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RECENT CIVIL DECISIONS

Appellate Summaries from 09 01 23 through 02 23 24

By David Wirtes, Jr.[i] & Joseph D. Steadman[ii]

EXCLUSION OF EVIDENCE OF PLAINTIFF'S PRIOR ACCIDENTS REVERSIBLE ERROR

Terrell v. Joshua, [Ms. SC-2022-0937, Sep. 1, 2023] __ So. 3d ___ (Ala. 2023). The Court (Mendheim, J.; Parker, C.J., and Shaw, Wise, Bryan, Sellers, Stewart, Mitchell, and Cook, JJ., concur) reverses the Jefferson Circuit Court's judgment entered on a $675,000 jury verdict and remands the case for a new trial, holding the trial court committed reversible error by excluding all evidence of and any references to the plaintiff's previous automobile accidents.

The plaintiff argued at trial that he suffered a new injury as a result of the November 2015 accident caused by Terrell and that all evidence related to his three motor vehicle accidents in 2005, 2013, and 2014 and should be excluded. Plaintiff relied on the testimony of his treating physicians that prior to the 2015 accident, he had fully recovered from the injuries suffered in the prior accidents. Ms. **11-12. The trial court excluded all evidence of the prior accidents.

While acknowledging the trial court's discretion in admitting evidence, the Court concludes the trial court erred to reversal in excluding the evidence given the similarities between the previous accidents, the fact that the plaintiff's injuries were to the same parts of his body in all the accidents, and the similarities in the pattern of plaintiff's pain and recovery following each accident. Ms. *32. The Court explains the trial court's exclusion of the evidence had "an enormous impact on [the defendant's] ability to mount a defense" on the cause and extent of plaintiff's injuries and the credibility of plaintiff's testimony concerning those issues, and thus the trial court's ruling was not harmless. Ms. *42.

FINAL JUDGMENT – ERROR PRESERVATION – DISCOVERY SANCTIONS

Regina Daily and The Daily Catch, Inc., etc., v. Esser, etc., [Ms. SC-2022-0672, Sep. 29, 2023] __ So. 3d __ (Ala. 2023). The Court (Parker, C.J., and Shaw, Bryan, Sellers, Stewart, and Mitchell, JJ., concur) affirms the Baldwin Circuit Court's May 10, 2022, bench verdict awarding damages to Greg Esser against Regina Daily and The Daily Catch, Inc.

The Court first rejects the defendants' mandamus petition contending that the May 10, 2022, order did not constitute a final judgment but grants the petition and vacates the circuit court's October 6, 2022, order, entered after the notices of appeal had been filed, purporting to remove the administration of the ancillary estate of Wallene R. Esser from the probate court to circuit-court, case number CV-17-901017. Ms. *52, citing *Harden v. Laney*, 118 So. 3d 186, 187 (Ala. 2013) ("The timely filing of a notice of appeal invokes the jurisdiction of an appellate court and divests the trial court of jurisdiction to act except in matters entirely collateral to the appeal.").

The circuit court's May 10, 2022, order "makes no specific findings of fact, gives no reasons for the circuit court's judgment, and does not specify upon which claim or claims it ruled in favor of Greg and against Regina and The Daily Catch." Ms. *53. The Court rejects the defendants' appeal challenging the sufficiency of the evidence because "when a trial court gives no reasons in its judgement, this Court will assume that it made whatever findings would be necessary to support that judgment. However, Regina and The Daily Catch, by not filing a postjudgment motion, waived any argument related to the sufficiency of the evidence." Ms. *83-84, citing *New Props., L.L.C. v. Stewart*, 905 So. 2d 797, 801, 802 (Ala. 2004).

The Court also denies Greg's cross-appeal challenging the circuit court's December 10, 2020, order granting in part and denying in part his motion for sanctions against Regina for having submitted into evidence, eight checks in which Regina had altered "the payee's name on the checks or the information in the 'memo' line of the checks" to remove the Daily Catch and make it appear that the checks were for medical services received by Wallene. Ms. **26-27. The Court references the circuit court's broad discretion to select a sanction and holds that Greg did not demonstrate a gross abuse of that discretion. Ms. *86-87.

INSUFFICIENT CONTACTS TO ESTABLISH PERSONAL JURISDICTION IN DEFAMATION ACTION

Ex parte M.E.J., [Ms. SC-2023-0062, Oct. 13, 2023] __ So. 3d __ (Ala. 2023). The Court (Cook, J; Parker, C.J., and Wise, Bryan, Sellers, Mendheim, and Stewart, JJ., concur in the result; Shaw, J., dissents) grants M.E.J.'s mandamus petition challenging the Jefferson Circuit Court's order denying her motion to dismiss for lack of personal jurisdiction in this defamation case.

M.E.J. claimed that M.T.C. raped her in Washington state while M.T.C. was a pastor there at M.E.J.'s church. Later, after M.T.C. had accepted a new position at an Alabama church, M.E.J. notified her new pastor in Washington about the alleged rape. M.E.J.'s new pastor communicated her allegation to M.T.C.'s senior pastor in Alabama. He also encouraged M.E.J. to write a letter to M.T.C.'s new senior pastor in Alabama detailing her allegations. That letter became the basis of M.T.C.'s contention that M.E.J. was subject to specific jurisdiction in Alabama.

The Court explains that the "effects test" laid out in *Calder v. Jones*, 465 U.S. 783 (1984) is applied to evaluate personal jurisdiction. Under *Calder*, the Court finds that M.E.J.'s letter is insufficient to establish jurisdiction. Ms. *30. The Court reasons that the underlying allegations concerned Washington activities committed while M.T.C. was a Washington resident. In addition, the Court notes that M.E.J. submitted unopposed affidavits. These affidavits establish that M.E.J. sent the letter at the direction of her new pastor in Washington, and that her Washington pastor had already spoken to M.T.C.'s new senior pastor in Alabama when she sent the letter. Plaintiff M.T.C. offered no evidence in opposition to M.E.J.'s affidavits, did not request jurisdictional discovery, and did not ask to exclude M.E.J.'s evidence. Ms. **31-32. Therefore, the Court finds "that M.E.J. lacked sufficient minimum contacts with Alabama under the 'purposeful availment' requirement" to support jurisdiction." Ms. **31-32.

The Court also notes that even if M.E.J. had sufficient contacts with Alabama, M.E.J. would still be entitled to relief because hailing her into court in Alabama would offend "traditional notions of fair play and substantial justice." Ms. *37. The Court concludes that Alabama's interest in the dispute is minimal and M.T.C.'s interest in convenient relief was outweighed by the burden placed on M.E.J. of litigating 2500 miles away from her home in Washington. Ms. **35-36.

DEFAMATION – PUBLICATION – MCDANIEL/BURNEY RULE

Watters and Yarbrough v. Birmingham Hematology and Oncology Associates, LLC, etc., et al., [Ms. SC-2022-0907, Oct. 13, 2023] __ So. 3d __ (Ala. 2023). The Court (Stewart, J.; Parker, C.J., and Wise, Sellers, and Cook, JJ., concur) affirms the Jefferson Circuit Court's summary judgment in favor of Birmingham Hematology and Oncology Associates, LLC ("Alabama Oncology") and Brian Adler in Karen Watters and Cheryl Yarbrough's ("the plaintiffs") suit for defamation and wantonness.

The plaintiffs argued that defendants defamed them through internal 'republication' of an anonymous letter alleging that the plaintiffs had engaged in illegal and unethical behavior. The Court grouped the alleged communications into three categories: (A) the receipt or transmission of a verbatim copy of the letter by management; (B) communications regarding the existence of the letter, but not its allegedly defamatory contents; and (C) external legal counsel's presentation to management and the owners of the business of counsel's internal investigation and resulting legal findings. Ms. *9.

The Court notes that the "main element at issue in this case is the element of publication." Ms. *12. Accordingly, the Court holds "all the alleged communications, whether framed as publication or a republication, fall under the *McDaniel/Burney* 'no publication' rule as communications between employees." Ms. *20, citing *McDaniel v. Crescent Motors, Inc.*, 249 Ala. 330, 31 So. 2d 343 (1947); and *Burney v. Southern Ry. Co.*, 276 Ala. 637, 639, 165 So. 2d 726, 728 (1964). Thus, the trial court correctly determined that there was no publication, or republication, because all the alleged communications occurred between Alabama Oncology employees and management. Ms. *22.

UNLICENSED SUBCONTRACTOR – § 34-8-1, ALA. CODE 1975

MSE Bldg. Co., Inc. v. The Stewart/Perry Company, et al., [Ms. SC-2022-0910, Oct. 20, 2023] __ So. 3d ____ (Ala. 2023). The Court (Stewart, J.; Parker, C.J., and Wise and Cook, JJ., concur; Sellers, J., concurs in the result) affirms in part and reverses in part the Jefferson Circuit Court's summary judgment dismissing claims asserted by MSE Building Company, Inc. ("MSE") for breach of contract, violation of the prompt-payment requirements of § 8-29-1, Ala. Code 1975, unjust enrichment, quantum meruit, negligence, and enforcement of materialman's liens against the general contractor The Stewart/Perry Company, the owner Buc-ee's, Ltd., Buc-ee's Alabama II, LLC, and Philadelphia Indemnity Insurance Company.

The defendants successfully moved for summary judgment, arguing that (1) MSE was barred from recovering any damages because its claims relied, in part, on an illegal contract with an unlicensed subcontractor, (2) its negligence claim failed as a matter of law, and (3) its lien claim failed because the lien had been transferred to a bond.

On de novo review, the Court concludes there are genuine issues of material fact regarding whether "the contracted work [temporary labor provided by PeopleHR] was the type covered by the licensure statute." Ms. *17. The Court explains "there is a dispute in this case regarding whether the temporary laborers were engaged in actual concrete work, construction, or supervisory activities that fall under the licensing requirements of § 34-8-1 or whether they were engaged in menial labor." Ms. *15.

The Court affirms the trial court's entry of summary judgment for Buc-ee's on MSE's negligence claim, concluding there was no evidence that Buc-ee's breached any duty or caused any harm to MSE. Ms. *19.

WANTONNESS AND PRESERVATION OF JURY CHARGE OBJECTION

State Farm Mut. Auto. Ins. Co. v. Wood, [Ms. SC-2022-0901, Oct. 20, 2023] __ So. 3d __ (Ala. 2023). The Court (Bryan, J.; Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ., concur) affirms a judgment entered against State Farm after a jury verdict in Lee Circuit Court.

First, State Farm argued the trial court improperly instructed the jury on the subsequent negligence doctrine (also known as last clear chance). During trial, State Farm objected to the charge on the basis that it was redundant. On appeal, State Farm contended the charge was improper because there was insufficient evidence to give the instruction. The Court finds

that State Farm's objection during trial (redundancy) was not sufficient to preserve State Farm's argument on appeal (lack of the evidence). Ms. **11-12.

Second, the Court finds the wantonness claim was properly submitted to the jury. Ms. *23. State Farm argued, in part, that inconsistencies between a witness's affidavit and trial testimony call into question whether there was sufficient evidence of wantonness. However, the Court did not consider this argument because the appellate record did not include a copy of the that witness's testimony, which was played by video at trial. Ms. *16. Citing *Vaughan v. Oliver*, 822 So. 2d 1163, 1170 (Ala. 2001), the Court concludes that "[w]here all the evidence is not in the record, it will be presumed that the evidence was sufficient to sustain the verdict or judgment." Ms. *17. Thus, the Court determines the judgment is due to be affirmed because the witness's testimony was not in the record. *Id.*

Regardless, the Court reasons that State Farm's wantonness argument is without merit, finding there to be sufficient evidence of "additional circumstances" in addition to speeding, to support the wantonness claim. Ms. *23. Citing *Hornady Truck Line, Inc. v. Meadows*, 847 So. 2d 908, 916 (Ala. 2002)(a Cunningham Bounds case), the Court points to evidence the vehicle executed an abrupt lane change from a mandatory turn lane, ignoring traffic warning signs, while the driver's view was obscured by a hillcrest. Ms. **19-23.

NO DUTY OF CARE WHERE INJURY NOT FORESEEABLE

Dolgencorp, LLC v. Gilliam, [Ms. SC-2023-0008, Oct. 27, 2023] __ So. 3d __ (Ala. 2023). The Court (Sellers, J; Parker, C.J., and Mitchell, J., concur in part and concur in result; Shaw, Wise, Mendheim, and Cook, JJ., concur in the result; Stewart, J., dissents) reverses a judgment entered on a personal injury jury verdict in favor of Plaintiff in the Tuscaloosa Circuit Court, and renders a judgment for Defendant Dolgencorp.

Plaintiff claimed that Dolgencorp negligently failed to erect bollard-type barriers outside its store that would have prevented a car from crashing through the storefront and injuring her. Dolgencorp argued, among other things, that it did not have a duty to erect such barriers following *Albert v. Hsu*, 602 So. 2d 895 (Ala. 1992) (holding, in relevant part, that a driver crashing into a business's building is not foreseeable and a business owner does not have a duty to protect indoor patrons from such a crash).

The trial court denied Dolgencorp's motion for summary judgment and its in-trial JML motions on the issue. The jury returned a verdict against Dolgencorp and assessed $381,000 in damages.

On appeal, the Court applies *Albert* and finds Dolgencorp had no duty to erect protective barriers outside the store's entrance. Ms. *7. The Court determines that under the evidence presented, Plaintiff's injury was not foreseeable and was too remote to give rise to a duty. Ms. *8.

Parker, C.J. and Mitchell, J. offer concurring opinions expressing reservations about broadly endorsing the *Albert* opinion as a categorical rule. Ms. **10, 12.

SAVINGS CLAUSE OF § 6-2-3 – FRAUD CLAIM – STATUTE OF LIMITATIONS

Price v. Alabama One Credit Union, et al., [Ms. SC-2022-1013, Oct. 27, 2023] So. 3d__(Ala. 2023). The Court (Parker, C.J., and Shaw, Bryan, Mendheim, Stewart, Mitchell, and Cook, JJ., concur; Sellers, J., concurs in the result; Wise, J., recuses) affirms the Tuscaloosa Circuit Court's summary judgment dismissing Walter Price's ("Price") fraud action against Alabama One Credit Union and William A. Lunsford ("the defendants").

On July 15, 2009, Price and the defendants entered into a real estate transaction conveying their respective interests in the subject property. On December 28, 2014, Price commenced this action against the defendants, alleging that the defendants conspired to divest Price of his interest through fraud. The circuit court determined that all of Price's claims against the defendants were barred by the two-year limitations period imposed by § 6-2-38, Ala. Code 1975.

On appeal, Price argues that § 6-2-3, Ala. Code 1975 saves his claims. The Court disagrees and reiterates:

> "[Section] 6-2-3 does not 'save' a plaintiff's fraud claim so that the statutory limitations period does not begin to run until that plaintiff has some sort of *actual knowledge* of fraud. Instead, under *Foremost* [*Insurance Co. Parham*], 693 So. 2d 409, 417-21 (Ala. 1997)], the limitations period begins to run when the plaintiff was privy to facts which would 'provoke inquiry in the mind of a [person] of reasonable prudence, and which, if followed up, would have led to the discovery of the fraud.' *Willcutt v. Union Oil Co.*, 432 So. 2d 1217, 1219 (Ala. 1983) (quoting *Johnson v. Shenandoah Life Ins. Co.*, 291 Ala. 389, 397, 281 So. 2d 636 (1973)); see also *Jefferson County Truck Growers Ass'n v. Tanner*, 341 So. 2d 485, 488 (Ala. 1977)('Fraud is deemed to have been discovered when it ought to have been discovered. It is sufficient to begin the running of the statute of limitations that facts were known which would put a reasonable mind on notice that facts to support a claim of fraud might be discovered upon inquiry.')."

Ms. *11, quoting *Auto-Owners Ins. Co. v. Abston*, 822 So. 2d 1187, 1195 (Ala. 2001), emphasis in *Abston*.

With respect to Price, the Court concludes that Price did, in fact, inquire about irregularities in the July 15, 2009, transaction that same day and that, if Price had followed up on those inquiries, he could have discovered the defendants' alleged fraud within the limitations period. Ms. **12-13. Thus, because Price did not commence this action until 2014, his claims are barred.

STATE-AGENT IMMUNITY – BEYOND AUTHORITY EXCEPTION REQUIRES VIOLATION OF MANDATORY DUTY

Ex parte Dr. Lisa N. Herring and Dr. John C. Lyons, Jr., [Ms. SC-2022-0981, Oct. 27, 2023] __ So. 3d __ (Ala. 2023). The Court (Cook, J.; Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) issues a writ of mandamus to the Jefferson Circuit Court directing the court to grant summary judgment to defendants on their State-agent immunity defense.

On March 7, 2018, Michael Barber, a junior at Huffman High School, left the cafeteria through an insecure side door with no metal detector. Barber retrieved and concealed a handgun and re-entered the school through the side door. Barber attempted to go to the field house for his last class of the day but was denied entry. Shortly thereafter, the handgun discharged in the hallway when Barber removed it from his pocket to show another student. As a result, seventeen-year-old Courtlin Arrington was killed. The personal representative of Courtlin's Estate filed a wrongful death action against then Superintendent of Birmingham City Schools, Dr. Lisa N. Herring, and Dr. John C. Lyons, Jr., the principal of Huffman High School. Herring and Lyons moved for summary judgment, asserting State-agent immunity as recognized in *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000).

Plaintiff argued *Cranman's* "beyond-authority" exception to State-agent immunity applied because Herring and Lyons "fail[ed] to discharge duties pursuant to detailed rules or regulations" included in one or more of the Birmingham Board of Education's policy manual, the principal's job description, the Code of Student Conduct, and by § 16-12-3(a), Ala. Code 1975. Ms. *11. In issuing the writ, the Court holds these documents did not "set forth a sufficiently specific, mandatory duty governing the conduct of the petitioners at issue in this case." Ms. *12. Accordingly, the court holds the plaintiff failed to meet her burden, and directs the trial court to enter summary judgment for petitioners. Ms. *25.

DUE-PROCESS REQUIREMENTS FOR CIVIL CONTEMPT HEARING

Hyundai Construction Equipment Americas, Inc., and Hyundai Heavy Industries Co., Ltd. v. Southern Lift Trucks, LLC, [Ms. SC-2023-0109, Nov. 3, 2023] __ So. 3d __ (Ala. 2023). The Court (Cook, J; Parker, C.J., and Shaw, Wise, Sellers, Stewart, and Mitchell, JJ., concur; Bryan and Mendheim, JJ., concur in the result) reverses the contempt order entered by the Washington County Circuit Court and remands the case for hearing.

This case involves a commercial dispute between Southern Lift Trucks, LLC and Hyundai. Southern alleges that Hyundai violated the terms of its dealer agreement by allowing a competitor to sell equipment in Southern's designated territory. Southern's lawsuit included a request for a preliminary injunction preventing Hyundai from allowing other dealers to sell certain equipment withing that territory. The circuit court granted the preliminary injunction and Hyundai appealed.

While that appeal was pending, Southern learned that Hyundai was still distributing equipment at another dealer within Southern's territory. Southern then filed a contempt petition seeking sanctions against Hyundai. Hyundai filed an opposition response, and the matter was set for hearing. Approximately thirty minutes before the contempt hearing, Southern filed a reply brief. Attached to the reply was email correspondence from Hyundai's counsel indicating that four sales had been made in Southern's territory in violation of the injunction. Southern's reply argued that these four sales represented an additional basis for contempt and sanctions. Ms. *14.

At the hearing and on appeal, Hyundai objected to Southern's reply and supporting evidence. Hyundai argued that it had not had an opportunity to review Southern's reply before the hearing. Further, Hyundai contended the reply contained new charges that Hyundai did not have proper notice of under Ala. R. Civ. P. 70A. The circuit court allowed the hearing to proceed as scheduled. Later, it issued an order granting in part Southern's motion for contempt and sanctions. The order did not state that the circuit court excluded Southern's reply arguments.

On appeal, the Court finds that the allegations of new sales contained in Southern's reply constituted new allegations not presented in the initial contempt petition. Ms. **30-31. Under Ala. R. Civ. P. 70A(c)(1), a party charged with contempt must have notice of "the essential facts constituting the alleged contemptuous conduct." Ms. *24. Thus, the Court concludes that "Hyundai was denied the ability to prepare a proper defense." Ms. *32. The Court notes that contempt allegations are serious, and that particular attention must be paid to the procedures addressing the due-process requirements for such hearings.

SELF DEFENSE – § 13A-3-23(D) – PRE-TRIAL EVIDENTIARY HEARING

Ex parte Dalton Teal, [Ms. SC-2023-0043, Nov. 17, 2023] __ So. 3d __ (Ala. 2023). The Court (Bryan, J.; Parker, C.J., and Wise, Sellers, Mitchell, and Cook, JJ., concur; Mendheim, J., dissents, which Shaw and Stewart, JJ., join) issues a writ of mandamus to the Jefferson Circuit Court directing the court to conduct a pre-trial evidentiary hearing pursuant to § 13A-3-23(d), Ala. Code 1975, to determine if Teal is immune from suit on the ground of self-defense.

Teal shot Paul Thomas with a pistol during an altercation outside a bar in Birmingham and Thomas subsequently sued Teal alleging assault and battery, negligence, and wantonness. Ms. *2. In *Ex parte Teal*, 336 So. 3d 165 (Ala. 2021), the Court had previously determined that there were genuine issues of material fact concerning self-defense and vacated the circuit court's summary judgment striking the defense. The Court explains "[o]ur holding in *Ex parte Teal* that the partial summary judgment was inappropriate due to the existence of genuine issues of material fact simply meant that the relevant issues should be decided by the appropriate trier of fact, not that the issues must necessarily be decided by a jury." Ms. *8.

The Court holds "Teal is plainly entitled to a pretrial evidentiary hearing to determine whether he is immune from suit on the ground of self-defense" because Section "13A-3- 23(d)(2) provides, in relevant part: 'Prior to the commencement of a trial in a case in which a defense is claimed under this section, the court having jurisdiction over the case, upon motion of the defendant, shall conduct a pretrial hearing to determine whether force, including deadly force, used by the defendant was justified or whether it was unlawful under this section.'" Ms. *9.

Justice Mendheim's dissent, joined by Justices Shaw and Stewart, would deny the petition because it "was filed 33 days after the presumptively reasonable time for filing a mandamus petition, and Teal has not provided this Court with a useful

'statement of circumstances constituting good cause" for its being "filed beyond the presumptively reasonable time.'" Ms. *14.

MEDICAL MALPRACTICE – PROXIMATE CAUSE OF DEATH

Mobile Infirmary Association, etc., et al., v. Fagerstrom, etc., [Ms. SC-2023-0355, Nov. 17, 2023] __ So. 3d __ (Ala. 2023). The Court (Sellers, J.; Shaw, Wise, Bryan, Stewart, Mitchell, and Cook, JJ., concur; Parker, C.J., and Mendheim, J., concur in the result) reverses the Baldwin Circuit Court's judgment on a jury verdict in a medical malpractice wrongful death action and renders judgment for the defendants. The Court concludes that the plaintiff failed "to offer sufficient evidence demonstrating that the proximate cause of Sylvia (Fagerstrom)'s death was sepsis resulting from an infected pressure ulcer allegedly caused by the defendants' breaches of the standard of care." Ms. *2.

On the element of proximate cause, "the plaintiff was required to demonstrate with expert medical testimony that Sylvia probably died from sepsis caused by her infected ulcer." Ms. *4. The Court concludes that the opinion of plaintiff's expert physician on causation based on the normal progression of sepsis causing death "was not supported by a proper evidentiary foundation, was conclusory and speculative, and did not justify submitting the issue of causation to the jury." Ms. *10.

ATTORNEY'S AUTHORITY TO SETTLE WRONGFUL DEATH CLAIM – SUMMARY JUDGMENT PROCEDURE

Robert Bowers, Jr., v. BBH SBMC, LLC, [Ms. SC-2023-0216, Dec. 1, 2023] __ So. 3d __(Ala. 2023). The Court (Cook, J.; Shaw, Mendheim, Stewart, and Mitchell, JJ., concur; Sellers, J., concurs in part and concurs in the result, which Wise, J., joins; Bryan, J., concurs in the result; Parker, C.J., concurs in part and dissents in part) reverses the Shelby Circuit Court's summary judgment dismissing claims for the wrongful death of Charles Evans against Terry Short ("Short") and various medical providers who treated Evans following an automobile accident.

As a result of an automobile accident caused by Short, Charles was treated and released at Shelby Baptist Medical Center ("Baptist East") on January 12, 2016. Charles collapsed the following day and was admitted to Baptist East where he died on the evening of January 13, 2016. Earlier that day, attorney Nicholas Vocino of the Slocumb law firm filed a medical malpractice claim in the Chilton Circuit Court against Baptist East on behalf of Charles naming his brother John as his next friend. Short was not named in that initial complaint but was subsequently named in an amended complaint.

On March 15, 2016, County Administrator, Robert Bowers, was appointed personal representative of Charles's estate, and on May 11, 2016, attorney James Moncus appeared in the action and Bowers was substituted as the plaintiff on the claim for Charles's wrongful death. Ms. **5-7. The action was then transferred to the Shelby Circuit Court where the alleged malpractice occurred.

Short filed a motion to dismiss arguing that the wrongful death claim should be dismissed under the terms of a previously executed general release, and Vocino's apparent authority to settle the claim for Charles's wrongful death. Ms. *15. In response, Bowers argued that he was solely authorized to settle the wrongful-death claim under §6-5-410, Ala. Code 1975, and that Vocino did not have authority to accept the offer under §34-3-21. Ms. *17. The circuit court entered summary judgment in favor of Short as well as Baptist East and other entities and individuals who had been added as defendants on the medical malpractice wrongful death claim.

The Court first reverses the summary judgment dismissing the malpractice defendants, none of whom had moved for summary judgment. The Court reiterates that "'Rule 56(c)(2), Ala. R. Civ. P., gives the nonmoving party certain rights to notice and a hearing after a summary-judgment motion has been filed.' *Moore v. Prudential Residential Servs. Ltd.*, 849 So. 2d 914, 926 (Ala. 2002). The purpose of this rule is to give the nonmoving party an opportunity to respond to the motion and present evidence in its favor. *Id.* at 927 (citing *Van Knight v. Smoker*, 778 So. 2d 801, 805-06 (Ala. 2000)). Thus, 'the trial court violates the rights of the nonmoving party if it enters a summary judgment on its own, without any motion having been filed by a party.' *Id.*" Ms. *21.

Bowers argues that the trial court erred in entering a summary judgment in favor of Short without first holding an evidentiary hearing on whether Vocino was authorized to settle the claim for Charles's wrongful death. Ms. *22. The Court reiterates that when there is a factual dispute regarding an attorney's authority to settle a claim, a court should hold an evidentiary hearing on that question. Ms. *22, citing *Lem Harris Rainwater Family Trust v. Rainwater*, 373 So. 3d 1089, 1094 (Ala. 2022). The Court also notes that "a settlement agreement negotiated by an attorney binds the client only when the attorney acts with 'express, special authority from the client or with apparent authority.'" Ms. **23-24, quoting *Mitchum v. Hudgens*, 533 So. 2d 194, 199 (Ala. 1988) (plurality opinion) (some internal quotation marks omitted). Accordingly, "because there was a substantial factual dispute concerning whether Vocino had express or apparent authority to enter into a settlement of the wrongful death claim against Short, the trial court was required to conduct an evidentiary hearing to resolve that dispute." Ms. *24.

Justice Sellers concurs in part, stating that on remand he would instruct "the trial court to apply the presumption that Vocino had the authority to settle on Bowers's behalf. Therefore, only if Bowers can affirmatively disprove Vocino's settlement authority should the trial court deny Short's motion for a summary judgment." Ms. *35. Justice Sellers reasons that "the presumption of authority, combined with a shift in the burden of proof, not only ensures that third parties may rely on attorneys' representations of their settlement authority but also protects clients from being bound to any settlement agreements should they affirmatively disprove having bestowed settlement authority upon their attorneys." Ms. *35.

ENFORCEMENT OF PROMISSORY NOTE UNDER NEW YORK LAW – AWARD OF ATTORNEY FEES

Eli Global, LLC, and Greg Lindberg v. Ronald Cieutat, et al., [Ms. SC-2023-0058, Dec. 1, 2023] __So. 3d __ (Ala. 2023). The Court (Mendheim, J.; Parker, C.J., and Shaw, Wise, Bryan, Stewart, Mitchell, and Cook, JJ., concur; Sellers, J., concurs in the result) affirms the Mobile Circuit Court's summary judgment in favor of Ronald Cieutat, Todd Vereen, and multiple other plaintiffs' ("Sellers") claims against Eli Global, LLC on a promissory note and guaranty executed as part of the sale of Hemophilia Preferred Care and its affiliated entities.

The Court first addresses the Defendants' argument that the Sellers failed to prove who was the holder/possessor of the Promissory Note, as required under the New York UCC to enforce a negotiable instrument. Ms. **25-26. The Court rejects this defense "because the Promissory Note was part of a larger transaction, all of its essential terms were not contained therein, meaning that the Promissory Note was not a negotiable instrument. Because the Promissory Note was not negotiable, the Sellers were not required to prove who possessed the Promissory Note in order to enforce it." Ms. **38-39. The Court also notes that even if the Promissory Note was negotiable, the Sellers presented enough evidence to establish that Sellers' representative possessed the Promissory Note at the commencement of the action. Ms. **47-48.

With respect to Eli Global and Lindberg's challenge to the award of attorney fees and expenses against them, the Court remands for the circuit court to enter an order articulating its reasons for the attorney fee award. The Court explains "the order's threadbare nature does not 'allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how it calculated the attorney fee.'" Ms. *58, quoting *Pharmacia Corp v. McGowan*, 915 So. 2d 553 (Ala. 2004).

STATE IMMUNITY – VIOLATION OF CORPORAL PUNISHMENT POLICY – SUMMARY JUDGMENT REVERSED

Ex parte Dawn S. Smith, [Ms. SC-2023-0322, Dec. 1, 2023] __ So. 3d __ (Ala. 2023). The Court (Mendheim, J.; Parker, C.J., and Wise, Sellers, Stewart, Mitchell, and Cook, JJ., concur; Shaw and Bryan, JJ., concur in the result) issues a writ of mandamus to the Macon Circuit Court directing the court to vacate summary judgment for the defendant, public school teacher Dawn Smith ("Smith"), based on State-agent immunity.

Latisha Bolden, as mother of T.B., a second-grade student at Deborah Cannon Wolfe Elementary School, filed individual-capacity claims against T.B.'s teacher, Dawn Smith. Bolden alleged that Smith held T.B.'s arm behind his back, and allowed another student to punch T.B. in the face. Ms. **8-9. Smith moved for summary judgment, asserting the affirmative defense of State-agent immunity as recognized in *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000).

Bolden argued *Cranman's* "beyond-authority" exception to State-agent immunity applied because Smith used corporal punishment in a manner that violated both the Macon County Board of Education's corporal-punishment policy and §16-28A-1, Ala. Code 1975. Ms. *25.

The Court holds that Bolden presented substantial evidence indicating that Smith violated the Macon County Board of Education's corporal-punishment policy, and is not entitled to summary judgment based on State-agent immunity. Ms. *40. Smith alternatively argued "schoolmaster's immunity," which grants a teacher authority to administer moderate correction to students under their care unless it is done so with legal malice. *Suits v. Glover*, 260 Ala. 449, 71 So. 2d at 50 (1954). However, the Court concludes that evidence indicating that Smith had violated the school board's policy would be evidence of malice. Ms. **43-44. Accordingly, the Court holds that Smith is not entitled to summary judgment.

CIRCUIT COURTS LACK JURISDICTION OVER LAWYER DISCIPLINE

Gatewood A. Walden v. The Disciplinary Board of the Alabama State Bar, [Ms. SC-2023-0507, Dec. 8, 2023] __ So. 3d __ (Ala. 2023). The Court (Sellers, J.; Parker, C.J., and Wise, Stewart, and Cook, JJ., concur) affirms the Montgomery Circuit Court's judgment dismissing for lack of subject matter jurisdiction Walden's pro se complaint against the Disciplinary Board of the State Bar.

In June 2012, the Board issued an order disbarring Walden, and the Supreme Court affirmed the order. Ms. *2. After his disbarment, Walden initiated multiple proceedings in both state and federal court challenging his disbarment. *Id.* On *de novo* review, the Court affirms the dismissal of Walden's latest action challenging his disbarment, reiterating that "matters involving the discipline of the State Bar are within the exclusive jurisdiction of the State Bar with review by the Supreme Court ...." Ms. *5.

FRAUD – REASONABLE RELIANCE

Brickhouse Capital, LLC v. Coastal Cryo AL, LLC, and Andres L. Santa, [Ms. SC-2023-0159, Dec. 15, 2023] __ So. 3d __ (Ala. 2023). The Court (Cook, J.; Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur) reverses the Baldwin County Circuit Court's judgment entered on a jury verdict and renders judgment in favor of Brickhouse Capital, LLC dismissing Andres Santa's and Coastal's Cryo AL, LLC's ("Coastal") fraud-in-the-inducement claim.

In 2019, Santa purchased Coastal and subsequently contacted Brickhouse Capital regarding financing the acquisition of a "CryoFusion" device. Ms. **2-3. Brickhouse sent (1) a lease application for the device identifying Santa as the lessee, and (2) a lease proposal identifying Coastal as lessee and Brickhouse as lessor, both of which Santa signed. *Id.* at **3-4. Brickhouse then sent a third document titled "Lease Agreement" listing Pawnee Leasing Corp. as lessor, Coastal as lessee, and Santa as guarantor. *Id.* at *5. Santa signed this document electronically through DocuSign. *Id.*

Pawnee brought a breach-of-contract action against Coastal and Santa after Santa missed two monthly payments. Ms. *7. Coastal and Santa added Brickhouse as a third-party defendant, asserting claims including fraud in the inducement. *Id.* The trial court denied Brickhouse's motion for judgment as a matter of law, and the jury returned a verdict against Brickhouse on

the fraud-in-the-inducement claim. *Id.*

On *de novo* review, the Court reverses, holding that the fraud-in-the-inducement claim fails because "Santa's reliance on any representation by Brickhouse was not reasonable as a matter of law" because he failed to read the lease and related documents, all of which clearly contradicted the alleged misrepresentations. Ms. *23. The Court further held that "no special duty to disclose existed simply because this was an electronic transaction." *Id.*

TORTIOUS INTERFERENCE – AFFIRMATIVE DEFENSES – DUTY TO MITIGATE DAMAGES

Ex parte BTC Wholesale Distributors, Inc., [Ms. SC-2022-0881, Dec. 15, 2023] __ So. 3d __ (Ala. 2023). The Court (Cook, J.; Shaw, Bryan, and Mitchell, JJ., concur; Mendheim, J., concurs in part, concurs in the result in part, and dissents in part; Parker, C.J., and Stewart, J., concur in part and dissent in part; Sellers, J., concurs in part and dissents in part, which Wise, J. joins) grants in part and denies in part a mandamus petition filed by the defendants challenging the Jefferson Circuit Court's orders in limine excluding all evidence and argument of or relating to (1) their justification and competitor's privilege defenses, (2) their "antitrust" or illegality defense, and (3) mitigation of damages under PepsiCo's Transshipment Enhancement Program ("TEP").

Buffalo Rock Company, Inc. has sole distribution rights for PepsiCo products in Alabama pursuant to a 1951 exclusive bottling agreement ("EBA"). Ms. *3. The defendants are wholesalers who sell a variety of PepsiCo products to convenience stores and other small stores ("C-stores") in Alabama. Defendants do not purchase those products from Buffalo Rock or Pepsico. When those wholesalers ignored demands from Buffalo Rock to terminate sales of PepsiCo products in Alabama, Buffalo Rock filed suit against them alleging claims for tortious interference with a business relationship, tortious interference with a contract, and conspiracy. Ms. *2.

The Court reiterates "[i]t is well settled that '[a] trial court's disallowance of a party's affirmative defense[s] is reviewable by a petition for a writ of mandamus.' *Ex parte Buffalo Rock Co.*, 941 So. 2d 273, 277 (Ala. 2006)." Ms. *11. The Court first addresses the justification defense and notes that "nothing in the Restatement test endorses Buffalo Rock's contention that selling products within a plaintiff's territory gives rise to liability for tortious interference whenever the plaintiff has exclusive distribution rights pursuant to a contract with the manufacturer of the products." Ms. *25. Accordingly, the Court holds the jury should determine whether the defendants are liable by balancing the justification factors found in §767 of the Restatement. Ms. **27-28.

Competitor's privilege applies when "the defendant causes a third person not to enter into a prospective contract with another who is his competitor." *Tom's Foods, Inc. v. Carn*, 896 So. 2d 443, 457 (Ala. 2004). The Court concludes the jury should decide the issues raised by this defense because Buffalo Rock did not have contracts with the defendants' C-store clients, and they did not cause PepsiCo to violate its contract with Buffalo Rock. Ms. **34-35.

The Court also vacates the trial court's order barring introduction of evidence of payments received by Buffalo Rock under PepsiCo's TEP program pursuant to which Buffalo Rock could have received payments from PepsiCo for transshipping, defined as sales by other wholesalers of PepsiCo products in Buffalo Rock's exclusive territory. The Court notes that Buffalo Rock had a duty to mitigate its damages and holds "the defendants are entitled to present evidence related to Buffalo Rock's decision not to mitigate its damages through the TEP to argue for a reduction [of] the amount of any damages that the jury may choose to award to Buffalo Rock should it prevail below." Ms. **41-42.

The antitrust/illegality defense related only to Buffalo Rock's equitable claim seeking injunctive relief. Ms. *45. The Court reiterates that "[p]urely legal claims, as well as factual issues common to the legal and equitable claims, must be determined by the jury; the remaining issues are then to be decided by the trial court." Ms. *45, citing *Ex parte Taylor*, 828 So. 2d 883 (Ala. 2001). Consequently, the "trial court was within its discretion to exclude evidence, testimony, and arguments regarding such [antitrust] defense during the jury-trial portion of this action." Ms. *47.

Justice Sellers dissents, joined by Justice Wise, on the justification/competitor's privilege defenses because allowing these defenses would undermine the purpose of the Soft Drink Interbrand Competition Act, 15 U.S.C. § 3501 *et seq*, which is to foster interbrand competition. Chief Justice Parker also dissents from issuance of the writ as to the justification/competitor's privilege defenses. Ms. **51-52. The Chief Justice questions whether there can be justification for intrabrand competition in an exclusively licensed territory and also concludes the petitioners have an adequate remedy by way of appeal as to these defenses. Ms. *52.

CONTEMPT – SUBPOENA FOR NONPARTY DOCUMENTS LOCATED IN ANOTHER STATE

In re: Omni Healthcare Financial, LLC, [Ms. SC-2023-0027, Dec. 15, 2023] __ So. 3d __ (Ala. 2023). The Court (Bryan, J.; Parker, C.J., and Shaw, Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) reverses the Dale Circuit Court's order holding Omni, a North Carolina limited liability company, in contempt for failing to comply with a nonparty subpoena.

After the defendants served a nonparty subpoena on Omni's registered agent in Alabama, Omni responded by producing certain documents while also asserting certain objections. Ms. **2-3. The circuit court entered an order granting defendant's motion to hold Omni in contempt for failing to comply with the subpoena. Ms. *3.

The Court reverses because the defendants did not obtain an order from a North Carolina court directing Omni to produce the documents, which were located at Omni's facility in North Carolina, as required by Rule 37(b)(1) for nonparty documents located entirely within the jurisdiction of foreign courts. Ms. *8.

ORDER DENYING COMPLIANCE WITH APPRAISAL PROVISION NOT APPEALABLE UNDER ALA. R. APP. P. 4(D)

Great American Insurance Company v. Crystal Shores Owners Assoc., Inc., [Ms. SC-2023-0092, Dec. 22, 2023] __ So. 3d __ (Ala. 2023). In a per curiam opinion, the Court (Wise, Bryan, Sellers, Mendheim, Stewart, and Cook, JJ., concur; Shaw, J., concurs in the result; Mitchell, J., concurs in the result, with opinion, which Parker, C.J., joins) dismisses Great American Insurance Company's appeal from the Baldwin County Circuit Court's order denying Great American's motion to compel compliance with the policy's appraisal provision.

On September 30, 2022, Great American filed a motion, contending that the amount of loss claimed by its insured Crystal Shores Owner Association, Inc ("Crystal Shores") was to be determined by an appraisal procedure mandated by the subject commercial property and casualty policy. Ms. *7. "Great American contended that the appraisal clause was a written arbitration agreement pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq." Ms. *9. Contending there were issues unrelated to the amount of loss that would not be resolved by the appraisal procedure, Crystal Shores successfully opposed the motion. Ms. *10.

The Court concludes the appraisal clause was not an arbitration clause under Federal or Alabama law definitions of arbitration. Consequently, the Court dismisses Great American's appeal because the non-final order from which it appealed was not "an order granting or denying a motion to compel arbitration ... appealable as a matter of right" pursuant to Ala. R. App. P. 4(d). Ms. *16.

ALA. R. CIV. P. RULE 37(D) LIMITED TO FAILURE TO APPEAR AT DEPOSITION

Ex parte Hankook Tire, et al., [Ms. SC-2023-0210; SC-2023-0312, Dec. 22, 2023] __ So. 3d (Ala. 2023). The Court (Mitchell, J.; Parker, C.J., and Shaw, Wise Bryan, Mendheim, and Stewart, JJ., concur; Cook, J., concurs specially) vacates on mandamus review the Dallas Circuit Court's order imposing sanctions against Hankook Tire pursuant to Ala. R. Civ. P. Rule 37(d) for conduct of its corporate representative and its counsel at Hankook's 30(b)(6) deposition.

Hankook designated Won Yong Choi as its corporate representative in response to Plaintiffs' 30(b)(6) deposition notice. The Plaintiffs moved for sanctions asserting Choi was "unable or unwilling to answer even simple questions during the deposition and that Hankook's counsel had 'bombard[ed] the deposition with argumentative interruptions, speaking objections, and instructions not to answer.'" Ms. *7. The circuit court granted Plaintiffs' motion for sanctions and entered an order "(1) prohibiting Hankook from having any corporate representative give testimony at trial that expounded on or went beyond Choi's deposition testimony; (2) barring Hankook from disputing at trial that the failed tire was defective; and (3) striking ten of Hankook's affirmative defenses concerning contributory negligence, assumption of risk, and misuse." Ms. **7-8.

The court holds mandamus review is appropriate because "'a trial court's disallowance of a party's affirmative defense is reviewable by a petition of mandamus.'" Ms. *12, quoting *Ex parte Gadsden Country Club*, 14 So. 2d 830, 833 (Ala. 2009).

The Court notes "Rule 37(d) provides that if a corporate representative designated under Rule 30(b)(6) fails 'to appear' for a properly noticed deposition, the trial court may sanction the party in the same manner as if a discovery order entered in response to a Rule 37(a)(2) motion was violated." Ms. *14. The Court holds given the plain meaning of Rule 37(d) and the overall structure of Rule 37, Rule 37(d) cannot support the sanctions award because Choi appeared for the deposition. Ms. *17.

The Court explains that "[i]f, over the course of a deposition, a deponent is consistently unable or unwilling to answer questions that are asked, Rule 37(a) – not Rule 37(d) – provides the mechanism by which an aggrieved party can obtain relief. Under Rule 37(a), if the aggrieved party is unable to resolve the dispute with counsel from the other side after the deposition, that party can move the trial court to compel responses. Ms. **17-18.

The Court also vacates the award of attorney fees against Hankook. The Court explains "[i]f Hankook was challenging only an award of attorneys' fees, our conclusion about whether that challenge was appropriate for mandamus review might be different. But it would be contrary to principles of judicial economy for us to ignore that award now when we have already held that the sanctions order was unwarranted." Ms. *21.

Justice Cook's special concurrence "suggest(s) that we consider modifying our Rules of Civil Procedure to address future occurrences of party or attorney misconduct during discovery in a more comprehensive way" and notes Rule 30(d)(2) of the Federal Rules of Civil Procedure "gives trial judges authority to issue sanctions against deponents and their attorneys for a broad range of misconduct that occurs during a deposition." Ms. *24.

IMPOSTER RULE – § 7-3-404(D), ALA. CODE 1975 – FRAUDULENT WIRING INSTRUCTIONS

Mile High, LLC, et al. v. Flying M Aviation, Inc., [Ms. CL-2023-0260, Jan. 5, 2024] __ So. 3d (Ala. Civ. App. 2024). The court (Moore, J.; Thompson, P.J., and Hanson, J., concur; Edwards and Fridy, JJ., concur in the result) affirms the Jefferson Circuit Court's order enforcing a $50,000 settlement agreement that Luther S. Pate entered into with Flying M Aviation, Inc. ("FMA").

FMA filed suit against Pate for breach of contract and the parties settled the case for $50,000. On July 12, 2022, FMA's counsel, Gresham, sent Pate's counsel an email with wiring instructions; however, hours later, an imposter "spoofed" Gresham's email, sent Pate's counsel a duplicate email containing wiring instructions to the imposter's bank account, and Pate wired the $50,000 to the imposter's account. Ms. *2. FMA filed a motion to enforce the settlement agreement when Pate refused to pay FMA. On February 1, 2023, the circuit court entered a judgment enforcing the settlement agreement. Ms. *3.

The Court determined both parties were defrauded, Pate by reasonably relying on the fraudulent email and sending the wire to the imposter, and FMA by not receiving the settlement proceeds. Ms. *10. Pate, his bookkeeper, and his bank failed to confirm wiring instructions with FMA or Gresham, Ms. *6, and consequently never made FMA aware of the fraudulent activity. Ms. *11.

The circuit court applied the UCC's "imposter rule," codified at §7-3-404(d), Ala. Code 1975, which provides the party in the best position to prevent the fraud by exercising reasonable care should bear the loss. Ms. *3, citing *Parmer v. United Bank, Inc.,* (No. 20-0013, Dec. 7, 2020 (W. Va. 2020) and *Arrow Truck Sales, Inc. v. Top Quality Truck & Equip., Inc.,* (No. 8:14-cv-2052-T-30-TGW) (M.D. Fla. Aug. 18, 2015). The court affirms, concluding that even if Pate could not have reasonably "detected the signs that the mail and wiring instructions were fraudulent, it remains that Pate was wiring a large sum of money as settlement proceeds. Under the circumstances, Pate should have verified the wiring instructions before executing the wire transfer, which it easily could have done." Ms. **12-13.

PROPER VENUE IN ACTION CONCERNING REAL ESTATE

Ex parte Mullen, [Ms. SC-2023-0278, Jan. 12, 2024] ___ So. 3d ____ (Ala. 2024). The Court (Bryan, J.; Parker, C.J., and Shaw, Wise, Sellers, Mendheim, Stewart, Mitchell, and Cook, JJ., concur) issues a writ of mandamus directing the Jefferson Circuit Court to transfer this action against Richard and Cheryl Mullen to the Walker Circuit Court.

The Mullens purchased real property located in Walker County ("the property"), built a residence on it, and subsequently sold the property to Karl and Fay Leo. Ms. *2. The Leos filed this action in Jefferson County asserting claims for breach of contract, breach of the implied warranty of habitability, fraud, negligence, and fraudulent suppression and requested damages and equitable relief. Ms. **2-3.

The Court first concludes pursuant to §§ 6-1-1(b) and 6-1-2 that Rule 82(b)(1)(B) governs and clearly requires that "if the subject matter of the action is real estate, whether or not exclusively, [must] ... be brought in the county where the real estate or a material portion thereof is situated." Ms. *19.

The Court "conclude(s) that the property at issue in this case is the 'subject matter' of the Leos' action within the meaning of Rule 82(b)(1)(B). Although the Leos do not appear to seek rescission of the contract for the sale of the property at issue in this case ..., the gravamen of the Leos' complaint is that the Mullens improperly designed and constructed the residence located on the property and sold it to the Leos in an uninhabitable condition by making false advertisements and representations concerning the condition of the residence." Ms. *16.

SERVICE OF SUMMONS AND COMPLAINT – RULE 4(I)(2)(C), ALA. R. CIV. P.

Reeves v. Wilson Floor and Wallcovering, Inc., [Ms. SC-2023-0410, Jan. 19, 2024] ___ So. 3d ____ (Ala. 2024). The Court (Cook, J.; Parker, C.J., and Wise, Mendheim, Stewart, and Mitchell, JJ., concur; Shaw and Bryan, JJ., concur in the result; Sellers, J., concurs in the result, with opinion) reverses the Autauga Circuit Court's order dismissing an action filed by Joseph Reeves against Wilson Floor & Wallcovering, Inc. ("Wilson Flooring") and Tom Jones for insufficiency of service of process.

Reeves filed suit against Wilson Flooring and Tom Wilson, who the complaint erroneously described as the company's owner. Ms. *2. Tina Wilson, Tom's wife and an officer of Wilson Flooring, signed the certified mail return receipt, but the boxes for "addressee" and "agent" were left unchecked. Ms. *3. Neither defendant answered the lawsuit, and the trial court ultimately entered a default judgment for Reeves. Ms. *4.

Reeves conceded that the default judgment was due to be set aside due to improper service but opposed dismissal of the action because Wilson Flooring was informed of the action against it due to its officer Tina Wilson receiving the summons and complaint. Ms. **6-7. Wilson relied on rule 4(i)(2)(C), Ala. R. Civ. P. which provides, "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within time to avoid a default."

Rule 4(c)(6) provides in pertinent part that service may be made on a corporation by serving an officer of the corporation. Because Tina Wilson received the summons and complaint and is listed as an officer of Wilson Flooring in its Articles of Incorporation, the Court concludes that even if service was technically improper, Wilson Flooring was informed of the action against it within the time to avoid a default and reverses dismissal of the action. Ms. **13-14.

In Justice Sellers's view, "service of process on a corporation via certified mail is perfected when an officer or other agent authorized to accept service gets actual notice, which can be substantiated through evidence, that the corporation is being sued. Thereafter, the defendant should not be allowed to rely on a technical defect in the certified-mailing procedure." Ms. *16. Accordingly, Justice Sellers concurs only in the result because as a practical matter there is "little difference" between reasoning that the action could not be dismissed because an officer of the corporation received the summons and complaint and "the idea that service was perfected and properly accomplished under the requirements of Rule 4." Ms. *17.

CORONAVIRUS IMMUNITY ACT – SCOPE OF §6-5-792(A) IMMUNITY FROM HEALTH EMERGENCY CLAIMS

Ex parte Triad of Alabama, LLC, d/b/a Flowers Hospital, [Ms. SC-2023-0395, Jan. 26, 2024] (Ala. 2024). In a plurality decision, the Court (Sellers, J.; Mendheim, J., concurs; Parker, C.J., and Shaw, Wise, Bryan, and Stewart, JJ., concur in the result; Mitchell, J., concurs in the result, with opinion; Cook, J., recuses) issues a writ of mandamus to the Houston Circuit Court vacating its order striking Flowers Hospital's affirmative defense of immunity under the Alabama Covid Immunity Act (ACIA) enacted in February 2021.

On September 21, 2021, Plaintiff Voncille Askew ("Voncille") had received COVID-19 treatment and as she was leaving the hospital tripped and fell on an allegedly defective concrete

ramp. The ramp was part of an entrance/exit to the hospital that Voncille had been directed to use when entering and exiting the hospital. The hospital had designated this entrance/exit as the "Infusion entry" for the exclusive use of COVID-19 patients.

The plurality opinion concludes that the hospital was immune from negligence liability under the ACIA's immunity provision codified at §6-5-792(a) and encompassing "Health Emergency Claims" defined by §6-5-791(a)(13) as "any cause of action that is related in any manner to ... the covered entity's efforts to prevent or delay the spread of Coronavirus...." The main opinion concludes Voncille's negligence claim was a "Health Emergency Claim" from which Flowers Hospital was immune because Voncille was at the hospital for treatment of COVID-19, Ms. *13, and "[t]he statute imposes no limitations on the chain of causation or on the relation between a claim and Coronavirus outside of those limitations inherent to the words 'arises from' or 'is related to.'" Ms. *15.

Justice Mitchell's special concurrence disagreed with the rationale of "the main opinion [because] it does not indicate whether there is any real limit to what claims may be covered by immunity. As I see it – and as our cases suggest – the phrase 'arises from or is related to' incorporates substantive limitations; I believe we must acknowledge those limitations here." Ms. *20. Justice Mitchell later emphasizes that "[t]hose limitations are especially important here. Almost every claim made since March 2020 can be traced back to Coronavirus given that the virus and the governmental response affected the entire world for the better part of three years." Ms. *22.

COURT REJECTS DETERMINATION THAT COVID-19 IS NOT COMPENSABLE AS A MATTER OF LAW UNDER WORKERS COMPENSATION ACT

Meeks v. Opp Health and Rehab., LLC, [Ms. CL-2023-0239, Jan. 31, 2024] ___ So. 3d ____ (Ala. Civ. App. 2024). In a per curiam opinion, the court (Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur; Edwards, J., concurs in the result) reverses the Covington Circuit Court's order granting Opp Health and Rehabilitation, LLC's ("OHR") motion for judgment on the pleadings dismissing Rena Meeks's worker's compensation claim filed after she contracted COVID-19 while working as a certified nurse assistant in an OHR nursing home.

Meeks alleged that because of her exposure to coronavirus and contraction of COVID-19, "she suffered injuries to her lungs and airway that left her permanently disabled." Ms. *2. In reversing, the court concludes "we are not prepared to hold that COVID-19 is not compensable under the Act as a matter of law. Meeks is entitled to pursue her claim that she contracted COVID-19 while working within the line and scope of her employment and that the performance of her duties as an employee exposed her to a danger or risk materially in excess of that to which people are normally exposed in their everyday lives." Ms. *13. *Ex parte Trinity Indus., Inc.*, 680 So. 2d 262, 269 (Ala. 1996).

RULE 54(B) CERTIFICATION – DAMAGES AVAILABLE ON CLAIM FOR COMMON LAW INDEMNITY

Roberson v. Drummond Co. Inc., [Ms. SC-2022-0863, Feb. 9, 2024] __ So. 3d (Ala. 2024). The Court (Parker, C.J.; Mendheim, Stewart, JJ., and Baschab and Welch, Special Justices, concur; Lyons, Special Justice, concurs in part and dissents in part, with opinion, joined by Main, Special Justice; Shaw, Wise, Bryan, Sellers, Mitchell, and Cook, recuse) affirms appeal from Jefferson Circuit Court's dismissal, certified as final under Rule 54(b), Ala. R. Civ. P., of their claim for indemnification from Drummond Company, Inc. ("Drummond"), for damages stemming from David Roberson's federal conviction for bribery. In affirming, the Court concludes the damages the Robersons seek are not available through indemnification.

The Court first concludes that the certification of finality was proper because "the issues in the indemnification claim and the promissory-fraud claim [pending in the trail court] are not so closely intertwined that separate adjudication will pose an unreasonable risk of inconsistent results." Ms. *11.

On the merits, the Court holds that "to the extent that the Robersons seek indemnification for the criminal penalties David incurred, they fail to demonstrate that the common-law duty to indemnify includes the type of indemnification that they seek." Ms. *20. The Court also rejects the Robersons' contention that they pleaded a claim for contractual indemnity. The Court explains "to state a claim for recovery of David's lost salary and benefits, they should have pleaded a simple breach-of-contract claim.... But the Robersons did not assert a breach-of-contract claim. 'It is not the duty of the courts to create a claim which the plaintiff has not spelled out in the pleadings.' *McCullough v. Alabama By-Prods. Corp.*, 343 So. 2d 508, 510 (Ala. 1977)." Ms. *22.

The Court also rejects the contention that the Drummond Board minutes establish a contract of indemnity. The Court explains "David's loss of his salary and benefits was not a liability or expense that he incurred to a third party ... Thus, regardless of whether the Robersons cast Drummond's decision to fire David as a breach of a corporate bylaw, a breach of a corporate resolution, or a breach of an implied contract, they cannot make it the basis of an indemnification claim." Ms. **25-26. Finally, the Court declines to consider whether the facts alleged by the Robersons support court-ordered indemnification under the Alabama Business and Nonprofit Entity Code ("the ABANEC"), § 10A-1-1.01 et seq., Ala. Code 1975, because the Robersons failed to preserve their ABANEC argument for appellate review because they did not raise it in the trial court. The Court explains

> [T]he Robersons conflate the requirements for sufficiently pleading a claim with the requirements for preserving for appeal a basis for reversing an order dismissing a claim. To preserve a basis for reversing an order dismissing a claim, a plaintiff must bring that basis to the trial court's attention either in response to the motion to dismiss or in a postjudgment motion. Allowing a plaintiff to assert a basis for reversal for the first time on appeal so long as it satisfied the requirements for sufficient pleading would violate

basic principles of appellate procedure. Ms. *28.

Justice Lyons's special writing, joined by Special Justice Main, concurred in rejection of the ABANEC claim, but dissented as to the issue of common law indemnity, asserting "the trial court's order should be reversed and the case remanded for full development below of the issue regarding the categories of recoverable damages under common-law indemnity and any other issues stemming from service by Drummond of an answer asserting applicable affirmative defenses." Ms. *36.

WRONGFUL DEATH OF A MINOR ACT INCLUDES EXTRAUTERINE EMBRYOS

LePage, etc. and Fonde, etc., et al. v. The Center for Reproductive Medicine, PC, et al., [Ms. SC-2022-0515 and SC-2022-0579, Feb. 16, 2024] __ So. 3d (Ala. 2024). The Court (Mitchell, J.; Wise and Bryan, JJ., concur; Parker, C.J., concurs specially, with opinion; Shaw, J., concurs specially, with opinion, which Stewart, J., joins; Mendheim, J., concurs in the result, with opinion; Sellers, J., concurs in the result in part and dissents in part, with opinion; Cook, J., dissents, with opinion) reverses the Mobile Circuit Court's dismissal of wrongful death claims and alternative common law negligence and wantonness claims asserted by three families who sued their IVF clinic and the hospital where the clinic was located after a patient of the hospital went into the clinic's freezers and picked up a container of embryos and dropped the container onto the floor, which killed all of the embryos it held.

The Court holds "[t]he Wrongful Death of a Minor Act applies on its face to all unborn children, without limitation. That language resolves the only issue on appeal with respect to the plaintiffs' wrongful-death claims and renders moot their common-law negligence and wantonness claims." Ms. *7. The Court emphasizes "the text of the Wrongful Death of a Minor Act is sweeping and unqualified. It applies to all children, born and unborn, without limitation. It is not the role of this Court to craft a new limitation based on our own view of what is or is not wise public policy. That is especially true where, as here, the People of this State have adopted a Constitutional amendment directly aimed at stopping courts from excluding 'unborn life' from legal protection. Art. I, § 36.06, Ala. Const. 2022." Ms. *22.

DUTY UNDER MISSISSIPPI LAW – JOINT VENTURE

Sykes, etc. v. Majestic Mississippi, LLC, et al. and Sullivan, et al. v. Majestic Mississippi, LLC, et al., [Ms. SC-2023-0520 and SC-2023-0572, Feb. 16, 2024] __ So. 3d (Ala. 2024). Applying Mississippi law, the Court (Sellers, J.; Parker, C.J., and Wise, Stewart, and Cook, JJ., concur) affirms the Madison Circuit Court's summary judgment dismissing personal injury and wrongful death claims of individuals injured or killed when a charter bus overturned en route to a Mississippi casino in icy conditions. The defendants were Majestic Mississippi, LLC ("the Casino") and Linda Parks, who organized the bus trip for her friends and family.

As to the claims against the Casino for failing to provide accurate weather information, the Court concludes there was no evidence that the Casino assumed a duty to provide accurate weather information. Ms. **12-13. The Court also affirms dismissal of the negligence claims against the Casino and Parks, alleging that they failed to conduct due diligence on Teague Express, the charter bus operator. The Court explains, "the uncontroverted evidence indicates that Majestic did not arrange for or approve the charter bus; rather, as Majestic's representative testified, the only role its casino plays regarding charter buses is to verify that those buses are properly insured before entering its property." Ms. *18. As to Parks, the Court points to evidence that Vines [the bus driver] was the 'captain' of the charter bus, and any decision to abort the trip to the casino remained with either her or Teague Express. Because Parks did not owe the plaintiffs a duty either to conduct due diligence on Teague Express or to abort the trip to the casino to ensure the plaintiffs' safety, there could be no negligence on her part...." Ms. **21-22.

The Court also rejected the Plaintiffs' contention that the casino and Parks were in a joint venture. "[T]he requirement of intent to form a single joint enterprise is completely absent here, where there is no evidence to indicate that the parties had any mutual intent to participate in a joint profit-making venture." Ms. **25-26.

Under Mississippi law, "negligence is characterized as the failure or refusal to exercise due care, wantonness is defined as 'a failure or refusal to exercise any care.' *Maldonado v. Kelly*, 768 So. 2d 906, 910 (Miss. 2000)." Ms. *26, some internal quotation marks omitted. There was no evidence of wantonness because "it strains credulity to believe that Park's receipt of approximately $250 a month in commissions was so significant that she would sacrifice friendship, reputation, or safety to obtain it." Ms. *27.

TIMELINESS OF MANDAMUS PETITION

Ex parte Kaitlyn Allinder, [Ms. CL-2023-0903, Feb. 16, 2024] __ So. 3d (Ala. Civ. App. 2024). The court (Edwards, J.; Moore, P.J., and Hanson and Fridy, concur) denies the mother's mandamus petition challenging the circuit court's denial of her request for a forensic examination of the child pursuant to Rule 35(a), Ala. R. Civ. P. in a custody modification proceeding.

The court first notes that an order denying a Rule 35(a) motion is reviewable by mandamus. Ms. *8, citing *Ex parte Wal-Mart Stores, Inc.*, 729 So. 2d 294, 296 (Ala. 1999). The court denies the petition as untimely under Rule 21(a)(3), Ala. R. App. P., and notes the mother "provided no 'statement of circumstances constituting good cause for the appellate court to consider the petition, notwithstanding that it was filed beyond the presumptively reasonable time.' *Id.*" Ms. **8-9. The court also holds that a subsequent motion filed by the mother on the same grounds that were previously denied could not afford her "'a second bite at the apple' or 'reset the clock' for purposes of mandamus review." Ms. *9. *Ex parte A.L.*, 368 So. 3d 400, 404 (Ala. Civ. App. 2022) (some internal quotation marks omitted).

EXCEPTION TO OPEN RECORDS ACT

Zackery v. Water Works and Sewer Board of the City of Gadsden, [Ms. SC-2023-0530, Feb. 23, 2024] __ So. 3d (Ala. 2024). The Court

(Sellers, J.; Wise, Mendheim, and Stewart, JJ., concur; Parker, C.J., and Shaw and Bryan, JJ., concur in the result; Mitchell and Cook, JJ., recuse) affirms Etowah Circuit Court's judgment holding that the Water Works and Sewer Board of the City of Gadsden ("the Board") does not have to immediately disclose confidential settlement agreements requested by Fred Zackery pursuant to the Open Records Act, § 36-12-40, et seq., Ala. Code 1975.

The Board entered into settlement agreements to resolve claims that certain carpet and chemical manufacturers caused PFAS contamination of the Board's raw water intake. In the settlements, the Board obtained "funding for technology to remediate PFAS from its drinking water." Ms. *2.

While acknowledging the settlement agreements are public records, the Board "relies on an exception to the Act, i.e., that disclosure of the settlement agreements would be detrimental to the best interests of the public. Specifically, the Board argues that disclosure of the settlement amounts before the competitive bid process is initiated and completed could drive the bids upwards, increasing the cost of the project." Ms. **6-7.

The Court reiterates that "applying the rule-of-reasoning test, courts 'must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference.'" Ms. *9, quoting *Stone v. Consolidated Publ'g Co.*, 404 So. 2d 678, 681 (Ala. 1981). The Court "conclude(s) the trial court did not exceed its discretion in holding that an exception to the Open Records Act was present, which justified nondisclosure of the settlement agreements until after the competitive-bid process was complete." Ms.**9-10.

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