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RECENT CIVIL DECISIONS

Summaries from Sept. 27, 2019 to April 10, 2020

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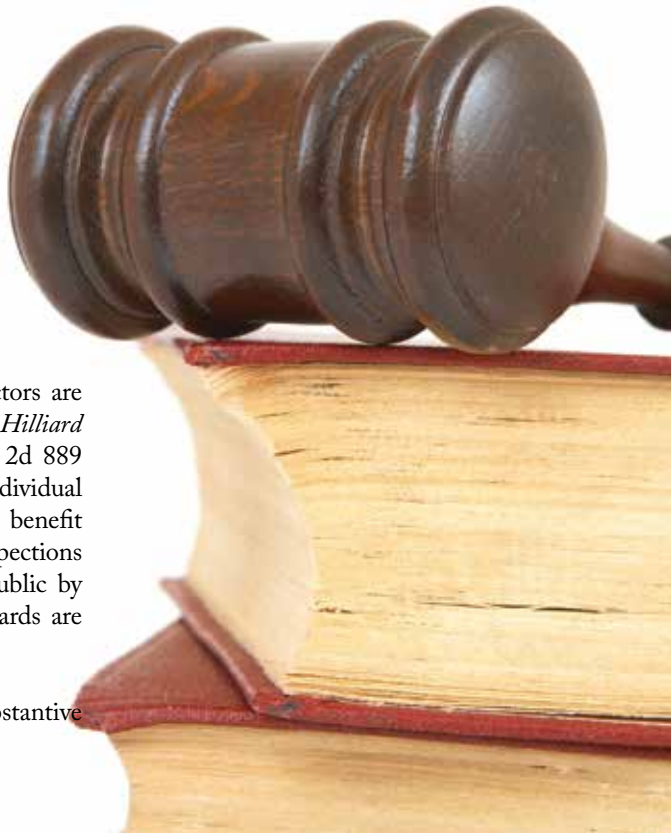
SUBSTANTIVE MUNICIPAL IMMUNITY – NEGLIGENT INSPECTION

Ex parte City of Tuskegee, [Ms. 1180474, Sept. 27, 2019] __ So. 3d __ (Ala. 2019). In a plurality opinion, the Court (Wise, J.; Bolin, Bryan, and Mendheim, JJ., concur; Parker, C.J., and Shaw, Sellers, and Mitchell, JJ., concur in the result; Stewart, J., dissents) issues a writ of mandamus directing the Macon Circuit Court to dismiss a wrongful-death action against the City of Tuskegee. Plaintiff, as administratrix of her mother's estate, alleged that her mother died in a fire as a result of the City's negligent failure to inspect the rental home prior to turning on utilities. Ms. **29-30. The Plaintiff also alleged that the City negligently failed to maintain adequate water pressure which prevented firefighters from saving the decedent from the burning rental home. Ms. *30. In regard to the negligent inspection claim, the Court concluded the City was entitled to substantive immunity because

> [T]he evidence established that the City required safety inspections of rental properties before utilities could be turned on at the property. The inspection form indicates that the City inspects multiple areas of the subject property and that it goes beyond merely checking to determine whether required smoke detectors are installed. As was the case in *Hilliard* [*v. City of Huntsville*, 585 So. 2d 889 (Ala. 1991)], although individual residents of the City derive a benefit from the inspections, the inspections are designed to protect the public by ensuring that municipal standards are met....
>
> Thus, the City is entitled to substantive immunity as to Nyasha's claim that the City was negligent in inspecting the house before allowing utilities to be turned on at the house.

Ms. **40-41.

In regard to the alleged negligent failure to maintain adequate water pressure, "the City presented a prima facie case that its actions were not negligent and that it was entitled to municipal immunity under § 11-47-190." Ms. *50. Further, Plaintiff "also did not present any evidence to contradict the City's evidence that the Macedonia fire department had caused the water hammer that resulted in the decrease in water pressure or the City's evidence indicating that the decrease in water pressure did not occur until after TFD [Tuskegee Fire Department] had ceased its efforts to rescue Yvonne and had moved into defensive mode." Ms. *52.



RULE 11 – FAILURE TO SIGN COMPLAINT – STATUTE OF LIMITATIONS – § 6-2-3, ALA. CODE 1975

McKenzie v. Janssen Biotech, Inc., [Ms. 1170787, Sept. 27, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, and Stewart, JJ., concur; Sellers and Mendheim, JJ., concur in the result) affirms the Monroe Circuit Court's dismissal of failure-to- warn and negligence claims against Janssen Biotech, Inc., the manufacturer of Remicade, a medication taken by the Plaintiff for psoriatic arthritis. It was undisputed that the Plaintiff received Remicade intravenously every two weeks until November 2014 when he developed severe neuropathy. Ms. *2. The Plaintiff filed a complaint in October 2016 which was copied from a complaint filed in an out-of-state wrongful-death action. Ms. *3. The October 2016 complaint was not signed by Plaintiff's counsel. Ms. **2-3.

The trial court struck the October 2016 complaint citing Rule 11(a), Ala. R. Civ. P. and the complaint's "'numerous, substantial errors' and 'the failure of any counsel to sign the document.'" Ms. *9. The trial court further dismissed as untimely all of the Plaintiff's claims asserted in an amended complaint filed in February 2017. Ms. *5.

The Court first noted that while Rule 11(a) requires a pleading to be signed, "'a trial court, under the rule, is not required to strike an unsigned pleading. Thus, Rule 11(a) itself contemplates that even a pleading that violates Rule 11(a) can stand.'" Ms. *7, quoting *State v. $93,917.50 & 376 Gambling Devices*, 171 So. 3d 10, 16 (Ala. 2014). A trial court has discretion in deciding whether to strike an unsigned pleading and such orders are reversed only if it is shown that the trial court exceeded its discretion. Ms. *7. The Court affirmed the order striking the unsigned October 2016 complaint. Ms. *12.

With the October 2016 complaint having been stricken and their amended complaint not filed until February 2017, Plaintiffs' negligence and negligent failure-to-warn claims were time-barred unless saved by § 6-2-3 which applies "to any cause of action fraudulently concealed." Ms. *13, quoting *Ex parte Price*, 244 So. 3d 949, 957 n. 2 (Ala. 2017). The Court held that § 6-2-3 did not save the Plaintiff's claims from the bar of limitations because their amended complaint failed "to allege the facts and circumstances of JBI's alleged fraud with the required specificity; nor do those statements explain why the McKenzies were prevented from discovering the facts surrounding the fraud at an earlier date.... The trial court's decision to dismiss those claims as untimely was therefore proper." Ms. **16-17.

AUTHORITY OF COUNSEL FOLLOWING DEATH OF PARTY

Billingsley v. City of Gadsden, [Ms. 2180621, Sept. 27, 2019] __ So. 3d __ (Ala. Civ. App. 2019). In this unanimous *per curiam* opinion, the court dismisses an appeal filed after the employee's death by counsel for the employee in a workers' compensation action. The court held "counsel for the employee may not properly question the correctness of the trial court's judgment of dismissal that was entered after the death of the employee, which death terminated counsel's authority to act on behalf of the employee." Ms. *6.

MANDAMUS – BAR OF LIMITATIONS APPARENT FROM FACE OF COMPLAINT – OPTION CONTRACT

Ex parte S. Mark Booth, [Ms. 1171194, Sept. 30, 2019] __ So. 3d __ (Ala. 2019). In a plurality opinion, the Court (Stewart, J.; Parker, C.J., and Wise and Mitchell, JJ., concur; Bolin, Shaw, Bryan, Sellers, and Mendheim, JJ., concur in the result) grants in part a petition for a writ of mandamus and directs the Marion Circuit Court to dismiss time-barred claims asserted against Booth by the City of Guin.

The Court first noted that "[g]enerally a petition for a writ of mandamus is not the appropriate means to seek review of whether a claim is time-barred by the expiration of a statute of limitations, but mandamus review of such a claim may be proper if the face of the complaint indicates the claim is untimely." Ms. *7.

Booth argued that although § 4.4(b) of the development agreement at issue did not place a time limit on the City's exercise of its option to repurchase the real property from Booth, § 35-4-76(a), Ala. Code 1975, required the City to exercise its option within two years. In pertinent part, § 35-4-76(a) states "'[w]here the instrument creating any such option shall place no limit upon the duration of the option or otherwise state the terms controlling the duration of the option, the option shall cease to be enforceable two years after the time of its creation.'" Ms. *11.

In opposition, the City argued that § 4.4(b) did not provide it with an option to repurchase but was in the nature of a reverter. The Court rejected this argument holding that "§ 4.4(b), in clear and unequivocal terms, provides the City with an option to repurchase the property." Ms. *15. The Court also emphasized that in its complaint, the City had stated that § 4.4(b) "provided it an 'option to repurchase'" and held that the Court "has recognized the importance of the language used by the parties in the pleadings to determine whether a provision in a contract constitutes an option." Ms. *15. The Court held that the City's specific performance and fraud claims were time-barred by § 35-4-76. Ms. *24.

In regard to the City's alternative claim that it did not possess legal authority to convey the property to Booth in the first place, although expressing skepticism on the merits of that claim, the Court declined to grant mandamus relief because it "has not previously recognized that a writ of mandamus is an appropriate means by which to review a trial court's denial of a motion to dismiss that was based on the capacity of a party to enter into a contract." Ms. *28.

STATUTE OF FRAUDS – ORAL STOCK PURCHASE AGREEMENT – FULL PERFORMANCE – CONVERSION OF CORPORATE PROPERTY

Patel v. Shah, etc., et al., [Ms. 1180012, Sept. 30, 2019] __ So. 3d __ (Ala. 2019). In a plurality opinion, the Court (Parker, C.J.; Wise, Mendheim, and Mitchell, JJ., concur; Bolin, Shaw, Bryan, and Stewart, JJ., concur in the result; Sellers, J., dissents) affirms in part and reverses in part a summary judgment entered by the Madison Circuit

Court dismissing contract and tort claims filed by Dahyalal Patel to enforce his ownership rights as a shareholder in Subway No. 43092, Inc. The circuit court dismissed Patel's breach of contract claim, citing § 8-9-2(8), Ala. Code 1975, requiring that stock purchase agreements be in writing subscribed by the party to be charged. Ms. **4-5.

Patel argued that the statute of frauds did not apply, because he had fully performed the oral stock purchase agreement by paying to Shah the full purchase price due under the agreement. The Court agreed with Patel holding that "our precedent shows that the common-law full-performance exception applies to all contracts within the scope of § 8-9-2. Consequently, when the Legislature in 1997 added stock-purchase agreements to § 8-9-2, it did not need to expressly reference the full-performance exception." Ms. **13-14.

The Court affirmed the summary judgment dismissing Patel's tort claims governed by a two-year statute of limitations, because the complaint showed on its face that the two-year limitations period had expired. Ms. *16. Also, "Patel did not submit any evidence to meet" the tolling requirements of § 6-3-2. *Ibid.* Instead, "he merely alleged in his response to the motion for a summary judgment that his 'claims based in fraud – fraudulent suppression, misrepresentation, and fraud – did not accrue until [he] discovered the fraud....'" Ms. *17.

With regard to Patel's conversion claim, the Court affirmed the summary judgment on Patel's claim that Shah converted money belonging to the corporation. Ms. *18. The Court reversed the summary judgment dismissing Patel's claim that Shah had converted personal property of the corporation. Ms. *19.

ARTICLE I, § 25, ALA. CONST. 1901 – RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES

Courtyard Manor Homeowners' Association, Inc. v. City of Pelham, [Ms. 1180683, Oct. 18, 2019] __ So. 3d __ (Ala. 2019). The Court (Sellers, J.; and Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur) affirms an Ala. R. Civ. P. 12(b)(6) order of dismissal from the Shelby Circuit Court where a homeowners' association complained of the failure of the City of Pelham to consider a petition for deannexation from that City. While acknowledging that Article I, § 25, Ala. Const. 1901, provides "[T]he citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the power of government for redress of grievances or other purposes, by petition, address, or remonstrance, the Court refuses to impose any additional duties upon the legislative branch to actually hear, consider, or decide any such petitions by citizens. Citing *Smith v. Arkansas State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979), the Court holds that under the equivalent provision of the federal Constitution, the First Amendment does not impose any affirmative obligation on government to listen to petitions or to respond to them. Ms. *8.

SECTION 37-6-20, ALA. CODE 1975 – ELECTRIC COOPERATIVES AND PATRONAGE – REFUNDS

Recherche, LLC v. Baldwin County Elect. Membership Corp., [Ms. 1171144, Oct. 18, 2019] __ So. 3d __ (Ala. 2019). The Court (Stewart, J.; Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur) affirms the dismissal by the Baldwin Circuit Court of a class action complaint ostensibly brought by members of the Baldwin County Electric Membership Corporation, which sought an order directing the Electric Cooperative to make annual cash refunds to its members of excess revenues. Construing § 37-6-20, Ala. Code 1975, in the light of several federal decisions construing the same statute, the Court holds there is no requirement in § 37-6-20 on the part of the Cooperative to make annual cash distributions to members such that the Baldwin Circuit Court properly dismissed the class action complaint.

ARBITRATION – DISMISSAL OF APPEAL

SAI Montgomery BCH, LLC v. Williams, [Ms. 1180220, Oct. 18, 2019] __ So. 3d __ (Ala. 2019). The Court (Stewart, J., and Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur) dismiss an appeal from an order of the Montgomery Circuit Court denying motions to compel arbitration upon concluding the trial court was without jurisdiction to enter the order appealed from because of the effect of the expiration of the 90-day time limitation imposed by Ala. R. Civ. P. 59.1, which meant the trial court was without jurisdiction to enter the challenged order. The Court rejects the appellant's contention that their motion was filed pursuant to Rule 60(b)(6) and was therefore not subject to denial by operation of law under Rule 59.1. Because the reviewing court looks to the essence of the motion rather than its title, the Court treated the appellant's post-judgment motion as a motion filed under Rule 59(e) (motion to alter, amend, or vacate a judgment) regardless of how the motion was denominated. *Id.*, Ms. **6-7.

Because the Montgomery Circuit Court's order purporting to deny the motion to compel arbitration was entered after expiration of the Rule 59.1 90-day time limit for consideration of post-judgment motions, that order was void. Ms. **13-14. Because the appellants did not timely file their appeal, appellate review was foreclosed. *Id.*

SECTION 43-8-224, ALA. CODE 1975, ALABAMA'S ANTILAPSE STATUTE

Norwood v. Barclay, [Ms. 1180281, Oct. 18, 2019] __ So. 3d __ (Ala. 2019). The Court (Stewart, J.; and Parker, C.J., and Wise, Sellers, and Mitchell, JJ., concur) reverses an order of the Jefferson Probate Court construing a will so that the testator's estate would pass by intestacy and escheat to the State of Alabama pursuant to § 43-8-44, Ala. Code 1975 ("If there is no taker under the provisions of this article, the intestate estate passes to the State of Alabama"). The Court instead holds that § 43-8-224, Ala. Code 1975 (the antilapse statute) requires construction of the will in such a way that the estate passes to the two surviving heirs of the person originally designated by the will to receive the entirety of the estate who predeceased the testator. The Court reasons that this result is compelled by § 43-8-222, Ala. Code 1975, which provides that "[t]he intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this article apply unless a contrary intention is indicated by the will."

Reasoning from several settled rules of construction ("[w]e 'presume that, when a testator undertakes to make a will of all his property, he did not intend to die intestate as to any of it or during any period of time'" ' " " Every doubt in a will must be resolved in favor of a testator's heirs at law" "[i]t is a well-settled principle that the law does not favor escheat" and "any doubt whether property is subject is escheat is resolved against the state") (Ms. **8-9), the Court concludes "[i]f the testator wanted to prevent the nieces from inheriting her estate, she could have included language in her will preventing the application of the antilapse statute. The testator gave no indication in her will that the antilapse statute should not apply." Ms. **11-12. Accordingly, applying the settled rules of construction, the Court holds the antilapse statute applicable and directs that the nieces of the sole devisee who predeceased the testator were entitled to take the devisee's share of the testator's estate.

APPELLATE PROCEDURE – WAIVER

Forbes v. Brawley, [Ms. 2180399, Oct. 18, 2019] __ So. 3d __ (Ala Civ. App. 2019). This *per curiam* opinion (Thompson, P.J.; and Moore, Donaldson, and Hanson, JJ., concur; Edwards, J., dissents) affirms a judgment of the Shelby Circuit Court dismissing claims against an orthodontist, which alleged breach of contract, misrepresentation, and fraudulent inducement on the basis of the waiver principle set forth in *Fogarty v. Southworth*, 953 So. 2d 1255 (Ala. 2006):

> In *Fogarty*, our supreme court stated:
>
> > When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue in the appellant's principal brief constitutes a waiver with respect to the issue."
>
> 953 So. 2d at 1232 (footnote omitted) (emphasis added).
>
> > "'This waiver, namely, the failure of the appellant to discuss in the opening brief an issue on which the trial court might have relied as a basis for its judgment, results in an affirmance of that judgment. [*Fogarty*, 953 So. 2d at 1232]. That is so, because "this court will not presume such error on the part of the trial court." *Roberson v. C.P. Allen Constr. Co.*, 50 So. 3d 471, 478 (Ala. Civ. App. 2010) (emphasis added). See also *Young v. Southern Life & Health Ins. Co.*, 495 So. 2d 601 (Ala. 1986).'"
>
> *Scrushy v. Tucker*, 70 So. 3d 289, 307 (Ala. 2011)(quoting *Soutullo v. Mobile Cty.*, 58 So. 3d 733, 739 (Ala. 2010)) (first emphasis added).

Although *Fogarty* and its progeny appear to have been applied primarily to appeals involving summary judgments, see, e.g., *Fogarty, Norvell v. Norvell*, 275 So. 3d 497 (Ala. 2018), *Drake v. Alabama Republican Party*, 209 So. 3d 1118 (Ala. Civ. App. 2016), *Soutullo v. Mobile County*, 58 So. 3d 733 (Ala. 2010), and *Ramson v. Brittin*, 62 So. 3d 1035 (Ala. Civ App. 2010), our supreme court has also applied the *Fogarty* line of cases to reviews of dismissals. In *Facebook, Inc. v. K.G.S.*, [Ms. 1170244, June 28, 2019] __ So. 3d __, (Ala. 2019), our supreme court discussed *Fogarty* in the context of the denial of a motion to dismiss, stating:

> "In its order denying Gelin's motion to dismiss, the trial court did not indicate the basis for its conclusion that 'it has jurisdiction over [Gelin].' In other words, the order does not indicate whether the trial court believed it had jurisdiction over Gelin because she had not timely raised the personal-jurisdiction defense or because Gelin had sufficient minimum contacts with Alabama. Under these circumstances, where the trial court did not specify a basis for its ruling, Gelin was required to present an argument in her principal brief on appeal, in compliance with Rule 28(a)(10), Ala. R. App. P., stating why neither ground was a valid basis for asserting personal jurisdiction over her. *See Fogarty v. Southworth*, 953 So. 2d 1225, 1232 (Ala. 2006). However, in her principal brief on appeal, Gelin argues only that she does not have sufficient minimum contacts with Alabama; she does not address the other potential basis for the trial court's order – that her assertion of the personal-jurisdiction defense was untimely. Gelin's failure to do so results in a waiver of this issue on appeal."
>
> (Footnote omitted.)

Id. at **14-15; see, also, *Belle v. Goldasich*, [Ms. 1171001, Sept. 13, 2019] __ So. 3d __ (Ala. 2019) (Supreme Court applies *Fogarty* to affirm dismissal of a count asserted in legal-malpractice action based upon waiver principle). The court holds the appellants' "failure even to mention the other grounds that [the orthodontist] raised and upon which the trial court might have relied in dismissing the action constitutes a waiver of those issues and results in the affirmance of the judgment." *Id.* at *17.

WORKERS' COMPENSATION – OUTRAGE – MISREPRESENTATION – SUPPRESSION – CONSPIRACY

Swain v. AIG Claims, Inc., [Ms. 2180336, Oct. 18, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Hanson, J.; and Thompson, P.J., and Donaldson, J., concur; Moore, J., concurs in part and concurs in the result; Edwards, J., concurs in the result) reverses and remands an order of the Jefferson Circuit Court dismissing, pursuant to Ala. R. Civ. P. 12(b)(6), an injured worker's tort claims alleging outrage, misrepresentation, suppression, and conspiracy upon concluding the worker's complaint sufficiently alleged facts and circumstances meeting the predicate elements of each of those torts.

The worker claims he suffered PTSD as the result of a workplace accident that also caused physical injuries to his head, lungs, neck, back, and pelvic region. His amended complaint further alleges that he suffered additional emotional distress and anxiety when the workers' compensation insurer, adjuster, and claims manager conspired with the initial employer-designated treating physician to deprive the worker of necessary care and treatment, including psychiatric and neuropsychological care. The Jefferson Circuit Court dismissed the worker's complaint upon finding he failed to exhaust the "second opinion" requirements

of § 25-5-77(a), Ala. Code 1975, and that the amended complaint failed to satisfy the elements of outrage, fraud, or conspiracy. Ms. **8-9.

Focusing upon the standard of review applicable when considering a Rule 12(b)(6) dismissal, the court first rejects the employer's contention that § 25-5-77(a) barred the worker's tort claims. Reviewing *Lowman v. Piedmont Executive Shirt Manufacturing Co.*, 547 So. 2d 90 (Ala. 1989), and its progeny (Ms. **13-17), the court concludes the worker's amended complaint alleges that he suffered mental anguish and emotional distress as a proximate result of the defendant's post-accident handling of his workers' compensation claim such that his claims are not barred by the exclusivity provision of the Workers' Compensation Act and, under the standard of review, alleges claims where there is at least a possibility of recovery. *Id.*, pp. 19-20.

Citing *Ex parte Austal USA, LLC*, 233 So. 3d 975 (Ala. 2017), which reiterated the principle 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."'" (Ms. **22-23 quoting *Austal*, 233 So. 3d at 981), the court concludes the worker's amended complaint sufficiently alleges facts and circumstances to meet the predicate elements of outrage (Ms. **23-26), fraudulent misrepresentation, and suppression (Ms. **27-30), and conspiracy (Ms. **30-31). Because under the applicable standard of review the judgment dismissing the worker's tort claims pursuant to Rule 12(b)(6) was in error, the judgment of the Jefferson Circuit Court is reversed and the case is remanded for further proceedings.

ALA. R. CIV. P. 17(C) – GUARDIAN AD LITEM

Ex parte CityR Eagle Landing, LLC, [Ms. 1180630, Oct. 25, 2019] __ So. 3d __ (Ala. 2019). The Court (Bolin, J.; Shaw, Wise, Sellers, and Mendheim, JJ., concur; Parker, C.J., and Bryan, Stewart, Mitchell, JJ., concur in the result) grants a petition for a writ of mandamus and directs the Montgomery Circuit Court to rescind an order appointing a guardian ad litem to represent the interests of minor residents of an apartment complex because there was no evidence of any inherent conflict between those minor children and their parents who were parties to the action against the owner and manager of the apartment complex, such that there was no justification or demonstrated need for appointment of a guardian ad litem under Ala. R. Civ. P. 17(c). The Court drew the distinction of when a guardian ad litem ought to be appointed to prepare a report on behalf of a minor when a proposed pro ami settlement is presented to a trial court with a request that it be approved as fair and reasonable and conservative of the minor's best interests (see *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988); *Abernathy v. Colbert Cty. Hosp. Bd.*, 388 So. 2d 1207, 1209 (Ala. 1980); *Tennessee Coal, Iron & R.R. v. Hayes*, 97 Ala. 201, 12 So. 98 (1892); and *Burlington Northern R.R. v. Warren*, 574 So. 2d 758 (Ala. 1990)) (Ms. **18-19).

The Court concludes the trial court exceeded its discretion in appointing the guardian ad litem to represent the minor residents "when there was no conflict of interest between the minor residents and their parents." Because "[a]t this point in the proceedings, such a practice would allow a stranger to the parent-child relationship to have the right to represent the parent's child in a legal action." Ms. *17.

SECTION 6-5-530, ALA. CODE 1975 – ABROGATION OF WYETH, INC. V. WEEKS, 159 SO. 3D 649 (ALA. 2014)

Forest Laboratories, LLC v. Feheley, [Ms. 1180387, Oct. 25, 2019] __ So. 3d __ (Ala. 2019). The Court (Wise, J.; and Parker, C.J., and Bolin, Bryan, Sellers, and Mitchell, JJ., concur; Mendheim and Stewart, JJ., concur in the result) accepts an Ala. R. App. P. 5 permissive appeal from the Calhoun Circuit Court seeking review of an order denying a prescription drug manufacturer's motion for summary judgment wherein it contended that the Alabama Legislature's promulgation of § 6-5-530, Ala. Code 1975, abrogated the Supreme Court's prior decision in *Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014), such that the prescription drug manufacturer could not be liable for the murder/suicide alleged in plaintiff's complaint when it was undisputed that the version of the antidepressant medication taken was manufactured by a generic drug manufacturer. Reviewing the history of the Legislature's promulgation in 2015 of Act 2015-106, which later became codified as § 6-5-530, in the context of the Supreme Court's decision on rehearing in *Wyeth v. Weeks*, the Court holds that the Legislature in promulgating § 6-5-530 intended to abrogate the holding of *Wyeth v. Weeks*, such that the manufacturer of a brand-named drug cannot now be held liable for fraud or misrepresentation based on statements made in connection with the manufacture of the brand-named prescription drug when the plaintiff's claim is based on a physical injury caused by a generic version of that drug manufactured by a different company.

MOOTNESS – WANT OF SUBJECT-MATTER JURISDICTION

Magic City Capital, LLC v. Twickenham Place Partners, LLC, [Ms. 1180215, Oct. 25, 2019] __ So. 3d __ (Ala. 2019). In this plurality opinion (Stewart, J.; and Parker, C.J., and Bolin and Wise, JJ., concur; Sellers, J., concurs in the result), the Court dismisses an appeal because the judgment ostensibly appealed from was entered by a trial court lacking subject-matter jurisdiction and was therefore void and would not support an appeal. Ms. **15-16 (citing *MPQ, Inc. v. Birmingham Realty Co.*, 78 So. 3d 391-94 (Ala. 2011)). The reason the underlying judgment is void is because the issue presented by summary judgment was rendered moot. The Court explains the concept of mootness this way:

> In considering mootness,
>
> > "'[t]his Court has often said that, as a general rule, it will not decide questions after a decision has become useless or moot. *Ex parte McFry*, 219 Ala. 492, 122 So. 641 (1929); *Byrd v. Sorrells*, 265 Ala. 589, 93 So. 2d 146 (1957); *Chisolm v. Crook*, 272 Ala. 192, 130 So. 2d 191 (1961); *Jacobs Banking Company v. Campbell*, 406 So. 2d 834 (Ala. 1981). Alabama courts do not give opinions in which there is no longer a justiciable controversy; yet, Alabama has recognized two exceptions to the mootness doctrine: questions of great public interest and questions that are likely of repetition of the situation. *Byrd v. Sorrells, supra,*

State ex rel. Eagerton v. Corwin, 359 So. 2d 767 (Ala. 1977). Neither of these exceptions seems applicable here ....'

"*Arrington v. State ex rel. Parsons*, 422 So. 2d 759, 760 (Ala. 1982).

"' " 'A moot case or question is a case or question in or on which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned.'" *Case v. Alabama State Bar*, 939 So. 2d 881, 884 (Ala. 2006) (quoting *American Fed'n of State, County & Mun. Employees v. Dawkins*, 268 Ala. 13, 18, 104 So. 2d 827, 830-31 (1958)). "The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties." *Crawford v. State*, 153 S.W.3d 497, 501 (Tex. App. 2004) (citing *VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex. 1993)). "A case becomes moot if at any stage there ceases to be an actual controversy between the parties." *Id.* (emphasis added) (citing *National Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999)).

""'There must be a bona fide existing controversy of a justiciable character to confer upon the court jurisdiction to grant declaratory relief under the declaratory judgment statutes, and if there was no justiciable controversy existing when the suit was commenced the trial court had no jurisdiction." *State ex rel. Baxley v. Johnson*, 293 Ala. 69, 73, 300 So. 2d 106, 110 (1974). ""'Unless the trial court has before it a justiciable controversy, it lacks subject matter jurisdiction and any judgment entered by it is void ab initio.'"" *Sustainable Forests, L.L.C. v. Alabama Power Co.*, 805 So. 2d 681, 683 (Ala. 2001) (quoting *Hunt Transition & Inaugural Fund, Inc. v. Grenier*, 782 So. 2d 270, 272 (Ala. 2000), quoting in turn *Ex parte State ex rel. James*, 711 So. 2d 952, 960 n. 2 (Ala. 1998)). "A moot case lacks justiciability." *Crawford*, 153 S.W.3d at 501. Thus, "[a]n action that originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised in it have become moot by subsequent acts or events." *Case*, 939 So. 2d at 884 (citing *Employees of Montgomery County Sheriff's Dep't v. Marshall*, 893 So. 2d 326, 330 (Ala. 2004)).

""'The lack of a justiciable controversy may be raised either by a motion to dismiss, Rule 12, [Ala. R. Civ. P.], or a motion for summary judgment.'" *Hornsby v. Sessions*, 703 So. 2d 932, 937 (Ala. 1997)(quoting *Smith v. Alabama Dry Dock & Shipbuilding Co.*, 293 Ala. 644, 649, 309 So. 2d 424, 427 (1975)). Indeed, "[i]t is well settled that lack of subject-matter jurisdiction can be raised at any time by the parties or by the court ex mero motu." *Ex parte V.S.*, 918 So. 2d 908, 912 (Ala. 2005). ""'[I]f there is an absence of jurisdiction over ... the subject matter, a court has no power to act, and jurisdiction over the subject matter cannot be created by waiver or consent.'"" *Id.* (quoting *Flanniqan v. Jordan*, 871 So. 2d 767, 768 (Ala. 2003), quoting in turn *Norton v. Liddell*, 280 Ala. 353, 356, 194 So. 2d 514, 517 (1967)). A court without subject-matter jurisdiction "'may take no action other than to exercise its power to dismiss the action.... Any other action ... is null and void.'" *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1029 (Ala. 1999) (quoting *Beach v. Director of Revenue*, 934 S.W.2d 315, 318 (Mo. Ct. App. 1996)). ...'

"*Chapman v. Gooden*, 974 So. 2d 972, 983-84 (Ala. 2007) (first emphasis original; other emphasis added).

"A declaratory-judgment action may be rendered moot.

"'Declaratory-judgment actions in Alabama are governed by the Declaratory Judgment Act, codified at §§ 6-6-220 through -232, Ala. Code 1975 ("the Act"). The Act does not "'empower courts 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.'" *Stamps v. Jefferson County Bd. of Educ.*, 642 So. 2d 941, 944 (Ala. 1994) (quoting *Town of Warrior v. Blaylock*, 275 Ala. 113, 114, 152 So. 2d 661, 662 (1963))(emphasis added in *Stamps*). Pursuant to § 6-6-226, declaratory relief may be afforded in cases "in which a judgment will terminate the controversy or remove the uncertainty,"but § 6-6-229 emphasizes the corollary that "[t]he court may refuse to enter a declaratory judgment where such judgment, if entered, would not terminate the uncertainty or controversy giving rise to the proceeding.'"

"*Bruner v. Geneva County Forestry Dep't*, 865 So. 2d 1167, 1175 (Ala. 2003). See also *Hunt Transition & Inaugural Fund, Inc. v. Grenier*, 782 So. 2d 270, 272 (Ala. 2000) ('For a court to grant declaratory relief, it must have before it a bona fide, presently existing justiciable controversy that affects the legal rights or obligations of the parties.'); *VanLoock v. Curran*, 489 So. 2d 525, 531 (Ala. 1986) ('Indeed, moot questions are not properly the subject of declaratory judgment actions.'(citing *City of Mobile v. Scott*, 278 Ala. 388, 178 So. 2d 545 (1965)))."

Underwood v. Alabama State Bd. of Educ., 39 So. 3d 120, 127-28 (Ala. 2009).

Ms. **10-13.

UNINSURED MOTORIST INSURANCE COVERAGE – CONSTRUCTION OF POLICY PROVISIONS

Cowart v. GEICO Casualty Co., [Ms. 1171126, Oct. 25, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; and Parker, C.J., and Shaw, J., concur; Bryan and

Mendheim, JJ., concur in the result) issues a plurality opinion reversing a summary judgment entered by the Mobile Circuit Court upon concluding that a GEICO uninsured motorist insurance policy could afford uninsured motorist coverage to a wife when struck by her husband while operating her individually-owned vehicle given the language in the policy excluding from the definition of an "insured auto" "an auto being used without the owner's permission." Because the wife presented substantial evidence that the husband had gifted the automobile to her, that she alone used the automobile, and that on the occasion when she was injured she told her husband not to use that automobile, the Court concludes there are genuine issues of material fact precluding entry of summary judgment.

SECTION 20-2-93, ALA. CODE 1975 – CIVIL FORFEITURE

Wilson v. State of Alabama, [Ms. 2180453, Oct. 25, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Edwards, J.; and Moore and Hansen, JJ., concur; Thompson, P.J., and Donaldson, J., concur in the result) affirms a judgment of the Shelby Circuit Court requiring forfeiture of $19,410 cash found by the trial court to be commingled with lawful deposits in a bank account because some or all of the funds on deposit were generated from the unlawful importation and distribution of marijuana and other drugs. Despite finding no clear precedent from Alabama or elsewhere supporting under § 20-2-93, Ala. Code 1975, forfeiture of all the funds on deposit when those funds could not all be traced to unlawful transactions, the court affirms pursuant to Ala. R. App. P. 28(a)(10) upon determining the appellant failed to provide legal authority or arguments warranting reversal.

COMMERCIAL LEASE – MATERIAL BREACH

LNM1, LLC v. TP Properties, LLC, [Ms. 1170708, Nov. 1, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; Parker, C.J. and Wise, Mendheim, and Stewart, JJ., concur; Bolin, Shaw, and Sellers, JJ., concur in the result; Bryan, J., concurs specially) affirms the Hale Circuit Court's summary judgment in favor of the plaintiff lessor rescinding a commercial lease due to the tenant's failure to maintain required insurance coverage.

The Court applied settled law that a material breach of contract is one "'that touches the fundamental purposes of the contract and defeats the objects of the parties in making the contract. ...'" Ms. *16, quoting *Sokol v. Bruno's, Inc.*, 527 So. 2d 1245, 1248 (Ala. 1988). The tenant argued that its breaches were not material because no claims were made against the lessor during the time the tenant failed to maintain the required liability insurance.

Citing *D & D Realty Trust v. Borgerson*, 2015 Mass. App. Div. 115 (Mass. Dist. Ct. 2015)(not reported in North Eastern Reporter), the Court rejected this argument, holding that "a tenant's failure to procure required insurance coverage protecting the landlord is tantamount to playing 'financial Russian roulette,' and the fact that no claims were incurred during the period when insurance coverage was lacking 'does not minimize the seriousness of [the tenant's] failure to insure.'" Ms. *21. The Court noted that the lessor's "expert indicated that he was unaware of any insurance that could be obtained to cover retroactively the gaps in coverage created by [the tenant's] failure to maintain the required coverages." Ms. *22.

ALA. CODE § 6-3-7(A) – VENUE

Ex parte Allstate Insurance Co., [Ms. 1180624, Nov. 8, 2019] __ So. 3d __ (Ala. 2019). The Court (Stewart, J.; and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur; Parker, C.J., dissents) grants a petition for a writ of mandamus and directs the Perry Circuit Court to vacate an order denying Allstate Insurance Company's motion to transfer venue of a breach of contract and bad faith action brought against it claiming Allstate allegedly refused to defend or indemnify its insured in an underlying wrongful-death action. Reviewing the propriety of venue in Perry County under § 6-3-7(a)(1), Ala. Code 1975, the Court determined that "the events or omissions giving rise to the claim" as used in that statute refer to "the wrongful acts or omissions of the corporate defendant," such that venue is proper where the wrongful acts or omissions occur rather than where injuries or damages resulting from those wrongful acts or omissions occur. Ms. **7-8. Because Allstate demonstrated that venue was improper in Perry County, but was proper in Shelby County pursuant to § 6-3-7(a)(1) and (2), or Bibb County under § 6-3-7(a)(3), it was entitled to mandamus relief by way of an order directing the Perry Circuit Court to vacate its order denying the motion for a change of venue.

WORKERS' COMPENSATION ACT, § 25-5-1 ET SEQ., ALA. CODE 1975 – EXCLUSIVITY PROVISIONS

Ex parte Ultratec Special Effects, Inc., [Ms. 1180180, 1180183, Nov. 8, 2019] __ So. 3d __ (Ala. 2019). In this plurality opinion, the Court (Bolin, J.; and Parker, C.J., concur; Mendheim and Stewart, JJ., concur in the result; Shaw, Bryan, and Sellers, JJ., dissent; and Wise and Mitchell, JJ., recuse themselves) considers two petitions for a writ of mandamus asking the Court to direct the Madison Circuit Court to vacate an order denying motions for summary judgment in a wrongful death case upon the claim that the petitioner was immune to suit because of the exclusivity provisions of the Workers' Compensation Act, § 25-5-1 *et seq.*, Ala. Code 1975. The Court initially denied the petitions without an opinion. However, upon application for rehearing, the Court entered an order in each case granting the application to consider whether petitioner was entitled to immunity under the Act. Upon consolidation of the petitions for the purpose of issuing one opinion, the Court rejects the petitioner's contentions that (1) it is immune as a "single employer group" within the meaning of § 25-5-1(4), Ala. Code 1975 (Ms. **9-17); (2) that petitioner is an "employer" as defined in § 25-5-1(4) (Ms. **17-18); (3) petitioner was entitled to immunity as a "joint employer" (Ms. **19-21); (4) that it was immune from suit based on the exclusivity provisions of the Act because it operated as a "division" of the decedent's employer (Ms. **21-26); and (5) that public policy favored application of the Act's immunity provisions to parent corporations for workplace injuries or deaths of employees of a parent corporation's subsidiary (Ms. **26-27). Rejecting each of these arguments, the petitions were due to be denied.

APPELLATE REVIEW – WAIVER

Devine v. The Bank of New York Mellon Corp., [Ms. 1171002, Nov. 22, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; and Parker, C.J., and Shaw, J., concur; Bryan and Mendheim, JJ., concur in the result) issues a plurality opinion affirming a summary judgment entered by the Baldwin Circuit Court in an illegal-foreclosure/quiet-title action because the appellant's brief failed to address all of the three grounds upon which the summary judgment order was entered. The Court reiterates that "[w]hen a trial court has stated that a judgment is warranted on multiple grounds, it is incumbent upon a party that subsequently appeals that judgment to address all of those grounds in the opening appellate brief because any issue not argued at that time is waived." Ms. *8 (citing *Crews v. National Boat Owners Ass'n Marine Ins. Agency, Inc.*, 46 So. 3d 933, 942 (Ala. 2010) (underlined emphasis in original)). When the appellant fails to address all such grounds, affirmance is required because an appellate court will not presume error on the part of the trial court. Ms. *9.

ALA. R. CIV. P. 60(B)(4) – MOTION TO SET ASIDE DEFAULT JUDGMENT

Ali v. Williamson, [Ms. 1170896, Nov. 22, 2019] __ So. 3d __ (Ala. 2019). The Court (Stewart, J.; and Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur) reverses the Jefferson Court's order denying an Ala. R. Civ. P. 60(b)(4) motion to set aside a default judgment as void for want of personal jurisdiction when the record reflected a failure to effect proper service under Ala. R. Civ. P. 4 as required to establish personal jurisdiction over a named defendant. To the extent plaintiff purported to serve the defendant by publication, the record also revealed deficiencies in compliance with the requirements of Rule 4.3(c), including a want of any meaningful assertion of the avoidance of service and a failure of proof of publication in a newspaper as required by Rule 4.3(d). Because of these deficiencies in the proof of service, the trial court never acquired personal jurisdiction over the defendant and its subsequent default judgment entered against the defendant was void. Accordingly, the Jefferson Circuit Court erred in denying the defendant's Rule 60(b)(4) motion to set aside the default judgment against him.

ALA. R. CIV. P. 4(C)(6) – SERVICE OF PROCESS UPON CORPORATIONS

Woodruff Brokerage Co., Inc. v. Beatty, [Ms. 1180349, Nov. 22, 2019] __ So. 3d __ (Ala. 2019). The Court (Wise, J.; Bolin and Stewart, JJ., concur; Parker, C.J., and Sellers, J., concur in the result) reverses an order of the Chambers Circuit Court denying a motion to set aside a default judgment upon concluding, pursuant to *Ex parte LERETA, LLC*, 226 So. 3d 140 (Ala. 2016), that plaintiff did not properly serve a corporate defendant as required by Ala. R. Civ. P. 4(c)(6) when the certified mail receipt used to prove service was addressed solely to the corporate defendant and not to a human being or natural person signing for the service as an officer, partner, managing or general agent, or agent authorized by appointment or by law to receive service of the process on behalf of the corporation. Because the plaintiff's service by certified mail was ineffective, the trial court did not obtain personal jurisdiction over the corporation and the default judgment entered against it was void. The trial court therefore erred when it denied the corporation's motion to set aside the default judgment.

MANDAMUS – DISCOVERY – ATTORNEY-CLIENT PRIVILEGE – WORK-PRODUCT DOCTRINE

Ex parte Dow Corning Alabama, Inc., [Ms. 1171118, Nov. 27, 2019] __ So. 3d __ (Ala. 2019). In this plurality opinion (Sellers, J.; and Parker, C.J., Bolin and Stewart, JJ., concur; Shaw and Bryan, JJ., concur in the result; Wise, Mendheim, and Mitchell, JJ., recused themselves), the Court grants a petition for a writ of mandamus directing the Houston Circuit Court to vacate its order in a declaratory judgment action requiring disclosures by petitioners of information protected by the attorney-client privilege and the work-product doctrine and to grant petitioner's motion for a protective order as to those documents. The plurality holds that in a declaratory judgment action challenging an indemnitor's decision not to provide indemnity in an underlying industrial accident personal injury case, the indemnitees – who incurred defense costs and paid money to settle the underlying personal injury claim – while obliged to prove that the settlement was a "good faith reasonable settlement," are nevertheless not entitled to discover evidence of reports, evaluations, or recommendations from defense counsel to the indemnitors regarding any analyses or recommendations of liability, injury, or damages in the underlying case. The plurality rejects the contention that by seeking indemnity and putting the reasonableness and good faith of the settlement in issue, the indemnitors did not waive the attorney-client privilege or the protections reported by the work-product doctrine. Instead, citing cases from other jurisdictions, the Court concludes the reasonableness and good faith of the settlement in the context of an indemnity claim is to be judged using an objective standard which can be proven with non-privileged documents and testimony.

PUBLIC SERVICE COMMISSION – § 37-1-31, ALA. CODE 1975 – EXCLUSIVE ADJUDICATORY JURISDICTION

City of Wetumpka v. Alabama Power Co., [Ms. 1170992, Nov. 27, 2019] __ So. 3d __ (Ala. 2019). The Court (Parker, C.J.; and Bolin, Shaw, Wise, and Mendheim, JJ., concur; Sellers, J., concurs in the result; Stewart and Mitchell, JJ., recused themselves) affirms the Elmore Circuit Court's dismissal of the City of Wetumpka's complaint for a declaratory judgment challenging Alabama Power Company's refusal to relocate overhead electrical facilities located within the city's downtown area at the power company's expense upon concluding that the controversy was within the exclusive adjudicatory jurisdiction of the Alabama Public Service Commission pursuant to §§ 37-1-31 and 37-1-83, Ala. Code 1975. Because the PSC has exclusive jurisdiction over a municipality's challenge to rules, regulations, or practices relating to the service or facilities of a utility such as Alabama Power Company, the Circuit Court of Elmore County was without jurisdiction to entertain a declaratory judgment action which sought to enforce a municipal ordinance that would in effect make

Alabama Power Company pay the costs of relocating the overhead electrical facilities when the PSC had previously amended Alabama Power's rules and regulations for electric services to prohibit Alabama Power from bearing such utility-relocation costs. Because the circuit court lacked subject-matter jurisdiction, its dismissal of the city's action against Alabama Power Company was due to be affirmed.

ALABAMA MEMORIAL PRESERVATION ACT, § 41-9-231 ET SEQ., ALA. CODE 1975

State of Alabama v. City of Birmingham, [Ms. 1180342, Nov. 27, 2019] __ So. 3d __ (Ala. 2019). The Court (Bryan, J.; and Parker, C.J., Shaw, Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur; Bolin, J., concurring specially) reverses a summary judgment entered by the Jefferson Circuit Court in favor of the City of Birmingham and its mayor, which held § 41-9-232, Ala. Code 1975 (the Alabama Memorial Preservation Act), unconstitutional because it violated the City's purported rights under the First and Fourteenth Amendments to the United States Constitution and was thus void in its entirety. The Court instead finds the City defendants' actions in erecting a plywood barrier around an 1894 Confederate Veterans Memorial statue in Birmingham's Linn Park violated § 41-9-232(a), a part of the Act, which provides "no ... monument which is located on public property and has been so situated for 40 or more years may be relocated, removed, altered, renamed, or otherwise disturbed." Because the erection of the plywood barrier altered and/or disturbed the monument, the City defendants violated the statute and were obliged to pay a single $25,000 fine as required by the Act's penalty provision, § 41-9-235(a)(2)d.

INVERSE CONDEMNATION – § 235, ALA. CONSTITUTION

City of Daphne v. Fannon, [Ms. 1180109, Dec. 6, 2019] __ So. 3d __ (Ala. 2019). The Court (Wise, J.; Bolin, Shaw, Mendheim and Stewart, JJ., concur; Bryan and Sellers, JJ., concur in the result; Parker, C.J., dissents; and Mitchell, J., recuses) reverses the Baldwin Circuit Court's judgment in favor of David and Sarah Fannon on an inverse condemnation claim predicated on Daphne's installation of an 18-inch drain pipe in the right-of-way adjacent to the Fannons' property. The pipe had been installed nine years prior to a substantial rain event in 2014 which caused trees to fall on the Fannons' home.

In reversing, the Court applied settled law that § 235 of the Alabama Constitution "was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged ...." Ms. *15, quoting *Hamilton v. Alabama Power Co.*, 195 Ala. 438, 449, 70 So. 737, 741 (1915) (emphasis in *Fannon*). The Court held the Fannons failed to present any evidence establishing that "it was ascertainable, or foreseeable, during the construction of the drainage project nine years earlier, that erosion would occur and cause trees from the City's right-of-way to fall onto and damage the Fannons' house." Ms. *21.

FAILURE TO ASSERT COMPULSORY COUNTERCLAIM

Ex parte Hayslip, [Ms. 1180604, Dec. 6, 2019] __ So. 3d __ (Ala. 2019). The Court (Mendheim, J.; Parker, C.J., and Bolin, Shaw, Sellers, Stewart, and Mitchell, JJ., concur; Wise, J., dissents) issues a writ of mandamus directing the Tuscaloosa Circuit Court to dismiss New Pate, LLC's 2018 action alleging a fraudulent transfer claim.

The Court first noted that "a petition for writ of mandamus is the appropriate vehicle for seeking review by this court of a denial of a motion to dismiss a counterclaim," Ms. *14, and that

> "'Under the logical-relationship standard, a counterclaim is compulsory if '(1) its trial in the original action would avoid a substantial duplication of effort or (2) the original claim and the counterclaim arose out of the same aggregate core of operative facts.' *Ex parte Canal Ins. Co.*, 534 So. 2d 582, 584 (Ala. 1988) (quoting *Brooks v. Peoples Nat'l Bank of Huntsville*, 414 So. 2d 917, 919 (Ala. 1982)). In determining whether the claims 'arose out of the same aggregate core of operative facts,' this Court must determine whether '(1) the facts taken as a whole serve as the basis for both claims or (2) the sum total of facts upon which the original claim rests creates legal rights in a party which would otherwise remain dormant.' *Canal Ins.*, 534 So. 2d at 584. Ms. **16-17, quoting *Ex parte Cincinnati Insurance Companies*, 806 So. 2d 376, 379-80 (Ala. 2001).

The Court held that New Pate's fraudulent transfer claim asserted in the 2018 action was barred because it should have been asserted as a compulsory counterclaim in a prior action. The Court explained:

> "The parties are the same in both actions. ... The facts serving as the basis of Pate and New Pate's fraudulent-transfer claim in the present case have a logical relationship with the facts that served as the basis of Hayslip's interpleader claim filed in Case No. CV-2014-901204; 'the facts taken as a whole serve as a basis for both claims.' *Ex parte Cincinnati Insurance*, 806 So. 2d at 380."

Ms. **21-22.

STATE-AGENT IMMUNITY – MUNICIPAL PUBLIC WORKS DIRECTOR – ROAD MAINTENANCE

Ex parte Tim Tucker, [Ms. 1180773, Dec. 6, 2019] __ So. 3d __ (Ala. 2019). The Court (Mendheim, J.; Parker, C.J., and Bolin, Stewart, Wise, Bryan, Sellers, JJ., concur; Mitchell, J., concurs in the result) issues a writ of mandamus directing the Baldwin Circuit Court to dismiss an action against Tim Tucker, the Public Works Director of the City of Orange Beach. Plaintiff fell while walking along the edge of a road which she alleged Tucker negligently failed to maintain.

The plaintiff contended that Tucker acted beyond his authority as Public Works Director by violating specific regulations set out in § 410.05(b) of the ALDOT specifications addressing edge requirements for paving of roads. Ms. *13. However, the specifications "... address standards for paving a roadway; they in no way address ongoing maintenance of roads and streets within the City ...." Ms. *19. The Court concluded "[i]t is undisputed that Tucker exercises judgment in determining how and

where to use the limited resources available to the City to repair and maintain its roads and streets. 'These decisions are the very sort protected by State-agent immunity as described in *Cranman*.'" Ms. *22, quoting *Ex parte Estate of Reynolds*, 946 So. 2d 450, 456-57 (Ala. 2006).

WORKER'S COMPENSATION EXCLUSIVITY – MANDAMUS PROCEDURE

Ex parte Burkes Mechanical, Inc., [Ms. 1180402, Dec. 6, 2019] __ So. 3d __ (Ala. 2019). A plurality of the Court (Stewart, J.; Parker, C.J., and Bolin and Wise, JJ., concur; Shaw, Bryan, Sellers, JJ., concur in the result; Mendheim and Mitchell, JJ., concur in part and dissent in part) denies Burkes Mechanical Inc.'s petition for a writ of mandamus directing the Wilcox Circuit Court to dismiss claims of negligence, wantonness, and the tort of outrage asserted against Burkes by Alexsie McCoy, an employee of Burkes. Burkes contended that the claims against it were barred by the exclusive-remedy provisions of §§ 25-5-52 and 25-5-53 of the Alabama Worker's Compensation Act. Ms. *3.

A petition for a writ of mandamus is the appropriate vehicle to review a trial court's denial of a motion to dismiss predicated on the exclusive-remedy provisions of the Worker's Compensation Act. Ms. *4. The plurality opinion distinguished cases relied upon by Burkes in support of its petition for writ of mandamus because those "cases involved claims related to a single injury that occurred while the employees were performing their jobs. In this case, McCoy has asserted claims based on additional injuries that he alleges arose from conduct that occurred following his workplace injury." Ms. *12.

Burkes's request to dismiss the outrage claim based on the exclusive-remedy provisions first made in its reply brief in support of mandamus came too late because "[a]rguments not made as a basis for mandamus relief are waived." Ms. *15, quoting *Ex parte Simpson*, 36 So. 3d 15, 25 (Ala. 2009).

VENUE

Ex parte Liberty National Life Ins. Co., [Ms. 1180693, Dec. 6, 2019] __ So. 3d __ (Ala. 2019). The Court (Stewart, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Mendheim, JJ., concur; Mitchell, JJ., recuses) issues a writ of mandamus to the Montgomery Circuit Court to vacate its order denying defendants' motion to transfer venue in a fraud action to Elmore County.

Because the plaintiffs resided in Elmore County and "[a]ll of the evidence indicates that the alleged wrongful events and omissions occurred in Elmore County; ... venue is not proper [as to Liberty National] in Montgomery County under § 6-3-7(a)(1)." Ms. *12. As to the individual defendant Rich, "pursuant to § 6-3-2(a)(2) and (3), venue would be proper in either Butler County, where Rich resides, or Elmore County, where 'the act or omission' occurred, but not in Montgomery County." Ms. *13.

STATE-AGENT IMMUNITY

Ex parte Sonia Blunt, [Ms. 1180372, Dec. 6, 2019] __ So. 3d __ (Ala. 2019). In a per curiam opinion (Parker, C.J.; and Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur; Mendheim, J., concurs specially), the Court issues a writ of mandamus to the Tuscaloosa Circuit Court directing the court to enter summary judgment, on grounds of state-agent immunity, in favor of Sonia Blunt, a teacher at Northridge High School in the Tuscaloosa City School System (TCS).

A short time after leaving Ms. Blunt's summer school class, student Marcus Crawford "crossed a double yellow line to pass another vehicle, and collided with a vehicle driven by Susan Kines Langston, a TCS teacher, in which Matthew Langston and Joshua Langston were passengers. Susan Langston was killed in the accident and Matthew and Joshua were seriously injured ...." Ms. *5.

Langston contended that Blunt acted beyond her authority in allowing Crawford to leave the Northridge campus without checking out according to the procedure set out in a resource guide requiring that "[s]tudents who leave school for any reason must check out through the principal's office." Ms. *18. Blunt presented undisputed evidence from a number of witnesses that the checkout policy applied only during the academic year, not during the summer session. Ms. *19. Based on this evidence, the Court concluded that "Langston failed to demonstrate the existence of a detailed rule binding upon Blunt that would establish that she acted beyond her authority in supervising students when she allowed Crawford to leave Northridge at the time and in the manner he did on June 28, 2010. Therefore, Blunt was entitled to State-agent immunity from Langston's claims of negligence and wantonness pertaining to her alleged violation of a TCS policy or procedure." Ms. *35.

APPELLATE JURISDICTION

Whitworth v. Crestwood Development Corporation, LLC, [Ms. 2180794, Dec. 6, 2019] __ So. 3d __ (Ala. Civ. App. 2019). A unanimous court (Moore, J.; Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur) dismisses Timothy Whitworth's appeal from the Jefferson Probate Court's order granting Whitworth's application for redemption of real property from a tax sale. Although Whitworth was successful in his action to redeem the property, he sought to appeal the probate court's order directing that he pay the redemption funds to the tax purchaser Crestwood, rather than to the Jefferson County Tax Collector. The court held because "'there is nothing in the record prejudicial to [Whitworth], and the judgment is in his favor to the full extent claimed, there is nothing on which to predicate an appeal.'" Ms. *6, quoting *Ex parte Jefferson Cty. Sheriff's Dep't*, 13 So. 3d 993, 996 (Ala. Civ. App. 2009). The court explained:

> "Appeals are 'not allowed for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct errors injuriously affecting the appellant.' *Alcazar Shrine Temple v. Montgomery Cty. Sheriff's Dep't*, 868 So. 2d 1095 (Ala. 2003), quoting 4 Am. Jur. 2d Appeal and Error § 182 (1962)).

Ms. *5.

STATUTE OF LIMITATIONS – SERVICE OF PROCESS

Brooks v. Austal USA, LLC, [Ms. 2180354, Dec. 6, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Hanson, J.; Thompson, P.J., and Moore and Donaldson,

JJ. concur; Edwards, J., concurs in the result) reverses a judgment of the Mobile Circuit Court determining that Brooks's worker's compensation claim was barred by the statute of limitations.

While it was undisputed that Brooks filed his complaint approximately one week before the statute of limitations expired, the initial attempt at service of process on Austal was returned unfound on March 1, 2018. Brooks then served an alias summons and complaint on Austal on October 12, 2018. The court noted

> "The filing of a complaint commences an action for purposes of the Alabama Rules of Civil Procedure but does not 'commence' an action for purposes of satisfying the statute of limitations. *Pettibone Crane Co. v. Foster*, 485 So. 2d 712 (Ala. 1986). See also *Dunnam v. Ovbiagele*, 814 So. 2d 232 (Ala. 2001); *Maxwell v. Spring Hill Coll.*, 628 So. 2d 335, 336 (Ala. 1993) ("'This Court has held that the filing of a complaint, standing alone, does not commence an action for statute of limitations purposes.'" (quoting *Latham v. Phillips*, 590 So. 2d 217, 218 (Ala. 1991))). For statute-of-limitations purposes, the complaint must be filed and there must also exist 'a bona fide intent to have it immediately served.' *Dunnam*, 814 So. 2d at 237-38."

Ms. *8, quoting *Precise v. Edwards*, 60 So. 3d 228, 230-31 (Ala. 2010) (underlined emphasis added in *Brooks*).

The court concluded that "considering all the evidence in a light most favorable to Brooks, there is nothing to indicate that Brooks's instruction for the clerk to issue service of process by certified mail to Austal's former registered agent, made contemporaneous with the filing of his complaint, was anything other than a bona fide attempt at immediate service; indeed, the facts before us indicate that the attempt to serve Austal through LIS was inadvertent, a product of Austal's having recently changed its registered agent. As indicated in *Thompson* [*v. E. A. Industries, Inc.*, 540 So. 2d 1362 (Ala. 1989)], a plaintiff who files a complaint with the bona fide intent that it be immediately served on the defendant has 'commenced' an action for statute-of-limitations purposes, even if the initial attempt at service fails for want of the defendant's correct address. Furthermore, on the authority of *Thompson*, a significant further delay in seeking service at the correct address is of no consequence – at least with respect to the statute of limitations." Ms. **12-13.

SELF-PROVING WILL – ALA. CODE § 43-8-132 – TRIAL OF ISSUES BY IMPLIED CONSENT

Rothwell v. Molitor, et al., [Ms. 2180845, Dec. 13, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Moore, J.; Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur) reverses a judgment of the Madison Circuit Court sustaining the validity of the Last Will and Testament of Lilly Molitor.

Section 43-8-132, Ala. Code 1975, providing the method for making a will self-proving, "is an innovation on the common law, [and] it should be strictly construed." Ms. *9, quoting *Morrow v. Helms*, 873 So. 2d 1132, 1138 (Ala. Civ. App. 2001) (Murdock, J., concurring in the result). Lilly's will was not self-proving under § 43-8-132 because "the notary did not, in fact, acknowledge the signature of the testator as required by § 43-8-132." Ms. *9. Further, because the proponents of the will did not offer testimony from either of the two witnesses to the will, the proper execution of the will was not proved through the methods set out in § 43-8-167. Ms. **10-11.

Although the petition did not contest Lilly's proper execution of the will, that issue was tried by implied consent pursuant to Rule 15, Ala. R. Civ. P., as a result of the proponents' failure to object to evidence concerning the error in the notary acknowledgment. Ms. *6.

EX PARTE VISITATION ORDER – MANDAMUS – RULE 65(B), ALA. R. CIV. P. CERTIFICATION

Ex parte John Lester, [Ms. 2190140, Dec. 13, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Edwards, J.; Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur) issues a writ of mandamus to the Lee Circuit Court directing it to set aside its ex parte order terminating the father's visitation. Although the father's mandamus petition was untimely, the court considered it because the petition challenged the jurisdiction of the trial court to enter the ex parte order. The court explained, "[t]he principle allowing us to consider untimely petitions for the writ of mandamus 'applies in cases in which a party argues that an order is void for want of due process.'" Ms. *7, quoting *Ex parte Murray*, 267 So. 3d 328, 332 (Ala. Civ. App. 2018).

The circuit court's ex parte temporary emergency order terminating the father's visitation was not supported by a certification pursuant to Rule 65(b), Ala. R. Civ. P. That rule provides:

> "A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required."

Ms. *8. "[T]he failure to provide a Rule 65(b) certification requires that an ex parte order be set aside." *Ibid.*

The court declined to issue a writ of mandamus directing the circuit court to set aside its protection-from-abuse [PFA] order. The father argued that the PFA order should be set aside because the mother had not filed a protection-from-abuse complaint. Rejecting this argument, the court held that "[t]he circuit court is a court of general jurisdiction with jurisdiction over the parties' dispute, which arose out of their divorce judgment, as amended by the 2018 judgment. A party need not institute a separate action to secure a PFA order ...." Ms. *12.

TAX DEED – EJECTMENT – DEMAND FOR POSSESSION – MESNE PROFITS

Prescott v. Milne; Milne v. Prescott, [Ms. 2180270; 2180305, Dec. 13, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court

(Donaldson, J.; Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur) affirms in part and reverses in part a judgment of the Mobile Circuit Court entered in an ejectment action. The court affirmed the circuit court's judgment that the holder of a tax deed is not required to demand possession before instituting an ejectment action. The court explained:

> Unlike the holder of a tax-sale certificate, the holder of a tax deed is vested with "all the right, title, interest and estate of the person whose duty it was to pay the taxes on [the] real estate [sold at the tax sale]," § 40-10-29, Ala. Code 1975, and his or her right to maintain an action in ejectment or in the nature of ejectment derives from his or her title to the property rather than the rights granted the holder of a certificate of sale in § 40-10-73. Section 6-6-280 does not require that the plaintiff in an action in ejectment or in the nature of ejectment demand possession before commencing his or her action.

Ms. *17.

The court reversed the judgment of the circuit court insofar as it determined that the plaintiff was not entitled to recover mesne profits during the period the defendant had occupied the house after the plaintiff obtained the tax deed. Ms. *14.

NON-SOLICITATION AGREEMENT – PROFESSIONAL – PRELIMINARY INJUNCTION BOND

DeVos and Simmons v. The Cunningham Group, LLC, et al., [Ms. 1180088, 1180434, Dec. 20, 2019] __ So. 3d __ (Ala. 2019). The Court (Stewart, J.; Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur; Parker, C.J., concurs in the result) reverses a preliminary injunction entered by the Jefferson Circuit Court in an action against Drs. DeVos and Simmons enforcing non-solicitation agreements signed by the physicians with their former employer medical practice.

In granting the preliminary injunction, the circuit court declined to rule on the physicians' defense that their status as professionals rendered the non-solicitation agreements void. The Court reversed the preliminary injunction because the circuit court could not conclude that the plaintiff had at least a reasonable chance of success on the merits "without determining whether the restrictive provisions are void ...." Ms. *16.

In addressing the physicians' challenge to the bond set by the circuit court, the Court explained:

> The purpose of an injunction bond is to protect an enjoined party from harm resulting from the issuance of a wrongful injunction. *Ex parte Waterjet Sys., Inc.*, 758 So. 2d 505, 512 (Ala. 1999)("[A] party is wrongfully enjoined 'when it turns out the party enjoined had the right all along to do what it was enjoined from doing.'" (quoting *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994))). The amount of the damages recoverable on the bond, however, is limited to the amount of the injunction bond. 758 So. 2d at 513.

Ms. *18.

The Court concluded that the $25,000 bond "is simply inadequate to compensate two physicians for damages and attorneys' fees in the event it is determined that they were wrongfully enjoined from soliciting and continuing to serve Brookwood [Hospital] through their new pathology business." Ms. *24.

MANDAMUS – DISCOVERY – EMPLOYMENT RECORDS OF NON-PARTY WITNESSES

Ex parte Baggett and Hogeland; Ex parte Hogeland, Miller, and Trott, [Ms. 1171028, 1180360, Dec. 20, 2019] __ So. 3d __ (Ala. 2019). In Case Number 1171028, the Court (Mitchell, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Stewart, JJ., concur) unanimously denies a petition for writ of mandamus filed by Baggett and Hogeland, non-party witnesses, seeking to vacate a circuit court's order compelling them to provide ESI in response to a non-party subpoena. In declining to issue the writ, the Court noted that the July 20, 2018, order challenged by Baggett and Hogeland was not the first order compelling them to produce the ESI. An earlier order entered on May 14, 2018 had required Baggett and Hogeland to produce the same information. The Court explained "vacating the July 20, 2018, order would have no effect on Baggett's or Hogeland's obligations. We decline to issue a writ of mandamus under such circumstances." Ms. *7.

In Case No. 1180360, a plurality of the Court (Mitchell, J.; Shaw, Wise, and Stewart, JJ., concur; Parker, C.J., and Bolin, Bryan, Sellers, and Mendheim, JJ., concur in the result) granted the witnesses' mandamus petition vacating the circuit court's order allowing Daphne Utilities Board to issue subpoenas to their employers. The plurality opinion concludes

> The subpoenas at issue here are neither proportional to the needs of this case nor reasonably calculated to lead to the discovery of admissible evidence. Daphne Utilities states its interest in the employment records as follows: "[The employment records] will aid in evidencing whether [the witnesses], all intimately involved in the violations alleged against Daphne Utilities, were working for Daphne Utilities, which is not only relevant to ADEM's claims against Daphne Utilities, but [the witnesses'] biases against Daphne Utilities." Although Daphne Utilities has provided the Court with a reasonably detailed list of what it anticipates the employment records will reveal, that list does not explain how any portion of the employment records may reveal the whistleblowers' bias.

Ms. **13-14.

SPECIFIC PERSONAL JURISDICTION

Ex parte Aladdin Mfg. Corp., et al., [Ms. 1170864, 1170894, 1171182, 1171196, 1171198, Dec. 20, 2019] __ So. 3d __ (Ala. 2019). A plurality opinion by Justice Stewart (Stewart, J.; Parker, C.J., and Wise, J., concur; Bryan, J., concurs in the result; Bolin, Sellers, and Mendheim, JJ., dissent; Shaw and Mitchell, JJ., recuse themselves), denies petitions for writs of mandamus challenging personal jurisdiction filed by out-of-state companies alleged to have deposited toxic wastewater into streams which subsequently contaminated Centre Water's and Gadsden Water's downstream water sources in Alabama. The opinion concludes that where out-of-state conduct causes injury in Alabama,

the tort is committed in Alabama, where the injury occurs. Ms. *49. In regard to the foreseeability analysis, Justice Stewart "reiterate[s] that foreseeability alone is insufficient to confer specific personal jurisdiction. In this situation, however, Centre Water's and Gadsden Water's allegations, which we are required to take as true, demonstrate that the remaining defendants continue to discharge PFC-containing chemicals in their industrial wastewater, despite allegedly knowing that the chemicals would enter the Coosa River." Ms. *53.

CONSTRUCTION OF DIVORCE SETTLEMENT AGREEMENT – ALIMONY IN GROSS – SERVICEMEMBERS' CIVIL RELIEF ACT

Wikle v. Boyd, [Ms. 2180283, Dec. 20, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Edwards, J.; Moore, Donaldson, and Hanson, JJ., concur; Thompson, P.J., dissents) reverses a judgment of the Dale Circuit Court holding that the wife's remarriage did not terminate the husband's obligation to pay alimony.

The court held that although the duration of the payment to the wife (seven years) was certain, the amount would fluctuate with the wife's monthly expenses. Ms. *19. Consequently, "[t]he trial court erred in determining the monetary obligations imposed by paragraph (2)(B) are alimony in gross and that the monetary obligations are not modifiable or terminable." Ms. **20-21.

The court also reversed the circuit court's judgment that the former husband's effort to set aside the 2011 divorce settlement agreement on the ground of fraud was time-barred. The court held that 50 U.S.C. § 3936(a) (the Servicemembers' Civil Relief Act) tolled the limitations period for the husband to challenge the settlement agreement on the ground of fraud. The court declined to follow *Crouch v. United Technologies Corp.*, 533 So. 2d 220 (Ala. 1988), which had held that tolling under the predecessor statute (the Soldiers' and Sailors' Civil Relief Act) was discretionary based on whether defense or maintenance "of the suit is materially affected by his military service, whether he be career or not." Ms. *27. The court noted that subsequent to *Crouch*, the United States Supreme Court had held in *Conroy v. Aniskoff*, 507 U.S. 511 (1993) that the statute of limitations is tolled until the conclusion of military service "without the need for proof that the servicemember's military service impaired his or her ability to bring suit." Ms. *27. The court noted that where a holding of the Alabama Supreme Court conflicts with a holding on the same issue by the United States Supreme Court, the Court of Civil Appeals is bound to follow the opinion of the United States Supreme Court. Ms. *28.

COHABITATION OF PREVIOUSLY DIVORCED PARENTS – NOTICE OF CONTEMPT PROCEEDING – IMPOSSIBILITY

Rivera v. Sanchez, [Ms. 2180624, Dec. 20, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Edwards, J.; Thompson, P.J., and Donaldson and Hanson, JJ., concur; Moore, J., concurs in the result) affirms a judgment of the Morgan Circuit Court holding the father in contempt for failure to pay child support.

In affirming, the court rejected the father's contention that the parties' reconciliation and cohabitation for four years following their divorce nullified the father's child support and alimony obligations. Although the remarriage of previously divorced parents abrogates child-custody and child-support provisions in a prior divorce judgment, the parties here did not remarry, nor did either party contend that a common-law marriage resulted from their cohabitation. Ms. *9.

In regard to the finding of contempt, the court first held that because the father was present at the hearing and no writ for his arrest was issued, "any deficiency in the hearing notice amounted only to harmless error." Ms. *25, quoting *C.D.M. v. W.B.H.*, 140 So. 3d 961, 967 (Ala. Civ. App. 2013). While noting that the inability to pay child support or alimony is a defense to a contempt charge, the circuit court correctly rejected the father's inability defense because the finding of contempt related to the failure to pay child support between August 2016 and February 2017, a period before the father suffered heart attacks which prevented him from working. Ms. *27.

FORUM NON CONVENIENS – INTEREST OF JUSTICE

Ex parte Burgess, [Ms. 1180989, Jan. 10, 2020] __ So. 3d __ (Ala. 2020). The Court (Sellers, J.; Parker, C.J., and Bolin, Wise, Mendheim, and Stewart, JJ., concur; Shaw, Bryan, and Mitchell, JJ., concur in the result) issues a writ of mandamus directing the Jefferson Circuit Court to vacate its order transferring this motor vehicle accident case to the Shelby Circuit Court. The Court held that

> Shelby County's sole connection to this case is the fact that the accident occurred there. The defendants have not asserted any additional facts to indicate that the overall connection between Shelby County and this case is strong. The defendants do not suggest that law enforcement located in Shelby County investigated the accident or prepared the accident report; they do not assert that any of the parties received medical treatment for their injuries in Shelby County; they have not identified any eyewitnesses who are located in Shelby County; and they have not identified any documents located in Shelby County.

Ms. *9.

The Court also found it "troubling that the Jefferson Circuit Court granted the motion for a change of venue without affording Burgess a reasonable time in which to file a response. Although courts are encouraged to act promptly in ruling on motions, especially at the initial phase of any case, we cannot condone a hasty decision that fails to consider a response from the opposing party – effectively ignoring any argument in support of the opposition." Ms. *10.

AMLA – SIMILARLY SITUATED HEALTHCARE PROVIDER – JML

Youngblood v. Martin, [Ms. 1171037, Jan. 10, 2020] __ So. 3d __ (Ala. 2020). The Court (Stewart, J.; Parker, C.J., and Bolin and Wise, JJ., concur; Sellers, J., concurs in the result) reverses a judgment on a jury verdict entered in favor of the plaintiff in a wrongful death action arising under the Alabama Medical Liability Act (AMLA). To qualify as a similarly situated healthcare provider under the AMLA, an expert must

be "licensed by the appropriate regulatory board or agency of this or some other state." § 6-5-548(c)(1), Ala. Code 1975. At trial, the plaintiff's expert did not testify that he was licensed in Alabama or any other state.

While the plaintiff's expert, Dr. Doblar, was testifying, the defendant objected and argued that plaintiff had not laid the proper predicate required by § 6-5-548. Ms. *9. The Court held that this objection was sufficiently specific to preserve for appellate review the expert's lack of qualification under § 6-5-548(c)(1). The Court explained that the defense "was not required 'to direct his opponent's mind to the correct law the way one would thrust a beagle's nose on a rabbit trail.'" Ms. *9, quoting *Ex parte Works*, 640 So. 2d 1056, 1058 (Ala. 1994)(some internal quotations marks omitted).

The Court reversed the jury verdict in favor of the plaintiff and directed that judgment as a matter of law be entered in favor of defendant "based on the plain language of the statute, Dr. Doblar was not qualified to testify concerning the standard of care ...." Ms. *11.

MANDAMUS REVIEW OF ORDER GRANTING MOTION TO DISMISS – RIGHT TO TRIAL BY JURY – AMENDED COMPLAINT

Ex parte Lindsey, [Ms. 1171172, Jan. 10, 2020] __ So. 3d __ (Ala. 2020). The Court (Mitchell, J.; Parker, C.J., and Bolin, Shaw, Bryan, Mendheim and Stewart, JJ., concur; Sellers, J., concurs in the result) denies in part and grants in part a petition for writ of mandamus filed by the plaintiff seeking to vacate the Dallas Circuit Court's order dismissing certain of plaintiff's claims and striking her jury demand with respect to new issues raised in a second amended complaint.

"A writ of mandamus will not issue absent 'the lack of another adequate remedy.'" Ms. *6, quoting *Ex parte Utilities Board of Foley*, 265 So. 3d 1273, 1279 (Ala. 2018). "Because an adequate remedy is available on appeal, we have held that 'the denial of a motion to dismiss or a motion for summary judgment is not reviewable by a petition for writ of mandamus .... This principle applies with equal force to the granting of a motion to dismiss. The granting of a motion to dismiss is adequately remedied by a direct appeal or by an interlocutory appeal under Rule 54(b), Ala. R. Civ. P." Ms. *7.

In regard to the order striking the jury demand, the Court noted Alabama's strong public policy favoring trial by a jury. Ms. *8. "'An amended or supplemental pleading sets in motion the 30-day time period for demanding of a trial for new issues raised in that pleading.'" Ms. *8, quoting 1 Champ Lyons, Jr., *Alabama Rules of Civil Procedure* § 38.6 (3d ed. 1996) (some internal quotation marks omitted). The Court held that even though the plaintiff "waived her right to a jury trial on the original negligence theory underlying her legal-services-liability claim, she is entitled to a jury trial on her new, alternative theor[ies] ..." asserted in her second amended complaint. Ms. *11.

SERVICE BY PUBLICATION – DEFAULT JUDGMENT

Cochran v. Engelland, [Ms. 1180216, Jan. 10, 2020] __ So. 3d __ (Ala. 2020). A plurality of the Court (Mitchell, J.; Parker, C.J., and Wise and Stewart, JJ., concur; Bolin, Shaw, Bryan, Sellers and Mendheim, JJ., concur in the result) affirms the Calhoun Circuit Court's order setting aside a $2 million default judgment.

"Rule 4.3(d) requires a plaintiff seeking to effect service by publication to submit an affidavit to the trial court 'averring facts showing avoidance,' and Rule 4.3(c) reiterates that this affidavit 'must aver specific facts of avoidance' (emphasis added) and cautions that '[t]he mere fact of failure of service is not sufficient evidence of avoidance.'" Ms. *10. The affidavit upon which service by publication was made and upon which the default judgment was ultimately founded "contained only a conclusory statement that '[u]nder information and belief, [Pilar] avoided service.' That statement does not meet the requirements of Rule 4.3, and Alabama appellate courts have universally held similar statements to be an insufficient basis upon which to request service by publication." Ms. **10-11.

DISMISSAL WITH PREJUDICE FOR FAILURE TO PROSECUTE

Wilson, et al., v. Merriweather, et al., [Ms. 2180737, Jan. 10, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Thompson, P.J.; and Moore, Donaldson, Edwards, and Hanson, JJ., concur) unanimously reverses the Talladega Circuit Court's order dismissing with prejudice a quiet title action filed by various plaintiffs.

Over the course of several years, the plaintiffs amended their complaint a number of times adding additional defendants. The court noted that in dismissing the case with prejudice, the trial court "cited the plaintiffs' failure 'to serve all party defendants' as the reason for its dismissal." Ms. *11. Because the case action summary reflected that the plaintiffs had attempted to perfect service on the nineteen defendants who lived throughout the country, the failure to serve all party defendants did not justify the prejudicial dismissal. Ms. *11. The court explained that because of the plaintiffs' responding to numerous motions to dismiss and taking part in various hearings "a lack of activity could not have been a proper basis for the trial court's dismissal of the action. Accordingly, there had to be a clear record of delay, willful default, or contumacious conduct by the plaintiffs to warrant the dismissal." Ms. **10-11 (internal quotations marks omitted).

PROBATE OF LOST WILL

Taylor v. Hoehn, [Ms. 1180375, Jan. 17, 2020] __ So. 3d __ (Ala. 2020). The Court (Wise, J.; Parker, C.J., and Bolin, Sellers, and Stewart, JJ., concur) unanimously affirms the Baldwin Circuit Court's judgment on partial findings in a bench trial denying a petition to probate a lost will of John Hoehn. The Court applied settled law that

> The elements necessary to "prove" a "lost" or "destroyed" will are set forth in *Tyson v. Tyson*, 521 So. 2d 956 (1988):\
>
> 1. The existence of a will – an instrument in writing, signed by the testator or some person in his presence, and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator.
> 2. The loss or destruction of the instrument.

3. The nonrevocation of the instrument by the testator.

4. The contents of the will in substance and effect.

Ms. *13 (internal quotation marks omitted).

In affirming, the Court noted that "Moore, [the attorney who drafted the will] could not support Roman's [the decedent's daughter's] testimony because he did not recall the execution of the will and because he did not have an executed copy of the will in his office files. Finally, the circuit court found that Roman was not credible as to the issue of whether Hoehn signed the will. Therefore, the circuit court could have reasonably concluded that Hoehn did not establish that Hoehn ever properly executed the purportedly lost will." Ms. **26-27.

DUE PROCESS – VOID JUDGMENT

GEICO v. Evans, et al., [Ms. 1180699, Jan. 17, 2020] __ So. 3d __ (Ala. 2020). The Court (Bryan, J.; Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ., concur) holds that a default judgment entered against GEICO approximately 49 days before GEICO was added as a party was void. The plaintiff argued that GEICO had "'constructive notice' of potential litigation because it had actual notice of Grey's [GEICO's insured's] accident involving the plaintiffs ...." Ms. *6. The Court agreed with GEICO that such "'constructive notice of potential litigation' clearly falls short of even the most basic requirements of due process." Ms. **6-7. "[A] judgment entered in a manner inconsistent with due process is void." Ms. *7, citing *Neal v. Neal*, 856 So. 2d 766, 781 (Ala. 2002).

ALABAMA LEGAL SERVICES LIABILITY ACT ("ALSLA") – STATUTE OF LIMITATIONS

Ex parte Edwards and Edwards Law, LLC, [Ms. 1180255, Jan. 17, 2020] __ So. 3d __ (Ala. 2020). The Court (Stewart, J.; Parker, C.J., and Bolin, Wise, and Mitchell, JJ., concur; Shaw and Bryan, JJ., concur in the result; Sellers, J., dissents; and Mendheim, J., recuses) grants the defendant's petition for writ of mandamus and directs the Jefferson Circuit Court to enter summary judgment dismissing an action filed by Ivan Gray against Edwards, Gray's former attorney, alleging conversion of a retainer. The Court first concluded that the case came within an exception allowing mandamus review of an order denying a motion for summary judgment where the bar of the statute of limitations appears on the face of the complaint. Ms. *5.

The Court rejected Gray's arguments that his claims were for conversion and breach of contract, governed by a six-year statute of limitations. The Court explained: "[i]t is well settled, however, that a legal-service-liability action under the ALSLA is the sole 'form and cause of action against legal service providers in courts in the state of Alabama.'" Ms. *7, quoting § 6-5-573, Ala. Code 1975. The Court held that "Gray's claims against Edwards arose out of the attorney-client relationship between Gray and Sonya; therefore, his claims fall under the ALSLA and its provisions." Ms. *9.

WORKERS' COMPENSATION

Ex parte Kohler Company, Inc., [Ms. 2190081, Jan. 17, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court unanimously (Moore, J.; Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur) denies the employer's petition for a writ of mandamus which sought a writ directing the Madison Circuit Court to vacate its order requiring the employer to refer the employee to an orthopedic specialist for a second opinion regarding her alleged work-related left-foot injury.

Acknowledging the continued viability of the rule of *Ex parte Brookwood Medical Center, Inc.*, 895 So. 2d 1000 (Ala. Civ. App. 2004), that when an employee exercises her right to select a second treating physician from a panel of four provided by the employer, the employer has no further obligation to provide a referral to another physician, Ms. *5, the court noted that the trial court "determined that the employer had prematurely provided the panel of four to the employee in September 2018." Ms. *10.

The court found from the materials presented in the employee's answer "that the request for a panel of four was necessitated by the failure of the employer to refer the employee to an orthopedic specialist as recommended by Dr. Rea (the initial workers' compensation physician) and as required by law." Ms. *12. The court held that "the employer had an affirmative duty to follow the treatment plan recommended by Dr. Rea and that its failure to do so led the employee to request a panel of four unnecessarily. Consequently, the employer is estopped from asserting that the employee exhausted her right to dissent to the care provided by her authorized treating physicians and to seek alternative treatment from a third physician at the expense of the employer." Ms. *13.

The court noted that "'[i]t is well settled that the averments of fact in the answer to the alternative writ and mandamus proceedings, when not controverted, are to be taken as true.'" Ms. *11, quoting *Tingle v. J.D. Pittman Tractor Co.*, 267 Ala. 29, 31, 99 So. 2d 435, 437 (1957).

MANDAMUS – DEPOSITIONS OF EXECUTIVE OFFICERS – APEX RULE

Ex parte Willimon, [Ms. 1180439, Jan. 24, 2020] __ So. 3d __ (Ala. 2020). A plurality of the Court (Parker, C.J.; Shaw, Mendheim, and Stewart, JJ., concur; Mitchell, J., concurs specially; Bolin and Bryan, JJ., concur in the result; Wise and Sellers, JJ., dissent) denies a petition for writ of mandamus sought by the former and current Bishops of the North Alabama Annual Conference, United Methodist Church, Inc. directing the Talladega Circuit Court to grant protective orders or alternatively quash their depositions in an action against a former youth pastor alleging sexual abuse. The petitioners invoked the so-called "Apex Rule" articulated by a federal district court in Florida as follows:

> "Courts routinely recognize that it may be appropriate to limit or preclude depositions of high-ranking officials, often referred to as 'apex' depositions, because 'high[-]level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the court.' Thus, parties seeking apex depositions bear the burden of demonstrating an executive has 'unique knowledge

> of the issues in the case' or the information sought has been pursued unsatisfactorily through less intrusive means."

Ms. *6, quoting *Goines v. Lee Mem'l Health Sys.*, No. 2:17-CV-656, August 13, 2018 (M.D. Fla. 2018) (not reported in F. Supp.). While the opinion leaves open the prospect of the Court adopting the Apex Rule, the Court declined to adopt it here because "the circuit court could have reasonably concluded that the bishops have superior personal knowledge of information" that the plaintiff seeks. Ms. *9.

The plurality opinion also concludes that Bishop Wallace-Padgett, who contended that the deposition sought of her was unreasonably cumulative or duplicative, failed to support her contention in the trial court with excerpts of prior deposition testimony. Ms. *13-14.

The plurality opinion also rejects Wallace-Padgett's argument premised on the attorney-client privilege noting that "[t]he privilege protects communications between an attorney and client, not necessarily all information or documents transmitted by or accompanying those communications." Ms. *22 (emphasis in the original).

AMLA – DISCOVERY – § 6-5-551, ALA. CODE 1975

Ex parte BBH BMC, LLC, [Ms. 1180961, Jan. 24, 2020] __ So. 3d __ (Ala. 2020). The Court (Bolin, J.; Shaw, Wise, Bryan, and Sellers, JJ., concur; Parker, C.J., and Mendheim and Stewart, JJ., concur specially; Mitchell, J., concurs in the result) grants Brookwood Baptist Medical Center's petition for a writ of mandamus directing the Jefferson Circuit Court to vacate its order compelling Brookwood to respond to certain interrogatories and requests for production.

While a patient at Brookwood's outpatient voluntary psychiatric treatment program, the plaintiff's decedent jumped to her death from a parking deck on the premises of the medical center. In the wrongful death action, the plaintiff alleged that despite actual notice from two previous suicides, Brookwood breached the standard of care by failing to take measures to erect physical barriers or other deterrents to prevent suicide. Ms. *3. Plaintiff also asserted a premises liability count. *Ibid.*

The discovery sought information as to possible changes to the parking deck considered by Brookwood after the two previous suicides and information as to why no changes were made. Ms. *6. In his response to the mandamus petition, the plaintiff waived any argument based on his separate and independent count alleging premises liability. Ms. **10-11.

The Court held that because of the plaintiff's concession, his complaint, solely one for medical malpractice under the AMLA, is governed by § 6-5-551. The statute provides in pertinent part that "any party shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission." The Court held that because

> Gaston alleges that Brookwood's failure 'to erect physical barriers or provide other deterrents like geo-fencing and landscaping to prevent suicide' was a breach of the standard of care Brookwood owed Donna. Whether changes had been considered and made or not made to the parking deck in the past is contingent, at least in part, on the facts underlying the earlier suicides. Any such considerations and determinations were in response to the earlier suicides and constitute "act[s] or omission[s]" with regard to the earlier suicides. Therefore, this information is not available in determining whether Brookwood provided a safe setting for Donna's care on the day of the incident.

Ms. *14.

Justice Mendheim's special concurrence, joined by Chief Justice Parker and Justice Stewart, asserts that had the plaintiff not conceded that his premises liability count was not relevant to the Court's consideration of Brookwood's mandamus petition, the premises liability count would have supported the circuit court's order allowing the discovery concerning the prior suicides.

TIMELINESS OF APPEAL FROM ORDER REMOVING PERSONAL REPRESENTATIVE

Player v. J.C., [Ms. 1180606, Jan. 24, 2020] __ So. 3d __ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur; Shaw, J., concurs in the result) dismisses Zambia Player's appeal from the Etowah Circuit Court's order removing her as the administrator of her brother's estate. On February 27, 2018, the circuit court removed Zambia as personal representative of the estate and specifically stated that her removal did not constitute a release or discharge of her or her sureties from any malfeasance or breach of duty in the management of the estate. Ms. *4.

In a subsequent order entered on January 30, 2019, the circuit court awarded judgment to the beneficiary of $27,662.85 against Zambia. Ms. **6-7. After filing a post-judgment motion challenging the January 30, 2019 order, Zambia appealed on May 8, 2019. Ms. *7.

The Court held that the February 2018 order removing Zambia as administrator was immediately appealable pursuant to § 12-22-21, Ala. Code 1975, and because Zambia's appeal was not filed until May 10, 2019, her appeal of the order removing her was untimely. Ms. *10.

§ 6-8-84, ALA. CODE 1975 NOT APPLICABLE TO COUNTERCLAIM AGAINST PARTY INVOLUNTARILY JOINED

Ex parte Dow AgroSciences LLC, [Ms. 1180887, Jan. 24, 2020] __ So. 3d __ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, and Stewart, JJ., concur; Shaw, J., concurs in the result; Mitchell, J., recuses) grants a petition for a writ of mandamus filed by Dow AgroSciences LLC ("DAS") directing the Conecuh Circuit Court to dismiss it based on the statute of limitations.

DAS was not a party to the suit when it was initially filed in February 2016 by Andalusia Farmers Cooperative ("AFC"). DAS was subsequently added as an indispensable party by plaintiff/counterclaim defendant AFC on November 20, 2018. After DAS was joined, the original defendant/counterclaim-plaintiff Ward filed a counterclaim against DAS. Ms. *5.

AFC contended that its claim against

DAS was not time-barred because § 6-8-84, Ala. Code 1975 provides that "[w]hen the defendant pleads a counterclaim to the plaintiff's demand, to which the plaintiff replies to the statute of limitations, the defendant is nevertheless entitled to his counterclaim, where it was a legal subsisting claim at the time the right of action accrued to the plaintiff on the claim in the action." Ms. **10-11.

The Court rejected this argument, holding that "DAS does not fit the ordinary understanding of a 'plaintiff' or of an 'opposing party' against whom a 'counterclaim' is brought. DAS did not bring an action or any claim against Ward. Instead, DAS is a party that was involuntarily joined as an indispensable party to the case. Consequently, § 6-8-84 – Ward's only defense in the circuit court to the two-year statute of limitations in § 6-2-38(l) – does not apply to Ward's claim against DAS." Ms. *14.

MANDAMUS – PERSONAL JURISDICTION

Ex parte Right at Home, LLC, [Ms. 1190289, Jan. 29, 2020] __ So. 3d __ (Ala. 2020). The Supreme Court denies a petition for a writ of mandamus filed by Defendant Right at Home, LLC, an out-of-state franchisor active throughout Alabama in the business of non-medical in-home care of the elderly. Right at Home's January 3, 2020 mandamus petition sought an order directing the Mobile Circuit Court to dismiss Right at Home, on grounds of lack of personal jurisdiction, from a wrongful-death action against Right at Home and its local franchisee for the death of an elderly Alzheimer's patient who died as a result of a scalding bath. The Plaintiff moved to dismiss or summarily deny the petition for non-compliance with Rule 21(a)(1)(E). Two weeks later, the Court (Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur; Sellers, J., dissents) denied the petition without opinion.

PREMISES LIABILITY – OPEN AND OBVIOUS

McClurg v. Birmingham Realty Co., [Ms. 1180635, Jan. 31, 2020] __ So. 3d __ (Ala. 2020). A plurality of the Court (Parker, C.J., and Wise, Mendheim, and Stewart, JJ., concur; Bryan, J., concurs in the result; Bolin, Shaw, and Sellers, JJ., dissent; Mitchell, J., recuses) reverses a summary judgment entered by the Shelby Circuit Court dismissing a premises liability action against Birmingham Realty Company ("BRC"). Plaintiff McClurg, an 82-year-old retail store patron, stepped in a pothole in the asphalt parking lot. The circuit court concluded that the pothole was an open and obvious danger. Ms. **2-3.

Openness and obviousness of a danger is resolved by an objective test of "'whether the danger should have been observed [by the plaintiff] not whether in fact it was consciously appreciated [by him or her].'" Ms. *5, quoting *Jones Food v. Shipman*, 981 So. 2d 355, 362 (Ala. 2006). This question is generally not to be resolved on a motion for summary judgment. Ms. *6, citing *Ex parte Kraatz*, 775 So. 2d 801, 804 (Ala. 2000).

The opinion holds that holes in parking lot asphalt "are not so categorically obvious that the situation merits a per se defense." Ms. *8. The Court declined to consider BRC's argument raised for the first time on appeal that McClurg failed to prove that BRC had notice of the dangerous condition. Ms. *11.

Judge Bolin's dissent would have affirmed the summary judgment because while retrieving a shopping basket, McClurg stepped backward into the pothole without looking. Ms. *19.

UIM – INSURER'S RIGHT TO JURY TRIAL AFTER OPTING OUT

Ex parte Allstate Property and Cas. Co., [Ms. 1180871, Jan. 31, 2020] __ So. 3d __ (Ala. 2020). The Court (Sellers, J.; Bolin, Wise, Mendheim, Stewart, and Mitchell, JJ., concur; Parker, C.J., and Shaw and Bryan, JJ., dissent) issues a writ of mandamus directing the Macon Circuit Court to grant Allstate's request for a jury trial in an action involving an underinsured motorist claim. The Court holds there is "a strong policy preserving the right to have a jury determine the extent of a party's liability. Ala. Const. 1901, Art. I, § 11; Rule 38, Ala. R. Civ. P. Accordingly, ... Allstate can insist that a jury determine liability and damages, and, at the same time, keep its involvement from the jury pursuant to the opt-out procedure adopted in *Lowe*." Ms. *6.

COUNTY CONTRACTING AUTHORITY – CONSTITUTIONAL AVOIDANCE

Robbins v. Cleburne County Commission, [Ms. 1180106, Jan. 31, 2020] __ So. 3d __ (Ala. 2020). The Court (Mitchell, J.; Parker, C.J., and Bolin, Bryan, Mendheim, and Stewart, JJ., concur; Shaw, J., concurs in the result; and Sellers, J., dissents) affirms the Cleburne Circuit Court's order dismissing a breach of contract action filed by the former county engineer after the County Commission denied the validity of a renewal option in his employment agreement.

Home rule is not extended to counties. Consequently, a county commission's "'contracting authority extends only so far as is authorized by the legislature ....'" Ms. *5, quoting *Cooper v. Houston Cty.*, 40 Ala. App. 192, 195, 112 So. 2d 496, 498 (1959). Two statutes potentially authorized the contract – a general law providing that a county may enter into an employment contract with a county engineer "for a period of time not to exceed five years,'" Ms. *5, and a local law, authorizing Cleburne County to hire a "county engineer who shall serve at the pleasure of the County Commission." Ms. *6.

In approving a contract with the county engineer for a period of five years with a one-year renewal option, the county exceeded its authority under either law. Ms. *6. The general law expressly limited a contract of employment of a county engineer to five years. The local law authorized at-will employment of a county engineer, leading the Court to hold that "[a] government body authorized to fill a position on an at-will basis may not contract away its power of removal." Ms. *10.

Citing its "duty to avoid constitutional questions unless essential for the proper disposition of the case," Ms. *6, quoting *Chisholm v. Jefferson Cty.*, 954 So. 2d 1058, 1063 (Ala. 2006)(internal quotation marks omitted), the Court declined to decide whether the general or local law applied.

DIRECT ACTION STATUTE – AVAILABILITY OF MANDAMUS REVIEW

Ex parte State Farm Fire and Cas. Co., [Ms. 1170760, Jan. 31, 2020] __ So. 3d

__ (Ala. 2020). In a *per curiam* decision (Bolin, Wise, Bryan, Sellers, Mendheim, and Stewart, JJ., concur; Parker, C.J., and Shaw and Mitchell, JJ., dissent), the Court denies State Farm's petition for a writ of mandamus challenging the Clarke Circuit Court's failure to dismiss an action against State Farm on the ground that the claims were barred by § 27-23-2, Ala. Code 1975 ("the direct-action statute").

The Court rejected State Farm's effort to couch its argument as a subject-matter jurisdiction challenge to plaintiffs' standing. Citing its recent cases on the subject, the Court explained that a lack of standing does not implicate subject-matter jurisdiction. Ms. *18-19. The Court denied the writ emphasizing that it "has never recognized an exception to the general rule that would permit interlocutory review of a trial court's denial of a motion to dismiss or for a judgment on the pleadings for cases that turn on whether the plaintiff has stated a cognizable claim under the applicable law." Ms. *20.

STUDENTS FIRST ACT – COMMON-LAW WRIT OF CERTIORARI

Wilkinson v. Cochran, [Ms. 2180741, Jan. 31, 2020] __ So. 3d __ (Ala. Civ. App. 2020). In a 3-2 decision (Thompson, P.J., and Donaldson and Hanson, JJ., concur; Moore and Edwards, JJ., dissent) reverses the Etowah Circuit Court's judgment dismissing an action filed by Roger Wilkinson, a former principal of Gadsden Elementary School who was suspended from his position for twenty days without pay for making a politically-charged Facebook post. Under the Students First Act ("SFA"), upon the written recommendation of the Chief Executive Officer and the approval of the governing board, a tenured employee can be suspended for up to twenty days without pay. Ms. *10. The SFA further provides that a suspension for no more than twenty days "is not a termination of employment, subject to [judicial] review...." Ms. *11, quoting § 16-24C-6(I), Ala. Code 1975.

While acknowledging that the complaint was not a model of clarity, the court noted that "it has long been the law that substance, not nomenclature, is the determining factor regarding the nature of a party's pleadings or motions. The substance of Wilkinson's complaint is that he disputed the board members' determination, and he sought to have that determination set aside and the discipline imposed somehow expunged." Ms. *19 (internal citations and quotation marks omitted).

The court held that Wilkinson's sole remedy was a common-law writ of certiorari and that "[i]n exploring and ultimately deciding the question of immunity, it is apparent that the trial court did not limit its role to deciding questions touching on the board's jurisdiction ... or the legality of its proceedings." Ms. *21. The court reversed and remanded to the trial court "to determine the extent, if any, that Wilkinson's complaint raised matters that can be properly considered appropriate for certiorari review and to proceed accordingly." *Ibid.*

The dissenters reasoned that because Wilkinson "seeks mandamus and injunctive relief, his complaint states claims different from a petition for the common-law writ of certiorari," Ms. *35, and "consequently the court should address the merits of Wilkinson's appeal of the circuit court's judgment that his action was barred by sovereign immunity." Ms. *37.

FICTITIOUS PARTIES – RELATION BACK

Ex parte Cowgill and Yarbrough, [Ms. 1180936, Feb. 7, 2020] __ So. 3d __ (Ala. 2020). A unanimous Court (Shaw, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) issues a writ of mandamus to the Jefferson Circuit Court directing the court to grant defendants Cowgill's and Yarbrough's motion for summary judgment based on the statute of limitations.

The Court held that plaintiff "was well aware of the petitioners' identity and possessed information as to their duties regarding training and supervision of Black Market employees." Ms. *23. In issuing the writ, the Court applied settled law providing "that delay in amending a complaint to substitute a named party for a fictitiously named party once information is available can defeat the availability of the doctrine of relation back." Ms. *24, quoting *Ex parte Bowman*, 986 So. 2d 1152, 1158 (Ala. 2007). The Court also held that "[a]lthough [plaintiff] Thomas disputes knowledge of the petitioner's precise duties, it is undisputed that he possessed sufficient information from which he should have known or was at least placed on notice of a factual basis for his eventual claims against them." Ms. *28.

SUBSTANTIVE ARBITRABILITY – SCOPE OF AGREEMENT

Wiggins v. Averett, LLC., [Ms. 1170943, Feb. 7, 2020] __ So. 3d __ (Ala. 2020). A plurality of the Court (Shaw, J.; and Bolin, Bryan, and Mitchell, JJ., concur; Shaw, J. and Donaldson, Special Justice, concur specially; Parker, C.J., and Wise, Sellers, and Mendheim, JJ., dissent; Stewart, J., recuses) affirms the Baldwin Circuit Court's judgment that plaintiff doctor Wiggins was compelled to arbitrate his claims against the defendant, Warren Averett, LLC, an accounting firm. The contract containing the arbitration agreement was between Eastern Shore Children's Clinic, P.C. and Warren Averett. Plaintiff Wiggins was a shareholder and employee of Eastern Shore, but was not a party to the arbitration agreement.

In pertinent part, the arbitration agreement provided that Eastern Shore "agrees that any controversies, issues, disputes, or claims (disputes) asserted or brought by or on behalf of Eastern Shore shall be resolved exclusively by binding arbitration administered by the American Arbitration Association."

Wiggins sued Warren Averett alleging accounting malpractice arising from Warren Averett allegedly disclosing his personal confidential financial information to Eastern Shore which caused Eastern Shore to oust him as a shareholder/employee. Ms. *3. Although conceding that he was a third-party beneficiary of the contract between Eastern Shore and Warren Averett, Wiggins contended that the narrow scope of the arbitration clause limited it to claims "by or on behalf of Eastern Shore." Ms. *5. The plurality opinion holds that "when an arbitration provision indicates that the AAA rules will apply

to the arbitration proceedings, ... that it is 'clear and unmistakable' that substantive-arbitrability decisions are to be made by the arbitrator; this includes the decision whether the arbitration provision may be enforced against a non-signatory to the contract ...." Ms. *8, citing *Federal Ins. Co. v. Reedstrom*, 197 So. 3d 971, 976 (Ala. 2015).

DECLARATORY JUDGMENT – MOOTNESS

Talladega County Commission v. State of Alabama, ex rel City of Lincoln, [Ms. 1180395, Feb. 21, 2020] __ So. 3d __ (Ala. 2020). The Court (Stewart, J.; Parker, C.J., and Bolin, Wise and Sellers, JJ., concur) dismisses the Talladega County Commission's appeal from an order of the Talladega Circuit Court dismissing a mandamus proceeding filed against the Commission by the City of Lincoln and directed the circuit court to vacate a declaratory judgment entered in the action.

When the legislative delegation withdrew its approval for the Commission to disburse funds from a special tax fund to the City, the City moved to dismiss its mandamus proceeding seeking to compel the Commission to disburse those funds. Ms. *7. The trial court granted the City's motion to dismiss but expressly ordered that its declaratory judgment construing the local act at issue would remain in effect. *Ibid.*

The Court dismissed the Commission's appeal and directed the trial court to vacate the declaratory judgment. "Once the State representatives withdrew their approval, a necessary precursor to the disbursement of moneys from the fund under the amended Act, the City was no longer entitled to the funds and there ceased to be a controversy between the City and the Commission. Whether the City and the Commission continue to disagree about how the amended Act should be interpreted in the future is irrelevant, because '[t]he Declaratory Judgment Act does not ... empower courts 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.'" Ms. *12, quoting *Stamps v. Jefferson Cty. Bd. of Educ.*, 642 So. 2d 941, 944 (Ala. 1994) (some internal quotation marks omitted).

SUBJECT-MATTER JURISDICTION OVER DIVORCE – PENDENTE LITE CUSTODY ORDER – UNIFORM CHILD CUSTODY JURISDICTION ENFORCEMENT ACT (UCCJEA)

Ex parte Cate, [Ms. 2190161, Feb. 21, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Thompson, P.J.; Moore, Donaldson, and Hanson, JJ., concur; Edwards, J., concurs in part and dissents in part) grants in part and denies in part the mother's petition for a writ of mandamus challenging the Cullman Circuit Court's subject-matter jurisdiction in a divorce proceeding.

In regard to subject-matter jurisdiction over the marital res, the court rejected the mother's argument that a new divorce action filed by the father could not be used to correct jurisdictional defects in a prior divorce action filed prior to the father having been a resident of Alabama for six months. Ms. *9.

The mother also challenged the trial court's pendente lite custody order entered without notice to her. In granting the writ as to the pendente lite custody order, the court held that a parent cannot be deprived of custody of his or her children (even temporarily) without appropriate notice and an opportunity to be heard. Ms. *18.

The court also granted the mother's petition to the extent it challenged the trial court's jurisdiction over the child custody issues. The court held:

> [I]t is clear from the lack of argument by the parties concerning the UCCJEA that the trial court was not presented with the issue of its jurisdiction under the UCCJEA. The trial court's comments during the October 16, 2019, hearing indicate that it did not consider the various grounds under § 30-3B-201 [Ala. Code 1975] in determining that it had jurisdiction over custody issues in case number CR[sic]-19-900325. Rather, those comments and the arguments of the parties indicate that the trial court relied solely on the father's apparent residence in Alabama for the six months preceding his commencement of case number DR-19-900325.

Ms. *16.

WORKERS' COMPENSATION EXCLUSIVITY – MANDAMUS PROCEDURE

Ex parte Drury Hotels Company, LLC, [Ms. 1181010, Feb. 28, 2020] __ So. 3d __ (Ala. 2020). The Court unanimously (Bryan, J.; Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) denies a petition for writ of mandamus by Drury Hotels in an action filed by Diaz, a housekeeper at Drury who alleged that while she was working at the hotel, she was attacked by an unknown assailant.

The Court first noted that mandamus review is available of an order denying a motion to dismiss asserting immunity under the exclusive remedy provisions of the Workers' Compensation Act. Ms. *4. The Supreme Court applies the 12(b)(6) standard when conducting mandamus review of the denial of a motion to dismiss:

> "The appropriate standard of review under Rule 12(b)(6) 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. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. 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."

Ms. *9, quoting *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993).

Because Drury failed to discuss the issues "within the necessary procedural framework, i.e., the denial of the Rule 12(b)(6) motion to dismiss, ... Drury has failed to establish a clear legal right to relief regarding the trial court's denial of its first motion to dismiss." Ms. **10-11.

REAL ESTATE CONSUMER'S AGENCY AND DISCLOSURE ACT

Rosenthal v. JRHBW Realty, Inc., [Ms. 1180718, Feb. 28, 2020] __ So. 3d __ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Bolin, Shaw, Bryan, Sellers, and Stewart, JJ., concur; Mitchell, J., concurs in the result; Wise, J., recuses) affirms the Jefferson Circuit Court's summary judgment in favor of JRHBW Realty, Inc. and agent Charles Valekis in an action by Rosenthal alleging claims of breach of contract and negligence/wantonness arising from the purchase of a used residence.

In an effort to avoid "as-is" provisions in the sales contract and provisions in the agency agreement placing upon Rosenthal responsibility for inspecting the home, Rosenthal argued that prior to the execution of the agency agreement Valekis voluntarily undertook a duty to have the home inspected by a structural engineer. Ms. *16. Construing § 34-27-82(b), Ala. Code 1975 (Real Estate Consumer's Agency and Disclosure Act, "RECAD"), the Court held that Valekis was acting as a transaction broker at the time he allegedly voluntarily undertook to retain a structural engineer to evaluate the foundation of the home. § 34-27-82(f) of RECAD provides that "'[w]hen serving as a transaction broker, the duties of the licensee to all the parties to a real estate transaction are limited to those which are enumerated in § 34-27-84.'" Ms. *29 (emphasis added). Because § 34-27-84 does not list a duty to inspect a property or procure any specific type of professional to inspect the property, § 34-27-87 precluded the home buyer's effort to establish that Valekis assumed a common law duty. Ms. **29-30.

The Court also noted that assuming, *arguendo*, that Valekis was not a transaction broker, the home owner failed to cite "a single statute or case that imposed on Valekis a voluntary duty to perform a house inspection or to retain a structural engineer outside an agency relationship." Ms. *32.

SPECIFIC PERSONAL JURISDICTION

Ex parte LED Corporations, Inc., [Ms. 1180629, Feb. 28, 2020] __ So. 3d __ (Ala. 2020). In a plurality opinion, the Court (Stewart, J.; Parker, C.J., and Wise and Mitchell, JJ., concur; Bolin, Shaw, Bryan, Sellers, and Mendheim, JJ., concur in the result) denies a petition for writ of mandamus filed by a Florida lighting fixture supply company and its sole owner Anthony Florence, challenging the Etowah Circuit Court's exercise of personal jurisdiction in an action alleging breach of contract, fraud, and conversion.

The plurality opinion concludes that

> [T]he contract between SDM and LED alone is not sufficient to establish LED's and Florence's minimum contacts with Alabama. But because the contract involved the purchase of materials that were to be shipped to an Alabama corporation for use in a construction project in Alabama and because LED, through its employee's visit, undertook substantial efforts within Alabama to assist the school board, the owners, the architect, the general contractors, and SDM with formulating the specifications for the lighting portion of the project, SDM has established a clear nexus between LED's conduct and the alleged injurious consequences of that conduct in Alabama such that LED should have reasonably anticipated being sued in an Alabama court.

Ms. **18-19, quoting *World-Wide Volkswagen*, 444 U.S. 286, 297, 100 S.Ct. 559, 567 (1980).

DEFAMATION – EXCEPTION TO FAIR REPORTING PRIVILEGE – STATE IMMUNITY

Birmingham Broadcasting LLC v. Leslie Wayne Hill, [Ms. 1180343, 1180370, Feb. 28, 2020] __ So. 3d __ (Ala. 2020). The Court (Stewart, J.; Parker, C.J., and Bolin, Sellers, Mendheim, and Mitchell, JJ., concur; Shaw and Bryan, JJ., concur in the result) reverses a $250,000 judgment entered by the Jefferson Circuit Court on a jury verdict on a defamation claim in favor of plaintiff Hill. The Court also affirms a summary judgment entered in favor of former Jefferson County Sheriff Mike Hale and two of his officers.

After an assistant district attorney concluded that probable cause existed that the plaintiff was in violation of the Sex Offender Registration and Notification Act ("SORNA"), the Jefferson County Sheriff's Department issued warrants for Hill's arrest for failure to register as a sex offender. Ms. **3-4. As part of an ongoing weekly news segment entitled "To Catch A Predator," WVTM broadcasted a segment featuring then Sheriff Hale and detailing the warrants issued against Hill. The day after the broadcast, Hill, through his attorney, contacted the Jefferson County District Attorney's Office and the D.A. agreed that Hill's convictions did not constitute an offense requiring registration under SORNA. Ms. **6-7. Neither Hill nor his attorney contacted WVTM to request a retraction or provide an explanation or a contradiction of the December 6 broadcast. However, on a December 13 broadcast, a WVTM news anchor stated in a broadcast that the warrants against the plaintiff had been recalled. Ms. *7.

In reversing and rendering judgment for WVTM, the Court construed § 13A-11-161's exception to the fair reporting privilege (upon which the jury verdict was based) as requiring

> [T]he plaintiff to provide the defendant a reasonable explanation or contradiction of the initial report. Only after defendant has been provided an explanation or contradiction and only after defendant refuses or neglects to publish that explanation or contradiction "in the same manner" as the original publication can an exception be triggered. ... It is undisputed in this case that Hill did not contact WVTM after the December 6 broadcast, much less supply WVTM with an explanation or contradiction of the information contained in the December 6 broadcast.

Ms. **20-21.

In affirming the summary judgment for Sheriff Hale and his officers, the Court noted that "[s]tate immunity applies 'whenever the acts that are the basis of the alleged liability were performed within the course and scope of the officer's employment'" Ms. *25, quoting *Ex parte Davis*, 930 So. 2d 497, 500-01 (Ala. 2005). Citing the undisputed fact that the Sheriff's Office requested a legal opinion from the Jefferson County District Attorney's Office prior to issuing the warrants, the Court concluded "that Hill failed to demonstrate the sheriff defendants acted in bad faith or that they

acted under a mistaken interpretation of the law sufficient to exempt them from application of state immunity under §14." Ms. *28.

ARBITRATION – AUTHENTICATION OF AGREEMENT

Oaks v. Parkerson Construction, LLC, [Ms. 1171193, Feb. 28, 2020] __ So. 3d __ (Ala. 2020). The Court unanimously (Mitchell, J.; Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur) reverses the Madison Circuit Court's order compelling arbitration in a construction contract dispute between Parkerson Construction, LLC ("Parkerson") and Jeanne Oaks. Parkerson's motion to compel arbitration did not contain an affidavit or other evidence authenticating the agreement containing the arbitration provision. Ms. *4.

Oaks filed a motion to strike the agreement on the ground that Parkerson failed to submit any evidence authenticating the arbitration agreement. In reversing, the Court relied on *Barrett v. Radjabi-Mougadam*, 39 So. 3d 95 (Ala. 2009) for the proposition that a judgment based on material that would not be admissible at trial is due to be reversed. Ms. *8.

The Court rejected Parkerson's argument that the agreement was admissible under the business/records exception to the hearsay rule. The Court held that "'authentication is necessary before a document can be admitted under the business records exception.'" Ms. *12, citing *Hampton v. Bruno's, Inc.*, 646 So. 2d 597, 599 (Ala. 1994).

LEGAL MALPRACTICE CLAIM – SUMMARY JUDGMENT – EXPERT TESTIMONY REQUIREMENT

Schaeffer v. Thompson, [Ms. 2180834, Feb. 28, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Moore, J.; Thompson, P.J., and Donaldson and Hanson, JJ., concur; Edwards, J., recuses) reverses a summary judgment entered by the Dallas Circuit Court in favor of an attorney on legal malpractice claims.

The attorney moved for summary judgment, attached a transcript from the trial of the underlying case, and asserted that he could not be found guilty of legal malpractice based upon tactical decisions made during the course of trial. Ms. *3. In reversing the summary judgment, the court noted that the attorney "did not introduce an affidavit in support of his first summary-judgment motion asserting his reasoning for the strategic decisions that he made at the trial in the underlying case. ... Therefore, we conclude that Thompson failed to establish that his decisions in the trial in the underlying case were tactical such that they would not support a legal malpractice claim." Ms. **11-12.

The attorney argued that the case fell within the common-knowledge exception such that expert testimony was not required. The common-knowledge exception was not raised in the attorney's motion for summary judgment, so the court refused to address it. Ms. *12.

APPEAL FROM DECISION OF CIVIL SERVICE BOARD – SUBJECT-MATTER JURISDICTION

Dockery v. City of Jasper, [Ms. 2180844, Feb. 28, 2020] __ So. 3d __ (Ala. Civ. App. 2020). In a per curiam opinion, the court (Hanson, J., concurs; Edwards, J., concurs specially; Thompson, P.J., and Donaldson, J., concur in the result, without writing; Moore, J., concurs in part and dissents in part) reverses a judgment of the Walker Circuit Court affirming a decision of the Jasper Civil Service Board terminating the employment of Dockery as a police officer with the City of Jasper. The court affirms the circuit court's dismissal of damages claims against the City asserted by Dockery in his circuit court appeal of the Civil Service Board's decision affirming his termination.

In the proceeding before it, the Board did not require the City to file written charges or a written complaint against Officer Dockery detailing the reasons for his termination. The court held that "the Board's error in not requiring the City to file written charges or a written complaint was reversible error." Ms. *38.

Notwithstanding that reversible error, the court affirmed the dismissal of the officer's damages claims because those claims were not properly before the circuit court in the first place. The court noted that "Dockery's appeal to the trial court from the Board's decision invoked only the limited appellate jurisdiction of the trial court to review the September 2003 order, not the original jurisdiction of the trial court. ... The appellate jurisdiction of the appellate court may not be enlarged by pointing to that court's original jurisdiction." Ms. *40 (internal citation and quotation marks omitted).

CHOICE OF LAW REGARDING TRUST ADMINISTRATION – AWARD OF ATTORNEY'S FEES FOR TRUSTEE MALFEASANCE

Foster v. Foster, [Ms. 1180648, Mar. 6, 2020] __ So. 3d __ (Ala. 2020). The Court (Sellers, J.; Bolin, Wise, and Stewart, JJ., concur; Parker, C.J., concurs in part and concurs in the result in part) affirms the Shelby Circuit Court's judgment in a dispute concerning a family trust. The trial court removed the trustee, awarded damages, and required the trustee to pay the prevailing party's attorney's fees.

The Court rejects the trustee's argument that subject matter jurisdiction was lacking based on California law. Ms. *7. Although the trust states it "is to be construed according to California law," Ms. *8 (emphasis in the original), the Court held that administration of the trust, including alleged mismanagement of the trust, is governed by Alabama law where the trust is being administered. Ms. *10.

The Court affirmed the award of attorney's fees against the trustee citing *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So. 2d 1238 (Ala. 1985) and held that a trial court has discretion to award attorney's fees to a successful party "when a defendant has committed fraud, willful negligence, or malice, or otherwise acted in bad faith ...." Ms. *21.

RECREATIONAL USE STATUTES – STATUTORY CONSTRUCTION

Ex parte City of Millbrook, [Ms. 1180050, Mar. 6, 2020] __ So. 3d __ (Ala. 2020). In a plurality opinion, the Court (Mitchell, J.; Wise and Stewart, JJ., concur; Parker, C.J., and Bolin, Shaw, Bryan, Sellers,

and Mendheim, JJ., concur in the result) denies the City of Millbrook's petition for a writ of mandamus directing the Elmore Circuit Court to grant the City's motion for a summary judgment based on the recreational use statutes, §§ 35-15-20 through -28, Ala. Code 1975. Ms. *2.

Plaintiff was injured when she fell in front of the Millbrook Civic Center. The plurality opinion concludes that the City failed to clearly establish that the Civic Center fits clearly within the definition of "outdoor recreational land" in Article 2 of the recreational use statutes. § 35-15-21(2), Ala. Code 1975. Ms. *5. The Plaintiff argued that the Civic Center is a stand-alone structure with no connection to outdoor recreation. Ms. *7. The plurality opinion concludes that "fundamental principles of statutory interpretation foreclose the City's reading ...." Ms. *7.

In regard to statutory construction, the opinion notes that

> "Textualism, in its purest form, begins and ends with what the text says and fairly implies." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 16 (Thomson West 2012). Textualism recognizes that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Antonin Scalia, A Matter of Interpretation 23 (Princeton University Press 1997). "Textualism ... tasks judges with discerning (only) what an ordinary English speaker familiar with the law's usages would have understood the statutory text to mean at the time of its enactment." Neil Gorsuch, The Case for Textualism, A Republic, If You Can Keep It 128, 131 (Crown Forum 2019).

Ms. **7-8.

HEARING ON POSTJUDGMENT MOTION

Harvison v. Lynn, [Ms. 2180999, Mar. 6, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Thompson, P.J.; Moore, Donaldson, Edwards, and Hanson, JJ., concur) reverses the Cullman Circuit Court's award of over $47,000 in attorney's fees against Nina Harvison, the daughter of an elderly dementia patient, McSwain, as to whom the circuit court had granted letters of guardianship.

For a number of years, Harvison filed numerous unsuccessful objections to actions of the guardian and conservator of McSwain.

The Court holds that Harvison raised "valid concerns regarding the factual and legal bases for the amount of the trial court's award of attorney fees pursuant to the ALAA [Alabama Litigation Accountability Act]. Therefore, the denial of the postjudgment motion by operation of law was not harmless error, and the trial court erred to reversal by allowing Harvison's postjudgment motion to be denied without a hearing." Ms. *36.

WRONGFUL DEATH – RELATION BACK – RULE 17, ALA. R. CIV. PROC.

Pollard v. H.C. Partnership, [Ms. 1180795, Mar. 13, 2020] __ So. 3d __ (Ala. 2020). The Court (Bolin, J.; Parker, C.J., and Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur; Bryan, J., concurs in the result; Shaw, J., dissents) reverses the Jefferson Circuit Court's summary judgment dismissing a wrongful death action on the ground of expiration of the two-year limitations period.

On May 7, 2017, Fannie Pollard filed an action against Hill Crest Behavioral Services for the wrongful death of Ed Young. Pollard was not appointed administrator of Young's Estate until May 8, 2017, the day before the second anniversary of Young's death. Ms. *2. On June 15, 2017, Pollard filed an amended complaint listing as plaintiffs Young's Estate and herself as personal representative. *Ibid.*

The Court rejected the defendant's argument that Rule 17(a) Ala. R. Civ. Proc.'s relation-back doctrine does not apply to wrongful death actions, explaining that the "doctrine does not extend the limitations period but merely allows substitution of a party in a suit otherwise timely filed." Ms. *11.

The Court distinguished cases such as *Alvarado v. Kidd*, 205 So. 3d 1188 (Ala. 2016) and *Wood v. Wayman*, 47 So. 3d 1212 (Ala. 2010) where the appointment of the personal representatives occurred after expiration of the wrongful-death limitations period. Ms. *12. The Court cited with approval *Ellis v. Hilburn*, 688 So. 2d 236 (Ala. 1997), allowing relation-back under Rule 17(a) of an amended complaint where the surviving spouse had filed the initial complaint as "next of kin" but was subsequently appointed personal representative prior to expiration of the wrongful-death limitations period. Ms. *16.

POST-JUDGMENT DISCOVERY DURING PENDENCY OF APPEAL CHALLENGING SERVICE OF PROCESS

Ex parte Slocumb Law Firm, LLC, [Ms. 2190297, Mar. 13, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Thompson, P.J.; Moore, Edwards, and Hanson, JJ., concur; Donaldson, J., recuses) denies the Slocumb Law Firm's petition for a writ of mandamus directing the Tuscaloosa Circuit Court to vacate its order compelling Slocumb to respond to post-judgment interrogatories. The court holds that the post-judgment discovery was collateral to Slocumb's appeal of the default judgment. Ms. *11, citing *Vesta Fire Ins. Corp. v. Liberty National Life Ins. Co.*, 992 So. 2d 1252, 1259 (Ala. 2008). Consequently, the trial court did not abuse its discretion in ordering Slocumb to respond to the discovery. *Ibid.*

The court emphatically rejected Slocumb's argument that responding to the discovery would waive his appeal asserting insufficiency of service of process. "Neither the filing of a general appearance, nor the taking of a position looking to the merits, prevents a party from attacking the jurisdiction of the court or the service of process." Ms. *11 (emphasis added by *Ex parte Slocumb*), quoting Committee Comments on 1973 adoption of Rule 12, Ala. R. Civ. P.

MUNICIPAL CEMETERY – DUTY TO PRESERVE ADORNMENTS TO GRAVES

Bailey, et al. v. City of Leeds, [Ms. 2180720, Mar. 13, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Edwards, J.; Moore, Donaldson, and Hanson, JJ., concur; Thompson, P.J., concurs in the

result) affirms the Jefferson Circuit Court's summary judgment dismissing trespass claims asserted by owners of burial plots in the Cedar Grove cemetery, owned and operated by the City of Leeds. Ms. *55. The court reverses the summary judgment dismissing the negligence claims. *Ibid.*

Pursuant to its police power the State "may provide for the establishment and discontinuance of cemeteries, and regulate their use. This power may be delegated to municipalities within their corporate limits or police jurisdiction." Ms. *40. The court rejected the plot owners' argument that permanent cemetery regulations were invalid because they were passed via municipal resolution instead of ordinance. Ms. *35.

In regard to the trespass claims, the court noted that "the law protects the interests of the next of kin of the decedent who is buried in a cemetery plot." Ms. *43. The court affirmed the summary judgment dismissing the trespass claims because employees of the city had "a right to enter upon the cemetery plots for purposes of fulfilling their maintenance duties under the 2011 regulations." Ms. *46.

In regard to the negligence claims, the court held that "'where the facts upon which the existence of a duty are disputed, the factual dispute is for resolution by the jury.'" Ms. *51, quoting *Garner v. Covington County*, 624 So. 2d 1346 (Ala. 1993). The court concluded there were genuine issue of fact on whether the City had a duty to burial plot owners to prevent damage to their adornments after the City removed the adornments from the burial plots. Ms. *53.

APPOINTMENT OF JUDGE FOLLOWING RECUSAL OF PRESIDING CIRCUIT JUDGE

Lawler Manufacturing Co., Inc. v. Lawler, [Ms. 1180889, Mar. 27, 2020] __ So. 3d __ (Ala. 2020). The Court (Bolin, J.; Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur) vacates orders entered by a district judge appointed by Presiding Circuit Judge Woodruff following Judge Woodruff's recusal.

The Court held "[i]n accordance with *Ex parte Jim Walter Homes*, [776 So. 2d 76 (Ala. 2000)] when Presiding Judge Woodruff disqualified himself from this case, he no longer had authority to appoint his successor or to enter the order appointing [District] Judge Fannin. Therefore, Presiding Judge Woodruff's appointment of Judge Fannin was not a valid judicial appointment, and that order is vacated. Additionally, because Judge Fannin never had jurisdiction over this case, any orders entered by Judge Fannin are void." Ms. *6 (internal citations omitted).

DERIVATIVE SUIT – DEMAND REQUIREMENT – RULE 23.1, ALA. R. CIV. P. – MANDAMUS REVIEW

Ex parte 4tdd.com, Inc., et al., [Ms. 1180262, Mar. 27, 2020] __ So. 3d __ (Ala. 2020). The Court (Stewart, J.; Parker, C.J., and Bolin, Wise, Mendheim, and Mitchell, JJ., concur; Shaw and Sellers, JJ., concur in the result and Bryan, J., dissents) grants a petition for a writ of mandamus directing the Mobile Circuit Court to dismiss a shareholder's derivative suit for failure to comply with the demand-requirement of Rule 23.1, Ala. R. Civ. P.

While reiterating the concept that standing plays no role in private law cases, the Court holds that mandamus review is available to review denial of a motion to dismiss predicated on failure to comply with Rule 23.1:

> ... Rule 23.1 logically requires a threshold determination, and an avenue for mandamus review, as to whether the derivative action may be maintained by the plaintiff before any decision is made regarding whether to proceed toward litigation on the merits. There is no procedure for appealing from a wrongful determination of that issue before the entry of a final judgment on the merits. In other words, the only alternative to mandamus review would be for the corporation whose rights are at issue to appeal after a final judgment has been entered on the merits. Such an appeal obviously is not adequate to protect the corporation's right to prevent the maintenance of a derivative action by one who does not fairly and adequately represent the interests of the shareholders because the action will have been maintained by the time the corporation can file an appeal.

Ms. *18.

The Court granted the writ directing dismissal of the action upon concluding that the action was in fact derivative in nature:

> Hale has alleged injuries in support of her claims that ""fall[] directly on the corporation as a whole and collectively, but only secondarily, upon its stockholders as a function of and in proportion to their pro rata investment in the corporation."" *Ex parte Regions Fin. Corp.*, 67 So. 3d [45, 55 (Ala. 2010)] (interpreting Delaware law and quoting *In re Triarc Cos.*, 791 A.2d 872, 878 (Del. Ch. 2001), quoting in turn Donald J. Wolfe and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* §9-2, at 516 (1998)). We, therefore, conclude that Hale's ultra vires claims, breach-of-fiduciary-duty claim, and breach-of-contract claim are derivative claims that were asserted on behalf of BAN [Bay Area Nutrition, Inc.].

Ms. **23-24.

REVIEW OF JUDGMENT IN BAR DISCIPLINARY PROCEEDINGS – APPELLATE PROCEDURE

Walden v. Alabama State Bar Association, et al., [Ms. 1180203, Mar. 27, 2020] __ So. 3d __ (Ala. 2020). The Court (Mitchell, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur; Mendheim, J., concurs in the result) affirms the Montgomery Circuit Court's dismissal of declaratory and monetary claims brought by a disbarred attorney against the State Bar and members of a State Bar disciplinary panel.

As to the declaratory claims, the Court held, "[s]imply put, circuit courts in this State have no authority to reverse a judgment made by the State Bar in a disciplinary proceeding, to admit an attorney to the State Bar, or to direct the State Bar to reinstate an attorney who has previously been disbarred." Ms. *8.

The Court also affirmed the dismissal of the monetary claims "[b]ecause Walden has failed to address the State Bar defendants' arguments that the trial court had no ability to award him monetary damages because of the doctrines of State immunity and

quasi-judicial immunity…." Ms. * 11, citing *Devine v. Bank of New York Mellon Corp.*, [Ms. 1171002, Nov. 22, 2019] ___ So. 3d ___, ___ (Ala. 2019) ("When a trial court has stated that a judgment is warranted on multiple grounds, it is incumbent upon a party that subsequently appeals that judgment to address all of those grounds in the opening appellate brief because any issue not argued at that time is waived.").

COLLATERAL ATTACK IN PROBATE COURT ON PRIOR CIRCUIT COURT JUDGMENT

Ex parte Huntingdon College, [Ms. 1180148, Mar. 27, 2020] __ So. 3d __ (Ala. 2020). In a per curiam opinion, the Court (Parker, C.J., and Bolin, Wise, Sellers, Mendheim, Stewart, Mitchell, and Bryan, JJ., concur; Shaw, J., dissents) grants a petition for writ of mandamus filed by Huntingdon College, one of the beneficiaries of the Bellingrath-Morse Foundation, directing the Mobile Probate Court to dismiss an action filed by Foundation's Trustees seeking to modify a 2003 judgment entered by the Mobile Circuit Court incorporating a settlement agreement between the Trustees and all Foundation beneficiaries.

The opinion explains

> Because the trustees sought to revise the circuit court's judgment approving the terms of the 2003 Amendment, they were required to file in the circuit court a motion for relief from that judgment pursuant to Rule 60(b), Ala. R. Civ. P. See *Hardy v. Johnson*, 245 So. 3d 617, 621 (Ala. Civ. App. 2017)(noting that, generally, a motion filed pursuant to Rule 60(b)(5), Ala. R. Civ. P., "must be directed to the judgment in the case in which the motion was filed"); see also *EB Invs., L.L.C. v. Atlantis Dev., Inc.*, 930 So. 2d 502, 508(Ala. 2005)(noting that the "typical approach for attacking a judgment under Rule 60(b) is by filing a motion in the court that rendered the judgment"). Rather than filing a Rule 60(b) motion for relief from the judgment in the circuit court, the trustees initiated an entirely new proceeding in the probate court seeking review of the entirety of the Foundation, its operations, and its distributions, as if the previously negotiated 1981 Agreement and 2003 Amendment were of no effect. This action was procedurally improper as a matter of law.

Ms. **13-14.

SPECIAL-NEEDS TRUST – PAYMENT OF TRUSTEE FEE AFTER MEDICAID BENEFICIARY'S DEATH

Alabama Medicaid Agency v. Britton, [Ms. 2180926, Mar. 27, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Edwards, J.; Donaldson and Hanson, JJ., concur; Moore, J., concurs in the result; Thompson, P.J., recuses) affirms the Talladega Circuit Court's order approving the final settlement of a Special Needs Trust following the death of the beneficiary who was a Medicaid recipient.

The Alabama Medicaid agency objected to a $1,500 trustee fee paid from the trust corpus after the beneficiary's death. Ms. *2. The fee was for services rendered by the trustee prior to the beneficiary's death. Ms. *4. The Agency argued that

> ... [B]ecause the December 2018 compensation was for services provided during Cinnamon's life, 42 U.S.C. § 1396p(d)(4)(A), as interpreted by the Social Security Administration's Program Operations Manual System ("POMS"),[] prohibited any payment of that compensation until after the Agency received full payment for its claim.

Ms. *5.

The court noted that while "POMS is not a statute, nor is POMS a regulation; nevertheless, it has been held that POMS may receive deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)." Ms. *15. Nonetheless, the court rejected the Agency's argument that the trustee fee was a prohibited expense because

> Comparison of the categories of "[a]llowable administrative expenses" in POMS SI 001120.203E.1. and the "[p]rohibited expenses and payments" in POMS SI 001120.203E.2. supports the trial court's conclusion, and the Agency's argument to the contrary is not a reasonable reading of the language ....

Ms. **16-17.

The court also rejected the Agency's argument that its sovereign immunity precluded payment to the trustee for the fee earned in 2018. The court held that a trustee is not a third-party creditor of a trust and "that a trustee, who is a party to a trust, has a lien for payment of his or her services to a trust…." Ms. *18 n. 8. Because "[t]he Agency's right to payment from the trust ... arose only upon [the beneficiary's] death, any lien of the Agency could not have attached before her death…." Ms. **19-20.

MARRIED VENIRE MEMBERS – CHALLENGE FOR CAUSE – ADMISSION OF EVIDENCE – HARMLESS ERROR

Leftwich v. Brewster, [Ms. 1180796, Apr. 3, 2020] __ So. 3d __ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur; Shaw, J., concurs in the result) affirms the Etowah Circuit Court's denial of plaintiff Leftwich's motion for new trial following a defense verdict on a claim of negligent home inspection.

After noting that § 12-16-150 does not list marriage to a fellow venire member as a ground of presumed bias, the Court also observed that "Leftwich did not ask the Battleses any direct questions pertaining to their relationship and how it might impact their decision-making in the case. ... Based on the lack of legal authority and evidentiary support for Leftwich's claim of bias, we conclude that the trial court did not err in denying Leftwich's motion to strike the married jurors for cause." Ms. *24.

While noting that in some circumstances repair costs can be relevant to determining damages for real property, Ms. *27, the Court rejecting Leftwich's claim of error, explaining

> [I]n *Poffenbarger v. Merit Energy Co.*, 972 So. 2d 792, 801 (Ala. 2007), this Court held that "the appropriate measure of direct, compensatory damages to real property generally is the diminution in the value of that property, even when the cost to remediate the property exceeds the diminution in

the value thereof." Thus, Leftwich's estimates of repairs that exceeded the value of the home could not have been considered by the jury.... In short, the trial court's conclusion was the product of weighing what evidence was the most relevant and the least confusing to the jury. Given the deference we afford to a trial court's judgments on the admission and exclusion of evidence, we cannot conclude that the trial court exceeded its discretion in not allowing the evidence.

Ms. **27-28.

The Court also held that because the jury returned a general verdict "even if the trial court had erred in excluding Leftwich's evidence of repair costs, we could not conclude that the ruling probably injuriously affected Leftwich's substantial rights because the jury could have determined that Brewster did not breach a duty to Leftwich." Ms. *29.

DIVORCE – JURISDICTION – DOMICILE

Sahu v. Sahu, [Ms. 2180946, Apr. 3, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court unanimously (Edwards, J.; Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur) reverses the Montgomery Circuit Court's order dismissing a divorce action for lack of jurisdiction.

The Court reiterated and applied settled law that

> "Residence, for purposes of § 30-2-5, is the same thing as domicile. As has been noted before, domicile is an abstract concept. Alabama decisions hold that domicile requires two elements: (1) one's physical presence in the chosen place of residence, and (2) an accompanying intent to remain there, either permanently or for an indefinite length of time. It has been said that domicile is that place to which, whenever one is absent, he or she has an intent to return. When a party physically resides in one location, [t]he intention to return [to another location] is usually of controlling importance in the determination of the whole question [of domicile]."

Ms. *6, quoting *Livermore v. Livermore*, 822 So. 2d 437, 441-42 (Ala. Civ. App. 2001) (internal citations and quotation marks omitted).

"[T]he overall tenor of the husband's testimony was that he desired and intended to remain in Montgomery indefinitely to continue in his current employment and associated research at Alabama State University, even to the point of seeking to become a legal permanent resident. The fact that he has not announced plans to seek to become a naturalized citizen does not preclude him from establishing Alabama as his domicile." Ms. *9.

RES IPSA LOQUITUR

Nettles v. Pettway, [Ms. 1181015, Apr. 10, 2020] __ So. 3d __ (Ala. 2020). The Court (Sellers, J.; and Bolin, Shaw, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur; Parker, C.J., dissents) affirms the Wilcox Circuit Court's summary judgment dismissing a negligence claim against Pettway who installed after-market wheel rims and tires on Aaron's vehicle. Approximately twelve hours after Pettway installed the tires, one of the tires came off and struck Plaintiff Nettles who was standing in a yard adjacent to the street where Aaron was driving. Ms. *3.

Nettles presented no evidence of any specific act of negligence on Pettway's part and instead relied on the doctrine of *res ipsa loquitur*, Ms. *4, which requires that

> "'(1) [T]he defendant ... had full management and control of the instrumentality which caused the injury; (2) the circumstances [are] such that according to common knowledge and the experience of mankind the accident could not have happened if those having control of the [instrumentality] had not been negligent; [and] (3) the plaintiff's injury ... resulted from the accident.'"

Ms. **5-6, quoting *Ex parte Crabtree Industrial Waste, Inc.*, 728 So. 2d 155, 156 (Ala. 1998), quoting in turn *Alabama Power Co. v. Berry*, 254 Ala. 228, 236, 48 So. 2d 231, 238 (1950).

In applying these elements to the facts at hand, the Court held

> Nettles claims that this evidence supports an inference that Pettway negligently failed to properly inspect and verify the integrity of the studs. Nettles, however, provided no evidence to foreclose the possibility that the detachment of the wheel could have occurred as a result of the manner in which Aaron had operated the automobile during the 10 to 12 hours before the accident or as a result of internal latent defects in the wheel-assembly parts. Because Nettles offered no evidence to foreclose such possibilities, he did not satisfy the second element of the *res ipsa loquitur* doctrine. Simply put, one could reasonably conclude that the tire detached from the automobile without any negligence on Pettway's part.

Ms. *9.

PARENTAL RELOCATION – FINAL JUDGMENT – UNTIMELY APPEAL

Pitts v. Pitts, [Ms. 2180655, Apr. 10, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Thompson, P.J.; and Moore and Hanson, JJ., concur; Edwards, J., concurs in the result) dismisses the mother's appeal from the Pickens Circuit Court's order denying her request to relocate to Mississippi with her child and granting the father sole physical custody of the child if the mother and child did not return to Alabama by a certain date.

The court rejected the mother's argument that the November 30, 2018 order was not a final judgment. The court explained the November 30, 2018, judgment conditioned "a modification of custody upon a permanent relocation by a custodial parent as the parent had proposed. ... [N]o other action was required of the trial court to effectuate the change in custody. Therefore, the adjudication in the November 30, 2018, judgment fully disposed of the custody issue and made the judgment final as to all pending issues." Ms. *11.

"Because the mother's 'Motion to Set Hearing' was not filed within 30 days of the entry of the November 30, 2018, judgment, it was not timely filed pursuant to Rule 59(b) and(e). An untimely motion does not extend the period for filing a notice of appeal. *Vincent v. Kondaur Capital Corp.*, 274 So. 3d 998, 1001 (Ala. Civ. App. 2018). Therefore, the trial court properly determined in its April 8, 2019, order that it no longer had jurisdiction in the case." Ms. **14-15