SURVEY OF 2005-2006 DEVELOPMENTS IN ALABAMA CASELAW*

* This survey summarizes significant decisions announced by the Alabama Supreme Court between October 1, 2005 and October 13, 2006. This survey was developed and compiled under the direction of Alabama Editor, Catherine Crosby.

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Cases

I. ARBITRATION

A. Whether a Party Has Waived Its Right to Arbitrate by Its Conduct During Litigation Is a Question for the Court, Not an Arbitrator, To Decide

In *Ocwen Loan Servicing v. Washington*,[1] the Alabama Supreme Court held that whether a party has waived its right to arbitration based on conduct during litigation is a procedural question for the court, not the arbitrator.[2] To decide whether the party seeking arbitration has waived the right to have the case arbitrated, the court reaffirmed the test as whether the party seeking arbitration has substantially invoked the litigation process, thus substantially prejudicing the opposing party.[3]

The appellant loan company was assigned a mortgage on the appellee's home. The original loan agreement between the appellee and a third-party mortgage company contained an arbitration clause that provided either party a right to demand arbitration with only a few exceptions. After several attempts to foreclose on the property, the appellee brought an action against the appellant in state court. The appellant removed the case to federal court and requested that it be transferred to a pending multidistrict litigation. The appellee challenged the removal, and the trial court remanded the case back to state court. Two months thereafter, the appellant filed a motion to compel arbitration. Notably, because the appellant had not put the appellee or the court on notice of its intent to reserve its right to arbitration, the appellee claimed the appellant's conduct during the litigation waived its right to have the case arbitrated.

Despite the United States Supreme Court's general allocation of functions between the court and an arbitrator—that a court should decide substantive issues of "arbitrability" and an arbitrator should determine questions of procedure, such as "waiver, delay, or a like defense" [4]—the Alabama Supreme Court found that waiver by court action "involve[d] matters occurring in the judicial forum" and is better resolved by the court.[5] Adopting the view of the First Circuit Court of Appeals in *Marie v. Allied Home Mortgage Corp.*,[6] the court reasoned that, because of the judge's control over the proceedings and expertise in recognizing abusive forum shopping, the issue could be handled more efficiently by the trial court judge.[7] More-

1. 939 So. 2d 6 (Ala. 2006).
2. *Id.* at 14.
3. *Id.*
4. *Id.* at 10 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)) (internal quotation marks omitted).
5. *Id.* at 12.
6. 402 F.3d 1 (1st Cir. 2005).
7. *Ocwen Loan Servicing*, 939 So. 2d at 13 (citing *Marie*, 402 F.3d at 13).

over, the court asserted that having judges determine conduct waiver was also unlikely to implicate the merits.[8]

In the present case, the court held that the appellant had waived its right to arbitration because it had substantially invoked the judicial process and would thereby cause prejudice to the opposing party if the case was arbitrated.[9] The appellant had removed the action to federal court, requested that the action be transferred to a pending multidistrict litigation, filed a motion to stay proceedings in the federal court, and opposed all of the appellee's attempts to block transfer or removal.[10] At no time prior to the remand to state court did the appellant assert its right to arbitration.[11] In fact, statements in the appellant's brief in support of its motion to stay unequivocally displayed the appellant's intent to litigate, not arbitrate.[12] The court held that the appellant's actions, especially attempting to transfer to multidistrict litigation, constituted a substantial invocation of the litigation process and a waiver of its right to arbitration.[13]

B. Stand-Alone Arbitration Agreements Not Mentioned in the Written Warranties Are Enforceable

In *Patriot Manufacturing, Inc. v. Jackson*,[14] the Alabama Supreme Court held that a written warranty did not have to contain arbitration agreements in order for the arbitration agreements to be enforceable,[15] explicitly overruling *Ex parte Thicklin*.[16]

The case was a consolidation of three cases with similar facts. In all of the cases, there had been a purchase of a mobile home. Included in the purchase agreements were written warranties that made no mention of arbitration. However, there were stand-alone arbitration agreements that mandated arbitration in order to resolve disputes that specifically included warranties. The purchasers of the mobile homes filed suit against the manufacturers asserting various claims, including violations of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (the Act). The manufacturers filed motions to compel arbitration, which were denied by each trial court pursuant to *Ex parte Thicklin* because the written warranty made no mention of arbitration.

The Alabama Supreme Court began its analysis by examining the Act.[17] The court noted that the Act required a warranty to include, in a single document, information on "any informal dispute settlement mechanism

8. *Id.*
9. *Id.* at 17.
10. *Id.* at 14-15.
11. *Id.* at 17.
12. *Id.*
13. *Id.*
14. 929 So. 2d 997 (Ala. 2005).
15. *Id.* at 1006.
16. 824 So. 2d 723 (Ala. 2002).
17. *Jackson*, 929 So. 2d at 1001.

elected by the warrantor."[18] But, because the Act further stated that a consumer could commence an action after resorting to informal methods of dispute resolution, such resolution was nonbinding in character.[19]

Looking to prior caselaw, the court noted that it had previously confronted the exact question posed in the present case in *Ex parte Thicklin*—whether a stand-alone arbitration agreement not mentioned in the warranty could be used to compel arbitration of Magnuson-Moss Act claims.[20] The court stated that in *Ex parte Thicklin* it had expressly relied on *Cunningham v. Fleetwood Homes of Georgia*,[21] a case decided by the United States Court of Appeals for the Eleventh Circuit, which had recently been called into doubt by another Eleventh Circuit decision, *Davis v. Southern Energy Homes, Inc.*[22] Since *Davis* did not expressly overrule *Cunningham*, the court evaluated *Cunningham* and *Davis* in order to determine whether *Cunningham*, and therefore *Thicklin*, should continue to be followed.

Cunningham affirmed a trial court's order denying a motion to compel arbitration under similar facts to the present case.[23] According to the Alabama Supreme Court, *Cunningham* did not bar arbitration but instead established that an arbitration clause must be included within the warranty in order to satisfy the Magnuson-Moss Act.[24] The court noted that the Eleventh Circuit failed to recognize in *Cunningham* that the Act only requires disclosure to the extent required by the Federal Trade Commission (FTC).[25] The Alabama Supreme Court also found fault with the *Cunningham* court's decision that arbitration was a form of informal dispute resolution, as those resolutions are required by the FTC under the Act to be contained within the warranty.[26]

In reaching their decision, the court relied on the Eleventh Circuit's reasoning in *Davis v. Southern Energy Homes, Inc.* The Alabama Supreme Court noted that *Davis* unequivocally rejected the idea that arbitration and informal dispute resolution are the same.[27] Accordingly, *Cunningham*'s reliance on arbitration as a form of informal dispute resolution was incorrect, and *Cunningham* was no longer binding authority on the issue.[28] The *Cunningham* court also reasoned that the stand-alone arbitration agreement would clash with the purposes of the Act.[29] The new Act intended, in part, "to improve the adequacy of information available to consumers, [and to]

18. *Id.* (quoting 16 C.F.R. § 701.3(a)(6) (2006)) (emphasis omitted) (internal quotation marks omitted).
19. *Id.* at 1002.
20. *Id.*
21. 253 F.3d 611 (11th Cir. 2001).
22. 305 F.3d 1268 (11th Cir. 2002).
23. *Jackson*, 929 So. 2d at 1002.
24. *Id.* (citing *Cunningham*, 253 F.3d at 620).
25. *Id.* at 1003.
26. *Id.*
27. *Id.* at 1004-05 (citing *Davis*, 305 F.3d at 1275).
28. *Id.* at 1005-06.
29. *Id.* at 1003.

prevent deception."[30] The Alabama Supreme Court reasoned that a stand-alone agreement was not deceptive because a signed document implied that the individual who signed the document had read the document.[31] Criticizing the Eleventh Circuit's reasoning as "dubious," the court determined that the "purpose" argument "wavers" under close scrutiny.[32]

Since *Thicklin* had expressly relied on *Cunningham* in asserting that an arbitration agreement must be found within the warranty to be enforceable, the Alabama Supreme Court explicitly overruled it and reinstated *Cavalier Manufacturing, Inc. v. Jackson*[33] to the extent that it did not diverge from the instant holding.[34] Applying the new standard, the court concluded that the arbitration agreements in the present case were valid, even though they were not disclosed in the warranty.[35] This finding meant that the manufacturers had met their respective burdens of proof under arbitration law, and the purchasers were required to show that the contract was either invalid or inapplicable.[36] Because the purchasers did not anticipate that the manufacturers would carry their burden, they did not argue that the contracts were invalid or inapplicable.[37] Therefore, they did not meet their burden of proof, and the court concluded that the motions to compel arbitration were due to be granted.[38] The trial courts' orders denying the motions to compel were reversed and remanded.[39]

C. An Arbitration Clause Excluding Punitive Damages Under Rules Accepted by the Contracting Parties Is Not Unconscionable When the Clause Contains Another Set of Rules Allowing Punitive Damages That Will Be Applied in the Event the Rules Agreed Upon Are Unavailable

In *Sloan Southern Homes, L.L.C. v. McQueen*,[40] the Alabama Supreme Court held that a set of rules in a construction contract's arbitration clause that did not permit the recovery of punitive damages was not unconscionable because it expressly provided for the application of another set of rules that permitted the recovery of punitive damages in the event that the accepted rules were unavailable.[41] The court also reaffirmed its position that an arbitration clause is not unconscionable where it fails to disclose or ex-

30. *Id.* (quoting 15 U.S.C. § 2302(a) (2000)) (internal quotation marks omitted).
31. *Id.*
32. *Id.* at 1004-06.
33. 823 So. 2d 1237 (Ala. 2001).
34. *Jackson*, 929 So. 2d at 1006.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 1007.
40. No. 1041893, 2006 WL 2383256 (Ala. Aug. 18, 2006).
41. *Id.* at *3-*4.

plain limitations resulting from the form of arbitration authorized by the clause.[42]

The appellees entered into a contract with the appellants for the purchase and construction of a new residence. In the contract, the parties agreed that any lawsuits relating to the contract would be governed by the arbitration rules of the Better Business Bureau (BBB). The arbitration provision also provided that in the event of the unavailability of BBB services, arbitration would be conducted pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association (AAA). The appellees brought suit against the appellants, alleging incomplete and improper house construction and misrepresentation or concealment of information regarding the appropriateness of the property for residential uses. The appellants moved to compel arbitration, but the trial court denied their motion. The appellants appealed the trial court's denial of arbitration.

Under the arbitration rules of the BBB, recovery of punitive damages is expressly precluded. However, all of the appellants agreed that this policy was not permissible under Alabama law. Thus, rather than arguing that arbitration should be conducted under the BBB rules, the appellants sought arbitration under the AAA. The appellants argued that the arbitration clause was not unconscionable because it provided for the use of AAA rules if the BBB's services were unavailable. The solution advocated by the appellants was to remove only the offending portion of the arbitration clause rather than invalidating the clause in its entirety. The appellees argued, however, that the arbitration clause was unconscionable because it fraudulently concealed the limitations in the BBB rules relating to an award of punitive damages.

The Alabama Supreme Court began its analysis by affirming the court's position that a seller has no duty to provide a buyer with an explanation of the provisions in an arbitration clause.[43] Based on this precedent, the court concluded that an absence of explanation of an arbitration clause does not provide a fraud defense to the seller for arbitration.[44] The court noted that Alabama law did not view arbitration clauses as unconscionable per se, as the party opposing arbitration, the appellees here, had the burden of demonstrating unconscionability.[45] Because the appellants had conceded that the terms of the BBB arbitration rules were unenforceable, the court found that the appellees could not rely on the conceded terms to make a showing of unconscionability.[46] Upon reviewing the functioning of the arbitration clause, the court concluded that the option for performing arbitration under AAA rules effectively operated as a severability clause: "the parties ex-

42. *Id.* at *3.
43. *Id.* (citing Johnnie's Homes, Inc. v. Holt, 790 So. 2d 956, 960 (Ala. 2001)).
44. *Id.*
45. *Id.*
46. *Id.*

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pressly agreed" that the arbitrability of disputes would not be diminished due to the unavailability of the services of the BBB.[47]

Although the court acknowledged its general duty to preserve a contract absent invalid or ineffective provisions, because the BBB rules excluded punitive damages, the services of the BBB went against public policy and were thus unavailable under Alabama law.[48] Therefore, because the BBB rules were unenforceable and the parties had agreed to arbitrate any disputes under AAA if such rules were unavailable, the arbitration clause was not unconscionable.[49] The court subsequently held that the trial court erred in denying the appellants' motions to compel arbitration and reversed the trial court's order.[50]

II. CIVIL PROCEDURE

A. A Human Organ Is Not an Inherently Dangerous Product

In *Ex parte Hospital Espanol de Auxilio Mutuo de Puerto Rico, Inc.*,[51] the Alabama Supreme Court held that a human organ is not an inherently dangerous product that allowed the use of a lower stream of commerce standard to establish personal jurisdiction.[52]

The plaintiff and her husband sued an out-of-state hospital and others, alleging that a kidney she received by transplant at a local in-state hospital was infected with hepatitis C. The plaintiffs identified the defendant as the party responsible for testing the suitability of the donor kidney. The out-of-state hospital was a transplant center that routinely performed serological testing on organs recovered locally, which are then distributed throughout the United States. The defendant moved to dismiss the complaint, contending that the Alabama trial court lacked personal jurisdiction over the defendant because the plaintiffs could not establish specific or general jurisdiction.

The defendant alleged that specific jurisdiction was lacking because the cause of action did not arise out of any contact it had with the State of Alabama, and general jurisdiction was not established because the defendant did not have systematic or continuous contacts or purposefully directed activities towards Alabama. The defendant explained that its only contact was with a foundation that coordinated transplants with member organizations. In opposition to the defendant's motion, the plaintiffs maintained that the court had personal jurisdiction because the defendant's contacts with the state gave rise to the suit, and its connections with the state were sufficient for the defendants to reasonably anticipate being haled into court in Ala-

47. *Id.* (emphasis omitted).
48. *Id.* at *2.
49. *Id.*
50. *Id.*
51. No. 1050685, 2006 WL 1451494 (Ala. May 26, 2006).
52. *Id.* at *10.

bama. The plaintiffs asserted that the defendant was a transplant center member within a region including Alabama, and evidence showed that the highest percentage of organs and bone grafts sent by the defendants were to Alabama. However, the record also reflected that the defendant did not determine where an organ or bone graft from its center would be sent, had no part in the delivery of the organs or bone grafts, and did not keep records reflecting the ultimate destination of an organ or bone graft.

The trial court denied the defendant's motion to dismiss because it found sufficient minimum contacts with Alabama to support personal jurisdiction. The trial court accepted a lesser showing than is normally required to support personal jurisdiction because it considered a human organ, a kidney in the present case, to be an inherently dangerous product that was placed into the stream of commerce by the defendant. Moreover, the trial court determined the defendants could reasonably anticipate being haled into court in Alabama if an organ was determined to be erroneously tested. Lastly, the trial court held that there is a necessity for regulated organ testing, and Alabama has a significant interest in organ testing. The defendant petitioned to the Alabama Supreme Court for a writ of mandamus ordering the trial court to vacate the order denying the defendant's motion to dismiss.

The Alabama Supreme Court held that the facts included in the record did not establish that the defendant had the minimum contacts with Alabama necessary to support personal jurisdiction.[53] To reach this conclusion, the court relied on a number of cases where items or substances were not found to be inherently dangerous, including *Defore v. Bourjois, Inc.*, which evaluated the definition of an inherently dangerous product.[54] Following these cases, the court determined that a donated kidney was not an inherently dangerous product; therefore, the court did not address whether the trial court improperly applied a lower standard to find personal jurisdiction over the defendant.[55]

In finding that the plaintiff failed to establish personal jurisdiction over the defendant, the court noted the defendant did not determine where the organs it tested were to be delivered, did not deliver the organs to the state, and did not directly or indirectly solicit business in the state.[56] Furthermore, the relationship between the defendant and the foundation was not sufficient to establish a substantial connection with Alabama.[57] Therefore, the plaintiffs failed to establish any nexus arising out of purposeful conduct directed towards Alabama that would support personal jurisdiction over the defendant.[58] Accordingly, the court issued the writ of mandamus and directed the

53. *Id.*
54. *Id.* at *9 (citing Defore v. Bourjois, Inc., 105 So. 2d 846 (Ala. 1958)).
55. *Id.* at *10.
56. *Id.*
57. *Id.*
58. *Id.*

trial court to enter an order dismissing the plaintiff's complaint against the defendant.[59]

B. Communication Between Company Directors and Counsel Concerning Individual Rights and Responsibilities of the Director Is Privileged

In *Ex parte Smith*,[60] the Alabama Supreme Court acknowledged that an individual attorney-client privilege arises as a result of communications between corporate directors and counsel so long as those communications concern rights and responsibilities of the individuals and not the corporation's obligations.[61]

This case involved an assertion of attorney-client privilege by the appellants, outside directors of a corporation in Chapter 7 bankruptcy. The bankruptcy trustee requested production of documents representing communications between the outside directors and a law firm they retained. The outside directors maintained the documents were privileged attorney-client communication since the attorney-client relationship existed between the outside directors and the law firm and not between the corporation and the firm. To support this proposition, the appellants offered an engagement letter that acknowledged a relationship between the outside directors and the firm and expressly disavowed any such relationship between the firm and the corporation. Additionally, the corporation's board of directors undisputedly knew of the separate nature of the attorney-client relationship between the outside directors and the law firm and did not object. Nevertheless, the trial court rejected the appellant's argument, holding the attorney-client privilege belonged to the corporation and, hence, to the trustee. The directors appealed to the Alabama Supreme Court seeking a writ of mandamus commanding the circuit court to vacate its order of production.

The Alabama Supreme Court granted the petition because, on the facts, the attorney-client privilege rightly belonged to the outside directors, not to the corporation.[62] The parties agreed that if the firm had been retained by the corporation, the trustee would be able to waive the privilege.[63] However, they disagreed as to the nature of the relationship between the outside directors and their counsel.[64] On one hand, the outside directors argued that no relationship existed between the corporation and the firm; on the other hand, the trustee argued that the outside directors were acting in their capacity as directors when they sought counsel, and the privilege therefore belonged to the corporation.[65] The court, agreeing with the interpretation of *In re Bevill,*

59. *Id.*
60. No. 1050607, 2006 WL 1304943 (Ala. May 12, 2006).
61. *Id.* at *4.
62. *Id.*
63. *Id.* at *3.
64. *Id.*
65. *Id.*

Bresler, & Schulman Asset Management Corp.[66] made by the First Circuit in *In re Grand Jury Subpoena*,[67] held that communications between a corporate officer and counsel regarding that officer's personal rights and responsibilities acquire a privilege, even though communications between an officer and counsel regarding rights and obligations of the corporation does not give rise to a privilege.[68]

The *Bevill* test, as interpreted by the First Circuit and adopted with approval by the Alabama Supreme Court here, holds that communications between an officer of a corporation and corporate counsel may give rise to an individual privilege if the subject communication meets five criteria: first, the officer must show she approached counsel to seek advice; second, the officer must have made clear to the attorney that she was seeking advice in her individual capacity; third, the officer must show counsel thought it appropriate to communicate with her in this manner; fourth, the officer must show the communications were confidential in nature; and fifth, the officer must show that their conversations did not concern "matters within the company or the general affairs of the company."[69] The First Circuit, in elucidating the fifth prong, held the test only precluded individual privilege when the communication concerned the corporation's rights and responsibilities; when communications concerned the officer's obligations, an individual privilege exists.[70] Accordingly, the court issued the writ commanding the circuit court to issue a protective order regarding communications between the outside directors and their counsel with respect to their personal rights and responsibilities.[71]

C. Defendant Waives Statute of Repose Defense by Pleading Only Statute of Limitations

In *Pinigis v. Regions Bank*,[72] the Alabama Supreme Court held that Alabama Code section 7-4-406(f),[73] which bars the litigation of certain issues against banks if the plaintiff does not provide notice to the bank of an alleged check forgery within 180 days, was a statute of repose that the defendant waived by asserting only the statute of limitation as an affirmative defense in its answer.[74]

The plaintiff-appellant in this action was the executrix of the estate of an elderly decedent. The acts giving rise to the claim were allegedly perpetrated by two individuals who involved themselves in the decedent's finan-

66. 805 F.2d 120 (3d Cir. 1986).
67. 274 F.3d 563 (1st Cir. 2001).
68. *Smith*, 2006 WL 1304943, at *4.
69. *Id.* (quoting *In re Bevill*, 805 F.2d at 123) (emphasis omitted) (internal quotation marks omitted).
70. *Id.* (citing *In re Grand Jury Subpoena*, 274 F.3d at 572).
71. *Id.* at *6.
72. No. 1041905, 2006 WL 1304938 (Ala. May 12, 2006).
73. ALA. CODE § 7-4-406(f) (1975).
74. *Pinigis*, 2006 WL 1304938, at *6-*7.

cial affairs. The appellant further alleged these individuals wrongfully stole funds from the decedent by forging checks and fraudulently redeeming certificates of deposit belonging to the decedent. The wrong asserted vis-à-vis the bank was that the bank honored forged checks, wrongfully cashed certificates of deposit, and allowed the individuals to expropriate the decedent's available funds. The appellant subsequently sought to recover the funds in question, stating claims pursuant to Alabama Code sections 7-4-401 and 405,[75] as well as common law conversion claims. In its answer, the bank asserted, as an affirmative defense, that appellant's claims were barred by the "*statutes of limitations*, including but not limited to the provisions of UCC Articles 3 and 4."[76] By contrast, the bank's subsequent motion for summary judgment argued appellant's claim was barred by the "statute of repose," that is, section 7-4-406(f).[77] The trial court granted the bank's summary judgment motion on the affirmative defense issue, and the appellant appealed to the Alabama Supreme Court.

The court held the bank waived the affirmative defense found in section 7-4-406(f) when it failed to plead it in its answer; language regarding the statutes of limitation[78] was insufficient to preserve the defense.[79] Pursuant to Rule 8(c) of the Alabama Rules of Civil Procedure, affirmative defenses must be set out in the answer to avoid waiver thereof.[80] As an affirmative defense, pursuant to section 7-4-406, if a customer does not within 180 days of receiving a copy of the instrument bearing the unauthorized signature alert the bank thereof, a customer may not assert against the bank the unauthorized signature.[81] The court noted the bank's implied concession that the section 7-4-406 defense is not a statute of limitation is in accord with the comments to the section, which describe the notice requirement in terms of repose.[82]

The court distinguished the applicable statutes of limitation and repose provisions of the Alabama Code. Section 7-4-406(f), the statute of repose, requires notice in order to preserve the claim whereas section 7-4-111, the statute of limitation, requires the action be filed within three years of accrual. Because of these distinctions, the court held that the bank's answer was insufficient to preserve the statute of repose defense under Rule 8(c).[83] This holding rejected the appellee's argument that the bank did not fail to plead the defense but merely failed to use a legal "term of art" because given the differences between statutes of limitations and repose, pleading

75. ALA. CODE §§ 7-4-401, -405.
76. *Pinigis*, 2006 WL 1304938, at *2 (quoting appellee's answer) (internal quotation marks omitted).
77. *Id.*
78. *Id.*
79. *Id.* at *5.
80. *Id.* at *4 (citing ALA. R. CIV. P. 8(c)).
81. *Id.* at *4.
82. *Id.* at *5-*6.
83. *Id.* at *6-*7.

the former is insufficient notice of intent to assert the latter.[84] Finally, the court rejected the bank's argument that the statute of repose defense was apparent on the face of the complaint—an exception to the provisions of Rule 8(c)—and thus preserved, notwithstanding its omission from the answer.[85] The bank did not plead the affirmative defense found in section 7-4-406, and therefore that defense was unavailable.[86]

D. Collateral Estoppel Bars Issues That Have Been Previously Litigated from Being Subsequently Decided in Arbitration

In *Ernst & Young, L.L.P. v. Tucker*,[87] the Alabama Supreme Court held, in a case of first impression, that collateral estoppel precludes issues that have previously been decided in litigation from being subsequently decided in arbitration.[88]

The issue in this case began when a shareholder brought suit against HealthSouth and several of its managers and board members alleging numerous contractual and tort claims. The shareholder then added Ernst & Young (E & Y) as a defendant and asserted that its failure to discover multiple instances of wrongdoing by various corporate officers of HealthSouth constituted a breach of an employment agreement with HealthSouth and amounted to negligence, wantonness, and fraud. E & Y filed a motion with the court to compel arbitration based on an arbitration agreement between HealthSouth and E & Y that stated any claims shall be submitted to meditation and then to arbitration. In addition to the motion to compel arbitration, E & Y also filed a motion in the alternative to dismiss the suit, claiming that Tucker failed to comply with Rule 23.1 of the Alabama Rules of Civil Procedure by not making a demand upon the board of directors in control of HealthSouth prior to the filing of the claims against E & Y.

In the trial court, Tucker filed a motion for an expedited determination of the demand issue, and the trial court conducted hearings on the matter. In the ensuing litigation, the issues relating to the demand for relief from HealthSouth and whether the shareholder was the proper party to pursue the claims were briefed and argued by all parties. Although HealthSouth had taken a neutral position on the demand issue in its answer, HealthSouth subsequently argued that it was the real party-in-interest and moved to be "realign[ed] [ ] in the litigation" to pursue the claims against E & Y.[89] The trial court denied HealthSouth's claim to be realigned and E & Y's claim of failure to meet the demand requirements pursuant to Rule 23.1. The trial court also referred the claims relating to the determination of liability to arbitration but retained jurisdiction for issues regarding demand, proper party-in-

84. *Id.* at *5-*6.
85. *Id.* at *7.
86. *Id.*
87. 940 So. 2d 269 (Ala. 2006).
88. *Id.* at 287.
89. *Id.* at 276.

interest, enforcement of the arbitration award, fairness of the settlement under Rule 23.1, enforcement of any settlement agreement, and the award of attorney fees obtained in arbitration. E & Y and HealthSouth, the appellants, appealed the preservation of jurisdiction by the trial court, claiming that it is improper since under the terms of the arbitration agreement the authority belonged to the arbitrators and not the court.

On appeal, the appellants argued that under the terms of the agreement, they were entitled to raise the same issues already decided by a court in arbitration.[90] The Alabama Supreme Court disagreed, however, and found the appellants' claims were precluded from being heard in arbitration.[91] The court found that Alabama law clearly establishes that collateral estoppel bars relitigation where the issue is the same as in the first case, it was actually litigated in the prior case, and the resolution of the issue was necessary to the prior judgment.[92] Nonetheless, the question of whether "collateral estoppel [was], itself, arbitrable" was an issue of first impression in Alabama.[93] The court noted that courts in other jurisdictions have found that the preclusive effect of a prior arbitration or judicial determination should be decided by the courts instead of an arbitrator.[94] Other courts, however, have found that the preclusive effect of such arbitrations should be determined by an arbitrator.[95]

Following Alabama law, the court reasoned that since the relevant legal issues had already been heard and decided by the trial court, collateral estoppel barred the claims from being reheard in front of an arbitrator.[96] The court noted that Alabama courts cannot render advisory opinions with limited exceptions that were not applicable in this case.[97] If an arbitrator could rehear the claims, it would effectively make the Alabama court's opinion advisory.[98] Therefore, the Alabama Supreme Court determined that collateral estoppel precludes issues that have previously been decided in litigation from being reheard in arbitration.[99]

90. *Id.* at 282.
91. *Id.* at 287.
92. *Id.* at 285 (citing Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 821 So. 2d 158, 162-63 (Ala. 2001)).
93. *Id.*.
94. *Id.*
95. *Id.*
96. *Id.* at 287.
97. *Id.* at 286.
98. *Id.*
99. *Id.* at 287.

E. For the Purposes of Proper Venue, Partnerships and Limited Liability Companies Are Governed by the Same Venue Rules As Individual Defendants

In *Ex parte Miller, Hamilton, Snider & Odom, L.L.C.*,[100] the Alabama Supreme Court, as a matter of first impression, held that limited liability companies with more noncorporate than corporate characteristics should be treated as partnerships subject to Alabama Code section 6-3-2(a)(3), the rule governing venue for actions against individual defendants.[101]

Prior to the instant action for malicious prosecution, two of the defendant lawyers had represented a bank and its holding company in a matter against the plaintiffs in this action. Ultimately, the bank and its holding company voluntarily dismissed the action. The earlier action was filed in a different county than where the alleged malicious prosecution action was filed. The defendant law firm (a limited liability company) and the three defendant lawyers petitioned the Alabama Supreme Court for a writ of mandamus directing the circuit court to vacate its order denying their motion to transfer and directing the court to transfer the action to another county within the state.

The Alabama Supreme Court determined that venue was not proper in regard to the individual attorney defendants since none of the individual defendants permanently resided in the county, and the alleged acts did not occur in the county where the suit was filed.[102] Because Alabama venue statutes failed to mention limited liability companies, the court turned to other Alabama statutes to determine which set of rules should govern.[103] The Alabama Limited Liability Company Act[104] classifies the limited liability company as a partnership "unless [the limited liability company] is classified otherwise for federal income tax purposes, in which case it shall be classified in the same manner as it is for federal income tax purposes."[105] Based on Alabama Code section 10-12-8[106] and the historical treatment of the firm as a partnership for federal income tax purposes, the court determined that the limited liability law firm would be treated as a partnership for venue purposes.[107] After evaluating prior interpretations of other venue statutes, specifically Alabama Code sections 6-3-7 and 6-3-6, the court held through process of elimination that the rule governing individual defendants also applied to partnerships.[108] Since no member of the law firm resided in the county in which the action was brought, the court held that venue was

100. No. 1050200, 2006 WL 573931 (Ala. Mar. 10, 2006).
101. *Id.* at *3.
102. *Id.* at *2.
103. *Id.*
104. ALA. CODE §§ 10-12-1 to -61 (1975).
105. *Miller*, 2006 WL 573931, at *2 (quoting ALA. CODE § 10-12-8) (internal quotation marks omitted).
106. ALA. CODE § 10-12-8.
107. *Miller*, 2006 WL 573931, at *2.
108. *Id.* at *3.

not proper for any defendant to the action.[109] Thus, the court granted the petition for writ and directed the trial court to transfer the action.[110]

F. Judgments in Consolidated Actions that Affect Fewer Than All the Claims Involved May Be Appealed Only if the Judgment Is Certified As Final

In *Hanner v. Metro Bank & Protective Life Insurance Co.*,[111] the Alabama Supreme Court held that judgments on individual claims in a consolidated action must be declared final in order to be eligible for appeal.[112]

As a condition of a divorce judgment, the appellant's ex-husband was to maintain a life insurance policy naming their minor son as an irrevocable beneficiary. The ex-husband stopped paying the premiums on the policy, allowing it to lapse. He then retained a new life insurance policy, only naming his son as a beneficiary instead of an irrevocable beneficiary. He then assigned the second policy to the defendant bank as collateral for a loan. After he again failed to make the payments on the premium, the second policy lapsed. Nevertheless, at this point he obtained a third life insurance policy through the defendant bank and plaintiff insurance company listing his minor son and current wife as beneficiaries. He failed to inform the bank of the requirement that his minor son be named an irrevocable beneficiary, and the policy did not reflect that designation. He then assigned the policy to the bank as collateral for the existing loan.

Following the insured's death, the insurance company paid the proceeds of the policy to the bank. After receiving notice of the minor son's potential claims, the company filed a declaratory judgment action to determine who should receive the proceeds of the life insurance policy. The action named the bank and the appellant, the guardian of the minor child, as defendants. In a counterclaim against the insurance company, the appellant alleged breach of contract, bad faith, conversion, and negligence. The appellant also filed a cross-claim against the bank for unjust enrichment and conversion, and initiated separate claims against the ex-husband's estate and his widow. All of the claims were then consolidated into one action. The trial court granted summary judgment for the insurance company and bank, finding the proceeds of the policy belonged to the bank; however, the judgment did not address the appellant's claims against the estate or the deceased's widow.

After reaffirming well-established law that only final judgments may be appealed, the Alabama Supreme Court looked to federal precedent to determine when a judgment in a consolidated action is final for purposes of appeal.[113] Relying on decisions out of the Ninth, Tenth, and Federal Cir-

109. *Id.*
110. *Id.*
111. No. 1041966, 2006 WL 1720394 (Ala. June 23, 2006).
112. *Id.* at *3.
113. *Id.* at *2.

cuits, the court held that judgments in a consolidated action are not final and may not be appealed unless they address all of the stated claims or are certified as final under Rule 54(b) of the Alabama Rules of Civil Procedure by the trial court.[114] While the trial court need not explicitly certify a decision as final under Rule 54(b) in order for it to be appealed, the court stated that it must be "clear and obvious" in the order that the trial court intended the judgment to be final.[115] Evidence of this intent may include quoting Rule 54(b) or specifically citing the rule in the order.[116] However, in applying the court's analysis, the order at issue claimed to be a final resolution of all controversies but did not include any specific reference to Rule 54(b) or quote the language therein.[117] Therefore, the court determined that the summary judgment order was not final since it did not address all the claims in the consolidated action or certify those it did address as final under Rule 54(b).[118] Accordingly, the court remanded the case to the trial court with limited jurisdiction to determine if final certification should be issued.[119]

G. An Agreement Between Parties to Postpone a Hearing on a Post-Judgment Motion for a New Trial Does Not Constitute Express Consent to Allow the Motion to Remain Pending in the Trial Court Beyond the Ninety-Day Limit Set by Rule 59.1 of the Alabama Rules of Civil Procedure

In *State of Alabama v. Redtop Market, Inc.*,[120] the Alabama Supreme Court held that although the parties had agreed to postpone the hearing on the State's post-judgment motion for a new trial, they had not agreed to extend the period for which the motion could remain pending.[121] Thus, the State's appeal was untimely filed and the appeal must be dismissed.[122]

The trial court heard a declaratory action brought by the defendant to determine whether the operation of video-gaming machines would violate Alabama law. On February 3, 2004, the trial court found that such operations would not violate Alabama law, and on February 27, 2004, the State filed a timely motion for a new trial pursuant to Rule 59(b) of the Alabama Rules of Civil Procedure. Although a hearing on the motion was scheduled on May 14, 2004, the trial court noted the hearing had been postponed until August 11, 2004, upon agreement by the parties. The hearing was subsequently postponed eight additional times, and the trial court ultimately denied the motion for a new trial on July 5, 2005. On August 11, 2005, the State filed a notice of appeal of the denial.

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114. *Id.* at *2-*3.
115. *Id.* at *3 (quoting Schneider Nat'l Carriers, Inc. v. Tinney, 776 So. 2d 753, 755 (Ala. 2000)) (internal quotation marks omitted).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at *3-*4.
120. 937 So. 2d 1013 (Ala. 2006).
121. *Id.* at 1014.
122. *Id.* at 1014-15.

The Alabama Supreme Court considered the dispositive issue of this case to be whether, by operation of law, the State's motion for a new trial was properly denied on May 27, 2004, pursuant to Alabama Rules of Civil Procedure Rule 59.1.[123] Rule 59.1 establishes, *inter alia*, that if a post-judgment motion filed under Rule 59 remains pending for more than ninety days, the motion is denied by operation of law absent express consent by the parties to extend the time period in which the trial court may rule on the motion.[124] The court relied on its previous holdings in *Ex parte Bodenhamer*[125] and *Harrison v. Alabama Power Co.*[126] to find that the agreement of the defendant and the State to postpone the hearing on the motion for a new trial did not constitute consent to extend the ninety-day pendency period as required by Rule 59.1.[127] Thus, since the parties did not expressly consent to extend the ninety-day period, the State's motion for a new trial was denied by operation of law when the period expired on May 27, 2004.[128]

Because the State's motion for a new trial was denied on May 27, 2004, the forty-two day period established by Rule 4 of the Alabama Rules of Civil Procedure in which the State could appeal the denial ran from that date.[129] However, this period also expired on July 8, 2004, rendering the State's appeal filed August 11, 2005, untimely and properly dismissed by the court without consideration on the merits.[130]

H. Sureties May Claim Statute of Limitation Defenses Available to Their Principals Under Section 6-5-221 of the Alabama Code

In *Housing Authority of Huntsville v. Hartford Accident & Indemnity Co.*,[131] the Alabama Supreme Court held that under the common law of Alabama, sureties are allowed to claim statute of limitation defenses available to their principals even when they are not expressly authorized to do so by statute.[132]

On April 21, 2004, the plaintiff commenced an action against the defendant insurance company seeking the enforcement of a performance bond issued by the insurance company for a construction company who allegedly had improperly renovated one of the plaintiff's facilities. Because the two-year statute of limitations established by section 6-5-221 of the Alabama Code on claims arising from construction projects had run before the plain-

123. *Id.* at 1014.
124. *Id.* (citing ALA. R. CIV. P. 59.1).
125. 904 So. 2d 294 (Ala. 2004).
126. 371 So. 2d 19 (Ala. 1979).
127. *Redtop Market*, 937 So. 2d at 1015.
128. *Id.*
129. *Id.* at 1014.
130. *Id.* at 1014-15.
131. No. 1040885, 2006 WL 2790037 (Ala. Sept. 29, 2006).
132. *Id.* at *6.

tiff filed the complaint, the trial court granted the defendant's motion for summary judgment on February 15, 2005.

The plaintiff appealed this decision, arguing that section 6-5-221 only established a two-year statute of limitations for claims against architects, engineers, and builders, and thus the limitations period did not apply to the defendant insurer. The defendant countered with the argument that under the common law of Alabama, it was allowed as a surety to assert any defense available to its principal, the construction company, including the statute of limitations defense established by section 6-5-221.

To reach its holding, the Alabama Supreme Court first noted that a conflict of authority in several states existed as to whether sureties may claim statute of limitation defenses that are available to a principal.[133] The court then looked to two prior rulings by the Alabama Court of Civil Appeals and to the Restatement (Third) of Suretyship & Guaranty to determine that, despite this conflict of authority, common law in Alabama allowed a surety to claim most defenses available to its principal, including a statute of limitations defense.[134] The court additionally rejected the plaintiff's claim that even if common law purportedly allowed the statute of limitations defense, statutory law did not.[135] In rejecting this argument, the court noted that these statutes are silent as to their application to sureties, and therefore they did not increase or limit the defendant's available defenses.[136] The legislature had the opportunity to overturn the common law extension of these defenses to sureties when it enacted these statutes but chose not to.[137] Therefore, the court determined that the common law rule still applied, and the statute of limitations defense was available.[138]

I. Untargeted Negligence Committed Outside of Alabama Does Not Grant an Alabama Court Personal Jurisdiction over the Defendant Merely Because the Plaintiff Will Feel the Effects of the Tort in Alabama

In *Ex parte Gregory*,[139] the Alabama Supreme Court held that in an action for wantonness or negligence, knowledge that an injured party was a resident of Alabama as the only contact a defendant had with the state is not sufficient to establish personal jurisdiction in an Alabama court over a defendant who is a resident of another state.[140]

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133. *Id.* at *4 (discussing holdings from courts in Texas, Iowa, and California on both sides of this issue).
134. *Id.* at *3-*4 (citing Ala. Surface Mining Reclamation Comm'n v. Commercial Standard Ins. Co., 469 So. 2d 619 (Ala. Civ. App. 1985); Commercial Standard Ins. Co. v. Ala. Surface Mining Reclamation Comm'n, 443 So. 2d 1245 (Ala. Civ. App. 1983); and RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 43 (1996)).
135. *Id.* at *5 (citing ALA. CODE §§ 6-5-221 to -228 (1975)).
136. *Id.*
137. *Id.*
138. *Id.*
139. No. 1050425, 2006 WL 1793751 (Ala. June 30, 2006).
140. *Id.* at *10.

The fifteen-year old plaintiff was visiting the defendant at the defendant's second home in Colorado. The plaintiff was a resident of Alabama, and the defendant's primary home was in Tennessee, where he had lived continuously for the past fifteen years. During that time, the defendant had not lived or worked in Alabama and therefore had no established contacts with the state. During the plaintiff's visit to Colorado, the defendant allowed the plaintiff to operate the defendant's four-wheel all-terrain vehicle, even though the plaintiff was not wearing a helmet and had never operated an all-terrain vehicle alone. While driving the vehicle, the plaintiff wrecked and suffered a head injury. She received the majority of her medical treatment in Colorado but did receive additional treatment when she returned home to Alabama.

The plaintiff and her parents subsequently sued the defendant, alleging the defendant was negligent or wanton in failing to provide or require the plaintiff to wear a helmet when she was operating the all-terrain vehicle. The complaint stated that the defendant was a resident of Tennessee and that the accident had occurred in Colorado. In his answer, the defendant claimed that the court lacked personal jurisdiction over him. He then filed a motion for summary judgment on the basis of lack of personal jurisdiction, which was supported by an affidavit from the defendant's wife that attested to the defendant's residency in Tennessee for the past fifteen years to establish his lack of contract with Alabama. The plaintiffs opposed the motion and argued the defendant should have foreseen that any harm caused to the plaintiff would have consequences in Alabama, such as medical expenses or the loss of the plaintiff's services to her parents. The trial court denied the defendant's motion for summary judgment, and the defendant petitioned the Alabama Supreme Court for a writ of mandamus.

In response to the defendant's petition, the plaintiffs asserted numerous procedural considerations in support of the trial court's denial of summary judgment for the defendant. The Alabama Supreme Court disagreed with each of the plaintiffs' contentions, finding the defendant had properly made a prima facie showing of the lack of personal jurisdiction, had not waived his right to assert the affirmative defense of a lack of personal jurisdiction, and that pending discovery responses from the defendant were irrelevant to the plaintiffs' ability to establish sufficient personal jurisdiction over the defendant.[141]

The court then noted the plaintiffs' principal argument for the establishment of personal jurisdiction over the defendant was based on the "effects test" established by the United States Supreme Court[142] and applied by the Alabama Supreme Court in *Duke v. Young*.[143] The effects test established that a forum state has personal jurisdiction over a defendant if the defendant should have reasonably anticipated that the direct consequences

141. *Id.* at *3-*4.
142. *Id.* at *8 (citing Calder v. Jones, 465 U.S. 783 (1984)).
143. 496 So. 2d 37 (Ala. 1986).

of his actions would be felt by a person residing in that state.[144] However, this test had only been applied in intentional tort cases where the defendant possessed more than a mere awareness that his intentional acts would cause harm in the forum state.[145] Therefore, the court found a lack of any alleged intentional tortuous behavior or allegations that the defendant possessed more than the awareness his behavior might cause harm in Alabama, and thus, the use of the effects test was not warranted.[146] Accordingly, there was no evidence that the defendant's actions were "purposely directed" at Alabama in order to establish personal jurisdiction for nonresidents, and the plaintiffs failed to establish personal jurisdiction over the defendant.[147] The court held the trial court erred in denying the defendant's motion for summary judgment.[148]

III. CONSTITUTIONAL LAW

A. Attorney Fees and Expenses Cannot Be Awarded Against a Department or Agency of the State of Alabama

In *Ex parte Town of Lowndesboro*,[149] as a matter of first impression, the Alabama Supreme Court held that section 14 of the Alabama Constitution of 1901 prohibits an award of attorney fees and expenses against an agency or department of the State of Alabama.[150]

The petitioners, the Town of Lowndesboro and an individual landowner, brought a declaratory judgment action in circuit court against the Alabama Department of Environmental Management (ADEM), alleging that ADEM, in approving a permit for a landfill in Lowndesboro, had failed to adopt a State Solid Waste Management Plan or give the individual landowner notice of their approval. Although ADEM immediately adopted a State Solid Waste Management Plan, the petitioners' motion for summary judgment was granted by the circuit court on grounds that ADEM provided improper notice to the public of the permit approval, and the court declared the landfill permit void. Stating that ADEM adopted the plan as a result of their efforts, the petitioners argued that they were entitled to attorney fees and expenses under the common-benefit doctrine. The circuit court entered an order granting fees and expenses totaling $338,618. The Alabama Court of Civil Appeals reversed the order, holding that the award of attorney fees and expenses violated section 14 of the Alabama Constitution of 1901, which provides sovereign immunity for the State of Alabama and its officers and agencies.

144. *Gregory*, 2006 WL 1793751, at *8 (quoting *Duke*, 496 So. 2d at 39).
145. *Id.* (citing Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002)).
146. *Id.* at *10.
147. *Id.* at *9-*10.
148. *Id.* at *11.
149. No. 1041071, 2006 WL 1304902 (Ala. May 12, 2006).
150. *Id.* at *10.

The Supreme Court of Alabama affirmed the decision of the Court of Civil Appeals, beginning its discussion by noting the long history of absolute sovereign immunity in Alabama.[151] The court discussed three main factors that determine whether an action is considered to be against the state.[152] First, actions where a favorable outcome for the plaintiff would result in recovery of money from the state or affect a property or contract right of the state are considered to be against the state for section 14 purposes.[153] Section 14 will also prohibit damages or fees where the defendant acts as a conduit through which the plaintiff attempts to recover from the state.[154] Additionally, the court noted that a party cannot sue the state through its officers or agencies when doing so would affect the financial status of the state treasury.[155] Regardless of whether the treasury is affected by an award of attorney fees or monetary damages, the award is forbidden under section 14.[156]

Although section 14 provides an exception to its sovereign protection for certain declaratory judgments, the court noted that none of the cases cited by the petitioners supported the idea that this exception extended to an award of attorney fees.[157] The court acknowledged that plaintiffs have been awarded attorney fees in cases against the state but found those cases were distinguishable because the fees were awarded for claims brought under federal law, not state law as in this case.[158] Finally, the court rejected the petitioners' claim that the decision should be applied prospectively, noting that the petitioners cited no authority for such a ruling.[159] The court then explained that a decision would be applied retroactively unless it displaced clear past precedent[160] or decided an issue of first impression whose answer was not obvious.[161] While acknowledging this was an issue of first impression, no clear past precedent pointed to allowing the imposition of attorney fees on the state.[162] The court also asserted that it has refused to give prospective-only application to constitutional holdings and therefore ruled that the judgment applied retroactively.[163]

151. *Id.* at *2 (citing Hutchinson v. Bd. of Trs. of Univ. of Ala., 256 So. 2d 281, 282-83 (Ala. 1971)).
152. *Id.* at *3.
153. *Id.* (citing Ala. Agric. & Mech. Univ. v. Jones, 895 So. 2d 867 (Ala. 2004)).
154. *Id.* (citing Barnes v. Dale, 530 So. 2d 770, 784 (Ala. 1988)).
155. *Id.* (citing Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002)).
156. *See id.* at *4.
157. *Id.* at *6.
158. *Id.* at *8.
159. *Id.* (citing Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969)).
160. *Id.* (citing Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 496 (1968)).
161. *Id.*
162. *Id.* at *9.
163. *Id.* at *9-*10.

B. Act No. 97-683, Amending Section 34-11-1 of the Alabama Code, Is Constitutional

In *Board of Water & Sewer Commissioners of Mobile v. Hunter*,[164] the Alabama Supreme Court held Act No. 97-683 (the Amendment), amending section 34-11-1 of the Alabama Code, was constitutional despite arguments that the Act was unconstitutionally vague and in violation of article IV, section 45, of the Alabama constitution.[165]

The controversy arose in an action by the appellee homeowners against the appellant water board for negligent design and maintenance of their sewer system. When the appellees attempted to call a certified engineer intern to testify, the appellant disputed the witness's ability to testify under title 34, chapter 11 of the Alabama Code, also known as the Licensure Act (the Act), which governs the profession of engineering. According to the appellant, the Amendment directed that only a professional engineer could testify to engineering matters under oath. Citing the Amendment, the appellant moved to strike the testimony of the homeowners' witness, as that witness was certified under the Act as an engineer intern and not a professional engineer. In response to the motion, the appellees argued that the witness in question was qualified to testify as an expert in the absence of the Amendment due to his extensive experience, training, and education as to engineering matters. The appellees also asserted that the Licensure Act was unconstitutional on several grounds, most notably that it violated the "single-subject rule" set forth in section 45 of the Alabama constitution and that it was unconstitutionally vague. The trial court agreed with the appellees on both issues, and the appellant instituted an appeal.

The Alabama Supreme Court agreed with the appellant's assertion that under the Alabama constitution an amendatory act's title only has to "identify that it is 'An Act to Amend' so long as (1) it identifies the statute being amended and (2) the substance of the amendment is germane to the existing statute."[166] Citing *Ex parte Boyd*,[167] the Alabama Supreme Court held that the amendment at issue clearly indicated its intention to amend the definition of the practice of engineering provided in section 34-11-1 of the Alabama Code to include "giving testimony" in the description.[168] Addressing claims made by the appellees that the Amendment was not germane or complementary to the existing statute, the court clearly stated that when an amendatory act modifies a definition contained within the section it intends to modify, it is hard to construe it "as anything but germane or complementary to the existing statute."[169]

164. No. 1050067, 2006 WL 2089914 (Ala. July 28, 2006).
165. *Id.* at *21.
166. *Id.* at *6.
167. 796 So. 2d 1092 (Ala. 2001).
168. *Hunter*, 2006 WL 2089914, at *6.
169. *Id.*

The court also distinguished the cases cited by the appellees to assert that the substance of the Amendment was irrelevant to the statute.[170] Showing deference to the legislature, the court stated that "[i]t is not for [us] to question the wisdom of the legislative amendment, particularly when determining whether the requirements of [section] 45 have been met."[171] The appellees also alleged that the Amendment violated the single-subject rule because notice was not given to the legislature regarding the significance of the changes made by the Amendment.[172] The court responded that while the Amendment did affect other subjects, such as the Rules of Evidence, an amendatory act's title was not required under the single-subject rule to list every subject which might be secondarily affected by the Amendment.[173] Additionally, simply because the Amendment might affect other rules did not mean that it violated the single-subject rule by including issues foreign to the existing statute.[174]

Addressing the appellees' contention that the Licensure Act, as amended, was unconstitutionally vague, the court held that the appellees lacked standing to bring a challenge on the issue.[175] In order to bring a void-for-vagueness challenge to a statute, the challenger must be affected by, or possibly affected by, that statute.[176] Because the appellees were not members of the class to whom the Licensure Act applied, the court observed that they would not be affected by whatever vagueness might exist.[177] The appellees heavily relied on *City of Chicago v. Morales*[178] in support of their contention that the vague nature of the Amendment gave them the necessary standing to support a facial challenge.[179] The court, however, distinguished the ordinance at issue in *Morales* from the Act, finding the Act sufficiently indicated the prohibited conduct whereas the ordinance in *Morales* did not notify the public as to what conduct was prohibited and left too much to the subjective enforcement of police officers.[180] In support of their finding, the court cited as evidence that the Act clearly applied to the appellees' witness and therefore could not be so vague as to be comparable to the ordinance in *Morales*.[181] A facial challenge to the Amendment by the appellees was therefore unsuccessful because the appellees' witness clearly fell within the boundaries of the Act.[182]

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170. *Id.* at *7-*8.
171. *Id.* at *8.
172. *Id.*
173. *Id.* at *9 (citing Smith v. Indus. Dev. Bd. of Andalusia, 455 So. 2d 839 (Ala. 1984)).
174. *Id.*
175. *Id.* at *12-*13.
176. *Id.* at *13.
177. *Id.*
178. 527 U.S. 41 (1999).
179. *Hunter*, 2006 WL 2089914, at *13-*14.
180. *Id.* at *14.
181. *Id.*
182. *Id.*

In addition, the court saw no merit in the argument that the Act was being enforced arbitrarily or discriminatorily and found sharp contrast between potential enforcement of the Act and the subjective analysis required for enforcement of the ordinance at issue in *Morales*.[183] The court also made note that those individuals wishing to act as experts on engineering matters could plainly see whether or not they would be in violation of the Act before taking the witness stand, whereas the ordinance at issue in *Morales* lacked such clear notice.[184] The court found *Toussaint v. State Board of Medical Examiners*[185] persuasive, in which the Supreme Court of South Carolina held that the statute at issue was sufficiently unambiguous to notify the select class of people to which it was directed of the actions it prohibited in light of the class's specialized knowledge.[186] Following *Toussaint*, the court disagreed with the appellees' contention that the Act was unconstitutionally vague because it applied to engineers, a group with specialized knowledge and experience who could understand and apply the terms of the Act, and held the Licensure Act was constitutional.[187]

C. Section 26-14-9 of the Alabama Code Does Not Provide Absolute Immunity to Department of Human Resources Employees

In *Gowens v. Tys. S. ex rel. Davis*,[188] the Alabama Supreme Court held that conduct of Alabama Department of Human Resources employees that falls outside the scope of section 26-14-9 of the Alabama Code is not protected by absolute immunity.[189]

The paternal grandmother of two neglected children brought a suit against a social worker and his supervisor who were assigned by the Alabama Department of Human Resources (DHR) to the children's case. The social worker became involved in the case when the children's mother gave birth to another child, and hospital personnel contacted DHR because the newborn and mother tested positive for cocaine. Although the social worker was supposed to verify the number of children in the home with outside sources, he initially only questioned the mother of the children who informed him that the newborn was the only child in the household. One of the children was subsequently injured in a fire at the home after the mother left them unattended. The children were eventually removed from the home, and the lawsuit ensued. The social worker was sued for a failure to carry out his duties, and the supervisor was sued for inadequate supervision. Both defendants moved for summary judgment. The trial court granted the super-

183. *Id.*
184. *Id.*
185. 400 S.E.2d 488 (S.C. 1991).
186. *Bd. of Water & Sewer Comm'rs*, 2006 WL 2089914, at *16 (citing *Toussaint*, 400 S.E.2d at 491).
187. *Id.*
188. Nos. 1041341, 1041413, 2006 WL 1195876 (Ala. May 3, 2006).
189. *Id.* at *7.

visor's motion but denied the social worker's. The plaintiffs appealed from the judgment for the supervisor, and the social worker appealed the denial of his motion. The cases were consolidated on appeal.

Although the applicability of section 26-14-9 of the Alabama Code to a social worker was an issue of first impression, the Alabama Supreme Court had previously ruled in *Harris v. City of Montgomery*[190] that the code section did not immunize a police officer who had acted outside the scope of the statute.[191] Following similar logic, the court ruled the social worker was not entitled to statutory immunity because he acted outside the scope of the statute by failing to follow the department's mandatory procedures after learning of the child abuse.[192] Essentially, the statute provides immunity for individuals who report child abuse, remove children from an abusive situation, or take part in a court proceeding regarding the same.[193] The court held that since the claims against the social worker for negligent investigation did not fall within one of the aforementioned categories, the conduct was outside the scope of the statute and absolute immunity was not available.[194]

The court then addressed the claim of state-agent immunity asserted by the social worker.[195] The court applied principles established in *Ex parte Cranman*,[196] which provided immunity for state employees who are sued for negligently exercising personal judgment in instances where they are required to do so.[197] The court found the social worker, however, had not followed the procedures set forth in the DHR manual by failing to contact an outside source to ascertain the number of children in the home.[198] Thus, since these actions were mandatory and not discretionary, the social worker could not claim state-agent immunity.[199]

The court next addressed the question of whether the social worker owed a duty to the neglected children.[200] The court found the social worker did have a duty to investigate the allegations set forth in the report submitted to him and that a breach of that duty gave rise to a cause of action.[201] The court distinguished the social worker's duty from the duty imposed on school administrators by section 26-14-3 of the Alabama Code, which criminalizes an administrator's failure to report instances of child abuse but provides immunity from civil liability related to a failure to report such abuse.[202] The court concluded that since criminal liability was not imposed

190. 435 So. 2d 1207 (Ala. 1983).
191. *Gowens*, 2006 WL 1195876, at *6-*7 (citing *Harris*, 435 So. 2d at 1212).
192. *Id.* at *7.
193. *Id.* at *5.
194. *Id.* at *7.
195. *Id.*
196. 792 So. 2d 392 (Ala. 2000).
197. *Gowens*, 2006 WL 1195876, at *7 (quoting Howard v. City of Atmore, 887 So. 2d 201, 204-05 (Ala. 2004)).
198. *Id.* at *12.
199. *Id.*
200. *Id.* at *13.
201. *Id.*
202. *Id.* at *15.

on the social worker by statute, the worker could be held civilly liable for a breach of his duties.[203] Accordingly, the court affirmed the trial court's denial of the social worker's motion for summary judgment.[204]

Turning to the supervisor's case, the court focused on her duty to oversee and supervise the investigation.[205] The court found the supervisor's responsibilities required discretion and judgment, and there was not a mandatory "checklist" of activities she had to follow in her capacity as a supervisor.[206] Therefore, the court held the supervisor was entitled to state-agent immunity as set forth in *Cranman* and affirmed the trial court's grant of summary judgment in her favor.[207]

D. A County Mental Health Board Operating As a Public Corporation Is Not a State Agent and Is Not Entitled to Sovereign Immunity

In *Brown v. Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc.*,[208] the Alabama Supreme Court held a public corporation that owned and operated a mental-health-care residential facility was not a state agency for the purposes of sovereign immunity under article I, section 14 of the Alabama constitution, despite common law requirements that the state provide a broad range of mental health programs and facilities.[209]

Two residents of a group home for the mentally ill were killed in an automobile accident while riding in a van driven by the group home's house manager. The Greater Mobile-Washington County Mental Health-Mental Retardation Board (the Board), a public corporation, owned and operated both the group home and the van. The personal representatives of the deceased residents filed separate wrongful death actions naming the Board and the house manager as defendants. In both actions, the defendants moved for summary judgment, claiming, *inter alia*, that they was entitled to sovereign immunity under article I, section 14 of the Alabama constitution because the Board was a state agency and the house manager was a state agent.

The circuit judge granted the defendants' motions for summary judgment. The judge concluded that the Board was a state agency and entitled to sovereign immunity, and consequently, the house manager was a state agent and entitled to sovereign immunity. The plaintiff then appealed the circuit court judge's grant of summary judgment. In the separate action for the other deceased resident, *Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc.* (*Kininessi*),[210] a different circuit

203. *Id.*
204. *Id.* at *16.
205. *Id.*
206. *Id.* at *17-*18.
207. *Id.* at *16-*18.
208. 944 So. 2d 954 (Ala. 2006).
209. *Id.* at 956-57.
210. 940 So. 2d 990 (Ala. 2006).

court judge denied the defendants' motions for summary judgment, ruling that the defendants did not qualify as a state agency or state agent for the purposes of sovereign immunity.[211] Regarding *Kininessi*, the defendants petitioned to the Alabama Supreme Court for a writ of mandamus. The defendants' petition in *Kininessi* reached the court before the plaintiff's appeal in *Brown*.

In *Kininessi*, the Alabama Supreme Court rejected the defendants' claim of sovereign immunity, declaring that the Board did not qualify as a state agency and the house manager was not a state agent.[212] The court relied on the "*Staudt* three-factor test" for determining whether a legislative body is a state agency for purposes of sovereign immunity and reviewed caselaw's application of the test.[213] The three factors of the *Staudt* test are as follows: the character of the power delegated to the body, the relation of the body to the state, and the nature of the function performed by the body.[214] However, the court found factors suggesting the Board was a state agency—the Board's power of eminent domain; its property, income and activities were exempt from taxation; the state's board of health had some oversight over the Board; and caring for the mentally ill was traditionally viewed as a governmental function.[215] Nevertheless, the court ultimately determined those factors were outweighed by the facts that the Board had the powers to sue or be sued,[216] construct and maintain facilities, make contracts, acquire property by purchase, lease or rent in its name, improve its property, borrow money, and determine and collect fees for its services.[217] There was also no indication that a judgment against the Board would have any impact on the state treasury.[218] Accordingly, the court concluded that neither the Board nor the house manager was entitled to sovereign immunity.[219]

On the plaintiff's appeal in *Brown,* the court noted that its holding in *Kininessi* essentially disposed of all of the defendants' argument for sovereign immunity.[220] However, the defendants advanced a different theory supporting their immunity in addition to the theory used in *Kininessi*.[221] The defendants argued that the Board was a state agency because its operations were a result of the "*Wyatt* litigation," which required the Alabama Department of Mental Health and Mental Retardation to provide community facilities and programs for the mentally ill that comply with minimum treatment

211. *Brown*, 944 So. 2d at 954.
212. *Id.*
213. *Kininessi*, 940 So. 2d at 997 (citing Armory Comm'n of Ala. v. Staudt, 388 So. 2d 991 (Ala. 1980)).
214. *Id.*
215. *Id.* at 999.
216. *Id.* at 1005.
217. *Id.* at 1001.
218. *Id.*
219. *Id.* at 1007.
220. *Brown*, 944 So. 2d at 954.
221. *Id.*

standards.[222] The Alabama Supreme Court rejected the defendants' new arguments for sovereign immunity as well, explaining that the mandates of the *Wyatt* litigation did not indicate that only the State of Alabama could own or operate the community mental health facilities[223] Thus, the court found that the defendants' assumption that any activities conducted under the *Wyattt* standards were within the scope of the sovereign immunity provision was incorrect.[224] Rejecting the defendants' argument based on the *Wyatt* litigation and relying on its opinion in *Kininessi*, the court again concluded that the defendants were not entitled to sovereign immunity and reversed the summary judgments entered in the defendants' favor.[225]

IV. CONTRACTS

A. Attorneys' Fees Recoverable Regardless of Whether Subcontractor Is Entitled to Interest Under the Miller Act

In *Tolar Construction, L.L.C. v. Kean Electric Co.*,[226] as a matter of first impression, the Alabama Supreme Court held that even if a subcontractor was not entitled to interest under section 8-29-3(d) of the Deborah K. Miller Act (the Act),[227] the subcontractor could still recover the amount due and an award for attorney fees, court costs, and reasonable expenses under section 8-29-6 of the Act.[228]

Tolar Construction, a general contracting company, secured a contract with the local board of education to construct an expansion of an elementary school. Tolar then hired the defendant, Kean, as a subcontractor to perform the expansion's electrical work. The subcontract provided that Tolar was to pay Kean a specified amount upon completion of the electrical work set to be completed by January 18, 2001. Construction began in June 2000 but was significantly delayed in November 2000, when the school board informed Tolar that the roof being constructed was not the roof they ordered for the expansion. Consequently, much of the electrical work was delayed as Tolar removed the first roof and began to construct a second. The delays rendered it impossible for Kean to finish the electrical work by January 18, 2001. On April 27, 2001, Tolar notified Kean by letter that the work needed to be completed by May 3, 2001. When the work was not completed by that date, Tolar sent a second letter dated May 12, 2001, that ordered Kean to stop work and leave the construction site. Although Tolar paid Kean $3,000

222. *Id.*
223. *Id.* at 955-56.
224. *Id.*
225. *Id.* at 957.
226. 944 So. 2d 138 (Ala. 2006).
227. ALA. CODE §§ 8-29-1 to -8 (1989) (enforcing contracts between contractors and subcontractors and providing special remedies for parties against contractors, subcontractors, and owners who improperly withhold payment).
228. *Tolar Constr.*, 944 So. 2d at 150-51.

during construction, the remainder of the work was not paid for. Kean, the appellee, subsequently sued Tolar for breach of contract and fraud. Tolar, the appellant, filed a counterclaim alleging Kean had breached the subcontract and sought attorneys' fees under a provision in the subcontract. Kean subsequently amended its complaint to seek costs for interest, attorneys' fees, and reasonable expenses under section 8-29-6 of the Act.

The trial court granted the appellant's motion for judgment as a matter of law on the appellee's fraud claim. The trial court and counsel agreed the appellant's claims for attorney fees and the appellee's claims for attorney fees, expenses, and interest would be determined by the court after a jury verdict. Following a trial on the merits, the jury entered a verdict in favor of the appellee on both its and the appellant's breach of contract claims. The trial court found the Act, in addition to providing that a subcontractor is entitled to timely payment from the contractor for performance under the contract, allows a contractor to withhold payment if there is a bona fide dispute over job progress, defective construction, or other problems. Furthermore, interest will only accrue if a party is obligated to pay under the Act but does not do so. The trial court held that the appellant withheld payment due to a bona fide dispute and awarded the appellee compensatory damages, attorney fees, expenses, and interest on the payments that began accruing on March 11, 2005, the date the jury reached its verdict. The appellant subsequently appealed, claiming the damages were excessive and the award of attorneys' fees and costs was inappropriate because interest should not have been awarded. The appellee cross-appealed, claiming the accrual of interest should begin on May 12, 2001, when the appellant sent the first letter to the appellee, and requesting additional attorneys' fees for the appellate work.

The Alabama Supreme Court, recognizing that interpreting section 8-29-6 of the Act was a matter of first impression, disagreed with the appellant's argument against awarding attorney fees and agreed with the trial court's decision that interest should begin accruing on the date that the jury reached its verdict.[229] Looking to the plain meaning of the words in section 8-29-6,[230] the court explained that the Act provides for awards of attorneys' fees to the prevailing party regardless of whether an award for interest is warranted under the Act.[231] On the issue of when the interest should begin to accrue, the court explained that while section 8-29-3(d) of the Act does not specify the correct date, it was obvious that the legislature intended for prejudgment interest on withheld payments to accrue only if such withholding was not in compliance with the Act.[232] The court concluded that because the appellant withheld payments due to a bona fide dispute under the Act,

229. *Id.* at 152.
230. *Id.* at 150.
231. *Id.*
232. *Id.* (noting that ALA. CODE § 8-29-4 (1989) allows for withholding payment from a subcontractor if there is a bona fide dispute over a specified circumstance listed in the statute).

the trial court was correct in setting the date to begin accruing interest as the date when the jury reached its verdict.[233]

Regarding the award of attorneys' fees, the court again looked to the plain language of the Act and noted that section 8-29-6 provides for the recovery of attorneys' fees by a party for whom a judgment is rendered.[234] The court concluded that because it had not rendered or reversed a judgment but instead had affirmed the trial court's judgment, the appellee's argument for a recovery of attorneys' fees for appellate work was outside of the scope of the Act.[235] The court also held the compensatory damage award was not excessive, finding the appellant's argument that the jury's award did not account for the amount the appellant spent as a consequence of his own breach was without merit.[236] Accordingly, the court affirmed the jury's compensatory damage award, the trial court's award of attorneys' fees, and the trial court's ruling to begin accruing interest on the date of the jury's verdict.[237]

B. Unpaid Debt on a Mortgage Secured Subsequent to a Junior Mortgagee's Debt Shall Be Excluded from Costs of Redemption on Property

In *Bockman v. WCH, L.L.C.*,[238] the Alabama Supreme Court held that under section 6-5-253(a)(4) of the Alabama Code, the balance of a fifth mortgage on a piece of real property held by a senior mortgagee was lower in priority than a second mortgage held by a junior mortgagee and could not be charged to the junior mortgagee redeeming property from the senior mortgagee.[239]

Hartley Silica, Inc. owned real property that it used to secure five loans from various lenders. In 1992 and 1994, the plaintiff loaned Hartley money on three occasions and became the junior mortgagee, holding the second, third, and fourth mortgages on the property. In 2000, Hartley borrowed money from the defendant evidenced by a promissory note and secured by a mortgage on the property, which became the fifth mortgage. In 2003, the mortgagees sold the first mortgage to the defendant. Because Hartley was in default on the first mortgage, the defendant—acting as the new senior mortgagee holding the first mortgage—foreclosed on the property and purchased the property at the foreclosure sale as the highest bidder.

In 2004, the plaintiff pursued lawful charges for redemption from the foreclosure sale under the statutory right of redemption set forth in section 6-5-248 of the Alabama Code.[240] The defendant responded to the plaintiff's

233. *Id.* at 151.
234. *Id.* at 152 (citing ALA. CODE § 8-29-6 (1989)).
235. *Id.*
236. *Id.* at 146.
237. *Id.* at 152.
238. 943 So. 2d 789 (Ala. 2006).
239. *Id.* at 797.
240. ALA. CODE § 6-5-248 (2005).

order; however, the plaintiff disagreed with the defendant's calculation of the redemption costs. Consequently, the plaintiff filed for a declaratory judgment to determine the amount he was required to pay as the junior mortgagee. Both parties then filed for summary judgment. The plaintiff alleged that the defendant's calculation was incorrect because it included interest upon unpaid interest from debt on the first mortgage and because it included the remaining debt from the fifth mortgage. The trial court subsequently determined that the debt from the fifth mortgage was not a lawful charge under section 6-5-253(a)(4) and should not be included in the calculation costs. Although the trial court did not address whether the amount of redemption should include interest upon unpaid interests, such interest was included in the redemption amount it ordered the plaintiff to pay. The plaintiff appealed, arguing that the trial court erred by including the interest upon unpaid interest in the redemption calculation. The defendant cross-appealed, arguing that under the plain meaning of section 6-5-253(a)(4) the trial court erred by excluding the debt of the fifth mortgage from the costs of redemption.

The Alabama Supreme Court agreed with the trial court's decision and upheld both the judgment for the defendant on the issue of including interest upon unpaid interest in the redemption costs and the judgment for the plaintiff on the issue of excluding the debt from the fifth mortgage in the redemption costs.[241] The court found that because the promissory note contained an express agreement to include interest upon unpaid interest, the defendant had established that the proper amount due on the first mortgage included such interest.[242] The court found additional support in *Smith v. Penn Mutual Life Insurance Co.*,[243] which provided that an express agreement to pay interest upon unpaid interest was permissible under Alabama law.[244] The court also agreed with the plaintiff that the debt of the fifth mortgage was not a lawful charge under section 6-5-253 of the Alabama Code, explaining that section 6-5-253(a)(4) clearly provides that lawful charges on a junior mortgagee's right of redemption include only those recorded mortgages with a "higher priority in existence at the time of the sale."[245] Accordingly, the court held that because the fifth mortgage was lower in priority than the plaintiff's second mortgage, it should not have been included in redemption costs for the property.[246]

241. *Bockman*, 943 So. 2d at 797.
242. *Id.* at 795-96.
243. 14 So. 2d 690 (Ala. 1943).
244. *Bockman*, 943 So. 2d at 796 (citing *Smith*, 14 So. 2d at 694).
245. *Id.* (quoting ALA. CODE § 6-5-253(a)(4)) (emphasis omitted) (internal quotation marks omitted).
246. *Id.*

C. Reliance on a Certificate of Insurance Alone to Indicate an Additional Insured Is Not Reasonable

In *Alabama Electric Cooperative, Inc. v. Bailey's Construction Co.*,[247] the Alabama Supreme Court, deciding an issue of first impression, held that relying on certificates of insurance to indicate that a landowner is an additional insured under a primary insurance policy, but failing to ask for a copy of the primary policy or for a chance to review the policy, is not reasonable as a matter of law and, as such, cannot sustain a claim of misrepresentation.[248] The Court also held that, for purposes of a negligence claim, any voluntarily assumed duty is discharged when a contract does not include that duty and where the duty is not voluntarily reassumed after the making of the contract.[249]

This dispute arose as a result of a written contract between a landowner and a contractor. The contract concerned removal by the contractor of debris from the landowner's holding pond. According to the landowner, the contractor agreed to name the landowner as an additional insured on the liability insurance policy obtained in conjunction with the removal services. However, the written contract did not include this stipulation; it required only that the contractor provide evidence that it had secured liability insurance to cover the removal. The landowner noted that on two prior occasions, in connection with other work performed for the landowner by the contractor, it requested the contractor provide evidence not only of liability insurance but also of the landowner's coverage as an additional insured under the contractor's respective policies. According to the landowner, the contractor sent these requests to its insurance agent who then sent certificates of insurance to the landowner. These certificates listed the landowner as an additional insured although the landowner was never officially added to the policies. The certificates of insurance warned that they were for informational purposes only, would not be construed to create rights under the policy represented, and noted specifically that if the underlying policy was not endorsed so as to add an additional insured, the certificate would not confer coverage. Significantly, the underlying policy was never endorsed to add the landowner as an additional insured.

In October of 2000, an independent contractor employed by the primary contractor was killed while working on the project outlined in the contract. An executor brought a wrongful death action against the landowner on behalf of the decedent's estate. The landowner requested the contractor's insurance agent provide it with a certificate showing the coverage under the contractor's policy. Although it was later determined that the landowner was not covered under the policy, the insurance agent—without permission from the contractor or the underwriter—added the landowner to the certifi-

247. No. 1050433, 2006 WL 2089900 (Ala. July 28, 2006).
248. *Id.* at *5.
249. *Id.* at *9-*10.

cate of insurance as an additional insured. The landowner then demanded a defense and indemnification by the contractor and the underwriter, and when they refused, the landowner and its own insurers brought an action against the contractor, the insurance agent, and the underwriter alleging misrepresentation, breach of contract, and negligence. The trial court granted summary judgment for the contractor on all claims, and the landowner's insurers appealed.

The Alabama Supreme Court, finding *TIG Insurance Co. v. Sedgwick James of Washington*[250] persuasive, agreed with the contractor and held the landowner had not proven reasonable reliance on the alleged misrepresentations.[251] The court adopted the standard set out in *TIG Insurance*, stating that a client who claims to be an additional insured under an insurance policy should be treated no differently than a named insured under a policy. *TIG Insurance* also established that, because a named insured has a duty to read the policy and is charged with the knowledge of what it says, an alleged additional insured cannot reasonably rely on a certificate of insurance alone.[252] Therefore, the court held the landowner's claim of misrepresentation failed because reliance on a certificate of insurance alone when the landowner neglected to request a copy or review the policies at issue was unreasonable as a matter of law.[253]

In rejecting the landowner's claim of negligence and wantonness, the court held that, even if the contractor had assumed a duty to name the landowner as an additional insured, it had discharged that duty when it entered into a written contract that did not place such a duty upon the contractor.[254] The landowner also argued that pursuant to Alabama caselaw established in *Berkel & Co. Contractors, Inc. v. Providence Hospital*,[255] the court should look to a different standard in interpreting whether a duty exists in a construction context.[256] The court distinguished *Berkel*, however, because it turned on very different facts from those at issue and dealt with a duty actually imposed by a written contract.[257] Because the landowner only provided evidence that suggested the contractor had assumed the duty to add the landowner as an additional insured prior to their written contract and failed to assert the contractor had reassumed that duty after the written contract was established, the court declined to hold that contractors owe clients a general duty to add them as an additional insured on insurance policies maintained for a construction project absent a contractual duty to do so.[258]

250. 184 F. Supp. 2d 591 (S.D. Tex. 2001).
251. *Ala. Elec. Coop.*, 2006 WL 2089900, at *4-*5.
252. *Id.* at *4 (citing *TIG Ins.*, 184 F. Supp. 2d at 603-04).
253. *Id.* at *4-*5.
254. *Id.* at *9.
255. 454 So. 2d 496 (Ala. 1984).
256. *Ala. Elec. Coop.*, 2006 WL 2089900, at *10.
257. *Id.*
258. *Id.*

V. CORPORATE LAW

A. An Action to Address Member Voting Rights Violations Is Direct Rather than Derivative and an Injunction May Issue to Enforce Those Rights Notwithstanding the Business Judgment Rule

In *Baldwin County Electric Membership Corp. v. Catrett*,[259] the Alabama Supreme Court, in a case of first impression, held that individual members of a cooperative properly brought an action to enforce and amend cooperative bylaws as a direct action and that the trial court's injunction was not a violation of the business judgment rule.[260]

The cooperative bylaws provided two mechanisms for nominating and electing trustee candidates. Candidates recommended by the nominating committee were added to a ballot, and members could vote either by mail or at the annual meeting. At the annual meeting, nominations for trustee positions could also be made. However, the bylaws did not include a provision for adding candidates nominated at the meeting to the ballots, some of which had been mailed to cooperative members weeks before the meeting. In light of this conflict, the appellee members sought an injunction to prevent the cooperative's trustees from conducting the election. The appellees also sought an order amending the voting procedures so that nominations made at the annual meeting could be added to the mail-in ballots. The trial court granted the appellees' request for injunctive relief and required the trustees to provide a mechanism to include annual meeting nominees on the ballot.

On appeal, the appellant cooperative asserted several grounds for overturning the injunction, including that the appellees' failure to file a derivative action precluded any success on the merits. As a matter of first impression, the court noted that derivative actions are brought to enforce a right of the corporation[261] while direct actions are brought to prevent a wrong to the shareholders themselves.[262] Therefore, since voting rights were contractually granted to the shareholders, any action to enforce those rights should be direct in nature.[263] Hence, the court held the direct nature of the appellees' action was not fatal to their claim.[264] The court also dismissed the appellants' argument that the trial court's injunction was an impermissible violation of the business judgment rule,[265] holding judicial review of shareholder actions to enforce bylaws was appropriate.[266]

259. 942 So. 2d 337 (Ala. 2006).
260. *Id.* at 348-49.
261. *Id.* (citing ALA. R. CIV. P. 23.1).
262. *Id.* at 345.
263. *Id.* at 345-46.
264. *See id.*
265. *Id.* at 348.
266. *Id.* (citing Dawkins v. Walker, 794 So. 2d 333, 338 (Ala. 2001)).

B. Although the Materiality of Representations or Omissions in the Alabama Securities Act Is Generally a Question of Fact, Enumerated Exceptions Are Matters of Law and Should Be Decided by the Trial Court

In *Blackmon v. Nexity Financial Corp.*, [267] the Alabama Supreme Court adopted the standard for immateriality as a matter of law established by the Eighth Circuit Court of Appeals in *In re Amdocs Ltd. Securities Litigation*,[268] and reaffirmed that a trial court has discretion to disallow an amendment to parties' pleadings for reasons of "undue delay."[269]

The appellee, a holding company of a bank located throughout Alabama, began Internet banking operations and decided to make a private offering of the stock. The appellee issued a private offering memorandum that described its business, the offering, and risks related to the investment. Although the memorandum included several positive statements about the company's future, it also raised multiple warnings regarding the type of offering, the uncertainty associated with the Internet, that the company may have to raise additional capital on terms unfavorable to investors, and that investors could be limited in reselling stocks if the stock did not go public. A supplement to the memorandum lowered the minimum offering from $15,000,000 to $10,000,000 and provided a timeframe for investors to cancel their purchase. Before his purchase, the appellant investor spoke with the CEO who stated that the company "was doing fine and things were progressing as per their plans."[270] Prior to his purchase of 150,000 shares for $750,000, the appellant did not request to see any financial statements. Despite extending the timeframe of the private offering, the appellee company raised only $11,000,000. The appellee also reported a net operating loss for the same year as the offering of $5,400,000.

The appellant sued the appellee for violations of Alabama Code section 8-6-19, alleging either omitted or misstated material facts relating to the financial status of the year of the offering, reasons and affects of lowering the minimum stock offering to $10,000,000, and assurances of an IPO. The trial court entered a scheduling order that cut off discovery six weeks before trial and allowed amendments to pleadings up to a month before trial. Five weeks before trial, the appellant filed an amended complaint adding claims of fraud, fraudulent suppression, and breach of contract. The appellee moved the trial court to disallow the appellant's complaint and for summary judgment, and the trial court granted both motions in favor of the appellee. The appellant subsequently appealed.

Although the Alabama Supreme Court recognized that Rule 15(a) of the Alabama Rules of Civil Procedure provides that an amendment may be filed with the court either within the default deadline of Rule 15(a) or by the

267. No. 1041796, 2006 WL 2709686 (Sept. 22, 2006).
268. 390 F.3d 542 (8th Cir. 2004).
269. *Blackmon*, 2006 WL 2709686, at *8.
270. *Id.* at *3.

deadline set by a court, the Rule also provides that the motion is "subject to disallowance on the court's own motion or a motion to strike of an adverse party."[271] While a policy of liberal construction is normally applied, the court noted that Rule 15(a) is not without limits.[272] Therefore, the trial court could refuse a proposed amendment if the amendment would cause "actual prejudice" to the other side or for reasons of "undue delay."[273] To qualify as undue delay, the court asserted that either the proposed amendment would unduly delay trial or that the moving party could have learned of the information necessary to file the amendment earlier but failed to do so.[274] Applying these definitions, the court affirmed the trial court's decision that the proposed amendment to the complaint fell within both explanations of "undue delay."[275] Specifically, the trial would be delayed because additional discovery would be required with the proposed amendment, and the appellant failed to demonstrate that he was unaware of the basis of the amended complaint at the time of his filing and could not explain the reasons for his delay.[276]

Addressing the appellant's claim that the appellees omitted or misstated material facts in the stock offering, the court noted the paucity of cases addressing the Alabama Securities Act (the Act) and the similarity of the Act to the Securities Act of 1933;[277] accordingly, the court looked to federal cases for assistance in evaluating the materiality of a misrepresentation or omissions of pertinent facts.[278] Although the court found that materiality is normally a question of fact for the jury, it also noted an exception existed where the trial court "determines that no reasonable investor could have been swayed by the alleged misrepresentation or omission."[279] Specifically, *Amdocs* established that alleged misrepresentations or omissions may be immaterial as a matter of law if: (1) they are common knowledge such that a reasonable investor could understand them; (2) they present or conceal insignificant data that in light of the total amount of information would not matter; (3) they are so vague in nature such that a reasonable investor would not rely upon them; or (4) sufficient cautionary statements are included.[280] Following this standard, the court held the appellee's alleged misrepresentations or omissions relating to the appellee company's financial performance the year of the offering, the change in minimum offering to $10,000,000, and the likelihood of an IPO, were immaterial as a matter of law and the trial court properly granted summary judgment in favor of the appellee.[281]

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271. *Id.* at *6.
272. *Id.*
273. *Id.*
274. *Id.* at *7.
275. *Id.*
276. *Id.*
277. *Id.* at *9 (citing 15 U.S.C. § 771(a)(2) (2000)).
278. *Id.*
279. *Id.* (citing *In re* Amdocs Ltd. Sec. Litig., 390 F.3d 542, 547 (8th Cir. 2004)).
280. *Id.* (citing *Amdocs*, 390 F.3d at 548).
281. *Id.* at *10-*12.

VI. CRIMINAL LAW PRACTICE AND PROCEDURE

A. Municipal Courts Are Not Authorized to Expunge Entire Criminal Files

In *Mobile Press Register, Inc. v. Lackey*,[282] a matter of first impression, the Alabama Supreme Court held that assuming the Alabama Criminal Justice Information Center Act (ACJIC Act)[283] applies to municipal courts, it does not authorize those courts to expunge entire criminal files.[284] The court also concluded that whether citizens should be entitled to have their criminal records expunged was a matter for the legislature to decide and suggested the legislature clearly define the legal effect of an expungement.[285]

The Mobile Press Register, Inc. (MPR) sought records from the Mobile Municipal Court concerning criminal charges against a Mobile public official and was informed by the court that the records did not exist. The MPR later discovered that, although such a record did exist, it had been "expunged."[286] The MPR then requested all the court's records expunged since 1988; the court again refused. The MPR sued the municipal court, seeking preliminary and permanent injunctions to prevent the court from expunging any more records and demanding access to all records expunged since 1988. Although after the MPR filed suit the court released the public official's file to the MPR, the court continued to deny access to all other expunged files.

The circuit court held that the municipal court did not have the authority to expunge its records and entered a permanent injunction to prohibit the court from doing so in the future. The circuit court did not order the municipal court to produce the expunged files because the court believed the process would be "extremely overbroad and cumbersome."[287]

On appeal, the municipal court argued that the ACJIC Act, which provides for the expungement of criminal records by public agencies whose principal function is the adjudication of civil, traffic, or criminal offenses, permitted them to expunge the public official's record.[288] The Alabama Supreme Court asserted that the Alabama legislature likely did not intend for the ACJIC Act to regulate how courts manage their records,[289] but concluded that the ACJIC Act did not permit the actions of the municipal court in this case because it does not authorize the municipal court to expunge entire files.[290] The court held the ACJIC Act allowed removal from files only that information which could be used to "track down and identify per-

282. 938 So. 2d 398 (Ala. 2006).
283. ALA. CODE § 41-9-590 (1975).
284. *Lackey*, 938 So. 2d at 402-03.
285. *Id.*
286. *Id.* The records had not actually been expunged, which requires destruction of the records. Rather, they were sealed; that is, the court prevented access to them. The records were treated by the Alabama Supreme Court as expunged for purposes of this appeal, however. *Id.* at 399 n.1.
287. *Id.* at 400.
288. *Id.* at 400-01.
289. *Id.* at 401.
290. *Id.* at 402-03.

sons."[291] Although the court declined to make a determination regarding whether the ACJIC Act applied to municipal courts, it asserted that even if the ACJIC Act was applicable, it would not justify the expungement of entire records.[292] The court also refused to decide whether citizens should be entitled to have their criminal records expunged, declaring the matter to be within the legislature's jurisdiction rather than the court's.[293] Accordingly, the court affirmed the circuit court's permanent injunction of any future expungements by the municipal court and urged the legislature to carefully define the legal effect of the expungement of a criminal record.[294]

B. Remand of a Case by the Court of Criminal Appeals Acts As a Final Decision Unless the Court has Expressly Directed a Return to Its Remand Order

In *Ex parte Harris*,[295] the Alabama Supreme Court held that when the Alabama Court of Criminal Appeals remands a case, unless that court expressly directs a return to its remand order, its decision is final and a petition for a writ of certiorari may lie.[296]

The Alabama Court of Criminal Appeals affirmed the defendant's conviction upon review of the defendant's Rule 32 petition but remanded the case to the trial court to conduct a new sentencing hearing. Both the defendant and the State of Alabama petitioned the Alabama Supreme Court for a writ of certiorari.

Before addressing the question before it, the court reviewed its earlier decision in *Ex parte Pierce*,[297] where it addressed whether the court should grant a petition of certiorari to review a case in which the Court of Criminal Appeals had affirmed the petitioner's conviction but remanded the case to the trial court for a new sentencing hearing.[298] In *Pierce*, the court held that the Court of Criminal Appeals retained jurisdiction of the case since it directed a return to its remand order.[299] Because the Court of Criminal Appeals had not affirmed the petitioner's sentence of death, an issue concerning that sentence remained and the petition for the writ of certiorari in *Pierce* was premature. The court subsequently denied the writ.[300]

The court found the present case was distinguishable from *Pierce* because the Court of Criminal Appeals had not issued a return to its remand order.[301] Thus, the lack of a return rendered the judgment of the Court of

291. *Id.* at 402.
292. *Id.*
293. *Id.* at 403.
294. *Id.* at 403-04.
295. No. 1041332, 2005 WL 2692491 (Ala. Oct. 21, 2005).
296. *Id.* at *1.
297. 576 So. 2d 258 (Ala. 1991).
298. *Harris*, 2005 WL 2692491, at *1 (citing *Pierce*, 576 So. 2d at 258).
299. *Id.* (citing *Pierce*, 576 So. 2d at 259).
300. *Id.* (citing *Pierce*, 576 So. 2d at 258).
301. *Id.*

Criminal Appeals a final decision, and a writ of certiorari was properly issued.[302] To the extent *Ex parte Pierce* held otherwise, it was overruled.[303]

C. When a Motorist Does Not Receive a Requested Independent Blood Test Before Submitting to a Breathalyzer Test, a Due Process Violation Does Not Exist

In *Ex parte Yelverton*,[304] the Alabama Supreme Court, in a matter of first impression, held that when a motorist suspected of driving under the influence of alcohol did not receive an independent blood test he requested before consenting to a breathalyzer test, a due process violation does not exist because he did not request the test after providing consent.[305]

The appellant was brought into custody for suspicion of driving under the influence of alcohol. A police officer asked him to submit to a breathalyzer test and informed him that if he refused, his driver's license would automatically be suspended. The appellant responded by asking the officer if he could pay for an independent blood test in a hospital, and the officer replied that he first had to take the breathalyzer test. After submitting to a breathalyzer test that indicated his blood alcohol level was above the legal limit, the appellant was arrested and subsequently convicted of driving under the influence of alcohol. On appeal, the appellant argued that the results of the breathalyzer test should not have been admitted by the trial court because his due process rights were violated when the officer refused his request to have an independent blood test administered.

Section 32-5A-194(a)(3)[306] of the Code of Alabama establishes that a person accused of driving under the influence of alcohol may pay for an independent blood test "in addition to any administered at the discretion of a law enforcement officer."[307] The Alabama Court of Criminal Appeals has added that if a defendant is unable to obtain the additional test because of unreasonable police conduct, the evidence of the breathalyzer test may be suppressed and any conviction based on such evidence may be overturned.[308] The Alabama Supreme Court also looked to previous rulings by the Court of Criminal Appeals to find that the appellant did not have a statutory right to an independent blood test until *after* he submitted to a breathalyzer test.[309] Thus, because the appellant did not have the right to an independent test at the time he requested it, the court found that the appellant's due process rights were not violated by the officer's actions.[310] Additionally,

302. *Id.*
303. *Id.*
304. 929 So. 2d 438 (Ala. 2005).
305. *Id.* at 445.
306. ALA. CODE § 32-5A-194(a)(3) (1975).
307. *Yelverton*, 929 So. 2d at 444 (quoting ALA. CODE § 32-5A-194(a)(3)) (internal quotation marks omitted).
308. *Id.* at 444 n.5 (citing Lockard v. Town of Killen, 565 So. 2d 679, 682 (Ala. Crim. App. 1990)).
309. *See id.* at 445.
310. *Id.* at 444.

the court held that the police did not violate the appellant's due process rights when they made him wait to place a phone call, which they had no reason to believe would be utilized to arrange an independent blood test.[311] The court noted *Lockard v. Town of Killen*,[312] where the Court of Criminal Appeals found a due process violation had occurred because the police refused to allow an independent blood test at a local hospital despite the fact that the defendant requested the test both before and after submitting to a breathalyzer test and arranged for the test at the hospital.[313] However, *Lockard* was distinguishable because the defendant in the present case had not requested an independent blood test again after the breathalyzer and failed to make any arrangements to have such a test administered.[314] The Alabama Supreme Court subsequently established a new rule that a suspect in custody for suspicion of driving under the influence of alcohol must request an independent blood test after consenting to a police administered breathalyzer and that if no request is made after the consent a due process violation has not occurred.[315]

D. Minimum Sentence Requirement in Alabama's Split-Sentence Act Does Not Proscribe Trial Judges' Suspension of Entire Sentence of Convicted Criminals

In *Ex parte McCormick*,[316] the Alabama Supreme Court reversed a trend in rulings from the Alabama Court of Criminal Appeals and held under Alabama's Split-Sentence Act,[317] if a defendant is sentenced to twenty years imprisonment, a trial judge may reduce the sentence to three years imprisonment and may suspend the entire sentence if the trial judge finds so doing will best serve the goals of justice.[318]

This case arose from three separate criminal trials where a defendant was convicted and sentenced to twenty years imprisonment. Under the Split-Sentence Act (the Act), if a defendant is sentenced to a term of imprisonment of fifteen to twenty years inclusive, section (a) of the Act allows a trial judge to reduce the sentence to a term of not less than three years.[319] Additionally, section (c) of the Act allows the trial court to suspend any portion of the minimum sentence required under section (a), "notwithstanding any provision of the law."[320] In the first case, the trial judge split the sentence and ordered the defendant to serve two years in prison and two years on probation. In the second case, the trial judge resentenced the de-

311. *Id.* at 446.
312. 565 So. 2d 679 (Ala. Crim. App. 1990).
313. *Yelverton*, 929 So. 2d at 447.
314. *Id.*
315. *Id.*
316. 932 So. 2d 124 (Ala. 2005).
317. ALA. CODE § 15-18-8 (1975).
318. *McCormick*, 932 So. 2d at 139.
319. ALA. CODE § 15-18-8(a).
320. ALA. CODE § 15-18-8(c).

fendant to three years in prison but then suspended the entire sentence and placed the defendant on probation for two years. In the final case, the trial judge reduced the sentence to three years in prison followed by five years probation and later suspended all but thirteen months the defendant had already served in prison. In each case, the Court of Criminal Appeals issued a writ of mandamus directing the trial judge to resentence the defendant to a minimum of three years imprisonment pursuant to the requirements of section (a) of the Act, and the trial judge filed a writ of mandamus with the Alabama Supreme Court asking the court to direct the Court of Criminal Appeals to vacate its writ.

The Alabama Supreme Court departed from the reasoning espoused by the Court of Criminal Appeals and determined that, while section (a)(1) of the Act established a minimum sentence of three years for defendants originally sentenced to a twenty-year term, section (c) of the Act provided the trial court with the power to suspend even the portion of the sentence that constituted the required minimum term.[321] The court acknowledged the validity of the Court of Criminal Appeals' argument that reading section (c) to allow such suspensions gave trial judges sentencing power that was inconsistent with the mandatory requirement of section (a)(1) but determined that the text of the Act rationally lead to such a conclusion and the court should not look beyond the words of the Act in an attempt to determine legislative intent or an alternative meaning.[322] In support of its holding, the court cited *DeKalb County LP Gas Co. v. Suburban Gas, Inc.*[323] for the proposition that whenever it is rational to interpret legislation exactly as written, courts are obligated to do so even if judges believe that a better result will come from reading a different meaning into the legislation.[324] Further, the words of legislation must be interpreted literally unless such interpretation is irrational, even if so doing negates what courts may perceive as the clear intent of the legislature in drafting the legislation to avoid running afoul of the separation of powers doctrine.[325]

The court acknowledged that its holding provided trial judges with an express authorization to reduce the time a convicted defendant spends in jail if the reduction serves the needs of justice, even if such time is less than the mandatory minimum sentence required by the Act. The court also asserted, however, that trial judges are not authorized to reduce a twenty-year sentence to a sentence of less than three years.[326] Finally, the court asserted that although their decision appeared to allow trial judges to negate the apparent intent of the legislature through a procedural maneuver, it also provided

321. *McCormick*, 932 So. 2d at 133.
322. *Id.* at 139.
323. 729 So. 2d 270 (Ala. 1998).
324. *McCormick*, 932 So. 2d at 132 (quoting *Suburban Gas*, 729 So. 2d at 276).
325. *Id.* at 139.
326. *Id.*

clear guidance to the legislature regarding exactly what steps need to be taken in order to close this procedural loophole.[327]

E. Writ of Mandamus Is the Only Appropriate Remedy for a Defendant Who Failed to Receive Timely Notice of the Dismissal of a Petition for Post-conviction Relief Issued Prior to June 1, 2005

In *Ex parte Bonner*,[328] the Alabama Supreme Court held if defendants, through no fault of their own, did not receive timely notice of a court order dismissing a motion for post-conviction relief issued prior to June 1, 2005, and were not afforded the opportunity to file a notice of appeal, a writ of mandamus ordering the trial court to reissue its dismissal is the only appropriate remedy under Rule 32.1(f) of the Alabama Rules of Criminal Procedure.[329]

After the defendant's criminal conviction in 2001, the defendant issued a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure to the trial court in December, 2003. On March 24, 2004, after the trial court granted the defendant leave to amend, the defendant's amended petition was summarily dismissed by the trial court. The defendant, however, was not notified of the trial court's dismissal and in June, 2004, again motioned for leave to amend his petition. The trial court denied his request, and the defendant then learned the trial court had dismissed his petition after the forty-two day period in which to file a notice of appeal had expired. The defendant subsequently requested the Alabama Court of Criminal Appeals to issue a writ of mandamus, which it denied without an opinion.[330] The defendant then petitioned the Alabama Supreme Court for the writ, arguing that he did not receive notification of the trial court's dismissal of his Rule 32 petition until after the time for filing a notice of appeal had already elapsed.

The court determined that the defendant had not been given the opportunity to file a timely notice of appeal; the trial court could not verify that a copy of its order of dismissal was mailed to the defendant, and the mail clerk at the defendant's place of incarceration stated the defendant had not received any legal mail within the time frame of the dismissal.[331] As such, because all of the events in this case occurred prior to the amendment to Rule 32 that became effective June 1, 2005,[332] the court found that the only available remedy was a writ of mandamus.[333] Therefore, the court issued a writ of mandamus directing the trial court to set aside its previous order of dismissal and to reissue a new order, thereby providing notice to the defen-

327. *See id.* at 136-39.
328. 926 So. 2d 339 (Ala. 2005).
329. *Id.* at 340 (citing Marshall v. State, 884 So. 2d 900, 905 (Ala. 2003)).
330. *Ex parte* Bonner, 925 So. 2d 1021 (Ala. Crim. App. 2005) (mem).
331. *Bonner*, 926 So. 2d at 340.
332. *Id.* at 340 n.1.
333. *Id.* at 340.

dant so that he would have an opportunity to file a timely notice of appeal.[334]

F. A Defective Indictment No Longer Deprives a Trial Court of Subject-Matter Jurisdiction

In *Ex parte Seymour*,[335] the Alabama Supreme Court held that a defective indictment does not deprive a circuit court of subject-matter jurisdiction over a felony prosecution.[336] The court overruled *Ex parte Lewis*[337] and *Ash v. State*,[338] which both held that the subject-matter jurisdiction of a circuit court to try a criminal case is derived from a valid indictment, which requires all essential elements of a charged offense to be alleged.[339]

The appellant was convicted of shooting into an occupied residence, which is a Class B felony. After his conviction was upheld on appeal, the appellant filed a petition for post-conviction relief asserting that the trial court lacked subject-matter jurisdiction to try his case because the indictment failed to allege a culpable mental state, a required element of the offense. This issue of a defective indictment was not raised either during trial or on direct appeal. Thus, trial court denied the petition and the Court of Criminal Appeals determined the petition was appropriately denied.

The Alabama Supreme Court noted under the Alabama Rules of Criminal Procedure, a petitioner "will not be given relief . . . based upon any ground" that was not raised either at trial or on appeal, "unless the ground for relief arises under Rule 32.1(b)."[340] Rule 32.1(b) allows relief, even if the issue was not previously raised, if the trial court lacked jurisdiction to decide the case or impose a sentence.[341] Thus, the appellant could only be granted relief if the defective indictment deprived the trial court of subject-matter jurisdiction to hear the appellant's case.[342]

The court acknowledged that prior Alabama caselaw held that the subject-matter jurisdiction of a circuit court to try a criminal case is derived from a valid indictment.[343] An indictment is not valid if an essential element of the charged offense was not alleged.[344] Under this view of a circuit court's jurisdiction, the appellant's petition for post-conviction relief should be granted because the defective indictment would have taken away the trial court's subject-matter jurisdiction.[345] However, the court overruled these

334. *Id.*
335. No. 1050597, 2006 WL 1793747 (Ala. June 30, 2006).
336. *Id.* at *3.
337. 811 So. 2d 485 (Ala. 2001).
338. 843 So. 2d 213 (Ala. 2002).
339. *Seymour*, 2006 WL 1793747, at *2 (quoting *Lewis*, 811 So. 2d at 487; *Ash*, 843 So. 2d at 216).
340. ALA. R. CRIM. P. 32.2.
341. ALA. R. CRIM. P. 32.1(b).
342. *Seymour*, 2006 WL 1793747, at *2.
343. *Id.* (quoting *Ash*, 843 So. 2d at 216).
344. *Id.* (quoting *Lewis*, 811 So. 2d at 487).
345. *Id.*

previous cases in favor of the view of subject-matter jurisdiction held by the United States Supreme Court, as well as a number of states.[346] The court found that a circuit court's subject-matter jurisdiction, which is the power of that court "to decide certain *types* of cases,"[347] is provided by both the Alabama constitution and the Alabama Code.[348] The Alabama constitution grants circuit courts general jurisdiction over all cases, except as otherwise provided by law,[349] and the Alabama Code grants circuit courts exclusive original jurisdiction over all felony prosecutions.[350] Therefore, the court found that the validity of an indictment is irrelevant to the question of subject-matter jurisdiction and the defective indictment did not affect the trial court's jurisdiction.[351] Accordingly, the court held the appellant's petition was properly denied by the trial court because the appellant was precluded from relief on any claim other than improper jurisdiction since the issue of the defective indictment was not raised at trial or on appeal.[352]

VII. FINANCIAL TRANSACTIONS

A. Deferred-Presentment Transactions Are Governed by the Alabama Small Loan Act to Ensure that Excessive Interest Rates are Not Applied

In *Austin v. Alabama Check Cashers Ass'n*,[353] as a matter of first impression, the Alabama Supreme Court held that the Alabama Small Loan Act[354] governs deferred-presentment transactions and that such transactions completed in compliance with a prior consent order are legal.[355]

The appellees operated a fee-based check cashing business and completed deferred-presentment transactions, which are a variation of standard check cashing transactions. In deferred-presentment transactions, also known as "payday loans," the appellees cashed the checks but agreed not to deposit them for a period of time ranging from two weeks to thirty days. As in standard check cashing transactions, this service was provided for a fee. The action arose after the appellant, the supervisor of the Bureau of Loans at the Alabama State Banking Department, initiated cease and desist orders against unlicensed businesses which issued loans of less than $750. The appellant claimed that the orders were issued in compliance with the Alabama Small Loan Act, which was passed in 1959 to regulate small loan operators and prevent them from charging excessive interests on loans they issued. In response, the Alabama Check Cashers Association (ACCA) and

346. *Id.* at *3.
347. *Id.* at *2 (citing Woolf v. McGaugh, 57 So. 754, 755 (Ala. 1911)).
348. *Id.*
349. ALA. CONST. amend. 328, § 6.04(b).
350. ALA. CODE § 12-11-30 (2006).
351. S*eymour*, 2006 WL 1793747, at *2.
352. *Id.* at *3.
353. 936 So. 2d 1014 (Ala. 2005).
354. ALA. CODE § 5-18-1 to -24 (1975).
355. *Austin*, 936 So. 2d at 1041.

individual check cashers asserted that the Act was not applicable to their business and sought a temporary injunction that would stop the cease and desist orders from being enforced. The parties participated in mediation and agreed upon a consent order that limited the appellees' ability to complete deferred-presentment transactions. In return, the appellant was enjoined from enforcing the cease and desist orders it had initiated against the appellees until the issues were resolved by the trial court.

While the action was pending, the appellees' customers who had obtained "payday loans" moved to intervene permissively and as a matter of right, requesting damages permitted by the Alabama Small Loan Act and the termination of the consent order. The intervention was partially granted but only as to the issue of the applicability of the Alabama Small Loan Act. Shortly thereafter, the appellant filed a motion for sanctions against the appellees for violating the consent order, or alternatively to amend the consent order to include another type of "payday loan," and also moved for summary judgment. The appellees, meanwhile, sought a determination that they were protected against their customers from civil liability since they were acting in compliance with the consent order. After considering these motions, the trial court held that because the Alabama Small Loan Act did not apply to the appellees, the appellant was permanently enjoined from issuing cease and desist orders. The trial court further held any deferred-presentment transactions conducted under the consent order were legal. The appellant banking department and customers who intervened subsequently appealed. Shortly after the trial court's decision, the Alabama legislature passed the Deferred Presentment Services Act (DPSA), which extended the applicability of the Small Loan Act to deferred-presentment transactions.

On appeal, an individual appellee moved to include the DPSA as additional authority in support of the assertion that the Small Loan Act did not apply to deferred-presentment transactions because the necessity of the DPSA implied such transactions were not previously regulated by the Act.[356] The Alabama Supreme Court disagreed, maintaining that the recent enactment of such a specific act did not necessarily mean that deferred-presentment transactions had not previously been regulated by state law.[357]

The appellant's key argument centered on its conclusion that the term "payday loan" was used to avoid inclusion under the Alabama Small Loan Act by giving the appearance that they were check cashing transactions.[358] The appellant maintained that although the Act does not detail what constitutes a "loan," the term generally includes a sum of money that is advanced to a party with the promise to repay it—whether or not interest is attached.[359] Because deferred-presentment transactions provide such advancements, the appellant asserted they would qualify for regulation under

356. *Id.* at 1024.
357. *Id.* at 1024-25.
358. *Id.* at 1026.
359. *Id.*

the Alabama Small Loan Act.[360] A previously issued opinion by the Attorney General of Alabama agreed with this assessment, stating that deferred presentments were a type of loan since the check cashers agreed to hold the checks until sufficient funds were available to fund them.[361]

Following a careful review of both Alabama caselaw and similar cases in other jurisdictions, the Alabama Supreme Court held that the Alabama Small Loan Act regulated the deferred-presentment transactions at issue.[362] The court maintained that the Act should be "interpret[ed] to promote, rather than to frustrate, its objectives" and thus should be viewed as a law that curbed, rather than encouraged, business practices that imposed high interest rates on those unequipped to pay them.[363] Additionally, although the term "loan" was not defined in the Act, in the absence of a full definition, the generally understood meaning of the word is assumed to apply.[364] The court also relied on Alabama's usury laws, which set a ceiling on interest rates that may be charged on loans, to find that the rates which applied to "payday loans" exceeded those permitted under the Act and thus violated public policy.[365] Following this analysis, the court held the Alabama Small Loan Act applied to the deferred-presentment transactions and remanded the case back to the trial court.[366]

VIII. HEALTH CARE

A. Certain Medical Specialists Cannot Give Expert Testimony in Fields Outside Their Specialty in Medical Malpractice Suits

In *Holcomb v. Carraway*,[367] the Alabama Supreme Court held an oncologist was not an appropriate expert to give competent testimony on a general surgeon's standard of care in a medical malpractice case, as he was not a similarly situated health care provider.[368] In addition, the court clarified that in medical malpractice actions, even when the expert at issue fulfills the requirements of the Alabama Medical Liability Act, the trial court still has discretion pursuant to Rule 702 of the Alabama Rules of Evidence to determine who may testify in the capacity of an expert witness.[369]

The medical relationship between the patient, who had a family history of breast cancer, and one of the defendant doctors, a general surgeon, began sixteen years before the patient was actually diagnosed with breast cancer. The relationship began when the surgeon removed a benign cyst from the

360. *Id.*
361. *Id.* at 1030.
362. *Id.* at 1037.
363. *Id.* at 1034.
364. *Id.* at 1034-35.
365. *Id.* at 1036.
366. *Id.* at 1035-36.
367. No. 1041471, 2006 WL 1046459 (Ala. Apr. 21, 2006).
368. *Id.* at *11.
369. *Id.* at *11 (citing ALA. CODE § 6-5-504 (2005)).

patient's left breast and continued over the next sixteen years as the surgeon routinely monitored the patient and her medical condition. As part of this monitoring, a series of mammograms were read by the other three defendant doctors, all radiologists. In January of 2000, after discovery of a lesion on the patient's femur during an examination of an unrelated hip injury, the patient underwent biopsies of her leg and left breast. The patient was subsequently diagnosed with cancer. Nine months following the diagnosis, the patient and her husband brought a negligence action against the four doctors for failing to detect and diagnose her breast cancer in a timely manner. Each of the defendants moved for summary judgment. The patient died of cancer over four years later, in January 2005. In May 2005, the trial court entered summary judgments in favor of all four of the defendants. The trial court allowed a motion to substitute the decedent's estate as the plaintiff in June 2005, and the plaintiffs filed a notice of appeal.

According to the court, the plaintiffs in a medical malpractice suit, pursuant to section 6-5-548(a) of the Alabama Code, must show that "the defendant health care provider 'failed to exercise such reasonable care, skill, and diligence as other similarly situated heath care providers.'"[370] In order to meet this burden, the plaintiff ordinarily must present expert medical testimony from a "similarly situated health care provider."[371] The court, addressing the plaintiffs' attempted use of a board-certified oncologist to establish the breach of a duty of care on behalf of the surgeon defendant, concluded that the plaintiffs' expert did not meet the requirements to give expert medical testimony in this instance.[372] Because the plaintiffs' complaint charged the surgeon with failing to perform a necessary surgical procedure, the plaintiffs' oncologist-expert was not a "similarly situated" health care provider that could provide expert testimony because he was not a board-certified surgeon.[373]

The court affirmed the trial court's decision not to allow the plaintiffs' radiologist expert to testify as well.[374] The court reasoned that although the plaintiffs' expert met the section 6-5-548(c) requirements of a "similarly situated health care provider," the trial court had discretion under Rule 702 of the Alabama Rules of Evidence to disallow the expert's testimony as not helpful to the trier of fact.[375] The court held that the statutory language did not mandate that once the credentials in the statute were met that the proffered expert must be allowed to testify, as the requirements were only the minimum qualifications to be considered by the trial court.[376] Therefore, the trial court was within its discretion to find that the radiologist's expert testimony would not assist the trier of fact, since the expert had not performed

370. *Id.* at *3 (quoting ALA. CODE § 6-5-548(a)).
371. *Id.* (quoting ALA. CODE § 6-5-548(e)) (internal quotation marks omitted).
372. *Id.* at *4-*5.
373. *Id.* at *5.
374. *Id.*
375. *Id.* at *11.
376. *Id.*

mammograms in the last four years.[377] Accordingly, because the plaintiff failed to produce any other acceptable expert testimony, the court affirmed the trial court's grant of summary judgment in favor of the three defendant radiologists.[378]

IX. INSURANCE

A. A Vehicle Registered in the Name of a Sole Proprietorship Creates a Rebuttable Presumption that the Vehicle Belongs to the Individual Sole Proprietor for Legal Purposes

In *Carolina Casualty Insurance Co. v. Williams*,[379] the Alabama Supreme Court, in a matter of first impression, held that a vehicle titled in the name of a sole proprietorship creates a rebuttable presumption that the vehicle is owned by the sole proprietor.[380]

Following an automobile accident involving a dump truck owned by the insured's trucking company, the insured filed a third-party complaint against the insurance company to determine whether the dump truck was covered under his policy with insurer. The insured contended that the dump truck should be covered as a "temporary substitute vehicle" as defined by the policy[381] because he was using the truck at issue while another vehicle his company owned was being repaired. The insurance company contended that because the dump truck involved in the accident was titled to the insured's sole proprietorship and not listed under the policy, the insured was the owner and the truck was not covered as an "un-owned" temporary substitute vehicle. The insured responded by asserting that the truck was titled to "Williams Trucking," a defunct corporation, and was not transferred to him in his divorce settlement with his ex-wife. The trial court agreed and held that because the defendant no longer owned the dump truck, it was a valid temporary substitute vehicle entitled to coverage under the insured's policy. The insurance company subsequently appealed.

In holding a vehicle titled to a sole proprietorship to be legally owned by the individual proprietor himself, the Alabama Supreme Court noted that the State of Alabama does not make a distinction between an individual operating a sole proprietorship and the business itself for legal purposes.[382] Accordingly, because Alabama law presumes holding a vehicle's title to be "prima facie evidence of ownership," the insured had to adequately rebut the presumption that he, as the sole proprietor, did not own the dump truck

377. *Id.*
378. *Id.*
379. No. 1050177, 2006 WL 1578678 (Ala. June 9, 2006).
380. *Id.* at *5.
381. *Id.* at *1 (defining temporary substitute vehicle as "any 'auto' you do not own while used with the permission of its owner as a temporary substitute for a covered 'auto' you own that is out of service").
382. *Id.* at *4 (citing Clardy v. Sanders, 551 So. 2d 1057, 1059-60 (Ala. 1989)).

at issue.[383] The court held that without written evidence or disinterested testimony to support the insured's claims that the dump truck was owned by his former corporation and not his sole proprietorship, the court could not "so lightly disregard the presumption of ownership that arises from the certificate of title to the [] dump truck, which shows that it is owned not by the corporation but by Williams Trucking."[384] Therefore, the court held that because the truck was still titled to the insured's proprietorship and not his former corporation, the evidence created a rebuttable presumption that he as a sole proprietor was the legal owner of the truck, and it could not qualify for coverage as an "un-owned" temporary substitute vehicle under the insurance policy.[385] Additionally, the insured's testimony alone was insufficient to overcome the presumption of ownership, thus the appellant insurance company was not liable to cover the insured's vehicle under the policy.[386]

B. Spouse Not Entitled to Uninsured-Motorist Coverage Because Her Deceased Husband Rejected the Coverage and Spouse Was Not a Named Insured

In *Progressive Specialty Insurance Co. v. Greene*,[387] the Alabama Supreme Court held that a policyholder's widow cannot collect uninsured-motorist benefits when the only named insured on the policy had rejected such coverage.[388]

The policyholder was the only named insured on a policy with the automobile insurer and had signed a form rejecting uninsured/underinsured motorist coverage. The policyholder was killed in a hit and run accident in which the driver was never identified. His widow sued the insurer, claiming although her husband rejected the uninsured/underinsured motorist coverage, she was also a named insured, had not rejected the coverage, and was therefore entitled to benefits. The trial court denied the insurance company's motion for summary judgment, and the company's petition for an interlocutory appeal was granted.

The Alabama Supreme Court found the controlling question in this case to be whether the policyholder's widow was a named insured under her husband's insurance policy with the insurance company.[389] The policyholder's widow relied on *Nationwide Insurance Co. v. Nicholas*,[390] where the Alabama Court of Civil Appeals held that a rejection of uninsured motorist coverage by one named insured did not apply to the other named in-

383. *See id.*
384. *Id.* at *8.
385. *Id.* at *8-*9.
386. *Id.* at *9.
387. 934 So. 2d 364 (Ala. 2006).
388. *Id.* at 368.
389. *Id.* at 365-66.
390. 868 So. 2d 457 (Ala. Civ. App. 2003).

sureds in the policy.[391] It followed that, if the policyholder's widow was a named insured, her husband's rejection of coverage would not be applicable to her, and therefore, she would be entitled to coverage.[392] The policyholder's widow contended that based on the policy's definition of the words "you" and "your" to include the named insured and their spouse, she was entitled to the same rights under the policy as her husband.[393] However, the court found that the policy did not extend this same definition to apply to "named insured" and thus effectively distinguished the term "named insured" from "named insured's spouse."[394] The court held the policyholder's widow was not entitled to uninsured motorist benefits and granted the insurer's motion for summary judgment.[395]

X. PROFESSIONAL RESPONSIBILITY

A. An Attorney Cannot be Deprived of His Law Practice Without Due Process of Law Except Where He Has Been Convicted of a Serious Crime or Poses an Immediate Harmful Threat to the Public or a Client

In *Ex parte Case*,[396] the Alabama Supreme Court held that an attorney could not be deprived of his law practice, except in emergency situations, without due process of law.[397] By separate order, the court revised Rule 20(a) and Rule 20(d) of the Alabama Rules of Disciplinary Procedure to reflect this change in policy.[398]

On September 27, 2004, the Alabama State Bar Disciplinary Commission entered an order temporarily suspending the petitioner attorney from practicing law and keeping an attorney trust account due to complaints pending against him and his disciplinary history with the Bar. The attorney was notified of the suspension on September 27, and on September 28 he filed a petition with the disciplinary commission to dissolve the order. The attorney argued that this petition should have triggered a hearing on the interim suspension's merits within a week as required by the Alabama Rules of Disciplinary Procedure. He also denied, as the Bar contended, that he had waived his right to such a hearing and claimed there was no evidence of such a waiver. The attorney also argued that the general counsel for the Bar did not file formal charges against him within four weeks of the interim suspension as was also required by the Alabama Rules of Disciplinary Procedure.

391. *Progressive*, 934 So. 2d at 367-68 (citing *Nationwide*, 868 So. 2d at 459-60).
392. *Id.* (citing *Nationwide*, 868 So. 2d at 459-60).
393. *Id.*
394. *Id.* at 366-67.
395. *Id.* at 368.
396. 925 So. 2d 956 (Ala. 2005).
397. *Id.* at 963-64.
398. *Id.*

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On April 5, 2005, the attorney filed another petition to terminate or dissolve the order. The disciplinary commission's subsequently evidentiary hearing determined that any additional complaints against the attorney filed after the September 27 suspension would not be allowed into evidence. Based on the existence of complaints filed after September 27, however, the disciplinary commission issued another order temporarily suspending the attorney from practicing law and moved to dissolve the interim suspension since it was superseded by the new order. After the commission granted this order, the attorney petitioned the Montgomery Circuit Court for declaratory and injunctive relief, arguing that he had made ongoing efforts to correct the alleged negligence in the complaints against him. Although the judge issued a temporary restraining order prohibiting the Bar from enforcing its interim suspension, the order expired less than a month later and on May 25, 2005, the Bar filed formal charges against the attorney for violations of the Alabama Rules of Professional Conduct.

The attorney subsequently filed a mandamus petition with the Alabama Supreme Court requesting the court to dissolve or set aside the Bar's interim suspension. The attorney argued because he had not received notice of his suspension and had not had an opportunity to be heard on the issue, the deprivation of his law practice by the Bar for over a year was a denial of due process under both the state and federal constitutions. He also asserted that the Bar's reliance upon the Alabama Rules of Disciplinary Procedure in temporarily suspending him did not suspend operation of the due process clauses included in both constitutions.

The Alabama Supreme Court held, as a matter of first impression, that the right to engage in the practice of law was a property right that could not be deprived without due process of law.[399] Additionally, although the Bar relied on a disciplinary rule in temporarily suspending the attorney, it could not deny him due process in doing so.[400] The court found support for its holding in United States Supreme Court precedent, which established a person has a property right in his professional license that cannot be deprived without due process of law, specifically notice and a right to a hearing.[401] Moreover, the court also pointed out that it is a violation of due process to hold a hearing after the deprivation, no matter how promptly the hearing occurs, if an ex parte restraining order has been issued without justification of the ex parte nature of the proceedings.[402]

The court did acknowledge that the Alabama Rules of Disciplinary Procedure provide for ex parte suspensions where a lawyer has been convicted of a "serious crime" if a lawyer is an immediate harmful threat to the public or to a client, or if a lawyer has failed to comply with certain orders in dis-

399. *Id.* at 961.
400. *Id.* at 963-64.
401. *Id.* at 961 (citing *In re* Ruffalo, 390 U.S. 544 (1968)).
402. *Id.* (quoting Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 184 (1968)).

ciplinary matters.[403] However, after evaluating other jurisdictional methods of handling ex parte suspensions and focusing on the fact that less than twenty percent of the states have rules allowing for an attorney's interim suspension without notice,[404] the Alabama Supreme Court granted the attorney's mandamus petition and ordered the Bar to dissolve his interim suspension.[405]

The court then revised Rule 20(a) of the Alabama Rules of Disciplinary Procedure to provide for the temporary suspension of an attorney without notice only when the attorney has been convicted of a "serious crime" or clearly poses the threat of "immediate and serious injury to a client or to the public."[406] Further, the court amended Rule 20(d) to provide that an attorney who has been suspended without notice and who petitions for the dissolution of that suspension must be afforded a hearing within a week, and "[t]he Disciplinary Board shall decide the petition with the utmost speed consistent with due process."[407] These revisions made by the court immediately went into effect.[408]

B. The Statute of Limitations for Legal Malpractice Claims Can Be Based on an "Occurrence" or "Damages" Approach

In *Denbo v. DeBray*,[409] the Alabama Supreme Court held that a legal malpractice action was barred by the statute of limitations under both the "occurrence" approach and the "damages" approach yet refused to designate which rule was controlling as to future causes of action.[410]

The appellant, a former client, filed a malpractice claim against his attorney and law firm following litigation with the Environmental Protection Agency relating to the client's involvement with a Superfund site. At the outset of the litigation, the client provided copies of insurance certificates covering activities at the site to the attorney and requested that the insurance companies be notified of the litigation and pending claims. Over seven years beginning in 1993, the attorney and law firm were actively engaged in the case and billed the client directly for attorneys' fees, which he paid in full. During that time, the client repeatedly questioned the attorney and staff at the law firm to determine if the insurance companies had been notified. The attorney consistently assured him that the matter was being handled in a timely fashion, including providing notification to the insurance companies, and continued to bill the client directly for costs associated with the lawsuit. In August 2000, the client agreed to settle the case based on advice of coun-

403. *Id.* (citing ALA. R. DISC. P. 20(a)).
404. *Id.* at 963 n.4.
405. *Id.* at 963.
406. *Id.*
407. *Id.* at 964.
408. *Id.*
409. No. 1041430, 2006 WL 1793755 (Ala. June 30, 2006).
410. *Id.* at *9.

sel. Then, in March 2002, the client was informed that the insurance companies had not been notified in a timely manner and were not responsible for fees and costs incurred by the client without the consent of the insurance company. Since the claim had not been forwarded to the carriers at the commencement of the litigation, the companies refused to provide any reimbursement for the cost of the litigation or the settlement. The client then commenced a legal malpractice claim based on the lack of notification, which, pursuant to a tolling agreement, was deemed filed on October 1, 2002. The defendants' motion for summary judgment was granted by the trial court, and the client appealed.

Legal malpractice actions are governed by the Alabama Legal Services Liability Act (ALSA),[411] which requires claims to be brought within two years of the "act or omission or failure giving rise to the claim" or six months from "the date of such discovery [of the cause of action] or the date of discovery of facts which would reasonably lead to such discovery" if the cause of action was not known during the two year period.[412] However, there is a four-year absolute bar on all claims arising after August 1, 1987.[413]

In determining the date on which the statute of limitations commences, the Alabama Supreme Court has recognized two different tests. In *Floyd v. Massey & Stotser, P.C.*,[414] the court found the statute of limitations began to run from the date on which the plaintiff sustained an injury or damages.[415] However, in *Ex parte Panell*[416] and *Ex parte Seabol*,[417] the court relied on the "occurrence" approach, which determined the date of the accrual of the cause of action and the beginning of the statute of limitations based on when the act or omission actually occurred, not when damages were first suffered.[418] Although the court recognized the apparent split of authority, it declined to designate a preferred test since the current cause of action was barred under either test.[419]

Applying the "occurrence" test, the court found the claim was barred by the two-year statute of limitations since the attorney's act or omission, the failure to notify the insurance companies, occurred more than two years prior to the filing of the complaint.[420] While the statute allows for a six-month period from when the act or omission is discovered, the client was notified by the insurance companies beginning in March of 2002, which was outside the six-month grace period for newly discovered claims based

411. ALA. CODE § 6-5-574 (2005).
412. *Id.*
413. *Id.*
414. 807 So. 2d 508 (Ala. 2001).
415. *Id.* at 511.
416. 756 So. 2d 862 (Ala. 1999).
417. 782 So. 2d 212 (Ala. 2000).
418. *Denbo*, 2006 WL 1793755, at *6 (explaining *Panell* and *Seabol*).
419. *Id.*
420. *Id.* at *7.

on the filing date of October 1, 2002.[421] Therefore, under the "occurrence" test, the court held that the claim was barred by both the two-year and six-month statute of limitations.[422]

Likewise, the court determined that the claim was also barred under the "damages" test.[423] The client's damages included the legal fees, which would have been paid by the insurance companies if properly notified; therefore, the date of the initial payment by the client signified his first legal damage and the beginning of the statute of limitations period.[424] Since the payments happened throughout the seven years leading up to the settlement in October 2000, the initial payment was well outside the two-year window prior to the filing in 2002 and was barred by the statute of limitations under the "damages" test.[425] Additionally, the court held that the absolute four-year bar precluded the claim under either test since both the attorney's omission and the payment of legal fees occurred more than four years prior to the filing date.[426]

Since the malpractice claim could not stand under either the "occurrence" or "damages" approach to the ALSA statute of limitations, the court affirmed the trial court's order of summary judgment in the instant case and refused to specify the appropriate rule, allowing lower courts to continue to utilize either approach.[427]

XI. REAL PROPERTY

A. Prejudgment Interest Begins to Run on the Date the Condemnor Posts Bond on a Prospective Condemned Property Because the Payment Creates a Right of Entry and Thus Serves As the Date of Taking

In *Samford University v. City of Homewood*,[428] the Alabama Supreme Court held that the date the condemnor posts bond on a prospective condemned property serves as the date of taking and the date that prejudgment interest begins to accrue, unless the condemnor has taken actual possession of the property prior to that date.[429]

On April 25, 2003, the City of Homewood began a condemnation proceeding against property owned by Samford University. On August 28, 2003, the probate court granted the application for condemnation and appointed commissioners to assess the compensation to which Samford was entitled. The commissioners determined that Samford was entitled to

421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.* at *8.
425. *Id.*
426. *Id.* at *7-*8.
427. *Id.* at *9.
428. No. 1050444, 2006 WL 2925311 (Ala. Oct. 13, 2006).
429. *Id.* at *5-*6.

$1,500,000 as compensation. In November 2003, Samford filed an appeal regarding the amount of compensation. In February 2004, Homewood paid into the probate court $1,505,054, the amount of damages and costs assessed by the probate court, and Samford moved the court to invest the deposited money in an interest-bearing account. The conflict regarding the amount of compensation went to trial, and the jury awarded Samford $2,650,000 as just compensation for the property. Homewood then deposited the difference of $1,150,000 with the court clerks. In October 2005, the trial court entered a final judgment awarding Samford $2,650,000 for the condemned property, but Samford moved to alter or amend the final judgment alleging it was entitled to prejudgment interest. The trial court subsequently amended its determination of the amount of interest to be awarded but held that Samford was not entitled to prejudgment interest because Homewood had not taken actual or physical possession of the property. Samford appealed.

The Alabama Supreme Court began its analysis with a discussion of the history of eminent domain law in Alabama, noting that prior to the establishment of the Eminent Domain Code, juries determined prejudgment interest as an element of compensation.[430] In *McLemore v. Alabama Power*, the court determined that prejudgment interest on a condemnation award begins to run "from the date [the] condemnor takes actual possession until the date of the jury's verdict."[431] Four years later, the court further clarified an award of prejudgment interest, holding that the date the interest on the condemnation award begins to run is the day the bond is approved because that is the day the condemnor attains authority to enter the land.[432] The court also held that in the rare circumstance in which the condemnor takes possession before filing the condemnation proceedings, the interest would begin to run as of the date of the condemnor's entry upon the property.[433]

This caselaw remained determinative as to the issue of when prejudgment interest began to run until 1985 when the Alabama legislature passed section 18-1A-211(a) of the Eminent Domain Code (the Code).[434] The Code provided for prejudgment interest on condemnation awards to be computed from the "date of valuation" to the date of the circuit court's judgment.[435] In interpreting this legislation, the court held that the date of valuation is the date the application to condemn is filed in the probate court.[436] In 1995, the legislature amended the Code to address post-judgment interest only, thus leaving Alabama without a statutory provision specifically dealing with prejudgment interest.[437] However, in *Williams v. Alabama Power Co.*,[438] the

430. *Id.* at *2 (citing McLemore v. Ala. Power Co., 228 So. 2d 780 (1969)).
431. *Id.* at *3 (quoting *McLemore*, 228 So. 2d at 787).
432. *Id.* at *3 (citing S. Natural Gas v. Ross, 275 So. 2d 143, 146 (Ala. 1973)).
433. *Id.* at *4.
434. *Id.*
435. *Id.*
436. *Id.* (citing State v. McGee, 543 So. 2d 669, 671 (Ala. 1989)).
437. *Id.*

court held that the right to prejudgment interest in a condemnation action is part of the just compensation mandated by the Alabama constitution for a taking of property.[439]

Of great importance was that the question of what constituted the "date of the taking" for purposes of determining when post-judgment interest on a condemnation award began to run had not been answered by the court since the statutory right to prejudgment interest was extinguished when the Eminent Domain Code was amended in 1995.[440] In reaching its determination, the court observed that when the common law is repealed by a statute and the statute itself is subsequently repealed, the common law is revived.[441] Thus, the court explicitly reaffirmed the rule set out in *Southern Natural Gas v. Ross*[442] that prejudgment interest begins to run on the date the condemnor posts bond on a prospective condemned property unless the condemnor has taken actual possession prior to that time.[443]

Finally, the court addressed Samford's contention that the date of taking was the date on which Homewood filed its application for an order of condemnation because the filing of the application effectively ousted Samford of its ability to derive income from its property.[444] The court looked to the United States Supreme Court for guidance and held that according to *Kirby Forest Industries, Inc. v. United States*[445] a substantial reduction in the value of property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment.[446] Therefore, the court held because Homewood paid bond on February 19, 2004, they had a right of entry on the condemned property at that time, and prejudgment interest should begin accrual on that date and continue until the date of judgment.[447]

B. The Thirty-day Time Period for Appealing Condemnation Orders Begins with the Date of the Order and Not with the Date the Order Is Recorded with the Probate Court

In *Ex parte State of Alabama*,[448] the Alabama Supreme Court, as a matter of first impression, held that the thirty-day time period for appealing condemnation orders begins with the date of the order and not with the date the order is recorded with the probate court.[449] The court also noted that equitable estoppel is only applicable in cases dealing with misrepresenta-

438. 730 So. 2d 172 (Ala. 1999).
439. *Samford*, 2006 WL 2925311, at *4 (citing *Williams*, 730 So. 2d at 174-76).
440. *Id.* at *5.
441. *Id.*
442. 275 So. 2d 143 (Ala. 1973).
443. *Samford*, 2006 WL 2925311, at *5.
444. *Id.*
445. 467 U.S. 1 (1984).
446. *Samford*, 2006 WL 2925311, at *5 (citing *Kirby*, 467 U.S. at 15).
447. *Id.*
448. No. 1050299, 2006 WL 2662244 (Ala. Sept. 8, 2006).
449. *Id.* at *4-*5 (citing ALA. CODE § 18-1A-282 (1975)).

tions of fact,[450] and therefore, the plaintiff in this case could not be granted an exception from the thirty-day time period despite his detrimental reliance on the probate judge's advisement that the date for entering an appeal began to run upon the recording of the order with the probate court.[451]

A petition to condemn certain real property owned by the plaintiff was filed in the Probate Court of Covington County in December of 2003 by the State of Alabama. The petition to condemn was granted by the probate court, and commissioners were appointed pursuant to section 18-1A-279 of the Alabama Code to determine the amount of compensation the plaintiff was entitled to for the property at issue. The probate court subsequently issued an order condemning the property and setting the compensation award. This order was signed on January 26, 2004, and was recorded in the probate court on January 27, 2004. The plaintiff was mailed a letter and a copy of the official order notifying him of the right to appeal and the thirty-day period in which to do so. This letter was dated January 27, 2006.

The plaintiff filed his notice of appeal on February 26, 2004, after being informed by the probate judge the day before that this would be timely; this was thirty days after the order of condemnation had been recorded with the probate court, but thirty-one days after the order was signed by the probate judge. The State argued the notice of appeal was untimely, however, and moved the court to dismiss the appeal. The circuit court held that the plaintiff had not followed the provisions of section 18-1A-283, and dismissed the plaintiff's case. After the plaintiff obtained an affidavit from the probate judge supporting his assertion that he had been told that his notice of appeal would be timely, he moved the circuit court to set aside its dismissal. When the circuit court refused, the plaintiff appealed to the Court of Civil Appeals. The Court of Civil Appeals reversed the circuit court and remanded the case based on its opinion that the legislature intended the thirty-day tolling period for filing a timely notice of appeal from an order of condemnation to begin once the probate court had signed and recorded an order of condemnation. The court also noted the language of the statute was ambiguous and that an alternative interpretation could lead to unfair results.

The Alabama Supreme Court, reviewing the issue de novo, acknowledged that it had a duty to follow the plain language of the statute unless the language was found to be ambiguous, and only then could it employ judicial construction to interpret section 18-1A-283 of the Alabama Code.[452] Although the court found some merit in the Court of Civil Appeals' concern with potential unfairness resulting from an alternative interpretation of the statute, it declined to agree with that court's interpretation.[453] The court considered the provision at issue in the context of the entire statute in order to

450. *Id.* at *6 (citing State Highway Dep't v. Headrick Outdoor Adver., Inc., 594 So. 2d 1202, 1204-05 (Ala. 1992)).
451. *Id.* at *5-*6.
452. *Id.* at *4 (citing *Ex parte* Pratt, 815 So. 2d 532, 535 (Ala. 2001)).
453. *Id.* at *4.

determine legislative intent and found section 18-1A-283 was "not ambiguous when . . . construed in the context of the entire legislative scheme governing condemnation proceedings."[454] The court also reviewed sections 18-1A-282 and 18-1A-283 of the Alabama Code, and concluded it was apparent that the legislature intended the tolling period for a notice of an appeal from a condemnation order to begin on the date of the order of condemnation, not on the date of record with the probate court.[455] Therefore, the plaintiff in this case did not file a timely notice of appeal under section 18-1A-283.[456]

The plaintiff, relying on *Ex parte Tanner*,[457] argued that even if interpretation of the statute at issue rendered his appeal untimely, equitable estoppel should be employed due to his reliance on the assertions of the probate judge that his appeal would be timely if submitted thirty days after the order of condemnation was recorded in the probate court.[458] The court, however, found *Tanner* to be distinguishable from the present case as it dealt with a misrepresentation of fact, not of law. It followed that the equitable estoppel doctrine could not be used to prevent dismissal of the plaintiff's untimely appeal where the representation at issue was as to the law and not the facts.[459] The court reversed the Court of Civil Appeals' judgment and remanded the case to that court.[460]

XII. TAX LAW

A. Taxpayer May Amend a Notice of Appeal of a Denied Refund Petition Under the Taxpayer Bill of Rights to Include an Additional Tax Year Occurring After Original Notice of Appeal was Filed

In *Ex parte Jefferson Smurfit Corp.*,[461] the Alabama Supreme Court, in a matter of first impression, held that a taxpayer filing for a petition to refund under the Taxpayer Bill of Rights (TBOR)[462] may amend a notice of appeal to include another tax year that occurred after the original notice to appeal was filed because neither the TBOR nor the Alabama Rules of Civil Procedure require an appellant to institute a new action in order to obtain relief.[463]

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454. *Id.*
455. *Id.* at *5.
456. *Id.*
457. 553 So. 2d 598 (Ala. 1989) (applying the doctrine of equitable estoppel where an untimely appeal of a condemnation was made as a result of an erroneous notification by the probate court to the plaintiff misrepresenting the date of the court's order of condemnation).
458. *Ex parte State of Alabama*, 2006 WL 2662244, at *5.
459. *Id.* at *6 (citing State Highway Dep't v. Headrick Outdoor Adver., Inc., 594 So. 2d 1202, 1204-05 (Ala. 1992)).
460. *Id.*
461. No. 1041151, 2006 WL 1451574 (Ala. May 26, 2006).
462. ALA. CODE § 40-2A-1 to -18 (1975).
463. *Jefferson*, 2006 WL 1451574, at *4.

The appellant, an out-of-state company, filed a petition with the Alabama Department of Revenue (the Department) for a refund of franchise taxes paid in 1994, 1995, and 1996, claiming that Alabama's franchise tax structure is unconstitutional for discriminating against interstate commerce. The petition was denied, and the appellant filed a Complaint on Notice of Appeal in the Montgomery Circuit Court, alleging again that the State's franchise tax structure is unconstitutional. The appeal was placed on the court's docket, pending the result of *South Central Bell Telephone Co. v. Alabama*,[464] a case before the United States Supreme Court that subsequently held Alabama's franchise tax to be unconstitutional.

Based on the holding in *South Central*, the appellant filed another petition with the Department seeking a refund of taxes paid for the 1999 tax year, which was also denied. The appellant then sought to amend its Complaint on Notice of Appeal to add an appeal of the Department's denial of its refund petition for the 1999 tax year, therefore appealing the denial of refund petitions for 1994, 1995, 1996, and 1999. The appeal was again placed on the docket pending the result of *Patterson v. Gladwin*,[465] an Alabama Supreme Court case where taxpayers sought refunds of franchise taxes through actions against the state. *Patterson* did not govern this case, however, because it was not filed pursuant to the TBOR.

More than two years later, the Department moved to strike the appellant's amended notice of appeal, arguing that it was not a "notice of appeal" under the TBOR and was improperly filed under Rule 15(d) of the Alabama Rules of Civil Procedure for not seeking leave of court. The Department alleged that the TBOR's use of the word "filing"[466] required the appellant to institute a new action, pay filing fees, and perform service of process on the Department. The trial court dismissed the appellant's amended notice of appeal because the appellants had not strictly complied with the procedures of the TBOR and the amended notice violated Rule 15(d).

The Alabama Supreme Court disagreed with the Department's assertion that the appellant failed to comply with the TBOR's appellate procedures for refund denials.[467] The court did not find a requirement under the TBOR or the Alabama Rules of Civil Procedure for payment of a filing fee and service of process, other than those required for a filing of the initial notice of appeal, explaining that an amendment to a complaint is not the institution of a new action.[468] Furthermore, the court found that the appellant's amendment complied with the TBOR, which only requires a notice to be written and to sufficiently identify the party appealing, the specific matter appealed, the basis for that appeal, and relief sought.[469] The court said that

464. 526 U.S. 160 (1999).
465. 835 So. 2d 137 (Ala. 2002).
466. *Jefferson*, 2006 WL 1451574, at *3 (citing ALA. CODE § 40-2A-7(c)(5)(b) (1975) (stating that a taxpayer may appeal the denial of petition for refund "by filing a notice of appeal")).
467. *Id.* at *4-*5.
468. *Id.* at *5.
469. *Id.*

the Department's argument is inconsistent with the legislative intent that calls for the TBOR to be liberally construed to permit substantial justice.[470]

The Alabama Supreme Court also disagreed with the trial court's alternative finding that the appellant's amendment was improper under Rule 15(d) of the Alabama Rules of Civil Procedure for not seeking leave of court.[471] The court asserted that the appellant's amended notice of appeal was actually a supplemental pleading, which always requires leave of court to file whereas an amended pleading sometimes does not.[472] However, the court found the distinction between the two was of no consequence in this case, given the early nature of the filing, because a trial date had not yet been set nor had the Department filed a responsive pleading.[473] Therefore, leave of court would have been granted had the appellant filed for it.[474] The court also agreed with the appellant that the Department operated a "trap for the unwary" by waiting to object to the supplemental pleading until the TBOR's statute of limitations period ran and asserted that the Department could have moved to strike the pleading in a timely manner.[475] Accordingly, the court reversed the trial court's dismissal of the appellant's amended notice of appeal.[476]

B. Certain City Ordinances that Impose an Additional Tobacco Tax on Wholesalers Violate Act 414 of the Alabama Acts of 1947, Regardless of Whether the Taxation Occurs Without a Tobacco Stamp

In *City of Bessemer v. McClain*,[477] the Alabama Supreme Court held that city ordinances in Bessemer, Hoover, and Hueytown that imposed an additional tobacco tax on wholesalers, violated Act 414 of the Alabama Acts of 1947 (the Act), regardless of whether the ordinances' taxation methods did not include tobacco stamps.[478] The court further held, as a matter of first impression, that the doctrine of *cy pres* was applicable to the tax fund at issue.[479]

The defendants, cities of Bessemer, Homewood, Hoover, Hueytown, Mountain Brook, Trussville, and Vestavia Hills, enacted ordinances that required tobacco wholesalers who deliver to retailers within each respective city to pay a $.10 tax on cigarettes and other tobacco products. The plaintiffs, comprised primarily of wholesale distributors, brought their claim in

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470. *Id.*
471. *Id.* at *8.
472. *Id.* at *5.
473. *Id.*
474. *Id.* at *6-*7 (relying on *Image Marketing, Inc. v. Florence Televisions, L.L.C.*, 884 So. 2d 822 (Ala. 2003), which provides that when a supplemental pleading is filed without leave of court, it may allow the filing where leave would have been granted).
475. *Id.* at *7.
476. *Id.* at *8.
477. No. 1031917, 2006 WL 2089923 (Ala. July 28, 2006).
478. *Id.* at *12-*13.
479. *Id.* at *16 (citing Powell v. Georgia-Pacific Corp., 119 F.3d 703, 706 (8th Cir. 1997)).

the Bessemer Division of the Jefferson County Circuit Court. Plaintiffs sought a judgment declaring the ordinances in violation of the Act, which imposed tobacco taxes in counties whose population exceeded 400,000 and provided that cities within those counties had no authority to impose tobacco taxes. The defendants filed a motion to dismiss, asserting that the trial court did not have subject-matter jurisdiction over the action, and the ordinances did not require the use of tobacco stamps to collect taxes as denoted in the Act. The cities of Vestavia Hills, Trussville, Homewood, and Mountain Brook also asserted that the Bessemer Division was an improper venue as to them.

At the plaintiffs' request, the trial court established a constructive trust under the doctrine of *cy pres* for the tobacco taxes that were collected. A third-party hospital also intervened, arguing that the funds should be used to help pay for the treatments of its Jefferson County patients with tobacco-related diseases. The trial court ruled in favor of the plaintiffs, finding: the plaintiffs had standing to bring their claims; venue was proper as to all defendants; the ordinances violated the Act; the funds should be held in an interest-bearing account until the case is final; and the plaintiffs should be awarded attorneys' fees. At a later hearing, the trial court concluded that approximately thirty-three percent of the tax fund should go towards attorneys' fees, with the remainder to be distributed to the intervening hospital and the Bessemer Board of Education. The defendants then appealed, reasserting their previous claims and arguing that both attorneys' fees and the doctrine of *cy pres* were inapplicable.

The Alabama Supreme Court first determined that the trial court had subject-matter jurisdiction because any administrative agency would lack authority to address the statutory interpretation issues within the plaintiffs' complaint.[480] Regarding venue, the court stated that venue in the Bessemer Division was improper as to Homewood, Mountain Brook, Trussville, and Vestavia Hills, reasoning that claims against those cities arose in the Birmingham Division,[481] and thus, those claims should be remanded to the Bessemer Division to either dismiss the claims or transfer them to the Birmingham Division.[482]

The court then held that city ordinances in Bessemer, Hoover, and Hueytown, which imposed an additional tobacco tax on wholesalers, violated the Act.[483] Relying upon caselaw allowing the court to look beyond the statutory language when legislative intent is unclear,[484] the court resorted to language within the title of the Act that evidenced an intention to

480. *Id.* at *5 (citing Mingledorff v. Vaughan Reg'l Med. Ctr., Inc., 682 So. 2d 415 (Ala. 1996); Budget Inn of Daphne, Inc. v. City of Daphne, 789 So. 2d 154 (Ala. 2000)).
481. *Id.* at *6 (citing *Ex parte* Walter Indus., Inc., 879 So. 2d 547, 552 (Ala. 2003)).
482. *Id.* at *7.
483. *Id.* at *12-*13.
484. *Id.* at *11 (citing Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc., 746 So. 2d 966, 973 (Ala. 1999)).

prevent double collection by the cities included in the Act.[485] The court also stated that a "technical construction" of the Act's phrase "payable by purchase and affixation of stamps" would produce absurd results and allow the defendants to impose a tobacco tax solely because they do not tax by using stamps.[486] The court noted that tax stamps were the ordinary means of tax collection when the Act was enacted,[487] but an ordinance's method of taxation is "immaterial."[488]

The court further held, as a matter of first impression, that the doctrine of *cy pres* is applicable to the tax fund created by the trial court due to the difficulty of identifying the beneficiaries.[489] As a result, the trial court's application of the doctrine of *cy pres* was reversed as to the cities affected by the venue ruling[490] and affirmed with respect to the distributions to the intervening hospital and the Bessemer Board of Education.[491]

C. A County Commission Has the Power to Issue Education Warrants, Which are Not Debt Included in Determining Whether a County Has Exceeded Its Constitutionally Imposed Debt Limit

In *Chism v. Jefferson County*,[492] the Alabama Supreme Court held that a defendant county commission was authorized to create education warrants that provided for the distribution of funds to the school systems within the county based on their school population as of 2003.[493] The court further held that the educational taxes imposed to fund the warrants were not chargeable against the county's constitutionally proscribed debt limit and were therefore constitutionally permissible.[494]

In 2004, the defendant county commission determined that the county board of education and local municipal school boards needed operating capital in excess of $1 billion. The defendant implemented a plan to provide each local school board in the county with a proportionate share of the $1 billion in order to fund current projects or to pay off debt the board had already incurred in financing those projects. The defendant adopted an ordinance which levied county-wide taxes and pledged those taxes to fund new warrants to be issued by the county. The net proceeds from the sale of the warrants were to be used for the needed capital improvements.

The plaintiffs filed suit following the first ordinance, and the county repealed the ordinance in order to adopt ordinance no. 1769, which levied a county-wide privilege or license tax and a county-wide excise tax (collec-

485. *Id.* at *12.
486. *Id.* (quoting 1947 Ala. Acts No. 414, § 13, at 309) (internal quotation marks omitted).
487. *Id.* at *9.
488. *Id.* at *12.
489. *Id.* at *16 (citing Powell v. Georgia-Pacific Corp., 119 F.3d 703, 706 (8th Cir. 1997)).
490. *Id.* at *14.
491. *Id.* at *16.
492. No. 1050046, 2006 WL 2374270 (Ala. Aug. 16, 2006).
493. *Id.* at *10.
494. *Id.* at *18.

tively educational taxes) and pledged the revenues to fund warrants, the net proceeds of which to be used for the needed capital improvements. In the new ordinance, each school system in the county was to receive its portion of the funds based on the local school board's Foundation Program costs for the 2004-2005 school year, which was based on student enrollment in the fall of 2003. The plaintiffs amended their complaint to challenge ordinance no. 1769, alleging the defendant had exceeded its authority in allowing the taxes to be distributed to the school systems based on enrollment in 2003. Instead, the plaintiffs argued that the proportional distribution of funds should be reassessed each year based on the Foundation Program costs for the prior year. The plaintiffs further alleged that the defendant violated article 12, section 224 of the Alabama constitution because these warrants would cause the county to surpass its permissible debt limit.[495] The trial court entered summary judgment for the defendant and the plaintiffs appealed.

The Alabama Supreme Court began by disagreeing with the plaintiffs' claim that the proceeds from education taxes must be distributed to local school boards based on their respective annual Foundation Program costs.[496] Although the court acknowledged the plaintiffs presented a strong policy argument that any school boards formed after the district's proportionate share of the proceeds was determined would be unable to access these funds, the court found an opposing argument in an existing statute that allowed counties with only one school board to levy taxes and issue warrants that funded the existing school board in the same manner as the ordinance at issue.[497] Therefore, reasoning that the legislature is never presumed to have enacted contradictory statutes, the court held that the education warrants could not be invalid on the grounds that they distribute revenue derived from the taxes in a manner contrary to the statutory provisions in section 40-12-4 of the Alabama Code.[498]

Addressing the constitutional issue presented by the plaintiffs, the court explicitly reaffirmed its holding in *Taxpayers & Citizens of Shelby County v. Acker*.[499] In *Acker*, the court held that warrants are not chargeable against the constitutional debt limit of a county because the source of funds that would service any debt created by the warrants was not a source available for general government purposes, and the warrants were payable only from that particular source of funds.[500] Therefore, because the education warrants in this case would be serviced exclusively by the proceeds of the education taxes, which were not available for general government purposes, and be-

495. *Id.* at *14 n.22 (citing ALA. CONST. art. XII, § 224, providing that "[n]o county shall become indebted in an amount including present indebtedness, greater than five percentum of the assessed value of the property therein").
496. *Id.* at *5.
497. *Id.* at *9.
498. *Id.* at *10.
499. 641 So. 2d 259 (Ala. 1994).
500. *Chism*, 2006 WL 2374270, at *18 (citing *Acker*, 641 So. 2d at 260).

cause the education taxes did not displace funds that would have been available for general use, the court held that the pledge of the education taxes did not constitute a debt chargeable against the county's constitutional debt limit.[501] Accordingly, the court found that summary judgment in favor of the defendant was appropriate.[502]

XIII. TORTS

A. To Sustain a Claim of Vicarious Liability Under the Doctrine of Respondeat Superior, Plaintiffs Must Prove Both That the Master Had a Reserved Right of Control Over the Servant and That the Master and Servant Had Entered Into a Consensual Relationship In Which the Master Possessed the Right of Selection

In *Ware v. Timmons*,[503] a case of first impression, the Alabama Supreme Court held that a supervising anesthesiologist was not vicariously liable for the negligence of a nurse anesthetist as a matter of law because even though he possessed a reserved right of control, both he, as supervisor, and the nurse, as a subordinate, were co-employees of the same professional corporation and thus could not enter into a master-servant relationship consensually.[504]

The appellee's daughter entered into the care of the appellants for elective surgery to correct an overbite. The appellant nurse elected to remove a breathing tube and transfer the patient to another room. Following the extubation, the patient went into cardiac arrest. As a result, she suffered brain damage and eventually died. At trial, the judge instructed the jury that the issue of vicarious liability was not in dispute and that if the jury found the nurse liable, then the supervising doctor was therefore vicariously liable as a matter of law. After a jury verdict in favor of the appellee, the appellants filed a timely notice of appeal arguing that the instructions were in error.

The court noted that to establish vicarious liability under the doctrine of respondeat superior, the plaintiff must show that a master-servant relationship existed.[505] In Alabama, the right-of-control test is used to find such a relationship, which asks if the master has reserved a right-of-control over the servant's methods and means of performing work.[506] However, the court reasoned that this test is not dispositive as to whether an undisputed servant is a servant to one master or another.[507] To answer that question, the court

501. *Id.*
502. *Id.* at *24.
503. No. 1030488, 2006 WL 1195870 (Ala. May 5, 2006).
504. *Id.* at *6.
505. *Id.* at *2 (citing Hendley v. Springhill Mem'l Hosp., 575 So. 2d 547, 550 (Ala. 1990)).
506. *Id.* at *2-*3 (citing Martin v. Goodies Distrib., 695 So. 2d 1175, 1177 (Ala. 1997); Gossett v. Twin County Cable T.V., Inc., 594 So. 2d 635, 639 (Ala. 1992)).
507. *Id.* at *3.

held that a servant serves a master who has the right to select the servant,[508] and therefore the relationship must be one that is consensual.[509] The court grounded its holding in the law of agency, reasoning that just as a principal and agent must manifest mutual consent to their relationship with the principal empowered to select or dismiss the agent,[510] so too must a master be empowered with regard to a servant.[511]

The court applied this two-pronged test of vicarious liability to the facts of this case.[512] It found that the appellant doctor, as supervisor of the appellant nurse, did reserve a right of control over her work.[513] However, because both parties stipulated as a matter of law that both the appellant nurse and the appellant doctor were employees of the same professional corporation, the right of selection of the appellant nurse rested with the corporation and not with the co-employee doctor.[514] As a result, they were merely co-employees, and the absence of a master-servant relationship eliminated the possibility of vicarious liability as between employees of the same employer.[515]

The court also addressed arguments that the appellant doctor was vicariously liable under statute,[516] both as a professional employee of a professional corporation and as the primary shareholder of the employer professional corporation.[517] The court dismissed the statutory liability charge, asserting that while the statute did impose personal liability on professional employees of professional corporations, the statute did not extend this personal liability to the acts of nonprofessional employees.[518] Similarly, as a shareholder, the appellant doctor was not personal liable under statute for the negligent acts of the corporation's employees.[519] Since the jury's award inextricably linked liability among the nurse, doctor, and corporation, the court reversed and remanded for a new trial.[520]

B. Classification Under Alabama's Guest Statute Determined at Inception of Journey

In *Coffey v. Moore*,[521] the Alabama Supreme Court held, as a matter of first impression, that the classification of a person as a guest or host under

508. *Id.* at *4 (citing Davenport-Harris Funeral Home, Inc. v. Chandler, 88 So. 2d 875, 877 (Ala. Civ. App. 1956)).
509. *Id.* (citing State Farm Mut. Auto. Ins. Co. v. Vails, 177 So. 2d 821, 824 (Ala. 1965)).
510. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 1 cmt. a (1958)).
511. *Id.*
512. *Id.* at *5-*6.
513. *Id.* at *5.
514. *Id.* at *6.
515. *Id.*
516. *Id.* at *7 (citing ALA. CODE § 10-4-390(a) (1975)).
517. *Id.* at *8.
518. *Id.*
519. *Id.*
520. *Id.* at *12.
521. No. 1031268, 2006 WL 1966989 (Ala. July 14, 2006).

Alabama's guest statute[522] is determined at the inception of the journey; simply changing drivers does not affect or alter the initial classification.[523]

In November 2002, the appellant rented an automobile to drive from Memphis, Tennessee to Tallahassee, Florida to visit her daughter. The appellee accompanied her on the trip but was not listed as a potential driver on the rental agreement nor did she make any financial contribution to the rental or operation of the vehicle. During the return trip, however, the appellee drove the vehicle while the appellant slept in the back seat. While driving, the appellee lost control of the vehicle, and the appellant was injured in the resulting accident.

On December 2, 2002, the appellant filed suit against the appellee for damages sustained from the accident and against the appellee's insurer seeking uninsured/underinsured motorist benefits. Both the appellee and its insurer argued, however, that the appellant was a "guest" under Alabama's guest statute and therefore could not recover absent willful or wanton misconduct. After finding the parties had already stipulated that the appellee was not liable for willful or wanton misconduct, the trial court found the appellant's claims were barred by the guest statute and granted the appellee's motion for summary judgment. The appellant subsequently appealed.

In its analysis, the Alabama Supreme Court noted that the guest statute was intended to benefit hosts and not guests.[524] The court then looked to caselaw from Alabama and other jurisdictions to determine the definition of "guest" under the statute.[525] The court first found that in Alabama, a guest is a passenger that provides no benefit to the driver and is not undertaking a mutually beneficial venture.[526] The court then looked to other jurisdictions to determine whether an individual's status as a guest or host can change at any point and found overwhelming caselaw holding that the owner of an automobile is not the guest of the driver while riding in his own car.[527] Specifically, the court cited *Froemke v. Hauff*,[528] which held that a plaintiff who falls asleep in the backseat of his own car is not a guest of the driver.[529] Following *Froemke*, the court noted that the appellees incorrectly assumed that an "owner" may become a "guest" under the statute by falling asleep in the backseat.[530] According to the court, to hold otherwise would create an inconsistent standard and would make it impossible to pinpoint when a change of status actually occurred.[531] Reviewing the lower court's grant of summary judgment, the court held the appellant's status under the statue as

522. ALA. CODE § 32-1-2 (1975).
523. *Coffey*, 2006 WL 1966989, at *3.
524. *Id.*
525. *Id.* at *3.
526. *Id.* at *2.
527. *Id.* at *3.
528. 147 N.W.2d 390 (N.D. 1966).
529. *Coffey*, 2006 WL 1966989, at *3 (citing *Froemke*, 147 N.W.2d at 390).
530. *Id.*
531. *Id.*

a host was decided at the inception of the trip, and the simple act of changing drivers did not affect that status.[532]

C. The Statute of Limitations for a Wrongful Death Action Brought About by the Death of Stillborn Child Begins on the Date of the Actual Death Within the Womb

In *Ziade v. Koch*,[533] the Alabama Supreme Court held that the statute of limitations on a wrongful death action is calculated from the date of a stillborn child's death in the womb, not from the date of delivery.[534]

The defendants were providing prenatal care to the plaintiff during her pregnancy. During a routine examination near the end of her pregnancy on August 28, 2000, the plaintiff informed one of the defendant physicians that there had been a decrease in fetal movement. The defendant did not find any problems and the plaintiff left. She returned on September 2, however, and informed a different defendant physician of the decrease in fetal movement. Again, she returned home after the defendant found that the fetus was fine. At her next appointment, September 12, 2000, the fetus was determined to have died at some point during the pregnancy and was delivered through induced labor on September 14. An autopsy performed the next day revealed the cause of death and listed the date of death as September 14, 2000.

On September 11, 2002, the plaintiffs commenced a wrongful death action against the defendants and averred that the death of the fetus occurred on September 15, 2000. On October 4, 2005, the defendants moved for summary judgment based on testimony given by three experts for the plaintiff that the fetus died at least forty-eight hours before its death was detected on September 12, 2000. The defendants asserted that this put the filing of the complaint on September 11, 2002, outside of the two-year statute of limitations for a wrongful death action. On October 13, 2005, the defendants filed a motion to amend their answer to assert an affirmative defense of the limitations period. The trial court allowed the defendants to amend and subsequently granted the defendants' motion for summary judgment. The plaintiffs appealed, arguing their claim was not time barred because the limitations period did not begin until September 14, 2000, when the fetus was delivered, regardless of the actual date of death.

On appeal to the Alabama Supreme Court, the plaintiffs sought a determination whether the statute of limitations began running on the actual date of death or on the date the fetus was delivered.[535] The plaintiffs cited three Alabama statutes to support the argument that a determination of death could only be made after the fetus was delivered because only then could a

532. *Id.* at *3-*4.
533. No. 1050378, 2006 WL 1793752 (Ala. June 30, 2006).
534. *Id.* at *8.
535. *Id.* at *6.

doctor make the requisite medical finding to declare the fetus dead.[536] Thus, they argued the fetus was not legally dead until September 15, 2000, when the doctor who performed the autopsy made such a finding, putting the date of death within the limitations period.[537] The court rejected this argument, finding the statutes cited by the plaintiffs were not applicable to this issue, and the correct statutes were found in Alabama Code sections 6-2-38(a) and 6-5-410.[538] Both statutes state that an action for wrongful death must be initiated within two years of death.[539] Therefore, the court found that the statute of limitations began running on the actual date of death of a fetus, not based on a legal, fictional death determined by the date of delivery.[540] Following this holding, the plaintiffs' fetus was legally dead forty-eight hours prior to the discovery of his death on September 12, 2000, and the subsequent filing of the complaint on September 11, 2002, was therefore outside of the limitations period.[541]

D. The Ex parte Cranman *Test for State-agent Immunity Shall be Expanded to Include the Immunity Provided by Section 6-5-338(a) of the Alabama Code*

In *Hollis v. City of Brighton*,[542] (*Hollis II*) the Alabama Supreme Court held that the *Ex parte Cranman*[543] test for state-agent immunity should be expanded to include the immunity provided by section 6-5-338(a) of the Alabama Code.[544]

A police officer on patrol saw flames rising from the plaintiffs' home. The officer awoke the plaintiffs and told them to wait outside the house for the fire department to arrive. One of the plaintiffs refused the officer's order and attempted to extinguish the fire himself. After an unsuccessful effort, he retreated outside but then asked the officer for permission to reenter the house and try to put out the fire again. The officer refused, and by the time the fire department arrived the house, its contents were destroyed.

The plaintiffs sued the City of Brighton, alleging that the fire department was negligent in responding to the fire and the police officer was negligent or wanton for not allowing the plaintiff to reenter the house. The defendant moved for summary judgment, arguing that both claims were barred under the doctrine of state-agent immunity. The trial court granted summary judgment for the defendant and the plaintiffs appealed. In *Hollis v. City of*

536. *Id.* (citing ALA. CODE § 22-9A-1(2) (1975); Alabama Determination of Death Act, ALA. CODE §§ 22-31-1 to -4 (1975); and Alabama Uniform Anatomical Gift Act, ALA. CODE §§ 22-19-40 to -47 (1975)).
537. *Id.*
538. *Id.* at *8.
539. *Id.*
540. *Id.*
541. *Id.*
542. No. 1040073, 2006 WL 2089919 (Ala. July 28, 2006).
543. 792 So. 2d 392 (Ala. 2000).
544. *Hollis II*, 2006 WL 2089919, at *8.

Brighton[545] (*Hollis I*), the Alabama Supreme Court upheld summary judgment for the fire department but reversed and remanded on the defendant officer's liability because the record did not establish as a matter of law whether the officer's actions fit within the *Cranman* test or section 6-5-338(a) of the Alabama Code. The court also noted that because the policeman's alleged negligence was not raised in the defendant's motion for summary judgment, it was not addressed. On remand, the defendant filed a new motion for summary judgment arguing the officer was immune under both the fourth category in *Cranman* and sections 6-5-338(a) and 13A-10-6 of the Alabama Code. The trial court granted summary judgment and the plaintiffs again appealed.

As they did in *Hollis I*, the Alabama Supreme Court noted language variations between the fourth category in *Cranman* and section 6-5-338(a) of the Alabama Code.[546] The court found these variations, coupled with Justice Lyons's special writing that indicated *Cranman* may be modified if necessary,[547] demanded section 6-5-338(a) of the Alabama Code to be incorporated into the fourth category in *Cranman*.[548] This section provides that one is immune from "conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties,"[549] and the revised fourth category would provide a state agent with immunity when "exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons, *or serving as peace officers under circumstances entitling such officers to immunity pursuant to § 6-5-338(a), Ala. Code 1975*."[550] Because the court's expansion of *Cranman* granted immunity to the officer, the court found the officer could not be held liable and affirmed the trial court's decision to grant summary judgment to the defendant.[551]

E. A City Has a Duty to Warn of a Danger On a Public Road at a Railroad Crossing if It Knew or Should Have Known the Danger Existed

In *Ex parte CSX Transportation, Inc.*,[552] the Alabama Supreme Court held that a defendant city had a duty to warn the plaintiffs of danger in the public roadway if the city knew or should have known that the danger existed.[553]

The plaintiffs were injured while crossing railroad tracks in the city of Athens after the driver drove her car off the pavement and onto the railroad

545. 885 So. 2d 135 (Ala. 2004).
546. *Hollis II*, 2006 WL 2089919, at *7 (citing *Hollis I*, 885 So. 2d at 143-44).
547. *Id.* (citing *Hollis I*, 885 So. 2d at 145 (Lyons, J., concurring in the rationale in part and concurring in the judgment)).
548. *Id.*
549. *Id.* at *8 (quoting ALA. CODE § 6-5-338(a) (2005)).
550. *Id.* (additional language emphasized).
551. *Id.*
552. Nos. 1041971, 1050016, 2006 WL 574035 (Ala. Mar. 10, 2006).
553. *Id.* at *5.

bed. The defendant railroad company had been upgrading and repairing crossings within the city, including the crossing where the accident occurred. At the time of the accident, the defendant had created a ditch across the road in front of the crossing as part of the upgrading process but had coordinated street closings with the city and borrowed traffic-control devices to block traffic from streets that would be affected by the work. When the accident occurred, however, there were no traffic-control devices or warnings marking that the road was closed. The plaintiffs filed a complaint against the city and the defendant, alleging negligence and wantonness by the railroad company and a breach of a duty by the city maintain the roadway and to provide proper warning to the plaintiffs of a danger in the public roadway. The trial court entered summary judgment in favor of both defendants. After the Alabama Court of Civil Appeals reversed the summary judgment, the defendants appealed to the Supreme Court of Alabama.

The court found the city's argument that it did not have a duty to maintain a railroad crossing or a duty to warn of a dangerous condition at a railroad crossing unpersuasive.[554] The court distinguished the city's reliance on *Yates v. Town of Vincent*,[555] explaining that although *Yates* supported the proposition that the city did not owe a duty to maintain the railroad crossing or the road crossing, it did not address the issue of whether the city had a duty to warn the public of a danger that existed in a public street if the city knew or should have known of the hazard.[556] Furthermore, section 11-47-190 of the Alabama Code established the city indeed had a statutory duty to warn the public if it knows or should have known of any hazard in the public right of way.[557] The court found additional support in prior cases that established a city has a duty to warn of a hazard in the public streets, even if the hazard was created by another.[558]

The court also rejected the defendant railroad company's assertion that summary judgment was appropriate. The court found the existence of warning devices located a block away from the accident site created a reasonable inference that the warning devices were not properly placed by the defendant.[559] Thus, a genuine issue of material fact existed as to whether the defendant railroad company placed safety devices around the roadway hazard, precluding summary judgment for the defendant. Therefore, the court held that the city owed a duty to warn the plaintiffs of a danger in the road if the city knew or should have known such a danger existed and affirmed the Court of Appeals' reversal of the trial court's summary judgment in favor of the city and the defendant railroad.[560]

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554. *Id.* at *3.
555. 611 So. 2d 1040 (Ala. 1992).
556. *Ex parte CSX Transp.*, 2006 WL 574035, at *3.
557. *Id.* at *4 (citing ALA. CODE § 11-47-190 (1975)).
558. *Id.* (citing City of Bessemer v. Brantley, 65 So. 2d 160 (Ala. 1953); City of Montgomery v. Moon, 94 So. 337 (Ala. 1922); and City of Montgomery v. Ferguson, 93 So. 4 (Ala. 1922)).
559. *Id.* at *7.
560. *Id.* at *5, *7.

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XIV. WILLS AND TRUSTS

A. Alabama's Pretermission Statute Does Not Take into Account Prior Marriages, and the Courts May Not Revise the Statute to Do So

In *Gray v. Gray*,[561] the Alabama Supreme Court held that section 43-8-91(a)(2) of the Alabama Code is valid in excluding a child born after the execution of a will, and who was omitted from that will, from taking a share of the testator's estate when that section's criteria are met.[562] Additionally, the court held the section is valid even when the "other parent" of the omitted child is not also the parent of children already born at the time the will was executed.[563]

The appellee's father executed his will in 1981. At that time, he was married to the appellee's mother and had two children from a previous marriage. The will devised the decedent's entire estate to the appellee's mother and excluded both children. The appellee was born three years later in 1984. The decedent and his wife, the appellee's mother, divorced in 1989, and the decedent did not change his will prior to his death in 2004. Because of the divorce, however, the appellee's mother could not inherit from the decedent's will. The appellee petitioned the probate court for a judgment declaring that he was entitled to a share of the decedent's estate under section 43-8-91(a) of the Alabama Code. The executor of the estate claimed the exception set forth in section 43-8-91(a)(2) prevented the appellee from receiving a share in the estate, however, because the decedent had two children when he executed his will and his estate was devised entirely to the appellee's mother. The probate court rejected the executor's argument and held that the appellee was entitled to his share of the estate. The executor appealed.

The Alabama Supreme Court began by reviewing the rules of statutory interpretation relevant to the Probate Code.[564] First, the words of a statute must be given "their plain, ordinary, and commonly understood meaning" and the language must be interpreted to mean exactly what it says.[565] Second, the Probate Code specifically requires that its sections be construed liberally to give effect to the intent of a decedent in distributing his property.[566] Contrary to two other exceptions to section 43-8-91(a), which explicitly require a court to consider the decedent's intent in omitting an afterborn child, the section at issue in this case, 43-8-91(a)(2), did not look to determine the decedent's intent when making the devises in the will.[567] Therefore, the court determined the exception at issue in this case automati-

561. No. 1050143, 2006 WL 1793753 (Ala. June 30, 2006).
562. *Id.* at *3 (citing ALA. CODE § 43-8-91).
563. *Id.*
564. *Id.* at *2-*3.
565. *Id.* at *2 (citing *Ex parte* Gadsden Reg'l Med. Ctr., 904 So. 2d 234, 236 (Ala. 2004)).
566. *Id.* (citing ALA. CODE § 43-8-2(b)(2)).
567. *Id.*

cally applied if the two conditions were met, and the court was not allowed to look further into the testator's intent.[568]

Applying these rules to interpret the statute at issue, the court found that the statute was not ambiguous, and it clearly excluded after-born children omitted from a will from taking from a parent's estate if the testator had one or more children when the will was executed and the will devised a substantial portion of the estate to the other parent of the omitted child.[569] The estate at issue in this case clearly met those two requirements; the decedent had two children at the time he executed his will, and he left his entire estate to the appellee's "other parent."[570] The appellee argued that the exception should not apply in his case because the section does not take into account a situation like this one, where a testator is divorced from his children's mother and has executed a will leaving his entire estate to his new wife and who he later has a child with.[571] The court rejected the argument, however, finding the rule that since the statute was one of substance and was in derogation of the common law, it must be strictly construed and not extended beyond the its terms.[572] Accordingly, the appellee could not receive a share of his father's estate.[573]

568. *Id.*
569. *Id.*
570. *Id.*
571. *Id.*
572. *Id.*
573. *Id.*