



AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: DEAN MICHAEL GREGORY
mdean@ago.state.al.us

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

STATE OF ALABAMA ET AL V. AMERICAN PLUMBING AND SEPTIC SERVICE, LLC E
11-CV-2018-900431.00

The following matter was FILED on 9/4/2018 4:38:34 PM

D001 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC

D002 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC

D004 PESNELL JESSICA

D005 PESNELL RICHARD G

D003 PESNELL RICHARD JOSHUA

MOTION TO DISMISS PURSUANT TO RULE 12(B)

[Filer: GRESHAM COLE ROBINSON]

Notice Date: 9/4/2018 4:38:34 PM

KIM MCCARSON
CIRCUIT COURT CLERK
CALHOUN COUNTY, ALABAMA
25 WEST 11TH STREET
ANNISTON, AL, 36201

256-231-1750
Kim.McCarson@alacourt.gov



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CIRCUIT COURT OF
CALHOUN COUNTY, ALABAMA
KIM MCCARSON, CLERK

STATE OF ALABAMA

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Unified Judicial System

11-CALHOUN

District Court Circuit Court

CV21

CIVIL MOTION COVER SHEET

STATE OF ALABAMA ET AL V. AMERICAN PLUMBING AND SEPTIC SERVICE, LLC E

Name of Filing Party: D001 - AMERICAN PLUMBING AND SEPTIC SERVICE, LLC
D002 - AMERICAN PLUMBING AND SEPTIC SERVICE, LLC
D003 - PESNELL RICHARD JOSHUA
D004 - PESNELL JESSICA
D005 - PESNELL RICHARD G

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

COLE ROBINSON GRESHAM
100 BROOKWOOD PL. 7TH FL.
BIRMINGHAM, AL 35209

Attorney Bar No.: GRE127

Oral Arguments Requested

TYPE OF MOTION

Motions Requiring Fee

Motions Not Requiring Fee

- Default Judgment (\$50.00)
Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative Summary Judgment (\$50.00)
- Renewed Dispositive Motion (Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56 (\$50.00)
- Motion to Intervene (\$297.00)
- Other _____ pursuant to Rule _____ (\$50.00)

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other _____

*Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

Local Court Costs \$ 0

pursuant to Rule _____ (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees)

Date:
9/4/2018 4:36:15 PM

Signature of Attorney or Party
/s/ COLE ROBINSON GRESHAM

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.
**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.



IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs.

AMERICAN PLUMBING AND SEPTIC
SERVICE, LLC, et al,

Defendants.

CASE NO CV18-900431

DEFENDANTS' MOTION TO DISMISS

COME NOW, American Plumbing and Septic Service, LLC, American Drain Cleaning & Plumbing Service, Richard J. Pesnell (“Josh Pesnell”), Jessica Pesnell, and Richard G. Pesnell (collectively “Defendants”) and, pursuant to Rule 12(b)(6) of the *Alabama Rules of Civil Procedure*, respectfully request that this Court dismiss all of the claims against Jessica Pesnell and Richard G. Pesnell, and that the Court dismiss Counts 90-92, 99-103, 107-123, 131-133, 136-143, 148-157, 170-178, and 187-188 as to all Defendants. As grounds for this Motion, Defendants state as follows:

DISCUSSION

- 1. THE CLAIMS AGAINST RICHARD AND JESSICA PESNELL ARE DUE TO BE DISMISSED BECAUSE THEY ARE NOT OWNERS OF AMERICAN PLUMBING, AND THE COMPLAINT FAILS TO ALLEGE ANY CLAIM AGAINST EITHER OF THEM UPON WHICH RELIEF MAY BE GRANTED.**

The State filed its Complaint against the Defendants on the premise that all of the Pesnells’ are owners of American Plumbing. The State’s premise, however, is flawed. Jessica and Richard Pesnell do not own or control American Plumbing. (*See* Affidavit of Richard Joshua Pesnell ¶¶3-5, attached as Exhibit “1” to Doc. 174) The fact is that Josh

Pesnell is the sole owner of American Plumbing and Richard and Jessica are merely employees. (*Id.*) Given their lack of ownership and control, Jessica and Richard Pesnell cannot be said to have directed or controlled any of the allegations made in the Complaint. The only direct allegations the Complaint makes against Jessica and Richard Pesnell relate to the allegedly unlicensed electrical work done at the home of Gerald Price. Doc. 2 at ¶¶ 25 and 40. These allegations, however, are not sufficient to state a claim against either Jessica or Richard Pesnell.

The Complaint alleges that Richard Pesnell “personally supervised unlicensed electrical work performed by American Plumbing at the home of retired veteran Gerald Price in Anniston” Doc. 2 at ¶ 40. The affidavit relied upon by the State, however, clearly states that it was Michael Young who performed the allegedly unlicensed electrical work. Ex. 26 to the Compl. at ¶ 8. Given that Richard Pesnell did not actually perform the work and that he does not own or control American Plumbing, there is no legal basis for holding him liable for the allegedly unlicensed work performed by someone else.

The Complaint alleges that Jessica Pesnell told Gerald Price, after the alleged unlicensed work had been performed, that “their plumbers were allowed to do electrical work of this nature, and that there is no requirement to have an Electrical License to do so.” Doc. 2 at ¶ 25. Even if this allegation were true, however, it cannot constitute an alleged violation of the Deceptive Trade Practices Act (“DTPA”). The State has alleged that this statement occurred after the allegedly defective work had already occurred, meaning that any injury that may have been suffered by Mr. Price had already occurred. As a result, the State’s sole direct allegation against Jessica Pesnell is insufficient to state

a claim given that there is no claim that her actions caused any actual harm to the consumer. *See* ALA. CODE § 8-19-10(a) (requiring monetary damages for a claim under the DTPA).

2. FIFTY-SEVEN OF THE COUNTS IN THE STATE’S COMPLAINT ARE BARRED BY THE DTPA’S ONE-YEAR STATUTE OF LIMITATIONS.

According to the DTPA, “No action may be brought under this chapter more than one year after the person bringing the action discovers or reasonably should have discovered the act or practice which is the subject of the action” ALA. CODE § 8-19-14. This section applies to the State because it brings this case “in a representative capacity on behalf of any named persons.” ALA. CODE § 8-19-10(g). While, the discovery rule is typically a question for the jury, it may be decided as a matter of law where “the plaintiff actually knew of facts that would have put a reasonable person on notice” *Holmes v. Behr Process Corp.*, No. 2:15-CV-0454-WMA, 2015 WL 7252662, at *2 (N.D. Ala. Nov. 17, 2015) (finding—at the motion to dismiss stage—that the plaintiff’s DTPA claim was barred by the statute of limitations where the allegations of the complaint demonstrated the plaintiff’s knowledge of the alleged trade practice more than one year prior to the filing of the complaint). Here, the affidavits of Kenneth Barnett, Dr. Roger Buck, Randy Carroll, Marlene Carson, Dana Cleveland, Connie Elder, Carol Farrell, Keith Ingram, Linda Lambert, Cynthia Mahaffey, Stuart McCormack, Shirley McKerley, Scott Naden, Donald Vaughan, Bernard Versansky, and Maura Williams all demonstrate that each of these individuals had knowledge of the alleged deceptive trade practices as soon as the Defendants completed the job. *See* Exhibits to the Complaint 5, 7, 9-13, 16, 18-19, 21-23,

27-28, and 31. Therefore, Counts 90-92, 99-103, 107-123, 131-133, 136-143, 148-157, 170-178, and 187-188 are barred by the statute of limitations as to all of the Defendants.

CONCLUSION

Each of the allegations against Richard and Jessica Pesnell are due to be dismissed as they do not own or control American Plumbing, and the sole direct allegation against them fails as a matter of law. Additionally, Counts 90-92, 99-103, 107-123, 131-133, 136-143, 148-157, 170-178, and 187-188, are due to be dismissed as to all Defendants given that they are barred by the DTPA's one-year statute of limitations.

Dated: September 4, 2018

Respectfully submitted,

/s/ Tabor R. Novak III

Tabor R. Novak III (ASB-3580-B60N)

J. Scott Dickens (DIC023)

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing with the Clerk of the Court using the Ala-File system to the following:

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/s/ Cole R. Gresham
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