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November 9, 2004

OF COUNSEL:  
JACK H. HARRISON

The Honorable David J. Evans, Jr.  
Marshall County Courthouse  
425 Gunter Avenue  
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Re: Keith Kubert v. Tobby Scheer, Philip Fraley and Adobe, Inc., d/b/a Amerispec  
Home Inspection Service  
Circuit Court of Marshall County, Alabama, Guntersville Division  
Civil Action No. CV-04-0244  
Our File No. 1171-7

Dear Judge Evans:

As you know, I have filed a Motion to Dismiss the above referenced action on behalf of defendants Adobe, Inc. d/b/a Amerispec Home Inspection Service and Philip Fraley. The basis of that Motion is the fact that Mr. Kubert had already released Mr. Fraley and Adobe/Amerispec from any liability in this action prior to the filing of the Complaint. That Release is effective to Mrs. Kubert as well, as Mrs. Kubert has only sued as a third party beneficiary to the contract between Mr. Kubert and Mr. Fraley for a home inspection.

In response to the Motion to Dismiss, plaintiff's counsel attempted to argue that Mr. Kubert was fraudulently induced into signing the Release, because Mr. Fraley was aware that there were significant problems with the house. In turn, I argued on behalf of the defendants that such an allegation was insufficient to establish fraud in the inducement.

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On October 1, 2004, approximately one month ago, the Alabama Court of Civil Appeals issued a ruling which establishes our position in this case as a correct statement of law.

In the case of Anderson v. Amberson and Amberson Construction, Inc., Case No. 2030544 (Ala. Civ. App. 10-1-2004), the Court of Civil Appeals had an opportunity to review a nearly identical question. In that case, a contractor fraudulently billed the plaintiff for change orders on a home which never took place. The facts of that case are fairly egregious. In short, the plaintiff's wife and the contractor were romantically involved. The contractor billed the plaintiff for change orders, then passed the money on to the wife who used the proceeds to pay for a divorce attorney.

The plaintiff apparently did not learn of the above described conduct until after he had signed a release arising out of an argument over timeliness of payments for the construction. Despite having signed a release, the plaintiff filed a fraud claim against the contractor Richard Amberson and his company Amberson Construction, Inc. However, as a result of the release, the Circuit Court of Shelby County entered summary judgment in favor of the defendants. The plaintiff argued that summary judgment should not be granted because he was fraudulently induced into signing the release. Specifically, the plaintiff claimed that he was fraudulently induced into the signing the release because he was deceived as to the quality of the construction. This is the exact same "fraudulent inducement" claim that plaintiff Keith Kubert makes in the case at bar.

The Court of Civil Appeals upheld summary judgment in favor Amberson and Amberson Construction pointing out that the plaintiff could not have been fraudulently induced as to the quality of the home due to the fact that his release indicated that the plaintiff was aware that the house contained certain defects.

Similarly, in the case before this Court, Mr. Kubert signed a release verifying that he was aware of the defects which he now complains of. Specifically, the release states "you [Keith Kubert] accuse me [Philip Fraley/Adobe/Amerispec] of negligence on the subject inspection and I [Philip Fraley and Adobe/Amerispec] deny negligence however noting problems do exist." The release further makes it clear that the release serves to discharge both Mr. Fraley and Adobe/Amerispec of any liability for damages, whether known or

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unknown, including any deficiencies in the physical condition of the property. (See Release at paragraphs 1 and 3).

Given the Court of Civil Appeals recent holding the Anderson v. Amberson and Amberson Construction, Inc. case, a copy of which is attached hereto, there can be no question that the Release signed by Mr. Kubert in this case is valid and his claims must be dismissed or in the alternative summary judgment must be granted. I have attached a copy of the case for your convenience.

Please feel free to contact me with any questions you may have with regard to the enclosed case law. I appreciate your time and attention to this matter.

Sincerely,

**SCOTT, SULLIVAN, STREETMAN  
& FOX, P.C.**

Joseph E. Stott

JES:lby

Enclosure

cc: Elisa Smith Rives, Esq.  
P. Scott Arnston, Esq.