RECENT CIVIL DECISIONS

Summaries from April to September 2016

MANDAMUS AND DISMISSAL

Ex parte Alfa Mut. Ins. Co., [Ms. 1141038, June 10, 2016] __ So. 3d __ (Ala. 2016). "A writ of mandamus ... will issue to correct a trial court's ruling regarding the amendment of pleadings ... when it is shown that the trial court has exceeded its discretion." Ms. *9, quoting *Ex parte Liberty National Life Ins. Co.*, 858 So. 2d 950, 952 (Ala. 2003). Here, Alfa sought a petition for a writ of mandamus directing the St. Clair Circuit Court to vacate its order denying Alfa's motion to strike an amended complaint. The Court grants the petition and directs the circuit court to vacate its order denying Alfa's motion to strike and to instead enter an order granting that motion and striking the amended complaint. The Court finds that the attempted amendment filed two years after the original complaint was filed, based upon facts and evidence known to the plaintiffs at the time of the filing of the original complaint, and which occurred after the death of the only material witness with personal knowledge about the facts and circumstances placed in issue by the purported amendment, amounted to "undue delay" and was prejudicial to Alfa such that the circuit court exceeded its discretion in permitting the amendment under authority of *Ex parte DePaola*, 46 So. 3d 884 (Ala. 2010); *Blackmon v. Nexity Financial Corp.*, 953 So. 2d 1180 (Ala. 2006); and *Ex parte Liberty Nat'l Life Ins. Co.*, 858 So. 2d 950 (Ala. 2003).

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MANDAMUS AND PRE-ACTION DISCOVERY

Ex parte City of Montgomery, [Ms. 1150439, 1150452, June 10, 2016] __ So. 3d __ (Ala. 2016). "[T]he proper avenue for seeking review of a trial court's disposition of a Rule 27(a) petition for pre-action discovery is by way of petition for a writ of mandamus. ..." Ms. *12, quoting *Ex parte Ferrari*, 171 So. 3d 631, 638 (Ala. 2015).

Reflecting a further restricting of the use of Rule 27 petitions for pre-action discovery, the Court states:

> Under *Ferrari*, the preservation of evidence is the only proper purpose for pre-action discovery under Rule 27. In *Ferrari*, this Court specifically considered and then rejected the idea that pre-action discovery under Rule 27 could be used to determine whether a cause of action exists.

Ms. *17, citing *Ferrari*, 171 So. 3d at 649-52. Furthermore, the mere risk of sanctions under the Alabama Litigation Accountability Act or Rule 11, Ala. R. Civ. P., does not constitute a showing of a present inability to bring an action as required for the proper filing of a petition pursuant to Rule 27. In short, "determining whether an action would be potentially meritorious is not a proper ground for pre-action discovery under Rule 27(a)." Ms. *19.

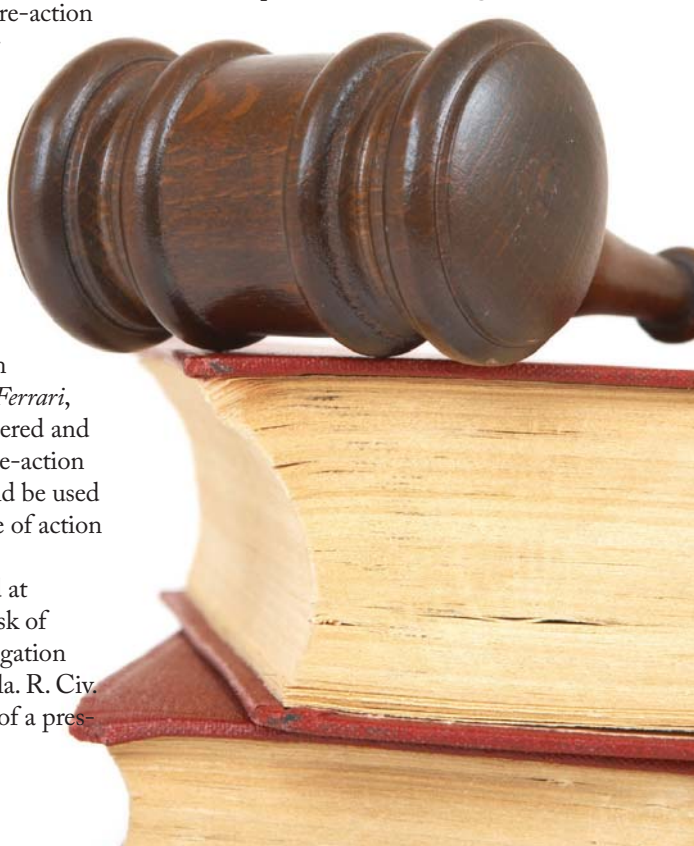
JUDICIAL RECUSAL AND AMENDMENT OF JUDGMENTS

Walker v. Walker, [Ms. 2140610, June 10, 2016] __ So. 3d __ (Ala. Civ. App. 2016) (On reh'g). This is a divorce case. One issue was whether the trial judge should have recused. The Court of Civil Appeals holds:

> [A]dverse rulings are insufficient to establish bias by the trial judge that would necessitate recusal. ...

Ms. *20, quoting *Landry v. Landry*, 182 So. 3d 553, 556 (Ala. Civ. App. 2014).

Another issue concerned the circuit court's *sua sponte* order amending the di-



vorce judgment to award additional money as property settlement during the pendency of a post-judgment motion. The opinion speaks to the propriety of such an order:

> "Although a trial court generally loses jurisdiction to amend its judgment 30 days after the entry of judgment (see Ex parte Owen, 420 So. 2d 80, 81 (Ala. 1982)), a trial court retains the power to correct sua sponte any error in its judgment that comes to its attention during the pendency of a party's Rule 59(e) motion to alter, amend, or vacate the judgment, regardless of whether the error was alleged or not alleged in the motion. See, e.g., Varley v. Tampax, Inc., 855 F.2d 696, 699 (10th Cir. 1988); Charles v. Daley, 799 F.2d 343, 347 (7th Cir. 1986); Arnold v. Sullivan, 131 F.R.D. 129, 133 (N.D. Ind. 1990)."

Henderson v. Koveleski, 717 So. 2d 803, 806 (Ala. Civ. App. 1998). See Parker v. Parker, 10 So. 3d 567, 569 (Ala. Civ. App. 2008) (noting that the trial court retained jurisdiction to correct an error in its judgment while a party's postjudgment motion was pending); Charles v. Daley, 799 F.2d 343, 347 (7th Cir. 1986) ("A judge may enlarge the issues to be considered in acting on a timely motion under Rule 59[Fed. R. Civ. P.]."); and Varley v. Tampax, Inc., 855 F.2d 696, 699 (10th Cir. 1988) ("The salient fact is that a motion to amend judgment was timely filed. Such gave the [trial court] the power and jurisdiction to amend the judgment for any reason, if it chose to do so, and it was not limited to the ground set forth in the motion itself."). [fn] See also Ex parte DiGeronimo, [Ms. 2140611, Oct. 9, 2015 __ So. 3d __, __ (Ala. Civ. App. 2015).

A trial court's jurisdiction to amend its judgment while a party's postjudgment motion is pending does not extend to granting new relief that was requested after the judgment had already been entered. Burgess v. Burgess, 99 So. 3d 1237 (Ala. Civ. App. 2012). Ms. *26-27.

WORKERS' COMPENSATION/ DEATH BENEFITS AND OFFSETS/CREDITS

Hospice Family Care v. Allen, [Ms. 2140861, June 10, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms the judgment of the Madison Circuit Court awarding workers' compensation death benefits for a home health care nurse who died in an automobile collision while traveling toward home within her ordinary work hours. Given the standard of review imposed by § 25-5-81(e), Ala. Code 1975, the court found no error (Ms. *11-18) in the circuit court's judgment that the claim was not barred by the so-called "going and coming rule" of *McDaniel v. Helmerich & Payne Int'l Drilling Co.*, 61 So. 3d 1091 (Ala. Civ. App. 2010); and *McClelland v. Simon-Williamson Clinic, P.C.*, 933 So. 2d 367 (Ala. Civ. App. 2005).

The court also found no error when the circuit court failed to award a setoff for life-insurance and employer-provided death benefits that had been paid to the worker's spouse. Ms. *18-21. Rejecting the employer's contention that §§ 25-5-57(c)(1) and (c)(3) entitled it to a setoff, the court concluded that those provisions did not apply to cases where death benefits are paid. *Id.*

RULE 60(A) AND CORRECTION OF JUDGMENTS AND CONSOLIDATED ACTIONS/APPEALS

Cox v. Cox, [Ms. 2141036, 2150667, June 10, 2016] __ So. 3d __ (Ala. Civ. App. 2016). These child custody-support appeals involve two important procedural rules. First, pursuant to Rule 60(a), Ala. R. Civ. P., a trial court "may correct a clerical mistake in a judgment at any time [on] its own initiative." Ms. *6, quoting *Deramus Hearing Aid Ctr., Inc. v. American Hearing Aid Assocs., Inc.*, 950 So. 2d 292, 293 (Ala. 2006). Such errors are those "resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination." Ms. *5, quoting *Deramus*, 950 So. 2d at 293-94 (original emphasis omitted). However, Rule 60(a) will not support a change in the judgment "if it purports to change the facts or to reweigh the evidence." Ms. *5-6, citing *Deramus*, 950 So. 2d at 295.

Second, the filing of a post-judgment motion in one action does not toll the appeal period as to another action consolidated for trial.

> "[W]here 'several actions are ordered to be consolidated for trial, each action retains its separate identity and thus requires the entry of a separate judgment.' League v. McDonald, 355 So. 2d 695, 697 (Ala. 1978), cited with approval by Solomon v. Liberty Nat'l Life Ins. Co., 953 So. 2d 1211 (Ala. 2006).
>
> > "'Moreover, "[a]n order of consolidation does not merge the actions into a single [action], change the rights or the parties, or make those who are parties to one [action] parties to another." Jerome A. Hoffman, Alabama Civil Procedure § 5.71 (2d ed. 2001) (citing Evers v. Link Enters., Inc., 386 So. 2d 1177 (Ala. Civ. App. 1980)). Finally, "'in consolidated actions ... the parties and pleadings in one action do not become parties and pleadings in the other.'" Ex parte Flexible Prods. Co., 915 So. 2d 34, 50 (Ala. 2005) (quoting Teague v. Motes, 57 Ala. App. 609, 613, 330 So. 2d 434, 438 (Ala. Civ. App. 1976)).' "Solomon, 953 So. 2d at 1222 (emphasis added)."

Pitts v. Jim Walter Resources, Inc., 994 So. 2d 924, 930 (Ala. Civ. App. 2007) (emphasis in original), Ms. *10-11.

PERSONAL JURISDICTION/ PRODUCTS LIABILITY

Hinrichs v. General Motors of Canada, Ltd., [Ms. 1140711, June 24, 2016] __ So. 3d __ (Ala. 2016). Here, the Court affirms the dismissal of an action under the AEMLD against GM-Canada for want of personal jurisdiction.

The Court first reiterates the standard of review in considering a Rule 12(b)(2)

Ala. R. Civ. P. motion to dismiss for want of personal jurisdiction:

> II. Standard of Review
>
> In Corporate Waste Alternatives, Inc. v. McLane Cumberland, Inc., 896 So. 2d 410, 413 (Ala. 2004), this Court repeated the standard of review applicable in a case such as this:
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> > "We discussed the standard of review applicable to a ruling on a motion to dismiss for lack of personal jurisdiction in Wenger Tree Service v. Royal Truck & Equipment, Inc., 853 So. 2d 888, 894 (Ala. 2002):
> >
> > > "'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)). 'For purposes of this appeal [on the issue of in personam jurisdiction] the facts as alleged by the ... plaintiff will be considered in a light most favorable to him [or her].' Duke v. Young, 496 So. 2d 37, 38 (Ala. 1986)."
> >
> > "'Ex parte McInnis, 820 So. 2d 795, 798 (Ala. 2001). "An appellate court considers de novo a trial court's judgment on a party's motion to dismiss for lack of personal jurisdiction." Elliott v. Van Kleef, 830 So. 2d 726, 729 (Ala. 2002).'"

Ms. *9-10.

Next, the Court examines principles of general and specific jurisdiction in the context of a product liability action against a manufacturer which manufactures the product in a jurisdiction other than Alabama. As to general jurisdiction, the Court cites Ms. *19-22 (*Daimler AG v. Bauman*, 571 U.S. __, 134 S. Ct. 746 (2014)) to hold "[t]he inquiry as to general jurisdiction ... is not whether [the product manufacturer] contacts with Alabama are in some way 'continuous and systematic,' but whether its contacts with Alabama are so 'continuous and systematic' that it is essentially 'at home' here." Ms. *22, quoting *Daimler*, 564 U.S. at 919 (underlined emphasis in original).

As to specific jurisdiction, relying upon *Walden v. Fiore*, 571 U.S. ___, 134 S. Ct. 1115 (2014), the Court (Ms. *47-51) concludes that "for specific jurisdiction to exist, [the product manufacturer's] in-state activity must 'g[i]ve rise to the episode-in-suit,' ... and involve 'adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." "[T]he defendant's suit-related conduct must create a substantial connection with the forum State." Ms. *51, quoting *Walden*, 571 U.S. at ____, 134 S. Ct. at 1121 (underlined emphasis in original). Thus, "unilateral activity [such as the victim bringing an automobile into Alabama in which the manufacturer did not participate] is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction." Ms. at *57, quoting *Walden*, 571 U.S. at ___, 134 S. Ct. at 1122.

Note that this is a *per curiam* opinion (Stuart, Acting Chief Justice, Main, and Bryan, JJ., and Lyons, Special Justice, concurring; Bolin, J., concurring in part and concurring in the result; Parker, Murdock, and Wise, JJ., dissenting; Shaw, J., recused). An application for rehearing is anticipated.

VENUE AND TRANSFER FOR INTERESTS OF JUSTICE

Ex parte Interstate Freight USA, Inc., [Ms. 1141422, June 24, 2016] __ So. 3d __ (Ala. 2016). Here, the Supreme Court grants a petition for a writ of mandamus and directs the Baldwin Circuit Court to vacate an order denying a motion to transfer venue to St. Clair Circuit Court on the basis of the interests-of-justice prong of Alabama's *forum non conveniens* statute, § 6-3-21.1, Ala. Code 1975. While venue was proper in Baldwin County pursuant to § 6-3-7(a)(3) because the plaintiff resided in Baldwin County and the defendants did business by agent in Baldwin County, a plaintiff's choice of forum must give way to a *forum non conveniens* challenge when the plaintiff's chosen forum has a weak connection to the controversy. "With the adoption of § 6-3-21.1, trial courts now have 'the power and the duty to transfer a cause' when 'the interests of justice' requires a transfer." Ms. *14-15, quoting *Ex parte Autauga Heating & Cooling, LLC*, 58 So. 3d 745, 748-49 (Ala. 2010). In this case, "petitioners have established that St. Clair County has a stronger connection to the claims ... than has Baldwin County." Ms. *20. Specifically, all the alleged wrongful conduct took place in St. Clair County, not Baldwin County, and all the injuries attributable to the wrongful conduct including termination from employment and damages sustained from alleged fraudulent misrepresentation that induced the plaintiff to accept the employment agreement also occurred in St. Clair County. Ms. *22. Accordingly, "the interests-of-justice prong of the *forum non conveniens* statute requires that the action be transferred to St. Clair County." Ms. *26-7.

PRIVACY OPEN RECORDS ACT

Kendrick v. The Advertiser Company d/b/a The Montgomery Advertiser, [Ms. 1150275, June 24, 2016] __ So. 3d __ (Ala. 2016). The Court holds that a request by The Montgomery Advertiser to obtain student-athletes' financial aid forms for students participating in the Alabama State University football program which were made under authority of §36-12-40, Ala. Code 1975 (the "Open Records Act"), (which provides "[e]very citizen has a right to inspect and take a copy of any public writing of this state except as otherwise expressly provided by statute") was preempted by the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232(g) ("FERPA"), and its implementing regulations, 34 C.F.R. Part 99, *et seq.*, because disclosure of the requested forms would reveal information regarding the student's name, the sports in which they participated, and whether they received financial aid. This is the very type of information FERPA was implemented to protect from disclosure.

Ms. *11-12, citing *Red and Black Publ'g Co. v. Board of Regents*, 262 Ga. 848, 852, 427 S.E. 2d 257, 261 (1993); *Bauer v. Kincaid*, 759 F.Supp. 575, 591 (W.D. Mo. 1991) and *New York State Bar Ass'n v. F.T.C.*, 276 F.Supp.2d 110, 145 (D.C. Cir. 2003).

ALABAMA LEGAL SERVICES LIABILITY ACT AND STATUTE OF LIMITATIONS

Cockrell v. Pruitt, [Ms. 1140849, June 30, 2016] __ So. 3d __ (Ala. 2016). At issue is vicarious liability for alleged fraudulent misrepresentations made by an associate attorney. The Supreme Court affirms a trial court's order denying defendant's motion for summary judgment alleging plaintiff's misrepresentation claims were barred by the two-year statute of limitations applicable pursuant to § 6-5-574, Ala. Code 1975, a part of the Alabama Legal Services Liability Act ("ALSLA"). Relying upon traditional rules of statutory construction (recited at Ms. *19-21), the Court found the claims actionable pursuant to § 6-5-574(a):

> "(a) All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that in no event may the action be commenced more than four years after such act or omission or failure; except, that an act or omission or failure giving rise to a claim which occurred before August 1, 1987, shall not in any event be barred until the expiration of one year from such date.
>
> "(b) Subsection (a) of this section shall be subject to all existing provisions of law relating to the computation of statutory periods of limitations for the commencement of actions, namely, Sections 6-2-1, 6-2-2, 6-2-3, 6-2-5, 6-2-6, 6-2-8, 6-2-9, 6-2-10, 6-2-13, 6-2-15, 6-2-16, 6-2-17, 6-2-30, and 6-2-39; provided, that notwithstanding any provisions of such sections, no action shall be commenced more than four years after the act, omission, or failure complained of; except, that in the case of a minor under four years of age, such minor shall have until his or her eighth birthday to commence such action."

Id. (underlined emphasis in original).

Following the reasoning of an analogous claim of misrepresentations subject to the Alabama Medical Liability Act decided in *Ex parte Sonnier*, 707 So. 2d 635 (Ala. 1997), the Court holds that misrepresentations made by an attorney during the course of representation regarding the status of legal services performed on behalf of the client during the four years preceding the filing of the complaint are actionable.

MEDICAL MALPRACTICE AND FOUR-YEAR PERIOD OF REPOSE

Cutler v. Univ. of Ala. Health Servs. Foundation, P.C., [Ms. 1150546, July 8, 2016] __ So. 3d __ (Ala. 2016). The Supreme Court affirms the Jefferson Circuit Court's dismissal of a medical-malpractice action against the University of Alabama Health Services Foundation, P.C. and Paul G. Matz, M.D., based upon § 6-5-482(a), Ala. Code 1975's four-year period of repose. The opinion notes the alleged medical malpractice occurred in 2005 "when the defendants failed to inform Cutler of the presence of a 2 cm tumor/lesion in the right frontal region of his brain." Ms. *8. But Cutler did not file his complaint against the defendants until 2015, more than 10 years after the alleged malpractice occurred. *Id.* Cutler alleged his cause of action did not accrue until 2015 when he "first suffered a legal injury – the seizure requiring him to undergo a surgical resection of the tumor/lesion, which was ultimately diagnosed as Grade II astrocytoma." *Ibid.* The Supreme Court rejected this contention, reiterating that "[i]t is well settled that in medical-malpractice actions, the legal injury occurs at the time of the negligent act or omission, regardless of whether the injury is or could be discovered within the statutory period." Ms. *15. Here, because Cutler's complaint alleged "that his tumor/lesion began its adverse growth process and/or became malignant 'within the four years following June 28, 2005' and/or that 'the process was started within the two years after [the MRI] on June 28, 2005' and "the four year statute of repose would have begun to run at the latest by June 28, 2009, despite Cutler not learning of the presence of the tumor/lesion until 2015." Ms. *18. Citing *Kline v. Ashland, Inc.*, 970 So. 2d 755, 761 (Ala. 2007) (Harwood, J., dissenting), the Court reiterated its rule concerning when an injury is "manifest" for purposes of beginning the running of a statute of limitations or a period of repose:

> 'Manifest' in this sense does not mean that the injured person must be personally aware of the injury or must know its cause or origin. All that is required is that there be in fact a physical injury manifested, even if the injured person is ignorant of it for some period after its development.

Id.

WRONGFUL DEATH AND PERSONAL REPRESENTATIVE

Northstar Anesthesia of Alabama, LLC v. Noble, [Ms. 1141158, 1141166, 1141168, released July 8, 2016] __ So. 3d __ (Ala. 2016). The Supreme Court grants three petitions for permissive appeals pursuant to Rule 5, Ala. R. App. P. and directs the Morgan Circuit Court to reverse its order denying motions for summary judgment in a wrongful death action based upon there being no lawfully appointed personal representative at the time the complaint for wrongful death was filed.

The opinion describes the facts as "undisputed." Ms. *3.

> On November 18, 2011, Thomas died. On January 9, 2012, Paula filed a petition in the Morgan Probate Court ("the probate court") for letters of administration, seeking to be appointed the personal representative of Thomas's estate. On January 18, 2012, the probate court granted Paula's petition and appointed her personal representative of Thomas's estate. On the same day, the probate court also issued letters of administration to Paula. On August 10, 2012, Paula filed a petition

for a consent settlement of Thomas's estate, seeking to close the estate; Paula specifically requested that she be discharged as the personal representative. On August 16, 2012, the probate court granted Paula's petition and, among other things, ordered that "said Personal Representative be discharged and released."

On November 15, 2013, Paula, on behalf of Thomas's heirs at law, after being discharged and released as the personal representative of Thomas's estate, filed a wrongful-death action against the appellants under § 6-5-410, Ala. Code 1975.

On November 18, 2013, the two-year limitations period for bringing a wrongful-death action set forth in § 6-5-410(d), Ala. Code 1975, expired: "(d) The [wrongful-death] action must be commenced within two years from and after the death of the testator or intestate."

Ms. *3-4. Citing *Ex parte Hubbard Properties, Inc.* [Ms. 1141196, Mar. 4, 2016] __ So. 3d __ (Ala. 2016) and *Waters v. Hipp*, 600 So. 2d 981 (Ala. 1992), the Court reiterates (Ms. *9-12) that only a personal representative may commence a wrongful-death action. Because Paula was not the personal representative of Thomas's estate on the date she filed the complaint, the complaint was a nullity such that her subsequent re-appointment as personal representative had nothing to relate back to. Accordingly, the relation-back doctrine of Rules 9 and 15, Ala. R. Civ. P., cannot apply.

DIVORCE AND QUALIFIED DOMESTIC RELATIONS ORDER ("QDRO")

Hudson v. Hudson, [Ms. 2150115, July 8, 2016] __ So. 3d __ (Ala. Civ. App. 2016). This opinion explains the legal authority for QDROs.

QDROs are provided for under the federal Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., and "'facilitate the distribution of pensions and employee benefits that are subject to [the] provisions [of the act].' Duran v. Duran, 657 N.W.2d 692, 694 n. 1 (S.D. 2003)." Romer v. Romer, 44 So. 3d 514, 516 n.1 (Ala. Civ. App. 2009). Under ERISA, pension plans "shall provide that benefits provided under the plan may not be assigned or alienated" except in accordance with the requirements of any applicable QDROs. 29 U.S.C. § 1056(d)(1) and (3)(A). ERISA further provides:

"(B) For purposes of this paragraph –

"(I) the term 'qualified domestic relations order' means a domestic relations order –

"(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

"(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

"(ii) the term 'domestic relations order' means any judgment, decree, or order (including approval of a property settlement agreement) which –

"(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

"(II) is made pursuant to a State domestic relations law (including a community property law).

"(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –

"(I) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

"(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

"(iii) the number of payments or period to which such order applies, and

"(iv) each plan to which such order applies.

"(D) A domestic relations order meets the requirements of this subparagraph only if such order –

"(I) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

"(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

"(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order."

29 U.S.C. § 1056(d)(3).

Id., Ms. *5-7.

WRONGFUL DEATH AND STANDING/ PERSONAL REPRESENTATIVE

Ex parte Bio-Medical Applications of Alabama, Inc., [Ms. 1150362, 1150363, July 15, 2016] __ So. 3d __ (Ala. 2016). The Supreme Court grants petitions for writs of mandamus and directs the Mobile Circuit Court to enter summary judgment in favor of two health care defendants because the wrongful-death action filed against the defendants by a person other than the personal representative of the estate was a nullity, and the two-year statute of limitations had now expired. Citing *Ex parte Hubbard Props, Inc.*, [Ms. 1141196, Mar. 4, 2016] __ So. 3d __ (Ala. 2016), and *Waters v. Hipp*, 600 So. 2d 981 (Ala. 1992), the Court concludes that a wrongful-death action filed

by one of the decedent's sons, rather than the son appointed by the Mobile Probate Court as testator of the decedent's estate (i.e., the properly appointed personal representative) was a nullity.

The personal representative sought to invoke § 43-2-843(17), Ala. Code 1975, contending he was authorized by the statute "to employ an agent to perform 'any act of administration,'" Ms. *7, and that pursuant to this statute, he had delegated the responsibility for filing the wrongful death action to his brother. The Supreme Court rejects this contention, holding that § 43-2-843(17) allows a personal representative to employ an agent "to perform any act of administration," but that the filing of a wrongful-death action is not an "act of administration." Ms. *11-13. As a consequence, the petitions for writs of mandamus were due to be granted and summary judgment entered in favor of the health care provider defendants.

ORE TENUS RULE AND JUDICIAL NOTICE

Petrina v. Petrina, [Ms. 2140870, July 15, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals reverses a judgment of divorce and its division of marital assets and debts subject to the terms of prenuptial agreement upon finding the Lee Circuit Court erred in taking judicial notice of facts concerning increased earning opportunities for naturalized American citizens set forth in the publication titled "Madeleine Sumption & Sarah Flamm, Migration Policy Inst., The Economic Value of Citizenship for Immigrants in the United States, (Sept. 2012)." Because the Lee Circuit Court took information from that publication into consideration in deriving the property settlement, when the publication could not properly be considered, the judgment was entered in error.

The opinion recites how Alabama courts construe Rule 201, Ala. R. Evid., concerning the proper taking of judicial notice:

> "Rule 201, Ala. R. Evid., allows a court to take judicial notice of certain facts, even ex mero motu. See Rule 201(b) ('A court may take judicial notice whether requested or not.').
>
> "'A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'
> "Rule 201(b), Ala. R. Evid. This rule has been explained as follows:
>
> "'Consistent with historic practice, a court is to dispense with the customary methods of proof "only in clear cases." Fed. R. Evid. 201 advisory committee's note. A court is to take judicial notice of adjudicative facts only when those facts are beyond reasonable dispute either because they are generally known within the court's territorial jurisdiction or because they can be accurately and readily determined by consulting sources that are acknowledged to be accurate. This limit upon judicial notice is consistent with historic Alabama law. See, e.g., Peebles v. Miley, 439 So. 2d 137 (Ala. 1983) (court judicially knows that great majority of collections are done on a contingent fee basis); Strother v. Strother, 355 So. 2d 731 (Ala. Civ. App. 1978) (judicial notice of increases in cost of living due to inflation); Mutual Bldg. & Loan Ass'n v. Moore, 232 Ala. 488, 169 So. 1 (1936) (facts found in reliable source).'
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> "Advisory Committee Notes, Rule 201, Ala. R. Evid. (emphasis added).
>
> "....
>
> "However, Alabama courts have concluded that some matters are outside the general or common knowledge and, therefore, not appropriate for judicial notice. For example, our supreme court has refused to take judicial notice that an arsenal was a 'sole hub' for certain Army activities. See Westwind Techs., Inc. v. Jones, 925 So. 2d 166, 171 (Ala. 2005) ('Although the activities of Redstone Arsenal in Madison County might well form a part of the common knowledge of every person of ordinary understanding and intelligence in Madison County, whether Redstone Arsenal represents the "sole hub of procurement and acquisitions" for the aviation branch of the United States Army would not be a matter susceptible of such common knowledge.'); see also Argo v. Walston, 885 So. 2d 180, 183 (Ala. Civ. App. 2003) (concluding that the trial court erred in determining the appropriate amount of damages when that determination was based in part on the judge's personal knowledge about fishing ponds). Also, in Foodtown Stores, Inc. v. Patterson, 282 Ala. 477, 484, 213 So. 2d 211, 217 (1968), our supreme court concluded that the reasonableness of certain bills for medical treatment and medication were matters 'outside the realm of common knowledge.'"
>
> B.H. v. R.E., 988 So. 2d 565, 569-70 (Ala. Civ. App. 2008). See also Independent Life Insurance Co. v. Carroll, 222 Ala. 34, 37, 130 So. 402, 405 (1930) (explaining that courts do not take judicial notice of facts merely because they may be ascertained by reference to dictionaries or other publications or of facts that cannot be known without, for example, expert testimony).

Id., Ms. *7-9.

PRESCRIPTIVE EASEMENT

Quinn v. Morgan, [Ms. 2150189, July 15, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms a judgment of the Coosa Circuit Court establishing an easement by prescription. The opinion reiterates the legal test for such easements:

> "To establish an easement by prescription, the claimant must use the premises over which the

> easement is claimed for a period of twenty years or more, adversely to the owner of the premises, under claim of right, exclusive, continuous, and uninterrupted, with actual or presumptive knowledge of the owner. The presumption is that the use is permissive, and the claimant has the burden of proving that the use was adverse to the owner. Cotton v. May, [293 Ala. 212, 301 So. 2d 168 (1974)]; Belcher v. Belcher, 284 Ala. 254, 224 So. 2d 613 (1969); West v. West, 252 Ala. 296, 40 So. 2d 873 (1949)."
>
> Bull v. Salsman, 435 So. 2d 27, 29 (Ala. 1983).

Ms. *7. The opinion then catalogues numerous prior reported appellate opinions supporting the Coosa Circuit Court's judgment, including *Belcher v. Belcher*, 284 Ala. 254, 224 So. 2d 613 (1969); *Roberts v. Wilbur*, 554 So. 2d 1029 (Ala. 1989) (Ms. *9-13); *Apley v. Tagert*, 584 So. 2d 816 (Ala. 1991) (Ms. *14); *Weeks v. Herlong*, 951 So. 2d 670 (Ala. 2006) (Ms. *14-15); and *Ex parte Gilley*, 55 So. 3d 242 (Ala. 2010) (Ms. *16).

DEFAULT JUDGMENT

Tucker v. Nixon, [Ms. 2150224, July 15, 2016] __ So. 3d __ (Ala. Civ. App. 2016). In this child custody case, the Court of Civil Appeals affirms the Autauga Circuit Court's entry of a default judgment against the mother because she failed to properly assert the grounds necessary for review of a default judgment as specified in *Kirtland v. Fort Morgan Auth. Sewer Serv., Inc.*, 524 So. 2d 600 (Ala. 1988). Specifically, "in order to trigger the mandatory requirement that the trial court consider the *Kirtland* factors, the party filing a motion to set aside a default judgment must allege and provide all arguments and evidence regarding all three of the *Kirtland* factors: 1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct." Ms. *5-7, quoting *Kirtland*, 524 So. 2d at 605 (underlined emphasis in original). Because the mother submitted no *evidence* in support of her contentions regarding the *Kirtland* factors, the trial court properly denied the motion to set aside the entry of judgment by default.

POLICE OFFICERS' IMMUNITY

Ex parte Harris, [Ms. 1141345, 1141385, July 29, 2016] __ So. 3d __ (Ala. 2016). This opinion revisits the standards for State-agent immunity set forth in *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000) (plurality opinion), *Ex parte Butts*, 775 So. 2d 173 (Ala. 2000), and *Hollis v. City of Brighton*, 950 So. 2d 300 (Ala. 2006).

The Court notes that an Alabama town's police chief qualifies as a law-enforcement officer for purposes of § 6-5-338(a), Ala. Code 1975 and *Ex parte Cranman*, as modified by *Hollis*. Ms. *14. To be immune under § 6-5-338(a), *Cranman* and *Hollis*, a police officer must, at the time of the complained-of-action, be "exercising judgment in the enforcement of the criminal laws of the State ... including ... arresting or attempting to arrest persons," or "serving as a peace officer under circumstances entitling such officer to immunity 'from tort liability arising out of his or her conduct and performance of any discretionary function within the line and scope of his or her law enforcement duties.'" Ms. *15 (underlined emphasis in original). "Generally, arresting a person is considered an exercise of a discretionary function entitling the arresting officer to State-agent immunity." *Id.*, citing *Swan v. City of Hueytown*, 920 So. 2d 1075 (Ala. 2005).

In this case, the plaintiff alleged that the police chief was not engaged in a lawful arrest because the criminal conduct for which she was arrested was classified as a misdemeanor that the chief did not actually observe. Ms. *16. Distinguishing *Telfare v. City of Huntsville*, 841 So. 2d 1222 (Ala. 2002) (Ms. *16-22), the Court held the police chief was engaged in making a lawful arrest such that the burden then shifted to the plaintiff to identify one of the two categories of exceptions to State-agent immunity recognized in *Cranman*.

Plaintiff contended that the *Cranman* exception concerning when the State-agent "act[ed] willfully, maliciously, fraudulently, in bad faith, [or] beyond his or her authority" (*Cranman*, 792 So. 2d at 405) was applicable. Ms. *23. The plaintiff contended there was personal animus between herself and the police chief based on conflicting financial interests and family disagreements. Citing *Borders v. City of Huntsville*, 875 So. 2d 1168 (Ala. 2003) and *Kingsland v. City of Miami*, 382 F.3d 1220 (11th Cir. 2004), the Court concluded (Ms. *25-28) that the police chief had "arguable probable cause" to make the arrest such that the Court could not conclude he acted "willfully, maliciously, fraudulently, [or] in bad faith" "so as to remove him from the umbrella of State-agent immunity afforded him under *Ex parte Cranman*." Ms. *28. So long as the police chief had probable cause to make the arrest, his "subjective intent is immaterial." *Id.*, quoting *Carruth v. Barker*, 454 So. 2d 539, 540 (Ala. 1984).

The opinion also rejects the plaintiff's claim of malicious prosecution against the police chief. The Court recites the elements of such a claim:

> "'(1) that there was a judicial proceeding initiated by the present defendant; (2) that it was initiated without probable cause; (3) that it was initiated with malice on the part of the present defendant; (4) that that judicial proceeding was terminated in favor of the present plaintiff; and (5) that the present plaintiff suffered damage from the prosecution of that earlier action.'"

Ms. *29, citing *Ex parte Tuscaloosa Cty.*, 796 So. 2d 1100, 1106 (Ala. 2000); *Kmart Corp. v. Perdue*, 708 So. 2d 106 (Ala. 1997). "A malicious-prosecution claim is disfavored in the law because "[p]ublic policy requires that all persons shall resort freely to the courts for redress of wrongs and to enforce their rights, and that this may be done without the peril of a suit for damages in the event of an unfavorable judgment by jury or judge." Ms. *29, quoting *Moon v. Pillion*, 2 So. 3d 842, 845 (Ala. 2008). Here, the police chief had probable cause to initiate a judicial proceeding against the plaintiff and the court concludes that he did so without malice. Ms. *31. Thus, the police chief is immune from suit on the malicious-prosecution claim under the doctrine of State-agent immunity set forth in *Ex parte Cranman* as well. Ms. *32.

Finally, the Court concludes that the town could not be held vicariously liable

for the alleged intentional acts of its police chief pursuant to § 11-47-190, Ala. Code 1975. Ms. *33-34, citing *Ex parte City of Tuskegee*, 932 So. 2d 895 (Ala. 2005); *Cremeens v. City of Montgomery*, 779 So. 2d 1190 (Ala. 2000); and *Town of Loxley v. Coleman*, 720 So. 2d 907 (Ala. 1998).

FINALITY OF JUDGMENT AND APPELLATE JURISDICTION

Elkins v. Carroll, Maguire, and Collins, [Ms. 1150529, Aug. 12, 2016] __ So. 3d __ (Ala. 2016). Elkins sued co-employees pursuant to § 25-5-11(c)(2), Ala. Code 1975, based on the theory that the co-employees removed a safety device on a Dalmec brand manipulator. Noting that "[w]hen 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.'" The Court was here concerned that the trial court's order failed to dispose of all claims as to all parties, thereby triggering the rule that "[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." [Ms. *14-15, citing Rule 54(b), Ala. R. Civ. P. and *Wilson v. Wilson*, 736 So. 2d 633 (Ala. Civ. App. 1999)]. Accordingly, the Court remanded the cause to the Madison Circuit Court under authority of *Foster v. Greer & Sons, Inc.*, 446 So. 2d 605 (Ala. 1984), *overruled on other grounds*, *Ex parte Andrews*, 520 So. 2d 507 (Ala. 1987), to certify whether it intended its judgment to be a final judgment within the meaning of Rule 54(b).

NON-JURY TRIAL AND BREACH OF LEASE

Evans v. Waldrop, [Ms. 2150342, Aug. 12, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms the Walker Circuit Court's judgment that Evans owed Waldrop for unpaid rent. The opinion discusses the consequences when a successor trial-court judge enters judgment based upon his review of trial transcripts and evidence submitted to his predecessor. Citing Rule 63, Ala. R. Civ. P., (governing further proceedings when "the judge is unable to proceed" and stating that, "[i]n a hearing or trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed"), the Court of Civil Appeals (Ms. *3-5) citing *Jackson v. Strickland*, 808 So. 2d 993 (Ala. 2001) noted that when an action is submitted on briefs, transcribed testimony and documentary evidence, appellate courts typically do not apply the *ore tenus* rule.

The Court of Civil Appeals also concludes that Waldrop, the lessor, did not unreasonably withhold his consent to a sublease proposed by Evans such that rents remained due and judgment was properly entered for past-due rents by the successor Walker County trial-court judge. See Ms. *12-13, quoting *Pantry, Inc. v. Moseley*, 126 So. 3d 152 (Ala. 2013), *Homa-Goff Interiors, Inc. v. Cowden*, 350 So. 2d 1035 (Ala. 1977), and *Rowley v. City of Mobile*, 676 So. 2d 316 (Ala. Civ. App. 1995).

FINALITY OF JUDGMENT AND APPELLATE JURISDICTION

Johnston v. Rice, [Ms. 2150253, Aug. 12, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals holds that in a post-divorce proceeding, a trial court's failure to dispose of all motions for contempt relating to alleged violations of the previous divorce judgment renders any judgment as to any other post-divorce proceeding non-final and therefore non-appealable. Accordingly, the Court of Civil Appeals dismisses an appeal from a Washington Circuit Court's order in a post-divorce modification and contempt proceeding as being non-final. See *Decker v. Decker*, 984 So. 2d 1216 (Ala. Civ. App. 2007).

RULE 77(D) AND OUT-OF-TIME APPEALS

J. D. v. M. B. and V. B., [Ms. 2150129, Aug. 12, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals dismisses an appeal from the determination of the Morgan probate court granting a right of adoption to a stepfather upon concluding the child's natural father did not timely file a notice of appeal from that judgment and did not properly appeal from the probate court's denial of his request for an extension of time to file a notice of appeal pursuant to Rule 77(d), Ala. R. Civ. P. (rule governing situations in which a party claims lack of notice of the entry of a judgment or order deprived the party of the opportunity to timely file a notice of appeal).

ARBITRATION/WAIVER

African Methodist Episcopal Church, Inc. v. Smith, [Ms. 1141100, 1141101, 1150055, 1150156, Aug. 19, 2016] __ So. 3d __ (Ala. 2016). This plurality opinion (Stuart, J., and Bolin, Shaw, and Wise, JJ., concurring; Parker, J., concurring in the result) reverses consolidated decisions of the Jefferson Circuit Court and Montgomery Circuit Court denying motions to compel arbitration in the context of purchases of group life insurance benefits from Lincoln National Life Insurance Company and that insurer's declination of claims for life insurance policy benefits.

Citing *Elizabeth Holmes, L.L.C. v. Gantt*, 882 So. 2d 313 (Ala. 2003), the opinion first notes (Ms. *8-9) that it "reviews de novo the denial of a motion to compel arbitration" as it "is analogous to a motion for a summary judgment."

Distinguishing its holding in *Aetna Insurance Co. v. Word*, 611 So. 2d 266, 267-69 (Ala. 1992) (where the Court, in reliance on § 27-14-8, Ala. Code 1975, affirmed a trial court's judgment finding an insurance policy endorsement form void when it had not first been filed with and approved by the Commissioner of the Alabama Department of Insurance), the Court (Ms. *10-13) adopts the reasoning of *Waikar v. Royal Insurance Co. of America, Inc.*, 765 So. 2d 11, 16 (Ala. Civ. App. 1999), and endorses Lincoln National's use of forms that had previously been approved by the Commissioner of the Department of Insurance for Lincoln National's predecessor-in-interest.

Next, citing *Advance Tank & Construction Co. v. Gulf Coast Asphalt Co.*, 968 So. 2d 520, 528-29 (Ala. 2006), the Court at Ms. *14-16 rejects the argument that Lincoln National's failure to comply with the Alabama Department of Insurance's published guidelines for arbi-

tration agreements rendered the arbitration provision in the group policy void. Instead, holding that courts may not "invalidate arbitration agreements under state laws applicable only to arbitration provisions," the Court holds that *Advance Tank* is to be construed as holding that federal law would prohibit any state requirement that an arbitration provision in an insurance contract be specially disclosed or executed separately from the main contract.

Citing *Blue Cross Blue Shield of Alabama v. Rigas*, 923 So. 2d 1077 (Ala. 2005), the Court (Ms. *16-26) rejects several contentions that the arbitration provision was substantively unconscionable and therefore unenforceable. Specifically, the Court rejects the holding of *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003)(which held that an arbitration provision's confidentiality clause preventing parties from disclosing "the existence, content or result of any arbitration" was unconscionable). Instead, the Court embraces the holdings of *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378-79 (11th Cir. 2005) and *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 175-76 (5th Cir. 2004) that such confidentiality requirements are not so "one-sided as to make the arbitration provision substantively unconscionable." Ms. *21.

The Court also rejects the contention premised upon the holding in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000) where the Supreme Court of California held an arbitration provision unconscionable when it was asymmetrical, i.e., it purported to require only one side of the contract to arbitrate claims. Ms. *23-4. Instead, citing its earlier conclusion in *Ex parte McNaughton*, 728 So. 2d 592, 598-599 (Ala. 1998) where the Court had rejected any mutuality-of-remedy requirement in the context of arbitration proceedings, the Court holds that because plaintiffs may seek a remedy at law or equity, there is no one-sidedness problem.

The Court next rejects the contention that the arbitration provision should not be enforced against the plaintiffs because they did not sign an arbitration agreement or ever assent to arbitration. Holding that because the plaintiffs assert claims dependent upon the existence of the contract containing an arbitration provision, *Custom Performance, Inc. v. Dawson*, 57 So. 3d 90, 97-98 (Ala. 2010) requires plaintiffs to be equitably estopped from avoiding the consequences of arbitration. See Ms. *26-29.

The Court also rejects plaintiffs' contention that arbitration should be rejected because Lincoln National failed to meet all the conditions precedent to arbitration. Citing *Brasfield and Gorrie, L.L.C. v. Soho Partners, L.L.C.*, 35 So. 3d 601, 606 (Ala. 2009), the Court determines that the arbitrator, not the trial court, should decide whether conditions precedent to arbitration have been met. See Ms. *30-33.

Next, relying upon *Metropolitan Life Ins. Co. v. Glisson*, 295 F.3d 1192 (11th Cir. 2002), the Court (Ms. *33-39) rejects an argument by one of the appellants that a merger clause contained within the group policy barred any amendment containing the arbitration provision. Because, as in *Glisson*, the amendment containing the arbitration provision was physically attached to and made reference to the underlying contract, the amendment containing the arbitration provision complied with the requirements of the underlying insurance contract's merger provision.

Lastly, the Court rejects another plaintiff's contention that Lincoln National waived the right to enforce the arbitration provision by substantially invoking the litigation process to the plaintiff's prejudice. Acknowledging that *Kennamer v. Ford Motor Credit Co.*, 153 So. 3d 752, 759 (Ala. 2014) "explained how a party might waive its right to enforce a valid arbitration provision and how the party opposing arbitration can establish that waiver," the Court (Ms. *39-53) finds there was no substantial invocation *despite* a. three answers by Lincoln National containing no mention of arbitration, b. participation in merits-based discovery, c. filing a dispositive motion to dismiss and arguing that motion before the trial court, and d. waiting approximately eleven months after the initiation of the action to first move to invoke arbitration. The Court rejects plaintiff's reliance upon decisions it characterizes as "on point," namely *In re Mirant Corp.*, 613 F.3d 584 (5th Cir. 2010) and *Hooper v. Advance America Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917 (8th Cir. 2009). Because of this Court's prior holding "that finding a waiver of the right to arbitration is disfavored and that any doubts concerning an allegation of waiver must be resolved in favor of arbitration (Ms. *52, quoting *Crews v. National Boat Owners Ass'n Marine Ins. Agency, Inc.*, 46 So. 3d 933, 941 (Ala. 2010)), the Court holds that Lincoln National did not substantially invoke the litigation process such that it may not be deemed to have waived its right to invoke arbitration.

PRODUCT LIABILITY/ SAFER ALTERNATIVE DESIGN

Hosford v. BRK Brands, Inc., [Ms. 1140899, 1140901, Aug. 19, 2016] __ So. 3d __ (Ala. 2016). Parker, Shaw, Wise, and Bryan, JJ., concur. In these consolidated appeals, the Supreme Court affirms judgments in favor of the manufacturer of two ionization smoke alarms alleged to be defective and unreasonably dangerous when they failed to provide adequate warning time for a minor child to escape from a burning mobile home, resulting in the child's death. Because the plaintiffs failed to present substantial evidence of a safer alternative design as required for AEMLD claims by *General Motors Corp. v. Jernigan*, 883 So. 2d 646, 662 (Ala. 2003), the judgments are due to be affirmed.

The opinion frames the issue this way:

> In order to survive [the manufacturer's] motion for a judgment as a matter of law at the close of her case, [mother] was required to put forth substantial evidence identifying a safer, practical, alternative design [manufacturer] could have used for the ionization smoke alarms purchased by [father]; that is, [mother] had to present substantial evidence indicating that the proposed alternative design would have resulted in [child's] escaping from the fire and substantial evidence indicating that the utility of the proposed alternative design outweighed the utility of the design actually used by [manufacturer].

Ms. *10-11. The Court rejects plaintiffs' evidence of safer alternative design consisting of another type of smoke alarm manufactured by the defendant, which used photoelectric technology in addition to ionization technology (i.e., dual sensor smoke alarms), holding that the two are entirely different products. The Court instead construes the safer alternative

design requirement of the AEMLD to require proof of a "safer, practical, alternative design for an ionization smoke alarm." Ms. *12. Embracing the reasoning of an unpublished federal decision cited by the manufacturer, *Hines v. Wyeth* (No. CIV. A 2:04-0690, May 23, 2011)(S.D. W. Va. 2011)(not reported in F. Supp.), the Court holds as a matter of law that the proposed alternative design cannot be a *different product*.

The Court borrows by analogy from the Prempro/Premarin decision of the Texas Court of Appeals in *Brockert v. Wyeth Pharmaceuticals, Inc.*, 287 S.W. 3d 760 (Tex. App. 2009) which noted that Premarin (estrogen) was not an "alternative design" for Prempro, but rather was "a different drug entirely." Ms. *15. The Court explained:

> Thus, even though Prempro, the allegedly defective product, and Premarin, the proposed alternative product, had essentially the same purpose – to treat menopausal symptoms – the *Brockert* court held as a matter of law that one was not a safer alternative to the other because they were different products. [Mother's] position in this case is effectively the same as that of the appellant in *Brockert* – both argued that a product was defective and, as evidence of that fact, identified as a safer alternative another product manufactured by the same manufacturer that allegedly had sold the defective product. Consistent with the rationale of the *Brockert* court, we now hold as a matter of law that the dual sensor smoke-alarm design put forth by [mother] is not, in fact, a safer, practical, alternative design to an ionization smoke alarm; rather, it is a design for a different product altogether.

Ms. *18. The Court therefore affirms the judgments in favor of the manufacturer, holding

> ... because a plaintiff asserting an AEMLD claim cannot prevail in the absence of evidence establishing the existence of a safer, practical, alternative design for the allegedly defective product – not a design for a different, albeit similar, product, even if it serves the same purpose – the judgment entered in favor of [the manufacturer] on [mother's] AEMLD claim is affirmed.

Ms. *21.

INTENTIONAL TORTS AND WORKERS' COMPENSATION EXCLUSIVITY

Ex parte Lincare, Inc., [Ms. 1141373, Aug. 19, 2016] __ So. 3d __ (Ala. 2016). This plurality opinion (Murdock, J., and Parker and Main, JJ., concur; Bolin and Bryan, JJ., concurring in the result) considers a petition for a writ of mandamus seeking reversal of the Jefferson Circuit Court's denial of an employer's motion to dismiss, which contended that its former employee's intentional torts claims were subsumed by the exclusivity provisions of the Workers' Compensation Act. The petition also requests enforcement of a jury waiver set forth in an employment agreement.

Martin alleged that after she presented her supervisor Stewart with a resignation letter, Stewart physically confronted her about some paperwork, physically attacked her, fractured two fingers on her left hand, and damaged her right thumb and elbow. Ms. *3. Martin then sued her employer for workers' compensation benefits and sued Stewart and her employer for assault and battery and outrage. Martin demanded a jury trial on all issues triable by a jury. *Id.*

The Court holds that even though Martin had resigned by the time she allegedly was physically assaulted by Stewart, her injury nevertheless "arose out of her employment with Lincare" because it was precipitated by her resignation, it occurred while she was still on Lincare's premises, and it concerned possession of Lincare's documents. Thus, under authority of *Cook v. AFC Enters., Inc.*, 826 So. 2d 174, 177 (Ala. Civ. App. 2002), and *Thompson v. Anserall, Inc.*, 522 So. 2d 284, 286 (Ala. Civ. App. 1988), Martin's work-related injuries were compensable under the Act "even though she technically was not a Lincare employee at the time she was injured." Ms. *9-11.

Citing *Ex parte Kohlberg Kravis Roberts & Co., L.P.*, 78 So. 3d 959, 979 (Ala. 2011), the Court (Ms. *13-14) refuses to grant mandamus relief with respect to the trial court's refusal to dismiss Martin's tort-of-outrage claim based on alleged pleading deficiencies. The Court notes the conspicuous absence of "any authority stating that the denial of a motion to dismiss for failure to adequately plead a cognizable claim is reviewable by mandamus." Ms. *13.

Finally, the Court rejects the contention that a pre-employment jury trial waiver inures to the benefit of a supervisory co-employee sued for willful misconduct under § 25-5-11, Ala. Code 1975. Because the supervisor was not a party to the jury waiver and because Alabama public policy, the Rules of Civil Procedure, and the Alabama Constitution "all express a preference for trial by jury" (*Ex parte Bancorp South Bank*, 109 So. 3d 163, 166 (Ala. 2012)) "... there is a presumption against denying a jury trial based on a contractual waiver, and a waiver of a right to a jury trial must be strictly construed, giving deference to the constitutional guarantee of the right to a trial by jury." Ms. *15, quoting *Ex parte Acosta*, 184 So. 3d 349, 352 (Ala. 2015).

FELA

Cottles v. Norfolk Southern Railway Co., [Ms. 1140632, Aug. 26, 2016] __ So.3d __ (Ala. 2016). The Supreme Court reverses a summary judgment entered by the Morgan Circuit Court in Cottles's action under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. The Court holds that expert opinion testimony from Cottles's railroad expert to the effect that a railroad inspector appropriately trained in federal railroad administration track safety standard (49 C.F.R. § 209) who inspected the switch at which Cottles was injured knew or should have known of its defective condition. The Court emphasized the "relaxed standard of causation" "applied under the FELA":

> ' ' "Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." ' "

Ms. 21, quoting *CSX Transp., Inc. v. Miller*, 46 So.3d 434, 460-61 (Ala. 2010). Under this standard, the issue on summary judgment is "whether Norfolk Southern should have known that the 'hard-to-throw' condition of the switch indicated that there could be something wrong with it," i.e., whether Norfolk Southern could have an anticipated or reasonably foreseen that the "hard-to-

throw" condition of the switch at least warranted a further investigation. Ms. *30.

Significantly, the Court rejects the contention that regulations promulgated pursuant to the Federal Rail Safety Act preclude recovery under FELA where the two conflict. *Henderson v. National R.R. Passenger Corp.*, 87 F.Supp.3d 610 (S.D.N.Y. 2015), *Infermo v. New Jersey Transit Rail Operations, Inc.* (No. 10-2498 SRC), Jan. 24, 2012 (D. N.J. 2012) (not selected for publication in F.Supp.), and *Fair v. BNSF Ry.*, 238 Cal. App. 4th 269, 189 Cal. Rptr.3d 150 (2015), the Court adheres to a construction of the interplay between the regulations under FRSA and the remedies afforded by FELA outlined in *Pom Wonderful, LLC v. Coca-Cola Co.*, __ U.S. __ 134 S.Ct. 228 (2014) (Ms. *35-44), namely, that FRSA's regulations are simply to be treated like any other regulation such that complying with them may provide non-dispositive evidence of due care. *Id.* Ms. *45-46. Accordingly, even though an FRSA regulation did not require Norfolk Southern's inspector to throw the switch when it was inspected, this regulation constituted non-dispositive evidence of due care which was placed in conflict by Cottles's expert's opinion testimony. Because of the conflict in the evidence, the summary judgment was due to be reversed.

SUMMARY JUDGMENT, BANKRUPTCY, MANDAMUS

Ex parte Bonds, [Ms. 2150845, Aug. 26, 2016] __ So.3d __ (Ala. Civ. App. 2016). In this divorce proceeding, the husband filed a petition for a writ of mandamus to seek review of an order of the St. Clair Circuit Court denying his motion for partial summary judgment in a divorce action instituted by wife. The motion for summary judgment was premised upon the wife's failure to list the couple's marital residence or claims for alimony and property division as potential assets or as pending claims in the schedule she attached to a bankruptcy petition filed under Chapter 7 of the United Stated Bankruptcy Code. After the wife's discharge in bankruptcy, the husband amended his answer in the divorce action to assert judicial estoppel and the failure to join the bankruptcy trustee as the real-party-in-interest given the non-disclosure of the assets in the bankruptcy proceeding. The St. Clair Circuit Court denied the motion for summary judgment, and the husband sought review by way of mandamus.

The Court of Civil Appeals notes that generally the denial of a motion for summary judgment is not reviewable by a petition for a writ of mandamus, Ms. *5, citing *Ex parte Griffin*, 4 So.3d 430, 435 (Ala. 2008), because an adequate remedy exists by way of an appeal. *Id.*, citing *Ex parte Liberty Nat'l Life Ins. Co.*, 825 So.2d 758, 761 (Ala. 2002), and *Ex parte Jackson*, 780 So.2d 681, 684 (Ala. 2000).

The court distinguished the holdings in *Ex parte Jackson Hosp. & Clinic*, 167 So.3d 324 (Ala. 2014), and *Ex parte Tyson Foods, Inc.*, 146 So.3d 1041 (Ala. 2013) (both involving mandamus and real-parties-in-interest) (Ms. *6-8), because neither Jackson Hospital nor Tyson involved the review of a denial of a motion for summary judgment based upon either judicial-estoppel or real-party-in-interest grounds. Thus, husband failed to demonstrate that the denial of the motion for summary judgment in his case fell within the limited exceptions to the general rule that denial of a summary judgment motion is not reviewable by a petition for a writ of mandamus.

GARNISHMENT, CLAIM OF EXEMPTION

Crews v. Jackson, [Ms. 2150422, Aug. 26, 2016] __So.3d __ (Ala. Civ. App. 2016). Rule 64B, Ala. R. Civ. P., explaining the procedure by which a defendant may seek exemption from garnishment and which provides, in pertinent part, that

> [i]f the plaintiff fails to make timely contest after notice of the defendant's claim of exemption, after fifteen (15) calendar days from the filing of such claim, the process of garnishment and any writ of garnishment issued therein shall be dismissed or, where appropriate, modified to the extent necessary to give effect to the claimed exemptions

is mandatory as explained in *Oliver v. Shealey*, 67 So.3d 73 (Ala. 2011), and *Ex parte Prudential Ins. Co. of America*, 721 So.2d 1135 (Ala. 1998). Thus, a trial court has no discretion to determine whether to dismiss a garnishment proceeding or to modify a writ of garnishment when a judgment creditor fails to contest a declaration and claim of exemption within the time provided by the rule.

RULE 12(B)(6) DISMISSAL, NEGLIGENCE, MISREPRESENTATION, BREACH OF CONTRACT

Giles v. Blackmon, [Ms. 2150430, Aug. 26, 2016] __ So.3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals reverses the Jefferson Circuit Court-Bessemer Division's 12(b)(6), Ala. R. Civ. P., dismissal of the Gileses' claims against a home inspector when, after their purchase of a home, they learned it had termite and water damage.

The Court of Civil Appeals first notes the standard of review applicable to a grant of a Rule 12(b)(6) motion to dismiss:

> Standard of Review
>
> "The standard of review applicable to an appeal of a trial court's judgment granting a Rule 12(b)(6)[, Ala. R. Civ. P.,] motion to dismiss is well settled. In *Crosslin v. Health Care Authority of Huntsville*, 5 So.3d 1193, 1195 (Ala. 2008), our supreme court stated:
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> > "'In considering whether a complaint is sufficient to withstand a motion to dismiss under Rule 12(b)(6), Ala. R. Civ. P., a court "must accept the allegations of the complaint as true." *Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C.*, 828 So.2d 285, 288 (Ala. 2002) (emphasis omitted). "'The appropriate standard of review under Rule 12(b)(6)[, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [it] to relief.'" *Smith v. National Sec. Ins. Co.*, 860 So.2d 343, 345 (Ala. 2003) (quoting *Nance v. Matthews*, 622 So.2d 297, 299 (Ala. 1993)). In determining whether this is true, a court considers only whether the plaintiff may possibly prevail, not whether

the plaintiff will ultimately prevail. *Id.* Put another way, "'a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'" *Id.* (emphasis added)."'

Murray v. Prison Health Servs., Inc., 112 So. 3d 1103, 1106 (Ala. Civ. App. 2012).

Ms. *4-5.

Next, the court recites the elements of a negligence claim (duty, breach of that duty, proximate cause, and damage) (Ms. *5-6, citing *Lowe's Home Ctrs., Inc. v. Laxson*, 655 So.2d 943, 945-46 (Ala. 1994)) and concludes that viewing the allegations of plaintiff's complaint most strongly in the Gileses' favor, the court cannot conclude that "it appears beyond doubt that [the Gileses] can prove no set of facts in support of the [negligence] claim that would entitle [them] to relief." *Id.*, Ms. *5-6, quoting *Murray v. Prison Health Servs., Inc., supra*, 112 So.3d at 1106 (emphasis in original). Thus, the 12(b)(6) dismissal of the negligence claim was due to be reversed.

The court next reviewed the elements of the misrepresentation claim (a false misrepresentation, concerning a material existing fact, reasonably relied upon by the plaintiff, who was damaged as a proximate result), Ms. *6, citing *Fisher v. Comer Plantation, Inc.*, 772 So.2d 455, 463 (Ala. 2000), and likewise finds, based upon the language in *Murray, supra*, that it cannot conclude that "it appears beyond doubt that [the Gileses] can prove no set of facts in support of the [misrepresentation] claim that would entitle [them] to relief." Ms. *7 (emphasis in original).

Finally, the court reviews the elements of the breach-of-contract claim (the existence of a valid contract binding the parties in the action, performance under the contract, non-performance by the defendant, and damages) (Ms. *7-8, citing *Southern Med. Health Sys., Inc. v. Vaughn*, 669 So.2d 98-99 (Ala. 1995)), and again concludes, on the basis of *Murray*, that the trial court erred in granting the motion to dismiss on the breach of contract claim.

42 U.S.C. § 1983 DELIBERATE-INDIFFERENCE, STATE-AGENT, STATE SOVEREIGN IMMUNITY

Johnson v. Dunn, [Ms. 2150040, Aug. 26, 2016] __ So.3d __ (Ala. Civ. App. 2016). On application for rehearing, the Court of Civil Appeals notes that state-agent immunity and state sovereign immunity are not available as defenses to a 42 U.S.C. § 1983 deliberate-indifference claim. See Ms. *7-8, citing *King v. Correctional Med. Servs., Inc.*, 919 So.2d 1186, 1191 (Ala. Civ. App. 2005) ("[S]ection 14 [sovereign] immunity and State-agent immunity have no applicability to federal-law claims.").

COMPENSATORY DAMAGES, COLLATERAL SOURCE RULE

Magrinat v. Maddox, [Ms. 2150357, Aug. 26, 2016] __ So.3d __ (Ala. Civ. App. 2016). Magrinat was injured in an automobile collision with Maddox, brought suit, and was awarded $42,000 in compensatory damages in a non-jury proceeding before the Lee Circuit Court. Evidence at trial from an orthopaedic surgeon, Dr. Buggay, was that surgery was required to repair an injury to Magrinat's arm and that the charge for the surgery was $9,281 for his services, but that Dr. Buggay sold Magrinat's debt to OrthoUSA for $3,200 with the understanding that OrthoUSA would try to collect the balance from Magrinat. Nevertheless, the Lee Circuit Court awarded only $3,200 for this component of Magrinat's compensatory damages award. Magrinat then appealed, challenging the amount of damages awarded and contending that the trial court used the wrong measure of damages in determining that amount.

Magrinat argued that the proper measure of damages should include the amount of the charges for which he is responsible and not the amount that Dr. Buggay agreed to accept from OrthoUSA in selling the debt. Ms. *3, 7. The Court of Civil Appeals characterized the issue as a "question of first impression in Alabama." Ms. *7. Maddox countered that the proper measure is the amount actually paid to the surgeon. *Id.*, citing *AMF Bowling Centers, Inc. v. Dearman*, 683 So.2d 436 (Ala. 1995). The Court of Civil Appeals agreed with Magrinat:

> "[T]he general rule regarding the recovery of medical expenses, including hospital expenses resulting from personal injuries, is that a plaintiff may recover those medical expenses that are reasonable and necessary." *Ex parte Hicks*, 537 So.2d 486, 489–90 (Ala. 1988); *Hooks v. Pettaway*, 142 So.3d 1151, 1158 (Ala. Civ. App. 2013). "This Court has consistently held that '[c]ompensatory damages are designed to make the plaintiff whole by reimbursing him or her for the loss or harm suffered.' *Ex parte Moebes*, 709 So.2d 477, 478 (Ala. 1997); see *Torsch v. McLeod*, 665 So.2d 934, 940 (Ala. 1995)." *Ex parte Goldsen*, 783 So.2d 53, 56 (Ala. 2000); *see also Ex parte S&M, LLC*, 120 So.3d 509, 510 (Ala. 2012).

Ms. * 9-10. The court found persuasive the reasoning of *Katiuzhinsky v. Perry*, 152 Cal. App. 4th 1288, 62 Cal. Rptr. 3d, 309 (2007), that "[t]he intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment." Ms. * 11, quoting *Katiuzhinsky*, 152 Cal. App. 4th at 1291, 62 Cal. Rptr. 3d at 310. Accordingly, the judgment for compensatory damages is reversed and the cause remanded for the trial court to apply the proper measure of damages and to recalculate its damage award.

JUDICIAL RECUSAL

Ex parte Rogers, [Ms. 2150828, Aug. 26, 2016] __ So.3d __ (Ala. Civ. App. 2016). Former wife sought recusal of Judge Dempsey, the only circuit judge allotted the 34th Judicial Circuit, in an original divorce proceeding because former husband is the son of an attorney who practiced before Judge Dempsey for many years. Judge Dempsey granted the recusal motion. Two years later, former husband filed a post-divorce proceeding seeking modification of custody, child support obligations, and seeking to hold former wife in contempt

for violating certain provisions of the divorce judgment. Former wife again sought Judge Dempsey's recusal on the same grounds, but Judge Dempsey refused to step aside. Former wife then filed a petition for a writ of mandamus seeking an order directing Judge Dempsey to recuse himself.

The Court of Civil Appeals denies the petition for writ of mandamus, finding that former wife had not produced substantial evidence to sustain her burden of proving whether a reasonable person could question Judge Dempsey's partiality and whether there is an appearance of impropriety. Ms. *18. Judge Dempsey's previous recusal in the underlying divorce case, alone, is not sufficient to mandate his recusal in the later post-divorce proceeding. *Id.* The standard for recusal is not whether the trial judge will be placed in an awkward position, but "whether another person, knowing all the circumstances, might reasonably question the judge's impartiality – whether there is an appearance of impropriety." Ms. *19, quoting *Ex parte Duncan*, 638 So.2d 1332, 1334 (Ala. 1994). The Court of Civil Appeals reiterates that the

> [T]he law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea.

Id., quoting *Ex parte Balogun*, 516 So.2d 606, 609 (Ala. 1987). "[M]andamus will lie to compel a judge's recusal only when there is sufficient evidence to call into question the impartiality of the judge." *Ibid.*, quoting *Ex parte Bank of Am. N.A.*, 39 So.3d 113, 120 (Ala. 2009). Here the evidence was not sufficient to call Judge Dempsey's impartiality into question or to show an appearance of impropriety so as to require recusal, so former wife failed to show a clear legal right to mandamus relief.

DISCOVERY SANCTIONS

Ex parte Sikes, [Ms. 2150469, Aug. 26, 2016] __ So.3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals denies a petition for a writ of mandamus filed by an attorney sanctioned by the Montgomery Circuit Court with a $3,000 fine for vexatious discovery practices. Holding that a trial court "is afforded broad discretion in managing discovery, and it may sanction parties who do not comply with the discovery process" (Ms. *22, quoting *Ex parte Community Health Sys. Prof'l Servs. Corp.*, 72 So.3d 595, 603 (Ala. 2011)), and that "the choice of discovery sanctions is within the trial court's discretion and will not be disturbed on appeal absent gross abuse of discretion" (Ms. *23, quoting *Iverson v. Xpert Tune, Inc.*, 553 So.2d 82, 87 (Ala. 1989)), the court holds that repeated discovery requests, motions to compel, and a request to deem privileges waived were efforts to circumvent an earlier trial court discovery ruling (Ms. *27) such that "given the entirety of the circumstances, we cannot say that Sikes has demonstrated that the trial court abused its discretion such that he has shown a clear legal right to a writ of mandamus." Ms. *28.

RES JUDICATA, PRIVITY

Sims v. JPMC Specialty Mortgage, LLC, [Ms. 2150437, Aug. 26, 2016] __ So.3d __ (Ala. Civ. App. 2016). This complex mortgage foreclosure, ejectment, trespass, conversion, and declaratory judgment action raises, in the context of cross motions for summary judgment, issues of *res judicata* and *privity*.

First, the court holds that JPMC and Chase properly filed a motion for summary judgment on the grounds of *res judicata* when they had not previously filed an answer asserting *res judicata* as an affirmative defense. The court reiterates the principle earlier established in *Marlow v. Mid-South Tool Co.*, 535 So.2d 120, 125 (Ala. 1988) ("If a defendant moves for summary judgment before he files an answer, any affirmative defense argued in support of the motion for summary judgment has not been waived.... Only if an answer fails to assert an affirmative defense that is argued in a subsequently filed motion for summary judgment is the affirmative defense deemed waived.").

The court then recites the elements of *res judicata*:

> "'The elements of res judicata are "(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions.'" *Chapman Nursing Home, Inc. v. McDonald*, 985 So.2d 914, 919 (Ala. 2007)(quoting *Equity Res. Mgmt., Inc. v. Vinson*, 723 So.2d 634, 636 (Ala. 1998)).'
>
> "*Ex parte Chesnut*, [Ms. 1140731, Jan. 22, 2016] __ So.3d __, __ (Ala. 2016)."
>
> *Osborne v. Osborne*, [Ms. 2150319, May 13, 2016] __ So.3d __, __ (Ala. Civ. App. 2016).

Ms. *20-21. Focusing on the "substantial identity of the parties" requirement, the Court of Civil Appeals finds genuine issues of material fact. The court first notes that the substantial identity requirement generally requires parties to be identical, but that there is an exception to this rule for "parties in privity with a party to the prior action." Ms. *21, quoting *Greene v. Jefferson County Comm'n*, 13 So.3d 901, 912 (Ala. 2008). The privity requirement has, in turn, been summarized as follows:

> "'The term "privity" has not been uniformly defined with respect to res judicata. The following three definitions have appeared in Alabama cases: (1) the relationship of one who is privy in blood, estate, or law; (2) the mutual or successive relationship to same rights of property; and (3) and identity of interest in the subject matter of litigation. Largely defining privity by example, the Alabama cases seem to resolve the question on an ad hoc basis in which the circumstances determine whether a person should be bound by or entitled to the benefits of a judgment. The decision usually turns on whether the relationship between the parties was close enough and whether adequate notice of the action was received by the privy; this test has been bolstered by the recent tendency of the Alabama courts to analyze privity as an identity of interest.'
>
> "*Hughes v. Martin*, 533 So.2d 188, 191 (Ala. 1988)(quoting *Issue Preclusion in Alabama*, 32 Ala. L. Rev. 500, 520-21 (1981)). Therefore, "'[a] person may be bound by a judgment even though

> not a party to a suit if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.'" *Brown v. Brown*, 680 So.2d 321, 323 (Ala. Civ. App. 1996)(quoting *Green v. Wedowee Hosp.*, 584 So.2d 1309, 1315 (Ala. 1991))."

Ms. *21-22. Continuing, the court notes that "privity" is a flexible legal term,

> "'"[C]omprising several different types of relationships and generally applying when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party."'" *McDaniel v. Harleysville Mut. Ins. Co.*, 84 So.3d 106, 112 (Ala. Civ. App. 2011)(quoting *Jim Parker Bldg. Co. v. G & S Glass Supply Co.*, 69 So.3d 124, 132 (Ala. 2011), quoting in turn *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1286 (11th Cir. 2004))."'"

Ms. *24. Because there was evidence which, when viewed in a light most favorable to the non-movant, could support the conclusion that the appellant's interest in the property at issue was different from his predecessor's interest in that property, genuine issues of material fact existed which precluded summary judgment on the affirmative defense of *res judicata*.

MENTAL ANGUISH DAMAGES AND PIERCING THE CORPORATE VEIL

TLIG Maintenance Services, Inc. v. Fialkowski, [Ms. 2150255, Sept. 2, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms in part and reverses in part a judgment entered by the Madison Circuit Court on a jury verdict in favor of Fialkowski on her claims against TLIG, Rusich, and Kitchura for compensatory damages, including mental anguish damages, following defendant's breach of a contract to make improvements to Fialkowski's home.

Noting first the general rule that "damages for mental anguish are not recoverable as part of a claim alleging breach of contract" Ms. *11, citing *B&M Homes, Inc. v. Hogan*, 376 So. 2d 667, 671 (Ala. 1979), the court reiterated that an exception to the general rule allows damages to be awarded for mental anguish when the action involves a contract for construction or repairs to a person's residence and the breach of the contract "'actually caused the complaining party mental anguish or suffering and ... was such that would necessarily result in emotional or mental detriment to the plaintiff. ...'" *Id.*, quoting *B&M Homes, Inc.*, 376 So. 2d at 672. The Court reiterated a survey of reported decisions when damages for mental anguish had been permitted in connection with the construction or repair of a residence:

> "In Ruiz de Molina v. Merritt & Furman Insurance Agency, Inc., 207 F.3d 1351 (11th Cir. 2000), the United States Court of Appeals for the Eleventh Circuit accurately summarized Alabama law concerning the recovery of mental-anguish damages for breach of a contract to build a residence:
>
> > "'Under Alabama law, "[d]amages for mental anguish can be recovered ... where the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering." Liberty Homes, Inc. v. Epperson, 581 So. 2d 449, 454 (Ala. 1991) (quoting F. Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630, 631 (1932)). ...
> >
> > "'.... The majority of the cases in which a plaintiff has been allowed to recover damages for mental anguish involved actions on "contracts for the repair or construction of a house or dwelling or the delivery of utilities thereto, where the breach affected habitability." See, e.g., Epperson, 581 So. 2d at 454; Orkin Exterminating Co. v. Donavan, 519 So. 2d 1330 (Ala. 1988); Lawler Mobile Homes, Inc. v. Tarver, 492 So. 2d 297 (Ala. 1986); Alabama Power Co. v. Harmon, 483 So. 2d 386 (Ala. 1986). Because a person's home is said to be his "castle" and the "largest single individual investment the average American family will make," these contracts are "so coupled with matters of mental concern or solicitude or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering." B & M Homes, Inc. v. Hogan, 376 So. 2d 667, 671-72 (Ala. 1979). Where such a contractual duty [is] breached, the Alabama Supreme Court has said that "it is just that damages therefor be taken into consideration and awarded." Id. at 671.
> >
> > "'....
> >
> > "'The Alabama Supreme Court has made very clear, however, that all these cases represent an exception to the general rule prohibiting mental anguish damages for breach of contract. These cases deserve special treatment because it is highly foreseeable that egregious breaches of certain contracts – involving one's home ..., for example – will result in significant emotional distress. See Sexton v. St. Clair Federal Sav. Bank, 653 So. 2d 959, 962 (Ala. 1995).'
>
> "Ruiz de Molina, 207 F.3d at 1359-60. See also Hardesty v. CPRM Corp., 391 F. Supp. 2d 1067, 1074 (M.D. Ala. 2005) (citing Volkswagen of America, Inc. v. Dillard, 579 So. 2d 1301, 1304 (Ala. 1991), for the proposition that '[t]he Alabama Supreme Court has indicated that it is not eager to "widen the breach in the general rule [prohibiting such damages]"'). ...
>
> "The Eleventh Circuit Court of Appeals' summary of Alabama law indicates that our decisions have set out three elements that are essential to the right to recover mental-anguish damages for the breach of a home-construction contract, namely: (1) that the breach be egregious, i.e., that it result in severe construction defects; (2) that those defects render the home virtually uninhabitable; and (3) that the breach necessarily or reasonably result in mental anguish or suffering. See,

e.g., Liberty Homes, Inc. v. Epperson, 581 So. 2d 449, 454 (Ala. 1991) (wiring defects that presented an imminent fire hazard); B & M Homes, Inc. v. Hogan, 376 So. 2d 667 (Ala. 1979) (crack in the concrete slab extending from the front porch through the den that widened and extended throughout the house, causing severe damage); Hill v. Sereneck, 355 So. 2d 1129, 1132 (Ala. Civ. App. 1978) (crack in the concrete slab that warped the doors and made them unable to be closed and locked, causing the owner's stay-at-home wife to be 'afraid and apprehensive' about her safety); F. Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932) (roof that, each time it rained, leaked into every room of the house, including the bedroom where the plaintiff slept)."

Ms. *11-14, quoting *Baldwin v. Panetta*, 4 So. 3d 555, 567-568 (Ala. Civ. App. 2008). Because the contracted-for improvements to Fialkowski's home did not put the structure at risk or impair her ability to live in the home, the evidence did not support the conclusion that she suffered mental anguish to the degree required for damages to be awarded. Hence, the judgment entered on the jury's verdict awarding Fialkowski $15,000.00 in damages for mental anguish is reversed. Ms. *17.

The court also affirmed in part and reversed in part as to the Madison Circuit Court's judgment determining the corporate veil of the business entity with which Fialkowski had contracted to perform the improvements could be pierced because of disregard of the corporate formalities and commingling of the corporation's assets with personal assets. Citing *Heisz v. Galt Indus., Inc.*, 93 So. 2d 918 (Ala. 2012)(Ms. *17-8), the court set forth the procedure for determining when the corporate veil should be pierced:

> "Whether the corporate veil of a business entity should be pierced is a matter of equity, properly decided by a judge after a jury has resolved the accompanying legal issues. Stephens v. Fines Recycling, Inc., 84 So. 3d 867, 877 (Ala. 2011); Ex parte Thorn, 788 So. 2d 140 (Ala. 2000). We accordingly review a trial court's determination in this regard under the ore tenus standard of review, which dictates that the trial court's judgment based on ore tenus evidence '"is presumed correct and should be reversed only if the judgment is found to be plainly and palpably wrong, after consideration of all the evidence and after drawing all inferences that can logically be drawn from that evidence."' Thomas v. Neal, 600 So. 2d 1000, 1001 (Ala. 1992) (quoting Sundance Marina, Inc. v. Reach, 567 So. 2d 1322, 1324–25 (Ala. 1990))."

Id. at 929. The court then examined whether the evidence supported the Madison Circuit Court's judgment under the test established by the Supreme Court for when it is appropriate to pierce the corporate veil:

> "The Alabama Supreme Court has set out the following extraordinary circumstances in which it would be appropriate to pierce the corporate veil: 1) where the corporation is inadequately capitalized; 2) where the corporation is conceived or operated for a fraudulent purpose; or 3) where the corporation is operated as an instrumentality or alter ego of an individual or entity with corporate control. First Health, Inc. v. Blanton, 585 So. 2d [1331] at 1334 [(Ala. 1991)] (citing Messick v. Moring, 514 So. 2d 892, 894 (Ala. 1987)). See also M & M Wholesale Florist, Inc. v. Emmons, 600 So. 2d 998 (Ala. 1992)."

Ms. * 22, quoting *Gilbert v. James Russell Motors, Inc.*, 812 So. 2d 1269, 1273 (Ala. Civ. App. 2001).

* * *

> "The corporate veil may be pierced where a corporation is set up as a subterfuge, where shareholders do not observe the corporate form, where the legal requirements of corporate law are not complied with, where the corporation maintains no corporate records, where the corporate maintains no corporate bank account, where the corporation has no employees, where corporate and personal funds are intermingled and corporate funds are used for personal purposes, or where an individual drains funds from the corporation."

Ms. *23, quoting *Simmons v. Clark Equip. Credit Corp.*, 554 So. 2d 398, 401 (Ala. 1989). Upon review of the evidence in light of these standards, the court concludes that the Madison Circuit Court correctly determined the corporate veil could be pierced as to the sole shareholder, but that the Madison Circuit Court erred in concluding the veil could be pierced to a non-shareholder and non-officer such that the judgment in that regard was required to be reversed as well.

BREACH OF CONTRACT AND ATTORNEY'S FEES

Massey v. Carriage Towne, LLC, [Ms. 2150432, Sept. 2, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms in part and reverses in part a judgment entered by the Mobile Circuit Court in an action for breach of contract and attorney's fees arising from an abandonment of a commercial lease agreement.

The court affirms the judgment concerning breach of lease damages finding that the lessor had not "accepted the abandonment" by merely reentering the leased premises, conducting an inspection, and attempting to re-lease the premises through advertising. Citing *Newman v. Spann*, 602 So. 2d 901 (Ala. Civ. App. 1992) and *McClure v. Daniel*, 45 Ala. App. 558, 233 So. 2d 500 (Civ. App. 1970) (Ms. *6-7), the court finds the trial court could properly have concluded that such actions by the lessor were insufficient to support a finding of an acceptance of the abandonment such that the past-due rents could be excused.

However, the Court found that the Mobile Circuit Court's failure to evaluate the lessor's claim for attorney's fees under the criteria established in *Peebles v. Miley*, 439 So. 2d 137 (Ala. 1983), required that the judgment awarding an attorney's fee apparently based upon a contingency fee formula was required to be reversed for reconsideration upon remand in light of the guidelines set forth in *Peebles v. Miley*. Ms. *7-10.

SUBJECT MATTER JURISDICTION AND EVICTION/UNLAWFUL-DETAINER

The Rimpsey Agency, Inc. v. Johnston, [Ms. 2150461, Sept. 2, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals dismisses an appeal from a judgment entered by the Calhoun Circuit Court in an eviction/unlawful detainer action upon concluding the circuit court never obtained original subject-matter

jurisdiction to adjudicate the dispute since original jurisdiction over unlawful-detainer actions lies in the district courts per § 6-6-330, Ala. Code 1975. Following *Darby v. Schley*, 8 So. 3d 1011 (Ala. Civ. App. 2008), the court found that the circuit court lacked jurisdiction:

> Because [the unlawful-detainer] action was not within the exclusive jurisdiction of the circuit court and because there had been no adjudication of the unlawful-detainer action and no appeal from such an adjudication had been taken to the circuit court, the district court's unauthorized transfer of the action to the circuit court did not transfer jurisdiction over that action to the circuit court. Like in Darby, because the circuit court lacked jurisdiction over [the] unlawful-detainer action, the circuit court's judgment purporting to grant the summary-judgment motion ... is void and will not support an appeal.

Ms. *10.

STATUTE OF LIMITATIONS/TIMELY COMMENCEMENT OF ACTION

ENT Associates of Alabama, P.A. v. Hoke, [Ms. 1141396, 1141401, Sept. 2, 2016] __ So. 3d __ (Ala. 2016). The Supreme Court, pursuant to Rule 5, Ala. R. App. P., reverses the Montgomery Circuit Court's interlocutory order denying motions for summary judgment premised upon arguments that an action for medical negligence was not timely commenced as required by Ala. R. Civ. P. 3. Citing *Precise v. Edwards*, 60 So. 3d 228 (Ala. 2010), the Court concludes the evidence before the Montgomery Circuit Court on summary judgment was not sufficient for the court to find that plaintiff's counsel had "a bona fide intent to have [the complaint] immediately served." Ms. *12, quoting *Dunnam v. Ovbiagele*, 814 So. 2d 232 (Ala. 2001). The Court reiterated that the timely commencement of an action for statute-of-limitations purposes requires both the filing of a complaint within the limitations period and objective proof of a bona fide intent to have the complaint immediately served:

> "'a bona fide intent to have [an action] immediately served' can be found when the plaintiff, at the time of filing, performs all the tasks required to serve process. ... On the other hand, when the plaintiff, at the time of filing, does not perform all the tasks required to effectuate service and delays a part of the process, a lack of the required bona fide intent to serve the defendant is evidenced."

Ms. *13, quoting *Precise*, 60 So. 3d at 233. Here, plaintiff did not provide the address of any of the defendants to the circuit court at the time she filed her complaint. She informed the clerk of court that she was electing to serve the defendants by use of a process server as permitted by Rule 4(i)(1), Ala. R. Civ. P. However, there was no evidence that she made any effort to actually obtain a process server at the time she filed her complaint, such that the Montgomery Circuit Court could not properly have concluded that the evidence supported a finding of a bona fide intention to immediately have the complaint served. See Ms. *13-26. Accordingly, the judgment denying the defendant's motion for summary judgment is reversed.

DISMISSAL OF APPEAL AND NON-FINAL JUDGMENT

McCullough v. Allstate Property and Cas. Ins. Co., [Ms. 2150459, Sept. 9, 2016] __ So. 3d __ (Ala. Civ. App. 2016).

> "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). The absence of a final judgment is a jurisdictional defect that cannot be waived by the parties."

Ms. *4, quoting *Baugus v. City of Florence*, 968 So. 2d 529, 531 (Ala. 2007).

Here, as in *Baugus*, plaintiff amended his complaint after defendant moved for summary judgment. Because defendant did not file a motion asking the trial court to include the amended claim, the trial court's order granting the motion for summary judgment did not dispose of all the claims between the parties and was therefore non-final, such that it would not support an appeal. Accordingly, the appeal was dismissed.

WORKERS' COMPENSATION MEDICAL AND TEMPORARY-TOTAL-DISABILITY BENEFITS

Kennamer Brothers, Inc. v. Stewart, [Ms. 2150359, Sept. 9, 2016] __ So. 3d __ (Ala. Civ. App. 2016). Kennamer Brothers, the employer, appeals from the judgment of the Marshall Circuit Court finding Stewart, the employee, eligible for temporary-total-disability benefits and medical benefits under the Workers' Compensation Act following injuries received in a trucking accident. The standard of review is set forth in *Ex parte Saad's Healthcare Services, Inc.*, 19 So. 3d 862 (Ala. 2008):

> "'An appellate court reviews the burden of proof applied at trial and other legal issues in workers' compensation claims without a presumption of correctness.' However, '[i]n reviewing pure findings of fact, the finding of the circuit court shall not be reversed if that finding is supported by substantial evidence.' 'The trial court's findings of fact "on disputed evidence in a workers' compensation case are conclusive."'"

Ms. *4, quoting *Ex parte Saad's*, 19 So. 3d at 870-71. In accident cases involving sudden and traumatic events, "an employee must produce substantial evidence tending to show that the alleged accident occurred and must also establish medical causation by showing that the accident caused or was a contributing cause of the injury." Ms. *4, quoting *Pair v. Jack's Family Rests., Inc.*, 765 So. 2d 678, 681 (Ala. Civ. App. 2000). "Whether the employment caused an injury is a question of fact to be resolved by the trial court." Ms. *4-5, quoting *Tenax Mfg. Alabama, LLC v. Holt*, 979 So. 2d 105, 112 (Ala. Civ. App. 2007). Here, upon review of the trial evidence, including the employer's failure to point to any other traumatic event since the crash that could have caused the employee's symptoms, the court holds that it cannot conclude that the trial court's determination of medical causation is not supported by substantial evidence.

Next, the employer contended temporary-total-disability benefits were not due

because the employee was "prevented from working for reasons unrelated to his or her workplace injury." Ms. *11, quoting *Fab Ark Steel Supply, Inc. v. Dodd*, 168 So. 3d 1244, 1259 (Ala. Civ. App. 2015). Specifically, the employer asserted the employee's employment was terminated because he represented an unacceptable insurance risk following the crash. The Court rejected this contention finding the trial court could probably have determined that the reason for terminating the employee's employment was not unrelated to the injury he sustained, i.e., that but for the crash, it could be inferred he would not have been deemed such an impossibly high insurance risk. *Id.*

JUDICIAL RECUSAL AND CAMPAIGN CONTRIBUTIONS

Dupre v. Dupre, [Ms. 2150632, Sept. 9, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms Jefferson County Circuit Judge Julie A. Palmer's order denying a motion to recuse from a petition for a rule nisi. The court holds § 12-24-3, Ala. Code 1975, effective without preclearance by the United States Department of Justice as required by § 5 of the Voting Rights Act of 1965 given the holding in Shelby County, *Alabama v. Holder*, __ U.S. __, 133 S.Ct. 2612, 186 L.Ed. 2d 651 (2013) invalidating § 4(b) of the Voting Rights Act so that the preclearance requirement in § 5 does not apply to § 12-24-3.

Section 12-24-3(a), Ala. Code 1975, provides:

> "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."

Ms. *3-4. Invoking traditional rules of statutory construction (Ms. *4-5), the Court construes § 12-24-3's phrase "immediately preceding" to apply to substantial campaign contributions to the judge in the "immediately preceding" judicial election, i.e., "the last judicial election before the filing of the motion to recuse." Ms. *4-5.

The Court also notes § 12-24-3(b)'s rebuttable presumption requiring recusal when a judge or justice accepts from a party, or his or her attorney, contributions of 15% or more of the total campaign contributions collected during an election cycle while the party, or his or her attorney, has a case pending before that judge or justice. Ms. *6.

MANDAMUS AND PSYCHOTHERAPIST-PATIENT PRIVILEGE

Ex parte Johnson, [Ms. 2150835, Sept. 9, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals grants the petition of a clinical psychologist seeking a writ of mandamus directing the Shelby Circuit Court to vacate an order denying the psychologist's motion to quash a subpoena calling for the production of the psychologist's evaluation and treatment records concerning a minor child.

The Court first notes that while appellate courts typically will not review discovery orders by way of a mandamus petition, an exception applies when a privilege, such as the psychotherapist-patient privilege has been disregarded. Ms. *3, citing *Ex parte T.O.*, 898 So. 2d 706 (Ala. 2004).

Reviewing § 34-26-2, Ala. Code 1975 (Psychotherapist-privilege statute) and Rule 503, Ala. R. Evid., the Court explains that the exception to the psychotherapist-patient privilege in child-custody cases recognized in Rule 503(d)(5), Ala. R. Evid., only applies to parties, i.e., parents, and not to communications or records of the child whose custody is in issue. Ms. *4-7. Because the psychologist was entitled to assert the privilege on behalf of the child (Ms. *4, n. 2, citing *Ex parte Western Mental Health Ctr.*, 884 So. 2d 835, 841, n. 4 (Ala. 2003)), the Shelby Circuit Court erred in not granting the psychologist's motion to quash the subpoena filed on behalf of her patient.

IMMUNITY U.S. CONSTITUTION AMENDMENT 11 AND 42 U.S.C. § 1983

Ex parte State of Alabama Board of Educ., [Ms. 1150366, Sept. 9, 2016] __ So. 3d __ (Ala. 2016). This plurality opinion (Parker, J., and Stuart, Main, and Wise, JJ., concur; Bolin, Murdock, Shaw, and Bryan, JJ., concur in the result) reviews assertions of federal immunity by the Alabama State Board of Education, the State Superintendent of Education, and the State Intervention Chief Financial Officer through their petition for a writ of mandamus seeking an order directing the Jefferson Circuit Court to vacate its order denying their motions to dismiss.

The Court first determines that the State Board of Education, an agency of the State of Alabama (Ms. *22-3, citing *State Board of Education v. Mullins*, 31 So. 3d 91, 96 (Ala. 2009)) is entitled to Eleventh Amendment immunity from 42 U.S.C. § 1983 liability claims in the absence of its consent to suit. Ms. *22, citing *Alabama State University v. Danley*, [Ms. 1140907, Apr. 8, 2016], __ So. 3d __, __ (Ala. 2016).

The Court next determines that the superintendent and State chief financial officer are immune to requests for money damages by the Eleventh Amendment as well. Ms. *23, quoting *Ex parte Retirement Sys. of Alabama*, 182 So. 3d 527, 538 (Ala. 2015)("[c]laims for monetary relief against State officials in their official capacities are barred by the Eleventh Amendment.").

However, claims against the superintendent and financial officer seeking prospective injunctive relief are not subject to Eleventh Amendment immunity pursuant to *Lane v. Central Alabama Community College*, 772 F.3d 1349 (11th Cir. 2014). Ms. *24-5.

Next, the Court holds that claims against the superintendent and financial officer in their personal capacities are not protected by the Eleventh Amendment per *Jackson v. Georgia Dep't of Transp.*, 16 F.3d 1573 (11th Cir. 1994). Ms. *25. The superintendent and financial officer are entitled to qualified immunity from § 1983 claims when the conduct does not "violate

clearly established statutory constitutional rights of which a reasonable person would have known." Ms. *25-6, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982) and *Ex parte Alabama Dep't of Youth Servs.*, 880 So. 2d 393, 402 (Ala. 2003). Should the State actors sued in their individual capacity demonstrate they were acting within their discretionary authority, the burden shifts to show that qualified immunity is not appropriate. Ms. *26, citing *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003). To determine if a right is "clearly established" within the meaning of *Harlow v. Fitzgerald*, *supra*, the Court considers "whether preexisting law at the time of the alleged acts provided fair warning ... that their actions were unconstitutional." Ms. *27, citing *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Wilson v. Layne*, 526 U.S. 603 (1999).

In conclusion, the Court grants the petition in part and issues a writ directing the Jefferson Circuit Court to vacate its order denying the motion to dismiss and to enter an order dismissing the § 1983 claims against the State Board of Education, dismissing the § 1983 claims against the superintendent and financial officer in their official capacities insofar as the claims seek money damages, and dismissing the § 1983 claims against the superintendent and financial officer in their individual capacities. The Court denies the petition to the extent claims were asserted against the superintendent and financial officer in their official capacities seeking prospective injunctive relief.

CIVIL FORFEITURE AND STANDING

Ex parte State of Alabama, [Ms. 1150559, Sept. 16, 2016] __ So. 3d __ (Ala. 2016). (Stuart, Acting Chief J., Bolin, Parker, Main, and Wise, JJ., concurring; Murdock, Shaw, and Bryan, JJ., dissenting). The Court grants certiorari to review the decision of the Court of Civil Appeals (*Okafor v. State*, [Ms. 2140649, Feb. 12, 2016] __ So. 3d __, __ (Ala. Civ. App. 2016)) to determine whether it erred in reversing the Madison Circuit Court's summary judgment for the State in an action pursuant to The Drug Profits Forfeiture Act of 1988, § 20-2-93, Ala. Code 1975.

Citing *Ex parte Collier*, 413 So. 2d 403 (Ala. 1982), *Jones v. State*, 946 So. 2d 903 (Ala. Crim. App. 2006), and *Kevin Sharp Enterprises, Inc. v. State ex rel Tyson*, 923 So. 2d 1117 (Ala. Civ. App. 2005), the Court concludes the Court of Civil Appeals erred in reversing the Madison Circuit Court's summary judgment because Okafor, as the party objecting to the allegedly unlawful search and seizure, failed to present substantial evidence of a possessory interest in the premises which were searched. Ms. *6-14.

Curiously, the dissenting opinions assert that the Supreme Court's grant of certiorari – concerning the standing issue – was *not* the basis upon which the Court of Civil Appeals reversed the Madison Circuit Court's summary judgment. The only issue addressed by the Court of Civil Appeals was whether, in a civil-forfeiture matter, evidence seized as the fruit of a Miranda violation is admissible (Ms. *18, Shaw, J., dissenting), but the Court denied certiorari review of the State's challenge to *that* issue.

RESTRICTIVE COVENANTS AND STATUTE OF LIMITATIONS

Bekken v. Greystone Residential Assoc., Inc., [Ms. 2150365, Sept. 16, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals reverses an injunction granted by the Shelby Circuit Court to enforce residential restrictive covenants.

The court first determines the appeal was timely filed as required by Rule 4(a)(1), Ala. R. App. P., as the Shelby Circuit Court's judgment constituted a "terminal decision which demonstrates there has been a complete adjudication of all matters in controversy between the litigants" (Ms. *22-25), and the homeowner timely appealed in conformance with Rule 26(a), Ala. R. App. P. when he filed his notice of appeal the day after Martin Luther King, Jr.'s birthday. See § 1-1-4, Ala. Code 1975 (providing for the exclusion of the last day from the computation of time required by law if that day is a legal holiday). Ms. *24-5.

The court then determined that the six-year statute of limitations set forth in § 6-2-34(6), Ala. Code 1975, was applicable to actions to enforce restrictive covenants (Ms. *26-27), and since the homeowners association's action was not commenced within six years of the date when the homeowner began making improvements without an approved plan from the homeowner's association, the applicable limitations period had expired, requiring the Shelby Circuit Court's judgment to be reversed and the cause remanded to allow the circuit court to make additional factual determinations from the evidence already presented. Ms. *26-31.

SUMMARY JUDGMENT PROCEDURE

Williams v. Limestone County Water and Sewer Authority, [Ms. 2150310, Sept. 16, 2016] __ So. 3d __ (Ala. Civ. App. 2016). On application for rehearing, the court withdraws its original June 17, 2016, opinion and substitutes a new opinion holding that the Lauderdale Circuit Court correctly entered a summary judgment in favor of the Limestone County Water and Sewer Authority on claims asserting innocent, negligent, wanton, and intentional misrepresentations concerning billings for water services and intentional, malicious, oppressive, and wanton conspiracy to conceal or suppress monthly bills for water being furnished to another landowner and for conversion and trespass asserting that the water had been unlawfully diverted to the other landowner, but had erred in granting summary judgment in favor of the water and sewer authority on a negligence claim and had erred in granting judgment in favor of co-defendants because of their failures to comply with the procedural requirements of Rule 12 and Rule 56, Ala. R. Civ. P.

The court's discussion of the procedural requirements for entry of dismissal/summary judgment are instructive:

> Williams argues that the trial court could not properly enter a summary judgment against defendants McCafferty, NuSouth, and Rackley because they did not comply with the requirements of Rule 56, Ala. R. Civ. P.; specifically, he asserts that they failed to demonstrate to the trial court that there were no genuine issues of material facts as to the claims against them and that they were entitled to a judgment as a matter of law as to those claims.
>
> "[A]n entry of a summary judgment for the defendants would

> not be proper until they have complied with the requirement of the rule that they submit a narrative summary of what they contend to be the undisputed material facts. See Rule 56(c), Ala. R. Civ. P., Northwest Florida Truss, Inc. v. Baldwin County Comm'n, 782 So. 2d 274 (Ala. 2000), and Moore v. ClaimSouth, Inc., 628 So. 2d 500 (Ala. 1993)."

Singleton v. Alabama Dep't of Corr., 819 So. 2d 596, 600 (Ala. 2001). Furthermore, the entry of a judgment in favor of the defendants who had not requested one deprived Williams of an opportunity to test their evidence or legal arguments.

> Under Rule 12 and Rule 56, Ala. R. Civ. P., the nonmovant must receive "(1) adequate notice that the trial court intends to treat the motion as one for summary judgment and (2) a reasonable opportunity to present material in opposition.'" Traywick v. Kidd, 142 So. 3d 1189, 1195 (Ala. Civ. App. 2013) (quoting Phillips v. AmSouth Bank, 833 So. 2d 29, 31 (Ala. 2002), quoting in turn Graveman v. Wind Drift Owners' Ass'n, 607 So. 2d 199, 202 (Ala. 1992))."
>
> Johnson v. Dunn, [Ms. 2150040, May 13, 2016] ___ So. 3d ___, ___ (Ala. Civ. App. 2016).
>
> Because McCafferty, NuSouth, and Rackley did not file motions for a summary judgment setting forth what each believed to be undisputed facts or stating why he or it was entitled to a judgment as a matter of law, the trial court had no basis upon which to enter a summary judgment in their favor. Thus, the summary judgment in favor of McCafferty, NuSouth, and Rackley is improper.

Ms. *24-6. Accordingly, the portion of the judgment in favor of the water and sewer authority on the negligence claim is reversed, as is the portion of the judgment in favor of McCafferty, NuSouth, and Rackley, as to all plaintiff's claims against them. The remainder of the Lauderdale Circuit Court's judgment is affirmed.

RULE 43(A), ALA. R. CIV. P. TRIAL UPON STIPULATED EVIDENCE

The Dombrowski Living Trust v. Morgantown Property Owners' Assoc., Inc., [Ms. 2150391, Sept. 16, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals, in a 3-2 decision (Donaldson, Judge; and Thompson, P.J. and Pittman, J., concurring; Moore, J. and Thomas, J., dissenting) affirms the judgment of the Baldwin Circuit Court denying a request to judicially redeem beachfront property in Gulf Shores that had been sold for unpaid ad valorem taxes. The decision is of interest because of the standard of review on appeal:

> Standard of Review
>
> By agreement of the parties, this case was tried based on stipulated evidence without the presentation of live testimony. The parties agreed that the trial court would decide any disputed facts based only on the written materials submitted and enter a final judgment accordingly. Pursuant to Rule 43(a), Ala. R. Civ. P., "[a]ttorneys for the parties are authorized to effect by agreement the manner of taking testimony absent a showing that the trial [c] ourt limited or prohibited such agreed manner." Jones v. Gladney, 339 So. 2d 1019, 1021 (Ala. 1976). "[W]here no testimony is presented ore tenus, a reviewing court will not apply the presumption of correctness to a trial court's findings of fact and ... the reviewing court will review the evidence de novo." Eubanks v. Hale, 752 So. 2d 1113, 1122 (Ala. 1999). "Our statutory obligation [pursuant to Section 12-2-7(1), Ala. Code 1975,] in a case such as this is to 'weigh the evidence and give judgment as [we] deem[] just.'" Bentley Sys., Inc. v. Intergraph Corp., 922 So. 2d 61, 71 (Ala. 2005). See also Jackson v. Strickland, 808 So. 2d 993, 995 (Ala. 2001) (quoting Smith v. Cook, 220 Ala. 338, 341, 124 So. 898, 900 (1929)) ("[W]here '[t]he testimony was taken by depositions' or was taken in a previous proceeding, '[t]here is ... no presumption of the correctness of the conclusion of the circuit court.'").

Ms. *10-11. The majority determines that the doctrine of laches applies to prevent the claimant from asserting its judicial-redemption claim. Ms. *21-2. The dissenting judges would hold that laches was inapplicable because of a failure of proof that undue prejudice would occur if the case were decided on its merits. See *id.*, Ms. *24-8.

STANDING & ENFORCEABILITY OF CONTRACTS - THE GARDENS AT GLENLAKES PROPERTY OWNERS ASSN., INC. V. BALDWIN COUNTY SEWER SERVICE, LLC

The Gardens at Glenlakes Property Owners Assn., Inc. v. Baldwin County Sewer Service, LLC, [Ms. 1150563, Sept. 23, 2016] __ So. 3d __ (Ala. 2016). In this plurality opinion (Main, J., Bolin, Shaw, and Bryan, JJ., concurring; Murdock, J., concurring in the result), the Supreme Court reverses a judgment of the Baldwin Circuit Court and remands the cause for further consideration to determine the enforceability of an agreement among property owners associations and a local sewer service provider.

The Court first rejects the Baldwin Circuit Court's reasoning for entering summary judgment in favor of the sewer service and denying summary judgments for the homeowners associations to the effect that the associations lacked standing to enforce the agreement. The Court rejected the sewer service's assertion of a lack of standing with a scholarly recitation of the law of standing:

> The concept of standing implicates a court's subject matter jurisdiction. See State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999) ("When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction."). As Justice Lyons wrote in Hamm v. Norfolk Southern Ry., 52 So. 3d 484, 499 (Ala. 2010) (Lyons, J., concurring specially): "Imprecision in labeling a party's inability to proceed

as a standing problem unnecessarily expands the universe of cases lacking in subject-matter jurisdiction." In Wyeth, Inc. v. Blue Cross & Blue Shield of Alabama, 42 So. 3d 1216 (Ala. 2010), this Court noted:

> "[O]ur courts too often have fallen into the trap of treating as an issue of 'standing' that which is merely a failure to state a cognizable cause of action or legal theory, or a failure to satisfy the injury element of a cause of action. As the authors of Federal Practice and Procedure explain:
>
> > "'The question whether the law recognizes the cause of action stated by a plaintiff is frequently transformed into inappropriate standing terms. The [United States] Supreme Court has stated succinctly that the cause-of-action question is not a question of standing.'
> >
> > "13A Charles Alan Wright, Arthur K. Miller, and Edward H. Cooper, Federal Practice & Procedure § 3531 (2008) (noting, however, that the United States Supreme Court, itself, has on occasion 'succumbed to the temptation to mingle these questions'). The authors go on to explain:
> >
> > > "'Standing goes to the existence of sufficient adversariness to satisfy both Article III case-or-controversy requirements and prudential concerns. In determining standing, the nature of the injury asserted is relevant to determine the existence of the required personal stake and concrete adverseness. ...'
> >
> > "13A Federal Practice & Procedure § 3531.6 .... Cf. 13B Federal Practice & Procedure § 3531.10 (discussing citizen and taxpayer standing and explaining that 'a plaintiff cannot rest on a showing that a statute is invalid, but must show "some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally"').
>
> "In the present case, Wyeth appears to argue that the plaintiff, BCBSAL, lacks standing because, Wyeth says, BCBSAL's allegations, even if true, would not entitle it to a recovery. ...
>
> "... The question whether the right asserted by BCBSAL is an enforceable one in the first place, i.e., whether BCBSAL has seized upon a legal theory our law accepts, is a cause-of-action issue, not a standing issue.
>
> "....
>
> "Nor do we see that the consideration of the legal theory asserted by BCBSAL is outside the subject-matter jurisdiction of either the trial court or this Court. The courts of this State exist for the very purpose of performing such tasks as sorting out what constitutes a cognizable cause of action, what are the elements of a cause of action, and whether the allegations of a given complaint meet those elements. Such tasks lie at the core of the judicial function. See generally, e.g., Art. VI, § 139(a), Ala. Const. 1901 (vesting 'the judicial power of the state' in this Court and lower courts of the State); Art. VI, § 142, Ala. Const. 1901 (providing that the circuit courts of this State 'shall exercise general jurisdiction in all cases except as may otherwise be provided by law'). ... The issue Wyeth seeks to frame for this Court as one of 'standing' is, in reality, an issue as to the cognizability of the legal theory asserted by BCBSAL, not of BCBSAL's standing to assert that theory or the subject-matter jurisdiction of this Court to consider it."

42 So. 3d at 1219-21 (some emphasis added; some emphasis omitted).

Recently, in Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013), this Court again examined the concept of standing and cautioned that the concept is generally relevant only in public-law cases. 159 So. 3d at 44-45. In BAC we quoted Professor Hoffman:

> "'[T]he word "standing" unnecessarily invoked in the proposition can be erroneously equated with "real party in interest" or "failure to state a claim." This simple, though doctrinally unjustified, extension could swallow up Rule 12(b)(6), Rule 17[, Ala. R. Civ. P.,] and the whole law of amendments.'"

159 So. 3d at 46 (quoting Hoffman, The Malignant Mystique of "Standing," 73 Ala. Law. 360, 362 (2012)).

Ms. *10-13. The Court concludes that the true issue before the Baldwin Circuit Court was not that of standing, but whether the homeowners associations were properly real parties in interest, an issue to be determined in conformance with Rule 17(a), Ala. R. Civ. P. and its corresponding case law, including *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025 (Ala. 1999). Ms. *13.

Next, the Court rejects the Baldwin Circuit Court's reasoning that the terms of the agreement were so insufficiently described and indefinite as to render the agreement unenforceable. Again, the Court provided a scholarly synopsis of the requirements for enforceability of contracts under Alabama law:

> "'To be enforceable, the [essential] terms of a contract must be sufficiently definite and certain, Brooks v. Hackney, 329 N.C. 166, 170, 404 S.E.2d 854, 857 (1991), and a contract that "'leav[es] material portions open for future agreement is nugatory and void for indefiniteness'" ....' Miller v. Rose, 138 N.C. App. 582, 587-88, 532 S.E.2d 228, 232 (2000) (quoting MCB Ltd. v. McGowan, 86 N.C. App. 607, 609, 359 S.E.2d 50, 51 (1987), quoting in turn Boyce v. McMahan, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974)). 'A lack of definiteness in an agreement may concern the time of performance, the price to be paid, work to be done, property to be transferred, or miscellaneous stipula-

tions in the agreement.' 1 Richard A. Lord, Williston on Contracts § 4:21, at 644 (4th ed. 2007). 'In particular, a reservation in either party of a future unbridled right to determine the nature of the performance ... has often caused a promise to be too indefinite for enforcement.' Id. at 644-48 (emphasis added). See also Smith v. Chickamauga Cedar Co., 263 Ala. 245, 248-49, 82 So. 2d 200, 202 (1955) ("'A reservation to either party to a contract of an unlimited right to determine the nature and extent of his performance, renders his obligation too indefinite for legal enforcement.'") (quoting 12 Am. Jur. Contracts § 66). Cf. Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1440 (7th Cir. 1992) (an indefinite term may 'render[] a contract void for lack of mutuality' of obligation).

> "'Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.' 17A Am. Jur. 2d Contracts § 183 (2004). 'The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.' Id. (emphasis added). See also Smith, 263 Ala. at 249, 82 So. 2d at 203."
> White Sands Group, L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1051 (Ala. 2008).
> "Generally speaking, our courts have not favored the destruction of contracts on the grounds that they are ambiguous, uncertain, or incomplete, see Alabama National Life Insurance Co. v. National Union Life Insurance Co., 275 Ala. 28, 151 So. 2d 762 (1963); Smith v. Chickamauga Cedar Co., 263 Ala. 245, 82 So. 2d 200 (1955), and 'will, if feasible, so construe a contract as to carry into effect the reasonable intention of the [contracting] parties if that can be ascertained.' McIntyre Lumber & Export Co. v. Jackson Lumber Co., 165 Ala. 268, 51 So. 767 (1910). Nevertheless, a trial court should not attempt to enforce a contract whose terms are so indefinite, uncertain, and incomplete that the reasonable intentions of the contracting parties cannot be fairly and reasonably distilled from them. Alabama National Life Insurance Co. v. National Union Life Insurance Co., supra ...."
> Cook v. Brown, 393 So. 2d 1016, 1018 (Ala. Civ. App. 1981).

Ms. *15-16. Relying upon these principles, the Court concludes the contract sufficiently described the geographic scope of the parcels intended to be encompassed by the agreement and that the contracts provision that charges for sewer service were to be "competitive with charges made by others for similar services in the South Baldwin County vicinity" was analogous to phrases such as "fair market value" and "reasonable price" which "have been uniformly held to be sufficiently definite for enforcement." Ms. *18-19 (string citing cases holding such phrases enforceable).

STATE IMMUNITY & EMPLOYEES RETIREMENT SYSTEM OF ALABAMA-DEFINED BENEFIT PLAN - SOUTHERN STATES POLICE BENEVOLENT ASSN., INC. V. BENTLEY

Southern States Police Benevolent Assn., Inc. v. Bentley, [Ms. 1150265, 1150360, Sept. 23, 2016] __ So. 3d __ (Ala. 2016). This *per curiam* opinion (Stuart, Acting C.J., and Bolin, Parker, Shaw, and Wise, JJ., concur) affirms judgments of the Montgomery Circuit Court, which denied an action by the Southern States Police Benevolent Association, Inc., and three City of Auburn police officer members who collectively sued Governor Bentley, members of the Board of Control of the Employees Retirement System of Alabama, David Bronner, the Chief Executive Officer and Secretary-Treasurer of the Retirement Systems of Alabama, and Thomas White, State Comptroller, in their representative capacities seeking injunctive relief and a judgment declaring that participants in the defined-benefit pension plan operated by the Employees Retirement System could make retirement contributions – and therefore receive increased retirement benefits – based upon a definition of "earnable compensation," which included payments received for overtime worked.

The Court first rejected an assertion of Article I, § 14 state immunity by Governor Bentley, Dr. Bronner, and the other Employees Retirement System officials. The Court construed the action as one seeking a declaratory judgment and therefore as an action falling within the recognized exceptions to § 14 immunity including 1) actions brought to compel state officials to perform their legal duties; 2) actions brought to enjoin state officials from enforcing an unconstitutional law; 3) actions to compel state officials to perform ministerial acts; 4) actions brought under the Declaratory Judgments Act, § 6-6-220, *et seq*., Ala. Code 1975, seeking construction of a statute and its application in a given situation; 5) valid inverse-condemnation actions; and 6) actions seeking injunctive relief where it is alleged that state officials have acted fraudulently, in bad faith, beyond their authority, or under a mistaken interpretation of the law. Ms. *15-16, citing *Ex parte Hampton*, 189 So. 3d 14 (Ala. 2015).

The Court next construes § 36-27-1(14) in light of Ala. Op. Atty. Gen. No. 2011-090 (August 22, 2011) and the legislature's 2012 amendment of §36-27-1(14). The Court rejects the contention that the state›s employees who participated in the defined-benefit plan had attained fixed and immutable rights in the plan through contributing to the plan for many years based upon overtime paid. While the Court has recognized generally that participants in public pension plans can attain contractually vested rights which could not be abrogated by subsequent legislation (Ms. *20-26), those cases only arose in the context of legislation demonstrating an unmistakable intent by the legislature to bind itself against prospectively changing the definition in the retirement plan benefit statute.

> "Having reviewed the relevant statute governing the [Employees Retirement System] plan, [the Court] concludes that there is nothing within

> the statutes that would indicate that the legislature intended to contractually bind itself to any definition of "earnable compensation" that would include overtime payments. Most notably, until May 2012, the definition of "earnable compensation" in § 36-27-1(14) made no mention of overtime payments and, as explained supra, and in the August 2011 Attorney General's Opinion, the language used in fact indicates that overtime payments were not "earnable compensation."

Ms. *30-31. Because up until 2012, the only thing which changed was the administrative interpretation of § 36-27-1(14), none of the defined-benefit plan participants gained any vested rights in the administration's prior erroneous interpretation as the Retirement Systems "long time erroneous interpretation of § 36-27-1(14) ... fail[ed] to bind the State in any respect." Ms. *33.

Finally, adhering to the rules of construction that the words in the 2012 amendment to § 36-27-1(14) must be given their "plain and ordinary meaning" and that the statute be read as a whole (as required by *State Superintendent of Education v. Alabama Education Ass'n*, 144 So. 3d 265, 272-73 (Ala. 2003)), the Court concludes the legislature properly intended to allow only limited overtime payments to be included within a member's earnable compensation.

In sum, the Court concludes that before the 2012 amendment of § 36-27-1(14), earnable compensation did not properly include overtime payments regardless of how the Employees Retirement System may have improperly interpreted the statute and that the 2012 amendment to the statute was properly interpreted by the Retirement Systems to allow overtime payments to be included within earnable compensation to a limited extent. Accordingly, the summary judgment entered by the Montgomery Circuit Court in favor of the state defendants is affirmed.

WORKERS' COMPENSATION & CONTEMPT BY EMPLOYER - AUGMENTATION, INC. V. HARRIS

Augmentation, Inc. v. Harris, [Ms. 2150307, Sept. 23, 2016] __ So. 3d __ (Ala. Civ. App. 2016). The Court of Civil Appeals affirms the Tuscaloosa Circuit Court›s judgment holding an employer in willful contempt pursuant to Rule 70A, Ala. R. Civ. P., *Overnight Transp. Co. v. McDuffie*, 933 So. 2d 1092 (Ala. Civ. App. 2005) and *Ex parte Cowgill*, 587 So. 2d 1002 (Ala. 1991) for its failure to pay for an employee's medical treatment. The determination of whether to hold a party in contempt is discretionary and «will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence.» Ms. *25-6, quoting *Good Hope Contracting Co. v. McCall*, 187 So. 3d 1128, 1142 (Ala. Civ. App. 2015). Here, the medical evidence from the employee›s treating physician indicated that care for her back injury including an epidural steroid injection and anti-inflammatory patches were warranted, but the employer failed to present any evidence that its refusal to pay for the indicated medical treatment was reasonable because it made its decision based upon the utilization-review procedure set out in Alabama Admin. Code (Workers› Compensation), Rule 480-5-5-.01, *et seq.*, or the procedure set forth in § 25-5-88, Ala. Code 1975 permitting an employer to dispute its liability for an injury by filing a petition setting out the basis of the dispute as described in *Total Fire Prot., Inc. v. Jean*, 160 So. 3d 795 (Ala. Civ. App. 2014). Because the trial court›s conclusion that the employer had not properly investigated or challenged its obligation to pay for the prescribed treatment before declining to pay for that treatment was supported by the evidence, and because the employer failed to show that it had invoked either the utilization-review procedure set forth in Rule 480-5-5-.01, *et seq.*, or the judicial review procedure set forth in § 25-5-88, the Tuscaloosa Circuit Court's judgment holding the employer in contempt is affirmed.