

Rel: March 8, 2024

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0550

Ex parte Gregory O'Neil Starr

PETITION FOR WRIT OF MANDAMUS

(In re: Noah Dew

v.

Gregory O'Neil Starr and GEICO Casualty Company)

(Choctaw Circuit Court: CV-22-900051)

COOK, Justice.

Gregory O'Neil Starr, a defendant in a personal-injury action

pending below, filed a motion to dismiss, which was denied by the Choctaw Circuit Court. He now petitions this Court for a writ of mandamus, asking that we direct the trial court to vacate that order and to instead enter an order dismissing all the claims against him based on a lack of personal jurisdiction. We grant the petition and issue the writ.

Facts and Procedural History

In February 2020, Dew and Starr were involved in a motor-vehicle collision on U.S. Highway 84 near Joe Booth Road. It is undisputed that U.S. Highway 84 intersects with Joe Booth Road in Mississippi.

More than two years after that collision, on September 16, 2022, Dew sued Starr in Choctaw County, Alabama, alleging negligence and wantonness and seeking \$74,000 in compensatory and punitive damages. Because Starr was allegedly uninsured at the time of the collision, Dew also alleged a claim for indemnification against his own insurer -- GEICO Casualty Company ("GEICO").

In February 2023, Dew moved for a default judgment against Starr after Starr had failed to appear in the lawsuit. That motion was granted, and a default judgment was entered against Starr on April 6, 2023.

On May 4, 2023, 28 days after the default judgment was entered

against him, Starr filed a "motion to set aside default" pursuant to Rules 59 and 60, Ala. R. Civ. P. In that motion, Starr argued that the default judgment against him was due to be set aside because (1) Starr "has viable defenses to [Dew's] claims," (2) Starr "[s]hould be allowed to have counsel appear and defend his position in this action," and (3) "the judgment [that] was entered in this matter has been in effect less than thirty (30) days."

The next day, Starr filed an "amended motion to set aside default" pursuant to Rules 55(c), 59, and 60, Ala. R. Civ. P. In that motion, Starr claimed that the default judgment against him should be set aside because (1) Starr "has viable defenses to [Dew's] claims including, but not limited to, lack of jurisdiction"; (2) "[Dew's] complaint indicates the subject accident occurred in Mississippi and [Starr] resides in Mississippi," and "[t]here is no nexus to Choctaw County, Alabama, other than [Dew's] residing there"; (3) Starr "should be allowed to have counsel appear and defend his position in this action"; (4) Starr "was not properly served with a copy of the summons and complaint" because "the certified mail return receipt was not signed by [Starr], his agent, or anyone residing at the service address"; and (5) "the judgment [that] was entered

in this matter has been in effect less than thirty (30) days."

Dew did not respond to Starr's first motion to set aside the default judgment. He also did not respond to Starr's amended motion to set aside the default judgment.

Before the trial court ruled on either motion, Starr filed a "motion to dismiss" pursuant to Rules 12(b)(2) and 12(b)(3), Ala. R. Civ. P. In that motion, Starr argued, among other things, that Dew's claims against him were due to be dismissed because the trial court lacked jurisdiction and was an improper venue for Dew's claims. In support of his assertion, Starr explained: (1) that he is a resident of Mississippi, (2) that Dew had attempted to serve him in Mississippi, (3) that the collision had occurred in Mississippi, (4) that the Mississippi Highway Patrol had investigated the collision, (5) that both Dew and Starr had sought medical treatment in Mississippi for their injuries caused by the collision, and (6) that there is no nexus to Choctaw County other than Dew's residing there.

Starr attached to his motion to dismiss a copy of the collision report, which showed: (1) that the collision had occurred in Mississippi, (2) that the Mississippi Highway Patrol had completed the collision report, (3) that Starr's driver's license listed a Mississippi address as his place of

residence, and (4) that the medical personnel that had responded to the collision were part of an emergency medical service affiliated with a Mississippi hospital. Starr also attached to his motion a map of the area where the collision occurred, which showed that U.S. Highway 84 intersects with Joe Booth Road in Mississippi.

In response, Dew argued that Starr's motion to dismiss was due to be denied. Specifically, Dew argued, among other things, that Choctaw County, Alabama, is an appropriate jurisdiction and venue because, under § 6-3-7(a)(3), Ala. Code 1975,¹

"the nexus of the filing is based on [Dew's] residence and the contract between [GEICO] and [Dew] in writing in a policy of uninsured and/or underinsured motorist coverage against loss, damage, injury and other damages incurred as a result of an automobile accident which [was] the fault of [Starr] a motorist who did not carry sufficient liability insurance to compensate [Dew]."

On June 23, 2023, the trial court granted Starr's amended motion to set aside default judgment. That same day, the trial court also denied

¹Section 6-3-7(a)(3), Ala. Code 1975, provides, in relevant part, that "[a]ll civil actions against corporations may be brought in ... the county in which the plaintiff resided"

Starr's motion to dismiss.² The record contains no indication that a hearing was held on either motion before the trial court made those rulings. Thereafter, Starr timely filed his petition for a writ of mandamus with this Court, challenging only the trial court's order denying the motion to dismiss.

Standard of Review

"'A writ of mandamus is an extraordinary remedy'" that is appropriate "'when the petitioner can show (1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court.'" Ex parte State Farm Fire & Cas. Co., 320 So. 3d 550, 552 (Ala. 2020) (quoting Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001)). It is well-settled that an order denying a motion to dismiss based on a lack of personal jurisdiction is reviewable by an appellate court on a petition for a writ of mandamus. Ex parte Alamo Title Co., 128 So. 3d 700, 707 (Ala. 2013).

""""An appellate court considers de novo a trial court's judgment on a party's motion to dismiss for lack of personal

²The trial court's order denying the motion to dismiss did not include either the factual or legal findings on which the court's decision was based.

jurisdiction.'" Ex parte Lagrone, 839 So. 2d 620, 623 (Ala. 2002) (quoting Elliott v. Van Kleef, 830 So. 2d 726, 729 (Ala. 2002)). Moreover, '[t]he plaintiff bears the burden of proving the court's personal jurisdiction over the defendant.' Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 50 (1st Cir. 2002).'"

Ex parte Bradshaw, 328 So. 3d 236, 239 (Ala. 2020) (quoting Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 229 (Ala. 2004), quoting in turn Ex parte Dill, Dill, Carr, Stonbraker & Hutchings, P.C., 866 So. 2d 519, 525 (Ala. 2003)).

"'"In considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253 (11th Cir. 1996), and Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829 (11th Cir. 1990), and "where the plaintiff's complaint and the defendant's affidavits conflict, the ... court must construe all reasonable inferences in favor of the plaintiff." Robinson, 74 F.3d at 255 (quoting Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990)).'"

"'Wenger Tree Serv. v. Royal Truck & Equip., Inc., 853 So. 2d 888, 894 (Ala. 2002) (quoting Ex parte McInnis, 820 So. 2d 795, 798 (Ala. 2001)).'"

Ex parte TitleMax of Georgia, Inc., 340 So. 3d 395, 400 (Ala. 2021) (quoting Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 229 (Ala. 2004)).

Discussion

Among other things, Starr asserts that he is entitled to a writ of mandamus because Dew's lawsuit against him should have been dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2), Ala. R. Civ. P. Although Dew does not dispute that the trial court lacked personal jurisdiction over Starr, he contends that Starr waived his right to challenge personal jurisdiction in this case because (1) Starr failed to raise his challenge in his first general appearance, which, Dew contends, was Starr's May 4, 2023, motion to set aside the default judgment; (2) Starr's assertion that the default judgment should be set aside for "lack of jurisdiction" in his May 5, 2023, amended motion to set aside the default judgement challenged only subject-matter jurisdiction, not personal jurisdiction; and (3) Starr's argument that the trial court "lacks jurisdiction" in his motion to dismiss was a challenge to venue, not personal jurisdiction. Thus, before reaching the merits of Starr's personal-jurisdiction challenge, we must first decide whether he waived

his right to raise such a challenge.

I. Waiver of the Right to Challenge Personal Jurisdiction

It is a well-established principle that "our review is restricted to the evidence and arguments considered by the trial court." Key v. Warren Averett, LLC, 372 So. 3d 1132, 1138 (Ala. 2022) (quoting Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992)); Smith v. Stowe, [Ms. SC-2023-0198, Sept. 15, 2023] __ So. 3d __, __ (Ala. 2023) ("Issues not raised before the trial court will not be considered for the first time on appeal." (quoting ITEC, Inc. v. Automated Precision, Inc., 623 So. 2d 1139, 1140 (Ala. 1993))); Moultrie v. Wall, 172 So. 3d 828, 840 (Ala. 2015) ("In order to be considered on appeal, issues must be presented to the trial court and to the opposing parties at the trial level." (quoting Birmingham Hockey Club, Inc. v. National Council on Comp. Ins., Inc., 827 So. 2d 73, 80 (Ala. 2002))); Black Warrior Elec. Membership Corp. v. McCarter, 115 So. 3d 158, 166 (Ala. 2012) ("[I]t is a well-settled rule that parties are restricted to the theory on which a cause is prosecuted or defended in the court below. Where both parties adopt a particular theory they will not be permitted to depart therefrom when the case is brought up for appellate review." (quoting Inter-Ocean Ins.

Co. v. Banks, 268 Ala. 25, 27, 104 So.2d 836, 837 (1958))).³

Here, Dew did not argue waiver in his response to Starr's motion to dismiss for lack of jurisdiction under Rule 12(b)(2). Instead, he proceeded as if Starr had not waived his objection to personal jurisdiction. Specifically, in his response to Starr's motion to dismiss, Dew argued that the trial court has jurisdiction over Starr because "the nexus of filing is based on" (1) Dew's state of residency, which is Alabama, and (2) Dew's insurance agreement with GEICO.⁴ Therefore, because Dew failed to

³In addition, opinions from other jurisdictions make clear that a plaintiff may not raise, for the first time, the issue of a defendant's waiver of the right to challenge personal jurisdiction. See, e.g., Rainsberger v. McFadden, 174 Mich. App. 660, 667, 436 N.W.2d 412, 415-16 (1989) ("Plaintiff's alternative contention that defendant waived any objections to the court's exercise of personal jurisdiction by requesting an attorney was not raised before the trial court. An issue which is not preserved at the trial court level cannot be raised for the first time on appeal. Schanz v. New Hampshire Ins. Co., 165 Mich. App. 395, 408, 418 N.W.2d 478 (1988). Thus, plaintiff's argument regarding any possible waiver of objection by defendant is not properly before this Court."); Hasley v. Black, Sivalls & Bryson, Inc., 70 Wis. 2d 562, 569-70, 235 N.W.2d 446, 450-51 (Wis. 1975) ("In the reply brief on this appeal, respondent urges decisional grounds not asserted in the trial court. ... [¶] Ordinarily, questions which are not properly presented to the trial court will not be considered for the first time on appeal. ... In this case, the new issues are presented merely to bolster the trial court's finding of jurisdiction. Therefore, no compelling policy exists to ignore the general rule.").

⁴Dew abandons the second ground of his argument on appeal.

argue to the trial court that Starr had waived his objection to personal jurisdiction, this Court cannot consider that argument for the first time on appeal.⁵

With regard to Dew's secondary argument that Starr waived his personal-jurisdiction challenge because his motion to dismiss challenged venue rather than personal jurisdiction, we note that this assertion is refuted by the materials before us. In his motion to dismiss, Starr specifically asserted that "Choctaw County, Alabama[,] ... lacks jurisdiction for [Dew's] claims" and cited Rule 12(b)(2), Ala. R. Civ. P., in support of that assertion. That rule provides for a motion to dismiss for "lack of jurisdiction over the person." Additionally, Starr alleged that he is a resident of Mississippi, that the collision had occurred in Mississippi, and that there is no "nexus" between Starr and Alabama. Under these circumstances, it seems clear to this Court that Starr sufficiently raised his personal-jurisdiction challenge in his motion to dismiss and thus did

⁵Dew not only failed to raise the waiver argument in a response to Starr's motion to dismiss, but also failed to raise the waiver argument in response to Starr's amended "motion to set aside default [judgment]" and did not file a motion to strike such amendment, which raised the lack-of-jurisdiction defense. In fact, he failed to file any response to that motion. The trial court then proceeded to grant the amended motion, which, as noted, raised the lack-of-jurisdiction defense.

not waive this issue for the purposes of the present petition. We therefore see no reason to deny Starr's petition for a writ of mandamus on this basis.

II. Personal Jurisdiction

Because Starr did not waive his right to challenge the trial court's ability to exercise personal jurisdiction over him, we must now determine whether Starr has demonstrated that he has a clear legal right to mandamus relief based on that issue. The issue of personal jurisdiction "'stands or falls on the unique facts of [each] case.'" Ex parte I.M.C., Inc., 485 So. 2d 724, 725 (Ala. 1986) (quoting and adopting trial court's order). As noted above, it is the plaintiff's burden to establish personal jurisdiction regardless of whether the form of personal jurisdiction is alleged to be general or specific. See Branded Trailer Sales, Inc. v. Universal Truckload Servs., Inc., 74 So. 3d 404, 409 (Ala. 2011); and Facebook, Inc. v. K.G.S., 294 So. 3d 122, 130 (Ala. 2019).

Under Rule 4.2(b), Ala. R. Civ. P., the personal jurisdiction of Alabama courts over out-of-state defendants extends ""to the limit of due process under the United States and Alabama Constitutions."" Ex parte Bradshaw, 328 So. 3d at 240 (quoting Ex parte McNeese Title, LLC,

82 So. 3d 670, 673 (Ala. 2011), quoting in turn Hiller Invs., Inc. v. Insultech Grp., Inc., 957 So. 2d 1111, 1115 (Ala. 2006)). Due process provides that "the exercise of jurisdiction is appropriate so long as the out-of-state defendant has "some minimum contacts with this state [so that] ... it is fair and reasonable to require the person to come to this state to defend an action." " Id. (quoting Dillon Equities v. Palmer & Cay, Inc., 501 So. 2d 459, 461 (Ala. 1986), quoting in turn former Rule 4.2(a)(2)(I), Ala. R. Civ. P.).

A defendant is deemed to have sufficient "minimum contacts" with a forum state when the plaintiff shows that the defendant's contacts were either general or specific and that such contacts were purposely directed at the forum state by the defendant. Id. at 241.

"General contacts" exist when the defendant's contacts with the forum state "are unrelated to the cause of action and ... are both "continuous and systematic." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9, 415, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).'" " Id. (quoting Ex parte Georgia Farm Bureau Mut. Auto. Ins. Co., 889 So. 2d 545, 550 (Ala. 2004), quoting in turn Elliott v. Van Kleef, 830 So. 2d 726, 731 (Ala. 2002), quoting in turn Ex parte Phase III

Constr., Inc., 723 So. 2d 1263, 1266 (Ala. 1998) (Lyons, J., concurring in the result)) (emphasis added).

By contrast, "specific contacts" exist when the defendant's contacts with the forum state "'are related to the cause of action'" and "'rise to such a level as to cause the defendant to anticipate being haled into court in the forum state.'" Id. (quoting Ex parte Georgia Farm Bureau, 889 So. 2d at 551, quoting in turn Elliott, 830 So. 2d at 731, quoting in turn Ex parte Phase III Constr., 723 So. 2d at 1266 (Lyons, J., concurring in the result)) (emphasis added).

"But regardless of whether jurisdiction is alleged to be general or specific, the nexus between the defendant and the forum state must arise out of "an action of the defendant [that was] purposefully directed toward the forum State." Elliott [v. Van Kleef, 830 So. 2d 726, 731 (Ala. 2002)] (quoting Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)). "This purposeful-availment requirement assures that a defendant will not be haled into a jurisdiction as a result of "the unilateral activity of another person or a third person.'" Elliott, 830 So. 2d at 731 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985))."

Leithead v. Banyan Corp., 926 So. 2d 1025, 1030-31 (Ala. 2005) (quoting Dill, Dill, Carr, Stonbraker & Hutchings, 866 So. 2d at 525-26) (some emphasis in original; some emphasis added). "'Jurisdiction is proper,

however, where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State." " Ex parte Bradshaw, 328 So. 3d at 241 (quoting Ex parte Georgia Farm Bureau, 889 So. 2d at 551, quoting in turn Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

In denying Starr's motion to dismiss, the trial court did not indicate whether it regarded its jurisdiction over him to be general or specific. We will thus address each form of personal jurisdiction in turn.

A. General Personal Jurisdiction

Starr argues that the trial court lacked general personal jurisdiction over him because Dew failed to allege that Starr has any contact or connection to Alabama. Dew does not provide this Court with any response or argument on this point.

As stated previously, general personal jurisdiction is established through a defendant's "general contacts" with a forum state. In most cases, "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile." Ex parte Bradshaw, 328 So. 2d at 242 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011)).

In his complaint, Dew specifically identified Starr as "a bona fide resident citizen of Covington County, Mississippi, ... at all times material to this lawsuit." Additionally, the materials before us do not indicate that Starr has ever visited or otherwise set foot in Alabama. Moreover, Dew does not assert that Starr has visited or traveled through Alabama, nor does he argue that Starr has engaged in any activity purposely directed to Alabama. As a result, there are no facts that would support a finding of general jurisdiction.⁶

B. Specific Personal Jurisdiction

Starr also argues that the trial court lacked specific personal jurisdiction over him because Dew failed to allege that his claims against Starr arose out of or relate to any contact Starr has had with Alabama. Once again, Dew does not provide this Court with any response or argument on this point.

This Court has recently explained:

⁶We are not called upon here to decide whether recent United States Supreme Court decisions have narrowed general jurisdiction for individuals to their state of domicile. In other words, we have not been asked to decide whether the previous "continuous and systematic" test for general jurisdiction for an individual could ever render a result broader than simply the domicile test. See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011).

"Specific jurisdiction ... depends on an "affiliatio[n] between the forum and the underlying controversy," principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. [Arthur T.] von Mehren & [Donald T.] Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1136 (1966) (hereinafter von Mehren & Trautman); see [Lea] Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L. Rev. 721, 782 (1988) In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of "issues deriving from, or connected with, the very controversy that establishes jurisdiction." von Mehren & Trautman 1136."

Facebook, Inc., 294 So. 3d at 134 (quoting Goodyear, 564 U.S. at 919).

The analytical framework used for determining whether specific jurisdiction exists consists of two primary requirements. First, there must be an indication that Starr has "purposefully availed" himself of the privilege of conducting activities within Alabama. See id. at 132 (quoting Elliott, 830 So. 2d at 731). Specifically, there must be (1) a "substantial connection' between [Starr] and [Alabama] necessary for a finding of minimum contacts" and (2) those contacts "must come about by an action of [Starr] purposefully directed toward [Alabama]." Id. (quoting Elliott, 830 So. 2d at 731, quoting in turn Asahi Metal Indus. Co. v. Superior Ct. of California, 480 U.S. 102, 112 (1987)) (first emphasis added). This requirement "assures that [Starr] will not be

haled into [Alabama] as a result of "the unilateral activity of another person or a third person.'" Id. (quoting Elliott, 830 So. 2d at 731, quoting in turn Burger King Corp., 471 U.S. at 475, quoting in turn Helicopteros, 466 U.S. at 417). Second, Dew's lawsuit must "arise[] out of or relate[] to [Starr's] contacts with [Alabama]." Id. at 134 (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014), quoting in turn Helicopteros, 466 U.S. at 414 n.8).

Here, Dew's complaint alleges only that Starr is a "bona fide resident of Covington County, Mississippi[,] and has [been] such at all times material to this lawsuit." It does not allege that Starr had any contacts with Alabama -- let alone that Starr engaged in an action "purposefully directed toward [Alabama]." Id. at 132. Dew also does not allege in his complaint that Dew's lawsuit "arose out of" or "relates to" any contacts that Starr may have had with Alabama. See id. at 134.

Rather, the factual allegations in the complaint make clear that Dew's negligence and wantonness claims against Starr relate to the motor-vehicle collision between Starr and Dew that occurred on U.S. Highway 84 near Joe Booth Road. Dew does not dispute Starr's assertion that the collision occurred in Mississippi. He also does not dispute Starr's

assertion that Joe Booth Road intersects with U.S. Highway 84 in Mississippi.

Considering the lack of any contacts between Starr and Alabama, there is nothing before us that would support the trial court's exercise of specific personal jurisdiction over Starr. We therefore conclude that the petition for a writ of mandamus filed by Starr establishes a clear legal right to the dismissal of the complaint against him on the basis that the trial court lacked personal jurisdiction over him.

Conclusion

For the reasons set out above, we grant the petition for the writ of mandamus and issue the writ. We further direct the Choctaw Circuit Court to vacate its order denying Starr's motion to dismiss and to enter an order dismissing Dew's claims against Starr on the basis that it lacks personal jurisdiction.⁷

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

⁷Because we are granting Starr's petition on the basis that the trial court lacked personal jurisdiction over him, it is unnecessary for us to consider the other arguments Starr asserted in his petition.

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Shaw, J., concurs in the result.

Bryan, J., concurs in the result, with opinion.

BRYAN, Justice (concurring in the result).

The main opinion concludes that "this Court cannot consider ... for the first time on appeal" Noah Dew's argument that Gregory O'Neil Starr waived his challenge to personal jurisdiction by not timely asserting that affirmative defense in the circuit court. ___ So. 3d at ___. I respectfully disagree with that conclusion. Crucially, Dew is the respondent in this mandamus proceeding. Subject to exceptions that are inapplicable here, when considering whether to affirm a judgment (or, as here, to deny mandamus relief), we may affirm (or deny mandamus relief) on any "valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected by the trial court." Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003).⁸ See also Ex parte Moulton, 116

⁸Liberty National states the exceptions to this general rule:

"This rule fails in application only where due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment, Ameriquet Mortgage Co. v. Bentley, 851 So. 2d 458 (Ala. 2002), or where a summary-judgment movant has not asserted before the trial court a failure of the nonmovant's evidence on an element of a claim or defense and therefore has

So. 3d 1119, 1133-34 (Ala. 2013) (applying the principle stated in Liberty National in the context of a mandamus petition); and Ex parte Jones, 147 So. 3d 415, 419 (Ala. 2013) (noting the general rule that we may affirm on any valid legal ground "even if that ground was not argued before or considered by, and even if it was rejected by, the trial court"). This well-settled principle has been cited many times in recent years by this Court.

In concluding that we cannot consider Dew's argument, the main opinion primarily relies on a statement of law found in decisions like the often-cited Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992), which states: "This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court." However, that broad statement should be read in the context of the procedural posture in Andrews, which involved an appellant's argument seeking a reversal of the trial court's

not shifted the burden of producing substantial evidence in support of that element, Rector v. Better Houses, Inc., 820 So. 2d 75, 80 (Ala. 2001) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), and Kennedy v. Western Sizzlin Corp., 857 So. 2d 71 (Ala. 2003))."

881 So. 2d at 1020.

judgment. This Court has consistently applied this principle to appellants and petitioners rather than appellees and respondents. A more precise statement of this principle is that "appellate courts 'cannot consider arguments advanced for the purpose of reversing the judgment of a trial court when those arguments were never presented to the trial court for consideration or were raised for the first time on appeal.'" Lay v. Destafino, [Ms. 1210383, Feb. 17, 2023] ___ So. 3d ___, ___ (Ala. 2023) (quoting State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d 806, 821 (Ala. 2005)). See also Ex parte City of Gulf Shores, 351 So. 3d 518, 521 (Ala. 2021) ("This Court will not grant relief to a petitioner or an appellant based on an argument presented for the first time to this Court."). That is, this principle properly applies to an appellant arguing for a reversal or to a petitioner seeking mandamus relief. On the other hand, an appellee or a respondent is not bound by this rule because, as noted, this Court generally may affirm a judgment on any valid legal ground presented by the record even if the ground was not considered by the trial court. Liberty Nat'l, *supra*. In other words, we generally may consider an argument made by an appellee or a respondent in defense of the trial court's decision even if that argument was not made to the trial

court. Thus, we may consider Dew's argument that Starr waived his challenge to personal jurisdiction by not timely asserting it below. However, I do not think that our consideration of this argument would change the result in this case, and I agree with the main opinion that Dew has failed to establish that the trial court has personal jurisdiction here. Accordingly, I concur in the result.