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Alabama's Appellate Standards Of Review in Civil Cases

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This is a primer on Alabama's appellate standards of review

in typical civil cases. The standards set forth here should be considered baselines or starting points, and you should always check for changes and updates in the law.

Why does the standard of review matter? For starters, Ala. R. App. P. 28(a)(8) *requires* that your appellate brief "shall" contain "[a] concise statements of the standard of review applicable to each issue." Alabama's Rule of Appellate Procedure 28(a)(8) and (b) state in pertinent part:

Rule 28 BRIEFS

(a) Brief of the Appellant/ Petitioner. The brief of the appellant or the petitioner, if a petition for a writ of certiorari is granted and the writ issues, shall comply with the form requirements of Rule 32. In addition, the brief of the appellant or the petitioner shall contain under appropriate headings and in the order here indicated:

* * *

(8) Statement of the Standard of Review. A concise statement of the standard of review applicable to each issue;

* * *

(b) Brief of the Appellee/ Respondent. The brief of the appellee, or the respondent if a petition for a writ of certiorari is granted and the writ issues, shall conform to the requirements of subdivision (a)(1)-(12), except that a statement of the jurisdiction, the case, the issues, the facts, or the standard of review need not be included unless the appellee/ respondent is dissatisfied with those statements as made by the appellant/petitioner.

Conformance with the requirements of the rules is mandatory. Recently, in *May v. May*, [Ms. 2180076, June 21, 2019] __ So. 3d __, 2019 WL 2558800, at *1 (Ala. Civ. App. 2019), the court unanimously issued a stern rebuke, observing "Rule 28(a), Ala. R. App. P., sets forth what an appellant's brief 'shall contain.' The rule is not merely a suggestion as to what one might wish to include in a brief. Rule 28(a) mandates that the appellant include certain specific information necessary for this Court to conduct a meaningful review of the matter before us." Ms. *2.[1]

The focus of this article is Rule 28(a)(8)'s and 28(b)'s requirement of a "concise statement of the standard of review applicable to each issue." The Court Comment to the amendment to Rule 28, effective June 1, 2002, states, "[a] conclusory statement of the standard of review is sufficient, reserving any argument as to the standard of review for the argument portion of the brief."

What then are the pertinent standards of review commonly at issue in civil cases? What is the significance of identifying the correct standards of review? And, where should the lawyer begin his analysis when considering which issues to raise on appeal?

A threshold determination is always whether the appellant sufficiently raised and preserved the issue sought to be appealed. Note that Ala. R. App. P. 4(a)(3) provides: "Any error or ground for reversal or modification of a judgment or order which was asserted in the trial court may be asserted on appeal without regard to whether such error or ground has been raised by motion in the trial court under [Ala. R. Civ. P.] 52(b) or Rule 59." This rule "prevents [the appellate courts] from judicially determining issues that have been raised for the first time on appeal." *University of Alabama Hospitals v. Alabama Renal Stone Institute, Inc.*, 518 So. 2d 721, 725 (Ala. Civ. App. 1987).[2] As a general rule, appellate review "is limited to the issues that were before the trial court–an issue raised on appeal must have first been presented to and ruled on by the trial court." *Norman v. Bozeman*, 605 So. 2d 1210, 1214 (Ala. 1992). "[A]ppellate courts can only review the actions of trial courts for alleged error, properly preserved and properly presented for review." *Bill Steber Chevrolet-Oldsmobile, Inc. v. Morgan*, 429 So. 2d 1013, 1015 (Ala. 1983). "[T]o preserve an alleged error of law for appellate review, the [defendant] must bring the alleged error to the attention of the trial court and receive an adverse ruling." *Grove Hill Homeowner's Ass'n, Inc. v. Rice*, 43 So. 3d 609, 613 (Ala. Civ. App. 2010); *Cottrell v. National Collegiate Athletic Ass'n*, 975 So. 2d 306, 349 (Ala. 2007). "An appellate court will not consider issues which are not properly delineated and it will not search out errors which have not been properly preserved or assigned." *McAliley v. McAliley*, 638 So. 2d 10 (Ala. 1983); *Ex parte Riley*, 464 So. 2d 92 (Ala. 1985).

Another threshold consideration is Ala. R. App. P. 45's harmless error rule:

Rule 45. Error Without Injury

No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.

See also Ala. R. Civ. P. 61. Examples of application of Rule 45's harmless error rule are numerous: *Chance v. Dallas County, Ala.*, 456 So. 2d 295, 299 (Ala. 1984) ("[R]eversible error does not find its source in mere imperfection, for litigants are not entitled to a *perfect trial*, only a *fair* one."); *Bethea v. Springhill Memorial Hosp.*, 833 So. 2d 1, 7 (Ala. 2002) ("Because a defendant has no right to a perfect jury or a jury of his or her choice, but rather only to an 'impartial' jury, see Ala. Const. 1901, § 6, we find the harmless-error analysis to be the proper method of assuring the recognition of that right."); *Flagstar Enterprises, Inc. v. Foster*, 779 So. 2d 1220, 1221-22 (Ala. 2000) ("Although it is error for a trial court not to grant a request for a hearing on a motion for a new trial, the error is not necessarily reversible error as when an appellate court determines that there was no probable merit to the motion, it may affirm based on the harmless-error rule."); *Chafian v. Alabama Bd. of Chiropractic Examiners*, 647 So. 2d 759, 762 (Ala. 1994) ("Variance between dates of acts

alleged in complaint against chiropractor and dates of acts offered by Board of Chiropractic Examiners during administrative hearing was harmless error which did not result in denial of due process"); *Waldrop v. Langham*, 260 Ala. 82, 87, 69 So. 2d 440, 444 (1953) (Alleged errors by trial court in admission and exclusion of testimony was error without injury when plaintiff failed to make a *prima facie* case); *Malone v. City of Mobile*, 602 So. 2d 403-04 (Ala. 1992) (Incorrect jury instruction deemed harmless as it did not prejudice the plaintiff because it stated a theory of recovery that did not exist under current Alabama law); *Osborne Truck Lines, Inc. v. Langston*, 454 So. 2d 1317, 1328 (Ala. 1984) (Any error by the trial court in permitting one doctor to comment upon the report of another was harmless when that report had been admitted into evidence and the testimony was wholly insignificant as regards any element of the case); *City of Gulf Shores v. Harbert Intern.*, 608 So. 2d 348, 354 (Ala. 1992) (A trial court's failure to admit cumulative evidence is harmless error).

Assuming the appellate issue is properly preserved and presented and not pretermitted by Rule 45's error-without-injury rule, the next step is identifying the applicable standard of review.

Why is this so important? The former Chief Judge Emeritus of the United States of Court of Appeals for the Third Circuit, Ruggero J. Aldisert, wrote in *Winning on Appeal–Better Briefs and Oral Argument*:

> "Standards of review are critically important in effective advocacy. In large part, they determine the power of the lens through which the appellate court may examine a particular issue in a case. The error that may be a ground for reversal under one standard of review may be insignificant under another. It does not matter what you ask the court to do on appeal if the court cannot jump the hurdle imposed by the standard of review. You must craft your brief on appeal to reflect the proper standard and to show why, under that standard, your client deserves to win. If your appeal raises more than one issue, then you should state the standard of review for each point.
>
> ...The competent advocate will have a clear understanding of the scope of review pertaining to each point in his or her brief....
>
> I elevate the necessity of correctly stating the review standard to a question of minimum professional conduct."

Aldisert, Ruggero J., *Winning on Appeal–Better Briefs and Oral Argument*, § 5.2, pp. 56-57 (2d Ed. 2003).

The former Chief Judge of the United States Court of Appeals for the Fifth Circuit, John Godbold, states in *Twenty Pages and Twenty Minutes–Effective Advocacy on Appeal*, 30 S.M.U. L. Rev. 801 (1976):

> "The standard of review is the appellate judge's 'measuring stick.' Early in the appeal, counsel must familiarize himself with the appropriate standard of appellate review for each issue. He cannot adequately prepare his case without that knowledge.... Unless counsel is familiar with the standard of review for each issue, he may find himself trying to run for a touchdown when basketball rules are in effect."

Id., pp. 810-11.

Former Supreme Court of Alabama Staff Attorney and Faulkner University Associate Law Professor Joi (Montiel) Christoff wrote in *Your Appellate Brief: An Obstacle Course for the Court or a Clear Pathway to Your Conclusion* states:

> "The standard of review may not be the same for each issue you present. If you present three issues, outline the standard of review for each issue. Do not overlook the standard as you proceed through your argument. In other words, do not argue as if you and your opposing counsel are on a level playing field if you are not. If the standard of review is in your favor, weave that into your argument. If the standard of review is not favorable to you, explain why it is not fatal to your argument."

Your Appellate Brief: An Obstacle Course for the Court or a Clear Pathway to Your Conclusion, 73 Ala. Law. 344, 346 (Sept. 2012).

Judge Roth of the Third Circuit writes in *Persuading Quickly: Tips for Writing an Effective Appellate Brief* that the standard of review section is vitally important because it:

> "[M]ay constrain the judge to the point that the standard dictates the decision. For instance, under an abuse-of-discretion standard, it does not matter if the judge believes that an advocate's argument is ultimately right. The advocate's argument, instead, is a legal winner (or a loser) if the lower court simply did not get it wrong enough. By contrast, a judge is unconstrained under a *de novo* standard, under which the appellate judge does not have to defer to the lower court's decision.

> You must [ ] understand that the standard of review controls the argument.... Too many advocates set out a standard of review without thinking critically about what they are doing. Even worse, an advocate may uncritically accept her opponent's characterization of it. Either course of action will undermine the advocate's chances of success in the appeal."

Id., 11 *Journal of Appellate Practice and Process* at 449.

What then are Alabama's appellate standards of review in civil cases?

Civil Cases

A. Review of judgments

1. Dismissals

a. Ala. R. Civ. P. 12(b)(1) dismissal for lack of jurisdiction over the subject matter

"We review *de novo* whether the trial court had subject-matter jurisdiction."

Taylor v. Paradise Missionary Baptist Church, 242 So. 3d 979, 986 (Ala. 2017) (quoting *Solomon v. Liberty National Life Ins. Co.*, 953 So. 2d 1211, 1218 (Ala. 2006)).

b. Ala. R. Civ. P. 12(b)(2) dismissal for lack of jurisdiction over the person

"We recently addressed the standard of review in a proceeding challenging the trial court's ruling on a motion to dismiss for lack of personal jurisdiction in *Ex parte Bufkin*, 936 So. 2d 1042, 1044-45 (Ala. 2006):

> """"The writ of mandamus is a drastic and extraordinary writ, to be "issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court." *Ex parte*

United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993); see also *Ex parte Ziglar*, 669 So. 2d 133, 134 (Ala. 1995).' *Ex parte Carter*, [807 So. 2d 534,] 536 [(Ala. 2001)]."

"'*Ex parte McWilliams*, 812 So. 2d 318, 321 (Ala. 2001). "An appellate court considers de novo a trial court's judgment on a party's motion to dismiss for lack of personal jurisdiction." *Elliott v. Van Kleef*, 830 So. 2d 726, 729 (Ala. 2002).

> """"In considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253 (11th Cir. 1996), and *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir.1990), and 'where the plaintiff's complaint and the defendant's affidavits conflict, the ... court must construe all reasonable inferences in favor of the plaintiff.' *Robinson*, 74 F.3d at 255 (quoting *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990))."'

"""*Wenger Tree Serv. v. Royal Truck & Equip., Inc.*, 853 So. 2d 888, 894 (Ala. 2002) (quoting *Ex parte McInnis*, 820 So. 2d 795, 798 (Ala. 2001)). However, if the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, 'the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint.' *Mercantile Capital, LP v. Federal Transtel, Inc.*, 193 F.Supp.2d 1243, 1247 (N.D. Ala. 2002) (citing *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir. 2000)). See also *Hansen v. Neumueller GmbH*, 163 F.R.D. 471, 474-75 (D. Del. 1995) ('When a defendant files a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), and supports that motion with affidavits, plaintiff is required to controvert those affidavits with his own affidavits or other competent evidence in order to survive the motion.') (citing *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 63 (3d Cir. 1984))."

"'*Ex parte Covington Pike Dodge, Inc.*, 904 So.2d 226, 229-30 (Ala. 2004).'"

Ex parte Duck Boo Int'l Co., 985 So. 2d 900, 905-06 (Ala. 2007).

Ex parte International Creative Management Partners, LLC, 258 So. 3d 1111, 1114 (Ala. 2018).

c. Ala. R. Civ. P. 12(b)(3) dismissal for improper venue

> """The question of proper venue for an action is determined at the commencement of the action."' *Ex parte Pike Fabrication, Inc.*, 859 So. 2d 1089, 1091 (Ala.2002) (quoting *Ex parte Pratt*, 815 So. 2d 532, 534 (Ala.2001)). If venue is improper at the outset, then upon motion of the defendant, the court must transfer the case to a court where venue is proper. *Ex parte Pike Fabrication*, 859 So. 2d at 1091. If the defendant's motion is denied, then the defendant is entitled to seek review of this decision by petitioning for a writ of mandamus. *Ex parte Alabama Great Southern R.R.*, 788 So. 2d 886, 888 (Ala. 2000).

"'Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' *Ex parte Integon Corp.*, 672 So. 2d 497, 499 (Ala. 1995). This Court reviews mandamus petitions seeking review of a venue determination by asking whether the trial court exceeded its discretion in granting or denying the motion for a change of venue. *Ex parte Scott Bridge Co.*, 834 So. 2d 79, 81 (Ala. 2002). Also, in considering such a mandamus petition, this Court is limited to those facts that were before the trial court. *Ex parte Pike Fabrication*, 859 So. 2d at 1091."

Ex parte Hampton Ins. Agency, 85 So. 3d 347, 350 (Ala. 2011) (quoting *Ex parte Perfection Siding, Inc.*, 882 So. 2d 307, 309-10 (Ala. 2003). Relatedly,

> "[T]he review of a trial court's ruling on the question of enforcing a forum-selection clause is for an abuse of discretion."

Ex parte Terex USA, LLC, 260 So. 3d 813, 816 (Ala. 2018) (quoting *Ex parte D.M. White Constr. Co.*, 806 So. 2d 370, 372 (Ala. 2001)).[3]

d. Ala. R. Civ. P. 12(b)(4) dismissal for insufficiency of process

"When the service of process on the defendant is contested as being improper or invalid, the burden of proof is on the plaintiff to prove that service of process was performed correctly and legally." *Cain v. Cain*, 892 So. 2d 952, 956 (Ala. Civ. App. 2004) (quoting *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 884 (Ala. 1983). In *Cain*, the Court of Civil Appeals reversed a denial of a motion to dismiss alleging an insufficiency of service of process upon finding an insufficiency of proof that service of process was performed in compliance with Ala. R. Civ. P. 4.2(b).

In reviewing the denial of a motion to dismiss which challenged the sufficiency of process, the court of civil appeals in *Williams v. Skysite Communications Corp.*, 781 So. 2d 241, 245 (Ala. Civ. App. 2000), stated "[w]e review the trial court's judgment *de novo*. Our review in this case is to determine whether the trial court correctly applied the law to the facts of this case. *Sims v. Leland Roberts Constr., Inc.*, 671 So. 2d 106 (Ala. Civ. App. 1995)."

e. Ala. R. Civ. P. 12(b)(5) dismissal for insufficiency of service of process

In reviewing the denial of a motion to dismiss which challenged the sufficiency of process, the court of civil appeals in *Williams v. Skysite Communications Corp.*, 781 So. 2d 241, 245 (Ala. Civ. App. 2000), stated "[w]e review the trial court's judgment *de novo*. Our review in this case is to determine whether the trial court correctly applied the law to the facts of this case. *Sims v. Leland Roberts Constr., Inc.*, 671 So. 2d 106 (Ala. Civ. App. 1995)."

f. Ala. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted

"'The applicable standard of review for a Rule 12(b)(6), Ala. R. Civ. P., dismissal is set forth in *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala.1993):

> "'"On appeal, a dismissal is not entitled to a presumption of correctness. *Jones v. Lee County Commission*, 394 So. 2d 928, 930 (Ala.1981); *Allen v. Johnny Baker Hauling, Inc.*, 545 So. 2d 771, 772 (Ala. Civ. App. 1989). The appropriate standard of review under Rule 12(b)(6) [, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. *Raley v. Citibanc of Alabama/Andalusia*, 474 So. 2d 640, 641 (Ala. 1985); *Hill v. Falletta*, 589 So. 2d 746 (Ala. Civ. App. 1991). In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. *Fontenot v. Bramlett*, 470 So. 2d 669, 671 (Ala. 1985); *Rice v. United Ins. Co. of America*, 465 So. 2d 1100, 1101 (Ala. 1984). We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Garrett v. Hadden*, 495 So. 2d 616, 617 (Ala. 1986); Hill v. Kraft, Inc., 496 So. 2d 768, 769 (Ala. 1986)."

> "'(Emphasis added.)'

"*Smith v. Smith*, 865 So. 2d 1221, 1223-24 (Ala. Civ. App. 2003) (footnote omitted)."

Ex parte Liberty Nat. Life Ins. Co., 209 So. 3d 486, 489 (2016).

g. Ala. R. Civ. P. 12(b)(7) dismissal for failure to join a party under Rule 19

"Rule 12(b)(7) provides for the dismissal of an action based on a 'failure to join a party under [Ala. R. Civ. P.] 19.' Courts considering a Rule 12(b)(7) motion must look to Rule 19, which sets forth 'a two-step process for the trial court to follow in determining whether a party is necessary or indispensable.' *Holland v. City of Alabaster*, 566 So. 2d 224, 226 (Ala. 1990). In *Ross v. Luton*, 456 So. 2d 249 (Ala. 1984), this Court stated that mandamus review is a proper means by which to address whether a trial court has exceeded its discretion in refusing to join a party under Rule 19."

Ex parte Advance Disposal Services South, LLC, No. 1170320, 2018 WL 4657321 at *3, __ So. 3d __ (Ala. 2018), reh'g denied 2018 WL 6583837, __ So. 3d __ (Ala. Dec. 14, 2018).

2. Ala. R. Civ. P. 56 summary judgment

a. When a trial court grants an Ala. R. Civ. P. 56 motion for summary judgment filed by defendant

"[An appellate 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). [The appellate court] appl[ies] the same standard of review as the trial court applied. Specifically, [the appellate court] 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, [the appellate court] 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)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004); accord, *Colony Homes, LLC v. Acme Brick Tile & Stone, Inc.*, 243 So. 3d 278, 280-81 (Ala. Civ. App. 2017). "'[W]e do not review a trial court's denial of a summary-judgment motion following a trial on the merits.'" *Wachovia Bank, N.A. v. Jones, Morrison & Womack, P.C.*, 42 So. 3d 667, 691 (Ala. 2009) (quoting *Beiersdoerfer v. Hilb, Rogal & Hamilton Co.*, 953 So. 2d 1196, 1205 (Ala. 2006)). Any challenge to the sufficiency of the evidence is subsumed within the review of the denial of the post-trial motion for judgment as a matter of law.

b. When a trial court grants an Ala. R. Civ. P. 56 motion for summary judgment by plaintiff

When a trial court grants a plaintiff's summary judgment motion, an appellate court will review the summary judgment as follows:

"When a plaintiff opposes a motion for summary judgment, the plaintiff is only seeking the opportunity to get to the jury. When a plaintiff moves for summary judgment, on the other hand, the plaintiff is asking that its case be kept from the jury. The trial court, in granting summary judgment for a plaintiff, denies a jury determination to defendant who seeks such. To justify such a denial, a plaintiff must do more than merely show sufficient evidence to get to the jury. The plaintiff must show that its evidence is so conclusive that a reasonable jury would have to believe that the facts are as the plaintiff maintains. Thus, a trial court may never properly grant summary judgment for a plaintiff without deciding not only that it believes the plaintiff's evidence, but that it believes such evidence so strongly that no reasonable jury could find otherwise.... A moving plaintiff ... must present overwhelming evidence on every element of the claims on which the plaintiff seeks the court's dispositive ruling."

Ed R. Haden, *Alabama Appellate Practice*, § 12.10[5], p. 12-12 (2019 Ed.) (quoting Othni Lathram & Anil A. Mujumdar, *Alabama Civil Procedure*, § 10.2, pp. 10-18 (2018) (citing inter alia, *Macon County Greyhound Park v. Knowles*, 39 So. 3d 100 (Ala. 2009)).

c. Default judgment

A trial court's ruling on a motion to set aside a default judgment is reviewed on appeal for an abuse of discretion and guided by the factors set out in *Kirtland v. Fort Morgan Authority Sewer Service, Inc.*, 524 So. 2d 600, 605 (Ala. 1988):

"(1) Whether the defendant has a meritorious defense; (2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and (3) whether the default judgment was a result of the defendant's own culpable conduct."

Id. See, e.g., *Zeller v. Bailey*, 950 So. 2d 1149, 1152-53 (Ala. 2006). If the trial court grants a motion to set aside a default judgment, appellate review is by way of a petition for a writ of mandamus. See *Ex parte Bolen*, 915 So. 2d 565, 567-68 (Ala. 2005). If a trial court denies a motion to set aside a default judgment, appellate review is by way of appeal as the default judgment is a final judgment concerning liability and damages. See *Ex parte S & Davis Int'l, Inc.*, 798 So. 2d 677, 679 (Ala. 2001).

3. Based upon jury verdicts

a. Review of denial of motion for entry of judgment as a matter of law

1. Preservation

> "It is a procedural absolute that a [post-trial motion for a judgment as a matter of law], based on the "insufficiency of the evidence," is improper, if the party has not moved for a [judgment as a matter of law] on the same ground at the close of all the evidence."

Williford v. Emerton, 935 So. 2d 1150, 1154 (Ala. 2004); *Industrial Technologies, Inc. v. Jacobs Bank*, 872 So. 2d 819, 825 (Ala. 2003). "[A] [Rule 50(a)(2), Ala. R. Civ. P.] motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." *CNH America, LLC v. Ligon Capital, LLC*, 160 So. 3d 1195, 1204 (Ala. 2013).

2. Merits

> "When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. *Palm Harbor Homes, Inc. v. Crawford*, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the non-movant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. *Carter v. Henderson*, 598 So. 2d 1350 (Ala. 1992). The non-movant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. *Carter*, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw." *Id*. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. *Ricwil, Inc. v. S.L. Pappas & Co.*, 599 So. 2d 1126 (Ala. 1992)."

GE Capital Aviation Services, Inc. v. PEMCO World Air Services, Inc., 92 So. 2d 749, 758-59 (Ala. 2012) (quoting *Waddell & Reed, Inc. v. United Investors Life Ins. Co.*, 875 So. 2d 1143, 1152 (Ala. 2003)).

b. Review of denial of motion for new trial

> "A motion for a new trial tests the weight and preponderance of the evidence... A jury verdict is entitled to a presumption of correctness, and this Court will not reverse the denial of a motion for a new trial unless the evidence, seen in the light most favorable to the non-movant, shows that the jury verdict was plainly and palpably wrong."

Boudreaux v. Pettaway, 108 So. 3d 486, 487, n.1 (Ala. 2012).

"Furthermore, a jury verdict is presumed to be correct.... In reviewing a jury verdict, an appellate court must consider the evidence in the light most favorable to the prevailing party, and it will set aside the verdict only if it is plainly and palpably wrong."

Lafarge North America, Inc. v. Nord, 86 So. 3d 326, 332 (Ala. 2011).

When considering the weight and preponderance of the evidence after a denial of a motion for a new trial, this court must "decline to substitute [its] judgment for that of the jury in matters dealing with credibility of witnesses and weight of the evidence."

Williford v. Emerton, 935 So. 2d 1150, 1154 (Ala. 2004); *Marsh v. Green*, 782 So. 2d 223, 227 (Ala. 2000).

c. Review of compensatory damages awards

1. Issue preservation

The court will not consider an alleged insufficiency of evidence to support a compensatory damages award where the defendant did not move for JML on the same ground at the close of all the evidence. *Williford v. Emerton*, 935 So. 2d, 1150, 1154 (Ala. 2004).

2. Merits

Appellate courts do not interfere with compensatory damages awards absent a strict showing under the following standard:

> "When a court is assessing whether compensatory damages are excessive, the focus is on the plaintiff. A court reviewing a verdict awarding compensatory damages must determine what amount a jury, in its discretion, may award, viewing the evidence from the plaintiff's perspective.... When there is no evidence before the

court of any misconduct, bias, passion, prejudice, corruption, or improper motive on the part of the jury, or when there is no indication that the jury's verdict is not consistent with the truth and the facts, there is no statutory authority to invade the province of the jury in awarding compensatory damages. See *Pitt v. Century II, Inc*., 631 So. 2d 235 (Ala. 1993)."

New Plan Realty Trust v. Morgan, 792 So. 2d 351, 363-64 (Ala. 2000); *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d 1045, 1049 (Ala. 2000); *Daniels v. East Alabama Paving, Inc*., 740 So. 2d 1033, 1045 (Ala. 1999). The applicable standard of review of a trial court's order granting a new trial on the basis of the inadequacy of a jury's verdict awarding damages is whether the evidence plainly and palpably supports the jury verdict." *Ex parte Courtney*, 937 So. 2d 1060, 1062 (Ala. 2006) (internal citations and quotations omitted). "Jury verdicts are presumed to be correct and will be set aside on the ground of an inadequate award of damages only where the award is so inadequate as to indicate that the jury was influenced by passion, prejudice, or improper motive." *Wells v. Mohammad*, 879 So. 2d 1188, 1191 (Ala. Civ. App. 2003). "Where a motion for a new trial is granted for reasons other than, or in addition to, a finding that the verdict was against the great weight or preponderance of the evidence, this Court applies a standard of review that is more deferential to the trial court's determination that a new trial is warranted." *Beauchamp v. Coastal Boat Storage, LLC*, 4 So. 3d 443, 449-50 (Ala. 2008) (internal citations and quotations omitted).

d. Review of punitive damages awards

The court "reviews the trial court's award of punitive damages de novo, with no presumption of correctness." *Boudreaux v. Pettaway*, 108 So.3d at 504 (Ala. 2012) (quoting *Mack Trucks, Inc. v. Witherspoon*, 867 So.2d 307, 309 (Ala. 2003)).

3. Based upon bench trials

a. *Ore tenus* evidence

Kennedy v. Boles Investments, Inc., 53 So. 3d 60 (Ala. 2010), generally states the applicable ore tenus standard of review from such bench trials:

"Because the trial court heard ore tenus evidence during the bench trial, the ore tenus standard of review applies. Our ore tenus standard of review is well settled. "'When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error.'" *Smith v. Muchia*, 854 So. 2d 85, 92 (Ala.2003) (quoting *Allstate Ins. Co. v. Skelton*, 675 So. 2d 377, 379 (Ala.1996)).

"'The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses.' *Hall v. Mazzone*, 486 So. 2d 408, 410 (Ala.1986). The rule applies to 'disputed issues of fact,' whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. *Born v. Clark*, 662 So. 2d 669, 672 (Ala.1995). The ore tenus standard of review, succinctly stated, is as follows:

"'[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence.'"

Id. at 67-68 (quoting *Reed v. Board of Trs. for Alabama State Univ*., 778 So. 2d 791, 795 (Ala. 2000), quoting in turn *Raidt v. Crane*, 342 So. 2d 358, 360 (Ala. 1977)).

The presumption of correctness has no application when the trial court is shown to have improperly applied the law to the facts. *Ex parte Board of Zoning Adjustment of Mobile*, 636 So. 2d 415, 417 (Ala. 1994).

Kennedy v. Boles Investments also states the general ore tenus standard of review relative to damages issues:

"'The ore tenus standard of review extends to the trial court's assessment of damages.'" *Edwards v. Valentine*, 926 So. 2d 315, 325 (Ala. 2005). Thus, the trial court's damages award based on ore tenus evidence will be reversed 'only if clearly and palpably erroneous.' *Robinson v. Morse*, 352 So. 2d 1355, 1357 (Ala. 1977)."

Id., 53 So. 3d at 68.

b. Undisputed evidence

When the evidence in a bench trial is uncontroverted, a *de novo* review of that evidence is warranted on appeal:

> "Where the evidence before the trial court is undisputed, however, 'the ore tenus rule is inapplicable, and the Supreme Court will sit in judgment on the evidence de novo, indulging no presumption in favor of the trial court's application of the law to those facts."' *Stiles v. Brown*, 380 So. 2d 792, 794 (Ala.1980), citing with approval *Kessler v. Stough*, 361 So. 2d 1048 (Ala. 1978); *Perdue v. Roberts*, 294 Ala. 194, 314 So. 2d 280 (1975); *McCulloch v. Roberts*, 292 Ala. 451, 296 So. 2d 163 (1974).

Freeman Wrecking Co., Inc. v. City of Prichard, 530 So.2d 235, 237 (Ala. 1988).

c. Workers' compensation

> "[An appellate court] will not reverse the trial court's finding of fact if that finding is supported by substantial evidence-if that finding is supported by '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.'"

Ex parte Trinity Indus., Inc., 680 So. 2d 262, 268-69 (Ala. 1996) (quoting *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989)). However, "an appellate court's review of the proof and consideration of other legal issues in a workers' compensation case shall be without a presumption of correctness." *Ex parte American Color Graphics, Inc*., 838 So. 2d 385, 387-88 (Ala. 2002) (citing § 25-5-81(e)(1), Ala. Code 1975). Accord, *Ex parte Dolgencorp, Inc*., 13 So. 3d 888, 893 (2008); *Ex parte Southern Energy Homes, Inc*., 873 So. 2d 1116, 1121 (Ala. 2003).

d. Domestic relations

Where the trial court issues findings of fact based upon credibility of witnesses, the *ore tenus* rule applies and the court's findings will not be overturned unless found to be clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. See, e.g., *Phillips v. Phillips*, 622 So. 2d 410, 412 (Ala. Civ. App. 1993):

> "Our standard of review is very limited in cases where the evidence is presented ore tenus. A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, *Payne v. Payne*, 550 So. 2d 440 (Ala. Civ. App. 1989), and *Vail v. Vail*, 532 So. 2d 639 (Ala. Civ. App. 1988), and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong, or unless an abuse of the trial court's discretion is shown. To substitute our judgment to that of the trial court would be to reweigh the evidence. This Alabama law does not allow."

Id., *Gamble v. Gamble*, 562 So. 2d 1343 (Ala. Civ. App. 1990); *Flowers v. Flowers*, 479 So. 2d 1257 (Ala. Civ. App. 1985). Cf., *C.M.L. v. C.A.L.*, nos. 2170922 and 2170983, __ So. 3d __, 2019 WL 3369268, at *8 (Ala. Civ. App. July 26, 2019) ("When evidence in a child custody case has been presented ore tenus to the trial court, that court's findings of fact based on that evidence are presumed to be correct. The trial court is in the best position to make a custody determination–it hears the evidence and observes the witnesses. Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court at custody hearing.").

e. Juvenile proceedings

"A judgment terminating parental rights must be supported by clear and convincing evidence. . . . The evidence necessary for appellate affirmance . . . is evidence that a fact-finder reasonably could find to clearly and convincingly establish the fact sought to be proved. . . . This court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported by evidence that the juvenile court could have found to be clear and convincing. When those findings rest on ore tenus evidence, this court presumes their correctness. We review the legal conclusions to be drawn from the evidence without a presumption of correctness." *D.W. v. Jefferson Cty. Dep't of Human Res*., No. 2180683, __ So. 3d __, 2019 WL 5284785, at *1–2 (Ala. Civ. App. Oct. 18, 2019) (internal citations and quotations omitted).

"Once a child is found dependent, a juvenile court may dispose of the custody of the child according to its determination of the best interests of the child. . . . In a child custody case, an appellate court presumes the trial court's findings to be correct and will not

reverse without proof of a clear abuse of discretion or plain error. This presumption is especially applicable where the evidence is conflicting. An appellate court will not reverse the trial court's judgment based on the trial court's findings of fact unless the findings are so poorly supported by the evidence as to be plainly and palpably wrong." *D.W. v. M.M.*, 272 So. 3d 1107, 1112 (Ala. Civ. App. 2018) (internal citations and quotations omitted).

"Our standard of review of dependency determinations is well settled. A finding of dependency must be supported by clear and convincing evidence. However, matters of dependency are within the sound discretion of the trial court, and a trial court's ruling on a dependency action in which evidence is presented ore tenus will not be reversed absent a showing that the ruling was plainly and palpably wrong." *E.D. v. Lee Cty. Dep't of Human Res.*, 266 So. 3d 740, 742–43 (Ala. Civ. App. 2018) (internal citations and quotations omitted).

"Visitation rights are a part of custody determinations. Both visitation and custody determinations are subject to the same standards of review. The trial court has broad discretion in determining the visitation rights of a noncustodial parent, and its decision in this regard will not be reversed absent an abuse of discretion. Every case involving a visitation issue must be decided on its own facts and circumstances, but the primary consideration in establishing the visitation rights accorded a noncustodial parent is always the best interests and welfare of the child." *S.D.B. v. B.R.B.*, No. 2180521, __ So. 3d __, 2019 WL 4564503, at *6 (Ala. Civ. App. Sept. 20, 2019) (internal citations and quotations omitted).

f. Probate proceedings

Appeals from probate proceedings present special challenges because of the statutory scheme affording appeals to either the circuit court or the Alabama Supreme Court. Section 12-22-20, Ala. Code 1975, states:

> "An appeal lies to the circuit court or Supreme Court from any final decree of the probate court, or from any final judgment, order or decree of the probate judge; and, in all cases where it may of right be done, the appellate court shall render such decree, order or judgment as the probate court ought to have rendered."

Should the appellant elect to appeal to the circuit court in the first instance, an appeal to the supreme court may then be taken from the judgment of the circuit court. Section 12-22-22, Ala. Code 1975.

When an appeal is taken to a circuit court, there is no trial *de novo* in the circuit court, but rather the circuit court sits as an appellate court and can consider only the record from the probate court in making its determination. *Womack v. Estate of Womack*, 826 So. 2d 138 (Ala. 2002) (circuit court sits as a reviewing court on appeal and may not consider matter *de novo*); *Martin v. Vreeland*, 526 So. 2d 24 (Ala. 1988) (no trial *de novo* available on appeal); *McKnight v. Pate*, 214 Ala. 163, 106 So. 691 (1925) (outcome on appeal to be based upon record before the probate court).

The standard of appellate review is exceedingly deferential. For example, in *Ladewig v. Estate of Arnold*, 694 So. 2d 25 (Ala. Civ. App. 1997), the court reviewed a probate court decree disapproving of a land purchase contract from a decedent's estate by co-administrators of the estate. Following deflection from the supreme court pursuant to § 12-2-7(6), Ala. Code 1975, the court of civil appeals held "[t]he probate court's decision is based on the testimony of the parties and the heirs of the estate; the decision being based upon *ore tenus* evidence and not appearing to be palpably erroneous, we will not disturb it."

In *McCallie v. McCallie*, 660 So. 2d 584 (Ala. 1995), the supreme court reviewed a probate court's decrees concerning guardianship and conservatorship proceedings. The court summarized the governing standards of review as follows:

> "Because there is no record of the testimony presented to the probate court, the probate court's apparent finding that David is qualified and competent to manage his mother's personal affairs is presumed to be correct. See *Davis v. Davis*, 278 Ala. 328, 330, 178 So. 2d 154, 155 (1965):
>
> > "The rule is that where no testimony is contained in the record on appeal, a decree which recites that it was granted on pleadings, proofs and testimony will not be disturbed on appeal. *Williams v. Clark*, 263 Ala. 228, 82 So. 2d 295 [(1955)], 2 Ala. Dig., Appeal & Error § 671(3). And it will be presumed that the evidence was sufficient to sustain the verdict, finding, judgment, or decree where all the evidence is not in the record. *Williams v. Clark, supra*; 2 Ala. Dig., Appeal & Error Key No. 907(4).

> "A decree of the probate court will not be reversed if the evidence upon which it is made is not set forth, and there is no bill of exceptions, unless it appears in the decree that the court had no jurisdiction. *Forrester v. Forrester's Adm'rs*, 40 Ala. 557 [(1867)]; *McAlpine v. Carre*, 203 Ala. 468, 83 So. 477 [(1919)].
>
> "The finding of the probate court, based on the examination of witnesses *ore tenus*, is presumed to be correct and will not be disturbed on appeal unless palpably erroneous. *Cox v. Logan*, 262 Ala. 11, 76 So. 2d 169 [(1954)], and cases there cited.
>
> "We assume that the circuit court affirmed the decree of the probate court on the principles that we have stated [above], and would have no alternative but to affirm the decree of the circuit court on the same authorities."

Id., 660 So. 2d at 585. The court also noted "... there is no record of the testimony presented at the [probate court] hearing in this case ... [therefore] we would have to presume that the probate court's judgment was supported by the evidence the court had before it. See *Vise v. Cole Sanitation, Inc.*, 591 So. 2d 32 (Ala. 1991)." *McCallie*, 660 So. 2d at 585, n. 1. See also *Roberson v. Roberson*, 284 Ala. 5, 221 So. 2d 122 (1969) (on appeal from circuit court order affirming probate court decree revoking appointment of guardian following jury trial), the supreme court held that the "... verdict of the jury is presumed to be correct" explaining:

> "No rule of law is more firmly established by our decisions than where there is a conflict in the evidence the jury should be left to find the facts without interference by the court and'... if there is any evidence tending to prove the fact, no matter how slight, the court has no right to take such question from the consideration of the jury. It is the province of the jury and not of the court to find from the evidence the truth of a disputed fact.' *Tobler v. Pioneer Mining and Manufacturing Co.*, 166 Ala. 482, 52 So. 86 (1909)."

Id., 284 Ala. at 5, 221 So. 2d at 124.

g. Grant or denial of preliminary injunction

> "A preliminary injunction should be issued only when the party seeking an injunction demonstrates:
>
> "'"(1) that without the injunction the [party] would suffer irreparable injury; (2) that the [party] has no adequate remedy at law; (3) that the [party] has at least a reasonable chance of success on the ultimate merits of his case; and (4) that the hardship imposed on the [party opposing the preliminary injunction] by the injunction would not unreasonably outweigh the benefit accruing to the [party seeking the injunction]."'
>
> "*Ormco Corp. v. Johns*, 869 So. 2d 1109, 1113 (Ala. 2003) (quoting *Perley v. Tapscan, Inc*., 646 So. 2d 585, 587 (Ala. 1994)).
>
> "... 'We review the [trial court's] legal rulings de novo and its ultimate decision to issue the preliminary injunction for abuse of discretion.' *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006)."
>
> "*Holiday Isle, LLC v. Adkins*, 12 So. 3d 1173, 1176 (Ala. 2008). Accordingly, "[t]o the extent that the trial court's issuance [or denial] of a preliminary injunction is grounded only in questions of law based on undisputed facts," this Court applies a de novo standard of review to the trial court's decision. *Id*."

Ex parte Folsom, 42 So. 3d 732, 736-737 (2009).

h. Declaratory judgments

Pursuant to § 6-6-232, Ala. Code 1975, ("All orders and judgments under this article [Declaratory Judgments] may be reviewed as other orders and judgments."); and Ala. R. Civ. P. 57, declaratory judgments and decrees are to be reviewed on appeal as other judgments and decrees. *Scott v. Alabama State Bridge Corp.*, 233 Ala. 12, 17, 169 So. 273, 277 (1936); *City of Mobile v. Board of Water & Sewer Com'rs of City of Mobile*, 258 Ala. 669, 673, 64 So. 2d 824, 826 (1953). In this context, "[a]bsent plain error or manifest injustice, the trial court's findings of fact will not be disturbed on appeal." *Coghlan v. First Alabama Bank of Baldwin County, N.A.*, 470 So. 2d 1119, 1122 (Ala. 1985). Accord, *Carpet Installation and Supplies of Glenco v. ALFA Mut. Ins. Co.*, 628 So. 2d 560, 563 (Ala. 1993).

4. Miscellaneous other matters

a. Admission of evidence

"[R]ulings on the admissibility of evidence are within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion."

Woven Treasures, Inc. v. Hudson Capital, L.L.C., 46 So. 3d 905, 911 (Ala. 2009).

b. Discovery matters

"The general rule in Alabama that discovery matters are within the trial court's sound discretion, and its ruling on those matters will not be reversed absent a showing of abuse of discretion and substantial harm to the appellant."

Cryer v. Corbett, 814 So. 2d 239, 243 (Ala. 2001).

c. Denial of motion to continue trial date

"We review a trial court's denial of a motion for a continuance by asking whether in denying the motion the trial court exceeded its discretion."

Wright Therapy Equip., LLC v. Blue Cross and Blue Shield, 991 So. 2d 701, 705 (Ala. 2008).

d. Statutory construction

"[T]his Court also reviews de novo questions of law concerning statutory construction."

Ex parte Liberty Nat. Life Ins. Co., 209 So. 3d 486, 487 (2016); Accord, *Ex parte Trinity Property Consultants, LLC*, Ms. 1180642, at *7, __ So. 3d __ (Ala. Aug. 30, 2019).

e. Rulings on motions for leave to intervene

"The denial of a motion to intervene as of right is an appealable order. *State v. Estate of Yarbrough*, 156 So. 3d 947 (Ala. 2014). Generally a ruling on a motion to intervene is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Id*. Likewise, the denial of a motion for permissive intervention is an appealable order. *Universal Underwriters Ins. Co. v. Anglen*, 630 So. 2d 441 (Ala. 1993). A motion for permissive intervention is committed to the broad discretion of the trial court and is therefore reviewed this Court for abuse of that discretion. *QBE Ins. Corp. v. Austin Co., Inc.*, 23 So. 3d 1127, 1131 (Ala. 2009)."

Magee v. Boyd, 175 So. 3d 79, 138 (Ala. 2015).

f. Review of rulings by special masters

Pursuant to Ala. R. Civ. P. 53(e)(2), a trial court accepts findings of a referee or special master unless the findings are clearly erroneous. To the extent the trial court adopts such findings, the same standard applies in appellate review. *State Dept. of Human Resources v. L.W.*, 597 So. 2d 703 (Ala. Civ. App. 1992). *E.F. v. H.P.K.*, 825 So. 2d 125 (Ala. Civ. App. 2001). Where the trial court does *not* adopt the referee's findings, there is no presumption of correctness with regard to the referee's findings. If the trial court did not receive any evidence in the case and did not observe witnesses, its judgment rejecting a referee's findings is not entitled to the *ore tenus* presumption of correctness. *E.F. v. H.P.K.*, *supra*, 825 So. 2d at 128.

If the referee or master makes no express findings of fact, its conclusions are not governed by the clearly erroneous rule. *Fry v. Fry*, 451 So. 2d 344-45 (Ala. Civ. App. 1984).

A special master's report is accorded the same weight as a jury's verdict and, therefore, is not to be disturbed unless it is plainly and palpably wrong. *Intergraph Corp. v. Bentley Systems, Inc.*, 58 So. 3d 63 (Ala. 2010).

g. Contempt citations

"The issue whether to hold a party in contempt is solely within the discretion of the trial court, and a trial court's contempt determination will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence." *Poh v. Poh*, 64 So. 3d 49, 61 (Ala. Civ. App. 2010). "To hold a party in contempt under either Rule 70A(a)(2)(C)(ii) or (D), Ala. R. Civ. P., the trial court must find that the party willfully failed or refused to comply with a court order." *T.L.D. v. C.G.*, 849 So. 2d 200, 205 (Ala. Civ. App. 2002).

J.S.S. v. D.P.S., No. 2170865, __ So. 3d __, 2019 WL 167748, at *3 (Ala. Civ. App. Jan. 11, 2019).

As to criminal contempt, see *Kizale v. Kizale*, 254 So. 3d 233, 237-38 (Ala. Civ. App. 2017) (internal citations and quotations omitted):

Unlike civil contempt, criminal contempt requires proof beyond a reasonable doubt of the alleged contemnor's guilt. The standard of review

in an appeal from an adjudication of criminal contempt occurring in a civil case is whether the offense, i.e., the contempt, was proved beyond a reasonable doubt. . . . The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty, and that such evidence is inconsistent with any reasonable hypothesis of his innocence.

h. Moot questions, abstract propositions, advisory opinions

Alabama's appellate courts have limited appellate jurisdiction and therefore will not undertake to decide moot questions, abstract propositions, or give advisory opinions, as explained in *Ex parte James*, 836 So. 2d 813, 869-70 (Ala. 2002):

> The question of the existence of a case or controversy is not an idle debate. That there be an actual controversy between parties that appear before a court has from time immemorial been a bedrock judicial principle. The question involves the foundational principles upon which our tripartite form of constitutional government was formed. This Court has stated:
>
> > "[O]ur Constitution vests this Court with a *limited judicial power that entails the special competence to decide discrete cases and controversies involving particular parties and specific facts*. Ala. Const. 1901, amend. 328, § 6.01 (vesting the judicial power in the Unified Judicial System); *see, e.g., Copeland v. Jefferson County*, 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969) (stating that courts decide only concrete controversies between adverse parties)."
>
> *Alabama Power Co. v. Citizens of Alabama*, 740 So. 2d 371, 381 (Ala. 1999) (italicized emphasis in original).

Cf., Case v. Alabama State Bar, 939 So. 2d 881, 884 (Ala. 2006) ("Matters that may or may not occur in the future are not matters in controversy." ..."It is well settled that the judiciary of Alabama is not empowered 'to decide moot questions, abstract propositions, or to give advisory opinions, however convenient it might be to have these questions decided for the government of future cases."').

i. Review of administrative agency determinations

Appellate review of administrative agency determinations in contested cases is limited by Ala. Code § 41-22-20(k), which provides:

> Except where judicial review is by trial *de novo*, the agency order shall be taken as *prima facie* just and reasonable and the court shall not substitute its judgment for that of the agency as for the weight of the evidence on questions of fact, except as otherwise authorized by statute.

In *Alacare Home Health Servs. v. Ala. State Health Planning & Dev. Agency*, 27 So. 3d 1267, 1273-74 (Ala. Civ. App. 2009), the court of civil appeals explained this limited scope of appellate review:

> "In reviewing the decision of a state administrative agency, the special competence of the agency lends great weight to its decision, and that decision must be affirmed, unless it is arbitrary and capricious or not made in compliance with applicable law. *Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Co-ordinating Council*, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). The weight or importance assigned to any given piece of evidence presented [to the agency in a contested matter] is left primarily to the [agency's] discretion, in light of the [agency's] recognized expertise in dealing with these specialized areas. *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, 766 So. 2d 176, 178 (Ala. Civ. App. 1999). Neither this court nor the trial court may substitute its judgment for that of the administrative agency. *Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Coordinating Council*, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). This holds true even in cases where the testimony is generalized, the evidence is meager, and reasonable minds may differ as to the correct result. *Healthcare Auth. of Huntsville v. State Health Planning Agency*, 549 So. 2d 973, 975 (Ala. Civ. App. 1989). Further, an agency's interpretation of its own rule or regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation. *Sylacauga Health Care Ctr., Inc. v. Alabama State Health Planning Agency*, 662 So. 2d 265, 268 (Ala. Civ. App. 1994)."

B. Extraordinary writs

1. Certiorari, generally:

> "In reviewing a decision of the Court of Civil Appeals on a petition for a writ of certiorari, this Court 'accords no presumption of correctness to the legal conclusions of the intermediate appellate court. Therefore, we must apply de novo the standard of review that was applicable in the Court of Civil Appeals.' *Ex parte Toyota Motor Corp.*, 684 So. 2d 132, 135 (Ala. 1996)."

Ex parte Folsom, 42 So. 3d 732, 736 (Ala. 2009); Accord, *Ex parte Exxon Mobil Corp.*, 926 So. 2d 303, 308 (Ala. 2005).

2. Petitions for writs of mandamus–general

a. Petition for writ of mandamus–discovery rulings

> "'"Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

Ex parte Allstate Prop. and Cas. Ins. Co., 237 So. 3d 199, 203 (Ala. 2017), quoting *Ex parte Progressive Specialty Ins. Co.*, 31 So. 3d 661, 663 (Ala. 2009), quoting *Ex parte Liberty Nat'l Life Ins. Co.*, 888 So. 2d 478, 480 (Ala. 2003), quoting *Ex parte Integon Corp.*, 672 So. 2d 497, 499 (Ala. 1995).

> "'Discovery matters are within the trial court's sound discretion, and this Court will not reverse a trial court's ruling on a discovery issue unless the trial court has clearly exceeded its discretion. *Home Ins. Co. v. Rice,* 585 So. 2d 859, 862 (Ala. 1991). Accordingly, mandamus will issue to reverse a trial court's ruling on a discovery issue only (1) where there is a showing that the trial court clearly exceeded its discretion, and (2) where the aggrieved party does not have an adequate remedy by ordinary appeal. The petitioner has an affirmative burden to prove the existence of each of these conditions.'"

Ex *parte Ocwen Fed. Bank, FSB,* 872 So. 2d 810, 813 (Ala. 2003).

> "Moreover, this Court will review by mandamus only those discovery matters involving (a) the disregard of a privilege, (b) the ordered production of 'patently irrelevant or duplicative documents,' (c) orders effectively eviscerating 'a party's entire action or defense,' and (d) orders denying a party the opportunity to make a record sufficient for appellate review of the discovery issue. 872 So. 2d at 813-14 ...."

Ex parte Mobile Gas Service Corp., 123 So. 3d 499, 504 (Ala. 2013), quoting *Ex parte Meadowbrook Ins. Group, Inc.*, 987 So. 2d 540, 547 (Ala. 2007). *Ocwen Federal Bank, FSB,* stated also that:

> Generally, an appeal of a discovery order is an adequate remedy, notwithstanding the fact that that procedure may delay an appellate court's review of a petitioner's grievance or impose on the petitioner additional expense; our judicial system cannot afford immediate mandamus review of every discovery order.

Ocwen, 872 So. 2d at 813 (citations omitted). Of course, it is well established that interlocutory appellate review of discovery orders is disfavored:

> "'An appellate court may not decide whether it would, in the first instance, have permitted the prayed for discovery. Furthermore, it is unusual to find abuse of discretion in these matters.'"

Ex parte Horton Homes, Inc., 774 So. 2d 536, 539 (Ala. 2000), quoting *Ex parte Marsh & McLennan, Inc.*, 404 So. 2d 654, 655 (Ala. 1981), quoting, in turn, *Assured Investors Life Ins. Co. v. National Union Assoc. Inc.*, 362 So. 2d 228, 232 (Ala. 1978), citing *Swanner v. United States*, 406 F.2d 716 (5th Cir. 1969)).

Mandamus is "a drastic and extraordinary remedy and should be issued only upon a clear showing that the trial court abused its discretion by exercising it in an arbitrary or capricious manner." *Ex parte Dothan Personnel Bd.*, 831 So. 2d 1, 5 (Ala. 2002) (quoting *Ex parte Cotton*, 638 So. 2d 870, 872 (Ala. 1994)). "[A] writ of mandamus will not be issued unless the movant has a clear and indisputable right to a particular result." *Ex parte Rudolph,* 515 So. 2d 704, 706 (Ala. 1987). "[T]here must be credible allegations, ironclad in nature, showing that the trial court is bound by law to do what the petitioner requests." *Ex parte Harper*, 934 So. 2d 1045, 1048 (Ala. 2006) (quoting *Ex parte State Bd. for Registration of Architects*, 574 So. 2d 53, 54 (Ala. Civ. App. 1990)). A writ will not issue where the right in question is doubtful. "[T]he right sought to be enforced by mandamus must be clear and certain with no reasonable basis for

controversy about the right to relief." *Ex parte Flexible Prods. Co.*, 915 So. 2d 34, 41 (Ala. 2005) (quoting *Goolsby v. Green*, 431 So. 2d 955, 958 (Ala. 1983) (quoting *Ex parte Dorsey Trailers, Inc.*, 397 So. 2d 98, 102 (Ala. 1981))).

b. Mandamus–forum selection clause

"'[A] petition for a writ of mandamus is the proper vehicle for obtaining review of an order denying enforcement of an "outbound" forum-selection clause when it is presented in a motion to dismiss. '*Ex parte D.M. White Constr. Co.*, 806 So. 2d 370, 372 (Ala. 2001); see *Ex parte CTB, Inc.*, 782 So. 2d 188, 190 (Ala. 2000).' [A] writ of mandamus is an extraordinary remedy, which requires the petitioner to demonstrate a clear, legal right to the relief sought, or an abuse of discretion. '*Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d 656, 660 (Ala. 2001).' [T]he review of a trial court' s ruling on the question of enforcing a forum-selection clause is for an abuse of discretion. '*Ex parte D.M. White Constr. Co.*, 806 So. 2d at 372."'

Ex parte Bad Toys Holdings, Inc., 958 So. 2d 852, 855 (Ala. 2006) (quoting *Ex parte Leasecomm Corp.*, 886 So. 2d 58, 62 (Ala. 2003)).

"'Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'"

Ex parte Riverfront, LLC, 129 So. 3d 1008, 1011 (Ala. 2013).

Additionally, "[a]n appellee can defend the trial court's ruling with an argument not raised below, for this Court 'will affirm the judgment appealed from if supported on any valid legal ground.'" *Smith v.*