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OUR MISSION *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 October 22, 2021 through March 18, 2022

PERFECTING AN APPEAL OF AN ARBITRATION AWARD

Wynlake Residential Association, Inc., et al. v. Hulsey, [Ms. 1200242, Oct. 22, 2021] __ So. 3d __ (Ala. 2021). The Court (Bryan, J.; Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ., concur) dismisses as untimely an appeal from the Shelby Circuit Court's judgment on an arbitration award entered in favor of Timothy Hulsey against Wynlake Residential Association, Inc. and related parties. The Court first explains the unique procedure for appealing an arbitration award:

> "Rule 71B establishes the following procedure for the appeal of an arbitration award(1) A party must file a notice of appeal with the appropriate circuit court within 30 days after service of the notice of the arbitration award; (2) the clerk of the circuit court shall promptly enter the award as the final judgment of the circuit court; (3) the aggrieved party may file a Rule 59, Ala. R. Civ. P., motion to set aside or vacate the judgment, and such filing is a condition precedent to further review by any appellate court; (4) the circuit court grants or denies the Rule 59 motion; and (5) the aggrieved party may then appeal from the circuit court's judgment to the appropriate appellate court."

Ms. *5, quoting *Guardian Builders, LLC v. Uselton*, 130 So. 3d 179, 181 (Ala. 2013).

The Defendants filed a timely notice of appeal in the Shelby Circuit on October 30, 2019 and filed a Rule 59 motion that same day. Ms.*5. However, the clerk did not enter the award as the final judgment of the circuit court until September 2, 2020. *Ibid.* When the judgment was entered, that quickened the Defendants' Rule 59 motion making it ripe for decision by the circuit court and triggering the 90-day period in Rule 59.1. Ms. *6, citing Rule 71B(f). "The disposition of any such [Rule 59] motion is subject to civil and appellate rules applicable to orders and judgments in civil actions."

The circuit court's January 20, 2021 order purporting to deny the Rule 59 motion was entered 50 days after the court lost jurisdiction to rule on the motion when it was denied by operation of law on December 1, 2020. Ms. *8. Because the Defendants had until January 12, 2021 to file a notice of appeal of the denial of their Rule 59 motion, their appeal filed on January 20, 2021 was untimely. Ms. *9.

IMPROPER 54(B) CERTIFICATION

Alabama Insurance Underwriting Association v. Skinner, [Ms. 1200132, Oct. 22, 2021] __ So. 3d __ (Ala. 2021). The Court (Mitchell, J.; Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur) concludes that the Mobile Circuit Court exceeded its discretion in certifying as a final judgment under Rule 54(b) a summary judgment in favor of Suzanne Dockery in a declaratory judgment action filed by Alabama Insurance Underwriting Association ("AIUA") invoking an arson exclusion contending that it had no obligation to Suzanne and her husband James Dockery for a fire loss at their home in Chunchula. The circuit court granted summary judgment for Suzanne "ruling that: (1) the language of the insurance policy did not exclude coverage to Suzanne based on the alleged arson of James acting alone; and (2) to the extent the policy purported to do so, that exclusion was void as against public policy under *Hosey v. Seibels Bruce Group*, 363 So. 2d 751 (Ala. 1978)." Ms. * 3. The Court vacates the Circuit Court's subsequent 54(b) certification of the summary judgment in favor of Suzanne. Reiterating its settled disfavor of piecemeal appellate review, the Court emphasizes that

> Piecemeal appeals are particularly inappropriate when the issues on appeal may be mooted by resolution of the remaining claims.... And that is the case here. The circuit court's summary judgment holds that Suzanne is owed coverage even if James started the fire. That holding makes a difference only if, in its still-pending claim against James's estate, AIUA establishes that James did start the fire.

Ms. *5.

SEPARATE TRIALS – MANDAMUS PROCEDURE

Ex parte Tiffina McQueen, [Ms. 1200594, Oct. 29, 2021] __ So. 3d __ (Ala. 2021). The Court (Wise, J.; Parker, C.J., and Shaw, Bryan, and Mitchell, JJ., concur; Bolin, Sellers, Mendheim, and Stewart, JJ., concur in the result) issues a writ of mandamus directing the Montgomery Circuit Court to vacate its order providing that Tiffina McQueen's compulsory counterclaims would be tried separately from the claims raised by Plaintiff Yukita A. Johnson. The Court holds that "[n]othing in the facts before this Court demonstrates that separate trials on the claims in Johnson's complaint and the claims in the counterclaim would further the convenience of the parties, would avoid prejudice to the parties, or would be 'conducive to expedition and economy.' Rule 42(b).

Accordingly, the trial court exceeded its discretion when it ordered separate trials in this case." Ms. *13.

The Court also refused to consider Johnson's arguments based on matters raised in Johnson's Reply to the Counterclaim that was not filed before entry of the order requiring separate trials. The Court reiterates

> "This Court has repeatedly recognized that in 'mandamus proceedings, "[t]his Court does not review evidence presented for the first time"' in a mandamus petition. [*Ex parte*] *Ebbers*, 871 So. 2d [776,] 794 [(Ala. 2003)] (quoting *Ex parte Ephraim*, 806 So. 2d 352, 357 (Ala. 2001)). In reviewing a mandamus petition, this Court considers 'only those facts before the trial court.' *Ex parte Ford Motor Credit Co.*, 772 So. 2d 437, 442 (Ala. 2000). Further, in ruling on a mandamus petition, we will not consider 'evidence in a party's brief that was not before the trial court.' *Ex parte Pike Fabrication, Inc.*, 859 So. 2d 1089, 1091 (Ala. 2002)." *Ex parte McDaniel*, 291 So. 3d 847, 852 (Ala. 2019). Because Johnson's reply to the petitioner's counterclaim was not filed before the trial court entered its order directing separate trials, we will not consider that reply.

Ms. *12, n. 3.

PREMISES LIABILITY – OPEN AND OBVIOUS DEFENSE – BLIND PLAINTIFF

Owens v. Ganga Hospitality, LLC, [Ms. 1200449, Oct. 29, 2021] __ So. 3d __ (Ala. 2021). The Court (Sellers, J.; Bolin, Wise, and Stewart, JJ., concur; Parker, C.J., concurs in part and concurs in the result) affirms the Montgomery Circuit Court's summary judgment dismissing Janene Owens's negligence and wantonness claims against a hotel. Janene, who describes herself as blind, fell over a concrete platform painted red in clear contrast to the surrounding area. Ms. *2. The Court cites settled law that "[t] here is no duty to remedy, or to warn about, open and obvious hazards. *Dolgencorp, Inc. v. Taylor*, 28 So. 3d 737, 742 (Ala. 2009)." Ms. *6. And holds that Janene's visual impairment does not impose on the hotel a duty to remedy or to warn her about open and obvious hazards. The Court explains

> There are a number of ways a person with Owens's level of visual impairment could be injured by alleged hazards that are otherwise open and obvious and, in fact, pose almost no danger at all to people with normal vision. Deciding whether an allegedly dangerous condition is open and obvious based on the point of view of a blind plaintiff might transform premises owners into insurers against all injuries suffered by people with significant visual impairment, no matter how harmless the condition is to people without that impairment.

Ms. *11.

JUDICIAL IMMUNITY – CITATION OF AUTHORITY IN MANDAMUS PETITIONS

Ex parte Tom F. Young, Jr., et al., [Ms. 1200184, Oct. 29, 2021] __ So. 3d __ (Ala. 2021). The Court (Stewart, J.; Parker, C.J., and Sellers, Mendheim, and Mitchell, JJ., concur; Bolin, Shaw, Wise, and Bryan, JJ., concur in the result) issues a writ of mandamus to the Randolph Circuit Court requiring dismissal of Danny Foster's claims against a current and former circuit judge arising from actions of the judges in criminal cases against Foster. The Court holds that

> The doctrine of judicial immunity shields judicial officers from liability for actions taken while acting in their judicial capacity, and it extends even to actions taken by judicial officers that are done in error, maliciously, or in excess of their authority. See *Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Ex parte City of Greensboro*, 948 So. 2d at 542; and *Almon v. Gibbs*, 545 So. 2d 18, 20 (Ala. 1989). As this Court has stated, "[a] judge acting in his or her judicial capacity must enjoy freedom from risk of a lawsuit, lest the administration of justice be inhibited by fear of personal liability." *City of Bayou La Batre v. Robinson*, 785 So. 2d 1128, 1133 (Ala. 2000)(citing *Dennis v. Sparks*, 449 U.S. 24, 31 (1980)).

Ms. *12.

The Court denies mandamus petitions filed by Chris May, Randolph Circuit Clerk, and her former employee Lindley. The Court acknowledges that "judicial immunity extends to the discretionary judicial acts of clerks of court and magistrates." Ms. *15. However, the Court concludes "Foster's claim against May and Lindley seeks to compel the performance of an administrative duty [because] they have not made any assertion that they exercised any judgment or discretion in regard to processing Foster's requests for records." Ms. *19.

The Court also observed with respect to mandamus proceedings: "[t]his Court has stated that, '[i]f anything, the extraordinary nature of a writ of mandamus makes the Rule 21 requirement of citation to authority even more compelling than the Rule 28 requirement of citation to authority in a brief on appeal.' *Ex parte Showers*, 812 So. 2d 277, 281 (Ala. 2001)." Ms. *9.

FAILURE TO REGISTER FOREIGN JUDGMENT

Boston v. Franklin, [Ms. 2200249, Oct. 29, 2021] __ So. 3d __ (Ala. Civ. App. 2021). The court (Moore, J.; Thompson, P.J., and Edwards, Hanson, and Fridy, JJ., concur) reverses the Geneva Circuit Court's denial of the father's Rule 60(b)(4) motion in a proceeding filed by the father seeking to establish his paternity and award him custody of two children. The mother responded that paternity of the children had been established by a prior Tennessee judgment which ordered the father to pay child support and argued that the father's Geneva County action should be treated as a motion to modify custody. The trial court agreed and ordered that the *McClendon* standard had not been met but awarded the father visitation. The court reverses denial of the Rule 60(b)(4) motion "[b]ecause the Tennessee judgment was not registered in accordance with the UCCJEA or the UIFSA, the trial court did not acquire jurisdiction over the father's complaint. Thus, the trial court's September 24, 2020, judgment is void, and the trial court erred in denying the father's Rule 60(b)(4) motion for relief therefrom." Ms. *8.

HEARING REQUIRED ON CONTEMPT PETITION

Ex parte SE Property Holdings, LLC; *SE Property Holdings, LLC v. Harrell*, [Ms. 1190814, 1190816, Nov. 5, 2021] __ So. 3d __ (Ala. 2021). The Court (1190814 – Shaw, J.; Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur; 1190816 – Shaw, J.; Bryan, Mendheim, and Mitchell, JJ., concur; Parker, C.J., concurs in part and concurs in the result) reverses the Baldwin Circuit Court's order denying SE Property Holdings, LLC's ("SEPH") petition to hold David L. Harrell in contempt for failing to comply with the trial court's postjudgment charging order entered in a previous action involving the parties. The Court first notes that pursuant to Rule 70A(g), Ala. R. Civ. P, adopted in 1994, an adjudication or finding of contempt in civil cases is subject to direct appeal. Ms. *7.

Noting that a party cannot be held in contempt without a hearing, the Court reverses due to the trial court's failure to hold a hearing before denying SEPH's petition for contempt. Ms. *15, quoting Rule 70A(c)(2):

> "Upon the filing of a contempt petition, the clerk shall issue process in accordance with these rules, unless the petition is initiated by a counterclaim or cross-claim authorized under Rule 13[, Ala. R. Civ. P.]. In any case, the person against whom the petition is directed shall be notified (1) of the time and place for the hearing on the petition and (2) that failure to appear at the hearing may result in the issuance of a writ of arrest pursuant to Rule 70A(d), to compel the presence of the alleged contemnor."

Ibid.

HEARING ON MOTION FOR DEFAULT JUDGMENT NOT REQUIRED IN EVERY CASE

Ex parte Living By Faith Christian Church, [Ms. 1190872, Nov. 5, 2021] __ So. 3d __ (Ala. 2021). On certiorari review, the Court (Stewart, J.; Shaw, Wise, Bryan, Sellers, and Mendheim, JJ., concur; Parker, C.J., and Bolin and Mitchell, JJ., dissent) affirms the Court of Civil Appeals's determination that Rule 55(b)(2) does not require a trial court to hold a hearing on every application or motion for a default judgment. Ms. *2. While acknowledging that the language of Rule 55(b)(2) is ambiguous in regard to the requirement of a hearing, after reviewing federal authorities construing the similar federal rule, the Court "conclude(s) that Rule 55(b)(2) does not require a trial court to hold a hearing before entering a default judgment in every circumstance and that, instead, a trial court has the discretion to determine whether a hearing is necessary." Ms. *15.

SEPARATE TRIALS ON LIABILITY AND DAMAGES NOT WARRANTED

Ex parte Endo Health Solutions Inc., et al., [Ms. 1200470, Nov. 19, 2021] __ So. 3d __ (Ala. 2021). In an opioid crisis related case filed by a number of hospitals and related entities against manufacturers, distributors, and retail pharmacies, the Court (Sellers, J.; Shaw and Bryan, JJ., concur; Bolin, J., concurs specially; Wise and Stewart, JJ., concur in the result; Parker, C.J. and Mendheim, J., dissent; Mitchell, J., recuses) issues a writ of mandamus to the Conecuh Circuit Court directing the court to vacate a portion of its case management order, providing that "[t] he first trial on the public-nuisance claim is to involve 'liability,' and the second trial is to involve 'special damage.'" Ms. *3.

The Court first rejects petitioners' standing argument and explains "'[t]he question whether the law recognizes the cause of action stated by a plaintiff is frequently transformed into inappropriate standing terms' (quoting 13A Charles Alan Wright et al., Federal Practice & Procedure § 3531 (2008))). The defendants have not demonstrated that if the plaintiffs ultimately fail to prove that they have suffered special damage, then they lack standing, as opposed to simply having failed to prove an element of their claim." Ms. *11 (some internal quotation marks omitted).

However, the Court issues the writ because the two trials resulting from the bifurcation involve overlapping issues and evidence. The Court concludes, "[b]ased on the literal meaning of the language used in the trial court's order, the first trial necessarily must involve the issue of special damage proximately caused by the defendants' conduct," Ms. *15, and holds "conducting a trial on the issue of the defendants' "liability" for a public nuisance and a second trial on 'special damage' neither avoids prejudice nor furthers convenience, expedition, or economy. See Rule 42(b) [Ala. R. Civ. P.]. We can only conclude that the trial court exceeded its discretion." Ms. **17-18.

PARTY WAIVED OBJECTION TO INADEQUATE NOTICE OF TRIAL SETTING

Johnson v. Brown, [Ms. 2200509, Nov. 19, 2021] __ So. 3d __ (Ala. Civ. App. 2021). The court (Hanson, J.; Thompson, P.J., and Moore and Fridy, JJ., concur; Edwards, J., concurs in the result) affirms the Lowndes Circuit Court's judgment in favor of Portia Coleman Brown and Samuel Bernard Brown on the Browns' claim to redeem certain real property located in Lowndes County. On appeal, the Johnsons argued that they were not prepared for trial because they had not been given 60-days' notice as required by Rule 40 Ala. R. Civ. P. The court rejects this argument and explains "by proceeding to trial without objecting, the Johnsons waived any error based on the lack of proper notice under Rule 40. See *Holleman* [*v. Elmwood Cemetery Corp.*, 295 Ala. 267, 273, 327 So. 2d 716, 720 (1976)] ("The failure to raise the question [of notice] constitutes a waiver."). Furthermore, we note that Rule 40(a)(7) permits parties to agree to a shorter notice period than that set forth in Rule 40(a). Thus, we also conclude that, by appearing and participating in a trial, without objection, on less than 60 days' notice, the parties effectively consented to a shorter notice period." Ms. *10.

TRIAL COURT LACKED JURISDICTION TO VACATE ORDER DENYING POSTJUDGMENT MOTION

State of Alabama v. Orlando, [Ms. 2200524, Nov. 19, 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 State's appeal from the Tuscaloosa Circuit Court's judgment denying the State's petition seeking the forfeiture

of certain cash and personal property of Ryan Orlando. The trial court denied the State's timely postjudgment motion on February 23, 2021 and later that same day, without indicating that the first order had been entered in error or by mistake, entered another order purporting to set aside the first order denying the postjudgment motion. The trial court then entered a third order on April 1, 2021 denying the motion. The State then filed its notice of appeal on April 20, 2021.

The court holds "the trial court lost jurisdiction over the matter when it entered the first order denying the State's motion to alter, amend, or vacate the judgment. Thus, its second order purporting to set aside the first order and its third order purporting to deny the postjudgment motion a second time are nullities." Ms. **5-6. Consequently, the State's appeal was untimely.

ALA. R. CIV. P. 54(B) CERTIFICATION, DISMISSAL OF APPEAL

Gleason v. Halsey, [Ms. 1200678, Dec. 3, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Mendheim, J.; Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur; Parker, C.J., concurs in the result) dismisses an appeal from an order granting summary judgment in favor of the seller of a used home which was certified as a final order within the meaning of Ala. R. Civ. P. 54(b) by the Baldwin Circuit Court.

Interestingly, neither party challenged the appropriateness of the Circuit Court's Rule 54(b) certification, but the Supreme Court determined to consider that issue *ex mero motu* "because the issue whether a judgment or order is sufficiently final to support an appeal is a jurisdictional one." Ms. *9, quoting *Barrett v. Roman*, 143 So. 3d 144, 148 (Ala. 2013).

Quoting *Lighting Fair, Inc. v. Rosenberg*, 63 So. 3d 1256, 1263-64 (Ala. 2010), the Court reiterates the standard for reviewing Rule 54(b) certifications.

> " ' "If a trial court certifies a judgment as final pursuant to Rule 54(b), an appeal will generally lie from that judgment." *Baugus v. City of Florence*, 968 So. 2d 529, 531 (Ala. 2007).
>
> " 'Although the order made the basis of the Rule 54(b) certification disposes of the entire claim against [the defendant in this case], thus satisfying the requirements of Rule 54(b) dealing with eligibility for consideration as a final judgment, there remains the additional requirement that there be no just reason for delay. A trial court's conclusion to that effect is subject to review by this Court to determine whether the trial court exceeded its discretion in so concluding.'
>
> "*Centennial Assocs. v. Guthrie*, 20 So. 3d 1277, 1279 (Ala. 2009). Reviewing the trial court's finding in *Schlarb v. Lee*, 955 So. 2d 418, 419-20 (Ala. 2006), that there was no just reason for delay, this Court explained that certifications under Rule 54(b) are disfavored:
>
> " 'This Court looks with some disfavor upon certifications under Rule 54(b).
>
> " ' "It bears repeating, here, that ' "[c]ertifications under Rule 54(b) should be entered only in exceptional cases and should not be entered routinely." ' *State v. Lawhorn*, 830 So. 2d 720, 725 (Ala. 2002) (quoting *Baker v. Bennett*, 644 So. 2d 901, 903 (Ala. 1994), citing in turn *Branch v. SouthTrust Bank of Dothan, N.A.*, 514 So. 2d 1373 (Ala. 1987)). ' " 'Appellate review in a piecemeal fashion is not favored.' " ' *Goldome Credit Corp.* [*v. Player*, 869 So. 2d 1146, 1148 (Ala. Civ. App. 2003)] (quoting *Harper Sales Co. v. Brown, Stagner, Richardson, Inc.*, 742 So. 2d 190, 192 (Ala. Civ. App. 1999), quoting in turn *Brown v. Whitaker Contracting Corp.*, 681 So. 2d 226, 229 (Ala. Civ. App. 1996)) ..."
>
> " '*Dzwonkowski v. Sonitrol of Mobile, Inc.*, 892 So. 2d 354, 363 (Ala. 2004).'
>
> "In considering whether a trial court has exceeded its discretion in determining that there is no just reason for delay in entering a judgment, this Court has considered whether 'the issues in the claim being certified and a claim that will remain pending in the trial court " 'are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results.' " ' *Schlarb*, 955 So. 2d at 419-20 (quoting *Clarke-Mobile Counties Gas Dist. v. Prior Energy Corp.*, 834 So. 2d 88, 95 (Ala. 2002), quoting in turn *Branch v. SouthTrust Bank of Dothan, N.A.*, 514 So. 2d 1373, 1374 (Ala. 1987), and concluding that conversion and fraud claims were too intertwined with a pending breach-of-contract claim for Rule 54(b) certification when the propositions on which the appellant relied to support the claims were identical). See also *Centennial Assocs.*, 20 So. 3d at 1281 (concluding that claims against an attorney certified as final under Rule 54(b) were too closely intertwined with pending claims against other defendants when the pending claims required 'resolution of the same issue' as issue pending on appeal); and *Howard v. Allstate Ins. Co.*, 9 So. 3d 1213, 1215 (Ala. 2008) (concluding that the judgments on the claims against certain of the defendants had been improperly certified as final under Rule 54(b) because the pending claims against the remaining defendants depended upon the resolution of common issues)."
>
> (Emphasis omitted.)

Ms. **10-12. The Court concludes (Ms. **12-16) that plaintiff's claims against both the seller of the used house and a pre-sale inspector for negligent inspection "are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results." Ms. *16, quoting *Branch v. SouthTrust Bank of Dothan, N.A.*, 514 So. 2d 1373, 1374 (Ala. 1987). As a result,

the Court concludes the Baldwin Circuit Court exceeded its discretion in certifying the order granting summary judgment for the seller of the home as a final order within the meaning of Rule 54(b). Accordingly, the appeal was dismissed.

ABATEMENT STATUTE, ALA. CODE § 6-5-440 AND INJUNCTIONS

Tipp v. JPMC Specialty Mortgage, LLC, [Ms. 1200600, Dec. 3, 2021], ___ So. 3d ___ (Ala. 2021). The Court (Mitchell, J.; Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur) affirms a judgment of the Mobile Circuit Court concluding Tipp's claims were barred by the doctrine of *res judicata*, the applicable statute of limitations and Alabama's abatement statute, § 6-5-440, Ala. Code 1975, and affirms the circuit court's entry of a permanent injunction prohibiting Tipp from initiating any further proceedings relating to a foreclosure of property previously owned by her parents without first obtaining permission from that court.

The Court recites the lengthy history of efforts by Tipp to sue JPMC claiming its initial foreclosure of the property was fraudulent. The Court notes that Tipp repeatedly commenced actions against JPMC alleging wrongful-foreclosure, slander-of-title, trespass and fraud claims against JPMC and other defendants. Ms. **2-12. In each of those claims, the issues were resolved in favor of JPMC and against Tipp. *Id.*

Because the evidence revealed that another action was pending in the United States District Court for the Southern District of Alabama arising from the same facts, the Court concludes the Mobile Circuit Court correctly entered summary judgment in the present action on the basis of the abatement statute, § 6-5-440 (providing that "[n]o plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party"). Ms. **11-12. Following the holding in *Ex parte Compass Bank*, 77 So. 3d 578, 587 (Ala. 2011), § 6-5-440 precludes the instant state-court action because "an action pending in federal court abate[s] the 'subsequently filed state-court action...arising out of the same facts.'").

The Court also notes that affirmance of the summary judgment entered by the Mobile Circuit Court is proper because "where the trial court has set forth multiple grounds supporting the entry of summary judgment, we will affirm that judgment if any of those grounds provides a basis for the judgment." Ms. *13, citing *Norvell v. Norvell*, 275 So. 3d 497, 506 (Ala. 2018). Here, "the trial court's judgment can be affirmed based on the abatement statute." *Id.*

The Court also explains that the permanent injunction against future litigation entered by the Mobile Circuit Court is appropriate because JPMC demonstrated "success on the merits, a substantial threat of irreparable injury if the injunction is not granted, that the threatened injury to [JPMC] outweighs the harm the injunction may cause the [other party], and that granting the injunction will not disserve the public interest." Ms. *16, quoting *Sycamore Mgmt. Grp., LLC v. Coosa Cable Co.*, 42 So. 3d 90, 93 (Ala. 2010). The Court especially notes that "in light of Tipp's history of litigation and stated intent to continue litigating this case regardless of the many judgments that have been entered against her, the permanent injunction is reasonable and serves the public interest by helping to conserve precious judicial resources." Ms. *18, citing *Walden v. ES Capital, LLC*, 89 So. 3d 90, 108-09 (Ala. 2011) (explaining that injunctions to halt harassing and vexatious litigation of matters that have already been litigated support the interests of justice and are favored by the courts).

The Court concludes with a direct warning to this litigant, stating

> "[s]hould she continue to pursue frivolous litigation against JPMC, either directly or indirectly, and those matters end up back before this Court, we will strongly consider an order requiring her to pay JPMC's attorney fees and costs. See *Guthrie v. Fanning*, [Ms. 1190852, Dec. 11, 2020] ___ So. 3d ___ (Ala. 2020) (emphasizing this Court's authority to sanction, either on the motion of the appellee or on the Court's own initiative, an appellant whose appeal is determined to be frivolous or without substantial justification)."

Ms. *19.

FULL FAITH AND CREDIT – JUDGMENT OF SISTER STATE – INTERSTATE SOVEREIGN IMMUNITY

Ex parte Space Race, LLC, [Ms. 1200685, Dec. 30, 2021] __ So. 3d __ (Ala. 2021). The Court (Sellers, J.; Parker, C.J., and Bolin, Wise, Mendheim, Stewart, and Mitchell, JJ., concur; Shaw and Bryan, JJ., concur in the result) issues a writ of mandamus to the Madison Circuit Court directing the court to dismiss an action filed by the Alabama Space Science Exhibit Commission d/b/a U.S. Space & Rocket Center ("ASSEC") seeking to avoid an arbitration award entered in favor of Space Race, LLC ("Space Race") and against ASSEC by an arbitration panel in New York. Space Race's motion to dismiss asserted that a New York court had already entered a final judgment confirming the arbitration award against ASSEC. Ms. *2.

In confirming the arbitration award, the New York court rejected ASSEC's sovereign immunity defense and held that ASSEC had waived the defense and that in any event, "ASSEC is not the equivalent of the State of Alabama for purposes of sovereign immunity." Ms. *5.

ASSEC argued that the New York judgment was not entitled to full faith and credit because the court lacked adjudicatory authority over the subject matter because ASSEC enjoyed interstate sovereign immunity form suit in New York. ASSEC relied on *Franchise Tax Board of California v. Hyatt*, 587 U.S. ___, ___ 139 S. Ct. 1485, 1497 (2019), which "held that states are immune from private suits in the courts of sister states, [and] that '[t]he Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design.'" Ms. **8-9.

In rejecting ASSEC's argument, the Court explains

> Whether the New York trial court's judgment is entitled to full faith and credit does not necessarily turn on whether this Court agrees with the New York trial court's conclusion that ASSEC should not be considered the equivalent of the State of Alabama for purposes of interstate sovereign immunity. Rather, the judgment is entitled to full faith and credit if the immunity issue was fully and fairly litigated in New York.

> [T]he [United States Supreme] Court made it clear that whether a state extends full faith and credit to a judgment of another state depends only upon the existence of a full and fair litigation in the foreign state of the issues resolved by that judgment:
>
> > "'[A] judgment is entitled to full faith and credit – even as to questions of jurisdiction – when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.'" *Omega Leasing Corp. v. Movie Gallery, Inc.*, 859 So. 2d 421, 422 (quoting *Durfee v. Duke*, 375 U.S. 106, 111(1963)).

Ms. **9-10.

The Court issues the writ and holds

> The New York trial court provided the parties with a full and fair opportunity to litigate the sovereign-immunity issue, and the court fully and fairly considered the parties' arguments and relevant law. Its determination that ASSEC should not be considered the equivalent of the State of Alabama for purposes of interstate sovereign immunity is, at the very least, defensible. We simply cannot conclude that the New York trial court was "so plainly" without subject-matter jurisdiction that it committed a "manifest abuse of authority," that its judgment substantially infringes on the authority of another tribunal or agency of government, or that it lacked the capability to make an informed determination regarding the sovereign-immunity issue. *Restatement (Second) of Judgments* § 12.

ALA. R. CIV. P. 54(B) CERTIFICATION & CRITERIA FOR APPEALABILITY

Baldwin County Sewer Service, LLC v. The Gardens at Glenlakes Property Owners Association, Inc. et al., [Ms. 1200493, Jan. 14, 2022] __ So. 3d __ (Ala. 2022). The Court (Stewart, J.; Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur) dismiss an appeal by Baldwin County Sewer Service ("BCSS") as an appeal from a non-final order.

The Court reiterates general principles required for the finality of judgments to support an appeal:

> … We have consistently held that this Court will not entertain the attempted appeal of a denial of a motion for a summary judgment because "'"[s]uch an order is inherently non-final and cannot be made final by a Rule 54(b) certification …. An order denying summary judgment is interlocutory and nonappealable."'" *Continental Cas. Co. v. SouthTrust Bank, N.A.*, 933 So. 2d 337, 340 (Ala. 2006) (quoting *Fahey v. C.A.T.V. Subscriber Servs., Inc.*, 568 So. 2d 1219, 1222 (Ala. 1990), quoting in turn *Parsons Steel, Inc. v. Beasley*, 522 So. 2d 253, 257-58 (Ala. 1988)).

Id., Ms. *10.

> … An order denying a motion to dismiss is, likewise, not a final, appealable judgment. See *Ex parte Noland Hosp. Montgomery, LLC*, 127 So. 3d 1160, 1165 (Ala. 2012).

Id., Ms. **10-11.

> Although the trial court purported to certify the March 5, 2021 [appealed from] order as final pursuant to Rule 54(b), Ala. R. Civ. P., for a Rule 54(b) certification to be effective, "the order must dispose of at least one of a number of claims or one of multiple parties, must make an express determination that there is no just reason for delay, and must expressly direct the entry of a judgment as to that claim or that party." *Ex parte Noland Hosp. Montgomery, LLC*, 127 So. 3d at 1165-66 (citing *Jakeman v. Lawrence Grp. Mgmt. Co.*, 82 So. 3d 655, 659 (Ala. 2011), citing in turn Committee Comments on 1973 Adoption of Rule 54(b), Ala. R. Civ. P.)). "In other words, for a Rule 54(b) certification of finality to be effective, [the order being certified as final] must fully adjudicate at least one claim or fully dispose of the claims as they relate to at least one party." *Haynes v. Alfa Fin. Corp.*, 730 So. 2d 178, 181 (Ala.1999)(emphasis omitted).

Id., Ms. *11.

Here, because the "order at issue[] does not fully dispose of any claims or parties – instead, it effectively permits the consolidated actions to proceed by determining that the Association's and the individual plaintiffs are the real parties in interest" … "'the trial court's purported Rule 54(b) certification was not effective to create a final judgment, and the order to which that certification related was not appealable as of right.'"

Ms. *11-12, quoting *Haynes, supra*, 730 So. 2d at 181-82. Because BCSS appealed from a non-final order, the Court dismisses its appeal.

ORDER ON MOTION TO QUASH GARNISHMENT IS NON-FINAL AND NON-APPEALABLE

Montgomery Piggly Wiggly, LLC and Scoggins v. Accel Capital, Inc., [Ms. 1200389, Jan. 14, 2022] __ So. 3d __ (Ala. 2022). The Court (Sellers, J.; Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur) dismisses an appeal from an order of the Montgomery Circuit Court denying a motion to quash a garnishment proceeding. The Court concludes that the order denying the motion to quash the garnishment proceeding is not a final judgment that will support an appeal. The Court reasons:

> … only a judgment that disposes of a garnishment proceeding in favor of either the judgment creditor or the garnishee, standing in relation to the defendant, and that leaves nothing for further adjudication is a final, appealable judgment. *See Steiner Bros. v. First Nat'l Bank of Birmingham*, 115 Ala. 379, 384, 22 So. 30, 31 (1987) (noting that, like appeals in general, an appeal in a garnishment proceeding must determine the issues before the court and ascertain and declare the rights of the parties involved). In contrast, an order that merely addresses the disposition of a motion to quash a garnishment proceeding without concluding the rights of the parties is preliminary in character and will not support an appeal. See *Miller Constr., LLC v. DB Elec.*, [Ms. 2190467,

Jan. 15, 2021] ___ So. 3d ___ , ___ (Ala. Civ. App. 2021) ("[A]n order denying a motion to quash garnishment proceedings without otherwise concluding the rights of the parties, such as by directing the garnishee to satisfy the garnishment, is not a final judgment capable of supporting an appeal.")

Ms. *4.

Because the Montgomery Circuit Court's order resulted in no final disposition of the garnishment, and contemplated additional discovery relative to whether the judgment creditor could seek evidence in aid of execution of its judgment, the appeal was premature and therefore required to be dismissed.

CIRCUIT COURT LACKS IN REM JURISDICTION OVER PERSONAL PROPERTY SEIZED UNDER 21 U.S.C. § 881

Hare and Sosa v. Sheriff Hoss Mack, et al., [Ms. 1200562, Jan. 21, 2022] __ So. 3d __ (Ala. 2022). The Court (Mitchell, J.; Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur; Mendheim, J., concurs in the result; Sellers, J., dissents; Shaw, J., recuses) affirms the Baldwin Circuit Court's order dismissing for lack of *in rem* jurisdiction an action filed by Yamil Alexsander Hare and Jose Sosa. Hare and Sosa sought to recover personal property (over $100,00 in cash) seized from Hare by a Gulf Shores police officer. The cash was seized from Hare by the Gulf Shores officer without a warrant under state law and then transferred to two Baldwin County Sheriff's Office ("BCSO") deputies, acting in their capacity as federally deputized agents of the Drug Enforcement Administration ("the DEA"). Ms. *4.

The Court first clarifies prior Alabama Court of Civil Appeals decisions holding that *de novo* review applies to rulings on motions to dismiss asserting lack of *in rem* jurisdiction. The Court explains that

> "[i]t is more exact … to say that we review issues of law de novo and findings of fact for clear error. In stating the standard of review as de novo (pure and simple), the parties overlook that the jurisdictional determination in this case was based on facts presented in evidentiary materials outside the pleadings."

Ms. *8.

In affirming, the Court holds "Deputies Middleton and Harville 't[ook] or detained' the personal property 'under [21 U.S.C. § 881]' when Officer McElroy transferred it to them in their federal capacity as DEA agents. 21 U.S.C. § 881(c). Under § 881(c), the personal property was in the exclusive jurisdiction of the federal government from that moment. Thus, the circuit court rightly held that it could not exercise in rem jurisdiction over the personal property." Ms. *35.

STAY – APPELLATE PROCEDURE – INHERENT AUTHORITY OF CIRCUIT COURT TO INTERPRET, CLARIFY AND ENFORCE FINAL JUDGMENTS

Moore and Lloyd v. Mikul, [Ms. 1200671, Jan. 21, 2022] __ So. 3d __ (Ala. 2022). The Court (Bryan, J.; Shaw, Wise, Sellers, Mendheim, and Stewart, JJ., concur; Bolin and Bryan, JJ., concur specially; Parker, C.J., and Mitchell, J., dissent) affirms the Shelby Circuit Court's summary judgment dismissing an ejectment action filed in 2020 by Howard Moore and Charles Lloyd against Margaret Sue Mikul. In a 2016 ejectment action (CV-16-900764) between the same parties involving the same property and issues, the Shelby Circuit Court entered an October 2018 order "concluding that Moore and Lloyd were entitled to possession of the property and that Mikul was not liable to Moore and Lloyd for mesne profits or rents" and stating further that "the Court finds no legal way [or] avenue to prevent [Moore and Lloyd] from taking possession of the subject property …." Ms. *3. The circuit court stayed execution of the October 2018 order and subsequently entered a judgment in April 2019 "concluding that it lacked jurisdiction to modify the October 2018 order because Moore and Lloyd had not, it determined, filed a timely postjudgment motion with respect to the October 2018 order." Ms. *5.

In affirming the summary judgment entered in the 2020 ejectment action, the Court notes that "[t]he principal appellate brief submitted by Moore and Lloyd does not address the effect of the stay of the October 2018 Order until the 'Conclusion' section of the brief, in which they state that the circuit court is acting as 'as though the stay is in place apparently forever.' … In their reply brief, Moore and Lloyd argue, for the first time, that the apparently indefinite stay entered by the circuit court in case no. CV-16-900764 is 'immoderate.'" Ms. *9. While acknowledging law that a stay cannot be "immoderate," the Court holds

> As noted, Moore and Lloyd assert this argument for the first time in their reply brief.
>
> > "'The law of Alabama provides that where no legal authority is cited or argued, the effect is the same as if no argument had been made.' *Bennett v. Bennett*, 506 So. 2d 1021, 1023 (Ala. Civ. App. 1987)(emphasis added). '[A]n argument may not be raised, nor may an argument be supported by citations to authority, for the first time in an appellant's reply brief.' *Improved Benevolent & Protective Order of Elks v. Moss*, 855 So. 2d 1107, 1111 (Ala. Civ. App. 2003), abrogated on other grounds, *Ex parte Full Circle Distribution, L.L.C.*, 883 So. 2d 638 (Ala. 2003). Where an appellant first cites authority for an argument in his reply brief, it is as if the argument was first raised in that reply brief, and it will not be considered."
> >
> > *Steele v. Rosenfeld, LLC*, 936 So. 2d 488, 493 (Ala. 2005). Moreover, the record in this case – case no. CV-20-900392 – demonstrates that Moore and Lloyd did not seek dissolution of the stay entered by the circuit court in case no. CV-16-900764 as being an immoderate stay. "[T]he appellate courts will not reverse a trial court on any ground not presented to the trial court." Rogers Found. Repair, Inc. v. Powell, 748 So. 2d 869, 872 (Ala. 1999).

Ms. *10.

The Court concludes its opinion with the observation that the circuit court "has inherent authority to interpret, clarify, and enforce its own final judgments." Ms. *11, internal quotation

marks omitted. The Court further instructs that if Moore and Lloyd "seek a dissolution of the stay entered by the circuit court pertaining to the execution of its October 2018 order in case no. CV-16-900764, a dissolution should be sought in that action." Ms. *12.

PERSONAL JURISDICTION

Pruitt v. AAA Interstate Transportation, LLC, [Ms. 1200666, Jan. 21, 2022] __ So. 3d __ (Ala. 2022). The Court (Mitchell, J.; Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur) affirms the Walker Circuit Court's order granting AAA Interstate Transportation, LLC's ("AAA") motion to dismiss asserting lack of personal jurisdiction. In the spring of 2018, AAA transported a crane truck owned by Michels Machinery Co., Inc. ("Michels") from Yukon, Oklahoma, to Michels's facility in Las Vegas, Nevada. AAA did not perform any maintenance on the crane truck, never had any property interest in it, and had no further involvement with it after delivering it to Michels. Ms. *2. After Michels sold the crane truck to Jimmy's Construction & Maintenance, Inc. ("Jimmy's"), an Alabama corporation headquartered in Walker County, Jimmy's hired Terry Pruitt to bring the crane truck from Nevada to Walker County. In Texas, one of the tires on the crane truck failed, causing it to roll over several times, resulting in severe and life-threatening injuries to Pruitt and his wife who accompanied him on the trip. Ms. *3.

The Court notes that "[w]e apply de novo review to rulings on motions to dismiss for lack of personal jurisdiction. *Elliott v. Van Kleef*, 830 So. 2d 726, 729 (Ala. 2002). And we review for excess of discretion trial courts' decisions on the availability and scope of jurisdictional discovery. See *Branded Trailer Sales, Inc. v. Universal Truckload Servs., Inc.*, 74 So. 3d 404, 411, 418-19 (Ala. 2011)." Ms. *8. The Court first rejects the Pruitts' general jurisdiction argument, noting that "it is undisputed that AAA is organized under the laws of Colorado and has its principal place of business there, so neither of the first two conditions is met. Nor (on the allegations and record before us) does AAA have such continuous and systematic contacts with Alabama that it is at home here despite its out-of-state provenance and headquarters." Ms. *10.

The Court also concludes that specific jurisdiction was lacking and notes "the touchstone of specific jurisdiction is whether the defendant has 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State,'" Ms. *12, quoting *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 592 U.S. ___, ___, 141 S. Ct. 1017, 1024 (2021)(some internal quotation marks omitted). The Court explains

> [T]he only suit-related conduct by AAA is its conduct involving the crane truck in which the Pruitts were injured. But all AAA did with the crane truck was transport it from Oklahoma to Nevada for Michels three months before the Pruitts' accident. The record shows that AAA had no knowledge of any Alabama business of Michels and that Michels did not sell the crane truck to Jimmy's until some time after AAA delivered it to Nevada. In short, the Pruitts cannot point to any suit-related conduct of AAA directed at Alabama or any facts indicating that AAA should have anticipated that its transportation of the crane truck might lead to a suit in Alabama.

Ms. *13.

The Court also concludes the circuit court did not exceed its discretion in denying jurisdictional discovery

> [A] plaintiff is not entitled to discovery to rebut a properly supported Rule 12(b)(2) motion if the plaintiff fails to "allege facts that would support a colorable claim of jurisdiction" or to offer more than "bare, attenuated, or unsupported assertions of personal jurisdiction." *Ex parte Lowengart*, 59 So. 3d 673, 678 (Ala. 2010); see also *Ex parte Gregory*, 947 So. 2d 385, 390 (Ala. 2006); *Troncalli Chrysler*, 876 So. 2d at 468. In this case, the Pruitts actually obtained discovery in the form of AAA's answers to their request for admissions, and the undisputed evidence before the circuit court abundantly showed that (for the reasons stated above) neither general nor specific personal jurisdiction over AAA could exist. There was no reason to believe that further evidentiary development was warranted.

Ms. *14.

FRAUD CLAIM AGAINST ATTORNEY BY NONCLIENT – ASLA – EXCLUSIVE REMEDY PROVISION

Roberson v. Balch & Bingham, LLP, [Ms. 1200002, Jan. 21, 2022] __ So. 3d __ (Ala. 2022). On rehearing, in a per curiam opinion, the Court (Stewart, J., and Lyons, Main, and Welch, Special Justices, concur; Parker, C.J., and Mendheim, J., and Baschab, Special Justice, dissent; Bolin, Shaw, Wise, Bryan, Sellers, and Mitchell, JJ., recuse) withdraws its per curiam opinion issued July 23, 2021 which had affirmed the dismissal of David Roberson's ("Roberson") claims against Balch & Bingham, LLP ("Balch"). Roberson, a former employee of Drummond Company, Inc. ("Drummond"), was convicted of bribery arising from payments of thousands of dollars to a charitable foundation controlled by Oliver Robinson, a member of the Alabama House of Representatives, in exchange for "advocacy" and "community outreach" aimed at undermining the Environmental Protection Agency's ("EPA") efforts to clean up a Superfund site at which Drummond was a potential responsible party. Balch was Drummond's outside legal counsel. Roberson alleged that prior to authorizing payments to the Foundation, he had asked Joel Gilbert, a registered lobbyist employed by Balch, "if Gilbert had inquired with the ethics lawyers at Balch & Bingham whether the Plan [to pay the Foundation] was legal and ethical. Gilbert represented to [Roberson] that Balch's in-house ethics attorneys had reviewed the Plan and determined that it was legal." Ms. *5.

Balch filed, and the circuit court granted, a motion to dismiss all the claims against Balch based on the limitations provisions in the Alabama Legal Service Liability Act. Ms. *17. On original deliverance, although the Court held that the limitations provisions in the ASLA did not support dismissal, the Court affirmed on the basis that Roberson's claims failed because Balch owed no duty to Roberson under the ASLA.

On rehearing, the Court reverses the dismissal of Roberson's fraud claims. The Court first notes that "[c]ommon sense dictates that a lawyer serves the lawyer's client, not the parties with whom the lawyer may come in contact while serving the client." Ms. *26. In support of its conclusion that a nonclient may sue a lawyer for fraud, notwithstanding the exclusive remedy provision of the ASLA, the Court writes

> In *Kinney v. Williams*, 886 So. 2d 753 (Ala. 2003), an attorney "assured" two couples (one clients and one nonclients) that a road to property they were purchasing was "private." *Id.* at 754. After they purchased the property and found otherwise, both couples sued the attorney. The trial court entered a summary judgment in favor of the attorney as to the claims of both the clients and the nonclients. On appeal, this Court affirmed the summary judgment on the clients' claims based on the applicability of the statute of limitations set forth in the ALSLA. However, this Court reversed the summary judgment on the nonclients' claims, allowing their fraud claims against the attorney to proceed.

Ms. *29. The Court concludes that in the absence of an attorney-client relationship between the plaintiff and the attorney, "the ALSLA simply does not apply" and cited prior case law "recogniz[ing] the availability of a fraud claim by a nonclient against an attorney for activities stemming from the attorney's activities while representing a client." Ms. *36.

FORECLOSURE – COLLATERAL ESTOPPEL – FRAUDULENT SUPPRESSION

Larsen v. WF Master REO, LLC, et al.; McDonald, et al., v. WF Master REO, LLC, et al.; WF Master REO, LLC v. Larsen, [Ms. 2200258, 2200259, 2200260, Jan. 21, 2022] __ So. 3d __ (Ala. Civ. App. 2022). The court (Moore, J.; Thompson, P.J., and Edwards and Fridy, JJ., concur; Hanson, J., concurs specially) affirms in part and reverses in part the Conecuh Circuit Court's final judgment entered after a bench trial in a 2017 ejectment action following a foreclosure sale. The ejectment action also included claims for fraud asserted against WF Master REO, LLC ("WF") by David Larsen who purchased the property after WF acquired the property at a foreclosure sale conducted by Waterfall Victoria Mortgage Trust 2011-1 REO, LLC ("Waterfall"). Ms. *4.

In 2015, the mortgagors, Donald and Mary McDonald, filed suit in an effort to stop the foreclosure. That action was removed to federal court by Waterfall, and the federal court subsequently entered final judgment in favor of Waterfall on all of the McDonalds' claims. Ms. *3.

When the McDonalds failed to vacate the property in 2017, WF filed the subject action in Conecuh Circuit Court. Ms. *4. Larsen intervened and filed a cross claim for fraud against WF.

The court first affirms the circuit court's ruling against the McDonalds on the ejectment claim and concludes that based on the prior federal court judgment "the doctrine of collateral estoppel precluded reconsideration of the power-of-sale, default, and notice issues in the ejectment action." Ms. *23. The court notes that although WF was not a party to the federal action, "WF is in privity with Waterfall, as a successor in title, deriving its claim to the property from the foreclosure deed executed by Waterfall, with an identical interest in enforcing the foreclosure sale." Ms. **24-25.

The federal court did not reach the McDonalds' claim that Waterfall sold the property at the foreclosure sale for too low a price. However, the court affirms the circuit court's ore tenus finding rejecting that claim, and notes "the trial court evidently concluded that the property was not worth the amounts advocated by the McDonald parties but, rather, was worth an amount more in line with the estimate proffered by the broker. It was the duty of the trial court, as the trier of fact, to resolve any conflicts in the evidence." Ms.*27.

On Larsen's cross appeal, the court affirms denial of Larsen's breach of warranty claim because after foreclosure "the McDonalds never had a valid claim to the title to the property, and their insistence on litigating that invalid claim did not encumber the title to the property, a fact even Larsen acknowledged in his testimony." Ms. **30-31.

The court reverses the judgment in favor of Larsen on his fraudulent suppression claim against WF and holds

> The third element [of fraudulent suppression] requires the party asserting a claim of fraudulent suppression to prove that he or she reasonably relied upon the defendant and was induced to act or to refrain from acting by the defendant. See generally *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997). If a party purchases real property pursuant to a purchase agreement that indicates that the property is being sold "as is," that party, by agreeing to that term, cannot later claim that he or she reasonably relied on any prior representation regarding the state or condition of the property; under those circumstances, any fraud claim based on that prior representation fails as a matter of law. See *Teer v. Johnston*, 60 So. 3d 253 (Ala. 2010).... Larsen essentially claimed that he would not have purchased the property had he known of the occupancy of the property by the McDonalds and of the litigation between WF and the McDonalds over the McDonalds' claim to title to the property. However, in the purchase agreement, WF clearly and unequivocally indicated that the property was being sold "as is" and that it was not making any warranties or representations regarding the property, other than the covenant against encumbrances.

Ms. **33-34.

ADMISSION BY PARTY OPPONENT – IMPUTED CONTRIBUTORY NEGLIGENCE – COMBINED AND CONCURRING CAUSES

Haddan v. Norfolk Southern Railway Co., et al., [Ms. 1190976, Feb. 4, 2022] __ So. 3d __ (Ala. 2022). In a plurality opinion, the Court (Stewart, J.; Bryan, Mendheim, and Mitchell, JJ., concur; Shaw and Sellers, JJ., concur in part and dissent in part; Bolin, J., concurs in the result; Parker, C.J., dissents; Wise, J., recuses) reverses the Lee Circuit Court's summary judgment in favor of Norfolk Southern on a negligence claim asserted by Yulanda Haddan, a passenger in a pickup truck struck by a train at a rail crossing. The circuit court concluded that Haddan could not recover against Norfolk Southern because the driver of the truck "failed to stop, look, and listen before entering the crossing and that failure was the sole proximate cause of Haddan's injury." Ms. *2.

The opinion first addresses Haddan's argument that the circuit court erred in striking a portion of her deposition testimony as hearsay. The opinion reiterates "'[i]n reviewing a ruling on the admissibility of evidence, ... the standard is whether the trial court exceeded its discretion in excluding the evidence.'

Woven Treasures, Inc. v. Hudson Cap., L.L.C., 46 So. 3d 905, 911 (Ala. 2009)." Ms. *7.

The circuit court struck from the summary judgment record "that portion of Haddan's deposition testimony in which she recounted statements that Cox [the driver of the truck] purportedly made to her after the collision concerning whether he had heard the train's horn before the collision." Ms. *7. Haddan named Cox a defendant but the circuit court ruled that he had never been served or appeared in the action. Accordingly, the circuit court ruled that admission by party opponent, Rule 801(d)(2), Ala. R. Evid., did not apply to the statements Cox made to Haddan. In a portion of the opinion joined by six Justices, the Court affirms the evidentiary ruling and explains "Haddan fails to demonstrate that the circuit court erred in ruling that she had not established proper service on Cox. Our Court of Civil Appeals has held that an unserved defendant is not a party to the action. *Harris v. Preskitt*, 911 So. 2d 8, 14 (Ala. Civ. App. 2005)." Ms. *8.

The plurality opinion reverses the summary judgment for Norfolk Southern with the following rationale joined by four Justices:

> [A] genuine issue of material fact exists as to the question of the proximate cause of Haddan's injuries. Norfolk Southern presented evidence attributing the cause of the collision to the contributory negligence of Cox, the driver of the pickup truck in which Haddan was a passenger, but negligence cannot be imputed to a passenger like Haddan absent a showing that the passenger "had some authority or control over the car's movement, such as some right to a voice in the management or direction of the automobile." *Adams* [*v. Coffee Cnty*., 596 So. 2d 892, 895 (Ala. 1992)]. Although, ..., a driver's failure to stop, look, and listen before crossing a railroad track amounts to negligence that, generally, will be treated as a superseding, intervening cause of injuries to a driver resulting from a collision of the driver's vehicle with a train, this Court has not addressed a situation in which a driver's negligence in failing to stop, look, and listen before crossing a railroad track constituted a superseding, intervening cause of injuries to a passenger resulting from such a collision ....
>
> Haddan presented substantial evidence – e.g., the evidence concerning the characteristics of the crossing and the evidence indicating that Rogers did not sound the train's horn when approaching the crossing – from which a reasonable person could conclude that Norfolk Southern contributed to cause the collision resulting in Haddan's injuries, calling into question whether Cox's contributory negligence rose to the level of a superseding, intervening cause and creating a jury question as to whether Cox's conduct was that of a concurrent tortfeasor. The evidence of Norfolk Southern's failure to install lights and a gate at the crossing further raises doubt as to whether Cox's failure to stop, look, and listen was truly unforeseeable. Haddan has raised enough of a factual issue to preclude the entry of a summary judgment in favor of Norfolk Southern.
>
> Ultimately, "the jury must decide whose actions are the proximate cause of the injury, or whether both [parties'] actions concurred and combined to proximately cause the injury." [*Western Railway of Alabama v.*] *Still*, 352 So. 2d 1092, 1095 [(Ala. 1977)].

Ms. **22-24.

PHOTOGRAPHIC ENFORCEMENT OF TRAFFIC LIGHT VIOLATIONS SURVIVE STATE CONSTITUTIONAL CHALLENGES

Glass v. City of Montgomery, [Ms. 1200240, Feb. 11, 2022] __ So. 3d __ (Ala. 2022). The Court (Stewart, J.; Sellers, J., concurs; Mendheim and Mitchell, JJ., concur in part and concur in the result; Bolin and Bryan, JJ., concur in the result; Parker, C.J., dissents; Shaw, J., recuses), affirms a judgment of the Montgomery Circuit Court ("the trial court") upholding the constitutionality of a municipal ordinance and corresponding Local Act 2009-740 authorizing automated photographic enforcement of traffic-light violations in the City of Montgomery. Richard Stephen Glass ("Glass") claimed that the Act violated Art. VI, §§ 89, 104, and 105, Ala. Const. 1901 (Off. Recomp.).

Section 105 provides: "No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law." Ms. *8.

The main opinion emphasizes "the text of § 105 – in particular, the plain meaning of the portion of the text of § 105 that provides that 'the courts, and not the legislature, shall judge as to whether the matter of said [local] law is provided for by a general law." Ms. **12-13. The opinion approves language in another recent plurality opinion construing Section 105 concluding that " 'how broadly to consider the 'case' or 'matter' addressed by a general law is necessarily an exercise in judicial prudence that will, in many respects, depend on the facts of the case – chiefly what the local law and general law say.'" Ms. *13, quoting *Barnett v. Jones*, [Ms. 1190470, May 14, 2021] ___ So. 3d___ (Ala. 2021). A plurality of the Court in the main opinion concludes that the matter addressed in the local law is provided for in the general law

> [B]oth the general laws and the Act cover the designation and penalization of identical violations of Alabama's motor-vehicle and traffic code. This is not a situation in which the general laws create and classify the traffic violation, but are entirely silent with respect to enforcement, and the Act merely addresses that void by providing for a civil penalty. Instead, both the general laws and the Act broadly, and dissimilarly, classify the same violations of Title 32; the general laws provide for enforcement of those violations, and the Act seeks to introduce a distinct, albeit nonexclusive, enforcement scheme.

Ms.* 17.

A plurality of the Court concludes in the main opinion,

however, that "the Act passes constitutional muster under the demonstrated local need exception to § 105, and the City's need to protect the safety of the traveling public is sufficient to permit the Act to survive the § 105 challenge in this case." Ms. *19. In this regard, the opinion points to legislative findings in Section 2 of the Act reciting that "accident data 'establishes that vehicles running red lights have been and are a dangerous problem in Montgomery, Alabama,' and further affirms that automated traffic-camera enforcement is 'very effective in reducing the number of red light violations and decreasing the number of traffic accidents, deaths, and injuries.'" Ms. *20.

The Court next addresses Glass's claim that the Act violates Section 89 of the Alabama Constitution which provides "[t]he legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state." A majority of the Court concludes that Section 89 is not violated because "the Ordinance and the Act are not inconsistent with the general laws; rather, the Ordinance and the Act merely and permissibly enlarge upon the general laws." Ms. *28.

Glass also claimed the Act violated Section 104(14) of the Alabama Constitution which provides "[t]he legislature shall not pass a special, private, or local law in any of the following cases: .... (14) Fixing the punishment of crime ...." A majority of the Court concludes that "the legislature's clear intent that the sanctions set out in the Act be civil in nature matters in the context of the § 104(14) analysis and indicates that the Act does not impermissibly fix punishment for a crime by assessing a civil penalty for a civil violation. Therefore, we affirm the trial court's judgment insofar as it concluded that the Act survived the § 104 challenge in this case." Ms. *34.

Justice Mendheim's special concurrence rejects the demonstrated local need exception to Section 105 as a judicial gloss unsupported by the text of Section 105. However, he concurred in the result rejecting the Section 105 claim. In his view, Section 105 is not violated because "there is no conflict or overlap between the general laws concerning red-light violations and the local Act and the Ordinance. The local Act and the Ordinance can operate only in instances in which the general laws have not been invoked." Ms. *47.

Justice Mitchell's special concurrence agrees with the "text-focused approach that Part B uses to analyze § 105 of the Alabama Constitution of 1901," but unlike the main opinion, Justice Mitchell concludes that "the local act ... does not cover the same 'case' or 'matter' 'provided for' by the statewide motor-vehicle and traffic code." Ms. *48.

Finally, Chief Justice Parker's dissent "agree(s) with the main opinion's conclusion that the Act, on its face, 'provide[s] for' the same 'case' or 'matter' – addresses the same subject – as the general law." Ms. *57. However, Chief Justice Parker concludes that the City did not discharge its burden to defend the Act based on demonstrated local need because in the findings the City relied upon, "the Legislature did not find a peculiarly local need for red-light cameras in Montgomery. And even if the Legislature's finding about the danger of running red lights was specific to Montgomery, that finding is answered by commonsense knowledge that it is dangerous throughout the State." Ms. **71-72.

QUO WARRANTO – APPEAL OF INTERLOCUTORY ORDER, RULE 4(A)(1)(C), ALA. R. APP. P.

Naftel and Ivey v. State of AL ex rel. Driggars, [Ms. 1200755, Feb. 18, 2022] __ So. 3d __ (Ala. 2022). The Court (Sellers, J.; Wise, Mendheim, and Stewart, JJ., concur; Parker, C.J., and Shaw and Bryan, JJ., dissent; Bolin and Mitchell, JJ., recuse) reverses the Jefferson Circuit Court's order denying a motion for summary judgment filed by Governor Ivey and Jefferson county Probate Judge James Naftel, II in a quo warranto action filed by Charles Driggars challenging Governor Ivey's authority to appoint Judge Naftel to fill a vacancy in the office of Jefferson County Probate Judge.

The Court first rejects Driggars's argument that the order denying cross motions for summary judgment was not appealable pursuant to Rule 4(a)(1)(C), Ala. R. App. P., which authorizes appeals from "any interlocutory order determining the right to public office." Noting that "'[b]y and large, the construction of rules of court are for the court which promulgated them' *Alabama Pub. Serv. Comm'n v. Redwing Carriers, Inc.*, 281 Ala. 111, 115, 199 So. 2d 653, 656 (1967), the Court concludes the interlocutory order on appeal denied a dispositive motion based only on legal grounds and requesting a conclusive determination of the right to public office." Ms. *7. The Court also notes that its "conclusion is buttressed by the nature of quo warranto actions, which are expedited proceedings because of the public's interest in quickly resolving questions surrounding who holds public office in Alabama. Rule 4(a)(1)(C)itself recognizes the importance of prompt resolution of such questions by providing that appeals provided by that rule are to be filed within 14 days." Ms. *8.

Turning to the merits, the Court explains "this case concerns the interpretation of §153 [Ala. Const. 1901 (Off. Recomp.)] and its interplay with Local Amendments, Jefferson County, § 8 and § 9, which pertain exclusively to Jefferson County. The question presented is whether, under § 153, the Governor of Alabama has the sole authority to fill, by appointment, a vacancy existing in the office of Judge of Probate of Jefferson County without considering the nominees selected by the judicial commission of that county." Ms. *10. Applying de novo review, the Court rejects the challenge to Governor Ivey's appointment of Judge Naftel and holds

> It is a well-settled and fundamental rule that, in construing provisions of the constitution, this Court must adhere to the plain meaning of the words used, and we cannot broaden or restrict the meaning of those words. *City of Bessemer v. McClain*, 957 So. 2d 1061,1092 (Ala. 2006). Both Local Amendments, Jefferson County, § 8 and § 9, reference only vacancies occurring in the circuit court, specifically the Birmingham Division of the Jefferson Circuit Court, and there is nothing in the language of those local amendments that can be construed as including within their scope the Probate Court of Jefferson County.

Ms. *13.

Chief Justice Parker and Justices Bryan and Shaw dissent. In their view, the Jefferson Circuit Court's order denying the cross motions for summary judgment did not determine Judge Naftel's right to hold the office of Jefferson County Probate Judge, and the merits were not properly before the Court pursuant to Rule 4(a)(1)(C), Ala. R. App. P.

VOID TAX SALE – SECTION 40-10-76, ALA. CODE 1975 – INTEREST ACCRUAL

Stiff v. Equivest Financial, LLC, [Ms. 1200264, Feb. 25, 2022] __ So. 3d __ (Ala. 2022). In a plurality opinion, the Court (Mitchell, J.; Wise and Stewart, JJ., concur; Parker, C.J., and Bolin, Sellers, and Mendheim, JJ. concur in the result; Shaw and Bryan, JJ., dissent) affirms the Jefferson Circuit Court's monetary judgment entered in favor of Equivest Financial, LLC, the purchaser of real property at a tax sale subsequently declared invalid. The property owner Mark Stiff argued that "the trial court erred: (1) by awarding Equivest interest on the amount it bid in excess of the delinquent taxes and (2) by awarding Equivest interest that accrued, and by failing to award him costs that he incurred, after he tendered an offer of judgment." Ms. *2.

Applying the rule that statutes on the same subject must be construed in *pari materia*, the Court rejects Mark's arguments:

> The "amount" that a court must ascertain under § 40-10-76 [Ala. Code 1975], and on which a delinquent taxpayer must pay interest, includes the excess bid. This interpretation gives effect to all the language in § 40-10-76 and harmonizes it with other provisions in the tax-sale statutes, particularly §§ 40-10-122(a) and 40-10-78. It is also the only plausible interpretation that furthers, rather than frustrates, the tax-sale statutes' purpose of encouraging participation in tax auctions. In addition, because the amount that Mark proposed to tender in his offer of judgment was not more favorable than the amount rightfully obtained by Equivest, it is clear that Equivest is entitled to interest that accrued [after the offer of judgment], and that Mark is not entitled to court costs that he incurred, after he made the offer of judgment.

Ms. **20-21.

In his dissent joined by Justice Bryan, Justice Shaw concludes that where a tax sale is declared invalid, the purchaser is not entitled to interest under § 40-10-76 on the amount of the bid in excess of the delinquent taxes:

> A redemption after a valid tax sale is entirely different from what occurs when there was no valid sale in the first place. There is a logical difference between these scenarios and why the legislature specified in §40-10-122(a) that, when lands are properly sold in a tax sale, the landowner, to regain his or her prior interest, must pay the entire sale price, but did not require in § 40-10-76 that, when there is no tax sale, the landowner be liable for an excess bid, which was not paid as part of a valid sale in the first place. There is no need to import the requirement of § 40-10-122(a) to pay interest on an excess bid made in a valid sale into § 40-10-76, under which the tax sale itself, and thus any bids or payment, were not valid in the first place. Although every word in a statute should be given effect "if possible," *Ex parte Beshears*, 669 So. 2d 148, 150 (Ala.1995), I do not believe judicial construction of § 40-10-76 to require it to say something contrary to its plain language is possible in this case.

Ms. **26-27.

STATE-AGENT IMMUNITY – RULE 56(F), ALA. R. CIV. P.

Burton v. Hawkins, et al.; Hood, etc. v. Hawkins, et al., [Ms. 1200825; 1200831, Mar. 11, 2022] __ So. 3d __ (Ala. 2022). The Court (Bolin, J.; Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur) affirms summary judgments entered by the Calhoun Circuit Court in favor of John Hawkins, Mark Steltenpohl, and Charles Savrda ("the Auburn defendants"), members of the Auburn University Geosciences Department. Plaintiff Howard Cole Burton was severely injured and Nicholas Lawrence Hood was killed when struck by a vehicle driven by Fulkerson, an impaired driver, who lost control. At the time they were struck, Burton and Hood were participating in a field exercise conducted by the Auburn Geosciences Department at a geologically significant site near Gadsden on U.S. Highway 431. Ms. **2-3. The plaintiffs argued that state-agent immunity was not available because (1) the Auburn defendants had not required the students to wear high-visibility safety clothing apparel on the day of the accident, as required by § 6D.03 of the Manual on Uniform Traffic Control Devices and (2) that Hawkins had been standing on the paved shoulder at the edge of the southbound lanes of the highway at the time of the accident, in violation of § 32-5A-215(b), Ala. Code 1975, which requires pedestrians to walk as far as practicable from the edge of the roadway. Ms. **12-13.

The Court affirms the circuit court's decision that the Auburn defendants were entitled to state-agent immunity. The Court first concludes the defendants "met their initial burden of demonstrating that their conduct fell within category (5) of the *Cranman* restatement – 'exercising judgment in the discharge of duties imposed by statute, rule, or regulation in ... educating students.'" Ms. *20. To avoid the immunity defense, the plaintiffs then had

> "To show that the Auburn defendants 'acted willfully, maliciously, fraudulently, in bad faith, or beyond their authority.' *Giambrone v. Douglas*, 874 So. 2d 1047, 1052 (Ala. 2003). 'A State agent acts beyond authority and is therefore not immune when he or she 'fail[s] to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist.'" *Giambrone*, 874 So. 2d at 1052 (quoting *Ex parte Butts*, 775 So. 2d at 178). The rules and/or regulations must be sufficiently detailed so as to "'remove a State agent's judgment in the performance of required acts.'" *Giambrone*, 874 So. 2d at 1055 (quoting *Ex parte Spivey*, 846 So. 2d 322, 333 (Ala. 2002)).
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> The plaintiffs argue that the Auburn defendants acted beyond their authority in failing to require the students to wear high-visibility safety apparel during the Gadsden exercise in accordance with provisions contained in the MUTCD. The Auburn defendants argue that the MUTCD did not apply to their planning and overseeing the Gadsden exercise; therefore, the Auburn defendants contend that the plaintiffs cannot demonstrate that the Auburn defendants acted beyond their authority in failing to require the students to wear high-visibility safety apparel during the Gadsden exercise.

Ms. **20-21.

The Court observes that "[t]he MUTCD is applicable to the

students only if the students fall within the definition of 'worker' as that term is defined in the MUTCD." Ms. *30. Applying the *noscitur a sociis* rule of construction, the Court holds that the students were not workers under the MUTCD. The Court holds the students "were not working within the scope of highway construction, highway maintenance, or improving highway safety. Accordingly, the students do not fall with the definition of the term 'worker' as that term is defined by the FHWA in the MUTCD." Ms. *33.

The Court also rejects the argument that Hawkins was not immune because he violated Section 32-5A-215(b), Ala. Code 1975, which provides: "Where a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway." The Court explains "the use of the term 'practicable' in the statute vested Hawkins with the discretion to determine where to stand on the shoulder of the highway as he supervised the students." Ms. **37-38.

The Court also rejects plaintiffs' Rule 56(f) argument predicated on their need to depose the impaired driver before responding to the Auburn defendants' summary-judgment motion because "[a]ny potential evidence obtained from Fulkerson would not have been 'essential' to the determination of whether the Auburn defendants acted beyond their authority by failing to follow the MUTCD or of whether Hawkins acted beyond his authority in failing to comply with § 32-5A-215(b). Accordingly, we cannot say that the circuit court exceeded its discretion." Ms. *40.

STATE-AGENT IMMUNITY – MANDAMUS PROCEDURE

Ex parte Runnels, [Ms. 1200647, Mar. 11, 2022] __ So. 3d __ (Ala. 2022). The Court (Stewart, J.; Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur) issues a writ of mandamus to the Baldwin Circuit Court directing the court to grant a motion for summary judgment filed by Susan Runnels, principal of Elsanor Elementary School asserting state-agent immunity on a third-party spoliation-of-evidence claim asserted against her by Amir Michael Fooladi ("Fooladi"), as father and next friend of Malia Fooladi ("Malia") who was injured on a glider at the school. The glider was put out in the trash by a custodian after Runnels had received a copy of a letter sent by an attorney for the School Board agreeing that the glider would be stored for an indefinite period.

The Court concludes Runnels is entitled to State-agent immunity under the second category identified in *Cranman* because "the Board had delegated to her the duty of storing the glider on school premises; [and] that, pursuant to that duty, she had exercised her judgment as an administrator of the school when assigning the head custodian the task of storing the glider ...." Ms. *11.

The Court declines to consider Fooladi's effort to establish a *Cranman* exception because

> In his reply to the mandamus petition, Fooladi argues that Runnels exceeded her authority by failing to obey the "detailed instruction" from the Board and Zeanah "to preserve the ... [the glider]." Significantly, however, none of the arguments raised by Fooladi in response to Runnels's mandamus petition were raised in the trial court. Thus, Fooladi's arguments are not properly before this Court, and we decline to address them. See, e.g., *Ex parte Green*, 108 So. 3d 1010, 1013 (Ala. 2012) (concluding that new argument raised in response to mandamus petition was not properly before this Court); *Ex parte Harper*, 934 So. 2d 1045, 1048 (Ala. 2006) (declining to address an alternate argument that a transfer was proper under the doctrine of *forum non conveniens* because "the trial court did not address this ground for transferring the action in its order"); and *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So. 2d 454, 457 n.1 (Ala. 1999) ("[T]he propriety of a ruling on a motion to compel arbitration, like the propriety of a ruling on a summary-judgment motion, must be tested by reviewing the pleadings and the evidence the trial court had before it when it ruled.")

Ms. **12-13.

SOVEREIGN IMMUNITY

Hawkins, et al. v. Gov. Ivey, et al., [Ms. 1200847, Mar. 18, 2022] __ So. 3d __ (Ala. 2022). The Court (Mitchell, J.; Parker, C.J., and Bolin, Shaw, Bryan, Mendheim, and Stewart, JJ. concur; Sellers, J., concurs in the result; Wise, J., recuses) affirms the Montgomery Circuit Court's dismissal of an action for lack of subject-matter jurisdiction filed by recipients of enhanced unemployment benefit payments approved by Congress as part of coronavirus relief. The plaintiffs sued Governor Kay Ivey and Alabama Secretary of Labor Fitzgerald Washington challenging their decision to terminate Alabama's participation in the program. Ms. *2.

The Court reiterates "'[a] ruling on a motion to dismiss is reviewed without a presumption of correctness' and that "'[m]atters of subject-matter jurisdiction are subject to de novo review.'" Ms. *3, quoting *Munza v. Ivey*, [Ms. 1200003, Mar. 19, 2021] ___ So. 3d ___ (Ala. 2021).

While noting that Art. 1 § 14's wall of immunity is "nearly impregnable," the Court reiterates there are "limited circumstances in which actions against State officers in their official capacities are not barred by § 14. Those permissible categories of actions include cases in which a plaintiff seeks injunctive relief compelling State officers to perform their legal duties." Ms. *5.

The Court rejects the plaintiffs' efforts to invoke this exception, and explains "if the Governor decides that accepting specific funds and complying with federally mandated terms and conditions would benefit Alabama, the Governor is authorized and empowered by § 36-13-8 [Ala. Code 1975] to accept those funds. But if the Governor decides that those terms and conditions are too burdensome, there is nothing in § 36-13-8 that requires her to accept the funds." Ms. *8. The Court holds with respect to Secretary Washington

> Section 36-13-8 identifies only the Governor as being "authorized and empowered" to accept federal funds "in the name of and for the State of Alabama," and Secretary Washington's duty to cooperate with the federal government under § 25-4-118(a) has no bearing on Governor Ivey's discretion to decide whether to accept federal grants and funds under § 36-13-8. Stated another way, Secretary Washington had no ability to

> "cooperate" with the federal government to provide enhanced unemployment-compensation benefits to Alabamians under the programs once Governor Ivey terminated Alabama's participation in them. The claimants have not shown that § 25-4-118(a) – either by itself or in conjunction with § 36-13-8 imposes any legal duty on Governor Ivey or Secretary Washington that would place this action beyond the jurisdictional bar of § 14.

Ms. **11-12.

RES JUDICATA – SAME EVIDENCE TEST

City of Trussville v. Personnel Board of Jefferson County, [Ms. 1200629, Mar. 18, 2022] __ So. 3d __ (Ala. 2022). The Court (Parker, C.J., and Bolin, Shaw, Wise, Stewart, and Mitchell, JJ., concur; Sellers and Mendheim, JJ., concur in the result; Bryan, J., dissents) affirms a summary judgment entered by the Jefferson Circuit Court dismissing the City of Trussville's (the City) action against the Jefferson County Personnel Board (the Board) seeking a declaration that the City has the authority to create and operate its own civil-service system. A 1991 action between the parties was concluded by a settlement, providing in pertinent part that the "parties hereby agree that, as of the Effective Date specified in paragraph 8 [October 3, 1992], all classified and regular employees of Trussville shall be deemed to be under the jurisdiction and control of the Board ...." Ms. *7.

The Court notes that

> The City relies upon the "same evidence" test to argue that the 1991 action and the present action do not involve the same cause of action. The "same evidence" test has been stated as follows:
>
> > "The determination of whether the cause of action is the same in two separate suits depends on whether the issues in the two actions are the same and whether the same evidence would support a recovery for the plaintiff in both suits. *Dominex, Inc. v. Key*, 456 So. 2d 1047, 1054 (Ala. 1984). Stated differently, the fourth element is met when the issues involved in the earlier suit comprehended all that is involved in the issues of the later suit. *Adams v. Powell*, 225 Ala. 300, 142 So. 537 (1932)." *Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 726 (Ala. 1990).

Ms. *22.

The Court rejects this argument

> Although the theories of relief in the two declaratory-judgment actions may differ – in the 1991 action, the City challenged whether the Board could assert jurisdiction over the City based solely on the 1990 federal census but, in the current action, the City challenged the jurisdiction of the Board based on the fact that part of the City's corporate limits lie outside Jefferson County – the two declaratory-judgment actions arose out of the same dispute and presented the same rights to be determined – whether the City fell under the jurisdiction of the Board or whether the City could form its own civil-service system. The fact that both the 1991 action and the present action were based on different theories is of no consequence. See *McDonald*, 985 So. 2d at 921 (stating that ""'[*r*]*es judicata* applies not only to the exact legal theories advanced in the prior case, but to all legal theories and claims arising out of the same nucleus of operative facts"'"). We further note that all the facts relevant to the theory that the City is not subject to the jurisdiction of the Board because a portion of the City's corporate limits lies outside Jefferson County, which is the City's theory of relief in the current action, were present and known to the City before the commencement of the 1991 action.

Ms. **30-31.

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