RECENT CIVIL DECISIONS

Summaries from October 5, 2018 – March 29, 2019

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ARBITRATION – LACK OF MENTAL CAPACITY

Stephan v. Millennium Nursing and Rehab Center, Inc., [Ms. 1170524, Oct. 5, 2018] __ So.3d __ (Ala.2018). This decision by Justice Bolin (Stuart, C.J. and Parker, Shaw, Main, Wise, Bryan, and Mendheim, JJ., concur; Sellers, J., dissents) reverses the Madison Circuit Court's order enforcing a motion to compel arbitration filed by Millennium Nursing and Rehab Center, Inc. where plaintiff's elderly decedent was admitted following hip surgery. Plaintiff was the daughter and personal representative of the decedent.

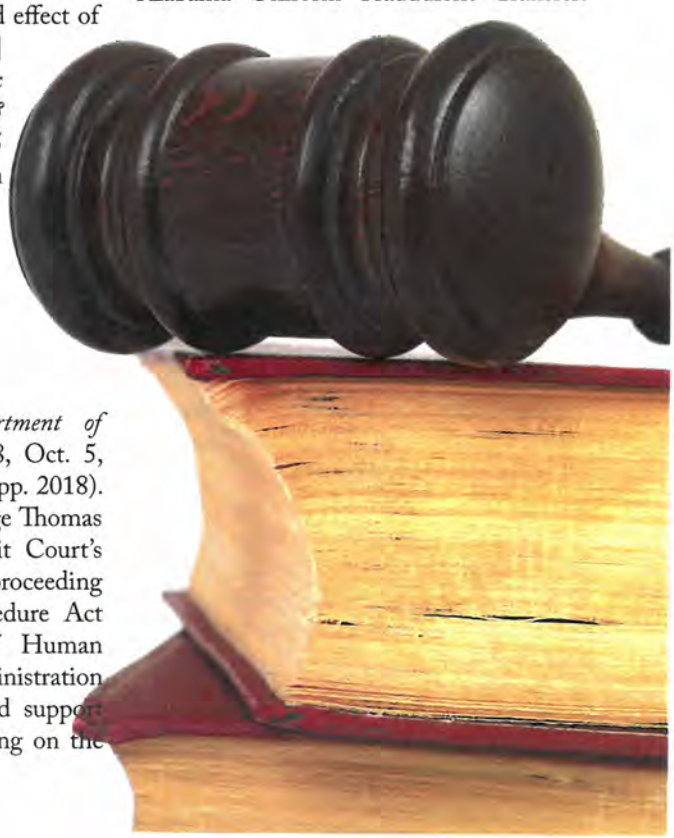
On *de novo* review of the order compelling arbitration, the Court reversed. At the time the daughter signed the admission agreement containing the arbitration provision, her father was suffering from dementia. The Court held that the decedent father "did not have sufficient capacity to understand in a reasonable manner the nature and effect of the act which he [or his daughter] was doing." Ms. *22, quoting *Ex parte Chris Langley Timber & Mgmt., Inc.*, 923 So. 2d 1100, 1105 (Ala. 2005) (internal quotation marks omitted).

VA DISABILITY BENEFITS – CHILD SUPPORT

Holmes v. Alabama Department of Human Resources, [Ms. 2170798, Oct. 5, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This unanimous decision by Judge Thomas affirms the Montgomery Circuit Court's judgment in a judicial review proceeding under the Administrative Procedure Act affirming the Department of Human Resources's levy of Veterans Administration disability benefits to pay a child support obligation of the veteran. Relying on the United States Supreme Court's decision in *Rose v. Rose*, 481 U.S. 619 (1987), the court noted that VA disability benefits "'are intended to support not only the veteran, but the veteran's family,' ...." Ms. *12. Consequently, the court affirmed the circuit court's affirmance of DHR's levy on the father's VA disability benefits to satisfy his child support obligation. Ms. *18.

SUMMARY JUDGMENT; FRAUDULENT CONVEYANCE

International Management Group, Inc. v. Bryant Bank, [Ms. 2170744, Oct. 12, 2018] __ So. 3d __ (Ala. Civ. App. 2018). The court (Thomas, J.; and Thompson, P.J., and Pittman and Moore, JJ., concur; Donaldson, J., recuses) reverses a summary judgment entered in favor of the plaintiff and movant, Bryant Bank, which was premised upon a fraudulent conveyance theory under the Alabama Uniform Fraudulent Transfers



Act, § 8-9A-1 *et seq.*, Ala. Code 1975, and set aside fraudulent transfers of a mortgage because they were transferred without consideration. On appeal, the transferees argued the trial court erred in entering summary judgment in favor of the bank for three reasons: (1) if the trial court's entry of summary judgment was based upon a violation of § 8-9A-5 (constructive fraudulent transfer), the summary judgment was improper because the bank committed a procedural error in not asserting its §8-9A-5(a) argument until it filed a brief in reply to the transferees' opposition to the bank's summary-judgment motion; (2) because the statute of limitations on a claim alleging constructive fraud under § 8-9A-5(a) had run by the time suit was filed; and, (3) if the summary judgment order was premised upon a violation of § 8-9A-4 (actual intent to hinder or defraud), the order was improper because issues of fraudulent intent are typically inappropriate for resolution via summary judgment. Ms. *8-9.

The court first reiterates the standard of review when the movant for summary judgment bears the burden of proof on its claims at trial:

> "'"[T]he manner in which the [summary-judgment] movant's burden of production is met depends upon which party has the burden of proof ... at trial."' *Denmark v. Mercantile Stores Co.*, 844 So. 2d 1189, 1195 (Ala. 2002) (quoting *Ex parte General Motors Corp.*, 769 So. 2d 903, 909 (Ala. 1999), quoting in turn *Berner v. Caldwell*, 543 So. 2d 686, 691 (Ala. 1989) (Houston, J., concurring specially)). If the movant is the plaintiff with the ultimate burden of proof, his '"proof must be such that he would be entitled to a directed verdict [now referred to as a judgment as a matter of law, see Rule 50, Ala. R. Civ. P.] if this evidence was not controverted at trial."' *Ex parte General Motors*, 769 So. 2d at 909 (quoting *Berner*, 543 So. 2d at 688).
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> "The first prerequisite for [a summary judgment] in favor of a movant who asserts a claim ... is that the claim ... be valid in legal theory, if its validity be challenged. See *Driver v. National Sec. Fire & Cas. Co.*, 658 So. 2d 390 (Ala. 1995). The second prerequisite for [a summary judgment] in favor of such a movant, who necessarily bears the burden of proof, *American Furniture Galleries v. McWane, Inc.*, 477 So. 2d 369 (Ala. 1985), *McKerley v. Etowah-DeKalb-Cherokee Mental Health Board, Inc.*, 686 So. 2d 1194 (Ala. Civ. App. 1996), and *Oliver v. Hayes International Corp.*, 456 So. 2d 802 (Ala. Civ. App. 1984), is that each contested element of the claim ... be supported by substantial evidence. See *Driver, supra*, and *McKerley, supra*. The third prerequisite for [a summary judgment] in favor of such a movant is that the record be devoid of substantial evidence rebutting the movant's evidence on any essential element of the claim.... See *Driver, supra*, and *First Fin. Ins. Co. v. Tillery*, 626 So. 2d 1252 (Ala. 1993). Substantial rebutting evidence would create an issue of fact to be tried by the finder of fact and therefore would preclude [a summary judgment]. See *Driver, supra*, and *First Financial, supra*. [Summary judgment] in favor of the party who asserts the claim ... is not appropriate unless all three of these prerequisites coexist. See *Driver, supra*, and *First Financial, supra, McKerley, supra*, and *Oliver, supra*."'

Ms. *15-16 (quoting *Ross v. Rosen-Rager*, 67 So. 3d 29, 35 (Ala. 2010) (quoting *Ex parte Helms*, 873 So. 2d 1139, 1143 (Ala. 2003)).

The court next rejects the transferees' argument that the bank was procedurally prohibited from invoking § 8-9A-5(a), because it failed to recite that statute in its complaint and raised that statute as a theory of recovery only for the first time in its reply to the transferees' opposition to the bank's motion for summary judgment. Citing *Phillips Colleges of Alabama, Inc. v. Lester*, 622 So. 2d 308 (Ala. 1993) (Ms. *23), the court reiterates "under modern rules of civil practice, the pleadings generally need only to put the defending party on notice of the claims against him," and that in light of the party's ability to fully develop their arguments, there could be no prejudice from allowing the parties to proceed under the § 8-9A-5(a) theory. The court quotes the holding of *Bracy v. Sippial Elec. Co.*, 379 So. 2d 582, 584 (Ala. 1980), that "[w]here an amendment merely changes the legal theory of a case or adds an additional theory, but the new or additional theory is based upon the same set of facts and those facts have been brought to the attention of the other party by a previous pleading, no prejudice is worked upon the other party." Ms. *23-24.

The court next considered the transferees' contention that the bank's § 8-9A-5 claim was barred by the four-year statute of limitations imposed by § 8-9A-9(3), and that § 6-2-3's discovery tolling provision did not save the claim. The court first notes that a party seeking to invoke § 6-2-3 must:

> "'(1) ... aver with precision the facts and circumstances which allegedly were not discovered and to which [plaintiff] allegedly w[as] defrauded, (2) ... aver how or when these facts were discovered, (3) ... aver what prevented these facts from being discovered before the bar of the statute became complete and (4) ... aver facts acquitting [the plaintiff] of all knowledge of facts which ought to have put [it] on inquiry.'"

Ms. *25. Quoting *Amason v. First State Bank of Lineville*, 369 So. 2d 547, 550 (Ala. 1979), the court concludes the bank failed to establish it lacked "knowledge of facts which ought to have put [it] on inquiry." As a result, the bank did not present evidence sufficient to demonstrate it met each element required under § 6-2-3 to be supported by substantial evidence, such that the issue of the timeliness of the complaint was not properly resolved at the summary-judgment stage. The court reiterates, Ms. *26, n. 11, "[a]s a general rule, the question of when the plaintiff discovered, or should have discovered, the fraud is reserved for the jury." *Id.* (quoting *Chambless-Killingsworth & Assocs., P.C. v. Osmose Wood Preserving, Inc.*, 695 So. 2d 25, 27 (Ala. Civ. App. 1996)).

Turning to whether summary judgment could be affirmed on the basis of the bank's proof of the required elements for fraudulent transfer under § 8-9A-4(a) (requiring proof that a debtor intended to "hinder, delay, or defraud" a creditor by transferring an asset), the court again found the bank's evidence

insufficient. Section 8-9A-4(b) requires substantial evidence of at least three indicia of fraud:

> "(b) In determining actual intent under subsection (a), consideration may be given, among other factors, to whether:
>
> "(1) The transfer was to an insider;
>
> "(2) The debtor retained possession or control of the property transferred after the transfer;
>
> "(3) The transfer was disclosed or concealed;
>
> "(4) Before the transfer was made the debtor had been sued or threatened with suit;
>
> "(5) The transfer was of substantially all the debtor's assets;
>
> "(6) The debtor absconded;
>
> "(7) The debtor removed or concealed assets;
>
> "(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred;
>
> "(9) The debtor was insolvent or became insolvent shortly after the transfer was made;
>
> "(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> "(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

Citing numerous decisions (Ms. *31-32), the court holds that proving an actual intent to hinder, delay, or defraud is a heavily fact-dependent question, usually revealed through circumstantial evidence, requiring determinations concerning the credibility of witnesses, such that claims under § 8-9A-4(a) are not well suited for summary judgment.

PREMISES LIABILITY – SUMMARY JUDGMENT

Unger v. Wal-Mart Stores East, L.P., [Ms. 1170657, Oct. 19, 2018] __ So. 3d __ (Ala. 2018). The Court (Sellers, J.; and Stuart, C.J., and Bolin, Parker, and Wise, JJ., concur) affirms a summary judgment entered in favor of Wal-Mart and its employees by the Mobile Circuit Court in a premises liability/personal injury/wrongful death action upon concluding the plaintiff failed to present substantial evidence of any breach of a duty owed by Wal-Mart to the business invitee injured on its premises. Quoting *South Alabama Brick Co. v. Carwie*, 214 So. 3d 1169, 1176 (Ala. 2016), the Court reiterates (Ms. *6) the scope of the duty owed by an invitor to a business invitee:

> "Alabama law is well-settled regarding the scope of the duty an invitor owes a business invitee. 'The owner of premises owes a duty to business invitees to use reasonable care and diligence to keep the premises in a safe condition, or, if the premises are in a dangerous condition, to give sufficient warning so that, by the use of ordinary care, the danger can be avoided.' *Armstrong v. Georgia Marble Co.*, 575 So. 2d 1051, 1053 (Ala. 1991) .... We have said that a premises owner's duty to warn extends only to 'hidden defects and dangers that are known to [the premises owner], but that are unknown or hidden to the invitee.' *Raspilair v. Bruno's Food Stores, Inc.*, 514 So. 2d 1022, 1024 (Ala. 1987)."

The Court rejected the plaintiff's contention that Wal-Mart's duty was defined by its own standard operating procedure for staging shopping carts which, plaintiff alleged, was breached when the Wal-Mart greeter failed to give plaintiff's decedent a single, unattached shopping cart when he arrived at the store. The Court reasons that even if Wal-Mart's standard operating procedure could be used to define the scope of the duty owed, plaintiff failed to present substantial evidence of a breach of that duty by any Wal-Mart employee. Ms. *8.

SUMMARY JUDGMENT – WAIVER – STANDING

Norvell v. Norvell, [Ms. 1170544, Oct. 19, 2018] __ So. 3d __ (Ala. 2018). The Court (Bryan, J.; and Stuart, C.J., and Parker, Main, and Mendheim, JJ., concur) affirms in part and reverses in part a summary judgment entered by the Lauderdale Circuit Court in a dispute among three brothers as to their mother's conveyance of title to a lake house. The circuit court entered summary judgment against the disappointed brother on claims of "intentional-interference-with-inheritance-expectancy," undue-influence, breach-of-fiduciary-duty, and conspiracy. That brother appealed, contending the circuit court erred in granting summary judgment as to all his claims.

As to the "intentional-interference-with-inheritance-expectancy" and undue-influence claims, the Court notes the circuit court did not state the ground or grounds upon which it based the summary judgment so that the appellate court is required to presume the circuit court relied on each of the grounds asserted by the defendants in their summary-judgment motion. Ms. *10-11, citing *Ramson v. Brittin*, 62 So. 3d 1035 (Ala. Civ. App. 2010) and *State Dep't of Revenue v. Hoover, Inc.*, 993 So. 2d 889 (Ala. Civ. App. 2007). Rather than reach the merits of the contentions regarding these claims, the Court finds the arguments waived because the appellant's brief "wholly ignores the circuit court's reliance on a lack of ripeness as a ground for the summary judgment on those claims." Ms. *11. Because the appellant failed to demonstrate error as to each of the alleged grounds for summary judgment, affirmance of the summary judgment was required:

> "In order to secure a reversal, 'the appellant has an affirmative duty of showing error upon the record.' *Tucker v. Nichols*, 431 So. 2d 1263, 1264 (Ala. 1983). It is a familiar principle of law:
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> > "'When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue ... constitutes a waiver with respect to the issue.'

"*Fogarty v. Southworth*, 953 So. 2d 1225, 1232 (Ala. 2006) (footnote omitted) (emphasis added). This waiver, namely, the failure of the appellant to discuss ... an issue on which the trial court might have relied as a basis for its judgment, results in an affirmance of that judgment. *Id.* That is so, because 'this court will not presume such error on the part of the trial court.' *Roberson v. C.P. Allen Constr. Co.*, 50 So. 3d 471, 478 (Ala. Civ. App. 2010) (emphasis added)."

Soutullo v. Mobile Cty., 58 So. 3d at 738 (middle emphasis added). See also *Ex parte Sikes*, 218 So. 3d 839, 847 (Ala. Civ. App. 2016) ("[T]here were alternate bases for the trial court's ruling that Sikes has failed to address in his brief on appeal, and, therefore, he has waived any argument as to the propriety of those alternate bases for the trial court's ruling. 'This court is required to affirm a judgment if the appellant has waived any arguments regarding an alternative basis for the judgment.'" (quoting *Drake v. Alabama Republican Party*, 209 So. 3d 1118, 1122 (Ala. Civ. App. 2016) (emphasis added))).

Ms. *11-13.

With respect to the breach-of-fiduciary duty and conspiracy claims, the Court found that the circuit court erred in granting summary judgment on the basis of an alleged lack of standing. Ms. *14. Citing *Gardens at Glenlakes Property Owners Ass'n, Inc. v. Baldwin County Sewer Service, LLC*, 225 So. 3d 47 (Ala. 2016), the Court repeated its caution to the Bench and Bar that standing issues are typically relevant only in public-law cases and generally inapplicable in private-law cases. See Ms. *14-20. Because the summary judgment was premised upon an erroneous contention about the disappointed brother's standing, it was required to be reversed.

SUMMARY JUDGMENT – WAIVER – STANDING

Campbell v. J.R.C., J.L.C., R.L.C., and J.H.S., [Ms. 1170385, Oct. 19, 2018] __ So. 3d __ (Ala. 2018). The Court (Sellers, J.; and Stuart, C.J., and Parker, Main, Wise, Bryan, and Mendheim, JJ., concur; Bolin and Shaw, JJ., concur in the result) affirms a judgment entered by the Mobile Circuit Court adjudicating J.R.C., J.L.C., R.L.C. and J.H.S. as heirs of the estate of their father such that they are entitled to proceeds of a life insurance policy insuring their father's life. The action commenced when the father's mother petitioned the Mobile Probate Court for letters of administration alleging that she was an heir and that the children were not heirs because they were not the father's biological children. Ms. *4.

Relying upon the legal presumption of paternity set forth in § 26-17-204(a)(1), Ala. Code 1975, for children born during a legal marriage and the failure by the father's mother to rebut the presumption with clear and convincing evidence as required by § 26-17-601, the Court holds that the father's mother has no standing to challenge paternity because the evidence established that the father, during his lifetime, persisted in his paternity. Ms. *8-11.

Significantly, Justice Bolin offers a separate writing expressing his view of why an administrator and an administrator ad litem could not coexist in this case. Ms. *14-25.

EJECTMENT – INTERVENTION – INDISPENSABLE PARTY

Chandler v. Branch Banking & Trust Co., [Ms. 2160999, Oct. 19, 2018] __ So. 3d __ (Ala. Civ. App. 2018). The court (Thompson, P.J.; and Pittman, Thomas, Moore, and Donaldson, JJ., concur) unanimously reverses a summary judgment entered by the Shelby Circuit Court in favor of a bank in this ejectment action. The court concluded the trial court erred in failing to permit intervention in the action by the defendant's wife who owned an equitable interest in the real property at issue. As an owner, the wife was an indispensable party who needed to be joined pursuant to Rule 19, Ala. R. Civ. P. for there to be a just adjudication of the ejectment action. Ms. *7.

MAILBOX RULE – APPEAL OF TAX ASSESSMENT

Ex parte Allen Kennemer, [Ms. 1170095, Oct. 26, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Mendheim reverses on *certiorari* review the Court of Civil Appeals' no opinion affirmance of the Shelby Circuit Court's order dismissing an appeal from a ruling of the Shelby County Board of Equalization.

The Court held that "[t]he mailbox rule applies to the filing of a notice of appeal with the Board under § 40-3-25. Accordingly, the Kennemers' notice of appeal was timely filed with the Board and the circuit court erred in dismissing their appeal from the Board's May 2016 ruling." Ms. *10.

SOVEREIGN IMMUNITY

Ex parte Alabama Peace Officers' Standards and Training Commission, [Ms. 1170892, Oct. 26, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Sellers grants the Commission's petition for a writ of mandamus directing the Montgomery Circuit Court to dismiss a complaint for declaratory judgment filed against the Commission by a former state trooper.

The Court first noted that "[i]t is well established that 'a court's failure to dismiss a case for lack of subject-matter jurisdiction based on sovereign immunity may properly be addressed by a petition for the writ of mandamus.'" Ms. *5, quoting *Ex parte Alabama Department of Mental Health and Mental Retardation*, 837 So. 2d 808, 810-11 (Ala. 2012). The Court held that "[a]s a State agency, the Commission is entitled to absolute immunity under § 14 [of the Alabama Constitution]." Ms. *7. The Court also held that an amended complaint was a nullity because the initial complaint naming only the Commission "failed to trigger the subject-matter jurisdiction of the circuit court." Ms. *7-8.

TIMELINESS OF FILING OF NOTICE OF APPEAL

Ex parte G.L.C., [Ms. 1170813, Oct. 26, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Bryan reverses the Court of Civil Appeals' dismissal of the mother's appeal of a judgment of the Baldwin Juvenile Court terminating her

parental rights.

Noting that the timely filing of a notice of appeal remains jurisdictional, Ms. *19, the Court nonetheless reversed dismissal of the appeal. The Court held "the mother ... was prevented from timely filing her Notice of Appeal based on erroneous information given to her by someone in the circuit clerk's office ... [and consequently] that equity requires that we deem the mother's notice of appeal timely filed." *Ibid.*

CONTRIBUTORY NEGLIGENCE – SPOLIATION OF EVIDENCE – EXCESSIVENESS OF COMPENSATORY DAMAGES

Campbell v. Kennedy, [Ms. 1160444, Oct. 26, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Sellers (Justice Shaw recuses) affirms the Greene Circuit Court's judgment entered on a jury verdict awarding Kennedy $3 million in compensatory damages. Ms. *2-3.

Defendants argued Kennedy was contributorily negligent as a matter of law for crossing the double yellow line as he attempted to pass the Defendant's Caterpillar motor grader. Ms. *9. The Court held that "there was an abundance of conflicting evidence before the jurors that would have allowed them to reach opposite conclusions as to whether Kennedy was justified in crossing the double-yellow line in an attempt to pass the motor grader ...." Ms. *13.

The Court also rejected the defendant's motion for new trial challenging the trial court's charging the jury on spoliation of evidence. After cataloguing the evidence regarding spoliation, the Court "conclude[d] that a sufficient foundation existed for the jury charge on the doctrine of spoliation of evidence." Ms. *18. However, the Court further held that "[m]ore importantly, we further conclude that the jury instruction on the doctrine of spoliation had no prejudicial effect on the trial of this case because ... nothing in the record suggests that the jury's verdict was aimed at punishing the defendants for the alleged spoliation rather than merely compensating Kennedy for his injuries." *Ibid.*

Finally, the Court rejected the excessiveness challenge to the $3 million compensatory-damages verdict. The Court noted that the plaintiff was 27 years old at the time of the accident and that his injuries required surgery to install a steel rod in his broken femur and insertion of screws to repair injuries to his pelvis. Ms. *19. The Court held that "[t]he law is clear ... that jury verdicts are presumed correct, 'especially where damages are awarded for pain and suffering.'" Ms. *22, quoting *Coca-Cola Bottling Co. v. Parker*, 451 So. 2d 786, 788 (Ala. 1984). The Court further noted that "compensatory damages for pain and suffering cannot be measured by any yardstick, and the amount awarded must be 'left to the sound discretion of the jury, subject only to correction by the court for clear abuse or passionate exercise of that discretion.'" Ms. *22, quoting *Alabama Power Co. v. Moseley*, 294 Ala. 394, 401, 318 So. 2d 260, 266 (1975).

MEDICAL NEGLIGENCE – EXPERT TESTIMONY – SUMMARY JUDGMENT

Shadrick v. Grana, [Ms. 1170513, Oct. 26, 2018] __ So. 3d __ (Ala. 2018). The Court (Sellers, J.; and Stuart, C.J., and Bolin, Parker, Main, Wise, Bryan, and Mendheim, JJ. concur, and Shaw, J. concurs in the result) affirms the Calhoun Circuit Court's summary judgment in favor of Dr. Wilfredo Grana in a medical malpractice action. Plaintiff's decedent presented to the emergency room of the Northeast Alabama Regional Medical Center experiencing shortness of breath and chest pain. The emergency room physician contacted the cardiologist on call at the time and Dr. Grana, a board-certified internist and hospitalist for the hospital. Ms. *2.

Dr. Grana consulted by telephone with the on-call cardiologist and relayed that the patient had low blood pressure, elevated heart rate, elevated troponin levels, and fluid in his lungs and that the cardiologist should see the patient before he went home for the night. Ms. *3-4. However, the cardiologist did not see the patient until the following afternoon after the patient had suffered cardiac arrest. Ms. *5.

The plaintiff settled her claims against the cardiologist, and the circuit court granted Dr. Grana's motion for summary judgment. In affirming the summary judgment for Dr. Grana, the Supreme Court held "[g]iven the complexities of the information being communicated between the physicians and the possible diagnostic interpretations of that information, the exception to the general rule that a medical-malpractice plaintiff must present expert testimony on the standard of care does not apply here." Ms. *13.

DIVORCE – IMPLIED REVOCATION OF BENEFICIARY DESIGNATION – § 30-4-17, ALA. CODE 1975

Blalock v. Sutphin and New York Life Ins. Co., [Ms. 1170879, Oct. 26, 2018] __ So. 3d __ (Ala. 2018). The Court (Sellers, J.; and Stuart, C.J., and Bolin and Wise, JJ., concur; Shaw, J. concurs in the result) affirms a judgment of the DeKalb Circuit Court declaring the decedent's daughter the sole beneficiary of his life insurance policy.

The insured and Blalock were divorced in 2016 and the life insurance policy was not addressed in the divorce judgment. After the divorce, the insured never changed the beneficiary designation giving Blalock a 50% share. Ms. *2. Applying § 30-4-17, Ala. Code 1975, the circuit court ruled that "Blalock's beneficiary designation had been revoked upon her divorce from [the insured]." Ms. *3.

The Court rejected Blalock's impairment-of-contracts argument, holding that "[i]n 2015, when § 30-4-17 became effective, it did not retroactively impair any existing contractual obligations. Instead, it created a prospective default rule, i.e., that a divorce effectively revokes any revocable beneficiary designation in favor of the former spouse, absent further action by the policyholder." Ms. *13.

ABATEMENT – ACTIONS TAKEN BY PERSONAL REPRESENTATIVE PRIOR TO APPOINTMENT

Ex parte Evangela Skelton, [Ms. 1160641, Oct. 26, 2018] __ So. 3d __ (Ala. 2018). The Court (Mendheim, J.; and Stuart, C.J., and Parker, Shaw, Bryan, and Seller, JJ., concur; Main, J., concurs

in the result; and Bolin and Wise, JJ., recuse) issues a writ of mandamus to the Jefferson Circuit Court directing it to vacate its order denying a motion to abate filed by the estate of Brian Lee Skelton, Sr. (Brian), pursuant to the prior pending action statute, § 6-5-440, Ala. Code 1975.

Prior to her appointment as personal representative of Brian's estate, Evangela Skelton (Angel) filed in the Jefferson Probate Court a motion to appoint a successor trustee for a trust for which Brian was acting as trustee at the time of his death. Angel named a number of interested parties, including Brian's nephew, Joshua M. Council (Joshua). Ms. *7. At the time Angel filed the motion to appoint a successor trustee, her petition to be appointed personal representative of Brian's estate had not yet been granted.

Joshua filed in the Jefferson Circuit Court a petition to terminate the trust. Ms. *8. Angel moved to abate Joshua's petition under the prior pending action statute. Ms. *9-10.

The Court first held that "[n]o impediment to subject-matter jurisdiction existed as to Angel when she filed the petition for appointment in the probate court. And, because no jurisdictional impediment existed as to Angel, her subsequent appointment as personal representative related back to her filing of that petition. See Ala. Code 1975, § 43-2-831 ("The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter.') ...." Ms. *15.

The Court ultimately held Joshua's action was subject to abatement because § 6-5-440 applies to compulsory counterclaims. Ms. *16. The Court noted that Joshua's "petition for termination sought, in part, the same substantive relief as to the trust as was sought in the petition for [Angel's] appointment, particularly the final division and distribution of the trust property according to the terms of the trust." Ms. *19.

FINALITY OF JUDGMENT – CONTEMPT

Morris House Condominium Association, Inc. v. Hirschfield, [Ms. 2170666, Oct. 26, 2018] __ So. 3d __ (Ala. Civ. App. 2018). The court (Thomas, J. and Thompson, P.J., and Pittman and Moore, JJ., concur; Donaldson, J., concurs in the result) dismisses the plaintiff's appeal of the Jefferson Circuit Court's order awarding plaintiff's counsel an attorney's lien on any judgment to be entered in the action and holding the plaintiff in contempt for failure to pay its counsel.

The court noted that the order in question "does not expressly direct the association to do anything[.]" Consequently, the contempt order was not appealable. Ms. *14.

The court further held that the order awarding plaintiff's counsel an attorney's lien on any judgment to be rendered in the action was also not a final order immediately appealable "because the predicate judgment may never be entered, thereby precluding attachment of the lien." Ms. *15.

MOOTNESS

Alabama Dept. of Transportation v. Lee Outdoor Advertising, LLC, [Ms. 2170774, Oct. 26, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This unanimous decision by Presiding Judge Thompson, dismisses as moot the Alabama Department of Transportation (ALDOT)'s appeal of the circuit court's order reversing ALDOT's decision to revoke a permit issued to Lee Outdoor Advertising, LLC (Lee) to erect an electronic billboard off Interstate 85 in Montgomery.

The court noted "'the law does not require the doing of a futile act.'" *Ibid.*, quoting *Kraft v. State*, 90 So. 3d 197, 204 (Ala. Crim. App. 2011) (quoting in turn, *Ohio v. Roberts*, 448 U.S. 56 74 (1980)). The court dismissed ALDOT's appeal as moot and directed the circuit court to enter an order reinstating ALDOT's revocation of Lee's permit because "[r]egardless of the propriety of the circuit court's judgment based on the issues presented on appeal, a judgment in Lee's favor is ultimately unenforceable." Ms. *12. It was undisputed that Lee did not have permission from the current owner of the property to erect a sign. *Ibid.*

DIVORCE – LACK OF SUBJECT-MATTER JURISDICTION

Mendia v. Encarnacion, [Ms. 2170509, Oct. 26, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This unanimous decision by Judge Pittman directs the Dale Circuit Court to vacate a judgment of divorce entered by default. The court found subject-matter jurisdiction lacking because no jurisdictional facts were established by evidence in the record. Under settled law, "jurisdictional facts must be established by the evidence in order for a trial court to enter a valid judgment of divorce ...." Ms. *11.

NEGLIGENCE – ICY ROADS

Dennis v. Blackwell and City of Birmingham, [Ms. 2170633, Oct. 26, 2018] __ So. 3d __ (Ala. Civ. App. 2018). The court (Moore, J.; and Pittman, Thomas, and Donaldson, JJ., concur; Thompson, P.J., concurs in the result) affirms the Jefferson Circuit Court's entry of summary judgment entered in favor of the City of Birmingham and its police officer whose police vehicle skidded on an icy road into the plaintiff's vehicle. In affirming, the court noted that plaintiff "cites no law indicating that a motorist is liable for negligence merely for driving in weather conditions such as those existing on the day of the accident at issue in this case. Because [plaintiff] has shown only the mere skidding of an automobile on an icy street, which does not necessarily prove negligence of the driver of the car, we conclude that she has failed to demonstrate the existence of a genuine issue of material fact with regard to whether [Officer] Blackwell acted negligently.'" Ms. *10 (internal citation and quotation marks omitted).

The court went on to note that "[r]egardless of whether the weather conditions could properly be deemed an 'act of God' under Alabama law, ... 'accidents produced exclusively by skidding on an ice-covered surface of a road, and which are not contributed to by nonobservance of some other precautionary requirement, will not support a cause of action based on negligence.'" Ms. *10-11, quoting [*National Biscuit Co. v.*] *Wilson*, 256 Ala. [241, 245,] 54 So. 2d [492,] 495 [(1951)].

OUTBOUND-FORUM-SELECTION CLAUSE

Ex parte Killian Construction Co., [Ms. 1170696, Nov. 2, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Mendheim issues a writ of mandamus to the Baldwin Circuit Court directing it to vacate its order denying a motion to dismiss a breach of contract action based on improper venue. Defendants Killian and its employee Christian Mills moved to dismiss the action based upon an outbound-forum-selection clause requiring that "[a]ny dispute arising under or related to this Subcontract Agreement, performance of work or provision of any materials pursuant hereto, shall be brought only in state court in Greene County, State of Missouri...." Ms. *2-3.

In issuing the writ, the Court applied now settled law that outbound-forum-selection clauses are enforceable. The Court reasoned that plaintiff failed to submit sufficient evidence to show that Missouri would be "seriously inconvenient for trial." Ms. *14. The Court also rejected plaintiff's argument that the non-signatory employee, Mills, could not enforce the outbound forum selection clause. The Court held that "the claims against Mills are 'related to' and 'intertwined with' the subcontract." Ms. *18. Finally, the Court rejected plaintiff's argument that the defendants waived enforcement of the clause when they unsuccessfully removed the case to federal court. Ms. *21.

APPELLATE JURISDICTION – RULE 59.1, ALA. R. CIV. P.

Johnson v. Walter Cox and General Auto and Truck Repair, Inc., [Ms. 2170874, Nov. 9, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This unanimous decision by Judge Thomas dismisses Johnson's appeal from the Jefferson Circuit Court's order dismissing his action alleging conversion, fraud, and unjust enrichment.

The court examined its subject-matter jurisdiction *sua sponte* and concluded that Johnson's notice of appeal was untimely. Johnson's post-judgment motion was subject to Rule 59.1, Ala. R. Civ. P., providing that a post-judgment motion is deemed denied 90 days after filing. The court applied settled law that "[a]n express consent of the parties, one evidenced by 'positive steps to express [an agreement to extend the 90-day period] in a direct and equivocal manner,' is required to extend the 90-day period under Rule 59.1." Ms. *5-6, quoting *Personnel Bd. for Mobile Cty. v. Bronstein*, 354 So. 2d 8, 11 (Ala. Civ. App. 1977). Because no such express agreement appeared in the record, Johnson's appeal was filed more than 42 days after his post-judgment motion was deemed denied under Rule 59.1.

CLASS CERTIFICATION – PERSONAL JURISDICTION

Jones v. Depuy Synthes Products, Inc., [Case No. 7:17-cv-01778-LSC, Nov. 20, 2018] 2018 WL 6431013 (N.D. Ala. 2018) (United States District Court Judge L. Scott Coogler).

The district court denies a Fed. R. Civ. P. 12(f) motion to strike plaintiffs' amended complaint and Rule 12(f) and 23(d)(1)(D) motion to strike plaintiffs' nationwide class action allegations, contending that component parts of Depuy's ATTUNE total knee replacement systems are defective. The district court rejects Depuy's contentions that plaintiffs' amended complaint was due to be stricken because plaintiffs could not meet the commonality and typicality requirements of Rule 23(a) or the superiority and preponderance requirements of Rule 23(b)(3). The court also rejects Depuy's contention that a plaintiff in a federal class-action must establish personal jurisdiction over all unnamed putative class members given the holding of the U.S. Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017).

FORUM NON CONVENIENS

Ex parte Tyson Chicken, Inc., [Ms. 1170820, Nov. 30, 2018] __ So. 3d __ (Ala. 2018). In a 5-4 decision, the Court (Sellers, J.; Stuart, C.J., and Bolin, Parker, and Mendheim, JJ., concur; Shaw, Main, Wise, and Bryan, JJ., dissent) issues a writ of mandamus directing the Marshall Circuit Court to transfer this motor vehicle collision case to the Cullman Circuit Court.

The collision occurred in Cullman County when a passenger vehicle operated by Lisa Huffstutler collided with a tractor-trailer owned by Tyson Chicken, Inc. ("Tyson") and driven by Charles Craig. Huffstutler was treated at the scene by emergency responders and taken to Cullman Regional Medical Center for further treatment. Ms. *2.

The Court first noted that:

> Our analysis under the interest-of-justice prong of the forum non conveniens statute does not involve a "simple balancing test weighing each county's connection to an action." *Ex parte J & W Enters., LLC*, 150 So. 3d 190, 196 (Ala. 2014). Instead, "[t]he 'interest of justice' prong of § 6-3-21.1 requires 'the transfer of the action from a county with little, if any, connection to the action, to the county with a strong connection to the action.'" *Ex parte Indiana Mills & Mfg., Inc.*, 10 So. 3d 536, 540 (Ala. 2008) (quoting *Ex parte National Sec. Ins. Co.*, 727 So. 2d at 789).

Ms. *5.

Even though Huffstutler and the driver, Craig, resided in Marshall County, and Craig worked at Tyson's facility in Marshall County, the Court found that transfer was warranted under the interest-of-justice factor. The Court cited these facts as requiring transfer: Huffstutler's treatment in Cullman County, the tractor-trailer involved in the accident was registered in Cullman County, and all documents relating to the driver's employment, training, and supervision were located in Cullman County. Ms. *9. The majority held that the location of the accident factor was particularly significant in this case because the terrain near the scene of the accident was a contributing factor such that a viewing of the scene would assist the trier of fact. Ms. *6.

Justice Shaw's dissent pointed out the driver's Marshall County residence and his employment at a Tyson facility in Marshall County and concluded "I cannot conceive how, under these circumstances, Marshall County has a 'weak' connection or 'little' connection to this case. Ms. *15. Likewise, Justice Bryan's dissent, while acknowledging

Cullman County's strong connection to the case, concluded that Marshall County's connection to the case was not weak and therefore transfer was inappropriate. Ms. *17.

SUMMARY JUDGMENT PROCEDURE – VIEW OF SCENE BY CIRCUIT JUDGE

Robinson v. Harrigan Timberlands Limited Partnership, [Ms. 1170515, Nov. 30, 2018] __ So. 3d __ (Ala. 2018). In this unanimous decision by Justice Mendheim (Stuart, C.J., and Parker, Main, Bryan, JJ., concur), the Court reverses a judgment of the Clarke Circuit Court dismissing Robinson's action against an adjoining landowner and several of the landowner's alleged agents. Robinson alleged that the defendants wrongfully cut timber on land owned by Robinson.

The defendants moved to dismiss, contending that they had cut no timber west of Bassetts Creek. The plaintiff's complaint alleged that Bassetts Creek was the eastern boundary of his property. Ms. *6. The parties submitted various surveys and affidavits in support of and in opposition to the motions to dismiss, and the trial court ultimately went to the property with the parties to conduct a view. Thereafter, the trial court purported to grant the defendants' motion to dismiss stating, in pertinent part, that the timber was cut on the east of Bassetts Creek and Robinson's property is all located on the west of Bassetts Creek, and further that "based on the inspection of the property the Court does not believe there was an avulsion (so as to alter the boundary line) of Bassetts Creek as argued by Robinson." Ms. *15.

The Court first concluded that the summary judgment standard of review applied because the circuit court had considered matters outside Robinson's complaint. Ms. *18-19. The Court reversed the summary judgment. The Court held the trial court improperly had made findings of fact based upon its view of the property.

> " 'The summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. ... The summary judgment procedure is not a substitute for the trial of disputed issues of fact. ... The procedure is well adapted to expose sham claims and defenses but cannot be used to deprive a litigant of a proper trial of genuine issues of fact.'"

Ms. *24, quoting *Howell v. Mobile Infirmary*, 337 So. 2d 338, 340 (Ala. 1976) (quoting in turn 3 Barron & Holtzoff, *Federal Practice and Procedure* § 1231 (1958)).

SUIT AGAINST SURETY OF NOTARY PUBLIC – STATUTE OF LIMITATIONS

Fidelity National Title Insurance Co. v. Western Surety Co., [Ms. 2170767, Nov. 30, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This unanimous decision by Judge Pittman affirms the Limestone Circuit Court's summary judgment dismissing as time-barred a complaint by Fidelity National Title Insurance Company against Western Surety Company, the surety on a notary bond.

The notary had attested to a materialman's execution of a waiver-of-lien form that had not been in fact signed by the materialman or its authorized representative. As a consequence, the title insurer paid $16,500 to the materialman in order to settle a civil action and cause the lien to be discharged. Ms. *3.

When the title insurer sued the surety on the notary bond, the surety pled the two-year general statute of limitations set out in § 6-2-38(l), Ala. Code 1975. The title insurer alleged that the governing statute of limitations was § 6-2-34(7), which provides a six-year statute for "actions against the sureties of any sheriff, coroner, constable, or any public officer; for any nonfeasance, misfeasance, or malfeasance, whatsoever, of their principal...." Ms. *4.

The court applied the Supreme Court's decision in *Ex parte Floyd*, 796 So. 2d 303 (Ala. 2001), and held that § 6-2-38(l) is the applicable statutory period to a claim against a surety, notary bond.

In addition to holding that *Ex parte Floyd* was controlling, the court noted that "Alabama law has long recognized the proposition that '[t]he liability of the surety follows that of the principal, and the surety can make any defense, not personal to the principal, that the principal can.'" Ms. *13, quoting *United States Fid. & Guar. Co. v. Town of Dothan*, 174 Ala. 480, 487, 56 So. 953, 955 (1911). Applying this principle, the court observed that "had the title insurer, as a private party, also named the notary (i.e., the primary obligor) as a defendant in this case, she would clearly have been entitled, under Ala. Code 1975, § 6-2-38(l) and *Ex parte Floyd*, to dismissal of the action against her. Ergo, the title insurer's delay in bringing an action against the surety in this case has resulted in the discharge of any duties that the surety would have owed to the title insurer in this case." Ms. *15.

SPOLIATION – DISMISSAL

Hartung Commercial Properties, Inc. v. Buffi's Automotive Equipment and Supply Co., Inc., [Ms. 1170482, Dec. 7, 2018] __ So. 3d __ (Ala. 2018). This decision (Bryan, J.; Stuart, C.J., and Parker and Main, JJ., concur; Mendheim, J., concurs specially) reverses the Mobile Circuit Court's order dismissing the action as a sanction for spoliation of evidence.

Hartung Commercial Properties, Inc. (Hartung) sued Buffi's Automotive alleging that Buffi's negligence caused a fire which destroyed an auto body shop owned by Hartung. After the fire, Hartung had the building demolished after its insurers concluded investigations of the fire. Ms. *7.

The circuit court ordered the action dismissed as a sanction for Hartung's failure to preserve the fire scene. In reversing, the Court applied five factors in analyzing the spoliation-of-the-evidence issue:

> "(1) the importance of the evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the information [that would have been available] from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal."

Ms. *13-14, quoting *Story v. RAJ Props., Inc.*, 909 So. 2d 797, 802 (Ala. 2005).

In applying these factors, the Court concluded that "Buffi's Automotive had at its disposal several individuals who investigated the fire and had taken photographs and written reports detailing

their findings, and it very well could be that, after deposing those individuals or hiring its own expert, Buffi's Automotive is able to present evidence from which the circuit court could conclude that the available evidence is not an adequate alternative to destroyed evidence and it would not be fundamentally fair to allow Hartung's claims to proceed in light of its destruction of evidence. However, the circuit court was not presented with evidence to support such a conclusion at this stage of the proceedings." Ms. *15-16 (emphasis in the original).

MANDATE RULE

Honea v. Raymond James Financial Services, Inc., [Ms. 1170152, Dec. 14, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Shaw dismisses the plaintiff's appeal from the Jefferson Circuit Court's implied denial of her Rule 59 motion following the Supreme Court's remand in a prior appeal. In the prior appeal, the Court had entered a narrow remand order instructing the trial court to conduct a hearing under Rule 59(g), Ala. R. Civ. P., on certain limited, identified claims which were the subject of a prior arbitration ruling which plaintiff was seeking to vacate. Ms. *4.

The plaintiff conceded on appeal that her 2017 motion to vacate did not address the limited claims subject to the remand order. Ms. *6. The Supreme Court agreed and dismissed the appeal, noting that "[a] n 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 the issues already decided by an appellate court's decision in a case. *Lynch v. State*, 587 So. 2d 306, 308 (Ala. 1991)." Ms. *7.

The Court noted that the judgment subject to the prior appeal "was reversed in part and the case remanded for the trial court to conduct a Rule 59(g) hearing on those designated claims before ruling on the appeal. The scope of our appellate mandate, which the trial court has not yet had the opportunity to carry out, is so limited." Ms. *8. The Court concluded that "because the trial court has not yet had the opportunity to fill this court's mandate in Raymond James III and the issues underlying it remain pending, there is no final judgment to support an appeal. Therefore, this appeal is due to be dismissed." Ms. *9 (internal citation omitted).

FEDERAL PRE-EMPTION – CLEAN AIR ACT

State of Alabama v. Volkswagen AG, [Ms. 1170528, Dec. 14, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision (Wise, J.; Stuart, C.J., and Bolin, Shaw, and Sellers, JJ., concur) affirms the Jefferson Circuit Court's order dismissing the State of Alabama's claims against Volkswagen AG asserting tampering claims and seeking penalties pursuant to the Alabama Environmental Management Act and the Alabama Air Pollution Control Act.

The claims arose from Volkswagen's tampering with new vehicle emission control systems by installing software designed to alter emissions readings on diesel engines. Ms. *3. The State had limited its claims in order to avoid federal pre-emption to only vehicles registered and licensed in the State of Alabama. Ms. *17. The State had done so because the Clean Air Act expressly preserves the power of a state government to regulate registered or licensed vehicles. *Ibid.*

Despite the State's limitation of its claims to vehicles registered or licensed in the State of Alabama, the Court held that "[c]onsidering the unique factual situation involved in this case and based on the reasoning set forth by the MDL court, allowing the State to proceed under Count 2 of the Second Amended Complaint would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [as expressed in the Clean Air Act]." Ms. *37.

INDISPENSABLE PARTY – INJUNCTIVE RELIEF

Ex parte Advanced Disposal Services South, LLC, et al., [Ms. 1170320, Dec. 14, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Sellers (Stuart, C.J., and Bolin, Main, Mendheim, JJ., concur; Parker, Shaw, and Bryan, JJ., dissent; and Wise, J., recuses) denies the plaintiff's application for rehearing of the Court's decision granting Advanced Disposal's petition for a writ of mandamus directing the Macon Circuit Court to join the City of Tallassee as a necessary indispensable party or to dismiss the action.

In declining to rehear or reverse its decision on original submission, the Court noted that

> [T]he City is an active participant in the factual assertions made in the complaint, and, without its joinder, Tarver cannot be accorded the relief he demands. Rule 19 contemplates that in situations where, as here, the plaintiff is seeking injunctive relief, a court will look to whether it can fashion complete relief without joinder of the absent party. See, e.g., 4 Moore's Federal Practice § 19.03[2] [c] (3d ed. 2014) (noting that courts will invoke the complete-relief clause as its sole basis for finding an absentee necessary in a situation where "the absentee's participation will be required to provide injunctive relief to extant parties"); see also *Rose v. Simms*, No. 95 Civ. 1446, Nov. 29, 1995 (S.D.N.Y. 1995)(not selected for publication in F. Supp.)("Courts are most likely to rule that complete relief may not be accorded among the parties present in circumstances where the absent party plays a significant role in the provision of some form of injunctive relief.").

Ms. *4-5.

JURISDICTION AND TIMELINESS OF POST-JUDGMENT ORDERS

Ex parte Chmielewski, [Ms. 1171089, Dec. 21, 2018] __ So. 3d __ (Ala. 2018) (Sellers, J.; and Stuart, C.J., Bolin, Parker, Main, Bryan, and Mendheim, JJ., concur). The Court grants a petition for a writ of mandamus and directs the Baldwin Circuit Court to vacate an order purporting to set aside an earlier dismissal of a will contest. Invoking Ala. R. Civ. P. 58(b), which provides in part that "[a] written order or a judgment will be sufficient ... indicates an intention to adjudicate, considering

the whole record, and if it indicates the substance of the adjudication" the Court concludes that the respondent's Rule 59(c) motion to alter, amend, or vacate the judgment entered by the Baldwin Circuit Court was untimely because it was not filed within 30 days of entry of that judgment. Because the circuit court lost jurisdiction to modify or amend its judgment 30 days after that judgment had been entered, the circuit court's post-judgment orders were void. Accordingly, the Court granted the writ and directed the circuit court to vacate its post-judgment order purporting to set aside its earlier dismissal of the will contest, because the circuit court acted without jurisdiction when it entered the post-judgment order more than 30 days after entry of the earlier order of dismissal.

ALA. R. CIV. P. 41(B) DISMISSAL FOR FAILURE TO PROSECUTE

Ace American Ins. Co. v. Rouse's Enter., LLC, [Ms. 1170818, Dec. 21, 2018], __ So. 3d __ (Ala. 2018) (Bolin, J.; and Stuart, C.J., Parker, Main, Wise, Sellers, and Mendheim, JJ., concur; Shaw and Bryan, JJ., concur in the result). Finding no evidence of any "clear record of delay, willful default, or contumacious conduct by the plaintiff" as required for an Ala. R. Civ. P. 41(b) dismissal for the failure of the plaintiff to prosecute an action (see Ms. *5-6 (quoting *Gill v. Cobern*, 36 So. 3d 31, 32-33 (Ala. 2009)), the Court reverses the judgment of the Baldwin Circuit Court dismissing a workers' compensation insurer's subrogation claim and remands the case to permit the workers' compensation subrogation insurer to proceed with its claim to final judgment.

INSURANCE AND AGENT'S DUTY OF CARE

Somnus Mattress Corp. v. Hilson, [Ms. 1170250, Dec. 21, 2018] __ So. 3d __ (Ala. 2018) (Mendheim, J.; and Stuart, C.J., Parker, Main, and Bryan, JJ., concur). The Court affirms an entry of a summary judgment by the Winston Circuit Court in favor of Stephen Hilson and Crutchfield & Graves Insurance Agency on Somnus's claim that Hilson and the agency were negligent in advising Somnus not to purchase insurance coverage for business interruption and loss of profits.

The Court first concludes Somnus failed to rebut Hilson's and the insurance agency's Ala. R. Civ. P. 56(c)(3) *prima facie* showing that there was no genuine issue of material fact when Somnus's principal, Jones, conceded he could not recall the representations made to him about the necessity for such business income and profits coverage in the time leading up to Somnus's acquisition of the policy in question. The Court holds (Ms. *13-14) "[n]ot remembering a conversation does not constitute evidence indicating that what the opposing party contends was relayed in that conversation did not occur." Quoting *Giles v. Brookwood Health Services, Inc.*, 5 So. 3d 533, 554 (Ala. 2008), the Court reiterates ... [an] inability to recall [ ] conversations does not constitute substantial evidence that the conversations did not occur, only that [one] cannot remember whether they occurred or what [was] discussed." *Id.*

Second, reviewing caselaw from Alabama and other jurisdictions, the Court finds no duty on the part of the insurance agent or his agency voluntarily undertaken to give advice regarding the availability or sufficiency of coverage. The Court concludes:

> Indeed, we have been unable to find any Alabama authority holding that an insurer may voluntarily assume a duty to advise a client regarding the adequacy of the client's insurance coverage. Moreover, to the extent that courts in other jurisdictions have concluded that such a duty can be voluntarily assumed, they have done so only in instances in which the insurer misrepresented information the client could not have known from reading the insurance policy or in which a "special relationship" existed.

Ms. *22.

Because Somnus failed to present substantial evidence creating a genuine issue of material fact as to the advice the agent gave to Jones in the year before its purchase of its business policy, and because it also failed to establish that the agent or his agency voluntarily assumed a duty to advise Somnus concerning the adequacy of its insurance coverage, the circuit court's summary judgment in favor of the agent and agency were due to be affirmed.

ALA. CODE § 6-3-21.1(A) VENUE – TRANSFER IN THE INTEREST OF JUSTICE

Ex parte Maynard, Cooper & Gale, P.C., [Ms. 1171102, Dec. 21, 2018] __ So. 3d __ (Ala. 2018) (Bryan, J.; and Stuart, C.J., Bolin, Parker, Shaw, Main, Wise, Sellers, and Mendheim, JJ., concur). The Court grants Maynard, Cooper & Gale's petition for writ of mandamus and directs the Jefferson Circuit Court to vacate an order denying the law firm's motion for a change of venue from Jefferson County to Madison County on the basis of the doctrine of *forum non conveniens.*

The law firm was sued in Jefferson County by clients asserting a claim of legal malpractice pursuant to the Alabama Medical Legal Services Liability Act, § 6-5-570 *et seq.*, Ala. Code 1975. After conducting extensive discovery concerning the issue of venue, the law firm moved the Jefferson Circuit Court to transfer the action to Madison County, invoking both the doctrines of *interest of justice* and *convenience of the parties and witnesses* afforded by § 6-3-21.1(a), Ala. Code 1975. The Court first notes that it is undisputed that both Jefferson County and Madison County are proper venues for the plaintiff's action pursuant to § 6-3-7(a) and (b). Ms. *17. " 'When venue is appropriate in more than one county, the plaintiff's choice of venue is generally given great deference.'" *Id.* (quoting *Ex parte Engineering Design Grp.*, 200 So. 3d 634, 642 (Ala. 2016)). Second, the law firm, as the party moving for a change of venue, has the burden of showing that the transfer is required in the interest of justice. *Ibid.* (citing *Ex parte Indiana Mills & Manufacturing, Inc.*, 10 So. 3d 536, 539 (Ala. 2008)).

Reviewing the conflicting facts, the Court concludes it is "abundantly clear that this action has a very strong connection to Madison County." Ms. *19. All legal work complained of occurred at the law firm's Huntsville office; the plaintiff's management and headquarters are located in Huntsville; the entity allegedly improperly created by the law firm which

created a conflict of interest is located in Madison County; and the plaintiff's alleged injuries occurred where its headquarters are located, i.e., Huntsville. *Id.* Further, the Court rejects the circuit court's findings of the relative strength of the connection between the acts complained of in Jefferson County, concluding that the connection with "Jefferson County is weak and does not 'warrant burdening the plaintiff's forum with the action.'" Ms. *24. The Court expressly concludes that the law firm's presence in the plaintiff's chosen forum does not, in and of itself, present a strong connection to the forum. Ms. *25.

The Court concludes the law firm carried its burden of showing that Madison County's connection to the action is strong, while Jefferson County's connection to the action is weak, such that the circuit court exceeded its discretion in refusing the law firm's motion to transfer the case to the Madison Circuit Court in the interest of justice. Accordingly, the petition for writ of mandamus is granted and the Jefferson Circuit Court is directed to transfer the plaintiff's action to the Madison Circuit Court.

VENUE – DOING BUSINESS BY AGENT – § 6-3-7, ALA. CODE 1975

Ex parte Mercedes-Benz U.S. International, Inc., [Ms. 1170623, Jan. 4, 2019] __ So. 3d __ (Ala. 2019). (Sellers, J.; Stuart, C.J., and Bolin, Main, and Mendheim, JJ., and B. Glenn Murdock, Special Justice, concur; Parker, Shaw, and Bryan, JJ. dissent). The Court grants a petition for a writ of mandamus directing the Jefferson Circuit Court to vacate its order denying Mercedes Benz's motion to transfer the action to Tuscaloosa Circuit Court.

Plaintiff, a resident of Jefferson County, was employed as an assembly worker at Mercedes Benz Manufacturing facility in Tuscaloosa and alleged that he suffered an on-the-job injury which left him permanently and totally disabled. Ms. *2. Mercedes Benz moved to transfer the action to Tuscaloosa County, asserting that venue was improper under § 6-3-7, Ala. Code 1975, and alternatively, that transfer was warranted under the doctrine of *forum non conveniens*. Ms. *3.

Nix contended that venue was proper in Jefferson County because Mercedes Benz regularly transacts business with Jefferson-County-based suppliers of automotive parts. Ms. *6. The circuit court denied the motion to transfer venue and the Court of Civil Appeals affirmed on the authority of *Ex parte Scott Bridge Co.*, 834 So. 2d 79 (Ala. 2002). Ms. *6-7.

The Court reversed, holding that

> [W]e hold that there was not sufficient evidence before the trial court to support a conclusion that venue in Jefferson County was proper in this case. The regular purchasing of parts or materials from a supplier located in a certain county, by itself, does not constitute "[doing] business by agent" in that county under § 6-3-7(a)(3). To the extent that this Court's opinion in *Scott Bridge* held otherwise, it is hereby overruled.

Ms. *15.

WORKERS' COMPENSATION – STANDARD OF REVIEW – CUMULATIVE INJURIES

Enterprise Leasing Company-South Central, LLC v. Drake, [Ms. 2170870, Jan. 4, 2019] __ So. 3d __ (Ala. Civ. App. 2019). (Moore, J.; Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur). The court unanimously reverses a judgment entered by the Jefferson Circuit Court awarding the employee workers' compensation benefits for injuries to both knees.

The plaintiff employee testified that he had injured his left knee in an on-the-job accident. Ms. *4. He testified that as a result of the injury to his left knee, he put more strain on his right knee, which caused problems in that knee as well. Ms. *4.

The trial court awarded plaintiff compensation for impairments to both knees. The employer appealed, contending, *inter alia*, that the trial court erred in awarding compensation for the right knee injury because the court failed to apply the clear-and-convincing evidence standard applicable to injuries allegedly resulting from gradual or cumulative physical stress. Ms. *8.

The court found this issue dispositive, holding that

> [T]he trial court used an incorrect evidentiary standard when determining the compensability of the employee's right-knee injury, [and] we reverse the trial court's judgment and remand the cause to the trial court for it to enter an amended judgment applying the correct clear-and-convincing evidence standard in deciding that claim. We instruct the trial court, on remand, to review the evidence adduced at trial and to determine whether the employee proved by clear and convincing evidence that his right-knee injury was a direct and natural consequence of his left-knee injury and to amend its judgment to make appropriate findings of fact using the correct evidentiary standard and to make any and all other amendments necessary to its judgment based on its determination.

Ms. *14-15.

VENUE – APPEAL FROM ORDER OF THE ALABAMA SURFACE MINING COMMISSION

Ex parte Alabama Surface Mining Commission, [Ms. 1170222, 1170223, Jan. 11, 2019] __ So. 3d __ (Ala. 2019). The Court (Sellers, J.; Stuart, C.J., Bolin, Main, and Mendheim, JJ. concur; Parker, Shaw, and Bryan, JJ., dissent) issues a writ of mandamus to the Jefferson Circuit Court directing it to transfer to the Walker Circuit Court this judicial review proceeding challenging the Alabama Surface Mining Commission's (the Commission) issuance of a surface-coal mining permit on property located in northern Jefferson County.

The majority held that venue was controlled by a 2015 amendment to § 9-16-79, Ala. Code 1975 providing that venue for a proceeding for judicial review of a final Commission decision is "in the circuit court of the county in which the Commission maintains its principal office."

Ms. *11-12. While it was undisputed that the Commission maintains its principal business in Walker County, the plaintiffs contended that the amendment to § 9-16-79 did not apply to the judicial review proceeding they filed in 2017 because the amendment had not yet been approved by the Secretary of the Interior as required by the Federal Surface Mining Act. Ms. *12. The Court held that the venue provision became effective upon its passage by the Alabama Legislature because "the 2015 amendment did not include any 'changes to law or the regulations that make up the approved state program.' See 30 CFR § 732.17(g)." Ms. *15. The Court held "the mere fact that this venue provision is codified within the Alabama Surface Mining Act, instead of elsewhere in the Alabama Code, does not remove the venue provision from state jurisdiction and place it in the realm of [federal] oversight." Ms. *17.

Justice Shaw's dissent, joined by Justice Bryan, would have denied the petition because the amendment to the Alabama Surface Mining Act adding the venue provision had been submitted to but not yet approved by the federal Office of Surface Mining Reclamation and Enforcement. Ms. *28-29. Justice Shaw disagreed with the majority concluding that "[i]t thus cannot be said that the judicial-review process is not part of the state program" requiring approval by the OSM. Ms. *32.

MANDAMUS COMPELLING TRIAL COURT TO RULE ON VENUE MOTION

Ex parte RM Logistics, Inc., [Ms. 2180137, Jan. 11, 2019] __ So. 3d __ (Ala. Civ. App. 2019). (Thompson, P.J.; Pittman, Moore, and Donaldson, JJ., concur; Thomas, J., concurs in the result). The court issues a writ of mandamus to the Walker Circuit Court directing the court to rule on the defendant's motion to transfer venue in this workers' compensation action as "expeditiously as possible." Ms. *7. While the court declined to order the circuit court to dismiss or transfer the action, the court applied recent Supreme Court authority that "'[v]enue is a threshold matter, and, as a general rule, a trial court should rule on a motion alleging improper venue as expeditiously as possible.'" Ms. *6, quoting *Ex parte Nationwide Agribusiness Ins. Co.*, [Ms. 1171081, Nov. 16, 2018] __ So. 3d __, __ (Ala. 2018)(some internal quotation marks omitted).

RULE 59 – NEW TRIAL – NEWLY DISCOVERED EVIDENCE

Rel v. Rel, [Ms. 2170423, Jan. 11, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Pittman, J.; Thomas, Moore, and Donaldson, JJ., concur; Thompson, P.J., concurs specially) reverses an amended divorce judgment entered by the Mobile Circuit Court awarding the wife $35,000 from the husband's retirement account.

When the case was called for trial, counsel for the wife acknowledged that he did not have any evidence as to the portion of the retirement account accruing during the parties' marriage but nevertheless wished to proceed rather than continue the trial. Ms. *2-3. After entry of the judgment of divorce, the wife filed a motion for new trial. Subsequently, the wife filed a "Motion to Amend Rule 60" motion in which she sought leave to present evidence concerning the amount of retirement benefits accruing during the marriage. Ms. *4-5. Subsequently the circuit court "reopened the case to consider the additional evidence and awarded the wife $35,000 from the retirement account." Ms. *7-8.

In reversing, the court first noted that the wife's motions invoking Rule 60 were in substance amendments to her timely Rule 59 motion because "the character of a motion is determined and interpreted from its essential substance, and not from its descriptive name or title." Ms. *10 (internal quotation marks omitted). The court reversed the award of retirement benefits holding "that the failure to discover evidence that could have been discovered before the trial by the exercise of reasonable diligence is not a cognizable ground for reopening the evidence or for granting a new trial. See, e.g., *Adams v. State*, 428 So. 2d 117, 119 (Ala. Civ. App. 1983) ('Our case law requires, among other criteria, that in order to grant a new trial on the basis of newly discovered evidence, it must be established the evidence could not have been discovered before the trial by the exercise of due diligence.')." Ms. *12.

NON-FINAL JUDGMENT RULE – SEPARATE TRIAL ON COUNTERCLAIMS

Donald v. Kimberley, [Ms. 2170991, Jan. 11, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This unanimous per curiam decision dismisses an appeal filed by plaintiff Donald from a judgment of the DeKalb County Circuit Court determining a boundary line between adjoining landowners. In the course of the litigation, the defendant filed counterclaims for trespass. Although the trial court entered an order "severing" the counterclaims, it did not separate Donald's claim and the Kimberleys' counterclaims into separate civil actions. Ms. *5.

The court dismissed Donald's appeal as from a non-final judgment because the counterclaims remained pending in the circuit court. The court concluded that "despite the trial court's use of the term 'sever' to refer to its action bifurcating the trials envisioned on the claims pleaded in Donald's complaint and the claims pleaded in the Kimberleys' counterclaim, the trial court did not separate those sets of claims into separate actions under Rule 21, Ala. R. Civ. P., so as to enable the June 21, 2018, order to constitute an adjudication of all claims as to all parties sufficient to constitute a final judgment." Ms. *13.

ATTORNEY FEE DISPUTE – JURISDICTION – ATTORNEY LIEN STATUTE, § 34-3-61(B), ALA. CODE 1975

Harris v. Capell & Howard, P.C., [Ms. 2170973, Jan. 11, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This unanimous per curiam decision affirms the Lee Circuit Court's award of $54,000 in attorney's fees from proceeds paid to settle a will contest.

Attorney Meadows and the law firm Capell & Howard, P.C., represented the plaintiffs in the will contest in Lee Circuit Court. The contest was resolved by the estate's payment of $170,000 to the contestants. Ms. *2. Following the settlement, the case was dismissed in a judgment in which the circuit court "retained jurisdiction to issue any additional

orders needed for the finalization of this matter." Ms. *3. When the contestants and their counsel could not agree on the payment of a fee from settlement proceeds, Meadows filed a motion to determine a reasonable attorney's fee and to disburse the settlement proceeds among the contestants. Ms. *2.

The court first rejected the attorney's contention that his motion was properly before the circuit court as a result of the retention of jurisdiction or pursuant to Rule 60. As to Rule 60, the court held that since the attorney and his firm were not parties to the litigation, they could not invoke Rule 60. Ms. *5. The court also held that the retention of jurisdiction did not support the court's jurisdiction over the fee dispute because that dispute was not directly related to the issues in the will contest. Ms. *5-6.

However, the court ultimately held that the fee dispute was properly adjudicated by the Lee Circuit Court in the will contest. The court held "the will contest produced, through settlement, a monetary judgment in favor of [plaintiffs]. Because [an attorney's lien] arose, § 34-3-61 did not require the law firm to institute an independent action to collect attorney fees." Ms. *14.

On the merits, the court held that although the order on appeal did not delineate and discuss the applicable *Peebles v. Miley* factors for determining the reasonableness of the fee award, the record supported the award. The court also noted that "[w]e defer to the trial court in an attorney-fee case because we recognize that the trial court, which has presided over the entire litigation, has a superior understanding of the factual questions that must be resolved in an attorney-fee determination." Ms. *20, quoting *Pharmacia Corp. v. McGowan*, 915 So. 2d 549, 553 (Ala. 2004).

MVA – JUDGMENT AS A MATTER OF LAW

Fazzingo v. Orange and Keim TS, Inc., [Ms. 2171008, Feb. 8, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This decision (Edwards, J.; Thompson, P.J., and Moore and Hanson, JJ., concur; Donaldson, J., concurs specially) reverses the Madison Circuit Court's entry of a judgment as a matter of law dismissing plaintiff's claims for negligence and wantonness at the close of her case alleging injuries caused in an automobile accident.

In reversing, the court noted that although the plaintiff's testimony was conflicting and contradictory, entry of judgment as a matter of law was improper, because "any conflicting or contradictory testimony ... is to be resolved by the jury and not by the trial court." Ms. *9.

The court also rejected the defense argument that defects in the plaintiff's expert medical opinion testimony on causation supported entry of the judgment as a matter of law. The court noted that the physician's testimony was admitted without objection and that "once expert testimony is admitted, 'any challenge to the facts upon which an expert bases his opinion goes to the weight, rather than the admissibility, of the evidence.'" Ms. *9, quoting *Baker v. Edgar*, 472 So. 2d 968, 970 (Ala. 1985). The court emphasized that "[a]ny decision regarding the weight to assign to Dr. Shafran's testimony is for the jury, not the trial court." Ms. *11.

54(B) CERTIFICATION – PIECEMEAL APPELLATE REVIEW

Wright v. Harris, [Ms. 1171031, Feb. 15, 2019] __ So. 3d __ (Ala. 2019). This unanimous decision dismisses the plaintiff's appeal from a summary judgment entered by the Cleburne Circuit Court in favor of nurses employed by the Cleburne County Hospital. The circuit court had entered summary judgment for the nurses concluding that the plaintiff failed to present substantial evidence of duty, breach, or proximate cause. Ms. *4. The circuit court stayed all proceedings on the plaintiff's claims against the hospital and certified the judgment dismissing the claims against the nurses under Rule 54(b). Ms. *6.

> In dismissing the appeal, the Court reiterated that
>
> "'[t]his court looks with some disfavor upon certifications under Rule 54(b),' ... and that Rule 54(b) certifications should be entered only in exceptional cases.... Because the 'claim that remains pending in the trial court presents issues that are 'intertwined' with the issues presented in the claim[s] certified as final pursuant to Rule 54(b),' *Smith v. Slack Alost Dev. Servs. of Alabama, LLC*, 32 So. 3d 556, 562 (Ala. 2009), we conclude that the trial court exceeded its discretion in certifying the summary judgment in favor of the nurses as a final judgment pursuant to Rule 54(b)." Ms. *18 (some internal citations and brackets omitted).

RESPONDEAT SUPERIOR – JML – EXPERT TESTIMONY

Hinkle Metals & Supply v. Feltman, [Ms. 1170512, Feb. 15, 2019] __ So. 3d __ (Ala. 2019). This decision (Sellers, J.; Parker, C.J., Wise and Stewart, JJ., concur; Bryan, J., concurs in the result) affirms a judgment entered on a $375,000 jury verdict in favor of Feltman for injuries she suffered when she was struck by a truck driven by Gabriel Butterfield, an employee of Hinkle Metals & Supply Company, Inc. ("Hinkle").

Hinkle contended that at the time of the accident, Butterfield was not acting within the line and scope of his employment. Ms. *2. The Court first noted that "'an employee's tort is not attributable to his employer if it stems from personal motives and objectives of the employee. *Plaisance v. Yelder*, 408 So. 2d 136 (Ala. Civ. App. 1981). However, the fact that an employee is combining personal activities with the employer's business does not necessarily signify an action outside the scope of employment.'" Ms. *12, quoting *Hudson v. Muller*, 653 So. 2d 942, 944 (Ala. 1995).

Hinkle contended that at the time of the accident, Butterfield was on a personal mission to file for his homestead exemption at the Jefferson County Courthouse. The Court rejected Hinkle's argument for a JML on this basis, holding that

> A fair-minded person could reasonably conclude that Butterfield traveled to Birmingham on the day of the accident for both a personal purpose (to file for the homestead exemption) and a business purpose (to pick up the air-handler unit from Hinkle's Birmingham warehouse). In cases where an employee combines personal activities with the employer's business,

> this Court has held that the question whether the employee is acting within the line and scope of his employment is a factual question for the jury. See *Hudson v. Muller*, 653 So. 2d 942, 944 (Ala. 1995). The trial court, therefore, did not err in denying Hinkle's motion for JML.

Ms. *15.

The Court also rejected Hinkle's argument that the circuit court erred in admitting the testimony of Feltman's expert providing historical cell-site analysis of Butterfield's call records on the date of the accident. Hinkle contended the testimony could not assist the trier of fact and should be excluded under Rule 702(a), Ala. R. Evid. Ms. *17. The Court noted that Feltman's expert did not "overpromise" on the accuracy of historical cell-site analysis and openly acknowledged the limitations inherent in applying the technique. The Court held that in this setting it was "the jury's responsibility to determine the weight to accord Draper's testimony." Ms. *20.

The Court also rejected Hinkle's challenge to the expert testimony under Rule 703, Ala. R. Evid. because that argument was not presented to the circuit court. Ms. *21.

LOAN PARTICIPATION AGREEMENT – PLAIN LANGUAGE RULE

SE Property Holdings, LLC v. Bank of Franklin, [Ms. 1171167 & 1171195, Feb. 15, 2019] __ So. 3d __ (Ala. 2019). This decision (Sellers, J.; Parker, C.J., Bolin, Wise, and Bryan, JJ. concur; and Stewart, J., recuses herself) reverses a summary judgment entered by the Mobile Circuit Court in favor of Bank of Franklin ("BOF") on a claim demanding specific performance of a contractual provision in a loan participation agreement between commercial lenders. The provision in question required SEPH's predecessor, Vision Bank, to repurchase BOF's interest in the loan if "any proceeding is commenced which involves the dissolution, termination of existence, insolvency, or business failure of originating bank ...." Ms. *5. The Court held that in light of the plain language of the entire agreement between these sophisticated commercial parties the term "'proceeding' means a judicial or quasi-judicial action relating to the originating bank's financial decline and putting the originating bank under the supervision of some official authority." Ms. *13.

The Court emphasized the participation agreement should be construed "holistically" and concluded that Vision Bank's voluntary merger with SEPH did not constitute a "proceeding" as that term is used in the paragraph requiring the repurchase of BOF's interest in the loan. Ms. *13-14.

INHERENT POWER TO INTERPRET JUDGMENT

LaFontaine v. LaFontaine, [Ms. 2171090, Feb. 15, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This decision (Moore, J.; Thompson, P.J., and Donaldson and Hanson, JJ., concur; Edwards, J., concurs in the result) affirms a trial court's judgment clarifying a judgment of divorce more than a year after its entry.

In rejecting the former husband's challenge to subject-matter jurisdiction, the court held

> A trial court possesses an inherent power over its own judgment that enables it to interpret, implement, or enforce those judgments. *Patterson v. Patterson*, 518 So. 2d 739 (Ala. Civ. App. 1987). Generally, a property provision in a divorce judgment is not modifiable more than 30 days after the judgment is entered. *Martin v. Martin*, 656 So. 2d 846, 848 (Ala. Civ. App. 1995). However, if the court finds that a provision dividing property is ambiguous, the court has the power to clarify the judgment, and such a clarification is not considered a modification. *Williams v. Williams*, 591 So. 2d 879 (Ala. Civ. App. 1991).

Ms. *8.

SUBJECT-MATTER JURISDICTION – ACTION FILED AGAINST DECEASED DEFENDANT

Kelton v. Caldwell, [Ms. 2170660, Feb. 15, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This unanimous decision by Judge Donaldson dismisses, *ex mero motu*, the defendant's appeal from a judgment of the Dallas Circuit Court in an ejectment action on the ground that the trial court lacked subject-matter jurisdiction. It was undisputed that at the time the plaintiff commenced the ejectment action, the defendant was deceased. Ms. *2.

Although the trial court subsequently granted plaintiff's motion to add the original defendant's widow as a defendant, the court held that the trial court lacked jurisdiction to do so. The court held

> [An action] instituted against an individual who is deceased at the time the action is filed [is] a nullity and do[es] not invoke the trial court's jurisdiction. *Maclin v. Congo*, 106 So. 3d 405, 408 (Ala. Civ. App. 2012). Such an action is void *ab initio*, and [t]he trial court ha[s] no jurisdiction to entertain an amendment of the complaint or any further motions or pleadings; it [is] required to dismiss the action for lack of subject-matter jurisdiction. *Id.*

Ms. *3-4 (internal quotation marks omitted).

FINAL JUDGMENT RULE – ADVERSE POSSESSION – ORE TENUS

Littleton v. Wells, [Ms. 2170948, Feb. 22, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This unanimous decision by Judge Thompson reverses on *ore tenus* review the Chilton Circuit Court's judgment denying the Littletons' claim of adverse possession of a disputed parcel of property.

The court first considered *sua sponte* whether the judgment was final. The judgment ordered the plaintiffs to have a survey done depicting the boundary line determined by the circuit court. The court found the judgment to be final because it meticulously established the quarter-by-quarter section line. Ms. *12.

The circuit court's judgment denying the Littletons' claim of adverse possession did not contain any factual findings. Ms. *16. Consequently, the court applied the settled rule that on *ore tenus* review "'in the absence of specific findings of fact, an appellate court will presume that the trial court made those findings necessary to support its judgment, unless such findings

would be clearly erroneous.'" Ms. *17, quoting *Baker v. Baker*, 862 So. 2d 659, 662 (Ala. Civ. App. 2003).

The court reversed the judgment rejecting the Littletons' claim of adverse possession. The court "conclud[ed] that there is no factual basis to support a determination that the Littletons had not been in actual, hostile, open, notorious, exclusive, and continuous possession of the disputed property for more than ten years." Ms. *21.

OUTBOUND FORUM-SELECTION CLAUSE – THIRD-PARTY CLAIM

Ex parte International Paper Co., [Ms. 1180144, Mar. 1, 2019] __ So. 3d __ (Ala. 2019). This unanimous decision by Justice Shaw issues a writ of mandamus to the Wilcox Circuit Court directing the court to grant a motion to dismiss filed by International Paper ("IP"), invoking an outbound forum-selection clause requiring suit in Memphis, Tennessee.

The claims were asserted by third-party plaintiffs who contended that serious inconvenience would result if they were forced to litigate their claims against IP in Tennessee while also having to defend a related case in Wilcox County. The court held "[n]othing in the materials before us demonstrates any issues litigated in the third-party action will also be litigated in the Caterpillar case. There is no identity of claims or underlying subject matter; there will be no duplicative discovery or litigation. Under these circumstances, enforcing the outbound forum-selection clause will not result in the 'splitting' of an action so as to offend judicial economy." Ms. *20.

SOVEREIGN IMMUNITY – SLIP AND FALL – ALABAMA STATE UNIVERSITY

Ex parte Leon C. Wilson, [Ms. 1170982, Mar. 1, 2019] __ So. 3d __ (Ala. 2019). This unanimous decision by Justice Wise directs the Montgomery Circuit Court to vacate its order denying the Defendant's motion to dismiss based upon sovereign immunity. Plaintiff alleged she was injured when she slipped and fell at a graduation ceremony at Alabama State University. The Plaintiff sued the petitioners solely in their official capacities. The Court held that "none of the exceptions to § 14 immunity exists in this case, and the petitioners are immune from suit...." Ms. *10.

MOTION TO SET ASIDE DEFAULT JUDGMENT – FAILURE TO SUBMIT SUPPORTING EVIDENCE

Ex parte Alvin and Diane Bhones, [Ms. 1171171, Mar. 1, 2019] __ So. 3d __ (Ala. 2019). This decision (Wise, J.; Parker, C.J., Shaw, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur; Bolin, J., concurs in the result; and Stewart, J., dissents) issues a writ of mandamus to the Limestone Circuit Court directing the court to vacate its order setting aside a default judgment. The Court held that "[b]ecause the Defendants did not present evidence to support their allegations that they had a meritorious defense and that the Bhoneses would not be unduly prejudiced if the default judgment was set aside, they failed to satisfy their initial burden of alleging and demonstrating the existence of all the *Kirtland* factors. Therefore, we conclude that the Defendants were not entitled to have the default judgment set aside and the trial court exceeded its discretion in setting aside the default judgment." Ms. *15.

WAIVER OF RIGHT TO CHALLENGE VENUE

Ex parte Tim Seriana, [Ms. 1180104, Mar. 1, 2019] __ So. 3d __ (Ala. 2019). This unanimous decision by Justice Wise issues a writ of mandamus to the Calhoun Circuit Court directing the court to vacate its order granting a motion for change of venue. In issuing the writ, the Court noted that the defendant failed to assert improper venue in its answer. The Court held "[t]herefore, Stevens did not preserve his right to file a motion for a change of venue in accordance with Rule 12(h), Ala. R. Civ. P. Accordingly, Stevens waived his right to challenge venue in Calhoun County, Seriana has a clear legal right to an order vacating the trial court's order granting Stevens's motion for change of venue." Ms. *11.

RETALIATORY DISCHARGE – ERROR PRESERVATION – FUTURE EARNINGS – MENTAL ANGUISH – WAIVER OF EVIDENTIARY OBJECTIONS – PUNITIVE DAMAGES

Merchants FoodService v. Denny Rice, [Ms. 1170282, Mar. 1, 2019] __ So. 3d __ (Ala. 2019). The Court (Mendheim, J.; Parker, C.J., Wise, Bryan, Stewart, JJ., concur; Bolin, Sellers, and Mitchell, JJ., concur in the result) affirms a judgment on a jury verdict for $314,000 in compensatory damages and $944,000 in punitive damages on a retaliatory discharge claim against Merchants FoodService ("Merchants").

The Court rejected Merchants' challenge to the future earnings award holding "the authorities are clear that the fact that a plaintiff earns more annually in a job following a wrongful termination does not preclude, as a matter of law, a recovery for lost future earnings, ..." Ms. *41.

The Court rejected Merchants' other challenges to the compensatory damages award noting that it "waived any issues concerning the sufficiency of the evidence in the trial court [by failing to move for judgment as a matter of law at the close of all the evidence], which includes arguments about the speculative nature of lost future earnings and weak evidence of stigma and mental anguish." Ms. *42.

The Court rejected Merchants' argument that reversal of the compensatory damages award was required in light of *Kmart Corp. v. Kyles*, 723 So. 2d 572, 578 (Ala. 1998). The Court held that "as *Kyles* and its progeny make clear, 'direct evidence' of mental anguish means testimony from the plaintiff about the degree of mental suffering." Ms. *52. The Court noted that "[i]n this case, Rice testified to experiencing shock from the sudden and unexpected termination of his employment; frequent sleepless nights during his unemployment and occasionally after finding a job, a lot of anxiety about what he was going to do, embarrassment, irritability, loss of trust towards his fiancee, her two children, and others ...." Ms. *53.

Merchants filed a motion *in limine* to preclude its former employee Nims from

testifying concerning his termination. Ms. *56. However, when his video deposition was introduced at trial, it failed to renew its objections. *Ibid.* Merchants did not preserve its objection to the admission of Nims' testimony because "an appellant who suffers an adverse ruling on a motion to exclude evidence, made *in limine*, preserves this adverse ruling for post-judgment and appellate review only if he objects to the introduction of the proffered evidence and assigns specific grounds therefor at the time of the trial, unless he has obtained express acquiescence of the trial court that subsequent objections to evidence when it is proffered at trial an assignment of grounds therefor are not necessary.'" Ms. *57, quoting *Ex parte Jackson*, 33 So. 3d 1279, 1283 (Ala. 2009)(some internal quotation marks omitted).

The Court further observed that reversal of the judgment was not warranted because Nims' testimony was offered on intent, not punitive damages. Ms. *59. The Court also noted that Merchants had requested and received a limiting instruction that Nims' testimony was admitted only on the issue of Merchants' intent. Ms. *60.

Finally, in rejecting Merchants' request for reduction of the punitive-damage verdict, the Court held that in regard to reprehensibility, Merchants terminated Rice's employment when he was in a vulnerable position having just come off of an extended period of reduced pay as a result of an on-the-job injury. Ms. *64. The Court held that the ratio of three-to-one between the compensatory and punitive award cut against Merchants' request for reduction.

CONTEMPT – TIME TO APPEAL – WAIVER OF CONSTITUTIONAL CHALLENGE

Boyd v. Boyd, [Ms. 2170729, Mar. 1, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Hanson, J.; Moore and Edwards, JJ., concur; Thompson, P.J. and Donaldson, J., concur in the result) dismisses the mother's appeal as untimely from the Mobile Circuit Court's September 28, 2017, order finding her in contempt for relocating to Texas with her children in contravention of a provision in the divorce decree incorporating the notice requirements of the Alabama Parent Child Relationship Protection Act (APCRPA). Ms. *2. The court noted that under Rule 70A(g)(2), Ala. R. Civ. P., an adjudication of contempt is immediately appealable if the contemnor is not in custody. Ms. *42.

On the merits, the court affirmed the final judgment sustaining the father's objection to the relocation of the children. The court applied the factors set out in the APCRPA and concluded that substantial evidence warranted a judgment in favor of the father's objection against the relocation of the children. Ms. *22.

In regard to the mother's constitutional challenge to the APCRPA, the court first held that arguments in the mother's post-judgment motion expanding the arguments set out in her timely "notice of constitutional challenge" would not be considered on appeal. The court concluded that "the trial court was under no duty to consider those expanded arguments...." Ms. *32.

The court applied prior precedent holding that "state-imposed restrictions (whether of a judicial nature, as in a territorial restriction regarding a child's residence contained in a judgment, or a legislative nature, as in the presumption in favor of a child stasis under the APCRPA) operate on the right to change the residence of a minor child and not upon the physical custodian's right to relocate so as to impinge a custodian's own travel rights." Ms. *36, citing *Meadows v. Meadows*, 3 So. 3d 221 (Ala. Civ. App. 2008).

STANDARD OF REVIEW – ADMINISTRATIVE PROCEDURES ACT

Stoneridge Homes, Inc. v. Alabama State Board for Registration of Architects, [Ms. 2171113, Mar. 1, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Thompson, P.J.; Moore, Donaldson, and Hanson, JJ. concur; Edwards, J., concurs specially) affirms the Montgomery Circuit Court's judgment affirming a decision of the Alabama State Board for Registration of Architects (the Board). The court first considered the applicable standard of review when a party files a complaint in circuit court for declaratory relief with regard to an agency rule under § 41-22-10, Ala. Code 1975, and simultaneously seeks review of a declaratory ruling by the state agency pursuant to § 41-22-11(a). The court held that in such scenarios, the circuit court is "restricted to performing a judicial review of the agency decision pursuant to § 41-22-20(k), Ala. Code 1975, which affords the agency's decision a presumption of correctness." Ms. *13.

On the merits, the court rejected the developer's contention that the Board's regulation expanded improperly on § 34-2-32(b) Ala. Code 1975 by adding the word "detached" to the phrase single family residence. The court held "we agree with the Board's conclusion that, if two or more dwellings are joined in a building, the building becomes a multi-family dwelling. Thus, a 'single-family residence building,' as described in § 34-2-32(b), is, by necessity, a detached single-family residence as stated in the regulation." Ms. *18.

OPEN MEETINGS ACT – MOOTNESS – PEEHIP PREMIUM INCREASE

Swindle v. Remington, [Ms. 1161044, Mar. 8, 2019] __ So. 3d __ (Ala. 2019). The Court (Bolin, J.; Parker, C.J., and Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur) affirms a summary judgment entered by the Montgomery Circuit Court granting injunctive and declaratory relief to the president of the Alabama Education Association invalidating premium increases approved by the Public Education Employees Health Insurance Program (PEEHIP) Board in violation of the Alabama Open Meetings Act, § 36-25A-1, *et seq.*, Ala. Code 1975.

On the morning of April 27, 2016, the Board met with PEEHIP staff in a closed "education session." In an open meeting later that day, the Board voted to increase premiums effective October 2016. The circuit court invalidated the premium increases holding that the private morning session was a meeting of the Board held in violation of the Open Meetings Act. Ms. *59.

In March 2018, the Board rescinded the premium increases and spousal surcharges effective May 1, 2018. As a result, the Supreme Court concluded that any controversy concerning the injunctive relief ordered by the circuit court "was no longer present after the Board voted during an open meeting to reduce the premium rate effective May 1, 2018. Thus, the need for injunctive relief occurring on or after

May 1, 2018, is moot." Ms. *29.

The Court rejected the Board's argument that a December 6, 2016, open meeting at which the Board voted not to rescind the premium increases mooted the challenged premium increase in its entirety. Ms. *34-35. The Court also rejected the Board's argument that the private morning meeting fell within the "training-program" exception to the Open Meetings Act. The Court held "it is clear that the staff presentation regarding the same matters that would be considered for a vote later in the day and that included proposed increases in insurance premiums does not fall within the 'training-program' exception." Ms. *41-42.

CHARTER SCHOOLS – STATUTORY CONSTRUCTION – QUORUM

Richardson v. Alabama Education Association, et al., [Ms. 1170737, 1170706, 1170724, Mar. 8, 2019] __ So. 3d __ (Ala. 2019). The Court (Bolin, J.; Parker, C.J., and Wise, Sellers, and Mendheim, JJ., concur; Bryan, J., concurs in the result; Shaw and Stewart, JJ., dissent) reverses a judgment of the Montgomery Circuit Court invalidating a decision of the Alabama Public Charter School Commission approving the application of LEAD Education Foundation to open a public charter school.

The circuit court invalidated the decision because it concluded that the Commission's five-to-one vote did not constitute a majority of the ten-member Commission. Ms. *11.

The Court first rejected the plaintiff's argument that the controversy was mooted by the failure of LEAD to sign a contract with the Commission. The Court concluded that the deadline for executing the contract was equitably tolled because LEAD had acted diligently in its effort to execute the charter contract. Ms. *19. The Court noted that "[t]he plaintiffs' own legal maneuvering ... is the very reason for any delay by LEAD in executing the contract. Thus, our interest in preventing litigants from attempting to manipulate the court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here." Ms. *20 (internal quotation marks omitted).

The Court noted that in regard to the merits "[t]he decision is a matter of statutory construction" and that

> Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the Legislature must be given effect.

Ms. *22, 23 (internal quotation marks omitted).

Applying these settled rules of statutory construction, the Court concluded that only a majority vote of a six-member quorum of the Commission is necessary to approve the application to open a charter school. "When the first and second sentences [of § 16-6F-6(c)(9), Ala. Code 1975] are read together and in the context of the entire statute, it is clear that a majority vote of a quorum of the Commission is sufficient. The 'majority vote of the commission' clause, which follows immediately the clause allowing the Commission to act by a quorum of six, is obviously meant to be a majority vote of the Commission transacting business as a quorum." Ms. *26.

The Court noted that "'in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to the common-law rule.'" Ms. *27, quoting *F.T.C. v. Flotill Prods., Inc.*, 389 U.S. 179, 183-84 (1967).

§ 1983 CLAIMS AGAINST COUNTY SCHOOL BOARD – ELEVENTH AMENDMENT IMMUNITY – SUBJECT-MATTER JURISDICTION TO ENTERTAIN AMENDED COMPLAINT

Ex parte Wilcox County Board of Education, [Ms. 1170705, Mar. 8, 2019] __ So. 3d __ (Ala. 2019). This unanimous decision by Justice Mendheim issues a writ of mandamus to the Wilcox Circuit Court directing the court to dismiss state law negligence claims against the Wilcox County Board of Education and Board members alleging that the Board and its members failed to supervise and/or remove a teacher who later assaulted the plaintiff's minor son. The Court denied the writ as to claims pursuant to 28 U.S.C. § 1983 against the Board and its members in their official capacities. Ms. *38.

In regard to the state law claims asserted against the County Board of Education and its members, the Court applied settled law that "'county boards of education,' along with the members of those boards, sued in their official representative capacities, also enjoy the protection of immunity provided by § 14 when the action against them is effectively an action against the State." Ms. *17, quoting *Colbert Cty. Bd. of Educ. v. James*, 83 So. 3d 473, 480 (Ala. 2011).

However, as to the claim against the Board and the members in their official capacities under § 1983, the Court concluded that these claims concern "an employment-related decision, i.e., whether the Board should have removed Smiley from his teaching position before he allegedly assaulted R.M. When making such decisions, the Board and the Board members in their official capacities are not 'an arm of the state' under the Eleventh Amendment. Therefore, they are not entitled to Eleventh Amendment immunity for the § 1983 claim asserted against them ...." Ms. *29.

As to the § 1983 claim asserted against the Board members in their individual capacities, those claims were due to be dismissed because they do "not allege the violation of a clearly established constitutional right or causally link such a violation to the Board members' conduct, both of which would be required in order to withstand the defense of federal qualified immunity." Ms. *35.

The Court rejected the defendant's argument that the entire action should be dismissed because the circuit court lacked subject-matter jurisdiction to entertain the amended complaint adding the § 1983 claims. The Court noted that while the original complaint asserted only state law claims against the Board and the Board

members, the complaint named the teacher and the principal as to whom no immunity defense applied. Ms. *38. Consequently, the Court concluded that "no jurisdictional impediment existed to prevent Perryman from amending her complaint to name the Board members as defendants and subsequently to assert a federal claim against the Board and the Board members." Ms. *39.

PROCEEDING TO ENFORCE JUDGMENT – SUBJECT-MATTER JURISDICTION – FILING FEE

Rowland v. Tucker, et al., [Ms. 2170928, Mar. 8, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This unanimous decision by Judge Edwards dismisses Rowland's appeal from a November 16, 2017, order of the Madison Circuit Court enforcing a May 1, 2008, judgment.

The court concluded that the circuit court never acquired subject-matter jurisdiction because although "a trial court has 'residual jurisdiction' to 'take any steps that are necessary to enforce its judgment,' *Ex parte Caremark Rx, LLC*, 229 So. 3d 751, 757 (Ala. 2017), ... the present case does not concern whether the May 2008 judgment can or should be enforced. Instead, the trustee sought to enforce deed restrictions and to assert a nuisance claim for the purposes of obtaining injunctive relief against Rowland." Ms. *25. Citing *Ex parte Caremark*, the court noted that "'[a] court cannot broaden by mere declaration the residual jurisdiction it necessarily holds to allow it to interpret or enforce its judgments.'" Ms. *26.

Because the trustees did not pay a filing fee in connection with the enforcement motion, the order purporting to enforce the 2008 judgment was void. Ms. *23, citing *Ex parte Carter*, 807 So. 2d 534, 536 (Ala. 2001) (payment of filing fee jurisdictional).

VENUE OF ARBITRATION PROCEEDING

Alliance Investment Co., LLC. v. Omni Construction Co., etc., [Ms. 1170504, Mar. 15, 2019] __ So. 3d __ (Ala. 2019). The Court (Bryan, J.; Parker, C.J., Bolin, Shaw, Wise, Sellers, JJ. concur; Mendheim, J., concurs in the result; Mitchell, J., recuses) reverses an order of the Madison Circuit Court determining the venue of an arbitration.

Alliance, a concrete subcontractor, sued KPS, the owner, and Omni Construction Company, the prime contractor, in a dispute over payment owed to Alliance for its work in constructing a Kroger grocery store. KPS and Omni invoked arbitration provisions in the prime and subcontract. Alliance did not oppose the motion to compel arbitration, and on August 28, 2017, the circuit court ordered the parties to arbitrate "in accordance with the terms of the agreements." Ms. *2.

A dispute subsequently arose between the parties as to whether the arbitration proceedings should be held in Alabama or in Ohio where Omni and Kroger are based. Ms. *3. The circuit court entertained an "emergency motion to clarify order compelling arbitration" and ordered the parties to arbitrate in Ohio. Ms. *4. The contracts required that any dispute be arbitrated in accordance with Construction Industry Arbitration Rules. Rule 9(a) of those rules provides that "'the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.'" Ms. *7. Consequently, "[t]he circuit court lacked authority to order that the arbitration proceedings be held in Ohio." Ms. *8.

UNTIMELY APPEAL – DATE OF ELECTRONIC ENTRY OF JUDGMENT

McCarn v. Langan, [Ms. 2171154, Mar. 15, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Thompson, P.J.; Donaldson, Edwards, and Hanson, JJ., concur; Moore, J., concurs specially) dismisses as untimely the father's appeal from a judgment of the Shelby Circuit Court modifying the father's child support obligation and determining a child support arrearage. The circuit court entered a final judgment on June 4, 2018, via electronic entry on the State Judicial Information System (SJIS). The court applied Rule 58(c), Ala. R. Civ. P., providing that "[a]n order or a judgment rendered electronically by the judge ... shall be deemed 'entered' ... as of the date the order or judgment is electronically transmitted by the judge to the electronic-filing system." Ms. *3.

Even though the circuit court entered a judgment identical to the June 14, 2018, judgment on SJIS on June 20, 2018, the court held that the subsequent judgment "is merely a duplication of the original judgment. Accordingly, the June 14, 2018, judgment was a final judgment in this case from which any post-judgment motion or appeal must have been filed." *Ibid.*

Because the father did not file his Rule 59 motion until July 20, 2018, that motion did not toll the time for taking an appeal from the June 14, 2018, judgment. Accordingly, the father's "September 19, 2018, notice of appeal was filed more than 42 days after entry of the June 14, 2018 judgment, and it did not invoke the jurisdiction of this court." Ms. *5.

TOLLING OF TIME TO APPEAL FROM FINAL JUDGMENTS IN CONSOLIDATED CASES

Casey v. Casey, [Ms. 2170449 and 2170450, Mar. 15, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Donaldson, J.; Thompson, P.J., Moore and Hanson, JJ., concur; Edwards, J., concurs in the result) dismisses the father's appeal from one of two judgments entered in consolidated domestic relations cases. Although the father filed a Rule 59 motion in one of the two consolidated cases, that motion did not toll the time to appeal from the judgment in the other case in which no Rule 59 motion was filed. The court applied prior precedent that "the filing of a Rule 59 motion in one consolidated case will not toll the running of time for filing a notice of appeal in the other." Ms. *17, citing *Cox v. Cox*, 218 So. 3d 1215, 1219-20 (Ala. Civ. App. 2016).

ARBITRABILITY – SCOPE OF ARBITRATION PROVISION

Carroll v. Castellanos, [Ms. 1170197, Mar. 22, 2019] __ So. 3d __ (Ala. 2019). The Court (Mendheim, J.; Parker, C.J., Bolin, Shaw, and Bryan, JJ., concur) reverses the Jefferson Circuit Court's order denying a motion to compel arbitration filed by defendant physicians in a tort

action alleging tortious interference with a contract between plaintiff physician and the University of Alabama Health Services Foundation, P.C. (UAHSF). The contract contained an arbitration provision.

The Court applied settled law that substantive arbitrability concerns "'1) whether a valid agreement to arbitrate exists and, if so, 2), whether the specific dispute falls within the scope of that agreement.'" Ms. *11, quoting *Brasfield and Gorrie, LLC v. Soho Partners, LLC*, 35 So. 3d 601, 604 (Ala. 2009). The Court noted that the arbitration agreement between the plaintiff and UAHSF was governed by AAA Rules. Pursuant to those rules, questions of substantive arbitrability are for the arbitrator. Ms. *11. The Court explained that "substantive arbitrability addresses both whether the non-signatories – the individual defendants – can enforce the agreement to arbitrate and whether the claims at issue are encompassed by the arbitration provision." *Ibid.*

DEFAMATION – 12(B)(6) DISMISSAL

Bell v. Smith, [Ms. 1171108, Mar. 22, 2019] __ So. 3d __ (Ala. 2019). The Court (Mendheim, J.; Parker, C.J., Shaw, Bryan, and Mitchell, JJ., concur) affirms the Montgomery Circuit Court's dismissal of a complaint alleging defamation. Ella Bell, a member of the Alabama State Board of Education, alleged that she was defamed by an article written by Cameron Smith quoting Bell's comments at a meeting of the State Board of Education and asserting that Bell believed that special education students should be institutionalized. Ms. *6.

The Court first held that the attachment of Smith's article to the various motions to dismiss did not convert the motions into motions for summary judgment because "'if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.'" Ms. *10, quoting *Donoghue v. American Nat'l Ins. Co.*, 838 So. 2d 1032, 1035 (Ala. 2002) (some internal quotation marks omitted).

In affirming the circuit court's dismissal of the action, the Court applied the "*Sanders* maxim" that "'one cannot recover in a defamation action because of another's expression of an opinion based upon disclosed, non-defamatory facts, no matter how derogatory the expression may be.'" Ms. *13, quoting *Sanders v. Smitherman*, 776 So. 2d 68, 74 (Ala. 2000).

The Court rejected Bell's contention that the circuit court improperly determined questions of fact in ruling on the motion to dismiss. The Court held "'[a] decision whether a statement is reasonably capable of a defamatory meaning is a question of law.'" Ms. *14, quoting *Cottrell v. National Collegiate Athletic Ass'n*, 975 So. 2d 306, 346 (Ala. 2007).

DEED – UNDUE INFLUENCE

Mitchell v. Brooks, [Ms. 1170490, Mar. 22, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; Parker, C.J., Shaw, Bryan, and Mendheim, JJ., concur) affirms the Marshall Circuit Court's judgment entered after a four-day non-jury trial rejecting claims of the deceased's children that a deed to the deceased's spouse was infected by undue influence. The Court first rejected the children's claim that the *ore tenus* presumption did not apply. The Court noted that the record indicated that numerous facts were in dispute so that the judgment was clothed with the *ore tenus* presumption of correctness. Ms. *17.

The Court explained

> "Undue influence is variously defined as influence that dominates the grantor's will and coerces it to serve the will of another, *Adair v. Craig*, 135 Ala. 332, 33 So. 902 (1902); influence which renders the grantor the passive agent of the dominating will of another, *Cox v. Parker*, 212 Ala. 35, 101 So. 657 (1924). In determining dominance, however, it is not a question whether the party knew what he was doing, had done, or proposed to do, but how the intention was produced. *Wooddy v. Matthews*, 194 Ala. 390, 69 So. 607 (1915)."

Ms. *18-19, quoting *Wyatt v. Riley*, 292 Ala. 277, 282, 293 So. 3d 288, 291 (1974).

In affirming the *ore tenus* judgment rejecting the children's claim of undue influence, the Court held "that the trial court heard and considered evidence from which it could have concluded that [the husband] was not the dominant party in his relationship with [the wife] at the time she deeded the Boaz house to him. The undisputed evidence indicated that [the wife] struggled with what to do with her estate and worried about the effect her decisions would have on her family. With regard to the Boaz house, there is evidence indicating that [the wife] changed her mind multiple times and that, on at least some occasions, she indicated that she wanted [the husband] to have the house. Ms. *25-26.

JUDICIAL REVIEW OF LICENSE SUSPENSION

Secretary of the Alabama Law Enforcement Agency v. Ellis, [Ms. 2180087, Mar. 22, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Moore, J.; Thompson, P.J., Donaldson, and Hanson, JJ., concur; Edwards, J., concurs in the result) dismisses an appeal by the Alabama Law Enforcement Agency (ALEA) from a judgment of the Wilcox Circuit Court directing ALEA to reinstate the commercial driver's license of Ellis who had been charged with DUI.

A party such as Ellis whose license is automatically suspended as a result of an arrest for driving under the influence may request an administrative review by ALEA or an administrative hearing before ALEA. Ms. *7-8, citing §§ 32-5A-306-307, Ala. Code 1975. Where a party requests an administrative review rather than an administrative hearing, that party is not entitled to judicial review of a decision upholding the suspension. Ms. *9.

The court concluded that subject matter jurisdiction was lacking because it was not evident from the face of the record as to whether Ellis had requested an administrative hearing before ALEA. Ms. *12. Consequently, the circuit court was without subject matter jurisdiction and its "order directing that Ellis's CDL be reinstated is void. 'A void judgment will not support an appeal and an appellate court must dismiss an attempted appeal from such a void judgment.'" *Ibid.*, quoting *Vann v. Cook*, 989 So. 2d 556, 559 (Ala. Civ. App. 2008)) (some internal quotation marks omitted).

RECENT CIVIL DECISIONS

WAIVER OF SERVICE OF PROCESS – ATTORNEY'S NOTICE OF APPEARANCE

Ex parte Kelsey A. Dunbar, [Ms. 2180249, Mar. 22, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This per curiam opinion denies the mother's contention that the circuit court's pendente lite custody order was void for lack of service of process. The court held that counsel's general notice of appearance in the circuit court on behalf of the mother constituted "'waiver of service of process.'" Ms. *6, quoting *Simmons v. Simmons*, 99 So. 3d 316, 320 (Ala. Civ. App. 2011).

FUTURE-ADVANCE MORTGAGE – PRIORITY – REHEARING

GHB Construction & Dev. Co., Inc. v. West Alabama Bank and Trust, [Ms. 1170484, Mar. 29, 2019] __ So. 3d __ (Ala. 2019). This plurality decision (Sellers, J.; Mendheim and Mitchell, JJ., concur; Parker, C.J., Bolin, Shaw, Wise, Bryan, and Stewart, JJ., concur in the result) withdraws the opinion issued September 21, 2018, which had reversed the Walker Circuit Court's dismissal of GHB's claim and held that "a future-advance mortgage does not create a mortgage lien until some indebtedness is incurred by the mortgagor under the future-advance mortgage." *GHB Construction & Dev. Co. v. West Alabama Bank and Trust,* [Ms. 1170484, Sept. 21, 2018] __ So. 3d __ (Ala. 2018) at *14.

On rehearing, the Court affirmed the Walker Circuit Court's judgment dismissing GHB Construction's claim alleging its materialman's lien had priority over West Alabama Bank and Trust's lien under a future-advance mortgage. Justice Shaw's concurring opinion, joined by Justices Bolin, Wise, Bryan, and Stewart, points out that defendant WABT cited § 35-4-34 for the first time on rehearing. Even though "new arguments on rehearing to reverse a trial court's judgment are not considered," Ms. *19 (emphasis in the original), the concurrence observes that "[i]f this Court on original submission could have affirmed the trial court's judgment on the basis of § 35-4-34 despite the fact that no party raised it, then this Court, in its discretion can on rehearing affirm the trial court's judgment on that basis." Ms. *20.

RULE 59.1, ALA. R. CIV. P. – SUBJECT MATTER JURISDICTION – VOID JUDGMENT

Espinosa v. Hernandez, [Ms. 2170876, Mar. 29, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This unanimous decision by Judge Edwards dismisses the father's appeal from a January 31, 2018, order of the Madison Circuit Court ordering the father to pay $27,956.02 as a child support arrearage arising from a 2004 judgment of divorce and subsequent 2010 order modifying the father's child support obligation. The court held that the circuit court lacked subject matter jurisdiction to enter the 2018 order and consequently that order was void. Ms. *32.

The circuit court had entered a handwritten order on March 4, 2011, "granting the mother's postjudgment motion and setting a hearing to determine what parts of the November 2010 order were to be altered or amended." Ms. *30. Given the open-ended nature of the March 4, 2011, order, the court held that the mother's December 10, 2010, postjudgment motion was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P., many years before the circuit court entered its 2018 judgment finding that the father owed a child support arrearage. Ms. *32.

APPELLATE PROCEDURE – § 34-3-21, ALA. CODE 1975 – AUTHORITY OF ATTORNEY TO BIND CLIENT TO SETTLEMENT AGREEMENT

S.L. and D.L. v. J.L.C. and R.C., [Ms. 2180013 and 2180014, Mar. 29, 2019] __ So. 3d __ (Ala. Civ. App. 2019). This per curiam decision (Moore, Donaldson, Edwards, Hanson, JJ., concur; and Thompson, P.J., concurs in the result) dismisses the paternal grandfather's appeal from an order of the Coffee Juvenile Court but reverses and remands the order on the grandmother's appeal.

In regard to the paternal grandfather's appeal, the court held that "'a party cannot claim error where no adverse ruling is made against him.'" Ms. *16, quoting *Alcazar Shrine Temple v. Montgomery Cty. Sheriff's Dep't*, 868 So. 2d 1093, 1094 (Ala. 2003) (some internal quotation marks omitted). Because the paternal grandfather did not file any postjudgment motion and suffered no adverse ruling in the trial court, he had no right to appeal. *Ibid.*

The paternal grandmother argued that the juvenile court erred in entering an agreed order that allowed the maternal grandparents visitation with the children without restrictions to protect the children. Ms. *10. The court held that under § 34-3-21, Ala. Code 1975, "'[w]here a trial court finds that an attorney has the authority to enter into a settlement agreement and an agreement is made in writing or by an entry of the agreement on the trial court record, the client will be bound.'" Ms. *17, quoting *Jones v. Stedman*, 595 So. 2d 1355, 1356 (Ala. 1992). The court further held that "'it is always a question of fact whether an attorney has the authority to make a settlement on behalf of his client.'" *Ibid.*, quoting *Warner v. Pony Express Courier Corp.*, 675 So. 2d 1317, 1320 (Ala. Civ. App. 1996). Because the paternal grandmother remained silent when her attorney recited the settlement agreement on the record, the juvenile court could properly infer that the lawyer had the paternal grandmother's authority to settle the case. Ms. *17-18.

Despite concluding that the paternal grandmother was bound to the settlement agreement, the court held the juvenile court erred in refusing to conduct a hearing on the paternal grandmother's postjudgment motion because the best interests of the children remain a paramount consideration that is not obviated by a settlement agreement. Ms. *20.