AUG 15 1973

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

SPECIAL TERM, 1973

Civ. 153

Bruce B. Byrd

v.

George T. Fowler, Individually, and d/b/a Emperor Clock Company; Ritz Instruments, Inc., an Alabama Corporation; Ritz Instruments, Inc., an Alabama Corporation, d/b/a Emperor Clock Company; and Emperor Clock Company, an Alabama Corporation, as successor corporation to Ritz Instruments, Inc.

Appeal from Baldwin Circuit Court

HOLMES, J.

This is an appeal from an order of the Circuit Court of Baldwin County granting the appellees', defendants below, motion for a new trial and setting aside the verdict of the jury in the amount of $7,500.

The appellant's bill of complaint consisted of two counts. One count alleging an indebtedness owed by the defendants to plaintiff for work and labor and the second count alleging the breach of an agreement entered into by and between the parties whereby the plaintiff agreed to perform sales and marketing services for the defendants and, in return, the plaintiff was to receive a percentage of the gross sales of defendants' product.

The appellant's bill of complaint, as ultimately received by the jury, was against George T. Fowler, Individually, and d/b/a Emperor Clock Company; Ritz Instruments, Inc., an Alabama Corporation; Ritz Instruments, Inc., an Alabama Corporation, d/b/a Emperor Clock Company; and Emperor Clock Company, an Alabama Corporation, as successor corporation to Ritz Instruments, Inc. The jury verdict was a general verdict against all of the defendants.

To the complaint, the defendants initially filed pleas of the general issue and during the trial of this cause the defendants amended their plea to include a plea of res judicata. To this additional plea, the appellant demurred, but the court made no ruling thereon.

The basic facts in this matter reveal that appellant was employed by appellees to perform certain promotional work and, in return, was to receive as compensation a percentage of the gross sales. Thereafter, the parties parted company and appellant brought suit, claiming he had not been paid the amount due him.

The jury returned a verdict for the appellant and the appellees filed a motion for a new trial. The learned trial court granted this motion and specified his reason therefor as being that the heretofore filed plea of res judicata was a defense to the action.

It should be noted that, as we understand appellant and appellees, the parties on both sides in this appeal contend and admit that the plea of res judicata was the trial court's basis for granting the new trial. We reach this conclusion, based upon argument in brief of both counsel and oral argument before this court.

In view of the above, this court accepts the contention of counsel that the plea of res judicata was the court's basis for granting the motion for new trial and the setting aside of the jury's verdict, and our opinion will be so directed.

The plea of res judicata, itself, and the record reveal the following facts as relate to the plea.

In November of 1970, Ritz Instruments, Inc., one of the defendants in the instant case, filed suit in the amount of $1,000 against Bruce Byrd, the plaintiff in the case now before us, on a promissory note. The instant case was filed on June 30, 1971. A judgment by consent in the suit filed in November was entered on September 15, 1971, and the instant case was tried on April 13, 1972.

In the former suit on the promissory note such facts as we have before us reveal that the appellant executed a promissory note in favor of the Baldwin National Bank, which note was endorsed by the daughter and son-in-law of one of the parties in the instant case, and possibly by Ritz Instruments, Inc. In any event, the November suit was brought by Ritz Instruments, Inc., and judgment was obtained against Bruce Byrd, the defendant in the November suit and the plaintiff in this case.

The appellant relies in essence on the general principle, noted in Gulf American Fire and Casualty Co. v. Johnson, 282 Ala. 73, 78, 209 So. 2d 212, 217 (quoting from Jones v. Adler, 183 Ala. 435, 441, 62 So. 777, 779) that:

> "' ... "The rule of res adjudicata or former recovery, is confined to those cases where the parties to the two suits are the same, the subject-matter the same, the identical point is directly in issue, and the judgment has been rendered on that point."' ..." (Emphasis omitted)

It is our opinion that the former controversy did not involve the same subject matter as presented in the case at bar.

While, certainly, the subject matter of the case before us might well have been presented as a cross-claim in the November suit on the promissory note, we do not believe it mandatory that it be so

presented. As the majority of the Supreme Court of Alabama, speaking through Mr. Justice Simpson, stated in A. B. C. Truck Lines v. Kenemer, 247 Ala. 543, 547, 25 So. 2d 511, 515:

> " ... 'As a general rule, where a defendant has an independent claim against plaintiff, such as might be either the basis of a separate action or might be pleaded as a set-off or counterclaim, he is not obliged to plead it in plaintiff's action, although he is at liberty to do so, and if he omits to set it up in that action, or if, although he introduces it in evidence in rebuttal of plaintiff's demand, it is not used as a set-off or counterclaim, this will not preclude him from afterward suing plaintiff upon it, in the absence of some statute to the contrary. But this rule does not apply where the subject-matter of the set-off or counterclaim was involved in the determination of the issue in the former action in such wise that the judgment therein necessarily negatives the facts on which defendant would have to rely in order to establish his demand * * *.' 34 C. J. 863, § 1276. See also Id., §§ 1282, 1283, pp. 868, 874, and Bell v. Jones, 223 Ala. 497, 136 So. 826."

In considering the application of res judicata to this case, it is necessary that one bear certain principles of law in mind which, at first blush, might appear to be in conflict. These principles and their distinctions are ably discussed by Mr. Justice Coleman in Gulf American Fire and Casualty Co. v. Johnson, supra.

In the instant case, as in Gulf American, supra, the appellee asserts that res judicata may be pleaded as a bar when any matter might have been presented in the prior action to sustain or defeat the right asserted. Appellee says the claim by appellant could and should have been presented in the prior action by Ritz Instruments, Inc., against Byrd. It might appear we are dealing with conflicting rules, for, on the one hand, the appellee says the prior judgment is a bar to relitigating an issue which could have been determined in the prior action; but the appellant appears to say the prior judgment is res judicata only if the issue was actually determined in the prior action.

Mr. Justice Coleman, however, points out that these seemingly conflicting rules do not conflict at all. Appellee's rule applies in cases founded on the same cause of action, while the appellant's rule applies in cases founded on different causes of action. This distinction is pointed out in 50 C. J. S. Judgments § 687:

> "While the effect of a judgment as a bar to a second action on the same

cause of action and the effect of a judgment as precluding relitigation in another action of facts or matters litigated and determined in the first action are both within the application of the term 'res judicata,' and some matters, such as identity of parties, are requisite elements under either phase of the doctrine of res judicata, nevertheless, the two situations to which the term is applied are, in fact, quite different, and the two phases of the doctrine are distinguishable in two respects; one respect is the scope of the conclusiveness of the judgment, ... in a former suit between the same parties ... on the same cause of action, operating as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action, ... while the conclusiveness of a judgment in a prior suit between the same parties ... on a different cause of action extends ... only to such matters and questions as were actually litigated and determined.

"Another respect in which the two phases of the doctrine differ is in the elements requisite to their application. ... the rule relating to a judgment as a bar to another action is applicable only to cases involving the same causes of action; but the rule relating to conclusiveness as to particular points or matters is not so restricted in its application, and even where the subsequent suit is on a different cause of action, yet where it is between the parties ... to a former action, the former judgment will be conclusive and final as to any matter actually in issue and determined in the former action, either on behalf of plaintiff to prove an essential fact or to disprove a defense, or on behalf of defendant to disprove essential elements of plaintiff's case, or to establish matters relied on in defense."

See also Am Jur 2d, Judgments, § 397, stating:

"At the outset of the consideration of the doctrine of res judicata it must be noticed that there is a wide difference between the effect of a judgment as a bar to the prosecution of a second action upon the same claim,

> demand, or cause of action, and its effect to preclude the relitigation of particular facts or issues in another action between the same parties on a different claim or cause of action. Although there is virtual unanimity of agreement on this distinction, confusion frequently arises from variations in nomenclature applied thereto. The two aspects of the doctrine do not necessarily have the same consequences, the effect of a judgment upon a subsequent controversy between the parties being more limited where the controversy is based upon a different cause of action than where it is based upon the original cause of action. ..." (Emphasis added)

Clearly, the question to be resolved is whether the cause of action is the same in both suits. In order for two actions to be regarded as based on the same cause of action so that a judgment in one is a bar to the maintenance of the other action, the two actions must relate to the same subject matter; where the subject matter is essentially different, there is no identity of causes of action.

Generally, even if two actions relate to the same subject matter, this does not necessarily establish that they are on the same cause of action. "Hence,

a judgment in a former action does not operate as a bar to a subsequent action where the cause of action is not the same, even though each action relates to the same subject matter." 46 Am Jur 2d, Judgments, § 407.

In the instant case, one suit is on a promissory note which is generally defined as a written promise made by one to pay another therein named, absolutely and unconditionally, a sum of money certain at a time specified therein. According to the facts, Byrd simply borrowed money from the bank and executed a promissory note to repay the amount borrowed. This situation appears quite different from the instant suit by the plaintiff for work and labor, or breach of an agreement of employment. Here, the plaintiff contracted to perform certain services for Emperor Clock which were to be of a continuing nature, and the remuneration for such services was to be directly related to the gross sales of the business. These facts lead to a finding that the subject matter is, to this court, not the same, with the only similarity being that both involve money owed or allegedly owed between the parties.

We would further note that it appears to this court that the parties are not the same. Clearly, the suit on the promissory note was by Ritz Instruments, Inc., against Bruce Byrd. The suit now before us is not only against Ritz Instruments as the successor corporation of Emperor Clock, but is against George Fowler, individually, as well. We further note that

in this instance the judgment was also against George Fowler. This court is aware of the rule of law as stated in 50 C.J.S., Judgments, § 773, and recognized in Young v. Rutledge, 229 Ala. 492, 158 So. 185, which is as follows:

> "Where both the party offering a judgment as an estoppel and the party against whom it is so offered were parties to the action in which the judgment was rendered, it is no objection that the action included some additional parties who are not joined in the present suit, or that there are additional parties in the present action, provided the judgment was rendered on the merits. This rule is especially applicable where the additional parties in either suit were merely formal, nominal, or unnecessary parties. Certainly it is sufficient if all the parties to the later case were parties in the former one even though some parties in the former case are not parties in the later case."

However, in this instance, one of the parties offering the judgment was not a party to the judgment being offered as an estoppel.

While we have reviewed this matter with the following rules of law in mind, as summarized by Mr. Chief Justice Heflin, in Parker v. McGaha, 7 ABR 1857, 1860, ___ Ala. ___, ___ So. 2d ___:

"'The granting or refusing a motion for new trial is a matter resting largely in the discretion of the trial court, and the exercise of this discretion carries with it a presumption of correctness. Shepherd v. Southern Ry. Co., 288 Ala. 50, 256 So. 2d 883 (1970); State v. Edmundson, 282 Ala. 293, 210 So. 2d 926 (1968); Grandquest v. Williams, 273 Ala. 140, 135 So. 2d 391 (1961). Furthermore, on appeal from an order granting a new trial, the record must be construed against the appellant. King v. Scott, 217 Ala. 511, 116 So. 681 (1928). Therefore, an order granting a new trial will not be disturbed on appeal unless some legal right was abused and the record plainly and palpably shows that the trial court was in error. Shepherd v. Southern Ry. Co., 288 Ala. 50, 256 So. 2d 883 (1970); Whitman v. Housing Authority of City of Elba, 272 Ala. 245, 130 So. 2d 362 (1961).' Johnson v. Hodge, ___ Ala. ___, ___ So. 2d ___, 7 ABR, Ms. 7th day of June, 1973. (Emphasis supplied)",

we have no alternative, in view of the manner in which

this appeal has been presented to this court, but to hold that the learned trial court erred in granting the motion, for the reasons it so specified, and setting aside the jury verdict.

For the error of the trial court heretofore pointed out, this case is reversed, and a judgment rendered by this court denying the motion for a new trial and reinstating the original judgment.

REVERSED AND RENDERED.

Wright, P. J., and Bradley, J., concur.

I, J. O. Sentell, Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 15 day of Aug. 1973

J. O. Sentell

Clerk, Court of Civil Appeals of Alabama

9902

Byrd

vs

Fowler

CITATION OF APPEAL

Moore Printing Company, Bay Minette, Alabama

THE STATE OF ALABAMA
Baldwin County - Circuit Court

TO ANY SHERIFF OF THE STATE OF ALABAMA—GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the 13th day of April ~~Monday in~~, 19 72, in a certain cause in said Court wherein Bruce B. Byrd Plaintiff, and George T. Fowler, et al Defendant, a judgement was rendered against said George T. Fowler, et al and motion for new trial being granted the 23rd day of June, 1972, to reverse which Judgment the said Plaintiff applied for and obtained from this office an APPEAL, returnable to the next Term of our Court of Civil Appeals Court of the State of Alabama, to be held at Montgomery, on the day of , 19 next, and the necessary bond having been given by the said Ernest M. Bailey ~~with~~ sureties,

Now, You Are Hereby Commanded, without delay, to cite the said George T. Fowler, et al or Wilson Hayes, & James R. Owen, attorneys, to appear at the next Term of our said ~~Supreme~~ Civil Court of appeals to defend against the said Appeal, if they think proper.

Witness, ~~XXXXXXXXXXX~~ EUNICE B. BLACKMON Clerk of the Circuit Court of said County, this 11th day of December, A. D., 19 72

Attest:

Eunice B. Blackmon Clerk.

Received ____ day of ____ 19__
and on 22 day of Dec 1972
I served a copy of the within Citation
on William Hayes & J. R. Owen
By service on ____

TAYLOR WILKINS Sheriff
By W. G. Allen D.S.

Sheriff's Fees
Miles @
Ten Cents per mile Total $
TAYLOR WILKINS, Sheriff
By ____ DEPUTY SHERIFF

#9902

CIRCUIT COURT
Baldwin County, Alabama

BRUCE B. BYRD

Vs. } **Citation in Appeal**

GEORGE T. FOWLER, et al

RECEIVED
DEC 13 1972
TAYLOR WILKINS
SHERIFF

Issued 11th day of Dec, 19 72

Serve: W. Hayes
& J. R. Owen

_____Div. No._____ CERTIFICATE OF APPEAL. (Civil Cases,)

No. 9902

BALDWIN County, Circuit Court.

BRUCE B. BYRD

Plaintiff.

vs.

GEORGE T. FOWLER, Individually, & d/b/a EMPEROR CLOCK COMPANY; RITZ INSTRUMENTS INC. an Alabama Corporation, and RITZ INSTRUMENTS, INC. an Alabama Corporation, d/b/a ~~Defendant.~~
EMPEROR CLOCK COMPANY, and EMPEROR CLOCK COMPANY, AN Individually Partnership or Corporation, Whose exact Identity is Unknown but will be added when ascertained,
DEFENDANT

I, ~~EUNICE B. BLACKMON~~ Clerk of CIRCUIT Court, of BALDWIN County, Alabama, hereby certify that in the cause of BRUCE B. BYRD plaintiff, vs. GEORGE T. FOWLER, et al defendant, which was tried and determined in this Court on the 13th day of April 1972, in which there was a judgment for $7,500.00 and Defendant's motion for new trial granted June 23, 1972 Dollars, in favor of the plaintiff, (or judgment for defendant,) the Plaintiff on the 9th day of December 1972, took an appeal to the Civil Court of Appeals of Alabama to be holden of and for said State.

I further certify that the Plaintiff filed security for cost of appeal, to the Court of Civil Appeals Court, on the 9th day of December 1972, and that Ernest M. Bailey, _____, _____, ~~were~~ was sure~~ties~~ on the appeal bond.

I further certify that notice of the said appeal was on the 27th day of December 1972, served on Wilson Hayes & J. E. Owen as attorney~~s~~ of record for said appellee, and that the amount sued for was $24,350.00 Dollars. (Or certain lands) (Or personal property.)

Witness my hand and the seal of this Court, this the 28th day of December 1972.

Eunice B. Blackmon
Clerk of the Circuit Court of
Baldwin County, Alabama.

ROBERTS & SON, BIRMINGHAM

AUGUST 15, 1973

THE STATE OF ALABAMA - - - - - - - - - - - -JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

SPECIAL TERM 1973

Civ. 153	*	
Bruce B. Byrd	*	
v.	*	BALDWIN CIRCUIT COURT
George T. Fowler, Individually and d/b/a Emperor Clock Company; et al.	*	

Come the parties by attorneys, and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the judgment of the Circuit Court which granted the defendants' motion for new trial and which set aside the verdict of the jury in the cause be and the same is hereby reversed and annulled and this Court proceeding to render the judgment that the Circuit Court should have rendered, IT IS ORDERED AND ADJUDGED that the defendants' motion for a new trial be and the same is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that the appellees George T. Fowler, Individually and d/b/a Emperor Clock Company; Ritz Instruments, Inc., an Alabama Corporation; Ritz Instruments, Inc., an Alabama Corporation, d/b/a Emperor Clock Company; and Emperor Clock Company, an Alabama Corporation, as successor corporation to Ritz Instruments, Inc., pay the costs accruing on said appeal in this Court and in the Court below, for which costs let execution issue.

I, J. O. Sentell, Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 15 day of Aug 1973

J. O. Sentell

Clerk, Court of Civil Appeals of Alabama

WILSON HAYES
LAWYER
P. O. BOX 300
BAY MINETTE, ALABAMA
36507

TELEPHONE 937-5506

July 16, 1971

Mrs. Eunice B. Blackmon, Clerk
Circuit Court, Baldwin County
Bay Minette, Alabama 36507

Re: Bruce B. Byrd Vs.
George T. Fowler, et al
Case #9902

Dear Eunice:

Enclosed are answer and motion in the above noted case. Please file and submit to Judge for signature.

With kind regards, I am

Yours very truly,

Wilson Hayes

ms
Enc.

BRUCE B. BYRD,	)	
PLAINTIFF	)	IN THE CIRCUIT COURT OF
VS	)	BALDWIN COUNTY, ALABAMA
GEORGE T. FOWLER, ET AL,	)	AT LAW
DEFENDANTS	)	CASE NO: 9902

NOTICE OF APPEAL

COMES NOW THE PLAINTIFF, BRUCE B. BYRD, IN THE ABOVE STYLED CAUSE, BY HIS ATTORNEY, AND GIVES NOTICE OF APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA, AT LAW, RENDERED ON THE 23RD DAY OF JUNE, 1972, GRANTING A MOTION FOR A NEW TRIAL AND SETTING ASIDE THE JUDGMENT IN THIS CAUSE, TO THE COURT OF CIVIL APPEALS FOR THE STATE OF ALABAMA.

DONE THIS 8TH, DAY OF DECEMBER, 1972.

BAILEY & TAYLOR

BY: Ernest M. Bailey
ATTORNEY FOR PLAINTIFF

FILED: _____

_____
CLERK

SECURITY FOR COSTS

I, ERNEST M. BAILEY, DO HEREBY ACKNOWLEDGE MYSELF AS SECURITY FOR COSTS OF THE FOREGOING APPEAL.

Ernest M. Bailey
ERNEST M. BAILEY

WILSON HAYES
LAWYER
P. O. BOX 300
BAY MINETTE, ALABAMA
36507

TELEPHONE 937-5506

March 1, 1972

Mrs. Eunice B. Blackmon, Clerk
Circuit Court, Baldwin County
Bay Minette, Alabama 36507

Re: Byrd v Fowler
Case #9902

Dear Eunice:

Please file the enclosed Answers to Interrogatories in the above noted case.

With kind regards, I am

Yours very truly,

Wilson Hayes

WH/mm
Enc.

cc: Ernest Bailey

WILSON HAYES
LAWYER
P. O. BOX 300
BAY MINETTE, ALABAMA
36507

TELEPHONE 937-5506

November 30, 1971

Mrs. Eunice B. Blackmon, Clerk
Circuit Court, Baldwin County
Bay Minette, Alabama 36507

9902

Re: Byrd v Fowler, et al
Case #9902 (at law)

Dear Eunice:

Please file the enclosed interrogatories and have them served on Plaintiff's Attorney, Bailey & Taylor.

With kind regards, I am

Yours very truly,

Wilson Hayes

WH/mm
Enc.

FILED
DEC 3 1971
EUNICE B. BLACKMON CIRCUIT CLERK

to Sher

BRUCE B. BYRD,	ß	IN THE CIRCUIT COURT OF
Plaintiff,	ß	BALDWIN COUNTY, ALABAMA
Vs.	ß	AT LAW
GEORGE T. FOWLER, ET AL.,	ß	
Defendants.	ß	CASE NUMBER: 9902

ANSWER

Comes now Defendants in the above styled cause and for answer to the complaint say:

1. Not guilty.

2. The matters alleged therein are untrue.

Attorney for Defendants.
Wilson Hayes
P. O. Box 300
Bay Minette, Alabama 36507

Defendants demand trial by Jury.

Attorney for Defendants

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 16 day of July, 1971, served a copy of the foregoing pleading on counsel for all Parties to this proceeding by mailing the same by United States Mail, properly addressed, with first class postage prepaid.

FILED

JUL 19 1971

EUNICE B. BLACKMON CIRCUIT CLERK

BAILEY & TAYLOR
ATTORNEYS AT LAW
61 NORTH SECTION STREET
P. O. BOX 361
FAIRHOPE, ALABAMA 36532

DECEMBER 21, 1971

EUNICE BLACKMON,
CLERK OF CIRCUIT COURT
BAY MINETTE, ALABAMA, 36507

RE: BYRD, VS FOWLER, ET AL
CASE NO 9902

DEAR EUNICE:

PLEASE FILE THE ATTACHED BILL OF COMPLAINT IN THE ABOVE CAUSE.

I HAVE THIS DATE FORWARDED A COPY OF SAME TO WILSON HAYES, THE ATTORNEY FOR DEFENDANTS.

THANKING YOU FOR YOUR ASSISTANCE IN THIS MATTER, I AM

VERY TRULY YOURS,

ERNEST M. BAILEY

EMB/W
INCL: AS NOTED

BRUCE B. BYRD,	ß	IN THE CIRCUIT COURT OF
Plaintiff,	ß	BALDWIN COUNTY, ALABAMA
Vs.	ß	AT LAW
GEORGE T. FOWLER, ET AL.,	ß	
Defendants.	ß	CASE NUMBER: 9902

MOTION

Come now Defendants in the above styled cause and show the Court that this cause was filed less than thirty days past; that the same is now at issue in that Defendants desire to take testimony in this cause of the Plaintiff under the provisions of Title 7 Section 474(1) et seq, Alabama Code 1940 as amended, and pray leave of the Court to take such testimony and make such examination as made and provided by the appropriate Statutes.

Respectfully moved this 16 day of July, 1971.

FILED
JUL 19 1971
EUNICE B. BLACKMON CIRCUIT CLERK

Attorney for Defendants
Wilson Hayes

* *

ORDER OF COURT

This day came Wilson Hayes, Attorney in the above styled cause for Defendants, and moved the Court to grant leave to take testimony in this cause under the provisions of Title 7, Section 474(1) et seq, Alabama Code 1940 as amended, and upon consideration thereof the Court finds the motion well taken, it is therefore

ORDERED, ADJUDGED and DECREED that Defendants' motion for leave to take testimony herein be, and the same is hereby granted.

Done this 28 day of July, 1971.

Joshua A. Marshburn
Circuit Judge

BRUCE B. BYRD,	)	
PLAINTIFF,	)	IN THE CIRCUIT COURT OF
VS	)	BALDWIN COUNTY, ALABAMA
GEORGE T. FOWLER, ET AL,	)	AT LAW
DEFENDANTS	)	CASE NO: 9902

COMES NOW THE PLAINTIFF IN THE ABOVE STYLED CAUSE AND DESIRING THE TESTIMONY OF GEORGE T. FOWLER, A DEFENDANT IN THE ABOVE STYLED CAUSE, PROPOUNDS THE FOLLOWING INTERROGATORIES, TO BE ANSWERED BY THE DEFENDANT, GEORGE T. FOWLER, UNDER OATH:

1. WHAT IS YOUR NAME?

2. WHAT IS YOUR ADDRESS?

3. ARE YOU A DEFENDANT IN THIS CAUSE?

4. ARE YOU AN OFFICER IN THE DEFENDANT CORPORATIONS?

5. WHAT CAPACITY DO YOU HOLD IN THE DEFENDANT CORPORATIONS?

6. WOULD YOU STATE THE DATES ON WHICH THE PLAINTIFF, BRUCE B. BYRD, WAS IN YOUR EMPLOYMENT OR IN THE EMPLOYMENT OF THE DEFENDANT CORPORATIONS?

7. WHAT POSITION DID MR. PHIL YOAS HOLD IN THE CORPORATION OR IN YOUR EMPLOYMENT?

8. WOULD YOU STATE WHAT PERSONS WERE PRESENT WHEN YOU HAD A CONFERENCE WITH THE SMALL BUSINESS ADMINISTRATION OFFICIALS AT THE FIRST NATIONAL BANK OF FAIRHOPE, ALABAMA.

9. ATTACH TO YOUR ANSWER THE FINANCIAL STATEMENT PRESENTED IN OBTAINING YOUR SMALL BUSINESS ADMINISTRATION LOAN OR THE SMALL BUSINESS ADMINISTRATION LOAN IN BEHALF OF RITZ INSTRUMENTS, INC.

10. WHO NEGOTIATED THE CONTRACT YOUR COMPANY HAD WITH MACTAD?

11. ATTACH COPIES HEREWITH OF YOUR APPLICATION WITH MACTAD.

12. WERE YOU IN THIS COUNTRY OR IN GERMANY AT THE TIME THIS CONTRACT WAS NEGOTIATED?

13. WOULD YOU FURNISH COPIES OF YOUR DIRECT MAIL BROCHURES PREPARED FROM JUNE 1969 THROUGH JUNE 1970?

14. WHO PREPARED THESE DIRECT MAIL BROCHURES?

15. WHO WAS THE PHOTOGRAPHER IN THE PREPARATION OF THESE BROCHURES?

16. ATTACH HEREWITH COPIES OF THE FOLLOWING STATEMENTS.

(A) OPERATING STATEMENTS FOR THE DEFENDANT CORPORATION DURING THE PERIOD JUNE 1969 TO JUNE 1970.

(B) THE STATEMENT AS TO ALL SALES OF EMPEROR CLOCKS DURING THE PERIOD JUNE 1969 TO JUNE 1970.

(C) STATEMENT OF ANY SALES NOT DELIVERED AS OF MARCH 1970.

17. ATTACH HEREWITH COPY OF MONTHLY SALES TAX REPORT OF ALL SALES PERTAINING TO THE SALE OF EMPEROR CLOCKS OR OTHER CLOCKS SOLD BY YOUR COMPANY FROM JUNE 1969 TO JUNE 1970, INCLUDING SALES IN THE STATE OF ALABAMA, AND SALES OUTSIDE OF THE STATE OF ALABAMA.

18. WOULD YOU STATE HOW MUCH WAS PAID TO THE PLAINTIFF, ACCORDING TO YOUR RECORDS FOR THE PERIOD JUNE 1969 THROUGH MARCH 1970?

BAILEY & TAYLOR

BY: Ernest M. Bailey

ERNEST M. BAILEY
ATTORNEY FOR PLAINTIFF

STATE OF ALABAMA)
COUNTY OF BALDWIN)

BEFORE ME, BETTY JOE WOLFF, A NOTARY PUBLIC IN AND FOR SAID COUNTY IN SAID STATE, PERSONALLY APPEARED ERNEST M. BAILEY, WHO BEING KNOWN TO ME, STATED UNDER OATH THAT HE IS THE ATTORNEY FOR THE PLAINTIFF IN THIS CAUSE; THAT THE ANSWERS TO THE FOREGOING INTERROGATORIES WHEN WELL AND TRULY MADE, WILL BE MATERIAL EVIDENCE FOR THE SAID PLAINTIFF ON THE TRIAL OF SAID CAUSE.

Ernest M. Bailey
ERNEST M. BAILEY

SWORN AND SUBSCRIBED TO BEFORE ME ON THIS THE 21st DAY OF DECEMBER, 1971.

Betty Joe Wolff
BETTY JOE WOLFF, NOTARY PUBLIC
STATE OF ALABAMA, AT LARGE

SERVICE OF A COPY OF THE FOREGOING INTERROGATORIES IN HEREBY ACKNOWLEDGED, THIS 22nd DAY OF DECEMBER, 1971.

Wilson Hayes
WILSON HAYES,
ATTORNEY FOR DEFENDANTS

FILED

DEC 22 1971

EUNICE B. BLACKMON CIRCUIT CLERK

FILED

DEC 22 1971

EUNICE B. BLACKMON CIRCUIT CLERK

BRUCE B. BYRD,	)	
PLAINTIFF,	)	IN THE CIRCUIT COURT OF
VS.	)	BALDWIN COUNTY, ALABAMA
GEORGE T. FOWLER, ET AL,	)	AT LAW
DEFENDANTS	)	NUMBER 9902

BEFORE ME, THE UNDERSIGNED AUTHORITY, PERSONALLY APPEARED BRUCE B. BYRD, AND FIRST BEING DULY SWORN DEPOSES AND SAYS IN ANSWER TO THE INTERROGATORIES FILED IN THIS CAUSE AS FOLLOWS;

1. INTERROGATORY NUMBER 1: ANS., BRUCE B. BYRD.

2. INTERROGATORY NUMBER 2: ANS., ROUTE 2, BOX 77, DAPHNE, ALABAMA.

3. INTERROGATORY NUMBER 3: ANS., AGE 45.

4. INTERROGATORY NUMBER 4: ANS., YES.

5. INTERROGATORY NUMBER 5: ANS., IN JUNE, 1969.

6. INTERROGATORY NUMBER 6: ANS., GEORGE T. FOWLER, RITZ INSTRUMENTS,OR BOTH DEFENDANTS DOING BUSINESS AS EMPEROR CLOCK COMPANY.

7. INTERROGATORY NUMBER 7: ANS., UNTIL ABOUT MARCH, 1970.

8. INTERROGATORY NUMBER 8: ANS., MY EMPLOYMENT WAS NOT TERMINATED BY THE DEFENDANT. I TERMINATED MY EMPLOYMENT BECAUSE I HAD NOT BEEN PAID IN ACCORDANCE WITH OUR AGREEMENT.

9. INTERROGATORY NUMBER 9: ANS., ON LEAVING MY EMPLOYMENT WITH THE DEFENDANTS, I WAS EMPLOYED FOR A SHORT PERIOD OF TIME IN PASCAGOULA, MISSISSIPPI UNDER A THREE MONTH CONTRACT WITH DIRECT MAIL SPECIALIST, INC. SINCE THAT TIME I HAVE BEEN EMPLOYED IN MY WIFE'S BUSINESS, JEANE'S OF FAIRHOPE.

10. INTERROGATORY NUMBER 10: ANS., SEE INTERROGATORY NUMBER 9.

11. INTERROGATORY NUMBER 11: ANS., SEE INTERROGATORY NUMBER 9.

12. INTERROGATORY NUMBER 12: ANS., W-2 FORMS DURING THE TIME I WAS IN THE EMPLOYMENT OF THE DEFENDANTS ARE IN THEIR POSSESSION. THE REMAINDER OF INTERROGATORY 12 IS IMMATERIAL AND IRREVELANT.

13. INTERROGATORY NUMBER 13: ANS., MY TAX RETURNS, ANNUALLY, HAVE BEEN JOINT RETURNS WITH MY WIFE WHO IS NOT A PARTY TO THIS ACTION. THE INCOME FROM SOURCES OTHER THAN FROM THE DEFENDANTS IS IRREVELANT AND IMMATERIAL.

14. INTERROGATORY NUMBER 14: ANS., I ATTENDED LAW SCHOOL AT THE UNIVERSITY OF MEMPHIS; I AM NOT A PRACTICING ATTORNEY NOR HAVE I PRACTICED LAW.

15. INTERROGATORY NUMBER 15: ANS., NO.

16. INTERROGATORY NUMBER 16: ANS., NO.

17.. INTERROGATORY NUMBER 17: ANS., NO.

18. INTERROGATORY NUMBER 18: ANS., THE ASSUMPTION OF SOME SUPPLIERS AND SOME CUSTOMERS COULD HAVE BEEN THAT I WAS GENERAL MANAGER OF RITZ INSTRUMENT COMPANY AS THOUSANDS OF PIECES OF DIRECT MAIL WAS DISPATCHED OVER MY SIGNATURE. THERE WERE ALSO OTHER TYPE OF CORRESPONDENCE RELATED TO PROMOTION, PUBLICITY AND ADVERTISING WHICH WAS DISPATCHED OVER MY SIGNATURE.

19. INTERROGATORY NUMBER 19: ANS., THE QUESTION IS DIFFICULT TO ANSWER, BUT I AM OF THE OPINION THAT IN VARIOUS FIELDS OF MY RESPONSIBILITY, WHILE IN THE EMPLOYMENT OF RITZ INSTRUMENT COMPANY, I WAS HELD OUT TO BE GENERAL MANAGER FOR THE COMPANY BY THE DEFENDANTS.

20. INTERROGATORY NUMBER 20: ANS., WHILE IN THE EMPLOYMENT OF THE DEFENDANTS, MY IMMEDIATE SUPERIORS OR SUPERVISORS WERE GEORGE T. FOWLER AND PHILIP YOAS. ANY OTHER MATTER PERTAINING TO THIS INTERROGATORY IS IRREVELANT AND IMMATERIAL.

21. INTERROGATORY NUMBER 21: ANS., AS STATED ABOVE, I TERMINATED MY EMPLOYMENT WITH THE DEFENDANTS BECAUSE I WAS NOT PAID COMMISSIONS IN ACCORDANCE WITH OUR AGREEMENT. ALL OTHER MATTER PERTAINING TO INTERROGATORY NUMBER 21 IS IRREVELANT AND IMMATERIAL.

Bruce B. Byrd
BRUCE B. BYRD

BEFORE ME, BETTY JOE WOLFF, A NOTARY PUBLIC IN AND FOR SAID COUNTY AND SAID STATE, PERSONALLY APPEARED BRUCE B. BYRD, WHO BEING KNOWN TO ME, STATED UNDER OATH THAT HE IS THE PLAINTIFF IN THIS CAUSE; THAT THE ANSWERS TO THE FOREGOING INTERROGATORIES ARE TRUE.

Bruce B. Byrd
BRUCE B. BYRD

SWORN AND SUBSCRIBED TO BEFORE ME
THIS 27th DAY OF DECEMBER, 1971.

Betty Jo Wolff
NOTARY PUBLIC STATE OF ALABAMA AT LARGE

BRUCE B. BYRD,	ß	IN THE CIRCUIT COURT OF
Plaintiff,	ß	BALDWIN COUNTY, ALABAMA
Vs.	ß	AT LAW
GEORGE T. FOWLER, et al,	ß	
Defendants.	ß	NUMBER: 9902

NOTICE TO TAKE DEPOSITION ON ORAL EXAMINATION

TO BAILEY & TAYLOR, Attorneys of Record for Plaintiff:

Please take notice that Defendants will take deposition, upon oral examination, for the purpose of discovery, or for use as evidence in this cause, or for both purposes, in accordance with the provisions of Title 7, Section 747(1) et seq of the 1940 Code of Alabama as amended, of the following named persons:

Bruce B. Byrd

Said deposition will be taken at Bay Minette, Alabama on the 7th day of March, 1972 at 10:00 A.M. before Louise Degenhart, or some other person authorized by law to administer oaths, and to take depositions. Said examination will continue from day to day until completed.

Wilson Hayes
Attorney for Defendants

* *

TO THE CLERK OF THE CIRCUIT COURT OF BAY MINETTE, ALABAMA:

This is to move you to issue Subpoena to Bruce B. Byrd, address - Route 2, Box 77, Daphne, Alabama, the above named person, whose deposition will be taken, summoning said person to be and appear at the time and place appearing above, together with such documents, papers and books listed as follows:

Income Tax Returns, 1969, 1970, 1971
All Records, Documents, Papers, Books and other written information pertaining to employment or work while in the employ of Ritz Instrument Company, now Emperor Clock Co., Inc. or George T. Fowler, the Defendants in the above named cause.
All memoranda in your possession which pertain to taking any agreement or actions by you with the Defendants in this cause.

Then and there to give testimony upon oral examination, as provided

by law.

This the 1st day of March, 1972.

Wilson Hayes
Attorney for Defendants

* *

BRUCE B. BYRD,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
Vs.	)	AT LAW
GEORGE T. FOWLER, et al,	)	
Defendants.	)	NUMBER: 9902

TO ANY SHERIFF OF THE STATE OF ALABAMA:

At the instance of the Defendants in the above styled cause you are hereby commanded to summon Bruce B. Byrd, Route 2, Box 77, Daphne, Alabama to be and appear before Lonnie Dunaway, at 10:00 o'clock, A.M. on the 7th day of March, 1972, in the Baldwin County Court House in Bay Minette, Alabama, then and there to have Income Tax Returns for 1969, 1970, 1971, all records, documents, papers, books and other written information pertaining to employment or work while in the employ of Ritz Instrument Company, now Emperor Clock Co., Inc. or George T. Fowler, the Defendants in the above named cause; all memoranda in his possession which pertains to taking any agreement or actions by him with the Defendants in this cause, then and there to give deposition of Bruce B. Byrd, to be taken by the said Defendants, and he will forthwith make return of this Writ as to how you have executed the same.

Witness my hand this 1st day of March, 1972.

Eunice B. Blackmon, Clerk
Circuit Court, At Law
Baldwin County, Alabama

FILED

MAR 1 1972

EUNICE B. BLACKMON CIRCUIT CLERK

9902

Bruce B. Byrd

vs.

George N. Fowler
et al

TO LAKE PIN SERVED
W. Moore
3-7-72

MAR 13 1972

TAYLOR WILKINSON
SHERIFF

serve - Bruce B. Byrd
Rt 2 - Box 77

Received 3 day of March 19 72
on day of 19
served a copy of the within Notice / Oral Examination
Bruce B. Byrd
service on

TAYLOR WILKINSON, Sheriff
D. C.

Sheriff claims 70 miles at 7.50
Ten Cents per mile Total $
TAYLOR WILKINSON, Sheriff
BY
D. C.

BRUCE B. BYRD,	)	
PLAINTIFF	)	IN THE CIRCUIT COURT OF
VS	)	BALDWIN COUNTY, ALABAMA
GEORGE T. FOWLER, ET AL,	)	AT LAW
DEFENDANTS	)	CASE NO: 9902

MOTION

COMES NOW THE PLAINTIFF IN THE ABOVE STYLED CAUSE AND MOVES THE COURT TO SPECIFY THE GROUNDS FOR SETTING ASIDE THE JUDGMENT AND GRANTING A NEW TRIAL TO THE DEFENDANTS BY ORDER OF THE COURT ENTERED ON JUNE 23RD, 1972.

BAILEY & TAYLOR

BY Edward B. Bailey

ATTORNEY FOR THE PLAINTIFF

FILED

FEB 21 1973

EUNICE B. BLACKMON CIRCUIT CLERK

BRUCE B. BYRD,	I	IN THE CIRCUIT COURT OF
Plaintiff,	I	BALDWIN COUNTY, ALABAMA
Vs.	I	AT LAW
GEORGE T. FOWLER, et al.	I	
Defendants.	I	NUMBER: 9902

ORDER

This cause coming on to be heard on motion of the Plaintiff to specify the grounds for the court for setting aside the judgment of the jury and granting a new trial by order of this court on the 23rd day of June, 1972.

Upon consideration thereof the Court finds the motion of Appellant well taken; it is therefore

ORDERED, ADJUDGED and DECREED as follows:

The Court specifies the grounds of its order granting the motion for new trial to be:

Number 4 in the motion for new trial.

Number 5 in the motion for new trial.

Number 6 in the motion for new trial.

Number 9 in the motion for new trial.

Number 10 in the motion for new trial.

Number 11 in the motion for new trial.

Number 13 in the motion for new trial.

Number 14 in the motion for new trial.

The Court further specifies that the motion for new trial was granted based upon Defendants' amended answer, plea Number 4, filed after Plaintiff rested.

Done this 26th day of February, 1973.

Telfair J. Mashburn

Telfair J. Mashburn, Judge
Circuit Court, at Law
Baldwin County, Alabama

BRUCE B. BYRD,

PLAINTIFF,

VS

GEORGE T. FOWLER, INDIVIDUALLY, AND D/B/A EMPEROR CLOCK COMPANY; RITZ INSTRUMENTS INC., AN ALABAMA CORPORATION, AND RITZ INSTRUMENTS, INC., AN ALABAMA CORPORATION, D/B/A EMPEROR CLOCK COMPANY, AND EMPEROR CLOCK COMPANY, AN INDIVIDUAL PARTNERSHIP OR CORPORATION, WHOSE EXACT IDENTITY IS UNKNOWN BUT WILL BE ADDED WHEN ASCERTAINED,

DEFENDANTS

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

AT LAW

CASE NO: _____

AMENDED COMPLAINT

COMES NOW THE PLAINTIFF, IN THE ABOVE STYLED CAUSE, AND AMENDS THE BILL OF COMPLAINT AND EACH COUNT THEREOF AS FOLLOWS:

1. TO DELETE AS A PARTY DEFENDANT, "EMPEROR CLOCK COMPANY, AN INDIVIDUAL PARTNERSHIP OR CORPORATION, WHOSE EXACT IDENTITY IS UNKNOWN BUT WILL BE ADDED WHEN ASCERTAINED".

2. TO SUBSTITUTE AS A PARTY DEFENDANT EMPEROR CLOCK COMPANY, AN ALABAMA CORPORATION, AS SUCCESSOR CORPORATION TO RITZ INSTRUMENTS, INC.

BAILEY & TAYLOR

BY: Ernest M. Bailey
ERNEST M. BAILEY
ATTORNEYS FOR PLAINTIFF

FILED

DEC 22 1971

EUNICE B. BLACKMON CIRCUIT CLERK

CERTIFICATE OF SERVICE

I do hereby certify that I have on this _____, served a copy of the foregoing on Wilson Hayes, By mailing the same by United States Mail, Properly addressed, and First Class Postage Prepaid.

BAILEY & TAYLOR

By: Ernest M. Bailey

BAILEY & TAYLOR
ATTORNEYS AT LAW
61 NORTH SECTION STREET
P. O. BOX 361
FAIRHOPE, ALABAMA 36532

ERNEST M. BAILEY
LLOYD E. TAYLOR

PHONE
FAIRHOPE 928-2393

For Citation & Cert of Appeal

DECEMBER
8TH
1972

MRS. EUNICE BLACKMON
CLERK, CIRCUIT COURT
BALDWIN COUNTY
BAY MINETTE, ALA., 36507

RE: BYRD VS FOWLER, ET AL
AT LAW # 9902

DEAR EUNICE:

I AM ENCLOSING NOTICE OF APPEAL IN THE ABOVE STYLED CAUSE. I WOULD APPRECIATE YOU FILING THIS NOTICE.

WILSON HAYES AND JIMMY OWEN ARE THE ATTORNEYS FOR THE DEFENDANTS.

VERY TRULY YOURS,

ERNEST M. BAILEY

EMB/W

INCLS: AS NOTED

CC: WILSON HAYES
JAMES R. OWEN

BRUCE B. BYRD,	∅	IN THE CIRCUIT COURT OF
Plaintiff,	∅	BALDWIN COUNTY, ALABAMA
Vs.	∅	AT LAW
GEORGE T. FOWLER, ET AL,	∅	
Defendants.	∅	NUMBER: 9902

MOTION FOR PROTECTIVE ORDER

Come now Defendants in the above styled cause and shows the Court as follows:

1. That Plaintiff did heretofore file interrogatories in this cause to be answered by George T. Fowler, one of the Defendants herein.

2. Defendants further show unto the Court that Questions 16 and 17, which said questions are set out in whole as follows:

"16. Attach herewith copies of the following statements.

(a) Operating statements for the defendant corporation during the period June 1969 to June 1970.

(b) The Statement as to all sales of Emperor Clocks during the period June 1969 to June 1970.

(c) Statement of any sales not delivered as of March 1970.

"17. Attach herewith copy of monthly sales tax report of all sales pertaining to the sale of Emperor Clocks or other clocks sold by your company from June 1969 to June 1970, including sales in the State of Alabama, and sales outside of the State of Alabama."

3. Defendants show unto the Court that the questions call for information which is of a confidential and private nature peculiar to Defendants' business; that the questions are not made in good faith but are for the purpose of discovering secrets and confidential information in and about Defendants' business.

Now therefore, Defendants respectfully move the Court for a protective order protecting them against answering the said interrogatories or from answering any other interrogatories or discovery procedures seeking matters confidential to and private to Defendants' business affairs not necessary or needed by Plaintiff and further prays that the Court may order special answers sealed pending Plaintiff's need for the answers thereto.

Respectfully moved this 10 day of January, 1972.

Wilson Hayes
Attorney for Defendants

STATE OF ALABAMA
BALDWIN COUNTY

Before me, the undersigned authority, personally appeared Wilson Hayes, who being known to me, and who being by me first duly sworn to speak the truth, deposes and says he has read the foregoing motion and knows the facts therein stated are true to the best of his information and belief.

Wilson Hayes

Sworn to and subscribed before me this the 10 day of January, 1972.

Mary C. Stiers McGill
Notary Public

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 10 day of Jan, 1972, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed, with first class postage prepaid.

FILED

JAN 11 1972

EUNICE B. BLACKMON CIRCUIT CLERK

BRUCE B. BYRD,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
Vs.	)	AT LAW
GEORGE T. FOWLER, ET AL,	)	
Defendants.	)	NUMBER: 9902

MOTION FOR RULE NISI

Come now Defendants in the above styled cause and show the Court as follows:

1. That heretofore Defendants in this cause filed interrogatories to Plaintiff Numbered 1-21.

2. That Plaintiff did on to-wit December 30, 1971 file answers to the said interrogatories.

3. Defendants further show unto Your Honor that the said answers were not responsive to the questions and that the said answers were a sham and a fraud and a contempt upon this Court.

Now therefore, Defendants move the Court to require Plaintiff to appear and show cause why the said cause should not be dismissed for failure to answer interrogatories and specifically to answer Interrogatores Number 9; Number 10; Number 11; Number 12; Number 13; Number 14; Number 18; Number 19; Number 20 and Number 21.

Respectfully moved this 18th day of January, 1972.

Wilson Hayes
Attorney for Defendants

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 11 day of Jan, 1972, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed, with first class postage prepaid.

FILED

JAN 11 1972

EUNICE B. BLACKMON CIRCUIT CLERK

BRUCE B. BYRD,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
Vs.	)	AT LAW
GEORGE T. FOWLER, ET AL,	)	
Defendants.	)	NUMBER: 9902

This day came Defendants in the above styled cause by their Attorney and moved the Court to require Plaintiff to answer interrogatories or suffer judgment and upon consideration thereof, the Court finds the motion well taken, it is therefore

ORDERED, ADJUDGED and DECREED that Plaintiff answer interrogatories heretofore propounded to him in this cause by the 31st day of January, 1972 or suffer judgment by default against him.

Done this 11th day of January, 1972.

Telfair J. Mashburn
Telfair J. Mashburn, Judge
Circuit Court, At Law
Baldwin County, Alabama

FILED

JAN 11 1972

EUNICE B. BLACKMON CIRCUIT CLERK

BRUCE B. BYRD,	)	
PLAINTIFF	)	IN THE CIRCUIT COURT OF
VS	)	BALDWIN COUNTY, ALABAMA
GEORGE T. FOWLER, ET AL,	)	AT LAW
DEFENDANTS	)	CASE NO: 9902

NOTICE OF APPEAL

COMES NOW THE PLAINTIFF, BRUCE B. BYRD, IN THE ABOVE STYLED CAUSE, BY HIS ATTORNEY, AND GIVES NOTICE OF APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA, AT LAW, RENDERED ON THE 23RD DAY OF JUNE, 1972, GRANTING A MOTION FOR A NEW TRIAL AND SETTING ASIDE THE JUDGMENT IN THIS CAUSE, TO THE COURT OF CIVIL APPEALS FOR THE STATE OF ALABAMA.

DONE THIS 8TH, DAY OF DECEMBER, 1972.

BAILEY & TAYLOR

BY: Ernest M. Bailey
ATTORNEY FOR PLAINTIFF

FILED: Dec. 9, 1972
Ernice B. Blackmon
CLERK

SECURITY FOR COSTS

I, ERNEST M. BAILEY, DO HEREBY ACKNOWLEDGE MYSELF AS SECURITY FOR COSTS OF THE FOREGOING APPEAL.

Ernest M. Bailey
ERNEST M. BAILEY

Taken + approved
this 9 day of Dec. 1972
Ernice B. Blackmon
Circuit Clerk

BRUCE B. BYRD,	§	IN THE CIRCUIT COURT OF
Plaintiff,	§	BALDWIN COUNTY, ALABAMA
Vs.	§	AT LAW
GEORGE T. FOWLER, et al,	§	
Defendants.	§	NUMBER: 9902

NOTICE TO TAKE DEPOSITION ON ORAL EXAMINATION

TO BAILEY & TAYLOR, Attorneys of Record for Plaintiff:

Please take notice that Defendants will take deposition, upon oral examination, for the purpose of discovery, or for use as evidence in this cause, or for both purposes, in accordance with the provisions of Title 7, Section 747(1) et seq of the 1940 Code of Alabama as amended, of the following named persons:

Bruce B. Byrd

Said deposition will be taken at Bay Minette, Alabama on the 7th day of March, 1972 at 10 o'c A.M. before [illegible], or some other person authorized by law to administer oaths, and to take depositions. Said examination will continue from day to day until completed.

Wilson Hayes
Attorney for Defendants

* * *

TO THE CLERK OF THE CIRCUIT COURT OF BAY MINETTE, ALABAMA:

This is to move you to issue Subpoena to Bruce B. Byrd, address - Route 2, Box 77, Daphne, Alabama, the above named person, whose deposition will be taken, summoning said person to be and appear at the time and place appearing above, together with such documents, papers and books listed as follows:

Income Tax Returns, 1969, 1970, 1971
All Records, Documents, Papers, Books and other written information pertaining to employment or work while in the employ of Ritz Instrument Company, now Emperor Clock Co., Inc. or George T. Fowler, the Defendants in the above named cause.
All memoranda in your possession which pertain to taking any agreement or actions by you with the Defendants in this cause.

Then and there to give testimony upon oral examination, as provided

by law.

This the 1st day of March, 1972.

Wilson Hayes
Attorney for Defendants

* *

BRUCE B. BYRD,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
Vs.	)	AT LAW
GEORGE T. FOWLER, et al,	)	
Defendants.	)	NUMBER: 9902

TO ANY SHERIFF OF THE STATE OF ALABAMA:

At the instance of the Defendants in the above styled cause you are hereby commanded to summon Bruce B. Byrd, Route 2, Box 77, Daphne, Alabama to be and appear before Lane Rogersley, at five o'clock, P.M. on the 7th ~~day~~ of March, 1972, in the Baldwin County Court House in Bay Minette, Alabama, then and there to have Income Tax Returns for 1969, 1970, 1971, all records, documents, papers, books and other written information pertaining to employment or work while in the employ of Ritz Instrument Company, now Emperor Clock Co., Inc. or George T. Fowler, the Defendants in the above named cause; all memoranda in his possession which pertains to taking any agreement or actions by him with the Defendants in this cause, then and there to give deposition of Bruce B. Byrd, to be taken by the said Defendants, and he will forthwith make return of this Writ as to how you have executed the same.

Witness my hand this 1st day of March, 1972.

Eunice B. Blackmon, Clerk
Circuit Court, At Law
Baldwin County, Alabama

FILED

MAR 1 1972

EUNICE B. BLACKMON CIRCUIT CLERK

13

BRUCE B. BYRD,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
Vs.	)	AT LAW
GEORGE T. FOWLER, et al,	)	
Defendants.	)	NUMBER: 9902

ANSWERS TO INTERROGATORIES

Comes now George T. Fowler, one of the Defendants in the above styled cause and for answer to the interrogatories heretofore propounded by Plaintiff, says as follows:

1. George T. Fowler.

2. P. O. Box 777 Fairhope, Alabama 36532.

3. Yes.

4. Yes.

5. President.

6. August 7, 1969 until March 5, 1970.

7. Employee, designer and production manager.

8. George T. Fowler, John Beasley and Elliot Rickarby on one occasion. A Mrs. Miller from Small Business Administration was present on another occasion.

9. These are not available from our office. They were consumed by fire. They may be available from the Small Business Administration.

10. George T. Fowler and Bruce B. Byrd.

11. These have been consumed by fire and are not available. They may be available from Mactad.

12. I don't know. I participated in the negotiations and executed the contract.

13. These are not available. They have been consumed by fire.

14. Bruce B. Byrd under the supervision and with the approval of George T. Fowler.

15. We had several photographers at that time. I do not remember the names of the ones who did each specific brochure but one of them was Herburt Countrymen and a person whose name I do not remember from DeFuniac Springs, Florida.

16. This interrogatory is the subject of a motion for protective order heretofore filed in this cause.

17. This interrogatory is the subject of a protective order heretofore filed in this cause.

18. Salary of $125 per week, $2,575 total in 1969; $200 per week, $1,800 total in 1970.

George T. Fowler

STATE OF ALABAMA
BALDWIN COUNTY

Before me, Wilson Hayes, a Notary Public in and for the State of Alabama, at Large, personally appeared George T. Fowler, who being known to me, stated under oath that he is one of the Defendants in this cause, and that he has read the foregoing answers to interrogatories, and that the matters stated therein are correct to the best of his knowledge, information and belief.

George T. Fowler

Sworn to and subscribed to before me this 27th day of January, 1972.

Wilson Hayes, Notary Public
State of Alabama, at Large

FILED

MAR 1 1972

EUNICE B. BLACKMON CIRCUIT CLERK

BAILEY & TAYLOR
ATTORNEYS AT LAW
61 NORTH SECTION STREET
P. O. BOX 361
FAIRHOPE, ALABAMA 36532

ERNEST M. BAILEY
LLOYD E. TAYLOR

PHONE
FAIRHOPE 928-2393

DECEMBER
29
1971

MRS. EUNICE B. BLACKMON
CIRCUIT CLERK
BAY MINETTE, ALABAMA, 36507

RE: BRYD VS FOWLER
CASE # 9902, AT LAW

DEAR EUNICE:

I AM FORWARDING HEREWITH ANSWERS TO INTERROGATORIES TO BE FILED IN THE ABOVE CASE.

I AM ALSO ATTACHING AN EXECUTED COPY OF THESE ANSWERS FOR WILSON HAYES, THE ATTORNEY FOR DEFENDANTS.

THANKING YOU FOR YOUR ASSISTANCE IN THIS MATTER, I AM

VERY TRULY YOURS,

ERNEST M. BAILEY

EMB/W
INCLS: 2

$24,356.02

BRUCE B. BYRD,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
Vs.	)	AT LAW
GEORGE T. FOWLER, ET AL,	)	
Defendants.	)	NUMBER: 9902

Comes now the Defendants in the above styled cause and desiring the testimony of Plaintiff, propounds the following interrogatories, to be answered by Plaintiff under oath:

1. What is your name?
2. What is your address?
3. What is your age?
4. Are you the Plaintiff in this case?
5. When were you first employed by Defendants?
6. Name which of the Defendants employed you.
7. How long did you work for Defendant?
8. When was your employment with Defendant terminated?
9. State the names and addresses of each of your employers during the last three calendar years and ending with the date of answering these interrogatories.
10. If there is any time during which you were not employed in the time period encompassed in the next question above, state that time and whether you were self-employed during those times.
11. If you were self-employed during such time above referred, state the dates and the type of employment.
12. Attach copies of your W-2 forms during the times of your employment in the Question Numbered 9 above.
13. Attach copies of your income tax statements for the period of three calendar years next preceeding this date and ending with the date of these interrogatories.
14. Are you an Attorney at Law?
15. Have you ever represented yourself to be an Attorney at Law?

16. Have you ever represented yourself to be a Certified Public Accountant?

17. Are you a Certified Public Accountant?

18. Have you ever represented yourself to be the general manager of Ritz Instrument Company?

19. Have you ever acted as general manager of Ritz Instrument Company?

20. State the name of your immediate superior or supervisor in each of the places of employment listed above.

21. State the reason given for your leaving each place of employment or, if applicable, the reason for your discharge.

Attorney for Defendants
Wilson Hayes

STATE OF ALABAMA
BALDWIN COUNTY

Before me, Mary C. Stiers McGuff, a Notary Public in and for said County in said State, personally appeared Wilson Hayes, who being known to me, stated under oath that he is the Attorney for Defendants in this case; that the answers to the foregoing interrogatories when well and truly made, will be material evidence for the said Defendants on the trial of the said cause.

Wilson Hayes

Sworn to and subscribed before me this the 30th day of November, 1971.

Mary C. Stiers McGuff, Notary Public
Baldwin County, Alabama

Service of a copy of the foregoing interrogatories is hereby acknowledged, this ___ day of _____, 1971.

Attorney for Plaintiff

FILED

DEC 3 1971

EUNICE B. BLACKMON CIRCUIT CLERK

9902

Bruce B. Byrd

vs.

George T. Fowler
et al

Interrogatories

DEC 7 1971

TAYLOR WILKINS
SHERIFF

For
Service on Bailey & Taylor, Attys

Received 7 day of Dec 1971
and on 7 day of Dec 1971
I served a copy of the within Interrogatories
on Bailey and Taylor Attorneys
At Addr.
By service on Ernest M. Bailey

TAYLOR WILKINS, Sheriff
By D. C.

Sheriff claims 70 miles
Ten Cents per mile Total $ 7.00
TAYLOR WILKINS, Sheriff
BY
DEPUTY SHERIFF

BRUCE B. BYRD,

PLAINTIFF,

VS

GEORGE C. POTTER, INDIVIDUALLY AND D/B/A EMPEROR CLOCK COMPANY, RITE INSTRUMENTS, INC., AND/OR CORPORATION, AND RITE INSTRUMENTS, INC., AN ALABAMA CORPORATION, D/B/A EMPEROR CLOCK COMPANY, AND EMPEROR CLOCK COMPANY, AN INDIVIDUAL PARTNERSHIP OR CORPORATION, WHOSE TRUE IDENTITY IS UNKNOWN BUT WILL BE ADDED WHEN ASCERTAINED,

DEFENDANTS

CASE NO. 9902

COUNT ONE:

THE PLAINTIFF CLAIMS OF THE DEFENDANTS THE SUM OF TWENTY-FOUR THOUSAND THREE HUNDRED FIFTY DOLLARS ($24,350.00) FOR WORK AND LABOR DONE FOR THE DEFENDANTS BY THE PLAINTIFF FROM [illegible] JULY 1st, 68 TO MARCH 1st, 71, AT THEIR REQUEST, WHICH SUM [illegible] WITH THE INTEREST THEREON IS STILL UNPAID.

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COUNT TWO:

THE PLAINTIFF CLAIMS OF THE DEFENDANTS THE SUM OF TWENTY-FOUR THOUSAND THREE HUNDRED FIFTY DOLLARS ($24,350.00) AS DAMAGES FOR A BREACH OF A VERBAL AGREEMENT ENTERED INTO BY THEM [illegible] TO-WIT, JULY 1969 BY THE TERMS OF WHICH THE PLAINTIFF WAS HIRED BY THE DEFENDANTS TO PROMOTE THE SALES AND MARKETING OF [illegible] MANUFACTURED BY THE DEFENDANTS FOR ALL OF WHICH THE [illegible] AGREED TO PAY THE [illegible] PERCENT OF THE GROSS [illegible] MADE BY THE DEFENDANTS. PLAINTIFF FURTHER AVERS [illegible] EFFORTS IN PROMOTING THE SALES AND MARKETING OF [illegible] DEFENDANTS SOLD TWO HUNDRED SIXTY-SEVEN THOUSAND [illegible] DOLLARS ($267,000.00) [illegible] SALES DURING THE [illegible] PLAINTIFF'S EMPLOYMENT FOR WHICH HE HAS BEEN PAID THE SUM [illegible] FOUR HUNDRED DOLLARS ([illegible]) TO THE DATE OF [illegible]

PLAINTIFF FURTHER AVERS THAT THE DEFENDANTS [illegible]

REFUSED TO PAY THE PLAINTIFF THE BALANCE DUE HIM, IN ACCORDANCE WITH SAID AGREEMENT, IN THE SUM OF AFORESAID, TOGETHER WITH INTEREST THEREON.

BAILEY & TAYLOR

BY: _____
ATTORNEYS FOR THE PLAINTIFF

FOR THE TRIAL IN THIS CAUSE THE PLAINTIFF DEMANDS A TRIAL BY JURY.

_____

FILED

JUN 30 1978

EUNICE B. BLACKMON CIRCUIT CLERK

12

BRUCE B. BYRD, Plaintiff,	)	IN THE CIRCUIT COURT OF
VS.	)	BALDWIN COUNTY, ALABAMA
GEORGE T. FOWLER, ET AL, Defendants.	)	AT LAW NO. 9902

AMENDED PLEA

Now come the defendants in the above styled cause and amend the plea heretofore filed in said cause, so that, as amended, the said plea will read as follows:

"Now comesthe defendants in the above styled cause and for plea to the complaint heretofore filed in said cause and to each count thereof, separately and severally, and says, separately and severally:

1. The allegations of the complaint are untrue.

2. The allegations of Count One are untrue.

3. The allegations of Count Two are untrue.

4. Now come the defendants in said cause and filing this plea of res judicata show:

A. On November 30, 1970, Ritz Instruments, Inc., the predecessor corporation of Emperor Clock Company, an Alabama corporation, one of the defendants in this cause, filed suit against Bruce B. Byrd, the plaintiff in this cause, and a judgment was rendered on to-wit, September 15, 1971, by consent for the said Ritz Instruments, Inc., (now Emperor Clock Company, an Alabama corporation,). That the said Bruce B. Byrd in the previous cause of action and the said Ritz Instruments, Inc., in the previous cause of action are one and the same as Bruce B. Byrd in the present cause of action and Emperor Clock Company, an Alabama corporation, in the present cause of action and the said court had jurisdiction in said matter.

B. A copy of the complaint and judgment in said case is hereto attached and made a part hereof.

C. Said judgment was a full and final adjudication of the cause of action now sued on.

~~Filed~~
Filed; Apr 12, 1972.
Lafair J. Maddox
Judge

WHEREFORE, defendants pray the judgment of this court.

WILSON HAYES and
JAMES R. OWEN

By _____

Attorneys for Defendants

RITZ INSTRUMENTS, INC., a corporation,	)	IN THE CIRCUIT COURT OF
Plaintiff,	)	BALDWIN COUNTY, ALABAMA
vs.	)	AT LAW
BRUCE B. BYRD,	)	
Defendant.	)	

COUNT ONE

Plaintiff claims of the Defendant the sum of ONE THOUSAND ($1,000.00) DOLLARS due by promissory note made by him on the 30th day of January, 1970 and payable on the 1st day of February, 1970, with the interest thereon.

That in and by the terms of said note, the Defendant agreed to pay all costs of collection of said note, including a reasonable attorneys fee, and the Plaintiff now claims the further and additional sum of TWO HUNDRED ($200.00) DOLLARS as a reasonable attorneys fee.

That in and by the terms of said note, the Defendant waived all rights under the Constitution and Laws of the State of Alabama, and the Plaintiff now claims the benefit of said waiver.

ATTORNEY FOR PLAINTIFF

FILED

NOV 30 1970

ALICE J. DUCK CLERK REGISTER

Consolidated Docket And Fee Book, Civil Division, _____ Court

CASE NO. 9573

BALDWIN COUNTY, ALABAMA

JURY—NON-JURY

Form No. 7—Alabama C. C. Revised 4-11-67

ATTORNEYS	PARTIES	ACTION (If Transferred or Appealed from Another Court, State Other Court's Name and Case No.)	DATE SET FOR HEARING
JOHN V. DUCK FOR PLAINTIFF	RITZ INSTRUMENTS, INC. , PLAINTIFF VS. BRUCE B. BYRD , DEFENDANT	PROMISSORY NOTE	
Bailey & Taylor FOR DEFENDANT			

SHERIFF'S RETURN

SUMMONS AND COMPLAINT: Ef 12-1-70

S. & C. IN DETINUE:

WRIT OF GARN.:

NOTICE OF GARN.:

ATT. WRIT:

OTHER.

MILEAGE:

FILED: 11/30/70

PAPERS FILED AND ORDERS AND DECREES OF COURT

12-23-70 · Demurrer
3-12-71 Cont. J. J. M.
6-17-71 " J. J. M.
9-15-71 Judgment by Consent for the Pl. and against the Def. for $1200.00. Jeffery J. Mackibben Judge.

I, Eunice B. Blackmon, Clerk of the Circuit Court of Baldwin County, Alabama do hereby certify that the foregoing is a true and correct copy of the Judgment Order entered in the above style case and same appears of record in this office.

Witness my hand and seal this 12 day of April 1972.

Eunice B. Blackmon
Clerk, Circuit Court

MINUTES

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SUBPOENAS (AND WRITS) FOR WITNESSES

WITNESSES FOR PLAINTIFF	ADDRESS	Date Issued	Return	Certif. No.	Amount	Date Certif. Surrend'd for Credit	Date Issued	Return	Certif. No.	Amount	Date Certif. Surrend'd for Credit	Date Issued	Return	Certif. No.	Amount	Date Certif. Surrend'd for Credit
1																

We the jury find for the Plaintiff and against the Defendants and assess his damages at $7,500.00.

J. D. CHASTANG

SUMMONS AND COMPLAINT

STATE OF ALABAMA
Baldwin County

Circuit Court, Baldwin County

No. 9902

.....TERM. 19.....

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon George T. Fowler, Ind. & d/b/a EMPEROR CLOCK CO. Ritz Instruments Inc., & Alabama Corp. & Ritz Instruments, Inc. an Alabama Corp. d/b/a Emperor Clock Co. & Emperor Clock Co. an Ind. partnership or corp. whose exact Identity is unknown but will be added when ascertained,

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint filed in the Circuit Court of Baldwin County, State of Alabama, at Bay Minette against .....

George T. Fowler, et al ..... Defendant.....

by Bruce B. Byrd,

..... Plaintiff.....

Witness my hand this 30th day of June 1971.

Eunice B. Black Clerk

No. 9902 Page.....

THE STATE OF ALABAMA

BALDWIN COUNTY

CIRCUIT COURT

BRUCE B. BYRD,

Plaintiffs

vs.

GEORGE T. FOWLER, INDIVIDUALLY, & d/b/a EMPEROR CLOCK CO. & Ala. Corp., & Ritz Instruments Inc. RITZ INSTRUMENTS INC.

Defendants

SUMMONS AND COMPLAINT

Filed June 30, 1971 19.....

EUNICE B. BLACKMON Clerk

FILED

JUN 30 1971

EUNICE B. BLACKMON CIRCUIT CLERK

BAILEY & TAYLOR

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at

Received In Office

June 30 1971

Taylor Wilkins Sheriff

I have executed this summons

this 7-6 1971

by leaving a copy with

George T. Fowler
Emperor Clock Co.
Ritz Instruments

Sheriff claims 240 miles at Ten Cents per mile Total $ 24.00

TAYLOR WILKINS, Sheriff

BY Byrd DEPUTY SHERIFF

TAYLOR WILKINS
~~W. CROOK~~ Sheriff

W. CROOK Deputy Sheriff

Moore Printing Company - Bay Minette, Ala.

JURY LIST - APRIL CIVIL TERM - APRIL 10, 1972

Byrd
2nd
Fowler

1. Bishop, Ethel, Merchant, 456 S. Section St., Fairhope, Ala.
~~2. Clay, Ray, Ast. Cstdn. VAW, 504 Equality St., Fairhpe, Fairhope, Ala.~~ D1
3. Coleman, Carolyn F., Housewife, 1801 Auburn Av., Bay Minette, Ala.
~~4. Crosby, Hm., N., Crosby Lbr. Co., 608 Mixon Av., Bay Minette, Ala.~~ P3
~~5. Davidson, Audrey N., Clk, West Bros., 310 Mango St., Bay Minette, Ala.~~ P11
6. Dorch, Alexander, Fisherman, 701 Dan Horne Lane, Fairhope, Ala.
~~7. Graves, Susie, Housewife, 914 S. Dobson, Bay Minette, Ala.~~ D1
~~8. Higgins, Robert, Salesman, 40 S. Section St., Fairhope, Ala.~~ P1
~~9. Hollingsworth, George H., Bob White Chev., 503 1st St., Bay Minette, Ala.~~ P4
~~10. Lee, Richard E., Merc. Stockton, Stockton, Ala.~~
~~11. Leon, Willie, Musician Grand Hotel, 253 S. Section Fairhope, Ala. Point Clear~~ P10
12. Lewis, Dollie S., Housewife, 1105 Marks Av., Bay Minette, Ala.
~~13. Long, Lee, Merc., Rabon St., Bay Minette, Ala.~~ D4
~~14. McGurie, Edith S., Housewife, Tensaw, Alabama~~ D5
15. McKenzie, Gene E., Purch Agt. Pinto Island Mtls. 113 Orange St., Fairhope, Ala.
~~16. McMillan, Raymond, Farmer, Stockton, Stockton, Alabama~~ P2
~~17. Parker, Gertrude M., Bkpr. Bald, Co. Sav. & Loan, 8 North School St., Fairhope~~
18. Passmore, Lousie S., School Sec. P. O. Box 247, Silverhill, Ala.
~~19. Phillips, Martha L., Vanity Fairh Star Rt. Stockton Atmore, Ala.~~ D7
~~20. Pipkin, James E., PNAS Stockton, Ala. Pensacola, Fla.~~ P12
~~21. Powell, John O, Kaiser Almn. 110 S. Day St., Bay Minette, Ala.~~ P5
~~22. Robinson, Marlene B., Housewife, 155 Orange St., Fairhope~~ D8
~~23. Rost, Charles H., Mech. NASS 22 Fig St., Fairhope, Ala. Pensacola, Fla.~~ D9
~~24. Smith, Sidney K., Retired Lee St., Bay Minette, Ala.~~ P9
25. Stephens, Robert T., Acct. Cheveron Asphalt, 374 Ridgewood Cir. Fairhope, Ala.
~~26. Vick, Lloyd, Janitor F'Hope High School, 306 Delmar, Fairhope, Ala.~~ D11
~~27. Washington, John Ed., Retired, Blacksher Rt., Bay Minette, Ala.~~
~~28. Watts, McFarlan, Logger, 101 Banyan St., Bay Minette, Ala.~~ P8
~~29. York, Annie W., Maid BCHS Tensaw, Ala. Bay Minette, Ala.~~ P6
30. White, Elaine, Beauty Shop, Perdido
~~31. Brown, Hilary, Bay Minette,~~ P7
32. Dean, Mary, Housewife, Bay Minette
~~33. Eddins, Laura Lee, Clerk, Bay Minette~~ P13
34. Weekley, Eleanor, Housewife, Perdido
~~35. Demko, Glenda, Housewife, Bay Minette~~
~~36. Bryars, Dollie Mae, Clerk, Bay Minette~~ D3
~~37. Gebel, Dennis, Telephone SCB, Winterhaven Ct., Fairhope~~ D12
38. Chastang, J. D., Paper Mill, Cross Roads Rt., Mobile
39. Rider, Hannis Monsanto, 207 Townsend Ave., Bay Minette, Pensacola
~~40. Irvin, Edward D., Mach. Opr. Kaiser Almn. 603 E. 7th St., Bay Minette~~ D2
~~41. McDade, Adelaide D., Ala. State Emp. Serv. 523 Stimpson Ave., Fairhope~~ D10

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