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ALABAMA ASSOCIATION FOR JUSTICE JOURNAL

The Official Publication of the Alabama Association for Justice

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We preserve and protect the constitutional right to a trial by jury guaranteed by the Seventh Amendment to the United States Constitution by ensuring that every person or business harmed or injured by the misconduct or negligence of others can hold wrongdoers accountable in the one room where everyone is equal – **The Courtroom**

RECENT CIVIL DECISIONS

Summaries from September 11, 2020 - February 26, 2021

David Wirtes, Jr. is a member of Cunningham Bounds, LLC of Mobile, Alabama, where he focuses on strategic planning, motion practice and appeals. Mr. Wirtes is licensed in all state and federal courts in Alabama and Mississippi, the Fifth and Eleventh Circuit Courts of Appeals and the United States Supreme Court. He is active in numerous professional organizations, including as a member of the Alabama and Mississippi State Bar Associations; long-time member of the Alabama Supreme Court's Standing Committee on the Rules of Appellate Procedure; Sustaining Member of the Alabama Association for Justice (and Member of its Board of Governors and Executive Committee (1990-present)), Member and/or Chairman of ALAJ's Amicus Curiae Committee (1990-present) and Co-editor of the Alabama Association for Justice Journal (1996-present)); and, member of the American Association for Justice where he serves on its Amicus Curiae Committee (1999-present). Mr. Wirtes is a Sustaining Fellow and Trustee of the Pound Civil Justice Institute; a Senior Fellow of the Litigation Counsel of America; a Founder and former Executive Director of the American Institute of Appellate Practice (and one of just thirteen persons certified nationwide by AIAP as an Appellate Specialist); and a Sustaining Member and the former Alabama Representative for Public Justice.

Joseph D. Steadman, Sr., joined Cunningham Bounds in 2016. His practice focuses on appellate practice and motion practice in the firm's personal injury and wrongful death litigation, class actions, general negligence, product liability, medical negligence, admiralty and maritime law, and consumer fraud actions. Joe received his undergraduate degree summa cum laude from the University of South Alabama in 1985 and his J.D. summa cum laude from the University of Alabama School of Law in 1988, where he served on the Editorial Board of the Alabama Law Review. Joe is a member of the American Bar Association and Mobile Bar Association.

UNINSURED MOTORIST INSURANCE COVERAGE AND PUBLIC ROADS

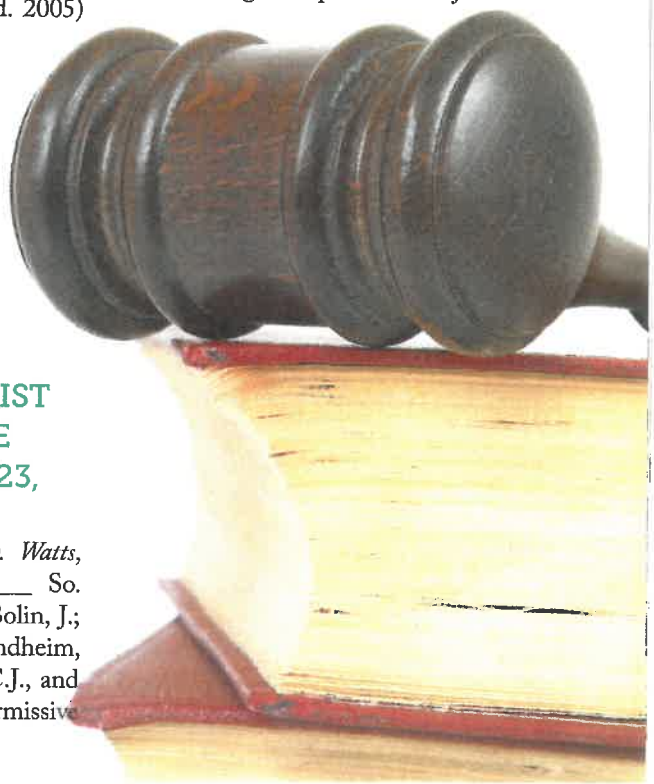
Nationwide Property and Casualty Ins. Co. v. Steward, [Ms. 1190011, Sept. 18, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Parker, C.J.; Wise, Mendheim, and Stewart, JJ., concur; Bryan, J., concurs in the result; Bolin, Shaw, Sellers, and Mitchell, JJ., dissent) affirms a summary judgment entered by the Etowah Circuit Court in favor of Steward who claimed uninsured-motorist benefits from Nationwide after he was injured in an accident involving a recreational vehicle at a publicly owned and operated all-terrain-vehicle park ("Top Trails") in Talladega. At issue was whether the roadway upon which Steward was injured was a "public road" as required for uninsured motorist coverage to apply under Nationwide's policy. The Court relies upon (Ms. **5-6) passages from a treatise, 1 Alan I. Widiss & Jeffrey E. Thomas, Uninsured and Underinsured Motorist Insurance, § 8.10 (3d ed. 2005) and a dictionary, Random House Webster's Unabridged Dictionary, 1562 (2d ed. 2001) in concluding that Steward's interpretation of "public road" was, as found by the Etowah Circuit Court in granting summary judgment in his favor, reasonable. Accordingly, the summary judgment in favor of coverage is due to be affirmed.

UNINSURED MOTORIST INSURANCE COVERAGE AND STACKING. § 32-7-23, ALA. CODE 1975

Mid-Century Insurance Co. v. Watts, [Ms. 1180852, Sept. 18, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Bolin, J.; Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur; Parker, C.J., and Stewart J., dissent) grants a permissive interlocutory appeal (see Rule 5, Ala. R. App. P.) and reverses a judgment of the Talladega Circuit Court denying a motion by Mid-Century Insurance Company for partial summary judgment seeking to limit its liability for payment of uninsured-underinsured motorist benefits in claims arising from a single accident resulting in four deaths and five serious injuries. Mid-Century contended that § 32-7-23(c) and its policy's UIM coverage provisions limited stacking to the limits of primary coverage and two additional coverages. The victims contended § 32-7-6(c) afforded greater coverage because five vehicles were insured, four persons were killed and five others seriously injured, such that coverage on a per person basis as required by this statute afforded coverages of $150,000.00 per person, for a total of $1,350,000.00.

Rejecting (Ms. **21-32) the victims' contentions, the Court reads § 32-7-6(c), as incorporated by § 32-7-23(a), such that

Reading the phrases "subject to the



> limit for one person" and "bodily injury to or death of two or more persons in any one accident" in § 32-7-6(c) so as to give those words their "natural, plain, ordinary, and commonly understood meaning," we conclude that, in those cases where two or more persons are injured or killed in a single accident, the per accident limit of liability contained in the policy is the proper coverage limit to be applied. The policy here contains a per accident limit of coverage as required by § 32-7-6(c). Because the accident made the basis of this UIM claim involved "two or more persons," the per accident coverage limit of $100,000 found in the policy is applicable. Section 32-7-23(c) of the uninsured-motorist statute and § 2a.(2) of the insurance policy allow the Watts plaintiffs to "stack" the primary coverage of $100,000 for up to two additional coverages, or a total amount of $300,000 in UIM benefits.

Ms. **22-23 (emphasis in original). Accordingly, the trial court's order denying Mid-Century's motion for partial summary judgment is due to be reversed.

KEY-MAN LIFE INSURANCE, MATERIAL MISREPRESENTATION, RECISSION

Protective Life Ins. Co. v. Apex Parks Group, LLC, [Ms. 1180508, Sept. 18, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Mendheim, J.; Bolin, Wise, Bryan, Sellers, and Stewart, JJ., concur; Parker, C.J., dissents; Mitchell, J., recuses) reverses a judgment entered on a jury verdict rendered in the Jefferson Circuit Court against Protective Life Insurance Company and in favor of Apex Parks Group in a breach of contract and bad faith action arising from Protective Life's refusal to pay $10,000,000.00 in key-man life insurance benefits based upon material misrepresentations in the application for the policy. The Court renders a judgment in favor of Protective Life.

The substantive contract issues concerning the policy and its condition are governed by California law because the policy was issued and was delivered to Apex in California. Ms. *25, explaining

> The contract at issue – the policy – is governed by California law because the policy was issued and was delivered to Apex in California. See, e.g., *Lifestar Response of Alabama, Inc. v. Admiral Ins. Co.*, 17 So. 3d 200, 213 (Ala. 2009) (explaining that, "[u]nder the principles of lex loci contractus, a contract is governed by the law of the jurisdiction within which the contract is made").

Ms. *25. Because the lawsuit was filed and tried in Alabama, procedural questions are governed by Alabama law. *Id.*, quoting *Middleton v. Caterpillar Indus., Inc.*, 979 So. 2d 53, 57 (Ala. 2007) (noting that "*lex fori* – the law of the forum – governs procedural matters.").

The Court also explains that Apex's filing of a petition for bankruptcy under Title 11 of the Bankruptcy Code did not impair the Court's appellate jurisdiction to decide the appeal because the automatic stay imposed by 11 U.S.C. § 362(a)(1) "operates as a stay, applicable to all entities, of … the commencement or continuation, including the issuance or employment of process, of a judicial … proceeding against the debtor that was or could have been commenced before the filing of the bankruptcy petition." Ms. *27. Because Apex initiated the action against Protective Life, § 362(a)(1) did not impose a stay of the appeal from Apex's judgment against Protective Life because the stay only operates to stay actions "against the debtor [Apex]." Ms. *28, citing *Freeman v. Comm'r*, 799 F.2d 1091, 1092-93 (5th Cir. 1986), the Court observes

> "[C]ourts of appeals that have considered this issue have held that whether a proceeding is against the debtor within the meaning of Section 362(a)(1) is determined from an examination of the posture of the case at the initial proceeding. ... If the initial proceeding is not against the debtor, subsequent appellate proceedings are also not against the debtor within the meaning of the automatic stay provisions of the Bankruptcy Code."

The Court holds the automatic stay under § 362 "… does not prevent entities against whom the debtor proceeds in an offensive posture – for example, by initiating a judicial or adversarial proceeding - from 'protecting their legal rights' … but is applicable only to actions against the bankrupt or to seizures of property of the bankrupt." Ms. *30, quoting *Justice v. Financial News Network, Inc.* (*In re Financial News Network, Inc.*, 158 B.R. 570, 572-73 (S.D. N.Y. 1993).

Analyzing Ms. **31-61, the allegations by Protective Life that Apex and its insured made material misrepresentations in the policy application by failing to reveal additional medical examinations and a surgical procedure which followed the date of the original application for the policy, the Court decides under California law that Protective Life's motions for judgment as a matter of law should have been granted. Accordingly, the judgment in favor of Apex on the breach-of-contract claim is reversed and judgment is rendered as a matter of law in favor of Protective Life.

MEDICAL NEGLIGENCE, SIMILARLY SITUATED HEALTHCARE PROVIDER, § 6-5-548(C)(3) ALA. CODE 1975 AND NECESSITY OF EXPERT TESTIMONY IN MEDICAL MISREPRESENTATION CASE

Hannah v. Naughton, [Ms. 1190216, Sept. 25, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Bolin, J.; Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur) affirms a summary judgment entered by the Etowah Circuit Court in favor of doctors Michael J. Naughton and Terisa A. Thomas on claims alleging medical negligence arising from misrepresentations in interpreting a pap smear as warranting a complete hysterectomy.

The Court affirms the entry of summary judgment in favor of the doctors upon concluding plaintiff failed to present expert testimony from a similarly situated healthcare provider within the meaning of § 6-5-548(c)(3) (which provides that a similarly situated health-care provider is one that "[i]s certified by an appropriate American board in the same specialty") and because plaintiff's claims required proof

by way of expert testimony of a similarly situated healthcare provider because the claims were not such "where want of skill or lack of care is so apparent…as to be understood by a layman, and requires only common knowledge and experience to understand it."

Specifically, the Court finds plaintiff's proffered expert deficient because he was not board certified in the same specialty as the defendant at the time he gave his testimony by deposition. Ms. **24-37. The Court holds:

> Section 6-5-548(c)(3) expressly states that a similarly situated health-care provider is one who "[i]s certified by an appropriate American board in the same specialty." Section 6-5-548(e) expressly states that a proffered expert may testify against a defendant health-care provider "only if he or she is certified by the same American board in the same specialty." Subsections 6-5-548(c)(3) and (e) are plain and unambiguous, and under no reasonable reading could those subsections be interpreted to allow testimony from a proffered expert who "was" once board certified in the same specialty as the defendant health-care provider but who was no longer so certified at the time the proffered expert provided his or her testimony. Subsections 6-5-548(c)(3) and (e) clearly require a similarly situated health-care provider who is proffered as an expert to be board certified in the same specialty as the defendant health-care provider at the time the proffered expert testifies. Had the legislature intended to require the proffered expert to simply be board certified at any time in the past it could have easily so provided in the statute. Section 6-5-548(c)(4) requires that a similarly situated health-care provider proffered as an expert be one who "[h] as practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred." The fact that the legislature chose to tie, in subsection (c)(4), the action to a specific point in time and chose to so qualify § 6-5-548(c)(3) and (e) evidences its intention that a proffered expert may not testify as a similarly situated health-care provider against a defendant health-care provider unless the proffered expert is board certified in the same specialty as the defendant health-care provider at the time the proffered expert gives his or her testimony.

Ms. **35-37.

The Court also rejects the plaintiff's contention that expert testimony was not needed given her claims that Dr. Thomas and Dr. Naughton falsely told her that she had cervical cancer and that she had no option but to have a full hysterectomy. After first reviewing case law (Ms. **38-41) explaining the exceptions to the general rule that the plaintiff in a medical-malpractice action must proffer independent medical expert testimony, the Court distinguishes *Ex parte Sonnier*, 707 So. 2d 635 (Ala. 1997) (Ms. **42-44) and holds:

> "…To the extent Dr. Thomas and Dr. Naughton made an alleged false representation to Hannah that she had cervical cancer, that representation was made based on their interpretation of the abnormal Pap smear and the treatment protocol dictated by that interpretation. Dr. Thomas and Dr. Naughton's interpretation of the abnormal Pap smear and resulting treatment recommendations based on that interpretation require a knowledge and understanding that is beyond the common knowledge, understanding, and experience of a layperson, and this case is thus distinguishable from the facts of *Ex parte Sonnier*.
>
> Accordingly, we conclude that Hannah's claims do not fall within the layperson exception to the rule that a plaintiff must support his or her medical-malpractice claim with expert testimony from a 'similarly situated health-care provider' in relation to the defendant medical professional."

Ms. **45-46.

JUDGMENT AS A MATTER OF LAW, RESPONDEAT SUPERIOR, RATIFICATION, NEGLIGENT/WANTON TRAINING, SUPERVISION AND RETENTION

QHG of Enterprise, Inc., d/b/a Medical Center Enterprise v. Pertuit, [Ms. 1181072, Sept. 25, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Bryan, J.; Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, and Stewart, JJ., concur; Mitchell, J., recuses) reverses an order of the Coffee Circuit Court denying a motion for a judgment as a matter of law and renders a judgment in favor of defendant/appellant QHG of Enterprise, Inc. d/b/a Medical Center Enterprise ("QHG") upon concluding that plaintiff failed to present substantial evidence supporting her claims that QHG was liable for the actions of a hospitalist, Dr. Diefenderfer, who had used a hospital computer to access the plaintiff's records contained within the Alabama Prescription Drug Monitoring Program as established by § 20-2-210, *et seq.*, Ala. Code 1975 and shared the information obtained from that database with a former patient who subsequently used the information in a legal proceeding against her former spouse concerning visitation with a minor child.

The former patient/spouse allegedly published the prescription drug information in a petition seeking a modification of the child's visitation schedule. The person against whom the allegations were made about misusing prescription drugs refuted those allegations and the trial judge left the visitation schedule unchanged. Thereafter, the person whose prescription information had been publicly revealed submitted reports alleging invasion of her privacy to the Enterprise Police Department, the United States Department of Health and Human Services, the Alabama Board of Medical Examiners, and the Alabama Bar Association. Indictments were presented by the Coffee County Grand Jury against the former spouse and hospitalist charging each with violation of § 20-2-216 (unauthorized disclosure of information contained in the controlled substances prescription database shall be guilty of a Class A Misdemeanor and unauthorized access to information contained in the database shall be guilty of a Class C Felony). She also filed suit against QHG alleging that the hospitalist's actions in accessing the database through the hospital's computer system rendered the hospital liable under the common law theories of *respondeat superior*, ratification and negligent/wanton training, supervision and retention.

Following a jury trial, the Coffee Circuit Court entered judgment in favor of the victim in the amount of $5,000.00

compensatory damages and $295,000.00 in punitive damages. The circuit court denied QHG's motion for judgment as a matter of law. On appeal, the Court reverses the judgment and renders a judgment for QHG upon finding that the victim failed to present substantial evidence supporting any of her theories of liability.

As to plaintiff's *respondeat superior* theory, the Court (Ms. **19-28) concludes no evidence was presented indicating that QHG employed the hospitalist "to assist or advise third parties in making a determination regarding whether they should permit their children to attend court-ordered visitation with a former spouse or to seek a modification of a former spouses court-ordered visitation." Ms. *27. The Court therefore characterizes the hospitalist's decision to collect and disclose the personal medical information as a "marked and unusual deviation" from QHG's business which were undertaken for personal reasons outside the scope of her employment. Ms. *28.

As to plaintiff's ratification theory, the Court cites (Ms. **28-36) *East Alabama Behavioral Medicine, P.C. v. Chancey*, 883 So. 2d 162 (Ala. 2003) for the principle that "[a]n employer cannot be said to have ratified an employee's conduct when the employer, upon learning of an employee's conduct, which was not in the scope of the employee's employment, gives instructions calculated to prevent a recurrence." Ms. *29, quoting *Chancey*, 883 So. 2d at 169-70. Here, QHG presented evidence that upon learning of the hospitalist's access to the database, hospital personnel met with the hospitalist and counseled her with respect to the importance of patient privacy and compliance with the requirements of HIPAA. Because there was no recurrence, "[a]n employer cannot be said to have ratified an employee's conduct when, after instruction by the employer, the employee's conduct stops." Ms. *35, citing *Chancey*, 883 So. 2d at 170.

With respect to plaintiff's theories of negligent/wanton training, supervision and retention, the record revealed no evidence of notice or knowledge (either actual or presumed) of the hospitalist's unfitness or that had QHG exercised due and proper diligence, it would have learned that which would charge it with such knowledge. The Court concludes (Ms. **37-39) the evidence was insufficient to meet the test of *Armstrong Business Services, Inc. v. AmSouth Bank*, 817 So. 2d 665, 682 (Ala. 2001) for negligent/wanton supervision or training.

CIVIL CONTEMPT; RULE 70A, ALA. R. CIV. P.

Williams v. Williams, [Ms. 2180981, Sept. 25, 2020], ___ So. 3d ___ (Ala. Civ. App. 2020). The court (Donaldson, J.; Edwards and Hanson, JJ., concur; Moore, J., concurs specially; Thompson, P.J., concurs in the result) reverses a Jefferson Circuit Court judgment holding a former husband in civil contempt for not paying retirement benefits to his former wife in conformance with a judgment of divorce. The husband argued on appeal he could not be held in civil contempt because the divorce judgment required only that the retirement benefits be paid through a Qualified Domestic Relations Order ("QDRO"), but the Retirement Systems of Alabama had refused to honor the QDRO.

The court first explains the standard of review from a trial court's finding of civil contempt:

> "We review the trial court's finding of civil contempt under the following well settled standard of review.
>
> > "'The issue whether to hold a party in contempt is solely within the discretion of the trial court, and a trial court's contempt determination will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence. *Brown v. Brown*, 960 So. 2d 712, 716 (Ala. Civ. App. 2006) (affirming a trial court's decision not to hold a parent in contempt for failure to pay child support when the parent testified that he had deducted from his monthly child-support payment the amount he had expended to buy clothes for the children).'
>
> "*Poh v. Poh*, 64 So. 3d 49, 61 (Ala. Civ. App. 2010).
>
> > "'Rule 70A, Ala. R. Civ. P., has governed contempt proceedings in civil actions since July 11, 1994. Rule 70A(a)(2)(D) defines "civil contempt" as a "willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with."'
>
> "*Stamm v. Stamm*, 922 So. 2d 920, 924 (Ala. Civ. App. 2004). Moreover, in order to hold a party in contempt under Rule 70A(a)(2)(D), the trial court must find that the party willfully failed or refused to comply with a court order. See *T.L.D. v. C.G.*, 849 So. 2d 200, 205 (Ala. Civ. App. 2002)."
>
> *Kreitzberg v. Kreitzberg*, 131 So. 3d 612, 627-28 (Ala. Civ. App. 2013).

Ms. **9-10.

The court explains that "[b]ecause the divorce judgment did not order the former husband not to accept his RSA retirement benefits if the RSA refused to honor the QDRO, his acceptance of those benefits could not constitute a violation of the divorce judgment and, therefore, could not constitute a basis for holding him in contempt." Accordingly, because Rule 70A(a)(2)(D) requires that "the trial court must find that the party willfully failed or refused to comply with a court order" before there can be a finding of civil contempt, the trial court's judgment holding appellant in civil contempt is due to be reversed. Ms. *11, quoting *Kreitzberg, supra*, 131 So. 3d at 628.

WAIVER OF RIGHT TO COMPEL ARBITRATION

Fagan v. Warren Averett Companies, LLC, [Ms. 1190285, Oct. 23, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Wise, J.; Parker, C.J., and Bolin, Sellers, and Mitchell, JJ., concur; Stewart, J., recuses) reverses the Jefferson Circuit Court's order compelling arbitration in a dispute arising under a Personal Services Agreement ("PSA") where Fagan alleged that Warren Averett Companies, LLC ("Warren Averett") had substantially underpaid her. Fagan filed a demand for arbitration with the American Arbitration Association ("AAA"). Ms. *4. When the AAA sent Warren Averett an invoice that exceeded half of the initial arbitration filing fee, Warren Averett refused to pay it, contending it was only required to pay half of the filing fee. Ms.

*6. After the AAA closed its file on the arbitration demanded by Fagan, Fagan filed suit in circuit court. Ms. *8.

The Court concludes that Warren Averett was in default of the arbitration agreement and reverses the order compelling arbitration. The Court rejects Warren Averett's argument that its refusal to pay more than half of the AAA filing fee was not a default under the PSA. The Court explains,

> "[t]he PSA does not specifically state that the parties will equally share all the costs of arbitration. Rather, it provides only that the parties will equally share "the fees or expenses of any arbitrator(s)" as well as the costs for the use of any facility."

Ms. *19.

DISMISSAL FOR FAILURE TO PROSECUTE REVERSED

S.C. and K.C. v. Autauga County Board of Education, et al., [Ms. 1190382, Oct. 30, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Bolin, J.; Parker, C.J., and Sellers, Stewart, and Mitchell, JJ., concur; Wise, J., recuses) reverses the Autauga Circuit Court's dismissal with prejudice pursuant to Rule 41(b), Ala. R. Civ. Pro. The circuit court had twice continued hearings on motions to dismiss requested by the defendants and had stated in the second continuance order that no further continuances would be granted "absent a showing of extraordinary circumstances." Ms. *5. The plaintiffs subsequently requested a continuance of the hearing which was not ruled upon. *Ibid.*

When the plaintiffs did not appear at the hearing, the circuit court dismissed all of their claims with prejudice. The Court reverses and holds, "[d]ismissals with prejudice or defaults are drastic sanctions, termed 'extreme' by the Supreme Court, *National Hockey League* [*v. Metropolitan Hockey Club, Inc.*], 427 U.S.[639] at 643, 96 S.Ct. [2778] at 2781 [(1976)], and are to be reserved for comparable cases." *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863,867-68 (3d Cir. 1984). That most severe sanction in the spectrum of sanctions is not warranted in this case." Ms. *14.

RECUSAL

Ex parte Alabama Dept. of Revenue, [Ms. 1190826, Oct. 30, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Bolin, J.; Shaw, Wise, Bryan, Stewart, and Mitchell, JJ., concur; Parker, C.J., and Sellers, J., concur in the result) issues a writ of mandamus requiring Judge Hardaway to recuse himself in Greenetrack's appeal of a $75 million dollar tax assessment.

> "A mandamus petition is a proper method by which to seek review of a trial court's denial of a motion to recuse. *Ex parte City of Dothan Pers. Bd.*, 831So. 2d 1, 5 (Ala. 2002); *Ex parte Cotton*, 638 So. 2d 870, 872 (Ala. 1994), *abrogated on other grounds*, *Ex parte Crawford*, 686 So. 2d 196 (Ala. 1996). A trial judge's ruling on a motion to recuse is reviewed to determine whether the judge exceeded his or her discretion. See *Borders v. City of Huntsville*, 875So. 2d 1168,1176 (Ala. 2003). The necessity for recusal is evaluated by the 'totality of the facts' and circumstances in each case. *Dothan Pers. Bd.*,831 So. 2d at 2. The test is whether "'facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.'" *In re Sheffield*, 465 So. 2d 350, 355-56 (Ala. 1984)(quoting *Acromag-Viking v. Blalock*, 420 So. 2d 60, 61 (Ala.1982))."

Ms. *8, quoting *Ex parte George*, 962 So. 2d 789, 791 (Ala. 2006). In issuing the writ, the Court explains

> The State and Greenetrack have a lengthy history of litigation before Judge Hardaway; Judge Hardaway has recused himself in several cases involving these parties; in one case this Court ordered Judge Hardaway's removal without the issue having been entertained in the circuit court; and Judge Hardaway recused himself in Greenetrack's initial challenge to the tax assessments filed in the circuit court. We are mindful that issues in some of the earlier cases.... However, in light of the totality of the facts and circumstances surrounding the past decisions of recusal and removal and the litigiousness of the parties regarding past recusal requests, a reasonable, prudent person might question the impartiality of Judge Hardaway.

Ms. **16-17.

EX PARTE COMMUNICATIONS WITH FORMER MANAGERIAL EMPLOYEE OF DEFENDANT

Ex parte The Terminix International Co., [Ms. 1180863, Oct. 30, 2020], ___ So. 3d ___ (Ala. 2020). In a 9-0 decision, the Court denies a writ of mandamus sought by Terminix seeking to disqualify Campbell Law from representing customers against Terminix involving termite infestations at the Bay Forest Condominiums. The firm had retained as an investigator and consultant, Steve Barnett, a former managerial employee of Terminix. Ms. *2.

The Court first notes

> It is well established that a trial court has the authority to disqualify counsel for violating the Alabama Rules Professional Conduct. See *Ex parte Utilities Bd. of Tuskegee*, 274 So. 3d 229, 232 (Ala. 2018). Nonetheless, this Court has explained that a "common-sense approach" should guide the trial court when considering motions to disqualify and that a violation of the Rules of Professional Conduct does not require disqualification in every instance. *See, e.g., Ex parte Wheeler*, 978 So. 2d 1, 7 (Ala. 2007) (concluding that counsel's disqualification was inappropriate even though he had violated Rule 1.11, Ala. R. Prof. Cond.). In sum, the decision of whether to disqualify counsel who has violated the Rules of Professional Conduct falls squarely within the sound discretion of the trial court. *Taylor Coal*, 401 So. 2d at 3. Accordingly, the trial court's denial of the motion to disqualify must be affirmed unless it is established that the ruling "is based on an erroneous conclusion of law" or that the trial court "has acted arbitrarily without employing conscientious judgment, has exceeded the bounds of reason in view of all circumstances, or has so far ignored recognized principles of law or practice as to cause substantial injustice." *Edwards v. Allied Home Mortg. Capital Corp.*, 962 So. 2d 194, 213 (Ala. 2007).

Ms. **8-9.

Terminix argued that under Rule 4.2(a), "Campbell Law had a duty to seek

Terminix's consent before contacting Barnett and before hiring him to be an investigator and consultant." Ms. *10. The Court rejects this argument, noting that "[t]he majority of states that have interpreted a rule derived from Model Rule 4.2 have likewise concluded that it applies only to current employees." Ms. *13.

The Court likewise rejects Terminix's argument that Barnett should be presumed to have shared with Campbell Law Terminix's confidential information, explaining "[g]iven the evidence indicating that Campbell Law clearly instructed Barnett that he could not disclose any privileged and confidential information that he had obtained from Terminix and the absence of any evidence indicating that Barnett violated that instruction, we cannot conclude that Rules 1.6(a) and 1.9(b) have been violated." Ms. *19. Likewise, the Court concludes that given "Barnett's limited involvement in Terminix's legal affairs generally and the Bay Forest matter in particular, we agree with the trial court that there has been no violation of Rule 1.9(a)" which prohibits a lawyer from switching sides in the same dispute. Ms. *23.

INTERVENING UIM CARRIER MAY NOT SUBSEQUENTLY OPT OUT

Ex parte Alfa Mutual Insurance Company, [Ms. 1190117, Oct. 30, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Mitchell, J.; Parker, C.J., and Shaw, Wise, Sellers, Mendheim, and Stewart, JJ., concur; Bolin, J., concurs in the result) denies Alfa's petition for writ of mandamus through which it sought to opt out of litigation against an uninsured motorist in which it had previously intervened. The Court denies the petition and explains:

> If the (UIM) insurer has been named as a defendant, the insurer can "either" participate in trial "or" not participate in trial (i.e., opt out). In parallel fashion, if the insurer has not been named as a defendant but is given notice that the suit has been filed, the insurer can "either" intervene "or" stay out of the case. In or out – that is the only choice *Lowe* gives the insurer under either scenario. ... *Lowe* [*v. Nationwide Insurance Co.*, 521 So. 2d 1309 (Ala. 1988)]does not provide a nonparty insurer with another election once the insurer chooses to intervene – and Alfa does not convincingly point to any authority that says otherwise.

Ms. **7-8.
Ms. **5-6.

INADEQUACY OF FORECLOSURE NOTICE

Rosser v. Federal Nat. Mtg. Assoc., et al., [Ms. 2180917, Oct. 30, 2020], ___ So. 3d ___ (Ala. Civ. App. 2020). The court (Donaldson, J.; Thompson, P.J., and Moore and Hanson, JJ. concur; Edwards, J., concurs in part and concurs in the result in part) affirms in part and reverses in part the Jefferson Circuit Court's summary judgment in favor of Fannie Mae and Bank of America in an ejectment action. The court reverses the summary judgment on Fannie Mae's ejectment claim because the foreclosure notice did not strictly comply with the requirements set out in the mortgage. The court notes "failure to provide proper notice under the mortgage is a ground for challenging a foreclosure sale within an ejectment action, and a lack of proper notice renders a foreclosure sale void." Ms. *12. The court holds "use of 'may' in reference to the right to initiate a court action does not unequivocally refer to an unconditional right under the mortgage. Therefore, Fannie Mae failed to establish that it was entitled to a judgment as a matter of law with respect to its ejectment claim." Ms. * 18.

The court affirms the dismissal of Rosser's breach of contract counter claim. "[T]he elements of a breach-of-contract claim in Alabama are (1) the existence of a valid contract binding the parties in the action, (2) [the plaintiff's] own performance under the contract, (3) the defendant's nonperformance, and (4) damages." Ms. *20. The court holds Rosser "has not argued on appeal that she performed her obligations under the mortgage. Therefore, Rosser has not demonstrated that the summary judgment denying her claim of breach of contract should be reversed." Ms.**20-21.

CANONS OF JUDICIAL ETHICS

Ex parte W. Perry Hall, [Ms. 1180976, Nov. 6, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Mitchell, J.; Parker, C.J., and Bolin, Wise, Bryan, Mendheim, and Stewart, JJ., concur; Shaw and Sellers, JJ., concur in the result) dismisses a petition for a Writ of Mandamus brought by attorney W. Perry Hall requesting the Court to direct the Mobile Circuit Court, Judge James Patterson presiding, to vacate an order requiring Hall to issue a letter of apology to his clients. While the Court dismisses the petition as moot because the record revealed the circuit court had vacated its order, the Court uses the opinion to reiterate the mandates of Cannons 2.A., and 3.A.(3) of the Canons of Judicial Ethics:

> ...we emphasize that a judge is expected to maintain "the decorum and temperance befitting his office" and should be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity." Canon 2.B., Canon 3.A.(3), Canons of Judicial Ethics. This is because deference to the judgments and rules of courts depends on public confidence in the integrity and independence of judges. Canon 2.A., Canons of Judicial Ethics. "The Canons are not merely guidelines for proper judicial conduct" but have "the force and effect of law." *In re Sheffield*, 465 So. 2d 350, 355 (Ala. 1984). We expect the circuit court to faithfully comply with the Canons at all times in its interaction with the litigants and attorneys who appear before it.

Ms. **3-4.

ENVIRONMENTAL INJURY & STANDING TO SUE

Ex parte Lance R. LeFleur, [Ms. 1190191, Nov. 6, 2020] ___ So. 3d ___ (Ala. 2020). The Court (Wise, J.; Parker, C.J., concurs; Bryan, Sellers, Mendheim, and Stewart, JJ., concur in the result; Bolin and Shaw, JJ., dissent; Mitchell, J., recuses) issues a plurality opinion granting a petition for a Writ of Certiorari filed by LeFleur, Director of the Alabama Department of Environmental Management ("ADEM"), seeking review of the Court of Civil Appeals' decision in *Smith v. LeFleur*, [Ms. 2180375, Oct. 11, 2019] ___ So. 3d ___ (Ala. Civ. App. 2019), in which that court held that ADEM did not have the authority to amend certain rules under the Alabama

Administrative Code permitting the use of alternative-cover materials at landfills.

Concluding the respondents (plaintiffs who lived in proximity to the landfills) did not present substantial evidence establishing they had standing to challenge the alternative-cover materials, the Court reverses the Court of Civil Appeals' judgment and remands the case for a judgment reflecting that the Montgomery Circuit Court properly granted LeFleur's motion for summary judgment on the want-of-standing issue.

COUNTY NOT LIABLE FOR FLOODING IN SUBDIVISION ADJACENT TO COUNTY PARK

Richardson v. County of Mobile; Phelps v. County of Mobile, [Ms. 1190468; 1190469, Nov. 25, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Sellers, J.; Parker, C.J., and Bolin, Wise, Mendheim, Stewart, and Mitchell, JJ., concur; Sellers, J., concurs specially; Shaw and Bryan, JJ., concur in the result in part and dissent in part) affirms in part and reverses in part a summary judgment in favor of Mobile County dismissing claims by homeowners in Cottage Park subdivision. The plaintiffs alleged that the County had a duty to maintain an adequate drainage system in nearby Cottage Park and the County's breach of that duty caused their properties to flood. In affirming the summary judgment dismissing the negligence, nuisance and trespass claims, the Court notes that "the County accepted dedication of the Cottage Park drainage system only 'as it affects' the roads in Cottage Park. [Consequently] unlike Jefferson County in *Long* [*v. Jefferson County*, 623 So. 2d 1130 (Ala. 1993)], the County 'has never operated any [drainage] system for the benefit of the surrounding landowners.'" Ms. *10. The Court also rejects the landowners' alternative argument that the County breached duties to them in approving the plans for the nearby O'Fallon subdivision whose faulty drainage system also caused their properties to flood. The Court explains that a County's duty in approving subdivisions "runs to the public in general, not to individual citizens, and therefore cannot support a cause of action against the County for the flooding of private property." Ms. *24, citing *Rich v. City of Mobile*, 410 So. 2d 385 (Ala. 1982).

The Court notes that the complaint asserts "that the flooded roadways in Cottage Park create a dangerous condition and requests an injunction directing the County to alleviate the flooding in the neighborhood." Ms. *30. The Court reverses the summary judgment on the injunction claim and notes that "[a] county can be held liable for injuries suffered by people using roads that are in an unsafe condition. [*Macon County Commission v.*] *Sanders*, [555 So. 2d 1054 (Ala. 1990)]. We have not been presented with a persuasive argument that a county cannot be enjoined from refusing to remediate the unsafe condition of a road." Ms. *35.

LITIGATION PRIVILEGE – LICENSED PROFESSIONAL COUNSELORS'S BREACH OF CONFIDENTIALITY

Borden v. Malone, [Ms. 1190327, Nov. 25, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Mendheim, J.; Bolin, Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur; Mendheim, J., concurs specially; Parker, C.J., and Mitchell, J., concur in part and concur in the result) reverses in part and affirms in part the Calhoun Circuit Court's dismissal based on litigation privilege of claims against Malone, a licensed professional counselor. The complaint filed by Borden individually and as father and next friend of his minor son, J.B., alleged that in a letter addressed to counsel for Borden's former spouse and "filed in open court" in post-judgment proceeding concerning the custody of J.B., "Malone made numerous false, defamatory, dishonest, malicious, fraudulent, reckless, and unprofessional allegations and misrepresentations about and against Plaintiff Borden." Ms. *4.

The Court first explains that

> Alabama courts treat the litigation privilege as an affirmative defense. See, e.g., *Webster* [*v. Byrd*], 494 So. 2d [31,] 32 [(Ala. 1986)]. Nevertheless, a court may dismiss a complaint for failure to state a claim based on an affirmative defense when the allegations of the complaint, on their face, show that the defense bars recovery. *Douglas v. Yates*, 535 F.3d 1316, 1321 (11th Cir. 2008). 'Thus, a court may dismiss claims based on the litigation privilege where the allegations in the complaint establish that the defendant's conduct occurred under circumstances that amounted to a privileged setting.' *Tolar v.* [*Bradley Arant Boult*] *Cummings*, [No. 2:13-cv-00132-JEO] (N.D. Ala. Aug. 11, 2014 [not selected for publication in Fed. Supp.] ..."

Ms. **12-13, quoting *July v. Terminix Int'l Co., Ltd. P'ship*, 387 F. Supp. 3d 1306, 1315 (S.D. Ala. 2019). While the Court holds that "the trial court correctly applied the litigation privilege to Borden's defamation claims in the context of the custody-modification proceeding," Ms. **25-26, the Court explains "'[s]uch absolutely privileged communications ... must not be published outside the circle of those who must have knowledge of them pursuant to the decision-making process. The recipient of a communication made outside the judicial or quasi-judicial proceeding must have a direct or close relationship to that proceeding or the absolute privilege is lost.'" Ms. *26, quoting *Webster v. Byrd*, 494 So. 2d 31, 35 (Ala. 1986). Citing allegations in Borden's complaint that Malone had published the letter to personnel at J.B.'s school and to other individuals not involved in the judicial proceeding, the Court holds "it remains possible that Borden could prove a set of facts under which the litigation privilege would be lost, depending on what role Malone and the clinic played in disseminating the letter outside the litigation context. Therefore, the trial court erred in dismissing Borden's defamation claims." Ms. *27.

The Court reverses the order dismissing the negligence and wantonness claims alleging that Malone breached the counselor-patient privilege enjoyed by the minor J.B. The Court explains that "Section 34-8A-21 does not contain an express exception to the counselor-patient privilege based on the litigation privilege. Therefore, the common-law litigation privilege must give way to the statutory right of confidentiality. In other words, the litigation privilege cannot insulate Malone and the clinic from a private action based on an unauthorized disclosure of patient confidentiality." Ms. **35-36.

The Court notes that "the complaint contains no specific allegation that Malone violated any confidentiality with respect to Borden [individually]," Ms. *36, and concludes that to the extent that Borden's

negligence/wantonness count seeks to state claims on behalf of Borden individually, the circuit court properly dismissed such claims. Ms. **36-37.

GENERAL PERSONAL JURISDICTION

Ex parte Bradshaw, [Ms. 1190765, Dec. 4, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Shaw, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) issues a writ of mandamus directing the Mobile Circuit Court to dismiss an action against Bradshaw for lack of personal jurisdiction. Bradshaw, a Florida resident, was involved in an automobile accident in Mississippi with Gregory, an Alabama resident.

In considering personal jurisdiction, the Court notes "because Gregory appears to have argued in the trial court that Alabama courts possess only general personal jurisdiction over Bradshaw based on his contacts with our State, we also limit our consideration to that claim. Ms. *13. In concluding Gregory did not establish general jurisdiction, the Court notes

> Bradshaw's ... affidavit and deposition testimony establish[] that he has not lived in Alabama since 2006 and that his contacts with Alabama since that time have been 'sporadic and insubstantial' in nature, including occasional familial or other brief visits amounting to an estimated total of six contacts per year. Bradshaw's testimony, as described above, further indicated that the nature of his contacts was largely derived from a motive of personal benefit to himself rather than an attempt to benefit from the protections of the laws of Alabama or an effort to further conduct aimed at Alabama or its citizens. Further, Bradshaw's alleged tortious conduct, which occurred on the return trip to Florida from a family vacation to visit relatives in Mississippi, indisputably did not arise out of any action by Bradshaw that was directed at Alabama or its residents.

Ms. *14.

The Court concludes "because Gregory, even with the benefit of jurisdictional discovery, does not demonstrate minimum contacts between Bradshaw and Alabama sufficient to establish general jurisdiction, we conclude that an exercise of personal jurisdiction over Bradshaw in this case would not satisfy 'the fair and reasonable test.'" Ms. *18, citing *View-All, Inc. v. United Parcel Serv.*, 435 So. 2d 1198, 1201 (Ala. 1983).

MENTAL CAPACITY TO AGREE TO ARBITRATE

TitleMax of Alabama, Inc. v. Falligant, [Ms. 1190670, Dec. 4, 2020], ___ So. 3d ___ (Ala. 2020). In a plurality opinion, the Court (Mendheim, J.; Bolin, Wise, and Bryan, JJ., concur; Shaw and Sellers, JJ., concur in the result; Parker, C.J., and Stewart, J., dissent; Mitchell, J., recuses) reverses the Jefferson Circuit Court's order carrying to trial whether the plaintiff's ward lacked mental capacity to agree to arbitrate disputes with TitleMax relating to a title loan and subsequent repossession and sale of a vehicle. The opinion reasons

> TitleMax met its burden of proving that a contract affecting interstate commerce existed and that that contract was signed by McElroy and contained an arbitration agreement. The burden then shifted to Falligant to prove that the arbitration agreement is void. Falligant failed to present substantial evidence indicating that McElroy is permanently incapacitated and, thus, lacked the mental capacity to enter into the contracts. Because Falligant has failed to create a genuine issue of fact, the circuit court erred in ordering the issue of McElroy's mental capacity to trial.

Ms. *28.

The opinion explains "there is no evidence explaining the specifics of McElroy's mental illness or how it affects her mental capacities. Falligant's affidavit testimony is conclusory and generally asserts that McElroy is not able to manage her personal financial affairs and that she did not understand the terms of the contracts. But there is no evidence explaining McElroy's mental illness and whether the reasons she is unable to manage her personal finances or understand the terms of the contracts mean that she is unable to understand and comprehend her actions generally." Ms. **26-27.

APPELLATE RECORD MUST CONTAIN DIRECT AND UNEQUIVOCAL AGREEMENT TO EXTEND TIME TO RULE ON POSTJUDGMENT MOTION

Okeke v. Okumu, [Ms. 2190668, Dec. 4, 2020], ___ So. 3d ___ (Ala. Civ. App. 2020). The court (Thompson, J.; Moore, Donaldson, Edwards, and Hanson, JJ., concur) dismisses the husband's appeal from a judgment of divorce because the record did not demonstrate that the parties had consented in "direct and unequivocal terms" to extend the 90-day period for ruling on the husband's postjudgment motion. Ms. *4. While noting that the wife attached to her letter brief in the Supreme Court a copy of a motion purporting to extend the 90-day period, the court reiterated "'attachments to briefs are not considered part of the record and therefore cannot be considered on appeal.'" Ms. *3, quoting *Morrow v. State*, 928 So. 2d 315, 320 n. 5 (Ala. Crim. App. 2004)(some internal quotation marks omitted).

The court also notes it is the appellant's duty to check the record to ensure that a complete record is presented on appeal and that "'[a]n error asserted on appeal must be affirmatively demonstrated by the record, and if the record does not disclose the facts upon which the asserted error is based, such error may not be considered on appeal.' *Martin v. Martin*, 656 So. 2d 846,848 (Ala. Civ. App. 1995).' *Brady v. State Pilotage Comm'n*, 208 So. 3d 1136, 1141 (Ala. Civ. App. 2015)." Ms. *4.

The court also rejects the husband's reliance on an amendment to Rule 59.1 providing that "'[c]onsent to extend the time for a hearing on the postjudgment motion beyond the 90 days is deemed to include consent to extend the time for the trial court to rule on and dispose of the postjudgment motion.'" Ms. *7. The court notes this "language is contained in an amendment to Rule 59.1 that became effective October 1, 2020, long after the time in which the trial court had to rule on the postjudgment motion in this case had expired." *Ibid.*

DELAY IN FILING MOTION TO DISQUALIFY COUNSEL WAIVES OBJECTIONS

Ex parte Petway Olsen, LLC, [Ms. 1190402, Dec.11, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Wise, J.; Parker, C.J., and Shaw, Bryan, Mendheim, and Stewart, JJ., concur; Sellers, J., concurs in the result; Bolin and Mitchell, JJ., dissent) issues a writ of mandamus directing the Jefferson Circuit Court to vacate its order disqualifying the Petway Olsen law firm from representing plaintiff in an action against Mercedes Benz USA ("MBUSA"). MBUSA's motion to disqualify asserted that one of the members of Petway Olsen was a former general counsel of its affiliate, Mercedes-Benz U.S. International, Inc. ("MBUSI"), and was privy to vast amounts of confidential information. Ms. *5. The Court denies the writ and explains

> MBUSA did not join MBUSI's motion to disqualify or file its own motion to disqualify at that time. Rather, it waited approximately17 to 18 months to file its motion to disqualify. Thus, MBUSA did not file its motion to disqualify within a reasonable time after discovering the facts constituting the basis for that motion. Additionally, in its response to MBUSA's motion to disqualify, Bruce Petway asserted that
>
> "[t]he Plaintiffs relied on MBUSA's absence of any objection to Petway [Olsen] representing the Plaintiffs in dismissing MBUSI, believing this would satisfy all concerns that had been raised by any Party to this action."

Therefore, Petway argued, the plaintiffs would be unduly prejudiced if MBUSA's untimely motion to disqualify was granted.

> We conclude that MBUSA did not timely file its motion to disqualify Petway Olsen from representing the plaintiffs. Therefore, it waived any objection to Petway Olsen's representation of the plaintiffs. Accordingly, the trial court erred when it granted MBUSA's motion to disqualify Petway Olsen.

Ms. *12.

SUMMARY JUDGMENT STRIKING DEFENSES TOO SEVERE A SANCTION FOR ALLEGED SPOLIATION

Ex parte The Water Works and Sewer Board of the City of Anniston, [Ms. 1190436, Dec. 11, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Bryan, J.; Bolin, Wise, Sellers, Stewart, and Mitchell, JJ., concur; Shaw, J., concurs in the result; Parker, C.J., and Mendheim, J., dissent) issues a writ of mandamus vacating the Calhoun Circuit Court's order entering partial summary judgment for Plaintiffs as a sanction for spoliation of evidence by The Water Works and Sewer Board of the City of Anniston ("the Board"). Plaintiffs sued the Board alleging that their vacant home was damaged by black mold as a result of the Board failing to properly cut off the water supply to the home. Ms.*2. The Board contended that a cap and lock device placed by a Board employee on the cut-off valve had been tampered with by a third party. Ms. *5. When the Plaintiffs requested the device be produced in discovery, the Board responded that the device had either been used at another residence or scrapped. *Ibid.*

Mandamus review was available because "[t]he trial court's order is, in essence, a discovery sanction 'effectively precluding a decision on the merits ... so that ... the outcome has been all but determined, and the [Board] would be merely going through the motions of a trial to obtain an appeal.' [*Ex parte*] *Ocwen* [*Federal Bank, FSB*], 872 So. 2d 810, 813-14 [(Ala. 2003)]. Thus, we conclude that the Board has demonstrated that, under the particular circumstances of this case, an appeal is not an adequate remedy." Ms. *15.

Given the preference for deciding cases on the merits, the Court holds although the cap and lock device was important evidence, the Plaintiffs had available to them testimony from the Board employee who placed and later removed the cap and lock device from the cut-off valve as well as photographs of the cap and lock device before it was removed. Ms. **19-20. The Court notes the evidence regarding the Board's culpability and emphasizes that "viewing the evidence in the light most favorable to the Board, any culpability imputed to the Board based on Crow's failure to maintain the equipment removed from the Plaintiffs' house was in a relatively low range on the 'continuum of fault.'" Ms. **22-23, citing *Vesta Fire Ins. Corp. v. Milam & Co. Constr.*, 901 So. 2d 84, 98 (Ala. 2004). Consequently, a jury instruction on spoliation would be adequate to protect the Plaintiffs' interests. Ms. *27.

STATUTE OF LIMITATIONS DEFENSE & NO EVIDENCE OF "BONA FIDE INTENT" TO HAVE COMPLAINT IMMEDIATELY SERVED

Varden Capital Properties, LLC v. Alexis Reese, [Ms. 1190692, Dec. 18, 2020] __ So. 3d __ (Ala. 2020). The Court (Sellers, J.; Parker, C.J., and Bolin, Shaw, and Mitchell, JJ., concur; Bryan, Mendheim, and Stewart, JJ., concur in the result) grants an Ala. R. App. P. 5 Petition for Permission to Appeal from an Interlocutory Order of the Montgomery Circuit Court denying a motion for summary judgment based on the statute of limitations, and reverses the Circuit Court's Order and remands for entry of judgment in favor of the defendant. The Court finds that while the victim of a fall on real property timely filed suit on the last day before the two-year statute of limitations expired (Ms. *2), an unexplained delay of 100 days in effectuating service of the complaint demonstrates the plaintiff did not possess the requisite bona fide intent to have the complaint immediately served when she filed it. Citing (Ms. **3-4) *Precise v. Edwards*, 60 So. 3d 228, 230-231 (Ala. 2010), the Court reiterates the principle that "[t]he filing of a complaint commences an action for purposes of the Alabama Rules of Civil Procedure but does not 'commence' an action for purposes of satisfying the statute of limitations." 60 So. 3d at 230-31. Rather, "[f]or statute-of-limitations purposes, the complaint must be filed and there must also exist 'a bona fide intent to have it immediately served.'" *Id.* at 231 (quoting *Dunnam v. Ovbiagele*, 814 So. 2d 232, 237-38 (Ala. 2001)). "The question whether such a bona fide intent exist[s] at the time [a] complaint [is] filed must be determined by an objective standard." *ENT Assocs. of Alabama, P.A. v. Hoke*, 223 So. 3d 209, 214 (Ala. 2016). Absent evidence demonstrating bona fide intent such as when she hired a process server and the

steps taken to discover the proper address for service, the trial court erred in denying the motion for summary judgment based upon such an unexplained delay in service.

WANT OF APPELLATE JURISDICTION & DISMISSAL OF APPEAL

Eleanor Williams v. Mari Properties, LLC, [Ms. 1190555, Dec. 18, 2020] __ So. 3d __ (Ala. 2020). The Court (Stewart, J.; Parker, C.J., and Shaw, Wise, Bryan, Mendheim, and Mitchell, JJ., concur; Sellers, J., concurs in the result; Bolin, J., recuses) dismisses an appeal from an order of the Jefferson County Probate Court after determining *ex mero motu* that the order appealed from was not a valid order capable of supporting an appeal such that the Supreme Court was without appellate jurisdiction to decide the appeal. Finding that the Appellee had invoked the jurisdiction of the Jefferson County Circuit Court under §12-22-20, Ala. Code 1975, by filing a Notice of Appeal to the Circuit Court, that Notice of Appeal divested the Probate Court of jurisdiction such that any further orders entered by the Probate Court were void. Ms. **8-9. Further, because the Appellee failed to obtain leave from the Jefferson County Circuit Court pursuant to Ala. R. Civ. P. 60(b) to file a Rule 60(b)(4) motion to reconsider in the Probate Court, that court did not acquire jurisdiction over the Rule 60(b) motion. Ms. *10, citing *P.I.M. v. Jefferson County Department of Human Resources*, 297 So. 3d 409 (Ala. Civ. App. 2019). Accordingly, because the Jefferson County Probate Court never had jurisdiction to issue the order appealed from, that order was a nullity which would not support an appeal.

JUDICIAL RECUSAL; VALIDITY OF DISMISSAL & RELEASE ORDER; ALABAMA LITIGATION ACCOUNTABILITY ACT, § 12-19-270 ET SEQ.

Newsome, et al. v. Cooper, et al.; Newsome, et al. v. Balch & Bingham, et al., [Ms. 1180252; 1180302, Dec. 18, 2020] ___ So. 3d ___ (Ala. 2020). The Court, *per curiam*, (Parker, C.J.; Bolin, Shaw, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur; Sellers, J., recuses) in consolidated appeals affirms summary judgments entered by the Jefferson County Circuit Court in favor of Cooper, Balch & Bingham, Bullock, Seier and Gottier ("Defendants") and against attorney Burt W. Newsome and his law practice Newsome Law, LLC ("Newsome") on claims by Newsome that the Defendants combined together to have Newsome arrested on a false menacing charge to damage his reputation and law practice. Finding that Newsome failed to produce substantial evidence supporting those claims despite extensive discovery, the Jefferson County Circuit Court's entry of summary judgments in favor of the Defendants was due to be affirmed. Ms. *13. The Court first holds that Newsome failed to demonstrate that the circuit court erred in denying a motion to recuse based upon campaign donations and adverse rulings. Ms. *21.

The Dismissal and Release Order (D&R Order) in the criminal case against Newsome "provided that Newsome's menacing case would be dismissed if, among other things, he released "all civil and criminal claims stemming directly or indirectly from this case...." Ms. **27-28. The Court concludes that Newsome was bound by the release and rejects his numerous arguments seeking to void the release. Ms. *14. Newsome primarily argued that the release "violates §13A-10-7(a), Ala. Code 1975, which provides that '[a] person commits the crime of compounding if he gives or offers to give, or accepts or agrees to accept, any pecuniary benefit or other thing of value in consideration for ... [r]efraining from seeking prosecution of a crime.'" Ms. *28. The Court holds "[t]he Newsome plaintiffs fail to acknowledge, however, that this Court expressly held that '[r]elease-dismissal agreements are not invalid per se' in *Gorman v. Wood*, 663 So. 2d 921,922 (Ala. 1995), another case in which an individual sought to file a law suit after signing a release in exchange for having his criminal charges dismissed.'" *Ibid.*

Finally, the Court concludes there was no error in awarding substantial attorney's fees to Defendants pursuant to §12-19-272(a), Ala. Code 1975, (a trial court "shall" award reasonable attorney's fees and costs when an attorney or party "has brought a civil action, or asserted a claim therein, ... that a court determines to be without substantial justification."). Ms. **45-46.

INVOCATION OF FIFTH AMENDMENT – CONTEMPT SANCTIONS

Willis v. Willis, [Ms. 2190241, Dec. 18, 2020], ___ So. 3d ___ (Ala. Civ. App. 2020). The court (Donaldson, J.; Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur) affirms the Madison Circuit Court's rejection of the mother's invocation of the Fifth Amendment in a contempt proceeding and remands for an express finding of the number of instances of criminal contempt. The court explains that "[t]his is a civil case in which the mother was facing both civil – and criminal – contempt allegations; it is not a 'criminal prosecution' as that term is commonly understood.' [*State ex rel. Payne v. Empire Life Insurance Co.*, 351 So. 2d 538, 542 (Ala. 1977)]. We are not directed to Alabama authority recognizing a witness's right to assert the Fifth Amendment privilege against self-incrimination in civil proceedings unless there is evidence that the witness anticipates that criminal prosecution could result from his or her testimony." Ms. *19.

The circuit court found the mother in both civil and criminal contempt and ordered her imprisoned for 104 days and to pay the father's attorney fees of a little over $11,000. Ms. **23-24. In view of §12-11-30(5), Ala. Code 1975, which limits sanctions for a single instance of criminal contempt to 5 days of incarceration and a $100 fine, the court "reverse[s] this portion of the trial court's judgment and remand(s) the cause for the trial court to specify the number of instances of criminal contempt it found and the corresponding period of incarceration imposed for each finding of criminal contempt." Ms. *28.

The court affirms the award of attorney fees and explains

> The trial court found the mother to be in civil contempt, and the record would support a finding that the mother's actions caused the father to seek the assistance of the trial court for more than two years in an effort to accomplish his goal, i.e., the cessation and removal of derogatory remarks and Facebook posts that were harmful and embarrassing to him and to the child. Under these circumstances,

we conclude that the trial court did not exceed its discretion in ordering the mother to pay attorney fees to the father's counsel as a result of the mother's civil contempt.

Ms. **29-30.

SUBJECT-MATTER JURISDICTION – STATUTORY CONSTRUCTION

Stricklin v. Alabama Cast Iron Pipe Company, [Ms. 2190470, Dec. 18, 2020], ___ So. 3d ___ (Ala. Civ. App. 2020). The court (Edwards, J.; Thompson, P.J., and Donaldson and Hanson, JJ., concur; Moore, J., concurs in the result) reverses the Jefferson Circuit Court's order dismissing for lack of subject-matter jurisdiction the employee's action to set aside an agreement releasing the employer from all future workers' compensation benefits in exchange for the employer's release of its subrogation interest in the employee's third-party action. The employee's guardian argued that he lacked the mental capacity to enter the agreement.

The Court first notes that

> "Jurisdiction is '[a] court's power to decide a case or issue a decree.' Black's Law Dictionary 867 (8th ed. 2004). Subject-matter jurisdiction concerns a court's power to decide certain types of cases. *Woolf v. McGaugh*, 175 Ala. 299, 303, 57 So. 754, 755 (1911) (' "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought." ' (quoting *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 316, 19 L. Ed. 931 (1870))). That power is derived from the Alabama Constitution and the Alabama Code. See *United States v. Cotton*, 535 U.S. 625, 630-31, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)(subject-matter jurisdiction refers to a court's 'statutory or constitutional power' to adjudicate a case)."

Ms. *8, quoting *Ex parte Seymour*, 946 So. 2d 536, 538 (Ala. 2006).

The court concludes the circuit court had subject-matter jurisdiction because "[e]ven if §25-5-292(b) prevents a circuit court from exercising its power to set aside a benefit-review agreement on the grounds of 'fraud, newly discovered evidence, or other good cause" after the expiration of the 60-day period, Stricklin's argument is not that the 2016 benefit-review agreement should be set aside for "other good cause'; instead, Stricklin's argument is that the 2016 benefit-review agreement did not and does not exist as a legal matter because Gray lacked the requisite capacity to form mutual assent and therefore to enter a contract in the first place." Ms *9.

The court also holds that

> Although they provide that a benefit-review agreement is irrevocable after 60 days and prevent a court from setting aside a benefit-review agreement after the expiration of that 60-day period, neither §25-5-290(f)(2) nor §25-5-292(b) addresses the validity of a benefit-review agreement entered into by an incompetent or insane employee; thus, those statutes do not, as ACIPCO suggests, prevent the application of the general law declaring contracts entered into by insane or incompetent persons void. See, e.g., *Baldwin Cnty. v. Jenkins*, 494 So. 2d 584, 588 (Ala. 1986) (explaining that, "[w]here two statutes are related to the same subject and embrace the same matter, a specific or particular provision is controlling over a general provision."

Ms. **11-12.

RECUSAL OF TRIAL JUDGE

Ex parte Derrick J. Williamson, Jr., [Ms. 2200070, Dec. 18, 2020], ___ So. 3d ___ (Ala. Civ. App. 2020). The court (Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur; Donaldson, J., recuses) denies a pro se plaintiff's petition for writ of mandamus seeking recusal of the trial judge presiding over an action asserting injunctive and damage claims arising from the termination of plaintiff's employment with the Alabama Department of Mental Health. In denying the petition, the court explains

> The political contribution made in 2008 by the law firm that employed [defense counsel] Tompkins was not made in "the immediately preceding election" so as to trigger the application of §12-24-3(a). None of the "procedural deficiencies" described by Williamson amount to a basis to question the trial-court judge's impartiality. That is, the trial-court judge was not required to have the hearings on the motions to dismiss recorded, was not required to state his rulings at the conclusion of the hearings, and was not required to make findings of facts or conclusions of law in his orders granting the motions to dismiss, preventing his failure to perform any of those actions from being construed as partiality or bias for or against any party. In addition, neither the fact that the trial-court judge failed to discipline Tompkins for a legal argument she asserted in the motion to dismiss filed on behalf of the individual defendants nor the fact that the trial-court judge and the attorneys for the various defendants are Caucasian are sufficient to raise questions of bias or partiality.

Ms. *20.

VENUE IN MULTI-PLAINTIFF ACTION – FORUM NON CONVENIENS

Ex parte Johnson & Johnson, et al., [Ms. 1190423, Dec. 31, 2020], ___ So. 3d ___ (Ala. 2020). In an action filed by 17 hospitals located throughout the State seeking damages for losses sustained as a result of the opioid epidemic, in a plurality opinion, the Court (Bolin, J.; Wise, Mendheim, and Stewart, JJ., concur; Parker, C.J., and Bryan, J., concur specially; Shaw and Sellers, JJ., dissent; Mitchell, J., recuses) denies the pharmaceutical defendants' mandamus petition challenging venue in Conecuh County and seeking to transfer venue to Jefferson County.

The opinion explains

> To establish that venue is proper in Conecuh County, the plaintiffs have to demonstrate, pursuant to § 6-3-7(c)[Ala. Code,1975], the following conditions
>
> 1. the17 plaintiffs assert a right "to relief jointly, severally, or arising out of the same transaction or occurrence";
> 2. a substantial number of questions of law or material fact common to all those persons will arise in the action;
> 3. the common questions of law

> or material fact will predominate over individualized questions pertaining to each plaintiff;
>
> 4. it is more efficient and economical for all parties that all the plaintiffs' claims are tried together, rather than separately; and
>
> 5. joinder of the parties in one action is in the interest of justice.

Ms. *33.

After noting that the Defendants conceded conditions 4 and 5, the opinion rejects the Defendants' contention that Plaintiffs were required to present evidence as to conditions 1-3 and concludes

> Here, common issues of fact and law predominate because they impact every plaintiff's burden regarding its establishment of liability and entitlement to damages. Additionally, although the fraud claims are reliance-based and reliance usually requires individual inquiries in the class-action context, see *Compass Bank v. Snow*, 823 So. 2d 667, 676-77 (Ala. 2001), in the joinder context, because each plaintiff proves its own case, the individual issues presented in the fraud claims do not spoil the cohesion. ... The materials before us indicate that the plaintiffs established that they had satisfied the exception-triggering conditions for venue to be proper in Conecuh County as to all plaintiffs. Thus, the trial court did not exceed its discretion in this regard ....

Ms. *42.

Turning to Defendants' argument that the *forum non conveniens* statute, § 6-3-21.1, Ala. Code 1975, mandated transfer to Jefferson County, the opinion concludes "the trial court did not exceed its discretion in denying the Defendants' motion for a change of venue. The Defendants did not clearly identify with specificity the evidence that they maintain will be inaccessible if the underlying action proceeds in Conecuh County." Ms. *50. The opinion goes on to note that "[i]n a multiparty case where venue is proper in numerous counties, the burden of demonstrating that a transferee venue is significantly more convenient for the parties and the witnesses is great." Ms. *51.

The opinion also concludes that transfer to Jefferson County is not mandated by the interest of justice because "both Conecuh County and Jefferson County have strong connections to this litigation." Ms. *57.

SCOPE OF ARBITRATION AGREEMENT – EQUITABLE ESTOPPEL

Wayne Farms v. Primus Builders, Inc. and Steam-Co, LLC, [Ms. 1190533, Dec. 31, 2020], ___ So. 3d ___ (Ala. 2020). The Court (Bolin, J.; Wise, Sellers, Mendheim, and Stewart, JJ., concur; Parker, C.J., and Bryan, J., concur in the result; Shaw and Mitchell, JJ., dissent) reverses the Houston Circuit Court's order compelling Wayne Farms to arbitrate claims against Primus Builders, Inc. ("Primus") arising from destruction of Wayne Farms' condenser unit during passivation of the unit's stainless steel.

The Court first rejects Primus's argument that Primus was equitably estopped to compel arbitration and explains

> A party raising the defense of equitable estoppel must show the following:
>
> "(1) That '[t]he person against whom estoppel is asserted, who usually must have knowledge of the facts, communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on;'
>
> "(2) That 'the person seeking to assert estoppel, who lacks knowledge of the facts, relies upon [the] communication;' and
>
> "(3) That 'the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct.'"
>
> *Lambert v. Mail Handlers Benefit Plan*, 682 So. 2d 61,64 (Ala. 1996)(quoting *General Elect. Credit Corp. v. Strickland Div. of Rebel Lumber Co.*, 437 So. 2d 1240, 1243 (Ala. 1983)). Primus has presented no evidence or argument that would satisfy those essential elements of the defense of equitable estoppel so as to prevent Wayne Farms from pursuing its claims in court rather than in arbitration proceedings.

Ms. **13-14.

The Court concludes Wayne Farms' claims were not within the arbitration provision:

> Although Primus was obligated under the Design/Build Agreement with Wayne Farms to perform the installation of the refrigeration unit, it is clear that performance of the passivation work was not an obligation contemplated by Wayne Farms or Primus with respect to the installation of the refrigeration unit under the Design/Build Agreement. Because Wayne Farms and Primus agreed to arbitrate only those disputes arising between them regarding their obligations or performance under the Design/Build Agreement, Wayne Farms cannot be compelled to arbitrate with Primus a dispute arising from the performance of passivation work ....

Ms. *18.

MEDICAL NEGLIGENCE CLAIM AGAINST BOARD-CERTIFIED PHYSICIAN – SIMILARLY SITUATED HEALTHCARE PROVIDER

McGill v. Szymela, [Ms. 1190260, Dec. 31, 2020], ___ So. 3d ___ (Ala. 2020). In a plurality opinion, the Court (Parker, C.J.; Stewart, J., concurs; Bolin, Sellers, and Mendheim, JJ., concur in the result) affirms the Jefferson Circuit Court's exclusion of the Plaintiffs' expert. The McGills alleged that Dr. Szymela, a board-certified oral and maxillofacial surgeon, failed to properly perform Janice McGill's temporomandibular-joint-replacement ("TJR") surgery.

The Court reiterates that "'[i]n determining whether the trial court properly precluded a designated expert from testifying under § 6-5-548 [, Ala. Code 1975], we apply the [excess]-of-discretion standard of review.'" Ms. *5, quoting *Tuck v. Health Care Auth. of Huntsville*, 851So. 2d 498, 501 (Ala. 2002).

The McGills identified Dr. Louis Mercuri, a world-renowned expert in TJR surgery. However, the trial court excluded Dr. Mercuri because of § 6-5-548(c)(4)'s requirement that an expert must have "practiced in [the same] specialty during the year preceding the date that the alleged breach of the standard of care occurred."

Ms. **7-8. Noting that the statute does not define "practiced" and after surveying pertinent cases, the opinion explains

> Read together, the lesson of these cases is clear: in a case involving a medical-malpractice claim based on "hands-on" medical practice, a trial court has wide latitude in deciding whether to admit or exclude as witnesses medical experts whose work in the year preceding the breach was at the margins of active medical practice.
>
> Here, the McGills' claim against Dr. Szymela was based on his "hands-on" medical practice. Dr. Mercuri's most similar work during the year preceding the surgery was his involvement in a TJR surgery in Brazil. However, as related above, the evidence before the trial court contained only vague information about the nature of Dr. Mercuri's participation in that surgery. In view of that absence of clarity, along with the general nature of Dr. Mercuri's post-retirement work discussed above, the trial court could reasonably have concluded that Dr. Mercuri's work during that year did not constitute having "practiced" for purposes of § 6-5-548(c)(4).

Ms. **15-16. The opinion notes that *Dowdy v. Lewis*, 612 So. 2d 1149 (Ala. 1992) has been "interpreted as creating an exception for 'highly qualified' experts, exempting them from the statute's requirement that the expert must have 'practiced' in the same discipline or school of practice. See *HealthTrust, Inc. v. Cantrell*, 689 So. 2d 822, 827 (Ala. 1997); *Tuck*, 851 So. 2d at 502; *Springhill Hosps., Inc. v. Critopoulos*, 87 So. 3d 1178,1189 (Ala. 2011)." Ms. *12 n.4. "The McGills have not relied on *Dowdy* as creating such an exception," so the Court did not consider whether the exception was applicable to Dr. Mercuri's testimony. *Ibid.*

➲ TESTIMONY ANALYZING HISTORICAL CELL SITE DATA IS SCIENTIFIC IN NATURE AND SUBJECT TO RULE 702(B), ALA. R. EVID.

Ex parte George; *Ex parte Watson*, [Ms. 1190490; 1190498, Jan. 8, 2021], ___ So. 3d ___ (Ala. 2021). On certiorari review, the Supreme Court reverses the Court of Criminal Appeals' affirmance of felony murder convictions and explains

> In accordance with the vast majority of courts throughout the nation, … testimony analyzing the historical cell-site data at issue in these cases was scientific testimony. In *Carmichael*, the Eleventh Circuit Court of Appeals stated that "a scientific expert is an expert who relies on the application of scientific principles, rather than on skill- or experience-based observation, for the basis of his opinion." *Carmichael* [*v. Samyang Tire, Inc.*,]131 F.3d 1433,1435 [(11th Cir. 1997)]. Duncan [the State's expert] offered opinion testimony on matters concerning cellular technology that went beyond simply presenting the call-detail records of Watson's and George's cellular telephones. Duncan's testimony was not based on "skill- or experience-based observation," *id.*, but, rather, as explained by Schenk and the extensive authority set out in *Johnson*, *supra*, was based, at least in part, on scientific principles. This conclusion is further supported by the fact that Duncan testified that "she had learned generally how cellular signals connect to cellular towers when calls are placed on a cellular device." Duncan's testimony applied scientific principles to determine the location of Watson and George at the time of Payne's murder. We conclude, based on the above-summarized evidence and authority, that such testimony involves the application of scientific principles; Duncan's testimony was based on more than her training and observations.

Ms. **51-52 (internal citation omitted).

➲ STAY – ALLEGED PARALLEL CRIMINAL PROCEEDINGS

Ex parte Steinberg, etc., [Ms. 1190576, Jan. 15, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Bryan, J.; Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, and Stewart, JJ., concur; Mitchell, J., recuses) issues a writ of mandamus directing the Etowah Circuit Court to lift a stay of a civil action. The circuit court stayed the entire action on the motion of Defendant Daughtery who asserted that because of a federal criminal investigation, a stay of the entire action was necessary to protect her right against self-incrimination. The Court first notes that "[a] petition for a writ of mandamus is a proper method by which to challenge a trial court's decision on a motion to stay a civil proceeding when a party to that proceeding is the subject of a criminal investigation." Ms. *5.

"A party requesting a stay of a civil case on the basis of the Fifth Amendment must 'clearly demonstrate[]' that the party 'is the subject of an ongoing, and overlapping, criminal investigation.'" Ms. *6, quoting *Ex parte Ebbers*, 871 So. 2d 776, 785 (Ala. 2003). The Court vacates the stay because "Daugherty summarily asserted that the allegations against her in the civil action are identical to those in a federal criminal investigation. She further asserted that, although a 'previously issued criminal information issued against [her] has been withdrawn and no indictment has yet to issue, [her] criminal attorney has represented that the threat of indictment is still present.' However, those statements are simply assertions that are unsupported by any evidence; such assertions do not clearly demonstrate the existence of a criminal proceeding parallel to this civil proceeding." Ms. *9, (internal quotation marks omitted).

➲ WAIVER OF RIGHT TO COMPEL ARBITRATION

Health Care Authority for Baptist Health, etc. v. Dickson, [Ms. 1190179, Jan. 15, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Stewart, J.; Parker, C.J., and Wise, J., concur; Bolin and Sellers, JJ., concur in the result) affirms the Autauga Circuit Court's denial of Health Care Authority for Baptist Health ("HCA")'s motion to compel arbitration. The Court concludes HCA waived its right to compel arbitration.

> The appropriate test for determining whether a party has waived its right to arbitration has two prongs: "[(1)] whether the party's actions as a whole have substantially invoked the litigation process and [(2)] whether the party opposing arbitration would be prejudiced if forced to submit its claims to arbitration subsequent to the other party's actions invoking the litigation process." *Hoover General*, 201 So. 3d

at 553. Waiver must be determined "'based on the particular facts of each case.'" Ms. *9, quoting *Voyager Life Ins. Co. v. Hughes*, 841 So. 2d 1216, 1219 (Ala. 2001).

Ms. *9.

The Court rejects HCA's argument that it moved to arbitrate as soon as it discovered that [Plaintiff] Dickson's BCBS policy required arbitration and explains

> The HCA entities might not have obtained a copy of Dickson's BCBS policy until April 29, 2019, but they had from May19, 2017, the day Dickson filed his complaint asserting claims based on the provider agreement, to subpoena BCBS for the policy, to contact Dickson's counsel, or to take any other action necessary to discern whether they could assert the applicability of the arbitration provision in the provider agreement. Instead, the HCA entities waited over two years, after the action had been transferred, after their motion to dismiss had been denied, and after class-related discovery had begun, to inquire into whether Dickson's BCBS policy contained an arbitration provision.

Ms. **15-16.

ABSENCE OF WRITTEN CONTRACT DOES NOT VOID CONTRACT WITH LICENSED HOMEBUILDER

Terrell v. Oak & Alley Homes, LLC, [Ms. 2190175, Jan. 15, 2021], ___ So. 3d ___ (Ala. Civ. App. 2021). The court (Hanson, J.; Thompson, P.J., and Moore and Donaldson, JJ., concur; Edwards, J., concurs in the result) affirms the Dale Circuit Court's judgment awarding breach of contract damages for a building contractor who repaired the defendant's home. The court rejects the homeowner's argument that the absence of a written contract rendered agreement void. The court explains

> § 34-14A-7(f) provides that a licensed residential homebuilder "shall utilize a valid written contract when engaging in the business of residential home building." The Act, however, does not expressly render an oral contract entered by a licensed residential homebuilder void or unenforceable. That the legislature did not include such a provision is instructive, because the Act does expressly prohibit the enforcement of residential-homebuilding contracts under certain other circumstances. For example, § 34-14A-14(d), Ala. Code 1975, provides that "[a] residential homebuilder, who does not have the license required, shall not bring or maintain any action to enforce the provisions of any contract for residential homebuilding which he or she entered into in violation of" the Act. The fact that the Act expressly prohibits the enforcement of residential-homebuilding contracts under those expressly enumerated circumstances indicates that the same penalty was not intended with regard to oral contracts entered into by licensed residential homebuilders. *See, e.g., Jefferson Cnty. v. Alabama Criminal Justice Info. Ctr. Comm'n*, 620 So. 2d 651, 658 (Ala. 1993) ("Under the principle of *expressio unius est exclusio alterius*, a rule of statutory construction, the express inclusion of requirements in the law implies an intention to exclude other requirements not so included.").

Ms. **14-15.

ORDER DENYING MTD NOT SUBJECT TO MANDAMUS REVIEW

Ex parte Michael Grayson Brown, [Ms. 1190962, Jan. 22, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Sellers, J.; Parker, C.J., and Bolin, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur; Shaw, J., concurs in the result) denies Brown's petition for a writ of mandamus seeking interlocutory review of the Lee Circuit Court's denial of Brown's 12(b)(6) motion to dismiss. Declining to expand interlocutory review of denial of motions to dismiss asserting a statute of limitations, the Court explains

> This case does not involve a statute of repose, which, unlike a statute of limitations, is not subject to equitable tolling. See *Pinigis v. Regions Bank*, 977 So. 2d 446 (Ala. 2007). Rather, this case presents a novel issue regarding whether equitable tolling should apply when Beamon first commenced an action in a federal court that lacked subject-matter jurisdiction and then commenced an action, asserting the same claims, in state court five days after the applicable limitations period had expired. The circuit court made no ruling on that issue. Rather, it concluded that Beamon, having the burden of proof, should have the opportunity to offer evidence establishing that equitable tolling is warranted under the specific circumstances presented. Thus, this case does not fit squarely with *Ex parte Hodge*, [153 So. 3d 734 (Ala. 2014)] in which, from the face of the complaint, it was apparent that the defendants were entitled to the relief they sought. Accordingly, Brown has not established a clear legal right to the dismissal of the complaint filed in the circuit court pursuant to Rule12(b)(6).

Ms. *8.

MANDAMUS REVIEW OF ORDER COMPELLING DISCOVERY

Ex parte Harbor Freight Tools USA, Inc., [Ms. 1190969, Jan. 22, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Mendheim, J.; Parker, C.J., and Shaw, Wise, Bryan, Stewart, and Mitchell, JJ., concur; Bolin and Sellers, JJ., concur in the result) denies as premature Harbor Freight's petition for a writ of mandamus seeking discovery of other similar incidents in a product liability action. Citing decisions such as *Ex parte Horton Homes, Inc.*, 774 So. 2d 536, 540 (Ala. 2000), the Court reiterates that "a party must file with the trial court what amounts, in substance, to a motion for a protective order that notifies the trial court of the errors that the party believes the trial court committed in granting the motion to compel." Ms. *17. The Court explains

> To the extent that Harbor Freight seeks mandamus relief on the grounds that the trial court's July16, 2020, order granting the Websters' motion to compel failed to limit discovery (1) to a specific period; (2) to incidents occurring in a specific geographic area; (3) to documents concerning only item number 60644; and (4) to accidents involving item number 60644 being used to transport people, the petition is premature because Harbor Freight failed to seek a protective order raising the need for those limitations on discovery after the trial court entered the order granting the Websters' motion

to compel. To the extent that Harbor Freight seeks mandamus relief based on the trial court's implicit denial of its motion to adopt its proposed protective order [limiting use of the information to the Websters' case], Harbor Freight has failed to demonstrate that any information that might be disclosed by providing the requested documents warrants the protections outlined in the proposed protective order. Accordingly, the petition is due to be denied.

Ms. **23-24.

SUBMISSION OF QUESTION OF LAW TO JURY REVERSIBLE ERROR

Nix and City of Haleyville v. Myers, [Ms. 1170224, Jan. 22, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Stewart, J.; Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur; Shaw, Bryan, Mendheim, and Mitchell, JJ., dissent) reverses the Marion Circuit Court's judgment entered on a $1,000,000 jury verdict against the City of Haleyville and Haleyville Police Officer Anthony Nix. Myers alleged that officer Nix acted negligently by passing another motorist in a no passing zone. As a result, the vehicle in front of Myers slammed on brakes causing Myers to lose control of his motorcycle. Ms. *4.

Officer Nix and the City argued that § 32-5A-7, Ala. Code1975, permitted Officer Nix to violate traffic rules, including § 32-5A-86, no passing zone, at the time of Myers's accident because Officer Nix was responding to an emergency call. Ms. *7. Over defense objections, the circuit court admitted the statutes into evidence and permitted the jury to have copies of § 32-5A-7 and § 32-5A-86 in the jury room. Ms. *11.

The Court reverses and remands for a new trial

> The question whether Officer Nix's crossing of the double-yellow lines in the no-passing zone, which is prohibited by § 32-5A-86, was permitted by § 32-5A-7(b)(4), which allows the driver of an authorized emergency vehicle, when responding to an emergency call, to "[d]isregard regulations governing direction of movement or turning in specified directions," was a legal question for the trial court to resolve. See *Ex parte Coleman*, 145So. 3d 751, 759 (Ala. 2013)(holding that "whether a single 'yelp' of a siren constitutes 'making use of an audible signal' under § 32-5A-7 is a question of statutory interpretation, which presents only a question of law"). Because that question was a question of law, the jury should not have been permitted to consider whether Officer Nix violated § 32-5A-86 or whether Officer Nix's actions were authorized by§ 32-5A-7, and the jury should not have had a copy of those statutes as evidence.

Ms. **11-12.

OFFICE OF INDIGENT DEFENSE SERVICES – SOVEREIGN IMMUNITY – THIRD-PARTY STANDING

Butler v. Parks and Porter, [Ms. 1190043, Jan. 22, 2021], ___ So. 3d ___ (Ala. 2021). Holding that the claims in question are barred by sovereign immunity, the Court (Mitchell J.; Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur; Shaw, Bryan, Sellers, and Mendheim, JJ., concur in the result) reverses the Montgomery Circuit Court's class certification order in an action filed by Attorneys Parks and Porter against the State Finance Director and Director of the Office of Indigent Defense Services asserting that the officials improperly refused to pay bills for fees that exceeded statutory payment caps.

The Attorneys sought a judgment "declaring that the omission of the good-cause exception in the 2011 amendment to § 15-12-21 [which created the Office of Indigent Defense Services] was a drafting error, which they say can be "cured" by reading that exception back into the statute, and that trial judges have inherent authority to order payment of fees to satisfy constitutional requirements. Alternatively, they asserted that the lack of a good-cause exception in § 15-12-21 violates the federal and state constitutions by, among other things, depriving indigent defendants of their rights to a fair trial and effective assistance of counsel." Ms. **5-6.

The Court first concludes the State officials enjoyed sovereign immunity because they were enforcing the law as written. Ms. *9. The Court rejects the drafting error argument, and explains "writing words into a statute that are not there – is the province of the Legislature and not within the judicial power. See Ala. Const. 1901 (Off. Recomp.), Art. III, § 42 ('[T]he judicial branch may not exercise the legislative or executive power.')." Ms. *11.

The Court also concludes the Attorneys lacked third-party standing to attack the constitutionality of the statute on behalf of indigent criminal defendants. Borrowing the analysis of third-party standing in *Kowalski v. Tesmer*, 543 U.S.125 (2004), the Court explains that "the Attorneys have not specifically identified whose rights have been violated – rather, their complaint refers to indigent defendants generally. That is not sufficient to establish a close relationship with any individual whose rights have allegedly been violated." Ms. *18. The Attorneys also failed to meet Kowalski's second requirement for third-party standing because they "have not shown a hindrance to indigent defendants' seeking an appellate or post conviction remedy." Ms. **19-20.

FICTITIOUS PARTIES PRACTICE – RELATION BACK

Ex parte McCoy, et al., [Ms. 1190403, Jan. 22, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Mitchell J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, and Mendheim, JJ., concur; Sellers, J., concurs in the result; Stewart, J., dissents) issues a writ of a mandamus directing the Jefferson Circuit Court to dismiss defendant police officers substituted for fictitious parties in a wrongful death action arising from a police case where the fleeing suspect crashed into the plaintiff's decedent. Ms. *2. The Court holds that Griffin was unable to invoke Rule 9(h) and the relation back principle of Rule 15(c) as to the officers substituted after the statute of limitations expired

> [W]hile we may take Griffin at his word that he did not actually know the identities of the defendant officers when he filed his original complaint, that actual ignorance does not entitle him to rely upon Rules 9(h) and15(c) and to avoid the bar of the statute of limitations if he nonetheless should have known of their identities based on the facts available to him at the time. A review of the materials submitted to

this Court demonstrates that Griffin should have been able to identify the defendant officers by name before filing his original complaint. The notices of claim filed with Trafford and Warrior establish that, within three months of Olvey's death, his estate had retained legal counsel and had decided to pursue legal action against Trafford and Warrior based on their police officers' allegedly negligent pursuit of Wright. But there is nothing in the materials filed with this Court indicating that any steps were taken to identify those officers over the next 21 months before Griffin's original complaint was filed. Rather, it appears that Griffin never asked Trafford and Warrior to identify the officers who were on duty the night in question before initiating this action – despite the fact that he had known for almost two years that Trafford and Warrior employed officers who had taken part in the pursuit of Wright.

Ms. **12-13.

CONTRIBUTORY NEGLIGENCE PER SE – SUBSEQUENT NEGLIGENCE – WANTONNESS

Pruitt v. Oliver, [Ms. 1190297, Jan. 29, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Mendheim, J.; Bolin, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur; Parker, C.J., concurs in part and concurs in the result; Shaw, J., concurs in the result) affirms the Jefferson Circuit Court's summary judgment dismissing Pruitt's wantonness claim and reverses the summary judgment on his negligence claim. Pruitt was injured when his motorized wheelchair was struck from the rear by Oliver's vehicle as Pruitt was driving the wheelchair in the left lane of Palisades Boulevard.

Although the Court concludes that Pruitt's motorized wheelchair was a "motor vehicle" as defined by § 32-1-1.1(33), Ala. Code 1975, and was not in compliance with a number of statutes, the Court reverses the summary judgment based on contributory negligence per se

> As this Court has explained: "[N]ot every violation of a statute or an ordinance is negligence per se. This Court has stated that four elements are required for violation of a statute to constitute negligence per se: (1) The statute must have been enacted to protect a class of persons, of which the plaintiff is a member; (2) the injury must be of the type contemplated by the statute; (3) the defendant must have violated the statute; and (4) the defendant's statutory violation must have proximately caused the injury." *Parker Bldg. Servs. Co. v. Lightsey*, 925 So. 2d 927, 931 (Ala. 2005) (emphasis added). If Pruitt had been traveling in a car with a broken taillight or a faulty horn, instead of in a motorized wheelchair, it could not be concluded as a matter of law that those deficiencies were the proximate cause of the accident with Oliver. Likewise, it cannot be concluded as a matter of law that the accident would not have occurred if Pruitt's wheelchair had been equipped with more reflective devices, brake lights, headlamps, brakes, or a horn.

Ms. **33-34.

The Court also reverses the circuit court's conclusion that there was not a triable issue on Oliver's subsequent negligence. The Court acknowledges that "'[t]he doctrine of subsequent negligence on the part of the plaintiff or defendant is not to be applied in a case where the manifestation of peril and the defendant's actual knowledge of the plaintiff's peril catastrophe are so close in point of time as to leave no room for preventive effort.'" Ms. **35-36, quoting *Owen v. McDonald*, 291 Ala. 572, 575, 285 So. 2d 79, 81 (1973). However, the Court reiterates that "'actual knowledge [of plaintiff's peril] may be inferred from proof that the driver was looking in the direction of the victims and that her view was unobstructed.'" Ms. *37, quoting *Dees v. Gilley*, 339 So. 2d 1000, 1002 (Ala. 1976). And explains further that while "'knowledge of the plaintiff's peril in a subsequent negligence case may not be 'imputed' to a defendant; the defendant's knowledge may, however, be 'inferred,' if such an inference would be reasonable under the totality of the circumstances.' *Zaharavich* [*v. Clingerman*, 529 So. 2d 978, 980 (Ala. 1988)]. Ms. *38.

The Court affirms the summary judgment dismissing the wantonness claim. While reiterating that "speed, coupled with other circumstances, may amount to wantonness," Ms. *40, the Court concludes

> The additional circumstances Pruitt contends are evidence of wantonness really just amount to evidence of inadvertence: Oliver's alleged failure to see Pruitt despite clear visibility because of the streetlight and the reflective devices on Pruitt's wheelchair. There is no evidence indicating that Oliver committed a conscious act or had knowledge that an injury would probably result from his manner of driving.

Ms. **41-42.

IMPROPER REBUTTAL CLOSING ARGUMENT – UIM – REPLY-IN-KIND

Allstate Ins. Co. v. Ogletree, [Ms. 1180896, Feb. 5, 2021], ___ So. 3d ___ (Ala. 2021). In a per curiam opinion, the Court (Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur; Sellers, J., concurs in the result) reverses a judgment on a jury verdict against Allstate which awarded punitive damages based on the tortfeasor Bice driving while intoxicated. Ms. *2. In rebuttal closing argument, Ogletree argued that if the jury awarded punitive damages, Allstate could secure reimbursement of the punitive damages award from the deceased tortfeasor's estate. Ms. *4. This was improper argument because 1) as the underinsured motorist carrier, Allstate had no right of subrogation because it had consented to its insured Ogletree's settlement with the estate for the liability limits and 2) no evidence had been offered or admitted on the issue. Ms. *7.

Regarding alleged improper closing argument, the Court first observes

> Although the trial court has wide latitude in ruling on such claims, its discretion is not boundless. See *Hayden v. Elam*, 739 So. 2d 1088, 1093 (Ala. 1999). We may 'reverse the trial court's denial of a [motion for a] mistrial based on improper statements [if] it appears from the record that the statements were probably prejudicial to the complaining party.' *Precise Eng'g, Inc. v. LaCombe*, 624 So. 2d 1339, 1342 (Ala. 1993). In that vein, 'where the improper argument is prejudicial and is based on facts not in evidence, the

> erroneous overruling of objection to the argument by the trial court would be cause for reversal.' *Southern Ry. Co. v. Jarvis*, 266 Ala. 440, 446, 97 So. 2d 549, 554 (1957).

Ms. *6.

On the issue of prejudice, the Court holds

> [W]hile we ordinarily defer to a trial court's rulings on what is allowed in closing arguments, it is clear that substantial prejudice resulted from the erroneous statements of counsel. See *Seaboard* [*Coast Line Ry. Co. v. Moore*], 479 So. 2d [1131, 1136 (Ala. 1985)] at 1136. The jury awarded Ogletree $60,000 in punitive damages after hearing the misleading proposition that Allstate could recover from the estate of the actual wrongdoer, Bice. Moreover, the 'fact' of recovery from Bice's estate was not in evidence.

Ms. **10-11. The Court emphasizes that "the prejudicial effects of the incorrect statements were exacerbated by the fact that they occurred during Ogletree's rebuttal closing argument, denying Allstate the opportunity to correct them." Ms. *11.

The Court rejects Ogletree's reply-in-kind justification, and holds that "[t]he key, however, is that the right of counsel to fight fire with fire materializes only when the other side breaks the rules first." Ms. *15. Allstate's assertion that the purpose of punitive damages would not be served because Bice was deceased was proper argument. Ms. **15-16.

SUFFICIENCY OF MANDAMUS PETITION – RULE 21(A)(1)(E), ALA. R. APP. P.

Ex parte Boone Newspapers, Inc., et al., [Ms. 1190995, Feb. 12, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur; Sellers, J., dissents) denies Defendants' mandamus petition seeking recusal of Dallas Circuit Judge Collins Pettaway, Jr. in Toure's defamation action. The petition was deficient for a number of reasons, for example,

> The Newspaper defendants state that Judge Pettaway served as counsel for Toure and her husband, Hank Sanders, in *Sanders v. Smitherman*, 776 So. 2d 68 (Ala. 2000). However, the Newspaper defendants did not raise this issue in their motion for recusal. See *Ex parte Montgomery Cnty. Dep't of Hum. Res.*, 294 So. 3d 811, 818 n. 4 (Ala. Civ. App. 2019) (noting that petitioner may not raise in mandamus petition new questions that he did not raise in motion for recusal). Further, beyond mentioning this issue in their statement of facts, the Newspaper defendants do not develop this issue in their petition. They do not include it in their statement of reasons why the writ of mandamus should issue, and they do not cite any case for the proposition that a judge must recuse himself if he represented a party two decades earlier. Thus, even construing the Newspaper defendants' brief mention of this issue as an argument, it fails under Rule 21(a)(1)(E), Ala. R. App. P., which requires a mandamus petition to contain "[a] statement of the reasons why the writ should issue, with citations to the authorities and statutes relied on." (Emphasis added.) "[F]ailure to cite authority supporting an argument [in a mandamus petition] 'provides this Court with an ample basis for refusing to consider th[e] argument[] ....'" *Ex parte Price*, 47 So. 3d 1221, 1225 (Ala. 2010) (quoting *Ex parte Showers*, 812 So. 2d 277, 281(Ala. 2001)).

Ms. **4-5.

SUMMARY JUDGMENT PROCEDURE

Riddle v. Everett, [Ms. 2190817, Feb. 12, 2021], ___ So. 3d ___ (Ala. Civ. App. 2021). The court (Moore, J.; Thompson, P.J., and Edwards, Hanson, and Fridy, JJ., concur) reverses the Winston Circuit Court's order dismissing a declaratory judgment action. The circuit court clearly considered matters outside of the pleadings in dismissing the action, consequently

> The motion to dismiss was converted into a summary-judgment motion, and both sides should have been given a reasonable opportunity to submit affidavits and other extraneous proof to avoid their being taken by surprise through conversion of the motion to dismiss to one for a summary judgment, see *Drees* [*v. Turner*, 10 So. 3d 601, 603 (Ala. Civ. App. 2008)], ..., particularly in light of the revival of the Everetts' original motion to dismiss, which had previously been denied, in the present case. We therefore reverse the trial court's July 14, 2020, judgment insofar as it dismissed the Winkleses' complaint, and we remand the cause for further proceedings consistent with this opinion.

Ms. **13-14.

PARTIES MAY NOT DIVEST ALABAMA COURTS OF JURISDICTION OVER WORKERS' COMPENSATION CLAIM ARISING FROM INJURY IN ALABAMA

Sellers v. Venture Express, Inc., [Ms. 2190165, Feb. 12, 2021], ___ So. 3d ___ (Ala. Civ. App. 2021). The court (Hanson, J.; Thompson, P.J., and Moore, Edwards, and Fridy, JJ., concur) reverses the Cullman Circuit Court's dismissal without prejudice of Sellers's action seeking workers' compensation benefits for an on-the-job injury occurring in Alabama. The employment contract stipulated that Sellers's employment was localized in Tennessee and that Tennessee would have exclusive jurisdiction over any claim seeking workers' compensation benefits. Ms. *3. The court holds "notwithstanding the parties' agreement that Sellers's employment was to be principally localized in Tennessee, § 25-5-35(g) gave Sellers the right to seek compensation benefits under the Act for injuries sustained in Alabama, and such jurisdiction could not be divested by agreement of the parties." Ms. *19.

Also of note is the court's explanation that

> "Typically, the dismissal of an action without prejudice lacks sufficient finality to support an appeal." *Edwards v. Hanger*, 197 So. 3d 993, 995 (Ala. Civ. App. 2015). Nevertheless, "when the applicable statue of limitations would bar a subsequent action, the dismissal becomes, in effect, a dismissal with prejudice." *Edwards*, 197 So. 3d at 995 (quoting *Guthrie v. Alabama Dep't of Labor*, 160 So. 3d 815, 816-17 n. 2 (Ala. Civ. App. 2014)). At the time Sellers's claim against Venture Express was dismissed, any subsequent workers'

compensation action, whether filed under Alabama or Tennessee law, would have been barred by the corresponding applicable statute of limitations."

Ms. *4 n.1.

TIMELINESS OF MANDAMUS PETITION

Ex parte M.D., [Ms. 2200205, Feb. 12, 2021], ___ So. 3d ___ (Ala. Civ. App. 2021). The court (Fridy, J.; Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur) dismisses as untimely the mother's mandamus petition challenging the Montgomery Juvenile Court's refusal to allow her to file a petition to modify custody. The court explains

> [T]he mother waited 47 days from the date she was notified that the Montgomery Juvenile Court would not permit the filing of the modification petition to file the petition for a writ of mandamus in this court. Thus, she failed to file the petition within a "presumptively reasonable time" from the date of the action that she seeks to challenge, i.e., the date the Montgomery Juvenile Court determined it would not accept the modification petition for filing. In addition, the mother failed to include in her mandamus petition "a statement of circumstances constituting good cause for the appellate court to consider the petition, notwithstanding that it was filed beyond the presumptively reasonable time," as required byRule21(a)(3), Ala. R. App. P. As a result, we conclude that the mother's petition for a writ of mandamus is not properly before us, and the petition is dismissed as untimely.

Ms. **7-8.

CRIMINAL CONTEMPT SANCTIONS FOR VIOLATING MEDIATION ORDER

Allstate Property and Cas. Ins. Co. v. Harbin, [Ms. 1190792, Feb. 19, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Shaw, J.; Parker, C.J., concurs; Bryan, J., concurs in the result; Mendheim and Mitchell, JJ., concur in part and concur in the result) reverses the challenged portion of the Madison Circuit Court's imposition of over $620,000 in sanctions against Allstate for violation of a mediation order. Allstate challenged the circuit court's order to the extent it imposed sanctions in excess of the $57,516.36 Plaintiff Harbin sought in his motion for sanctions. Ms. *14.

The standard of review of a finding of criminal contempt is

> "The essential elements of the criminal contempt for which punishment has been imposed ... are that the court entered a lawful order of reasonable specificity, [the alleged contemnor] violated it, and the violation was wilful. Guilt may be determined and punishment imposed only if each of these elements has been proved beyond a reasonable doubt." [*United States v.*] *Turner*, 812 F.2d [1552] at 1563 [11th Cir. 1987]. The *Turner* court also stated, quoting *Gordon v. United States*, 438 F.2d 858, 868 n. 30 (5th Cir. 1971):
>
> "The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty, and that such evidence is inconsistent with any reasonable hypothesis of his innocence. Such is the substantial evidence test." ... "[A]bsent an abuse of discretion, or unless the judgment of the trial court is unsupported by the evidence so as to be plainly or palpably wrong, the determination of whether a party is in contempt is within the sound discretion of the trial court." *C.D.M. v. W.B.H.*, 140 So. 3d 961, 967 (Ala. Civ. App. 2013).

Ms. **23-24 (some internal quotation marks omitted). The Court reverses the finding that Allstate violated the mediation order

> The only evidence offered by Harbin ... was the apparent lack of back-and-forth settlement negotiations during mediation, a fact that Harbin terms "the archetype of failing to send someone with authority." However, Allstate's alleged failure to extend a settlement offer to Harbin during mediation does not demonstrate a lack of settlement authority. ... Instead, as Allstate's counsel also explained to the trial court, it became apparent that the parties' settlement expectations were so disparate that compromise was unlikely. ... Because the record before this Court fails to show any evidence indicating that Allstate violated the trial court's mediation order, the trial court exceeded its discretion by issuing the sanctions Allstate challenges.

Ms. **28-29.

DEFENDANT FAILED TO PRESERVE CHALLENGES TO SUFFICIENCY OF AND ADMISSION OF EVIDENCE IN NON-JURY TRIAL

Murphy Oil, USA, Inc. v. English, [Ms. 1190610, Feb. 19, 2021], ___ So. 3d ___ (Ala. 2021). In a plurality opinion, the Court (Mitchell, J.; Parker, C.J., concurs; Shaw, Bryan, and Mendheim, JJ., concur in the result) affirms the Monroe Circuit Court's judgment in favor of Plaintiff English following a non-jury trial. The opinion first reiterates that "[a]s a general matter, 'we do not review a trial court's denial of a summary-judgment motion following a trial on the merits.' *Mitchell v. Folmar & Assocs., LLP*, 854 So. 2d 1115, 1116 (Ala. 2003). Instead, 'the sufficiency of the evidence at trial would be the significant question on appeal.' *Superskate, Inc. v. Nolen*, 641 So. 2d 231, 233 (Ala. 1994)." Ms. *5. Because there was no argument or evidence that English had changed her testimony at trial based on experience gained during the summary-judgment proceeding, there was no basis for the Court to depart from the usual rule of declining to review the denial of a summary-judgment following a trial on the merits. Ms. *6.

Murphy Oil's failure to move for a new trial doomed its effort to challenge the sufficiency of the evidence on appeal

> "In a 'nonjury case in which the trial court makes no specific findings of fact, a party must move for a new trial or otherwise properly raise before the trial court the question relating to the sufficiency or weight of the evidence in order to preserve that question for appellate review.' *New Props., L.L.C. v. Stewart*, 905 So. 2d 797, 801-02 (Ala. 2004). This case was tried without

> a jury. The trial court made no oral factual findings at the trial, nor did it make any specific written factual findings in its judgment in favor of English. And the record does not indicate that Murphy Oil moved for a new trial or otherwise raised the alleged insufficiency of the evidence to the trial court after the judgment was entered. Thus, the issue of whether English provided sufficient evidence to support the judgment is not properly before us."

Ms. *7. Finally, the opinion rejects Murphy Oil's contention that the trial court improperly admitted evidence of medical expenses because it failed to object to admission of the evidence of the reasonableness and necessity of the treatment English received. The deposition testimony of English's treating orthopedic surgeon and the surgeon's testimony provided a sufficient evidentiary foundation for admission of the medical expenses. Ms. *8.

NEGLIGENCE PER SE NOT ESTABLISHED AS A MATTER OF LAW – SPOLIATION – INADEQUACY OF COMPENSATORY DAMAGES – FUTURE MEDICALS

Goins v. Advanced Disposal Services Gulf Coast, LLC, et al., [Ms. 1190393, Feb. 19, 2021], ___ So. 3d ___ (Ala. 2021). In a plurality opinion, the Court (Mitchell, J.; Parker, C.J., concurs; Shaw, Bryan, and Mendheim, JJ., concur in the result) affirms the Mobile Circuit Court's judgment on a jury verdict awarding train conductor Goins $175,000 in compensatory damages for injuries he suffered when the locomotive he was operating collided with an Advanced Disposal garbage truck at a railroad crossing. Dissatisfied with the damages award, Goins appealed raising a number of alleged errors. Ms. *2.

The opinion rejects Goins's argument that the trial court should have entered judgment as a matter of law for him based on negligence per se arising from the garbage truck driver failing to stop, look, and listen at the crossing and explains "[w]hile we have imposed a duty on motorists to 'stop, look, and listen' when crossing railroad tracks, see *Ridgeway v. CSX Transp., Inc.*, 723 So. 2d 600, 605 (Ala. 1998), and have been willing to deem a party contributorily negligent as a matter of law in some instances when that duty was breached, we have not expanded that rule to establish negligence as a matter of law that would bar a defendant from presenting an affirmative defense." Ms. *10. In addition to evidence showing that Goins was looking away from the crossing prior to the collision, the opinion also emphasizes evidence "that Goins wiped the data from the cell phone that he had at the time of the accident when he knew that the defendants had asked to inspect the phone. Under our case law, the jury was permitted to draw an inference of contributory negligence from Goins's spoliation of the cell-phone data, so we cannot hold that Goins's negligence claim was established as a matter of law." Ms. **11-12.

The opinion likewise rejects the challenge to the adequacy of the compensatory damages award and reiterates settled law 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.' *Helena Chem. Co. v. Ahern*, 496 So. 2d 12, 14 (Ala. 1986). At its core, Goins's argument on appeal is that because he presented uncontroverted evidence of damages, he was entitled to all the damages he requested. But the jury had ample evidence before it to doubt both Goins's credibility and the assumptions on which his damages claims were based." Ms. *13. The opinion also rejects plaintiff's contention that the circuit court erred in excluding evidence of his need for future back surgery. "Dr. Savage, was specifically asked in his deposition about Goins's need for future surgeries as a result of the accident, and Dr. Savage did not testify that, to a reasonable degree of medical certainty, Goins would need future surgeries." Ms. *16.

STATE-AGENT IMMUNITY – ELEMENTARY EDUCATION

Moore v. Tyson and Douthit, [Ms. 1190547, Feb. 19, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Stewart, J.; Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur) affirms the Madison Circuit Court's summary-judgment order dismissing on immunity grounds negligence and wantonness claims against Tyson, an elementary school teacher, and Douthit, the principal. The minor plaintiff was injured when another student caused her to fall in the classroom and strike her head. Ms. *2. Tyson had left the students in her class unattended while she went to the restroom. *Ibid.*

The Court first holds that "the claims asserted against Tyson and Douthit in their official capacities are barred by Article I, §14." Ms. *23, citing *Ex parte Montgomery County Board of Education*, 88 So. 3d 837 (Ala. 2012).

The Court affirms the summary judgment for Tyson based on state-agent immunity and explains "[t]here is no detailed rule or regulation that prohibited Tyson from leaving the students in her classroom unattended in order to use the restroom. The statements from the policy manual and the SafeSchools videos submitted by the Moores are 'general statements' and 'are not the type of detailed rules or regulations that would remove [Tyson's] judgment in the performance of required acts.'" Ms. **18-19, quoting *Ex parte Spivey*, 846 So. 2d 322, 333 (Ala. 2002).

The Court also affirms the dismissal of Douthit because "the Moores do not support their assertions that Douthit is not entitled to State-agent immunity with sufficient authority or argument...." Ms. *21.

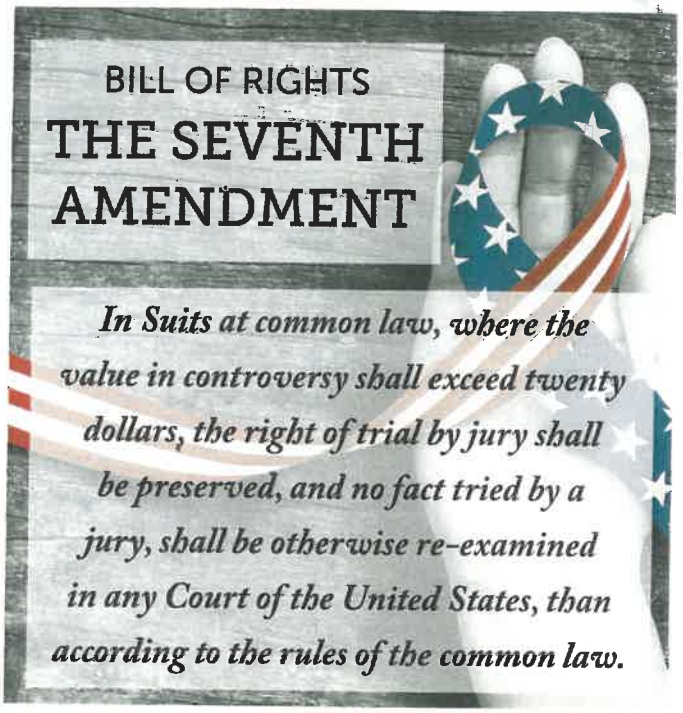
ORDER DECLARING JUDGMENT SATISFIED IS APPEALABLE

1st Franklin Fin. Corp. v. Pettway, [Ms. 2190871, Feb. 26, 2021], ___ So. 3d ___ (Ala. Civ. App. 2021). The court (Edwards, J.; Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur) reverses the Jefferson Circuit Court's order dismissing 1st Franklin Financial Corporation's ("1st Franklin") appeal from the Jefferson District Court's order granting Pettway's motion for relief from judgment asserting that the judgment was paid in full as a result of prior garnishments. The circuit court dismissed 1st Franklin's appeal on the ground that it was from a nonfinal

judgment. The court reverses and first explains " [a]n appellate court looks to the essence of a motion, not necessarily its title, to determine how the motion is to be considered under the Alabama Rules of Civil Procedure." Ms. *4 (internal quotation marks omitted).

> The court concludes the order was a final judgment because "A final judgment is a terminative decision by a court of competent jurisdiction which demonstrates there has been complete adjudication of all matters in controversy between the litigants within the cognizance of that court. That is, it must be conclusive and certain in itself." *Jewell v. Jackson & Whitsitt Cotton Co.*, 331 So. 2d 623, 625 (Ala. 1976). ... The district court's April 2020 order granting Pettway's motion to deem the 2012 judgment satisfied adjudicated the issue presented to it and settled the matters in controversy between the parties by terminating Pettway's duty to make further payments on the 2012 judgment and by prohibiting1st Franklin from collecting on any outstanding balance of that judgment, assuming one exists.

Ms. **6-7.



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