REL: September 6, 2019

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

1180292

Startley General Contractors, Inc., and Mandy Powrzanas

v.

Water Works Board of the City of Birmingham et al.

Appeal from Jefferson Circuit Court
(CV-18-901080)

PER CURIAM.

Startley General Contractors, Inc. ("Startley"), and Mandy Powrzanas, the plaintiffs below (hereinafter referred to collectively as "the plaintiffs"), appeal from the denial by Jefferson Circuit Court Judge Robert S. Vance, Jr., of their

renewed motion seeking to have Judge Vance recuse himself from the underlying action the plaintiffs filed against the Water Works Board of the City of Birmingham ("BWWB"); Tommy Joe Alexander, Deborah Clark, Brenda J. Dickerson, William Burbage, Jr., Ronald A. Mims, Brett A. King, Sherry A. Lewis, George Munchas, and William R. Muhammad, members of BWWB; Macaroy Underwood, T.M. Jones, Jerry Lowe, and Richard Newton, employees of BWWB; Jones Utility and Contracting Co., Inc. ("Jones Utility"); and Richard Jones (all hereinafter referred to collectively as "the defendants"). We affirm.

I. Facts

Judge Vance's decision concerning the plaintiffs' renewed motion to recuse is the only matter before us in this appeal. Therefore, the facts of the underlying action are largely immaterial to the disposition of this appeal. It suffices to say that the plaintiffs allege that the defendants conspired to violate Alabama's competitive-bid law in ways that resulted in financial harm to the plaintiffs.

On March 15, 2018, the plaintiffs filed their original complaint in the Jefferson Circuit Court alleging against the defendants claims of negligence, wantonness, and recklessness

in violating Alabama's competitive-bid law, "improper contract award," willful violation of Alabama's public-works law, collusion, breach of contract, fraud, deceptive business practices, falsifying business records, criminal solicitation, breach of fiduciary duty, violation of the Alabama Code of Ethics, federal-law claims under the Sarbanes-Oxley Act and the False Claims Act, and negligent retention or supervision of employees. The case was initially assigned to Judge Tamara Harris Johnson.

On April 5, 2018, Judge Johnson entered an order recusing herself from the case based on Canon 3.C., Alabama Canons of Judicial Ethics, because, before she began her service as a judge, she had represented defendants BWWB and Macaroy Underwood in her legal practice. On the same date, April 5, 2018, defendants Jones Utility and Richard Jones removed the case to the United States District Court for the Northern District of Alabama based on federal-law claims the plaintiffs had asserted against the defendants in the action. According to the parties, even though the case had been removed to federal court, on April 6, 2018, the case was reassigned to Judge Vance. On May 24, 2018, the federal district court

entered an order dismissing without prejudice the plaintiffs' federal-law claims under the Sarbanes-Oxley Act and the False Claims Act and remanding the plaintiffs' state-law claims to the Jefferson Circuit Court. At that point, the case was returned to Judge Vance, and he set a status conference for the case to be held on June 22, 2018.

On July 5, 2018, the plaintiffs filed a motion seeking to have Judge Vance recuse himself "pursuant to Alabama Code [1975,] § 12-24-3[,] and Alabama Canons of Judicial Ethics, Canon 3(C)." The plaintiffs contended that Judge Vance had received monetary contributions to his 2018 campaign for Chief Justice of the Alabama Supreme Court from law firms and attorneys representing the defendants. Specifically, the motion to recuse highlighted a $2,500 contribution to Judge Vance's campaign by the law firm of Starnes, Davis and Florie, LLP ("Starnes"), which represented Jones Utility and Richard Jones in the action, which contribution the plaintiffs alleged was donated on April 9, 2018. The plaintiffs alleged that the contribution represented the first time that Starnes had ever donated to a judicial campaign for Judge Vance and that it represented the largest amount Starnes had "made to any

campaign or PAC to date." The motion further noted two individual contributions in April and June 2018 to Judge Vance's campaign from attorneys at Starnes, each in the amount of $250. The motion to recuse also noted three individual contributions to Judge Vance's campaign in March, April, and June 2018 by attorneys at the law firm of Cory Watson, P.C., which represented BWWB, in the amounts of $1,000, $250, and $250. Finally, the motion to recuse noted a $1,000 contribution on May 1, 2018, by Parnell Thompson, LLC, which represented BWWB, to the Alabama Development PAC, and a subsequent $1,000 contribution two weeks later from the Alabama Development PAC to Judge Vance's campaign. Although the motion to recuse mentioned Canon 3.C., it made no specific argument as to why that canon required Judge Vance's recusal from the case.

On July 10, 2018, BWWB filed a response in opposition to the plaintiffs' motion to recuse. Among other things, they observed that the contributions highlighted in the motion were small in comparison to the total amount received by Judge Vance's campaign for Chief Justice in the month of April 2018 alone, which they averred to be $74,700.

On July 11, 2018, the plaintiffs filed a reply in support of their motion to recuse in which they observed that "[c]ollectively the Defendants' attorneys, law firms and law partners have given $5,500 to the Honorable Judge Robert Vance, Jr.'s campaign." They argued that this "could cause an objective probability of actual bias by the Judge by the acceptance of the campaign contributions," echoing language in § 12-24-3(a)(2), Ala. Code 1975.

On July 12, 2018, Jones Utility and Richard Jones filed their own response in opposition to the motion to recuse in which they observed, among other things, that the $2,500 contribution from Starnes to Judge Vance's campaign, although received by the campaign on April 9, 2018, was donated on March 30, 2018, before the case was randomly assigned to Judge Vance. The response also noted that, even if the date the donation was received was considered relevant, the case was pending in the federal district court between April 5, 2018, and May 24, 2018, and it was not known during that period that the case would eventually be remanded to the Jefferson Circuit Court.

On July 29, 2018, Judge Vance entered an order denying the motion to recuse. In pertinent part, he explained: "Recusal is not mandated or even presumed under Ala. Code [1975,] § 12-24-3[,] given that the contributions at issue make up a relatively small percentage of the all contributions received in the undersigned's current campaign."

On August 3, 2018, the plaintiffs petitioned this Court for a writ of mandamus directing Judge Vance to recuse himself from the case (case no. 1171021).[1] The petition presented arguments for recusal based on Canon 3.C(1), Ala. Canons of Jud. Ethics, and § 12-24-3, Ala. Code 1975. On August 13, 2018, the plaintiffs filed in this Court a "First Supplement to Petition for Writ of Mandamus" in which they asserted that they had just discovered that "on February 22, 2018 [BWWB] retained the services of attorney Anthony Joseph with Maynard, Cooper and Gayle[, P.C.,] to investigate whether [BWWB] is

[1]The petition listed one contribution to Judge Vance's campaign for Chief Justice that was not mentioned in the motion to recuse in the circuit court. The petition alleged that one of the attorneys at Starnes who contributed to Judge Vance's campaign, H. Thomas Wells III, had a father, H. Thomas Wells, Jr., who worked at Maynard, Cooper, and Gayle, P.C., and who "donates regularly to the MCG PAC, and the MCG PAC made a campaign contribution to the Honorable Judge Robert Vance on April 30, 2018."

violating the Alabama Competitive Bid Law, which is at issue in this litigation." The plaintiffs then asserted that 11 attorneys at Maynard, Cooper, and Gayle, P.C. ("Maynard"), had contributed to Judge Vance's campaign for Chief Justice. The first supplement also stated that W. Stancil Starnes, the father of an attorney at Starnes, W. Stancil Starnes, Jr., had contributed $1,000 to Judge Vance's campaign on July 30, 2018. The first supplement concluded that up to that point in time "defense counsel and their partners" had contributed a total of $10,950 to Judge Vance's campaign for Chief Justice. On August 16, 2018, the plaintiffs filed a motion in the circuit court seeking a stay of the proceedings while the petition for a writ of mandamus was pending before this Court. On September 16, 2018, Judge Vance denied the plaintiffs' motion to stay the proceedings.

On September 18, 2018, while the plaintiffs' mandamus petition was still pending with this Court, the plaintiffs filed a "Renewed Motion to Recuse the Honorable Judge Robert Vance" in the circuit court ("the renewed motion to recuse"). The first three pages of the renewed motion to recuse repeated verbatim the first three pages of the original motion to

recuse, except that it mentioned filings, such as the petition for a writ of mandamus, that had not been submitted at the time of the original motion. The renewed motion to recuse then related the plaintiffs' discovery of Maynard's relationship with BWWB and the attorneys at that firm who had contributed to Judge Vance's campaign, just as the plaintiffs had done in their first supplement to their mandamus petition. The renewed motion to recuse asserted that, "as of the date of the filing of this motion," Judge Vance's campaign for Chief Justice had "received a total of $40,645 from the [defendants' counsel] and associated parties," and it broke that number down in monthly increments from April 2018 through August 2018. The plaintiffs contended in the renewed motion to recuse that the amounts contributed established a "rebuttable presumption" under § 12-24-3(b)(l), Ala. Code 1975, that Judge Vance should recuse himself from the case. This was so, the plaintiffs argued, because in April 2018 Judge Vance's campaign received $75,645 in total donations, and during the same month counsel for the defendants had contributed $8,750 to Judge Vance's campaign, thus meeting the 10% threshold required in § 12-24-3(b)(l) to establish a rebuttable

presumption. Although the renewed motion to recuse mentioned Canon 3.C., it made no specific argument as to why that canon required Judge Vance's disqualification from the case.

On September 25, 2018, the plaintiffs filed in this Court a "Second Supplement to Petition for Writ of Mandamus." In the second supplement, the plaintiffs repeated the updated amounts they contended counsel for the defendants had given to Judge Vance's campaign. They added the observation that the total "contributions to date are $632,472.19. The defense counsel contributions account for nearly 6.5% of the Honorable Judge Robert Vance's total campaign contributions."

On October 29, 2018, this Court denied the plaintiffs' mandamus petition by order. In pertinent part, the order stated: "IT IS ORDERED that the Petition for Writ of Mandamus is DENIED. See § 12-24-3(d), Ala. Code 1975." On November 13, 2018, Judge Vance denied the renewed motion to recuse. He did not elaborate his reasons for doing so in the order. On December 13, 2018, the plaintiffs filed this appeal from the denial of the renewed motion to recuse.

II. Analysis

We note at the outset that our basis for evaluating all aspects of this appeal, including our standard of review, is § 12-24-3, Ala. Code 1975. In their briefs to this Court the plaintiffs have presented additional arguments based on Canon 3.C(1), Ala. Canons of Jud. Ethics, and the federal due-process standard for judicial recusal provided in Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009). However, as our rendition of the facts recounts, although both the motion to recuse and the renewed motion to recuse mentioned Canon 3.C., neither motion presented any argument based on the Canons of Judicial Ethics. Moreover, the plaintiffs never mentioned Caperton, let alone presented an argument based on Caperton's due-process standard, in either the original motion to recuse or the renewed motion to recuse. Therefore, this Court will not consider those new arguments in this appeal. See, e.g., Ware v. Timmons, 954 So. 2d 545, 557 (Ala. 2006) (observing that "'[t]his 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'"

(quoting Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992))).

We are left, then, with § 12-24-3, a statute that became effective in 2014 that has not been interpreted by this Court. Section 12-24-3 provides:

> "(a) In any civil action, on motion of a party or on its own motion, a justice or judge shall recuse himself or herself from hearing a case if, as a result of a substantial campaign contribution or electioneering communication made to or on behalf of the justice or judge in the immediately preceding election by a party who has a case pending before that justice or judge, either of the following circumstances exist:
>
> > "(1) A reasonable person would perceive that the justice or judge's ability to carry out his or her judicial responsibilities with impartiality is impaired.
> >
> > "(2) There is a serious, objective probability of actual bias by the justice or judge due to his or her acceptance of the campaign contribution.
>
> "(b) A rebuttable presumption arises that a justice or judge shall recuse himself or herself if a campaign contribution made directly by a party to the judge or justice exceeds the following percentages of the total contributions raised during the election cycle by that judge or justice and was made at a time when it was reasonably foreseeable that the case could come before the judge or justice:

> "(1) Ten percent in a statewide appellate court race.
>
> "(2) Fifteen percent in a circuit court race.
>
> "(3) Twenty-five percent in a district court race.

"Any refunded contributions shall not be counted toward the percentages noted herein.

"(c) The term party, as referenced in this section, means any of the following:

> "(1) A party or real party in interest to the case or any person in his or her immediate family.
>
> "(2) Any holder of five percent or more of the value of a party that is a corporation, limited liability company, firm, partnership, or any other business entity.
>
> "(3) Affiliates or subsidiaries of a corporate party.
>
> "(4) Any attorney for the party.
>
> "(5) Other lawyers in practice with the party's attorney.

"(d) An order of a court denying a motion to recuse shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action. The appeal may be filed only within 30 days of the order denying the motion to recuse. During the pendency of an appeal, where the threshold set forth in subsection (b) is met,

> the action in the trial court shall be stayed in all respects."

A. Preliminary Motions

The defendants have filed a motion to dismiss this appeal as untimely filed. They argue that the renewed motion to recuse is nothing more than a repetition of the original motion to recuse, which was denied by the circuit court on July 29, 2018. The defendants note that § 12-24-3(d) clearly states that an order denying a motion to recuse based upon the provisions of § 12-24-3 "shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action" and that "[t]he appeal may be filed only within 30 days of the order denying the motion to recuse." Instead of appealing the denial of their original motion to recuse, however, the plaintiffs filed a petition for a writ of mandamus, which this Court denied by order on October 29, 2018, with a citation to § 12-24-3(d). The defendants contend that the renewed motion to recuse is nothing more than attempt to get a "second bite at the apple" of appellate review because, they say, the plaintiffs did not follow correct appellate procedure the first time. The defendants further

observe that the renewed motion to recuse cannot be viewed as the equivalent of a Rule 59(e), Ala. R. Civ. P., motion because it was filed on September 18, 2018, more than 30 days after the denial of the original motion to recuse. The defendants also argue that the renewed motion to recuse cannot be viewed as the equivalent of a Rule 60(b), Ala. R. Civ. P., motion because "it did not rely on new evidence, only citing to redundant contributions and/or contributions which could have been discovered within the 30 day period following the first order." Defendants' motion to dismiss appeal, p. 3 n.1.

The plaintiffs counter that the renewed motion to recuse is based upon new evidence "that was not available at the time of the filing of their first motion or their mandamus." Plaintiffs' response in opposition to the motion to dismiss, p. 6. The plaintiffs assert that on August 13, 2018, they

> "discovered via the BWWB website that on February 22, 2018, the BWWB Board, adopted a resolution retaining the services of [Maynard] to investigate whether BWWB was violating the Alabama [Competitive] Bid Law, which is one of the matters at the very heart of this litigation. ... [Plaintiffs] found this information by reviewing BWWB Board agendas that had been posted to the BWWB website. The BWWB Board agenda for July 26, 2018 stated that the minutes for February 22, 2018 and April 12, 2018 were approved at the July 26, 2018 BWWB Board meeting. ... [Plaintiffs] filed their

> first supplement to their mandamus on August 13, 2018 to include this newly discovered information and on September 18, 2018, the [plaintiffs] filed a renewed Motion to Recuse to update the trial court with this newly discovered evidence."

The plaintiffs attached to their response in opposition to the motion to dismiss copies of the BWWB board-meeting minutes for certain dates.[2] They also have attached copies of the same BWWB minutes to their appellate brief along with what they say is a list summarizing contributions to Judge Vance's campaign for Chief Justice by attorneys associated with the defendants. The defendants have filed motions to strike the attachments to the plaintiffs' response to the motion to dismiss and the attachments to the plaintiffs' appellate brief on the basis that none of those materials is contained in the record on appeal. The defendants further contend that the plaintiffs' arguments based on this evidence, which was not before the circuit court, should be stricken as well and should not be considered by this Court.

The defendants are correct that the attachments to the plaintiffs' response to the motion to dismiss as well as their

[2]Specifically, the plaintiffs attached meeting minutes for February 22, 2018, and April 12, 2018. They also attached a BWWB "Agenda" for the BWWB meeting of July 26, 2018.

attachments to their appellate brief are not contained in the record on appeal, and the plaintiffs offer no plausible explanation as to why we should consider them.[3]

> "'"[A]ttachments to briefs are not considered part of the record and therefore cannot be considered on appeal."' Morrow v. State, 928 So. 2d 315, 320 n.5 (Ala. Crim. App. 2004) (quoting Huff v. State, 596 So. 2d 16, 19 (Ala. Crim. App. 1991)). Further, we cannot consider evidence that is not contained in the record on appeal because this Court's appellate review '"is restricted to the evidence and arguments considered by the trial court."' Ex parte Old Republic Sur. Co., 733 So. 2d 881, 883 n.1 (Ala. 1999) (quoting Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) ...)."

Roberts v. NASCO Equip. Co., 986 So. 2d 379, 385 (Ala. 2007). Accordingly, we grant the defendants' motions to strike the plaintiffs' attachments that are not contained in the record. We cannot agree that all the plaintiffs' arguments that are related to those attachments must be stricken because the plaintiffs mentioned some of those campaign contributions, particularly contributions by Maynard attorneys, in their renewed motion to recuse, even though they did not explain in

[3]The plaintiffs argue that the attachments were submitted "in the interest of judicial economy and to expedite this appeal process" and that "[t]he trial court as well as this Honorable Court can view them on the BWWB website just as the [plaintiffs] did." Plaintiffs' response in opposition to defendants' motion to strike, p. 4.

that motion how they discovered the connection between BWWB and Maynard.

As for the defendants' motion to dismiss the appeal, we also agree with the defendants that most of the information the plaintiffs claim to be "new evidence" in the renewed motion to recuse does not, in fact, meet that description. As this Court has explained many times, "newly discovered evidence" is, among other things, evidence that "could not have been discovered with the exercise of due diligence" within the time for filing the first motion, and the evidence "is not merely cumulative." Welch v. Jones, 470 So. 2d 1103, 1112 (Ala. 1985). The plaintiffs assert that they only discovered that BWWB had retained Maynard to investigate BWWB's compliance with the competitive-bid law on August 13, 2018, and that this was because the BWWB minutes revealing this information were not approved for public posting until July 26, 2018. This latter date was still before Judge Vance denied the original motion to recuse on July 29, 2018, and it was well before the 30-day period after the entry of that

order.[4] Despite this, the plaintiffs did not file in the circuit court a motion containing this information until September 18, 2018. Moreover, most of the new contributions listed in the renewed motion to recuse occurred between April and July 2018 and could have been included in a "postjudgment motion" from the denial of the original motion to recuse. The remainder of the listed contributions occurred in August 2018. Even assuming those remaining contributions were not reported until September 2018, they were not markedly different from any of the previous contributions; thus that evidence was merely cumulative of what had already been, or could have been, presented for purposes of seeking Judge Vance's recusal.

However, even though most of the evidence contained in the renewed motion to recuse cannot be considered "newly discovered," it is clear that the plaintiffs used that evidence to present a new argument in their renewed motion to recuse that they had not presented in their original motion. Specifically, in their renewed motion to recuse, the plaintiffs contended that the contributions to Judge Vance's

[4]It is also unclear why the plaintiffs were solely dependent upon the BWWB minutes to find out whom BWWB had retained as counsel for various purposes.

campaign for Chief Justice by parties to the case established a "rebuttable presumption" under § 12-24-3(b)(1) that Judge Vance should recuse himself. The plaintiffs did not argue in their original motion to recuse that the rebuttable presumption found in the statute applied.[5] Because the plaintiffs presented a new argument in their renewed motion to recuse, that motion cannot be considered a mere repetition of the original motion. Accordingly, we conclude that the motion to dismiss this appeal is due to be denied because the plaintiffs filed a timely appeal from Judge Vance's denial of the renewed motion to recuse.

B. The Merits of the Renewed Motion to Recuse

As we noted in Part A of this analysis, the plaintiffs contend that § 12-24-3 requires Judge Vance's recusal in this case. For the most part, their arguments in this regard focus

[5]Indeed, even assuming the plaintiffs are correct in the method they use to calculate whether the threshold for a rebuttable presumption has been reached -- and this opinion explains that they are not -- the plaintiffs could not have argued in their original motion that the 10% threshold in a statewide appellate race required for a rebuttable presumption requiring recusal had been met because in their original motion they mentioned only $5,500 in campaign contributions during the month of April 2018 and Judge Vance had received over $70,000 in campaign contributions during that month.

on their contention that the campaign contributions they highlight meet the threshold in § 12-24-3(b)(1) for creating a rebuttable presumption that Judge Vance should have recused himself from the case. The plaintiffs also argue that the circumstances of one particular contribution, and the total amount of contributions they highlight, give cause to believe that "[a] reasonable person would perceive that [Judge Vance's] ability to carry out his ... judicial responsibilities with impartiality is impaired." § 12-24-3(a)(1).

Before we examine the plaintiffs' arguments in detail, we again note that this Court has not previously had occasion to interpret § 12-24-3. We have repeatedly emphasized that

> "[t]he fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. 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."

IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992). Moreover, "[w]e have often stated that 'the

meaning of statutory language depends on context,' and that, as a result, statutes must be read as [a] whole in order to ascertain the meaning and intent of each component." Ex parte Master Boat Builders, Inc., 779 So. 2d 192, 196 (Ala. 2000) (quoting Ex parte Jackson, 614 So. 2d 405, 406 (Ala. 1993)).

The plaintiffs contend that the "rebuttable presumption" in § 12-24-3(b)(1) has been met because counsel for the defendants contributed more than 10 percent of the total contributions to Judge Vance's campaign during certain months of 2018. The plaintiffs explain:

> "During the month of April 2018, Judge Vance's campaign received a total of $74,700.00 in campaign contributions. Ten percent of that amount would be $7,470[;] parties whose campaign contributions can be counted for purposes of creating a rebuttable presumption totaled $11,400.00. In May 2018, Judge Vance's campaign contributions totaled $130,365.00, ten percent would be $13,036.50. Parties campaign contributions related to this matter totaled $16,400.00. And finally, in July 2018, Judge Vance's campaign contributions received and the amount the parties contributed to Judge Vance's campaign again exceeded 10%."

Plaintiffs' reply brief, p. 28. There are at least three ways in which the plaintiffs' conclusion in this regard is erroneous under the statute.

The first error concerns who the plaintiffs consider to be a "party" for purposes of § 12-24-3. Section 12-24-3(b)(1) provides, in part, that "[a] rebuttable presumption arises that a justice or judge shall recuse himself or herself if a campaign contribution made directly by a party to the judge or justice exceeds the following percentages." (Emphasis added.) The plaintiffs repeatedly note that § 12-24-3(c) defines the term "party"; it provides, in part:

> "(c) The term party, as referenced in this section, means any of the following:
>
> "....
>
> "(4) Any attorney for the party.
>
> "(5) Other lawyers in practice with the party's attorney."

The plaintiffs argue that the foregoing definition encompasses all the contributors they listed in the renewed motion to recuse. For example, the plaintiffs included contributions from attorneys at Maynard because Maynard has been retained by BWWB, and so the plaintiffs contend that Maynard is an "attorney for [a] party."[6]

[6]Similarly, the plaintiffs relate that "the law firm of Baker Donelson is one of Jones Appellee, Jones Utility and Contracting Co., Inc.'s, law firms," and so they include

This argument fails to account for the fact that the statute must be read as a whole. Section 12-24-3(c)(1) defines a "party" as "[a] party or real party in interest to the case or any person in his or her immediate family." (Emphasis added.) Subsection (c)(4) and (5) then list as a "party" "[a]ny attorney for the party" or "[o]ther lawyers in practice with the party's attorney." Section 12-24-3(a) discusses "a substantial campaign contribution ... to or on behalf of the justice or judge ... by a party who has a case pending before that justice or judge." (Emphasis added.) Section 12-24-3(b) states that a rebuttable presumption arises as to a campaign contribution that "was made at a time when it was reasonably foreseeable that the case could come before the judge or justice." (Emphasis added.) In the context of the statute as a whole, the term "party" in § 12-24-3 refers to a party to the case that is before the judge or justice who

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contributions to Judge Vance's campaign from attorneys at Baker, Donelson Bearman, Caldwell, and Berkowitz P.C. ("Baker Donelson") in their calculations. Plaintiffs' brief, p. 4. However, contributions from Baker Donelson attorneys cannot be considered because the plaintiffs never mentioned contributions from Baker Donelson attorneys in the circuit court, and they provide no citation to the record establishing that Baker Donelson is, in fact, counsel for Jones Utility in some capacity.

received the contribution. Therefore, when § 12-24-3(c)(4) mentions an "attorney for the party" it refers to an attorney representing the party in the case before the judge or justice. The term "party" does not refer to all attorneys who may be retained by a party to a case for purposes other than representing that party in the case before the judge or justice.

No attorney at Maynard is counsel of record for any party in the underlying action. Consequently, contributions from Maynard attorneys cannot be included in determining whether the 10% threshold of § 12-24-3(b)(1) has been met in this case. When Maynard contributions are excluded, even if the plaintiffs' monthly calculation method is employed, the contributions listed by the plaintiffs fail to reach the 10% threshold.

The plaintiffs' second error is that they fail to account for the plain language of the statute with respect to the calculation of contributions. Specifically, the statute contains repeated references to a single "party." As we noted above, § 12-24-3(a) discusses "a substantial campaign contribution ... made to or on behalf of the justice or judge

... by a party who has a case pending before that justice or judge." (Emphasis added.) Section 12-24-3(b)(1) states that "[a] rebuttable presumption arises that a justice or judge shall recuse himself or herself if a campaign contribution made directly by a party to the judge or justice exceeds the following percentages." (Emphasis added.) Under § 12-24-3(c), a "party" may include more than one person, but only those persons who are directly affiliated with a single party. So, § 12-24-3(c) states: "The term party, as referenced in this section, means ... [a] party or real party in interest to the case or any person in his or her immediate family," "[a]ffiliates or subsidiaries of a corporate party," "[a]ny attorney for the party," or "[o]ther lawyers in practice with the party's attorney." (Emphasis added.) The consistent usage of the term "party" throughout § 12-24-3 is to a party to a case and those directly related to that party, by family or business or through legal representation.

In contrast, in order to achieve a larger campaign-contribution amount so as to meet the rebuttable-presumption threshold in § 12-24-3(b), the plaintiffs have aggregated the campaign contributions of separate defendants in the case. In

other words, the plaintiffs have added together the campaign contributions of attorneys for BWWB and attorneys for Jones Utility and Richard Jones, even though § 12-24-3 does not contemplate the aggregation of campaign contributions by multiple parties as if the total of those contributions counted as contributions from "a party" to a case. Such aggregation does not naturally follow, given that separate defendants in an action do not necessarily have united interests; indeed, they often have opposing interests. Yet, the plaintiffs' interpretation of the statute assumes that separate defendants have a united motive in making campaign contributions. We reject that interpretation as contrary to the plain language of the statute. If the contributions highlighted by the plaintiffs are separated by individual party rather than aggregated, even if the plaintiffs' monthly calculation method is used, the 10% threshold necessary to create a rebuttable presumption is not met.

Third, the plaintiffs' interpretation of § 12-24-3(b) does not comport with the plain meaning of the term "election cycle." Section 12-24-3(b) states, in part: "A rebuttable presumption arises that a justice or judge shall recuse

himself or herself if a campaign contribution made directly by a party to the judge or justice exceeds the following percentages of the total contributions raised during the election cycle by that judge or justice ...." (Emphasis added.) The plaintiffs contend that an "election cycle" under this statute is a single month during a judge or justice's campaign for office. Hence, the plaintiffs' focus on the percentage of a "party's" campaign contributions to Judge Vance's campaign for Chief Justice for the month of April and then for other single months during the 2018 calendar year.[7] The only support the plaintiffs offer for this interpretation of the term "election cycle" is a passage from Dupre v. Dupre, 233 So. 3d 357 (Ala. Civ. App. 2016), the only previous appellate-court decision to interpret § 12-24-3, in which the Court of Civil Appeals noted:

> "In this case, the former husband asserted that, while presiding over the underlying action, Judge Palmer had collected an in-kind contribution of $480

[7]We note that the renewed motion to recuse argued only that party campaign contributions for the month of April 2018 met the threshold for the rebuttable presumption in § 12-24-3(b). The plaintiffs added the months of May, June, July, and August in their brief to this Court. Therefore, arguments concerning those additional months constitute new arguments on appeal that cannot be considered by this Court. See, e.g., Roberts, 986 So. 2d at 385.

> from Sexton [one of the former wife's attorneys] on September 24, 2015. The former husband presented evidence indicating that Judge Palmer had collected $5,190 in campaign contributions in September 2015. Assuming that the term 'election cycle' as used in § 12-24-3(b) could be limited to only one month of the election season, which we do not decide, it remains that the former husband did not allege or prove that Judge Palmer had collected 15%[8] of her campaign contributions from Sexton in September 2015 because his $480 in-kind contribution amounted to only 9.25% of the September 2015 total. Accordingly, the former husband did not prove the essential facts giving rise to the rebuttable presumption in § 12-24-3(b)(2)."

233 So. 3d at 360 (emphasis added).

As the passage from Dupre clearly indicates, the Court of Civil Appeals did not conclude that the term "election cycle" as used in § 12-24-3(b) can be limited to one-month increments. Instead, the court simply accepted that notion for the sake of argument and concluded that the appellant's argument nonetheless failed because the campaign contribution at issue did not reach the threshold percentage required to establish a rebuttable presumption for recusal. Thus, the plaintiffs lack any support for their interpretation beyond the fact that it is convenient for reaching the required

[8]Judge Palmer was in a campaign for circuit judge. The rebuttable presumption in § 12-24-3(b)(2) for a circuit-court race is 15%.

threshold percentage of campaign contributions to constitute a rebuttable presumption.

In any event, the plaintiffs' interpretation is contrary to the plain language of § 12-24-3(b). Section 12-24-3(b) refers to "the election cycle," which contemplates a single period during a judicial campaign, not multiple periods as would be the case if the term "election cycle" could be referring to one-month increments over the course of a campaign for judicial office. Moreover § 12-24-3(a) discusses "a substantial campaign contribution ... made to or on behalf of the justice or judge in the immediately preceding election by a party who has a case pending before that justice or judge." (Emphasis added.) This reference to the "preceding election" also indicates that the term "election cycle" means the entire time frame in which campaign contributions may be accepted until the election for the judicial office at issue.

The plaintiffs' interpretation of "election cycle" is also contrary to the common usage of the term in Alabama law. A perusal of Alabama statutes that use the term "election cycle" shows that the term is most often used to refer to the full period during a year in which an election is held, not

individual months preceding an election. See, e.g., § 17-5-9(a), Ala. Code 1975 (stating that "[a]ll statements and reports, including amendments, required of principal campaign committees under the provisions of this chapter shall be filed with the Secretary of State ... and in the case of candidates for local office ... with the judge of probate of the county in which the office is sought for the 2016 election cycle" (emphasis added)); § 17-5-19.1(a), Ala. Code 1975 (stating that "[c]ommencing with the 2018 election cycle, the appropriate election official ... shall levy an administrative penalty against any person who fails to timely file a report required by this chapter and who does not remedy the filing of the report pursuant to subsection (h)" (emphasis added)); § 17-5-8(a)(1), Ala. Code 1975 (stating that the candidate or designated agent shall file, "[b]eginning after the 2012 election cycle, ... monthly reports not later than the second business day of the subsequent month, beginning 12 months before the date of any primary, special, runoff, or general election for which a political action committee or principal campaign committee receives contributions or makes expenditures with a view toward influencing such election's

result" (emphasis added)); and § 17-16-2.1(b) (stating that "[t]he [Election Expense Reimbursement] committee shall meet not less than 90 days prior to the 2012 state primary to develop and approve the list of reimbursable expenses for the upcoming election cycle" (emphasis added)). The use of the term "election cycle" in the foregoing statutes is particularly noteworthy, given that several concern election-contribution reports, and they all refer to a yearly "election cycle."[9] Section 17-5-8, in particular, discusses "monthly reports" that are to be filed "[b]eginning after the 2012 election cycle," thus indicating that an "election cycle" typically includes more than a single month during a campaign for public office.

Thus, keeping in mind the common usage of the term in Alabama law and the use of the term in the context of this

[9]Of course, the term is not used exclusively to refer to a period of a year or years; sometimes it references the period for a specific type of election, such as a primary election or a general election. See Ala. Op. Att'y Gen. No. 2006-101 (June 6, 2006) (explaining that "[b]ecause, pursuant to Act 2006-354, the primary election and any primary runoff election are more than 30 days apart, separate applications are required. This requirement, however, cannot be implemented for the 2006 primary election cycle." (emphasis added)). We do not intend to preclude the possibility of that meaning in § 12-24-3(b).

specific statute, we conclude that "election cycle," as that term is used in § 12-24-3(b), cannot be limited to only one-month increments preceding the election but, instead, includes the entire period in which a candidate for judicial office may accept campaign contributions until the election for the office.

The plaintiffs admitted before the circuit court and in the docketing statement attached to their notice of appeal that the total amount of campaign contributions "by defendants' counsel and others account for approximately 6.5%" of the total campaign contributions Judge Vance received in his campaign for Chief Justice. Therefore, the plaintiffs did not establish that the threshold for a rebuttable presumption for recusal was met for the election cycle.

Apart from arguing that a rebuttable presumption arose from campaign contributions by parties to the case, the plaintiffs also argue more generally that the nature and timing of one particular campaign contribution, along with the total amount contributed by parties highlighted in the renewed motion to recuse, lead to the conclusion that "[a] reasonable person would perceive that [Judge Vance's] ability to carry

out his ... judicial responsibilities with impartiality is impaired." § 12-24-3(a)(1). Specifically, the plaintiffs call attention to a $2,500 contribution by Starnes that they assert was contributed just after Judge Vance was assigned their case, that it was the first time Starnes had given to a campaign of Judge Vance's, and that it was "the largest campaign contribution [Starnes] has made to any campaign or PAC to date." Plaintiffs' brief, p. 11.

However, the record shows that the $2,500 contribution was made on March 30, 2018, not on April 9, 2018, as the plaintiffs repeatedly asserted both in the circuit court and on appeal. Thus, at the time the contribution was made, Judge Johnson had not yet recused herself from the case, and so Judge Vance had not yet been assigned to the case. Moreover, the plaintiffs' own submissions in support of the renewed motion to recuse show that Starnes had contributed similar or even larger amounts to other candidates for public office in Alabama both before and after that particular contribution to Judge Vance's campaign for Chief Justice.

The plaintiffs also emphasize the total amount contributed by parties they highlight, which they calculate to

be $71,583.40. As we have already explained, however, this amount includes campaign contributions from entities and individuals who are not "parties" as that term is defined in § 12-24-3(c), and it also represents an aggregated amount rather than the total contributions from a single party, which is contrary to § 12-24-3(b).[10] The total amount contributed by any single party to this case in comparison to the total amount Judge Vance received in his campaign for Chief Justice is small, not "substantial" as § 12-24-3(a) requires for recusal.

Even if the plaintiffs had established: (1) a rebuttable presumption under § 12-24-3(b) or (2) that Judge Vance had received a "substantial campaign contribution" as described in § 12-24-3(a), the plaintiffs have completely ignored what is perhaps the most problematic portion of § 12-24-3 for their recusal argument. Section 12-24-3(a) provides:

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[10]We also take the opportunity to note that, in both the renewed motion to recuse and in their briefs to this Court, the plaintiffs mentioned a couple of donations to political-action committees and political-action-committee donations to Judge Vance's campaign for Chief Justice. Such campaign contributions are not contemplated by § 12-24-3(b), which addresses "a campaign contribution made directly by a party to the judge or justice." (Emphasis added.)

> "(a) In any civil action, on motion of a party or on its own motion, a justice or judge shall recuse himself or herself from hearing a case if, as a result of a substantial campaign contribution or electioneering communication made to or on behalf of the justice or judge in the immediately preceding election by a party who has a case pending before that justice or judge, either of the following circumstances exist:
>
> > "(1) A reasonable person would perceive that the justice or judge's ability to carry out his or her judicial responsibilities with impartiality is impaired.
> >
> > "(2) There is a serious, objective probability of actual bias by the justice or judge due to his or her acceptance of the campaign contribution."

(Emphasis added.)

As the defendants observe, the campaign contributions about which the plaintiffs complain were contributed during an election contest that was ongoing when the plaintiffs filed the original motion to recuse and the renewed motion to recuse. However, § 12-24-3(a) addresses "a substantial campaign contribution ... made ... in the immediately preceding election." (Emphasis added.) Consequently, the defendants argue, § 12-24-3 has no application in this situation.

The plaintiffs never address this rather straightforward argument. We note, however, that the Dupre court obliquely suggested one potential way of avoiding the defendants' conclusion that § 12-24-3(a) renders the entire statute inapplicable in a case such as this one. The Dupre court explained:

> "Subsection (a) of § 12-24-3 applies when a party moves to recuse a judge on the ground that the opposing party, which would include an attorney of the opposing party, see Ala. Code 1975, § 12-24-3(c)(4), had made a substantial campaign contribution to the judge in the 'immediately preceding' judicial election."

Dupre, 233 So. 3d at 359. The court then noted that "[t]he former husband did not contend that the former wife or her attorney had made a substantial campaign contribution for Judge Palmer's 'immediately preceding' election, which we judicially notice occurred in 2010." 233 So. 3d at 360. The court therefore concluded that "§ 12-24-3(a) does not apply in these circumstances." Id.

Although the foregoing analysis in Dupre would appear to confirm the defendants' argument, the Dupre court subsequently went on to examine the recusal argument of the appellant in that case ("the former husband") separately under § 12-24-3(b)

to determine whether the former husband had proved facts giving rise to a rebuttable presumption that Judge Palmer should recuse himself from that case. In other words, the Dupre court read subsection (a) and subsection (b) of § 12-24-3 as separate, stand-alone provisions: a party can seek to establish that the judge in its case should recuse himself or herself either by filing a motion concerning "a substantial campaign contribution" that was made "in the immediately preceding election" or by filing a motion that seeks to establish a rebuttable presumption that the judge or justice should recuse by showing that the judge or justice has received "a campaign contribution made directly by a party" that "exceeds" the given "percentages of the total contributions raised during the election cycle by that judge or justice" and the campaign contribution "was made at a time when it was reasonably foreseeable that the case could come before the judge or justice." In short, the Court of Civil Appeals in Dupre did not read the reference to "the immediately preceding election" in subsection (a) of § 12-24-3 as also applying in subsection (b) with regard to a rebuttable presumption that recusal is necessary.

To the extent that the Dupre court intended to read subsections (a) and (b) of § 12-24-3 as separate, stand-alone provisions, we reject that interpretation. Subsection (a) begins by giving the context for the rest of the statute: "In any civil action, on motion of a party or on its own motion, a justice or judge shall recuse himself or herself." Subsection (b) contains no reference to a motion to recuse and instead immediately mentions "[a] rebuttable presumption" that judicial recusal is necessary. Subsection (a) continues by explaining that "a justice or judge shall recuse himself or herself from hearing a case," while subsection (b) references "a time when it was reasonably foreseeable that the case could come before the judge or justice," an implicit reference back to subsection (a). Subsection (c) defines the term "party, as referenced in this section," indicating that subsections (a) and (b) of § 12-24-3 are to be read together because both use the term "party." Subsection (d) states that "[a]n order of a court denying a motion to recuse shall be appealable," a clear reference to the "motion of a party" mentioned in subsection (a), and subsection (d) then explains that "[d]uring the pendency of an appeal, where the threshold set

forth in subsection (b) is met, the action in the trial court shall be stayed in all respects." (Emphasis added.) Thus, subsection (d) discusses the "rebuttable presumption" of subsection (b) as being part of a "motion" to recuse mentioned in subsection (a).

Given the above-highlighted language in the specific subsections § 12-24-3, it is clear that subsection (b) concerns the evidence required to establish a rebuttable presumption of recusal but that subsection (a) provides the context for that rebuttable presumption, i.e., if the threshold of subsection (b) is met, then a rebuttable presumption for recusal exists under one of the two circumstances described in subsection (a)(1) and (a)(2). Therefore, the reference in § 12-24-3(a) to "a substantial campaign contribution ... in the immediately preceding election" applies to any motion for recusal filed under § 12-24-3. Consequently, § 12-24-3 applies only to recusal motions concerning campaign contributions to justices or judges "in the immediately preceding election."

Both the plaintiffs' motion to recuse filed in July 2018 and the renewed motion to recuse filed in September 2018

concerned campaign contributions to Judge Vance's campaign for Chief Justice for the election held in November 2018, not for an "immediately preceding election." Accordingly, the strictures of § 12-24-3 do not apply to the plaintiffs' motions.[11]

In sum, although we conclude that the plaintiffs' renewed motion to recuse is not due to be dismissed as untimely filed because it is not a pure replication of the plaintiffs' original motion to recuse, we also conclude that the renewed motion to recuse does not fall under the auspices of § 12-24-3 because it is not based on campaign contributions in "the immediately preceding election." Moreover, even if § 12-24-3 did apply, the plaintiffs failed to establish a rebuttable presumption for recusal because, in order to meet the required threshold, the plaintiffs: (1) included contributions from law firms and individuals who were not "parties," as that term

[11]The above-stated finding does not mean, of course, that a party cannot file a motion seeking the recusal of a justice or judge based on campaign contributions made during an ongoing election cycle. It just means that such a motion must be made under the auspices of the federal due-process standards for judicial recusal or Canon 3.C. of the Alabama Canons of Judicial Ethics. However, as we observed at the outset of this analysis, the plaintiffs in this case waived such arguments by failing to argue them in the circuit court.

is defined in § 12-24-3(c), to the case; (2) aggregated campaign contributions from multiple parties in contravention to § 12-24-3(b) addressing campaign contributions made by "a party to the judge or justice"; and (3) incorrectly assumed that "total campaign contributions raised during the election cycle" refers to one-month totals for campaign contributions rather than the ordinary meaning of an "election cycle," which concerns a longer period. Finally, the plaintiffs did not establish that a single, actual "party" to this case gave a "substantial campaign contribution" that would give rise to the conclusion that "[a] reasonable person would perceive that [Judge Vance's] ability to carry out his ... judicial responsibilities with impartiality is impaired." § 12-24-3(a)(1). For all of those reasons, Judge Vance's denial of the plaintiffs' renewed motion to recuse is due to be affirmed.

III. Conclusion

Based on the foregoing, we affirm Judge Vance's denial of the renewed motion to have Judge Vance recuse himself from this case under § 12-24-3, Ala. Code 1975.

MOTIONS TO STRIKE GRANTED; MOTION TO DISMISS DENIED; AFFIRMED.

Wise, Sellers, Mendheim, and Stewart, JJ., concur.

Shaw and Bryan, JJ., concur in the result.

Bolin, J., dissents.

Mitchell, J., recuses himself.

BOLIN, Justice (dissenting).

I believe that this appeal should be dismissed; therefore, I must respectfully dissent. The renewed motion for recusal filed by Startley General Contractors, Inc., and Mandy Powrzanas (hereinafter referred to collectively as "the plaintiffs") on September 18, 2018, is an attempt to take a "second bite at the apple."

The plaintiffs' initial motion seeking Judge Vance's recusal based on § 12-24-3, Ala. Code 1975, was denied on July 29, 2018. Section 12-24-3(d) provides for appellate review of that order within 30 days. Instead of filing a notice of appeal, the plaintiffs sought mandamus relief in this Court, which we ultimately denied on October 29, 2018.

On September 18, 2018, the plaintiffs filed a renewed motion for recusal, again based on § 12-24-3. The renewed motion repeated the assertions contained in the initial motion, adding references to campaign contributions, most of which did not predate the initial motion and involved contributions made by Maynard, Cooper, and Gayle, P.C. ("Maynard"), or its lawyers and family members of those lawyers. Maynard and its lawyers were not counsel of record

in this case. Although the plaintiffs asserted for the first time in the renewed motion that the threshold for a "rebuttable presumption" under § 12-24-3(b)(1) that Judge Vance should recuse himself had been met, the plaintiffs were making essentially the same arguments regarding campaign contributions to Judge Vance's campaign for Chief Justice that they had made in their initial motion to recuse. Indeed, this Court considered the application of § 12-24-3, Ala. Code 1975, which implicitly included application of § 12-24-3(b)(1), in reaching its decision to deny the petition for a writ of mandamus challenging Judge Vance's denial of the plaintiffs' original motion to recuse.[12] Ex parte Startley Gen. Contractors, Inc. (No. 1171021, October 29, 2018). Moreover, because any "new" evidence supporting the plaintiffs' renewed motion for recusal has been stricken by this Court, the plaintiffs' "new" argument has no basis in evidence, which supports my conclusion that this appeal should be dismissed.

Therefore, I dissent.

[12]The main opinion recognizes the principle that "the statute must be read as whole." ___ So. 3d at ___.