RECENT CIVIL DECISIONS

Summaries from April 24, 2020 - September 4, 2020

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➲ Relation Back of Amendment Naming Correct Defendant – Rule 15, Ala. R. Civ. P.

Ex parte Marvin Gray, [Ms. 1180999, Apr. 24, 2020] __ So. 3d __ (Ala. 2020). The Court (Stewart, J.; and Parker, C.J., and Shaw, Wise, Bryan, Mendheim, and Mitchell, JJ., concur; Sellers, J., concurs in the result) denies Marvin Gray's petition for writ of mandamus contending that claims in an amended complaint adding him as a defendant were barred by the statute of limitations.

Rather than naming Gray, plaintiff had mistakenly named as a defendant the police officer who investigated the motor vehicle accident. Ms. *2. The Court concludes that pursuant to Rule 15(c)(3) Ala. R. Civ. P., the amendment adding Gray related back to the filing of the original complaint, explaining

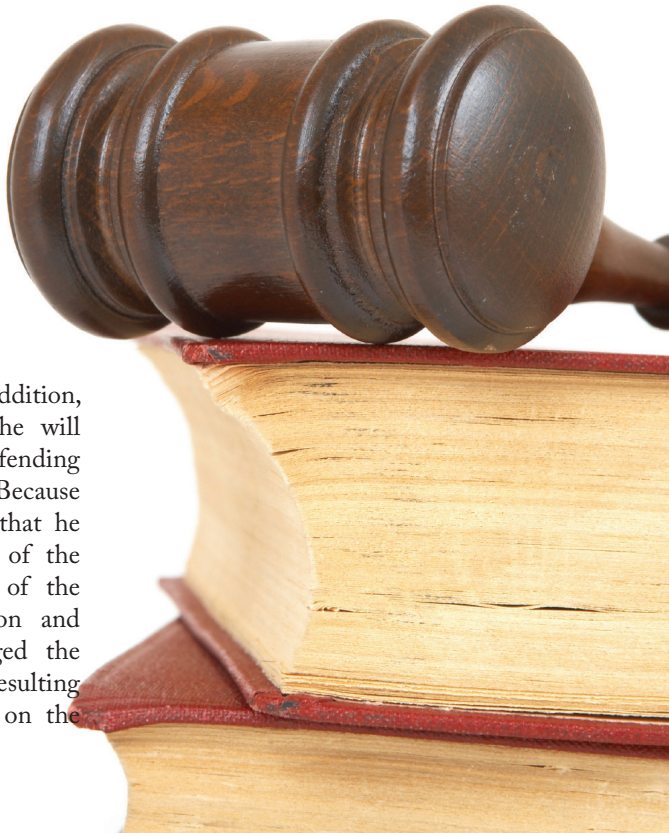
> Thomas filed the amended complaint naming Gray as a defendant 89 days after she filed the original complaint, which was within the 120-day period prescribed by Rule 15(c)(3). As explained above, Gray does not dispute that he was served with the amended complaint or that he otherwise received notice of the commencement of the action before the expiration of the 120-day period. In addition, Gray does not assert that he will suffer any prejudice from defending the action on the merits. Because Gray has failed to establish that he did not have proper notice of the complaint within 120 days of the commencement of the action and because Gray has not alleged the existence of any prejudice resulting from maintaining a defense on the merits, Gray has not demonstrated that Thomas's amendment should not relate back to the filing of the original complaint under Rule 15(c)(3).

Ms. **13-14.

➲ Availability of Mandamus Review – Direct Action Statute

Ex parte State Farm Fire & Casualty Co., [Ms. 1180451, Apr. 24, 2020] __ So. 3d __ (Ala. 2020). The Court (Mitchell, J.; and Parker, C.J., and Bolin, Wise, Mendheim, and Stewart, JJ., concur; Shaw and Bryan, JJ., concur in the result; Sellers, J., dissents) denies State Farm's petition for a writ of mandamus that contended plaintiff, who obtained a default judgment against a State Farm insured, was required to file a new direct action against State Farm rather than amending her complaint in the action against the insured. Ms. *3.

Citing its recent decision in *Ex parte State Farm Fire & Casualty Co.*, [Ms.



1170760, January 31, 2020] ___ So. 3d ___ (Ala. 2020), the Court holds that "State Farm has failed to meet its burden of establishing that it has no adequate remedy aside from a writ of mandamus. See *Ex parte Brian Nelson Excavating, LLC*, 25 So. 3d 1143, 1148 (Ala. 2009) (pretermitting consideration of the issue of law raised by the petitioner because of the availability of an adequate remedy on appeal)." Ms. *9.

Dram Shop – ABC Regulation Prohibiting Over-Serving

Everheart, Coachman, Coleman, Weatherspoon v. Rucker Place, LLC and Savoie Catering, LLC, [Ms. 1190092, 1190102, 1190110, 1190116, Apr. 24, 2020] __ So. 3d __ (Ala. 2020). The Court (Sellers, J.; and Bolin, Wise, Mendheim, Stewart, and Mitchell, JJ., concur; Parker, C.J., and Shaw and Bryan, JJ., dissent) affirms summary judgments entered for Savoie Catering, LLC and Rucker Place, LLC on dram shop claims predicated on the ABC Regulation 20-X-6.02(4) stating "No ABC Board on-premises licensee, employee or agent thereof shall serve any person alcoholic beverages if such person appears, considering the totality of the circumstances, to be intoxicated." Ms. **5-6.

Savoie did not hold an ABC license, while Rucker Place did. While Savoie served alcohol at the party where the intoxicated driver was served alcohol, Rucker Place did not serve food or beverages at the party. Ms. *6. The plaintiffs argued that "Savoie was actually acting as the agent of Rucker Place, which does hold an ABC on-premises license, when it served Bewley alcohol." Ms. *7.

The Court affirmed without reaching the question of joint venture/agency. The Court holds that Regulation 20-X-6-.02(4) does not apply, because the alcohol Savoie served was provided by the host of an off-site private party. Ms. *9. The Court explained

> [A] reasonable interpretation of Reg. 20-X-6-.02(4) is that it applies when the on-premises licensee, either as an individual or through its agents, is acting in its capacity as an on-premises licensee. In other words, the regulation is limited and applies only when a licensee is engaged in the activity contemplated by the on-premises license, i.e., selling and dispensing alcohol at the premises covered by the license.

Ms. **10-11.

Proximate Cause – Lost Profits – Circumstantial Evidence

Jostens, Inc., et al. v. Herff Jones, LLC, et al., [Ms. 1180808, Apr. 24, 2020] __ So. 3d __ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur) affirms the Mobile Circuit Court's judgment entered on a $3.15 million dollar jury verdict on claims of breach of contract, tortious interference and misappropriation of trade secrets predicated on breach of covenants not to compete in the highly competitive scholastic recognition business.

Defendants Jostens and two independent contractor salesmen for Jostens challenged the verdict on the sole ground that there was no substantial evidence that the damages for lost profits awarded Herff Jones and its sales agent were proximately caused by the allegedly wrongful acts of Jostens and its salesmen Wiggins and Urnis who had previously been affiliated with Herff Jones and who were subject to covenants not to compete. Ms. *23.

In affirming the Court explained

> "There is nothing wrong with a case built around sufficient circumstantial evidence, provided the circumstances are proved and not merely presumed. *Richards v. Eaves*, 273 Ala.120, 135 So. 2d 384 (1961). Any judgment in such a case must necessarily involve some amount of speculation or inference by the jury. There is conjecture only where there are two or more plausible explanations of causation, and the evidence does not logically point to one any more than the other. Where the evidence does logically point in one direction more than another, then a jury can reasonably infer that things occurred in that way." *Folmar v. Montgomery Fair Co.*, 293 Ala. 686, 690, 309 So. 2d 818, 821 (1975). ... As long as the circumstantial evidence presented by the plaintiffs was sufficient to allow the jury to reasonably infer that wrongful acts by the defendants led to the plaintiffs' loss of the 47 school accounts, direct evidence was not required to submit the issue of causation to the jury. See *Bell v. Colony Apartments Co.*, 568 So. 2d 805, 810-11 (Ala. 1990) ("A fact is established by circumstantial evidence if it can be reasonably inferred from the facts and circumstances adduced.").

Ms. **42-43.

The plaintiffs were not required to present direct, customer-by-customer evidence of the reasons each of the 47 blue-list schools switched from Herff Jones to Jostens in order for the issue of causation to be submitted to the jury. The plaintiffs presented ample circumstantial evidence that would allow the jury to infer that the defendants' wrongful conduct led to the plaintiffs' loss of the school accounts at issue. Ms. *48.

Workers' Compensation – Forum Non Conveniens

Ex parte Wal-Mart Associates, Inc., [Ms. 2190468, Apr. 24, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Edwards, J.; Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur) issues a writ of mandamus to the Mobile Circuit Court directing it to transfer a workers' compensation action to Baldwin County where the on-the-job injury occurred.

The court concludes transfer was required in the interest of justice because "[t]he connections between Martin's action and Mobile County – Martin's residency and Wal-Mart's operation of stores in Mobile County that have no relation to Martin's alleged accident – are weak. In contrast, the connections between Martin's action and Baldwin County, as described above, clearly are strong. Because Wal-Mart offered evidence indicating that Baldwin County has a strong connection to Martin's action and the evidence likewise would support only the conclusion that Mobile County has a weak connection to Martin's action, Mobile County must not be burdened with Martin's action. Accordingly, the trial court exceeded its discretion by denying Wal-Mart's motion to transfer; the interest of justice requires the transfer of Martin's action to Baldwin

County." Ms. *13.

➲ Justiciable Controversy – Civil Enforcement of Traffic-Signal Violations Captured By Video

The City of Montgomery and American Traffic Solutions, Inc. v. Hunter and Henderson, [Ms. 1170959, May 1, 2020] __ So. 3d __ (Ala. 2020);

Moore, Farmers, and DeBose v. City of Center Point and Redflex Traffic Systems, Inc., [Ms. 1171151, May 1, 2020] __ So. 3d __ (Ala. 2020);

Woodgett and Ruffin v. City of Midfield and American Traffic Solutions, Inc., [Ms. 1180051, May 1, 2020] __ So. 3d __ (Ala. 2020); and

Mills and Braswell v. City of Opelika and American Traffic Solutions, Inc., [Ms. 1180268, May 1, 2020] __ So. 3d __ (Ala. 2020).

In class actions challenging civil enforcement of traffic-control signal violations captured by video, these plurality opinions (Bolin, J.; and Bryan, Sellers, and Stewart, JJ., concur; Parker, C.J., and Mendheim, J., concur in the result; Shaw, Wise, and Mitchell, JJ., recuse) hold that no justiciable controversy exists between plaintiffs and the municipalities and companies operating automated photographic equipment. None of the putative class representatives had timely challenged the civil enforcement of the violations in the manner set out in the pertinent local acts and ordinances.

The subject local acts and ordinances provided procedures for challenging civil enforcement of violations, such as the Center Point ordinance providing "[a] person who receives a notice of violation may contest the imposition of the fine by submitting a request for an administrative hearing of the civil violation, in writing, within 15 days of the 10th day after the date the notice of violation is mailed." Ms. *1171151, p. 14.

The opinions explain that the failure to timely challenge the notice of violation was fatal to subject-matter jurisdiction in the trial courts:

> The plaintiffs accepted liability under the Act and the ordinance by failing to challenge their liability within the time and in the manner provided for in the Act and the ordinance. See § 6(c) of the Act and § 6.3 of the ordinance quoted *supra*, which provide that the failure to pay a the fine or to contest liability in a timely manner is an admission of liability under the Act and the ordinance. As was the case in *City of Midfield*, the plaintiffs' acceptance of liability under the Act and the ordinance settled the matter and mooted the controversy between the parties. Because there was no justiciable controversy between the parties at the time the declaratory-judgment action was filed, the trial court lacked subject-matter jurisdiction, and the trial court properly dismissed the action.

Ms. *1171151, p. 17.

➲ Ownership of CD In Joint Names – Inter Vivos Gift

Dupree v. PeoplesSouth Bank, [Ms. 1180095, May 8, 2020] __ So. 3d __ (Ala. 2020). In a plurality opinion, the Court (Mitchell, J.; Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur in the result) affirms the Houston Circuit Court's judgment for PeoplesSouth Bank on Brad Dupree's breach-of-contract claim alleging wrongful payment of the proceeds of a certificate of deposit.

Although the opinion rejects the trial court's conclusion that Brad's claim was barred by *res judicata*, it concludes that Brad failed to prove damages, because

> [W]here two parties' names appear on a CD and the funds used to purchase the CD belong[] to one of the parties, unless there is evidence that the party whose funds were used to purchase the CD intended to make a gift or create a trust, the other party's claim to the funds must fail. [*Ex parte Lovett*], 450 So. 2d 116, 118 (Ala. 1984).
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> … Because Brad undisputedly did not furnish any of the funds used to purchase the CD and because he is not a trustee over those funds, the only way he could prevail is if he established that the CD was an *inter vivos* gift to him from Jimmy. To prove the existence of such a gift, Brad was required to satisfy, by clear and convincing evidence, the following three elements: "[a]n intention to give and surrender title to, and dominion over, the property; delivery of the property to the donee; and acceptance by the donee." *First Alabama Bank of Montgomery v. Adams*, 382 So. 2d 1104, 1110 (Ala. 1980) (quoting *Garrison v. Grayson*, 284 Ala. 247, 249, 224 So. 2d 606, 608 (1969)). The trial court properly found that Brad did not carry his burden of proving that an *inter vivos* gift was made.

Ms. **15-16.

➲ Unjust Enrichment – Affirmative Defense

Pentagon Federal Credit Union v. McMahan, [Ms. 1180804, May 8, 2020] __ So. 3d __ (Ala. 2020). In a plurality opinion, the Court (Mendheim, J.; Bolin, Sellers, and Stewart, JJ., concur; Shaw, Bryan, and Mitchell, JJ., concur in the result; Parker, C.J., dissents; Wise, J., recuses) reverses the Baldwin Circuit Court's judgment on stipulated facts in an action concerning surplus proceeds of a post-foreclosure sale of a residence.

The central question was whether PenFed was entitled to deduct from the sale proceeds the $91,256 PenFed paid to settle Wells Fargo's first mortgage on the plaintiff's residence. Ms. *6. The circuit court concluded that PenFed had waived its defense of unjust enrichment by failing to include it in its responsive pleading. Ms. *8. The opinion rejects this conclusion, explaining

> This Court cannot find any authority characterizing the doctrine of unjust enrichment as an affirmative defense. Accordingly, PenFed did not waive the defense of unjust enrichment by failing to plead it in its responsive pleadings. Instead, PenFed raised the argument to the circuit court at trial and in its trial brief; the argument was properly before the circuit court. *Cf. GreenTree Acceptance, Inc. v. Blalock*, 525 So. 2d 1366, 1369 (Ala. 1988) (holding that a trial court may even consider an argument raised for the first time in a postjudgment motion).

Ms. *11.

➲ Timeliness of Appeal of Arbitration Award – Rule 71B, Ala. R. Civ. P.

Russell Construction of Alabama, Inc. v. Christopher Peat, [Ms. 1180979, May 22, 2020] __ So. 3d __ (Ala. 2020). The Court (Shaw, J.; Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur) reverses in part and affirms in part the Montgomery Circuit Court's order vacating arbitration awards in favor of Russell Construction of Alabama, Inc. in a dispute involving the construction of a residence.

The arbitration award resolving the parties' contract-balance dispute was issued on September 5, 2018. Under Rule 71B, Ala. R. Civ. P., a party dissatisfied with a final award is required to raise any challenge by timely filing his notice of appeal in the circuit court within 30 days of the entry of the award. Ms. **15-16. The home owner, Peat, failed to file an appeal within 30 days of September 5, 2018. The Court held "[w]e find no authority allowing a trial court to extend the time for filing the notice of appeal from an arbitrator's award beyond the deadline provided in Rule 71B or establishing exceptions thereto. In consideration of the foregoing, we conclude that the circuit court erred in setting aside the judgment [confirming the arbitration award on the contract-balance dispute] entered by the clerk in favor of Russell." Ms. *16.

The Court rejects Peat's effort to invoke Rule 60 to support the circuit court's order vacating the award because "Peat raises no grounds that could not have been raised in a timely appeal, and a Rule 60(b) motion cannot be used as a substitute for an appeal." Ms. *16, n. 5.

As to the arbitrator's second "Final Award" entered on March 7, 2019, which addressed subsequent breaches of a settlement agreement between the parties, the Court affirms. Within one week of the entry of that award, Peat filed an answer to Russell's Rule 71C motion to confirm the award. Ms. *17. "Peat's answer denied the enforceability of the award, sought a hearing, and included as stated defenses grounds for attacking the finality of the award, including fraud, as contemplated by § 6-6-14, Ala. Code 1975. Thus, the circuit court could properly have treated Peat's answer as a timely notice of appeal to the extent that it provided notice that Peat was challenging the Final Award." Ms. **17-18.

In its appellate brief, Russell did not include "argument and authority establishing that, based on its contents, Peat's answer was insufficient to be deemed a notice of appeal [of the second Final Award]. 'It is the appellant's burden to refer this Court to legal authority that supports [his] argument.' *Madaloni v. City of Mobile*, 37 So. 3d 739, 749 (Ala. 2009). Accordingly, Russell has waived this claim for purposes of appellate review." Ms. *19.

➲ State-Agent Immunity – School Bus Driver

Edwards v. Pearson, [Ms. 1180801, May 22, 2020] __ So. 3d __ (Ala. 2020). The Court (Stewart, J.; Bolin, Wise, and Sellers, JJ., concur; Parker, C.J., concurs in the result) affirms the Elmore Circuit Court's summary judgment for school bus driver Penny Pearson based on grounds of state-agent immunity. Raven Edwards, an eight-year-old child, who missed the bus at her designated stop, was killed by oncoming traffic as she ran to the bus as it approached a stop sign across from her home.

The plaintiff argued that because school bus stops are set by the board of education, in making the unscheduled stop at the intersection when she observed Raven running from her home, Pearson was not performing her duties as a bus driver. The Court rejected this argument holding that "there can be no question but that Pearson was performing her duties as a bus driver in supervising students when she stopped the school bus and exited the bus." Ms. *17.

The burden thus shifted to plaintiff to demonstrate that Pearson "'act[ed] willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law.'" *Ex parte Cranman*, 792 So. 2d 392, 405 (Ala. 2000). Ms. *17. The Court affirmed the summary judgment, holding

> "Pearson established that she was justified to stop the school bus at the intersection because she feared that Raven would cross the highway; it is undisputed that this is precisely what happened before Pearson could exit the bus. Nothing in the State handbook or the Elmore County handbook addressed what course of action a school-bus driver must take if the bus driver observes a student approaching a busy highway and the driver believes the student is in imminent danger. This is precisely the type of situation that requires an exercise of discretion, based on the circumstances as they are known to the school-bus driver at that time. As we have previously explained:
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> > 'State-agent immunity protects agents of the State in their exercise of discretion in educating [and supervising] students. We will not second-guess their decisions.' *Ex parte Blankenship,* 806 So. 2d 1186, 1190 (Ala. 2000)."

Ms. *21.

The Court rejected Edwards's argument, raised for the first time in her reply brief, that Pearson violated standards in employee handbooks. Ms. *22. The Court also noted that "Edwards did not submit with her response to Pearson's summary-judgment motion the full text of the handbooks, which would aid this Court in determining whether the rules in the handbooks were intended to be mandatory and whether they were applicable at the time of the accident." Ms. *22, n. 1. Thus, even if timely raised on appeal, the handbook argument would have failed on the merits.

➲ FELA – Summary Judgment Procedure – Isolated Deposition Excerpts

Mohr v. CSX Transportation, Inc., [Ms. 1180338, May 22, 2020] __ So. 3d __ (Ala. 2020). The Court (Mitchell, J.; Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur) affirms a summary judgment entered by the Mobile Circuit Court for CSX Transportation, Inc. in an FELA action by Mohr, a CSX bridge mechanic. Mohr was injured when the cuff of his leather glove supplied by CSX was caught on the edge of a sheet metal pile being lifted by a crane. As a result, Mohr was lifted up and fell 10 feet on to some rip rap below the bridge.

Mohr argued that CSX breached its duty under the FELA to provide a safe work place by providing standard leather

work gloves. On appeal of the summary judgment, "Mohr argue[d] that his and Laufhutte's [a co-worker] deposition testimony constitutes substantial evidence indicating (1) that the standard leather work gloves he was issued were not reasonably safe and (2) that CSX had knowledge of the danger posed by the gloves." Ms. *12.

The Court rejects this argument noting that the "Court has cautioned against the practice of relying on isolated excerpts of deposition testimony to argue in favor of a proposition the testimony as a whole does not support. 'Even if portions of her expert's testimony could be said to be sufficient to defeat a summary-judgment motion when viewed 'abstractly, independently, and separately from the balance of his testimony,' 'we are not to view testimony so abstractly.' *Hines v. Armbrester*, 477 So. 2d 302, 304 (Ala. 1985).' *Giles v. Brookwood Health Servs., Inc.*, 5 So. 3d 533, 550 (Ala. 2008). See also *Riverstone Dev. Co. v. Garrett & Assocs. Appraisals, Inc.*, 195 So. 3d 251, 257-58 (Ala. 2015) (explaining that this Court's standard of review when reviewing a trial court's ruling on a motion for a judgment as a matter of law requires us to consider a witness's testimony as a whole, not just isolated excerpts)." Ms. *15.

Viewed as a whole, the deposition testimony of Mohr and Laufhutte did not provide "substantial evidence indicating that, before Mohr's accident, CSX knew or should have known that the leather work gloves it provided to its employees were not reasonably safe." Ms. *27.

The Court also affirms as to Mohr's claim that CSX failed to provide a safe place to work by not requiring more than one tag line on a load suspended by a crane, explaining

> "A railroad breaches its duty to provide a safe workplace if it 'knew or should have known of a potential hazard in the workplace, and yet failed to exercise reasonable care to inform and protect its employees.'" *Tootle*, 746 F. Supp. 2d at 1337 (quoting *Ulfik*, 77 F.3d at 58). It is undisputed that CSX had appropriately recognized that a load suspended by a crane presents a potential hazard because it might begin to rotate. CSX therefore had a safety rule in place requiring its employees to use tag lines to control such loads. That safety rule left it to the discretion of the employees to determine how many tag lines are necessary, and all four members of Mohr's crew, as well as their supervisor May, testified that it was reasonable to use one tag line for the task the crew was performing when Mohr was injured. There is no testimony in the record indicating otherwise, and "'the mere fact that the injury occurred'" is insufficient to show that CSX's safety rules were not adequate. *Glass*, 905 So. 2d at 793 (quoting *Atlantic Coast Line R.R. v. Dixon*, 189 F.2d 525, 527 (5th Cir. 1951)). See also *Durso v. Grand Trunk Western R.R.*, 603 F. App'x 458, 460 (6th Cir. 2015) ("To be actionable, the railroad must have known or should have known that the standards of conduct were not adequate to protect its employees."). In the absence of any evidence indicating that CSX should have known that one tag line was insufficient to protect its employees at the time Mohr was injured, CSX was entitled to a judgment as a matter of law on Mohr's claim.

Ms. **28-29.

➲ Uninsured Motorist Insurance Coverage

Turner v. State Farm Mut. Ins. Co., [Ms. 1181076, May 29, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Bryan, J.; Parker, C.J., and Bolin, Shaw, Wise, Sellers, Stewart and Mitchell, JJ., concur; Mendheim, J., concurs in part and concurs in the result) affirms a summary judgment entered by the Baldwin Circuit Court in favor of State Farm in a case seeking underinsured motorist insurance benefits when the plaintiff accepted a tortfeasor's settlement offer and released the tortfeasor from liability in derogation of State Farm's "Consent-to-Settle" contractual provision. Citing *Lambert v. State Farm Mut. Auto. Ins. Co.*, 576 So. 2d 160, 167 (Ala. 1991) (Ms. *11), the Court reiterates that:

> "[T]he purpose of consent-to-settle clauses in the uninsured/underinsured motorist insurance context is to protect the underinsured motorist insurance carrier's subrogation rights against the tort-feasor, as well as to protect the carrier against the possibility of collusion between its insured and the tortfeasor's liability insurer at the carrier's expense."

Id. Because the plaintiff accepted the tortfeasor's settlement offer and released the tortfeasor and his liability insurance carrier from liability, any subrogation interest State Farm may otherwise have had against either of those parties was extinguished. *Id.*, Ms. **11-12. Accordingly, the plaintiff repudiated his contract with State Farm with the result that "when one party repudiates a contract, the non-repudiating party is discharged from its duty to perform." *Id.* at *12, quoting *Beauchamp v. Coastal Boat Storage, LLC*, 4 So. 3d 443, 451 (Ala. 2008). Thus, when the plaintiff refused to abide by the terms of the consent-to-settle provision in his policy with State Farm, he repudiated the contractual agreement and State Farm's obligation to pay UIM benefits to the plaintiff was discharged. *Ibid.*

The Court suggests, albeit in *dicta*, that a party can seek injunctive relief from the trial court in determining whether an uninsured/underinsured motorist insurance carrier is unreasonably withholding its consent to settle with a tortfeasor. See discussion at Ms. **23-25, citing *United Services Automobile Ass'n v. Allen*, 519 So. 2d 506 (Ala. 1988).

➲ Construction of Art. IV, § 94.01, Ala. Const. 1901 (Off. Recomp.)/§ 35-4-410, Ala. Code 1975, Regarding City's Development of Recreational Property for Retail Use

Kennamer v. City of Guntersville, [Ms. 1180939, May 29, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Bolin, Shaw, Wise, Sellers, Stewart, and Mitchell, JJ., concur; Bryan, J., concurs in the result) affirms the dismissal of a complaint seeking a declaratory judgment, a preliminary injunction and a permanent injunction against the City of Guntersville and its elected representatives regarding the City's intention to develop property for retail purposes. Reviewing the history of development of county and municipal industrial development boards, the Court concludes that § 94.01 is to be

construed to permit retail development despite any conflicting language in § 35-4-410 as earlier construed in *McDonald's Corp. v. DeVenney*, 415 So. 2d 1075 (Ala. 1982) and *Brown v. Longiotti*, 420 So. 2d 71 (Ala. 1982). "When the Constitution and a statute are in conflict, the Constitution controls." Ms. *38, quoting *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987). Accordingly, the Marshall Circuit Court did not err in dismissing plaintiff's complaint.

➲ Mandamus and Ala. R. Civ. P. 12(b)(2) Dismissal For Want of Personal Jurisdiction

Ex parte TD Bank US Holding Co., [Ms. 1180998, May 29, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Stewart, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Mendheim, JJ., concur; Mitchell, J., recuses) grants TD Bank's Petition for a Writ of Mandamus and directs the Jefferson Circuit Court to grant TD Bank's motion to dismiss premised upon a Rule 12(b)(2) motion to dismiss for want of personal jurisdiction. The record demonstrated that TD Bank established prima facie that the Jefferson Circuit Court was without general or specific personal jurisdiction as demonstrated through a TD Bank employee's affidavit revealing no connections with the State of Alabama. Plaintiff failed to respond to the motion to dismiss. Having established prima facie that the trial court was without personal jurisdiction, the burden shifted to plaintiff to substantiate the jurisdictional allegations in the complaint. *Ex parte Güdel AG*, 183 So. 3d 147, 156 (Ala. 2015). Because plaintiff did not meet this burden, TD Bank's motion to dismiss should have been granted.

➲ Protected Game Animals § 9-11-30(a), Ala. Code 1975 and Rules of Statutory Construction

Blankenship v. Kennedy, [Ms. 1180649, May 29, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Mitchell, J.,; Parker, C.J., and Stewart, J., concur; Bolin, Shaw, Wise, Bryan and Mendheim, JJ., concur in the result; Sellers, J., dissents) issues a plurality opinion that hybrid white tail deer artificially inseminated with mule-deer semen are not, according to the plain meaning of § 9-11-30(a), Ala. Code 1975, "protected game animals" based solely on the fact that they are the offspring of white tail deer. The Montgomery Circuit Court's Order on a motion for a judgment on the pleadings holding otherwise was in error.

The issue arose because of a letter from the Alabama Department of Conservation and Natural Resources advising Alabama game breeders that hunting mule-deer hybrids is prohibited by § 9-11-503, Ala. Code 1975.

The opinion analyzes two competing principles of statutory interpretation – the series-qualifier principle and the rule of the last antecedent – to discern the plain and unambiguous meaning of § 9-11-30(a). The series-qualifier principle is "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Ms. **8-9, quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 19, at 147 (Thomson/West 2012). The rule of the last antecedent is "[a] pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent." Ms. *9, quoting Scalia & Garner, *Reading Law* § 18, at 144. Relying upon *Lockhart v. United States*, ___ U.S. ___, 136 S. Ct. 958 (2016) for guidance on how to determine which of the rules of statutory construction to apply (Ms. **10-16), the Court holds that the rule of the last antecedent applies such that the phrase "and their offspring" in § 9-11-30(a) does not modify "white tail deer" so that the hybrid deer are not "protected game animals" based solely on the fact that they are offspring of white tail deer.

➲ Implied Contracts and Prompt Pay Act, §§ 8-29-1 through 8-29-8, Ala. Code 1975

Autauga Creek Craft House, LLC V. Brust, [Ms. 2180300, May 29, 2020] ___ So.3d ___ (Ala. Civ. App. 2020). The Court of Civil Appeals (Donaldson, J.; Thompson, P.J., and Hanson, J., concur; Moore and Edwards, JJ., concur in the result) affirms in part and reverses in part the judgments entered by the Autauga Circuit Court in a dispute over labor and construction costs and attorney's fees following a non-jury trial concerning the contractor's claims of damages. The court affirms the judgment of the Autauga Circuit Court to the extent it awarded damages to the contractor on a theory of *quantum meruit* arising from an implied contract between the parties. The court notes the elements required for implied contracts:

> "'The basic elements of a contract are an offer and an acceptance, consideration, and mutual assent to the essential terms of the agreement. '*Hargrove v. Tree of Life Christian Day Care Ctr.*, 699 So. 2d 1242, 1247 (Ala. 1997). Proof of an implied contract requires the same basic elements as an express contract. *Steiger v. Huntsville City Bd. of Educ.*, 653 So. 2d 975, 978 (Ala. 1995)(explaining that '[n]o contract is formed without an offer, an acceptance, consideration, and mutual assent to terms essential to the contract' (citing *Strength v. Alabama Dep't of Fin.*, 622 So. 2d 1283, 1289 (Ala. 1993)))."

Ms. **32-33, quoting *Stacey v. Peed*, 142 So. 3d 529, 531 (Ala. 2013). Because as found by the trial court, the parties had reached an agreement that the contractor would perform services and be compensated for those services, the facts meet the legal requirements for implied contract even though the terms of compensation were not fixed. Ms. *34, citing, *inter alia*, *Evans v. Dominick, Fletcher, Yielding, Acker, Wood & Lloyd, P.A.*, 494 So. 2d 657, 658 (Ala. Civ. App. 1986). And while the parties may have disagreed about the meaning of the testimony, because it was heard by the trial court ore tenus, the trial court's "findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust." Ms. **34-35, quoting *Jewett v. Boihem*, 23 So. 3d 658, 660-61 (Ala. 2009).

The court notes "a contract involving work performed by an unlicensed party is unenforceable if the work required a licensed general contractor as defined in § 34-8-1, Ala. Code 1975." Ms. *36. Since the work at issue involved less than $50,000.00, § 34-8-1(a), Ala. Code 1975, did not require this contractor to be a

licensed "general contractor." Ms. *37, citing *Dabbs v. Four Tees, Inc.*, 36 So. 3d 542, 555 (Ala. Civ. App. 2008).

The court affirms the trial court's award of 12% interest on the judgment because 1% per month or 12% per annum is mandated by § 8-29-3(d), Ala. Code 1975, a part of the Prompt Pay Act. Ms. **38-39.

Finally, the court reverses the judgment of the trial court which refused to award the contractor attorney's fees as attorney's fees are mandated by § 8-29-6 of the Prompt Pay Act upon a finding that an owner has not made payment in compliance with the Act. Because the trial court entered a judgment in favor of the contractor and awarded him damages and interest, § 8-29-6 mandated that he also be awarded attorney's fees. Ms. **40-42.

➲ Fraud in the Inducement and Reliance

Wood v. ADT, [Ms. 2180739, May 29, 2020] ___ So.3d ___ (Ala. Civ. App. 2020). The court (Donaldson, J.; Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur) affirms a partial summary in favor of a home security company and its local contractor entered by the Lee Circuit Court following extensive briefing and consideration of voluminous documents and telephonic recordings which revealed an absence of genuine issues of material facts concerning plaintiff's reliance upon representations made by the security company's personnel to induce her to install a residential security system. Because the security system's local dealer's representative made oral representations at the point of sale contradicting the representations earlier made by the security company's telephone sales personnel, those contradictions imposed a duty upon the plaintiff to inquire and to investigate in order to protect her own interests before signing any written contract, authorizing the installation of any equipment or paying any additional money. Ms. **37-39. Plaintiff did not do so. Only after money had been paid did she read the written contract and realize that the contract contradicted representations previously made. Because plaintiff could have waited to obtain and read the written contract before she paid the additional money, authorized the installation of the equipment or signed the written contract, she could not be deemed to have reasonably relied upon any oral fraudulent inducements.

➲ Forum Non Conveniens – Interest-of-Justice Transfer

Ex parte Sean Michael Allen, et al., [Ms. 1190276, June 5, 2020] __ So. 3d __ (Ala. 2020). The Court (Parker, C.J.; Bolin, Shaw, Wise, Bryan, Mendheim, and Mitchell, JJ., concur; Sellers and Stewart, JJ., concur in the result) issues a writ of mandamus directing the Macon Circuit Court to transfer this motor vehicle collision case to the Lee Circuit Court under the interest-of-justice prong of the forum non conveniens statute, § 6-3-21.1, Ala. Code 1975.

> "Although it is not a talisman, the fact that the injury occurred in the proposed transferee county is often assigned considerable weight in an interest-of-justice analysis,'" *Ex parte Southeast Alabama Timber Harvesting, LLC*, 94 So. 3d 371, 375 (Ala. 2012) (quoting *Ex parte Wachovia Bank, N.A.*, 77 So. 3d 570, 573-74 (Ala. 2011)), because "litigation should be handled in the forum where the injury occurred," *Ex parte Fuller*, 955 So. 2d 414, 416 (Ala. 2006)." Specific reasons for focusing on the location of the injury include "the burden of piling court services and resources upon the people of a county that is not affected by the case and ... the interest of the people of a county to have a case that arises in their county tried close to public view in their county." *Ex parte Smiths Water & Sewer Auth.*, 982 So. 2d 484, 490 (Ala. 2007). Here, the accident occurred and Drisker's injuries were sustained in Lee County."

Ms. **5-6.

"Transfer in the interest of justice was warranted because the only connection Macon County has to this case is that Drisker resides there. Thus, Macon County has a weak connection to the case, and Lee County has a strong one." Ms. *8.

➲ Ethics Law – § 36-25-24(a), Ala. Code 1975

Craft v. McCoy, et al., [Ms. 1180820, June 5, 2020] __ So. 3d __ (Ala. 2020). The Court (Bolin, J.; Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur; Parker, C.J., dissents) affirms the Lee Circuit Court's summary judgment dismissing a complaint by the Crafts against the members of the Lee County Board of Education and the school Superintendent. The Crafts, who were employed as HVAC technicians by the Board, alleged that after they contacted the State Ethics Commission regarding possible ethics violations by members of the Board and an assistant superintendent, they were subject to adverse employment action by the Board in violation of § 36-25-24(a), Ala. Code 1975. The circuit court construed § 36-25-24(a)'s protection as applying only to an employee who files a formal complaint with the Ethics Commission.

> The Court affirms, holding
>
> …recognizing that we must strive to interpret a statute as a harmonious whole, see *City of Montgomery v. Town of Pike Road*, 789 So. 3d 575, 580 (Ala. 2009), we observe that subsections (b), (c), (e), and (f) of § 36-25-24 each focus on acts involving or resulting from the filing of a complaint with the Commission. Admittedly, subsection (c) recognizes that other means exist to "initiate action" regarding an alleged violation of the Code of Ethics. However, a harmonious reading of all the subsections in § 36-25-24 requires the conclusion that the legislature's intent in § 36-25-24(a) was to prevent retaliation by an employer against a public employee when the employee files a complaint with the Commission.

Ms. **20-21.

➲ State-Agent Immunity – Municipal Police Officer

Walters v. De'Andrea and Progressive Cas. Ins. Co., [Ms. 1190062, June 5, 2020] __ So. 3d __ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Wise, Sellers, Stewart, and Mitchell concur; Bryan, J., concurs in the result; Bolin and Shaw, JJ., dissent) reverses the Montgomery Circuit Court's summary judgment conferring State-agent immunity on Montgomery Police Department (MPD) Patrol Officer Jessica De'Andrea for claims asserting that she struck Walters's motorcycle from the rear with her patrol vehicle as both were waiting for a red light to change. The officer testified that at the time of the accident,

she had completed her patrol duties and was returning to headquarters to turn in her paperwork in conformance with MPD policy. Ms. *2.

The Court holds Officer De'Andrea was not entitled to immunity, explaining

> "A government employee sued for a tortious act committed in the line and scope of his employment may, in an appropriate case (i.e., where the employee has breached a duty he owes individually to a third party), be sued individually." *Wright v. Cleburne Cty. Hosp. Bd., Inc.*, 255 So. 3d 186, 191 (Ala. 2017). The *Wright* Court provided as an example that "a driver on an errand for his employer owes an individual duty of care to third-party motorists whom he encounters on public roadways." *Id.*
>
> The *Cranman* Court itself observed: "As an example, there should be some recognizable difference in legal consequence between, on the one hand, a prison warden's decision not to fire or not to sanction the entity contracting with the State Department of Corrections to provide medical services and, on the other hand, a decision by the driver of a pickup truck on how to drive through or around potholes while transporting prisoners. Each situation involves judgment or discretion. Under our recent cases, the warden is immune [citing *Ex parte Davis*, 721 So. 2d 685 (Ala. 1998),] and the truck driver is not [citing *Town of Loxley v. Coleman*, 720 So. 2d 907 (Ala. 1998)]." *Ex parte Cranman*, 792 So. 2d at 404 (emphasis added). The duty at issue here – "the conduct made the basis of the claim against [De'Andrea]" – was nothing more or less than the duty of due care that every driver on the roadway owes to other motorists. *Cranman*, 792 So. 2d at 405. Under *Venter* and other authorities, such an action is not clothed with State-agent immunity.

Ms. **16-17.

➲ Juror Misconduct – Internet Search

Resurrection of Life, Inc. v. Dailey, [Ms. 1180154, June 5, 2020] __ So. 3d __ (Ala. 2020). The Court (Mitchell, J.; Parker, C.J., and Wise, Mendheim, and Stewart, JJ., concur; Bolin, Shaw, Bryan, and Sellers, JJ., concur in the result) denies the day-care defendants' motion for new trial based solely on juror misconduct based upon a juror conducting an internet search on the meaning of a word.

> "Juror misconduct involving the introduction of extraneous information necessitates a new trial only when: "1) the jury verdict is shown to have been actually prejudiced by the extraneous material; or 2) the extraneous material is of such a nature as to constitute prejudice as a matter of law." *Ex parte Apicella*, 809 So. 2d 865, 870 (Ala. 2001) (abrogated on other grounds, *Betterman v. Montana*, __ U.S. __, 136 S. Ct. 1609 (2016)). But no single fact or circumstance determines whether a verdict is unlawfully influenced by a juror's misconduct. 809 So. 2d at 871. Instead, the unique facts and circumstances of each case determine whether juror misconduct resulted in prejudice requiring a new trial."

Ms. *14. The Court affirms denial of the motion for new trial because the trial court conducted an adequate investigation and found "based on competent evidence, the alleged prejudice to be lacking…." Ms. *15.

> The Court holds
>
> The day-care defendants were required to show that at least one juror had been motivated by the extraneous information to decide the case in a particular manner or that there was evidence proving that juror misconduct continued to occur and that the new misconduct affected the verdict. *Ankor Energy, LLC v. Kelly*, 271 So. 3d 798, 809 (Ala. 2018); *Dawson*, 710 So. 2d at 475; *Bascom v. State*, 344 So. 2d 218, 222 (Ala. Crim. App. 1977). The day-care defendants failed to make this showing.

Ms. *20.

➲ Award of Fees Under Prevailing-Party Provision

SMM Gulf Coast, LLC v. Dade Capital Corp. and David Fournier; Collier, et al. v. Dade Capital Corp. and David Fournier, [Ms. 1170743; 1170771, June 5, 2020] __ So. 3d __ (Ala. 2020). Applying *de novo* review, the Court (Parker, C.J.; Bolin, Wise, Bryan, Mendheim, and Stewart, JJ., concur; Sellers, J., dissents) reverses the Mobile Circuit Court's denial of the Defendants' request for attorney fees and other amounts pursuant to a prevailing-party provision. The Court holds that claims for attorney fees, court costs, and litigation expenses were not compulsory counterclaims that were waived when not asserted in Defendants' answers. Ms. *16. The Court rejects the trial court's conclusion that it lacked jurisdiction to award attorney fees after a final judgment was entered, explaining "a trial court has jurisdiction to award attorney fees and costs after entering a final judgment because such requests are collateral to the merits." Ms. **18-19.

The Court holds "a party requesting attorney fees, court costs, and litigation expenses in accordance with a prevailing-party provision is not required to make that request within a motion invoking Rule 59(e), nor is such a party required to file that request within the 30-day postjudgment period set forth in Rule 59(e)." Ms. *25.

➲ Collateral Attack On Administrative Agency Ruling – Intrinsic Fraud

Ex parte Washington County Students First, et al., [Ms. 2190529, June 5, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Hanson, J.; Thompson, P.J., and Moore, Donaldson, and Edwards, JJ., concur) issues a writ of mandamus to the Washington Circuit Court directing dismissal of an action filed by the Washington County Education Association ("WCEA"). Plaintiffs WCEA and certain affiliated individuals sought an order setting aside the Alabama Public Charter School Commission's ("the Commission") approval of an application by Washington County Students First ("WCSF") for the approval of a charter school. WCSF's petition for a writ of mandamus asserted that the action should be dismissed because the WCEA failed to exhaust administrative remedies. Ms. *5. The Plaintiffs countered that they did not seek to collaterally attack the Commission's decision but to show that WCSF committed fraud on the Commission.

The court rejects this distinction, observing that

> "'[W]hen the law has vested a special board, commission or tribunal with authority to hear and determine matters arising in the course of its duties, its decisions on those matters are conclusive, and like the judgments of courts, cannot be collaterally attacked in another proceeding.' *City of Lubbock v. Corbin*, 942 S.W.2d 14, 22 (Tex. App. 1996). The decision of an administrative agency acting in a quasi-judicial capacity is not subject to collateral attack if the agency had jurisdiction over the parties and the subject matter. *In re Applications T-851 and T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004); *Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996)."

Ms. **8-9, quoting *Bishop State Community College v. Williams*, 4 So. 3d 1152, 1159 (Ala. Civ. App. 2008). The fraud asserted by the Plaintiffs did not allow a collateral action because it was "[i]ntrinsic fraud [which] necessarily includes, for example, perjury of a party to a case or controversy, such as the false statements allegedly made by the Defendants to the Commission. See generally *Greathouse v. Alfa Fin. Corp.*, 732 So. 2d 1013, 1016-17 (Ala. Civ. App. 1999) (allegedly false statements contained in affidavit filed in collections action amounted to intrinsic fraud rather than 'fraud on the court')." Ms. *7, n. 9.

In dismissing the action as a collateral attack, the court explains "[a]llegations of fraud before a deliberative body should be brought before the body which was the victim of the alleged fraud." Ms. **11-12, quoting *Wyatt v. United States*, 23 Cl. Ct. 314, 319 (1991).

➲ Requirements for Issuance of Injunction – Appellate Procedure

Winston County Bd. of Health v. Clark, [Ms. 2190074, June 12, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Thompson, P.J.; Moore, Donaldson, Edwards, and Hanson, JJ., concur) affirms the Winston Circuit Court's judgment denying the Winston County Board of Health's request for an injunction requiring the Clarks to install a sanitary sewer system at their residence in rural Winston County. Notwithstanding the board's convincing proof of the Clarks' violation of law by discharging raw sewage on their property, the Court affirms because,

> "In its appellate brief, the board does not mention the requirements for obtaining an injunction, and there is no discussion or analysis regarding whether it met those requirements in this case. Arguably, the board's discussion of the applicable statutes and the undisputed facts may be construed as an argument that it demonstrated success on the merits, but, as to the other elements required for the issuance of a permanent injunction, i.e., a showing that there exists a substantial threat of irreparable injury if the injunction is not granted, that the threatened injury to the plaintiff outweighs the harm the injunction may cause the defendant, and that granting the injunction will not disserve the public interest, *Vestlake Communities Prop. Owners' Ass'n, Inc.*, *supra*, the board's brief is silent.
>
> As has been stated many times, it is not an appellate court's function to craft arguments for the parties. *Jimmy Day Plumbing & Heating, Inc. v. Smith*, 964 So. 2d 1, 9 (Ala. 2007) (""[I]t is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument.'" *Butler v. Town of Argo*, 871 So. 2d 1, 20 (Ala. 2003)(quoting *Dykes v. Lane Trucking, Inc.*, 652 So. 2d 248, 251 (Ala. 1994)).").

Ms. **8-9.

➲ Requirements for Order Granting Preliminary Injunction

City of Trussville v. Personnel Board of Jefferson County, [Ms. 2190075, June 12, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Thompson, P.J.; Moore and Donaldson, JJ., concur; Edwards, J., concurs in the result; and Hanson, J., recuses) reverses a preliminary injunction issued by the Jefferson Circuit Court prohibiting the City of Trussville from forming its own civil-service system separate from the Jefferson County Personnel Board.

> "[T]he trial court's order merely recited two of the elements to be proven to warrant the granting of the preliminary injunction and did not specify its own reasons for issuing the injunction. Thus, the order does not comply with the mandatory requirements of Rule 65(d)(2), and this court is required to reverse the order issuing the preliminary injunction. As a result, 'we need not consider whether the evidence ultimately supports the issuance of the preliminary injunction because the order is due to be reversed regardless of whether the evidence supports the issuance of the injunction.'"

Ms. *13, quoting *Stephens v. Colley*, 160 So. 3d 278, 283 (Ala. 2014).

➲ Injunction – Mootness

Rogers v. Burch Corporation, [Ms. 1190088, June 19, 2020] __ So. 3d __ (Ala. 2020). The Court (Bolin, J.; Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur) dismisses as moot an employee's appeal from a preliminary injunction prohibiting him from soliciting customers or employees of his former employer. Because the two-year period established by the employment agreement expired December 6, 2019, the Court holds "there is nothing justiciable concerning the preliminary injunction because the nonsolicitation clause in the employment agreement expired, at the latest, on December 6, 2019." Ms. *15. The Court explains that

> "The primary purpose of injunctive relief ... is to prevent future injury. See *Williams v. Wert*, 259 Ala. 557, 559, 67 So. 2d 830, 831 (1953) ('The court cannot enjoin an act which has occurred.'); 43A C.J.S. *Injunctions* 17 (2014) ('Equity will not usually issue an injunction when the act complained of has been committed and the injury has already occurred.')."

Ms. **13-14, quoting *Irwin v. Jefferson Cty. Pers. Bd.*, 263 So. 3d 698, 704 (Ala. 2018).

➲ Mortality Table – Permanent Injury – Error Preservation

Hicks v. Allstate; Allstate v. Hicks, [Ms. 1170589; 1170632, June 19, 2020] __ So. 3d __ (Ala. 2020). The Court (Stewart, J.; Parker, C.J., and Wise, J., concur; Bolin and Sellers, JJ., concur in the result) reverses the Madison Circuit Court's denial of plaintiff's motion for new trial following a plaintiff's verdict for $135,000 in a motor vehicle collision case. The circuit court refused to admit a mortality table into evidence because it determined that Hicks's injuries were not permanent. Ms. *7. The Court reverses, holding

> Although Dr. Murray [the plaintiff's surgeon] did not specifically mention the words "permanent injury" he testified that the hardware inserted during the surgery – screws, rods, and "spacers" between Hicks's vertebrae – is likely to remain permanently in Hicks's body. He testified that, as a result of the surgery, the spinal bones that were involved in the operation no longer bend, which adds stress to the joints above those bones. When asked about the effect that the surgery he performed on Hicks in 2009 could have on the development of her spondylolisthesis, Dr. Murray responded: "[W]hen you operate on anyone, even the smallest operation, you do not strengthen the spine. In fact, you take a little bit of strength away from the spine." He testified that Hicks had a "10 to 15 percent chance of developing adjacent level significant disease." Finally, Dr. Murray testified that he was certain that there would be an impairment rating associated with the surgery he performed on Hicks.

Ms. **12-13.

On Allstate's cross appeal, the Court (Stewart, J.; Parker, C.J., and Bolin and Wise, JJ., concur; Sellers, J., concurs in the result) affirms the circuit court's denial of Allstate's motion for partial judgment as a matter of law asserting that plaintiff failed to prove her spinal fusion surgery was necessitated by the accident. The Court explains

> "Allstate did not make a postjudgment motion for a partial judgment as a matter of law on the issue of causation. Therefore, Allstate did not preserve its causation argument for appellate review."

Ms. *10.

➲ State-Agent Immunity

Odom v. Helms, et al., [Ms. 1180749, June 26, 2020] __ So. 3d __ (Ala. 2020). The Court (Parker, C.J.; Shaw, Bryan, Mendheim, and Mitchell, JJ., concur) affirms the Butler Circuit Court's summary judgment dismissing claims against supervisors of former state trooper McHenry who sexually assaulted Odom following a traffic accident where then trooper transported Odom from the scene. Odom asserted claims against the supervisory defendants for "failure to properly train and supervise McHenry and for violating various law-enforcement policies and procedures." Ms. *3. To avoid State-agent immunity, Odom contended that the supervisory defendants acted willfully and beyond the scope of their authority in "fail[ing] to supervise McHenry ... after he violated the [r]elay procedure" that required him to notify the trooper post of his starting and ending mileage when he transported Odom from the accident scene. Ms. *7.

> "To meet the willfulness exception, a plaintiff must show more than that the defendant was negligent. See *City of Birmingham v. Sutherland*, 834 So. 2d 755, 762 (Ala. 2002); *Giambrone v. Douglas*, 874So. 2d 1046, 1057 (Ala. 2003). Rather, in this context, 'willfully' means that the defendant was consciously aware that his act or omission would likely cause harm to someone."

Ms. *7. Affirming the summary judgment, the Court holds "Odom presented no evidence that the supervisory defendants were consciously aware of McHenry's relay-procedure violation, let alone that their omission would harm anyone." Ms. *8.

Odom also argued that certain of the supervisory defendants acted beyond their authority because they violated certain provisions in the Highway Patrol manual. Ms. *9. The Court holds that the manual's "provisions are not the kind of detailed, checklist-like rules that remove a State agent's judgment and bring his conduct within the beyond-the-scope-of-authority exception." Ms. **14-15.

➲ Premises Liability – Open and Obvious Danger

Daniels v. Wiley, et al., [Ms. 1190208, June 26, 2020] __ So. 3d __ (Ala. 2020). The Court (Bolin, J.; Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) affirms the Madison Circuit Court's summary judgment dismissing claims by Daniels, an apartment tenant against her landlord, alleging that mud had accumulated on the sidewalk as a result of a rain earlier in the day, causing her to slip and fall when she stepped off the sidewalk curb. Ms. *2. Daniels acknowledged that the danger was open and obvious but argued that a jury question was presented because the landlord had prior knowledge that mud accumulated on the sidewalk during rain events creating a hazard.

The Court affirms, explaining that "the law relied upon by Daniels holding that a landlord has a duty to eliminate open and obvious dangers or to warn an invitee of such dangers if the invitor 'should anticipate the harm' – is not the law in Alabama." Ms. *27, citing *Lamson &Sessions Bolt Co. v. McCarty*, 234 Ala. 60,173 So. 388 (1937).

The Court declines to reach the merits of Daniels's alternative argument that the defendant "breached a special duty, as distinguished from the general duty we have already discussed. Daniels appears to maintain that, because the [Safety & Maintenance] Manual used at the apartment complex required daily inspections of the property to identify and remove debris, Hawthorne-Midway had 'a self-imposed duty to inspect the property for daily debris' and that it breached that duty by failing to identify and remove the danger created by the mud." Ms. *29. Daniels failed to cite any authority to support the existence of special duty. *Ibid.*

Daniels waived any argument that the trial court erred in dismissing her wantonness claim because she failed to present evidence showing that Hawthorne-Midway consciously disregarded her safety and did not address the dismissal of her wantonness claim in her appellate brief. Ms. *31.

➲ Medical Negligence – Prima Facie Case

Williams v. Barry, et al., [Ms. 1180352, June 26, 2020] __ So. 3d __ (Ala. 2020). The Court (Wise, J.; Parker, C.J., and Shaw, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) reverses the Montgomery Circuit Court's judgment as a matter of law for the defendants entered at the close of plaintiff's case in wrongful death case under the Alabama Medical Liability Act.

"'The plaintiff in a medical-malpractice action is required to present substantial evidence indicating both that the defendant health-care provider failed to comply with the standard of care and that such failure probably caused the injury or death in question.'" Ms. *10, quoting *Hill v. Fairfield Nursing & Rehab. Ctr., LLC*, 134 So. 3d 396, 401 (Ala. 2013), quoting in turn *Mobile OB-GYN, P.C. v. Baggett*, 25 So. 3d 1129, 1133 (Ala. 2009).

In reversing the judgment as a matter of law, the Court holds that "when viewing the evidence in a light most favorable to Williams, [plaintiff's expert] Dr. Nguyen's testimony presented substantial evidence to create a factual dispute requiring resolution by the jury as to whether Dr. Barry breached the applicable standard of care by recommending and performing an unnecessary surgery on Li'Jonas." Ms. *15.

As to proximate cause, the Court concludes that

> "To present a jury question, the plaintiff [in a medical-malpractice action] must adduce some evidence indicating that the alleged negligence (the breach of the appropriate standard of care) probably caused the injury. A mere possibility is insufficient. The evidence produced by the plaintiff must have 'selective application' to one theory of causation." Ms. *16, quoting *Cain v. Howorth*, 877 So. 2d 566 (Ala. 2003)(internal quotation marks omitted).

After extensively reviewing the expert testimony concerning the cause of Li'Jonas's death, including an autopsy performed two years after his death, the Court concludes the plaintiff presented substantial evidence to create a factual dispute requiring resolution by the jury as to the issue whether the surgery performed by Dr. Barry was the proximate cause of Li'Jonas's death."
Ms. *37.

Subject Matter Jurisdiction – Suit Against Foreign Executor

Ex parte Nancy T. Beamon, [Ms. 1181060, June 26, 2020] __ So. 3d __ (Ala. 2020). The Court (Wise, J.; Parker, C.J., and Bolin, Shaw, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur; Sellers, J., concurs in the result) issues a writ of mandamus directing the Washington Circuit Court to dismiss Bruce Arnott's action against Beamon, as personal representative of the estate of Lois P. Arnott. Bruce alleged that as life tenant, Lois Arnott clear cut timber and failed to satisfy her timber regeneration obligations. Ms. **4-5. Lois Arnott died testate in Georgia in 2014 and Beamon was appointed executor of her estate in 2017 by the probate court of Lee County Georgia. Ms. *3.

Noting that no ancillary administration of Lois's estate had been filed in Alabama, the Court holds "it is clear that Bruce's claim is, in actuality, a claim against Lois's estate and that he is actually suing Beamon in her capacity as the executor of Lois's estate. However, Beamon, in her capacity as the executor of Lois's estate, has no authority to defend a suit in Alabama because the letters testamentary appointing her were issued by the Georgia court. ... Therefore, the circuit court did not have subject-matter jurisdiction over claims against Beamon in her capacity as the executor of Lois's estate." Ms. **18-19.

Specific Performance

Porter v. Williamson; *Williamson v. Porter*, [Ms. 1180355; 1180634, June 26, 2020] __ So. 3d __ (Ala. 2020). The Court (Bryan, J.; Parker, C.J., and Bolin, Wise, Stewart, and Mitchell, JJ., concur; Sellers, J., recuses) reverses the Jefferson Circuit Court's judgment in favor of Williamson specifically enforcing a shareholder's agreement requiring the Porter Defendants to purchase Williamson's shares in Porter Bridge Loan Company, Inc. The Court concludes that the judgment determined share value using an evaluation process inconsistent with the evaluation process set forth in the agreement. Ms. *27. The Court explains

> "[S]pecific performance means 'performance specifically as agreed.'" 71 Am. Jur. 2d Specific Performance § 1 (2012). "The purpose of the remedy is to give the one who seeks it the benefit of the contract in specie by compelling the other party to the contract to do what he or she agreed to do – perform the contract on the precise terms agreed upon by the parties." *Id.* (Emphasis added.)
>
> "It is also a principle of equity jurisprudence that, before a court of chancery will specifically enforce a contract, it must be made to clearly appear to the court that it is thereby enforcing the contract which the parties made .... The court will not attempt to make a contract for the parties, and enforce it, even though it be one which the parties might and ought to have made."
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> *Gachet v. Morton*, 181 Ala. 179, 182, 61 So. 817, 818 (1913) (emphasis added).

Ms. *20.

Forum Non Conveniens

Ex parte Doris Sanders, [Ms. 1190478, June 26, 2020] __ So. 3d __ (Ala. 2020). The Court (Sellers, J.; Bolin, Wise, Bryan, and Mendheim, JJ., concur; Mitchell, J., concurs specially; Parker, C.J., and Shaw and Stewart, JJ., concur in the result) issues a writ of mandamus directing the Macon Circuit Court to vacate its order transferring this action from Macon County (where the motor vehicle accident occurred) to Montgomery County where one of the defendants and an eyewitness reside.

The Court holds that the transfer was not warranted by the interest of justice because "[t]he defendants have not demonstrated that Sanders's choice of venue, Macon County, has a weak or little connection to this case. As indicated, the accident made the basis of this case occurred in Macon County and was investigated there. Sanders indicated in her affidavit that litigating the case in Macon County would be more convenient for her because she works in Macon County, and Macon County is closer to her residence in Barbour County. Ms. *8. Moreover, "although the defendants rely on the fact that one of the defendants, a

nonparty witness, and a witness from the State of Alabama all reside or work in Montgomery County, they have produced no evidence or affidavits from any witnesses declaring that Montgomery County would be a significantly more convenient forum for litigating the action or that traveling to Macon County for trial would be burdensome or otherwise inconvenient for them." Ms. *9.

Direct Criminal Contempt

Ex parte H. Chase Dearman, [Ms. 1180911, June 26, 2020] __ So. 3d __ (Ala. 2020). On certiorari review, the Court (Mendheim, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur; Shaw, J., concurs in the result) reverses the Court of Criminal Appeals's affirmance of the Mobile Circuit Court's finding of criminal contempt against attorney Chase Dearman relating to his actions in stating an objection in a probation revocation hearing. "Direct contempt" is defined in Rule 33.1(b)(1), Ala. R. Crim. P., as "... disorderly or insolent behavior or other misconduct committed in open court, in the presence of the judge, that disturbs the court's business, where all of the essential elements of the misconduct occur in the presence of the court and are actually observed by the court, and where immediate action is essential to prevent diminution of the court's dignity and authority before the public." Ms. *6, n. 3. The scope of appellate review on the issue of direct contempt is limited to questions of law and, if there is any evidence to support its finding, the judgment of the trial court will not be disturbed. Ms. *10, citing *Holland v. State*, 800 So. 2d 602, 604 (Ala. Crim. App. 2000).

The Court concludes the affirmance of the circuit court's finding of direct contempt was in conflict with *Hawthorne v. State*, 611 So. 2d 436 (Ala. Crim. App. 1992) and that there was no evidence to support it:

> ... the record is devoid of any evidence that Dearman's conduct "disturb[ed] the court's business" and that "immediate action [was] essential to prevent diminution of the court's dignity and authority before the public." Rule 33.1(b)(1). The evidence before us indicates that Dearman, by trying to make an objection on the record to preserve the issue for appellate review, was simply trying to engage the court in the business before it, not detract from it. The immediate action taken by the circuit court in silencing Dearman was not to prevent Dearman from diminishing the court's dignity or authority, but to prevent Dearman from asserting a necessary objection on behalf of his client. When finally given the opportunity to present mitigating evidence as to why Dearman continually attempted to state his objection on the record ... Dearman specifically stated that his intent was "only to fulfill my duty as the advocate for my client."

Ms. **16-17.

Homeowner's Policy – Coverage of Other Structures – Negligent Procurement of Insurance

Crook v. Allstate Indemnity Co., et al., [Ms. 1180996, June 26, 2020] __ So. 3d __ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, and Mitchell, JJ., concur; Shaw and Stewart, JJ., concur in the result) affirms the Tuscaloosa Circuit Court's judgment granting summary judgment to Allstate and its agent in an insurance coverage dispute involving damage to homeowner Crook's deck and boat dock. Crook argues Coverage A, rather than Coverage B, "Other Structures," applies to cover the damage to the deck and the boat dock. The defendants argue that the damage is covered by Coverage B, which applies to "[s]tructures ... separated from your dwelling by clear space." The defendants argue that the deck and the boat dock are separated from the dwelling by "clear space," so as to qualify only for Coverage B. Ms. *12.

The Court holds that the damage to the deck and boat dock is covered only under coverage B, explaining that the various jurisdictions that have considered the issue before us have determined that Coverage B applies to cover damage to an "other structure" when there is "clear space" between the dwelling and the other structure, even if the dwelling and the damaged other structure are connected by a structure such as a deck." Ms. **18-19.

The Court also affirms as to the negligent procurement of insurance claim and holds that

> … it is undisputed that Crook did not read the policy or the numerous policy-renewal notices sent to him from 2006 to 2015 that explicitly set forth the policy limits and explicitly requested that he read them. Had he done so, Crook would have discovered that the policy limit for Coverage B was only $11,455 and could have, had he desired, requested additional coverage. Crook failed to do so and, thus, ""put [himself] in danger's way'" and had a "'conscious appreciation of the danger'" of suffering a monetary loss." *Kanellis* [*v. Pacific Indemnity Co.*], 917 So. 2d [149,] 155 [(Ala. Civ. App. 2005)]. Crook was contributorily negligent as a matter of law.

Ms. **30-31.

Tax Sale

Stiff v. Equivest Financial, LLC, [Ms. 1181051, June 26, 2020] __ So. 3d __ (Ala. 2020). In a plurality decision, the Court (Mitchell, J.; Parker, C.J., and Bolin and Stewart, JJ., concur; Sellers, J., concurs in the result; Shaw, Wise, Bryan, and Mendheim, JJ., dissent) reverses the Jefferson Circuit Court's judgment refusing to set aside a tax sale of Stiff's property that was sold at a tax sale that took place inside the Bessemer courthouse instead of "in front of the door of the courthouse" as required by § 40-10-15, Ala. Code 1975. "When an appeal focuses on the application of the law to undisputed facts, we apply a *de novo* standard of review." Ms. *4, citing *Carter v. City of Haleyville*, 669 So. 2d 812, 815 (Ala. 1995).

The opinion concludes that the irregularity in the sale renders it void:

> The tax-sale statutes include detailed instructions on the manner in which a tax sale must be held: "Such sales [of land for taxes] shall be made in front of the door of the courthouse of the county at public outcry, to the highest bidder for cash, between the hours of 10:00 A.M. and 4:00 P.M., and shall continue from day to day until all the real estate embraced in the decree has been sold." § 40-10-15. Jefferson County ignored one of those requirements – the location of

> the tax sale – with no apparent excuse. Despite that, Equivest argues "that the holding of the tax sale indoors rather than outdoors [in front of] the courthouse substantially complies with the requirements of Section 40-10-15." Equivest's brief at 15. This is essentially an argument that the statute's sale-location requirement is a minor technicality that is not essential to the objectives of the tax-sale statutes. We disagree – the sale-location requirement plays an important role, and a county may not disregard it for convenience.

Ms.*7.

Justice Bryan's dissent (joined by Justices Shaw, Wise, and Mendheim) would have affirmed the circuit court's judgment as "substantially compliant with the statutory requirements…." Ms. *19.

Fictitious Parties Practice

Ex parte Russell; Ex parte Blanchard; Ex parte Gulas, et al., [Ms. 1180317; 1180318; 1180319, June 26, 2020] __ So. 3d __ (Ala. 2020). The Court (1180137 – Mitchell, J.; Bolin, Shaw, Wise, Bryan, and Stewart, JJ., concur; Mendheim, J., concurs in the result; Parker, C.J., recuses; 1180318 – Mitchell, J.; Bolin, Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur; Parker, C.J., recuses; 1180319 – Mitchell, J.; Bolin, Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur; Parker, C.J., recuses) grants defendant Russell's petition for writ of mandamus directing the Talladega Circuit Court to dismiss Miles's action against her based upon expiration of statute of limitations. The Court denies petitions filed by defendants Blanchard, Gulas, and Pruitt, concluding that the plaintiff properly substituted those defendants for fictitious defendants in plaintiff's original complaint.

> "Although mandamus will not generally issue to review the merits of an order denying a motion for a summary judgment, this Court has held that, in the 'narrow class of cases involving fictitious parties and the relation-back doctrine,' mandamus is the proper method by which to review the merits of a trial court's denial of a summary-judgment motion in which the defendant argues that the plaintiff's claim was barred by the applicable statute of limitations. [*Ex parte*] *Mobile Infirmary Ass'n*, 74 So. 3d [424], [at] 427-28 [(Ala. 2011)] (quoting [*Ex parte*] *Jackson*, 780 So. 2d [681,] [at] [(Ala. 2000)] 684)."

Ms. **18-19, quoting *Ex parte Integra Life Sciences Corp.*, 271 So. 3d 814, 817 (Ala. 2018).

As to Blanchard, the Court denied the petition concluding "it is undisputed in this case that Miles did not learn that Blanchard had any specific connection to Tameca until after the statute of limitations expired. All Miles knew before the statute of limitations expired was that Blanchard had been on duty in the Emergency Room when Tameca was brought in .... Ms. *23.

The Court also denied the petition of Gulas because "although Gulas was identified in a list of fourteen CVMC employees who worked in the Emergency Room on December 28, 2013, Miles had no knowledge of Gulas's relevance to this case until CVMC supplemented its discovery responses on June 10, 2016, and revealed for the first time that Gulas 'saw Tameca Miles on December 28, 2013.' Miles then amended her complaint to substitute Gulas as a defendant that same month." Ms. **28-29.

The Court also denies the petition of Pruitt, explaining that

> "[a] complaint stating a claim against a fictitiously named defendant must contain sufficient specificity to put that defendant on notice of the plaintiff's claim if it were to read the complaint." Ms. *32, quoting *Ex parte International Refining & Manufacturing Co.*, 972 So. 2d 784, 789 (Ala. 2007). Moreover, "the complaint must describe the actions that form the basis of the cause of action against the fictitiously named defendant. *Id.* We have further explained that "[o]ne need not state with more particularity a cause of action against an unknown party as compared to a named party – the test is the same." *Ibid.*, quoting *Columbia Eng'g Int'l, Ltd. v. Espey*, 429 So. 2d 955, 960 (Ala. 1993).

The Court concludes that "Miles's original complaint is sufficiently specific to assert a cause of action against Pruitt." Ms. *33.

As to defendant Russell, the Court grants the writ directing the circuit court to dismiss Russell. The Court notes "it is undisputed that defendant Russell was never in the Emergency Room involved in any attempt to provide medical services to Tameca. Rather, Russell is alleged only to have told the security guard Hill – after he telephoned her to describe the services in the Emergency Room – "'if you think you need to call the police, call them.'" Ms. *36. The Court holds that

> because none of the allegedly tortious acts described in Miles's complaint adequately describe the act Russell is accused of committing – telling the security guard he could call the police if the thought it was necessary to do so – Miles cannot use Rule 9(h) to avoid the statute of limitations and assert an otherwise untimely claim against Russell. The trial court therefore erred by denying her motion for a summary judgment.

Ms. *36.

Foreclosure Notice

Barnes v. U.S. Bank Nat. Assoc., [Ms. 2180699, June 26, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Thompson, P.J.; Moore and Donaldson, JJ., concur; Edwards, J., concurs in the result) reverses the Jefferson Circuit Court's judgment in favor of the mortgagee in an ejectment action. Citing *Ex parte Turner*, 254 So. 3d 207 (Ala. 2017), the court holds that the foreclosure notice failed to strictly comply with the notice required by the mortgage. Paragraph 22 of the mortgage stated in pertinent part that "[t]he notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale of the mortgaged property." Ms. *3.

The servicer of the loan, Ocwen Loan Servicing, LLC, sent a foreclosure notice stating that "You may have the right to assert in court the non-existence of a default or any other defense to acceleration or foreclosure." Ms. *4. The court holds the notice did not meet the strict compliance standard of *Ex parte Turner*:

> Contrary to the trial court's conclusion, and U.S. Bank's appellate argument, Ocwen's default notice does not "strictly comply" with paragraph 22 in at least two respects. First, … Ocwen's notice contains no reference

to a right to affirmatively seek relief in a court action directly challenging the foreclosure …. Second, the reference in Ocwen's notice is not unequivocal because it refers to what rights Barnes "may" have…."

Ms. *18.

➲ Equal Protection – Voting Rights

Veitch v. Friday, [Ms. 1180152, June 30, 2020] __ So. 3d __ (Ala. 2020). The Court (Mitchell, J.; Parker, C.J., and Wise, Bryan, and Stewart, JJ., concur; Shaw, Sellers, and Mendheim, JJ., concur in the result; Bolin, J., recuses) declares Act No. 138, Ala. Acts 1953 unconstitutional. Act No. 138 prohibits residents of the Bessemer Cutoff from voting in primary elections for the position of Jefferson County District Attorney. The Court holds

> "[t]he Jefferson County D.A. has the statutory authority to displace the Bessemer Division D.A. and exercise his powers in the Bessemer Cutoff. Because residents of the Bessemer Cutoff are subject to the prosecutorial power of the Jefferson County D.A., they have an equal interest with other Jefferson County residents in who occupies that office. Despite that equal interest, Act No. 138 denies voters in the Bessemer Cutoff the right to participate in the primary election for Jefferson County D.A. That discrimination violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and renders Act No. 138 unconstitutional."

Ms. *24.

➲ Intestate Estate Administration

Brown, et al. v. Berry-Pratt, [Ms. 1180348, June 30, 2020] __ So. 3d __ (Ala. 2020). The Court (Mitchell, J.; Bolin, Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur; Parker, C.J., and Sellers, J., concur in the result) affirms the Tuscaloosa Circuit Court's judgment authorizing an administrator to sell real property owned of the decedent to pay expenses of administration. The Court notes

> § 43-2-830, Ala. Code 1975, [] provides:
>
> "(a) Upon the death of a person, decedent's real property devolves ..., in the absence of testamentary disposition, to decedent's heirs ...."
>
> ....
>
> "(c) The devolution of a decedent's property, real and personal, is subject to homestead allowance, exempt property, family allowance, rights of creditors, elective share of the surviving spouse, and to administration."

Our appellate courts have considered how § 43-2-830 should be applied. In *Self v. Roper*, 689 So. 2d 139, 141(Ala. Civ. App. 1996), the Court of Civil Appeals summarized the statute as follows:

> "[T]itle to the real property vests upon death in the heirs as joint owners, but subject to divestment, if needed, for payment of debts of the estate or costs and expenses of administration. Real property is left with the heirs, the persons presumptively entitled thereto, unless the personal representative shall determine that his possession of the real property is necessary for purposes of administration."

Ms. *14.

➲ Discovery & Protective Orders & Ex parte Interviews with Plaintiffs' Health Care Providers

Ex parte Freudenberger (*In re: Rhonda Brewer and Charlie Brewer v. Crestwood Medical Center, LLC; Curt Freudenberger, M.D.; and Sportsmed Orthopedic Surgery & Spine Center, P.C., Madison Circuit Court*), [Ms. 1190159, June 30, 2020] __ So. 3d __ (Ala. 2020) (Sellers, J., joined by Bolin, J.; Mendheim, J., joined by Mitchell, J., writes separately to concur specially; Shaw, J., joined by Bryan, J., writes separately, concurring in the result; Stewart, J., writes separately, concurring in the result; Wise, J., concurs in the result; and Parker, C.J., dissents, without writing). The four-vote plurality opinion grants a petition for a writ of mandamus and directs the Madison Circuit Court to vacate a protective order prohibiting ex parte communications by defense counsel with plaintiff's health care providers.

This is at least the fifth time within the past twenty years the issue of a trial court's discretion to limit an attorney's ex parte contacts with health care providers was presented to the Court in the context of a petition for a writ of mandamus. On each prior occasion, the petition was denied, without opinion. See, *Ex parte Eagan*, Supreme Court Case No. 1001142, petition for writ of mandamus denied, without opinion, March 8, 2002 (Brown, J.; and Moore, C.J., and Houston, See, Lyons, Johnstone, Harwood, and Woodall, JJ., concur; Stuart, J., not sitting); *Ex parte Farley*, Supreme Court Case No. 1100570, petition for writ of mandamus denied without opinion June 10, 2011 (Stuart, J.; Cobb, C.J., and Parker, Shaw, and Wise, JJ., concur); *Ex parte Mobile Infirmary Association, d/b/a Mobile Infirmary Medical Center*, Supreme Court Case Nos. 1130677, 1130678, petitions for writs of mandamus denied without opinions December 5, 2014 (Wise, J.; Moore, C.J., and Stuart, Bolin, Parker and Shaw, JJ., concur); and *Ex parte Rose Carpenter, as the Personal Representative and Administratrix of the Estate of David Brandon Chambers, Deceased*, Supreme Court Case No. 1140963, petition for a writ of mandamus denied without opinion June 17, 2015 (Moore, C.J.; Stuart, Bolin, Parker, Murdoch, Shaw, Main, Wise, and Bryan JJ., concur). Most recently, the Court of Civil Appeals in a written opinion found that this sort of discovery dispute does not meet *Ocwen*'s criteria for extraordinary mandamus relief. *See Ex parte Alabama Gas Corp.*, 258 So. 3d 1148 (Ala. Civ. App. 2018)(Thomas, J.; Thompson, P.J., and Pittman and Donaldson, JJ., concur; Moore, J., concurs in the result).

In this case, the Court again had the benefit of extensive briefing by the parties and amici (including the Alabama Association for Justice and others), and the benefit of oral argument, but nevertheless declined to deliver a precedential opinion that changes anything about settled Alabama law. In consequence, *Ex parte Henry*, 770 So. 2d 76 (Ala. 2000), remains the controlling opinion on this issue.

Each separate writing should be studied to discern how the individual justices view the ex parte communications issue. Justice Sellers's plurality opinion (joined only by Justice Bolin) discounts the

role of HIPAA, but leaves open the door for protective orders upon particularized showings of need by plaintiffs. All the separate special writings also leave the door open for trial courts to exercise discretion and to fashion protective orders prohibiting ex parte communications with health care providers upon particularized showings of need by plaintiffs' counsel. For example, Justice Mendheim (joined by Justice Mitchell) writes:

> In my opinion, the trial court's error in this case was issuing a "blanket" prohibition on ex parte interviews by Dr. Freudenberger's lawyers of Rhonda Brewer's medical providers without any other considerations. The trial court should have considered the specific facts and issues of the case, balanced the competing positions of the litigants regarding ex parte interviews, and then issued an appropriate qualified protective order. . . .

Ms. *19.

> In this case, the Brewers offered no patient-specific reason why any restrictions beyond those listed in 45 C.F.R. § 164.512(e)(1)(v) should be placed upon Dr. Freudenberger's ex parte interviews of Rhonda's treating physicians. Accordingly, as the main opinion concluded, the trial court in this case exceeded its discretion by requiring additional restrictions without sufficient justification of privacy concerns from the Brewers. On return of the case to the trial court, I believe that the Brewers would have the opportunity to present specific arguments to the trial court consistent with the parameters discussed herein.

Ms. *21.

Justices Mendheim and Mitchell believe that limitations can be placed on ex parte contacts "if the particular circumstances warranted such measures." Ms. *17. In their view, a plaintiff has to prove facts specific to the case, and cannot get a limitation order just by arguing general public policy or generic "tactical litigation strategy." They offer a few hints as what case-specific facts, "such as sensitive medical history irrelevant to the lawsuit," might be persuasive. Other examples include: cases involving "a minor, an independent confidentiality issue, sexual issues, unnecessary embarrassment, and so forth." Even if defense counsel is permitted to contact treating physicians, these two say that certain notice and procedural protections for the plaintiff could be added to the HIPAA order: "one requirement federal district courts sometimes add in qualified protective orders that address ex parte interviews is 'clear and explicit' notice to the plaintiff's physician about the purpose of the interview and that the physician is not required to speak to defense." Ms. *18. Further, they say:

> "Other courts have suggested 'affording plaintiff's counsel the opportunity to communicate with the physician, if necessary, in order to express any appropriate concerns as to the proper scope of the interview and the extent to which plaintiff continues to assert the patient-physician privilege.' [citations omitted]. Generally speaking, I believe regulations such as these could be deemed appropriate as 'standard language' in a HIPAA qualified protective order."

Ms. *19.

Justice Stewart says that plaintiffs have a privacy interest in their medical records that are not relevant to the litigation. "Accordingly, a plaintiff seeking to limit the scope of an ex parte interview with a treating physician is authorized under the Alabama Rules of Civil Procedure to seek a protective order to prevent the disclosure of medical information that is irrelevant to the disposition of a claim or defense raised in the action." She further opines:

> The trial court is in the best position to craft, on a case-by-case basis, a protective order specific to the facts of the case setting forth the precise parameters within which ex parte interviews of treating physicians may be conducted. I would adopt the reasoning of the Georgia Supreme Court in *Baker v. Wellstar Health System, Inc.*, 288 Ga. 336, 339, 703 S.E.2d 601, 605 (2010), in which the Georgia Supreme Court "exhort[ed] trial courts, in authorizing [ex parte] interviews [of treating physicians], to fashion their orders carefully and with specificity as to scope" and in which that court developed a framework for trial courts in that state to follow when issuing such orders [citations omitted]:
>
> > "[I]n issuing orders authorizing ex parte interviews, trial courts should state with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary. ... In addition, when issuing or modifying such orders, trial courts should consider whether the circumstances – including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds – warrant requiring defense counsel to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request."

Ms. *26-27.

Justice Stewart concludes "[a] ccordingly, I would issue the writ, but with direction to the trial court to conduct a hearing to allow the parties to present evidence in conjunction with the aforementioned parameters." Ms. *28.

Justice Shaw (joined by Justice Bryan) writes:

> "'Any concerns that ex parte interviews might be abused could be remedied by a more narrowly tailored and equitable order. I therefore agree that the writ should be issued, and I concur in the result.'"

Ms. *22.

The end result is a non-precedential plurality opinion demonstrating no clear consensus among the justices.

Due Process – Guardianship Proceeding

Ex parte Joann Bashinsky, [Ms. 1190193, July 2, 2020] __ So. 3d __ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, and Stewart, JJ., concur; Mitchell, J., recuses) issues a writ of mandamus to the Jefferson Probate Court directing the Court to vacate orders appointing a temporary guardian for Ms. Bashinsky and disqualifying her attorneys. Ms. Bashinsky's mandamus petition contended that the probate court lacked personal jurisdiction over her because she was not properly served with the emergency petition and that her basic due-process rights were violated because the probate court disqualified her attorneys and did not allow her the opportunity to retain new counsel so that she could be heard in the October 17, 2019, hearing on the emergency petition. Because Ms. Bashinsky's arguments raise issues of procedural due process that could render the probate court's underlying judgment on the emergency petition void, the Court concludes "a mandamus petition is an appropriate method of seeking review of the trial court's judgment as to those two issues." Ms. *28.

The Court rejects the respondent's arguments that an emergency situation existed which excused lack of notice to Ms. Bashinsky. The Court applies the definition of the term "emergency" in the edition of Black's Law Dictionary in use at the time the AUGPPA was enacted in 1987 provided: "A sudden unexpected happening; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity. Emergency is an unforeseen combination of circumstances that calls for immediate action." *Black's Law Dictionary* 469 (5th ed. 1979). Ms. *42.

Although the Court concludes that notice to Ms. Bashinsky's lawyers of the emergency hearing to appoint a temporary guardian was sufficient notice to her, because "the probate court disqualified Ms. Bashinsky's attorneys at the outset of the October 17, 2019, hearing on the emergency petition and [] she was not afforded the opportunity to retain new attorneys or to present any evidence or question witnesses at that hearing." Ms. *52. The Court concludes "Ms. Bashinsky's basic due-process rights were egregiously violated, as the probate court treated the proceeding like an ex parte hearing even though Ms. Bashinsky was present." Ms. *52 (emphasis in the original).

Reasonableness of Guardian Ad Litem's Fee

Ex parte Sandra Shinaberry, [Ms. 1180935, July 31, 2020] __ So. 3d __ (Ala. 2020). The Court (Bolin, J.; Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) reverses on certiorari review the Court of Civil Appeals's no opinion affirmance of the Shelby Circuit Court's approval of a $7500 guardian ad litem fee. The Court holds

> The parties entered into a settlement agreement, and the guardian ad litem was appointed to evaluate the settlement agreement and to determine whether it was in the best interest of the minors. ... Wilson states that he spent 32 hours working on this case; however, he failed to provide the parties and the court with a report giving his recommendation, nor do we know how he spent those 32 hours or whom he talked to or what he reviewed as part of his evaluation. He delayed the parties' settlement by failing to communicate with the parties' attorneys for a nine-month period. It also appears that Wilson took on tasks that were either unnecessary or outside his limited role. It also appears that the circuit court arbitrarily chose $250 per hour as a reasonable hourly amount for "work in circuit court" without considering the guardian ad litem's limited role, the nature of the underlying action, or the guardian ad litem's experience (or lack thereof) in such matters. Additionally, the fee awarded Wilson is almost twice the damages awarded the minor plaintiffs and almost twice the fee awarded the attorneys who represented the plaintiffs.

Ms. **14-15.

Prenuptial Agreement

Denson v. Denson, [Ms. 2180653, July 31, 2020] __ So. 3d __ (Ala. Civ. App. 2020). A plurality of the court (Donaldson, J.; Thompson, P.J., concurs; Moore, Edwards, and Hanson, JJ., concur in the result) reverses that portion of the Baldwin Circuit Court's judgment of divorce awarding the wife an interest in a house titled solely in the husband's name and treated as the husband's separate property in the parties' valid prenuptial agreement. The opinion explains

> "It is undisputed that the husband possessed sole title to the house before and during the marriage, and the trial court found that the house was his separate property. When the wife assumed personal liability for the home-equity line of credit associated with the house, the parties did not take action to change the title to the house, i.e., the title remained in the name of the husband alone. Although the trial court's reasoning for awarding the wife a portion of the equity in the house might have been valid if § 30-2-51(a) was applicable, the agreement was in this case valid and fully enforceable. Because the award of a portion of the equity in the house to the wife contravened the agreement, we reverse the judgment …"

Ms. ** 9-10.

Jurisdiction of Court of Civil Appeals – Mandamus

Ex parte Greene County Commission, [Ms. 2190686, Aug. 7, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Thompson, P.J.; Moore, Donaldson, Edwards, and Hanson, JJ., concur) transfers to the Supreme Court a petition for writ of mandamus filed in an action by 28 plaintiffs against the Greene County Commission seeking injunctive relief and compensatory damages arising from deplorable conditions in the Greene County Courthouse. The court explains "[a]lthough the plaintiffs' complaint sought injunctive relief, given the nature of all of the claims asserted, the complaint primarily seeks relief in the form of awards of damages. ... The plaintiffs did not demand specified amounts of damages in their claims, but the nature of those claims indicate that the amount in controversy in their action exceeds the $50,000 monetary jurisdictional limit of this court." Ms. *4.

The court declines to accept jurisdiction over the petition based on the amount in controversy and transfers the petition to the Alabama Supreme Court. See § 12-1-4, Ala. Code 1975 ("[W]hen any case is submitted to a court of appeals which should have gone to the Supreme Court, it shall be transferred to the Alabama Supreme Court."). Ms. *5.

Attorney Disqualification – Law of the Case

Ex parte Robin Fipps, [Ms. 2190628, Aug. 7, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Moore and Hanson, JJ., concur; Thompson, P.J., concurs specially; Donaldson and Edwards, JJ., concur in the result) denies the father's petition for a writ of mandamus challenging the Jefferson Circuit Court's disqualification of the father's counsel in this custody modification proceeding. Although the wife failed to raise the law-of-the-case doctrine in the circuit court, the court noted that, "a petition for the writ of mandamus may be denied if the order under review is correct and supported by any valid legal ground, even one not argued in the trial court. Thus, we will consider whether the law-of-the-case doctrine requires the denial of the father's mandamus petition." Ms. *7, citing *Ex parte CTB, Inc.*, 782 So. 2d 188, 191(Ala. 2000).

The father acknowledged his attorney in the current custody proceeding represented the mother in her 2003 divorce action against her former husband and also acknowledged that in 2015 the trial court entered orders disqualifying the attorney from representing the father on the basis of Rules 1.6 and 1.9, Ala. R. Prof. Cond. Ms. *8.

The court denied the petition based on the-law-of-the-case doctrine because "once an issue has been decided in a divorce action, the law-of-the-case doctrine precludes reconsideration of that issue in subsequent modification and enforcement actions arising out of the divorce judgment." *Ibid*.

The court notes that the attorney argues that "the factual conclusion that he had acquired confidential 'knowledge of private and confidential information' during his 2003 representation of the mother was erroneous; however, the specific purpose of the law-of-the-case doctrine is to preclude rehashing of the same issues in repeated litigation. See *Ex parte Discount Foods, Inc.*, 789 So. 2d 842, 846, n. 4 (Ala. 2011)." Ms. **10-11.

Certified Mail Service – Affidavit Required by Rule 4(i)(2)(B)(ii)

Ex parte Loyd Jenkins, [Ms. 2190272, Aug. 14, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Moore, J.; Donaldson, Edwards, and Hanson, JJ., concur; Thompson, P.J., concurs specially) vacates a default judgment entered by the Montgomery Circuit Court modifying custody of the parties' minor children and reserving the issue of child support. In its discretion, the court treats the father's appeal from the non-final judgment as a petition for the writ of mandamus. Ms. *4.

The court explains that

> "Failure of proper service under Rule 4[, Ala. R. Civ. P.,] deprives a court of jurisdiction and renders its judgment void." *Ex parte Pate*, 673 So. 2d 427, 428-29 (Ala. 1995). "When the service of process on the defendant is contested as being improper or invalid, the burden of proof is on the plaintiff to prove that service of process was performed correctly and legally." *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 884 (Ala. 1983). "'[S]trict compliance with the rules regarding service of process is required.'" *Johnson v. Hall*, 10 So. 3d 1031, 1037 (Ala. Civ. App. 2008) (quoting *Ex parte Pate*, 673 So. 2d at 429).

Ms. *5.

The court concludes certified mail service on the father was improper because the mother failed to file the affidavit required by Rule 4(i)(2)(B)(ii), Ala. R. Civ. P., which provides that an attorney or party who attempts service by certified mail must, "[u]pon mailing, ... immediately file with the court an 'Affidavit of Certified Mailing of Process and Complaint.'" Ms. *6.

The trial court had found that a tracking form from the United States Postal Service indicated that service by certified mail was completed to "328 Brown Street." Ms. *6. The court rejects that finding as "not supported by the materials [because] [t]he tracking form in the record indicates only that service was perfected in "Hutto, TX," without referencing the actual street address." Ms. **6-7.

Removal of Estate to Circuit Court

Holt v. Holt, [Ms. 1190025, Aug. 21, 2020] __ So. 3d __ (Ala. 2020). The Court (Shaw, J.; Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur) dismisses a co-executor's appeal from a judgment entered by the Walker Circuit Court in an estate proceeding. The Court declines to reach the merits because the estate was not properly removed from probate to circuit court. The Court explains:

> "'the filing of a petition for removal in the circuit court and the entry of an order of removal by that court are prerequisites to that court's acquisition of jurisdiction over the administration of the estate pursuant to § 12-11-41[, Ala. Code 1975].'"

Ms. *4, quoting *DuBose v. Weaver*, 68 So. 3d 814, 822 (Ala. 2011).

> "… [A] removal order was not entered in this case. As a result, the circuit court never acquired subject-matter jurisdiction over the administration of Geneva's estate; its June 4, 2019, order, therefore, is void, and the appeal is due to be dismissed."

Ms. *5.

Conversion – Respondeat Superior – Negligent Hiring and Supervision

Synergies3 Tec Services v. Corvo, et al., [Ms. 1170765, Aug. 21, 2020] __ So. 3d __ (Ala. 2020). In a plurality opinion, the Court (Stewart, J.; Parker, C.J., and Wise, J., concur; Bolin, J., concurs in part and concurs in the result in part; Sellers, J., concurs in the result) affirms in part and reverses in part the Baldwin Circuit Court's judgment on a jury verdict on claims of conversion and negligent hiring and supervision. Plaintiffs Corvo and Bonds alleged that Castro and McLaughlin, employees of Synergies3 Tec Services LLC, an agent of DIRECTV, stole a 3-carat diamond ring and $160 from their master bedroom while installing DIRECTV in Plaintiffs' home on Ono Island. The opinion rejects Synergies3 and DIRECTV's argument

that they were entitled to judgment as a matter of law on the conversion claim and explains

> There was no evidence indicating that any individual, other than Castro, McLaughlin, Corvo, and Bonds, entered the bedroom where the diamond was kept. Corvo found McLaughlin in her bedroom where the diamond and cash were located with the door almost closed. After Castro and McLaughlin left the house, Corvo discovered that the diamond was missing from her engagement ring and that the prongs that held the diamond in place were bent and damaged. Corvo also discovered that $160 in cash was missing. Accordingly, Corvo and Bonds 'presented substantial evidence creating a genuine dispute' as to whether one of [Synergies3 or DIRECTV's] employees took or carried away the property.

Ms. **18-19 (internal quotation marks omitted).

The opinion concludes, however, that Synergies3 and DIRECTV were not liable for conversion under the doctrine of *respondeat superior* because

> Theft and conversion are a "marked and unusual deviation" from the business of Synergies3 and DIRECTV for which Castro and McLaughlin were in Corvo's house – installing equipment for DIRECTV's satellite television service. Furthermore, there was no evidence indicating that the theft or conversion was done for Synergies3's or DIRECTV's benefit or in furtherance of their interests. … Moreover, there is no evidence indicating thatSynergies3 or DIRECTV authorized or participated in theft and conversion or later ratified the conduct so as to give rise to any direct liability for theft or conversion.

Ms. **24-25 (internal citation omitted).

The Court affirms the $75,000 mental anguish award and $40,000 for the value of the ring on the negligent hiring and supervision claim. The opinion explains

> The question in this case involves the liability of a business to a customer on the theory of negligent hiring ,training, and supervision when an employee commits an intentional tort and/or criminal act. To confer liability on an employer for the negligent hiring, training, or supervision of an employee, the following principles are applicable.
>
> "'In the master and servant relationship, the master is held responsible for his servant's incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof that such incompetency was actually known by the master or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge. It is incumbent on the party charging negligence to show it by proper evidence.
>
> > This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the master, or by showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. While such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of, it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant to leave it to the jury whether they would have come to his knowledge, had he exercised ordinary care.'"
>
> *Lane v. Central Bank of Alabama, N.A.*, 425 So. 2d 1098, 1100 (Ala. 1983) (quoting *Thompson v. Havard*, 285 Ala. 718, 723 (1970)).

Ms. **27-28.

The Court affirms the verdict for plaintiffs on negligent hiring and supervision because

> Corvo and Bonds submitted substantial evidence creating a factual dispute as to whetherSynergies3 and DIRECTV should have performed a more thorough background check and thereby discovered Castro's criminal history and whether it should have been foreseeable to Synergies3 or DIRECTV that Castro would steal from a customer during an installation. From that evidence, a jury could reasonably infer that Synergies3 and DIRECTV negligently hired, trained, and supervised Castro. Accordingly, the trial court did not err in denying Synergies3 and DIRECTV's motion for a judgment as a matter of law as to Corvo and Bonds's claim of negligent hiring, training, and supervision of Castro.

Ms. *32.

➲ Failure To Join Necessary Party

Capitol Farmers Market v. Delongchamp, [Ms. 1190103, Aug. 28, 2020] __ So. 3d __ (Ala. 2020). The Court (Bryan, J.; Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ., concur) reverses a judgment of the Montgomery Circuit Court enforcing restrictive covenants requiring that the real property subject to the covenants not be subdivided into lots of less than five acres. Alfa, which was not a party to the declaratory judgment action, owned adjoining land that was also subject to the restrictive covenants. The Court *sua sponte* raised the effect of Plaintiff Delongchamp's failure to join Alfa to her action seeking a declaration that the covenants were enforceable and restrained Capitol Farmers Market from subdividing its adjoining property into a high density residential subdivision. The Court holds

> [A]s one of the parties determined by the circuit court to be an owner of the property restricted by the covenants in the 1982 Declaration, Alfa possesses an interest "relating to the subject of th[is] action and is so situated that the disposition of the action in [Alfa]'s absence may (i) as a practical matter impair or impede [Alfa]'s ability to protect that interest or (ii) leave [Delongchamp and Capitol Farmers Market] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Rule 19(a). At this time, we do not hold that Alfa is an indispensable party;

> we hold only that Alfa is a necessary party that should be joined, if feasible, in accordance with the requirements of Rule 19(a)…. Thus, we reverse the judgment and remand the cause. On remand, the circuit court is directed to join Alfa as a party to this action, if feasible. … If Alfa cannot be made a party, the circuit court should consider the reasons Alfa cannot be joined and decide whether the action should proceed in Alfa's absence. See Rule 19(b) and (c).

Ms. **19-21 (internal citations omitted).

Administrator ad Litem

Ex parte Stephens, [Ms. 1190457, Aug. 28, 2020] __ So. 3d __ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur) issues a writ of mandamus to the Coffee Circuit Court which had denied Berry Stephens's motion to appoint an administrator ad litem for the estate of his mother, Louise Gennuso, which had been removed to circuit court. Following Louise's death, the personal representative, Youngblood, had transferred to herself the funds in Louise's bank accounts owned jointly with Youngblood. The Court holds

> [T]he facts showed that Youngblood, the personal representative of Gennuso's estate, had an interest adverse to the estate. Therefore, under § 43-2-250, the circuit court had a duty to appoint an administrator ad litem for the estate, but it failed to do so. See, e.g., *Loving v. Wilson*, 494 So. 2d 68,70 (Ala. 1986) (observing that, "[s]ince all of the elements necessary to require an appointment of an administrator ad litem are present, it was error for the trial court not to appoint one for each of the estates"); *Cannon v. Birmingham Tr.& Sav. Co.*, 212 Ala. 316, 319, 102 So. 453, 456 (1924)(stating that an identical predecessor statute to § 43-2-250 "makes it the duty of the court, in any proceeding where the personal representative is interested adversely to the estate, to appoint an administrator ad litem").

Ms. **18-19.

Rule 60 – Premature Notice of Appeal

Thompson v. State of Alabama, ex rel. Jett, [Ms. 2180977, Aug. 28, 2020] __ So. 3d __ (Ala. Civ. App. 2020). The court (Donaldson, J.; Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur) dismisses an appeal from the denial of a Rule 60 motion because the appellant filed the notice of appeal before the trial court ruled on the Rule 60 motion. The court notes that "[a]lthough Rule 4(a)(5) provides that a notice of appeal shall be held in abeyance until certain types of motions have been ruled on, a motion filed pursuant to Rule 60 is not one of the enumerated motions." Ms. *6. The court also noted that

> Rule 4(a)(4), Ala. R. App. P., provides that "[a] notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after the entry and on the day thereof." There is, however, no indication in the record that the trial court had announced any decision on Thompson's Rule 60(b) motion before the entry of its order purportedly denying that motion. In addition, in her notice of appeal, which was filed after the hearing on her Rule 60(b) motion, Thompson stated that the trial court had not ruled on her Rule 60(b) motion.

Ms. *7.

Real Estate, Caveat Emptor and "As Is" Clauses

Kidd v. Benson, [Ms. 1190413, Sept. 04, 2020], ___ So. 3d ___ (Ala. 2020). In a plurality opinion, (Sellers, J.; Wise and Mitchell, JJ., concur; Parker, C.J., and Bolin, Shaw, Bryan, Mendheim, and Stewart, JJ., concur in the result) the Court affirms a summary judgment entered by the Baldwin Circuit Court in favor of the sellers of residential real estate located adjacent to the Fish River who were sued by the parcel's purchasers when a retainer wall collapsed. The purchase agreement contained an "As Is" clause.

The Court first discusses Alabama's version of the doctrine of *caveat emptor* ("let the buyer beware") as it applies to the sale of used real estate. Ms. **6-7, citing *Nesbitt v. Frederick*, 941 So. 2d 950, 956 (Ala. 2006). The Court reiterates that ordinarily there are three exceptions to *caveat emptor* that require a seller to disclose to the buyer known defects in the property, *i.e.*, 1) when the seller has a duty under § 6-5-102, Ala. Code 1975, to disclose known defects because a fiduciary relationship exists between the buyer and the seller; 2) when a seller has a duty to disclose material defects affecting health or safety not known to or readily observable by the buyer; and 3) when a buyer inquires directly about a material defect or condition of the property. *Id.*

However, in this case, because of the inclusion of the "As Is" language, *Clay Kilgore Construction, Inc. v. Buchalter/Grant, L.L.C.*, 949 So. 2d 893, 897-98 (Ala. 2006) negates the element of reliance essential to any claim of fraud and/or fraudulent suppression. Ms. *8. The Court concludes "under Alabama law, when a buyer elects to purchase real property subject to an 'as is' clause in the purchase agreement and neglects to inspect the property, the buyer cannot take advantage of any exceptions to the doctrine of *caveat emptor*." Ms. *9. Accordingly, the summary judgment in favor of the sellers is due to be affirmed.

Medical Negligence and Similarly Situated Healthcare Providers

Spencer v. Remillard, [Ms. 1180650, Sept. 4, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Mendheim, J.; Parker, C.J., and Wise, Bryan, Stewart, and Mitchell, JJ., concur; Sellers, J., concurs in part and dissents in part as to the rationale and concurs in the result; and Shaw, J., concurs in the result) reverses a judgment as a matter of law entered by the Shelby Circuit Court at the close of a medical negligence wrongful death action arising from an allegation of a failure to timely diagnose and treat prostate cancer against Dr. Remillard and Helena Family Medicine. This 77-page opinion reviews the requirements for expert testimony against healthcare provider defendants who qualify as both non-specialists (§ 6-5-548(b), Ala. Code 1975) and, in particular, sub-section (b)(3) of the statute ("has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.");

and specialists (§ 6-5-548(c), Ala. Code 1975) and, in particular, sub-section (c)(4) ("has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred."). With respect to "the same discipline or school of practice" requirement in § 6-5-548(b)(3) for non-specialists, the Court explains:

> …[d]oes "the same discipline or school of practice" in § 6-5-548(b)(3) mean that which is identical to the defendant, including the type of lab test to be reported to a patient?
>
> The question of what constitutes "the same discipline or school of practice" for purposes of the applicable standard of care of a CMA is similar to the issue we addressed earlier with regard to whether Dr. Haines was qualified to offer an opinion as to the standard of care for a family-medicine practitioner because he was not working in a private, community-based family-medicine practice during the year preceding the breach of the standard of care. On that issue, we concluded that "this specialty" in § 6-5-548(c)(4) refers to the board-certified specialty practiced by the defendant doctor rather than the exact setting in which the defendant doctor practiced that specialty. Likewise, a CMA who carries out a task that is very similar, though not identical, to the task of the defendant CMA is still "practic[ing] in the same discipline or school of practice." §6-5-548(b)(3).

Ms. *66. With respect to the "practiced in this specialty during the year preceding…" requirement in § 6-5-548(c)(4) for specialists, the Court concludes "that the requirement in § 6-5-548(c)(4) that an expert must have 'practiced in this specialty' in the year preceding the alleged breach of the standard of care refers to the actual practice of the specialty at issue rather than the exact setting in which the defendant doctor practices the specialty." Ms. *43.

Commenting upon the sufficiency of an expert's *standard of care testimony*, the Court reiterates "that the testimony of an expert witness in a medical malpractice case must be viewed as a whole, and that a portion of it should not be viewed abstractly, independently, or separately from the balance of the expert's testimony." Ms. *48, quoting *Downey v. Mobile Infirmary Medical Center*, 662 So. 2d 1152, 1154 (Ala. 1995).

The Court also reiterates the test for proximate causation in a case subject to the Medical Liability Act, *i.e.*, "the plaintiff must prove, through expert medical testimony, that the alleged negligence probably caused, rather than only possibly caused, the plaintiff's injury." Ms. *51, quoting *Kraselsky v. Calderwood*, 166 So. 3d 115, 119 (Ala. 2014). The Court notes "[t]he standard for proving causation in a medical-malpractice action is not proof that the complained-of act or omission was the certain cause of the plaintiff's injury. Instead, as this Court has frequently reiterated, the standard is one of the 'probable' causes…". Ms. *52, quoting *Hill v. Fairfield Nursing & Rehab. Ctr., LLC*, 134 So. 3d 396, 406 (Ala. 2013).

Commenting upon the sufficiency of an expert's *causation testimony*, the Court reiterates "[o]ur cases make it abundantly clear, however, that a portion of the testimony of the plaintiff's expert cannot be viewed 'abstractly, independently, and separately from the balance of his testimony.'" "[W]e are to view the [expert] testimony as a whole, and, so viewing it, determine if the testimony is sufficient to create a reasonable inference of the fact the plaintiff seeks to prove." Ms. **56-57 quoting *Hrynkiw v. Trammell*, 96 So. 3d 794, 800-01 (Ala. 2012). The Court reminds us that "the issue of causation in a malpractice case may properly be submitted to the jury where there is evidence that prompt diagnosis and treatment would have placed the patient in a better position than [he] was in as a result of inferior medical care." Ms. *59, quoting *Hamilton v. Scott*, 278 So. 3d 1180, 1186 (Ala. 2018).

Because plaintiff presented competent expert testimony regarding breaches of the standard of care and causation, the JML in favor of the healthcare providers is reversed and the cause is remanded for a new trial.

➲ Statutory Immunity Under Alabama's Adult Protective Services Act § 38-9-11, Ala. Code 1975

Streip v. Smith, [Ms. 1180834, Sept. 4, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Shaw, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, and Stewart, JJ., concur; Mitchell, J., concurs specially) grants a petition for a writ of mandamus and directs the Jefferson Circuit Court to vacate an order denying motions for summary judgment in a wrongful death action filed against officers and employees of the Calhoun County Department of Human Resources involved with the placement of an impaired adult in a licensed boarding home setting which was alleged to be the proximate cause of her subsequent death. Finding that the DHR defendants had acted in conformance with the DHR Adult Policy Services Manual in making their placement determination, the Court concludes they are each entitled to statutory immunity under § 38-9-11, Ala. Code 1975, a provision of the Alabama Adult Protective Services Act, which states "Any officer, agent, or employee of the department, in the good faith exercise of his duties under this chapter, shall not be liable for any civil damages as a result of his acts or omissions in rendering assistance or care to any person." Concluding that plaintiff failed to present substantial evidence that the DHR defendants' determinations were not made in good faith, the defendants were entitled to statutory immunity under the plain and unambiguous language of the statute.

➲ Public Education Employees Health Insurance Plan ("PEEHIP") and Venue

Ex Parte Blue Cross and Blue Shield of Alabama, [Ms. 1190232, Sept. 4, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Stewart, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Mendheim, JJ, concur; Mitchell, J., recuses) grants a petition for a writ of mandamus and orders the Macon Circuit Court to transfer a case asserting claims of breach of contract and bad faith against Blue Cross and Blue Shield of Alabama to the Montgomery Circuit Court as required by § 16-25A-7(e), Ala. Code 1975, the venue provision of the Public Education Employees Health Insurance Plan ("PEEHIP") Legislation § 16-25-A-1 *et seq.*, Ala. Code 1975. Section 16-25A-7(e), concerning denial of claims,

provides: "Review of a final decision by the claims administrator shall be by the Circuit Court of Montgomery County as provided for the review of contested cases under the Alabama Administrative Procedure Act, Section 41-22-20." (Emphasis added.) The Court holds that the use of the word "shall" in the statute is "clear and unambiguous and is imperative and mandatory" such that "the Legislature affirmatively determined that proper venue for all cases concerning review of a claims administrator's final decision in Montgomery County." Ms. *6. Further, under "well settled case law," Alabama's courts are required to "follow the mandate of a specific-venue provision when that provision conflicts with general-venue statutes." Ms. *7, citing *Ex parte Fontaine Trailer Co.*, 854 So. 2d 71, 81 (Ala. 2003). Accordingly, the Circuit Court of Macon County erred in denying a motion to transfer venue to Montgomery County for this case which alleges claims of breach of contract and bad faith in the denial of a claim for pre-approval and then reimbursement of expenses related to the purchase of insulin for treatment of diabetes.

Mandamus Review of Denial of Motion to Strike Amended Complaint

Ex parte Gulf Health Hospitals, Inc., [Ms. 1180596, Sept. 4, 2020] ___ So. 3d___ (Ala. 2020). The Court (Mitchell, J.; Parker, C.J., and Wise, Bryan, Mendheim, and Stewart, JJ., concur; Bolin and Sellers, JJ., concur in the result) denies a petition for a writ of mandamus by Gulf Health Hospitals which contended the Baldwin Circuit Court exceeded its discretion in allowing a plaintiff to amend his complaint in a medical negligence case in derogation of Ala. R. Civ. P. 15(a) because the plaintiff failed to first seek the trial court's permission before filing the amended complaint after the first trial setting had passed. Denying the petition, the Court reiterates the requirement that a petitioner must show all four of the following requirements to be entitled to extraordinary mandamus relief: "1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court." Ms. **6-7, quoting *Ex parte BOC Grp., Inc.*, 823 So. 2d 1270, 1272 (Ala. 2001).

In this case, the petitioner failed to show how it lacked "another adequate remedy." Ms. *7. Citing *Ex parte State Farm Fire & Casualty Co.*, [Ms. 1180451, April 24, 2020] ___ So. 3d ___, ___ (Ala. 2020), the Court again emphasizes that a party seeking mandamus relief must adequately address the third element of the mandamus test – whether the party lacks "another adequate remedy." *Id.* While mandamus review may be available to a party aggrieved by a trial court's ruling on a motion to amend a complaint, an appeal is usually an adequate remedy from such a ruling and mandamus review is generally not available under such circumstances. Ms. *9. "Because mandamus review of a trial court's ruling on a plaintiff's motion to amend his or her complaint is the exception, not the rule, it is incumbent upon a party seeking mandamus review of such a ruling to explain why an ordinary post-judgment appeal would not be adequate." Ms. *10. Accordingly, Gulf Health Hospital's petition was due to be denied.