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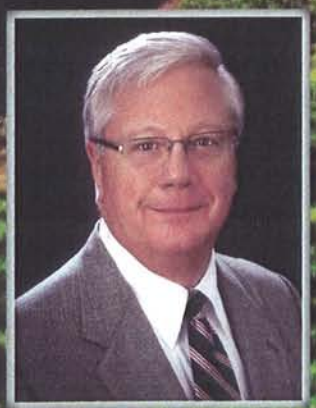

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ALABAMA SUPREME COURT RESTORES TWO YEAR STATUTE OF LIMITATIONS FOR CLAIMS OF WANTONNESS

By Joe Duncan

In 2004, the Alabama Supreme Court issued *McKenzie v. Killian*, 887 So. 2d 861 (Ala. 2004), effectively diverging from two decades of Alabama precedent in regard to the statute of limitations that is applicable to a claim of wantonness. This divergence arose from the Court's conclusion that wantonness is the legal equivalent to intentional conduct, and, therefore, by analogy, trespass. While *McKenzie* began as a well intentioned attempt by the Court to resolve the murky, and somewhat antiquated, distinctions between using causality versus intent as a determinative factor in trespass claims, it resulted in the application of trespass's six year statute of limitations to all claims of wantonness. § 6-2-34(1) Ala. Code (2005).

This genesis for this change arose principally from a 1980 dissent authored by Justice Jones in *Strozier v. Marchich*, 380 So. 2d 804, 804 (Ala. 1980). Specifically, the *McKenzie* Court adopted the reasoning set out in Justice Jones's statement that "[w]anton conduct, as that term is traditionally used and understood in the jurisprudence of our state, signifies the intentional doing of, or failing to do, an act, or discharge a duty, with the likelihood of injury to the person or property of another as a reasonably foreseeable consequence. Such conduct, resulting in injury is actionable in trespass and governed by the six year statute of limitations, in my opinion." *Id.* at 809. *McKenzie*, 887 So. 2d at 870.

McKenzie entrenched this logic and conclusory opinion while giving "very little attention -- and no analysis -- as to the meaning of wantonness or the difference between a claim of wantonness and an intentional tort." *Ex parte Capstone Bldg Corp.*, __ So. 3d __, 19-20 (Ala. 2011). "The fundamental difficulty with [*McKenzie and Strozier*, however] is that [they] collapse[] the concept of wantonness into the concept of an intentional tort. [They] do so in part by ignoring the difference between intended acts and intended consequences. . . ." *Id.* at 21.

The statutes of limitation in question were adopted by the Alabama Legislature in 1984, four years after *Strozier*. For two decades, every Alabama Supreme Court opinion ruled that the two year statute of limitations found in § 6-2-38 (l) Ala. Code (2005) governed claims of wantonness. There was no gradual change or foreshadowing development in the law that led to the expectation that the Court would make such an abrupt jump between the statutes. More problematic may be the fact that application of the trespass statute is contrary to the plain meaning of the statutory scheme and definition of wantonness provided by the Alabama legislature in 1984.

The Alabama Supreme Court was recently allowed the opportunity to reassess the distinctions between wanton conduct and intentional conduct with the sole focus on what statute of limitations is appropriate for wanton conduct. Through *Ex parte Capstone*, the Court overruled *McKenzie's* premise that wanton and intentional conduct are the same legal idea. In doing so, however, the Court elected to apply the decision prospectively only. Many thanks and gratitude are offered to ADLA and the BCA for their assistance in this result. They jointly filed amicus briefs at the Supreme Court level and worked tirelessly to help effect this change in the law.

Twenty Years of Alabama's Statutes of Limitation

Alabama's current statutory scheme was passed in 1984. Two statutes are involved in the question of what period of limitation is applicable for claims of wantonness. The first, § 6-2-38 (l) provides: "All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years."

The statute governing trespass claims, § 6-2-34 (1), provides a six year statute of limitations for "[a]ctions for any trespass to person or liberty, such as false imprisonment or assault and battery." The legislature's definition of wantonness, also adopted in 1984, that wantonness is defined as "[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others." Ala. Code § 6-11-20 (b)(3) (2005).

For the two decades that passed between the passage of the statutes and *McKenzie*, the Alabama Supreme Court decided a long line of cases which applied § 6-2-38 (l) to claims of wantonness. At no point in the development of these cases was there any development to suggest that the appropriate statute of limitations would be § 6-2-34 (1) Ala. Code (2005). These opinions include, at a minimum: *Jim Walter Homes, Inc. v. Nicholas*, 843 So. 2d 133, 135-36 (Ala. 2002), *R.R. Sanders v. Peoples Bank and Trust Co.*, 817 So. 2d 683, 686 (Ala. 2001), *Cunningham v. Langston, Frazer, Sweet & Freese, P.A.*, 727 So. 2d 800, 805 (Ala. 1999), *Life Ins. Co. of Georgia v. Smith*, 719 So. 2d 797, 802-03 (Ala. 1998), *Booker v. United Amer. Ins. Co.*, 700 So. 2d 1333 (Ala. 1997), *Rumford v. Valley Pest Control, Inc.*, 629 So. 2d 623, 627 (Ala. 1993), *Henson v. Celtic Life Ins. Co.*, 621 So. 2d 1268, 1274 (Ala. 1993), *Smith*

v. Medtronic, 607 So. 2d 156, 159 (Ala. 1992), see also *Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101, 125 (Ala. 2003)(Johnston J. concurring).

It was not until Justice Lyons, writing for the majority in *McKenzie*, attempted to resolve the question of whether causality of injury or intent of the tortfeasor should be used to determine whether a claim is considered trespass or trespass on the case. Factually, *McKenzie* arose from an auto accident resulting in injury to the plaintiff. The plaintiff alleged claims of both negligent and wanton conduct, arguing that the wantonness claim was really grounded in trespass since the injury arose due to the direct application of force with an immediate injury. *Id.* at 865. This causal approach is the historical definition of trespass, whereas if the injury was consequential, then the remedy would be in trespass on the case. *Id.* at 866. An analysis of intent would examine the actions of the tortfeasor to determine how to classify the case.

What is somewhat perplexing, however, is that Justice Lyons' analysis seems to be largely dicta. After conducting a thorough review of the historical developments and differences between cause and intent, the Court determined to apply an intent based analysis as to whether a case is trespass or trespass on the case. *Id.* at 870. In the next step of the analysis, the Court determined that an allegation of wanton conduct is an allegation of intentional trespass, thereby deserving a six year statute of limitations because wanton conduct is intentional conduct. *Id.* at 870-71. Justice Lyons, however, concluded the opinion by adopting the Trial Court's ruling that there was no evidence of wanton or intentional conduct. In other words, the Court's analysis was unnecessary to determine what limitation period to apply to the wantonness claim since there was no evidence of intent to justify classification under the six year statute. The opinion unnecessarily creates the argument that a mere allegation of wanton conduct is an action in trespass, deserving of a six year statute of limitations.

Post *McKenzie* Opinions

Given *McKenzie's* notable effect on the law, one would expect that the Supreme Court's application of the six year statute of limitation would be uniform in all subsequent opinions. In short, the Court changed the statute of limitations for a claim that is made in almost every cause of action. In the twenty-six months that followed *McKenzie*, however, the Alabama Supreme Court examined three separate cases that referenced the appropriate statute of limitations for claims of wantonness. *McKenzie* was decided on March 5, 2004. On July 2, 2004 the Court decided *Gilmore v. M & B Realty,* 895 So. 2d 200 (Ala. 2004), applying a two year statute of limitations. Less than a year later, the Court released *Malsch v. Bell Helicopter Textron, Inc.*, 916 So. 2d 600, 601 (Ala. 2005), again applying a two year statute of limitations. The Court even went so far as to state that a claim of wantonness is subject to and "unambiguous two-year statute [] of limitations." The Court then released *Boyce v. Cassese,* 941 So. 2d 932, 945-46 (Ala. 2006), again providing that a two year statute of limitations applied to claims of wantonness.

These cases exhibit one of the problematic aspects of *McKenzie* in that wanton conduct is not limited merely to personal injury causes of action, but extends to all manner of cases, including contracts, professional services, fraud and wrongful death. If a claim of wantonness enjoys a six year statute of limitations, then a number of other statute of limitations are potentially invalidated simply by mentioning wanton conduct in a Complaint. This would include, at the very least, the two year statute of limitations for actions against architects, engineers and contractors, Ala. Code § 6-5-221 (2005); claims for fraud, Ala. Code § 6-2-3(2005); medical malpractice, Ala. Code § 6-5-482 (2005), worker's compensation, Ala. Code § 25-5-80 (2005), and actions against co-employees, Ala. Code § 25-5-11 (2005).

It was not until *Carr v. IRMCo*, 13 So. 2d 947 (Ala. 2009), that the Alabama Supreme Court again addressed the points raised by *McKenzie*. Carr, through a per curiam opinion, applied *McKenzie's* holding that wanton conduct is trespass. The main opinion, again authored by Justice Lyons, was joined by three other justices. Four Justices, somewhat reluctantly, concurred in the result with Justice Murdock dissenting.

Justice See, in concurring with the result, set out a number of concerns that arose from the finding. While he believed *McKenzie* to be the controlling law applicable to the claims, he expressed a great deal of concern as to the legal foundation of *McKenzie*, i.e., whether wanton conduct is intentional conduct. Ultimately, however, Justice See felt he had no other choice than to concur in the result because the litigants did not ask that *McKenzie* be overruled. Id. at 956.

"I question whether all wanton conduct is, by definition an action for trespass analogous to false imprisonment or assault and battery, both of which require intent to commit the wrongful act." Id. at 958. Justice See went on to analyze the distinctions between the intentional nature of the acts set out in § 6-2-34 (1) along with trespass, as compared with Alabama precedent discussing the nature of wanton conduct. Unlike Justice Jones' opinion in Strozier, Justice See's analysis demonstrated a marked and distinct difference between trespass and wanton conduct. *Id.* at 958, f. 4.

Justice Murdock dissented, again noting that the Court was not asked to overrule *McKenzie*. Id. at 959. Justice Murdock, however, proposed that the *McKenzie* opinion was dicta. "[B]ecause *McKenzie* was a case in which the evidence did not present a wantonness claim, it was not essential in that case to decide the correct limitations period for a wantonness claim." *Id.* at 959. He went on to provide that "a long line of decisions, reaching back many years, including some that postdate *McKenzie*, has consistently af-

firmed the proposition that wantonness claims are governed by the relatively shorter statute of limitations now embodied in § 6-2-38 (l)." *Id.* at 964-65.

Walker v. Capstone

In the Fall of 2007, our office began with its defense of Capstone Building Corporation in regard to a Complaint filed by William "Toby" Walker. The case arose from a 2005 accident where Walker alleged that he stepped on a manhole cover only to find it was loose, causing him to fall. Importantly, Walker's Complaint made allegations of wanton and negligent personal injury only. There was no claim of trespass made in the Complaint. The Complaint, filed July 10, 2007, alleged that the accident occurred on July 12, 2005. Capstone's internal incident report showed that the accident occurred on June 6, 2005. When Mr. Walker was deposed, he conceded that he did not know when his accident happened. He could not provide a date for his fall, and he did not prepare any type of documentation for the event for his employer. Third party documents also supported June 6 as the date of the incident.

Following these revelations, a Motion for Summary Judgment was filed on the basis that Plaintiff failed to file his claim within the two year statute of limitations for personal injury set out in § 6-2-38 (l) Ala. Code (2005). Walker argued, based on *McKenzie* and *Carr*, that his claim of wantonness was entitled to a six year statute of limitations. Judge Charles Malone determined that the appropriate statute of limitations for the personal injury claim was two years, thereby dismissing the matter.

Capstone Appellate Opinions

Capstone was originally deflected and addressed by the Alabama Court of Civil Appeals. The Court ruled that it was obligated to follow the guidelines of *McKenzie*. While the Court of Civil Appeals noted the constitutional arguments raised by *Capstone*, it determined that it was not in a position to address the validity of legally binding precedent. *Walker v. Capstone Bldg Corp.*, __ So. 3d __, 2010 WL 1170094, *6 (Ala. Civ. App.) (citing *State Farm Mut. Auto. Ins. Co. v. Carlton*, 867 So. 2d 320, 325 (Ala. Civ. App 2001), § 12-3-16 Ala. Code (1975)). As such, the Court of Civil Appeals was obligated to reverse Judge Malone's dismissal of the matter.

Capstone then filed a Petition for Writ of Mandamus, seeking review of *Walker* by the Alabama Supreme Court. The limited question of law for the Court was simply whether wanton conduct is intentional conduct, thereby providing for a six year statute of limitations. *Ex parte Capstone Bldg Corp.*, __ So. 3d __, 2011 WL 2164027, *8 (Ala. 2011). The Court ordered the parties to brief the matter and issued its opinion on June 3, 2011.

Writing for the majority this time, Justice Murdock's first observation was "that *McKenzie* stands alone as an exception to the long line of cases that addressed the question of what statute of limitations was applicable to wantonness and that repeatedly answered

that question by deciding that the two-year limitations period of § 6-2-38 (l) was applicable." *Id.* at 8. The Court reviewed portions of the extended line of cases, also turning to the opinions which postdated *McKenzie*, each applying the two year statute of limitations.

"The reality . . . is that, until *McKenzie*, no decision of this Court ever applied the six-year statute of limitations of § 6-2-34 (1) to a claim of wantonness, as that term is now understood." *Id.* at 10. The Court reaffirmed *McKenzie's* point that intent, rather than causality should be used to determine whether a claim made is for trespass or trespass on the case. *Id.* at 12. "Acceptance of this conclusion, however, does not answer, but only begs, the separate question of whether a claim of wantonness is a trespass claim for purposes of § 6-2-34 (1)." Id. at 12-13. That required answer was "compelled . . . by the text of § 6-2-38 (l) and other statutes." *Id.* at 11.

Justice Murdock, in citing his own dissent from Carr, analyzed the historical nature of wantonness and whether it has been interpreted to include intentional conduct. *Id.* at 13-15. Based on the holding of *Alfa Mutual Insurance Co. v. Roush,* 723 So. 2d 1250, 1256 (Ala. 1998), which included the statutory definition of wantonness found in § 6-11-20 (b) (3), it was determined that intent to injure another is not an element of a claim of wantonness. *Id.* at 14.

In determining that the six year trespass statute of limitations related to intentional acts, and not trespass on the case, the Court provided:

> Consistent with the foregoing, we note that the legislature employs the term "trespass" in § 6-2-34 (1) in concert with the concepts of false imprisonment and assault and battery. We note the aforementioned derivation of the latter causes -- requiring an intent to cause the actionable injury -- as forms of trespass. We likewise find pertinent the doctrine of *"noscitur a sociss"*, which holds that "where general and specific words which are capable of an analogous meaning are associated on with the other, they take color from each other, so that the general words are restricted to a sense analogous to that of the less general."

Id. at 16 (quoting *Winner v. Marion County Comm'n,* 415 So. 2d 1061, 1064 (Ala. 1982) (citing *State v. Western Union Tel. Co.,* 72 So. 99 (Ala. 1916), and C. Sands, Sutherland Statutory Construction § 47.16 (4th ed. 1973)).

In order to resolve the statutory question, "all that is required is that we be able to conclude that reckless or wanton conduct is not an intentional tort". *Id.* at 18. In other words, "[u]nder the choices made for us by the legislature, our task is simply to decide if wantonness is intent. . . . Plainly, it is something different." *Id.* at 18, f. 4.

The Court continued, "[w]e are clear to the conclusion that recklessness and wantonness are fundamentally different concepts than intent, and that claims alleging reckless or wanton conduct are distinctively different from those alleging intentional harm to a plaintiff." Id. at 18. In overruling *McKenzie*, the Court noted that "[t]he basis for our decision in this case is a recognition that there is a difference between a claim for negligence and an intentional tort." *Id.* at 19.

Stare Decisis

While Chief Justice Cobb expressed concern over stare decisis and the precedential value of *McKenzie*, the majority had very little concern with reversing the case. "McKenzie gave very little attention -- and no analysis -- as to the meaning of wantonness or the difference between a claim of wantonness as an intentional tort." Id. at 19-20. Further, based on *McKenzie's* deviation from two decades of statutory interpretation, it was truly an outlier opinion, cited as binding authority, rather reluctantly, in only one *per curiam* case.

Given this history, both Alabama and United States Supreme Court guidance on stare *decisis* required reversal. *Id.* at 26. (citing *Citizens United v. Federal Election Commission,* __ U.S. __, 130 S. Ct. 876 (2010), *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 231 (1995)). Justice Murdock provided:

> If we did not follow these principles and overrule *McKenzie*, we would be enshrining in our law an erroneous decision. A failure by this Court to admit its error and to adhere to the policy choice that has been made by our legislature would be the course that would "undermine [] its judicial authority and equate th[is] Court with some sort of 'other legislature' to the detriment of all the courts in this State," __ So. 3d at __ (Cobb, C.J., dissenting), and the doctrine of the separation of powers.
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> *Id.* at 28.

Retroactivity

Despite the tenor and certainty of the Court's decision that *McKenzie* was decided incorrectly, the majority has elected to apply *Ex parte Capstone* prospectively only. The rationale for this decision is that *McKenzie* created a vested right to an existing cause of action, thereby allowing potential litigants to rely on the holding. Id. at 29-36. Even though *Capstone* succeeded in changing the law and convincing the Court that *McKenzie* was an incorrect and outlier opinion, it will not get the benefit of the Court's reversal. Based on the current language of *Capstone*, any claim for wanton conduct that accrues after the date of the decision, June 3, 2011, will have a two year statute of limitations under § 6-2-38 (l). The new deadline for all claims of wantonness that have occurred within the last six years is June 3, 2013, or six years

from the date of the occurrence, whichever is earlier. Id. at 35.

Jerkins

Four weeks after Capstone was released, the Court issued an opinion in *Jerkins v. Lincoln Electric Co.*, __ So. 3d __, (Ala. 2011). Jerkins answered certified questions from multi-district litigation relating to 1,800 cases seeking damages for personal injuries alleged to be caused by exposure to welding fumes. *Id.* at 2. While the Court answered several questions, it was asked to answer the question:

> 2. Does the six-year statute of limitations for wantonness claims adopted by the Alabama Supreme Court in *McKenzie v. Killian,* 887 So. 2d 861 (Ala. 2004) apply: 1) prospectively to claims that were filed after *McKenzie* was decided; 2) retroactively to claims that accrued no earlier than two years before *McKenzie* was decided; or 3) in some other fashion?

Id. at 5. In citing *Ex parte Capstone*, the Court determined *McKenzie* to be controlling law since the claims were filed before *Capstone.*

Applications For Rehearing

At the time of submission for this article, Applications for Rehearing were pending in both Capstone and Jerkins. *Capstone* has requested that the Court reconsider the decision to apply the opinion prospectively only. It is Capstone's position that the *Chevron Oil* factors employed by the Court require retroactive application of the Court's decision. *Chevron Oil v. Huson,* 404 U.S. 97 (1971). *Chevron Oil*, as adopted by this Court, provides that a decision can be applied prospectively only if the opinion 1) establishes a new principle of law by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; 2) does not retard or hinder the operation of the rule being examined; and 3) does not create baseless inequitable results through retroactive application. *Id.* at 106-07.

Capstone has argued that *McKenzie* was not clear past precedent, that *McKenzie* retards the statutory requirements established by the legislature and that inequity is created by not allowing Capstone to benefit from its efforts to correct erroneous law. As a policy matter, Alabama law allows the application of changes in the law, including overruling earlier precedent, to apply retrospectively to this matter to the benefit of the party responsible for correcting the law. The Court has determined that such a policy provides "an incentive for litigants to challenge existing rules of law that are in need of reform." *Hosea O. Weaver & Sons, Inc. v. Towner*, 663 So. 2d 892, 899 (Ala. 1995)(quoting Prospective Application of Judicial Decisions, 33 Ala. L. Rev. 463, 473 (1982)).

Finally, the Court is considering a constitutional issue since its earlier rulings in *McKenzie* contravened a statutory mandate provided by the legislature. Thus, the separation of powers provision of the Alabama Constitution is invoked, which is recognized, albeit briefly, by the majority in *Ex parte Capstone.* See pp. 22, 28. This issue makes the Court's decision more problematic because retroactive application is heavily favored in question of constitutional concern.

> Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision would take prospective form does not make sense.

Alabama State Docks Terminal Ry. v. Lyles, 797 So. 2d 432, 439 (Ala. 2001)(quoting *Am. Trucking Ass'ns, Inc., v. Smith,* 496 U.S. 167 201 (1990) (Scalia, J., concurring)). This concern was further discussed in *Jefferson County Comm. v. Edwards,* 32 So. 2d 572, 596 (Ala. 2009).

The Jerkins litigants, as well as the BCA and ADLA in an amicus role, seek to resolve how *McKenzie* is to be applied to causes of actions that may have accrued prior to 2004. While the Court addressed the question of prospective application in *Capstone*, that issue was never addressed in *McKenzie.*

Conclusion

As these opinions currently stand, the Alabama Supreme Court has restored the two year statute of limitations found in § 6-2-38 (l) for all claims of wantonness. Wanton conduct is, by definition, not intentional conduct. It is the hope of Capstone, ADLA and the BCA that the continued efforts will result in retroactive application of *Ex parte Capstone* to all claims of wantonness and that Capstone will receive the benefit of the correct application that it successfully restored to the law for all future litigants.

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Again, this result is due in part to the efforts of the *amicus* groups of ADLA and the BCA. Special thanks should be offered to Patrick Sefton, Matthew McDonald and Harlan Prater for the effort by them individually and their firms.