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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2014-2015

1140264

Ex parte Courtyard Citiflats, LLC, and Action Property Management, L.L.C.

PETITION FOR WRIT OF MANDAMUS

(In re: Coretta Arrington

v.

Courtyard Citiflats, LLC, and Action Property Management, L.L.C.)

(Montgomery Circuit Court, CV-14-447)

SHAW, Justice.

Courtyard Citiflats, LLC, and Action Property Management,

L.L.C. (hereinafter collectively referred to as "Citiflats"), the defendants below,[1] petition this Court for a writ of mandamus directing the Montgomery Circuit Court to dismiss the complaint of the plaintiff, Coretta Arrington, as untimely filed. We grant the petition and issue the writ.

Facts and Procedural History

On July 18, 2014, Arrington filed, both individually and in her capacity as the administrator of the estate of her deceased minor child, a complaint against Citiflats. Arrington's complaint alleged tort-based claims in connection with the death of Arrington's child as the result of injuries allegedly sustained on July 24, 2012, on premises owned and managed by Citiflats. Arrington's complaint was accompanied by an "Affidavit of Substantial Hardship" (hereinafter referred to as "the hardship statement") alleging that Arrington was unable to pay the corresponding filing fee. See § 12-19-70, Ala. Code 1975.[2] It is undisputed that, at the

[1]Based on the limited materials before us, it appears that Courtyard Citiflats, LLC, and Action Property Management, L.L.C., are, respectively, the owner of an apartment complex and the management company for the complex.

[2]Section 12-19-70 provides as follows:

time it was filed, the hardship statement had not been approved by the trial court as required by § 12-19-70(b). Arrington's complaint was also accompanied by the summonses necessary for service on the named defendants, which were stamped "filed" by the clerk of the trial court on the filing date.

On August 18, 2014 -- after the July 24, 2014, expiration of the applicable two-year statute of limitations -- the trial court entered an order purporting to approve the hardship statement. On August 19, 2014, the clerk of the trial court issued the previously filed summonses for service.

Citiflats filed a motion pursuant to Rule 12(b)(6), Ala. R. Civ. P., seeking to dismiss Arrington's complaint on the

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> "(a) There shall be a consolidated civil filing fee, known as a docket fee, collected from a plaintiff at the time a complaint is filed in circuit court or in district court.
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> "(b) The docket fee may be waived initially and taxed as costs at the conclusion of the case if the court finds that payment of the fee will constitute a substantial hardship. A verified statement of substantial hardship, signed by the plaintiff and approved by the court, shall be filed with the clerk of court."

(Emphasis added.)

ground that the statutory limitations period had expired without the payment of a filing fee or the approval of a hardship statement--either of which, according to Citiflats, was necessary to commence the action and to invoke the jurisdiction of the trial court. Relying on prior authority from this Court, notably De-Gas, Inc. v. Midland Resources, 470 So. 2d 1218 (Ala. 1985), and Mace v. Centel Business Systems, 549 So. 2d 70 (Ala. 1989), Citiflats alleged that the mere filing of Arrington's complaint without payment of the filing fee or approval of the hardship statement was insufficient to commence the action for statute-of-limitations purposes; thus, Citiflats contended, all of Arrington's claims were time-barred.

In her opposition to the dismissal motion, Arrington, among her other arguments, attempted to distinguish the present case from the authorities cited by Citiflats and requested, pursuant to Hornsby v. Sessions, 703 So. 2d 932 (Ala. 1997), that the trial court enter an order nunc pro tunc deeming its approval of the hardship statement as having been "retroactively entered" on the original filing date.

After a hearing, the trial court, on November 5, 2014, entered, over Citiflats' opposition, an order approving the hardship statement "Nunc Pro Tunc retroactive to [the original] filing date"; shortly thereafter, the trial court entered a second order denying Citiflats' motion to dismiss. Citiflats promptly filed this petition for a writ of mandamus.

Standard of Review

A writ of mandamus will be granted where there is

> "'"(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."'
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> "Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003)(quoting Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991)). Mandamus will lie to direct a trial court to vacate a void judgment or order. Ex parte Chamblee, 899 So. 2d 244, 249 (Ala. 2004)."

Ex parte Sealy, L.L.C., 904 So. 2d 1230, 1232 (Ala. 2004).

Discussion

In its petition, Citiflats maintains that either the payment of the requisite filing fee or the trial court's approval of the hardship statement was a jurisdictional prerequisite for the commencement of Arrington's action. More

specifically, Citiflats contends that the trial court exceeded its discretion in issuing an order "nunc pro tunc" in an effort to cure a jurisdictional defect. Although this Court is aware of the unfortunate result from Arrington's perspective, and despite her attempts to demonstrate that the authorities cited by Citiflats are inapposite, we must agree that the authorities cited by Citiflats are both applicable and controlling: caselaw clearly dictates that the payment of a filing fee or the preapproval of the hardship statement is a jurisdictional prerequisite to the commencement of Arrington's action.

Here, it is undisputed that Arrington timely filed her complaint -- accompanied by the hardship statement -- within the applicable limitations period. This Court has repeatedly cautioned, however, that mere filing, alone, is not always sufficient to commence an action and to toll the running of the limitations period:

> "Although Rule 3, Ala. R. Civ. P., states that '[a] civil action is commenced by filing a complaint with the court,' this Court has held that the filing of a complaint is not the sole factor in determining when an action is 'commenced.' A major function of Rule 3, Ala. R. Civ. P., is to identify, with certainty, the specific time when a civil action is initiated. The filing of a complaint is, therefore,

> a significant factor in commencing an action and suspending the operation of the applicable statute of limitations; however, it is not the sole factor. Ward v. Saben Appliance Co., 391 So. 2d 1030, 1032 (Ala. 1980). This Court has held that the filing of a complaint, standing alone, does not commence an action for statute-of-limitations purposes."

Ex parte East Alabama Mental Health-Mental Retardation Bd., Inc., 939 So. 2d 1, 3 (Ala. 2006).

In De-Gas, supra, the plaintiffs delivered both summonses and a complaint to the clerk of the trial court, who stamped the items "filed" on the date they were delivered. 470 So. 2d at 1219. However, the plaintiffs neglected to pay the filing fee at that time. Over one month later, the plaintiffs paid the filing fee, and service was then effected; however, the statute of limitations on at least one of the plaintiffs' claims had expired between the filing of the complaint and the payment of the filing fee. In rejecting the claim that the delivery of the complaint and summonses without the payment of the filing was sufficient to commence the action for statute-of-limitations purposes, this Court explained:

> "The use of the term 'shall' in [§ 12-19-70] makes the payment of the filing fee mandatory. See Prince v. Hunter, 388 So. 2d 546, 547 (Ala. 1980). It was the obvious intent of the legislature to require that either the payment of this fee or a court-approved verified statement of substantial

> hardship accompany the complaint at the time of filing."

470 So. 2d 1220 (first emphasis added).

In reaching that conclusion in De-Gas, we further noted that "'[t]he most important and essential element of interruption of [the running of the limitations period] is that defendant be judicially notified of the rights which are sought and of plaintiff's intent to proceed with the action.'" 470 So. 2d at 1221 (quoting 54 C.J.S. Limitations of Actions § 264 at p. 294 (1948)). Thus, we held that "the payment of the fees required by § 12-19-70 or the filing of a court-approved verified statement of substantial hardship is a jurisdictional prerequisite to the commencement of an action for statute of limitations purposes." 470 So. 2d at 1222 (emphasis added). See also Reynolds v. Sheppard, 818 So. 2d 389, 391 (Ala. 2001) ("Unless the filing fee is paid or a court-approved verified statement of substantial hardship is filed within the limitations period, the action has not been commenced within that period." (emphasis added)); Ex parte Beavers, 779 So. 2d 1223, 1225 (Ala. 2000) (concluding, where the circuit court had ruled on the merits of postconviction petition after it had denied petitioner's request to proceed

in forma pauperis, that, solely "[b]ecause the circuit court denied [petitioner's] request to proceed in forma pauperis, it lacked jurisdiction to rule on the merits of his petition"); Vann v. Cook, 989 So. 2d 556, 559 (Ala. Civ. App. 2008) ("The payment of a filing fee or the filing of a court-approved verified statement of substantial hardship is a jurisdictional prerequisite to the commencement of an action." (emphasis added)); Carpenter v. State, 782 So. 2d 848, 850 (Ala. Crim. App. 2000) (dismissing the appeal as from a void judgment where trial court had purported to rule on affidavit of substantial hardship at the conclusion of the underlying proceeding on ground that "[a] trial court does not obtain jurisdiction of an action until either a filing fee is paid or the fee is properly waived according to § 12-19-70" (emphasis added)); and Goldsmith v. State, 709 So. 2d 1352, 1353 (Ala. Crim. App. 1997) ("[A]bsent payment of the filing fee or approval of the in forma pauperis declaration, the circuit court does not acquire subject-matter jurisdiction." (emphasis added)).

Mace, supra, similarly involved a plaintiff who filed a complaint at or near the statutory deadline with an

accompanying, but unapproved, affidavit of substantial hardship. Relying on De-Gas, among other cases, we affirmed, on direct appeal, a summary judgment for the defendants on the ground that the plaintiff's claim was barred by the applicable statute of limitations. 549 So. 2d at 71. It is true, as Arrington notes, that the plaintiff in Mace also failed to include, at the time of filing, the summonses and information necessary to accomplish service on the defendants -- which the Court considered evidence of Mace's lack of intent actually to commence the lawsuit at filing. Id. We note, however, that, despite the inclusion of the summonses with her complaint, Arrington's failure to pay the filing fee or to submit a court-approved hardship statement at the time of filing resulted in a similar delay in the service of her own summonses. Moreover, in De-Gas, we specifically concluded that cases in which service was withheld on instruction of the plaintiff were applicable to cases involving nonpayment of filing fees:

> "By failing to pay at the time of filing the complaint the filing fee mandated by § 12-19-70, the plaintiffs not only caused service to be withheld but effectively precluded any action by the clerk's office necessary to actually set the case in motion."

470 So. 2d at 1221-22. Despite Arrington's attempt to demonstrate otherwise, the facts in Mace appear indistinguishable from those in the present case.[3] As Arrington notes, the provision for proceeding in forma pauperis is an attempt to make sure even our poorest citizens receive access to our courts for the redress of perceived grievances; nonetheless, to gain that access, parties proceeding in forma pauperis must nevertheless comply with the accompanying filing prerequisites. See § 12-19-70(b), Ala. Code 1975.

In light of the foregoing, the trial court lacked the authority to grant Arrington's request for a nunc pro tunc order retroactively approving the hardship statement. See State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999) ("'[A] jurisdictional defect ... cannot be cured nunc pro tunc back to the date when the original complaint was filed.'" (quoting Tyler House Apartments, Ltd. v. United

[3]In her answer to Citiflats' petition, Arrington identifies minor factual distinctions between the identified precedents and the facts of her case and identifies exceptions she contends prevent the application here of those cases. Arrington does not, however, argue that those cases were wrongly decided, nor does she request that they be overruled.

States, 38 Fed. Cl. 1, 7 (1997))); Farmer v. Farmer, 842 So. 2d 679, 681 (Ala. Civ. App. 2002) ("The failure to pay the filing or docketing fee is a jurisdictional defect.").[4]

Finally, because the identified defect was jurisdictional, it would not appear to be, as Arrington urges, subject to principles of equitable tolling. In any event, Arrington has failed to allege circumstances sufficient to demonstrate that she is entitled to equitable tolling;

[4]We note, too, as Citiflats argued both in the trial court and on appeal, that, even considering the minor typographical error consisting of the transposition of Arrington's first and last names in its August 18, 2014, order, the trial court's November 5, 2014, order does not appear to fall within the limited category of situations in which a judgment nunc pro tunc may be applied -- nor was that error a ground cited by Arrington in support of her request for its issuance. See Ex parte Brown, 963 So. 2d 604, 608 (Ala. 2007) ("'"'The object of a judgment nunc pro tunc is not the rendering of a new judgment and the ascertainment and determination of new rights, but is one placing in proper form on the record, the judgment that had been previously rendered, to make it speak the truth, so as to make it show what the judicial action really was, not to correct judicial errors, such as to render a judgment which the court ought to have rendered, in the place of the one it did erroneously render, nor to supply non-action by the court, however erroneous the judgment may have been.'"'" (quoting other cases)). See also BMJA, LLC v. Murphy, 41 So. 3d 751, 756 (Ala. 2010); Hornsby, supra. We likewise conclude that the court's inherent authority to control "calendaring" within its own docket under Rule 16, Ala. R. Jud. Admin., fails to supply sufficient authority for the trial court's action in entering the nunc pro tunc order.

specifically, as Citiflats notes, Arrington offers no explanation -- much less an "extraordinary" circumstance -- either for her failure to seek approval of the hardship statement prior to filing or for waiting until six days before the expiration of the limitations period to file the hardship statement. See Weaver v. Firestone, 155 So. 3d 952, 957-58 (Ala. 2013) ("'[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' as to the filing of his action. Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)."). See also Ex parte Ward, 46 So. 3d 888, 897 (Ala. 2007) (holding that "equitable tolling is available in extraordinary circumstances that are beyond the petitioner's control and that are unavoidable even with the exercise of diligence"). Certainly, nothing suggests that any action by or on behalf of Citiflats either caused or contributed to Arrington's delay.

Conclusion

"A writ of mandamus is a drastic and extraordinary remedy, and to justify issuance of such a writ there must be

a clear showing of injury to the petitioner." Ex parte Thomas, 628 So. 2d 483, 485 (Ala. 1993) (citing Ex parte J.E.W., 608 So. 2d 728 (Ala. 1992) (emphasis added)). Because we hold that the trial court erred in refusing to dismiss Arrington's complaint as untimely, we conclude that Citiflats has made the requisite showing of a clear legal right to the relief sought. Ex parte Hodge, 153 So. 3d 734 (Ala. 2014). We therefore grant the petition and issue the writ of mandamus directing the Montgomery Circuit Court to dismiss Arrington's complaint.

PETITION GRANTED; WRIT ISSUED.

Stuart, Bolin, Parker, Wise, and Bryan, JJ., concur.

Moore, C.J., and Murdock, J., dissent.

MOORE, Chief Justice (dissenting).

Coretta Arrington sued Courtyard Citiflats, LLC, the owner of an apartment complex, and its property-management company, Action Property Management, L.L.C. (hereinafter collectively referred to as "Citiflats"), alleging multiple tort claims after her six-year-old child drowned in a pool on premises owned and managed by Citiflats. Arrington's complaint was filed within the applicable two-year statute-of-limitations period. However, she was unable to pay the filing fee required by § 12-19-70(a), Ala. Code 1975; therefore, she filed with her complaint a statement of substantial hardship, seeking judicial verification of that hardship pursuant to § 12-19-70(b), Ala. Code 1975 (permitting circuit courts to waive filing fees for plaintiffs suffering from substantial hardship). The circuit court verified that Arrington was suffering from substantial hardship and thus was excused from paying the filing fee required by § 12-19-70(a), although the circuit court did not do so until after the expiration of the statute of limitations.

Today this Court overrides the circuit court's finding that Arrington suffered from substantial hardship and holds,

on procedural grounds, that the circuit court lacked subject-matter jurisdiction to consider Arrington's case on its merits. I believe this holding mistakes the nature and function of subject-matter jurisdiction and continues a line of erroneous precedent that elevates judicially created procedural technicalities over the substance of the case.

Subject-matter jurisdiction is "a court's power to decide certain types of cases." Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006). See Woolf v. McGaugh, 175 Ala. 299, 303, 57 So. 754, 755 (1911) ("'By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought.'" (quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316 (1870))). This Court has recently stated:

> "Subject-matter jurisdiction is a simple concept:
>
> > "'Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong. The principle of subject matter jurisdiction relates to a court's inherent authority to deal with the case or matter before it. The term means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs.'

> "21 C.J.S. Courts § 11 (2006). In determining a trial court's subject-matter jurisdiction, this Court asks '"only whether the trial court had the constitutional and statutory authority" to hear the case.' Russell v. State, 51 So. 3d 1026, 1028 (Ala. 2010) (quoting Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006)). Problems with subject-matter jurisdiction arise if, for example, a party files a probate action in a juvenile court, a divorce action in a probate court, or a bankruptcy petition in a circuit court, because the nature or class of those actions is limited to a particular forum with the authority to handle them. There are, however, no problems with subject-matter jurisdiction merely because a party files an action that ostensibly lacks a probability of merit."

Ex parte Safeway Ins. Co. of Alabama, 148 So. 3d 39, 42-43 (Ala. 2013). A circuit court has jurisdiction over the tort claims alleged by Arrington; therefore, regardless of whether Arrington paid the filing fee in this case, the circuit court did not lack subject-matter jurisdiction. If Arrington's failure to pay the filing fee was a procedural prerequisite to jurisdiction, then the filing deadline mandated by the statute of limitations was subject to equitable tolling on the basis that the clerk or circuit court--not the filer--delayed the verification of hardship until the statutory limitations period had expired. If the doctrine of equitable tolling applies, then the circuit court's verification of Arrington's affidavit of substantial hardship relates back to the filing

of the complaint, and her cause of action is not barred by the statute of limitations. See Weaver v. Firestone, 155 So. 3d 952, 957-68 (Ala. 2013) (discussing equitable tolling in the context of statutes of limitations).

Justice Murdock and I agree on the fundamental issue before us concerning subject-matter jurisdiction; we disagree only regarding the application of the doctrine of equitable tolling. He does not believe the facts before us present an extraordinary circumstance warranting the application of the doctrine of equitable tolling, whereas I do.[5] The United States Supreme Court has stated: "We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during

[5]I note that the Court in Weaver permitted equitable tolling on the basis that the plaintiff in that case was unable to identify the defendants before the running of the statutory limitations period, a situation no less extraordinary than the one before us involving an indigent plaintiff with no means to pay the filing fee. The fact that the underlying facts in Weaver were horrific -- they involved a conspiracy in which certain men set another man on fire in a cabin in the woods -- should not distract from the procedural issue regarding the tolling of the statute of limitations. See Weaver, 155 So. 3d at 954-56. The discovery of eligible defendants after the running of the limitations period seems just as common or uncommon as the inability of an indigent plaintiff to pay a filing fee before the running of the limitations period.

the statutory period" and that "[w]e generally have been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990). Lacking the means to pay the filing fee, Arrington actively pursued the only judicial remedies available to her when she filed a hardship statement with her complaint. The record suggests she exercised due diligence in preserving her legal rights. By holding that she somehow was required to obtain court approval of her hardship statement before she ever filed it with the clerk of court, this Court punishes Arrington for her poverty and preserves a rule that is not articulated in our statutes or rules. Alabama law is silent as to how, procedurally, an indigent plaintiff with no means to pay a filing fee must obtain court approval of substantial hardship before the statute of limitations runs on his or her claims. The reasonable and commonsense approach for obtaining such approval would be filing with the circuit court the affidavit of substantial hardship along with the complaint before the statutory limitations period runs, as Arrington did.

The erroneous rule that a failure to pay the filing fee deprives the circuit court of subject-matter jurisdiction emanates from expansive interpretations by the Court of Civil Appeals of this Court's holding in De-Gas, Inc. v. Midland Resources, 470 So. 2d 1218, 1222 (Ala. 1985), that "the payment of the fees required by § 12-19-70[, Ala. Code 1975,] or the filing of a court-approved verified statement of substantial hardship is a jurisdictional prerequisite to the commencement of an action for statute of limitations purposes" (emphasis added). Although De-Gas did not hold that the failure to pay a filing fee deprives the circuit court of subject-matter jurisdiction, the Court of Civil Appeals repeatedly held otherwise until at last this Court, in Johnson v. Hetzel, 100 So. 3d 1056, 1057 (Ala. 2012), adopted the erroneous holdings of the Court of Civil Appeals.[6] Realizing the harmful and unintended consequences flowing from those erroneous holdings, two judges on the Court of Civil Appeals now urge this Court to correct our mistake in Hetzel. Presiding Judge Thompson has stated:

[6]See, e.g., Odom v. Odom, 89 So. 3d 121 (Ala. Civ. App. 2011), Vann v. Cook, 989 So. 2d 556 (Ala. Civ. App. 2008), and Farmer v. Farmer, 842 So. 2d 679 (Ala. Civ. App. 2002).

> "I would urge the supreme court to examine its holding in Johnson v. Hetzel, supra, and to consider whether, in this case, the main opinion again improperly expands the holding of De-Gas to hold that, in all cases, a failure to pay a filing fee under § 12-19-70 divests the circuit court of subject-matter jurisdiction over the action. I do not believe that such a holding was the intention of the legislature in enacting the requirement that litigants pay filing fees to offset the costs of litigation at the commencement of their actions."

Hicks v. Hicks, 130 So. 3d 184, 193 (Ala. Civ. App. 2012)(Thompson, P.J., dissenting). Recently, Judge Thomas stated: "I now join Presiding Judge Thompson in calling on our supreme court to reexamine De-Gas and [Hetzel] and to determine that the failure to pay a filing fee at the time of an action is commenced does not necessarily deprive the trial court of subject-matter jurisdiction." Burgett v. Porter, [Ms. 2130889, April 10, 2015] ___ So. 3d ___, ____ (Ala. Civ. App. 2015)(Thomas, J., concurring specially). The majority in this case furthers an erroneous rule that prudent judges bound by our earlier mistake are urging us to overrule. In a previous case, I stated: "[T]his Court and the Court of Civil Appeals have erroneously confused subject-matter jurisdiction and filing-fee requirements in cases applying the holding in De-Gas." Ex parte Hicks, 130 So. 3d 194 (Ala. 2013)(Moore,

C.J., dissenting). Because my views about De-Gas and its progeny have not changed, I must respectfully dissent.

MURDOCK, Justice (dissenting).

I agree with Chief Justice Moore that Coretta Arrington's complaint was not due to be dismissed for lack of subject-matter jurisdiction. Indeed, were it not for the passage in which Chief Justice Moore urges equitable tolling as the doctrinal basis for what we both agree would be the correct result in this case, I would join Chief Justice Moore's dissent. I write separately then (1) to explain my disagreement with Chief Justice Moore's invocation of the doctrine of equitable estoppel in this case and, further, (2) to explain why I believe the actions taken by Arrington nonetheless were sufficient to meet the statute of limitations.

To begin, I agree with the statements at the outset of Chief Justice Moore's dissent to the effect that the subject matter of this case -- a tort action -- certainly is subject matter over which the Montgomery Circuit Court had jurisdiction. I also agree, as the dissent concludes, that this Court's opinion in De-Gas, Inc. v. Midland Resources, 470 So. 2d 1218 (Ala. 1985), was concerned with what a plaintiff must do to satisfy a statute of limitations, not with the

subject-matter jurisdiction of the trial court, and that Johnson v. Hetzel, 100 So. 3d 1056, 1057 (Ala. 2012), in which this Court gave a more expansive reading to De-Gas, should be overruled.

What I cannot agree with in Chief Justice Moore's dissent is the discussion in which he suggests resort to the doctrine of equitable estoppel. As the author of this Court's opinion in Weaver v. Firestone, 155 So. 3d 952 (Ala. 2013), I cannot agree that the doctrine of equitable tolling invoked in that case is the proper vehicle for examining the issue presented here. As we explained in Weaver, the application of the doctrine of equitable tolling to provide relief from the running of a statutory limitations period requires a very fact-specific weighing of the applicable facts and, at the end of the day, is available only in response to extraordinary circumstances:

> "'[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' as to the filing of his action. Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005). In Ex parte Ward, 46 So. 3d 888 (Ala. 2007), this Court '[held] that equitable tolling is available in extraordinary circumstances that are beyond the petitioner's control and that are

unavoidable even with the exercise of diligence.' 46 So. 3d at 897. The Court noted that in determining whether equitable tolling is applicable, consideration must be given as '"to whether principles of 'equity would make the rigid application of a limitation period unfair' and whether the petitioner has 'exercised reasonable diligence in investigating and bringing [the] claims.'"' Id. (quoting Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001), quoting in turn Miller v. New Jersey Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998)); see also Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) ('We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.' (footnotes omitted)). This Court acknowledged in Ward that '"the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule." United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000).' 46 So. 3d at 897. The plaintiff

> "'bears the burden of demonstrating ... that there are ... extraordinary circumstances justifying the application of the doctrine of equitable tolling. See Spitsyn v. Moore, 345 F.3d [796,] 799 [(9th Cir. 2003)] (holding that the burden is on the petitioner for the writ of habeas corpus to show that the exclusion applies and that the "extraordinary circumstances" alleged, rather than a lack of diligence on his part, were the proximate cause of the untimeliness); Drew v. Department of Corr., 297 F.3d 1278, 1286 (11th Cir. 2002) ("The

> burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner.")).'
>
> "Ward, 46 So. 3d at 897. It is well settled that whether equitable tolling is applicable in a case generally involves a '"fact-specific inquiry."' See, e.g., Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003); Putnam v. Galaxy 1 Marketing, Inc., 276 F.R.D. 264, 275 (S.D. Iowa 2011) ('[R]esolution of the issue is fact-specific.'); see also Transport Ins. Co. v. TIG Ins. Co., 202 Cal. App. 4th 984, 1012, 136 Cal. Rptr. 3d 315, 337 (2012) ('[W]e are hard pressed to think of more fact-specific issues than "accrual" and [equitable] "tolling."')."

Weaver, 155 So. 3d at 957-58 (footnote omitted).

The circumstance presented here -- an indigent plaintiff timely filing a complaint accompanied by an affidavit of substantial hardship in lieu of a filing fee —- does not in my view constitute the extraordinary circumstance contemplated by our holding in Weaver. To the contrary, in fact, the circumstances in this case do not even represent a failure of the plaintiff to meet the deadline for commencing an action imposed by the statute of limitations thereby necessitating resort to any doctrine to save the complaint, much less the doctrine of equitable estoppel.

As the main opinion notes:

> "'Although Rule 3, Ala. R. Civ. P., states that "[a] civil action is commenced by filing a complaint

> with the court," this Court has held that the filing of a complaint is not the sole factor in determining when an action is "commenced."'"

___ So. 3d. at ___ (quoting Ex parte East Alabama Mental Health-Mental Retardation Bd., Inc., 939 So. 2d 1, 3 (Ala. 2006)). We have explained that, in addition to being filed in a timely manner, the filing of a complaint must be done in a manner that demonstrates "a bona fide intent, at the time of filing, to proceed with this action." De-Gas, 470 So. 2d at 1222. That is, the complaint may not be filed in a manner that "effectively preclude[s] any action by the clerk's office," but must be filed with everything "necessary to actually set the case in motion." Id., at 1220, 1222. Thus, in Pettibone Crane Co. v. Foster, 485 So. 2d 712, 713 (Ala. 1989), we held that "the filing of a complaint within the statutory period but without any instructions with regard to serving the defendant with process and without any explanation as to why no instructions are included" does not demonstrate the bona fide intent to proceed with the action at that time and is insufficient to meet the statute of limitations.

Contrary to the view expressed in the main opinion, it appears to me that the result in Mace v. Centel Business

Systems, 549 So. 2d 70 (Ala. 1989), was a function of a comparable failure of the plaintiff to include with the filing of her complaint the necessary summons and information to accomplish service that evidenced a lack of intent to actually commence the lawsuit in that case. Similarly, in Ward v. Saben Appliance Co., 391 So. 2d 1030, 1035 (Ala. 1980), we held that an action was not commenced for statute-of-limitations purposes on the day the complaint was filed when that filing was accompanied by a request to withhold service. And in De-Gas, a case in which the plaintiff merely neglected to pay the filing fee (there was no attempt to file an affidavit of substantial hardship in lieu of the payment of the fee), we explained:

> "By failing to pay at the time of filing the complaint the filing fee mandated by § 12-19-70, [Ala. Code 1975,] the plaintiffs not only caused service to be withheld but effectively precluded any action by the clerk's office necessary to actually set the case in motion."

470 So. 2d at 1221-22 (emphasis, other than on "any," added).

Unfortunately for present purposes, the opinion in De-Gas went further and, through dicta in the following single sentence, laid the groundwork for what I consider to be much confusion: "[T]he payment of the [filing] fee[] ... or the

filing of a court-approved verified statement of substantial hardship is a jurisdictional prerequisite to the commencement of an action for statute of limitations purposes." 470 So. 2d at 1222 (emphasis added). This sentence unfortunately conflates the issue of what is necessary to meet the filing deadline of a statute of limitations (which has nothing to do with "jurisdiction") and the issue of what must occur in order for a court thereafter to have authority to act in an otherwise timely filed case.

In particular, the first problem with this sentence is that, in dicta, it references a potential factual scenario not at issue in De-Gas, i.e., the filing by a plaintiff of a complaint accompanied by an affidavit of substantial hardship in lieu of the filing fee. De-Gas involved nothing more than a mere failure on the part of the plaintiff to pay the filing fee; no attempt to file an affidavit of substantial hardship was made in De-Gas, and no issue regarding the timing or nature of the affidavit that would have to be filed was before the court.

Making this dicta more problematic, the sentence injects into the discussion the concept of "jurisdiction." This in a

case involving an issue of satisfaction of the statute of limitations, an issue that has nothing whatsoever to do with the jurisdiction of the court -- subject-matter or otherwise. A failure to satisfy a statute of limitations merely gives rise to a waivable affirmative defense.

Further confusing the issue, the problematic sentence speaks of "the filing of a court-approved verified statement of substantial hardship," which the main opinion takes as requiring Court approval before the statute of limitations has run. Yet, if read literally, this sentence actually would require that the statement of substantial hardship must already be approved at the time of its filing. In any event, our rules offer no procedure entitling a plaintiff to seek some sort of pre-complaint approval of a statement of substantial hardship. It appears then that the Court was intending to describe simply the requirement that, if a filing fee is not paid with the complaint, the plaintiff must file an affidavit that, ultimately, meets with the approval of the court.

The main opinion's understanding of this language as requiring that the affidavit of substantial hardship be

approved at some point before the statute of limitations expires would mean that a plaintiff's meeting a statute-of-limitations deadline depends not on the plaintiff's own action, but on how quickly a third party -- a trial court judge -- takes some sort of action. Such a scheme is unseemly at best, and unworkable and inequitable at worst. Indeed, it raises the specter that two plaintiffs appearing before two different judges in adjoining circuits, or even in the same circuit, with similar causes of action against the same defendant might file essentially the same "papers" (including in both cases similar affidavits of substantial hardship) in an effort to commence an action several weeks (or perhaps even months) before the expiration of a statute of limitations and that one will be deemed in the end to have succeeded in meeting the deadline while the other will not, the only difference between them being the timeliness of the trial judge assigned to their respective cases. Surely the satisfaction of a statute of limitations, not to mention the invocation of a court's jurisdiction, is something that is to be within the control of the plaintiff and not dependent on

the actions of a third party, even if that third party is the court itself.

In the end, I must conclude that the reference in De-Gas to the necessity of a "court-approved verified statement of substantial hardship" was a loosely, and ultimately poorly, worded attempt to note that a trial court loses authority to act in a case if it subsequently fails to approve the plaintiff's affidavit. Again, however, even this statement is dicta in that the issue in De-Gas was compliance with the statute of limitations. That also is the only issue here.[7]

[7]Consistent with the approach of overruling Johnson v. Hetzel, 100 So. 3d 1056, 1057 (Ala. 2012), as urged by two judges of the Court of Civil Appeals and discussed in Chief Justice Moore's dissent, the reference to "jurisdiction" in the problematic sentence in De-Gas can and should be treated as a reference not to the "subject-matter jurisdiction" imparted to circuit courts by § 142 of the Alabama Constitution of 1901, but to what is properly understood as "jurisdiction over the case." By this I mean the authority of a court over a given case that is acquired when there has been compliance with the necessary procedural formalities to put the case before the court and the failure of which may be waived if not timely objected to by the court or the opposing party. Cf. Thompson v. Lea, 28 Ala. 453 (1856), in which Justice Stone wrote the court's opinion inquiring whether failure to post a bond as required by a statute governing appeals could be considered a defect of subject-matter jurisdiction of the Supreme Court. "To hold them such," Justice Stone reasoned, "is to declare that the solemn judgments of this court, pronounced on records wanting either the bond or certificate, or when either is substantially defective, are absolute nullities, and may be collaterally

impeached ...." 28 Ala. at 456. Justice Stone continued:

> "Section 3041 declares, that 'no appeal can be taken without giving bond to supersede the execution of the judgment or decree, unless the appellant give security for the costs of such appeal.' Section 3016 enacts, that the certificate, in conformity with its terms, 'gives the supreme court jurisdiction of the case.' In my opinion, the term 'jurisdiction,' as found in this chapter of the Code, cannot properly be regarded as conferring power to declare or apply the law to either subject-matter or persons, technically so called. It gives jurisdiction over the case. It is the mode prescribed, by which a party asserting rights against another, may compel that other, with or without his consent, to come into court, and have those rights litigated and passed on."

Thompson, 28 Ala. at 456-57 (emphasis added). Justice Stone reasoned that the Court would be bound to dismiss the appeal if an objection was timely made, but that "when there has been joinder in error, arguments on the merits, or other act done which admits the case rightfully in this court, the motion to dismiss for insufficient or defective appeal, comes too late." Id. at 458.

Justice Walker agreed with Justice Stone's distinction between subject-matter jurisdiction and jurisdiction over the case, and warned of the injustices that could arise from the failure to distinguish between subject-matter jurisdiction and jurisdiction over the case:

> "To deny to a joinder in error the effect of waiving an appeal, or deficiencies in it, would be productive of great injustice. It would permit appellees to conceal a detected deficiency in the appeal, until another appeal was barred by lapse of time, or until on the hearing in this court he might find the inclination of the court adverse to him on the merits. He would thus be able to wrong his

Unlike in De-Gas, in which the plaintiff merely neglected to pay a filing fee and there was no attempt to file an affidavit of substantial hardship in lieu thereof, the plaintiff in this case did file such an affidavit and thereby did everything she could do to "set the case in motion." The clerk was not waiting on anything further from the plaintiff. The statute of limitations therefore was satisfied in this case. If in the end the affidavit had not been approved, then, upon proper motion of the defendant or on the court's own motion, the trial court would have been obligated to dismiss the case for loss of jurisdiction over the case. Even that turn of events would not have undone the plaintiff's previous meeting of the statute of limitations.

> adversary and speculate upon the chances in this court. A rule which would be attended by such consequences, ought not to be inferred from the statute, unless it is required by the clearest language."

Thompson, 28 Ala. at 462-63 (opinion of Walker, J.).