Out of the Quagmire: Alabama's Statute of Limitations for Wantonness is Six Years

by David G. Wirtes, Jr.[1]

Upon the recent conclusion of our presentation of plaintiff's evidence in a real property pollution case, we were confronted with a motion for judgment as a matter of law contending that plaintiff's wantonness claim was time-barred by the two-year statute of limitations of Ala. Code § 6-2-38(l). We countered that wantonness has a six-year statute of limitations following the history in McKenzie v. Killian, 887 So.2d 861, 870 (Ala. 2004). While we ultimately prevailed on the motion and were successful in obtaining a verdict for our client, the trial court's struggle to reach the right conclusion in the law suggested that this article might be helpful to plaintiffs' lawyers who may be confronted with this issue.

DEFENSE ARGUMENTS

The defense asserted that Ala. Code § 6-2-34 "Commencement of actions - Six years" makes no mention of wantonness. They argued, citing numerous opinions, that Ala. Code § 6-2-38(l)'s two-year statute of limitations applied. They cited numerous federal and state cases that were decided by application of the traditional two-year statute of limitations, e.g., Boyce v. Cassese, 941 So.2d 932 (Ala. 2006); Gilmore v. M & B Realty Co., L.L.C., 895 So.2d 200 (Ala. 2004); Jim Walter Homes, Inc. v. Nicholas, 843 So.2d 133 (Ala. 2002); Booker v. United American Ins. Co., 700 So.2d 1333 (Ala. 1997); Life Ins. Co. of Georgia v. Smith, 719 So.2d 797 (Ala. 1998); Henson v. Celtic Life Ins. Co., 621 So.2d 1268 (Ala. 1993); Williams v. Norwest Financial Alabama, Inc., 723 So.2d 97 (Ala.Civ.App. 1998); Dorsey v. Bowers, 709 So.2d 51 (Ala.Civ.App. 1998); Ratcliff v. Heavy Machines, Inc., 2007 WL 2051352 (S.D. Ala. 2007); Nobles v. Rural Community Ins. Services, 303 F.Supp.2d 1279 (M.D. Ala. 2004); Whitlock v. Jackson Nat. Life Ins. Co., 32 F.Supp.2d 1286 (M.D. Ala. 1998).

Additionally, the defense asserted that to the extent McKenzie v. Killian held that wantonness claims were subject to a six-year statute of limitations, that six-year statute applied only when wantonness proximately caused personal injuries, not damages to real property as was contended in our lawsuit.

PLAINTIFF'S RESPONSE

According to Burrell v. Essary, 2006 WL 2847242 (Ala.Civ.App. Oct. 4, 2006), at * 1, n. 2, reversed on other grounds, Ex parte Essary, 2007 WL 3238879 (Ala. Nov. 2, 2007):

> A six-year statute of limitations applies to claims of wantonness, see McKenzie v. Killian, 887 So.2d 861, 870 (Ala. 2004), and trespass, see § 6-2-34(a), Ala. Code 1975.

Id. Judge Pittman, concurring specially, wrote separately to expressly note the significance to the outcome of the case of Alabama's six-year statute of limitations for wantonness:

> The plaintiffs' complaint was filed more than two years, but less than six years, after the accrual of their causes of action arising from the May 22, 2002, automobile collision. The importance in this case of a factual dispute concerning whether Essary's conduct was "wanton" stems from McKenzie v. Killian, 887 So.2d 861, 870 (Ala. 2004), in which the Alabama Supreme Court opined that "wanton conduct is the equivalent in law to intentional conduct" so as to be actionable in trespass and held that "intent renders the six-year statutory period of limitations applicable" (rather than the two-year residual personal-injury limitations period). Compare § 6-2-34(1), Ala. Code 1975, with § 6-2-38(l), Ala. Code 1975. As the main opinion demonstrates, there is a genuine factual issue in this case regarding Essary's state of mind, and I therefore concur in the reversal of the trial court's judgment as to the plaintiffs' wantonness claim.

Id. at * 4. Burrell v. Essary should be the end of this issue. It is the most recent statement of positive law from an Alabama appellate court that Alabama trial courts are duty-bound to follow.

Importantly, on November 2, 2007, the Supreme Court of Alabama reversed the part of the judgment of the Court of Civil Appeals that had reversed the trial court's summary judgment in favor of the defendant (see Ex parte Essary, 2007 WL 3238879, (Ala. Nov. 2, 2007) at * 1-2); however, the Supreme Court did not reverse that part of the judgment that held that a six-year statute of limitations applies to claims of wantonness.

The holding of McKenzie v. Killian is the controlling opinion. There, Justice Lyons endeavored to reconcile the historical conflict between actions in trespass and those in trespass on the case which he characterized as a "quagmire in Alabama jurisprudence." Id. 887 So.2d at 866. The holding of McKenzie v. Killian, supra, is summarized in this paragraph:

> We overrule Sasser [v. Dixon, 290 Ala. 17, 273 So.2d 182 (1973)] [holding a wantonness claim against a fellow employee to be trespass on the case], and its progeny to the extent that those cases

Out of the Quagmire: Alabama's Statute of Limitations for Wantonness is Six Years

> prefer the theory of causality over intent as the mechanism for distinguishing between actions for trespass and for trespass on the case. As the Court recognized in [Louisville & Nashville R.R. v.] Johns[, 267 Ala. 261, 101 So.2d 265 (1958)], wanton conduct is the equivalent in law to intentional conduct. Such an allegation of intent renders the six-year statutory period of limitations applicable.
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> Id. at 870 (emphasis added).

In our recent case, the defendant argued that McKenzie v. Killian is limited in its scope because of the differences between personal injury actions and actions alleging damage to real property. This contention is flatly wrong. First, two of the cases that McKenzie v. Killian expressly overrules are property damage cases: Cochran v. Hasty, 378 So.2d 1131 (Ala. Civ.App. 1979) (defendant's dam caused water to flood plaintiff's land); City of Fairhope v. Raddcliffe, 48 Ala. App. 224, 263 So.2d 682 (Ala.Civ.App. 1972) (holding that allegation of injury to plaintiff's house and property from sewage overflow through toilet was subject to one-year trespass-on-the-case statute of limitations, not six-year trespass statute of limitations, despite allegation of wanton failure to maintain sewer). If the Court in McKenzie had intended to draw a distinction between personal injury and property damages cases caused by wanton conduct, it would not have overruled these two cases, and it clearly does so. 887 So.2d at 867-68.

Second, the fact that the McKenzie rule applies to all cases of wanton conduct, including cases where property damage occurs, can be seen from the following quotation from Justice Jones's dissenting opinion "embrace[d]" by the Court in McKenzie:

> "Whatever vestige of the out-moded direct/indirect distinction between trespass and trespass on the case still exists in Alabama, I would now abandon and adopt instead the more modern tort concept of measuring the cause of action in terms of the degree of culpability of the alleged wrongful conduct. Wanton 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.
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> "The rationale for my view comports with the fundamental concept of our fault-based system of tort law. One who injures another, or another's property, as a result of conduct intentionally committed should be held to a higher degree of accountability than one who injures through a simple lack of due care. Just as the former, because of its higher degree of culpability, carries a potential for punitive damages, so should it also carry a longer period within which to enforce accountability for such intentional wrong."

McKenzie v. Killian, 887 So.2d at 870, quoting Strozier v. Marchich, 380 So.2d 804, 809-10 (Ala. 1980) (Jones, J., dissenting) (emphasis added). After this quotation, the McKenzie Court stated "We embrace this reasoning today." 887 So.2d at 870.

A helpful analysis of the Supreme Court's rationale and holding in McKenzie v. Killian is found in M. Roberts & G. Cusimano, Alabama Tort Law Handbook, § 46.02[3] (4th ed. 2006):

> The law as expressed in Lowery v. Densmore[, 744 So.2d 959 (Ala. Civ. App. 1998)] was altered in 2004 in McKenzie v. Killian. Plaintiff McKenzie claimed wantonness against defendant Killian arising from a collision between Killian's vehicle and McKenzie's vehicle. Defendant McKenzie was not added as a defendant until more than two years after the collision. Summary judgment was granted to defendant Killian on statute of limitations grounds, but plaintiff McKenzie argued that her wantonness claim was grounded in trespass, invoking a six-year statute of limitations.
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> The court took this occasion to examine anomalies in the law. The statutory period for limitations for an action in trespass is six years and that for an action in trespass on the case is two years. A distinction between trespass and trespass on the case was described as a "quagmire in Alabama jurisprudence."
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> The court in McKenzie observed that the problem presented by the dependence upon causality is illustrated by the problematic result of allowing a less culpable wrongdoer to be exposed to a significantly longer statutory limitations period than that applicable to a more culpable wrongdoer, depending upon the character of the force applied. The court embraced the reasoning of Justice Jones's dissent in Strozier v. Marchich, and overruled Sasser and its progeny to the extent that those cases prefer the theory of causality over intent as the mechanism for distinguishing between actions for trespass

and for trespass on the case. As was recognized in Louisville & Nashville R.R. v. Johns, wanton conduct is equivalent in law to intentional conduct. Such an allegation of intent renders the six-year statutory period of limitations applicable.

The court expressly declined to apply the "cryptic formulation" in Lowery v. Densmore dealing with evidence of a "wilful or wanton application of force" to gauge the sufficiency of McKenzie's wantonness claim.18

18The court concluded, however, that McKenzie had not presented substantial evidence that Killian consciously did some act or omitted some duty while knowing of existing conditions and being conscious that, from doing or omitting to do an act, an injury would likely or probably result, and thus affirmed the trial court's summary judgment, finding insufficient evidence of wantonness.

Id., pp. 46-5 through 46-6 (some footnotes omitted).

Bottom line: McKenzie v. Killian holds that wantonness claims are governed by a six-year statute of limitations.

DEFENDANT'S COUNTER ARGUMENTS AND PLAINTIFF'S RESPONSES

In our case, defendant asserted that Gilmore v. M & B Realty Co., L.L.C., 895 So.2d 200 (Ala. 2004), was decided three months after McKenzie and applied the two-year statute of limitations to plaintiff's claims of wantonness. However, there, the Gilmores, as plaintiffs and as appellants, "concede[d] that § 6-2-38(l), Ala. Code 1975, prescribe[d] a two-year statute of limitations for their negligence and wantonness claims." 895 So.2d at 208 (emphasis added). As observed earlier in this article, it was true at the time the Gilmores filed their lawsuit (August 7, 2000, see id. at 207) that § 6-2-38 had consistently been construed to provide a two-year statute of limitations for wantonness. The Gilmores argued only that their cause of action accrued within two years before they filed their action. Id. There is no suggestion in the opinion that the McKenzie-six-year statute of limitations argument was even mentioned. The Supreme Court will not reverse a trial court for a reason not argued to the trial court, Bagley v. Mazda Motor Corp., 864 So.2d 301, 311 (Ala. 2003), so ordinary principles of review precluded reversing Gilmore based on the holding in McKenzie.

The same holds true regarding Defendant's other post-McKenzie v. Killian authority, Boyce v. Cassese, 941 So.2d 932 (Ala. 2006). Nowhere in Boyce is McKenzie cited. Nowhere in Boyce is there any discussion or analysis as to whether McKenzie should be overruled. Nowhere in Boyce is there any hint that the plaintiffs, the Boyces, argued that the six-year statute-of-limitations should apply to their wantonness claims. The Boyces filed their complaint in April 2002 (see id. at 939), well before McKenzie was decided. The long-established interpretation of § 6-2-38 at that time provided a two-year limitations period in wantonness cases. That was the applicable statute of limitations governing the outcome of that dispute unless changed through an argument like the one advanced by the plaintiff in McKenzie. The opinion in Boyce v. Cassese is barren of any suggestion that the Boyces advanced any McKenzie-like six-year-statute-of limitations argument to either the Shelby Circuit Court or the Supreme Court.

In Boyce v. Cassese, the Court analyzed only the plaintiffs' allegations "that the Golf Club fraudulently suppressed from them the existence of the license agreement," id., at 944, and held that the recordation of the license agreement gave the Boyces constructive notice and precluded any tolling of the statute of limitations due to fraudulent concealment. Id. at 944-45. As to the title company defendants, the Court held that "the Boyces were charged with constructive notice" of the recorded instruments more than two years before filing suit, so their negligence and wantonness claims were barred by the two-year statute of limitations, noting that "Alabama has no 'discovery rule' with respect to negligence or wantonness actions that would toll the running of the limitations period." 941 So.2d at 946, n. 2.

Given Justice Lyons's painstaking and detailed analysis for the Court in McKenzie, silence in Gilmore and Boyce cannot be taken as an overruling of McKenzie. McKenzie is not even mentioned in either Gilmore or Boyce. Simply put, McKenzie states the law and Burrell v. Essary confirms that fact.

Finally, as to the Defendant's other post-McKenzie "authority" for applying a two-year statute of limitations, Ratcliff v. Heavy Machines, Inc., 2007 WL 2051352 (S.D. Ala. 2007), two important observations are necessary. First, Ratcliff is factually distinguishable. There, Judge William H. Steele declined to grant Rule 60(b)(6) to a dilatory plaintiff, who raised McKenzie in his Rule 60(b)(6) motion only after having failed to timely respond to a summary judgment motion. Id. at *1. After stating reasons why the motion was due to be denied based on the plaintiff's "failure to take reasonable steps to protect [his] interests in litigation," id. at *2, the court added a final comment that "[l]eaving aside

the inappropriateness of invoking Rule 60(b)(6) in these circumstances, the Court is not at all convinced that the June 20 summary judgment ruling contained an error of law." Id. at *3. The court then stated that because Boyce and Gilmore post-date McKenzie and apply a two-year statute of limitations to wantonness, it was not convinced by the plaintiff's "mere citation to McKenzie" to grant the Rule 60(b)(6) relief. Id. The plaintiff in Ratcliff obviously did not explain the bases for distinguishing Boyce and Gilmore effectively, or how they should not be construed to sub silentio overrule McKenzie.

Second, and more important, in LaBauve v. Olin Corp., 231 F.R.D. 632 (S.D. Ala. 2005), Judge Steele applied a six-year statute of limitations to wantonness, stating:

> The Court recognizes that Alabama courts draw an arcane, often abstruse distinction between trespass (which is subject to a six-year limitation period) and trespass on the case (which is subject to a two-year limitation period). See McKenzie v. Killian, 887 So.2d 861, 866 (Ala.2004) ("We can say with comfort that the statutory period of limitations for an action in trespass is six years and that the statutory period of limitations for an action in trespass on the case is two years."). The Court need not parse the minutiae of this distinction, as defendants admit that the six-year term applies to plaintiffs' trespass and wantonness claims here. (See Opposition Brief (doc. 138), at 19.) This concession appears prudent, given recent Alabama Supreme Court musings on that topic. See McKenzie, 887 So.2d at 870 (explaining that wanton conduct, or the intentional doing of, or failing to do, an act, with likelihood of injury to another's property as a reasonably foreseeable consequence, is actionable in trespass and governed by the six-year limitations period). As such, the Court will apply the six-year limitations period to this claim.

Id. at fn. 47 (emphasis added).

CONCLUSION

McKenzie v. Killian and Burrell v. Essary establish that the present Alabama statute of limitations for wantonness claims is six years. In an effort to eliminate future confusion, ALAJ's legislative review committee will this year urge the legislature to amend Ala. Code § 6-2-34 to conform with the holding in McKenzie and Burrell by stating expressly that wantonness is included among the actions that must be commenced within six years.

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BIOGRAPHICAL INFORMATION

Mr. Wirtes graduated from the University of the South, Sewanee, Tennessee, with a B.A. in 1981. He then attended the Cumberland School of Law of Samford University in Birmingham, Alabama earning his J.D. in 1985. During law school, he was Articles Editor of the *Adelphia Law Journal* and an Associate Editor of *The American Journal of Trial Advocacy*.

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