Rel: August 31, 2018

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2018

1170162

Bert S. Nettles

v.

Rumberger, Kirk & Caldwell, P.C., et al.

Appeal from Jefferson Circuit Court
(CV-15-904514)

MAIN, Justice.

Bert S. Nettles appeals from a summary judgment entered in favor of Rumberger, Kirk & Caldwell, P.C. ("Rumberger"), Jesse P. Evans III, Meredith J. Lees, J. Michael Rediker, and Michael B. Odom (Evans, Lees, Rediker, and Odom are

hereinafter referred to collectively as the "individual defendants") in an action he filed against them. Because Nettles's action violated § 6-5-440, Ala. Code 1975, we conclude that the judgment of the trial court is due to be affirmed.

I. Facts and Procedural History

This case arises from the demise of the law firm of Haskell Slaughter Young & Rediker, LLC ("Haskell Slaughter"). Nettles and the individual defendants are all former members of Haskell Slaughter. It is undisputed that, in the fall of 2013, Haskell Slaughter was in financial distress, and members of the firm were in discussions as to what, if anything, could be done to save the firm. In December 2013, 10 lawyers, including the individual defendants, left Haskell Slaughter and joined Rumberger. Haskell Slaughter permanently closed in February 2014.

On April 8, 2015, Bluebird Holdings, LLC ("Bluebird"), filed a complaint in the Jefferson Circuit Court against Nettles and three other former members of Haskell Slaughter, seeking to collect on personal guarantee agreements executed by the former members. The case was assigned case number CV-

15-901420 ("the Bluebird action"). On September 11, 2015, Nettles filed a third-party complaint in the Bluebird action against Rumberger and the individual defendants. Nettles sought damages from Rumberger and the individual defendants for alleged breach of fiduciary duty, fraud, conspiracy, and tortious interference with a contract. Nettles alleged that the individual defendants, in violation of fiduciary duties owed Nettles and Haskell Slaughter, conspired with each other and with Rumberger to orchestrate Rumberger's acquisition of two of Haskell Slaughter's most profitable practice groups. Nettles alleged that the loss of those practice groups "was the psychological and financial death blow to Haskell Slaughter" in that it thwarted plans for a potential firm-saving reorganization, caused the remaining members of the firm to leave, and resulted in the liquidation of Haskell Slaughter and ultimately the Bluebird action. Nettles alleged that the demise of Haskell Slaughter caused it to default on bank debt for which he was a guarantor. He also alleged that it caused him to lose his capital contribution to the firm and caused him to suffer decreased earning ability. Nettles claimed that he suffered direct personal harm, financial

injury, emotional distress, and mental anguish. He sought compensatory and punitive damages from Rumberger and the individual defendants.

Rumberger and the individual defendants filed a motion to dismiss Nettles's third-party complaint, arguing, among other things, that certain of Nettles's damages claims were not permissible under Rule 14, Ala. R. Civ. P. The trial court agreed and ruled that Nettles could recover only money that he may be required to pay as a result the personal guarantee agreement made the basis of the Bluebird action. The trial court ruled that "Nettles['s] claim of damages for the loss of his capital contribution to the Haskell Firm [and] his suffering a decreased earning capacity are not cognizable within the context of a Third Party Complaint."

In response to that ruling, on November 20, 2015, Nettles filed a new lawsuit against Rumberger and the individual defendants in the Jefferson Circuit Court. The case, given case number CV-15-904514, was assigned to a different circuit judge. Nettles described the action as a "supplemental lawsuit" (case no. CV-15-904514 is hereinafter referred to as "the supplemental action"), and the complaint expressly

incorporated the facts and allegations alleged in his third-party complaint filed in the Bluebird action, which was attached as "Exhibit A" to the complaint. In his complaint, Nettles explained that the supplemental action was necessary because of the trial court's ruling in the Bluebird action limiting Nettles's potential recovery in that action to money he might be required to pay under the personal guarantee agreement: "[I]t is hence necessary and appropriate that this supplemental action be brought and consolidated with the ... Third-Party Complaint in the Bluebird Action for Nettles to obtain compensation for all the damages proximately caused him by the wrongful conduct of ... Rumberger and [the individual defendants]." Nettles filed a contemporaneous motion to consolidate the supplemental action with the Bluebird action.

Between December 7, 2015, and February 18, 2016, Rumberger and the individual defendants each separately moved to dismiss the supplemental action on the ground that it was barred by Alabama's abatement statute, § 6-5-440, which prohibits a plaintiff from prosecuting two actions at the same time for the same cause of action against the same parties. The court did not immediately rule on the motions to dismiss.

On July 29, 2016, the parties jointly moved in the supplemental action to consolidate that action with the Bluebird action. The trial court granted the motion to consolidate, stating that the joint motion was not a waiver of any defenses raised in the still pending motions to dismiss, and the consolidated cases were assigned to the circuit judge presiding over the Bluebird action.

On September 29, 2016, the trial court entered a summary judgment in favor of Rumberger and the individual defendants as to all claims asserted against them in the third-party complaint in the Bluebird action. The trial court, however, did not certify that order as final pursuant to Rule 54(b), Ala. R. Civ. P.

On February 27, 2017, the trial court denied Rumberger's and the individual defendants' motions to dismiss Nettles's supplemental action. The trial court reasoned that § 6-5-440 did not require dismissal of the supplemental action because the earlier filed third-party action had been dismissed by the summary-judgment order of September 29, 2016. The trial court concluded that "since September 29, 2016, there have not been

two actions pending in the state between the same parties with regard to the same cause."

In April 2017, the individual defendants moved for a summary judgment as to all the claims asserted against them in the supplemental action. On May 23, 2017, the trial court entered a summary judgment for the individual defendants, concluding that the arguments and evidence were the same as addressed in its September 29, 2016, order entering a summary judgment in the Bluebird action.

On September 9, 2017, Rumberger moved for a summary judgment as to all claims asserted against it in the supplemental action. On September 26, 2017, the trial court entered a summary judgment in favor of Rumberger, resolving all claims as to all parties in the supplemental action. Nettles then filed this appeal.

II. Analysis

A. Finality

Before considering the merits of the appeal we address the appealability of the judgment. Although that issue was not an issue raised by the parties, "jurisdictional matters, such as whether an order is final so as to support an appeal,

are of such importance that an appellate court may take notice of them ex mero motu." Fuller v. Birmingham-Jefferson Cty. Transit Auth., 147 So. 3d 907, 911 (Ala. 2013). This Court has stated:

> "An appeal will not lie from a nonfinal judgment. Robinson v. Computer Servicenters, Inc., 360 So. 2d 299, 302 (Ala. 1978). 'A ruling that disposes of fewer than all claims or relates to fewer than all parties in an action is generally not final as to any of the parties or any of the claims. See Rule 54(b), Ala. R. Civ. P.' Wilson v. Wilson, 736 So. 2d 633, 634 (Ala. Civ. App. 1999). When an action involves multiple claims or parties, Rule 54(b), Ala. R. Civ. P., gives the trial court the discretion to 'direct the entry of a final judgment as to one or more but fewer than all of the claims or parties.' If a trial court certifies a judgment as final pursuant to Rule 54(b), an appeal will generally lie from that judgment."

Hanner v. Metro Bank & Prot. Life Ins. Co., 952 So. 2d 1056, 1060 (Ala. 2006)

The present appeal is taken only from the judgment in the "supplemental action." As to that action, the judgment resolved all claims as to all parties. The supplemental action, however, was consolidated with the Bluebird action pursuant to Rule 42(a), Ala. R. Civ. P., and that action remains pending. Although the trial court entered a summary judgment for Rumberger and the individual defendants on the

claims asserted against them in Nettles's third-party complaint in the Bluebird action, no Rule 54(b) certification has been entered. We must therefore consider whether the judgment in this matter is a final, appealable judgment in light of the fact that the matter was consolidated with a factually and legally intertwined companion case that has not been fully resolved. Did the consolidation effectively merge the cases for purposes of determining whether there is a final judgment for the purpose of an appeal, or may Nettles take an immediate appeal from the judgment in the supplemental action?

The appellate courts of this State have oft repeated the axiom that cases consolidated under Rule 42(a), Ala. R. App. P., retain their separate identity. See, e.g., League v. McDonald, 355 So. 2d 695, 697 (Ala. 1978) ("Where several actions are ordered to be consolidated for trial, each action retains its separate identity ...."); Ex parte Glassmeyer, 204 So. 3d 906, 908 (Ala. Civ. App. 2016)("It is well settled that consolidated actions retain their separate identity."). Likewise, we have held that consolidated actions require the entry of separate judgments. See League, 355 So. 2d at 697. In Hanner, however, this Court held that "a trial court must

certify a judgment as final pursuant to Rule 54(b), Ala. R. Civ. P., before a judgment on fewer than all the claims in a consolidated action can be appealed." A straightforward application of Hanner, thus, dictates that this case be remanded for a Rule 54(b) certification or that it be dismissed. See also Hossley v. Hossley, [Ms. 2160979, May 18, 2018] __ So. 3d __, ___ (Ala. Civ. App. 2018) (citing Hanner, and dismissing appeal as being from a nonfinal judgment on ground that judgment had not been entered in consolidated action). Nevertheless, in light of a recent decision by the United States Supreme Court, we conclude that it is necessary to reexamine our decision in Hanner.

In Hanner we relied upon decisions from several federal circuit courts. We reasoned:

> "According to Wright and Miller:
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> > "'Although federal courts usually have said that consolidated actions do not lose their separate identity, some courts have reasoned persuasively that they should be treated as a single action for purposes of review by way of Rule 54(b), and that a judgment in the consolidated case that does not dispose of all claims and all parties is appealable only if certified as that rule requires.'

> "9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2386 (2d ed. 1995) (footnote omitted). The United States Court of Appeals for the Ninth Circuit has said:
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> > "'In our view, the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions unless a 54(b) certification is entered by the district court. This leaves the discretion with the court which is best able to evaluate the [e]ffect of an interim appeal on the parties and on the expeditious resolution of the entire action.'
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> "Huene v. United States, 743 F.2d 703, 705 (9th Cir. 1984). See, also, Trinity Broad. Corp. v. Eller, 827 F.2d 673, 675 (10th Cir. 1987) ('To obtain review of one part of a consolidated action, appellant must obtain certification under Fed. R. Civ. P. 54(b).'); and Spraytex, Inc. v. DJS&T, 96 F.3d 1377, 1382 (Fed. Cir. 1996) ('We now extend this approach to join the Ninth and Tenth Circuits in adopting the rule that, absent Rule 54(b) certification, there may be no appeal of a judgment disposing of fewer than all aspects of a consolidated case.'). We find persuasive the holdings of these decisions interpreting the Federal Rules of Civil Procedure, on which our own Rules of Civil Procedure are based. Accordingly, we hold that a trial court must certify a judgment as final pursuant to Rule 54(b), Ala. R. Civ. P., before a judgment on fewer than all the claims in a consolidated action can be appealed."

952 So. 2d at 1060-61.

Although in Hanner we adopted the federal approach we then found most persuasive, that approach was not the only one

being applied by the federal courts. Indeed, the federal courts had developed at least three differing approaches to the question of finality in consolidated cases. See, e.g., In re Refrigerant Compressors Antitrust Litig., 731 F.3d 586, 589 (6th Cir. 2013) ("Some federal appellate courts have concluded that, after the cases are consolidated, they retain their separate identities, others that they always merge, and still others that they sometimes merge and sometimes remain distinct."). That circuit split has now been resolved by the United States Supreme Court.

In Hall v. Hall, 584 U.S. ___, 138 S.Ct. 1118 (2018), the United States Supreme Court unanimously held that when one of multiple cases consolidated under Rule 42(a), Fed. R. Civ. P., is finally decided, that ruling confers upon the losing party the right to an immediate appeal, regardless of whether any of the other consolidated cases remain pending. In reaching that decision, the Court discussed the historical development of the concept of consolidation and the meaning ascribed to that term at the adoption of Rule 42(a), Fed. R. Civ. P. The Court noted that the term "consolidate" had a legal lineage stretching back at least to the first federal consolidation

statute, enacted by Congress in 1813, and that "[f]rom the outset, we understood consolidation not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them." 584 U.S. at ___, 138 S.Ct. at 1125. The Court then summarized pre-Rule 42 Supreme Court and lower-court decisions in which consolidation was held not to have affected the rights of the parties. The Court noted that Rule 42(a) was promulgated against the backdrop of this history and that

> "Rule 42(a) did not purport to alter the settled understanding of the consequences of consolidation. That understanding makes clear that when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals."

584 U.S. at ____, 138 S.Ct. at 1131. The Court summarized its decision:

> "Over 125 years, the Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together -- but not the complete merger -- of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of 'consolidate' in subsection (a)(2). It makes clear that one of

> multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases."

584 U.S. at ____, 138 S.Ct. at 1125.

Although we are not bound to adopt the holding of the Court in Hall, Alabama's Rule 42(a) is derived directly from Federal Rule 42(a). See Rule 42, Committee Comments on 1973 Adoption ("Rule 42(a)[, Ala. R. Civ. P.,] is identical to Rule 42(a)[, Fed. R. Civ. P.]."). Thus, the history of the development and meaning of the term "consolidation" as used in Rule 42(a), Fed. R. Civ. P., examined in Hall, is directly applicable to our own Rule 42(a). Indeed, this Court has expressly recognized the persuasiveness of federal authorities in interpreting our Rule 42(a). See League, 355 So. 2d at 697; Hanner, 952 So. 2d at 1061. As to the issue of finality in consolidated cases, we find the rationale in Hall convincing, and we adopt it. Once a final judgment has been entered in a case, it is immediately appealable, regardless of whether it is consolidated with another still pending case. To the extent Hanner held otherwise, it is overruled.[1]

[1]No party has requested that this Court overrule Hanner, and ordinarily this Court is disinclined to overrule existing caselaw in the absence of a specific request that we do so.

Accordingly, we conclude that this appeal is from a final, appealable judgment.

B. Abatement

Having recognized that the Bluebird action, including Nettles's third-party claims, and the supplemental action are, notwithstanding their consolidation, separate parallel actions, we are squarely presented with the question of abatement under § 6-5-440. Rumberger and the individual defendants each moved the trial court to dismiss the supplemental action pursuant to § 6-5-440. The trial court denied those motions, and ultimately entered a summary judgment in the supplemental action on the merits. Nevertheless, the abatement argument is reasserted on appeal

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See Ex parte McKinney, 87 So. 3d 502, 509 n.7 (Ala. 2011). It is the duty of this Court, however, to consider its own appellate jurisdiction, and "[w]e therefore are not confined to the arguments of the parties in our subject-matter-jurisdiction analysis." Riley v. Hughes, 17 So. 3d 643, 648 (Ala. 2009). Addressing our jurisdiction in this case compels a review of Hanner. Furthermore, we are mindful that we are overruling clear precedent on which other litigants may have relied -- in determining, for example, if and when a notice of appeal is due. In such a case, we think a prospective-only application of today's decision is appropriate. See Ex parte Capstone Bldg. Corp., 96 So. 3d 77, 91 (Ala. 2012) ("'A decision overruling a judicial precedent may be limited to prospective application where required by equity or in the interest of justice.'" (quoting 20 Am. Jur. 2d Courts § 151 (2005))).

as an alternative basis on which to affirm the trial court's judgment.[2]

Section 6-5-440 provides:

> "No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times."

In Ex parte J.E. Estes Wood Co., 42 So. 3d 104 (Ala. 2010), this Court discussed the purpose and application of § 6-5-440:

> "'Section 6-5-440, as initially codified in Ala. Code 1907, § 2451, was "a transcript of section 4331 of the Civil Code of Georgia." Ex parte Dunlap, 209 Ala. 453, 455, 96 So. 441, 442 (1923). See current version at Ga. Code Ann. § 9-2-5(a) (Michie 1982). However, these statutes

[2]Rumberger initially petitioned this Court for a writ of mandamus seeking review of the trial court's denial of its motion to dismiss the supplemental action on abatement grounds. This Court denied the petition without an opinion. Ex parte Rumberger, Kirk & Caldwell, P.C. (No. 1160574, June 29, 2017). We note that "'"[t]he denial [of a petition for a writ of mandamus] does not operate as a binding decision on the merits."'" EB Invs., L.L.C. v. Atlantis Dev., Inc., 930 So. 2d 502, 510 (Ala. 2005)(quoting Ex parte Shelton, 814 So. 2d 251, 255 (Ala. 2001), quoting in turn R.E. Grills, Inc. v. Davison, 641 So. 2d 225, 229 (Ala. 1994)). Thus, denial of an earlier mandamus petition does not preclude this Court from now considering the abatement issue on direct appeal.

merely codified the principle expressed in the common-law maxim: "Nemo debet bis vexari (si constet curiae quod sit) pro una et eadem causa," that is: "No man ought to be twice troubled or harassed (if it appear to the court that he is), for one and the same cause." O'Barr v. Turner, 16 Ala. App. 65, 67-68, 75 So. 271, 274 (1917), cert. denied, 200 Ala. 699, 76 So. 997 (1917). This rule was well established in Alabama long before it was first codified in Ala. Code 1907, § 2451. In Foster v. Napier, 73 Ala. 595 (1883), for example, this Court explained:

> "'"The doctrine is thus stated in 1 Bac. Ab. 28, M.: 'The law abhors multiplicity of actions; and, therefore, whenever it appears on record, that the plaintiff has sued out two writs against the same defendant, for the same thing, the second writ shall abate; for if it were allowed that a man should be twice arrested, or twice attached by his goods for the same thing, by the same reason he might suffer in infinitum; ... if there was a writ in being at the time of suing out the second, it is plain the second was vexatious and ill ab initio.'"

"'Foster v. Napier, 73 Ala. 595, 603 (1883) (quoting 1 M. Bacon, A New Abridgment of the Law 28 (1843)). In fact, the rule was well established as early as 1461, for it was thoroughly discussed and applied in Y.B. 39 Henry VI, pl. 12 (1461), case quoted in toto, Commonwealth v. Churchill,

> 5 Mass. 174 (1809); see also Sparry's Case, 5 Coke 61a., 77 Eng. Rep. 148 (K.B. 1591).'
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> "Ex parte State Mut. Ins. Co., 715 So. 2d 207, 213 (Ala. 1997) (emphasis added).
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> "Historically, a violation of the prohibition against multiple pending actions was redressable by a 'plea in abatement.' Benson v. City of Scottsboro, 286 Ala. 315, 317, 239 So. 2d 747, 748-49 (1970). The plea in abatement of simultaneous actions was the predecessor of the modern motion to dismiss. Terrell v. City of Bessemer, 406 So. 2d 337, 340 (Ala. 1981) ('In this jurisdiction the rule is that a motion to dismiss (formerly a plea in abatement) will be granted where defendant moves to dismiss plaintiff's second action for the same cause, even though plaintiff dismissed his first action after the motion to dismiss was filed.'). Thus, a stay is not an abatement. See Ex parte DeArman, 694 So. 2d 1288, 1290 (Ala. 1997).
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> "Moreover, where § 6-5-440 applies, it 'compels dismissal.' Ex parte Canal Ins. Co., 534 So. 2d 582, 585 (Ala. 1988)(emphasis added) ('Since the matter raised in the state court complaint constitutes a compulsory counterclaim in the federal court action that was pending at the time the state court action was commenced, the statute compels dismissal of the state court action.'). See Ex parte Bennett, 231 Ala. 223, 224, 164 So. 298, 299 (1935) ('A plea in abatement goes to the present right to maintain the action. To sustain the plea results in a dismissal of the action.')."

42 So. 3d at 108-09.

Here, there can be no question that the supplemental action qualifies as a "second action" for the purposes of § 6-5-440. The supplemental action asserts the same causes of

action, against the same parties, arising from the same set of operative facts as does Nettles's third-party complaint in the Bluebird action. Indeed, the express purpose of the supplemental action was to seek recovery of those damages the court in the Bluebird action had ruled were not permitted under third-party practice.[3] Our caselaw has established that this type of claim-splitting is not permitted under § 6-5-440. See Sessions v. Jack Cole Co., 158 So. 2d 652 (Ala. 1963) (holding that the abatement statute precluded simultaneous prosecution of two actions -- one for personal injury, one for property damage -- arising out of the same act).

Furthermore, we are compelled to conclude that, notwithstanding the entry of a summary judgment as to the third-party complaint, because the judgment as to the third-party claim is interlocutory, the Bluebird action remains pending for purposes of § 6-5-440. Our decision in L.A. Draper & Son, Inc. v. Wheelabrator-Frye, Inc., 454 So. 2d 506 (Ala. 1984), is instructive on this issue. In Draper, the plaintiff filed a state-law unfair-competition claim in the

[3]The question whether the trial court properly limited the scope of the third-party claim, or, indeed, whether that claim was a proper third-party claim under Rule 14, Ala. R. Civ. P., is not before this Court.

federal court. The federal court dismissed the claim. The plaintiff refiled the action in the state court, but also appealed the dismissal of the federal action. The trial court dismissed the state action pursuant to § 6-5-440. In affirming the judgment of the trial court, this Court stated:

> "An action is deemed pending in federal court so long as a party's right to appeal has not yet been exhausted or expired. Knights of the K.K.K. v. East Baton Rouge Parish School Board, 679 F.2d 64, 67 (5th Cir. 1982); Mendoza v. Blum, 560 F.Supp. 284 (S.D.N.Y. 1983); Berman v. Schweiker, 531 F.Supp. 1149 (N.D. Ill. 1982). Appellant had thirty days from the issuance of the final order in which to perfect an appeal. Fed. R. App. P. 4(a)(1). Appellant filed the state court suit before the thirty days had expired; therefore, the state court suit was filed while the federal court action was still pending.
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> "...[T]he purpose of § 6-5-440 is to prevent a party from having to defend against two suits in different courts at the same time brought by the same plaintiff on the same cause of action. 'Whether the prior suit is capable of being made effectual, is, in the second suit, a collateral and incidental inquiry; however it may be then decided, the defendant is not by its decision relieved from its burdens. There is a continuing necessity that he should remain before the court, prepared to make defense against it.' [Orman v. Lane, 130 Ala. 305, 308, 30 So. 441, 442 (1901)]. Defendant is still required to defend simultaneously against the same cause of action brought by the same plaintiff in two courts."

454 So. 2d at 508 (footnote omitted). Likewise, in J.E. Estes Wood, we stated that "the dismissal of an earlier filed federal action does not render § 6-5-440 inapplicable during the pendency of an appeal." 42 So. 3d at 111 n.1. In Ex parte Compass Bank, 77 So. 3d 578, 585 (Ala. 2011), this Court, citing L.A. Draper & Son and J.E. Estes Wood, concluded that, "for purposes of abatement, a case is pending until it has been finally adjudged."

Here, the earlier filed third-party complaint in the Bluebird action has not been finally adjudged. The summary judgment entered against Nettles in the Bluebird action has not been certified as final. It remains interlocutory; it is not subject to a direct appeal; and it may be revised by the trial court at any time before the entry of a final judgment. See Rule 54(b), Ala. R. Civ. P. (stating that, absent a Rule 54(b) certification, "the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties"). Accordingly, the multiplicity of actions was not cured by the trial court's entry of a nonfinal judgment as to Nettles's third-party claim in the Bluebird

action. Thus, for the purposes of § 6-5-440, Nettles's third-party action stemming from the Bluebird action remains pending.

Although abatement was not the basis for the trial court's judgment in this matter, this court "will affirm a summary judgment if that judgment is proper for any reason supported by the record, even if the basis for our affirmance was not the basis of the decision below." DeFriece v. McCorquodale, 998 So. 2d 465, 470 (Ala. 2008). Based on the foregoing, the supplemental action was improper under § 6-5-440. Because we conclude that the action was an improper second action under § 6-5-440, we pretermit discussion as to the remaining issues raised on appeal.

III. Conclusion

The summary judgment of the trial court in favor of Rumberger and the individual defendants on all claims asserted against them in the supplemental action is affirmed.

AFFIRMED.

Stuart, C.J., and Bolin, Parker, and Sellers, JJ., concur.

Shaw, Bryan, and Mendheim, JJ., dissent.

Wise, J., recuses herself.

SHAW, Justice (dissenting).

For two independent reasons, I would not overrule Hanner v. Metro Bank & Protective Life Insurance Co., 952 So. 2d 1056 (Ala. 2006). Therefore, I respectfully dissent.

I.

The issue of the correctness of Hanner was not raised or briefed by the parties, and there has been no request to overrule it. In fact, it is not cited by the parties at all. The main opinion, citing Ex parte McKinney, 87 So. 3d 502, 509 n.7 (Ala. 2011), notes that "[n]o party has requested that this Court overrule Hanner, and ordinarily this Court is disinclined to overrule existing caselaw in the absence of a specific request that we do so." ___ So. 3d at ___ n.1. This is true.[4] The main opinion then states, however, that it is

[4]"[T]his Court has long recognized a disinclination to overrule existing caselaw in the absence of either a specific request to do so or an adequate argument asking that we do so." Ex parte McKinney, 87 So. 3d at 509 n.7. This is because "'[s]tare decisis commands, at a minimum, a degree of respect from this Court that makes it disinclined to overrule controlling precedent when it is not invited to do so.'" American Bankers Ins. Co. of Fla. v. Tellis, 192 So. 3d 386, 392 n.3 (Ala. 2015) (quoting Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 926 (Ala. 2002)). See Fort Morgan Civic Ass'n, Inc. v. City of Gulf Shores, 100 So. 3d 1042, 1047 (Ala. 2012) ("However, no party in this case has asked us to overrule City of Dothan [v. Dale County Commission, 295 Ala. 131, 324 So. 2d 772 (1975)], and we accordingly leave any reexamination of our holding in that

the duty of this Court "to consider its own appellate jurisdiction," and that this Court is not confined to the arguments of the parties in analyzing that issue. ___ So. 3d at ___ n.1. Our caselaw, however, indicates that this is only partly the case: Although we will, on our own motion, address the lack or absence of subject-matter jurisdiction, we will not on our own motion address issues for the purpose of finding that subject-matter jurisdiction does exist: "Although our cases indicate that we may, ex mero motu, address 'jurisdictional issues' ... we generally do so in cases involving the lack of subject-matter jurisdiction." Ex parte McKinney, 87 So. 3d at 509 n.7. See also Crutcher v. Williams, 12 So. 3d 631, 635 (Ala. 2008) ("[T]his Court is not obligated to embark on its own expedition beyond the parties'

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case for another day."); Ex parte Alabama Dep't of Human Res., 999 So. 2d 891, 896 (Ala. 2008) (noting that the respondent had not "offered any arguments or support for the conclusion that precedent ... should be overruled or modified in any way"); and Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 898 (Ala. 2006) (noting the absence of a specific request by the appellant to overrule existing authority and stating that, "[e]ven if we would be amenable to such a request, we are not inclined to abandon precedent without a specific invitation to do so"). See also Eickhoff Corp. v. Warrior Met Coal, LLC, [Ms. 1161099, May 4, 2018] ___ So. 3d ___,___ (Ala. 2018) (refusing to overrule controlling caselaw with no request to do so, citing Moore and Clay Kilgore), and M.G.D. v. C.B., 203 So. 3d 855, 858 n.2 (Ala. Civ. App. 2016).

arguments in pursuit of a reason to exercise jurisdiction."). Cf. Blevins v. Hillwood Office Ctr. Owners' Ass'n, 51 So. 3d 317, 322 (Ala. 2010) ("[J]ust because the Court is duty bound to notice the absence of subject-matter jurisdiction, it does not follow that it is so bound to construct theories and search the record for facts to support the existence of jurisdiction for plaintiffs who choose to stand mute in the face of a serious jurisdictional challenge."). The main opinion correctly notes that Riley v. Hughes, 17 So. 3d 643, 648 (Ala. 2009), states that we "are not confined to the arguments of the parties in our subject-matter-jurisdiction analysis," but fails to note that the remainder of the sentence in Riley makes clear that this is "because subject-matter jurisdiction cannot be waived by the failure to argue it as an issue." Riley was ex mero motu addressing the absence of subject-matter jurisdiction. Without a request by the parties for this Court to address Hanner and briefing on why it should be retained or discarded, I would not overrule it.

II.

It appears to me that, if the option to overrule Hanner were before us, there is good reason to keep it. Hanner holds

that a judgment in one action that is consolidated with other actions must be certified as final under Rule 54(b), Ala. R. Civ. P., before it can be immediately appealed. Hanner, 952 So. 2d at 1061. Rule 54(b) acts as a gateway preventing both appellate review in a piecemeal fashion and the risk of inconsistent results arising from a later ruling in the still pending matters. Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 363 (Ala. 2004), and Clarke-Mobile Ctys. Gas Dist. v. Prior Energy Corp., 834 So. 2d 88, 95 (Ala. 2002). Further, the need for an immediate appeal might be mooted by future developments or rulings in the remaining claims pending in the trial court. Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1265 (Ala. 2010). The trial court is thus afforded discretion to determine whether there is a just reason--or not--for an immediate appeal. Ragland v. State Farm Mut. Auto. Ins. Co., 238 So. 3d 641, 644 (Ala. 2017).

This was the rationale for adopting the rule in Hanner:

> "'In our view, the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions unless a 54(b) certification is entered by the district court. This leaves the discretion with the court which is best able to evaluate the [e]ffect of an interim appeal on the parties and on the expeditious resolution of the entire action.'"

Hanner, 952 So. 2d at 1061 (quoting Huene v. United States, 743 F.2d 703, 705 (9th Cir. 1984)). The Supreme Court's decision in Hall v. Hall, 584 U.S. ___, 138 S.Ct. 1118 (2018), the rationale of which is used in the main opinion to overrule Hanner, focuses on the historical development and meaning of the applicable federal rules. It does not address the above practical concerns found in Alabama law; for that reason, I am unpersuaded that Hall's rationale should be applied in our case.

Under the new rule adopted in the main opinion, an appeal of a judgment in a case that is part of a consolidated action might be so intertwined with the still pending matters that all the concerns that require the denial of a Rule 54(b) certification--the danger of inconsistent results, piecemeal appellate review, and the potential for the judgment to be mooted--could exist. In such an appeal, there would be strong reasons either to abstain from ruling or to create an exception, but that simply transfers the Rule 54(b) gateway determination from the trial court to this Court. I see no need to alter our current rule; nothing before us indicates that our current process is in need of alteration. I would not overrule Hanner. Under Hanner, the instant appeal is

from a nonfinal judgment and, thus, is due to be dismissed. I would dismiss the appeal and pretermit the discussion of the applicability of Ala. Code 1975, § 6-5-440. I thus respectfully dissent.

MENDHEIM, Justice (dissenting).

Because the parties did not address overruling Hanner v. Metro Bank & Protective Life Insurance Co., 952 So. 2d 1056 (Ala. 2006), and adopting the rule of Hall v. Hall, 584 U.S. ___, 138 S.Ct. 1118 (2018), I respectfully dissent. I agree with Justice Shaw's analysis of this issue.