RECENT CIVIL DECISIONS

Summaries from September 2016 to March 2017

STANDING AND ENFORCEABILITY OF CONTRACTS

The Gardens at Glenlakes Property Owners Assn., Inc. v. Baldwin County Sewer Service, LLC, [Ms. 1150563, Sept. 23, 2016] __ So. 3d __ (Ala. 2016). In this plurality opinion (Main, J., Bolin, Shaw, and Bryan, JJ., concurring; Murdock, J., concurring in the result), the Supreme Court reverses a judgment of the Baldwin Circuit Court and remands the cause for further consideration to determine the enforceability of an agreement among property owners associations and a local sewer service provider.

The Court first rejects the Baldwin Circuit Court's reasoning for entering summary judgment in favor of the sewer service and denying summary judgments for the homeowners associations to the effect that the associations lacked standing to enforce the agreement. The Court rejected the sewer service's assertion of a lack of standing with a scholarly recitation of the law of standing:

> The concept of standing implicates a court's subject matter jurisdiction. See State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999) ("When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction."). As Justice Lyons wrote in Hamm v. Norfolk Southern Ry., 52 So. 3d 484, 499 (Ala. 2010) (Lyons, J., concurring specially): "Imprecision in labeling a party's inability to proceed as a standing problem unnecessarily expands the universe of cases lacking in subject-matter jurisdiction." In Wyeth, Inc. v. Blue Cross & Blue Shield of Alabama, 42 So. 3d 1216 (Ala. 2010), this Court noted:
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> > "[O]ur courts too often have fallen into the trap of treating as an issue of 'standing' that which is merely a failure to state a cognizable cause of action or legal theory, or a failure to satisfy the injury element of a cause of action. As the authors of Federal Practice and Procedure explain:
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> > > "'The question whether the law recognizes the cause of action stated by a plaintiff is frequently transformed into inappropriate standing terms. The [United States] Supreme Court has stated succinctly that the cause-of-action question is not a question of standing.'
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> > "13A Charles Alan Wright, Arthur K. Miller, and Edward H. Cooper, Federal Practice & Procedure § 3531 (2008) (noting, however, that the United States Supreme Court, itself, has on occasion 'succumbed to the temptation to mingle these questions'). The authors go on to explain:
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> > > "'Standing goes to the existence of sufficient adverseariness to satisfy both Article III case-or-controversy requirements and prudential concerns. In determining standing, the nature of the injury asserted is relevant to determine the existence of the required personal stake and concrete adverseness. ...'
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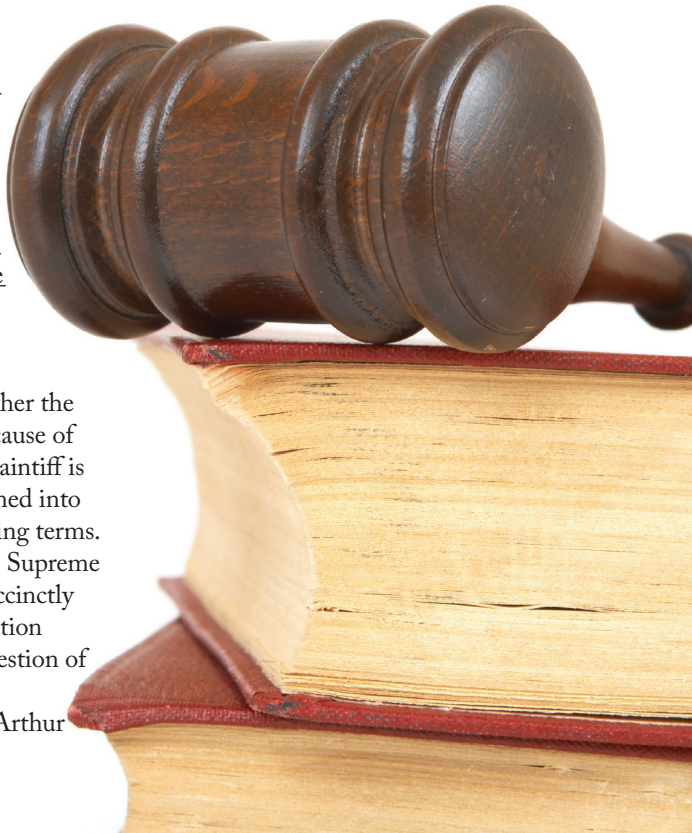
> > "13A Federal Practice & Procedure § 3531.6 .... Cf. 13B Federal Practice & Procedure § 3531.10 (discussing citizen and taxpayer standing and explaining that



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'a plaintiff cannot rest on a showing that a statute is invalid, but must show "some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally"').

"In the present case, Wyeth appears to argue that the plaintiff, BCBSAL, lacks standing because, Wyeth says, BCBSAL's allegations, even if true, would not entitle it to a recovery. ...

"... The question whether the right asserted by BCBSAL is an enforceable one in the first place, i.e., whether BCBSAL has seized upon a legal theory our law accepts, is a cause-of-action issue, not a standing issue.

"....

"Nor do we see that the consideration of the legal theory asserted by BCBSAL is outside the subject-matter jurisdiction of either the trial court or this Court. The courts of this State exist for the very purpose of performing such tasks as sorting out what constitutes a cognizable cause of action, what are the elements of a cause of action, and whether the allegations of a given complaint meet those elements. Such tasks lie at the core of the judicial function. See generally, e.g., Art. VI, § 139(a), Ala. Const. 1901 (vesting 'the judicial power of the state' in this Court and lower courts of the State); Art. VI, § 142, Ala. Const. 1901 (providing that the circuit courts of this State 'shall exercise general jurisdiction in all cases except as may otherwise be provided by law'). ... The issue Wyeth seeks to frame for this Court as one of 'standing' is, in reality, an issue as to the cognizability of the legal theory asserted by BCBSAL, not of BCBSAL's standing to assert that theory or the subject-matter jurisdiction of this Court to consider it."

42 So. 3d at 1219-21 (some emphasis added; some emphasis omitted).

Recently, in Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013), this Court again examined the concept of standing and cautioned that the concept is generally relevant only in public-law cases. 159 So. 3d at 44-45. In BAC we quoted Professor Hoffman:

> "'[T]he word "standing" unnecessarily invoked in the proposition can be erroneously equated with "real party in interest" or "failure to state a claim." This simple, though doctrinally unjustified, extension could swallow up Rule 12(b)(6), Rule 17[, Ala. R. Civ. P.,] and the whole law of amendments.'"

159 So. 3d at 46 (quoting Hoffman, The Malignant Mystique of "Standing," 73 Ala. Law. 360, 362 (2012)).

Ms. *10-13. The Court concludes that the true issue before the Baldwin Circuit Court was not that of standing, but whether the homeowners associations were properly real parties in interest, an issue to be determined in conformance with Rule 17(a), Ala. R. Civ. P. and its corresponding case law, including *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025 (Ala. 1999). Ms. *13.

Next, the Court rejects the Baldwin Circuit Court's reasoning that the terms of the agreement were so insufficiently described and indefinite as to render the agreement unenforceable. Again, the Court provided a scholarly synopsis of the requirements for enforceability of contracts under Alabama law:

> "'To be enforceable, the [essential] terms of a contract must be sufficiently definite and certain, Brooks v. Hackney, 329 N.C. 166, 170, 404 S.E.2d 854, 857 (1991), and a contract that "'leav[es] material portions open for future agreement is nugatory and void for indefiniteness'" ....' Miller v. Rose, 138 N.C. App. 582, 587-88, 532 S.E.2d 228, 232 (2000) (quoting MCB Ltd. v. McGowan, 86 N.C. App. 607, 609, 359 S.E.2d 50, 51 (1987), quoting in turn Boyce v. McMahan, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974)). 'A lack of definiteness in an agreement may concern the time of performance, the price to be paid, work to be done, property to be transferred, or miscellaneous stipulations in the agreement.' 1 Richard A. Lord, Williston on Contracts § 4:21, at 644 (4th ed. 2007). 'In particular, a reservation in either party of a future unbridled right to determine the nature of the performance ... has often caused a promise to be too indefinite for enforcement.' Id. at 644-48 (emphasis added). See also Smith v. Chickamauga Cedar Co., 263 Ala. 245, 248-49, 82 So. 2d 200, 202 (1955) ('"A reservation to either party to a contract of an unlimited right to determine the nature and extent of his performance, renders his obligation too indefinite for legal enforcement."') (quoting 12 Am. Jur. Contracts § 66). Cf. Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1440 (7th Cir. 1992) (an indefinite term may 'render[] a contract void for lack of mutuality' of obligation).
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> "'Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.' 17A Am. Jur. 2d Contracts § 183 (2004). 'The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.' Id. (emphasis added). See also Smith, 263 Ala. at 249, 82 So. 2d at 203."

White Sands Group, L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1051 (Ala. 2008).

"Generally speaking, our courts have not favored the destruction of contracts on the grounds that they are ambiguous, uncertain, or incomplete,

see Alabama National Life Insurance Co. v. National Union Life Insurance Co., 275 Ala. 28, 151 So. 2d 762 (1963); Smith v. Chickamauga Cedar Co., 263 Ala. 245, 82 So. 2d 200 (1955), and 'will, if feasible, so construe a contract as to carry into effect the reasonable intention of the [contracting] parties if that can be ascertained.' McIntyre Lumber & Export Co. v. Jackson Lumber Co., 165 Ala. 268, 51 So. 767 (1910). Nevertheless, a trial court should not attempt to enforce a contract whose terms are so indefinite, uncertain, and incomplete that the reasonable intentions of the contracting parties cannot be fairly and reasonably distilled from them. Alabama National Life Insurance Co. v. National Union Life Insurance Co., supra ...."

Cook v. Brown, 393 So. 2d 1016, 1018 (Ala. Civ. App. 1981).

Ms. *15-16. Relying upon these principles, the Court concludes the contract sufficiently described the geographic scope of the parcels intended to be encompassed by the agreement and that the contracts provision that charges for sewer service were to be "competitive with charges made by others for similar services in the South Baldwin County vicinity" was analogous to phrases such as "fair market value" and "reasonable price" which "have been uniformly held to be sufficiently definite for enforcement." Ms. *18-19 (string citing cases holding such phrases enforceable).

STATE IMMUNITY AND EMPLOYEES RETIREMENT SYSTEM OF ALABAMA-DEFINED BENEFIT PLAN

Southern States Police Benevolent Assn., Inc. v. Bentley, [Ms. 1150265, 1150360, Sept. 23, 2016] __ So. 3d __ (Ala. 2016). This *per curiam* opinion (Stuart, Acting C.J., and Bolin, Parker, Shaw, and Wise, JJ., concur) affirms judgments of the Montgomery Circuit Court, which denied an action by the Southern States Police Benevolent Association, Inc., and three City of Auburn police officer members who collectively sued Governor Bentley, members of the Board of Control of the Employees Retirement System of Alabama, David Bronner, the Chief Executive Officer and Secretary-Treasurer of the Retirement Systems of Alabama, and Thomas White, State Comptroller, in their representative capacities seeking injunctive relief and a judgment declaring that participants in the defined-benefit pension plan operated by the Employees Retirement System could make retirement contributions – and therefore receive increased retirement benefits – based upon a definition of "earnable compensation," which included payments received for overtime worked.

The Court first rejected an assertion of Article I, § 14 state immunity by Governor Bentley, Dr. Bronner, and the other Employees Retirement System officials. The Court construed the action as one seeking a declaratory judgment and therefore as an action falling within the recognized exceptions to § 14 immunity including 1) actions brought to compel state officials to perform their legal duties; 2) actions brought to enjoin state officials from enforcing an unconstitutional law; 3) actions to compel state officials to perform ministerial acts; 4) actions brought under the Declaratory Judgments Act, § 6-6-220, *et seq.*, Ala. Code 1975, seeking construction of a statute and its application in a given situation; 5) valid inverse-condemnation actions; and 6) actions seeking injunctive relief where it is alleged that state officials have acted fraudulently, in bad faith, beyond their authority, or under a mistaken interpretation of the law. Ms. *15-16, citing *Ex parte Hampton*, 189 So. 3d 14 (Ala. 2015).

The Court next construes § 36-27-1(14) in light of Ala. Op. Atty. Gen. No. 2011-090 (August 22, 2011) and the legislature's 2012 amendment of §36-27-1(14). The Court rejects the contention that the state's employees who participated in the defined-benefit plan had attained fixed and immutable rights in the plan through contributing to the plan for many years based upon overtime paid. While the Court has recognized generally that participants in public pension plans can attain contractually vested rights which could not be abrogated by subsequent legislation (Ms. *20-26), those cases only arose in the context of legislation demonstrating an unmistakable intent by the legislature to bind itself against prospectively changing the definition in the retirement plan benefit statute.

> "Having reviewed the relevant statute governing the [Employees Retirement System] plan, [the Court] concludes that there is nothing within the statutes that would indicate that the legislature intended to contractually bind itself to any definition of "earnable compensation" that would include overtime payments. Most notably, until May 2012, the definition of "earnable compensation" in § 36-27-1(14) made no mention of overtime payments and, as explained supra, and in the August 2011 Attorney General's Opinion, the language used in fact indicates that overtime payments were not "earnable compensation."

Ms. *30-31. Because up until 2012, the only thing which changed was the administrative interpretation of § 36-27-1(14), none of the defined-benefit plan participants gained any vested rights in the administration's prior erroneous interpretation as the Retirement Systems "long time erroneous interpretation of § 36-27-1(14) ... fail[ed] to bind the State in any respect." Ms. *33.

Finally, adhering to the rules of construction that the words in the 2012 amendment to § 36-27-1(14) must be given their "plain and ordinary meaning" and that the statute be read as a whole (as required by *State Superintendent of Education v. Alabama Education Ass'n*, 144 So. 3d 265, 272-73 (Ala. 2003)), the Court concludes the legislature properly intended to allow only limited overtime payments to be included within a member's earnable compensation.

In sum, the Court concludes that before the 2012 amendment of § 36-27-1(14), earnable compensation did not properly include overtime payments regardless of how the Employees Retirement System may have improperly interpreted the statute and that the 2012 amendment to the statute was properly interpreted by the Retirement Systems to allow overtime payments to be included within earnable compensation to a limited extent. Accordingly, the summary judgment entered by the Montgomery Circuit Court in favor of the state defendants is affirmed.

WORKERS' COMPENSATION AND CONTEMPT BY EMPLOYER

Augmentation, Inc. v. Harris, [Ms. 2150307, Sept. 23, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms the Tuscaloosa Circuit Court's judgment holding an employer in willful contempt pursuant to Rule 70A, Ala. R. Civ. P., *Overnight Transp. Co. v. McDuffie*, 933 So. 2d 1092 (Ala. Civ. App. 2005) and *Ex parte Cowgill*, 587 So. 2d 1002 (Ala. 1991) for its failure to pay for an employee's medical treatment. The determination of whether to hold a party in contempt is discretionary and "will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence." Ms. *25-6, quoting *Good Hope Contracting Co. v. McCall*, 187 So. 3d 1128, 1142 (Ala. Civ. App. 2015). Here, the medical evidence from the employee's treating physician indicated that care for her back injury including an epidural steroid injection and anti-inflammatory patches were warranted, but the employer failed to present any evidence that its refusal to pay for the indicated medical treatment was reasonable because it made its decision based upon the utilization-review procedure set out in Alabama Admin. Code (Workers' Compensation), Rule 480-5-5-.01, *et seq.*, or the procedure set forth in § 25-5-88, Ala. Code 1975 permitting an employer to dispute its liability for an injury by filing a petition setting out the basis of the dispute as described in *Total Fire Prot., Inc. v. Jean*, 160 So. 3d 795 (Ala. Civ. App. 2014). Because the trial court's conclusion that the employer had not properly investigated or challenged its obligation to pay for the prescribed treatment before declining to pay for that treatment was supported by the evidence, and because the employer failed to show that it had invoked either the utilization-review procedure set forth in Rule 480-5-5-.01, *et seq.*, or the judicial review procedure set forth in § 25-5-88, the Tuscaloosa Circuit Court's judgment holding the employer in contempt is affirmed.

SECTION 43-2-290, ALA. CODE 1975, REMOVAL OF PERSONAL REPRESENTATIVE

Wylie v. Estate of Cockrell, [Ms. 1141405, Sept. 30, 2016] __ So. 3d __ (Ala. 2016). The Court affirms the Montgomery Circuit Court's affirmance of the Montgomery Probate Court's decision to remove a personal representative of an estate for reasons set forth in § 43-2-290(2), (3), and (4), Ala. Code 1975.

The Court first notes the standard of review by which the circuit court was to abide in reviewing the initial determination of the probate court:

> II. Standard of Review
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> As this Court recently stated in Hardy ex rel. Estate of Carter v. Hardin, [Ms. 1130612, Jan. 22, 2016] __ So. 3d __ (Ala. 2016):
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> > "The circuit court was sitting as an appellate court in this case and was bound by the ore tenus rule. The ore tenus rule required the circuit court to defer to the probate court's factual determinations where evidence supported those determinations. Specifically, where evidence is presented ore tenus, the findings of the trial court are presumed correct 'and will not be disturbed on appeal absent a showing of plain and palpable error.' Pilalas v. Baldwin Cnty. Sav. & Loan Ass'n, 549 So. 2d 92, 95 (Ala. 1989); see also Williams v. Thornton, 274 Ala. 143, 144, 145 So. 2d 828, 829 (1962) ('The finding of the Probate Court based on the examination of witnesses ore tenus is presumed to be correct, and will not be disturbed by this court or the Circuit Court unless palpably erroneous.').
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> > "As this Court stated in Yeager v. Lucy, 998 So. 2d 460 (Ala. 2008):
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> > > "'"'The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses.' Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The rule applies to 'disputed issues of fact,' whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. Born v. Clark, 662 So. 2d 669, 672 (Ala. 1995)."'
> >
> > "998 So. 2d at 463 (quoting Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000)); see also, e.g., Woods v. Woods, 653 So. 2d 312, 314 (Ala. Civ. App. 1994) ('[I]n determining the weight to be accorded to the testimony of any witness, the trial court may consider the demeanor of the witness and the witness's apparent candor or evasiveness . . . . It is not the province of this court to override the trial court's observations.'). 'Under the ore tenus rule, the trial court's judgment and all implicit findings necessary to support it carry a presumption of correctness.' Transamerica Commercial Fin. Corp. v. AmSouth Bank, 608 So. 2d 375, 378 (Ala. 1992). However, '[t]he ore tenus rule does not extend to cloak with a presumption of correctness a trial judge's conclusions of law or the incorrect application of law to the facts.' Waltman v. Rowell, 913 So. 2d 1083, 1086 (Ala. 2005)."
>
> __So. 3d at __; see also Womack v. Estate of

> Womack, 826 So. 2d 138 (Ala. 2002).

Ms. *12-13. The Court then stated its own standard of review on appeal:

> "This Court ' "review[s] the trial court's conclusions of law and its application of law to the facts under the de novo standard of review." ' " Espinoza v. Rudolph, 46 So. 3d 403, 412 (Ala. 2010) (quoting Ex parte J.E., 1 So. 3d 1002, 1008 (Ala. 2008), quoting in turn Washington v. State, 922 So. 2d 145, 158 (Ala. Crim. App. 2005)).

Ms. *13. Upon review of the transcript of the hearings before the probate court, the Supreme Court found ample statutory bases for the circuit court's affirmance of the probate court's determination that Wylie should be removed as personal representative, including her treatment of the decedent's share of assets and income of an LLC after his death as her own not subject to a distributive share to devisees set forth in a will. Accordingly, the Montgomery Circuit Court's judgment is due to be affirmed.

Collaterally, the Court found insufficient supporting evidence of the probate court's award pursuant to Rule 17(d), Ala. R. Civ. P., of an $18,000 guardian ad litem fee taxed against the personal representative. On authority of *Van Schaack v. AmSouth Bank N.A.*, 530 So. 2d 740 (Ala. 1998), and *Whele v. Bradley*, [Ms. 1101290, Oct. 30, 2015] __ So. 3d __ (Ala. 2015) (Ms. *25-29), the Court remands the cause for the Montgomery Circuit Court to ascertain whether sufficient evidence supported taxation of a guardian ad litem fee in that amount.

GOOD COUNT-BAD COUNT AND NEW TRIAL

Dolgencorp, LLC v. Spence, [Ms. 1150124, Sept. 30, 2016] __ So. 3d __ (Ala. 2016). The Court reverses the judgment of the Autauga Circuit Court entered on a $100,000 jury verdict for Spence in her claims against Dolgencorp (Dollar General) for false imprisonment, assault and battery, invasion of privacy, negligent training, malicious prosecution, and defamation arising out of an incident at a Dollar General store in Prattville where Spence was alleged to have shoplifted mineral oil and hair spray. The Court finds substantial evidence to support the jury's verdict on the assault and battery claim (Ms. *14-16), negligent-training claim (Ms. *16-19), false-imprisonment claim (Ms. *19-23), but fails to find substantial evidence of malice to support the malicious-prosecution claim (Ms. *23-30) or actual malice to support her defamation claim (Ms. *30-34). Because the Court cannot presume that the verdict was based solely upon the good counts, i.e., the claims that were supported by the evidence, a new trial on the claims supported by the evidence is required pursuant to *Cook's Pest Control v. Rebar*, 28 So. 3d 716 (Ala. 2009). *Alfa Life Ins. Corp. v. Jackson*, 906 So. 2d 143 (Ala. 2005), and *Waddell & Reed, Inc. v. United Inv'rs Life Ins. Co.*, 875 So. 2d 1143 (Ala. 2003).

DECLARATORY JUDGMENT AND STATUTE OF LIMITATIONS

Breland v. City of Fairhope, [Ms. 1131057, 1131210, Sept. 30, 2016] __ So. 3d__ (Ala. 2016). The Court reverses a summary judgment entered by the Baldwin Circuit Court in favor of the City of Fairhope and against a landowner in an action seeking declaratory relief and damages based on Fairhope's conduct in issuing stop-work orders based on local ordinances purporting to regulate wetlands located within the City's planning jurisdiction.

The Court first determines that no statute of limitations applies to an action seeking prospective relief through a complaint for a declaratory judgment. Ms. *20-27.

As to Breland's damages claim based on losses incurred as a consequence of Fairhope's stop-work order, the Court applies the two-year limitations period found in § 6-2-38(l), Ala. Code 1975, citing *Baugus v. City of Florence*, 985 So. 2d 413 (Ala. 2007) (Ms. *29-31). The Court holds that each time Fairhope enforced its ordinances to stop Breland from filling activity on this property, Fairhope committed a new act that served as a basis for a new claim.

Accordingly, the summary judgment entered by the Baldwin Circuit Court against Breland on statute-of-statute limitations grounds is reversed and the cause is remanded for further proceedings.

MANDAMUS/CHANGE OF VENUE

Ex parte Tier I Trucking, LLC, [Ms. 1150740, Sept. 30, 2016] __ So. 3d __ (Ala. 2016). The Court once again disregards the plain language of § 6-3-7(a), Ala. Code 1975, relative to proper venue, and relies instead upon its own re-weighing of competing evidence of convenience to find that the Circuit Court of Wilcox County exceeded its discretion in refusing to transfer a motor vehicle collision case from Wilcox County to Conecuh County pursuant to Alabama's *forum non conveniens* statute, § 6-3-21.1(a), Ala. Code 1975. Here, the Court "gives great weight to the fact that the accident occurred in Conecuh County and to the fact that no material events occurred in Wilcox County" such that "[t]here is no reason to burden the people of Wilcox County with the use of their court services and other resources for a case that predominantly affects another county, [while] we recognize the interest of the people of Conecuh County to have a case that arose in their county tried close to public view in their county." Ms. *17-18.

MORTGAGE FORECLOSURE SUMMARY JUDGMENT

Turner v. Wells Fargo Bank, N.A., [Ms. 2150320, Sept. 30, 2016] __ So. 2d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms a summary judgment entered by the Jefferson Circuit Court in favor of Wells Fargo in an action for ejectment pursuant to § 6-6-280, Ala. Code 1975. The court rejects the homeowner's contention that Wells Fargo failed to present substantial evidence in support of its motion for summary judgment showing

that it was a holder of the note and the mortgage at the time notice of the impending foreclosure sale was published. The court found that prior to such publication, an assignment of the note and mortgage had been recorded such that Wells Fargo was a holder and had authority to foreclose based upon the reasoning in *Smalls v. Wells Fargo Bank, N.A.*, 180 So. 3d 910, 915-16 (Ala. Civ. App. 2015), as follows:

> In Gray v. Federal National Mortgage Ass'n, 143 So. 3d 825 (Ala. Civ. App. 2014), this court addressed a nearly identical issue, stating:
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> > "In Harris v. Deutsche Bank National Trust Co., 141 So. 3d 482, 491 (Ala. 2013), our supreme court reasoned:
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> > > " 'The Harrises also argue that the power of sale described in the mortgage was given by the Harrises as part of the security for the repayment of the debt evidenced by the note and can be "executed" only by the trustee if it was the party entitled to the money thus secured. They cite § 35–10–12, Ala. Code 1975, which states that the power to sell lands given in a mortgage "is part of the security and may be executed by any person, or the personal representative of any person who, by assignment or otherwise, becomes entitled to the money thus secured." In Carpenter v. First National Bank, 236 Ala. 213, 181 So. 239 (1938), this Court applied the predecessor to § 35–10–12, stating:
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> > > > " ' "A power of sale in a mortgage of real estate is a part of the security, and passes to any one who by assignment or otherwise becomes entitled to the money secured. Code 1923, § 9010.
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> > > > " ' "But an agent of such holder to whom the mortgage is delivered merely for the purpose of foreclosure, having no ownership of the debt, is not authorized to foreclose in his own name, and execute a deed in his name to the purchaser. Ownership of the debt does not pass to such agent merely because the note is indorsed in blank. Such foreclosure is ineffective, and a court of equity may take jurisdiction for the purpose of foreclosure.'
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> > > " '236 Ala. at 215, 181 So. at 240 (emphasis added). The foreclosure deed in this case was executed by the trustee in its own name, not on behalf of the lender, SouthStar, or any other party to which SouthStar may have assigned the note. The deed was effective to transfer title and to foreclose the rights of the mortgagor, therefore, only if the trustee, in its own name, was entitled to receive the money secured by the note at the time it executed and delivered that deed.
> > >
> > > "'The parties agree in their briefs, however, and we accept for purposes of this case, that the mortgage given MERS "solely as a nominee for Lender and Lender's successors and assigns" did not entitle MERS to the money secured by the mortgage. Accordingly, the subsequent assignment of that mortgage by MERS to the trustee did not accomplish an assignment of that right to the trustee. The trustee in fact concedes that summary judgment was inappropriate in this case and that on the state of the current record there is a genuine issue of material fact as to whether the trustee received an assignment of the note so as to have entitled it to execute the power of sale in its own name. (It asserts that, if this case is returned to the trial court, it will introduce "conclusive evidence" of its receipt as early as 2005 of the debt evidenced by the original note signed by the Harrises). The summary judgment entered by the trial court therefore is due to be vacated and the case remanded for a determination as to whether the trustee received an assignment by the note, and thus the power to execute the corresponding power of sale in its own name, before executing and delivering the foreclosure deed.'

"(Footnote omitted.). See also Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 35-36 (Ala. 2013) (holding that the right of the foreclosing entity to conduct a foreclosure sale must be proven in order to show that the buyer at a foreclosure sale has superior legal title and a cause of action to eject the debtor). Further, in Coleman v. BAC Servicing, 104 So. 3d 195 (Ala. Civ. App. 2012), this court explained:

> " 'Alabama law specifically contemplates that there can be a separation. See § 35–10–12 and Harton [v. Little, 176 Ala. 267, 57 So.

851 (1911)]. The Restatement (Third) of Property: Mortgages takes the position that a note and mortgage can be separated but that "[t]he mortgage becomes useless in the hands of one who does not also hold the obligation because only the holder of the obligation can foreclose." Restatement (Third) of Property: Mortgages § 5.4, Reporter's Note –– Introduction, cmt. a at 386. The Restatement explains: "'The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow.'" Id. at 387 (quoting Best Fertilizers of Arizona, Inc. v. Burns, 117 Ariz. 178, 179, 571 P.2d 675, 676 (Ct. App.), reversed on other grounds, 116 Ariz. 492, 570 P.2d 179 (1977)).'

"104 So. 3d at 205."
143 So. 3d at 830-31.

"An assignee of a debt secured by a mortgage may execute the right to foreclose. § 35-10-1 and § 35-10-12, Ala. Code 1975. '"The clear test of the right of an assignee of the mortgage to exercise the power of sale under [§ 35-10-1, Ala. Code 1975,] is that such assignee is entitled to receive the money secured by the mortgage."' Ex parte GMAC Mor[t]g., LLC, 176 So. 3d 845, 848 (Ala. 2013) (quoting Kelly v. Carmichael, 217 Ala. 534, 537, 117 So. 67, 70 (1928)). ...

"....

" 'In Alabama, a note secured by a mortgage is a negotiable instrument. Thomas v. Wells Fargo Bank, N.A., 116 So. 3d 226, 233 (Ala. Civ. App. 2012). A holder of a note secured by a mortgage is entitled to enforce the terms of the note. Perry v. Federal Nat'l Mortg. Ass'n, 100 So. 3d [1090,] 1094 [(Ala. Civ. App. 2012)].'

"Sturdivant v. BAC Home Loan Servicing, LP, 159 So. 3d 47, 55 (Ala. Civ. App. 2013) (footnote omitted); see § 7-3-301, Ala. Code 1975 (providing that a holder is a 'person entitled to enforce' the negotiable instrument). The negotiable instrument must have been either issued or negotiated to a person or an entity in order for the transferee to become a holder. § 7-3-302, Ala. Code 1975; Stone v. Goldberg & Lewis, 6 Ala. App. 249, 259, 60 So.744, 748 (1912) (opinion on rehearing) ('[T]he instrument must be "negotiated" to the holder in order for the holder to be a "holder in due course."'). A negotiation requires a transfer of possession and an indorsement by the holder if the instrument is payable to an identified person or transfer by possession only if the instrument is payable to bearer. § 7-3-201(b), Ala. Code 1975."

Smalls v. Wells Fargo Bank, N.A., 180 So. 3d 910, 915-16 (Ala. Civ. App. 2015).

Ms. *23-27 (underlined emphases in original).

WORKERS' COMPENSATION AND RULE 35(A) ALA. R. CIV. P. MENTAL EXAMINATION

Ex parte Tidra Corp., [Ms. 2150940, Oct. 7, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals grants a petition for a writ of mandamus and directs the Lee Circuit Court to set aside two orders concerning an employee who claimed workers' compensation benefits.

First, the court holds that the Lee Circuit Court erred in *sua sponte* ordering the employee to undergo a mental examination pursuant to Rule 35(a), Ala. R. Civ. P. The plain language of Rule 35(a) states that such an order "... may be made only on motion for good cause shown ...." Because neither party moved the circuit court for an order directing such a mental examination, the circuit court erred in *sua sponte* ordering such an examination. Ms. *5-9.

The court also concludes that the Lee Circuit Court erred in ordering the employer to pay for physical therapy sessions for the employee without first determining compensability of the worker's claims in conformance with *Ex parte Publix Supermarkets, Inc.*, 963 So. 2d 654 (Ala. Civ. App. 2007). Reiterating its holding in *Ex parte Publix Supermarkets*, the court explains that a trial court may not compel an employer to pay for medical treatment for an employee without first holding an evidentiary hearing on the issue of compensability or utilizing either Rule 12(c), Ala. R. Civ. P. (authorizing a judgment on the pleadings), or Rule 56, Ala. R. Civ. P. (authorizing a summary judgment), to determine the issue of compensability without a trial. Ms. *9-10. Because the evidence of compensability and necessity for such medical treatments was in dispute, such that neither Rule 12(c)'s nor Rule 56's procedures could be invoked, and because there was no evidence the Lee Circuit Court had conducted an evidentiary hearing concerning the issue of compensability, the order directing the employer to provide the medical treatment was due to be vacated.

VENUE AND PROOF OF CONVENIENCE

Ex parte Gentile Company, LLC, [Ms. 2150901, Oct. 14, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals grants a petition for a writ of mandamus and directs the Circuit Court of Jefferson County to vacate an order

transferring the action to the Bessemer division of Jefferson County upon finding that the party seeking a transfer of venue to the Bessemer division upon the basis of the relative convenience of the parties (the Bright Star Restaurant, Inc.) failed to support its motion with evidence of convenience. The pertinent standard of review for a motion pursuant to § 6-3-21.1, Ala. Code 1975, is stated as follows:

> ""A defendant moving for a transfer under § 6-3-21.1[, Ala. Code 1975, the statute governing venue transfers under the doctrine of forum non conveniens,] has the initial burden of showing that the transfer is justified, based on the convenience of the parties or witnesses or based on the interest of justice.'" Ex parte Kane, 989 So. 2d 509, 511 (Ala. 2008) (quoting Ex parte National Sec. Ins. Co., 727 So. 2d [788,] 789 [(Ala. 1998)]). 'Our review is limited to only those facts that were before the trial court.' Ex parte Kane, 989 So. 2d at 511. Further, 'those facts "must be based upon 'evidentiary material,' which does not include statements of counsel in motions, briefs, and arguments."' Ex parte Indiana Mills & Mfg., Inc., 10 So. 3d [536,] 541 n.3 [(Ala. 2008)] (quoting Ex parte ADT Sec. Servs., Inc., 933 So. 2d 343, 345 (Ala. 2006))."

Ex parte Veolia Envtl. SVC, 122 So. 3d 839, 842 (Ala. Civ. App. 2013). Ms. *8-9.

JUDICIAL RECUSAL

Ex parte Crawford, [Ms. 2150868, Oct. 14, 2016] __ So. 2d __ (Ala. Civ. App. 2016). The Court of Civil Appeals denies a petition for a writ of mandamus which sought to direct a Lauderdale circuit judge to recuse himself from further presiding over an underlying divorce case between the petitioner and her husband. The wife contended that because the judge received an ex parte communication from a non-party, the superintendent of a local school system, there was a reasonable basis for questioning the judge's impartiality. The Court of Civil Appeals denies the petition upon finding that while the judge did indeed receive an unsolicited ex parte communication from the school superintendent, the wife failed to show how she had been materially prejudiced by the communication such that recusal was not warranted.

The statement of the standard of review is well-reasoned and helpful:

> "A trial judge's ruling on a motion to recuse is reviewed to determine whether the judge exceeded his or her discretion. See Borders v. City of Huntsville, 875 So. 2d 1168, 1176 (Ala. 2003). The necessity for recusal is evaluated by the 'totality of the facts' and circumstances in each case. [Ex parte City of] Dothan Pers. Bd., 831 So. 2d [1,] 2 [(Ala. 2002)]. The test is whether '"facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge."' In re Sheffield, 465 So. 2d 350, 355–56 (Ala. 1984) (quoting Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982))."

Ex parte George, 962 So. 2d 789, 791 (Ala. 2006).

> "The presumption in Alabama is that a judge is qualified and unbiased. Rikard v. Rikard, 590 So. 2d 300 (Ala. Civ. App. 1991). The burden is on the moving party to present evidence establishing the existence of bias or prejudice. Rikard. Disqualifying prejudice or impartiality must be of a personal nature and must stem from an extrajudicial source. Rikard."

Zimmerman v. Zimmerman, 655 So. 2d 1042, 1044 (Ala. Civ. App. 1995). "'The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" Medical Arts Clinic, P.C. v. Henry, 484 So. 2d 385, 387-88 (Ala. 1986)(quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)).

Pursuant to Canon 3.A.(4), Alabama Canons of Judicial Ethics, "[a] judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications concerning a pending or impending proceeding." "Ex parte communications are those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter." James J. Alfini, Steven Lubet, Jeffrey Shaman, and Charles Gardner Geyh, Judicial Conduct and Ethics § 5.02, 5–2 (4th ed. 2007).

Although "a private interview or conversation between a judge and a witness or non-party (where interests which might be affected by such conduct are not represented) could be deemed an impropriety and worthy of criticism," Stewart v. Stewart, 354 So. 2d 816, 820 (Ala. Civ. App. 1977), a showing that such an ex parte communication has occurred, without more, might not be sufficient to require a trial judge's disqualification. The party seeking the trial judge's recusal must present sufficient evidence showing that the trial judge has been biased or prejudiced by the ex parte communication "such that 'a reasonable person knowing everything that the [trial] judge knows would have a "reasonable basis for questioning the [trial] judge's impartiality."'" S.J.R. v. F.M.R., 984 So. 2d 468, 472 (Ala. Civ. App. 2007) (quoting Ex parte Bryant, 682 So. 2d 39, 41 (Ala. 1996), quoting in turn Ex parte Cotton, 638 So. 2d 870, 872

(Ala. 1994)). See also Canon 3.C.(1), Alabama Canons of Judicial Ethics ("A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned ...."); and Medical Arts Clinic, P.C., 484 So. 2d at 387 (holding that when a trial judge receives an ex parte communication, the evidence must be "sufficient to show bias or prejudice so as to disqualify the trial judge").

> "Attorneys usually realize that it is improper to initiate ex parte communications with a judge regarding a case that is presently pending before him, but the same is not necessarily true of members of the general public, who may pick up the telephone and try to call a judge regarding such a matter or send him a letter. In fact, it is not at all uncommon for a judge to receive calls or letters from the public – particularly in a high-profile case. Judges should do whatever they can to prevent such inadvertent ex parte communications from occurring, and should endeavor to disregard such communications when they inadvertently receive them. But the mere fact that an unsolicited ex parte communication has taken place does not ordinarily warrant judicial disqualification – much less reversal of any decision rendered by the challenged judge. This is true a fortiori where the ex parte communication was received by the judge after he rendered that decision.
>
> "There are sound reasons for not mandating judicial disqualification on the basis of a judge's inadvertent receipt of letters or telephone calls. For one thing, [if] the rule is otherwise – and a judge were to be disqualified from presiding over a proceeding merely because he received a letter from a party or someone else who is interested in a matter pending before that judge – few cases would ever be resolved. At some point, however, a judge's receipt of unauthorized communications about a case may so affect his impartiality, or the appearance of that impartiality, that he would be duty bound to recuse. This is so, a fortiori, where the inadvertently contacted judge has voluntarily elected to respond to such communications."
>
> Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges § 14.5.5, pp. 395-97 (2d ed. 2007)(footnotes omitted).
>
> When a trial judge receives an ex parte communication, "prompt disclosure of the ex parte communication to all affected parties may avoid the need for other corrective action." Elfin, et al., Judicial Conduct and Ethics § 5.05, at 5-22. However, "[w]here irremediable prejudice has occurred, of course, disclosure will not be sufficient to avoid disqualification or reversal." Id. at 5-23.

Ms. *12-16.

ARBITRATION

Hanover Ins. Co. v. Kiva Lodge Condominium Owners Assoc., Inc., [Ms. 1141331, Oct. 21, 2016] __ So. 3d __ (Ala. 2016). The Supreme Court affirms an order of the Baldwin Circuit Court granting a motion to stay, pending arbitration, in a commercial contract dispute about construction repairs to a golf course club house and condominiums. The Court construes the phrase "any claim arising out of or related to the contract ... may at the election of either party ... be subject to arbitration ..." as requiring in conformance with *Beni Hana of Tokyo, LLC v. Beni Hana, Inc.*, 73 F. Supp. 3d 238 (S. D. N.Y. 2014) mandatory arbitration upon election of either party to the agreement. In other words, once one party elects to submit the dispute to arbitration, arbitration of that issue becomes mandatory for both parties.

Also, in conformance with *Dudley, Hopton-Jones, Sims & Freeman, PLLP v. Knight*, 57 So. 3d 68 (Ala. 2010), the issue of whether a party's claims are barred by an applicable statute of limitations is to be considered and ruled upon by the arbitrator, not the court.

DIVORCE, ALIMONY, CHILD SUPPORT, DIVISION OF MARITAL ASSETS

Person v. Person, [Ms. 2150225, Oct. 21, 2016] __ So. 3d__ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms in part and reverses in part a divorce judgment entered by the Crenshaw Circuit Court concerning the 20-year marriage of former NBA star Wesley Person and his wife. The court concludes it is unable to affirm the Crenshaw Circuit Court's judgment awarding alimony, child support, and property division because there was no evidence presented by the parties from which the circuit court could make accurate determinations of the parties' incomes, the needs of the children, or of whether the wife would be able to maintain her former marital standard of living absent an award of periodic alimony. Accordingly, the cause is remanded for the circuit court to reconsider its judgment as to alimony, child-support and division of marital assets.

PROBATE AND ADMINISTRATION OF FOREIGN ESTATE

Ex parte Scott, [Ms. 1140645, Oct. 28, 2016] __ So. 3d __ (Ala. 2016). The Supreme Court unanimously grants a petition for a writ of mandamus directing the Jefferson Probate Court to vacate its order requiring beneficiaries of an estate to pay into the probate court distributions they were to receive from a concurrent administration of the estate in London, England. The Court concludes the Jefferson County Probate Court has no jurisdiction to direct control or distribution of the estate assets from the English administration because those assets derive from real property in England. Citing the principle of *lex loci*

rei sitae as explained in *Phillips v. Phillips*, 213 Ala. 27, 104 So. 234 (1925), the Court concludes the Jefferson Probate Court was without in rem jurisdiction over the proceeds from the sale of the lands in England because of the

> inherent right of every sovereign state, for its own security and in keeping with its dignity and independence, to regulate the alienation, devise, or descent of real estate within its borders.

Ms. *22, quoting *Phillips v. Phillips*, 213 Ala. at 29, 104 So. at 236.

POST-JUDGMENT MOTIONS

Wynn v. Steger, [Ms. 2150789, Oct. 28, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals reverses a judgment of the Madison Circuit Court transferring custody of children from the children's maternal grandmother to their mother based upon its failure to apply the correct standard of review provided by *Ex parte McClendon*, 455 So. 2d 863 (Ala. 1984). Of significance is the court's treatment of the grandmother's successive post-judgment motions and their impact in establishing the deadline for filing her notice of appeal. The court notes that a valid and timely post-judgment motion operates to extend the Rule 59.1, Ala. Rule Civ. P. 90-day period in which a trial court may consider a post-judgment motion. Ms. *4, citing *Curry v. Curry*, 962 So. 2d 261 (Ala. Civ. App. 2007). The court also notes that a second post-judgment motion is not precluded from consideration merely because a party previously filed an earlier post-judgment motion:

> ... Goodyear Tire & Rubber Co. v. Haygood, 93 So. 3d 132, 140 (Ala. Civ. App. 2012) ("[A] second postjudgment motion is not to be precluded from the trial court's consideration merely because a party already has filed one postjudgment motion. The trial court must look to the substance of the motion to see whether it constitutes an 'amendment' to the first postjudgment motion."); and Roden v. Roden, 937 So. 2d 83, 85 (Ala. Civ. App. 2006) ("Rule 59.1 has been held to apply separately to each distinct timely filed postjudgment motion so as to afford the trial court a full 90-day period to rule on each separate motion (see Spina v. Causey, 403 So. 2d 199, 201 (Ala. 1981)).").

Ms. *5.

APPEAL AND DISMISSAL

Graham v. City of Talladega, [Ms. 2150803, Oct. 28, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals dismisses an appeal as untimely where the appellant calculated her appeal deadline from the date of dismissal of an amended complaint that she filed without previously obtaining leave of court in conformance with Rule 15(a), Ala. R. Civ. P. (stating that "a party may amend a pleading [after the 42nd day before the first trial setting] only by leave of court, and leave shall be given only upon a showing of good cause"). Because the appellant filed her amended complaint without leave of court after the case had previously been set for trial, the court concludes she "was not entitled to amend her complaint 'without leave of court.'" Ms. *7, citing *Image Marketing, Inc. v. Florence Television, L.L.C.*, 884 So. 2d 822 (Ala. 2003), the court holds that the filing of the amended complaint without leave of court resulted in that amended complaint being a nullity which, accordingly would not support an appeal.

TEACHER DISCIPLINE AND STANDARD OF REVIEW

Boaz City School Board v. Stewart, [Ms. 2150582, Nov. 4, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals unanimously reverses an administrative determination of a hearing officer who, upon appellate review, reversed an earlier decision of the Boaz City School Board terminating a teacher's employment for abuse of its regulations concerning paid medical leave.

The court first noted that under the Students First Act, § 16-24C-1 *et seq.*, Ala. Code 1975, hearing officers are supposed to employ an "extremely deferential" "arbitrary-and-capricious" standard of review of employer's decisions. Ms. *2, quoting *Ex parte Lambert* [Ms. 1130071, Aug. 28, 2015] __ So. 3d __ (Ala. 2015), and *Huntsville City Bd. of Educ. v. Jacobs*, 194 So. 3d 929, 939 (Ala. Civ. App. 2014).

By contrast, the Court of Civil Appeals' standard of review of the hearing officer's order is *de novo* with no presumption of correctness. Ms. *3, citing *Chilton Cty. Bd. of Educ. v. Cahalane*, 117 So. 3d 363 (Ala. Civ. App. 2012).

Upon engaging in such a *de novo* review of the evidence presented to the Boaz City School Board, the court (Ms. *4-14) concludes the school board could reasonably have concluded that the teacher failed to adhere to board policy and, thus, just cause existed for his termination pursuant to § 16-24C-6(a), Ala. Code 1975. Because the board's determination was reasonable, the hearing officer erred in determining it was arbitrary or capricious such that *Ex parte Lambert* required the board's decision to be reinstated.

FRIVOLOUS APPEAL AND SANCTIONS

Johnson v. Ives, [Ms. 2150613, Nov. 4, 2016] __ So. 3d __ (Ala. Civ. App. 2016). In an extraordinary *per curiam* opinion, the court unanimously determines that an appellant's brief failed to comply with the procedural requirements of Rule 28(a), Ala. R. App. P., and thereby resulted in a waiver of appellant's argument as provided by *White Sands Grp. L.L.C. v. PRS II, LLC*, 998 So. 2d 1042, 1048 (Ala. 2008). Under authority of Rule 38, Ala. R. App. P., the court *ex mero motu* determined the appeal was frivolous and awarded $1,500 damages to the appellee with instruction that the fine was to be paid by the attorney and not charged against his client, the appellant.

CIVIL FORFEITURE AND RULE 60(B), ALA. R. CIV. P., RELIEF FROM JUDGMENT

Bharara Segar LLC v. State of Alabama, [Ms. 2150663, Nov. 4, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals reverses a judgment of the Etowah Circuit Court entered pursuant to an agreement between the Etowah County District Attorney on behalf of

the State of Alabama and Subeet Arora, a member of Bharara Segar LLC, involving condemnation and forfeiture of $5,000 cash and a 2003 Mercedes-Benz E320 vehicle pursuant to § 20-2-93, Ala. Code 1975. The court concludes the LLC's due process rights were violated when the Etowah Circuit Court entered judgment based upon the settlement agreement prior to the time within which the LLC was required pursuant to Rule 12(a), Ala. R. Civ. P., to file its answer to the complaint for civil forfeiture. When publication of the notice of the action is given pursuant to § 28-4-286, Ala. Code 1975, individuals who have an interest in the property at risk of condemnation and forfeiture are entitled by due process to the time prescribed by law to file an answer and contest the claim.

In this case, while Mr. Arora may have been a member of the LLC when he personally entered the settlement agreement with the district attorney, there was no showing that the LLC itself agreed to the purported settlement agreement. Thus, the LLC's Rule 60(b), Ala. R. Civ. P., motion for relief from judgment was due to be granted, and the Etowah Circuit Court's order and judgment reversed and remanded.

SUMMARY JUDGMENT AND OPEN AND OBVIOUS DANGER

Smith v. Wells Fargo Bank, NA, [Ms. 2150715, Nov. 4, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The court reverses a summary judgment entered by the Jefferson Circuit Court in a premises liability case upon concluding that jury questions were presented on whether the premises owner had actual or constructive knowledge of defects in a chair that failed and injured the plaintiff.

> " 'A condition is "open and obvious" when it is "known to the [plaintiff] or should have been observed by the [plaintiff] in the exercise of reasonable care." *Quillen v. Quillen*, 388 So. 2d 985, 989 (Ala. 1980). "The entire basis of [a store owner's] liability rests upon [its] superior knowledge of the danger which causes the [customer's] injuries. Therefore, if that superior knowledge is lacking, as when the danger is obvious, the [store owner] cannot be held liable." *Id.* (citation omitted)."'
>
> *Horne v. Gregerson's Foods, Inc.*, 849 So. 2d 173, 176 (Ala. Civ. App. 2002) (quoting *Denmark v. Mercantile Stores Co.*, 844 So. 2d 1189, 1194 (Ala. 2002)).

Ms. *8-9.

> " '[q]uestions of openness and obviousness of a defect or danger and of an [invitee's] knowledge are generally not to be resolved on a motion for summary judgment.' *Harding v. Pierce Hardy Real Estate*, 628 So. 2d 461, 463 (Ala. 1993). See also *Woodward* [*v. Health Care Auth. of Huntsville*, 727 So. 2d 814 (Ala. Civ. App. 1998)]. Additionally, 'this Court has indicated that even though a defect is open and obvious, an injured invitee is not barred from recovery where the invitee, acting reasonably, did not appreciate the danger of the defect.' *Young v. La Quinta Inns, Inc.*, 682 So. 2d 402, 404 (Ala. 1996)."
>
> *Ex parte Kraatz*, 775 So. 2d 801, 804 (Ala. 2000).

Ms. *9-10.

INTERPLEADER AND CONSTRUCTION OF INSURANCE POLICY

Pharmacists Mutual Ins. Co. v. Advanced Specialty Pharmacy LLC, [Ms. 1140046, Nov. 18, 2016] __ So. 3d __ (Ala. 2016). The Court reverses a judgment of the Jefferson Circuit Court which held in the context of an interpleader action that a commercial general liability insurer owed an additional $3 million in liability insurance coverage under its policies' products/completed work-hazard aggregate limit to afford coverage for 17 injuries and 9 deaths attributable to serious bloodstream infections from administrations in Alabama hospitals of total parenteral nutrition injections. The issue of the amount of liability insurance coverage owed came before the Supreme Court upon review of the Jefferson Circuit Court's entry of summary judgment. Because the circuit court interpreted the insurance policy as a matter of law, its interpretation is subject on appeal to *de novo* review. Ms. *16.

The basic rules concerning interpretation of insurance policies are as follows:

> "When analyzing an insurance policy, a court gives words used in the policy their common, everyday meaning and interprets them as a reasonable person in the insured's position would have understood them. Western World Ins. Co. v. City of Tuscumbia, 612 So. 2d 1159 (Ala. 1992); St. Paul Fire & Marine Ins. Co. v. Edge Mem'l Hosp., 584 So. 2d 1316 (Ala. 1991). If, under this standard, they are reasonably certain in their meaning, they are not ambiguous as a matter of law and the rule of construction in favor of the insured does not apply. Bituminous Cas. Corp. v. Harris, 372 So. 2d 342 (Ala. Civ. App. 1979). Only in cases of genuine ambiguity or inconsistency is it proper to resort to rules of construction. Canal Ins. Co. v. Old Republic Ins. Co., 718 So. 2d 8 (Ala. 1998). A policy is not made ambiguous by the fact that the parties interpret the policy differently or disagree as to the meaning of a written provision in a contract. Watkins v. United States Fid. & Guar. Co., 656 So. 2d 337 (Ala. 1994). A court must not rewrite a policy so as to include or exclude coverage that was not intended. Upton v. Mississippi Valley Title Ins. Co., 469 So. 2d 548 (Ala. 1985)."

> "B.D.B. v. State Farm Mut. Auto. Ins. Co., 814 So. 2d 877, 879-80 (Ala. Civ. App. 2001). However, if a provision in an insurance policy is found to be genuinely ambiguous, 'policies of insurance should be construed liberally in respect to persons insured and strictly with respect to the insurer.' Crossett v. St. Louis Fire & Marine Ins. Co., 289 Ala. 598, 603, 269 So. 2d 869, 873 (1972)."

State Farm Mut. Auto. Ins. Co. v. Brown, 26 So. 3d 1167, 1169-70 (Ala. 2009).

Ms. *16-17. Here, the Court concludes the Jefferson Circuit Court erred in construing the language of the products/completed-work-hazard aggregate limit such that its judgment was due to be reversed.

WILL CONTEST

Ray v. Huett, [Ms. 1150572, Nov. 23, 2016] __ So. 3d __ (Ala. 2016). The Supreme Court reverses a judgment of the Tallapoosa Circuit Court in a will contest which was transferred to the circuit court from the Tallapoosa Probate Court pursuant to § 43-8-198, Ala. Code 1975. The Court concludes the circuit court had no subject-matter jurisdiction to address and construe the purported testamentary-trust provision of the will as its jurisdiction was limited to the issues expressly raised by the pleadings, namely whether the decedent had the capacity to make the will, whether it was properly executed, and whether it was the product of undue influence. Given the limited scope of jurisdiction afforded will contests by § 43-8-190, Ala. Code 1975 and the mandate in § 43-8-198 that "[t]he issues must be made up in the circuit court as if the trial were to be had in the probate court ..." the circuit court upon a § 43-8-198 transfer is limited to the trial of the issues presented by the contest and once those issues are determined the case must be certified back to the probate court under authority of *Bardin v. Jones*, 371 So. 2d 23 (Ala. 1979) and *Jean v. Jean*, 32 So. 3d 1274 (Ala. 2009). While a circuit court can in an appropriate case entertain additional issues properly raised, the present record reveals that the only issues properly before the Tallapoosa Circuit Court were whether the decedent had testamentary capacity to execute the will, whether it was properly executed, and whether there was undue influence in its execution. Since the circuit court went beyond these issues to construe the testamentary trust, it exceeded its jurisdiction such that its judgment was required to be reversed.

OUTBOUND FORUM SELECTION CLAUSE

Ex parte PT Solutions Holdings, LLC, [Ms. 1150687, Nov. 23, 2016] __ So. 3d __ (Ala. 2016). The Supreme Court grants a petition for a writ of mandamus and directs the Barber Circuit Court to vacate an order denying a motion to dismiss a complaint based upon a contractually agreed-upon outbound forum selection clause which requires litigation of claims between the parties to take place in Fulton County, Georgia.

The standard of review in determining whether an outbound forum selection clause is enforceable is as follows:

> II. Standard of Review
>
> > "[A]n attempt to seek enforcement of the outbound forum-selection clause is properly presented in a motion to dismiss without prejudice, pursuant to Rule 12(b)(3), Ala. R. Civ. P., for contractually improper venue. Additionally, we note that a party may submit evidentiary matters to support a motion to dismiss that attacks venue. Williams v. Skysite Communications Corp., 781 So. 2d 241 (Ala. Civ. App. 2000), quoting Crowe v. City of Athens, 733 So. 2d 447, 449 (Ala. Civ. App. 1999)."
>
> Ex parte D.M. White Constr. Co., 806 So. 2d 370, 372 (Ala. 2001).
>
> > "'[A] petition for a writ of mandamus is the proper vehicle for obtaining review of an order denying enforcement of an "outbound" forum-selection clause when it is presented in a motion to dismiss.' Ex parte D.M. White Constr. Co., 806 So. 2d 370, 372 (Ala. 2001); see Ex parte CTB, Inc., 782 So. 2d 188, 190 (Ala. 2000). '[A] writ of mandamus is an extraordinary remedy, which requires the petitioner to demonstrate a clear, legal right to the relief sought, or an abuse of discretion.' Ex parte Palm Harbor Homes, Inc., 798 So. 2d 656, 660 (Ala. 2001). '[T]he review of a trial court's ruling on the question of enforcing a forum-selection clause is for an abuse of discretion.' Ex parte D.M. White Constr. Co., 806 So. 2d at 372."
>
> Ex parte Leasecomm Corp., 886 So. 2d 58, 62 (Ala. 2003).

Ms. *11.

Under authority of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), *Professional Ins. Corp. v. Sutherland*, 700 So. 2d 347 (Ala. 1997, and *Ex parte Leasecomm Corp.*, *supra*, 886 So. 2d at 62-63, the Court rejected challenges to this particular clause premised upon the contention that the forum selection clause is invalid because it is contained in a non-competition agreement involving professionals which allegedly violates Alabama public policy. The Court holds instead that *M/S Bremen* requires forum selection clauses to be unenforceable only when enforcement of the forum selection clause itself would contravene a strong public policy of the forum in which the suit is brought. In other words, the focus must be on whether the forum selection clause contravenes public policy, not whether the underlying contract that contains the forum selection clause contravenes public policy. Ms. *15-16. Because "[i]t has long been established that forum selection clauses are not against Alabama public policy ...." *Ex parte Riverfront, LLC*, 129 So. 3d 1008, 1015 (Ala. 2013)(Ms. *16), the contractually agreed-upon outbound forum selection clause requiring litigation of the parties' disputes to be conducted in Georgia warrants dismissal of the lawsuit between the parties in the Barber Circuit Court. Accordingly, the petition for writ of mandamus is granted and the Barber

Circuit Court is ordered to grant the motion to dismiss without prejudice.

RULE 59.1, ALA. R. CIV. P. AND DENIAL OF POST-JUDGMENT MOTION BY OPERATION OF LAW

Ex parte Genesis Pittman, [Ms. 1150947, Dec. 2, 2016] __ So. 3d __ (Ala. 2016). The Court unanimously (Shaw, J., and Stuart, Bolin, Parker, Murdock, Main, Wise, and Bryan, JJ., concurring) grants a petition for a writ of mandamus and directs the Jefferson Circuit Court to vacate its order setting aside a prior summary judgment because the circuit court's order was entered on a date beyond the 90-day deadline imposed by Rule 59.1, Ala. R. Civ. P. Noting (Ms. *3-4), Rule 59.1's provision that "[a] failure by the trial court to render an order disposing of any pending post-judgment motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period," the Court holds there cannot be any implied consent to an extension of the 90-day period provided for in Rule 59.1. Citing *Higgins v. Higgins*, 952 So. 2d 1144 (Ala. Civ. App. 2006), *Alabama Elect. Co. v. Dobbins*, 744 So. 2d 928 (Ala. Civ. App. 1999), and *Farmer v. Jackson*, 553 So. 2d 550 (Ala. 1989), the Court reiterates (Ms. *6-7) that any extension of the 90-day deadline must be by express consent or by the grant of an extension of time by an appellate court. Because the circuit court's order purporting to set aside the earlier summary judgment was entered beyond the 90-day deadline imposed by Rule 59.1, that order was a nullity per *Alabama Dep't of Indus. Relations v. Roberson*, 97 So. 3d 176 (Ala. Civ. App. 2012).

DEFAULT JUDGMENT AND RULE 4(C), ALA. R. CIV. P. SERVICE OF PROCESS

Ex parte Lereta, LLC, [Ms. 1151054, Dec. 2, 2016] __ So. 3d __ (Ala. 2016). The Court grants a petition for a writ of mandamus and directs the Colbert Circuit Court to vacate its order denying a motion to set aside a default judgment based upon a failure to properly perfect service upon an LLC. Because service was directed only to the LLC and was signed for by an employee who was not an officer, partner, managing agent, general agent, or agent authorized by appointment or by law to receive service of process, service was not perfected as required by Rule 4(c) such that the default judgment taken against that LLC was void. See *Boudreaux v. Kemp*, 49 So. 3d 1190, 1194 (Ala. 2010)("the failure to effect proper service under Rule 4, Ala. R. Civ. P., deprives the trial court of personal jurisdiction over the defendant and renders a default judgment void."). Rule 4(c)(6), Ala. R. Civ. P. directs to whom certified mail must be addressed:

> "(c) Upon Whom Process Served. Service of process ... shall be made as follows:
>
> "....
>
> "(6) Corporations and Other Entities. Upon a domestic or foreign corporation or upon a partnership, limited partnership, limited liability partnership, limited liability company, or unincorporated organization or association, by serving an officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process."
>
> (Emphasis added.)

For service by certified mail to a business entity to be effective, Rule 4(i)(2)(C) requires delivery to an "addressee," who must be a person as identified in Rule 4(c)(6) or to the addressee's agent specifically authorized to receive the addressee's mail. Ms. *11-12. Accordingly, because the underlying default judgment was void, mandamus was warranted to direct the Colbert Circuit Court to set aside the default judgment and to enter an order setting aside the default judgment.

VENUE AND § 6-3-21.1, ALA. CODE 1975 FORUM NON CONVENIENS

Ex parte Benton, [Ms. 1151181, Dec. 2, 2016] __ So. 3d __ (Ala. 2016). The Court grants mandamus and orders the Bibb Circuit Court to vacate an order denying a motion to transfer an action concerning an automobile collision to the Shelby Circuit Court on the basis of *forum non conveniens*. Reiterating its stance that "[t]he 'interest of justice' prong of § 6-3-21.1 requires 'the transfer of the action from a county with little, if any, connection to the action, to the county with a strong connection to the action'" [Ms. *5], the Court "gives great weight to the fact that the accident occurred in Shelby County and to the fact that no material events occurred in Bibb County" (Ms. *6), such that *Ex parte Wayne Farms, LLC* [Ms. 1150404, May 27, 2016], __ So. 3d __ (Ala. 2016), *Ex parte Manning*, 170 So. 3d 638 (Ala. 2014), *Ex parte Autauga Heating and Cooling, LLC*, 58 So. 3d 745 (Ala. 2010), and *Ex parte Indiana Mills & Mfg. Co., Inc.*, 10 So. 3d 536 (Ala. 2008) warrant transferring this action to Shelby County.

JURISDICTION AND ATTORNEY FEE

Ex parte Hill, [Ms. 1150162, 1150148, Dec. 9, 2016] __ So. 3d __ (Ala. 2016). The Court holds that when an estate is properly removed from the probate court to the circuit court pursuant to § 12-11-41, Ala. Code 1975, the circuit court acquires constitutional authority to enter orders necessary to resolve issues attendant to the administration of the estate pursuant to Ala. Const. of 1901, Art. VI, § 144 (providing that "whenever the circuit court has taken jurisdiction of the settlement of any estate, it shall have power to do all things necessary for the settlement of such estate"). Ms. *18. Accordingly, the circuit court had subject matter jurisdiction to determine whether a contingency fee owed to attorneys constituted an administrative expense of the estate. Ms. *19.

However, under general contract law principles, a court must enforce an unambiguous, lawful contract as it is written. Ms. *21-2, citing *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33, 35-36 (Ala. 1998). Here, the circuit court exceeded the scope of its discretion by ordering that an attorney's fee agreement providing for a contingent fee of 40% of any recovery including cash, real or personal property,

stock in a company, and ownership in real estate would be construed to require the estate to pay the attorney fee in cash in a lump sum. Ms. *22-3.

GARNISHMENT AND RIGHT TO CONTEST

Fields v. State Department of Human Resources, [Ms. 2150799, Dec. 9, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The court holds "Alabama's garnishment statutes recognize that both the putative garnishee and the defendant are entitled to notice and an opportunity to appear as parties in interest entitled to assert their respective positions as to the plaintiff's garnishment claim." Ms. *11, quoting *Robbins v. State ex rel Priddy*, 109 So. 3d 1128 (Ala. Civ. App. 2012). Here, the Jefferson Circuit Court permitted a former husband's wages to be garnished from his employer under authority of a writ of garnishment served by the Department of Human Resources without affording the former husband an opportunity to appear before the court and contest the writ. The court holds "that the person whose wages are subject to a writ of garnishment is entitled to be heard if a hearing is requested." Ms. *1-2.

INTERVENTION

RGIS Inventory Specialists v. Huey, [Ms. 2150801, Dec. 16, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms the Sumpter Circuit Court's denial of a workers' compensation insurance carrier's motion for leave to intervene in a third party action. The court notes "[a]n order denying a motion to intervene is a final judgment that will support an appeal." Ms. * 3, n. 2, citing *Universal Underwriters Ins. Co. v. Anglen*, 630 So. 2d 441 (Ala. 1993).

The court also notes that a joint stipulation of dismissal based upon a settlement of the third party action does not necessarily moot an appeal from the denial of the motion for leave to intervene. Ms. * 4-5, citing *Purcell v. Bank Atlantic Fin. Corp.*, 85 F.3d 1508 (11th Cir. 1996).

While this particular workers' compensation carrier may properly have sought leave to intervene, its failure to cite controlling Alabama authorities constituted a violation of Rule 28(a)(10), Ala. R. App. P., such that its arguments are waived under authority of *White Sands Grp., L.L.C. v. PRS II, LLC*, 998 So. 2d 1042 (Ala. 2008). "Because the employer and the carrier have failed to present this court with an argument containing relevant legal authorities, we conclude that the employer and the carrier waived their argument that the trial court wrongfully denied the motion to intervene." Ms. * 6-7.

NEW TRIAL; WEIGHT OF THE EVIDENCE

Taylor v. Wheeler, [Ms. 2150776, Dec. 16, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The sharply divided Court of Civil Appeals (Thomas, J., and Pittman, J., concur; Donaldson, J., concurs specially; Thompson, P.J., dissents, with writing, with which Moore, J., joins), reverses the St. Clair Circuit Court's order granting a new trial based on weight of evidence grounds in an automobile collision/sudden emergency case upon finding that the circuit court exceeded its discretion because the verdict was not against the great weight or preponderance of the evidence.

The Court states the standard for granting a new trial in such circumstances:

> A trial court may grant a new trial when it "believes that justice demands that a new trial be granted on the weight and preponderance ground." *Jawad v. Granade*, 497 So. 2d 471, 477 (Ala. 1986).
>
> > "In the landmark case *Jawad v. Granade*, 497 So. 2d 471 (Ala. 1986), this Court established the standard of review it would apply in cases where a party appeals from an order granting a motion for a new trial on the basis that the jury's verdict was 'against the great weight or preponderance of the evidence':
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> > > "'[A]n order granting a motion for new trial on the sole ground that the verdict is against the great weight or preponderance of the evidence will be reversed for abuse of discretion where on review it is easily perceivable from the record that the jury verdict is supported by the evidence.'

Ms. * 5-6, quoting *Jawad*, 497 So. 2d at 477, and *Scott v. Parnell*, 775 So. 2d 789, 791 (Ala. 2000).

The three-vote majority concludes, based upon conflicting testimony, that the jury's verdict was supported by the evidence such that the St. Clair Circuit Court exceeded its discretion in granting a new trial when the evidence was sufficient to support the jury's verdict.

ADMINISTRATIVE AGENCIES; RIGHT TO A HEARING

ABC Coke v. GASP, Inc., [Ms. 2150489, 2150490, Dec. 16, 2016] __ So. 3d __ (Ala. Civ. App. 2016). This appeal concerns the right of a public interest entity to challenge a state agency's issuance of a permit affecting air pollution. Specifically, GASP, Inc. (aka "Group Against Smog and Pollution"), a not-for-profit corporation, sought a hearing before the Jefferson County Board of Health ("JCBH"), a local health authority established pursuant to § 22-4-1, Ala. Code 1975, and the state agency responsible for enforcement of local air pollution standards pursuant to Title V of the Clean Air Act, 42 U.S.C. § 7401-7671q, regarding ABC Coke's effort to obtain a renewal permit for ongoing operations at its plant in Tarrant. When GASP's petition requesting a hearing before JCBH to contest the renewal of the Title V permit to ABC Coke was declined, GASP filed a petition for judicial review of that agency's administrative determination pursuant to § 41-22-20, Ala. Code 1975. The Jefferson Circuit Court ultimately concluded that GASP qualifies as a "person aggrieved" under JCBH's Rules of Administrative Procedure and that its petition requesting a hearing should have been granted. JCBH and ABC Coke (which had intervened in the circuit court action) then filed separate notices of appeal.

The standard of review applicable to an appeal from a trial court's judgment regarding a decision of an administrative agency is stated as follows:

"This court reviews a trial court's judgment regarding the decision of an administrative agency 'without any presumption of its correctness, since [the trial] court was in no better position to review the [agency's decision] than' this court. *State Health Planning & Res. Dev. Admin. v. Rivendell of Alabama, Inc.*, 469 So. 2d 613, 614 (Ala. Civ. App. 1985). Under the Alabama Administrative Procedure Act ('AAPA'), § 41-22-1 *et seq.*, Ala. Code 1975, which governs judicial review of agency decisions,

> "'[e]xcept where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:
>
> "'(1) In violation of constitutional or statutory provisions;
>
> "'(2) In excess of the statutory authority of the agency;
>
> "'(3) In violation of any pertinent agency rule;
>
> "'(4) Made upon unlawful procedure;
>
> "'(5) Affected by other error of law;
>
> "'(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "'(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.'
>
> "§ 41-22-20(k), Ala. Code 1975 .... In reviewing the decision of a state administrative agency, '[t]he special competence of the agency lends great weight to its decision, and that decision must be affirmed, unless it is arbitrary and capricious or not made in compliance with applicable law.' *Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Coordinating Council*, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). ... Neither this court nor the trial court may substitute its judgment for that of the administrative agency. *Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Coordinating Council*, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). 'This holds true even in cases where the testimony is generalized, the evidence is meager, and reasonable minds might differ as to the correct result.' *Health Care Auth. of Huntsville v. State Health Planning Agency*, 549 So. 2d 973, 975 (Ala. Civ. App. 1989)."

Colonial Mgmt. Grp., L.P. v. State Health Planning & Dev. Agency, 853 So. 2d 972, 974–75 (Ala. Civ. App. 2002)(emphasis omitted).

Ms. * 8-10. The court concludes that GASP's petition met the administrative requirements promulgated by JCBH such that it should have been afforded a hearing.

> "[W]here an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must vigorously comply with those requirements; regulations are regarded as having the force of law and, therefore, become a part of the statutes authorizing them." *Hand v. State Dep't of Human Res.*, 548 So. 2d 171, 173 (Ala. Civ. App. 1988).

Ms. * 21. Because JCBH's rules were promulgated pursuant to authority afforded by the Alabama Administrative Act,

> "...so long as the agency holds out, through a duly adopted and promulgated agency regulation having the force of law, that a [specific] procedure is required – and since such an alternative to the AAPA procedure is authorized by § 41-22-20(b) – the agency must be held to its own standard." Id. at 174.

Ms. * 21, quoting *Hand*, 548 So. 2d at 174.

The court concludes that while "an agency is afforded deference in its decisions, the agency decision must be reversed when 'substantial rights of the petitioner has been prejudiced because the agency action is ... [i]n violation of any pertinent agency rule.'"

Ms. * 25, citing § 41-22-20(k)(3), Ala. Code 1975, and *Ex parte Wilbanks Health Care Servs, Inc.*, 986 So. 2d 422, 425 (Ala. 2007).

DECLARATORY JUDGMENT; SUBJECT MATTER JURISDICTION

Privilege Underwriters Reciprocal Exchange v. Grayson, [Ms. 1150927, Dec. 16, 2016] __ So. 3d __ (Ala. 2016). Privilege Underwriters Reciprocal Exchange ("PURE"), a Florida insurance exchange, obtained a judgment, entered upon a jury verdict, after a three-day trial, declaring that Grayson was not entitled to coverage under the uninsured-motorist portion of an automobile insurance policy. The Mobile Circuit Court granted Grayson's motion to set aside the judgment based upon his contention that the judgment was void for lack of subject-matter jurisdiction since there was no justiciable controversy at the time PURE filed its complaint for a declaratory-judgment pursuant to § 6-6-220 *et seq.*, Ala. Code 1975. The Supreme Court reverses the order setting aside the judgment upon concluding

the Mobile Circuit Court had jurisdiction over the declaratory-judgment action.

The standard of review on appeal from an order granting relief under Rule 60(b)(4), Ala. R. Civ. P. ("the judgment is void") is straightforward and dispositive:

> "The standard of review on appeal from an order granting relief under Rule 60(b)(4), Ala. R. Civ. P. ('the judgment is void'), is not whether the trial court has exceeded its discretion. When the decision to grant or to deny relief turns on the validity of the judgment, discretion has no field of operation. *Cassioppi v. Damico*, 536 So. 2d 938, 940 (Ala. 1988). 'If the judgment is void, it is to be set aside; if it is valid, it must stand.... A judgment is void only if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process.' *Seventh Wonder v. Southbound Records, Inc.*, 364 So. 2d 1173, 1174 (Ala. 1978) (emphasis added)."

Ex parte Full Circle Distribution, L.L.C., 883 So. 2d 638, 641 (Ala. 2003)(some emphases added). Ms. * 7.

Alabama law is settled that unless there is a justiciable controversy, a trial court does not obtain subject-matter jurisdiction under the Declaratory Judgment Act:

> "'There must be a bona fide justiciable controversy in order to grant declaratory relief. If no justiciable controversy exists when the suit is commenced, then the court lacks jurisdiction.' *Durham v. Community Bank of Marshall County*, 584 So. 2d 834, 835 (Ala. 1991) (citations omitted). Where 'the trial court ha[s] no subject-matter jurisdiction, [it has] no alternative but to dismiss the action.' *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1029 (Ala. 1999). '"Any other action taken by a court lacking subject matter jurisdiction is null and void."' *Id.* (quoting *Beach v. Director of Revenue*, 934 S.W.2d 315, 318 (Mo. Ct. App. 1996)). ...
>
> "This Court has recognized that a purpose of the Declaratory Judgment Act, codified at §§ 6–6–220 through –232, Ala. Code 1975, is 'to enable parties between whom an actual controversy exists or those between whom litigation is inevitable to have the issues speedily determined when a speedy determination would prevent unnecessary injury caused by the delay of ordinary judicial proceedings.' *Harper v. Brown, Stagner, Richardson, Inc.*, 873 So. 2d 220, 224 (Ala. 2003).... Further, '[w]e have recognized that a justiciable controversy is one that is "definite and concrete, touching the legal relations of the parties in adverse legal interest, and it must be a real and substantial controversy admitting of specific relief through a [judgment]."' *MacKenzie v. First Alabama Bank*, 598 So. 2d 1367, 1370 (Ala. 1992)(quoting *Copeland v. Jefferson County*, 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969))." *Harper*, 873 So. 2d at 224.... Thus, the Declaratory Judgment Act does not '"empower courts to decide ... abstract propositions, or to give advisory opinions, however convenient it might be to have these questions decided for the government of future cases."' *Bruner v. Geneva County Forestry Dep't*, 865 So. 2d 1167, 1175 (Ala. 2003) (quoting *Stamps v. Jefferson County Bd. of Educ.*, 642 So. 2d 941, 944 (Ala. 1994), quoting in turn *Town of Warrior v. Blaylock*, 275 Ala. 113, 114, 152 So. 2d 661, 662 (1963))....
>
> "In determining whether [PURE's] complaint alleges a bona fide justiciable controversy, we 'must accept the allegations of the complaint as true,' and 'must also view the allegations of the complaint most strongly in [PURE's] favor.' *Harper*, 873 So. 2d at 223."

Gulf Beach Hotel, Inc. v. State ex rel. Whetstone, 935 So. 2d 1177, 1182-83 (Ala. 2006)(emphasis omitted). Ms. * 7-9. Adhering to the principle that neither party to an insurance contract "should be compelled to wait until the events giving rise to liability had occurred before having a determination of the rights and obligations under the policy" (Ms. * 10, quoting *Federated Guaranty Life Insurance Co. v. Bragg*, 393 So. 2d 1386, 1388-89 (1981)), the Court concludes that PURE's action seeking a declaratory-judgment about whether uninsured motorist benefits were owed to Grayson based upon the policy's residency requirement stated a bona fide justiciable controversy such that the Circuit Court of Mobile County did in fact obtain subject-matter jurisdiction.

LIFE INSURANCE AND DESIGNATED BENEFICIARY

Aderholt v. McDonald, [Ms. 1150878, Dec. 16, 2016] __ So. 3d __ (Ala. 2016). The Supreme Court affirms a summary judgment entered by the Walker Circuit Court in favor of an ex-wife of a decedent, holding that she, rather than the decedent's mother, was entitled to the proceeds of a $150,000 life-insurance policy the decedent held at the time of his death because the ex-wife remained the designated beneficiary under the life insurance policy. The Court reiterates that "a divorce, by itself, has no impact on one spouse's status as the beneficiary of the other spouse's life-insurance policy." Ms. * 7-8, citing *Flowers v. Flowers*, 284 Ala. 230, 224 So. 2d 590 (1969), and *Kowalski v. Upchurch*,

186 So. 3d 460 (Ala. Civ. App. 2015). This legal principle "stems from the fact that any rights a beneficiary has to the proceeds of a life-insurance policy are contractual, not marital." Ms. * 9, citing *Rountree v. Frazee*, 282 Ala. 142, 209 So. 2d 424 (1968). Here, because there is no evidence the decedent took any affirmative action indicating he did not want his ex-wife to be the beneficiary of the policy, the circuit court properly entered summary judgment in favor of the ex-wife as beneficiary under the policy.

FICTITIOUS PARTIES AND RELATION BACK

Ex parte VEL, LLC, [Ms. 1150542, Dec. 30, 2016] __ So. 3d __ (Ala. 2016). The Court grants in part and denies in part petitions for writs of mandamus directing the Montgomery Circuit Court to vacate an order denying a summary-judgment motion on the basis of the expiration of the statute of limitations in a mis-filled prescription case. The Court rejected the plaintiff's contention that he properly substituted the pharmacy's true corporate owner and its pharmacist and pharmacy technician pursuant to Rule 15(c)(3), Ala. R. Civ. P., and that failing the test for proper substitutions, the amendments should be deemed timely under principles of "equitable tolling," and "equitable estoppel."

The Court first rejected the plaintiff's contention that the substitutions were proper pursuant to Rule 15(c)(3). The Court held, on the contrary, that Rule 15(c)(3) did not apply:

> Rule 15(c)(3) applies to an amendment that "changes the party or the naming of the party against whom a claim is asserted"; Rule 15(c)(3) expressly does not apply to amendments "naming a party under the party's true name after having been initially sued under a fictitious name." In the present case, Kyser did not seek to change the name of the party against whom she brought the original complaint. Kyser sued VEL in the original complaint. In the amended complaints, Kyser did not seek to change the name of VEL to MDCI, Stafford, or Greene but, instead, substituted MDCI, Stafford, and Greene for fictitiously named defendants; VEL remains a party to this action. Kyser sought to add MDCI, Stafford, and Greene as parties based on the "principles applicable to fictitious party practice." Rule 15(c)(4). Accordingly, under Rule 15(c)(4), Kyser's amendments substituting MDCI, Stafford, and Greene for fictitiously named defendants relate back to the date of the original complaint only if she satisfied the requirements of Rule 9(h), Ala. R. Civ P. See *Ex parte Noland Hosp. Montgomery, LLC*, 127 So. 3d 1160, 1169 (Ala. 2012) ("An amendment merely substituting a named party for a fictitiously named party relates back only if the provisions of Rule 9(h) are satisfied."), and *Mitchell v. Thornley*, 98 So. 3d 556, 561 (Ala. Civ. App. 2012)("The Committee Comments on the 1973 Adoption of Rule 15, Ala. R. Civ. P., indicate that the provisions of Rule 15(c)(3) 'permit[] an amendment to relate back which substitutes the real party in interest for a named plaintiff.' (Emphasis added.) Such an amendment, which changes a named party, relates back only if the requirements of Rule 15(c)(3) are met. Conversely, an amendment merely substituting a real party for a fictitiously named party relates back if the provisions of Rule 9(h) are satisfied. Committee Comments on 1973 Adoption."). We will analyze whether Kyser's amendments substituting MDCI, Stafford, and Greene for fictitiously named defendants relate back to the filing of the original complaint under Rule 15(c)(4); Rule 15(c)(3) does not apply in this case.

Ms. *19-21. Having rejected the Rule 15(c)(3) argument, the Court turned to an analysis of whether the substitution was proper under Rule 15(c)(4) in light of its express requirement that the party attempting to substitute comply with the provisions of Rule 9(h). Quoting *Ex parte Nicholson Mfg. Ltd.*, 182 So. 3d 510 (Ala. 2015), the Court explained:

> In *Ex parte Nicholson, supra*, we set forth the following applicable law:
>
> > "Rule 9(h), Ala. R. Civ. P., provides:
> >
> > "'When a party is ignorant of the name of an opposing party and so alleges in the party's pleading, the opposing party may be designated by any name, and when the party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.'
> >
> > "This rule permits a party who is 'ignorant of the name of an opposing party' to identify that party by a fictitious name. Once the true name of the opposing party is discovered, the party may amend the pleadings to substitute that true name. Rule 15(c)(4), Ala. R. Civ. P., provides that such an amendment shall 'relate[] back to the date of the original pleading when ... relation back is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h).'
> >
> > > "'However, the relation back principle applies only when the plaintiff "is ignorant of the name of an opposing party." Rule 9(h); *Harmon v. Blackwood*, 623 So. 2d 726, 727 (Ala. 1993) ("In order to invoke the relation-back principles of Rule 9(h) and Rule 15(c), a plaintiff must ... be ignorant of the identity of that defendant...."); *Marsh v. Wenzel*, 732 So. 2d 985 (Ala. 1998).'
> >
> > "*Ex parte General Motors [of Canada Ltd.]*, 144 So. 3d [236,] 239 [(Ala. 2013)].
> >
> > ""The requirement that the plaintiff be ignorant of the identity of the fictitiously named party has been generally explained as follows: 'The correct test is whether the plaintiff knew, or should have known, or was on notice, that the substituted defendants

were in fact the parties described fictitiously.' *Davis v. Mims*, 510 So. 2d 227, 229 (Ala. 1987)....'"

"*Ex parte Mobile Infirmary[Ass'n]*, 74 So. 3d [424,] 429 [(Ala. 2011)] (quoting *Crawford v. Sundback*, 678 So. 2d 1057, 1060 (Ala. 1996)(emphasis added)).

"In addition to being ignorant of the fictitiously named party's identity, the plaintiff has a duty to exercise 'due diligence' in identifying such a defendant. *Ex parte Mobile Infirmary*, 74 So. 3d at 429; *Crowl v. Kayo Oil Co.*, 848 So. 2d 930, 940 (Ala. 2002). It is incumbent upon the plaintiff to exercise due diligence both before and after the filing of the complaint. *Ex parte Ismail*, 78 So. 3d 399 (Ala. 2011). Only if the plaintiff has acted with due diligence in discovering the true identity of a fictitiously named defendant will an amendment substituting such a party relate back to the filing of the original complaint. *Ex parte Mobile Infirmary*, 74 So. 3d at 429. Therefore, if at the time the complaint is filed, a plaintiff knows the identity of the fictitiously named party or should have discovered that party's identity, relation back is not permitted and the running of the statute of limitations is not tolled:

> "'[A]n amendment substituting a new defendant in place of a fictitiously named defendant will relate back to the filing of the original complaint only if the plaintiff acted with "due diligence in identifying the fictitiously named defendant as the party the plaintiff intended to sue." Ignorance of the new defendant's identity is no excuse if the plaintiff should have known the identity of that defendant when the complaint was filed....'

"74 So. 3d at 429 (quoting *Ex parte Snow*, 764 So. 2d 531, 537 (Ala. 1999) (emphasis added))."

Ms. *21-23, quoting *Nicholson*, 182 So. 3d at 513-14. The Court found significant that plaintiff's counsel had received correspondence from the pharmacy's liability insurance carrier identifying the insured as the party that owned the pharmacy. That evidence indicated plaintiff "knew, or should have known," of the identity of the pharmacy's owner at the time the original complaint was filed. Ms. *24-25, citing *Davis v. Mims*, 510 So. 2d 227 (Ala. 1987). At a minimum, these communications indicated plaintiff was at least "on notice" of the true owner's identity. *Id.* Because the plaintiff was not ignorant of the party's identity before the statute of limitations expired, the circuit court had no discretion other than to grant [the true owner's] summary-judgment motion in its favor on the statute-of-limitations ground." Ms. *25.

The Court rejected the petitioner's argument that plaintiff's counsel failed to exercise due diligence in identifying the pharmacist and pharmacy tech when they waited two months after filing the complaint to submit discovery requests seeking those parties' true identities. Because petitioners failed to cite any legal authority holding that a two-month delay in serving such discovery requests constitute a failure to exercise due diligence, petitioners have not demonstrated a clear legal right as required for mandamus relief. Ms. *27-28.

The Court also rejected the plaintiff's contention that equitable-tolling principles supported the circuit court's ruling that the substitutions were timely. Quoting *Weaver v. Firestone*, 155 So. 3d 952 (Ala. 2013), the Court holds that plaintiff failed to present any evidence indicating an "extraordinary circumstance" which kept plaintiff from learning the identity of the owner of the pharmacy before the statute of limitations expired. The requirements for equitable tolling to apply include the following:

> "'[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' as to the filing of his action. *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). In *Ex parte Ward*, 46 So. 3d 888 (Ala. 2007), this Court '[held] that equitable tolling is available in extraordinary circumstances that are beyond the petitioner's control and that are unavoidable even with the exercise of diligence.' 46 So. 3d at 897. The Court noted that in determining whether equitable tolling is applicable, consideration must be given as '"to whether principles of 'equity would make the rigid application of a limitation period unfair' and whether the petitioner has 'exercised reasonable diligence in investigating and bringing [the] claims.'"" *Id.* (quoting *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001), quoting in turn *Miller v. New Jersey Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998)); see also *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) ('We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.' (footnotes omitted)). This Court acknowledged in *Ward* that '"the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule." *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000).' 46 So. 3d at 897. The plaintiff '"bears the burden of demonstrating ... that there are ... extraordinary circumstances justifying the application of the doctrine of equitable tolling.

Ms. *31-32, quoting *Weaver v. Firestone*, 155 So. 3d at 957-58.

Finally, the Court also rejected the plaintiff's contention that the doctrine of equitable estoppel should work to deem the substitution timely. Quoting *McCormack v. AmSouth NA*, 759 So. 2d 538 (Ala. 1999), the Court rejects plaintiff's contention that the liability insurer concealed the identity of the true owner of the pharmacy. Ms. *33-35. *McCormack v. AmSouth NA* holds:

> "In *City of Birmingham v. Cochrane Roofing & Metal Co.*, 547 So. 2d 1159 (Ala. 1989), this Court summarized the law applicable in situations where one party asserts equitable estoppel as a bar to another party's pleading the statute of limitations as a defense:
>
> > "In *Mason v. Mobile County*, 410 So. 2d 19 (Ala. 1982),

> this Court held that if a defendant either fraudulently or innocently represents to the plaintiff that he will remedy a problem, and relying on these representations the plaintiff is induced not to file a lawsuit or take any action, the defendant may be estopped from raising the statute of limitations as a defense. Additionally, in *Arkel Land Co. v. Cagle*, 445 So. 2d 858 (Ala. 1983), we held that if a defendant represents that a lawsuit is unnecessary because he intends to take care of the problem he is likewise estopped from raising the statute of limitations as a defense.'
>
> "*Cochrane Roofing*, 547 So. 2d at 1167."

Ms. *33-34 (quoting *McCormack v. Amsouth NA*, 759 So. 2d at 543).

WRONGFUL DEATH AND UNBORN PRE-VIABLE FETUS (§§ 6-5-391, ALA. CODE 1975)

Stinnett v. Kennedy, [Ms. 1150889, Dec. 30, 2016] __ So. 3d __ (Ala. 2016). The Court reverses the judgment of the Jefferson Circuit Court which dismissed a claim alleging wrongful death based on the death of a pre-viable unborn child. The Court also rejected contentions that the defendant physician was due summary-judgment on the wrongful-death claim on lack-of-proof-of-causation grounds, and that the judgment of the circuit court was due to be affirmed on the basis of the doctrine of collateral estoppel since other issues about the defendant physician's provision of care to the mother had been litigated to judgment in a jury trial. In the end, the Court reiterates the holdings of *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011), and *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012), that Alabama's wrongful-death statute allows an action to be brought for the wrongful death of any unborn child, even when the child dies before reaching viability. The test for proximate cause in such a case is not whether the deviation from the standard of care adversely affected probable progression to viability, but rather the health care provider's actions "probably caused the death of the fetus, 'regardless of viability.'" Ms. *38.

FRAUDULENT TRANSFERS; § 8-9A-1 ET SEQ., ALA. CODE 1975

RES-GA Lake Shadow, LLC v. Kennedy, [Ms. 2160110, Jan. 6, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals reverses a Montgomery Circuit Court judgment dismissing three claims alleging property transferred from a husband to a wife pursuant to a divorce settlement agreement were for fraudulent transfers made to prevent collection of a debt owed by the husband. The court distinguishes *Aliant Bank v. Davis*, 198 So. 3d 508 (Ala. Civ. App. 2015) (Ms. *8-11) in response to husband's contention that the Alabama Fraudulent Transfers Act, § 8-9A-1 et seq., Ala. Code 1975, did not apply to marital assets transferred pursuant to divorce property settlements. Citing *Canty v. Otto*, 304 Conn. 546, 41 A.3d 280 (2012), the court holds "There is no prohibition on a creditor's ability to seek relief under the Alabama Fraudulent Transfers Act based on an allegation that an agreement to transfer marital assets in a divorce action was made with the intention of hindering, delaying, or defrauding a creditor of a spouse." Ms. *12. Because the creditor's allegations, if true, would entitle it to relief under the Fraudulent Transfers Act, the Montgomery Circuit Court improperly dismissed those claims.

UNDERINSURED MOTORIST COVERAGE; WAIVER

Johnson v. First Acceptance Ins. Co., Inc., [Ms. 2150629, Jan. 6, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals reverses a summary judgment entered by the Lowndes Circuit Court in favor of First Acceptance Insurance Company, where the circuit court had held an applicant waived in writing his option to purchase uninsured/underinsured motorist benefits. See § 32-7-23(a), Ala. Code 1975 (statute interpreted in *Continental Cas. Co. v. Pinkston*, 941 So. 2d 926, 929 (Ala. 2006), as "requir[ing] that every automobile-liability-insurance policy issued or delivered in Alabama provide uninsured/underinsured-motorist coverage with limits for bodily injury or death of at least $25,000 per person, unless the coverage is specifically rejected in writing by the named insured."). Here, there was conflicting evidence from the deposition testimony of the policyholder and the local agent concerning the circumstances whereby the policyholder applied for such coverage electronically. Because it was a factual dispute about the material issue of whether the policyholder signed that part of the application that waived the UIM coverage, the Lowndes Circuit Court erred in entering a summary judgment in favor of the insurance company.

WRIT OF PROHIBITION

Blevins v. Boller, [Ms. 2150969, Jan. 6, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals dismisses an appeal from a Baldwin Circuit Court order construing a "motion for order of interpleader" filed by a law firm to protect funds allegedly owed pursuant to the attorney lien statute as a request for injunctive relief.

> "An injunction is defined as '[a] court order commanding or preventing an action.'" *Dawkins v. Walker*, 794 So. 2d 333, 335 Ala. 2001) (quoting *Black's Law Dictionary* 788 (7th ed. 1999)). " ' [I] has long been the law that substance, not nomenclature, is "the determining factor regarding the nature of a party's pleadings or motions."' " *Ex parte Alabama Dep't of Mental Health*, [Ms. 2150415, April 22, 2016] __ So. 3d __, __ (Ala. Civ. App. 2016) (quoting *Chamblee v. Duncan*, 188 So. 3d 682, 691 (Ala. Civ. App. 2015), quoting in turn *Eddins v. State*, 160 So. 3d 18, 20 (Ala. Civ. App. 2014)). Under the circumstances of this case, we determine that the substance of the law firm's "Motion for Order of Interpleader" constituted a request for injunctive relief, i.e., an order commanding action by Blevins, and that the trial court's June 24, 2016, interlocutory order issued an injunction requiring Blevins to transfer the funds to the trial court."

Ms. *10. The proper means for obtaining

appellate review of an interlocutory order issuing an injunction is through an appeal. *Ex parte State Pers. Bd.*, 45 So. 3d 751 (Ala. 2010). Rule 4(a)(1)(A), Ala. R. App. P., provides that a notice of appeal challenging such an order must be filed within 14 days of the date of the entry of the "interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or modify an injunction." Because appellate review was sought of the Baldwin Circuit Court's order more than 14 days after that order was entered, the appeal was untimely and was therefore required to be dismissed.

The attorney also sought a writ of prohibition in anticipation of a scheduled hearing which sought to hold the attorney in contempt for failing to pay over the funds allegedly subject to the attorney's lien. The attorney contended the Baldwin Circuit Court had subject-matter jurisdiction over the proceeding or personal jurisdiction over him. Ms. *12. The Court of Civil Appeals first notes "The filing of a petition for a writ of prohibition is the proper procedure for challenging a trial court's jurisdiction in a contempt proceeding." *Id.*, citing *Ex parte Segrest*, 718 So. 2d 1 (Ala. 1998). The court then provides a helpful description of the required elements for issuance of such a writ:

> "[A] writ of prohibition is not only an extraordinary writ, but a drastic one which is to be employed with extreme caution. *Ex parte Burch*, 236 Ala. 662, 184 So. 694 (1938). It should be used only in cases of extreme necessity. *Burch*, 236 Ala. 662, 184 So. 694. It is not a favored writ and will be invoked only where the petition shows on its face that the court below does not have jurisdiction to do or perform an act of judicial nature which it is proposing to perform. *Hudson v. Sparks*, 272 Ala. 203, 129 So. 2d 664 (1961)."

Ex parte State Dep't of Mental Health & Mental Retardation, 536 So. 2d at 79-80.

> "[T]here are generally four prerequisites to the issuance of a writ of prohibition: '(1) usurpation or abuse of power by an inferior judicial or quasi-judicial tribunal, (2) lack of another adequate remedy, (3) injury to the petitioner, and (4) presentation of the question before the inferior tribunal before resorting to the writ.' *Barber Pure Milk Co. v. Alabama State Milk Control Bd.*, 274 Ala. 563, 565, 150 So. 2d 693, 695 (1963)."

Ex parte Segrest, 718 So. 2d at 4 n. 2. Ms. *13. Because the attorney preemptively filed the petition for a writ of prohibition before first affording the Baldwin Circuit Court the opportunity to rule upon whether it obtained subject-matter or personal jurisdiction, one of the required elements for issuance of such a writ had not been presented such that his petition was due to be denied.

DEFAULT JUDGMENT; KIRTLAND FACTORS

Hilyer v. Fortier, [Ms. 1140991, Jan. 6, 2017] __ So. 3d __ (Ala. 2017). The Court reverses an order of the Elmore Circuit Court denying a defendant 18-wheel log truck driver's motion filed pursuant to Rule 55(c), Ala. R. Civ. P., to set aside a default judgment entered against him and in favor of a parent and minor child injured in a collision with the log truck. The court reviews the required elements for setting aside a default judgment first enunciated in *Kirtland v. Fort Morgan Authority Sewer Service, Inc.*, 524 So. 2d 600 (Ala. 1988). The Court discusses *Kirtland* as follows:

> In *Kirtland*, we held that a trial court's broad discretionary authority to set aside a default judgment under Rule 55(c) should not be exercised without considering the following three factors: 1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct. 524 So. 2d at 605. ""However, in order to trigger the mandatory requirement that the trial court consider the *Kirtland* factors, the party filing a motion to set aside a default judgment must allege and provide arguments and evidence regarding all three of the *Kirtland* factors.""

Ms. *13 n. 3. The standard of review of a trial court's denial of the motion to set aside a default judgment is as follows:

> "'A trial court has broad discretion in deciding whether to grant or deny a motion to set aside a default judgment. *Kirtland v. Fort Morgan Auth. Sewer Serv., Inc.*, 524 So. 2d 600 (Ala. 1988). In reviewing an appeal from a trial court's order refusing to set aside a default judgment, this Court must determine whether in refusing to set aside the default judgment the trial court exceeded its discretion. 524 So. 2d at 604. That discretion, although broad, requires the trial court to balance two competing policy interests associated with default judgments: the need to promote judicial economy and a litigant's right to defend an action on the merits. 524 So. 2d at 604. These interests must be balanced under the two-step process established in Kirtland.
>
> "'We begin the balancing process with the presumption that cases should be decided on the merits whenever it is practicable to do so. 524 So. 2d at 604. The trial court must then apply a three-factor analysis first established in *Ex parte Illinois Central Gulf R.R.*, 514 So. 2d 1283 (Ala. 1987), in deciding whether to deny a motion to set aside a default judgment. *Kirtland*, 524 So. 2d at 605. The broad discretionary authority

given to the trial court in making that decision should not be exercised without considering the following factors: "1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct." 524 So. 2d at 605.'

"*Zeller v. Bailey*, 950 So. 2d 1149, 1152-53 (Ala. 2006)."

Manci v. Ball, Koons & Watson, 995 So. 2d 161, 165 (Ala. 2008).

Ms. *16-17. The Court then examined each of the three required *Kirtland* elements in detail.

Whether the Defendant Has a Meritorious Defense

Concerning whether the defendant has alleged a meritorious defense under *Kirtland*, this Court has stated:

> "To present a meritorious defense, for Rule 55(c) purposes, does not require that the movant satisfy the trial court that the movant would necessarily prevail at a trial on the merits, only that the movant show the court that the movant is prepared to present a plausible defense. *Kirtland*, 524 So. 2d at 605.
>
> "'The defense proffered by the defaulting party must be of such merit as to induce the trial court reasonably to infer that allowing the defense to be litigated could foreseeably alter the outcome of the case. To be more precise, a defaulting party has satisfactorily made a showing of a meritorious defense when allegations in an answer or in a motion to set aside the default judgment and its supporting affidavits, if proven at trial, would constitute a complete defense to the action, or when sufficient evidence has been adduced either by way of affidavit or by some other means to warrant submission of the case to the jury.
>
> "'The allegations set forth in the answer and in the motion must be more than mere bare legal conclusions without factual support; they must counter the cause of action averred in the complaint with specificity -- namely, by setting forth relevant legal grounds substantiated by a credible factual basis. Such allegations would constitute a "plausible defense."'
>
> "*Kirtland*, 524 So. 2d at 606."

Sampson v. Cansler, 726 So. 2d 632, 634 (Ala. 1998).

Ms. *17-18.

Whether the Plaintiff Will Suffer Substantial Prejudice

Concerning the second *Kirtland* factor, whether a plaintiff will suffer substantial prejudice, this Court has said:

> "The second factor that a trial court must consider in ruling on a motion to set aside a default judgment is whether the plaintiff will be unfairly prejudiced if it grants the motion. *Kirtland*, 524 So. 2d at 606-07. This prejudice cannot take the form of mere delay or increased costs, because those can be remedied by imposing additional costs on the defendant if the plaintiff later prevails. 524 So. 2d at 607. Rather, the prejudice must be substantial, facilitating fraud or collusion, resulting in the loss of evidence, or hindering discovery. 524 So. 2d at 607.
>
> "Although common sense dictates that a plaintiff is usually in a far better position to know what prejudice might befall him from the delay, and more importantly how substantial that prejudice would be, we have placed upon the defendant the initial burden of demonstrating that the plaintiff will not be substantially prejudiced. As we have stated:
>
> "'We hold that when a party files a motion to set aside a default judgment, the movant has the initial burden of making a prima facie showing that the plaintiff will not be unfairly prejudiced if the default judgment is set aside. If the movant makes a prima facie showing that the plaintiff will not be unfairly prejudiced, the burden then shifts to the plaintiff to present facts showing that the plaintiff will be unfairly prejudiced if the default judgment is set aside.'
>
> "*Phillips v. Randolph*, 828 So. 2d 269, 278 (Ala. 2002). Additionally, a defendant cannot simply state that the plaintiff will not be prejudiced if the motion to set aside the default judgment is granted. *Phillips*, 828 So. 2d at 275."

Royal Ins. Co. of America v. Crowne Invs., Inc., 903 So. 2d 802, 811 (Ala. 2004).

Ms. *26-27.

Lack of Culpable Conduct on the Part of the Defaulting Party

The third *Kirtland* factor requires a circuit court to examine the conduct of the defaulting party. Concerning the third *Kirtland* factor, this Court has stated:

> "To warrant a refusal to set aside a default judgment, the defaulting party's actions that resulted in the entry of the default judgment must constitute willful conduct or conduct committed in bad faith. Negligence alone is not

sufficient. Bad faith or willfulness is identified by 'incessant and flagrant disrespect for court rules, deliberate and knowing disregard for judicial authority, or intentional nonresponsiveness.' *Kirtland*, 524 So. 2d at 608 (citing *Agio Indus., Inc. v. Delta Oil Co.*, 485 So. 2d 340, 342 (Ala. Civ. App. 1986)). A trial court's finding with respect to the culpability of the defaulting party is subject to great deference. *Jones v. Hydro–Wave of Alabama, Inc.*, 524 So. 2d 610, 616 (Ala. 1988)."

Zeller v. Bailey, 950 So. 2d 1149, 1154 (Ala. 2006).

Ms. *32-33.

Finding that the defendant introduced evidence satisfying each of the three *Kirtland* factors, the Court holds the Elmore Circuit Court exceeded its discretion in refusing to set aside the default judgment such that reversal of that order was required.

WORKERS' COMPENSATION AND ABATEMENT

Ex parte Thompson Tractor Co., Inc., [Ms. 2160086, Jan. 13, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals grants a petition for a writ of mandamus by an employer seeking dismissal of a workers' compensation injury action (seeking benefits on account of the worker's contraction of asbestosis) because of the death of the worker. Citing *Ex parte Woodward Iron Co.*, 277 Ala. 133, 167 So. 2d 702 (1964), the court reiterates "[an employee's] rights [to workers' compensation benefits] terminate[s] at his [or her] death." Ms. *6. A workers' compensation claim is not considered an action that survives the death of an employee so that it may be continued in the name of the personal representative of the estate. Id. If a workers' compensation claim has been adjudicated or settled before the death of the employee, a dependent widow may recover the benefits specified under the Act, but, if not, the claim abates upon the death of the employee. Ms. *7, citing *Gibson v. Staffco, L.L.C.*, 63 So. 3d 1272 (Ala. Civ. App. 2010). Accordingly, because in this case the worker died before his claim was adjudicated or settled, the claim was extinguished by his death and his widow could not be substituted as a plaintiff under Rule 25, Ala. R. Civ. P. in order to pursue the work-related injury claim. Ms. *7, citing *Hardin v. Palmer Truss Co.*, 558 So. 2d 963 (Ala. Civ. App. 1990) and *Owens v. Ward*, 49 Ala. App. 293, 271 So. 2d 251 (Civ. App. 1972).

DEFAULT JUDGMENT

Wilson v. Avant, [Ms. 2150847, Jan. 13, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals in a per curiam opinion unanimously reverses the Autauga Circuit Court's decision not to set aside a default judgment where the evidence established that the defaulting party filed a responsive pleading on the day before the scheduled hearing when the default judgment was entered. Citing *TA Financial, Inc. v. Discover Bank*, 967 So. 2d 90 (Ala. 2007) and *Winford v. Winford*, 139 So. 3d 179 (Ala. Civ. App. 2013), the court concludes the Autauga Circuit Court erred in entering the default judgment after a responsive pleading had been filed.

WORKERS' COMPENSATION AND SUBJECT MATTER JURISDICTION

Hand Construction, LLC v. Stringer, [Ms. 2150730, Jan. 13, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals reverses a judgment entered by the Mobile Circuit Court awarding medical and temporary-total disability benefits under the Alabama Workers' Compensation Act, § 25-5-1, *et seq.*, Ala. Code 1975 to an employee hired in Alabama but who worked principally in North Dakota and then was injured in an automobile accident in Arkansas. The court rejected the Mobile Circuit Court's conclusion that it had obtained subject matter jurisdiction pursuant to § 25-5-35(d)(2), Ala. Code 1975 based upon the finding that at the time the accident occurred, the worker was "working under a contract of hire made in this state in employment not principally localized in any state." Ms. *6-7. Noting that § 25-5-35(d)(2) "allows an employee to recover workers' compensation benefits under the Act for injuries he or she sustained while working outside the State of Alabama when he or she 'was working under a contract of hire made in the state in employment not principally localized in any state'" (Ms. *8) the court found that the employee failed to meet his burden under the statute of proving that his "employment must not have been principally localized in any one state." Ms. *9, quoting *Sims v. Leland Roberts Constr., Inc.*, 671 So. 2d 106, 108 (Ala. Civ. App. 1995). The court concludes "Substantial evidence does not support the trial court's finding that, at the time of the accident, [employee's] employment 'was not principally localized in any state.'" Ms. *11. The Mobile Circuit Court thus lacked subject-matter jurisdiction and erred in finding the employee entitled to recover benefits pursuant to § 25-5-35(d)(2). *Id.*

RESTRICTIVE COVENANTS AND STATUTE OF LIMITATIONS

Bekken v. Greystone Residential Assoc., Inc., [Ms. 2150365, Jan. 13, 2017] __ So. 3d __ (Ala. Civ. App. 2017) (On reh'g). The court grants rehearing, withdraws the original September 16, 2016 opinion which had reversed an injunction granted by the Shelby Circuit Court to enforce residential restrictive covenants and, on rehearing, unanimously affirms the judgment. The court rejects the homeowner's arguments that the restrictive covenants contained ambiguities, that the trial court should have applied the relative-hardship test before issuing the injunction, and that affirmative defenses of statute of limitations, laches, and unclean hands applied to require reversal of the judgment.

The court first stated Alabama law relative to whether the restrictive covenants were ambiguous:

"Our Supreme Court has held that

> ""in construing restrictive covenants, all doubts must be resolved against the restriction and in favor of free and unrestricted use of property. However, effect will be given to the manifest intent of the

parties when that intent is clear .... Furthermore, restrictive covenants are to be construed according to the intent of the parties in the light of the terms of the restriction and circumstances known to the parties."

"'Hines v. Heisler, 439 So. 2d 4, 5-6 (Ala. 1983).'"

Grove Hill Homeowners' Ass'n, Inc. v. Rice, 43 So. 2d 609, 614 (Ala. Civ. App. 2010)(quoting Hipsh v. Graham Estates Owners Ass'n, 927 So. 2d 846, 848 (Ala. Civ. App. 2005)).

Ms. *26-7.

"'[W]hen the language of a restrictive covenant is not "of doubtful meaning and ambiguous," the language of that covenant "is entitled to be given the effect of its plain and manifest meaning.'" Maxwell [v. Boyd], 66 So. 3d [257,] 261 [(Ala. Civ. App. 2010)] (quoting Laney v. Early, 292 Ala. 227, 231-32, 292 So. 2d 103, 107 (1974)). However,

"'"[w]here the language [in a restrictive covenant] is ambiguous, "its construction will not be extended by implication or include anything not plainly prohibited and all doubts and ambiguities must be resolved against [the party seeking enforcement]."'" Smith v. Ledbetter, 961 So. 2d [141,] 146 [(Ala. Civ. App. 2006)] (quoting Greystone Ridge Homeowners' Ass'n, Inc. v. Shelton, 723 So. 2d [88,] 90 [(Ala. Civ. App. 1998)], in turn quoting Bear v. Bernstein, 251 Ala. 230, 231, 36 So. 2d 483, 484 (1948)).'

"Traweek v. Lincoln, 984 So. 2d 439, 447 (Ala. Civ. App. 2007)

"'"In written instruments, two types of ambiguities can arise: a patent ambiguity and a latent ambiguity. McCollum v. Atkins, 912 So. 2d 1146, 1148 (Ala. Civ. App. 2005). A patent ambiguity results when a document, on its face, contains unclear or unintelligible language or language that suggests multiple meanings. Thomas v. Principal Fin. Group, 566 So. 2d 735, 739 (Ala. 1990). On the other hand, '[a]n ambiguity is latent when the language employed is clear and intelligible and suggests but a single meaning but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings.' Id.'"

"Grove Hill Homeowners' Ass'n v. Rice, 43 So. 3d 609, 614 (Ala. Civ. App. 2010) (quoting Smith v. Ledbetter, 961 So. 2d 141, 145 (Ala. Civ. App. 2006)). '[W]hether a latent ambiguity exists is a question of law we review de novo.' Id. at 615."

Vestlake Cmtys. Prop. Owners' Ass'n, Inc. v. Moon, 86 So. 3d 359, 365 (Ala. Civ. App. 2011).

Ms. *28-9.

The court also rejected the homeowner's contention that enforcement of the restrictive covenants should be rejected because of the "relative-hardship test":

The relative-hardship test is "an equitable doctrine that generally provides that a restrictive covenant 'will not be enforced if to do so would harm one landowner without substantially benefitting another landowner.'" Grove Hill II, 90 So. 3d at 736 (quoting Lange v. Scofield, 567 So. 2d 1299, 1302 (Ala. 1990)). The party seeking the invocation of the relative-hardship doctrine, however, must have "clean hands." Maxwell v. Boyd, 66 So. 3d 257, 261 (Ala. Civ. App. 2010).

"A pertinent specific application of the clean-hands doctrine is that a restrictive covenant should be enforced if the defendant had knowledge of it before constructing an improvement contrary to its provisions, even if the harm is disproportionate. Green v. Lawrence, 877 A.2d 1079, 1082 (Me. 2005) (citing 9 Powell on Real Property § 60.10(3)); accord Turner v. Sellers, 878 So. 2d 300, 306 (Ala. Civ. App. 2003) (affirming denial of relief from restrictive covenant when the burdened parties 'knew that there were restrictions on the free use of their lot when they purchased it'). The knowledge sufficient to warrant denial of the relative-hardship defense need not be actual, but may be constructive. Miller v. Associated Gulf Land Corp., 941 So. 2d 982, 989 (Ala. Civ. App. 2005) (noting that trial court's judgment denying relief from covenant was supported by evidence that the owners of the burdened lot had 'purchased the subject property knowing of the nature of the deed restriction and therefore at least constructively knowing' of nearby land conditions and property owners' rights)."

Maxwell, 66 So. 3d at 261-62; see Grove Hill II, 90 So. 3d at 738-39 (quoting Gladstone v. Gregory, 95 Nev. 474, 480, 596 P.2d 491, 495 (1979)) ("'[W]here one takes land with notice of restrictions, equity and good conscience will not permit that person to act in violation thereof ....'"). "The application of the clean hands doctrine is a matter within the sound discretion of the trial court." J & M Bail Bonding Co. v. Hayes, 748 So. 2d 198, 199 (Ala. 1999).

Ms. *32-3.

In a scholarly dissertation, the court rejects the homeowner's contention that the 6-year statute of limitations set forth

in § 6-2-34(4), (6), and/or (9) apply to the facts of the case (Ms. *38-45) or that the doctrine of laches barred the action against him. Ms. *45-6.

Finally, the court rejected the homeowner's contention that the defense of unclean hands applied to the actions of the homeowner's association and the committee seeking to enforce the restrictive covenants. The court explained:

> "[O]ne 'who seek[s] equity must do equity' and 'one that comes into equity must come with clean hands.' Levine v. Levine, 262 Ala. 491, 494, 80 So. 2d 235, 237 (1955). The purpose of the clean hands doctrine is to prevent a party from asserting his, her, or its rights under the law when that party's own wrongful conduct renders the assertion of such legal rights 'contrary to equity and good conscience.' Draughon v. General Fin. Credit Corp., 362 So. 2d 880, 884 (Ala. 1978). The application of the clean hands doctrine is a matter within the sound discretion of the trial court. Lowe v. Lowe, 466 So. 2d 969 (Ala. Civ. App. 1985)."
>
> J & M Bail Bonding Co. v. Hayes, 748 So. 2d at 199. "'[T]he doctrine of unclean hands cannot be applied in the context of nebulous speculation or vague generalities; but rather it finds expression in specific acts of willful misconduct ....'" Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc., 985 So. 2d 924, 932 (Ala. 2007) (quoting Sterling Oil of Oklahoma, Inc. v. Pack, 291 Ala. 727, 746, 287 So. 2d 847, 864 (1973), citing in turn Weaver v. Pool, 249 Ala. 644, 32 So. 2d 765 (1947)); see also Weaver v. Pool, 249 Ala. at 648, 32 So. 2d at 768 ("the maxim refers to willful misconduct rather than merely negligent misconduct").

Ms. *48-9.

ARBITRATION

FMR Corp. v. Howard, [Ms. 1151149, Jan. 13, 2017] __ So. 3d __ (Ala. 2017). The Court reverses an order of the Pike Circuit Court denying a motion to compel arbitration of a dispute regarding an investment account holder's responsibility to indemnify Fidelity Management Trust Company and Fidelity Brokerage Services, LLC for losses it might suffer if the investor's stepchildren prevail on claims they assert against Fidelity in a separate pending arbitration proceeding.

The opinion reviews familiar principles of arbitration law. First, the Court reviews *de novo* the denial of a motion to compel arbitration. Ms. *8-9, quoting *Elizabeth Homes, L.L.C. v. Gantt*, 882 So. 2d 313, 315 (Ala. 2003). Second, the party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidence is a transaction affecting interstate commerce. *Id.* Third, once a motion to compel arbitration is made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question. *Ibid.*

The Court concludes the investor's two theories for avoiding arbitration must both be decided by the arbitrator. First, her contention that as the indemnification claim is contingent on the outcome in the other pending arbitration proceeding, no dispute was ripe for resolution by the Pike Circuit Court. The Court holds to the contrary that whether a dispute is allegedly not ripe is for the arbitrator to decide, not the court. Ms. *13, citing, *inter alia*, *Transportation Workers' Union of America v. Veolia Transp. Servs., Inc.*, 24 F.Supp.3d 223, 230 (E.D.N.Y. 2014). Second, the Court also rejects the investor's contention that there was a waiver of the right to enforce the arbitration provision because of a failure to timely invoke it. Citing *Dudley, Hopton-Jones, Sims & Freeman, P.L.L.P. v. Knight*, 57 So. 3d 68 (Ala. 2010), the Court concludes the waiver issue should also be decided by the arbitrator, not the Court. Ms. *14-16.

Accordingly, the judgment entered by the Pike Circuit Court denying the motion to compel arbitration is reversed and the cause remanded for the trial court to enter an order granting the motion.

JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DETERMINATIONS

Alabama Medicaid Agency v. Marshall, [Ms. 2150903, Jan. 20, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals reverses a judgment of the Montgomery Circuit Court reversing a denial by the Alabama Medicaid Agency following an administrative hearing of three separate requests for Medicaid-nursing home benefits where the Montgomery Circuit Court concluded the Agency's decision denying such benefits was "arbitrary and capricious." The Court of Civil Appeals makes no determination about the merits of that judgment, but instead reverses on procedural grounds because, under the Alabama Administrative Procedures Act, § 41-22-20(l), Ala. Code 1975, when a trial court reverses an administrative agency determination "the court shall set out in writing, which writing shall become a part of the record, the reasons for its decision." Citing *Alabama Medicaid Agency v. Peoples*, 549 So. 2d 504 (Ala. Civ. App. 1989)(Ms. *4), the court concludes that a trial court cannot merely recite the statutory grounds for reversal, but must give in its order specific reasons to support its conclusions. *Id.*

SECURITY INTERESTS AND CERTIFICATED SECURITIES

Citizens Bank & Trust v. Piggly Wiggly Alabama Distributing Co., Inc., [Ms. 2150749, Jan. 20, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals affirms the judgment of the Jefferson Circuit Court, Bessemer Division, holding that a security interest a bank held in certain stock was subordinate to the right to that same stock held by a lien creditor. The opinion reviews control and delivery of certificated securities under §§ 7-8-102, 7-8-301, 7-9A-313 and 7-9A-314, Ala. Code 1975. Because the undisputed evidence established that the bank did not have physical possession of the stock certificate, nor support the bank's contention that any other entity was holding the stock for the bank. The trial court's conclusion that the bank did not perfect its security interest pursuant to § 7-8-301(a) was supported by substantial evidence such that the lien creditor's security interest in the stock was superior to the bank's interest.

ALIMONY AND CHILD SUPPORT

Person v. Person, [Ms. 2150225, Jan. 20, 2017] __ So. 3d __ (Ala. Civ. App. 2017)(on application for rehearing). The Court of Civil Appeals in this plurality opinion (Moore, J., Pittman and Donaldson, JJ, concur; Thompson, P.J., and Thomas, J., concurring in the result) revisits its October 21, 2016 opinion which affirmed in part and reversed in part a divorce judgment entered by the Crenshaw Circuit Court concerning the 20-year marriage of former NBA star Wesley Person and his wife. The court's original opinion remanded the cause for the circuit court to reconsider its judgment as to alimony, child support, and division of marital assets.

On rehearing, the court reverses the circuit court's judgment to the extent it found an arrearage of $320,000 in child support payments based upon a pendente lite order entered at the wife's request shortly after the complaint for divorce was filed. The court finds that the pendente lite order failed to conform with the mandatory requirements of Rule 65(b), Ala. R. Civ. P. in that the wife's petition failed to contain specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage, would result to the applicant, and the petition was also deficient as the attorney never certified in writing the efforts made, if any, to give notice to the respondent for the reasons why such notice should not be required. Citing *Ex parte Franks*, 7 So. 3d 391 (Ala. Civ. App. 2008) and *Ex parte Hutson*, 201 So. 3d 570, (Ala. Civ. App. 2016)(Ms. *10-14) the court holds that the pendente lite order was entered in violation of Rule 65(b) and was therefore a nullity insofar as it purported to award the wife $320,000 in past-due child support.

The court also reverses the judgment under authority of *Morgan v. Morgan*, 183 So. 3d 945 (Ala. Civ. App. 2014) because the record did not contain any evidence as to the parties' respective incomes or the needs of the children. Ms. *15-17.

Finally, the judgment awarding alimony is likewise reversed because of the absence in the record of evidence establishing the need for such alimony. Citing *Sullivan v. Sullivan*, [Ms. 2140760, Feb. 26, 2016] __ So. 3d __ (Ala. Civ. App. 2016), and *Shewbart v. Shewbart*, 64 So. 3d 1080 (Ala. Civ. App. 2010)(Ms. *19-22), the court finds no evidence that the wife would be unable to maintain her former marital standard of living absent an award of periodic alimony, and without such evidence the trial court must be deemed to have exceeded its discretion in awarding periodic alimony.

The court directs that on remand the trial court is permitted to consider anew the child support issue and whether support should be ordered paid from the date the divorce petition was filed, and the trial court can also reconsider its division of property in light of the reversal of the award of alimony.

WORKERS' COMPENSATION IMMUNITY AND SPECIAL EMPLOYER

Ex parte Tenax Corp., [Ms. 1151122, Jan. 27, 2017] __ So. 3d __ (Ala. 2017). The Supreme Court grants a petition for a writ of mandamus and reverses a judgment of the Conecuh Circuit Court which had denied a motion for summary judgment claiming workers' compensation immunity under § 25-5-1, *et seq.*, Ala. Code 1975.

The Court first reiterates that mandamus is an appropriate means for reviewing a denial of a claim of employer immunity under the exclusive-remedy provisions of the Workers' Compensation Act. Ms. *8-9, citing, *inter alia*, *Ex parte Rockwell Mfg. Co.*, 202 So. 3d 669 (Ala. 2016).

The Court next cites *Gaut v. Medrano*, 630 So. 2d 362 (Ala. 1993) for its recitation of the elements of the Special Employer defense:

> In Terry v. Read Steel Products, 430 So. 2d 862 (Ala. 1983) this Court adopted a three-pronged test for determining when an employee of a general employer can become the employee of a 'special employer' for purposes of workers' compensation:
>
> > "" When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation [and thus immune from liability for tort actions brought by the special employee] only if
> >
> > ""(a) the employee has made a contract of hire, express or implied, with the special employer;
> >
> > ""(b) the work being done is essentially that of the special employer; and
> >
> > ""(c) the special employer has the right to control the details of the work.
> >
> > "'When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.'"
>
> "430 So. 2d at 865 (quoting 1C A. Larson, The Law of Workmen's Compensation, § 48 (1980)). The requirement of a contract of hire comports directly with our Workers' Compensation Act, which defines an 'employee' as a 'person in the service of another under any contract of hire, express or implied, oral or written.' Ala. Code 1975, § 25-5-1(5)."

Ms. *10-11, quoting *Gaut*, 630 So. 2d at 364.

In this case, the ultimate issue was whether there was an implied agreement for the plaintiff to work under a contract of hire with the petitioner Tenax. Substantial evidence shows that the employee intended to enter into a contract of hire with Tenax, that he submitted to its control and supervision and he admitted it was his understanding that he was employed by Tenax. Ms. *14. Additionally, the evidence established that Tenax provided workers' compensation insurance, albeit through the temporary employment agency by paying a compensation rate above the rate paid to the employee, which was used in part to pay for workers' compensation insurance premiums. Ms. *15-16. Finally, the employee's activities at Tenax were "of such duration that [he] could be reasonably presumed to have evaluated and acquiesced in the risk of his employment." Ms. *17. Accordingly, the special employer was entitled to summary judgment on the basis of workers' compensation immunity.

ARBITRATION

University Toyota v. Hardeman, [Ms. 1151204, Jan. 27, 2017] __ So. 3d __ (Ala. 2017). The Court reverses an order of the Colbert Circuit Court allowing parties to pursue claims against automobile dealerships in arbitration proceedings conducted by the American Arbitration Association rather than by the Better Business Bureau of North Alabama as specified in the controlling arbitration agreements. The evidence established that the Better Business Bureau rejected the arbitration petition because it sought relief on a class-wide basis. Citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) and *Chambers v. Groome Transp. of Alabama*, 41 F.Supp.3d 1327 (M.D. Ala. 2014)(Ms. *14-15), the Court holds that the arbitration agreement's silence as to the availability of class-wide relief did not afford the circuit court the discretion to select an alternative arbitration forum which could provide class-wide relief because, under Alabama law, class-wide arbitration is permitted only when the arbitration agreement provides for it. The Court concludes

> Because a trial court can compel arbitration only in a manner consistent with the terms of the applicable arbitration agreement, we reverse the trial court's order compelling arbitration and remand the cause for the entry of a new order compelling [plaintiffs] to arbitrate their claims against the University dealerships before the BBB if they wish to pursue those claims.

Ms. *17.

LIABILITY INSURANCE COVERAGE AND IMPLIED PERMISSION

Grimes v. Alfa Mut. Ins. Co., [Ms. 1150041, Jan. 27, 2017] __ So. 3d __ (Ala. 2017). Invoking traditional rules of statutory construction (Ms. *34-6), the Court holds that Alabama's Mandatory Liability Insurance Act, § 32-7A-1, *et seq.*, Ala. Code 1975, does not require omnibus coverage for operators of insured motor vehicles with implied permission of the named insured. Accordingly, a declaratory judgment entered by the Coffee Circuit Court holding that a liability policy issued by Alfa Mutual Insurance Company which did not provide coverage for a user of an automobile who did not have the express permission of the owner or drivers covered by the policy was valid and enforceable.

ALABAMA LEGAL SERVICES LIABILITY ACT, § 6-5-570, ET SEQ., ALA. CODE 1975

Yarbrough v. Eversole, [Ms. 1150400, Jan. 27, 2017] __ So. 3d __ (Ala. 2017). The Supreme Court affirms in part and reverses in part a judgment entered in favor of a law firm and its lawyers in a legal malpractice action brought in the Shelby Circuit Court. An unopposed motion for summary judgment which was granted by the circuit court was affirmed, but an opposed motion for judgment on the pleadings which resulted in a dismissal by the circuit court was due to be reversed and remanded.

> "To prevail in a legal-malpractice action, the plaintiff must prove that, but for the attorney's negligence, the legal matter concerning which the attorney is alleged to have been negligent would have been resolved more favorably to the plaintiff. Pickard v. Turner, 592 So. 2d 1016, 1019 (Ala. 1992). To meet this burden, the plaintiff must prove (1) that, in the absence of the alleged malpractice, the plaintiff would have been entitled to a more favorable result in the legal matter concerning which the attorney is alleged to have been negligent, and (2) that the attorney's negligence in fact caused the outcome of the legal matter to be less favorable to the plaintiff than the outcome would have been in the absence of the alleged malpractice. Pickard, 592 So. 2d at 1020 (' "Generally, actionable [legal] malpractice cannot be established in the absence of a showing that the attorney's wrongful conduct has deprived the client of something to which he would otherwise have been entitled." [7A C.J.S. Attorney and Client § 255 at 462 (1980).] A lawyer cannot be expected to achieve impossible results for a client.'); Hall v. Thomas, 456 So. 2d 67, 68 (Ala. 1984) ('A claim for malpractice requires a showing that in the absence of the alleged negligence the outcome of the case would have been different.' (citing Mylar v. Wilkinson, 435 So. 2d 1237 (Ala. 1983)))."

Ms. *12, quoting *Bonner v. Lyons, Pipes & Cook, P.C.*, 26 So. 3d 1115, 1120 (Ala. 2009) (emphasis in original).

Citing *Bryant v. Robledo*, 938 So. 2d 413 (Ala. Civ. App. 2005), which is characterized as analogous, the Court holds a fraud-in-the-inducement claim concerning the prospects of filing a petition under Rule 32, Ala. R. Crim. P., stated a viable claim for relief under the Alabama Legal Services Liability Act. "Accordingly, the circuit court erred in concluding that [plaintiff's] legal malpractice action against the firm and [its attorney] failed as a matter of law. There exists a plain dispute of fact as to what [the attorney] told [plaintiff] about the prospects of a Rule 32 petition and the subsequent appellate filings. Therefore, a judgment on the pleadings in favor of the firm and [the attorney] was not warranted." Ms. *16.

WORKERS' COMPENSATION AND VENUE

Ex parte Hibbett Sporting Goods, Inc., [Ms. 2160069, Jan. 27, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals grants a petition for writ of mandamus and orders the Lamar Circuit Court to vacate an order denying Hibbett Sporting Goods' motion for change of venue and to enter an order transferring the underlying workers' compensation action to the Jefferson Circuit Court. The court rejected the contention that Hibbett Sporting Goods did business by agent in Lamar County (the county of the worker's residence) such that venue was proper

under § 6-3-7(a)(3), Ala. Code 1975. The court notes the distinction in the law in the test of agency for purposes of *liability* versus *venue*:

> "[I]n Ex parte Peabody Galion Co., 497 So. 2d 1126 (Ala. 1986), [the Supreme Court] held that the standard for testing agency for venue purposes is different from the standard for testing agency for the purpose of liability. [The Supreme Court] discussed the standard as follows:
>
> > "'The term "agency" is frequently used to describe an arrangement which does not rise to the level of a principal/agent relationship and which is not governed by the law of respondeat superior. See Black's Law Dictionary, (rev. 4th ed. 1968); and 3 Am.Jur. 2d Agency § 2, p. 510. Indeed, that term "is also often used in statutes or constitutional provisions in a more restricted sense than that commonly given it, and, where so used, its significance must generally be determined by a study of the context." 2A C.J.S. Agency § 4, p. 557 (1972).
> >
> > "'...'
>
> "Id. at 1128-29. Peabody tells us that for the purpose of venue, the element of control, or lack thereof, of the principal over its agent is not determinative. Id. at 1129. If the entity is the 'means' by which the principal is able to do business in a particular county, then the entity is the 'agent' of the principal for venue purposes. In Peabody, [the supreme court] found that an independent corporation, acting as a distributor of products for another corporation, was an 'agent' for the purpose of venue, because it was a 'means' by which the principal corporation did business. Id."
>
> Ex parte Charter Retreat Hosp., Inc., 538 So. 2d 787, 789-90 (Ala. 1989). ""[A] corporation 'does business' in a county for purposes of § 6-3-7 if, with some regularity, it performs there some of the business functions for which it was created."" Ex parte Pike Fabrication, 859 So. 2d at 1093 (quoting Ex parte Wiginton, 743 So. 2d 1071, 1074-75 (Ala. 1999), quoting in turn Ex parte SouthTrust Bank of Tuscaloosa, N.A., 619 So. 2d 1356, 1358 (Ala. 1993)). "Doing business" includes "the sale of [a] corporation's products." Ex parte Peabody Galion Co., 497 So. 2d 1126, 1129 (Ala. 1986).

Ms. *12-13. The court concludes that "§ 6-3-7(a)(3) requires that the defendant corporation have an agent, not a principal, that does business in the county." Ms. *14. "For the purposes of venue, an agent must be the 'means' by which the principal is able to do business in a particular county." Ms. *15, quoting *Ex parte Charter Retreat Hosp., Inc.*, 538 So. 2d 787, 790 (Ala. 1989). Because the injured worker failed to meet this required showing, venue was appropriate only in the Jefferson Circuit Court.

GUEST STATUTE

Hurst v. Sneed, [Ms. 1151067, Feb. 3, 2017] __ So. 3d __ (Ala. 2017). The Court reverses a summary judgment entered by the Madison Circuit Court in a negligence action upon determining questions of fact existed about application of the Alabama Guest Statute, § 32-1-2, Ala. Code 1975.

The Court first stated the basic rule of construction of the statute:

> "" The general rule is that if the transportation of a rider confers a benefit only on the person to whom the ride is given, and no benefits other than such as are incidental to hospitality, good will or the like, on the person furnishing the transportation, the rider is a guest; but if his carriage tends to promote the mutual interest of both [the rider] and driver for their common benefit, thus creating a joint business relationship between the motorist and his rider, or if the rider accompanies the driver at the instance of the driver for the purpose of having the rider render a benefit or service to the driver on a trip that is primarily for the attainment of some objective of the driver, the rider is a 'passenger for hire' and not a guest.""

Ms. *6, quoting *Sullivan v. Davis*, 263 Ala. 685, 688, 83 So. 2d 434, 436-37 (1955). The Court emphasized,

> "If the excursion is not purely social, any benefit to the driver of the automobile conferred or anticipated or mutual benefit present or anticipated to the driver and the person carried is sufficient to take the case out of the automobile guest statute.'"

Ms. *6, quoting *Harrison v. McCleary*, 281 Ala. 87, 90, 199 So. 2d 165, 167 (1967). The Court focused on the nature of the benefit that must be conferred to take a case outside of the statute:

> "'... In order to keep the person transported from being a gratuitous guest, it is not necessary that he should have paid or agreed to pay directly for his transportation or be a "passenger for hire" in the legal sense of the term; and the payment or compensation which the carrier derives from the undertaking need not consist of cash or its equivalent, but may consist of some other substantial benefit, recompense, or return making it worth while for him to furnish the ride.' 60 C.J.S., Motor Vehicles, § 399(5)b, p. 1011.
>
> "....
>
> "... [T]he general rule [is] that a mere incidental benefit to the driver is not sufficient to take the rider out of the guest statute. The benefit conferred must in some degree have induced the driver to extend the offer to the rider. Further, courts have generally held that the benefit must be material and tangible and must flow from the transportation provided. ..."

Ms. *7, quoting *Sullivan*, 263 Ala. at 688-89, 83 So. 2d at 437. The Court then summarized the three components of the

determination of whether a rider in a vehicle is considered a "guest" or a "passenger for hire" for purposes of application of the guest statute:

> (1) if the transportation of a rider confers a benefit only on the rider, and no benefits, other than such as are incidental to hospitality, good will, or the like, on the driver, the rider is a guest; (2) if the transportation tends to promote the mutual interest of both the rider and the driver for their common benefit, thus creating a joint business relationship between the motorist and his or her rider, the rider is a "passenger for hire" and not a "guest"; and (3) if the rider accompanies the driver at the instance of the driver for the purpose of having the rider confer a benefit or service to the driver on a trip the primary objective of which is to benefit the driver, the rider is a "passenger for hire" and not a "guest."

Ms. *8-9, citing *Sullivan*, *supra*. Here, the Court found a material issue of fact concerning whether the passenger conferred a material benefit upon the driver by agreeing to the driver's request to accompany her to a store to assist the driver with her elderly aunt. Ms. *11. Viewing this evidence in the light most favorable to the passenger, the Court concludes that accompanying the driver to the store to assist with an elderly aunt conferred a material benefit so as to remove the passenger from "'guest' status" under the Alabama Guest Statute. Ms. *12.

CIVIL FORFEITURE

Wallace v. State, [Ms. 2150967, Feb. 10, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals reverses a judgment entered by the Shelby Circuit Court ordering the forfeiture of an automobile based upon its use in a sale of marijuana. The court notes that innocent owners of property subject to forfeiture have an affirmative defense pursuant to § 20-2-93(h) which states:

> "An owner's or bona fide lienholder's interest in any type of property other than real property and fixtures shall be forfeited under this section unless the owner or bona fide lienholder proves both that the act or omission subjecting the property to forfeiture was committed or omitted without the owner's or lienholder's knowledge or consent and that the owner or lienholder could not have obtained by the exercise of reasonable diligence knowledge of the intended illegal use of the property so as to have prevented such use."

Ms. *7. Under this statute, "lack of knowledge or consent is an affirmative defense, available after the state has made a prima facie case for forfeiture." *Id.*, quoting *State ex rel. Williams v. One Glastron Boat*, 411 So. 2d 795, 796 (Ala. Civ. App. 1982) and *Kuykendall v. State*, 955 So. 2d 442, 445 (Ala. Civ. App. 2006).

Here, as in *Kuykendall v. State*, there was no evidence supporting any conclusion that the owner knew or should have known that his son was using the automobile illegally. Thus, the trial court's judgment was not supported by the evidence.

STANDING TO APPEAL

Manley v. Vaughn, [Ms. 2150855, Feb. 10, 2017] __ So. 3d __ (Ala. Civ. App. 2017). Citing *McCollum v. Keating*, 5 So. 3d 1283 (Ala. Civ. App. 2008), the court again holds that "[u]nless a person is a party to a judgment, he [cannot] appeal from that judgment. ... One must have been a party to the judgment below in order to have standing to appeal any issue arising out of that judgment." Ms. *5-6, quoting *McCollum*, 5 So. 3d at 1287.

In this case, the appellant purports to appeal from a judgment of the Etowah Circuit Court approving a settlement agreement stemming from a claim filed by his father which contested a will. Because the appellant was never a party in the will contest, he had no standing to appeal and his appeal was required therefore to be dismissed.

APPARENT AUTHORITY AND NON-DELEGABLE DUTY

Bain v. Colbert County Northwest Ala. Health Care Auth., [Ms. 1150764, Feb. 10, 2017] __ So. 3d __ (Ala. 2017). The Court, per curiam, (Stuart, Bolin, Shaw, Main, Wise, and Bryan, JJ, concur; Parker and Murdock, JJ, concur in part and dissent in part) affirm a summary judgment entered by the Colbert Circuit Court in favor of Helen Keller Hospital and against a personal representative of her deceased husband's estate in a medical negligence case which sought to impose vicarious liability upon the hospital for the acts of its emergency room physician.

As to plaintiff's apparent authority theory, the Court (Ms. *20-41) applies existing law and concludes plaintiff presented no evidence the hospital held itself out as employing the doctors that worked in its emergency room and no evidence that she or her husband in seeking treatment at the hospital relied on any representation by the hospital that the doctor who would treat her husband was an agent or employee of the hospital.

> "'"As between the principal and third persons, mutual rights and liabilities are governed by the apparent scope of the agent's authority which the principal has held out the agent as possessing, or which he has permitted the agent to represent that he possesses and which the principal is estopped to deny.'
>
> "'"Such apparent authority is the real authority so far as affects the rights of a third party without knowledge or notice ...." ...
>
> "'"When one has reasonably and in good faith been led to believe, from the appearance of authority which a principal permitted his agent to exercise, that a certain agency exists, and in good faith acts on such belief to his prejudice, the principal is estopped from denying such agency ...." ...
>
> "'"The apparent authority of the agent is the same, and is based upon the same elements as the authority created by the estoppel of the principal to deny the agent's authority; that is to say, the two are correlative, inasmuch

> as the principal is estopped to deny the authority of the agent because he has permitted the appearance of authority in the agent, thereby justifying the third party in relying upon the same as though it were the authority actually conferred upon the agent.'"
>
> "Pearson v. Agricultural Insurance Co., 247 Ala. 485, 488, 25 So. 2d 164, 167 (1946) (citations omitted); see Wood v. Shell Oil Co., 495 So. 2d [1034,] 1038 [(Ala. 1986)]. The doctrine of apparent authority is based upon the actions of the principal, not those of the agent; it is based upon the principal's holding the agent out to a third party as having the authority upon which he acts, not upon what one thinks an agent's authority might be or what the agent holds out his authority to be. See Automotive Acceptance Corp. v. Powell, 45 Ala. App. 596, 234 So. 2d 593 (Ala. Civ. App. 1970), quoted with approval in Massey-Ferguson, Inc. v. Laird, 432 So. 2d 1259 (Ala. 1983)."

644 So. 2d at 891. The third party's belief that an individual is an agent or employee of the principal must be "objectively reasonable"; what the third party "subjectively perceived" is immaterial to the analysis. Brown v. St. Vincent's Hosp., 899 So. 2d 227, 239 (Ala. 2004).

As indicated above, this Court has held that "'there must be a reliance on the part of the injured person before liability can be engrafted through the doctrine of respondeat superior, by estoppel, on the master.'" Brown, 899 So. 2d at 237 (quoting Union Oil Co. of California v. Crane, 288 Ala. 173, 179, 258 So. 2d 882, 887 (1972) (emphasis added)).

> "'"'Estoppel,' by holding out another as the agent of the asserted principal, 'is always a matter personal to the individual asserting it and he must therefore show that he was misled by the appearances relied upon. It is not enough that he might have been, ... so misled. It must also appear that he had reasonable cause to believe that the authority existed; mere belief without cause, or belief in the face of facts that should have put him on his guard is not enough.'"'
>
> "[Crane,] 288 Ala. at 180, 258 So. 2d at 887.
>
> "'[B]efore there can be apparent authority that implies an agency relationship, the "authority" must be "apparent" to the complaining party and that party must have relied on the appearance of authority; he cannot rely on an appearance of authority that he was ignorant of.'
>
> "Watson v. Auto-Owners Ins. Co., 599 So. 2d 1133, 1136 (Ala. 1992) (emphasis supplied)."

Ms. *22-25, quoting *Malmberg v. American Honda Motor Co.*, 644 So. 2d 888, 891 (Ala. 1994) and *Brown v. St. Vincent's Hosp.*, 899 So. 2d 227, 237 (Ala. 2004).

As for the non-delegable duty theory, the Court rejected Plaintiff's contention that regulations promulgated by the State Board of Health imposed any duty on the hospital to provide emergency medical physician services (Ms. *41-49) because Ala. Admin. Code Reg. 420-5-7-.04(4) imposes the duty of care for patients in hospitals on physicians ("a doctor of medicine or osteopathy is responsible for the care of each patient). In short, the Court concludes that "[t]he duty of care owed to a patient by a physician is distinct from the duty of care owed to a patient by a hospital." Ms. *49-50, citing § 6-5-484(a), Ala. Code 1975 (setting forth the duty of care owed by a physician and by a hospital). Because the emergency room physician allegedly breached a duty owed by him rather than a duty owed by the hospital, there was no basis for alleging the hospital should be vicariously liable for the physician's breach of a non-delegable duty owed by that hospital.

MEDICAL NEGLIGENCE AND EXCEPTIONS TO REQUIREMENT OF EXPERT TESTIMONY TO ESTABLISH BREACH OF THE STANDARD OF CARE AND CAUSATION

Collins v. Herring Chiropractic Center, LLC, [Ms. 1151173, Feb. 17, 2017] __ So. 3d __ (Ala. 2017). The Court reverses a summary judgment entered by the Jefferson Circuit Court in favor of a chiropractor and his clinic in an action under the Alabama Medical Liability Act for burn injuries and scarring attributable to application of a cold pack to a patient's knee.

Defendants supported a motion for summary judgment with an affidavit from the chiropractor asserting that his treatment was within the standard of care. Defendants then asserted that because plaintiff failed to present controverting testimony from a similarly situated health care provider, summary judgment was due to be granted in their favor. Plaintiff responded that expert testimony was not required because her claims could "be readily understood by a lay person." Ms. *4.

The opinion reiterates "there is an exception to the rule requiring expert testimony 'in a case where want of skill or lack of care is so apparent ... as to be understood by a layman, and requires only common knowledge and experience to understand it.'" Ms. *7, quoting *Tuscaloosa Orthopedic Appliance Co. v. Wyatt*, 460 So. 2d 156, 161 (Ala. 1984). The "general rule" concerning when a plaintiff can prove a medical negligence claim without testimony from a similarly situated health care provider is:

> "'(1) where a foreign instrumentality is found in the plaintiff's body following surgery; 2) where the injury complained of is in no way connected to the condition for which the plaintiff sought treatment; 3) where the plaintiff employs a recognized standard or authoritative medical text or treatise to

> prove what is or is not proper practice; and 4) where the plaintiff is himself or herself a medical expert qualified to evaluate the doctor's allegedly negligent conduct.'"

Ms. *8, quoting *Allred v. Shirley*, 598 So. 2d 1347, 1350 (Ala. 1992). This list is illustrative and not exclusive. Ms. *8, citing *Ex parte HealthSouth Corp.*, 851 So. 2d 33 (Ala. 2002).

The Court highlights its "*reformulation*" of the general rule concerning when a plaintiff can prevail in a medical negligence action without the benefit of independent expert testimony this way:

> "[T]o recognize first, a class of cases "'where want of skill or lack of care is so apparent ... as to be understood by a layman, and requires only common knowledge and experience to understand it,'" [Tuscaloosa Orthopedic Appliance Co. v.] Wyatt, 460 So. 2d [156] at 161 [(Ala. 1984)](quoting Dimoff v. Maitre, 432 So. 2d 1225, 1226-27 (Ala. 1983)), such as when a sponge is left in, where, for example, the wrong leg is operated on, or, as here, where a call for assistance is completely ignored for an unreasonable period of time. A second exception to the rule requiring expert testimony applies when a plaintiff relies on ""a recognized standard or authoritative medical text or treatise,"" Anderson [v. Alabama Reference Labs., 778 So. 2d [806] at 811 [(Ala. 2000)], or is himself or herself a qualified medical expert."

Ms. *9, quoting *HealthSouth*, 851 So. 2d at 39.

Viewing the evidence in a light most favorable to the plaintiff, it was not necessary for her to present independent expert testimony where her claim concerning misapplication of the cold pack "requires only common knowledge and experience to understand what is akin to frostbite." Ms. *11. The facts place this case within the class of cases "where want of skill or lack of care is so apparent ... as to be understood by a layman, and requires only common knowledge and experience to understand it. ..." Ms. *12, quoting *HealthSouth*, 851 So. 2d at 39.

Furthermore, because "[b]listering and subsequent scarring does not ordinarily occur following the application of a cold pack, absent negligence" "[t]he causative relationship between [plaintiff's] injury and the defendants' acts are such that it can be readily understood, to the extent that a lay person can reliably determine the issue of causation without independent expert testimony to assist in that determination." Ms. *14-15. Thus, under authority of *Sorrell v. King*, 946 So. 2d 854, 862-63 (Ala. 2006), no independent expert testimony was required on the issue of causation either.

RULE 54(B), ALA. R. CIV. P. "FINALITY"

Equity Trust Co. v. Breland, [Ms. 1150302, 1150876, Feb. 17, 2017] __ So. 3d __ (Ala. 2017)(certification and dismissal of appeal). The Court dismisses consolidated appeals from the Mobile Circuit Court upon concluding the circuit court exceeded its discretion in certifying its judgments under Rule 54(b), Ala. R. Civ. P. as final and therefore appealable. Because claims remained pending in the circuit court arising out of the same underlying operative facts, *Schlarb v. Lee*, 955 So. 2d 418 (Ala. 2006), *Pavilion Dev., L.L.C. v. JBJ P'ship*, 142 So. 3d 535 (Ala. 2013) and *Stephens v. Fines Recycling, Inc.*, 84 So. 3d 867 (Ala. 2011) warranted dismissal of the consolidated appeals because of the probability of repeated appellate review of the same underlying facts.

TIMELINESS OF APPEAL FROM DISTRICT COURT JUDGMENT

Modi v. Johnson, [Ms. 2160072, Feb. 17, 2017] __ So. 3d __ (Ala. Civ. App. 2017). Citing *Croskey v. Crawford*, 177 So. 3d 468 (Ala. Civ. App. 2014) and *McCaskill v. McCaskill*, 111 So. 3d 736 (Ala. Civ. App. 2012), the Court of Civil Appeals holds that an appeal from a district court judgment concerning a request for imposition of a garnishment was untimely because it was not filed "within 14 days from the date of the judgment or the denial of a post-trial motion, whichever is later" as required by § 12-12-70(a), Ala. Code 1975. Though the district court purported to make rulings beyond the 14-day period provided by § 12-20-70(a), those rulings were nullities. Ms. *5, citing *Moragne v. Moragne*, 888 So. 2d 1280 (Ala. Civ. App. 2004). Further, to the extent the circuit court ruled on the merits in the case untimely appealed to that court, the circuit court's judgment was void. Ms. *6, citing *Colburn v. Colburn*, 14 So. 3d 176 (Ala. Civ. App. 2009).

SUMMARY JUDGMENT PROCEDURE

Hendon v. Holloway, [Ms. 2150958, Feb. 17, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals affirms in part and reverses in part a summary judgment entered by the Jefferson Circuit Court in favor of defendants in an action alleging malicious prosecution and harassment.

The appellant first contended the summary judgment was improper as to one of the defendants because that defendant had not filed his own summary-judgment motion. However, the court rejected the contention because the record reflected that the appellant never challenged the summary judgment at any time in the trial court on the basis of a failure by that defendant to file his own motion. Citing *Andrews v. Merritt Oil Co.*, 612 So. 2d 409 (Ala. 1992) (Ms. *6), the court reiterates that an appellate court's review is restricted to the evidence and arguments presented to the trial court such that an appellate court will not consider an issue raised for the first time on appeal.

Citing *Dow v. Alabama Democratic Party*, 897 So. 2d 1035 (Ala. 2004) (Ms. *7-9), the court finds that the defendants' motion for partial summary judgment and supporting affidavit contain no evidence "that could be construed as a refutation of [plaintiff's] malicious-prosecution claim" such that there was a failure to meet the summary-judgment "burden of demonstrating that no genuine issue of material fact existed or that she was entitled to a judgment as a matter of law." Ms. *9, citing *Dow*, 897 So. 2d at 1038-39.

Finally, the court concludes that defendants' motion for partial summary judgment and supporting affidavits established *prima facie* that they had not engaged in harassment such that the burden shifted to the appellant to present substantial evidence as to the existence of a genuine issue of material fact. Ms. *10, citing *Dow*, 897 So. 2d at 1038-39. Because the appellant failed to present controverting evidence, the summary judgment was properly entered

in favor of defendants as to the harassment claim. *Id.*

FRAUD IN THE INDUCEMENT – VERDICT FOR COMPENSATORY AND PUNITIVE DAMAGES AFFIRMED

Farmers Ins. Exchange v. Morris, [Ms. 1121091, Feb. 12, 2016], 2016 WL 661671, __ So. 3d __ (Ala. 2016), reh'g denied Feb. 24, 2017.

In this Cunningham Bounds case, Kyle Morris sued Farmers Insurance for fraudulently inducing him to become a Farmers agent. Kyle was already an agent in his father's insurance agency, and Farmers agents assured him that continuing this relationship was not prohibited by any Farmers' rules. After he worked successfully for Farmers for more than two years, Farmers terminated him because of an alleged conflict of interest from working with his father's agency. The termination caused him to lose the value of the work he did over that time.

Despite *amicus* support from the Business Council of Alabama; Alfa Insurance Corporation, Alfa Mutual Fire Insurance Company, Alfa Mutual General Insurance Corporation, Alfa Life Insurance Corporation, Alfa Mutual Insurance; The Alabama Civil Justice Reform Committee; Automobile Dealers Association of Alabama, Inc.; National Federation of Independent Business; Alabama Road Builders Association; Alabama Retail Association; Home Builders Association of Alabama; Alabama Associated General Contractors of America; Alabama Rural Electric Association of Cooperatives; Alabama Bankers Association; Association of Alabama Life Insurance Companies; and the Alabama Defense Lawyers Association, the Supreme Court of Alabama affirmed the $2.4 million fraud judgment ($600,000 compensatory damages and $1.8 million punitive damages) and on February 24, 2017, denied rehearing.

The Supreme Court rejected Farmers' three arguments for judgment as a matter of law on the fraud claim. First, it argued that Morris was only an employee at will and so could not have any injury from reasonable reliance on the misrepresentations that he could become a Farmers agent while continuing in his father's agency. The Court held that Morris's status as an employee at will did not prevent him from asserting that he reasonably relied by altering his relationship with his father's business (i.e., by concentrating instead on selling Farmers policies). Second, the Court rejected an argument that the merger and integration clause precluded reliance on earlier oral misrepresentations – a statement in a contract that no other representations have been made does not bar a fraud action alleging that oral misrepresentations fraudulently induced the plaintiff to enter into the contract. Third, the Court rejected Farmers' argument that a statement available to Mr. Morris in its training materials should have alerted him to a Farmers rule against maintaining an office in another insurance agency; that rule was buried deep within training materials and both Mr. Morris and the Farmers agents who trained him testified that they had never seen it and were not aware of it, so a jury question was presented on whether it precluded reasonable reliance.

STATE-AGENT IMMUNITY

Ex parte Ingram, [Ms. 1131228, Feb. 24, 2017] __ So. 3d __ (Ala. 2017). In a plurality opinion (Murdock, J. and Main and Wise, JJ., concur; Stuart and Murdock, JJ., concur specially; Parker and Bryan, JJ., concur in the result; and Shaw, J., concurring in the result in part and dissenting in part), the Court revisits the "beyond-authority" exception to state-agent immunity identified in *Ex parte Cranman*, 792 So. 2d 392, 405 (Ala. 2002) and applied in *Ex parte Sumerlin*, 26 So. 3d 1178 (Ala. 2009) and *Ex parte Coleman*, 45 So. 3d 751 (Ala. 2013) in the context of claims to state-agent immunity by a special needs teacher and her paraprofessional assistant. The Court embraces language from the Supreme Court of Texas to recast the "beyond-authority" test to ask whether a rule, regulation, policy, or procedure is "sufficiently specific so as to leave no choice to [the state-agent] in the performance of [his or her] duties." Ms. *25, quoting *City of Lancaster v. Chambers*, 883 S.W. 2d 650, 655 (Tex. 2003). The way to evaluate future "beyond-authority" issues is to ask whether "[t]he [rule, regulation, policy, or procedure] is "sufficiently specific so as to leave no choice to [the state-agent] in the performance of [his or her] duties." Does the rule, regulatory policy or procedure define the [state-agent's] responsibilities with such precision to leave nothing to the exercise of the [state-agent's] discretion or judgment?" Ms. *26 paraphrasing *Enriquez v. Khouri*, 13 S.W. 3d 458, 462-63 (Tex. Ct. App. 2000).

Guidance may be found in language of the Restatement (Second) of Torts § 895D, cmt. b (1979).

> "The complex process of the administration of government requires that officers and employees be charged with the duty of making decisions, either of law or of fact, and of acting in accordance with their determinations. ... The basis of the immunity has been not so much a desire to protect an erring officer as it has been a recognition of the need of preserving independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits. This, together with the manifest unfairness of placing any person in a position in which he is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of hindsight, has led to a general rule that tort liability should not be imposed for conduct of a type for which the imposition of liability would substantially impair the effective performance of a discretionary function."

Ms. *29, quoting Restatement (Second) of Torts, § 895D, cmt. b (1979)(emphasis in original).

MANDAMUS AND RESIDUAL JURISDICTION

Ex parte Caremark Rx, LLC, [Ms. 1151160, Feb. 24, 2017] __ So. 3d __ (Ala. 2017). 2017). The Court reverses an order of the Franklin Circuit Court requiring a defendant in a class action case settled

sixteen years ago to produce under authority of Rule 60(b)(6), Ala. R. Civ. P., and an assertion by the circuit court of "retained jurisdiction" documents identifying all members of the plaintiff class covered by the settlement. Citing *Schramm v. Spotswood*, 109 So. 3d 154 (Ala. 2012), *State ex rel Abdullah v. Roldan*, 207 S.W. 3d 642 (Mo. Ct. App. 2006) and *Holifield v. Holifield*, 109 S.W. 3d 711 (Mo. Ct. App. 2003), the Court concludes that the Franklin Circuit Court's purported reservation of jurisdiction had no legal effect as its inherent enforcement power applies only to the judgment as originally rendered and its power to modify that judgment ceases when the judgment becomes final. Accordingly, the settling defendant was entitled to the writ directing the Franklin Circuit Court to vacate its order requiring production of the class members' identifying information.

ALABAMA LEGAL SERVICES LIABILITY ACT § 6-5-570, ET SEQ., ALA. CODE 1975

Bond v. McLaughlin, [Ms. 1151215, Feb. 24, 2017] __ So. 3d __ (Ala. 2017). The Court reverses a summary judgment entered by the Lee Circuit Court in an action alleging legal malpractice under the Alabama Legal Services Liability Act § 6-5-570, *et seq.*, Ala. Code 1975, upon concluding that the plaintiff met her burden of presenting substantial evidence creating a genuine issue of material fact concerning whether a will contest, had it been properly filed in an underlying action, would have been successful. The Court reiterates the required elements for a legal malpractice action:

> "[T]o prevail in a legal-malpractice action, the plaintiff must prove that, but for the attorney's negligence, the legal matter concerning which the attorney is alleged to have been negligent would have been resolved more favorably to the plaintiff. Pickard v. Turner, 592 So. 2d 1016, 1019 (Ala. 1992). To meet this burden, the plaintiff must prove (1) that, in the absence of the alleged malpractice, the plaintiff would have been entitled to a more favorable result in the legal matter concerning which the attorney is alleged to have been negligent, and (2) that the attorney's negligence in fact caused the outcome of the legal matter to be less favorable to the plaintiff than the outcome would have been in the absence of the alleged malpractice. Pickard, 592 So. 2d at 1020 ('"Generally, actionable [legal] malpractice cannot be established in the absence of a showing that the attorney's wrongful conduct has deprived the client of something to which he would otherwise have been entitled." [7A C.J.S. Attorney and Client § 255 at 462 (1980).] A lawyer cannot be expected to achieve impossible results for a client.'); Hall v. Thomas, 456 So. 2d 67, 68 (Ala. 1984) ('A claim for malpractice requires a showing that in the absence of the alleged negligence the outcome of the case would have been different.' (citing Mylar v. Wilkinson, 435 So. 2d 1237 (Ala. 1983)))."

Ms. *10-11, quoting Bonner v. Lyons, Pipes & Cook, P.C., 26 So. 3d 1115, 1120 (Ala. 2009).

Here, because the plaintiff presented evidence admissible under Rule 803(3), Ala. R. Evid. (then existing state of mind exception to hearsay rule) concerning the decedent's statements that he had destroyed his will, the plaintiff met her burden of presenting substantial evidence creating a genuine issue of material fact to be resolved by the finder of facts. Ms. *12-13.

MANDAMUS AND REVIEW OF AHSAA ELIGIBILITY DETERMINATIONS

Ex parte Alabama High School Athletic Association, [Ms. 1160121, Feb. 24, 2017] __ So. 3d __ (Ala. 2017). The Court issues a formal opinion confirming its November 14, 2016 summary order granting petitions for writs of mandamus which declared orders of the Geneva Circuit Court and Washington Circuit Court void when those courts purported to issue orders impacting an eligibility determination made by the Alabama High School Athletic Association and its executive director. The Court reiterates the extremely high burden confronted when challenging an eligibility determination by the AHSAA:

> In Scott v. Kilpatrick, 286 Ala. 129, 132-33, 237 So. 2d 652, 655 (1970), this Court stated:
>
> "If officials of a school desire to associate with other schools and prescribe conditions of eligibility for students who are to become members of the school's athletic teams, and the member schools vest final enforcement of the association's rules in boards of control, then a court should not interfere in such internal operation of the affairs of the association. ...
>
> "Of course, if the acts of an association are the result of fraud, lack of jurisdiction, collusion, or arbitrariness, the courts will intervene to protect an injured part[y's] rights."
>
> In Alabama High School Athletic Ass'n v. Rose, 446 So. 2d 1, 5 (Ala. 1984), this Court further stated:
>
> "[A]s Kilpatrick and Kubiszyn [v. Alabama High School Athletic Ass'n, 374 So. 2d 256 (Ala. 1979),] indicate, the burden on the challenger to overcome the presumption favoring the Association's absolute authority in the conduct of its own affairs is a heavy one. We reaffirm the Kilpatrick test to the effect that the Court's jurisdiction in such matters is invoked when, and only when, the averments of fraud, collusion, or arbitrariness are supported by clear and convincing evidence; and the trial court's acceptance of jurisdiction will be affirmed only where its order makes an unequivocal factual finding of one or more of those narrow, restrictive grounds, founded upon clear and convincing evidence."

Ms. *4.

PERMISSIVE APPEALS AND MANDAMUS

Ex parte Boddie, [Ms. 2160228, Feb. 24, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals denies a father's petition seeking permission to

appeal pursuant to Rule 5, Ala. R. App. P., and, in the alternative, for a writ of mandamus following certification by the Shelby Circuit Court of a Rule 54(b), Ala. R. Civ. P., final order rejecting the father's contention that no past-due child support was owed because he and the mother of the children were involved in a common-law marriage.

The court denied the petition for permission to appeal because the Shelby Circuit Court's final order arose from a domestic-relations case and the Court of Civil Appeals pursuant to § 12-3-10, Ala. Code 1975 has exclusive appellate jurisdiction of such cases such that a permissive appeal could not be afforded the father given Rule 5, Ala. R. App. P.'s command that such appeals "of interlocutory orders are limited to those civil cases that are within the original appellate jurisdiction of the Supreme Court." Ms. *7.

The court also denied the petition for a writ of mandamus finding that the father had an adequate remedy through an ordinary appeal of the Shelby Circuit Court's Rule 54(b) final order and judgment. Ms. *9. Because that alternative adequate remedy was available to the father, he did not meet the criteria for mandamus relief as set forth in *Ex parte Ocwen Fed. Bank, F.S.B.*, 872 So. 2d 810, 813 (Ala. 2003):

> "Mandamus is an extraordinary remedy and will be granted only where there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991). This Court will not issue the writ of mandamus where the petitioner has '"full and adequate relief"' by appeal. State v. Cobb, 288 Ala. 675, 678, 264 So. 2d 523, 526 (1972) (quoting State v. Williams, 69 Ala. 311, 316 (1881))."

Ms. *9.

EXCLUSIVITY PROVISION OF LONGSHORE & HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. § 901, ET SEQ. AND AFFIRMANCE OF DENIALS OF MOTIONS TO DISMISS

Ex parte Austal USA, LLC, [Ms. 1151138, 1151244, Mar. 3, 2017] __ So. 3d __ (Ala. 2017). In another Cunningham Bounds case, the Supreme Court denies petitions for writs of mandamus by Austal USA, LLC, a shipbuilder in Mobile, which sought dismissal of a complaint brought by eight of its employees who alleged Austal intentionally injured them by requiring each to work with an improperly modified hand-held rotary saw that had previously injured dozens of Austal's employees. Citing *Rodriguez-Flores v. U.S. Coatings, Inc.*, 133 So. 3d 874 (Ala. 2013), the Court rejected Austal's claim of absolute immunity under the Longshore Act upon concluding that Plaintiffs' amended complaint stated potentially viable claims that Austal had intentionally injured its employees.

Rejecting arguments from Austal's amici curiae, The Business Council of Alabama, the Mobile Area Chamber of Commerce, the Alabama Defense Lawyers Association, and the Shipbuilders' Council of America, the Court concluded that Austal had not demonstrated a clear legal right to an order granting its Rule 12(b)(6) Ala. R. Civ. P. motions to dismiss because it was indeed possible that Plaintiffs could prevail with their claims:

> In considering whether a complaint is sufficient to withstand a motion to dismiss, we must take the allegations of the complaint as true, Ussery v. Terry, 201 So. 3d 544, 546 (Ala. 2016); we do not consider "'whether the pleader will ultimately prevail but whether the pleader may possibly prevail,'" Daniel v. Moye, [Ms. 1140819, November 10, 2016] ___ So. 3d ___, ___ (Ala. 2016) (quoting Newman v. Savas, 878 So. 2d 1147, 1149 (Ala. 2003) (emphasis added)); and "[w]e construe all doubts regarding the sufficiency of the complaint in favor of the plaintiff." Daniel, ___So. 3d at ___. Furthermore, a Rule 12(b)(6) dismissal is proper "'only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'" Knox v. Western World Ins. Co., 893 So. 2d 321, 322 (Ala. 2004) (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

Ms. *14-15.

ARBITRATION & APPELLATE REVIEW PURSUANT TO RULE 4(D), ALA. R. APP. P.

Bevel v. Marine Group, LLC, [Ms. 1150941, Mar. 3, 2017] __ So. 3d __ (Ala. 2017). The Court reverses an order of the Marshall Circuit Court granting a motion to compel arbitration upon concluding that a purchaser's failure to check a box on a bill of sale containing an arbitration provision indicated the purchaser never assented to arbitrate disputes arising from the purchase. The Court cites *Crown Pontiac, Inc. v. McCarrell*, 695 So. 2d 615 (Ala. 1997) and *Ex parte Pointer*, 714 So. 2d 971 (Ala. 1997) as authority for the proposition that when a consumer does not sign a signature line specifically corresponding to an arbitration provision, but does sign lines corresponding to other provisions, the failure to sign the signature line corresponding to the arbitration provision is a compelling indication of a failure to assent to that provision. Ms. *13.

IN REM JURISDICTION AND CIVIL FORFEITURE

Little v. Gaston, [Ms. 2150889, Mar. 3, 2017] __ So. 3d __ (Ala. Civ. App. 2017). The Court of Civil Appeals affirms an entry of summary judgment by the Montgomery Circuit Court ordering an Alabama law enforcement agency officer to return cash seized pursuant to a search warrant upon concluding that the Montgomery Circuit Court had exclusive *in rem* jurisdiction over the money seized and that it was due to be returned because no state forfeiture proceeding had been promptly commenced as required by § 20-2-93(c), Ala. Code 1975.

> "In rem jurisdiction" refers to the "court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it." Black's Law Dictionary 982 (10th ed. 2014). A court obtains in rem jurisdiction when it validly seizes property so that it is brought within the control of the court. Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 85 (1992). Judicial control of the res may

be either actual or constructive. Id. at 87. "[T]hat court which first acquires [in rem] jurisdiction draws to itself the exclusive authority to control and dispose of the res." Ex parte Consolidated Graphite Corp., 221 Ala. 394, 397-98, 129 So. 262, 265 (1930).

Ms. *7. Because the Montgomery Circuit Court issued a search warrant pursuant to §§ 15-5-2(2) or 15-5-2(3) or both, and the search warrant it issued required service of the warrant by a state law enforcement officer, upon execution of the warrant and seizure of the funds, the property fell under control of the circuit court pursuant to § 15-5-14, Ala. Code 1975 and thereby afforded *in rem* jurisdiction over the property the moment of its seizure. "As the first court to obtain *in rem* jurisdiction, the [Montgomery Circuit] Court had the exclusive power to dispose of the res, and the federal government could not exercise any jurisdiction over the currency. Therefore, we hold that the trial court ruled correctly when deciding that it had *in rem* jurisdiction over the [seized funds]." Ms. *12.

UNINSURED MOTORIST COVERAGE AND UNINSURED VEHICLE EXCLUSION

GEICO Indemn. Co. v. Bell, [Ms. 2150745, Mar. 10, 2017] __ So. 3d __ (Ala. Civ. App. 2017). Citing *Watts v. Preferred Risk Mut. Ins. Co.*, 423 So. 2d 171 (Ala. 1982), the Court of Civil Appeals holds "that a vehicle which is insured under a policy of insurance 'does not become uninsured because liability coverage may not be available to a particular individual.'" Ms. *10. Citing *Ex parte O'Hare*, 432 So. 2d 1300 (Ala. 1983) the court holds a "motor vehicle cannot be both insured and uninsured in the same policy." Ms. *11. Thus, "when the insurance carrier of the vehicle involved in an accident denied liability coverage to an individual because of an applicable liability exclusion or exclusionary definition, that denial does not trigger the availability of uninsured motorist coverage to that individual under the same policy." Ms. *11, quoting *Hall v. State Farm Mut. Auto Ins. Co.*, 514 So. 2d 853, 855 (Ala. 1987). Accordingly, the judgment of the Lowndes Circuit Court finding, after a jury trial, that wrongful death benefits were owed under GEICO's UIM coverage was due to be reversed with instructions to enter a judgment in favor of GEICO.

QUALIFIED IMMUNITY AND STATE-AGENT IMMUNITY

Ex parte Hugine, [Ms. 1130428, Mar. 17, 2017] __ So. 3d __ (Ala. 2017). In this 75-page opinion, the full Court (Murdock, J., and Stuart, Bolin, Main, Wise, and Bryan, JJ., concur; Parker, J., concurs in part and concurs in the result; Shaw, J., concurs in the result) grants a petition for a writ of mandamus and directs the Madison Circuit Court to enter summary judgment in favor of an administrator at Alabama A&M on the bases of qualified immunity relative to retaliation claims premised upon alleged violations of a tenured professor's free-speech and free-association rights and on the bases of state-agent immunity relative to the professor's state-law claims alleging wrongful termination, fraud and tortious interference with a contractual relationship.

As to the qualified immunity analysis, the opinion borrows heavily from United States and Eleventh Circuit precedent:

> "Qualified immunity offers complete protection for individual public officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sherrod v. Johnson*, 667 F.3d 1359, 1363 (11th Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).
>
> > "In *Saucier* [*v. Katz*,] 533 U.S. 194, 121 S.Ct. 2151 [(2001)], this Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. 533 U.S., at 201, 121 S.Ct. 2151. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct. *Ibid*. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Anderson* [*v. Creighton*, 483 U.S. 635,] 640, 107 S.Ct. 3034 [(1987)]."
>
> *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

Ms. *31. However, before engaging in any qualified immunity analysis, the reviewing court must first ascertain whether the official was engaged in a discretionary function when performing the acts of which the plaintiff complains. Ms. *32, citing *Holliman v. Harland*, 370 F.3d 1252 (11th Cir. 2004). That inquiry is two-fold: "We ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize." Ms. *32, quoting *Holliman v. Harland*, 370 F.3d at 1265. This analysis entails the following:

> "Instead of focusing on whether the acts in question involved the exercise of actual discretion, we assess whether they are of a type that fell within the employee's job responsibilities. ...
>
> "....
>
> "Consider the first prong of the test – whether the official is engaged in a legitimate job-related function. In *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992), 'we did not ask whether it was within the defendant's authority to suspend an employee for an improper reason; instead, we asked whether [the defendant's] discretionary duties included the administration of discipline.' *Harbert* [*Int'l., Inc. v. James*], 157 F.3d [1271] at 1282 [(11th Cir. 1998)]. ... Put another way, to pass the first step of the discretionary function test for qualified immunity, the defendant must have been performing a function that, but for the alleged constitutional infirmity, would have fallen with his legitimate job description.
>
> "....

> "After determining that an official is engaged in a legitimate job-related function, it is then necessary to turn to the second prong of the test and determine whether he is executing that job-related function – that is, pursuing his job-related goals – in an authorized manner. ... Each government employee is given only a certain 'arsenal' of powers with which to accomplish her goals. For example, it is not within a teacher's official powers to sign her students up for the Army to promote patriotism or civic virtue, or to compel them to bring their property to school to redistribute their wealth to the poor so that they can have firsthand experience with altruism."

370 F.3d at 1265, 1266-67 (some emphasis added).

Ms. *33-34. Once a defendant establishes that he/she was engaged in a discretionary function at the time of the act in question, the burden shifts to the plaintiff to show that the defendant is not entitled to summary judgment on qualified immunity ground. Ms. *34. "To do so, the plaintiff must demonstrate that a reasonable jury could interpret the evidence in the record as showing that the defendant violated a constitutional right that was clearly established at the time of the acts in question." Ms. *34-35, quoting *Holliman*, 370 F.3d at 1267.

Evaluating whether a government official violates free-speech rights of a government employee for purposes of this test involves its own special analysis stemming from *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968) as explained in *Boyce v. Andrew*, 510 F.3d 1333 (11th Cir. 2007):

> "Following *Pickering*, our analysis of retaliation against an employee by a government employer for alleged constitutionally protected speech has been comprised of four parts:
>
> > "'To prevail under this analysis, an employee must show that: (1) the speech involved a matter of public concern; (2) the employee's free speech interests outweighed the employer's interest in effective and efficient fulfillment of its responsibilities; and (3) the speech played a substantial part in the adverse employment action. If an employee satisfies her burden on the first three steps, [(4)] the burden then shifts to the employer to show by a preponderance of the evidence that it would have made the same decision even in the absence of the protected speech.'"

Ms. *35-36, quoting *Boyce v. Andrew*, 510 F.3d at 1342, n. 12, quoting *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1318 (11th Cir. 2005). In the end, in this case the Court relied upon *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996) in concluding that "state officials can act lawfully even when motivated by a dislike or hostility to certain protected behavior by a citizen." Ms. *39. The Court holds that a "state official can act lawfully despite having discriminatory intent where the record shows that they would have acted as they, in fact, did act even if they had lacked discriminatory intent." *Id*. Because the record established that the administrators were concerned with budgetary constraints at the time they made their decisions terminating the employment of the plaintiff and others, they were entitled to qualified immunity even if they acted with some discriminatory intent. The Court therefore embraces the holding of *Rioux v. City of Atlanta*, 520 F.3d 1269, 1282-83 (11th Cir. 2008) that

> at least when an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field even at the summary judgment stage. Unless it, as a legal matter, is plain under the specific facts and circumstances of the case that the defendant's conduct – despite his having adequate lawful reasons to support the act – was the result of his unlawful motive, the defendant is entitled to immunity. ...

Ms. *46. This holding is in keeping with the general principles underlying the doctrine of qualified immunity:

> "When public officials do their jobs, it is a good thing. Qualified immunity is a real-world doctrine designed to allow local officials to act (without always erring on the side of caution) when action is required to discharge the duties of public office. See *Davis v. Scherer*, 468 U.S. 183, 196, 104 S.Ct. 3012, 3020, 82 L.Ed.2d 139 (1984) ('[O]fficials should not always err on the side of caution.'). For many public servants, a failure to act can have severe consequences for the citizenry. ...
>
> "As we decide this case, we cannot forget the purpose of qualified immunity. The qualified immunity defense functions to prevent public officials from being intimidated – by the threat of lawsuits which jeopardize the official and his family's welfare personally – from doing their jobs. Qualified immunity can be a muscular doctrine that impacts on the reality of the workaday world as long as judges remember that the central idea is this pragmatic one: officials can act without fear of harassing litigation only when they can reasonably anticipate – before they act or do not act – if their conduct will give rise to damage liability for them."

Ms. *50, quoting *Foy*, 94 F.3d at 1534.

With respect to the state-agent immunity analyses, the Court recognizes first that "[t]he dismissal of a public employee who is entitled to a pre-termination hearing, without such a hearing, is a wrongful act constituting a tort under Alabama law." Ms. *56, quoting *Hardric v. City of Stevenson*, 843 So. 2d 206, 210 (Ala. Civ. App. 2002). Here, however, because the evidence supported a finding that the administrators violated no rule, regulation, policy, or procedure in determining that the professor was not in fact tenured and therefore not entitled to a pre-termination hearing, they were engaged in doing their jobs as state-school officials and entitled to state-agent immunity as to this particular claim.

The Court next restates the requirements for fraudulent suppression:

> "In order to establish a prima facie claim of fraudulent suppression, a plaintiff must produce substantial evidence establishing the following elements:
>
> > "'"(1) that the defendant had a duty to disclose an existing material fact; (2) that the defendant suppressed that existing material fact; (3) that the defendant had actual knowledge of the fact; (4) that the defendant's suppres-

sion of the fact induced the plaintiff to act or to refrain from acting; and (5) that the plaintiff suffered actual damage as a proximate result.'"" Ms. *63, quoting *Johnson v. Sorensen*, 914 So. 2d 830, 837 (Ala. 2005) (quoting *Waddell & Reed, Inc. v. United Investors Life Ins. Co.*, 875 So. 2d 1143, 1161 (Ala. 2003), quoting in turn *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 323-24 (Ala. 1999)). Here, no evidence supported any duty to speak on the part of the administrators, thus the administrators were entitled to state-agent immunity as to this claim as well.

Finally, the Court restated the essential elements of intentional interference with contractual or business relations claim:

> "(1) the existence of a protectible business relationship; (2) of which the defendant knew; (3) to which the defendant was a stranger; (4) with which the defendant intentionally interfered; and (5) damage." *White Sands Grp., L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 14 (Ala. 2009). Our courts also have stated:
>
> "An employee who desires to maintain a suit against a coworker for intentional interference with the employee's employment contract must also"'show that the [coworker] acted outside [his or her] scope of employment and did so maliciously.'" *Hanson v. New Technology, Inc.*, 594 So. 2d 96, 103 (Ala. 1992) (quoting *Hickman v. Winston County Hosp. Bd.*, 508 So. 2d 237, 241 (Ala. 1987) (Adams, J., concurring specially)). Further, in order to show malice the plaintiff must "'make a strong showing of a pattern of interference.'" *Perlman v. Shurett*, 567 So. 2d 1296, 1299 (Ala. 1990) (quoting *Hickman*, 508 So.2d at 241 (Adams, J., concurring specially))."

Ms. *69-70, quoting *Michelin Tire Corp. v. Goff*, 864 So. 2d 1068, 1077 (Ala. Civ. App. 2002). Here again the evidence was insufficient to meet the required elements and in particular there was no showing of any pattern of interference, so the administrators were entitled to state-agent immunity with respect to this claim, too.

FEDERAL EMPLOYERS LIABILITY ACT; CLAIM PRECLUSION BY FEDERAL RAILROAD ADMINISTRATION REGULATIONS

Cottles v. Norfolk Southern Rwy. Co., [Ms. 1140632, Mar. 17, 2017] __ So. 3d __ (Ala. 2017) (on rehearing). The Court overrules Norfolk Southern's Application for Rehearing and again emphasizes that *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. __, 134 S.Ct. 2228 (2014) is correctly construed so that Federal Railroad Administration Regulations do not preclude Federal Employers Liability Act-based claims. The Court rejected Norfolk Southern's assertion that the Court had made the plaintiff's argument for him in citing and relying upon *POM Wonderful*. While the Court acknowledged that the plaintiff's brief on original submission did not discuss federal statutory preclusion or *POM Wonderful*, Norfolk Southern's appellee's brief had raised the issue as a basis for defending the trial court's entry of summary judgment in its favor. Having raised the issue, it could not be heard on rehearing to complain when the Court elected to address the issue in its opinion.

RULE 54(B), ALA. R. CIV. P., FINALITY OF JUDGMENT; DISMISSAL OF APPEAL

Blackmon v. Renasant Bank, [Ms. 1150692, Mar. 17, 2017] __ So. 3d __ (Ala. 2017). The Court dismisses an appeal from the Madison Circuit Court in an action by Renasant Bank against a purported debtor and the estate of her deceased husband for money allegedly owed under a home equity line of credit upon concluding that the circuit court's Rule 54(b), Ala. R. Civ. P., order was not sufficiently final to support the appeal.

> Rule 54(b) states, in relevant part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." "[F]or a Rule 54(b) certification of finality to be effective, it must fully adjudicate at least one claim or fully dispose of the claims as they relate to at least one party." Ms. *7-8, quoting *Scrushy v. Tucker*, 955 So. 2d 988, 996 (Ala. 2006).

Here, the circuit court entered judgment in favor of the bank and against the debtor and her deceased husband's estate on the basis of the bank's unjust-enrichment and money-had-and-received claims while specifically stating that "[a]ll other counts asserted by the parties remain pending." Ms. *5. Those other claims included "a claim seeking a judgment declaring that [the debtor] executed the agreement establishing a home-equity line of credit with Renasant Bank and a mortgage on [the debtor's] house securing that line of credit; breach of contract; 'equitable mortgage'; 'open account'; 'account stated'; unjust enrichment; money had and received; 'quasi-contract'; and 'constructive trust.'" Ms. *9-10. Under all of these separate theories, Renasant Bank sought the same damages, i.e., the amount owed under the home equity line of credit loan, interest, costs, and attorney's fees. It follows that all Renasant's several claims are actually just one claim which the circuit court's partial summary judgment did not fully adjudicate. The requirement for Rule 54(b) finality was therefore not met, and would not support the appeal as it was from a non-final judgment.

FUNERAL SERVICES; ARBITRATION

Newell v. SCI Alabama Funeral Services, LLC, [Ms. 1151078, Mar. 17, 2017] __ So. 3d __ (Ala. 2017). The Court affirms an order of the Mobile Circuit Court granting a motion to compel arbitration filed by a funeral services company alleged to have mishandled human remains prior to cremation. The Court rejected an argument the arbitration provision was unconscionable noting,

> In order to meet [the] burden, the party seeking to invalidate an arbitration provision on the basis of unconsciona-

bility must establish both procedural and substantive unconscionability. *Blue Cross Blue Shield of Alabama v. Rigas*, 923 So. 2d 1077, 1087 (Ala. 2005). As this Court explained in *Rigas*:

> "Substantive unconscionability
>
> > ""relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.'"
>
> "*Ex parte Thicklin*, 824 So. 2d 723, 731 (Ala. 2002) (emphasis omitted) (quoting *Ex parte Foster*, 758 So. 2d 516, 520 n. 4 (Ala. 1999), quoting in turn 8 Richard A. Lord, *Williston on Contracts* § 18:10 (4th ed. 1998)). *See also Leeman v. Cook's Pest Control, Inc.*, 902 So. 2d 641 (Ala. 2004).
>
> "Procedural unconscionability, on the other hand, 'deals with "procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, today often analyzed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction."' *Thicklin*, 824 So. 2d at 731 (quoting *Foster*, 758 So. 2d at 520 n. 4, quoting in turn 8 *Williston on Contracts* § 18:10)."

923 So. 2d at 1086-87.

Ms. *7-9. Here, the Court rejected the contentions that the arbitration provision was substantively and procedurally unconscionable: Because the arbitration provision was "expressly limited to only those claims 'relating to the transaction contemplated by this agreement,' [the Court could not] say that it is so overly broad as to be unconscionable." Ms. *12-13.

Relatedly, the arbitration provision was not substantively unconscionable merely because it gave the arbitrator the authority to determine arbitrability. Ms. *13-14. Further, the provision was not substantively unconscionable by reserving to the funeral home the right to avail itself of courts while forcing a plaintiff to arbitrate claims.

Finally, the provision was not procedurally unconscionable due to unequal bargaining power. The Court rejected the contention that funeral matters should not require grieving family members to shop around for a funeral home that does not require execution of such a provision in order to show that there was no meaningful alternative. Ms. *19.

WORKERS' COMPENSATION BENEFITS; PERMANENT, TOTAL DISABILITY

Brewton Area Young Men's Christian Assoc., Inc. v. Lanier, [Ms. 2150914, Mar. 17, 2017] __ So. 3d __ (Ala. Civ. App. 2017). Relying upon the stringent standard for appellate review of factual findings and legal determinations after an *ore tenus* trial of a workers' compensation claim, the Court of Civil Appeals affirms a judgment of the Escambia Circuit Court finding an employee of the Brewton Area Young Men's Christian Association entitled to permanent and total workers' compensation disability benefits.

First, the Court rejected the employer's challenge to the trial court's conclusion that the employee proved legal causation of her injury. Ms. *12-14. Citing § 25-5-81(e)(2), Ala. Code 1975 (the reviewing court must affirm the trial court's finding if it is supported by substantial evidence), the Court noted:

> "'the trial court is the sole judge of the facts and of the credibility of witnesses, and the trial court should accept only that testimony it considers to be worthy of belief.' "*Engineered Cooling Servs., Inc. v. Star Serv., Inc. of Mobile*, 108 So. 3d 1022, 1027 (Ala. Civ. App. 2012) (quoting *Woods v. Woods*, 653 So. 2d 312, 314 (Ala. Civ. App. 2014), citing in turn *Ostrander v. Ostrander*, 517 So. 2d 3 (Ala. Civ. App. 1987)). "'This court is precluded from weighing the evidence presented before the trial court.' "*Carquest Auto Parts & Tools of Montgomery, Alabama, Inc. v. Waite*, 892 So. 2d 422, 426 (Ala. Civ. App. 2004) (quoting *Fryfogle v. Springhill Mem'l Hosp., Inc.*, 742 So. 2d 1255, 1258 (Ala. Civ. App. 1998), *aff'd*, 742 So. 2d 1258 (Ala. 1999)). Put another way, "'[t]he resolution of conflicting evidence is within the exclusive province of the trial court, and this court is forbidden to invade that province upon review.'" *Hooker Constr., Inc. v. Walker*, 825 So. 2d 838, 842 (Ala. Civ. App. 2001) (quoting *Mayfield Trucking Co. v. Napier*, 724 So. 2d 22, 25 (Ala. Civ. App. 1998)).

Ms. *15-16.

The Court also rejected the employer's contention that the trial court erred in concluding it received the notice required under § 25-5-78 upon concluding the employer had actual knowledge of the injury which is sufficient pursuant to *Ex parte Brown & Root, Inc.*, 726 So. 2d 601 (Ala. 1998). Ms. *17-20. Because the evidence established that the employer notified its workers' compensation carrier of the accident via a first report of injury and that an investigation was undertaken, the Court could not perceive how the employer was in any way prejudiced by the absence of written notice of the injury from the employee. Ms. *20.

The Court next rejects the employer's contention that the trial court erred in treating the employee's injury as a non-scheduled injury based upon aggravated back pain and an altered gait. Citing *Crown Textile Co. v. Dial*, 507 So. 2d 522 (Ala. Civ. App. 1987), the Court noted that fractures of the type suffered by the employee had previously been deemed injuries to an employee's hip, and therefore

to a non-scheduled part of the body such that the alleged back pain and altered gait need not be considered.

Next, the Court rejected the employer's contention that the trial court erred in calculating the employee's average weekly wage by including retirement plan contributions in its calculations. Ms. *22. Noting the employer never made that argument to the trial court, the Court of Civil Appeals was precluded from considering the issue. Ms. *23.

JUDGMENTS UPON VERDICTS IN PERSONAL INJURY CASES AFFIRMED; PUNITIVE DAMAGES; TAXATION OF COSTS

Thomas v. Heard, [Ms. 1150118, Mar. 24, 2017] __ So. 3d __ (Ala. 2017). On rehearing, the Court affirms in part judgments entered by the Geneva Circuit Court upon a jury's verdict awarding compensatory and punitive damages for multiple severe injuries in an intersection collision case caused by a driver under the influence of alcohol and Seroquel. The Court finds the defendant driver's motions for JML were properly denied as the jury's verdict was supported by clear and convincing evidence of wantonness by the driver in entering the intersection while not in the possession of his normal faculties at the time of the accident as the result of his voluntary consumption of alcohol and the prescription medication. However, because the circuit court failed to explain in writing its reasons for not remitting the punitive damages awards, a remand was required pursuant to *Williford v. Emerton*, 935 So. 2d 1150 (Ala. 2004) so the trial court "could reflect in the record the reasons for interfering with the jury verdict, or refusing to do so, on the grounds of excessiveness of the damages." Ms. *39-40.

The Court also rejects the defendant driver's contention that the trial court erred in taxing costs pursuant to Rule 54(d), Ala. R. Civ. P. Upon reviewing the evidence of record, the Court found no error in taxation of costs for things such as deposition transcripts and the like. The Court found fault in the driver's failure to point to excerpts from the voluminous record justifying his contentions given the requirement of Rule 28(a)(10), Ala. R. App. P. that a party provide "citations to the ... parts of the record relied on." Ms. *43-44. The Court states

> Further, 'it is well settled that a failure to comply with the requirements of Rule 28(a)(10) requiring citation of authority in support of the arguments presented provides this Court with a basis for disregarding those arguments.' *State Farm Mut. Auto. Ins. Co. v. Motley*, 909 So. 2d 806, 822 (Ala. 2005)(citing *Ex parte Showers*, 812 So. 2d 277, 281 (Ala. 2001)). This is so, because "'it 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))." *Jimmy Day Plumbing & Heating, Inc. v. Smith*, 964 So. 2d 1, 9 (Ala. 2007).

Ms. *44.

PEACE-OFFICER IMMUNITY § 6-5-640, ALA. CODE 1975 AND STATE-AGENT IMMUNITY

Ex parte City of Homewood, [Ms. 1151310, Mar. 24, 2017] __ So. 3d __ (Ala. 2017). The Court unanimously grants a petition for a writ of mandamus seeking an order directing the Jefferson Circuit Court to enter summary judgment in favor of two Homewood police officers alleged to have acted wantonly during a high-speed vehicular pursuit of an alleged shoplifter who lost control of her vehicle causing the plaintiff's injuries. Citing *Reeves v. Porter*, 521 So. 2d 963 (Ala. 1988), the Court reiterates that a summary judgment may properly be granted when discovery requests remain outstanding unless the non-movant, through submission of an affidavit in compliance with Rule 56(f), Ala. R. Civ. P., demonstrates that the discovery responses are crucial to his/her case. Ms. *17-18. "However, when no such crucial evidence would be supplied by the production or by the answers to the interrogatories, it is not error for the trial court to grant summary judgment with discovery pending." Ms. *18, quoting *Reeves v. Porter*, 521 So. 2d at 965.

In this case, a dashboard video recording of the chase demonstrated that the officers were exercising due care in the operation of their vehicles and never came in contact with the shoplifter's vehicle before she lost control and caused the injuries complained of. This evidence showed that the officers were engaged in conduct that qualified for immunity and that their conduct was not the proximate cause of the plaintiff's injuries. Thus, the trial court erred in denying their motions for summary judgment based upon immunity.

DISCOVERY SANCTION; DISMISSAL OF PERSONAL-INJURY ACTION

Horton v. Hinton, [Ms. 2150631, Mar. 24, 2017] __ So. 3d __ (Ala. Civ. App. 2017). Citing Rule 37(b) and (d), Ala. R. Civ. P., *Iverson v. Xpert Tune, Inc.*, 553 So. 2d 82 (Ala. 1989), *Napier v. McDougal*, 601 So. 2d 446 (Ala. 1992), *Tri-Shelters, Inc. v. A. G. Gaston Constr. Co.*, 622 So. 2d 329 (Ala. 1993) and *Bowman v. May*, 678 So. 2d 1135 (Ala. Civ. App. 1996), the Court of Civil Appeals unanimously concludes that the Tuscaloosa Circuit Court properly dismissed a personal-injury action as an appropriate sanction for a plaintiff's willful disregard of discovery obligations including her failure to appear for a scheduled deposition.