2013 WL 10371746 (Ala.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Alabama.
Jefferson County

Myrtice L. HOUSTON by and through, Richard Houston as
Administrator of The Estate of Myrtice L. Houston, Plaintiff,
v.
BIRMINGHAM REGIONAL PARATRANSIT, CONSORTIUM d/b/a ClasTran, et al., Defendant(s).

No. CV-2011-901665.
April 26, 2013.

Defendant's Brief Regarding Hearsay Testimony

William S. Crowson (CRO058), for defendants.

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COME NOW, the Defendants in the above-referenced claim and, pursuant to the request of the Court, submit this brief with regard to the hearsay testimony of Plaintiff, Richard Houston regarding the occurrence made the basis of this lawsuit. At the recent hearing on the Defendant's Motion to alter, amend, or vacate the judgment previously entered by the Court, the Court indicated that it agreed that the testimony of Richard Houston, with regard to how the incident made the basis of the claim occurred, was hearsay pursuant to the Alabama Rules of Evidence. The Court then indicated that it wished to be briefed with regard to whether or not the statement allegedly made by Mrs. Houston and repeated by Plaintiff Richard Houston fell into any exception to the hearsay rule in Alabama. As the Court indicated that it agreed that the statement was hearsay, the Defendants will not address that issue but will, instead, address the issue of whether or not the statement fell within any of the exceptions to the hearsay rule. More specifically, the Defendants will address the issue of whether or not the statement would be subject to the res gestae doctrine.

FACTS

On the date that this alleged incident occurred, Defendant John Belser had picked up Mrs. Myrtice Houston at the Dialysis Center on the former Carraway Methodist Hospital campus located at 1600 Carraway Boulevard in Birmingham, Alabama. Mr. Belser testified that the alleged incident involving Mrs. Houston had occurred just blocks from the campus. Following the incident, he drove to the McCoy Community Center at 730 Eighth Avenue West in Birmingham, where he picked up Mr. John Dotson. This was a distance of 3.88 miles. After picking up Mr. Dotson, he then traveled to the 2121 Building, located at 2121 Reverend Abraham Woods, Jr. Boulevard. This is a distance of 2.5 miles from the McCoy Community Center. At that point, he assisted Mr. Dotson, who is an **elderly** Alzheimer's patient, out of the van and into a private vehicle. At that point, Mr. Belser departed from the 2121 Building and traveled 13.38 miles to the Candy Mountain Apartments located at 105 Candy Mountain Road in Birmingham, Alabama. (See MapQuest documents attached as Exhibit A.) Once arriving at the Candy Mountain Apartments, he assisted Mrs. Houston from the ClasTran van and, at that point, Plaintiff Richard Houston took control of Mrs. Houston's wheelchair and began moving toward the couple's apartment.

The total distance traveled by John Belser with Mrs. Myrtice Houston in the ClasTran van following the incident was 19.76 miles. In addition, there were two intermediate stops, where Mr. Belser assisted into and out of the van an **elderly** Alzheimer's patient.

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ARGUMENT

While the Court indicated at the hearing that the issue to be addressed was whether or not the statement made by Plaintiff Richard Houston fell within the "res gestae", Defendants wish to point out that this exception historically existed at common law. However, it has received considerable criticism since the adoption of the Alabama Rules of Evidence. As stated by Professor Gamble, "The judicially created res gestae exception may not have survived 'the enactment of the hearsay provisions in the Alabama Rules of Evidence because it is not expressly included in them'." Charles W. Gamble, *McElroy's Alabama Evidence* § 262.01(2). Further, in the committee comments to Rule 803(2), Ala. R. Evid., the committee expressed its preference for terms other than the term "res gestae" in connection with the hearsay exception in Rule 803(2). Criticism of the use of the "res gestae" exception has been voiced by the Alabama Supreme Court for over a century. Citing Professor Wigmore, the Alabama Supreme Court stated that, "The term 'res gestae' is one of 'convenient obscurity', and is wholly unnecessary as an explanation of the testimonial use of declarations made out of Court. It has, in fact, too often served only to obscure the real principles upon which such declarations may be properly admitted as evidence of the truth of the facts declared." *Illinois Central R.R. v. Lowery,* 63 So. 952(Ala. 1913).

As the Appellant Courts in Alabama have criticized the "res gestae" doctrine both before and after the adoption of the Alabama Rules of Evidence, the statement made by Plaintiff Richard Houston must be analyzed in the context of the exceptions to the hearsay rule as enumerated in the Alabama Rules of Evidence. The only possible exceptions would be pursuant to Alabama Rule of Evidence § 803(1), Present Sense Impression, or Alabama Rule of Evidence 803(2), Excited Utterance.

Rule 803(1) allows for admission of hearsay statements whenever it constitutes a present sense impression. "In terms of the subject matter scope of the exception, such a statement must either describe or explain an event or condition, and the exception carries a timing requirement that the statement be made either while the declarant is perceiving or immediately after perceiving the event or condition." Charles W. Gamble, Gamble's Alabama Rules of Evidence § 803(1) page 342 (Second Edition 2002).

Clearly, the statements allegedly made by Myrtice Houston to Plaintiff Richard Houston were not present sense impressions, as the statement did not describe or explain an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. The statement was allegedly made by Myrtice Houston after she had traveled more than 20 miles with two intermediate stops. Even if the vehicle operated by Mr. Belser had been traveling at a constant speed of 55 miles an hour, the conversation could not have taken place within 20 minutes of the alleged occurrence. This would not comply with the advisory committee notes to Rule 803(1) in that "the event and the statement that describes or explains the event must be substantially contemporaneous." Ala. R. Evid. 803(1) Advisory Committee notes.

As the hearsay statement of Richard Houston does not fall within the present sense impression exception as set out in Rule 803(1), the only other exception would be pursuant to Alabama Rule of Evidence 803(2) as an excited utterance. The Alabama Rules of Evidence state that an excited utterance is "a statement relating to a startling event or condition made while the Declarant was under the stress of excitement caused by the event or condition." Ala. R. Evid. § 803(2). In order for a hearsay statement to be admissible pursuant to Rule 803(2) it must be made while the speaker is under the stress of the nervous excitement created by the perception of the startling occurrence. Charles W. Gamble, *Gamble's Alabama Rules of Evidence,* 803(2) at page 344. As pointed out by Professor Gamble, the "key ingredient in recognition of the present hearsay exception is spontaneity." *Id.* at page 345.

Admissibility of statements pursuant to the excited utterance exception depend largely on whether the declaration was produced by an instinct upon the startling event as opposed to a retrospective narration of the event. *Nelson v. State,* 130 Ala. 83, 30 So. 728 (1901). In discussing acts or statements accompanying or connected with an event, the Alabama Supreme court has stated:

> '[i]t is difficult, if not impossible, to accurately define the principle of Res gestae, as it is often called. It is commonly said to have reference to such circumstances and declarations as are Contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character. 1 Greenl. Ev. s

> 108. What lapse of time is embraced in the word 'contemporaneous,' is often a question of difficulty. Perfect coincidence of time between the declaration and the main fact is not, of course, required. It is enough that the two are substantially contemporaneous; they need not be literally so. The declarations must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as to virtually constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the earmarks of a device, or afterthought, nor be merely narrative of a transaction which is really and substantially past. (Citations Omitted)

Alabama Power Company v. Sellers, 283 Ala. 137, 214 So. 2d 833, 837-838 (1968). See also, Harrison v. Baker, 260 Ala. 488, 71 So. 2d 284, 288-289 (1954).

The trial court, in determining whether the statement was made spontaneously, ought to consider at least the following: the degree of startlingness of the occurrence; how much time passed after the occurrence but before the statement was made; the affect of intervening events; the nearness of the place where the statement was made to the place of the occurrence; the condition of the declarant; the content of the statement itself; and all other facts relating to whether the declarant was under the stress of a nervous excitement at the time he made the statement. *McElroy's* § 265.01(2).

In the instant case, the event giving rise to the lawsuit and the statement allegedly made by Myrtice Houston to Richard Houston had to have occurred at least 30 minutes after the alleged event happened and more likely closer to an hour after the alleged event happened. In addition to the distance traveled and the time it took to travel from the Dialysis Center to the McCoy Center back to the 2121 Building and then onto the Candy Mountain Apartments, a distance in excess of 19 miles, there were two intervening stops where an **elderly** Alzheimer's patient had to be assisted onto the van and off of the van. Additionally, there was testimony offered by Jonifer Dotson that she had spoken with the deceased Myrtice Houston and that Ms. Houston did not tell her that she had been thrown into the floor of the van, nor did she indicate that she needed any attention for any condition relative to the alleged incident.

Plaintiff Richard Houston testified that after he took his wife into the apartment that she only told him of the incident after he asked her how she was doing. There was no testimony offered by Mr. Houston that she was in an agitated state or that she appeared to be under any sort of stress. There was no evidence presented to support the contention that Ms. Houston was under the stress of a nervous excitement at the time that she allegedly made the statement giving rise to the hearsay testimony of Richard Houston. This alleged statement was merely a narrative of a transaction or event which occurred in the past. As such, the alleged statement is not admissible pursuant to the excited utterance exception to the hearsay rule. Further, it does not fall within the res gestae of the incident as it was too remote in time to be considered virtually part of the same transaction or event.

SUMMARY

The Court has already acknowledged that the testimony of Richard Houston with regards to how the alleged event on the ClasTran van occurred was hearsay. The question before the Court is simply whether or not the statements made by Mr. Houston in Court and in front of the jury are admissible pursuant to the exceptions to Alabama's hearsay rule. As previously pointed out, the alleged statement of Mrs. Houston was not admissible pursuant to Rule 803(1) as a present sense impression since the statement made by Ms. Houston was too remote in time. The only other exception would be pursuant to Rule 803(2) as an excited utterance. Clearly, the Plaintiff has not offered any evidence that Ms. Houston was in an excited, nervous or stressful state at the time that the statement was made. The theory underlying the exception to the hearsay rule is that in the heat of excitement statements were made that negate reflection and must preclude conscious fabrication and guarantee trustworthiness. (See, Advisory Committee's notes to Ala. R. 803(2)). The evidence presented at trial does not support the contention that any alleged statement made by Mrs. Houston was an excited utterance in that the statement was made remotely in timed to

the incident; it was made approximately 20 miles away from where the incident occurred; and there had been a telephone conversation in the interim with another individual regarding the incident and there was no mention made of the statement as presented by Plaintiff Richard Houston. If the alleged statement was made by Mrs. Houston, it would simply be a narrative of a past event, which would not be a part of the res gestae of the incident, nor would it fall within any of the exceptions to the hearsay Rule.

The Defendants acknowledge that the Court has discretion with regards to the admission of hearsay testimony pursuant to the excited utterance exception. However, in the instant case to allow this testimony was an abuse of discretion in that the statement cannot be said to have fallen within the res gestae of the incident, nor was it subject to any of the hearsay exceptions. It was merely a narrative of a past event. As the testimony went to the ultimate issue in the case, it cannot be said to have been harmless error. As such, the Defendants request that the Court grant the Motion to Vacate the judgment previously entered and set the case for a new trial.

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