RECENT CIVIL DECISIONS

Summaries from September 22, 2017 to March 23, 2018

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PRELIMINARY INJUNCTION – ABSENCE OF IRREPARABLE INJURY

Slamen v. Slamen, [Ms. 1160578, Sept. 22, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Bryan (Stuart, C.J., and Bolin and Main, JJ., concur and Murdock, J., concurs in the result), reverses a preliminary injunction entered by the circuit court enjoining the defendants "'from disbursing funds and profits of Harris, LLP,' except as necessary for ordinary business expenses, pending resolution of Herbert's claims." Ms. *4-5. Herbert, a partner in the limited partnership, had sued the other partners alleging that they had failed to distribute proceeds due Herbert from the limited partnership. In reversing, the Court held that Herbert did not demonstrate an irreparable injury and was not entitled to injunctive relief. The Court held "'a plaintiff that can recover damages has an adequate remedy at law and is not entitled to an injunction.'" Ms. *6, quoting *Monte Sano Research Corp. v. Kratos Defense & Sec. Sols., Inc.*, 99 So. 3d 855, 861-62 (Ala. 2012). The Court also held that

> Herbert's mere allegation that, without the injunction, the defendants might be unable to satisfy a potential judgment remedying his alleged monetary loss does not transform his injury into an irreparable one that justifies injunctive relief.

Ms. *9.

ARBITRATION – WAIVER OF RIGHT TO ARBITRATE

Nation v. Lydmar Revocable Trust, [Ms. 1160660, Sept. 22, 2017] __ So. 3d __ (Ala. 2017). In a decision by Justice Parker (Stuart, C.J., and Murdock, Main, Wise, and Bryan, JJ., concur, and Bolin, Shaw, and Sellers, JJ. concur in the result) the Court reverses the circuit court's order returning a case to the active docket after the circuit court had previously granted the defendants' motion to compel arbitration.

The circuit court granted the defendants' motion to compel arbitration and after the plaintiff had not initiated an arbitration proceeding for some time, the defendants moved the circuit court to dismiss the case without prejudice. The plaintiff responded arguing that because the defendants had not initiated an arbitration proceeding after the order compelling arbitration, the case should be returned to the active docket. The circuit court entered an order returning the case to the active docket. The defendants appealed.

Noting that the circuit court's order stated no reason for returning the case to the active docket, the Court concluded that the order was based upon the circuit court's conclusion that by failing to initiate an arbitration proceeding, the defendants had waived their right to compel arbitration. Ms. *9.

Construing the applicable arbitration provisions as well as the commercial arbitration rules of the American Arbitration Association ("AAA"), the Court concluded that the claimant, i.e., the plaintiff, had the burden to initiate the arbitration process. Ms. *14-15. Accordingly, the Court reversed the circuit court's order returning the case to the active docket because the defendants were not obliged to initiate arbitration. Ms. *21.

STATE-AGENT IMMUNITY – DRIVER OF MUNICIPAL FIRE TRUCK – "PATROLLING"

Ex parte Terrence Venter and the City of Selma, [Ms. 1160539, Sept. 22, 2017] __ So. 3d __ (Ala. 2017). In this decision by Justice Sellers (Stuart, C.J., and Parker and Main, JJ., concur, Murdock, J., concurs specially, and Bolin, Shaw, Wise, and Bryan, JJ., dissent), the Court denies a petition for writ of mandamus sought by the City of Selma and Terrence Venter, a Selma fireman who was driving a fire truck which collided at an intersection with a vehicle driven by Aubrey Vick. Vick was killed in the collision.

Venter was not responding to an emergency call at the time of the crash. Instead, Venter testified that he was "patrolling" which he described as "driving around the City of Selma, 'learning streets and areas, and inspecting streets and layout.'" Ms. *14. The City of Selma and Venter contended that these actions constituted formulating plans, policies, or designs and entitled the City and Venter to state-agent immunity under the rules set forth in *Ex parte Cranman*, 792 So. 2d 392, 405 (Ala. 2000). A sharply-divided Court rejected this argument, noting that

> Venter and the City have not provided this Court with any caselaw from this State or any other jurisdiction in which immunity has been extended to a fireman who was engaged in routine patrolling when an alleged tort occurred. And, assuming, without deciding, that the act of "patrolling" could somehow be equated with formulating policy or procedure, Venter, by his own admission, was not engaged in the act of patrolling when the accident occurred.

Ms. *9-10. Venter acknowledged that he was returning to the station when the collision occurred. Ms. *10. The dissenting opinion by Justice Shaw, joined by Justice Wise, would have granted the writ and dismissed the case based on state-agent immunity as "it appears that in the instant case, the firefighter was both learning and determining routes and locations in the City as part of planning responses to future fires or other emergencies." Ms. *14.

TRIBAL SOVEREIGN IMMUNITY FROM TORT ACTION

Wilkes v. PCI Gaming Authority, [Ms. 1151312, Sept. 29, 2017] __ So. 3d __ (Ala. 2017). This 7-0 decision by Chief Justice Stuart (Bolin, Parker, Murdock, Main, Bryan, and Sellers, JJ., concur; Shaw and Wise, JJ., recuse) reverses a summary judgment entered by the Elmore Circuit Court dismissing claims against PCI Gaming Authority and the Poarch Band of Creek Indians based on sovereign immunity of the Poarch Band of Creek Indians. The plaintiffs were injured when an automobile driven by an employee of Wind Creek-Wetumpka collided with plaintiffs' vehicle. The Wind Creek-Wetumpka employee had a blood alcohol level of .293 one hour and 45 minutes after the crash.

Noting that immunity of Indian tribes is a question of federal law, the Court also observed that the Supreme Court of the United States had never "specifically addressed (nor, as far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with the tribe, has no alternative way to obtain relief for off-reservation commercial conduct." Ms. *11, quoting *Michigan v. Bay Mills Indian Community*, __ U.S. __, ___ 134 S.Ct. 2024, 2036, n. 8 (2014).

The Court held

> In light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it; accordingly, we hold that the doctrine of tribal sovereign immunity affords the tribal defendants no protection from the claims asserted by Wilkes and Russell. As Justice Stevens aptly explained in his dissent in *Kiowa*, a contrary holding would be contrary to the interests of justice, especially inasmuch as the tort victims in this case had no opportunity to negotiate with the tribal defendants for a waiver of immunity.

Ms. *11-12.

The Court also relied on the dissent of Justice Thomas in *Bay Mills* concluding that none of the rationale supporting continued application of tribal sovereign immunity "to tribes' off-reservation commercial activities sufficiently outweigh the interests of justice so as to merit extending that doctrine to shield tribes from tort claims asserted by individuals who have no personal or commercial relationship to the tribe." Ms. *13 (underlined emphasis in the original). The Court acknowledged that its holding is contrary to the holdings of several United States Courts of Appeals on this issue but that the Alabama Supreme Court "is not bound by decisions of lower federal courts." Ms. *14.

DISPUTE OVER GAMBLING WINNINGS AT INDIAN CASINO – ILLEGAL CONTRACT

Rape v. Poarch Band of Creek Indians,

[Ms. 1111250, Sept. 29, 2017] __ So. 3d __ (Ala. 2017). In this plurality opinion by Justice Murdock (Bolin, Parker, and Wise, JJ., concur; Stuart, C.J., and Main and Bryan, JJ., concur in the result; Shaw and Sellers, JJ., recuse), the Court affirms the Montgomery Circuit Court's dismissal of the plaintiff Rape's contract and tort claims arising from a dispute over a $1,377,015.30 slot jackpot at Wind Creek Casino.

Plaintiff argued that the lands on which the Wind Creek Casino is located are not properly considered Indian lands, because the Poarch Band of Creek Indians was not a federally recognized tribe when Congress enacted the Indian Reorganization Act of 1934. Plaintiff argued that as a result, the Poarch-Creek tribal courts did not have exclusive jurisdiction. After extensively discussing the history of the 1934 Act, the Court ultimately decided that it faced "a Catch-22." Ms. *29. The Court held that if it concluded that the lands were not properly taken into trust and therefore not considered "Indian country," those lands would remain in the political jurisdiction of the State of Alabama. Ms. *29-30. The Court then held that if the activity out of which the claim founded on the winning slot jackpot occurred on land within the jurisdiction of the State of Alabama, that activity was illegal. Ms. *30. The Court held "[i]t is well established that this Court will not aid a plaintiff seeking to recover under an illegal contract but, instead, will simply leave the parties where it finds them," Ms. *30, and that "[t]his principle applies whether the claim framed by a plaintiff sounds in contract or in tort; either way, a plaintiff cannot recover on a claim that depends upon or requires the aid of an illegal contract." Ms. *32.

INDIAN TRIBAL IMMUNITY – DRAM SHOP CLAIM

Harrison v. PCI Gaming Authority, [Ms. 1130168, Sept. 29, 2017] __ So. 3d __ (Ala. 2017). In this *per curiam* decision (Bolin, Parker, Murdock, Wise, Bryan, and Sellers, JJ., concur; Stuart, C.J. and Main, J., concur in the result; Shaw, J., recuses himself), the Court reverses a dismissal based on tribal immunity. Plaintiff's decedent suffered injuries and subsequently died when he was a passenger in an automobile which crashed following a high-speed police chase on a portion of a county road traversing land held by the Poarch Band of Creek Indians in Escambia County. The plaintiff alleged that the driver of the vehicle in which her son was a passenger had consumed alcohol while a patron at Wind Creek Casino. The complaint alleged that the tribal defendants were responsible for negligently or wantonly serving alcohol to the driver despite his being visibly intoxicated and asserted claims under the Alabama Dram Shop Act, § 6-5-71, Ala. Code 1975. Ms. *3.

Plaintiff also asserted claims against Fountain and Coon, Poarch Creek police officers, who were chasing the vehicle at the time of the crash which led to the death of plaintiff's decedent. Ms. *3. The circuit court dismissed the tribal defendants based on sovereign immunity but denied the motions to dismiss of the individual defendants Fountain and Coon.

For reasons substantially identical to those set forth in *Wilkes v. PCI Gaming Authority*, [Ms. 1151312, Sept. 29, 2017] __ So. 3d __ (Ala. 2017), the Court concluded that the tribal defendants were not entitled to substantive sovereign immunity. The Court stated

> Based on ... our holding in *Wilkes*, we similarly conclude that the judgment entered by the trial court in the present case – extending to the tribal defendants' immunity from responsibility for the life-ending injuries to Benjamin allegedly caused by their negligent or wanton serving of alcohol to a visibly intoxicated patron – is due to be reversed.

Ms. *23. The Court in remanding instructed the circuit court to consider whether it has adjudicative or "direct" subject-matter jurisdiction in view of the defendants' contention that the crash which ended the plaintiff's decedent's life occurred on Indian land. Ms. *23. The Court noted that according to the complaint, the crash occurred on Jack Springs Road, which is Escambia County Road 1, a fact that may bear on whether adjudicative authority over this case lies in tribal or state courts. Ms. *23-24.

ARBITRATION – TIMING OF MERITS DISCOVERY

Ex parte Locklear Chrysler Jeep Dodge, etc., [Ms. 1160372, 1160373, 1160374, Sept. 29, 2017] __ So. 3d __ (Ala. 2017). In this unanimous decision by Justice Bolin (Stuart, C.J., and Parker, Murdock, Shaw, Main, Wise, Bryan, and Sellers, JJ., concur), the Court issues writs of mandamus to the Bibb Circuit Court to vacate discovery orders in three tort actions filed by purchasers of vehicles from Locklear Chrysler Jeep Dodge, LLC. The orders in question compelled responses to general merits discovery at a time when the trial court had not yet ruled upon Locklear's motion to compel arbitration. The unanimous Court concluded "the trial court exceeded its discretion by allowing general discovery before the resolution of the issue whether the purchasers must arbitrate their claims." Ms. *12.

ARBITRATION – ENFORCEMENT BY NON-PARTY – APPELLATE PROCEDURE – WAIVER – ALTERATION OF INSTRUMENT

Locklear Automotive Group, Inc. v. Hubbard, et al., [Ms. 1160335, 1160336, 1160337, 1160375, 1160435, 1160436, 1160437, Sept. 29, 2017] __ So. 3d __ (Ala. 2017). In this unanimous decision by Justice Murdock (Stuart, C.J., and Bolin, Main, and Bryan, JJ., concur), the Court reverses orders of the circuit courts of Bibb and Tuscaloosa counties denying motions to compel arbitration in six of the seven appeals and affirms the Bibb Circuit Court's order denying the defendants' motion to compel arbitration in the other appeal (Lollar).

The various actions alleged that the respective plaintiffs were victims of identity theft as a result of having dealt with Locklear Chrysler Jeep Dodge, LLC ("Locklear CJD"). Plaintiffs also sued Locklear Automotive Group, the sole member of Locklear CJD. Ms. *5. The operative language in each of the seven arbitration agreements was identical; the material part concerning the scope of the

agreements was as follows:

> The undersigned agree that all disputes not barred by applicable statutes of limitation, resulting from, arising out of, relating to or concerning the transaction entered into or sought to be entered into (including but not limited to: any matters taking place either before or after the parties entered into this agreement, including any prior agreements or negotiations between the parties; the terms of this agreement and all clauses herein contained, their breadth and scope, ... shall be submitted to BINDING ARBITRATION.

Ms. *5-6.

The Court agreed with the plaintiffs that Locklear Group had waived its argument that the arbitrator should decide the issue of arbitrability. In agreeing with plaintiffs on waiver, the Court held that Locklear Group's solitary sentence in its motions to compel was not sufficient to apprise the trial courts of Locklear Group's position that arbitrability issues had to be decided by the arbitrator. Ms. *32. The Court cited a number of cases holding that a fleeting mention of a contention in a sentence in a lengthy trial court filing was not sufficient to raise an argument in the trial court so as to preserve the issue for appellate review. Ms. *33.

The Court also granted the plaintiffs' motion to strike references in Locklear Group's appellate brief to arguments and statements Locklear Group allegedly made in hearings before the trial court which were not transcribed. The Court noted that "[t]his court is limited to a review of the record alone and the record cannot be changed, altered, or varied on appeal by statements in briefs of counsel." Ms. *35.

The Court reversed the trial courts' orders denying Locklear Group's motion to compel arbitration in six of the seven appeals. The Court concluded that those plaintiffs were equitably estopped from contending that non-signatory Locklear Group was not entitled to enforce the arbitration provisions. The Court pointed to language in the agreements that "the undersigned agree that all disputes ... resulting from, arising out of, relating to, or concerning the transaction ... shall be submitted to binding arbitration." Ms. *47. The Court also concluded that the claims against Locklear Group were sufficiently intertwined with the underlying contract obligations of Locklear CJD to support invocation of estoppel of the plaintiffs to oppose the non-signatory's enforcement of the arbitration provision. The Court noted that "[t]he plaintiffs' complaints make virtually no distinction between the bad acts of Locklear Group and those of Locklear CJD." Ms. *52. The Court ultimately concluded "that the plaintiffs' claims against Locklear Group as a non-signatory to the arbitration agreement are 'intimately founded in and intertwined with' the underlying contract obligations and with the plaintiffs' contract-related claims against the signatory to the arbitration agreement, Locklear CJD, so that the doctrine of equitable estoppel is applicable." Ms. *53.

As to the appeal of Jeffery Lollar and Betsy Lollar, the Court affirmed the Bibb Circuit Court's order denying the defendants' motion to compel arbitration. This was a fact-specific holding driven by the fact that the Lollars alleged that they were the victims of identity theft arising from their having given the defendants their personal financial information in December 2015, an occasion on which they did not buy a vehicle or sign any purchase/arbitration agreement. The purchase agreement which contained the arbitration provision was executed by the Lollars in May 2013 when they purchased a 2009 Dodge Ram truck. Accordingly, the Court held that from the face of the plaintiffs' complaint, that the claims alleged by the plaintiffs were not within the scope of the arbitration provision signed in 2013. Ms. *59.

In the appeal involving plaintiff Anthony Hood, the Court also rejected Hood's unsupported contention that the arbitration agreement was "fabricated." Ms. *71. Hood contended that the agreement was fabricated because it had been altered after his signature by the addition of the words "Locklear Chrysler Jeep Dodge, LLC." The Court rejected this contention holding "'[i]n general, for the alteration of an instrument to be 'material,' the alteration must be such as to change the legal effect of the instrument." Ms. *66. The Court found that there was no material alteration of the arbitration agreement because

> Hood knew and admitted he was signing an arbitration agreement with Locklear CJD in connection with his purchase of a vehicle. A representative of the dealership signed the agreement. The terms of that agreement were not changed in any degree by the alleged addition of the words Locklear Chrysler Jeep Dodge, LLC. Accordingly, the arbitration agreement was not "fabricated," and Hood's argument does not defeat the arbitration of Hood's underlying claims.

Ms. *66-67.

FRAUD IN THE INDUCEMENT – HALF TRUTH – CONTINUANCE – PUNITIVE DAMAGES RATIO

Alabama River Group and George Landegger v. Conecuh Timber, Inc., et al., [Ms. 1150040, Sept. 29, 2017] __ So. 3d __ (Ala. 2017). This opinion by Justice Parker (Main, Wise, and Bryan, JJ., concur; Stuart, C.J., and Bolin J., concur in part and concur in the result; Shaw, J., concurs in the result; and Sellers, J., recuses himself) conditionally affirms judgments in favor of wood dealers against the ARG defendants (Alabama River Group, Inc. and its CEO George Landegger) for compensatory and punitive damages on claims of fraudulent inducement and breach of contract. The wood dealers were awarded a total of a little over $1 million in compensatory damages and $7 million in punitive damages. Ms. *2.

The transactions involved in the litigation were affected by a subsidy program administered by the USDA known as the Biomass Crop Assistance Program ("BCAP"). Pursuant to BCAP, a wood dealer was eligible to receive subsidies for qualifying materials. The BCAP program specifically excluded from eligibility for subsidies materials known in the timber and paper industry as "black liquor." Ms. *4. Black liquor is a slurry of water and other chemicals removed from wood as a by-product in the manufacturing of paper. Ms. *4. Defendant George Landegger was on a call the day after the release of the eligible material list, during which

a USDA representative stated emphatically that "black liquor is not going to be eligible" for subsidy. Ms. *5. The ARG defendants' pulp mills entered into agreements with the USDA to follow the rules and regulations concerning the BCAP and to certify for BCAP subsidies only eligible materials. Ms. *6.

ARG was suspended from the BCAP program as a result of allegedly having certified as eligible products that were not eligible for the subsidies. ARG represented to the wood dealers that the suspension resulted from "a misunderstanding" and encouraged them to continue to deliver their products to the ARG pulp mills. Ms. *10. The gravamen of the wood dealers' complaint was that ARG made various misrepresentations to them related to its participation in BCAP to induce them to continue to sell wood products to ARG pulp mills at a reduced price. Ms. *14.

The Court rejected ARG defendants' sufficiency of the evidence on fraudulent inducement in part because "ARG's representations to the wood dealers that they would receive a BCAP subsidy, even if true for part of the wood products at issue, was not true as to the material used to make black liquor. It is no defense that the statements that ARG made were, at best, 'half-true'." Ms. *26-27.

The Court also rejected the defendants' contention that the false statements were merely an opinion or a prediction about events to occur in the future. The Court concluded that many of the statements in question related to past events and were therefore actionable as misrepresentations. For example, the Court noted testimony from one of the plaintiffs that ARG represented "'[w]e are not really kicked out. Everything was legal. We got the formula approved by the FSA. Just a misunderstanding. We are going to get put back in the program.'" Ms. *29.

The Court also rejected the ARG defendants' contention that the representations in question were in the nature of promissory fraud. The Court held

> ""Fraud in the inducement consists of one party's misrepresenting a material fact concerning the subject matter of the underlying transaction and the other party's relying on the misrepresentation to his, her, or its detriment in executing a document or taking a course of action."" *Farmers Ins. Exch. v. Morris*, [Ms. 1121091, Feb. 12, 2016] ___ So. 3d ___, ___ (Ala. 2016) (quoting *Johnson Mobile Homes of Alabama, Inc. v. Hathcock*, 855 So. 2d 1064, 1067 (Ala. 2003), quoting in turn *Oakwood Mobile Homes, Inc. v. Barger*, 773 So. 2d 454, 459 (Ala. 2000)).

Ms. *32-33. The Court noted that the ARG defendants' representations were in the nature of statements as to how much money the plaintiffs would make in the future based upon existing facts. The Court also noted that "a claim of misrepresentation is not necessarily mutually exclusive with a promissory-fraud claim. We have upheld findings of liability for both misrepresentation and promissory fraud where the record below supported each claim." Ms. *34.

The Court also held the defendants' contention that the trial court had erroneously instructed the jury that there was a contract claim against defendant Landegger in his individual capacity was not preserved for review. The Court explained "an appellant 'must adequately state specific grounds for his objection' at the close of the court's jury instructions, *McElmurry v. Uniroyal, Inc.*, 531 So. 2d 859, 860 (Ala. 1988), and thereby permit the trial court to correct any error immediately." Ms. *40-41.

The Court also rejected the defendants' contention that George Landegger could not be held liable for fraud individually:

> "Landegger certainly 'cannot escape individual liability on the ground that he was acting in an official corporate capacity,' [*Inter-Connect, Inc. v. Gross*], 644 So. 2d [867,] 869 [(Ala. 1994)], or on the ground that he did not directly communicate with the wood dealers. The evidence in this case was sufficient for a jury to conclude that, in the alleged scheme of misrepresentation in this case, Landegger authorized and directed his companies and his companies' employees in at least one of the essential components of the scheme: the crucial decision that ARG would certify as eligible for BCAP subsidies wood material used to make black liquor."

Ms. *44.

The Court rejected the defendants' motion for new trial based on alleged error by the trial court in denying defendants' motion for a continuance asserting Landegger could not attend the trial due to his home confinement on a criminal charge in Connecticut. The Court held "civil litigants in Alabama have no right to a continuance of the trial, nor do incarcerated parties have a right to personally attend or testify at trial." Ms. *52.

Noting that compensatory damages must be reasonably certain but are not held to a strict numerical standard, the Court rejected the defendants' challenge to the amount of compensatory damages. The Court declined the ARG defendants' invitation to reexamine the competing arithmetic of the parties and to reweigh the competing testimony and exhibits. The Court noted "just as a trial court may not substitute its judgment for that of the jury when the jury has returned a compensatory verdict that is supported by the record, neither may this court." Ms. *88 (internal citations omitted).

As for remittitur of punitive damages, the Court held

> Although we continue to refuse to identify any bright-line numerical value that would judicially cap punitive damages for all cases, we conclude that in the present case the second *Gore* guidepost, informed by *Campbell* and Alabama law, favors a remittitur to a 3:1 ratio [to compensatory damages]....

Ms. *113.

SUBJECT MATTER JURISDICTION

Paulk v. Paulk, [Ms. 2160481, Sept. 29, 2017] __ So. 3d __ (Ala. Civ. App. 2017). This unanimous decision by Judge Moore (Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur) holds that an order on remand entered by a retired circuit judge who is not lawfully appointed as a temporary judge is void. The court in a previous appeal had reversed and remanded with instructions to enter an order calculating the amounts the parties owed for the children's activities fees, books, and uniforms associated with their attendance at a prep school. Judge

Banks, who retired effective December 31, 2015, had entered an order on remand subsequent to his retirement. The court held that an order entered by a retired judge, who was not appointed a temporary circuit judge pursuant to either § 12-1-14, Ala. Code 1975, or § 12-1-14.1, Ala. Code 1975, was void. Ms. *4. The court dismisses the mother's appeal from that order because a void judgment will not support an appeal. Ms. *5.

UIM – INSURERS' WAIVER OF COVERAGE DEFENSE

Travelers Indemnity Co. of Connecticut v. Worthington, [Ms. 1150370, Oct. 13, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Wise (Stuart, C.J., Bolin, Parker, Main, and Bryan, JJ., concur, Murdock, J., concurs in part and concurs in the result; Shaw, J., concurs and Sellers, J., dissents), affirms a judgment on a jury verdict against Travelers for UIM benefits.

On the eve of trial, the plaintiff Worthington settled with and released the tortfeasor Thomas without affording Travelers an opportunity to advance the amount of the settlement offer. The policy required the insured to provide Travelers notice prior to releasing the tortfeasor. Ms. *3-4.

After learning of the eve of trial settlement, Travelers did not amend its answer nor did it argue to the trial court that the insured's failure to provide notice forfeited the UIM coverage. The Court noted that

> At no time before the trial started or at any time during the trial proceedings did Travelers present to the trial court its argument that Worthington had forfeited coverage by entering into the settlement agreement with Thomas. Rather, it proceeded to trial on a stipulation that UIM coverage existed and that the policy covered the claims asserted by Worthington. ... Travelers went so far as to tell the jury in closing arguments that it should return a verdict in favor of Worthington and that the only dispute was the amount of damages that should be awarded.

Ms. *32.

The Court affirmed the judgment on the jury verdict against Travelers holding that "one who has stipulated to certain facts is foreclosed from repudiating them on appeal." Ms. *42 (internal quote marks omitted). The Court also held that "Travelers has not presented any argument to establish that the trial court exceeded its discretion in not considering the merits of its forfeiture-of-coverage defense." Ms. *43.

CLASS ACTION APPROVAL – STANDARD OF REVIEW – ATTORNEY FEES

Lawler, et al. v. Sam Johnson and City of Birmingham Retirement and Relief System, [Ms. 1151347, 1160049, 1160158, Oct. 20, 2017] __ So. 3d __ (Ala. 2017). This decision by Chief Justice Stuart (Shaw, Wise, and Sellers, JJ., concur; Parker, J., concurs in the result) vacates the trial court's award of a $124 million attorney fee in the *Johnson v. Caremark RX, LLC* class action. The trial court had overruled some of the objections on the ground that they were untimely and others on the ground that the objectors failed to present adequate evidence contesting the award of attorney fees and expenses.

In regard to the trial court's ruling that the Lawler objection was untimely, the Court held that

> Lawler's action in waiting to file an objection until after the July 22, 2016, deadline set by the trial court was consistent with the short form notice he was sent telling him he could object to the proposed settlement "by filing a written objection and/or by appearing at the settlement hearing."

Ms. *21. The Court found a due process violation, explaining

> [T]hat due process is fundamentally about fair play. See, e.g., *Industrial Chem. and Fiberglass Core v. Chandler*, 547 So. 2d 812, 835 (Ala. 1988)(on application for rehearing), and it would hardly be fair of this Court or comport with notions of due process to punish Lawler for acting in accordance with the notice actually provided to him.
>
> It is notable, moreover, that the relevant language and the short-form notice sent to Lawler was not the language approved by the trial court; rather, it is language that was unilaterally added to the short-form notice by class counsel.

Ms. *21-22.

The Court also concluded that requiring objectors to file objections to class counsel's application for attorney's fees and expenses before class counsel's filing of its attorney-fee application "deprives objecting class members of a full and fair opportunity to contest class counsel's fee motion." Ms. *25, quoting *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010).

The Court also held that in applying for attorney's fees, class counsel, otherwise a fiduciary for the class, becomes a claimant against the fund. "Because the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." Ms. *28, quoting *Mercury*, 618 F.3d at 994-95. The Court vacated the attorney-fee award because "class members were not afforded due process inasmuch as they were not allowed to view, consider, and respond to class counsel's attorney-fee application before they were required to file any objections to that application." Ms. *31.

Class counsel argued that any error was harmless because subsequent to the filing of the fee application, the objectors filed supplemental pleadings with the trial court objecting to the fee application. The Court declined to find the error harmless, noting "that the interval between class counsel's filing of its application for attorney fee and the subsequent fairness hearing was only ten days – five business days." Ms. *34. The Court also declined to find the error harmless because it noted that the objectors were never provided with detailed records on the amount of time spent by class counsel on the case. Ms. *35-36. The Court noted the amount of time expended on behalf of the class, though not dispositive, is "a relevant factor that should be considered when determining a reasonable attorney fee in a class-action case. Accordingly, class members are entitled to basic informa-

tion in that regard so they can adequately argue any objections they have, as is their due process right." Ms. *38-39, citing *Edelman & Combs v. Law*, 663 So. 2d 957, 959 (Ala. 1995). The Court required that on remand, the trial court direct a process where objectors are provided with detailed information on the time spent on the case and are subsequently provided adequate time to supplement their objections after review of that information. Ms. *39.

SECTION 11-52-77, ALA. CODE 1975 – STRICT COMPLIANCE – MOOTNESS

Ex parte Frank S. Buck, et al., [Ms. 1151011, Oct. 27, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Shaw (Stuart, C.J., and Bolin, Main, Wise, and Bryan, JJ., concur; Parker and Sellers, JJ., dissent) reverses on certiorari review the decision of the Court of Civil Appeals affirming the trial court's judgment in favor of the City of Birmingham in a challenge to a rezoning ordinance by property owners Frank and Martha Buck.

The Court granted certiorari review on the narrow question of "whether notice of ordinance 1949-G was properly published pursuant to § 11-52-77 and § 11-52-78." Ms. *9.

While the case was pending before the Supreme Court on certiorari review, the city passed a new zoning ordinance replacing the zoning ordinance challenged by the Bucks. The Court declined to find the passage of the new ordinance to moot the controversy before it, because the Bucks had also filed a challenge to the new ordinance. Ms. *12. The Court reasoned that if the challenge to the new ordinance was sustained, the question of the validity of the zoning ordinance before the Court would be material. Ms. *13. Justices Sellers and Parker dissented from this holding. The dissenters would have dismissed the appeal for lack of a justiciable controversy. Ms. *32.

On the merits, the Court rejected the city's contention that substantial compliance with § 11-52-77 is sufficient. The Court held

> [T]he plain language of § 11-52-77 requires that the ordinance ultimately adopted be the same as the proposed ordinance that was published....
>
> In this case, the proposed ordinance that was published in full was not the ordinance that was adopted; instead, the proposed ordinance that was published was later amended, and the amended ordinance was adopted. To hold that only a proposed ordinance need be published, but something else, whether an ordinance that is insignificantly different from the proposed ordinance or an ordinance that is radically different, could be adopted, is contrary to the plain language of § 11-52-77.

Ms. *29-30.

APPELLATE PROCEDURE – RULE 54(B) CERTIFICATION

Ghee v. USAble Mutual Ins. Co. d/b/a Blue Advantage Administrators of Arkansas, [Ms. 1160082, Oct. 27, 2017] __ So. 3d __ (Ala. 2017). This unanimous decision by Justice Murdock (Stuart, C.J., and Bolin, Main, and Bryan, JJ., concur) dismisses the plaintiff's appeal from the circuit court's order dismissing the plaintiff's claims against USAble Mutual Insurance Company. Plaintiff alleged that his decedent died as a result of negligence and other wrongful conduct of the group health insurer in failing to approve certain medical procedures for the plaintiff. Ms. *6-7. The insurer was joined as a defendant with several other healthcare providers, and the plaintiff alleged the wrongful acts of the defendants combined and concurred to cause his decedent's death. Ms. *7. In granting the insurer's motion to dismiss based upon defensive ERISA preemption, the Court granted plaintiff leave to amend his complaint while also certifying the dismissal of the insurer as a final judgment under Rule 54(b). Ms. *10-11.

In dismissing the appeal, the Supreme Court held "[t]he circuit court cannot purport to enter a final adjudication of a claim while making it possible for the plaintiff to revive that very claim. Accordingly, the circuit court did not render a proper Rule 54(b) certification, and we do not have before us a final judgment." Ms. *17. This is the latest in a consistent line of cases in which the Court finds appellate review "in a piecemeal fashion" inappropriate.

FRAUD IN THE INDUCEMENT – PAROL EVIDENCE – MERGER CLAUSE

McCullough v. Allstate, [Ms. 2160497, Oct. 27, 2017] __ So. 3d __ (Ala. Civ. App. 2017). This unanimous decision by Judge Moore (Thompson, P. J., and Pittman, Thomas, and Donaldson, JJ., concur) reverses summary judgment of dismissal in favor of Allstate on the insured's claims of fraudulent inducement. Plaintiff alleged that he had been fraudulently induced to enter into a release agreement with Allstate.

The court concluded that Allstate's reliance on the merger clause to bar the plaintiff's parol evidence of the alleged fraudulent inducement was erroneous. The court held that "a merger clause does not prevent proof of fraudulent representations by a party to the contract ...." Ms. *14, quoting *Environmental Sys., Inc. v. Rexam Corp.*, 624 So. 2d 1379, 1383 (Ala. 1993), (internal quote marks and other citations omitted). Ms. *14.

REMITTITUR OF PUNITIVE DAMAGES – CREDIBILITY OF WITNESS-UNSIGNED AFFIDAVIT

Thomas v. Heard, [Ms. 1150119, Nov. 3, 2017] __ So. 3d __ (Ala. 2017). In this *per curiam* opinion (Parker, Main, and Wise, JJ., concur; Shaw and Bryan, JJ., concur in the result; Stuart, C.J., Bolin, Murdock, and Sellers, JJ., dissent) the Court affirms the Geneva Circuit Court's judgment after remand leaving intact punitive damage awards on claims arising from an intersection collision. The respective damage awards for each of the injured victims were $850,000 compensatory/$750,000 punitive to Randell Heard, $450,000 compensatory/$750,000 punitive to Donna Heard, and $500,000 compensatory/$500,000 punitive to Laura Wells.

In a prior opinion, a sharply-divided court affirmed the submission of the wantonness claim against the defendant to the jury in view of evidence of the defendant's voluntary intoxication.

On return from remand, the Court noted that the issues focused on by the parties in oral argument in the *Hammond/Green Oil* proceeding were "the degree of reprehensibility of defendant's conduct and the financial position of the defendant." Ms. *5. The Court found that the defendant's conduct in operating his motor vehicle while intoxicated "evinces indifference and a reckless disregard for the health and safety of others." Ms. *8. The Court held that "the trial court properly found that Thomas's conduct was reprehensible; this factor weights against remittitur of the punitive-damages awards." *Ibid.* The Court also found that the modest ratio between the compensatory and punitive damages militated against remittitur. Ms. *9.

In rejecting Thomas's argument that his financial condition warranted remittitur, the circuit court held that "Thomas 'was not a credible witness,'" Ms. *10, and placed little to no weight on his testimony concerning his alleged meager financial condition. The Court noted that a trial court's finding concerning credibility "'is binding [on the appellate court] which can neither pass judgment on the possible truthfulness or falsity of testimony, ... nor on the credibility of witnesses.'" Ms. *11 (internal citations and quotation marks omitted).

The Court also noted that Thomas's affidavit, in which he asserted that he was unemployed with little to no assets, was not signed. "[A]n affidavit unsigned by the affiant 'does not constitute admissible evidence.'" Ms. *12, quoting *State Home Builders Licensure Board v. Stephens*, 756 So. 2d 878, 879 (Ala. Civ. App. 1998).

INCONSISTENT VERDICT – JURY'S FAILURE TO FOLLOW INSTRUCTIONS

Johnston v. Castles and Crowns, Inc., and Delaire Tibbetts, [Ms. 1160171, Nov. 3, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Wise (Stuart, C.J., and Bolin, Parker, Murdock, Shaw, Main, and Bryan, JJ., concur; Sellers, J., dissents) reverses the Mobile Circuit Court's judgment on a jury verdict in favor of Castles and Crowns and against Jami Johnston in the amount of $800,000 in compensatory damages and $1 in punitive damages for conversion and conspiracy. Ms. *14. The jury also awarded Castles and Crowns $75,000 in compensatory damages on a claim for unjust enrichment. Ms. *15. After the jury returned its verdict, the circuit court stated on the record that the judgment in favor of Castles and Crowns against Jami Johnston on the claim for unjust enrichment was inconsistent with the instructions given by the trial court and the court accordingly set aside the verdict in favor of Castles and Crowns for unjust enrichment. Ms. *15.

Johnston moved for a new trial contending that the verdicts were inconsistent with the trial court's instruction to the jury "to consider Castles's unjust enrichment claim against Johnston if it did not find against Johnston on conversion and conspiracy claims." Ms. *24-25, (emphasis in the original). The Court held that Johnston was entitled to a new trial because

> The jury found against Johnston on both the conversion and conspiracy claims. However, it then considered the unjust-enrichment claim and found against Johnston on that claim as well. Thus, the jury's verdict was inconsistent with the trial court's instructions and was obviously the result of confusion on the part of the jury.

Ms. *25. The Court held that the circuit court's attempt to cure the inconsistency by setting aside the award for unjust enrichment "was based on mere speculation about the jury's intent." *Ibid.* Accordingly, the Court reversed the judgment and remanded the case for a new trial.

STANDING – CHALLENGE TO EXPENDITURE OF STATE FUNDS

Morrow and Zeigler v. Bentley, [Ms. 1151313, Nov. 3, 2017] __ So. 3d __ (Ala. 2017). This *per curiam* decision (Stuart, C.J., and Bolin, Shaw, Bryan, and Sellers, JJ., concur; Parker and Wise, JJ., concur in the result; and Main, J., recuses himself) affirms the Montgomery Circuit Court's dismissal of this action by Johnny Morrow, a member of the Alabama House of Representatives, and State Auditor Jim Zeigler, challenging the defendant state officials' expenditure of funds received from BP as a result of the Deepwater Horizon disaster toward the construction of a hotel conference center at Gulf State Park. The plaintiffs, asserting claims both in their individual and official capacities, contended that the expenditure of the BP funds violated § 9-14E-1, *et seq.*, the Gulf State Park Projects Act, which in pertinent part provided that "other than project revenues, only National Resource Damage Assessment funds or Restore Act funds may be expended to implement this chapter." Ms. *3, quoting § 9-14E-9, Ala. Code 1975.

The plaintiffs contended that the BP funds were not project revenues, Restore Act funds, or National Resource Damages Assessment funds and that the defendants should be enjoined from making further unconstitutional and illegal expenditures toward the project at Gulf State Park and required to account for any sums previously disbursed or expended. Ms. *4-5.

The Court noted that "'[t]he issue of standing presents a pure question of law, and the trial court's ruling on that issue is entitled to no deference on appeal.'" Ms. *9, quoting *Town of Mountainboro v. Griffin*, 26 So. 3d 407, 409 (Ala. 2009).

The Court refused to consider the plaintiffs' argument on appeal that they had standing to prosecute the action in their individual capacities as taxpayers because "the plaintiffs waived that argument by not presenting it to the trial court." Ms. *9. The Court was at pains to point out that "the issue of lack of standing may not be waived" because lack of standing implicates the subject matter jurisdiction of the court. Ms. *12. The Court explained that by contrast when a party fails to present an argument to support his standing in the trial court, affirmance of dismissal of the action "does not risk affirming a void judgment by refusing to address the plaintiff's taxpayer-standing argument. As a result, this Court is under no duty, as it would be in a case

where a judgment had been entered in favor of a plaintiff who lacks standing, to consider the abandoned theory that the plaintiffs have taxpayer standing." Ms. *12-13.

The Court rejected State Auditor Zeigler's official capacity standing because "the complaint did not allege that the defendants' actions constitute an 'ongoing harm' to Zeigler by interfering with or usurping his authority as state auditor. The plaintiffs' failure to allege that Zeigler suffered an injury in fact in the form of intrusion upon or usurpation of his statutory and/or constitutional authority as state auditor is fatal to the plaintiffs' argument that Zeigler has standing to prosecute their action in his official capacity." Ms. *18-19.

In regard to legislator Morrow's standing, the Court noted that "'legislators have no special right to standing simply by virtue of their status: like other plaintiffs, legislators must establish a distinct, concrete injury in fact.'" Ms. *20, quoting *American Civil Liberties Union of Tennessee v. Darnell*, 195 S.W. 3d 612, 625 (Tenn. 2006). The Court noted that "'to establish standing, a legislator must overcome a heavy burden' because 'courts are reluctant to hear disputes that may interfere with the separation of powers between branches of government.'" Ms. *21, quoting *Dodak v. State Admin. Board*, 441 Mich. 547, 555, 495 N.W. 2d 539, 543 (1993). In addressing whether Morrow suffered a particularized injury in fact, the Court held

> Courts that have addressed the issue of legislator standing have held that a legislator suffers an injury in fact in his or her capacity as a legislator only in limited circumstances, which typically include (1) allegations that the legislator has been deprived of his or her right to vote or that his or her legislative votes have been nullified and (2) allegations that the legislator has been deprived of his or her constitutional right to advise and consent on executive appointments or other matters upon which a legislator has a right to act.

Ms. *23-24. The Court ultimately concluded that Morrow lacked standing because

> [A] mere allegation that executive action is unlawful because it fails to comport with previously enacted legislation is simply too attenuated to establish an injury in fact to a single legislator and, thus, is an insufficient ground upon which the single legislator can establish standing to challenge the executive action. This is so because, ..., once a legislator's vote on a bill has been counted and the bill signed into law, the legislator's connection with the transaction as a legislator, ... is at an end, and a subsequent failure to comply with the provisions of validly enacted legislation is nothing more than a generalized grievance about the correctness of governmental conduct that does not in any manner impact a single legislator's ability to act in his or her capacity as a legislator.

Ms. *35 (internal citations and quote marks omitted).

ABATEMENT OF UNFILED CAUSE OF ACTION FOR PERSONAL INJURIES BY DEATH OF INJURED PARTY

Shelton v. Green, [Ms. 1160474, Nov. 9, 2017] __ So. 3d __ (Ala. 2017). This unanimous decision by Justice Sellers (Stuart, C.J., and Parker, Wise, and Bryan, JJ., concur) affirms the DeKalb's Circuit Court's judgment on the pleadings dismissing a personal injury action.

Shelton, as personal representative of Blansit's estate, sued Green for personal injuries allegedly sustained when Blansit fell at Green's residence. Ms. *2. It was undisputed that prior to the filing of the action, Blansit died of causes unrelated to her alleged fall at Green's residence. *Ibid.*

In affirming, the Court held that

> Like the prior versions of the survival statute, § 6-5-462 "did not change the common-law rule in Alabama that a cause of action in tort does not survive in favor of the personal representative of the deceased." *Continental Nat'l Indem. Co. v. Fields*, 926 So. 2d 1033, 1037 (Ala. 2005). Thus, "[t]he general rule is that under Ala. Code 1975, § 6-5-462, an unfiled tort claim does not survive the death of the person with the claim." *Malcolm v. King*, 686 So. 2d 231, 236 (Ala. 1996).

Ms. *6.

The plaintiff did not contest that the action abated with her decedent's death, but rather contended that § 6-5-462 was unconstitutional. The Court rejected this contention, holding

> It has, however, been settled for some time that the legislature has the authority to decide which actions and causes of action survive. Indeed, more than 100 years ago, this Court stated: "Whether our statutes should or should not provide for the survival of causes as well as of actions, is one conclusively for the Legislature and not for the court."

Ms. *8-9, quoting *Wynn v. Tallapoosa Cty. Bank*, 118 Ala. 469, 491-92, 53 So. 228, 237 (1910).

CHALLENGE TO EMPLOYMENT CONTRACT OF COUNTY SCHOOL SUPERINTENDENT – IMMUNITY – TAXPAYER STANDING

Ingle v. Adkins, [Ms. 1160671, Nov. 9, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Main (Stuart, C.J., and Bolin and Bryan, JJ., concur; Murdock, J., concurs in the result) affirms in part and reverses in part the order of the Walker Circuit Court dismissing Sheila Ingle's claims challenging the legality of the compensation and contract of Walker County School System Superintendent Jason Adkins.

Ingle conceded her claim against Adkins and the School Board members in their individual capacities was due to be dismissed and that she could not recover past expenditures of funds by the Board on Adkins's contract. Ms. *6.

The Court reversed the dismissal of Ingle's claims against the defendants in their official capacities seeking to restrain future expenditures of funds under the allegedly illegal contract with Adkins. The Court noted that "'[b]ecause county boards of education are local agencies of

the state, they are clothed in constitutional immunity from suit.'" Ms. *7, quoting *Ex parte Hale Cty. Bd. of Educ.*, 14 So. 3d 844, 848 (Ala. 2009).

> In reversing, the Court held
>
> In the present case, Ingle's claim against the Board members and Adkins in their official capacities to declare Adkins's current contract illegal and to enjoin payments under that contract going forward fits squarely into the sixth "exception" to § 14 immunity. Specifically, Ingle seeks an "injunction ... against State officials in their representative capacity where it is allege[d] that they had acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law."

Ms. *13, quoting *Ex parte Moulton*, 116 So. 3d 1119, 1141 (Ala. 2013).

In rejecting the defendant's challenge to Ingle's standing, the Court noted "'[t]o be a proper party, the person must have a real, tangible legal interest in the subject matter of the lawsuit.'" Ms. *14, quoting *Doremus v. Business Council of Alabama Workers' Comp. Self-Insurers Fund*, 686 So. 2d 252, 253 (Ala. 1996). Noting that it "has repeatedly recognized that a taxpayer has standing to seek an injunction against public officials to prevent illegal payments from public funds," the Court concluded that Ingle has standing to seek the injunctive relief in question. Ms. *18.

PARTNERSHIP DISPUTE – ARBITRATION – APPELLATE PROCEDURE

Norvell, et al. v. Parkhurst, etc., [Ms. 1160696, Nov. 9, 2017] __ So. 3d __ (Ala. 2017). This unanimous decision by Chief Justice Stuart (Bolin, Murdock, Main, and Bryan, JJ., concur), reversed an order of the Lauderdale Circuit Court lifting a stay and granting motion for partial summary judgment.

Parkhurst and Norvell had agreed to dissolve their accounting partnership and executed a written agreement of dissolution. Ms. *3. They also agreed to arbitrate disputes concerning the dissolution. Ms. *4. Following Parkhurst's death, his spouse and personal representative filed this action alleging that Norvell had improperly adjusted Parkhurst's capital account and had failed to make monthly payments to Parkhurst required by the dissolution agreement. Ms. *7. The circuit court granted Parkhurst's motion to compel Norvell to arbitrate the dispute and stayed the action "'until the arbitration is completed and an award is entered.'" *Ibid.*

Subsequently, Parkhurst filed a motion in the trial court to lift the stay and for partial summary judgment. Ms. *11. The trial court lifted the stay and granted Parkhurst's motion for partial summary judgment. Ms. *12.

In reversing, the Court noted that "a direct appeal is the proper vehicle by which to challenge a trial court's refusal to stay matters pending arbitration ...." Ms. *12-13. The Court rejected Parkhurst's contention that Norvell had waived the right to enforce the arbitration agreement. The Court noted that "to make out a case of implied waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such purpose." Ms. *16 (internal quotation marks and citations omitted). The Court noted that though Norvell had argued that the arbitrator lacked the authority to consider dispositive motions, it did "not necessarily follow that Norvell [was] therefore arguing that the trial court does have that authority." Ms. *17.

The Court also rejected Parkhurst's contention that Norvell expressly waived arbitration in a conference call with the mediator. The Court held

> [W]e have before us only the unsupported assertions of counsel on either side. Even if Norvell did not expressly refute Parkhurst's recollection of the conference call, however, unsupported assertions concerning the substance of that call could not form the basis of a judgment on appeal affirming the trial court's decision to lift the stay. As explained in *Davant v. United Land Corp.*, 896 So. 2d 475, 483 (Ala. 2004), this is not because we doubt counsel's integrity or credibility, but because, as an appellate court, we are limited to the facts as established by the record. There is no evidence in the record from which we can conclude that Norvell clearly waived his right to proceed in arbitration. ..."

Ms. *18-19.

VENUE IN ACTION AGAINST STATE OFFICIALS – WAIVER

Ex parte Alabama Director of Finance Clinton Carter, [Ms. 1160894, Nov. 22, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Sellers (Stuart, C.J., and Bolin, Parker, Wise, and Bryan, JJ., concur; Murdock and Shaw, JJ., concur in the result) issues a writ of mandamus to the Jackson Circuit Court directing transfer of this action to Montgomery County where the defendant state officials reside.

The plaintiffs, Smith and Paulk, are attorneys who represented Whitton, an indigent defendant, in a prior criminal case in the Jackson Circuit Court. Ms. *3.

In the Whitton criminal case, Smith and Paulk filed a motion for a declaratory judgment that § 15-12-21's statutory cap on total attorney fees payable to appointed counsel for indigent defense is unconstitutional. Ms. *4. The Jackson Circuit Court heard the motion while two assistant State attorneys general were present at the hearing. The Jackson Circuit Court declared § 15-12-21 unconstitutional, and the Attorney General did not appeal the order or otherwise challenge it. *Ibid.* After completion of the criminal trial, the Jackson County Circuit Court approved attorney-fee declarations of Smith and Paulk exceeding the fee cap set out in § 15-12-21. Ms. *4. However, the Alabama Office of Indigent Defense Services approved and paid only the amount of the fee award authorized by § 15-12-21. *Ibid.*

Smith and Paulk then sought unsuccessfully to recover from the State Board of Adjustment the balance of the fee award. Ms. *5.

Smith and Paulk filed the subject civil action in Jackson Circuit Court individually and on behalf of all similarly situated Alabama lawyers seeking injunctive relief directing the state defendants to perform their legal and ministerial duties pursuant to the Whitton order declaring § 15-12-21 unconstitutional. *Ibid.* The complaint also sought retroactive relief dating back to June 14, 2011. and prospective relief for a state-wide class of similarly situated criminal-defense lawyers. *Ibid.*

The state defendants, the Director of Finance and Director of the Alabama

Office of Indigent Defense Services, moved the Jackson Circuit Court to transfer venue of the action to Montgomery County. Ms. *6. The Jackson Circuit Court denied the motion to transfer. *Ibid.*

In issuing the writ and ordering the action transferred to Montgomery, the Court held that "'absent statutory authority to the contrary, venue for ... actions against a state agency or a state officer should be in the county of the official residence of the agency or officer.'" Ms. *7, quoting *Ex parte Neeley*, 653 So. 2d 945, 947 (Ala. 1995).

The plaintiffs argued that in failing to appeal the order in the Whitton criminal case declaring § 15-12-21 unconstitutional, the Attorney General waived any objections to venue in Jackson County. Ms. *8. The Court rejected this contention holding that "the civil action is distinct from the criminal proceeding, and there has been no waiver of venue in the civil action." Ms. *10.

CONSPIRACY THEORY OF PERSONAL JURISDICTION

Ex parte The Maintenance Group, Inc., [Ms. 1160914, Nov. 22, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Main (Stuart, C.J., and Bolin, Parker, Wise, and Sellers, JJ., concur; Murdock and Bryan, JJ., concur in the result; Shaw, J., dissents) issues a writ of mandamus to the Madison Circuit Court to dismiss The Maintenance Group, Inc. as a defendant based on lack of personal jurisdiction. The Maintenance Group conducted a pre-sale inspection of an aircraft sold by an out-of-state equipment rental company to plaintiff MARC Transport, a Delaware LLC with its principal place of business in Georgia. Ms. *2-3.

MARC sued The Maintenance Group, the seller, and various agents of the seller alleging that certain discrepancies with the aircraft discovered by The Maintenance Group in the pre-sale inspection had not been corrected before closing. Ms. *3-4.

MARC's claims against The Maintenance Group included claims for negligence, fraud, and conspiracy. Ms. *4.

The plaintiff conceded that it could not show any acts committed by The Maintenance Group in Alabama to support "ordinary" specific jurisdiction. Ms. *19. However, MARC contended that The Maintenance Group should be held subject to personal jurisdiction under a conspiracy theory of jurisdiction. *Ibid.* The Court noted that under this theory "there must be an overt act or acts in furtherance of the conspiracy committed in Alabama, and that act or those acts must amount to a constitutionally sufficient contact with Alabama that supports specific personal jurisdiction." Ms. *22-23. The Court rejected plaintiff's attempt to predicate jurisdiction on the conspiracy theory of jurisdiction holding

> In this case, the purported aim of the alleged conspiracy was to "sell the Aircraft to [MARC] without incurring the costs of fully resolving the Discrepancies." The only contact with Alabama alleged by MARC is that, following MARC's purchase of the aircraft, Fitch and TAD, MARC's alleged coconspirators, routinely transported passengers into and out of Madison County, Alabama, on the aircraft. We agree with Maintenance that this contact alone is insufficient to establish personal jurisdiction as to Fitch or TAD and thus as to Maintenance.

Ms. *23.

The Court also rejected MARC's argument because one of its members is an Alabama citizen that MARC should be considered an Alabama plaintiff for purposes of the personal jurisdiction analysis. In this regard, MARC relied on Eleventh Circuit authority holding that a limited liability company's citizenship is determined by the citizenship of each of its members. The Court held that "the rule for determining citizenship for diversity-jurisdiction purposes has never been extended to the personal-jurisdiction context, and we agree with Maintenance that doing so raises obvious due process concerns. Accordingly, we do not consider the individual citizenship of [plaintiff] MARC's members in our analysis." Ms. *26, n. 3.

CIVIL CONTEMPT – CRIMINAL CONTEMPT – STANDARDS OF REVIEW

Kizale v. Kizale, [Ms. 2160296, Dec. 1, 2017] __ So. 3d __ (Ala. Civ. App. 2017). This decision by Judge Thomas (Pittman, Moore, and Donaldson, JJ., concur; Thompson, P.J., concurs in the result) affirms in part and reverses in part the Morgan Circuit Court's order holding the former husband in both criminal and civil contempt for failing to comply with certain provisions of the divorce decree in regard to debts of the former wife.

The court first noted that "'[t]here is no legal prohibition against the finding of both criminal and civil contempt in an appropriate factual setting.'" Ms. *9, n. 2, quoting *Norland v. Tanner*, 563 So. 2d 1055, 1058 (Ala. Civ. App. 1990). The court held

> "whether a party is in contempt of court is a determination committed to the sound discretion of the trial court, and, absent an abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm."

Ms. *10, quoting *Stack v. Stack*, 646 So. 2d 51, 56 (Ala. Civ. App. 1994).

Criminal contempt "requires proof beyond a reasonable doubt of the alleged contemnor's guilt." Ms. *10. Whereas, a finding of civil contempt must be supported by clear and convincing evidence. Ms. *10, n. 3.

The court affirmed the circuit court's finding that the former husband was in contempt for failing to remove the former wife's name from various accounts related to debts of the parties. However, the court reversed as to the finding of contempt for the former husband's failure to refinance certain debts into his sole name because the decree did not require the husband to refinance the debts and accordingly, he could not be held in contempt for having failed to do so. Ms. *21.

STATE-AGENT IMMUNITY – DHR EMPLOYEES – FAILURE TO SUBMIT EVIDENCE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Ex parte Angela McClintock, [Ms. 1160782, Dec. 1, 2017] __ So. 3d __ (Ala.

2017). This decision by Justice Wise (Stuart, C.J., and Bolin, Main, Bryan, and Sellers, JJ., concur; Murdock, J., concurs in the result; and Parker and Shaw, JJ., dissent) issues a writ of mandamus to the Jefferson Circuit Court directing it to dismiss this action against petitioners/employees of the Jefferson County Department of Human Resources.

Plaintiff's infant decedent died while in foster care allegedly as a result of the foster parents' placing the baby face down on a sheet that was allegedly too large for the crib. Ms. *4-5. Plaintiff sued the DHR employees responsible for removing the child from her custody and placing the child in foster care. The defendants moved for summary judgment based upon state-agent immunity, and the Jefferson Circuit Court denied the motion. Ms. *5.

In the Supreme Court, the plaintiff conceded that the acts of the defendants were within category three of *Cranman* immunity protecting employees discharging duties "imposed ... by statute, rule, or regulation ...." Ms. *7. The Court held that the plaintiff did not carry her burden to establish by substantial evidence the applicability of "'one of the two categories of exceptions to state-agent immunity recognized in *Cranman* ....'" Ms. *10, quoting *Ex parte City of Montgomery*, 99 So. 3d 282, 283 (Ala. 2012)(some internal quote marks omitted).

The plaintiff argued that the defendants were not entitled to immunity because they allegedly violated mandatory relative placement policies of the Alabama Department of Human Resources (ADHR) and also failed to ensure that the non-relative foster parent complied with ADHR's "Minimum Standards for Foster Family Homes." Ms. *11. The Court noted that although the plaintiff cited guidelines regarding relative placements, they "did not present any actual evidence to support those allegations." *Ibid.*, emphasis in the original. Likewise, with regard to plaintiff's reliance on DHR's "Minimum Standards for Foster Family Homes," the plaintiff failed to present any evidence to support the applicability of those guidelines to the circumstances which led to the infant's death. Ms. *12. The Court concluded "that because K.H. and T.H. did not demonstrate that one of the exceptions to the State-agent immunity under *Ex parte Cranman* applies under the facts of this case, the petitioners are entitled to state-agent immunity." Ms. *13.

SUMMARY JUDGMENT – MEDICAL NEGLIGENCE – CHALLENGING CREDIBILITY OF AFFIANT – PROXIMATE CAUSE

Coleman v. Anniston HMA, LLC, [Ms. 1151212, Dec. 1, 2017] __ So. 3d __ (Ala. 2017). This per curiam decision (Stuart, C.J., and Main, Bryan, and Sellers, JJ., concur; Shaw, J., concurs specially; Bolin, Parker, Murdock, and Wise, JJ., dissent) affirms without opinion a summary judgment entered by the Calhoun Circuit Court dismissing Stringfellow Memorial Hospital from a medical negligence case. Although as a no-opinion affirmance, the case has no precedential value, the special writings in the case highlight an issue as to which the Court was sharply divided and as to which practitioners should take note.

The decedent was admitted to the hospital late at night and was diagnosed promptly with a gastrointestinal bleed. Ms. *2-3. The theory of negligence against the hospital was that its nurses should have alerted the decedent's treating physician, Dr. Black, of her worsening condition despite being given multiple units of blood during the night. Dr. Black, who saw the patient at 8:30 the following morning, testified by affidavit that he would not have prescribed any different care if he had been advised by the nurses during the night of the patient's worsening condition. Ms. *4.

Based largely upon Dr. Black's affidavit testimony, the circuit court granted the hospital's motion for summary judgment. Justice Bolin's dissenting opinion joined by Justices Murdock and Wise, noted that

> In the present case, there is a disagreement between two medical experts – Dr. Moulis and Dr. Black [the treating physician] – as to the care that should have been provided to Virginia. This is exactly the genuine issue of material fact that is reserved for a jury. Dr. Black's assertion that he would not have changed his course of treatment even if he had been told that Virginia's condition was worsening does not conclusively establish that the nurses' care and treatment of Virginia during the overnight hours in no way caused or contributed to her death.
>
> Courts in Illinois have addressed this issue, holding that where expert testimony establishes both a duty to notify and the availability of treatment that would have been successful had notice been given, the treating physician's statement that he would not have done anything had he been notified creates a genuine question of fact for the jury.

Ms. *34, Bolin, J., dissenting. The dissenting opinion also disagreed with the assertion in Justice Shaw's special concurrence that the credibility of Dr. Black's affidavit testimony that he would have done nothing different if notified by the nurses of his patient's deteriorating condition was not before the Supreme Court because the plaintiff had not attacked Dr. Black's affidavit in opposing summary judgment in the circuit court. Ms. *24, n. 2. The dissenters concluded that Dr. Black's credibility was necessarily before the trial court inasmuch as a trial court is not to make credibility determinations in ruling upon motions for summary judgment and plaintiff's expert's affidavit conflicted with the treating physician's testimony. *Ibid.*

TIMELINESS OF MANDAMUS PETITION – RELATION BACK OF AMENDMENT ADDING PARTY DEFENDANT AFTER EXPIRATION OF STATUTE OF LIMITATIONS

Ex parte Profit Boost Marketing, Inc., [Ms. 1160326, Dec. 1, 2017] __ So. 3d __ (Ala. 2017). This unanimous decision by Justice Shaw (Stuart, C.J., and Bolin, Parker, Main, Wise, Bryan, and Sellers, JJ., concur) issues a writ of mandamus to the Marshall Circuit Court directing it to dismiss as a party defendant HVCM based upon expiration of the statute of limitations. Even though the plaintiff's original complaint included fictitious parties, when the plaintiff sought to add

HVCM, it did not substitute HVCM for a fictitious party, rather it added HVCM as a defendant. Ms. *16.

The Court first addressed the plaintiff's contention that HVCM's mandamus petition was untimely. The Court noted that the mandamus petition was filed some four months after the trial court had denied HVCM's prior motion to dismiss based upon insufficiency of service of process as well as expiration of the statute of limitations and lack of personal jurisdiction. The Court noted that HVCM had included in its mandamus petition a statement pursuant to Ala. R. App. P. 21(a)(3) stating good cause for its delay in filing its mandamus petition "because it was reasonable to require [the plaintiff] to perfect service upon [HVCM] before it appealed lack of personal jurisdiction." Ms. *13.

The Court concluded that the amendment adding HVCM did not relate back to the filing of the original complaint, because, as plaintiff conceded, plaintiff did not invoke the provisions of Rule 9(h) by substituting HVCM for a fictitious party listed in the original complaint. Ms. *23. The Court held relation back was not available under Ala. R. Civ. P. Rule 15(c) which allows relation back of an amendment filed after expiration of the statute of limitations if filed within 120 days of the commencement of the action and the party added "'(A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits and (B) knew or should have known that, but for mistake concerning the identity of the proper party, the action would have been brought against the party ....'" Ms. *18, quoting Rule 15(c), Ala. R. Civ. P. Relation back under Rule 15(c)(3) was clearly not available, the Court reasoned, because "nothing in the materials before [the Court] indicates that HVCM either had notice of the institution of the action or should have understood that HVCM was, in the absence of mistake, an intended defendant." Ms. *21-22.

TIMELINESS OF APPEAL FROM DENIAL OF POST-JUDGMENT MOTION – FAILURE TO SUPPLEMENT DISCOVERY RESPONSE TO DISCLOSE EYEWITNESS – NEW TRIAL – JUDGMENT AS A MATTER OF LAW

Mitchell's Contracting Service v. Gleason, [Ms. 1160376, Dec. 8, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Sellers (Stuart, C.J., and Wise, J., concur; Murdock, J., concurs in part and concurs in the result in part; Parker, J., concurs in the result; and Bolin, Shaw, Main, and Bryan, JJ., dissent) reverses the Wilcox Circuit Court's denial of Mitchell's Contracting Service, LLP ("Mitchell")'s motion for new trial in a wrongful-death action in which the jury awarded $2.5 million against Mitchell. The claim arose from an automobile accident in which the decedent Lorena's vehicle left Wilcox County Road 12 and struck a tree. Plaintiff's theory of liability was that a dump truck driven by a Mitchell employee forced Lorena's vehicle from the roadway. Ms. *2.

The Court first considered whether Mitchell's appeal was timely. On October 24, 2016, the circuit court denied Mitchell's post-judgment motion but set aside that order a week later. Ms. *3. The circuit court did not subsequently enter another order disposing of the post-judgment motion and the parties treated Mitchell's motion as having been denied by operation of law under the provisions of Rule 59.1, Ala. R. Civ. P. The opinion concluded the appeal was timely because the October 24, 2017 order did not dispose of Mitchell's motion for new trial so that the trial court retained jurisdiction to rule on the post-judgment motion notwithstanding entry of the October 24, 2016 order. Ms. *5-6.

On the substantive issue presented by the appeal, on a 5-4 vote, the Court held that the trial court exceeded its discretion in denying Mitchell's request for a continuance in the midst of trial based on the plaintiff's having failed to disclose an eyewitness to the crash. This witness, A. G. Smith, had been disclosed by plaintiff on a general witness list six weeks prior to the trial but the plaintiff had failed to identify Mr. Smith in response to an interrogatory requesting the identity of any eyewitness to the accident. Ms. *17-18. Mr. Smith's testimony was critical to the plaintiff's case as he was the only person who testified to having observed a white dump truck force Lorena's vehicle off the highway. Ms. *10. Other witnesses testified that the only white dump truck operating in the area prior to the accident was a Mitchell dump truck. Ms. *15.

Quoting its seminal decision on the purpose of modern civil discovery, *Ex parte Dorsey Trailers, Inc.*, 397 So. 2d 98, 103 (Ala. 1981), the Court reaffirmed that "the rules for discovery are designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments be rested upon the real merits of cases and not upon the skill and maneuvering of counsel." Ms. *19, (internal citations and quote marks omitted). The Court held that when the plaintiff "discovered two months before trial that Smith was an eyewitness to the accident (in fact the only eyewitness), he had an immediate and affirmative duty to disclose to Mitchell that Smith had witnessed the accident." Ms. *21. The Court further held that plaintiff's disclosure of Smith only as a possible witness on a generic witness list six weeks before trial did not satisfy plaintiff's discovery obligation:

> Even though Gleason's counsel learned of Smith's status as the only eyewitness two months before the trial started, he failed to inform Mitchell. Gleason's witness list identified Smith only as a possible trial witness; it did not disclose the substance of Smith's proposed testimony. In addition, Gleason provided his witness list to Mitchell only after Gleason had previously indicated that he was unaware of the existence of any eyewitnesses to the accident. Gleason's lack of candor in failing to supplement its responses to Mitchell's interrogatories prevented Mitchell from fully preparing for trial.

Ms. *24. The Court concluded that in light of all the circumstances "the trial court exceeded its discretion in refusing Mitchell's request for a continuance." *Ibid.*

The Court rejected Mitchell's appeal of the denial of its post-judgment motion for JML. The Court noted that "the question for this Court to answer is not what conclusion its members would have reached had they been on the jury

that heard the case." Ms. *14. The Court rejected Mitchell's contention that a jury finding that its truck forced plaintiff's decedent's vehicle off the road was based on speculation. The Court concluded the testimony "was sufficient to allow a fair-minded person to conclude that Lorena was forced off the road by a white dump truck traveling in the opposite direction and that the only dump truck in the area during the relevant time frame fitting that description was one driven by a driver employed by Mitchell." Ms. *15.

> Similarly, the Court noted that "ordinarily it is a question of fact for the jury, [but] the question whether a plaintiff is guilty of contributory negligence becomes a matter of law, and therefore one for the Court to decide, when the facts are such that all reasonable persons must draw the same conclusion therefrom."

Ms. *16, quoting *Rowden v. Tomlinson*, 538 So. 2d 15, 18 (Ala. 1988). The Court concluded that on the record before it, it could not determine that all reasonable persons must conclude that Lorena was contributorily negligent in not maintaining control of her vehicle. Ms. *16.

AWARD OF ATTORNEY'S FEES UNDER LITIGATION ACCOUNTABILITY ACT – EFFECT OF PLAINTIFF'S VOLUNTARY DISMISSAL OF CLAIM

Green v. Beard and Beard, Attorneys, [Ms. 2160590, Dec. 8, 2017] __ So. 3d __ (Ala. Civ. App. 2017). This unanimous decision by Judge Moore (Thompson, P.J. and Pittman, Thomas, and Donaldson, JJ., concur) affirms the Marshall Circuit Court's award of attorney fees pursuant to the Alabama Litigation Accountability Act (the ALAA), against Attorney Phil Green. Purporting to act on behalf of Willadean Willard, Green filed a libel claim against attorneys Beard and Beard alleging that an interrogatory propounded by Beard and Beard to Willadean in Willadean's divorce action defamed her. Ms. *2. The interrogatory asked whether during her marriage, Willadean had engaged in sexual relations with any person other than her spouse. *Ibid.* Subsequent to the filing of the libel action, Green withdrew and Willadean's new counsel filed a notice of voluntary dismissal prior to the filing of an answer or summary judgment in the libel action. Ms. *3.

On appeal, Green argued, *inter alia*, that the trial court lacked jurisdiction to enter an award under the ALAA because Willadean's voluntary dismissal was effective without an order of the trial court pursuant to Rule 41(a)(1), Ala. R. Civ. P. Ms. *4-5. While agreeing with the premise of Green's argument concerning the effect of a notice of voluntary dismissal, the court rejected Green's argument that the trial court lacked jurisdiction to enter an award pursuant to the ALAA. The court first noted that in § 12-9-272(d), Ala. Code 1975, the legislature provided that no award pursuant to the ALAA could be entered if a voluntary dismissal is filed within 90 days after filing. The court held that "[i]t stands to reason that the legislature intended that, conversely, if the claim is dismissed more than 90 days after the claim is filed, attorney's fees and costs may be assessed." Ms. *5. The court further noted that a trial court retains jurisdiction for 30 days to modify a judgment *sua sponte* or pursuant to a Rule 59(e) motion. *Ibid.* The court noted that the trial court's order awarding attorney's fees to Beard and Beard against Green pursuant to the ALAA was entered within 30 days of the filing of Willadean's voluntary dismissal. The court reasoned "[t]herefore, the trial court acted within its jurisdiction to modify the effectual dismissal to award attorney's fees." Ms. *6.

AMLA – DISCOVERY PRIVILEGE – ALA. CODE § 22-21-8 – MANDAMUS

Ex parte Tombigbee Healthcare Authority, [Ms. 1160706, Dec. 15, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Sellers (Stuart, C.J., and Bolin, Parker, Main, Wise, and Bryan, JJ., concur; Murdock, J., concurs in part and concurs in the result; Shaw, J., dissents) denies a petition for writ of mandamus sought by Tombigbee Healthcare Authority challenging an order of the Marengo Circuit Court compelling the hospital to respond to certain discovery requests.

Four patients of the hospital filed this joint action alleging that a hospital employee, radiology technician Taylor, sexually assaulted them while they were patients in the hospital. Plaintiffs allege the hospital was negligent and/or wanton in its hiring, training, supervision, and retention of Taylor. Ms. *2. The hospital contends that discovery sought by the plaintiffs of incidents involving sexual misconduct by Taylor and the hospital's investigation into allegations of sexual assault were exempt from discovery pursuant to § 6-5-551, Ala. Code 1975 and § 22-21-8 (b), Ala. Code 1975.

> The Court first concluded that the plaintiffs' claim against the hospital alleging that it was negligent in handling or wanton in its hiring, training, supervising, and retaining of Taylor involves a breach of an applicable standard of care of the health-care providers and is, therefore, governed by the AMLA.

Ms. *10. The Court rejected the hospital's assertion that the circuit court exceeded its discretion by disregarding the hospital's discovery privilege under § 6-5-551, holding

> [b]ecause the plaintiffs have consolidated their claims, it would be impractical, if not impossible, to prevent each plaintiff from discovering information concerning the alleged acts by Taylor against the other plaintiffs. Therefore, contrary to the hospital's assertion, § 6-5-551 does not prohibit each plaintiff from discovering information pertaining to the claims of the other plaintiffs.

Ms. *13.

In rejecting the hospital's assertion that § 22-21-8 protected the documents at issue from discovery, the Court noted that "'the party asserting the privilege under § 22-21-8 has the burden of proving the existence of the privilege and the prejudicial effect of disclosing the information.' Ms. *14, quoting *Ex parte Fairfield Nursing*, 22 So. 3d [445,] 448 [(Ala. 2009)]."

In resolving the issue under § 22-21-8, the Court quoted at length the affidavit submitted by the hospital from its director of professional standards who averred, *inter alia*,

> All documents and other materials created during the course of quality

> assurance investigation are not kept in the ordinary course of business, nor do they become a part of the patient's medical chart.
>
> Quality assurance documents and other materials are, obviously, created for quality assurance purposes. The creation of these documents and materials are needed to guarantee quality of care for all patients.

Ms. *16. The Court distinguished *Ex parte Qureshi*, 768 So. 2d 374 (Ala. 2000), in which the Court had issued mandamus vacating an order requiring production of a physician's credentialing file. The Court held "[t]he instant case does not involve a physician's application for staff privileges, which, as explained in *Qureshi*, are kept confidential to ensure that physicians applying for staff privileges provide 'complete and accurate information about their qualifications.'" Ms. *18. The Court held that "the hospital has failed to demonstrate that the quality assurance privilege applies to claims arising out of allegations of sexual acts that are wholly unrelated to medical treatment or that investigations related to allegations of sexual assault are undertaken to improve the quality of patient care." Ms. *18.

12(B)(6) STANDARD OF REVIEW FOR FAILURE TO STATE A CLAIM – TORT OF OUTRAGE

Wilson v. University of Alabama Health Services Foundation, [Ms. 1160654, Dec. 15, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Shaw (Stuart, C.J., and Parker, Main, Wise, and Bryan, JJ., concur; Bolin, Murdock, and Sellers, JJ., dissent) reverses the Jefferson Circuit Court's dismissal of the plaintiff's complaint alleging the tort of outrage against the University of Alabama Health Services Foundation and a number of its physicians. Wilson alleged that the defendant physicians made egregious and tactless comments to her and her dying mother to the effect that the mother was wasting resources by being in the hospital rather than dying at home. Ms. *2-3. The trial court dismissed the claim at the pleading stage for failure to state a claim concluding that outrage is limited to three situations. In reversing, the Court reiterated that

> "At the motion-to-dismiss stage, however, a court's ability to pick and choose which allegations of the complaint to accept as true is constrained by Alabama's broad and well settled standard for the dismissal of claims under Rule 12(b)(6). ... [O]ur standard of review does not permit this Court to consider the plausibility of the allegations. Rather, in considering whether a complaint is sufficient to withstand a motion to dismiss, we must take the allegations of the complaint as true, *Ussery v. Terry*, 201 So. 3d 544, 546 (Ala. 2016); we do not consider '"whether the pleader will ultimately prevail but whether the pleader may possibly prevail,"' *Daniel v. Moye*, 224 So. 3d 115, 127 (Ala. 2016) (quoting *Newman v. Savas*, 878 So. 2d 1147, 1149 (Ala. 2003) (emphasis added)); and '[w]e construe all doubts regarding the sufficiency of the complaint in favor of the plaintiff.' *Daniel*, 224 So. 3d at 127."

Ms. *6, quoting *Ex parte Austal USA, LLC*, [Ms. 1151138, March 3, 2017] __ So. 3d __, __ (Ala. 2017).

The Court noted that it had previously held that the limited cause of action of outrage is recognized in the family-burial context, barbaric methods to coerce insurance settlements, and egregious sexual harassment. Ms. *7, citing *Potts v. Hayes*, 771 So. 2d 462, 465 (Ala. 2000). However, the Court held that the circuit court erred in holding that the tort of outrage is necessarily limited to the three situations set out in *Potts*. Accordingly, the Court reversed the judgment of dismissal with instructions to the trial court to consider under the appropriate 12(b)(6) standard, "whether the alleged conduct was so extreme and degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized society." Ms. *8.

FORUM NON CONVENIENS – INTEREST OF JUSTICE – LOCATION OF ACCIDENT

Ex parte Elliott, [Ms. 1160941, Dec. 22, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Main (Stuart, C.J., and Bolin, Parker, Wise, Bryan, and Sellers, JJ., concur; Shaw, J., concurs in the result; and Murdock, J., dissents) issues a writ of mandamus to the Lowndes Circuit Court directing the court to vacate its order transferring venue in this action to Montgomery County.

Elliott, a resident of Montgomery County, was injured in a motor vehicle accident in Lowndes County by a phantom motorist. She brought suit in Lowndes County against her UIM carrier Allstate. Ms. *2.

Citing the interest of justice prong of the forum non conveniens statute, § 6-3-21.1, Allstate argued that Lowndes County's connection to the litigation was merely fortuitous and that Montgomery County had a much stronger connection because the uninsured motorists policy was delivered in Montgomery County to the plaintiff, a resident of Montgomery County. Ms. *10. The Lowndes Circuit Court agreed.

In reversing, the Court noted that Allstate had to show not only that Montgomery County has a strong connection to the action, it must also demonstrate that Lowndes County has a weak or little connection to the action. The Court explained

> "Our *forum non conveniens* analysis has never involved a simple balancing test weighing each county's connection to an action. Rather, to compel a change of venue under the 'interest of justice' prong of § 6-3-21, 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. This inquiry necessarily depends on the facts of each case."

Ms. *9-10, quoting *J & W Enters., LLC,* 150 So. 3d 190, 196 (Ala. 2014).

COUNTY DAMAGES CAP – § 11-93-2, ALA. CODE 1975 INAPPLICABLE TO INDIVIDUAL CAPACITY CLAIMS AGAINST GOVERNMENTAL EMPLOYEES

Wright v. Cleburne County Hospital Board, Inc., [Ms. 1151317, Dec. 29, 2017] __ So. 3d __ (Ala. 2017). This decision by Justice Murdock (Parker, Wise, and Bryan, JJ., concur; Stuart, C.J., and Bolin, Shaw, and Main, JJ., concur in the result; and Sellers, J., dissents) reverses the Cleburne Circuit Court's interlocutory order determining that the $100,000 cap on damages set out in § 11-93-2, Ala. Code 1975, applied to plaintiff's claims against three nurses employed by the Cleburne County Hospital Board. Ms. *3.

Plaintiff alleged that his decedent, Ms. Wright, died in the Cleburne County Hospital and Nursing Home as a result of a fall. Ms. *3. Plaintiff asserted individual capacity wrongful death claims against nurses caring for Ms. Wright. Specifically, the plaintiff alleged that the nurse employees of the county hospital board negligently failed to provide appropriate nursing care by, *inter alia*, negligently failing to properly assess Ms. Wright for the risk of falling and negligently failing to provide adequate safety measures. Ms. *4.

In holding that the individual defendants were not entitled to the $100,000 cap on damage claims against a governmental entity, the Court held that "a government employee sued for a tortious act committed in the line and scope of his employment may, in an appropriate case (i.e., where the employee has breached a duty he owes individually to a third party), be sued individually." Ms. *8-9. The Court held that § 11-93-2 is not applicable to such individual capacity claims against governmental employees. Ms. *22.

PREMISES LIABILITY – DEFICIENT FLOOR INSPECTIONS

Dolgencorp, LLC, d/b/a/ Dollar General v. Deborah Revette, [Ms. 1160361, Jan. 12, 2018] __ So. 3d __ (Ala. 2018). In this unanimous, no-opinion affirmance (Stuart, C.J., Parker, Main, Wise, and Sellers, JJ., concur), the Court affirms a $1,725,000 verdict against Dollar General.

On September 21, 2016, a Mobile County jury found that Dollar General's inadequate inspection policies led to a customer's injuries, and returned a $1,725,000 verdict against the corporation.

The incident occurred at Dollar General Store No. 7853 in Mobile on July 9, 2012. Deborah Revette, a customer, slipped and fell in clear, liquid laundry detergent that was on the floor in the chemical aisle. She suffered severe leg and shoulder fractures that resulted in eight surgeries, 395 doctor visits, and over $470,000 in medical bills. She remains permanently disabled.

The evidence showed that while Dollar General stores are open 14 hours a day, Dollar General corporate policy only requires employees to devote 10 minutes each day to safety inspections. Those safety inspections are informal, undocumented, and are not verified by a supervisor. Testimony comparing the method by which and how often other retailers in and around Mobile County conduct safety inspections made clear that Dollar General's informal policy of "visual safety checks" for 10 minutes each day was both unsafe and unacceptable.

RULE 56(F) MOTION – STATE-AGENT IMMUNITY

Austill v. Krolikowski, [Ms. 1160820, Jan. 12, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Sellers, (Stuart, C.J., and Wise, J., concur; Parker and Shaw, JJ., concur in the result), affirms the Mobile Circuit Court's summary judgment dismissing a claim by decedent's survivors alleging that Dr. Krolikowski, a Senior Medical Examiner with the Alabama Department of Forensic Sciences (ADFS), "without any compelling legitimate reason 'harvested the decedent's entire brain without the family's permission and preserved it in his office for his own use.'" Ms. *3. The circuit court granted Dr. Krolikowski's motion for summary judgment based on State-agent immunity.

The plaintiffs appealed challenging the circuit court's ruling denying their request pursuant to Rule 56(f), Ala. R. Civ. P., to delay disposition of the motion for summary judgment until defendant responded to outstanding discovery. The Supreme Court affirmed the circuit court's ruling concluding "that the trial court did not exceed its discretion in denying the plaintiffs' motion to compel discovery of items it concluded were irrelevant to the issue of State-agent immunity." Ms. *18, citing *Ex parte Ocwen Fed. Bank, FSB*, 872 So. 2d 810, 813 (Ala. 2003). The Court noted that the plaintiffs had conceded at trial that they were not challenging the procedures and methods employed by Dr. Krolikowski in performing the autopsy, but rather were challenging his retention of the decedent's brain. The Court noted that the discovery which formed the basis of the plaintiffs' Rule 56(f) motion did not relate to Dr. Krolikowski's retention of the brain and the ADFS's policies related to same but rather Dr. Krolikowski's performance of the autopsy. Ms. *16.

STATE-AGENT IMMUNITY RELATED TO STATE CORRECTIONS OFFICIALS

Ex parte Price and Lovelace, [Ms. 1160956, Jan. 12, 2018] __ So. 3d __ (Ala. 2018). This unanimous decision by Justice Bryan, (Stuart, C.J., Bolin, Parker, Murdock, Shaw, Main, Wise, and Seller, JJ., concur) grants defendant's petition for the writ of mandamus and directs the Montgomery Circuit Court to dismiss claims against Cheryl Price, the former warden at Donaldson Correctional Facility, and Greg Lovelace, Deputy Commissioner of the Alabama Department of Corrections. The plaintiff, Parrish, a correctional officer, was injured when he was attacked by an inmate who surprised him by coming through a door Parrish believed to be locked. Ms. *2-3. Parrish sued Price and Lovelace in their individual capacities, contending that they willfully breached their duties by failing to monitor the prison and by failing to repair or replace allegedly defective locks. As to Warden Price, the Court noted that she had broad responsibility for the safety and security of the prison including the safety of correctional officers such as Parrish. As such, Warden Price fell within *Cranman* Category 2 which protects a State-agent when "'exercising ... judgment in the administration of a department or agency.'" Ms. *12.

As to Deputy Commissioner Lovelace, whose responsibilities include renovations to and modifications of DOC facilities including Donaldson Correctional Facility, Ms. *15, the Court concluded that "even more so than Warden Price, Lovelace operates at the

planning and decision-making level of government." Ms. *16.

PERSONAL JURISDICTION

Ex parte International Creative Management Partners, LLC, d/b/a ICM Partners, [Ms. 1161059, Feb. 2, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Parker (Stuart, C.J., Bolin, Shaw, Main, Wise, and Sellers, JJ., concur and Bryan, J., concurs in the result), issues a writ of mandamus reversing the Mobile Circuit Court's order denying Defendant International Creative Management Partners, LLC's (ICM) Ala. R. Civ. P. 12(b)(2) motion to dismiss for lack of personal jurisdiction.

ICM, a Delaware limited liability company, with its principal place of business in Los Angeles, California, is a talent agency representing clients throughout the world. Ms. *2. ICM represents Cannibal Corpse, a "death-metal" music band. Ms. *3. C.C. Touring is Cannibal Corpse's manager. Red Mountain Entertainment, an Alabama company, contacted ICM about scheduling Cannibal Corpse to perform at Soul Kitchen Music Hall in Mobile. Ms. *3. ICM acting as agent for Cannibal Corpse and C.C. Touring, conducted fee negotiations for Cannibal Corpse's performance with an employee of Red Mountain Entertainment. *Ibid.* Storch testified that all of the negotiations were conducted by phone or email and that ICM received a $250 commission for Cannibal Corpse's appearance at Soul Kitchen. Ms. *3-4.

During the Mobile performance by Cannibal Corpse, the plaintiff was thrown to the ground when the crowd became violent and was paralyzed as a result. Ms. *4. The plaintiff sued a number of parties, including the talent agency ICM. The plaintiff conceded on mandamus review that ICM was not subject to general personal jurisdiction in Alabama. In regard to the conduct necessary to support an exercise of *specific* personal jurisdiction, the Court reiterated the standard set out in *Hinrichs v. General Motors of Canada, Ltd.*, 222 So. 3d 1114, 1136-37 (Ala. 2016):

> "'[O]ur "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there. See, e.g., *International Shoe* [*Co. v. Washington*, 326 U.S. 310,] 319 [(1945)] (Due process "does not contemplate that a state may make binding a judgment in personam against an individual ... with which the state has no contacts, ties, or relations"); *Hanson* [*v. Denckla*, 357 U.S. 235,] 251 [(1958)] ("However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him"). Accordingly, we have upheld the assertion of jurisdiction over defendants who have purposefully "reach[ed] out beyond" their State and into another by, for example, entering a contractual relationship that "envisioned continuing and wide-reaching contacts" in the forum State, *Burger King* [*Corp. v. Rudzewicz*, 471 U.S. 462,] 479-480 [(1985)], or by circulating magazines to "deliberately exploit" a market in the forum State, *Keeton* [*v. Hustler Magazine, Inc.*, 465 U.S. 770,] 781 [(1984)]. And although physical presence in the forum is not a prerequisite to jurisdiction, *Burger King*, *supra*, at 476, physical entry into the State – either by the defendant in person or through an agent, goods, mail, or some other means – is certainly a relevant contact. See, *e.g.*, *Keeton, supra*, at 773-774.'"

Ms. *16-17, (quoting *Walden*, 571 U.S. at ___, 134 S. Ct. at 1122).

In finding that personal jurisdiction over ICM was lacking, the Court found that "ICM simply facilitated the performance agreement between C.C. Touring and Red Mountain Entertainment at the unsolicited request of Red Mountain Entertainment." Ms. *17.

The Court further concluded that ICM's conduct did not give rise to the episode in suit because "ICM's relationship with Alabama is very tenuous, [and] the claims asserted by the parties do not arise out of or relate to ICM's contacts with Alabama ...." Ms. *20.

OUTBOUND FORUM-SELECTION CLAUSE

Ex parte United Propane Gas, Inc., [Ms. 1160891, Feb. 2, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Bolin, (Stuart, C.J., and Shaw, Main, Wise, Bryan, and Sellers, JJ., concur; Parker, J., concurs in the result), issues a writ of mandamus vacating the Cullman Circuit Court's order denying United Propane's motion to dismiss an action arising from a contract for the purchase of propane filed by Cullman Security Services, Inc. (CSS). The circuit court had denied the motion to dismiss reasoning that the outbound forum-selection clause, requiring suit in McCracken County, Kentucky, effectively deprived CSS of the ability to file a class action in contravention of Alabama public policy. Ms. *2.

The Court held, consistent with prior law, "that an outbound forum-selection clause is enforceable unless the party challenging the clause can clearly establish that enforcement of the clause would be (1) unfair on the basis that the contract was affected by fraud, undue influence, or overweening bargaining power, or (2) that enforcement would be unreasonable on the basis that the chosen forum would be seriously inconvenient for the trial of the action." Ms. *9. In considering whether enforcement of a forum-selection clause is unreasonable, the Court applies the following five factors:

> ""'When an agreement includes a clearly stated forum-selection clause, a party claiming that clause is unreasonable and therefore invalid will be required to make a clear showing of unreasonableness. In determining whether such a clause is unreasonable, a court should consider these five factors: (1) Are the parties business entities or businesspersons? (2) What is the subject matter of the contract? (3) Does the chosen forum have any inherent advantages? (4) Should the parties have been able to understand the agreement as it was written? (5) Have extraordinary facts arisen since the agreement was entered that would make the chosen forum seriously inconvenient? We state these items not as requirements, but merely as factors that, considered together, should in a particular case give a clear indication whether the chosen forum is reasonable.'"

Ms. *11, (quoting *Ex parte Nawas Int'l*

Travel Serv., Inc., 68 So. 3d 823, 827 (Ala. 2011), quoting in turn *Ex parte Rymer*, 860 So. 2d 339, 342-43 (Ala. 2003), quoting in turn *Ex parte Northern Capital Res. Corp.*, 751 So. 2d 12, 15 (Ala. 1999)).

The Court noted while the chosen Kentucky forum is inherently advantageous to United Propane because the plaintiffs are prevented from filing class actions in Kentucky state courts in which alleged damages are aggregated to meet the $5,000 jurisdictional threshold. Ms. *12. The Court rejected plaintiffs' argument that the disallowance of a class action prevents plaintiffs' pursuit of their claims because "there is nothing to stop the purported class action plaintiffs from pursuing their claims individually in a district or a small-claims court in McCracken County, Kentucky." Ms. *12-13.

The Court rejected the circuit court's finding that the parties' bargaining power was significantly disproportionate because plaintiff CSS is a business and purchased the propane for business use. Ms. *16. The Court also rejected the argument that the contract was a contract of adhesion because CSS presented no evidence that it had taken steps to pursue sources of propane other than United Propane. Ms. *16-17.

Finally, the Court rejected CSS's contention that the unavailability of a class action remedy in Kentucky violated Alabama public policy and precluded enforcement of the outbound forum-selection clause. The Court distinguished *Leonard v. Terminix International Co.*, 854 So. 2d 529 (Ala. 2002), a 5-4 decision, which invalidated an arbitration provision which limited the consumer's damages to $500 and prohibited class actions. The Court noted that CSS is a business, not an individual consumer as in *Leonard*, and that (also unlike *Leonard*) there is no arbitration clause or limitation of damages clause in the United Propane contracts. Ms. *19. The Court concluded, "[t]herefore, ... this Court cannot say that the outbound forum-selection clause is an unconscionable violation of public policy." Ms. *21.

STANDARDS FOR CIVIL AND CRIMINAL CONTEMPT

C.N.M. v. J.D.D., [Ms. 2160863, Feb. 9, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This opinion by Presiding Judge Thompson (Pittman, Thomas, and Donaldson, JJ., concur; Moore, J., concurs in the result), affirms the Madison Juvenile Court's order finding the mother in contempt for refusal to comply with court orders regarding the father's visitation.

The opinion contains the following helpful discussion of the distinction between civil contempt and criminal contempt:

> "In general, civil contempt seeks to compel compliance with a juvenile court's judgment or order, while criminal contempt imposes punishment for failure to obey a judgment or order of the court. Rule 70A, Ala. R. Civ. P.; *see also State v. Thomas*, 550 So. 2d 1067, 1072 (Ala. 1989). An essential element of a finding of criminal contempt is that such a finding is intended to punish the contemnor, while a finding of civil contempt seeks to compel future compliance with court orders. *See generally Chestang v. Chestang*, 769 So. 2d 294 (Ala. 2000). Sanctions for criminal contempt are limited by statute to a maximum fine of $100 and imprisonment not to exceed five days. *See* Ala. Code 1975, § 12-11-30(5). On the other hand, sanctions for civil contempt may exceed those limits and may continue indefinitely until the contemnor performs as ordered.
>
> "... In *Chestang v. Chestang, supra*, our Supreme Court reviewed the provisions of Rule 70(A), Ala. R. Civ. P., the rule that governs contempt in civil cases. The Supreme Court noted that Rule 70A(a)(2)(C) defines two types of criminal contempt:
>
> > (1) misconduct that obstructs the administration of justice and (2) willful disobedience or resistance to a court order or judgment "'where the dominant purpose of the finding of contempt is to punish the contemnor.'" *Chestang*, 769 So. 2d at 297-98."
>
> In *Davenport v. Hood*, 814 So. 2d 268 (Ala. Civ. App. 2000), this court explained that
>
> > "'[t]he question of whether [an action involves] civil contempt or criminal contempt becomes important ... because a contemnor must be in a position to purge himself from the contempt. *Mims v. Mims*, 472 So. 2d 1063 (Ala. Civ. App. 1985). In order to purge himself in a criminal contempt case, the contemnor must pay the fine imposed, serve the authorized time, or do both. *Kalupa v. Kalupa*, 527 So. 2d 1313 (Ala. Civ. App. 1988). In order to purge himself in a civil contempt case, the contemnor must comply with the court's order. Rule 33.4(b), A[la]. R. Crim. P.'"
>
> 814 So. 2d at 272-73 (quoting *Hill v. Hill*, 637 So. 2d 1368, 1370 (Ala. Civ. App. 1994)).

Ms. *10-11. The court affirmed the finding of contempt, even though the juvenile court's order did not specify whether the mother's contempt was criminal or civil. The court noted that "according to the mother's own testimony, she refused to allow the father to exercise [] visitation, even after the father pointed to her that the December 1, 2016 order specifically ordered her to allow him to visit the children at that time." Ms. *12.

JML – NEGLIGENCE – FORESEEABILITY

DeKalb-Cherokee Counties Gas District v. Raughton, [Ms. 1160838, Feb. 23, 2018] __ So. 3d __ (Ala. 2018). This decision by Justice Sellers (Stuart, C.J., and Bolin and Wise, JJ. concur; Shaw, J., concurs in the result), reverses and renders judgment in favor of defendant DeKalb-Cherokee Counties Gas District (DC Gas) in a negligence case in which the DeKalb Circuit Court had entered judgment on a jury verdict in the amount of $100,000 in favor of Plaintiff Raughton.

Raughton, an employee of the City of Fort Payne landfill, was injured when he was standing next to a DC Gas dump truck which was dumping a load of bricks and concrete blocks. The evidence showed that the DC Gas dump truck driver was executing a clutch-release procedure commonly performed by dump truck drivers

to dislodge materials. Ms. *2-3. When the driver performed the maneuver, a sidewall of the dump truck fell off and struck Raughton. Ms. *3.

Raughton argued the DC Gas driver Ridgeway acted negligently in performing the clutch-release maneuver while Raughton was standing in close proximity to the truck. Ms. *5. The Court rejected this basis of liability, pointing to a lack of evidence showing that it was foreseeable to the driver that the sidewall of the truck would become detached during a clutch-release procedure. Ms. *8. Raughton also argued that DC Gas was liable for having negligently failed to properly inspect the dump truck. Ms. *5. While noting that the evidence showed that DC Gas had never had the truck professionally inspected or physically checked for loose sidewalls, Ms. *11, the Court pointed to a lack of evidence "indicating that the sidewall of the dump truck had become detached in the past or that DC Gas's agents knew that it might become detached." Ms. *12. The Court further noted that

> no evidence was presented clearly showing how the sidewall was attached to the truck or showing exactly why and how it had become detached. Thus, there was no evidence presented indicating that an inspection would have revealed that it might become detached and, therefore, that an inspection would have prevented the accident.

Ms. *12. The Court noted that "'while a person is expected to anticipate and guard against all reasonable consequences, yet he is not expected to anticipate and guard against that which no reasonable man would expect to occur.'" Ms. *8, quoting *City of Birmingham v. Latham*, 230 Ala. 601, 606, 162 So. 675, 678 (1935).

MUNICIPAL IMMUNITY – DUTY – JURY QUESTION

Ex parte City of Muscle Shoals, [Ms. 1160396, Feb. 23, 2018] __ So. 3d __ (Ala. 2018). This per curiam opinion (Stuart, C.J., and Bolin, Parker, Main, Wise, Bryan, Sellers, and Mendheim, JJ., concur), issues a writ of mandamus to the Colbert Circuit Court directing dismissal of a negligence action against the City of Muscle Shoals on the ground of municipal immunity.

Plaintiff Harden alleged he was injured when he stepped into a twenty-five-year-old grate covering a drain in a Muscle Shoals city park. Ms. *2. The City moved for summary judgment based upon municipal immunity, Ala. Code § 11-47-190. The circuit court denied that motion.

In issuing the writ of mandamus, the Court noted that if there is a genuine issue as to any material fact on whether the movant is entitled to immunity, then summary judgment is not appropriate. However, the Court noted that "the availability of immunity 'is ultimately a question of law to be determined by the court.'" Ms. *13, quoting *Suttles v. Roy*, 75 So. 3d 90, 100 (Ala. 2010).

Because the City filed a properly supported motion for summary judgment, the burden shifted to Harden to present "substantial evidence of 'neglect, carelessness, or unskillfulness' by a municipal agent, officer, or employee, or to present substantial evidence that the municipality had actual or constructive notice of a defect and failed to remedy it and that such negligence or defect caused the plaintiff's injuries." Ms. *15. Regarding Harden's claim for negligent failure to repair the defective grate, the Court pointed out that the existence of a duty is not always a question of law for the Court. Instead, the Court reiterated that "'where the facts upon which the existence of a duty depends, are disputed, the factual dispute is for resolution by the jury.'" Ms. *12 (quoting *Garner v. Covington Cty.*, 624 So. 2d 1346, 1349-50 (Ala. 1993)(internal quote marks omitted). The Court held that the City was entitled to summary judgment because there was no evidence "indicating that the City had any notice that the grate was, in fact, defective." Ms. *16.

The Court specifically rejected Harden's *res ipsa loquitur* argument, holding that because ""'the owner of a premises ... is not an insurer of the safety of his invitees ... and the principle of *res ipsa loquitur* is not applicable. There is no presumption of negligence which arises from the mere fact of an injury to an invitee.'"" Ms. *16, n. 2, quoting *Ex parte Harold L. Martin Distrib. Co.*, 769 So. 2d 313, 314 (Ala. 2000), quoting in turn, *Tice v. Tice*, 361 So. 2d 1051, 1052 (Ala. 1978).

JUDICIAL NOTICE

Tabyshaliev v. Tabyshaliev, [Ms. 2160811, Mar. 2, 2018] __ So. 3d __ (Ala. Civ. App. 2018). This decision by Judge Thomas (Thompson, P.J. and Pittman, J., concur; Moore and Donaldson, JJ., concur in the result) affirms in part and reverses in part a judgment of the Covington Circuit Court divorcing the parties.

The wife referred in her pleadings to having custody of the children based on a Protection From Abuse [PFA] order. Ms. *6. The court affirmed the trial court having taken judicial notice of the PFA order noting that "'where a party refers to such other proceeding or judgment in its pleadings for any purpose, the court, ... may and should take judicial notice of the entire proceeding insofar as it is relevant to the question of law presented.'" *Ibid.*, quoting *Butler v. Olshan*, 280 Ala. 181, 187-88, 191 So. 2d 7, 13 (1966). The court also held that "[w]hen a case before the same court is referred to in a motion to dismiss, a trial court is authorized and required to take judicial notice of the mentioned proceedings." *Ibid.*, citing *Slepian v. Slepian*, 355 So. 2d 714, 716 (Ala. Civ. App. 1977).

MEDICAL NEGLIGENCE – CAUSATION

Hamilton v. Scott, [Ms. 1150377, Mar. 9, 2018] __ So. 3d __ (Ala. 2018). This *per curiam* (Bolin, Main, Wise, Bryan, Sellers, and Mendheim, JJ., concur; Parker, J., concurs specially; Stuart, C.J., and Shaw, J., dissent) opinion reverses a defense verdict in a medical negligence-wrongful death case concerning the death of a non-viable fetus where the trial court failed to give the plaintiff's proposed requested jury instruction on causation from *Parker v. Collins*, 605 So. 2d 824 (Ala. 1992).

Specifically, citing *Parker*, the Court reiterates that:

> ... the issue of causation in a malpractice case may properly be

> submitted to the jury where there is evidence that prompt diagnosis and treatment would have placed the patient in a better position than she was in as a result of inferior medical care. *Waddell v. Jordan*, 293 Ala. 256, 302 So. 2d 74 (1974); *Murdoch v. Thomas*, 404 So. 2d 580 (Ala. 1981). It is not necessary to establish that prompt care could have prevented the injury or death of the patient; rather, the plaintiff must produce evidence to show that her condition was adversely affected by the alleged negligence. *Waddell*; see, also, Annot., 54 A.L.R. 4th 10, § 3 (1987).

Ms. *14 (quoting *Parker*, 605 So. 2d at 827).

DECLARATORY JUDGMENT ACT – ADVISORY OPINIONS

Walker County Commission v. Kelly, Ms. 1160862, Mar. 9, 2018] __ So. 3d __ (Ala. 2018). The Court (Stuart, C.J., and Wise, Bolin, Parker, Shaw, Main, and Bryan, JJ., concur; Sellers, J., dissents) dismisses an appeal by the Walker County Commission and its Commissioners from a summary judgment entered by the Walker Circuit Court in favor of the Walker County Civil Service Board and its board members in a dispute concerning how a former revenue auditor was suspended, reprimanded, and terminated from her employment. The Commission alleged the Board violated the Alabama Open Meetings Act, § 36-25A-1 *et seq.*, Ala. Code 1975, and sought a declaratory judgment from the circuit court concerning the Board's conduct in how it reached its conclusions regarding the revenue officer's employment status.

The Supreme Court concludes that the Commission's action against the Board essentially sought legal advice from the circuit court and thus did not properly invoke the Declaratory Judgment Act, § 6-6-220 *et seq.*, Ala. Code 1975:

> "The Declaratory Judgment Act, § 6-6-220 et seq., Ala. Code 1975, is not a vehicle for obtaining legal advice from the courts:
>
> > "'The Declaratory Judgment Act, codified at §§ 6-6-220 through -232, Ala. Code 1975, "does not '"empower courts to ... give advisory opinions, however convenient it might be to have these questions decided for the government of future cases."'" *Bruner v. Geneva County Forestry Dep't*, 865 So. 2d 1167, 1175 (Ala. 2003) (quoting *Stamps v. Jefferson County Bd. of Educ.*, 642 So. 2d 941, 944 (Ala. 1994), quoting in turn *Town of Warrior v. Blaylock*, 275 Ala. 113, 114, 152 So. 2d 661, 662 (1963) (emphasis added in *Stamps*). ...'
>
> "*Bedsole*, 912 So. 2d at 518."
>
> *Etowah Baptist Ass'n v. Entrekin*, 45 So. 3d 1266, 1274 (Ala. 2010). *See also Ex parte Bridges*, 925 So. 2d 189, 192 (Ala. 2005).

Ms. *13. Because there was no bona fide existing controversy of a justiciable character to infer upon the Walker Circuit Court jurisdiction to grant declaratory relief, and there was no justiciable controversy existing when the suit was commenced, the trial court had no jurisdiction. Ms. *15 (quoting *State ex rel. Baxley v. Johnson*, 293 Ala. 69, 73, 300 So. 2d 106, 110 (1974). Accordingly, the circuit court never obtained subject-matter jurisdiction and its judgment was therefore void such that it would not support an appeal. Ms. *16.

SECTION 3-5-3(A), ALA. CODE 1975, LIABILITY FOR LIVESTOCK ON ROADWAY

Brewer v. Atkinson, [Ms. 2161073, Mar. 9, 2018] __ So. 3d __ (Ala. Civ. App. 2018). In this deflection case (see § 12-2-7(6), Ala. Code 1975)), the Court of Civil Appeals unanimously affirms a summary judgment entered by the Mobile Circuit Court in favor of owners and keepers of a cow that had wandered onto a roadway causing damage to a pickup truck and injuries to its driver. The court construed § 3-5-3(a), Ala. Code 1975, as requiring "proof not only that the owner acted knowingly or wilfully, but also that he or she 'put or placed such stock upon such public highway.'" Ms. *18 (quoting § 3-5-3(a) and *Carpenter v. McDonald*, 495 So. 2d 640, 641 (Ala. 1986) (stating that "a livestock owner is not liable to the owner or occupant of a motor vehicle 'unless the owner knowingly or wilfully puts the livestock on the road'")); *Chandler v. Waugh*, 290 Ala. 70, 74, 274 So. 2d 46, 49 (1973) (stating that liability to the owner or occupant of a motor vehicle arises under § 3-5-3(a) "only where the owner or keeper knowingly or wilfully placed or put the livestock on the highway, road, or street"); and *Carter v. Alman*, 46 Ala. App. 633, 635, 247 So. 2d 676, 677 (1971) (liability under the predecessor statute arises only when the owner puts or places livestock on the roadway).

RULE 41(B) INVOLUNTARY DISMISSAL FOR FAILURE TO PROSECUTE

Curry v. Miller, [Ms. 1170176, Mar. 16, 2018] __ So. 3d __ (Ala. 2018). The Court (Stuart, C.J., Sellers, Bolin, Shaw, and Wise, JJ., concur) affirms the Houston Circuit Court's order of involuntary dismissal pursuant to Rule 41(b), Ala. R. Civ. P., for failure to prosecute.

The standard of review is as follows:

> "Ala. R. Civ. P. 41(b) provides for the involuntary dismissal of an action upon 'failure of the plaintiff to prosecute or to comply with [the Rules of Civil Procedure] or any order of [the] court.' Although dismissal for failure to comply with a court order is a 'harsh sanction,' it is warranted where there is a 'clear record of delay, willful default or contumacious conduct by the plaintiff.' *Selby v. Money*, 403 So. 2d 218, 220 (Ala. 1981). Because the trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance, his decision to grant a motion to dismiss for failure to prosecute will be accorded considerable weight by a

reviewing court. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 947 (9th Cir. 1976); *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1051 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039, 92 S.Ct. 715, 30 L.Ed.2d 731 (1972). Therefore we will reverse that decision only upon a showing of abuse of discretion. *Selby*, at 220; *Smith v. Wilcox County Bd. of Educ.*, 365 So. 2d 659 (Ala. 1978)."

Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 604 So. 2d 332, 341 (Ala. 1991). Moreover, "'[w]illful' is used in contradistinction to accidental or involuntary noncompliance. No wrongful motive or intent is necessary to show willful conduct." *Selby v. Money*, 403 So. 2d 218, 221 (Ala. 1981).

Ms. *6-7. Because the record contained evidence from which the trial court could conclude that the plaintiff wilfully disregarded an order directing him to retain counsel by a specified date, and that the plaintiff's only response was that he did not "recall" receiving that order, the trial court did not exceed its discretion in concluding that the plaintiff's failure to prosecute his lawsuit was "willful" for purposes of a Rule 41(b) involuntary dismissal.

AMBIGUITIES IN AN EMPLOYMENT DISPUTE HANDBOOK ARE TO BE CONSTRUED IN FAVOR OF ARBITRATION

Bridgestone Americas Tire Operations, LLC v. Adams, [Ms. 1160877, Mar. 16, 2018] __ So. 3d __ (Ala. 2018). The Supreme Court (Stuart, C.J., and Sellers, Bolin, Shaw, and Wise, JJ., concur) reverses a judgment of the Tuscaloosa Circuit Court denying Bridgestone's motion to compel arbitration of an employment-related dispute.

The Court first states the standard of review:

"This Court reviews *de novo* the denial of a motion to compel arbitration. *Parkway Dodge, Inc. v. Yarbrough*, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. *TransSouth Fin. Corp. v. Bell*, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce. *Id.* '[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' *Jim Burke Automotive, Inc. v. Beavers*, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995) (opinion on application for rehearing)."

Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) (emphasis omitted).

Ms. *6. Citing *SSC Selma Operating Co. v. Fikes*, [Ms. 1160080, May 19, 2017] __ So. 3d __ (Ala. 2017), the Court (Ms. *12-13) reiterates that "[i]n the event of an ambiguity or uncertainty over the policy of an arbitration clause, federal policy 'dictates that it be resolved in favor of arbitration.'" Because this case turns upon alleged ambiguities in Bridgestone's employee dispute resolution plan, those ambiguities were required to be resolved in favor of arbitration such that the circuit court erred in denying Bridgestone's motion to compel arbitration pursuant to the terms of the Plan.

JUDGMENT FOR NOMINAL DAMAGES AFFIRMED IN PERSONAL INJURY CASE

Caplan v. Benator, [Ms. 2160904, Mar. 16, 2018] __ So. 3d __ (Ala. Civ. App. 2018). Here the Court of Civil Appeals (Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur; Moore, J., concurs in the result) affirms a judgment on a jury's verdict in favor of a plaintiff awarding $1 in damages in a tort action brought by the 93-year-old surviving girlfriend of a decedent against the decedent's two daughters who were named as executrixes of the estate of their deceased father. The court rejects the girlfriend's assertion that the award of $1 in damages was inadequate compensation for her injuries, and was inconsistent with the jury's determination that the daughters were liable to her for their tortious conduct. The analysis begins with the standard of review:

"In Alabama, jury verdicts are presumed to be correct and that presumption of correctness is further strengthened by a trial court's denial of a motion for new trial. The appellate court reviews the tendencies of the evidence most favorable to the prevailing party and indulges such inferences as the jury was free to draw. Accordingly, when a judgment is based on a jury verdict, it will not be reversed unless it is plainly and palpably wrong. *Ashbee v. Brock*, 510 So. 2d 214 (Ala. 1987)."

Dennis v. Lewis, 621 So. 2d 301, 303 (Ala. Civ. App. 1993).

""'When reviewing a motion for new trial on the grounds of inadequate damages, the reviewing court must consider whether the verdict is so opposed to the clear and convincing weight of the evidence as to clearly fail to do substantial justice, and whether the verdict fails to give substantial compensation for substantial injuries. *Orr v. Hammond*, 460 So. 2d 1322 (Ala. Civ. App. 1984). In addition, the reviewing court must keep in mind that a jury verdict is presumed to be correct and will not be set aside for an inadequate award of damages unless the amount awarded is so inadequate as to indicate that the verdict is the result of passion, prejudice, or other improper motive. *Orr v. Hammond, supra*.'"

"*Wells [v. Mohammad]*, 879 So. 2d 1188, 1194 (Ala. Civ. App. 2003) (quoting *Helena Chem. Co.*

v. Ahern, 496 So. 2d 12, 14 (Ala. 1986))."

412 S. Court St., LLC v. Alabama Psychiatric Servs., P.C., 163 So. 3d 1020, 1029 (Ala. Civ. App. 2014).

Ms. *16. Because the girlfriend's medical expert's opinion testimony did not necessarily relate her heart attack to the actions of the daughters "[i]t [was] peculiarly within the province of the jury to resolve conflicts regarding the proximate consequences of a defendant's negligence. *Youngblood v. Thornton*, 576 So. 2d 229 (Ala. 1991)." Ms. *18-19. Further, "[i] t is ... axiomatic that a jury is entitled to award nominal damages in those cases where no causal connection can be found between the damages suffered and the duty breached." Ms. *18 (quoting *Courtesy Ford Sales, Inc. v. Hendrix*, 536 So. 2d 88, 90 (Ala. Civ. App. 1988)).

The court also rejects the girlfriend's arguments that the trial court erred in refusing to give certain instructions to the jury. Citing *Ware v. Timmons*, 954 So. 2d 545, 558 (Ala. 2006), the court concludes the girlfriend failed to preserve her arguments for appeal as she was required to have "(1) objected before the jury retired to consider its verdict; (2) stated the matter that [s]he was objecting to; and (3) supplied the grounds for [her] objection." Ms. *31. Because the girlfriend did not object to the trial court's refusal to instruct the jury on her requested instructions, she waived any contentions of error.

CLASS ACTIONS, ADEQUACY OF REPRESENTATIVE

Baldwin Mut. Ins. Co. v. McCain, [Ms. 1160093, Mar. 23, 2018] __ So. 3d __ (Ala. 2018). The Supreme Court (Stuart, C.J., and Mendheim, Parker, Main, and Bryan, JJ., concur) reverses an order of the Montgomery Circuit Court pursuant to Rule 23, Ala. R. Civ. P., a class action arising from payments under Baldwin Mutual homeowner's insurance policies upon finding that the putative class representative could not fairly and adequately represent the interests of the class as required by Rule 23(a)(4) when her personal breach of contract claims were subject to a unique *res judicata* defense. Citing *Hannon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992), and other reported federal opinions, the Court holds that class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation. Ms. *26-27.