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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2010-2011

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Ex parte Capstone Building Corporation

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: William Walker

v.

Capstone Building Corporation)

(Tuscaloosa Circuit Court, CV-07-900226; Court of Civil Appeals, 2081153)

MURDOCK, Justice.

We granted Capstone Building Corporation's petition for a writ of certiorari to review the decision of the Court of

Civil Appeals in Walker v. Capstone Building Corp., [Ms. 2081153, March 26, 2010] ___ So. 3d ___ (Ala. Civ. App. 2010), in which the Court of Civil Appeals, relying upon this Court's decision in McKenzie v. Killian, 887 So. 2d 861 (Ala. 2004), applied a six-year statute of limitations to a claim of wantonness. In McKenzie, this Court held that a tort claim based on allegations of wanton misconduct was subject to the six-year statute of limitations found in Ala. Code 1975, § 6-2-34(1), rather than the two-year statute of limitations found in Ala. Code 1975, § 6-2-38(l). We hereby overrule McKenzie and confirm that claims of wantonness are subject to the two-year statute of limitations found in Ala. Code 1975, § 6-2-38(l). Nevertheless, because we conclude that we cannot apply today's decision retroactively in the present case, we affirm the judgment of the Court of Civil Appeals.

I. Facts and Procedural History

The pertinent facts as stated in Walker are as follows:

> "[William 'Toby'] Walker filed an action against Capstone and several fictitiously named parties on July 10, 2007. He alleged that Capstone had been the general contractor on a construction job on which he had worked. Walker alleged that, on July 12, 2005, while working at the construction site, he stepped on a manhole cover, which flipped over, causing him to fall partially into the manhole and

causing him serious injury. He asserted that Capstone had been responsible for providing a safe work environment at the site but that it had failed in that responsibility. Walker alleged that Capstone previously had been made aware that the manhole cover that had flipped over was not properly secured and was unsafe because of a previous accident involving the same manhole cover. He alleged that Capstone's failure to properly secure the manhole cover constituted negligence or wantonness.

"On April 20, 2009, Capstone filed a motion to dismiss or, in the alternative, for a summary judgment. It contended that the evidence developed during discovery demonstrated that the incident giving rise to Walker's action occurred on June 6, 2005, not on July 12, 2005, as alleged in the complaint. As a result, Capstone argued, Walker's claims alleging negligence and wantonness were barred by the two-year statute of limitations set forth in § 6-2-38, Ala. Code 1975. In support of its motion, Capstone submitted, among other things, the incident report generated as a result of the accident forming the basis of Walker's action, deposition excerpts, and affidavits. Walker filed a response to Capstone's motion in which he argued that there was a question of fact as to when the incident occurred and that, even if his negligence claim was barred by the applicable statute of limitations, his claim of wantonness was, he maintained, subject to a six-year statute of limitations that had not run at the time he filed his action.

"....

"On August 10, 2009, the trial court granted Capstone's motion and entered a summary judgment in its favor."

___ So. 3d at ___.

Walker appealed to the Court of Civil Appeals, arguing that the six-year statute of limitations found in § 6-2-34(1) applied to his claim alleging wantonness:[1]

> "Walker contends that the statute of limitations applicable to wantonness claims is set forth in § 6-2-34(1), Ala. Code 1975, which provides that '[a]ctions for any trespass to person or liberty, such as false imprisonment or assault and battery,' are subject to a six-year statute of limitations. He argues that, because it is undisputed that his action was filed within six years of the date on which he was allegedly injured, the trial court erred when it entered a summary judgment in favor of Capstone as to his wantonness claim. In asserting that argument, Walker relies on our supreme court's decisions in McKenzie v. Killian, 887 So. 2d 861 (Ala. 2004), and Carr v. International Refining & Manufacturing Co., 13 So. 3d 947 (Ala. 2009) (plurality opinion)."

___ So. 3d at ___ (footnote omitted).

After discussing the decisions in McKenzie and Carr v. International Refining & Manufacturing Co., 13 So. 3d 947 (Ala. 2009), the Court of Civil Appeals continued:

> "In the present case, Walker alleged that Capstone acted with wantonness and, in so doing, caused his personal injuries. Based on the holding in McKenzie and the plurality opinion in Carr, we must conclude that Walker's wantonness claim is governed by the six-year statute of limitations applicable to trespass claims, rather than the two-

[1]On appeal to the Court of Civil Appeals, Walker abandoned his claim of negligence. ___ So. 3d at ___ n.2.

> year statute of limitations the trial court applied. As such, the trial court's summary judgment with regard to Walker's wantonness claim is due to be reversed.
>
> "We note Capstone's argument that, if McKenzie and Carr require this court to apply a six-year statute of limitations to Walker's wantonness claim, those decisions represent unconstitutional attempts by our supreme court to create a separate cause of action for wantonness, even though the Alabama Code does not enumerate such a claim, as well as a judicial attempt to amend the statute of limitations provided by the Alabama Code. As such, Capstone argues, McKenzie and Carr should be overruled.
>
> "We will not address the merits of this contention. This court is bound by the decisions of our supreme court, and we are not at liberty to overrule those decisions or to choose not to follow them. See State Farm Mut. Auto. Ins. Co. v. Carlton, 867 So. 2d 320, 325 (Ala. Civ. App. 2001) ('This court is bound by the decisions of the Alabama Supreme Court, see § 12-3-16, Ala. Code 1975, and we have no authority to overrule that court's decisions.'). We recognize that a majority of the members of the supreme court did not join the main opinion in Carr; however, as previously noted, Justice See's opinion concurring in the result reached in Carr demonstrates that a majority of the members of the supreme court deciding that case were of the view that McKenzie provides that claims of wantonness are subject to a six-year statute of limitations. So long as McKenzie is binding on this court, we must and we will apply its holding."

___ So. 3d at ___.

Capstone petitioned this Court for a writ of certiorari, arguing that we should overrule McKenzie and reverse the

judgment of the Court of Civil Appeals. The question presented is a pure question of law subject to de novo review by this Court. Simcala, Inc. v. American Coal Trade, Inc., 821 So.2d 197, 200 (Ala. 2001).

II. Analysis

A. Statute of Limitations

Specifically, the question presented is whether the six-year limitations period provided in § 6-2-34(1) is applicable to Walker's claim that he was injured as a result of wanton conduct by Capstone. Section 6-2-34(1) provides:

> "The following must be commenced within six years:
>
> > "(1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery."

If Walker's claim does not fall within the six-year limitations period provided in § 6-2-34(1), then, by default, it falls within the two-year period provided by the catchall provision of § 6-2-38(l), which states:

> "All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years."

In applying the six-year statute of limitations of § 6-2-34(1) to Walker's claim alleging that Capstone acted

wantonly, there are only two decisions of this Court upon which the Court of Civil Appeals might have, and did, rely: McKenzie v. Killian, 887 So. 2d 861 (Ala. 2004), and Carr v. International Refining & Manufacturing Co., 13 So. 3d 947 (Ala. 2009) (plurality opinion). The main opinion in only one of those decisions, McKenzie, was joined by a majority of the Court so as to constitute a precedential decision of the Court. See, e.g., State ex rel. James v. ACLU of Alabama, 711 So. 2d 952, 964 (Ala. 1998) ("[N]o appellate pronouncement becomes binding on inferior courts unless it has the concurrence of a majority of the Judges or Justices qualified to decide the cause."). As indicated, the main opinion in the other case, Carr, was a plurality opinion.

In McKenzie, this Court concluded that "wanton conduct is the equivalent in law to intentional conduct. Such an allegation of intent renders the six-year statutory period of limitations [i.e., § 6-2-34] applicable." 887 So. 2d at 870. Although the main opinion in Carr relied upon McKenzie, only four Justices joined the main opinion. Carr, 13 So. 3d at 956. Four other Justices concurred in the result; the author of this opinion dissented. Id.

In a special writing concurring in the result in Carr, Justice See offered the view that "application [of McKenzie] in this case is troubling." 13 So. 3d at 956 (See, J., concurring in the result). Justice See ultimately concluded, however, that "because we have not been asked to overrule McKenzie, [he would] concur in the result of the main opinion." 13 So. 3d at 956-58. In the present case, we have been asked to overrule McKenzie, and we do so for the reasons hereinafter discussed.

We first observe that McKenzie stands alone as an exception to the long line of cases that addressed the question of what statute of limitations was applicable to a claim of wantonness and that repeatedly answered that question by deciding that the two-year limitations period of § 6-2-38(l) was applicable. Examples of such cases decided during the two decades immediately before McKenzie was decided include the following: Jim Walter Homes, Inc. v. Nicholas, 843 So. 2d 133, 135-36 (Ala. 2002) (holding that a claim of wantonness was barred under § 6-2-38(l)); Sanders v. Peoples Bank & Trust Co., 817 So. 2d 683, 686 (Ala. 2001) (claim of wantonness governed by two-year statute); Cunningham v.

Langston, Frazer, Sweet & Freese, P.A., 727 So. 2d 800, 805 (Ala. 1999) ("[A]n action alleging ... wantonness must be brought within two years of the accrual of the cause of action."); Life Ins. Co. of Georgia v. Smith, 719 So. 2d 797, 802-03 (Ala. 1998) (claim of wantonness governed by two-year statute); Booker v. United Am. Ins. Co., 700 So. 2d 1333, 1340 (Ala. 1997) ("Because the [plaintiffs] filed their complaint in August 1993 -- over two years after their claims accrued -- their negligence and wantonness claims are time-barred."); Rumford v. Valley Pest Control, Inc., 629 So. 2d 623, 627 (Ala. 1993) (claim of wantonness "governed by the two-year statute" at § 6-2-38(l)); Henson v. Celtic Life Ins. Co., 621 So. 2d 1268, 1274 (Ala. 1993) ("The statutory period of limitations for ... wantonness actions, found at ... § 6-2-38, is two years ...."); Smith v. Medtronic, Inc., 607 So. 2d 156, 159 (Ala. 1992) ("An action alleging ... wantonness ... must be brought within two years after the cause of action accrued."). See also Spain v. Brown & Williamson Tobacco Corp., 872 So. 2d 101, 125 (Ala. 2003) ("'An action alleging ... wantonness ... must be brought within two years after the cause of action accrued.'" (Johnstone, J., concurring in

part, concurring specially in part, and dissenting in part) (quoting Smith v. Medtronic, Inc., 607 So. 2d 156, 159 (Ala. 1992))).

Indeed, even in cases decided after McKenzie, this Court has applied a two-year statute of limitations to wantonness claims. See Boyce v. Cassese, 941 So. 2d 932, 945-46 (Ala. 2006), and Gilmore v. M & B Realty Co., 895 So. 2d 200, 207-09 (Ala. 2004). See also Malsch v. Bell Helicopter Textron, Inc., 916 So. 2d 600, 601 (Ala. 2005) (claim of wantonness subject to "unambiguous two-year statute[] of limitations").

The dissenting opinion refers to the "years of ongoing confusion regarding the proper limitations period governing willful and wanton torts," ___ So. 3d at ___, that, according to it, preceded this Court's decision in McKenzie. The reality, however, is that, until McKenzie, no decision of this Court ever applied the six-year statute of limitations of § 6-2-34(1) to a claim of wantonness, as that term is now understood. Most of the cases reviewed in McKenzie and in the law review article referenced in McKenzie (Linda Suzanne Webb, Limitation of Tort Actions under Alabama Law: Distinguishing between the Two-Year and the Six-Year Statutes of Limitations,

49 Ala. L. Rev. 1049 (Spring 1998)), and to which the dissenting opinion apparently alludes, addressed the distinction between trespass and trespass on the case, and they did so for purposes other than ascertaining the applicable limitations period (e.g., determining the sufficiency of pleadings or of proof of a given claim). To the extent the issue of wantonness was addressed at all in such cases, it was not in the context of the applicable statute of limitations.[2]

Thus, the decisions of this Court before McKenzie and, with the exception of Carr, since McKenzie, that have addressed the specific question whether the two-year limitations period prescribed by § 6-2-38(l) is applicable to claims of wantonness have uniformly answered that question in the affirmative. That answer was compelled in those cases, as it is in this one, by the text of that and other statutes. As

[2]In W.T. Ratliff Co. v. Henley, 405 So. 2d 141 (Ala. 1981), this Court discussed a statute-of-limitations issue, but its discussion of this issue related to a claim other than the claim of wantonness discussed later in the opinion. The opinion contained no analysis as to the appropriate limitations period with respect to the claim of wantonness. Also, the underlying tort was a trespass to land governed by § 6-2-34(2), Ala. Code 1975, not a trespass to the person or liberty of another as in the present case.

noted, § 6-2-38(l) plainly provides that "[a]ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years." Walker's claims alleging wanton conduct do not arise out of contract and do not implicate another enumerated action within § 6-2-38. As explained below, neither do they fall within the category of actions for "trespass" to which § 6-2-34(1) makes a six-year limitations period applicable.

In McKenzie, this Court quoted from Justice Jones's dissenting opinion in Strozier v. Marchich, 380 So. 2d 804, 809 (Ala. 1980), in concluding that the issue presented in McKenzie turned on "'the degree of culpability of the alleged wrongful conduct.'" McKenzie, 887 So. 2d at 870. Insofar as it goes, we reaffirm this fundamental conclusion as sound. As both McKenzie and Strozier document, courts as a general rule have indeed moved from a causality-based distinction between actions labeled as trespass and trespass on the case to a culpability-based distinction, i.e., between intentional torts and those based in negligence. Acceptance of this conclusion, however, does not answer, but only begs, the separate question

whether a claim of wantonness is a trespass claim for purposes of s 6-2-34(1).

With respect to this separate question, the author of this opinion observed as follows in his dissenting opinion in Carr:

> "In discussing the transition from a jurisprudence that categorized causes of action based on the causal sequence of events to one that categorizes based on the culpability of the tortfeasor, one well known authority makes no mention of recklessness or wantonness, instead dividing actions merely between those involving intentional conduct and those involving negligence. See W. Page Keeton, Prosser and Keeton on the Law of Torts at 29-31 (5th ed. 1984). Further, the discussion in Prosser explains that causes of action for trespass, assault and battery, and false imprisonment -- in other words, causes of action of the very type addressed in § 6-2-34(1) -- involve intentional conduct by the tortfeasor: 'Terms such as battery, assault and false imprisonment, which were varieties of trespass, came to be associated with intent, and negligence emerged as a separate tort. ... There is still some occasional confusion, and some talk of a negligent "assault and battery," but in general these terms are restricted to cases of intent.' Id. at 30 (footnote omitted). '"The intention to do harm, or an unlawful intent, is of the very essence of an assault, and without it there can be none."' Id. at 30 n. 17 (quoting Raefeldt v. Koenig, 152 Wis. 459, 462, 140 N.W. 56, 57 (1912)). See also id. at 31 n. 18 (explaining that 'assault and battery, false imprisonment, and trespass to land' were 'derived from trespass').
>
> "Our own cases likewise hold that the types of claims described in § 6-2-34(1) involve intentional

> harm to the plaintiff. See, e.g., Harper v. Winston County, 892 So. 2d 346, 353 (Ala. 2004) (explaining that the unconsented touching in an assault and battery must have been done intentionally); Crown Cent. Petroleum Corp. v. Williams, 679 So. 2d 651 (Ala. 1996) (false-imprisonment case). In contrast, '"'[w]antoness' has been defined by this Court as the conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result."' Bozeman v. Central Bank of the South, 646 So. 2d 601, 603 (Ala. 1994) (quoting Stone v. Southland Nat'l Ins. Corp., 589 So. 2d 1289, 1292 (Ala. 1991)). 'To prove wantonness, it is not essential to prove that the defendant entertained a specific design or intent to injure the plaintiff.' Alfa Mut. Ins. Co. v. Roush, 723 So. 2d 1250, 1256 (Ala. 1998)."

Carr, 13 So. 3d at 962-63 (Murdock, J., dissenting) (footnotes omitted; some emphasis added).

In Alfa Mutual Insurance Co. v. Roush, 723 So. 2d 1250 (Ala. 1998), cited in the above-quoted passage, this Court explained that wantonness involved recklessness and that intent to injure another was not an element of a claim alleging wantonness:

> "'Wantonness' is statutorily defined as '[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others.' Ala. Code 1975, § 6-11-20(b)(3). 'Wantonness' has been defined by this Court as the conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will

> likely or probably result. Bozeman v. Central Bank of the South, 646 So. 2d 601 (Ala. 1994). To prove wantonness, it is not essential to prove that the defendant entertained a specific design or intent to injure the plaintiff. Joseph v. Staggs, 519 So. 2d 952 (Ala. 1988). ... Certain language in Lynn Strickland [Sales & Service, Inc. v. Aero-Lane Fabricators, Inc., 510 So. 2d 142, 145 (Ala. 1987)] suggested that a specific design or intent to injure the plaintiff was an element of a claim for wantonness. To the extent that Lynn Strickland deviates from the statutory definition of wantonness, as followed by this Court, it is hereby overruled."

723 So. 2d at 1256 (emphasis added). See also Ex parte Thicklin, 824 So. 2d 723 (Ala. 2002) (citing Alfa v. Roush); Porterfield v. Life & Cas. Co. of Tennessee, 242 Ala. 102, 105, 5 So. 2d 71, 73 (1941) (quoting Central of Georgia Ry. v. Corbitt, 218 Ala. 410, 411, 118 So. 755, 756 (1928), for the following proposition: "'To constitute willful or intentional injury there must be a knowledge of the danger accompanied with a design or purpose to inflict injury, whether the act be one of commission or omission, while in wantonness this design or purpose may be absent, and the act done or omitted with knowledge of the probable consequence, and with reckless disregard of such consequence. Alabama G.S.R. Co. v. Moorer, 116 Ala. 642, 22 So. 900 [(1897)]; Birmingham R. & E. Co. v. Bowers, 110 Ala. 328, 20 So. 345 [(1896)]; Louisville & N.R.

Co. v. Anchors, Adm'r, 114 Ala. 492, 22 So. 279, 62 Am.St.Rep. 116 [(1897)].'" (emphasis added)).

Consistent with the foregoing, we note that the legislature employs the term "trespass" in § 6-2-34(1) in concert with the concepts of false imprisonment and assault and battery. We note the aforementioned historical derivation of the latter causes -- requiring an intent to cause the actionable injury -- as forms of trespass. We likewise find pertinent the doctrine of "noscitur a sociis," which holds that "where general and specific words which are capable of an analogous meaning are associated one with the other, they take color from each other, so that the general words are restricted to a sense analogous to that of the less general." Winner v. Marion County Comm'n, 415 So. 2d 1061, 1064 (Ala. 1982) (citing State v. Western Union Tel. Co., 196 Ala. 570, 72 So. 99 (1916), and C. Sands, Sutherland Statutory Construction § 47.16 (4th ed. 1973)).

It is true that this Court has stated that "[w]antonness is not merely a higher degree of culpability than negligence" and that negligence and wantonness "are qualitatively different tort concepts." Lynn Strickland Sales & Serv., Inc.

v. Aero-Lane Fabricators, Inc., 510 So. 2d 142, 145 (Ala. 1987).[3] If we are to accept the difference in these concepts as qualitative in nature, however, then we certainly may accept the difference between wantonness and intent as qualitative in nature, and for that matter more distinctive.

That said, as Justice See observed in his special writing in Carr, questioning the conclusion reached in McKenzie that claims of reckless and wanton conduct ought to be treated the same as intentional-tort claims for statute-of-limitations purposes "does not require that wanton conduct be considered more closely akin to negligence than to an intentional tort; this Court has repeatedly held that wantonness is neither an

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[3]This Court indicated in Lynn Strickland that this "difference in quality rather than in degree" is rooted in a "difference of degree ... so marked as to amount substantially to a difference in kind":

> "This 'difference in quality rather than in degree' is well recognized and firmly established by leading authorities on tort law. Restatement (Second) of Torts § 500 comment g (1965), provides, in part, that '[t]he difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.'"

Lynn Strickland, 510 So. 2d at 146.

intentional tort nor some form of 'super-negligence.'" 13 So. 3d at 958 n. 6 (See, J., concurring in the result). In other words, all that is required is that we be able to conclude that reckless or wanton conduct is not an intentional tort.[4]

We are clear to the conclusion that recklessness and wantonness are fundamentally different concepts than intent, and that claims alleging reckless or wanton conduct are distinctively different types of claims from those alleging intentional harm to a plaintiff. We therefore cannot place claims of wantonness within the governance of § 6-2-34(1), which we interpret as imposing a six-year statute of

[4]Whether wantonness and intent are in some respects more similar to one another than are negligence and recklessness is not the question we must answer. It is not as if we have before us a statute of limitations of two years for negligence and a statute of limitations of six years for intentional acts, with these two options as our only choices and our task being simply to decide to which of these two types of wrongful conduct a wanton act is more similar. Instead, we have at issue a specific statute that prescribes a six-year statute of limitations for intentional torts and a catchall statute prescribing a two-year statute of limitations for all torts not expressly referenced in the former statute or some similar specific statute. Under the choices made for us by the legislature, our task is simply to decide if wantonness is intent. If it is, a claim alleging it falls within the former statute; if, by definition, it is something different, a claim alleging it falls outside that statute. Plainly, it is something different.

limitations on the intentional torts described therein, i.e., "trespass to person or liberty, such as false imprisonment or assault and battery." Concomittantly, we conclude that claims alleging reckless and wanton conduct fall within the governance of the catchall provision in § 6-2-38(l) for a two-year limitations period for "[a]ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section."

The dissenting opinion states that "[t]he majority opinion simply puts forward the opposing arguments this Court rejected in McKenzie v. Killian, 887 So. 2d 861 (Ala. 2004)." ___ So. 3d at ___. The dissenting opinion is simply incorrect. The basis for our decision in this case is a recognition that there is a difference between a claim of wantonness and an intentional tort. As the dissenting opinion itself concedes, McKenzie "detailed the law of trespass and trespass on the case." ___ So. 3d at ___. After concluding that the difference between trespass on the case and trespass is one of culpability rather than causation (again, a notion that we reaffirm today), McKenzie gave very little attention -- and no analysis -- as to the meaning of wantonness or the

difference between a claim of wantonness and an intentional tort. The following conclusory declaration is the extent of the Court's treatment of this issue in McKenzie: "As the Court recognized in [Louisville & Nashville R.R. v.] Johns[, 267 Ala. 261, 101 So. 2d 265 (1958)], wanton conduct is the equivalent in law to intentional conduct." 887 So. 2d at 870.[5]

As did the Court in McKenzie, Chief Justice Cobb relies in her dissenting opinion today upon the views expressed by Justice Jones in a dissenting opinion in the 1990 case of Strozier v. Marchich, 380 So. 2d 804, 806 (Ala. 1980):

> "'"The rationale for my view comports with the fundamental concepts of our fault-based system of tort law. One who injures another, or another's property, as a result of conduct intentionally committed should be held to a higher degree of accountability than one who injures another through a simple lack of due care. Just as the former, because of its higher degree of culpability, carries a potential for punitive damages, so should it also carry a longer period within which to enforce

[5]In Louisville & Nashville R.R. v. Johns, 267 Ala. 261, 101 So. 2d 265 (1958), this Court was concerned with whether the plaintiff had satisfied common-law pleading requirements in a complaint attempting to assert corporate liability for the wanton acts of its employee where the corporate defendant had not directly participated in the act. In addition, it was decided based on a causality-based view of trespass and trespass on the case, rather than the modern culpability-based view. See Johns, 267 Ala. at 276-77, 101 So. 2d at 279-80.

> accountability for such intentional wrong. One who knowingly sets into motion, by intentionally doing ... an act, a sequence of events resulting in reasonably foreseeable injury to another, whether the resulting injury is immediate or consequential, in my opinion, has committed a trespass within the contemplation of the six-year statute of limitations.
>
> "'"Indeed, I have searched in vain for possible alternative policy considerations for limiting the period of accountability in certain tort cases to one year and in other cases to six years. I submit that the only logical, as well as the only defensible, basis for this difference is the extent of the wrong or the degree of culpability."'"

___ So. 3d at ___ (Cobb, C.J., dissenting) (quoting McKenzie, 887 So. 2d at 870, quoting in turn Strozier, 380 So. 2d at 809-10 (Jones, J., dissenting) (emphasis added)).

The fundamental difficulty with the quoted passage is that it collapses the concept of wantonness into the concept of an intentional tort. It does so in part by ignoring the difference between intended acts and intended consequences, stating, for example, that "[o]ne who injures another ... as a result of conduct intentionally committed should be held to a higher degree of accountability than one who injures another through a simple lack of due care," and by its reference to "conduct intentionally committed" as an "intentional wrong." 887 So. 2d at 870. Subsequently, the passage refers to

"intentionally doing ... an act" that results in only a "reasonably foreseeable injury to another" as a "trespass," notwithstanding the fact that reasonable foreseeability clearly is a negligence standard. Id.

As already noted, this Court agrees, insofar as it goes, with the fundamental notion expressed at the end of the above-quoted passage, i.e., that "the only defensible basis" for applying a two-year statute of limitations to some conduct and a six-year statute of limitations to other conduct is "the degree of culpability" of the wrongdoer. We do so, however, not because we, like Justice Jones, have searched for, but been unable to find, "policy considerations" that would support a different conclusion, but because the legislature has made the policy choice for us by statute. Moreover, unlike Justice Jones, we cannot conclude that it is appropriate to conflate the concepts of wantonness and intent for purposes of assessing "the degree of culpability."

B. Stare Decisis

As in this case, this Court was asked in Foremost Insurance Co. v. Parham, 693 So. 2d 409 (Ala. 1997), to overrule a decision of this Court made only a few years

earlier and thereby reaffirm a rule that had been recognized as the law of Alabama for many years before that recent decision.[6] In deciding to overrule the earlier decision, the Court in Foremost declared:

> "Although this Court strongly believes in the doctrine of stare decisis and makes every reasonable attempt to maintain the stability of the law, this Court has had to recognize on occasion that it is necessary and prudent to admit prior mistakes and to take the steps necessary to ensure that we foster a system of justice that is manageable and that is fair to all concerned. See, e.g., Jackson v. City of Florence, 294 Ala. 592, 598, 320 So. 2d 68, 73 (1975), in which Justice Shores, writing for this

[6]Like the present case, one of the issues presented in Foremost related to the proper operation of a statute of limitations. In this regard, the specific issue presented in Foremost was when a fraud cause of action "accrued" under Ala. Code 1975, § 6-2-30(a), so as to trigger the running of the limitations period of § 6-2-38(l). Before 1989, the Court had construed the term "accrued" in that context to mean that "a fraud claim accrued, thus commencing the running of the statutory limitations period, when the plaintiff discovered the fraud or when the plaintiff should have discovered the fraud in the exercise of reasonable care." 693 So. 2d at 417. Under the combined effect of Hickox v. Stover, 551 So. 2d 259 (Ala. 1989), and Hicks v. Globe Life & Accident Insurance Co., 584 So. 2d 458 (Ala. 1991), that judicial interpretation was changed so that the theretofore recognized "reasonable-reliance" standard was replaced by a "justifiable-reliance" standard. Under that new standard, a person's reliance was to be judged only by what he or she actually knew of facts that would have put a reasonable person on notice of fraud. 693 So. 2d at 418. The Court determined in Foremost that the so-called "reasonable-reliance" standard was in fact the proper construction for the statutory term "accrued" and overruled Hickox and Hicks on that point.

> Court, stated: 'As strongly as we believe in the stability of the law, we also recognize that there is merit, if not honor, in admitting prior mistakes and correcting them.'"

693 So. 2d at 421.

Consistent with the foregoing, we overrule McKenzie to the extent that it holds that a claim of wantonness falls within the six-year statute of limitations now found in § 6-2-34(1). We once again reaffirm the proposition that wantonness claims are governed by the two-year statute of limitations now embodied in § 6-2-38(l).

In her dissenting opinion, the Chief Justice characterizes as "particularly distressing" what she describes as this Court's "willingness to disregard the critical judicial policy of stare decisis." ___ So. 3d at ___. We reject both the Chief Justice's characterization and its premise.

The stated premise for the Chief Justice's "distress" is the notion that "the law in Alabama concerning the proper legal analysis of wantonness was not settled and was in fact based on confusing and inconsistent discussions of causality rather than culpability," ___ So. 3d at ___, prior to this Court's decision in McKenzie, and that "McKenzie represented

a thorough and persuasive discussion of the proper legal policy to be applied." ___ So. 3d at ___. As we have noted, McKenzie did provide "a thorough and persuasive discussion" of the propriety of distinguishing between "trespass" and "trespass on the case" based upon culpability rather than causality. It did not, however, present "a thorough and persuasive discussion" of the respective meanings of the terms wantonness and intent, or how the concepts represented by those terms relate to the language in § 6-2-34(1) and § 6-2-38(l). Moreover, as also has been noted, for many years before McKenzie was decided, our cases consistently and expressly applied a two-year statute of limitations to claims of wantonness, just they did after McKenzie was decided, with one exception. Even in that exception, a majority of this Court suggested with their vote that they had some concern regarding the analysis in McKenzie. See Carr, 13 So. 3d at 956 (See, Stuart, Smith, and Bolin, JJ., concurring in the result); Carr, 13 So. 3d at 959 (Murdock, J., dissenting). In the only opinion written by any of the four Justices who concurred in the result only, Justice See opined that if and

when this Court were to be asked to revisit McKenzie, it would be appropriate to do so.

In revisiting and overruling McKenzie today, we find applicable not only the above-quoted admonition of Justice Shores in Foremost, but also the admonitions of the United States Supreme Court in cases such as Citizens United v. Federal Election Commission, ___ U.S. ___, 130 S. Ct. 876 (2010):

> "[I]f the precedent under consideration itself depart[s] from the Court's jurisprudence, returning to the '"intrinsically sounder" doctrine established in prior cases' may 'better serv[e] the values of stare decisis than would following [the] more recently decided case inconsistent with the decisions that came before it.' Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995); see also Helvering[v. Hallock, 309 U.S. 106], at 119 [(1940)]; Randall[v. Sorrell, 548 U.S. 230], at 274 [(2006)] (Stevens, J., dissenting). Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects."

___ U.S. at ___, 130 S.Ct. at 921.

> "'[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.' Helvering v. Hallock, 309 U.S. 106, 119 (1940). Remaining true to an 'intrinsically sounder' doctrine established in

> prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, 'special justification' exists to depart from the recently decided case."

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231-33 (1995) (emphasis added) (considering the operation of stare decisis as to an issue of constitutional interpretation).[7]

For the reasons explained, McKenzie altered the law in a manner that, under well established principles concerning the operation of the doctrine of stare decisis, we are now

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[7]"Stare decisis is not an inexorable command.

> "Particularly where a precedent or series of precedents has been treated as authoritative for a long time, courts are generally reticent to deviate from that policy, especially where the precedent has been followed for a long period of years.
>
> "....
>
> "... A court may overrule precedent after reviewing the plausibility of the existing interpretation of a statute, the extent to which that interpretation has been fixed in the fabric of the law, and the strength of arguments for changing the interpretation."

20 Am. Jur. Courts § 131 (2005).

impelled to overrule. If we did not follow these principles and overrule McKenzie, we would be enshrining in our law an erroneous decision. A failure by this Court to admit its error and to adhere to the policy choice that has been made by our legislature would be the course that would "undermine[] its judicial authority and equate[] th[is] Court with some sort of 'other legislature' to the detriment of all the courts in this State," ___ So. 3d at ___ (Cobb, C.J., dissenting), and the doctrine of separation of powers.[8]

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[8]What would be truly "distressing" would be if, when this Court has made an error as it did in McKenzie, it would be unwilling to "confess" that error and set the law right.

In the last 17 months alone, dating back to the beginning of last year, this Court has issued opinions in nine cases overruling preexisting precedent. See Williams v. State, [Ms. 1090759, March 18, 2011] ___ So. 3d ___ (Ala. 2011); Ex parte Rogers, [Ms. 1080880, Dec. 30, 2010] ___ So. 3d ___ (Ala. 2010); Hutchinson v. State, [Ms. 1091018, Dec. 30, 2010] ___ So. 3d ___ (Ala. 2010); Steele v. Federal Nat'l Mortg. Ass'n, [Ms. 1091441, Dec. 3, 2010] ___ So. 3d ___ (Ala. 2010); Elliott v. Navistar, Inc., [Ms. 1090152, Dec. 3, 2010] ___ So. 3d ___ (Ala. 2010); DGB, LLC v. Hinds, 55 So. 3d 218 (Ala. 2010); Riley v. Cornerstone Community Outreach, 57 So. 3d 704 (Ala. 2010); Robertson v. Gaddy Elec. & Plumbing, LLC, 53 So. 3d 75 (Ala. 2010); and Teer v. Johnston, [Ms. 1081613, Sept. 30, 2010] ___ So. 3d ___ (Ala. 2010). Chief Justice Cobb concurred in the action of this Court in overruling prior precedent in all but one of those cases; most of those cases were decided unanimously. In each of them, the Court, as it does today, felt compelled to overrule one or more prior decisions based on its good-faith belief that doing so comported with well established

C. Prospective Application

We now turn to the manner in which the rule we announce today should be applied with respect to litigants as to whom the six-year limitations period previously announced by this Court in McKenzie has begun to run but has not yet expired. In this regard, we note that Walker's claim was timely filed under the rule of law announced in McKenzie, but untimely if we were to apply retroactively to him the rule of law announced today.

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principles of stare decisis and was necessary to set the law right. In none of them did any member of this Court challenge the decision of those in the majority as being a function of anything other than such a good-faith belief.

A fortiori, and for the same reasons, we reject as ill-conceived and offensive the dissenting opinion's attribution to other members of this Court of a "willingness to change [the Court's] basic pronouncements of the law as its composition changes." ___ So. 3d at ___. In addition, we note that in all the cases referenced above in which this Court overruled prior precedent, the composition of this Court changed between the date of the precedent overruled and the decision overruling it. Yet, in none of those cases did a dissenting Justice of this Court write an opinion accusing the other Justices of this Court of a "willingness to change ... basic pronouncements of the law" merely because they could do so as a result of "composition changes" in the Court. Such an accusation would have been ill-conceived in each of those other cases, just as it is in this case.

Although the retroactive application of judgments is the usual practice, "[t]he determination of the retroactive or prospective application of a decision overruling a prior decision is a matter of judicial discretion that must be exercised on a case-by-case basis." Ex parte Coker, 575 So. 2d 43, 51 (Ala. 1990). Compare Foremost, 693 So. 2d at 421 (applying prospectively a decision reinstating an earlier rule as to when a cause of action for fraud accrues "because this return to the reasonable reliance standard represents a fundamental change in the law of fraud").

We are particularly cognizant in a case such as this of the fact that an existing cause of action is a vested right. See, e.g., Pickett v Matthews, 238 Ala. 542, 545, 192 So. 261, 264 (1939) ("[T]he right to the remedy must remain and cannot be curtailed after the injury has occurred and right of action vested, regardless of the source of the duty which was breached, provided it remained in existence when the breach occurred."). Thus, applying our decision retroactively to parties such as Walker would deprive them of a vested right without granting them any opportunity to preserve it. Cf. Thomas v. Niemann, 397 So. 2d 90, 93 (Ala. 1981)("[T]he

legislature may create or shorten periods of limitation provided a reasonable time is allowed for existing causes of action to be brought."); Cronheim v. Loveman, 225 Ala. 199, 201, 142 So. 550, 550 (1932).

The restriction recognized in such cases as Thomas v. Niemann on the legislature's power to affect existing causes of action is of constitutional dimension, and it provides useful guidance in the present case. As this Court stated in Coleman v. Holmes, 44 Ala. 124, 125 (1870), "[u]nder the restrictions of our Federal and State constitutions a statute of limitations which should not give a reasonable time after its passage for the commencement of suits upon existing causes of action, would be void." See also 51 Am. Jur. 2d Limitation of Actions § 45 (2000) ("A statute of limitation, like any other procedural or remedial law, cannot under the United States Constitution apply retroactively to deprive a person of a preexisting right."). In other words, as would be true of the legislature, this Court's recognition today of a different statute of limitations than previously announced by this Court must "provide[] a reasonable time ... for existing causes of action to be brought." Thomas, 397 So. 2d at 93.

Cf. Ex parte DeBruce, 651 So. 2d 624, 631 (Ala. 1994) ("[T]his Court can adopt rules of procedure to govern the proceedings in a criminal case, so long as those rules guarantee substantive procedural due process of law and do not infringe upon a right granted an accused by the State or Federal Constitution, or other provisions of substantive law."); see also 20 Am. Jur. 2d Courts § 151 (2005) ("The judicial overruling of a precedent should not be given retroactive effect where to do so would interfere with vested rights ....").

In addition, we note that in First Tennessee Bank, N.A. v. Snell, 718 So. 2d 20 (Ala. 1998), this Court discussed

> "certain factors a court should consider in deciding whether a judicial decision is to be applied nonretroactive. See Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (U.S. 1971). We quoted the Chevron Oil factors in McCullar v. Universal Underwriters Life Ins. Co., 687 So. 2d 156 (Ala. 1996):
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> > "'"First, the decision to be applied nonretroactive must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp., [392 U.S. 481, 88 S. Ct. 2224, 2233, 30 [20] L. Ed. 2d 1231 (1968),] ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g.,

> Allen v. State Board of Elections, [393 U.S. 544, 572, 89 S. Ct. 817, 835, 22 L. Ed. 2d 1 (1969)]. Second, it has been stressed that 'we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Linkletter v. Walker, [381 U.S. 618, 629, 85 S. Ct. 1731, 1737-38, 14 L. Ed. 2d 601 (1965)]. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.'"'

"687 So. 2d at 165 (quoting Chevron Oil, 404 U.S. at 106-07, 92 S. Ct. at 355, 30 L. Ed. 2d at 296 (1971)).

> "We also noted in McCullar that under Alabama law, the first of these Chevron Oil factors will, in many cases, prove dispositive of the retroactivity issue. That first factor suggests that the retroactivity issue turns on the extent to which the new decision affects pending or preexisting rights. 687 So. 2d at 165."

718 So. 2d at 24; see also 20 Am. Jur. 2d Courts § 151 (2005) ("A decision overruling a judicial precedent may be limited to prospective application where required by equity or in the interest of justice. ... Some jurisdictions distinguish between decisions that overrule substantive law and those that

overrule procedural law; in these jurisdictions, a decision overruling substantive law applies retroactively, while a decision overruling procedural law applies prospectively only.").[9]

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[9]The general rule in some jurisdictions as described in the cited section of American Jurisprudence is consistent with our decision today and arguably other decisions of this Court. This rule was expressly articulated in the following passage from Corpus Juris Secundum quoted with approval by this Court in City of Birmingham v. Brasher, 359 So. 2d 1153 (Ala. 1978), though our research has not found any express repetition of it in more recent cases:

> "'As a general rule, the effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective, as well as prospective, and makes the law at the time of the overruled decision as it is declared to be in the last decision .... The distinction has been made that if the overruled decision is one dealing with procedural or adjective law the effect of the subsequent overruling decision is prospective only; but if the overruled decision is one dealing with substantive law the effect of the subsequent overruling decision is retroactive. In any event, a court of final decision may expressly define and declare the effect of a decision overruling a former decision, as to whether or not it shall be retroactive, or operate prospectively only, and may, by a saving clause in the overruling decision, preserve all rights accrued under the previous decision.' 21 C.J.S. Courts § 194(a) (Footnotes omitted.)"

359 So. 2d at 1155.

The above-discussed principles require that we not apply our ruling today retroactively so as to immediately cut off the claims of persons who have been wantonly injured within the last six years and who therefore have been entitled to rely upon the rule this Court announced in McKenzie. Thus, for a person as to whom the six-year limitations period previously announced by this Court will, under the rule announced today, expire on a date less than two years from today's date, we conclude that it is just and equitable that the limitations period not be affected by today's decision. For a person whose limitations period would expire more than two years from today, however, equity does not require that that person have more time to bring his or her action than would a party whose cause of action accrues on the date of this decision. In other words, as a result of our holding, litigants whose causes of action have accrued on or before the date of this decision shall have two years from today's date to bring their action unless and to the extent that the time for filing their action under the six-year limitations period announced in McKenzie would expire sooner.

III. Conclusion

Based on the foregoing, the decision of the Court of Civil Appeals reversing the summary judgment entered against Walker is affirmed.

AFFIRMED.

Stuart, Bolin, Parker, Shaw, and Wise, JJ., concur.

Murdock and Main, JJ., concur specially.

Woodall, J., concurs in the result.

Cobb, C.J., dissents.

MURDOCK, Justice (concurring specially).

In addition to its reliance upon Justice Jones's dissenting opinion in Strozier v. Marchich, 380 So. 2d 804 (Ala. 1980) (a reliance that is discussed in the main opinion), the dissenting opinion would perpetuate the confusion and/or conflation of the concepts of intent and wantonness by the manner in which it describes and then analyzes various hypothetical situations involving the discharge of a firearm into a crowd. Before addressing these hypotheticals and other statements in the dissenting opinion that would have the same effect, I will first address the difference between intent and wantonness.

Wantonness entails the intent to do an act, but not the intent to produce the consequence or injury for which the actor is to be held responsible. As noted, "wantonness" has been defined by our cases as the "'conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result.'" George v. Alabama Power Co., 13 So. 3d 360, 368 (Ala. 2008) (quoting Alfa Mut. Ins. Co. v. Roush, 723 So. 2d 1250, 1256 (Ala. 1998)

(emphasis omitted; emphasis added)) ; Norfolk Southern Ry. v. Johnson, [Ms. 1090011, March 11, 2011] ___ So. 3d ___ (Ala. 2011) (to like effect). As noted in the main opinion, wantonness involves an "'"act done or omitted with knowledge of the probable consequence, and with reckless disregard of such consequence."'" ___ So. 3d at ___ (quoting Porterfield v. Life & Cas. Co. of Tennessee, 242 Ala. 102, 105, 5 So. 2d 71, 73 (1941), quoting in turn another case). Specific intent to injure the plaintiff is not an element of wantonness, which has been statutorily defined as "'[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others.'" Alfa Mut. Ins. Co. v. Roush, 723 So. 2d at 1256 (quoting Ala. Code 1975, § 6-11-20(b)(3)).[10]

In contrast, the concept of intent does not apply to conduct carried on by the actor merely with an awareness of the "probability" of a given consequence. Instead, the law reserves the term "intent" for circumstances where the actor desires or is substantially certain of the injury to result

[10]See also Alabama Pattern Jury Instructions: Civil 29.00 (2d ed. 1993)(Cum. Supp. 2010): "[An actor]'s conduct is wanton if [he/she] consciously acts of fails to act with a reckless or conscious disregard of the rights or safety of others and [he/she] is aware that harm will likely or probably result."

from his or her act. As § 8A of the Restatement (Second) of Torts (1965) explains, "[t]he word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." (Emphasis added.)[11]

The comments to § 8A of the Restatement (Second) of Torts further explain:

> "a. 'Intent,' as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself. ... 'Intent' is limited, wherever it is used, to the consequences of the act.
>
> "b. All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially

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[11]Section 1 of the Restatement (Third) of Torts (2010) explains that

> "[a] person acts with the intent to produce a consequence if:
>
> "(a) the person acts with the purpose of producing that consequence; or
>
> "(b) the person acts knowing that the consequence is substantially certain to result."

(Emphasis added.)

> certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500."

(Emphasis added.)

Comment f to Restatement (Second) of Torts § 500 (1965) discusses the difference between intentional misconduct and recklessness:

> "f. Intentional misconduct and recklessness contrasted. Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results."

(Emphasis added.)

American Jurisprudence explains it this way:

> "An individual may undertake an intentional act, and if the act is undertaken without an intent to harm or a substantial certainty that harm will result from the act, the actor is not guilty of an intentional tort. Instead, in such a situation, the activity is properly classified as reckless disregard of safety or reckless misconduct. To be

> reckless, the act must be intended by the actor; but, at the same time, the actor does not intend to cause the harm which results from it. Thus, reckless misconduct results when a person, with no intent to cause harm, intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result.... Nevertheless, existence of probability is different from substantial certainty, which is an ingredient of the intent to cause harm which results from the act."

57A Am. Jur. 2d Negligence § 276 (2004) (emphasis added; footnotes omitted).

Perhaps the simplest explanations come from the hornbook authored by Professor Prosser:

> "The three most basic elements of [the] most common usage of 'intent' are that (1) it is a state of mind, (2) about consequences of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act."

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 8, p. 34 (4th ed. 1984) (first two emphases in original; other emphasis added; footnotes omitted).[12] We also are

[12]Professor Prosser goes on to explain that another source of "confusion" is the "failure to distinguish between (1) the factual elements essential to a finding of intent," as quoted in the text of this writing, and "(2) the elements of proof and argument that advocates and factfinders may bring to bear in addressing the question whether those factual elements are

provided with this very helpful distinction by Professor Prosser:

> "[T]he mere knowledge and appreciation of a risk -- something short of substantial certainty -- is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong."

Prosser, § 8, p. 36 (emphasis added).

At odds with the foregoing fundamental principles, Chief Justice Cobb makes reference in her dissenting opinion to wantonness as "generalized intentional conduct." ___ So. 3d at ___. She then posits the following series of hypothetical circumstances and outcomes:

> "Thus, if one who is in a crowd accidently drops a loaded firearm that discharges and injures another, the actionable tort is negligence. If that person intentionally discharges the firearm into a crowd and injures another, the actionable tort is wantonness. And if that person intentionally fires the firearm at a particular person and injures that person the tort becomes assault and battery. Unlike the tort of negligence, in both wantonness and

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present in a given case." Prosser, § 8, pp. 35-36. As to the latter, Prosser explains that one of the common ways of proving the factual elements is to show that "given the circumstances disclosed in the evidence, a reasonable person in the actor's position would have known that the consequences in question were substantially certain to follow [his or her] act." Id., at 36.

> assault and battery, there is intent to cause injury. That is, in both the wanton shooting and the assault and battery, there is intentional conduct."

__ So. 3d at ___ (some emphasis added). In so doing, the Chief Justice conflates the concepts of intent and wantonness.

The last sentence in the above-quoted excerpt from the dissenting opinion -- that "in both the wanton shooting and the assault and battery, there is intentional conduct" -- is true, but only to the extent that one might consider the word "conduct" narrowly as a reference to the act, rather than to the consequences of the act. Furthermore, the next to last sentence of the excerpt -- the statement that "in both wantonness and assault and battery, there is intent to cause injury" -- is simply wrong. Wantonness does not contemplate that the actor intends the result achieved by their act. It is only necessary that the injury resulting from the act is "likely" or "probable." Again, the "existence of probability is different from substantial certainty," 57A Am. Jur. 2d Negligence § 276 (2004), and "[t]he defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is

great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong." Prosser, § 8, p. 36.

The most specific concern expressed by Chief Justice Cobb with respect to her series of hypotheticals is with reference to the situation where, as she puts it, "[a] person intentionally discharges [a] firearm into a crowd and injures another." ___ So. 3d at ___. The Chief Justice is concerned that a two-year statute of limitations would necessarily apply in this situation because, she concludes, "the actionable tort is wantonness." Consistent with all the foregoing authorities, however, if the actor had as his or her purpose to injure someone in the crowd, then he or she is guilty of an intentional tort, not merely an act of wantonness. Likewise, the location of the crowd in relation to the actor and the density of the crowd might be such that the jury may infer that the actor knew that it was "substantially certain" that someone in the crowd would be injured, given the manner in which the actor discharged the firearm.[13] Under all the

[13] "The movement of the finger which fires a gun is the same, whether it takes place in a crowded city, or in the solitude of the Mojave Desert, and regardless of the actor's state of mind about the consequences. But the legal outcome will depend on the actor's

foregoing authorities, the law would treat either circumstance as involving intentional conduct, and, therefore, the concern expressed in the dissenting opinion regarding the application of a two-year statute of limitations would be misplaced.

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surroundings and the actor's state of mind....

"....

"... [Intent] extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does. The actor who fires a bullet into a dense crowd may fervently pray that the bullet will hit no one, but if the actor knows that it is unavoidable that the bullet will hit someone, the actor intends that consequence."

Prosser, § 8, p. 35.

MAIN, Justice (concurring specially).

I concur in the main opinion. I write to note that the main opinion should not be interpreted as holding that trespass no longer has a field of operation in tort claims. Rather, the main opinion holds that trespass is not equivalent to wantonness.

As I see it, the basic distinction between "negligence," "wantonness," and "trespass" is explained as follows: Essentially, "negligence" is akin to "careless." See Hornady Truck Line, Inc. v. Meadows, 847 So. 2d 908, 915 (Ala. 2002) ("'"Negligence" is defined as "refer[ring] only to that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary, or great." Black's Law Dictionary 1032 (6th ed. 1990).'" (quoting Clayton ex rel. Clayton v. Fargason, 730 So. 2d 160, 163-64 (Ala. 1999))). "Wanton" is akin to "reckless" with respect to the injury or outcome. See Bozeman v. Central Bank of the South, 646 So. 2d 601, 603 (Ala. 1994) (wantonness is "'the conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury

will likely or probably result.'" (quoting Stone v. Southland Nat'l Ins. Corp., 589 So. 2d 1289, 1292 (Ala. 1991))); and Galaxy Cable, Inc. v. Davis, [Ms. 1090086, Sept. 10, 2010] ___ So. 3d ___, ___ (Ala. 2010) ("'To establish wantonness, the plaintiff must prove that the defendant, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty.'" (quoting Martin v. Arnold, 643 So. 2d 564, 567 (Ala. 1994))). "Trespass" is akin to "intentional" with regard to the injury or outcome. See Carr v. International Refining & Mfg. Co., 13 So. 3d 947, 959 (Ala. 2009) (Murdock, J., dissenting) (containing a detailed analysis of the proposition that causes of action for trespass "involve intentional conduct by the tortfeasor" and the "intentional procurement of a harm to the plaintiff"). Finally, because each of these causes of action are distinguishable, I believe that the adequacy of pleadings in a complaint would govern the applicable statute of limitations.

WOODALL, Justice (concurring in the result).

I am not convinced that McKenzie v. Killian, 887 So. 2d 861 (Ala. 2004), was wrongly decided; therefore, I do not agree that the decision should be overruled. However, because the majority affirms the decision of the Court of Civil Appeals reversing the summary judgment against Walker, I concur in the result.

COBB, Chief Justice (dissenting).

I respectfully dissent. The majority opinion simply puts forward the opposing arguments this Court rejected in McKenzie v. Killian 887 So. 2d 861 (Ala. 2004). In McKenzie, the Court detailed the law of trespass and trespass on the case and its application, which application had resulted in years of ongoing confusion regrading the proper limitations period governing willful and wanton torts. The Court stated:

> "The problem presented by the dependence upon causality is illustrated by the problematic result of allowing a less culpable wrongdoer to be exposed to a significantly longer statutory limitations period than that applicable to a more culpable wrongdoer, depending upon the character of force applied. See the Webb article[14] for discussion of these anomalies. See also Justice Jones's dissenting opinion in Strozier [v. Marchich, 380 So. 2d 804, 806 (Ala. 1980)]. Justice Jones succinctly summed up the case for ending the confusion:
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> > "'Whatever vestige of the outmoded direct/indirect distinction between trespass and trespass on the case still exists in Alabama, I would now abandon and adopt instead the more modern tort concept of measuring the cause of action in terms of the degree of culpability of the alleged wrongful conduct. Wanton conduct, as that term is traditionally used and understood

[14]Linda Suzanne Webb, Limitation of Tort Actions under Alabama Law: Distinguishing between the Two-year and the Six-year Statutes of Limitations, 49 Ala. L. Rev. 1049 (Spring 1998).

in the jurisprudence of our State, signifies the intentional doing of, or failing to do, an act, or discharge a duty, with the likelihood of injury to the person or property of another as a reasonably foreseeable consequence. Such conduct, resulting in injury, is actionable in trespass and governed by the six-year statute of limitations, in my opinion.

"'The rationale for my view comports with the fundamental concepts of our fault-based system of tort law. One who injures another, or another's property, as a result of conduct intentionally committed should be held to a higher degree of accountability than one who injures another through a simple lack of due care. Just as the former, because of its higher degree of culpability, carries a potential for punitive damages, so should it also carry a longer period within which to enforce accountability for such intentional wrong. One who knowingly sets into motion, by intentionally doing (or failing to do) an act, a sequence of events resulting in reasonably foreseeable injury to another, whether the resulting injury is immediate or consequential, in my opinion, has committed a trespass within the contemplation of the six-year statute of limitations.

"'Indeed, I have searched in vain for possible alternative policy considerations for limiting the period of accountability in certain tort cases to one year and in other cases to six years. I submit that the only logical, as well as the only defensible, basis for this difference is the extent of the wrong or the degree of culpability.'

> "Strozier, 380 So.2d at 809-10 (emphasis added; footnote omitted). We embrace this reasoning today."

887 So. 2d at 870.

The essential rationale of McKenzie was the recognition that wantonness is injury caused another by one who intentionally engages in conduct that he or she knows is likely to result in that injury. Today, the majority simply contradicts that rationale by asserting that wantonness, as generalized intentional conduct, is as distinct from specific intentional conduct as it is from negligence, which involves no intentional conduct. I respectfully disagree, and I believe that the distinction should be apparent from any examination of the situations in which these concepts of tort law are applied. Thus, if one who is in a crowd accidently drops a loaded firearm that discharges and injures another, the actionable tort is negligence. If that person intentionally discharges the firearm into a crowd and injures another, the actionable tort is wantonness. And if that person intentionally fires the firearm at a particular person and injures that person the tort becomes assault and battery. Unlike the tort of negligence, in both wantonness and assault and battery, there is intent to cause injury. That is, in

both the wanton shooting and the assault and battery, there is intentional conduct. Accordingly, the proper limitations period is the six-year period governed by the concept of "trespass" in § 6-2-34(1), Ala. Code 1975, in concert with the concept of assault and battery. This is why I believe that McKenzie was correctly decided and why the majority errs in its opinion today.

I note further the particularly distressing problem with the Court's willingness to disregard the critical judicial policy of stare decisis. As noted in McKenzie, the law in Alabama concerning the proper legal analysis of wantonness was not settled and was in fact based on confusing and inconsistent discussions of causality rather than culpability. McKenzie represented a thorough and persuasive discussion of the proper legal policy to be applied; now, seven years later, the Court states that the limitations period for wanton torts will henceforth be two years. With respect to the application of the doctrine of stare decisis, this Court has employed the following test from Ex parte First Alabama Bank, 883 So. 2d 1236, 1245 (Ala. 2003):

> "Justice Houston, writing specially in Southern States Ford, Inc. v. Proctor, 541 So. 2d 1081 (Ala.

> 1989), embraced a useful standard for weighing the need for change against the advantages of settled principles of law under the doctrine of stare decisis. He posed the question as follows: whether the ratio decidendi of earlier precedent would '"hypothetically be consented to today by the conscience and the feeling of justice of the majority of all those whose obedience is required by [that] rule of law?"' Southern States Ford, Inc., 541 So.2d at 1093 (quoting Laun, Stare Decisis, 25 Va. L.Rev. 12, 22 (1938))."

See also Prattville Mem'l Chapel v. Parker, 10 So. 3d 546 (Ala. 2008). So, would the judiciary and citizenry of this State approve this Court's decision to limit the period of determining the liability of one who fires blindly into a crowd to the same period as one whose discharge of the firearm is truly an accident? I think not. I believe that this Court's willingness to change its basic pronouncements of the law as its composition changes undermines its judicial authority and equates the Court with some sort of "other legislature" to the detriment of all the courts in this State. I therefore dissent.