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and FAMILY

RECENT CIVIL DECISIONS

Summaries from April 5, 2019 – September 20, 2019

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FINALITY OF JUDGMENT FOR MONEY

Ex parte Ralph Eustace, et al., [Ms. 1171103, Apr. 5, 2019] __ So. 3d __ (Ala. 2019). The Court (Bolin, J.; Parker, C.J., and Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur; Shaw and Bryan, JJ., concur in the result) vacates on certiorari review the Court of Civil Appeals' no opinion affirmance of the Jackson Circuit Court's judgment in an action alleging trespass, conversion of timber, and interference with contractual relationship claims.

The Court considered, *ex mero motu*, whether the appeal was from a non-final judgment such that the Court of Civil Appeals lacked jurisdiction. The Court determined "[t]he finality of the judgment is merely illusory, because it is conditioned upon the judgment in favor of the Wilbourns on the intentional interference with the contractual relationship claim being affirmed on appeal." Ms. *9. The Court applied settled law that "'a judgment for damages to be final must ... be for a sum certain determinable without resort to extraneous facts.'" Ms. *8, quoting *Moody v. State ex rel Payne*, 351 So. 2d 547, 551 (Ala. 1977) (some internal quotation marks omitted).

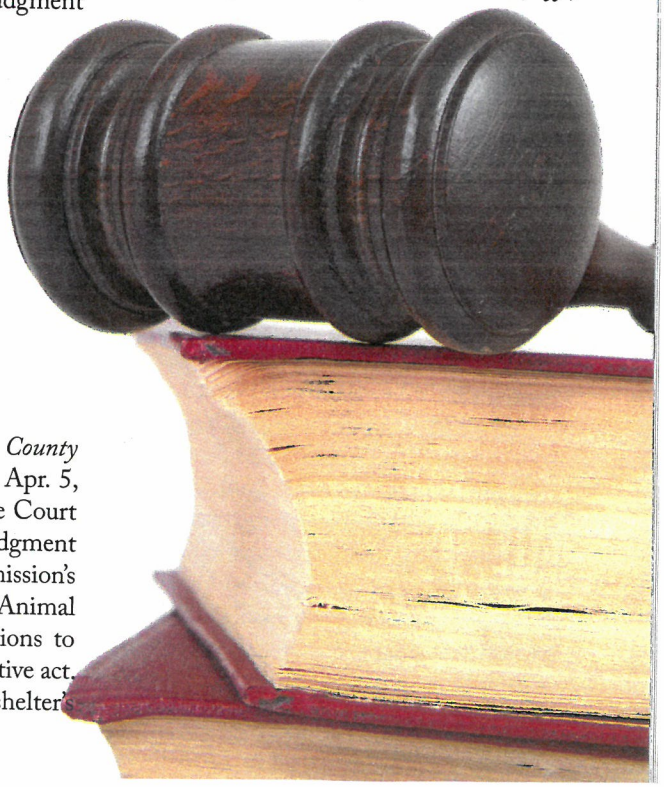
LEGISLATIVE APPROPRIATION TO CHARITABLE INSTITUTION

Clay County Commission v. Clay County Animal Shelter, Inc., [Ms. 1170795, Apr. 5, 2019] __ So. 3d __ (Ala. 2019). The Court reverses the Clay Circuit Court's judgment dismissing the Clay County Commission's action against the Clay County Animal Shelter, Inc. challenging appropriations to the shelter pursuant to a 2017 legislative act.

After first rejecting the animal shelter's contention that the passage of a subsequent act mooted and rendered non-justiciable any controversy concerning the validity of the 2017 act, in question, the Court held that the 2017 act violated § 73 of the Alabama Constitution requiring that any appropriation to a charitable or educational institution not under the control of the state be made only "by a vote of two-thirds of all the members elected to each house." Ms. *4, quoting Article IV, § 73, Ala. Const. 1901. The Court concluded that "legislative appropriations must comply with the requirements of the Alabama Constitution, including § 73...." Ms. *38.

ADMINISTRATIVE PROCEDURE ACT INAPPLICABLE TO COUNTY BOARD OF HEALTH

Ex parte GASP, [Ms. 1171082, Apr. 5, 2019] __ So. 3d __ (Ala. 2019). The Court (Mendheim, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, and Stewart, JJ.,



concur; Mitchell, J., recuses) on certiorari review rejects the Court of Civil Appeals' decision that the Alabama Air Pollution Control Act of 1971, § 21-28-1, *et seq.*, preempts the rule-making procedures of the Alabama Administrative Procedure Act ("AAPA"), § 41-22-21, *et seq.*, Ala. Code 1975. The Court noted that "'the AAPA shall take precedence over any other statute which diminishes the rights created by the AAPA, unless that statute expressly provides otherwise.'" Ms. *11, quoting *Ex parte Varner*, 571 So. 2d 1108, 1109 (Ala. 1990) (some internal quotation marks omitted). Accordingly, the Court concluded "that the Court of Civil Appeals erred in affirming the trial court's judgment on the basis of preemption." Ms. *12.

The Court found the AAPA inapplicable for a different reason, holding that "the Jefferson County Board of Health is a 'local governmental unit' rather than a 'state agency' for purposes of the AAPA. Accordingly, it was unnecessary for the Board to comply with the notice and hearing requirements of the AAPA when it repealed Chapter 12 and adopted new rules for the Air Program." Ms. *29.

MANDAMUS REVIEW OF DISCOVERY ORDER – ATTORNEY-CLIENT PRIVILEGE – INSURANCE COVERAGE DISPUTE

Ex parte Alfa Insurance Corp., [Ms. 1170804, Apr. 5, 2019] __ So. 3d __ (Ala. 2019). This per curiam opinion (Parker, C.J., and Bolin, Wise, Bryan, and Mitchell, JJ., concur; Mendheim, J., concurs in part and dissents in part; Sellers, and Stewart, JJ., dissent) issues a writ of mandamus directing the Montgomery Circuit Court to vacate its orders denying Alfa's motion for protective order and challenging orders to produce a coverage opinion letter from Alfa's outside counsel.

The Court first noted that "the order challenged ... is reviewable because it allegedly disregards the attorney-client privilege ... and further noted that '[t]he parameters of an evidentiary privilege and, in particular, whether the law recognizes contended-for exceptions to that privilege' are questions of law, and, as such, are subject to *de novo* review." Ms. *23-24, quoting *Ex parte Northwest Alabama Mental Health Ctr.*, 68 So. 3d 792, 796 (Ala. 2011).

Despite noting that it may "affirm the trial court on any valid legal ground presented by the record, whether that ground was considered, or even if it was rejected, by the trial court," Ms. *39, the Court concluded because Alfa had not invoked advice of counsel as a defense in the coverage dispute, the plaintiffs could not establish any exception to the attorney-client privilege authorizing the production of the opinion letters. Ms. *34. The Court issued the writ because "Alfa has established that the trial court exceeded its discretion when it disregarded the attorney-client privilege and entered the May 2018 order denying Alfa's motion for protective order and compelling Alfa to produce the materials sought for *in camera* inspection or for discovery." Ms. *46.

Noting that Alfa's privilege log listed numerous documents in addition to the coverage opinion letter, Justice Mendheim's dissent concludes that "an *in camera* inspection of the documents included in the privilege log – other than the coverage opinion – is an appropriate method in this kind of situation for determining the applicability of the attorney-client privilege to those documents." Ms. *50.

ORE TENUS STANDARD – ASSIGNMENT OF NOTE – POSTJUDGMENT MOTION – WAIVER

Ayers v. Mays, [Ms. 2170639, Apr. 5, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Moore, J.; Thompson, P.J., and Donald, Hanson, JJ., concur; Edwards, J., concurs in part and dissents in part) affirms in part and reverses in part a judgment of the Randolph Circuit Court in a dispute regarding the foreclosure of a mortgage. The court noted that in reviewing the judgment, it must assume that the trial court made those findings necessary to support its judgment and that "[u]nder the ore tenus rule, all implicit findings of fact necessary to support a trial court's judgment carry a presumption of correctness and will not be held to be erroneous unless they are plainly and palpably wrong." Ms. *17-18.

The court affirmed the trial court's judgment that Ayers's counterclaim seeking to enforce a deficiency under the note was barred pursuant to § 7-3-118(a), Ala. Code 1975, because it was filed more than six years after the due date stated in the note. Ayers asserted for the first time in his postjudgment motion that § 6-8-84, Ala. Code 1975, preserved his counterclaim to enforce a deficiency under the note despite the statute of limitations. Section 6-8-84 provides:

> "When the defendant pleads a counterclaim to the plaintiff's demand, to which the plaintiff replies the statute of limitations, the defendant is nevertheless entitled to his counterclaim, where it was a legal subsisting claim at the time the right of action accrued to the plaintiff on the claim in the action."

Ms. *23. The court declined to address the merits of this issue holding "[g]iven the lack of any explanation for the tardy assertion of the argument asserting the applicability of § 6-8-84, we conclude that the trial court did not exceed its discretion in refusing to grant Ayers's post-judgment motion insofar as it requested that the trial court amend its ruling that the statute of limitations barred its counterclaim." Ms. *27.

BREACH OF CONTRACT – EMPLOYMENT AGREEMENT

Shoals Extrusion, LLC v. Beal, [Ms. 1170673, Apr. 19, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur) reverses a summary judgment entered by the Lauderdale Circuit Court awarding severance benefits pursuant to a written employment agreement.

The Court held there were genuine issues of material fact concerning the employee's alleged breach of the employment agreement so that he could not enforce the severance benefit. Ms. *9. The Court applied settled law that a court "should not enforce an agreement where the party seeking to enforce the agreement has failed to perform his part of the bargain." *Ibid.*, quoting *Smith v. Clark*, 341 So. 2d 720, 721 (Ala. 1977).

DRAM SHOP ACT – WRONGFUL DEATH – CIRCUMSTANTIAL EVIDENCE

Wiggins v. Mobile Greyhound Park, LLP, [Ms. 1170874, May 3, 2019] __ So. 3d __ (Ala. 2019). The Court (Bryan, J.; Parker, C.J., and Wise, Mendheim, Stewart, Mitchell, JJ., concur; Bolin and Sellers dissent) reverses a summary judgment entered by the Mobile Circuit Court dismissing a Dram Shop action predicated on overserving a patron at a dog-racing track.

The Court first held that "the totality of the circumstances" must be considered where an on-premises licensee is alleged to have sold alcohol to a visibly intoxicated person. Ms. *16.

McMillian, the intoxicated driver, testified that he only consumed two beers at the defendant dog-racing track and had not consumed alcohol before arriving there. Ms. *32. However, the fatal crash occurred only twenty minutes after McMillian left the dog-racing track and numerous witnesses testified that immediately following the crash McMillian was visibly intoxicated. Ms. *18-20. The plaintiff also submitted expert testimony that based upon his BAC, McMillian consumed 20-23 beers during the time he was at the dog-racing track. Ms. *33.

The Court held that "'circumstantial evidence is in no wise considered inferior evidence and is entitled to the same weight as direct evidence ....'" Ms. *35, quoting *Edwards v. State*, 139 So. 3d 827, 836-37 (Ala. Crim. App. 2013). Consequently, the circuit court erred in discounting the circumstantial evidence that McMillian was visibly intoxicated when he was served by the defendants. Ms. *37.

The Court also rejected defendants' collateral estoppel argument because collateral estoppel only extends to "matters actually litigated and determined in the first action." Ms. *48, quoting 50 C.J.S. Judgment § 928 (2009) (emphasis added by *Wiggins*). The issue of McMillian's visible intoxication was not actually determined in the prior declaratory judgment action. Ms. *47-48.

In affirming the trial court's order striking the claim for wrongful death, the Court reiterated settled law that

> "[t]he Dram Shop Act provides the exclusive remedy for the unlawful dispensing of alcohol to an adult." *Johnson v. Brunswick Riverview Club, Inc.*, 39 So. 3d 132, 139 (Ala. 2009). "In Alabama, one cannot recover for negligence in the dispensing of alcohol." *Williams v. Reasoner*, 668 So. 2d 541, 542 (Ala. 1995).

Thus, Wiggins cannot assert both a claim under the Dram Shop Act and a claim under the Wrongful Death Act for the same injury. To the extent that the circuit court's order granting MGR's motion to strike is based on such a conclusion, it is affirmed. Our decision in that regard, however, does not alter the relief available to Wiggins under the Dram Shop Act for damages arising from Turner's death.

Ms. *50-51.

REVIEW OF CIVIL APPEALS DECISION DENYING PETITION FOR WRIT OF MANDAMUS

Ex parte T.M.F., [Ms. 1180454, May 3, 2019] __ So. 3d __ (Ala. 2019). The Court (Sellers, J.; Bolin, Shaw, Mendheim, and Stewart, JJ., concur; Parker, C.J., and Wise, Bryan, and Mitchell, JJ., concur in the result) dismisses a petition for certiorari seeking review of the Court of Civil Appeals's denial of a petition for a writ of mandamus. The Court noted that:

> Rule 21(e), Ala. R. App. P., sets forth the procedures for seeking review of decisions of the Courts of Appeals granting or, as in this case, denying a petition for a writ of mandamus. Rule 21(e) states, in relevant part:
>
> "(1) A decision of a court of appeals on an original petition for writ of mandamus or prohibition or other extraordinary writ (i.e., a decision on a petition filed in the court of appeals) may be reviewed de novo in the supreme court, and an application for rehearing in the court of appeals is not a prerequisite for such review. If an original petition for extraordinary relief has been denied by the court of appeals, review may be had by filing a similar petition in the supreme court (and, in such a case, in the supreme court the petition shall seek a writ directed to the trial judge. ...
>
> "....
>
> "(3) Without regard to whether the court of appeals has issued an opinion, rehearing may be sought in the court of appeals, but if a rehearing is sought, then review in the supreme court shall be by petition for writ of certiorari pursuant to Rule 39[, Ala. R. App. P.]."

Ms. *2-3. (Emphasis in original.) The Court held that "[b]ecause T.M.F. did not file an application for rehearing in the Court of Civil Appeals, his only avenue for seeking review in this court would be filing a petition for a writ of mandamus." Ms. *3.

ET AL. DESIGNATION IN NOTICE OF APPEAL – MALICIOUS PROSECUTION

Naman v. Chiropractic Life Center, Inc., [Ms. 1170934, May 3, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; Parker, C.J., Shaw, Wise, Sellers, and Stewart, JJ., concur; Bolin, Bryan, and Mendheim, JJ., concur in the result) affirms the Mobile Circuit Court's summary judgment dismissing a claim for malicious prosecution asserted by Naman against Chiropractic Life Center, Inc. (CLC) and Dr. Agren.

Naman's Notice of Appeal identified the appellee as "Chiropractic Life Center, Inc., *et al.*" In accordance with Rule 3(c), Ala. R. App. P., the Court had previously stricken the *et al.* from the Notice of Appeal and stated that Naman's appeal "would be docketed 'only as to those parties specifically identified in the Notice of Appeal' and that '[a]ny person or entity not specifically identified will not be a party to this appeal.'" Ms. *8. The Court effectively granted Dr. Agren's motion to dismiss Naman's appeal as to her, holding that "'it is settled law that notice of appeal from a judgment in favor of two or more parties must specifically name each party whose judgment the appellant wishes to overturn.'" Ms. *9, quoting *Sperau v. Ford Motor Co.*, 674 So. 2d 24, 40 (Ala. 1995).

As to the appeal from the dismissal of CLC, the Court affirmed, concluding "[t]here are undisputed facts in the record ... supporting CLC's argument that it had a good-faith basis for believing that Naman owed it money." Ms. *15.

RECENT CIVIL DECISIONS

LIABILITY OF OWNER OR KEEPER OF DOGS

Armstrong v. Hill, [Ms. 1170650, May 10, 2019] __ So. 3d __ (Ala. 2019). This *per curiam* decision (Parker, C.J., and Shaw, Sellers and Stewart, JJ., concur; Bolin, Bryan, Mendheim, JJ., concur in the result; Wise and Mitchell, JJ., concur in part and dissent in part) reverses a judgment of the Montgomery Circuit Court awarding plaintiff $75,000 in damages for injuries suffered when she was bitten by three dogs. Ms. *1-2.

The defendant and her counsel did not appear for trial, and the circuit court announced from the bench that a default would be entered and afforded the plaintiff an opportunity to put on evidence of damages. Ms. *2. Minutes later, the defendant entered the courtroom without her counsel and was afforded an opportunity to cross-examine the plaintiff. On cross-examination, the plaintiff admitted that she knew the defendant's property was being rented, and that the tenant kept dogs there but "she did not know to whom the dogs belonged." Ms. *5.

The Court first held that "the absence of an entry of default in the electronic docket in this case indicates that no default was entered into the SJIS. Because no entry of default preceded the judgment, we presume the judgment from which Armstrong appeals was a judgment on the merits." Ms. *9-10.

On the merits, the Court first noted that

> Under Alabama law, only owners and keepers of dogs have a duty to prevent their dogs from biting others. *Humphries v. Rice*, 600 So. 2d 975, 976 (Ala. 1992). Therefore, to support a conclusion that Armstrong was negligent, there must be sufficient evidence that Armstrong owned or kept the dogs that attacked Hill. Hill does not claim that Armstrong owned the dogs. Accordingly, the only way Armstrong could be found liable for negligence is if she were found to be a "keeper" of the dogs.

Ms. *16.

"[D]espite the high degree of deference accorded to the trial court's factual findings," the Court could "identify no evidence in the record to sustain the judgment entered against Armstrong on the basis of (1) negligence and/or wantonness or (2) premises liability." Ms. *15. The Court reversed and directed entry of judgment for the defendant.

Justice Mitchell's dissent would have reversed the judgment for the plaintiff but remanded for a new trial because the plaintiff may have been induced to ignore the issue of liability by the trial court's instruction to prove damages only. Ms. *21.

CONVERSION OF 12(B)(6) MOTION TO MOTION FOR SUMMARY JUDGMENT

Reese v. Bolling, et al., [Ms. 2180265, May 10, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Moore, J.; Thompson, P.J., and Donaldson and Edwards, JJ., concur; Hanson, J., concurs specially) reverses a judgment of the Montgomery Circuit Court dismissing claims asserted by an inmate against the warden and medical personnel at the Donaldson Correctional Facility. Defendant moved to dismiss based upon immunity and other defenses. Ms. *5. The defendants attached to their motion certain exhibits, including an affidavit and DOC records regarding the plaintiff's diet, and the circuit court's order of dismissal indicating that the court had "'carefully reviewed all pleadings and evidentiary materials ...'" *Ibid.*

Applying settled law, the court held that the trial court's consideration of the materials attached to the Rule 12 motion converted the motion into a motion for summary judgment. Ms. *8. The court reversed, holding

> "[I]f a motion under Rule 12(b)(6) [, Ala. R. Civ. P.,] is converted into a motion for summary judgment, both parties shall be given a reasonable opportunity to submit affidavits and other extraneous proofs to avoid a party being taken by surprise through conversion of the motion to dismiss to one for summary judgment. It is also clear that the spirit of Rule 56[, Ala. R. Civ. P.,] requires the same notice and hearing where the court contemplates summary judgment on its own initiative as it does when a party moves for summary judgment; i.e., ten days[']notice."

Ms. *8, quoting *Singleton v. Alabama Department of Corrections*, 819 So. 2d 596 (Ala. 2001) (some internal quotation marks omitted).

MOTION TO COMPEL ARBITRATION

Greenway Health, LLC, et al. v. Southeast Alabama Rural Health Associates and Sunrise Technology Consultants, LLC et al. v. Southeast Alabama Rural Health Associates, [Ms. 1171046 and 1171061, May 17, 2019] __ So. 3d __ (Ala. 2019). The Court (Bolin, J.; Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur) affirms the Pike Circuit Court's order denying the Defendants' motion to compel arbitration in an action brought by Southeast Alabama Rural Health Associates ("SARHA") alleging that the Defendants failed to properly maintain and protect the protected health information of SARHA. The Defendants contended that SARHA was required to arbitrate its claims against them. Ms. *13.

In rejecting the Defendants' contention that an arbitration provision in a software licensing agreement required arbitration, the Court noted that "the business associate agreement ("BAA") (upon which SARHA sued) contains an 'entire agreement' clause, which provides that the BAA 'constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof and supersedes any prior ... written contracts ... of any nature or kind between the Parties.'" Ms. *20. The BAA did not contain an arbitration provision. Ms. * 9. Consequently, the Court held "we conclude that SARHA cannot be compelled to arbitrate these claims against the Greenway Defendants because the Greenway Defendants have failed to establish the existence of a contract calling for arbitration." Ms. *22.

FORUM-SELECTION CLAUSE

Castleberry v. Angie's List, Inc., [Ms. 1180241, May 17, 2019] __ So. 3d __ (Ala. 2019). The Court (Sellers, J.; Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur) affirms the Montgomery Circuit Court's order dismissing the Castleberrys' claims against Angie's List, Inc., based on a forum-selection clause.

The Castleberrys used their membership with Angie's List to locate a

contractor to renovate a bathroom in their home to make it handicap accessible. Ms. *2. The Castleberrys sued the contractor for poor work and named Angie's List as a defendant alleging that Angie's List had misrepresented the qualifications of the contractor. *Ibid.*

The membership agreement between Angie's List and the Castleberrys contained a forum-selection clause providing for exclusive jurisdiction in the courts of Marion County, Indiana. Ms. *3. The Castleberrys argued that the forum-selection clause required Angie's List members to litigate in Indiana only those claims brought against them by Angie's List and did not apply to claims brought by members against Angie's List. Ms. *3-4. The Court rejected this argument, noting that "the first sentence of the forum-selection clause provides for the application of Indiana law in 'any action.'" Ms. *5.

APPELLATE PROCEDURE

Archer v. America's First Fed. Cr. Union, [Ms. 2180136, May 17, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Edwards, J.; Thompson, P.J., and Moore, Donaldson and Hanson, JJ., concur) affirms a summary judgment entered by the Mobile Circuit Court in favor of America's First Federal Credit Union in an ejectment action filed following a foreclosure of Archer's home.

The court pretermitted consideration of the merits of Archer's appeal for a number of reasons. The court first held that "Archer submitted a reply brief containing completely new arguments. It is well settled that an appellate court will not consider arguments raised for the first time in a reply brief." Ms. *5.

The court also rejected Archer's efforts to incorporate by reference arguments he made in opposition to the summary-judgment motion in the circuit court. The court held "[t]o the extent Archer might be attempting to incorporate any arguments that he may have made in a submission to the trial court, Archer may not do so. *Perry v. State Pers. Bd.*, 881 So. 2d 1037, 1039 (Ala. Civ. App. 2003) (explaining that Rule 28, Ala. R. App. P., does not provide for the incorporation into an appellate brief of arguments made in trial briefs or other submissions in the trial court) ...." Ms. *7.

ADMINISTRATIVE PROCEDURE ACT – STANDARD OF REVIEW

Alabama State Bd. of Pharmacy v. Parks, et al., [Ms. 2180227, May 17, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Thompson, P.J.; Moore, Donaldson, Edwards, and Hanson, JJ., concur) reverses a judgment of the Montgomery Circuit Court reducing the punishment imposed by the Alabama Board of Pharmacy for violations of the Alabama Pharmacy Act.

The Board suspended Parks's pharmacist's license for five years and imposed an administrative fine against her of $27,000 in addition to aggregate fines of $47,000 imposed against various pharmacies operated by Parks. Ms. *7-8. While affirming the Board's decision and factual findings and conclusions of law regarding Parks's violations of the Alabama Pharmacy Act, the circuit court concluded that the sanctions imposed by the Board were "arbitrary, capricious, and unreasonable and are due to be modified." Ms. *8. The circuit court reduced the suspension of Parks's license to three months and reduced the fines to a total of $3,000. Ms. *8-9.

Applying the deferential standard of review of decisions of administrative agencies under the Alabama Administrative Procedure Act, the court held that "we cannot say that the Board acted in an unreasonable, arbitrary, or capricious manner in imposing [the] sanctions." Ms. *14. The standard of review under the APA expressly provides that a reviewing "court shall not substitute judgment for that of the agency ...." Ms. *10.

CGL POLICY – OCCURRENCE – FAULTY WORKMANSHIP

Nationwide Mutual Fire Ins. Co. v. The David Group, Inc., [Ms. 1170588, May 24, 2019] __ So. 3d __ (Ala. 2019). The Court unanimously (Shaw, J.; Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur) reverses the Jefferson Circuit Court's judgment that TDG, a construction company, was entitled to coverage and indemnification under a commercial general liability insurance policy.

The opinion reiterates settled law "that faulty workmanship itself is not an occurrence under a CGL policy ...." Ms. *9. The Court pointed out that faulty work may lead to an occurrence if it subjects personal property or other parts of a structure to continuous or repeated exposure to harmful conditions. Ms. *9-10. "This concept is consistent with the idea that the purpose of the CGL policy is to protect and insure the contractor from tort liability, not to insulate it from its own faulty work. This means that, although there is no coverage for replacing poor work, there may be coverage for repairing resulting damage caused by the poor work." Ms. *10 (emphasis in the original)(internal citations omitted).

The Court reversed the judgment that the contractor was entitled to coverage because "the record before us does not support the conclusion that the arbitrator found the Shahs [the homeowners] to have 'suffered damages' because of an occurrence caused by faulty workmanship." Ms. *16.

LEAVE TO AMEND COMPLAINT AFTER DISMISSAL

Ghee v. USAble Mutual Ins. Co., [Ms. 1170249, May 24, 2019] __ So. 3d __ (Ala. 2019). A plurality of the Court (Stewart, J.; Parker, C.J., and Wise, J., concur; Bryan and Mendheim, JJ., concur in the result; Bolin, J., dissents; and Shaw, Sellers, and Mitchell, JJ., recuse) reverses an order of the Calhoun Circuit Court dismissing a wrongful death action brought against USAble Mutual Insurance Company (d/b/a Blue Advantage Administrators of Arkansas) ("Blue Advantage").

In a prior appeal following the circuit court's dismissal of the wrongful death claim against Blue Advantage based upon defensive ERISA preemption, the Court held that the circuit court's Rule 54(b) certification was improper because a trial court "cannot purport to enter a final adjudication of the claim while making it possible for the plaintiff to revive that very claim.'" Ms. *12, quoting *Ghee I*, 253 So. 3d at 373. A day after the Supreme Court's certificate of judgment was entered dismissing the prior appeal, the plaintiff moved for leave "to more precisely state in the complaint his state-law claim setting forth the allegations he presented in

opposition to Blue Advantage's motion to dismiss." Ms. *12. The circuit court denied leave to amend and again dismissed the claim. *Ibid.*

The Court again reversed, holding that the trial court exceeded its discretion in refusing leave to amend, holding

> This Court has previously recognized that under Rule 15 a plaintiff has the right to amend a complaint to remedy a defect after the trial court has entered an order of dismissal. *Papastefan v. B & L Constr. Co. of Mobile*, 356 So. 2d 158, 160 (Ala. 1978). Because the trial court determined that Ghee's allegations against Blue Advantage as stated in the original complaint were defensively preempted by ERISA, Ghee should have had the right to amend his complaint to clarify his state-law claims.

Ms. *22-23.

FORUM NON CONVENIENS – MOTOR VEHICLE CRASH

Ex parte Tyson Chicken, Inc., [Ms. 1170820, May 24, 2019] __ So. 3d __ (Ala. 2019). This per curiam opinion (Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur; Parker, C.J., and Bolin and Sellers, JJ., dissent; Mitchell, J., recuses) grants rehearing and denies defendants' motion to transfer venue invoking the *forum non conveniens* statute.

The Court held that "Craig and Tyson had not presented evidence or affidavits demonstrating that Cullman County is a 'significantly more convenient' forum than Marshall County." Ms. *7. The Court declined to consider the location of documents as bearing on the issue of convenience because "Craig and Tyson have not presented information regarding the nature of the documentary evidence, and thus, we cannot consider the location of the documents in determining whether the trial court exceeded its discretion in denying the transfer." Ms. *8

The Court also noted that the record was devoid of evidence "such as affidavits from potential witnesses, indicating the witnesses who might testify ... would be 'seriously inconvenienced' by having to travel to Marshall County for trial." Ms. *9.

The Court found that the connection between the action in Cullman County was strong because the accident occurred there and the company that provided emergency medical care and the hospital at which the plaintiff was treated were located in Cullman County. Ms. *11. However, the Court concluded transfer to Cullman County was not required because "Marshall County's connection to the underlying action is not weak. All the parties in this case either live in or operate in Marshall County." Ms. *13. Accordingly, the Court concluded that the defendants "have failed to establish that the trial court exceeded its discretion or that they have a clear legal right to the relief sought." Ms. *14-15 (emphasis in the original).

ATTORNEYS' FEES AND CONTINGENCY FEE AGREEMENT

Rose v. Penn & Seaborn, LLC, [Ms. 2180184, June 7, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court affirms a judgment of the Pike Circuit Court awarding attorneys' fees and costs to lawyers whom the trial court found after the *ore tenus* proceedings were entitled to be paid for services rendered pursuant to a contingency fee agreement. The court determined the client's obligation to pay the attorneys became fixed when a settlement agreement was reached, but the client then ended the relationship with his attorneys and refused to perform under that settlement agreement. Citing *Triplett v. Elliott*, 597 So. 2d 908 (Ala. 1991), and *Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton*, 554 So. 2d 445 (Ala. Civ. App. 1989), the court concluded the trial court correctly calculated the fee based on the original contingency fee agreement rather than by calculating a reasonable fee award on the theory of *quantum meruit*. *Id.* Ms. *13-17.

POSTJUDGMENT INTEREST

Pope, McGlamry, etc. v. DuBois, [Ms. 1171178, June 14, 2019] __ So. 3d __ (Ala. 2019). The Court (Stewart, J.; Parker, C.J., Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur) reverses a judgment of the Etowah Circuit Court awarding postjudgment interest to Jason DuBois. DuBois was injured in a workplace accident. After a settlement, the Pope McGlamry law firm intervened to assert an attorney's lien on the settlement proceeds, and the proceeds were paid into court. Ms. *2.

The circuit court determined that the firm was not entitled to any portion of the proceeds and subsequently awarded postjudgment interest to DuBois. Ms. *4. The Court reversed the award of postjudgment interest, holding "there simply was not a money judgment against the firm that would permit the accrual of postjudgment interest pursuant to § 8-8-10. The settlement sum interpleaded in the court from the underlying case 'was not money that [the firm] owed to [DuBois] pursuant to any note, mortgage, judgment, or other indebtedness, nor was it awarded as a result of any legal claims against [the firm].'" Ms. *7, quoting *Bank Independent v. Coats*, 621 So. 2d 951, 953 (Ala. 1993).

EXEMPTION FROM ZONING – GOVERNMENTAL ENTITY

Meriwether, Factors and Drayage v. Pike Road Volunteer Fire Protection Authority, [Ms. 1180330, June 14, 2019] __ So. 3d __ (Ala. 2019). The Court (Sellers, J.; Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur) reverses a judgment of the Montgomery Circuit Court which had held that the Pike Road Volunteer Fire Protection Authority was a governmental entity exempt from zoning regulations. The Court acknowledged that immunity from zoning regulations has long been afforded to "'political subdivisions' in the operation of their governmental functions." Ms. *4, quoting *City of Selma v. Dallas Cty.*, 964 So. 2d 12, 19 (Ala. 2007).

In reversing, the Court concluded that the fire protection authority was an independent organization that did not qualify for exemption from zoning regulations as a political subdivision. Ms. *15. The Court explained that exemption from zoning regulations should not be lightly awarded "[b]ecause of the importance of protecting property rights, restricting the use of property or exempting property from existing zoning restrictions requires a process that will preserve a property owner's right to the peaceful enjoyment of his or her property and simultaneously allow property owners the confidence and assurance that neighbors will not develop their property for an inconsistent and nonconforming use that

could diminish the value or use of other property." Ms. *14.

RESPONDEAT SUPERIOR – LINE AND SCOPE OF EMPLOYMENT

Donaldson v. Country Mutual Insurance Company, [Ms. 1171045, June 14, 2019] __ So. 3d __ (Ala. 2019). The Court (Sellers, J.; Bolin, Wise, and Stewart, JJ., concur; Parker, C.J., concurs in the result) affirms a summary judgment entered by the Madison Circuit Court holding that Country Mutual Insurance Company was not vicariously liable for an automobile accident caused by Gregory Johnston, an insurance agent with Country Mutual.

The relevant agent agreement identified Johnston as an independent contractor and further stipulated that "'nothing in this agreement shall be construed to create the relationship of employer and employee' ...." Ms. *3. The Court held that the manner in which the parties characterized the relationship was not determinative on whether Johnston was an independent contractor or an employee. Ms. *6. Rather, the Court held that "for an employer-employee relationship to exist, the purported employer must retain the right to direct the manner in which the individual work is to be performed, as well as the result the employer desires the individual to accomplish." Ms. *5-6.

In affirming the summary judgment for Country Mutual, the Court held that "the evidence submitted to the trial court failed to show that Country Mutual retained the right to control Johnston's time or his day-to-day activities. Johnston determined his own work schedule and the hours of operation of his office. Johnston was not assigned a specific territory; he solicited potential customers at his own discretion and in whatever manner he deemed the most effective." Ms. *8.

The Court also held that there was not substantial evidence showing that the accident occurred within the line and scope of Johnston's alleged employment with Country Mutual. The Court applied settled law that "'[a]n act is within an employee's scope of employment if the act is done as part of the duties the employee was hired to perform or if the act confers the benefit on his employer.'" Ms. *10, quoting *Holbert v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 22, 23 (Ala. 1998). The Court concluded "there is not sufficient evidence presented from which it could reasonably be inferred that Johnston was traveling for a purpose related to his alleged employment. There was no evidence indicating that Johnston's trip was connected to the work-related phone calls made before the accident." Ms. *13.

REVIEW OF ARBITRATOR'S DECISION ON AVAILABILITY OF CLASS ARBITRATION

Alabama Psychiatric Services, P.C. v. Lazenby, [Ms. 1170856, June 21, 2019] __ So. 3d __ (Ala. 2019). The Court (Bryan, J.; Parker, C.J., and Bolin, Shaw, Mendheim, Stewart, and Mitchell, JJ., concur; Seller, J., concurs in the result; Wise, J., recuses) affirms the Jefferson Circuit Court's judgment denying defendants' motion to vacate the arbitrator's decision that class arbitration was available. Ms. *32. Pursuant to Rule 3 of the AAA's Supplementary Rules for Class Arbitration, a party may request the arbitrator for a clause-construction award determining whether class arbitration is available. Ms. *2-3.

The Court held that

> [t]he circuit court, in its earlier order compelling arbitration, ... conclud[ed] that the arbitrator should decide whether class arbitration is available. APS and MHCA could have appealed the circuit court's order and argued on appeal that the parties had never agreed to submit the class-question to an arbitrator; however, APS and MHCA did not do that, thus precluding any further judicial review of that issue. Accordingly, APS and MHCA cannot establish that the circuit court should have applied a *de novo* standard of review based on a conclusion that the parties had never agreed to submit the class-action issue to the arbitrator.

Ms. *18.

Because of the failure of the defendants to appeal the circuit court's initial order that the arbitrator would decide availability of class arbitration, the Court concluded that "'the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.' *Oxford Health* [*Plans, LLC v. Sutter*, 569 U.S. 564, 569 (2013)]. The arbitrator here interpreted the policy; our review of the award goes no further than that determination." Ms. *28.

ADEQUACY OF BRIEF OF APPELLANT

May v. May, [Ms. 2180076, June 21, 2019] __ So. 3d __ (Ala. Civ. App. 2019). A unanimous Court of Civil Appeals issues a stern rebuke of counsel for a woefully inadequate brief of appellant submitted on behalf of the husband. The court observed "Rule 28(a), Ala. R. App. P., sets forth what an appellant's brief 'shall contain.' The rule is not merely a suggestion as to what one might wish to include in a brief. Rule 28(a) mandates that the appellant include certain specific information necessary for this court to conduct a meaningful review of the matter before us." Ms. *2. The court issued a $1500 sanction and instructed that the sanction was to be paid by the husband's attorney, not the husband. Ms. *9.

PERSONAL JURISDICTION

Facebook, Inc. v. K.G.S., etc., [Ms. 1170244, June 28, 2019] __ So. 3d __ (Ala. 2019). Justice Bryan, writing for the Court (Parker, C.J., and Shaw, Wise, Sellers, and Mendheim, JJ. concur; Bolin, J., concurs in the result; Stewart and Mitchell, JJ., recuse themselves) reverses a preliminary injunction entered in the Mobile Circuit Court, concluding that the Court lacked personal jurisdiction over Facebook.

Applying *Walden v. Fiore*, 571 U.S. 277, 291 (2014), the Court held:

> "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant 'focuses on "the relationship among the defendant, the forum, and the litigation."' *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State. Two related aspects of this necessary relationship are relevant in this case. "First, the relationship must arise out of contacts that the 'defendant himself' creates with the forum State. *Burger King Corp. v. Rudzewicz*, 471

U.S. 462, 475 (1985). Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant – not the convenience of plaintiffs or third parties. See *World-Wide Volkswagen Corp.* [*v. Woodson*, 444 U.S. 286,] 291-292 [(1980)]. We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) ('[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction'). ... Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.' *Rush v. Savchuk*, 444 U.S. [320,] 332 [(1980)].

> "Second, our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contact with persons who reside there. See, e.g., *International Shoe* [*Co. v. Washington*, 326 U.S. 310,] 319 [(1945)] (Due process 'does not contemplate that a state may make binding a judgment in personam against an individual ... with which the state has no contacts, ties, or relations'); *Hanson* [*v. Denckla*, 357 U.S. 235,] 251 [(1958)] ('However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him').
>
> ...
>
> [T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him. See *Burger King*, *supra*, at 478 ('If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot'); *Kulko v. Superior Court of Cal., City and County of San Francisco*, 436 U.S. 84, 93 (1978) (declining to 'find personal jurisdiction in a State ... merely because [the plaintiff in a child support action] was residing there'). To be sure, a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction. See *Rush*, *supra*, at 332 ('Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction'). Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State. *Burger King*, 471 U.S., at 475 (internal quotation marks omitted)." 571 U.S. at 283-86.

Ms. *25-28.

OPEN RECORDS ACT

The Health Care Authority for Baptist Health v. Central Alabama Radiation Oncology, LLC, [Ms. 1171030, June 28, 2019] __ So. 3d __ (Ala. 2019). The Court (Mendheim, J.; Parker, C.J., and Shaw, Wise, Sellers, and Stewart, JJ., concur; Bolin and Bryan, JJ., concur in the result; Mitchell, J., recuses) affirms the Montgomery Circuit Court's judgment requiring Baptist Health, an affiliate of UAB Health Systems, to disclose certain records to Central Alabama Radiation Oncology, LLC pursuant to the Alabama Open Records Act, § 36-12-40 and -41, Ala. Code 1975.

The Court concluded that "regardless of how Baptist Health began, it chose to partner with the University of Alabama to become a government-authorized health-care authority." Ms. *20. Consequently, the Court "conclud[ed] that the circuit court did not err in determining that the Authority is subject to the Open Records Act." Ms. *24.

The Court further held that the records in question were not covered by the "*Stone*" exception to the Public Records Act. The Court noted that "[t]he exception set forth in *Stone* must be strictly construed and must be applied only in those cases where it is readily apparent that disclosure results in undue harm or embarrassment to an individual, or where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure." Ms. *25, quoting *Chambers v. Birmingham News Co.*, 552 So. 2d 854, 856-57 (Ala. 1989).

UNJUST ENRICHMENT – ILLEGAL CONTRACT

Construction Services Group, LLC v. MS Electric, LLC, [Ms. 2171099, June 28, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Donaldson, J.; Thompson, P.J., and Moore and Hanson, JJ., concur; Edwards, J., concurs in the result) reverses the Jefferson Circuit Court's judgment in favor of MS Electric, LLC on its claim for unjust enrichment arising from services MS Electric performed as part of a subcontract with a general contractor, Construction Services Group, LLC. It was undisputed that while MS Electric possessed a valid electrical contracting license, it did not have an additional license from the state licensing board for general contractors required for jobs over $50,000. Ms. *3. MS Electric's subcontract with Construction Services was for over $200,000. Ms. *4.

The court held that "'current Alabama law does not recognize any exceptions to the rule that public policy will not permit recovery by an unlicensed contractor regardless of the conduct of the other party.'" Ms. *15, quoting *KLW Enters., Inc. v. West Alabama Commercial Indus., Inc.*, 31 So. 3d 136, 138 (Ala. Civ. App. 2009).

RELOCATION-REIMBURSEMENT AGREEMENT; ATTORNEY FEES, INTEREST, AND COSTS

Arnold v. Hyundai Motor Manufacturing Alabama, LLC, [Ms. 1170974, 1171026, July 12, 2019] __ So. 3d __ (Ala. 2019). In Case No. 1170974, the Court (Mitchell, J.; Parker, C.J., and Bolin, Wise, Sellers, Mendheim, and Stewart, JJ., concur; Bryan, J., concurs in the result) affirms a judgment of the Montgomery Circuit Court requiring a former employee to reimburse his former employer, Hyundai Motor Manufacturing Alabama, for expenses the employer incurred in moving the employee from Kentucky to Alabama to begin employment at Hyundai's manufacturing facility in Montgomery. The Court held that the undisputed evidence revealed the former employee owed the reimbursement pursuant to a standard relocation-reimbursement agreement because the former employee resigned his employment within 24 months of acceptance of the position. Following the *de novo* review of the facts before the trial court, the Court holds the former employer established each of the predicate elements of a breach-of-contract claim, and that evidence of working under duress was irrelevant to the trial court's determination that the former employee resigned within the 24-month period specified in the relocation-reimbursement agreement.

In Case No. 1171026, the Court (Mitchell, J.; Parker, C.J., and Bolin, Sellers, Mendheim, and Stewart, JJ., concur; Bryan, J., concurs in the result; Wise, J., dissents) accepted Hyundai's argument in its cross-appeal that the trial court erred by failing to award it pre-judgment interest, attorney fees, and expenses all as provided by the relocation-reimbursement agreement when the employee failed to timely reimburse Hyundai for amounts that became due under that agreement. Noting that while generally the decision to award attorney fees and costs is within the discretion of the trial court, *Classroomdirect.com, LLC v. Draphix, LLC*, 992 So. 2d 692 (Ala. 2008), recognized an exception when such claims are made pursuant to a contract. Because the sums due for attorney fees, interest, and costs were readily apparent from the record and the reasonableness of such sums was not challenged by the former employee on appeal, the Court remanded the cause to the trial court to enter a judgment in favor of the former employer, which included specified sums for pre-judgment interest, attorney fees, and costs.

TAX SALE; REDEMPTION; RES JUDICATA; LITIGATION ACCOUNTABILITY ACT

Austill v. Prescott, [Ms. 1170709, 1170730, July 12, 2019] __ So. 3d __ (Ala. 2019). With majority, concurring and dissenting opinions totaling 121 pages, a plurality of the Court in Case No. 1170709 (Bryan, J.; Shaw, J., concurs; Parker, C.J., and Bolin and Mitchell, JJ., concur in the result; Sellers, Mendheim, and Stewart, JJ., dissent) affirms a judgment of the Baldwin Circuit Court permitting Prescott to redeem real property under §§ 40-10-82 and 40-10-83, Ala. Code 1975. In Case No. 1170730, a plurality of the Court (Bryan, J.; Shaw, J., concurs; Parker, C.J., and Bolin, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur in the result) concludes the Baldwin Circuit Court did not exceed its discretion in denying Prescott's motion for an award of attorney fees under the Alabama Litigation Accountability Act, § 12-19-270, *et seq.*, Ala. Code 1975.

The plurality opinions implicate Alabama law of tax sales (§ 40-10-1, *et seq.*, Ala. Code 1975), judicial redemption (§§ 40-10-82 and 40-10-83, Ala. Code 1975), statutory redemption (§ 40-10-120, *et seq.*, Ala. Code 1975), tax deeds (§ 40-10-29, Ala. Code 1975), possession of land purchased at tax sale (§ 40-10-74, Ala. Code 1975), and the statute of limitations for bringing a judicial-redemption claim pursuant to the 2009 Amendment to § 40-2-82, Ala. Code 1975. See generally Ms. *2-25.

The plurality opinions also explore principles of *res judicata*, claim preclusion, and issue preclusion. See generally Ms. *27-41.

In the cross-appeal, the plurality examines the meaning of the phrase "without substantial justification" as used in § 12-19-272(a), Ala. Code 1975, and finds that because the appellant's attorney candidly explained in his pleadings why his client's claims were made in good faith despite the anticipated assertion of a *res judicata* defense, the Baldwin Circuit Court could not be found to have exceeded its discretion in declining to award attorney fees under the Litigation Accountability Act.

GARNISHMENT; EXEMPTION; § 6-6-227, ALA. CODE 1975 (SERVICE OF CONSTITUTIONAL CHALLENGES UPON THE ATTORNEY GENERAL)

Smith v. Renter's Realty, [Ms. 2180304, July 12, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court, *per curiam*, with all judges concurring, remands a judgment of the Madison Circuit Court which denied a claim of exemption in connection with a writ of garnishment to afford the Attorney General the opportunity to appear and be heard pursuant to § 6-6-227, Ala. Code 1975, and *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1990), on whether to weigh in on the issue of the constitutionality of § 6-10-6.1, Ala. Code 1975, which purports to exempt wages, salaries, and other compensation from the list of exemptions from garnishment, levy, sale under execution, and other process for the collection of debts.

FALSE ARREST – MALICIOUS PROSECUTION – PROBABLE CAUSE

Heining v. Abernathy, [Ms. 1180273, Aug. 16, 2019] __ So. 3d __ (Ala. 2019). The Court (Sellers, J.; Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur) affirms the Calhoun Circuit Court's summary judgment in favor of defendants Dean and Abernathy in an action alleging false arrest and malicious prosecution.

The defendants filed a complaint against Ronald and Tyler Heining to the Anniston Police Department accusing the Heinings of bribery and witness intimidation. Lt. George of the Anniston Police Department conducted an investigation which concluded with the arrest of the Heinings for attempted bribery and witness intimidation. Ms. *4. Those charges were ultimately nolle prossed. Ms. *6.

The Court affirmed the summary judgment dismissing the false arrest and

malicious prosecution claims asserted by Ronald and Tyler Heining. The Court held that "[o]nce the trial court determined that there was no dispute concerning the underlying facts of Lt. George's independent investigation, it became irrelevant whether the information conveyed to Lt. George by Fluker had been originally fabricated by Dean and Abernathy." Ms. *19. The Court applied settled law applicable to both false arrest and malicious prosecution claims that "if the officer 'acts solely on his own judgment and initiative, the defendant would not be responsible even though he had directed or requested such action, and even though he were actuated by malice or other improper motive.'" Ms. *10, quoting *Standard Oil Co. v. Davis*, 208 Ala. 565, 567, 94 So. 754, 756 (1922). The Court also applied settled law that "'[p]robable cause exists if facts and circumstances known to the arresting officer are sufficient to warrant a person of reasonable caution to believe that the suspect has committed a crime.'" Ms. *13-14.

PREMISES LIABILITY – OPEN AND OBVIOUS – WANTONNESS

Pittman v. The Hangout, [Ms. 2180429, Aug. 23, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Edwards, J.; Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur) reverses the Baldwin Circuit Court's summary judgment dismissing premises liability claims against The Hangout in Gulf Shores. A patron was injured when she fell as she entered a lower level of The Hangout separated by a single step, the top of which had been painted yellow. Ms. *2.

"'A condition is obvious if the risk is apparent to, and of the kind that would be recognized by, a reasonable person in the position of the invitee.'" Ms. *3, quoting *Howard v. Andy's Store for Men*, 757 So. 2d 1208, 1210 (Ala. Civ. App. 2000) (emphasis added). The plaintiff submitted expert testimony in opposition to the summary judgment that "'someone who is walking from one portion [of a building] to another, believing the ground is flat and stable, ... expect[s] that it will remain flat and stable.'" Ms. *8. In reversing, the court held "the environment in which a particular hazard appears is a factor in determining whether, in fact, a hazard is obvious to an invitee," Ms. *14, and that "'questions of whether the condition or defect was open and obvious should ordinarily be determined by the fact-finder.'" Ms. *17, quoting *Ex parte Kraatz*, 775 So. 2d 801, 804 (Ala. 2000).

The court also held that although The Hangout's attempt to make the step more noticeable via the use of contrasting (yellow) paint might not have been sufficient warning, that effort required affirmance of the summary judgment dismissing the wantonness claims. Ms. *21-22.

SECTION 1983 – SEIZURE OF VEHICLES FROM DRIVEWAY OF RESIDENCE – PROCEDURAL DUE PROCESS

McDonald v. Keahey and Foster Wrecker Svc., Inc., [Ms. 2180284, Aug. 23, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Hanson, J.; Thompson, P.J., and Moore and Donaldson, JJ., concur; Edwards, J., concurs in the result) reverses a summary judgment entered by the Jefferson Circuit Court in favor of Foster Wrecker Service, Inc. and Jefferson County Sheriff's Deputy Robert Keahey in a Section 1983 action.

Two inoperable vehicles were towed from the backyard of plaintiff's home pursuant to a Center Point municipal ordinance prohibiting a premises owner from storing non-operable motor vehicles on his or her property. Ms. *5. After a Center Point building inspector notified the plaintiff of an alleged violation of the ordinance, Deputy Keahey returned to the property and instructed Foster Wrecker, which was under contract with Center Point, to remove the vehicles. Ms. *4-5.

With regard to the Fourth Amendment claim, the court noted that the home is the first among equals and that "the United States Supreme Court has been reluctant to expand the scope of exceptions to the warrant requirement when the search and seizure involves intrusion into the home." Ms. *18, citing *Payton v. New York*, 445 U.S. 573, 585 (1980). The court also noted that "[t]he curtilage is considered to be 'part of the home itself for Fourth Amendment purposes.'" Ms. *19, quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984). The court reversed the summary judgment holding that "there is at the very least a question of fact as to whether the vehicles were within the curtilage" of the home when they were seized. Ms. *21.

The court also found a question of fact on the owner's Fourteenth Amendment procedural due process claim. "[D]ue process requires that 'individuals must receive notice and an opportunity to be heard before the government deprives them of property.'" Ms. *29, quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). "[D]ue process generally requires that the state afford a party threatened with a deprivation of property a process involving predeprivation notice and access to a tribunal in which the merits of the deprivation may be fairly challenged." Ms. *30. The notice provided to the owner here did not provide her an opportunity to correct the violation, and there was no preseizure process by which she could challenge the determination that her vehicles violated the municipal ordinance. Ms. *31.

Finally, the court held that Deputy Keahey did not establish qualified immunity as a matter of law because "it should have been clear to Keahey that, absent some exigent circumstance, he could not seize private property from the curtilage of a home without a warrant." Ms. *40.

UNLAWFUL DETAINER – SERVICE OF PROCESS

Ex parte Trinity Property Consultants, LLC, [Ms. 1180642, Aug. 30, 2019] __ So. 3d __ (Ala. 2019). In a plurality opinion, the Court (Sellers, J.; Bolin, Wise, and Mendheim, JJ., concur; Bryan and Mitchell, JJ., concur in the result; Parker, C.J., and Shaw and Stewart, JJ., dissent) reverses on certiorari review a judgment of the Court of Civil Appeals holding that Trinity Property Consultants, LLC had failed to demonstrate that its tenant had been properly served in an unlawful detainer proceeding.

The Court of Civil Appeals had reversed a default judgment in favor of Trinity "because the process server's affidavit did not include enough information to support the propriety of service by posting and mailing." Ms. *5. Section 35-9A-461(c) of the Alabama Uniform Residential Landlord and Tenant Act allows service by posting and mailing "'if after reasonable effort no person is found residing on the premises ....'" Ms. *7. The Court concluded that "in the absence of any extraordinary facts, the process server's single attempt at

personal service by knocking on the door to determine if anyone was home was suitable under the circumstances." Ms. *13 (emphasis in original).

Justice Shaw's dissent, joined by Justice Stewart, concluded there was insufficient information regarding the circumstances of the attempt at personal service to determine that the effort was reasonable. Ms. *16. The dissent noted that the process server's affidavit did not state the time of day he knocked on the door of the residence. *Ibid.*

STANDING – UNLICENSED CONTRACTOR – MANDAMUS

Ex parte Barton J. Weeks, [Ms. 2180658, Aug. 30, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Edwards, J.; Thompson, P.J., and Moore, J., concur; Hanson, J., concurs specially; Donaldson, J., concurs in the result) denies mandamus review of the Shelby Circuit Court's order denying a motion for summary judgment in a contract action.

Rustic Mountain Roof and Restoration, LLC ("RMR") filed a complaint in the Shelby Circuit Court for breach of contract and for work and labor done under a construction contract. Ms. *3. The Defendants moved for summary judgment predicated on RMR's failure to possess a license from the Home Builders Licensure Board. Ms. *4. Section 34-14A-14(d), Ala. Code 1975, provides in pertinent part that: "'[a] residential home builder, who does not have the license required, shall not bring or maintain any action to enforce the provisions of any contract for residential home building which he or she entered into in violation of this chapter.'" Ms. *5.

The Defendants sought mandamus review of the Shelby Circuit Court's denial of their motion for summary judgment contending the motion challenged RMR's standing which implicated the subject-matter jurisdiction of the circuit court. Ms. *9. The court rejected this argument and noted that "the Supreme Court has recently and repeatedly clarified that the doctrine of standing, as a jurisdictional concept, remains applicable in public-law cases ..., but generally has no application, as a jurisdictional concept, in private-law cases such as the present case." Ms. *11. The court denied mandamus review because RMR's lack of a license "is not a matter of subject-matter jurisdiction but, rather, is a matter of whether RMR has a cognizable claim." Ms. *14.

ARBITRATION

Blanks, et al. v. TDS Telecommunications LLC, et al., [Ms. 1180311, Sept. 6, 2019] __ So. 3d __ (Ala. 2019). The Court (Sellers, J.; and Bolin, Wise, Mendheim, and Stewart, JJ., concur; Parker, C.J., and Shaw and Bryan, JJ., concur in the result) reverses and remands a declaratory judgment entered by the Cherokee Circuit Court and directs the parties to proceed to arbitration in a case concerning delivery speeds of internet services.

"The question of who is to decide whether a dispute is arbitrable is one that must necessarily precede the question of whether a dispute is arbitrable." *VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P.*, 717 F. 3d 322, 324 (2d Cir. 2013).

> Although questions of arbitrability are typically answered by courts, those questions should be sent to an arbitrator if there is clear and unmistakable evidence that the relevant parties intended an arbitrator to decide the issue of arbitrability. *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986); *Eickhoff Corp. v. Warrior Met Coal, LLC*, 265 So. 3d 216, 221 (Ala. 2018).

Ms. *7. Moreover, in May 2018, this Court reiterated that:

> "even when arbitrability is delegated to an arbitrator, a court should still determine if a dispute is "arguably within the scope of [a] contract [containing an arbitration provision]." *Eickhoff Corp. v. Warrior Met Coal, LLC*, 265 So. 3d [216] at 224 [(Ala. 2018)].

Id. at *13. The trial court therefore erred in declining the customers' motion to compel arbitration.

RECUSAL – § 12-24-3, ALA. CODE 1975 – ATTACHMENTS TO APPELLATE BRIEFS – NEWLY DISCOVERED EVIDENCE

Startley Gen. Contractors, Inc., v. Water Works Bd. of the City of Birmingham, et al., [Ms. 1180292, Sept. 6, 2019] __ So. 3d __ (Ala. 2019). This per curiam opinion (Wise, Sellers, Mendheim, and Stewart, JJ., concur; Shaw and Bryan, JJ., concur in the result; Bolin, J., dissents; Mitchell, J., recuses himself) affirms Jefferson Circuit Court Judge Robert S. Vance, Jr.'s denial of Plaintiffs' renewed motion seeking to have Judge Vance recuse himself. Plaintiffs argued that campaign contributions by the defendant and their attorneys, considered in the aggregate, required recusal under § 12-24-3, Ala. Code 1975. Ms. *9-10.

The Supreme Court affirmed, noting that the campaign contributions in question were for Judge Vance's campaign for Chief Justice for the election held in November 2018, not for an "immediately preceding election." The Court held that § 12-24-3 applies only to contributions made for an immediately preceding election cycle. Ms. *41-42.

The Court struck the Plaintiffs' attachments to their appellate brief citing settled law that "attachments to briefs are not considered part of the record and therefore cannot be considered on appeal" and that appellate review "is restricted to the evidence and arguments considered by the trial court." Ms. *17, quoting *Roberts v. ASCO Equip. Co.*, 986 So. 2d 379, 385 (Ala. 2007) (internal citations and quotation marks omitted).

The Court rejected the Plaintiffs' argument that it had submitted newly discovered evidence in support of its renewed motion to recuse because "newly discovered evidence is, among other things, evidence that could not have been discovered with the exercise of due diligence within the time for filing the first motion, and the evidence is not merely cumulative.'" Ms. *18, quoting *Welch v. Jones*, 470 So. 2d 1103, 1112 (Ala. 1985).

WORKERS' COMPENSATION – HEARING LOSS – RIPENESS

Ex parte Warrior Met Coal, Inc., [Ms. 2180740, Sept. 6, 2019] __ So. 3d __ (Ala. Civ. App. 2019). The court (Edwards, J.; Moore, Donaldson, and Hanson, JJ., concur; Thompson, P.J., concurs in the result) denies a petition for writ of mandamus

sought by Warrior Met Coal, Inc. (WMC) challenging the Tuscaloosa Circuit Court's order denying WMC's motion for summary judgment contending the trial court lacked subject matter jurisdiction because the employee's hearing loss claim was not ripe.

The court noted that one of the narrow exceptions to the unavailability of review of the denial of a motion for summary judgment lies when a trial court lacks subject matter jurisdiction, Ms. *8-9, and that "when a 'claim is not ripe for adjudication, ... the trial court lacks subject matter jurisdiction.'" Ms. *9, quoting *Ex parte Safeway Ins. Co. of Alabama, Inc.*, 990 So. 2d 344, 352 (Ala. 2008).

> "Ripeness is defined as '[t]he circumstance existing when a case has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made' or '[t]he requirement that this circumstance must exist before a court will decide a controversy.' Black's Law Dictionary 1353 (8th ed. 2004)."

Ms. *9, quoting *Ex parte Safeway Ins. Co. of Alabama, Inc.*, 990 So. 2d at 352 n. 5.

The court construed § 25-5-117(b), the statute of limitations for occupational exposure claims, as providing that "'the date of the injury shall mean the date of the [most recent] exposure to the hazards of the disease in the employment of the employer in whose employment the employee was [most recently] exposed to the hazards of the disease.'" Ms. *22, quoting 25-5-117(b).

The court concluded that this construction was most compatible with other sections of the Workers' Compensation Act and the construction that "best effectuates the beneficent purposes of the Act." Ms. *29. The employee presented evidence from his treating physician supporting that his hearing loss was caused "by work-related noise and that such hearing loss 'is most often permanent and no further medical care or treatment could be reasonably anticipated to medically treat [it] ....'" Ms. *34. Accordingly, the court held that "the trial court did not err in denying WMC's motion for summary judgment on the basis that the court lacked subject-matter jurisdiction because [the employee's] workers' compensation claim purportedly was not ripe." Ms. *35.

GARNISHMENT – ALA. R. APP. P. 28(A)(10) WAIVER

Elliott Law Group, P.A. v. Five Star Credit Union, [Ms. 1170922, Sept. 13, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; Sellers and Stewart, JJ., concur; Parker, C.J., and Shaw and Mendheim, JJ., concur in the result; Wise, J., recuses) issues a plurality opinion affirming a judgment of the Montgomery Circuit Court permitting garnishment of an Alabama attorney's wages from his law firm in satisfaction of a judgment entered against that attorney in 2011.

First, the plurality rejects the appellants' jurisdictional contentions because they "do not explain how [cited] cases support their argument; nor do the appellants identify the portions of the cited opinions upon which they rely." Ms. *8. Replying upon Ala. R. App. P. 28(a)(10), the Court holds "[w]e are thus under no obligation to consider those cases. The appellants provide no reason we should accept this jurisdictional argument – and we therefore reject it." Ms. **8-9.

Next, following the *ore tenus* standard of review, the plurality holds "the trial court did not exceed its discretion in finding that there was no legitimate business purpose for the line of credit, and that the line of credit was established to aid [the attorney] in avoiding creditors." Ms. *12.

Finally, the Court rejects the appellants' challenges to the garnishment proceeding in the trial court's final order. Finding that appellants' contentions were unsupported, each argument is rejected.

VENUE – ALA. CODE § 6-11-23.1 TRANSFER FOR CONVENIENCE OF PARTIES AND WITNESSES AND IN INTEREST OF JUSTICE

Ex parte KKE, LLC, [Ms. 1180074, Sept. 13, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; and Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur; Sellers, J., concurs specially) denies a petition for a writ of mandamus seeking a transfer of venue from Bibb County to Chilton County in a wrongful death case arising from a collision of an automobile with a logging truck.

The Court first notes that Bibb County is an appropriate venue for the action because the individual defendant is a Bibb County resident and the corporate defendant's principal place of business is in Bibb County. *See* §§ 6-3-2 and 6-3-7, Ala. Code 1975 (setting forth rules governing venue in actions against individuals and actions against corporations). Ms. *5. Further, because the collision occurred in Chilton County, Chilton County would be an appropriate venue as well. However, "[w]hen venue is appropriate in more than one county, the plaintiff's choice of venue is generally given great deference." Ms. *5, (quoting *Ex parte Perfection Siding, Inc.*, 882 So. 2d 307, 312 (Ala. 2003).

The Court next rejects the defendant's contentions that transfer was required pursuant to § 6-3-21.1, Ala. Code 1975, both "for the convenience of parties and witnesses" and "in the interest of justice." Citing *Ex parte New England Mut. Life Ins. Co.*, 663 So. 2d 952, 956 (Ala. 1995) (Ms. *7), the Court explains that the burden of proof for a movant under § 6-3-21.1 must show the transferee forum to be significantly more convenient than the forum in which the action is filed by the plaintiff. Noting that no party lived in Chilton County and neither side identified any potential witnesses from Chilton County, the Court rejects the contention that transfer was warranted because investigating Alabama State Troopers resided in Montgomery County, which was closer to Chilton County than Bibb County. Ms. **8-10.

Citing its recent decision on rehearing in *Ex parte Tyson Chicken, Inc.*, [Ms. 1170820, May 24, 2019] __ So. 3d __ (Ala. 2019) (Ms. *11), the Court reiterates that "[t]o compel a change of venue [in the interest of justice], the underlying action must have both a 'strong' connection to the county in which the transfer is sought and a 'weak' or 'little' connection to the county in which the case is pending...." *Id.* Relying upon *Ex parte J&W Enterprises, LLC*, 150 So. 3d 190 (Ala. 2014), the Court holds it significant that the defendant driver resides in Bibb County and that the driver and his employer were sued for negligence in hiring, training, and supervision of that driver which all occurred in Bibb County. Ms. **13-16. The Court again emphasizes that following *Tyson Chicken*,

the evidence must demonstrate both that the intended transfer venue has a strong connection to the underlying action, while the plaintiff's chosen forum has a "weak" or "little" connection. Because the trucking company's driver did not show that Bibb County's connection to the action was weak, the interest of justice prong of the *forum non conveniens* statute did not mandate a transfer of venue from Bibb County to Chilton County. Ms. **16-18.

VENUE – ALA. CODE § 6-11-23.1 TRANSFER FOR CONVENIENCE OF PARTIES AND WITNESSES AND IN INTEREST OF JUSTICE

Ex parte Reed, [Ms. 1180564, Sept. 13, 2019] __ So. 3d __ (Ala. 2019). The Court (Sellers, J.; and Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, and Mitchell, JJ., concur; Stewart, J., dissents) grants a petition for writ of mandamus and directs the Jefferson Circuit Court to vacate its order denying a defendant's motion for a change of venue and to enter an order transferring the underlying action from Jefferson County to Marshall County in a personal injury case arising from an automobile collision that occurred in Marshall County.

The Court's analysis of the § 6-3-21.1, Ala. Code 1975, *forum non conveniens* factors mirror those set forth in *Ex parte KKE, LLC, supra*. *See* Ms. **3-9. However, in this case the Court concludes a transfer is warranted because Marshall County has a strong connection to the underlying action (the accident occurred in Marshall County, the police personnel and emergency personnel who responded to the accident were from Marshall County, and one of the eye witnesses to the accident is a resident of Marshall County), while plaintiff's chosen forum, Jefferson County, had only a weak connection (the only connection to the action is that the defendant resides there). Ms. **9-10. The Court concludes that "[a]lthough we accord deference to a plaintiff's choice of venue, the facts in this case dictate that Marshall County has a strong connection to the action and that Jefferson County has a weak connection. Therefore, a transfer is warranted under the interest-of-justice prong of § 6-3-21.1." Ms. *10.

ALABAMA LEGAL SERVICES LIABILITY ACT, § 6-5-570, ET SEQ., ALA. CODE 1975

Belle v. Goldasich, [Ms. 1171001, Sept. 13, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; Wise, Sellers, and Stewart, JJ., concur; Parker, C.J., and Bolin, Shaw, Bryan, and Mendheim, JJ., concur in the result) affirms judgments entered by the Mobile Circuit Court in favor of several attorneys in a legal-malpractice case stemming from a medical-malpractice action. Citing the Legal Services Liability Act's four-year statute of repose in § 6-5-574(a), Ala. Code 1975, the Court first finds the appellant to have waived any arguments because her brief on appeal failed to address the statute of repose issue. Citing *Fogarty v. Southworth*, 953 So. 2d 1225 (Ala. 2006) (Ms. *14), the Court states:

> "When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue in the appellant's principal brief constitutes a waiver with respect to the issue."

Id. (quoting *Fogarty*, 953 So. 2d at 1232).

The Court also rejects the appellant's fraudulent-suppression claim, citing *Coilplus-Alabama, Inc. v. Vann*, 53 So. 3d 898 (Ala. 2010) (Ms. **15-16), "because it is undisputed that [the attorneys] had no knowledge of the supposed fact they allegedly suppressed – that [appellant] had a potential legal-malpractice claim against the attorneys ... – while they represented her because she did not, in fact, have such a claim." Ms. *16. The Court notes "[a]fter reviewing the relevant facts and the chronology of the medical-malpractice action, we agree with the attorney defendants." *Id.* Accordingly, the judgments entered by the trial court in favor of the attorneys and their law firms are affirmed.

THIRD-PARTY SPOLIATION OF EVIDENCE – ORE TENUS REVIEW – WANTON SPOLIATION

Imperial Aluminum-Scottsboro, LLC v. Taylor, [Ms. 1171133, Sept. 20, 2019] __ So. 3d __ (Ala. 2019). The Court (Stewart, J.; and Parker, C.J., and Bolin and Wise, JJ., concur; Sellers, J., concurs in the result) affirms the Jackson Circuit Court's judgment awarding compensatory damages on a third-party spoliation of evidence claim against Taylor's former employer, Imperial, entered after a bench trial. The Court reverses the circuit court's award of punitive damages predicated on wanton spoliation.

The Court first noted that a claim for third-party spoliation is premised on the Court's long-recognized "'doctrine that one who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care and is liable for negligence in connection therewith.'" Ms. *17, quoting *Dailey v. City of Birmingham*, 378 So. 2d 728, 729 (Ala. 1979).

The Court noted that Imperial conceded that the spray gun was essential to its former employee Taylor's products liability claim but disputed that the evidence substantiated that Imperial was aware of the potential for litigation when it disposed of the spray gun and that Taylor would have prevailed in the products liability action but for the spoliation. The Court affirmed on ore tenus review because "the trial court judge was in the unique position to observe the testimony of Imperial's management, supervisors, and employees who had knowledge of or were involved directly with the efforts to preserve the Tradeworks 170 unit. It was within the province of the trial court judge as the fact finder to resolve any conflicts in the testimony and to judge the credibility of the witnesses. *Hall v. Mazzone*, 486 So. 2d 408, 410 (Ala. 1986) ('The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony, it has an opportunity to evaluate the demeanor and credibility of witnesses.')" Ms. *22.

The Court reversed the award of punitive damages concluding that "[a]lthough evidence presented at trial would support a finding that Imperial's employees and its attorney were not forthright with Taylor and his attorney regarding the location of the spray gun after litigation commenced, there is no evidence indicating that Imperial engaged in any intentional, willful, or wanton conduct in destroying, losing, or disposing of the spray gun." Ms. *32-3.

TERMINATION OF MUNICIPAL EMPLOYEE – COMMON LAW WRIT OF CERTIORARI – APPELLATE PROCEDURE

Wiggins v. City of Evergreen, [Ms. 1170833, Sept. 20, 2019] __ So. 3d __ (Ala. 2019). The Court (Mitchell, J.; Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur) affirms on *certiorari* review the Conecuh Circuit Court's judgment in favor of the City of Evergreen in an action filed by a former warrant clerk challenging her termination by the City. The employee was terminated for failure to issue a warrant. Ms. *5.

The Court first noted that "[b]ecause a municipal employee has no statutory right to appeal the termination of his or her employment, the trial court properly treated Wiggins's complaint as a petition for a common-law writ of certiorari." Ms. *9-10. The Court noted that

> "[A] common-law writ of certiorari extends only to questions touching the jurisdiction of the subordinate tribunal and the legality of its proceedings. The appropriate office of the writ is to correct errors of law apparent on the face of the record. Conclusions of fact cannot be reviewed, unless specially authorized by statute. The trial is not de novo but on the record; and the only matter to be determined is the quashing or the affirmation of the proceedings brought up for review."

Ms. *11, quoting *G.W. v. Dale County Dep't of Human Res.*, 939 So. 2d 931, 934 n. 4 (Ala. Civ. App. 2006) (internal quotation marks omitted).

The employee challenged her termination on the ground that it was not by a two-thirds vote of the City Council in a pre-termination hearing as required by § 11-43-160(a), Ala. Code 1975. The employee did not present this argument to the trial court and the Court "cannot consider arguments raised for the first time on appeal; ...." Ms. *12, quoting Marks v. Tenbrunsel, 910 So. 2d 1255, 1263 (Ala. 2005) (some internal quotation marks omitted). The Court noted that "[t]he well settled rule [that an appellate court's review is limited to only those issues that were raised before the trial court] admits of no exception for cases in which legal issues, or the application of legal principles to undisputed facts, are considered de novo by the appellate court." Ms. *12, n. 5, quoting Ex parte Knox, 201 So. 3d 1213, 1218 (Ala. 2015).

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