IN THE ALABAMA COURT OF CIVIL APPEALS

***Ex parte* DEBORAH HABEB,**	)	
	)	
Petitioner.	)	**CIVIL APPEALS CASE NO.**
	)	**2110060**
Re:	)	
	)	
DEBORAH HABEB,	)	**MOBILE CIRCUIT COURT**
	)	**CIVIL ACTION NO.**
vs.	)	**CV-10-902267**
	)	**Judge John Lockett**
ACCOR NORTH AMERICA,	)	
et al.	)	

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Thomas F. Campbell (CAM036)
D. Keiron McGowin (MCG058)
Attorneys for Petitioner
DEBORAH HABEB

OF COUNSEL:
CAMPBELL LAW
A Professional Corporation
One Chase Corporate Drive, Suite 180
Birmingham, AL 35244
Telephone: (205) 278-6650
Facsimile: (205) 278-6654
tcampbell@campbelllitigation.com
kmcgowin@campbelllitigation.com

IN THE ALABAMA COURT OF CIVIL APPEALS

***Ex parte* DEBORAH HABEB,**	)	
	)	
Petitioner.	)	**CIVIL APPEALS CASE NO.**
	)	**2110060**
Re:	)	
	)	
DEBORAH HABEB,	)	**MOBILE CIRCUIT COURT**
	)	**CIVIL ACTION NO.**
vs.	)	**CV-10-902267**
	)	**Judge John Lockett**
ACCOR NORTH AMERICA,	)	
et al.	)	

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Thomas F. Campbell (CAM036)
D. Keiron McGowin (MCG058)
Attorneys for Petitioner
DEBORAH HABEB

OF COUNSEL:
CAMPBELL LAW
A Professional Corporation
One Chase Corporate Drive, Suite 180
Birmingham, AL 35244
Telephone: (205) 278-6650
Facsimile: (205) 278-6654
tcampbell@campbelllitigation.com
kmcgowin@campbelllitigation.com

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

I. SUMMARY OF THE ARGUMENT 1

II. ARGUMENT 6

A. The Trial Court and Clerk Lacked Discretion to Refuse to Enter Judgment Because Accor Claims Not to Have Understood the Consequence of the Offer It Drafted 6

B. Accor's Proposal to Ignore Recent Precedent and Adopt a New Rule That Offers Made Pursuant to Rule 68 Imply Inclusion of Attorney Fees Would Create a Morass of Inconsistent Rules for Alabama Lawyers to Follow 10

C. Accor's Argument that Attorney Fees Cannot Be Part Of Its Offer Because A DTPA Claim is Inconsistent With Pleading Fraud Is Barred By the Invited Error Doctrine 21

TABLE OF AUTHORITIES

Cases **Page**

Ala. Ins. Guar. Ass'n v. Ass'n of Gen. Contractors Self-Insurer's Fund, _ So. 2d_, 2010 WL 4777547, 19 (Ala. 2010) 22

Auburn Engineers, Inc. v. Downtown Properties #1, 675 So.2d 415 (Ala. 1996) 7, 8

Bennett v. Bennett, 506 So. 2d 1021 (Ala.Civ.App. 1987) 22

Corley v. Epperson, 353 So.2d 794 (Ala. 1978) . . 6, 9

Davis v. Childers, 381 So. 2d 200 Ala.Civ.App. 1979) 23, 26

Hines v. Riverside Chevy-Olds, 655 So. 2d 909 (Ala. 1994) 25, 26

Horn v. City of Birmingham (Horn I), 648 So.2d 607 (Ala.Civ.App. 1994) 15, 21

Louisville & N. R. Co. v. Hurt, 13 So. 130 (Ala. 1893) 24

McCain v. Detroit II Auto Finance Center, 378 F. 3d 561 6th Cir., 2004) 12

Mitchell v. State Farm Mutual Auto. Ins. Co., 2011 Ala. Civ. App. LEXIS 274, _So. 3d_, (Ala.Civ.App. 2011) 3, 14, 15

Mobile Infirmary Med. Ctr. V. Hodgen, 884 So. 2d 801 (Ala. 2003) 24

Steele v. Rosenfeld, LLC, 936 So.2d 488 (Ala. 2005). 22

Utility Automation 2000, Inc. v. Choctawhatchee Electric Cooperative, Inc., 298 F. 3d 1238 (11th Cir., 2002) 13, 15, 20

Western Union Telegraph Co. v. Griffith, 50 So. 91 (Ala. 1909) 24

Rules **Page**

Rule 8, *Ala.R.Civ.P* 26

Rule 12(c), *Ala.R.Civ.P* 17

Rule 54, A*la.R.Civ.P* 18

Rule 55, *Ala.R.Civ.P* 7, 17

Rule 68, *Ala.R.Civ.P* 1, 3, 6, 7, 11, 13, 14, 15 16, 19, 20, 24

Rule 68, *Fed.R.Civ.P* 13, 14

I. SUMMARY OF THE ARGUMENT

The three prongs of Accor's argument share a fatal premise: The Appeals Court should twist the law to effectively re-write the terms of a bad deal Accor made when it failed to appreciate the legal consequence that befalls any defendant who fails to explicitly address all three of the items that usually appear in an *ad damnum* clause: money damages, costs, and attorney fees. The final two are typically dealt with post-judgment.

First, Accor's proposition that trial courts are allowed to interfere with Rule 68 offers of judgment for any reason deemed "just" is simply unsupported by the holding of the cases it cites; the proposition is also bad policy anathema to basic tenants of the law. The two opinions it cites actually explain in clear terms that discretion is narrowly limited to setting aside offers infected with fraud or clerical mistakes (which are not even alleged or cited by Judge Lockett below) or when entry of the judgment needs to be delayed in multi-party cases to protect the interests of non-parties to the offer of judgment (here are only Ms. Habeb and Accor). More to the point, the cases do

not provide any straight-faced argument that trial courts have discretion to permit backing-out terms parties regret that result from their own failure to carefully draft offers or to understand basic rules of construction easily found by cursory legal research. Accor essentially concedes in this case that it guessed, based upon seat-of-the-pants belief about "common sense," that if it set the monetary amount of the judgment and dealt with costs, a request for attorney fees in the *ad damnum* clause would just disappear. That is not a lack of meeting of the minds, it is a mistake on one side based on an incorrect hunch.

Moreover, changing the law to allow trial courts broad discretion to edit away one-sided "mistakes" of law like this would be bad public policy. For a legal and commercial system to thrive, it has to be based on predictability. The legal system unravels when judges have discretion to excuse alleged unilateral mistakes of law. The system is then based on who can convince a judge that it is fair to get out of regrettable offers rather than a predicable outcome based on the rule of

law. If deals can be unwound because one side convinces a local trial court it was under a unilateral mistake of law, no businessman or litigant could predict which agreements will be enforced and which will be excused. Both offers under Rule 68 and other private contracts would have no meaning.

Second, Accor argues that rather than follow the principles of construction this Court explained months ago in *State Farm,* a new rule should be adopted that would imply into every offer of judgment that lawyers will not get paid for the work they do to get a judgment. *Mitchell v. State Farm Mutual Auto. Ins. Co.*, [No. 2100184, October 7, 2011], 2011 Ala. Civ. App. LEXIS 274, So. 3d (Ala. Civ. App. 2011). The hook for the argument is the erroneous claim that the Sixth Federal Circuit follows a rule that all offers of judgment imply coverage of fees. The case does not say that. Even if this were the rule, adopting it would be terrible public policy in Alabama. Under present rules in Alabama and in both state and federal courts, the law is to the contrary and in harmony. Adopting Accor's argument would mean lawyers and lay business

owners would have to follow three different rules of construction depending upon where a potential or pending dispute exists. Accor claims that existing law in Alabama and in the Eleventh Circuit does not make "common sense" so there should be three inconsistent rules instead to avoid "trapping" other lawyers and clients who draft offers based on hunches and gut feelings about common sense. It may seem "fair" to give breaks to litigants who make a regrettable tactical or drafting decision that is based upon the wrong intuition about how precise drafting must be in critical legal documents. Drafting an offer that allows a judgment for fraud and deceptive trade practices is a critical legal document. However, appeals courts need to balance excusing errors of law against the need for harmonious and rational rules that citizens and litigants should be presumed to know or required to research if they do not.

Finally, for the first time on appeal, and without citation to authority, Accor contends established rules concerning alternative pleading and election of remedies should be overturned as a means to reach the

result Accor plaintively requests so it will not have to face a judgment on a DTPA count. This argument fails both because it is first raised on appeal and by the "invited error doctrine." The rules of procedure and precedent from this Court establish that when the law requires election of a remedy, as it occasionally does, the election does not have to be made at the time of pleading and the Rules of Civil Procedure expressly permit alternative and even inconsistent pleading. It is Accor's fault that judgment will be entered on fraud and DTPA claims when it could have forced an election of remedies prior to entry of judgment. The law does not allow holding a trial court in error due to a party's changing positions to the disadvantage of an opponent when that party makes an error of law and asks for a worse outcome than it could have ever received at a trial.

In summary, Accor's brief highlights the fact that it made one mistake after another that resulted in making guesses that turned out to be wrong. However, the law does not excuse the errors to the detriment of the other litigants in the case who knew the law,

participated in the adversarial system we have, and acted in their own interests as the system we have presumes they will. Requiring entry of the judgment will not result is some gross windfall for Ms. Habeb or her lawyers. Ms. Habeb will get $2,500 and her lawyers will get paid for the work they did for her and for upholding the Legislature's consumer protection policy goals in the DTPA.

The writ should issue against the Trial Court and Trial Clerk and they should either be directed to enter judgment or judgment should be rendered without further delay or room for interference.

II. ARGUMENT

A. The Trial Court and Clerk Lacked Discretion to Refuse to Enter Judgment Because Accor Claims Not to Have Understood the Consequence of the Offer It Drafted

Accor incorrectly contends *Corley v. Epperson,* 353 So. 2d 794 (Ala. 1978) (Resp. Br., p. 5) and related cases hold that trial courts have "discretion" to ignore the mandate of Rule 68 to enter judgment whenever "there is just reason to do so." Resp. Br., p. 5. However, *Corley* does not state the rule Respondent claims. In *Corley*, the question at issue was only

whether the trial courts have discretion to *delay* entering judgment until the claims against remaining defendants are resolved so as to permit the Court to manage the case as a whole and prevent introducing complex evidentiary issues for remaining parties. After analyzing the Rules of procedure as a whole (including Rule 55 concerning judgment on the pleadings) the Supreme Court recognized that to harmonize Rule 68 with the Rules as a whole, courts must have this discretion. The Circuit Court did not deny entering judgment for Ms. Habeb to protect remaining parties or the manage the interests of all litigants in a multi-party case - he let the largest hotel company in the world back out of an offer that was not the product of clerical error or fraud but one it regretted because it claims now not to have adequately thought through the consequences of its offer.

Likewise, this case is not analogous to *Auburn Engineers, Inc. v. Downtown Properties No. 1*, 675 So.2d 415, 416 (Ala., 1996). See Resp. Br., p. 6. In *Auburn Engineers* the offeror proved that the Rule 68 offer

that was filed with an acceptance had actually been withdrawn before the opposing lawyer filed the acceptance. "Counsel for the defendants immediately informed counsel for the plaintiff that the offer contained a mistake and that it was revoked, explaining that the written offer had been intended to reflect the earlier oral offer wherein all three defendants had offered to settle all claims for $70,000." *Id.* Clerical errors in offers can be the basis for withdrawing the offer or setting an offer aside. *Id.* That is not what happened here. There is no allegation or proof by Accor that it meant to explicitly state that the offer covered the request for attorney fees claimed in the *ad damnum* in addition to the costs it offered to be taxed as paid. Its argument is that it either did not know it needed to do that (i.e., a mistake of law) or that this Court should create a rule that says sophisticated drafters of instruments designed to resolve disputes that may include attorney fees do not have to expressly cover attorney fees.

In summary, Accor misreads the cases as stating rules allowing broad discretion to deny entry of

judgment for any reason trial judges believe creates unfairness. However, the cases reiterate the entry of judgment is usually a mandatory "clerical function" and the grounds for refusing to enter or delay entry of judgment are narrow. *Corley* at 796.

The Clerk and the Trial Court did not refuse to enter the offer of judgment as *both* parties requested because the acceptance of it was infected with fraud, clerical error, or that entering it should be delayed to serve the larger interest of fairness to non-parties to the offer. Therefore, the authorities Accor relies upon to claim the Trial Court could prevent the Clerk from entering judgment on the unambiguous offer that Plaintiff accepted do not support the position.

Accor did not site in its brief any legal precedent for disturbing an offer of judgment based on a "mistake" of fact or law as to whether the offer covered attorney fees because, of course, there are not any. Consequently, since the opinions Accor cited do not hold (or even say in *dicta*) that offers can be set aside "where there is just reason to do so" the

argument it makes is without legal support and should be disregarded.

B. Accor's Proposal to Ignore Recent Precedent and Adopt a New Rule That Offers Made Pursuant to Rule 68 Imply Inclusion of Attorney Fees Would Create a Morass of Inconsistent Rules for Alabama Lawyers to Follow

Accor concedes that "the [DTPA] statute treats the award of an attorney fee as distinct from 'costs of the action.'" Resp. Br., p. 19. It also concedes that Alabama law does not define "costs" to include attorney fees. Resp. Br., p. 8. Mrs. Habeb's complaint stated a DTPA cause of action or claim upon which her *ad damnum* clause requested relief in the form of money, costs, and attorney fees *if she received a judgment*. Accor offered to allow her to take a judgment for $2,500 on the DTPA cause of action alleged in the complaint with "costs of the action" taxed as paid but it undeniably did not expressly address the *ad damnum's* request for attorney fees, to be decided after entry of judgment. Mrs. Habeb accepted the offer and the Circuit Clerk had the duty to enter the judgment absent a showing of unfairness occasioned by clerical error or fraud and those grounds have never been alleged much

less supported by evidence. Accor just plaintively says over and over that Accor thought attorney fees were included in the offer without expressly addressing that part of the *ad damnum*. The Circuit Court had no authority to interfere to fix this mistaken belief by Accor about how the law interprets such offers.

Accor offered to allow a judgment against it on the DTPA cause of action (i.e., "claim") and expressly addressed how to assign the "costs of the action" but Accor chose not to expressly address the undisguised request in the *ad damnum* clause for attorney fees, *should judgment be in Mrs. Habeb's favor on the DTPA count*. Accor never really explains why it addressed the monetary demand and costs requested in the *ad damnum* but left open the request for attorney fees that may result from entering the money judgment. Accor only attempts to imply for the first time in its Brief that it presumed the case law interpreting Rule 68 in Alabama Courts was the opposite of the interpretation of the Eleventh Circuit Court of Appeals since the federal court's view displays "the absence of commonsense." Resp. Br., p. 11-12.

The theme of Respondent's brief is that Accor assumed the law comported with its inherent view of "common sense" that its offer would imply coverage of attorney fees. Accor never expressly admits this even though the Trial Court's order does state there is no "meeting of the minds" because Accor was mistaken about the scope of its offer. That can only be a mistake of law and Accor cannot admit it because of the long line of authority cited in the Petition and Opening Brief that will not excuse that mistake.

Accor now argues that an offer of judgment that is silent as to attorney fees should be treated the same as an offer that expressly excludes them. This is nothing more than a thinly veiled argument that it mistakenly thought that was the law or should be if only Alabama would follow a lone opinion from the Sixth Circuit United States Court of Appeals.[1] Accor argues

---

[1] Accor claims the 6th Circuit case, *McCain v. Detroit II Auto Finance Center*, mandates the result that silence as to attorney fees means exclusion of attorney fees. 378 F.3d 561 (6th Cir., 2004). A careful reading of the case demonstrates even the Sixth Circuit's rule will not save Accor. The different language in the McCain offer of judgment is far from an immaterial diversion from Accor's offer language. It is key to the *McCain* opinion, repeated as a reminder for the reader several times. It warns

this wrong result may be accomplished because the offer should not be construed against the drafter or by creating a split in Alabama courts on how identical language in Rule 68 in state and federal courts will be interpreted. Accor admits that in any federal court in Alabama its offer of judgment would allow petitioning for attorney fees. *See Utility Automation 2000, Inc. v. Choctawhatchee Electric Cooperative, Inc.*, 298 F.3d 1238 (11th Cir. 2002)("*Utility Automation*").[2] Accor's only argument against this case is the 11th Circuit judges lack "common sense" whereas the 6th Circuit's judges have it.[3]

To avoid creating "traps" in the law, Accor advocates establishing three different outcomes in Alabama depending upon how an offer will deal with

---

"prudent defense counsel, who after all has total control over the drafting of a Rule 68 offer" to be clear when dealing with attorney fees. Accor's offer contains none of the clear language found in *McCain*.

[2] Accor admits at page 12 of its Brief: "While the Eleventh Circuit in *Utility Automation* did allow for the recovery of attorney fees under Federal Rule of Civil Procedure 68 in addition to the offer of judgment accepted by the Plaintiffs, which did not refer to attorney fees, this Court is not bound by that decision and for the reasons set forth herein should not follow that decision."

[3] Of the Eleventh Circuit, Accor asserts "the decision in *Utility Automation* does not comport with basic common sense." Resp. Br., p. 20.

attorney fees. First, the Eleventh Circuit rule for construing Federal Rule 68 offers means attorney fees are not covered by Accor's offer. Second, the rule recently reiterated by *Mitchell v. State Farm Mutual Auto. Ins. Co.*, [Ms. 2100184, October 7, 2011], 2011 Ala. Civ. App. LEXIS 274, So. 3d (Ala. Civ. App. 2011)("State Farm") will apply to settlement offers that are not made pursuant to Rule 68 in state court. If attorney fees are recoverable by law and you do not expressly prohibit recovery, they will be recoverable. Third, terms of Alabama Rule 68 offers in state court will follow the law of the Sixth Federal Circuit. If the law of Alabama is rewritten to hand Accor the results-oriented outcome it wants, it will create a confusing morass of three different rules a shop keeper or insurer must follow when proposing terms to resolve disputed claims.

Where an offer to end a claim is made through a contractual agreement the recent *State Farm* decision makes clear that attorney fees have to be specifically covered and they will not be implied especially in a contract of adhesion like a unilaterally drafted Rule

68 offer accompanied by the threat of cost-shifting if rejected. *State Farm* explains in depth the rationale for the rule this Court must apply and that the Circuit Court ignored in its analysis to reach the result Accor ultimately desired. Accor's effort to distinguish the case is unpersuasive. In *State Farm,* this Court strictly construed the scope of the agreement that the powerful party offered on a take-it-or-leave-it basis as it relates to attorney fees, as it should do here. The only way the case could be closer on point is if it specifically dealt with the drafting of a unilateral, take-it-or-leave-it Rule 68 offer and acceptance thereof.

The existing law including rules discussed in *State Farm, Horn v. City of Birmingham,* 648 So. 2d 607 (Ala.Civ.App. 1994)("*Horn*") and *Utility Automation* are all in harmony: Attorney fees are recoverable unless expressly addressed and excluded. When under rules of law attorney fees could be awarded, they must be explicitly covered if attorney fees cannot be recovered. That rule is the current rule and it is capable of easy understanding and application. Existing

law is in harmony with the sound public policy of making sure lawyers are fairly compensated for making the civil justice system function.

Accor's advocacy for three sets of rules on the same subject matter stems from nothing more than a selfish desire for a results-oriented outcome. However, when fashioning coherent, predictable rules based upon sound public policy, appeals courts must take a broader view. Sound and consistent rules based upon a sound rationale are guideposts. A results-oriented decision to help Accor will often lead to unintended results or bad policy which is exactly what will happen if Accor leads this Court astray in this case.

The result under existing law is also in harmony with the Rules of Civil procedure overall. Accor's argument is in tension with rules other than Rule 68. To explain this requires some set up. Accor's brief plaintively complains over and over that its offer covers "all claims." Accor's argument only makes sense if "all claims" means every aspect of the complaint as a whole. That argument glosses over the various parts of a well-plead complaint.

Defendants construct an argument that the offer of judgment should be read to (i.e., impliedly) include attorney fees because the "claim" it offered to allow a judgment on includes attorney fees but it never admits that this reasoning rests upon conflating the "claims" contained in counts or causes of action and the *ad damnum* clause which is where a plaintiff states the relief sought *in the event of a judgment*. Defendants blur the distinction between the cause of action or count in a complaint and the *ad damnum* clause which Black's Law Dictionary explains is what is requested for the claims asserted.

A defendant looks to the *ad damnum* to determine the consequence of allowing a judgment to be taken upon the claims or causes of action stated in the body or counts of the complaint. Without trial, a judgment is taken under the Federal or Alabama Rules of Civil Procedure by either a default judgment (Rule 55), judgment on the pleadings (Rule 12(c)) or through an offer of judgment. In each event, and without express stipulation or agreement of the parties to the contrary, the Court looks to the *ad damnum* to evaluate

the relief to be afforded the judgment holder. Accor could have allowed a judgment to be taken on the causes of action by default, a judgment on the pleadings wherein it admitted the allegations in the body of the complaint and denied the relief sought in the *ad damnum*, or through the offer of judgment it actually made to Ms. Habeb: It offered a set amount of damages for a judgment on all causes of action plead in the complaint but left open the attorney fees requested in the *ad damnum*.

If a judgment is obtained on causes of action through the other means of obtaining judgment of liability under the rules short of trial, it is typical that post judgment remedies include proving the amount of damages, fees and costs. *See* Rule 54, *Ala.R.Civ.P.* Accor's argument ignores the fact that the Rules of Civil Procedure treat the body of the complaint and Counts which state causes of action distinctly from an *ad damnum* clause at the end of the complaint.

Whether analyzing the situation at hand from contract or rule-based principles the result is the same under existing law: Due care should be taken by a

party drafting language that will define the scope of a process for resolving a dispute by contract or settlement offer. Courts are not free to imply (and parties should not expect courts) to imply terms that parties should have thought through to begin with.

In litigation, there is always another side with interests to consider. Accor made a deal it failed to think through and wants a result that is inconsistent with the existing rules of law and seeks a change in the rules that will complicate or reverse a rule of construction of written instruments that was just reaffirmed months ago. On the other hand, the weaker and less sophisticated party understood the law and took the offer because she knew attorney fees would be born by Accor. She was not only free to presume that Accor understood what it was doing but that it actually did understand the law and was not ignorant of it. That is not a trap as Accor's lawyers characterize it but the neutral application of a Rule of Procedure that is also consistent with contract construction principles.

This Court should prevent the Circuit Court and Clerk from interfering with the operation of Rule 68 in

this case and pushing the parties to the burden and expense of trial that Rule 68 was designed to prevent. Permitting the Circuit Court's and Clerk's interference does not further the goal of Rule 68, it hinders it.

In the case at bar, if the offer expressly included attorney fees, Mrs. Habeb would have rejected it and the trial would have resulted in a verdict against Accor and its parasite-infested Motel 6 in Mobile. She understood the rules of construction of contracts and Rule 68 under Alabama law and in the Eleventh Circuit's jurisprudence in *Utility Automation* and should be allowed the benefit of the bargain offered her without interference by the Circuit Court and Clerk. Because she knew the law and that an application for fees could be filed upon entry of judgment, she accepted it and her lawyers asked for a scheduling conference or order to accomplish resolving the issue. In other words, she and her lawyers acted in the forthright and transparent manner that Courts should encourage.

Perhaps Mrs. Habeb could have filed a vanilla acceptance and waited for entry of judgment and then

filed a post-judgment motion for fees as occurred in *Horn*. However, she believed alerting the Clerk, trial court, and Accor to the need for post-judgment case management is responsible and not indicative of altering an offer the scope of which has nothing to do with legal fees under binding precedent in the state and federal courts of Alabama.

C. Accor's Argument that Attorney Fees Cannot Be Part Of Its Offer Because A DTPA Claim is Inconsistent With Pleading Fraud Is Barred By the Invited Error Doctrine

Accor's concluding argument about the wisdom of offering to allow a judgment for fraud and under the Alabama Deceptive Trade Practices Act ("DTPA")is at once puzzling and unclear. Respondent appears to invite the Court to decide the merits of whether an attorney fee should be awarded under the DTPA even though that issue was not raised by Accor with the Trial Court and it was not addressed in the Trial Court's orders which are the subject of the petition.

Accor cites no legal authority for why these arguments are addressable in this proceeding. Petitioner should not be required to address the issue in its limited Reply Brief. Issues raised without

citation to authority are not addressed on appeal. "'[W]here no legal authority is cited or argued, the effect is the same *as if no argument had been made.*'" *Steele v. Rosenfeld, LLC,* 936 So.2d 488, 493 (Ala.2005) (quoting *Bennett v. Bennett,* 506 So.2d 1021, 1023 (Ala.Civ.App.1987))." *Ala. Ins. Guar. Ass'n v. Ass'n of Gen. Contractors Self-Insurer's Fund*, __So.2d__, 2010 WL 4777547, 19 (Ala. 2010)(emphasis in original).

On the merits of the argument, Respondent appears to say it mistakenly or foolishly offered judgment on two claims when the law would have only allowed recovery for one. Thus, in hindsight, Accor contends the offer was illegal and the courts should presume that recovery on statutory claims that allow an attorney fee for prevailing parties should be deemed void after entry of a judgment it caused in the first place. It is hard to know where to start when addressing the argument aside from acknowledging that it is based on a lot of gumption and no law. In the broad sense, this is just another variation of the Respondent's plaintive plea to be favored with a way to

escape an offer it now regrets it made without understanding the consequences.

Respondent's argument is clearly barred by the invited error doctrine which has been applied in instances where an aggrieved party failed to hold its opponent to an election which can be required if raised on a timely basis. In *Davis v Childers*, 381 So.2d 200, 202 (Ala. Civ. App. 1979) this Court examined the situation in which a party has the right to force an election of parties against whom a judgment could be enforced. That election is not required at the pleading stage and if not raised in the trial court it cannot be argued on appeal. But where a party acquiesces or invited error by its own conduct, it can never raise the error as grounds for relief, and that is exactly what happened here because it was Accor that made the offer that should result in a judgment without a pre-judgment election. Accor cannot assign error to use of a procedure that will result in judgment on two claims where it could have forced an election between the two because Accor proposed it and in doing so invited the error if there is any. The invited error doctrine has

been black letter law for at least 118 years in Alabama. *Mobile Infirmary Med. Ctr. v. Hodgen*, 884 So.2d 801, 808 (Ala. 2003)*(per curium)*(agreement to an erroneous procedure or conclusion results in "invited error" and cannot be subsequently challenged in the trial court or on appeal). *Accord, Western Union Telegraph Co. v. Griffith*, 50 So. 91, 93 (Ala. 1909)("A party who has invoked a particular action or ruling on the part of the trial court will not be heard to complain in this court of such action or ruling, though it be erroneous."); *Louisville & N.R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130(Ala. 1893). The argument that it would be wrong to enter the DTPA judgment that will support the attorney fee application when it was Accor that asked for the judgment is not permitted for at least five generations of lawyers in this State and for good reason. The Court of Appeals lacks authority to disturb this precedent even if it wanted to do so.

Accor argues at page 30 of its Brief that despite the fact that it made a Rule 68 offer to allow entering judgment both on counts of fraud and the Alabama Deceptive Trade Practices Act ("DTPA") that a judgment

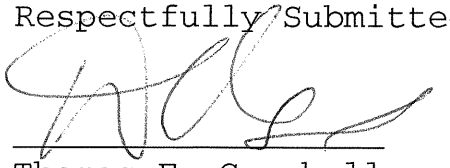
on both counts is unlawful and therefore the court should presume its offer only allowed judgment for fraud such that no claim for fees under the DTPA would ever provide a basis for a post-judgment motion for attorney fees. Resp. Br., p. 29-31. Citing *Hines v. Riverside Chevy-Olds*, 655 So.2d 909 (Ala. 1994), Accor argues that Ms. Habeb was "legally prohibited" from pleading and/or prevailing upon both fraud and DTPA counts and thereby lost her right to obtain the judgment on DTPA claim[4] that it offered and the application for attorney fees flowing therefrom. First, the *Hines* Court did not hold alternatively pleading or proving a DTPA and fraud claim are disallowed. In a *footnote*, the *Hines* Court said in *dicta* that fraud and DTPA claims are mutually exclusive and an election

---

[4] Respondent offers no legal authority to support the implied premise which must underpin its argument for the assertion to comply with the rules of logic: i.e., that Ms. Habeb would have been forced to elect her fraud remedy instead of the DTPA remedy or that it is the opposing party who owns the right of election. It should be rejected for this lack of legal support but if not, either presumption is farcical. Since she served notice of intent to apply for fees it is obvious that if forced to elect she would have chosen the option that afforded greater relief and if presumptions are to be indulged, this Court should presume able counsel for Ms. Habeb would have encouraged her to act in her self-interest and that she would have made the responsible choice.

between the two must be made but the Court did not say when that election has to be made. Neither *Hines* nor the DTPA states it is "legally prohibited" for one to plead both causes of action. If the rationale for this Court's holding in *Davis v Childers, supra.*, is persuasive, the election is made at the time judgment is entered (and here Accor asked for judgment to be entered on both counts). Second, Rule 8, *Ala.R.Civ.P.*, specifically allows alternative and even inconsistent pleading. So an election could not be forced at the pleading stage as Accor argues without citing to legal authority. Accor waived any right to move for election when it offered to allow judgment on all causes of action. As stated in the opening brief, this new issue Accor raises for the first time on appeal is waived. Moreover, it neither moved for election below nor specified in its offer that its offer would not cover the DTPA cause of action and that such action would be dismissed (and thus, so would the right to request attorney fees).

Respectfully Submitted,



Thomas F. Campbell
(CAM036)
D. Keiron McGowin
(MCG058)
Attorneys for
Petitioner
DEBORAH HABEB

OF COUNSEL:
CAMPBELL LAW
A Professional Corporation
One Chase Corporate Drive, Suite 180
Birmingham, AL 35244
Telephone: (205) 278-6650
Facsimile: (205) 278-6654
tcampbell@campbelllitigation.com
kmcgowin@campbelllitigation.com

CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of January, 2012, a copy of the foregoing pleading was served on Respondents and on counsel for all parties to this proceeding and that the *original and 5 copies were served on the Clerk of the Court of Civil Appeals* by mailing a copy of same to:

Hon. John R. Lockett
Circuit Judge
6500 Government Plaza
Mobile, AL 36644

Hon. Jo Schwarzauer
Circuit Court Clerk
205 Government Plaza
Suite 913
Mobile, AL 36644-2913

Thomas S. Thornton, III.
CARR ALLISON

100 Vestavia Parkway
Birmingham, AL 35216
Tel.: (205) 822-2006
Fax: (205) 822-2057

Caroline T. Pryor
Sarah C. Blackwood
CARR ALLISON
6251 Monroe Street, Suite 200
Daphne, AL 36526
Tel.: (251) 626-9340
Fax: (251) 626-8928

Hon. John H. Wilkerson, Jr.
Clerk, Alabama Court of Civil Appeals
300 Dexter Ave.
Montgomery, AL 36104-3741

D. K. McGOWIN