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ALABAMA ASSOCIATION FOR JUSTICE

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OUR MISSION

We preserve and protect the constitutional right to a trial by jury guaranteed by the Seventh Amendment to the United States Constitution by ensuring that every person or business harmed or injured by the misconduct or negligence of others can hold wrongdoers accountable in the one room where everyone is equal – **The Courtroom**

RECENT CIVIL DECISIONS

Summaries from March 3, 2121 - October 1, 2021

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Joseph D. Steadman, Sr., joined Cunningham Bounds in 2016. His practice focuses on appellate practice and motion practice in the firm's personal injury and wrongful death litigation, class actions, general negligence, product liability, medical negligence, admiralty and maritime law, and consumer fraud actions. Joe received his undergraduate degree summa cum laude from the University of South Alabama in 1985 and his J.D. summa cum laude from the University of Alabama School of Law in 1988, where he served on the Editorial Board of the Alabama Law Review. Joe is a member of the American Bar Association and Mobile Bar Association.

MANDATE RULE

Ex parte Encompass Health Corporation, [Ms. 1190797, Mar. 12, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Bryan, J.; Parker, C.J., and Bolin, Shaw, and Wise, JJ., concur; Sellers, Mendheim, and Stewart, JJ., dissent; Mitchell, J., recuses) issues a writ of mandamus directing the Jefferson Circuit Court to vacate a June 2020 order entered on remand following Nichols's successful prior appeal of a final judgment dismissing the action. In that prior appeal, the only appellee named by Nichols was HealthSouth. The June 2020 order amended a February 2016 order that had dismissed the individual defendants with prejudice. Ms. **3-4.

The Court first reiterates that "'[a] petition for a writ of mandamus is the proper method for bringing before an appellate court the question whether a trial court, after remand, has complied with the mandate of this Court or of one of our intermediate appellate courts.'" Ms. *9, quoting *Ex parte International Refin. & Mfg. Co.*,153 So. 3d 774, 783 (Ala. 2014) (quoting in turn *Ex parte Edwards*, 727 So. 2d 794 (Ala. 1998)).

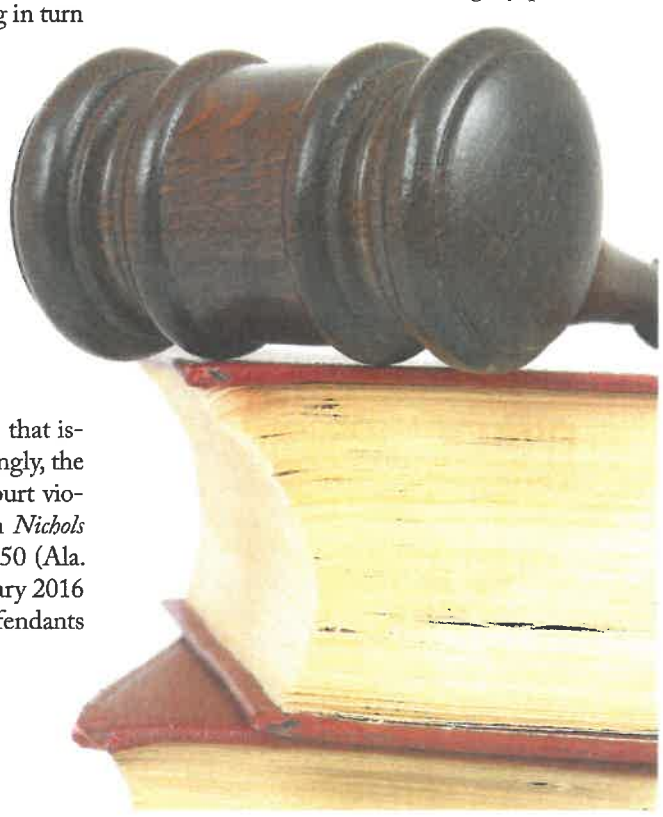
The Court holds "[b]ecause the mandate rule is merely a 'specific application' of the law-of-the-case doctrine, the same reasoning applies to the mandate rule: a ruling on an issue that could have been, but was not, raised on appeal becomes the law of the case, and a trial court violates the law-of-the-case doctrine and the mandate rule by purporting to relitigate that issue on remand." Ms. *16. Accordingly, the Court "conclude[s] that the trial court violated the mandate of this Court in *Nichols* [*v. HealthSouth Corp.*, 281 So. 3d 350 (Ala. 2018)] when it amended the February 2016 order dismissing the individual defendants with prejudice." Ms. *22.

STANDING – PUBLIC LAW ACTION

Munza, et al. v. Ivey, Harris, and Alabama State Bd. of Health, [Ms. 1200003, Mar. 19, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Bolin, J.; Parker, C.J., and Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur; Shaw, J., concurs in the result) affirms the Montgomery Circuit Court's dismissal of an action challenge Governor Ivey's emergency COVID-19 order mandating the wearing of facial coverings.

Public-law actions involve "constitutional or other challenges to the actions of officials or administrative agencies." Ms. *13, quoting *Ex parte BAC Home Loans Servicing, LP*,159 So. 3d 31, 34 (Ala. 2013). Regarding standing, the Court explains

> A party establishes standing to bring a challenge in a public-law case "when it demonstrates the existence of (1) an actual, concrete and particularized injury in fact – an invasion of a legally pro-



tected interest; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision." Ms. *13, quoting *Poiroux v. Rich*, 150 So. 3d 1027, 1033 (Ala. 2014) (internal quotation marks omitted).

The Court concludes "that the plaintiffs have failed to allege specific concrete facts demonstrating an actual ... particularized injury in fact, and that they, therefore, lack standing to proceed with this action." Ms. *21 (internal citations and quotation marks omitted). The Court also rejected the Plaintiffs' contention that the Alabama Administrative Procedure Act (AAPA) affirmatively granted them standing and explains "the AAPA incorporates all the normal standing requirements discussed in *Poiroux* and does not grant the plaintiffs a separate avenue to assert standing to bring an action." Ms. *22.

BREACH OF SETTLEMENT AGREEMENT – HEARSAY – TORTIOUS INTERFERENCE WITH PROSPECTIVE EMPLOYMENT – VICARIOUS LIABILITY

Cobbs, Allen & Hall, Inc. v. EPIC Holdings, Inc., [Ms. 1190687, Mar. 26, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Mendheim, J.; Parker, C.J., and Bolin, Wise, Sellers, Stewart, and Mitchell, JJ., concur; Bryan, J., concurs in part and dissents in part) affirms in part and reverses in part the Jefferson Circuit Court's summary judgment dismissing Cobbs, Allen & Hall (CAH)'s claims for breach of contract and tortious interference with a prospective employment relationship. CAH sued its former employee McInnis and his current employer EPIC Holdings, Inc. (EPIC) asserting breach of a settlement agreement and tortious interference with CAH's employment offer to Michael Mercer. Ms. *20.

The Court affirms the summary judgment on the breach of contract claim and concludes the settlement agreement merely required EPIC to instruct its employees not to disparage CAH. The Court declines CAH's invitation to imply a duty not to disparage and explains "the implied covenant of good faith and fair dealing cannot be used to alter the plain meaning of a contract." Ms. *64.

The Court also affirms the trial court's striking on grounds of hearsay an affidavit of CAH principal Bruce Denson. In pertinent part the Denson affidavit averred

> "7. On July 31, 2018, Mr. Mercer informed me that he was not coming to work for CAH and was instead remaining at Lockton. In response to my inquiry as to his reasons for such decision, Mr. Mercer told me that he had spoken to Mr. McInnis and that Mr. McInnis had told him that CAH was a terrible place to work, that it was controlled by the Densons and the Rices, and that if anyone disagreed with the Densons or Rices, ... they would take their stock and not pay them for it."

Ms. *25. The Court rejects CAH's argument that the statements were not hearsay because they were not offered for the truth of the matter asserted and explains

> Rule 805, Ala. R. Evid., provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." ... Thus, even though McInnis's alleged statements to Mercer might qualify as non hearsay because they are not offered for the truth of the matter asserted but, rather, to prove that McInnis made those statements to Mercer, CAH still must satisfy hearsay concerns with respect to Mercer's relating those statements to Denson. In that regard, it matters whether Mercer was truthfully conveying to Denson what McInnis said, and therefore that part of the statement is being offered for the truth of the matter asserted.

Ms. **26-27.

The Court also rejects CAH's argument that the statements are admissible under "Rule 803(3), Ala. R. Evid., because they 'explain [Mercer's] reasons, i.e. , his state of mind, for not taking the [CAH] job.' CAH's brief, p. 39." Ms. **29-30. The Court explains

> ...[T]he statement still does not reflect Mercer's intent to do something. Instead, the statement allegedly reflects the reasons behind Mercer's decision to do something – specifically, to decline CAH's job offer. The hearsay exception in Rule 803(3) does not apply to such statements. Rather, it concerns statements indicating a present feeling or physical condition or "statements of mind expressed before the commission of the act as to which the state of mind is relevant." Advisory Committee's Notes to Rule 803, Paragraph (3) (emphasis added). This exception "does not apply to the declarant's after-the-fact statements made about his past state of mind .... It similarly does not apply to the 'declarant's statements as to why he held the particular state of mind.'" *United States v. Cummings*, 431 F. App'x 878, 882 (11th Cir. 2011)(quoting *United States v. Duran*, 596 F.3d 1283, 1297 (11th Cir. 2010)).

Ms. *33 (emphasis in original).

The Court also affirms the circuit court's judgment that EPIC was not vicariously or directly liable because "... the communication on both sides was impelled by personal motives that had nothing to do with McInnis's duties at EPIC." Ms. *59. The Court explains "EPIC could not have stopped McInnis's conduct because it had no knowledge of the communications at the time they were taking place. Accordingly, there is no evidence that EPIC ratified McInnis's conduct." Ms. *62.

On the defense of justification, the circuit court applied Restatement (Second) of Torts §772 which provides:

> "One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person '(a) truthful information, or (b) honest advice within the scope of a request for the advice.'"

Ms. *39. Despite expressly approving the circuits court's application of §772, Ms. *43, the Court reverses the summary judgment in favor of McInnis because "when the evidence is viewed in the light most favorable to CAH, it becomes apparent that McInnis's statements to Mercer potentially were misleading." Ms. **54-55.

APPEAL DISMISSED – TRIAL COURT LACKED AUTHORITY TO EXTEND 90-DAY PERIOD IN RULE 59.1

West v. Bagwell, [Ms. 2190780, Mar. 26, 2021], ___ So. 3d ___ (Ala. Civ. App. 2021). The court (Edwards, J.; Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur) dismisses West's appeal of the Fayette Circuit Court's judgment in a boundary line dispute. The court reiterates that "'[t]here are only two methods listed in Rule 59.1 for extending the 90-day period: (1) the express consent of all parties to an extension of the 90-day period, [and] (2) the grant of an extension of time by an appellate court.'" Ms. *6, quoting *Ex parte Davidson*, 782 So. 2d 237, 241 (Ala. 2000). The court explains "West sought from the trial court an extension of the 90-day period, despite the fact that the Bagwells had refused to consent to the extension. The trial court lacked the authority under Rule 59.1 to extend the 90-day period for ruling on West's postjudgment Motion...." Ms. **6-7. Consequently, West's appeal was untimely.

DETERMINATION OF FEE DUE TO DISCHARGED ATTORNEY– QUANTUM MERUIT

Ifediba v. Staffney, [Ms. 2190615, Mar. 26, 2021], ___ So. 3d ___ (Ala. Civ. App. 2021). In a per curiam opinion, the court (Thompson, P.J., and Moore and Edwards, JJ., concur; Hanson, J., concurs specially; Friday, J., concurs in part and concurs in the result) reverses a judgment of the Bibb Circuit Court awarding attorney Ifediba $5,000 from the proceeds of a wrongful death settlement. The court explains

> The right of Ifediba to any recovery as to his fee claim stems from the principle recognized by this court in *Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton*, 554 So. 2d 445 (Ala. Civ. App. 1989), under which, notwithstanding the acknowledged power of a client, such as Staffney, to unilaterally revoke a retained attorney's authority to represent the client's interests in a legal proceeding, "'an attorney discharged without cause, or otherwise prevented from full performance, is entitled to be reasonably compensated ... for services rendered before such discharge.'" 554 So. 2d at 448 (quoting *Owens v. Bolt*, 218 Ala. 344, 348, 118 So. 590, 594 (1928) (emphasis added)).

Ms. **8-9 (emphasis added by *Ifediba*).

The circuit court awarded Ifediba a flat $5,000 which was not referable to Ifediba's evidentiary submissions regarding the alleged hours expended and claimed hourly rate. Ms. *11. The court reverses and remands for entry of a new judgment specifying the basis for any fee and expense award. The court reiterates that " 'a trial court's order regarding an attorney fee must allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how it calculated the attorney fee.'" *Ibid.*, quoting *Pharmacia Corp. v. McGowan*, 915 So. 2d 549, 553 (Ala. 2004) (emphasis added by *Ifediba*).

ALA. R. CIV. P. 59.1 DENIAL OF POST-JUDGMENT MOTION BY OPERATION OF LAW NOT IMPACTED BY SUPREME COURT'S ADMINISTRATIVE COVID-19 ORDERS

Ex parte Miller, [Ms. 1190918, Apr. 2, 2021] ___ So. 3d ___ (Ala. 2021). The Court (Shaw, J.; Bolin, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur; Parker, C.J., concurs in the result) grants a petition for a writ of mandamus directing the Madison Circuit Court to vacate an order purporting to grant a post-judgment motion of a plaintiff seeking a new trial because it was untimely given the 90-day automatic denial of such a motion imposed by Ala. R. Civ. P. 59.1. The plaintiff argued in opposition to the petition that the Supreme Court's administrative COVID-19 orders suspended operation of Rule 59.1, but the Supreme Court disagreed explaining how Rule 59.1 is construed:

At all times relevant to this case, Rule 59.1 provided:

> No postjudgment motion filed pursuant to Rules 50, 52, 55, or 59[, Ala. R. Civ. P.,] shall remain pending in the trial court for more than ninety (90) days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown. A failure by the trial court to render an order disposing of any pending postjudgment 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.

At the expiration of the 90-day period provided by the rule, the trial court loses jurisdiction to rule on the postjudgment motion. See *Ex parte Jackson Hosp. & Clinic, Inc.*, 49 So. 3d at 1212 (explaining that the trial court's order purporting to rule on a postjudgment motion "was void because [the trial court] lost jurisdiction after the running of the 90-day period prescribed by Rule 59.1"), *Ex parte Davidson*, 782 So. 2d 237, 241 (Ala. 2000) ("If a trial judge allows a postjudgment motion to remain pending and not ruled upon for 90 days, then the motion is denied by operation of law at the end of the 90th day and the trial judge then loses jurisdiction to rule on the motion."), *Ex parte Caterpillar, Inc.*, 708 So. 2d 142, 143 (Ala. 1997) ("If a trial court does not rule on a post-judgment motion within 90 days, it loses jurisdiction to rule on the motion."), and *Ex parte Hornsby*, 663 So. 2d 966, 967 (Ala. 1995).

Ms. **8-9, and,

* * *

> Because the trial court lost jurisdiction after the expiration of the 90-day period prescribed by Rule 59.1, its order is void. See, e.g., *Ex parte Jackson Hosp. & Clinic, Inc.*, 49 So. 3d at 1212, *Ex parte Davidson*, 782 So. 2d at 241, *Ex parte Caterpillar, Inc.*, 708 So. 2d at 143, and *Ex parte Hornsby*, 663 So. 2d at 967. That jurisdictional deadline applies even if the trial court's failure to rule within 90 days is inadvertent rather than deliberate. See *Howard v. McMillian*, 480 So. 2d 1251, 1252 (Ala. Civ. App. 1985) ("Rule 59.1 makes no distinction between an inadvertent failure, a deliberate failure, and any other type of failure by the trial court to dispose of a pending postjudgment motion within the prescribed ninety day

period. Any type of failure to rule upon such a motion during such period of time is adequate to bring rule 59.1 into operation."). See also *Ex parte Limerick*, 66 So. 3d 755, 757 (Ala. 2011).

Ms. **11-12. Accordingly, because the petitioner demonstrated the trial court lacked jurisdiction to enter the order purporting to grant a post-judgment motion for a new trial, the petition for a writ of mandamus was due to be granted and the Madison Circuit Court was directed to vacate its order purporting to grant, after the expiration of the 90-day period imposed by Rule 59.1, the post-judgment motion seeking a new trial.

⊃ MANDAMUS PETITION DENIED WHEN MOOT BECAUSE PETITION NO LONGER PRESENTS A JUSTICIABLE CONTROVERSY

Ex parte Taylor, [Ms. 2200379, Apr. 2, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021). The court (Moore, J.; Thompson, P.J., and Edwards, Hanson, and Fridy, J.J., concur), unanimously dismisses a petition for a writ of mandamus requesting an order directing Montgomery Circuit Judge Anita L. Kelly to enter an order on a father's pending motion for *pendente lite* relief concerning custody of minor children when that motion – and subsequent follow-up motions imploring Judge Kelly to rule – had been pending before the circuit court for almost 500 days. Upon receipt of the father's petition on February 22, 2021 requesting mandamus relief, the court entered an order on February 23, 2021 directing Judge Kelly to file an answer by February 26, 2021 and to "explain why she has failed to rule on the *pendente lite* matters pending before her and the request for a final hearing filed by [the father]." Ms. *4. On February 26, 2021, Judge Kelly's judicial assistant e-mailed to the clerk of the Court of Civil Appeals two orders that had been entered which disposed of the request for *pendente lite* relief by awarding father physical custody of the children, enjoining mother from removing the children from Montgomery County, and suspending the father's child-support obligation. *Id.* Neither of Judge Kelly's orders complied with the directive to explain why she failed to rule on the father's motions. Ms. *5. Nevertheless, the Court of Civil Appeals dismisses the father's petition as moot because Judge Kelly's order effectively granted all the relief sought by the father in his mandamus petition, explaining

> ...The filing of a petition for the writ of mandamus does not divest the trial court of jurisdiction unless the action is stayed, and, if the trial court grants the relief that is sought in the mandamus petition, the petition may be mooted. *Ex parte McDaniel*, 291 So. 3d 847, 851 n.2 (Ala. 2019). A petition for the writ of mandamus is moot when there is no real controversy and it seeks to determine an abstract question that does not rest on existing facts. *State ex rel. Eagerton v. Corwin*, 359 So. 2d 767, 769 (Ala. 1977). To the extent that the petition seeks relief requiring Judge Kelly to grant the father's motions, the petition for the writ of mandamus is moot because it no longer presents a justiciable controversy. See *Ex parte St. John*, 805 So. 2d 84, 686 (Ala. 2001).

Ms. *6. Because the delay was attributable solely to Judge Kelly, and not the mother, the Court of Civil Appeals was precluded from granting the father any additional relief despite the prejudice suffered and expenses incurred, noting

> The father requests attorney's fees and costs for filing this mandamus petition, but this court cannot order Judge Kelly, who, according to the materials before this court is the sole person responsible for the delay in entering the orders on the father's motions, to pay those fees and costs. See *Ex parte Town of Lowndesboro*, 950 So. 2d 1203 (Ala. 2006) (concluding that an award of attorney fees and expenses against an officer of the State is precluded by the doctrine of sovereign immunity set out in Art. 1, § 14, Ala. Const. 1901 (Off. Recomp.)).

Ms. **7-8.

The Court of Civil Appeals publicly admonishes the judge, stating

> A judge is expected to "dispose promptly of the business of the court, being ever mindful of matters taken under submission," Canon 3.A.(5), Ala. Canons of Jud. Ethics, and to "diligently discharge his [or her] administrative responsibilities," Canon 3.B.(1), Ala. Canons of Jud. Ethics. We note that Judge Kelly's consistent dereliction of duty in promptly disposing of the cases before her led to Judge Kelly's being disciplined by the Court of the Judiciary in 2018. Based partly on her past history, this court ordered Judge Kelly to explain why she had not ruled on the father's motion for pendente lite custody, but Judge Kelly did not respond to that order or otherwise file an answer to the mandamus petition when her judicial assistant filed the February 26, 2021, orders, presumably relying on that action to moot the mandamus petition. See *Montgomery Cnty. Dep't of Hum. Res. v. A.S.N.*, 215 So. 3d 582 (Ala. Civ. App. 2016) (recounting Judge Kelly's pattern and practice of entering orders only after petitions for the writ of mandamus had been filed requesting that she be required to adjudicate actions over which she was presiding and this court had entered orders requiring her to file answers to those petitions). Because this court does not have jurisdiction to do anything other than dismiss a moot case, see *K.L.R. v. K.S.*, 201 So. 3d 1200 (Ala. Civ. App. 2016), it appears that this gambit has relieved Judge Kelly of any responsibility to this court for explaining her inaction. However, we once again admonish Judge Kelly that the public places great confidence in judges to act with integrity in discharging their judicial duties. See, generally, *Ex parte Hall*, [Ms. 1180976, Nov. 6, 2020] ___ So. 3d ___ (Ala. 2020). In particular, in cases involving the delicate matter of the custody of children, any delay in disposing of such cases is contrary to the children's best interests, see *Durham v. Sisk*, 628 So. 2d 873, 875 (Ala. Civ. App. 1993) ("The consequences of delaying the opportunity for correction of child custody problems could include preventable damage to a child's well-being, physically, emotionally, or otherwise."), and should be steadfastly avoided in future cases.

Ms. **10-12.

⊃ STAND-YOUR-GROUND LAW – §§ 13A-3-23, ALA. CODE 1975

Ex parte Dalton Teal, [Ms. 1180877, Apr. 9, 2021], ___ So. 3d ___ (Ala. 2021).

In a per curiam opinion, the Court (Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur; Parker, C.J., concurs specially) issues a writ of mandamus vacating the Jefferson Circuit Court's order striking Teal's affirmative defenses of self-defense and statutory immunity. While engaged in a physical struggle with Pallante, fearing for his life, Teal pulled a pistol and fired. He missed Pallante but struck Thomas, who was also in close proximity to Teal. Ms. *5. The Court concludes that because Teal "presented substantial evidence indicating that he acted in legally justified self-defense, as defined by § 13A-3-23, ... he was entitled to have a jury, rather than the trial court on a motion for a partial summary judgment, determine the issue." Ms. *9.

The Court first explains that "[t]o demonstrate that § 13A-3-23(a)(1) is applicable and to defeat Thomas's properly supported motion for a partial summary judgment, Teal was required to produce substantial evidence indicating that he reasonably believed that Thomas was using, or was about to use, unlawful deadly physical force. Viewing the evidence in the light most favorable to Teal, which our standard of review of a summary judgment requires, ..., we hold that a fair-minded person could reasonably infer from Teal's evidence that Teal believed that Thomas was joining – or was about to join – Pallante's attack on Teal and was about to use the same level of physical force against Teal that Pallante was using." Ms. **15-16.

The Court rejects Thomas's argument that Teal could not have acted in self-defense against Thomas because Teal testified he was attempting to shoot Pallante. The Court explains "[t]he entirety of Teal's testimony indicated that he feared both Pallante and Thomas, that he possessed limited ability to aim and maneuver, and that he fired his weapon in the general upward direction of both men with the goal of 'get[ting] them off of [him],' i.e., to stop the use of deadly physical force against him." Ms. *17.

➲ DISMISSAL WITH PREJUDICE – VIOLATION OF DUE PROCESS

Tompkins v. Wal-Mart Associates, Inc., [Ms. 2200051, Apr. 9, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021). In this per curiam opinion, the court (Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur; Fridy, J., recuses) concludes a Montgomery Circuit Court's order dismissing a workers' compensation case with prejudice violated the claimant's right to due process as provided in *Hosey v. Lowery*, 911 So. 2d 15 (Ala. Civ. App. 2005) because the record did not reflect that the claimant was given notice and an opportunity to participate in a virtual hearing contrary to the circuit court's conclusion that the claimant had willfully failed to prosecute his action. The record revealed a history of the claimant firing counsel, and the pendency of a motion to withdraw filed by his present counsel of record, so when the claimant himself failed to appear during the virtual hearing, it could not be concluded that the failure to prosecute was willful as required to justify the severe sanction of dismissal with prejudice.

The opinion notes the tension which can arise when a party is represented by counsel but attempts to participate personally in ongoing litigation:

> Section 10 of the Alabama Constitution of 1901 provides that a person has the right, "by himself or counsel," to prosecute or defend "any civil cause to which he is a party" (emphasis added). However, "the cases are ... in substantial agreement with respect to the ... proposition that where a [nonattorney] party ... does appear by counsel he has no right to conduct personally, or to help counsel conduct, the litigation." H.C. Lind, Annotation, Right of Litigant in Civil Action Either to Assistance of Counsel Where Appearing Pro Se or to Assist Counsel Where Represented, 67 A.L.R.2d 1102, § 3 (1959).

Ms. *9, n. 3. The opinion reiterates the essential requirements of due process as set forth in *Hosey v. Lowery*:

> The plaintiffs argue that they were denied due process by the trial court's *sua sponte* dismissal of all claims against Lowery as a sanction for the plaintiffs' counsel's failure to attend the October 14 hearing. The constitutional requirement of due process of law means 'notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing.' *Ex parte Rice*, 265 Ala. 454, 458, 92 So. 2d 16, 19 (1957). See also *Kingvision Pay-Per-View, Ltd. v. Ayers*, 886 So. 2d 45, 54 (Ala. 2003). Our Supreme Court has also noted that due process
>
> > 'contemplates the rudimentary requirements of fair play, which include a fair and open hearing ... with notice and the opportunity to present evidence and argument ... and information as to the claims of the opposing party, with reasonable opportunity to controvert them.'
>
> *Ex parte Weeks*, 611 So. 2d 259, 261 (Ala. 1992).
>
> This state 'has a long-established and compelling policy objective of affording litigants a trial on the merits whenever possible.' *Cincinnati Ins. Co. v. Synergy Gas, Inc.*, 585 So. 2d 822, 827 (Ala. 1991). A trial court has the discretion and inherent power to dismiss claims for various reasons, including failure to prosecute and failure to attend a hearing, but 'since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations.' *Burdeshaw v. White*, 585 So. 2d 842, 848 (Ala. 1991) (quoting *Smith v. Wilcox County Bd. of Educ.*, 365 So. 2d 659, 661 (Ala. 1978)).
>
> * * *
>
> Although we do not condone an unexcused failure to attend a hearing, we do not find that the circumstances presented here were extreme and we do not believe that the sanction was proportionate to the offense. Compare *Burdeshaw*, 585 So. 2d at 849 (unexcused failure to appear at a hearing and a 10-month delay in attempting to schedule another hearing was not sufficient to warrant dismissal); *Brown v. Brown*, 896 So. 2d 573 (Ala. Civ. App. 2004) (reversing a dismissal that was based on an inmate's failure to attend a pretrial conference); and *Miller v. Miller*, 618 So. 2d 728 (Ala. Civ. App. 1993) (reversing a dismissal based on counsel's failure to attend hearing; counsel was 30 minutes late).

Ms. **16-17, quoting *Hosey v. Lowery*, 911 So. 2d at 17-18.

➲ ALA. R. CIV. P. 54(B) CERTIFICATION REVERSED

Rowland v. Sparkman, Shepard & Morris, P.C., [Ms. 2200092, Apr. 9, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021). The

court unanimously (Moore, J.; Thompson, P.J., and Edwards, Hanson, and Fridy, JJ., concur) dismisses an appeal from a summary judgment order entered by the Madison Circuit Court and certified as final within the meaning of Ala. R. Civ. P. 54(b). Reviewing case law on the propriety of Rule 54(b) certifications including *Baker v. Bennett*, 644 So. 2d 901, 903 (Ala. 1994) (Rule 54(b) certification should be entered only in exceptional cases and should not be entered routinely); *Branch v. SouthTrust Bank of Dothan, N.A.*, 514 So. 2d 1373, 1374 (Ala. 1987) (a Rule 54(b) certification should not be entered if the issues relating to the claim being certified and the issues relating to a claim that will remain pending in the trial court are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results); and *Howard v. Allstate Insurance Co.*, 9 So. 3d 1213, 1215 (Ala. 2008) (a summary judgment in favor of one or more, but fewer than all, of the defendants should not be certified as final if the issue or issues relating to the claim upon which the summary judgment was granted and the issue or issues relating to a claim that will remain pending in the trial court are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results), the court concludes the Madison Circuit Court erred in granting Rule 54(b) certification in this case because the remaining claims against all of the remaining defendants should be adjudicated before the Court of Civil Appeals engages in appellate review of only part of the case as those claims are so closely intertwined that the possibility of duplicative appeals involving the same facts is likely and because the parties to the remaining claims could be prejudiced by a premature appellate decision on the merits of the present claim. Accordingly, because the circuit court improperly certified a non-final order as a final judgment, the appeal from that judgment should be dismissed based on a lack of appellate jurisdiction pursuant to *Smith v. Slack Alost Dev. Servs. of Alabama, LLC*, 32 So. 3d 556 (Ala. 2009) (noting that an appellate court should not review a matter on appeal when the same matter might affect the pending claims against the remaining parties). Ms. **11-12.

PRESUMPTION OF CORRECTNESS AFFORDED ADMINISTRATIVE AGENCY DETERMINATIONS AND JUDICIAL REVIEW

Alabama Department of Environmental Management v. Wynlake Development, LLC, [Ms. 2190999, Apr. 9, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021). The court, in a plurality opinion (Thompson, P.J.; Hanson, J., concurs; Moore and Edwards, JJ., concur in the result; and Fridy, J., recuses) reverses a judgment of the Jefferson Circuit Court which had vacated fines imposed against a subdivision developer for violations of best management practices imposed pursuant to the National Pollutant Discharge Elimination System as required by the Alabama Department of Environmental Management. The court concludes the Jefferson Circuit Court erred in concluding the fines should be vacated because the circuit court's ruling imposed evidentiary burdens exceeding its authority when engaging in judicial review of an agency determination under the Alabama Administrative Procedure Act, § 41-22-1 *et seq.*, Ala. Code 1975. Finding that the record reflected that ADEM's administrative determination to impose the fines was supported by evidence it had considered each of the factors specified in § 22-22A-5 (18)c, the court concludes the circuit court erred by substituting its judgment for that of the agency as to the weight of the evidence in violation of the principle that a presumption of correctness is afforded to decisions of administrative agencies because of their recognized expertise in specialized areas. Ms. **14-16. The opinion notes

> The prohibition against a trial court's or an appellate court's substituting its own judgment for that of the administrative agency " ' "holds true even in cases where the testimony is generalized, the evidence is meager, and reasonable minds might differ as to the correct result." ' " *ABC Coke v. GASP*, 233 So. 3d 999, 1004 (Ala. Civ. App. 2016) (quoting *Colonial Mgmt. Grp., L.P. v. State Health Planning & Dev. Agency*, 853 So. 2d 972, 974-75 (Ala. Civ. App. 2002), quoting in turn *Health Care Auth. of Huntsville v. State Health Planning Agency*, 549 So. 2d 973, 975 (Ala. Civ. App. 1989)).

Ms. **16-17.

Because the record contains evidence supporting the administrative agency's decisions, those decisions are to be afforded a presumption of correctness and the trial court accordingly erred to the extent it determined there was a lack of evidence supporting the agency's imposition of an administrative fine after consideration of the factors set forth in § 22-22A-5(19)c. Ms. *17:

> In essence, in reaching its judgment, the trial court has imposed on ADEM a requirement that is not set forth in § 22-22A-5(18)c., i.e., that of demonstrating a specific method pursuant to which it calculated the penalty against Wynlake. However, courts may not insert additional language or requirements into a statute. *Bassie v. Obstetrics & Gynecology Assocs. of Nw. Alabama, P.C.*, 828 So. 2d 280, 284 (Ala. 2002). See also *Pace v. Armstrong World Indus., Inc.*, 578 So. 2d 281, 284 (Ala. 1991) (explaining that courts may not insert language into a statute). "'This [c]ourt's role is not to displace the legislature by amending statutes to make them express what we think the legislature should have done. Nor is it this [c]ourt's role to assume the legislative prerogative to correct defective legislation or amended statutes.'" *Grimes v. Alfa Mut. Ins. Co.*, 227 So. 3d 475, 488-89 (Ala. 2017) (quoting *Siegelman v. Chase Manhattan Bank (USA), Nat'l Ass'n*, 575 So. 2d 1041, 1051 (Ala. 1991)). See also *Ex parte Christopher*, 145 So. 3d 60, 66-67 (Ala. 2013) (discussing the caselaw prohibiting courts from interpreting a statute so as to add language not included in that statute by the legislature).

Ms. **19-20.

CIRCUIT COURT HAS JURISDICTION TO CONSIDER RULE 37(A)(4) MOTION FOR SANCTIONS FILED MORE THAN 30 DAYS AFTER ENTRY OF FINAL JUDGMENT

Duncan v. Duncan, [Ms. 2190594, Apr. 16, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021). The court (Fridy, J.; Thompson,

P.J., and Moore, Edwards, and Hanson, JJ., concur) reverses the Montgomery Circuit Court's order awarding husband attorney's fees against the wife as a discovery sanction. Although the husband's Rule 37(a)(4) motion for sanctions was filed nearly six months after entry of the divorce judgment, the court concludes the circuit court retained jurisdiction to consider the husband's Rule 37 motion. The court explains "[b]ased on our supreme court's holding in *SMM Gulf Coast [LLC, v. Dade Capital Corp.*, 311 So. 3d 736 (Ala. 2020)] and what we view as the better reasoned authorities from other jurisdictions …, we hold that the husband's motion seeking attorney's fees under Rule 37(a)(4) for work performed in connection with the parties' discovery disputes falls under the general rule that permits a trial court to entertain such a motion after the entry of a final judgment." Ms. *15.

However, the court reverses the award of sanctions to the husband because

> The trial court did not explicitly "grant" the wife's motion to compel; however, its directives to the husband from the bench and in the June 2018 order compelled the husband to respond to the discovery that the wife had propounded to him, as the wife had sought in her motion to compel. The husband clearly did not prevail against the wife in their discovery disputes; therefore, he was not entitled to attorney's fees pursuant to Rule 37(a)(4). Accordingly, the trial court abused its discretion in awarding the husband attorney's fees, and its order of March 18, 2020, is reversed.

Ms. **17-18.

SEXUAL ASSAULT VICTIM'S SUICIDE IS NOT AS A MATTER OF LAW A SUPERSEDING CAUSE

Rondini v. Bunn, [Ms. 1190439, May 7, 2021], ___ So. 3d ___ (Ala. 2021). Answering a certified question from the United States District Court for the Northern District of Alabama, the Court (Mitchell, J.; Bolin, Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur; Parker, C.J., concurs in part and concurs in the result; Sellers, J., concurs in the result) holds that the suicide of a victim of an intentional sexual assault is not, as a matter of law, an intervening cause which cuts off liability of the assailant for the wrongful death of the victim.

In resolving the certified question, the Court first notes that the federal court had held "'a reasonable juror could conclude that [Bunn's] conduct was the cause-in-fact of Megan's suicide' but that 'proximate causation is less certain.' *Rondini v. Bunn*, 434 F.Supp.3d 1266, 1278 (N.D. Ala. 2020)." Ms. *6. The Court holds that "[w]hen a person commits suicide after an alleged sexual assault, that act does not as a matter of law break the chain of causation so as to absolve the alleged assailant of liability," Ms. *11, and explains

> … [T]raditional negligence concepts like foreseeability and proximate cause, which form the backbone of the negligence analysis in *Gilmore* [*v. Shell Oil Co.*, 613 So. 2d 1272 (Ala. 1993)], have a more limited application in intentional-tort cases. See *Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortg. Co.*, 390 So. 2d 601, 607 (Ala. 1980) (explaining that "in cases of intentional or aggravated acts there is an extended liability and the rules of proximate causation are more liberally applied than would be justified in negligence cases"); see also W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 9 at 40 (5th ed. 1984) (explaining that in most cases involving intentional torts "[t]he defendant's liability for the resulting harm extends ... to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim."

Ms. *12.

Clarifying the narrow scope of its holding, the Court observes "the question certified by the federal court concerns an alleged sexual assault. To answer that question, we need declare only that the suicide of a person who is the victim of one specific intentional tort – sexual assault – is not a superseding cause that will absolve the alleged assailant of liability as a matter of law. Whether other intentional torts stemming from a defendant's extreme and outrageous conduct that causes severe emotional distress to the victim might also support a wrongful-death action after a suicide is a question for another day." Ms. *15.

STATE-AGENT IMMUNITY

Shell v. Butcher and Payne, [Ms. 1200097, May 14, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Sellers, J.; Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur) affirms the Montgomery Circuit Court's summary judgment dismissing claims for the wrongful death of Annie Ruth Peterson against Montgomery municipal jail employees Butcher and Payne. Peterson was arrested on suspicion of DUI but was in fact suffering a hemorrhagic stroke. Ms. *2. Butcher and Payne were the officers who booked and processed Peterson following her arrest. Ms. **2-3.

The Court first rejects the plaintiff's contention that the denial of an earlier petition for the writ of mandamus was law-of-the-case denying state-agent immunity. The Court explains

> When this Court summarily denies such a petition without ordering a response, that act of denial neither amounts to a ruling on the merits of the assertions in the petition nor affirms the determination of the trial court such that it becomes the law of the case. Contrary to the estate's claim, this Court's February 21, 2018, order denying the petition for a writ of mandamus had no effect on the underlying litigation, but merely returned the parties to the status quo ante as if no petition had been filed. See, e.g., *Ex parte Shelton*, 814 So. 2d 251, 255 (Ala. 2001).

Ms. *7.

On the merits, the Court first notes that "[i]t is undisputed that Butcher and Payne were discharging duties pursuant to Montgomery municipal-jail policies and procedures and, therefore, generally would be entitled to State-agent immunity. The issue for our resolution is whether the estate met its burden of showing that Butcher and Payne failed to follow those policies and procedures and, thus, acted beyond their authority so as to become liable for their respective actions." Ms. *10. The Court affirms the summary judgment and concludes that the policies relied upon by the plaintiff were not detailed rules or checklists that required Butcher or Payne to have Peterson evaluated by a nurse. Ms. **15-16.

RECENT CIVIL DECISIONS

ACTION SEEKING REFUND OF OVERPAYMENT OF RETAIL LIQUOR TAXES BARRED BY SOVEREIGN IMMUNITY

Reagan v. Alabama Alcoholic Beverage Control Board, et al., [Ms. 1200213, May 14, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Sellers, J.; Bolin, Bryan, Mendheim, and Stewart, JJ., concur; Shaw and Mitchell, JJ., concur in the result; Parker, C.J., and Wise, J., concur in the result in part and dissent in part) affirms the Montgomery Circuit Court's summary judgment dismissing claims alleging on behalf of a class of taxpayers overpayment of taxes on retail liquor sales at ABC stores. The Court limits its review to the original complaint because although "Reagan requested leave of the trial court to amend his complaint, ..., the trial court dismissed the action without ruling on Reagan's motion for leave to amend, thus effectively denying it. Reagan made no attempt to establish good cause for his delay or to otherwise establish good cause for allowing the amendment. He has not demonstrated on appeal that the trial court erred in refusing to grant him leave to amend." Ms. *6.

The Court concludes that sovereign immunity barred Reagan's claims because "like the plaintiffs in *Patterson* [*v. Gladwin Corp.*, 835 So. 2d 137 (Ala. 2002)], Reagan seeks to represent a class of taxpayers in order to pursue refunds of taxes paid to the State. Thus, they asserted, if Reagan prevails, this action clearly will affect the financial status of the treasury and is therefore barred by sovereign immunity." Ms. *10. The Court noted that the Alabama Taxpayers' Bill Of Rights provides a means by which to seek tax refunds but that Reagan failed to avail himself of that procedure. Ms. *9, n. 3. While acknowledging that sovereign immunity does not necessarily bar suits for declaratory judgment, Ms. *10, the Court concludes that "Reagan [does not] clearly address the defendants' argument to the trial court that, even though his complaint requests a declaratory judgment, the 'true nature' of his action is one for the recovery of a monetary award against the State. He does not cite or discuss *Lyons* [*v. River Road Construction, Inc.*, 858 So. 2d 257 (Ala. 2003)], on which the defendants relied in arguing that Reagan essentially has recast an action seeking a money judgment as a declaratory-judgment action." Ms. *15.

PERSONAL JURISDICTION NOT ESTABLISHED BY ALABAMA CONTACTS OF INDEPENDENT CONTRACTOR

Ex parte TitleMax of Georgia, Inc., et al., [Ms. 1200128, May 21, 2021], ___ So. 3d ___ (Ala. 2021). On mandamus review, the Court (Bolin, J.; Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, and Stewart, JJ., concur) determines the Talladega Circuit Court lacked personal jurisdiction over TitleMax of Georgia, Inc. and its affiliate TMX Finance, LLC in an action filed by Billingsley alleging wrongful repossession of a vehicle. Phallon Billingsley, an Alabama resident, had purchased the vehicle in Georgia and received a certificate of good title. Ms. *2. Following a "perceived" default on the "pawn ticket" agreement executed by a former owner of the vehicle, TitleMax of Georgia authorized a vehicle-repossession company to repossess the vehicle when it was located in Virginia. Ms. **2-3.

The Court first rejects Billingsley's contention that TMX Finance was subject to general jurisdiction in Alabama and explains

> We cannot equate TMX's control of the Web site that its subsidiary, TitleMax of Alabama, used in its business operations with TMX's control of TitleMax of Alabama, for the purpose of determining whether the trial court had general personal jurisdiction over TMX. The evidence before the trial court did not show that TMX controlled the internal business operations and decision-making of TitleMax of Alabama such that TitleMax of Alabama's operations in Alabama should be imputed to TMX for the purpose of determining whether the trial court had general personal jurisdiction over TMX.

Ms. **16-17.

The Court also rejects judicial estoppel as a basis to find that TMX was subject to personal jurisdiction, and reasons "[w]e cannot say that TMX's waiving a challenge to personal jurisdiction in the Etowah Circuit Court [workers' compensation] case is inconsistent with its position in this case when the circumstances out of which the Etowah Circuit Court case arose are indisputably distinct from those that form the basis of this action." Ms. **19-20.

The Court also rejects Billingsley's reliance on specific jurisdiction arising from the activities of the companies which stored and then transported the repossessed vehicle back to Alabama where it was ultimately returned to Billingsley with extensive damage. The Court concludes "there is no evidence to support a finding that an agency relationship exists between either TitleMax of Georgia or TMX and IAA or Attention to Detail. There is no evidence suggesting that either TitleMax of Georgia or TMX controlled the means or methods of IAA's storage of the vehicle or Attention to Detail's transportation of the vehicle. Instead, it appears that IAA and Attention to Detail are independent contractors." Ms. **22-23. The Court acknowledges the recent specific jurisdiction decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. ___, 141 S. Ct. 1017 (2021), but notes "[t]he present case is distinguishable from *Ford Motor* because *Ford Motor* did not involve the issue of agency." Ms. **23-24, n. 2.

CLAIMS RELATED TO OPIOID EPIDEMIC TIME BARRED

Ex parte Abbott Laboratories, [Ms. 1191001, May 28, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Mendheim, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur; Mitchell, J., recuses) issues a writ of mandamus to the Mobile Circuit Court directing dismissal of the Mobile County Health Department's ("MCHD") public nuisance claims against Abbott Labs arising from the opioid epidemic. The Court concludes from the face of the complaint that the claims are barred by the statute of limitations. The Court rejects MCHD's argument based on a continuing public nuisance because the "allegations against Abbott in the complaint do not mention conduct of any kind by Abbott after 2006. This is important because there must be a connection between the defendant's actions and the ongoing tort." Ms. *21. The Court explains "the fact that the alleged opioid epidemic itself was ongoing at the time [MCHD] filed its original complaint does not mean that Abbott's conduct

relation to the epidemic is not subject to e statute of limitations. As the Court explained in *Payton* [*v. Monsanto Co.*, 801 So. d 829, 836 (Ala. 2001)]: 'Alabama law does ot recognize a continuing tort in instances here there has been a single act followed y multiple consequences.'" Ms. *23.

The Court also rejects MCHD's argument that its claims are saved by tolling nd explains the "complaint lacks any of the pecificity required by Rule 9(b), Ala. R. Civ. ., for allegations of fraud against Abbott. Without such allegations, [MCHD] cannot meet its burden of demonstrating that ts claims fall within the savings clause of § 6-2-3. Therefore, the applicable statutes f limitations on [MCHD's] claims against Abbott are not tolled by the existence of fraud." Ms. *27. Finally, the Court notes that "'plaintiff's ignorance of a tort or injury does not postpone the running of the statute of limitations until that tort is discovered.' *Payne v. Alabama Cemetery Ass'n*, 413 So. 2d 1067, 1072 (Ala. 1982). See, e.g., *Kelley v. Shropshire*,199 Ala. 602, 605, 75 So. 291, 292 (1917) (same)." Ms. *31.

ARBITRABILITY

Performance Builders, LLC, et al. v. Lopas, [Ms. 1190977, May 28, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Mendheim, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur) reverses the Etowah Circuit Court's denial of a motion to compel arbitration of the Lopases' claims arising from a home inspection, appraisal and sale. The Court concludes that "the movants have met their burden of establishing the existence of an agreement containing an arbitration provision between the parties and that that agreement involves a transaction affecting interstate commerce." Ms. **19-20. The Court declines to reach the merits of the Lopases' argument that enforcing the arbitration agreement would violate § 8-1-40(2), Ala. Code 1975, which provides that "'[s]pecific performance cannot be enforced against a party to a contract. ... [i]f it is not, as to him, just and reasonable,'" Ms. *13. The Court explains "[b]ased on this Court's analysis in *Lewis* [*v. Conseco Finance Corp.*, 848 So. 2d 920 (Ala. 2002)], it is apparent that a challenge to a contract under § 8-1-40 is a challenge to the enforceability of the contract as a whole, which is an issue of arbitrability. Pursuant to the terms of the arbitration clause in the inspection agreement, issues of arbitrability are the responsibility of an arbitrator, not this Court, to decide." Ms. *19.

SINGLE-SUBJECT RULE OF § 45, ALA. CONST. 1901

Clay County Animal Shelter, Inc. v. Clay County Commission, et al., [Ms. 1190947, May 28, 2021], ___ So. 3d ___ (Ala. 2021). In a plurality opinion, (Stewart, J.; Wise and Mitchell, JJ., concur; Parker, C.J., concurs specially; Shaw and Bryan, JJ., concur in the result; Bolin, Sellers, and Mendheim, JJ., dissent), the Court reverses the Clay Circuit Court's judgment declaring Act No. 2018-432 relating to the Clay County Animal Shelter violates § 46 of the Alabama Constitution of 1901. The parties challenging the Act alleged, *inter alia*, that it violates § 45 because it "contains more than one subject because it both alters an existing earmark and simultaneously appropriates funds to the animal shelter." Ms. *11.

The opinion notes that "[c]onsistent with the presumption favoring the validity and constitutionality of legislation, in reviewing whether legislation violates the single-subject rule, this Court will accord the legislation a liberal interpretation without requiring hypercritical exactness or strict enforcement 'in such manner as to cripple legislation.'" Ms. *16, quoting *Knight v. West Alabama Env't. Improvement Auth.*, 287 Ala. 15, 22, 246 So. 2d 903, 908 (1971)(some internal quotation marks omitted). The opinion explains that "[t]he single-subject rule encompasses two primary requirements of legislation. Specifically, the legislation must be limited to a single subject and the single subject must be clearly expressed in the title of the legislation." Ms. *17.

The opinion concludes "'[t]he title need not be an index or catalog of every power bestowed in the act, nor of every effect of the act.' *Lane* [*v. Gurley Oil Co.*], 341 So. 2d [712, 715 (Ala. 1977)], (citing Opinion of the Justices No.138, 262 Ala. 345, 81 So. 2d 277 (1955)). Thus, Act No. 2018-432 satisfies the two-part test for establishing whether legislation complies with § 45, see *Bagby Elevator & Elec.* [*Co. v. McBride*, 292 Ala. 191, 194, 291 So. 2d 306, 308 (1974)] and the act fulfills the above-stated objectives of the single-subject rule." Ms. *32.

FICTITIOUS PARTIES PRACTICE – CO-EMPLOYEE LIABILITY

Means v. Glover, et al., [Ms. 1190660, June 4, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Mitchell, J.; Parker, C.J., and Wise and Bryan, JJ., concur; Bolin and Mitchell, JJ., concur specially; Sellers and Stewart, JJ., concur in the result; Shaw and Mendheim, JJ., dissent) affirms the Pike Circuit Court's summary judgment dismissing Means's willful misconduct claims against co-employees. Means was injured on July 8, 2015 when molten lead splashed from a kettle as Means poured sodium hydroxide into the kettle using a forklift. The use of sodium hydroxide in the processing of aluminum dross was a new process at Sanders Lead Company. Ms. **2-3.

On September 27, 2018, Means substituted a number of defendants for fictitious parties named in his original complaint filed on June 2, 2017. Ms. *9. As to the substituted defendants, the Court explains

> "In order to avoid the bar of a statute of limitations when a plaintiff amends a complaint to identify a fictitiously named defendant on the original complaint, the plaintiff: (1) must have adequately described the fictitiously named defendant in the original complaint; (2) must have stated a cause of action against the fictitiously named defendant in the body of the original complaint; (3) must have been ignorant of the true identity of the fictitiously named defendant; and (4) must have used due diligence in attempting to discover the true identity of the fictitiously named defendant. *Ex parte Tate & Lyle Sucralose* [*,Inc.*], 81 So. 3d [1217,] 1220-21 [(Ala. 2011)]."

Ms. *17, quoting *Ex parte Noland Hospital Montgomery, LLC*, 127 So. 3d 1160, 1167 (Ala. 2012). The Court holds that Means failed to exercise due diligence in identifying the substituted defendants because "the OSHA report that Means received no later than August 2016 contains the accident notice that Sanders Lead submitted to OSHA following his accident. That notice expressly states that the process Means was undertaking when he was injured 'was developed with a metallurgist; Vice President of Operations, Bart Sanders; Kelley Grenon and staff from the Casting and Alloying

Department.'" Ms. *20.

The Court affirms the summary judgment dismissing Means's timely-filed claims against his co-employees Glover and Brown. The Court reiterates that willful misconduct claims under § 25-5-11(c)(1) require the injured employee to show

> [E]ither 1) "the reason why the co-employee defendant would want to intentionally injure the plaintiff, or someone else," or 2) "that a reasonable man in the position of the defendant would have known that a particular result (i.e., injury or death) was substantially certain to follow from his actions." *Reed v. Branson*, 527 So. 2d 102, 120 (Ala. 1988)."

Ms. *25. Means failed to identify "any evidence in the record that would support a finding that either Glover or Brown would have known that his injury was substantially certain to follow any course of conduct they consciously pursued, see § 25-5-11(c)(1), related to Sanders Lead's processing of aluminum dross." Ms. *27.

The Court also affirms the summary judgment as to the claim involving failure to install a safety windshield on the forklift Sanders was operating. The evidence showed that Sanders Lead installed aftermarket safety windshields on certain of its forklifts but did not install a windshield on the forklift Means was operating when he was injured. Ms. *28. However, the Court explains "Section 25-5-11(c)(2) does not provide an 'injured employee with a cause of action against a co-employee simply because that co-employee did not install a safety device that was available. Rather, § 25-5-11(c)(2) requires the co-employee to have willfully and intentionally removed a manufacturer-provided safety device before liability can be found." Ms. *30.

Justice Shaw's dissent, joined by Justice Mendheim, concludes that Means's appeal was untimely. Ms. **38-51.

UNINSURED MOTORIST INSURANCE COVERAGE

Jay v. United Serv's Auto. Ass'n, [Ms. 1190941, June 18, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Stewart, J.; Parker, C.J., and Bolin, Bryan, and Sellers, JJ., concur; Wise, J. recuses) affirms an order granting summary judgment in favor of an uninsured motorist insurer because the claimant was not a "covered person" as defined by the policy. The Court reiterates the familiar rules governing construction of insurance policies.

> "A contract of insurance, like other contracts, is governed by the general rules of contracts. *Pate v. Rollison Logging Equip., Inc.*, 628 So. 2d 337 (Ala. 1993). Insurance companies are entitled to have their policy contract enforced as written. *Gregory v. Western World Ins. Co.*, 481 So. 2d 878 (Ala. 1985). 'Insurance contracts, like other contracts, are construed so as to give effect to the intention of the parties, and, to determine this intent, a court must examine more than an isolated sentence or term; it must read each phrase in the context of all other provisions.' *Attorneys Ins. Mut. of Alabama, Inc. v. Smith, Blocker & Lowther, P.C.*, 703 So. 2d 866, 870 (Ala. 1996).
>
> "If an insurance policy is clear and unambiguous in its terms, then there is no question of interpretation or construction. *American & Foreign Ins. Co. v. Tee Jays Mfg. Co.*, 699 So. 2d 1226 (Ala. 1997). The fact that the parties interpret the insurance policy differently does not make the insurance policy ambiguous. *Tate v. Allstate Ins. Co.*, 692 So. 2d 822 (Ala. 1997). While ambiguities or uncertainties in an insurance policy should be resolved against the insurer, ambiguities are not to be inserted by strained or twisted reasoning. *Kelley v. Royal Globe Ins. Co.*, 349 So. 2d 561 (Ala. 1977). Where the parties disagree on whether the language in an insurance contract is ambiguous, a court should construe [the] language according to the meaning that a person of ordinary intelligence would reasonably give it. *Western World Ins. Co. v. City of Tuscumbia*, 612 So. 2d 1159 (Ala. 1992)."

Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co., 817 So. 2d 687, 691-92 (Ala. 2001). Furthermore, "[w]here an insurance policy defines certain words or phrases, a court must defer to the definition provided by the policy. *St. Paul Fire & Marine Ins. Co. v. Edge Mem'l Hosp.*, 584 So. 2d 1316 (Ala. 1991)." *Id.* at 692.

Ms. **6-7. The Court rejects the claimant's contention that he was a "covered person," because his spouse (the policyholder's daughter) was provided with a proof-of-insurance card listing her as a "named insured." Because the policy unambiguously listed the claimant's spouse only as an "operator" on the declarations page rather than as the "insured," the description of the spouse as "named insured" on the insured's card did not create an ambiguity with regard to the true "named insured" defined within the policy.

ALA. R. CIV. P. 19(A) & JOINDER OF INDISPENSABLE PARTIES

Randolph County Commission v. Landrum, [Ms. 2190961, 2190971, June 18, 2021], ___ So. 3d ___ (Ala. Civ. App. 2021). The court (Edwards, J.; Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur) reverses the judgment of the Randolph Circuit Court declaring, after *ore tenus* proceedings, that an unimproved road located within Randolph County was a public, county road. The court concludes the circuit court erred by entering the judgment without first ensuring, in conformance with Ala. Code § 43-2-830(a) that all of an adjoining deceased real property owner's heirs were joined as necessary parties in conformance with Ala. R. Civ. P. 19. Ms. **13-14. Citing [Ms. **13-14] *Allbritton v. Dawkins*, 19 So. 3d 241, 243-44 (Ala. Civ. App. 2009), [Ms. *15] *Darby v. Presley*, [Ms. 2190403, Nov. 20, 2020] __ So. 3d __, __ (Ala. Civ. App. 2020), and [Ms. *15] *Hall v. Reynolds*, 60 So. 3d 927, 931 (Ala. Civ. App. 2010), the court concludes "[b]ased on our precedents and Rule 19, each heir of [the deceased adjoining property owner] who inherited an interest in the property on which Road 968 is located, or such heirs' successor in interest to the extent an heir may have subsequently died or transferred his or her interest in the property at issue, must be made a party to [this] action, if feasible."

ALA. R. CIV. P. 56(F), PIERCING THE CORPORATE VEIL AND BREACH OF CONTRACT DAMAGES

Shorter Brothers, Inc. v. Vectus 3, Inc., [Ms. 1190876, 1190903, June 25, 2021] __ So. 3d __ (Ala. 2021). The Court (Mitchell, J.; Parker, C.J., and Shaw and Bryan, JJ., concur; Mendheim, J., concurs in the result) affirms judgments entered by the Jefferson Circuit Court in favor of Vectus 3, Inc. and against Shorter Brothers, Inc. in a breach of contract action whereby Shorter Brothers allegedly failed to pay for its purchase of Vectus's operation of FedEx ground delivery routes and nine delivery trucks.

The Court first concludes the circuit court did not err in denying Shorter Brothers's Ala. R. Civ. P. 56(f) motion which requested the court to deny a motion for summary judgment and allow them the "opportunity to finish discovery." Ms. **4-5. The Court concludes there was no error, because at the time Shorter Brothers filed its Rule 56(f) motion, it had not served or conducted any discovery and had disregarded its own discovery production obligations as the circuit court had granted two motions to compel and one motion for sanctions filed by Vectus. "Whether to grant a continuance under Rule 56(f) is 'within the sound discretion of the trial court.'" Ms. *7, quoting *Rosser v. AAMCO Transmissions, Inc.*, 923 So. 2d 294, 300 (Ala. 2005). The Court reiterates that "[i]f the party opposing summary judgment 'properly establishes before the trial court that unresponded-to discovery is crucial to the party's case, it is error for the trial judge to enter a summary judgment before the discovery has been supplied.' *Id.* But '[o]nly rarely will an appellate court find that the trial court has exceeded its discretion in not allowing a requested continuance for the purpose of conducting further discovery.'" Ms. *7, quoting *Rosser*, 923 So. 2d at 301.

The Court also concludes the circuit court did not err by piercing the corporate veil. Citing *First Health, Inc. v. Blanton*, 585 So. 2d 1331, 1334 (Ala. 1991), the Court notes (Ms. *11) "[p]iercing the corporate veil is not a power that is lightly exercised" but "... may be appropriate when the corporate entity is (1) undercapitalized, (2) formed or operated with a fraudulent purpose, or (3) operated 'as an instrumentality or alter ego' of its shareholders." Here, Vectus established that Shorter Brothers was operated as an alter ego of its owners because its principals did not observe the corporate form, maintained inadequate corporate records (i.e., failed to produce in response to discovery requests any by-laws, operating agreement, shareholder agreement, corporate minutes, or other documents demonstrating a separate corporate existence) "had little, if any, financial records at that time" and "produced no information about employee numbers, roles, or duties." Ms. **12-13, citing *Econ Mktg., Inc. v. Leisure Am. Resorts, Inc.*, 664 So. 2d 869, 870-71 (Ala. 1994) (holding the trial court erred by not piercing corporate veil when entity failed to keep complete and correct records of all transactions, minutes of the proceedings of its shareholders and board directors and where the financial records, books, or minutes of the meetings of the directors could not be located).

With respect to Vectus's cross appeal contending the circuit court erred in awarding insufficient damages, the Court notes (Ms. *16) that "[d]amages for a breach of contract 'should return the injured party to the position he would have been in had the contract been fully performed.'" *Garrett v. Sun Plaza Dev. Co.*, 580 So. 2d 1317, 1320 (Ala. 1991). The sum awarded "is within the discretion of the fact-finder and is presumed to be correct." Ms. *17, quoting *Tri-Tube, Inc. v. O E M Components, Inc.*, 672 So. 2d 1303, 1306 (Ala. Civ. App. 1995). Parsing through Vectus's damages calculations (Ms. **17-20), the Court concludes there were apparent defects in the calculations such that "we cannot say that the trial court exceeded its discretion in ignoring [the defects] or that Vectus has overcome the presumption that the trial court's damages award is correct." Ms. *19-20, citing *Tri-Tube*, 672 So. 2d at 1306.

FINALITY OF JUDGMENT & DISMISSAL OF APPEAL

Cathedral of Faith Baptist Church, Inc. v. Moulton, et al., [Ms. 1200062, June 25, 2021] __ So. 3d __ (Ala. 2021). The Court (Bolin, J.; Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur) dismisses an appeal from a judgment of the Jefferson Circuit Court purporting to dismiss forgery, fraud, conspiracy, conversion, and unjust enrichment claims on the basis of statute of limitations defenses, finding the circuit court was without authority to *sua sponte* assert and apply a statute of limitations defense for Defendants against whom default judgments have been entered for failure to appear and defend in the action when those default judgments were non-final because the circuit court had expressly reserved the right to entertain Plaintiff's claim for damages at a later date and the defaulting Defendants had not raised the statutes of limitations as affirmative defenses in responsive pleadings. Citing (Ms. **18-20) *Waite v. Waite*, 891 So. 2d 341, 343-44 (Ala. Civ. App. 2004), the Court reiterates the principle that a circuit court's authority to *sua sponte* raise an affirmative defense on behalf of a defendant and dismiss an action based on that defense is limited to matters of *jurisdiction*:

> "Other courts ... have concluded that a trial court may dismiss an action on its own motion, but only if the basis for that dismissal is jurisdictional. See *People v. Matulis*, 117 Ill. App. 3d 876, 454 N.E.2d 62, 73 Ill. Dec. 318 (1983) (the trial court erred in dismissing, *sua sponte*, the action because the defect was not jurisdictional). See also *Diamond Nat'l Corp. v. Dwelle*, 164 Conn. 540, 325 A.2d 269 (1973); *Lease Partners Corp. v. R & J Pharmacies, Inc.*, 329 Ill. App. 3d 69, 768 N.E.2d 54, 263 Ill. Dec. 294 (2002); *Adams v. Inman*, 892 S.W.2d 651 (Mo. Ct. App.1994); and *Neal v. Maniglia* (No. 75566, April 6, 2000) (Ohio Ct. App. 2000) (not published in Ohio Appellate Reports or in Northeastern Reporter). In two of those cases, the courts determined that the statute of limitations served as a jurisdictional basis that supported affirming a trial court's *sua sponte* dismissal of an action. *Diamond Nat'l Corp. v. Dwelle*, *supra*; *Neal v. Maniglia*, *supra*. However, in several of the other cases, the courts concluded that, although a trial court is permitted to dismiss an action based on a lack of jurisdiction, the statute of limitations is not a proper basis for such a dismissal because the statute of limitations is an affirmative defense that must be raised by a party. *Lease Partners Corp. v. R & J Pharmacies, Inc.*, *supra*; *Adams v. Inman*, *supra*. See also *McCarvill v. McCarvill*, 144 Or. App. 437, 441, 927 P.2d 115, 116 (1996) (a trial court 'may not raise defenses on its own and then dismiss

the complaint on the basis of its determination of the defenses'); *Francke v. Gable*, 121 Or. App. 17, 853 P.2d 1366 (1993) (a trial court may not raise an affirmative defense on behalf of a defendant and then dismiss the action based on that defense).

"The doctrines of res judicata and collateral estoppel are affirmative defenses, Rule 8(c), Ala. R. Civ. P.; *Lee L. Saad Constr. Co. v. DPF Architects, P.C.*, 851 So. 2d 507, 516 (Ala. 2002), and do not affect a court's jurisdiction to consider an action. Affirmative defenses may be waived if they are not pleaded by a party against whom a claim is asserted. Rule 8(c), Ala. R. Civ. P.; *Bechtel v. Crown Cent. Petroleum Corp.*, 451 So. 2d 793 (Ala. 1984) (citing 2A J. Moore, *Federal Practice* § 8.27[3] at 8-251 (2d ed. 1948)). By its actions in the present case, the trial court, in essence, asserted the affirmative defenses of the doctrines of res judicata and collateral estoppel on behalf of the defendants and dismissed the matter based on those affirmative defenses.

"After careful consideration, we find most persuasive the reasoning of the courts that have held that, although a trial court may dismiss an action on its own motion on a jurisdictional basis, affirmative defenses such as the statute of limitations or the doctrine of res judicata are not jurisdictional bases upon which a court may base a sua sponte dismissal."

Id. Because the Jefferson Circuit Court lacked the authority to *sua sponte* raise the affirmative defense of the statute of limitations on behalf of the defaulted Defendants, it could not dismiss the claims against those Defendants on the basis of the statute of limitations defense. Accordingly, the nonfinal interlocutory default judgments entered against those Defendants remained pending and there was no finality to support the appeal as required by Ala. Code § 12-22-2 and Ala. R. Civ. P. 54(b).

ALABAMA MEDICAL LIABILITY ACT & JUDGMENT AS A MATTER OF LAW

Jackson Hospital & Clinic, Inc. v. Murphy, [Ms. 1190463, June 25, 2021] __ So. 3d __ (Ala. 2021). The Court (Shaw, J.; Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur) reverses a judgment entered on a jury's verdict by the Montgomery Circuit Court against Jackson Hospital & Clinic, Inc., upon concluding the circuit court erred in denying Jackson Hospital's motion for judgment as a matter of law when there was a complete absence of proof presented by Plaintiff that Jackson Hospital had breached the applicable standard of care. Both Plaintiff's expert witness, the Defendant surgeon, and the Defendants' expert witness concurred that the surgeon's handling of a glidewire to establish the correct surgical path to the Plaintiff's kidneys through his urinary tract for a ureteroscopy procedure to remove kidney stones was within the standard of care and that Jackson Hospital's procedure for selecting and presenting the glidewire to the surgeon was likewise within the standard of care. Plaintiff presented no evidence that anything done by the hospital relative to the glidewire deviated from the required standard of care. Accordingly, there was a complete absence of proof by Plaintiff of a breach of the applicable standard of care such that Jackson Hospital's motion for judgment as a matter of law should have been granted. See *HealthSouth Rehab. Hosp. of Gadsden, LLC v. Honts*, 276 So. 3d 185, 193 (Ala. 2018)("'"'A judgment is a matter of law is proper ... where there is a complete absence of proof on a material issue....'"'").

NEGLIGENT MAINTENANCE & REPAIR, BASES OF DUTY

Lands v. Ward, [Ms. 1191074, June 25, 2021] __ So. 3d __ (Ala. 2021). The Court (Mitchell, J.; Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur) affirms in part and reverses in part a summary judgment entered by the Morgan Circuit Court in favor of the owner of a Peterbilt truck used to haul timber where Plaintiff was injured when attempting to hot-wire the truck to get it started, the truck started suddenly, and then rolled forward injuring the Plaintiff. The circuit court concluded the Plaintiff failed to prove the bases of any duties owed by the owner of the truck to sustain claims for negligence and wantonness. Reversing, the Supreme Court finds duties were indeed owed by the owner of the truck to inspect, repair, and maintain it, as imposed by statute, federal regulations, and Alabama common law.

First, the Court notes that regulations promulgated by the Federal and Motor Carrier Safety Administration and incorporated into the Alabama Code by reference pursuant to § 32-9A-2(a)(1), imposed a duty upon the truck owner to inspect the truck and maintain it in a safe condition. Ms. *7. The Court explains (Ms. *8) "[i]n a negligence action, it is possible for a legal duty imposed by statute or regulation to inform the common-law standard of reasonable care or to supplant it entirely." *Id.*, citing *Parker Bldg. Servs. Co. v. Lightsey, ex rel Lightsey*, 925 So. 2d 927, 930-31 (Ala. 2005). Accordingly, "[a] violation of [a safety] statute or ordinance can, therefore, be evidence of negligence under certain circumstances." *Id.*, quoting *Murray v. Alabama Power Co.*, 413 So. 2d 1109, 1114 (Ala. 1982). "The decision of whether a violation occurred, whether such violation was negligence, and whether such negligence was the proximate cause of the injuries complained of, will ... be left ... to the jury." *Id.*

Specific regulations applicable to inspection, repair, and maintenance of trucks include 49 C.F.R. § 396.3(a) which provides "Every motor carrier ... must systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired or maintained, all motor vehicles ... subject to its control." This regulation has been incorporated into Alabama law by § 32-9A-2(a)(1), along with the regulations (49 C.F.R. § 396.3(a) and 49 C.F.R. § 390.5) defining "motor carrier" to include the term "employer" which means "any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business." *Id.*, Ms. *9. The pertinent Alabama statute, § 32-9A-2(a)(1) provides, as pertinent "no person may operate a commercial motor vehicle in this state, or fail to maintain required records or reports, in violation of the federal motor carrier safety regulations as prescribed by the U.S. Department of Transportation, 49 C.F.R. ... Parts 390-399 and as they may be amended in the future." Ms. **9-10. Furthermore, an additional regulation, 49 C.F.R. § 369.7(a) specifies "[a] motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle." The

Court explains (Ms. *10) that these regulations "are designed to prevent motor carriers from shirking responsibility if someone gets hurt in an accident involving a commercial motor vehicle."

The Court concludes the owner of the Peterbilt truck qualifies as a motor carrier because it meets the definition of "employer." It is "engaged in a business affecting interstate commerce" and "own[s] or lease[s] a commercial motor vehicle in connection with that business." Ms. **10-11, quoting 49 C.F.R. § 390.5. Because, through its ownership of the truck, the Defendant owner is "engaged in a business affecting interstate commerce," the Federal Motor Carrier Safety Act regulations could be found by the jury to impose duties of care upon the Defendant to properly inspect, repair, and maintain the Peterbilt truck which injured the Plaintiff.

Additionally, the owner owed a duty to inspect and maintain the truck under Alabama common law. The Court, quoting *Motor Terminal & Transp. Co. v. Millican*, 244 Ala. 39, 43, 12 So. 2d 96, 99 (1943), reiterates (Ms. **15-16) that "[i]f the use of [an] instrumentality threatens serious danger to others unless it is in good condition, there is a duty to take reasonable care to ascertain its condition by inspection." Alabama's common law rule is:

> " '[T]he owner or operator of a motor vehicle must exercise reasonable care in the inspection of the machine, and is chargeable with notice of everything that such inspection would disclose. This rule applies where the operator is the owner of the vehicle or rents it from another, or permits another to use it, or lets it to another for hire. But in the absence of anything to show that the appliances were defective, the owner or driver is not required to inspect them before using the car or permitting it to be used.'"

Ms. *16, quoting *Millican*, *supra*.

Still further, a duty of care could be found by the jury to have arisen in this instance from the foreseeability of harm caused by the necessity of using a jumper wire to start the Peterbilt truck. The Court reiterates familiar rules of how foreseeability can form the basis of duty under Alabama common law:

> " 'Foreseeability does not require that the particular consequence should have been anticipated, but rather that some general harm or consequence should have been anticipated.' " *City of Birmingham v. Benson*, 631 So. 2d 902, 907 (Ala. 1993) (quoting *Thetford v. City of Clanton*, 605 So. 2d 835, 840 (Ala. 1992)). "[T]he test is not what [the defendant] in fact knew, but whether it was reasonably foreseeable that a failure to maintain the [device] in a safe condition could cause injury to a third party." *Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1209 (Ala. 1999). Here, it is certainly foreseeable that a failure to maintain a longhaul truck according to safety regulations would result in an injury to a third party – especially the driver of that vehicle. Protecting the public and the driver is precisely the reason trucking safety regulations exist. See *Phillips*, 565 So. 2d at 70 (quoting *Transamerican Freight Lines*, 423 U.S. at 37) (" ' "The purpose of the [automotive] rules is to protect the industry from practices detrimental to the maintenance of sound transportation services ..." and to assure safety of operation.'").

Ms. *17.

The Court rejects the owner's contention it was relieved of liability because it had leased the truck to another business. The Court notes that 49 C.F.R. §§ 376.11(a) and 376.12 impose specific requirements upon authorized carriers to use vehicles they do not own pursuant to a written lease, which must include language providing that "the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease, and that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." Ms. **18-19.

The Court also reiterates familiar principles of why the issue of proximate cause could not properly be resolved on summary judgment:

> It is well established that proximate cause is generally a jury question. *Giles v. Gardner*, 287 Ala. 166, 169, 249 So. 2d 824, 826 (1971). "[I]t is only when the facts are such that reasonable men must draw the same conclusion that the question of proximate cause is one of law for the courts." *Id.* Like the duty analysis, proximate cause accounts for foreseeability, which has been labeled "the cornerstone of proximate cause." *Alabama Power Co. v. Taylor*, 293 Ala. 484, 498, 306 So. 2d 236, 249 (1975). An injury is deemed foreseeable if it is the " ' ' " ' ' "natural, although not the necessary and inevitable, result of the negligent fault." ' ' " ' ' " *Looney v. Davis*, 721 So. 2d 152, 162 (Ala. 1998) (quoting *Lawson v. General Tel. Co. of Alabama*, 289 Ala. 283, 289, 267 So. 2d 132, 138 (Ala. 1972)). "Thus, generally a defendant may be found liable if some physical injury of the general type the plaintiff sustained was a foreseeable consequence of the defendant's negligent conduct, even though the extent of the physical injuries may have been quite unforeseeable." *Id.* (emphasis added).
>
> What is foreseeable can be broader than what the defendant actually knew. *Lance*, 731 So. 2d at 1209. Foreseeability encompasses " 'all consequences which a prudent and experienced person, fully acquainted with all the circumstances, at the time of his negligent act, would have thought reasonably possible to follow that act, including the negligence of others.' " *Looney*, 721 So. 2d at 159 (internal citation omitted).

Ms. **21-23.

Finally, the Court rejects the contention that the Plaintiff was contributorily negligent as a matter of law:

> The question of contributory negligence is "normally one for the jury" to decide. *Wyser v. Ray Sumlin Constr. Co.*, 680 So. 2d 235, 238 (Ala. 1996). To obtain summary judgment based on contributory negligence, the moving party must show two things: (1) that the plaintiff put himself in danger's way and (2) that the plaintiff had a conscious appreciation of the danger at the moment the incident in question occurred. *Hannah v. Gregg, Bland & Berry, Inc.*, 840 So. 2d 839, 860 (Ala. 2002). Further, "[w]e protect against the inappropriate use of a summary judgment to establish contributory negligence as a matter of law by requiring the defendant on such a motion to establish by undisputed evidence a plaintiff's conscious appreciation of the danger." *Id.* at 861 (emphasis added).

Ms. *24.

Because Plaintiff had made out a prima facie case of negligence, the issues concerning duty, causation, and Plaintiff's own possible negligence were required to be answered by a jury. Accordingly, the Court reverses the Morgan Circuit Court's summary judgment on Plaintiff's negligence claim and remands the case for further proceedings.

SUCCESSIVE ALA. R. CIV. P. 60(B) MOTIONS NOT PERMITTED

Ex parte Caterpillar Financial Services Corp., [Ms. 1200332, June 30, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Sellers, J.; Parker, C.J., and Bolin, Shaw, Wise, Mendheim, Stewart, and Mitchell, JJ., concur; Bryan, J., concurs in the result) grants a petition for a writ of mandamus filed by Caterpillar Financial Services Corporation ("CFS") and directs the Shelby Circuit Court to vacate its order purporting to grant a motion to set aside a default judgment in favor of CFS in its action against Horton Logging, LLC and Gary Horton.

fter service, Horton Logging and Mr. Horton did not answer CFS's complaint, the circuit court entered a default judgment. Horton Logging and Horton then moved the trial court pursuant to Ala. R. Civ. P. 55(c) and 60(b) to set aside the default judgment. The circuit court subsequently conducted a hearing and during the course of that hearing, rescheduled the matter for another hearing at a later date. On the date of the rescheduled hearing, Horton Logging and Horton failed to appear, so the court denied their motion for relief from the default judgment. Ms. **2-3.

Horton Logging and Horton did not appeal from the circuit court's order denying their motion for relief from the default judgment; instead, they filed another motion pursuant to Rule 60(b) asking the circuit court to reconsider and set aside its order and to reset the motion for relief for another hearing. Following a hearing, the circuit court entered an order purporting to grant Horton Logging's and Horton's second Rule 60(b) motion without specifying its reasoning. Ms. *4. CFS then timely filed its petition for a writ of mandamus contending that the second Rule 60(b) motion was a successive post-judgment motion that the trial court lacked jurisdiction to grant. *Id.*

The Supreme Court agreed. A Rule 55(c) motion is subject to Ala. R. Civ. P. 59.1, which provides that certain post-judgment motions are deemed denied by operation of law if they remain pending more than ninety days. Ms. **5-6. More than ninety days elapsed without any ruling on Horton Logging's and Horton's initial motion for relief from default judgment. Accordingly, to the extent that motion relied upon Rule 55(c), it was denied by operation of law. Ms. *6.

Since the Shelby Circuit Court erred in granting Horton Loggings's and Horton's second Rule 60(b) motion, CFS's petition for writ of mandamus was due to be granted and the circuit court was directed to vacate its order setting aside the default judgment.

ALABAMA MEDICAL LIABILITY ACT OF 1987, § 6-5-540, ET SEQ. AND NECESSITY OF EXPERT TESTIMONY

Fletcher v. Health Care Authority of the City of Huntsville, [Ms. 1190706, June 30, 2021] __ So. 3d __ (Ala. 2021). The Court (Stewart, J.; Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur) affirms the entry of summary judgment in favor of the Health Care Authority of the City of Huntsville d/b/a Huntsville Hospital entered by the Madison Circuit Court.

The Court notes (Ms. *9) that § 6-5-548(a) requires a plaintiff in a medical malpractice case to prove "by substantial evidence that the health care provider failed to exercise reasonable care, skill, and diligence, as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case." To satisfy the burden of proving a medical-malpractice claim by substantial evidence, a plaintiff

> "ordinarily must present expert testimony from a 'similarly situated health-care provider' as to (1) 'the appropriate standard of care,' (2) a 'deviation from that standard [of care],' and (3) 'a proximate causal connection between the [defendant's] act or omission constituting the breach and the injury sustained by the plaintiff.' *Pruitt v. Zeiger*, 590 So. 2d 236, 238 (Ala. 1991) (quoting *Bradford v. McGee*, 534 So. 2d 1076, 1079 (Ala. 1988)). The reason for the rule that proximate causation must be established through expert testimony is that the issue of causation in a medical-malpractice case is ordinarily 'beyond "the ken of the average layman."' *Golden v. Stein*, 670 So. 2d 904, 907 (Ala. 1995), quoting Charles W. Gamble, *McElroy's Alabama Evidence*, § 127.01(5)(c), p. 333 (4th ed. 1991). The plaintiff must prove through expert testimony 'that the alleged negligence "probably caused the injury."' *McAfee v. Baptist Med. Ctr.*, 641 So. 2d 265, 267 (Ala. 1994)."

Ms. *9-10, quoting *Lyons v. Walker Regional Medical Center*, 791 So. 2d 937, 942 (Ala. 2000).

"An exception to requirement of presenting expert-medical-testimony exists where the lack of care is so apparent as to be within the ken of the average layman." Ms. *10, quoting *Jones v. Bradford*, 623 So. 2d 1112, 1114-15 (Ala. 1993). This exception was discussed in *Ex parte HealthSouth Corp.*, 851 So. 2d 33 (Ala. 2002) and in *Collins v. Herring Chiropractic Center, LLC*, 237 So. 3d 867 (Ala. 2017). Generally, the exception to the requirement of expert-medical-testimony applies "where the lack of skill is so apparent as to be understood by a lay person, thereby requiring only common knowledge and experience to understand it" or when a plaintiff relies on "a recognized standard or authoritative medical text or treatise" or "is himself or herself a qualified medical expert." See *HealthSouth*, 851 So. 2d at 39.

The facts at issue involved the standard of care for restraining a surgical patient who may be placed in the deep Trendelenburg position during surgery. Ms. *12. The Court, relying in part on *Tuck v. Health Care Authority of Huntsville*, 851 So. 2d 498, 506 (Ala. 2002) (Ms. **12-14) concludes "this case is precisely the type of case in which expert medical testimony from a similarly situated health-care provider is necessary to establish the applicable standard of care, a deviation from that standard, and proximate causation linking the defendant's actions to the plaintiff's injury." The Madison Circuit Court therefore did not err when it entered summary judgment in favor of Huntsville Hospital based on the Plaintiff's failure to present expert medical testimony.

ALABAMA MEDICAL LIABILITY ACT OF 1987, § 6-5-540, ET SEQ. AND NECESSITY OF EXPERT TESTIMONY

Peterson v. Triad of Alabama, LLC, [Ms. 1190982, June 30, 2021] __ So. 3d __ (Ala. 2021). The Court (Stewart, J.; Parker, C.J., and Bolin and Wise, JJ., concur; Sellers, J., concurs in the result) affirms the entry of an order granting summary judgment in favor of Triad of Alabama, LLC d/b/a Flowers Hospital ("Triad") by the Houston Circuit Court in a medical-malpractice action brought by John & Brenda Peterson.

To satisfy the burden of proving a medical-malpractice claim by substantial evidence, a plaintiff

> "ordinarily must present expert testimony from a 'similarly situated health-care provider' as to (1) 'the appropriate standard of care,' (2) a 'deviation from that standard [of care],' and (3) 'a proximate causal connection between the [defendant's] act or omission constituting the breach and the injury sustained by the plaintiff.' *Pruitt v. Zeiger*, 590 So. 2d 236, 238 (Ala. 1991) (quoting *Bradford v. McGee*, 534 So. 2d 1076, 1079 (Ala. 1988)). The reason for the rule that proximate causation must be established through expert testimony is that the issue of causation in a medical-malpractice case is ordinarily 'beyond "the ken of the average layman."' *Golden v. Stein*, 670 So. 2d 904, 907 (Ala. 1995), quoting Charles W. Gamble, *McElroy's Alabama Evidence*, § 127.01(5)(c), p. 333 (4th ed. 1991). The plaintiff must prove through expert testimony 'that the alleged negligence "probably caused the injury."' *McAfee v. Baptist Med. Ctr.*, 641 So. 2d 265, 267 (Ala. 1994)."

Ms. *8-9, quoting *Lyons v. Walker Regional Medical Center*, 791 So. 2d 937, 942 (Ala. 2000).

"An exception to requirement of presenting expert-medical-testimony exists where the lack of care is so apparent as to be within the ken of the average layman." Ms. *9, quoting *Jones v. Bradford*, 623 So. 2d 1112, 1114-15 (Ala. 1993). This exception was discussed in *Ex parte HealthSouth Corp.*, 851 So. 2d 33 (Ala. 2002) and in *Collins v. Herring Chiropractic Center, LLC*, 237 So. 3d 867 (Ala. 2017).

The Court rejects Plaintiffs' contention that they met their burden of proving a deviation from the standard of care through submission of excerpts from Mr. Peterson's medical records. Ms. *11, citing Ala. R. App. P. 28(a)(10) and *State Farm Mut. Auto Ins. Co. v. Motley*, 909 So. 2d 806 (Ala. 2005) (explaining consequences of insufficient citations to legal authority or argument).

The Court also rejects the contention that the doctrine of *res ipsa loquitur* required denial of the motion for summary judgment as the appellant's brief cites only general propositions of law regarding the doctrine and does not explain how their case presents an exception to the general rule, outlined above, requiring expert testimony in medical-malpractice actions. Ms. *11-12, citing, *inter alia*, *Ex parte Riley*, 464 So. 2d 92 (Ala. 1985)(it is well established the general propositions of law are not considered "supporting authority" for purposes of Rule 28(a)(10)).

Finally, the summary judgment order is due to be affirmed because the appellant's brief does not address the trial court's determination that Plaintiffs failed to satisfy their burden as to the breach of the standard of care through expert medical testimony as to "what is or what is not the proper practice, treatment, and procedure." Ms. *12, quoting *McGill v. Szymela*, [Ms. 1190260, Dec. 31, 2020], __ So. 3d __, __ (Ala. 2020).

Merely pointing to a passage contained within a learned treatise is insufficient. While "medical treatises are admissible, as a pre-condition or a predicate to their admission, the rule requires that the parties seeking to introduce medical books authenticate them as 'standard works within that profession.'" Ms. *13, quoting *Johnson v. McMurray*, 461 So. 2d 775, 779-80 (Ala. 1984).

TERMINATION OF ATTORNEY-CLIENT CONTRACT

Fuston, Petway & French, LLP v. The Water Works Board of Birmingham, [Ms. 1180875, June 30, 2021] __ So. 3d __ (Ala. 2021). The Court, in a *per curiam* decision (Bolin, Wise, Sellers, Mendheim, and Stewart, JJ., concur; Parker, C.J., concurs in part and dissents in part; Shaw and Bryan, JJ., and McCool, Special Justice, dissents; Mitchell, J., recuses) affirms an order granting summary judgment in favor of the Water Works Board of the City of Birmingham regarding the Board's termination of a contract for the provision of legal services with the law firm of Fuston, Petway & French, LLP ("the Firm").

The Firm argues there is a genuine dispute as to whether a contractual provision requiring a supermajority vote to terminate the contract violates public policy and that genuine issues of material fact exist as to the whether the Board violated the supermajority provision by terminating the contract with the Firm without a supermajority of the Board voting to do so. The Court rejects these contentions, explaining that a contract between a lawyer and a client is not to be evaluated in the same way as commercial or other contracts:

> At the outset, we note that " '[t]he attorney-client relationship is similar to the doctor-patient relationship in that it is a "close, personal relationship built upon trust and confidence." ' " *Ex parte Dunaway*, 198 So. 3d 567, 586 (Ala. 2014)(quoting *Boykin v. Keebler*, 648 So. 2d 550, 552 (Ala. 1994)).
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> In *Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton*, 554 So. 2d 445 (Ala. Civ. App. 1989), the Court of Civil Appeals held that a client may discharge an attorney with or without cause and that, in certain circumstances, the discharged attorney may recover compensation for services performed before the discharge. 554 So. 2d 447-48.
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> In *Garmon v. Robertson*, 601 So. 2d 987, 989 (Ala. 1992), this Court quoted *Gaines* with approval, explaining:
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> > "The Court of Civil Appeals has correctly stated:
> >
> > " 'It is well recognized that the employment of an attorney by a client is revocable by the client with or without cause, and that such discharge ordinarily does not constitute a breach of contract even with a contract of employment which provides for the payment of a contingent fee. There are, of course, well recognized procedures where a discharged attorney may recover compensation for the services rendered to that client before the discharge.'
>
> "*Gaines, Gaines & Gaines, P.C. v. Hare,*

Wynn, Newell & Newton, 554 So. 2d 445, 447 (Ala. Civ. App. 1989)."

In *Cheriogotis v. White* (*In re Cheriogotis*), 188 B.R. 996, 1000 n.4 (Bankr. M.D. Ala. 1994), the United States Bankruptcy Court for the Middle District of Alabama observed:

> "The existence of an attorney-client relationship gives rise to special duties and responsibilities. 'A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.' Ala. Rules of Prof. Conduct (1994), preamble. A lawyer serves as a legal advisor, but his role is not merely limited to the law. There is a fiduciary duty with regards to the client's financial and other interests. A lawyer acts as an advocate, a negotiator, an intermediary, and an evaluator. These disparate duties have been codified in the code of professional conduct in each of several states. Eg. Ala. Rules of Prof. Conduct (1994). ...
>
> "Moreover, the attorney-client relationship is a very personal relationship. It must be based on some established and known arrangement between the counselor and the counseled. Attorneys are not fungible goods that may be traded one for another like preadolescent boys trading baseball cards of their sports heroes. A lawyer, absent consent of the client, has no right to assign the representation of a client to another member of the bar. See Ala. Rules of Prof. Conduct (1994), Rule 1.5(e)(2).
>
> "We need hardly add that an attorney's power to represent a client may be limited and a lawyer is dischargeable by the client as a matter of right and without cause or justification. *Doggett v. Deauville Corp.*, 148 F.2d 881 (5th Cir. (Ala.) 1945); *Gaines, Gaines, & Gaines, P.C. v. Hare, Wynn, Newell, & Newton*, 554 So. 2d 445 (Ala. Civ. App. 1989)."

See also Alabama State Bar Ethics Opinion RO-93-21 (discussing fee agreements and noting that "non-refundable fee language is objectionable because it may chill a client from exercising his or her right to discharge his or her lawyer and, thus, force the client to proceed with a lawyer that the client no longer has confidence in"); Alabama State Bar Ethics Opinion RO-92-17 (discussing *Gaines* and stating: "[T]he client has the absolute right to terminate the services of his or her lawyer, with or without cause, and to retain another lawyer of their choice. This right would be substantially limited if the client was required to pay the full amount of the agreed on fee without the services being performed."); and 7A C.J.S. Attorney & Client § 326 (2015) ("The right of a client to terminate his or her relationship with a lawyer is necessarily implied in the attorney-client relationship, and the right is absolute.").

Rule 1.16(a), Ala. R. Prof. Cond., provides, in part:

> "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client, if:
>
> "....
>
> "(3) The lawyer is discharged."

The Comment to Rule 1.16 provides, in part: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances." That is, a client has the unqualified right to hire and fire attorneys at will with no obligation at all except to pay for completed services.

Ms. **23-27. Continuing, the Court expressly recognizes that the attorney-client relationship is treated different from a client's relationships with other professions:

> "This Court has the inherent authority to admit lawyers to the practice of law, to approve or disapprove any rule governing lawyers' conduct, to inquire into matters of any disciplinary proceeding, and to take any action it sees fit in disciplinary matters. *Board of Comm'rs of the Alabama State Bar v. State ex rel. Baxley*, 295 Ala. 100, 324 So. 2d 256 (1975); *Simpson v. Alabama State Bar*, 294 Ala. 52, 311 So. 2d 307 (1975)."
>
> *Ex parte Case*, 925 So. 2d 956, 962-63 (Ala. 2005).
>
> "The relationship of attorney and client is one of the most sacred relationships known to the law and places upon the attorney a position likened to a fiduciary calling for the highest trust and confidence, so that in all his relations and dealings with his client, it is his duty to exercise the utmost honesty, good faith, fairness, integrity and fidelity, and he may not at any time use against his former client knowledge or information acquired by virtue of the previous relationship. This rule is universal and hoary with age."
>
> *Hannon v. State*, 48 Ala. App. 613, 618, 266 So. 2d 825, 829 (Crim. App. 1972).

Ms. *28. The Court also examines opinions concerning the nature of attorney-client contracts as evaluated in other states' appellate decisions (Ms. **28-35), and concludes that requiring enforceability of the supermajority provision of the contract in this case would impede the City of Birmingham Water Works Board's right to discharge its attorney with or without cause.

> The relationship between the attorney and his or her client must be based on the utmost trust and confidence, and such trust and confidence is undermined by restrictions penalizing or impeding the client's right to terminate the relationship. As the United States Bankruptcy Court for the Middle District of Alabama recognized in *Cheriogotis*, *supra*, the attorney-client relationship is very personal and not "fungible goods that may be traded one for another." 188 B.R. at 1000 n.4. Applying general contract law to contracts governing the attorney-client relationship, especially with regard to the termination of the attorney-client relationship, ignores the unique relationship between an attorney and client. We recognize that the Board is an en-

> tity composed of members who act on behalf of the public by voting in order to conduct the business of the Board. However, the supermajority provision circumvents established Alabama public policy allowing a client to terminate the attorney-client relationship at any time, with or without cause. ..."

Ms. *36.

CORPORATIONS CANNOT HAVE CIVIL CASE STAYED BASED ON SPECULATION THAT AN INDIVIDUAL CO-DEFENDANT MAY INVOKE SELF-INCRIMINATION PRIVILEGE

Ex parte Jane Doe, [Ms. 1191073, July 9, 2021] __ So. 3d __ (Ala. 2021). The Court (Wise, J.; Parker, C.J., and Bolin, Shaw, Bryan, Sellers, Mendheim, and Stewart, JJ., concur; Mitchell, J., dissents) issues a writ of mandamus vacating the Tuscaloosa Circuit Court's stay of a premises liability case. Plaintiff was raped by Tereza Demone Jones in a common area of an apartment complex. Jones was named as a defendant in the civil case but failed to appear. On motion of Gulf South and Pinnacle, owners of the apartment complex, the trial court stayed the civil case pending resolution of the criminal charges against Jones. Ms. *4.

The Court holds that the corporate Defendants "cannot assert the Fifth Amendment for Jones and [that] they failed to present evidence that Jones had asserted or would assert his Fifth Amendment right against self-incrimination in response to discovery that might, at some point in the future, be served on him in this case, so as to justify the stay imposed by the trial court." Ms. *6 (internal quotation marks omitted). The Court explains

> Jones, the only defendant against whom criminal charges have been filed regarding the underlying incident, had not filed an appearance in this civil action and had not invoked his Fifth Amendment privilege against self-incrimination when Gulf South and Pinnacle filed their motion for a stay. Instead, Gulf South and Pinnacle, which are corporations, filed the motion to stay based on speculation that Jones might later invoke his Fifth Amendment privilege against self-incrimination in response to discovery in this civil action. However
>
> > "[i]t has long been settled in federal jurisprudence that the constitutional privilege against self-incrimination is 'essentially a personal one, applying only to natural individuals.' It 'cannot be utilized by or on behalf of any organization, such as a corporation.' *United States v. White*, 322 U.S. 694, 698, 699 (1944)." *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288-89 (1968).

Ms. **9-10.

ALSLA EXCLUSIVE REMEDY PROVISION

Roberson v. Balch & Bingham, LLP, [Ms. 1200002, July 23, 2021] __ So. 3d __ (Ala. 2021). In a plurality per curiam opinion, the Court (Parker, C.J., and Mendheim and Stewart, JJ., concur, and Baschab, Special Justice, concur; Lyons, Main, and Welch, Special Justices, concur in part and dissent in part; Bolin, Shaw, Wise, Bryan, Sellers, and Mitchell, JJ., recuse) affirms the Jefferson Circuit Court's 12(b)(6) dismissal of David Roberson's claims of negligence, fraud, suppression, and "implied indemnity" against Balch & Bingham, LLP and Drummond Company, Inc. ("Drummond"). Roberson, a former employee of Drummond, was convicted of bribery arising from payments of thousands of dollars to a charitable foundation controlled by Oliver Robinson, a member of the Alabama House of Representatives, in exchange for "advocacy" and "community outreach" aimed at undermining the Environmental Protection Agency's ("EPA") efforts to clean up a Superfund site at which Drummond was a potential responsible party. Balch was Drummond's outside legal counsel. Roberson alleged that prior to authorizing payments to the Foundation, he had asked Joel Gilbert, a registered lobbyist employed by Balch, "if Gilbert had inquired with the ethics lawyers at Balch & Bingham whether the Plan [to pay the Foundation] was legal and ethical. Gilbert represented to [Roberson] that Balch's in-house ethics attorneys had reviewed the Plan and determined that it was legal." Ms. **4-5.

Although the circuit court dismissed the claims against Balch based upon the statute of limitations in the Alabama Legal Service Liability Act ("ALSLA"), the per curiam plurality opinion affirms on lack of duty. The opinion explains "if the gravamen of a plaintiff's action against a legal-service provider concerns the provision of legal services, the action is governed by the ALSLA, but to state a cognizable ALSLA claim, an attorney-client relationship must exist between the plaintiff and the defendant because there must be a duty owed by the defendant attorney or law firm to the plaintiff that can be assessed 'by the legal service provider's violation of the standard of care applicable to a legal service provider.' § 6-5-572(1), Ala. Code 1975." Ms. **40-41.

The opinion notes that "[w]e recognize that our basis for affirming the circuit court's judgment differs from the circuit court's rationale, which was based on the applicability of the ALSLA's limitations periods. However, it is well established that this Court may 'affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court.' *Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C.*, 881 So. 2d 1013, 1020 (Ala. 2003)." Ms. *43.

Special Justice Lyons's dissent, joined by Special Justices Main and Welch, explains

> Article I, § 13, Ala. Const. 1901 (Off. Recomp.), provides that the courts shall always be open and that for every wrong there shall be a remedy. In the wake of the main opinion, an individual without a law license can deceive another individual with whom he or she has no contractual relationship and be liable for damages. However, an individual who happens to have a law license can deceive another individual with whom he or she has no contractual relationship and be immune from liability for damages because of the exclusivity of the ALSLA as a remedy.

Ms. *60.

JUSTICIABLE CONTROVERSY

Alcantara-Angeles v. Birmingham Water Works Board, [Ms. 1200159, Aug. 13, 2021]

__ So. 3d __ (Ala. 2021). The Court (Bryan, J.; Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ., concur) reverses the Jefferson Circuit Court's 12(b)(6) dismissal of Ciro Alcantara-Angeles's complaint for declaratory judgment against the Birmingham Water Works Board. The Court holds

> We express no opinion regarding the propriety of Alcantara-Angeles's contention that the Board has a duty to repair or maintain the pipeline system at issue or whether the Board has breached a contract with Alcantara-Angeles. At this stage in the proceedings, the question before us is " 'not whether [Alcantara-Angeles] will prevail in the declaratory-judgment action.' " *Muhammad* [*v. Ford*, 986 So. 2d 1158, 1161 (Ala. 2007)]. The only question at this time is whether Alcantara-Angeles is " ' entitled to a declaration of rights at all.'" *Id.* On that point, " '[a]ll that is required for a declaratory judgment action is a *bona fide* justiciable controversy.'" *MacKenzie* [*v. First Alabama Bank*, 598 So. 2d 1367, 1370 (Ala. 1992)].
>
> Based on Alcantara-Angeles's amended complaint, it is clear that he has alleged the existence of a controversy that is " 'definite and concrete, touching the legal relations of the parties in adverse legal interest, and [that it is] a real and substantial controversy admitting of specific relief through a decree.'".

Ms. **11-12.

NEW ARGUMENT MAY NOT BE RAISED ON REHEARING

Alabama Department of Environmental Management v. Wynlake Development, LLC, [Ms. 2190999, Aug. 13, 2021] __ So. 3d __ (Ala. Civ. App. 2021). The court (Thompson, P.J.; Moore, Edwards, and Hanson, JJ., concur; Fridy, J., recuses) denies Wynlake Development, LLC's application for rehearing in action in which Wynlake appealed fines imposed by ADEM against Wynlake. The Court holds

> On application for rehearing, however, Wynlake, for the first time, cites caselaw concerning "fixed standards" as they relate to decisions of administrative agencies .... Wynlake did not argue the applicability of, or rely upon, the "fixed standard" caselaw in its appellee's brief submitted to this court on original submission, nor did it mention that concept or supporting law at any point before the trial court. "It is for the court to address the merit of the claim as framed by the [parties], not to reframe it." *Wright v. Cleburne Cnty. Hosp. Bd., Inc.*, 255 So. 3d 186, 192 (Ala. 2017). Furthermore, a party generally may not raise an issue or argument for the first time on application for rehearing.

Ms. **2-3.

INJUNCTIVE RELIEF – DUE PROCESS

JT Construction, LLC v. MW Industrial Services, Inc., [Ms. 1200066, Aug. 20, 2021] __ So. 3d __ (Ala. 2021). The Court (Shaw, J.; Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur) reverses the Walker Circuit Court's order granting permanent injunctive relief requiring JT Construction Company (JTC) to remove a mechanic's lien it had filed. JTC argued that hearing the merits of the request for a permanent injunction at the hearing on the request for a preliminary injunction deprived JTC of due process. The Court first explains "[b]ecause the determinative issue on appeal concerns a question of law related to the trial court's entry of permanent injunctive relief, we review that judgment *de novo*. *Holiday Isle, LLC v. Adkins*, 12 So. 3d 1173, 1176 (Ala. 2008)." Ms. *15.

The Court holds that "[u]nder the present circumstances, JTC received inadequate notice of the consolidation of the preliminary-injunction hearing with a final hearing on the merits. *Cf. Funliner of Alabama, L.L.C. v. Pickard*, 873 So. 2d 198, 219 (Ala. 2003) ('"Notice to the adverse party before a preliminary injunction is issued is mandatory, pursuant to Rule 65(a), Ala. R. Civ. P."' Ms. *21. The Court concludes that JTC demonstrated prejudice because "JTC timely demanded a jury trial. The trial court's premature consolidation and decision on the merits, however, deprived JTC of that right in contravention of Rule 65(a)(2), which permits consolidation but 'save[s] the parties[']... rights ... to trial by jury.'" Ms. *25.

DECLARATORY JUDGMENT – SUMMARY JUDGMENT PROCEDURE

James v. Assurance America Insurance Company, [Ms. 1200462, Aug. 20, 2021] __ So. 3d __ (Ala. 2021). The Court (Wise, J.; Bolin, Sellers, and Stewart, JJ., concur; Parker, C.J., concurs in the result) reverses the Montgomery Circuit Court's entry of a summary judgment in favor of Assurance America Insurance Company (Assurance) on its complaint for a declaratory judgment that it had no duty to defend or indemnify due to policy provisions excluding coverage of an accident caused by an unlicensed driver.

In reversing, the Court reiterates

> "While Rule 56, Ala. R. Civ. P., permits evidence in the form of depositions, answers to interrogatories, admissions on file, and affidavits to be submitted in support of, or in opposition to, a summary judgment motion, that evidence must, nevertheless, conform to the requirements of Rule 56(e) and be admissible at trial. *Welch v. Houston County Hosp. Bd.*, 502 So. 2d 340 (Ala. 1987)." *Dunaway v. King*, 510 So. 2d 543, 545 (Ala. 1987).
>
> Finally, "[t]he contents of an affidavit filed in support of, or in opposition to, a motion for summary judgment must be asserted upon personal knowledge of the affiant, must set forth facts that would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters asserted. These requirements are mandatory. *Arrington v. Working Woman's Home*, 368 So. 2d 851, 854 (Ala. 1979); *Oliver v. Brock*, 342 So. 2d 1, 4 (Ala. 1976)."

Ms. *15, quoting *Crawford v. Hall*, 531 So. 2d 874, 875 (Ala. 1988). The Court holds that "Assurance did not produce substantial admissible evidence to establish that Mejia did not have a valid driver's license at the time of the accident and therefore did not shift the burden of proof to James. Accordingly, the trial court erred in granting Assurance's motion for a summary judgment." Ms. **21-22.

PRESERVATION OF ERROR – IMPEACHMENT BY CONVICTION

Cannon v. Lucas, [Ms. 1190505, 1190725, Aug. 20, 2021] __ So. 3d __ (Ala. 2021). In a per curiam opinion, the Court (Bolin, Shaw, Bryan, and Sellers, JJ., concur; Mendheim and Stewart, JJ., concur in the result; Parker, C.J., dissents; Wise and Mitchell, JJ., recuse) reverses and remands for a new trial a judgment in favor of Zachary Lucas entered on an $18 million jury verdict by the Jefferson Circuit Court on claims arising from a 2017 motor vehicle collision. The trial court granted a motion in limine excluding Plaintiff's 2018 conviction for forging a prescription. Ms. *5.

The Court first determines the issue was properly preserved for appellate review because the motion "was an absolute motion in limine, rather than a preliminary motion in limine, and no subsequent offer of proof was required to preserve the issue for appellate review." Ms. *9.

The Court holds "Rule 609 does not impose any requirement that a conviction that is to be used for impeachment purposes must have occurred before the incident that provides the basis for the current proceeding. Therefore, to the extent that the trial court found that Cannon could not introduce evidence of Lucas's 2018 conviction merely because it occurred after the accident in this case, that finding was erroneous." Ms. **10-11. The Court "conclude[s] that presenting a forged drug prescription is a crime involving 'dishonesty or false statement' and that evidence concerning a conviction for that offense is automatically admissible for impeachment purposes pursuant to Rule 609(a)(2). Therefore, to the extent that the trial court found that Cannon could not introduce evidence of Lucas's 2018 conviction because it was irrelevant and because the danger of unfair prejudice to Lucas substantially outweighed the probative value of the evidence, those findings were erroneous." Ms. *15.

Chief Justice Parker's dissent would have affirmed for failure of the Defendant Cannon to demonstrate prejudicial error. Ms. *17.

ATTORNEY DISCIPLINE

Alabama State Bar v. Kaminski; Alabama State Bar v. Marshall; Kaminski v. Alabama State Bar; Marshall v. Alabama State Bar, [Ms. 1200073, 1200074, 1200083, 1200084, Sept. 3, 2021] __ So. 3d __ (Ala. 2021). The Court (Shaw, J.; Parker, C.J., and Bolin, Mendheim, Stewart, and Mitchell, JJ., concur; Wise, Bryan, and Sellers, JJ., concur in the result) remands for further proceedings an order of the Disciplinary Board of the Alabama State Bar suspending Christopher Kaminski and Amy Marshall from the practice of law for 180 days and 90 days respectively. The Court notes that "[t]he material facts in these matters are undisputed: Kaminski, formerly a judge of the Coffee District Court, and Marshall, an Enterprise attorney who routinely appeared before the Coffee District Court, secretly engaged in an extramarital affair, during which Kaminski admittedly both appointed Marshall as counsel in pending cases and took judicial action in cases in which Marshall appeared as counsel of record, without disclosing their relationship to the parties." Ms. *3. The State Bar argued the suspensions were too lenient while the attorneys argued that the Board should have imposed lesser punishments. Ms. *8.

The Court remands for further proceedings and explains

> ...[I]t is unclear to this Court how – or more precisely based on what evidence – the Board could have reached some of its findings regarding the existence or nonexistence of certain aggravating and mitigating circumstances. More critical than the absence of specific underlying factual findings, though the Board's order also omits, in "determin[ing] the appropriate discipline in this matter," reference to any supporting Standards pursuant to which that discipline was allegedly imposed – as Rule 4.2(b)(6)(C)(iii) specifically requires. The Board had an independent duty to comply with Rule 4.2, and this Court, which is called upon to approve the Board's actions, is unable to do so in the present matters without either further clarification or additional information.

Ms. *12.

TEACHER ENTITLED TO STATE-AGENT IMMUNITY – FAILURE TO ATTACH DEPOSITION EXCERPTS TO OPPOSITION TO SUMMARY JUDGMENT

Ex parte Williamson, [Ms. 1200347, Sept. 3, 2021] __ So. 3d __ (Ala. 2021). The Court (Wise, J.; Bolin, Shaw, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur; Parker, C.J., dissents) issues a writ of mandamus to the Tuscaloosa Circuit Court directing dismissal of claims asserted by Re. W., a 20-year old student with mental disabilities, against Williams, a teacher with the Tuscaloosa City Board of Education. While enrolled in CrossingsPoints, a collaborative program of the Board and the University of Alabama college, Re. W. was sexually abused in a Lowe's parking lot when left alone in a CrossingsPoint van with another student while Williamson was assisting two other students applying for a job at Lowe's.

The Court explains that "[b]ecause Williamson established that she was performing a discretionary function that could entitle her to State-agent immunity, the burden then shifted to Re. W. to establish that "'one of the two categories of exceptions to State-agent immunity recognized in *Cranman* is applicable.'" *Ex parte City of Montgomery*, 99 So. 3d 282, 293 (Ala. 2012)." Ms. *14. Re. W. attempted to establish a *Cranman* exception by relying on the deposition of another teacher, Olivia Robinson, that a teacher or aide was required to be with Re. W. at all times.

The Court rejects this argument because

> Although Re. W. referenced and purported to quote portions of pages 53and 54 of Olivia Robinson's deposition, she did not attach those pages to her response in opposition to Williamson's motion for a summary judgment. Also, Williamson did not attach those pages of Robinson's deposition in support of her motion for a summary judgment. Therefore, based on the materials before us, that purported evidence was not actually before the trial court and could not be used as a basis for finding that there was a rule, regulation, or policy that required Williamson to stay

with Re. W. from the time the van was parked until they left that location.

Ms. *15, citing *Autauga Creek Craft House, LLC v. Brust*, 315 So. 3d 614, 627 (Ala. Civ. App. 2020).

PRESERVING ERROR IN BENCH TRIAL – CONTRACT – PIERCING CORPORATE VEIL

Childs and Granger Construction v. Pommer; Pommer v. Granger, [Ms. 1190525; 1190580, Sept. 3, 2021] __ So. 3d __ (Ala. 2021). The Court (Wise, J.; Parker, C.J., and Bolin, Bryan, and Mitchell, JJ., concur; Shaw, Sellers, Mendheim, and Stewart, JJ., concur in the result) affirms in part and reverses in part the Baldwin Circuit Court's judgment entered after a bench trial awarding damages and attorney fees to the Pommers in a dispute involving the construction of a garage on their property in Fairhope. The Court affirms the judgment for compensatory damages as to Defendant Granger Construction Company LLC (Granger Construction). The Court concludes that none of the various issues presented by Granger Construction were properly preserved. Citing *Weeks v. Herlong*, 951 So. 2d 670, 676-77 (Ala. 2006), the Court notes that although it filed a JML at the close of all the evidence, that motion did not assert any of the issues Granger Construction argued on appeal. Ms. **24-26. For similar reasons, the Court affirms the attorney-fee award against Granger Construction. The Court explains, "counsel for Granger Construction ... did not file a postjudgment motion challenging the award of attorneys' fees. Therefore, this issue is not properly preserved for our review and will not support a reversal of the attorney-fee award against Granger Construction." Ms. *29.

The Court reverses the judgment against Paul Childs because "[i]t is undisputed that Childs was not a signatory on the contract, that Childs was not named in the contract, and that Childs was not an owner or a member of Granger Construction." Ms. *20.

Finally, on the cross appeal filed by the Pommers, the Court affirms the circuit court's order declining to pierce the corporate veil of Granger Construction and holds

> The evidence presented at trial would support a finding by the trial court that Granger did not ignore the corporate form of Granger Construction and that the company was not run as an instrumentality of or as the alter ego of Granger. Additionally, the evidence presented would also support a finding by the trial court that the Pommers did not establish fraud in asserting the corporate existence and did not establish that the recognition of the corporate existence, under the facts of this case, would result in an injustice or inequitable consequences. Therefore, the trial court's denial of the Pommers' request to pierce the corporate veil of Granger Construction was not plainly and palpably wrong.

Ms. *46.

COUNTY BOARDS OF EDUCATION – SOVEREIGN IMMUNITY

Ex parte Jefferson County Board of Education, [Ms. 1200230, Sept. 3, 2021] __ So. 3d __ (Ala. 2021). The Court unanimously (Bryan, J.; Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) issues a writ of mandamus directing the Jefferson Circuit Court to dismiss Alabama Lockers, LLC's contract action against the Jefferson County Board of Education. The Court rejects the plaintiff/respondent's request to overturn its settled precedent holding that county boards of education are entitled to sovereign immunity, "[w]e reaffirm our holding in [*Ex parte*] *Hale* [*County Board of Education*, 14 So. 3d 844 (Ala. 2009),] stating that county boards of education are entitled to State immunity." Ms. *12.

CIRCUIT COURT JURISDICTION – RULE 59, ALA. R. CIV. P.

Ex parte Utilities Board of the City of Roanoke, [Ms. 1200307, Sept. 3, 2021] __ So. 3d __ (Ala. 2021). The Court (Stewart, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur) issues a writ of mandamus to the Randolph Circuit Court directing the court to vacate its order reinstating a case. The Court first explains "'[i]f no Rule 59 motion is filed after a judgment is entered, the trial court that entered the judgment generally loses jurisdiction to amend the judgment 30 days after the judgment is entered.' *Ex parte Caremark Rx, LLC*, 229 So. 3d 751, 757 (Ala. 2017)(citing *Pierce v. American Gen. Fin., Inc.*, 991 So. 2d 212, 215 (Ala. 2008)); see also *George v. Sims*, 888 So. 2d 1224, 1227 (Ala. 2004)('Generally, a trial court has no jurisdiction to modify or amend a final order more than 30 days after the judgment has been entered, except to correct clerical errors.')" Ms. *6.

The Court holds, "[u]nder the totality of the circumstances surrounding the entry of the September 9 order, we conclude that the order was a final judgment. The provision of the order granting the Esters 45 days to request reinstatement of the case did not extend the time for the Esters to file a post-judgment motion under Rule 59(e)." Ms. *14.

VOLUNTARY DISMISSAL – TRANSFER OF STRUCTURED-SETTLEMENT RIGHTS – INTERVENTION – INTERPLEADER

Ex parte Scoggins, [Ms. 1200102, 1200103, 1200104, 1200105, 1200106, 1200107, Sept. 3, 2021] __ So. 3d __ (Ala. 2021). Addressing six consolidated mandamus petitions arising from multiple actions in the Calhoun Circuit Court relating to a structured settlement executed in 2002 to resolve a wrongful death action where the distributees Michael Scoggins and Matthew Scoggins were minors, the Court (Mendheim, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur; Mitchell, J., recuses) first holds that the Calhoun Circuit Court lacked jurisdiction to "reopen" the wrongful death action in 2011 which had been dismissed by joint stipulation in 2002. The Court explains

> The unequivocal fact is that the wrongful-death action was dismissed by joint stipulation on July 19, 2002. '"'[T]he effect of a voluntary dismissal ... is to render the proceedings a nullity and leave the parties as if the action had never been brought.'" *Ex parte Sealy* [, *L.L.C.*],904 So. 2d [1230,] 1236 [(Ala. 2004)] (quoting *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 219 (8th Cir. 1977)) (emphasis

added)." *Gallagher Bassett Servs., Inc. v. Phillips*, 991 So. 2d 697, 700 (Ala. 2008).

Ms. **46-47.

The Court explained further that

> The only purported authority for "re-opening" the wrongful-death action is the probate court's April 20, 2010, order, but, even though the probate court had the authority to appoint a legal conservator for the then-minor brothers' estates under the Alabama Uniform Guardianship and Protective Proceedings Act ("the AUGPPA"), Ala. Code 1975, § 26-2A-1 *et seq.*, [to pursue sale of certain future payments under the structured settlement] such authority could not empower the circuit court to revive an action that had so long ago ceased to exist.

Ms. *51.

The Court noted that even though the distributees of the wrongful death settlement were minors, the circuit court did not approve the settlement and had determined in an order entered in 2002 that "[t]he interest of the minors in this matter are as distributees of the estate and are not personal in nature. The representatives have the authority to settle this matter. No pro ami is necessary in this matter." Ms *7. In this regard, the Court noted in dicta that

> [A] pro ami settlement may not be required in a wrongful-death action in which a minor is a distributee of the settlement proceeds because "[t]he Wrongful Death Act, § 6-5-410, [Ala. Code 1975,] creates the right in the personal representative of the decedent to act as agent by legislative appointment for the effectuation of a legislative policy of the prevention of homicides through the deterrent value of the infliction of punitive damages." *Steele v. Steele*, 623 So. 2d 1140, 1141 (Ala. 1993). Thus, the personal representative has the authority to settle a wrongful-death claim even though "[i]n a wrongful death action the personal representative is only the nominal or formal party. He sues as statutory trustee for the benefit of the designated beneficiaries, who are the real parties in interest." *Board of Trs. of Univ. of Alabama v. Harrell*, 43 Ala. App. 258, 261, 188 So. 2d 555, 557 (1965). See William E. Shreve, Jr., *Settling the Claims of a Minor*, 72 Ala. Law 308, 315-16 (2011). But see also *Roby v. Benton Express, Inc.*, No. 2:05cv494-MHT, May 19, 2006 (M.D. Ala. 2006) (not published in Federal Supplement) (finding that "court's approval [of the final settlement of a wrongful-death claim] is necessary because the decedent ... left surviving him minor children ... who will receive a portion of the settlement.").

Ms.*6, n. 2.

Turning to 2012 actions filed by Stratcap Investments, Inc. ("Stratcap"), a purchaser of the structured-settlement payment rights, the Court denies Michael's petition for a writ of mandamus seeking to vacate the circuit court's order denying Michael's motion to intervene in the Stratcap actions. The Court explains

> In this instance, Michael's motion did not clearly delineate whether he was seeking permissive intervention or intervention as a matter of right. This is important because "trial courts have broader discretion in denying a motion for permissive intervention as untimely under Rule 24(b) than they do in denying as untimely a motion to intervene as of right under Rule 24(a)." *QBE Ins. Corp.*, 23 So. 3d at 1131. As we have already mentioned, Michael also did not clearly indicate in his motion that he was seeking to set aside the circuit court's orders [in the Stratcap actions] approving the transfers of certain structured-settlement-payment rights. Such an argument is especially important when a party seeks to intervene after a final judgment has been entered because otherwise the motion to intervene serves no relevant purpose in the "defunct" action. *Phillips*, 991 So. 2d at 700.

Ms. *75, citing *Gallagher Bassett Servs., Inc. v. Phillips*, 991 So. 2d 697, 700 (Ala. 2008). The Court also rejected Michael's argument that Stratcap's failure to notify him of the filing of the actions to approve the transfer to Stratcap of certain of the structured-settlement-payments rights voided the judgments approving the transfers. While acknowledging that Michael and Matthew were interested parties under the Alabama Structured Settlement Protection Act (ASSPA) who were entitled to notice of the Stratcap action, the Court concludes the failure to give notice does not render the order approving the transfer void because "the ASSPA itself suggests that failures to fulfill its procedural requirements are remedied by holding the transferee accountable, not by voiding the transfer transaction." Ms. *64, citing Section 6-11-54(a)(2)b., Ala. Code 1975.

Finally, the Court issues the writ directing the circuit court to vacate its order denying American General Annuity Service Corporation's motion to interplead annuity payments in the 2019 action [filed by Michael and Matthew against Stratcap and others] and holds

> Whether they [Michael and Matthew] ultimately will succeed in undermining the orders in the Stratcap actions is not relevant to whether American General's motion to interplead funds should be granted. What is relevant is that multiple parties clearly claim a stake in American General's annuity payments. The circuit court granted American General's motion to intervene in the 2019 action, which was filed with the intention of desiring to interplead its annuity-payment funds. Under those circumstances, the circuit court should have granted American General's motion for interpleader relief.

Ms. **79-80.

OPEN RECORDS ACT – CRIMINAL INVESTIGATION EXCEPTION

Something Extra Publishing, etc. v. Huey Hoss Mack, et al., [Ms. 1190106, Sept. 24, 2021] __ So. 3d __ (Ala. 2021). The Court (Shaw, J.; Bolin, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur; Shaw, J., concurs specially; Wise and Stewart, JJ., concur in the result in the result; Parker, C.J., dissents) affirms the Baldwin Circuit Court's summary judgment dismissing independent newspaper Lagniappe's claims related to its Open Records Act (ORA) request to Baldwin County Sheriff Hoss Mack seeking " [a]ll of the records related to the shooting of Jonathan Victor ..., including but not limited to dash cam, body cam, and third party video; the audio from any 911 calls or radio communications; photographs from the scene; autopsy records; and com-

munications such as emails, text messages, and other forms of messaging." Ms. *13. Noting that the ORA states that "'[e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute,'" Ms. *9, quoting Ala. Code 1975, § 36-12-40, the Court holds

> All materials requested by Lagniappe are related to the incident regarding Cpl. Hunady, which was the subject of a criminal investigation. The very wording of Lagniappe's request, seeking all the "records related to the shooting," seeks such investigative material. There is no need for affidavits or other evidence to establish what the Sheriffs possessed because all the records that were requested would be covered under § 12-21-3.1(b). Thus, the investigative-privilege exception applies.

Ms. *14.

INSURANCE COVERAGE DISPUTE – SUMMARY JUDGMENT – EFFECT OF DEFAULT

Keith Company v. Lyndon Southern Insurance Co., [Ms. 1200599, Sept. 24, 2021] __ So. 3d __ (Ala. 2021). The Court (Wise, J.; Shaw, Bryan, and Mitchell, JJ., concur; Bolin, Sellers, Mendheim, and Stewart, JJ., concur in the result; Parker, C.J., dissents) reverses the Tallapoosa Circuit Court's summary judgment for Lyndon Southern Insurance Company (Lyndon) in an action seeking a declaration that a household exclusion applied. The Court reverses because "Lyndon did not produce substantial evidence to establish that [the driver] Felicia did not have a valid driver's license at the time of the accident and did not produce substantial evidence to establish that Felicia was under the age of 25 and resided in [the insured] Annette's household at the time of the accident. Therefore, Lyndon did not shift the burden of proof to BEK. Accordingly, the trial court erred in granting Lyndon's motion for a summary judgment." Ms. *15.

The Court rejects Lyndon's effort to use the defaults of Felicia and Annette to establish facts necessary to support the summary judgment as to tort claimant Ben E. Keith Company, Inc. ("BEK") which had answered Lyndon's declaratory judgment complaint and denied the allegations of the complaint,

> In *Dorcal* [*Inc. v. Xerox Corp.*, 398 So. 2d 665 (Ala. 1981)], this Court stated: "The general effect of an entry of default is that of a decree pro confesso or a judgment by nil dicit at common law. 6 Moore's Federal Practice § 55.03(2) at 55-32 (2nd ed. 1976); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2681 (1971). Under a decree pro confesso, the defaulting party loses his standing in court, cannot appear in any way, cannot adduce any evidence and cannot be heard at the final hearing. *Clifton v. Tomb*, 21 F.2d 893 (4th Cir. 1927). (Emphasis added.)
>
> Although the holding in *Dorcal* may apply to Felicia and Annette, there is no indication that that holding would apply to a third party such as BEK. In fact, the application of the *Dorcal* holding to a party like BEK, which answered and challenged the allegations in the complaint for a declaratory judgment, is counterintuitive and unwarranted. *Cf. McDaniel v. Harleysville Mut. Ins. Co.*, 84 So. 3d 106 (Ala. Civ. App. 2011). Therefore, we conclude that Lyndon could not rely on the allegations that are included in its complaint for a declaratory judgment to establish any undisputed facts with regard to BEK.

Ms.**14-15.

LAWYER REFERRAL FEE

Sirote & Permutt, P.C. v. Caldwell, [Ms. 1200092, Sept. 24, 2021] __ So. 3d __ (Ala. 2021). The Court (Mitchell, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Mendheim, JJ., concur) affirms the Mobile Circuit Court's bench verdict awarding attorney Randall Caldwell a disputed referral fee from the Woerner entities' BP oil spill claim handled by Cunningham Bounds. Sirote & Permutt, P.C. (Sirote) contended that it rather than Caldwell was entitled to the fee.

In affirming, the Court rejects Sirote's argument that a client must give informed consent to a referral fee and holds "by its express terms, Rule 1.5(e) [Rules of professional Conduct] does not require informed consent" but only requires that "the client is advised of and does not object to the participation of all the lawyers involved." Ms. *21.

The Court also rejects Sirote's argument that the client replaced Caldwell with Sirote as the referring lawyer and holds

> Even though there is a "virtually absolute" right to terminate the attorney-client relationship in Alabama, *National Filtronics*, [*Inc. v. Sherwood Land, Ltd.*, 428 So. 2d 11, 15 (Ala. 1983)], that right does not allow the client to escape its obligation to pay an attorney for services rendered. The Woerner entities consented to Caldwell's referral of their BP claims to Cunningham Bounds. And, as explained above, there was sufficient evidence for the trial court to find that Caldwell fulfilled his duties under the referral agreement. See *Bassett Lumber Co. v. Hunter-Benn & Co.*, 238 Ala. 671, 675, 193 So. 175, 178 (1939) ("It is elementary law that a contract may be executed as to one of the parties and executory as to the other, and where one of the parties to a contract has performed everything necessary to be done by him, according to the terms of the contract, the contract, in so far as that party is concerned, is executed ...."). Allowing the Woerner entities to alter the referral agreement at this stage would undermine freedom of contract, do nothing to protect a client's right to terminate the attorney-client relationship ....

Ms. **27-28.

SOVEREIGN IMMUNITY – ALDOT DIRECTOR

Ex parte John R. Cooper, [Ms. 1200269, Sept. 30, 2021] __ So. 3d __ (Ala. 2021). The Court (Parker, C.J.; Bolin, Shaw, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur; Sellers, J., concurs in the result) issues a writ of mandamus to the Morgan Circuit Court directing dismissal of claims against John R. Cooper, the director of the Alabama Department of Transportation ("ALDOT"). Plaintiff Hulsey alleged that he lost control of his vehicle as a result of the negligence of ALDOT employees who applied "an improper mixture of anti-icing brine and diesel fuel" to the highway, Ms. *2, and asserted "individual capacity" claims against Cooper for "fail[ing] to supervise and train ALDOT employees and to ensure that they followed ALDOT policies." *Ibid.*

Citing *Barnhart v. Ingalls*, 275 So. 3d 1112, 1122 (Ala. 2018), the Court holds the "claims against Cooper were, in effect, official-capacity claims against the State, they were not claims against him individually," Ms. *8, because "[a]part from his official position, Cooper owed no duty to keep the roadway in repair, to follow ALDOT policies, or to ensure that ALDOT policies were being followed by ALDOT employees." Ms. *5.

MANDAMUS PROCEDURE

Ex parte City of Gulf Shores, [Ms. 1200366, Sept. 30, 2021] __ So. 3d __ (Ala. 2021). The Court (Bryan, J.; Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, and Stewart, JJ., concur; Mitchell, J., dissents) denies the City of Gulf Shores's mandamus petition invoking the recreational-use statutes, § 35-15-1 *et seq.*, Ala Code 1975, which the City argued required dismissal of personal injury claims asserted by Ronald Paulinelli ("Ronald") on behalf of his minor daughter who was injured while walking on a wooden boardwalk owned by the City. Expressing no opinion on the merits of Ronald's claims, the Court holds

> The applicability of the cases relied on by Ronald [in opposing the summary judgment] is a key issue before us. However, nothing in the materials before us indicates that the City ever presented to the circuit court the arguments that it now presents to us regarding the applicability of those decisions. This Court will not grant relief to a petitioner or an appellant based on an argument presented for the first time to this Court. See *State Farm Mut. Auto. Ins. Co. v. Motley*, 909 So. 2d 806, 821 (Ala. 2005) (stating that "[t]his Court cannot consider arguments advanced for the purpose of reversing the judgment of a trial court when those arguments were never presented to the trial court for consideration"); and *Ex parte Staats-Sidwell*, 16 So. 3d 789, 792 (Ala. 2008) (stating that, "on mandamus review, 'we look only to the factors actually argued before the trial court'" in considering a petitioner's arguments (quoting *Ex parte Antonucci*, 917 So. 2d 825, 830 (Ala. 2005), citing in turn *Ex parte Ebbers*, 871 So. 2d 776, 792 (Ala. 2003))).

Ms. ** 8-9.

MEDICAL NEGLIGENCE – RELATION BACK OF AMENDMENTS – ERROR PRESERVATION – WRONGFUL DEATH REMITTITUR

Bednarski, et al. v. Johnson, [Ms. 1200183, Sept. 30, 2021] __ So. 3d __ (Ala. 2021). In a per curiam plurality opinion, the Court (Shaw, Bryan, Mendheim, and Stewart, JJ., concur; Parker, C.J., concurs specially; Bolin and Mitchell, JJ., concur in part and dissent in part; Sellers, J., dissents) affirms the Lee Circuit Court's $6.5 million dollar judgment in a medical negligence wrongful death case against Dr. Zenon Bednarski and his practice, Auburn Urgent Care, Inc. ("AUC"). A few months after being prescribed birth control pills for the first time, the decedent Johnson went to AUC on December 1, 2014, complaining of shortness of breath, chest pains, coughing, a headache, and a sore throat. Dr. Bednarski diagnosed Hope with bronchitis. Hope returned two days later complaining of sharp chest pains and extreme shortness of breath. Hope was diagnosed with leukocytosis and dyspnea and was prescribed an inhaler. The next morning, Hope died of a pulmonary blood clot.

The Plaintiff substituted Dr. Willis, who saw Hope on her second visit to AUC, for a fictitious party. Defendants argued that Plaintiff was not ignorant of the identity of Dr. Willis so that the substitution of Dr. Willis did not relate back. The opinion rejects this argument because "the AUC triage sheet nowhere reflected Dr. Willis's name and that, instead, Dr. Bednarski and Dr. Edvin Larson were the only physicians noted on that document as practicing at the AUC clinic." Ms. *12, citing *Ex parte VEL, LLC*, 225 So. 3d 591, 602 (Ala. 2016). The opinion also concludes that Plaintiff acted with due diligence and notes that "the failure of the Bednarski defendants to shed any additional light on Dr. Willis's identity as the physician who had treated Hope on December 3, 2014, in response to discovery requests renders the circumstances of this case similar to those recently addressed by the Court in *Ex parte Russell*, 314 So. 3d 192, 202-03 (Ala. 2020)("[T]he trial court could have reasonably concluded that [the plaintiff] had diligently pursued discovery targeted toward identifying [a nurse] but had been hindered by [the hospital]'s failure to timely disclose a requested record." Ms. *22.

The opinion rejects a number of issues because the Defendants failed to preserve them. For example, the Bednarski Defendants argued that Plaintiff counsel's reference in closing argument to alleged negligent hiring of Dr. Willis was improper. However, "[b]ecause the Bednarski defendants did not object to the statements of [Plaintiff's] counsel during closing arguments and because they have failed to demonstrate that the statements were grossly improper, they have not demonstrated that the trial court's judgment should be reversed based on the statements." Ms. *39. The Defendants also contended that "the inclusion of an unpleaded 'negligent hiring' claim in the jury instructions presented a 'good count/bad count' situation under § 6-5-551 and *Long v. Wade*, 980 So. 2d 378 (Ala. 2007), and that, under *Long*, a challenge to the sufficiency of the evidence was adequate to preserve their challenge to the jury instructions." Ms. **41-42. The opinion notes that the defendants in *Long* objected to the jury instructions and concludes that the Bednarski Defendants' failure to object to the jury instructions results in a failure to properly present this issue for review. Ms. *42. Similarly, the Bednarski Defendants waived their objection to the qualifications of Plaintiff's expert witness because they failed to object when his testimony was offered. Ms. *43, citing *HealthTrust, Inc v. Cantrell*, 689 So. 2d 822, 826 (Ala. 1997).

On the remittitur issue, the opinion notes that the verdict of $9 million was reduced by a $1 million pro tanto settlement with Hope's OBGYN physician who prescribed Hope birth control pills and failed to accurately interpret genetic testing for Hope's risk of blood clots. In addition, the trial court granted a remittitur reducing the verdict to $6.5 million following the *Hammond/Green Oil* hearing. On the reprehensibility analysis, the opinion leaves undisturbed the trial court's findings that the culpability of the Bednarski Defendants was high because staffing of the clinic was arranged to maximize profits. Ms. **50-51. As to the comparable cases factor, the opinion concludes "[i]n light of the disparate conduct involved, the Bednarski defendants have failed to demonstrate that the trial

court was, or that this Court is, obligated to view Cortney's $1 million settlement with Dr. Hensarling and Lee OBGYN as a highly credible benchmark ..." Ms. *54.

Finally, the opinion concludes that "[t]he burden of clearly establishing their financial position fell on the Bednarski Defendants, and we have been presented with no basis to conclude that the trial court erred in its determination that they did not meet that burden" so as to warrant a further reduction of the verdict," Ms. *62, and "it is unclear ... whether the $6.5 million award will actually financially 'destroy' the Bednarski defendants." Ms. *61.

COUNTY DHR EMPLOYEES – STATE-AGENT IMMUNITY

Smith v. Alexander, et al., [Ms. 1200215, Sept. 30, 2021] __ So. 3d __ (Ala. 2021). The Court (Bolin, J.; Shaw, Wise, Mendheim, Stewart, and Mitchell, JJ., concur; Parker, C.J., concurs in part and concurs in the result; Bryan and Sellers, JJ., concur in the result) affirms the Cullman Circuit Court's summary judgment dismissing Steven Smith's claims asserted as conservator for B.J., a minor, against the staff of the Cullman County DHR. B.J. was rendered a functional quadriplegic in June 2015 when he "initiated a confrontation with jail correctional officers" in the Mobile Metro Jail. The incident occurred some nine days after the DHR defendants requested a hold on B.J.'s release from jail – despite having the bond money to release him and securing his placement at an intensive inpatient psychiatric-treatment facility located in Gadsden – so that he would be present for a court hearing.

Smith sued three DHR employees for failing to provide B.J. with appropriate placement or medication and alleged that they knew he would likely suffer emotional distress as a result of remaining in jail.

Noting that "[c]ategory 3 of *Cranman* extends immunity to a State agent when that agent is 'discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner.' *Ex parte Cranman*, 792 So. 2d at 405," Ms. *36, the Court concludes that each of the three defendants, Key, Alexander and Buchanan, met their "initial burden(s) of demonstrating that Smith's claims arose from a function that entitled [each of them] to State-agent immunity." Ms.*47.

The Court also holds that Smith failed to meet his burden under *Cranman* to establish a genuine issue of fact as to any exception to state-agent immunity

> Because we have determined that incarceration in jail is not a placement made pursuant to DHR policies and because those policies fail to address the circumstances presented when a minor in the custody of DHR is incarcerated and in the physical custody of a law-enforcement agency, we conclude that Smith has failed to provide substantial evidence demonstrating that Alexander acted beyond her authority by failing to discharge her duties pursuant to a detailed set of rules or regulations because no DHR policies existed addressing the circumstances with which Alexander and the other defendants were faced in this case.

Ms. *58, citing *Giambrone v. Douglas*, 874 So. 2d 1046,1052 (Ala. 2003).

The opinion also concludes

> In summary, none of the actions taken by the defendants in dealing with B.J. indicate that any defendant made a conscious decision to act "with a design or purpose to inflict injury" upon B. J. *Ex parte Nall*, 879 So. 2d at 546. The evidence indicates that each crucial decision made by the defendants – i.e., the decisions not to place B.J. at the Gateway facility and not to post B.J.'s bond before his court date – were made with B.J.'s best interests in mind after consideration of all the relevant recommendations and factors."

Ms. *66.