

The Alabama Jury Verdict Reporter

The Most Current and Complete Summary of Alabama Jury Verdicts

September, 2007

Statewide Jury Verdict Coverage - Published Monthly

7 A.J.V.R. 9

Unbiased and Independently Researched Jury Verdict Results

In This Issue

Jefferson County

Auto Negligence - \$600	p. 3
Premises Liability - \$58,461	p. 5
Auto Negligence - Defense verdict	p. 10
Auto Negligence - Defense verdict	p. 11

Lee County

Fraud - \$2,750,000	p. 1
---------------------	------

Houston County

Medical Neg. - Judg. as matter of law	p. 4
Auto Negligence - Defense verdict	p. 6
Underinsured Motorist - \$100,000	p. 10

Federal Court - Mobile

Construction Negligence - \$77,980	p. 4
Excessive Force - Defense verdict	p. 6
Race Discrimination - Defense verdict	p. 13

Madison County

Auto Negligence - \$190,000	p. 5
-----------------------------	------

Franklin County

Truck Negligence - Defense verdict	p. 7
------------------------------------	------

Barbour County

Auto Negligence - \$14,500	p. 7
----------------------------	------

Coffee County

Medical Negligence - Defense verdict	p. 8
--------------------------------------	------

Mobile County

Auto Negligence - Defense verdict	p. 8
Medical Negligence - Defense verdict	p. 12

Walker County

Premises Liability - Defense verdict	p. 8
--------------------------------------	------

Tuscaloosa County

Auto Negligence - \$6,500	p. 9
---------------------------	------

Escambia County

Medical Negligence - Defense verdict	p. 9
--------------------------------------	------

Morgan County

Auto Negligence - \$3,247	p. 11
---------------------------	-------

Cullman County

Subrogation - Defense verdict	p. 11
-------------------------------	-------

Russell County

Auto Negligence - \$1,334	p. 13
---------------------------	-------

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Fraud - A real estate developer hired a contractor to work on the construction of a new subdivision; the contractor misappropriated funds, did substandard work, and went out of business without completing the project

Whittelsey Properties, Inc., et al. v.

Manifold, et al., 05-137

Plaintiff: Davis B. Whittelsey,
Whittelsey, Whittelsey & Poole, P.C.,
Opelika

Defense: Bradley J. Smith, Eric D. Bonner, and Cynthia N. Williams,
Clark Oncale Hair & Smith, P.C.,
Birmingham

Verdict: \$2,750,000 for plaintiffs

Circuit: Lee, 11-2-06

Judge: Brady E. Mendheim, Jr.

C. Sheldon Whittelsey, III (hereinafter, "Whitt") has been a successful attorney and real estate developer in Alabama for the past fifty years. His son, C. Sheldon Whittelsey,

IV (hereinafter, "Sheldon") is also a real estate developer. Together, they operate a business known as Whittelsey Properties, Inc. (hereinafter, "Whittelsey").

In May of 2004, the Whittelseys were interested in developing a project to be known as the Sanders Creek Subdivision, Phase II. They contracted with a company called Manifold Construction, LLC. to do part of the work. The managing member of Manifold Construction was Jack Manifold.

The agreement between the parties provided that Manifold Construction was to be responsible for construction of the fire and water system, the sewer system, and the entrance drive to the subdivision. Manifold Construction would also handle erosion control, general excavation, and paving operations.

In exchange for Manifold's work, Whittelsey was to pay the sum of

\$646,712. The arrangement also provided that Manifold would pay for all labor, materials, etc. out of the funds it received from Whittelsey.

Furthermore, Manifold would submit invoices to Whittelsey at the end of each month, and Whittelsey would pay the invoices shortly thereafter. With each payment, Manifold would provide affidavits affirming the company had paid all labor and material costs to that point.

Manifold began work on the project on 5-28-04. Shortly after work began, however, it was discovered that a great deal of rock lay hidden beneath the surface of the construction site. Based on that discovery, Manifold submitted a change request to Whittelsey for the increased cost of removing the rock.

Whittelsey agreed to the change request and the increased costs. There would allegedly be many more change requests and cost increases over the course of the project. In the end, the total cost Manifold would claim climbed to \$883,849.

While Manifold was working on the project, the company was experiencing cash flow problems. In an effort to cope with the problem, Manifold began secretly using the money it was receiving from Whittelsey to pay for expenses relating to other projects in which Whittelsey was not involved.

As a result of this maneuver, many of the expenses relating to the Whittelsey project were going unpaid. Despite that reality, Manifold continued to provide Whittelsey with affidavits affirming that all debts relating to the project were being paid.

Manifold's bookkeeping sleight of hand could not be sustained in the long run. On 11-30-04, Jack Manifold met with Sheldon and informed him the company could not make its payroll and was going out of business.

Also during the meeting, Jack stated that the outstanding debts relating to the project amounted at that time to approximately \$200,000. Jack explained that Manifold would liquidate its assets and pay the debts out of the proceeds. In the meantime, Sheldon agreed that Whittelsey would pay Manifold's payroll and take over responsibility for completing the project.

Plaintiffs would later claim, however, that at the same time Jack was

promising to pay the outstanding debts out of the proceeds of Manifold's liquidation, he was also telling various vendors that payment would be forthcoming directly from Whittelsey.

Sheldon and Jack had a second meeting on 12-1-04, during which Jack represented that the outstanding debts at that time were only approximately \$86,000. Yet the following day, Jack faxed Sheldon a document that listed the unpaid debts at \$302,747.

According to plaintiffs, at the time Manifold went out of business the project was substantially incomplete. Whittelsey then stepped in and was forced to act as the general contractor to finish the project. Furthermore, unpaid vendors began coming out of the woodwork and threatening to file liens if payment was not immediately forthcoming.

Whittelsey, Sheldon, and Whitt all filed suit against Manifold Construction and Jack Manifold personally. In their complaint, plaintiffs alleged counts for breach of contract, reckless fraud, innocent fraud, negligence, theft, slander of title, and wantonness.

Plaintiffs' specific allegations criticized defendants for using the money they received from plaintiffs to pay expenses on other projects, repeatedly misrepresenting that all debts relating to the project were being paid, placing plaintiffs in the position of being threatened with liens from unpaid vendors, and forcing plaintiffs to act as the general contractor to complete the project.

In addition, plaintiffs claimed that the work Manifold did complete was done in an unworkmanlike manner such that it failed to pass the required city inspections. Thus, plaintiffs had to incur additional expenses to have the work redone properly. If successful, plaintiffs sought punitive damages in addition to compensatory damages.

Plaintiffs identified a number of experts. They included Charles Bush, Engineer, Opelika; Jim Sailor, Engineer, Atlanta, GA; Davis Bartlett, CPA, Opelika; Walter Dorsey, Building Codes, Opelika; John Fuller, Paving, Opelika; Brady Pollock, Engineer, Opelika; and Gavin McLeod, Rental Equipment, Auburn.

Jack Manifold and Manifold Construction defended the case as best they could. They argued that plaintiffs

knew from the beginning that Manifold was having cash flow problems. Defendants simply tried to do what they could to keep their business afloat. Moreover, when Manifold finally did pull out of the project, its work was substantially complete.

The defense also identified a number of experts. They included M. Sanford Thomas, CPA, Birmingham; Dan Brown, Engineer, Sequatchie, TN; and a construction expert in the person of Rayford Smith.

The case was tried for four days in Opelika. At the close of plaintiffs' case, Sheldon dismissed his claim, and the remaining plaintiffs dismissed their breach of contract claim. At the close of all evidence, the court granted plaintiffs a judgment as a matter of law on the counts for negligence, reckless fraud, and innocent fraud.

The jury returned a verdict for plaintiffs and awarded them compensatory damages of \$275,000 against both defendants. To that amount was added another \$1,500,000 in punitive damages against Manifold Construction, plus \$1,000,000 in punitive damages against Jack Manifold.

The court entered a judgment that reflected the verdict. Thereafter plaintiffs filed a motion for additur on the ground that they had presented uncontroverted evidence that their actual damages were \$474,000 rather than the \$275,000 the jury awarded them.

At the same time, defendants filed a motion for remittitur or for a new trial. The court entered an order remitting the punitive damages component of the award to \$825,000 against each of the two defendants. Plaintiffs accepted that decision, but defendants have filed an appeal. At the time the AJVR reviewed the record, the appeal was still pending.

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