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# SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

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Dahyalal H. Patel

v.

Ashish Shah, individually and in his capacity as president, treasurer, director, and controlling shareholder of Subway No. 43092, Inc.; Ramesh Shah, individually and in his capacity as secretary of Subway No. 43092, Inc.; and Subway No. 43092, Inc.

Appeal from Madison Circuit Court  
(CV-12-901307)

PARKER, Chief Justice.

Dahyalal H. Patel filed an action seeking to enforce his ownership rights as a shareholder in Subway No. 43092, Inc.

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("the corporation"), against shareholder Ashish Shah ("Shah"); Shah's father, Ramesh Shah ("Ramesh"); and the corporation (hereinafter referred to collectively as "the Shah defendants"). The Madison Circuit Court entered a summary judgment in favor of the Shah defendants. Patel appeals. We affirm in part and reverse in part.

### I. Facts and Procedural History

In 2007, Shah, the owner of eight Subway restaurants in and around Madison County, prepared to open a ninth Subway restaurant in Huntsville ("the restaurant"). In July 2008, Shah formed the corporation for the purposes of owning and operating the restaurant. Shah owned 90 percent of the stock of the corporation and Ramesh owned 10 percent.

In 2008, Patel met with Shah about Shah's plan to open the restaurant. At some point, Patel and Shah orally agreed that Patel would purchase a 25 percent ownership interest in the corporation. Because Shah estimated that start-up costs for the restaurant would be \$240,000, Patel agreed to purchase a 25 percent interest in the corporation for \$60,000, payable in monthly installments.<sup>1</sup> After the restaurant opened in

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<sup>1</sup>The record does not indicate on what date the parties agreed that Patel's monthly payments would begin.

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December 2008, Shah began making periodic distributions of profits to Patel.

In April 2009, Shah orally agreed to sell Patel an additional five percent interest for \$12,000, which Patel paid that month. In December 2009, Patel began making the monthly payments on the purchase price for his original 25 percent interest, and he eventually paid the \$60,000. Accordingly, Patel owned a 30 percent interest in the corporation, and he continued to receive distributions of profits of the restaurant.

In September 2012, Patel sued the Shah defendants, alleging that Shah had misrepresented the start-up costs for the restaurant in calculating the price of Patel's 25 percent interest. Patel alleged that the actual start-up costs were \$140,000 rather than \$240,000, as Shah had represented. Accordingly, Patel alleged that he either overpaid for his interest or acquired more than a 50 percent interest in the corporation. Patel further alleged that the distributions of profits he received were not proportional to his interest, even assuming that his interest was 30 percent. In addition, he claimed that Shah had withheld Patel's share of franchise-

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sales commissions that the corporation received from its franchisor, Doctor's Associates, Inc. Finally, Patel alleged that Shah had engaged in illegal business practices such as hiring illegal immigrants and filing false tax returns. Patel's complaint asserted claims of breach of contract and unjust enrichment. Patel also asserted several tort claims, including claims of shareholder oppression, civil conspiracy, breach of fiduciary duties, fraudulent suppression, misrepresentation, conversion, waste, statutory violations,<sup>2</sup> and fraud. The Shah defendants asserted several counterclaims against Patel. The circuit court consolidated Patel's case with cases filed by other persons against Shah relating to the ownership and operation of other restaurants. The restaurant was subsequently sold to a third party in 2016, and the proceeds were placed in escrow pending final resolution of Patel's action.

The Shah defendants moved for a summary judgment in Patel's case based on their affirmative defense that Patel's breach-of-contract claim was barred by the Statute of Frauds,

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<sup>2</sup>Patel made no argument in his brief regarding his tort claim based on alleged statutory violations. Accordingly, that claim is deemed abandoned on appeal. Tucker v. Cullman-Jefferson Ctys. Gas Dist., 864 So. 2d 317, 319 (Ala. 2003).

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§ 8-9-2, Ala. Code 1975. The Shah defendants also argued that Patel's tort claims were barred by the applicable statutes of limitations and that, if they were not time-barred, there were no genuine issues of material fact as to those claims. The circuit court granted the motion for a summary judgment. The circuit court later dismissed the Shah defendants' counterclaims on August 20, 2018. Patel filed his notice of appeal on October 1, 2018. The other consolidated cases remain pending in the circuit court.

## II. Standard of Review

We review a summary judgment de novo. McClendon v. Mountain Top Indoor Flea Market, Inc., 601 So. 2d 957, 958 (Ala. 1992).

"A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of that party. To defeat a properly supported summary judgment motion, the nonmoving party must present "substantial evidence" creating a genuine issue of material fact -- "evidence of such weight and quality that fair-minded persons in the exercise of impartial

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judgment can reasonably infer the existence of the fact sought to be proved."'"

Pritchett v. ICN Med. Alliance, Inc., 938 So. 2d 933, 935 (Ala. 2006) (quoting Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994)).

### III. Discussion

#### A. Jurisdiction

Before addressing the merits of Patel's appeal, we first address this Court's jurisdiction to consider the appeal while the other consolidated cases remain pending below. By granting the Shah defendants' summary-judgment motion and dismissing the Shah defendants' counterclaims against Patel, the circuit court resolved all the claims and disposed of all the parties in Patel's case. At that time, Patel could not immediately appeal the judgment in his case without an order from the circuit court certifying the judgment as final under Rule 54(b), Ala. R. Civ. P. See Hanner v. Metro Bank & Protective Life Ins. Co., 952 So. 2d 1056, 1061 (Ala. 2006) (holding that "a trial court must certify a judgment as final pursuant to Rule 54(b), Ala. R. Civ. P., before a judgment on fewer than all the claims in a consolidated action can be appealed").

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However, 11 days after the circuit court dismissed the counterclaims, after having earlier entered the summary judgment, in Patel's case, this Court overruled Hanner in Nettles v. Rumberger, Kirk & Caldwell, P.C., [Ms. 1170162, August 31, 2018] \_\_\_ So. 3d \_\_\_ (Ala. 2018). We held that, "[o]nce a final judgment has been entered in a case, it is immediately appealable, regardless of whether it is consolidated with another still pending case." Nettles, \_\_\_ So. 3d at \_\_\_. After Nettles was released, Patel filed his notice of appeal in his case. Hence, this case presents the question whether Patel was entitled to appeal under Nettles or was required to wait under Hanner for the disposition of the other cases that had been consolidated with his.

In overruling Hanner, we noted that "we are overruling clear precedent on which other litigants may have relied -- in determining, for example, if and when a notice of appeal is due. In such a case, we think a prospective-only application of today's decision is appropriate." Nettles, \_\_\_ So. 3d at \_\_\_ n.1 (emphasis added). In light of our reliance-based declaration that Nettles would be prospective only, Nettles applies only to cases in which (a) the judgment was entered

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after Nettles was released or (b) the appellant filed a timely notice of appeal under Rule 4, Ala. R. App. P., after Nettles was released. Here, Patel did the latter; he did not rely on Hanner. Therefore, Nettles applies to Patel's appeal, which was properly filed without waiting until the circuit court resolved the other consolidated cases. Accordingly, this Court has jurisdiction over Patel's case.

### B. Analysis

In support of the motion for a summary judgment, the Shah defendants asserted that Patel's breach-of-contract claim was barred by the Statute of Frauds because the claim was based on oral agreements to purchase stock. The Shah defendants also argued that Patel's tort claims were barred by the applicable statutes of limitations and that, if they were not time-barred, there was no genuine issue of material fact as to those claims. Patel contends that his claims were not barred by the Statute of Frauds or by a statute of limitations and that there were genuine issues of material fact as to his tort claims.

#### 1. Statute of Frauds



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Patel's breach-of-contract claim was based on his status as a shareholder in the corporation. Thus, his claim hinges on the enforceability of his two oral stock-purchase agreements with Shah.

Regarding stock-purchase agreements, the Statute of Frauds provides:

"In the following cases, every agreement is void unless such agreement or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party to be charged therewith or some other person by him thereunto lawfully authorized in writing:

". . . .

"(8) ... [E]very agreement for the sale or purchase of securities other than through the facilities of a national stock exchange or of the over-the-counter securities market."

§ 8-9-2(8), Ala. Code 1975.

The Shah defendants contend that, because the stock-purchase agreements between Patel and Shah were oral agreements for the sale of securities outside an organized securities market, they are unenforceable under § 8-9-2(8). Accordingly, the Shah defendants contend that Patel has no enforceable ownership rights in the corporation.

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Patel, however, contends that the Statute of Frauds does not apply here because he has fully performed under the agreements. In Alabama,

"there is a historic common law principle that a party to a parol contract, which would ordinarily fall within the statute of frauds, who has so far performed the contract as to render it a fraud for the other party to repudiate the agreement, is not prevented by the statute from recovering damages for its breach. Stated differently, the oral contract is not within the statute of frauds to the extent that it has been performed."

Jenelle Mims Marsh, Alabama Law of Damages § 17:11 (6th ed. 2012) (footnotes omitted). Further, "[a] contract is executed, and not voided by the Statute of Frauds, if the plaintiff has fully performed his obligation to the defendant and sues the defendant to obtain the defendant's performance or the completion of the defendant's performance." Ramsay v. State, 829 So. 2d 146, 155 (Ala. 2002).

Patel contends that he fully paid the amounts agreed to in the oral stock-purchase agreements. Accordingly, he contends that the full-performance exception removes those agreements from the Statute of Frauds.

Patel relies on Ingram v. Omelet Shoppe, Inc., 388 So. 2d 190 (Ala. 1980), a case in which this Court applied the full-

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performance exception to enforce an oral stock-purchase agreement. Ingram was decided before the repeal in 1997 of Alabama's former Statute of Frauds relating to the purchase of stock, § 7-8-319, Ala. Code 1975. That statute provided:

"A contract for the sale of securities is not enforceable by way of action or defense unless:

"(a) There is some writing signed by the party against whom enforcement is sought ...; or

"(b) Delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment ...."

388 So. 2d at 195 (emphasis added).

The Legislature repealed § 7-8-319, effective January 1, 1997. Act No. 96-742, Ala. Acts 1996. At the same time, however, the Legislature amended § 8-9-2, by adding subsection (8), imposing the previously quoted requirement that agreements "for the sale or purchase of securities other than through the facilities of a national stock exchange or of the over-the-counter securities market" be in writing. Accordingly, although the Legislature eliminated the writing requirement for certain kinds of organized-market securities,

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it retained the requirement for stock-purchase agreements generally.<sup>3</sup>

The Shah defendants contend that, when the Legislature added subsection (8) to § 8-9-2, it chose not to adopt the exceptions that had been included in § 7-8-319, including the full-performance exception. Accordingly, the Shah defendants argue that the full-performance exception to the writing requirement no longer exists in the context of stock purchases.

Patel, on the other hand, contends that the full-performance exception is not merely a statutory exception that was abolished by the repeal of § 7-8-319 but, rather, is a

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<sup>3</sup>In Act No. 96-742, the Legislature also added § 7-8-113, Ala. Code 1975, which eliminated the writing requirement for stock-purchase agreements generally. See Act No. 96-742, § 1, adding § 7-8-113; see also § 7-8-102(a)(15), Ala. Code 1975 (defining "security"), and § 7-8-103(a), Ala. Code 1975 (further defining "security"). Section 8-9-2(8), however, provides that a writing is required for non-organized-market securities "[n]otwithstanding Section 7-8-113." Thus, as to such securities, § 8-9-2(8) expressly prevails over § 7-8-113. See § 7-8-113, Alabama Comment ("[Section 8-9-2(8)] explicitly applies notwithstanding [§ 7-8-113]. Thus, an agreement by a shareholder of a closely held corporation to sell all or part of his shares continues to be subject to the statute of frauds, notwithstanding the elimination of a statute of frauds requirement as to transactions in the organized securities market.").

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common-law exception that applies to all provisions of § 8-9-2, the Statute of Frauds. See Marsh, Alabama Law of Damages § 17:11 (referring to full-performance exception as a "historic common law principle").

Consistent with Patel's argument, this Court has applied the full-performance exception to contracts that fall within § 8-9-2 despite the absence of statutory language requiring it. Specifically, this Court has applied the exception to contracts that, by their terms, are not to be performed within one year (§ 8-9-2(1)), Ramsay, 829 So. 2d at 155, Scott v. Southern Coach & Body Co., 280 Ala. 670, 673, 197 So. 2d 775, 777 (1967), Erswell v. Ford, 208 Ala. 101, 102, 94 So. 67, 68 (1922); to promises to answer for the debt of another (§ 8-9-2(3)), Ramsay, supra; to contracts upon consideration of marriage (§ 8-9-2(4)), Andrews v. Jones, 10 Ala. 400, 426 (1846); and to contracts conveying an interest in real property (§ 8-9-2(5)), Fowler v. Oliver, 540 So. 2d 54, 55 (Ala. 1984), Talley v. Talley, 248 Ala. 84, 87-88, 26 So. 2d 586, 589 (1946). Our precedent shows that the common-law full-performance exception applies to all contracts within the scope of § 8-9-2. Consequently, when the Legislature in 1997

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added stock-purchase agreements to § 8-9-2, it did not need to expressly reference the full-performance exception.

Because the stock-purchase agreements here were fully performed by Patel, the Statute of Frauds did not apply to them. Accordingly, the circuit court erred in entering a summary judgment for the Shah defendants on Patel's breach-of-contract claim based on the Statute of Frauds.<sup>4</sup>

## 2. Statute of limitations

In the motion for a summary judgment, the Shah defendants argued that Patel's tort claims were barred by the applicable statutes of limitations. The parties agree that those claims, with the exception of Patel's conversion claim, are subject to a two-year limitations period. See § 6-2-38(1), Ala. Code 1975.<sup>5</sup> The parties differ, however, on when that two-year period began running -- that is, when the claims accrued.

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<sup>4</sup>To the extent that the circuit court relied on the Statute of Frauds in entering a summary judgment as to Patel's unjust-enrichment claim, we similarly conclude that that claim was not barred.

<sup>5</sup>It is undisputed that Patel's conversion claim is subject to a six-year statute of limitations. See § 6-2-34(3), Ala. Code 1975.

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The Shah defendants contend that Patel's claims accrued in 2008 or, at the latest, 2009. The Shah defendants rely on Patel's allegations in his complaint that the tortious acts and omissions had been occurring "[s]ince opening the [restaurant]" and "[s]ince the formation of [the corporation]." The Shah defendants point out that Shah formed the corporation and opened the restaurant in 2008 and that Patel first obtained an ownership interest in 2009. Accordingly, Shah argues that the claims accrued by 2009 at the latest.

In contrast, Patel contends that his claims accrued in 2011, when he alleges he discovered Shah's wrongdoing. Patel invokes the tolling provision of § 6-2-3, Ala. Code 1975:

"In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action."

Patel failed, however, to present evidence to support the application of § 6-2-3.

"[T]he burden is upon he who claims the benefit of § 6-2-3 to show that he comes within it." Amason v. First State Bank of Lineville, 369 So. 2d 547, 550 (Ala. 1979). To make

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that showing in opposition to a defendant's summary-judgment motion, the plaintiff must submit evidence indicating (1) how and when he discovered the facts of the claim, (2) what prevented him from discovering those facts before the limitations period ended, and (3) why, based on his knowledge during the limitations period, he had no reason to conduct an inquiry that would have led him to those facts. See 369 So. 2d at 550.

In Amason, the complaint on its face showed that the limitations period had expired on at least some of the plaintiff's claims. 369 So. 2d at 550. However, the plaintiff failed to show any of the above facts required for tolling the statute of limitations under § 6-2-3, other than when he discovered the facts of the claim. 369 So. 2d at 551.

Like the complaint in Amason, Patel's complaint, on its face, showed that the two-year limitations period had expired on his tort claims. Thus, in opposition to the Shah defendants' motion for a summary judgment, it was incumbent on Patel to submit evidence that the tolling provision of § 6-3-2 rescued his claims from the running of the statute of limitations. Yet Patel did not submit any evidence to meet



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the above requirements for tolling. Instead, he merely alleged in his response to the motion for a summary judgment that his "claims based in fraud -- fraudulent suppression, misrepresentation, and fraud -- did not accrue until [he] discovered the fraud" and that his breach-of-fiduciary-duty claim "did not begin to run until [he] discovered damage from the breach."<sup>6</sup>

Because Patel failed to submit to the circuit court any evidence of how or when he discovered the Shah defendants' actions giving rise to his tort claims, of what prevented Patel from discovering those actions before the expiration of the statute of limitations, and of why he had no reason to previously conduct an inquiry that would have led him to discover those actions, he cannot invoke the tolling provision of § 6-2-3. Accordingly, we affirm the summary judgment on those claims.

### 3. Genuine issues of material fact as to conversion claim

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<sup>6</sup>In his response to the Shah defendants' motion for a summary judgment, Patel argued that his oppression and waste claims were continuing wrongs and, thus, were not barred by the statute of limitations. However, Patel abandoned those claims on appeal because he has not argued that they were not barred by the statute of limitations. Tucker v. Cullman-Jefferson Ctys. Gas Dist., 864 So. 2d 317, 319 (Ala. 2003).

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In their summary-judgment motion, the Shah defendants argued that Patel's conversion claim, based on Shah's allegedly keeping Patel's share of profits, was not legally viable. Specifically, the Shah defendants argued that non-specific money cannot be converted.

""[G]enerally, an action will not lie for the conversion of money"" unless ""the money at issue is capable of identification."" Only when money is earmarked or otherwise identifiable, such as enclosed in a container like a bag or chest, does an action lie for conversion of money."

Hensley v. Poole, 910 So. 2d 96, 101 (Ala. 2005) (citations omitted).

In response, Patel contends that the converted money was identifiable because, he says, the proceeds from the sale of the restaurant were segregated in a designated account. This argument fails because the account Patel relies on contained the proceeds from the sale of the restaurant, not the allegedly converted profits and commissions from the income of the restaurant. Therefore, Patel fails to show error in the summary judgment as to conversion of profits and commissions.

Alternatively, Patel contends that he alleged conversion not of money, but of his ownership interest in the corporation. This argument fails because Patel did not allege

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conversion of his ownership interest in his complaint. Rather, Patel merely alleged that the Shah defendants failed to pay him his fair share of the profits, failed to convey to him an ownership interest equal to that for which he paid, and converted profits, revenues, bonuses, assets, and property of the corporation. Patel cannot now expand the scope of his allegations to defeat the summary judgment. Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment."). Consequently, Patel fails to show error in the summary judgment as to conversion of his ownership interest in the corporation.

However, Patel also argues that he alleged conversion of the corporation's personal property. In his complaint, Patel alleged that the Shah defendants "wrongfully and maliciously converted ... the ... property of the Corporation." The Shah defendants ignored this aspect of Patel's conversion claim in their summary-judgment motion. Thus, conversion of corporate property was outside the scope of the motion. Therefore, the circuit court erred in entering a summary judgment on the issue of conversion of the corporation's property. See Henson

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v. Mobile Infirmary Ass'n, 646 So. 2d 559, 562 (Ala. 1994) ("[T]he trial court could not properly enter the summary judgment as to all of [the plaintiff's] claims. Counts one and two of the complaint ... were not before the trial court on the [defendant's] motion."). Accordingly, we affirm the summary judgment on Patel's conversion claim insofar as it relates to profits, commissions, and Patel's ownership interest in the corporation, and we reverse the summary judgment insofar as it relates to the conversion of corporate property.

#### IV. Conclusion

For the foregoing reasons, we affirm the circuit court's summary judgment in favor of the Shah defendants on Patel's tort claims, other than conversion, and on Patel's conversion claim insofar as Patel alleged conversion of profits, commissions, and his ownership interest in the corporation. We reverse the summary judgment on Patel's breach-of-contract and unjust-enrichment claims and on his conversion claim insofar as Patel alleged the conversion of corporate property. This case is remanded for further proceedings.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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Wise, Mendheim, and Mitchell, JJ., concur.

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

Sellers, J., dissents.

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SHAW, Justice (concurring in the result).

In this case, which is one of four consolidated cases, the trial court's summary judgment is deemed final and an immediate appeal is available under the authority of Nettles v. Rumberger, Kirk & Caldwell, P.C., [Ms. 1170162, Aug. 31, 2018] \_\_\_ So. 3d \_\_\_ (Ala. 2018). I dissented in Nettles, and this appeal, in my opinion, illustrates why that case was incorrectly decided.

In the trial court, this case was consolidated with three other actions against one of the defendants below, Ashish Shah. Those other actions, which are still pending in the trial court, appear to contain multiple issues of law and fact that are common with those in the instant case.

This Court's decision in Hanner v. Metro Bank & Protective Life Insurance Co., 952 So. 2d 1056, 1061 (Ala. 2006), held that "a trial court must certify a judgment as final pursuant to Rule 54(b), Ala. R. Civ. P., before a judgment on fewer than all the claims in a consolidated action can be appealed." I have previously discussed the rationale of Hanner:

"Rule 54(b) [, Ala. R. Civ. P.,] acts as a gateway preventing both appellate review in a piecemeal

fashion and the risk of inconsistent results arising from a later ruling in the still pending matters. Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 363 (Ala. 2004), and Clarke-Mobile Ctys. Gas Dist. v. Prior Energy Corp., 834 So. 2d 88, 95 (Ala. 2002). Further, the need for an immediate appeal might be mooted by future developments or rulings in the remaining claims pending in the trial court. Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1265 (Ala. 2010). The trial court is thus afforded discretion to determine whether there is a just reason--or not--for an immediate appeal. Ragland v. State Farm Mut. Auto. Ins. Co., 238 So. 3d 641, 644 (Ala. 2017).

"This was the rationale for adopting the rule in Hanner:

" "In our view, the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions unless a 54(b) certification is entered by the district court. This leaves the discretion with the court which is best able to evaluate the [e]ffect of an interim appeal on the parties and on the expeditious resolution of the entire action."

"Hanner, 952 So. 2d at 1061 (quoting Huene v. United States, 743 F.2d 703, 705 (9th Cir. 1984))."

Nettles, \_\_\_ So. 3d at \_\_\_ (Shaw, J., dissenting).

This Court's decision in Nettles, however, overruled Hanner and held that "[o]nce a final judgment has been entered in a case, it is immediately appealable, regardless of whether it is consolidated with another still pending case." Nettles,

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\_\_\_ So. 3d at \_\_\_. Thus, under Nettles, the trial court's summary judgment in the instant case in favor of the Shah defendants was immediately appealable.

In my dissent in Nettles, I stated:

"Under the new rule adopted in the main opinion, an appeal of a judgment in a case that is part of a consolidated action might be so intertwined with the still pending matters that all the concerns that require the denial of a Rule 54(b) certification--the danger of inconsistent results, piecemeal appellate review, and the potential for the judgment to be mooted--could exist."

Nettles, \_\_\_ So. 3d at \_\_\_\_ (Shaw, J., dissenting). This is what has occurred in this case. This case on appeal and the actions still pending below with which it was consolidated are so closely intertwined that separate appellate adjudication poses an unreasonable risk of inconsistent results.<sup>7</sup> Therefore, a decision in the appeal before us, at least to the extent we affirm the summary judgment, presents the danger of inconsistent results if the similar claims still pending in the trial court are ultimately decided differently. Despite

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<sup>7</sup>Thus, any Rule 54(b), Ala. R. Civ. P., certification entered by the trial court, which would have been required for this appeal if Hanner still applied, would be inappropriate.



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that fact, Nettles provides that the appeal can proceed; I therefore concur in the result.

Stewart, J., concurs.