Rel: March 12, 2021



# SUPREME COURT OF ALABAMA

## OCTOBER TERM, 2020-2021

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## 1190797

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**Ex parte Encompass Health Corporation**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Steven R. Nichols**

**v.**

**Encompass Health Corporation)**

**(Jefferson Circuit Court, CV-03-2023)**

BRYAN, Justice.

Encompass Health Corporation, formerly known as HealthSouth Corporation ("HealthSouth"), petitions this Court for a writ of mandamus directing the Jefferson Circuit Court ("the trial court") to vacate an order entered on June 17, 2020, which amended a February 26, 2016, order entered by the trial court dismissing with prejudice several defendants in the underlying action, to dismiss those defendants without prejudice. For the reasons set forth herein, we grant the petition and issue the writ.

## Procedural History

This is the second time this case has been before this Court. See Nichols v. HealthSouth Corp., 281 So. 3d 350 (Ala. 2018). The underlying action was initiated in March 2003 by Steven R. Nichols, a former employee of HealthSouth and a holder of HealthSouth stock; Nichols initially sued HealthSouth, Richard Scrushy, Weston Smith, William Owens, and the accounting firm Ernst & Young, alleging fraud and negligence.[1] As we noted in Nichols, "[t]he action was delayed for 11 years

[1]At the time the action was initiated, and at various points throughout the underlying litigation, there were additional plaintiffs and defendants in this action; however, Nichols is the only remaining plaintiff and HealthSouth the only remaining defendant.

for a variety of reasons," 281 So. 3d at 352, but, in the meantime, Nichols filed several amended complaints. In his fifth amended complaint, Ernst & Young was not named as a defendant, but Nichols named an additional individual defendant, Eugene Smith (Eugene Smith, Richard Scrushy, Weston Smith, and William Owens are hereinafter collectively referred to as "the individual defendants").

On November 25, 2014, Nichols filed his eighth amended complaint, which named HealthSouth as the only defendant. At the same time, Nichols filed a "motion to dismiss [the] individual defendants without prejudice." (Emphasis added.) In that motion, Nichols "specifically reserve[d] all claims against HealthSouth ... based upon respondeat superior and vicarious liability theories."

On February 26, 2016, the trial court entered an order providing that Nichols's eighth amended complaint controlled, that HealthSouth was the only remaining defendant in the action, and that there were now no claims asserted against any of the other defendants named in the previously filed complaints. The trial court stated: "All defendants other than HealthSouth ... are accordingly dismissed from this action with

prejudice." (Emphasis added.) There is no dispute that all parties received notice of the trial court's February 2016 order dismissing the individual defendants with prejudice.

HealthSouth subsequently filed a motion to dismiss Nichols's eighth amended complaint, arguing, among other things, that "the claims asserted in that complaint were derivative in nature rather than direct and were therefore due to be dismissed" based on Nichols's failure to comply with the demand-pleading requirements of Rule 23.1, Ala. R. Civ. P. Nichols, 281 So. 3d at 354. The trial court conducted a hearing on that motion in May 2016. During that hearing, when summarizing the procedural history of the case, counsel for HealthSouth stated that Nichols had "inexplicably dismissed Mr. Scrushy" from the action and pointed out that the trial court had dismissed him "with prejudice." On May 26, 2016, the trial court entered a judgment granting HealthSouth's motion to dismiss, concluding that, under Delaware law, which applied to the issue before the trial court, "a shareholder may not pursue a direct claim based on the diminution in stock value that all other shareholders suffered."

Nichols appealed that judgment; HealthSouth was the only appellee identified by Nichols in his notice of appeal.

On appeal, this Court addressed only two issues: (1) whether the claims asserted in the eighth amended complaint related back to Nichols's complaint so that those claims were not barred by the statute of limitations and (2) whether the claims raised in the eighth amended complaint were direct or derivative claims. See Nichols, supra. Nichols did not challenge on appeal the trial court's February 2016 order dismissing the individual defendants with prejudice. This Court held that the claims in the eighth amended complaint related back to the original complaint and, thus, were not barred by the statute of limitations; we also reversed the trial court's judgment insofar as it concluded that the claims raised in the eighth amended complaint were due to be dismissed under Delaware law. Thus, we remanded the cause "for further proceedings." Nichols, 281 So. 3d at 363. HealthSouth's application for rehearing was overruled on March 22, 2019, and a certificate of judgment was issued the same day.

On remand, the parties engaged in further discovery, and, on March 2, 2020, HealthSouth filed a motion for a summary judgment as to all of Nichols's claims against it. HealthSouth summarized its basis for seeking a summary judgment as follows:

> "[HealthSouth] is entitled to judgment in its favor on Nichols's claims because his claims are based solely on alleged representations made by HealthSouth's former agent, Richard Scrushy, and his claims against Scrushy were dismissed with prejudice. Under Alabama law, if a plaintiff bases its claims against a principal entity on the conduct of the principal's agent, the dismissal with prejudice of the claims against the agent necessarily foreclose the plaintiff's claims against the principal. Accordingly, the Court should grant summary judgment in [HealthSouth's] favor and dismiss Nichols's claims."

In response to HealthSouth's motion, Nichols filed a motion to amend the trial court's February 2016 order dismissing Scrushy and the other individual defendants with prejudice. Nichols asked the trial court to amend the order to reflect that he had specifically reserved his right to proceed against HealthSouth or, in the alternative, to amend the order to reflect that the individual defendants were dismissed without prejudice.

HealthSouth objected to Nichols's motion to amend the February 2016 order, arguing that the order had become final at the time the trial court dismissed Nichols's eighth amended complaint and that, because Nichols had failed to appeal the trial court's judgment dismissing the individual defendants with prejudice, that issue was waived on appeal and the trial court had no authority to amend that final judgment on remand, unless permitted by Rule 60, Ala. R. Civ. P. HealthSouth further argued that none of the grounds for relief from a final judgment set forth in Rule 60(b), Ala. R. Civ. P., applied in this case.

After both parties filed additional briefs, the trial court conducted a hearing on May 26, 2020. At the outset of the hearing, in reference to the February 2016 order that had dismissed the individual defendants with prejudice, instead of dismissing them without prejudice as Nichols had requested, the trial-court judge stated: "I can't tell you why I did that other than to say that it was probably just a mistake on my part."

On June 17, 2020, the trial court granted Nichols's motion to amend and amended the February 2016 order to reflect that the individual defendants were dismissed from the action without prejudice. The trial

court concluded that "the effect of [this Court]'s decision [in Nichols, supra,] was simply to throw out the order of May 26, 2016. No other decision of [the trial court] was impacted." Then, determining that the "mandate rule" -- which generally provides that a lower court may not reconsider issues already decided by an appellate court -- did not apply under the circumstances, the trial court concluded that it had discretion to amend the February 2016 order, that amending the order would be "fair and proper," and that it had erred in dismissing the individual defendants with prejudice after Nichols specifically notified the trial court and HealthSouth of his intent to preserve his claims against HealthSouth. The same day, the trial court entered an order denying HealthSouth's motion for a summary judgment.

HealthSouth timely filed a petition seeking mandamus review of the trial court's June 2020 order amending its February 2016 order.

Standard of Review

> "'"'Mandamus is a drastic and extraordinary writ to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked

> jurisdiction of the court.' " ' Ex parte Sears, Roebuck & Co., 895 So. 2d 265[, 268] (Ala. 2004) (quoting Ex parte Mardis, 628 So. 2d 605, 606 (Ala. 1993)(quoting in turn Ex parte Ben-Acadia, Ltd., 566 So. 2d 486, 488 (Ala. 1990))). 'The petitioner bears the burden of proving each of these elements before the writ will issue.' Ex parte Glover, 801 So. 2d 1, 6 (Ala. 2001)(citing Ex parte Consolidated Publ'g Co., 601 So. 2d 423 (Ala. 1992))."

Ex parte Vance, 900 So. 2d 394, 397 (Ala. 2004).

Analysis

In its petition, HealthSouth first argues that the trial court violated the mandate rule by amending the February 2016 order dismissing the individual defendants with prejudice following remand from this Court because Nichols did not appeal any aspect of that order once it became final. Considering the requirements for the issuance of a writ of mandamus set forth above, we first note that it is undisputed that the jurisdiction of this Court has been properly invoked. Further, this Court has held 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.' " Ex parte International Refin. & Mfg. Co., 153 So. 3d 774, 783 (Ala. 2014) (quoting Ex parte Edwards, 727 So. 2d

792, 794 (Ala. 1998)). Accordingly, we must determine whether HealthSouth has demonstrated a clear legal right to the relief it seeks -- an order vacating the trial court's June 2020 order amending its February 2016 order.

First, HealthSouth contends that the "trial court violated the mandate rule when it amended its [February 2016] with-prejudice dismissal order following remand [from Nichols, supra,] because Nichols did not appeal [any aspect of that order], and therefore waived any challenge to the with-prejudice aspect of the final judgment." HealthSouth's petition at 9. We agree that the trial court's February 2016 order dismissing the individual defendants with prejudice -- though interlocutory at the time it was entered -- became final on May 26, 2016, when the trial court dismissed Nichols's claims against the only remaining defendant in the action -- HealthSouth. See Dickerson v. Alabama State Univ., 852 So. 2d 704, 705 (Ala. 2002) ("The general rule is that a trial court's order is not final unless it disposes of all claims as to all parties." (citing Rule 54(b), Ala. R. Civ. P.)); and Robert S. Grant Constr., Inc. v. Frontier Bank, 80 So. 3d 901, 902 (Ala. 2011) (noting that, in the absence

of a proper Rule 54(b) certification, "[i]t is only in the context of an otherwise final and appealable judgment that an interlocutory order ... merges with the final judgment and becomes reviewable by way of appeal"). It is undisputed that, after the February 2016 order became a final judgment, Nichols did not challenge any aspect of the February 2016 order on appeal and that this Court, in Nichols, did not modify or address any aspect of the February 2016 order. As noted above, this Court in Nichols reversed the May 2016 judgment dismissing Nichols's eighth amended complaint; held that Nichols's claims were, under Delaware law, "direct in nature"; and remanded the cause "for further proceedings." 281 So. 3d at 363.

Thus, we must determine whether the trial court, by modifying an otherwise final judgment on remand from proceedings that did not disturb or address that final judgment, exceeded the scope of this Court's mandate in Nichols. Concerning the mandate rule, this Court has stated:

> "An appellate court's decision is final as to the matters before it, becomes the law of the case, and must be executed according to the mandate. Ex parte Edwards, 727 So. 2d 792, 794 (Ala. 1998). Generally, a lower court 'exceeds its authority' by addressing issues already decided by an appellate court's

> decision in that case. Lynch v. State, 587 So. 2d 306, 308 (Ala. 1991). In Anderson v. State, 796 So. 2d 1151, 1156 (Ala. Crim. App. 2000) (opinion on return to remand), the Alabama Court of Criminal Appeals held that a trial court's order on remand that exceeded the scope of the appellate court's remand order 'exceeded [the trial court's] jurisdiction' and was 'a nullity.' See also Ellis v. State, 705 So. 2d 843, 847 (Ala. Crim. App. 1996) (on application for rehearing on second return to remand) ('[T]he trial court had no jurisdiction ... to take any action beyond the express mandate of this court.'), and Peterson v. State, 842 So. 2d 734, 740 (Ala. Crim. App. 2001) (opinion on return to third remand) (holding that a trial court 'did not have jurisdiction' to enter an order that exceeded the scope of the appellate court's remand order and that, therefore, its order was 'void'). Similarly, in Ex parte DuBose Construction Co., 92 So. 3d 49, 58 (Ala. 2012), this Court held that an order by a trial court that was outside the scope of an appellate mandate was void."

Honea v. Raymond James Fin. Servs., Inc., 279 So. 3d 568, 570-71 (Ala. 2018) .

HealthSouth contends that "the trial court erroneously held that only matters expressly addressed by an appellate court cannot be relitigated on remand." HealthSouth's petition at 14. The trial court reasoned that it had authority to amend the February 2016 order on remand from Nichols because the "effect" of this Court's decision in Nichols "was simply to throw out the order of May 26, 2016," dismissing

the eighth amended complaint. Thus, it appears that the trial court reasoned that it had authority to amend the February 2016 order on remand because this Court did not expressly include in its mandate that the trial court could not amend any final judgments pertaining to other parties to the proceeding below that had not been a subject of the appeal. Such reasoning is inconsistent with Alabama law and with the law applied by various United States Courts of Appeals.

As referenced above, the "mandate rule" is an application of the law-of-the-case doctrine. See Honea, supra; and Cambridge Univ. Press v. Albert, 906 F.3d 1290, 1299 (11th Cir. 2018) (stating that the mandate rule is " 'nothing more than a specific application of the "law of the case" doctrine' " (quoting Transamerica Leasing, Inc. v. Institute of London Underwriters, 430 F.3d 1326, 1331 (11th Cir. 2005), quoting in turn Piambino v. Bailey, 757 F.2d 1112, 1120 (11th Cir. 1985))). This Court has held that the law-of-the-case doctrine prevents a party from relitigating an issue that was addressed before the first appeal of a case but was not raised in that appeal:

" 'Under the law of the case doctrine, "[a] party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or which would have been resolved had they been properly presented in the first appeal." ' Kortum v. Johnson, 786 N.W.2d 702, 705 (N.D. 2010)(quoting State ex rel. North Dakota Dep't of Labor v. Riemers, 779 N.W.2d 649 (N.D. 2010) (emphasis added)); see also Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ('Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. C.J.S. Appeal & Error § 991 (2008)....').

"The doctrine is the same in Alabama. '[I]n a second appeal, ... a matter that had occurred before the first appeal, but that was not raised in the first appeal, [is] the law of the case.' Life Ins. Co. of Georgia v. Smith, 719 So. 2d 797, 801 (Ala. 1998) (summarizing the holding in Sellers v. Dickert, 194 Ala. 661, 69 So. 604 (1915)). The doctrine in this form was applied in Bankruptcy Authorities, Inc. v. State, 620 So. 2d 626 (Ala. 1993), which was the second of two appeals in that case. There, this Court held that the failure of the appellant to raise an issue in its first appeal regarding the sufficiency of the evidence to support the judgment precluded review of that issue in the second appeal.[4]

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"[4]Although the Court referred to the appellant's failure to raise the issue as a 'waiver,' it is just as properly referred to as a basis for the application of the law-of-the-case doctrine."

Scrushy v. Tucker, 70 So. 3d 289, 303-04 (Ala. 2011) ("Scrushy II") (footnote 3 omitted).[2]

In Scrushy II, which was the second of two appeals from the same underlying action, this Court specifically rejected an argument that the law-of-the-case doctrine did not apply to an issue that had not been specifically addressed by this Court in the first appeal in that case. In Scrushy II, Scrushy sought to apply certain defenses to claims filed against him, despite the facts that he had not raised those defenses against other claims that the trial court had already ruled upon and that this Court had affirmed those rulings on appeal. See Scrushy v. Tucker, 955 So. 2d 988 (Ala. 2006) ("Scrushy I"). Specifically, Scrushy asserted that "the doctrine of the law of the case 'turns on whether the Court addressed the issue between the parties' [in Scrushy I] and does not apply because the defenses were not asserted in the first appeal." Scrushy II, 70

[2]Scrushy II involved a shareholder-derivative action brought by HealthSouth shareholders against HealthSouth and others, including Richard Scrushy. Scrushy II is a separate action from the present case, although some of the same parties involved in Scrushy II are, or have been, parties to the present case.

So. 3d at 303. Citing the authority quoted above, this Court rejected that understanding of the law-of-the-case doctrine: "Scrushy's understanding of the law-of-the-case doctrine is inaccurate: it is not essential to the application of the doctrine that the issue be asserted in the first appeal. It is enough that the issue should have been raised in the first appeal." Id.

Because 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. Persuasive authority from various United States Courts of Appeals supports this conclusion. For example, the United States Court of Appeals for the Tenth Circuit succinctly stated the applicability of the mandate rule to issues that were not, but could have been, raised on appeal:

> "A lower court is 'bound to carry the mandate of the upper court into execution and [cannot] consider the questions which the mandate laid at rest.' Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); accord Ins. Grp. Comm. v. Denver & Rio Grande W. R.R. Co., 329 U.S.

> 607, 612, 67 S.Ct. 583, 91 L.Ed. 547 (1947) ('When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court.'); Bryan A. Garner et al., The Law of Judicial Precedent § 55 at 459 (2016) (Law of Judicial Precedent) ('When a case has been heard and determined by an appellate court, the legal rules and principles laid down as applicable to it bind the trial court in all further proceedings in the same lawsuit. They cannot be reviewed, ignored, or departed from.'). Failing to raise an issue on appeal, or abandoning an issue that was initially raised, has the same consequences for that litigation as an adverse appellate ruling on that issue. Thus, the mandate rule applies not only to issues on which the higher court has ruled but also 'forecloses litigation of issues decided by the district court but [forgone] on appeal or otherwise waived.' Doe v. Chao, 511 F.3d 461, 466 (4th Cir. 2007) (internal quotation marks omitted); see United States v. Husband, 312 F.3d 247, 250 (7th Cir. 2002) ('[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded.'); id. at 251 ('Parties cannot use the accident of remand as an opportunity to reopen waived issues.' (brackets and internal quotation marks omitted))."

Estate of Cummings v. Community Health Sys., Inc., 881 F.3d 793, 801 (10th Cir. 2018) (emphasis added).

In Estate of Cummings, the plaintiff alleged several claims against several defendants, including Community Health Systems, Inc. ("CHSI"). A federal district court dismissed the claims against CHSI for lack of personal jurisdiction and later disposed of the remaining claims in favor

of the remaining defendants. The plaintiff appealed and initially challenged the district court's dismissal of CHSI for lack of personal jurisdiction, but it later agreed to dismiss CHSI from the appeal. The Tenth Circuit Court of Appeals entered an order dismissing CHSI from that appeal, affirmed the "federal claims" against the other defendants, vacated the district court's rulings on the supplemental claims against the other defendants, and instructed the district court to remand the supplemental claims to state court. On remand, however, the district court vacated its earlier dismissal of CHSI for lack of personal jurisdiction and remanded the claims against CHSI to state court. On appeal of that order, citing the authority set forth above, the Tenth Circuit Court of Appeals held that the district court had violated the mandate in the first appeal; the court held that its mandate, which had not mentioned CHSI, "barred any further action with respect to the claims against CHSI." 881 F.3d at 801.

In General Universal Systems, Inc. v. HAL, Inc., 500 F.3d 444 (5th Cir. 2007), General Universal Systems ("GUS") sued HAL, Inc., and certain individuals ("the HAL defendants"), raising several claims

involving alleged theft of proprietary software; GUS also sued several companies to which HAL had licensed the software program ("the Customer Defendants"). A federal district court disposed of all of GUS's claims in favor of the HAL defendants and dismissed the claims against the Customer Defendants. In GUS's initial appeal, see General Universal Sys., Inc. v. Lee, 379 F.3d 131 (5th Cir. 2004), the United States Court of Appeals for the Fifth Circuit reversed the dismissal of only one claim against the HAL defendants and remanded "that claim to the district court for further proceedings not inconsistent with this opinion." Lee, 379 F.3d at 159. On remand, the district court entered another judgment in favor of the Customer Defendants, "finding that the claims against those parties were not included in the scope of the remand from [the Fifth Circuit Court of Appeals]." HAL, 500 F. 3d at 447. GUS appealed that judgment, and the Fifth Circuit Court of Appeals held that its "prior opinion and the circumstances it embraces disposed of any issues related to the Customer Defendants through waiver." 500 F.3d at 453. Specifically, the court held that, although its prior decision did not "explicitly address the Customer Defendants nor any claim by GUS

brought against them, this is not surprising based on the absence of any arguments against the Customer Defendants in GUS's brief in the original appeal." Id. Thus, the court concluded, "our remand in the prior opinion did not include any claims against the Customer Defendants." Id. at 454.

In Doe v. Chao, 511 F.3d 461 (4th Cir. 2007), the United States Court of Appeals for the Fourth Circuit considered whether a federal district court had violated the mandate rule on remand from a previous appeal in the same case. The court stated:

> "The mandate rule ... restricts the district court's authority on remand from the court of appeals. First, 'any issue conclusively decided by this court on the first appeal is not remanded,' and second, 'any issue that could have been but was not raised on appeal is waived and thus not remanded.' United States v. Husband, 312 F.3d 247, 250-51 (7th Cir. 2002); see also S. Atl. Ltd. P'ship of Tenn.[ v. Riese], 356 F.3d [576,] 584 [(4th Cir. 2004)] (stating that the mandate rule prohibits district courts from 'reconsider[ing] issues the parties failed to raise on appeal').
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> "The mandate rule serves two key interests, those of hierarchy and finality. 'A rule requiring a trial court to follow an appellate court's directives that establish the law of a particular case is necessary to the operation of a hierarchical judicial system.' Mirchandani v. United States, 836 F.2d 1223, 1225 (9th Cir.1988). ...

> "This is not to say appellate courts are somehow superior or always correct, but only that our system has been served well by the availability of review and the need for appropriate review to be final. The mandate rule in fact 'serves the interest of finality' in litigation. See, e.g., United States v. Thrasher, 483 F.3d 977, 982 (9th Cir. 2007); United States v. O'Dell, 320 F.3d 674, 679 (6th Cir. 2003). 'Repetitive hearings, followed by additional appeals, waste judicial resources and place additional burdens on ... hardworking district and appellate judges.' O'Dell, 320 F.3d at 679 (internal quotation marks omitted). If no appeal of a judgment is taken, or if the appellate court determines questions put before it, the orderly resolution of the litigation requires the district court to recognize those interests served by final judgments and to implement the appellate mandate faithfully."

Chao, 511 F.3d at 465-66.

In that case, in a prior appeal, the Fourth Circuit Court of Appeals had instructed the district court, on remand, "to determine the reasonableness of [the plaintiff's] attorneys' fee award under the Privacy Act." Id. at 466. However, on remand, the district court awarded the plaintiff attorneys' fees for work performed on an unrelated contempt motion that the plaintiff had filed earlier in the underlying litigation, before the plaintiff's first appeal. The court held:

> "[T]he mandate of this court did not permit the district court to award [the plaintiff] attorneys' fees for work performed on the contempt motion. In 2004, the district court rejected [the

> plaintiff's] request for fees for his unsuccessful 'motion to hold the Secretary in contempt,' Doe [v. Chao], 346 F. Supp. 2d [840,] 850 [(W.D. Va. 2004)], and [the plaintiff] did not appeal that ruling. At that point, the denial of fees for work performed on the contempt motion became final. Because the mandate rule 'forecloses litigation of issues decided by the district court but [forgone] on appeal or otherwise waived,' the district court was not free to deviate from this court's mandate by reconsidering [the plaintiff's] claims for attorneys' fees that it had denied before appeal and that had not been raised by [the plaintiff] on cross-appeal. [United States v. ]Bell, 5 F.3d [64,] 66 [(4th Cir. 1993)]; see also, e.g., S. Atl. Ltd. P'ship of Tenn.[ v. Riese], 356 F.3d [576,] 584 [(4th Cir. 2004)]."

Chao, 511 F.3d at 466.

The same is true in the present case. Because Nichols failed to challenge the February 2016 order on appeal, any challenge to that order was waived and was not remanded to the trial court for reconsideration. Based on authority from this Court and from various United States Courts of Appeals, we conclude that the trial court violated the mandate of this Court in Nichols, supra, when it amended the February 2016 order dismissing the individual defendants with prejudice.[3] Accordingly, we

[3]The two decisions cited by the trial court to support its conclusion that the mandate rule did not apply to prevent amendment of the February 2016 order -- Stewart v. ATEC Assocs., Inc., 652 So. 2d 270 (Ala. Civ. App. 1994), and Gray v. Reynolds, 553 So. 2d 79 (Ala. 1989) -- are

conclude that HealthSouth has demonstrated a clear legal right to a writ of mandamus directing the trial court to vacate its June 2020 order amending the February 2016 order to dismiss the individual defendants without prejudice.[4]

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inapposite. Those cases stand for the straightforward proposition that the mandate rule does not require a lower court on remand, or the appellate court on second review of the case, "to carry out literally the dicta pertaining to questions that were not then presented." Gray, 553 So. 2d at 81 (emphasis added). See Stewart, 652 So. 2d at 273 (holding that the trial court was not bound by the mandate rule to apply the dicta from an appellate decision to the case on remand). The trial court did not identify any dicta in Nichols that it had authority to ignore so as to justify its amendment of the February 2016 order on remand; dicta related to the February 2016 order would have been difficult to identify in Nichols given that the February 2016 order was not addressed by this Court.

[4]HealthSouth also argues that Rule 60(b) could not operate to provide relief from the February 2016 order because, among other reasons, the only possible Rule 60(b) ground for relief would be under Rule 60(b)(1), Ala. R. Civ. P., which allows for relief from a final judgment on the ground of mistake, and the rule requires that a motion for relief from a final judgment brought under Rule 60(b)(1) be filed "within a reasonable time ...[but] not more than four (4) months after the judgment ... was ... taken." Rule 60(b). See HealthSouth's petition at 17-20. As noted above, the February 2016 order became final on May 26, 2016, see Dickerson and Frontier Bank, supra; however, Nichols did not move to amend that order until nearly four years after it was entered. Nichols agrees that Rule 60(b) does not provide a procedural basis for relief from the February 2016 order, although he contends that Rule 60(b) does not apply because the February 2016 order became interlocutory again after this Court reversed the May 2016 judgment dismissing the eighth amended complaint and

Conclusion

For the reasons stated herein, the petition for a writ of mandamus is due to be granted. Accordingly, we grant the petition and direct the trial court to vacate its June 2020 order amending the February 2016 order to dismiss the individual defendants without prejudice.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, and Wise, JJ., concur.

Sellers, Mendheim, and Stewart, JJ., dissent.

Mitchell, J., recuses himself.

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remanded the cause for further proceedings. As discussed in detail above, this is incorrect. An interlocutory order that later becomes a final judgment remains a final judgment and the law of the case unless an appellate court disturbs that judgment on appeal. There is no indication that the trial court relied upon Rule 60(b) to grant relief from its February 2016 order, and we agree with both parties insofar as they contend that Rule 60(b) did not provide the trial court a procedural basis for amending the February 2016 order under the circumstances of this case.

MENDHEIM, Justice (dissenting).

I do not believe that the central argument presented by Encompass Health Corporation, formerly known as HealthSouth Corporation ("HealthSouth"), warrants mandamus review, and so I respectfully dissent. HealthSouth presents Judge Vance's correction of his February 26, 2016, order -- an order that all parties as well as the main opinion concede was erroneous -- as a straightforward violation of the mandate rule. This Court unquestionably does review mandate-rule violations by petition for the writ of mandamus because such violations constitute deviations from direct orders of a superior court, something a lower court lacks any discretion to do. But the situation presented here does not fall into that category.

> "An appellate court's decision is final as to the matters before it, becomes the law of the case, and must be executed according to the mandate. Ex parte Edwards, 727 So. 2d 792, 794 (Ala. 1998). Generally, a lower court 'exceeds its authority' by addressing issues already decided by an appellate court's decision in that case. Lynch v. State, 587 So. 2d 306, 308 (Ala. 1991)."

Honea v. Raymond James Fin. Servs., Inc., 279 So. 3d 568, 570-71 (Ala. 2018) (emphasis added).

As the author of Nichols v. HealthSouth Corp., 281 So. 3d 350 (Ala. 2019), I can state unequivocally that the issue presented by HealthSouth's summary-judgment motion on remand -- whether Steven R. Nichols could assert claims against HealthSouth after individual defendant Richard Scrushy accidentally had been dismissed with prejudice by the February 26, 2016, order -- was not presented, addressed, or decided in that appeal. Instead, as the main opinion notes, Nichols had appealed a May 26, 2016, judgment in which Judge Vance concluded that Nichols's claims had to be dismissed for failing to follow the demand-pleading requirements of Rule 23.1, Ala. R. Civ. P., that applied because, Judge Vance determined, the claims were, under Delaware law, derivative rather than direct in nature. This Court in Nichols reversed that judgment, finding that Nichols's claims were, in fact, direct claims under Delaware law and thus not subject to the strictures of Rule 23.1. The Court also addressed the only other argument HealthSouth had raised in its motion to dismiss that preceded the May 26, 2016, judgment -- that the claims Nichols asserted in his eighth amended complaint did not relate back to his original complaint and thus were barred by the applicable

statute of limitations -- and we concluded that the claims did, in fact, relate back and, therefore, that the statute of limitations did not bar Nichols's claims. Notably absent from our decision, and therefore absent from our mandate in Nichols, was any discussion or decision concerning the effect Scrushy's dismissal from the case had upon the viability of Nichols's claims against HealthSouth. This absence was unremarkable given that HealthSouth never presented such an argument to Judge Vance until it filed a summary-judgment motion a full year after the case had been remanded from this Court to the trial court following our judgment in Nichols.

The actual reason the propriety of Judge Vance's correction of his February 26, 2016, order is in question is not because of the mandate from this Court in Nichols but, rather, because of the understanding in the law-of-the-case doctrine that issues that could have been raised in a first appeal but were not argued cannot be revisited after remand of the case to the trial court. As the main opinion observes, this Court reiterated that rule in Scrushy v. Tucker, 70 So. 3d 289, 304 (Ala. 2011): " '[I]n a second appeal, ... a matter that had occurred before the first appeal, but that was

not raised in the first appeal, [is] the law of the case.' " (Quoting Life Ins. Co. of Georgia v. Smith, 719 So. 2d 797, 801 (Ala. 1998).)

The main opinion states that "the 'mandate rule' is an application of the law-of-the-case doctrine," ___ So. 3d at ___, and "courts often refer to the mandate rule as a subset of the law-of-the-case doctrine." Washington v. Bishop, Civil Action No. GLR-16-2374, Aug. 5, 2019 (D. Md. 2019) (not selected for publication in Federal Supplement). However, even if the concepts are related, HealthSouth has inappropriately conflated the two concepts in order to obtain mandamus review.

> "Application of the 'law of the case' principle is not absolute as a court has the discretionary power not to adhere to a previous legal conclusion it reached earlier in the same case. See, e.g., Eckell v. Borbidge, 114 B.R. 63, 68 n.5 (E.D. Pa. 1990). In contrast, application of the 'mandate rule' is 'nondiscretionary.' Coquillette, et al., 18 Moore's Federal Practice 3d, § 134.23[1], at 134-58 (2000). A trial court has no authority upon remand to deviate from the legal conclusions reached by an appellate court."

In re Phoenix Petroleum Co., 278 B.R. 385, 396 n.9 (Bankr. E.D. Pa. 2001). This Court made the very same observation about the discretionary nature of the law-of-the-case doctrine in Barnwell v. CLP

Corp., 264 So. 3d 841, 850 (Ala. 2018), in which it applied the rule as expressed in Scrushy:

> "Application of the law-of-the-case doctrine is discretionary rather than mandatory, Ex parte Discount Foods, Inc., 789 So. 2d 842, 846 n.4 (Ala. 2001), and there are exceptions to the doctrine. For example, '[i]f ... an observation by the appellate court concerning an issue is premised on a particular set of facts, and the nature of the remand is such that it is permissible and appropriate to consider additional facts relevant to the issue, the law-of-the-case doctrine is inapplicable.' Lyons v. Walker Reg'l Med. Ctr., 868 So. 2d 1071, 1077 (Ala. 2003). Further, 'the law-of-the-case doctrine may be disregarded if the court is convinced its prior decision was clearly erroneous or there has been an intervening change in the law.' Belcher v. Queen, 39 So. 3d 1023, 1038 (Ala. 2009)."

(Emphasis added.) See also 18B Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice & Procedure § 4478.6 (2019) ("Focus on the mandate rule is desirable only if its requirements are met -- if the appellate court in fact did not consider and resolve an issue not presented on the first appeal, the trial court acting on remand should not be bound as tightly as if the issue had in fact been resolved. The trial court should take account of the needs of orderly progression through the trial and appeals processes in deciding whether to reconsider its own

pre-appeal ruling, but so long as further proceedings are otherwise appropriate on remand there is no point in pretending that the trial court owes fealty to a nonexistent appellate ruling.").

This distinction concerning discretion between the mandate rule and the law-of-the-case doctrine matters in this instance because HealthSouth seeks mandamus review under the guise of the mandate rule, positing that Judge Vance had no discretion to correct his February 26, 2016, order that dismissed Scrushy with prejudice because doing so would violate our mandate in Nichols. But because the mandate rule is not implicated here, the impetus for mandamus review evaporates due to the discretion permitted in applying the law-of-the-case doctrine.[5] Cf. Ex parte Lang, 500 So. 2d 3, 5 (Ala. 1986) ("In the absence of abuse, the exercise of a discretion vested in the trial court obviates the use of the remedy of

[5]Even the law-of-the-case doctrine is not the most precise concept to describe what is at issue here: "In most cases, the decision not to press an argument is the result of 'an unreflected failure to think about the procedural need to make a choice (forfeiture),' rather than 'a conscious choice to abandon a position (waiver).' " Howe v. City of Akron, 801 F.3d 718, 743 (6th Cir. 2015) (quoting Wright et al., § 4478.6). Regardless, "[s]uitably persuasive reasons justify relief from either forfeiture or waiver." Wright et al., § 4478.6.

mandamus."). Indeed, I have been unable to find a single instance in which this Court has afforded mandamus review for an alleged violation of the law-of-the-case doctrine as opposed to the several instances in which mandamus review has been invoked to apply the mandate rule, and HealthSouth fails to cite any such case in its briefs to this Court. Accordingly, because the mandate rule is not implicated in this case, and because that is the basis upon which the main opinion purports to allow mandamus review, I believe the petition is due to be denied.[6]

[6]HealthSouth also seeks mandamus review on the basis that Rule 60(b), Ala. R. Civ. P., does not permit correction of Judge Vance's February 26, 2016, order, but, as the main opinion observes, "[t]here is no indication that the trial court relied upon Rule 60(b) to grant relief from its February 2016 order." ___ So. 3d at ___ n.4. In any event, I find HealthSouth's arguments asserting the inapplicability of Rule 60(b) to be wholly inadequate to warrant relief on that basis, and apparently a majority of the Court agrees given that the discussion of Rule 60(b) is relegated to a single footnote at the end of the main opinion. See id.