

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

THOMAS, MEANS, GILLIS & SEAY, P.C.,	)	
a Domestic Professional Corporation,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.: CV-10-900394
v.	)	
	)	
THOMAS L. WHITE, JR., as Comptroller	)	
of the State of Alabama,	)	
	)	
Defendant.	)	

PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS

COMES NOW the Plaintiff and, in response to the Defendant’s Motion to Dismiss, states as follows:

1. Plaintiff’s Complaint does state a valid cause of action for which relief may be granted.
2. The Defendant alleges that Plaintiff’s Complaint seeks relief not permitted by § 14 of the Alabama Constitution. However, Section 14 of the Alabama Constitution states only “[t]hat the State of Alabama shall never be made a defendant in any court of law or equity.” The Plaintiff wishes to point out that the State of Alabama is not a defendant in this civil action.
3. There are exceptions to the State's sovereign immunity, and the present action falls within those exceptions:

**A state official is not immune from an action that (1) seeks to compel a state official to perform his or her legal duties, (2) seeks to enjoin a state official from enforcing unconstitutional laws, (3) seeks to compel a state official to perform ministerial acts, or (4) seeks a declaration under the Declaratory Judgments Act, § 6-6-220 et seq., Ala. Code 1975, construing a statute and applying it in a given situation.... Other actions that are not prohibited by § 14 include: "(5) valid inverse condemnation actions brought against State officials in their representative capacity; and**

(6) actions for injunction or damages brought against State officials in their representative capacity and individually where it was alleged that they had acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law.

Ex parte Ala. DOT, 978 So. 2d 17, 21 (Ala. 2007) (*internal citations omitted*) (*emphasis added*); See also Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2007) (“This Court has recognized several species of action that are not ‘against the State’ for § 14 purposes. They include: Actions brought to compel State officials to perform their legal duties ... [and] Actions to compel State officials to perform ministerial acts.”). In Ex parte Ala. DOT, the Court explained that it has held that sovereign immunity would not bar an action to compel State officials to perform a legal duty, including in a case where a state agency had incurred a legal duty to pay money owed under a contract with the state. 978 So. 2d at 23.

4. Plaintiff’s Complaint is not a suit for damages against the State but rather is an action to compel Defendant White to perform his legal duties and ministerial acts, which is clearly not prohibited by the Alabama Constitution. Plaintiff is merely asserting its legal right to be paid for the work it contracted with the Alabama House of Representatives to perform and which it did perform in compliance with said contract. Under Alabama law, the Plaintiff is entitled to be paid for the work performed under the subject contract. Code of Alabama § 41-16-3(a) provides that:

Whenever the State of Alabama is a party to any contract, the contract shall be executed by all parties in a timely fashion. **When a party to a contract, other than the state, has fully executed the responsibility under the contract and there remains only the payment of funds by the state, payment shall be made in a timely manner.** If the amount due by the state is not in dispute, payment shall be made within 30 days after the other party has completed his or her portion of the contract and presented a proper invoice. If the amount payable is not paid within 30 days, interest on the amount shall be charged. ... The interest rate shall be the legal amount currently charged by the state. Interest shall be paid from the same fund or source from which the contract principal is paid.

5. Like in Gunter v. Beasley, 414 So. 2d 41 (Ala. 1982), the present case is also an action to compel a State official to perform his official duties, namely to remit payment for services rendered, and such suit is not barred by § 14 of the Constitution. In Gunter, the court held that the defendants failed to perform their legal duties in refusing to make payments due to the Plaintiff and thus the suit was not barred by § 14. Id. at 49. The “trial court can generally, by writ of mandamus, order State officers in certain situations to pay liquidated damages or contractually specified debts. The payment of these certain, liquidated amounts would be only a ministerial act that State officers do not have the discretion to avoid.” Alabama Dep’t of Transportation v. Harbert Int’l, 990 So. 2d 831, 845 (Ala. 2008).

6. The Defendant relies on Alabama Dep’t of Transportation v. Harbert Int’l, 990 So. 2d 831 (Ala. 2008); Williams v. John C. Calhoun Community College, 646 So. 2d 1 (Ala. 1994); Wallace v. Malone, 182 So. 2d 360 (Ala. 1964); and Comer v. Banked, 70 Ala. 493 (Ala. 1881), for the proposition that in the present suit the State is the real party in interest. However, those cases are distinguishable. Alabama Dep’t of Transportation v. Harbert Int’l involved a lawsuit by Harbert against the Alabama Department of Transportation, its Director, other DOT employees, and the Governor in which Harbert sought mandamus relief directing payment of the liquidated damages, the retainage, and compensation for the extra work Harbert performed, or alternately, sought a writ of mandamus to compel the defendants to give it a fair and impartial forum for Harbert to submit its claim for extra compensation. See 990 So. 2d at 836. Additionally, the Supreme Court affirmed the trial court's mandamus relief directing the retainage amount withheld by the State to be paid to Harbert. Id. at 844. Williams v. John C. Calhoun Community College involved a lawsuit by an employee against John C. Calhoun

Community College, the president of Calhoun, and the State of Alabama Board of Education, alleging that the defendants had breached an employment contract with the plaintiff. See 646 So. 2d at 1. The Williams Court held that the lawsuit was “an action to compel the specific performance of a contract of the State by forbidding those acts that would constitute a breach of contract.” Id. at 6-7. Contrast that with the present case, which is not an attempt to prohibit the State or its officers from breaching a contract, but rather is an attempt to compel the State Comptroller to perform his official duties. Wallace v. Malone involved a lawsuit seeking to enjoin the State officers from cancelling a contract between the Plaintiff and the State Board of Education. See 182 So. 2d at 361. Wallace has no applicability to the present case. Comer v. Banked involved a lawsuit that sought specific performance of a contract made by the warden of the state penitentiary and to enjoin the successor warden from breaching the contract. See 70 Ala. at 494. Comer is similar to the Williams case, discussed supra, in that both were attempts to prevent the State agencies or State officers from breaching or cancelling contracts, but both case are clearly distinguishable from the present case where the contract has already been fully performed by the Plaintiff.

7. While the defendant alleges that the House of Representatives “overstepped its authority” and that Plaintiff’s Complaint seeks payment for activities not authorized by the Alabama Constitution, the House of Representatives definitively had the power to contract with the Plaintiff under the Subject Contract. Nowhere in the Alabama Constitution is the House of Representatives expressly limited or prohibited from contracting with outside legal counsel for any purpose. Accordingly, the House of Representatives had the power and authority to contract with Plaintiff for the purpose expressed in the Subject Contract. See Hart v. deGraffenried, 388 So. 2d 1196, 1198 (Ala. 1980) (“The Legislature is laden with a broad form of governmental

power which is plenary in character, and subject only to those *express limitations* appearing in the Constitution.”); County Board of Education v. Taxpayers & Citizens, 163 So. 2d 629, 634 (Ala. 1964) (“There are no limits to the legislative power of state governments save those written into its constitution. All that the legislature is not forbidden to do by the organic law, state or federal, it has full power to do.”). The Alabama Supreme Court “has long stood by the doctrine that the Constitution is not the source of legislative power, and there are no limits to the legislative power of the state government save such as are written upon the pages of its Constitution.” Ex parte Alabama Senate, 466 So. 2d 914, 918 (Ala. 1985) (*internal quotation omitted*). The Defendant’s reliance on Alabama Constitution, Article III, Section 43 is badly misplaced, as the underlying lawsuit was never about the “the legislative department ... execris[ing] the executive and judicial powers” and the Defendant’s assertion of such is nothing more than an attempt to confuse the true issue in this civil action, which is mandamus relief to compel the State Comptroller to perform his ministerial duty of remitting payment to the Plaintiff for work performed under the Subject Contract between the Plaintiff and the Alabama House of Representatives.

8. Alabama Code § 41-16-72(7) specifically exempts the legislature from having to seek approval from the Governor or the Attorney General for the procurement of legal services to represent the legislature in litigation.

9. The Defendant’s reliance on Lyons v. Norris, 829 So. 2d 748 (Ala. 2002), for justification for the Comptroller to audit and deny payment to the Plaintiff is misplaced. Lyons involved a lawsuit over the State officials’ denial of reimbursement for office-overhead expenses of several attorneys who represented indigent criminal defendants. See 829 So. 2d at 749. Lyons is readily distinguishable from the present case because in Lyons there was a statute that required

prior court approval of such expenses See Id. at 751-752. See also Ala. Code § 15-12-21(d), the statutory section applicable to Lyons. There is no similar statute requiring any prior approval of legal services contracted for by the House of Representatives. One point from Lyons is applicable to the present case: “It is the duty of the Comptroller, before issuing a warrant for the payment of an account against the state, to make an administrative determination that the money is in the state treasury, that an appropriation has been made by law to pay the account, and that the expenditure is within the law .... **The Comptroller has no authority to supervise the operation of other state officers or state agencies .... Neither does he have the power to veto their action in the performance of their legal duties.**” 829 So. 2d at 753 (*emphasis added*). In the present case, the Comptroller’s actions are an improper attempt to supervise the operation of the House of Representatives as well as an improper attempt to veto the actions of the House of Representatives in contracting with the Plaintiff to provide legal services to the Committee for no reason other than the fact that the Governor and Department of Finance opposed the underlying litigation and denied payment to the Plaintiff out of spite and a belief that they are above the laws of this State. Defendant’s argument that under Lyons v. Norris, “if the claimed expense is not undertaken in the manner provided by law, it is due to be rejected” (Defendant’s brief at p. 10), blatantly ignores the fact that there is so such applicable statute requiring pre-approval

10. The Defendant’s reliance on State ex. Rel. Daly v. Henderson, 74 So. 951 (Ala. 1917) is also misplaced. Henderson involved the following statute:

The Attorney General is authorized to incur such expenses as may be necessary in the investigation of violations of the criminal law, in the prosecution of crime, and in the conduct, investigation and prosecution of any civil cause in which the state is interested or the state's revenues involved. Authority is herein contained for the Attorney General and his assistants to incur such traveling expenses in the performance of their duties as may be necessary; and the like **expenses of solicitors traveling in obedience to the direction of the Attorney General** as herein

prescribed shall be paid; and such other incidental expenses of the office as may be necessary. **All such expenses shall be paid by warrant drawn by the state auditor upon the certificate** of the Attorney General of accounts properly itemized and sworn to, **such certificate to be approved by the Governor.**

74 So. at 951 (*emphasis added*). Unlike in Henderson where the Governor is empowered by statute with the power to approve expenses authorized by the Attorney General for the hiring of outside counsel, there is no similar statute applicable to the present case and neither the Governor nor any other member of the executive branch has the power over approving expenses authorized by the House of Representatives for the hiring of outside counsel for the legislature. Unlike in Henderson, the Plaintiff was not hired by or subject to the direction of the Attorney General. While the Governor has authority over the Attorney General by virtue of the fact that the Attorney General is part of the executive branch, the House of Representatives is part of the legislative branch, which is separate from and not subject to the authority of the Governor or the executive branch, and any such attempt by the executive branch to police the lawful actions of the House of Representatives would clearly infringe on the separation of powers doctrine.

11. Alabama Code § 41-16-72(7) specifically exempts the legislature from having to seek approval from the Governor or the Attorney General for the procurement of legal services to represent the legislature in litigation.

12. The Defendant should not be allowed to hide behind a mistaken interpretation of Alabama law to avoid remitting the payments due to the Plaintiff for work performed under the subject contract. In Williams v. Hank's Ambulance Serv., 699 So. 2d 1230 (Ala. 1997), the Court discussed the exceptions to § 14 of the Alabama Constitution as well as the legislative intent of that section. “The common thread running through the cases discussed above is the unfairness that would have occurred from allowing the State to arbitrarily avoid its financial obligations.

There was, and is, no legitimate reason to allow State department heads to avoid their clear contractual or ministerial obligations (once those obligations are determined), even if the performance of those obligations ultimately touches the State treasury. Such avoidance of legal and moral responsibility by the State was not the intent of the framers of the Constitution. Likewise, there was, and is, no legitimate reason (or constitutional authority) for this Court to interfere in the legislative appropriation process.” Id. at 1237. Just like as discussed in Williams, the Defendant, at the direction of his boss, Governor Bob Riley, is unfairly attempting to arbitrarily avoid the State’s contractual financial obligations as a personal vendetta against the Plaintiff for bringing the underlying litigation.

13. Defendant’s reliance on and interpretation of State ex rel. Daly v. Henderson, 74 So. 951 (Ala. 1917) is also incorrect and misplaced. While the Defendant cites Henderson for the proposition that “approval of attorney charges is discretionary” (Defendant’s Motion at ¶ 2), nowhere in that opinion does it reach such a conclusion. That case is also very distinguishable from the present case, as Henderson involved the issue of whether the Governor has discretion to approve or disapprove expenses incurred by the Attorney General. 74 So. at 951. Unlike the Attorney General in Henderson, who was part of the State Executive branch, the Alabama House of Representatives, who is the State entity that contracted with the Plaintiff, is part of the separate Legislative branch. Additionally, as the Defendant pointed out, in Henderson, there was a “statute [that] provided for the expense of the attorney to be ‘paid by warrant drawn by the state auditor upon certificate of the Attorney General of accounts properly itemized and sworn to, such certificates **to be approved by the Governor**’” (Defendant’s Brief at p.8) (*emphasis added*). In the present case there is no applicable statute requiring approval by the Governor of contracts entered into by the Legislature. In fact, such a statute would clearly violate the

separation of powers principles as expressed in Section 43 of the Alabama Constitution (“the executive shall never exercise the legislative and judicial powers, or either of them”).

14. The Defendant argues that “Ala. Code § 29-2-41 defines the authority of Plaintiff’s client, the Committee” and “that the authority does not include the power to ‘interfere with execution of a contract,’ or implicitly ‘the power to sue’” (Defendant’s brief at p.5). In response, first, the Plaintiff again points out that the subject “contract is made by and **between the House of Representatives** and Tyrone Means and the law firm of Thomas, Means, Gillis & Seay, PC.” (Exhibit 1) (*emphasis added*). However, as discussed above, the power of the House of Representatives is extremely broad and only subject to express limitations contained in the Constitution. See Hart v. deGraffenried, 388 So. 2d 1196, 1198 (Ala. 1980) (“The Legislature is laden with a broad form of governmental power which is plenary in character, and subject only to those *express limitations* appearing in the Constitution.”); County Board of Education v. Taxpayers & Citizens, 163 So. 2d 629, 634 (Ala. 1964) (“There are no limits to the legislative power of state governments save those written into its constitution. All that the legislature is not forbidden to do by the organic law, state or federal, it has full power to do.”). While the Governor may feel that he is superior to and can deny power to the legislature, Alabama law is crystal clear that the House of Representatives had the power to contract with the Plaintiff as expressed in the subject contract. Second, the stated services the Plaintiff was to provide under the subject contract were to “advise, consult and assist the Joint Legislative Contract Review Committee on any matters that come before the committee” (Exhibit 1). While the Defendant argues that that legislative committee does not have the power to sue, the Defendant cannot point to any such express limitation in the Constitution because no such limitation exists. While Governor Riley and his executive agencies may believe that they are above the law, particularly

when it comes to competitive bidding and honoring state contracts, and that they can dictate what the legislature can and cannot do, such an interpretation is ridiculous, egomaniacal, an infringement of the powers of the legislature, and completely unsupported by the Constitution and laws of this State, which the Governor is supposedly sworn to uphold.

15. Even if the Defendant lawfully denied payment to Plaintiff for work performed under the subject contract, the Plaintiff would still be entitled to compensation for the work performed under the doctrine of quantum meruit. See State v. American Tobacco Co., 772 So. 2d 417, 422-423 (Ala. 2000). In American Tobacco, the court held that, “under the doctrine of quantum meruit, James's attorneys are entitled to a reasonable fee” despite the fact that the attorneys’ contract was void as a matter of law due to the Governor’s failure to submit it for review to the Contract Review Permanent Legislative Oversight Committee. Id at 420, 423. While the Defendant questions the propriety of the actions taken by the Plaintiff in the underlying litigation, whether or not the course of action pursued by the House of Representatives and the Plaintiff in the underlying litigation was wise or appropriate is not for the executive or judicial branches to decide. Id. at 422. “[A]ll questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies.” Id.

### **CONCLUSION**

Plaintiff’s Complaint is not a suit for damages against the State but rather is an action to compel Defendant White to perform his legal duties and ministerial acts, which is clearly not prohibited by the Alabama Constitution. Plaintiff is merely asserting its legal right to be paid for the work it contracted with the Alabama House of Representatives to perform and which it did perform in compliance with said contract. This lawsuit clearly falls within one or more of the

exceptions to the State's sovereign immunity, and sovereign immunity does not bar this action to compel a State official to perform a legal duty, particularly in this case where state incurred a legal duty to pay money owed under the subject contract with the House of Representatives.

The House of Representatives definitively had the power to contract with the Plaintiff under the Subject Contract. Nowhere in the Alabama Constitution is the House of Representatives expressly limited or prohibited from contracting with outside legal counsel for any purpose. Accordingly, the House of Representatives had the power and authority to contract with Plaintiff for the purpose expressed in the Subject Contract. There is no statute requiring any prior approval of legal services contracted for by the House of Representatives. The Defendant should not be allowed to hide behind his mistaken interpretation of Alabama law to avoid remitting the payments due to the Plaintiff for work performed under the subject contract. Even if the Defendant lawfully denied payment to Plaintiff for work performed under the subject contract, the Plaintiff would still be entitled to compensation for the work performed under the doctrine of quantum meruit.

s/ Thomas T. Gallion, III

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Thomas T. Gallion, III (GAL010)  
Attorney for the Plaintiff

**OF COUNSEL:**

Constance C. Walker

**Haskell Slaughter Young & Gallion**

305 S. Lawrence Street (36104)

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Montgomery, Al 36103-4660

(334) 265-8573

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of July 2010, I have filed the foregoing using the AlaFile system and that will provide notice of the foregoing to the following Counsel of Record by means of AlaFile Notices:

Albert L. Jordan, Esq.  
Wallace Jordan Ratliff & Brandt, L.L.C.  
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Chief Legal Counsel  
State of Alabama, Department of  
Finance

s/ Thomas T. Gallion, III

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OF COUNSEL

Professional Services Contract

This contract is made by and between the House of Representatives and Tyrone Means and the law firm of Thomas, Means, Gillis & Seay, P.C. - 3121 Zelda Court Road, Montgomery, Alabama 36106 ("Contractor").

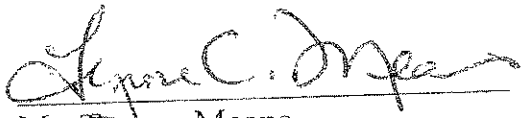
Contractor shall advise, consult and assist the Joint Legislative Contract Review Committee on any matters that come before the committee.


The House of Representatives agrees to pay Contractor \$195 per hour not to exceed \$200,000.00.


The contract shall become effective on October 7, 2009 and shall terminate on ~~October 7, 2010.~~  
Sept. 30 DBH

This contract may be terminated by either party upon the giving of thirty (30) days written notice to the other party.

In Witness Whereof, the parties hereunto have executed this contract as of the 7th day of October, 2009.

  
Mr. Tyrone Means  
Thomas, Means, Gillis & Seay, P.C.

  
Mr. Greg Pappas  
Clerk, House of Representatives

  
Representative Alvin Holmes  
Chairman, Joint Legislative Contract Review Committee

Reviewed by Contract  
Review Committee

OCT 08 2009  
Dianne Harper  
Alabama Legislative  
Dianne Harper, Clerk  
10CLCCT008

Plaintiff's Exhibit

Contract Review Permanent Legislative Oversight Committee  
Alabama State House  
Montgomery, Alabama 36130

**LEGAL SERVICES CONTRACT REVIEW REPORT**

(Separate review report required for each contract)

Name of State Agency: House of Representatives

Name of Contractor: THOMAS, MEANS, GILLIS & SCALI

Contractor's Physical Street Address (No P.O. Box) 321 Zelda Court Rd Montgomery AL  
City ST

Is Contractor Registered with Alabama Secretary of State to do Business as a Corporation in Alabama?  
YES  NO  If Yes, in what State is Contractor Incorporated? \_\_\_\_\_

Is Act 2001-955 Disclosure Form Included with this Contract? YES  NO   
Was a Lobbyist/Consultant Used to Secure this Contract? YES  NO

If Yes, Give Name: \_\_\_\_\_

Contract Number: 10CLEG008

Contract/Amendment Total: \$ 200,000 (estimate if necessary)

Rate of Compensation: \$ 195 (If over \$85/hr, attach Governor or Attorney General approval)

Amount of Retainer: & \_\_\_\_\_ Is this Contract for Litigation? YES \_\_\_\_\_ NO \_\_\_\_\_  
Is this a Contingency Contract? YES \_\_\_\_\_ NO

Attorney Assigned Work: TURONE MEANS  
Is Contractor Appointed by Attorney General? YES \_\_\_\_\_ NO \_\_\_\_\_ (If yes, attach copy of appointment letter)

% State Funds:  % Federal Funds: \_\_\_\_\_ % Other Funds: \_\_\_\_\_ \*\*

\*\*Please Specify Source of Other Funds (Fees, Grants, etc.) \_\_\_\_\_

Date Contract Effective: Oct 7, 2009 Date Contract Ends: Sept. 30, 2010

Type Contract: NEW:  RENEWAL: \_\_\_\_\_ AMENDMENT: \_\_\_\_\_

If AMENDMENT, Complete A through C:

(A) Original contract total \$ \_\_\_\_\_

(B) Amended total prior to this amendment \$ \_\_\_\_\_

(C) Amended total after this amendment \$ \_\_\_\_\_

Summary of Contract Services to be Provided: Advise, consult and assist the  
Committee including, but not limited to, the matter  
pertaining to contract between Finance Dept. and Paragon  
Source

Why Contract Necessary AND why this Service cannot be performed by Merit Employee:  
Legal representative for Joint Legislative  
Contract Review Committee

I certify that the above information is correct.

[Signature]  
Signature of Agency Head

Printed Name

[Signature]  
Signature of Contractor

Printed Name