RECENT CIVIL DECISIONS

Summaries from March 30, 2018 through September 28, 2018

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WILL CONTEST – UNDUE INFLUENCE

McGimsey v. Gray, [Ms. 1161016, Mar. 30, 2018] __ So. 3d __ (Ala. 2018). The Court (Stuart, C.J., and Bolin, Parker, Shaw, Main, Wise, Bryan, and Mendheim, JJ., concur; Sellers, J., dissents) reverses a summary judgment entered by the Jefferson Circuit Court in favor of a personal representative of an estate upon finding that will contestants presented substantial evidence of each of the elements of a claim of undue influence, which are

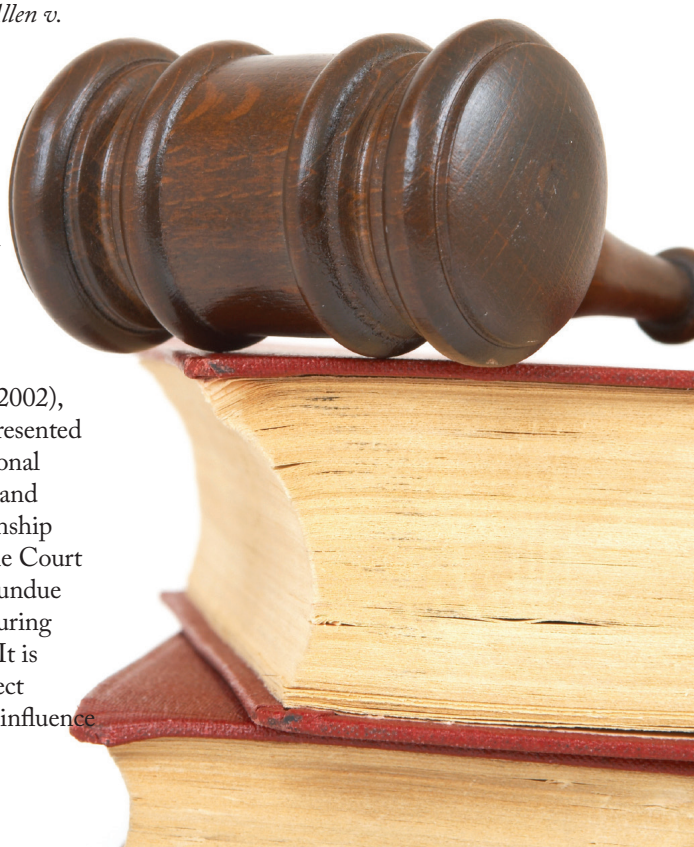
> "(1) that a confidential relationship existed between a favored beneficiary and the testator; (2) that the influence of or for the beneficiary was dominant and controlling in that relationship; and (3) that there was undue activity on the part of the dominant party in procuring the execution of the will."

Ms. *11 (quoting *Clifton v. Clifton*, 529 So. 2d 980, 983 (Ala. 1988)).

The Court (Ms. *12) citing *Allen v. Sconyers*, 669 So. 2d 113 (Ala. 1995), *Bolan v. Bolan*, 611 So. 2d 1051 (Ala. 1993), and *Cook v. Morton*, 241 Ala. 188, 1 So. 2d 890 (1941), finds substantial evidence of a confidential relationship between the personal representative (the "favored beneficiary") and the testator. Citing *Pirtle v. Tucker*, 960 So. 2d 620 (Ala. 2006), and *Hayes v. Apperson*, 826 So. 2d 798 (Ala. 2002), the Court finds the contestants presented substantial evidence that the personal representative was in a dominant and controlling position in the relationship with the testator. Ms. *13-14. The Court also finds substantial evidence of undue activity by the beneficiary in procuring the execution of the will, noting "It is next to impossible to produce direct evidence of the exercise of undue influence over another person. Frequently, the best evidence which can be offered ... is circumstantial, tending only to support inferences which can be drawn therefrom." Ms. *16 (quoting *Ex parte Henderson*, 732 So. 2d 295, 299 (Ala. 1999) (quoting *Smith v. Moore*, 278 Ala. 173, 177, 176 So. 2d 868, 871 (1965))).

Because there was substantial evidence supporting each of the requisite elements of such a claim, the Jefferson Circuit Court erred in granting summary judgment and in taxing costs against the contestants. Accordingly, the order granting summary judgment and the order taxing costs and expenses are reversed. Ms. *21.

OUTBOUND FORUM SELECTION CLAUSE – ALABAMA HEAVY EQUIPMENT DEALER ACT § 8-21B-1 ET SEQ., ALA. CODE 1975



Ex parte Terex USA, LLC, [Ms. 1161113, Mar. 30, 2018] __ So. 3d __ (Ala. 2018). The Supreme Court (Stuart, C.J., and Bolin, Parker, Main, Wise, and Mendheim, JJ., concur; Shaw and Bryan, JJ., concur in the result; Sellers, J., dissents) denies a petition for a writ of mandamus brought by Terex USA, LLC, which sought an order directing the Jefferson Circuit Court to enforce an outbound forum-selection clause contained in a distributorship agreement between Terex and Cowin Equipment Company, and to dismiss Cowin's action against Terex based on improper venue pursuant to Rule 12(b)(3), Ala. R. Civ. P. The Court read provisions of the Alabama Heavy Equipment Dealer Act, § 8-21B-1 *et seq*., Ala. Code 1975, as pretermitting enforcement of the distributorship agreement's forum-selection clause. Invoking traditional rules of statutory construction (Ms. *9-10), the Court focused upon § 8-21B-13's provisions that:

> "Notwithstanding the terms, provisions, or conditions of any dealer agreement, any person who suffers bodily injury, loss of profit, or property damage as a result of a violation of this chapter may bring a civil action in a court of competent jurisdiction in this state to enjoin further violations and to recover the damages sustained by him or her together with the costs of the suit, including a reasonable attorney's fee. ..."

Ms. *11-12. The Court agrees that the phrase "[n]otwithstanding the terms, provisions, or conditions of any dealer agreement," were to be given effect and thereby permitted Cowin to file an action in Alabama even though the distributor agreement contained a provision to the contrary, i.e., the outbound forum-selection clause. Ms. *13. This is made so by § 8-21B-9's incorporation-by-reference provision which states:

> "This chapter shall be deemed to be incorporated into every dealer agreement subject to this chapter and shall supersede and control all provisions of any dealer agreement inconsistent with this chapter."

Ms. *14. Further, § 8-21B-8(d) prohibits a party from requiring an Alabama dealer to waive any legislatively enacted protection under the Act, including the right to bring an action in this state. Section 8-21B-8(d) states:

> "No supplier shall require a dealer to prospectively assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from any liability or obligation under this chapter, which would limit the entitlement to recover damages under this chapter or other Alabama law, or which would waive the right to trial by jury. Any provision or agreement purporting to do so is void and unenforceable to the extent of the waiver or release. ..."

Citing (Ms. *16-18), *Wimsatt v. Beverly Hills Weight Loss Clinics International, Inc.*, 32 Cal. App. 4th 1511, 38 Cal. Rptr. 2d 612 (1995), and *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128 (7th Cir. 1990), the Court finds that almost identical language cited in both opinions articulated strong public policy that prohibits the enforcement of choice-of-forum provisions in similar franchise agreements.

The Court therefore concludes that the legislature expressed a strong public policy against any provision in a dealer agreement which would foreclose an Alabama dealer's right to seek redress under the Act in a court in Alabama. Ms. *23.

ARBITRATION – UNCONSCIONABILITY – CEMETERY INTERNMENT CONTRACT

SCI Alabama Funeral Services, LLC v. Hinton, [Ms. 1161107, Mar. 30, 2018] __ So. 3d __ (Ala. 2018). The Court (Stuart, C.J., and Bryan, Bolin, Parker, Shaw, Wise, Sellers, and Mendheim, JJ., concur; Main, J., concurs in the result) reverses an order of the Jefferson Circuit Court denying a motion to compel arbitration in a dispute arising from a cemetery's internment contract on the basis of unconscionability. The Supreme Court concludes, citing *American General Finance, Inc. v. Branch*, 793 So. 2d 738 (Ala. 2000), *Layne v. Garner*, 612 So. 2d 404 (Ala. 1992), *Steele v. Walser*, 880 So. 2d 1123 (Ala. 2002), and *Leeman v. Cooks Pest Control, Inc.*, 902 So. 2d 641 (Ala. 2004), that an arbitration provision may not be found unconscionable merely because it is overbroad. As overbreadth was the only basis for the circuit court's order denying the motion to compel arbitration, it was due to be reversed and the case remanded for the circuit court to enter an order granting the motion to compel arbitration.

PRIOR PENDING ACTION STATUTE § 6-5-440, ALA. CODE 1975 – DISMISSAL – MANDAMUS

Ex parte Nautilus Insurance Company, [Ms. 1170170, Mar. 30, 2018] __ So. 3d __ (Ala. 2018). In consolidated actions (*Ex parte Nautilus Ins. Co.*, Alabama Supreme Court Case No. 1170170, and *Ex parte Lyon Fry Cadden Insurance Agency, Inc.*, Alabama Supreme Court Case No. 1170235), the Court unanimously (Stuart, C.J., and Bryan, Bolin, Parker, Shaw, Main, Wise, Sellers, and Mendheim, JJ., concur) considers separate petitions for writs of mandamus seeking orders directing the Baldwin Circuit Court to vacate its orders denying motions to dismiss. The Court grants Nautilus Insurance Company's petition on the basis of Alabama's Prior Pending Action statute, § 6-5-440, Ala. Code 1975. The Court denies Lyon Fry Cadden Insurance Agency's petition, concluding that the denial of a motion to dismiss based upon Rule 12(b)(6), Ala. R. Civ. P., is not reviewable upon a petition for a writ of mandamus, and that the denial of a motion to dismiss premised upon an alleged failure to join indispensable parties under Rule 19, Ala. R. Civ. P., is not reviewable by mandamus either.

As to Nautilus's petition, the Court concludes that later-filed state court breach of contract, abnormal bad faith, bad-faith-failure-to-settle, breach-of-the-enhanced-duty-of-good-faith, fraud, and negligence claims against this insurer were due to be dismissed under authority of § 6-5-440 because they were compulsory counterclaims required to be filed in federal court in response to the insurer's

earlier-filed complaint for a declaratory judgment which sought a declaration of its rights and obligations under the liability policy at issue. The Court reasoned:

> Section 6-5-440 provides:
>
> "No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times."
>
> Regarding the operation of § 6-5-440, this Court has stated:
>
> "This Code section, by its plain language, forbids a party from prosecuting two actions for the 'same cause' and against the 'same party.' This Court has previously held that an action pending in a federal court falls within the coverage of this Code section:
>
> > ""'The phrase 'courts of this state,' as used in § 6-5-440, includes all federal courts located in Alabama. This Court has consistently refused to allow a person to prosecute an action in a state court while another action on the same cause and against the same parties is pending in a federal court in this State.'"
>
> "*Ex parte University of South Alabama Found.*, 788 So. 2d 161, 164 (Ala. 2000) (quoting *Weaver v. Hood*, 577 So. 2d 440, 442 (Ala. 1991) (citations in *Weaver* omitted in *University of South Alabama*)). Additionally, a compulsory counterclaim is considered an 'action' for purposes of § 6-5-440. *Penick v. Cado Sys. of Cent. Alabama, Inc.*, 628 So. 2d 598, 599 (Ala. 1993). As this Court has noted:
>
> > "'This Court has held that the obligation ... to assert compulsory counterclaims, when read in conjunction with § 6-5-440, Ala. Code 1975, which prohibits a party from prosecuting two actions for the same cause and against the same party, is tantamount to making the defendant with a compulsory counterclaim in the first action a "plaintiff" in that action (for purposes of § 6-5-440) as of the time of its commencement. See, e.g., *Ex parte Parsons & Whittemore Alabama Pine Constr. Corp.*, 658 So. 2d 414 (Ala. 1995); *Penick v. Cado Systems of Cent. Alabama, Inc.*, 628 So. 2d 598 (Ala. 1993); *Ex parte Canal Ins. Co.*, 534 So. 2d 582 (Ala. 1988). Thus, the defendant subject to the counterclaim rule who commences another action has violated the prohibition in § 6-5-440 against maintaining two actions for the same cause.'
> >
> > "*Ex parte Breman Lake View Resort, L.P.*, 729 So. 2d 849, 851 (Ala. 1999). See also *University of South Alabama Found.*, 788 So. 2d at 165 (holding that a party in an action pending in a federal court was subject to the counterclaim rule and thus violated § 6-5-440 by commencing another action in a state court); *Ex parte Parsons & Whittemore Alabama Pine Constr. Corp.*, 658 So. 2d 414 (Ala. 1995) (holding that the prosecution in a subsequent action of claims that had been compulsory counterclaims in a previously filed declaratory-judgment action violated § 6-5-440)."
> >
> > *Ex parte Norfolk S. Ry.*, 992 So. 2d 1286, 1289-90 (Ala. 2008).

Ms. *7-9. Citing (Ms. *14) *Ex parte Brooks Ins. Agency*, 125 So. 3d 706 (Ala. 2013), and *Ex parte Canal Ins. Co.*, 534 So. 2d 582 (Ala. 1988), the Court concludes that both parties' sets of claims arise out of the issuance of the same policy of insurance and hence "arise out of the same transaction or occurrence and are based on the same operative facts." The test for whether a counterclaim is compulsory is the "logical-relationship test":

> "'A counterclaim is compulsory if there is any logical relation of any sort between the original claim and the counterclaim.' Committee Comments on 1973 adoption of Rule 13, [Ala. R. Civ. P.,] ¶ 6. Under the logical-relationship standard, a counterclaim is compulsory if '(1) its trial in the original action would avoid a substantial duplication of effort or (2) the original claim and the counterclaim arose out of the same aggregate core of operative facts.' *Ex parte Canal Ins. Co.*, 534 So. 2d 582, 584 (Ala. 1988) (quoting *Brooks v. Peoples Nat'l Bank of Huntsville*, 414 So. 2d 917, 919 (Ala. 1982)). In determining whether the claims 'arose out of the same aggregate core of operative facts,' this Court must determine whether '(1) the facts taken as a whole serve as the basis for both claims or (2) the sum total of facts upon which the original claim rests creates legal rights in a party which would otherwise remain dormant.' *Canal Ins.*, 534 So. 2d at 584."
>
> *Ex parte Cincinnati Ins. Cos.*, 806 So. 2d 376, 380 (Ala. 2001).

Ms. *15. Since the claims against Nautilus meet the logical-relationship test, they are compulsory counterclaims in the federal action thereby requiring the dismissal of the later-filed state court claims pursuant to § 6-5-440. Ms. *17-18.

As to Precision's petition, the Court cites (Ms. *19) *Ex parte Kohlberg Kravis Roberts & Co., L.P.*, 78 So. 3d 959 (Ala. 2011), for the rule that the denial of a motion to dismiss based upon Rule 12(b)(6) is not reviewable by a petition for writ of mandamus because any alleged error in the denial of such a motion can be adequately remedied by appeal. Further, citing (Ms. *20) *Ex parte U.S. Bank Nat'l Ass'n*, 148 So. 3d 1060 (Ala. 2014), the Court concludes there is no authority indicating that the denial of a motion to dismiss predicated upon a failure to join an indispensable party is an issue properly reviewable by a petition for a writ of mandamus.

Finally, the Court rejects Lyon Fry Cadden's argument that it was entitled to dismissal because the claims against it were not ripe for adjudication (as there had not yet been a final determination of liability on the underlying policy of liability insurance) such that the trial court's subject-matter jurisdiction was allegedly not properly invoked. Citing (Ms. *23-24) *Ex parte Safeway Insurance Co. of Alabama*, 148 So. 3d 39 (Ala. 2013), the Court concludes that such a contention does not involve a lack of subject-matter jurisdiction, but only a potential merits issue involving the alleged ripeness of the claims.

Because Lyon Fry Cadden did not demonstrate that it had a clear legal right to dismissal from the state action based upon any of its arguments, the petition for writ of mandamus was due to be denied.

WRONGFUL DEATH – STANDING TO SUE

Watson v. The University of Alabama Health Services Foundation, P.C., [Ms. 1170057, Apr. 27, 2018] __ So. 3d __ (Ala. 2018). The Court (Stuart, C.J., and Sellers, Bolin, Parker, Main, and Mendheim, JJ., concur; Shaw, J., concurring in part and concurring in the result; Wise and Bryan, JJ., dissenting) affirms a summary judgment entered by the Jefferson Circuit Court in a wrongful death action in favor of The University of Alabama Health Services Foundation and Graham C. Towns, M.D. Noting the facts were undisputed, the Court holds that once a personal representative petitions a probate court for a final settlement of a decedent's estate, and the probate court enters a judgment of final settlement discharging the personal representative and his surety from all further liabilities, the former personal representative no longer has lawful authority to commence a wrongful-death action pursuant to § 6-5-410, Ala. Code 1975. Further, Rule 60(a), Ala. R. Civ. P., cannot be invoked beyond the 30-day deadline afforded by § 12-13-3, Ala. Code 1975, for setting aside or amending or reopening a judgment entered by a probate court, to correct, amend, or substantively enlarge or modify the probate court's judgment to make it say something other than what was originally pronounced.

SUMMARY JUDGMENT – CORPORATE VALUATION

Lynd v. Marshall County Pediatrics, P.C., [Ms. 1160683, Apr. 27, 2018) __ So. 3d __ (Ala. 2018). The Court (Stuart, C.J., and Mendheim, Parker, Main, and Bryan, JJ., concur) reverses a judgment of the Marshall Circuit Court in a breach of contract and specific performance action concerning valuation of shares in a pediatrics medical practice in Guntersville. The plaintiff, Dr. Lynd, upon resigning from the practice and surrendering her shares, contended that the remaining shareholders should purchase her shares in the practice at "fair value" pursuant to § 10A-4-3.02, Ala. Code 1975. The remaining shareholders insisted instead that valuation should be based upon the "book value" of Dr. Lynd's shares pursuant to § 10-4-228, Ala. Code 1975 (repealed in 1980) as referenced in the by-laws of the Articles of Incorporation of the practice. Under Dr. Lynd's proposed valuation, her shares were worth $230,000; in contrast, the book valuation method insisted upon by the remaining shareholders placed the value of Dr. Lynd's shares at $6,275. The Marshall Circuit Court granted the remaining shareholders' motions for summary judgment and concluded that the value was set at "book value" as of the date Dr. Lynd left the practice. Ms. *9.

After engaging in a detailed analysis of the practice's underlying incorporation documents, and because the incorporating parties failed to adopt a stockholder agreement specifying the manner of valuation of shares upon shareholder's resignation or disqualification from the practice, the Court was unable to conclude that the Marshall Circuit Court correctly applied the book valuation statute such that the entry of summary judgment in favor of the remaining shareholders in the practice was due to be reversed. The Court also determined, based on that same review of the incorporation documents, that the Marshall Circuit Court had not erred in denying Dr. Lynd's motion for summary judgment premised upon the fair valuation statute. Accordingly, the summary judgment entered in favor of the remaining shareholders in the practice was reversed and the cause remanded for further proceedings.

SUBJECT MATTER JURISDICTION – TAXPAYER STANDING

Richardson v. Relf, [Ms. 1170559, May 4, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Main (Parker, J., concurring; Stuart, C.J., and Bolin, Wise, Sellers, and Mendheim, JJ., concur specially) vacates an order of the Montgomery Circuit Court enjoining the sale of George Washington Middle School by the Montgomery County Board of Education. The Court reiterated recent authority that "'to have standing to bring an action, the plaintiff must have an interest in the outcome of the action and show that he or she has suffered or imminently will suffer an injury.'" Ms. *17, quoting *Ingle v. Adkins*, [Ms. 1160671, Nov. 9, 2017], __ So. 3d. __, ___ (Ala. 2017). The Court held:

> A taxpayer has standing to challenge the unlawful disbursement of public funds that he or she is liable to replenish through the payment of taxes. In the present case, because the sale of George Washington Middle School would bring money into the public treasury that tax-paying residents of Montgomery County are responsible for replenishing, tax-paying residents of Montgomery County do not have standing as taxpayers to challenge the sale.
>
> Because the plaintiffs did not have standing to bring the present action, the trial court never acquired subject matter jurisdiction over this case.

Ms. *22.

APPELLATE PROCEDURE – MOTION FOR NEW TRIAL – ADMISSIBILITY OF EVIDENCE OF FINANCIAL CONDITION

Ansley v. Inmed Group, [Ms. 1160465, May 4, 2018] __ So. 3d __ (Ala. 2018).

This decision by Justice Sellers (Stuart, C.J., and Parker, Wise, and Mendheim, JJ., concur; Bolin, Shaw, and Bryan, JJ., concur in the result; and Main, J., recuses) affirms the Bullock Circuit Court's denial of plaintiff's motion for new trial in a medical negligence wrongful-death case against Bullock County Hospital ("BCH") and BCH hospitalist Dr. Domingo.

The Court refused to consider the plaintiff's argument that she was entitled to a JML on the claims against Dr. Domingo because the plaintiff "never asked the trial court to enter a JML on all elements of her medical-malpractice claim ...." Ms. *17.

The Court held that the plaintiff had "not demonstrated that Dr. Domingo's own testimony was not sufficient to allow the jury to determine he did not breach the standard of care applicable to a hospitalist." Ms. *25. Accordingly, the Court concluded that the Bullock Circuit Court did not exceed its discretion in denying her motion for new trial. *Ibid.*

Finally, the Court rejected plaintiff's contention that the circuit court erred to reversal in preventing plaintiff to put on evidence of the wealth of BCH. A witness for BCH had testified that BCH was a small hospital and could not afford certain equipment. Ms. *26. The Court held that

> "[W]hen evidence of financial worth goes to material issue in the case, it is admissible." *Johns v. A.T. Stevens Enters., Inc.*, 815 So. 2d 511, 516 (Ala. 2001). Moreover, "[e]vidence regarding a party's financial condition may also be admissible when the party's opponent has opened the door by commenting upon or asking questions concerning [the] party's financial standing." *Hathcock v. Wood*, 815 So. 2d 502, 509 (Ala. 2001) (quoting 1 Charles W. Gamble, *McElroy's Alabama Evidence* § 189.05(2)(c) (5th ed. 1996)). "A trial court's ruling on the admission or exclusion of evidence will be reversed only if it is shown that the trial court exceeded its discretion in so ruling." *Jimmy Day Plumbing and Heating, Inc. v. Smith*, 964 So. 2d 1, 7 (Ala. 2007).

Ms. *28.

SUBJECT MATTER JURISDICTION – ADMINISTRATION OF PROBATE ESTATE – DECLARATORY JUDGMENT

Suggs v. Gray, [Ms. 1161118, May 4, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Sellers (Stuart, C.J., and Bolin, Parker, Main, and Wise, JJ., concur; Shaw, Bryan, and Mendheim, JJ., concur in the result in part and dissent in part) affirms in part and vacates in part a judgment of the Montgomery Circuit Court in a declaratory judgment action. A dispute arose between the estate of Frances W. Gray (the wife) and the estate of Floyd H. Gray, (the husband), as to the ownership of the proceeds from the sale of the couple's residence. The proceeds were being held in an attorney's trust account. Ms. *3. The administration of both estates was pending in the Montgomery Circuit Court.

On appeal, the personal representative of the wife's estate asserted that the circuit court lacked subject matter jurisdiction over the declaratory judgment action because the administration of both estates was pending in the probate court at the time the declaratory judgment action was filed. Ms. *10. The Court noted that generally probate courts lack equitable jurisdiction such that "the probate court did not have jurisdiction to fashion an equitable remedy concerning the assets being held in the law firm's trust account." Ms. *11.

The Court also rejected any notion that because the administration of the estates could have been removed to circuit court, a declaratory judgment action was improper. "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Ms. *13, quoting Rule 57, Ala. R. Civ. P.

In regard to the circuit court's declaratory judgment concerning the ownership of certificates of deposit and a diamond necklace, the Court held that the circuit court lacked subject matter jurisdiction. The Court explained that "[u]sing the declaratory-judgment action to expand the jurisdiction of the circuit court to encompass all the assets of the estates was improper. And, any attempt to have the circuit court consider other issues related to the administration of the estates, absent following the statutory provisions for removal, does not confer jurisdiction on the circuit court, and actions such as those taken in the case are, thus, void." Ms. *15.

PRETRIAL CONFERENCE – DUE PROCESS

Casey v. Bingham, [Ms. 2170045, May 11, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This unanimous decision by Judge Pittman reverses a judgment for the plaintiffs in an unlawful detainer action which had been appealed from district court to circuit court. At a scheduled pretrial conference, the circuit judge reviewed certain evidentiary exhibits and entered an order prior to trial ruling in favor of the plaintiffs on the merits. Ms. *8-9. The court reversed, finding an abuse of discretion. The court noted that "'the pretrial procedure established by Rule 16, [Ala.] R. Civ. P., is designed to clarify and simplify the issues to be tried.'" Ms. *14, quoting *Arfor-Brynfield, Inc. v. Huntsville Mall Assocs.*, 479 So. 2d 1146, 1149 (Ala. 1985). The court further held that "'pretrial conferences are not intended to be a forum in which the parties present evidence.'" Ms. *14, quoting *Brown v. Brown*, 896 So. 2d 573, 575 (Ala. Civ. App. 2004). The court found prejudice to the defendants because

> The circuit court in this case implicitly concluded, after a review of evidentiary materials and other matters at a pretrial conference, that Bingham and her husband had met their substantive burden so as to entitle them to relief, yet the court did not thereby afford Casey his due-process rights to notice and a hearing on the merits of the controversy in accord with that notice in ruling in their favor.

Ms. *17 (internal quote marks omitted).

MEDICAL NEGLIGENCE – CURATIVE ADMISSIBILITY – § 6-5-551, ALA. CODE 1975

Baptist Health System, Inc. v. Cantu, [Ms. 1151117, May 18, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Shaw reverses the Walker Circuit Court's judgment entered on a $10 million verdict for compensatory damages in a medical negligence case.

Plaintiff alleged the hospital was vicariously liable for alleged malpractice by a pediatrician with admitting privileges at the hospital who failed to diagnose his infant son's bacterial meningitis. Ms. *5. At trial, the hospital's corporate representative testified that she had never heard "of a hospital somehow controlling or supervising the actions of independent physicians" so as to be liable for the physician's acts. Ms. *12. Plaintiff argued this testimony opened the door under the doctrine of curative admissibility to the introduction of evidence of previous claims against the hospital asserting a similar agency theory. Over the hospital's objection, the circuit court allowed plaintiff to examine the witness concerning ten prior malpractice cases against the hospital, including the injuries alleged by the plaintiffs in those prior cases. Ms. *20-22.

The Court held this was reversible error because "'the doctrine of curative admissibility is limited to the extent that it cures the effect of the admission of the first illegal evidence.'" Ms. *11, citing *Kelley v. State*, 405 So. 2d 728, 730 (Ala. Crim. App. 1981). Admission of this evidence violated the privilege set out in § 6-5-551, Ala. Code 1975, which provides that "[a]ny party shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission." Ms. *8.

MANDAMUS – LEGAL SERVICES LIABILITY ACT – SEVERANCE

Ex parte Albert Daniels, [Ms. 1170347, May 18, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Main grants a writ of mandamus vacating the Barbour Circuit Court's severance and stay of an action against a law firm.

Plaintiff alleged the law firm had represented the personal representative in a prior wrongful-death action and although the plaintiff was an heir of the decedent, none of the wrongful-death settlement proceeds were distributed to him. Ms. *3. The law firm invoked § 6-5-579 of the Alabama Legal Services Liability Act ("the ALSLA") which requires a severance and stay of legal malpractice claims until the conclusion of any related underlying litigation.

The Court held that the circuit court exceeded its discretion in ordering the severance and stay because the Morris law firm never rendered legal services to the plaintiff and because plaintiff's claim against co-defendant Johnson (the personal representative of plaintiff's deceased father's estate) was not an underlying action as defined by the ALSLA. Ms. *8.

SOVEREIGN IMMUNITY

Ex parte the Board of Trustees of the University of Alabama, [Ms. 1170183, May 18, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Mendheim, issues a writ of mandamus, directing the Jefferson Circuit Court to dismiss for lack of subject matter jurisdiction an action filed against the Board of Trustees of the University of Alabama School of Medicine ("the Board") by Paul F. Castellanos, M.D. The Board was one of six named defendants in the action, and the only defendant which moved to dismiss based upon Article I, § 14, Ala. Const. 1901 immunity. Ms. *3. The defendants, other than the Board, filed a motion to compel arbitration. That motion was based on an arbitration provision contained in an employment contract between Dr. Castellanos and the University of Alabama Health Services Foundation, P.C. *Ibid.* Even though the Board did not move to compel arbitration, the circuit court ordered the Board to arbitrate the claims asserted against it.

The Court held that the Board, created by § 16-47-1, Ala. Code 1975, is entitled to § 14 immunity and directed the circuit court to vacate the order compelling the Board to arbitrate and to dismiss the Board from the action. Ms. *9-10.

MOTION TO SET ASIDE DEFAULT JUDGMENT – EVIDENCE REQUIRED

Ex parte Joshua Ward, [Ms. 1170183, May 18, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Sellers issues a writ of mandamus directing the Shelby Circuit Court to vacate its order setting aside a default judgment entered against an automobile dealership. Plaintiff argued that the default judgment was improperly set aside because the dealership failed to present any facts, evidence, or authority that it had a meritorious defense, that plaintiff would not be unfairly prejudiced if the default judgment were set aside, and lack of culpability on the part of the dealership.

The Court noted that the trial court's broad discretion under Rule 55(c), Ala. R. Civ. P., to decide whether to set aside a default judgment is only activated when "the [defaulted] party alleges and provides evidence regarding each of the three *Kirtland* [*v. Fort Morgan Auth. Sewer Serv., Inc.*, 524 So. 2d 600 (Ala. 1988)] factors. Ms. *7. The Court noted that the dealership merely averred that it had a good and meritorious defense but failed to provide any evidence substantiating that assertion. The Court held "[i]t is well settled that bare legal conclusions unsupported by affidavit or other evidence do not suffice to demonstrate a meritorious defense under *Kirtland*." *Ibid.*

RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT

Ex parte Mark Price, [Ms. 1161167, May 18, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Wise issues a writ of mandamus ordering the Perry Circuit Court to vacate its order granting a motion for relief from judgment filed by the plaintiffs. The action had been dismissed with plaintiffs' consent and some two years lapsed before plaintiffs filed their motion for relief from judgment. In this setting, the Court held that the trial court exceeded its discretion in granting the Rule 60 motion and reinstating the case to the active docket. The Court held

> In this case, although the [plaintiffs] characterize their motion as one seeking relief under Rule 60(b)(6), they fail to allege specifically why the motion should be treated as a Rule 60(b)(6) motion. From the face of the motion, it is clear that [they] sought relief based on one or more of the reasons set forth in Rule 60(b)(1), (2), and (3), as J&M alleges. It is also clear that [plaintiffs] sought the relief more than two years after the order of dismissal was entered – well past the four-month limitation period for such a request.

Ms. *9.

The Court rejected the plaintiffs' argument that the trial court could treat their motion for relief from judgment as an independent action. This avenue was not available to the plaintiffs, because they did not pay a filing fee with their rule 60 motion. Consequently, "the trial court did not have jurisdiction to treat the motion as an independent action and to grant the relief requested therein." Ms. *12.

RULE 60(A) – TIMELINESS OF APPEAL

P.H. v. Butler County Dept. of Human Resources, [Ms. 2170380, 2170381, and 2170382, May 18, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This unanimous decision by Presiding Judge Thompson dismisses the mother's appeal from judgments of the Butler Juvenile Court terminating her parental rights. The Juvenile Court entered judgments terminating parental rights on November 17, 2017. Ms. *2. On November 28, 2017, the court amended the judgments but made no substantive changes. *Ibid.*

The court concluded that the November 28, 2017 amended judgments merely corrected a clerical error. The court held "'[t]he effect of Rule 60(a) amendment is a correction of the original judgment to reflect the original intention of the trial court. There was no change in the actual judgment. The amendment relates back to the original judgment and becomes a part of it.'" Ms. *3, quoting *Bergen-Patterson, Inc. v. Naylor*, 701 So. 2d 826, 829 (Ala. Civ. App. 1997). The mother's appeal was untimely because "'[a] Rule 60(a) correction has no bearing on the timeliness of the appeal from the original uncorrected judgment.'" Ms. *3-4, quoting *J.S. v. S.W.*, 702 So. 2d 169, 171 (Ala. Civ. App. 1997).

RULE 54(B) CERTIFICATION

Richardson v. Chambless, [Ms. 1170263, June 15, 2018 __ So. 3d __ (Ala. 2018). This unanimous panel decision by Justice Bryan dismisses the plaintiff's appeal from a summary judgment dismissing the plaintiff's fraudulent transfer claim against Rosemarie Chambless. Plaintiff predicated his alleged creditor status on a claim for damages against Rosemarie's husband arising from a faulty home inspection. Ms. *2. The Jefferson Circuit Court granted the wife's motion for summary judgment on the fraudulent transfer claim and certified the order as final under Rule 54(b). The claims against the husband for the faulty inspection remained pending in the circuit court.

The Supreme Court raised *ex mero motu* the jurisdictional question presented by the propriety of the 54(b) certification. The Court dismissed the appeal because developments in the circuit court, namely a judgment in favor of the husband on the claim for faulty inspection, would moot the fraudulent transfer claim which was the subject of the instant appeal. Ms. *9. This case is the latest in a line of cases in which the Supreme Court has found a trial court exceeded its discretion in issuing a Rule 54(b) certification.

REFERENDUM OF TRUST – SHAM AFFIDAVIT RULE

G.R.L.C. Trust v. Garrison Decatur Crossings, LLC, [Ms. 1170315, June 15, 2018] __ So. 3d __ (Ala. 2018). This unanimous panel decision by Justice Sellers affirms the Morgan Circuit Court's entry of summary judgment in favor of Garrison Decatur Crossings, LLC (Garrison Decatur) reforming the recorded memorandum of lease to include an Exhibit A containing the legal description of the property subject to the lease. As a consequence of the omission of Exhibit A, Defendant Franklin Land and Trust attempted to avoid the period of a 50-year ground lease exceeding 20 years. Ms. *3.

The Court found that Garrison Decatur established by clear and convincing evidence that the property description was omitted from the recorded memorandum of lease as a result of mutual mistake. The Court rejected the Trust's argument that genuine issues of material fact precluded summary judgment. Ms. *15.

In support of its motion for summary judgment, Garrison Decatur submitted the deposition of Kenneth Lee, the Trustee, who executed the lease memorandum. Lee testified that the parties intended to attach a legal description of the subject property to the lease memorandum. Ms. *11. In opposition to the motion for summary judgment, the Trust submitted an affidavit from Lee that averred, among other things, that the Trust did not intend for the lease memorandum to contain the property description and that the Trust did not make any mistake with regard to the lease memorandum. *Ibid.*

The Court held that "the trial court properly struck those portions of Lee's affidavit that were not based on personal knowledge, that purported to express opinions about the parties' intentions that he was not qualified to express, and that attempted to color or qualify his earlier deposition testimony." Ms. *12, citing *McGough v. G&A, Inc.*, 999 So. 2d 898, 904 (Ala. Civ. App. 2007) (noting that "[t]he court may not consider deposition or affidavit testimony that directly contradicts earlier deposition or affidavit testimony without adequate explanation."). Ms. *12.

RELATION BACK OF AMENDMENT ADDING PROPER PARTY – RULE 15(C)(3), ALA. R. CIV. P.

Ex parte Brookwood Health Services, Inc., [Ms. 1170054, June 22, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Wise issues a writ of mandamus to the Jefferson Circuit Court directing dismissal

of Rita Kay's action under the AMLA against Brookwood Health Services, Inc. based upon expiration of the statute of limitations.

Kay sued Brookwood Baptist Health, LLC shortly before the statute of limitations was set to expire. She subsequently amended the complaint to sue Brookwood Baptist Health, Inc.

The Court held that Kay could not establish relation back of the amendment adding the correct entity because Kay could not establish that Brookwood Baptist Health, LLC received the complaint within 120 days of filing and also could not establish that Brookwood Health Services, Inc. received notice of the complaint within 120 days after she filed it. Ms. *11.

The Court noted that under Rule 15(c)(3), Ala. R. Civ. P., an amendment changing a party must be filed "within the applicable period of limitations or 120 days of the commencement of the action. ..." Ms. *10.

STAY OF CIVIL MATTER – PARALLEL CRIMINAL PROCEEDING

Ex parte Decatur City Board of Education, [Ms. 1170017, June 22, 2018] __ So. 3d __ (Ala. 2018). This unanimous en banc decision by Justice Wise issues a writ of mandamus to the Morgan Circuit Court directing the dissolution of a preliminary injunction and dismissal of the petition upon which the injunction was based in a matter involving termination proceedings against a teacher employed by the Decatur City Schools. Ms. *1-2.

Carrie Witt, a teacher in the Decatur City School System, was indicted by a Morgan County grand jury for violating § 13A-6-81, Ala. Code 1975 for engaging in a sex act with two students under the age of nineteen years. The Board scheduled a termination hearing for Witt and a few days prior to that hearing, Witt filed the instant case in Morgan Circuit Court seeking a preliminary injunction staying the termination proceedings until after disposition of the underlying criminal case. Ms. *3.

The trial court granted Witt's petition for preliminary injunction reasoning in part that § 16-24C-6(j), Ala. Code 1975, which provides in pertinent part, that an employee may not delay or defer termination proceedings based upon the pendency of criminal proceedings arising out of the facts of the employment action. The statute further provides that the employee's testimony in a termination proceeding shall not waive or forfeit the employee's right against self-incrimination. Ms. *4. The circuit court ruled that this provision did not adequately protect Witt because of a conflicting provision at § 13A-6-83 had not been repealed or amended.

After first concluding that the termination proceeding and the criminal proceeding were parallel proceedings, the Court found that the stay must be lifted because after it was entered, the court presiding over the criminal case against Witt declared the statute under which she was indicted unconstitutional. The Court reasoned that even though the underlying criminal case is on appeal in the Court of Criminal Appeals and could be reversed, such possibility was too remote to warrant continuing to stay the employment termination proceeding. Ms. *11. The Court also held that in view of § 16-24C-6(j), the Board had established that Witt's privilege against self-incrimination will not be threatened if the stay is lifted. Ms. *11-12.

The Court also held that the balancing test for determining whether a civil matter should be stayed during the pendency of parallel criminal proceedings favored the Board. The Board showed that Witt had received salary and benefits approaching $100,000 since her suspension in March 2016, while the Board continued to pay for a replacement teacher for Witt. Ms. *14.

VENUE – FORUM SELECTION PROVISION

Ex parte Consolidated Pipe & Supply Co., Inc., [Ms. 1170050, June 22, 2018] __ So. 3d __ (Ala. 2018). This unanimous en banc decision by Justice Mendheim issues a writ of mandamus directing the Morgan Circuit Court to vacate its transfer of this action to the Jackson Circuit Court.

Consolidated Pipe supplied materials to Bolt Construction and Excavating, LLC (Bolt Construction) to construct a public work in Morgan County known as the "Vaughn Bridge Road Water Line Relocation Project." Ms. *2. Ohio Casualty was Bolt Construction's surety on the project. Consolidated Pipe brought a number of claims, including a claim that Bolt Construction and Ohio Casualty violated Alabama's little Miller Act; this count expressly sought recovery under the bond issued by Ohio Casualty. Ms. *3.

The defendants filed a motion for change of venue to Jackson County contending that Bolt Construction is headquartered in Jackson County and Ohio Casualty is a foreign corporation so that venue was not proper against any defendant. Ms. *4. The Court noted that Bolt contracted with Ohio Casualty to obtain the bond "because of a legal requirement for public-works projects that is intended to provide a remedy for suppliers on such projects because suppliers cannot file a materialman's or mechanic's lien against public property for nonpayment." Ms. *9.

In opposing the motion to transfer venue, Consolidated Pipe pointed to paragraph 11 of the bond contract which provides "no suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the location in which the Work or part of the Work is located ...." Ms. *9. The Court noted that it was undisputed that the public-works project in question was located in Morgan County. Accordingly, the Court held that the circuit court had exceeded its discretion in transferring venue to Jackson County because per the terms of the bond contract, the only proper venue was Morgan County where the case was originally filed. Ms. *13.

STATE-AGENT IMMUNITY AND STATE-AGENCY IMMUNITY

Ex parte The Utilities Board of the City of Foley, Alabama, d/b/a Riviera Utilities, [Ms. 1161168, June 28, 2018] __ So. 3d __ (Ala. 2018). This *per curiam* opinion

(Champ Lyons, Jr., Special Chief Justice, and Pamela Baschab, Jean Williams Brown, Robert Bernard Harwood, Jr., Gorman Houston, and Thomas A. Woodall, Special Justices, concur; Terry L. Butts, Special Justice, concurs in the result in part and dissents in part) grants a petition for writ of mandamus directing the Circuit Court of Baldwin County to enter summary judgment on the basis of State-agent immunity in favor of several Riviera Utilities employees in a personal injury action; the opinion denies the petition for a writ of mandamus sought on the basis of immunity by Riviera Utilities.

Charles Hilburn suffered electrocution injuries in the course of a bridge-repair project in Robertsdale (Baldwin County) when a track hoe driving steel pilings into the ground came in contact with an uninsulated overhead electrical power line. Hilburn's complaint alleged Riviera Utilities and its employees acted negligently by not insulating, de-energizing, re-routing, or employing fuses or circuit breakers to de-energize the power lines. When Hilburn filed a motion for partial summary judgment seeking a declaration that Riviera's employees were not entitled to immunity or legislative caps on damages, Riviera Utilities and the employees countered by filing motions for summary judgment as to all of Hilburn's claims. The Supreme Court was accordingly confronted with *de novo* review of the Baldwin County Circuit Court order denying the motions for summary judgment.

The Court first notes that denials of motions for summary judgment grounded on claims of immunity are reviewable by petitions for writs of mandamus. Ms. *9 (citing *Ex parte Purvis*, 689 So. 2d 794 (Ala. 1996), and *Ex parte Yancey*, 8 So. 3d 299 (Ala. 2008)).

The Court next reiterates the test for State-agent immunity first articulated in *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000), and then adopted in *Ex parte Butts*, 775 So. 2d 173 (Ala. 2000). Ms. *12-23, noting that State-agent immunity extends to municipal employees per *City of Birmingham v. Brown*, 969 So. 2d 910 (Ala. 2007).

Procedurally, the Court reiterates that a defendant asserting State-agent immunity bears the initial burden of demonstrating that the plaintiff's claims arise from a function that would entitle the State agent to immunity per *Ex parte Estate of Reynolds*, 946 So. 2d 450 (Ala. 2006); and if the State agent makes such a showing, the burden then shifts to the plaintiff to show that one of the exceptions to State-agent immunity recognized in *Cranman* is applicable per *Ex parte Kennedy*, 992 So. 2d 1276 (Ala. 2008).

Engaging in a *Cranman* analysis of the facts, the Court holds that the Riviera Utilities employee, Saucier, a risk manager, was charged with the responsibility for supervising and overseeing the daily operations of the line-locate department. Saucier's responsibilities were deemed to fall within the discretion afforded state agents in "formulating plans, policies, or designs or exercising his or her judgment in the administration of a department or agency of government." Ms. *20-21. Whether Saucier had constructive notice of the risk of serious bodily harm is irrelevant to the determination of whether he is entitled to immunity within the meaning of *Cranman*.

Having met the *Cranman* standard of entitlement to immunity, the burden shifted to Hilburn "to show, by substantial evidence, that one of the two exceptions to State-agent immunity recognized in *Cranman* applies." Ms. *21 (quoting *Ex parte Price*, [Ms. 1160956, Jan. 12, 2018], __ So. 3d __, __ (Ala. 2018)). Because there was no evidence Saucier acted "willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law," he is entitled to State-agent immunity. Ms. *21-23 (citing *Cranman*, 792 So. 2d at 405). Mere evidence that Saucier engaged in a tort no longer supports the view that committing a tort constitutes acting beyond a State agent's authority. Ms. *23 (citing *Taylor v. Shoemaker*, 605 So. 2d 828 (Ala. 1992)).

The Court next evaluates Riviera Utilities' claim that as it acts as a municipal utility, it is a governmental entity entitled to substantive immunity. Ms. *24-25. Citing *Bill Salter Advertising, Inc. v. City of Atmore*, 79 So. 2d 646 (Ala. 2010), the duties owed by Riviera Utilities were not to the general public, but to the employees working on the bridge reconstruction project, i.e., protecting them from the risk of harm from the overhead power lines. The Court concludes that "because the Hilburns' claims against Riviera Utilities did not involve actions that took place within the city limits of Foley, Riviera Utilities clearly is not entitled to substantive immunity." Ms. *26. While Riviera Utilities may ultimately be able to avail itself of the statutory cap on damages afforded a governmental authority by § 11-93-2, Ala. Code 1975, its claim that it is entitled to a summary judgment on the basis of substantive immunity was properly denied by the Baldwin Circuit Court. Ms. *27.

WRONGFUL DEATH – CAPACITY – ADMINISTRATOR AD LITEM

Ex parte Continental Motors, Inc., [Ms. 1170165, June 29, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Parker grants in part and denies in part petitions for writs of mandamus filed by defendants challenging the capacity of the respective personal representatives of the various decedents to file and prosecute the wrongful-death actions.

In regard to the decedents, where suit was filed by an administrator ad litem, the Court granted the defendant's petition holding that an administrator ad litem is not a legally appointed personal representative with capacity to file a wrongful-death action. Ms. *29. This holding differs from the result reached in *Affinity Hospital, LLC v. Williford*, 21 So. 3d 712, 715 (Ala. 2009), where an administrator ad litem prosecuted a claim for wrongful death. The Court held that *Williford* was not dispositive of the question of capacity because "[i] n *Williford*, the parties did not present this court with any authority indicating that an administrator ad litem lacks the authority to pursue a wrongful-death action under § 6-5-410." Ms. *29.

In regard to the claims of decedents whose representatives were appointed in a Florida ancillary estate proceeding, the Court denied the petitions for writs of mandamus noting that the defendants "have not directed this court's attention to any authority indicating that a personal

representative of a foreign ancillary estate is without authority to pursue a wrongful-death claim under § 6-5-410(a). In the absence of such authority, it appears that a personal representative of a foreign ancillary estate is '[a] personal representative' as that term is used in § 6-5-410(a) ...." Ms. *23. The Court added a cautionary footnote to the opinion stating that "of course, this court would consider any authority presented in a future case indicating that a personal representative of a foreign ancillary estate is not '[a] personal representative,' as that term is used in § 6-5-410(a)." Ms. *23, n. 4.

AEMLD

DISA Industries, Inc. v. Bell, [Ms. 1160339, June 29, 2018] __ So. 3d __ (Ala. 2018). This decision reverses a $500,000 compensatory judgment entered on a jury verdict against DISA Industries, Inc. ("DISA") for injuries suffered by plaintiff Bell while working as an employee of Union Foundry.

Union Foundry purchased a new molding line system from DISA which DISA installed at the foundry. Ms. *4. Bell was injured when he stepped over a trough containing molten metal and his boot dipped into the trough. Ms. *11.

The Court reversed the judgment on the jury verdict for Bell as it agreed with DISA that DISA did not sell, manufacture, or design the modified trough and work platform where Bell was injured. Ms. *13. The Court concluded that a contract provision referencing design and construction solely related to the molding line that DISA sold and installed at the foundry and did not relate to the modified trough. Ms. *14.

The Court pointed out that plaintiff's expert "testified that DISA was not the actual designer or manufacturer of the modified trough." Ms. *18. The Court concluded "it is clear that the AEMLD is not applicable, because DISA was not a manufacturer, designer, or seller of the modified trough." Ms. *22. The Court likewise found that DISA was not liable under a negligence theory because "there was no evidence presented at trial indicating that the scope of DISA's contractual duties extended beyond the molding line to the furnace system, which includes the modified trough [where the plaintiff was injured]." Ms. *27.

NONCLAIM STATUTE – § 43-2-350, ALA. CODE 1975 – CLAIM OF COMMON LAW SPOUSE

Harbin v. Estess, [Ms. 1170209, July 27, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Wise reverses the Colbert Circuit Court's judgment in favor of the estate denying a claim for an omitted spouse's share of the estate by an alleged common law spouse of the decedent.

The circuit court dismissed the claim because it was filed more than six months after the issuance of letters testamentary and, therefore, barred by the statute of nonclaim, § 43-2-350, Ala. Code 1975. Ms. *7. The Court reversed, holding that a claim by the alleged common-law spouse for an omitted spouse's share "is a claim of title for purposes of the nonclaim statute and, therefore, not a claim against the estate." Ms. *14. This result was required because "a determination of whether a common law marriage existed does not diminish the assets of the estate and does not affect the financial status of the estate." *Ibid.*

ARBITRATION – APPELLATE JURISDICTION – FINALITY

Aurora Healthcare, Inc., et al. v. Ramsey, [Ms. 1160659, July 27, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Mendheim dismisses the nursing home's appeal from an order on its motion to compel arbitration. The Jefferson Circuit Court's order concluded that the plaintiff had established a question of fact on the validity of the arbitration agreement purportedly signed by her on November 26, 2003. Ms. *9. The circuit court also ruled that in any event, if valid, the arbitration agreement's effect was not retroactive to November 7 when the plaintiff's mother was originally admitted to the nursing home. Ms. *10.

The Court dismissed the nursing home's appeal because "[i]f the jury concludes that the arbitration agreement is not valid, however, the retroactive enforcement issue becomes moot." Ms. *16. The Court held that "the defendants here seek relief from the harm they have not yet suffered because there has been no definitive determination that the arbitration agreement is valid and therefore enforceable." Ms. *20.

The Court also dismissed the plaintiff's cross-appeal from the circuit court's order denying her motion for summary judgment as to the validity of the arbitration agreement. The Court held "an order denying a motion for summary judgment is inherently non-final and cannot be made final by a Rule 54(b) certification." Ms. *22 (internal quotation marks and citations omitted).

RESTRICTIVE COVENANTS – RELATIVE HARDSHIP DEFENSE – UNCLEAN HANDS

Esfahani v. Steelwood Property Owners' Association, Inc., [Ms. 2170455, Aug. 10, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This unanimous decision by Judge Thomas affirms the Baldwin Circuit Court's judgment requiring a property owner to remove palm trees planted in violation of a subdivision restrictive covenant requiring approval of substantial changes to landscaping.

The court acknowledged the continuing viability of the relative hardship test which denies enforcement of a restrictive covenant if enforcement would harm one landowner without substantially benefitting other landowners. Ms. *25. The court held that this equitable doctrine was unavailable to Esfahani because he planted the palm trees knowing that the restrictive covenants required the HOA's approval. The court held that "'pertinent specific application of the clean hands doctrine is that a restrictive covenant should be enforced if the defendant had knowledge [or constructive notice] of it before constructing an improvement contrary to its provisions, even if the harm is disproportionate.'" Ms. *26, quoting *Grove*

Hill Homeowners' Association, Inc. v. Rice, 90 So. 3d 731, 737 (Ala. Civ. App. 2011) (internal quote marks omitted).

The court reversed the circuit court's award of attorney fees to the Association because "[t]he plain language of neither the Association's bylaws nor Steelwood's declaration authorized an award of attorney fees in actions involving only injunctive relief...." Ms. *34.

EASEMENT – CONDEMNATION – RES JUDICATA

McCrary v. Cole, [Ms. 2170508, Aug. 17, 2018] __ So. 3d __ (Ala. Civ. App. 2018). The McCrarys filed a complaint in Autauga Probate Court seeking condemnation of real property pursuant to § 18-3-1, Ala. Code 1975, to afford access from a public roadway to their landlocked parcel. The evidence revealed the McCrarys had previously sought a prescriptive easement concerning the same means of ingress and egress to the landlocked parcel. The issue presented on appeal was whether the doctrine of *res judicata* barred the subsequent action for condemnation because it was an issue that could have been raised in the earlier action which sought the prescriptive easement.

> "'[T]he application of [the doctrine of res judicata] is a question of law. Thus, the appropriate standard of review is de novo.' *Walker v. Blackwell*, 800 So. 2d 582, 587 (Ala. 2001).
>
> > "'"The elements of res judicata, or claim preclusion, 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 suits. *Hughes v. Allenstein*, 514 So. 2d 858, 860 (Ala. 1987). If those four elements are present, any claim that was or could have been adjudicated in the prior action is barred from further litigation.'"
> >
> > "*Webb v. City of Demopolis*, 14 So. 3d 887, 894 (Ala. Civ. App. 2008) (quoting *Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990))."

Bullock v. Howton, 168 So. 3d 1270, 1272 (Ala. Civ. App. 2015).

Ms. *13-14.

In order to establish a prescriptive easement, a plaintiff must show she "had used the property over which [she] saw an easement, exclusively and continuously, for more than 20 years in a manner that was adverse to the rights of the [property owners] and under a claim of right." Ms. *16, citing *Andrews v. Hatten*, 794 So. 2d 1184, 1186 (Ala. Civ. App. 2001). For a plaintiff to demonstrate a right to condemn a right-of-way across the property of others, she "must prove that [she] owns landlocked property that has no reasonable access to a public roadway." [Ms. *16, citing *Williams v. Deerman*, 587 So. 2d 381, 382 (Ala. Civ. App. 1991).

The Court of Civil Appeals holds "[r]es judicata ... bars a party from asserting in a subsequent action a claim that it has already had an opportunity to litigate in a previous action." Ms. *16-17, quoting *Lee L. Saad Constr. Co. v. DPF Architects, P.C.*, 851 So. 2d 507, 517 (Ala. 2002). Further, "[c]ourts determine whether a cause of action could have been asserted in an earlier action by determining whether the evidence necessary to support the causes of action is the same." Ms. *17.

> "'Discussing the same-cause-of-action element of *res judicata*, this Court has noted that '"'the principal test for comparing causes of action [for the application of *res judicata*] is whether the primary right and duty or wrong are the same in each action.'"' *Old Republic Ins. Co. v. Lanier*, 790 So. 2d 922, 928 (Ala. 2000) (quoting *Wesch v. Folsom*, 6 F.3d 1465, 1471 (11th Cir. 1993)). This Court further stated: '"Res judicata applies not only to the exact legal theories advanced in the prior case, but to all legal theories and claims arising out of the same nucleus of operative facts."' 790 So. 2d at 928 (quoting *Wesch*, 6 F.3d at 1471). As a result, two causes of action are the same for res judicata purposes '"when the same evidence is applicable in both actions."' *Old Republic Ins. Co.*, 790 So. 2d at 928 (quoting *Hughes v. Martin*, 533 So. 2d 188, 191 (Ala. 1988))."'
>
> *Bullock v. Howton*, 168 So. 3d at 1273 (quoting *Chapman Nursing Home, Inc. v. McDonald*, 985 So. 2d 914, 921 (Ala. 2007)). See also *Equity Res. Mgmt., Inc. v. Vinson*, 723 So. 2d at 637 ("[W]hether the second action presents the same cause of action depends on whether the issues in the two actions are the same and on whether substantially the same evidence would support a recovery in both actions.").

Ms. *17-18.

The court concludes *res judicata* did not preclude the McCrarys from seeking to condemn a right-of-way because circuit courts do not have jurisdiction over such cases, such that the McCrarys could not have sought condemnation in the prior proceeding. Ms. *18-19.

> "The doctrine of res judicata does not necessarily apply when '[t]he plaintiff was unable to rely on a certain theory ... or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action ....' *Restatement (Second) of Judgments* § 26 (1982). In other words, '[i]f the court rendering judgment lacked subject-matter jurisdiction over a claim or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded.' *Browning v. Navarro*, 887 F.2d 553, 558 (5th Cir. 1989)."

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 795 (Ala. 2007).

Ms. *19

In contrast, the court concludes the trial court did not err in ruling that the McCrarys' claim seeking a declaration of a roadway as a public road was barred by the doctrine of *res judicata* because that issue could have been raised in the prior action which sought a prescriptive easement providing access to the alleged public road. Quoting (Ms. *23) *Green v. Wedowee Hosp.*, 584 So. 2d 1309, 1315 (Ala. 1991), the court concludes the McCrarys could have litigated the issue about the public roadway in the prior filed action:

> "As we emphasized in *Whisman v. Alabama Power Co.*, 512 So. 2d 78, 81 (Ala. 1987), this Court has recognized the doctrine of res judicata in that '[t]he interest of society demands that there be an end to litigation, that multiple litigation be discouraged, not encouraged, and that the judicial system be used economically by promoting a comprehensive approach to the first case tried.' See, also, *Reed v. Farm Bureau Mut. Cas. Ins. Co.*, 549 So. 2d 3 (Ala. 1989) (a case in which we said that the purpose of the doctrine of res judicata was to prohibit the relitigation of claims, so as not to unnecessarily subject a defendant to the expense and trouble of repeatedly defending himself)."

Id.

VENUE – FORUM NON CONVENIENS

Ex parte Moore, [Ms. 1170638, Aug. 17, 2018] __ So. 3d __ (Ala. 2018). Because of recusals pursuant to Canon 3.C of the Alabama Canons of Judicial Ethics, a specially convened Court comprised of randomly selected retired justices and judges and active circuit judges was called upon to review a petition for a writ of mandamus filed by former Alabama Supreme Court Chief Justice Roy S. Moore which sought transfer of venue of an action against Judge Moore brought by Leigh Corfman alleging defamation against Moore and his campaign committee Judge Roy Moore for US Senate. The special Court, with Supreme Court Associate Justice William B. Sellers serving as Acting Chief Justice, unanimously denies the petition upon concluding the Montgomery Circuit Court did not exceed its discretion in denying Judge Moore's and his campaign's motion to transfer venue. (Sellers, Acting Chief Justice and Mendheim, and Special Associate Justices Christopher F. Abel, Hewitt L. Conwill, Jenifer Collins Holt, Claud Dent Neilson, and James Harold Roberts, Jr., JJ., concur).

The Court first rejects Moore's and the Committee's reliance upon the interest-of-justice prong of the *forum non conveniens* statute, § 6-3-21.1, Ala. Code 1975, which is described,

> "The 'interest of justice' prong of § 6-3-21.1 requires 'the transfer of the action from a county with little, if any, connection to the action, to the county with a strong connection to the action.' *Ex parte National Sec. Ins. Co.*, 727 So. 2d [788] at 790 [(Ala. 1998)]. Therefore, 'in analyzing the interest-of-justice prong of § 6-3-21.1, this Court focuses on whether the "nexus" or "connection" between the plaintiff's action and the original forum is strong enough to warrant burdening the plaintiff's forum with the action.' *Ex parte First Tennessee Bank Nat'l Ass'n*, 994 So. 2d 906, 911 (Ala. 2008)." *Ex parte Indiana Mills & Mfg., Inc.*, 10 So. 3d 536, 540 (Ala. 2008).

Ms. *5-6.

Rejecting the petitioners' contentions, the Court reiterates

> "... to compel a change of venue under the 'interest of justice' prong of § 6-3-21.1, the county to which the transfer is sought must have a 'strong' nexus or connection to the lawsuit, while the county from which the transfer is sought must have a 'weak' or 'little' connection to the action.'"

Ms. *7-8, quoting *Ex parte Elliott*, [Ms. 1160941, Dec. 22, 2017] ___ So. 3d ___, ___ (Ala. 2017). The evidence reveals that Corfman suffered her defamation injury in Montgomery County where the allegedly defamatory statements were made by Moore and members of his committee. "[T]he location of the injury is 'often assigned considerable weight in an interest-of-justice analysis.'" Ms. *8, quoting *Ex parte Wachovia Bank, N.A.*, 77 So. 3d 570, 573-74 (Ala. 2011). While the allegedly defamatory statements were also made in places other than Montgomery County, "[w]hen venue is appropriate in more than one county, the plaintiff's choice of venue is generally given great deference.'" Ms. *9-10, quoting *Ex parte Perfection Siding, Inc.*, 882 So. 2d 307, 312 (Ala. 2003). Under the standard of review, whether the transfer in action based upon *forum non conveniens* is an issue "addressed to the sound discretion of the trial judge." Ms. *10, quoting *Ex parte Ben-Acadia, Ltd.*, 566 So. 2d 486, 488 (Ala. 1990). Because of the deference owed to the trial court , the specially convened Supreme Court could not say "that the trial court acted arbitrarily and capriciously in determining that this action has more than a 'little' or 'weak' connection to Montgomery County" such that the Court "cannot say the trial court erred in determining that the interest of justice does not require the transfer of this action to Etowah County." Ms. *10.

The Court also rejected Moore's and the Committee's contention that venue should have been transferred based upon the convenience of the parties and witnesses. The Court reiterated that "[t]he transferee forum must be significantly more convenient than the forum in which the action was brought ... to justify a transfer" under the "convenience of the parties and witnesses" prong of § 6-3-21.1. Ms. *10, quoting *Ex parte Swift Loan & Fin. Co.*, 667 So. 2d 706, 708 (Ala. 1995) (underlined emphasis in original). Again, considering the standard of review, the Court concludes "the trial court did not exceed its discretion in denying the motion for a change of venue" on this basis. Ms. *12.

JUROR AFFIDAVITS – JUROR INVESTIGATION – REQUIREMENT THAT AFFIDAVIT BE SWORN

Ankor Energy, LLC v. Kelly, [Ms. 1151269 and 1160476 , Aug. 24, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Bolin reverses the Escambia Circuit Court's order granting a new trial in favor of plaintiffs in an action in which the plaintiffs claimed that Ankor Energy, LLC and its affiliate breached implied covenants arising under oil leases and committed fraud and waste in connection with production activities near plaintiffs' property. Ms. *4. The order granting the new trial was based on juror misconduct. Ms. *16.

One of the jurors provided a handwritten affidavit to the plaintiffs' counsel that she had conducted an online search of terms used during the trial such as "smackover," "how oil migrates," "reservoirs," and "rock formation." Ms. *6.

Ankor filed motions to strike the juror's affidavit alleging, *inter alia*, that it was not sworn. Ms. *7. Ankor also submitted subsequent affidavits from the juror stating that she did not understand that she was under oath when she gave the first statement to plaintiffs' counsel and that her research was only marginally effective, was not shared with other jurors, and did not affect her verdict. Ms. *8, 10.

The Court first noted that "an affidavit showing that extraneous facts influenced the jury's deliberations is admissible." Ms. *18. The Court noted that the juror's initial handwritten affidavit comes within the "extraneous-information exception to Rule 606(b)'s general exclusionary rule prohibiting a juror from impeaching his or her verdict." Ms. 19. However, the Court concluded that the circuit court had exceeded its discretion in denying Ankor's motion to strike the juror's handwritten affidavit. The Court noted that "'the true test of the sufficiency of a paper as an affidavit is the possibility of assigning perjury upon it if false. To meet this test it must be sufficient in both the form and in substance.'" Ms. *20, quoting *Sellers v. State*, 162 Ala. 35, 39, 50 So. 340, 341 (1909) (some internal quote marks omitted). The Court held in light of the juror's second affidavit and an affidavit from plaintiffs' counsel that "it does not appear that the juror was administered an oath or that she was otherwise informed that she was swearing to the truth of the handwritten affidavit. Additionally, it does not appear that counsel added the jurat, indicating when, where, and before whom the affidavit was sworn, until after the juror signed the affidavit." Ms. *20-21.

While the Court noted that § 13A-10-108(3), Ala. Code 1975 provides that "it is not a defense to perjury that the document was not sworn to if the document contains a recital that it was made under oath, that the declarant was aware of the recital when he or she signed the document, and that the document contains the signed jurat of a public servant to administer oaths." Ms. *21. The Court noted that in regard to the juror's first affidavit, the lack of the administering of an oath and the absence of a recital on the handwritten affidavit that it was being made under oath when the juror signed it, rendered the handwritten affidavit an unsworn document. *Ibid.*

Accordingly, the Court concluded that the order granting a new trial must be reversed because "[w]ithout the handwritten affidavit, there is nothing to indicate juror misconduct warranting a new trial." Ms. *22. The Court cited settled law that "'juror misconduct will justify a new trial when it indicates bias or corruption, or when the misconduct affected the verdict, or when from the extraneous facts prejudice may be presumed as a matter of law.'" *Ibid.*, quoting *Whitten v. Allstate Insurance Co.*, 447 So. 2d 655, 658 (Ala. 1984).

Consideration of extraneous materials as a basis for juror misconduct supports a new trial only where "1) the jury verdict is shown to have been actually prejudiced by the extraneous material; or 2) the extraneous material is of such a nature as to constitute prejudice as a matter of law." Ms. *22-23. The Court noted that mere exposure to a definition as was involved in this case, does not constitute prejudice as a matter of law. Ms. *23. The Court noted that the juror's third affidavit stated that she obtained "very little information" and that it did not affect her verdict. Ms. *25.

FICTITIOUS PARTIES PRACTICE – RELATION BACK OF AMENDMENT – BREACH OF WARRANTY

Ex parte Integra LifeSciences Corporation, [Ms. 1170692, Aug. 24, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Main grants in part and denies in part a petition for writ of mandamus filed by Integra LifeSciences Corporation in an action involving an allegedly defective surgical mesh implanted during plaintiff's breast reconstruction procedure on May 19, 2014. While plaintiff filed an action on March 19, 2014, she did not substitute Integra for a fictitious party until March 16, 2017. Ms. *4.

Integra promptly moved for summary judgment on the ground that the claims against it were barred by the statute of limitations and that the complaint against it did not relate back because the plaintiff was in possession of medical records which identified SurgiMend as the surgical mesh used in her procedure. Ms. *4-5.

The Court agreed with Integra. The Court cited prior case law that "'a party is responsible for knowing the contents of medical records in its possession.'" Ms. *13, quoting *Ex parte Mobile Infirmary Ass'n*, 74 So. 3d 424, 431 (Ala. 2011). The Court further held that reasonable diligence on the part of the plaintiff would have led to a web site "www.surgimend.com," located on Integra's web site. Ms. *13. The Court noted that plaintiff "does not dispute that a simple Internet query using the word "SurgiMend" would have led her to those Web sites and, ultimately, to Integra's identity as a manufacturer of the mesh." *Ibid.*

The Court reached a different conclusion as to the breach of warranty claim, noting that such a claim is "separate and distinct from an AEMLD claim." Ms. *16 (internal quote marks omitted). The Court refused to dismiss plaintiff's breach of warranty claim, because it was asserted against Integra within 4 years of plaintiff's May 19, 2014 surgery. *Ibid.*

SOVEREIGN IMMUNITY – COUNTY BOARD OF EDUCATION

Ex parte Montgomery County Board of Education, [Ms. 1170733, Aug. 24, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Main grants a petition

for writ of mandamus by the Montgomery County Board of Education ("the Board") directing the Montgomery Circuit Court to dismiss an action against it based on sovereign immunity. The minor plaintiff sued the Board through his mother and next friend seeking compensatory damages and punitive damages arising from an alleged assault on the child by a school employee. The complaint asserted a single count of negligence against the Board and other unidentified fictitious party defendants. Ms. *2. The Court held that the Board "is entitled to have the underlying action against it dismissed because it is an agency of the State and entitled to State immunity under Art. I, § 14 of the Alabama Constitution." Ms. *4.

UIM BENEFITS – PHANTOM MOTORIST – HEARSAY – AUTHENTICATION

Dailey v. State Farm Mutual Automobile Ins. Co., [Ms. 2161069, Aug. 24, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This per curiam opinion denies the plaintiff's application for rehearing of the court's no-opinion affirmance of a summary judgment entered by the St. Clair Circuit Court dismissing plaintiff's claim for uninsured motorist benefits. Plaintiff claimed she was run off the road by an unidentified person driving a second motor vehicle. Ms. *2. Plaintiff did not report the accident to law enforcement for some ten days. *Ibid.*

State Farm moved for summary judgment citing a policy provision requiring that an accident involving an unidentified motorist be reported to police within 24 hours of the accident. Plaintiff argued that the provision in question was unenforceable as contrary to Alabama public policy and inconsistent with the UIM statute. Ms. *8. The court rejected this argument, citing *Alabama Farm Bureau Mutual Casualty Insurance Company v. Cain*, 421 So. 2d 1281 (Ala. Civ. App. 1982) in which the court reversed a judgment for the insured for uninsured motorist benefits arising from a hit-and-run accident where the insured had failed to report the accident to the police within 24 hours. See Ms. *10-11. The court rejected the insured's public policy argument noting that § 32-10-5(a), Ala. Code 1975 requires that an accident with bodily injuries be reported "'immediately by the quickest means of communication.'" Ms. *14.

The court also rejected the insured's contention that the policy filed by State Farm in support of its motion for summary judgment was inadmissible hearsay. The court noted that the custodian's affidavit that she was "custodian of the records pertaining to issuance of policies," satisfied the requirement of Rule 803(6), Ala. R. Evid., that records be "kept in the course of the regularly conducted business activity [pursuant to] the regular practice of that business activity ...." Ms. *6. The court further held that "the certified policy attached to the affidavit had 'distinctive characteristics' that 'constitute[d] a prima facie showing that the policy offered ... is likely authentic,' which is 'all that is required under Rule 901(a), Ala. R. Evid.'" Ms. *7, quoting *Royal Ins. Co. of America v. Crowne Investments, Inc.*, 903 So. 2d 802, 809 (Ala. 2004).

CONSOLIDATION – FINALITY – PRIOR PENDING ACTION – EFFECT OF DENIAL OF MANDAMUS RELIEF

Nettles v. Rumberger, Kirk & Caldwell, P.C., et al., [Ms. 1170162, Aug. 31, 2018] __ So. 3d __ (Ala. 2018). This 4-3 decision by Justice Main affirms the Jefferson Circuit Court's summary judgment in favor of the Rumberger law firm and individual defendants, former members of the Haskell Slaughter law firm, on claims for breach of fiduciary duty, fraud, conspiracy and tortious interference with contract brought by Bert Nettles, a former member of the Haskell Slaughter firm.

Before reaching the merits, the Supreme Court considered whether the appeal was from a non-final judgment because the summary judgment had been entered in an action filed by Nettles which was consolidated with an action brought by Bluebird, a creditor of the Haskell Slaughter firm, against Nettles and other former members of that firm as guarantors of firm debt. The Court concluded the summary judgment was final notwithstanding the pendency of the Bluebird action in the trial court. Overruling *Hanner v. Metro Bank and Prot. Life Ins. Co.*, 952 So. 2d 1056, 1060 (Ala. 2006), the Court adopted the rationale of the United States Supreme Court's recent decision in *Hall v. Hall*, 584 U.S. ____, 138 S.Ct. 1118 (2018). The Court held that "[o]nce a final judgment has been entered in a case, it is immediately appealable regardless of whether it is consolidated with another still pending case." Ms. *14.

As to the merits of the Defendants' motion for summary judgment involving the prior pending action statute, § 6-5-440, Ala. Code 1975, the Court held that the subject action filed by Nettles "qualifies as a 'second action' for the purposes of § 6-5-440." Ms. *18. The second action asserts the same causes of action, against the same parties, arising from the same set of operative facts as does Nettles' third-party complaint in the Bluebird action. Ms. *18-19.

The Court also concluded that the entry of summary judgment as to the third-party complaint filed by Nettles in the Bluebird action did not cure the multiplicity of actions presented by the second action filed by Nettles. The Court reasoned that "[t]he summary judgment entered against Nettles in the Bluebird action has not been certified as final. It remains interlocutory; it is not subject to a direct appeal; it may be revised by the trial court at any time before the entry of final judgment." Ms. *21.

The Court also noted that the Rumberger firm initially petitioned for a writ of mandamus to review the trial court's denial of its motion pursuant to Rule 6-5-440, which petition was denied without an opinion. Ms. *16, n. 2. The Court noted, however, that the denial of a petition for writ of mandamus does not operate as a binding decision on the merits. *Ibid.*, quoting *E B Invs., LLC v. Atlantis Dev., Inc.*, 930 So. 2d 502, 510 (Ala. 2005) (internal quote marks omitted).

VENUE – DECLARATORY JUDGMENT ACTION AGAINST GOVERNMENTAL AGENCY

Ex parte Board of Water and Sewer Commissioners of the City of Mobile, [Ms. 1170400, Aug. 31, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Bryan, issues a writ of mandamus to the Baldwin Circuit Court directing it to transfer the action to the Mobile Circuit Court. The Board of Water and Sewer Commissioners of the City of Mobile ("the Board") agreed to sell treated water to the Spanish Fort Water System ("SFWS"), pursuant to a 2011 agreement. Ms. *2. SFWS sued the Board contending that the Board breached the agreement. Ms. *4. SFWS also sought a declaratory judgment. *Ibid.*

The Court issued the writ of mandamus requiring transfer of the action to Mobile County based "on the general common-law rule that an action against a governmental entity like the Board is properly maintained in the county where the governmental entity officially resides." Ms. *9.

FICTITIOUS PARTY PRACTICE – RELATION BACK – MANDAMUS

Ex parte American Sweeping, Inc., [Ms. 1170461, Aug. 31, 2018] __ So. 3d __ (Ala. 2018). This 7-2 decision by Justice Sellers issues a writ of mandamus to the Baldwin Circuit Court directing the court to dismiss the underlying action against American Sweeping, Inc. ("ASI") as time-barred.

The claims at issue arose from a May 22, 2014, crash that involved a tractor-trailer colliding with the rear of a "buffer vehicle" following an ASI street sweeper on the Interstate 65 bridge crossing the Mobile-Tensaw River Delta. Ms. *2. A subsequent collision in which a second tractor-trailer collided with the first tractor-trailer resulted in an explosion and substantial damage to the bridge. ALDOT brought an action against TKS Trucking and the estate of its driver, who was killed in the crash, to recover the cost of repairs made to the bridge. Ms. *3. Sanders, the driver of the second tractor-trailer, and his wife filed individual complaints in intervention asserting claims against the same defendants for personal injuries and loss of consortium. *Ibid.*

On May 17, 2016, five days before expiration of the statute of limitations, the Sanderses amended their complaints in intervention to assert claims against fictitiously-named defendants whose conduct allegedly contributed to the tractor-trailer accident involving Mr. Sanders. *Ibid.* The Sanderses subsequently amended their complaint on August 31, 2017, to substitute ASI for a fictitiously-named defendant. Ms. *3-4.

The Court held that the amendment adding ASI did not relate back because the Sanderses did not exercise due diligence to learn ASI's identity. The Court concluded that the materials before the Court indicated the Sanderses made little to no effort to research the cause of the traffic on the bridge coming to a complete stop. The Court cited the fact that the Uniform Traffic Crash Report identified the driver of the ASI buffer vehicle and listed ASI as its owner. Ms. *7. The Court further held that "the most compelling information concerning the Sanderses' knowledge of ASI's identity comes from Jonathan Brown, an eyewitness to the tractor-trailer accident. Brown testified in his deposition, dated August 17, 2016, that he telephoned the Sanderses within a week after the tractor-trailer accident and at least two other times in 2014 to inquire about Mr. Sanders and that they all talked about the 'accident that caused [Mr. Sanders's] accident ["the street sweeper and the guy falling asleep at the wheel.']" Ms. *10.

A dissent by Justice Shaw joined by Justice Bryan would have declined to reach the merits of the mandamus petition because of ASI's failure to provide the Court with a copy of its motion to dismiss and resulting lack of compliance with Rule 21(a)(1)(E), Ala. R. App. P., requiring a petitioner to include "copies of any order or opinion or parts of the record that would be essential to an understanding of the matter set forth in the [mandamus] petition." Ms. *13.

STATE-AGENT IMMUNITY – DASHBOARD-CAMERA VIDEO EVIDENCE

Ex parte City of Montgomery and Charday P. Shavers, [Ms. 1170103, Aug. 31, 2018] __ So. 3d __ (Ala. 2018). This 7-1 decision by Justice Mendheim (Parker, J., dissents) issues a writ of mandamus in a motor vehicle collision case directing the Montgomery Circuit Court to dismiss the action against a Montgomery police officer and the City on the ground of state-agent immunity.

The officer was stopped at a red light heading north on Eastern Boulevard when she received an emergency call. The dashboard-camera video showed that the officer immediately activated the emergency lights and 3 or 4 seconds later, activated the siren. Ms. *2-3. During the interval, the video shows that the officer waited for northbound vehicles that had entered the intersection to pass through and that before the officer entered the intersection, the vehicles traveling in the northbound lane closest to the officer came to a complete stop. Ms. *3. The officer testified she believed that the third lane (the one furthest from her excluding the turn lane) was clear and she proceeded slowly. *Ibid.*

The Court had little difficulty in concluding based upon the video evidence that the officer was entitled to state-agent immunity pursuant to § 6-5-338(a), Ala. Code 1975 and *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000). The plaintiff contended that the officer and City were not entitled to state-agent immunity because of the requirement in § 32-5A-7 that in responding to an emergency call, an officer may "proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation ...." Ms. *13. The Court held "as clearly shown in the dashboard-camera video, after activating the emergency lights and siren on her patrol car, and starting from a complete stop, Shavers's patrol car slowly proceeded into the intersection. Shavers was not required to further slow her patrol car when entering each lane and crossing the intersection in order to satisfy the requirements of § 32-5A-7(b)(2)." Ms. *17. The Court also rejected plaintiff's argument based on § 32-5A-7(d), pursuant to which the plaintiff argued that an issue of material fact existed as to whether the officer acted "with due regard for the safety" of others. Ms. *24.

In an interesting aspect of this case, the Court departed from the usual rule of construing evidentiary submissions in the light most favorable to the non-moving party. The Court observed that with a record containing dashboard-camera video that "'[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.'" Ms. *19, quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007).

RES IPSA LOQUITUR – POST-MORTEM INJURIES TO CORPSE

Martin v. Comfort Touch Transport, et al., [Ms. 2170288, Aug. 31, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This unanimous decision by Judge Donaldson affirms in part and reverses in part summary judgments entered by the Madison Circuit Court in favor of the Comfort Touch defendants, who transported the decedent's body following her death, and the Valhalla defendants who prepared the body and handled the decedent's funeral arrangements. Summary judgment was affirmed as to all claims except for the negligence claims against the Comfort Touch Defendants based upon the doctrine of *res ipsa loquitur* as it related to a post-mortem head wound. The court noted that

> "a plaintiff is not required in every case to show a specific instrumentality that caused the injury." *Ward v. Forrester Day Care, Inc.*, 547 So. 2d 410, 414 (Ala. 1989). A plaintiff can also connect negligence to a defendant "by showing that ... 'all reasonably probable causes were under the exclusive control of the defendant.'" *Ward*, 547 So. 2d at 414 (quoting *Restatement (Second) of Torts* § 328D (1965)).

Ms. *21 (emphasis in the original). The court held that as to alleged abrasion injuries to the decedent's head and hand, "the doctrine of *res ipsa loquitur* would not apply because the evidence indicates that those injuries could have occurred without the negligence of any defendant." Ms. *22. However, the court reached a different conclusion with the post-mortem injuries to the decedent's head because "'the circumstances [are] such that according to common knowledge and the experience of mankind the accident could not have happened if those having control of the management had not been negligent.'" Ms. *23, quoting *Alabama Power Co. v. Berry*, 254 Ala. 228, 236, 48 So. 2d 231, 238 (1950).

BURDEN TO ESTABLISH EVIDENTIARY PRIVILEGE – ALA. CODE § 22-21-8 – PRIVILEGE LOG

Ex parte Estate of Elliott, [Ms. 1170564, Sept. 7, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Wise issues a writ of mandamus to the Jefferson Circuit Court vacating an order denying certain requests for production of documents made by the Plaintiff in a medical negligence wrongful-death case.

The hospital objected to the production of the employment file of one of its nurses as well as training records for the nurse and the hospital's nursing policies, procedures, rules, and regulations. The defendants objected to the requests on various grounds, including privileges based on §§ 6-5-333, 6-5-551, 22-21-8, 34-24-59, Ala. Code 1975. Ms. *6-7. The defendants relied solely on the assertions of defense counsel and did not submit an affidavit or any other evidence in an effort to establish that the requested information was privileged and also failed to provide a privilege log. Ms. *7.

The Court held that the trial court exceeded its discretion in denying the Estate's motion to compel because "the defendants did not satisfy their burden of establishing that the information requested ... was privileged." Ms. *22, citing *Ex parte Coosa Valley Healthcare, Inc.*, 789 So. 2d 208 (Ala. 2000).

The Court further held that in denying the requests for production without ordering defendants to produce a privilege log "the trial court effectively prevented the plaintiff 'from making a record on the discovery issue so that an appellate court cannot review the effect of the trial court's alleged error.'" Ms. *23, quoting *Ex parte Ocwen Federal Bank, F.S.B.*, 872 So. 2d 810, 814 (Ala. 2003). In accordance with its conclusions, the Court granted the Estate's petition for a writ of mandamus and directed the trial court to order the requested documents produced.

STATE BAR COMPLAINT – IMMUNITY

D.A.R. v. R.E.L., D.H., and R.H., [Ms. 1151080, Sept. 7, 2018] __ So. 3d __ (Ala. 2018). This per curiam decision affirms the Baldwin Circuit Court's dismissal of claims brought by D.A.R., a licensed practicing Alabama attorney, against two individuals who filed a Bar complaint against him and against R.E.L., an assistant general counsel of the Alabama State Bar who prosecuted the claim against D.A.R. Ms. *2. D.A.R. alleged that complainant D.H. and R.E.L. were involved in a sexual relationship at the time D.H. and R.H. filed the Bar complaint against D.A.R. D.A.R. alleged R.E.L. should have recused himself from handling the Bar complaint. *Ibid.*

Based upon Rule 15(a) of the Rules of Disciplinary Procedure, the Court held that D.H. and R.H. were entitled to absolute immunity from suit, regardless of the allegedly "false and malicious nature" of the Bar complaint. Ms. *17.

The Court also affirmed the circuit court's dismissal of the claims against R.E.L. on the ground of quasi-judicial immunity. The Court held that the plaintiff effectively abandoned arguments concerning the proper application of quasi-judicial immunity under state law by discussing precedents on appeal applying federal-law quasi-judicial immunity in actions under 42 U.S.C. § 1983. Ms. *34. The Court explained "in other words, D.A.R. has shifted his argument as to quasi-judicial immunity from the argument he presented to the trial court, and he has failed to demonstrate the trial court erred by dismissing his complaint on the grounds he presented to it." Ms. *35, citing *Snider v. Morgan*, 113 So. 3d 643, 655 (Ala. 2012) (holding arguments made to the trial court but not made on appeal are waived).

DISCOVERY OF OTHER SIMILAR INCIDENTS – PROPORTIONALITY-MANDAMUS

Ex parte Dolgencorp, LLC, [Ms. 1161003, Sept. 14, 2018] __ So. 3d __ (Ala. 2018). This plurality per curiam opinion (Stuart, C.J., and Bolin, Sellers, and Mendheim, JJ. concur) issues a writ of mandamus to the Tuscaloosa Circuit Court vacating a discovery order which required Defendant Dolgencorp to produce incident reports with associated photographs of similar incidents at Dolgencorp stores in the United States where cars crashed into the front of a Dollar General store due to lack of bollards for the five-year period leading up to the March 14, 2016 incident in which plaintiff was injured. Ms. *5.

Dolgencorp presented evidence that it allegedly would take thousands of hours to search for the requested incident reports at a total cost of approximately $270,000 to $300,000. Ms. *8. The opinion concludes that "the burden on Dollar General to comply with that order was out of proportion to any benefit [plaintiff] Gilliam would obtain from the requested information." Ms. *9.

The Court granted the petition and directed the trial court to modify the order by limiting the scope of the request to similar incidents in the State of Alabama. Ms. *10. Justices Shaw and Wise concurred in the result with Justice Shaw writing a concurring opinion. Justices Parker, Main, and Bryan dissented with Justice Parker writing a dissenting opinion.

Justice Shaw's special concurrence found Dollar General's affidavit unpersuasive as to the burden of production but opined that the Court should "balance the burden created by producing the requested evidence against the 'relevance' of that evidence to the subject matter of the case." Ms. *13-14. Justice Shaw concurred in the result because he concluded the relevance of the information was minimal. Ms. *14.

Justice Shaw noted that he was not persuaded that the burden of producing the documents was as profound as Dollar General argued. Ms. *15. He noted that the information concerning the number of incident reports and associated burden of searching through those reports largely came from assertions of counsel at argument and that such assertions are not evidence. Ms. *16. Justice Shaw also noted that Dolgencorp's affiant, Helmbrecht, was a difficult deponent who did not appear to "possess a complete knowledge of the ability to search incident-report records." Ms. *16.

In dissent, Justice Parker noted that Helmbrecht's affidavit was "severely undermined" by her deposition and that he would hold Dolgencorp had failed to discharge its burden to show clear entitlement to a writ of mandamus. Ms. *20.

FUTURE-ADVANCE MORTGAGE – PRIORITY

GHB Construction & Dev. Co. v. West Alabama Bank and Trust, [Ms. 1170484, Sept. 21, 2018] __ So. 3d __ (Ala. 2018). This plurality decision by Justice Parker reverses the Walker Circuit Court's judgment dismissing by GHB Construction's claim asserting that its materialman's lien has priority over West Alabama Bank and Trust's lien under a future-advance mortgage.

Although the future-advance mortgage was executed prior to GHB Construction providing any materials toward construction of the home, it was unclear from the complaint whether any advances were actually made to the homeowner pursuant to the future advance mortgage before the materialman provided materials. The plurality opinion concludes as a matter of first impression that "a future-advance mortgage does not create a mortgage lien until some indebtedness is incurred by the mortgagor under the future-advance mortgage." Ms. *14.

A dissenting opinion by Justice Sellers, joined by Chief Justice Stuart and Justice Mendheim, would hold that "absent a showing that the mortgagee failed to make any advance as contemplated or had no intention of ever advancing funds, ... that a future-advance mortgage [lien] is created on the date the mortgage contract is recorded." Ms. *26.

TRADE FIXTURES – SECURED SALE AGREEMENT – § 7-1-203, ALA. CODE 1975

Pipkin v. Sun State Oil, Inc., et al., [Ms. 1160850, Sept. 21, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Mendheim reverses the Mobile Circuit Court's summary judgment in favor of Sun State Oil dismissing claims for conversion and trespass asserted by Pipkin, the owner of a convenience store. Sun State had installed the gasoline pumps at the convenience store in connection with a petroleum supply agreement (PSA) which obligated the then-owner, IMAS, to purchase a minimum of 6 million gallons of petroleum over the 10-year term. Ms. *4. The PSA further provided that Sun State would lease to IMAS two new gasoline pumps with card readers. *Ibid.* After the store was closed and sold to Pipkin, Sun State entered the property and removed the gasoline pumps.

The circuit court granted Sun State's motion for summary judgment, concluding that the gasoline pumps were trade fixtures and that Sun State retained an interest in and right to remove the pumps notwithstanding the pumps being affixed to the real property. Ms. *12-13. Pipkin argued the gasoline pumps were not trade fixtures and that Sun State had sold the pumps to the prior owner but failed to perfect a security by filing a UCC-1 financing statement. Ms. *14.

The Supreme Court agreed with Pipkin and concluded that although "unlike fixtures generally, a trade fixture retains its status as personal property and does not become part of the real property to which it is affixed," Ms. *15, the gasoline pumps were not trade fixtures because they were affixed to the property by the owner, not a tenant. *Ibid.* The Court noted that "'[a] trade fixture is an article annexed to realty by a tenant for purposes of carrying on a tenant's trade or business." Ms. *16, quoting *Sycamore Mgmt. Grp., LLC v. Coosa Cable Co.*, 42 So. 3d 90. 94 (Ala. 2010).

Applying §7-1-203, Ala. Code 1975, the Court concluded that the PSA was not a true lease of the pumps but was a sale of the pumps disguised as a lease.

Ms. *34. Because Sun State did not file a UCC-1 financing statement, it had no security interest and no right to remove the gasoline pumps. *Ibid.*

ATTORNEY DISQUALIFICATION – RULES OF PROFESSIONAL CONDUCT

Ex parte Utilities Board of the City of Tuskegee, [Ms. 1170234, Sept. 28, 2018] __ So. 3d __ (Ala. 2018). This unanimous opinion (Mendheim, J.; and Stuart, C.J., and Bolin, Parker, Shaw, Main, Wise, Bryan, and Sellers, JJ., concur) grants a petition for a writ of mandamus and directs the Macon Circuit Court to vacate an order disqualifying retained counsel (Huie, Fernambucq & Stewart, LLP ("The Huie Firm")) from representing its client.

The Supreme Court concludes the movant failed to present sufficient evidence to sustain its motion to disqualify, which was premised upon Rule 1.11(a), Ala. R. Prof. Cond., such that the trial court's order requiring disqualification was required to be vacated.

The standard of review is:

> "It is well settled that '[a] petition for a writ of mandamus is the appropriate vehicle by which to review an order disqualifying an attorney from representing a party.' *Ex parte Tiffin*, 879 So. 2d 1160, 1164 (Ala. 2003). See also *Ex parte Intergraph Corp.*, 670 So. 2d 858, 860 (Ala. 1995); *Ex parte Central States Health & Life Co. of Omaha*, 594 So. 2d 80 (Ala. 1992). 'A writ of mandamus will issue where the petitioner has demonstrated "a clear legal right to the relief sought."' *Ex parte Dowdell*, 677 So. 2d 1158, 1159 (quoting *Ex parte Clark*, 643 So. 2d 977, 978 (Ala. 1994))."

Ex parte Regions Bank, 914 So. 2d 843, 847 (Ala. 2005). In other words, "[t]he question before us ... is whether [UBT] has a 'clear legal right' to [be] represent[ed by the Huie firm] in this litigation." *Ex parte Wheeler*, 978 So. 2d 1, 5 (Ala. 2007).

Ms. *8. The standard to be used by the trial court in evaluating a motion to disqualify is:

> "'[a] trial court has the authority and the discretion to disqualify counsel for violating the Rules of Professional Conduct, and a "common sense" approach should be used.'" *Ex parte Wheeler*, 978 So. 2d at 7 (quoting *Ex parte Lammon*, 688 So. 2d 836, 838 (Ala. Civ. App. 1996)). See also *Roberts v. Hutchins*, 572 So. 2d 1231, 1233, 1234 (Ala. 1990) (noting that, "[i]n *Ex parte America's First Credit Union*, [519 So. 2d 1325 (Ala. 1988)], this Court adopted the 'common sense' approach to questions concerning the vicarious disqualification of lawyers" and that this "'common sense' approach ... has been carried forward into the new Alabama Rules of Professional Conduct").

Ms. *9. Further,

> "The party moving for an attorney's disqualification ... bears the burden of proving the existence of a conflict of interest." *Ex parte Tiffin*, 879 So. 2d 1160, 1164 (Ala. 2003). See also *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) ("The party moving to disqualify counsel bears the burden of proving the grounds for disqualification.").

Ms. *11, n. 1. Importantly, the Court rejected the old attorney-disqualification standard that required disqualification because "[l]awyers must avoid even the appearance of impropriety." The Court stated:

> However, an "appearance-of-impropriety" test in assessing whether an attorney should be disqualified under the Alabama Rules of Professional Conduct simply is not the law of our state. See UBT's reply brief, pp. 10-11.
>
> "Both the ABA's Model Rules of Professional Conduct and Alabama's Rules of Professional Conduct, however, have since deleted their provisions concerning the appearance of impropriety in favor of the more precise rules governing client confidences, conflicts of interest and other matters. Thus, disqualification of counsel in this district can no longer be grounded on an appearance of impropriety."

Wade v. Nationwide Mut. Fire Ins. Co., 225 F. Supp. 2d 1323, 1331 (S.D. Ala. 2002). Indeed, the commentary to Rule 1.10, Ala. R. Prof. Cond., which concerns imputed disqualification when attorneys move from one law firm to another, specifically notes that there are at least two problems

> with the "rubric formerly used for dealing with vicarious disqualification[, i.e.,] the appearance of impropriety proscribed in Canon 9 of the ABA former Code of Professional Responsibility. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since 'impropriety' is undefined, the term 'appearance of impropriety' is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety."

Comments to Rule 1.10 (as amended effective June 23, 2008), Ala. R. Prof. Cond. Because of these problems, the commentary counsels that "[a] rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification." *Id.*

Ms. *18-19. Because a *common sense* review of the evidence did not substantiate the movant's contention of a Rule 1.11(a) violation, the petition for a writ of mandamus was granted and the trial court was directed to vacate its order requiring disqualification of the Huie firm.

RECREATIONAL USE STATUTE

Ex parte Town of Dauphin Island, [Ms. 1170424, Sept. 28, 2018] __ So. 3d __ (Ala. 2018). The Supreme Court (Bolin, J; and Stuart, C.J., and Parker, Main, Wise, Sellers, and Mendheim, JJ., concur; Shaw and Bryan, JJ., concur in the result) grants a petition for a writ of mandamus directing the Mobile Circuit Court to set aside its order denying Dauphin Island's motion for summary judgment premised upon the recreational-use statute, § 35-5-1 *et seq*., Ala. Code 1975, and to enter summary judgment in Dauphin Island's favor in claims brought on behalf of a child who suffered a broken leg when a tree limb holding a swing on a public park fell causing injury.

Quoting *Ex parte City of Guntersville*, 238 So. 3d 1243, 1246-47 (Ala. 2017), the Court reiterates Alabama's recreational-use principles:

> "In *Ex parte City of Geneva*, 707 So. 2d 626 (Ala. 1997), this Court set forth the following applicable law concerning the recreational-use statutes:
>
> > "'Sections 35-15-1 through -5[, Ala. Code 1975,] of the recreational use statutes, appearing in Article 1 of Chapter 15, define and limit the duties of an owner of recreational land in relation to a person using the land for recreational purposes. Under these sections, "[a]n owner, whether public or private, owes no duty to users of the premises except for injury caused by a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." *Poole v. City of Gadsden*, 541 So. 2d 510 (Ala. 1989); § 35-15-3, Ala. Code 1975.
> >
> > "'Unlike Article 1, Article 2, consisting of §§ 35-15-20 through -28, [Ala. Code 1975,] applies specifically to owners of noncommercial public recreational land, such as the City here. These sections "provide such landowners with even greater protections than §§ 35-15-1 through -5." *Poole*, at 513. See also *Grice v. City of Dothan*, 670 F. Supp. 318, 321 (M.D. Ala. 1987) ("[Article 2] further limits the liability of owners of land"); *Clark v. Tennessee Valley Authority*, 606 F. Supp. 130 (N.D. Ala. 1985) ("[Article 2] provides [landowners] even tighter limitations than [Article 1]"). The recreational use statutes appearing in Article 2 provide the following limitations on landowner duty and liability:
> >
> > > "'"§ 35-15-22[, Ala. Code 1975].
> > >
> > > "'"Except as specifically recognized by or provided in this article, an owner of outdoor recreational land who permits non-commercial public recreational use of such land owes no duty of care to inspect or keep such land safe for entry or use by any person for any recreational purpose, or to give warning of a dangerous condition, use, structure, or activity on such land to persons entering for such purposes."
> > >
> > > "'"§ 35-15-23[, Ala. Code 1975].
> > >
> > > "'" Except as expressly provided in this article, an owner of outdoor recreational land who either invites or permits non-commercial public recreational use of such land does not by invitation or permission thereby:
> > >
> > > "'"(1) Extend any assurance that the outdoor recreational land is safe for any purpose;
> > >
> > > "'"(2) Assume responsibility for or incur legal liability for any injury to the person or property owned or controlled by a person as a result of the entry on or use of such land by such person for any recreational purpose; or
> > >
> > > "'"(3) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.'"
> >
> > "707 So. 2d at 628-29."

Ex parte City of Guntersville, 238 So. 3d 1243, 1246-47 (Ala. 2017). Ms. *14-16. The Court notes § 35-15-24 carves out an exception to liability limitations when the owner of recreational land has knowledge but chooses not to guard or warn of conditions, uses, structures, or activity on the land which involve an unreasonable risk of death or serious bodily harm:

> Section 35-15-24, Ala. Code 1975, "carves out an exception to the liability limitations provided in §§ 35-15-22 and -23." *Ex parte City of Geneva*, 707 So. 2d at 629. Section 35-15-24 provides:
>
> > "(a) Nothing in this article limits in any way legal liability which otherwise might exist when such owner has actual knowledge:
> >
> > > "(1) That the outdoor recreational land is being used for non-commercial recreational purposes;
> > >
> > > "(2) That a condition, use, structure, or activity exists which involves an unreasonable risk of death or serious bodily harm;
> > >
> > > "(3) That the condition, use, structure, or activity is not apparent to the person or persons using the outdoor recreational land; and
> > >
> > > "(4) That having this knowledge, the owner chooses not to guard or warn, in disregard of the possible consequences.
> >
> > "(b) The test set forth in subsection (a) of this section shall exclude constructive knowledge by the owner as a basis of liability and does not create a duty to

> inspect the outdoor recreational land."

Ms. *16-17.

In the end, the Court concludes there was no substantial evidence that Dauphin Island had actual knowledge of "a condition ... [that] exist[ed] which involve[d] an unreasonable risk of death or serious bodily harm" as required to invoke the exception to liability established by § 35-15-24(a)(2). Accordingly, Dauphin Island established a clear legal right to the relief sought requiring the granting of its petition for a writ of mandamus and an order directing the Mobile Circuit Court to set aside its order denying the motion for summary judgment based upon the recreational-use statutes and to enter a summary judgment in favor of Dauphin Island.

MEDICAL NEGLIGENCE – VERDICT NEW TRIAL

HealthSouth Rehabilitation Hospital of Gadsden, LLC v. Honts, [Ms. 1160045, 1160068, Sept. 28, 2018] __ So. 3d __ (Ala. 2018). In this plurality opinion authored by Justice Sellers (Stuart, C.J., concurs; Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur in the result), the Court reverses a $20 million judgment entered on a jury verdict in a medical negligence wrongful death case filed against HealthSouth Gadsden based upon the Etowah Circuit Court's refusal to give the hospital's requested jury instruction.

The Court initially concludes the circuit court properly denied HealthSouth Gadsden's motion for JML, as there was sufficient expert testimony to the effect that the jury could reasonably infer that a hospital nurse improperly over-administered an opioid to the patient's decedent. Ms. *11-18.

However, the Court concludes the circuit court erred in denying HealthSouth Gadsden's motion for new trial, which alleged the circuit court charged the jury on the incorrect standard of care. The hospital objected to the plaintiff's request that the jury be charged on the duty of care owed by hospitals when plaintiff's expert testimony supported only the claim that there had been a breach of a duty of care by a hospital *nurse*. Thus, the circuit court erred in giving the jury a charge derived from Alabama Pattern Jury Instruction-Civil 25.02 entitled "Standard of Care for Hospital," when it should have given the hospital's proposed requested charges on the liability of a *nurse*. Ms. *19-33.

The Court also rejected the plaintiff's cross-appeal which contended the circuit court exceeded its discretion in denying its request for production of a nurse's personnel files. Quoting *Ex parte Liberty Mut. Ins. Co.*, 92 So. 3d 90, 102 (Ala. Civ. App. 2012), and its heightened evidentiary requirements before personnel files will be required to be disclosed (Ms. *33-34), the Court concludes there was insufficient evidence presented to warrant production of a particular nurse's personnel files absent proof that particular nurse was connected to the events causing the death of plaintiff's decedent.

CORPORATE OPPORTUNITY DOCTRINE – CONSTRUCTIVE TRUSTS

Mitchell v. K&B Fabricators, Inc., [Ms. 1170021, Sept. 28, 2018] __ So. 3d __ (Ala. 2018). This opinion (Mendheim, J.; and Stuart, C.J., and Parker, Main, and Bryan, JJ., concur) affirms in part a judgment entered by the Morgan Circuit Court following a bench trial with evidence heard *ore tenus* in a case involving alleged usurpation of corporate opportunities by businesses engaged in fabricating storm shelters. The Court affirms the judgment as to liability, but remands the case for the trial court to recalculate its damages award.

The Court first addresses the corporate opportunity doctrine and reiterates its essential principles:

> "The corporate fiduciary duty is divided into two parts: (1) a duty of care; and (2) a duty of loyalty. ... The corporate opportunity doctrine is one aspect of the duty of loyalty." *Massey v. Disc Mfg., Inc.*, 601 So. 2d 449, 456 (Ala. 1992).
>
> > "The duty is only co-extensive with the trust, so that in general the legal restrictions which rest upon such officers in their acquisitions are generally limited to property wherein the corporation has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purposes of its creation."
>
> *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 502, 28 So. 199, 201 (1900).
>
> > "The last restriction in *Lagarde*, that which prohibits 'balking the corporate purpose,' is really quite broad in its formulation, although the case has often been described as restrictive. See e.g., Note, *Corporate Opportunity*, 74 Harv. L. Rev. 765 (1961). We think that *Lagarde* when properly read establishes responsibilities for the corporate officer or director comparable to those outlined *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503 (1939), where the Delaware Supreme Court employed the doctrine of corporate opportunity and observed that it
> >
> > > "'... demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions

> for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.'
>
> "Moreover, the Delaware Supreme Court stated in more practical terms what the law demands of corporate officers or directors:
>
> "'[I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.'
>
> "We think that this passage provides a workable definition of 'balking the corporate purpose.'"

Morad, 361 So. 2d at 8–9. Ms. *22-24 (quoting *Morad v. Coupounas*, 361 So. 2d 6 (Ala. 1978). The Court summarizes *Morad*'s essential holding regarding the duty of loyalty owed by corporate fiduciaries as "must 'not only affirmatively ... protect the interests of [the corporation], but also ... refrain from doing anything that would work injury to [the corporation], or ... deprive it of profit or advantage which its skill and ability might properly bring to it,' ... or 'in some degree balk [the corporation] in effecting the purposes of its creation.'")). Ms. *26.

When one serves as a corporate fiduciary among competing corporations, Alabama adheres to Delaware law which holds:

> "[t]here is no 'safe harbor' for such divided loyalties .... When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. [Citations omitted.] The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts."

Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983). Ms. *31-32. This "unflinching" "requirement" "of fairness" means:

> "'When acting in good faith, a director or officer is not precluded from engaging in distinct enterprises of the same general class of business as the corporation is engaged in; but he may not wrongfully use the corporation's resources therein, nor may he enter into an opposition business of such a nature as to cripple or injure the corporation.'"

Banks, 497 So. 2d at 462-63 (Ala. 1986). Ms. *32.

The Court also reviewed the law of constructive trusts, holding the Morgan Circuit Court did not err in imposing a constructive trust upon the competitor corporation's profits from the opportunities usurped by the shared fiduciary. The Court explained:

> "A constructive trust 'bears much the same relation to an express trust that a quasi contractual obligation bears to a contract.... [A]n obligation is imposed not because of the intention of the parties but to prevent unjust enrichment.' 3 *Scott on Trusts* § 462.1 (1939).
>
> "Equity may impress a constructive trust on property in favor of one beneficially entitled thereto when another holds title to the property by fraud, commission of wrong, abuse of a confidential relationship, or any other form of unconscionable conduct. Keeton, *Law of Trusts*, 210 (5th ed. 1949); 4 *Pomeroy, Equity Jurisprudence*, § 1053 (5th ed. 1941); *Walsh on Equity*, § 106 (1930). ...
>
> "Equity may also impress a constructive trust on property in favor of one beneficially entitled thereto against a person, who, against the rules of equity and against good conscience, in any way either has obtained or holds and enjoys legal title to property that in justice that person ought not to hold and enjoy. 3 *Scott on Trusts* § 462.1 (1939); *Restatement (Restitution)* § 160, Comment A (1937).
>
> "'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.'
>
> "*Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378, 380 (1919)."

American Family Care, Inc. v. Irwin, 571 So. 2d 1053, 1058-59 (Ala. 1990). In short, a constructive trust is imposed when property is wrongfully acquired and held; the fact that the present holder of the property was not complicit in the wrongful acquisition will not necessarily prevent the imposition of a constructive trust. Ms. *38-39. The purpose of a constructive trust in such circumstances is not to capture the profits the plaintiff corporation would have made, but to instead capture the profits wrongfully made by the new competitive business. (See Ms. *42-43 summarizing opinions).

NECESSARY AND INDISPENSABLE PARTIES, ALA. R. CIV. P. 19

Ex parte Advanced Disposal Services South, LLC, [Ms. 1170320, Sept. 28, 2018] __ So. 3d __ (Ala. 2018). This splintered

opinion by Justice Sellers (Sellers, J.; and Stuart, C.J., and Bolin, Main, and Mendheim, JJ., concur; Parker, Shaw, and Bryan, JJ., dissent; Wise, J., recuses) grants a petition for a writ of mandamus and directs the Circuit Court of Macon County to join the City of Tallassee as a necessary and indispensable party pursuant to Rule 19, Ala. R. Civ. P.

Twenty-seven actions were commenced in the Circuit Court of Macon County against Advanced Disposal and others seeking monetary damages and injunctive relief for exposure to allegedly contaminated water that had been illegally discharged into the Tallapoosa River, ultimately sold by the Utilities Board of Tuskegee for use by local citizens and businesses. Defendant, Advanced Disposal, moved to dismiss the action under Rule 12(b)(7), Ala. R. Civ. P., based upon a plaintiff's alleged failure to join Tallassee as a necessary and indispensable party as required by Rule 19, Ala. R. Civ. P. The trial court entered an order denying the motion to dismiss, concluding it could afford relief to the existing parties without the addition of Tallassee as a party. Advanced Disposal then filed the petition for a writ of mandamus seeking review of the denial of its motion to dismiss.

> "Courts considering a Rule 12(b)(7) motion must look to Rule 19, which sets forth "a two-step process for the trial court to follow in determining whether a party is necessary or indispensable." *Holland v. City of Alabaster*, 566 So. 2d 224, 226 (Ala. 1990). In *Ross v. Luton*, 456 So. 2d 249 (Ala. 1984), this Court stated that mandamus review is a proper means by which to address whether a trial court has exceeded its discretion in refusing to join a party under Rule 19."

Ms. *7-8.

The opinion summarizes the essential principles of Rule 19 this way:

> Next, if joinder of a necessary party is not feasible, then the trial court should proceed to determine under Rule 19(b) "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Indispensable parties under Rule 19(b) are
>
> > "[p]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."
>
> *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854). Rule 19(b) sets forth the following factors for the court's consideration of whether a party is indispensable:
>
> > "[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."
>
> "The determination of whether a party is indispensable under Rule 19(b) is based on equitable and pragmatic considerations." *Ross*, 456 So. 2d at 257. Finally, "[t]he absence of a necessary and indispensable party necessitates the dismissal of the cause without prejudice or a reversal with directions to allow the cause to stand over for amendment." *J.C. Jacobs Banking Co.*, 406 So. 2d at 850-51.

Ms. *9-12.

The Court concludes the City is a necessary party because in its absence the plaintiff cannot be accorded complete relief. Relying upon facts arguably not found within the plaintiff's complaint, the Court concludes the City's presence in the lawsuit is required because "the majority of the effluent being discharged into the [Tallapoosa] river will continue to reach [plaintiff's] water supply even if an injunction is ordered for Advanced Disposal's leachate. ... And "because, the City, by entering into the [water treatment] agreement, pursuant to which it takes title to the leachate and treats the leachate, has a legally protected interest relating to the subject matter of this case that will be affected by the outcome of [plaintiff's] claims." Ms. *14-15.

IMPORTANT DATES

PRESIDENT'S DAY | FEBRUARY, THIRD MONDAY

LINCOLN'S BIRTHDAY | FEBRUARY 12TH

WASHINGTON'S BIRTHDAY | FEBRUARY 22ND

NATIONAL MEDAL OF HONOR DAY | MAR. 25TH

ARMED FORCES DAY | MAY 21ST

MEMORIAL DAY | MAY LAST MONDAY

FLAG DAY | JUNE 14TH

INDEPENDENCE DAY | JULY 4TH

LABOR DAY | SEPTEMBER FIRST MONDAY

PATRIOT DAY | SEPTEMBER 11TH

CONSTITUTION DAY | SEPTEMBER 17TH

COLUMBUS DAY OBSERVED | OCTOBER 10TH

VETERANS DAY | NOVEMBER 11TH

PEARL HARBOR REMEMBRANCE DAY | DEC. 7TH

BILL OF RIGHTS DAY | DECEMBER 15TH