



QUARTERLY BYTES

FEES & BURGESS, P. C.



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The Interpretation of “Related To” in Arbitration Agreements

Fees & Burgess, P.C., Emphasizes:

In a recent decision, the Alabama Supreme Court affirmed that in spite of Alabama’s traditional hostility toward arbitration, an agreement containing an arbitration agreement, even a broad agreement, is to be enforced. See Stonemor Alabama, L.L.C., v. Summers, 2009 WL 3335893 (Ala. Oct. 16, 2009).

General Civil Litigation

Michelle Summers’ deceased husband was buried in Lakeview Memory Gardens, a cemetery in Phenix City, Alabama. She sued the companies that owned and operated the cemetery for conversion, negligence, and outrage because one or all of them removed a stone bench she had installed on her husband’s grave. StoneMor filed a motion to compel arbitration, alleging the parties had entered into an arbitration agreement and that the contract involved interstate commerce. The trial court denied the motion, and StoneMor appealed.

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Railroad Law

When Summers’ husband died, she entered into a contract with StoneMor, under which she purchased two cemetery plots and contracted for perpetual care of those plots. The contract contained an arbitration provision for any dispute concerning the agreement “or any other matters relating to goods or services” purchased by Summers.

According to Summers, she did not purchase the stone bench from StoneMor but from a third-party, and that third-party then installed the bench after paying StoneMor the fee.

The Supreme Court reiterated the standard of review in determining whether an arbitration agreement can be enforced. The party arguing for enforcement of the arbitration agreement has the burden of proving the existence of the agreement and that the contract involves interstate commerce. StoneMor introduced the contract as evidence.

To establish the contract involved interstate commerce, StoneMor presented evidence that a trust fund in Tennessee was used to maintain the funds paid by Summers and that the cemetery itself is maintained with equipment purchased outside Alabama. However, Summers did not challenge the enforceability of the arbitration agreement on either ground. Instead, she argued the subject matter of the dispute fell outside the subject matter of the arbitration agreement.

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The Supreme Court again reviewed the basic dispute (whether StoneMor was authorized to remove the stone bench) and the subject matter of the contract and the arbitration agreement. It then noted that, in arbitration agreements, the phrase “relating to” is given a broad interpretation. “Among the goods and services purchased by Summers from StoneMor was perpetual care of the two burial plots.” The Supreme Court then held that the right to remove the bench clearly fell within the subject matter of the arbitration agreement.

This reaffirmation of the Supreme Court’s interpretation of arbitration agreements stands as a reminder that valid arbitration agreements may be interpreted broadly. The lesson to learn here is that the language of arbitration agreements must be crafted carefully to ensure your objections are accomplished.

LITIGATION SPOTLIGHT

United States Supreme Court Addresses Pat Down of Passenger in Vehicle

Earlier this year, in Arizona v. Johnson, 129 S. Ct. 781 (2009), the United States Supreme Court further refined the law dictating when a police officer may conduct a pat down or “stop and frisk” of a passenger in a vehicle, holding that a passenger in a vehicle is subject to a pat down if there is reasonable suspicion he or she is armed and dangerous.

In Johnson, three police officers working on a gang task force were on patrol in a Tucson, Arizona, neighborhood associated with the Crips gang. The police officers pulled over an automobile after a license plate check revealed the vehicle’s registration had been suspended. Under Arizona law, driving a vehicle with a suspended registration is an offense warranting a traffic citation. At the time of the traffic stop, the vehicle had three occupants: the driver, a front-seat passenger, and a back-seat passenger, Johnson, the plaintiff in this case.

The driver was ordered out of the vehicle, while another police officer dealt with the front-seat passenger. Another police officer was focused on Johnson, whom she noticed kept looking back and watching all of the police officers closely. Further heightening the police officer’s suspicion was the fact Johnson wore clothing, including a blue bandana, consistent with Crips membership. The police officer also noticed a police scanner in Johnson’s front jacket pocket, which struck her as unusual. When the police officer questioned Johnson, he provided her with his name and date of birth, but had no identification. Johnson volunteered that he was from Eloy, a town home to the Crips gang, and that he had served time in prison for burglary for about a year. The police officer decided to question Johnson away from the front-seat passenger to possibly gain information about what gang with which he might be affiliated and asked him to get out of the vehicle.

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LITIGATION SPOTLIGHT

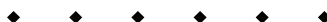
United States Supreme Court Addresses Pat Down of Passenger in Vehicle
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Because of the police officer's observations and Johnson's answers to her question, she suspected he may have a weapon on him. Therefore, the police officer conducted a pat down of Johnson when he exited the vehicle. During the pat down, the police officer felt the butt of a gun near Johnson's waist. At that point, Johnson began to struggle, and he was handcuffed. Johnson was charged with possession of a weapon by a prohibited possessor. At trial, Johnson argued the search of his person was unlawful and moved to suppress the gun as evidence. Johnson's motion to suppress was denied, and he was convicted of the gun-possession charge. Johnson appealed his conviction, and his case eventually made it to the Supreme Court.

The Supreme Court first reviewed its case law regarding investigative detentions and pat-down searches in the traffic-stop setting. In Pennsylvania v. Mimms, the Supreme Court held that, once a vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the car without violating the Fourth Amendment. Maryland v. Wilson applied the Mimms rule to passengers as well as to drivers. Specifically, the Supreme Court held that a police officer making a traffic stop may order passengers to get out of the car pending completion of the traffic stop. Completing the picture, Brendlin v. California held that, like the driver, a passenger is also seized from the moment a car stopped by a police officer comes to a halt on the side of a road; therefore, a passenger may challenge the legality of the traffic stop.

Drawing upon these cases, the Supreme Court observed that a lawful traffic stop begins when a vehicle is pulled over for investigation of a traffic violation. The seizure of both the driver and any passengers continues and ordinarily remains reasonable for the duration of the traffic stop. Police officers generally may inquire into matters not related to the justification of the traffic stop, as long as the inquiries do not measurably extend the duration of the stop. Furthermore, a traffic stop communicates to the passenger he or she is not free to leave. Applying these principles, the Supreme Court found that nothing occurred that would have conveyed to Johnson, prior to the pat down, he was free to leave. Moreover, the police officer was not required by the Fourth Amendment to give Johnson an opportunity to leave without first patting him down.

Johnson is a victory for police officers because it recognizes the need for officer safety in the traffic-stop setting, not just from drivers, but passengers too. Permitting a police officer to conduct a pat-down search of a passenger with reasonable suspicion he or she is armed and dangerous is another way for police officers to protect themselves.





HR CORNER

Third Circuit Case Highlights Breadth of FMLA Rights

A recent case from the Third Circuit Court of Appeals exemplifies the wide parameters of protection for employees under the Family Medical Leave Act (FMLA). An employee of Nationwide Insurance Company brought a claim under the FMLA after she was terminated following a request to take FMLA leave. The employee was terminated after her request to take leave was submitted in accordance with company procedures, but before she actually left work to commence the FMLA leave. The employee sued Nationwide, claiming that it interfered with her FMLA rights. She also claimed that the company retaliated against her by terminating her employment with the company. Nationwide argued that applicable case law among various circuit courts of federal appeals throughout the United States defines retaliation in terms of “having taken” an FMLA leave. As such, Nationwide argued that the employee’s FMLA retaliation claim should fail.

In its opinion, the Third circuit held that, to invoke rights under the anti-retaliation provision of the FMLA, an employee “takes” FMLA leave when she requests the leave and not later when the employee commences the leave. So, in addition to any claims the employee maintained for interference with her FMLA rights, the employee maintained a valid claim for retaliation.

Furthermore, the Third Circuit provided a good reminder regarding calculation of eligibility rights under the FMLA. Nationwide argued that the employee had not worked the requisite 1,250 hours to qualify for FMLA eligibility, and as such, could not make a valid claim under the FMLA. The Third Circuit notes that, according to federal regulations, all work that “the employer knows or has reason to believe . . . is being performed” counts toward the eligibility threshold requirement. (The Court cites 29 C.F.R. § 785.12.) Because this particular employee often worked from home, an issue arose regarding whether her home-based work hours counted toward the threshold. Nationwide argued that it did not have any notice of these hours worked, and as such, they did not count towards the employee’s eligibility. However, after reviewing e-mails between the employee and her management regarding work performed at home, the Court upheld the lower court’s determination that the company could have known about the hours worked and that the hours therefore counted towards eligibility for FMLA.

This holding serves as a reminder for employers in two ways: 1) all work time may count toward eligibility, whether the employer has an official record of the hours or not; and 2) employers should take care to document their legitimate business reasons for terminated employees who have requested FMLA leave, whether or not the leave has actually commenced. The FMLA is interpreted broadly both in the implementing regulations and by many circuit courts of appeal throughout the United States. As such, employers must ensure that proper paperwork and documentation is in place to protect their business decisions against employee claims.

PROTECTIVE MEASURES**LOCATION, LOCATION, LOCATION**

The proper location of a lawsuit is an important consideration, particularly in Alabama.

In Ex parte McKenzie, the Alabama Supreme Court ordered a trial court to transfer a lawsuit because it had been brought in the incorrect venue. Ex parte McKenzie, 2009 WL 3517604 (Ala. Oct. 30, 2009).

Tracey Booker sued Stacey McKenzie for damages arising from an automobile accident that she alleged occurred in Wilcox County. McKenzie moved to transfer the matter to Monroe County, where she lived and where the accident happened. To support her motion, McKenzie submitted the accident report and the affidavit of the investigating officer. Booker challenged the use of the accident report because, by statute, it is inadmissible. The trial court denied McKenzie's motion for change of venue.

The Court reviewed the statute setting the standard for venue (determined by the location of the incident or where the defendant resides). The Court also noted that the accident report was submitted only as evidence of the location of the accident and for no other reason. Because the location of the accident was within the personal knowledge of the investigating officer, the Court determined his affidavit and the accident report were evidence of the proper venue of the accident, in spite of the statute.

McKenzie had the burden of proving that venue in Wilcox County was improper, and she did so. Booker failed to rebut McKenzie's evidence. Therefore, the case was ordered to be transferred to Monroe County. In doing so, the Alabama Supreme Court again reminded the trial court that matters must be brought in the appropriate venue.





Fees & Burgess, P.C. — Calendar of Events

Fees & Burgess, P.C., is proud to present, or participate in the presentation of, the following upcoming seminars:

- Wednesday, January 20, 2010— Huntsville, Alabama, *[International Commercial Contracting: Identifying, Avoiding, and Managing Risk Areas](#)*, presented by Allen L. Anderson; Jeffrey L. Roth; Leah M. Green; and Ryan G. Blount of Fees & Burgess, P.C. This four-part course provides a practical introduction to international contracting, focusing particularly on risk identification and avoidance. Attendees will gain an understanding of the laws and provisions governing international agreements, and how international contractual relationships differ from domestic counterparts. The course will provide a solid grasp of the concepts, theories, and practical considerations necessary for drafting, interpreting, and negotiating international contracts. This course can be used toward ISM and NCMA credit.

Topics:

- What unique risks are involved with international contracts dealing with the sale of goods?
- How to identify, allocate, and manage risks in international contracting?
- Which laws apply to international contracts and when?
- What are the practical differences in drafting domestic and international contracts?
- How are disputes resolved between international contracting parties?
- How can a party secure the other party's performance?
- Will U.S. laws apply outside of the U.S. to international contracts?

Session 1: Introduction to International Contracting ~ February 17, 2010; 11:30 AM - 1:00 PM CST [Click here for details.](#)

Session 2: Drafting 101 ~ March 17, 2010; 11:30 AM ~ 1:00 PM CST [Click here for details.](#)

Session 3: Drafting 101 *Continued* ~ April 21, 2010; 11:30 AM ~ 1:00 PM CST [Click here for details.](#)

Session 4: Special Considerations in International Contracting ~ May 12, 2010; 11:30 AM ~ 1:00 PM CST [Click here for details.](#)

For more information on these and other seminars, please go to <http://www.feesburgess.com/category/events-seminars/> or contact Sylvia Taylor at staylor@feesburgess.com.



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SPEAKERS

Fees & Burgess, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program contact Sylvia Taylor at staylor@feesburgess.com.

NEWSLETTERS

Fees & Burgess, P.C., also publishes *F&B HR Corner*, focusing on human resource issues; and *F&B SCM Memo*, focusing on the supply chain management industry. To receive any of these e-newsletters, please e-mail Sylvia Taylor at staylor@feesburgess.com with your contact information.

To remove your name from our mailing list, please e-mail staylor@feesburgess.com.

Michael L. Fees
mfees@feesburgess.com

C. Gregory Burgess
gburgess@feesburgess.com

Allen L. Anderson
anderson@feesburgess.com

Jeffrey L. Roth
jroth@feesburgess.com

FEES & BURGESS, P.C.
213 Green Street
Huntsville, Alabama 35801

Telephone (256) 536-0095
Facsimile (256) 536-4440

www.feesburgess.com

Stacy L. Moon
smoon@feesburgess.com

Leah M. Green
lgreen@feesburgess.com

Nori D. Horton
nhorton@feesburgess.com

Ryan G. Blount
rblount@feesburgess.com

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“No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”

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