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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

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Newman's Medical Services, Inc., and Kenneth E. Newman

v.

**Mobile County and Mobile County Emergency Medical Services
System Rescue Squad, Inc.**

**Appeal from Mobile Circuit Court
(CV-21-901196)**

SHAW, Justice.

The plaintiffs in the action below, Newman's Medical Services, Inc., and Kenneth E. Newman, appeal from the summary judgment entered

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by the Mobile Circuit Court in favor of the defendants below, Mobile County and Mobile County Emergency Medical Services System Rescue Squad, Inc. ("EMS"). We affirm.

Facts and Procedural History

Newman's Medical Services provides medical and ambulance-transport services in Mobile County. It primarily responds to medical emergencies located within the County but outside the corporate limits of the City of Mobile. Kenneth Newman is identified in the complaint as the "owner" of Newman's Medical Services.

EMS is a nonprofit corporation formed in 1991 to provide emergency ambulance-dispatch and ambulance-response services in areas within Mobile County, excluding the corporate limits of the City of Mobile. For many years, Mobile County and EMS have entered into annual ambulance-services contracts under which EMS has been responsible for ambulance-dispatch and ambulance-response services for medical emergencies within the county. Under the terms of those contracts, each year Mobile County paid over \$1,000,000 to EMS for its services. Those contracts have never been competitively bid.

On July 8, 2021, the plaintiffs commenced an action against Mobile

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County and EMS, seeking injunctive and declaratory relief. In their complaint, the plaintiffs noted that, under Alabama's Competitive Bid Law, § 41-16-50 et seq., Ala. Code 1975, "all expenditure of funds of whatever nature" for labor or services involving \$15,000 or more "made by or on behalf of" a county commission "shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder." § 41-16-50(a), Ala. Code 1975. According to the plaintiffs, because it is undisputed that the annual ambulance-services contracts Mobile County enters into routinely exceed \$15,000, Mobile County is required to bid out those contracts before awarding them to EMS. They further alleged that it was undisputed that the defendants' then upcoming 2021-2022 ambulance-services contract, which was set to be finalized and signed on October 1, 2021, and "any such future contracts" were going to exceed \$1,000,000 and that Mobile County had no intention of bidding out any of those contracts. Therefore, the plaintiffs contended, they were entitled to a judgment declaring that the Competitive Bid Law applied to and rendered "void" the 2021-2022 ambulance-services contract and any future ambulance-services contracts. They further contended that they were entitled to injunctive

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relief "unless and until those contracts are competitively bid."

Mobile County and EMS moved to dismiss the plaintiffs' complaint on the basis that it failed to state a claim for which relief could be granted. In their motion, the defendants explained that they had been entering into ambulance-services contracts for many years. The defendants further explained that the effective period of those contracts generally coincided with Mobile County's fiscal year (October 1 through September 30) and that they intended to enter a new annual ambulance-services contract on or about October 1, 2021. According to the defendants, that contract was expected to be "in substantially the same form as the FY 2018-2019 contract" and would require Mobile County to pay EMS \$1,625,000.

In addressing the plaintiffs' claim that the annual ambulance-services contracts between Mobile County and EMS were subject to the Competitive Bid Law, the defendants argued, among other things, that the contracts fell under an express exception to the bidding requirements because those contracts involved services "related to, or having an impact upon, ... the ... safety of persons." § 41-16-51(a)(15), Ala. Code 1975. According to the defendants, the services that EMS agrees to provide

relate to and have an impact on the safety of the residents of and visitors to Mobile County. Therefore, they assert, the ambulance-services contracts are exempt from the Competitive Bid Law. In support of their motion, the defendants attached a variety of evidentiary exhibits.

The plaintiffs filed a response in opposition to the defendants' motion to dismiss in which they also sought a summary judgment in their favor. They noted that it was undisputed that the 2021-2022 ambulance-services contract between Mobile County and EMS would require Mobile County to pay \$1,625,000 and that Mobile County had no plans to solicit bids for that contract. According to the plaintiffs, because the amount of that contract exceeded the \$15,000 limit imposed by § 41-16-50(a), that contract -- and any such future contracts -- would be "void" under § 41-16-51(d). In addressing the defendants' contention that the ambulance-services contracts are exempt from the bidding requirements because they fall under the "safety of persons" exception found in § 41-16-51(a)(15), the plaintiffs noted that ambulance services, like those provided by EMS, "are not designed to keep people from being hurt or to keep people from danger" and, thus, do not fall under that exception. In support of their response in opposition to the motion to dismiss, the

plaintiffs attached a variety of documents, including the affidavit and deposition testimony of EMS's executive director, Mark Turner, as well as copies of the annual ambulance-services contracts between Mobile County and EMS for fiscal years 2010-2018.

Following additional filings by the parties, the trial court entered an order granting the defendants' motion and "dismissing" the plaintiffs' claims with prejudice. The plaintiffs appeal.

Standard of Review

As stated above, the defendants filed a joint motion to dismiss the plaintiffs' complaint, which they supported with evidence outside the pleadings. Likewise, the plaintiffs attached affidavit and deposition testimony and other exhibits to their response in opposition to that motion. Nothing in the record before us indicates that the trial court specifically excluded any of that evidence from its consideration when it ruled on the defendants' motion.

"If the court considers matters outside the pleadings in ruling on the defendant's motion to dismiss, then the motion is converted into a motion for summary judgment, regardless of how the motion was styled. Rule 12(b), Ala. R. Civ. P.; Papastefan v. B & L Constr. Co., 356 So. 2d 158 (Ala. 1978). The circuit court held a hearing to consider the defendants' motions to dismiss, and the [plaintiffs] presented affidavits Because there was no indication during the course of the

hearing, or in the circuit court's order dismissing the plaintiff[s'] claims, that the court had excluded the affidavits, we must assume that the circuit court considered them when it ruled on the motions. Thus, we must analyze the motions to dismiss under the summary judgment standard. Rule 12(b), Ala. R. Civ. P."

Travis v. Ziter, 681 So. 2d 1348, 1351 (Ala. 1996). See also Treadwell v. Farrow, 253 So. 3d 967, 969 (Ala. Civ. App. 2017), and Bearden v. Coker, 121 So. 3d 359, 364-65 (Ala. Civ. App. 2012).

It is well settled that

"" [t]his Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the

exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

"Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004))."

Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

Discussion

As an initial matter, the defendants contend that this appeal is now moot because the 2021-2022 ambulance-services contract "has been executed and performance has begun." This Court has stated:

"The general rule in this state is that if, pending an appeal, an event occurs which makes determination of the case unnecessary, the appeal will be dismissed." Slawson v. Alabama Forestry Comm'n, 631 So. 2d 953, 957 (Ala. 1994) (quoting Adams v. Warden, 422 So. 2d 787, 790 (Ala. Civ. App. 1982)). In South Alabama Gas District v. Knight, 138 So. 3d 971[, 975-76] (Ala. 2013), we summarized the law as follows:

"Events occurring subsequent to the entry or denial of an injunction in the trial court may properly be considered by this Court to determine whether a cause, justiciable at the time the injunction order is entered, has been rendered moot on appeal. "[I]t is the duty of an appellate court to consider lack of subject matter jurisdiction" Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983). "[J]usticiability is jurisdictional." Ex parte State ex rel. James, 711 So. 2d 952, 960 n.2 (Ala. 1998). A justiciable controversy is one that "is

definite and concrete, touching the legal relations of the parties in adverse legal interest, and it must be a real and substantial controversy admitting of specific relief through a decree." Copeland v. Jefferson Cnty., 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969)....

"'....

"'We have previously dismissed appeals when events occurring subsequent to the entry of the order or judgment being appealed rendered the controversy moot.'"

Swindle v. Remington, 291 So. 3d 439, 451-52 (Ala. 2019).

It is undisputed that, as of October 1, 2021, the 2021-2022 ambulance-services contract has been entered into and performance under that contract has begun. According to the defendants, these events, which occurred after the entry of the trial court's order, "make[] determination of the case unnecessary" and this appeal from the trial court's order, at least insofar as it applied to that contract, moot.

Section 41-16-61, Ala. Code 1975, provides: "Any taxpayer of the area within the jurisdiction of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of [the Competitive Bid Law]."

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The issue is what "execution" that Code section allows one to seek to enjoin, i.e., whether "execution" refers to the creation of a contract or whether it refers to the performance of a contract. Black's Law Dictionary defines the term "execution" as having both connotations. "Execution" is generally defined as "carrying out or putting into effect" or as "[v]alidation of a written instrument, such as a contract or will, by fulfilling the necessary legal requirements," and Black's provides the following example of the latter definition: "delivery of the goods completed the contract's execution." Black's Law Dictionary 714 (11th ed. 2019). To "execute" means "[t]o perform or complete (a contract or duty)" or "[t]o make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form." Id.

The language of § 41-16-61 contemplates that "execution" refers to the performance of a contract: the "execution" that may be enjoined is of a "contract" that has been "entered into," that is, a contract that has already been created. See Black's Law Dictionary, 672 (defining "enter" as "to become a party to"). By using the past tense of "enter," that Code section contemplates that the contracting entities have already become parties to the contract, that is, that the contract has been signed and is

final or otherwise has been created. The "execution" that may be enjoined must necessarily refer to the performance of the contract after it has been created and "entered into." In this case, the 2021-2022 ambulance-services contract has been "entered into" and put into effect, but it remains to be fully carried out. If it has been "entered into in violation" of the Competitive Bid Law and thus is "void" under § 41-16-51(d), however, its further execution -- i.e., its further performance and "carrying out" -- may be enjoined before it is fully completed. See Ex parte Carter, 275 So. 3d 115, 123-124 (Ala. 2018) (holding that because the contract at issue had been fully performed, injunctive relief was no longer available and any judgment declaring that the requirements of the Competitive Bid Law had been violated would serve no purpose).¹

¹Additionally, in their complaint, the plaintiffs did not limit their request for relief strictly to an injunction of the execution of the 2021-2022 ambulance-services contract. The plaintiffs also specifically requested a judgment declaring that the method of awarding the ambulance-services contracts, which had been occurring for over a decade and which, it was undisputed, would continue to occur, are subject to the Competitive Bid Law. Although this Court has recognized that the Competitive Bid Law itself does not provide a basis to enjoin future contracts, the plaintiffs argue that an injunction prohibiting the future formation of contracts that violate bid laws "can be warranted under general principles of equity." City of Montgomery v. Brendle Fire Equip., Inc., 291 Ala. 216, 223, 279 So. 2d 480, 487 (1973). Because of our determination that the plaintiffs' challenge to the 2021-2022 ambulance-

Turning to the arguments raised on appeal, the plaintiffs contend that the trial court erred in dismissing their claims when, they say, the ambulance-services contracts between the defendants are subject to the Competitive Bid Law. Section 41-16-50(a) provides, in pertinent part:

"[A]ll expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars (\$15,000) or more ... made by or on behalf of ... the county commissions ... shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder."

As noted above, contracts entered in violation of the above Code section are deemed "void." § 41-16-51(d). In such cases, injunctive relief is available. See § 41-16-61.

In their motion to dismiss, the defendants did not dispute that the ambulance-services contracts have routinely exceeded the \$15,000 limit prescribed by § 41-16-50(a). However, they argued that those contracts fall under an exception to the bidding requirements enumerated in § 41-16-51(a). Specifically, they pointed out, the competitive-bidding requirements do not apply to "[c]ontractual services and purchases of

services contract is not moot, and because of our resolution of the substantive issue whether the Competitive Bid Law applies in this case, we pretermit discussion of this issue.

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products related to, or having an impact upon, ... the ... safety of persons" § 41-16-51(a)(15). According to the defendants, under that exception, "they would be expressly exempt from competitive bidding because [the services provided for in their contracts] relate to and have an impact on the safety of the residents and visitors of Mobile County."

In addressing the defendants' contention that the ambulance-services contracts fall under the "safety of persons" exception, the plaintiffs contended that ambulance services "are not designed to keep people from being hurt or to keep people from danger." Instead, they said, ambulance services, like the services provided by EMS, "exist to provide medical care after a dangerous incident or condition arises" and are not intended to prevent accidents from occurring. EMS, they said, simply "responds to scenes of accidents after they have happened." Thus, the plaintiffs argued, the defendants' ambulance-services contracts do not fall under that exception to the Competitive Bid Law.

The record includes a copy of the 2018-2019 ambulance-services contract, the terms of which, the defendants said, would be identical to the ones included in the 2021-2022 contract. According to that contract, Mobile County, "acting by and through the Mobile County Commission,"

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decided to contract with "EMS for professional services, for the management and operation of an emergency ambulance service and the provision of emergency rescue transit services and by providing funding for such services" to "protect the health, safety and welfare of the public."

(Emphasis added.) In that contract, Mobile County and EMS agreed to the following:

"3. EMS shall respond to and/or dispatch to medical emergencies in all areas within the County except the City of Mobile. ...

"4. In addition to the foregoing, EMS shall provide medical emergency rescue transit in Mobile County.

"5. In the performance of its obligations hereunder, EMS will perform functions which are public in nature, by protecting the health, safety and welfare of the public. ..."

Although a recitation that the services provided under the contracts are related to safety is not controlling, the record contains evidence that demonstrates that the services that EMS provides include not only responding to accidents and emergencies after someone has already been injured, but also performing certain functions during those responses to prevent people from being further harmed.

For example, Turner, EMS's executive director, explained both in his affidavit and during his deposition that EMS serves as the emergency

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medical dispatcher for 911 and employs people who work at the 911 call center to dispatch ambulances to local emergencies. According to Turner, "[d]ispatching and responding to medical emergencies relates to the safety of persons because the time it takes to reach a patient and transport them safely to a hospital, and the manner in which emergency medical care is provided at the scene and/or during transport, can be the deciding factor as to whether someone lives or dies." He further explained that "[EMS] responds to medical emergencies using only ambulances equipped with Advanced Life Support ('ALS') equipment and personnel, which are used to provide life-saving medical response and care," and that such is "true regardless of the nature of the emergency reported to 911 dispatch." Turner stated that the primary goal of EMS's paramedics and emergency medical technicians is to help people and to get them out of potentially life-threatening situations. Turner further explained that EMS's personnel are trained to assist in searches for missing persons and to help extricate people caught in wrecked vehicles. EMS personnel, he said, are equipped with window punches, crowbars, and seat-belt cutters for those purposes and have the ability to use a special type of portable stretcher suitable for carrying people "out of the woods." Finally, Turner

indicated that EMS provides special training to individual volunteer-rescue units in the area so that they are able to safely locate and assist someone in need.²

The term "safety" is not defined in the Competitive Bid Law. "Safety" refers to, among other things, "the condition of being safe from undergoing ... hurt, injury, or loss." Merriam-Webster's Collegiate Dictionary 1095 (11th ed. 2003). The foregoing evidence demonstrates that the services that EMS provides include not only responding to accidents and emergencies after someone has already been injured, but also performing functions during those responses to prevent people from being further harmed. Additionally, EMS receives 911 emergency calls and dispatches ambulances in response. Along with other services described by Turner, these services fell within the "safety of persons" exception, applying the definition of "safety" above. Thus, the defendants

²The record also includes a copy of EMS's application for membership in the Alabama Association of Rescue Squads ("the AARS") along with a copy of that organization's constitution. According to the AARS's constitution, membership in that organization is limited to entities that are "actively engaged in rescue, life-saving, first aid, and emergency work." On its membership application, EMS specifically confirmed that it is an ambulance service that provides "advanced life support or ALS" and that it also offers "light duty rescue" services.

adequately demonstrated that no genuine issue of material fact existed as to whether the ambulance-services contracts fell under the exception found in § 41-16-51(a)(15).³ Therefore, the trial court's decision in favor of the defendants is affirmed.⁴

AFFIRMED.

Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur.

³We note briefly that the defendants also argued that § 9-3-18(a), Ala. Code 1975, exempts the ambulance-services contracts from the Competitive Bid Law. That statute, however, appears to apply to donations between counties and entities that that statute deems to be "public in nature" and makes no reference to the Competitive Bid Law. Given our affirmance of the trial court's decision below based on the applicability of the "safety of persons" exception found in § 41-16-51(a)(15), we pretermit discussion of this issue.

⁴The plaintiffs also briefly argue that the defendants "have contracted and continue[] to contract for exclusive services" for amounts that exceed \$15,000 without any intention of bidding out those contracts in the future and that allowing this practice to continue violates Art. IV, §§ 93 and 94, Ala. Const. 1901 (Off. Recomp.), and the express provisions of the Competitive Bid Law. There is no evidence indicating that the ambulance-services contracts between the defendants are "exclusive contracts." According to Turner, when EMS dispatches calls it selects between three companies providing ambulance services in the area: itself, Newman's Medical Services, and another company called "Lifeguard." He said that the ambulance-services company selected for a particular emergency call depends on the closest available ambulance -- meaning that the ambulance-services company that ultimately responds to an emergency in Mobile County could be from EMS, Newman's Medical Services, or another company.