REL: 09/14/2012

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2012

2110408

Bona Faye Hicks

v.

Donald Ray Hicks

Appeal from DeKalb Circuit Court
(CV-09-4)

MOORE, Judge.

Bona Faye Hicks ("Bona Faye") appeals from a December 15, 2011, judgment of the DeKalb Circuit Court ("the trial court") denying her motion for contempt, sanctions, and specific performance stemming from a previous judgment entered by the

trial court deciding a boundary-line dispute between Bona Faye and Donald Ray Hicks ("Donald"). We dismiss the appeal.

On January 9, 2009, Dennis Hicks ("Dennis") and Bona Faye filed a complaint against Donald in the trial court regarding a boundary-line dispute. Following a trial, the trial court entered a judgment on September 18, 2009, ordering Donald to relocate a fence, which had been erected by Donald, to the location of a previous fence that Donald had removed.

On August 12, 2010, Dennis and Bona Faye filed a motion for contempt, sanctions, and specific performance. In that motion, they asserted that Donald had failed to comply with the trial court's September 18, 2009, judgment because he had moved the fence only partially rather than according to the trial court's directions. On September 29, 2011, Donald filed a suggestion of death, indicating that Dennis had died. On October 3, 2011, Donald filed a motion to dismiss, asserting that Dennis had died and that Dennis's estate, which, Donald argued, was an indispensable party to the action, had not been opened. Donald requested the trial court to dismiss the action for the failure of Bona Faye to add Dennis's estate as an indispensable party. On October 5, 2011, however, the

trial court entered an order denying Donald's motion to dismiss and noting that Bona Faye was prosecuting the motion for contempt, sanctions, and specific performance on her own behalf. The trial court also concluded that Donald had substantially complied with the trial court's September 18, 2009, judgment and denied Bona Faye's motion for contempt, sanctions, and specific performance.

Bona Faye filed a motion to alter, amend, or vacate on November 1, 2011, asserting, among other things, that the trial court lacked subject-matter jurisdiction to enter its October 5, 2011, judgment because no filing fee had been paid upon the filing of the motion for contempt, sanctions, and specific performance. On November 30, 2011, Donald filed a motion to dismiss Bona Faye's postjudgment motion; he also sought an attorney fee.

On December 15, 2011, the trial court entered an order that stated, in pertinent part:

> "It has been held that the payment of a docketing fee or the filing of a court-approved verified statement of substantial hardship is a jurisdictional prerequisite to the commencement of an action, and that a motion to enforce a previous order or judgment of the court is a new action that requires the payment of such a fee. Odom v. Odom, [89 So. 3d 121 (Ala. Civ. App. 2011)]; Opinion of

> the Clerk [No. 17], Supreme Court of Alabama, 363 So. 2d 97 (Ala. 1978). A jurisdictional defect cannot be waived and the rule of equitable estoppel has not been applied to remedy such a defect.
>
> "The Alabama Supreme Court has ruled, however, that when a filing fee has not been paid, the trial court may make such orders as are reasonable and necessary to ensure payment, and has approved the trial court giving a party an opportunity during the course of a proceeding to pay a filing fee that was not paid at the time of filing. Espinoza v. Rudolph, 46 So. 3d 403 (Ala. 2010).
>
> "It appears to the court that the payment of the filing [fee], even at this stage of the proceeding, will cure the jurisdictional defect and that the court has the discretion to permit such late payment. Accordingly, the court finds that either party may, within 14 days from the date of this order, pay the filing fee that was unpaid by [Bona Faye], and upon such payment, the court will deny [Bona Faye's] motion to alter, amend or vacate its order of October 5, 2011. In the event the filing fee is not paid within such period, then the court will vacate its order of October 5, 2011."

On December 19, 2011, Donald filed a notice to the court, indicating that he had paid the filing fee associated with Bona Faye's motion. Bona Faye filed her notice of appeal to this court on January 26, 2012.

Bona Faye raises only one issue on appeal -- that the trial court lacked subject-matter jurisdiction to enter its October 5, 2011, judgment because no filing fee had been paid when the motion for contempt, sanctions, and specific

performance was filed. Both parties agree that a "contempt action is a separate action requiring the payment of a filing fee." G.E.A. v. D.B.A., 920 So. 2d 1110, 1113 (Ala. Civ. App. 2005). Citing Odom v. Odom, 89 So. 3d 121 (Ala. Civ. App. 2011), Bona Faye argues that the trial court lacked subject-matter jurisdiction to rule on her contempt motion for her failure to pay a filing fee when she filed that motion.

In Odom, the former husband filed a "motion for modification" of the support provisions of a judgment divorcing him from the former wife. The trial court purported to deny the former husband's motion, and the former husband appealed. 89 So. 3d at 121-22. Citing Vann v. Cook, 989 So. 2d 556 (Ala. Civ. App. 2008), this court dismissed the appeal and concluded that, because the former husband had failed to pay a docket fee or file a verified statement of substantial hardship seeking waiver of prepayment of any applicable docket fee, the trial court was without jurisdiction to act on the former husband's motion. 89 So. 3d at 123. This court stated in Vann:

> "Section 12-19-70, Ala. Code 1975, provides that 'a consolidated civil filing fee, known as a docket fee, [shall be] collected ... at the time a complaint is filed in circuit court or in district

court,' although that payment 'may be waived initially and taxed as costs at the conclusion of the case' if '[a] verified statement of substantial hardship' is filed and is approved by the trial court. In turn, § 12-19-71(a)(7), Ala. Code 1975, specifies that a filing fee of $248 is to be collected 'for cases filed in the domestic relations docket of the circuit court seeking to modify or enforce an existing domestic relations court order' (emphasis added [in Vann]). The payment of a filing fee or the filing of a court-approved verified statement of substantial hardship is a jurisdictional prerequisite to the commencement of an action. See De-Gas, Inc. v. Midland Res., 470 So. 2d 1218, 1222 (Ala. 1985); see also Farmer v. Farmer, 842 So. 2d 679, 681 (Ala. Civ. App. 2002) ('The failure to pay the filing or docketing fee is a jurisdictional defect.').

"In this case, the record does not reflect that the mother paid any docketing fee with respect to her August 2005 motion to enforce the divorce judgment or her September 2005 petition for protection from abuse. Likewise, the record does not reflect that the father paid any filing fee with respect to his September 2005 motion to enforce the divorce judgment or his December 2005 petition for custody. Each of those filings may be characterized as 'cases ... in the domestic relations docket of the circuit court seeking to modify or enforce an existing domestic relations court order' under § 12-19-71(a)(7), yet on none of those occasions was the appropriate docketing fee paid.

"....

"The trial court, in exercising jurisdiction over the parties' claims asserted after the entry of its default judgment in April 2005, acted outside its jurisdiction because the parties did not pay the docketing fees required under Ala. Code 1975, § 12-19-70 et seq., for that court to acquire

> subject-matter jurisdiction. A judgment entered by a court lacking subject-matter jurisdiction is absolutely void and will not support an appeal; an appellate court must dismiss an attempted appeal from such a void judgment. Hunt Transition & Inaugural Fund, Inc. v. Grenier, 782 So. 2d 270, 274 (Ala. 2000). The mother's appeal is, therefore, dismissed, and the trial court is instructed to vacate all orders entered after the April 2005 default judgment. See, e.g., State Dep't of Revenue v. Zegarelli, 676 So. 2d 354, 356 (Ala. Civ. App. 1996). Any further pleadings filed in the trial court in which either party may seek to enforce or modify that court's April 2005 default judgment should be accompanied by the requisite filing fee."

989 So. 2d at 558-60.

Donald attempts to distinguish Odom and Vann from the present case by asserting that, in those cases, no filing fee was paid by either party at any time, whereas, in the present case, he argues, Donald paid the filing fee subsequent to the entry of the trial court's December 15, 2011, order allowing either party to pay the filing fee.

In Bernals, Inc. v. Kessler-Greystone, LLC, 70 So. 3d 315, 319 (Ala. 2011), the Alabama Supreme Court discussed whether a jurisdictional defect can be cured with regard to lack of standing at the time a complaint is filed:

> "The question of standing implicates the subject-matter jurisdiction of the court. Ex parte Howell Eng'g & Surveying, Inc., 981 So. 2d 413, 419 (Ala. 2006). 'When a party without standing purports

> to commence an action, the trial court acquires no subject-matter jurisdiction.' State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999). Moreover, '[t]he jurisdictional defect resulting from the plaintiff's lack of standing cannot be cured by amending the complaint to add a party having standing.' Cadle Co. v. Shabani, 4 So. 3d 460, 463 (Ala. 2008). 'When the absence of subject-matter jurisdiction is noticed by, or pointed out to, the trial court, that court has no jurisdiction to entertain further motions or pleadings in the case. It can do nothing but dismiss the action forthwith.' Id. When a circuit court lacks subject-matter jurisdiction, all orders and judgments entered in the case, except an order of dismissal, are void ab initio. Redtop Market, Inc. v. State, 66 So. 3d 204 (Ala. 2010). Thus, if Brentwood lacked standing to commence this action, then the absence of subject-matter jurisdiction was not cured by the substitution of Kessler, and every order and judgment entered by the trial court is void."

Applying that discussion to the present case, we conclude that the lack of subject-matter jurisdiction at the outset of the case could not be cured by the subsequent payment of the filing fee.

The trial court relied on Espinoza v. Rudolph, 46 So. 3d 403 (Ala. 2010), in its judgment, concluding that Espinoza stood for the proposition that, "when a filing fee has not been paid, the trial court may make such orders as are reasonable and necessary to ensure payment," and that the trial court may "giv[e] a party an opportunity during the

course of a proceeding to pay a filing fee that was not paid at the time of filing." We disagree.

In Espinoza, a filing fee was not submitted alongside a counterclaim; the circuit court later dismissed the complaint that had initiated the action, and a subsequent motion to set aside the order dismissing the action, based on the still-pending counterclaim, was filed. 46 So. 3d at 409. The circuit court entered an order allowing the counterclaimant 14 days to pay the requisite fee for her counterclaim; the court indicated that, upon her paying the fee, the status of the case would be changed from "disposed" to "active." Id. The counterclaimant paid the filing fee and was ultimately successful on her counterclaim. Id. at 411. On appeal, the Alabama Supreme Court concluded that the circuit court had not erred by reinstating the counterclaims upon payment of the filing fee, stating, in pertinent part:

> "In De-Gas, Inc. v. Midland Resources, 470 So. 2d 1218 (Ala. 1985), the plaintiffs did not pay the docket fee required by § 12-19-70(a)[, Ala. Code 1975,] until nearly two months after they had filed their complaint. The statute of limitations on the action had expired between the time the complaint was filed and the time the plaintiffs paid the docket fee. In considering whether the plaintiffs' action commenced for statute-of-limitation purposes before the payment of the docket fee, this Court

observed that '§ 12-19-70 requires the payment of filing fees ... at the time of filing the complaint' and that 'the defendant in an initial action cannot know of the existence of the suit against him' until the fees are paid and certain judicial action is taken on the complaint. Accordingly, this Court concluded that the payment of the fees required by § 12-19-70 'is a jurisdictional prerequisite to the commencement of an action for statute of limitations purposes.' De-Gas, 470 So. 2d at 1222. But cf. Rule 3(a), Ala. R. Civ. P. ('A civil action is commenced by filing a complaint with the court.').

"Section 12-19-71(a)(8), Ala. Code 1975, requires the clerk to collect a filing fee for a counterclaim filed in the circuit court. Jabez argues that, like the docket fee mandated by § 12-19-70, the filing fee for a counterclaim is 'jurisdictional.' See De-Gas, 470 So. 2d at 1222. Jabez suggests that a counterclaim is not truly 'filed,' and thus does not become part of the action, until the filing fee required by § 12-19-70 is paid.

"Although § 12-19-70 expressly requires that the docket fee must be 'collected from [the] plaintiff at the time [the] complaint is filed,' § 12-19-70(a), Ala. Code 1975 (emphasis added), the legislature has not expressly provided that a filing fee must be collected at the time a counterclaim is filed. Cf. De-Gas, 470 So. 2d at 1220 ('"There shall be a consolidated civil filing fee ... collected from a plaintiff at the time a complaint is filed ...." ... It was the obvious intent of the legislature to require that either the payment of this fee or a court-approved verified statement of substantial hardship accompany the complaint at the time of filing.' (quoting § 12-19-70, Ala. Code 1975)). Therefore, when Rudolph delivered the counterclaim to the clerk, the counterclaim was 'filed' and became a part of the action over which the trial court had jurisdiction. See Rule 5(e),

> Ala. R. Civ. P. ('The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court...."); Rubin v. Department of Indus. Relations, 469 So. 2d 657 (Ala. Civ. App. 1985) ('"[A] pleading or other paper may be said to have been duly filed when it is delivered to the proper filing officer."' (quoting Covington Bros. Motor Co. v. Robinson, 239 Ala. 226, 194 So. 663 (1940))); cf. Cunningham v. Lavoie, 874 So. 2d 1068, 1071-72 (Ala. 2003) (distinguishing the statutory fee for filing a claim in the probate court from the docket fee statutorily required to be submitted with complaint in a civil action in the circuit or district court); De-Gas, 470 So. 2d at 1222 (distinguishing the docket fee submitted with a complaint from the filing fee required in conjunction with the filing of an appeal)."

46 So. 3d at 413-14 (footnotes omitted).

Thus, the supreme court distinguished between the necessity of a filing fee alongside a complaint, which, in accordance with De-Gas, Inc. v. Midland Resources, 470 So. 2d 1218 (Ala. 1985), is jurisdictional, and the failure to pay a docket fee at the time a counterclaim is filed, which, it determined, may be subsequently cured.

Donald argues in his appellee's brief that

> "[a]ddressing the jurisdictional defect in the manner prescribed by the trial court prevents plaintiffs, such as [Bona Faye] in this case, from filing a claim and pursuing it to the end, but getting another bite at the apple when they disagree with the final judgment. The trial court has already invested substantial time and money in the resolution of this case and to allow [Bona Faye] to

> pursue her claim a second time would cause the court's already stretched resources to be stretched even further."

Although we agree that this result is not particularly judicially economical, we note that this court has already considered whether a jurisdictional defect may be overlooked on the basis of estoppel in Vann, in which we stated: "[W]e reject the father's contention that the mother is estopped to assert nonpayment of filing fees as a ground of attack on the trial court's jurisdiction because (1) 'jurisdiction over the subject matter of a proceeding cannot be conferred by estoppel.'" 989 So. 2d at 559 (quoting Alves v. Board of Educ. for Guntersville, 922 So. 2d 129, 134 (Ala. Civ. App. 2005)).[1]

Because no filing fee was paid when Bona Faye filed her motion for contempt, sanctions, and specific performance, we conclude that the trial court lacked subject-matter

[1]See also Ex parte Carter, 807 So. 2d 534 (Ala. 2001) (concluding that, although the circuit court purported to invoke subject-matter jurisdiction over an inmate's Rule 32, Ala. R. Crim. P., petition by taxing the filing fee as costs at the end of the proceeding, when the inmate had failed to pay a filing fee and the circuit court had not approved an in forma pauperis declaration for the petition, the circuit court's order was void because the circuit court never had jurisdiction to rule on the petition).

jurisdiction over the action. Because a judgment entered by a court lacking subject-matter jurisdiction is absolutely void and will not support an appeal, we dismiss the appeal, albeit with instructions to the trial court to vacate all orders stemming from the filing of Bona Faye's motion for contempt, sanctions, and specific performance. See Vann, supra.

APPEAL DISMISSED WITH INSTRUCTIONS.

Thomas, J., concurs.

Bryan, J., concurs in the result, without writing.

Thompson, P.J., dissents, with writing.

Pittman, J., dissents, without writing.

THOMPSON, Presiding Judge, dissenting.

I respectfully dissent. I believe that the facts of this case are distinguishable from those of De-Gas, Inc. v. Midland Resources, 470 So. 2d 1218 (Ala. 1985), and that in subsequent cases this court has incorrectly applied the holding of that case.

In De-Gas, supra, the plaintiffs sued De-Gas, Inc., and others ("the defendants") alleging breach of contract and fraud. However, because the plaintiffs did not pay the docket fee, the trial-court clerk only stamped the action as "filed"; she did not "assign the complaint a case number, list the case in the index of pending actions, docket the case, or forward the summonses and copies of the complaint to the sheriff's office for service." De-Gas, 470 So. 2d at 1219. The clerk in that case explained that it was the policy of the clerk's office to hold an action and not take further action if the plaintiff had failed to pay the filing fee. The plaintiffs paid the filing fee two months after the statute of limitations had expired on their fraud claim. The defendants argued, among other things, that the fraud claim was barred by the applicable statute of limitations. The trial court

disagreed and denied that part of the defendants' summary-judgment motion that asserted that argument with regard to the fraud claim. Our supreme court reversed, concluding that "the payment of the fees required by § 12-19-70[, Ala. Code 1975,] or the filing of a court-approved verified statement of substantial hardship is a jurisdictional prerequisite to the commencement of an action for statute of limitations purposes." De-Gas, Inc. v. Midland Res., 470 So. 2d at 1222 (emphasis added). The supreme court noted that the clerk's testimony in that case established

> "that, unless the filing fees are paid at the time a complaint is filed, there is absolutely no judicial notice to a defendant that an action has been filed against him. Regardless of the fact that the clerk's office stamped the complaint and summonses 'filed' on June 14, no real action was taken to set this suit in motion until the filing fees were paid, by which time the limitations period had expired. Not only were the defendants not notified by personal or other service, but they could not have even gone to the clerk's office and found evidence that a suit had been filed against them because the case was not listed in the index of pending actions. Thus, the defendants received no more notice of this action than if the plaintiffs' attorney had retained the complaint in his desk drawer."

De-Gas, Inc. v. Midland Res., 470 So. 2d at 1221.

Later, in Farmer v. Farmer, 842 So. 2d 679 (Ala. Civ. App. 2002), this court expanded the holding in De-Gas, supra. In that divorce case, during a hearing on a postjudgment motion that the father conceded was untimely filed, the father handed a petition to modify custody to the judge in open court. The record on appeal did not indicate that the petition to modify was filed in the trial court or with its clerk. The mother objected to the purported petition to modify, arguing, among other things, that the father was required to properly file and serve the modification petition and that he had failed to pay a filing fee for the modification action. The trial court overruled the mother's objections, but it ultimately denied the father's petition to modify. This court dismissed the appeal, holding that the father had failed to properly file the petition as required by Rule 5(e), Ala. R. Civ. P., so as to invoke the jurisdiction of the trial court. This court also noted that the father had failed to pay the filing fee and stated that "[t]he failure to pay the filing or docketing fee is a jurisdictional defect." Farmer v. Farmer, 842 So. 2d at 681 (citing DeGas, supra).

This court held that the trial court's judgment was void for want of jurisdiction and dismissed the appeal.

This court again characterized a failure to pay a filing fee as a defect in the trial court's subject-matter jurisdiction in Vann v. Cook, 989 So. 2d 556 (Ala. Civ. App. 2008). In that case, the mother argued for the first time on appeal that the trial court had no jurisdiction over the modification and postjudgment proceedings initiated by both of the parties because neither she nor the father had paid the required filing fees for their respective filings in the trial court. In that case, this court held that the failure to pay the filing fee required in § 12-19-70(a), Ala. Code 1975, implicated the subject-matter jurisdiction of the trial court and dismissed the appeal as void for want of subject-matter jurisdiction. Vann v. Cook, supra.

This court went further in Odom v. Odom, 89 So. 3d 121 (Ala. Civ. App. 2011), and dismissed an appeal ex mero motu after examining the record on appeal and determining that the appellant had failed to pay filing fees in the trial court. This court again concluded that the failure to pay the filing

fee rendered the trial court's judgment void for want of subject-matter jurisdiction. Odom v. Odom, supra.

Although I concurred in those cases, I am now convinced that this court's holdings in Farmer v. Farmer, supra, Vann v. Cook, supra, and Odom v. Odom, supra, extend beyond our supreme court's holding in De-Gas, supra, and that in those cases this court incorrectly determined that the trial courts had lacked subject-matter jurisdiction over those actions because of a party's failure to pay the filing fee required by § 12-19-70, Ala. Code 1975. The holding in De-Gas, supra, addressed when an action is deemed commenced for the purposes of analyzing a statute-of-limitations defense. De-Gas, Inc. v. Midland Res., 470 So. 2d at 1222. The statute of limitations for an action is an affirmative defense and does not implicate the subject-matter jurisdiction of the trial court. Waite v. Waite, 891 So. 2d 341, 343 (Ala. Civ. App. 2004) ("[A]lthough a trial court may dismiss an action on its own motion on a jurisdictional basis, affirmative defenses such as the statute of limitations or the doctrine of res judicata are not jurisdictional bases upon which a court may base a sua sponte dismissal."). Rather, the statute of

limitations may be raised to bar a claim asserted in the trial court, and, as an affirmative defense, it may be waived if it is not asserted by the defendant. Special Assets, L.L.C. v. Chase Home Finance, L.L.C., 991 So. 2d 668, 675 (Ala. 2007); Taylor v. Newman, 93 So. 3d 108, 115 (Ala. Civ. App. 2011).

I do not agree that the payment of the filing fee is a matter that implicates the subject-matter jurisdiction of a trial court to consider an action that is otherwise within the subject-matter jurisdiction of the court.[2] Our supreme court did not hold in De-Gas that the trial court lacked subject-matter jurisdiction over the action because the plaintiff had failed to pay the required filing fee. Rather, I interpret De-Gas as holding that a filing fee must be paid at the time of the filing of the complaint for the purposes of properly

[2]In this writing, I assert my belief that the failure to pay a filing fee required by § 12-19-70 does not implicate the subject-matter jurisdiction of the circuit courts. In referencing that failure to pay a filing fee in this writing, I also intend to include those situations in which a party fails to properly obtain a waiver of the filing fee on the basis of substantial hardship. See § 12-19-70(b), Ala. Code 1975 (in order to obtain a waiver of a filing fee, "[a] verified statement of substantial hardship, signed by the plaintiff and approved by the court, shall be filed with the clerk of court").

initiating an action in compliance with the statute of limitations applicable to that action.

However, the circuit courts exercise jurisdiction over claims that are not subject to a statute of limitations. In this case, the claims are in the nature of contempt and enforcement, and those claims are not required to be filed within a certain time prescribed by a statute of limitations. In actions involving claims to which no statute of limitations applies, I cannot see how the payment of filing fees or the filing of a statement of substantial hardship can be said to be a "jurisdictional prerequisite to the commencement of an action [such as the one currently before this court] for statute of limitations purposes." De-Gas, 470 So. 2d at 1222 (emphasis added). As is explained later in this writing, I believe that the failure to pay a filing fee in cases such as this one is curable.

Further, § 12-19-70 is not set forth in a part of the Alabama Code governing the matters over which the various courts have jurisdiction. Rather, it is contained in Title 12, Article 19, which governs court finances. As the court noted in De-Gas, the purpose behind the enactment of § 12-19-

70 was to ensure the payment of filing fees and to prevent a trial-court clerk from having to collect those fees after the termination of litigation. See De-Gas, 470 So. 2d at 1220 ("No doubt the purpose behind the passage of this provision was to discourage the filing of frivolous suits and to insure that the clerks of the circuit courts do not become 'credit men.'"). Accordingly, I conclude that, although it is preferable that the filing fee is paid at the initiation of a new action, the failure to do so is a matter of concern for the trial-court clerk and does not determine the trial court's subject-matter jurisdiction to consider the pending action.[3]

---

[3]I also believe that my interpretation is consistent with the analysis of De-Gas set forth in our supreme court's recent decision in Espinoza v. Rudolph, 46 So. 3d 403 (Ala. 2010). In that case, our supreme court concluded that a trial court did not err in reinstating counterclaims after the defendant paid the filing fees for those claims. The trial court and our supreme court rejected the plaintiff's argument that the trial court had not obtained subject-matter jurisdiction over the counterclaims because the defendant had not paid the filing fee at the time he asserted the counterclaim. The court noted that § 12-19-71, Ala. Code 1975, which set forth the amount of filing fees to be paid on a counterclaim, did not require that those fees be paid at the time the counter-claim was filed. 46 So. 3d at 413-14. In its analysis in that case, our supreme court noted that De-Gas had held that the payment of fees was a "'jurisdictional prerequisite ... for statute of limitations purposes.'" Espinoza v. Rudolph, 46 So. 3d at 413. The court also noted that, in that case, the plaintiff had made no argument that the filing fee for the

Recently, in Johnson v. Hetzel, [Ms. 1110754, Aug. 10, 2012] ____ So. 3d ____, ____ (Ala. 2012), our supreme court, based on the argument of the appellant, held a trial court's judgment void for want of subject-matter jurisdiction because the appellant had not paid the required filing fee. In that case, our supreme court relied on this court's holdings in Odom v. Odom, supra, and Vann v. Cook, supra, as well as its own holding on De-Gas, supra.

The precedent of our supreme court is binding on this court. § 12-3-16, Ala. Code 1975; Farmers Ins. Exch. v. Raine, 905 So. 2d 832, 835 (Ala. Civ. App. 2004). For that reason, because of our supreme court's holding in Johnson v. Hetzel, supra, this court cannot overrule Farmer v. Farmer, supra, Odom v. Odom, supra, and Vann v. Cook, supra, as improperly expanding the holding of De-Gas, supra. However, I would urge the supreme court to reexamine its holding in Johnson v. Hetzel, supra, and to consider whether, in this case, the main opinion again improperly expands the holding of De-Gas to hold that, in all cases, a failure to pay a filing fee under § 12-19-70 divests the circuit court of subject-

---

counterclaim had not been paid before the statute of limitations expired on that claim. Id. at 414 n.11.

matter jurisdiction over an action. I do not believe that such a holding was the intention of the legislature in enacting the requirement that litigants pay filing fees to offset the costs of litigation at the commencement of their actions.

Further, even assuming that the requirement of a filing fee does affect a trial court's subject-matter jurisdiction, when a late payment of a filing fee would not affect the claim with regard to its statute of limitations, I believe any defect in jurisdiction may be cured by the payment of the filing fee.[4] To hold otherwise sets the stage for anyone who can create doubt as to whether a filing fee was paid to seek to set aside a judgment, regardless of how old the judgment might be or whether the parties or others have relied upon the judgment. See International Longshoremen's Ass'n v. Davis, 470 So. 2d 1215, 1217 (Ala. 1985) (A judgment entered without subject-matter jurisdiction can "be set aside at any time as void, either on direct or on collateral attack ...."); Alves v. Board of Educ. for City of Guntersville, 922 So. 2d 129, 134 (Ala. Civ. App. 2005) (same). Under the holding of the

[4]As is indicated in the main opinion, in this case, Donald paid the filing fee associated with Bona Faye's motion.

main opinion and the cases upon which it relies, it is easy to foresee a situation in which parties might rely on a judgment for many years but in which another party who wants to avoid being bound by the judgment seeks to set aside the judgment for a failure to pay a filing fee. See Shamburger v. Lambert, 24 So. 3d 1139, 1142 (Ala. Civ. App. 2009) ("Rule 60 allows a party to move to set aside a judgment that is void for lack of subject-matter jurisdiction at any time."); and J.T. v. A.C., 892 So. 2d 928, 931 (Ala. Civ. App. 2004) (same). Such a result would be unfortunate in cases in which a judgment that would be void under the holding of the main opinion involved a monetary judgment or an injunction, but it would be extremely damaging in the context of a divorce or custody judgment. Thus, the holding of the main opinion and the cases upon which it relies can operate to defeat the policy in favor of finality of judgments upon which the litigants may rely. See Mississippi Valley Title Ins. Co. v. Hooper, 707 So. 2d 209, 214 (Ala. 1997) (discussing the policy favoring finality of judgments).

In addition, as is the situation in this case, the effect of the holding in the main opinion is to allow parties to sue

for certain relief, and, if that relief is denied, to use their own failure to pay a filing fee as a means to avoid the ramifications of the litigation. See also Johnson v. Hetzel, ___ So. 3d at ____ (the appellant successfully nullified a summary judgment in favor of the defendants on the basis of his own failure to pay the required filing fee); and Vann v. Cook, supra. The courts of this state have ruled that, in certain circumstances, parties may not assert lack of subject-matter jurisdiction after receiving an unfavorable adjudication. See Levine v. Levine, 262 Ala. 491, 493, 80 So. 2d 235, 237 (1955) (holding that former wife was estopped from setting aside a divorce judgment based on a lack of jurisdiction when the basis for jurisdiction had been affirmed by the former wife on original submission and the former wife "ha[d] enjoyed the fruits of the original decree"). See also Shapiro v. Shapiro, 280 Ala. 115, 117, 190 So. 2d 548, 549 (1966) (applying the "doctrine of estoppel by conduct" in circumstances similar to those in Levine); Reiss v. Reiss, 46 Ala. App. 422, 429, 243 So. 2d 507, 513 (Civ. App. 1970) ("Mrs. Reiss, having acquiesced in the divorce decree and the separation agreement and having accepted the fruits thereof

for some ten years, is estopped to have the same annulled and is bound by the terms thereof."); and Hughes v. Hughes, 624 So. 2d 198, 199 (Ala. Civ. App. 1993) ("[P]arties may be estopped to assert the invalidity of a decree to their own advantage obtained by their own fraud."). "To constitute estoppel the conduct of the party must have been intended for his adversary to act upon." Colvin v. Payne, 218 Ala. 341, 343, 118 So. 578, 579 (1928). In this case, it is clear that in filing the contempt petition, Bona Faye intended that Dennis and the trial court take action in response to that petition.

For the foregoing reasons, I conclude that the trial court properly denied Bona Faye's postjudgment motion. Accordingly, I respectfully dissent from the main opinion's reversal of that order.