

**N THE CIRCUIT COURT OF MARSHALL COUNTY, ALABAMA  
GUNTERSVILLE DIVISION**

KEITH A. KUBERT, et. al.	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	
	)	CV-04-0244
TOBYE SCHEER, et. al.	)	
Defendants.	)	
	)	

**PLAINTIFFS' MOTION TO CONTINUE**

COME NOW plaintiffs, Keith A. and Brenda C. Kubert, and move this court pursuant to Alabama Rules of Civil Procedure Rule 56(f) to deny Defendant's Motion to Dismiss or in the alternative defer ruling until discovery is complete. As grounds for said motion plaintiffs state as follows:

1. On June 4, 2004, the above styled matter was filed.
2. Defendant Adobe, Inc., filed a Motion to Dismiss on July 19, 2004, alleging that the above styled matter should be dismissed for failure to state a claim because this defendant by and through its agent Mr. Philip Fraley (hereinafter "Mr. Fraley") obtained a release from Mr. Keith Kubert. Additionally, defendant attached material that would be "materials outside the pleading" if considered by the court that would automatically convert the defendant's Motion to Dismiss under Alabama Rules of Civil Procedure Rule 12(b) into one for summary judgment under Rule 56.
3. On August 26, 2004, oral argument was heard on defendant's Motion to Dismiss.
4. On August 31, 2004, counsel for the Kuberts submitted a brief in opposition to defendant's motion to dismiss.
5. On September 2, 2004, counsel for defendant, Adobe/Amerispec, submitted a letter brief in support of its motion.
6. Defendant cites Alabama Code § 7-3-310 and an Alabama Court of Civil Appeals Cases, *Spencer v. West Alabama Properties, Inc.*, 564 So.2d 425 (Ala. 1990), in opposition to plaintiffs' position that

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the release was invalid because there was no consideration for the release because the check given to the Mr. Kubert was never signed and cashed and because Mr. Fraley fraudulent induced Mr. Kubert to sign the release knowing that Amerispec's agent wantonly and fraudulent concealed major defects in the home and fraudulently misrepresented the home's condition and that despite language in the contract regarding negligence, the Kuberts in fact had a cause of action against Amerispec.

7. On November 9, 2004, counsel for Adobe/Amerispec submitted a second letter brief in support of its motion to dismiss citing a recent Alabama Court of Civil Appeals case *Anderson v. Amberson and Amberson Construction, Inc.* 2004 WL 2201250 (Ala. Civ. App. October 1, 2004).
8. Defendant cite *Anderson v. Amberson and Amberson Construction, Inc.* 2004 WL 2201250 (Ala. Civ. App. October 1, 2004), for the proposition that the motion to dismiss should now be granted or in the alternative the court should grant summary judgment against the Kuberts because the Alabama Court of Civil Appeals granted summary judgment in *Anderson* when the plaintiff failed to present substantial evidence to support a claim that the company fraudulent induced him to sign the release agreement.
9. Should the court decide to consider the material submitted by the defendant thereby automatically converting defendant's motion into one for summary judgment then plaintiffs cannot without the opportunity for sufficient discovery present evidence in opposition, and for that reason and for the reasons stated herein and in their Letter Brief in Support of Motion to Continue and in Opposition to Defendants' Motion to Dismiss, ask that the court grant the motion to continue.
10. Furthermore, defendant in passing during both oral argument and in both letter briefs states as a matter of fact that plaintiff, Brenda C. Kubert, is suing as a third party beneficiary to the contract between Mr. Kubert and Mr. Fraley for a home inspection.
11. Plaintiff, Brenda C. Kubert, is not a third party beneficiary to the contract with the defendant, Adobe, Inc. a/k/a Amerispec, for the inspection of the home at 980 Huntington Circle, Arab, Alabama because Brenda C. Kubert owns the hom, and the defendant, Ms. Tobbye Scheer, as agent for Brenda C. and Keith A. Kubert hired Amerispec to inspect the home. Brenda Kubert is not suing the defendant as a third party beneficiary.
12. Plaintiffs have alleged counts of fraudulent suppression and fraudulent misrepresentation.
13. Plaintiffs are entitled discovery on the issue of whether Mr. Fraley knew

at the time that he induced Mr. Kubert to sign the release that Amerispec's agent engaged in fraudulent and wanton conduct to conceal certain defects in the home, and that as a result Mr. Fraley's misrepresentation to Mr. Kubert that the only recourse against the defendant was a return of the contract price, Mr. Kubert signed the release.

WHEREFORE, plaintiffs, Keith A. Kubert and Brenda C. Kubert, respectfully request that the court deny defendant's Motion to Dismiss and grant plaintiffs' Motion to Continue allowing discovery.

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing as been served on counsel for defendants and pro se defendants at addresses listed below by placing a copy of the same in the United States Mail on this 18th day of November, 2004.

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