RECENT ALABAMA APPELLATE DECISIONS

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SPRING CLE SEMINAR
April 27, 2018
First United Methodist Church

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("Recent" meaning those decisions available subsequent to the Tuscaloosa County Bar Association Fall 2017 CLE Seminar.)

(1.) Austill v. Krolikowski, [Ms. 1160820, Jan. 12, 2018] ___ So.3d ___:

For a party resisting a motion for summary judgment to be entitled to a delay in ruling on the motion because of pending discovery, that party must demonstrate by affidavit why further discovery is crucial to its case; discovery irrelevant to the dispositive issue won't suffice.

(2.) Ex parte Wilson, [Ms. 1160101, Jan. 16, 2018] ___ So.3d ___:

On review of a decision of the Court of Civil Appeals on petition for writ of certiorari, the Supreme Court reversed that court's judgment, and held that a decision as to the modification of periodic alimony is to be based on changes in circumstances since the date alimony was awarded or last modified, as opposed to a subsequent judgment disposing of a claim for modification regardless of whether it yielded any such modification.

(3.) Ex parte United Propane Gas, Inc., [Ms. 1160891, Feb. 2, 2018] ___ So.3d ___:

Thorough discussion of the nature and effect of an "outbound forum-selection clause" in a contract, and the defenses to its enforcement.

(4.) Ex parte State of Alabama, [Ms. 1161087, Feb. 2, 2018] ___ So.3d ___:

The district court does not retain authority over a felony criminal case once it has been bound over to the grand jury by that court. Thus, discovery ordered by the district court before it bound the case over, is not enforceable. Chief Justice Stuart concurred in the result, being of the broader view that a district court's jurisdiction in a felony case does not involve authority to issue discovery orders.

(5.) Ex parte Sanderson, [Ms. 1160824, Feb. 9, 2018], Holbrook v. Wainwright, [Ms. 1160832, Feb. 9, 2018] ___ So.3d ___:

A settlement agreement which disposes of pending litigation in its entirety moots the controversy and deprives the court of subject-matter jurisdiction going forward; a release executed before the releasor has commenced legal proceedings against the releasee does not, although it might ultimately bar the relief the releasor seeks pursuant to the post-release claims. (Release is an affirmative defense which is waived if not affirmatively pleaded, whereas subject-matter jurisdiction cannot be waived.)

An order denying a motion to dismiss or a motion for summary judgment is generally not reviewable by a petition for writ of mandamus, but two exceptions are: (1) where there is a question regarding the trial court's jurisdiction and (2) where it is clear from the face of the complaint that the defendant is entitled to a dismissal or a judgment in its favor.

(6.) EvaBank v. Traditions Bank, [Ms. 1160495, Feb. 9, 2018] ___ So.3d ___:

EvaBank held two mortgages on property owned by its customers William Michael Robertson and Connie Robertson. They agreed to sell the property to Terry Williams, who got financing with Traditions Bank, to be secured by a first mortgage. TBX Title, a subsidiary of Traditions, acted as closing agent. Robertson requested by telephone that EvaBank fax a payoff statement to Traditions. EvaBank did so, but mistakenly sent the payoff for a mortgage of another, similarly named, customer. Loan closed, payoff funds sent to EvaBank and it applied them to the account of that other customer. TBX Title wired to the "real" customer/seller his net proceeds. EvaBank soon contacted him about his loan being past due and he responded that it was paid off at the closing. In the

ensuing litigation among EvaBank, Traditions and Williams, the trial court held that EvaBank was equitably estopped to claim a different payoff and must release its mortgages on the property. The Supreme Court reversed. It noted that a party relying on estoppel must prove these elements:

> "(1) [t]he person against whom estoppel is asserted, who usually must have knowledge of the facts, communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on; (2) the person seeking to assert estoppel, who lacks knowledge of the facts, relies upon that communication; and (3) the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct."
> (Source citation omitted)

The Court then cited two reasons why estoppel was not established under the facts of the case. First, it reasoned that because EvaBank did not become aware of the mistake until after the loan closed,

> it could not have intended to induce reliance. In other words, there is no evidence indicating that EvaBank intended to induce either Traditions Bank or TBX Title to rely on the payoff statement for [the wrong customer] to close the real-estate transaction between [the right customer and seller.]
>
> (All I can say to that explanation is, What!!??)

The Court's other basis for rejecting estoppel was that an employee of Traditions Bank and an employee of TBX Title had noted various discrepancies between the name of the seller and the address of the property, as they appeared on the closing documents versus the payoff statement, but did not check that out simply because it was the seller who had procured the payoff statement. Quoting an earlier case, the Court pointed out that a "party invoking estoppel must have in good faith been ignorant of the true facts at the time a representation is made to him, and must have acted with diligence to learn the truth." The Court then held that because Traditions Bank and TBX Title were on notice of the discrepancies, "which, through the exercise of due diligence, would have revealed" the mix up in the EvaBank loan customers, as a matter of law their "reliance on the payoff without further inquiry was not reasonable." (The Court observed in footnote 3 that "§ 35-10-91(f), Ala. Code 1975, a section of the Alabama Residential Mortgage Satisfaction Act" addresses erroneous payoff statements for mortgages

secure residential property, but that it expressly does not apply to payoff statements issued in response to telephone calls.)

(7.) Spencer v. Spencer, [Ms. 1161095, Feb. 16, 2018] ___ So.3d ___:

" 'When the will is shown to have been in the possession of the testator, and is not found at his death, the presumption arises that he destroyed it for the purpose of revocation; but the presumption may be rebutted, and the burden of rebutting it is on the proponent.' " (Opinion quote from a 1975 case.) However, "to rebut the presumption, the proponent need only establish to the satisfaction of the trier of fact that the will was not revoked." In this case, on the particular facts involved, the probate court held, and the Supreme Court affirmed, that there was sufficient evidence to rebut the presumption.

(8.) Dekalb-Cherokee Counties Gas District v. Raughton, [Ms. 1160838, Feb. 23, 2018] ___ So.3d ___:

$100,000 personal injury verdict/judgment reversed and judgment rendered for defendant. Plaintiff worker at a landfill was injured when a side panel from a debris-depositing truck became dislodged during a "clutch-release" maneuver performed by the driver to dislodge debris. No evidence was presented that the maneuver was negligence in itself, or negligently performed. Held: Because there was no evidence presented that performing the clutch-release maneuver could cause the side wall to detach, and no evidence that inspection of the truck could have revealed it was foreseeable that the maneuver would cause that, there was no liability. There is a duty on the part of an owner or operator of a vehicle reasonably to inspect it for defects, but that duty doesn't arise in absence of anything to show that there were indicators of a defective condition. In this case, there was "no evidence presented clearly showing how the side wall was attached to the truck or showing exactly why and how it became detached," so there was no evidence "that an inspection would have revealed that it might become detached."

(9.) Ex parte Hrobowski, [Ms. 1170014, Feb. 23, 2018] ___ So.3d ___:

Another in the recent series of decisions by the Supreme Court ordering a forum non conveniens venue transfer from a forum county having only a weak connection to the case to the county where the underlying automobile accident occurred.

(10.) Ex parte City of Muscle Shoals, [Ms. 1160396, Feb. 23, 2018] ___ So.3d ___:

When the facts upon which the existence of a duty depends are disputed, that factual issue may be submitted to a jury to resolve but the existence of a duty is ultimately a question of law for the court. The availability of the doctrine of municipal immunity is likewise ultimately a question of law for the court to determine. In the face of a properly supported motion for summary judgment by a municipal defendant, a premises liability plaintiff must present substantial evidence of one of the two exceptions to that immunity set out in § 11-47-190, Ala. Code 1975, to-wit: that the injury was caused by neglect, carelessness, or unskillfulness of some municipal agent, officer or employee, or was a result of some premises defect called to the attention of the municipality, or which had existed long enough to raise a presumption of knowledge on the part of the municipality. Here, plaintiff fell through a storm drain opening covered by a steel grate consisting of steel rebar welded together; the mere fact that the grate had been in place for approximately 25 years and apparently had deteriorated to a hazardous state such that it gave way when plaintiff happened to step on it, was not substantial evidence of either exception.

(11.) Hillwood Office Center Owners' Association, Inc. v. Blevins, [Ms. 1160725, 738 and 739, March 2, 2018] ___ So.3d ___:

Another case dealing with the arcane propositions of "substantive arbitrability" and "procedural arbitrability." Held, issue whether a nonsignatory to an arbitration agreement can be compelled to arbitrate is a question of substantive arbitrability for a court to decide, whereas a question of whether certain conditions precedent to an obligation to arbitrate have been satisfied involves a matter of procedural arbitrability to be decided by the arbitrator.

(12.) <u>Fitzpatrick v. Hoehn</u>, [Ms. 1160348, March 2, 2018] ___ So.3d ___:

Among the holdings in this obviously bitter litigation between a mother and daughter, were these:

1) There are no formal requirements for an assignment of a contract and it "may be written, parol, or otherwise." There must be, however, proof that the assignor intended to transfer a present interest in the subject matter of the contract and that the assignor and the assignee mutually assented to the assignment.

2) A quit claim deed from the co-owner of a flea market to his co-owner wife did not serve per se to effect an assignment to her of his interest in a collateral agreement among the two of them and their daughter to sell his interest in the property to the daughter upon payment of 360 monthly payments, because the deed made no mention of the collateral agreement. Moreover, there was no proof that the wife assented to any purported assignment to her.

3) The trial judge did not commit reversible error in refusing to allow two amendments to the complaint tendered subsequent to the deadline for joinder of additional parties and amendments to the pleadings set by the judge's scheduling order, given that the plaintiff had long known of the facts underlying he proposed addition of a party and the proposed addition of claims. However, the Court quoted with approval this statement from former Justice Champ Lyons' treatise on the Alabama Rules of Civil Procedure: "Even though an amended pleading is filed after the cut-off date in a scheduling or pre-trial order, the trial court must still have a valid reason for disallowing the amendment." Accordingly, the strict language of Rule 16 Ala. R. Civ. P. concerning the enforceability of pre-trial orders must be read in conjunction with the liberal allowance of amendments provided for by Rules 1 and 15. The Court observed:

> From our reading of the applicable caselaw and the treatise on the Alabama Rules of Civil Procedure, it appears that the liberal standard of Rule 15, Ala. R. Civ. P., applies, even if the amended pleading is filed after a deadline established by the Rule 16(b) scheduling order has passed. . . . Although Rule 15(a) itself calls for liberal amendment, this Court has held consistently that the grant or denial of leave to amend is a matter that is within the discretion of the trial court and is subject to reversal on appeal only for an abuse of discretion. 621 So.2d at 245. Thus, Rule 15, Ala. R. Civ. P., is not carte blanche authority to amend a complaint at any time. Undue delay in filing an amendment, when it could have been filed earlier

based on the information available or discoverable, is in itself ground for denying an amendment.

4) Among the elements a plaintiff must prove to establish a claim of tortious interference with a contractual or business relationship is that the defendant is a stranger to the contract or relationship. That circumstance is not an affirmative defense the defendant must plead and prove but, rather, is an essential element the plaintiff must establish.

5) Alabama has not yet recognized definitively the existence of a cause of action for tortious interference with an inheritance. The Court in this case notes the elements and levels of proof other jurisdictions have articulated for the tort but deflects any adoption of the tort by stating, "[e]ven if we were to recognize such a cause of action, the facts of this case" don't measure up to the "common list of the elements" for it.

(13.) <u>Ex parte Industrial Warehouse Services, Inc.</u>, [Ms. 1170013, March 2, 2018] ___ So.3d ___:

Decisions of the Alabama Supreme Court are sometimes described as "divided" when there are fragmented special writings and votes. The writings in this appeal can best be described as "dispersed," like a flushed covey of quail, heading off in all different directions. At issue was the trial judge's refusal to enter a protective order requested by the defendant trucking company, whereby certain documents it was willing to produce to the plaintiffs were asserted by it to contain trade secrets and other confidential information, such that the plaintiffs should be prohibited from sharing them with other plaintiffs' attorneys. The "main" opinion by Justice Parker was concurred in, without special writing, only by Justices Main and Sellers. Four of the other justices authored separate special writings, (wherein they variously concurred in the result, concurred in part and concurred in the result in part, or concurred in part and dissented in part), in some of which other justices concurred in whole or in part. Cross referencing the various portions of the main opinion and those of the special writings, it can be discerned that two other justices wound up concurring in one of the holdings of the three-member main opinion, which reversed the trial judge and directed him to enter a protective order providing adequate protection against dissemination outside the case of trade secrets contained in the defendant's bills of lading. Having garnered five votes, that part of the opinion represents binding "precedent." Two additional justices

concurred in the result in that holding, but concurring only in the result don't vindicate the opinion, just the decision.

The "main" opinion declined to grant a writ of mandamus to require entry of a protective order similarly protecting against disclosure by plaintiffs to non-parties of defendant's produced operations and safety manuals. Two other justices wrote specially to concur in the result as to that holding, so it stands as a "judgment" of the Court, but not a precedential "opinion."

Because of the splintered nature of the reasonings and results of the combined sets of writings, it would consume too much time and space to try here to lay out a comparative "line up" of all the different views on all of the issues, but a reader of the full body of writings will find these issues addressed, even if not agreed upon:

1) What constitutes a trade secret under Section 8-27-2(1), Ala. Code 1975.

2) To what extent does a trucking company's reporting of certain information required to be reported to the Federal Motor Carrier Safety Administration; or the company's making the information available to its employees, prevent the information from having the status of trade secrets.

3) Whether or when a party seeking a protective order pursuant to Rule 26(c)(7), Ala. R. Civ. P. [for protection of "a trade secret or other confidential research, development, or commercial information"] must present evidence to support its assertion that the discovery sought does represent such material.

4) What limitations apply to the availability of mandamus review of discovery orders, in general, and, as set out in the dueling footnotes (5 and 8) to the main opinion and Justice Shaw's special writing.

5) Option for in camera review by the trial judge of material alleged to contain trade secrets.

6) The "burden of showing" that a party seeking protection of a document as a trade secret, must meet.

7) An issue or contention not presented to the trial court can't be the basis for a reversal and, on appeal, issues not raised below, or not raised in the brief of the appellant, can't be injected into the appellate review by an amicus curiae.

(14.) <u>Ex parte Alabama Power Company</u>, [Ms. 1161161, March 2, 2018] ___ So.3d ___:

In an eminent domain case, a probate court enters two orders: an order either granting or denying the complaint for condemnation and, if the complaint is granted, an order of condemnation setting the amount of the award. An appeal can be taken only from the second, final order. In this case, the order granting the complaint was entered May 18, 2017 and the order of condemnation was entered June 8, 2017. The property owners filed a notice of appeal within the statutorily prescribed 30-day appeal period, but stated therein that they appealed "the Order of this Court, dated May 18, 2017, granting Plaintiff's Petition for Condemnation." They filed the notice of appeal seven days after the June 8th order and the probate court entered an order on July 5, 2017 – still within the 30-day window for an appeal – stating that the action was transferred to the circuit court "in its entirety," expressly referencing both the May order and the June order. Condemnor Alabama Power Company petitioned for a writ of mandamus after the circuit court denied its motion for dismissal of the appeal from probate court, arguing that the circuit court never acquired subject matter jurisdiction due to the notice of appeal having expressly specified the May 18 order – a non-appealable order. The Supreme Court held that the applicable appeal statute doesn't specify the content of the notice of appeal – only that it be a "written" notice, and here there was one and it was filed after the June 8th order. Moreover, after it was filed, but before the 30-day period expired, the probate court entered its order which would have confirmed to the property owners their belief that they had properly appealed the June 8th order, thus bringing the doctrine of equitable estoppel into play. In prior cases where parties desiring to appeal have relied on incomplete or incorrect information received from a probate court or a circuit clerk about the appeal deadline, the Court had applied equitable estoppel to forgive the untimely filing which was reliant on that court-provided information:

> "Had the probate court's July 5 transfer order notified the property owners that it found their notice of appeal to be vague or in some way deficient—instead of ordering a transfer of the action—the property owners would have still had time to correct that deficiency before the period for filing an appeal expired. However, because the probate court understood the property owners' notice of appeal to encompass the June 8 order of condemnation, no such notice of deficiency was given, and the property owners instead reasonably relied on the probate court's representation that their notice of appeal was effective

> and that the action had been transferred to the circuit court. It would be unjust in these circumstances, and contrary to the equitable principles articulated in [three cited cases], for this Court now to declare that the property owners' notice of appeal was in some way deficient so as to render it ineffective.

Justice Bolin, a former probate judge, dissented, arguing that "[t]he notice of appeal was not from the order of condemnation but from the preliminary order granting Alabama Power's complaint," and, therefore, the circuit court never acquired jurisdiction to hear the appeal.

(15.) Hamilton v. Scott, [Ms. 1150377, March 9, 2018] ___ So.3d ___:

Section 6-5-549 of the Alabama Medical Liability Act mandates that a trial judge must charge the jury that it has to "be reasonably satisfied by substantial evidence that the health care provider failed to comply with the standard of care and that such failure probably caused the injury or death in question." In this wrongful death case brought for the death of a still born infant, the trial judge so charged the jury. The Plaintiff had requested, however, that the judge include in the charge language from Parker v. Collins, 605 So.2d 824 (Ala. 1992), to the effect that "the issue of causation in a malpractice case may properly be submitted to the jury where there is evidence that prompt diagnosis and treatment would have placed the patient in a better position than she was in as a result of inferior medical care." The Supreme Court, in a per curium opinion, reversed the defense verdict which ensued, doing so for want of inclusion in the charge of Parker language. [In the interest of full disclosure, your presenter notes that he has been engaged to, and has, filed an application for rehearing and supporting brief, based on the query, what "better position" is at issue in a death case, where there was no pre-death personal injury action filed and, therefore, no issue of any better position short of death, other than survival versus death?]

(16.) Walker County Commission v. Kelly, [Ms. 1160862, March 9, 2018] ___ So.3d ___:

After the Walker County Civil Service Board ("the Board") overturned an employee termination by the Walker County Commission ("the Commission"), the Commission filed suit seeking a declaratory judgment that the Board's actions

constituted a violation of the Alabama Open Meetings Act. Various pleadings and motions battles ensued, with a variety of additional claims and counterclaims being asserted. (The pages of the slip opinion setting out all of those procedural moves and counter moves extend from page 2 through page 11.) On the appeal by the Commission from an adverse ruling by the circuit court, the Supreme Court held that it was its duty to consider ex mero motu any lack of subject matter jurisdiction, and that "justiciability is jurisdictional." In reviewing the Commission's pled assertions about the various ways the practices of the Board were in violation of the Open Meetings Act, the Court concluded that, "on its face, the Commission's complaint does not allege any actual controversy between parties whose legal interests are adverse. Rather, it simply reflects the Commission's uncertainty concerning the proper interpretation of the Alabama Open Meetings Act." Quoting from a 2010 decision, the Court pointed out:

> The Declaratory Judgment Act, § 6–6–220 et seq., Ala. Code 1975, is not a vehicle for obtaining legal advice from the courts:
>
> > The Declaratory Judgment Act, codified at §§ 6–6–220 through –232, Ala. Code 1975, does not empower courts to ... give advisory opinions, however convenient it might be to have these questions decided for the government of future cases.
>
> (all internal punctuation and case citations omitted; underlining in original)

After analyzing all of the complaints the Commission was making about the Commission's handling of employee termination appeals, and the various forms of relief it sought, the Court observed, "[i]t appears that, after the [subject] contested [ ] case, the Commission filed this action seeking to get clarification, or an advisory opinion, as to whether the Board would be bound by the Open Meetings Act in the future." Although the claims and reliefs sought by the parties had escalated over time, and the Board wound up seeking relief that included having the circuit court order the Commission to pay the Board's attorney fees (which the circuit court did), the Supreme Court limited its justiciability analysis to the averments of the Commission's original complaint:

> There must be a bona fide existing controversy of a justiciable character to confer upon the court jurisdiction to grant declaratory relief under the declaratory judgment statutes, and if there was no

justiciable controversy existing when the suit was commenced the trial court had no jurisdiction.

(quotation marks and case citations omitted; underlining in original)

Therefore, because the Court deemed that original complaint to seek only an advisory opinion, it held the circuit court judgment void, and directed that court to dismiss the case without prejudice.

(17.) Curry v. Miller, [Ms. 1170176, March 16, 2018] ___ So.3d ___:

A Rule 41(b), Ala. R. Civ. P. dismissal of an action for failure to prosecute can be upheld on the basis of a clear record of willful default and "willful" in that context is used in contradistinction to accidental or involuntary noncompliance, it not being necessary to show a wrongful motive or intent.

(18.) Baldwin Mutual Insurance Company v. McCain, [Ms. 1160093, March 23, 2018] ___ So.3d ___:

Plaintiff McCain filed a breach of contract and misrepresentation/suppression case against Baldwin Mutual, and sought class-action certification, which the trial court granted. Baldwin Mutual appealed that certification order. As one of its defenses to class certification, Baldwin Mutual had asserted that McCain was subject to a defense of res judicata and, therefore, couldn't be an adequate class representative. The basis for the res judicata defense was that two months after McCain had filed the underlying action in the Montgomery Circuit Court, Baldwin Mutual had filed in another circuit a declaratory judgment action against McCain and various other of its policy holders seeking a declaration that they had improperly invoked the appraisal process under their policies. (The "Adair case") Subsequently, the defendant policyholders in the Adair case, including McCain, filed counterclaims alleging breach of contract against Baldwin Mutual. In McCain's counterclaim, she identified as her "covered claims" at issue the same two claims she'd asserted in her own, first-filed action. Ultimately, the circuit court handling the Adair case granted Baldwin Mutual's motion for summary judgment, disposing of that case, and McCain did not appeal. On Baldwin Mutual's appeal of the certification order in the McCain case, the Supreme it noted that "class certification is inappropriate where the purported class

representative's claims are barred by the doctrine of res judicata," because that defense not applicable to the class as a whole, could become the focus of the litigation and divert the class representative's attention from the case as a whole. McCain attempted to prevent application of the defense on the basis that the court in which the Adair case was filed lacked subject matter jurisdiction over it. She relied on pronouncements by the Court in prior cases that "[i]t is uniformly held that where two or more courts have concurrent jurisdiction, the one which first takes cognizance of a cause has the exclusive right to entertain and exercise such jurisdiction, to the final determination of the action and the enforcement of its judgments or decrees." The Court reasoned in the present case, however, that those prior cases had not addressed the issue presented by the present case: "Whether a final judgment in a second-filed action may have res judicata effect as to a first-filed action (1) where the pendency of the first-filed action was not asserted as a defense in the second-filed action, or, (2) if such a defense was asserted, where no appeal raising the issue of the effect of the pendency of the first-filed action was taken from the final judgment entered in the second-filed action." Therefore, the Court explained:

> McCain's argument, as well as her use of the foregoing precedents as support, confuses the proper exercise of subject-matter jurisdiction with the existence of subject-matter jurisdiction. The former is an issue of limits on the exercise of power by a court that actually has power over a certain type of case; the latter is an issue of whether the court actually has any power over the type of case at issue, i.e., subject-matter jurisdiction.

The issue thus presented was actually one of abatement on account of the pendency of a prior action, pursuant to the abatement statute, § 6-5-440, Ala. Code 1975. Because abatement is a waivable affirmative defense, and McCain had not raised it in the Adair case, thereby waiving the existence of her first-filed action as a defense to the prosecution of the Adair case. (The Court did note in a footnote that in one of its prior cases discussing the first court/second court issue, it had described "the resolution of the issue as a matter of subject-matter jurisdiction rather than as a matter of abatement," but deflected that statement by explanation in the footnote, "[a]s hereinafter discussed, however, the pendency of a first-filed action clearly presents an issue of abatement, a waivable affirmative defense, not an issue of the subject-matter jurisdiction of the court in which the second-filed action is pending."

Bottom Line: The trial court erred in certifying McCain's action for class treatment because the claims of the purported class representative are subject to a unique defense—res judicata. There are no other named class representatives in the complaint, and the action obviously cannot continue on a class basis without a representative, so the class-certification order must be reversed.

However, in the final footnote to the opinion, the Court states, "we do not here reach the question whether the elements of Rule 23 would be met by an unnamed class member whose claims are not subject to a res judicata defense."

(19.) Nichols v. HealthSouth Corporation, [Ms. 1151071, March 23, 2018] ___ So.3d ___:

Plaintiffs amended their complaint for the eighth time to add new claims of fraud to their complaint relating to actions occurring over 12 years before that amendment, and defendant asserted bar of the statute of limitations. The new claim was held by the Supreme Court to relate back to the original complaint by virtue of Rule 15(c)(2) Ala. R. Civ. P., even though the amended claims of fraud related to alleged misrepresentations not mentioned in the previous seven versions of the complaint. The Court's reasoning was that, "[t]he eighth amended complaint is not raising a different matter or something entirely distinct from the HealthSouth fraud alleged in the original complaint. It refined how that fraud was perpetrated." Another issue in the case was whether the shareholder claims were "derivative," and therefore due to be dismissed for failure to fulfil the procedural requirements of Rule 23.1 Ala. R. Civ. P. for bringing class actions, or rather were "direct" and could be filed by the shareholders without having to satisfy these requirements. Applying Delaware law, the Court discussed the differences between the two concepts and held the present suit to be of a "direct" nature.

(20.) SCI Alabama Funeral Services, LLC, v. Hinton, [Ms. 1161107, March 30, 2018] ___ So.3d ___:

The Supreme Court reversed the trial court's denial of a motion to compel arbitration, which the trial court had based on its finding of unconscionability. "To avoid an arbitration provision on the ground of unconscionability, the party objecting to arbitration must show both procedural and substantive

unconscionability." The opinion discusses the distinction between the two concepts and sets out various indicators of substantive unconscionability. The trial judge had found the arbitration provision in the contract between the parties to be unconscionable because it was too overbroad, an issue of substantive unconscionability, but the Supreme Court held that an overbroad arbitration provision alone doesn't indicate substantive unconscionability.

> Both substantive unconscionability and procedural unconscionability must be shown to establish unconscionability as a defense to an arbitration provision; these are separate, independent elements. Although there was no actual evidence presented on the issue of procedural unconscionability, the circuit court concluded that enforcing the arbitration provision would be procedurally unconscionable because, the circuit court found, SCI had overwhelming bargaining power over [the Plaintiff]. However, because the arbitration provision in this case is not substantively unconscionable, we do not need to consider the issue of procedural unconscionability.
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> (internal case citation omitted)

(21.) <u>Ex parte Nautilus Insurance Company</u>, [Ms. 1170170, March 30, 2018] ___ So.3d ___:

An appeal involving a lot of procedural twists and turns. Precision Sand Products, LLC ("Precision") was sued on a premises liability injury claim. It called on its insurance carrier, Nautilus Insurance Company ("Nautilus") to defend and indemnify it. Nautilus agreed to defend, but only under a reservation of rights. Nautilus then filed a declaratory judgment action in federal court seeking a ruling that a policy exclusion relieved it of any duty to defend or indemnify. Precision filed a motion to dismiss that federal DJA, urging the district court to refuse to exercise its discretionary jurisdiction under the federal Declaratory Judgment Act. The federal judge has not yet ruled on that motion. Next, Precision filed third-party complaints in the premises liability action over against Nautilus and Lyon Fry Cadden Insurance Agency, Inc. ("LFC"), its insurance agent, seeking a declaratory judgment and asserting various claims of bad faith, fraud and negligent failure to issue a policy providing the necessary coverage. Nautilus filed a motion to dismiss on the basis that Precision's claims against it were barred under § 6-5-440, Ala. Code 1975, the "prior pending action" abatement statute. Held:

> In determining whether a counterclaim is compulsory, this Court applies the logical-relationship test. A counterclaim is compulsory if there is any logical relation of any sort between the original claim and the counterclaim. Committee Comments on 1973 adoption of Rule 13, Ala. R. Civ. P., ¶ 6. Under the logical-relationship standard, a counterclaim is compulsory if (1) its trial in the original action would avoid a substantial duplication of effort or (2) the original claim and the counterclaim arose out of the same aggregate core of operative facts. In determining whether the claims arose out of the same aggregate core of operative facts, this Court must determine whether (1) the facts taken as a whole serve as the basis for both claims or (2) the sum total of facts upon which the original claim rests creates legal rights in a party which would otherwise remain dormant.
>
> (punctuation and case citations in original, omitted)

The Court concluded that Precision's state court claims would be compulsory counterclaims in the federal DJA, and, as such, were due to be regarded as an "action" for the purposes of § 6-5-440, and deemed to have been pending (although not actually filed) from the commencement of that federal case. Thus, the compulsory counterclaims would have been pending when Precision filed its state court action and Precision is therefore precluded from asserting the same claims in its later-filed action. The fact that the federal district court has not yet ruled whether it will exercise its discretion so as to entertain the DJA, or whether it will decline to do so, doesn't affect that court's present jurisdiction over the action. "Precision's speculation that the district court might decide at some future moment not to exercise its discretionary jurisdiction over the federal action does not call into question the priority of the federal action."

The only claims Precision asserted against LFC were fraud and negligence, and LFC sought to have them dismissed under Rule 12(b)(6), Ala. R. Civ. P., as failing to state a claim upon which relief could be granted. "However, the denial of a motion to dismiss based upon Rule 12(b)(6) is not reviewable by petition for a writ of mandamus." LCF alternatively argued that it was entitled to a dismissal of Precision's claims under Rule 19, Ala. R. Civ. P., which provides for the joinder of persons needed for just adjudication, i.e., an indispensable party. The Court agreed that "if Nautilus was an absent indispensable party to Precision's claims against LFC, the trial court would have had a duty to dismiss the state action without prejudice." But, even if Nautilus were deemed an indispensable party, it was in

fact present in the case when LFC moved for dismissal, so the trial court had no clear duty to grant LFC's motion. It would only be after the release of the Supreme Court's decision in the present appeal that Nautilus would no longer be a party, "and it is therefore only after the issuance of this opinion that the trial court could even potentially incur any duty to dismiss the state action for failure to join an indispensable party." Therefore, LFC had not established one of the elements required for issuance of a writ of mandamus, to wit: an imperative duty to perform on the part of the trial judge accompanied by a refusal to do so.

Lastly, LFC argued that Precision's claims against it would not be "ripe for adjudication" unless and until it was determined that Nautilus, in fact, had no duty to defend and indemnify Precision. Therefore, LFC further argued, the trial court's subject matter jurisdiction over those claims was not invoked. The Supreme Court agreed that "ripeness" implicates subject matter jurisdiction but held that LFC's argument actually went to Precision's ability to prove the merits of its claims, not to the subject matter jurisdiction of the trial court to preside over those claims. The circuit court, as a court of general jurisdiction, had the authority to hear the types of claims Precision was asserting against LFC, so it had subject matter jurisdiction of them. LFC's petition for a writ of mandamus was denied.

(22.) <u>McGimsey v. Gray</u>, [Ms. 1161016, March 30, 2018] ___ So.3d ___:

In this case where the Supreme Court reversed the summary judgment the trial judge entered in favor of the proponent of a will in a will contest based on alleged undue influence, the Court discusses in detail the elements and evidence required to establish undue influence. The Court began by quoting this summary of the elements from an earlier case, whereby a contestant must prove:

> "(1) that a confidential relationship existed between a favored beneficiary and the testator; (2) that the influence of or for the beneficiary was dominant and controlling in that relationship; and (3) that there was undue activity on the part of the dominant party in procuring the execution of the will."

As with most undue influence cases, there were numerous facts, both pro and con, put forth by the parties. Quoting from another earlier case, the Court observed, "it is next to impossible to produce direct evidence of the exercise of undue influence over another person. Frequently the best evidence which can be

offered ... is circumstantial, tending only to support inferences which can be drawn therefrom." (quotation marks in original omitted)

The evidence the Court relies on to determine that a jury question was made out with respect to the third element, i.e., undue activity by the beneficiary in procuring the execution of the will, seems to your presenter to be "quite thin," but certainly the result serves to alert trial judges to the low level of circumstantial evidence and inferences therefrom which can suffice to create a jury question on the issue.

(23.) <u>Ex parte Terex USA, LLC</u>, [Ms. 1161113, March 30, 2018] ___ So.3d ___:

In the Alabama Heavy Equipment Dealer Act, § 8-21B-1 et seq., Ala. Code 1975 ("the AHEDA") the legislature declared:

> "The Legislature finds and declares that . . . the distribution and sale of heavy equipment in this state vitally affects the general economy of the state, the public interest, the public safety, and the public welfare and that, in the exercise of its police power, it is necessary to regulate the conduct of heavy equipment suppliers and dealers and their representatives doing business in this state in order to prevent fraud, unfair business practices, unfair methods of competition, and other abuses upon its citizens."

It is the exclusive prerogative of the legislature declare the public policy of the state; the courts cannot do so on their own.

A forum selection clause in a contract is enforceable unless, as declared by the United States Supreme Court in a 1972 decision, the party resisting it can establish, as one alternative factor, that "enforcement of the clause would contravene public policy."

The AHEDA contains a provision stating:

> "Notwithstanding the terms, provisions, or conditions of any dealer agreement, any person who suffers bodily injury, loss of profit, or property damage as a result of a violation of this chapter may bring a civil action in a court of competent jurisdiction in this state to enjoin

> further violations and to recover the damages sustained by him or her together with the costs of the suit, including a reasonable attorney's fee. ..."
> (Emphasis added.)

Other portions of the Act declare it to be automatically incorporated in every dealer agreement, to supersede and control any inconsistent provisions, and to prevent a supplier from requiring a dealer to waive any right to recover damages under the Act.

Held: "Although outbound forum-selection clauses are not expressly mentioned in the AHEDA, we are persuaded by the foregoing provisions of the AHEDA that the legislature has expressed a strong public policy against any provision in a dealer agreement that would foreclose a dealer's right to seek redress under the AHEDA in the State of Alabama. An outbound forum-selection clause is exactly the type of provision the legislature intended to prohibit because it would undermine the remedial measures and protections the legislature clearly intended to afford heavy-equipment dealers under the AHEDA; this is especially so as to the outbound forum-selection clause in this case, which also contains a choice-of-law provision designating Georgia law as controlling."

Therefore, enforcement of the outbound forum selection clause in the parties heavy equipment distributorship agreement was disallowed.

(24.) <u>Irwin v. Jefferson County Personnel Board</u>, [Ms. 1161145, April 20, 2018] ___ So.3d ___:

Irwin, a rejected applicant for a municipal chief of police job sought an injunction to halt examinations for the position and restrain any appointments from any list other than the one on which Irwin had been included. After the trial judge issued a final judgment denying an injunction, the municipality appointed a permanent police chief and Irwin appealed to the Alabama Supreme Court. It first noted "[i]n other words, [the municipality] has filled the job sought by Irwin and in a manner Irwin sought to prevent." Therefore, the Court concluded, Irwin's case, seeking only injunctive relief to prevent a future inquiry, had become moot, because it was "now impossible to provide Irwin the relief he requests." That invoked this proposition:

"The test, when a motion is made to dismiss an appeal because the right to an injunction, if it ever existed, has become moot, is whether the event which occurred pending appeal makes a determination of the appeal unnecessary, or renders it impossible for the appellate court to grant effectual relief."

The Court observed in a footnote:

Even if the trial court could, on remand, restore the prejudgment status quo by issuance of a permanent mandatory injunction, such an injunction would amount to a collateral attack on the appointment of the currently serving police chief, who is not a party to this action. Under the circumstances presented to us, we are not sure this would be an appropriate exercise of the court's equitable powers. See 63C Am. Jur. 2d Public Officers & Employees § 472 (2009). At any rate, Irwin has not requested such relief.

All that being so, the Court dismissed the appeal.