit of James Stephens, maintenance engineer for the State of Alabama. Stephens's affidavit stated in part:

"My name [**4] is James Stephens and I am forty-seven (47) years of age and a resident of Montgomery County, Alabama. I have been the maintenance engineer for the State of Alabama, Sixth Division, for the last fourteen (14) years. My job [*1297] entails the general supervision of all state maintained highways in all counties in the Sixth Division, which includes Macon County. It is my job to investigate and repair any and all defects of state maintained highways in my counties that are brought to my attention. If a particular county is aware of a defect on a state maintained highway within that county, and advises me of said defects, I investigate and take appropriate action.

"On June 3, 1988, the Macon County Commission passed a resolution that the intersection of Highway U.S. 80 and Macon County Road 69 was a dangerous and hazardous area in need of a caution signal. Said resolution was submitted to the Highway Department and we investigated and took corrective action, which included installing a flashing traffic signal."

(C.R. 37).

The court held a hearing on the motion for summary judgment on January 11, 1990. At that hearing, the plaintiff sought leave of the court to file a second affidavit of James [**5] Stephens. The trial judge gave the plaintiff 10 days to file the affidavit. The plaintiff did not file the second affidavit until February 14, 1990. On August 2, 1990, the trial judge entered a summary judgment in favor of the county. We affirm.

Rule 56, A. R. Civ. P., sets forth a two-tiered standard for determining whether to enter a summary judgment. In order to enter a summary judgment, the trial court must determine: 1) that there is no genuine issue of material fact, and 2) that the moving party is entitled to a judgment as a matter of law. In determining whether summary judgment was properly granted, a reviewing court must view the motion in a light most favorable to the nonmovant. See *Turner v. Systems Fuel, Inc.,* 475 So.2d 539, 541 (Ala. 1985); *Ryan v. Charles Townsend Ford, Inc.,* 409 So.2d 784 (Ala. 1981). Rule 56 is read in conjunction with the "substantial evidence rule" (§ 12-21-12, Code 1975), for actions filed on or after June 11, 1987. See *Bass v. SouthTrust Bank of Baldwin County,* 538 So.2d 794, 797-98 (Ala. 1989). In order to defeat a properly supported motion for summary judgment, the plaintiff must present [**6] substantial evidence, i.e., "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida,* 547 So.2d 870, 871 (Ala. 1989).

The plaintiff contends that there was substantial evidence before the court indicating that the intersection in question was not under the exclusive control of the State of Alabama. We do not agree. Both affidavits establish that the State, not the county, maintained the intersection in question. The untimely affidavit of James Stephens does not dispute this fact. Stephens states in his late affidavit that a county may request permission from the state highway department to allow the county itself to install a traffic control device on a state-controlled roadway; that after a county makes such a request, the highway department determines whether the installation of the traffic control device on the state-controlled roadway is warranted; and that the state retains control of the decision whether to install the device. This affidavit reinforces the fact that the State of Alabama has exclusive [**7] control of the state-controlled roadways, like the one in this case.

The plaintiff argues that this Court should overrule its holding in *Perry v. Mobile County,* 533 So.2d 602 (Ala. 1988), which is on point with the present case. We decline to do so. In *Perry* this Court unanimously held as follows:

"The evidence in the record conclusively establishes that the intersection of Hamilton Boulevard [a state highway in Mobile] and Rangeline Road is under the exclusive control of the State of Alabama. The State owns all of the right-of-way surrounding the intersection, and the intersection was entirely designed, constructed and maintained by the State. Yet, the appellants, relying on *Jefferson County v. Sulzby,* 468 So.2d 112, 114 (Ala. 1985), insist that Mobile County had [*1298] a duty to warn of a dangerous condition of a roadway and a duty to keep the roadways under its control in a safe condition. The holding of *Sulzby* is not applicable to the facts in the instant case. It is undisputed that the intersection involved in this case, unlike that involved in *Sulzby,* was not under the control of the county. Consequently, Mobile County owed no duty [**8] to maintain the intersection in a safe condition, or to warn of the intersection's allegedly dangerous condition. Therefore, summary judgment was properly entered in favor of Mobile County."

The plaintiff here, like the plaintiff in *Perry*, argues that a county has a duty to keep its roads in a reasonably safe condition for travel and to remedy defects in the roadway on receipt of notice of those defects; the plaintiff cites *Jefferson County v. Sulzby,* 468 So.2d 112, 114 (Ala. 1985), *Macon County Comm'n v. Sanders,* 555 So.2d 1054, 1057 (Ala. 1990), and Alabama Code 1975, § 23-1-80. However, as we said in *Perry*, the cases in which we have found this duty have been those in which the county controls the roadway, unlike the present case.

The evidence before the trial court on the motion for summary judgment reflects that the intersection in question was under the exclusive control of the State of Alabama. Both affidavits establish that the State, not the county, maintained the intersection in question. Further, any notice given to the county of an unsafe condition was given *after* the accident happened, not before.

For the reasons stated [**9] above, the judgment of the trial court is due to be affirmed.

AFFIRMED.

Kennedy, J., concurs in the result.

Gerald W. Hawkins, Brooks H. Hawkins, and Federal Land Bank of New Orleans, a corporation v. Thomas W. Griffin and Lynn Taylor

Civ. No. 5607

Court of Civil Appeals of Alabama

512 So. 2d 109; 1987 Ala. Civ. App. LEXIS 1215

March 4, 1987

SUBSEQUENT HISTORY: [**1] Rehearing Denied April 1, 1987.

PRIOR HISTORY: Appeal from Marshall Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: municipality, rights-of-way, public road, tract, body of land, convenient, condemned, adjacent, written approval, municipal government, planning board, corporate limits, condemnation, contiguous, landlocked, landowners, highway, nearest, condemn, legislative intent, liberal construction, accomplished, intervening, exceeding, sensible, acquire, street, width, lying, feet

COUNSEL: Ralph Smith, for Appellant.

Clark E. Johnson, III, for Appellee.

JUDGES: Bradley, P.J., Holmes and Ingram, JJ., concur.

OPINION BY: BRADLEY

OPINION

[*110] This is a condemnation case.

Thomas W. Griffin and Lynn Taylor made an application in the Probate Court of Marshall County for the condemnation of land owned by Gerald W. and Brooks H. Hawkins for the purpose of obtaining a right-of-way. The right-of-way was necessary as plaintiffs' property is not adjacent to or contiguous to any public road or highway.

Both the Probate Court of Marshall County and the Circuit Court of Marshall County condemned the property for a private right-of-way easement and awarded the owners $1,000 as compensation for the land condemned plus all costs. Gerald Hawkins, Brooks Hawkins, and the Federal Land Bank of New Orleans, argue that the award is erroneous because section 18-3-1, Code 1975, does not provide a mechanism by which lands located outside a municipality may be condemned. Because the condemned land is situated outside a municipality, they argue that the condemnation was improperly entered.

Section [**2] 18-3-1, Code 1975, reads as follows:

> "The owner of any tract or body of land, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from the municipal government and the planning board of such municipality."

Prior to the enactment of this section, the applicable statute was found at Title 19, Section 56, Code 1940 (recomp. 1958). It read:

> "The owner of any tract or body of land, outside the corporate limits of a municipality, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way not exceeding in width thirty feet over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto."

The language of Section 18-3-1, Code 1975 (prior to its 1982 amendment), clearly provides that the owner of a tract of land not within [**3] a municipality can obtain a right-of-way over the lands of another if his lands are not adjacent to a public road. *Bull v. Salsman*, 435 So. 2d 27 (Ala. 1983). In 1982 the legislature amended this section of the Code by deleting therefrom the phrase "outside the corporate limits of a municipality," and adding the phrase "provided written approval is obtained from the municipal government and the planning board of such municipality."

The defendants argue that the change in the statute was prompted by the legislature's desire to give the owners of land within a municipality the same right to condemn private rights-of-way as possessed by landowners located outside a municipality.

A basic rule of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the language of the statute. *Ex parte Holladay*, 466 So. 2d 956 (Ala. 1985). In divining the legislative intent:

> "Courts may look to the history of a statute and the purpose sought to be accomplished, conditions which led to its enactment, ends to be accomplished and evils to be remedied; a rational, sensible and liberal construction with due consideration of the practical [**4] effect should be reached in ascertaining a dubious legislative intent."

State v. T.R. Miller Mill Co., 272 Ala. 135, 130 So. 2d 185 (1961).

Although inartfully drafted, section 18-3-1, Code 1975, as amended, appears to be the result of an effort by the legislature to permit those landowners within the boundaries of municipalities who have no access to a public road or street to condemn private rights-of-way just as landlocked landowners [*111] outside municipalities are permitted to so condemn. That such was the purpose of the legislation in question appears from the deletion in the forerunner of section 18-3-1 of the language "outside the corporate limits of a municipality;" the introductory language in the act amending section 18-3-1, which is "to provide further for said acquisition" (1982 Ala. Acts No. 82-784); and the added language in section 18-3-1, as amended, requiring written approval of the municipal government and the planning board of such municipality.

After giving the two Code sections in question a rational, sensible, and liberal construction, we conclude that the legislature intended to permit landlocked owners in municipalities to obtain private [**5] rights-of-way over the lands of others to the nearest public road or street and did not intend to deprive landlocked owners outside municipalities of the same right, which they had possessed for many years.

The judgment of the trial court is affirmed.

AFFIRMED.

Holmes and Ingram, JJ., concur.

Sherman Holland, Jr. v. City of Alabaster and Kathleen Hill

No. 88-1641

Supreme Court of Alabama

566 So. 2d 224; 1990 Ala. LEXIS 592

July 6, 1990

SUBSEQUENT HISTORY: [**1] Released for Publication August 23, 1990.

PRIOR HISTORY: Appeal from Shelby Circuit Court, CV-87-230.

DISPOSITION: MOTION DENIED AS MOOT; REVERSED AND REMANDED.

CORE TERMS: joined, vacating, vacation, necessary party, public nuisance, nuisance, dirt, summary judgment, blocking, tenus, join, ore, convenient, abatement, municipal, vacated, blocked, traffic, piles, resolution passed, property owners, presumption of correctness, failure to maintain, indispensable, contending, adjudicate, feasible, absentee, reversal, decree

COUNSEL: Ralph J. Bolen, Birmingham.

Hewitt L. Conwill and William R. Justice, Columbiana.

JUDGES: Hornsby, Chief Justice. Maddox, Almon, Adams, and Steagall, JJ., concur.

OPINION BY: HORNSBY

OPINION

[*225] This is a dispute regarding the vacating of a road in Pelham, Shelby County, Alabama. Sherman Holland, Jr., executed a petition for declaration of vacation of a portion of an unnamed road. Pursuant to the request of the mayor of Pelham, Bobby Hayes, he presented this petition to the City of Pelham, which, by resolution, gave its assent to the declaration.

Hayes's affidavit states that Holland is the owner of all land abutting both sides of the portion of the road that was vacated. The affidavit further states that no person "was denied other convenient access to his or her property." The petition filed by Holland alleges that the vacation would "not deprive other property owners of convenient and reasonable means of ingress and egress to and from their property." On April 20, 1987, the mayor and the city council of the City of Pelham passed a resolution vacating the "unpaved and unnamed road being located upon and through the lands [**2] fully owned by Sherman Holland, Jr." Subsequent to this resolution, Holland blocked access to the road with piles of dirt.

Holland contends that the vacated road was a chert "all weather" road located in a flood plain. He also claims that the road was a trash dumping site and that a one-lane bridge with no guard rails was located on the road. Holland claims that there were no traffic control devices or lights on the road, and that the road was a danger as well as a nuisance to the public. Testimony by the Shelby County engineer, Gary Ray, shows that a fully loaded fire truck or other heavy vehicle would not be safe in crossing the bridge.

The City of Alabaster and Kathleen Hill sued Holland. Hill requested an abatement of an alleged private nuisance and sought damages, contending that Holland's blocking of the road devalued her property by $ 11,600 due to inconvenience and loss of utility. Alabaster's claim was for the abatement of an alleged public nuisance, i.e., Holland's blocking of the road.

Alabaster and Hill contend that the road was maintained by Shelby County until the date on which the City of Pelham passed the resolution vacating the road. Holland answered the complaint [**3] and alleged that Alabaster was not a proper plaintiff because the actions taken concerned a road wholly within the city limits of Pelham and were taken at the request and direction of the City of Pelham. Holland also claims on appeal that the City of Pelham placed barricades and "road closed" signs in the road after it was closed.

Holland filed a motion for summary judgment, relying on the pleadings, various discovery documents and the affidavit of Hayes. Alabaster opposed the motion with an affidavit by Larry Rollan, police chief for the City of Alabaster. Rollan stated that a portion of the road that was blocked by Holland or his agents was within the city limits of Alabaster. [1] He further stated that the road had been used by Alabaster citizens for more than 20 years and that it provided more convenient

and quicker access to Highway 31 than was otherwise available. The motion for summary judgment was subsequently denied.

1 Holland initially blocked the road by placing piles of dirt just inside the city limits of Alabaster by mistake. He later moved the dirt to within the city limits of Pelham and it appears that all of the closed portion of the road is within the city limits of Pelham.

[**4] The trial court heard ore tenus evidence without a jury and entered a final judgment ordering the abatement of a public nuisance, specifically Holland's blockage of the road with dirt piles. The trial court held that the private nuisance claim of Mrs. Hill was without merit. The trial court restrained Holland from continuing any further obstruction or damage to the road and from interfering with the use of the road by vehicular or pedestrian traffic. The trial court further set aside the vacation of the road. Holland appeals.

Issues

Holland raises several issues on appeal:

1) Whether the trial court erred by not granting Holland's motion for summary judgment; 2) whether the City of Pelham should be joined as a necessary party; 3) [*226] whether Holland was justified in relying on the City of Pelham's resolution vacating the road; 4) whether Holland should have been compensated when the circuit court reversed the actions of the City of Pelham; and 5) whether the trial court erred in setting aside the vacation of the road. Holland has, additionally, filed a motion to strike the appellees' brief, contending that the City of Pelham should have been served with the appellees' brief under [**5] Rule 44, A.R.App.P. We address these issues below.

Discussion

Standard of Review

This case was heard by the trial court sitting without a jury. Where ore tenus evidence is presented to the trial court, a presumption of correctness exists as to the court's conclusions on issues of fact based on that ore tenus evidence; its determination will not be disturbed unless clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. Gaston v. Ames, 514 So. 2d 877, 878 (Ala. 1987); Cougar Mining Co. v. Mineral Land & Mining Consultants, Inc., 392 So. 2d 1177 (Ala. 1981). However, when the trial court improperly applies the law to the facts, no presumption of correctness exists. Gaston, supra; Smith v. Style Advertising, Inc., 470 So. 2d 1194 (Ala. 1985); League v. McDonald, 355 So. 2d 695 (Ala. 1978).

Necessary Party

Holland contends that the trial court erred in failing to join the City of Pelham as a necessary party under Rule 19 of the Alabama Rules of Civil Procedure. The rule reads as follows:

"(a) *Persons to be joined if feasible.* A person who is subject to jurisdiction of the court shall [**6] be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

(Emphasis added.)

The trial court specifically held that "under the evidence, the City of Pelham does not have an interest [in] the subject matter of the above action such that [in the absence of Pelham the] disposition of this action would leave any of the parties subject to substantial risk of incurring double, multiple, or inconsistent obligations." The court erred in holding that the City of Pelham was not a necessary party.

Rule 19, A.R.Civ.P., provides a two-step process for the trial court to follow in determining whether a party is necessary or indispensable. Ross v. Luton, [**7] 456 So. 2d 249, 256 (Ala. 1984), citing Note, Rule 19 in Alabama, 33 Ala. L. Rev. 439, 446 (1982). First, the court must determine whether the absentee is one who should be joined if feasible under subdivision (a). If the court determines that the absentee should be joined but cannot be made a party, the provisions of (b) are used to determine whether an action can proceed in the absence of such a person. Loving v. Wilson, 494 So. 2d 68 (Ala. 1986); Ross v. Luton, 456 So. 2d 249 (Ala. 1984). It is the plaintiff's duty under this rule to join as a party anyone required to be joined. J. C. Jacobs Banking Co. v. Campbell, 406 So. 2d 834 (Ala. 1981).

"If such persons are not joined, the plaintiff must, under subsection (c) of Rule 19, ARCP, state their names and the reasons why they are not joined. If there is a failure to join a person needed for just adjudication by a litigant then under subsection (a) of Rule 19, the trial court shall order that he be made a party."

406 So. 2d at 849-50. (Emphasis added.)

We note that the interest to be protected must be a legally protected interest, not just a financial interest. Ross, supra; see Realty Growth Investors [**8] v. [*227] Commercial & Indus. Bank, 370 So. 2d 297 (Ala. Civ. App. 1979), cert. denied, 370 So. 2d 306 (Ala. 1979). There is no prescribed formula for determining whether a party is a necessary one or an indispensable one. This question is to be decided in the context of each particular case. J. R. McClenney & Son v. Reimer, 435 So. 2d 50 (Ala. 1983), citing Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). The absence of a necessary party requires a dismissal of the cause without prejudice or a reversal with prejudice or a reversal with directions. J. C. Jacobs Banking Co. v. Campbell, 406 So. 2d 834 (Ala. 1981).

Can complete relief be afforded among those already parties? We do not believe so. The City of Pelham is required under the trial court's order to assume duties of policing and maintaining a road that it wished to vacate. The City of Pelham is also now required to maintain a public thoroughfare, which the evidence shows may or may not be suitable for traffic, without any hearing on the matter. Moreover, the City of Pelham will now incur liability to the public for any failure of maintenance with respect to this road. While ordering Holland to [**9] refrain from obstructing the road will provide Hill with a possible route to travel, it does so at the expense of the City of Pelham. We cannot see that Alabaster should be afforded relief of the opening of a road that is not within its city limits, and lies within the city limits of Pelham in the absence of the City of Pelham's presence in the judicial proceedings that afford Alabaster this remedy. This is true particularly in view of the evidence that reasonable alternative means of travel were available to the citizens of Alabaster.

Does the City of Pelham claim an interest relating to the subject of the action so that the disposition of the case without the City, as a practical matter, will impair or impede its ability to protect that interest? We believe so. Although Holland is the party actually claiming that the City of Pelham has an interest, the City of Pelham cannot properly protect its interest in vacating roads within its municipal limits unless it is given a fair hearing before a vacation of such a road is set aside.

We find further support in Boles v. Autery, 554 So. 2d 959, 960-61 (Ala. 1989), and Johnston v. White-Spunner, 342 So. 2d 754, 760 (Ala. 1977). In [**10] Boles, we held that Autauga County should have been joined as a party to an action to determine whether a particular road was public or private. In that case, the trial court had determined that the road was private and awarded damages in the breach of contract action. This Court wrote:

"The trial court's determination of whether the road was public or was private might affect not only the rights of the individual litigants but also the rights of members of the public to use the road, the duty of the county to maintain it, and the liability of the county for failure to maintain it. If the county is not joined as a party, then neither it nor other members of the public are bound by the trial court's ruling. Accordingly, if the county and other persons are not bound, then the status of the road as public or private is subject to being litigated again, and the results of later litigation may be inconsistent with the results of the initial litigation. We note the following as a possible example: Suppose the landowners, over the course of time, allow the road to fall into disrepair, and a school bus carrying children has an accident because of the road's deterioration. Would the county [**11] be liable for its failure to maintain the road? Coupled with the other problems discussed, that possibility of contradictory rulings about the status of the road as public or private is a sufficient reason to require the joinder of Autauga County as a party."

554 So. 2d at 961.

Johnston involved a boundary line dispute between owners of contiguous lots in a subdivision. One of the issues there concerned whether a road was public or private, and another issue dealt with the proper location of that road. We held in Johnston that the City of Mobile had no less interest in the outcome of an action involving [*228] the road than any of the property owners in the subdivision. 342 So. 2d at 760. We stated:

"If, as the record indicates, the City is exercising authority over a strip of land not actually dedicated to use as a public street, then any decree that finds to that effect, expressly or by implication, is void if the City is not a party to this action. In any event, the interest of the City is of such a nature that the court decree 'relocating' the road directly affects that interest and the trial court must have jurisdiction over the City before proceeding to adjudicate any [**12] issues affecting such interest."

342 So. 2d at 760. (Emphasis added.) As shown by Johnston, the trial court must have jurisdiction over the City of Pelham before proceeding to adjudicate any issues affecting that entity's interests. While both Boles and Johnston dealt with the determination of whether a particular road was public or private, the same analysis must be applied here. Before the Circuit Court of Shelby County can determine whether the action of a city vacating a road is void, the court must have that city before it as a party.

Alabaster and Hill have contended in their briefs that the resolution passed by Pelham vacating the road that is the subject of this appeal was illegal, and consequently that the road was never legally vacated. The trial court specifically found that the vacation met all statutory requirements, yet set the vacation aside on the basis that it created a public nuisance. The record further reveals that the road had been closed for over two years at the time of the trial court's order.

The City of Pelham will now be required to maintain the road, police the area, and ultimately clean up the dumping of garbage on the road, all without [**13] a hearing as to the city's reasons for vacating the road initially.

The allegations by Alabaster and Hill of illegality and the claims of nuisance are efforts by them to thwart the actions and procedures correctly used by the City of Pelham in vacating roads pursuant to Ala. Code 1975, § 23-4-20. The trial court's further ruling that Holland's actions in blocking the road subsequent to the vacation of the road, at the request of the City of Pelham, constitute a public nuisance improperly aids their efforts. Although the trial court's order implied that the vacation of the road occurred solely through the actions of Holland, the evidence does not show this to be the case.

We hold that the City of Pelham was a necessary party in this action. We therefore reverse and remand this case to the trial court for proceedings consistent with this opinion. Thus, it is not necessary to discuss the other issues raised.

Rule 44, A.R.App.P.

Holland also contends that Alabaster and Hill's brief should be stricken or, alternatively, that the appellees should be required to serve their brief on the City of Pelham as, he contends, Rule 44, A.R.App.P., requires. He asserts that the appellees [**14] have challenged the validity of a resolution passed and adopted by the City of Pelham.

Rule 44 states as follows:

"If the validity of any statute, executive or administrative order, municipal ordinance, franchise or written directive of any governmental officer, agent, or body is raised in the appellate court, and the state, municipal corporation or governmental body which enacted or promulgated such questioned order is not a party to the proceeding, the party raising such question shall serve a copy of his written brief, which shall clearly set out the question raised, on the . . . city attorney . . . of the governmental body whose order is questioned."

We believe the motion made by Holland has merit. However, because we reverse this case on the issue concerning the City of Pelham's being omitted as a necessary party, the motion is denied as being moot.

MOTION DENIED AS MOOT; REVERSED AND REMANDED.

Patricia J. Holt, Charles Holt, and Cori Nicole Howard, a minor, by her grandmother and next friend Patricia J. Holt v. Lauderdale County

1050740

SUPREME COURT OF ALABAMA

26 So. 3d 401; 2008 Ala. LEXIS 234

November 7, 2008, Released

SUBSEQUENT HISTORY: Released for Publication January 4, 2010.
Rehearing denied by Holt v. Lauderdale County, 2009 Ala. LEXIS 311 (Ala., June 19, 2009)

PRIOR HISTORY: [**1]
Appeal from Lauderdale Circuit Court. No. CV-03-17. Trial Judge: Ned Michael Suttle.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: bridge, guardrail, roadway, summary judgment, notice, safe, duty to keep, constructive, county road, safe condition, issue of material fact, deposition, breached, shoulder, genuine, travel, paved, creek bed, substantial evidence, unforeseeable, negligently, extending, engineer, drop-off, install, street, creek, curve, erect, common law

COUNSEL: For Appellants: Robert L. Gonce of Gonce, Young & Collum-Butler, Florence; William E. Smith, Jr., Florence.

For Appellee: Frank E. Bankston, Jr., Webb & Eley, P.C., Montgomery; Christopher A. Smith of Self, Smith, Burdine & Burdine, Florence.

JUDGES: PARKER, Justice. Cobb, C.J., and Woodall, Smith, and Murdock, JJ., concur. See, Lyons, Stuart, and Bolin, JJ., concur in the result.

OPINION BY: PARKER

OPINION

[*402] PARKER, Justice.

Case History

The genesis of this case is a motor-vehicle accident that occurred on county road 88 in Lauderdale County. On January 11, 2003, Patricia J. Holt and Cori Nicole Howard, Holt's granddaughter, were traveling to Lexington Elementary School in a vehicle that Holt was driving. To get to the school they had to travel across a narrow bridge over a creek bed. Before arriving at the bridge, Holt's vehicle crested a hill, entered an "S" curve, which turned to the left and then to the right. As Holt approached the bridge, her car began to slide, apparently on ice, and she lost control of the vehicle. The vehicle hit the end of a concrete barrier on the side of the bridge, overturned, and landed upside down in the creek bed 10 feet below. Paramedics took Holt and Howard to the hospital. Howard was treated and released; however, Holt remained in the hospital for approximately 25 days.

This case originated in the Lauderdale Circuit Court where Holt, her husband Charles [**2] Holt, and Howard, a minor, by her grandmother and next friend Patricia J. Holt (hereinafter referred to collectively as "Holt") sued Lauderdale County and the county engineer, Ken Allamel, alleging negligence in that they breached their duty to maintain county roads in a safe manner, under both Ala. Code 1975, § 23-1-80, and the common law. Specifically, [*403] they contend that a guardrail, extending from the edge of the concrete barrier on the bridge, should have been erected and that such a guardrail would have prevented her vehicle from dropping into the creek bed. Both defendants filed motions for a summary judgment. On February 10, 2005, the trial court, with Holt's consent, granted Allamel's summary-judgment motion. On January 31, 2006, the trial court entered a summary judgment for Lauderdale County. On March 7, 2006, Holt filed a notice of appeal from the summary judgment for Lauderdale County. We reverse and remand.

Standard of Review

On appeal, this Court reviews a summary judgment de novo, applying the same standard of review as did the trial court. *Hornsby v. Sessions*, 703 So. 2d 932 (Ala. 1997). To defeat a summary judgment, the nonmoving party must show substantial evidence creating [**3] a genuine issue of material fact. *Ex parte General Motors Corp.*, 769 So. 2d 903 (Ala. 1999). "Our review

is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant." *Hobson v. American Cast Iron Pipe Co.*, 690 So. 2d 341, 344 (Ala. 1997). In a negligence action, the plaintiff must show that a duty existed, that the defendant breached the duty, and that the breach caused the plaintiff's injury. See *Bowden v. E. Ray Watson Co.*, 587 So. 2d 944 (Ala. 1991); *Thompson v. Lee*, 439 So. 2d 113 (Ala. 1983). Lauderdale County contends that Holt has failed to meet her burden as to duty, breach, and causation.

Legal Analysis

A. Duty

"A county, by virtue of its exclusive authority to maintain and control its roads, is under a common law duty to keep its roads in repair and in reasonably safe condition for their intended use." *Mixon v. Houston County*, 598 So. 2d 1317, 1318 (Ala. 1992). A county also has a statutory obligation to maintain the safety of its roadways. Section 23-1-80, Ala. Code 1975, provides that a county has "general superintendence of the public roads ... so as to render travel [**4] over the same as safe and convenient as practicable."

Lauderdale County attempts to limit its general duty, stating that there is "no authority ... that a county has a legal duty to install guardrails or other devices." Lauderdale County's brief at 13. Lauderdale County also contends that no duty exists because at the time the bridge was built the bridge was in compliance with all safety regulations then in effect. *Id.*

Lauderdale County appears to be arguing that in order to have a duty to perform a specific renovation to a county road, there must be some statutory authority requiring it to do so. However, Lauderdale County cites no Alabama caselaw that suggests such a rule. It relies instead on a Kansas decision that refers to a line of cases, based upon a since-repealed statute, that held that "failure to place (or replace) a guardrail ... does not constitute a defect unless there is a statutory duty to erect such a ... guardrail." *Schmeck v. City of Shawnee*, 232 Kan. 11, 23, 651 P.2d 585, 595 (1982). Alabama does not have the same statutory scheme as did Kansas when *Schmeck* was decided. To the contrary, this Court has recognized that a county's duty may require it to do more than is even [**5] required by a manual issued by the Sate and regulating roadways. In *Jefferson County v. Sulzby*, 468 So. 2d 112, 114 (Ala. 1985), this Court, affirming a judgment against Jefferson County in an action arising out of a one-vehicle accident, [*404] said: "Claiming that because the Alabama Manual of Uniform Control Devices (AMUTCD) does not require edge-of-pavement markings or curve warning signs at the accident site, the County contends that it was under no duty, statutory or otherwise, to install such devices. We disagree."

In *Springer v. Jefferson County*, 595 So. 2d 1381 (Ala. 1992), Jefferson County was sued for negligently failing to erect a guardrail on an allegedly unsafe stretch of road. This Court proceeded on the assumption that if Springer presented substantial evidence indicating that Jefferson County had negligently acted or failed to act and that a guardrail would have prevented the injury, then a summary judgment against Springer was inappropriate. 595 So. 2d at 1384. There was no mention as to whether the guardrail was specifically required by statute, but the analysis proceeded under a county's general duty to keep its roads safe. Clearly, under applicable Alabama law, the lack [**6] of explicit statutory obligation does not automatically eliminate a county's general statutory and common-law duty to maintain safe roadways.

Lauderdale County also cites no Alabama law for the proposition that the appropriate standard for bridge and guardrail construction and safety are the standards applicable at the time of construction of the bridge and not at the time of the accident. Alabama law clearly describes a county's duty to "'*keep* its roads in a reasonably safe condition.'" *Mixon*, 598 So. 2d at 1318 (quoting *Elmore County Comm'n v. Ragona*, 540 So. 2d 720, 724 (Ala. 1989))(emphasis added). None of the limitations of that duty Lauderdale County proposes are sufficient to defeat its general statutory and common-law duty to keep its roadways in a reasonably safe condition. Thus, it is clear that Lauderdale County had a duty to keep the bridge and the roadway approaching it in a reasonably safe condition.

B. Breach of Duty

Once a duty is established, the question then becomes whether that duty was breached. A county's "standard of care is to keep its streets in a reasonably safe condition for travel, and to remedy defects in the roadway upon receipt of notice." *Sulzby*, 468 So. 2d at 114. [**7] Constructive notice of a defect, however, is enough to support an action based on a breach of duty. *Tuscaloosa County v. Barnett*, 562 So. 2d 166, 168 (Ala. 1990).

Lauderdale County alleges that there was no evidence presented indicating that there was a defect in the roadway. Lauderdale County's brief at 11. However, Holt's expert, in his deposition, noted the speed limit on the road on which the accident occurred, the narrowness of the paved area on the bridge, the raw end of the bridge-barrier rail, and the steepness of the slope to the creek below and concluded that "any of those four fac-

tors by themselves would warrant a guardrail, but all four of them combined just almost makes it a necessity."

Lauderdale County appears to contend that the lack of a guardrail cannot be considered a defect in the roadway. Lauderdale County's brief at 11. A county could breach its duty by failing to erect a guardrail. *Springer*, 595 So. 2d at 1386 (Houston, J., concurring in the result). This Court has stated: "The duty [to keep streets safe for travel] extends the entire width of the street and one injured by a defect or obstruction outside the prepared part may still be entitled to recover, if the [**8] defect is so near the traveled part as to render its use unsafe." *Jacks v. City of* [*405] *Birmingham*, 268 Ala. 138, 143, 105 So. 2d 121, 126 (1958).

Lauderdale County contends that, even if the lack of a guardrail can be considered a defect, it had no notice of the alleged defect. Lauderdale County's brief at 11. However, as previously noted, notice can be constructive. *Barnett*, 562 So. 2d at 168. Lauderdale County clearly has maintained control of the bridge since its construction in 1937. Further, Holt's expert, Dr. Deatherage, testified that "safety and construction standards such as the Roadside Design Guide require the construction of guardrails at points such as the place where this accident occurred." Holt's brief at 6. There is a genuine issue of material fact as to whether Lauderdale County was put on constructive notice that the approach to the bridge was not reasonably safe.

Lauderdale County states that "there is no accident data that would indicate that guardrails should be placed extending back from the end of that bridge," and it uses the lack of such accident data to support its argument that it had no constructive notice of any defect in the bridge or the approach to the bridge. [**9] Lauderdale County's brief at 5. However, the record reveals that there was no accident data available because Lauderdale County did not release the data. In response to the question, "Are you aware of any accident data that would indicate that guardrails should be placed at this place that we see on exhibit 1," county engineer Allamel responded with a simple "no." [1] The transcript of Allamel's deposition reveals, however, that he was instructed not to disclose any accident data during the deposition, for fear that the State of Alabama would revoke Lauderdale County's privilege of reviewing accident data in the future. Holt's expert testified that "the physical evidence would indicate that there have been other impacts at this sight [sic]." But the absence of other accident reports in the record does not offset the testimony of Holt's expert witness as to the road conditions at the scene of the accident and the existence of those conditions over time, which creates an issue of fact as to whether Lauderdale County had constructive knowledge of this alleged defect. *Funera v. Jefferson County*, 727 So. 2d 818, 822 (Ala. Civ. App. 1998).

1 Exhibit 1 is mentioned in a partial transcript from [**10] Allamel's deposition that was attached to Lauderdale County's motion for a summary judgment. The available portion of the transcript does not say what the exhibit is.

C. Causation

Lauderdale County also contends that Holt failed to show by substantial evidence that negligence on its part was the cause of her injury. In fact, Lauderdale County states that "the absence of guardrails extending back from the end of the bridge was not the proximate cause of the accident." Lauderdale County's brief at 15. Lauderdale County relies on *Jones v. General Motors Corp.*, 557 So. 2d 1259 (Ala. 1990), and implies that Holt's failure to establish why her vehicle left the road makes her claim the "'product of pure supposition, conjecture and guesswork.'" *Jones*, 557 So. 2d at 1265 (quoting trial court's order). Lauderdale County's reliance on *Jones*, however, is misplaced. The above-quoted text is from the trial court's order. Neither in *Jones* nor subsequently has this Court endorsed the trial court's rationale. "In *Jones*, this Court equivocated -- saying that 'we do not necessarily agree with the trial court's "proximate cause" rationale' set out in the trial court's judgment. *Jones*, 557 So. 2d at 1265." [**11] *Peters v. Calhoun County Comm'n*, 669 So. 2d 847, 851 (Ala. 1995). Accord *Ward v. Morgan* [*406] *County*, 769 So. 2d 884, 888 (Ala. 2000). In *Peters*, basically in response to the very same argument presented here, this Court held, in part:

> "We find that the circuit court erred in basing the summary judgment upon this ground [that the unreasonable condition of the roadway was the cause of the accident], because Mr. Peters readily concedes that he does not know why his tires dropped off onto the road shoulder and because Mr. Peters's theory of the Commission's liability in this case is not based upon the Commission's having proximately caused his tires to leave the pavement. Mr Peters seeks to prove, through expert testimony of an accident reconstructionist, that the Commission's alleged negligent failure to perform necessary shoulder work prevented him, after leaving the road surface for whatever reason, from safely steering back onto Coldwater Road."

669 So. 2d at 850. Similarly, in *Ward*, this Court held:

> "Under the facts of this case, reasonable persons could disagree as to whether it was foreseeable that injury or death could result from Morgan County's failure to repair the shoulder drop-off [**12] on Indian Hills Road or to warn of the drop-off level that existed after the resurfacing. The trial court stated in Morgan County's summary judgment that it was not foreseeable that any part of Anthony Ward's vehicle would leave the paved portion of the road in an area where the roadway was straight and during daylight hours. This is tantamount to concluding that it is unforeseeable that a driver will leave the road in an attempt to avoid an object, to avoid a collision with another vehicle, or as a result of simple inadvertence--all of these things, in fact, can happen on a straight road during daylight hours. Why Anthony Ward's vehicle left the road is not the central issue in this case, given the fact that the complaint alleges that his death occurred because the low shoulder drop-off prevented him from being able to return to the road safely. Moreover, the county's own engineer testified that it was 'a known fact' that vehicles leave the road for various reasons.
>
> "Ward presented substantial evidence from which a jury could conclude that the county knew or should have known that a member of the motoring public might experience difficulty returning a vehicle to the paved portion of [**13] Indian Hills Road and might as a result of that difficulty, caused by an unreasonably dangerous shoulder-drop-off level or caused by a failure to warn motorists of that danger, be involved in an accident."

769 So. 2d at 888-89.

Holt is not arguing here that any negligence on Lauderdale County's part caused her vehicle to leave the road; instead, she is arguing that Lauderdale County negligently maintained the approach to the bridge by failing to install guardrails. It is this failure, she alleges, that caused her vehicle to roll over into the creek. She maintains, through an expert witness, that had the guardrails been there, her vehicle would have been deflected back toward the road and would not have gone off the bridge into the creek. Holt's brief at 6. Her proof for this claim goes beyond "mere conclusory allegations." *Brown v. St. Vincent's Hosp.*, 899 So. 2d 227, 238 (Ala. 2004). Her expert stated that, had a guardrail been in place, Holt's vehicle would have "been deflected back into County Road 88, or spun around to where she would have basically been protected sideways from going off the edge of the bridge," and he opined that "had those guardrails been in place at the ... bridge, [**14] ... [*407] the accident would have been much less severe."

A defendant will not usually be liable for harm that is unforeseeable, even when it is proven that the defendant breached a duty. *Thetford v. City of Clanton*, 605 So. 2d 835, 840 (Ala. 1992). The *Peters* Court stated that "a jury should decide whether Mr. Peters's leaving the road, under the circumstances, was so far outside the bounds of reasonable driving as to be unforeseeable by the Commission." 669 So. 2d at 850. Applying this same test to the facts here, we conclude that a genuine issue of material fact exists regarding the foreseeability of the vehicle's leaving the road under the circumstances. The hill and the curves approaching the bridge, the narrow bridge, and the possible ice on the roadway are all pertinent facts that could allow a juror to find that it is reasonable for Lauderdale County to foresee that a vehicle might leave the paved portion of the road.

Conclusion

The trial court's ruling was in error. In this case, there were genuine issues of material facts, and those issues should have been presented to a jury for its decision. The summary judgment is reversed, and the case is remanded for further proceedings consistent [**15] with this opinion.

REVERSED AND REMANDED.

Cobb, C.J., and Woodall, Smith, and Murdock, JJ., concur.

See, Lyons, Stuart, and Bolin, JJ., concur in the result.

Stephen Hurley v. Marshall County Commission, et al.

1911614

SUPREME COURT OF ALABAMA

614 So. 2d 427; 1993 Ala. LEXIS 133

February 26, 1993, Released

SUBSEQUENT HISTORY: [**1] Released for Publication March 26, 1993.

PRIOR HISTORY: Appeal from Marshall Circuit Court. (CV-91-136)

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CORE TERMS: engineer, termination, merit system, county commission, salary, repeal, summary judgment, repealed, irreconcilable, repugnant, removal, hired, county employees, terminated, continuity, stability, excepted, enacting, Ala Acts, county government, public properties, calendar, demotion, earlier act, process rights, process protection, order to ensure, issue of material fact, statutory provision, civil service

COUNSEL: For Appellant: Mary Ann Stackhouse of Floyd, Keener, Cusimano & Roberts, Gadsden.

For Appellees: George W. Royer, Jr., of Sirote & Permutt, P.C., Huntsville.

JUDGES: SHORES, Hornsby, Maddox, Houston, Kennedy

OPINION BY: SHORES

OPINION

[*428] **SHORES, JUSTICE.**

Stephen Hurley appeals from a summary judgment entered on June 5, 1991, in favor of the Marshall County Commission, the Marshall County Personnel Board, and individual Marshall County commissioners. We affirm in part, reverse in part, and remand.

The Marshall County Commission ("Commission") hired Stephen Hurley as Marshall County engineer on January 9, 1984. Hurley was hired after the adoption of Act 76-616, Ala. Acts 1976, and Act 82-206, Ala. Acts 1982. At all times during his tenure as county engineer, Hurley lived in Etowah County, Alabama. The Commission was aware when it hired him that Hurley was not a resident of Marshall County.

The Commission terminated Hurley's employment as county engineer on March 11, 1991, citing his failure to reside in Marshall County, as required by Act 76-616, as the reason for his termination. On March 8, 1991, Hurley requested a written notice and a hearing concerning [**2] his termination, which the Commission denied. Hurley filed a grievance with the Marshall County Personnel Board ("Board") against the Commission on March 12, 1991. The Board, in turn, sued the Commission for a declaratory judgment, to determine whether termination of the Marshall County engineer was controlled by Act 76-616 or by Act 82-206, which established a merit system for Marshall County employees. The Board later added Hurley as a defendant in the declaratory action.

[*429] Hurley filed a counterclaim against the Board and a cross-claim against the Commission, alleging a violation of his constitutional right to due process and seeking damages under 42 U.S.C. § 1983. Hurley later sued Marshall County and members of the Marshall County Commission as third-party defendants. The Board and the Commission moved independently for summary judgment, and the commissioners moved for a partial summary judgment. The trial court on June 5, 1992, order entered a judgment declaring that Act 76-616 governed the employment (and termination) of Hurley as county engineer, and it entered a summary judgment in favor of the Commission, the individual commissioners, and [**3] Marshall County on Hurley's cross-claim and third-party claims. On June 16, 1992, the trial court amended its June 5 judgment to enter a summary judgment in favor of the Board on Hurley's counterclaim. Hurley appeals the June 5 order.

The primary issue is whether Act 82-206 repealed Act 76-616 by implication. A related issue is whether Hurley's employment as county engineer was governed entirely by Act 76-616, as the trial court found, or

whether Hurley's employment also falls within the purview of Act 82-206, which guarantees due process in matters of employment to Marshall County merit system employees.

A summary judgment is proper when there exists no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56, A. R. Civ. P.; *King v. Breen*, 560 So. 2d 186 (Ala. 1990). In determining the existence or absence of a genuine issue of material fact, this Court is limited to a consideration of the factors that were before the trial court when it ruled on the summary judgment motion. *Broadmoor Realty, Inc. v. First Nationwide Bank*, 568 So. 2d 779 (Ala. 1990). However, this Court's [**4] reasoning is not limited to that applied by the trial court. *Hill v. Talladega College*, 502 So. 2d 735 (Ala. 1987).

The parties do not dispute the material facts in this case. Therefore, we need only address whether the court properly applied the law to those facts. The trial court, applying well-established laws of statutory interpretation, held that Act 82-206 did not repeal Act 76-616, and, therefore, that Hurley's employment with Marshall County was governed entirely by Act 76-616.

Act 76-616 creates the position of Marshall County engineer and provides for the engineer's employment and termination by the Commission, as follows:

> "Section 12. Engineer Employed. The commission shall employ a County Engineer, who shall be a thoroughly qualified and competent civil engineer, possessing all the qualifications as specified for County Engineers under the General Laws of Alabama; and he shall devote his entire time and attention to the maintenance and construction of the public roads, highways, bridges, and parks, and other public properties of Marshall County, and shall reside in Marshall County during his employment as county engineer. Termination of [**5] the employment of the county engineer shall only be made by an affirmative vote of four (4) members of the commission at a regular session of the commission and with the approval by a majority vote of the Marshall County Salary Commission."

The law establishing the Marshall County Salary Commission was expressly repealed by § 19, Act 82-206, Ala. Acts 1982, before Hurley was hired as county engineer. Thus, under Act 76-616 alone, termination of the county engineer is solely within the discretion of the Commission, without review. Because Act 76-616 contains no other guidelines for the termination of the county engineer, he is an "at will" employee unless some other act entitles him to due process rights in his employment. We conclude that under Act 82-206, Hurley is entitled to due process safeguards in his termination.

Act 82-206 created a merit system for Marshall County employees and established the Marshall County Personnel Board to govern the "appointment, hiring, salaries, benefits, removal and official conduct" of Marshall County employees. Act 82-206, [*430] Acts of Alabama 1982, at 242. The pertinent parts of this act provide:

> "Section 2. As used in this Act, unless the [**6] context clearly requires a different meaning: 'County' means Marshall County, Alabama; 'employee' means any person . . . not excepted by Section 3 of this Act, who is employed in the service of Marshall County or any board, agency, or instrumentality thereof; 'merit employee' means any such employee who shall have completed six months of probationary employment; 'Board' means the Personnel Board created by this Act. . . .
>
> "Section 3. The provisions of this Act, shall apply to all officials and employees in the service of the County or any board paid by the Marshall County Commission, agency or instrumentality thereof except: (a) persons holding elective offices; (b) members of appointive boards, commissions, and committees; (c) all employees of the County Board of Education; (d) independent contractors; [and (e)] any person whose employment is subject to the approval of the United States Government or any agency thereof.
>
> ". . . .
>
> "Section 13. (a) The county commission, any member of the governing body, or the head of any department or office, respectively, can remove, discharge, or demote any merit employee who is directly under such governing body, mem-

> ber thereof, or department [**7] head, provided that within five calendar days a report in writing of such action is made to the Board and employee, giving the reason for such removal, discharge or demotion. The employee shall have ten calendar days from the time of notification of his discharge, removal, or demotion in which to appeal to the Board. If such appeal be filed, the Board shall thereupon order the charges or complaint to be filed forthwith in writing, if not already filed, and within 15 calendar days shall hold a hearing de novo on such charges. No merit employee shall be removed, discharged, or demoted except for some personal misconduct, or fact, rendering his further tenure harmful to the public interest, or for some cause affecting or concerning his fitness or ability; and if such removal, discharge or demotion is appealed to the Board, then the same will become final only upon affirmation by the Board after a hearing upon written charges or complaint has been had and after an opportunity has been given such employee to face his accusers and be heard in his own defense. . . . Hearings on appeal shall be held within 30 days from the date of receipt of written request to the Board. In all cases, the [**8] decision of the Board shall be reduced to writing and entered in the record of the case and shall include the Board's finding of facts upon which its decision is based."

Act 82-206.

Hurley contends that the trial court erred in holding that Act 82-206 did not impliedly repeal Act 76-616. We disagree. A later statute may repeal an earlier statute by implication only under certain circumstances, such as when the two statutes, taken together, are so repugnant to each other that they become irreconcilable. "Repeal of a statute by implication is not favored, however, and a prior act is not repealed unless provisions of a subsequent act are directly repugnant to the former." *Merrell v. City of Huntsville*, 460 So. 2d 1248, 1251 (Ala. 1984) (citing *Ex parte Jones*, 212 Ala. 259, 102 So. 234 (1924)). Moreover, "legislative intent is a crucial factor in determining whether two statutes are irreconcilable so as to require repeal." *Id.*

Act 76-616 established the Marshall County engineer as an "at will" employee whose employment could be terminated by the Marshall County Commission. Subsequently, Act 82-206 established [**9] a merit system of employment for all Marshall County employees not excepted by § 3 of the Act. As shown below, these two acts are not so repugnant to each other, or in such irreconcilable conflict, that one must be repealed by implication for the other to continue to operate. Therefore, we affirm that part of the trial court's judgment holding [*431] that Act 76-616 is not repealed by Act 82-206.

The trial court's conclusion that employment of the Marshall County engineer is governed solely by Act 76-616 does not comport with our law of statutory construction, however.

> "It is only when two laws are so repugnant to or in [irreconcilable] conflict with each other that it must be presumed that the Legislature intended that the latter should repeal the former. If there is a reasonable field of operation, by a just construction, for both, they will both be given effect. This is said to be preferable to repeal by implication."

Davis v. Browder, 231 Ala. 332, 335, 165 So. 89, 91 (1935), quoted in *City of Tuscaloosa v. Alabama Retail Ass'n*, 466 So. 2d 103, 106 (Ala. 1985).

There is nothing to indicate that the [**10] legislature did not intend for Act 82-206 to apply to the Marshall County engineer. The legislature specifically listed, in § 3 of Act 82-206, five classes of Marshall County employees whose employment would not be covered by the merit system. (See § 3, quoted above.) The county engineer's position does not fit within any of these exceptions. Because the legislature drafted 82-206 to "apply to all officials and employees" of Marshall County not excluded by § 3, and because the county engineer is not excluded by § 3, then the legislature must have intended for employment of the county engineer to be covered by the merit system established by Act 82-206. Further analysis supports this conclusion.

The overlap between Act 76-616 and Act 82-206 concerning employment of the county engineer creates an ambiguity or uncertainty as to what employment status the legislature intended the county engineer to have. The earlier act not only specified conditions of employment for the county engineer, but also enumerated duties of the engineer, the role of the engineer in purchasing, and the requirement that the engineer be bonded, and allowed the Marshall County Commission to set the salary for the [**11] county engineer. §§ 12-16, Act 76-616. Most of these provisions do not con-

flict with Act 82-206. Because the earlier act enumerated no reasons or conditions necessary for the termination of the county engineer, other than a vote by the Marshall County Commission and approval by the Salary Commission, under Act 76-616 the engineer was an "at will" employee with no due process expectations in his employment. Act 82-206, however, grants the county engineer, and all other county employees not excepted under § 3, due process rights, as merit system employees, to a hearing and to an appeal process, in order to ensure that any such employee is not terminated without cause. To resolve this ambiguity, we must ascertain and give effect to the intent of the legislature in enacting Act 82-206. *John Deere Co. v. Gamble*, 523 So. 2d 95, 99 (Ala. 1988); *Advertiser Co. v. Hobbie*, 474 So. 2d 93, 95 (Ala. 1985).

When possible, the intent of the legislature "must be gathered from the language of the statute itself, and only when the language of the statute is ambiguous or uncertain will the court resort to considerations of fairness or policy [**12] to ascertain the legislature's intent." *Advertiser Co., supra*, at 95. We must rely on these fairness and policy considerations to determine whether the legislature, in failing to exclude the county engineer from the merit system established by Act 82-206, intended to extend to the county engineer the due process protection of the merit system.

> "In deciding between alternative meanings to be given to an ambiguous or uncertain statutory provision, we will not only consider the results that flow from assigning one meaning over another, but will also presume that the legislature intended a rational result, one that advances the legislative purpose in adopting the legislation, that is 'workable and fair,' and that is consistent with related statutory provisions."

John Deere, supra, at 100 (citations omitted).

Clearly, the legislature, in enacting §§ 12-16 of Act 76-616, intended to create the position of county engineer, in order to ensure efficient administration of the construction and maintenance of the roads, [*432] parks, bridges, and other public properties of Marshall County. The hiring and firing of the county engineer were placed in the hands of the Marshall County [**13] Commission. The termination of the county engineer by the Marshall County Commission, however, was subject to review by the Salary Commission. When the legislature specifically abolished the Salary Commission by enacting the repealer clause of Act 82-206, it eliminated this review by the Salary Commission. However, at the same time Act 82-206 abolished the Salary Commission, it also established the Personnel Board to regulate the employment of Marshall County employees and created a merit system of employment whereby the termination of any merit system employee was subject to due process protection--including a right to appeal the termination--and whereby termination had to be for just cause. Thus, the same act abolishing review by the Salary Commission of termination of the county engineer established review by the Personnel Board of the termination of any merit employee.

We note that Act 82-206, by creating a merit system for Marshall County employees, is similar to other civil service statutes passed by the Alabama legislature. "The purpose of civil service statutes is to provide stability, continuity, and security in the various job classifications within a municipality." *Williams v. Ivey*, 484 So. 2d 468, 469 (Ala. Civ. App. 1985) [**14] (citation omitted). These statutes also ensure that protected employees are not discharged by local authorities for political reasons. *See id.*; *Miller v. State*, 249 Ala. 14, 22, 29 So. 2d 411 (1947).

The purpose of these laws is to promote efficiency of county government by providing to county employees rights guaranteeing stability, continuity, and security in their jobs. It would seem nonsensical for the legislature to pass an act providing stability, continuity, and security to all nonexcluded county merit system employees, without intending that a position as important to county government as the county engineer also be included in the merit employment system. The performance of the county engineer, as the individual primarily responsible for the construction and upkeep of public roads and other public properties within the county, bears directly on the efficiency of the county government. This conclusion is strengthened by the fact that the county engineer does not fit within any of the classes of county employees excluded from the merit system by § 3 of Act 82-206.

We hold that the Marshall County engineer is a merit system employee [**15] under Act 82-206, and that the conditions, duties, and responsibilities of his employment are governed by Act 76-616 insofar as they do not conflict with the status of the county engineer as a merit employee under Act 82-206. We need not address the other issues raised in this appeal, because they can be addressed more properly by the trial court on remand.

Based on the foregoing, we affirm that portion of the trial court's judgment holding that Act 82-206 does not repeal Act 76-616, but we reverse that portion holding that the employment of the Marshall County engineer is governed solely by Act 76-616; and we remand

the cause for further consideration consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Hornsby, C. J., and Maddox, Houston, and Kennedy, JJ., concur.

ISBELL v. SHELBY COUNTY et al.

7 Div. 510.

SUPREME COURT OF ALABAMA

235 Ala. 571; 180 So. 567; 1938 Ala. LEXIS 310

April 16, 1938, Decided

PRIOR HISTORY: [***1] Appeal from Circuit Court, Shelby County; W. W. Wallace, Judge.

Bill by Barney Isbell against Shelby County, the Board of Revenue, and the Treasurer of said County, to enjoin issuance of proposed warrants, and cross-bill by respondents for a declaratory judgment. From a decree favorable to the respondents, the complainant appeals.

Affirmed as corrected.

DISPOSITION: Corrected and affirmed.

CORE TERMS: highway, gasoline taxes, Gen Acts, allotment, interest-bearing, indebtedness, registration, allocated, warrants issued, contractor, Control Act, public roads, registered, purchaser, governing body, issuance, lawfully, general power, agreed price, nonnegotiable, auditing, suffice, Revenue Act, county treasurer, phraseology, invalidate, corrected, discount, audited, rules of law

HEADNOTES

1. Counties

Interest-bearing warrants issued by county for highway construction purposes, payable solely from county's future allotments of state gasoline taxes and not operating as a charge on general credit of county and not affecting general revenues of county nor proceeds of any levy by county for special county purposes under constitution, were not unconstitutional. Gen.Acts 1935, p. 441, § 348, Schedule 156.11.

2. Counties

Highways

A county can contract with State Highway Department for construction of highway at agreed price and can issue in payment therefor to the Highway Department its interest-bearing warrants payable solely from county's future allotments of state gasoline taxes. Gen.Acts 1935, p. 441, § 348, Schedule 156.11.

3. Counties

Where county contracts with State Highway Department for construction of public highway at agreed price and to issue in payment therefor to Highway Department interest-bearing warrants payable solely from county's future allotments of state gasoline taxes, further auditing by county is not essential.

4. Counties

A county's issuance of interest-bearing warrants which were payable solely from county's future allotments of state gasoline taxes and did not operate as a charge on general credit of county, and the proceeds of which were to be used to pay contractor constructing highway, was not objectionable as a borrowing of money, notwithstanding that warrants were worth less than par and that the discount at which they would be bought might represent interest.

5. Counties

A provision in the Revenue Act authorizing county to direct State Tax Commission to pay county's share of state gasoline taxes directly to State Highway Department did not invalidate proposed plan by which county's share of taxes was to be paid to county treasurer for payment of interest-bearing warrants issued by county and payable from county's future allotments of state gasoline taxes. Gen.Acts 1936-37, Ex.Sess., p. 179; Gen.Acts 1935, p. 441, § 348, Schedule 156.11.

6. Highways

A provision in the Revenue Act authorizing county to direct State Tax Commission to pay to State Highway Department such part of county's share of state gasoline taxes as might be agreed upon by county and Governor did not restrict the general power of the county over the matter of road construction. Code 1923, § 1347; Gen.Acts 1935, p. 441, § 348, Schedule 156.11.

7. Counties

A provision that warrants to be issued by county for highway construction purposes, payable solely from county's future allotments of state gasoline taxes, were

to bear interest, did not invalidate proposed plan for issuance of warrants, as against contention that provision for interest created a diversion of gasoline tax funds from road construction purposes in violation of statute allotting such funds to county. Gen. Acts 1935, p. 441, § 348, Schedule 156.11.

8. Counties

The rules of law concerning registration of claims against counties were not applicable to registration of interest-bearing warrants issued by county for highway construction purposes payable solely from county's future allotments of state gasoline taxes. Gen.Acts 1935, p. 441, § 348, Schedule 156.11.

9. Statutes

The County Financial Control Act must be read as a whole. Gen.Acts 1935, p. 803.

10. Counties

A provision in the County Financial Control Act that county cannot issue warrants against public funds until funds are available did not invalidate interest-bearing warrants issued by county for highway construction purposes payable from county's future allotments of state gasoline taxes, since county's share of state gasoline taxes never reached or affected the general funds of the county and the act was therefore not applicable to county's share of such taxes. Gen.Acts 1935, pp. 804, 805, §§ 2, 7; Gen. Acts 1935, p. 441, § 348, Schedule 156.11.

11. Counties

County had right to issue interest-bearing warrants for highway construction purposes payable solely from county's future allotments of state gasoline taxes and not operating as a charge on general credit of county. Gen.Acts 1935, p. 441, § 348, Schedule 156.11.

12. Counties

Recitals in nonnegotiable interest-bearing warrants issued by county for highway construction purposes payable solely from county's future allotments of state gasolime taxes and not operating as a charge on general credit of county, that warrants had been registered and that indebtedness represented by warrants was a lawfully incurred indebtedness which had been audited and allowed by governing body of county, would not estop county from asserting that warrants were payable only out of county's share of gasoline taxes. Gen.Acts 1935, p. 441, § 348, Schedule 156.11.

13. Counties

Nonnegotiable interest-bearing warrants issued by county for highway construction purposes payable solely from county's future allotments of state gasoline taxes and not operating as a charge on general credit of county should not contain statement that warrants had been registered and that indebtedness represented by warrants was a lawfully incurred indebtedness which had been audited and allowed by governing body of county. Gen.Acts 1935, p. 441, § 348, Schedule 156.11.

BROWN, J., dissenting.

COUNSEL: Barney Isbell, of Columbiana, pro se.

Wm. Alfred Rose and Bradley, Baldwin, All & White, all of Birmingham, amici curiae.

Schedule 156.11 does not contemplate the issuance of any warrants by the county drawn on its treasurer. But if warrants can be issued at all, they cannot be issued until claim is first filed with the governing body, and such claim audited and allowed. Code 1923, §§ 224, 225; Smith v. McCutchen, 146 Ala. 455, 41 So. 619. The County Control Act applies to Shelby county, applies to funds here involved, and hence the proposed warrants would not be authorized. Gen.Acts 1935, p. 803. Authority to issue such warrants cannot be referred to the act dealing with counties collecting $ 40,000 per annum from the road and bridge tax authorized by section 215 of the Constitution, [***2] for the reason that Shelby county is shown not to be within that classification. Gen.Acts 1935, p. 231. It is questionable whether the issue of bonds, securities, orders, or other legal commitments against the gasoline tax allotments are fairly germane to the generic purpose of road construction. Gen.Acts 1936-7, p. 179; Gen. Acts 1935, § 348, Schedules 156.9, 156.11. The authority granted by Schedule 156.11 to county governments to make agreements with the State Highway Department for road work and to direct the State Tax Commission to pay over to the highway department funds agreed upon, should be limited to the current year's allotment. County governments may not commit by contract future boards to policies which are essentially current and discretionary in character. Willett & Willett v. Calhoun County, 217 Ala. 687, 117 So. 311; 15 C.J. 542. Counties in Alabama have no implied power to borrow money and must look to express statutory or constitutional authority. Simpson v. Lauderdale County, 56 Ala. 64; Allen v. Intendant, etc., 89 Ala. 641, 8 So. 30, 9 L.R.A. 497. If the device proposed is not authorized, the designation of the instruments as warrants and their registration would [***3] add nothing to their validity. Littlejohn v. Littlejohn, 195 Ala. 614, 71 So. 448; Mobile County v. Williams, 180 Ala. 639, 61 So. 963.

L. H. Ellis, of Columbiana, for appellees.

The validity of the procedure here involved has been specifically decided in. Lyon v. Shelby County, Ala.Sup., 177 So. 306; Herbert v. Perry, Ala.Sup., 177 So. 561. The county has power to contract with reference to roads, except as specifically limited by debt or other express limitation. Code 1923, §§ 1347, 6443, 6759; Gen.Acts 1927, p. 391; Ala.Code 1928, § 1397(110); Gen.Acts 1935, § 348, Schedule 156, p. 512. The authority by Schedule 156.11 of the Revenue Act has not been restricted in any wise by Acts 1935, p. 231. The orders or warrants proposed and like special fund commitments are in no sense obligations of the county within the prohibitory definition. Opinions of the Justices, 230 Ala. 673, 163 So. 105; Kimmons v. Jefferson County Board, 204 Ala. 384, 85 So. 774; People's Bank v. Moore, 201 Ala. 411, 78 So. 789; Lyon v. Shelby County, supra; Herbert v. Perry, supra. The fact the warrants bear interest does not affect their validity; both principal and interest are devoted to road purposes [***4] as required by Schedule 156. Littlejohn v. Littlejohn, 195 Ala. 614, 71 So. 448; Board of Revenue v. Farson, Son & Co., 197 Ala. 375, 72 So. 613, L.R.A.1918B, 881. The County Budget Act does not apply to gasoline tax allotments which are expressly withheld from general fund purposes. Gen.Acts 1935, p. 803; Opinion of the Justices, supra; Herbert v. Perry, supra; Reports of Atty.Gen., Vol. V, p. 32. The discretion of the county authorities with respect to warrants against proceeds of a special fund is not limited to the terms of their offices. Littlejohn v. Littlejohn, supra; Board of Revenue v. Farson, Son & Co., supra; Ala.Code 1928, § 1397(110); Gen.Acts 1935, p. 231. The devotion of proceeds of a continuing fund for a stated statutory purpose until the purpose is accomplished is in no sense a loan. Littlejohn v. Littlejohn, supra; Board of Revenue v. Farson, Son & Co., supra; Lyon v. Shelby County, supra; Herbert v. Perry, supra. The form of the proposed warrants is without bearing upon the validity of the arrangement, and which has been affirmed. Lyon v. Shelby County, supra; Herbert v. Perry, supra.

JUDGES: GARDNER, Justice. ANDERSON, C. J., and THOMAS, BOULDIN, FOSTER, and KNIGHT, [***5] JJ., concur. BROWN, J., dissents.

OPINION BY: GARDNER

OPINION

[*573] [**568] GARDNER, Justice.

In Lyon v. Shelby County, 177 So. 306 [1] this court considered and approved substantially the same plan proposed by the county, as here presented, for financing its proportion (approximately one-third) of the cost of construction of one of the county's highways under what is commonly known as the "three way project."

1 Ante, p. 69.

Some additional considerations are advanced in this renewed attack upon the plan which require brief treatment. It is proposed to finance the county's pro rata of expense out of that portion (one-half of one-third) of the gasoline tax allotment provided for by Schedule 156.11 of the Revenue Act of 1935, Gen.Acts 1935, pp. 441, 512, § 348, wherein there is a provision for an agreement of co-operation between the counties and the State Highway Department as to these funds to be used in the construction and maintenance of public roads and bridges, evidently intended to facilitate [***6] the work and aid the counties in the matter of road construction, which originally was primarily a county obligation.

The statute provides that the county has the authority to "direct the State Tax [**569] Commission to pay over to the State Highway Department such part of said funds as may be agreed upon by the * * * county, and the Governor." Taking advantage of this statutory provision, the original agreement contemplated the payment to, or upon the order of, the State Highway Department of $ 2,500 per month out of this allotment of the gasoline tax. But it was found that, if the work was to be expedited and the road completed in a reasonable time, it was necessary that the county make available its agreed contribution in cash. Thereupon the county agreed with the Highway Department upon the plan here proposed, that is, the issuance of interest-bearing warrants payable out of this particular fund, from sale of which the county's cash contribution to the Highway Department for construction of the road may be obtained. The State Highway Department and the county have agreed, and the Governor has approved.

The warrants to be issued are not to be a charge on the general credit [***7] of the county, and so expressly disclose on their face, but are payable solely from the funds which form a part of the proceeds of a state excise tax, allocated by statute to the counties for the construction and maintenance of roads and highways. They in no manner affect the general revenues of the county, nor the proceeds of any levy by the county for special county purposes under the Constitution. The proposed warrants, therefore, do not fall within any constitutional prohibition (In re Opinions of the Justices, 230 Ala. 673, 163 So. 105; Lyon v. Shelby County, supra; Herbert v. Perry, Ala.Sup., 177 So. 561 [2]), and the question for consideration rests upon the matter of statutory construction.

2 Ante, p. 71.

The plan is not one to borrow money. The county has now allocated to it these funds for a definite purpose, the construction and maintenance of public roads. It has the expectancy of a continuation of such allocation, and that of consequence the fund will continue. [***8] And [*574] the county has the unquestioned right to contract with the State Highway Department for the construction of this public road at the agreed price and to issue, in payment therefor to said Highway Department, its interest-bearing warrants. Littlejohn v. Littlejohn, 195 Ala. 614, 71 So. 448; Board of Revenue v. Merrill, 193 Ala. 521, 68 So. 971; Talley v. Commissioners' Court, 175 Ala. 644, 39 So. 167; Lyon v. Shelby County, supra.

And under such a contract further auditing by the county would not be essential. Talley v. Commissioners' Court, supra.

Looking through form to substance, it is difficult to see wherein the plan here proposed differs materially from that just mentioned. In the one the warrants are issued to the contractor, and in the other the warrants, though of a non-negotiable character, are sold by the contractor or at his suggestion, and the proceeds used to pay him in cash, and the purchaser rather than the contractor is delayed in payment of the cash. The purchaser is compensated for the delay by way of interest on the warrants, just as would be the contractor had the warrants been issued [***9] direct to him. These instruments are not warrants of the county in the true sense, but are merely evidences of transfer and pledge of a definite fund to their payment. Their issuance amounts in effect to a sale by the county of the anticipated revenue to be derived from the gasoline tax allocated by the state to the county for these purposes. There is no county obligation to pay, and the funds received from a sale of these instruments, denominated warrants, are in no sense a borrowing of money.

The authorities cited, therefore, relative to the authority of municipal organizations to borrow money (Allen v. Intendant, etc., of La Fayette, 89 Ala. 641, 8 So. 30, 9 L.R.A. 497; Simpson v. Lauderdale County, 56 Ala. 64; McQuillin's Law of Municipal Corporations, 2d Ed. § 2318; Mayor, etc., of Nashville v. Ray, 86 U.S. 468, 19 Wall. 468, 22 L. Ed. 164) are without application.

The question of interest bears a relation to the cash and credit price of an article sold. The warrants, by reason of their deferred status, are worth less than par, and the contractor or purchaser may state his price in terms of a necessary discount, and the fact that such [***10] discount may represent a given rate of interest does not make such a transaction a loan of money.

It is suggested that the proposed plan is variant from that provided in Schedule 156.11, supra, in that here the funds allocated to the county are paid by the State Tax Commission to the county treasurer, while the language of the act [**570] indicates a plan whereby the funds never reach the county but are paid over by the commission directly to the State Highway Department. But this is a difference in form only and not of substance, an administrative feature with which the act was not concerned, except in a general way.

But the argument overlooks the purpose of the act, and the character of authority possessed by the governing body of the county. The Highway Department and the county have agreed that the funds be sent to the county treasurer and then paid out. There is nothing in the act indicating any restriction whatever of the general power of the county over the matter of road construction. The general statute, section 1347, Code 1923, stands wholly unaffected, and must be considered in this connection. By that statute the governing county body is given unlimited jurisdiction [***11] and powers as to the construction and maintenance of public roads and bridges, and may make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts or boards for such purpose, provided the payment of the contract price does not extend beyond ten years. The lawmakers could have given power in no more comprehensive terms than they employed in this statute, and the courts have no right to ignore it, or refuse to recognize its significance.

There is here no charge of fraud or unfair dealings, but good faith is acknowledged, and the time limit of the statute is observed. It is clear enough, therefore, that under the broad language of this statute, considered in connection with that of Schedule 156.11, supra, the county and the Highway Department had the right to enter into this contract and effectuate the change of method as to payment of the fund, as above indicated.

Nor are we able to see any restriction upon this authority by any provision of the Act approved March 4, 1937, Gen.Acts 1936-37, Ex.Sess. p. 179, which merely reiterate the purposes for which these [*575] funds are to be used, with some clarification as to detail [***12] matter intended to be included within such purpose.

And what has been said as to the nature of the proposed plan should suffice to indicate our view that the payment of interest does not constitute a diversion of the funds from the purpose of road construction to which it must be devoted, but it is merely a part of the contract deemed necessary to effectuate the very purpose of the Act.

The case of Willett v. Calhoun County, 217 Ala. 687, 117 So. 311, dealt with the matter of employment of counsel under contract extending beyond the term of the officer the counsel were employed to serve, and, upon the theory it was contrary to public policy, the extended contract was invalidated. That authority is without application here, as no such question of public policy is involved, and, indeed, the provision for a ten-year period of limitation, found in section 1347, Code, should suffice for a refutation of this insistence.

Nor are the rules of law concerning registration of claims against counties (Mobile County v. Williams, 180 Ala. 639, 61 So. 963; Commissioners' Court v. Moore, 53 Ala. 25) applicable to the matter of registration of these warrants. [***13] There is no law so far as these warrants are concerned requiring their registration. They are to be registered for convenience and as a matter of record bookkeeping. But this results from the contract between the county and the Highway Department, which was entirely appropriate though not required by law.

The County Financial Control Act, Gen.Acts 1935, p. 803, is similar in its design and object to the Budget and Financial Control Act, Gen.Acts, Ex.Sess.1932, p. 35, for the state, considered to some extent in Southern Industrial Institute v. Lee, 234 Ala. 404, 175 So. 365, and much of the discussion therein as to the purpose of the act is applicable to that relating to the counties.

Counsel lay stress upon the expression in section 2 of the County Act, supra, "all public funds" that may come under the management and control of the counties, and argue that this fund allocated to the county of the gasoline tax to be used solely for highway purposes is within the influence of that act, and therefore, warrants against it are illegal, as under section 7 thereof no such warrant can issue until funds are available.

But we think this too restricted an interpretation of the [***14] act. It must be read as a whole and construed upon consideration of the entire act. So considered, we think it clear enough this Act has no relation to this particular fund which never reaches, [**571] and can never affect, the general funds of the county.

We think a detailed discussion of the act is here unnecessary, and content ourselves with the statement of our agreement with the opinion of the Attorney General upon this very question, as found in his quarterly report, volume VIII, page 156, and volume V, page 32.

As to the effect of the act relating to counties collecting $ 40,000 per annum for a special tax under section 215 of the Constitution, Gen.Acts 1935, p. 231, upon the power of the counties not within that classification, such as is here presented, we held in Herbert v. Perry, supra, that such an act in no manner limited the general power of the counties under section 1347, Code, and they were of consequence unaffected thereby. We noted also that the time period was changed from ten to twenty years. We adhere to the view expressed upon that question in the Herbert Case, supra, and deem further discussion unnecessary.

We have elaborated somewhat on the [***15] holdings in Lyon v. Shelby County, supra, and Herbert v. Perry, supra, and expressed our views upon objections not discussed because not presented in those cases. After all, constitutional objections being out of the way, the matter becomes one of legislative intent to be drawn from a proper construction of our statutes relating to the subject in hand.

Our conclusion is that Shelby County was within its legal rights in entering into the agreement with the Highway Department, and has authority to go forward with the proposed plan, and that the court properly dismissed the bill.

There was no specific attack made by appellant in brief, however, on the form of the warrants to be issued, though in the declaratory decree rendered on cross-bill the form of warrants is approved.

Counsel for the county states "conventional phraseology" was adopted to make them marketable. We feel constrained, [*576] however, to express disagreement with some of the phraseology used. The transaction is a simple one. A certain allocated fund is being sold, assigned, or pledged for the payment of these warrants, and the county is to maintain this fund as it is received from the [***16] state inviolate for such purpose. But the warrant in the beginning acknowledges that the County of Shelby is indebted in the manner hereinafter stated. There is no indebtedness of Shelby County, and, though it subsequently appears the credit of the county is not pledged, yet the opening statement may well be considered as misleading. This is further emphasized by later phraseology in the warrant to the effect that the "indebtedness has been lawfully incurred, and to the extent required by any provision of law in respect thereof, has been audited and allowed by the governing body of the county; that such indebtedness is lawfully due without conditions, abatement or offset of any description; that this warrant has been registered in the manner required by law." There are other references to the "indebtedness evidenced and ordered paid by this warrant," as being within the debt limit allowed by law, and as being consistent with the Constitution and laws of Alabama.

The record disclosing upon its face there is no indebtedness of the county here involved, that in fact no auditing or allowance of claim nor their registration was required by law, we think it clear that all such recitals,

[***17] as above indicated, would not suffice as an estoppel against the county, and the purchasers of such nonnegotiable warrants would not have the right to rely thereon. Mobile County v. Williams, supra; Commissioners' Court v. Moore, supra; Jeffersonian Publishing Co. v. Hilliard, 105 Ala. 576, 17 So. 112.

While we uphold the right of the county to issue warrants upon the plan proposed, yet we do not approve the form of the warrants adopted. On the contrary, we disapprove the form to the extent herein indicated, and the declaratory decree will be modified and corrected in this respect, and as thus corrected as to the form of the warrants will be here affirmed.

Corrected and affirmed.

ANDERSON, C. J., and THOMAS, BOULDIN, FOSTER, and KNIGHT, JJ., concur.

BROWN, J., dissents.

Jeanne T. Jackson, et al. v. Lyn Moody, et al.

No. 81-870

Supreme Court of Alabama

431 So. 2d 509; 1983 Ala. LEXIS 4286

April 1, 1983

SUBSEQUENT HISTORY: [**1] As amended June 20, 1983.

PRIOR HISTORY: Appeal from Baldwin Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: street, beach, vacation, alleyway, gulf, alley, motel, highway, shores, feet, property owners, convenient, dedicated, abutting, ingress, vacated, egress, cottage, remoteness, plat, parking, guests, property interest, public street, purchaser, block, traffic, parked, owners of real property, public ways

COUNSEL: Allan R. Chason for Chason & Chason, Bay Minette, for Appellant(s).

John D. Whetstone, Gulf Shores, for Appellee(s).

JUDGES: Beatty, Justice. Torbert, C.J., Maddox, Jones and Shores, JJ., concur.

OPINION BY: BEATTY

OPINION

[*510] This is an appeal by certain owners of real property in the town of Gulf Shores from a circuit court judgment declaring void the vacation of a public alleyway. We affirm.

The controversy originated from a declaration of vacation of a public alley by the defendants, owners of Lots 3, 4, 5 and 6 of Block 1, Romeo and Skipper's Subdivision, in accord with Code of 1975, § 35-2-54. For aught that appears, the vacation was regularly obtained. Plaintiffs are also owners of real property in Romeo and Skipper's Subdivision. They brought this action to set aside the vacation on the ground that the alleyway was a vital easement to them for ingress and egress to a private beach. The defendants filed an answer containing a general denial and an attack upon the plaintiffs' standing to sue, because, they alleged, plaintiffs' reasonable access to the private beach by way of [**2] a public street was unimpaired by the vacation of the alleyway. The trial court heard the matter *ore tenus*, ultimately declaring the vacation null and void, and specifically finding that the vacation would impair plaintiffs' convenient access to the beach.

Before us the defendants contend that the evidence adduced below was insufficient to establish an interference with reasonable access to beach property, in which plaintiff had a property right, that would give plaintiff standing to have the vacation of the alleyway set aside.

That evidence established that plaintiffs, the Moodys, own a motel located on Lots 14, 15 and 36 within Romeo and Skipper's Subdivision in Gulf Shores. They also own, with certain others, an undivided interest in beach front property on the Gulf of Mexico. Plaintiffs' motel property fronts on the north side of East Gulf Shores Boulevard, the "Gulf Highway," and the defendants own lots south of that highway. East Fourth Street is a dedicated public street 36 feet 3 inches in width and 300 feet in length, and running from its north end at "Gulf Highway" south to a private beach on the Gulf of Mexico at its south end. South of "Gulf Highway" and running [**3] east and west so as to intersect East Fourth Street are two public alleys, each being 20 feet wide and 102 feet long. Neither Fourth Street nor the alleys have ever been publicly maintained. The respective streets and ways are depicted in the following plat:

[*511] [SEE ILLUSTRATION IN ORIGINAL]

Plaintiffs testified that their motel is approximately 200 feet from the beach and that the vacated alleyway is about halfway between the beach and the motel. Plaintiff's testimony was that his motel guests walk or drive the distance from the motel to the beach, using East Fourth Street as their access to the private beach. According to one of the plaintiffs, the next access available to his motel guests would be the public beach about four blocks up the highway, but that guests could not get to his private beach from that point without walking across

other private beaches; hence, the only legal access to plaintiffs' private beach was by East Fourth Street. [*512] Plaintiff Lyn Moody also testified that the vacation would eliminate some parking area and block other persons' rights of access to the beach as well. He estimated that at least one hundred people use this access [**4] to the beach, and that the parking of more than one car at the closed end of East Fourth Street would make it difficult to turn a car around.

Jerry Boddie, owner of a motel located in Gulf Shores directly behind the Moodys' motel, testified to the interference with access to the private beach in substance as did the Moodys. He emphasized that were there no alleyway, persons driving to the beach on East Fourth Street would find it necessary to park on that street's right-of-way, limiting the number of people who could use the beach and denying access to others, and restricting the turn around area if more than two or three vehicles were parked on East Fourth Street.

Ernest Frady, owner of a beach house in Romeo and Skipper's Subdivision, testified that he and his guests used East Fourth Street for access to the beach, and that closing the alleyway would hinder driving there and turning around, especially if cars were parked along East Fourth Street.

Pat Boddie, wife of Jerry Boddie, testified that the vacation would damage their business, devalue their property, and reduce access to the beach on East Fourth Street because the alleyway was used as a parking area. The gist of [**5] her conclusions was that parking on East Fourth Street would cause congestion and inconvenience and necessitate backing automobiles into the "Gulf Highway." Mrs. Boddie conceded that cars could pass one another in the alley, which was 20 feet wide, and on East Fourth Street as well, which is wide enough for more than two cars.

Defendant Mrs. Jeanne Jackson, owner of a beach cottage, testified that she used East Fourth Street for access to her cottage by car. She also testified that vacation of the alleyway would join her lots and make them more valuable. She testified that since 1973, when she purchased her cottage, and for a number of years before, when she rented a cottage for months at a time, she had never seen enough traffic "to amount to anything" on East Fourth Street; that the largest number of people on the beach from across the street was about twenty. She had never seen any traffic congestion; in fact, she said it would be difficult for cars to use the alleys because of the sand. Mrs. Jackson testified to her acquiescence in the vacation and in the permission of the town council to vacate the alley.

Mr. Tutt Barrett, a witness called for the defendants, testified [**6] concerning the extent of the use of East Fourth Street. Before Hurricane Frederic it was used as a driveway for persons who had Lots 5 and 6. Since the hurricane, it has been utilized by persons using his cottage. Use of nonowners has been very light; on summer weekends, he said, one car would put in there. When he bought an interest in Lots 5 and 6 he thought East Fourth Street was a private driveway. East Fourth Street, he said, is not very accessible to anyone, being only partly covered with shells, and that if the entire 36-foot width were shelled over there would be no trouble getting in and out.

Mr. Lee McPhearson testified, as one of the owners of Lots 5 and 6, that he had never seen anybody other than himself parked on East Fourth Street. He added that if East Fourth Street were shelled over, the vacation of the alley would not affect anyone's ability to come and go. He, and Mrs. Jackson earlier, testified that the vacation would enhance the value of their property.

It may be observed, in substance, that much of the testimony on both sides dealt with the actual use of the streets and alleys by vehicular traffic, with that testimony being in substantial conflict.

[**7] Section 35-2-54, allowing vacation of an alley, states that "convenient means of ingress and egress to and from their property shall be afforded to all other property owners owning property in the tract of land embraced in the . . . plat . . . ."

[*513] First, we decide that plaintiffs do possess standing to contest the vacation, notwithstanding the fact that they are not abutting property owners. They are owners of lots in the subdivision with a designated beach area dedicated for the private use of owners like themselves. Thus, they have a property interest in the ways of access to that beach area as set forth in that plat, subject to the rule of "remoteness," *i.e.*, lack of a close connection between the wrong and the injury. Black's Law Dictionary, 5th ed. at 1164. See *Gwin v. Bristol Steel & Iron Works, Inc.*, Ala., 366 So. 2d 692 (1979). The fact that these plaintiffs have such a right in the dedicated beach area, an area whose obvious value requires no discussion for explanation, together with their proximity both to the beach area and to the access road to that area, make their interests in the subject matter far from remote.

On the merits we are guided [**8] by several decisions: *McPhillips v. Brodbeck*, 289 Ala. 148, 266 So. 2d 592 (1972); *Gwin, supra*; and *Booth v. Montrose Cemetery Association*, Ala., 387 So. 2d 774 (1980).

Brodbeck contains an extensive review of the principles of law which protect those who are affected by the vacation of dedicated streets, and recognizes that these principles apply to ingress to and egress from waterways as well as highways. In that case this Court re-

fused to uphold a vacation which deprived an abutting landowner of his only convenient and reasonable ingress to and egress from Mobile Bay, stating:

> "It is a matter of common knowledge of which we are not unaware that for those who live on or near the beautiful shores of our bays and gulf convenient access to them is of the greatest benefit and that such access enhances the value of such property. . . ." 289 Ala. at 154.

Likewise, *Gwin* contains an analysis of cases dealing with vacation, and accords protection to protestors of the vacation of a dedicated public street without regard to whether or not they own land abutting the way proposed to be closed.

Booth also clearly defines the interest of the protestor: [**9]

> "Case law in this State reflects that the statute authorizing a platted street to be vacated by 'the owner or owners of the lands abutting the street,' is interpreted to protect the interests of other property owners in the subdivision, who may not necessarily own property abutting the street or portions thereof sought to be vacated. Every purchaser of a lot shown on the recorded map of the subdivision has the right, as against the dedicator of the streets and the purchasers of the other lots, to have the designated scheme of public thoroughfares maintained in its integrity, as it existed when he purchased the property, and all persons whosoever may use these public ways as the occasion requires. *Whitten v. Ferster*, 384 So. 2d 88 (Ala. 1980); *Thetford v. Town of Cloverdale*, 217 Ala. 241, 115 So. 165 (1927); *Highland Realty Co. v. Avondale Land Co.*, 174 Ala. 326, 56 So. 716 (1911); *East Birmingham Realty Co. v. Birmingham Machine & Foundry Co.*, 160 Ala. 461, 49 So. 448 (1909).
>
> "The vacation statute is in derogation of the common law prohibition against the vacation of public ways and is interpreted by the Court, as mandated by constitutional due process standards, [**10] to protect the property interests of nonconsenting property owners affected by the proposed vacation, *subject only to the rule of remoteness. Gwin v. Bristol Steel & Iron Works, Inc.*, 366 So. 2d 692 (Ala. 1978). The remoteness limitation is also mentioned by the *Thetford* Court, where, in discussing the rights of the property owners adjacent to the street sought to be vacated, it states, 'The interest of the purchasers of lots more or less remote from the street in question may be more or less theoretical, depending on circumstances.'" 387 So. 2d at 776-777.

See also *Williams v. Norton*, Ala., 399 So. 2d 828 (1981).

As with the Montrose Cemetery in the *Booth* decision, no fact question can be presented here to invoke a rule of remoteness [*514] which would deny protection to these plaintiffs, as we have already stated, even though plaintiffs are non-abutting owners. Nor does the reference to convenient ingress and egress in § 35-2-54 limit the protection of their respective property interests in the alleyways in question. As Mr. Justice Sayre stated in *Thetford v. Town of Cloverdale*, 217 Ala. 241, 115 So. 165 (1927):

> "Nor is it of any [**11] consequence that all attingent owners other than appellant have access to other streets from their lots. Their lots were purchased with the covenant implied by the plat . . . that they should have more than one way of access . . . and it does not lie in the mouth of appellant to say that they should now be satisfied with one way only." 217 Ala. at 243.

It follows that the judgment of the trial court, based upon evidence presented *ore tenus* in a non-jury case, was correct in determining that the alleyway should not be vacated. That judgment, therefore, must be, and it is, affirmed.

AFFIRMED.

Torbert, C.J., Maddox, Jones and Shores, JJ., concur.

JEFFERSON COUNTY et al. v. CITY OF BIRMINGHAM.

6 Div. 776.

SUPREME COURT OF ALABAMA

251 Ala. 634; 38 So. 2d 844; 1948 Ala. LEXIS 802

November 26, 1948, Decided

SUBSEQUENT HISTORY: [***1] Rehearing Denied February 17, 1949, 251 Ala. 634 at 641.

PRIOR HISTORY: Appeal from Circuit Court, Jefferson County; E. M. Creel, Judge.

Bill in equity by the City of Birmingham against the County of Jefferson, the members of the County Commission, and the Treasurer of said County, to enforce payment of certain tax collections to complainant. From a decree for complainant, respondents appeal.

DISPOSITION: Affirmed.

COUNSEL: Chas. W. Greer, Frank Bainbridge, Maurice Bishop, and John Foster, all of Birmingham, for appellants.

The local act of 1885, requiring the governing body of Jefferson County to include in its annual general tax levy a tax of one-tenth of one per cent. for county roads, was repealed by the adoption of the Constitution of 1901. Acts 1884-5, p. 709; Const. 1901, Sec. 215; Code 1907, § 138; Code 1896, § 1409; Code 1886, § 894; Code 1876, § 223; Acts 1875-6, p. 237; Local Acts 1886-7, p. 847; Jefferson Co. v. City of Birmingham, 221 Ala. 476, 129 So. 48; Exchange Drug Co. v. State Tax Comm. 218 Ala. 115, 117 So. 673; Board of Revenue v. Jefferson Co., 205 Ala. 338, 88 So. 16; Id., 205 Ala. 320, 88 So. 18; Littlejohn v. Littlejohn, 195 Ala. 614, 71 So. 448; Montgomery v. Montgomery [***2] Co., 190 Ala. 366, 67 So. 311; Southern R. Co. v. Jackson Co., 189 Ala. 436, 66 So. 570; Montgomery v. Montgomery Co., 185 Ala. 281, 64 So. 588; Gunter v. Hackworth, 182 Ala. 205, 62 So. 101; Board of Revenue v. State, 172 Ala. 138, 54 So. 757; Adams v. Southern R. Co., 167 Ala. 383, 388, 52 So. 439; Southern R. Co. v. Cherokee Co., 144 Ala. 579, 42 So. 66; Keene v. Jefferson Co., 135 Ala. 465, 33 So. 435; State v. Sayre, 118 Ala. 1, 24 So. 89; State v. Street, 117 Ala. 203, 23 So. 807; Elyton Land Co. v. Birmingham, 89 Ala. 477, 7 So. 901; Garland v. Board of Revenue, 87 Ala. 223, 6 So. 402; Hare v. Kennerly, 83 Ala. 608, 3 So. 683; Western Union Tel. Co. v. State Board of Assessment, 80 Ala. 273, 60 Am.Rep. 99; American Union Tel. Co. v. Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90; Mayor, &c., v. Dargan, 45 Ala. 310; Tuskaloosa Bridge Co. v. Olmstead, 41 Ala. 9; 12 C.J. 725; 61 C.J. 1520; Cooley's Const. Lim., 7th Ed., 127, 243; Code 1940, Tit. 12, §§ 129, 130, 131, 191. No municipality in Alabama can, except as is otherwise specifically provided by Section 216 of the Constitution of 1901, levy or collect in any one year a higher rate of taxation than that prescribed by the [***3] Constitution. Jefferson Co. v. Birmingham, 248 Ala. 319, 27 So. 2d 584; State v. Alabama Educational Foundation, 231 Ala. 11, 163 So. 527; State v. O'Quinn, 114 Fla. 222, 154 So. 166; Eliasberg Bros. Mer. Co. v. Grimes, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300; Ward v. McDonald, 201 Ala. 237, 77 So. 827; Amer. Union Tel. Co. v. Western Union Tel. Co., supra; Town of Eutaw v. Coleman, 189 Ala. 164, 66 So. 464; Gunter v. Hackworth, 182 Ala. 205, 62 So. 101; State v. Birmingham S. R. Co., 182 Ala. 475, 62 So. 77, Ann.Cas.1915D, 436; Commissioners' Court, Tuscaloosa County v. State ex rel. City of Tuscaloosa, 180 Ala. 479, 61 So. 431; Francis v. Southern R. Co., 124 Ala. 544, 27 So. 22; State v. Southern R. Co., 115 Ala. 250, 22 So. 589; Elyton Land Co. v. Mayor, &c., 89 Ala. 477, 7 So. 901; Hare v. Kennerly, supra; West. Union Tel. Co. v. State Board of Assessment, supra; Ex parte City Council, 64 Ala. 463; Perry Co. v. Selma, M. & M. R. Co., 58 Ala. 546; Code 1940, Tit. 12, § 129; Acts 1884-5, p. 709; Acts 1894-5, p. 378; Const. 1901, Sec. 216; Const. 1875, Art. IX, Sec. 5; Scudder v. Baker, 33 N.J.Law 424; Parsons v. People, 32 Colo. 221, 76 P. 666; United States v. Blair, C.C., 190 [***4] F. 372; People ex rel. Kelly v. Baltimore & O. R. Co., 376 Ill. 393, 33 N.E.2d 604; Hubbell v. Board of Commissioners of Bernalillo County, 13 N.M. 546, 86 P. 430; People ex rel. Attorney General v. Reis, 76 Cal. 269, 18 P. 309; Board of Commissioners of Okfuskee County v. Hazelwood, 79 Okl. 185, 192 P. 217, 11 A.L.R. 709; Isler v. Nat. Park Bank, 239 N.Y. 462, 147 N.E. 66; Hilburn v. St. Paul, M. & M. Ry. Co., 23 Mont. 229, 58 P. 551, 811; Auerbach v. Foster's Place, 128 Misc. 875, 229 N.Y.S. 281; Naylor v. Board of Education of Fulton County, 216 Ky. 766, 288 S.W. 690; Coventry Co. v. Assessors of Taxes of Coventry, 16 R.I. 240, 14 A. 877; State v. Mason Co. Logging Co., 31 P.2d 539; Crawford v. Linn Co., 11 Or.

482, 5 P. 738; Burlington & M. R. Co. v. Lancaster County, 4 Neb. 293; Pac. Mut. Life Ins. Co. v. Lowe, 354 Ill. 398, 188 N.E. 436, 91 A.L.R. 788.

Jas. H. Willis and Amzi G. Barber, both of Birmingham, for appellee.

All public ways within the state comprise but a single network or system of public ways, and those portions thereof which lie in a county outside municipal boundaries and those inside municipal boundaries are equally within the jurisdiction, power, control [***5] and dominion of the state, acting through its legislature, except to such extent as may be specifically otherwise provided by the constitution. State ex rel. City of Mobile v. Board of Revenue & Road Com'rs of Mobile County, 180 Ala. 489, 61 So. 368; Jefferson Co. v. Hard, 227 Ala. 201, 149 So. 81; Chamberlain v. Board, 243 Ala. 662, 11 So. 2d 724; Ryan v. Goodrich, 199 Ala. 642, 75 So. 17; Williams v. Albany, 216 Ala. 408, 113 So. 257; Lewis v. Leon Co., 91 Fla. 118, 107 So. 146. Maintenance of public ways within municipal boundaries in a county, as well as of such ways without municipal boundaries, may be constitutionally made by the legislature a county matter, function or purpose. State v. Board of Revenue, supra; Town of Eutaw v. Coleman, 189 Ala. 164, 66 So. 464; Ryan v. Goodrich, supra; Birmingham v. Carlson, 209 Ala. 428, 96 So. 333; State ex rel. City of Birmingham v. Board of Revenue of Jefferson County, 201 Ala. 568, 78 So. 964. The legislature may constitutionally require a county to maintain streets of a municipality therein by means of any county funds other than those raised by levies authorized under the second proviso of Constitution, Sec. 215. State v. Board of Revenue, [***6] supra; Town of Eutaw v. Coleman, supra; Ryan v. Goodrich, supra. The legislature may constitutionally require county to deliver over to city county funds for purpose of enabling the latter to apply such funds to the county purpose of maintaining public ways in such city. Johnson v. Robinson, 238 Ala. 568, 192 So. 412; Jefferson Co. v. Birmingham, 248 Ala. 319, 27 So. 2d 584. The first clause, and also the second proviso, of Section 215 of the Constitution is solely a limitation on powers of the legislature to authorize counties to levy rates and, hence, is neither a grant to counties to levy rates nor a command to the legislature to authorize counties to levy rates. State v. Street, 117 Ala. 203, 23 So. 807; Adams v. Southern R. Co. 167 Ala. 383, 52 So. 439; Jefferson Co. v. Birmingham, 248 Ala. 319, 27 So. 2d 584. The rate mentioned in the second proviso of Section 215 of the Constitution is not the exclusive rate which the legislature may authorize counties to levy for buildings, bridges or roads, but the legislature may also authorize counties to levy the rate mentioned in the first clause for buildings, bridges and roads as well as for ways, schools and other purposes. Phillips [***7] v. Atkins, 229 Ala. 15, 155 So. 537; State v. Board of Revenue, supra; Jefferson Co. v. Birmingham, 248 Ala. 319, 27 So. 2d 584. The apportionment statute, Code 1940, Tit. 12, §§ 129-131, does not levy any rate, and so cannot violate Section 216 of the Constitution. Commissioners Court, Tuscaloosa County v. State ex rel. City of Tuscaloosa, 180 Ala. 479, 61 So. 431. Counties derive all their powers and duties to levy rates, to create debt from the legislature, and not from the constitution. State v. Brewer, 64 Ala. 287; Phoenix Carpet Co. v. State, 118 Ala. 143, 22 So. 627, 72 Am. St. Rep. 143; Keene v. Jefferson Co., 135 Ala. 465, 33 So. 435; Ensley Motor Co. v. O'Rear, 196 Ala. 481, 71 So. 704; Mills v. Court of Co. Commissioners, 204 Ala. 40, 85 So. 564; Tuscaloosa Co. v. Alabama G. S. R. Co., 227 Ala. 428, 150 So. 328; Escambia Co. v. Dixie Co., 229 Ala. 287, 156 So. 631. All questions of law which are raised by the pleadings in a cause are questions adjudicated therein, whether they be mentioned as questions or to be debated as questions or not. Ex parte Proctor, 247 Ala. 138, 22 So. 2d 896.

Irvine C. Porter, City Atty., for City of Homewood, Bryant A. Whilmire, City Atty. [***8] , for City of Leeds, and Edw. L. Ball, City Atty., for City of Bessemer, amici curiae.

JUDGES: FOSTER, Justice. BROWN, LAWSON, SIMPSON, and STAKELY, JJ., concur.

OPINION BY: FOSTER

OPINION

[*637] [**845] FOSTER, Justice.

This case is here on second appeal. The first appeal was from a decree overruling demurrer to the bill. 248 Ala. 319, 27 So. 2d 584. After we affirmed the decree, respondents, who are the county of Jefferson and certain county officers on behalf of the county, filed answer and special pleas setting up two contentions, not determined on former appeal, namely (1) that the local act of 1885 (herein more particularly referred to) was repealed by the adoption of the Constitution of 1901; and (2) that to allow the claim the city would in substance and effect *collect* a *rate* of taxation greater than one-half of one percentum on property situated therein, since the city had for the years in controversy, 1944, 1945, 1946 and 1947, levied and collected the rate of one-half of one percentum on such property.

The contention that the local act was repealed by the adoption of the Constitution of 1901 is controlled by statutes and constitutional provisions copied [***9] in the opinion on former appeal. We will refer to those

statutes and provisions without here copying their pertinent parts, since they were set out in that opinion.

(1) The Local Act of February 17, 1885, Acts of Alabama 1884-5, page 709.

(2) The opportionment statute as set out in section 130, Title 12, Code of 1940. See Act of August 26, 1909, General and Local Acts, Special Session 1909, pages 303 and 304.

(3) Section 5, Article XI, Constitution 1875.

(4) Section 215 of the Constitution of 1901.

On this appeal, appellants' counsel disclaim an intention of seeking to change any ruling on former appeal, but contend that they are no advancing theories not heretofore acted on or suggested in this controversy.

Their first contention is that the Act of 1885, supra, was repealed by the adoption of the Constitution of 1901, in that in doing so the second proviso of section 5, Article XI of the Constitution of 1875 was so amended by its counterpart in the Constitution of 1901, section 215, as that in addition to the limit of one-half of one percentum provided in the first part thereof, there was also a limit placed on the special tax referred to in the proviso, as set out in the Constitution [***10] of 1875, and it was also broadened by section 215, supra, so as to include as a beneficiary of such special taxes levied over and above the one-half of one percentum roads, as well as public buildings and bridges, to which such special tax applied in the Constitution of 1875.

On former appeal, we discussed the contention that the *proviso* of section 1 of the Act of 1885 was repealed by the second proviso of section 215, supra, and denied the contention. But that is not what appellant is now insisting on. But it is that by making the amendment to the second proviso, so as to include *roads* as beneficiaries of the special tax and putting a limitation on the amount of it, the Constitution intended to confine the entire right of a county to levy special road taxes to the terms of that proviso, and thereby set at naught a right held to exist under the Constitution of 1875 in favor of a county acting by authority of law to levy a special road tax within the limits of one-half of one percentum as set out in the first part of section 5, Article XI, and section 215, supra.

Under the Constitution of 1875, a county could not levy a special road tax in excess of the one-half of one percentum [***11] limit for general purposes. See, Montgomery County v. City of Montgomery, 190 Ala. 366, 67 So. 311; Board of Revenue of Jefferson County v. City of Birmingham, 172 Ala. 138, 54 So. 757. [**846] Such was the constitutional status when the Act of 1885, supra, was enacted. [*638] It could only have validity as a part of the general limit of one-half of one percentum. And as pointed out in our former cases, it created a mandatory duty on the county to make the levy within such general limitation. So considered, the Act was not violative of the Constitution of 1875. Board of Revenue of Jefferson County v. City of Birmingham, 205 Ala. 338, 88 So. 16; Board of Revenue of Jefferson County v. City of Birmingham, 205 Ala. 320, 88 So. 18.

Under the Constitution of 1875, the right of the county to levy a special tax for roads was restricted within narrower limits than was a special tax for public buildings and bridges There are a number of our cases cited and relied on by appellant, which hold that by the amendment of the second proviso of section 5, Article XI, Constitution 1875, to include roads, counties may, outside of the general [***12] limit of one-half of one percentum, by special levy raise funds for roads; and counsel for appellant argue that having such right to share in the broadened limits, counties are restricted to the special tax mentioned in the proviso and cannot also have a special tax as theretofore within the limits of the one-half of one percentum tax, although so provided by law. This is important because a special tax within the limit of one-half of one percentum may by law be shared with a city for street purposes, but funds derived from a special levy made under the second proviso must go to debts for roads (or public buildings or bridges), not including city streets. City of Montgomery v. Montgomery County, 185 Ala. 281, 64 So. 588; Commissioners Court of Tuscaloosa v. City of Tuscaloosa, 180 Ala. 479, 61 So. 431; Board of Revenue of Jefferson County v. City of Birmingham, 172 Ala. 138, 54 So. 757; Commissioners Court of Pike County v. City of Troy, 173 Ala. 442, 56 So. 131, 274, Ann.Cas.1914A, 771.

But there is nothing in any of our cases which refers to a constitutional policy to confine a special road tax by a county to the second proviso [***13] (section 215, supra), and therefore to prohibit authority to levy such a tax under the general limit of one-half of one percentum. And we see no sound argument for making such an interpretation of the second proviso of section 215, supra. It opened the door to roads to enter into a status theretofore applicable only to public buildings and bridges. It has never been held that the power to levy a special tax for public buildings and bridges was confined by the proviso to its provisions.

We do not so interpret the cases of State v. Street, 117 Ala. 203, 23 So. 807; Southern Rwy. Co., v. Cherokee County, 144 Ala. 579, 42 So. 66; Adams, Tax Collector v. Southern Rwy. Co., 167 Ala. 383, 52 So. 439.

The special tax under the proviso must be used to pay past debts or those thereafter created for such construction, not to raise money to be used in construction

without creating a debt. Southern Rwy. Co., v. Cherokee County, supra. But a special tax levied under the general limit has no such restriction, nor any other restriction. It is not indicated in our cases that the court thought that the amendment intended to cut off a power which [***14] theretofore existed, but rather to broaden the limits of another power to include roads. Our cases recognize the validity of a road fund created by law since the Constitution of 1901, made out of the tax levied within the limitation of one-half of one percentum. State ex rel. City of Mobile v. Board of Revenue of Mobile County, 180 Ala. 489(8), 61 So. 368; Town of Eutaw v. Coleman, 189 Ala. 164, 66 So. 464; Commissioners Court of Tuscaloosa County v. City of Tuscaloosa, 180 Ala. 479, 61 So. 431; Phillips v. Atkins, 229 Ala. 15, 155 So. 537.

Since the proviso only applies to debts, it does not embrace the power to create funds for road purposes when a county is in no position to make a debt, or unless a debt has already been created. Gunter v. Hackworth, 182 Ala. 205, 62 So. 101; Littlejohn v. Littlejohn, 195 Ala. 614, 71 So. 448. The amendment to the proviso in section 5, Article XI (section 215, supra) should not be construed to prevent a county, which cannot make a debt, from raising funds by a special tax for road construction [**847] when such special tax is within the [*639] narrow limitation [***15] of one-half of one percentum. State v. Street, supra.

We cannot therefore agree with appellants' first contention.

The next insistence is that the opportionment act serves to violate section 216 of the Constitution of 1901, in respect to the years in question, 1944, 1945, 1946 and 1947, because for those years the city of Birmingham had levied and collected a tax in the amount of the maximum rate there authorized of one-half of one percentum of the value of the property situated therein as assessed for State taxation during the preceding year.

The contention is soundly stated that a tax cannot be levied by the county for a city, and collected by the city in any amount when the city has levied the full maximum rate of one-half of one percentum on the value of the property situated in the city, since section 216 prohibits the *collection* of a tax beyond the maximum as well as the *levy* of such a tax. Section 216 of the Constitution of 1901 is as follows:

"No city, town, village, or other municipal corporation, other than as provided in this article, shall levy *or collect* a higher rate of taxation in any one year on the property situated therein than one-half [***16] of one per centum of the value of such property as assessed for state taxation during the preceding year." (Italics ours.)

Reliance is had on the case of State v. Southern Rwy. Co., 115 Ala. 250, 22 So. 589, to sustain the view that the instant situation is governed by that principle. In that case it appears that the city of Birmingham had levied its maximum amount of ad valorem taxes. The effort was to levy an additional tax for the city schools. In order to evade section 7, Article XI, Constitution of 1875 (section 216, Constitution of 1901), the legislature passed an act making the levy of twenty cents on the value of every one hundred dollars worth of property in the city. This was by way of amending another act. The Court held that the amendment introduced a new subject to the existing act and violated section 2, Article IV of the Constitution of 1875 (section 45 of the Constitution of 1901). It also held that it violated section 7, Article XI of the Constitution of 1875 (section 216, Constitution of 1901). It contained the provision that "there is hereby laid and levied upon all the taxable property within the corporate limits of the said city, or that may be lawfully [***17] taxable therein, an annual tax, two tenths of one per cent. or twenty cents on every one hundred dollars worth of such property, which shall be assessed by the tax assessor of Jefferson county at the same time, and in the same manner, and under the same penalties and entered on the same lists with other state taxes. And the same shall be collected by the tax collector of Jefferson county at the same time with and as a part of the state taxes. And when collected shall be paid over each week to the treasurer of said board to be by him paid out and expended under the orders and direction of the said school board that whenever the tax levied by the state shall exceed fifty-five cents on every one hundred dollars of taxable property, then [**848] the tax hereby levied shall be diminished to that rate which added to the rate levied by the state shall not exceed seventy-five cents on every one hundred dollars worth of taxable property, the limit fixed by the constitution." Acts 1894-95, p. 738.

The Court in that case held that the Act violated what is now section 216, Constitution of 1901, using the following language [115 Ala. 250, 22 So. 592]:

"If this tax had been [***18] authorized to be levied directly by the city, most obviously, it would have been in direct violation of this provision of the constitution, as being a tax authorized to be levied by the city in addition to the maximum rate of taxation authorized by the constitution. For this reason, no doubt, such a provision was not incorporated in the act. It was supposed, however, as appears from the terms of the act, that this constitutional inhibition might be legally avoided, by providing that the state should levy and collect the tax and pay the same over to the treasurer of the board of education. In aid of this device, it is provided, as we have seen, 'that whenever the tax levied by the state shall exceed fifty-five cents on every hundred dollars of

taxable property, then the tax hereby levied shall be diminished [*640] to that rate, which added to the rate levied by the state, shall not exceed seventy-five cents on every hundred dollars worth of taxable property,--the limit fixed by the constitution.' But if this were allowed, it would effectually emasculate this constitutional prohibition. It would sanction the levy of a tax by the state for the purposes of public education in the [***19] city, which the city itself is prohibited by the constitution from levying and collecting, and which, if sanctioned as to one city, might be extended to every other locality in the state, in overthrow of this fundamental law. It would allow a thing to be done indirectly, which is forbidden to be directly done."

In the case of Commissioners Court of Tuscaloosa County v. City of Tuscaloosa, 180 Ala. 479, 61 So. 431, the question of the application of section 216, Constitution, again came before the Court. The Court was dealing with an Act of 1903, page 433. The substance of it, here material, is that the commissioners' court is required to appropriate and set apart out of the taxes levied for general purposes (one-half of one percentum) an amount not less than one-sixth of one percentum of the assessed value of property in the county to become a part of the county road and bridge fund. It therefore came under the apportionment act of August 26, 1909, General Acts 1909, page 304: Section 130, Title 12, Code of 1940. See, County of Montgomery v. City of Montgomery, 190 Ala. 366, 377, 67 So. 311.

It was held first that since the apportionment act was an appropriation [***20] of funds derived from taxes levied under the general power not to exceed one-half of one percentum, and not under the second proviso of section 215, supra, it did not violate section 215 to make an apportionment of the special road tax with the city, citing Board of Revenue of Jefferson County v. City of Birmingham, 172 Ala. 138, 54 So. 757; Commissioners Court of Pike County v. City of Troy, 173 Ala. 442, 56 So. 131; Commissioners Court of Calhoun County v. City of Anniston, 176 Ala. 605, 58 So. 252. And further the Court was cited to the case of State v. Southern Rwy., supra, in support of a contention that the Act violated section 216, Constitution of 1901. Answering that citation, the Court observed [180 Ala. 479, 61 So. 431]:

"This case has no bearing upon the present question, for there the act considered expressly increased the rate of taxation on property within the municipality above the constitutional limit, notwithstanding it was levied and collected by the state or county authorities. *It was a tax on municipal property for municipal schools, and was not an appropriation of a part of a county fund legally* [***21] *levied and collected to the municipality.* Here there is no additional burden of taxation put upon the property owners of the municipality, and the tax rate is in no sense increased, as the act creates a benefit instead of a burden on the city taxpayer. It simply, with the ends of justice and equity in view, requires the transfer of a certain portion of a fund legally collected, to the source from which it was derived, instead of expending all of said fund upon the highways outside of the municipalities." (Italics ours.) See, [**849] State v. Street, supra, 117 Ala. at page 211, 23 So. 807.

The argument is here made that the report of that case does not show that the city of Tuscaloosa had levied the maximum of one-half of one percentum, and therefore that the collection of this amount was not shown to be in excess of the limit of one-half of one percentum. But the original record in our files shows that one-half of one percentum had been levied in full.

Section 216, supra, would have no application or need of discussion if the amount of the collection by the city from the county did not raise the rate beyond the maximum. The Court held that the tax levied under [***22] the Act of 1903 by the county, and the apportionment of it with the city, under the apportionment act, was not a city tax collected by the city, but an appropriation to the city of a part of a county fund legally levied and collected.

It is well settled that the State may appropriate county funds by act of the legislature for public purposes. Stone, Treas. v. State ex rel. Horn, Ala.Sup., 37 So. 2d 111; [1] [*641] Board of Revenue of Mobile County v. Puckett, 227 Ala. 374, 149 So. 850; State v. Street, 117 Ala. 203, 23 So. 807; City of Mobile v. Board of Revenue of Mobile County, supra; Town of Eutaw v. Coleman, supra; Ryan v. Goodrich & Crinkley, et al., 199 Ala. 642, 75 So. 17.

1 Ante, p. 240.

As pointed out in the Tuscaloosa case, supra, the city here will not collect a tax, nor was one levied for the city, but an appropriation was made by the legislature of funds out of the county treasury. It is immaterial to the validity [***23] of such appropriation how the county derived the fund, if the appropriation did not violate some other superior right or constitutional provision.

The tax here in question was county wide on all assessable property in the county, and in existence long before the adoption of the apportionment act, as in the Tuscaloosa case, supra. The tax levy was valid as a part of the one-half of one percentum maximum, and created a county fund subject to apportionment, with no constitutional restriction as to its use.

But it is insisted that the Southern Railway case, supra, should apply because of a provision of the Act there in question, which is thought to be important, though not given importance in the Tuscaloosa case, supra. That is, the provision which automatically reduced the rate for the city when it with the State levy for other purposes exceeded the limit for the State of seventy-five cents on the hundred dollars.

But the purpose of the Act in so providing was to make sure that it would stand as a State tax, knowing it would not stand as a city tax. True, it did not and could not stand as contemplated if the entire State tax with it exceeded seventy-five cents on the hundred dollars. [***24] But if it was to have any effect at all, it must increase the State tax, otherwise levied by the State. If that increased the State tax beyond seventy-five cents, it was automatically reduced by the amount of such increase.

But the mandatory provisions of the Act of 1885, here dealt with, had no such automatic reduction. The other general levies of the county would necessarily be reduced. So that under that Act, the combined tax levies by the county could not exceed one half of one percentum, not considering other constitutional special tax levies.

But the effect of the requirement that it must be part of the one-half of one percent tax limit, is to make it a valid constitutional tax.

The decree of the trial court gave effect to these views, and it is affirmed.

Affirmed.

BROWN, LAWSON, SIMPSON, and STAKELY, JJ., concur.

JEFFERSON COUNTY, Alabama, et al. v. James T. JOHNSON, Jr. and Betty B. Johnson

SC No. 1206

Supreme Court of Alabama

333 So. 2d 143; 1976 Ala. LEXIS 1847

May 21, 1976

DISPOSITION: [**1] AFFIRMED.

CORE TERMS: flood, building permit, building code, flood-prone, hazard, creek, flooding, administrative remedies, new construction, new developments, legal authority, authorize, land-use, channel, creek bed, pertinent part, alteration, ordinances, drainage, easement, exposure, drawings, pillars, debris, impede, repair, stream, exhaustion, conferred, building permit applications

COUNSEL: Edwin A. Strickland, Birmingham, for Appellants.

James M. Tingle, Birmingham, for Appellees.

Robert R. Reid, Jr., Birmingham, for Amicus Curiae, friends of Jemison Park.

JUDGES: Heflin, Chief, Justice, wrote the opinion. Merrill, Maddox, Faulkner and Jones, JJ., concur.

OPINION BY: HEFLIN

OPINION

[*144] This suit was begun in the equity division of Jefferson County Circuit Court as a declaratory judgment action which also sought affirmative relief in the form of an order to compel the Jefferson County Engineer to issue a building permit to plaintiffs. The complaint and proof at trial showed that plaintiffs James and Betty Johnson owned two lots in Shades Creek Parkway Estates, a subdivision in Jefferson County; that they had previously built a commercial building called the Johnson Building on the property; and that they were seeking a building permit to add an addition to the presently existing building. The evidence further showed that plaintiff James Johnson and his attorney, Charles Beavers, who is now deceased, discussed the proposed addition with defendant Hewitt A. Snow, the Jefferson County Engineer and Building Official, prior to taking any official [**2] action to acquire a permit. Snow, who is the county officer authorized to issue building permits, informed plaintiff that the proposed plans, which called for the placement of sixteen concrete support pillars in the area of the creek bed and the construction of the addition over the creek, were unacceptable because the pillars would interfere with maintenance of the creek bed, would cause blockage problems in that debris would be trapped on the pillars, and would preclude [*145] the enlarging of the creek bed in the future to prevent flooding. There was dispute at the trial as to whether an application for a permit was officially submitted to the County Engineer prior to initiation of this suit.

Subsequent to the filing of the suit, the trial court ordered plaintiffs to submit a partial permit application for the sole purpose of determining whether the County Engineer would deny the permit because of the proposed location of the addition. The defendant County Engineer did deny the permit in a letter which read in pertinent part:

> "* * * In our opinion, which is based on flood experience in this area, it would be very unwise to construct any new facility which would [**3] tend to impede the flow of water within this creek or preclude the possibility of enlarging the creek channel to provide for future increases in run-off and make it difficult to clean the channel of silt and debris."
>
> "Therefore your application for a permit, on the plans submitted, for construction of a building over the confines of the creek area is denied."

In the letter and also in a counter-claim included in defendant's answer to the complaint, defendant Jefferson County asserted a right to a fifty-five foot wide drainage

easement on plaintiffs' property which was alleged to include portions of the property upon which the addition was to be built. Subsequent to the filing of defendant's answer, plaintiffs amended their complaint to request a declaration by the court as to the validity of the asserted easement. Although the trial court's later ruling, which found no easement, was assigned as error by appellants it has not been argued on this appeal. Thus this issue is not before this court.

The case was tried to the court with at least one expert testifying to the effect that the construction would not contribute to flood conditions in and around the creek. [**4] In its final judgment the court found: (1) that the plaintiffs were not precluded from bringing this action by the doctrine of exhaustion of administrative remedies because they did not have adequate remedies to pursue; (2) that the denial of the building permit by the defendants did not involve zoning regulations nor did such denial stem from any regulation, method or mode of construction found in the applicable Jefferson County Building Code or adopted standards; (3) that the denial was based solely on the reasons specifically set forth in the letter of denial addressed to plaintiff James T. Johnson by defendant Hewitt A. Snow and that these reasons were not supported by the evidence and were not well taken; (4) that the plaintiffs had made a proper application for the building permit and (5) that the proposed location would not significantly impede the flow of Shades Creek or increase the likelihood of flooding in the area. The court then ordered the county to issue the building permit as soon as final plans meeting all technical building code requirements had been submitted.

This court interprets the trial judge's final decree as holding that the Jefferson County Engineer had [**5] no legal authority to deny a building permit for the reasons set out in the letter addressed to plaintiff James T. Johnson. Therefore the issue presented to the court is whether this conclusion of the trial court is correct as a matter of law.

It is a well established proposition of law that, as a political subdivision of the state, a county can exercise only that authority conferred on it by law. *Alexander v. State*, 274 Ala. 441, 443, 150 So.2d 204, 206 (1962); *Trailway Oil Co. v. City of Mobile*, 271 Ala. 218, 222, 122 So.2d 757, 760 (1960). Therefore, in order to take action on the subject of flood control, the county must be so authorized by the legislature.

Appellants contend that there was ample legal authority for the denial of the building [*146] permit. The primary authority, they argue, is the Building Code of Jefferson County, adopted in 1970, under the authority of an act passed by the Alabama legislature in 1967, codified in the Appendix, § 1059(14aaa)-14ddd), Code of Alabama 1940 (Recompiled (1958)). This statute provides that counties with populations greater than 600,000 may adopt a building code which is not less restrictive [**6] than the Southern Building Code. The pertinent parts of the Jefferson County Building Code as set out by appellants are these:

> (1) Section 101.2 - Code Remedial
>
> "This code is hereby declared to be remedial, and shall be construed to secure the beneficial interests and purposes thereof - which are public safety, health, and general welfare - through structural strength, stability, sanitation, adequate light and ventilation, and safety to life and property from fire and other hazards incident to the construction, alteration, repair, removal, demolition, use and occupancy of buildings, structures, or premises."
>
> (2) Section 101.3 - Scope
>
> "(a) The provisions of this code shall apply in all unincorporated areas of Jefferson County and also in those parts of said County lying within the corporate limits of municipalities which have not adopted and are not enforcing municipal building codes, to the construction, alteration, repair, equipment, use and occupancy, location, maintenance removal and demolition of every building or structure or any appurtenances connected or attached to such building or structures."
>
> (3) Section 106.1 - Action on [Building Permit] Application [**7]
>
> "(a) No person, firm or corporation shall erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish any building or structure in any area described in Section 101.3(a), or cause the same to be done, without first obtaining a separate building permit for such building or structures from the Building Official.
>
> "(b) If the Building Official is satisfied that the work described in an application for permit and the drawings filed therewith conform to the requirements of this code and other pertinent laws and ordinances, he shall issue a permit therefor to the applicant.

"(c) If the application for a permit and the drawings filed therewith describe work which does not conform to the requirements of this code or other pertinent laws or ordinances, the Building Official shall not issue a permit, but shall return the drawings to the applicant with his refusal to issue such permit. Such refusal shall, when requested, be in writing and shall contain the reasons therefor."

(4) Section 112.1 - Time Limit

"(a) Whenever the Building Official shall reject or refuse to approve the mode or manner of construction proposed to be followed or materials to be used in [**8] the erection or alteration of a building or structure, or when it is claimed that the provisions of this code do not apply, or that an equally good or more desirable form of construction can be employed in any specific case, or when it is claimed that the true intent and meaning of this code or any of the regulations thereunder have been misconstrued or wrongly interpreted, the owner of such building or structure, or his duly authorized agent, may appeal from the decision of the Building Official to the Board of Adjustments and Appeals. Notice of appeal shall be in writing and filed within 30 days after the decision is rendered by the Building Official. A fee of $10.00 shall accompany such notice of appeal."

The Board of Adjustments and Appeals is created by section 111 of the Building Code. Section 113 authorizes the Board of Adjustments [*147] and Appeals to vary the application of the code provisions so as to prevent manifest injustice.

Appellants further contend that Title 12, Sections 341-364 of the Code, which is entitled "Comprehensive Land Management and Use Program in Flood-Prone Areas," empowers Jefferson County to adopt ordinances, regulations and building [**9] codes for flood-prone areas. Section 344 of the act reads in pertinent part:

"Land-use and control measures shall provide land-use restrictions based on probable exposure to flooding. Measures provided in this section shall:

(a) Prohibit inappropriate new construction or substantial improvements in the flood-prone areas;

(b) Control land uses and elevations of all new construction within the flood-prone area;

* * * *

(d) Be based on competent evaluation of the flood hazard as revealed by current authoritative flood-prone information;

(e) Be consistent with existing flood-prone management programs affecting adjacent areas and applicable to appropriate state standards; and

(f) Prescribe such additional standards as may be necessary to comply with federal requirements for making flood insurance coverage under the National Flood Insurance Act of 1968 available in this state."

Section 345 provides:

"In addition to land-use restrictions commensurate with the degree of the flood hazards in various parts of the area, there shall be such subdivision regulations as may be necessary:

(a) To prevent the inappropriate development of flood-prone lands;

* * * [**10] *

"(c) To provide for adequate drainage so as to minimize exposure to flood hazards and to prevent the aggravation of flood hazards; and

"(d) To require such minimum elevation of all new developments as required."

Appellants also point to a resolution passed by the Jefferson County Commission on March 5, 1974, as further authority for the action of the County Engineer. This resolution charges the County Engineer as follows:

"1. That the (Urban Engineer-Inspection Services) shall review all building permit applications for new construction or substantial improvements to determine whether proposed building

> sites will be reasonably safe from flooding. If a proposed building site is in a location that has a flood hazard, any proposed new construction or substantial improvement (including prefabricated and mobile homes) must (i) be designed (or modified) and anchored to prevent flotation, collapse, or lateral movement of the structure, (ii) use construction materials and utility equipment that are resistant to flood damage, and (iii) use construction methods and practices that will minimize flood damage; and
>
> "2. That the (Public Works Director-County Engineer) shall [**11] review subdivision proposal and other proposed new developments to assure that (i) all such proposals are consistent with the need to minimize flood damage, (ii) all public utilities and facilities, such as sewer, gas, electrical, and water systems are located, elevated, and constructed to minimize or eliminate flood damage, and (iii) adequate drainage is provided so as to reduce exposure to flood hazards; and
>
> "3. That the (Public Works Director-County Engineer) shall require new or replacement water supply systems and/or sanitary sewage systems to be designed to minimize or eliminate infiltration of flood waters into the systems and [*148] discharges from the systems into flood waters, and require on-sight waste disposal systems to be located so as to avoid impairment of them or contamination from them during flooding."

Appellants maintain that all of these enactments provide the legal authority to support the denial of a building permit to plaintiff by the Jefferson County Engineer. After studying each of the enactments cited by appellant, this court concludes that none of them as presently enacted establish in the County Engineer the authority to deny a building [**12] permit for the reasons set out by defendant Snow in the letter of denial.

This court is unable to locate within the Building Code, and neither has there been pointed out to the court, any provision of the Code which deals with protecting streams from construction which might impede the flow of water within the stream, or prevent enlargement of the creek channel or interfere with clearing the channel of silt and debris. While section 101.2 mentions the words "other hazards," nothing contained therein authorizes the County Engineer to take any action concerning flooding. The Building Code is largely directed to what is to be constructed rather than to the consequences that result to lands and streams.

It is contended that the resolution adopted by the County Commission of Jefferson County on March 5, 1974, provides the County Engineer with legal authority to deny the building permit; however, an inspection of the resolution fails to point up such authority. In order to be a valid exercise of county authority the resolution must be found to be within the scope of power conferred on the county by Title 12, Sections 341-64. It is not clear to this court that the resolution complies [**13] with the requisites set out in these Code sections. And, even if it were found to comply with the statutory requisites (a question this court need not reach), the provisions of the resolution do not authorize the denial of the building permit before the County Engineer in this case. The first section of the resolution sets out requirements which can be imposed to protect the building itself. See (1)(i)(ii)(iii). This section does not authorize the County Engineer to prohibit the building of a structure. It merely empowers him to require that certain protective measures to the building be taken prior to issuance of a permit. Only the builder's refusal to comply with these provisions would justify denial of a permit.

Appellants argue that section (2) of the resolution gives the Engineer such authority. An inspection of this section, however, reveals that it deals only with the refusal of subdivision proposals and other proposed new developments. In this instance the construction is an addition to an existing building and cannot be classified as a subdivision proposal or other proposed new development.

The third section of the resolution is not applicable since it refers only [**14] to water supply systems and sanitary sewer systems.

The appellants contend that the County Engineer had authority under sections 344 and 345 of Title 12 to act as he did. These provisions of the "Comprehensive Land Management and Use Program in Flood-Prone Areas Act" do appear, on first review, to provide sufficient authority to deny the permit. However, further study reveals that the provisions of these sections are not controlling unless the county governing body has adopted or established comprehensive land-use and control measures or building codes for flood-prone areas. In this instance the Jefferson County Commission has not acted pursuant to these requirements. Until such action is taken, the provisions of the act are not binding. Thus this court concludes that the trial court was correct in finding that the authorities presented by

appellants do not provide legal justification for the denial of the building permit by the County Engineer.

[*149] The court also concludes that the trial judge was under no duty to require that further administrative remedies be pursued prior to granting final equitable relief to plaintiff-appellees. Although appellants argue that [**15] the exhaustion of administrative remedies doctrine should be applied in this case, this court finds that the doctrine is not applicable under the exception that holds that administrative remedies are not required to be exhausted where there is a defect in the power of the agency to act in any respect. See *Simpson v. Van Ryzin*, 289 Ala. 22, 32, 265 So.2d 569, 577 (1972); *State ex rel. Barbuto v. Ohio Edison Co.*, 16 Ohio App.2d 55, 45 Ohio Op.2d 159, 241 N.E.2d 783, affirmed 16 Ohio St. 2d 54, 242 N.E.2d 562 (1968).

Because the Jefferson County Engineer was not authorized to deny a building permit for the reasons stated in his letter of denial to appellee, the findings of the trial court are correct and are hereby affirmed.

AFFIRMED.

MERRILL, MADDOX, FAULKNER and JONES, JJ., concur.

Jefferson County, Alabama v. William D. Sulzby

No. 83-79

Supreme Court of Alabama

468 So. 2d 112; 1985 Ala. LEXIS 3618; 57 A.L.R.4th 333

March 29, 1985

SUBSEQUENT HISTORY: [**1] As Amended.

PRIOR HISTORY: Appeal from Jefferson Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: roadway, marking, street, notice, manual, curve, contributory negligence, edge-of-pavement, vertical, couldn't, install, front, reasonably safe condition, motorist's, traffic control devices, warning signs, horizontal, engineer, pavement, confused, traffic, site, matter of law, duty to keep, governmental entities, uncontroverted, sudden, proximate cause, judgment notwithstanding, defective condition

COUNSEL: Edwin A. Strickland, County Attorney, and Charles S. Wagner, Asst. County Attorney, for Appellant.

Stephen D. Heninger for Hare, Wynn, Newell & Newton, Birmingham, for Appellee.

JUDGES: Faulkner, Justice. Torbert, C.J, Almon, Embry and Adams, JJ., concur.

OPINION BY: FAULKNER

OPINION

[*113] This appeal arose out of a personal injury action brought by plaintiff, William D. Sulzby, against Jefferson County, Alabama. On the evening of June 12, 1978, Sulzby was driving his AMC Jeep vehicle on 23rd Avenue N.W., a two-lane county road in Jefferson County. It had been raining earlier in the evening. The road was extremely dark and hilly in some areas. According to the evidence, Sulzby was using the centerline as a guide. Apparently, after he crested hill in front of the Sun Valley Church of Christ he became "lost in a sea of asphalt," and he could no longer see in which direction to go. Where the road curved to the left, he veered off the road. Sulzby then turned his vehicle to the left, saw a pole in front of him, and then cut to the left again. The Jeep overturned and Sulzby was thrown from [**2] the vehicle.

In his complaint, Sulzby alleged that Jefferson County was responsible for the design and construction of 23rd Avenue N.W. and that its negligence in designing and maintaining the road was the proximate cause of his injuries and damages. The jury returned a verdict in favor of Sulzby and awarded damages in the amount of $75,000.00. After the trial court denied Jefferson County's motion for judgment notwithstanding the verdict or in the alternative for new trial, the County appealed.

The County argues that this case presents one of first impression regarding the statewide application of the standards established by the Alabama Manual of Uniform Traffic Control Devices (AMUTCD). Jefferson County urges that "in its present posture this case stands for the proposition that juries, [and not qualified engineers], will decide the standard, i.e., DUTY of counties and cities of road design, road marking and road signing for county and city streets."

Specifically, the County raises three issues on appeal:

> I.
>
> Whether the jury properly found that the County had notice of the defective roadway and therefore was under a duty to install curve warning signs and edge-of-pavement [**3] markings.
>
> II.
>
> Whether statements made by Sulzby at trial constitute an admission of contributory negligence which would bar his recovery.
>
> III.

> Whether the jury improperly ignored the testimony of the County's accident reconstruction expert.

[*114] I.

Initially, Jefferson County contends that the trial court committed reversible error in denying its motions for directed verdict and judgment notwithstanding the verdict. The County argues that the case should not have been submitted to the jury because (1) there was insufficient evidence that the County had actual or constructive notice of a defective roadway condition and; (2) there was insufficient evidence to prove that the County was under a legal duty to install curve warning signs or edge-of-pavement markings. Claiming that because the Alabama Manual of Uniform Traffic Control Devices (AMUTCD) does not require edge-of-pavement markings or curve warning signs at the accident site, the County contends that it was under no duty, statutory or otherwise, to install such devices. We disagree.

The 1972 AMUTCD, which was in effect on the date of Sulzby's accident, provides in part:

> "This Manual provides [**4] standards and criteria for the application and use of all types of signs. In any given situation, however, and particularly in circumstances not specifically covered by this Manual, the judgment and experience of a traffic engineer must be depended upon for the proper choice and application of the guiding standards here set forth."

The manual, while providing standards for the statewide application of traffic control devices, is not intended to be a substitute for engineering judgment.

It is undisputed that governmental entities, by virtue of their exclusive authority to maintain and control the roadways are under a common law duty to keep the streets in repair and in a reasonably safe condition for their intended use. Cf. § 23-1-80, Code of Alabama 1975.

This Court has addressed the issue of a county's duty with regard to the maintenance of public roadways in *Cook v. County of St. Clair*, 384 So. 2d 1 (Ala. 1980). This Court held that the plaintiffs could sue St. Clair County and Houston County and the county commissions for negligence [**5] for injuries arising as a result of defects in the public roads. This holding was based on Code 1975, § 11-1-2, which provides "Every county is a body corporate, with power to sue or be sued in any court of record."

Since the county can be sued for its negligence, and is exclusively responsible for the maintenance and control of its roadways, its standard of care is to keep its streets in a reasonably safe condition for travel, and to remedy defects in the roadway upon receipt of notice.

In the instant case, the evidence presented justified submission to the jury on the issue of whether the County had notice of a defective roadway condition and thus was under a duty to remedy the alleged defects. Although there was conflicting testimony as to whether the County had in fact breached its duty, there was evidence from which the jury could have reasonably inferred that the County had at least constructive notice of a defective condition of 23rd Avenue N.W. The testimony at trial showed that Jefferson County received an independent traffic engineering survey of [**6] this street in November 1977, just seven months prior to Sulzby's accident. The survey, as it relates to a 1.2 mile stretch of this roadway, stated:

> "Classified as an urban collector street, 23rd Avenue N.W. is oriented in an east-west direction, with the survey portion being approximately 1.2 miles in length beginning at Center Point Road and extending westward to Carson Road as illustrated on the adjacent strip map. It is a narrow roadway with limited shoulders situated on a bad, horizontal and vertical alignment. The pavement markings are worn and faded and are deficient relative to no-passing restrictions. The horizontal and vertical curvature of the roadway creates site, distance restrictions for traffic entering from all the side streets. The road is bounded by dense residential development."

[*115] The summary with respect to 23rd Avenue N.W. included the following statements and recommendations:

> ". . . The overall signing was poor. There were few signs warning of the existing geometric conditions. . . .
>
> "To reduce the threat of potential hazards and improved safety, the following measures are recommended for the overall corridor.

"Repaint [**7] the poorly-marked pavement and put new sight distance limits on the horizontal and vertical curves. Determine a maintenance schedule to restripe the entire corridor on an annual basis.

"Used raised pavement markings in addition to the center line reflective paint from Center Point Road to Carson Road. This action will alleviate the high accident potential on the sharp curves and vertical alignment.

"Install the appropriate advance warning signs throughout the entire roadway in conformance with AMUTCD."

Additionally, Darryl Skipper, the county safety engineer, testified that on February 17, 1978, the center and edge lines of 23rd Avenue N.W., including the accident site, had been restriped by the County. However, the evidence indicated that no edge-of-pavement markings were visible or existent in June 1978 when Sulzby's accident occurred. The evidence also indicated that none of the other recommendations from the survey had been followed on the date of the accident, but that in subsequent years the road had been straightened and repaired to correct some of the defects.

While we agree with the County's contention that a jury cannot set the standard for a governmental [**8] entity's duty to mark the roadways, in this instance there was ample evidence by which a jury could have reasonably concluded that Jefferson County had notice of the defective roadway condition and had breached its duty to keep the roadway in a reasonably safe condition for travel.

II.

The County's second argument on appeal is that the trial court should have directed a verdict as a matter of law due to Sulzby's in-court admission of contributory negligence.

The colloquy in issue was set out by the trial court as follows:

"All this happened in a course of a split second. I started -- I said, 'that isn't the thing to do', and made a turn. I didn't know where I was.

"Question: And you could have stopped your Jeep when you became confused; couldn't you, Mr. Sulzby?

"Answer: No, sir. I couldn't have stopped in that sense. If I had known where I was before I got there and what I had to work with, as far as how much road surface, maybe I could have, but I didn't think that was the thing to do and I would have to say no.

"Question: Your testimony is that you couldn't have stopped your vehicle after you became confused?

"Answer: Well, I can say this, if I had put [**9] my brakes on, I would have stopped, but I wouldn't have known where I was or what was in front of me. It wasn't the right thing to do.

"Question: Your testimony is, the right thing to do would have been to go on even though you were confused; isn't it, Mr. Sulzby?

"Answer: All of this happened in a split second. I came over the hill. I didn't know where I was. I couldn't see which way to go and I had been using the line to come over with and then I was lost. I didn't know what to do."

Sulzby further testified that he did not stop his vehicle even when he saw the pole directly in front of his Jeep because he had lost contact with where he was.

We cannot agree with the County's contention that this testimony constitutes an admission of contributory negligence as a matter of law. *See Elba Wood Products, Inc. v. Brackin*, 356 So. 2d 119 (Ala. 1978).

[*116] Generally a motorist whose vision is obscured is under a duty to exercise greater care than in ordinary circumstances. On the other hand, a motorist, without fault of his own, confronted with a sudden [**10] emergency, is not required to exercise the same presence of mind as would a prudent person under more deliberate circumstances. *Williams v. Worthington*, 386 So. 2d 408 (Ala. 1980); *Pittman v. Calhoun*, 231 Ala. 460, 165 So. 391 (1935). A motorist's duty in any given case is dependent upon the circumstances.

We find that the evidence in this case was sufficient to create a jury question as to whether, considering the circumstances, Sulzby's failure to stop or slow down constituted contributory negligence. The trial court

properly submitted the issue to the jury, who, by their verdict, necessarily found that Sulzby was not contributorily negligent.

III

Finally, the County contends that the jury improperly ignored the testimony of Mr. John Noettl, a qualified Jeep accident reconstruction expert.

Mr. Noettl testified that AMC Jeep vehicles, like the one Sulzby was driving, were unstable and more likely to roll over as a result of a sudden turn by the driver. He further testified that the design of the vehicle was the cause of the accident, and that only a Jeep would roll over under the circumstances on 23rd Avenue, N.W.

[**11] In Alabama, opinion testimony of an expert witness is binding upon a jury only when such testimony concerns a subject which is exclusively within the knowledge of experts and the testimony is uncontroverted. *Ex parte Blue Cross-Blue Shield of Alabama*, 401 So. 2d 783, 785 (Ala. 1981).

In this case the testimony was far from uncontroverted as to the cause of Sulzby's accident. Although testimony on one side indicated that the Jeep design may have been the cause of the accident, there was also evidence that the defective condition of 23rd Avenue N.W. was at least a contributing proximate cause of the accident. Accordingly, there was sufficient evidence to submit the issue to the jury, and for the jury to determine the liability of the County.

AFFIRMED.

Torbert, C.J, Almon, Embry and Adams, JJ., concur.

Jenkins, Weber and Associates, et al. v. Harry Hewitt, et al.

No. 89-406

Supreme Court of Alabama

565 So. 2d 616; 1990 Ala. LEXIS 623

July 27, 1990

SUBSEQUENT HISTORY: [**1] Released for Publication August 23, 1990.

PRIOR HISTORY: Appeal from Montgomery Circuit Court; CV-88-342-G; William R. Gordon.

DISPOSITION: AFFIRMED.

CORE TERMS: injunctive relief, summary judgment, bidder, bid, monetary damages, unsuccessful, interpreting, enjoining, lowest, equitable remedy, lost profits, unambiguous, discovery, particular contract, invitation, vendors, enjoin

COUNSEL: Thomas W. Bowron II of Polson, Jones, Bowron & Robbins, Birmingham.

H. E. Nix, Jr., and Alex L. Holtsford, Jr., of Nix & Holtsford, Montgomery, for Appellees Robin Swift, Ben Barnes, Howard L. White, Ken Givens, Jamie Flowers, Larry Spann, Lee Miller and Wendell Humphries.

Sharon E. Ficquette and Lois Brasfield, Dept. of Human Resources, for Appellees Andrew P. Hornsby, Jr., and Harry Hewitt.

W. Joseph McCorkle, Jr., of Balch & Bingham, Montgomery, for Appellee Unisys Corporation.

JUDGES: Steagall, Justice. Hornsby, C. J., and Maddox, Jones, Adams, Houston, and Kennedy, JJ., concur. Almon, J., concurs in the result.

OPINION BY: STEAGALL

OPINION

[*617] Plaintiffs appeal from a summary judgment in favor of defendants in an action brought pursuant to Ala. Code 1975, § 41-16-1 et seq., the Alabama Competitive Bid Law.

On December 24, 1986, the State of Alabama Department of Finance (hereinafter "Finance"), in conjunction with the State of Alabama Department of Human Resources (hereinafter "DHR"), issued a formal invitation to vendors to bid on the sale and installation of a computer processimg system. The appellants, Kenneth Jenkins, Albert [**2] L. Weber, and Jenkins, Weber and Associates (hereinafter collectively referred to as "Jenkins, Weber"), bid on the invitation, as did the appellee Unisys Corporation and approximately six other vendors. Jenkins, Weber's bid was the second lowest and Unisys's was the fourth lowest. After a lengthy evaluation process, however, DHR and Finance determined that Unisys was the "lowest responsible bidder" and awarded the contract to Unisys.

Jenkins, Weber filed a complaint against Harry Hewitt, a DHR employee, and, by amendment, added as defendants Unisys and certain employees of Finance and DHR, specifically, Robin Swift, Andrew Hornsby, Ben Barnes, Howard L. White, Ken Givens, Jamie Flowers, Larry Spann, Lee Miller, and Windell Humphries, alleging noncompliance with Code § 41-16-1 et seq., and demanding monetary relief. Following protracted discovery, the trial court entered a summary judgment in favor of all of the defendants. Jenkins, Weber appeals from that judgment.

Section 41-16-31, the statute under which this action is brought, reads:

"Institution of actions to enjoin execution of contracts entered into in violation of article.

"Any taxpayer of the area within the jurisdiction [**3] of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court *to enjoin* execution of any contract entered into in violation of the provisions of this article."

(Emphasis added.)

This Court held as follows in *City of Montgomery v. Brendle Fire Equipment, Inc.,* 291 Ala. 216, 220, 279

So.2d 480, 484 (1973), interpreting Ala. Code 1940, Title 55, § 515, the predecessor to § 41-16-31:

"This court finds the language of section 515 to be unambiguous, and under such circumstances the 'expressed intent must be given effect, and there is no room for construction.' Under the statutory language it appears that the City's interpretation is correct. The statute makes available the equitable remedy of an injunction on a 'particular contract.' This wording does not contemplate enjoining future contractual arrangements. Also, the statute provides for enjoining the *'execution'* of any contract which is violative of Chapter 22, not the formation of contracts to be made in the future which may run afoul of Chapter 22."

(Citations omitted, emphasis original.) *City of Montgomery* established [**4] the remedy pursuant to Title 55, § 515, as one for injunctive relief. Jenkins, Weber's complaint, as amended three times, did not seek injunctive relief pursuant to [*618] § 41-16-31, but rather claimed monetary damages. [1]

1 The original complaint claimed compensatory damages and lost profits; the first amendment added certain parties as defendants; the second amendment claimed lost profits; the third amendment requested that the contract entered into between the State of Alabama and Unisys be declared void and also requested "any other legal and/or equitable remedy deemed appropriate by this court." While the third amendment could possibly be interpreted to include injunctive relief, this amendment came approximately 18 months after Unisys had begun work on the project and, therefore, too late to obtain injunctive relief.

We find nothing in the legislative history of § 41-16-31 nor in the cases interpreting that statute that allows an unsuccessful bidder to sue for monetary damages. In *Urban Sanitation Corp. v. City of* [**5] *Pell City,* 662 F. Supp. 1041, 1044 (N.D. Ala. 1986), a federal district court interpreting that statute stated:

"There is no indication in this statute, however, that an unsuccessful bidder has any right or expectancy to insist upon the award of a contract. To the contrary, the statute is carefully crafted to limit the remedy to 'enjoin[ing] execution of any contract entered into in violation of the provisions of this article.' When the statute is unambiguous, its expressed intent must be given effect and there is no room for construction."

(Citation omitted.)

Jenkins, Weber contends that the decision not to award it the contract was arbitrary and capricious, and it relies on *White v. McDonald Ford Tractor Co.,* 287 Ala. 77, 248 So.2d 121 (1971); *International Telecommunications Systems v. State,* 359 So.2d 364 (Ala. 1978); *Arrington v. Associated General Contractors of America,* 403 So.2d 893 (Ala. 1981), *cert. denied,* 455 U.S. 913, 102 S. Ct. 1265, 71 L. Ed. 2d 453 (1982); and *Mobile Dodge, Inc. v. Mobile County,* 442 So.2d 56 (Ala. 1983). However, those cases dealt with injunctive relief and do not control this case, because Jenkins, Weber sought monetary damages rather than injunctive relief. [**6]

We, therefore, conclude that the summary judgment in favor of the defendants was proper, because Jenkins, Weber failed to state a claim cognizable under Code § 41-16-31. In view of this holding, we do not address the claim by Jenkins, Weber that a summary judgment should not have been entered while discovery was pending.

AFFIRMED.

Alan Keeton and Faye Keeton v. Kelly Company, LLC

2090023

COURT OF CIVIL APPEALS OF ALABAMA

47 So. 3d 1262; 2010 Ala. Civ. App. LEXIS 85

April 2, 2010, Released

SUBSEQUENT HISTORY: Released for Publication November 3, 2010.

PRIOR HISTORY: [**1]

Appeal from Geneva Circuit Court. (CV-08-900046). P. Ben McLauchlin, Jr., Trial Judge.
Keeton v. Kelly Co., 65 So. 3d 1051, 2009 Ala. Civ. App. LEXIS 1624 (Ala. Civ. App., 2009)

DISPOSITION: AFFIRMED.

CORE TERMS: right-of-way, vacated, abutting, landowner, vacation, summary judgment, comprising, highway, common law, counterclaim, predecessor, common-law, vest, contributed, centerline, Alabama Litigation Accountability Act, general rule, public rights, street, vacate, alley, abutting property, rightful owner, attorney fee, final judgment, summary-judgment, legislatively, declaration, transferred, fee-simple

COUNSEL: For Appellants: David F. Holmes, Holmes & Eubanks, Slocumb.

For Appellee: H. Samuel Prim III, Prim & Mendheim, LLC, Dothan.

JUDGES: THOMPSON, Presiding Judge. Pittman, Bryan, Thomas, and Moore, JJ., concur.

OPINION BY: THOMPSON

OPINION

[*1263] THOMPSON, Presiding Judge.

Alan Keeton and Faye Keeton appeal from a summary judgment entered by the Geneva Circuit Court in favor of Kelly Company, LLC ("Kelly"). For the reasons stated herein, we affirm the trial court's judgment.

On September 18, 2008, Kelly filed an action against the Keetons seeking a declaratory judgment. Kelly alleged that it owned real property in the City of Geneva ("the City") that abutted an undeveloped right-of-way known as Briarcliff Avenue ("the right-of-way"). It asserted that one of its predecessors in interest, the Kelly-Morris Development Company, had owned both the parcel that Kelly now owned and the property comprising the right-of-way. Kelly asserted that the Kelly-Morris Development Company had deeded the property comprising the right-of-way to the City in 1976 for use as a right-of-way but that the City had formally vacated that property in 2008. Kelly alleged that, at the time the City vacated the right-of-way, Kelly, as well as the Keetons, owned property abutting the undeveloped right-of-way. Kelly acknowledged [**2] that the general rule applicable to the vacation of a right-of-way is that the abutting landowners take the vacated property adjacent to their property to the centerline. However, Kelly sought a declaration that, because Kelly's predecessor had owned the entire parcel comprising the right-of-way, Kelly was the rightful owner of the entire right-of-way.

The Keetons filed an answer in which, among other things, they denied the material allegations of the complaint and asserted that, pursuant to § 23-4-2(b), Ala. Code 1975, they were entitled to a portion of the vacated right-of-way. In pertinent part, § 23-4-2(b) provides that, upon the [*1264] vacation of a right-of-way, "[t]itle and all public rights, including the right to close the street, alley, or highway vacated, shall vest in the abutting landowners." The Keetons also asserted that Kelly's action was based on common law that had been legislatively overruled by § 23-4-2 and that, as a result, Kelly's action was without substantial justification and was groundless in law. Thus, they asserted a counterclaim for an attorney fee pursuant to the Alabama Litigation Accountability Act, § 12-19-270 et seq., Ala. Code 1975.

On December 29, 2008, [**3] the Keetons filed a motion for a summary judgment. They asserted that, because their property abutted the vacated right-of-way, the City's vacation of the right-of-way had caused that

property to vest in them from the centerline of the right-of-way to their property line.

On February 2, 2009, Kelly filed a response to the Keetons' motion as well as its own motion for a summary judgment. It argued that its predecessor in interest had supplied the property to the City for the right-of-way and that, as a result, upon the City's vacation of that property, Kelly was entitled to fee-simple title to the entire property comprising the right-of-way. Kelly argued that the general rule that title to vacated property vests in abutting landowners was based on the abutting landowners' having contributed equal amounts of land at the time the right-of-way was originally dedicated. Kelly argued that an exception to the general rule applied when all the property for the right-of-way was taken from only one of the owners of abutting property. In such a case, it argued, the owner of the abutting property who had contributed all the property for the right-of-way was entitled to retake fee-simple ownership [**4] of the entire right-of-way upon its vacation. In support of its motion, Kelly relied on *State v. Mobile River Terminal Co.*, 898 So. 2d 763 (Ala. Civ. App. 2004). Kelly attached to its motion several deeds purporting to demonstrate that it was, in fact, the successor in interest to the entity that had originally provided all the property to the City for the right-of-way.

On April 23, 2009, the trial court granted Kelly's motion and entered a summary judgment in its favor. Relying on *State v. Mobile River Terminal Co.*, supra, it held that Kelly was the rightful owner of the right-of-way. Because the trial court's judgment was silent as to the Keetons' counterclaim for an attorney fee pursuant to the Alabama Litigation Accountability Act, we conclude that the trial court implicitly denied the Keetons' counterclaim. *See Casey v. McConnell*, 975 So. 2d 384, 389 (Ala. Civ. App. 2007) (indicating that a judgment's silence on a counterclaim under the Alabama Litigation Accountability Act is interpreted, under Alabama precedents, "as an implicit denial of that counterclaim"). The Keetons filed a "motion for rehearing" on May 13, 2009, which we construe as motion to alter, amend, or vacate the [**5] summary judgment. That motion was denied by operation of law on August 11, 2009. *See* Rule 59.1, Ala. R. Civ. P. [1] The Keetons filed a timely appeal to this court, which transferred the appeal [*1265] to the supreme court for lack of subject-matter jurisdiction. The supreme court transferred the appeal back to this court pursuant to § 12-2-7(6), Ala. Code 1975.

1 On September 3, 2009, the trial court purported to enter an order denying the Keetons' motion to alter, amend, or vacate the judgment, and, on September 23, 2009, the trial court entered a "certificate of final judgment" in which it purported to, among other things, certify its judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. Each of those orders was a nullity, however; the former because the time to rule on the motion had already expired, *see Starr v. Wilson*, 11 So. 3d 846, 850 (Ala. Civ. App. 2008), and the latter because the April 23, 2009, summary judgment was a final judgment and, after the time for ruling on the Keetons' postjudgment motion had expired, the trial court no longer had jurisdiction over the cause, *see Colburn v. Colburn*, 14 So. 3d 176, 178 (Ala. Civ. App. 2009).

The Keetons contend that Kelly provided no evidence [**6] indicating that the City properly followed the statutory procedures, set forth in § 23-4-2(b), Ala. Code 1975, to vacate the right-of-way and that, as a result, the trial court erred in entering a summary judgment in Kelly's favor. The Keetons did not make this argument to the trial court in opposition to Kelly's summary-judgment motion. In fact, their own summary-judgment motion, in which they sought a judgment declaring that they were the proper owners of a portion of the right-of-way because of the City's vacation of the right-of-way, presupposed that the City had properly vacated the right-of-way. A party cannot raise an issue for the first time on appeal. *Andrews v. Merritt Oil Co.*, 612 So. 2d 409, 410 (Ala. 1992). As a result, we will not consider the merits of this contention.

The Keetons also contend that, based on § 23-4-2(b), they were entitled to ownership of a share of the vacated right-of-way equal to Kelly's share of the vacated right-of-way. The Keetons point out that this statute was amended, effective July 1, 2004, to provide, among other things, that, upon vacation of a right-of-way, "[t]itle and all public rights, including the right to close the street, alley, or [**7] highway vacated, shall vest in the abutting landowners." They acknowledge that, under common law predating the 2004 amendment of § 23-4-2, all the land constituting a dedicated right-of-way should be restored, upon vacation, to a landowner whose predecessors in title had owned all the property comprising the right-of-way before its dedication. However, they argue, the 2004 amendment to § 23-4-2 constituted a legislative overruling of that principle in favor of a rule requiring an equal vesting in all abutting landowners of the property comprising a right-of-way upon the vacation of the right-of-way.

In *State v. Mobile River Terminal Co.*, supra, this court quoted *Neil v. Independent Realty Co.*, 317 Mo. 1235, 298 S.W. 363 (1927), for the following proposition:

> "'So it appears that the common-law rule to the effect that adjoining owners had title to the middle of the highway rested upon the presumption that they had contributed equally to the road, but if the facts showed the contrary the rule did not apply. In other words, the facts would govern rather than the mere presumption. Out of this grew the rule that if the highway is taken wholly from one man's property and such highway is vacated, [**8] the land in fee reverts to the original owner, or his grantees, freed from the public use or easement.'"

898 So. 2d at 776 (quoting 317 Mo. at 1244, 298 S.W. at 366). The Keetons do not contend that, if the 2004 amendment to § 23-4-2(b) did not overrule the above-stated common-law principle, that principle would not, for other reasons, control the outcome of this case. For example, they do not contend that the evidence does not support Kelly's assertion that, at the time of its creation, the right-of-way was carved out of property that was owned entirely by one of Kelly's predecessors in interest. Instead, the thrust of their argument is [*1266] that the above-quoted common-law principle was overruled by the 2004 amendment to § 23-4-2(b).

Our supreme court has written that ""'[s]tatutes in derogation or modification of the common law are strictly construed. ... Such statutes are presumed not to alter the common law in any way not expressly declared.'"" *Ex parte Key*, 890 So. 2d 1056, 1060 (Ala. 2003) (quoting *West Dauphin Ltd. P'ship v. Callon Offshore Prod., Inc.*, 725 So. 2d 944, 952 (Ala. 1998), quoting in turn *Arnold v. State*, 353 So. 2d 524, 526 (Ala. 1977)). As previously stated, the sentence [**9] added by the 2004 amendment to § 23-4-2(b) upon which the Keetons rely reads: "Title and all public rights, including the right to close the street, alley, or highway vacated, shall vest in the abutting landowners." Although the Keetons contend that this language means that all the owners of land abutting a vacated right-of-way are entitled to a share of the right-of-way, running to the centerline thereof, we cannot construe the statute as requiring such a result, regardless of whether one or all of the abutting landowners originally contributed the property comprising the right-of-way. The statute does not expressly state that every abutting landowner is entitled to a share of a vacated right-of-way, it does not provide that the centerline of the right-of-way constitutes the appropriate dividing line between abutting landowners on opposite sides of the right-of-way, and, most importantly, it does not indicate the proportion of the right-of-way to which each abutting landowner is entitled. As a result, in applying the statutory amendment on which the Keetons rely, courts are still required to look to common-law principles in dividing a vacated right-of-way between abutting landowners. [**10] Because we fail to uncover any "express declaration" in the 2004 amendment altering the common law, we presume that the legislature did not intend to alter the common-law rules in place before the effective date of the 2004 amendment. Therefore, the Keetons' contention that the rule of law stated in *State v. Mobile River Terminal Co.*, supra, has been legislatively overruled is without merit.

Based on the foregoing, we conclude that the Keetons waived their first contention on appeal by failing to raise it in the trial court, and we find no merit in their second contention. As a result, we affirm the trial court's summary judgment in favor of Kelly.

AFFIRMED.

Pittman, Bryan, Thomas, and Moore, JJ., concur.

Billy Kennedy, d/b/a Kennedy's Wrecker Service; and Orange Stallworth, d/b/a Stallworth's Wrecker Service v. City of Prichard, Alabama, a Municipal Corporation; and Michael Glen Robinson, d/b/a City Wrecker Service

No. 84-761

Supreme Court of Alabama

484 So. 2d 432; 1986 Ala. LEXIS 3421

February 7, 1986

PRIOR HISTORY: [**1] Appeal from Mobile Circuit Court.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: bid, competitive, wrecker, competitive bidding, bidder, ordinance, special privileges, municipality, proscription, expenditure, franchise, reasonableness, departmental, injunction, requisite, organic, lowest, service contract, exclusive contract, injunctive relief, prescribed, towed

COUNSEL: William H. McDermott and Steven L. Nicholas for McDermott, Slepian, Windom and Reed, Mobile, for Appellant.

Norman J. Gale, Jr. and Melissa Posey for Clay, Massey & Gale, Mobile, for Appellee.

JUDGES: Jones, Justice. Torbert, C. J., and Maddox, Faulkner, Shores, Beatty, Adams, and Houston, JJ., concur.

OPINION BY: JONES

OPINION

[*433] This suit involves a dispute over the validity of a contract for wrecker service entered into by the City of Prichard and Michael Robinson, doing business as City Wrecker Service. Plaintiffs, who are Appellants here, are owners of wrecker service companies who were deprived of the right to compete for wrecker services granted to Robinson by his exclusive contract with the City. The circuit court found the contract to be valid and denied Plaintiffs' motion for a permanent injunction.

Plaintiffs raise three issues on appeal. First, that the contract constituted an exclusive grant of special privileges in violation of Ala. Const. 1901, Art. I, § 22; second, that the contract was void for failing to comply with the competitive bid law (Code 1975, § 41-16-50, *et seq.*); and third, [**2] that the contract and ordinance were improperly executed. Any of these, argue Plaintiffs, would be proper grounds for granting a permanent injunction.

Because of our holding that the interrelationship of the constitutional and competitive bid law issues requires our reversal of the judgment below, we pretermit any discussion of the "improper execution" issue.

The pertinent language of § 22 of the Constitution is:

> "No . . . law . . . making any . . . exclusive grants of special privileges . . . shall be passed by the legislature; . . ." [1]

1 The prohibition of this language applies to municipalities as well as to the legislature. *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465 (1885).

The competitive bid law, in pertinent part, reads:

> "All expenditure of funds of whatever nature for labor, services or work . . . involving $3,000.00 or more . . . made by . . . the governing bodies of the municipalities of the state . . . shall be made under contractual [**3] agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder . . . ." [2]

Code 1975, § 41-16-50(a).

2 For other procedural provisions, see Code 1975, § 41-16-57.

The argument against application of the competitive bid law most strongly urged by the City is that the law's "expenditure of funds" requirement is an element missing here, because it is the owners of the towed vehicles, and not the City, that pay for the service. Appellants counter this argument by citing several cases from other jurisdictions which have invalidated similar contracts for city services, reasoning that the "expenditure of funds" provision cannot serve as an "escape" from the law's application simply by requiring that the cost of such services be paid by the individual recipient.

These respective arguments are relevant to the dispositive issue only if we confine our inquiry to an analysis of the competitive bid law. But our inquiry is not so confined. Although counsel for [**4] the respective parties argue § 22 of the Constitution and the competitive bid law as separate and distinct issues, these independent laws are not mutually exclusive. For a discussion of the constitutional implications of a wrecker service franchise granted by a municipality, see *Crabtree v. City of Birmingham*, 292 Ala. 684, 299 So. 2d 282 (1974).

As the Court held in *Franklin Solid Waste Services v. Jones*, 354 So. 2d 4 (Ala. 1978), compliance with the bid law will generally satisfy the constitutional proscription [*434] against the government's "exclusive grants of special privileges." Indeed, not only are these two laws--one organic and one statutory--legally compatible, but the minimum *constitutional* requisite for upholding the instant franchise consists substantially in its compliance with the *statutory* requisites.

Stated otherwise, under these circumstances, the City's grant of an exclusive contract for wrecker service that does not substantially comply with the bid law necessarily violates the constitutional proscription of § 22. Primarily this is true because competitive bidding of the contract is a fundamental requirement for compliance with either [**5] law. In order to escape its "exclusive grants of special privileges" proscription, our organic law mandates that governmental grants of "exclusive" franchises be subjected to a free, open, and competitive market.

It is true, of course, that the wrecker service contract here involved has its own set of peculiarities not present in other competitive bid contracts. Certainly, the City has the right (and, indeed, the duty) to require that prospective bidders meet minimum standards, *e.g.*, adequate equipment, availability and accessibility of facilities to render the specified services, the proximity of an adequate storage lot to the city hall, etc. Few contracts for city services, however, fall into a simple, classical pattern; but these differences can be readily accommodated by the various departmental rules and regulations that implement the competitive bid ordinance or by the ordinance itself.

When contracts of this nature are agreed upon without proper competitive bidding, the Constitution is violated:

> "The monopoly which is obnoxious to the law, or the special exclusive privilege under the ban of the Constitution, is a privilege farmed out to the highest bidder, or [**6] conferred because of favoritism to the donee, and not one awarded to the lowest bidder, and for the convenience and benefit of the public." *Dickinson v. Cunningham*, 140 Ala. 527 at 533-534, 37 So. 345 at 349 (1903).

Similarly, in *Crabtree*, the Court observed:

> "The exercise of such power does not grant carte blanche discretion to the City in its drafting of the specifications for qualification of the bidders in such a manner as to be violative of fundamental constitutional rights. Clearly, . . . departmental regulations supplementing [the authorizing ordinance] must meet the same test of reasonableness, and any such contract resulting from arbitrary regulatory requirements favoring one potential bidder to the exclusion of all others would fail to meet such a test." 292 Ala. at 691, 299 So. 2d at 288.

Given the constitutional necessity for competitive bidding, then, we look to statutory law for an expression of public policy with respect to standards of reasonableness applicable to contract letting procedures. Thus, the juxtaposition of § 22 of the Constitution and the competitive bid law comprises the test for determining the validity of Robinson's [**7] wrecker service contract with the City. Stated another way, the *in pari materia* construction of the two laws--the competitive bidding law as mandated by the Constitution and the procedural steps incident thereto as prescribed by statute--governs the right to injunctive relief herein sought by Appellants.

The fatal flaw in Robinson's contract is amply demonstrated by a combination of two facts: 1) The ordinance authorizing the contract established the fixed

price for each towed vehicle (thus eliminating the primary object of the competitive bidding process [3]); and 2) the completed contract, tailored specifically to fit Robinson's operation, was already executed by Robinson before bid offers were tendered by the City to competing wrecker services. The judgment denying injunctive relief is reversed [*435] and this cause is remanded for entry of a judgment consistent with this opinion.

3 The only item subject to bid, as prescribed by the City's request for proposals, was the percentage of proceeds to be split between the wrecker company and the City after the auctioning of abandoned vehicles.

[**8] REVERSED AND REMANDED.

Torbert, C. J., and Maddox, Faulkner, Shores, Beatty, Adams and Houston, JJ., concur.

William M. Key and Brandy D. Key v. Donald E. Ellis et al.

2051020

COURT OF CIVIL APPEALS OF ALABAMA

973 So. 2d 359; 2007 Ala. Civ. App. LEXIS 314

May 11, 2007, Released

SUBSEQUENT HISTORY: Released for Publication January 18, 2008.

PRIOR HISTORY: [**1]

Appeal from Blount Circuit Court. (CV-04-375). Robert E. Austin.
Key v. Ellis, 2006 Ala. Civ. App. LEXIS 1401 (Ala. Civ. App., Sept. 15, 2006)

DISPOSITION: AFFIRMED.

CORE TERMS: tract, right-of-way, easement, public road, grantor's, route, right of way, landlocked, highway, adjacent, conveyed, feet, probate, per acre, condemnation, unquestioned, tenus, ore, unobstructed, pasture, nearby, fence, gate, condemnation action, contiguous, declaring, nearest, stable, acre, corner

COUNSEL: For Appellants: Jeffrey W. Brumlow and Shay N. Click of Massey, Stotser & Nichols, P.C., Birmingham.

For Appellees: Alexander M. Smith of Smith & NeSmith, P.C., Oneonta.

JUDGES: THOMPSON, Presiding Judge. Pittman, Bryan, Thomas, and Moore, JJ., concur.

OPINION BY: THOMPSON

OPINION

[*362] THOMPSON, Presiding Judge.

William M. Key and Brandy D. Key ("the Keys") appeal from a judgment declaring a right-of-way across their land in favor of Donald E. Ellis, Gary Ellis, John Ellis, Glenn Ellis, and Sharon Ellis Laird ("the Ellises"), the owners of an adjoining tract of land. Because the circuit court did not err to reversal in declaring the right-of-way or in admitting certain testimony regarding the value of the taking, we affirm.

Sections 18-3-1 to 18-3-3, Ala. Code 1975, authorize the owner of a landlocked property to maintain a private condemnation action in order to obtain a right-of-way from the property to a nearby public road. Section 18-3-1 states:

> "The owner of any tract or body of land, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from [**2] the municipal government and the planning board of such municipality." [1]

Section 18-3-2 establishes limits on private condemnation actions under § 18-3-1:

> "In the establishment and condemnation of such right-of-way, no road or right-of-way shall be established through any person's yard, garden, orchard, stable lot, stable, gin house or curtilage without the consent of the owner; and the applicant must pay the owner for the value of the land taken and compensation for damage to the land, through which said right-of-way is established, resulting from the establishment of such road or right-of-way."

Section 18-3-3 provides that private condemnation actions under § 18-3-1 "shall be exercised by application to the probate court of the county in which the lands over which such right-of-way is desired, . . . and the same proceedings shall be had as in cases of condemna-

tion of lands for public uses as provided by Chapter 1 [replaced by Chapter 1A] of this title."

1 The Keys argue on appeal that the Ellises failed to obtain municipal approval for the right-of-way as required by § 18-3-1. However, the land at issue in this case is located in an unincorporated part of Blount County and does not [**3] fall within the jurisdiction of any municipality. Regardless, the record does not show that the Keys raised this argument below. Because we cannot consider arguments made for the first time on appeal, we will not address this issue. *See Andrews v. Merritt Oil Co.*, 612 So. 2d 409, 410 (Ala. 1992); *Schiesz v. Schiesz*, 941 So. 2d 279, 290 (Ala. Civ. App. 2006).

The Ellises are the children of William and Mary Ellis. They inherited from their parents a 20-acre tract of land that the parties refer to as "Tract 14." In September 2003, the Ellises petitioned the probate court of Blount County for a right-of-way under § 18-3-1, alleging that Tract 14 was landlocked. [2] They requested that the probate court grant a right-of-way across land owned by the Keys, which the parties refer to as "Tract 5," to the nearest public road.

2 As a joint owner of Tract 14 with her children, Mary Ellis was also a party to the petition. Mary died while the litigation was pending, and the Ellises advised the circuit court that they had inherited her interest. There is no question on appeal as to the Ellises' title to Tract 14.

The probate court took ore tenus testimony and viewed the land. In August 2004, it granted [**4] the right-of-way and appointed commissioners who subsequently [*363] assessed $ 4,250 in damages for the taking. In September 2004, the probate court confirmed the assessment and ordered the right-of-way condemned upon the Ellises' payment of damages. The Keys appealed to the circuit court.

The circuit court reviewed the case *de novo* and held a bench trial at which it took ore tenus testimony. In the presence of the parties' counsel, the court viewed the proposed right-of-way across Tract 5 and the alternative rights-of-way suggested by the Keys. On June 23, 2006, the court entered a detailed order. The order described the testimony and the history of the lands in detail. After discussing the Keys' arguments, the court found that Tract 14 was landlocked and that the Ellises "presently have no unobstructed and unquestioned right of way to a public road." The court then declared a right-of-way across Tract 5 and ordered a jury trial as to the value of the taking. A jury assessed the value of the taking at $ 4,000, and on July 27, 2006, the circuit court entered a final judgment on the verdict. [3] The Keys filed a notice of appeal to this court on September 5, 2006. The case was transferred to [**5] the supreme court; it was subsequently transferred back to this court by the supreme court pursuant to § 12-2-7(6), Ala. Code 1975.

3 The case action summary shows that the circuit court entered the judgment on July 25, 2006; however, the reporter's transcript shows that the jury trial occurred on July 27, 2006. Despite this discrepancy, the Keys filed their notice of appeal within 42 days of either date, as required by Rule 4, Ala. R. App. P.

The record reveals the following relevant facts. In the late 1930s, Alvin and Bonnie Ellis acquired approximately 80 acres of land in Blount County. The boundary of the 80 acres is nearly rectangular in shape and is adjacent to Berry Mountain Loop Road on the southern and southeastern sides. The land is now divided into four rectangular tracts of approximately equal size. The county-tax-assessment map identifies the northwest tract as Tract 14, the northeast tract as Tract 13, the southwest tract as Tract 4, and the southeast tract as Tract 3. Only Tracts 4, 3, and the southeastern corner of Tract 13 are adjacent to Berry Mountain Loop Road. No part of Tract 14 is adjacent or contiguous to any public road or highway.

In 1951, Alvin and Bonnie Ellis [**6] conveyed Tract 13 to their son, Herman Ellis. In 1962, they conveyed Tract 3 to Herman and Tract 14 to their son and daughter-in-law, the plaintiffs' parents, William and Mary Ellis. Alvin and Bonnie retained ownership of Tract 4 until 1969, when, after Alvin's death, Bonnie conveyed it to another son, Easley Ellis. Tract 4 is now owned by Easley's widow, the plaintiffs' aunt, Earline Ellis.

There are no structures on Tract 14. John Ellis, one of the plaintiffs, testified that the Ellises use Tract 14 primarily as a hay field and, on occasion, to pasture cattle. The Ellises bale hay on Tract 14 approximately three to four times each year. They leave the hay on the field and retrieve the bales periodically throughout the winter months.

The Keys' land, Tract 5, is adjacent to the northern borders of Tracts 13 and 14. From 1937 until 2000, Tract 5 was owned by Coy Jones. In 1966, County Road 57 ("CR-57"), also known as Hendrix Road, was built along the northern border of Tract 5. Tract 5 lies between Tract 14 and CR-57. In 2000, after Jones had died, the Keys purchased Tract 5 from Jones's testamentary trust.

John Ellis testified that from 1962, when Alvin and Bonnie Ellis conveyed Tract [**7] 14 to William and

Mary Ellis, until Alvin's [*364] death in 1969, he accessed Tract 14 from the south across the western edge of Tract 4 with Alvin's permission. The circuit court made the following finding of fact regarding this route:

> "From viewing the premises, this route would intersect Berry Mountain Loop Road by way of the driveway of the owner of Tract 4, then staying to the left along the western boundary line of Tract 4 (as the driveway bears to the right) for a short distance along a utility access right of way . . . , then continuing straight north through the pasture along the west boundary line . . . to a gate that is located near the southwest corner of [Tract 14]. Although this route is certainly more level than the route proposed by the [Ellises], it is more than 1,300 feet in length."

The Ellises do not have any express easement or right-of-way across Tract 4. John Ellis testified that the current owner of Tract 4, his aunt Earline Ellis, has never given the Ellises permission to cross Tract 4 and has objected to their doing so. The testimony showed that a "no trespassing" sign has been placed at the entrance to Tract 4; however, the testimony conflicts regarding whether it [**8] was placed there by Earline or by the local utility board.

John Ellis testified that when CR-57 was built in 1966, Jones agreed to allow the Ellises access to Tract 14 from CR-57 across the western edge of Tract 5. The circuit court made the following findings regarding this route:

> "Although he has accessed Tract 14 through several different permissive routes, John Calvin Ellis testified that during Coy Jones's life his primary access to Tract 14 was from Highway 57 by going over Mr. Jones's property. [John] Ellis even sought to improve the convenience of this access by installing access gates at his own expense. [John] Ellis testified that he made an agreement with Coy Jones that he would buy and erect gates on Jones's property (one on Highway 57 and one on the fence line between Tract 14 and Tract 5) so that he could pass through the property to gain access to [Tract 14] but still maintain the integrity of Jones's pasture. The gates purchased and erected by Ellis are still in place. . . ."

In 2000 or 2001, after the Keys had purchased Tract 5, they locked the gates and would not allow the Ellises to cross Tract 5 in order to access Tract 14. John Ellis testified that he had been on [**9] Tract 14 only once during the years since the Keys had blocked the route over Tract 5. The Ellises subsequently filed their petition with the probate court asking it to declare a right-of-way to CR-57 across Tract 5. The circuit court made the following findings regarding the proposed right-of-way:

> "Highway 57 is the closest public road to [Tract 14]. The distance from the [northwest] corner of [Tract 14], across the Keys' property to Highway 57 is 385.55 feet. The [Ellises] seek a right of way 30 feet wide running north from [Tract 14's] northwest corner, across the Key property, running parallel to the west boundary line fence dividing the Keys' property from their neighbor to the west . . . . However, because the area along the west fence line of the Keys' property becomes low, wet and marshy as it nears Highway 57, the [Ellises], according to the testimony, want the western edge of the right of way to be located 30 feet east of the Keys' west fence line and to extend 30 feet wide from that point. In essence, this would mean that the Keys would give up not only the 30 feet for the right of way but they would have an additional 30 feet [*365] west of the right of way that would be practically [**10] unsuitable for most uses." [4]

4 The circuit court noted that a shorter route to CR-57 existed across the adjoining property of an unrelated third party. However, due to the physical conditions of that land, the court found that route to be impracticable.

The proposed right-of-way across Tract 5 and the 30-foot area rendered unusable by it are together less than one-quarter of an acre in total size. The proposed right-of-way does not cross any "yard, garden, orchard, stable lot, stable, gin house or curtilage." *See* § 18-3-2, Ala. Code 1975. The testimony showed that the western part of Tract 5 over which the right-of-way lies is "raw

farmland" and has been used to pasture cattle or keep hogs. The circuit court found that "[f]rom the court's observation of the land, the way the pasture of the Keys rolls downhill to the low area along their west fence line, it would be difficult for the Keys to even observe such a right of way from their house which is located . . . about 275 yards away."

Regarding the value of the taking, the jury heard testimony from John Ellis and Brandy Key, who testified as to the current and contemplated uses of Tract 5 and Tract 14. Brandy Key testified that she and [**11] her husband purchased Tract 5 for $ 89,900, approximately $ 4,000 per acre. She testified that had the right-of-way been in place at the time she purchased the property, she would have paid $ 75,000 for the land, a difference of $ 14,900. The Ellises attempted to submit testimony from John Ellis regarding the value of land he owned that was located across CR-57 from Tract 5. The circuit court sustained the Keys' objection to that testimony, but it later withdrew that ruling and allowed the testimony over the Keys' objection. John Ellis testified that he owned land across CR-57 from Tract 5 that was subservient to two easements. He stated that he believed this land was worth $ 4,000 per acre.

The Keys raise two issues on appeal. First, they argue that the circuit court erred in declaring the right-of-way. Under precedent from this court and our supreme court, the ore tenus rule applies to our review of judgments in private condemnation actions under § 18-3-1, Ala. Code 1975.

> "Under the ore tenus rule, a trial court's findings of fact are presumed correct and its judgment will be reversed only if plainly or palpably wrong or against the preponderance of the evidence. . . . The ore tenus [**12] rule is especially applicable in private condemnation cases under § 18-3-1. See *Tate [v. Loper*], 459 So. 2d [892, 894 (Ala. Civ. App. 1984)]; see also *Brothers [v. Holloway]*, 692 So. 2d [845, 847-48 (Ala. Civ. App. 1987)] ('We note that our standard of review in condemnation cases is highly deferential.')."

Ex parte Cater, 772 So. 2d 1117, 1119 (Ala. 2000). "Particularly in this case, where [the judge] had the advantage of viewing the premises and knowing the locale, the rule should be emphasized and we would be most reluctant to disturb his findings." *Tenison v. Forehand*, 281 Ala. 379, 381, 202 So. 2d 740, 742 (1967).

> "However, § 18-3-1 '"is not a favored statute,"' *Southern Ry. v. Hall*, 267 Ala. 143, 147, 100 So. 2d 722, 725 (1957) (quoting *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 232, 181 P. 689, 691 [(1919)]), and the *ore tenus* presumption of correctness 'does not apply where the trial court has incorrectly applied the law to [the] facts,' *DeWitt [v. Stevens*], 598 So. 2d [849, 850 (Ala. 1992)]."

Ex parte Cater, 772 So. 2d at 1119.

Section 18-3-1 gives owners of land that is not adjacent or contiguous to [*366] any public road or highway the right to obtain a right-of-way to [**13] the nearest or most convenient public road. Our supreme court has held that "under § 18-3-1, a landowner is not entitled to condemn a right-of-way across a neighbor's intervening land if the landowner has an *existing, reasonably adequate* means of access to his property, or if he could construct such access without prohibitive expense." *Ex parte Cater*, 772 So. 2d at 1121 (emphasis supplied); *see also Southern Ry. Co. v. Hall*, 267 Ala. 143, 100 So. 2d 722 (1957). To determine whether a landowner has a reasonably adequate means of access, this court considers whether the access is unobstructed and unquestioned. [5] Section 18-3-1 does not authorize "the taking of lands of another as a mere matter of convenience," and "the burden is on the petitioner for a right of way to show that he has no reasonably adequate outlet." *Southern Ry. Co.*, 267 Ala. at 147, 146, 100 So. 2d at 725. Under § 18-3-1 as applied by this court and our supreme court, therefore, we must determine whether the evidence demonstrated that the Ellises had an existing means of access to Tract 14 and whether that access was reasonably adequate.

> 5 *See McGowin Inv. Co. v. Johnstone*, 54 Ala. App. 194, 197, 306 So. 2d 286 (Ala. Civ. App. 1974) [**14] (quoting *Starnes v. Diversified Operations, Inc.*, 47 Ala. App. 270, 272, 253 So. 2d 330, 332 (Ala. Civ. App. 1971), quoting in turn *Davenport v. Cash*, 261 Ala. 380, 382, 74 So. 2d 470, 471 (1950), adopting the language of *Carter v. Barkley*, 137 Iowa 510, 115 N.W. 21, 23 (1908)) ("'"The statute, in our judgment, should be construed to mean that, unless a party has a way, either public or private, which is unobstructed and unquestioned, he may institute proceedings under the statute."'").

The Keys argue that a reasonably adequate means of access to Tract 14 existed in the form of an easement by necessity across Tract 4. The rules governing the creation of an easement by necessity are distinct from those governing the private condemnation of a

right-of-way under § 18-3-1. *See, e.g., Kelly v. Panther Creek Plantation*, 934 So. 2d 1049, 1054 (Ala. 2006). Easements by necessity are a form of implied easement. *See Kelly*, 934 So. 2d at 1053-54; *Burrow v. Miller*, 340 So. 2d 779, 780 (Ala. 1976); and *Hamby v. Stepleton*, 221 Ala. 536, 130 So. 76 (1930).

> "[T]wo elements are necessary for the finding of an easement of necessity. First, the properties in controversy must come from a common source [**15] . . . . Secondly, there must be a reasonable necessity for the creation of this easement; that is, it must be the only practical avenue of ingress and egress."

Burrow, 340 So. 2d at 780 (citing *Hamby, supra*). Our supreme court examined the law related to easements by necessity in *Hamby v. Stepleton, supra*, stating:

> "'It is a universally established rule that where a tract of land is conveyed which is separated from the highway by other lands of the grantor, or which is surrounded by his lands or by his and those of third persons, there arises by implication in favor of a grantee a way of necessity across the premises of the grantor to the highway. *The basis of this right is the presumption of a grant arising from the circumstances of the case. Necessity does not of itself create a right of way, but it is evidence of the grantor's intention to convey one and raises an implication of a grant. The presumption, however, is one of fact, and whether or not the grant is to be implied in a given case depends upon the following terms of the deed and the facts in that case.* . . . Since the [easement by necessity] is founded on a grant, it can arise only between grantor and grantee. No way of necessity [**16] can [*367] be presumed or acquired over the land of a stranger. . . .' 9 R.C.L. § 31, Page 768; *Walker v. Clifford*, 128 Ala. 67, 29 So. 588, 86 Am. St. Rep. 74 [(1901)]; *Greenwood v. West*, 171 Ala. 463, 54 So. 694 [(1911)]; *Trump v. McDonnell*, 120 Ala. 200, 24 So. 353 [(1898)]."

Hamby, 221 Ala. at 537-38, 130 So. at 77 (emphasis supplied).

The Keys argue that the grant of Tract 14 from Alvin and Bonnie Ellis to William and Mary Ellis created a presumption of an easement by necessity over Tract 4 that the Ellises have not overcome. The Keys base their argument on the fact that both Tract 14 and Tract 4 were owned by Alvin and Bonnie Ellis; that Alvin and Bonnie retained Tract 4 when they conveyed Tract 14; that the conveyance landlocked Tract 14; and that Alvin allowed William and Mary and the Ellises to access Tract 14 across Tract 4 from 1962 until 1969.

Most cases involving easements by necessity arise when a landlocked grantee seeks a judicial grant or declaration of such an easement over the lands of the grantor who conveyed landlocked property. We have found only two cases in which defendants who were not the grantors of landlocked property attempted to use the law regarding easements [**17] by necessity defensively as the Keys do here.

In *McGowin Investment Co. v. Johnstone*, 54 Ala. App. 194, 306 So. 2d 286 (Ala. Civ. App. 1974), this court affirmed the trial court's judgment condemning a right-of-way in favor of the Johnstones across McGowin Investment Company's land under the then-existing version of § 18-3-1. The Johnstones' property was landlocked, but their grantor had retained land adjacent to it that had access to a public road via a perpetual easement. 54 Ala. App. at 196, 306 So. 2d at 287. McGowin argued that the Johnstones had "access from their land to a public road by means of implied way of necessity over the remaining land of their grantors and, therefore, should not be allowed access over the lands of a stranger." 54 Ala. App. at 196, 306 So. 2d at 287. This court stated: "The issue to be determined is whether or not a reasonably adequate means of access exists. *To this court, a way by necessity is not necessarily equivalent to a reasonably adequate means of access.*" 54 Ala. App. at 198, 306 So. 2d at 289 (emphasis added). Although circumstances existed under which the presumption of an easement by necessity could arise, this court concluded that, given [**18] the rugged physical makeup of the grantors' land, "there was ample evidence from which the trial court could determine that [the Johnstones] had no right of way over their grantor's remaining land which was unobstructed and unquestioned, or adequately reasonable." 54 Ala. App. at 198, 306 So. 2d at 289.

In *Crabtrey v. Tew*, 485 So. 2d 726 (Ala. Civ. App. 1985), this court affirmed a circuit court's judgment in a case with facts nearly identical to those at issue here. In 1983, Lochie Tew "divided her property among her children. Each of the children, except James Tew, was conveyed parcels of land that fronted on a public road . . . ." 485 So. 2d at 727. "The [James] Tew property [was] neither adjacent to nor contiguous to any public road or

right-of-way. The Crabtrey property [lay] between the [James] Tew property and an unnamed paved county road . . . ." *Id.* at 727. James Tew filed a petition for private condemnation seeking a right-of-way across the Crabtrey property to the county road. *Id.* at 727. The probate court and the circuit court both granted the right-of-way. Reviewing the case on appeal, this court considered a possible route across the land owned by James Tew's brothers, [**19] and stated:

> [*368] "In the present case, the route of access which Tew might have over his brothers' property could be cut off at any time, which made this route of access questionable and subject to being obstructed. Such a situation authorizes a proceeding by Tew to gain access to the nearest public road.
>
> "The Crabtreys contend that Tew should be given access over his brothers' land and should not be allowed access over the lands of a stranger, since both Tew's property and that of his brothers comes from a common grantor."

Id. at 728. Based on the language of § 18-3-1 and on *McGowin*, this court rejected the defendants' argument and found "that there was ample evidence to support the trial court's decision to grant the . . . right-of-way . . . ." *Id.*

As this court stated in *McGowin, supra*, a way by necessity is not necessarily equivalent to an existing, reasonably adequate means of access. *McGowin*, 54 Ala. App. at 198, 306 So. 2d at 289. First, as noted in *Hamby* and as the Keys themselves recognize, the grant of a landlocked property creates a presumption of an easement by necessity. "'Necessity does not of itself create a right of way,'" but is merely evidence of the grantor's intent. *Hamby*, 221 Ala. at 537, 130 So. at 77. [**20] The presumption of an easement by necessity may be overcome. *Id.* Based on this language, we cannot say that the Ellises had an existing easement by necessity across Tract 4. Additionally, because most opinions of this court and our supreme court speak of easements by necessity as being "granted" or "declared" by the courts, [6] we agree with the circuit court's conclusion that the Ellises did not "*already* have an easement which was neither sought nor declared during the lifetime of the former owner." (Emphasis in original.)

6 *See, e.g., Gowan v. Crawford*, 599 So. 2d 619, 622 (Ala. 1992); *Miller v. Harris*, 945 So. 2d 1072, 1074 (Ala. Civ. App. 2006); and *Bluffs Owners Ass'n, Inc. v. Adams*, 897 So. 2d 375, 378 (Ala. Civ. App. 2004).

Second, because the facts here created a presumption instead of an existing easement, the Ellises did not have a means of access over Tract 4 that was unquestioned so as to be reasonable access that would preclude the declaration of a right-of-way under § 18-3-1. Furthermore, in light of Earline Ellis's refusal to grant the Ellises permission to cross Tract 4, the access over Tract 4 is not unobstructed and unquestioned. The evidence did not show that Tract 4 [**21] provided the "permanency" and "unrestricted ability of usage" associated with reasonably adequate means of access. *Starnes v. Diversified Operations, Inc.*, 47 Ala. App. 270, 272, 253 So. 2d 330, 331 (Ala. Civ. App. 1971).

Based on the foregoing, we cannot say that the circuit court erred in finding that Tract 14 was landlocked with no existing, reasonably adequate means of access. As this court did in *McGowin* and *Tew, supra*, we affirm the circuit court's judgment declaring the right-of-way.

The Keys also argue on appeal that the circuit court erred in admitting John Ellis's testimony that the value of his nearby property, which was not at issue in the litigation, was $ 4,000 per acre. On appeal, the Keys argue only that the testimony was irrelevant and prejudicial. We review the circuit court's decision to admit or exclude evidence to determine whether the circuit court exceeded its discretion. *Middleton v. Lightfoot*, 885 So. 2d 111, 114 (Ala. 2003).

> "The standard applicable to a review of a trial court's rulings on the admission of evidence is determined by two fundamental principles. The first grants trial judges wide discretion to exclude or to [*369] admit evidence. 'The test is that the [**22] evidence must ... shed light on the main inquiry, and not withdraw attention from the main inquiry.' *Atkins v. Lee*, 603 So. 2d 937 (Ala. 1992) (citing *Ryan v. Acuff*, 435 So. 2d 1244 (Ala. 1983)). The second principle 'is that a judgment cannot be reversed on appeal for an error unless . . . it should appear that the error complained of has probably injuriously affected substantial rights of the parties.' *Atkins*, 603 So. 2d at 941."

Wal-Mart Stores, Inc. v. Thompson, 726 So. 2d 651, 655 (Ala. 1998).

Section 18-1A-192(a) provides that "[u]pon proper foundation, opinion evidence as to the value of property may be given in evidence only by [certain specified

persons, including] an owner of the property . . . ." Section 18-1A-192(b) provides that § 18-1A-192(a) "does not preclude the admissibility of other evidence explaining or enabling the trier of fact to understand and weigh any opinion testimony given under subsection (a)." "The rationale for allowing a nonexpert owner or his designated representative to testify regarding the value of his property, is that an owner presumably knows the value of his asset." *E-Z Serve Convenience Store, Inc. v. State*, 686 So. 2d 351, 353 (Ala. Civ. App. 1996). [**23] However, the "presumption of the owner's knowledge of value does not extend to one who would testify as to the value of another's property." *Id.*

Here, the ultimate issue before the jury was the value of the taking of the right-of-way across Tract 5. John Ellis, however, did not testify to his belief or opinion regarding the value of Tract 5 or the value of the taking. Instead, he testified that he believed the value of nearby property that he owned was worth $ 4,000 per acre, the same price that Brenda Key testified she paid for Tract 5 before the circuit court declared the right-of-way.

We cannot say that testimony regarding the value of nearby property does not shed light on the main inquiry or withdraws attention from it. Indeed, evidence regarding the value of nearby property would likely have explained or enabled the trier of fact to understand and weigh Brandy Key's opinion as to the value of her land. Furthermore, in light of Brenda Key's testimony that Tract 5 was worth $ 4,000 per acre before the taking, we cannot say that Ellis's testimony injuriously affected substantial rights of the Keys. Indeed, the jury awarded the Keys $ 4,000 in damages for a taking of less than one-quarter [**24] of an acre. This amounted to an effective award of $ 16,000 per acre taken. *See Brothers v. Holloway*, 692 So. 2d 845, 849 (Ala. Civ. App. 1997). Accordingly, the circuit court did not err to reversal in admitting the testimony over the Keys' objection.

Therefore, as to both issues the Keys raise on appeal, the circuit court's judgment is affirmed.

AFFIRMED.

Pittman, Bryan, Thomas, and Moore, JJ., concur.

Lake Cyrus Development Company, Inc. v. Attorney General of the State of Alabama ex rel. Bessemer Water Service

1090948

SUPREME COURT OF ALABAMA

143 So. 3d 771; 2014 Ala. LEXIS 1

January 10, 2014, Released

SUBSEQUENT HISTORY: Released for Publication August 14, 2014.

PRIOR HISTORY: [**1]

Appeal from Jefferson Circuit Court, Bessemer Division. (CV-97-378). Jerry M. White, Trial Judge.
Bessemer Water Serv. v. Lake Cyrus Dev. Co., 959 So. 2d 643, 2006 Ala. LEXIS 337 (Ala., 2006)

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: waterlines, tendered, attorney general, bid, main-extension, customer, water service, developer's, convincing evidence, provider, water line, ownership, easement, void, tap, public services, residential, customarily, repurchase, awarding, inherit, pressure-tested, devoted, entitled to recover, undisputed evidence, correctness, undisputed, manager, lateral, partial

COUNSEL: For Appellant: V. Edward Freeman II of Stone, Patton, Kierce & Freeman, Bessemer.

For Appellee: Troy King and Luther Strange, attys. gen., and J. Matt Bledsoe and Olivia W. Martin, asst. attys. gen.

JUDGES: BOLIN, Justice. Stuart, Shaw, Main, Wise, and Bryan, JJ., concur. Murdock, J., concurs specially. Moore, C.J., and Parker, J., concur in the result.

OPINION BY: BOLIN

OPINION

[*773] BOLIN, Justice.[1]

1 This case was mistakenly placed on this Court's administrative docket in September 2011. It was not assigned to Justice Bolin until October 31, 2013. We regret the delay in the issuance of a decision in this appeal.

Lake Cyrus Development Company, Inc. ("LCDC"), appeals from the trial court's denial of its motion to alter, amend, or vacate a judgment in favor of Bessemer Water Service ("BWS") or, in the alternative, its motion for a new trial. We reverse and remand.

I. Facts and Procedural History

This case involves a dispute between BWS and LCDC over a contract referred to as the "1998 water agreement." In Bessemer Water Service v. Lake Cyrus Development Co., 959 So. 2d 643 (Ala. 2006)("Bessemer I"), this Court determined that the 1998 water agreement was entered into in violation of § 39-2-2, Ala. Code 1975, which mandates that all public-works contracts in excess of $50,000 be advertised for sealed bids. The relevant facts and [**2] much of the procedural history of this appeal are set forth in Bessemer I:

> "The 1998 water agreement was entered into on April 30, 1998. The contract was signed by the then mayor of Bessemer, Quitman Mitchell, who by statute also served as the manager of Bessemer Utilities, and by Charles Givianpour, the president of LCDC. It was the product of two months of negotiations that began when Mayor Mitchell and Charles Nivens, operations manager for Bessemer Utilities, approached Givianpour and asked him to use BWS, instead of Birmingham Water Works, as the provider of water to the new Lake Cyrus residential development in Hoover. BWS was interested in providing water to Lake Cyrus not only to increase its customer base, but also to further its reach. Toward that end, BWS expressly negotiated for LCDC to increase the size

of the main water line within the development (running from Highway 150 to Parkwood Road) from a 12-inch line to a 16-inch line to allow for future expansion.

"The 1998 water agreement obligated BWS

> "'to provide potable water to all residential, industrial and commercial areas within the [Lake Cyrus] development at the same rates and upon the same terms and conditions (as [**3] modified by the terms and provisions of this agreement) as BWS provides water service to all other residential, industrial and commercial customers, respectively, of BWS.'

"(Emphasis added.) The terms and provisions of the 1998 water agreement had [*774] been modified; they were not the terms and provisions of the typical BWS water-services contract. Nivens and Terry Hinton, water-distribution superintendent at BWS, testified that it was BWS's standard procedure to fund the cost of a water-main extension for a residential development to the point of the entrance to the development and that the developer customarily paid all costs associated with bringing water from that point into the development, including the construction of the interior main extension, the submain, and the lateral lines. However, under the 1998 water agreement, BWS agreed to pay LCDC $273,000 as 'a partial deferment' of the costs LCDC incurred in installing the interior 16-inch main extension, the submains, and the associated water valves. Moreover, BWS agreed to reimburse LCDC on a monthly basis for all costs and expenses LCDC incurred in installing the lateral water lines within the development.

"It was also standard BWS [**4] practice to charge a 'tap fee' to each new customer that requested water service. The tap fee was used to offset the cost of extending the water main to the entrance of a new development and the cost of maintaining the water lines in the development after the lines were installed and tendered by the developer for BWS's acceptance. However, the 1998 water agreement required BWS to remit to LCDC, on a monthly basis, 100% of the tap fees collected in the development.

"Aside from the provisions mandating a $273,000 payment to LCDC, the reimbursement of LCDC's lateral-line construction costs, and the transmittal to LCDC of 100% of the collected tap fees, BWS also identified the following requirements in the 1998 water agreement as deviating from the terms and conditions of its standard water-services contract: 1) BWS was to provide and install all fire hydrants; 2) LCDC was to retain an option to repurchase all of the waterworks in the development after they were tendered to BWS; 3) BWS was required to keep the contents of the 1998 water agreement confidential; and 4) all late payments by BWS accrued interest at the rate of 18%.

"In 2002, Edward May was elected mayor of Bessemer. May replaced [**5] Mayor Mitchell and began his term on October 7, 2002. Mayor May initially continued to sign the reimbursement checks being sent to LCDC under the 1998 water agreement. However, in approximately May 2004, after reviewing a copy of the contract, Mayor May began to doubt the legality of the 1998 water agreement. After consulting with the City's attorney, Mayor May sent LCDC a letter, dated August 9, 2004, informing it of the City's position that the 1998 water agreement was void and requesting that legal counsel for the City and for LCDC meet and discuss the options.

"The relationship between LCDC and BWS rapidly disintegrated. Because BWS would not pay LCDC $202,990 in reimbursements LCDC was claiming under the 1998 water agreement for finishing the interior 16-inch water-main extension through the back of the subdivision to complete the connection with the main BWS line at Parkwood Road, LCDC refused to complete the work.

BWS was anxious to have the extension completed because the connection at Parkwood Road would 'loop' the system. In response, BWS delayed approving water lines connecting the remaining sector of the Lake Cyrus development, causing delays in residential construction.

"On [**6] December 6, 2004, BWS filed its cross-claim seeking, among other relief, relief from the allegedly invalid provisions in the 1998 water agreement that [*775] required it: 1) to remit to LCDC $71,540, the outstanding balance of the $273,000 partial-deferment payment; 2) to further reimburse LCDC for costs and expenses associated with constructing lateral lines; 3) to turn over to LCDC 100% of the tap fees that were collected in the development; 4) to sell LCDC all the water lines in the development if LCDC elected to exercise the purchase option; and 5) to keep the terms of the 1998 water agreement confidential. BWS also asked the trial court to enforce the valid portions of the 1998 water agreement so as to allow BWS to continue to provide water to the Lake Cyrus development. Finally, BWS asked the trial court to determine if it could recover any of the funds previously paid to LCDC under the 1998 water agreement and to declare that BWS was the owner of all of the waterworks within the Lake Cyrus development that had previously been tendered by LCDC and accepted by BWS.

"LCDC thereafter filed a 'motion for emergency expedited and injunctive relief,' asking the trial court to order BWS to supply [**7] water to the final sector of the Lake Cyrus development as promised and to pay LCDC the money LCDC was claiming under the 1998 water agreement. LCDC further asked the court to enjoin BWS from future breaches of the contract.

"The trial court held a bench trial on all pending matters in the case from February 28, 2005, through March 3, 2005. On March 7, 2005, the trial court entered an order finding the entire 1998 water agreement to be valid and entering a judgment in favor of LCDC. On March 8, 2005, the trial court entered an amended order, ordering BWS to pay LCDC $224,979.83 in damages. BWS appeals."

959 So. 2d at 646-48 (emphasis in original; footnotes omitted).

In Bessemer I, this Court concluded that the trial court had exceeded its discretion in holding that the 1998 water agreement was a valid binding contract and in awarding LCDC $224,979.83 because, we held, the agreement was entered into violation of § 39-2-2 and was therefore void:

> "Because the 1998 water agreement involved a public-works project (in an amount in excess of $50,000), BWS was required by § 39-2-2 to advertise for sealed bids before entering into the contract calling for it to expend public funds on the project. [**8] BWS did not do so. By way of the 1998 water agreement, BWS and LCDC effectively bypassed the bidding process entirely so as to award the contract directly to LCDC. This violated § 39-2-2 and, pursuant to § 39-2-2(c), the 1998 water agreement is accordingly 'null, void, and violative of public policy.' The trial court therefore erred in holding that it was a valid binding contract. Moreover, because § 39-5-6 and § 39-5-1(a)[, Ala. Code 1975,] forbid a party from receiving any payment in connection with a contract awarded in violation of the competitive bid law, regardless of the party's culpability, the trial court also erred in awarding LCDC $224,979.83 for BWS's alleged breach of contract. Because the 1998 water agreement was entered into in violation of the mandatory provisions of § 39-2-2, LCDC is not entitled to recover any payment for the work it performed under that contract."

959 So. 2d at 651. In addition to holding that LCDC was not entitled to recover any payments for the work it had performed under the 1998 water agreement, we also held (1) that any invalid provisions of the 1998 water agreement were not subject to severance; (2) that because LCDC did not hold a valid option [**9] to repurchase the waterlines previously tendered to BWS under the 1998 water agreement, those lines [*776]

were the property of BWS and the lines that LCDC had not yet tendered to BWS remained the property of LCDC; and (3) that any action to recover payments made by BWS to LCDC under the 1998 water agreement could be brought only by the attorney general or any other interested person for the benefit of BWS, § 39-5-3, Ala. Code 1975. For the foregoing reasons, this Court reversed the judgment of the trial court and remanded the cause for proceedings consistent with this Court's opinion.

II. Proceedings on Remand

On December 18, 2006, the trial court entered an order setting aside its March 8, 2005, judgment in favor of LCDC and awarding LCDC $224,979.83. On January 10, 2007, then Attorney General Troy King[2] intervened, pursuant to § 39-5-3, on BWS's behalf and filed a complaint against LCDC seeking to recover the payments BWS had made to LCDC under the 1998 water agreement. On August 27, 2007, Attorney General King, on behalf of BWS, filed (1) a motion for a partial judgment in the amount of $224,979.83[3] and (2) a motion for a summary judgment, asserting that BWS was entitled to recover $1,093,727.96--the [**10] amount BWS claimed it had paid LCDC under the 1998 water agreement. The trial court granted BWS's motion for a partial judgment but denied its motion for a summary judgment. The trial court thereafter conducted a hearing for the purpose of determining (1) whether, pursuant to § 39-5-3, Attorney General King was entitled to recover on behalf of BWS the payments BWS had made under the 1998 water agreement and (2) which waterlines in the Lake Cyrus development had been tendered to BWS.

2 While this case was pending on appeal, Luther Strange succeeded Troy King as attorney general. By virtue of Rule 43(b), Ala. R. App. P., Attorney General Strange was automatically substituted as a party.

3 The $224,979.83 represents the amount the trial court awarded LCDC in its March 8, 2005, order. BWS deposited the money with the clerk of the circuit court, and the money was thereafter disbursed to LCDC. This Court ordered LCDC to restore the money to the clerk of the circuit court. However, LCDC had already spent the money, so the clerk of the circuit court accepted a property bond in lieu of cash.

On November 13, 2009, the trial court entered a judgment in favor of Attorney General King for the benefit [**11] of BWS:

> "(1) That judgment is rendered in favor of the Intervenor Troy King, as Attorney General of the State of Alabama for the benefit of [BWS] and against [LCDC], in the amount of $1,093,727.96.
>
> "(2) That all water lines in question wherein [LCDC] or a customer has requested water services from [BWS] and the lines are interconnected with the public water system and are devoted to public services have been 'tendered' by [LCDC] to [BWS] and are the property of [BWS]."

LCDC thereafter filed a postjudgment motion requesting that the trial court alter, amend, or vacate its judgment or, in the alternative, that it order a new trial. The trial court denied the motion. LCDC appealed.

III. Standard of Review

> "Our standard of review for rulings on postjudgment motions is well settled:
>
> > "'In general, whether to grant or to deny a posttrial motion is within the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless by its ruling the court abused some legal right and the record plainly shows [*777] that the trial court erred. See Green Tree Acceptance, Inc. v. Standridge, 565 So. 2d 38 (Ala. 1990).'"

Hitt v. State of Alabama Pers. Bd., 873 So. 2d 1080, 1085 (Ala. 2003) [**12] (quoting Flagstar Enters., Inc. v. Foster, 779 So. 2d 1220, 1221 (Ala. 2000)).

IV. Discussion

1. Section 39-5-3, Ala. Code 1975

The first issue presented by LCDC is whether the trial court's judgment in favor of Attorney General

King, acting on behalf of BWS, was supported by clear and convincing evidence that Charles Givianpour, the president of LCDC, knew before the 1998 water agreement was executed that the agreement was being entered into in violation of § 39-2-2.

Section 39-5-3 provides:

> "An action shall be brought by the Attorney General or may be brought by any interested citizen, in the name and for the benefit of the awarding authority, to recover paid public funds from the contractor, its surety, or any person receiving funds under any public works contract let in violation of or contrary to this title or any other provision of law, if there is clear and convincing evidence that the contractor, its surety, or such person knew of the violation before execution of the contract. The action shall be commenced within three years of final settlement of the contract."

(Emphasis added.)

As previously noted, Attorney General King intervened in this case on behalf of BWS to recover payments [**13] BWS had made to LCDC under the 1998 water agreement. It is undisputed (1) that Attorney General King was an appropriate party to bring an action on behalf of BWS under § 39-5-3, (2) that the 1998 water agreement constituted a contract for public works as determined in Bessemer I, and (3) that BWS had made payments to LCDC under the 1998 water agreement.[4] The only issue left for our determination is whether the record demonstrates clear and convincing evidence that Givianpour knew before the 1998 water agreement was executed that the agreement was being entered into in violation of § 39-2-2. The evidence is this case was presented to the trial court ore tenus.

> "'[W]hen evidence is presented ore tenus in a nonjury case, a judgment based on that ore tenus evidence will be presumed correct and will not be disturbed on appeal unless it is plainly and palpably wrong or against the great weight of the evidence. Eagerton v. Second Econ. Dev. Coop. Dist. of Lowndes County, 909 So. 2d 783, 788 (Ala. 2004). Nevertheless, this rule is not applicable where the evidence is undisputed or where the material facts are established by undisputed evidence. Salter v. Hamiter, 887 So. 2d 230, 233-34 (Ala. 2004). [**14] Additionally, when the trial court "improperly applies the law to the facts, the presumption of correctness otherwise applicable to the trial court's judgment has no effect." Ex parte Bd. of Zoning Adjustment of Mobile, 636 So. 2d 415, 418 (Ala. 1994).'"

Bessemer I, 959 So. 2d at 648 (quoting Hartford Cas. Ins. Co. v. Merchants & Farmers Bank, 928 So. 2d 1006, 1009 (Ala. 2005)).

4 The parties do not address the timeliness of the action brought by the attorney general, i.e., whether the action was "commenced within three years of final settlement of the contract."

As stated in Bessemer I, the 1998 water agreement was the product of two months of negotiations that began when Quitman Mitchell, then mayor of the City of Bessemer, [*778] and Charles Nivens, operations manager for Bessemer Utilities, approached Givianpour and asked him to use BWS instead of Birmingham Water Works as the provider of water services to the Lake Cyrus development. The 1998 water agreement was signed by both Mayor Mitchell on behalf of the City of Bessemer and Givianpour as president of LCDC; both parties were represented by attorneys.

The only witnesses who testified at the hearing were Givianpour; Nivens; Fred Hinton, [**15] a supervisor at BWS; and Terry Edwards, a supervisor at BWS. Givianpour testified that he had been in the "land construction development" and "construction" business for over 20 years and that, during that time, he had never been involved with a government contract. Givianpour testified that Steven R. Monk of Bradley & Arant, LLC, had represented him in negotiating the 1998 water agreement. Givianpour testified that Monk specifically told him that the City of Bessemer had represented and certified that it had the right to enter into the agreement, and he stated that, according to Monk, the contract was valid. It is BWS's position that Monk told Givianpour that the 1998 water agreement violated the competitive-bid law, i.e., § 39-2-2, but that Givianpour chose to enter into the agreement in hopes that that would not present a problem. BWS relies heavily on the fact that Monk did not testify regarding the legality of the 1998 water agreement, that Givianpour had failed to bring a legal-malpractice action against Monk, and that Givianpour had continued to use Monk as an attorney for other matters even after Attorney General King had intervened in the case.

Givianpour testified as follows:

"Q. [**16] Let me ask you this: Do you recall finding out-- do you recall when you found out that you had been--that [LCDC] had been sued?

"A. The only thing I know was that I heard that the mayor goes to the council and tell[s] the council that [the 1998 water agreement was going to] court [to] get [the] judge's opinion on that contract, that whether that contract is good by--by the mayor's signature or [should the 1998 water agreement have the] city council's signature on it. That's what I was told that this whole thing was about.

"....

"A. And then it evolved from that.

"Q. But when it evolved, what did you do? Did you contact anybody?

"....

"A. I talked to Steve Monk, and, you know, he is not a litigator, so I had to get someone that, you know, can [represent me in court]. He doesn't go to court and litigate.

"....

"A. I believe when originally this [came] up there was no question of bid laws. It was question of whether [the] council had to sign or not.

"....

"A. I [had a] conversation with [Steve Monk], and over and over and over again he [told] me that this [1998 water agreement] is good even with [the Supreme Court] not calling it [in Bessemer I]. He stated that [the Supreme Court] was misled; [**17] they made their own decision; and we're still good. ...

"Q. And nobody has ever told you that you would have a malpractice suit?

"....

"A. ... There is no possible way that [BWS] could have bid this project. And that's the technicality that everybody is hanging their hat on.

"....

"This project could have never been bid. ...

[*779] "But the only thing was that it was--they came to me as a favor to them. This was not a profit center. No one made any money on it. No one was going to make any money on it.

"The only thing here was, they ask me to upgrade this pipe that I was putting in the ground from 12-inch to 16-inch. And they said that we calculated our cost from US Pipe. ... They paid no labor. I even subsidized the taxes.

"So how could they bid anything to anyone out there that whoever is doing it is going to lose money on it? There was no profit here. ... It was a favor that I did for Bessemer ..., and here I'm getting burned because of it.

"Since then, we lost most of our net worth. I lost my retirement money on it. I lost some of my net worth that I worked thirty, forty years. My kids going to college? Now [there is a threat] that they [will] not be able to register next time. And all of that [**18] happened just because of a technicality.

"....

"Q. And so you're telling me that [Steve Monk] never once told you that this is in violation of the bid law; I'll set up this contract for you, and we'll just see how it goes?

"A. No. He still thinks that, you know, everything was done right and we got caught in some kind of technicality.

"But, no, I think that [Steve Monk] is a very honorable man, and I back him up a hundred percent.

"....

"Q. Was the City of Bessemer represented by any attorney?

"A. Calvin Biggers.

"Q. Did you rely on this [1998 water agreement]?

"A. We borrowed money on it.

"Q. Before you entered into this agreement, did anyone ever tell you or

> did you have any knowledge that the contract should have been bid out?
>
> "A. No. It could not have been bid out. It's humanly not possible."

There was no other evidence or testimony presented to dispute Givianpour's testimony that he had no knowledge before the 1998 water agreement was executed that the agreement was being entered into in violation of § 39-2-2. Fred Hinton testified primarily regarding the repairs BWS had made in the Lake Cyrus development from 1998 through 2004 and the costs involved in making those repairs. Terry Edwards [**19] testified primarily regarding the amount of work BWS had performed in the Lake Cyrus development between 1998 and 2006. Charles Nivens testified about the specific payments alleged to be owed by LCDC under the 1998 water agreement, about the procedure BWS customarily used to inherit and/or receive ownership of waterlines, about the waterlines LCDC had tendered to BWS, and about the fact that BWS had worked on the waterlines within the Lake Cyrus development without procuring any easements. The testimony provided from Edwards, Hinton, and Nivens was unrelated to the issue whether Givianpour had knowledge before its execution that the 1998 water agreement violated § 39-2-2.

Section 39-5-3 requires a showing by "clear and convincing evidence" that Givianpour knew before its execution that the 1998 water agreement violated § 39-2-2. Clear and convincing evidence is defined as follows:

> "Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than [**20] a [*780] preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

Ala. Code 1975, § 6-11-20(b)(4) (emphasis added).

The record does not support a showing of any evidence, much less clear and convincing evidence, that Givianpour had knowledge before its execution that the 1998 water agreement was in violation of § 39-2-2. Accordingly, BWS is not entitled, pursuant to § 39-5-3, to recover any money it paid to LCDC under the agreement. When the trial court improperly applies the law to the facts, the presumption of correctness otherwise applicable to the trial court's judgment is not applicable. Bessemer I, 959 So. 2d at 648. Because the trial court improperly applied the law to the facts of this case, its judgment awarding BWS $1,093,727.96 in damages is due to be reversed.

2. Ownership of the Waterlines

In Bessemer I, this Court addressed the ownership of the waterlines as follows:

> "The last remaining issue relates to ownership of the waterlines that are currently in place in the Lake Cyrus development. The 1998 water agreement contained a purchase option purporting to allow LCDC to repurchase all the waterlines previously tendered to BWS [in [**21] the event of a default by BWS] if it elected to do so. BWS has asked this Court to declare BWS the owner of those waterlines. Because we have held that the 1998 water agreement is void pursuant to § 39-2-2(c), LCDC does not hold a valid option to repurchase the waterlines previously tendered to BWS pursuant to the 1998 water agreement; those lines are thus the property of BWS. However, all lines that LCDC has not yet tendered to BWS remain the property of LCDC. LCDC may hereafter elect to tender those lines to BWS; however, because we have held that the 1998 water agreement is void, LCDC is under no legal obligation to do so."

959 So. 2d at 652 (emphasis added).

Bessemer I addressed ownership of the waterlines that were "currently" in place at the Lake Cyrus development. Bessemer I specifically held that because LCDC did not hold a valid option to repurchase the waterlines "previously" tendered to BWS under the 1998 water agreement, those lines remained the property of BWS and all lines LCDC had not yet tendered to BWS remained the property of LCDC. On remand, the trial court held a hearing to determine, among other things, which waterlines had actually been tendered to BWS. In his opening [**22] statement to the trial court, BWS's attorney stated:

> "The Supreme Court stated that those lines that had already been tendered to Bessemer Water Services belong to Bes-

> semer Water Services and that those lines that had not been tendered to Bessemer Water Services belong to the Lake Cyrus Development Company.
>
> "There's yet to be a determination as to what lines have been tendered. ..."

In Bessemer I, however, this Court did not address how a "tender" occurred in the absence of a valid written agreement. Therefore, before the trial court could properly make a determination regarding which waterlines had actually been tendered to BWS, it had to determine how a tender could be accomplished. Charles Nivens, operations manager for Bessemer Utilities, testified as follows:

> "Q. And is there something that happens when someone develops a subdivision, as far as if they install the lines, what's the procedure for Bessemer receiving those waterlines?
>
> "A. They normally pressure-test [the lines] to our satisfaction and disinfect the lines to our satisfaction. And then [*781] we, as utilities, inherit the lines based on a main-extension agreement.
>
> "Q. Were the lines in Lake Cyrus Development, had they been pressure-tested, [**23] and any other kind of requirements that Bessemer requires, have all those requirements been met?
>
> "A. Yes.
>
> "....
>
> "... Other than sections 16A and 16B inside the Lake Cyrus Development Company [sic], have any lines ever been tendered as far as the main-extension lateral agreement? Has it ever been signed by [LCDC] and transferring those lines to [BWS]?
>
> "A. Not that I'm aware of.
>
> "Q. So it's your testimony that those lines have never been transferred to [BWS]?
>
> "A. The lines were disinfected, pressure-tested and signed off by our--by our lab. And because of past practice and customs and agreements that we've had over numerous years, that was when [BWS] took over responsibility for those lines and made the appropriate taps on those lines.
>
> "Q. To the best of your knowledge, had [BWS] ever entered [into] an agreement with anyone like they did [LCDC]?
>
> "A. No, that was the first.
>
> "....
>
> "Q. Is that your common pattern and practice, is to have a development complete a document that states they're transferring the lines to [BWS]?
>
> "A. [Nivens:] Again, we have what we call a main-extension agreement. It's where the contractor submits plans to us for their subdivision.
>
> "It's reviewed by [BWS] ....
>
> "It's approved [**24] and signed off on and then--and sent back to the individual.
>
> "And in that document--the main-extension agreement states that those lines would become property of [BWS].
>
> "....
>
> "Q. You were asked earlier if you--if the Lake Cyrus Development had any--I'm sorry, if [BWS] had easements over those waterlines in the Lake Cyrus Development Company [sic], and you said no. Why did you say no?
>
> "....
>
> "A. I've requested ... for years to get mapping of Lake Cyrus. And in order to get easements, you have to have the mapping so that easements can be recorded with the court system.
>
> "Q. Are you aware that in the [1998 water agreement] there was a provision there for easements?
>
> "A. Yes.
>
> "Q. And is it your understanding that there was a question of whether or not there was an easement within the development after this Supreme Court opinion came out?
>
> "A. It's my understanding that the minute that we accepted the lines as being pressure-tested and disinfected and

> approved by our environmental group that the lines were ours based on the contract."

(Emphasis added.)

To reiterate, Nivens testified regarding the procedure BWS customarily used to inherit waterlines from a developer. Specifically, Nivens testified that [**25] once waterlines are pressure-tested and disinfected to BWS's satisfaction, BWS inherits the lines based on a main-extension agreement. Nivens also testified that, in this case, it was his understanding "that the minute that we accepted the lines as being pressure-tested and disinfected and approved by our environmental group that the lines were ours based on the contract." The contract to which Nivens refers is the 1998 water agreement, which this Court in Bessemer I held was void. Nivens further [*782] acknowledged that he was unaware of any other waterlines, other than those lines in sections 16A and 16B of the Lake Cyrus development that had been tendered to BWS pursuant to a main-extension agreement. Givianpour also testified that in 2008 he signed a main-extension agreement with the City of Bessemer for sections 16A and 16B and that the agreement was presented to him by Aaron Killings, the attorney for BWS.

Despite the undisputed evidence adduced at the hearing concerning BWS's customary pattern and practice of receiving tender of waterlines from a developer, the trial court held, without citation to authority or any basis therefor:

> "(2) [t]hat all waterlines in question wherein the developer [**26] or a customer has requested water services from [BWS] and the lines are interconnected with the public water system and are devoted to public services have been 'tendered' by [LCDC] to [BWS] and are the property of [BWS]."

On appeal, LCDC argues, in part, that the trial court's judgment is unsupported by the evidence. We agree. As previously stated, in order to determine which waterlines had been tendered, the trial court was tasked with determining how a "tender" of those lines is accomplished. The trial court's judgment regarding how a tender is accomplished is both ambiguous and unsupported by the evidence. Specifically, the judgment is silent regarding the procedure BWS customarily uses to inherit waterlines from a developer; the judgment neither references a main-extension agreement nor excludes it. Moreover, the judgment, among other things, refers to waterlines being "devoted to public services." There was no testimony presented during the hearing regarding the devotion of waterlines to "public services," nor is there any record of such argument being made to the trial court. The trial court's judgment neither defines the phrase "devoted to public services" nor cites any authority [**27] for the meaning of the phrase. There is simply nothing in the record to support the trial court's finding that a tender is accomplished "once the developer or a customer has requested water services" and "the lines are interconnected with the public water system" and "are devoted to public services."[5] Moreover, the trial court's judgment is silent regarding which waterlines had actually been tendered; the undisputed evidence was that only those waterlines in sections 16A and 16B had been tendered.

> 5 We note that it appears from the transcript that, following the hearing, the trial judge instructed the parties to "brief the matters." The post-hearing briefs are not included in the record. It appears, however, that, based on the terminology used by BWS in its brief on appeal, the trial court took BWS's position in fashioning its judgment. Because the testimony regarding the procedure customarily used by BWS for inheriting waterlines was undisputed, our review of the evidence is de novo and the trial court's judgment is not accorded any presumption of correctness. Bessemer I.

We hold, under the undisputed facts of this case, that a "tender" occurs between LCDC and BWS when LCDC signs a main-extension [**28] agreement after BWS's testing protocol. The undisputed evidence is that LCDC signed a main-extension agreement for only those waterlines in sections 16A and 16B of the Lake Cyrus development. This Court's holding in Bessemer I that LCDC may elect to "tender" additional lines to BWS, but that it is under no obligation to do so, remains the law of the case. 959 So. 2d at 652. Additionally, in the absence of a written agreement between BWS and LCDC, any "tender" of waterlines to BWS post-Bessemer I, under the evidence submitted to the trial court, should have been pursuant to a signed main-extension agreement in accordance [*783] with BWS's customary practice of inheriting waterlines from a developer. Because the trial court's judgment regarding the manner for a "tender" not only is ambiguous, but also is unsupported by the evidence, its judgment concerning ownership of the waterlines is due to be reversed. See Scott v. McGriff, 222 Ala. 344, 346, 132 So. 177, 179 (1930) ("The rule that the finding and conclusion of the trial court on testimony given ore tenus will be accorded the weight of the verdict of a jury, and

will not be disturbed unless contrary to the great weight of the evidence, [**29] is without application, where the evidence is without dispute and but one conclusion can be drawn from it.").

V. Conclusion

The trial court's finding that Givianpour, LCDC's president, had knowledge before the 1998 water agreement was executed that the agreement was in violation of the competitive-bid law, § 39-2-2, Ala. Code 1975, was not supported by clear and convincing evidence. Further, the trial court's finding regarding how a "tender" of waterlines occurred in the absence of a valid written agreement was not supported by the evidence. Accordingly, the trial court's denial of LCDC's postjudgment motion seeking relief from the November 13, 2009, judgment is due to be reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart, Shaw, Main, Wise, and Bryan, JJ., concur.

Murdock, J., concurs specially.

Moore, C.J., and Parker, J., concur in the result.

CONCUR BY: MURDOCK

CONCUR

MURDOCK, Justice (concurring specially).

I question the holding of the Court in Bessemer Water Service v. Lake Cyrus Development Co., 959 So. 2d 643 (Ala. 2006) ("Bessemer I"), that waterlines installed by a private developer on what, at the time of installation, was the developer's [**30] privately owned land constituted a "public works" on "public property" under §§ 39-5-1(4) and (5), Ala. Code 1975.[6] That decision, however, is res judicata and is not, in its own right, before this Court today. Nonetheless, based in part on the foregoing, I certainly agree with the main opinion that the evidence does not indicate that LCDC knew --- indeed, I submit that, before the Court's decision in Bessemer I, it had no reason to know --- that its installation of waterlines within the boundaries of its own property under the circumstances presented would be in violation of some publicbid law, e.g., § 39-2-2.

6 For that matter, I do not understand how the contractual arrangement at issue lent itself in any practical or logical way to the letting of public bids. It was a contract between a provider of a utility service and a single customer describing the terms and conditions under which the provider would provide a utility service to that single customer through transmission lines to be installed by that customer on its own property. It was, in its essence, simply an agreement for the provider to reimburse that single customer for some of the costs that customer would incur to install [**31] waterlines on its own property, this being partial consideration for that private party's choosing to receive water through those lines from that provider rather than some other provider. There was no other party to bid on the terms and conditions of this one-on-one arrangement. It certainly was not for BWS to decide whether to engage some third party to install such lines; this was a decision belonging solely to LCDC, the sole owner of the property and the transmission lines at the time of the installation.

Donnie Laney v. John Edward Garmon

2090157

COURT OF CIVIL APPEALS OF ALABAMA

66 So. 3d 766; 2010 Ala. Civ. App. LEXIS 159

June 11, 2010, Released

SUBSEQUENT HISTORY: Released for Publication July 27, 2011
As Corrected October 7, 2011.

PRIOR HISTORY: [**1]
Appeal from Cherokee Circuit Court. (CV-05-96).

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: disputed, roadway, public road, abandoned, parcel of property, insufficient to prove, blocked, highway, tenus, drive, ore, truck, clear and convincing evidence, infrequently, hunt, blocking, passable, paved, judgment declaring, evidence to support, cut timber, general public, county road, private road, presumption of correctness, special need, postjudgment, transferred, abandonment, ownership

JUDGES: THOMAS, Judge. Thompson, P.J., and Pittman and Moore, JJ., concur. Bryan, J., concurs in the result, without writing.

OPINION BY: THOMAS

OPINION

[*767] THOMAS, Judge.

Donnie Laney appeals from a judgment of the Cherokee Circuit Court determining that a 700-foot-long section of roadway ("the disputed roadway") abutting property owned by Laney and John Edward Garmon is no longer a public road.

Facts and Procedural History

Laney and Garmon own adjacent parcels of real property. A roadway runs from a public highway to a point on Garmon's property, and, for most of its length, the roadway runs across Garmon's property; its edge forms the boundary between the two properties. In 2000, Garmon erected a gate blocking the disputed roadway. In 2005, Laney filed a complaint in the trial court requesting that the court (1) declare that the disputed roadway is a public road and enjoin Garmon from blocking it or otherwise interfering with the public's access and (2) declare that Garmon had no right or interest in a parcel of property ("the disputed parcel of property") that both parties claimed was included in their deeds' descriptions. Garmon answered Laney's [**2] complaint, alleging that the disputed roadway had been abandoned as a public road for at least 20 years and that he owned the disputed parcel of property.

The trial court held a hearing on Laney's complaint, at which it heard ore tenus evidence. Several witnesses testified that at one time the disputed roadway was part of what was known as the Piedmont Cedar Bluff Road, a road regularly used by the public. The testimony from those witnesses all concerned a period occurring more than 20 years before the date of the hearing. The fact that the disputed roadway was, at some time in the past, part of a public road is not in dispute in this case.

Gary Laney, one of Laney's brothers, testified that he regularly used the disputed roadway until Garmon blocked it in 2000; Gary testified that the disputed roadway had been accessible to the public before Garmon blocked access to it. Gary also testified that other people had used the disputed roadway to go hunting, to cut timber, or to farm. According to Gary, the last time he drove on the disputed roadway was between 4 and 10 years before the hearing. Gary further stated that everyone who had a connection with the disputed roadway had helped to [**3] maintain it; he said that he had last performed maintenance on the disputed roadway between 10 and 15 years ago.

According to Harold Laney, one of Laney's brothers, he owns property in the area and had lived in a house at the beginning of the disputed roadway for several years. Harold testified that the disputed roadway is passable and that it had been used by him and other members of the public to hunt and to access pasture land. Harold stated that he had driven on the disputed roadway up until the time Garmon blocked access to it.

Michael Laney, one of Laney's brothers, testified that he has owned property in the immediate vicinity of the disputed roadway since the mid 1980s. Michael stated that he had driven on the disputed roadway until the time Garmon blocked access to it. Michael further testified that the general [*768] public had used the road to access fields and to hunt.

Jimmy Singleton, the previous owner of the part of Garmon's land over which the disputed roadway runs, testified that he had farmed the property from 1977 until 1998, when he rented it to Garmon; Garmon bought the property from Singleton in 2000. According to Singleton, when the county paved the road that runs from [**4] the highway to the beginning of the disputed roadway in 1977, the county had to obtain a right-of-way in order to pave the road and have the road dedicated to the public. Singleton testified that he had never considered the disputed roadway to be a public road and that, before he purchased the property, he had used the disputed roadway only with the permission of the then owner of the property. According to Singleton, he was the only person who had performed any maintenance work on the roadway during the time he had owned the property. Singleton stated that the disputed roadway was not passable in an automobile but that it was passable in a four-wheel-drive truck or a truck pulling a cattle trailer. Singleton testified that the disputed roadway had been his private road; however, he also stated that "he was not a stickler" about requiring people to get permission to use the disputed roadway and that "[i]f anyone wanted to ride up [the disputed roadway], they were welcome to drive up there." According to Singleton, he did not erect any barriers at the end of the paved road blocking access to the disputed roadway.

Billy Ray Pierce testified that he had repaired the disputed roadway for [**5] Garmon in 2000. According to Pierce, at that time the disputed roadway was washed out and was almost impassable. Pierce testified that, although he would not have wanted to drive his truck down the disputed roadway, it was possible to drive a truck down the disputed roadway.

John Bates, the assistant county engineer for the county highway department, testified that the county did not consider the disputed roadway to be a county road and that the county had never performed any maintenance on the disputed roadway. Bates also testified that the county maps show only the paved road, not the disputed roadway. Bates could not express an opinion on the past condition of the disputed roadway.

On June 12, 2008, the trial court entered a judgment declaring that the disputed roadway is not a public road. The trial court's judgment did not address ownership of the disputed parcel of property. Laney filed a postjudgment motion, alleging that Garmon had not presented sufficient evidence to support the trial court's judgment determining that the disputed roadway had been abandoned for the requisite 20 years. The trial court denied Laney's postjudgment motion. Laney appealed to the Alabama Supreme Court, [**6] and that court transferred that appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

This court dismissed Laney's appeal as being from a nonfinal judgment because the trial court had failed to address the ownership of the disputed parcel of property. *Laney v. Garmon*, 25 So. 3d 478, 480 (Ala. Civ. App. 2009). We also noted that the county was an indispensable party to the action and that it had not been joined as a party. *Laney*, 25 So. 3d at 480 n.1.

Thereafter, the trial court held a hearing, at which the parties testified that Laney owned the disputed parcel of property. The county was also added as a party to the action. The trial court then entered a judgment, declaring that Laney owned the disputed parcel of property and adopting and re-entering its June 12, 2008, judgment. [*769] Laney subsequently appealed to our supreme court, and that court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

Issues

Laney raises one issue in his appeal: whether the trial court had sufficient evidence to support its determination that the disputed roadway had been abandoned as a public road.

Standard of Review

The trial court entered its judgment after hearing ore tenus [**7] evidence.

> """"[W]hen a trial court hears ore tenus testimony, its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust."" *Water Works & Sanitary Sewer Bd. v. Parks*, 977 So. 2d 440, 443 (Ala. 2007) (quoting *Fadalla v. Fadalla*, 929 So. 2d 429, 433 (Ala. 2005), Quoting in turn *Philpot v. State*, 843 So. 2d 122, 125 (Ala. 2002)). '"The presumption of correctness, however, is rebuttable and may be overcome where there is insufficient evidence presented to the trial court to sustain its judgment."' *Waltman v. Rowell*, 913 So. 2d 1083, 1086 (Ala. 2005) (quoting *Dennis v. Dobbs*, 474 So. 2d 77, **79 (Ala. 1985)). 'Additionally, the ore tenus** rule

> does not extend to cloak with a presumption of correctness a trial judge's conclusions of law or the incorrect application of law to the facts.' *Waltman v. Rowell*, 913 So.2d at 1086."

Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc., 985 So. 2d 924, 929 (Ala. 2007).

Analysis

Laney argues that the evidence was insufficient to support the trial court's determination that the disputed roadway had been abandoned.

> "A public road [**8] may be abandoned in one of several ways: (1) by a formal, statutory action; (2) by nonuse for a period of 20 years; and (3) where one road replaces another, by an abandonment of the public road caused [by] nonuse for a period short of the time of prescription."

Fox Trail Hunting Club v. McDaniel, 785 So. 2d 1151, 1154 (Ala. Civ. App. 2000). In this case, Garmon alleged that the disputed roadway had been abandoned because, Garmon said, it had not been used by the public for a period exceeding 20 years. Garmon bore the burden in the trial court of proving by clear and convincing evidence that the disputed roadway is no longer a public road. *Autry v. Clarke County*, 599 So. 2d 590, 591 (Ala. 1992).

The testimony in this case shows that before Garmon blocked access to the disputed roadway in 2000, it was infrequently used, it was in a bad state of repair, and it was not maintained by the county. However, even the combination of those facts is insufficient to prove by clear and convincing evidence that the disputed roadway had been abandoned as a public road. *See Ayers v. Stidham*, 260 Ala. 390, 392, 71 So. 2d 95, 97 (1954). The Alabama Supreme Court has stated that

> "the law lays down no fixed [**9] rule as to the quantum of travel over the road essential to impress upon it a public use. Although the chief user be a few families having special need therefor, this does not of necessity stamp it as a private way. It is the character rather than the quantum of use that controls. It seems clear enough that the general public, including these with special interests, have continuously used the road without let or hindrance as they had occasion so to do, and such combined use has been so constant and continuous as to mark at all times a well-defined highway for vehicles [*770] and pedestrians. As to public user this is sufficient."

Still v. Lovelady, 218 Ala. 19, 20, 117 So. 481, 482 ((928). Thus, the fact that the disputed roadway was infrequently used and generally used only by those who had a special need to do so by virtue of owning nearby land, or desiring to hunt or cut timber on nearby land, is insufficient to prove that the disputed roadway is a private road. *See Fox Trail*, 785 So. 2d at 1154 (holding that a road remained a public road even though its use had decreased substantially and even though it was used only by local landowners, hunters, and timber harvesters). We also note that [**10] Singleton testified that, when he owned the property over which the disputed roadway runs, access to the disputed roadway had not been blocked and anyone who so wished could drive on the disputed roadway. A public road is not considered abandoned "so long as it is open for use by the public generally and is being used by those who desire, or have the occasion to use it." *Auerbach v. Parker*, 544 So. 2d 943, 946 (Ala. 1989).

The fact that the county did not consider the disputed roadway to be a county road and that it did not maintain the disputed roadway is also insufficient to prove abandonment. "[I]t is not essential to the status of a public road that it be maintained by the county in which the road is located." *Fox Trail*, 785 So. 2d at 1154. Similarly, the fact that the disputed roadway was in a state of disrepair is also insufficient to prove that it had been abandoned. *Ayers, supra; Fox Trail, supra.* Therefore, the evidence before the trial court indicating that the disputed roadway had been infrequently used, that is had been in bad repair, and that it had not been maintained by the county was insufficient to prove by clear and convincing evidence that the disputed roadway had [**11] been abandoned as a public road.

Conclusion

Because the evidence was insufficient to prove that the disputed roadway is no longer a public road, the judgment of the trial court is reversed insofar as it determined that the disputed roadway had been abandoned as a public road, and the cause is remanded to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Pittman and Moore, JJ., concur.

Bryan, J., concurs in the result, without writing.

Layman's Security Company v. Water Works and Sewer Board of the City of Prichard

No. 88-329

Supreme Court of Alabama

547 So. 2d 533; 1989 Ala. LEXIS 449

June 23, 1989, Filed

SUBSEQUENT HISTORY: Released for Publicatio September 5, 1989.

PRIOR HISTORY: [**1] Appeal from Mobile Circuit Court, (CV-87-002486), Ferrill D. McRae, Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: Competitive Bid Law, estoppel, summary judgment, bid, competitive bidding, competitive, void, water works, municipal, estopped, sewer, Alabama Competitive Bid Law, doctrine of estoppel, public accountants, public policy, failure to comply, detrimentally, personality, terminated, undisputed, prescribed, equitable, decisive, voiding, plant, contractual

COUNSEL: Ronnie L. Williams, Mobile, Alabama.

Phillip M. Leslie, Mobile, Alabama.

JUDGES: Jones, Justice. Hornsby, C.J., and Shores, Houston, and Kennedy, JJ., concur.

OPINION BY: JONES

OPINION

[*534] This is an appeal from a summary judgment in favor of the Water Works and Sewer Board of the City of Prichard ("the Board"). The case arose when the Board terminated a three-year contract that it had with Layman's Security Company ("Layman's"), whereby Layman's was to provide security for the Board's plant located in Prichard. Because we find that the contract between the Board and Layman's was not entered into in compliance with the Alabama Competitive Bid Law, Ala. Code 1975, § 41-16-50 (Supp. 1988), we affirm the summary judgment.

The facts in the present case are basically undisputed. On December 1, 1985, Layman's and the Board entered into a three-year contract in which Layman's agreed to provide security services for the Board's plant in Prichard, in exchange for a $ 1,500 per month fee and a five percent yearly increase. The contract was not entered into in compliance with the competitive bidding process outlined in the Competitive Bid Law. Layman's [**2] performed its contractual obligations until it was notified by a letter from the Board dated March 15, 1987, that the contract was terminated as of that date.

On July 31, 1987, Layman's filed suit, seeking damages for breach of contract. The court entered summary judgment for the Board. Layman's appeals.

The terms of the contract in question are unambiguous. The only issue presented is what effect, if any, is to be given a contract that falls within the scope of the Competitive Bid Law, but is not in compliance with the prescribed competitive bidding process. The Competitive Bid Law mandates that any contract for an amount in excess of $ 3,000 entered into by specified state or municipal governing bodies (including a water works or sewer board), shall be subject to free and open competitive bidding.

Clearly, the contract between Layman's and the Board is one that is covered by the Competitive Bid Law. The contract was for over $ 3,000, and it was made by a municipal water works and sewer board. It is also undisputed that the provisions of the Competitive Bid Law were not complied with when the contract was entered into. Therefore, unless the contract falls within one of the exceptions [**3] to the Competitive Bid Law, which are enumerated in Ala. Code 1975, § 41-16-51 (Supp. 1988), or it [*535] can be shown that the Board should be estopped from terminating the contract, the contract between the Board and Layman's is void.

The relevant portion of § 41-16-51 states that competitive bidding is not required for:

> "(3) Contracts for the securing of services of attorneys, physicians, architects,

> teachers, superintendents of construction, artists, appraisers, engineers, consultants, certified public accountants, public accountants or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part. . . ."

Layman's argues that the instant contract is within the language of this section; thus, it argues, summary judgment in favor of the Board was improper. It further asserts that the application of the statutory provisions calls for a factual determination that should be reserved for a jury. We disagree, and we hold that the providing of security does not constitute a service where the individual's personality is a decisive factor. Therefore, the contract does not fall within this exception to the Competitive Bid Law.

The [**4] only remaining grounds for enforcement of the contract is the equitable doctrine of estoppel. The relationship between the use of estoppel and the Alabama Competitive Bid Law was discussed by this Court in *Maintenance, Inc. v. Houston County*, 438 So.2d 741 (Ala. 1983). In *Maintenance*, this Court held that a contract between the county and a solid waste corporation was void because of a failure to comply with the Competitive Bid Law. "The failure to comply with the competitive bid law therefore renders the 1980 contract void in accordance with Code 1975, § 41-16-51(d)." *Id.* at 744. The Court went on to address the estoppel issue raised by Maintenance.

> "Maintenance contends that the County is estopped from denying the validity of the 1980 contract because the president of Maintenance detrimentally relied upon the assurances of the County attorney that the contract would be valid without the necessity of receiving competitive bids.
>
> "Maintenance cannot, however, by way of estoppel, endow with validity a transaction which is illegal and against public policy. *Cochran v. Ozark Country Club, Inc.*, 339 So.2d 1023 (Ala.1976). Where the 1980 contract between Maintenance and the [**5] County was void for noncompliance with the bid law, the principle of estoppel could not be utilized to create the contract anew. *Bates v. Jim Walter Resources, Inc.*, 418 So.2d 903 (Ala.1982).
>
> "Where, moreover, the legislature has expressed its public policy of voiding contracts which do not comply with the competitive bid law, we decline to expand the scope of our holding in *Alford v. City of Gadsden*, 349 So.2d 1132 (Ala.1977), which upheld an estoppel argument against city officials who merely failed to follow the formalities of contract execution."

Id.

The use of estoppel to prevent a municipality from voiding a contract was later analyzed by this Court in *City of Guntersville v. Alred*, 495 So.2d 566 (Ala. 1986). Although the Competitive Bid Law was not involved in that case, the discussion is, nonetheless, useful in the present appeal. In affirming a judgment based on a jury verdict, which had found the City estopped to deny the validity of a lease that had been entered into without compliance with the statutorily prescribed procedures, the Court stated:

> "The doctrine of estoppel may apply against a municipal corporation when justice and fair play demand it. [**6] *Alford v. City of Gadsden*, [349 So.2d 1132 (Ala. 1977)]; *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Board of Adjustment*, 470 So.2d 1234 (Ala.Civ.App.1985)."

Id. at 568.

Applying those prior decisions to this case, we hold that the judgment of the trial court is due to be affirmed. Because Layman's presented no proof that it materially and detrimentally changed its position in reliance on the contract, estoppel will not [*536] apply. While we do not condone the use of the Competitive Bid Law as a means for a party to escape liability for a contract it voluntarily entered into, we are, nonetheless, under the facts of this case, compelled to affirm the trial court's judgment. Where a city or state agency seeks to use the Competitive Bid Law to escape contractual liability, the burden is on the opposing party, in defending against a summary judgment motion, to present evidence of material and detrimental reliance on the contract to support the application of the equitable remedy of estoppel.

AFFIRMED.

Hornsby, C.J., and Shores, [**7] Houston, and Kennedy, JJ., concur.

Lightwave Technologies, LLC v. Escambia County

1991566

SUPREME COURT OF ALABAMA

804 So. 2d 176; 2001 Ala. LEXIS 85

March 30, 2001, Released

SUBSEQUENT HISTORY: [**1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published August 15, 2001. The Date of This Document has been Changed.

PRIOR HISTORY: Appeal from Escambia Circuit Court. (CV-99-90). TRIAL JUDGE: Bradley E. Byrne.

DISPOSITION: REVERSED AND JUDGMENT RENDERED.

CORE TERMS: rights-of-way, summary judgment, bridge, telecommunications, public roads, fiber-optic, Telecom Act, genuine issue, material fact, authority to impose, general superintendence, per-linear-foot, construct, highway, cable, original condition, Tax Injunction Act, county commission, county commissioners, public highways, authority to regulate, executive powers, respective counties, unnecessarily, impermissible, transmission, unreasonably, declaration, interfered, deposited

COUNSEL: For Appellant: Mark D. Wilkerson and Amanda C. Carter of Brantley & Wilkerson, Montgomery.

For Appellee: James B. Rossler of Stout & Rossler, Mobile; and Tillman L. Lay of Miller, Canfield, Paddock & Stone, Washington, D.C.

Amicus curiae Alabama Power Company, in support of the appellant: Susan B. Livingston, Gregory C. Cook, and Yvonne N. Beshany of Balch & Bingham, L.L.P., Birmingham.

Amicus curiae Association of County Commissions of Alabama, in support of the appellee: Mary E. Pons, Montgomery.

JUDGES: BROWN, Justice. Moore, C.J., and Houston, See, Lyons, Harwood, Woodall, and Stuart, JJ., concur.

OPINION BY: BROWN

OPINION

[*177] **BROWN, Justice.**

This case concerns the validity of a charge assessed by Escambia County to a telecommunications company that wished to install a fiber-optic cable along the public right-of-way. Because we conclude that this charge is, in reality, an unauthorized tax, we reverse the judgment of the trial court and render a judgment in favor of the telecommunications company, Lightwave Technologies, LLC.

Facts and Procedural History

Lightwave Technologies, LLC ("Lightwave"), is a telecommunications company authorized by the Alabama Public Service Commission ("APSC") to provide interexchange-telecommunications service in Alabama pursuant to a "certificate of public convenience and necessity" ("CPCN"). Pursuant to the CPCN, Lightwave has been constructing a fiber-optic network in Alabama that will help to provide rural consumers with advanced telecommunications services. In July [**2] 1997, Lightwave contacted Escambia County officials regarding the procedure it needed to undertake in order to install approximately 17 miles of fiber-optic cable along the County's highway right-of-way. The County required Lightwave to provide a "right-of-way restoration bond," pursuant to a comprehensive "Utility Agreement," in the amount of 10% of the total cost of the project, to guarantee that the right-of-way would be restored to its original condition. Additionally, the County advised Lightwave that it, like all for-profit companies, had to pay a $ 1.00 per-linear-foot "fee" for each foot of a right-of-way it used.

Lightwave was the first telecommunications or utility provider to be assessed this charge. Thinking it unfair that the County's right-of-way could be used at no cost, while private landowners were receiving [*178] large amounts of money for the use of their private

rights-of-way, the County's commissioners imposed the charge in order to obtain compensation for the use of the County's right-of-way. The charge was designated as a "fee." It was designed to generate revenue for the County, and all money generated from it was to be deposited into an account used to maintain [**3] roads and bridges throughout the county.

In May 1998, Lightwave sued Escambia County in the United States District Court for the Southern District of Alabama, seeking a declaration that the imposition of the charge violated certain provisions of the Telecommunications Act of 1996 ("Telecom Act"). The federal court determined that the charge was a tax and that, under the Tax Injunction Act, [1] the federal court lacked subject-matter jurisdiction to decide the case. Accordingly, the federal court dismissed the action. See *Lightwave Techs., L.L.C. v. Escambia County*, 43 F. Supp. 2d 1311 (S.D. Ala. 1999).

1 The Tax Injunction Act of 1937 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341

Lightwave then sued in the Escambia Circuit Court, seeking a declaration that the charge violated Alabama [**4] law, the United States Constitution, the Alabama Constitution, and the Telecom Act. After the County had answered Lightwave's complaint, Lightwave filed a motion for a partial summary judgment and filed a brief in support thereof, arguing that it was entitled to a judgment, on the basis that the imposition of the charge denied Lightwave due process of law and was otherwise unauthorized and invalid under Alabama law. The County filed a cross-motion for summary judgment, asserting that the charge was not prohibited by Alabama law and that it did not violate the Telecom Act. After considering the pleadings, the briefs, and the arguments of counsel, the trial court denied Lightwave's motion for a partial summary judgment and granted the County's cross-motion for summary judgment. Lightwave appeals from that judgment.

Analysis

Because Lightwave appeals from a summary judgment, our review is de novo. *EBSCO Indus., Inc. v. Royal Ins. Co. of America*, 775 So. 2d 128 (Ala. 2000). "'We utilize the same standard as the trial court in determining whether the evidence before [it] made out a genuine issue of material fact,' *Bussey v. John Deere Co.*, 531 So. 2d 860, 862 (Ala. 1988), [**5] and whether the movant was 'entitled to a judgment as a matter of law.' *Wright v. Wright*, 654 So. 2d 542 (Ala. 1995)." *Hobson v. American Cast Iron Pipe Co.*, 690 So. 2d 341, 344 (Ala. 1997). Once a party moving for a summary judgment establishes that no genuine issue of material fact exists, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. *Bass v. SouthTrust Bank of Baldwin County*, 538 So. 2d 794, 797-98 (Ala. 1989). "Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assur. Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989). In reviewing a summary judgment, we view the evidence in the light most favorable to the nonmovant and entertain such reasonable inferences as the jury would have been free to draw. *Jefferson County Comm'n v. ECO Preservation Servs., L.L.C.*, [Ms. 1990736, Aug. 18, 2000] So. 2d , 2000 Ala. LEXIS 351 (Ala. 2000) (citing *Renfro v. Georgia Power Co.*, 604 So. 2d 408 (Ala. 1992)). [**6]

[*179] Lightwave first contends that the County lacks the statutory authority to impose the $ 1.00 per-linear-foot charge for the use of its rights-of-way. The County's authority to regulate its public rights-of-way is outlined in § 23-1-85, Ala. Code 1975, which states:

> "The right-of-way is granted to any person or corporation having the right to construct electric transmission, telegraph or telephone lines within this state to construct them along the margin of the right-of-way of public highways, subject to the removal or change by the county commission of the county, except in cases where the State Department of Transportation has jurisdiction over such highway."

Although this Court has not recently interpreted this statute, it has interpreted its predecessors. In doing so, the Court has stated:

> "The right and authority to erect and maintain such transmission lines along public highways was not made to depend upon the discretion or consent of the court of county commissioners or like bodies. The only authority conferred on such public bodies was to so regulate such use as that the right of the public to use such roads would not be unreasonably [**7] or unnecessarily interfered with."

City of Prichard v. Alabama Power Co., 234 Ala. 339, 342, 175 So. 294, 295 (1937).

The County argues that its authority to impose the charge derives from § 23-1-80, Ala. Code 1975, which gives the County the right of general superintendence of the public roads and bridges within its boundaries. However, that same statute also provides that the County's legislative and executive powers with regard to that general superintendence may be limited by other statutes within the same chapter of Title 23. [2] Because § 23-1-85 (a Code provision appearing in the same chapter) specifically addresses the use of the County's rights-of-way, its language acts to limit the County's authority. In view of our holding in *City of Prichard v. Alabama Power Co.*, 234 Ala. at 342, 175 So. at 295, we conclude that the County's authority extends only so far as to allow it to regulate the use of the rights-of-way so that the use of the roads will not be unreasonably or unnecessarily interfered with.

2 Section 23-1-80 states:

> "The county commissions of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end, they have legislative and executive powers, *except as limited in this chapter*. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary or as may be deemed necessary or advisable by such commissions to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than 20 years."

(Emphasis added).

[**8] Before the County imposed the $ 1-per-linear-foot charge, the County had exercised its statutory authority to regulate the use of the public rights-of-way by requiring Lightwave to post a "right-of-way restoration bond." This bond ensured that the County would have funds available to return the property to its original condition in case Lightwave failed to comply with the terms of the Utility Agreement. [3]

3 Among other things, the Utility Agreement required Lightwave to restore sewers, drains, pavement, driveways, or other structures to their original condition after it completed its project. It also required Lightwave to bear the cost of any damage or interruption to other utility services, and it made Lightwave solely responsible for the costs associated with relocating its lines if the highway or road needed to be expanded or relocated.

[*180] The evidence before this Court indicates that the purpose behind the imposition of the per-linear-foot charge was not to "regulate" the use of the County's rights-of-way; [**9] rather, the charge was not a "fee," but was in reality an impermissible tax. First, the charge was designed to generate revenue for the County; this fact was established by the deposition testimony of two County Commissioners, who stated that they voted to impose and collect the charge because they felt the County was entitled to receive compensation for allowing Lightwave to use the public rights-of-way. Second, the amount of the fee is not rationally related to the expected cost of repairing the rights-of-way after the fiber-optic cable has been installed. We agree with the federal court that the "lack of correlation between the expected cost to the county and the magnitude of the fee militates in favor of a finding that the right-of-way fee is a revenue-raising 'tax under State law.'" *Lightwave Techs., L.L.C. v. Escambia County*, supra, 43 F. Supp. 2d at 1314. Third, the moneys received through the imposition of the charge were deposited into the County's Gasoline Tax Fund. This fund held tax moneys collected for maintenance of the County's roads and bridges -- not for maintenance of the County's rights-of-way.

Under Alabama law it is well settled that "the power [**10] to tax does not inhere in county governmental bodies" and that "consequently, authority for the imposition of county taxes must proceed from an express legislative grant." *Ex parte Coffee County Comm'n*, 583 So. 2d 985, 986 (Ala. 1991) (citations omitted). Because the Legislature had made no such grant, the County had no authority to impose the tax.

Lightwave also argues that the per-foot "fee" violated the Telecom Act. Because we hold that the "fee" was in fact an impermissible tax, we need not address that argument.

We reverse the judgment of the trial court and render a judgment in favor of Lightwave.

REVERSED AND JUDGMENT RENDERED.

Moore, C.J., and Houston, See, Lyons, Harwood, Woodall, and Stuart, JJ., concur.

Limestone Creek Developers, LLC v. Stuart Trapp et al.

1110838

SUPREME COURT OF ALABAMA

107 So. 3d 189; 2012 Ala. LEXIS 104

August 17, 2012, Released

SUBSEQUENT HISTORY: Released for Publication March 15, 2013.
Rehearing denied by Limestone Creek Developers, LLC v. Trapp, 2012 Ala. LEXIS 176 (Ala., Oct. 12, 2012)

PRIOR HISTORY: [**1]
Madison Circuit Court. (CV-10-900). James P. Smith, Trial Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: plat, summary judgment, developer, void, county commission, offering, engineer, genuine issue, material fact, breach-of-contract, subdivision-control, asserting, modifying, movant, lease, agreeing, prima facie, actual sale, joint venture, purpose of creating, summary-judgment, nonmovant, inspector, designee, partner, referred to collectively, agreed to purchase, personally, contacted, construct

COUNSEL: For Appellant: Jeff Johnson, Madison.

For Appellees: R. Wayne Wolfe, Marcia St. Louis, Wolfe, Jones , Conchin, Wolfe, Hancock & Daniel, LLC, Huntsville.

JUDGES: STUART, Justice. Malone, C.J., and Parker, Shaw, and Wise, JJ., concur.

OPINION BY: STUART

OPINION

[*190] STUART, Justice.

Limestone Creek Developers, LLC ("LCD"), sued Stuart Trapp and two companies in which Trapp had a controlling interest -- Kyvest, Ltd., and Redesign, Inc. (these two companies are hereinafter referred to collectively as "the Trapp companies," while all the defendants are referred to collectively as "the Trapp defendants") -- in the Madison Circuit Court after Trapp was unable or unwilling to close on a contract he had personally entered into agreeing to purchase all the lots in a new subdivision owned by LCD. The trial court entered a summary judgment in favor of the Trapp defendants, and LCD appeals. We affirm.

I.

Sometime in late 2007, Mark Yarbrough and Terry McDonald were contacted by Joe William Hulsey to gauge their interest in purchasing some property that Hulsey's mother, Margaret B. Hulsey, owned in Toney. Joe Hulsey was aware that Yarbrough and McDonald had previous experience related to developing subdivisions, and he believed his mother's property might be suited for such a project. Yarbrough and McDonald had never before personally [**2] purchased property and overseen its subsequent development into a subdivision; however, over a period of approximately 20 years they had done extensive site work for Trapp in connection with subdivisions his companies had developed, and they accordingly contacted him to discuss this opportunity. Trapp was in the midst of developing another subdivision, The Landings, less than five miles from Hulsey's property, and, after visiting Mrs. Hulsey's property, he expressed an interest in working with Yarbrough and McDonald to construct houses on the property if they subsequently purchased it. Yarbrough, McDonald, and Trapp thereafter had discussions with a bank official who orally agreed to lend money to fund both Yarbrough and McDonald's initial purchase of Hulsey's property and Trapp's subsequent purchase of lots from them once the initial development of the proposed subdivision was complete.

Mrs. Hulsey thereafter visited The Landings to verify that she was comfortable with the general types of houses Trapp expected to build on the property, and she, Yarbrough and McDonald, and Trapp collectively agreed to certain restrictions and covenants that would govern the property. At some point, [**3] Yarbrough and McDonald created the entity known as LCD. On January 9, 2008, Yarbrough and McDonald formally signed a contract with Mrs. Hulsey on behalf of LCD agreeing to purchase approximately 28 acres for

$560,000. The contract was contingent on an engineer examining the property and conducting soil tests to confirm that the property was suitable for residential development, and Yarbrough and McDonald thereafter hired Nash Engineering, LLC, to complete those tests. Nash Engineering also drafted an initial layout for the subdivision, dividing the property into 51 lots based on Trapp's request that each lot be approximately 100 feet wide. LCD thereafter closed on the property. LCD engaged in further negotiations with Trapp regarding the property, and Trapp eventually agreed to purchase the 51 lots from LCD for $30,000 each. The $30,000 price was a slight increase from the initial price discussed between the parties of approximately $29,000 because Trapp also wanted LCD to construct a decorative sigh for the entrance to the subdivision comparable to the sign outside The Landings. Trapp also created the name for the new subdivision -- Heritage Landings.

On March 7, 2008, Trapp signed [**4] a contract agreeing to purchase the 51 lots in [*191] Heritage Landings from LCD for $30,000 each. Pursuant to the terms of the contract, Trapp agreed to purchase 10 lots once initial development of the subdivision was completed and then to purchase an additional 7 lots within the next 6 months. For all lots other than the first 10, Trapp was obligated to pay the corresponding interest on LCD's bank loan along with the $30,000 lot price.

Following the execution of the contract, LCD commenced site work on the property, such as clearing the land and laying out streets. When it was discovered that 12 of the lots would need engineered septic systems, Trapp paid an engineer to complete the necessary work. On or about June 15, 2009, the initial development of Heritage Landings was completed, and LCD thereafter sought to have Trapp finalize his purchase of lots pursuant to the terms of the contract; however, Trapp would not do so, asserting that he no longer had the ability to finalize the purchase because of prevailing economic conditions that had negatively affected his home-building business.

On June 15, 2010, LCD sued Trapp, asserting fraud and breach-of-contract claims and seeking specific performance [**5] of the contract as well as damages, including attorney fees. LCD also sought a judgment from the trial court estopping Trapp from denying the validity of the contract. Trapp filed an answer on August 27, 2010, generally denying the allegations of LCD's complaint. On August 16, 2011, LCD filed an amended complaint, adding the Trapp companies as defendants and asserting an alter ego theory and seeking "to pierce the veil" of the Trapp companies. LCD subsequently filed a motion for a summary judgment. The Trapp defendants filed a response and thereafter filed their own summary-judgment motion, arguing that Trapp's contract with LCD was void because it purported to sell lots in a new subdivision before the county issued the permit to develop the subdivision, in violation of § 11-24-2(a), Ala. Code 1975, part of the county subdivision-control statutes, § 11-24-1 et seq., Ala. Code 1975, and in violation of various provisions in the Madison County Subdivision Regulations ("MCSR").

On December 27, 2011, the trial court entered an order holding that the contract between LCD and Trapp violated § 11-24-2(a) and was therefore void. Accordingly, the trial court entered a summary judgment in favor [**6] of the Trapp defendants on LCD's breach-of-contract claim, as well as on LCD's other claims, which, the trial court held, were all dependent on the contract, which was void. LCD's subsequent motion to alter, amend, or vacate the judgment was denied, and, on March 29, 2012, LCD filed its notice of appeal to this Court.

II.

LCD argues that the trial court erred in entering a summary judgment in favor of the Trapp defendants. We review this argument pursuant to the following standard:

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson [*192] v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is [**7] no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

III.

The gravamen of LCD's argument on appeal is that its contract with Trapp did not violate § 11-24-2 (a) or the MCSR and that the trial court accordingly erred by declaring that contract void and entering a summary judgment in favor of the Trapp defendants. Section 11-24-2(a) states, in relevant part:

> "It shall be the duty of the owner and developer of each subdivision to have all construction completed in conformity with this chapter and, prior to beginning any construction or development, to submit the proposed plat to the county commission for approval and obtain a permit to develop as required in this section. The permit to develop shall be obtained before the actual sale, offering for sale, transfer, or lease of any lots from the subdivision or addition to the public, it must include a plan to deliver utilities including water, and shall only [**8] be issued upon approval of the proposed plat by the county commission."

(Emphasis added.) LCD argues that its contract with Trapp did not violate § 11-24-2(a) because, LCD argues, Trapp is not "the public" as that term is used, in the statute. The term "the public" is not defined in § 11-24-2(a), and LCD argues that the term is not intended to encompass a business partner with whom the owner and/or developer of a subdivision is engaged in a joint venture; rather, LCD argues, "the public" generally refers to the ultimate purchaser of a lot once initial development of the subdivision is complete. The Trapp defendants, however, urge us to apply a broader definition of the term "the public" to include, essentially, anyone. Ultimately, however, it is unnecessary for us to define the term "the public" because, regardless of the definition we ascribe to the term, the contract between LCD and Trapp would nonetheless be void because it violates a prohibition in the MCSR.

The county subdivision-control statutes contemplate the adoption of additional regulations by the different counties governing the manner in which subdivisions are approved and developed in their jurisdiction. See, e.g., § 11-24-1 (c), Ala. Code 1975 [**9] ("The county commission or like governing body of each county in the state may establish a board of developers to make suggestions to the commission regarding the development and division of subdivisions. The board may advise the commission on the contents of the regulations, revisions that need to be made to the regulations, and assist in resolving disputes between the commission and developers.); § 11-24-2 (b), Ala. Code 1975 ("No proposed plat shall be approved or disapproved by the county commission without first being reviewed by the county engineer or his or her designee. Following the review, the county engineer or his or her designee shall certify to the commission whether the proposed plat meets the county's regulations. If the proposed plat meets the regulations, it shall be approved by the commission."); and § 11-24-3(c), Ala. Code 1975 ("The county commission may employ inspectors and may request the county license inspector to see that its rules and regulations are not violated . . . .").

[*193] Madison County has in fact enacted such regulations and a complete copy of the MCSR was submitted into the record by LCD along with its summary-judgment motion. Like § 11-24-2 (a), § 4.3 of the MCSR [**10] provides that a permit to develop a subdivision may be obtained after a proposed plat is submitted to and approved by the county; § 4.3 further details the procedure for seeking approval of that proposed plat. However, unlike § 11-24-2(a), the MCSR prohibit the offering, sale, transfer, or lease of lots to the public even after the proposed subdivision plat is approved; such activity is prohibited until a final plat is submitted and approved once the owner or developer decides to proceed with the proposed subdivision. See § 4.1 of the MCSR (providing that no lot shall "be offered for sale, sold, transferred or leased to the public until the final plat has been submitted to and approved by the commission and the final plat has been recorded in the office of the probate judge"); and § 4.4 of the MCSR (describing the procedure for submitting and getting approval of the final plat).

Aside from this distinction, however, the MCSR contain another prohibition that is applicable in this case. Section 1.2.3 of the MCSR provides:

> "Prior to the actual sale, offering for sale, transfer or lease of any lots as defined herein for the purpose of creating, establishing or modifying a subdivision as [**11] defined herein, any owner or developer of a subdivision ... which lies within the subdivision jurisdiction of the county shall submit the proposed plat of the proposed subdivision ... to the commission and obtain for [sic] approval of the proposed plat in accordance with the procedures prescribed by [§ 11-24-1 et seq., Ala. Code 1975,] as amended, and set out in these regulations."

Thus, this regulation requires an owner or developer of a subdivision to submit and gain approval of a proposed subdivision plat before the sale or offering for sale of any lots "for the purpose of creating, establishing or modifying a subdivision." Notably, there is no language barring only those sales or offerings made to "the public."

It has been LCD's position throughout this litigation that Trapp is not part of "the public" because he was essentially a partner in a joint venture created to develop Heritage Landings. Regardless of whether we agree that he is a member of "the public, " LCD cannot, in light of its position, maintain that its attempt to sell him lots was done for any purpose other than "creating, establishing or modifying a subdivision," and whether he was a member of "the public" is immaterial [**12] to that inquiry. Accordingly, because the contract LCD entered into required LCD to sell lots to Trapp before the proposed plat for Heritage Landings was approved, that contract was in violation of § 1.2.3 of the MCSR.

The summary judgment in favor of the Trapp defendants was therefore proper because the judicial system may not be used to enforce illegal contracts. See, e.g., Ex parte W.D.J., 785 So. 2d 390, 393 (Ala. 2000) ("Moreover, this Court has held that '[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or in part on an illegal or immoral act or transaction to which he is a party.' Hinkle v. Railway Express Agency, 242 Ala. 374, 378, 6 So. 2d 417, 421 (1942). In Oden v. Pepsi Cola Bottling Co., 621 So. 2d 953 (Ala. 1993), this Court stated that the purpose of the Hinkle rule is to ensure that '"those who transgress the moral or criminal code shall not receive aid from the judicial branch of government."' 621 So. 2d at 955 . . . . " (emphasis omitted)). See also Kilgore Dev., Inc. v. Woodland [*194] Place, LLC, 47 So. 3d 267, 271 (Ala. Civ. App. 2011) (holding that subdivision-control statutes were implemented to protect the public, not [**13] to raise revenue, and that contracts violating those statutes are accordingly void).

Indeed, the policy behind this principle has been deemed to be of such importance that contracts found to violate the law will not be enforced even if, as has been alleged in this case, the defaulting party failed to properly plead the affirmative defense of illegality. Brown v. Mountain Lakes Resort, Inc., 521 So. 2d 24, 26 (Ala. 1988) ("'"It is the rule ... in Alabama and a few other jurisdictions to not enforce a contract in violation of the law and to deny the plaintiff the right to recover upon a transaction contrary to public policy, even if the invalidity of the contract or transaction be not specially pleaded and is developed by the defendant's evidence."'" (quoting National Life & Accident Ins. Co. v. Middlebrooks, 27 Ala. App. 247, 249, 170 So. 84, 86 (1936), quoting in turn Shearin v. Pizitz, 208 Ala. 244, 246, 94 So. 92, 93 (1922))).

IV.

LCD sued the Trapp defendants after Trapp failed to close on the purchase of 51 lots in a new subdivision LCD was developing, as required by the contract entered into by LCD and Trapp. The trial court entered a summary judgment in favor of the Trapp defendants [**14] after holding that LCD's contract with Trapp was void because it violated § 11-24-2(a). While expressing no opinion with regard to whether that contract violated § 11-24-2 (a), we nevertheless hold that the contract was void because it violated § 1.2.3 of the MCSR. Accordingly, the trial court correctly entered a summary judgment in favor of the Trapp defendants on LCD's breach-of-contract claim, as well as LCD's other claims, which were dependent on that contract. The judgment of the trial court is accordingly affirmed.

AFFIRMED.

Malone, C.J., and Parker, Shaw, and Wise, JJ., concur.

Joe Watt Lockridge, Jr., et al. v. John L. Adrian, et al.

1921433

SUPREME COURT OF ALABAMA

638 So. 2d 766; 1994 Ala. LEXIS 11

January 14, 1994, Released

SUBSEQUENT HISTORY: [**1] Released for Publication July 12, 1994.

PRIOR HISTORY: Appeal from Cherokee Circuit Court. (CV-84-72). David A. Rains, Trial Judge.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: public use, private property, municipality, public road, private use, public purpose, right-of-way, private roads, right of way, right of eminent domain, municipal, tract, right of way, body of land, landlocked, convenient, confer, general laws, corporate limits, condemnation, compensated, franchises, nearest, land outside, taking of property, eminent domain, declaration, preceding, ownership, condemned

COUNSEL: For Appellants: Robert D. McWhorter, Jr., of Inzer, Stivender, Haney & Johnson, P.A., Gadsden.

For Appellees: Albert L. Shumaker, Centre.

JUDGES: HOUSTON, Hornsby, C. J., and Maddox, Almon, Shores, Kennedy, Ingram, and Cook, JJ., concur. Steagall, J., concurs specially.

OPINION BY: HOUSTON

OPINION

[*767] HOUSTON, JUSTICE.

In October 1981, Joe Watt Lockridge and his three sons (hereinafter "the Lockridges"), owners of a landlocked parcel of land, petitioned the probate court pursuant to Ala. Code 1975, § 18-3-1, for the condemnation of a right-of-way across the lands of John L. Adrian and his wife, Lucille Adrian, to the nearest and most convenient public road. The landlocked property in question, situated in Cherokee County and containing approximately five acres, is bounded on the north, east, and south by the waters of Weiss Lake and on the west by the Adrians' land. The probate court denied the relief requested; the Lockridges appealed to the circuit court for a trial de novo. Both the Lockridges and the Adrians moved for summary judgments. In support of their motion for summary judgment, the Adrians asserted that Art. I, § 23, of the Alabama [**2] Constitution of 1901, and Ala. Code 1975, § 18-3-1, violated the Fifth and Fourteenth Amendments to the United States Constitution. The trial court upheld Art. I, § 23, but, finding no "public use" in the proposed condemnation of a right-of-way over the Adrians' property, the trial court declared that § 18-3-1 was unconstitutional to the extent that it permitted a taking of the Adrians' private property without their consent for the Lockridges' private use. [1] The Lockridges appeal. We reverse.

> 1 The trial court determined Alabama Power Company to be a necessary and indispensable party and ordered its joinder. However, Alabama Power is not a party to this appeal.

Article I, § 23, Constitution of Alabama 1901, the provision authorizing the legislature to secure for persons a right-of-way over lands of other persons upon the payment of just compensation, reads as follows:

> "[The] exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property [**3] and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other per-

> sons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner...."

Pursuant to Art. I, § 23, the legislature, by general law, enacted § 18-3-1, which, at the time relevant to this case, read as follows: [2]

> 2 We quote here § 18-3-1 as it read before July 8, 1982; that version of the statute applies in this case. That pre-July 8, 1992, version refers to land "outside the corporate limits of a municipality." Section 18-3-1 was amended by Alabama Acts 1982, 2d Ex. Sess., Act No. 82-784, p. 288, to delete any reference to land "outside the corporate limits of a municipality"; that 1982 amendment added the language "provided written approval is obtained from the municipal government and the planning board of such municipality." The 1982 amendment thereby seems to restrict the application of the statute to land within the corporate limits of a municipality. After the 1982 amendment, the section reads:
>
> > "The owner of any tract or body of land, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from the municipal government and the planning board of such municipality."
>
> The Court of Civil Appeals interpreted the amended provision in *Hawkins v. Griffin*, 512 So. 2d 109, 110-11 (Ala.Civ.App. 1987):
>
> > "Although inartfully drafted, section 18-3-1, Code 1975, as amended, appears to be the result of an effort by the legislature to permit those landowners within the boundaries of municipalities who have no access to a public road or street to condemn private rights-of-way just as landlocked landowners outside municipalities are permitted to so condemn....
> >
> > "After giving [§ 18-3-1, as amended in 1982,] a rational, sensible, and liberal construction, we conclude that the legislature intended to permit landlocked owners in municipalities to obtain private rights-of-way over the lands of others to the nearest public road or street and did not intend to deprive landlocked owners outside municipalities of the same right, which they had possessed for many years."
>
> We think the Court of Civil Appeals correctly interpreted the 1982 Amendment.

[**4]

> " [*768] The owner of any tract or body of land, outside the corporate limits of a municipality, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way not exceeding in width thirty feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto."

In *Harvey v. Warren*, 212 Ala. 415, 102 So. 899 (1925), this Court was faced with a constitutional challenge to General Act No. 679, Acts of Alabama 1919, p. 982, the predecessor to § 18-3-1. The Court upheld the act, stating:

> "The provision is contained in the Constitution of this state that the Legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide and regulate the exercise by persons and corporations of the rights reserved, etc. Section 23. *Such a statute has been upheld in this court. Steele v. [County Commissioners]*, 83 Ala. 304, 3 So. 761 [(1888)].

> "....
>
> "It has been noted [**5] that to come within the provisions of the Constitutions (state and federal) having application to the taking of private property by paying to the owner just compensation (Ala. Const. § 23; 14th Amend. to Const. of U.S.), the use to which it is to be subjected must be a recognized 'public use'...."

212 Ala. at 416-17, 102 So. at 900-01. (Emphasis added.)

Specifically, the interpretation from *Steele v. County Commissioners*, 83 Ala. at 305-08, 3 So. at 762-63, relied on by the Court in *Harvey v. Warren*, supra, for upholding the act, reads as follows:

> "The material question presented by the record involves the constitutionality of sections 1676 and 1677 of Code of 1876, which provide for and regulate the establishment of private roads.
>
> "The right of eminent domain antedates constitutions, and is an incident of sovereignty, inherent in, and belonging to every sovereign State. The only qualification of the right is, that the use for which private property may be taken shall be public. Section 13 of the Declaration of Rights in the constitution [**6] of 1819 declared: 'Nor shall any person's property be taken or applied to public use, unless just compensation be made therefor.' The constitution did not assume to confer the power of eminent domain, but, recognizing its existence, limited its exercise by requiring that just compensation shall be made. Under this constitutional provision it was held, that the legislature could not, with or without compensation, take private property for private use; that a private road was a private use, and that sections 1187 and 1188 of Code of 1852, which correspond with sections 1676 and 1677 of Code of 1876, were unconstitutional, so far as they undertook to confer authority to establish such road over the lands of another without his consent. *Sadler v. Langham*, 34 Ala. 311 [1857]. An amended or revised State constitution should be interpreted in the light of its predecessors; and when new provisions are introduced, they should be given a fair and legitimate meaning, and so construed, having regard, to their nature and purposes, as to accomplish the objects intended. In framing the constitution of 1861, the declaration of the constitution of 1819, above quoted, [**7] was retained, and a new and additional provision was introduced, which is as follows: 'Private property shall not be taken for private use, or for the use of corporations, other than municipal corporations, without the consent of the owner; but the right of way [*769] may be secured by law to persons and corporations, over the land of persons and corporations; also, the right to establish depots, stations and turnouts, to works of public improvement; *Provided*, just compensation be made to the owner of such land.' Const., Art. III, § 30. It is manifest there was a purpose in the introduction of this new provision, which may be discovered from its nature, the circumstances under which it was introduced, and the causes thereof. These provisions were co-joined, and substantially incorporated in the constitutions of 1865 and 1868, as section 25 of the Bill of Rights; the only material alteration being, that compensation shall be made before the taking.
>
> "The makers of the present constitution deemed it necessary and proper to change in some respects the provisions in the constitutions next preceding, and framed section 24 of the Declaration of Rights so as to read as follows: 'That the [**8] exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as individuals. But private property

shall not be taken or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; *Provided*, however, that the General Assembly may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein secured; but compensation shall, in all cases, be first made to the owner.' It will be observed, that in respect to the power to secure to persons and corporations the right of way over the lands of other persons and corporations, the provision in the preceding constitutions is unchanged. The purposes of this section are unmistakable. It is intended to prohibit the abridgment of the exercise of the right of eminent domain, in reference [**9] to the property and franchises of corporations; to require just compensation in all cases; and to prevent private property from being taken for private use, or for the use of corporations other than municipal, without the consent of the owner, qualified by the proviso to the section. The same purposes which operated to introduce the power to secure the right of way to persons and corporations in the constitution of 1861, operated to continue it in the succeeding constitutions.

"The authority of the court of County Commissioners to establish private roads was first conferred by the act of 1832. Under this authority, private roads had been established; and in *Long v. Comm'rs*, 18 Ala. 482 [1850], the proceedings for this purpose were held to be regular. No constitutional question was raised or considered, but the decision was generally considered as a silent recognition of the constitutionality of the act. When the framers of the constitution of 1861 were brought to consider the exercise of the right of eminent domain, they were faced by the decision in *Sadler v. Langham*, supra, holding that the legislature had no authority [**10] to confer such power, which decision was made two years previously. *Having been taught by experience the imperious necessity of some power to establish private roads, so that there may be secured to the owners of lands, shut in by lands of co-terminous proprietors, a way of egress and ingress [from and to] the public roads, thereby preserving and enhancing the value, promoting the owner's full and lawful use and enjoyment of his property, and serving the public interest, by putting the citizen in position to perform public services, and to remedy the consequences of the decision that the legislature had no such authority under the constitution of 1819, they introduced the provision, that the General Assembly may secure by law to individuals and corporations the right of way over the lands of other persons and corporations.* The uses of some incorporated companies, such as railroads and turn-pike roads, had been pronounced public by a series of decisions, and were so understood when the constitution was adopted. The power to secure the right of [*770] way applies to persons and corporations without discrimination, and the effect is to put both in the same class in respect to the character [**11] of the use. *The proviso in the section of the constitution serves the natural and appropriate office of restraining or qualifying the preceding general provisions; and its operation is to except the right of way over the lands of persons and corporations from the general prohibition against taking private property for private use, by impliedly declaring the same to be a public use. The conclusion is, that the legislature may provide for the establishment of private roads, and that private property, to the extent of the right of way, may be taken for such purpose, upon just compensation being first made, and that the enactment of sections 1676 and 1677 is a constitutional exercise of the power. -- Schehr v. Detroit*, 45 Mich. 626, 8 N.W. 578."

(Emphasis added.) See, also, *Johnston v. Alabama Public Service Comm'n*, 287 Ala. 417, 252 So. 2d 75 (1971)

(holding that § 18-3-1 does not violate Art. I, § 23, or the 14th Amendment to the United States Constitution).

The trial court in the present case correctly recognized that even a compensated taking of property when executed for no reason other than to confer a private [**12] benefit on a particular private party is unconstitutional under both the Alabama Constitution and the United States Constitution. See, e.g., *Harvey v. Warren*, supra; *Steele v. County Commissioners*, supra; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984); and 2A Nichols, *The Law of Eminent Domain* §§ 7.01-7.73 (3d ed. 1990). In *Hawaii Housing Authority v. Midkiff*, the Hawaii Legislature enacted the Land Reform Act of 1967 ("the Act"), which created a land condemnation procedure whereby title to real property was taken from lessors and transferred to lessees in order to reduce the concentration of land ownership on the islands. The Hawaii Legislature concluded that such drastic legislation was necessary, based on its finding that concentrated land ownership was skewing the state's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare. Rejecting a challenge to the Act based on the Fifth Amendment's Eminent Domain Clause and on Due Process provisions, the United States Supreme Court held:

> "To be sure, [**13] the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80, 81 L. Ed. 510, 57 S. Ct. 364 (1937). See, e.g., *Cincinnati v. Vester*, 281 U.S. 439, 447, 74 L. Ed. 950, 50 S. Ct. 360 (1930); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-252, 49 L. Ed. 462, 25 S. Ct. 251 (1905); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 159, 41 L. Ed. 369, 17 S. Ct. 56 (1896). Thus, in *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 41 L. Ed. 489, 17 S. Ct. 130 (1896), where the 'order in question was not, *and was not claimed to be*, ... a taking of private property for a public use under the right of eminent domain,' *id.*, at 416 (emphasis added), the Court invalidated a compensated taking of property for lack of a justifying public purpose. But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause. [**14] See *Berman v. Parker*, [348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954)]; *Rindge Co. v. Los Angeles*, 262 U.S. 700, 67 L. Ed. 1186, 43 S. Ct. 689 (1923); *Block v. Hirsh*, 256 U.S. 135, 65 L. Ed. 865, 41 S. Ct. 458 (1921); cf. *Thompson v. Consolidated Gas Corp ., supra* (invalidating an *uncompensated* taking).
>
> "....
>
> "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable [*771] portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use.' *Rindge Co. v. Los Angeles*, 262 U.S. at 707. 'What in its immediate aspect [is] only a private transaction may ... be raised by its class or character to a public affair.' *Block v. Hirsh*, 256 U.S. at 155. As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was [**15] justified. The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.
>
> "Similarly, the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate. Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective

spheres of authority. See *Berman v. Parker*, 348 U.S. at 32. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.

"...

"The State of Hawaii has never denied that the Constitution forbids even a compensated taking of property when executed for no reason other than to [**16] confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii -- a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational. Since we assume for purposes of these appeals that the weighty demand of just compensation has been met, the requirements of the Fifth and Fourteenth Amendments have been satisfied."

467 U.S. at 241-45. (Emphasis in original.)

However, the trial court in the present case erred in holding that § 18-3-1 was unconstitutional to the extent that it permits the taking of private property to establish a private easement by necessity. As this Court explained in *Steele v. County Commissioners*, and as the United States Supreme Court explained in *Hawaii Housing Authority v. Midkiff*, the [**17] taking of private property for a private use is constitutional provided that there exists a valid public purpose for the taking. There is no "literal requirement that condemned property be put into use for the general public," *Midkiff*, 467 U.S. at 244; it is only the purpose of the taking that must pass constitutional scrutiny, and a state's assessment as to what public purposes should be advanced by the exercise of the taking power is entitled to substantial deference by the courts. *Midkiff*. The public purpose advanced by § 23 of the Alabama Constitution, which § 18-3-1 was enacted to implement, was adequately stated in *Steele v. County Commissioners*:

"Having been taught by experience the imperious necessity of some power to establish private roads, so that there may be secured to the owners of lands, shut in by lands of co-terminous proprietors, a way of egress and ingress [from and to] the public roads, thereby preserving and enhancing the value, promoting the owner's full and lawful use and enjoyment of his property, and serving the public interest, by putting the citizen in position to perform public services ..., [the framers of [**18] *the Constitution of 1861] introduced the provision, that the General Assembly may secure by law to individuals and corporations* [*772] *the right of way over the lands of other persons and corporations."*

83 Ala. at 307, 3 So. at 763.

For the foregoing reasons, the judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C. J., and Maddox, Almon, Shores, Kennedy, Ingram, and Cook, JJ., concur.

Steagall, J., concurs specially.

CONCUR BY: STEAGALL

CONCUR

STEAGALL, JUSTICE (concurring specially).

I concur specially to point out that while the taking referred to by the majority is constitutional, the actual use of the condemned right-of-way is, in my opinion, for the use of the condemnor and not for the use of the general public.

W. Thomas Loveless v. Joelex Corporation, Inc.

No. 1901223

Supreme Court of Alabama

590 So. 2d 228; 1991 Ala. LEXIS 1101

November 15, 1991

SUBSEQUENT HISTORY: [**1] Released for Publication December 20, 1991.

PRIOR HISTORY: Appeal from Jefferson Circuit Court, Bessemer Division; No. CV-89-604.

DISPOSITION: AFFIRMED.

CORE TERMS: right-of-way, public road, highway, interstate highway, condemnation, landlocked, convenient, bordering, adjacent, acquire, body of land, contiguous, tract, property owner, field of operation, intervening, landowner, probate, property owned, access road

COUNSEL: For Appellant: Ralph Loveless of Loveless & Banks, Mobile.

For Appellee: Arthur Green, Jr., of Green, Armstrong & Bivona, P.C., Bessemer.

JUDGES: Kennedy, Justice. Hornsby, C. J., and Maddox, Shores, Adams, Steagall, and Ingram, JJ., concur.

OPINION BY: KENNEDY

OPINION

[*228] *The defendant appeals from a condemnation judgment in favor of the plaintiff, Joelex Corporation, Inc.*

The issue is whether private condemnation proceedings are available to a property owner whose property is contiguous to an interstate highway to which he has no access.

The plaintiff owns 5.89 acres of land contiguous to and directly north of property owned by the defendant, Thomas Loveless. The property owned by the plaintiff also borders Interstate Highway 59, which in places is known as Powder Plant Road and in other places is known as Academy Drive. That portion of the highway bordering the plaintiff's property is a limited access road. Under State Highway Department regulations, the plaintiff cannot enter or exit the interstate highway from his land. That portion of the interstate bordering the defendant's property, however, is not a limited access road.

[*229] *On August 5, 1987,* [**2] *the plaintiff filed a petition in the probate court for a private condemnation to acquire a right-of-way across the defendant's property. The probate court entered an order of condemnation, and the defendant, appealed to the Circuit Court of Jefferson County. Both parties moved for summary judgment. The parties stipulated that the proposed 30-foot right-of-way was the shortest route by which the plaintiff could reach the interstate highway and presented to the court the question whether the plaintiff's land is considered "landlocked" for the purposes of § 18-3-1, Ala. Code 1975. The trial court found that although the land is actually adjacent to a public road, the plaintiff's inability to access the road because of Highway Department regulations renders the land "landlocked." The circuit court entered a judgment allowing the plaintiff a right-of-way over the defendant's property and required the plaintiff to pay the defendant $ 13,387.45 in compensation for the right-of-way.*

Section 18-3-1 provides:

"The owner of any tract or body of land, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient [**3] *right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from the municipal government and the planning board of such municipality."*

The obvious purpose of this statute is to provide a means whereby a landowner, enclosed on all sides by lands of others and unable to access to his land from a public road or highway, can get relief by condemning a right-of-way across intervening land. However, if a landowner already has a reasonably adequate way to and from his land, then there is no field of operation for

the statute. If there is no reasonably adequate means of access, he may acquire, as provided in the statute, a convenient right-of-way. *Southern Ry. Co. v. Hall*, 267 Ala. 143, 100 So.2d 722 (1957). "A property owner may institute a proceeding under the statute if he does not have a way of access to a public road, either public or private, which is unobstructed and unquestioned." *Crabtrey v. Tew*, 485 So.2d 726, 727-28 (Ala.Civ.App. 1985), cert. denied, 485 So.2d 729 (Ala. 1986). [**4] The burden is on the person petitioning for a right-of-way to show that he has no reasonably adequate means of ingress and egress. *Southern Ry.*, 267 Ala. 143, 100 So.2d 722.

In the case at bar, the plaintiff has no access to the interstate highway bordering his property because of Highway Department regulations. Although the defendant argues that the plaintiff's land is adjacent to a public road and that therefore the statute has no field of operation, this very literal reading would defeat the obvious intent of the statute. Clearly, the plaintiff is landlocked for the purposes of § 18-3-1. The trial court correctly granted the right-of-way across the defendant's property.

All other issues presented on appeal are without merit.

AFFIRMED.

Jim B. McClendon and Nancy P. McClendon v. Shelby County, et al.

Civ. No. 4872

Court of Civil Appeals of Alabama

484 So. 2d 459; 1985 Ala. Civ. App. LEXIS 1337

September 11, 1985

SUBSEQUENT HISTORY: [**1] As Amended October 29, 1985. Writ Denied January 31, 1986.

PRIOR HISTORY: Appealed From Shelby County Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: street, cul-de-sac, general welfare, characterization, arbitrary and capricious, classification, dedicated, vacate, front, circle, Administrative Law, matter of law, public health, present case, dedication, freeholder, planning, contest, map, connecting, diagram, planning commission, state interest, administrative agency, quasi-judicial, qualification, land-planning, irrational, debatable, recorded

COUNSEL: Douglas Corretti, Mary D. Hawkins, Birmingham, Alabama, for Appellant.

Oliver P. Head, Columbiana, Alabama, for Appellee.

JUDGES: Wright, Presiding Judge. Holmes, J., concurs. Bradley, J., concurs specially.

OPINION BY: WRIGHT

OPINION

[*461] In January 1982 the McClendons contracted to buy Lot 8 in the Meadow Brook, 6th Sector Subdivision, paying earnest money of $10,000. They had visited the site several times prior to signing the contract. The street in front of the lot appeared to be a cul-de-sac with curbs and gutters in place. In March 1982, before the closing of the sale, the McClendons were informed that the Shelby County Planning Commission (SCPC) had authorized extending the street in front of their property to connect with a neighboring subdivision. The McClendons examined the record map of the area during this time and talked to one of the planning commissioners, who confirmed the extension of the street. In spite of this knowledge, the McClendons closed the sale of the property on April 30, 1982.

The McClendons then petitioned the [**2] SCPC to contest this extension. The petition asked the SCPC to "change the plans" that it had previously approved, which called for the extension. Having previously authorized the extension in an entirely separate action, it was understandably unsure of the proper way in which to address this petition. The SCPC ultimately decided to treat the petition as a request "for approval to vacate a 60-foot right-of-way behind [the alleged] cul-de-sac circle at North End of Colonial Park Road to block future connecting road with Broken Bow Subdivision." We can find no objection in the record to the SCPC's characterization of this petition. In fact, one might say that this characterization was virtually ignored by the McClendons. The petition was denied.

An appeal was taken to the Shelby County Circuit Court. The circuit court found that one of the commissioners had acted improperly. The court set aside the SCPC's decision and allowed the McClendons to repetition the SCPC. The petition was again denied. A second appeal was taken to the circuit court, and this time the SCPC's decision was upheld. On appeal to this court, the McClendons make a number of arguments, most of which, it [**3] seems, would have more properly been made and addressed in a declaratory judgment action or perhaps even an independent action to contest the constitutionality of the act by which the SCPC was created. However, in acknowledgement of the time and energy expended on this case, by both the attorneys and the judiciary, we will address most of these arguments.

The McClendons' first and main contention is that the street in front of their property is a cul-de-sac as a matter of law. This contention, if correct, would arguably make the SCPC's decision wrong as a matter of law in that its characterization of the petition as a request "for approval to vacate" would be inaccurate. In essence, the argument is that approval of the connecting street would constitute an illegal taking of the McClendons' property without just and fair compensa-

tion. We, however, cannot agree with the McClendons' contention. The SCPC's characterization of both the street and the petition was correct. A diagram of the area will facilitate an understanding of this case.

[*462] [SEE ILLUSTRATION IN ORIGINAL]

We find substantial evidence in the record to support the proposition that the street in question [**4] is not a cul-de-sac. The subdivision regulations state clearly that a cul-de-sac is a *circle* with certain specified dimensions. The diagram clearly shows that Colonial Park Road dead-ends at the boundary of the subdivision. There is no circle, but only an area to facilitate the turn around of automobiles or emergency vehicles as provided for by these same subdivision regulations. Moreover, there exists an actual cul-de-sac in the very same subdivision. The following diagram shows this to be a fully-closed circle surrounded by wedge-shaped lots.

[SEE ILLUSTRATION IN ORIGINAL]

Once a plat or map is recorded in the office of the probate court in the county where the land lies, the streets, avenues and highways are held to be dedicated to the public. § 35-2-51, Code of Alabama 1975. *See Talley v. Wallace*, 252 Ala. 96, 39 So. 2d 672 (1949). Once an area is dedicated, the parties who purchase surrounding [*463] lots are put on notice of such dedication. *Hoiles v. Taylor*, 278 Ala. 515, 179 So. 2d 148 (1965). Thus, in the present case, the entire street in question was dedicated to the public. This dedication included the entire area up to the actual boundary [**5] of the subdivision. As this map was recorded well before the McClendons purchased their property, they were put on notice of such dedication. Because of this, logically, the SCPC was correct in its characterization of the McClendons' petition as a request for *approval* to vacate. The SCPC does not have the power to actually vacate a public street. *See* §§ 23-4-1 to -20, Code of Alabama 1975.

We note that local governing authorities are presumed to have a superior opportunity to know and consider the general welfare of an area. *See Episcopal Foundation v. Williams*, 281 Ala. 363, 202 So. 2d 726 (1967); *Sanders v. Board of Adjustment*, 445 So. 2d 909 (Ala. Civ. App. 1983). The question becomes whether the decision of the planning commission, denying the McClendons' request, was arbitrary and capricious in that it was unrelated to the public health, safety, morals or general welfare. *City of Mobile v. Waldon*, 429 So. 2d 945 (Ala. 1983). The trial court held that the decision was not arbitrary and capricious. If supported by evidence, this decree is favored with a presumption of correctness and is not to be disturbed, unless it is plainly or palpably wrong or manifestly [**6] unjust. *Hall v. Jefferson County*, 450 So. 2d 792 (Ala. 1984). Our standard of review, once a substantial relationship to the promotion of public health, safety or general welfare has been determined, is whether the SCPC's denial is founded upon "fairly debatable" factual and policy issues. *See Hall v. Jefferson County, supra.*

We find ample evidence in the record before us to show that the decision had a substantial and obvious relation to the public health, safety, and general welfare of those persons in Shelby County. We also find that the decision was founded upon "fairly debatable" factual and policy issues. Testimony by witnesses, including that of experts, showed that the connecting road would improve fire and police protection, facilitate utility connection, reduce commuting time for residents and improve safety in the event of catastrophic fire or storm. Thus, the decision of the SCPC not to approve the McClendons' request was not arbitrary and capricious. The decision of the trial court was not plainly and palpably wrong and must be affirmed.

Incidentally, we note that any contention that the SCPC's decision at the first hearing was arbitrary and capricious [**7] would now be moot. Any error made in the first hearing has been cured by the second hearing and subsequent appeals.

Our decision that Colonial Park Road does not end in a cul-de-sac obviates the need to address the McClendons' arguments concerning estoppel, the vested rights doctrine and 42 U.S.C. §§ 1983, 1988. As the property had already been properly dedicated to the public, there has been no deprivation or detriment to consider.

The McClendons' attempt to make a number of arguments concerning the constitutionality of 1982 Ala. Acts 693, as amended by 1984 Ala. Acts 454. This act created the SCPC.

Counsel for the SCPC strongly argues, and we think correctly, that the rationale of the supreme court's decision in *Byrd Companies, Inc. v. Jefferson County*, 445 So. 2d 239 (Ala. 1983), should prevent the McClendons from requesting approval from the SCPC while at the same time and in the same action contesting the constitutionality of the act establishing such commission's authority. We note, however, without condoning the McClendons' methods as proper, that such a decision might cause an unnecessary waste of both judicial and attorney time and expense. As did the supreme [**8] court in *Byrd* then, we address the McClendons' main contentions.

The McClendons first argue that the act constitutes an unlawful delegation of legislative and judicial powers. Particularly, it is argued that section 14 of the act violates the doctrine of separation of powers.

[*464] A very good argument can be made that the McClendons have not established the necessary standing to contest the constitutionality of the act in question. There has been no argument made that would even suggest any "causal connection" between the injury they allege and the unconstitutionality of the act. Thus, there has been no showing that the McClendons would benefit personally from the court's intervention. *See Warth v. Seldin*, 422 U.S. 490, 508, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). In other words, we fail to see how striking section 14 of the act as unconstitutional will benefit the McClendons in any way. The street in question would still not be a cul-de-sac, and the McClendons will still not have complied with §§ 23-4-1 to -20, Code 1975.

We note, however, that the McClendons' argument must still fail on the merits. Only three powers are granted the SCPC by section 14. [**9] Two of these deal with special exceptions and variances, powers which have long been recognized as validly delegable. *See generally* Ala. Digest, *Zoning and Planning*, Key No. 484 (Supp. 1985), 101A C.J.S. *Zoning and Land Planning* §§ 228-29 (1979). The third, stated as the power "to hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Commission or official in the enforcement of this article or any regulation adopted pursuant thereto" is merely providing the SCPC with the power to reconsider its own decisions. It is generally recognized that an administrative agency has the power to do this as long as the legislature has granted such authority. *See generally* 73A C.J.S. *Public Administrative Law and Procedure* § 161 (1983). Further, the legislature of a state may delegate to an administrative body the power to make rules and decide particular cases. *State ex rel. Dyer v. Sims*, 341 U.S. 22, 95 L. Ed. 713, 71 S. Ct. 557 (1951). This includes the power to delegate adjudicatory or quasi-judicial duties. *Ex parte Darnell*, 262 Ala. 71, 76 So. 2d 770 (1954). As noted in 73A C.J.S. *Public* [**10] *Administrative Law and Procedure* § 161 (1983):

> "Legislative acts granting to an administrative agency quasi-judicial power are valid, where the legislature has laid down the policy and established the standards while leaving to the agency the determination of facts to which the legislative policy is to apply."

See also Ball v. Jones, 272 Ala. 305, 132 So. 2d 120 (1960). *See generally* 73A C.J.S. *Public Administrative Law and Procedure* § 10b (1983). There has been no issue raised as to the validity, or lack thereof, of a clear standard to apply under section 14.

The McClendons also contend that the selection process for commissioners provided for by the act unlawfully discriminates in that it limits selection to resident "freeholders" of Shelby County. We cannot agree.

The basic tenet of the equal protection clause is that all persons similarly situated must be treated equally. *Eagerton v. Gulas Wrestling Enterprises, Inc.*, 406 So. 2d 366 (Ala. 1981). It does not, however, require that a statute necessarily apply equally to all persons or require that things different in fact be treated in law as though they were the same. *Hall v. McBride* [**11] , 416 So. 2d 986 (Ala. 1982). *Eagerton v. Gulas Wrestling Enterprises, Inc., supra.*

We note that there has been no argument that either a fundamental right or a suspect classification is involved in the present case. Thus, the only question is whether the classification bears a rational relation to a legitimate state interest. *Board of Trustees of Policemen's and Firemen's Retirement Fund v. Cardwell*, 400 So. 2d 402 (Ala. 1981); *Madison v. Lambert*, 399 So. 2d 840 (Ala. 1981). *See also Pappanastos v. Board of Trustees of University of Alabama*, 615 F.2d 219 (5th Cir. 1980).

The McClendons argue that the classification in the present case is irrational, because in two hypothetical situations such a classification does not make logical sense. We must simply ask whether "any state of [*465] facts reasonably may be conceived to justify" the challenged qualification. *McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961). *Accord Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 35 L. Ed. 2d 659, 93 S. Ct. 1224 (1973); *Pappanastos, supra.* Thus, if it can be reasonably concluded that the "freeholder" qualification [**12] promotes a legitimate state interest, it must be sustained. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 76 L. Ed. 2d 497, 103 S. Ct. 2296, *on remand, Eagerton v. Exchange Oil and Gas Corp.*, 440 So. 2d 1031 (Ala. 1983). A similar test would be applied to any challenge based on a denial of due process. *See Jones v. Alabama State Docks*, 443 So. 2d 902 (Ala. 1983); *Juneman Electric, Inc. v. Cross*, 414 So. 2d 108 (Ala. Civ. App. 1982).

We cannot say that it is irrational for the legislature to conclude that, for the most part, those persons having the greatest interest in land-planning in Shelby County, i.e. freeholders, should not also be the persons best qualified to make land-planning decisions. In fact, it is quite logical for the legislature to make such a conclusion. The rationale for such a conclusion is similar to

that used in establishing the aforementioned presumption that local governing bodies have a superior opportunity to know and consider the interests involved and to consider the general welfare of the area involved. *Cf. Sanders v. Board of Adjustment, supra*. We, therefore, uphold the act.

In view of our decision on the first issue, and the fact [**13] that it was not discussed in brief by either party, we discern no reason to determine if § 6-6-227, Code of Alabama 1975, applies in this case as in the recent cases of *Barger v. Barger*, 410 So. 2d 17 (Ala. 1982), and *Guy v. Southwest Alabama Council on Alcoholism*, 475 So. 2d 1190 (Ala. Civ. App. 1985).

In light of the foregoing, we are of the opinion that the trial court's decision that the SCPC has not acted arbitrarily or capriciously in denying the McClendons' petition was correct. Further, there is no sound challenge that can be made to the constitutionality of Act No. 82-693, as amended by Act No. 84-454. We are therefore of the opinion that the trial court's decision is due to be affirmed.

AFFIRMED.

HOLMES, J., concurs.

BRADLEY, J., concurs specially.

CONCUR BY: BRADLEY

CONCUR

BRADLEY, J., concurring specially:

I agree with the majority that the first issue decided, i.e. that the street in front of the McClendons' property is not a cul-de-sac as a matter of law, is dispositive of the appeal. Consequently, I see no need to consider the constitutional issues presented or whether they were properly presented to the trial court. *See Guy v. Southwest Alabama Council* [**14] *on Alcoholism*, et al., 475 So. 2d 1190 (Ala. Civ. App. 1985). Hence, I do not agree or disagree with the decision in this aspect of the case.

Cynthia Dale McCool v. Morgan County Commission and Morgan County

2961176

COURT OF CIVIL APPEALS OF ALABAMA

716 So. 2d 1201; 1997 Ala. Civ. App. LEXIS 887

November 7, 1997, Released

SUBSEQUENT HISTORY: [**1] Application for Rehearing Overruled December 5, 1997, Reported at: 1997 Ala. Civ. App. LEXIS 993.

PRIOR HISTORY: Appeal from Morgan Circuit Court. (CV-96-691).

DISPOSITION: AFFIRMED.

CORE TERMS: intersection, street, summary judgment, municipal, annexed, repair, county commission, matter of law, designated, supervise, warning, manage, county roads, stop sign, traffic control, undisputed evidence, undisputed facts, exercised control, joint control, traffic-control, municipality, vested, resume, lying

JUDGES: MONROE, Judge. Robertson, P.J., and Yates, Crawley, and Thompson, JJ., concur.

OPINION BY: MONROE

OPINION

[*1201] MONROE, Judge

On July 24, 1995, Cynthia Dale McCool was injured in a one-vehicle accident that [*1202] occurred at the intersection of Davis Street and Thompson Road in the Town of Priceville, in Morgan County. There was no stop sign or other warning device at this intersection. On December 18, 1996, McCool sued Morgan County and the Morgan County Commission, (collectively "Morgan County"), alleging that they had negligently or wantonly failed to maintain a stop sign or other traffic signal or warning device at the intersection. Morgan County moved for a summary judgment on the ground that it did not exercise authority or control over the intersection and that the intersection was under the control of the Town of Priceville. The trial court entered a summary judgment in favor of Morgan County. McCool appealed to the Alabama Supreme Court, which transferred the case to this court pursuant to § 12-2-7(6), Ala. Code 1975.

In [**2] order to enter a summary judgment, the trial court must determine that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; *Silk v. Merrill Lynch, Pierce, Fenner & Smith*, 437 So. 2d 112 (Ala. 1983). A summary judgment carries no presumption of correctness, and our review of a summary judgment is de novo. *Bunting Plastic Surgery Clinic, P.C. v. Tucker*, 624 So. 2d 1073 (Ala. Civ. App. 1992), *aff'd Ex parte Bunting Plastic Surgery Clinic, P.C.*, 624 So. 2d 1075 (Ala. 1993). Because neither party argues the existence of disputed material facts, we must determine whether the defendants are entitled to a judgment as a matter of law. *Id.*

The undisputed evidence before the trial court shows that on March 31, 1986, the Town of Priceville annexed certain property, including portions of Thompson Road and Davis Street, and the intersection of these roads where McCool's accident occurred. In support of the motion for a summary judgment, Morgan County submitted the affidavit of its county engineer, Bobby Woodruff, and the affidavit of the mayor of Priceville, Melvin L. Duran, Jr. These affidavits [**3] showed that the intersection had been annexed by Priceville on March 31, 1986; that Morgan County had ceased exercising authority and control over the annexed roadways, including the intersection at issue, on March 31, 1986; and that the Town of Priceville had exercised sole authority and control of the intersection since March 31, 1986. In fact, Mayor Duran's affidavit specifically states that, since the time of annexation, "the Town of Priceville has maintained traffic control or warning signs on those portions of Davis Street and Thompson Road at issue in this case."

McCool does not dispute any of these facts. However, McCool contends that Morgan County had control of the intersection in question because Priceville had not enacted a resolution providing for the authority to control and maintain the intersection. McCool argues that such a resolution is required by § 11-49-80 and § 11-49-81, Ala. Code 1975. Section 11-49-80(a) [1] provides:

1 As amended effective July 7, 1995.

> "Where the authority to control, [**4] manage, supervise, regulate, repair, maintain and improve a street or streets or part thereof lying within a municipal corporation is vested in the county commission of the county within which a municipal corporation is located, a municipal corporation may resume or take over the authority to control, manage, supervise, repair, maintain and improve such street or streets or part thereof designated in the resolution adopted by the governing body of a municipal corporation to resume or take over such authority."

Section 11-49-81 further specifies:

> "Such resolution shall designate the sum or sums ascertained to be the reasonable charge to be paid by such county for being relieved of the burden of the control, management, supervision, repair, maintenance and improvement of such street or streets or part thereof designated in said resolution, and no such resolution shall become effective until and unless the county shall by appropriate action of its county commission pay or contract to pay such sum or sums as may be designated in such resolution."

McCool argues that according to these statutes and the Alabama Supreme Court's holding in *Yates v. Town of Vincent*, [**5] 611 So. 2d 1040 [*1203] (Ala. 1992), Morgan County had authority and control over the intersection at issue because Priceville had not adopted a resolution in accordance with these statutes.

In *Yates*, the plaintiffs sued the Town of Vincent for failing to maintain traffic-control devices at an intersection of two Shelby County roads located within the limits of the town. The trial court entered a summary judgment in favor of the town on the ground that Shelby County was solely responsible for maintenance and control of the intersection. The undisputed facts in *Yates* showed that Shelby County uniformly maintained and controlled the intersection. The Court held that §§ 11-49-80 and -81 governed a municipality's control over county roads within its city limits and that, because the town had not invoked the procedures set forth in these statutes, it was not responsible for the traffic-control devices at the intersection. In construing these statutes, the court surmised that there should be no jointly exercised traffic control between city and county governments.

The *Yates* decision is not dispositive in this case. In *Yates*, the county had exercised exclusive control of the [**6] intersection of two *county* roads, while in this case Priceville has exercised sole control of the intersection of the two annexed roads since 1986. To hold that Morgan County exercised control of the intersection, in spite of the undisputed evidence that Priceville actually maintained sole control of the intersection, would result in our establishing joint control of the intersection, a result that *Yates* prohibits. In addition, nothing in § 11-49-80(a) or § 11-49-81 prevents Priceville from exercising sole control of the intersection. Instead, these statutes merely establish procedures for a municipality to utilize before it repairs or improves a street "where the authority to control, manage, supervise, regulate, repair, maintain and improve a street or streets . . . lying within a municipal corporation is vested in the county commission." Thus, nothing in these statutes requires Morgan County to exercise control of the intersection, when Priceville has annexed it and taken sole responsibility for its maintenance and control. Because Morgan County and Priceville maintained and exercised control of the intersection consecutively, and not concurrently, this does not appear [**7] to be a situation involving the potential joint control of an intersection, which is the situation §§ 11-49-80(a) and -81 were designed to prevent.

The undisputed facts show that Priceville has had sole authority and control over the intersection at issue since 1986. We reject McCool's argument that Morgan County had control as a matter of law. Therefore, the summary judgment was proper.

AFFIRMED.

Robertson, P.J., and Yates, Crawley, and Thompson, JJ., concur.

City of Mobile v. Pinto Island Land Company, Inc.

2051075

COURT OF CIVIL APPEALS OF ALABAMA

5 So. 3d 1248; 2007 Ala. Civ. App. LEXIS 432

June 29, 2007, Released

SUBSEQUENT HISTORY: Released for Publication March 10, 2009.
Rehearing overruled by City of Mobile v. Pinto Island Land Co., 5 So. 3d 1248, 2007 Ala. Civ. App. LEXIS 780 (Ala. Civ. App., Dec. 14, 2007)

PRIOR HISTORY: [**1]
Appeal from Mobile Circuit Court. (CV-05-1243.51).

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: street, vacation, convenient, summary judgment, vacating, public street, trucks, abutting, deprive, genuine, abuts, issue of material fact, violating, traffic, lane, feet, matter of law, evidence indicating, substantial evidence, accessing, alternate, deprived, adduced, vacated, turning, vacate, alley, deposition testimony, right-of-way, traffic laws

JUDGES: PITTMAN, Judge. Thompson, P.J., and Thomas, J., concur. Bryan, J., dissents, with writing, which Moore, J., joins.

OPINION BY: PITTMAN

OPINION

[*1249] PITTMAN, Judge.

The City of Mobile ("the City") appeals from a summary judgment entered in favor of Pinto Island Land Company, Inc. ("Pinto Island"), in Pinto Island's action to prevent the City from vacating a portion of a public street abutting a parcel of property owned by Pinto Island.

Pinto Island owns a parcel of real property ("the property") located within the City's corporate limits, and it leases the property to a shipbuilding company. On March 8, 2005, pursuant to Ala. Code 1975, § 23-4-2, the City adopted a resolution stating that it was in the public interest to vacate a portion of Short Texas Street, a public street that abuts the property. Pinto Island appealed from the City's decision to the Mobile Circuit Court, pursuant to Ala. Code 1975, § 23-4-5. [1]

1 That statute, as amended by Act No. 2004-323, Ala. Acts 2004, which became effective July 1, 2004, entitles any party affected by the vacation of a street to de novo review via appeal to the appropriate circuit court.

In the circuit [**2] court, Pinto Island filed a motion, supported by various evidentiary submissions, seeking a summary judgment declaring the City's vacation resolution void. The motion and supporting affidavits asserted that vacating a portion of Short Texas Street would deprive Pinto Island of its "only means" of ingress to and egress from the property. The City responded to Pinto Island's summary-judgment motion by submitting affidavits and documentary evidence indicating that vacating a portion of Short Texas Street would not deprive Pinto Island of reasonable and convenient means of accessing the property.

After hearing the arguments of counsel, the circuit court entered a summary judgment on May 30, 2006, in favor of Pinto Island. That judgment specifically determined that the City's resolution vacating a portion of Short Texas Street had violated § 23-4-2(b), Ala. Code 1975, because that vacation, according to the circuit court, deprived Pinto Island "of its reasonable and convenient access to its property and fail[ed] to provide Pinto Island with other reasonable and convenient access to its property." After the City's postjudgment motion was denied, the City appealed. The City contends that Pinto [**3] Island has not been denied "reasonable and convenient access to its property" and that the City has not violated § 23-4-2(b), Ala. Code 1975. Moreover, the City asserts that whether Pinto Island has such access is a question of fact. In addition, the City states that the circuit court erred in granting Pinto Island's summary-judgment motion because, the City claims, it adduced substantial evidence to rebut Pinto Island's contention that vacating a portion of Short Texas Street

would result in the loss of reasonable and convenient access to its property.

Our standard of review is well settled:

> [*1250] "A summary judgment is proper where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c)(3), Ala. R. Civ. P. When a party moving for a summary judgment makes a prima facie showing that there is no genuine issue of material fact and that the party is entitled to a judgment as a matter of law, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material [**4] fact. *Bass v. SouthTrust Bank of Baldwin County*, 538 So. 2d 794, 797-98 (Ala. 1989). 'Substantial evidence' is 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' *West v. Founders Life Assur. Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989). In determining whether a summary judgment is proper, a court must construe the evidence in a light most favorable to the nonmoving party, and all reasonable doubts concerning the existence of a genuine issue of material fact must be resolved against the movant. *Wilma Corp. v. Fleming Foods of Alabama, Inc.*, 613 So. 2d 359 (Ala. 1993)."

Telfare v. City of Huntsville, 841 So. 2d 1222, 1226-27 (Ala. 2002).

The record establishes the following pertinent facts. The property owned by Pinto Island is situated along the Mobile River, near the river docks in downtown Mobile. The property is bordered on the east by the waterfront and on the west by Old Water Street, which runs north and south along the entire length of the property. Short Texas Street, which runs east and west, abuts the property at the point where that street intersects Old [**5] Water Street. The portion of Short Texas Street that was vacated by the City's resolution includes that portion of Old Texas Street that abuts the property. After the vacation, the only public street abutting the property was Old Water Street, which could be accessed either by Elmira Street or Palmetto Street; those two streets are parallel to, and north of, Short Texas Street.

Old Water Street originally had a total width of 50 feet, but railroad tracks, running generally north and south, later occupied approximately 30 feet of the westernmost part of that street. The remaining usable road surface abutting the property has a width of approximately 20 feet. Vehicles approaching the property must turn onto Old Water Street from Elmira or Palmetto Streets before proceeding south to the point where the entry gate to the property opens onto Old Water Street. The undisputed evidence indicated that even before the City vacated the pertinent portion of Short Texas Street, vehicles entering the property were required to turn south onto Old Water Street to access the entry gate to the property, which is located several hundred feet south of the intersection of Short Texas Street and Old Water [**6] Street.

Alabama's street-vacation statute, as amended, requires that when a county or municipality desires to vacate a street, alley, or highway, or any portion thereof, the proposed vacation must be advertised for four weeks in a local newspaper, a public hearing must be held, and abutting landowners must be notified of the proposed vacation and the date of the public hearing before a vacation resolution may be adopted. *See* § 23-4-1 et seq., Ala. Code 1975. In addition, the Code stipulates that a street vacation cannot deprive "property owners of any right they may have to [*1251] convenient and reasonable means of ingress and egress to and from their property" and further provides that "if that right is not afforded by the remaining streets and alleys, another street or alley affording that right must be dedicated." *See* § 23-4-2(b), Ala. Code 1975.

Pinto Island submitted a survey and the deposition testimony of W.L. Lawler III, whose survey indicated the previously described boundaries of Pinto Island's property. Pinto Island also offered the deposition testimony of Gary D.E. Cowles, who opined that oversized trucks and large hauling trucks would not be able to negotiate the turn from either [**7] Elmira Street or Palmetto Street onto Old Water Street without crossing into the oncoming lane of traffic, thereby violating the standard rules of the road.

In contrast, the City submitted deposition testimony from William J. Metzger, the City's traffic engineer, who opined that vacating the pertinent portion of Short Texas Street would *not* deprive Pinto Island of reasonable and convenient access to the property because the property in question abuts a lengthy portion of Old Water Street and has other access points, including Elmira Street and Palmetto Street. Directly contradicting Cowle's testimony, Metzger offered his opinion that "large semi-trailer trucks" could access the property by

turning from Elmira Street onto Old Water Street without leaving the dedicated rights-of-way of either street.

Our Supreme Court has previously noted that any private right of abutting owners to a vacated street is "entirely and completely subordinate to the public right, and any invasion of the street in the way of private use can be justified only on the ground of public necessity." *Thetford v. Town of Cloverdale*, 217 Ala. 241, 243, 115 So. 165, 167 (1927). In addition, when comparing a private citizen's [**8] interest in a public street to that of a government's interest in vacating a street, our Supreme Court pointed out that "a vacation of a street initiated by public authority to better serve the public interest [is a situation] where the rule of public necessity must override private convenience." *McPhillips v. Brodbeck*, 289 Ala. 148, 154, 266 So. 2d 592, 598 (1972). In *McPhillips*, our Supreme Court reversed a judgment upholding the vacation of a portion of a public street because the vacation had deprived the plaintiff of his *only* means of access to his property and Mobile Bay. In the instant case, however, Pinto Island continues to have the means to access its property through the use of at least two alternate streets that intersect Old Water Street, a public thoroughfare that abuts the entire length of the property.

In reading the trial court's summary judgment, it appears that the trial court entered that judgment in favor of Pinto Island based upon a determination that the City's vacation of the pertinent portion of Short Texas Street deprived Pinto Island of "reasonable and convenient access" to the property, thereby violating § 23-4-2(b). However, when viewed in the light most [**9] favorable to the City as the nonmovant, the record indicates that substantial evidence was adduced establishing that Pinto Island still retains at least two viable alternative routes to access the property located on Old Water Street. Our Supreme Court has stated that in considering the propriety of the vacation of a public street, "[i]t is not a question of comparing conveniences or desirability, but whether there is left or provided some other reasonably convenient way." *Chichester v. Kroman*, 221 Ala. 203, 206, 128 So. 166, 169 (1930); *see also Elmore County Comm'n v. Smith*, 786 So. 2d 449 (Ala. 2000). Moreover, the City's resolution to vacate a portion of Short Texas Street is [*1252] prima facie evidence that such action is in the public's best interests. *See Chichester* and *McPhillips, supra.*

Because we conclude that the City adduced substantial evidence to rebut Pinto Island's contention that vacating a portion of Short Texas Street would result in the loss of reasonable and convenient access to its property, we must reverse the trial court's summary judgment in favor of Pinto Island and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, [**10] P.J., and Thomas, J., concur. Bryan, J., dissents, with writing, which Moore, J., joins.

DISSENT BY: BRYAN

DISSENT

BRYAN, Judge, dissenting.

In its summary judgment, the trial court concluded that the vacation of Short Texas Street would deprive Pinto Island of convenient and reasonable access to its property, in violation of § 23-4-2(b), Ala. Code 1975. The main opinion notes that Pinto Island has alternate means to access the property following the vacation. However, the trial court concluded that those alternate means were not convenient and reasonable because the property could not be accessed after the vacation by large commercial trucks without violating traffic laws. [2] The trial court specifically based its conclusion on evidence indicating that large commercial trucks accessing the property by turning south, or right, from Elmira Street onto Old Water Street must, in order to make that turn, illegally enter the left-hand lane of Elmira Street, *i.e.*, the oncoming lane of traffic. The trial court's judgment also cited evidence indicating that, at some time before the vacation of South Texas Street, that street could be used to access the property without violating traffic laws.

2 The City presents no [**11] argument addressing whether the trial court's conclusion on this issue is correct as a matter of law.

William J. Metzger, the City's traffic engineer, testified that "large semi-trailer trucks" could make the turn from Elmira Street onto Old Water Street "without going onto the railroad tracks and without leaving the right-of-way" of either street. The term "right-of-way," as used in this case, refers to the strip of land that contains an entire public street. Therefore, I do not believe that Metzger's testimony refutes the essential evidence on which the trial court based its judgment: that large commercial trucks accessing the property by turning south from Elmira Street onto Old Water Street must, in order to make that turn, illegally enter the left-hand lane of Elmira Street. The City submitted no evidence disputing this essential evidence.

Because I conclude that Metzger's testimony does not establish the existence of a genuine issue of material fact, I would affirm the summary judgment of the trial court. Accordingly, I respectfully dissent.

Moore, J., concurs.

Mobile Dodge, Inc., a corporation v. Mobile County and Treadwell Ford, Inc., etc.

No. 82-401

Supreme Court of Alabama

442 So. 2d 56; 1983 Ala. LEXIS 5080

December 2, 1983

PRIOR HISTORY: [**1] Appeal from Mobile Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: specifications, bid, suspension, package, frame, lowest, unitized, torsion bar, responsible bidder, patrol cars, coupling, tractor, injunctive relief, engineering, selecting, bidder, motive, coil-spring, Competitive Bid Law, bad faith, abuse of discretion, capriciously, arbitrarily, invitation, interfere, suitable, awarding, durable, bidding, coil

COUNSEL: Mylan R. Engel and Edgar P. Walsh, Mobile, for Appellant.

Richard D. Horne for Hess, Atchison & Horne, Mobile, Vincent F. Kilborn, III for Kilborn & Gibney, Mobile, for Appellee(s).

JUDGES: Beatty, Justice. Torbert, C.J., Maddox, Jones and Shores, JJ., concur.

OPINION BY: BEATTY

OPINION

[*57] This is an appeal by the plaintiff, Mobile Dodge, Inc., from the denial of injunctive relief which it sought against Mobile County and Treadwell Ford, Inc., for an alleged violation of Code of Ala. 1975, §§ 41-16-50 through -63 (the Competitive Bid Law). We affirm.

On September 14, 1982, the Mobile County Commission gave notice that it would receive bids per specifications on thirty-nine 1983 model police package automobiles for the Mobile County Sheriff's Department. By stipulation of the parties, this litigation involves only the 36 units that were to be delivered between January 15 and February 1, 1983. The invitations to bid contained specifications calling for, among other things, heavy-duty full length frames and front and rear coil-spring suspension systems. Both Mobile Dodge and Treadwell Ford submitted bids on the 36 [**2] units involved: Mobile Dodge submitted a bid of $289,199.89, and Treadwell Ford submitted a bid of $340,989.63. Although Mobile Dodge submitted the lowest bid of those responding, the contract was not awarded to Mobile Dodge, because it had submitted its bid on police units having frames with unibody construction and torsion bar suspension systems, and those units were determined by county officials not to be suitable for the needs and purposes for which the units were required.

Upon the recommendation of Mobile County Sheriff Thomas J. Purvis, and over the objection of Mobile Dodge, the Mobile County Commission awarded the contract to Treadwell Ford, which had submitted the lowest responsible bid, its units having met the frame and suspension requirements, and otherwise conforming to the bid specifications.

On November 15, 1982, Mobile Dodge filed its petition for injunctive relief in the Circuit Court of Mobile County against Mobile County and Treadwell Ford, seeking to enjoin Mobile County from purchasing for the Mobile County Sheriff's Department the 36 police package automobiles from Treadwell Ford.

In its complaint, Mobile Dodge alleged that it was the lowest responsible [**3] bidder; that the specifications were drawn so as to deliberately exclude Mobile Dodge as a competitor; and that Mobile County acted arbitrarily, capriciously, and in bad faith in awarding the contract to Treadwell Ford. In denying injunctive relief, the trial court, guided by the decision of this Court in [*58] *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971), found:

> "That the Sheriff's Department of Mobile County engaged in a reasonable and rational process, based on their experience and the experience of others, in selecting the requirements most suitable to meet their needs.
>
> ". . .

> ". . . The action of the Sheriff and the County in selecting the specifications found in the bid invitation did not constitute an abuse of discretion, was not illegal or contrary to the law, was not discriminatory, nor was it arbitrary, capricious or the result of bad faith."
>
> ". . .
>
> ". . . That process was directed toward the selection of cars which would be durable, safe and crashworthy. . . ."

The trial court's order was entered on December 21, 1982. Since Mobile Dodge did not obtain a stay pending appeal, the purchase of the 36 police packages [**4] took place. Mobile Dodge's position on this appeal, however, is that although injunctive relief has been rendered moot it would be entitled to its profit from the sale of the 36 units.

The pertinent provisions of the competitive bid law, found in § 41-16-57(a) and (c), provide as follows:

> "(a) When purchases are required to be made through competitive bidding, awards shall be made to the lowest responsible bidder taking into consideration the qualities of the commodities proposed to be supplied, their conformity with specifications, the purposes for which required, the terms of delivery, transportation charges and the dates of delivery.
>
> ". . .
>
> "(c) The awarding authority or requisitioning agency shall have the right to reject any bid if the price is deemed excessive or quality of product inferior."

The standard of conduct to be followed by State officials when drawing specifications for products to be bid on, and when selecting the lowest responsible bidder, were set out with particularity by this Court in *White v. McDonald Ford Tractor Co., supra*, and followed in *International Telecommunications Systems v. State*, 359 So. 2d 364 (Ala. 1978). In *White* [**5] , the invitation to bid upon the purchase of tractors contained specifications requiring tractors with sleeve-type engines, among other things. It was admitted that the specifications were drawn around the Massey-Ferguson turf tractor after State officials had agreed that it was best suited for the required purposes. McDonald was the low bidder; however, its Ford tractors did not meet the sleeve-type engine requirement, nor certain other requirements contained in the specifications, and the State officials determined that they were unsuitable. McDonald sought an injunction when it failed to persuade State officials of the merits of the Ford tractor. Injunctive relief was denied, and on appeal this Court upheld the award of the contract to a higher conforming bidder, explaining:

> "We think that State authorities should have discretion in determining who is the lowest responsible bidder. This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence. In reaching the decision [**6] which we reach in this case, we do not mean to imply that this Court or some other court would not have the authority to declare a contract as being void because the 'specifications' were written in such a manner that full and fair competition were excluded. It is fair to say that the legislative intent in passing the Competitive Bid Law was to get the best quality equipment at the lowest possible price, and the executive authorities should carry out this intent of the legislature. These officials must have discretion, not an unbridled discretion, but one exercised within the bounds we have tried to delineate in this opinion. The single most important requirement of the Competitive Bid Law is the good [*59] faith of the officials charged in executing the requirements of the law. A bad motive, fraud or a gross abuse of discretion will vitiate an award whether made with specifications which are quite general or very precise. The trial court found that no bad faith, improper motive, fraud or gross abuse of discretion was present here; hence, we think the court was without authority to interfere with the judgment and discretion of the State officials in determining that Booker [**7] was the 'lowest responsible bidder' in this instance." 287 Ala. at 86, 248 So. 2d at 129-30.

The Court further stated that "if . . . specifications were intentionally drawn so as to exclude others in order to purchase from a favored bidder because of some bad or improper motive on the part of State officials, then the practice could not be condoned." *White, supra,* 287 Ala. at 82, 48 So. 2d at 125.

Mobile Dodge contends that the Mobile County Sheriff's Department acted arbitrarily and capriciously by drawing the specifications for the police packages so specifically as to result in exclusion and disqualification of all Chrysler police packages, and further, that such exclusion of Mobile Dodge was intentional in order that the contract could be awarded to a favored bidder, Treadwell Ford. The specifications in question were developed by Lt. Rufus Harbin, of the Mobile County Sheriff's Department, together with Joe Ferrouillat, County Garage Supervisor. Both men testified that they included full-frame and coil-spring suspension system requirements in the specifications for patrol cars because, based on their experience and the experience of others, these characteristics [**8] made the vehicle safer, more crashworthy, more durable, and cheaper to maintain and repair.

The evidence of record discloses that, although the specifications were revised somewhat each year, the full-frame and coil-spring suspension requirements were added after the Sheriff's Department had had bad experiences with several 1977 Dodge Monacos: on at least three of these vehicles, the torsion bars broke on the right side. Nevertheless, the Sheriff's Department has continued to use vehicles with the unitized frame on the "civil side" and currently has several 1981 Dodge Aspens for these purposes.

At trial, Mobile Dodge adduced evidence showing that the Mobile Police Department uses as patrol cars Dodge police packages having torsion bar suspension and unitized bodies, and is satisfied with their performance. Mobile County put on evidence, however, indicating that due to the unpaved roads and rougher terrain found in the rural areas of the county, over which the Sheriff's Department patrol cars routinely travel, having sturdier frames and more flexible suspension systems on its vehicles was a necessary and often critical consideration, especially when a vehicle is wrecked or involved [**9] in a collision. Based on the experience the Sheriff's Department had with vehicles with full-frame and coil-spring suspension systems, they proved more durable, cheaper to maintain, and longer lasting, and offered more protection to the patrolmen in the event of a collision.

Furthermore, the experience of the Alabama State Highway Patrol with the unitized body was shown not to have been particularly good; twisting or wrinkling often occurred as a result of crossing highway medians, and other damage to the body would result if the vehicle had to be towed from the back. It was also shown that repairs of the unitized body, calling for straightening or welding, required special and more expensive equipment which the county garage did not own.

Most importantly, both Lt. Harbin and Joe Ferrouillat testified that it was their intent to draw the specifications only to eliminate unitized frames and torsion bar suspension systems on its patrol cars, and not to eliminate Dodge as a competitor. Nor did they favor the Ford police packages. In fact, the evidence showed these specifications would not only exclude Chrysler products, but also certain Ford vehicles and any other vehicle not [**10] having a [*60] full frame and an independent coil suspension system. It was further shown that certain products made by General Motors and American Motors would not be excluded by the specifications. Therefore, it cannot be said that Ford products were preferred when the specifications were drawn. As the trial court found: "These specifications excluded *all* cars which did not have a full frame and which did not have coil spring suspension on all four wheels. It may be an unfortunate result that some cars are in fact excluded by this process but this does not make the process illegal." (Emphasis in original.)

Mobile Dodge further asserts that the Chrysler police package, on which it bid, is a "quality product comparable to other police packages," but that the specifications as written effectively eliminated it from the bid competition altogether. Therefore, it contends, the specifications were written in such a manner as to exclude full and fair competition, *White v. McDonald Ford Tractor Co., supra*; nor, it says, was Mobile Dodge given the opportunity to compete "upon a level of quality" established by the specifications, *International Telecommunications Systems* [**11] *v. State, supra.* In substance, we see no distinction between the contentions made here by Mobile Dodge and those made by the complainant in the case of *Carson Cadillac Corp. v. City of Birmingham*, 232 Ala. 312, 167 So. 794 (1936), cited with approval in *White v. McDonald Ford Tractor Co., supra.* In *Carson*, the complainants sought an injunction against the City of Birmingham and further sought to compel the city to modify or change its specifications for water pipe couplings to include the Carson joint so that it could bid on the Birmingham water supply project. Carson further alleged that its joint was "equal, if not the superior of any other bolted joint or coupling manufactured," and that it had been excluded by the specifications from bidding "either as a result of the failure or inability [of the Engineering Commission] to consider and appreciate" its product, or as a result of improper influence, and that because of all this the bid process was "unwarranted, illegal and con-

trary to law." 232 Ala. at 315-16, 167 So. at 795-96. This Court held:

> "From the averments of the bill, it is apparent that the appellant is not as much concerned about the method the city [**12] has adopted in obtaining the materials for such construction, as it is that it is not in a situation to submit prices or bids for its production, because such production does not meet the requirements of the specifications adopted by the Engineering Commission, and therefore it seeks to compel the commission to modify its specifications so that complainant may submit bids or prices for the sale of its bolted joint couplings for the steel pipes, ranging from 48 to 60 inches in diameter, on the theory that appellant's coupling is the equal or superior of any such coupling obtainable.
>
> "To grant such relief would be to substitute the judgment of the court and its process for the judgment and discretion of the Engineering Commission as to technical matters within the field of engineering.
>
> "It is well-settled that courts of equity, in the absence of fraud or gross abuse, will not interfere with the exercise of discretion by administrative boards in the determination of the necessity and requirements of public accomplishment, much less control the judgment of such boards in respect to matters within the technical field of their duties and powers.
>
> "The averments of the bill fall far [**13] short of showing such fraud or gross abuse, or supporting the pleader's conclusion that the act of said board 'is unwarranted, illegal and contrary to law * * * a discrimination against the complainant and unjustifiable, interferes with its privileges and immunities which are protected by the Constitution of the United States.' [Citations omitted.]" 232 Ala. at 317, 167 So. at 798-799.

While it is true that, due to the fact that all Chrysler products are manufactured with unitized bodies and torsion bar suspension systems, Mobile Dodge is effectively excluded from bidding on patrol cars for [*61] the Mobile County Sheriff's Department, we cannot upon the record conclude that the specifications calling for full frames and coil spring suspension systems are unreasonable, impulsive, or irresponsible, and thus arbitrary and capricious. *International Telecommunications Systems v. State, supra.* Nor are we able to find any evidence in the record that would support a conclusion contrary to the trial court's finding that the county officials engaged in a reasonable and rational process in selecting the requirements most suitable to meet their needs, and acted in good [**14] faith from proper motives, without any showing of a gross abuse of their discretion in awarding the contract to Treadwell Ford. Consequently, we conclude that the order of the trial judge is due to be affirmed. It is so ordered.

AFFIRMED.

Torbert, C.J., Maddox, Jones and Shores, JJ., concur.

Mike Montabano v. The City of Mountain Brook, a municipal corporation

1931542

SUPREME COURT OF ALABAMA

653 So. 2d 947; 1995 Ala. LEXIS 24

January 13, 1995, Released

SUBSEQUENT HISTORY: [**1] Released for Publication April 22, 1995.

PRIOR HISTORY: APPEALED FROM: Jefferson Circuit Court. (CV-94-0399). N. Daniel Rogers, Jr., TRIAL JUDGE.

DISPOSITION: AFFIRMED.

CORE TERMS: plat, map, parcel, original owners, dedication, recorded, tax deed, surveyor, fee simple, probate, tax sale, statutory dedication, dedicated, recording, conveyed, platted, street, summary judgment, public park, government survey, ad valorem, acknowledgment, certificate, surveyed, vacation, marked, convey, divide, quiet, assessor's

COUNSEL: For Appellant: James H. Faulkner, Pelham.

For Appellee: Frank C. Galloway, Jr., and David B. Walston, of Walston, Stabler, Wells, Anderson & Bains, Birmingham.

JUDGES: INGRAM, Maddox, Shores, Steagall, and Cook, JJ., concur.

OPINION BY: INGRAM

OPINION

[*948] INGRAM, JUSTICE.

Mike Montabano appeals from a summary judgment for the City of Mountain Brook in his action to quiet title to a certain parcel of real estate. Montabano claims under a chain of title stemming from a 1982 tax deed to his father (that 1982 tax deed was based on a 1979 tax sale). The City claims fee simple title by means of a statutory dedication that it claims occurred pursuant to Ala. Code 1975, § 35-2-50 and § 35-2-51. It contends that the property was dedicated to the City as a public park on May 11, 1961.

The undisputed facts are as follows: In 1961, Louise Bethune and Peggy McHenry (hereinafter referred to together as "the original owners") owned a tract of land in the City of Mountain Brook; within that tract was the particular parcel at issue here. [1] In February 1961, the original owners hired a registered surveyor to survey the property and prepare a subdivision map platted to the government survey. The surveyor certified the subdivision plat, and the original [**2] owners signed the plat and acknowledged the certification. The certified and acknowledged plat was approved by the City's Planning Commission. On May 11, 1961, the original owners recorded the certified, acknowledged, and approved subdivision plat in the office of the judge of probate of Jefferson County. On the recorded plat, the parcel at issue here is clearly marked "DEDICATED AS A PUBLIC PARK." After recording the subdivision plat, the original owners sold several of the lots in the new subdivision.

1 That land is described as "Unit No. 17-5204, Parcel ID 28-2-3-14--3, Park Westbury Addition to Mountain Brook, 2d Sector."

Despite the recordation of the plat, the Jefferson County tax assessor's office continued to assess the parcel in the original owners' names for ad valorem tax purposes. Because of this oversight, the probate judge held the 1979 tax sale, based on taxes the assessor's records indicated were due from the original owners. In 1982, Montabano's father received and recorded his tax deed to the property; [**3] it purported to convey to him "all right, title and interest" the original owners had held in the property. In 1991, he conveyed his interest to his daughter, and in 1993, his daughter conveyed her interest to her brother, Mike Montabano. In 1994, Montabano filed this quiet title action.

The dispositive issue on appeal is whether the property in question was properly dedicated to the City of Mountain Brook pursuant to § 35-2-50 and § 35-2-51.

The burden of proof regarding the dedication of property to the public lies with the party asserting the dedication, and the dedication must be demonstrated by affirmative evidence. *Johnson v. Morris*, 362 So. 2d 209 (Ala. 1978). The declaration and act of the owner concerning a dedication of land to the public must be unequivocal. *Johnson*, supra. In determining if there has been a proper dedication to the public, the map or [*949] plat is to be construed in its entirety. *Johnson*, supra.

Sections 35-2-50 and -51 provide the statutory mechanism for subdividing property in Alabama. Section 35-2-50 reads:

> "Any person . . . desiring to subdivide his lands into [**4] lots shall cause the same to be surveyed by a competent surveyor, if not already surveyed, and shall cause a plat or map thereof to be made, showing the subdivisions into which it is proposed to divide the same, giving the length and bearings of the boundaries of each lot and its number; and, if it is the purpose of the owner to divide the lands into town lots, such plat or map shall show the streets, alleys and public grounds and give the bearings, length, width and name of each street, as well as the number of each lot and block. Such plat or map must show the relation of the lands so platted or mapped to the government survey."

Section 35-2-51 reads:

> "(a) The plat or map having been completed shall be certified by the surveyor, which certificate must also be signed by the owner . . . and acknowledged by such owner . . . in the same manner in which deeds are required to be acknowledged. The plat or map, together with the certificate of the surveyor and acknowledgment, shall be recorded in the office of the judge of probate in the county in which the lands are situated, in a suitable book to be kept for that purpose. . . .
>
> "(b) The acknowledgment and recording of such [**5] plat or map shall be held to be a conveyance in fee simple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public, and the premises intended for any street, alleyway, common or other public use, as shown in such plat or map, shall be held in trust for the uses and purposes intended or set forth in such plat or map."

The recording of a plat or map in substantial compliance with the requirements of these sections constitutes a valid dedication to the public of all public places designated in the plat or map. *Blair v. Fullmer*, 583 So. 2d 1307 (Ala. 1991); *Gaston v. Ames,* 514 So. 2d 877 (Ala. 1987); *Johnson*, supra. A statutory dedication is deemed to convey title in fee simple to the governing body. § 35-2-51(b); *Johnson*, supra. "After there has been a proper dedication to the public, that dedication is irrevocable and it cannot be altered or withdrawn except by statutory vacation proceedings." *Gaston*, 514 So. 2d at 879.

Here, the City introduced into evidence a [**6] copy of the subdivision plat recorded by the original owners; that copy was certified true and correct by the judge of probate of Jefferson County. In examining the recorded subdivision plat, we find it evident that the original owners substantially complied with the requirements of § 35-2-50 and -51 and thereby perfected a statutory dedication of the parcel to the City. Because there has been no statutory vacation with respect to this parcel or as to the subdivision, the City of Mountain Brook holds title to the parcel in fee simple.

We note that the tax deed through which Montabano claims title conveyed no interest in the parcel to Montabano's father. At the time of the tax sale, no taxes were due on the parcel; it was owned by the City of Mountain Brook, a municipal corporation not subject to ad valorem taxation. *DiChiara v. Jefferson County*, 570 So. 2d 667 (Ala. 1990). Montabano's father obtained no interest in the parcel through the tax deed, because no taxes were owed on the land. Therefore, Montabano obtained no interest in the property.

The summary judgment in favor of the City of Mountain Brook is affirmed.

AFFIRMED.

Maddox, Shores, Steagall, [**7] and Cook, JJ., concur.

In re OPINION OF THE JUSTICES

No. 159

Supreme Court of Alabama

266 Ala. 363; 96 So. 2d 634; 1957 Ala. LEXIS 528

July 31, 1957

CORE TERMS: license tax, registration fee, motor vehicle, levy, governing body, general law, election, levied, license, registration, fee authorized, local law, public hospital, collection, public highways, net proceeds, municipality, excise, qualified voters, indebtedness incurred, prescribed, collecting, municipal, annual, taxes levied, village, act authorizing, constitutional questions, purpose of providing, vehicles owned

OPINION

[***1] [*364] [**635] The House of Representatives

State Capitol

Montgomery, Alabama

Dear Sirs:

We are in receipt of House Resolution 58, adopted July 12, 1957, which is as follows:

"HR -58	Haltom
	Broadfoot

"Whereas, important constitutional questions are presented by House Bill No. 749 (copy of which is hereto attached), now pending in the Legislature of Alabama.

"Now, Therefore, Be It Resolved By The House Of Representatives Of Alabama that the Justices of the Supreme Court of Alabama are hereby respectfully requested to render an opinion, as provided for in Title 13, Section 34 of the Code of Alabama of 1940, on the following important constitutional questions:

"(1) Will the said Bill, if enacted, constitute a levy by the State of fees or taxes for hospital purposes in violation of the provisions of Amendment [*365] XCIII of the Constitution of Alabama, proposed by Acts of 1951, page 1306?

"(2) Will the provisions of said Bill, insofar as they are inconsistent with the provisions of Section 711 of Title 51 of the Alabama Code of 1940, violate Sections 105 and 108 of the Constitution of Alabama?

"(3) Do the provisions of said Bill violate [***2] the provisions of Sections 104 and 105 of the Constitution of Alabama?

"(4) Do the provisions of said Bill regulate fees, commissions or allowances of public officers within the prohibition of Section 96 of the Constitution of Alabama?"

"H.B. #749	By: Broadfoot
	Haltom

"A Bill
To Be Entitled
An Act

"Providing for the submission to the qualified voters of Lauderdale County the question of whether or not an annual license tax and registration fee shall be levied in the amount of $ 5.00 upon every motor vehicle, as defined in Section 692 of Title 51 of the Code of Alabama of 1940, as amended, owned by any individual who is a resident of Lauderdale County and upon every motor vehicle used or operated in said county and owned by any corporation, firm or association which has an office or place of business in said county, and if approved by said voters, authorizing and providing for the levying of said tax by the governing body of Lauderdale County with the concurrence of the governing body of the City of Florence, for a period not exceeding 10 years; providing for the calling, giving of notice, holding, conducting, canvassing and contesting of [***3] elections thereunder and the collection and enforcement of said license tax and registration fee; exempting motor vehicles owned and used by the state and counties and municipalities of the [**636] state, prescribing the time and manner for the payment of the license tax and registration fee; authorizing the governing body of Lauderdale County to adopt and promulgate rules and regulations necessary for the collection and enforcement of the license tax and registration fee; prohibiting any motor vehicle from using the public highways of Lauderdale County until the license tax and registration fee shall have been paid; providing that the net proceeds of said tax and fee shall be used solely for the purpose of providing additions to, improvements in and equipment for the Eliza Coffee Memorial Hospital or the payment of principal of or interest on any obligations or indebtedness incurred for such purpose and for the payment of said net proceeds to a public hospital corporation in the event said Hospital shall be acquired by such hospital corporation, and repealing all laws in conflict therewith.

"Be It Enacted By The Legislature of The State of Alabama:

"Section 1. The governing [***4] body of Lauderdale County is authorized to call an election of the qualified voters of said county to determine whether or not a special county license tax and registration fee shall be levied as hereinafter provided. The election provided for herein shall be called, held, conducted and canvassed and may be contested in the same manner as provided by law for the calling, holding, conducting and canvassing of county bond elections provided, however, the notice of election need be published only once a week in each of two consecutive weeks, the first such publication to be not less than ten days prior to the date of the election. Elections to authorize the levy of said [*366] special county license tax and registration fee may be held as often as ordered by the governing body of Lauderdale County, but if the proposition is submitted to the voters and is defeated, another election shall not be held in one year thereafter.

"Section 2. The governing body of Lauderdale County shall declare the results of the election and, if a majority of the qualified voters participating at an election are found to have voted for the levy of the special license tax and registration fee, and if [***5] the governing body of the City of Florence files with the governing body of Lauderdale County a certified copy of a duly adopted resolution so requesting, the governing body of Lauderdale County may levy, in addition to all other taxes, licenses and fees of every kind now imposed by law, an annual license tax and registration fee in the amount of $ 5.00 upon every motor

vehicle, as defined in Section 692 of Title 51 of the Code of Alabama of 1940, as amended, which is owned by any individual who is a resident of Lauderdale County and upon every such vehicle used or operated in said county and owned by any corporation, firm or association which has an office or place of business in said county. The county license tax and registration fee shall become due on the due date of the state license and registration fee levied under the provisions of Article 8, Chapter 20, Title 51, Code of Alabama, 1940, or any laws amendatory thereof or supplementary thereto, next following the levy of said county license tax and registration fee by the governing body of Lauderdale County, and on the same day in each year thereafter for a period of not to exceed ten years from the first date on which said [***6] tax and fee became due.

"Section 3. The Judge of Probate of Lauderdale County shall collect the annual license tax and registration fee authorized by this Act from the owner of the motor vehicle at the time he collects [**637] the state license and registration fee levied on such motor vehicles under the provisions of Article 8, Chapter 20, Title 51, Code of Alabama, 1940, or any laws amendatory thereof or supplementary thereto, and shall maintain complete records of each transaction on forms to be prescribed and furnished by the governing body of Lauderdale County, but the Judge of Probate shall not be allowed any fee for collecting the county license tax and registration fee. Until the county license tax and registration fee has been paid, the Judge of Probate shall not issue a motor vehicle license tag for use on any motor vehicle upon which a license tax and registration fee is imposed pursuant to this Act.

"Section 4. Motor vehicles owned and used by the state, and counties or municipalities of this state, shall not be liable for the payment of the county license tax and registration fee authorized by this Act.

"Section 5. Statutes providing for the purchase of any [***7] motor vehicle license on a monthly declining or half-year basis shall not apply to the license tax and registration fee authorized by this Act.

"Section 6. The purchaser of any motor vehicle shall have four days from the date of acquisition within which to pay the county license tax and registration fee authorized herein.

"Section 7. The governing body of Lauderdale County shall have the power and authority to adopt and promulgate rules and regulations necessary for the collection and enforcement of the county license tax and registration fee authorized by this Act and to expend so much of the proceeds thereof [*367] as may be necessary to collect and enforce the tax and to provide for the evidence of the payment thereof.

"Section 8. No motor vehicle upon which a county license tax and registration fee is imposed pursuant to this Act shall be operated upon the public highways of Lauderdale County until said tax and fee shall have been paid as herein provided.

"Section 9. The proceeds of the county license tax and registration fee authorized by this Act, less the cost of collecting, administering and providing the evidence of the payment thereof, shall be used solely for [***8] the purpose of providing additions to, improvements in and equipment for the Eliza Coffee Memorial Hospital, a public hospital which is now jointly operated by the City of Florence and Lauderdale County, or for the purpose of paying the principal of or interest on any obligations or indebtedness incurred for such purpose. In the event the Eliza Coffee Memorial Hospital shall be acquired by a public hospital corporation organized under the laws of the State of Alabama heretofore or hereafter enacted, the net proceeds of said county license tax and registration fee shall be paid over to such public hospital corporation for the aforesaid purposes and, within fifteen days after the end of each month, the Judge of Probate of Lauderdale County shall turn over the net proceeds thereof to said public hospital corporation, whose duty it shall be to receipt therefor.

> "Section 10. All laws and parts of laws in conflict with any provision of this Act are hereby repealed.
>
> "Section 11. If any section, clause or provision of this Act shall be, or declared to be, invalid, this shall not affect any other section, clause or provision hereof not in itself invalid.
>
> "Section 12. This Act shall take [***9] effect immediately upon its passage by the Legislature and approval by the Governor or upon its otherwise becoming law."

[**638] We list the answers to your questions in the same order in which asked, viz.:

(1) Our answer to this question is No.

Amendment XCIII to the Constitution of 1901, proclaimed ratified on November 19, 1952, provides as follows:

> "No moneys derived from any fees, excises, or license taxes, *levied by the state*, relating to registration, operation, or use of vehicles upon the public highways except a vehicle-use tax imposed in lieu of a sales tax, and no moneys derived from any fee, excises, or license taxes, *levied by the state*, relating to fuels used for propelling such vehicles except pump taxes, shall be expended for other than cost of administering such laws, statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulation, and the expense of enforcing state traffic and motor vehicle laws. The provisions of this amendment shall not apply to any such fees, excises, [***10] or license taxes now *levied by the state* for school purposes for the whole state or for any county or city board of education therein."
>
> [Emphasis supplied.]

The question is whether the license tax and registration fee provided for in House Bill 749 comes within the restrictions of said constitutional amendment as being "levied by the state." As we read said Bill no levy of a tax is there made. Instead, there is a grant of authority to Lauderdale County to make the levy. In our view, the levy authorized is not a fee nor an excise or license tax *levied by the state* within the meaning of Amendment XCIII. It seems to us that Amendment [*368] XCIII applies only to such fees and taxes as are levied directly by the legislature and not to those levied by counties and municipalities pursuant to authority granted by the state. If construed otherwise the words "levied by the state" would be rendered meaningless. The addition of these words manifests a clear purpose to limit the application of the amendment as herein indicated.

(2) Our answer to this question is No.

Section 105 and 108, Constitution 1901, provide as follows:

> "Sec. 105. No special, private, or [***11] local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."
>
> "Sec. 108. The operation of a general law shall not be suspended for the benefit of any individual, private corporation, or association; nor shall any individual, private corporation or association be exempted from the operation of any general law except as in this article otherwise provided."

Section 711, Tit. 51, Code 1940, is as follows:

> "The registration fee or license tax herein required to be paid on motor vehicles shall be in lieu of all other privilege or license taxes which the state, or any county or municipality thereof might impose, where the motor vehicle is used by the owner. Provided further, that only one of such license tax can be levied and collected on one [***12] and the

> same motor vehicle for one and the same period of time; provided further, that incorporated cities and towns are hereby authorized to collect a reasonable license or privilege [**639] tax on motor vehicles used for carrying passengers or freight for hire."

As to Section 105, the question is whether House Bill 749, a local act, being in conflict with § 711, Tit. 51, a general law, comes within the prohibiting clause of Section 105 that "no * * * local law * * * shall be enacted in any case which is provided for by a general law". What was said in In re Opinion of the Justices, 262 Ala. 345, 350-351, 81 So.2d 277, 283, sufficiently answers this question, viz.:

> "We have said that § 105 does not forbid local legislation on subjects not prohibited by § 104, merely because a general law deals with the same matter. If, in the judgment of the legislature, local needs demand additional or supplemental laws substantially different from the general law, the legislature is not prohibited by § 105 from so enacting. Van Sandt v. Bell, 260 Ala. 556, 71 So.2d 529; Steadman v. Kelly, 250 Ala. 246, 34 So.2d 152, and cases cited; Johnson v. State ex rel. City of Birmingham, [***13] 245 Ala. 499, 17 So.2d 662; Talley v. Webster, 225 Ala. 384, 143 So. 555; Standard Oil Co. v. Limestone County, 220 Ala. 231, 124 So. 523; State ex rel. Brooks v. Gullatt, 210 Ala. 452, 98 So. 373.
>
> "H. 39 levies a tax in addition to that fixed by the general laws of this state. §§ 178 and 179, Title 51, Code 1940. In the case of Standard Oil Co. v. Limestone County, supra, this court upheld a local act authorizing Limestone County to levy a license tax on persons selling gasoline and motor fuel in addition to that provided by general law.
>
> "We are of the opinion that our holding in Standard Oil Co. v. Limestone [*369] County, supra, is controlling of the question here considered. We have not overlooked the provisions of § 188, Title 51, Code 1940, which read: 'No county shall levy a privilege or license tax on any business or occupation on which a privilege or license tax is levied by section 176-180, 182-186 of this title.' If the provisions of § 188, Title 51, were not merely statutory, but were a part of the Constitution of this state, then of course we would have a different question. But we cannot read the provisions of § 188, supra, into § 105 and thereby get a [***14] different result from that reached by this court in Standard Oil Co. v. Limestone County, supra, which holding has been followed many times. * * *"

As to Section 108, the question is whether Lauderdale County is an "individual, private corporation, or association", within the meaning of those terms as therein used. A county is an agency or subdivision of the state, created by law for the more efficient administration of government, and is not within the meaning of the quoted terms of Section 108. Newton v. City of Tuscaloosa, 251 Ala. 209, 216, 36 So.2d 487, and cases there cited. See Ex parte City Council of Montgomery, 64 Ala. 463, 467, where the constitutional provision (Art. 4, § 23, Constitution 1875, the forerunner of § 108, Constitution 1901) inhibited the suspension of a general law "for the benefit of any individual, corporation, or association." It is to be noted that Section 108 uses the term "*private* corporation".

(3) This question is stated so broadly that we will not undertake to answer it categorically, but will limit our answer to the following specific questions:

> A. Do the provisions of the Bill violate the following provisions of Section 104, Constitution [***15] 1901, viz.: "The legislature shall not pass a special, private, or local law in any of the following cases: * * * (15) Regulating either the assessment or collection of taxes * * *; (17) Authorizing any county, city, town, village, district, or other political subdivision of a county, to issue bonds or other securities unless [**640] the issuance of said bonds or other securities shall have been authorized before the enactment of such local or special law, by a vote of the duly qualified electors of such county, township, city, town, village, district, or other political subdivision of a county, at an election held for such purpose, in the manner that may be prescribed by law; provided, the legislature may, without such election, pass

> special laws to refund bonds issued before the date of the ratification of this constitution; (18) Amending, confirming, or extending the charter of any private or municipal corporation, or remitting the forfeiture thereof; provided, this shall not prohibit the legislature from altering or rearranging the boundaries of the city, town, or village; * * *."?
>
> B. Do the provisions of the Bill violate that part of Section 105, Constitution 1901, which [***16] prohibits the enactment of a local law "in any case which is provided for by a general law"?

Our answers to both of these questions are No.

As to question A: In Standard Oil Co. v. Limestone County, 220 Ala. 231, 234-235, 124 So. 523, supra, there was involved a local act authorizing the Court of County Commissioners to "levy" and "collect" a local gasoline tax. It was held that the "levy and collection" of the tax did not violate the restrictions of Subdivision (15). The court drew a distinction between the terms "assessment" and "levy" and held that "assessment", as used in Subdivision (15), related to property taxes rather than privilege taxes.

While it is provided that the proceeds of the tax, if levied by the county, may be used [*370] to pay "the principal or interest on any obligations or indebtedness incurred" for the prescribed hospital purposes, there is no provision authorizing the issuance of bonds or other securities. Accordingly, there is no conflict with Subdivision (17).

The only reference in the Bill to a municipal corporation is the provision in Section 2 requiring, as a condition to the levy of the tax by the governing body of Lauderdale County, that [***17] the governing body of the City of Florence file with the County governing body a resolution requesting the levy of the tax. We do not think this provision operates to "amend, confirm, or extend the charter" of a municipal corporation contrary to Subdivision (18). Houston County v. Covington, 233 Ala. 606, 609, 172 So. 882.

(4) Our answer to this question is No.

Section 96, Constitution 1901, provides as follows:

"The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

The only provision of the Bill which could possibly be said to conflict with Section 96 is that contained in Section 3 to the effect that the Judge of Probate shall collect the tax and that he "shall not be allowed any fee" for collecting it. We see no conflict between such provisions and the provisions of Section 96.

Respectfully submitted,

J. Ed LIVINGSTON

Chief Justice.

THOMAS S. LAWSON

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JAS. S. COLEMAN, Jr.

Associate Justices.

Arnel J. Osborn v. Champion International Corporation and International Paper Company; Champion International Corporation and International Paper Company v. Arnel J. Osborn

1020276 and 1020325

SUPREME COURT OF ALABAMA

892 So. 2d 882; 2004 Ala. LEXIS 53

March 12, 2004, Released

SUBSEQUENT HISTORY: [**1] Released for Publication November 24, 2004.
Rehearing denied by Osborn v. Champion Int'l Corp., 2004 Ala. LEXIS 323 (Ala., May 14, 2004)

PRIOR HISTORY: Appeals from Franklin Circuit Court. (CV-01-014).

DISPOSITION: 1020276 -- AFFIRMED. 1020325 -- DISMISSED AS MOOT.

CORE TERMS: public road, roadway, prescription, case number, public use, unimproved land, permissive, claim of right, prescriptive, dedication, user, wooded, legal conclusion, unimproved, unused, declaratory judgment, moot, permissive use, burden of proving, undisputed, continuous, landowner, reclaimed, highway, tending, tract, water line, cross-appeal, abandonment, easement

COUNSEL: For Appellant/cross-appellee: Daniel G. McDowell and Brian Hamilton of McDowell & Beason, P.C., Russellville.

For Appellees/cross-appellants: Joseph S. Miller of Starnes & Atchison, LLP, Birmingham.

JUDGES: JOHNSTONE, Justice. Houston, Lyons, Harwood, and Woodall, JJ., concur.

OPINION BY: JOHNSTONE

OPINION

[*883] JOHNSTONE, Justice.

In case number 1020276, the plaintiff Arnel J. Osborn appeals a judgment for the defendants Champion International Corporation and International Paper Company (collectively "Champion-International") entered by the trial court after a bench trial. In case number 1020325, Champion-International purports to cross-appeal the denial of its summary-judgment motion. In case number 1020276, we affirm, on a rationale different from that of the trial court, the judgment of the trial court entered after the bench trial. In case number 1020325, we hold that the purported appeal of the denial of the Champion-International summary-judgment motion is moot.

Procedural Facts

After Champion-International insisted that the plaintiff pay Champion-International for an easement before using a road located on land owned by Champion-International as a route for the construction of [**2] a water line and a power line to the plaintiff's adjoining land, the plaintiff sued Champion-International for a declaratory judgment and money damages. The plaintiff claimed that the road on the Champion-International land had become a public road through prescriptive use of the road by the public for more than 20 years. The plaintiff further claimed that, because the road on the Champion-International land was a public road, he was entitled to use it as a route for constructing the water line and power line to his land without paying Champion-International for an easement. [1] Champion-International moved for a summary judgment, which the trial court denied without stating a rationale. Thereafter, the trial court conducted a bench trial and entered judgment for Champion-International on the basis of evidence *ore tenus* at the bench trial.

1 Although the original complaint claimed, in the alternative, that an easement by implication entitled the plaintiff to use the Champion-International road as a route for utilities without paying either Champion or International, an amendment to the complaint struck this alternative claim.

[**3] In pertinent part, the declaratory judgment entered by the trial court states:

"It is the finding of the Court that there is a roadway which connects Buck Haney Road, off Franklin County Road 75, with the Bessie Duboise Road, off Franklin County Road 73. It is further the finding of the Court that the roadway crosses property owned by [Champion-International] as well as property owned by other individuals who do not [*884] object to it being declared a public roadway. The roadway in question was utilized prior to 1969 as access from the residences located in that area to the county seat, Russellville, Alabama. The roadway was used consistently and regularly by the public at that time. However, in 1969 the public highway identified as Highway 243 was opened for public use. Thereafter, the roadway in question had limited use with the majority of it being by individuals owning property and living in the area. Evidence indicates that there has been very little use of the roadway by anyone other than Plaintiff, [Champion-International,] and other adjoining landowners since 1982.

"It is the further finding of the Court that any maintenance done on the roadway since approximately 1969 has [**4] been done by [Champion-International]. No evidence of public maintenance was presented with the exception of some work done on the roadway by the [Works Progress Administration] in the 1940's. It is the finding of the Court that the roadway was used as public access prior to 1969. However, since that time it has been abandoned and lost its public character. The roadway runs over wooded or unimproved land and there is a presumption that any use is permissive. The plaintiff has the burden of proving his use of the roadway is adverse to that of the owner.

"It is undisputed that Plaintiff, Arnel J. Osborn, utilized the roadway for access to his property [and that his use of it] was permissive. The first adverse use was the attempt to run a water line [under] the roadway. It is the finding of the Court that Plaintiff has failed to meet his burden of proof. It is therefore the finding of this Court that the roadway between Buck Haney Road and Bessie Duboise Road is a private roadway and not a public roadway.

"It is ORDERED, ADJUDGED, and DECREED that the gravel and dirt roadway in question, which lies between and adjoins Buck Haney Road and Bessie Duboise Road is *NOT* a public [**5] roadway."

I. *Case Number 1020276*

Issue

On appeal, neither the plaintiff nor Champion-International disputes the fact findings of the trial court in the declaratory judgment. Instead, the plaintiff asserts that, while the trial court correctly reached the legal conclusion that the use of the road by the public before 1969 established the road as a public road by prescription, the trial court erred in reaching the legal conclusion that the cessation of the use of the road by the public after 1969 constituted an abandonment of the prescriptive right of the public to use the road as a public road. On the other hand, while Champion-International asserts that the trial court correctly reached the ultimate legal conclusion that the road is not a public road at the present time, Champion-International also asserts that the trial court erred in reaching the initial legal conclusion that the use of the road by the public before 1969 established the road as a public road through prescription. Thus, the issues presented by the appeal in case number 1020276 are: (1) whether the trial court erred in reaching the legal conclusion that the use of the road by the public before 1969 established [**6] the road as a public road by prescription, and, if the trial court did not err in that conclusion, (2) whether the trial court erred in reaching the legal conclusion that the cessation of use of the road by the public after 1969 constituted an abandonment of the prescriptive right of the public to use the road as a public road.

[*885] *Law*

1. *Standard of Review*

"'"When a trial court sits in judgment on facts that are undisputed, an appellate court will determine whether the trial court misapplied the law to those facts."' *Harris v. McKenzie*, 703 So. 2d 309, 313 (Ala. 1997) (quoting *Craig Constr. Co., Inc. v. Hendrix*, 568 So. 2d 752, 756 (Ala. 1990)). The *ore tenus* 'standard's presumption of correctness has no application to a trial court's conclusions on questions of law.' *Beavers* [v. Walker County], 645 So. 2d [1365,] 1372 [(Ala. 1994)]. 'On appeal, the ruling on a question of law carries no presumption of correctness, and this Court's review is *de novo*.' *Ex parte Graham*, 702 So. 2d 1215, 1221 (Ala. 1997)."

Rogers Foundation Repair, Inc. v. Powell, 748 So. 2d 869, 871 (Ala. 1999). [**7]

2. *Establishment of Public Roads by Prescription and Evidentiary Presumptions Applicable to the*

Determination of Whether a Public Road Has

Been Established by Prescription

In holding that public use of a road for over 60 years had not established it as a public road by prescription, this Court in *Ford v. Alabama By-Products Corp.*, 392 So. 2d 217, 218-19 (Ala. 1980), stated:

"A public road may be established by common law dedication, statutory proceeding, or by prescription. *Powell v. Hopkins*, 288 Ala. 466, 262 So. 2d 289 (1972). An open, defined roadway, through reclaimed land, in continuous use by the public as a highway without let or hindrance for a period of twenty years becomes a public road by prescription. When such circumstances are shown, a presumption of dedication or other appropriation to a public use arises. The burden is then on the landowner to show the user was permissive only, in recognition of his title and right to reclaim the possession. *Ayers v. Stidham*, 260 Ala. 390, 71 So. 2d 95 (1954).

"In *Benson v. Pickens County*, 260 Ala. 436, 70 So. 2d 647 (1954), it was noted that the above [**8] principles were not applicable to wooded or unimproved lands or lands which, though once reclaimed, had been 'turned out' or left open and unused. Instead, where the road runs over unimproved or 'turned out' lands there is no presumption of dedication by mere use; rather there is a presumption of permissive use and the user must establish his use as adverse to that of the owner. This principle is grounded on sound policy. Otherwise, an owner with no present use for the land over which a road runs would be required to suffer the expense of taking affirmative action to prevent travel over his unused land to avoid having a public road established on that land."

In holding that the trial court had erred in applying a presumption that the public use of a road on unimproved land was adverse rather than permissive, this Court in *McInnis v. Lay*, 533 So. 2d 581, 584-85 (Ala. 1988), stated:

"Where a road runs over wooded or 'unimproved' land, or land which, though once reclaimed, has been 'turned out' or left open and unused, there is no presumption of dedication by mere use; rather there is a presumption of permissive use, and the user must establish his use as adverse [**9] to that of the owner. 'This principle is grounded on sound policy. Otherwise, an owner with no present use for the land over which the road runs would be required to suffer the expense of taking affirmative action to prevent travel over his unused land to avoid having a public road established on that land.' *Ford v. Alabama By-Products Corp.*, [392 So. 2d 217,] 219 [(Ala. 1980)]. ... We can see no basis [*886] upon which to conclude that the character of a tract of wooded or 'unimproved' land should be altered by its mere proximity to another tract, or other tracts, of 'improved' land. The interest sought to be protected by the 'unimproved' land presumption is that of the owner of the land over which the road runs.

"'The presumption in such cases is that the user is permissive; and it is a perfectly natural presumption, since the use conflicts with no interest of the owner in the land, does not interfere with any use he presently desires to make of it, nor curtail or limit in any way his enjoyment of it in the state and condition in which he has put it or allowed it to remain, and very frequently ... conserves the ends of good neighborhood.'

"*Trump v. McDonnell*, 120 Ala. [200,] 204, 24 So. [353,] 354 [**10] [(Ala. 1898)]. ... Under the facts of this case, as we understand them, the burden was on the plaintiffs to prove continuous, adverse public use for a period of 20 years. Our review of the record indicates that they did not meet that burden. Plaintiffs introduced evidence at trial tending to show that the roadway in question had existed for well over 20 years and had, in fact, been used over the years by the owners and tenants of [parcels of land that were either contiguous to the road or near the road], as a means of ingress and egress, as well as by members of the general public to reach a recreational area on Sandy Creek. However, we are unable to find any evidence tending to show that this use was adverse for the prescriptive period. As previously stated, where a road runs over wooded or 'unimproved' land, there is no presumption of dedication by mere use. Because the plaintiffs failed to prove an essential element of prescriptive dedication (i.e., adverse public use), that portion of the judgment of the trial court establishing the roadway in question as a public road must be reversed."

(Emphasis omitted.)

In *Kerlin v. Tensaw Land & Timber Co.*, 390 So. 2d 616, 618 (Ala. 1980), [**11] this Court stated that "adverse possession by prescription requires actual, exclusive, open, notorious and hostile possession under a claim of right for a period of twenty years." *Accord*, *Sparks v. Byrd*, 562 So. 2d 211, 214 (Ala. 1990). In *Benson v. Pickens County*, 260 Ala. 436, 438-39, 70 So. 2d 647, 649 (1954), this Court accentuated the importance of the "under-a-claim-of-right" element of adverse possession to overcome the presumption that use of a road on unimproved land is permissive:

"In [the case of roads running over unimproved or 'turned out' land] mere user without tending to show adverse user *under claim of right* does not raise a presumption of dedication. *Locklin v. Tucker*, [208 Ala. 155, 93 So. 896 (1922)]; *Trump v. McDonnell*, 120 Ala. 200, 203, 24 So. 353 [(1898)]; *Rosser v. Bunn*, 66 Ala. 89, 94 [(1880)]. As was said in *Merchant v. Markham*, 170 Ala. 278, 280, 54 So. 236, 237 [(1911)] (principle later held to be limited in application to wooded, unimproved or open, unreclaimed land, *Locklin v. Tucker*, *supra*):

"'The doctrine of [**12] prescription applies to public roads, but when a public road is sought to be declared, by prescription, the burden is on the complainant to show not only the continuous user for 20 years, *but that the road was used as a matter of right*, and not merely by permission of the landowners. ...'"

(Emphasis added.)

Analysis

Since the undisputed evidence established that the road was situated on unimproved woodland owned by Champion-International, the plaintiff bore the [*887] burden of proving that the use of the road by the public was adverse under a claim of right. *McInnis v. Lay*, 533 So. 2d at 583-85; *Ford v. Alabama By-Products Corp.*, 392 So. 2d at 218-19; and *Benson v. Pickens County*, 260 Ala. at 438-39, 70 So. 2d at 649. The status of the Champion-International land as unimproved woodland also imposed a presumption that any use of the road by the public had been permissive rather than adverse. *Id.* Thus, affirmative evidence of adverse use, under a claim of right, by the public was necessary to overcome the presumption of permissive use and to justify a legal conclusion that the use of the road by the public established a [**13] prescriptive right in the public to use the road as a public road.

While the plaintiff presented witnesses who testified that they had used the road without asking permission from anyone, none of the plaintiff's witnesses testified that he or she had used the road under a claim of right before, during, or after 1969. This evidence and lack of evidence, like the plaintiffs' evidence in *McInnis v. Lay*, tended to prove only that the public had used the road. The evidence did not tend to prove that the use was adverse, under a claim of right, rather than permissive. Similarly, while several of the plaintiff's witnesses testified that they assumed the road was a public road because they had observed the public using the road, this evidence tended to prove only that the public had used the road. Thus, the plaintiff failed to meet his burden of proving that the use of the road by the public before 1969 was adverse, under a claim of right.

Accordingly, the trial court erred in concluding that the public use of the road before 1969 established the road as a public road through prescription. Since the road never became a public road through public use in the first place, we do not reach [**14] the merits of the plaintiff's contention that the trial court erred in concluding that the road later became private again through the abandonment of its use by the public.

In summary, while we affirm the judgment of the trial court for Champion-International on the plaintiff's claims for a declaratory judgment and money damages, our affirmance is based on the failure of the plaintiff to prove that the road ever became a public road through prescription. This rationale eliminates the issue whether the public abandoned a prescriptive right to use the road as a public road after 1969.

II. *Case Number 1020325*

In case number 1020325, we hold that the cross-appeal by Champion-International of the denial of its motion for a summary judgment is moot.

Conclusion

In case number 1020276, we affirm the judgment for Champion-International entered by the trial court after the bench trial. The cross-appeal in case number 1020325 is dismissed as moot.

1020276 -- AFFIRMED.

1020325 -- DISMISSED AS MOOT.

Houston, Lyons, Harwood, and Woodall, JJ., concur.

Arthur Lee Perkins et al. v. Shelby County; Shelby County v. Arthur Lee Perkins et al.

2060313

COURT OF CIVIL APPEALS OF ALABAMA

985 So. 2d 952; 2007 Ala. Civ. App. LEXIS 609

September 21, 2007, Released

PRIOR HISTORY: [**1]
Appeals from Shelby Circuit Court. (CV-03-1294). Perkins v. Shelby County, 2007 Ala. Civ. App. LEXIS 484 (Ala. Civ. App., July 20, 2007)

DISPOSITION: OPINION OF JULY 20, 2007, WITHDRAWN; OPINION SUBSTITUTED; APPLICATION FOR REHEARING OVERRULED; REVERSED AND REMANDED.

CORE TERMS: deed, right-of-way, public road, vacation, predecessor, municipality, void, estopped, estoppel, summary judgment, abandonment, abandoned, highway, vacate, river, doctrine of equitable estoppel, equitably estopped, challenging, formalities, landowner, execute, street, ferry, Competitive Bid Law, authority to enter, public character, public policy, reply brief, transferred, municipal

COUNSEL: For Arthur Lee Perkins, Vicki Perkins, Robert Perkins, Gail Perkins, Appellants/cross-appellees: Orrin R. Ford, Birmingham.

For Talladega County Economic Development Authority, Appellant/cross-appellee: Andrew Dean McConatha, Sylacauga.

For Shelby County, Appellee/cross-appellant: Frank C. Ellis, Jr., William R. Justice, Wallace, Ellis, Fowler & Head, Columbiana.

JUDGES: THOMPSON, Presiding Judge. Pittman, Bryan, Thomas, and Moore, JJ., concur.

OPINION BY: THOMPSON

OPINION

[*954] *On Application for Rehearing*

THOMPSON, Presiding Judge.

This court's opinion of July 20, 2007, is withdrawn, and the following is substituted therefor:

This is the second time this case has been before this court. In *Perkins v. Shelby County*, 942 So. 2d 850, 851-52 (Ala. Civ. App. 2006), this court set forth the procedural history and facts of the case as follows:

> "Arthur Lee Perkins, Vicki Perkins, Robert Perkins, Gail Perkins (hereinafter collectively referred to as 'the Perkinses'), and the Talladega County Economic Development Authority ('the TCEDA') filed an action against Shelby County in which they sought a judgment declaring the Perkinses' rights in certain property purportedly transferred to the Perkinses' predecessors in interest by Shelby County. Shelby County answered and counterclaimed.
>
> "Shelby County filed a motion for a summary judgment, and the Perkinses and the TCEDA (hereinafter collectively referred to as 'the plaintiffs') also [**2] moved for a summary judgment. The parties filed a stipulation of facts, and they agreed that 'the [trial court] could consider the Stipulation of Facts and the Motions for a Summary Judgment and rule upon the same.' On November 19, 2004, the trial court entered an order in which it granted Shelby County's motion for a summary judgment and denied the plaintiffs' motion for a summary judgment. The plaintiffs timely appealed. This case was transferred to this court by the supreme court, pursuant to § 12-2-7(6), Ala. Code 1975.
>
> "In 1960, the Perkinses' predecessors in interest, Solly H. Perkins, Jr., and his wife, Pearl Helen Perkins, executed a deed in favor of Shelby County that

conveyed to Shelby County a 40-foot-wide right-of-way across their farm. The right-of-way extended eastward across Solly and Pearl's land from Highway 28 to the west bank of the Coosa River. Shelby County paved the right-of-way and used it as a public road to connect Highway 28 to the west bank of the Coosa River; Shelby County also constructed a docking ramp on the property to accommodate a river ferry boat. Between November 1965 and November 1977, Shelby County and Talladega County jointly owned and operated [**3] a ferry service across the Coosa River.

"When the ferry service discontinued in November 1977, the Perkinses' predecessors in interest requested that Shelby County reconvey to them the county's interest in the right-of-way. On February 26, 1979, Shelby County issued a quit-claim deed returning the right-of-way to the Perkinses' predecessors in interest, subject to the following conditions:

> "'1. The [Perkinses' predecessors in interest] will not place any permanent buildings on said property;
>
> "'2. If at any time in the future, [Shelby] County should require said property for (a) the purpose of again operating a ferry, (b) the construction of a bridge, or (c) in any way need said property for the expansion of the transportation system in Shelby County, the property will be conveyed back to [Shelby County] at no cost.'

"At approximately the same time Shelby County executed the 1979 deed, the Perkinses' predecessors in interest executed another deed in favor of Shelby County, granting Shelby County title to a circular parcel of land on which to construct a traffic 'turn around.' That 'turn around' is located at the western edge of the right-of-way that Shelby [*955] County returned to the Perkinses' [**4] predecessors in interest pursuant to the 1979 deed; in other words, the 'turn around' is located at the point at which Shelby County had, in 1960, begun paving the right-of-way to connect Highway 28 to the Coosa River. After 1979, Shelby County neither used nor maintained the right-of-way; Shelby County has maintained the 'turn around.'

"In 2003, the Perkinses entered into an option contract to sell the right-of-way to the TCEDA. According to the pleadings, the TCEDA intends to construct a bridge across the Coosa River to the 'public roadway [i.e., the right-of-way] across the subject property.'

"The plaintiffs filed the declaratory-judgment action that is the subject of this appeal seeking to have the trial court invalidate the conditions in the 1979 deed between Shelby County and the Perkinses' predecessors in interest; the plaintiffs specifically maintained that the 1979 deed is valid. Shelby County answered and counterclaimed, seeking a judgment declaring the 1979 deed to be void.

"In its motion for a summary judgment, Shelby County argued, among other things, that in issuing the 1979 deed it had failed to comply with the statutory requirements for closing and vacating a public road. [**5] *See* § 23-4-1 through -6, Ala. Code 1975. In the alternative, Shelby County argued that, assuming the 1979 deed is valid, the conditions in the deed are also valid and due to be upheld. In response, the plaintiffs argued that the deed is valid but that the conditions contained in the deed are invalid. The plaintiffs also argued, among other things, that, assuming that the statutory requirements for vacating a public roadway had not been followed, Shelby County had lost its interest in the right-of-way through its abandonment of the right-of-way for more than 20 years. *See Barber v. Anderson*, 527 So. 2d 1296, 1297 (Ala. 1988) ('A public road may be abandoned and thus lose its pub-

> lic character by nonuse by the general public for a period of 20 years.'); *see also Bownes v. Winston County*, 481 So. 2d 362 (Ala. 1985).
>
> "After considering the parties' summary-judgment motions and the stipulation of facts, the trial court entered a judgment on November 10, 2004, in which it found in favor of Shelby County on all of the plaintiffs' claims and in favor of Shelby County on all of Shelby County's claims against the plaintiffs. In that order, the trial court declined to determine the validity of [**6] the 1979 deed. Instead, it concluded that the conditions contained in the 1979 deed are valid, and it detailed its reasons for reaching that conclusion."

This court concluded that the trial court had failed, in its November 10, 2004, judgment, to determine the primary pending issue, specifically, whether the 1979 deed was valid. Accordingly, this court reversed the judgment and remanded the cause to the trial court for a determination of the validity of the 1979 deed. *Perkins v. Shelby County*, supra.

On remand, the trial court, on October 6, 2006, entered a summary judgment in favor of Shelby County. However, in reaching that judgment, the trial court, among other things, determined that the 1979 deed was valid based on its finding that Shelby County was equitably estopped from challenging the validity of the deed. The plaintiffs appealed the October 6, 2006, judgment to our supreme court, and Shelby County cross-appealed. The appeals were transferred to this court by the supreme court, pursuant to § 12-2-7(6), Ala. Code 1975.

[*956] The plaintiffs agree on appeal with the trial court's determination that the 1979 deed is valid because Shelby [**7] County was equitably estopped from challenging its validity, but they raise issues pertaining to the trial court's determination that a condition in the deed was valid and binding upon them. In its cross-appeal, Shelby County argues that the trial court erred in concluding that it is equitably estopped from challenging the validity of the 1979 deed. We conclude that the resolution of the issue whether Shelby County is equitably estopped from challenging the validity of the deed is dispositive.

The doctrine of equitable estoppel is rarely applied against counties or municipalities. *Talladega City Bd. of Educ. v. Yancy*, 682 So. 2d 33 (Ala. 1996); *State Highway Dep't v. Headrick Outdoor Adver., Inc.*, 594 So. 2d 1202 (Ala. 1992); and *Alford v. City of Gadsden*, 349 So. 2d 1132 (Ala. 1977). A municipality or county may be estopped from denying the validity of a contract that it did not properly execute or into which it did not legally enter. *City of Guntersville v. Alred*, 495 So. 2d 566 (Ala. 1986); *Alford v. City of Gadsden*, supra. However, """[t]he doctrine of equitable estoppel is not a bar to the correction ... of a mistake of law.""" *State Highway Dep't v. Headrick Outdoor Adver., Inc.*, 594 So. 2d at 1205 [**8] (quoting *First Nat'l Bank of Montgomery v. United States*, 176 F. Supp. 768, 772 (M.D. Ala. 1959) (quoting in turn *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 182, 77 S. Ct. 707, 1 L. Ed. 2d 746, 1957-1 C.B. 513 (1957))) (emphasis omitted). Our supreme court has explained:

> "Although the doctrine of equitable estoppel is only *infrequently* applied against a municipality or other governmental entity, *Marsh v. Birmingham Board of Education*, 349 So. 2d 34, 36 (Ala. 1977), it *will* 'apply against a municipal corporation when justice and fair play demand it.' *City of Guntersville v. Alred*, 495 So. 2d 566, 568 (Ala. 1986). See *Ex parte Mathers*, 541 So. 2d 1110 (Ala. 1989); *Alford v. City of Gadsden*, 349 So. 2d 1132 (Ala. 1977); *City of Montgomery v. Weldon*, 280 Ala. 463, 195 So. 2d 110 (1967); *Brown v. Tuskegee Light & Power Co.*, 232 Ala. 361, 168 So. 159 (1936); see also *Kohen v. Board of School Commissioners of Mobile County*, 510 So. 2d 216 (Ala. 1987); *Ex parte Four Seasons, Ltd.*, 450 So. 2d 110 (Ala. 1984). In other words, '"[t]he defense of equitable estoppel may be asserted against a municipal corporation when the character of the action and the facts and circumstances are such that justice and equity demand that the corporation [**9] should be estopped." Dillon on Municipal Corporations (4th Ed.) 675.' *Brown*, 232 Ala. at 367, 168 So. at 165. The application of the doctrine to governmental entities is in accord with the principle that ""[t]he state, *in all its contracts and dealings with individuals*, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other."" 232 Ala. at 367, 168 So. at 165 (emphasis added).

> "Indeed, this Court recognizes only two specific instances in which a municipality *cannot* be estopped. The first instance is one in which the municipality 'question[s] the legality of a contract into which *it had no authority to enter*.' *Alford v. City of Gadsden*, 349 So. 2d 1132, 1135 (Ala. 1977) (emphasis added). The second instance is one in which the municipality seeks to avoid doing 'that which it has *no authority to do*.' *Id.* (emphasis added); see also *City of Guntersville v. Alred*, 495 So. 2d 566, 568 (Ala. 1986). The *sine qua non* of the inapplicability of the estoppel doctrine in both instances is the *absence of general* [*957] *authority* in the municipality to do that which would result from the application of the doctrine. Thus, [**10] where it has the authority to enter a particular contract, 'a city *can* be estopped to deny a contract [--even one] into which it *did not legally enter*.' 495 So. 2d at 568 (emphasis added)."

Talladega City Bd. of Educ. v. Yancy, 682 So. 2d at 36-37.

Shelby County asserts that the 1979 deed is void because it did not have the authority to execute the deed. Therefore, Shelby County argues, it may not be estopped from asserting that the deed is invalid. When a municipality or county lacks the legal authority to enter into a particular contract, the municipality or county cannot be estopped from challenging the validity of the contract. *Ex parte Ballew*, 771 So. 2d 1040, 1041 (Ala. 2000); *Maintenance Inc. v. Houston County*, 438 So. 2d 741, 744 (Ala. 1983).

In *Maintenance Inc. v. Houston County*, supra, the parties entered into a contract without complying with the Competitive Bid Law, § 41-16-51, Ala. Code 1975, which specifies that contracts that are not entered into in compliance with that law are void. Maintenance argued that a county representative assured it that the contract would be valid even in the absence of competitive bids, and Maintenance contended that the County should be estopped [**11] from asserting the Competitive Bid Law as a defense. The trial court disagreed, and our supreme court affirmed, holding that "Maintenance cannot, ... by way of estoppel, endow with validity a transaction which is illegal and against public policy." *Maintenance Inc. v. Houston County*, 438 So. 2d at 744. The court went on to state:

> "Where, moreover, the legislature has expressed its public policy of voiding contracts which do not comply with the competitive bid law, we decline to expand the scope of our holding in *Alford v. City of Gadsden*, 349 So. 2d 1132 (Ala. 1977), which upheld an estoppel argument against city officials who merely failed to follow the formalities of contract execution."

Maintenance Inc. v. Houston County, 438 So. 2d at 744.

In *Ex parte Ballew*, supra, the trial court determined that a contract between Ballew and the Town of Priceville was void because it violated the Competitive Bid Law. Our supreme court affirmed, concluding that the contract at issue was void and that estoppel was not applicable to prevent a challenge to the legality of the contract. *Ex parte Ballew*, 771 So. 2d at 1043. In so holding, the court reaffirmed the holding of *Maintenance Inc. v. Houston County*, supra, [**12] noting that in that case the court had "expressly limited the use of the estoppel doctrine against a municipality to a situation where the contract was void as a result of a failure to comply with the formalities of execution, such as the situations in *Alford [v. City of Gadsden,* 349 So. 2d 1132 (Ala. 1977),] and [*City of Guntersville v.*] *Alred*[, 495 So. 2d 566 (Ala. 1986)]." *Ex parte Ballew*, 771 So. 2d at 1042.

In arguing that it cannot be equitably estopped from contesting the validity of the 1979 deed, Shelby County argues that its failure to properly vacate the right-of-way rendered the 1979 deed void and, therefore, that the doctrine of equitable estoppel could not be applied to prevent its challenge of the validity or legality of the deed. *See Ex parte Ballew*, supra; *Maintenance Inc. v. Houston County*, supra. Shelby County maintains that the deed is invalid because it purports to convey a public right-of-way that had not lost its public character to a private party.

[*958] A public road may lose its public character if it is abandoned or if it is vacated pursuant to statute. *See* § 23-4-1 through -6 and § 23-4-20, Ala. Code 1975; *Bownes v. Winston County*, 481 So. 2d 362, 364 (Ala. 1985) [**13] ("Non-use for a period of 20 years will operate as discontinuance of a public road."); *see also Walker v. Winston County Comm'n*, 474 So. 2d 1116, 1117 (Ala. 1985) (discussing the manners in which a public road may be abandoned). The statutes governing the vacation of a public road are in derogation of the common law and must be strictly construed. *Holland v. City of Alabaster*, 624 So. 2d 1376 (Ala. 1993); *Bownes v. Winston County*, 481 So. 2d at 363.

Section 23-4-2, Ala. Code 1975, governs the procedures by which a municipality or county may vacate a public road. Section 23-4-20 governs the procedures by which an owner of land abutting a public road may seek to vacate the road. *See Elmore County Comm'n v. Smith*, 786 So. 2d 449, 455 (Ala. 2000) ("[T]he plain language of the statutes [provides] that in order for an abutting landowner to vacate a road pursuant to § 23-4-20, it is not necessary to comply with the procedures set forth in § 23-4-2.").

In *Holland v. City of Alabaster*, supra, an adjoining landowner sought to vacate a public road, and the City of Pelham passed a resolution assenting to the vacation of the road. Another adjoining landowner objected, as did the City of Alabaster, [**14] a neighboring city. The trial court set aside the vacation of the road. Our supreme court affirmed the trial court's voiding of the City of Pelham's assent to the vacation of the public road. The court stated that "[w]hen a city is vacating a street, a resolution of assent is not sufficient unless it follows all the requirements of the [applicable vacation] statute." *Holland v. City of Alabaster*, 624 So. 2d at 1378. In so holding, the court referenced a similar case as follows:

> "In *McPhillips v. Brodbeck*, 289 Ala. 148, 266 So. 2d 592 (1972), the trial court set aside a street vacation that had been assented to by the county commission. Affirming, this Court stated:
>
> > "'Nor are we here dealing with a vacation of a street initiated by public authority to better serve the public interest where the rule of public necessity must override private convenience, but on the contrary we deal with a statutory provision whereby private interests may under prescribed circumstances deprive others of the use of a portion of an existing street in order to further the personal desire of such private interests. Such a statute should be strictly construed so that it not be an agency for oppression or misuse. [**15] ...'
>
> "289 Ala. at 154, 266 So. 2d at 598."

Holland v. City of Alabaster, 624 So. 2d at 1378.

In *Hammond v. Phillips*, 516 So. 2d 707 (Ala. Civ. App. 1987), a trial court determined that an attempt by owners of land adjoining a public road to have that road vacated pursuant to the predecessor to § 23-4-20 was flawed by the landowners' failure to follow the procedure set forth in the applicable statute. The trial court concluded that the vacation of the public road was a nullity, and this court affirmed. This court stated that, "[b]ased upon our review of the applicable case law, we agree with the trial court's conclusion that the attempted vacation of a portion of [the public road] ... was fatally flawed and, therefore, void." *Hammond v. Phillips*, 516 So. 2d at 709.

In this case, the Perkinses' predecessors in interest asked that the public road be returned to them, and Shelby County, acting upon that request, executed the 1979 deed. No evidence in the record [*959] indicates that the public abandoned its use of the right-of-way. [1] Further, none of the parties contends that either of the applicable vacation statutes was complied with before Shelby County executed the 1979 deed. Our review of the record does [**16] not indicate that Shelby County or the Perkinses' predecessors in interest complied, or attempted to comply, with either of the applicable statutes governing the vacation of a public road.

1 The plaintiffs contend for the first time in their reply brief submitted to this court that the right-of-way was abandoned by the public. In support of that contention, the plaintiffs cite only the fact that Shelby County did not maintain the right-of-way. However, the record is devoid of any other evidence that might support an inference of abandonment. *See Chatham v. Blount County*, 789 So. 2d 235, 238 (Ala. 2001) (discussing the proof required to establish an abandonment of a right-of-way); *Walker v. Winston County Comm'n*, 474 So. 2d at 1117 (same); and *Zadnichek v. Fidler*, 894 So. 2d 702, 708 (Ala. Civ. App. 2004) (same). The party "alleging abandonment by virtue of nonuse ha[s] the burden of showing abandonment by clear and convincing evidence." *Walker v. Winston County Comm'n*, 474 So. 2d at 1117. Further, the plaintiffs did not make this argument to the trial court, and they first raised the issue in their reply brief submitted to this court. *See Ex parte Ryals*, 773 So. 2d 1011, 1013 (Ala. 2000) [**17] (an appellate court may not hold the trial court in

error on an issue or argument the parties did not present to the trial court); *see also Kyser v. Harrison*, 908 So. 2d 914, 917 (Ala. 2005) ("We note 'the well-established principle of appellate review that we will not consider an issue not raised in an appellant's initial brief, but raised only in its reply brief.'" (quoting *Brown v. St. Vincent's Hosp.*, 899 So. 2d 227, 234 (Ala. 2004))). Accordingly, this court may not reach the issue of the possible abandonment of the right-of-way.

Regardless, because the vacation statutes were not followed and the record does not indicate that the right-of-way was abandoned as a public road, the right-of-way remained a public road at the time of the execution of the 1979 deed.

> "'The ancient maxim, "once a highway, always a highway," which has frequently been quoted by the Courts, is subject to the qualification that a highway, once established, continues until it ceases to be such by the action of the general public in no longer traveling upon it, or by action of the public authorities in formally closing it. Accordingly, a highway once in existence is presumed to continue until it ceases to be [**18] such, owing to abandonment or some other lawful cause.'"

Bownes v. Winston County, 481 So. 2d at 363 (quoting 39 Am. Jur. 2d *Highways, Streets and Bridges* § 139, pp. 512-13 (1968)).

A public road such as the right-of-way "cannot lawfully be disposed of" unless it is properly vacated pursuant to the vacation statutes or it is abandoned. *Bownes v. Winston County*, 481 So. 2d at 364. Therefore, at the time it executed the 1979 deed, Shelby County lacked the legal authority to convey or transfer title to the right-of-way to the Perkinses' predecessors in interest. *See Talladega City Bd. of Educ. v. Yancy*, supra; *Bownes v. Winston County*, supra. Accordingly, we must conclude that Shelby County's "absence of general authority" to execute the 1979 deed renders null and void the deed purporting to convey the right-of-way to the Perkinses' predecessors in interest. *Talladega City Bd. of Educ. v. Yancy*, 682 So. 2d at 37; *Holland v. City of Alabaster*, supra; and *Hammond v. Phillips*, supra; *see also Boys Work Inc. v. Gale*, 321 So. 2d 435, 437 (Fla. Dist. Ct. App. 1975) (the county commission "lacked jurisdiction to execute and deliver the deed" conveying a public road when it had failed to comply [**19] with the requirements in the statute governing the vacation of public roads).

[*960] We must further hold that the trial court erred in concluding that Shelby County was estopped from contesting the validity of the 1979 deed. The failure to vacate the right-of-way as a public road renders void any attempt by Shelby County to transfer by deed title to the right-of-way. The failure to properly vacate the right-of-way before the 1979 deed was issued is not in the nature of a mere failure to perform all required elements for the formalities of contract execution, as was the case in *Alford v. City of Gadsden*, supra, and *City of Guntersville v. Alred*, supra. Rather, the 1979 deed was an illegal attempt to transfer public property to private individuals. Estoppel may not operate to "endow with validity a transaction which is illegal and against public policy." *Maintenance Inc. v. Houston County*, 438 So. 2d at 744. "[T]he problem with [the 1979 deed] does not involve the formalities of contract execution, [and, accordingly,] the doctrine of estoppel is not available to [the plaintiffs]." *Ex parte Ballew*, 771 So. 2d at 1043.

We hold that the trial court erred in attempting to apply the doctrine of equitable [**20] estoppel to imply the vacation of the right-of-way as a public road in order to validate the 1979 deed, and we reverse the trial court's judgment. Based on this holding, the issues raised in the plaintiffs' appeal are moot.

OPINION OF JULY 20, 2007, WITHDRAWN; OPINION SUBSTITUTED; APPLICATION FOR REHEARING OVERRULED; REVERSED AND REMANDED.

Pittman, Bryan, Thomas, and Moore, JJ., concur.

Michael Perry, a minor, by and through his mother and next friend, Brenda Perry; and Brenda Perry, individually v. Mobile County, et al.

No. 87-77

Supreme Court of Alabama

533 So. 2d 602; 1988 Ala. LEXIS 543

September 23, 1988, Filed

SUBSEQUENT HISTORY: [**1] As Amended.

PRIOR HISTORY: Appeal from Mobile Circuit Court. Original Opinion of June 10, 1988, Withdrawn & Substituted.

CORE TERMS: intersection, summary judgment, signal, traffic, highway, recommendation, installation, manual, admissible, roadway, traffic signal, traffic engineers, division engineer, inadmissible, warn, accident reports, misinterpretation, negligently, following language, dangerous condition, safe condition, issue of material fact, personal knowledge, constructed, speculative, furtherance, undisputed, conclusory, discovery, genuine

JUDGES: Shores, Justice. Torbert, C. J., and Jones, Adams, Houston, and Steagall, JJ., concur. Maddox, J., concurs in the result.

OPINION BY: SHORES

OPINION

[*603] On rehearing ex mero motu

On rehearing ex mero motu, the original opinion in this case is withdrawn and the following is substituted therefor:

This is an appeal from a summary judgment entered in favor of the defendants, Mobile County, the Mobile County Commission, and M. L. Risher, and made final pursuant to Rule 54(b), Ala. R. Civ. P. We affirm.

Michael Perry was injured in an automobile accident that occurred in the intersection of Hamilton Boulevard and Rangeline Road in Mobile County. The complaint alleged that Mobile County and the Mobile County Commission (hereinafter, both Mobile County and the Mobile County Commission will be referred to as "Mobile County") had negligently or wantonly designed, constructed, and maintained the intersection and had negligently continued to use at that intersection a flashing signal light that showed amber on one side and red on the other side. The plaintiffs alleged that, instead of this light, Mobile County should have used at this intersection a regular [**2] traffic signal with red, amber, and green lights on each side. The complaint was amended to allege negligent and wanton failure to warn of a dangerous roadway condition.

Mobile County's motion for summary judgment was granted by the trial court, but that judgment was reversed by this Court on a prior appeal because Mobile County had not complied with some of the plaintiffs' discovery requests. *Perry v. Mobile County*, 497 So.2d 829 (Ala. 1986). On remand, after discovery had been completed, the trial court granted Mobile County's second motion for summary judgment.

[*604] The evidence in the record conclusively establishes that the intersection of Hamilton Boulevard and Rangeline Road is under the exclusive control of the State of Alabama. The State owns all of the right-of-way surrounding the intersection, and the intersection was entirely designed, constructed, and maintained by the State. Yet, the appellants, relying on *Jefferson County v. Sulzby*, 468 So.2d 112, 114 (Ala. 1985), insist that Mobile County had a duty to warn of a dangerous condition of a roadway and a duty to keep the roadways under its control in [**3] a safe condition. The holding of *Sulzby* is not applicable to the facts in the instant case. It is undisputed that the intersection involved in this case, unlike that involved in *Sulzby*, was not under the control of the county. Consequently, Mobile County owed no duty to maintain the intersection in a safe condition, or to warn of the intersection's allegedly dangerous condition. Therefore, summary judgment was properly entered in favor of Mobile County.

The complaint was amended to add M. L. Risher as a defendant. Risher was employed by the State of Alabama Highway Department as a division engineer at the time of the accident, and the amended complaint alleged that Risher was negligent or wanton in designing and/or maintaining the intersection. It further alleged that

Risher had negligently or wantonly failed to alter, modify, or change the intersection prior to the accident.

The evidence in the record is uncontroverted that Risher had no involvement with the design of the intersection; therefore, the only issue is whether Risher may be held liable for the alleged failure to alter, modify, or change the intersection prior to the accident.

After a party moving for summary judgment [**4] has made a prima facie showing that there is no genuine issue of material fact, the burden moves to the non-moving party to show by *admissible* evidence the existence of a genuine issue of material fact. Ala.R.Civ.P. 56(e); *Horner v. First National Bank of Mobile*, 473 So.2d 1025 (Ala. 1985). If an affidavit is filed in opposition to a motion for summary judgment, the court should not consider it unless it is based on personal knowledge, *Welch v. Houston County Hospital Board*, 502 So.2d 340 (Ala. 1987). The affidavit may not consist of bare conclusory statements, but must be based on facts, *Nowell v. Mobile County Health Dept.*, 501 So.2d 468 (Ala.Civ.App. 1986). An additional requirement is that the affidavit contain information that allows more than speculative or conjectural inferences, *Thompson v. Lee*, 439 So.2d 113 (Ala. 1983). Where documents have been submitted, as exhibits to affidavits or otherwise, they must be admissible in evidence either as sworn or certified copies, Ala.R.Civ.P. 56(e).

In opposition to Risher's motion for summary judgment, the [**5] plaintiffs filed a motion and an affidavit that contains speculative and conclusory statements. The affidavit is not based on the personal knowledge of the affiant. It is accompanied by various documents, including computer printouts of accident reports, individual accident reports, and letters. None of these documents was certified or otherwise authenticated so as to be made admissible into evidence; therefore, they constitute inadmissible hearsay. Additionally, the affidavit referred to an accident report that is not in the record and also referred to the depositions of Michael Perry, Robert Williams, and Christopher Perry, but those depositions are not contained in the record. Under these facts, it would have been appropriate for the trial court to disregard the affidavit. However, we cannot be sure that it did, since no ruling on the matter was invoked.

The issue of admissibility of the evidence in opposition to the motion for summary judgment was raised by Risher for the first time on appeal. In response to his contention on this issue, we adopt the following language from C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2738 (1983):

> "A party must [**6] move to strike an affidavit that violates Rule 56(e); if he fails to do so, he will waive his objection and, in the absence of a 'gross miscarriage of [*605] justice,' the court may consider the defective affidavit. This principle applies to affidavits containing evidence that would not be admissible at trial as well as to affidavits that are defective in form. The motion to strike must be timely, [and] the decision on that question is left to the discretion of the trial judge. It is clear that a motion to strike presented for the first time on appeal comes too late.
>
> "The court will disregard only the inadmissible portion of the challenged affidavit and consider the rest of it. . . . [A] motion to strike should specify the objectionable portions of the affidavit and the grounds for each objection. A motion asserting only a general challenge to an affidavit will be ineffective."

The foregoing is applicable equally to those affidavits in support of a motion for summary judgment and to those in opposition to such a motion.

Since Risher did not call to the trial court's attention the fact that the affidavit was inadmissible, he waived that objection, but, after considering it, we conclude [**7] that the trial court did not err in granting summary judgment for Risher. Even considering the plaintiff's affidavit, the evidence remains undisputed that Risher acted within the scope of his authority as a division engineer of the State Highway Department when he made his determination not to install a different signal at the intersection of Hamilton Boulevard and Rangeline Road in Mobile County prior to the accident. Consequently, Risher was the "mere conduit" through which the State maintained control of the intersection. Further, in determining whether to install a different signal at this intersection, Risher was exercising his judgment or discretion. Therefore, Risher is entitled to substantive and procedural immunity for his acts performed in the furtherance of his duties with the State of Alabama Highway Department. *Carter v. Board of Trustees of University of Alabama in Birmingham*, 431 So.2d 529, 531 (Ala. 1983); *Deal v. Tannehill Furnace & Foundry Commission*, 443 So.2d 1213 (Ala. 1983); *Hickman v. Dothan City Board of Education*, 421 So.2d 1257 (Ala. 1982); *Bell v. Chisom*, 421 So.2d 1239 (Ala. 1982); [**8] *DeStafney v. University of Alabama*, 413 So.2d 391, 393-94 (Ala. 1982); *Gill v. Sewell*, 356 So.2d 1196, 1198 (Ala. 1978); *Cairl v. State*, 323 N.W.2d 20, 23 (Minn. 1982).

The appellants insist that Risher is subject to tort liability because, they say, he acted in bad faith or under a mistaken interpretation of law in not recommending that a different signal be installed at the intersection. The record is devoid of any evidence that Risher acted in bad faith; therefore, the only question is whether there is evidence to support the allegation that Risher acted under a misinterpretation of law.

The necessary criteria or "warrants" for the placement of a traffic signal at a given intersection are set forth in the Alabama manual on uniform traffic control devices. This manual, published by the State of Alabama Highway Department, is the guideline for traffic engineers to follow when making a recommendation on the installation of a traffic signal. The installation of all electrically operated highway traffic signals on the State highway system must be approved by the State of Alabama Highway Department. [**9] The manual contains the following language regarding all traffic engineers' considerations as a basis for the installation of a traffic signal:

> "Based upon many years of traffic engineering experience, and analyses of traffic operations and other factors at signalized and unsignalized intersections, a series of warrants have been developed that define the minimum conditions under which traffic control signals should be installed. These warrants, combined with the judgment of experienced traffic engineers, shall be utilized to determine the justification for the installation of traffic control signals. It is necessary that the judgment of the experienced traffic engineer be based upon a thorough engineering study of the roadway and traffic conditions."

Risher testified that he could not make a recommendation for a regular three-color [*606] signal at the intersection because the traffic volume did not warrant it. The plaintiffs submit that Risher was acting under a misinterpretation of law because, they say, he followed the literal language of the manual and did not make a recommendation based on other factors.

Risher testified that he knew that he was authorized to make a recommendation [**10] for the installation of signals at the intersection, but that he felt that such a recommendation would be rejected because it was not justified by the "warrants." Clearly, Risher was aware that his authority was not limited to the literal wording of the manual, but that he was free to exercise his judgment based on his experience as an engineer when he made recommendations. The evidence is uncontroverted that Risher was not acting under a misinterpretation of law, but was performing a discretionary function, the result of which is not to the satisfaction of the plaintiffs. Therefore, Risher is entitled to the exception from tort liability, because he was exercising his judgment or discretion in the furtherance of his duties as a division engineer for the State of Alabama; the summary judgment was, thus, also proper as to Risher.

Based on the foregoing, the judgment is due to be, and it hereby is, affirmed.

ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Torbert, C. J., and Jones, Adams, Houston, and Steagall, JJ., concur.

Maddox, J., concurs in the result.

CONCUR BY: MADDOX

CONCUR

MADDOX, JUSTICE (Concurring in the result).

I concur in the result, but I believe the rule of law in this state is stated in the following cases: *Hall v. Harris*, 504 So.2d 271, 273 (Ala. 1987); [**11] *Welch v. Houston County Hospital Board*, 502 So.2d 340, 342-44 (Ala. 1987); *Autrey v. Blue Cross & Blue Shield of Alabama*, 481 So.2d 345, 347 (Ala. 1985); *MJM, Inc. v. Casualty Indemnity Exchange*, 481 So.2d 1136, 1140-41 (Ala. 1985); *Turner v. Systems Fuel, Inc.*, 475 So.2d 539, 541-42 (Ala. 1985); *Day v. Merchants National Bank of Mobile*, 431 So.2d 1254, 1256-57 (Ala. 1983); *Butler v. Michigan Mutual Insurance Co.*, 402 So.2d 949, 952 (Ala. 1981); *Arrington v. Working Woman's Home*, 368 So.2d 851, 854 (Ala. 1979); *Oliver v. Brock*, 342 So.2d 1, 4 (Ala. 1977).

George Robert Perry v. State

No. 7 Div. 15

Court of Criminal Appeals of Alabama

441 So. 2d 127; 1983 Ala. Crim. App. LEXIS 4499

May 3, 1983

SUBSEQUENT HISTORY: [**1] Rehearing Denied July 5, 1983. Certiorari Denied November 23, 1983.

PRIOR HISTORY: Appeal From Shelby Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: axle, pounds, dump truck, interstate highway, gross weight, consecutive, tolerance, highway, width, interstate system, maximum, feet, distance, interstate, formula, tandem, load, federal law, Federal-Aid Highway Amendments, public highways, date of enactment, motor vehicles, apportionment, prescribed, lawfully, exempt, federal funds, losing, wheels

COUNSEL: Eason Mitchell for Mitchell, Green, Pino & Medaris, Calera, for Appellant.

Charles A. Graddick, Attorney General, and William D. Little, Asst. Atty. Gen., for Appellee.

JUDGES: Joseph J. Mullins, Retired Circuit Judge. All the Judges concur.

OPINION BY: MULLINS

OPINION

[*128] The appellant was convicted in the Circuit Court of Shelby County of the offense of operating an overweight dump truck on Interstate Highway I-65 in Shelby County, Alabama, and was fined $400.00 and costs. He appeals to this Court.

The appellant was at all proceedings in the trial court, and in this Court is represented by counsel of his choice. This case was submitted to this Court on briefs.

The facts in this case were stipulated by counsel for state, and the appellant, and submitted to the trial judge by agreement. The facts are that a proper complaint has been filed and served on the defendant. That the defendant and the state waive notice of the setting of the case, and are ready for trial. That the trial court has jurisdiction and venue of the case. That the defendant [**2] operated a dump truck on Interstate Highway I-65 in Shelby County. That the scales used to weigh the dump truck were properly certified and accurate. That the weight of the dump truck was 79,000 pounds. That the dump truck had 5 axles, and the distance between the first and last axle or combination of axles was 37 feet. That the arrest was made in accordance with the laws of the state of Alabama.

The appellant's first contention in his brief is that the "dump truck exclusion" as set forth in Code of Alabama, 1975, Sec. 32-9-20(4)(e) applies to the Interstate Highway System of Alabama. Appellant's second contention is that the 10% scale tolerance for enforcement purposes as set out in Code Of Alabama, 1975, Sec. 32-9-20(4)(d) applies to the Interstate Highway System in Alabama.

The United States Code, Title 23, Section 127 is in words and figures, as follows:

> "Sec. 127. Vehicle weight and width limitations -- Interstate System
>
> "No funds authorized to be appropriated for any fiscal year under section 108(b) of the Federal-Aid Highway Act of 1956 (23 USCS Sec. 101 note) shall be apportioned to any State within the boundaries of which the Interstate System may lawfully [**3] be used by vehicles with weight in excess of twenty thousand pounds carried on any one axle, including all enforcement tolerances; or with a tandem axle weight in excess of thirty-four thousand pounds, *including all enforcement tolerances*; or with an overall gross weight on a group of two or more consecutive axles produced by application of the following formula:
>
> $$W = 500\ LN / N-1 + 12N + 36$$

where W = overall gross weight on any group of two or more consecutive axles to the nearest 500 pounds, L = distance in feet between the extreme of any group of two or more consecutive axles, and N = number of axles in group under consideration, except that two consecutive sets of tandem axles may carry a gross load of [*129] 34,000 pounds each providing the overall distance between the first and last axles of *such consecutive sets of tandem axles is thirty-six feet or more; Provided, That such overall gross weight may not exceed eighty thousand pounds, including all enforcement tolerances*, or with a width in excess of ninety-six inches, or the corresponding maximum weights or maximum widths permitted for vehicles using the public highways of such State under laws or regulations [**4] established by appropriate State authority in effect on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles, on the date of enactment of the Federal-Aid Highway Amendments of 1974 (enacted Jan. 4, 1975), whichever is the greater. Any amount which is withheld from apportionment to any State pursuant to the foregoing provisions shall lapse. This section shall not be construed to deny apportionment to any State allowing the operation within such State of any vehicles or combinations thereof that could be lawfully operated within such State on July 1, 1956. With respect to the State of Hawaii, laws or regulations in effect on February 1, 1960, shall be applicable for the purposes of this section in lieu of those in effect on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles, on the date of enactment of the Federal-Aid Highway Amendments of 1974 (enacted Jan. 4, 1975). Notwithstanding any limitation relating to vehicle widths contained in this section, a State may permit any bus having a width of 102 inches or less to operate on any lane of 12 feet or more in width on the [**5] Interstate System.

(As amended Jan. 4, 1975, P.L. 93-643, Sec. 106, 88 Stat. 2283; May 5, 1976, P.L. 94-280, Title 1, Sec. 120, 90 Stat. 438.)"

Code Of Alabama, 1975, 1982 Cumulative Supplement, Title 32-9-20(4)(a) provides, in part, as follows:

> "(4) Weight.
>
> "(a.) The gross weight imposed on the highway by the wheels of any one axle of a vehicle shall not exceed 20,000 pounds, *or such other weight, if any, as may be permitted by federal law to keep the state from losing federal funds*; provided, that inadequate bridges shall be posted to define load limits." (Emphasis Supplied)

Title 32-9-20(4)(c) provides, in part:

> "(4) Weight.
>
> "(c.) * * * *Nothing in this section shall be construed as permitting size or weight limits on the national system of interstate and defense highways in this state in excess of those permitted under 23 U.S.C., Section 127.* If the federal government prescribes or adopts vehicle size or weight limits greater than or less than those now prescribed by 23 U.S.C., Section 127 for the national system of interstate and defense highways, the increased or decreased limit shall become effective on the national system [**6] of interstate and defense highways in this state."

Section 32-9-29, 1975 Code of Alabama, 1982 Pocket Parts, provides for permits for movement of oversize vehicles or loads. Section (e) contains the following provision:

> "(e.) *Violation of federal laws*, etc. No permit shall be issued under this section if the issuance of the permit would violate United States law or would cause the State of Alabama to lose its Federal-Aid funds."

Code of Alabama, 1975, Pocket Parts 1982, Title 32-9-20 (4)(d) provides, as follows:

> "(d.) For the purpose of enforcement of subdivision (4) of this section, all scaled weights shall be deemed to have a margin of error of ten percent of the true gross or axle weight."

Code of Alabama, 1958, Cumulative Pocket Parts, Title 36, Section 89(d) provided.

> "(d.) Weight (1) the gross weight imposed on the highway by the wheels of any one axle of a vehicle shall not exceed 18,000 pounds, *or such other weight, if any, as may be permitted by federal law to keep the state from losing federal funds*, and subsection (3) *provided that* [*130] *the maximum gross weight limit of any vehicle or combination* [**7] *of vehicles, including any tolerance which may be granted hereunder, shall not exceed the maximum gross weights prescribed by the Congress of the United States under the provisions of subsection 127, Section 1, Chapter 1, Title 23, United States Code or any other federal legislation amendatory thereof, or supplemental thereto, and no vehicle or combination of vehicles shall be permitted to operate on any portion of the interstate highway system of Alabama except as shall meet the above provisions of United States Code.*"

Title 36, Section 95 (*l*) of Code Of Alabama, 1958, Cumulative Pocket Parts 1973, provided for special permits for the movement of certain vehicles over the public highways, "*excepting highways that are a segment of the interstate system.*"

From a review of the history of the legislation, and a review of 1975 Code Of Alabama, Title 32-9-20 through 32-9-32, as last amended, and Title 23 USCS, Section 127, as last amended, it is clear that the legislators of Alabama intended that the size and weight of motor vehicles operating on interstate highways in the State of Alabama shall not exceed the provisions set out in Title 23 USCS, Section 127. Title [**8] 23 U.S.C.S. § 127 provides the operator of a motor vehicle a formula to figure the weight allowed on an interstate system, and states the kind of vehicles a state may exempt from the provisions of Title 23 U.S.C.S, Section 127, and allow to operate on an interstate highway. A five-axle dump truck weighing 79,000 pounds is not included as a vehicle exempt from the provisions of USCS, Section 127. It is noted that the formula for figuring the weight includes all enforcement tolerances; therefore, to add 10% allowed by Code Of Alabama, 1975, Section 32-9-20(4)(d), would violate the weight set out in Title 23 USCS, Section 127, and result in doing the very thing sought to be prevented by the Legislature of the State of Alabama.

We hold that 71,000 pounds is the maximum weight allowed on an interstate highway in the State of Alabama for a five-axle (5) dump truck with a distance of 37 feet between the first and last axle; therefore, the trial judge did not err when he ruled that the dump truck exclusion, as set out in the Code Of Alabama, 1975, Section 32-9-20(4)(e), and the ten percent (10%) weight tolerance as set out in the Code Of Alabama, 1975, Section 32-9-20(4)(d), does not apply [**9] to the interstate highway system.

The judgment of the trial court is due to be, and is hereby affirmed.

The foregoing opinion was prepared by Honorable Joseph J. Mullins, a retired Circuit Judge, serving as a Judge of this Court; his opinion is hereby adopted as that of the Court.

The judgment below is hereby affirmed.

AFFIRMED.

All the Judges concur.

Ladochie Pritchett v. Mobile County; Addie L. Edwards v. Mobile County

2050668 and 2050785

COURT OF CIVIL APPEALS OF ALABAMA

958 So. 2d 349; 2006 Ala. Civ. App. LEXIS 680

November 17, 2006, Released

SUBSEQUENT HISTORY: [**1] Released for Publication April 10, 2007.

PRIOR HISTORY: Appeals from Mobile Circuit Court. (CV-02-2044.51 and CV-01-2550.51).

DISPOSITION: 2050668 - AFFIRMED. 2050785 - APPEAL DISMISSED.

CORE TERMS: plat, right-of-way, case number, dedicated, recorded, street, dedication, feet, alley, public road, roadway, map, undisputed, convey, vacation, summary judgment, notice of appeal, consolidate, widening, vacated, paved, deed, postjudgment, irrevocable, width, evidence indicating, strip of land, failure to use, conveyance, strip

COUNSEL: For Appellants: John W. Parker, Mobile, for appellants Ladochie Pritchett and Addie L. Edwards.

For Appellee: Andrew J. Rutens and Lawrence M. Wettermark of Galloway, Smith, Wettermark & Everest, LLP, Mobile.

JUDGES: THOMPSON, Judge. Crawley, P.J., and Pittman and Bryan, JJ., concur. Murdock, J., concurs in the result, without writing.

OPINION BY: THOMPSON

OPINION

[*350] THOMPSON, Judge.

On July 25, 2001, Addie L. Edwards sued Mobile County and Bank of America; that action was designated as case number 2050668 and 2050785 CV-01-2550.51. In her complaint, Edwards alleged that she had been damaged by Mobile County's construction or extension of a roadway known as "Fernland Road" over property she owned and that Bank of America had breached a warranty of title it had provided her regarding that property. The trial court ultimately dismissed Bank of America as a party to Edwards's action.

On June 18, 2002, Ladochie Pritchett filed a complaint against Mobile County alleging that Mobile County had extended Fernland Road in a manner that encroached upon her property and seeking damages for the damage to her property. Pritchett's action, which was filed in the same circuit court [**2] as was Edwards's complaint but which was assigned to a different trial judge, was designated as case number CV-02-2044.51.

On June 9, 2004, Edwards filed in case number CV-01-2550.51 a motion to consolidate that action with Pritchett's action, case number CV-02-2044.51. The record in case number CV-01-2550.51 does not indicate that the trial court in that case ruled on that motion. On November 22, 2004, [*351] the trial court in case number CV-01-2550.51 entered a summary judgment in favor of Mobile County, the sole remaining defendant, on Edwards's claims. Edwards filed a timely postjudgment motion, and the trial court denied that motion on January 28, 2005. On April 27, 2006, Edwards filed a notice of appeal. Our supreme court transferred Edwards's appeal in case number CV-01-2550.51 to this court, pursuant to § 12-2-7(6), Ala. Code 1975. This court assigned Edwards's appeal the case number 2050785.

In Pritchett's action, case number CV-02-2044.51, Mobile County moved for a summary judgment, and Pritchett opposed that motion. On February 16, 2006, the trial court granted Mobile County's motion for a summary judgment in case number CV-02-2044.51 and entered a [**3] detailed judgment in favor of Mobile County on Pritchett's claims. Pritchett filed a postjudgment motion, which the trial court denied on March 16, 2006. Pritchett timely appealed on April 27, 2006. Pritchett's appeal in case number CV-02-2044.51 was transferred to this court by the supreme court, pursuant to § 12-2-7(6), Ala. Code 1975. This court assigned the case number 2050668 to Pritchett's appeal and consolidated it with Edwards's appeal.

Initially, we note that jurisdictional matters are of such significance that an appellate court may take notice of them *ex mero motu*. *Wallace v. Tee Jays Mfg. Co.*, 689 So. 2d 210, 211 (Ala. Civ. App. 1997); *Nunn v.*

Baker, 518 So. 2d 711, 712 (Ala. 1987). "The timely filing of [a] notice of appeal is a jurisdictional act." *Rudd v. Rudd*, 467 So. 2d 964, 965 (Ala. Civ. App. 1985); *see also Parker v. Parker*, 946 So. 2d 480, , 2006 Ala. Civ. App. LEXIS 354, *10-11 (Ala. Civ. App. 2006) ("an untimely filed notice of appeal results in a lack of appellate jurisdiction, which cannot be waived").

Neither Mobile County nor Edwards [**4] has favored this court with a statement of jurisdiction addressing the timeliness of Edwards's appeal in case number CV-01-2550.51. In the "statement of the case" portion of her brief on appeal, Edwards refers to Pritchett's action in case number CV-02-2044.51 as a "companion case." Edwards asserts that because the two actions raised many of the same issues, the appeal in case number CV-01-2550.51 was "held open," presumably until the trial court in case number CV-02-2044.51 ruled on Mobile County's summary-judgment motion and Pritchett's postjudgment motion. Edwards cites no authority supporting the proposition that the time for filing a notice of appeal might be tolled by a trial court's consideration of another action involving similar issues; there is no such authority. We reiterate that the trial court did not rule on Edwards's motion to consolidate the two actions, [1] and nothing in the record in case number CV-02-2044.51 indicates that a similar motion to consolidate was filed or ruled upon in that action.

1 A handwritten notation in the case-action summary near the entry documenting the filing of the motion to consolidate the two actions reads "August 13, 2004--withdrawn." However, this court is unable to discern whether that handwritten notation was made in reference to the motion to consolidate or to a nearby entry documenting Mobile County's filing of an opposition to the motion to consolidate the two actions.

[**5] The trial court entered its judgment in Edwards's action (case number CV-01-2550.51) on November 22, 2004, and it denied Edwards's postjudgment motion on January 28, 2005. Edwards had 42 days from January 28, 2005, in which to file her notice of appeal. Rule 4(a)(1), Ala. R. App. P. However, Edwards filed her notice of appeal from the judgment and the postjudgment order in case number CV-01-2550.51 [*352] on April 27, 2006, more than a year after the entry of those orders. Therefore, Edwards's appeal in case number CV-01-2550.51 is untimely and is due to be dismissed. *See* Rule 2(a)(1), Ala. R. App. P. ("An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court.").

We reach the merits of Pritchett's timely appeal. In that appeal, Pritchett contends that the trial court erred in entering a summary judgment in favor of Mobile County.

A motion for a summary judgment is properly granted when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Rule 56, Ala. R. Civ. P.; *Bussey v. John Deere Co.*, 531 So. 2d 860 (Ala. 1988). "When the movant makes a prima [**6] facie showing that those two conditions are satisfied, the burden shifts to the nonmovant to present 'substantial evidence' creating a genuine issue of material fact." *Ex parte Alfa Mut. Gen. Ins. Co.*, 742 So. 2d 182, 184 (Ala. 1999) (citing *Bass v. SouthTrust Bank of Baldwin County*, 538 So. 2d 794, 797-98 (Ala. 1989)). "Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989). In reviewing a summary judgment, this court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts concerning the existence of a genuine issue of material fact against the movant. *Hanners v. Balfour Guthrie, Inc.*, 564 So. 2d 412 (Ala. 1990).

In 1910, Mobile County obtained what the parties and the trial court frequently referred to as a public right-of-way for the construction of a road over an area extending 30 feet west of the section line ("the section line") dividing Section [**7] 5 and Section 4, Township 7 South, Range 3 West in Mobile County. A public roadway, now known as "Fernland Road," has existed on or near that 30-foot-wide strip of land for some period of time; the roadway began as a dirt road and was later paved. [2]

2 The parties and the trial court refer to the 30-foot-wide strip of property interchangeably as a "right-of-way" and as a "public road." In its judgment, the trial court found that the 30-foot-wide strip of land was dedicated as a public road in 1910. As discussed later in this opinion, the dedication of that property is deemed to have constituted a conveyance of that property in fee simple. *Gaston v. Ames*, 514 So. 2d 877, 879 (Ala. 1987). For the purposes of this opinion, we consider that 30-foot-wide strip of property as a public right-of-way dedicated for the purpose of creating a public roadway. Accordingly, we refer to the 30-foot-wide strip of land as a "right-of-way" and to the public road constructed thereon as a "public roadway" or "Fernland Road."

[**8] In 2001, Mobile County widened and resurfaced Fernland Road. It appears that before the roadway-improvement project, Fernland Road did not occupy the entire 30-foot-wide right-of-way west of the section line claimed by Mobile County. John E. Murphy, Jr., the Assistant County Engineer for Mobile County, testified that "at the time of the most recent [(2001)] widening and resurfacing of Fernland Road, the then-existing paved portion of the road straddled the section line."

Donald W. Rowe, the president of Rowe Surveying and Engineering Company, testified in an affidavit on behalf of Mobile County. According to Rowe, approximately 15 feet of the total width of the roadway (including the paved portion, shoulders, and ditches) was located west of the section line before the 2001 improvement project. Mobile County used the entire 30-foot-wide right-of-way located west of the [*353] section line in constructing the 2001 improvements to Fernland Road.

In 1989, a subdivision known as "Fernland Acres" was platted and recorded in the Probate Court of Mobile County. In 1992, Pritchett purchased lot number 8 and lot number 11 in the Fernland Acres subdivision; only possible encroachment on lot [**9] 8 is at issue in this action. We note that in her brief submitted to this court, Pritchett contends that her property is subject to a 15-foot-wide right-of-way lying west of the section line. According to Rowe's affidavit, the Fernland Acres subdivision plat indicates that the lots fronting Fernland Road, including Pritchett's lot number 8, have eastern boundaries that extend to the section line. Rowe testified, however, that the Fernland Acres subdivision plat contains an error. Rowe testified that the eastern boundary of the lots is contrary to that set forth in the 1910 subdivision plat creating the right-of-way. According to Rowe, the lots fronting Fernland Road have eastern boundaries that the 1910 subdivision plat established as extending only 30 feet west of the section line.

Pritchett did not present any evidence indicating that the 1910 plat was incorrect or that the Fernland Acres plat (regardless of whether there was a right-of-way depicted on that plat) was correct in establishing the eastern boundaries of the lots, including lot number 8, fronting Fernland Road. In support of her opposition to Mobile County's summary-judgment motion, Pritchett incorporated a copy of a [**10] filing Edwards submitted in Edwards's action in opposition to a motion for a summary judgment filed by Mobile County. Relying on that filing, Pritchett disputed that the 1910 plat set forth the claimed 30-foot-wide right-of-way and contended that, even if it did so, Mobile County never accepted or used any of the right-of-way west of the section line.

The trial court entered a judgment setting forth a detailed recitation and analysis of the facts of this case. That judgment reads as follows:

> "This [action] arises from the widening and resurfacing of a public street, Fernland Road, by [Mobile County]. The plaintiff, Ladochie Pritchett ('Pritchett') owns a home located on Fernland Road and claims that the widening project encroached onto her property approximately thirty feet. The undisputed facts show otherwise.
>
> "[Mobile County] acquired a public right-of-way for what is now Fernland Road by a recorded subdivision plat in 1910. The plat indicates that a right-of-way was dedicated to Mobile County which extended thirty feet west of a section line dividing Sections 5 and 4, Township 7 South, Range 3 West in Mobile County. 1 This same subdivision plat shows numerous subdivided [**11] parcels which remained in private ownership, the easternmost of which had a property line which began, consistent with the right-of-way, thirty feet from the section line. Pritchett's later-acquired property is located within this subdivision lot which clearly does not overlap [Mobile County's] right-of-way. 2
>
> "Pritchett mistakenly alleges that her property line extends all the way to the section line. Her belief is understandable. Pritchett acquired title to her property through a corporate statutory warranty deed recorded in 1992. The deed conveys Lots 11 and 8 in a recorded subdivision known as Fernland Road Acres. Only Lot 8 abuts Fernland Road. Lot 8 is located within the same originally subdivided lot depicted in the 1910 subdivision.
>
> [*354] "Pritchett's mistaken belief that she owns to the section line arises from an examination of the subdivision plat for Fernland Road Acres which was recorded in 1989. According to this subdivision plat, Lot 8 does indeed extend to the section line. However, the undisputed evidence before the Court indicates that this subdivision plat, by overlaying a previously dedicated public road, was in error.

"There is nothing before the Court to indicate [**12] that the subdivision plat filed in 1910 did not effectively convey a right-of-way for Fernland Road to the public. The undisputed affidavit of Donald Rowe, a registered professional engineer and land surveyor, establishes that any deed based on the 1989 recorded subdivision plat of Fernland Road Acres attempts to convey what the grantor had no legal title to convey, that is the thirty foot right-of-way previously dedicated to [Mobile County] as a public road in 1910. As Rowe indicates, a comparison of the 1910 subdivision plat to the 1989 subdivision plat clearly demonstrates that the latter plat from which Pritchett claims title could not effectively convey the thirty foot strip of property located west of the section line in that it had previously been dedicated as a public road.

"It being undisputed that Pritchett has no viable claim of title based on documents recorded in Probate Court, an issue arises whether or not once the public right-of-way was established it was somehow lost. The undisputed evidence, as well as clearly established law, indicates that this did not and could not occur. According to the undisputed testimony of John Murphy, a registered professional engineer [**13] employed by Mobile County, Fernland Road began as a dirt road which was subsequently paved and then resurfaced and widened. Prior to the widening project described in Pritchett's complaint, the paved portion of Fernland Road straddled the section line with eighteen feet of paved surface, five of which was located west of the section line on the property claimed by Pritchett. In addition, when considering shoulders and ditches, the entirety of Fernland Road before its improvement consisted of forty feet of width, fifteen feet of which was located west of the section line.

"After the widening and resurfacing project, the total pavement width of Fernland Road was increased to twenty-two feet. Of this, seven feet of pavement was located west of the section line. Of the total width of the improved Fernland Road, including shoulders and ditches, twenty-five feet of the improved road was located west of the section line. It is undisputed that both before and after the most recent widening project, [Mobile County] utilized the disputed thirty foot strip for public road purposes.

"The undisputed testimony of John Murphy also established that [Mobile County] has not abandoned the road [**14] nor has it permitted any uses of the road which are inconsistent with its maintenance as a public thoroughfare. [Mobile County] did permit the construction of mailboxes located within the dedicated right-of-way, which is not unusual and is permitted throughout [Mobile County] 3 There has never been a statutory vacation of any portion of the dedicated public right-of-way for Fernald Road.

"Compliance with statutory requirements constitutes a valid dedication to the public of all streets, alleys, and other public places. *Johnson v. Morris*, 362 So. 2d 209 (Ala. 1978); *Gaston v. Ames*, 514 So. 2d 877 (Ala. 1987). Once a dedication to the public has occurred, that dedication is irrevocable, and it cannot [*355] be altered or withdrawn except by statutory vacation proceedings. *Booth v. Montrose Cemetery Association*, 387 So. 2d 774 (Ala. 1980). Once the active dedication is complete and made irrevocable, it is not affected by the present use of the property or the failure to use the property for the dedicated purposes. *Cottage Hill Land Corp. v. City of Mobile*, 443 So. 2d 1201 (Ala. 1983).

"The Court is sympathetic to Pritchett, [**15] who acquired title by virtue of a warranty deed which does indeed purport to convey title to the thirty foot strip of land in dispute. Unfortunately, Pritchett's grantor warranted title to and attempted to convey property for which it had no legal title. While Pritchett may have legal recourse, her remedy does not lie against [Mobile County].

"- - - -

"1 'The acknowledgement and recording of such plat or map shall be held to be a conveyance in fee sim-

ple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public, and the premises intended for any street, alleyway, common or other public use, as shown in such plat or map, shall be held in trust for the uses and purposes intended or set forth in such plat or map.' Ala. Code 1975 § 35-2-51(b).

" 2 A duly recorded plat, 'showing dimensions of lots, and also width of adjoining streets, with no indicia that the lot overlaps into the street, imports that the dimensions given extend only to the street boundary shown on the plat.' *Edmundson v. Mullen*, [215 Ala. 297,] 110 So. 391 (Ala. 1926).

" 3 Abutting property [**16] owners are allowed permissive use of publicly dedicated rights of way subject to the superior right of the public pursuant to the terms of the dedication. *Kizer v. Finch,* 672 So. 2d 511 (Ala. 1995)."

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On appeal, Pritchett "adopts the arguments as set forth by Edwards" in the brief Edwards submitted to this court, which we hereinafter refer to as being asserted by Pritchett. Pritchett also expands on those arguments in her brief submitted to this court.

Pritchett argues that at some time (Pritchett does not specify what period of time), Mobile County had not used its right-of-way as a roadway and that its alleged failure to use the right-of-way constituted a vacation of the right-of-way. In this case, the evidence and the trial court's judgment clearly indicate that the 1910 subdivision plat was properly recorded in the probate office as required by § 35-2-50 and § 35-2-51, Ala. Code 1975. Pritchett has not presented any evidence indicating that the 1910 subdivision plat was not properly recorded or accepted by Mobile County.

> "Having met those two requirements [set forth in § 35-2-50 and [**17] § 35-2-51], [the party establishing a subdivision] is deemed to have made a conveyance in fee simple of all areas granted or dedicated to the public. § 35-2-51(b), *Code of Alabama* 1975. '[S]ubstantial compliance with the statutory requirements constitutes a valid dedication to the public of all streets, alleys, and other public places.' *Johnson v. Morris*, 362 So. 2d 209, 210 (Ala. 1978). *Cottage Hill Land Corp. v. City of Mobile*, 443 So. 2d 1201, 1203 (Ala. 1983).
>
> "After there has been a proper dedication to the public, that dedication is irrevocable and it cannot be altered or withdrawn except by statutory vacation proceedings. *Booth v. Montrose Cemetery Ass'n*, 387 So. 2d 774 (Ala. 1980); *Smith v. City of Opelika*, 165 Ala. 630, 51 So. 821 (1910). Once the act of dedication is complete and made irrevocable, it is not affected by the present use of the property or the failure to use the property for the dedicated purposes. *Cottage Hill Land Corp. v. City of Mobile, supra.*"

Gaston v. Ames, 514 So. 2d 877, 879 (Ala. 1987). Accordingly, [**18] in this case, the 1910 [*356] dedication of the 30-foot-wide right-of-way conveyed to Mobile County an irrevocable fee-simple interest in that property.

There is no evidence indicating that Mobile County failed to use its right-of-way, or at least a portion of it, as a public roadway. Even if such evidence were presented, however, a failure to use property dedicated for public use is immaterial. *Gaston v. Ames*, 514 So. 2d at 879. A public roadway may be vacated only according to vacation proceedings initiated pursuant to § 35-2-54, Ala. Code 1975. [3] *See* § 35-2-54; *Booth v. Montrose Cemetery Ass'n*, 387 So. 2d 774 (Ala. 1980). Pritchett submitted no evidence indicating that the public road or the right-of-way was vacated pursuant to § 35-2-54.

3 The text of that section reads as follows:

"Any street or alley shown by any map, plat or survey, whether such map or plat is executed and recorded as provided by law or not, may be vacated, in whole or in part, by the owner or owners of the lands abutting the street or alley (or that portion of the street or alley desired to be vacated), or their executors, administrators or guardian, joining in a written instrument declaring the same to be vacated, such written instrument to be executed, acknowledged and recorded in like manner as conveyances of land, which declaration being duly recorded shall operate to destroy the force and effect of the dedication by the map, plat or survey and to divest all public rights, including any rights which may have been acquired by prescription, in that part of the street or alley so vacated. If any such street or alley is within the limits of any municipality, the assent of the mayor and aldermen or other governing body of the municipality must be procured, evidenced by a resolution adopted by such governing body, a copy of which, certified by the clerk or ministerial officer in charge of the records of the municipality must be attached to, filed and recorded with the written declaration of vacation. Convenient means of ingress and egress to and from their property shall be afforded to all other property owners owning property in the tract of land embraced in the map, plat or survey, either by the remaining streets and alleys dedicated by such map, plat or survey or by any other street or alley being dedicated. If such street or alley has been or is being used as a public road and outside of any municipality, the assent of the county commission of the county in which the property is situated must be procured, evidenced by resolution adopted by such county commission, a copy of which, certified by the presiding officer thereof, must be attached thereto, filed and recorded with the declaration of vacation."

[**19] Pritchett also contends that the 1989 Fernland Acres subdivision plat superseded the 1910 subdivision plat and, she contends, the 1989 plat does not provide for Mobile County's having a 30-foot-wide right-of-way. Therefore, Pritchett contends, Mobile County was bound by its acceptance of the 1989 Fernland Acres subdivision plat and cannot claim the 30- foot-wide right-of-way. Pritchett cites no authority supporting that argument. "'Where an appellant fails to cite any authority for an argument, this Court may affirm the judgment as to those issues, for it is neither this Court's duty nor its function to perform all the legal research for an appellant.'" *Spradlin v. Birmingham Airport Auth.*, 613 So. 2d 347, 348 (Ala. 1993) (quoting *Sea Calm Shipping Co. v. Cooks*, 565 So. 2d 212, 216 (Ala. 1990)). We also note that as a part of this argument in her brief on appeal, Pritchett claims that Mobile County is estopped from relying on the 1910 subdivision plat because it accepted the 1989 Fernland Acres subdivision plat. Pritchett did not assert her estoppel argument before the trial court, and she impermissibly raises it for the first time on appeal. *See* [**20] *Andrews v. Merritt Oil Co.*, 612 So. 2d 409, 410 (Ala. 1992) ("This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court."); *see also Shiver v. Butler County Bd. of Educ.*, 797 So. 2d 1086, 1089 (Ala. Civ. App. 2000) (this court will not consider an issue not presented [*357] to the trial court and on which the trial court was not given the opportunity to rule).

Pritchett has not challenged the trial court's determination that the 1989 subdivision plat on which the deed to her property is based is in error. She also failed to challenge the trial court's finding that the grantor from whom Pritchett obtained her deed purported to convey to her property for which it had no legal title. Our review of the record supports those determinations, as well as the other conclusions reached by the trial court in its judgment, quoted above. As the trial court indicated, Pritchett might have a valid claim against another entity or party. However, Pritchett has failed to demonstrate that the trial court erred in entering a judgment in favor of Mobile County.

2050668 [**21] - AFFIRMED.

2050785 - APPEAL DISMISSED.

Crawley, P.J., and Pittman and Bryan, JJ., concur.

Murdock, J., concurs in the result, without writing.

Ex Parte Pine Brook Lakes, Inc. (Re: Jefferson County, Alabama, etc., et al. v. Pine Brook Lakes, Inc., a corporation)

1910284

SUPREME COURT OF ALABAMA

617 So. 2d 1014; 1992 Ala. LEXIS 631

June 19, 1992, Released

PRIOR HISTORY: [**1] PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS. (Jefferson Circuit Court, CV-90-6543)

CORE TERMS: staff, plat, subdivider, approve, disapproval, sectors, Enabling Act, recommendations, notification, disapprove, roadway, zoning, notify, writ of mandamus, applicable statutes, conditionally, postponement, specificity, ordinance, planned, notice, original plan, requesting, planning, engineer, tracts

COUNSEL: For Petitioner: Douglas Corretti and Mary Douglas Hawkins of Corretti & Newsom, Birmingham.

For Respondent: Charles S. Wagner, Birmingham.

JUDGES: ADAMS, Hornsby, Shores, Houston, Steagall, Kennedy, Ingram

OPINION

[*1014] ADAMS, JUSTICE.

Pine Brook Lakes, Inc. ("Pine Brook"), petitions this Court for a writ of certiorari to review a judgment of the Court of Civil Appeals reversing a judgment of the Circuit Court of Jefferson County that had ordered Jefferson County; the Jefferson County Planning and Zoning Commission; and O. C. Moon, land and zoning administrator of Jefferson County (all hereinafter referred to as "Jefferson County"), to approve Pine Brook's preliminary subdivision plats. We reverse and remand.

In 1978, Pine Brook purchased 150 acres of land for development into residential subdivisions. This land was subsequently divided into five tracts known as Pine Brook Sectors 1 and 2 and Candlewood Sectors 1, 2, and 3. Pine Brook submitted plats to Jefferson County, requesting its approval for the subdivision of Pine Brook Sectors 1 and 2, and Candlewood Sector 1. Jefferson County approved the three plats for development [**2] in 1978, 1982, and 1987, respectively, and those tracts have been developed.

In March 1990, Pine Brook submitted preliminary plats to Jefferson County, requesting permission to subdivide and develop Candlewood Sectors 2 and 3. Although [*1015] the plats, when submitted for approval, complied with its subdivision regulations, Jefferson County refused to approve them. Jefferson County defended its rejection of the plans on the ground that the plats would not comply with regulations if a roadway, which had been envisioned since Pine Brook had purchased the property, were to be constructed across those sectors. More specifically, Timothy Westhoven, Jefferson County traffic studies engineer, in a letter to Pine Brook dated March 16, 1990, stated: "We have completed our review of the plans for the Candlewood Lakes Subdivision, Sectors 2 and 3. The engineering of the plans is acceptable in nature; however, due to planned county roadway construction, we will be unable to issue approval of these sectors."

On August 23, 1990, Pine Brook petitioned the Jefferson County Circuit Court for a writ of mandamus ordering Jefferson County to approve the preliminary subdivision plats. On January 22, 1991, the [**3] trial court granted the petition. The Court of Civil Appeals subsequently reversed the judgment of the trial court and remanded the cause with directions to the trial court to vacate its judgment. We granted Pine Brook's petition for certiorari review in order to determine whether Jefferson County's explanation for its rejection of Pine Brook's plats is sufficient under our statutes and case law.

A county's authority to regulate the subdivision of private property lying within its jurisdictional boundaries is derived solely from legislative act. Cf. *Smith v. City of Mobile,* 374 So. 2d 305 (Ala. 1979); E. C. Yokely, *The Law of Subdivisions,* § 4 (2d ed. 1981). A county's enactment of supplementary ordinances and

regulations pursuant to authority granted it by the legislature may further restrict the county's regulatory authority. Cf. *Boulder Corp. v. Vann,* 345 So. 2d 272 (Ala. 1977). Federal and state constitutional due process guarantees require counties to comply with all applicable statutes and regulations. Cf. *Smith v. City of Mobile,* supra; *Boulder v. Vann,* supra.

Pursuant to Act No. 581, 1947 Ala. [**4] Acts 404, *codified,* Ala. Code 1958, Append. §§ 944 to 969 ("the Enabling Act"), the Jefferson County Commission adopted *Jefferson County Subdivision, Land Development and Construction Regulations* (Book No. 355, 1981) ("County Regulations"). Section 956 of the Enabling Act provides:

"The planning commission shall approve or disapprove a plat within thirty days after the submission thereof to it; otherwise such plat shall be deemed to have been approved, and a certificate to that effect shall be issue by the commission on demand . . . . The *ground of disapproval of any plat shall be stated* upon the records of the commission."

(Emphasis added.) The following section of the County Regulations supplements § 956, and further delineates the notification procedures to be followed:

"2.22 Preliminary Plan. Following the pre-application conference, the subdivider shall seek approval of a preliminary plan in accordance with the following procedure:

"1. Formal Application and Submission -- The subdivider shall file a formal application for preliminary plan approval on a form supplied by the Public Works Department and shall submit therewith a preliminary plan prepared in conformance [**5] with the requirements of Article 2, Section 2.30 hereof.

"2. Distribution of Plan -- Upon receipt of the preliminary plan the staff may, at its discretion, submit copies to interested public agencies and utility companies and obtain a written report on the plan from each such agency or company.

"3. Staff Review -- The Staff of the Land Development Division of the Public Works Department shall review the plat and make recommendations to the Public Works Director/County Engineer, who shall then take action on behalf of the County Commission.

"4. Land Development Review -- The Land Development Division shall review all reports, and may make recommendations, [*1016] and may consult with the subdivider or his agent before making its decision. The staff may notify the subdivider in writing of all recommendations and shall afford him an opportunity to submit an amended plan.

"5. Amended Plan -- Upon receipt of the written notice from the Land Development Division, the subdivider may submit amendments to the plan for consideration by the staff, and the staff may approve the changes on the basis of the amended plan.

"6. Staff Action -- Within 14 days of receipt of the preliminary plan, the [**6] staff shall take action upon it, and notify the subdivider in writing of its action. Staff action shall take one of the following forms:

"a. Approval -- The staff may approve the preliminary plan as submitted. . . .

"b. Conditional Approval -- The staff may approve the preliminary plan conditionally and require amendments to the plan before granting full approval. If the subdivider does not submit an acceptable amended plan within ninety days after submission of the original plan, the plan shall be deemed to be disapproved by the staff.

"c. Postponement -- The staff may postpone its decision pending further study of the plan, but in no event shall its decision be postponed more than thirty days after submission of the original plan.

"d. Disapproval -- The staff may disapprove a preliminary plan and shall *state in writing its reasons for disapproval.* The subdivider must then submit a new preliminary plan if he wishes to create the subdivision."

(Emphasis added.)

Both the Enabling Act and the County Regulations expressly require Jefferson County to provide prompt notification of disapproval of a preliminary plat. See Enabling Act § 956 (commission shall approve or disapprove [**7] a plat within 30 days); County Regulations § 2.22(6) (requires a decision and written notification within "14 days of receipt of the preliminary plan"). Notification of disapproval must be accompanied by reasons sufficiently *clear and definite* to inform a developer *"wherein the plan failed to meet the requirements of the regulations."* E. C. Yokely, supra, § 54, at 252 (emphasis added) (quoted in *Smith v. City of Mobile,* supra); see also County Regulations § 2.22(4) ("staff may notify the subdivider in writing of all recommendations and *shall afford him an opportunity to submit an amended plan")* (emphasis added); § 2.22(6)(b) ("staff may approve the preliminary plan conditionally and *require amendments to the plan")* (emphasis added); § 2.22(6)(d) (following disapproval, subdivider "must then *submit a new preliminary plan* if he wishes to create the subdivision") (emphasis added). Such specificity is required in order to satisfy constitutional due process guarantees against arbitrary and capricious government action. E. C. Yokely, supra, § 54, at 252 (citing *RK Development Corp. v. City of Norwalk,* 156 Conn. 369, 242 A.2d 781 (1968)). [**8]

Jefferson County's official notice citing "planned county roadway construction" as the basis for disapproval of the preliminary plats falls considerably short of the specificity required by the applicable statutes and regulations. More precisely, the purported explanation utterly fails to apprise Pine Brook of the nature of the deficiency, and, consequently, of the nature of such amendments as would render the plans acceptable. County Regulations § 2.22(4) and (6)(b). Indeed, recognition of the explanation offered in this case would effectively authorize suspension of real estate development for an indefinite time -- a result inconsistent with the strict time constraints imposed on the Jefferson County authorities by the county's own regulations. See County Regulations § 2.22(6) (requiring staff action within "14 days of receipt of the preliminary plan"); § 2.22(6)(b) (requiring submission of acceptable amended plan within 90 days); § 2.22(6)(c) (preventing postponement of a [*1017] decision beyond 30 days). Cf. *Urbanizadora Versalles, Inc. v. Rivera Rios,* 701 F.2d 993 (1st Cir. 1983) (zoning ordinance preventing development of property for 13 years in anticipation of [**9] eventual highway construction violated federal due process guarantees).

Under these facts, we hold that Pine Brook had a clear, legal right to the approval of its plats. See *Sigler v. City of Mobile,* 387 So. 2d 813 (Ala. 1980) (approval of subdivision plans may be secured through a writ of mandamus where the reason offered for disapproval fails to comply with applicable statutes); E. C. Yokely, supra, § 69(e). Consequently, the judgment of the Court of Civil Appeals is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C. J., and Shores, Houston, Steagall, Kennedy, and Ingram, J.J., concur.

Providence Park, Inc. v. Mobile City Planning Commission

2000134

COURT OF CIVIL APPEALS OF ALABAMA

824 So. 2d 769; 2001 Ala. Civ. App. LEXIS 360

August 3, 2001, Released

SUBSEQUENT HISTORY: [**1] Rehearing Denied March 24, 2000. Certiorari Granted May 11, 2001 (1991310). Rehearing Denied September 21, 2001. Rehearing denied January 18, 2002 (1991310) No Opinion. Released for Publication August 9, 2002. Released for Publication August 21, 2002. As Corrected May 13, 2002. As Corrected December 12, 2002.

PRIOR HISTORY: Appeal from Mobile Circuit Court. (CV-00-1843).

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: buffer, planning commission, feet, planting, fence, strip, width, buffer zone, writ of mandamus, zoning ordinances, height, screen, zoned, ordinance, land use, residential, capricious, neighborhood, exceeded, adjacent, noise, present case, residential property, feet high, nightclubs, mandamus, approve, privacy, maximum, adjoins

COUNSEL: For Appellant: Bradley R. Byrne of Adams & Reese, L.L.P., Mobile.

For Appellee: John L. Lawler of Finkbohner, Lawler & Ray, L.L.C., Mobile.

JUDGES: CRAWLEY, Judge. Yates, P.J., and Thompson and Pittman, JJ., concur. Murdock, J., dissents.

OPINION BY: CRAWLEY

OPINION

[*770] CRAWLEY, Judge

Providence Park, Inc., is a corporation that owns the land upon which Providence Hospital is located; it also owns acreage surrounding the hospital, a total of approximately 265 acres. When Providence Park purchased it, the entire acreage was zoned B-3, a classification allowing heavy commercial uses such as automobile sales lots and nightclubs. When Providence Park first built Providence Hospital at its present location, off Airport Boulevard in Mobile, it developed a master plan for the development of the area. In 1991, Providence Park subdivided 45 acres of land and had it rezoned from B-3 to R-1, which is a single-family residential zone. It sold that land to Providence Estates, Inc., which developed a subdivision on the land. The subdivision contains homes valued between $ 200,000 and $ 500,000. When the [*771] subdivision lots were sold, the deeds contained restrictive covenants [**2] requiring that the landowners construct fences along the portion of their land abutting Providence Park's land. [1] In addition, Providence Park agreed to restrict the height of the buildings built within 250 feet of the Providence Estate property to two stories.

1 The restrictive covenants require that the fences be uniform in height, that they be constructed of the same materials, and that they join. The testimony at the hearing indicated that the fences in existence were seven feet high.

In March 2000, Providence Park applied to the Mobile City Planning Commission for a two-lot commercial subdivision of land abutting Providence Estates. The land, zoned B-3, was to be divided into two parcels, one which was to be developed as the site for a dentist's office, which is actually a B-1, or light commercial, use. Providence Park had no plans, as of March 2000, for the other parcel. The original plans called for a 10-foot buffer zone, an undeveloped area left in its natural state, between the boundary of the Providence [**3] Estates subdivision and the utilization of the commercial property, for a parking lot or a landscaping area. Although the staff of the Planning Commission indicated approval of the plans, the Planning Commission itself, after a public hearing, approved the subdivision but with the requirement that the buffer zone be increased to 20 feet. Providence Park resubmitted its plans, again indicating the inclusion of only a 10-foot buffer zone, and, again, the Planning Commission approved the subdivision provided the buffer zone was increased to 20 feet.

Providence Park then petitioned the Mobile Circuit Court for a writ of mandamus directing the Planning

Commission to approve the subdivision with only a 10-foot buffer zone. It argued that the Planning Commission's requirement that the subdivision include a 20-foot buffer zone was arbitrary and capricious and exceeded its authority under the Subdivision Regulations of the City. After conducting a bench trial, the court denied the mandamus petition. Providence Park appeals.

The City Subdivision Regulation in question states:

> "*Buffer Planning Strips or Privacy Fence.*
>
> Where a residential subdivision adjoins land zoned [**4] for or used for a railroad right-of-way, an industrial area, a commercial area, or other land use which would have a depreciating effect on the residential use of the land, a buffer planting strip or a wooden privacy fence of 6 feet in height may be required by the Planning Commission."

A portion of the City's Zoning Ordinances relating to buffers is also included in the record. It reads:

> "1. PROTECTION BUFFER. Except as otherwise provided hereinafter, wherever the boundary of a building site in a B-1, B-2, B-3, B-4, I-1, or I-2 District adjoins an R-1, R-2, or R-3 District, there shall be provided on such building site a protection buffer strip not less than ten (10) feet in width. ... The protection buffer provided may be a wall, fence, or screen planting that complies with the following regulations:
>
> "(a) Wall or Fence. If a wall or fence is provided as a protection buffer, it shall be six (6) feet height, of a construction and a design approved by the Land Use/Code Administration Department.
>
> "(b) Screen Planting. If screen planting is provided as a protection buffer, it shall be at least ten (10) feet in width, shall be planted with materials [**5] in sufficient density and of sufficient height (but in no case less than six (6) [*772] feet high at the time of planting) to afford protection to the residence district from the glare of lights, from blowing papers, dust and debris, from visual encroachment, and to effectively reduce the transmission of noise."

The parties dispute whether this is a zoning case or a subdivision case. Under the caselaw dealing with actions like this one, it is clear that this case is not a zoning case; in such a case we would be concerned with the city's legislative action in enacting a particular ordinance. *Ryan v. City of Bay Minette*, 667 So. 2d 41, 43-44 (Ala. 1995). Instead, this case involves the city's administrative decision to approve or disapprove a particular land use under its zoning ordinances. *Ryan*, 667 So. 2d at 44. The Planning Commission has no discretion but to approve a subdivision plan that conforms to those ordinances, *see Smith v. City of Mobile*, 374 So. 2d 305, 307 (Ala. 1979) (quoting E.C. Yokely, *The Law of Subdivisions* § 52 (1963 and Supp. 1979)), and a mandamus action is available to compel such approval when it is denied for reasons unrelated to conformance [**6] with those ordinances. *Smith*, 374 So. 2d at 308 (quoting E.C. Yokely, supra, *The Law of Subdivisions* § 53). "Mandamus is also appropriate where all applicable ordinances have been complied with, and the proposal is denied because adjacent property owners object." *Smith*, 374 So. 2d at 308.

Our supreme court has stated that planning commission regulations must "set forth sufficient standards to give applicants notice of what is required of them." *Smith*, 374 So. 2d at 308 (Ala. 1979) (citing Powell, *Law of Real Property*, Chapter 79, "Subdivision Control," 866). A planning commission is bound by its regulations, and those regulations, because they impose restrictions on the use of private property, are strictly construed. *Id.* at 307 (citations omitted). In addition, the regulations "'must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities.'" *Id.* (quoting *Longshore v. City of Montgomery*, 22 Ala. App. 620, 622, 119 So. 599, 600 (1928)).

After reviewing the City's subdivision regulation in question, [**7] we conclude that the Planning Commission is clearly given the power to discriminate between property owners by determining, for example, the width of the buffer required. Providence Park was aware that a buffer might be required, and it in fact included a 10-foot buffer in its subdivision plans; however, it was not aware, and could not have known, what particular concerns might influence the Planning Commission to increase the buffer from 10 feet to 20 feet. Although we cannot disagree with the Planning Commission's opin-

ion that land uses permitted in a B-3 zone, such as automobile lots and nightclubs, might create light and noise "pollution" that would likely affect the residences in Providence Estates, the fact that the inartfully drawn regulation permits the totally discretionary determination of the size of the buffer needed in a particular location, unguided by any objective, clearly stated criteria, compels the conclusion that it fails to "set forth sufficient standards to give applicants notice of what is required of them." *See Smith v. City of Mobile*, 374 So. 2d at 308.

Accordingly, we conclude that the Planning Commission's imposition of the additional 10 [**8] feet of buffer space was arbitrary and capricious and exceeded its power and that the trial court should have granted Providence Park's petition for the writ of mandamus. The judgment of the trial court is reversed and the cause is remanded [*773] for entry of a judgment in accordance with this opinion.

REVERSED AND REMANDED.

Yates, P.J., and Thompson and Pittman, JJ., concur.

Murdock, J., dissents.

DISSENT BY: MURDOCK

DISSENT

MURDOCK, Judge, dissenting.

I respectfully dissent from the majority's reversal of the trial court's judgment; I would affirm the trial court's denial of Providence Park's petition for a writ of mandamus.

A petitioner seeking a writ of mandamus must demonstrate, among other things, "a clear legal right to the relief sought." *Alabama Dep't of Mental Health & Mental Retardation v. State*, 718 So. 2d 74, 75 (Ala. Civ. App. 1998). This court also has held that "in an appeal from the trial court's denial of a petition for a writ of mandamus, [we] must indulge all reasonable presumptions favoring the correctness of the judgment appealed from." *Frazer v. Tyson*, 587 So. 2d 326, 328 (Ala. Civ. App. 1990) (affirming decision of city planning commission). [**9] In addition, "our review ... is further limited by the strong presumption of correctness which attaches to the trial court's findings when the evidence is presented ore tenus," and "this court will not disturb the lower court's findings unless there is a clear showing that the findings are plainly and palpably wrong." *Id.*

The subdivision regulation that governs this case provides that

> "where a residential subdivision adjoins land zoned for or used by ... an industrial area, a commercial area, or other land use *which would have a depreciating effect* on the residential use of the land, *a buffer planting strip* or a wooden privacy fence of 6 feet in height *may be required* by the Planning Commission."

(Emphasis added.) This regulation sets no maximum or minimum width for the buffer strip. (A separate Mobile zoning ordinance specifies that an owner of land zoned B-3 must provide a buffer zone of "not less than ten (10) feet in width," but sets no *maximum* buffer width. [2]) Thus, I interpret the subdivision regulation as allowing the Commission to exercise discretion in setting the width of a buffer strip it determines to be warranted in a given case. The [**10] Commission's exercise of its discretion, done in an administrative capacity, is subject to revision only if its decision was arbitrary, capricious, or not in compliance with applicable law. *Ex parte City of Fairhope*, 739 So. 2d 35, 38 (Ala. 1999).

> 2 The zoning ordinance, while prescribing a minimum 10-foot protective buffer, which may consist of either a wall, a fence, or a screen planting, goes on to add that "if a screen planting is provided as a protection buffer, it shall be *at least* ten (10) feet in width." (Emphasis added.)
>
> In addition to the zoning ordinance's added emphasis on the fact that the 10-foot width of a buffer on B-3 zoned property is a minimum, it is equally or more important to note that the buffer contemplated by the zoning ordinance is a "screen planting." A "screen planting" buffer, for purposes of the ordinance, is one in which the owner must *plant* materials "in sufficient density and of sufficient height (but in no case less than six (6) feet high at the time of planting) to afford protection to the residents' district from the glare of lights, from blowing papers, dust and debris, from visual encroachment, and to effectively reduce the transmission of noise." In contrast, the 20-foot buffer the Planning Commission required of the landowner in the present case was an undeveloped area left in its *natural state*.

[**11] I cannot conclude that the facts of this case compel the conclusion that the Commission's requirement of a 20-foot buffer [*774] (or only 10 feet in addition to the minimum required by the zoning ordinance) was arbitrary, capricious, or outside applicable law. The applicable subdivision regulation clearly provides that the Planning Commission may do what it has done in this case -- require such buffer as it reasonably

deems necessary to further the regulation's stated goal of preventing depreciation in value of adjoining residential property. That distinguishes this case from *Smith v. City of Mobile*, 374 So. 2d 305 (Ala. 1979), upon which Providence Park and the majority rely.

In *Smith*, the subdivision ordinance under review stated that the characteristics of lots "shall be appropriate to the location of the subdivision," but then set forth specific criteria regarding minimum lot size, maximum depth, position of lots in relation to streets, and other characteristics. These criteria were such as to allow for town-house developments like the one proposed, and the lots in *Smith* fully complied with them. Nonetheless, the surrounding neighborhood was an old one with [**12] large lots and abundant shrubbery and trees, and the neighbors objected to the proposed construction of townhouses in their neighborhood. As a result, the planning commission denied the subdivision request altogether, on the ground that it would be "out of character" with the neighborhood.

In striking down the Commission's decision, our Supreme Court explained in *Smith* that the planning commission could not use its power "to further goals not designated by [the] statute." 374 So. 2d at 307. The Supreme Court concluded that the planning commission's denial of approval of the requested subdivision on the ground that it was "out of character" with the neighborhood was "unrelated to its conformance with the Planning Commission's own regulations and exceeded its statutory grant of power." The same cannot be said in the present case. To the contrary, in the present case, the Commission is approving the requested subdivision, subject only to a condition that is expressly permitted by this applicable subdivision regulation. The Commission cannot be said to have exceeded its authority, as the municipal body did in *Smith*, because it is authorized by the terms of the [**13] regulation to require a buffer strip. It therefore may do so so long as the buffer strip it requires is not arbitrary and is in furtherance of the goal of the regulation.

Expert testimony before the trial court tended to show that commercial development allowed in an area zoned "B-3" (which allows for bars and nightclubs, grocery and department stores, taxicab services, automobile repair, and skating rinks) would cause depreciation in the value of adjacent residential properties such as those located in Providence Estates, which are of substantial value (from $ 200,000 to $ 500,000). Other testimony indicated that the Commission has previously required buffer strips of a similar width to protect adjacent residential property from noise, dust, pollution, and light associated with commercial activities, all of which cause adjacent property to depreciate. While Providence Park has a natural incentive to maximize the amount of its property it can market for development, its interests did not necessitate a finding by the trial court that the Commission's requirement of a buffer strip of 20 feet is arbitrary or capricious such that a writ of mandamus was due to be issued.

In light of the [**14] facts in this case and the applicable standards of review, I cannot conclude that the trial court "plainly and palpably" erred in determining that Providence Park had not met its burden of proving the elements required for issuance of a writ of mandamus, including particularly [*775] that of a "clear legal right to the relief sought."

STATE of Alabama DEPARTMENT OF PUBLIC SAFETY et al. v. SCOTCH LUMBER CO., INC., a corp., et al

SC 747

Supreme Court of Alabama

293 Ala. 330; 302 So. 2d 844; 1974 Ala. LEXIS 968

November 7, 1974

DISPOSITION: [***1] Reversed and rendered.

CORE TERMS: truck, husbandry, pulpwood, public highways, exempt, temporarily, injunction, propelled, highways, farming, witnesses testified, drivers, preliminary injunction, questioned, husbandary, severance, traveling, distance, temporary, farm, financially, load

COUNSEL: William J. Baxley, Atty.Gen., and George Beck, Deputy Atty.Gen., and Leon Ashford, Asst.Atty.Gen., for appellants.

When a temporary injunction is requested, the right of complainant must be clear and unmistakable on the law ahd the facts. Valley Heating, Cooling & Electric Co., Inc., et al. v. Ala. Gas Corp., 286 Ala. 79, 237 So.2d 470; City of Decatur v. Meadors, 235 Ala. 544, 180 So. 550. Upon showing abuse of discretion, an appellante court may in reviewing a trial court's decree granting a temporary injunction, reverse the finding made. Ex parte Jones, 246 Ala. 433, 20 So.2d 859; Southern Rock Products Co., Inc. v. Self, 279 Ala. 488, 187 So.2d 244.

McCorquodale & McCorquodale, Jackson, and D'Wayne May, Butler, for appellees.

The trial court is vested with wide discretion in determining whether a temporary injunction should issue and in absence of abuse of that discretion, an appellate court will not disturb the finding made. Southern Rock Products Co., Inc. v. Self, 279 Ala. 488, 187 So.2d 244.

JUDGES: FAULKNER, Justice, wrote the opinion. HEFLIN, C.J., and MERRILL, HARWOOD and MADDOX, JJ., concur.

OPINION BY: FAULKNER

OPINION

[**845] [*331] [***2] FAULKNER, Justice.

This is an appeal from an order of the trial court granting a preliminary injunction. The appellants-defendants below - were enjoined from enforcement of §§ 89 and 90, Title 36, Code of Alabama 1940, Recompiled 1958, and the penalty provisions of Title 36, against haulers or carriers or unmanufactured forest products upon the public highways in Clarke, Washington, and Choctaw Counties. Bond was set in the amount of $2,500.

The complaint as last amended alleged in substance:

(1) the defendants, by causing the plaintiffs to be weighed pursuant to the truck weight statute, were acting beyond the scope of their authority or were acting illegally;

(2) that defendants were acting under a mistaken interpretation of the law and were acting tortiously on the rights of plaintiffs and were injuring them irreparably;

(3) that because log trucks and pulpwood trucks were vehicles which were used primarily and necessary in the operation of fariming, they were "implements of husbandry" and were exempt from the truck weight statute, § 90, Title 36, Code of Alabama 1940, Recompiled 1958, which exempts "implements of husbandry temporarily propelled or moved upon highways."

[***3] The defendants filed a motion for a change of venue to Montgomery County on [*332] the ground that the individual defendants were State officials officially residing in Montgomery County. The court denied the motion. Next, the defendants filed a plea of jurisdiction alleging the action against the State of Alabama was prohibited by the Constitution of Alabama. This plea was overruled. Finally defendants filed a motion to dismiss on the ground that plain-

tiffs failed to state a cause of action and plaintiffs will not suffer any irreparable injury as a result of any acts of defendants; that defendants were not acting without the scope of their authority by enforcing the truck weight statutes against plaintiffs.

The evidence before the court consisted of testimony by two witnesses engaged in the business of transporting pulpwood from the severance point to the mill. Both witnesses testified their business had been affected financially by payment of fines in violation of the truck weight statute, and that compliance with the truck weight statute affected their business financially. The witnesses testified because of the enforcement of the weight law their drivers were being [***4] harassed and that their drivers were reluctant to work. They further testified a greater problem was created with the present gasoline shortage because of the reduced weight load. One witness testified

that much confusion exists among the drivers because of the inability to determine what each different load weighs, and the inconsistency that is apparent from one set of scales to another. The testimony revealed that the truck-trailer combination used in hauling pulpwood could not be used for any other purpose.

In reviewing an order granting a temporary injunction, we proceed under the premise that a trial judge has wide discretion in granting the writ, and his ruling will not be reversed unless he has abused his discretion, or exercised his discretion in an arbitrary manner. Madison Limestone [**846] Co. v. McDonald, 264 Ala. 291, 87 So.2d 545 (1956); Western Grain Co. Cases, 264 Ala. 145, 85 So.2d 395 (1955). The granting of the preliminary injunction in the present case, though prohibotory in nature, has the effect of granting plaintiffs all the relief they could obtain upon a final hearing. Consequently, the temporary injunction should issue only where the rights [***5] of the plaintiffs are clear and unmistakable under the law and facts of the case. City of Decatur v. Meadors, 235 Ala. 544, 180 So. 550 (1938).

The primary question to be answered in this case is whether the plaintiffs are exempt from enforcement of the truck weight law on the public highways of Alabama. Section 89, Title 36, Code of Alabama 1940, Recompiled 1958, limits the weight for any one axle of a vehicle to 18,000 pounds, or "such other weight, if any, as may be permitted by federal law to keep the state from losing federal funds."

Section 90 of this title provides:

"There shall be exempt from the provisions of this article motor trucks, semi-trailer trucks or trailers, owned by the United States, or any agency thereof, the State of Alabama, or any county or city, or incorporated town; *nor shall the provisions of this article apply to implements of husbandry temporarily propelled or moved upon the highways."*

It is not questioned that pulpwood can be classified as husbandary. Pulpwood farming is a major industry of Alabama. And, it can not be questioned that a truck specifically designed for hualing pulpwood from the point of severance to the mill is an implement [***6] of husbandary. An "implement of husbandry" is something necessary for carrying on the business of farming, without which the work could not be done. Hester v. State, 40 Ala.App. 123, 108 So.2d 385 (1959). See Vol. 20, Words and Phrases, Premanent Edition, p. 322. Even though these trucks are implements [*333] of husbandry, we are of the opinion they are not exempt from the truck weight law under the facts of this case. the key words in § 90 are *"implements of husbandry temporarily propelled or moved."* It is reasonable to conclude that when the legislature enacted § 90, it envisioned that in the operation of farming it is often necessary to move vehicles or machines used in farming from one farm to another, or from one area to another, covering a limited distance. And, it is often necessary that they move or be moved for a brief period of time upon a public highway. But, we are not convinced that the legislature would exempt overweight pulpwood trucks traveling unlimited distances on the public highways in three countries from farm to marked on a permanent or regular basis. Cf. Wood Bros. Thresher Co. v. Eicher, 231 Iowa 550, 1 N.W.2d 655 (1942).

The obvious purposes [***7] for enacting truck weight laws is for the safety of the public, and keeping highways in good condition for the traveling public. Travel upon the highways must be as safe as it can reasonably be made consistent with their efficient use. Any overloaded truck creates a safety hazard upon the public highway, as well as contributing to a bad state of repair.

We conclude that since the trucks (implements of husbandry) were not temporarily being moved or propelled upon the public highway, they are subject to the provisions of the truck weight law of this State. Loss of profits does not justify the issurance of an injunction.

Since the case is being reversed for the reasons stated in this opinion, we pretermit discussion of the other assignments of error.

The injunction is dissolved.

Reversed and rendered.

HEFLIN, C.J., and MERRILL, HARWOOD and MADDOX, JJ., concur.

Janice B. Pugh, individually, and as Administratrix of the Estate of James Gregory Pugh, deceased v. Larry Ervin Taylor

No. 85-754

Supreme Court of Alabama

507 So. 2d 428; 1987 Ala. LEXIS 4165

February 27, 1987, Filed

SUBSEQUENT HISTORY: [**1] Rehearing Denied May 1, 1987.

PRIOR HISTORY: Appeal from Escambia Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: truck, lane, chopper, bridge, feet, highway, brake, miles, log, wantonness, pickup, travel, chip, oversized, husbandry, corn, approaching, temporarily, propelled, reflectors, conscious, warning, trooper, width, farm, present case, traveling, exemption, speeding, distance

COUNSEL: Broox G. Garrett, Jr., and Edward T. Hines, Garretts, Thompson & Hines, for Appellant.

Reggie Copeland, Jr., and Mark A. Newell, Nettles, Barker, Janecky & Copeland, for Appellee.

JUDGES: Shores, Justice, Torbert, C. J., and Jones, Adams, and Steagall, JJ., concur.

OPINION BY: SHORES

OPINION

[*429] Plaintiff, Janice B. Pugh, appeals from a judgment entered pursuant to a jury verdict in favor of defendant, Larry Ervin Taylor, in a wrongful death action. We affirm.

The evidence produced at trial, which was largely undisputed, reveals the following: On January 24, 1984, defendant Larry Ervin Taylor left his farm in Perdido, Alabama, to carry a piece of farm equipment to sell at an auction in Dothan, Alabama. The journey was to be in excess of 200 miles, taking approximately 6 hours to drive. The piece of farm equipment was an International 830 corn chopper used in Taylor's farming operations. It was attached to the rear of his pickup truck. It was undisputed that the corn chopper was an oversized vehicle as defined by Code 1975, § 32-9-20. Taylor had no warning devices on either the pickup [**2] or the chopper to warn approaching motorists of his oversized load. See Code 1975, § 32-9-20 and § 32-9-29.

On that same day, James Gregory Pugh, plaintiff's intestate, was operating a fully loaded tractor/trailer log truck on Highway 29 heading southwest toward Brewton, Alabama. Near Andalusia, Alabama, Pugh met Bobby Ray Thomas, who was driving a log chip truck headed in the same direction. They stopped, talked, and had something to drink at a local store. At [*430] that time, Pugh mentioned to Thomas that his brakes were not "holding like they normally would." The two trucks then continued together on Highway 29 heading southwest toward the McGowin Bridge in Escambia County, Alabama.

Defendant Taylor had traveled in excess of fifty miles and was traveling in an easterly direction, driving 30 to 35 miles per hour, as he approached the McGowin Bridge. As he approached the bridge, he saw a "narrow bridge" sign. At this sign, the bridge was not visible, because of a curve in the road. As Taylor entered the bridge, his truck was in the right lane of traffic, but his chopper extended into the left lane. Taylor was unable to see the log and chip trucks approaching from the west [**3] until he passed under the bridge's steel spans.

The first truck Taylor saw approaching him on the bridge was the chip truck driven by Thomas. Taylor looked into his side-view mirrors and maneuvered his truck and his chopper as far as he could to the right. He testified that he was able to get both within his lane of travel. When he looked back up, he saw the second truck, driven by Pugh, come out from behind Thomas's chip truck and into his lane of travel. Taylor started blinking his headlights and decelerating. The Pugh truck started back into its own lane, got partially in, then came back into Taylor's lane of travel. Pugh never moved back into his own lane prior to the collision.

Thomas and Pugh both had citizen's band ("CB") radios in their trucks. Thomas testified that when he saw the defendant's pickup and corn chopper, he told Pugh over his CB radio that they needed to stop. Thomas then applied his brakes. At that point, Pugh said over his CB to Thomas, "Oh my God, I can't stop," and moved into the left lane, to keep from hitting Thomas. Pugh's speed was between 50 and 70 miles an hour at the time of the incident.

The defendant testified that Pugh's truck appeared to be [**4] going faster than Thomas's truck, which it was passing. In order to avoid hitting the speeding truck, the defendant testified that he attempted to turn his truck and chopper into Thomas's lane of travel; however, before he could get both the pickup and chopper completely into the other lane, Pugh's truck struck the right front edge of the chopper.

The impact occurred in what had originally been the defendant's lane of travel. The impact caused the pickup truck to come to a complete stop. Thomas was able to stop his chip truck and avoid a head-on collision with the defendant. Pugh's log truck traveled another 61 feet after impact before striking the bridge railing. It then continued down the bridge, knocking down 106 feet of railing, before falling to the ground and bursting into flames. Pugh died of burns he received from the fire. There were no skid marks.

The width of the defendant's corn chopper was 10 feet, 3 inches, the chip and log trucks were both 8 feet wide, and the roadway on the bridge between the white lines was 18 feet, 2 inches wide. There was an additional 10 inches on either side between the white line and the edge of the bridge abutment. In other words, while the [**5] total vehicle measurements were 18 feet 3 inches, there was maneuvering space of 19 feet, 10 inches.

Janice B. Pugh, Pugh's widow, filed a complaint against Taylor, alleging that Taylor's conduct was negligent and wanton and caused the wrongful death of her husband on January 24, 1984. Taylor denied the plaintiff's allegations and contended that the deceased was contributorily negligent.

The case was tried to a jury and at the conclusion of all the evidence, the trial court granted the defendant's motion for directed verdict as to the claim for wantonness. The jury returned a verdict in favor of the defendant, Taylor, on the remaining count of negligence. The court entered a judgment for the defendant and this appeal followed.

Two issues are presented for our review. First, plaintiff contends that the trial court erred in directing a verdict on the wantonness count. Second, plaintiff contends that the trial court erred when it failed to rule [*431] as a matter of law that the width exemption found in Code 1975, § 32-9-22, for "implements of husbandry temporarily propelled or moved upon the highways" was inapplicable to Taylor under the facts of this case.

Plaintiff contends [**6] that the present case is analogous to *Smith v. Bradford*, 475 So. 2d 526 (Ala. 1985), where this Court held that the trial court erred in granting the defendant's motion for directed verdict on the issue of wanton conduct. In *Smith*, a state trooper was traveling between and 80 and 90 miles per hour in order to reduce the distance between his patrol car and a speeding vehicle. He did not turn on his blue lights or siren as required by law, Code 1975, § 32-5A-7.

The trooper testified that while he was pursuing the speeding vehicle, he saw reflectors approximately 300 to 500 feet in front of him, apparently in the right lane of traffic where he was traveling. He then immediately moved over to the left innermost lane, and when it appeared that the reflectors were moving into the left lane, he applied his brakes. His vehicle skidded approximately 265 feet in the left lane. The trooper, believing that he had passed the reflectors, partially released his brakes. He traveled 96 feet and then struck a 13-year-old boy on a bicycle. The boy died four days later.

In *Smith*, this court restated the elements of wanton conduct, quoting from *Kilcrease v. Harris*, 288 Ala. 245, 259 [**7] So. 2d 797 (1972), and *Deaton, Inc. v. Burroughs*, 456 So. 2d 771 (Ala. 1984), as follows:

> """Wantonness" is the conscious doing of some act or the omission of some duty under the knowledge of the existing conditions, and conscious that from the doing of such act or omission of such duty injury will likely or probably result. . . . Wantonness may arise [when one has] knowledge that persons, though not seen, are likely to be in a position of danger, and with conscious disregard of known conditions of danger and in violation of law brings on disaster. . . . Wantonness may arise after discovery of actual peril, by conscious failure to use preventive means at hand. . . . Knowledge need not be shown by direct proof, but may be shown by adducing facts from which knowledge is a legitimate inference.'"

475 So. 2d at 528.

In *Smith*, the plaintiff argued that "the trooper gave no warning of his impending arrival upon the unsuspecting child, he did not activate his spot light to see if he had actually passed the moving reflectors, and he did not even attempt to stop his vehicle because he assumed he had passed the bikes." 475 So. 2d 529. We agreed with the plaintiff [**8] "that a jury could have found he was recklessly indifferent to the consequences." *Id.* at 529.

We also stated in *Smith* that the question of whether there was proof of wantonness must be determined by the facts and circumstances of each case. See, *Deaton, Inc. v. Burroughs, supra*. After a careful review of the record in the present case, we agree with the trial court that the plaintiff failed to produce evidence that defendant Taylor, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty, and that this act or omission produced the injury. *Roberts v. Brown*, 384 So. 2d 1047 (Ala. 1980).

Plaintiff next contends that the trial court erred when it charged the jury on the exemptions found in Code 1975, § 32-9-22. Plaintiff contends that by so charging, the trial court "indicat[ed] to the jury that Taylor was not required to comply with the width limitation and rules and regulations for the movement of oversized loads found in Sections 32-9-20 and -29, Code of Alabama (1975)." This, plaintiff contends, was erroneous and prejudicial to her case.

Code 1975, § 32-9-22(a), reads as follows:

> "(a) [**9] There shall be exempt from the provisions of this article trucks, semitrailer trucks or trailers owned by the United States, or any agency thereof, the state of Alabama, or any county or city, or incorporated town; *nor shall the provisions of this article apply to implements of husbandry temporarily propelled or moved upon the highways*; nor shall the provisions of this article [*432] apply to trucks, semitrailer trucks, or trailers used exclusively for carrying 50 bales or less of cotton." (Emphasis added.)

In *State Department of Public Safety v. Scotch Lumber Co.*, 293 Ala. 330, 302 So. 2d 844 (1974), the lumber company filed an action to enjoin the state from enforcing the truck weight statute against log trucks operating on the public highways. The circuit court granted a preliminary injunction, and this court reversed. We held that although a truck specifically designed for hauling pulpwood from the point of severance to the mill was an "implement of husbandry" within the meaning of § 32-9-22(a), it did not meet the other requirement of being "*temporarily* propelled or moved upon the highways"; thus, it was not exempt from the truck weight and width laws. [**10]

> "Even though these trucks are implements of husbandry, we are of the opinion they are not exempt from the truck weight law under the facts of this case. The key words in § 90 [now § 32-9-22(a)] are '*implements of husbandry temporarily propelled or moved.*' It is reasonable to conclude that when the legislature enacted § 90, it envisioned that in the operation of farming it is often necessary to move vehicles or machines used in farming from one farm to another, or from one area to another, covering a limited distance. And, it is often necessary that they move or be moved for a brief period of time upon a public highway."

293 Ala. at 332, 302 So. 2d at 846.

The evidence in the present case shows that Taylor was not on the highway with his corn chopper for a brief period of time or for a short distance. He was intending to travel some 200 miles, which would take approximately 6 hours. Furthermore, the purpose of the trip was to sell his chopper at an auction. We agree with the plaintiff that as a matter of law, Taylor did not come within the exception found in § 32-9-22(a), and that the trial court erred in submitting that statutory exemption to the jury for [**11] its consideration. However, to warrant reversal, the error must be considered prejudicial. *Underwriters National Assurance Co. v. Posey*, 333 So. 2d 815 (Ala. 1976). Under the facts of this case, no reasonable factfinder could conclude that the failure of Taylor to get a permit and place warning devices on either the pickup or the chopper to warn approaching motorists of his oversized vehicle, as provided for in Code 1975, § 32-9-20 and § 32-9-29, proximately caused this accident. Under the evidence presented at this trial, a jury could only conclude, as this jury did, that the proximate cause of the accident was Pugh's brake failure and his driving his runaway truck in the wrong lane of traffic.

Under the particular facts of this case, we find that the error was harmless, and, therefore, does not warrant a reversal of the case. A careful review of the record

leads us to conclude that the jury's verdict was not influenced by the contested charge.

Thomas testified that prior to the accident Pugh stated that his brakes were not functioning properly. Then immediately prior to the accident, Pugh, upon being told by Thomas to slow down and stop, said, "Oh my God, I can't stop." [**12] As a result, Pugh passed Thomas on a narrow bridge at approximately 50 to 70 miles an hour. The center line was a double yellow line prohibiting passing. No skid marks were found.

Taylor's lack of proper warning devices on his oversized chopper did not cause this unfortunate accident. Furthermore, the evidence indicates that Pugh was negligent in continuing to drive a loaded log truck after experiencing brake difficulties. The contributory negligence of the deceased defeats recovery. *Ross v. United States*, 640 F.2d 511 (5th Cir. 1981).

Having found no error warranting reversal, we affirm the judgment of the trial court.

Affirmed.

James Andrew Ridnour v. Brownlow Homebuilders, Inc., and John David Brownlow

2100851

COURT OF CIVIL APPEALS OF ALABAMA

100 So. 3d 554; 2012 Ala. Civ. App. LEXIS 69

March 16, 2012, Released

SUBSEQUENT HISTORY: Released for Publication November 27, 2012.

As Amended June 22, 2012.

Rehearing denied by Ridnour v. Brownlow Homebuilders, Inc., 2012 Ala. Civ. App. LEXIS 326 (Ala. Civ. App., Apr. 18, 2012)

PRIOR HISTORY: [**1]

Appeal from Limestone Circuit Court. (CV-07-347), James W. Woodroof, Jr., Trial Judge.

Ridnour v. Brownlow Homebuilders, Inc., 2011 Ala. Civ. App. LEXIS 1256 (Ala. Civ. App., Oct. 12, 2011)

DISPOSITION: AFFIRMED.

CORE TERMS: fire marshal, building code, fire prevention, residential construction, municipality, residential, county commission, building laws, ordinance, limine, residential buildings, offer of proof, home building, materialman's, statewide, empowered, matter of law, power to adopt, purported, excluding, prescribe, explosive, builders, exit, Ala Acts, state laws, construction contract, construction industry, standards of practice, unincorporated areas

COUNSEL: For Appellant: Michael C. Lambert, Athens.

For Appellees: James M. Corder, Mitchell K. Shelly, Alexander, Corder, Plunk & Shelly, P.C., Athens.

JUDGES: MOORE, Judge. Thompson, P.J., and Pittman, Bryan, and Thomas, JJ., concur.

OPINION BY: MOORE

OPINION

[*555] MOORE, Judge.

James Andrew Ridnour appeals from a judgment entered by the Limestone Circuit Court ("the trial court") on a jury's verdict in favor of Brownlow Homebuilders, Inc. ("BHI"), awarding BHI $55,461.96 on its claim of breach of contract and from judgments as a matter of law entered by the trial court on claims asserted by Ridnour against BHI and John David Brownlow. We affirm.

Procedural History

The pertinent procedural history is as follows. In September 2007, BHI sued Ridnour alleging that Ridnour had failed to pay the last installment due under the terms of a residential construction contract and seeking a declaration of the validity and enforcement of a materialman's lien against the property. Ridnour answered the complaint and asserted counterclaims against BHI alleging, among other things, breach of contract and slander of title. With the approval of the trial court, Ridnour joined John David Brownlow as a defendant, in his individual capacity, asserting the same claims against Brownlow as had been made against BHI. In May 2009, the trial [**2] court granted Ridnour's motion for leave to amend his counterclaim in order to allege latent defects in the construction of the residence and for a continuance. After the recusal of the first trial judge and several continuances, the case went to trial in April 2011.

The day before jury selection was to begin, the trial court heard arguments on a motion in limine filed by BHI and Brownlow in August 2010, requesting that the trial court exclude from the trial any arguments or evidence based on the 1997 Standard Building Code. The trial court granted that motion, stating in a written order that

> "there existed no building code in the unincorporated areas of Limestone County for the relevant time frame of the case at hand. The State Fire Marshal's purported adoption of a residential building code has no application to this case."

[*556] During the subsequent trial, near the end of the presentation of his case, Ridnour, as an offer of proof made outside the presence of the jury, called Alabama State Fire Marshal Ed Paulk, who testified regarding his office's adoption of the 1997 Standard Building Code. Ridnour further moved the trial court to take judicial notice of certain state laws and regulations [**3] that, Ridnour argued, authorized the State Fire Marshal to adopt the 1997 Standard Building Code. Ridnour further offered expert testimony and exhibits summarizing the alleged violations of the 1997 Standard Building Code committed in the construction of the residence. After receiving the offer of proof, the trial court maintained its ruling on the motion in limine and denied the judicial-notice motion.

At the close of the evidence, Ridnour voluntarily dismissed his breach-of-contract claim against BHI. The trial court disposed of all of Ridnour's remaining claims against Brownlow and BHI by granting their respective motions for a judgment as a matter of law ("JML") pursuant to Rule 50, Ala. R. Civ. P. The trial court denied Ridnour's motion for a JML on the breach-of-contract claim filed by BHI, submitting that claim to the jury.[1] After deliberating, the jury returned a verdict in favor of BHI in the amount of $55,461.96, and the trial court entered a judgment on that verdict without objection on April 26, 2011. Ridnour did not file any postjudgment motions, and he timely appealed the trial court's judgment.[2]

1 The record contains no judgment as to BHI's claim for enforcement of its [**4] materialman's lien. In his answer, Ridnour properly demanded that that claim be submitted to the jury. See Cumens v. Garrett, 294 Ala. 535, 319 So. 2d 665 (1975) (a party may demand jury on issue of enforcement of materialman's lien). BHI did not object to the jury instructions or the verdict, which did not include any mention of the materialman's lien. Therefore, we conclude that BHI has waived that claim. See Foster v. Prince, 224 Ala. 523, 141 So. 248 (1932) (when jury verdict awarded contract damages only, court could not later amend judgment to declare and enforce lien). The judgment is therefore final and will support an appeal.

2 Ridnour appealed to this court, but the appeal was transferred to our supreme court because the amount of the judgment exceeded $50,000 and, thus, was outside this court's appellate jurisdiction. See § 12-3-10, Ala. Code 1975. Our supreme court deflected the appeal back to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Issues

On appeal, Ridnour raises eight different issues. We do not reach the sixth issue, in which Ridnour argues that BHI did not present sufficient evidence that it was a party to the residential construction contract, because Ridnour [**5] did not properly preserve that issue for appeal. See United Servs. Auto. Ass'n v. Hobbs, 858 So. 2d 966, 971-72 (Ala. Civ. App. 2003) (recognizing that, when a party wishes to challenge the sufficiency of the evidence, that party must follow the "precise plan" of Rule 50, Ala. R. Civ. P., which requires that the party move for a JML at the close of all the evidence and make a postverdict or renewed motion for a JML). This court will not consider Ridnour's seventh issue -- that the trial court erred in granting the motion for a JML filed by BHI on his slander-of-title claim -- because Ridnour does not cite any legal authority in support of that argument. See Rule 28(a)(10), Ala. R. App. P.; and Asam v. Devereaux, 686 So. 2d 1222, 1224 (Ala. Civ. App. 1996) ("This court will address only those issues properly presented and for which supporting authority has been cited."). We also do not reach Ridnour's eighth issue, in which Ridnour argues that the trial court erred in entering a JML on Ridnour's claim that the residence was not [*557] constructed in compliance with the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq., again due to Ridnour's failure to cite any legal authority. Id.

Ridnour's [**6] first five issues all relate to the correctness of the trial court's ruling excluding any evidence of the applicability of or violations of the 1997 Standard Building Code. We will address those issues because they have been properly preserved, see State v. Askew, 455 So. 2d 36 (Ala. Civ. App. 1984) (noting that the party seeking review of a denial of a motion in limine generally must make an offer of proof at trial to preserve the issue for appellate review), and argued.

Analysis

On appeal, Ridnour argues that the trial court erred in excluding evidence regarding the 1997 Standard Building Code because that code had been lawfully promulgated through the office of the state fire marshal and the commissioner of insurance and that code established the mandatory residential construction standards that were applicable statewide at the time of the contract and construction of the residence at issue. We disagree.

Pursuant to § 27-2-10(a), Ala. Code 1975, the state commissioner of insurance "shall prescribe the ... duties of ... a State Fire Marshal." The commissioner of insurance has not adopted any rules or regulations setting out

the duties of the state fire marshal, but those duties are [**7] described in Chapter 19 of Section 36 of the Alabama Code of 1975 and, under § 27-2-17 (a), Ala. Code 1975, no rule or regulation of the commissioner of insurance "shall extend, modify, or conflict with any law of this state or the reasonable implications thereof." Thus, the commissioner of insurance would have authority only to prescribe duties of the state fire marshal that are in line with those duties established by the more specific laws regulating the duties of that officer, and the commissioner of insurance cannot confer additional powers on the state fire marshal that have been withheld by the legislature.

The only statute empowering the state fire marshal to adopt regulations of any kind is § 36-19-9, Ala. Code 1975. That section provides:

> "The Fire Marshal, subject to the approval of the Commissioner of Insurance, shall make regulations for fire prevention and protection of any construction or building, exits or other safety measures and the keeping, storing, use, manufacture, sale, handling, transportation or other disposition of rubbish and highly inflammable materials, gunpowder, dynamite, carbide, crude petroleum or any of its products, explosives or inflammable fluids [**8] or compounds, tablets, torpedoes or any explosive of like nature including all fireworks, and may prescribe the material and construction of receptacles and buildings to be used for any of said purposes."

(Emphasis added.) It is well settled that "[w]ords used in [a] statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says." Tuscaloosa Cnty. Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa Cnty., 589 So. 2d 687, 689 (Ala. 1991). The word "any" is a broad term, Pappenburg v. State, 10 Ala. App. 224, 229, 65 So. 418, 420 (1914), synonymous with "all," see Neal v. Watkins, 12 Ala. App. 593, 594-95, 68 So. 552, 553 (1915) (construing statutory phrase "all questions of fact" to mean "any question of fact that might be submitted to a jury"), so that the phrase "any construction or building" would encompass every type of construction or building, including residential construction and residential [*558] buildings. Thus, there can be no question that the state fire marshal can make regulations applicable to residential construction and buildings within the state.

Section 36-19-9, [**9] however, plainly states that those regulations shall be for the limited purpose of "fire prevention and protection." The office of the state fire marshal was created by our legislature, see Ala. Acts 1919, No. 701, p. 1013, § 2, and, like any other creature of statute, the state fire marshal "can exercise only those powers which are expressly conferred upon [him or her], or necessarily incident thereto." County Bd. of Educ. v. Slaughter, 230 Ala. 229, 232, 160 So. 758, 760 (1935). Hence, we conclude that the state fire marshal is empowered by § 36-19-9 to make regulations affecting residential construction and residential buildings only insofar as those regulations relate to fire prevention and protection.

In reaching our conclusion, we note that the legislature specifically empowered the state fire marshal to enter into "any building or premises" in the state, but only for "the purpose of making an investigation or inspection which under the provisions of this article he [or she] may deem necessary to be made." § 36-19-4, Ala. Code 1975 (emphasis added); see also § 36-19-11, Ala. Code 1975 (authorizing state fire marshal to inspect any building to determine if it is "especially liable [**10] to fire and is situated so as to endanger life or property"). Section 36-19-1, Ala. Code 1975, provides that the state fire marshal may act as a statewide peace officer. Section 36-19-2, Ala. Code 1975, provides that the state fire marshal can enforce state laws, regulations, and ordinances relating to:

> "(1) Prevention of fires;
>
> "(2) Storage, sale and use of combustibles and explosives;
>
> "(3) Installation and maintenance of automatic and other fire alarm systems and fire extinguishing equipment;
>
> "(4) Construction, maintenance and regulation of fire escapes;
>
> "(5) The means and adequacy of exits in case of fire from factories, asylums, hospitals, churches, schools, halls, theaters, amphitheaters and all other places in which numbers of persons live, work or congregate from time to time for any purpose or purposes;
>
> "(6) Suppression of arson, and the investigation of the cause, origin and circumstance of fires."

No section of article 19 expressly or impliedly gives the state fire marshal the authority to inspect or investigate a residential building for design or construction flaws

other than for the purpose of fire prevention or protection.[3]

> 3 Section 36-19-2 provides that, in addition to the duties [**11] and powers set out in article 19, the state fire marshal "shall have such other powers ... as may be ... imposed upon [him or her] from time to time by the laws of this state." Ridnour has not directed this court to, and we have not independently discovered, any law found elsewhere in the Alabama Code of 1975 that authorizes the state fire marshal to adopt or to enforce regulations for residential construction within this state, other than for fire-prevention and fire-protection purposes.

"It is the duty of the court to construe every word in each section of a statute consistent with the other sections in pari materia." Winner v. Marion Cnty. Comm'n, 415 So. 2d 1061, 1063 (Ala. 1982). Our construction of § 36-19-9 corresponds exactly with the powers and duties of the state fire marshal as described in the other sections of article 19. Those sections reinforce our conclusion that the power of the state fire marshal to promulgate or adopt regulations regarding residential construction and buildings is limited to the subject [*559] matter of fire prevention and protection and that the state fire marshal lacks any authority to regulate residential construction and residential buildings for any [**12] other purpose.

The legislature no doubt knows how to employ language to authorize a governmental agency to adopt a general residential building code. For example, § 11-45-8(c), Ala. Code 1975, specifically provides that municipalities may pass ordinances that

> "adopt by reference thereto, without setting the same out at length in the ordinance, rules, and regulations which have been printed as a code in book or pamphlet form for:
>
> > "(1) The construction, erection, alteration, or improvement of buildings."

Section 41-9-166, Ala. Code 1976, provides that any municipality and any county commission may similarly adopt by reference building codes "published by the Southern Building Code Congress International" to apply to "private buildings and structures" within their jurisdiction. The legislature has not used similar language in describing the powers of the state fire marshal. See Ex parte Jackson, 614 So. 2d 405, 407 (Ala. 1993) (stating that the legislature knows how to draft a statute to reach a particular end and that "[t]he judiciary will not add that which the Legislature chose to omit").

In 1992, the legislature enacted its most recent and most specific law relating to the adoption of [**13] residential building codes. Act No. 92-608, Ala. Acts 1992, codified as amended at Ala. Code 1975, § 34-14A-1 et seq., created the Home Builders Licensure Board ("the Board"). The legislative intent of Act No. 92-608 is stated in § 34-14A-1:

> "In the interest of the public health, safety, welfare, and consumer protection and to regulate the home building and private dwelling construction industry, the purpose of this chapter, and the intent of the Legislature in passing it, is to provide for the licensure of those persons who engage in home building and private dwelling construction, including remodeling, and to provide home building standards in the State of Alabama. ... The Legislature finds it necessary to regulate the residential home building and remodeling construction industries."

(Emphasis added.) In § 34-14A-12, Ala. Code 1975, the Legislature has provided, in pertinent part:

> "(a) The board is authorized to establish or adopt, or both, standards of practice for residential home builders within the state.
>
> "(b) The county commissions of the several counties are authorized and empowered to adopt building laws and codes by ordinance which shall apply in the unincorporated areas of the [**14] county. The building laws and codes of the county commission shall not apply within any municipal police jurisdiction, in which that municipality is exercising its building laws or codes, without the express consent of the governing body of that municipality. The building laws and codes of the county commission may apply within the corporate limits of any municipality with the express consent of the governing body of the municipality. The county commission may employ building inspectors to see that its laws or codes are not violated and that the plans and specifications for buildings are not in

> conflict with the ordinances of the county and may exact fees to be paid by the owners of the property inspected.
>
> ....
>
> "(d) The county commissions, municipalities, and other public entities are [*560] hereby authorized to enter into mutual agreements, compacts, and contracts for the administration and enforcement of their respective building laws and codes."

(Emphasis added.)

By virtue of the foregoing statutes, the legislature has expressly granted county commissions the authority to adopt general residential building codes and laws, which, in turn, can be adopted by municipalities, see Murry v. City of Abbeville, 997 So. 2d 299 (Ala. 2008), [**15] and empowered the Board to develop standards of practice for home builders to assure compliance with those codes. It would be inconsistent with this express statutory scheme, which follows the historical pattern of giving county commissions and municipalities the power to adopt general residential building codes suitable to their particular jurisdictions, to conclude that the state fire marshal also holds the power to adopt general building codes that would be applicable statewide.

Harmonizing the various statutory and regulatory provisions together, as we are required to do, see Ex parte Jones Mfg. Co., 589 So. 2d 208, 211 (Ala. 1991) ("Statutes should be construed together so as to harmonize the provisions as far as practical."), we hold that only county commissions and municipalities have the power to adopt general residential construction and building codes but that the state fire marshal may adopt residential construction and building codes relating to fire prevention and protection applicable statewide that supersede the municipal and county codes to the extent they are inconsistent with the code adopted by the state fire marshal. See Alabama Dep't of Revenue v. Jim Beam Brands Co., 11 So. 3d 858, 862-63 (Ala. Civ. App. 2008) [**16] ("[A] specific statute relating to a specific subject is regarded as an exception to and must prevail over a general statute relating to a broad subject.").

At the time of the contract and construction of the residence at issue in this case, Ala. Admin. Code, Rule 482-2-101-.02(1), promulgated by the Department of Insurance, provided that "[t]he Standard Building Code, 1997 Edition, is adopted by reference as a regulation of the State Fire Marshal, with certain exceptions as listed in this rule." Ridnour argues that that regulation should be given the force of law. See Standard Oil Co. v. City of Gadsden, 263 F. Supp. 502, 508 (N.D. Ala. 1967) ("Being adopted pursuant to legislative authority, the official regulations of the State Fire Marshal are to be given the effect of law."). However, to the extent that portions of the 1997 Standard Building Code did not relate to fire prevention and protection,[4] under § 36-19-9, the state fire marshal lacked the authority to adopt them and, pursuant to § 27-2-17, the commissioner of insurance could not adopt them, so they would be considered ""'a mere nullity.'"" See Alabama Dep't of Revenue v. Jim Beam Brands Co., 11 So. 3d at 864 (quoting Ex parte City of Florence, 417 So. 2d 191, 193-94 (Ala. 1982)).

> 4 In [**17] 2006, Ala. Admin. Code (Dep't of Ins.), Rule 482-2-101-.03(1), provided: "The Standard Fire Prevention Code, 1994 Edition, is adopted by reference as a regulation of the State Fire Marshal, with certain exceptions as listed in this rule." Our decision should not be construed as holding that that regulation does or does not apply to residential construction and buildings or that it is or is not valid.

As part of Ridnour's offer of proof, Paulk testified that the 1997 Standard Building Code included standards regarding: the number of brick ties and anchor bolts to be used; the proper construction of brick-veneer walls; the use of weepholes;[5] [*561] the use of concrete reinforcement in the construction of foundation walls; the construction of block piers; and the construction of homes accessible to handicapped individuals. Ridnour's expert witnesses were prepared to opine that BHI had violated those standards in constructing the residence at issue. However, Paulk did not indicate that those standards related to fire prevention and protection, and, on appeal, Ridnour does not argue that they do. This court is convinced that those standards are not intended for fire prevention and protection and [**18] that they were not within the authority of the state fire marshal or the commissioner of insurance to adopt.

> 5 According to the evidence in the record, "weepholes" are openings incorporated into the brick veneer and foundational materials to allow water and condensation to escape from the foundation area.

In its order granting the motion in limine, the trial court found that "[t]he State Fire Marshal's purported adoption of a residential building code has no application to this case." Because it is not necessary for our decision, we do not decide whether all the portions of the 1997 Standard Building Code adopted in the 2006 version of Rule 482-2-101-.02 are void because they are unrelated to fire prevention and protection, but we do

hold, as a matter of law, that those portions upon which Ridnour and his witnesses relied were not effective and did not govern the construction of the residence at issue.[6] The trial court, therefore, correctly granted the motion in limine, properly excluding all evidence relating to those standards and their alleged violation, see Foster v. Kwik Chek Super Markets, Inc., 284 Ala. 348, 349-50, 224 So. 2d 895, 896 (1969) (requirements in city code regarding [**19] slope of exit ramps that were not in effect at time of accident and that did not apply to particular structure at issue were not relevant and were properly excluded as inadmissible to prove negligence in slip-and-fall action), and it committed no reversible error by failing to take judicial notice of the statutes and administrative regulations under which the state fire marshal and commissioner of insurance purported to adopt them. See Rule 45, Ala. R. App. P. ("No judgment may be reversed ... unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."). The judgment of the trial court is, therefore, affirmed.

6 We make no comment as to the applicable standard because that issue is not before the court.

AFFIRMED.

Thompson, P.J., and Pittman, Bryan, and Thomas, JJ., concur.

City of Robertsdale, a municipal corporation v. Baldwin County, Alabama

Civ. No. 6246

Court of Civil Appeals of Alabama

538 So. 2d 33; 1988 Ala. Civ. App. LEXIS 376

November 30, 1988

PRIOR HISTORY: [**1] On Remand from the Supreme Court of Alabama.

DISPOSITION: REVERSED AND REMANDED WITH INSTRUCTIONS.

CORE TERMS: municipal, building permits, planning commission, municipality, functional, police power, corporate limits, disputed, power to issue, issuance, building code, authority to issue, located outside, assumed jurisdiction, unincorporated areas, sea level, territory, presently, ordinance, feet, exercise jurisdiction, ordinance requiring, divest, mile, county contends, county's authority, proposed construction, general revenue, governmental powers, pretermitted

COUNSEL: Robert S. MacLeod, Robertsdale, Alabama.

Taylor D. Wilkins, Bay Minette, Alabama.

JUDGES: Ingram, Judge, Bradley, P.J., and Holmes, J., concur.

OPINION BY: INGRAM

OPINION

[*34] ON REMAND FROM THE SUPREME COURT OF ALABAMA

This case comes to us on remand from the Supreme Court of Alabama. In our original opinion, we affirmed the trial court on the basis of *Ex parte City of Leeds*, 473 So. 2d 1060 (Ala. 1985). *City of Robertsdale v. Baldwin County*, 538 So. 2d 30 (Ala. Civ. App. 1988) (hereinafter cited as *Robertsdale I*). However, at the urging of the appellant herein, the supreme court overruled *City of Leeds, supra*, and remanded the case to this court for consideration of the issues pretermitted by our decision in *Robertsdale I. Ex parte City of Robertsdale*, 538 So. 2d 31 (Ala. 1988). The major issue pretermitted by *Robertsdale I* was whether the City of Robertsdale (city), Baldwin County (county), or both, have the power to issue building permits regulating the use and design of structures within the city's police jurisdiction but outside its corporate limits. The trial court held, *inter alia*, [**2] that the county had a superior power to issue such permits by virtue of § 11-24-5, Code 1975 (Cum. Supp. 1988). We disagree with the trial court's conclusion.

Alabama statutes regulating land use planning, including issuance of building permits, make a clear distinction between regulation of subdivisions and regulation of areas not located within subdivisions. We will, therefore, discuss those areas separately.

I. Subdivisions

The trial court determined that § 11-24-5, Code 1975 (Cum. Supp. 1988), grants the county superior authority to issue building permits in all the territory located outside the city's corporate limits but inside its police jurisdiction. This was error.

Section 11-24-5 provides:

> "No county shall exercise jurisdiction under provisions of this chapter within the jurisdiction of any municipal planning commission presently organized and functional or which shall become organized and functional within six months of the date the county assumes such jurisdiction by publishing and adopting notice thereof."

The chapter referred to in § 11-24-5 is entitled "Regulation of Subdivisions" and encompasses § 11-24-1 through § 11-24-7. Section 11-24-1 provides that a county [**3] may regulate the minimum size of lots, planning of public streets, and several other aspects of *proposed subdivisions* located "outside the corporate limits of any municipality in said county." We fail to see how a statute regarding regulation of subdivisions can grant a county power to issue permits for construction throughout a city's police jurisdiction. If § 11-24-5 has any application at all in this case, it is within subdivi-

sions only. Nothing in chapter 24 of Title 11 authorizes a county to regulate any construction outside a "proposed subdivision." The trial court therefore erred in applying § 11-24-5 to the entire area in dispute.

Under the circumstances of this case, the trial court further erred in its application of § 11-24-5. Section 11-24-5 limits the county's power to regulate subdivisions located outside the corporate limits of a municipality in that it may *not* regulate subdivisions within the jurisdiction of a municipal planning commission (1) which was "presently organized and functional" or (2) which became organized and functional [*35] within six months after the county assumed jurisdiction. The county contends, and the trial court found, that the county "assumed [**4] jurisdiction" pursuant to § 11-24-1 when it began issuing building permits in unincorporated areas of the county in 1972. Since Robertsdale's municipal planning commission was not organized until 1978, the trial court concluded that it had not been organized and functional within six months after the county assumed jurisdiction.

Although the trial court's reasoning in this regard is sound, it ignores one very important aspect of the statute. That is that a county may not exercise jurisdiction pursuant to § 11-24-1 within the jurisdiction of a municipal planning commission "presently organized and functional." Chapter 24 of Tit. 11 became law on July 30, 1979. *Acts of Alabama 1979*, Act No. 553, Regular Session, July 30, 1979, pp. 1002-04. Clearly, the legislature intended that no county exercise jurisdiction under § 11-24-1 within the jurisdiction of a municipal planning commission "organized and functional" as of that date. The evidence showed that Robertsdale did not actually issue building permits until 1982, but there was undisputed evidence that its municipal planning commission was "organized and functional" as of 1978. Thus, that body was "presently organized and functional" [**5] at the time the legislature enacted § 11-24-5. The county is precluded from exercising jurisdiction pursuant to § 11-24-1 over any area within the jurisdiction of Robertsdale's municipal planning commission, and the trial court erred in holding otherwise.

We must, therefore, determine whether the disputed area was within the jurisdiction of the city's municipal planning commission.

Section 11-52-30, Code 1975, grants a municipal planning commission jurisdiction over the subdivision of (1) all land within the municipality, and (2) all land within five miles of the corporate limits of the municipality which is not located in another municipality. Section 11-52-31, Code 1975, authorizes each municipal planning commission to adopt regulations governing the subdivision of land within its jurisdiction. *City of Mobile v. Waldon*, 429 So. 2d 945 (Ala. 1983). Section 11-40-10, Code 1975, outlines the police jurisdiction of municipalities in Alabama. That section provides, in pertinent part:

> "The police jurisdiction in cities having 6,000 or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than 6,000 inhabitants and [**6] in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town."

Thus, the territorial jurisdiction of a municipal planning commission includes all the land within that municipality's police jurisdiction.

Furthermore, § 11-52-36, Code 1975, provides that once a municipal planning commission assumes jurisdiction over the subdivision of land as provided in § 11-52-31, that jurisdiction is exclusive. Section 11-52-30(b) grants the county the authority to "approve plats" within the extraterritorial jurisdiction of a municipal planning commission. But after the plat has been approved, the municipal planning commission has exclusive jurisdiction over development of the subdivision, pursuant to § 11-52-36. A regulation requiring issuance of building permits falls within the authority of the municipal planning commission to "adopt regulations governing the subdivision of land within its jurisdiction." § 11-52-31, Code 1975. *See City of Mobile v. Waldon, supra; Smith v. City of Mobile*, 374 So. 2d 305 (Ala. 1979).

Robertsdale's municipal planning commission assumed jurisdiction over subdivisions within [**7] the City's police jurisdiction when it became organized and functional in 1978. That jurisdiction is exclusive and § 11-24-5 does not divest the commission of jurisdiction. Therefore, the trial court erred in invoking § 11-24-5. The city, through its municipal planning commission, has exclusive power to issue permits for construction of buildings within subdivisions in the city's police jurisdiction.

[*36] *II. Areas Not Within Subdivisions*

All the statutes discussed above relate to the regulation of subdivisions. Thus, the authority to issue building permits in areas located outside subdivisions must be predicated on some other statute. The city asserts that its general police power over the disputed area, granted by § 11-40-10, gives it the superior power to issue building permits in the area. Under the circumstances of this case, we agree.

In addition to prescribing the limits of a city's police jurisdiction as noted above, § 11-40-10 provides:

> "Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof shall have force and effect in the limits of the city or town and in the police jurisdiction thereof and on any [**8] property or rights-of-way belonging to the city or town."

The first question then is whether an ordinance requiring issuance of building permits is a "police regulation." Police regulations include "all appropriate ordinances for the protection of the peace, safety, health and good morals of the people affected thereby." *City of Homewood v. Wofford Oil Co.*, 232 Ala. 634, 169 So. 288 (1936). In addition, a police regulation may not be primarily designed to raise general revenue for the city. *City of Mountain Brook v. Beaty*, 349 So. 2d 1097 (Ala. 1977).

The ordinance herein meets all those requirements. The regulation of "construction, erection, alteration or improvement of buildings" is an appropriate subject for municipal ordinances. § 11-45-8(c)(1), Code 1975. The mayor of Robertsdale testified that the fees collected upon issuance of building permits are used to partially defray the cost of building inspection, not as general revenue for the city. Undoubtedly, an ordinance requiring issuance of building permits prior to construction serves a substantial and legitimate governmental interest in the safety of the citizens governed thereby. We are, therefore, convinced that [**9] the city's ordinance requiring procurement of a building permit prior to construction of a building within the city's police jurisdiction was a valid exercise of the police power granted to the city by § 11-40-10.

A municipality is created by the State as a convenient agency for exercising such of the State's governmental powers as may be entrusted to them. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 99 S. Ct. 383, 58 L. Ed. 2d 292 (1978). The State has broad discretion as to the number, nature, and duration of the governmental powers delegated to a municipality. *Holt Civic Club, supra*. The State of Alabama has entrusted a general police power to each municipality over a narrow strip of land just outside the municipality's corporate limits. In the absence of authority to the contrary, each municipality may exercise all aspects of that police power.

We must consider, then, whether any authority overrides the general police power of the City of Robertsdale to issue building permits in the disputed area. The county contends that its adoption of the state building code overrides the city's police power. We disagree because the county has not shown that its adoption of [**10] the state building code applies to the area in question.

Section 41-9-166, Code 1975, grants counties the authority to adopt the state building code and to enlarge the applicability of that code. The county presented evidence that it did in fact enact the state building code by a resolution dated March 2, 1972, and that it has required building permits for construction in all unincorporated areas of the county since that resolution went into effect on April 1, 1972. That resolution provides, in part:

> "Beginning April 1, 1972, a building permit for all proposed construction or other improvements in the unincorporated areas of Baldwin County, Alabama, which are less than twenty (20) feet above Mean Sea Level . . . shall be required; and no construction shall be begun in said area until and unless a building permit has been issued by Baldwin County, Alabama, and the plans and specifications for such proposed construction [*37] or other improvements have been approved."

By its terms, this resolution applies only to "unincorporated areas of [the county] which are less than twenty feet above Mean Sea Level." There was no proof that any of Robertsdale's police jurisdiction lies in an area which [**11] is less than twenty feet above sea level. Thus, the county may not rely on this resolution nor on § 41-9-166 to show it has the power to issue building permits in the disputed area. The trial court found that the county had, in actual practice, been issuing permits for construction in the disputed area since 1972. The only evidence in the record of the county's authority to do so is found in the resolution quoted above. However, absent proof that the disputed area, or some part thereof, lies less than twenty feet above sea level, that resolution fails to show the county's authority to issue these permits, and the trial court erred in relying on the resolution.

We express no opinion as to whether a validly enacted county resolution adopting the state building code in the disputed area could divest the city of its general police power jurisdiction. In this case, the city enacted a valid police regulation requiring permits for construc-

tion of buildings within its police jurisdiction. The county has shown no authority which divests the city of its jurisdiction, nor has it proven its own authority to issue building permits in the disputed area. The trial court erred in holding that the [**12] county may issue these permits.

III. Conclusion

The Alabama legislature obviously envisioned co-operation between county governments and municipal governments in the regulation of land use. *See* § 11-24-6, Code 1975 (Cum. Supp. 1988). However, when that cooperation is not forthcoming, the legislature has provided a statutory scheme for resolution of disputes.

The municipal planning commission of the City of Robertsdale has exclusive statutory authority to issue permits for construction of buildings in subdivisions within the commission's jurisdiction. That jurisdiction includes all the territory within the city's police jurisdiction. In addition, the City of Robertsdale, under its general police power, has the authority to issue permits for construction of buildings within its police jurisdiction. Baldwin County has not shown that its power to issue building permits in that area is superior to that of the city.

We, therefore, reverse the trial court's decision and remand this case to the trial court for issuance of an order consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Bradley, P.J., and Holmes, J., concur.

Guy ROLLINGS v. MARSHALL COUNTY et al.

No. 8 Div. 803

Supreme Court of Alabama

263 Ala. 317; 82 So. 2d 428; 1955 Ala. LEXIS 627

June 30, 1955

SUBSEQUENT HISTORY: [***1] Rehearing Granted September 15, 1955.

DISPOSITION: Application for rehearing granted. Decree of the lower court modified and affirmed.

CORE TERMS: surface, farm-to-market, referendum, license tax, proviso, per gallon, gallonage, gasoline, decree, pledge, soft, special tax, debt limit, indebtedness, issuance, levy, county commissioners, sinking fund, modified, bridges, pocket part, constitutional provision, constitutional grant, self-executing, authority conferred, gasoline tax, taxable property, used exclusively, hard surfaced, interest-bearing

COUNSEL: Guy Rollings, pro se.

Act No. 385 (Acts 1953, p. 456) is unconstitutional and void. Levy of the tax thereunder and pledge of proceeds thereof are invalid and cannot be validated or confirmed. Constitutional Amendment LXVI is a grant of authority to the county to levy and collect a tax when authorized by a referendum. Such a referendum was held and the majority voted against it. A similar grant by legislative act, without the requirement of a referendum would render meaningless the constitutional amendment. 11 Am.Jur. 667, § 57.

Scruggs & Scruggs, Guntersville, and Dumas, O'Neal & Hayes, Birmingham, for appellees.

Act No. 385 of 1953 is valid and constitutional. There are important differences between the act and Constitutional Amendment LXVI. The decree validating and confirming this act, the levy of the tax thereunder and the pledge of the proceeds of the tax should be affirmed. Standard Oil Co. v. Limestone County, 220 Ala. 231, 124 So. 523; Hill v. Moody, 207 Ala. 325, 93 So. 422; Capital City Water Co. v. Board of Revenue, 117 Ala. 303, 23 So. [***2] 970; Southern R. Co. v. St. Clair County, 124 Ala. 491, 27 So. 23; Walcott v. People, 17 Mich. 68; Vertrees v. State Board of Elections, 141 Tenn. 645, 214 S.W. 737; State v. Cheyenne County, 127 Neb. 619, 256 N.W. 67; Aubol v. Engeseth, 66 N.D. 63, 262 N.W. 338, 100 A.L.R. 853.

White, Bradley, Arant, All & Rose, Wm. Alfred Rose and Ellene Winn, Birmingham, amici curiae, on application for rehearing.

JUDGES: Livingston, C. J., and Lawson, Stakely and Merrill, JJ., concur.

OPINION BY: PER CURIAM

OPINION

[*319] [**429] This is an appeal from a decree of the Circuit Court, in equity, of Marshall County, validating certain described proposed revenue warrants of the county under authority of sections 169 et seq., Title 7, Code of 1940.

The county commission passed a resolution authorizing the issuance of warrants bearing interest at two per cent per annum. They are to be due semiannually to and including January 1, 1965, and to be payable solely out of a sinking fund there provided to be set up. The county obligates itself to pay into the sinking fund a sum sufficient for the payment of the principal and interest on the warrants as they mature, but solely out of (1) a privilege tax not [***3] exceeding one cent per gallon on gasoline as there provided under authority of an act of the legislature, said act being No. 385, approved August 26, 1953, Acts 1953, page 456, and (2) subject to a prior pledge thereof, the proceeds of the special tax of one-fourth of one percent on the value of taxable property in the county as authorized by section 215 of the Constitution and section 186, Title 12, Code, to pay debts, etc., for public buildings, bridges or roads, but only to the extent that the gasoline tax of one cent, *supra*, is not sufficient to pay the principal and interest on the bonds; and the county proposes to irrevocably pledge to such payment a sufficient amount of the proceeds of said special tax so agreed to be levied and collected. The warrants are declared to be in anticipation of the receipt of the above taxes. The full faith and credit

of the county are not [**430] pledged to the payment of the warrants. For payment of such warrants the holders must look solely to the proceeds of the taxes pledged to the payment thereof. The county assigns and pledges for the benefit of the holders the sinking fund and so much of said specified taxes as may be necessary for [***4] that purpose.

The bill of complaint alleges that the assessed value of the taxable property in the county is $ 18,999,785, and that its general indebtedness is the sum of $ 163,600, not including claims payable solely out of its share of the State's six cents gallonage tax on gasoline, section 657, Title 51, as amended, pocket part Code, for which the county has issued revenue warrants so payable.

The inquiry involves Act No. 385 of August 26, 1953, and Amendment LXVI to the Constitution, which was proclaimed ratified January 15, 1948. That amendment authorizes the governing body of Marshall County, when empowered to do so by a majority of the qualified electors of the county voting in a referendum for that purpose, to levy and collect a county license tax of not exceeding three cents per gallon on gasoline, etc. The amendment, supra, provides that the proceeds of the gallonage tax shall be used exclusively for the "construction and maintenance of *hard surface* farm-to-market roads in the county". The Act No. 385, provides that the revenues derived from the tax or taxes authorized therein shall be paid into the county treasury, kept in a special fund, and appropriated for and [***5] used exclusively to pay for the building, construction and maintenance of farm-to-market roads and bridges on such roads.

The resolution of the county commissioners (section 2) provides that the proposed issue of warrants is "to provide funds to pay the indebtedness to be created for the purpose of constructing necessary farm-to-market roads and bridges on such roads". It does not prescribe hard surface roads as contained in the amendment. The Act No. 385 does not require the roads so constructed to be hard surfaced. The proposal of the county commissioners does not prescribe what the surface shall be. It is apparent therefore that the county does not wish to be confined to hard surface roads, but that it shall be at liberty to finish such roads with material not called "hard". The answer refers to the amendment, and alleges that there was a referendum under its provisions that was not favorable. The trial court so found.

We find the voters opposed to an additional gasoline tax which could be as much as three cents per gallon, when the [*320] proceeds could be used to construct and maintain only hard surface roads. So that the plan here involved cannot be based upon the authority [***6] conferred by the amendment, *supra.*

The Act No. 385 limits the amount of the tax to one cent per gallon, and inferentially leaves it to the county commissioners to decide whether the roads to be constructed shall be hard surfaced or of soft material.

Of course valid legislation cannot be inconsistent with or prohibited by a constitutional provision, whether the latter is self-executing or prohibitory. The prohibition or limitation need not be expressed, but it is sufficient if such is the manifest implication from the tenor and spirit of all the provisions relating to the subject matter. Schultes v. Eberly, 82 Ala. 242, 2 So. 345. The legislative power under the Constitution of Alabama is otherwise supreme. Gunter v. Dale County, 44 Ala. 639; Perkins v. Corbin, 45 Ala. 103.

The county has no power to levy a license tax except as authorized by legislative grant. Jefferson County v. City of Birmingham, 248 Ala. 319, 27 So.2d 584. The legislature may grant that power. Standard Oil Co. v. Limestone County, 220 Ala. 231, 124 So. 523.

Therefore, the question is whether the amendment bound the county to a referendum when the county is not seeking the benefit of the amendment.

[**431] [***7] A constitutional provision is sometimes legislative in form and substance. Miller v. Marx, 55 Ala. 322, 331-334.

There is no reason to assume that the amendment here in question is more than self-executing legislation. It is in terms a grant of authority to the county. Whereas section 215 of the Constitution is in terms a limitation on the power of the legislature to grant authority to the county. Jefferson County v. City of Birmingham, supra. The constitutional grant is exclusive of legislation within the limits named, as when the proposal is for the county to build hard surface farm-to-market roads.

It is our view that the county commissioners of Marshall County should not be held to be limited by the amendment, *supra*, to the construction of hard surface farm-to-market roads and to a referendum in order to be authorized to make a license charge of one cent a gallon on gasoline for soft surface road construction when there is a statute which does not so confine them and does not require a referendum, although the authority conferred by the constitutional grant is conditional upon the referendum but is limited in its application to hard-surfaced roads. The statute should not be [***8] construed as authorizing the use of the funds so raised for the construction of hard-surface roads.

Neither the Act No. 385 nor the amendment, *supra*, provides for the issuance of interest-bearing revenue

warrants to be secured by and payable out of the revenue from the license tax so imposed.

But this Court has held that section 1347, Code of 1923 (which is section 43, Title 23, Code of 1940, as amended pocket part, and not prohibited by section 73 et seq., Title 12, Code) confers such power without special legislation on counties generally. Littlejohn v. Littlejohn, 195 Ala. 614, 71 So. 448; Lyon v. Shelby County, 235 Ala. 69, 177 So. 306; Herbert v. Perry, 235 Ala. 71, 177 So. 561; Burleson v. Marion County, 235 Ala. 576, 180 So. 572. See, also, Isbell v. Shelby County, 235 Ala. 571, 180 So. 567; Bullock County v. Sherlock, 242 Ala. 262, 5 So.2d 800; Cochran v. Marshall County, 242 Ala. 314, 6 So.2d 489.

So that, since the county will not thereby exceed its debt limit it has the right under Act No. 385 to assess a gallonage license tax of one cent to raise funds to construct and maintain soft surface farm-to-market roads, and may issue interest-bearing warrants and pledge [***9] for their payment the revenue to be so derived.

The special ad valorem tax of one-fourth of one percent provided by the second [*321] proviso of section 215 of the Constitution is a constitutional limitation on legislation and does not grant to the counties the right to tax without an enabling act. Jefferson County v. City of Birmingham, 248 Ala. 319, 27 So.2d 584; Id., 251 Ala. 634, 38 So.2d 844. Such legislation has been enacted, sections 186 and 191, Title 12, Code.

It is thoroughly established by our decisions, and not here questioned, that the second proviso of section 215 of the Constitution authorizing the use of funds derived from the special road tax in paying the "debt or liability" there specified, has reference to such a debt or liability as will affect the limit of indebtedness described by section 224 of the Constitution. Southern Ry. Co. v. Jackson County, 189 Ala. 439, 66 So. 570; Littlejohn v. Littlejohn, 195 Ala. 614, 71 So. 448.

The material question, therefore, is to determine whether or not the proposed warrants will constitute a debt within the limit of liability under section 224, supra. If those warrants do not create such a debt, the Constitution does [***10] not authorize the use of funds derived from the special tax to pay them.

This Court held in Hagan v. Commissioner's Court of Limestone County, 160 Ala. 544, 49 So. 417, 37 L.R.A., N.S., 1027, that the levy of a special tax under the second proviso of section 215, supra, as authorized by section 186, Title 12, Code, and the issuance of warrants payable out of [**432] such revenue in future years for the purposes there specified, constitute a debt within the meaning of sections 215 and 224, supra. So that a county which has reached its debt limit under section 224 cannot avail of the second proviso of section 215. Southern Ry. Co. v. Jackson County, supra; Littlejohn v. Littlejohn, supra.

We think it advisable to observe that this conclusion does not conflict with In re Opinion of the Justices, 230 Ala. 673, 163 So. 105; Isbell v. Shelby County, 235 Ala. 571, 180 So. 567; Lyon v. Shelby County, 235 Ala. 69, 177 So. 306. In those cases the question related to the portion of a state tax which was allocated by law to the counties. That did not in any respect tap a resource of revenue of the counties existing or potential, but it was merely a donation of state funds and, therefore, [***11] it was not influenced by the principle here given effect.

The result is that the proposal set out in the instant proceeding as it applies to section 215 of the Constitution is authorized by it and by section 186, Title 12, Code; and although it will create a debt for Marshall County that county will not on the showing here made thereby exceed its debt limit under section 224 of the Constitution.

The application for rehearing should be granted, and the decree of the lower court modified so as to limit the use of the proposed gallonage tax of one cent to the construction of soft surface farm-to-market roads, and that decree as thus modified should be affirmed.

The foregoing opinion was prepared by FOSTER, Supernumerary Justice of this Court, while serving on it at the request of the Chief Justice under authority of Title 13, § 32, Code, and was adopted by the Court as its opinion.

Application for rehearing granted. Decree of the lower court modified and affirmed.

Byron Bart Slawson and Naomi N. Furman v. Alabama Forestry Commission, et al.

1921309

SUPREME COURT OF ALABAMA

631 So. 2d 953; 1994 Ala. LEXIS 13

January 14, 1994, Released

SUBSEQUENT HISTORY: Released for Publication February 25, 1994.

PRIOR HISTORY: [**1] Appeal from Montgomery Circuit Court. (CV-92-2565). H. Randall Thomas, Trial Judge.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

CORE TERMS: notice, public purpose, forestry, forest, public notice, summary judgment, appropriation, sunshine, Sunshine Law, family farm, special meetings, forester, ranch, public meetings, requires notice, regular meeting, reasonable notice, promoting, state funds, private landowner, public interest, general public, citations omitted, attorney fees, personnel, promotion, private property rights, Alabama Sunshine Law, matter of law, general rule

COUNSEL: For Appellants: Ray Vaughan, Montgomery; and Edward W. Mudd, Jr., Birmingham.

For Appellees: Linda C. Breland, Montgomery.

JUDGES: SHORES, Hornsby, C. J., and Maddox, Houston, and Ingram, JJ., concur.

OPINION BY: SHORES

OPINION

[*954] SHORES, JUSTICE.

Bart Slawson and Naomi Furman appeal from a summary judgment entered in favor of the defendants, the Alabama Forestry Commission ("the Commission"); individual members of the Commission; and Bill Moody, the Alabama state forester. We affirm in part, reverse in part, and remand.

A summary judgment is appropriate when (1) there is no genuine issue as to any material fact and (2) the moving party is entitled to a judgment as a matter of law. Rule 56 (c)(3), Ala. R. Civ. P. Because the parties do not dispute the facts in this case, we must determine whether the trial court properly applied the law to the facts in entering a summary judgment for the defendants.

The facts of this case, as agreed to by all parties, indicate that the Commission has used its resources, including the services of state personnel and equipment, to organize, promote, and support various nonprofit organizations [**2] [*955] or "cooperators" whose goals or objectives, according to the Commission, are consistent with the overall objectives of the Forestry Commission. At issue in this case is the Commission's support of a private nonprofit organization known as Stewards of Family Farms, Ranches, and Forests ("Stewards"). [1] The purposes of Stewards, according to its by-laws, is to promote stewardship among private landowners, to protect these landowners' private property rights "by confronting environmental and political extremism in the public and/or political arena," and to develop and implement "a national strategy designed to confront actions which threaten private property rights of family farm, ranch, and forest owners." Stewards opposes certain state and federal laws, such as estate taxation laws and numerous federal environmental laws, that, it contends, interfere with private property rights.

1 Bill Moody, the state forester, is the head of the Stewards organization. The Commission's legal counsel, Linda Breland, assisted in drafting Stewards' by-laws and articles of incorporation. Although the Commission contends it has not given any money directly to Stewards, the Commission has used the resources and services of members of its Forest Education Division, and has spent approximately $ 8730.60 in promoting Stewards, of which $ 7500 was from a grant given to the Alabama Forest Resources Center to further its programs designed to "foster, encourage, develop and promote Alabama's

forest resources, forest products and forestry's overall contribution to the state." C.R. 452-53.

[**3] Slawson and Furman sued the Alabama Forestry Commission and its members, seeking declaratory and injunctive relief. They contended that the Commission's support of Stewards violates §§ 93 and 94, as amended, of the Alabama Constitution of 1901. Slawson and Furman further contended that the Commission failed to provide the public with notice of a meeting it held by special session on October 7, 1992, at which the Commission passed a resolution approving the use of Commission resources and the continued involvement of the state forester, Bill Moody, in promoting Stewards of Family Farms. [2] Slawson and Furman sought a judgment declaring that the Commission's failure to provide notice of its October 7, 1992, meeting violated of Alabama Code 1975, § 13A-14-2 (the Sunshine Law), and violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. They sought to enjoin the defendants from meeting in secret, from meeting without prior public notice, and from using state funds, personnel, and resources to support Stewards. The trial court entered a summary judgment for the defendants. Slawson and Furman appeal.

2 The resolution, in its entirety, states:

> "In the belief that the promotion of good stewardship of farms, ranches and forests, and the defense of private landowner rights are essential in promoting forestry in the State of Alabama, the Alabama Forestry Commissioners approved the continued involvement of the State Forester in promoting these principles within the State of Alabama. Use of Forestry Commission resources shall be limited to those that have traditionally been provided to other non-profit cooperators within the state. No separate appropriations or cash outlays will be made for the Stewards of Family Farms, Ranches and Forests organization. The State Forester is within the bounds of his job to help with the promotion of this organization as long as it remains a part of his total responsibility to the people of Alabama and the Alabama Forestry Commission's overall objectives."

C.R. 93, 446.

[**4] The issues for our review are whether the trial court erred, as a matter of law, in holding that the defendants' financial support of Stewards did not violate §§ 93 and 94 of the Constitution of Alabama, and in holding that neither the Due Process Clause of the Fourteenth Amendment nor our Sunshine Law requires the Alabama Forestry Commission to give public notice of its special meetings.

The State Constitution Issue

Section 93, Alabama Constitution of 1901, as amended by Amendment No. 58, prohibits the state from being interested in any private or corporate enterprise or from lending "money or its credit to any individual, association, or corporation." *Edmonson v. State Indus. Dev. Auth.*, 279 Ala. 206, 184 So. 2d 115 (1966). This section has been interpreted as banning the state or other public entities of the state from engaging in private enterprise. *Edmonson.* Section 94, as amended by Amendment No. 112, prohibits [*956] the legislature from authorizing any subdivision of this state to "grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever." Sections 93 and 94 have been interpreted [**5] as allowing the appropriation of public revenues in the aid of an individual, association, or corporation only when the appropriation is for a "public purpose." *Board of Revenue & Road Comm'rs of Mobile County v. Puckett*, 227 Ala. 374, 149 So. 850 (1933); *Opinion of the Justices No. 269*, 384 So. 2d 1051 (Ala. 1980); *Opinion of the Justices No. 261*, 373 So. 2d 290 (Ala. 1979). Thus, for instance, the state or other public entities may donate public money or other things of value to a volunteer fire department or a rescue squad because these are organizations that benefit the general public and are not engaged in private enterprise and therefore have a lawful public purpose. *Opinion of the Justices No. 261*, 373 So. 2d at 292.

In *Opinion of the Justices No. 269*, 384 So. 2d 1051, this Court was asked whether the appropriation of state funds to nonstate agencies and organizations was for a "public purpose" and, thus, did not violate §§ 93 and 94 of our constitution, as interpreted by *Puckett*, supra. [**6] Although we were unable to give an advisory opinion because the question asked presented a mixed question of law and fact, we did provide guidelines as to what constituted a "public purpose." Quoting *Clifford v. City of Cheyenne*, 487 P.2d 1325, 1329 (Wyo. 1971), we stated that, generally speaking, a public purpose "has for its objective the promotion of public health, safety, morals, security, prosperity, contentment,

and the general welfare of the community." 384 So. 2d at 1053 (citations omitted).

> "The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit. . . . The trend among the modern courts is to give the term 'public purpose' a broad expansive definition."

Id. "The question of whether or not an appropriation was for a public purpose [is] largely within the legislative domain rather than within the domain of the courts." *Id.* at 1052; *Opinion of the Justices No. 261*, 373 So. 2d 290; [**7] *Puckett*, supra.

> "The Legislature has to a great extent the right to determine the question, and its determination is conclusive when it does not clearly appear to be wrong, assuming that we have a right to differ with them in their finding. . . . Taken on its face, it is our duty to assume that the Legislature acted within constitutional limits and did not make a donation, when such construction is not inconsistent with the recitals of the act."

Puckett, supra, 227 Ala. at 377-78, 149 So. at 852.

Our earlier decisions deferred to the legislature's determination that the appropriations were for a public purpose. The trial court, in its summary judgment order, relied on these decisions in giving deference to the Commission's determination, "absent compelling evidence to the contrary," that its support of Stewards was "for a public purpose in a broad, general sense." The trial court found that Slawson and Furman did not meet their burden of proving that the Commission's support of Stewards was "clearly wrong, illegal, or unconstitutional."

Slawson and Furman argue that the Commission's [**8] support of Stewards through the use of state funds, resources, and personnel does not confer "a direct public benefit of a reasonably general character" upon the people of Alabama. The legislature has given the Alabama Forestry Commission authority to "give such advice, assistance and cooperation as may be practicable to private landowners and promote, so far as it may be able, a proper appreciation in this state among all classes of the population of the benefits to be derived from forest culture, preservation, and use." Code 1975, § 9-13-3(a). The Commission's October 7, 1992, resolution indicates that, in its opinion, Stewards' goals are compatible with the objectives of the Forestry Commission. Moody, in his affidavit in support of the defendants' summary judgment motion, states:

> "All the actions of the Forestry Commission are designed to promote the public [*957] good by maintaining healthy forests. One way we do this is by helping private landowners to develop and maintain environmentally healthy and economically sound forests. We are convinced that activities of Stewards of Family Farms, Ranches and Forests will complement, and in no way conflict with, this mission."

Applying [**9] a broad, expansive definition of "public purpose," the trial court determined that Slawson and Furman had failed to clearly prove that the Commission's support for Stewards was not for a public purpose.

In reviewing the judgment of a trial court, this Court will not presume error and will affirm the trial court's judgment if it is supported by any valid legal ground. *Turner v. Clutts*, 565 So. 2d 92, 94 (Ala. 1990); *Odom v. Blackburn*, 559 So. 2d 1080 (Ala. 1990). We cannot say that the trial court erred by giving deference to the Commission's determination that its support of Stewards was for a proper public purpose. Therefore, we affirm the trial court's judgment that the Commission's support of Stewards did not violate §§ 93 and 94 of the Alabama Constitution.

The Notice Issue

Slawson and Furman contend that the Commission must give the public notice of any special meeting, and that the Commission violated the Due Process Clause of the Fourteenth Amendment and violated the Alabama Sunshine Law, § 13A-14-2, by not providing public notice of its October 7, 1992, meeting. [3]

> 3 The Commission must hold two regularly scheduled meetings each year, in January and in June, and is authorized to call special meetings at other times. Section 9-3-2, Ala. Code 1975. The Commission normally records the time and place of each regular meeting six months in advance in the minutes of the prior regular meeting. These minutes are public records available for inspection at the Commission's main office in Montgomery.

[**10] The appellees argue that, because the Commission is now providing public notice of its meetings, the notice issue is moot and cannot be decided by this Court. *Smith v. Cook*, 578 So. 2d 1055, 1057 (Ala. 1991). The record indicates that the Commission provided public notice of its meetings years ago, but discontinued that practice because the public did not attend, and that the Commission is now providing notice to the public once again. "The general rule in this state is that if, pending an appeal, an event occurs which makes determination of the case unnecessary, the appeal will be dismissed." *Adams v. Warden*, 422 So. 2d 787, 790 (Ala. Civ. App. 1982). An exception to this general rule exists where "a broad public interest is involved." *Payne v. J.T.N.*, 568 So. 2d 830, 831 (Ala. Civ. App. 1990). We consider the public's interest in receiving notice of public meetings to be a "broad public interest"; therefore, we may properly decide this issue.

"Procedural due process, protected by the Constitutions of the United States and this State, requires notice and an opportunity to be heard when one's [**11] life, liberty, or property interests are about to be affected by governmental action." *Brown's Ferry Waste Disposal Ctr., Inc. v. Trent*, 611 So. 2d 226, 228 (Ala. 1992). Therefore, we must first determine whether the appellants have a protected interest or right within the meaning of the Due Process Clause before we may address the question of what notice, if any, was constitutionally required. See *Save Our Dunes v. Pegues*, 642 F. Supp. 393, 408-09 (M.D. Ala. 1985), *reversed on other grounds*, *Save Our Dunes v. Alabama Dep't of Envtl. Management*, 834 F.2d 984 (11th Cir. 1987).

> "To have a protectable right a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. The courts have rejected the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. The question is not merely the weight of the individual's interest, but whether the nature of the interest is one within the [**12] contemplation of the 'liberty or property' language of the Fourteenth Amendment."

Ellard v. State, 474 So. 2d 743, 754 (Ala. Crim. App. 1984), *affirmed*, 474 So. 2d 758 (Ala. 1985) (citations omitted).

[*958] Although the Sunshine Law gives the appellants standing to enforce their right to attend Commission meetings, *Miglionico v. Birmingham News Co.*, 378 So. 2d 677, 680 (Ala. 1979), we find no evidence that the appellants have been deprived of any life or liberty interests that would give rise to procedural due process protections. We must also agree with the trial court that "there is no evidence that the [appellants] have any specific property interest of any nature that has been detrimentally affected by any action of the [appellees]." Thus, we hold that, under the facts of this case, the appellants have no constitutional due process right to receive notice of the Commission's special meetings.

We do conclude, however, that the Sunshine Law requires the Commission to provide public notice of its special meetings. The Law's requirement that meetings be open to the public has been interpreted [**13] to mean that the public cannot be excluded from attending meetings that are subject to the Sunshine Law. *See, e.g.*, *Dale v. Birmingham News Co.*, 452 So. 2d 1321, 1323 (Ala. 1984). The Law itself contains no language expressly requiring that the public be given notice of these meetings. The sunshine laws of most states require that some form of notice be provided to the public. The appellants refer us to the cases of two other jurisdictions that require reasonable notice for public meetings even when the statute is silent as to notice. These cases indicate that the public must be aware of a meeting in order for that meeting to be open to the public. The Minnesota Supreme Court stated:

> "The language of the statute directing that meetings be open to the public is meaningless if the public has no knowledge that the meeting is to take place. Therefore, we believe that the statute, by implication, requires adequate notice of the time and place of the meeting. The mere fact that the meeting-room door is unlocked is not sufficient compliance with the directive of the statute."

Sullivan v. Credit River Township, 299 Minn. 170, 217 N.W. 2d 502, 505 (1974). [**14] Florida courts have also held that reasonable notice is a mandatory requirement under Florida's sunshine law. *Hough v. Stembridge*, 278 So. 2d 288, 291 (Fla. Dist. Ct. App. 1973); *Yarbrough v. Young*, 462 So. 2d 515, 517 (Fla. Dist. Ct. App. 1985).

> "Although the statute does not contain a specific notice requirement, it has been held that 'reasonable notice' of a public meeting is mandatory in order for the meeting to be public in essence. . . . And in a 1973 attorney general's opinion, it was stated that the meaning of the term

> 'due public notice' would vary depending on the fact situation, but that its purpose was to apprise the public of the pendency of matters that might affect their rights, afford them the opportunity to appear and present their views, and afford them a reasonable time to make an appearance if they wished."

Rhea v. City of Gainesville, 574 So. 2d 221, 222 (Fla. Dist. Ct. App. 1991) (citations omitted).

The Commission contends that we should follow the Georgia Supreme Court, which has indicated that "[Georgia's] Sunshine Law deals with the openness of public meetings, [**15] not with the notice of such meetings." *Harms v. Adams*, 238 Ga. 186, 187, 232 S.E.2d 61, 62 (1977). The Georgia court held that Georgia's sunshine law did not require notice, and it indicated that meetings were not to be considered closed when there was no evidence "that any person was excluded from or denied admission to the meetings." *Id.*; *see also Dozier v. Norris*, 241 Ga. 230, 231, 244 S.E.2d 853, 855 (1978) (sunshine law does not require notice). Although at the time of *Harms* and *Dozier*, the applicable Georgia statute, Ga. Code Ann. § 40-3301 (1977), did not expressly require notice, we note that the statute was amended in 1980 to require that notice be given to the public, Ga. Code Ann. § 40-3301(e) (Supp. 1982), now codified at O.C.G.A. § 50-14-1(d). [4]

4 The Georgia sunshine law now states:

> "Every agency shall prescribe the time, place, and dates of regular meetings of the agency. Such information shall be available to the general public and a notice containing such information shall be posted and maintained in a conspicuous place available to the public at the regular meeting place of the agency. . . . Whenever any meeting required to be open to the public is to be held at a time or place other than at the time and place prescribed for regular meetings, the agency shall give due notice thereof."

O.C.G.A. § 50-14-1(d) (Supp. 1993).

[**16] [*959] For the above reasons, we hold that the Alabama Sunshine Law does require that reasonable notice be given to the public of those meetings that must be open to the public under § 13A-14-2, Ala. Code 1975. The public must be given a reasonable opportunity to be aware of the place where the notice will be posted; and the time, date, and place of the meeting must be available to the public upon reasonable inquiry. When special circumstances arise or when a meeting is called for truly emergency purposes, the agency holding the meeting should so declare and should give such notice as is reasonable under the circumstances, unless the giving of such notice is impractical or impossible. That portion of the judgment of the trial court holding that notice is not required under § 13A-14-2 is reversed, and the cause is remanded for further consideration of the notice issue consistent with this opinion.

Issue of Costs and Attorney Fees

Finally, the appellants request an award of reasonable costs and attorney fees; such an award is appropriate when the trial court determines that a case will result in a benefit to the general public. *State v. Brown*, 577 So. 2d 1256 (Ala. 1991); [**17] *Brown v. State*, 565 So. 2d 585 (Ala. 1990). The award of attorney fees may be appropriate in an action based on § 13A-14-2, *Bell v. Birmingham News Co.*, 576 So. 2d 669, 670-71 (Ala. Civ. App. 1991). This is an issue for the trial court to determine on remand.

For the foregoing reasons, the judgment is affirmed in part and reversed in part, and the cause is remanded for further consideration.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hornsby, C. J., and Maddox, Houston, and Ingram, JJ., concur.

Jamie L. Smitherman et al. v. Marshall County Commission et al.

1971866

SUPREME COURT OF ALABAMA

746 So. 2d 1001; 1999 Ala. LEXIS 230

August 27, 1999, Released

SUBSEQUENT HISTORY: [**1] Application for Rehearing Denied October 22, 1999. As Corrected November 19, 1999. Released for Publication January 21, 2000.

PRIOR HISTORY: Appeal from Marshall Circuit Court. (CV-96-262). Julian M. King, TRIAL JUDGE.

This Opinion Substituted on Overrule of Rehearing for Withdrawn Opinion of April 23, 1999, Previously Reported at: 1999 Ala. LEXIS 113.

DISPOSITION: OPINION OF APRIL 23, 1999, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED; APPLICATION FOR REHEARING OVERRULED.

CORE TERMS: official capacities, county commissions, cap, county commissioners, engineer, governmental entities, summary judgment, individual capacities, municipality, unprotected, entity, specially, governing bodies, judgment creditor's, concurrence, tort-feasor, partial, naming, driver, county employees, legal duty, municipal employees, joint tortfeasors, instrumentality, indemnification, substituted, tortfeasor, construing, elected, amici curiae

COUNSEL: For Appellants: Benjamin E. Baker, Jr., and Richard D. Stratton of Hogan, Smith & Alspaugh, P.C., Birmingham.

For Appellees: James R. Shaw and R. Gordon Sproule, Jr., of Huie, Fernambucq & Stewart, L.L.P., Birmingham.

For Amicus curiae Mobile County (on application for rehearing): Lawrence M. Wettermark of Galloway, Smith, Wettermark & Everest, L.L.P., Mobile.

For Amicus curiae Association of County Commissions of Alabama (on application for rehearing): James W. Webb, Kendrick E. Webb, and Bart Harmon of Webb & Eley, P.C., Montgomery.

For Amicus curiae Alabama Trial Lawyers Ass'n (on application for rehearing): David G. Wirtes, Jr., and George M. Dent III of Cunningham, Bounds, Yance, Crowder & Brown, L.L.C., Mobile.

For Amicus curiae Shelby County (on application for rehearing): Frank C. Ellis, Jr., of Wallace, Ellis, Fowler & Head, Columbiana.

For Amicus curiae Madison County (on application for rehearing): Julian D. Butler and George W. Royer, Jr., of Sirote & Permutt, P.C., Huntsville.

JUDGES: Hooper, C.J., and Maddox, Houston, Cook, Lyons, and Brown, JJ., concur. Johnstone, J., concurs in part and concurs specially in part.

OPINION

[*1002] *On Application for rehearing*

PER CURIAM.

The opinion of April 23, 1999, is withdrawn, and the following is substituted therefor. [1]

1 On application for rehearing, this Court received briefs not only from the parties but also from several amici curiae, including the Alabama Trial Lawyers Association and the governing bodies of several counties. The defendants and the counties seek clarification of our holding on original submission, especially in light of several cases this Court has decided involving the statutory cap on damages recoverable from governmental entities. § 11-93-2, Ala. Code 1975. Upon considering the arguments presented by the parties and by amici curiae, we conclude that the application for rehearing is due to be overruled, but we issue this substituted opinion to clarify our holding.

[**2] [*1003] Jamie L. Smitherman sued, by and through her mother, alleging that the defendants Marshall County; the Marshall County Commission; and past and present Marshall County commissioners and the county engineer, acting individually and in their official capacities, had negligently and/or wantonly designed and/or maintained a Marshall County road and that their negligence and/or wantonness had caused a motor-vehicle accident in which Smitherman was severely injured. Smitherman's mother also sued the same defendants. Both plaintiffs made various claims for damages arising from the injuries sustained by Smitherman in the accident. The trial court entered a partial summary judgment for all defendants except the County. It made that summary judgment final, pursuant to Rule 54(b), Ala. R. Civ. P., and the plaintiffs appealed. We affirm in part, reverse in part, and remand.

Facts and Procedural History

On August 4, 1995, Smitherman, a minor, was a passenger in an automobile driven by Robin Kilpatrick. As the automobile traveled along Martling Road in Marshall County, Kilpatrick lost control of the vehicle, which left the roadway, ran upon a pile of dirt, became airborne, and landed [**3] in a creek.

Smitherman suffered injuries that rendered her a quadriplegic. She and her mother, Shirley A. Mote, sued Kilpatrick, along with both past and present Marshall County commissioners; the county engineer, Bob Pirando; the Marshall County Commission; and Marshall County. The plaintiffs claim that the Marshall County defendants were under a legal duty to maintain Martling Road; that they had been provided with notice of dangerous conditions on Martling Road; and that they had negligently or wantonly failed to take the action necessary to keep the roadway in a reasonably safe condition.

The plaintiffs moved for a partial summary judgment, seeking, in part, a ruling from the trial court that the statutory governmental-entity damages cap of § 11-93-2, Ala. Code 1975, did not apply to the Marshall County defendants in their individual capacities. Those defendants responded with their own summary-judgment motion.

The trial judge, after holding a hearing on the motions, entered the following order:

> "This matter came before the Court on Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment. ... The Court finds that the Defendants' Motion [**4] for Summary Judgment is due to be GRANTED in part and denied in part, and Plaintiffs' Motion for Partial Summary Judgment is due to be DENIED. The Court makes the following rulings of law and fact:
>
> "1. There is no evidence that County Engineer, Bob Pirando, acted in his individual capacity with regard to the issues presented in the Plaintiffs' Complaint. Accordingly, Bob Pirando, in his individual capacity, is dismissed with prejudice.
>
> "2. As stated in *Cook v. County of St. Clair*, 384 So. 2d 1 (Ala. 1980), and *Calvert v. Cullman County Commission*, 669 So. 2d 119 (Ala. 1995), the Defendant commissioners, in their individual capacities cannot be sued in tort. Accordingly, the commissioners, in their individual capacities, are dismissed with prejudice.
>
> "3. The Plaintiffs have sued the county commissioners and the county engineer, in their official capacities, and the Marshall County Commission, in addition [*1004] to suing Marshall County, Alabama. However, this Court finds that suing the county commissioners, in their official capacities, the county engineer, in his official capacity, and the Marshall County Commission is only another [**5] way of pleading a claim against the entity, Marshall County, Alabama. *Calvert v. Cullman County Comm'n*, 669 So. 2d 119 (Ala. 1995); *Elmore County Comm'n v. Ragona*, 561 So. 2d 1092 (Ala. 1990). Accordingly, the Marshall County Commission, its county commissioners and the county engineer, in their official capacities, are dismissed with prejudice; however, Marshall County remains as a Defendant.
>
> "4. The court finds that the statutory cap set out in § 11-93-2, Ala. Code 1975, applies to Plaintiffs' claims against Defendant, Marshall County, Alabama.

> "5. Defendant, Marshall County, is immune from punitive damages as per § 6-11-26, Ala. Code 1975.
>
> "6. The issues involved in Defendants' Motion for Summary Judgment are novel and there is no just reason for any delay in the entry of final judgment and the Clerk of the Court is hereby ordered and directed to enter this as a final judgment, except as to the remaining claims against Marshall County, on the records of the Clerk of the Circuit Court."

I.

We first consider the trial court's ruling that the county commissioners and the county engineer are not amenable to [**6] suit in their individual capacities. The trial court relied on *Cook v. St. Clair County*, 384 So. 2d 1 (Ala. 1980), in which this Court held:

> "Counties are amenable to suit in tort under Code of Alabama, 1975, § 11-1-2. Because counties, as bodies corporate, act through their governing bodies, the county [commissions, the] commissioners likewise are subject to suit in tort, not in their individual capacities but only in their official capacities."

384 So. 2d at 7 (opinion on application for rehearing). It is therefore clear that the summary judgment was properly entered for the commissioners as to the claims against them in their individual capacities. [2] With regard to the claim against the county engineer in his individual capacity, the plaintiffs present no argument as to why the summary judgment was not proper as to the county engineer, and the record supports that summary judgment as to the county engineer. Consequently, we affirm the judgment as it relates to the county commissioners and the county engineer in their individual capacities.

2 The plaintiffs acknowledge, in a footnote to their brief, "that the law appears to state that [the commissioners] cannot be sued in their individual capacities."

[**7] *II.*

We next consider the trial court's holding that an action against the county commissioners, in their official capacities; the county engineer, in his official capacity; and the Marshall County Commission is only another way of pleading a claim against Marshall County. The defendants point to *Calvert v. Cullman County Commission*, 669 So. 2d 119, 120 (Ala. 1995), in which this Court stated: "The difference between naming a county as a defendant and naming its governing body as a defendant is a difference in nomenclature." Relying on this statement, the defendants contend that the summary judgment was proper as to the claims against the county commission and the county officials, in their official capacities, and in their brief they argue:

> "Since suit against the commissioners and the county engineer, in their official capacity, and the county commission is simply a suit against Marshall County, the statutory cap of § 11-93-2, which protects counties, applies to Plaintiffs' claims."

[*1005] To the extent that *Calvert* and other cases imply that there is no legal distinction between counties and county commissions, they are incorrect and are overruled. [**8] In taking this action, we note that there was disagreement on the Court about the rationale used by the majority in *Calvert*, and one of the Justices wrote a special concurrence in which he concurred with the result reached in that case but disagreed with the rationale used as it related to the distinction between a county and a county commission:

> "[A] 'county commission,' which was previously called a 'board of revenue,' is the *governing body* of the county, and is not the *county* itself. A county commission is similar to a city council or the state legislature. The county commission is the entity, of course, that governs the county, and in many counties the probate judge is the chairman of the county commission. For example, to sue a county requires presentment of an itemized, verified claim to the county commission within 12 months of the accrual of the claim, and the commission's denial or reduction of the claim within 90 days. *See* §§ 6-5-20, 11-12-5, 11-12-6, and 11-12-8, Ala. Code 1975; *see also Health Care Auth. v. Madison County*, 601 So. 2d 459 (Ala. 1992).
>
> "There are other statutory functions and powers exercised by county [**9]

commissions. For example, if a person wants a permit, the county commission has the power to decide the merits of the permit request and render what could be called a final decision, subject, of course, to limited, deferential review on the ultimate issue. *See Taxpayers & Citizens of Lawrence County v. Lawrence County*, 273 Ala. 638, 143 So. 2d 813 (1962). ... The only statutory authority county commissions have regarding claims against a county for the county's alleged negligence is to receive and file them. The county commission cannot finally adjudicate the merits of the person's claim. That power is reserved to the courts. *Steadham v. Sanders*, 941 F.2d 1534 (11th Cir. 1991).

"In this case, it is Cullman County, not the Cullman County Commission, that is alleged to have been negligent. Any judgment in the case should be against Cullman County, not against the county commission or the county commissioners.

"? Of course, ... there could be instances when the county commission or the county commissioners collectively or individually might be proper parties, if either were under a legal duty to act or not [to] act. In those instances, [**10] the judgment would be against either for breach of a legal duty."

Calvert, 669 So. 2d at 124 (Maddox, J., concurring in the result but disagreeing with the rationale).

Several of the briefs filed in support of the defendants suggest that the rationale in the special concurrence in *Calvert* more closely expresses the intent of the Legislature in adopting the cap statute, and we agree with the principle that there is in fact a legal distinction between a county and its commission. We also hold that, similarly, there is a legal distinction between a county and its employees, acting in their official capacities. Further, it is clear from *Cook*, as quoted above, that county commissioners may be sued in their official capacities. Therefore, as to the claims against the Marshall County Commission and the county commissioners and the county engineer, in their official capacities, the summary judgment was improper and must be reversed.

III.

We now address the applicability of the statutory cap of § 11 -93-2, Ala. Code 1975, to those defendants who will still be involved in this litigation as a result of this opinion: the County; its commission; the commissioners, [**11] in their official capacities; and the county engineer, in his official capacity. The trial court held that the cap applied to the County. That holding is not [*1006] in dispute here. The question we must determine, however, is whether it applies to the commission and to the commissioners and the engineer, in their official capacities.

The plaintiffs and amicus Alabama Trial Lawyers Association argue that the cap statute should not apply to any entity except the county, citing *Ravi v. Coates*, 662 So. 2d 218, 223 (Ala. 1995). In *Ravi*, this Court wrote:

"The statute states that the cap applies to *a governmental entity*. A 'governmental entity' is defined as:

"'Any incorporated municipality, any county and any department, agency, board or commission of any municipality or county, municipal or county public corporations and any such instrumentality or instrumentalities acting jointly. "Governmental entity" shall also include county public school boards, municipal public school boards and city-county school boards when such boards do not operate as functions of the State of Alabama. "Governmental entity" shall also mean county or city hospital boards [**12] when such boards are instrumentalities of the municipality or county or organized pursuant to authority from a municipality or county.'

"Section 11-93-1(1), Ala. Code 1975. Immediately thereafter, § 11-93-1(2) defines 'employee':

"'An officer, official, employee or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of any governmental entity in any official capacity, temporarily or permanently, in the service of the governmental entity, whether with or without compensation, but the term "employee" shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which this chapter applies in the event of a claim.'

"The Legislature could easily have made certain that the $ 100,000 cap was applicable to 'employees' of 'governmental entities,' but it did not do so. 'Unprotected joint tort-feasors are not entitled to the statutory protection against the judgment creditor's right to recover in excess of $ 100,000.' *Elmore County Commission v. Ragona*, 540 So. 2d 720, 728 (Ala. 1989) (Jones, J., concurring [**13] specially)."

The plaintiffs are correct in stating that in *Ravi* this Court held that the cap did not apply to nurses employed by a public hospital. However, in that case, this Court did not analyze the distinctions between claims against public employees in their individual capacities and those against public employees in their official capacities. That distinction is a key element in our analysis of this case.

Because of the apparent confusion caused by several of this Court's cases that discuss the application of the statutory cap on damages when defendants other than the governmental entity are sued, we believe that a review of some of the holdings, especially those in which county commissioners or county employees were sued *in their official capacities*, would be helpful to the bench and bar.

Before beginning that review, however, we point out that we have already concluded above that the summary judgment was proper as to the county commissioners and the county engineer *in their individual capacities*; consequently, we are concerned only with the claims against them *in their official capacities*.

This Court has on several occasions considered the question [**14] of the applicability of the statutory cap in cases in which judgments have been rendered against officials of a governmental entity. We begin our discussion with *Elmore County Commission v. Ragona*, 540 So. 2d 720 (Ala. 1989) ("*Ragona I*"), where a plaintiff sued Elmore County, the Elmore County Commission, and Elmore County Commissioners [*1007] Melvin Curlee and Elzie Mehearg in a personal-injury action arising out of an automobile accident. Curlee and Mehearg were sued *only* "in their official capacities as Elmore County Commissioners." *Ragona I*, 540 So. 2d at 722. The jury returned a verdict for the plaintiffs in excess of $ 100,000. Commissioners Curlee and Mehearg, Elmore County, and the Elmore County Commission all appealed to this Court, raising the question whether the award against the county, the commission, and Commissioners Curlee and Mehearg should be reduced to the aggregate amount of $ 100,000 because of the damages cap contained in § 11-93-2. *Ragona I*, 540 So. 2d at 727. This Court held that the statutory cap *applied and limited any recovery against the county, the county commission, and the commissioners in their* [**15] *official capacities to $ 100,000. Id.* In so holding, this Court stated: "As rendered, the verdict and judgment will support a recovery by Ms. Ragona against the County defendants *only in the amount of $ 100,000.*" *Ragona I*, 540 So. 2d at 727. (Emphasis added).

In a second appeal in the same case, *Elmore County Commission v. Ragona*, 561 So. 2d 1092 (Ala. 1990) ("*Ragona II*"), this Court specifically noted again that the claims against Commissioners Curlee and Mehearg were claims asserted against them "in their official capacities as Elmore County Commissioners." *Id.* at 1092. After thoroughly discussing the application of the damages cap contained in § 11-93-2, this Court in *Ragona II*, consistent with its prior decision in *Ragona I*, held that the judgment in that case would support a recovery against the county, the commission, and Commissioners Curlee and Mehearg only in the total amount of $ 100,000. *Ragona II*, 561 So. 2d at 1096.

We hold, therefore, that claims against county commissioners and employees *in their official capacity* are, as a matter of law, claims against the county and are subject [**16] to the $ 100,000 cap contained in § 11-93-2.

The plaintiffs strongly rely on *Ravi* to support their claim that the $ 100,000-cap statute applies only to "governmental entities," and not to county commissioners and the county engineer. Does *Ravi* conflict with *Ragona I* and *Ragona II*? The answer is that it does not. As a matter of fact, *Ravi* cites Justice Jones's special concurrence in *Ragona I* [3] to support its conclusion that

"'Unprotected joint tort-feasors are not entitled to the statutory protection against the judgment creditor's right to recover in excess of $ 100,000.'" *Ravi*, 662 So. 2d at 223.

> 3 *Elmore County Comm'n v. Ragona*, 540 So. 2d 720, 728 (Ala. 1989) (Jones, J., concurring specially).

The "unprotected joint tortfeasors" referred to by Justice Jones in his special concurrence in *Ragona I* were *not* Commissioners Curlee and Mehearg. Rather, the defendant to whom Justice Jones referred in *Ragona I* was a third-party tortfeasor wholly [**17] unrelated to the county defendants. In *Ragona I*, the plaintiff sued the county defendants and also sued the driver of the other motor vehicle involved in the collision with the plaintiff. This driver was not a county employee and was clearly not acting within the line and scope of any employment relationship with the county at the time of the accident. In the majority opinion in *Ragona I*, this Court specifically defined the "County defendants" to include Elmore County, the Elmore County Commission, and Commissioners Curlee and Mehearg "in their official capacity as Elmore County Commissioners." *Ragona I*, 540 So. 2d at 722. The majority opinion in *Ragona I* held that "the verdict and judgment will support a recovery by Ms. Ragona against the County defendants only in the amount of $ 100,000." *Ragona I*, 540 So. 2d at 727. Justice Jones's concurring opinion emphasized *only* that the *judgment* was not reduced by application of the cap and that [*1008] the plaintiff could recover any excess amount of the judgment over $ 100,000 against "unprotected tortfeasors." The "unprotected joint tortfeasor" in *Ragona I* was the driver of the other vehicle [**18] involved in the accident with Ms. Ragona.

Justice Jones did not state, or even remotely imply, in *Ragona I* that the Elmore County Commissioners, "in their official capacities," were "unprotected joint tortfeasors." Justice Jones stated:

> "This case presents the identical facts used as a hypothetical example in my dissent from the denial of rehearing in *St. Paul Fire & Marine Ins. Co. v. Nowlin*, 542 So. 2d 1190 (Ala. 1988) (*Nowlin II*) (rehearing denied, Jan. 13, 1989), to illustrate the proposition that [§ 11-93-2] does not effect a reduction of the judgment to $ 100,000 -- the statutory cap on the judgment creditor's right of recovery. Notwithstanding *Nowlin II*'s implicit holding to the contrary, a unanimous Court now holds that the $ 136,750 judgment against Elmore County and the other joint tort-feasors is not reduced to $ 100,000, only that the judgment creditor is limited in her recovery against the County to the statutory cap of $ 100,000, and that *the unprotected joint tort-feasor* is separately and severally liable for the full $ 136,750 judgment."

Ragona, 540 So. 2d at 727 (emphasis supplied). Justice [**19] Jones thus did not state that he disagreed in any way with the holding of the main opinion in *Ragona I* that the claims against the individual county defendants were subject to the damages cap contained in § 11-93-2. Rather, he stated only that the driver of the other vehicle involved in the collision could not claim the benefit of the damages cap. Because the Court in *Ravi* clearly misread Justice Jones's concurring opinion in *Ragona I*, *Ravi* should not be considered in any way as precedent concerning the plaintiffs' official-capacity claims against the defendants in this case.

The statutory definition of "employee" includes "persons acting on behalf of any governmental entity *in any official capacity*." § 11-93-1(2) (emphasis added). Further, the definition of "employee" includes elected officials of governmental entities. *Id.* Thus, it would appear that the Legislature intended that persons such as county commissioners and the county engineer, who act in their official capacities, are "employees" as that term is used by the Legislature in § 11-93-1(2).

In *Benson v. City of Birmingham*, 659 So. 2d 82 (Ala. 1995), however, this Court considered [**20] the effect of § 11-93-2 in a case where a judgment is entered against a city and its employees and where the city is required to indemnify the employees under § 11-47-24, Ala. Code 1975. The Court, speaking through Justice Almon, wrote:

> "'The purpose behind § 11-93-2 was stated by this Court in *Home Indemnity Co. v. Anders*, 459 So. 2d 836, 841 (Ala. 1984), when we quoted with approval from *Stanhope v. Brown County*, 90 Wis. 2d 823, 280 N.W.2d 711 (1979):

> "'"It is within the legitimate power of the legislature to take steps to preserve sufficient public funds to ensure that the government will be able to continue to provide those services which it believes

benefit the citizenry. We conclude that the legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit.'"'

St. Paul Fire & Marine Ins. Co. v. Nowlin, 542 So. 2d 1190, 1194 (Ala. 1988) (*Nowlin II*). This holding was reiterated in *Garner v. Covington County*, 624 So. 2d 1346, 1354-55 (Ala. 1993), [**21] where this Court stated, 'Because cities and counties are exercising governmental [*1009] functions, however, and because judgments against them must be paid out of public moneys derived from taxation, the reasonable limitation of § 11-93-2 on awards against them must be sustained.' This rationale is no less applicable to the question now before this Court. The need to preserve the public coffers does not disappear simply because the plaintiff has proceeded against a negligent employee of the municipality rather than, or in addition to, proceeding directly against the municipality.

"For § 11-93-2 to be given proper effect, the cap must be applicable to indemnity actions. If it were not, the City could be subjected to judgments over $ 100,000 just as surely as if the cap were not in place, because almost all actions against municipalities will be based on allegations of negligence by municipal employees. Thus, if plaintiffs were able to circumvent the cap simply by naming an employee and then requiring the city to indemnify the employee for the entire amount of a large judgment, the cap would effectively be repealed. This result can be avoided by construing the two statutes harmoniously [**22] -- holding that § 11-47-24 provides for indemnification only to the limits of § 11-93-2. ... The policy of protecting the public coffers, for the benefit of all of the citizenry, necessarily outweighs the policy of indemnifying negligent municipal employees beyond the § 100,000 cap amount."

Benson, 659 So. 2d at 86-87.

The plaintiffs, on application for rehearing, argue that *Benson* and this case have virtually no relation to each other and that the *Benson* holding is irrelevant to this case. We cannot agree. We believe *Benson* is analogous to this present case, even though it involved a city and not a county. [4]

4 In this present case, although there is no indemnification statute applicable to counties that is similar to the municipal-indemnification statute involved in *Benson*, by naming county commissioners and county employees in their official capacities the plaintiffs have accomplished substantially the same thing as suing a municipal employee for whom § 11-47-24 would require a municipality to provide indemnification.

[**23]

In reaching the conclusion that we do, we have applied the principle that it is the duty of this Court, when construing a statute, to ascertain and give effect to the intent of the Legislature. *Ex parte Sanders*, 612 So. 2d 1199 (Ala. 1993). We have carefully sought to determine what the Legislature intended in cases in which an employee of a governmental entity is sued. In *Benson*, this Court considered the policies behind the statute and concluded, implicitly, that the statute's protection of a county's financial resources must be read broadly.

To hold that the caps of § 11-93-2 did not apply to the claims against the county commissioners and the county engineer in their official capacities would, as we suggested in *Benson*, effectively repeal that Code section, because then plaintiffs would simply file their actions against employees of a governmental entity instead of the governmental entity itself; in construing acts of the Legislature, we presume that that body "does not enact meaningless, vain or futile statutes." *Druid City Hospital Bd. v. Epperson*, 378 So. 2d 696, 699 (Ala. 1979). We must interpret a statute in a way that is consistent [**24] with our understanding of the Legislature's intent and that gives some meaningful effect to that intent.

The trial court's judgment is affirmed as it relates to the claims against the county commissioners and the county engineer in their individual capacities, but, as it relates to the claims against the county engineer and the county commissioners in their official capacities, it is reversed. It is also reversed as it relates to the County Commission.

OPINION OF APRIL 23, 1999, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED; APPLICATION [*1010] FOR REHEARING OVERRULED.

Hooper, C.J., and Maddox, Houston, Cook, Lyons, and Brown, JJ., concur.

Johnstone, J., concurs in part and concurs specially in part.

CONCUR BY: JOHNSTONE (In Part)

CONCUR

JOHNSTONE, Justice (concurring in part and concurring specially in part).

I concur in the affirmance of the summary judgment in favor of the defendant county commissioners and county engineer in their respective individual capacities. I further concur in the reversal of the summary judgment in favor of the county commissioners and the county engineer in their respective official capacities.

I specially concur in the [**25] holdings that the county commissioners and the county engineer, in their respective official capacities, are protected by the statutory cap established by § 11-93-2, Ala. Code 1975. Section 11-93-1, Ala. Code 1975, expressly includes county commissions and county departments within the definition of "governmental entity." For purposes of the § 11-93-2 cap, although not necessarily for any other purposes, the county commissioners in their official capacity, as the elected officials who compose the county commission, would seem to be synonymous with the county commission itself. Likewise, only for purposes of the § 11-93-2 cap, the county engineer himself, in his official capacity, would seem to be synonymous with the county engineering department. Thus the county commissioners and the county engineer, in their respective official capacities, are "governmental entities," which § 11-93-2 expressly protects with its cap. Section 11-93-2 does not protect anyone or anything not included within the definition of "governmental entity" specified by § 11-93-1.

Mark Smyth v. Wade Bratcher

2050553

COURT OF CIVIL APPEALS OF ALABAMA

962 So. 2d 842; 2006 Ala. Civ. App. LEXIS 681

November 17, 2006, Released

SUBSEQUENT HISTORY: [**1] Released for Publication July 13, 2007.
Rehearing overruled by Smyth v. Bratcher, 2007 Ala. Civ. App. LEXIS 9 (Ala. Civ. App., Jan. 5, 2007)

PRIOR HISTORY: Appeal from Barbour Circuit Court. (CV-05-179). L. Bernard Smithart.
Smyth v. Bratcher, 2006 Ala. Civ. App. LEXIS 1069 (Ala. Civ. App., May 5, 2006)

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: public road, permissive, prescriptive period, dedication, church, user, mail, prescription, burden of proof, permission, trespass, nuisance, residents, lived, public use, evidence indicating, claim of right, alternate route, mail carrier, water line, general public, reclaimed, hindrance, regularly, easement, improved, travel, tenants, unimproved land, adverse user

COUNSEL: For Appellant: Albert H. Adams, Jr., Eufala.

For Appellee: Robert L. Bowden, Clayton.

JUDGES: CRAWLEY, Presiding Judge. Thompson, Pittman, Murdock, and Bryan, JJ., concur.

OPINION BY: CRAWLEY

OPINION

[*843] CRAWLEY, Presiding Judge.

Mark Smyth currently resides at 41 Lugo Road. Before moving to 41 Lugo Road in late 1999, Smyth lived at 115 Lugo Road; that house, which Smyth had lived in since 1985, burned down. Wade Bratcher now lives at that location, in a new house he constructed, having purchased the land from Smyth's family members in 2005. Smyth had always used a dirt road named Lugo Road for ingress and egress to both properties. Lugo Road crosses Bratcher's property.

In October 2005, Bratcher blocked access to Lugo Road. Smyth sued Bratcher, seeking a temporary restraining order preventing Bratcher from blocking Lugo Road pending a trial, a permanent injunction preventing the road from being blocked, and damages for trespass and nuisance. The trial court granted a temporary restraining order pending a hearing; after the hearing, Bratcher was permitted to gate Lugo Road provided that he provided [**2] a key to Smyth for his use. Smyth amended his complaint, adding Barbour County as a party and alleging that Lugo Road was a public road maintained by the county.

At trial, the county stipulated that it had no records indicating that it had ever maintained Lugo Road; the county was subsequently dismissed as a party to the action. After hearing the testimony and considering the evidence presented, the trial court entered a judgment finding that Lugo Road was not a public road because Smyth's use and any use by the public had been permissive. The judgment further denied Smyth the damages he sought on his claims of trespass and nuisance. The trial court gave Smyth 60 days to establish an alternate route for ingress and egress to his property. Smyth appealed to the Alabama Supreme Court, which transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7(6).

Smyth argued at trial and continues to argue on appeal that Lugo Road was a public road established by prescription. He made no argument below and makes no argument on appeal relating to an establishment of an easement by prescription or by necessity over Lugo Road. He further makes no argument [**3] on appeal relating to his claims of nuisance and trespass other than to state in the conclusion of his brief that the judgment against him on those claims should be reversed, he asserts, because the judgment finding Lugo Road not to be a public road should be reversed. Thus, we will not address Smyth's trespass and nuisance claims. [*844] *Boshell v. Keith*, 418 So. 2d 89, 92 (Ala. 1982) (stating that issues not raised in an appellant's initial brief are waived).

Although neither party directly discusses the fact that the burden of proof regarding the establishment of a public road differs based on whether the road travels over improved land or unimproved land, we will begin our analysis with an explanation of those differing burdens of proof.

> "[O]ur supreme court [has] explained the different presumptions attendant to 'improved' or 'reclaimed' property and to 'unimproved' or 'unreclaimed' property and the different burdens of proof resulting from those presumptions. The court stated:
>
> > "'A public road may be established by common law dedication, statutory proceeding, or by prescription. *Powell v. Hopkins*, 288 Ala. 466, 262 So. 2d 289 (1972). [**4] An open, defined roadway, through reclaimed land, in continuous use by the public as a highway without let or hindrance for a period of twenty years becomes a public road by prescription. When such circumstances are shown, a presumption of dedication or other appropriation to a public use arises.'
>
> "*Ford v. Alabama By-Products Corp.*, 392 So. 2d [217,] 218 [(Ala. 1980)]. In an earlier case, the supreme court explained the presumption of dedication as follows:
>
> > "'While it is recognized that, to constitute a dedication, the public user must be under a claim of right, the presumption referred to is held to relate to the burden of proof upon the issue of adverse user under such claim of right. So that there is a presumption that 20 years' user is an adverse user and under claim of right, when "there is nothing in the evidence to contradict the presumption."'
>
> "*Newell v. Dempsey*, 219 Ala. 634, 635, 122 So. 881, 882 (1929) (quoting *Locklin v. Tucker*, 208 Ala. 155, 156, 93 So. 896, 897 (1922)). The *Ford* court continued:
>
> > "'The burden is then on the landowner to show the user was permissive [**5] only, in recognition of his title and right to reclaim the possession. *Ayers v. Stidham*, 260 Ala. 390, 71 So. 2d 95 (1954).
> >
> > "'In *Benson v. Pickens County*, 260 Ala. 436, 70 So. 2d 647 (1954), it was noted that the above principles were not applicable to wooded or unimproved lands or lands which, though once reclaimed, had been "turned out" or left open and unused. Instead, where the road runs over unimproved or "turned out" lands there is no presumption of dedication by mere use; rather there is a presumption of permissive use and the user must establish his use as adverse to that of the owner. This principle is grounded on sound policy. Otherwise, an owner with no present use for the land over which a road runs would be required to suffer the expense of taking affirmative action to prevent

> travel over his unused land to avoid having a public road established on that land.'
>
> "*Ford v. Alabama By-Products Corp.*, 392 So. 2d at 218-19. *See also Thompson v. Wasdin*, 655 So. 2d 1058 (Ala. Civ. App. 1995). *See generally* Jesse P. Evans, *Alabama Property Rights and Remedies* § 10.4(b) at 202-03 (2d ed. [**6] 1998)."

Baker v. Wilbourn, 895 So. 2d 965, 968-69 (Ala. Civ. App. 2003) (footnote omitted).

Apparently, neither party was aware of the need to establish the character of the land during the prescriptive period. Based on the evidence, Lugo Road runs across the land on which Bratcher's home sits and on which Smyth's former residence sat. Thus, we conclude that the [*845] land over which Lugo Road runs was, during the prescriptive period -- at least during the 20 years preceding 2005 -- improved land. Thus, Smyth had the burden of establishing use of Lugo Road by the public for a period of 20 years, and Bratcher would then have the burden to establish that the use was, in fact, permissive instead of adverse. *Baker*, 895 So. 2d at 968.

Smyth testified that, to his knowledge, Louis Sellers, Smyth's predecessor in title, and Sellers's friends and family, had used Lugo Road without hindrance. He admitted, however, that he did not know if anyone had requested permission to use the road. Smyth specifically mentioned a church that was located "behind" his current residence and two other houses that were formerly located along the road in 1985, indicating [**7] that Lugo Road had been used by the tenants of those homes and presumably by the church members to reach those structures. He also noted that the mail carrier delivered mail along Lugo Road to several residents in 1985 and in the years after; he said that the mail carrier had stopped delivering his mail to his home in 2001 or 2002.

Smyth also presented evidence indicating that the Cowikee Water Authority had installed a water line under Lugo Road. The general manager of the Authority, Mike Wood, testified that he had found no record of any condemnation proceeding or grant of an easement for that purpose, indicating to him, he said, that the road was a public road, because the Authority would not have needed permission to install a water line under a public road. Smyth further presented the testimony of Wheeler Ludlam, who testified that in 1928 or 1929 he rode on a school bus from his home on Lugo Road to school.

Sellers testified that he lived at 41 Lugo Road between 1967 and 1999. He testified that "the general public" used Lugo Road. He said that his friends and family had regularly used the road while he was living there and that no one had asked permission to do so. Sellers [**8] also testified that his water meter had been on Lugo Road and that the mail carrier had always driven up Lugo Road to deliver his mail. In order to establish Lugo Road as a public road, Smyth had the initial burden of proving that the public used Lugo Road for the prescriptive period. The testimony presented established that the residents along the road used the road to go about daily business like receiving mail, having visitors, and being transported to school. The water line runs under the road, and the water meters are located at the edge of Lugo Road in front of each residence. Until 2001 or 2002, the mail carrier used the road to deliver mail to the residences on the road. At one point, a church was located on the road; the testimony does not reveal at what time the church was relocated. However, during at least part of the prescriptive period and in prior years, the church members must have used the road to reach the church. Sellers, who lived on the road from 1967 to 1999, testified that members of the general public used the road regularly and without permission.

> "[T]he law lays down no fixed rule as to the quantum of travel over the road essential to impress upon [**9] it a public use. Although the chief user be a few families having special need therefor, this does not of necessity stamp it as a private way. It is the character rather than the quantum of use that controls. It seems clear enough that the general public, including these with special interests, have continuously used the road without let or hindrance as they had occasion so to do, and such combined use has been so constant and continuous as to mark at all times a well-defined highway for vehicles [*846] and pedestrians. As to public user this is sufficient."

Still v. Lovelady, 218 Ala. 19, 20, 117 So. 481, 482 (1928). In *Smith v. Smith*, 482 So. 2d 1172 (Ala. 1985), our supreme court affirmed a trial court's determination

that a particular road was a public road based on testimony from residents in the area and from the parties that the road had been in existence for many years and on the following evidence:

> "The gist of the remaining evidence is that the road for many years connected the paved public road to two houses no longer in existence. However, the road has been used by many persons, including prior owners and residents of the dwellings, [**10] as well as their tenants, friends, families, and persons doing business with them. Various crops have been grown on the land, and the road has provided access to and from the areas where they were grown. Cattle buyers and timber crews utilized the road to transport timber and cattle raised on the land. Hunters and fishermen also used the road, as did utility company personnel. The parties, their family, friends, tenants, and business invitees also used the road. Additionally, Blount County employees and others worked and maintained the road periodically."

Smith, 482 So. 2d at 1174.

The evidence that supported the conclusion that the road in *Smith* was a public road is quite similar to the evidence Smyth presented at trial in the present case. Thus, we conclude that Smyth presented sufficient evidence to establish that Lugo Road was used adversely by the public for at least 20 years before 2005. Once Smyth met this burden, Bratcher was required to present evidence indicating that the use by the public was, in fact, permissive. *Baker*, 895 So. 2d at 969.

At trial, Bratcher focused on establishing that Smyth had an alternate route by which [**11] to access his property. Evidence of an available alternate route to Smyth's property would have been relevant if Smyth had been attempting to establish an easement by necessity over Lugo Road. *See Kelly v. Panther Creek Plantation, LLC*, 934 So. 2d 1049, 1053-54 (Ala. 2006) (""""[I]f one has an outlet over his own land, although less convenient he cannot claim a right of way over the premises of another."""" (quoting *Roberts v. Monroe*, 261 Ala. 569, 575, 75 So. 2d 492, 497 (1954))). However, such evidence was irrelevant to the question whether Lugo Road is a public road. Bratcher presented no evidence indicating that the use of Lugo Road by the public was permissive during the prescriptive period.

Although the trial court based its judgment determining that Lugo Road was not a public road on ore tenus evidence, and although we will disturb such a judgment on appeal only when it is demonstrated to be unsupported by the evidence, plainly erroneous, or manifestly unjust, *see Auerbach v. Parker*, 544 So. 2d 943 (Ala. 1989), we cannot affirm the trial court's judgment in the present case. Because Smyth met his burden, establishing that Lugo [**12] Road had been regularly used by the public for at least 20 years, a presumption of dedication to public use arose. *Baker*, 895 So. 2d at 968 (quoting *Ford v. Alabama By-Products Corp.*, 392 So. 2d 217, 218 (Ala. 1980)). The burden then shifted to Bratcher, requiring that he present opposing evidence to establish that the use by the public during the prescriptive period was, in fact, permissive. *Baker*, 895 So. 2d at 969 (quoting *Ford*, 392 So. 2d at 218). Bratcher failed to meet that burden. Accordingly, we reverse the judgment of the trial court insofar as it determined that Lugo Road was not a public road by prescription [*847] and remand this cause for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, Pittman, Murdock, and Bryan, JJ., concur.

Spring Hill Lighting & Supply Company, Inc. v. Square D Company, Inc., et al.

1930027

SUPREME COURT OF ALABAMA

662 So. 2d 1141; 1995 Ala. LEXIS 189

April 14, 1995, Released

SUBSEQUENT HISTORY: [**1] Rehearing Denied June 23, 1995. Released for Publication November 28, 1995.

PRIOR HISTORY: Appeal from Mobile Circuit Court. (CV-91-3986). Michael E. Zoghby, TRIAL JUDGE.

DISPOSITION: REVERSED AND REMANDED.

CORE TERMS: bidder's, specification, bid, substation, unsuccessful, manufacturer, injunctive relief, electrical, manufactured, Competitive Bid Law, transformer, business relations, small business, lowest, wrongful conduct, substantial evidence, competitive, bidding, addendum, warranty, enjoin, confer, single-source, substitution, summary judgment, intentional interference, state cause of action, cause of action, monetary, misrepresentation

COUNSEL: For Appellant: James L. Shores, Fairhope.

For Appellees: Edward S. Sledge III and P. Russel Myles, of Hand, Arendall, Bedsole, Greaves & Johnston, Mobile, for David Volkert & Associates, Inc., and Nelson Russell. William A. Robinson and Cecil H. Macoy, Jr., of Cabaniss, Johnston, Gardner, Dumas & O'Neal, Mobile, for Square D Company and David Hartselle. C. Robert Gottlieb, Jr., Geary A. Gaston, and William W. Watts III, of Reams, Philips, Brooks, Schell, Gaston & Hudson, P.C., Mobile, for James R. Diamond.

JUDGES: Hornsby, C. J., and Almon, Kennedy, Ingram, and Butts, JJ., concur. Maddox, Houston, and Cook, JJ., dissent. Shores, J., recused.

OPINION

[*1143] PER CURIAM.

The plaintiff, Spring Hill Lighting, Inc., appeals from a summary judgment in favor of the defendants on Spring Hill's claims alleging fraud, intentional interference with business relations, and conspiracy. The defendants are James R. Diamond, an electrical engineer employed by the Alabama State Docks Department; David Volkert & Associates, Inc. ("Volkert"), an engineering firm that contracted with the Docks Department to design and oversee construction of the project that is the subject of this controversy; Nelson Russell, the manager of Volkert's electrical engineering department; Square D Company, Inc., a manufacturer of electrical equipment; and David M. Hartselle, Square D's senior sales representative in Mobile. Spring Hill distributes electrical equipment manufactured by Siemens Energy & Automation, Inc. The alleged [**2] fraudulent misrepresentation is the published statement that the specification of Square D equipment only set a definite standard and did not mean that the Docks would not consider for approval equipment that was equal to Square D equipment. The alleged interference with business relations consists of alleged acts by which the plaintiff says the defendants prevented Spring Hill from selling Siemens equipment for use on the Docks project at issue.

Spring Hill states the issues as being whether there was substantial evidence in support of its two substantive claims and its claim alleging that the defendants conspired to do the alleged wrongs. Diamond asserts that he is immune from liability in this action because he was performing discretionary functions on behalf of the State of Alabama; that this action is barred by certain sections of the Code of Alabama that provide for injunctive relief against contracts let in violation of the Competitive Bid Law; that there is no substantial evidence of any misrepresentation by Diamond, of any intent on his part not to perform, or of any damage proximately caused by any fraud; that there is no substantial evidence of any knowledge of a business [**3] relationship or of any conduct interfering with such a relationship; and that there is no evidence of a conspiracy to commit either of the alleged wrongs. Volkert and Russell similarly argue that the injunctive remedies provided by statute are exclusive of any remedy for damages, and that there was not substantial evidence of the

alleged wrongful conduct. Square D and Hartselle make similar arguments.

In July 1990, the Alabama State Docks Department released an invitation for bids, publishing plans and specifications for rehabilitation of and additions to its Pier C in Mobile. Spring Hill submitted to E. H. Smith & Sons Electrical Contractors, Inc. ("Smith Electric"), a proposal to provide the electrical substation for the project. The substation includes high voltage switchgear, a transformer, and a low voltage or secondary switchboard. Spring Hill proposed to provide Siemens products for the substation. Smith Electric submitted a proposal to Ray Sumlin Construction Company that included Spring Hill's quotation. Sumlin included Smith Electric's proposal in its bid and was awarded the contract. Sumlin subcontracted the electrical work to Smith Electric, but Smith Electric ultimately [**4] did not buy the substation equipment from Spring Hill, because Diamond refused to accept the Siemens equipment as conforming to the specifications.

The specifications for the substation required that "The transformer shall be as manufactured by Square D or equal." The switchgear specifications also made reference to Square D equipment. Section 16.02M governed substitutions for equipment described in the specifications by manufacturer name:

> "*Substitution of Equipment and Materials.* Equipment and materials specified herein by catalog number and/or manufacturer represents a standard of quality and design required. Any proposed substitution shall be submitted no less than ten (10) days prior to the bid date. No substitution shall be assumed as acceptable without [*1144] being properly submitted to the Engineer for approval. ..."

Section SP-21 also concerned substitution of materials, stating:

> "Whenever a definite material is specified by manufacturer's name and model, it is not the intention to discriminate against any equal product made by another manufacturer, which in the opinion of the Engineer will perform the same function equally as well as the material specified. [**5] It is rather the intention to set a definite standard as to class of material required for the particular application. The Contractor shall not substitute other products without first receiving written approval from the Owner or his representative."

The Docks Department issued the invitation for bids on July 8, 1990, and the bids were due on August 3, 1990. This due date was changed to August 10 when the second addendum to the specifications was issued on July 23.

Brian M. Brey, a Siemens sales representative, submitted to Volkert on July 17 a list of Siemens equipment proposed as substitutes of a quality equal to that of the named Square D equipment. Russell, on behalf of Volkert, wrote to Diamond, who was the project electrical engineer for the Pier C project, on August 6, recommending that the Siemens request be approved contingent on satisfaction of nine conditions. Also on August 6, Diamond, with Russell's approval, issued Addendum Number 4, which included the following Item Number 5:

> "Reference SPECIFICATIONS, DIVISION III, Article 16.12 *SWITCHGEAR*. Add a new paragraph as follows:
>
> "I. The unit substation switchgear sections which include the [**6] high voltage, transformer and secondary distribution switchboard are to be manufactured by a single source."

Although this addendum was issued only four days before the bids were due, the Docks Department did not extend the bid deadline so that proposals for substitutions offered in compliance with this addendum could meet the 10-days-prior-to-bids requirement of Section 16.02M.

On August 7, Diamond sent Brey a response to his request, stating, "Tentative approval is predicated upon successfully resolving the following," and listing the nine conditions described by Russell. Neither Russell's letter to Diamond nor Diamond's letter to Brey mentioned Item 5 of Addendum 4.

Further discussions about approval of the Siemens equipment took place, and when those were unsuccessful Spring Hill attempted to obtain approval of a Minnesota supplier of Square D products, American Midwest Power ("AMP"). During this process, Hartselle telephoned A. W. McPhillips, a Spring Hill vice president, who gave the following deposition testimony:

> "I got it from David Hartselle on the telephone one time that nothing was going to be approved but Square D. He told me he would have a last look [**7] at everything.
>
> "Q. When did he tell you that?
>
> "A. Telephone conversation one time shortly after the bid was let."
>
> "....
>
> "... We had a conversation for probably--in the neighborhood of five minutes or so. I don't recall all of it. The pertinent facts that I do recall were that Mr. Hartselle told me that there was no way in the world I would be able to buy any Square D in this town or anywhere else; that he would ensure that I couldn't. Mr. Hartselle told me that only Square D would be approved because he had final say-so on what went through there."

The AMP request was rejected, and Smith Electric canceled its order with Spring Hill and obtained Square D equipment for the substation. Spring Hill thereafter brought this action.

Spring Hill asserts that Item 5 of Addendum 4, the "single source requirement," was added for the sole purpose of preventing the approval of Siemens equipment, because Diamond and Russell were aware that Siemens transformers were manufactured by another company. Spring Hill asserts that it is immaterial that the transformer was manufactured by a company other than Siemens, because it was manufactured according to Siemens's [**8] specifications and was covered by [*1145] a Siemens warranty, and because this was common practice in the industry; Russell acknowledged in a later meeting that even Square D uses transformers manufactured by a subsidiary company. Spring Hill also contends that Diamond, Russell, and Hartselle conspired from an early stage of the development of the plans and specifications to prevent the approval of any electrical equipment other than Square D. Thus, Spring Hill contends that the defendants fraudulently caused the plans and specifications to falsely represent that equipment from other manufacturers would be considered without discrimination, and that they intentionally interfered with Spring Hill's business relations with Smith Electric.

Part of Spring Hill's evidence in support of these contentions is the following deposition testimony by Eddie Smith, the president of Smith Electric:

> "... I don't think it would matter what--I've been told that it didn't matter what we submitted, it wasn't going to be approved.
>
> "Q. Who told you that?
>
> "A. Square D man, David Hartselle.
>
> "....
>
> "Q. David Hartselle told you that--well, what did he tell you?
>
> "A. [**9] Well, shortly after the job bid, David came to the office and said he wanted to talk to me. So we sit there in my office and David says what do you intend to do with the power portion of this job. I said, David, I am going to give it to the person that was low bidder with me when I bid the job. I've already listed it on Ray Sumlin's bid form. And he says that--his exact words were--because I remember this well because it made me--it upset me that I just couldn't believe that something like this could go on. He says we've been involved in this project since conception, now Square D had been involved in the design working on this project, *and the specs were written in such a way that no one would get approved but Square D.* And he said you can either deal with me now or later. My response to him was I said, David, this is a state job that's got state money in it. I said this is stuff people get put in jail for. He said, well, I may have said too much; but you'll be back to see me. I said, well, I think you're wrong because Spring Hill Lighting and Siemens are big enough that they can take care of themselves, and they will do what it takes to get the job done."

(Emphasis added.)

[**10] *Exclusivity of Statutory Remedies*

Section 41-16-31, Ala. Code 1975, is part of Article 2, "Competitive Bidding on Public Contracts Generally," within

Title 41, Chapter 16. That section provides:

> "Any taxpayer of the area within the jurisdiction of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of this article."

Article 3, "Competitive Bidding on Contracts of Certain State and Local Agencies, etc.," provides for bidding on contracts let by municipalities, school boards, and other entities. It is very similar to Article 2, and includes § 41-16-61, which is identical to § 41-16-31. These Articles are commonly known as the Competitive Bid Law. See, e.g., *Crest Construction Corp. v. Shelby County Bd. of Educ.*, 612 So. 2d 425, 431-32 (Ala. 1992).

The defendants cite cases from this Court as holding that §§ 41-16-31 and 41-16-61 provide the only remedy for allegations that the State or another public body has entered into a contract in violation of the Competitive Bid Law. [**11] However, none of those cases addressed a tort action alleging intentional wrongful conduct by individuals involved in the bidding process.

City of Montgomery v. Brendle Fire Equipment, Inc., 291 Ala. 216, 279 So. 2d 480 (1973), was an action against the City of Montgomery for an injunction against the City's entering into contracts in the future in violation of the Competitive Bid Law. The Court reversed the circuit court's injunction, holding:

> "The statute makes available the equitable remedy of an injunction on a 'particular [*1146] contract.' This wording does not contemplate enjoining future contractual arrangements. Also the statute provides for enjoining the '*execution*' of any contract which is violative of [Title 55,] Chapter 22 [Code 1940 (Recompiled 1958) (now Title 41, Chapter 16)], not the formation of contracts to be made in the future which may run afoul of Chapter 22. To interpret the statute as Brendle suggests would unduly strain the construction of unambiguous language and provide a remedy not intended by the legislature."

291 Ala. at 220, 279 So. 2d at 484 (emphasis in original).

In *Jenkins, Weber & Associates v. Hewitt*, 565 So. 2d 616, [**12] (Ala. 1990), a disappointed bidder had brought an action "pursuant to Ala. Code 1975, § 41-16-1 et seq., the Alabama Competitive Bid Law." *Id.*, at 617. The Court held:

> "*City of Montgomery* [*v. Brendle Fire Equipment*, 291 Ala. 216, 279 So. 2d 480 (1973),] established the remedy pursuant to Title 55, § 515 [now § 41-16-31], as one for injunctive relief. Jenkins, Weber's complaint, as amended three times, did not seek injunctive relief pursuant to § 41-16-31, but rather claimed monetary damages.
>
> "We find nothing in the legislative history of § 41-16-31 nor in the cases interpreting that statute that allows an unsuccessful bidder to sue for monetary damages. In *Urban Sanitation Corp. v. City of Pell City*, 662 F. Supp. 1041, 1044 (N.D. Ala. 1986), a federal district court interpreting that statute stated:
>
> "'There is no indication in this statute, however, that an unsuccessful bidder has any right or expectancy to insist upon the award of a contract. To the contrary, the statute is carefully crafted to limit the remedy to "enjoining execution of any contract entered into in violation of the provisions of this article." When the statute is [**13] unambiguous, its expressed intent must be given effect and there is no room for construction.'

"(Citation omitted.)

"Jenkins, Weber contends that the decision not to award it the contract was arbitrary and capricious, and it relies on *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971); *International Telecommunications Systems v. State*, 359 So. 2d 364 (Ala. 1978); *Arrington v. Associated General Contractors of America*, 403 So. 2d 893 (Ala. 1981), *cert. denied*, 455 U.S. 913, 102 S. Ct. 1265, 71 L. Ed. 2d 453 (1982); and *Mobile Dodge, Inc. v. Mobile County*, 442 So. 2d 56 (Ala. 1983). However, those cases dealt with injunctive relief and do not control this case, because Jenkins, Weber sought monetary damages rather than injunctive relief.

"We, therefore, conclude that the summary judgment in favor of the defendants was proper, because Jenkins, Weber failed to state a claim cognizable under Code § 41-16-31."

565 So. 2d 617-18 (footnote omitted). As can be seen from the above quotation, Jenkins, Weber did not bring a tort action alleging intentional wrongful conduct, but instead attempted "to state a claim cognizable [**14] under Code § 41-16-31."

In *Crest Construction Corp. v. Shelby County Bd. of Educ.*, 612 So. 2d 425, 431-32 (Ala. 1992), the Court rejected an argument that a "disappointed bidder" should be allowed "to recover bid preparation expenses." Again, the action simply alleged that the county board had violated the Competitive Bid Law by declaring one other than the plaintiff to be the lowest responsible bidder, even though the board had prequalified the plaintiff. No issue as to intentional tortious conduct was presented.

In *Tectonics, Inc. v. Castle Construction Co.*, 496 So. 2d 704 (Ala. 1986), the Court answered a certified question asking whether it would use the federal "'Small Business Act as a standard in determining fraud, unjust enrichment or interference with a business relationship,' in a suit brought by the second lowest and unsuccessful bidder against the lowest and successful bidder on a government contract," 496 So. 2d at 704. The Court recited the fact that the plaintiff Tectonics had not challenged the determination that the defendant Collins Company, Inc., was a small business and therefore was entitled to bid on the contract at issue. The Court then [*1147] stated: "For [**15] this Court to allow Tectonics to maintain an action *now* in state court would be to nullify the federal government's determination that Collins was a small business." *Id.*, at 705 (emphasis in original). The Court continued:

"Moreover, the Court has refused to confer a state cause of action in favor of an unsuccessful bidder on a municipal procurement:

"'The provision for letting the contract to the lowest responsible bidder is for the benefit of the public and *does not confer on a bidder any right enforceable at law or in equity* ....' (Emphasis added.)

" *Townsend v. McCall*, 262 Ala. 554, 558, 80 So. 2d 262, 265 (1955).

"In light of this pronouncement in *Townsend* and in light of the fact that the Small Business Act is a *federal* law which does not confer a federal cause of action in favor of an unsuccessful bidder, this Court sees absolutely no logic in interpreting the Small Business Act to allow a state cause of action.

"This Court would *not* use the Small Business Act as a standard in determining fraud, unjust enrichment, or interference with a business relationship in a suit brought by the second lowest and [**16] unsuccessful bidder against the lowest and successful bidder on a government contract."

496 So. 2d at 705-06 (emphasis in *Tectonics*). Because the certified question simply asked whether the Court would use the Small Business Act as a standard in assessing the described tort claims, the Court's reference

to *Townsend v. McCall*, 262 Ala. 554, 558, 80 So. 2d 262, 265 (1955), was purely dictum. *Townsend* was an action to enjoin the execution of a contract, and it does not address the question whether injunctive relief is the exclusive remedy in such cases.

Urban Sanitation Corp. v. City of Pell City, 662 F. Supp. 1041 (N.D. Ala. 1986), quoted in *Jenkins, Weber & Associates, supra*, presented a question whether the Competitive Bid Law created a property right that would support an action by an unsuccessful bidder under 42 U.S.C. § 1983. The court found no such property right.

Of the above cases, only the federal action underlying the certified question answered in *Tectonics* involved a claim alleging intentional torts. Four Justices dissented, with an opinion by Justice Adams, expressing the opinion that the Small Business Act's definitions and determinations [**17] should be allowed as evidence in regard to the state causes of action, even though that Act did not create a "standard" in the sense of creating a cause of action based on that law. The dissenters expressed the opinion that the claims of fraud, unjust enrichment, and interference with business relations "are indeed viable causes of action under Alabama law." 496 So. 2d at 707-08. The majority opinion held only that "This Court would *not* use the Small Business Act as a standard in determining fraud, unjust enrichment, or interference with a business relationship in a suit brought by the second lowest and unsuccessful bidder against the lowest and successful bidder on a government contract." 496 So. 2d at 706. Although the language referring to *Townsend v. McCall*, 262 Ala. 554, 558, 80 So. 2d 262, 265 (1955), implied that the action would not lie, the majority did not definitively express the opinion that the federal court should dismiss the claim.

Upon full consideration of the question, we hold that an action such as this one, alleging intentional wrongful conduct by persons involved in the bidding process, is not necessarily barred by the potential availability of injunctive [**18] relief pursuant to Ala. Code 1975, §§ 41-16-31 and 41-16-61. The remedy of injunctive relief provides no sanctions against intentional wrongful conduct by individuals involved, and we see no reason why such individuals should be shielded from responsibility for such intentional wrongful conduct.

Injunctive relief is seldom granted in actions alleging violations of the Competitive Bid Law. *Compare Crest Constr. Corp. v. Shelby County Bd. of Educ.*, 612 So. 2d 425 (Ala. 1992); *Steeley v. Nolen*, 578 So. 2d 1278 (Ala. 1991); *Horne Wrecker Service, Inc. v. City of Florence*, 567 So. 2d 1285 (Ala. 1990); *Advance Tank & Constr. Co. v. Arab Water Works*, 910 F.2d 761 (11th Cir. 1990) (applying [*1148] Alabama law); *Hospital Systems, Inc. v. Hill Rom, Inc.*, 545 So. 2d 1324 (Ala. 1989); *McCord Contract Floors, Inc. v. City of Dothan*, 492 So. 2d 996 (Ala. 1986); *J. F. Pate Contractors v. Mobile Airport Authority*, 484 So. 2d 418 (Ala. 1986); *Mobile Dodge, Inc. v. Mobile County*, 442 So. 2d 56 (Ala. 1983); *International Telecommunications Systems v. State*, 359 So. 2d 364 (Ala. 1978); *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971); *Townsend* [**19] *v. McCall*, 262 Ala. 554, 80 So. 2d 262 (1955); *Mitchell v. Walden Motor Co.*, 235 Ala. 34, 177 So. 151 (1937); and *Carson Cadillac Corp. v. City of Birmingham*, 232 Ala. 312, 167 So. 794 (1936), all denying injunctive relief, *with Kennedy v. City of Prichard*, 484 So. 2d 432 (Ala. 1986), and *Arrington v. Associated General Contractors of America*, 403 So. 2d 893 (Ala. 1981), *cert. denied*, 455 U.S. 913, 102 S. Ct. 1265, 71 L. Ed. 2d 453 (1982), both granting injunctive relief. While it is appropriate to create a restrictive standard for interfering with the normal progress of government works, the statements in the cases discussed above indicating that the injunctive remedy is the only remedy for violation of the Competitive Bid Law were not intended to create a license for persons to commit fraud and other intentional torts.

Even the potential availability of injunctive relief does not necessarily protect the defrauded party, because the intentional tort may not support the granting of injunctive relief. This case illustrates the likelihood that the statutory provision for injunctive relief will prove ineffective to prevent wrongful conduct. Spring Hill quoted to Smith [**20] Electric a price of $ 114,597 for the substation. Smith Electric included this price as part of its proposal to Sumlin Construction that it would perform as the electrical subcontractor for the sum of $ 792,850. Sumlin Construction was the low bidder on the Pier C project, bidding $ 9,431,348. A court would be reluctant to enjoin an entire project based on a complaint by a supplier of materials worth only a little more than 1% of the value of the entire project. Nevertheless, if Spring Hill's evidence is viewed most favorably to Spring Hill's allegations and all reasonable inferences in support thereof are drawn, it appears that the defendants may have intentionally defrauded Spring Hill and interfered with its business.

For the foregoing reasons, we hold that an action alleging intentional wrongful conduct by persons involved in a bidding process is not subject to a summary judgment solely on the basis that the injunctive relief afforded by §§ 41-16-31 and 41-16-61 is the sole remedy for violations of the Competitive Bid Law.

Immunity

The State of Alabama "shall never be made a defendant in any court of law or equity." Ala. Const. 1901, art. I, §

14. The State Docks Department [**21] is clothed with this immunity, and its employees are also, under certain circumstances. *Alabama State Docks v. Saxon*, 631 So. 2d 943 (Ala. 1994); *Jones v. Alabama State Docks*, 443 So. 2d 902 (Ala. 1983). Diamond, as an employee of the Docks Department, asserts that he is immune from liability in this action.

> "Clearly, a state officer or employee is not protected by § 14 when he acts willfully, maliciously, illegally, fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of the law. See *Lumpkin v. Cofield*, 536 So. 2d 62, 65 (Ala. 1988); *Barnes [v. Dale*, 530 So. 2d 770, 782 (Ala. 1988)]; *DeStafney v. University of Alabama*, 413 So. 2d 391, 393 (Ala. 1981); *Gill v. Sewell*, 356 So. 2d 1196, 1198 (Ala. 1978); *Unzicker v. State*, 346 So. 2d 931, 933 (Ala. 1977); and *St. Clair County v. Town of Riverside*, 272 Ala. 294, 296, 128 So. 2d 333, 334 (1961)."

Phillips v. Thomas, 555 So. 2d 81, 83 (Ala. 1989). Because this action can proceed only on allegations of intentional wrongdoing, the defendants are not protected by immunity.

Fraud

Spring Hill's allegation of fraud is that the defendants falsely caused [**22] the plans and specifications to represent that the specification of material by a manufacturer's name did not represent an intention to discriminate against other manufacturers, but only represented a definite standard. The defendants contend that the evidence supported their [*1149] summary judgment motions and that Spring Hill's evidence did not present a genuine issue of material fact on any of the elements of fraud.

The elements of fraud are (1) a false representation (2) of a material existing fact (3) on which the plaintiff justifiably relies (4) and damage proximately caused by the plaintiff's reliance. *Allstate Ins. Co. v. Hilley*, 595 So. 2d 873, 875 (Ala. 1992); *General Motors Acceptance Corp. v. Covington*, 586 So. 2d 178, 181 (Ala. 1991). The defendants contend that the alleged fraud is "promissory fraud." In promissory fraud, the material existing fact that is misrepresented is the defendant's state of mind, when the defendant represents that he intends to perform some act although he does not in fact intend to perform it. *Walker v. Woodall*, 288 Ala. 510, 513, 262 So. 2d 756, 759 (1972).

> "Neither [Ala. Code 1975, § 6-5-101] nor [Ala. Code 1975, § 6-5-103] [**23] [speaks] of future occurrences. They both refer to 'a material fact,' which is then existing. As to promises (or opinions) there must have been at the time an intention not to do the act promised (an existing status) and [there must be a showing] that it was made with the intent to deceive."

Birmingham Broadcasting Co. v. Bell, 259 Ala. 656, 664, 68 So. 2d 314, 321 (1953).

We question whether the allegation of fraud is necessarily an allegation of promissory fraud. If the misrepresentation is that the specification of Square D products for the substation did not represent discrimination against other manufacturers, that is not necessarily a representation regarding a future act. However, even accepting the defendants' characterization that the alleged misrepresentation is that the defendants would fairly consider alternative submissions, there is substantial evidence that the defendants had no intention to do so at the time the invitation to bid was issued.

The defendants also argue that there is no evidence that they made any false representation, because the Docks Department, not any of these defendants, published the plans and specifications. However, Volkert drew [**24] the specifications, and Russell conferred with Hartselle in preparing the electrical specifications for the project. There is substantial evidence that Diamond, Russell, and Hartselle conspired to cause the specifications to falsely represent that the specification of Square D products for the substation did not indicate improper favoritism for Square D. Thus, whether directly under the fraud count or indirectly through the conspiracy count, a jury could find that the defendants falsely made the representation.

The defendants assert that Spring Hill suffered no damage as a result of any reliance on the alleged misrepresentations. They argue that the failure to approve the Siemens equipment was the result of Brey's failure to complete the request for approval, not the result of any misconduct on their part. They cite the following facts: After Brey submitted responses to the nine conditions for which Russell requested clarification, he was asked for further clarification on three of them. He never submitted any such information. The defendants assert that he misinterpreted the single-source requirement as precluding the use of Siemens equipment, when, they say, the Siemens equipment [**25] would have met

that requirement because the transformer was manufactured to Siemens's specifications and was warranted by Siemens. This argument ignores the fact that Diamond wrote a letter to Brey telling him that Siemens would *not* be approved, because of the single-source requirement. On August 23, 1990, Brey wrote Diamond a letter that included the following:

> "The question about a single line manufacture on the substation was brought up and can be answered by saying that Siemens' name and warranty applies to the complete substation. This warranty extends to all components including lugs, bus bars and transformer components. It is Siemens' understanding that the intent of this specification is to insure that there is a single manufacturer taking responsibility (not a Westinghouse switch with a Siemens Transformer with a GE secondary -three manufacturers and three warranties)."

Diamond wrote back the following day, informing Brey that "The Siemens/ITE transformer may not be manufactured by Siemens/ITE. [*1150] If this is the case, Addendum No. 4, item 5 would not be satisfied." Thus, contrary to the position now taken by the defendants, Brey *did* take the position that [**26] the Siemens equipment could meet the single-source requirement, but Diamond responded that it could not. Thus, there was no point in Brey's addressing the other three conditions that Diamond, in the same letter, said needed further clarification, and the defendants have not established that the failure to obtain approval of Siemens occurred because Brey did not pursue it.

Spring Hill can show lost profits as damage. Sumlin Construction was awarded the contract, and it subcontracted the electrical work to Smith Electric. Smith Electric contracted with Spring Hill to buy the substation equipment, but had to cancel that order when Diamond did not approve the Siemens equipment.

To avoid unduly lengthening the opinion, we have omitted other evidence cited by the parties as tending to support or to defeat the fraud claim. The discussion above shows that Spring Hill submitted substantial evidence in support of the fraud claim and that the circuit court erred in entering the summary judgment on that claim.

Intentional Interference with Business Relations

The elements of a cause of action for intentional interference with business or contractual relations are: (1) the existence [**27] of a contract or business relation; (2) the defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the contract or business relation; and (4) damage to the plaintiff as a result of the defendant's interference. Justification or competitor's privilege may be presented as a defense. *Soap Co. v. Ecolab, Inc.*, 646 So. 2d 1366 (Ala. 1994); *Joe Cooper & Assocs., Inc. v. Central Life Assur. Co.*, 614 So. 2d 982 (Ala. 1993); *Century 21 Academy Realty, Inc. v. Breland*, 571 So. 2d 296 (Ala. 1990); *Gross v. Lowder Realty Better Homes & Gardens*, 494 So. 2d 590 (Ala. 1986).

The defendants argue that there is no evidence that they were aware of the business relation between Spring Hill and Smith Electric; rather, they say, they simply knew that Siemens was applying for approval of its products as substitutes for the specified Square D products. However, Spring Hill presented evidence regarding a Siemens substation that had been installed in an earlier Docks Department project, Pier B. There was evidence that Diamond knew that Spring Hill had supplied that Siemens equipment. From this evidence, a jury could infer that the defendants [**28] knew that the proposed Siemens equipment would be supplied through Spring Hill.

The evidence discussed above presents a jury question on the issue of intentional interference. Particularly pertinent to this aspect of the claim is Diamond's insistence that the single-source requirement required a single manufacturer, not simply a single responsible manufacturer that would provide warranties for the entire substation. That insistence is rendered suspect by the minutes of a meeting held at Volkert's office on January 4, 1991, as an attempt to resolve the substation controversy. Present were James Hancken, general manager for engineering for the Docks Department; J. R. Sute, Volkert's vice president for operations; W. R. Bramer, Volkert's Pier C construction manager; Patrick J. Wilson, Volkert's Pier C project engineer, and Russell. The minutes, in regard to the single-source requirement, read:

> "The specification requirements that the subject electrical gear is to be 'manufactured by a single source' was discussed. Mr. Bramer said it is his understanding that many electrical manufacturers use outside sources to furnish some items of equipment. Mr. Russell agreed but noted the [**29] most reputable manufacturers (G.E., Westinghouse, and Square D) furnish this equipment under *their* nameplate and under *their* warranty. Mr. Russell noted that the transformers furnished by Square

D are manufactured by Sorgel, but that this company is a wholly-owned subsidiary of Square D. Mr. Sute made the point that the specification use of the word 'manufactured' may have not been the best choice here. He suggested that use of the term '*supplied and warranted* by a single source' would have been a better choice of [*1151] words. Mr. Russell agreed and stated that this certainly was the *intent* of the specs."

Brey's August 23 letter established that Siemens could meet a "supplied and warranted by a single source" requirement, but Diamond responded the next day with insistence that the requirement meant what it said, that the substation components must be *manufactured* by a single source. A jury could find that the single-source requirement was not honestly imposed (because even Square D arguably could not meet it and because the later-asserted justification was a need for a single warranty and a single party responsible for repair), but was imposed solely as part of [**30] a conspiracy by the defendants to prevent the approval of any equipment other than Square D equipment. This, along with other evidence, constitutes substantial evidence that the defendants intentionally interfered with Spring Hill's business relation with Smith Electric.

Spring Hill has shown damage by virtue of Smith Electric's cancellation of its order from Spring Hill. The defendants may have justification defenses to assert, but the evidence does not support such a defense as a matter of law. Similarly, Square D and Hartselle may be able to assert a competitor's privilege defense, but the evidence does not support a ruling that there is no genuine issue of material fact on this question. *See Soap Co. v. Ecolab, Inc., supra.*

For the foregoing reasons, we hold that the circuit court erred in entering the summary judgment for the defendants.

REVERSED AND REMANDED.

Hornsby, C. J., and Almon, Kennedy, Ingram, and Butts, JJ., concur.

Maddox, Houston, and Cook, JJ., dissent.

Shores, J., recused.

Spring Hill Lighting, Inc. v. Square D. Company

DISSENT BY: HOUSTON

DISSENT

HOUSTON, JUSTICE (dissenting).

The dispositive issue is whether the remedy provided by the Alabama [**31] Competitive Bid Law [1] is an exclusive remedy that preempts Spring Hill's entire action. In my opinion, based upon long established precedent, which the majority opinion does not overrule, Ala. Code 1975, § 39-5-4 [2] and § 41-16-31 [3], provide an exclusive remedy. *Crest Construction Corp. v. Shelby County Board of Education*, 612 So. 2d 425, 432 (Ala. 1992) (Ala. Code 1975, § 41-16-61, prevents awards of compensatory damages); *Jenkins, Weber & Associates v. Hewitt*, 565 So. 2d 616, 618 (Ala. 1990) ("We find nothing in the legislative history of § 41-16-31 nor in the cases interpreting that statute that allows an unsuccessful bidder to sue for monetary damages."); *Tectonics, Inc. v. Castle Construction Co.*, 496 So. 2d 704, 705-06 (Ala. 1986) (because this Court had refused to confer a state cause of action in favor of an unsuccessful bidder under the Alabama Competitive Bid Law, and because federal law did confer a federal cause of action, this Court refused to interpret the Small Business Act to allow a state cause of action); *Townsend v. McCall*, 262 Ala. 554, 558, 80 So. 2d 262 (1955) ("The provision for letting the contract to the lowest responsible bidder is for the [**32] benefit of the public and does not confer on a bidder any right enforceable at law or in equity.").

1 Ala. Code 1975, §§ 41-16-20 through 41-16-63; §§ 39-5-1 through 39-5-6.

2 "An action shall be brought by the Attorney General or may be brought by any interested citizen, in the name and for the benefit of the state, to recover from the awarding authority, contractor or their sureties or any person receiving funds under any public works contract let in violation of or contrary to this title or any other provision of law."

3 "Any taxpayer of the area within the jurisdiction of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of this article."

The stated purpose behind the Competitive Bid Law is to get the best quality equipment at the lowest possible price. *J. F. Pate Contractors v. Mobile Airport Authority*, [**33] 484 So. 2d 418, 421 (Ala. 1986). It is because Alabama's competitive bid provisions are designed for the public's benefit, and not for the benefit of those vying for public funds, [*1152] that the legislature created an exclusive remedy for those who contend that a public contract has been let or administered in violation of the Competitive Bid Law. The Code provides that the attorney general, any tax-

payer, an unsuccessful bidder, or any interested citizen may sue to enjoin the execution of any contract entered into in violation of the Competitive Bid Law's provisions. See § 39-5-4; § 41-16-3; and § 41-16-61. In this case, Spring Hill does not seek to enjoin the letting or execution of the contract or the payment of public funds under the contract.

The policy of the legislature in enacting the Competitive Bid Law was to protect the public purse; and this Court has proclaimed that to be the policy for the past 40 years.

If it is a felt necessity that this Court must change our established law, why do it in this case, when Spring Hill has not sought to protect the public purse, but only to personally profit? Certainly, a monetary reward should be available *only* after the public [**34] has benefited from an unsuccessful bidder's efforts; otherwise, we are changing our law and policy by molar, rather than molecular, motions. In short, we are legislating, and not interstitially. [4]

4 *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 218-23, 61 L. Ed. 1086, 37 S. Ct. 524 (1917) (Holmes, J., dissenting).

Maddox, J., concurs.

James Wesley Steeley, Jr. v. David Nolen, as Mayor of Gadsden, et al.

No. 89-1176

Supreme Court of Alabama

578 So. 2d 1278; 1991 Ala. LEXIS 394

April 26, 1991

SUBSEQUENT HISTORY: [**1] Released for Publication May 28, 1991.

PRIOR HISTORY: Appeal from Etowah Circuit Court; CV-90-197; William W. Cardwell, Jr., Judge.

DISPOSITION: MOTION TO DISMISS APPEAL DENIED. JUDGMENT AFFIRMED. MOTION TO STAY PERFORMANCE OF CONTRACT DISMISSED AS MOOT.

CORE TERMS: bid, bid bond, bidder, delinquent, notice, summary judgment, supplier, invitation to bid, awarding, truck, ad valorem taxes, standing to bring, require reversal, regular payments, refused to pay, responsible bidder, unsuccessful, competitive, converted, container, enjoin, paying, lowest, moot

COUNSEL: For Appellant: James Wesley Steeley, Jr., Gadsden.

For Appellee: Roger W. Kirby, City Attorney, Gadsden.

JUDGES: Hornsby, C.J., and Adams, Steagall, and Ingram, JJ., concur. Almon, Justice.

OPINION BY: ALMON

OPINION

[*1278] James Wesley Steeley appeals from a summary judgment entered in favor of the defendants, the City of Gadsden ("City") and a number of its elected officials, in an action for a declaratory judgment and injunctive relief. Steeley brought this action in his capacity as a taxpayer, to challenge [*1279] the City's acceptance of a bid by Ingram Equipment, Inc. ("Ingram"), to supply it with an automated refuse collection system. He alleged that the bid submitted by Ingram was higher than the one submitted by Rapid Rail Systems ("Rapid Rail") and, therefore, that the City's acceptance of Ingram's bid violated laws governing competitive bidding on public contracts. Ala. Code 1975, § 41-16-50 et seq. Steeley [**2] asked the court to declare that the City's rejection of Rapid Rail's bid was unlawful and to enjoin the performance of its contract with Ingram. [1]

1 Neither Ingram nor Rapid Rail was made a party to this action, and there is no evidence that Steeley owned any interest in either company.

The City filed a motion to dismiss Steeley's complaint, alleging *inter alia,* that: (1) Steeley was not a "taxpayer" because he was delinquent in paying his *ad valorem* taxes and therefore lacked standing; and (2) Rapid Rail had failed to submit a bid bond as specified in the City's invitation to bid and as required by Ala. Code 1975, § 41-16-50(c).

The trial court converted the City's motion to one for summary judgment and held a hearing, at which affidavits, documentary evidence, and testimony were considered. After the hearing the court granted the City's motion, holding, *inter alia,* that Steeley lacked standing and that Rapid Rail had failed to submit a proper bid bond. Steeley's "motion to reconsider" was denied, and [**3] he appeals. He argues that the court erred by holding that he lacked standing; by holding that the bonds submitted by Rapid Rail did not comply with § 41-16-50(c) and the City's invitation to bid; and by holding a hearing on the City's motion less than 10 days after he was given notice. Steeley has also filed a motion asking this Court to stay the performance of the contract between Ingram and the City pending the resolution of his appeal. After Steeley's notice of appeal was filed, Rapid Rail, the unsuccessful bidder, was bought by the Heil Company, Ingram's supplier of trucks and refuse containers. The City contends that the competing bidders have, in effect, merged, and asks this Court to dismiss Steeley's appeal as moot.

Because we conclude that the trial court correctly held that Rapid Rail failed to submit a proper bid bond, the judgment is due to be affirmed. However, we do not agree with the court's holding that Steeley lacked stand-

ing. Although that error does not require reversal in this case, the question of when a citizen could lose his status as a taxpayer, and thus, his standing to bring an action under sections like § 41-16-61, has far-reaching consequences and must [**4] be addressed.

Standing

Steeley's action was brought pursuant to Ala. Code 1975, § 41-16-61:

"*Any taxpayer* of the area within the jurisdiction of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of this article."

(Emphasis added.) The trial court held that because Steeley was delinquent in paying his *ad valorem* taxes for the years 1987-1989, he was not a taxpayer and therefore lacked standing to bring an action pursuant to § 41-16-61. We do not agree. At the time that he filed his complaint, Steeley was in Chapter 13 bankruptcy and was making regular payments to the trustee handling his case. He presented evidence that the trustee made regular payments to the local tax collector in an ongoing effort to cure his tax delinquency. Steeley's evidence was not contradicted by the City.

The City argued at the trial level, and continues to contend, that the fact that Steeley was delinquent, standing alone, deprived him of his status as taxpayer. It directs this Court's attention to one case, *Donna Independent School Dist. v. Sanders,* 57 S.W.2d 857 (Tex. Civ. App. 1933), [**5] as support for its argument. We find that case to be inapposite. In *Sanders* the appellate court reversed an order granting an injunction that had been sought by a number [*1280] of delinquent taxpayers. The court held that because those taxpayers were delinquent and *refused* to pay their taxes, they were not entitled to the relief they requested. 57 S.W. 2d at 857-58. Unlike Steeley, the taxpayers in *Sanders* were not debtors under the Bankruptcy Act or Code, and there is no evidence that Steeley has refused to pay his taxes.

The bankruptcy laws enacted by the federal government are remedial in nature and are intended to give debtors a fresh start, unhampered by the pressure and discouragement of pre-existing debt. *Perez v. Campbell,* 402 U.S. 637, 649, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971). Governmental units are expressly prohibited from discriminating against a debtor solely because he has sought the protection afforded by those laws. *Perez, supra*; 11 U.S.C. § 525; *In re Layfield,* 12 Bankr. 846, 850 (Bkrtcy. N.D. Ala. 1981). As a result, a debtor in bankruptcy does not lose his rights as a taxpayer, including his right to bring an action [**6] pursuant to § 41-16-61. *Id.* The court's ruling on this issue was error. However, for the reasons set out below, that error does not require reversal.

Rapid Rail's Bid Bond

One of the grounds for the court's entry of a summary judgment for the defendants was its holding that Rapid Rail had not submitted a proper bid bond, as required by Ala. Code 1975, § 41-16-50(c), and by the City's specifications in its invitation to bid. Section 41-16-50(c) provides:

"It is further provided that all bidders must furnish a bid bond on any contract exceeding $ 10,000; provided that bonding is available for such services, equipment or materials."

Section 12 of the City's invitation, "Terms & Conditions To Be Complied With By All Bidders," stated:

"Security in the form of a bid bond equal to five percent (5%) of the total bid must be furnished with all bids of $ 10,000 or more."

Rapid Rail did not submit a bid bond that named it as the principal. Instead, it submitted bonds in the name of the truck supplier and in the name of the refuse container supplier that it planned to use if it was awarded the contract. The trial court held that § 41-16-50(c) requires, by its plain language, that [**7] the bond submitted be in the name of the bidder. Because the bonds submitted by Rapid Rail were in the name of third parties, the court held, they did not fulfill the requirements of the statute.

We agree. The purpose of the statutory bond requirement is to guarantee that successful bidders honor the terms of their bids. That purpose can be accomplished only if the bidder is the principal on the bond, as the surety's liability is measured by that of the principal. *Phelps v. Dawson,* 97 F.2d 339 (8th Cir. 1938); 74 Am. Jur. 2d *Suretyship* §§ 24-25, at 27-28 (1974). If, in the instant case, the City had accepted Rapid Rail's bid, along with the bonds naming the truck and refuse suppliers as principals, it would have had no recourse on the bonds if Rapid Rail had independently breached its obligations. *Id.* Therefore, the bonds submitted along with Rapid Rail's bid were not sufficient.

In *White v. McDonald Ford Tractor Co.,* 287 Ala. 77, 248 So. 2d 121 (1971), this Court recognized that the authority soliciting bids is in the best position to determine if a bid meets its needs. We also held that the legislature did not intend to [**8] remove all discretion from awarding authorities when determining which bid to accept:

"We think that [awarding] authorities should have discretion in determining who is the lowest responsible bidder. This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence."

287 Ala. at 86, 248 So. 2d at 129-30. See also, *Mobile Dodge, Inc. v. Mobile County,* 442 So. 2d 56 (Ala. 1983).

Because Rapid Rail failed to submit a proper bond, we conclude that the City did not exercise its discretion in an arbitrary, [*1281] capricious, or otherwise improper manner when it determined that Rapid Rail was not the "lowest responsible bidder." *White, supra.* Therefore, there was no violation of the competitive bid laws, and the City was entitled to a judgment as a matter of law.

Finally, we note that Steeley argues that he did not receive proper notice that the trial court had converted the City's motion to dismiss to a motion for [**9] summary judgment. However, our review of the record reveals that Steeley did not object to the allegedly insufficient notice. Any failure to comply with the notice requirement set out in Rule 56(c), Ala. R. Civ. P., must be raised at trial or is waived. *Kelly v. Harrison,* 547 So. 2d 443, 445 (Ala. 1989).

For the reasons set out above, the judgment of the trial court is affirmed.

MOTION TO DISMISS APPEAL DENIED. JUDGMENT AFFIRMED. MOTION TO STAY PERFORMANCE OF CONTRACT DISMISSED AS MOOT.

J. C. STUDDARD, etc. v. SOUTH CENTRAL BELL TELEPHONE COMPANY, a corporation

No. 77-22

Supreme Court of Alabama

356 So. 2d 139; 1978 Ala. LEXIS 2096

February 24, 1978

DISPOSITION: [**1] AFFIRMED.

CORE TERMS: margin, summary judgment, right of way, cable, counterclaim, public highways, highway, feet, property line, right-of-way, telephone, construct, barrier, center line, genuine issue, telegraph, telephone lines, material fact, governing body, permission, buried, exact, deed, trespass, matter of law, telephone cable, lines along, moving party, constructed, placement

COUNSEL: James F. Hinton, Gadsden, for Appellants.

Anita Leslie Miller, Birmingham, James D. Pruett, Gadsden, for Appellee.

JUDGES: Bloodworth, Justice Wrote The Opinion. Faulkner, Almon, Embry and Beatty, JJ., concur.

OPINION BY: BLOODWORTH

OPINION

[*140] Defendant, J. C. Studdard, appeals from the grant of a motion for summary judgment for plaintiff, South Central Bell Telephone Company. We affirm.

In 1969, J. C. Studdard and wife, Grace Studdard, conveyed by deed a "right-of-way" for a public road to Etowah County. The deed stated the right-of-way "shall be 25 feet in width on each side of the center line of said road, as it is now located and staked out by Etowah County or as much of our lands as is required to make a 50 foot right-of-way across our lands, on Road known locally as Heath Herring (Chris Lyn Dr.) Road. . . ." In 1973, the telephone company was granted permission by the company was granted permission by the Etowah County Engineer, pursuant to Tit. 23, § 48, Code of Alabama 1940, [§ 23-1-85 Code 1975] to install a buried telephone cable within the right of way of said road. The cable was buried between 16.5 feet and 18 feet from the center line of the [**2] road.

In June, 1976, J. C. Studdard's brother-in-law damaged plaintiff's underground cable while he was erecting a fence for the Studdards on their property. Plaintiff brought suit for negligence. Defendant J. C. Studdard answered with a general denial and interposed the defense of contributory negligence. In addition, defendant filed a counterclaim for trespass to real property, which allegedly occurred when plaintiff installed the cable without permission or authority to do so. Plaintiff answered defendant's counterclaim with a general denial and later moved for summary judgment on defendant's counterclaim. Defendant also moved for summary judgment on plaintiff's complaint and on defendant's counterclaim.

The trial court held, *inter alia*, that plaintiff was entitled to summary judgment; that defendant's motion for summary judgment on its counterclaim was due to be denied; that there was no just reason for delay; and, that this was a final judgment. This appeal then followed.

Defendant J. C. Studdard contends the trial court erred in granting a summary judgment for plaintiff on his counterclaim for trespass, because, he claims the underground cable was installed at [**3] an improper point, and because the question regarding proper placement of the cable is a "genuine issue of material fact," which precludes summary judgment. We must disagree.

A restatement of our rules respecting summary judgment is in order. A motion for summary judgment may be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Isbell v. City of Huntsville*, 295 Ala. 380, 330 So.2d 607 (1976).

The movant for summary judgment has the burden of showing the absence of any genuine issue of material fact, and all reasonable doubts touching the genuine issue of material fact must be resolved against the moving party. *Donald v. City National Bank of Dothan*, 295 Ala. 320, 329 So.2d 92 (1976).

[*141] Moreover, if there is a scintilla of evidence supporting the nonmoving party, a summary judgment is inappropriate. *Wilbanks v. Hartselle Hospital, Inc.*, 334 So.2d 870 (Ala.1976).

Where, as here, however, all the basic facts are undisputed and the matter is one of interpretation or of reaching a conclusion of law by the court, the court may grant a motion for summary judgment. *Bible* [**4] *Baptist Church v. Stone*, 55 Ala.App. 411, 316 So.2d 340 (1975).

We think it is clear that what is involved in this case is purely a question of law.

Placement of telephone lines in Alabama is governed by Tit. 23, § 48, Code [§ 23-1-85 Code 1975] which provides, as follows:

> "§ 48. (1367)(5817) Right to construct telephone and telegraph lines along highway.-The right of way is granted to any person or corporation having the right to construct the telegraph or telephone lines within this state to construct them *along the margin of the right of way of public highways*, subject to the removal or change by the court of county commissioners, board of revenue, or other like governing body of the county, except in cases where the highway department has jurisdiction over such highway. (1927, p. 348.)" [Emphasis supplied.]

There is no dispute as to the location of the buried telephone cables at the time the damage was done to them. Both sides agree on that location. Therefore, the trial judge was faced exclusively with a question of law, the interpretation of the statutory phrase "along the margin of the right of way of public highways," contained in Tit. 23, [**5] § 48, supra. What he had to determine, in effect, in granting summary judgment for the plaintiff on defendant's counterclaim for trespass, was that the location of the cables between 16.5 feet and 18 feet from the center line of the road, fell "along the margin of the right of way of public highways," which right of way extended 25 feet in width from the center line, according to the deed, as a matter of law.

Defendant relies on *Gilbert v. Southern Bell Telephone and Telegraph Co.*, 200 Ala. 3, 75 So. 315 (1917), which was decided according to § 5817, Code of Alabama 1907, the statutory predecessor of Tit. 23, § 48, Code of Alabama 1940, as supporting their contention that the location of the cables was not "along the margin of the right of way of public highways." In *Gilbert*, this court, in holding that the giving of a certain jury charge was not improper, discussed the meaning of the phrase "along the margin of public highways" as the statute then read, viz:

> ". . . Telegraph and telephone companies, under their statute license to construct their lines along the margin of public highways (Code § 5817) could not, for example, take advantage of the convenient windings [**6] of travel due to difficulties in the road, to intrude their poles into that part of a highway set apart and devoted to the use of the public traveling on foot and in vehicles. The right of such companies under the statute is limited to the margin of the road. This means necessarily that their poles may be planted within the borders of the way devoted to public use; but they must not unreasonably or unnecessarily interfere with or endanger the use of the highway by the traveling public. . . ."

200 Ala. at 4, 75 So. at 316.

Defendant argues that the addition of the words, "of the right of way" to the 1907 Code dictates the conclusion that the cables were improperly placed. Defendant contends that the cables may only be placed along the *exact* outer limit of the *right of way*.

Plaintiff's counsel answers this argument as follows:

> ". . . When used as it is in this statute, 'margin' patently means an area. It is so understood in everyday usage. The rules of this Court require that a *margin* of 1.5 inches be left around the typescript of this page. ARAP 32. If one of the judges of this Court makes notes in the *margin* of this brief, he or she will write [**7] in the space between the [*142] typewriting and the edge. As the word is employed in the statute it can have no comprehensible meaning unless it refers to the space between the traveled part of the roadway and the edge of the right-of-way. It was so understood in *Gilbert* and the best that counsel for Mr. Studdard can do with that is to claim that

adding "of the right-of-way" to the section turns *Gilbert* inside out.

"To reason that the added words change both *Gilbert* and ordinary usage so completely is to wind up standing on thin air. The same Legislature that incorporated those words retained the requirement that the lines be constructed 'along' the margin and added also the provision that they be subject to removal or 'change' by county governing bodies.

"'Along' recently has been construed by this Court:

> "'The word "along" is not exact or specific. * * *
>
> "'If the barrier were on the highway right of way and extended in the direction of the property line, it could be said that the barrier was "along" the property line. If the barrier were on the land owned by the defendant railroad and extended in the direction of the property line, it could be said [**8] that the barrier was "along the property line." Whether on one side or the other, the barrier would be "along" the property line. *Holley v. Seaboard Air Line R. Co.*, 291 Ala. 510, 515, 283 So.2d 168, 173 (1973).'"

> If 'margin' means an exact, fixed point, its use with 'along' is a contradiction. Furthermore, if the Legislature granted telephone and telegraph companies a franchise to construct their lines only upon definite, fixed points (joined together to make a line) there was no sense in simultaneously giving county governing bodies the power to require the location of the lines to be *changed.* If the lines could be in one place only, to what other location could they be changed?"

In order to agree with defendant's statutory interpretation, we would have to hold that telephone lines and cables may only be constructed along one line. Not only would this prove to be impracticable as plaintiff's counsel points out, but it would require an excessively strained reading of Tit. 23, § 48, Code, which we are unwilling to give it.

In ascertaining legislative intent, we are entitled to consider conditions which may arise under the provisions of statutes [**9] and to examine the results which will flow from giving the language in question a particular meaning over another. *Wright v. Turner*, 351 So.2d 1 (Ala.1977); *League of Women Voters v. Renfro*, 292 Ala. 128, 290 So.2d 167 (1974). We agree with plaintiff's interpretation of the meaning of "along the margin of the right of way."

For the foregoing reasons, therefore, this case is due to be affirmed.

AFFIRMED.

FAULKNER, ALMON, EMBRY and BEATTY, JJ., concur.

Gene Courtney Suttle and Wanda Wideman Suttle v. Robert C. Tucker

No. 79-712

Supreme Court of Alabama

398 So. 2d 266; 1981 Ala. LEXIS 3468

May 1, 1981

SUBSEQUENT HISTORY: Related proceeding at Tucker v. Moorehouse, 2010 Ala. Civ. App. LEXIS 209 (Ala. Civ. App., July 23, 2010)

PRIOR HISTORY: [**1] Appeal from St. Clair Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: public road, land owned, geodetic survey, roadway, quantum, personally, blocking, disputed, vicinity, traveled, viewing, ingress, egress

COUNSEL: R. A. Ferguson, Jr. for Leach, Hampe, Dillard & Ferguson, Birmingham, for Appellant.

Charles E. Robinson for Church, Trussell & Robinson, Pell City, for Appellee.

JUDGES: Maddox, Faulkner, Almon, Embry and Adams, JJ., concur.

OPINION BY: PER CURIAM

OPINION

[*266] Tucker sued the Suttles for blocking a road leading from a paved road over his land, and over land owned by the Suttles. This blockage deprived Tucker of a convenient and direct access to a public highway.

Tucker contended that the road was public, and had been for more than 50 years. To that contention, the Suttles say, well, it may have been a public road in the past, but for the last 25 years there has been little to no use of the alleged road. Therefore, it is no longer a public road.

After hearing the case ore tenus, and after personally viewing the lands relating to the disputed roadway, the trial court found:

> The road in dispute is located on lands situated near the Odenville area, a community located in western St. Clair County, Alabama, and is near churches and other development areas of the community of Odenville, Alabama.
>
> The Court finds [**2] that the road, as described in the complaint, leading across the lands owned by the defendants to the lands owned by the plaintiff is a public road, and had been used by the public continuously for many years.
>
> The Court finds from the testimony that many years ago in the vicinity of where the plaintiff's property is located, that there were several homeplaces; that the residents used the said road as a means of ingress and egress; that one of the witnesses, viz: T. M. Campbell testified that he had lived in the vicinity of the said road for sixty years, and that he had traveled the said road on many occasions going from Odenville to a water mill known as Coleman Mill; that the last time he traveled the road was in the early 1950's; that the road was considered public.
>
> Other witnesses testified that the road was used by the public.
>
> [*267] The plaintiff testified that even though the public in general has not used the road in several years, he and his family have continued to use the road as a means of ingress and egress up and to the time the defendants stopped them prior to the filing of the complaint.
>
> The Court further notes that a geodetic survey map of the areas was [**3] introduced into evidence which clearly defined the road in question.
>
> The Court further finds that the defendants were well aware of the plaintiff's contention that the road was public

> at the time he blocked the road and prohibited the plaintiff from using said road.
>
> After hearing the testimony, the Court accompanied by the attorneys representing the plaintiff and defendants, went to the property and personally viewed the old road. From viewing the area, the Court has determined that there clearly is a road bed as described in the complaint.

From these findings, the trial court ordered the obstruction removed, and enjoined the Suttles from closing or blocking the road, or in "any manner obstructing the public road."

As a general rule, an open, defined roadway in continuous use by the public, without let or hindrance for a period of 20 years becomes a public road by prescription. The burden is on the landowner to show permissive use only in recognition of his title and his right to reclaim possession. *Ritter v. Hewitt*, 236 Ala. 205, 181 So. 289 (1938); *Scruggs v. Beason*, 246 Ala. 405, 20 So. 2d 774 (1945).

This Court has said that it is the character rather [**4] than the quantum of use that controls whether a road is public. *Valenzuela v. Sellers*, 246 Ala. 329, 20 So. 2d 469 (1945). Here, the character of the road was clearly defined by a geodetic survey; the trial judge viewed the road, and found it to exist. We, therefore, conclude that the character of the road, rather than the quantum of use is controlling. Finally, the fact that the "public" has moved out does not destroy the character of the road. *Davis v. Linden*, 340 So. 2d 775 (Ala. 1976).

We opine that the trial judge was correct in finding the disputed road to be a public one. His decree is, therefore, affirmed.

AFFIRMED.

Maddox, Faulkner, Almon, Embry and Adams, JJ., concur.

Tim L. Swann and Tina J. Swann v. William P. Hunter, Jr., et al.

1920715

SUPREME COURT OF ALABAMA

630 So. 2d 374; 1993 Ala. LEXIS 940

September 17, 1993, Released

SUBSEQUENT HISTORY: Released for Publication February 3, 1994.

PRIOR HISTORY: [**1] Appeal from Limestone Circuit Court. (CV-88-235). Henry W. Blizzard, Judge.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

CORE TERMS: percolation, beneficiary, sewage disposal, plat, substantial evidence, contracted, purchasers, engineer, summary judgment, field lines, engineering firm, soil, septic tank, residential, developer, suitable, contract claims, fraudulent scheme, water supply, participated, approving, surveyor, licensed, surface, sewage, bought, contracting parties, circumstances known, tract of land, real estate

COUNSEL: For Appellants: Jimmy Alexander of Alexander, Corder & Plunk, P.C., Athens.

For Appellees: Byrd Latham of Patton, Latham, Legge & Cole, Athens; and Elizabeth R. Jones, Birmingham, for William P. Hunter and H. C. Mabry. Winston V. Legge, Jr., of Patton, Latham, Legge & Cole, Athens, for Limestone County, Alabama, and the Limestone County Commission.

JUDGES: Hornsby, C. J., and Maddox, Almon, Shores, Adams, Houston, Kennedy, and Ingram, JJ., concur.

OPINION BY: PER CURIAM.

OPINION

[*375] **PER CURIAM.**

The plaintiffs, Tim L. Swann and Tina J. Swann, appeal from a summary judgment entered in favor of the defendants, William P. Hunter, Jr., H. C. Mabry, and Limestone County.

This action arose from the Swanns' purchase of a residential house and lot, whose sewage disposal system failed. About a month after the Swanns bought their house in Chriswood subdivision, located in Limestone County, sewage began oozing to the surface of their property. After conducting soil and percolation tests and learning that their land was not suitable for an individual sewage disposal system, i.e., a septic tank and field lines, the Swanns brought this action. In their amended complaint, they named as defendants, Limestone County; Bobby Wood, the developer of the Chriswood subdivision; [1] and Hunter and Mabry, a surveyor and an engineer respectively, who were contracted [**2] by Wood to perform surveying and engineering services. The Swanns alleged, under a third-party beneficiary theory, breach of contract claims against Hunter, Mabry, and Limestone County, in connection with surveying and engineering services performed by Hunter and Mabry, and a claim of fraud against Limestone County.

1 Bobby Wood is not a party to this appeal.

The issues are (1) whether the Swanns, purchasers of a lot in a subdivision, presented substantial evidence that they were intended third-party beneficiaries of a contract between developer Wood and Hunter and Mabry, who contracted with Wood to perform the percolation and soil boring tests on each of the lots in the subdivision, [2] and (2) whether the Swanns presented substantial evidence that Limestone County participated in a fraudulent scheme when it approved the final plat for the Chriswood subdivision.

2 Although the Swanns alleged in their amended complaint that they were third-party beneficiaries of an alleged contract between Wood and Limestone County, on appeal they make no argument in support of this claim. Therefore, we consider any issue with regard to this breach-of-contract claim waived.

[**3] In March or April 1985, Wood orally contracted with Hunter, a licensed land surveyor, for Hunter to survey and draw a plat for the Chriswood subdivision

and to perform percolation tests on each of the 18 lots in the nascent subdivision. Required by regulations of the Alabama Department of Health, percolation tests determine whether a lot is suitable for an individual ground absorption sewage disposal system. In May and June 1985 Hunter surveyed the tract of land, drew the plat, and performed the percolation tests. Hunter then completed a "Preliminary Subdivision Water Supply and Sewage Disposal Report of the Alabama Department of Public [*376] Health" and delivered it to Wood, for it to be filed with the Alabama Health Department.

Because Hunter was not a licensed engineer and because the signature of a licensed engineer was required on the water supply and sewage disposal report, Hunter, and allegedly Wood, hired Mabry, a retired civil engineer, to prepare and sign the report. After conducting an on-site examination of the percolation-test holes dug by Hunter and noting that they revealed no groundwater, Mabry signed the report.

Wood sold lot 11 of the Chriswood subdivision to Myron McGee, [**4] Tina Swann's brother. McGee engaged a contractor to build a house on the lot. Three months after buying the lot, McGee sold it to the Swanns.

Shortly after moving into the house, the Swanns began experiencing problems with their septic tank and field lines. After raw sewage began to seep to the surface of their property, the Swanns had new field lines dug in April 1987. The new field lines ameliorated the condition until January 1988, when sewage again began to ooze to the surface. This time, the Swanns contracted with Ronnie Coffman, a register surveyor, to perform percolation tests on their property. On January 15, 1988, Coffman performed five percolation tests on lot 11. These tests revealed that the Swanns' property was not suitable for a septic tank and field lines.

The first issue is whether the Swanns presented substantial evidence that they were intended beneficiaries under the contract between Wood and Hunter and the contract between Wood and Mabry.

To recover in a breach of contract action, as a third-party beneficiary, the plaintiff must prove the following: (1) that the contracting parties intended, when they entered the contract, to bestow a direct, as opposed to an incidental, [**5] benefit upon a third party, (2) that the plaintiff was the intended third-party beneficiary of the contract, and (3) that the contract was breached. *Pope v. McCrory*, 575 So. 2d 1097, 1100 (Ala. 1991); *Sheetz, Aiken & Aiken v. Spann, Hall, Ritchie, Inc.*, 512 So. 2d 99, 101-02 (Ala. 1987). The intention of the contracting parties, as disclosed by the writing, if any, and the surrounding circumstances known to the parties, determines the rights of the alleged third-party beneficiary. *Weninegar v. S.S. Steele & Co.*, 477 So. 2d 949, 955 (Ala. 1985); *Mutual Benefit Health & Accident Ass'n of Omaha v. Bullard*, 270 Ala. 558, 567, 120 So. 2d 714, 723 (1960).

The Swanns argue that purchasers of the lots in the Chriswood subdivision, such as they, directly benefited from the contracts between Wood and Hunter and Wood and Mabry. They contend that there was no reason to perform the percolation tests, other than to directly benefit purchasers of these lots by determining whether the lots were suitable for individual sewage disposal systems.

In *Pope v. Gregory* [**6] , *supra*, the Court addressed the issue before us in a case involving similar circumstances. In *Pope*, Rogers offered a parcel of real estate for sale. Interested in purchasing it, Tisdale contracted with an engineering firm to survey the property and perform percolation tests. The engineering firm prepared an application for an individual water supply and prepared an on-site sewage disposal report, both of which were filed with, and subsequently approved by, a county health department. Tisdale, however, decided not to buy the property. Thereafter, the plaintiff Pope bought it. At the closing, Rogers gave Pope a copy of the engineering firm's report and survey, and Pope's name was substituted for Tisdale's on the application and report. While the septic tank was being installed, it was discovered that the water table was too high for an individual sewage disposal system, and approval of the septic system was withdrawn. Pope brought an action against the engineering firm, alleging, *inter alia*, a third-party beneficiary breach of contract claim, based on the contract between the engineering firm and Tisdale. This Court affirmed a summary judgment in favor of the firm, holding [**7] that the evidence showed that when the contract was entered into the firm did not envision that Pope would be a direct beneficiary of its contract with Tisdale.

The surrounding circumstances known to the parties to the contract in this case distinguish this from *Pope*. In *Pope*, the engineer [*377] performed the percolation test for an individual negotiating the purchase of a tract of land. In this case, however, Hunter and Mabry contracted with the developer of a residential subdivision to perform percolation tests for the purpose of obtaining approval of the subdivision from state and local health agencies. In the circumstances of this case, it was obvious that Wood intended to sell the lots, on which the percolation tests were performed, to individuals for the construction of residential dwellings, which would require a properly functioning sewage disposal system. Unlike the engineer in *Pope*, Hunter and Mabry could clearly envision that purchasers of lots in the

Chriswood subdivision would be direct beneficiaries of their performance under the contract with Wood.

Hunter and Mabry argue that they entered into the contract with Wood solely for the purpose of complying with state [**8] and local regulations and obtaining approval of the Chriswood subdivision, not, they say, for the purpose of benefiting future purchasers of lots in the Chriswood subdivision. However, the state and local regulations, in accordance with which Wood had to obtain approval of the subdivision, were promulgated for the protection and benefit of the public, especially those members of the public purchasing real property for residential purposes. The most direct benefit of Hunter and Mabry's performance of the percolation tests under the contract to obtain approval of the Chriswood subdivision inured ultimately to the benefit of the purchasers of lots in the subdivision, such as the Swanns. Therefore, we hold that Tim and Tina Swann presented substantial evidence that they were intended beneficiaries of the contracts, between Wood and Hunter and Wood and Mabry, to perform percolation tests on the lot purchased by the Swanns.

The second issue is whether there was evidence that Limestone County committed fraud or participated in a fraudulent scheme with Wood when it approved the final plat for Chriswood subdivision.

The Swanns argue that the Limestone County participated in a fraudulent scheme [**9] because, they say, the Limestone County Commission, in approving the plat, impliedly represented that the commission had complied with all of the county's subdivision regulations, when, in fact, it had not. To prove that Limestone County did not comply with its own subdivision regulations, the Swanns introduced evidence that, in derogation of the regulations in effect when the Chriswood subdivision was built, the Limestone County Commission and Wood agreed to split the cost of constructing the roads through the subdivision. Deposition testimony in the record indicates that at that time Limestone County subdivision regulations required the developer to bear all the costs of constructing roads through a subdivision.

In its summary judgment, the circuit court held that in approving the subdivision plat the Limestone County Commission made no material representations, express or implied, that the soil on lot 11, or the soil on any other lot, would pass a soil percolation test. We agree. The Swanns presented no evidence that, in approving the final plat for the Chriswood division, the Limestone County Commission made any implied representation as to the condition of the real estate.

Because [**10] the Swanns presented substantial evidence creating a factual issue of whether they were intended beneficiaries of a contract between Wood and Hunter and a contract between Wood and Mabry, we reverse the summary judgment entered on their breach of contract claim. Because the Swanns did not introduce substantial evidence creating a factual issue of whether Limestone County made an implied misrepresentation concerning the condition of the lot they later bought, we affirm the summary judgment entered in favor of Limestone County. Therefore, we affirm in part, reverse in part, and remand the cause.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hornsby, C. J., and Maddox, Almon, Shores, Adams, Houston, Kennedy, and Ingram, JJ., concur.

TAXPAYERS AND CITIZENS OF LAWRENCE COUNTY v. LAWRENCE COUNTY et al.

No. 8 Div. 97

Supreme Court of Alabama

273 Ala. 638; 143 So. 2d 813; 1962 Ala. LEXIS 445

July 12, 1962

SUBSEQUENT HISTORY: [***1] Rehearing Denied August 30, 1962.

DISPOSITION: Affirmed.

CORE TERMS: refunding, outstanding warrants, bridge, public roads, mature, governing body, constructive fraud, gasoline tax, issuance, appvd, distributive, refunded, issuing, repeal, respective counties, decree, ferries, Gen Acts, authority to issue, constructing, outstanding, predecessor, practically, improving, times, maturity dates, installments, exchanged, maturing, effected

COUNSEL: Thos. C. Pettus, County Sol., Moulton, and J. O. Sentell, Jr., Montgomery, for appellants.

The refunding of road and bridge warrants after May 31, 1941, is governed by Act No. 308, Acts of 1943, p. 279. Bullock County v. Sherlock, 242 Ala. 262, 5 So.2d 800; Cochran v. Marshall County, 242 Ala. 314, 6 So.2d 489.

The proper construction of The Act limits the power of boards of revenue in issuing refunding road and bridge warrants to the warrants which were outstanding on May 1, 1943. Cochran v. Marshall County, supra.

A county cannot use the proceeds of the gasoline tax fund for the refunding of state gasoline tax warrants, as distinguished from the retirement of bonds. Code, Tit. 51, § 647; Cochran v. Marshall County, supra; Littlejohn v. Littlejohn, 195 Ala. 614, 71 So. 448; State ex rel. Radcliff v. City of Mobile, 229 Ala. 93, 155 So. 872; Opinion of The Justices, In re, 230 Ala. 673, 163 So. 105; Opinion of The Justices, In re, 231 Ala. 152, 164 So. 572.

A county cannot use the gasoline tax fund for the employment of bond counsel, the cost of printing new warrants and for the relinquishment of investment bankers' rights [***2] under contracts in litigation. Code, Tit. 51, § 647; Cochran v. Marshall County, supra.

The issuance of refunding warrants with maturity dates more than twenty years after the issuance of the original warrants is invalid. Code, Tit. 23, § 43; Herbert v. Perry, 235 Ala. 71, 177 So. 561; Isbell v. Shelby County, 235 Ala. 571, 180 So. 567.

The action of a county governing body in the exercise of discretionary powers is subject to review for fraud, corruption or unfair dealing. Ensley Motor Co. v. O'Rear, 196 Ala. 481, 71 So. 704; Bentley v. County Commission, 264 Ala. 106, 84 So.2d 490.

Constructive fraud is a breach of duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive, to violate confidence or to injure public interests. Hornaday v. First Natl. Bank, 259 Ala. 26, 65 So.2d 678; 37 C.J.S. Fraud § 2, p. 211.

In cases involving fraud, it is not necessary that actual present damage result but it is sufficient if injury is to accrue in the future. Lacey v. Edmunds Motor Co., 269 Ala. 398, 113 So.2d 507.

R. L. Almon, Moulton, Harry R. Teel, Wm. Alfred Rose and White, Bradley, Arant, All & Rose, Birmingham, for appellees.

The [***3] statute confers on the counties broad legislative, judicial and executive powers with respect to roads and bridges and the governing bodies of the counties can contract for the payment of costs of constructing roads and bridges by the issuance of interest bearing warrants payable solely out of the state gasoline tax moneys distributed to the county. Code 1940, Tit. 23, § 43; Isbell v. Shelby County, 235 Ala. 571, 180 So. 567; Cochran v. Marshall County, 242 Ala. 314, 6 So.2d 489.

Warrants of the nature involved are not bonds and are not debts.Littlejohn v. Littlejohn, 195 Ala. 614, 71 So. 448; Cochran v. Marshall County, supra.

Warrants payable solely out of the portion of the state gasoline tax distributed to the issuing county do not fall within the prohibition contained in Code, Tit. 12, § 78. Isbell v. Shelby County, supra; Cochran v. Marshall County, supra.

Warrants may be issued for the purpose of refunding outstanding warrants which were theretofore issued for the purpose of constructing or improving highways and bridges. Dodson v. Beaird, 237 Ala. 587, 187 So. 862.

Public officers are presumed to do their duty and to act in good faith. Gaines v. Harmon, 246 Ala. 307, [***4] 20 So.2d 503; 9 Ala.Dig., Evidence, key83(1).

The action of a county governing body in the exercise of discretionary powers vested in it is not subject to judicial review except for fraud, corruption or unfair dealing. Bentley v. County Commission, 264 Ala. 106, 84 So.2d 490; Van Antwerp v. Board of Commissioners, 217 Ala. 201, 115 So. 239; Hill v. Bridges, 6 Porter 197.

Fraud is never presumed, and when relied upon must be distinctly alleged and proved. Decker v. State Natl. Bank, 255 Ala. 373, 51 So.2d 538; Board of Revenue of Covington County v. Merrill, 193 Ala. 521, 68 So. 971; Lacey v. Edmunds Motor Co., 269 Ala. 398, 113 So.2d 507.

When a material part of testimony is taken ore tenus before a trial judge, his findings and judgment will not be disturbed on appeal unless palpably wrong. Mitchell v. Kinney, 242 Ala. 196, 5 So.2d 788.

JUDGES: Goodwyn, Justice. Livingston, C. J., and Simpson and Merrill, JJ., concur.

OPINION BY: GOODWYN

OPINION

[*640] [**814] This is a warrant validation proceeding brought in the circuit court of Lawrence County, in equity, by Lawrence County and its governing body, the Board of Revenue of said county, appellees here, against the taxpayers [***5] and citizens of said county, appellants here, under the provisions of Code 1940, Tit. 7, §§ 169 to 176, as amended. The appeal is from a decree validating the warrants. Our conclusion is that the decree is due to be affirmed.

The question of paramount concern is whether the Board of Revenue has authority to issue the proposed refunding warrants. Another point insisted on relates to the trial court's finding that the issuance of such refunding warrants does not constitute constructive fraud.

As to the Board's Authority to Issue the Warrants

The warrants are designated in the Board's authorizing resolution as "State Gasoline Tax Anticipation Refunding Warrants, Series 1961A," and are in the aggregate principal amount of $ 1,175,000. They are to be issued in exchange for outstanding warrants of the same amount maturing prior to the year 1968, on a warrant-for-warrant basis. The refunding warrants, like those outstanding, are payable, both as to principal and interest, solely out of the county's distributive portion (under Code 1940, Tit. 51, §§ 655 and 657, as amended) of the gasoline tax levied by the state (under Code 1940, Tit. 51, § 647, as amended) and are not general [***6] obligations of the county. No question is presented as to the validity of the outstanding warrants. The refunding warrants are to be in the denomination of $ 1,000 each (as are the outstanding warrants), to be numbered consecutively from 1 to 1,175, inclusive, to be dated October 1, 1961, and a portion thereof are to mature in each of the years 1970 through 1980 with the first date of maturity being April 1, 1970, and the last April 1, 1980.

The outstanding warrants were issued at various times between August 15, 1952, and April 1, 1959, for the purpose of constructing, maintaining and improving public roads and bridges in the county. With respect to the refunding warrants, the Board, in its authorizing resolution, included, among its findings and determinations, the following:

> "Section 1(c). The installments of principal and interest which will mature on the outstanding warrants prior to the year 1968 are so great that the amounts which will remain each year out of the distributions to the county from the State tax, * * * when added to all other revenues of the county * * * will not be sufficient to maintain the existing public roads and bridges of the county in good condition. [***7] In consequence thereof, the said existing roads and bridges in the county will rapidly deteriorate and new roads and bridges cannot be constructed unless additional funds are made [*641] available for said purposes * * *. Additional funds can be made available for said purpose * * * if the principal installments of the out-

> standing [**815] warrants which will mature prior to the year 1968 should be extended so that the same principal maturing prior to the year 1968 will mature at later dates * * *. Such an extension * * * can be effected by refunding the same in the manner hereinafter provided. The board is of the opinion that it will be to the best interest of the county and its citizens, as well as the public generally, if such refunding is effected."

Code 1940, Tit. 23, § 43, as amended by Act No. 729, appvd. Sept. 17, 1953, Acts 1953, Vol. II, p. 984, provides that the governing bodies of the several counties of the state "have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable"; that "to this end they have legislative, judicial, and executive [***8] powers, except as limited in this chapter"; that they "are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state"; and that they may "make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties." It also provides that "no contract for the construction or repair of any public roads, bridge or bridges, shall be made where the payment of the contract price for such work shall extend over a period of more than twenty years." (The 1953 amendment changed the period referred to in the last quoted provision from ten years to twenty years. In other respects, § 43 has remained unchanged since adoption of the 1940 Code, and its predecessor statutes were practically the same. See: Act No. 505, § 1, appvd. Sept. 22, 1915, Gen.Acts 1915, p. 573; Act No. 347, § 157, appvd. Aug. 23, 1927, Gen. [***9] Acts 1927, pp. 348, 391; Code 1923, § 1347.)

It has been held that warrants payable solely from a county's distributive part of the state gasoline tax "do not fall within any constitutional prohibition" (Isbell v. Shelby County, 235 Ala. 571, 573, 180 So. 567, 569; Lyon v. Shelby County, 235 Ala. 69, 71, 177 So. 306; Herbert v. Perry, 235 Ala. 71, 72, 177 So. 561; In re Opinions of the Justices, 230 Ala. 673, 163 So. 105), and are not bonds or debts of the county (Littlejohn v. Littlejohn, 195 Ala. 614, 617, 71 So. 448; Cochran v. Marshall County, 242 Ala. 314, 319, 6 So. 2d 489). Accordingly, whether the refunding warrants may be issued depends upon whether the legislature has given the county authority to that end.

This court has held that a county's governing body, under the provisions of § 43, Tit. 23, supra, can contract for payment of the cost of constructing, improving, and maintaining roads and bridges by issuing interest bearing warrants payable solely out of the county's distributive part of the state gasoline tax, and that such warrants are not prohibited by the county financial control act (Code 1940, Tit. 12, Chap. 6, § 78). Cochran v. Marshall County, 242 Ala. 314, [***10] 6 So. 2d 489, supra; Isbell v. Shelby County, 235 Ala. 571, 180 So. 567, supra.

Our real problem is to determine, first, whether there is authority for issuing refunding warrants of the character here involved and, second, if so, whether the maturity dates of some of such refunding warrants may be fixed at a time more than twenty years after issuance of the outstanding warrants for which they are to be exchanged.

Appellees take the position, in which we concur, that what was said in Dodson v. Beaird, 237 Ala. 587, 590, 187 So. 862, [*642] calls for an affirmative answer to these questions. Appellants, on the other hand, argue that § 81, Tit. 12, Code 1940, and [**816] Act No. 308, appvd. June 28, 1943, Gen. Acts 1943, p. 279 (§ 81(1), Tit. 12, Recompiled Code 1958), are the only authority for refunding outstanding warrants of the character here involved; that these statutes authorize a refunding only with respect to such warrants outstanding on the effective dates of such laws; that the warrants to be refunded in the instant case were issued (between 1952 and 1959) after the effective dates of said statutes and, hence, cannot be refunded.

Assuming, without deciding, [***11] that § 81, Tit. 12, and Act No. 308 relate to warrants of the character here involved, we entertain the view that such enactments were not intended to take away the authority given by § 43, Tit. 23. Certainly, there is nothing in either § 81 or Act No. 308 indicating a clear intent to repeal any authority given by § 43. "Repeal by implication is not favored. It is only when two laws are so repugnant to or in conflict with each other that it must be presumed that the Legislature intended that the latter should repeal the former." State v. Bay Towing & Dredging Company, 265 Ala. 282, 289, 90 So. 2d 743, 749; City of Birmingham v. Southern Express Co., 164 Ala. 529, 538, 51 So. 159.

In Dodson v. Beaird, supra, it is said:

> "In Isbell v. Shelby County, 235 Ala. 571, 180 So. 567, it was held that counties had authority to issue and dispose of

> interest bearing warrants for highway construction purposes and no reason occurs to us, and none has been suggested, why the proceeds of the sale of such warrants may not be used to refund warrants of like character issued by the Board of Finance and Control under the former Local Acts."

The statute dealt with in Isbell v. Shelby County, [***12] supra, was § 1347, Code 1923, the predecessor of § 43, Tit. 23, Code 1940. As already noted, the two statutes are practically the same, except as to a change in the contract period from ten to twenty years. It seems obvious, therefore, that the court, in Dodson v. Beaird, had § 1347 under consideration.

An examination of the record in Dodson v. Beaird reveals that the maturity date of some of the refunding warrants was more than ten years (that being the prescribed period at that time) after the date of issue of the outstanding warrants to be refunded. All of the refunding warrants in the instant case mature within twenty years after their date. On the authority of Dodson v. Beaird we hold that the county is not precluded from issuing refunding warrants even though some of them mature more than twenty years after issuance of the outstanding warrants for which they are to be exchanged.

As to Constructive Fraud

There can be no question that the burden was on respondents (appellants) to establish constructive fraud in the issuance of the proposed refunding warrants. It has been held many times that the action of a county governing body, in the exercise of discretionary [***13] powers vested in it, is not subject to judicial review except for fraud, corruption or unfair dealings. Bentley v. County Commission for Russell County, 264 Ala. 106(7), 84 So. 2d 490, and cases there cited; Van Antwerp v. Board of Commissioners of City of Mobile, 217 Ala. 201, 115 So. 239. The evidence in this case was taken ore tenus and the usual presumption in favor of the trial court's findings from the conflicting tendencies of evidence so taken calls for an affirmance of its finding on the issue of constructive fraud. From a full consideration of the evidence we certainly cannot say that such finding was plainly and palpably wrong.

The decree appealed from is due to be affirmed.

Affirmed.

TFT, Inc. v. Warning Systems, Inc., et al.; Warning Systems, Inc. v. TFT, Inc.

1980664, 1980705

SUPREME COURT OF ALABAMA

751 So. 2d 1238; 1999 Ala. LEXIS 366

November 24, 1999, Released

SUBSEQUENT HISTORY: [**1] Released for Publication March 24, 2000.

PRIOR HISTORY: Appeals from Montgomery Circuit Court (CV-98-2276). Charles Price, Trial Judge.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; AND INJUNCTION DISSOLVED.

CORE TERMS: bid, receiver, injunction, central-control, bidder, lowest, operating-support, pricing, matrix, responsible bidder, preliminary injunction, purchasing, sheet, addendum, unit price, solicitation, crystals, competitive, vendor, calculated, technical specifications, capriciously, arbitrarily, injunctive, listing, funding, item-by-item, installation, Competitive Bid Law, specifications

COUNSEL: For Appellant/cross appellee: Madeline H. Haikala, Jackson R. Sharman III, and Lisa J. Wathey of Lightfoot, Franklin & White, L.L.C., Birmingham.

For Appellees/cross appellants: J. Fairley McDonald III of Maynard, Cooper & Gale, P.C., Montgomery, for Warning Systems, Inc., Dennis M. Wright, asst. atty. gen., for Alabama Emergency Management Agency; and A. Lee Miller, general counsel, for Alabama Finance Department.

JUDGES: HOOPER, Chief Justice. Maddox, Houston, See Brown, Johnstone, and England, JJ., concur. Lyons, J., concurs in the result and dissents in part.

OPINION BY: HOOPER

OPINION

[*1239] HOOPER, Chief Justice.

This case arises out of a competitive bid on a Tone Alert Radio ("TAR") System intended for use in connection with the destruction of chemical weapons. TFT, Inc., filed a complaint seeking declaratory and injunctive relief. It alleged that the Purchasing Division of the State Finance Department had awarded the contract for the TAR system to Warning Systems, Inc. [**2] ("WSI"), in violation of §§ 41-16-20 through -32, Ala. Code 1975. Those Code sections require the State to award certain contracts to the lowest responsible bidder. The trial court denied injunctive relief as to that portion of the contract relating to the TAR receivers; however, it enjoined the execution of the contract as it related to the central-control equipment and the operating-support system, concluding that [*1240] a bid for this equipment must be resolicited. TFT appealed from the order denying an injunction in regard to the TAR receivers, and WSI cross-appealed from the injunction relating to the central-control equipment and the operating-support system. We affirm in part and reverse in part.

Facts

The Alabama Emergency Management Agency ("AEMA"), acting through the State Finance Department's Purchasing Division, solicited bids on Project 98-R-2071, which involved TAR receivers to be used in connection with the destruction of chemical weapons or chemical agents stockpiled at a United States Army facility in Anniston. As part of its obligations under the Chemical Stockpile Emergency Preparedness Program, the State was required to purchase and install a system to alert persons [**3] at nearby homes, businesses, and other facilities in the event of an emergency. TFT, WSI, and another company, Federal Signal, submitted bids. AEMA and the Purchasing Division awarded the contract to WSI. TFT claims that those agencies, in awarding the contract to WSI, violated the State's obligation under Ala. Code 1975, § 41-16-20, to award the contract to the "lowest responsible bidder."

The dispute concerns whether the State's Invitation to Bid ("ITB") was a solicitation for bids as to only one component of the system or was a solicitation for bids as to the entire system. The ITB described the TAR System as involving three major items: The central-control equipment, the indoor-warning device (TAR

receiver), and the operating-support system. The ITB also stated that the seller would be required to deliver 12,000 indoor alerting devices and 2 control-point-equipment sets by September 1, 1998.

WSI submitted questions regarding the pricing format for the bid responses. In an Addendum to the ITB, which was provided to all of the interested bidders, AEMA responded:

> "P2A. The initial procurement will be for approximately 12, 000 Ba., 800 MHz. *TAR receivers only.* [**4] The bidder should provide a quotation for the support services, the VHF TAR receiver, and the accessory devices as outlined in the Technical Specifications. The bidder's price for these additional items will be considered in the selection of the successful bidder for the 12,000 UHF TAR receivers. The bidders should provide pricing information for the support activities for a period of five years from date of award. A base price with annual increases would be acceptable to the State.
>
> "P2B. The State is purchasing the TAR equipment and the long term support activities for the public warning obligations of the CSEPP program. There are several aspects of the overall program that have not been defined because of the lack of demographic information on the affected portions of the population. The support functions to be provided and the accessory equipment are described in the Technical Specifications in sufficient detail to permit the bidder to provide a quotation for these items. *The State would ask that the bidder present the pricing information in the form of a price matrix that would allow the State to determine the pricing for these activities and equipment on an item-by-item* [**5] *basis.* After the State determines the extent of the support requirements and the number of accessory devices needed, a subsequent purchase order will be issued based on the prices offered with this bid response."

(Emphasis added.) In reliance on these answers, WSI understood the ITB as requesting a bid on the receivers only, with an additional price matrix regarding the central-control equipment and the operating-support system, as well as the optional accessory devices. WSI submitted a bid of $ 175 per receiver unit and included a price matrix regarding the other components.

[*1241] One of the other bidding vendors, Federal Signal, also submitted a question regarding the pricing format:

> "The Price Sheet for this Bid does not include separate line items for 800 MHZ and VHF receivers, or for the two (2) control point equipment sets required for this bid. *Should pricing for one of the receiver models and the Control point equipment be submitted on a separate quote sheet* with the options for installation, external antennas, and service support operations or will an addendum be issued for the Price Sheet?"

AEMA responded:

> "The state has already replied to [**6] an earlier question on this subject. *A price submittal in the form of a 'matrix' would be reasonable. This 'price matrix' should permit the state to determine the pricing on an item-by-item basis.* An addendum is not needed.

(Emphasis added.) Federal Signal included the total-system price within its unit price of $ 215.0833. (R.T. 58-59.) However, Federal Signal also included a price matrix listing the price of each component separately.

TFT understood the ITB to be requesting bids on the entire TAR system, including all three components, and calculated its bid by including the entire-system cost within the unit price. TFT calculated its bid as follows: 12,000 receivers at a price of $ 165 each, for a total of $ 1,980,000; plus $ 13,118 for the control equipment, $ 141,750 for installation, and $ 505,252 as the cost of the first year's support, for a total system price of $ 2,640,000. TFT then divided the total by 12,000 to get an installed receiver unit price of $ 220. [1] TFT did not include a price matrix regarding the receivers, central-control equipment, or operating-support system, but did list the separate prices of the optional equipment and the support services [**7] for years two through five. The trial court found that, because TFT combined the prices of the TAR receivers, the central-control equipment, and the operating-support system, its bid was nonresponsive.

1 We recognize that this mathematical calculation is not precise.

The Price Sheet provided in the ITB contained a line item price blank with a description of "radio receiver, tone alert (TAR) in accordance with provided specifications." According to the vendors' bids on the price sheet, WSI bid $ 165 per unit; TFT bid $ 220 per unit; and Federal Signal bid $ 215.0833 per unit. The State awarded the contract to WSI as the lowest responsible bidder. Both TFT and Federal Signal protested the award of the contract to WSI. TFT claimed in its protest that an examination of the bid responses makes it clear that WSI is in fact the high bidder. TFT stated that if the State considered the price of the central-control equipment and the first-year operating support in making its award, then WSI was the highest bidder. [**8] In its protest, TFT did not illustrate the manner in which its bid was calculated and did not list item-by-item prices. The Legal Division of the Finance Department responded to TFT's protest, stating that AEMA had reviewed the bids and had confirmed that WSI was the lowest responsible bidder complying with the instructions of the ITB and whose products met all mandatory technical specifications.

Discussion

I. Standard of Review

The applicable standard of review depends on whether the trial court entered a preliminary injunction or a permanent injunction. A preliminary injunction is reviewed under an abuse-of-discretion standard, whereas a permanent injunction is reviewed *do novo. Smith v. Madison County Comm'n,* 658 So. 2d 422, 423 n.1 (Ala. 1995). The trial court used the term "preliminary injunction" throughout its order. The language of the order denies a "preliminary injunction" as to the TAR receivers, but grants a "preliminary injunction" as to the central-control equipment and the operating-support [*1242] system; the injunction requires that the bids on those components be resolicited. However, TFT argues that the court and the parties had agreed during [**9] the hearing that the requests for both preliminary and final relief could be combined. (Appellee's brief, at 1.) (R.T. 54-55.) Combining those requests is provided for in Rule 65(a) (2), Ala. R. Civ. P., although normally, when the court orders that the hearing on the merits be consolidated with a hearing on the request for a preliminary injunction, the parties are given notice of that before the hearing, in order to afford them the opportunity to fully present their respective cases. *University of Texas v. Camenisch,* 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981). In this case, the trial court asked the parties during the hearing, "Are we going to combine this hearing with any subsequent hearing, for the record?" and to that question counsel for each of the parties responded, "Yes, sir." (R.T. 54-55.)

WSI admits in its reply brief that its counsel intended to consolidate the hearing on the request for a preliminary injunction with the trial on the merits, and WSI even agrees that judicial economy suggests such a consolidation. Yet, WSI argues that, because the trial court never ordered such a consolidation and because the trial court's order clearly [**10] refers to a "preliminary injunction," that order must be treated as a preliminary injunction. However, in *Union Springs Telephone Co. v. Green,* 285 Ala. 114, 229 So. 2d 503 (1969), this Court held that when the parties and the court have treated a hearing as one on the merits, rather than as one on a motion to dissolve an injunction, this Court will also treat it as a hearing on the merits.

WSI also argues that because no injunction bond was posted, it was error to enter a preliminary injunction as to the central-control equipment and the operating-support system, and that the order entering the injunction therefore must be reversed. In contrast, TFT argues that the trial court's failure to require an injunction bond indicates that the trial court intended the injunctive order to serve as a permanent injunction, for which no bond is necessary.

To be entitled to a permanent injunction, a plaintiff must demonstrate success on the merits, a substantial threat of irreparable injury if the injunction is not granted, that the threatened injury to the plaintiff outweighs the harm the injunction may cause the defendant, and that granting the injunction will not disserve [**11] the public interest. *Clark Constr. Co. v. Pena,* 930 F. Supp. 1470 (M.D. Ala. 1996). The elements required for a preliminary injunction and the elements required for a permanent injunction are substantially similar, except that the movant must prevail on the merits in order to obtain a permanent injunction, while the movant need only show a likelihood of success on the merits in order to obtain a preliminary injunction. *Pryor v. Reno,* 998 F. Supp. 1317 (M.D. Ala. 1998). The purpose of a preliminary injunction is to preserve the status quo until a full trial on the merits can finally determine the contest. *Camenisch,* 451 U.S. at 395.

In this case, the court held a two-day hearing, and both parties presented testimony and other evidence as to the merits of the case. The relief granted by the trial court does more than preserve the status quo, because it actually examines the merits of the case and requires the State to resolicit bids for part of the contract. Despite its use of the words "preliminary injunction," the trial court's injunctive order has the effect of a permanent injunction, and it should be treated as such. Therefore, [**12] the proper standard of review is the *de novo* standard as opposed to the abuse-of-discretion standard. *Madison County Comm'n,* 658 So. 2d at 423, n.1.

II. Denial of Injunction as to the TAR Receivers

TFT argues that the court should have granted injunctive relief because, it [*1243] argues, the contract between the State and WSI is void under Alabama's Competitive Bid Law. Specifically, TFT argues that its bid for the TAR receivers was actually lower than WSI's bid, but that TFT calculated its bid by a method different from the method WSI used, because TFT interpreted the ITB differently. This case turns on whether the ITB was a solicitation for bids as to the entire TAR system, as TFT argues, or was a solicitation for a unit-price bid as to the TAR receivers and for price quotations on the other components, as WSI claims.

Before this Court, for the first time, TFT attempts to argue that the ITB was ambiguous and that the project, therefore, should be rebid. Because TFT did not raise this argument in the trial court, it cannot raise it now on appeal. *Abbott v. Hurst,* 643 So. 2d 589, 593 (Ala. 1994). The only mention of ambiguity TFT made at trial [**13] came in one sentence of TFT's trial brief, wherein TFT asserted that the AEMA and the Purchasing Division had acted arbitrarily and capriciously in allowing an inexperienced person to handle the bid process. TFT states, "Not surprisingly, the ITB and the addendum he issued were ambiguous at best." (R. 350.) In *Knight v. Alabama Power Co.,* 580 So. 2d 576 (Ala. 1991), this Court refused to consider an argument that was not sufficiently raised before the trial court. In *Knight,* the appellant had included in an amended response to a motion for summary judgment one sentence asking the trial court to adopt the doctrine of comparative negligence. The appellant in *Knight* had, in the trial court, presented nothing in the way of argument on the issue. Similarly, at the trial in this present case, TFT did not argue that the ITB was ambiguous, either in its pleadings or during the hearing. In contrast, TFT consistently maintained before the trial court that the ITB was a solicitation for bids as to the entire TAR system and that TFT understood what the ITB was soliciting. This Court's review is restricted to the evidence and arguments considered by the trial court. *Andrews v. Merritt Oil Co.,* 612 So. 2d 409 (Ala. 1992). [**14]

TFT claims that had the State investigated the basis of the bids, it would have realized that TFT's bid was the lowest. Alabama's Competitive Bid Law, specifically Ala. Code 1975, § 41-16-50, does not require that the award of a public contract go to the lowest bidder, but to the "lowest responsible bidder." See *Advance Tank & Constr. Co. v. Arab Water Works,* 910 F.2d 761 (11th Cir. 1990); *White v. McDonald Ford Tractor Co.,* 287 Ala. 77, 248 So. 2d 121 (1971). This Court has stated that an agency's determination of whether the apparent low bidder on a contract is "responsible" should not be disturbed unless the determination was made arbitrarily or capriciously. *Advance Tank,* 910 F.2d at 765; *Mobile Dodge, Inc. v. Mobile County,* 442 So. 2d 56, 58 (Ala. 1983); *McDonald,* 287 Ala. at 86, 248 So. 2d at 127. The standard for reviewing a determination that a bidder is "responsible" is whether the State's actions constitute fraud or an abuse of discretion. *Carson Cadillac Corp. v. City of Birmingham,* 232 Ala. 312, 167 So. 794 (1936); *Advance Tank,* 910 F.2d at 765. This [**15] Court has also stated that the courts should not interfere with the discretion of public contracting authorities in determining who was the lowest responsible bidder unless the decision was "based upon a misconception of the law," was the "result of improper influence," was made in "violation of law," or was based "upon ignorance through lack of inquiry." *McDonald,* 287 Ala. at 86, 248 So. 2d at 129 (cited in *Advance Tank,* 910 F.2d at 765).

The Purchasing Division awarded the contract to WSI, based on its bid in the line-item price blank on the price sheet provided in the ITB. The face of the price sheet indicated WSI was the lowest bidder. When TFT contested the award of the contract to WSI, claiming to be the true lowest bidder, the AEMA and the Purchasing Division reviewed all of the bid [*1244] responses and concluded that TFT had not provided pricing for the central-control equipment and had not complied with the instructions regarding the itemized pricing of support items. (Plaintiff's exhibit 34.) TFT argues that this conclusion was incorrect because, TFT says, it did include pricing for the central-control equipment within its bid for the receivers. [**16] TFT also maintains that even if it did not provide a separate price for the equipment, that fact should not be dispositive because the ITB did not specifically ask for the pricing of the equipment.

"'Honest exercise of discretion ... will not be interfered with by the courts, even if erroneous.'" *Advance Tank,* 910 F.2d at 765, n.12, quoting 64 Am. Jur. 2d *Public Works and Contracts* § 67 (1972). After reviewing the Price Sheets submitted by the three bidding vendors, this Court cannot ascertain TFT's price for the central-control equipment. Because TFT's price for the equipment is imbedded within the unit price for the receivers, the AEMA and the Purchasing Division did not act arbitrarily and capriciously in concluding that TFT did not submit a price for the equipment. The agencies properly reviewed the bid responses, pursuant to TFT's bid contest, and could not ascertain a price for the equipment. Therefore, the agencies properly inquired as to who was the lowest responsible bidder.

TFT argues that the failure of the agencies to review the way in which TFT's bid was calculated constituted "ignorance through lack of inquiry," making the award to WSI arbitrary [**17] and capricious. Specifically, TFT argues that, throughout its proposal, it indicated that its bid was for a system, including cen-

tral-control equipment, indoor alerting devices, and support activities. TFT also included the following statement in its summary:

> "This bid is in response to the State of Alabama's request for
>
> > "12,000 UHF Indoor Alerting Devices, including installation and one year's support, and 2 sets of Central Control Equipment."

TFT contends that this statement and other similar statements throughout its proposal provided notice to the agencies that its bid included the cost of central-control equipment and support activities, as well as the cost of the receivers. TFT further contends that through proper inquiry the agencies would have been able to determine the separate prices for these items.

This Court has never set forth rigid standards delineating what constitutes an adequate or proper inquiry in the context of the Competitive Bid Laws. The determination of whether a proper inquiry has been conducted will depend on the situation presented. TFT erroneously asserts that this Court discussed what a proper inquiry consists of in *International Telecommunications Systems v. State,* 359 So. 2d 364 (Ala. 1978). [**18] In that case, this Court upheld the award of a contract for replacement radio crystals to General Electric Corporation ("GE") because GE's crystals were superior in quality. Even though International Telecommunications Systems ("ITS") submitted the lowest bid, ITS was not the lowest *responsible* bidder, because its brand of crystals was unsatisfactory. The ITB had specified "GE parts or equal," and when the bids were opened the ITS representative agreed to supply samples of its crystals for testing, to determine if the crystals were of a quality equal to that of GE crystals. The engineer evaluating the bids then wrote to ITS, stating that the State had not received the samples or a warranty. TFT points to that case as an illustration of "proper inquiry," suggesting that in this present case the State should have contacted TFT for further information about its bid. However, the issue in *International Telecommunications Systems* was not whether the State had conducted a proper inquiry, but whether the State had acted arbitrarily and capriciously in testing the crystals by [*1245] a method different from the method a professional testing laboratory might have used. This Court never stated [**19] that to make an adequate inquiry the State must contact a bidder for further information.

In this present case, the State agencies properly reviewed the bids in response to TFT and Federal Signal's contest and concluded that TFT's bid did not comply with the ITB's pricing format. Nowhere in TFT's bid or in its bid protest does TFT explain how its unit price was calculated. Even if the agencies were on notice that TFT's bid included the price of other components within the unit price of the receivers, because TFT did not provide a price matrix listing the item-by-item price of each component the State could not ascertain the price of the individual components. WSI specifically listed the pricing for individual aspects of the central-control equipment and the operating-support system, giving the State the option to purchase some or none of those components. In its price matrix on central-control equipment, WSI provided separate prices for Site 1 and Site 2 primary and backup control equipment. For operating support, WSI provided separate prices for logistic support and other project charges, as well as prices for three different levels of installation, separate prices for different [**20] shifts depending on the time and day of the week, and separate prices for on-site replacement based on the number of months after installation. In contrast to WSI's detailed price matrix, TFT's prices were wrapped up into one unit price, with no delineation as to how much of the cost was for the central-control equipment and how much was for the operating-support system, much less any indication of separate prices for the individual aspects making up these components.

The State might have been able to compare the prices for these components had TFT separately listed its prices. However, TFT failed to comply with the pricing instructions of the ITB and its Addendum, which requested an item-by-item listing of the price of each component. Contrary to TFT's suggestion, the State should not be required to contact TFT to request clarification of a bid that was not responsive to the State's request. Therefore, we cannot say the award of the contract to WSI was an abuse of discretion based on ignorance occurring through lack of inquiry.

Further, TFT's bid did not comply with the ITB's technical specifications. The ITB specifically required a "rechargeable lead-acid or gel storage battery. [**21] " TFT's bid contained a compliance table that expressed an exception, offering a NiCad battery instead. Conformity with the specifications of the ITB is one standard for determining who is the lowest "responsible" bidder. *See Advance Tank,* 910 F.2d at 765. From the record, it appears that the agencies initially awarded the contract to WSI solely because WSI submitted the lowest bid on the price sheet. However, pursuant to the bid contest, the agencies examined the bids and found TFT's

bid to be nonresponsive, based on its failure to comply with technical and pricing specifications. TFT's bid did not properly provide a price for the receivers on the price sheet, did not provide a price matrix as requested in the Addendum to the ITB, and did not meet the technical specifications with regard to the type of battery. We cannot say that the AEMA and the Purchasing Division acted arbitrarily and capriciously in determining that WSI was the lowest responsible bidder. "The single most important requirement of the Competitive Bid Law is the good faith of the officials charged in executing the requirements of the law." *McDonald,* 287 Ala. at 86, 248 So. 2d at 129. [**22] Therefore, we affirm the order denying an injunction as to the TAR receivers.

III. Grant of Injunction as to the Other Components

The trial court also determined that the ITB did not include a solicitation of bids for the central-control equipment and the operating-support system; it ordered [*1246] that these items be rebid. The court erred. Even TFT argues that the ITB was clearly designed to elicit a bid for the entire TAR system and not just for the receivers. The ITB specifically listed the three major components of the system, and all three bidders made an effort to price the receivers, the central-control equipment, and the operating-support system. The Addendum to the ITB also stated that the vendor's price on the additional items "would be considered in the selection of the successful bidder for the 12,000 UHF TAR receivers."

The evidence in the record shows that the Purchasing Division intended initially to solicit bids only for the receivers and a price matrix for the other components. The Purchasing Division then decided to purchase these components from the same vendor that supplied the receivers. TFT argues that awarding the entire system to a bidder based on the price [**23] bid for only the receiver violates Alabama's Competitive Bid Law. The trial court never ruled as to whether the State's approach violated Alabama's Competitive Bid Law. Instead, the trial court simply found that the ITB did not solicit bids for any components of the system other than the receivers.

When the State issued the ITB, the AEMA did not know how many receivers would be required, nor how much funding it would receive from the Federal Emergency Management Agency ("FEMA"); therefore, it decided to buy initially 12,000 receiver units. (R. 164, 171.) The unit price of the receivers was an important element in AEMA's determination because the agency intended to purchase increasingly more receivers as funding became available. (R. 120, 126-27, 149-50.) The receivers would be the most numerous of the items to be purchased. (R. 126-27.) The State had only limited funding from FEMA and intended to purchase the additional components -- the central-control equipment and the operating-support system -- as funds became available; therefore, the State also sought price quotations for the additional components that would eventually be needed to make a complete system. (R. 171-73.) The use [**24] of a single vendor to supply all of the components of the system ensures that the components will be compatible, and the solicitation of prices for these other components locks in a price for their future purchase.

No evidence in the record supports the trial court's finding that the ITB did not include the central-control equipment and the operating-support system. In its Addendum to the ITB, the agencies specifically requested that prices for these components be listed in a price matrix, in response to written questions from WSI and Federal Signal. These prices were supposed to be considered in determining the successful bidder. However, because TFT did not submit separate prices for the central-control equipment and the operating-support system, the State could not compare its prices with those of WSI.

We do not find that the State's method of soliciting bids on this contract violates the Competitive Bid Law. Alabama Admin. Code § 355-4-1-.03 (8) (a) permits the State to "determine the lowest responsible bidder on the basis of an individual item, group of items or in any way determined to be in the best interest of the state." The Legislature specifically authorized the Finance [**25] Department to promulgate regulations with respect to the performance of its duties, and those regulations have the effect of law. Ala. Code 1975, § 41-4-35. The agencies found it to be in the best interest of the State to solicit bids for the TAR receivers, based on the funding available at the time, and to solicit, at the same time, prices for the additional components, in order to guarantee a price for those components to be purchased when funding became available. While we do not find the State's actions in this particular case to constitute fraud or an abuse of discretion, we do not hold that awarding a contract on the basis of one item alone will never violate the Competitive Bid Law.

[*1247] *Conclusion*

The Competitive Did Law was enacted for the benefit of the public, not for the benefit of the unsuccessful bidder. *Advance Tank,* 910 F.2d at 765; *Townsend v. McCall,* 262 Ala. 554, 558, 80 So. 2d 262, 265 (1955). TFT contends that it was actually the lowest responsible bidder. We disagree. The ITB and its Addendum solicited bids for the price of the receivers only and solicited a price matrix listing the other components. Further, TFT was not a [**26] "responsible" bidder, because its bid did not include the price matrix requested and its

receivers did not meet the technical specifications. The AEMA and the Purchasing Division received a responsible bid from WSI indicating the price of the receivers alone and listing the prices of the other components. The agencies did not abuse their discretion in determining that WSI was the lowest responsible bidder. Therefore, we affirm the trial court's order denying an injunction as to the receivers, and we reverse the trial court's injunction as to the central-control equipment and the operating-support system. That injunction is dissolved.

AFFIRMED TN PART; REVERSED IN PART; AND INJUNCTION DISSOLVED.

Maddox, Houston, See, Brown, Johnstone, and England, JJ., concur.

Lyons, J., concurs in the result in part and dissents in part.

DISSENT BY: LYONS

DISSENT

LYONS, Justice (concurring in the result in part and dissenting in part).

As to Part II, I concur in the result. As to Parts I and III, I dissent. I would reverse the order entering the injunction because the trial court did not require a bond, and I would remand for further proceedings. Rule 65(c), Ala. R. Civ. P.; *Jefferson County Comm'n v. Fraternal Order of Police, Lodge No. 64,* 543 So. 2d 198 (Ala. 1989). [**27]

Steven Thompson v. Champion International Corporation

No. 85-746

Supreme Court of Alabama

500 So. 2d 1048; 1986 Ala. LEXIS 4092

October 24, 1986, Filed

SUBSEQUENT HISTORY: [**1] Rehearing Denied December 19, 1986.

PRIOR HISTORY: Appeal from Colbert County Circuit Court, Inge Johnson, Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: highway, gate, landowner, roadway, private road, trespasser, dune buggy, parking lot, travel, directed verdict, quasi-public, constructed, street, traffic control devices, cause of action, establishment, permission, vehicular, adjacent, logging, manual, logging operations, undisputed, collided, duty owed, public roads, predecessor, scintilla, unmarked, supplied

COUNSEL: John R. Benn, of Peck & Slusher, Attorneys, for Appellant.

Steve A. Baccus of Almon, McAlister, Ashe, Baccus and Tanner, Attorneys, for Appellee.

JUDGES: Maddox, J. Almon, Beatty, and Houston, JJ., concur. Torbert, C.J., concurs in the result.

OPINION BY: MADDOX

OPINION

[*1049] Steven Thompson (plaintiff/appellant) filed this action to recover damages for personal injuries he sustained early one morning when the motor vehicle in which he was a passenger struck an unmarked gate maintained by Champion International Corporation (Champion).

In the early morning hours of August 3, 1984, Thompson met with two friends, Jeff Tirey and Butch Fuller, in the parking lot of a local nightclub. At approximately 1:00 a.m., the three decided to drive to Tirey's mobile home. Thompson and Fuller stopped at a convenience store while en route to Tirey's home and purchased gas and a six pack of beer. Upon arriving at Tirey's mobile home, the men sat on the porch for approximately one hour talking and drinking beer.

At approximately 2:30 a.m., Tirey suggested that they take [**2] a ride in his dune buggy. Tirey drove the dune buggy, with Fuller sitting in the front seat. Thompson sat on a pillow between the two seats, and held on to the roll bar. Initially, Tirey proceeded along a county highway; he then turned left onto a dirt and gravel company road leading to land owned by Champion. The gate across the road was locked, and Tirey went around the gate by driving over a large dirt mound located to the left of the gate.

The road on which Thompson and his friends entered the Champion land had been constructed by Champion employees in 1983 for logging purposes, and also to afford access to the land for other company purposes. The gate in question was also erected in 1983 and was only open during logging operations by Champion. It is undisputed that the gate could clearly be seen from the county road during the day.

Thompson and his friends drove the dune buggy several miles back on Champion land and rode around for thirty to forty-five minutes. Upon leaving the Champion property, Tirey rounded a curve in the company road at approximately 30 m.p.h. and collided with the same gate he had earlier gone around to gain access to the property. The accident occurred [**3] between 3:30 and 4:00 a.m.

Thompson sued Champion. The complaint contained claims based on negligence, wantonness, failure to warn, and statutory or regulatory violation. Champion moved for a directed verdict at the conclusion of the plaintiff's case, asserting that Thompson had failed to establish that as a trespasser he had been intentionally injured by Champion and that the provisions of the Alabama Manual of Uniform Traffic Control Devices (A.M.U.T.C.D.) had no application to the roadway in question. The trial court granted the directed verdict. This appeal followed.

The first issue raised on appeal is whether the trial court erred when it directed a verdict in favor of Champion and found that Thompson had failed to establish a prima facie case that Champion had breached any duty owed to Thompson by erecting the gate. Thompson contends that this case does not involve a personal injury action brought by a trespasser against a landowner; instead, Thompson characterizes the case as one involving a landowner owning property immediately adjacent to a public highway. Thompson argues that the special factual circumstances of this case significantly alter Champion's legal liability [**4] with respect to the unmarked gate across Champion's roadway.

In ruling upon the propriety of a directed verdict, this Court must view the entire evidence in a light most favorable to the party opposing the motion. When a reasonable inference can be drawn which proves to be adverse to the moving party, a motion for directed verdict should be denied. *City of Birmingham v. Wright*, 379 So.2d 1264 (Ala.1980). The scintilla evidence rule is the standard by which a trial judge is to determine the propriety of a directed verdict. *Quillen v. Quillen*, 388 So.2d 985 (Ala.1980).

[*1050] In negligence cases, the duty owed by a landowner depends upon the status of the injured party in relation to the defendant's land. It is well settled law in this state that in regard to a trespasser, the landowner owes only the duty not to wantonly or intentionally injure him. *Tolbert v. Gulsby*, 333 So.2d 129 (Ala.1976). There is no duty to warn of open and obvious defects which the trespasser should be aware of in the exercise of reasonable care. *Owens v. National Security of Alabama, Inc.*, 454 So.2d 1387 (Ala.1984). The legal doctrine that a landowner may not erect a "trap" or "pitfall" [**5] to injure a trespasser is rested upon the theory that if he does so, then the owner "has expected the trespasser and prepared an injury." *Moseley v. Alabama Power Co.*, 246 Ala. 416, 419, 21 So.2d 305, 308 (1945).

Thompson testified that he never received permission to enter Champion's land. The evidence is also undisputed that the road leading to the Champion land was constructed by Champion employees in 1983 to allow company personnel operating company equipment access to the land for logging operations. Additionally, hunters and pleasure riders were allowed to use the road *only if they obtained a permit from Champion*. The driver of the dune buggy saw the locked gate across the road and drove the dune buggy over the hill to get around the gate and thereby gain access to the land. The gate with which Thompson and his friends collided had been in place for eight months prior to the accident and was "open and obvious" from the abutting highway.

Thompson attempts to alter the duty owed by Champion to him by arguing that his status as a trespasser is not relevant because Champion's land is located adjacent to a public highway. Thompson argues that as an abutting landowner, [**6] Champion was under an obligation to use reasonable care to keep its premises in such a condition as not to create defects or obstructions in the adjacent highway endangering travelers in their lawful use of the land. Thompson cites several cases which hold that a landowner may owe a greater duty to a trespasser where the public has been allowed to use the premises in such a manner, and for such a length of time, that members of the public who go thereon may reasonably presume that the owner will give some warning or notice of any change in the condition of the property. See *W.S. Fowler Rental Equipment Co. v. Skipper*, 276 Ala. 593, 165 So.2d 375 (1963); *Nashville, C.& St. L. R. v. Blackwell*, 201 Ala. 657, 79 So. 129 (1918); *Barlow v. Los Angeles County Flood Control Dist.*, 96 Cal.App.2d 979, 216 P.2d 903 (1950).

These cases are easily distinguishable from the case at bar. The undisputed evidence before the trial court was that the road upon which Thompson trespassed was constructed by Champion in November 1983, to allow company equipment access for logging operations. The gate into which the dune buggy collided was erected immediately subsequent to the construction of [**7] the road and was clearly visible from the highway. The evidence in this case was that *only individuals who obtained permits were allowed to travel on the road.* This restriction is in contrast to the situation where a landowner allows all members of the public access to the property and thereby creates a duty upon himself to give a warning or notice of the change.

Additionally, the most readily distinguishable factor between the cases cited by Thompson and this case, is that the driver of the dune buggy *actually saw the locked gate into which he later collided.* He saw it when he turned onto the company road and wrongfully gained access to the land by climbing a hill directly adjacent to the gate. Obviously, to compare these facts to a factual situation where a member of the public has entered a private road in the mistaken belief that the road was open for public use would be clearly wrong. We refuse, therefore, to place on Champion a burden of giving warning or notice, under these facts.

The second issue raised on appeal is whether Code 1975, § 23-1-131, together with the Alabama Manual of Uniform Traffic [*1051] Control Devices (A.M.U.T.C.D.), provides a statutory [**8] cause of action for injuries sustained as a result of striking an unmarked gate. On appeal, Thompson contends that the trial court erred when it refused to apply A.M.U.T.C.D. to the private roadway in this case.

A predecessor of Code 1975, § 23-1-131 was enacted as part of "The Alabama Highway Code," Acts of Alabama 1927, Act No. 347, pp. 348-408, and its purpose included providing "for the establishment and maintenance of private roads."

Predecessor code sections had also made provision for the establishment of a private road. Section 23-1-131 provides:

> "In establishing a private road, the same rules must be observed and the same proceedings had as in the case of public roads; but no road must be opened through any person's yard, garden, orchard, garage, stable, lot, ginhouse or curtilage without his consent, and the applicant must pay the owner of the land over which such road passes all damages resulting thereto from the establishment of such road, to be assessed as in case of public roads. (Code 1907, §§ 5842, 5843; Code 1923, § 1371; Acts 1927, No. 347, p. 348; Code 1940, T. 23, § 66.)"

The act was passed to allow an individual to establish a private road [**9] across the land of another by applying to the county commission. Section 23-1-131 and its predecessors were enacted to ensure that the rights of private landowners were protected in the establishment of private roads across their land. See *Ballard v. Cook*, 166 Ala. 105, 52 So. 147 (1910).

Thompson's argument that section 23-1-131 required that a private landowner comply with all statutes governing markings, signs, and barriers on public roads when constructing and maintaining a private road on its own land for its own private use, is without merit. This statute, when read in conjunction with the case law, does not require a landowner to meet such a standard when merely constructing a roadway across its own land.

Thompson also contends that he was entitled to recover under a private statutory cause of action based upon a violation of A.M.U.T.C.D.. Section 32-5A-30, Code 1975, provides that the State of Alabama Highway Department shall adopt a manual and specifications for a uniform system of traffic control devices consistent with the provisions of that chapter and other state laws for use upon highways in the state. Section 32-1-1.1(23), Code 1975, defines a "highway" as "the [**10] entire width between the boundary lines of every way *publicly maintained* when any part thereof is open to the use of the public for purposes of vehicular travel." (Emphasis supplied.) Thus, a highway may be distinguished from a "private road or driveway," which is defined as "every way or place in private ownership and used for vehicular travel by the owner and *those having express or implied permission from the owner*, but not by other persons." Code 1975, § 32-1-1.1(46). (Emphasis supplied.)

The evidence in this case reveals that the road upon which Thompson trespassed was constructed in November 1983 to allow company equipment access for logging operations. The road and gate are located on Champion property and are maintained by Champion. The evidence is undisputed that with the exception of company use, *only* individuals who obtained permits were allowed to travel on the road.

The company road on which the accident occurred constitutes a "private road or driveway," as opposed to a "highway," under the definitions of § 32-1-1.1. The road is privately maintained and it was used for vehicular traffic by the owner and those having express or implied permission from [**11] the owner. The road would, therefore, not be governed by the provisions and specifications of the A.M.U.T.C.D.

Assuming, however that the A.M.U.T.C.D. did apply to this case, we would reach the same conclusion. The road in question is not a "highway" as defined by the A.M.U.T.C.D. A "highway" is defined by the A.M.U.T.C.D. as: "The entire width between [*1052] the boundary lines of every way, publicly maintained, when any part thereof is open to the use of the public for purposes of vehicular travel." This is the same definition provided by § 32-1-1.1(23). The A.M.U.T.C.D. also defines a "quasi-public parking lot, street or highway" as: "Any parking lot, street or highway owned and *maintained* by a private individual or corporation *for the use of customers, tenants, and employees*." (Emphasis supplied.) In his brief, plaintiff argues that there was at least a scintilla of evidence that the road was a "quasi-public parking lot, street or highway." He sets out this evidence as follows:

> "The testimony of Jimmy Murphy, Defendant's District Land Use Manager confirmed that Defendant constructed the roadway in question. (Tr. at 9). Other trial testimony indicated the roadway [**12] was used for logging purposes. (Tr. at 30). A life -long resident of the area testified that the roadway in question was used by 'hunters and people just pleasure riding'. (Tr. at 76). Trial testimony later developed that Defendant 'sold' hunting permits to use the roadway

> (Tr. at 77) and that the roadway was used for cutting and logging timber (Tr. at 78). Lastly, Witness Murphy near the conclusion of Plaintiff's case confirmed that the roadway in question 'was built so that logging trucks could travel it'. (Tr. at 171). Even a cursory review of this testimony certainly leads to the conclusion that Plaintiff mustered more than a scintilla of evidence to support his claim that the roadway was 'quasi-public'."

Plaintiff's argument, therefore, that the road was a "quasi-public parking lot, street, or highway" is without merit.

Here, we need not decide whether a person lawfully on the premises would have a cause of action if the landowner failed to follow the requirements of law relative to markings, signs, and barriers on a "quasi-public parking lot, street or highway." The evidence is without dispute here, that plaintiff had *no permission* to be on the land. It follows, [**13] therefore, that plaintiff, as a trespasser, cannot claim any benefit from the requirements of the A.M.U.T.C.D. Furthermore, the evidence is clear in this case that plaintiff, to gain access to the land, evaded the very gate he now claims was a "trap" or "pitfall." The trial court correctly directed a verdict against Thompson on his claim that the facts in this case established a cause of action under the Alabama Manual of Uniform Traffic Control Devices.

The judgment of the trial court is due to be, and it hereby is, affirmed.

AFFIRMED.

Almon, Beatty, and Houston, JJ., concur.

Torbert, C. J., concurs in the result.

Carol J. Tucker and Donald L. Tucker v. Luther Gene Moorehouse

2081032

COURT OF CIVIL APPEALS OF ALABAMA

58 So. 3d 1262; 2010 Ala. Civ. App. LEXIS 209

July 23, 2010, Released

SUBSEQUENT HISTORY: Released for Publication March 24, 2011.

As Corrected June 28, 2011.

PRIOR HISTORY: [**1]
Appeal from St. Clair Circuit Court. (CV-07-44).
Tucker v. Moorehouse, 2010 Ala. Civ. App. LEXIS 548 (Ala. Civ. App., Feb. 12, 2010)
Suttle v. Tucker, 398 So. 2d 266, 1981 Ala. LEXIS 3468 (Ala., 1981)

CORE TERMS: parcel, public road, disputed, roadway, strip, summary-judgment, deed, conveyed, adjudicated, assigns, successors, heirs, blocking, driveway, pasture, tenus, ore, parcel of land, eastern boundary, corner, ran, marked, northwesterly, right of way, aerial photographs, abandoned, vacated, visible, chain, right to use

COUNSEL: For Appellants: Charles M. Thompson, Birmingham.

For Appellee: Fred W. Teague, Ashville.

JUDGES: BRYAN, Judge. Thompson, P.J., and Pittman, Thomas, and Moore, JJ., concur.

OPINION BY: BRYAN

OPINION

[*1263] *On Application for Rehearing*

BRYAN, Judge.

The no-opinion affirmance of February 12, 2010, is withdrawn, and the following is substituted therefor.

Carol J. Tucker and Donald L. Tucker, the defendants below, appeal from a judgment finding that a dirt roadway located on their property ("the disputed roadway") [*1264] is part of a public dirt road named Lower Mill Road, ordering the Tuckers to remove a chain blocking the southern end of the disputed roadway, and enjoining the Tuckers from blocking the disputed roadway in the future. We reverse and remand with instructions.

Luther Gene Moorehouse, the plaintiff below, owns a parcel of land ("the Moorehouse parcel") in St. Clair County that is generally rectangular in shape. The Tuckers own a parcel of land ("the Tucker parcel") in St. Clair County that abuts the entire northern boundary of the Moorehouse parcel and the northern half of the eastern boundary of the Moorehouse parcel. The portion of the Tucker parcel that abuts the eastern boundary of the Moorehouse parcel is a narrow strip of land ("the strip") bounded on the [**2] east by a parcel of land owned by persons who are not parties to this action. A couple named Suttle, who are not parties to this action, own a square-shaped parcel of land ("the Suttle parcel") in St. Clair County that abuts the southern half of the eastern boundary of the Moorehouse parcel and the southern boundary of the strip.

Access to the Moorehouse parcel, the Tucker parcel, and the Suttle parcel is provided by a dirt road named Lower Mill Road. Lower Mill Road runs generally north from Liberty Road, the closest paved road, across several parcels of land that are owned by persons who are not parties to this action until it reaches the southeastern corner of the Suttle parcel. Upon reaching the southeastern corner of the Suttle parcel, Lower Mill Road runs diagonally across the Suttle parcel in a generally northwesterly direction to the northwestern corner of the Suttle parcel. At the northwestern corner of the Suttle parcel, Lower Mill Road intersects with the southern terminus of the disputed roadway, which is located on the strip.

Moorehouse contends that the disputed roadway is part of Lower Mill Road; that Lower Mill Road was determined to be a public road in a 1979 action [**3] ("the 1979 action") brought by the Tuckers' predecessors in title, who were Donald L. Tucker's parents, against the Suttles; [1] and that, therefore, they have the right to use the disputed roadway. The Tuckers, on the

other hand, contend that the disputed roadway is not part of Lower Mill Road; rather, they contend, the disputed roadway is their private driveway. Specifically, the Tuckers contend that, when Lower Mill Road was determined to be a public road in the 1979 action, it ran from the northwestern corner of the Suttle parcel in a generally northwesterly direction through the middle of a pasture on the Moorehouse parcel to the Tucker parcel rather than in a northerly direction on the strip. They further contend that, after Lower Mill Road was adjudicated to be a public road in the 1979 action, Moorehouse's parents, who are his predecessors in title, entered into a written agreement with Donald L. Tucker's parents titled "Covenant Running With the Land." According to the Tuckers, this Covenant Running With the Land provided that Moorehouse's parents would deed the strip to Donald L. Tucker's parents so that they could use the strip to access their parcel in exchange for Donald [**4] L. Tucker's parents' agreeing that they and their heirs, successors, and assigns would abandon their use of the portion of Lower Mill Road that ran in a northwesterly direction through the middle of a pasture on the Moorehouse parcel. The Tuckers contend that Moorehouse's parents subsequently deeded the strip to Donald L. Tucker's parents; that Donald L. Tucker's parents constructed a private [*1265] driveway on the strip, which is the disputed roadway; and that Donald L. Tucker's parents and their assigns, i.e., the Tuckers, abandoned their use of the portion of Lower Mill Road that ran in a northwesterly direction through the middle of a pasture on the Moorehouse parcel. Thus, the Tuckers contend that Moorehouse does not have the right to use the disputed roadway because, they say, it is their private driveway rather than a portion of Lower Mill Road.

> 1 See *Suttle v. Tucker,* 398 So. 2d 266 (Ala. 1981).

At some point before February 26, 2008, the Tuckers prevented Moorehouse from using the disputed roadway by placing a chain across its southern terminus, which prompted Moorehouse to sue the Tuckers on February 26, 2008. Moorehouse alleged that the Tuckers had blocked Lower Mill Road, that Lower [**5] Mill Road had been adjudicated to be a public road in the 1979 action, that Lower Mill Road was still a public road, and that Moorehouse needed to use the portion of Lower Mill Road abutting the eastern boundary of his parcel in order to access the northern portions of his parcel. As relief, Moorehouse sought a judgment determining that Lower Mill Road was still a public road, an injunction preventing the Tuckers from blocking Lower Mill Road in the future, and an award of damages to compensate him for losing the use of the portion of Lower Mill Road that abutted the eastern boundary of his parcel while it was blocked by the Tuckers.

Answering, the Tuckers denied the material allegations of Moorehouse's complaint and asserted various affirmative defenses.

The trial court set Moorehouse's action for trial on November 27, 2007. On February 4, 2008, the trial court entered a judgment stating:

> "This cause having heretofore been set for final hearing on November 27, 2007, and the Plaintiff, Luther Gene Moorehouse being present in Court with his attorney, the Honorable Fred W. Teague, and the Defendants, Donald L. Tucker and Carol L. Tucker, being present in Court with their attorney the Hon. [**6] Dale Stracner, the Court proceeded to consider the issues raised in the respective pleadings.
>
> "Therefore, after a consideration of the pleadings filed in this cause; a review of the case styled Robert C. Tucker v. Gene Courtney Suttle and Wanda Wideman Suttle, St. Clair County Circuit Court Case Number: CV 1979-3, and a discussion with the said attorneys at the bench, the Court is of the opinion that [Moorehouse's] complaint or petition is due to be granted.
>
> "Therefore, the Court finds and it is hereby Ordered, Adjudged and Decreed that:
>
> "1.) That a right of way as a public road was previously established in that certain St. Clair County Case styled Robert C. Tucker vs. Gene Courtney Suttle and Wanda Wideman Suttle, Civil Action Number: CV 1979-3.
>
> "2.) That the Court finds that the ruling in Robert Tucker vs. Gene Courtney Suttle and Wanda Wideman Suttle is applicable to the issues raised in this herein stated cause.
>
> *"That the said public right of way established in said cause runs adjacent to [Moorehouse's and the Tuckers' land], which were subject to the right of way established in Tucker vs. Suttle, et al., supra.*
>
> 3.) Therefore, the Court finds that the Defendants, Donald J. Tucker and

> [**7] Carol J. Tucker have no right or authority to obstruct, block or prevent the use of the public right of way stated herein.
>
> [*1266] "It is hereby Ordered, Adjudged and Decreed that the Defendants, Donald J. Tucker and Carol J. Tucker, immediately remove the chain that is presently blocking the passage of the said public road way.
>
> "It is further Ordered, Adjudged and Decreed that the said Defendants, Donald J. Tucker and Carol J. Tucker are permanently enjoined from blocking, obstructing or otherwise preventing the public use of the said right of way."

(Emphasis altered.) However, on June 4, 2008, the trial court granted a Rule 60(b), Ala. R. Civ. P., motion filed by the Tuckers and vacated the judgment entered on February 4, 2008.

On September 24, 2008, the Tuckers moved the trial court for a summary judgment. As the primary ground of their summary-judgment motion, they asserted that the disputed roadway was their private driveway, that the disputed roadway was not part of Lower Mill Road, and, therefore, that Moorehouse did not have a right to use the disputed roadway.

As evidence in support of their summary-judgment motion, the Tuckers submitted, among other things, contemporary aerial photographs [**8] of the area where their parcel, the Moorehouse parcel, and the Suttle parcel are located; the affidavit of Donald L. Tucker; the Covenant Running With the Land executed by Moorehouse's parents and Donald L. Tucker's parents in 1981; a 1981 deed in which Moorehouse's parents had conveyed the strip to Donald L. Tucker's parents; and a deed in which Donald L. Tucker's parents had conveyed the strip to the Tuckers.

On January 2, 2009, Moorehouse filed an affidavit in opposition to the Tuckers' summary-judgment motion and filed his own summary-judgment motion. Moorehouse's affidavit stated that the trial court had been correct in finding in its February 4, 2008, judgment that the 1979 action had adjudicated the same issues raised by Moorehouse's action. As the ground of his own summary-judgment motion, Moorehouse asserted that the disputed roadway was a public road by virtue of its being adjudicated to be a public road in the 1979 action.

Following a hearing, the trial court signed an order denying the Tuckers' summary-judgment motion on February 9, 2009. [2] On April 28, 2009, the trial court set the action for a bench trial on May 27, 2009. [3]

2 The order was stamped filed by the St. Clair Circuit [**9] Clerk on February 10, 2009, stamped filed a second time on February 11, 2009, and entered on the case-action summary maintained by the clerk on February 11, 2009; however, it does not appear to have been entered on the State Judicial Information System's case-action summary.

3 The record does not contain an order expressly denying Moorehouse's summary-judgment motion; however, the entry of the trial court's order setting the action for trial on May 27 is inconsistent with an intention to grant that motion.

Before the trial court received any evidence at the May 27 trial, the parties' attorneys explained their clients' positions. The trial court then stated:

> "THE COURT: Let's hear from Mr. Tucker, because he certainly has the burden of telling me why this road should close. Let's do our best to keep it quick."

The Tuckers then called Donald L. Tucker as their sole witness. Mr. Tucker testified as follows. When Lower Mill Road was adjudicated to be a public road in the 1979 action, it ran through the middle of a pasture on the Moorehouse parcel and the disputed roadway did not exist. [*1267] After Lower Mill Road was adjudicated to be a public road in the 1979 action, Moorehouse's parents and Donald [**10] L. Tucker's parents entered into a contractual agreement that was memorialized in the Covenant Running With the Land. The agreement provided that Moorehouse's parents would convey the strip to Donald L. Tucker's parents to use for accessing their parcel in exchange for Donald L. Tucker's parents' agreeing that they and their heirs, successors, and assigns would abandon their use of the portion of Lower Mill Road that ran through the middle of the Moorehouse parcel. Moorehouse's parents subsequently conveyed the strip to Donald L. Tucker's parents, and Donald L. Tucker's parents subsequently conveyed the strip to the Tuckers.

In addition to Donald L. Tucker's testimony, the Tuckers introduced into evidence contemporary aerial photographs depicting the area where their parcel, the Moorehouse parcel, and the Suttle parcel are located. On Defendants' Exhibit 1, which is one of those aerial photographs, Tucker marked the location of the portion

of Lower Mill Road that he contended had run through a pasture in the middle of the parcel now owned by Moorehouse. He marked the X in a location covered with vegetation where no road is visible. Donald L. Tucker testified that the growth of vegetation [**11] after his parents had abandoned their use of that portion of Lower Mill Road in 1981 accounted for the absence of any visible sign of a road where he marked the X. The Tuckers also introduced into evidence, among other things, the Covenant Running With the Land; the deed in which Moorehouse's parents conveyed the strip to Donald L. Tucker's parents; the deed in which Donald L. Tucker's parents conveyed the strip to the Tuckers; a survey of the strip; a copy of the judgment entered by the St. Clair Circuit Court in the 1979 action; and a copy of the supreme court's opinion in *Suttle v. Tucker,* 398 So. 2d 266 (Ala. 1981), the appeal of the 1979 action.

The opinion of the supreme court was delivered on May 1, 1981. In pertinent part, the Covenant Running With the Land stated:

> "This agreement, executed at Pell City, St. Clair County, Alabama, on this the *6th day of October, 1981,* by and between J.L. Moorehouse and wife, Ruby Moorehouse, hereinafter referred to as parties of the first part, and Robert C. Tucker and wife, Jessie S. Tucker, hereinafter referred to as parties of the second part. *It being the intent and purpose of this contract to provide the parties of the second part access* [**12] *to establish a road to their property and to assure to the parties of the first part that the parties of the second part and their heirs, successors, and assigns, shall be deemed to have abandoned that portion of the land belonging to the parties of the first part which was previously adjudicated to be a public road.* That the parties of the first part and their heirs, successors and assigns and the parties of the second part and their heirs, successors and assigns shall not interfere with the peaceful possession of their respective properties.
>
> "In furtherance of this intent, the parties of the first part and the parties of the second part enter into this contract and agreement which is to run with the land under the following terms and conditions:
>
> "1. That the parties of the first part agree to deed in fee simple to the parties of the second part, the following described real estate:
>
> "[legal description of the strip]
>
> "2. That the parties of the second part agree that neither they nor their [*1268] assigns, successors or heirs shall now, nor forever, seek to establish a public road across the property belonging to the parties of the first part. *This shall include that area heretofore adjudicated* [**13] *by the Court of St. Clair County, Alabama, to be a public road across the property belonging to the parties of the first part.*
>
> "....
>
> "4. It is expressly understood and agreed that this contract in all its terms and conditions shall be binding on and shall enure to the benefit of the heirs, executors, administrators, successors and assigns of the parties hereto."

(Emphasis added.) Moorehouse's parents executed the deed conveying the strip to Donald L. Tucker's parents on October 19, 1981.

Following the trial on May 27, the trial court, on June 10, 2009, entered a judgment stating:

> "This case came on to be heard on the 27 day of May, 2009. ... The issue in this case is whether or not the road in question continues to be a public road. Testimony was taken ore tenus and after consideration of the pleadings, motions for summary judgment, affidavits and exhibits filed herewith, and a review of the case 'Tucker vs. Suttle' CV-1979-3, *the Court is of the opinion that the road declared a public road in said 1979 has not been vacated by any act or resolution of the City of Odenville or St. Clair County.*
>
> *"The Court therefore finds and decrees that the order entered by this Court on [February 4,] 2008 is* [**14] *adopted and shall continue as set out therein."*

(Emphasis added.)

On July 12, 2009, the Tuckers timely appealed to the supreme court, which transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Because the trial court's judgment followed a bench trial in which the court heard ore tenus evidence, the following principles govern our review:

> """[W]hen a trial court hears ore tenus testimony, its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust."" *Water Works & Sanitary Sewer Bd. v. Parks,* 977 So. 2d 440, 443 (Ala. 2007) (quoting *Fadalla v. Fadalla,* 929 So. 2d 429, 433 (Ala. 2005), quoting in turn *Philpot v. State,* 843 So. 2d 122, 125 (Ala. 2002)). "'The presumption of correctness, however, is rebuttable and may be overcome where there is insufficient evidence presented to the trial court to sustain its judgment."' *Waltman v. Rowell,* 913 So. 2d 1083, 1086 (Ala. 2005) (quoting *Dennis v. Dobbs,* 474 So. 2d 77, 79 (Ala. 1985)). 'Additionally, the ore tenus rule does not extend to cloak with a presumption of correctness a trial judge's conclusions [**15] of law or the incorrect application of law to the facts.' *Waltman v. Rowell,* 913 So. 2d at 1086."

Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc., 985 So. 2d 924, 929 (Ala. 2007).

The Tuckers first argue that the trial court erred in denying their summary-judgment motion. However, when there is a trial on the merits after the denial of a summary-judgment motion, we do not review the denial of the summary-judgment motion. *Beiersdoerfer v. Hilb, Rogal & Hamilton Co.,* 953 So. 2d 1196, 1205 (Ala. 2006) ("'[W]e do not review a trial court's denial of a summary-judgment motion following a trial on the merits.'" (quoting *Mitchell v. Folmar & Assocs., LLP,* 854 So. 2d 1115, 1116 (Ala. 2003))). [*1269] Because there was a trial on the merits after the denial of the Tuckers' summary-judgment motion, we will not review the denial of their summary-judgment motion. *See Beiersdoerfer* and *Mitchell.*

Second, the Tuckers argue that the uncontroverted evidence established that the disputed roadway was not part of Lower Mill Road when Lower Mill Road was determined to be a public road in 1979. The trial court found in its February 4, 2008, judgment that the disputed roadway was part of Lower Mill [**16] Road when it was determined to be a public road in the 1979 action, and the trial court adopted that finding in its June 10, 2009, judgment. Moreover, the trial court found in its June 10, 2009, judgment that Lower Mill Road had not been vacated subsequent to its being determined to be a public road in the 1979 action. Because the trial court made those written findings of fact, the Tuckers are entitled to challenge the sufficiency of the evidence supporting the trial court's judgment even though they did not challenge its sufficiency in the trial court. *See* Rule 52(b), Ala. R. Civ. P.; and *Ex parte Vaughn,* 495 So. 2d 83, 87 (Ala. 1986). In pertinent part, Rule 52(b) provides:

> "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the court an objection to such findings or has made a motion to amend them or a motion for judgment or a motion for a new trial."

In *Ex parte Vaughn,* the supreme court held:

> "Rule 52(b) provides an exemption from the requirement of invoking a ruling by the trial court on the issue of [**17] evidentiary insufficiency when written findings of fact are made. The trial court's ruling on the sufficiency of the evidence is implicit in a decree in which the trial judge is the trier of the facts. Moreover, by making written findings of fact, the trial judge has had the additional opportunity to reconsider the evidence and discover and correct any error in judgment which he or she may have made upon initial review. Thus, when written findings of fact are made, they serve the same useful purpose as does an objection to the trial court's findings, a motion to amend them, a motion for a new trial, and a motion to dismiss under Rule 41(b), [Ala. R. Civ. P.] -- to permit the trial judge an opportunity to carefully review the evidence and to perfect the issues for review on appeal."

495 So. 2d at 87. Accordingly, we will consider the Tuckers' challenge of the sufficiency of the evidence supporting the trial court's judgment.

The Covenant Running with the Land, the deed in which Moorehouse's parents conveyed the strip to Donald L. Tucker's parents, and the testimony of Donald L. Tucker indicate that the disputed roadway was not part of Lower Mill Road when it was determined to be a public [**18] road in the 1979 action and that the disputed roadway was a private driveway constructed by Donald L. Tucker's parents after the supreme court delivered its opinion concluding the 1979 action. Thus, that evidence directly contradicts the trial court's finding that the disputed roadway was part of Lower Mill Road when it was determined to be a public road in the 1979 action. Even if the trial court, as the sole judge of Donald L. Tucker's credibility as a witness, *see Woods v. Woods,* 653 So. 2d 312, 314 (Ala. Civ. App. 1994), found that that testimony was not credible, Moorehouse did not dispute the authenticity of the Covenant Running With the Land and the deed in which Moorehouse's parents [*1270] conveyed the strip to Donald L. Tucker's parents. The Covenant Running With the Land affirmatively established that the disputed roadway was not part of Lower Mill Road when it was determined to be a public road in the 1979 action. That affirmative proof precluded the trial court from inferring from the absence of any visible sign of a road where Donald L. Tucker marked an X on Defendants' Exhibit 1 that the disputed roadway had been part of Lower Mill Road when it was determined to be a public road [**19] in the 1979 action. No other evidence supports the trial court's finding that the disputed roadway was part of Lower Mill Road when it was determined to be a public road in the 1979 action.

> "'[E]ven under the ore tenus rule, "[w]here the conclusion of the trial court is so opposed to the weight of the evidence that the variable factor of witness demeanor could not reasonably substantiate it, then the conclusion is clearly erroneous and must be reversed."'"

Cheek v. Dyess, 1 So. 3d 1025, 1029 (Ala. Civ. App. 2007) (quoting *B.J.N. v. P.D.,* 742 So. 2d 1270, 1274 (Ala. Civ. App. 1999), quoting in turn *Jacoby v. Bell,* 370 So. 2d 278, 280 (Ala. 1979)). Given the undisputed authenticity of the Covenant Running with the Land, we conclude that the trial court's finding that the disputed roadway was part of Lower Mill Road when it was determined to be a public road "is so opposed to the weight of the evidence that the variable factor of witness demeanor could not reasonably substantiate it" and, therefore, that that finding "is clearly erroneous and must be reversed." *Cheek v. Dyess,* 1 So. 3d at 1029. Moreover, because that finding was essential to the trial court's judgment in favor of Moorehouse, [**20] we reverse the judgment of the trial court and remand the action to the trial court with instructions to enter a judgment in favor of the Tuckers.

Because the Tuckers' argument regarding the sufficiency of the evidence disposes of the appeal, we pretermit discussion of their other arguments.

APPLICATION GRANTED; NO-OPINION AFFIRMANCE OF FEBRUARY 12, 2010, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ., concur.

James P. Turner, Kenneth M. Carnathan, and James L. Livingston v. Margaret Rose Hoehn, et al.

No. 85-264

Supreme Court of Alabama

494 So. 2d 28; 1986 Ala. LEXIS 3659

July 18, 1986, Filed

PRIOR HISTORY: [**1] Appeal from Jefferson Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: alley, vacate, public way, abutting, street, municipality, vacated, summary judgment, abutting properties, owners of property, property rights, refused to consent, parcels of land, compensate, attingent, vacation, annul, plat, map, non-consenting

COUNSEL: Jesse P. Evans III of Corretti & Newsom, for Appellant.

Edward L. Ramsey, and Samuel Fisher, Assistant City Attorney, for Appellee City of Birmingham.

JUDGES: Shores, J. Torbert, C.J., and Jones, Adams, and Steagall, JJ.

OPINION BY: SHORES

OPINION

[*28] James P. Turner and the other plaintiffs appeal from a summary judgment entered [*29] against them in an action to vacate a public alley. We affirm.

The plaintiffs filed this action under Code 1975, § 35-2-58, to vacate a 25-foot public alley. In accordance with the statute, they named as defendants the owners of property abutting the alley, various mortgagees holding mortgages on the abutting properties, and the City of Birmingham. Many of the defendants entered into an agreement for a consent judgment vacating the alley and received compensation from the plaintiffs. However, several of the defendants objected to the vacation and refused to consent to it. They filed a motion for summary judgment, stating that the court was not empowered to vacate a public way without the consent of all the abutting owners. The trial court granted summary judgment, and this appeal [**2] followed.

Section 35-2-58 provides:

> "The circuit courts of this state shall have jurisdiction and power to vacate and annul any map, plat or survey of lands, or any streets, alleys, avenues or roads, whether designated by any such maps, plats or surveys or not, upon the filing of a civil action by any person or persons owning any of the lots, parcels or tracts of land abutting such roads, streets or alleys sought to be vacated or annulled. Unless the owners of all the lots or parcels of land so abutting upon the roads, streets or alleys sought to be vacated join as plaintiffs, the owners and claimants of such other lots or parcels of land abutting upon the roads, streets or alleys sought to be vacated shall be made parties defendant; and the municipality, town or city, if the land is located within any municipality, town or city, shall also be made a party defendant; and, if not located in such municipality, city or town, the county in which such lands are located shall be made a party defendant. (Code 1923, § 10365; Code 1940, T. 56, § 21.)"

Because no provision is made in the statute to provide compensation for the deprivation of property rights, the court is [**3] not authorized to vacate a public way where the owners of abutting property do not consent. *Talley v. Wallace*, 252 Ala. 96, 39 So.2d 672 (1949). In construing the predecessor to § 35-2-58, et seq., the *Talley* Court specifically stated:

"Indeed, the language of those sections seems to expressly confer upon a court of equity the jurisdiction and authority to vacate and annul a public way when all the owners of property attingent thereupon and the political subdivision (municipality or county) in which the said way is located are parties to the litigation. But said sections make no provision whereby compensation may be awarded to the owners of lots which abut that portion of the way to be vacated or whose lots, though not attingent upon the way to be vacated, are thereby cut off from access over some other reasonable and convenient way.

". . . In the case of *Thetford v. Town of Cloverdale*, 217 Ala. 241, 115 So. 165, . . . it was held in effect that the provisions of said section are inefficacious to empower a court of equity to vacate a public way where the owners of abutting property do not consent and no provision is made to compensate them for the property rights [**4] of which they would be deprived. . . .

". . . .

"It is to be noted that in proceedings instituted by municipalities and counties under the terms of §§ 26-31, Title 56, Code 1940 [now Code 1975, § 23-4-1, et seq.], to vacate streets, alleys, etc., provision is made for compensating those who are injured by said vacation. But no such provision is found in §§ 21-25, Title 56, Code 1940 [now Code 1975, § 35-2-58, et seq.]."

252 Ala. at 98-99, 39 So.2d at 674. *Gwin v. Bristol Steel & Iron Works, Inc.*, 366 So.2d 692 (Ala. 1979) (statute also protects owners of non-abutting property affected by street closing, subject to rule of remoteness); *Thetford v. Town of Cloverdale*, 217 Ala. 241, 115 So. 165 (1928).

The sole issue is whether the court is authorized to vacate a public way where the plaintiffs have offered to compensate [*30] the non-consenting defendants for their loss. As the cases indicate, we have long held that the statute authorizes the court to vacate a public way only when consent is obtained from all the owners of the affected property. We reaffirm that holding; the statute requires the unanimous consent of the owners, and offers of compensation [**5] to non-consenting owners cannot negate that requirement. Because some of the abutting property owners in this case refused to consent to the closing of the alley, the court recognized that it could not grant the plaintiffs' request to close the alley. Therefore, summary judgment was appropriately rendered, as no genuine issue of material fact existed, and the defendants were entitled to judgment as a matter of law. Rule 56(c), A.R.Civ.P. We affirm the judgment of the trial court.

AFFIRMED.

Torbert, C.J., and Jones, Adams, and Steagall, JJ.

Tuscaloosa County v. Jim Thomas Forestry Consultants, Inc.; Jim Thomas Forestry Consultants, Inc. v. Tuscaloosa County

1910403 and 1910574

SUPREME COURT OF ALABAMA

613 So. 2d 322; 1992 Ala. LEXIS 1562

December 31, 1992, Released

SUBSEQUENT HISTORY: [**1] As Amended. Released for Publication February 9, 1993. Second Correction.

PRIOR HISTORY: Appeals from Tuscaloosa Circuit Court. (CV-89-1174)

DISPOSITION: AFFIRMED.

CORE TERMS: bridge, market values, highway, replacement, cost-benefit, damaged, appraisal report, measure of damages, destruction, repair, valuation, estimate, formula, contrivance, destroyed, driving, depreciation, replacing, replace, cross-appeal, raw data, inadmissible, compensate, collapsed, traffic, sheets, recommended, admitting evidence, intrinsic value, opinion evidence

COUNSEL: For Appellant/Cross-Appellee: Barry L. Mullins and Robert M. Spence or deGraffenried & Mullins, Tuscaloosa.

For Appellee/Cross-Appellant: John F. McDaniel and W.J. McDaniel of McDaniel, Hall, Conerly & Lusk, P.C., Birmingham.

JUDGES: ADAMS, Hornsby, Maddox, Shores, Houston, Steagall, Kennedy, Ingram

OPINION BY: ADAMS

OPINION

[*323] **ADAMS, JUSTICE.**

Tuscaloosa County ("the County") and Jim Thomas Forestry Consultants, Inc. ("JTFC"), appeal and cross-appeal, respectively, from a judgment entered on a jury verdict in favor of Tuscaloosa County in its action against JTFC for damages to compensate for the destruction of a bridge. We affirm.

On May 12, 1989, the "Whittson bridge," a 100-year-old structure spanning the North River in northern Tuscaloosa County, collapsed when a truck owned by JTFC attempted to cross. The truck weighed approximately 40 tons -- four times the bridge's posted carrying capacity.

On November 7, 1989, the County sued JTFC, alleging that JTFC had negligently or wantonly caused the destruction of its bridge. Following a jury's verdict awarding the County $ 100,000 in compensatory damages, both parties moved for a new trial on the grounds, *inter alia*, that the verdict was contrary to the law and the facts and was against the weight of the [**2] evidence. Both parties appealed the judgment entered following the denial of their post-trial motions.

Although the parties attack the judgment on various procedural grounds, the issue on which both the appeal and the cross-appeal turn is the proper method of calculating damages for the destruction of the bridge. Specifically, the County contends that the trial court erred in (1) instructing the jury that it was to calculate damages based on the "difference between the reasonable, market values of the property" before and after the accident; (2) allowing JTFC to argue to the jury for a deduction from damages based on a "straight-line" depreciation formula; and (3) excluding evidence of a "cost-benefit" analysis, which purported to show the use and benefit of the bridge to the residents of the community it served. Similarly, JTFC contends in its cross-appeal that the trial court erred in (1) admitting evidence of the cost of replacing the bridge, particularly in allowing the jury to consider the cost of replacing it with one of larger dimensions; and (2) excluding a pre-accident "appraisal report," which purported to show the bridge's condition, projected expenditures for repair, and [**3] recommended schedules for the bridge's repair or rehabilitation. For procedural reasons, we deem it expedient to address first the issues raised in the cross-appeal.

I. Issues Raised on Cross-Appeal

Damages for the destruction of a public bridge are expressly authorized by Ala. Code 1975, § 32-5-9, which provides in pertinent part:

> "(a) Any person driving any vehicle, object or contrivance upon any highway or highway structure shall be liable for all damage which said highway or structure may sustain as a result of any illegal or careless operation, driving or moving of such vehicle, object or contrivance, [*324] or as a result of operating, driving or moving any vehicle, object or contrivance weighing in excess of the maximum weight prescribed by law . . . ."

This section was originally enacted as Act No. 516, § 41, 1949 Ala. Acts 740, and, as far as we have been able to determine, has never been interpreted by an appellate court. Thus, the measure of damages recoverable under this section appears to be a question of first impression.

A. Damages Calculation

As authority for its theory of damages calculation, JTFC cites *Chambers County Commissioners v. Walker*, 459 So. 2d 861 (Ala. 1984), [**4] and *Smith v. Springsteen*, 385 So. 2d 56 (Ala. Civ. App. 1980), thus contending, as we understand it, that the proper measure of damages is the *value* of the bridge before it collapsed, minus its value after the accident. The "value" measure, that is, "the difference in the value of [the] property immediately before and immediately after the injury to it," is one method used to calculate the damages recoverable for damage to structures attached to the land. Dan Dobbs, *Handbook of the Law of Remedies* § 5.1 (1975). Characteristically, however, it is linked to the concept of *market* value, *Dobbs* supra, at 315-18, which is the amount that "a willing buyer . . . would pay to a willing seller." *United States v. Certain Property in the Borough of Manhattan*, 403 F.2d 800, 802 (2d Cir. 1968). At least two courts considering a similar issue have concluded that damages for the destruction of a public structure such as a bridge cannot be determined by a reference to market value. See *Commonwealth of Pennsylvania Dep't. of Transp. v. Estate of Crea*, 92 Pa. Commw. 242, 483 A.2d 996, 1001 (1977); [**5] *Town of Fifield v. State Farm Mutual Auto. Ins. Co.*, 119 Wis. 2d 220, 349 N.W.2d 684, 687 (1984) (destroyed bridge "had no market value, in the sense that no willing buyer or willing seller, even hypothetically, could be imagined").

We agree with these characterizations of bridges and similar structures. In our view, a consideration of damages for the destruction of an inherently unmarketable structure in the context of market value represents a contradiction in terms. Damages for the destruction of the Whittson bridge cannot, therefore, be computed on the basis of market value.

In the absence of a market on which to value a bridge, *Town of Fifield* adopted a damages formula based on the *intrinsic* value of the destroyed bridge to its owner -- a formula requiring a consideration of an expanded roster of factors, including "opinion evidence, cost, use, cost of restoration, ease or likelihood of repair, continued usefulness, age of the property, and its condition." 119 Wis. 2d at , 349 N.W.2d at 687. [1] The court quoted with approval the following remarks:

> "In 25 C.J.S. Damages § 157a(2), p. 807, . . . we find the following:

[**6]

> "'In establishing the actual or intrinsic value of property having no market value, wide latitude in the evidence is permissible, and resort may be had to *any* facts which fairly tend to show such actual value. Thus, in determining the actual or intrinsic value of such property, *or its value to the owner*, it has been held proper to admit evidence showing the original cost, the replacement cost, the age of the property, *its use and utility*, and its condition.'"

Town of Fifield, 119 Wis. 2d at , 349 N.W.2d at 688, quoting *Johnson v. Board of County Commissioners*, 138 Colo. 392, 395, 336 P.2d 300 (1959) (disapproving the use of replacement cost as the measure of damages for a destroyed bridge) (emphasis in *Town of Fifield*). Interestingly, this rule as currently expressed in 25A C.J.S. *Damages*, § 157, at 57-58 (1966), specifically prohibits the admission of "evidence purporting to show the market value of such property."

> 1 See generally *Columbia Gas of Kentucky, Inc. v. Maynard*, 532 S.W.2d 3, 5 (Ky. 1975) (market value represents "sale value as distinct from intrinsic value or value to some particular person").

[**7] The applicability of *Town of Fifield*'s multi-factor valuation formula to structures [*325] within the scope of § 32-5-9, however, appears tenuous at best. Just how such structures can be said to have a realistically calculable value to their *owners*, which are generally government entities, is not readily apparent. In-

structive in this connection is the following colloquy that transpired during the County's attempt to introduce evidence of its cost-benefit analysis:

> "Q. [By counsel for the County]. Have you [used] any other method to determine the value of that bridge?
>
> "A. [By a County engineer]. I did a cost-benefit analysis.
>
> "Q. All right. If you would, describe for us what a cost benefit analysis is.
>
> [By counsel for JTFC]. I'm going to object to the cost-benefit analysis. That goes into a determination of what is feasible for the county to build back on a one-to-one basis. It has nothing to do with the replacement cost. It has nothing to do with any cost whatever involved in the case, and no issues have been brought forth for it to be introduced.
>
> "[By counsel for the County]. Judge, it is a basis for valuation.
>
> "[By counsel for JTFC]. No, sir, [**8] Judge. It's not a basis of valuation. It's a basis to determine how much money it is feasible for the county to spend in order to justify building a new bridge. It has nothing to do with the value of the bridge.
>
> "[By the court]. Subject to it being tied up [to the issue of market value], I'm going to let it in.
>
> ". . . .
>
> "Q. [By counsel for the County]. Tell us what process you go through to do a cost-benefit analysis.
>
> "A. Determine the [average daily traffic]. . . .
>
> "Q. What is the [average daily traffic]?
>
> "A. [Average daily traffic] listed a fifty.
>
> ". . . .
>
> "Q. All right. And what do you do then?
>
> "A. You would determine the detour that the people that use the bridge would have to go out of their way to get around.
>
> "Q. All right. And . . . does that information tell you anything related to value?
>
> "A. *It tells you what the cost has been for those citizens excluding their time, what cost they have incurred for detouring around.*
>
> "[By counsel for JTFC]. Your Honor, now we object and move that it be excluded. It has no bearing whatsoever on the market value of the bridge at the time of the loss.

[**9]

> "[By counsel for the County]. Judge, it bears on the issue of what the value of that bridge was to Tuscaloosa County and the *public*. And we think --
>
> "[By the court]. Subject to it being tied up, I'm going to let it in. I'll grant you an exception.
>
> "Q. [By counsel for the County]. Mr. Hagler, if you will, take me through the process of how you did your cost benefit analysis and what you came up with.

"A. The [average daily traffic] was fifty vehicles per day.

"....

"A. The detour was 13.7 miles.

"....

"A. [With] 365 days in a year -- the current level by [the Internal Revenue Service], I believe is 27 cents per mile.

"Q. [At 27 cents per mile], . . . what did you come up with for a cost-benefit analysis of one, annual period?

"....

"A. Sixty-seven thousand, five hundred six dollars and seventy-five cents.

"....

"Q. Mr. Hagler, with that information, how is the cost-benefit [analysis] . . . utilized in determining the value or decision to rebuild a bridge?

"A. If the *benefit* . . . would exceed the cost of the bridge, we should replace it, and, as you can see, it wouldn't take [**10] very many years to replace it.

"Q. All right. So, if the cost of that bridge to replace it exceeded what that [*326] money would finance or would pay for, then that would bear on a decision to rebuild the bridge?

"A. Yes, sir.

"Q. In your opinion, based on the analysis and based on these figures for replacement, was [replacement] justified . . .?

"A. To replace the bridge, yes, sir -- the estimate being [this amount] and the cost-benefit that amount -- it wouldn't be but about a five-year payback.

"....

"[By counsel for JTFC]. Your Honor, again, we move to exclude all the testimony concerning the cost-benefit analysis. There is no connection [to] the fair market value of the Whittson bridge at the time it collapsed.

"[By the court]. Motion granted."

(Emphasis added.)

From the preceding remarks, it is clear that the *County* in its corporate capacity anticipated no tangible *benefit* from a bridge at this location. On the contrary, any benefit to be derived from such a structure inured to the area's residents, while the responsibility for the *cost* devolved upon the County. Because the County's only interest in the Whittson bridge [**11] was a *vicarious* interest, attempts to ascertain its value to the County could rest only upon speculation and conjecture. See *Crea*, supra, 92 Pa. Commw. 242 at , 483 A.2d 996 at 1001 (purported valuation of an unmarketable structure such as a bridge "would be wholly speculative, the very pitfall to be avoided in proof of damages"). We disapprove, therefore, of the damages theories adopted by *Town of Fifield* and *Johnson*, and conclude that the multi-factor valuation formula as a method of determining damages is -- like the market-value formula -- here inapplicable.

Where damages calculations under such formulas are inapplicable or otherwise fail to compensate the owner of a destroyed structure adequately for his injury, the owner may recover the cost of its replacement. D. Dobbs, *Handbook on the Law of Remedies* § 5.1 (1973). Thus, *Crea* held that the proper measure of damages for the destruction of a bridge "must be the reasonable cost of replacement by a similar structure consistent with current standards of design." The court reasoned that

"anything less would not compensate the owner for the actual loss." 92 Pa. Cmmw. at [**12] , 483 A.2d at 1002.

Of particular relevance to this case is *State Highway Comm'n v. Stadler*, 158 Kan. 289, 148 P.2d 296, 300 (1944), in which the Kansas Supreme Court construed a statute similar to § 32-5-9. That statute provided in pertinent part:

> "Any person driving any vehicle, object, or contrivance upon any highway or highway structure *shall be liable for all damage* which said *highway or structure may sustain as a result of any illegal operation*, driving, or moving of *such vehicle*, object, or contrivance, *or as a result of operation, driving, or moving any vehicle, object, or contrivance weighing in excess of the maximum weight* in this act . . . ."

As quoted in *Stadler*, 158 Kan. at , 148 P.2d at 298 (emphasis in *Stadler*). The Kansas Supreme Court held that the amount recoverable under the statute was the amount of the "actual replacement cost of the illegally destroyed structure." 158 Kan. at , 148 P.2d at 300. The court reasoned that the intention of its legislature was, because of the inherent difficulties involved in assigning a value to highway structures, "to specifically designate [**13] the liability therefore [sic] was all damages sustained." *Id.*

We find this construction persuasive. Structures within the scope of statutes such as § 32-5-9 and the one involved in *Stadler* are commonly provided by governmental entities that, in acting within statutorily prescribed powers and duties, deem them necessary to the public good. See *James v. Conecuh County*, 79 Ala. 304, 307 (1885) (county commissioners are charged with "the duty to provide for keeping the necessary bridges in repair"); see also Ala. Code 1975, §§ 23-1-80 and -93. Such entities may, in fact, have little practical alternative but to replace destroyed bridges and similar highway structures at [*327] the taxpayers' expense *regardless of the cost.* Replacement costs will include material and labor that must be purchased at contemporary prices, which, in many cases, will greatly exceed those involved in the original construction. We conclude that the measure of damages comporting most closely to the language of § 32-5-9(a), which expressly imposes liability "for *all* damage which said highway or structure may sustain," is the cost of repair or replacement. Therefore, we reject [**14] JTFC's contention that the measure of damages is the value of the bridge before it collapsed minus its value after the accident.

These conclusions also dispose of JTFC's argument that the trial court erred in admitting evidence of the cost of replacing the 19th century Whittson bridge with a *two-lane* structure that exceeded the length of the Whittson bridge by 108 feet. The County contended that the Whittson bridge did not satisfy current state highway specifications, because, as originally constructed, it was situated below the floodplain. Therefore, it contended, the extra length was needed in order to provide the requisite height. At trial, a construction expert estimated the cost of replacing the Whittson bridge with another *one-lane* bridge of similar length at between $ 200,000 and $ 300,000. [2]

> 2 Subsequently, estimates of the costs of constructing bridges that exceeded the width and length of the Whittson bridge were introduced. Those estimates ranged from $ 250,000 - $ 350,000 for a two-lane bridge comparable to the original bridge in length, to $ 550,000 for a two-lane bridge that complied with state highway elevation standards.

[**15] Based on this evidence properly calculated, the jury could have returned a verdict considerably larger than the amount it awarded. Assuming, without deciding, that the trial court erred in admitting evidence of the costs of structures exceeding the dimensions of the Whittson bridge, JTFC suffered no prejudice as a result of the $ 100,000 verdict, which fell far below the minimum estimate of a bridge of the same dimensions as the original bridge. This Court will reverse a judgment only where it "appears that the error complained of has probably *injuriously* affected substantial rights of the parties." Ala. R. App. P. 45 (emphasis added); see also *Snow v. Boykin*, 432 So. 2d 1210, 1214 (Ala. 1983).

B. Appraisal Report

JTFC attempted to introduce an "appraisal report" prepared by the State Highway Department as evidence of the pre-accident structural integrity and the projected financial liabilities of the bridge. The appraisal report was produced from raw data collected from on-site inspections by County bridge inspectors and entered on "structure inventory sheets." These sheets contained detailed observations as to deterioration of the component [**16] parts of the Whittson bridge and estimates of its remaining useful life. They were sent to the State Highway Department, which, based on an analysis of the raw data, made determinations regarding the need for repair or replacement, estimated the costs of such operations, and recommended a time schedule for effecting the operations recommended. The Department sent the appraisal reports to the County, which retained them in its files.

JTFC sought to introduce the appraisal reports through the testimony of Bobby Hagler, a Tuscaloosa County engineer, who stated that the reports were kept by the County in the ordinary course of business. The County objected on the ground that Mr. Hagler, a County official, was not competent to testify about the preparation or custody of the appraisal reports by the *State Highway Department.* The trial court sustained the objection, and JTFC contends that it erred to reversal in doing so. We disagree.

"The opinion evidence rule is equally applicable to the business record as it is to any other form of testimony." C. Gamble, *McElroy's Alabama Evidence* § 254.01(5) (4th ed. 1991). "A statement about a matter in a business record or entry, which constitutes [**17] an opinion that a witness having knowledge of the matters could not testify in the words of such statement because such testimony would be violative of [*328] the opinion rule, is inadmissible." *Id.* at 680. The statement is inadmissible notwithstanding the fact that it "was made in the regular course of business and that it was the regular course of the business to make such a statement." *Id.* See *Pierce v. State*, 52 Ala. App. 422, 425, 293 So. 2d 483, 485 (1973), *cert. quashed*, 292 Ala. 745, 293 So. 2d 489 (1974) (psychologist's correspondence with the appellant's expert witness was, notwithstanding the business records exception to the hearsay rule, inadmissible "inasmuch as it was replete with opinions and conclusions of a putative psychologist whose qualifications appeared nowhere in the record").

The only apparent relevance of the appraisal report, in addition to its references to the raw data from which it was prepared, [3] consisted of projected financial expenditures and timetables recommended for the repair or rehabilitation of the bridge. These estimates and recommendations rested [**18] entirely on the opinions of certain undisclosed individuals -- presumably, Highway Department officials -- whose qualifications JTFC made no effort to demonstrate. Because no attempt was made to identify or qualify such individuals as having the expertise to estimate the bridge's repair costs or to recommend replacement schedules, the appraisal report was inadmissible as violating the opinion evidence rule.

> 3 The raw data to which the appraisal reports referred were also contained in the structure inventory sheets. These sheets were introduced into evidence, and, through the examination and cross-examination of at least two witnesses, the included data were made the subject of detailed testimony. Thus, any error resulting from the rejection of the appraisal reports was, as to the factual evidence of the bridge's physical condition, harmless. See *Dixon v. Hardey*, 591 So. 2d 3 (Ala. 1991); *Patton v. Palmer*, 555 So. 2d 127 (Ala. 1989).

The trial court did [**19] not err, therefore, in sustaining the County's objection to this evidence.

II. Issues Raised on Appeal

The County contends that the trial court erred in instructing the jury in the following manner:

> "As I mentioned, the plaintiff has claimed compensatory or actual damages, and the measure of the damages for damaged personal property -- there is a difference between the reasonable, market value of the property immediately before it is damaged and the reasonable, market value immediately after it is damaged. In other words, if you find for the plaintiff, you would determine from the evidence a reasonable, market value of the [bridge] immediately before it was damaged and then determine from the evidence the reasonable, market value of the [bridge] immediately after it was damaged -- in its damaged condition. The difference found by you is the market value -- in the market value -- would be the measure of damages."

These instructions were erroneous, the County insists. It says, "The 'fair market value' test had no application to this type of bridge, if, indeed, it could be applied to any bridge at all. The only rational measure of damages, therefore, would have to be the cost [**20] of replacing the bridge." *Brief of Appellant*, at 7. Paradoxically, these instructions virtually parroted the County's "requested jury charge number 13," which stated:

> "The measure of damages for the damaged personal property is the *difference between the reasonable market value of the property immediately before it is damaged and the reasonable market value immediately after it is damaged.* In other words, if you find for the plaintiff you should determine from the evidence the *reasonable market value* of the Whittson bridge *immediately before* it was damaged and then determine from the evidence the *reasonable market value* of the Whittson bridge *immediately after* it was damaged in its damaged condition.

> The *difference as found by you in the market value would be the measure of damage.*"

(Emphasis added.) Moreover, before the jury retired, both parties indicated "satisfaction" with the jury instructions. Thus, not only did the County fail to oppose instructions based on the concept of market value, but it affirmatively *requested* a charge containing the very element that it now assails. We can only conclude that the County's course of action in the [**21] proceeding [*329] below constituted "invited error," for which this Court will not reverse. *State Farm Mutual Automobile Ins. Co. v. Humphres*, 293 Ala. 413, 418, 304 So. 2d 573, 577 (1974); *Dixie Highway Express, Inc. v. Southern Ry.*, 286 Ala. 646, 651, 244 So. 2d 591, 595 (1971).

A. Depreciation

Similarly, the County did not preserve for review the question of depreciation. It contends that JTFC argued to the jury for a deduction from damages based on a "straight-line" depreciation method. JTFC denies that it made such an argument, and, apparently in the alternative, that the County failed to object. In either case, we cannot address the issue, because the arguments of counsel were not recorded. "It is well established that this court, absent an accurate and complete record, will not question the propriety of a trial court's ruling based on matter before that court." *City of Scottsboro v. Johnson*, 436 So. 2d 859, 860 (Ala. 1983); see also *Valley Min. Corp. v. Metro Bank*, 383 So. 2d 158 (Ala. 1980). Consequently, we express no opinion [**22] on the propriety of deductions for depreciation in regard to an award of damages to compensate for destruction of a bridge.

B. Cost-Benefit Analysis.

We also find no reason for reversal in the trial court's exclusion of the County's cost-benefit analysis, to which we have already spoken in section *I.A.* Evidence demonstrating the use of the bridge by the area's residents and its utility to them is relevant under *Town of Fifield's* expanded roster of valuation factors. We have concluded, however, that such a method of valuation is inappropriate for bridges and similar structures within the scope of § 32-5-9. Because the cost-benefit analysis had no bearing on the cost of replacement, the evidence was properly excluded.

For the reasons expressed above, the arguments advanced by the County and by JTFC for reversing the trial court's judgment must be rejected. Consequently, that judgment is affirmed.

AFFIRMED.

Hornsby, C. J., and Maddox, Shores, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

Union Springs Telephone Company, Inc. v. James H. Rowell, acting director of the State of Alabama Department of Finance

1911569

SUPREME COURT OF ALABAMA

623 So. 2d 732; 1993 Ala. LEXIS 599

June 25, 1993, Released

SUBSEQUENT HISTORY: [**1] Released for Publication September 3, 1993.

PRIOR HISTORY: Appeal from Montgomery Circuit Court. Joseph D. Phelps. (CV-92-1162)

DISPOSITION: AFFIRMED.

CORE TERMS: pay-telephone, emergency, bid, Competitive Bid Law, state agency, attorney general, bidding process, pendency, void, public health, telecommunications, convenience, injunction, telephone, palpably, notified, plainly, expired, temporary, acting director, declaratory judgment, restraining order, preliminary injunction, judicial review, declaration, expiration, procuring, declare, tenus, ore

COUNSEL: For Appellant: C. Knox McLaney III, Montgomery.

For Appellee: A. Lee Miller III, Montgomery, for State of Alabama Department of Finance. James L. North and J. Timothy Francis of James L. North & Associates, Birmingham, for Talton Telecommunications Corporation.

JUDGES: ALMON, Hornsby, Adams, Steagall, Ingram

OPINION BY: ALMON

OPINION

[*733] **ALMON, JUSTICE.**

The plaintiff, Union Springs Telephone Company, Inc., ("USTC") appeals from a judgment entered by the trial court in favor of the defendant, James H. Rowell, acting director of the State Finance Department, on USTC's claim for declaratory and injunctive relief. The issue is whether the trial court, after hearing *ore tenus* testimony, plainly and palpably erred in entering the judgment for the defendant.

The order and final judgment of the trial court, supplemented by facts from the record necessary for an understanding of this controversy, are as follows:

> "On May 26, 1992, plaintiff USTC filed this action against James H. Rowell in his official capacity as Acting Director of the Alabama Department of Finance (the 'Finance Department') whereby USTC sought (i) a temporary restraining order, (ii) a preliminary injunction, (iii) a permanent injunction, and (iv) a declaratory judgment.
>
> "....
>
> "The Court makes the following findings [**2] of fact and conclusions of law:
>
> "1. On May 16, 1989, USTC entered into a contract with the Alabama Department of Corrections ('Corrections') pursuant to which USTC agreed to provide pay-telephone services at the Bullock County Correctional Facility ('BCCF').
>
> "2. The term of the USTC-BCCF contract was three years with an automatic renewal term of three years unless either party notified the other party of its intention not to renew the contract. The contract provided that such notification

could be given at any time prior to the expiration of the term of the contract.

"[On December 31, 1991, Corrections entered into a contract with Talton Communications, whereby Talton would replace USTC as the telephone service provider at BCCF when USTC's contract expired. The Talton contract was not entered into in accordance with the Competitive Bid Law, Ala. Code 1975, § 41-16-1 et seq.]

"3. On May 5, 1992, USTC was notified in writing by Corrections that its contract regarding the provision of pay-telephone services at BCCF would not be renewed and, pursuant to its terms, such contract expired on May 15, 1992.

"[On May 14, 1992, the attorney general issued an advisory [**3] opinion to the Finance Department concerning the contracts for the provision of pay-telephone services entered into between the Department and private vendors. [1] The opinion stated that any existing contracts that had not been entered into in accordance with the Competitive Bid Law were void. Because the Talton contract had not been procured in accordance with the Competitive Bid Law, that contract was declared void. The attorney general also expressed the opinion that the Department had the authority to enter into emergency agreements without soliciting bids to acquire such service pending the earliest possible acquisition of such services through an appropriate bidding process.]

"4. [Ala. Code 1975, § 41-16-23,] allows a state agency to enter into a contract without first seeking competitive bids 'in case of emergency affecting public health, safety, or convenience,' provided that the state agency declares in writing the nature of the emergency.

"5. On May 27, 1992, Talton agreed with the Finance Department that Talton would provide pay-telephone services to BCCF during the pendency of the bid process.

"6. On May 27, 1992, the Finance Department declared in writing [**4] that an emergency affecting the public health, safety, and convenience existed at BCCF, citing as the nature therefor that there was no current contract regarding provision of pay-telephone services at BCCF. Consistent [*734] with its customary procedure, the Finance Department requested the State Purchasing Agent to make such declaration public.

"In this action, USTC attempted to enjoin the Finance Department from effectuating its contract with Talton whereby Talton has agreed to provide pay-telephone services at BCCF during the pendency of the bid process. USTC argues that no emergency exists at BCCF regarding pay-telephone services as it [USTC] is presently providing such services and has notified the Finance Department that it is willing to continue to do so during the pendency of the bid process.

"On the other hand, the Finance Department urges that because (i) USTC's contract has expired and (ii) the Attorney General has advised that the Talton contract is void, there is no current contract for the provision of pay-telephone services at BCCF. The Finance Department contends that this lack of a contract for pay-telephone services at BCCF has caused an emergency situation [**5] and, pursuant to § 41-16-23, it is authorized to contract with Talton for the provision of the services during the pendency of the bid process.

"The May 27, 1992, letter of the Finance Department specifically explains the existing emergency as follows:

"'Because the pay telephones covered by these and other agreements are located throughout the State of Alabama providing service to the public and to the inmate population of the Department of Corrections, it is imperative that such service be continued during the period of time required to prepare solicitations, receive and evaluate responses and award such agreements to the respondent proposing the offer most advantageous to the State. The absence of pay-telephone services during the period, would, in my opinion, constitute a danger to the public health, safety or convenience.'

"This Court accepts this explanation as compliance with the requirements of § 41-16-23. Accordingly, it is hereby ordered, adjudged, and decreed as follows:

"1. That the applications of USTC for a temporary restraining order, a preliminary injunction, and a permanent injunction are in all respects denied.

"2. That, pursuant to Rule 65(a)(2), [**6] Ala.R.Civ. P., the hearing on USTC's application for preliminary and permanent injunction was consolidated with the trial on the merits of this cause and, with respect to the claim of USTC for declaratory judgment, judgment is entered in favor of defendant, James Rowell."

When the trial court hears *ore tenus* evidence, its judgment based on that evidence is presumed to be correct, and it will not be reversed unless it is plainly and palpably wrong. *Spruiell v. Robinson*, 582 So. 2d 508 (Ala. 1991). The result reached by the trial court was not plainly and palpably wrong. We add only a few comments to address the specific contention of USTC.

1 In 1990, the Department of Finance was given the responsi-bility of procuring contracts for telecommunications systems. Acts 1990, No. 90-553, codified at Ala. Code 1975, § 41-4-280 through -293. Before the adoption of that act, the individual state agencies were responsible for procuring their own telecommunications contracts.

USTC [**7] contends that the trial court erred because it believed that it could not "look behind" the Department's determination that the lack of a viable contract for pay-telephone services at BCCF constituted an emergency. This Court wishes to emphasize that these determinations are reviewable by the courts; if they were not, the Competitive Bid Law would become practically useless, because the State could declare an emergency anytime it wanted to and thus dispense with the bidding process. See *Reynolds Construction Co. v. Twin Falls County* 92 Idaho 61, 437 P.2d 14 (1968). The scope of review is limited, however, because a proclamation of a state agency is clothed with a presumption of correctness and may not be overturned unless it is shown to be unreasonable, arbitrary, or capricious. *Benton v. Alabama Board of Medical Examiners*, 467 So. 2d 234 (Ala. 1985).

The highly deferential review employed by the trial court is justified, because here the Department of Finance does not seek to bypass the bidding procedures; in fact, it is presumably now conducting those procedures. Because we are concerned only with the [**8] period between the expiration of USTC's contract and the award of a contract through the bidding process, it follows that the magnitude [*735] of the "emergency" does not have to be as great as if the Department were attempting to let a contract without going through the bidding process at all. Therefore, the scope of the judicial review of the Department's declaration of emergency is even more closely circumscribed than the usual judicial review of an agency's decision. This is especially true here, because the attorney general, in his opinion declaring the telecommunications contracts void, expressly stated that the Department of Finance had the authority to use § 41-16-23 to obtain temporary pay-telephone service. Therefore, we hold that the trial court's review was proper under the circumstances in this case.

AFFIRMED.

Hornsby, C. J., and Adams, Steagall, and Ingram, JJ., concur.

Vinson Guard Service, Inc. v. Retirement Systems of Alabama

1001561

SUPREME COURT OF ALABAMA

836 So. 2d 807; 2002 Ala. LEXIS 67

February 22, 2002, Released

SUBSEQUENT HISTORY: Released for Publication January 10, 2003.

PRIOR HISTORY: [**1] Appeal from Montgomery Circuit Court. (CV-2001-656).

DISPOSITION: AFFIRMED.

CORE TERMS: bidder, bid, invitation, rebid, responsible bidder, rebidding, lowest, enjoin, Competitive Bid Law, security services, annual, correctly, guard, candidates, Alabama Competitive Bid Law, unsuccessful, injunction, mandatory, letting, mandatory relief, calculation, injunctive, successive, Competitive Bid Law, competitive bidding, security guard, prohibitory, enjoining, enjoined, bona fide

COUNSEL: For Appellant: Gregory C. Buffalow and W. Kyle Morris of Miller, Hamilton, Snider & Odom, L.L.C., Mobile.

For Appellee: William F. Kelley, Jr., general counsel, Retirement Systems of Alabama.

JUDGES: WOODALL, Justice. Lyons and Johnstone, JJ., concur. Moore, C.J., and Houston, J., concur in the result.

OPINION BY: WOODALL

OPINION

[*808] GOODALL, Justice.

Vinson Guard Service, Inc. ("Vinson"), appeals from a judgment entered in favor of the Retirement Systems of Alabama ("RSA"), in Vinson's action alleging violations of the Competitive Bid Law. We affirm.

This dispute began in February 2001, when RSA posted "Invitation to Bid No. 00-012," seeking bids for "Security Guard Services" ("the invitation"). The invitation solicited bids for the provision of security services at properties owned by RSA. These properties were described on a form styled "Schedule A," which was attached to the invitation. Schedule A included blanks, requesting from the bidders a separate bid for "monthly hours," a "monthly charge," and an "annual charge by facility," for each property or location listed on the schedule. Additionally, Schedule A included a blank requesting a bid for the "total annual charge for all facilities." Although it illustrated guard [**2] schedules for each location for which RSA required security services, Schedule A did not contain [*809] the *total annual hours* for which security services were to be provided.

Five candidates responded to the invitation: (1) Vinson, (2) Murray Guard, Inc. ("Murray"), (3) Burns International Security Services, (4) Montgomery Security Service, and (5) Don Terry and Associates. *None* of the candidates calculated the same number of *total annual hours*.

After an initial examination of the bids, RSA notified Murray that it would be awarded the contract. However, after Vinson requested a review of RSA's decision and objected to the proposed award, RSA suspended its decision to award the contract to Murray. Subsequently, RSA proposed to reject *all* the bids and to rebid the contract, on the ground that the invitation contained "multiple errors" and "bad information." Consequently, Vinson filed a "Complaint for Declaratory and Injunctive Relief" against RSA. The complaint alleged that Vinson was the "lowest responsible bidder in compliance with the complete terms and specifications of the [invitation], so that the contract should be awarded to [it]." [1] Vinson sought a judgment [**3] enjoining RSA from rebidding the contract, declaring Vinson the winning bidder, and compelling RSA to award the contract to Vinson.

1 The Competitive Bid Law, Ala. Code 1975, § 41-16-20 *et seq.*, mandates that contracts awarded "through competitive bidding" be awarded to the "lowest *responsible* bidder." § 41-16-27(a) (emphasis added).

On May 4, 2001, the trial court entered a judgment denying Vinson's requested relief. Specifically, the order stated:

"Defendant, Retirement Systems of Alabama ('RSA'), has contended that there was a mistake in the calculation of the required number of hours of guard service required by the invitation for bids. Plaintiff, Vinson, contends that it was the responsible low bidder, and that the putative low bidder, by approximately 1 cents per hour, [Murray] should be disqualified for failure to comply fully with the bid instructions. While the court finds that the lowest responsible bidder with a complete bid package was Vinson, the court does [**4] not find existing Alabama statutory authority, or other precedent, which would empower the court to make an affirmative award of the contract to Vinson.

"....

"The alternative request is HEREBY DENIED that RSA should be enjoined from rebidding the contract."

In other words, the trial court refused to compel RSA to award the contract to Vinson and refused to enjoin RSA from rebidding the contract. From that judgment, Vinson appealed. [2]

2 Murray was never a party to this action and is not involved in this appeal.

On appeal, Vinson contends that the trial court correctly held that it was the lowest responsible bidder and that it erred, therefore, in refusing to compel RSA to award it the security-services contract. As a corollary to that argument, it argues that the trial court erred in refusing to enjoin RSA from rebidding the contract. According to RSA, on the other hand, the trial court correctly concluded that it had no authority under the Alabama Competitive Bid Law, Ala. Code 1975, § 41-16-20 [**5] *et seq.*, to compel it to award the contract to Vinson.

Both parties cite Ala. Code 1975, § 41-16-31, which provides:

"Any taxpayer of the area within the jurisdiction of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered [*810] to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of this article."

See also Ala. Code 1975, § 41-16-61, applicable to "competitive bidding on contracts of certain state and local agencies," which provides:

"Any taxpayer of the area within the jurisdiction of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of this article."

Vinson states: "It is clear that the court could properly *enjoin any award by RSA to bidders other than Vinson* which [was] not in compliance with the invitation to bid or who should have been otherwise disqualified." Vinson's Brief, at 16 (emphasis added). [**6] "While RSA argues ... that the court lacked power to *award* a contract ..., it is clear that the injunctive power is broad enough to cover both mandatory and prohibitory relief, i.e., to preclude [an] award to bidders other than Vinson, and preclude rebidding where ... Vinson was the lowest responsible bidder." Vinson's Brief, at 16 (emphasis in original). The dispositive issue is whether the Competitive Bid Law authorizes mandatory relief, namely, an order *compelling* a state agency to award a contract to a certain bidder. If it does not, then, corollarily, the court cannot enjoin the agency from rebidding the contract.

In considering this issue, we do not write on a clean slate. This Court has often addressed the scope of the remedy available under both § 41-16-31 and § 41-16-61. [3] As a threshold matter, this Court has noted that the language of these sections is "unambiguous"; consequently, "'there is no room for construction.'" *City of Montgomery v. Brendle Fire Equipment, Inc.*, 291 Ala. 216, 220, 279 So. 2d 480, 484 (1973) (quoting *Alabama Industrial Bank v. State*, 286 Ala. 59, 63, 237 So. 2d 108, 111 (1970)).

3 These two sections "contain[] identical language," differing only as to the specific portions of the Competitive Bid Law to which they apply. *Crest Constr. Corp. v. Shelby County Bd. of Educ.*, 612 So. 2d 425, 432 (Ala. 1992). Therefore, "the legislature obviously intended these two sections to have the same meaning." *Id.*

[**7] The remedy provided by the Competitive Bid Law is a "limited one." *Crest Constr. Corp. v. Shelby County Bd. of Educ.*, 612 So. 2d 425, 432 (Ala. 1992). "When letting contracts covered by the Competitive Bid Law, public agencies have discretion to determine who is the lowest responsible bidder." *Crest*, 612 So. 2d at 429. "Courts will not interfere with that discretion 'unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence.'" *Id.* (quoting *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 86, 248 So. 2d 121, 129 (1971)).

"'The provision for letting the contract to the lowest responsible bidder is for the benefit of the public and *does not confer on a bidder any right enforceable at law*

or in equity ....'" Tectonics, Inc. v. Castle Constr. Co., 496 So. 2d 704, 705-06 (Ala. 1986) (quoting *Townsend v. McCall*, 262 Ala. 554, 558, 80 So. 2d 262, 265 (1955)) (emphasis added in *Tectonics*). An unsuccessful bidder may not sue for monetary damages. [**8] *Jenkins, Weber & Assocs. v. Hewitt*, 565 So. 2d 616, 617 (Ala. 1990); or "recover bid preparation expenses." *Crest Constr. Corp.*, 612 So. 2d at 431-32. More to the point, an unsuccessful bidder has no [*811] "'right or expectancy to *insist upon the award of a contract*.'" *Jenkins, Weber & Assocs.*, 565 So. 2d at 618 (quoting with approval *Urban Sanitation Corp. v. City of Pell City*, 662 F. Supp. 1041, 1044 (N.D. Ala. 1986) (emphasis added)).

These cases answer the first question presented by Vinson -- whether Vinson is entitled to a *mandatory* injunction in the negative. [4] In other words, the Alabama Competitive Bid Law does not authorize an order compelling RSA to award Vinson the contract.

4 Because our cases have spoken to this issue, we decline Vinson's invitation to consider cases from other jurisdictions construing their respective competitive bid laws.

Wallace v. Board of Education of Montgomery County, 280 Ala. 635, 197 So. 2d 428 (1967), [**9] cited by Vinson, is not to the contrary. In that case, the trial court *enjoined* the letting of a contract, the substantive provisions of which violated the Competitive Bid Law. 280 Ala. at 638, 197 So. 2d at 431. Thus, the power exercised by the trial court in *Wallace* -- and affirmed by this Court -- was of the sort expressly contemplated by § 41-16-31 and § 41-16-61, and traditionally exercised by this Court in applying the Competitive Bid Law. [5] *Wallace* is no authority for the relief Vinson seeks: an order *mandating* the letting of a contract to a specific bidder. [6]

5 To be sure, the trial court's injunction in *Wallace* was mandatory in some respects. However, this Court expressly refused to address those aspects of the injunction, stating: "Whether the mandatory provisions of the decree, if considered separately from the prohibitory provisions, might be erroneous is not presented and, therefore, is not decided." 280 Ala. at 639-40, 197 So. 2d at 432.

6 *General Electric Co. v. City of Mobile*, 585 So. 2d 1311 (Ala. 1991), another case cited by Vinson, involved the same species of relief as that involved in *Wallace*. Indeed, Vinson concedes that it is confronted by a "scarcity of *favorable* Alabama cases." Vinson's Brief, at 20 (emphasis added).

[**10] Vinson insists, however, that the judiciary has "free-standing" injunctive power, that is, *outside* the statutes. More specifically, it contends that "the power to enjoin, with both prohibitive and mandatory relief, existed in Alabama courts without the statutes, which were specific to [the] Alabama Competitive Bid Laws." Reply Brief, at 4. It argues that the judiciary's broad, general equity powers include both prohibitive and mandatory relief. Vinson insists, in other words, that relief under general equity principles is broader than that afforded by the statutes.

The difficulty in adopting such an approach is, of course, that the exception would swallow the rule, rendering the statutes superfluous. The rule we apply, as distilled from our cases, is consistent with the healthy deference we afford governmental agencies in their determinations as to who is the "lowest responsible bidder." The trial court did not err in refusing to compel RSA to award the contract to Vinson.

From this conclusion, it follows that Vinson was not entitled to an injunction prohibiting RSA from rebidding. This is so, because, logically, if RSA cannot be compelled to award the contract to Vinson [**11] -- or to any of the other entities responding to the invitation -- then RSA may have *no alternative* but to rebid the contract. Indeed, this result is consistent with the principle recited in our cases that the statutes do "not contemplate enjoining *future* contractual arrangements." *Brendle Fire Equipment, Inc.*, 291 Ala. at 220, 279 So. 2d at 484 (emphasis added); *Spring Hill Lighting & Supply Co. v. Square D* [*812] *Co.*, 662 So. 2d 1141, 1146 (Ala. 1995); *Jenkins, Weber & Assocs.*, 565 So. 2d at 617.

Vinson, nevertheless, suggests that allowing RSA to rebid the contract creates a potential for abuse, such as successive rebids "designed to reward favorite-son candidates." Reply Brief, at 4. It argues that it is "entitled to the award in order to protect the public interest against such arbitrary or *ad hoc* practices." *Id.*

We are not here presented with a case involving successive rebids, and the trial court made no finding that RSA's rebid proposal was arbitrary or capricious. As justification for its decision to rebid, RSA cites the errors contained in its invitation. For example, Schedule A not only failed to set forth the [**12] total annual hours for which security was to be provided, but RSA had miscalculated on Schedule A the weekend hours it required security services at some of the facilities. Specifically, in relation to four of the facilities, Schedule A computed the hours from 6:00 p.m. Friday through 6:00 a.m. Monday as 48 consecutive hours. That calculation is incorrect, and William Douglass, "RSA director of office services," testified in the trial court that, "if anyone relied on that [calculation in forming a bid], they would have been mistaken."

Moreover, because RSA failed to provide bidders with a total of annual hours, none of the candidates bid on the same number of total hours. None of the bidders arrived at the same total number of hours as did RSA. According to RSA, "everybody had miscalculated the hours." Douglass testified that, because of the errors in the invitation, the "only fair thing to do is to rebid."

Under these circumstances, we need not consider whether there might be a judicially created remedy for arbitrary, successive bids apparently "designed to reward favorite-son candidates." Under the facts of this case, any expansion of remedies under the Competitive Bid Law [**13] must proceed from the Legislature, not from this Court.

In summary, the trial court correctly refused to compel RSA to award the contract to Vinson, and it correctly declined to enjoin RSA from rebidding the contract. Consequently, the judgment of the trial court is affirmed.

AFFIRMED.

Lyons and Johnstone, JJ., concur.

Moore, C.J., and Houston, J., concur in the result.

CONCUR BY: HOUSTON

CONCUR

HOUSTON, Justice (concurring in the result).

The trial court correctly held that under the Alabama Competitive Bid Law, specifically under Ala. Code 1975, § 41- 16-31, Vinson Guard Service, Inc. ("Vinson"), lacked standing to seek to be awarded the contract for security guard services put out for bids by the Retirement Systems of Alabama ("RSA") and to challenge RSA's decision to rebid that contract. This is so even if Vinson was the low bidder, which Vinson contends it was (a contention RSA disputes). This Court need not decide who was the low bidder; that fact is irrelevant in this action -- an action that Vinson had no standing to bring.

Aletha Walker, Donald Walker and Sam Oditt v. Winston County Commission, et al.

No. 84-389

Supreme Court of Alabama

474 So. 2d 1116; 1985 Ala. LEXIS 4026

August 2, 1985

PRIOR HISTORY: [**1] Appeal from Winston Circuit Court.

DISPOSITION: AFFIRMED.

CORE TERMS: county roads, abandonment, fence, public road, property line, abandoned, pasture, landowners, nonuse, convincing evidence, officially, confirmed, northern, palpably, neighbor, tenus, gate, ore, abutting, saplings, forest

COUNSEL: Jerry W. Jackson, Haleyville, for Appellants.

Charles E. Tweedy, Jr. for Tweedy, Jackson & Beech, Jasper, for Appellees.

JUDGES: Adams, Justice. Faulkner, Jones, Almon and Shores, JJ., concur.

OPINION BY: ADAMS

OPINION

[*1117] Mrs. Aletha Walker, Donald Walker, and Sam Oditt brought this action seeking damages for the destruction of trees, fences, and pasture resulting from the grading and reopening of the Lawson-Alexander ("Old Lawson") Road by appellees Maze and Cagle, and seeking a decree from the court that the road had been abandoned. At the *ore tenus* non-jury trial, the Winston County Circuit Court found for Maze, Cagle, and the Winston County Commission, and held that the Old Lawson Road had not been abandoned and was still a public road. The Walkers and Oditt appeal. We affirm.

The Walkers, Oditt, Maze, and Cagle own land abutting the Old Lawson Road, an unpaved road in northeast Winston County. It is undisputed that the road was open to the public until 1971 or 1972. At that time, Mrs. Aletha Walker and her late husband allegedly entered into an unwritten agreement with Mahugh Porter, a State Highway Department [**2] superintendent, whereby they would give the right-of-way for a new section of County Road 80 in exchange for the closing of Old Lawson Road. None of the other area land owners were parties to this agreement, however. This new paved road, which is now a part of County Road 80, connects County Road 80 with County Road 39. (See Appendix A. [1]) The Old Lawson Road had formerly connected these two county roads.

1 Appendix A is not drawn to scale and is merely intended to aid the reader's understanding of the facts of this case.

The county ceased maintaining Old Lawson Road after the new road was built, although it never officially closed the old road. The northern portion of the old road continued to be travelled from the intersection of County Road 39 to the Walkers' property line. At the Walkers' property line, saplings had sprung up in the road, and they had placed a fence across it in order that a portion of the road could be used as a pasture.

In 1982, Maze and Cagle cleared the road with a bulldozer, [**3] tearing down the fence and saplings. Mrs. Walker, her son Donald, and Sam Oditt then brought this action.

When testimony is presented *ore tenus*, the findings of the trial court will be sustained unless they are clearly and palpably wrong or without supporting evidence, or are manifestly unjust. *Johnson v. Cleveland*, 460 So. 2d 1257 (Ala. 1984). Upon careful review of the record, we cannot conclude that the trial court erred in finding that the road had not been abandoned.

A public road may be abandoned in one of several ways. One method of abandonment may be effected by a formal, statutory action. *See* Code 1975, §§ 23-4-1 through 23-4-6. Another method is nonuse for a period of twenty years. *See Harbison v. Campbell*, 178 Ala. 243, 59 So. 207 (1912). Additionally, as the appellants allege here, where one road replaces another, there can

be an abandonment of a public road by nonuse for a period short of the time of prescription. *Floyd v. Indus. Development Bd. of Dothan*, 442 So. 2d 927 (Ala. 1983). See also *Purvis v. Busey*, 260 Ala. 373, 71 So. 2d 18 (1954). In such a case, the landowners alleging abandonment by virtue of nonuse have the burden of showing [**4] abandonment by clear and convincing evidence. *Floyd, supra.*

The evidence in this case shows that Mahugh Porter did not have the authority to make an agreement with the Walkers to close the Old Lawson Road. Mack Robinson, Porter's supervisor, testified that Porter merely had authority to carry the deeds to the landowners for their signatures, and did not have authority to negotiate agreements. Furthermore, the other abutting property owners were not parties to the agreement.

Although the evidence indicated the Old Lawson Road was not maintained, county maintenance is not essential to the status of a public road. *Davis v. Linden*, 340 So. 2d 775 (Ala. 1976). A letter from the Winston County Commission, admitted into [*1118] evidence, stated that the old road had never been officially closed by the county. Wayne Tidwell, a County Commissioner from 1971 to 1983, confirmed by his testimony that the Commission had taken no action to formally close the road while he was in office. Cagle testified that Tidwell told him in 1978 that there were no records indicating that the road had been closed and, as far as the Commission was concerned, the road could be used.

Although [**5] the Walkers had placed a fence across the road at their property line, this alone will not prove abandonment. In *Purvis v. Busey, supra*, Purvis attempted to fence and pasture a section of a public road ("Road B") in Monroe County. Road B had been replaced by Road A, and had fallen into disuse. In the action to restrain obstruction of a public road, this Court held that although part of Road B had been put into cultivation or pasture by other landowners, this use did not per se constitute an abandonment of Road B. *Purvis*, at 378.

The evidence indicates that all but the southernmost part of Old Lawson Road continued to be used. Cagle used the road to get to the western section of his property, where he kept cattle. Cagle had no access to this part of his land from the east because of a high bluff and a creek running through his property. Although Cagle had purchased an easement from his neighbor White to get to his land, the costs of developing it were prohibitive, so he continued to use the Old Lawson Road.

Maze also used the old road for access to his property. Maze's son had a mobile home on his northeastern property, and used the road down to the "Y" to get to [**6] it. Maze also used the old road to get to the barn on his land. Others, such as forest rangers and loggers, used the Old Lawson Road for access to the forest nearby.

Although a wire fence had been across the road at the Maze-Cagle property line until 1979, when Maze purchased the property, the fence had a gate which allowed cars to pass. A gap or gate across a way to control livestock, as here, will not cause a road to lose its character as a public way, when it is evident that there was no interruption of its use by those travelling it. *Powell v. Hopkins*, 288 Ala. 466, 262 So. 2d 289 (1972). Both Maze and Cagle testified the road had been travellable all the way down to the Walker line. Donald Walker confirmed that the northern portion of the road had always been open, as did another neighbor, Alvin N. White.

On the basis of this testimony, we find the trial court was not clearly and palpably wrong in finding appellants did not meet their burden of showing abandonment by clear and convincing evidence. We must therefore affirm the judgment of the trial court.

AFFIRMED.

[**7] Faulkner, Jones, Almon and Shores, JJ., concur.

[*1119] [SEE APPENDIX A IN ORIGINAL]

Howard L. WHITE, Jr. v. McDONALD FORD TRACTOR COMPANY, Inc

3 Div. 478

Supreme Court of Alabama

287 Ala. 77; 248 So. 2d 121; 1971 Ala. LEXIS 685

May 6, 1971

DISPOSITION: [***1] Reversed and rendered.

CORE TERMS: bid, specification, tractor, lowest, bidder, responsible bidder, competitive, truck, highway, purchasing agent, dealer, Competitive Bid Law, lowest bidder, interfere, machinery, invitation to bid, county authorities, modify, purchasing, conformity, delivery, coupling, turf, temporary, feet, state officials, manufacturer, impropriety, engine, notice

COUNSEL: Hill, Hill, Stovall, Carter & Franco and Robert C. Black, Montgomery, for appellant.

Under the Competitive Bid Law, purchasing authorities are not required to purchase a particular article just because it may have been bid at a cheaper initial cost; they have the discretion and duty to make decision between articles bid, taking into consideration their conformity to specifications, quality, and adaptability and suitability to the particular purposes and uses for which the article is required, and may they purchase the article which they have so determined as being the best and most suitable for the purposes required although its initial price may not be as cheap as another article offered on the lowest bid. Code of Alabama, Title 55, Section 502; Mitchell v. Walden Motor Co., 235 Ala. 34, 177 So. 151; Eggart v. Westmark, (Fla.Sup.Ct.), 45 So.2d 505; Otter Tail Power Co. v. Elbow Lake, 234 Minn. 419, 49 N.W.2d 197, 27 A.L.R.2d 906; Leskinen v. Pucelj, 115 N.W.2d 346; J. C. Lewis Motor Co. v. Mayor, etc.(S.Ct.Ga.), 210 Ga. 591, 82 S.E.2d 132. In the absence of fraud, or gross abuse, the courts will not interfere with the exercise of a bona fide judgment [***2] and honest discretion by a purchasing authority in their determination as to who is the "lowest responsible bidder" taking into consideration the quality of equipment, its conformity to specifications, and its adaptability and suitability to the particular purposes for which the equipment is required. Inge v. Bd. of Public Works, 135 Ala. 187, 33 So. 678; Van Antwerp v. Bd. of Commissioners, 217 Ala. 201, 115 So. 239; William A. Berbusse, Jr. v. North Broward Hospital (Fla.S.Ct.) 117 So.2d 550; J. C. Lewis Motor Co. v. Mayor etc., (S.Ct.Ga.), 210 Ga. 591, 82 S.E.2d 132; Austin v. Housing Auth. of Hartford, (S.Ct.Conn.), 122 A.2d 399; 43 Am.Jur., Public Works and Contracts, § 42, p. 784; § 44, p. 786.

J. Paul Lowery and James D. Straiton, Montgomery, for appellee.

A State agency or administrative authority may properly designate a special product which may be covered by patent or which is manufactured by only one bidder; and where the equipment is covered by a patent, of necessity, the description of one article would exclude others and in such cases, competitive bidding may be entirely legally excluded. But where the specifications are so worded that they are, in reality, [***3] a particular bidder's specifications, unless the matter comes within the exception noted, the bidding is invalid and unlawful. Van Antwerp v. Bd. of Commissioners of the City of Mobile, 217 Ala. 201, 115 So. 239; Poyner v. Whiddon, 234 ala. 168, 174 So. 507; Gamewell v. City of Phoenix, 216 F.2d 928, 1955 (Ninth Circuit); Pacella v. Metropolitan Dist. Commission, 339 Mass. 338, 159 N.E.2d 75. If specifications are so framed as to preclude the free and full competition, it simply does not matter whether there were any secret understandings or that the Stage agencies acted corruptly in the premises; if the forbidden act was in fact done the contract is void without reference to the intent with which it was done, for the purpose of the rule is to secure fair competiton upon equal terms to all bidders, and to remove all temptation for collusion and opportunity for gain at the expense of the public by State agencies. Diamond v. City of Mankato, et al., 93 N.W. 911, 89 Minn. 48, 61 L.R.A. 448.

Herman H. Hamilton, Jr., Champ Lyons, Jr., Montgomery, James R. Solomon, Jr., amici curiae.

JUDGES: MADDOX, Justice, wrote the opinion. HEFLIN, C.J., and MERRILL, HARWOOD and McCALL, JJ., concur.

OPINION BY: [***4] MADDOX

OPINION

[**122] [*78] MADDOX, Justice.

The question presented by this appeal requires an interpretation of Alabama's Competitive Bid Law.

On October 19, 1970, the Division of Purchases and Stores of the Department of Finance issued an invitation to bid for sixty-five low center of gravity turf tractors with sleeve-type engines to be used [*79] by the Alabama Highway Department for mowing grass and brush from highway right-of-ways. The invitations, with specifications, were sent to 278 prospectived, including the bid by McDonald Ford Tractor Company, Inc., the appellee here. The bids were opened on October 29, 1970 and all parties admit that McDonald submitted the lowest bid of those responding. Five of the bidders, including McDonald, submitted bids on tractors which did not have sleeve-type engines and did not meet other specifications and were determined by State officials not to be suitable for the needs and purposes for which the tractors were required. Five bidders were determined to meet specifications, needs and purposes and upon recommendation of Highway Department personnel, concurred in by the State Purchasing Agent, Howard L. White, Jr., (Appellant) [***5] and Finance Director, Robert B. Ingram, the award of the contract was made to Booker Tractor Company, which had submitted the lowest bid of the five qualifying and conforming bids. McDonald had submitted the lowest bid of what state officials determined to be non-qualifying and non-conforming bids. Since the award was not made to the lowest bidder, reasons for the award were entered in the bid record. [1] Booker ordered [**123] the tractors, delivered them to the State, but has not been paid therefor.

> 1 Highway Director Marion H. Wilkins wrote Finance Director Ingram that the equipment bid by McDonald did not meet specifications on engine, transmission, parking brakes, clutch size, hydraulic system pump, tire size and weight. He also noted that the Ford tractor had a higher center of gravity than the equipment specified. The second, fourth and fifth lowest bidders each submitted a Ford tractor of the same type as had McDonald but had quoted a higher price. The Highway Department determined each no fail to meet specifications as had McDonald's. The third lowest bid was on a John Deere tractor which Wilkins stated failed to meet specifications on engine, transmission, parking brake, clutch size and stage, hydraulic system pump, tire size and weight. The Highway Department submitted a detailed analysis of the differences between the requisition specifications and the descriptive literature specifications submitted by the four Ford dealers and the John Deere dealer.

[***6] On december 23, 1970, McDonald filed its petition for injunctive relief in the Circuit Court of Montgomery County against Albert P. Brewer, Robert B. Ingram, Marion H. Wilkins, and Howard L. White, Jr. [2]

> 2 Each respondent was sued in his individual capacity, but appellant during oral argument stated he would not seriously argue this pleading defect in order to get a decision on the merits.

Booker Tractor Company, to whom the award was made, was not made a party.

A motion for a temporary restraining order was presented to Circuit Judge Richard P. Emmet on December 28, 1970, and December 28, 1970, Judge Emmet ordered a hearing on the matter for December 31, 1970.

The cause was heard orally by the court and on January 8, 1971, Judge Emmet entered a decree in which he found that there was "no evidence of any impropriety whatsoever on the part of any state officials; elected, appointed or merit." He also found "no evidence of untruthfulness upon the part of any official's testimony."

Much of the testimony centered around the relative merits of the Massey-Ferguson tractor bid by bBooker and a Ford tractor bid by McDonald. Unquestionably, the record shows that State [***7] Highway Department employees who initiated the requests for the sixty-five tractors preferred the Massey-Ferguson tractor. In fact, it is admitted that the specifications sent with the invitations to bid were drawn around the Massey-Ferguson truff tractor, but only after the division engineers of the Highway Department agreed that this type tractor was best suited for the purposes for which the tractors were required. The trial court, although finding "no evidence of any impropriety on the part of any [*80] state official; elected, appointed or merit", nevertheless restrained purchasing agent White from proceeding further with the bid.The justification for such relief, if appropriate, must come from the trial court's finding and conclusion as follows:

"The intent, spirit and language of the Competitive Bid Law certainly discourages these admitted specially drawn specifications. This is, to this Court, self-evidence. A competitive bid to be "competitive" must be an open bid. If the specifications are so drawn as to allow only one item to meet the specifications, then a mockery is made of the law. Practically all products have competitors. If the specifications are so

drawn [***8] as to eliminate most of the competitors and to leave in only a select few, the competitive aspect is also eliminated.

"The Court finds that the item offered by the Petitioner here substantially meets or exceeds the relevant specifications and there fore is a qualified bid.

"The Court observes the fact that these practices might well have existed before. It might even be that in previous instances the petitioner benefited. These facts, however, do not justify the continuance of such a system. Indeed, such prior existance is all the more reason to bring about a discontinuance."

Therefore, as we view this appeal, there is one question involved:

"Under Alabama's Competitive Bid Law, can specifications be drawn to fit a particular article or piece of equipment which has been determined to be suitable for the needs and purposes required prior to the time the equipment is requisitioned?"

The quetion presented is not a simple one. The appellant says tht our Competitive Bid Law authorizes the drawing of [**124] specifications around a piece of equipment such as the Massey-Ferguson tractor in this case, especially since it was shown that the other bids were considered and [***9] that the bid accepted was the "lowest responsible bid." McDonald (Appellee) stoutly denies that our law so provides and contends that when specifications are so framed, free and full competition is precluded and the award made to Booker is void even though the state officials were found not to be guilty of any impropriety.

To answer the question, we must look at our Competitive Bid Law, especially Section 1 of Act No. 870, Acts of Alabama, 1961, p. 1365, which amends Section 9 of Act No. 343, approved August 20, 1957, (Title 55, § 502, Code of Alabama 1940, Recompiled 1958), and provides as follows:

"Section 9. When purchases are required to be made through competitive bidding, award shall be made to the lowest responsible bidder taking into consideration the qualities of the commodities proposed to be supplied, their conformity with specifications, the purposes for which required, the terms of delivery, transportation charges, and the dates of delivery. The purchasing agent in the purchase of or contract for personal property or contractual services shall give preference, provided there is no sacrifice or loss in price or quality, to commodities produced in Alabama or sold [***10] by Alabama persons, firms, or corporations. It is provided, however, that the awarding authority may at any time within five days after the bids are opened, negotiate and award the contract to any one provided he secures a price at least five per cent (5%) under the low acceptable bid. The award of such a negotiated contract shall be subject to approval by the Director of Finance and the Governor. The awarding authority or requisitioning agency shall have the right to reject and bid if the price is deemed excessive or quality of product inferior. Each bid, which the name of the bidder, shall be entered on a record. Each record, with the successful bid indicated thereon, and with the reasons for the award if not awarded to the lowest bidder, shall, after award of the [*81] order or contract, be open to public inspection. Contracts for the purchase of personal property or contractual services shall be let for periods not greater than one year."

All parties seem to agree that being the *lowest bidder* does not automatically entitle the bidder to the award in every instance. As a matter of fact, counsel for McDonald stated at oral argument in answer to a question from a [***11] member of the Court that if the specifications in this case had been written in *more general terms,* and had the identical bidders responded, as did respond here, then the Highway Department officials could have determined Booker to be the "lowest responsible bider" on the ground that the Massey-Ferguson tractor would better meet their needs and no violation of the statute would have occurred. The position of McDonald on this point is not completely without merit. For instance, in this case, McDonald's bid was classified as non-qualifying and non-conforming, as were the other three Ford dealers' bids and the John Deere dealer's bid. Failure to meet *specifications* was always given as one of the reasons why the bid failed to conform. Also, Purchasing Agent White testified that specifications could be written so precise as to exclude other items, but denied that the specifications were so drawn in this instance or that the policy of the agents for the State was to drawn specifications which would have this affect. In testimony:

"Q Now, you seem to be very familiar with the Competitive Bid Law, Mr. White.

"A I hope I am.

"Q Do you feel that it is a good practice to [***12] write specifications around a particular product so as to allow the State to purchase a particular product or do you feel the intent of that law [**125] is to write a general specification so as to get the best responsible product at the lowest possible price?

"A Do you want me to answer yes or no or elaborate?

"Q I would like for you to elaborate, please.

"A In all specifications you have to start with some item. In our department, in our experience, we always

start with something that they know will do the job, and they know a piece of equipment whatever it might be. To begin, we state that we are using these specifications on the level of quality. It is not our intention to exclude anybody. If we were wanting to exclude people we would put turn radius, such items as center of gravity, things that nobody could actually meet, but we do have to start somewhere. Five years ago we tried to use Federal specifications exclusively or as much as we could. The Federal specifications were so outdated that we were not getting anywhere, and we were not even many times getting any bids. So, we have to use as a criteria or some level of quality some piece of equipment. The departments [***13] have distorically used that for they know it will do the job that they desire to be done."

According to the Purchasing Agent, the procedures used in this instance have been followed on many occasions since the passage of the State Competitive Bid Law in 1957, and the administrative interpretation placed on the law by the department charged with its operation over a period of time has some weight in determining the rightness of that interpretation. See Harden v. McCarty, 275 Ala. 76, 152 So.2d 141 (1963). Without question, the legislature intended to rquire that competitive bidding be employed in the purchase by the State of equuipment such as the turf tractors here. However, the legislature did not direct that the award must be made to the *lowest bidder,* but to the *lowest responsible bidder,* and specifically provided that in making the award to the *lowest responsible bidder* consideration could be given to the quality of the commodity [*82] proposed to be supplied, their conformity to specifications, [3] the purposes for which required, the terms of delivery, transportation charges, and the dates of delivery. The Competitive Bid Law specifically provides that if [***14] he award is not made to the losest bidder, however, that the reasons must be stated why the award was not made to the lowest bidder and these records must be open to public inspection. Reasons for making the award to Booker were made a part of the record in this case in conformity with the law.

3 The purchasing agent is required by law to develop standard specifications for all property required by the State or any department thereof. Title 55, § 108, Code 1940. "Specification" has been defined as the act or process of identifying or making specific through the supplying of particularizing detail.Webster's Third New International Dictionary (Unabridged).

The practice of the purchasing division of using a piece of quality equipment as the criteria for the specifications, if the specifications were drawn *too specific,* could result in excluding all other makes or models of similar equipment, and if the specifications were intentionally drawn so as to exclude others in order to purchase from a favored bidder because of some bad or improper motive, on the part of State officials, then the practice could not be condoned. However, the trial court specifically found in [***15] this proceeding that there was no impropriety on the part of any State official and that each testified *truthfully;* therefore, in light of these findings and conclusions the only question remaining was the authority of the Purchasing Department to use manufacturer's specifications in his invitation to bid as was done in this case. In discussing this question we specifically do not wish to be understood as sanctioning every practice which might be used in writing "specifications", but we find no violation of State was done in this case. In discussing this question we specifically do not wish to be understood as sanctioning every practice which might be used in writing "specifications", [**126] but we find no violation of State law by the Purchasing Agent in this instance. In the invitation to bid, which was attached as an exhibit to McDonald's petition in the tried court, the following clauses appear:

"NOTE: All bidders to send descriptive literature, manufacturer's specifications, along with any supplemental additional specifications necessary to compare the item of equipment bid on with the requirements set forth in the bid forms."

"Brand names, catalog numbers, etc., [***16] are used to indicate levels of quality. If you are unable to furnish an item as specified and desire to offer a substitute, give full description of the item. Any attachment hereto is made and decomes a part of this inquiry and must be signed by bidder. No errors will be corrected after the bids are opened. No prices shall inclde State or Federal Excise Taxes. Tax exemption certificates furnished upon request. State reserves right to accept or reject all bids or any portion thereof."

These clauses on the invitation to bid form sent to all prospective bidders from the Purchasing Agent would seem to indicate to these bidders the "level of quality" desired, and that a bidder who wanted to offer comparable or better equipment should send this manufacturer's specifications to allow for such comparison. While the use of "specifications" of a particular brand of equipment might have some chilling effect upon competitors who do not deal in the specific product, the invitation to bid form specifies that brand names and catalog numbers are used only to indicate a "level of quality". The bid form does not encourage prospective bidders to submit bids on similar or comparable equipment, [***17] but on the other hand, it does not limit the amount of material which a prospective bidder might submit to support his claim and to persuade the

State officials that he could furnish comparable or better equipment at a lower price. As a matter of fact, McDonald not onlysent his literature which described in detail the merits of his Ford [*83] tractor, but he, his counsel, or a representative from Ford, talked to all the State officials involved with the purchase by the State of the sixty-five turf tractors. The State officials were not convinced apparently that McDonald's tractor was best suited for their purposes and were not persuaded sufficiently by his presentation to award the contract to him.

We have found no opinion which construes the provisions of the State Competitive Bid Law, but this Court has previously had occasion to interpret the meaning of the term "lowest responsible bidder" under a similar fact situation. In Mitchell, et al. v. Walden Motor Co., 235 Ala. 34, 177 so. 151 (1937), the question presented was whether county officials could buy a Chevrolet truck at a higher price when a bid for a Ford truck was lower. No bad faith was charged but the low bidder [***18] claimed that the Competitive Bid Law required that the low did be accepted. This Court said:

" * * * That the notice of purchase was posted and published the required length of time and by registered mail forwarded to three dealers in such material, as provided by the amended act, appears not to be controverted. And that the substance of the notice likewise meets the act's requirements we think quite clear. It called for sealed bids on 'two one and one-half ton trucks, short wheel base, chasis with cab, with dual real wheels, equipped with 30x5-8 ply tries on rear and 600-20 balloon tires on front.' Clearly, no provision of the act demanded that the notice name the manufacturer of the truck desired to be purchased as complainants argue. This the commissioners may well determine after receiving bids on various makes of trucks. In the instant case, the road supervisor by his affidavit discloses he favored the Chevrolet over the Ford, and gives his reasons as economy in operation and durability of service. The commissioners [**127] evidently deferred to his judgment in the matter, and purchased the Chevrolet trucks at a cost of $179.50 more than the bid of the Ford dealer, [***19] one of those complainants, after first eliminating from consideration the bids of the Dodge and other dealers in trucks.

"Complainant Walden Motor Company was the Ford dealer offering the lowest bid, and it is insisted the statute was violated for the reason that its bid ws not accepted and the Chevrolet bought for a bigheer price. To accept this contention would lead also to the conclusion that in advertising for bids the make of manufacture must be given and the purchase confined thereto, a theory which we have repudiated as not within any requirements of the act. In determining who is the lowest responsible bidder, the proper authorities may take into consideration the quality of the materials as well as their adaptability to the particular use required. 44 Corpus Juris 342. A very apt illustration is found in West v. City of Oakland, 30 Cal.App. 556, 159 P. 202, where was involved the purchase of a locking device for the jail; the court holding that: 'The honest exercise f decision of a city council, in considering the adaptability to the use required of goods offered, in determining who is the lowest responsible bidder under a charter calling for award of public works contract [***20] to such bidder, is not reviewable.'

"So far as here appears, there was such honest exercise of discretion in the instant case. There is no charge of bad faith. The county authorities merely preferred the one make of truck over the other, and were willing to pay the difference as they viewed it in the exercise of their honest judgment. Clearly, in the exercise of such discretion, the courts cannot interfere.

"The holding of this court in Inge v. Board of Public Works, 135 Ala. 187, 33 So. 678, 681, 93 Am.St.Rep. 20, was to like effect, wherein it was said that, 'in the absence of fraud or gross abuse, the courts will not interfere with the exercise of discretion by administrative boards or [*84] officers in their determination of who is the lowest responsible bidder.' That authority is further to the effect that where it is charged the county authorities in violation of the statute did not let the contract to th elowest bidder, no presumption is to be indulged in the matter of exercise of their discretion. It then becomes defensive matter, just as in the instant case defendants, by their answer and affidavit of the road supervisor (all of which were properly considered [***21] in connection with the billhs averments on the motion to dissolve the temporary injunction), disclosed that in their judgment the lower bid was not for the same manufactured truck, but for a different make, and their preference for the one over the other, and reasons therefor.

"Under these circumstances, therefore, no fraud or improper conduct appearing, a court of equity should not interfere with the bona fide exercise of the judgment of the cournty authorities."

Appellee McDonald relies strongly on this Court's decision in Poyner v. Whiddon, 234 Ala. 168, 174 So. 507 (1937), and Diamond v. City of Mankato, 89 Minn. 48, 93 N.W. 911 (1903), to support its contention that "specifications" drawn around a particular product are violative of the intent and purpose of the Bid Law and therefore illegal.

The main thrust of appellee's argument to support the judgment of the trial court is that if the specifications are so framed as to preclude free and full competition, it does not matter if there are secret understandings

or that State officials acted corruptly in the premises. In other words, appellee contends that the admission by the State that the Massey-Ferguson turf tractor was [***22] used to write the specifications is sufficient in and of itself to void the contract without reference to the intent with which the act was done. We cannot agree that our legislature intended such a result. The wording of the statute itself follows [**128] very closely some of the language used by this Court in the *Walden Motor Co.* case, supra, wherein this Court said that in determining who is the lowest responsible bidder the proper authorities may take into consideration the quality f the materials as well as their adaptability to the particular use required.

Because of appellee's insistence on Poyner v. Whiddon, supra, we have examined the original record in that appeal, involving a competitive bid law applicable to Houston County. There, the county had properly advertised for bids on a piece of road machinery described in the advertisement as "one gasoline motor driven shovel with three-eights cubic yards dipper, not loss than three-quarters swing; length of boom not less than fifteen feet six inches; length of dipper stick not less than nine feet six inches; mounted on crawler-type track."

Seven responses were made to the advertisement for bids on the road machinery [***23] and th emajority of the Board of Commissioners awarded the contract to the highest bidder, Austin Western Road Machinery Company. Young and Vann Supply Company of Birmingham was alleged in the bill to be the lowest responsible bidder for supplying the road machinery and the bill alleged that the road machinery bid by Young and Vann was *approved and recommended by the county road foreman.* An examination of the original record indicates that the bids submitted by Austin Western Road Machinery Company did not conform to the specifications which were set out in the newspaper advertisement for bids, in that the machiner offered by Austin Western had a boom which was only fifteen feet in length and the specifications called for a boom of not less than fifteen feet six inches. In Poyner v. Whiddon, supra, this court said:

" * * * The averments of the bill show that the contract in question was made in violation of said section 13; that the contract was let to the highest, not the lowest responsible bidder; that the bid accepted and approved was upward [*85] of $1,800, more than the bid of said lowest bidder.

"If this is true, and on demurrer and motion to dissolve for *want* [***24] *of equity* in the bill the averments are taken as true, said contract is void, and the county authorities were not warranted in paying public funds on the basis thereof, or issuing negotiable warrants pursuant thereto.

"It was the right and duty of the county to submit in its published bids the specifications for the article which it desired to purchase, and the bidder to qualify must meet said specifications. The county was under no obligation, and under the statute the county authorities had no authority, to modify the specifications to suit a single bidder. Carson Cadillac Corporation v. City of Birmingham et al., 232 Ala. 312, 167 So. 794. Such course would not only destroy the purpose of the statute, but would open the door to fraud. No doubt, it was the legislative purpose in prescribing said restrictions on the county authorities to avoid such results."

The language in Poyner v. Whiddon, supra, to the effect that the county officials had no authority to modify the specifications to suit a single bidder would seem to indicate that once specifications are drawn for a particular piece of equipment, the awarding authority cannot then modify the specifications. Viewed inthis [***25] perspective, Poyner v. Whiddon would not support the position taken by McDonald Ford in this matter. In Carson Cadillac Corporation v. City of Birmingham, 232 Ala. 312, 167 So. 794 (1936), cited approvingly in Poyner v. Whiddon, the Carson Corporation brought suit to compel the City of Birmingham to modify or change its specifications for water pipe couplings, claiming that if the specifications were allowed to stand, only one company could successfully bid and it would be prevented from bidding, in effect, because its product would not meet the specifications drawn, [**129] but would do the job required as well or better than the pipe joints specified - Carson's contention there being like McDonald's here. This Court held:

" * * * From the averments of the bill, it is apparent that the appellant is not as much concerned about the method the city has adopted in obtaining the materials for such construction, as it is that it is not in a situation to submit prices or bids for its production, because such production does not meet the requirements of the specifications adopted by the Engineering Commission, and therefore it seeks to compel the commission to modify its specifications [***26] so that complainant may submit bids or prices for the sale of its bolted joint couplings for the steel pipes, ranging from 48 to 60 inches in diameter, on the theory that appellant's coupling is the equal or superior of any such coupling obtainable.

"To grant such relief would be to substitute the judgment of the court and its process for the judgment and discretion of the Engineering Commission as to technical matters within the field of engineering.

"It is well-settled that courts of equity, in the absence of fraud or gross abuse, will not interfere with the

exercise of discretion by administrative boards in the determination of the necessity and requirements of public accomplishment, much less control the judgment of such bards in respect to matters within the technical field of their duties and powers.

"The averments of the bill fall far short of showing such fraud or gross abuse, or supporting the pleader's conclusion that the act of said board 'is unwarranted, illegal and contrary to law * * * a discrimination against the complainant and unjuristifiable, interferes with its privileges and immunities which are protected by the Constitution of the United States.' Hays [***27] et al. v. Ahlrichs et al., 115 Ala. 239, 22 So. 465; Inge et [*86] al. v. Board of Public Works of Mobile, 135 Ala. 187, 33 So. 678, 93 Am.St.Rep. 20."

In an amicus curiae brief filed in this cause, Governor George C. Wallace and Finance Director Taylor Hardin state that they feel that the Competitive Bid Law is clear and unambiguous and that the purchasing procedures adopted and used by the State since the enactment of the bid law are in complete conformity with its requirements. They further state that the temporary injunction issued by the lower court in this cause has had the effect of disrupting the purchasing of services, equipment and supplies by the State.

We think that State authorities should have discretion in determining who is the lowest responsible bidder. This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence. In reaching the decision which we reach in this case, we do not mean to imply that this Court or some other court would not have the authority [***28] to declare a contract as being void because the "specifications" were written in such a manner that full and fair competition were excluded. It is fair to say that the legislative intent in passing the Competitive Bid Law was to get the best quality equipment at the lowest possible price, and the executive authorities should carry out this intent of the legislature. These officials must have discretion, not an unbridled discretion, but one exercised within the bounds we have tried to delineate in this opinion. The single most important requirement of the Competitive Bid Law is the good faith of the officials charged in executing the requirements of the law. A bad motive, fraud or a gross abuse of discretion will vitiate an award whether made with specifications which are quite general or very precise. The trial court found that no bad faith, improper motive, fraud or gross abuse of [**130] discretion was present here; hence, we think the court was without authority to interfere with the judgment and discretion of the State officials in determining that Booker was the "lowest responsible bidder" in this instance.

The temporary restraining order was improvidently issued and [***29] the judgment of the trial court is due to be reversed and rendered.

Having reached the decision we have in this appeal, we consider it unnecessary to pass on the petition for certiorari filed by Booker Tractor Company to bring up the record of the proceedings wherein Booker sought to intervene as a party after notice of appeal was filed by White in the trial court. In reaching the merits, we have intentionally not discussed the point that Booker, who was awarded the contract which the lower court declared illegal, was not made a party to the proceeding.

Reversed and rendered.

HEFLIN, C.J., and MERRILL, HARWOOD and McCALL, JJ., concur.

Wilburn Williams v. Cliff Nearen and Ethel Nearen; Cliff Nearen and Ethel Nearen v. Wilburn Williams

Nos. 87-696, 87-826

Supreme Court of Alabama

540 So. 2d 1371; 1989 Ala. LEXIS 89

February 24, 1989, Filed

PRIOR HISTORY: [**1] Appeals from Marshall Circuit Court, CV-86-301.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

CORE TERMS: public road, width, map, tax assessor's, special injury, path, farm equipment, transporting, easement, roadway, highway, cattle, ditch, farm, feet wide, reasonably necessary, encroachment, obstruction, convenience, injunction, traveling, repairs, tenus, user, ore, obstructing, restricting, feet

COUNSEL: T. J. Carnes of Carnes & Carnes, Albertville

Don L. Hardeman of Hardeman & Copeland, Cullman

JUDGES: Almon, Justice. Hornsby, C. J., and Maddox, Adams, and Steagall, JJ., concur.

OPINION BY: ALMON

OPINION

[*1372] Wilburn Williams filed an action against Cliff and Ethel Nearen for obstructing a public road. Williams alleged that the road that turns to the east from Union Grove-Parches Cove Road and which runs generally along the northern boundary of the Nearens' land is a public road. He further alleged that the Nearens had obstructed the road by digging a ditch across it, and requested that the court enjoin the Nearens from obstructing the public road. The Nearens counterclaimed, alleging trespass. After a bench trial, the court entered judgment for Williams. The judgment stated:

> "1. The court judicially ascertains that there is a public road of approximately ten feet in width which runs from the Union Grove Cove Road east along the north side of the defendants' property. . . .
>
> "2. That the plaintiff has a right to maintain said road in such condition that it may be used for transporting farm produce, supplies, cattle and farm equipment, and for similar uses. . . .
>
> "3. [**2] That the defendants are enjoined from interfering with the plaintiff's use of said road as herein described and are ordered and required to remove any obstacles placed in said roadway and required to fill in any ditches across said roadway which were placed or caused to be placed by the defendants or either of them."

Williams appeals, arguing that the court erred by declaring the road to be "approximately ten feet" wide and by restricting the use of the public road to "transporting farm produce, supplies, cattle and farm equipment, and for similar uses." The Nearens also appeal, arguing that the trial court erred when it declared the road to be a public road and when it granted Williams an injunction.

When a trial court hears ore tenus testimony, as in this case, its judgment based upon that testimony is presumed correct and will be reversed only if, after consideration of the evidence and all reasonable inferences to be drawn therefrom, we find the judgment to be plainly and palpably wrong. *McInnis v. Lay*, 533 So. 2d 581 (Ala. 1988). This rule does not apply when the trial court erroneously applies the law to the facts before it. *McInnis, supra; League v. McDonald*, [**3] 355 So. 2d 695 (Ala. 1978).

The Nearens contend that the trial court erred when it declared the road to be a public road. Having reviewed the record, we find no error in the court's judgment, based largely on ore tenus evidence, that the road is a public road.

Having established that the road is a public road, Williams is entitled to an injunction against an encroachment or obstruction of the road only if he has sustained special injury different, "not merely in degree, but in kind from that suffered by the public at large." *Osborne v. Cromeans*, 514 So. 2d 32, 35 (Ala. 1987). The Nearens argue that Williams did not establish that he suffered any injury different from that suffered by the public at large.

The Nearens point out that Williams still has access to his property and argue that, because he has access, he suffers no special injury. No doubt if Williams was landlocked, he would suffer special injury; however, it is not accurate to say that because Williams has access to his property, he necessarily has not suffered special injury. Whatever access Williams may otherwise have, the loss of access to his pasture and livestock caused by an obstruction or encroachment to the [**4] road certainly constitutes a special injury "different not merely in degree, but in kind from that suffered by the public at large."

Williams challenges the trial court's judgment that the road is "approximately [*1373] ten feet" wide. The trial court apparently based this holding on the Marshall County tax assessor's map that showed, for tax purposes, that there was an easement for a road ten feet wide. The tax assessor's map tracked approximately the path of the road.

Williams presented considerable evidence that the road, as it was actually used, did not run precisely as the map indicated, and that the map was a reference for the tax assessor to compute tax, not an attempt to describe the path and size of the roadway. In *Grubb v. Teale*, 265 Ala. 257, 262, 90 So. 2d 727, 731 (1956), the Court, citing 39 C.J.S. *Highways* § 20 at 938-39, stated:

> "Generally speaking, the width and extent of a highway established by prescription or user are governed, measured, and limited *by the extent of the actual user* for road purposes. The easement is not, however, necessarily limited to the beaten path or traveled track, or to such path and the ditches on either side, but carries with it the [**5] usual width of highways in the locality, or such width as is reasonably necessary for the safety and convenience of the traveling public, and for ordinary repairs and improvements."

(Emphasis supplied.)

The trial court apparently relied on the tax assessor's map, deciding to limit the public road to the width of the easement described on the tax assessor's map. This is a misapplication of law: as *Grubb v. Teale* states, the width of the road should be determined by considering how wide the public road actually in use is, considering the width reasonably necessary for the safety and convenience of the traveling public, and by considering the need for repairs or improvements. The trial court should have considered these factors in determining the width of the road; the court should not have relied on the tax assessor's map to the extent that it overlooked other compelling evidence. Accordingly, the trial court erred, and, on remand, the trial court should consider these factors in determining the width of the road.

Williams also complains of the trial court's order that he may use the road "for transporting farm produce, supplies, cattle and farm equipment, and for similar uses." [**6] Williams contends that since the court declared the road public, it should not have limited to those uses named by the trial court how the public could use the road. We agree. The restriction the trial court imposed virtually established in Williams a private right to use the road. A public road, which the trial court properly held this road to be, belongs entirely to the public, and there can be no limitation to private use. *Holz v. Lyles*, 280 Ala. 521, 195 So. 2d 897 (1967). Accordingly, the trial court erred in regard to the particular restrictions it ordered in this case.

The trial court's ruling that the road is a public road is due to be affirmed; the court's ruling limiting the width of the road to "approximately ten feet" and the ruling restricting the uses of the road are due to be reversed; and the cause is to be remanded for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hornsby, C.J., and Maddox, Adams, and Steagall, JJ., concur.

Joe A. Yates, et al. v. Town of Vincent

1911065

SUPREME COURT OF ALABAMA

611 So. 2d 1040; 1992 Ala. LEXIS 1559

December 31, 1992, Released

SUBSEQUENT HISTORY: [**1] Released for Publication February 9, 1993.

PRIOR HISTORY: Appeal from Shelby Circuit Court. (CV-91-141)

DISPOSITION: AFFIRMED.

CORE TERMS: intersection, highway, traffic, stop sign, municipal, street, duty to maintain, entity, traffic control, control devices, roadway, repair, owed, county commission, traffic-control, municipality, designated, vested, damaged, summary judgment, exclusive authority, undisputed, concurrent, supervise, breached, manage, resume, police officer, broken, scene

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For Appellee: James R. Shaw and Jack M. Beard, Jr., of Huie, Fernambucq & Stewart, Birmingham.

Amicus Curiae: Jere L. Beasley, Michael J. Crow, and Julia A. Beasley of Beasley, Wislon, Allen, Main & Crow, P.C., Montgomery, for amicus curiae Ricky Lynn Smith.

JUDGES: ADAMS, Hornsby, Steagall, Kennedy, Ingram

OPINION BY: ADAMS

OPINION

[*1041] **ADAMS, JUSTICE.**

Joe A. Yates, administrator of the estate of Clara Yates Phillips, deceased; Sherri and Jeffery Phillips, by and through their father and next friend, Wallace Phillips; and Wallace Phillips, individually (all hereinafter called "the plaintiffs"), appeal from a summary judgment entered in favor of the Town of Vincent in an action alleging wrongful death and personal injuries. We affirm.

On March 31, 1990, Clara Phillips was killed and Sherri and Jeffery were injured when the automobile in which they were riding collided with an automobile driven by Ricky L. Smith at the intersection of Shelby County Highways 62 and 85. The intersection, which was located inside the limits of the Town of Vincent, had been the scene of another accident within the preceding two weeks. During the earlier accident, a stop sign regulating traffic at the intersection was broken off. Present at the scene on the occasion of the previous accident were a number of law enforcement [**2] officials, including Wayne Butler, a Vincent police officer; George Humphries, the Vincent police chief; and Shelby County sheriff's deputies, Jim Roper and Billy Moore. At that time, Roper and at least one of the Vincent officials leaned the upper section of the post to which the stop sign was still attached against the bottom portion, which was protruding some distance from the ground. The stop sign had not been repaired at the time of the accident involving the Phillips family, and, therefore, traffic at the intersection was unregulated.

On March 4, 1991, the plaintiffs sued, *inter alia*, the Town of Vincent, alleging that it had breached its duty to maintain traffic control devices at the intersection of Shelby County Highways 62 and 85. The Town moved for a summary judgment, arguing that Shelby County was solely responsible for the maintenance and control [*1042] of the intersection. [1] On March 18, 1992, the trial court granted the Town's motion and certified the resulting judgment as final pursuant to Ala. R. Civ. P. 54(b).

1 Subsequently, the plaintiffs amended their complaint to allege that the Town of Vincent had breached a duty to inform Shelby County officials about the damaged stop sign, a duty the plaintiffs say the Town of Vincent had voluntarily assumed by a practice of routinely reporting damaged stop signs at that intersection. The

> amended complaint also alleged that the police officer's assistance in propping up the broken stop sign at the time of the earlier accident represented a voluntary assumption of a duty to regulate traffic at the intersection.

[**3] The plaintiffs concede that the "facts of this case are essentially undisputed." *Brief of Appellants*, at 8. Similarly, the record shows conclusively that until the events involved in this dispute, authority to maintain the stop sign at the intersection had been uniformly exercised by Shelby County.

The plaintiffs also acknowledge a number of cases in which this Court has held that the duty to maintain traffic control devices follows the entity vested with authority to control the relevant roadway. See *Harris v. Macon County*, 579 So. 2d 1295 (Ala. 1991) (Macon County owed no duty to maintain traffic control at an intersection under the exclusive authority of the State Highway Department); *Perry v. Mobile County*, 533 So. 2d 602, 604 (Ala. 1988) ("Mobile County owed no duty to maintain" traffic control devices at an intersection under the exclusive authority of the State Highway Department); *Nichols v. Town of Mt. Vernon*, 504 So. 2d 732 (Ala. 1987) (Town of Mt. Vernon owed no duty to restrict parking on a highway under the control of the State Highway Department). They contend, however, [**4] that this duty may arise where two governmental entities share or participate in the right of control. For this proposition, they rely on a footnote in *Maharry v. City of Gadsden*, 587 So. 2d 966, 968 n.1 (Ala. 1991), in which we stated: "Last term this Court held in *Harris v. Macon County*, 579 So. 2d 1295 (Ala. 1991), that a right to control, or a right to participate in control, is necessary to hold a county or municipality responsible for negligent construction, design, or maintenance of a roadway."

The plaintiffs' reliance on the *Maharry* footnote is misplaced. *Maharry* involved traffic-control authority that was shared by a municipality with the *State*, not by a municipality with a *county*. A city's traffic-control authority over county roadways within its municipal limits is governed by statute -- specifically, Ala. Code 1975, §§ 11-49-80 and -81, which provide:

> "[§ 11-49-80]. Where the authority to control, manage, supervise, regulate, repair, maintain and improve any street or streets or any part thereof lying within any municipal corporation is vested in the county commission of the county within which [**5] such municipal corporation is located, such municipal corporation may, from time to time, *resume or take over* the authority to control, manage, supervise, repair, maintain and improve such street or streets or part thereof designated in the resolution adopted by the governing body of such municipal corporation to resume or take over such authority.
>
> "[§ 11-49-81]. Such resolution shall designate the sum or sums ascertained to be the reasonable charge to be paid by such county for being relieved of the burden of the control, management, supervision, repair, maintenance and improvement of such street or streets or part thereof designated in said resolution, and *no such resolution shall become effective until and unless the county shall by appropriate action of its county commission pay or contract to pay such sum or sums as may be designated in such resolution.*"

(Emphasis added.)

The concept of *jointly exercised* traffic control is inconsistent with the plain language of these sections. The phrase in § 11-49-80 providing for periodic assumption or resumption of authority is meaningless unless such control is to be exercised only by the respective entities *consecutively* [**6] . That the assumption is to become effective only after a municipal government's [*1043] formal resolution and a definite and positive response by the county commission, as expressly set forth in § 11-49-81, is further evidence that the legislature did not contemplate arbitrarily exercised concurrent traffic control.

These conclusions comport with both safety and economic considerations. Multiple government entities exercising concurrent control over the same roadway or intersection would be forced either to incur duplicative expenditures to replace the same traffic control devices, or sacrifice crucial replacement time while the respective governments attempted to fix responsibility for repairing or replacing a damaged device. The repair time lost while the city and county governments negotiated this question of responsibility would inevitably create a greater risk to the public than would follow if traffic control was unquestionably vested in only one entity.

It is undisputed that the Town of Vincent never invoked the procedures set forth in §§ 11-49-80 and -81 for assuming traffic-control responsibility at the intersection of Shelby County Highways 62 and 85. Under the law and the facts [**7] of this case, the Town of Vincent owed no duty to maintain a stop sign at that

intersection. Consequently, the judgment of the trial court is affirmed.

AFFIRMED.

Hornsby, C. J., and Steagall, Kennedy, and Ingram, JJ., concur.