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# ALABAMA LAWYER

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A cold winter morning in rural Alabama

—Photo by Marie Ward, Lanett

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W. Gregory Ward, Lanett.....Chair and Editor  
 wgward@mindspring.com  
 Wilson F. Green, Tuscaloosa .....Associate Editor  
 wgreen@fleenorgreen.com  
 Jonathan C. Hill (Rudy), Montgomery.....Associate Editor  
 rhill@bradley.com  
 Linda G. Flippo, Birmingham.....Associate Editor  
 lflippo@whitearnolddowd.com

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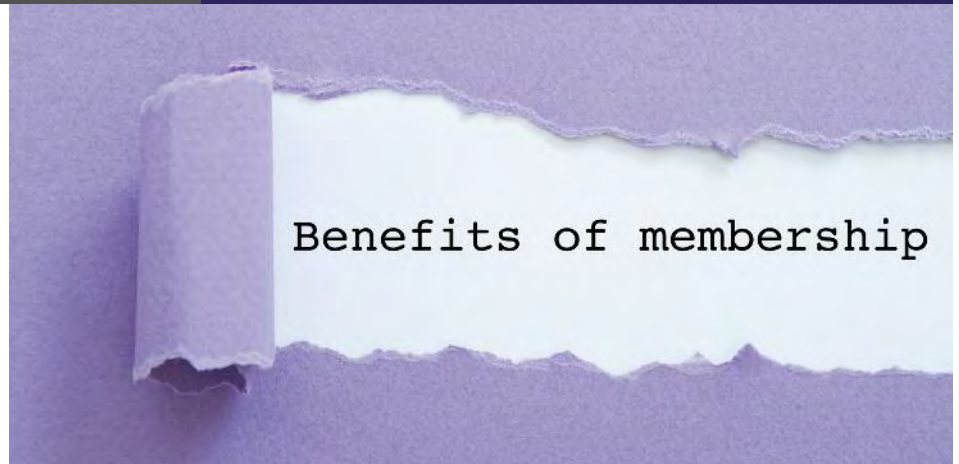


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*Christina D. Crow*  
*ccrow@jinkslaw.com*



## Member Benefits Update

New goals often come with a new year. For many of us, one goal is to save more and spend less. One of my main priorities for this year is to provide significant value and monetary savings to Alabama State Bar members through increased member benefits and to increase awareness of the member benefits we have in place. George Parker and Jimbo Terrell are co-chairs of the Member Benefits Committee. With the assistance of Ashley Penhale, state bar director of programs, they introduced several recently approved benefits.

These benefits include discounts with:

- Cartography Consulting;
- Hertz, Dollar and Thrifty Rental Cars;
- Identillect;
- Indexed I/O;
- Lenovo Computers;
- Office Depot;
- Orangetheory Fitness;
- Smith.ai; and
- Wellbeing Coaching Consultants

These new benefits are in addition to the numerous ones already offered to our members, including from:

- ABA Retirement Funds;
- ABA Web Store and Books for Bars;
- Avis and Budget Rental Cars;
- Bar Member Travel Discount;
- Brooks Brothers;
- Casemaker;
- Clio Practice Management;
- Conference America;
- CosmoLex Practice Management;
- Easysoft Closing Software;
- GEICO Insurance;
- ISI Major Medical, Life, Disability, Business, Overhead, Umbrella and Other Insurance
- LawPay Credit Card/Debit Card Processing;
- Legal Directories Alabama Blue Book;
- LocalLawyers Internet-Based Client Development;



- MyCase;
- Orlando Employee Discounts;
- Robert Trent Jones Golf Trail Marriott Hotels Discount;
- Rocket Matter Practice Management;
- Ruby Receptionists Virtual Receptionist Service;
- Thriving in the Legal Profession; and
- UPS Shipping Discounts

To stay up to date on the member benefits, look for highlights such as Member Benefit Mondays featured in *The Scoop* or on the bar's social media channels. For a full list of benefits, visit <https://www.alabar.org/members/benefits/> and click on Discounts. Log in to your Alabama State Bar account to get the discount codes.

Recently, a new lawyer shared with me that he saved several hundred dollars on his car insurance with the GEICO discount. My firm has taken advantage of several of these discounts through the years. You can receive 20 percent off the best available rate at all eight Marriott hotels associated with the Robert Trent Jones Golf Trail: Renaissance Montgomery Hotel & Spa at the Convention Center; Renaissance Birmingham Ross Bridge Golf Resort & Spa; Renaissance Mobile Riverview Plaza Hotel; Battle House Renaissance Mobile Hotel & Spa; Grand Hotel Marriott Resort, Golf Club & Spa; Montgomery Marriott Prattville Hotel & Conference Center at Capitol Hill; Auburn Marriott Opelika Hotel & Conference Center at Grand National; and Marriott Shoals Hotel & Spa. I hope that our members will utilize this valuable discount as they travel. Log in to your state bar account to access the discount code before booking your reservation at [marriott.com](http://marriott.com).

After surveying a diverse group of state bar members, the committee learned that members are most interested in receiving discounts in technology and software, travel and recreation, office supplies and services, clothing and retail, and dining. The Member Benefits Committee will continue to look for additional benefits for 2020 to enhance your membership and bring even greater value to your state bar membership. We

are also exploring health insurance and cybersecurity insurance benefits.

My theme is "Better Together." We are working hard to identify amazing benefits and bring them to the 18,000+ members of the Alabama State Bar. The committee would like your thoughts, input, and ideas on any new benefits that you could help us obtain or that you would like us to offer. Contact me at [ccrow@jinkslaw.com](mailto:ccrow@jinkslaw.com), George Parker at

[gparker@bradley.com](mailto:gparker@bradley.com), Jimbo Terrell at [jterrell@mtattorneys.com](mailto:jterrell@mtattorneys.com), or Ashley Penhale at [ashley.penhale@alabar.org](mailto:ashley.penhale@alabar.org). We would love to hear from you.

Many thanks to George Parker and Jimbo Terrell for their help writing this article and for their leadership on the Member Benefits Committee, and to everyone on the committee for vetting these discounts to make sure we offer the best options available for our members. ▲

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## EXECUTIVE DIRECTOR'S REPORT

*Phillip W. McCallum*  
*phillip.mccallum@alabar.org*

# Saluting Our Veterans

January isn't typically the month you might expect to read a column about veterans, but in our case, the timing makes perfect sense. This past November, we launched a new feature series, "Salute to Veterans." The response was so great that we realized it wasn't something we should limit to only one month.

To get this new series off the ground, we asked member veterans to send us photos and stories from their time in service. In the first few weeks, thanks to the help of folks who assisted in spreading the word (like Col. Chuck Langley, state judge advocate for the Alabama National Guard), we had dozens of submissions. In addition to placing those photos on a newly-created page on our website, we also shared a group of them each Friday on Facebook.

Judge John L. Carroll was in the United States Marine Corps from June 1965 to December 1969. He was a bombardier/navigator in the A6A Intruder aircraft, and from October 1967 to October 1968, he was with Marine All-Weather Attack Squadron 242 at the Danang Airbase in Vietnam. During that time, he flew more than 200 combat missions, many of them over North Vietnam.



*Carroll*



*Luke Bentley (front row, center) and air crew prior to deployment*

Luke Bentley, who was a C-130 pilot in the 908<sup>th</sup> Airlift Wing, told us about going to law school while flying for the 908<sup>th</sup>. "Once during law school, I skipped a few days of classes to fly supplies to Haiti after the big earthquake," he said. "I was glad that I was able to support that relief mission to Haiti, and I enjoyed responding to professors asking why I had missed class."

Amy Quick Glenos's civilian law practice focuses on employment-related disputes and litigation. In addition, Glenos is a reserve component soldier and captain in the United States Army JAG Corps., Alabama Army National Guard. She is assigned to the 167<sup>th</sup> Theater Sustainment Command in Fort McClellan, Alabama, where she serves as trial counsel in administrative



*Glenos*

separation boards and personnel disciplinary matters.

Retired Col. Bryan E. Morgan served more than 34 years in the Guard and Reserve, including tours at the Pentagon and as the state judge advocate for the Alabama Military Department. He



Morgan

is a graduate of the Army Airborne School, the Army Judge Advocate General's School and the Army and Air Force War Colleges, and received the Legion of Merit. He is a 1977 graduate of the University of Alabama and a 1981 graduate of Cumberland School of Law. He serves as director of career development at Faulkner University Jones School of Law and has served as an attorney with the State of Alabama.



Houts with his baby daughter

James R. Houts, who is a judge advocate in the Alabama Army National Guard, shared a photo of him seeing his daughter for the first time upon his return home from service. She was born in 2005 while he was deployed to Iraq with the XVIII<sup>th</sup> Airborne Corps.

Rich Raleigh attended the University of Alabama on a U.S. Army ROTC Scholarship, graduated in 1992 as a Distinguished Military Graduate and was commissioned a Second Lieutenant in the U.S. Army Armor Branch. He

attended law school from 1992-1995 on an educational delay, and then served on active duty from 1995-2000 as a JAG Officer with U.S. Army Judge Advocate General's Corps in Virginia, Germany, Bosnia-Herzegovina, Croatia and former Yugoslav Republic of Macedonia. Raleigh also served from 2000-2005 in U.S. Army Reserves JAG Corps, serving with the 154<sup>th</sup> Legal Support Organization (Trial Defense Service), completing his service as a major.



Raleigh

Finally, Judge Lang Floyd, who spent 12 years in private practice and 20 as a trial court judge, served 28 years in the Army Reserves as a judge advocate general. In speaking with us about the new veterans' series we'd begun, he shared memories of fellow lawyer friends who had to temporarily shut down their practice because they were called to active duty and deployed overseas.



Floyd

The stories themselves were amazing, and many of them were quite moving. What stood out most to us, however, was the immense gratitude shown by our featured veterans; they were grateful for the simple fact that we took time to recognize their service. It made us realize that our series, while focused annually each November, should also become a permanent fixture on our website. They deserve our thanks every day of the year, so that page will remain all year and can be updated and added to as needed.

The timing is also significant because the Board of Bar Commissioners recently considered a military spouse exception to Alabama's rule on reciprocal admission. The exception, if approved by the Supreme Court of Alabama, would allow lawyer-spouses of military members stationed in Alabama to be admitted to the Alabama State Bar without having to pass the bar exam here. For those families who sacrifice greatly for our security, this is an important change. It removes the barriers that prevented them from continuing on with their profession in a meaningful way.

We hope you'll join us in celebrating and saluting our service members year-round, not just on the annual designated holidays. ▲

## Lunch with the CHIEF JUSTICE



*Pictured above, left to right, are Jon Townsend, Stephanie Hunter, Linda Lund, Scott Holmes, Emily Baggett, Chief Justice Parker, Christy Crow, Tinsley Griffin Hill, Crystal Smitherman, Joseph Green, Lauren James, Bob Methvin, and Phillip McCallum. New admittees Hill, Smitherman, Green, and James were selected to have lunch with Justice Parker, after enrolling in the Volunteer Lawyers Program during Pro Bono Month 2019.*



*Over 150 lawyers attended the section's Cyber Crime and Law Firms CLE event at the state bar's 2019 Annual Meeting, with another 130 watching via Livestream.*

# Solo & Small Firm Section Update

**By Tazewell T. Shepard, III**

The Solo & Small Firm Section is the largest and most active section of the Alabama State Bar, with about 940 members as of September 2019. The SSF Section emphasizes service to solo and small firm lawyers, but is open to all lawyers in Alabama. Section members are also encouraged to pursue service to their community, including pro bono cases with the various volunteer lawyers programs in Alabama.

The section's most popular feature is its very active ListServ, where members ask for advice on legal issues, post possible referrals, and trade suggestions on law practice management.

The section also creates free and low-cost CLE opportunities for its members and sometimes for all

Alabama attorneys, such as live-streaming a section CLE event. The most popular CLE opportunity has been the probate practice series, where the section partnered with the Alabama Probate Lawyers Association and local bars in seven areas of the state to provide a CLE event of six credit hours and lunch, all for \$25. This program reached almost 1,000 lawyers during spring 2019, and section leadership is planning a similar six-hours-and-lunch program on district court practice for spring 2020.

In addition to the section's growing forms and knowledge bank, a partnership between the section and Legal Services Alabama will soon produce an electronic book of useful legal forms for both pro



*Almost 200 lawyers attended the section's Probate Practice CLE event in Mobile this past summer.*

bono and private cases. The section is also upgrading its website and Facebook page to provide additional services to its members.

The second annual winter meeting of the SSF Section will take place in Birmingham in spring 2020. The section is also working on mentoring and wellness program goals for 2020.

Section membership is only \$15 per year, and questions can be directed to section Chair Taze Shepard at [taze@ssmattoorneys.com](mailto:taze@ssmattoorneys.com). ▲



*Montgomery County Bar President Frank Snowden and section Chair Taze Shepard served as waiters at the MCBA's annual Community Table event to benefit the Montgomery VLP and Mercy House.*



## EDITOR'S CORNER

**W. Gregory Ward**  
wgward@mindspring.com



# Welcome to the appellate edition.

Appeals are—we lawyers like to describe in Latin—*sui generis*: a genus unto itself. Nothing is quite like them. Let's tease that out a little bit.

When a new case comes into a law office—civil or criminal—the case generally arrives as an unformed mess and someone wants your help. The lawyer's job is to take those messy facts and attempt to mold them into a shape that he thinks gives his client the best chance to get the result they want.

An appeal has little in common with this.

So, what is an appeal?<sup>1</sup>

An appeal happens when one side (we call them the appellant) is dissatisfied with what a trial judge or jury decided, so they look for someone with authority to give them a do-over. They ask for a document showing what happened (the transcript) and the documents used (the record on appeal). They have to follow imposed draconian rules of both procedure and form, and within those rules they have to draft a specialized document (called a brief) and send it to a group of people elected or appointed to read them and make a decision (appellate judges). And the brief

has to cite to prior appeals and prior rulings by the appellate courts. Alabama's appellate courts don't usually want the people who sent them the briefs to come and talk to them (quaintly called oral argument), so the briefs are either mailed in or filed online (or both). The lawyers who filed the briefs don't have to talk to each other, and all that is exchanged is paper and electrons. After a while the appellate court judges write something and send it out (we call that an opinion). The opinion either ends things, or we start a new round at another appellate court.

Ain't nothing like it.

*The Alabama Lawyer* decided to dedicate an issue to this whole process.

Our problem wasn't finding things to write about, it was deciding when to stop. An enormous body of law surrounds just the issue of the process of appeals, much less the substantive law they address. And if you have any question about the breadth of appellate court opinions, go to a law library and take a good look at a printed copy of the *Alabama Digest* (which is just a formal short-form summary of opinions). I took my father's wooden folding ruler to my copy, and it measured about 80 inches—more than six feet. If you've never spent time looking through a paper copy of our digest, spend some time just flipping through it. You'll be shocked at how many things are actually on paper pages. And if anyone sees you, they'll be impressed.

Our friend and fellow editorial board member Lloyd Gathings helped us assemble this edition. He knows a little something about appeals, and he did a fine job.

Dave Wirtes and Bruce McKee are two of Alabama's best appellate lawyers. They know that if you understand (or control) the standard of review the appellate court applies, you've shifted things in your favor before you even start. They wrote "Alabama's Appellate Standards of Review in Civil Cases" to help you nudge the case in your favor (page 22).

Are there special considerations for certain types of cases? Randy Nichols gives us a head's up for one type in his "A Primer for Navigating Potential Appellate Issues in Child Custody Cases." As a bonus, he tells us how to think through both pre- and post-trial issues to decide if you need appellate review, and if you need it, how to get it (page 40).

While everyone else is talking about how to handle an appeal, Allan Chason fascinates us with the story of how an unlikely Fairhope, Alabama lawyer who was trying to help out some friends with a termite issue stumbled his way into having to make an oral argument in what became a landmark case before the United States Supreme Court. Wouldn't you know it, just before he had to argue, a new Supreme Court associate justice was seated, so the press was on high alert. You never know where good articles come from, and this one came from a conversation

between state bar President Sam Irby and me as we shared a table and a Diet Coke between seminars at last summer's annual meeting. Sam, my thanks.

Allan's article, which has the terrific title of "An Alabama Lawyer in the United States Supreme Court," starts on page 46.

Ed Haden, Jason Tompkins, and Robert Baxley do their best to keep us from messing up things before we begin. In "Preventing Waiver of Arguments on Appeal" they help us make sure that we have a record to appeal from. With 131 footnotes included, their article is a useful research tool. See what you think (page 50).

Just to keep our readers on their toes, we always try to include an off-topic article. This month's is "Alabama's Class Action Statute Turns 20: A Defense Retrospective." Mike Pennington, Scott Smith, and Hunter Pearce give us their thoughts on what effect Alabama's 1999 watershed class action statute had. Spoiler alert—it was huge (page 64).

So, enjoy the articles. Email me at [wguard@mindspring.com](mailto:wguard@mindspring.com) if you have questions or comments or want to write. Come join the fun. We are always looking for our next group of excellent writers.

And just wait till you see what we have for you in March. ▲

## Endnote

1. Before my email blows up, I admit up front that this is an elemental view and that I'm leaving out a lot.



*Save  
the Date*

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**JULY 2019 BAR EXAM  
 STATISTICS  
 OF INTEREST**

Number sitting for exam.....	486
Number passing exam (includes MPRE deficient and AL course deficient) .....	298
Bar exam pass percentage.....	61.3 percent

**Bar Exam Passage by School**

University of Alabama School of Law .....	97.0 percent
Cumberland School of Law .....	82.6 percent
Faulkner University Jones School of Law.....	63.0 percent
Birmingham School of Law .....	21.7 percent
Miles College of Law .....	7.1 percent

**Certification Statistics\***

Admission by examination .....	279
Admission by transfer of UBE score .....	32
Admission without examination (reciprocity) .....	21

*\*Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period May 15, 2019 through October 15, 2019. To be certified for admission, a candidate must satisfy all admission requirements as prescribed by the Rules Governing Admission to the Alabama State Bar.*

**For detailed bar exam statistics, visit <https://admissions.alabar.org/exam-statistics>.**

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Jeremy Lynn Mapes  
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# Alabama's Appellate Standards Of Review in Civil Cases

By David G. Wirtes, Jr. and Bruce J. McKee

## This is a primer on Alabama's appellate standards of review

in typical civil cases. The standards set forth here should be considered baselines or starting points, and you should always check for changes and updates in the law.

Why does the standard of review matter? For starters, Ala. R. App. P. 28(a)(8) *requires* that your appellate brief "shall" contain "[a] concise statements of the standard of review applicable to each issue." Alabama's Rule of Appellate Procedure 28(a)(8) and (b) state in pertinent part:

### Rule 28 BRIEFS

(a) Brief of the Appellant/ Petitioner. The brief of the appellant or the petitioner, if a petition for a writ of certiorari is granted and the writ issues, shall comply with the form requirements of Rule 32. In addition, the brief of the appellant or the petitioner shall contain under appropriate headings and in the order here indicated:

\* \* \*

(8) Statement of the Standard of Review. A concise statement of the standard of review applicable to each issue;

\* \* \*

(b) Brief of the Appellee/ Respondent. The brief of the appellee, or the respondent if a petition for a writ of certiorari is granted and the writ issues, shall conform to the requirements of subdivision (a)(1)-(12), except that a statement of the jurisdiction, the case, the issues, the facts, or the standard of review need not be included unless the appellee/respondent is dissatisfied with those statements as made by the appellant/petitioner.

Conformance with the requirements of the rules is mandatory. Recently, in *May v. May*, [Ms. 2180076, June 21, 2019] \_\_ So. 3d \_\_, 2019 WL 2558800, at \*1 (Ala. Civ. App. 2019), the court unanimously issued a stern rebuke, observing “Rule 28(a), Ala. R. App. P., sets forth what an appellant’s brief ‘shall contain.’ The rule is not merely a suggestion as to what one might wish to include in a brief. Rule 28(a) mandates that the appellant include certain specific information necessary for this Court to conduct a meaningful review of the matter before us.” Ms. \*2.<sup>1</sup>

The focus of this article is Rule 28(a)(8)’s and 28(b)’s requirement of a “concise statement of the standard of review applicable to each issue.” The Court Comment to the amendment to Rule 28, effective June 1, 2002, states, “[a] conclusory statement of the standard of review is sufficient, reserving any argument as to the standard of review for the argument portion of the brief.”

What then are the pertinent standards of review commonly at issue in civil cases? What is the significance of identifying the correct standards of review? And, where should the lawyer begin his analysis when considering which issues to raise on appeal?

A threshold determination is always whether the appellant sufficiently raised and preserved the issue sought to be appealed. Note that Ala. R. App. P. 4(a)(3) provides: “Any error or ground for reversal or modification of a judgment or order which was asserted in the trial court may be asserted on appeal without regard to whether such error or ground has been raised by motion in the trial court under [Ala. R. Civ. P.] 52(b) or Rule 59.” This rule “prevents [the appellate courts] from judicially determining issues that have been raised for the first time on appeal.” *University of Alabama Hospitals v. Alabama Renal Stone Institute, Inc.*, 518 So. 2d 721, 725 (Ala. Civ. App. 1987).<sup>2</sup> As a general rule, appellate review “is limited to the issues that were before the trial court—an issue raised on appeal must have first been presented to and ruled on by the trial court.” *Norman v. Bozeman*, 605 So. 2d 1210, 1214 (Ala. 1992). “[A]ppellate courts

can only review the actions of trial courts for alleged error, properly preserved and properly presented for review.” *Bill Steber Chevrolet-Oldsmobile, Inc. v. Morgan*, 429 So. 2d 1013, 1015 (Ala. 1983). “[T]o preserve an alleged error of law for appellate review, the [defendant] must bring the alleged error to the attention of the trial court and receive an adverse ruling.” *Grove Hill Homeowner’s Ass’n, Inc. v. Rice*, 43 So. 3d 609, 613 (Ala. Civ. App. 2010); *Cottrell v. National Collegiate Athletic Ass’n*, 975 So. 2d 306, 349 (Ala. 2007). “An appellate court will not consider issues which are not properly delineated and it will not search out errors which have not been properly preserved or assigned.” *McAliley v. McAliley*, 638 So. 2d 10 (Ala. 1983); *Ex parte Riley*, 464 So. 2d 92 (Ala. 1985).

Another threshold consideration is Ala. R. App. P. 45’s harmless error rule:

#### **Rule 45. Error Without Injury**

No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.

See also Ala. R. Civ. P. 61. Examples of application of Rule 45’s harmless error rule are numerous: *Chance v. Dallas County, Ala.*, 456 So. 2d 295, 299 (Ala. 1984) (“[R]eversible error does not find its source in mere imperfection, for litigants are not entitled to a *perfect trial*, only a *fair one*.”); *Betha v. Springhill Memorial Hosp.*, 833 So. 2d 1, 7 (Ala. 2002) (“Because a defendant has no right to a perfect jury or a jury of his or her choice, but rather only to an ‘impartial’ jury, see Ala. Const. 1901, § 6, we find the harmless-error analysis to be the proper method of assuring the recognition of that right.”); *Flagstar Enterprises, Inc. v. Foster*, 779 So. 2d 1220, 1221-22 (Ala. 2000) (“Although it is error for a trial court not to grant a request for a hearing on a motion for a new trial, the error is not necessarily reversible error as when an appellate court determines that there was no probable merit to the motion, it may affirm based on the harmless-error rule.”); *Chafian v. Alabama Bd. of Chiropractic Examiners*, 647 So. 2d 759, 762 (Ala. 1994) (“Variance between dates of acts

alleged in complaint against chiropractor and dates of acts offered by Board of Chiropractic Examiners during administrative hearing was harmless error which did not result in denial of due process”); *Waldrop v. Langham*, 260 Ala. 82, 87, 69 So. 2d 440, 444 (1953) (Alleged errors by trial court in admission and exclusion of testimony was error without injury when plaintiff failed to make a *prima facie* case); *Malone v. City of Mobile*, 602 So. 2d 403-04 (Ala. 1992) (Incorrect jury instruction deemed harmless as it did not prejudice the plaintiff because it stated a theory of recovery that did not exist under current Alabama law); *Osborne Truck Lines, Inc. v. Langston*, 454 So. 2d 1317, 1328 (Ala. 1984) (Any error by the trial court in permitting one doctor to comment upon the report of another was harmless when that report had been admitted into evidence and the testimony was wholly insignificant as regards any element of the case); *City of Gulf Shores v. Harbert Intern.*, 608 So. 2d 348, 354 (Ala. 1992) (A trial court’s failure to admit cumulative evidence is harmless error).

Assuming the appellate issue is properly preserved and presented and not pretermitted by Rule 45’s error-without-injury rule, the next step is identifying the applicable standard of review.

Why is this so important? The former Chief Judge Emeritus of the United States of Court of Appeals for the Third Circuit, Ruggero J. Aldisert, wrote in *Winning on Appeal—Better Briefs and Oral Argument*:

“Standards of review are critically important in effective advocacy. In large part, they determine the power of the lens through which the appellate court may examine a particular issue in a case. The error that may be a ground for reversal under one standard of review may be insignificant under another. It does not matter what you ask the court to do on appeal if the court cannot jump the hurdle imposed by the standard of review. You must craft your brief on appeal to reflect the proper standard and to show why, under that standard, your client deserves to win. If your appeal raises more than one issue, then you should state the standard of review for each point.

...The competent advocate will have a clear understanding of the scope of review pertaining to each point in his or her brief....

I elevate the necessity of correctly stating the review standard to a question of minimum professional conduct.”

Aldisert, Ruggero J., *Winning on Appeal—Better Briefs and Oral Argument*, § 5.2, pp. 56-57 (2d Ed. 2003).

The former Chief Judge of the United States Court of Appeals for the Fifth Circuit, John Godbold, states in *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 S.M.U. L. Rev. 801 (1976):

“The standard of review is the appellate judge’s ‘measuring stick.’ Early in the appeal, counsel must familiarize himself with the appropriate standard of appellate review for each issue. He cannot adequately prepare his case without that knowledge.... Unless counsel is familiar with the standard of review for each issue, he may find himself trying to run for a touchdown when basketball rules are in effect.”

*Id.*, pp. 810-11.

Former Supreme Court of Alabama Staff Attorney and Faulkner University Associate Law Professor Joi (Montiel) Christoff wrote in *Your Appellate Brief: An Obstacle Course for the Court or a Clear Pathway to Your Conclusion* states:

“The standard of review may not be the same for each issue you present. If you present three issues, outline the standard of review for each issue. Do not overlook the standard as you proceed through your argument. In other words, do not argue as if you and your opposing counsel are on a level playing field if you are not. If the standard of review is in your favor, weave that into your argument. If the standard of review is not favorable to you, explain why it is not fatal to your argument.”

*Your Appellate Brief: An Obstacle Course for the Court or a Clear Pathway to Your Conclusion*, 73 Ala. Law. 344, 346 (Sept. 2012).

Judge Roth of the Third Circuit writes in *Persuading Quickly: Tips for Writing an Effective Appellate Brief* that the standard of review section is vitally important because it:

“[M]ay constrain the judge to the point that the standard dictates the decision. For instance, under an abuse-of-discretion standard, it does not matter if the judge believes that an advocate’s argument is ultimately right. The advocate’s argument, instead, is a legal winner (or a loser) if the lower court simply did not get it wrong enough. By contrast, a judge is unconstrained under a *de novo* standard, under which the appellate judge does not have to defer to the lower court’s decision.



You must [ ] understand that the standard of review controls the argument.... Too many advocates set out a standard of review without thinking critically about what they are doing. Even worse, an advocate may uncritically accept her opponent’s characterization of it. Either course of action will undermine the advocate’s chances of success in the appeal.”

*Id.*, 11 *Journal of Appellate Practice and Process* at 449.

What then are Alabama’s appellate standards of review in civil cases?

## Civil Cases

### A. Review of judgments

#### 1. Dismissals

- a. **Ala. R. Civ. P. 12(b)(1) dismissal for lack of jurisdiction over the subject matter**

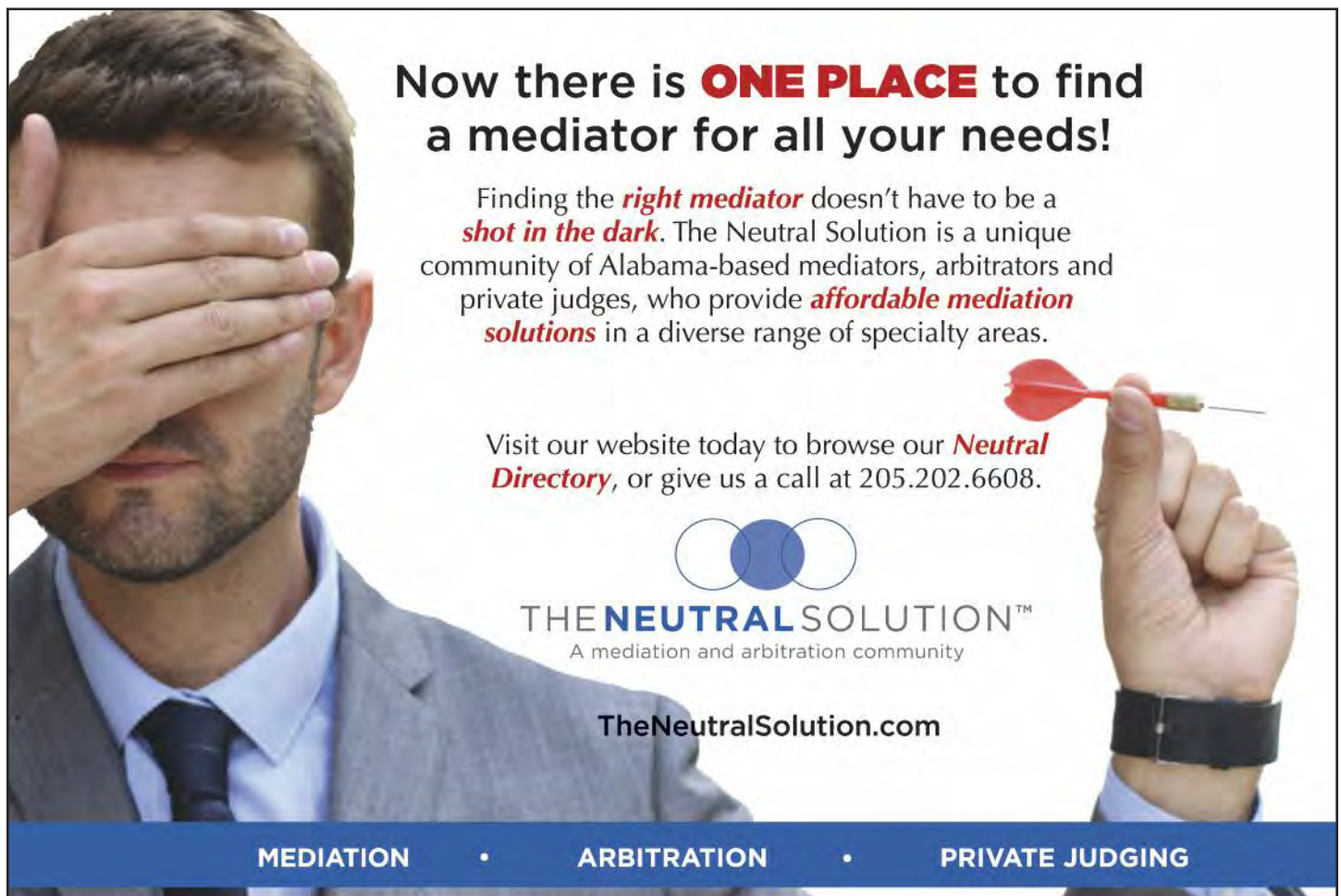
“We review *de novo* whether the trial court had subject-matter jurisdiction.”

*Taylor v. Paradise Missionary Baptist Church*, 242 So. 3d 979, 986 (Ala. 2017) (quoting *Solomon v. Liberty National Life Ins. Co.*, 953 So. 2d 1211, 1218 (Ala. 2006)).

#### b. **Ala. R. Civ. P. 12(b)(2) dismissal for lack of jurisdiction over the person**

“We recently addressed the standard of review in a proceeding challenging the trial court’s ruling on a motion to dismiss for lack of personal jurisdiction in *Ex parte Bufkin*, 936 So. 2d 1042, 1044-45 (Ala. 2006):

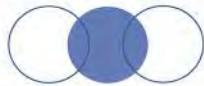
““““The writ of mandamus is a drastic and extraordinary writ, to be “issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.” *Ex parte*



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*United Serv. Stations, Inc.*, 628 So. 2d 501, 503 (Ala. 1993); see also *Ex parte Ziglar*, 669 So. 2d 133, 134 (Ala. 1995).’ *Ex parte Carter*, [807 So. 2d 534,] 536 [(Ala. 2001)].”

“*Ex parte McWilliams*, 812 So. 2d 318, 321 (Ala. 2001). “An appellate court considers de novo a trial court’s judgment on a party’s motion to dismiss for lack of personal jurisdiction.” *El-liott v. Van Kleef*, 830 So. 2d 726, 729 (Ala. 2002).

““““In considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff’s complaint not controverted by the defendant’s affidavits, *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253 (11<sup>th</sup> Cir. 1996), and *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829 (11<sup>th</sup> Cir.1990), and ‘where the plaintiff’s complaint and the defendant’s affidavits conflict, the ... court must construe all reasonable inferences in favor of the plaintiff.’ *Robinson*, 74 F.3d at 255 (quoting *Madara v. Hall*, 916 F.2d 1510, 1514 (11<sup>th</sup> Cir. 1990) ).”

““““*Wenger Tree Serv. v. Royal Truck & Equip., Inc.*, 853 So. 2d 888, 894 (Ala. 2002) (quoting *Ex parte McInnis*, 820 So. 2d 795, 798 (Ala. 2001)). However, if the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, ‘the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint.’ *Mercantile Capital, LP v. Federal Transtel, Inc.*, 193 F.Supp.2d 1243, 1247 (N.D. Ala. 2002) (citing *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11<sup>th</sup> Cir. 2000)). See also *Hansen v. Neumueller GmbH*, 163 F.R.D. 471, 474-75 (D. Del. 1995) (‘When a defendant files a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), and supports that motion with affidavits, plaintiff is required to controvert those affidavits with his own affidavits or other competent evidence in order to survive the motion.’) (citing *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 63 (3d Cir. 1984)).”

“*Ex parte Covington Pike Dodge, Inc.*, 904

So.2d 226, 229-30 (Ala. 2004).”

*Ex parte Duck Boo Int’l Co.*, 985 So. 2d 900, 905-06 (Ala. 2007).

*Ex parte International Creative Management Partners, LLC*, 258 So. 3d 1111, 1114 (Ala. 2018).

### c. Ala. R. Civ. P. 12(b)(3) dismissal for improper venue

““““The question of proper venue for an action is determined at the commencement of the action.” *Ex parte Pike Fabrication, Inc.*, 859 So. 2d 1089, 1091 (Ala.2002) (quoting *Ex parte Pratt*, 815 So. 2d 532, 534 (Ala.2001)). If venue is improper at the outset, then upon motion of the defendant, the court must transfer the case to a court where venue is proper. *Ex parte Pike Fabrication*, 859 So. 2d at 1091. If the defendant’s motion is denied, then the defendant is entitled to seek review of this decision by petitioning for a writ of mandamus. *Ex parte Alabama Great Southern R.R.*, 788 So. 2d 886, 888 (Ala. 2000).

““Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.’ *Ex parte Integon Corp.*, 672 So. 2d 497, 499 (Ala. 1995). This Court reviews mandamus petitions seeking review of a venue determination by asking whether the trial court exceeded its discretion in granting or denying the motion for a change of venue. *Ex parte Scott Bridge Co.*, 834 So. 2d 79, 81 (Ala. 2002). Also, in considering such a mandamus petition, this Court is limited to those facts that were before the trial court. *Ex parte Pike Fabrication*, 859 So. 2d at 1091.”

*Ex parte Hampton Ins. Agency*, 85 So. 3d 347, 350 (Ala. 2011) (quoting *Ex parte Perfection Siding, Inc.*, 882 So. 2d 307, 309-10 (Ala. 2003). Relatedly,

“[T]he review of a trial court’s ruling on the question of enforcing a forum-selection clause is for an abuse of discretion.”

*Ex parte Terex USA, LLC*, 260 So. 3d 813, 816 (Ala. 2018) (quoting *Ex parte D.M. White Constr. Co.*, 806 So. 2d 370, 372 (Ala. 2001)).<sup>3</sup>

**d. Ala. R. Civ. P. 12(b)(4) dismissal for insufficiency of process**

“When the service of process on the defendant is contested as being improper or invalid, the burden of proof is on the plaintiff to prove that service of process was performed correctly and legally.” *Cain v. Cain*, 892 So. 2d 952, 956 (Ala. Civ. App. 2004) (quoting *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 884 (Ala. 1983)). In *Cain*, the Court of Civil Appeals reversed a denial of a motion to dismiss alleging an insufficiency of service of process upon finding an insufficiency of proof that service of process was performed in compliance with Ala. R. Civ. P. 4.2(b).

In reviewing the denial of a motion to dismiss which challenged the sufficiency of process, the court of civil appeals in *Williams v. Skysite Communications Corp.*, 781 So. 2d 241, 245 (Ala. Civ. App. 2000), stated “[w]e review the trial court’s judgment *de novo*. Our review in this case is to determine whether the trial court correctly applied the law to the facts of this case. *Sims v. Leland Roberts Constr., Inc.*, 671 So. 2d 106 (Ala. Civ. App. 1995).”

**e. Ala. R. Civ. P. 12(b)(5) dismissal for insufficiency of service of process**

In reviewing the denial of a motion to dismiss which challenged the sufficiency of process, the court of civil appeals in *Williams v. Skysite Communications Corp.*, 781 So. 2d 241, 245 (Ala. Civ. App. 2000), stated “[w]e review the trial court’s judgment *de novo*. Our review in this case is to determine whether the trial court correctly applied the law to the facts of this case. *Sims v. Leland Roberts Constr., Inc.*, 671 So. 2d 106 (Ala. Civ. App. 1995).”

**f. Ala. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted**

“The applicable standard of review for a Rule 12(b)(6), Ala. R. Civ. P., dismissal is set forth in *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala.1993):

““On appeal, a dismissal is not entitled to a presumption of correctness. *Jones v. Lee County Commission*, 394 So. 2d 928, 930 (Ala.1981); *Allen v. Johnny Baker Hauling, Inc.*, 545 So. 2d 771, 772 (Ala. Civ. App. 1989). The appropriate standard of review under Rule 12(b)(6) [Ala. R. Civ. P.] is whether, when the allegations of the com-

plaint are viewed most strongly in the pleader’s favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. *Raley v. Citibanc of Alabama/Andalusia*, 474 So. 2d 640, 641 (Ala. 1985); *Hill v. Falletta*, 589 So. 2d 746 (Ala. Civ. App. 1991). In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. *Fontenot v. Bramlett*, 470 So. 2d 669, 671 (Ala. 1985); *Rice v. United Ins. Co. of America*, 465 So. 2d 1100, 1101 (Ala. 1984). We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Garrett v. Hadden*, 495 So. 2d 616, 617 (Ala. 1986); *Hill v. Kraft, Inc.*, 496 So. 2d 768, 769 (Ala. 1986).”

“(Emphasis added.)”

“*Smith v. Smith*, 865 So. 2d 1221, 1223-24 (Ala. Civ. App. 2003) (footnote omitted).”

*Ex parte Liberty Nat. Life Ins. Co.*, 209 So. 3d 486, 489 (2016).

**g. Ala. R. Civ. P. 12(b)(7) dismissal for failure to join a party under Rule 19**

“Rule 12(b)(7) provides for the dismissal of an action based on a ‘failure to join a party under [Ala. R. Civ. P.] 19.’ Courts considering a Rule 12(b)(7) motion must look to Rule 19, which sets forth ‘a two-step process for the trial court to follow in determining whether a party is necessary or indispensable.’ *Holland v. City of Alabaster*, 566 So. 2d 224, 226 (Ala. 1990). In *Ross v. Luton*, 456 So. 2d 249 (Ala. 1984), this Court stated that mandamus review is a proper means by which to address whether a trial court has exceeded its discretion in refusing to join a party under Rule 19.”

*Ex parte Advance Disposal Services South, LLC*, No. 1170320, 2018 WL 4657321 at \*3, \_\_\_ So. 3d \_\_\_ (Ala. 2018), reh’g denied 2018 WL 6583837, \_\_\_ So. 3d \_\_\_ (Ala. Dec. 14, 2018).

**2. Ala. R. Civ. P. 56 summary judgment**

**a. When a trial court grants an Ala. R. Civ. P. 56 motion for summary judgment filed by defendant**

“[An appellate court’s] review of a summary judgment is de novo. *Williams v. State Farm Mut. Auto. Ins. Co.*, 886 So. 2d 72, 74 (Ala. 2003). [The appellate court] appl[ies] the same standard of review as the trial court applied. Specifically, [the appellate court] must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; *Blue Cross & Blue Shield of Alabama v. Hordurski*, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, [the appellate court] must review the evidence in the light most favorable to the nonmovant. *Wilson v. Brown*, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce ‘substantial evidence’ as to the existence of a genuine issue of material fact. *Bass v. SouthTrust Bank of Baldwin County*, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. ‘[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.’ *West v. Founders Life Assur. Co. of Fla.*, 547 So. 2d 870, 871 (Ala. 1989).”

*Dow v. Alabama Democratic Party*, 897 So. 2d 1035, 1038-39 (Ala. 2004); accord, *Colony Homes, LLC v. Acme Brick Tile & Stone, Inc.*, 243 So. 3d 278, 280-81 (Ala. Civ. App. 2017). “[W]e do not review a trial court’s denial of a summary-judgment motion following a trial on the merits.” *Wachovia Bank, N.A. v. Jones, Morrison & Womack, P.C.*, 42 So. 3d 667, 691 (Ala. 2009) (quoting *Beiersdoerfer v. Hilb, Rogal & Hamilton Co.*, 953 So. 2d 1196, 1205 (Ala. 2006)). Any challenge to the sufficiency of the evidence is subsumed within the review of the denial of the post-trial motion for judgment as a matter of law.

**b. When a trial court grants an Ala. R. Civ. P. 56 motion for summary judgment by plaintiff**

When a trial court grants a plaintiff’s summary judgment motion, an appellate court will review the summary judgment as follows:

“When a plaintiff opposes a motion for summary judgment, the plaintiff is only seeking the

opportunity to get to the jury. When a plaintiff moves for summary judgment, on the other hand, the plaintiff is asking that its case be kept from the jury. The trial court, in granting summary judgment for a plaintiff, denies a jury determination to defendant who seeks such. To justify such a denial, a plaintiff must do more than merely show sufficient evidence to get to the jury. The plaintiff must show that its evidence is so conclusive that a reasonable jury would have to believe that the facts are as the plaintiff maintains. Thus, a trial court may never properly grant summary judgment for a plaintiff without deciding not only that it believes the plaintiff’s evidence, but that it believes such evidence so strongly that no reasonable jury could find otherwise.... A moving plaintiff ... must present overwhelming evidence on every element of the claims on which the plaintiff seeks the court’s dispositive ruling.”

Ed R. Haden, *Alabama Appellate Practice*, § 12.10[5], p. 12-12 (2019 Ed.) (quoting Othni Lathram & Anil A. Mujumdar, *Alabama Civil Procedure*, § 10.2, pp. 10-18 (2018) (citing inter alia, *Macon County Greyhound Park v. Knowles*, 39 So. 3d 100 (Ala. 2009)).

**c. Default judgment**

A trial court’s ruling on a motion to set aside a default judgment is reviewed on appeal for an abuse of discretion and guided by the factors set out in *Kirtland v. Fort Morgan Authority Sewer Service, Inc.*, 524 So. 2d 600, 605 (Ala. 1988):

“(1) Whether the defendant has a meritorious defense; (2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and (3) whether the default judgment was a result of the defendant’s own culpable conduct.”

*Id.* See, e.g., *Zeller v. Bailey*, 950 So. 2d 1149, 1152-53 (Ala. 2006). If the trial court grants a motion to set aside a default judgment, appellate review is by way of a petition for a writ of mandamus. See *Ex parte Bolen*, 915 So. 2d 565, 567-68 (Ala. 2005). If a trial court denies a motion to set aside a default judgment, appellate review is by way of appeal as the default judgment is a final judgment concerning liability and damages. See *Ex parte S & Davis Int’l, Inc.*, 798 So. 2d 677, 679 (Ala. 2001).

**3. Based upon jury verdicts**

**a. Review of denial of motion for entry of judgment as a matter of law**

**1. Preservation**

“It is a procedural absolute that a [post-trial motion for a judgment as a matter of law], based on the “insufficiency of the evidence,” is improper, if the party has not moved for a [judgment as a matter of law] on the same ground at the close of all the evidence.”

*Williford v. Emerton*, 935 So. 2d 1150, 1154 (Ala. 2004); *Industrial Technologies, Inc. v. Jacobs Bank*, 872 So. 2d 819, 825 (Ala. 2003). “[A] [Rule 50(a)(2), Ala. R. Civ. P.] motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.” *CNH America, LLC v. Ligon Capital, LLC*, 160 So. 3d 1195, 1204 (Ala. 2013).

**2. Merits**

“When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. *Palm Harbor Homes, Inc. v. Crawford*, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the non-movant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. *Carter v. Henderson*, 598 So. 2d 1350 (Ala. 1992). The non-movant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. *Carter*, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw.” *Id.* Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court’s ruling. *Ricwil, Inc. v. S.L. Pappas & Co.*, 599 So. 2d 1126 (Ala. 1992).”

*GE Capital Aviation Services, Inc. v. PEMCO World Air Services, Inc.*, 92 So. 2d 749, 758-59 (Ala. 2012)

(quoting *Waddell & Reed, Inc. v. United Investors Life Ins. Co.*, 875 So. 2d 1143, 1152 (Ala. 2003)).

**b. Review of denial of motion for new trial**

“A motion for a new trial tests the weight and preponderance of the evidence... A jury verdict is entitled to a presumption of correctness, and this Court will not reverse the denial of a motion for a new trial unless the evidence, seen in the light most favorable to the non-movant, shows that the jury verdict was plainly and palpably wrong.”

*Boudreaux v. Pettaway*, 108 So. 3d 486, 487, n.1 (Ala. 2012).

“Furthermore, a jury verdict is presumed to be correct.... In reviewing a jury verdict, an appellate court must consider the evidence in the light most favorable to the prevailing party, and it will set aside the verdict only if it is plainly and palpably wrong.”

*Lafarge North America, Inc. v. Nord*, 86 So. 3d 326, 332 (Ala. 2011).

When considering the weight and preponderance of the evidence after a denial of a motion for a new trial, this court must “decline to substitute [its] judgment for that of the jury in matters dealing with credibility of witnesses and weight of the evidence.”

*Williford v. Emerton*, 935 So. 2d 1150, 1154 (Ala. 2004); *Marsh v. Green*, 782 So. 2d 223, 227 (Ala. 2000).

**c. Review of compensatory damages awards**

**1. Issue preservation**

The court will not consider an alleged insufficiency of evidence to support a compensatory damages award where the defendant did not move for JML on the same ground at the close of all the evidence. *Williford v. Emerton*, 935 So. 2d, 1150, 1154 (Ala. 2004).

**2. Merits**

Appellate courts do not interfere with compensatory damages awards absent a strict showing under the following standard:

“When a court is assessing whether compensatory damages are excessive, the focus is on the plaintiff. A court reviewing a verdict awarding compensatory damages must determine what amount a jury, in its discretion, may award, viewing the evidence from the plaintiff’s perspective.... When there is no evidence before the

court of any misconduct, bias, passion, prejudice, corruption, or improper motive on the part of the jury, or when there is no indication that the jury's verdict is not consistent with the truth and the facts, there is no statutory authority to invade the province of the jury in awarding compensatory damages. See *Pitt v. Century II, Inc.*, 631 So. 2d 235 (Ala. 1993)."

*New Plan Realty Trust v. Morgan*, 792 So. 2d 351, 363-64 (Ala. 2000); *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d 1045, 1049 (Ala. 2000); *Daniels v. East Alabama Paving, Inc.*, 740 So. 2d 1033, 1045 (Ala. 1999). The applicable standard of review of a trial court's order granting a new trial on the basis of the inadequacy of a jury's verdict awarding damages is whether the evidence plainly and palpably supports the jury verdict." *Ex parte Courtney*, 937 So. 2d 1060, 1062 (Ala. 2006) (internal citations and quotations omitted). "Jury verdicts are presumed to be correct and will be set aside on the ground of an inadequate award of damages only where the award is so inadequate as to indicate that the jury was influenced by passion, prejudice, or improper motive." *Wells v. Mohammad*, 879 So. 2d 1188, 1191 (Ala. Civ. App. 2003). "Where a motion for a new trial is granted for reasons other than, or in addition to, a finding that the verdict was against the great weight or preponderance of the evidence, this Court applies a standard of review that is more deferential to the trial court's determination that a new trial is warranted." *Beauchamp v. Coastal Boat Storage, LLC*, 4 So. 3d 443, 449-50 (Ala. 2008) (internal citations and quotations omitted).

#### **d. Review of punitive damages awards**

The court "reviews the trial court's award of punitive damages de novo, with no presumption of correctness." *Boudreaux v. Pettaway*, 108 So.3d at 504 (Ala. 2012) (quoting *Mack Trucks, Inc. v. Wither- spoon*, 867 So.2d 307, 309 (Ala. 2003)).

### **3. Based upon bench trials**

#### **a. Ore tenus evidence**

*Kennedy v. Boles Investments, Inc.*, 53 So. 3d 60 (Ala. 2010), generally states the applicable ore tenus standard of review from such bench trials:

"Because the trial court heard ore tenus evidence during the bench trial, the ore tenus standard of review applies. Our ore tenus standard of review is well settled. "When a judge in a nonjury case

hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error.'" *Smith v. Muchia*, 854 So. 2d 85, 92 (Ala.2003) (quoting *Allstate Ins. Co. v. Skelton*, 675 So. 2d 377, 379 (Ala.1996)).

"The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses.' *Hall v. Mazzone*, 486 So. 2d 408, 410 (Ala.1986). The rule applies to 'disputed issues of fact,' whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. *Born v. Clark*, 662 So. 2d 669, 672 (Ala.1995). The ore tenus standard of review, succinctly stated, is as follows:

"[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence."

*Id.* at 67-68 (quoting *Reed v. Board of Trs. for Alabama State Univ.*, 778 So. 2d 791, 795 (Ala. 2000), quoting in turn *Raidt v. Crane*, 342 So. 2d 358, 360 (Ala. 1977)).

The presumption of correctness has no application when the trial court is shown to have improperly applied the law to the facts. *Ex parte Board of Zoning Adjustment of Mobile*, 636 So. 2d 415, 417 (Ala. 1994).

*Kennedy v. Boles Investments* also states the general ore tenus standard of review relative to damages issues:

"The ore tenus standard of review extends to the trial court's assessment of damages.'" *Edwards v. Valentine*, 926 So. 2d 315, 325 (Ala. 2005). Thus, the trial court's damages award based on ore tenus evidence will be reversed 'only if clearly and palpably erroneous.' *Robinson v. Morse*, 352 So. 2d 1355, 1357 (Ala. 1977)."

*Id.*, 53 So. 3d at 68.

### **b. Undisputed evidence**

When the evidence in a bench trial is uncontroverted, a *de novo* review of that evidence is warranted on appeal:

“Where the evidence before the trial court is undisputed, however, ‘the ore tenus rule is inapplicable, and the Supreme Court will sit in judgment on the evidence *de novo*, indulging no presumption in favor of the trial court’s application of the law to those facts.’” *Stiles v. Brown*, 380 So. 2d 792, 794 (Ala. 1980), citing with approval *Kessler v. Stough*, 361 So. 2d 1048 (Ala. 1978); *Perdue v. Roberts*, 294 Ala. 194, 314 So. 2d 280 (1975); *McCulloch v. Roberts*, 292 Ala. 451, 296 So. 2d 163 (1974).

*Freeman Wrecking Co., Inc. v. City of Prichard*, 530 So.2d 235, 237 (Ala. 1988).

### **c. Workers’ compensation**

“[An appellate court] will not reverse the trial court’s finding of fact if that finding is supported by substantial evidence—if that finding is supported by ‘evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.’”

*Ex parte Trinity Indus., Inc.*, 680 So. 2d 262, 268-69 (Ala. 1996) (quoting *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989)). However, “an appellate court’s review of the proof and consideration of other legal issues in a workers’ compensation case shall be without a presumption of correctness.” *Ex parte American Color Graphics, Inc.*, 838 So. 2d 385, 387-88 (Ala. 2002) (citing § 25-5-81(e)(1), Ala. Code 1975). Accord, *Ex parte Dolgencorp, Inc.*, 13 So. 3d 888, 893 (2008); *Ex parte Southern Energy Homes, Inc.*, 873 So. 2d 1116, 1121 (Ala. 2003).

### **d. Domestic relations**

Where the trial court issues findings of fact based upon credibility of witnesses, the *ore tenus* rule applies and the court’s findings will not be overturned unless found to be clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. See, e.g., *Phillips v. Phillips*, 622 So. 2d 410, 412 (Ala. Civ. App. 1993):

“Our standard of review is very limited in cases where the evidence is presented *ore tenus*. A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, *Payne v. Payne*, 550 So. 2d 440 (Ala. Civ. App. 1989), and *Vail v. Vail*, 532 So. 2d 639 (Ala. Civ. App. 1988), and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong, or unless an abuse of the trial court’s discretion is shown. To substitute our judgment to that of the trial court would be to reweigh the evidence. This Alabama law does not allow.”

*Id.*, *Gamble v. Gamble*, 562 So. 2d 1343 (Ala. Civ. App. 1990); *Flowers v. Flowers*, 479 So. 2d 1257 (Ala. Civ. App. 1985). Cf., *C.M.L. v. C.A.L.*, nos. 2170922 and 2170983, \_\_ So. 3d \_\_, 2019 WL 3369268, at \*8 (Ala. Civ. App. July 26, 2019) (“When evidence in a child custody case has been presented *ore tenus* to the trial court, that court’s findings of fact based on that evidence are presumed to be correct. The trial court is in the best position to make a custody determination—it hears the evidence and observes the witnesses. Appellate courts do not sit in judgment of disputed evidence that was presented *ore tenus* before the trial court at custody hearing.”).

### **e. Juvenile proceedings**

“A judgment terminating parental rights must be supported by clear and convincing evidence. . . . The evidence necessary for appellate affirmance . . . is evidence that a fact-finder reasonably could find to clearly and convincingly establish the fact sought to be proved. . . . This court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported by evidence that the juvenile court could have found to be clear and convincing. When those findings rest on *ore tenus* evidence, this court presumes their correctness. We review the legal conclusions to be drawn from the evidence without a presumption of correctness.” *D.W. v. Jefferson Cty. Dep’t of Human Res.*, No. 2180683, \_\_ So. 3d \_\_, 2019 WL 5284785, at \*1-2 (Ala. Civ. App. Oct. 18, 2019) (internal citations and quotations omitted).

“Once a child is found dependent, a juvenile court may dispose of the custody of the child according to its determination of the best interests of the child. . . . In a child custody case, an appellate court presumes the trial court’s findings to be correct and will not

reverse without proof of a clear abuse of discretion or plain error. This presumption is especially applicable where the evidence is conflicting. An appellate court will not reverse the trial court's judgment based on the trial court's findings of fact unless the findings are so poorly supported by the evidence as to be plainly and palpably wrong." *D.W. v. M.M.*, 272 So. 3d 1107, 1112 (Ala. Civ. App. 2018) (internal citations and quotations omitted).

"Our standard of review of dependency determinations is well settled. A finding of dependency must be supported by clear and convincing evidence. However, matters of dependency are within the sound discretion of the trial court, and a trial court's ruling on a dependency action in which evidence is presented *ore tenus* will not be reversed absent a showing that the ruling was plainly and palpably wrong." *E.D. v. Lee Cty. Dep't of Human Res.*, 266 So. 3d 740, 742-43 (Ala. Civ. App. 2018) (internal citations and quotations omitted).

"Visitation rights are a part of custody determinations. Both visitation and custody determinations are subject to the same standards of review. The trial court has broad discretion in determining the visitation rights of a noncustodial parent, and its decision in this regard will not be reversed absent an abuse of discretion. Every case involving a visitation issue must be decided on its own facts and circumstances, but the primary consideration in establishing the visitation rights accorded a noncustodial parent is always the best interests and welfare of the child." *S.D.B. v. B.R.B.*, No. 2180521, \_\_\_ So. 3d \_\_\_, 2019 WL 4564503, at \*6 (Ala. Civ. App. Sept. 20, 2019) (internal citations and quotations omitted).

#### **f. Probate proceedings**

Appeals from probate proceedings present special challenges because of the statutory scheme affording appeals to either the circuit court or the Alabama Supreme Court. Section 12-22-20, Ala. Code 1975, states:

"An appeal lies to the circuit court or Supreme Court from any final decree of the probate court, or from any final judgment, order or decree of the probate judge; and, in all cases where it may of right be done, the appellate court shall render such decree, order or judgment as the probate court ought to have rendered."

Should the appellant elect to appeal to the circuit court in the first instance, an appeal to the supreme

court may then be taken from the judgment of the circuit court. Section 12-22-22, Ala. Code 1975.

When an appeal is taken to a circuit court, there is no trial *de novo* in the circuit court, but rather the circuit court sits as an appellate court and can consider only the record from the probate court in making its determination. *Womack v. Estate of Womack*, 826 So. 2d 138 (Ala. 2002) (circuit court sits as a reviewing court on appeal and may not consider matter *de novo*); *Martin v. Vreeland*, 526 So. 2d 24 (Ala. 1988) (no trial *de novo* available on appeal); *McKnight v. Pate*, 214 Ala. 163, 106 So. 691 (1925) (outcome on appeal to be based upon record before the probate court).

The standard of appellate review is exceedingly deferential. For example, in *Ladewig v. Estate of Arnold*, 694 So. 2d 25 (Ala. Civ. App. 1997), the court reviewed a probate court decree disapproving of a land purchase contract from a decedent's estate by co-administrators of the estate. Following deflection from the supreme court pursuant to § 12-2-7(6), Ala. Code 1975, the court of civil appeals held "[t]he probate court's decision is based on the testimony of the parties and the heirs of the estate; the decision being based upon *ore tenus* evidence and not appearing to be palpably erroneous, we will not disturb it."

In *McCallie v. McCallie*, 660 So. 2d 584 (Ala. 1995), the supreme court reviewed a probate court's decrees concerning guardianship and conservatorship proceedings. The court summarized the governing standards of review as follows:

"Because there is no record of the testimony presented to the probate court, the probate court's apparent finding that David is qualified and competent to manage his mother's personal affairs is presumed to be correct. See *Davis v. Davis*, 278 Ala. 328, 330, 178 So. 2d 154, 155 (1965):

"The rule is that where no testimony is contained in the record on appeal, a decree which recites that it was granted on pleadings, proofs and testimony will not be disturbed on appeal. *Williams v. Clark*, 263 Ala. 228, 82 So. 2d 295 [(1955)], 2 Ala. Dig., Appeal & Error § 671(3). And it will be presumed that the evidence was sufficient to sustain the verdict, finding, judgment, or decree where all the evidence is not in the record. *Williams v. Clark, supra*; 2 Ala. Dig., Appeal & Error Key No. 907(4).



“A decree of the probate court will not be reversed if the evidence upon which it is made is not set forth, and there is no bill of exceptions, unless it appears in the decree that the court had no jurisdiction. *Forrester v. Forrester’s Adm’rs*, 40 Ala. 557 [(1867)]; *McAlpine v. Carre*, 203 Ala. 468, 83 So. 477 [(1919)].

“The finding of the probate court, based on the examination of witnesses *ore tenus*, is presumed to be correct and will not be disturbed on appeal unless palpably erroneous. *Cox v. Logan*, 262 Ala. 11, 76 So. 2d 169 [(1954)], and cases there cited.

“We assume that the circuit court affirmed the decree of the probate court on the principles that we have stated [above], and would have no alternative but to affirm the decree of the circuit court on the same authorities.”

*Id.*, 660 So. 2d at 585. The court also noted “... there is no record of the testimony presented at the [probate court] hearing in this case ... [therefore] we would have to presume that the probate court’s judgment was supported by the evidence the court had before it. See *Vise v. Cole Sanitation, Inc.*, 591 So. 2d 32 (Ala. 1991).” *McCallie*, 660 So. 2d at 585, n. 1. See also *Roberson v. Roberson*, 284 Ala. 5, 221 So. 2d 122 (1969) (on appeal from circuit court order affirming probate court decree revoking appointment of guardian following jury trial), the supreme court held that the “... verdict of the jury is presumed to be correct” explaining:

“No rule of law is more firmly established by our decisions than where there is a conflict in the evidence the jury should be left to find the facts without interference by the court and’ ... if there is any evidence tending to prove the fact, no matter how slight, the court has no right to take such question from the consideration of the jury. It is the province of the jury and not of the court to find from the evidence the truth of a disputed fact.’ *Tobler v. Pioneer Mining and Manufacturing Co.*, 166 Ala. 482, 52 So. 86 (1909).”

*Id.*, 284 Ala. at 5, 221 So. 2d at 124.

#### g. Grant or denial of preliminary injunction

“A preliminary injunction should be issued only when the party seeking an injunction demonstrates:

““(1) that without the injunction the [party] would suffer irreparable injury; (2) that the [party] has no adequate remedy at law; (3) that the [party] has at least a reasonable chance of success on the ultimate merits of his case; and (4) that the hardship imposed on the [party opposing the preliminary injunction] by the injunction would not unreasonably outweigh the benefit accruing to the [party seeking the injunction].”

“*Ormco Corp. v. Johns*, 869 So. 2d 1109, 1113 (Ala. 2003) (quoting *Perley v. Tapscan, Inc.*, 646 So. 2d 585, 587 (Ala. 1994)).

“... ‘We review the [trial court’s] legal rulings de novo and its ultimate decision to issue the preliminary injunction for abuse of discretion.’ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).”

“*Holiday Isle, LLC v. Adkins*, 12 So. 3d 1173, 1176 (Ala. 2008). Accordingly, “[t]o the extent that the trial court’s issuance [or denial] of a preliminary injunction is grounded only in questions of law based on undisputed facts,” this Court applies a de novo standard of review to the trial court’s decision. *Id.*”

*Ex parte Folsom*, 42 So. 3d 732, 736-737 (2009).

#### h. Declaratory judgments

Pursuant to § 6-6-232, Ala. Code 1975, (“All orders and judgments under this article [Declaratory Judgments] may be reviewed as other orders and judgments.”); and Ala. R. Civ. P. 57, declaratory judgments and decrees are to be reviewed on appeal as other judgments and decrees. *Scott v. Alabama State Bridge Corp.*, 233 Ala. 12, 17, 169 So. 273, 277 (1936); *City of Mobile v. Board of Water & Sewer Com’rs of City of Mobile*, 258 Ala. 669, 673, 64 So. 2d 824, 826 (1953). In this context, “[a]bsent plain error or manifest injustice, the trial court’s findings of fact will not be disturbed on appeal.” *Coghlan v. First Alabama Bank of Baldwin County, N.A.*, 470 So. 2d 1119, 1122 (Ala. 1985). Accord, *Carpet Installation and Supplies of Glenco v. ALFA Mut. Ins. Co.*, 628 So. 2d 560, 563 (Ala. 1993).

#### 4. Miscellaneous other matters

### a. Admission of evidence

“[R]ulings on the admissibility of evidence are within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion.”

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

### b. Discovery matters

“The general rule in Alabama that discovery matters are within the trial court’s sound discretion, and its ruling on those matters will not be reversed absent a showing of abuse of discretion and substantial harm to the appellant.”

*Cryer v. Corbett*, 814 So. 2d 239, 243 (Ala. 2001).

### c. Denial of motion to continue trial date

“We review a trial court’s denial of a motion for a continuance by asking whether in denying the motion the trial court exceeded its discretion.”

*Wright Therapy Equip., LLC v. Blue Cross and Blue Shield*, 991 So. 2d 701, 705 (Ala. 2008).

### d. Statutory construction

“[T]his Court also reviews de novo questions of law concerning statutory construction.”

*Ex parte Liberty Nat. Life Ins. Co.*, 209 So. 3d 486, 487 (2016); *Accord, Ex parte Trinity Property Consultants, LLC*, Ms. 1180642, at \*7, \_\_\_ So. 3d \_\_\_ (Ala. Aug. 30, 2019).

### e. Rulings on motions for leave to intervene

“The denial of a motion to intervene as of right is an appealable order. *State v. Estate of Yarbrough*, 156 So. 3d 947 (Ala. 2014). Generally a ruling on a motion to intervene is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Id.* Likewise, the denial of a motion for permissive intervention is an appealable order. *Universal Underwriters Ins. Co. v. Anglen*, 630 So. 2d 441 (Ala. 1993). A motion for permissive intervention is committed to the broad discretion of the trial court and is therefore reviewed this Court for abuse of that discretion. *QBE Ins. Corp. v. Austin Co., Inc.*, 23 So. 3d 1127, 1131 (Ala. 2009).”

*Magee v. Boyd*, 175 So. 3d 79, 138 (Ala. 2015).

### f. Review of rulings by special masters

Pursuant to Ala. R. Civ. P. 53(e)(2), a trial court accepts findings of a referee or special master unless the findings are clearly erroneous. To the extent the trial court adopts such findings, the same standard applies in appellate review. *State Dept. of Human Resources v. L.W.*, 597 So. 2d 703 (Ala. Civ. App. 1992). *E.F. v. H.P.K.*, 825 So. 2d 125 (Ala. Civ. App. 2001). Where the trial court does *not* adopt the referee’s findings, there is no presumption of correctness with regard to the referee’s findings. If the trial court did not receive any evidence in the case and did not observe witnesses, its judgment rejecting a referee’s findings is not entitled to the *ore tenus* presumption of correctness. *E.F. v. H.P.K.*, *supra*, 825 So. 2d at 128.

If the referee or master makes no express findings of fact, its conclusions are not governed by the clearly erroneous rule. *Fry v. Fry*, 451 So. 2d 344-45 (Ala. Civ. App. 1984).

A special master’s report is accorded the same weight as a jury’s verdict and, therefore, is not to be disturbed unless it is plainly and palpably wrong. *Intergraph Corp. v. Bentley Systems, Inc.*, 58 So. 3d 63 (Ala. 2010).

### g. Contempt citations

“The issue whether to hold a party in contempt is solely within the discretion of the trial court, and a trial court’s contempt determination will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence.” *Poh v. Poh*, 64 So. 3d 49, 61 (Ala. Civ. App. 2010). “To hold a party in contempt under either Rule 70A(a)(2)(C)(ii) or (D), Ala. R. Civ. P., the trial court must find that the party willfully failed or refused to comply with a court order.” *T.L.D. v. C.G.*, 849 So. 2d 200, 205 (Ala. Civ. App. 2002).

*J.S.S. v. D.P.S.*, No. 2170865, \_\_\_ So. 3d \_\_\_, 2019 WL 167748, at \*3 (Ala. Civ. App. Jan. 11, 2019).

As to criminal contempt, see *Kizale v. Kizale*, 254 So. 3d 233, 237-38 (Ala. Civ. App. 2017) (internal citations and quotations omitted):

Unlike civil contempt, criminal contempt requires proof beyond a reasonable doubt of the alleged contemnor’s guilt. The standard of review

in an appeal from an adjudication of criminal contempt occurring in a civil case is whether the offense, i.e., the contempt, was proved beyond a reasonable doubt. . . . The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty, and that such evidence is inconsistent with any reasonable hypothesis of his innocence.

#### **h. Moot questions, abstract propositions, advisory opinions**

Alabama’s appellate courts have limited appellate jurisdiction and therefore will not undertake to decide moot questions, abstract propositions, or give advisory opinions, as explained in *Ex parte James*, 836 So. 2d 813, 869-70 (Ala. 2002):

The question of the existence of a case or controversy is not an idle debate. That there be an actual controversy between parties that appear before a court has from time immemorial been a bedrock judicial principle. The question involves the foundational principles upon which our tripartite form of constitutional government was formed. This Court has stated:

“[O]ur Constitution vests this Court with a *limited judicial power that entails the special competence to decide discrete cases and controversies involving particular parties and specific facts*. Ala. Const. 1901, amend. 328, § 6.01 (vesting the judicial power in the Unified Judicial System); *see, e.g., Copeland v. Jefferson County*, 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969) (stating that courts decide only concrete controversies between adverse parties).”

*Alabama Power Co. v. Citizens of Alabama*, 740 So. 2d 371, 381 (Ala. 1999) (italicized emphasis in original).

*Cf., Case v. Alabama State Bar*, 939 So. 2d 881, 884 (Ala. 2006) (“Matters that may or may not occur in the future are not matters in controversy.” ... “It is well settled that the judiciary of Alabama is not empowered ‘to decide moot questions, abstract propositions, or to give advisory opinions, however convenient it might be to have these questions decided for the government of future cases.’”).

#### **i. Review of administrative agency determinations**

Appellate review of administrative agency determinations in contested cases is limited by Ala. Code § 41-22-20(k), which provides:

Except where judicial review is by trial *de novo*, the agency order shall be taken as *prima facie* just and reasonable and the court shall not substitute its judgment for that of the agency as for the weight of the evidence on questions of fact, except as otherwise authorized by statute.

In *Alacare Home Health Servs. v. Ala. State Health Planning & Dev. Agency*, 27 So. 3d 1267, 1273-74 (Ala. Civ. App. 2009), the court of civil appeals explained this limited scope of appellate review:

“In reviewing the decision of a state administrative agency, the special competence of the agency lends great weight to its decision, and that decision must be affirmed, unless it is arbitrary and capricious or not made in compliance with applicable law. *Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Co-ordinating Council*, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). The weight or importance assigned to any given piece of evidence presented [to the agency in a contested matter] is left primarily to the [agency’s] discretion, in light of the [agency’s] recognized expertise in dealing with these specialized areas. *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, 766 So. 2d 176, 178 (Ala. Civ. App. 1999). Neither this court nor the trial court may substitute its judgment for that of the administrative agency. *Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Coordinating Council*, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). This holds true even in cases where the testimony is generalized, the evidence is meager, and reasonable minds may differ as to the correct result. *Health-care Auth. of Huntsville v. State Health Planning Agency*, 549 So. 2d 973, 975 (Ala. Civ. App. 1989). Further, an agency’s interpretation of its own rule or regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation. *Sylacauga Health Care Ctr., Inc. v. Alabama State Health Planning Agency*, 662 So. 2d 265, 268 (Ala. Civ. App. 1994).”

## **B. Extraordinary writs**

### **1. Certiorari, generally:**

“In reviewing a decision of the Court of Civil Appeals on a petition for a writ of certiorari, this Court ‘accords no presumption of correctness to the legal conclusions of the intermediate appellate court. Therefore, we must apply de novo the standard of review that was applicable in the Court of Civil Appeals.’ *Ex parte Toyota Motor Corp.*, 684 So. 2d 132, 135 (Ala. 1996).”

*Ex parte Folsom*, 42 So. 3d 732, 736 (Ala. 2009); Accord, *Ex parte Exxon Mobil Corp.*, 926 So. 2d 303, 308 (Ala. 2005).

## 2. Petitions for writs of mandamus—general

### a. Petition for writ of mandamus—discovery rulings

““Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.”

*Ex parte Allstate Prop. and Cas. Ins. Co.*, 237 So. 3d 199, 203 (Ala. 2017), quoting *Ex parte Progressive Specialty Ins. Co.*, 31 So. 3d 661, 663 (Ala. 2009), quoting *Ex parte Liberty Nat’l Life Ins. Co.*, 888 So. 2d 478, 480 (Ala. 2003), quoting *Ex parte Integon Corp.*, 672 So. 2d 497, 499 (Ala. 1995).

““Discovery matters are within the trial court’s sound discretion, and this Court will not reverse a trial court’s ruling on a discovery issue unless the trial court has clearly exceeded its discretion. *Home Ins. Co. v. Rice*, 585 So. 2d 859, 862 (Ala. 1991). Accordingly, mandamus will issue to reverse a trial court’s ruling on a discovery issue only (1) where there is a showing that the trial court clearly exceeded its discretion, and (2) where the aggrieved party does not have an adequate remedy by ordinary appeal. The petitioner has an affirmative burden to prove the existence of each of these conditions.”

*Ex parte Ocwen Fed. Bank, FSB*, 872 So. 2d 810, 813 (Ala. 2003).

“Moreover, this Court will review by mandamus only those discovery matters involving (a) the disregard of a privilege, (b) the ordered production of ‘patently irrele-

vant or duplicative documents,’ (c) orders effectively eviscerating ‘a party’s entire action or defense,’ and (d) orders denying a party the opportunity to make a record sufficient for appellate review of the discovery issue. 872 So. 2d at 813-14 ....”

*Ex parte Mobile Gas Service Corp.*, 123 So. 3d 499, 504 (Ala. 2013), quoting *Ex parte Meadowbrook Ins. Group, Inc.*, 987 So. 2d 540, 547 (Ala. 2007). *Ocwen Federal Bank, FSB*, stated also that:

Generally, an appeal of a discovery order is an adequate remedy, notwithstanding the fact that that procedure may delay an appellate court’s review of a petitioner’s grievance or impose on the petitioner additional expense; our judicial system cannot afford immediate mandamus review of every discovery order.

*Ocwen*, 872 So. 2d at 813 (citations omitted). Of course, it is well established that interlocutory appellate review of discovery orders is disfavored:

““An appellate court may not decide whether it would, in the first instance, have permitted the prayed for discovery. Furthermore, it is unusual to find abuse of discretion in these matters.”

*Ex parte Horton Homes, Inc.*, 774 So. 2d 536, 539 (Ala. 2000), quoting *Ex parte Marsh & McLennan, Inc.*, 404 So. 2d 654, 655 (Ala. 1981), quoting, in turn, *Assured Investors Life Ins. Co. v. National Union Assoc. Inc.*, 362 So. 2d 228, 232 (Ala. 1978), citing *Swanner v. United States*, 406 F.2d 716 (5<sup>th</sup> Cir. 1969)).

Mandamus is “a drastic and extraordinary remedy and should be issued only upon a clear showing that the trial court abused its discretion by exercising it in an arbitrary or capricious manner.” *Ex parte Dothan Personnel Bd.*, 831 So. 2d 1, 5 (Ala. 2002) (quoting *Ex parte Cotton*, 638 So. 2d 870, 872 (Ala. 1994)). “[A] writ of mandamus will not be issued unless the movant has a clear and indisputable right to a particular result.” *Ex parte Rudolph*, 515 So. 2d 704, 706 (Ala. 1987). “[T]here must be credible allegations, ironclad in nature, showing that the trial court is bound by law to do what the petitioner requests.” *Ex parte Harper*, 934 So. 2d 1045, 1048 (Ala. 2006) (quoting *Ex parte State Bd. for Registration of Architects*, 574 So. 2d 53, 54 (Ala. Civ. App. 1990)). A writ will not issue where the right in question is doubtful. “[T]he right sought to be enforced by mandamus must be clear and certain with no reasonable basis for

controversy about the right to relief.” *Ex parte Flexible Prods. Co.*, 915 So. 2d 34, 41 (Ala. 2005) (quoting *Goolsby v. Green*, 431 So. 2d 955, 958 (Ala. 1983) (quoting *Ex parte Dorsey Trailers, Inc.*, 397 So. 2d 98, 102 (Ala. 1981))).

**b. Mandamus–forum selection clause**

“[A] petition for a writ of mandamus is the proper vehicle for obtaining review of an order denying enforcement of an “outbound” forum-selection clause when it is presented in a motion to dismiss. ‘*Ex parte D.M. White Constr. Co.*, 806 So. 2d 370, 372 (Ala. 2001); see *Ex parte CTB, Inc.*, 782 So. 2d 188, 190 (Ala. 2000).’ [A] writ of mandamus is an extraordinary remedy, which requires the petitioner to demonstrate a clear, legal right to the relief sought, or an abuse of discretion. ‘*Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d 656, 660 (Ala. 2001).’ [T]he review of a trial court’s ruling on the question of

enforcing a forum-selection clause is for an abuse of discretion. ‘*Ex parte D.M. White Constr. Co.*, 806 So. 2d at 372.’”

*Ex parte Bad Toys Holdings, Inc.*, 958 So. 2d 852, 855 (Ala. 2006) (quoting *Ex parte Leasecomm Corp.*, 886 So. 2d 58, 62 (Ala. 2003)).

“Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.”

*Ex parte Riverfront, LLC*, 129 So. 3d 1008, 1011 (Ala. 2013).

Additionally, “[a]n appellee can defend the trial court’s ruling with an argument not raised below, for this Court ‘will affirm the judgment appealed from if supported on any valid legal ground.’” *Smith v.*

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*Equifax Services, Inc.*, 537 So. 2d 463, 465 (Ala. 1988) (quoting *Tucker v. Nichols*, 431 So. 2d 1263, 1265 (Ala. 1983)).

**c. Interlocutory appeals pursuant to Ala. R. App. P. 5**

“As this Court stated in *Morrow v. Caldwell*, 153 So. 3d 764, 767 (Ala. 2014), an appeal under Rule 5, Ala. R. App. P.,

‘presents a pure question of law. This Court has held: “““[O]n appeal, the ruling on a question of law carries no presumption of correctness, and this Court’s review is *de novo*.””

*Wright v. Cleburne Co. Hosp. Bd., Inc.*, 255 So. 3d 186, 190 (Ala. 2017)(citations omitted).

## Conclusion

We hope this article helps your appellate briefs conform with the requirements of Ala. R. App. P. 28(a)(8). ▲

### Endnotes

1. Because of numerous deficiencies in the appellant’s brief, the court imposed a \$1,500 sanction and instructed that the sanction was to be paid by the party’s attorney, not the party. Ms. \*9. Compare *McAliley v. McAliley*, 638 So. 2d 10 (Ala. 1994) (“The husband’s brief substantially fails to comply with the requirements of Rule 28, Ala. R. App. P. in numerous respects, leaving this court with nothing to review on appeal.”).

2. However, note that the Committee Comments to Rule 4(a)(3) warn that this Rule does not “extend the right to raise for the first time on appeal new matter not presented to the trial court or upon which the trial court had no opportunity to pass.” If the trial court has not ruled on the issue, a post-judgment motion must be filed on that issue in order to preserve appellate review. Thus, post-judgment motions must be filed in order to raise issues like the amount of damages or assertions that the verdict is contrary to the weight of the evidence. Obviously, no one knows what the verdict will be until it is returned, so the trial court has not yet had an opportunity to rule on objections to the verdict. Similarly, issues of juror misconduct during deliberations must be raised by post-judgment motion. See generally, Ed R. Haden, *Preventing Waiver of Arguments on Appeal*, 68 Alabama Lawyer 302, 305-06 (July 2007).
3. Note that Ala. Code § 6-8-101 provides that the issue of improper venue can also be raised on appeal from the final judgment.

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### David G. Wirtes, Jr.



Dave Wirtes is a member of Cunningham Bounds LLC in Mobile.

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### Bruce J. McKee



Bruce McKee is a partner at Hare, Wynn, Newell & Newton in Birmingham.



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# A Primer for Navigating Potential Appellate Issues in Child Custody Cases

*By Randall W. Nichols*

Child custody cases rarely sail along smoothly.

The trial lawyer can become so engulfed in what is at stake—important issues involving a child and families—that he finds it difficult to focus the other stages of the case. If he wins, is the case ready to withstand an appellate attack? Should he get a disappointing result, is the case postured for an appellate attack? Or—and often forgotten—is there a need for a pre-trial appeal?

In fact, the appellate side of these cases has become so complex that many trial lawyers use or retain appellate counsel to consult or to participate in the pre-trial or trial process.

My hope is that this article will chart an appellate-minded course for the journey that is child custody litigation.

## Pre-Trial Mandamus

There are several issues which could prompt a petition for writ of mandamus to the trial court. Among them are recusal,<sup>1</sup> pendente lite orders,<sup>2</sup> venue,<sup>3</sup> discovery,<sup>4</sup> evidence,<sup>5</sup> and jurisdiction (personal<sup>6</sup> or subject matter<sup>7</sup>). The trial court's rulings on these issues are often interlocutory orders which prevent review by appeal. The only real option is a pre-trial petition for writ of mandamus, pursuant to Rule 21, Ala. R. App. P.

It should be noted that mandamus is an extraordinary remedy which is not intended to be a substitute for appeal.<sup>8</sup>



In order to obtain the writ, a litigant must show a clear right to the relief sought.<sup>9</sup> The lack of success on a petition for writ of mandamus is not a binding decision on the merits of the issue presented,<sup>10</sup> and, in some cases, the issue can be raised on appeal.<sup>11</sup>

If mandamus is appropriate, however, resolution of some issues prior to trial can save resources by preventing the necessity of a re-trial.

In looking at subject matter jurisdiction, one must first determine whether Alabama is the proper forum under Alabama divorce law and the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).<sup>12</sup>

In most cases, both parties and the child are residents of Alabama for a substantial length of time and interstate considerations are not implicated. However, if the parents live in different states, the six-month statutory residency requirement<sup>13</sup> and/or the provisions of the UCCJEA determine whether Alabama is the correct state in which to resolve the dispute. A dispute regarding which state has jurisdiction may prompt a motion to dismiss, a motion for a stay, or a motion for the trial court to defer jurisdiction. Alabama is also in the minority of states which require personal jurisdiction over a party in order to validly effect or enforce a custody order.<sup>14</sup> A trial court's preliminary rulings on these issues have been considered appropriate for mandamus review.<sup>15</sup>

A special venue provision applies to child custody modification cases. Venue for modification of an order is generally in the court which entered the previous order. However, a custodial parent with primary custody who has lived with the child (or children) in a different county for three consecutive

years may choose (it is not mandatory) to file a petition or transfer a petition filed by an opposing party to the county of their residence.<sup>16</sup>

Pendente lite orders are of particular concern if an ex parte order is entered or if an order is issued without an evidentiary hearing. For example, the Alabama Court of Civil Appeals reversed the entry of a pendente lite custody order because the notice requirements of Rule 65(b), Ala. R. Civ. P., were not met.<sup>17</sup> In another case, the Alabama Court of Civil Appeals, on due process grounds, overturned a pendente lite custody order because the trial court heard only argument from the child's guardian ad litem and did not provide an opportunity for an evidentiary hearing.<sup>18</sup>

Though petitions for writ of mandamus begin at the Alabama Court of Civil Appeals,<sup>19</sup> the non-prevailing party may file a similar petition with the Alabama Supreme Court within 14 days.<sup>20</sup> A party may file an application for rehearing with the court of civil appeals, but, in that event, review must be sought by petition for writ of certiorari.<sup>21</sup> Applications for rehearing and petitions for writ of certiorari are discussed below in more detail.

## Burden of Proof

It is important to recognize that the burden of proof and the scope of review are not interchangeable concepts.<sup>22</sup> The burden of proof is what level of proof you must meet in order for the trial court to rule in your favor. The scope of review establishes the degree of deference the appellate court gives the trial court. Understanding each of these concepts is vital.

Fortunately, only two burden-of-proof standards cover most custody cases.

The first is the "best interest of the child" standard. It applies in initial custody determinations, in cases in which dependency is established, and in modification cases where the order being modified grants the parties joint physical custody with approximately equal periods of custodial time.<sup>23</sup> This is often referred to as the *Couch* standard.<sup>24</sup>

Cases which involve prior custody orders granting primary physical custody to one parent or the other fall under the "material promotion" standard, which provides that the parent seeking modification must show that a change in custody will materially promote the best interest of the child such that the positive benefits of the proposed change will outweigh the inherently disruptive effects caused by uprooting the child. This is often referred to as the *McLendon* standard.<sup>25</sup>

Different standards and different burdens of proof apply to attempts by a third party to obtain custody from a parent, and to cases involving the termination of parental rights. When a third party attempts to gain custody from a parent, the third party has the burden of proving by clear and convincing evidence that a parent is unfit in order to be awarded custody of the child.<sup>26</sup> When a party seeks to terminate parental rights, that party must prove their case by clear and convincing evidence, but they have a multiplicity of complicating factors to take into account.<sup>27</sup>

When someone has custody of a child and wants to relocate more than 60 miles within Alabama or to a location outside of Alabama, the Alabama Parent-Child Relationship Protection Act<sup>28</sup> establishes shifting burdens. It begins with a rebuttable presumption that



# Custody decisions based upon *ore tenus* testimony are generally reversed only when the appellant can demonstrate an abuse of discretion by the trial court.

the relocation is not in the best interest of a child, and the burden is on the parent who desires to relocate to overcome this presumption. If that parent is able to overcome that presumption, then the burden shifts to the responding parent to prove that the move is not in the child's best interest.<sup>29</sup>

Becoming familiar with which burden of proof applies and directing your presentation to the trial court accordingly can greatly enhance the chances of success in defending or challenging the trial court's custody order. The differences between the burdens of proof in cases governed by *Couch* and *McLendon* are stark. In fact, if the applicable standard is in doubt, it might be advisable to obtain a ruling by the judge prior to trial regarding which burden of proof governs the matter before the court.

## Scope of Review

In general, custody cases fall under the *ore tenus* rule: when there is a dispute in oral testimony, the resolution of that dispute by the trial court is entitled to a presumption of correctness on appeal. Custody decisions based upon *ore*

*tenus* testimony are generally reversed only when the appellant can demonstrate an abuse of discretion by the trial court. In the custody context, this rule makes the trial court's custody decision extremely difficult to reverse on appeal, especially in *Couch* cases where the trial court is deciding between two fit parents:

Giving due consideration to the mother's argument that placing primary custody of the child, who was seven at the time of the trial, with the father would require the child to change schools, we must find ample evidence to support an award of custody to the father. While the record indicated animosity between the parents, the evidence and testimony tend to show that both parties provided for the child's emotional, financial and educational needs. Both parties presented testimony as to their fitness to raise the child, and both attested to their love for the child. We would note that, given our standard of review, had the trial court awarded the mother custody of the child, our decision would likely be the same.<sup>30</sup>

What happens on appeal when the trial court applies the wrong standard?

[The] distinction between the two burdens is crucial to our review. In appeals from a judgment denying a custody petition where the *Couch* standard was applied, but where the *McLendon* standard should have been applied, and in appeals from a judgment granting a custody petition where the *McLendon* standard was applied, but where the *Couch* standard should have been applied, we have affirmed the judgments under review, concluding that the trial courts' errors were harmless. See *Lawley v. Byrd*, 689 So.2d 191 (Ala. Civ. App. 1997), and *I.M. v. J.P.F.*, 668 So.2d 843 (Ala. Civ. App. 1995). However, where trial courts have denied custody petitions after applying the more stringent *McLendon* standard where the less stringent *Couch* standard should have been applied, we have reversed those judgments and remanded the cases for those trial courts to apply the *Couch* standard. See *Davis v. Davis*, 753 So.2d 513, 514 (Ala. Civ. App. 1999). Thus, as noted in the main opinion in *Ex parte W.T.M.*, 851 So.2d 55 (Ala. Civ. App. 2002), "when the

trial court uses an improper, higher standard to deny relief to a party requesting a modification of a prior custody order, the appellate court will not review the evidence under the correct lower standard and direct the award of custody,” but will reverse the judgment and remand the cause “for the trial court to make a custody determination, applying the correct standard.”<sup>31</sup>

## Trial and Post-Judgment Preservation of Error

The general rule is that an appellate court will not review issues raised for the first time on appeal.<sup>32</sup> The best, and perhaps safest, practice is to file a post-judgment motion setting forth any and all issues one intends to appeal. However, some issues will require proactive action at trial prior to the filing of a motion pursuant to Rule 59, Ala. R. Civ. P.

## Evidentiary Issues

Preservation of error regarding evidentiary matters is generally made by objection at the time the evidence is offered. Where the trial court has made clear its intention to overrule objections with regard to a particular line of questioning, a “standing objection” or “continuing objection” can be requested.<sup>33</sup> Where evidentiary issues can be anticipated prior to trial, a motion *in limine* may be appropriate to obtain a ruling regarding the admissibility of evidence or testimony. Of utmost importance is to remember to make an offer of proof for the record should the trial court refuse to admit evidence or testimony.<sup>34</sup> The failure to do so can result in a failure to preserve error.

## Sufficiency of the Evidence

In Alabama, custody litigation is tried before a trial judge without a jury. When the trial court enters an order and does not make a specific finding of facts, unless trial counsel files a post-judgment motion contesting the sufficiency of the evidence, that issue is likely waived on appeal.<sup>35</sup>

## Constitutional Issues

Constitutional issues must generally be raised at trial in order to allow appellate review, and the best practice is to raise them by affirmative defense or motion. Any constitutional challenge to an Alabama statute must be served on the Alabama Attorney General.<sup>36</sup> The attorney general then has a right to participate in the case, but often waives it. Similarly, Rule 44, Ala. R. App. P., requires that where the validity of a statute, executive or administrative order, municipal ordinance, franchise, or written directive of any governmental officer is in question, the appealing party must serve a copy of their brief upon the attorney general, city attorney, or chief legal officer of the governmental body whose order is at issue. Compliance with Rule 44 is not necessarily fatal, as the appellate court may, by special order, withhold ruling until the appropriate party is given notice and opportunity to respond. It is wise, however, to provide notice and not rely on the appellate court to cure the omission.

## The Appeal

After you have tried the case and secured the judgment, the analysis begins to determine whether to appeal. As alluded to, the first step will almost always be to file a post-

judgment motion pursuant to Rule 59, followed by the filing of the notice of appeal, docketing statement, and transcript purchase order as required by our appellate courts. Between those two actions, however, you have to decide whether to file a motion to stay the judgment.

Prior to taking any post-judgment action, however, the first inquiry is whether you have a final judgment for appellate purposes.

Only a final order will support an appeal. Trial counsel should confirm that all issues raised by either party in your proceeding have been ruled upon by the trial court. Many, including the author, have been involved in appellate cases which were unexpectedly dismissed and remanded to the trial court to rule on outstanding issues. Among the many such circumstances resulting in remand have been failure to rule on contempt issues,<sup>37</sup> failure to award child support,<sup>38</sup> and failure to resolve property division issues.<sup>39</sup>

## Rule 59

A post-judgment motion must be filed on or before the 30<sup>th</sup> day after entry of the custody order by a circuit court, and on or before the 14<sup>th</sup> day in the juvenile court.

Rule 4(a)(3), Ala. R. App. P., provides that the time for filing a notice of appeal is suspended by the filing of a timely Rule 59 post-judgment motion and that the time for appeal begins to run upon the trial court’s ruling granting or denying a post-judgment motion (although the granting of relief which substantially changes the order may result in the ability of the aggrieved party to file a subsequent post-judgment motion challenging the new order).

Under Rule 59.1, Ala. R. Civ. P., should the trial court fail to rule on a post-judgment motion within 90

days (circuit court) or 14 days (juvenile court), the post-judgment motion is deemed denied as of that date, thus reinstating the running of the time within which to file an appeal. Under Rule 4(a)(5), Ala. R. App. P., a notice of appeal filed before the disposition of all post-judgment motions is held in abeyance and becomes effective upon disposition.

## Notice of Appeal/ Docketing Statement/ Transcript Purchase Order

The basic documents required to perfect an appeal are the notice of appeal, docketing statement, and transcript purchase order. These forms are straightforward and are available online from the Alabama Judicial System website.<sup>40</sup> These forms may now be filed online via the AlaFile system.<sup>41</sup> The timely filing of a notice of appeal is jurisdictional, and an untimely filing will result in dismissal of the appeal.<sup>42</sup>

## Motion to Stay the Custody Order

Rule 8 (b), Ala. R. App. P., states that a request for a stay should be sought from the trial court. A motion to the appellate court should show that application to the trial court is impracticable or has been denied. If the trial court has given reasons for its actions, those should be set forth. The motion should detail the reasons for the relief requested and be supported by affidavits or other sworn statements in support of the application.

Rule 8(c) authorizes the trial court to condition the granting of a stay upon posting a sufficient

bond. A bond has, for example, been required to assure compliance with visitation provisions pending appeal.<sup>43</sup>

The Alabama Court of Civil Appeals recently issued guidance as to the factors it will consider in deciding whether to stay operation of a custody order pending appeal:

“(1) [w]hether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the ‘best interests’ of the child would be served by the stay.”<sup>44</sup>

## Rehearing and Certiorari Review

Once an opinion or no opinion affirmance order has been issued by the Alabama Court of Civil Appeals, either party may apply for rehearing from that court. Alternatively, or additionally, either party may petition the Alabama Supreme Court for a writ of certiorari. While prior practice made an application for rehearing a prerequisite to petitioning for certiorari review, such is not now the case.

## Application for Rehearing/Court of Civil Appeals

Applications for rehearing are governed by Rule 40, Ala. R. App. P. The application and supporting brief must be filed within 14 days of the date of the Alabama Court of Civil Appeals’ opinion. No brief opposing the application is required, but may be filed within 14 days of the filing of the application and supporting brief.

## Petition for Writ of Certiorari/Application For Rehearing

Petitions for writ of certiorari are governed by Rule 39, Ala. R. App. P. Certiorari will be granted only in limited circumstances, which are enumerated in Rule 39 (a)(1)(A)-(E). A petition for writ of certiorari must be filed within 14 days of the issuance of the Alabama Court of Civil Appeals’ opinion unless an application for rehearing has been filed. In that event, the petition for writ of certiorari must be filed within 14 days of the granting or the overruling of the application for rehearing. No brief is filed with the petition. In the event the writ is granted, the petitioner’s brief is due to be filed within 14 days of the grant, with the respondent’s brief due 14 days after the filing of the petitioner’s brief. The petitioner may file a reply brief within 14 days of the filing of the respondent’s brief. No application for rehearing is authorized in the supreme court if the petition is denied, quashed or stricken. Should the supreme court issue an opinion upon certiorari review, an application for rehearing may be filed with the supreme court pursuant to Rule 40.

## Conclusion

It is hoped that this primer will provide an overview of the interplay between trials and appeals. It is not intended to be exhaustive, just a point of beginning.

One invaluable bit of advice I received early in my career was to *read the rules!* The value of having a working knowledge of the rules of civil procedure and the rules of appellate procedure cannot be underestimated.

Godspeed on your custody litigation journeys. ▲



# The basic documents required to perfect an appeal are the notice of appeal, docketing statement, and transcript purchase order.

## Endnotes

1. *S.J.R. v. F.M.R.*, 984 So. 2d 468 (Ala. Civ. App. 2007).
2. *Amberson v. Long*, 998 So. 2d 1078 (Ala. Civ. App. 2008).
3. *Ex parte Brandon*, 113 So. 3d 638 (Ala. 2012); *Ex parte Hester*, 682 So. 2d 6 (Ala. 1996).
4. *Ex parte Hartley*, 50 So. 3d 1102 (Ala. Civ. App. 2010) (writ issued to overturn protective order regarding discovery of information pertaining to husband's law firm).
5. *Ex parte Johnson*, 219 So. 3d 655 (Ala. Civ. App. 2016) (writ issued directing quashing of subpoena requiring release of psychological records of children).
6. *Ex parte Diefenbach*, 64 So. 3d 1091 (Ala. Civ. App. 2010).
7. *Ex parte Ferguson*, 15 So. 3d 520 (Ala. Civ. App. 2010).
8. *Ex parte Weaver*, 781 So. 2d 944 (Ala. 2000).
9. *Ex parte Robbins*, 276 So. 3d 232 (Ala. Civ. App. 2018).
10. *Ex parte Shelton*, 814 So. 2d 251 (Ala. 2001).
11. *R.E. Grills, Inc. v. Davison*, 641 So. 2d 225 (Ala. 1994); *Osborne v. Osborne*, 216 So. 3d 1237 (2016).
12. Ala. Code §§ 30-3B-101 to -405 (1975).
13. *Id.* at § 30-2-5.
14. *Coleman v. Coleman*, 864 So. 2d 371 (Ala. Civ. App. 2003) (divorce matter); *Ex parte J.B.*, 223 So. 3d 251 (Ala. Civ. App. 2016) (UCCJEA matter); *Ex parte Diefenbach*, 64 So. 3d 1091 (Ala. Civ. App. 2010) (discussing Alabama's variance from the Model Uniform UCCJEA with regard to personal jurisdiction).
15. Review by petition for writ of mandamus may be the most efficient method for raising a challenge to subject matter jurisdiction. Nevertheless, it should be noted that subject matter jurisdiction may be raised at any time, including by the appellate court on its own motion. *See, e.g., Weith v. Weith*, 263 So. 3d 715 (Ala. Civ. App. 2018).
16. § 30-3-5, Ala. Code, 1975. One should note that the analysis as to the choice of venue is not as straightforward in cases involving joint physical custody and split custody. *Ex parte Rose*, 101 So. 3d 777 (Ala. Civ. App. 2012)(joint physical custody); *Ex parte Brandon*, 113 So. 3d 638 (Ala. 2012)(split custody).
17. *Ex parte Hutson*, 201 So. 3d 570 (Ala. Civ. App. 2016).
18. *Ex parte Dean*, 137 So. 3d 341 (Ala. Civ. App. 2013).
19. § 12-3-10 provides that the court of civil appeals shall have exclusive appellate jurisdiction of "... all appeals in domestic relations cases, including annulment, divorce, adoption, and child custody cases and all extraordinary writs arising from appeals in said cases."
20. Rule 21(e)(1)-(2), Ala. R. App. P.
21. Rule 21(e)(3), Ala. R. App. P.
22. *See, e.g., J.C. v. State Dept. of Human Resources*, 986 So. 2d 1172, 1184-85 (Ala. Civ. App. 2007) (discussing difference between burden of proof and scope of appellate review).
23. The custody division of time and authority which will place a modification into the "best interest of the child standard" is, unfortunately, not completely clear. *Compare Rehfeld v. Roth*, 885 So. 2d 791 (Ala. Civ. App. 2004) (father's 50 extra days of physical custody was not a preference under *McLendon* where decree did not name a physical custodian) with *Whitehead v. Whitehead*, 214 So. 3d (Ala. Civ. App. 2016) (mother having 150 days of custodial time did not trigger the use of the *Couch* standard where the decree provided the father would have "primary placement" and the mother "secondary placement").
24. *Ex parte Couch*, 521 So. 2d 987 (Ala. 1988).
25. *Ex parte McLendon*, 455 So. 2d 863 (Ala. 1984).
26. *Ex parte Terry*, 494 So. 2d 628 (Ala. 1986).
27. Ala. Code § 12-15-319; *Ex parte Beasley*, 564 So. 2d 950 (Ala. 1990).
28. *Id.* at §§ 30-3-160 through -169.10.
29. *Id.* at § 30-3-169.4.
30. *Reuter v. Neese*, 586 So. 2d 232, 234-35 (Ala. Civ. App. 1991).
31. *Rehfeld v. Roth*, 885 So. 2d 791 (Ala. Civ. App. 2004).
32. *McConico v. Patterson*, 204 So. 3d 409, 2016 Ala. Civ. App. LEXIS 61.
33. *Blume v. Durrett*, 703 So. 2d 986 (Ala. Civ. App. 1997).
34. *Ex parte Harris*, 461 So. 2d 1332 (Ala. 1984).
35. *Batchelor v. Batchelor*, 188 So. 3d 704 (Ala. Civ. App. 2015).
36. Ala. Code § 6-6-227.
37. *Decker v. Decker*, 984 So. 2d 1216 (Ala. Civ. App. 2007).
38. *Anderson v. Anderson*, 899 So. 2d 1008 (Ala. Civ. App. 2004).
39. *Sims v. Sims*, 38 So. 3d 71 (Ala. Civ. App. 2009).
40. <http://eforms.alacourt.gov/Appellate%20Forms/Forms/AllItems.aspx>.
41. For a detailed discussion of the new appellate electronic filing rules, see Stewart, Sarah and Haden, Ed, "Authorizing Electronic Filing of the Notice of Appeal," *The Alabama Lawyer*, Vol. 80, No. 5, pp. 375-77 (Sept. 2019).
42. The author can point to but one case which excused the late filing of a notice of appeal for equitable reasons. *See Ex parte G.L.C.*, \_\_\_ So. 3d \_\_\_, 2018 WL 5307629 (Ala. 2018).
43. *Caldwell v. Fisk*, 523 So. 2d 464 (Ala. Civ. App. 1988).
44. *Johnson v. Johnson*, 262 So. 3d 1229, 1232 (Ala. Civ. App. 2018), *citing Ex parte Krukenberg*, 252 So. 3d 676, 678 n. 1 (Ala. Civ. App. 2017)(discussing the factors considered by this court when considering a motion to stay).

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## Randall W. Nichols



Randy Nichols is a senior partner at Massey, Stotser & Nichols PC in Birmingham. He is the former chair of the Alabama State Bar Family Law Section and a Fellow and current president of the Alabama Chapter of the American Academy of Matrimonial Lawyers. He has appeared as appellate counsel in more than 100 published opinions.



# An Alabama Lawyer in the United States Supreme Court

*By Allan R. Chason*

## The Case

There was nothing exceptional about the case at first.

Mike and Wanda Dobson bought a house in Fairhope. The house came with a Terminix termite bond. Terminix inspected the house prior to closing and gave it a clean bill of health. Shortly after closing, the Dobsons commenced remodeling the house and found active termites in the floors, walls, ceiling, and roof decking. I filed suit against Terminix for them in the Circuit Court of Baldwin County. Terminix hired Joey Jones and Julian Motes of Sirote Permutt.

I commenced the usual preparation for trial, but unknown to me, Terminix had other plans for the case. To my dismay, Terminix soon filed a motion to stay for arbitration.

After a quick refresher on Alabama's statute barring the enforcement of pre-dispute arbitration agreements, I confidently argued that the Dobsons could not be required to arbitrate their claim because the transaction did not "involve" interstate commerce sufficient to invoke the preemptive Federal Arbitration Act. I pointed to the fact that the case involved Alabama buyers and sellers

of an Alabama house. Terminix replied that Terminix was a national company and that the chemical used to treat the termites was made in Arkansas. Circuit Judge Jim Reid denied the Terminix motion without much debate.

I was again surprised when Terminix sought review in the Alabama Supreme Court. That court affirmed Judge Reid and I resumed my preparation for trial, curious about our procedural detour on an issue I thought to border on frivolous. As it turned out, the fun had just begun.

## Certiorari

I was even more perplexed when on December 23, 1993, Terminix filed a petition for writ of certiorari in the United States Supreme Court. A few days later, it became apparent that we were caught up in a carefully-orchestrated Terminix plan.

I received a call from The Public Citizen, a public interest law firm in Washington founded by Ralph Nader. The caller explained that there were four other petitions for certiorari then pending in the Supreme Court raising the same issue: what facts “involve” interstate commerce under the Federal Arbitration Act? The caller explained that The Public Citizen assists “underdog” clients pro bono on issues affecting consumer rights. They would provide me background advice and support in opposing the Terminix petition. I understood that I needed their help. My brother, Johnny, and I were then a two-man firm, with an office in Bay Minette. The Terminix petition was filed by a new member of their team, H. Bartow Farr, III, a Washington regular before the Supreme Court who had clerked for Chief Justice William Rehnquist. He had served as Assistant Solicitor General. He has now argued 32 cases in the Supreme Court and lists *Dobson* as one of his top 10 arguments.

I was later told that the going fee among regular practitioners before the Supreme Court was \$500,000. So, slightly above my pay grade, but with the help of The Public Citizen, in February I drafted and filed our brief in opposition to certiorari. At that point, I took solace in the fact that some 5,000 petitions for certiorari were filed annually with the Supreme Court. The Court heard only about 50 of them.

But, on March 21, I found out I had won the lottery.

## Arranging a Support Team

Only a few minutes after cert. was granted, my contact at The Public Citizen called me to give me the news. That call started out something like: “Well, Allan, you and the Dobsons are about to become famous.” Her advice was “beware of offers to take control of your case.”

I was aware that there had never been another case out of the Baldwin County Circuit Court heard by the Supreme Court, but even at this point, I underestimated the national interest in the case. What I did understand was that I needed more help than what The Public Citizen offered.

After a day of gathering my wits, I made four calls. First, I was fairly sure that less than all of our claims were arbitrable and that we could return to the circuit court if I dismissed the claims which were subject to the arbitration agreement. So I called Mike and Wanda Dobson and after giving them the news, I asked: “Do you want to try your case, or do you want to be famous?” They chose fame.

Next, I considered that I was a business lawyer, a commercial litigator, and that plaintiff’s damage cases were not my bread and butter. My practice would not likely be impacted by arbitration the way the practice of the full-time plaintiff’s bar would be. So, I called my law school friend and full-time plaintiff’s lawyer, Kenny Hooks, in Birmingham. Kenny signed on to the team without hesitation and promptly raised generous financial support for our effort.

My third call was to my law school study buddy, close friend, and confidant, Ed Hines, in Brewton.

And my last call was to my now partner, Jessica McDill, who was then a student at Cumberland and set to clerk for us that summer.

## The Harvard Connection

Our team knew we needed some horsepower. Kenny suggested Professor Lawrence Tribe, then teaching at Harvard Law. Tribe was also a regular at the Supreme Court. At last count he has argued 36 cases there. He is the author of a leading treatise on constitutional law.

In our initial contact with Tribe, we were instructed to work through Ken Chesebro, a Cambridge appellate

lawyer who was a former student of Tribe. The plan was that Chesebro would take the lead on the merits briefing and Tribe would argue the case.

On May 2, Kenny and I flew to Boston to meet with Tribe and Chesebro at Harvard. Tribe initially signed on to the plan and Chesebro began circulating drafts of our brief, which was due on July 19.

In August our plan took a turn for the worse. Tribe had been hired in an international banking scandal in Europe and would not be able to argue our case. Oral argument was set for October 4. So, with about six weeks to go and our ace unavailable, Kenny, Ed, and Jessica gave me their decision: it's you or nobody.

I cleared my calendar and worked on nothing else for that six weeks.

## National Attention

Amicus curiae briefs poured in on both sides.

The Southern Poverty Law Center supported us because of the consumer issue; the National Association of Attorneys General joined us as well because the case involved a state's rights issue.

In support of Terminix there was the American Council of Life Insurance Companies, American Arbitration Association, American Bankers Association, American Financial Service Association, ITT Consumer Financial Corporation, Alabama Manufactured Housing Institute, Alabama Water and Wastewater Institute, and Alabama Pest Control Association.

The lawyers representing those parties were a veritable "Who's Who" of the Supreme Court Bar. Ted Olson was among them. He has now argued 12 cases in the Supreme Court, and he served as Solicitor General under President Bush (43). He represented Bush in the *Bush v. Gore* election dispute.

Media coverage was intense. I received calls from, or was interviewed by, the *ABA Journal*, CBS News "Eye to Eye," Connie Chung for "60 Minutes," LAWYERS WEEKLY USA, BLOOMBERG, THE WALL STREET JOURNAL, Associated Press, National Public Radio, American Association of Retired Persons, National Consumer Law Center, National Employment Lawyer Association, and law professors writing law review articles at Boston College and Cumberland School of Law.

*About 9:00 the night before the argument, with my self-confidence in tatters, I remembered an article a lawyer-friend had sent me, "Preparing for a Supreme Court Argument... Do What Your Mother Told You."*

## The Team Sets Up Shop in Washington

Oral argument was set for a Tuesday, the second day of the term. That was Justice Stephen Breyer's second day on the Court and much of the media attention was on him and whether he would be an active questioner of the lawyers.

We flew to Washington the preceding Saturday and checked into an executive suite at the Watergate Hotel. My wife, Nancy, was with me, as were our three teenage children, who were tucked away in a separate room far from me.

The most exciting part of their trip was getting on the hotel treadmill next to Dan Rather.

We shipped our multiple banker's boxes of files to the hotel in advance and set up a war room in my suite. Mike and Wanda Dobson joined us in Washington. Trying to be helpful, Wanda brought a Mason jar full of termites for me to show the Court in case they doubted our claim.

## Last-Minute Preparation

On Sunday morning, we went to The Public Citizen, where a moot court had been arranged for me to present my argument to a panel of their appellate lawyers.

The panel didn't like anything I planned to do with my argument. "Say it this way." "Don't say that!" "Emphasize this case." I took their advice and went back to the hotel Sunday afternoon to re-work my argument.

Having never been in the Supreme Court building, I made arrangements through the clerk's office to attend the opening session of Court on Monday morning.

Monday afternoon I went back to The Public Citizen for another moot court, with a different panel of lawyers. That panel didn't like the changes I had made to the argument the day before. So Monday night I tried to re-work the argument again.

About 9:00 the night before the argument, with my self-confidence in tatters, I remembered an article a lawyer-friend had sent me, "Preparing for a Supreme Court Argument...Do What Your Mother Told You." At that point I told my wife to turn out the lights and



unplug the phone because we were going to bed. I tore up all the advice I had gotten from the moot court panels. I had decided to be myself and deliver the argument I brought to Washington.

## Courtroom Decorum

I had orally argued many cases in the appellate courts of Alabama and in the Eleventh Circuit and pretty well took those in stride, but an argument in the United States Supreme Court is the Super Bowl of appellate advocacy and is tension-filled beyond belief.

Our case was set for 10:00 a.m. I was to arrive in the lawyers' lounge at 9:00 a.m. for instructions from William K. Suter, the clerk. More instruction was the last thing I needed at that point. I listened dutifully, though, as Suter told me firmly to be seated at counsel table before the Court comes into the room; don't speak until the Chief Justice recognized me; do not introduce myself; only refer to the Chief Justice as "Mr. Chief Justice"; do not refer to anybody as "Judge"; that the Chief Justice has a bad back and if he gets up during my argument and walks behind the draperies, don't be distracted as he is just stretching his back; and by all means, when answering a question, if I was not sure of a Justice's name, don't call them by name.

Kenny sat at counsel table beside me. I've heard a number of lawyers comment on how close the counsel table is to the Justices and that is true. Behind the Justices' chairs are ceiling-to-floor heavy burgundy draperies. We sat nervously at counsel table watching the clock countdown to 10:00 a.m. when, on cue, the Justices would file out from behind the draperies to take their seats. A few rows behind counsel table in the packed-house gallery sat Mike and Wanda, Ed, my family, and Jessica.

At 9:59 a.m., with my heart already in my throat, a U.S. Marshall tapped me on the shoulder and handed me a rolled-up chewing gum wrapper. "That young lady back there asked me to give this to you," he said. All that was written on the wrapper was "Dad, I love you."

About that time, the draperies shifted and the Justices filed into the courtroom.

## The Argument

The argument went okay, I suppose. The problem with Supreme Court arguments is that they are so scrutinized that if you make a mistake, the whole world knows it. If you're really unlucky your name and mistake make THE NEW YORK TIMES. A few months before

my argument, THE WALL STREET JOURNAL ran a story on embarrassing mistakes lawyers have made during Supreme Court arguments. Plus, the arguments are recorded and archived at [oyez.com](http://oyez.com).

I guess my biggest mistake came in the following exchange with Justice Scalia:

Me: ...in trying to give some meaning to the word "involving" commerce and what Congress might have thought it meant, we cite Your Honors, to the Coronado Coal Company case which was decided in 1922.

Scalia: You cite the case to Our Honors, I think, you don't cite Our Honors to the case, but that's all right.

Me: Yes sir. Excuse me.

## Conclusion

The decision went against us on a 7-2 vote and the floodgates of arbitration were opened.

For years after the decision, I got calls from lawyers all over the country. The calls usually started out something like "the defense lawyer in my case says I can't have a jury trial and he cites this *Dobson* case you were in." "What can you tell me about that?"

For Mike and Wanda Dobson, the case turned out okay. Because we had a non-arbitrable claim, and because Terminix had prevailed on the much larger issue for them, they settled our case. So, Mike and Wanda got famous and got paid.

I got a quill which hangs over my desk in a shadow box, the same souvenir all lawyers get for an argument before the Supreme Court. I sometimes look at that shadow box and cherish my experience there.

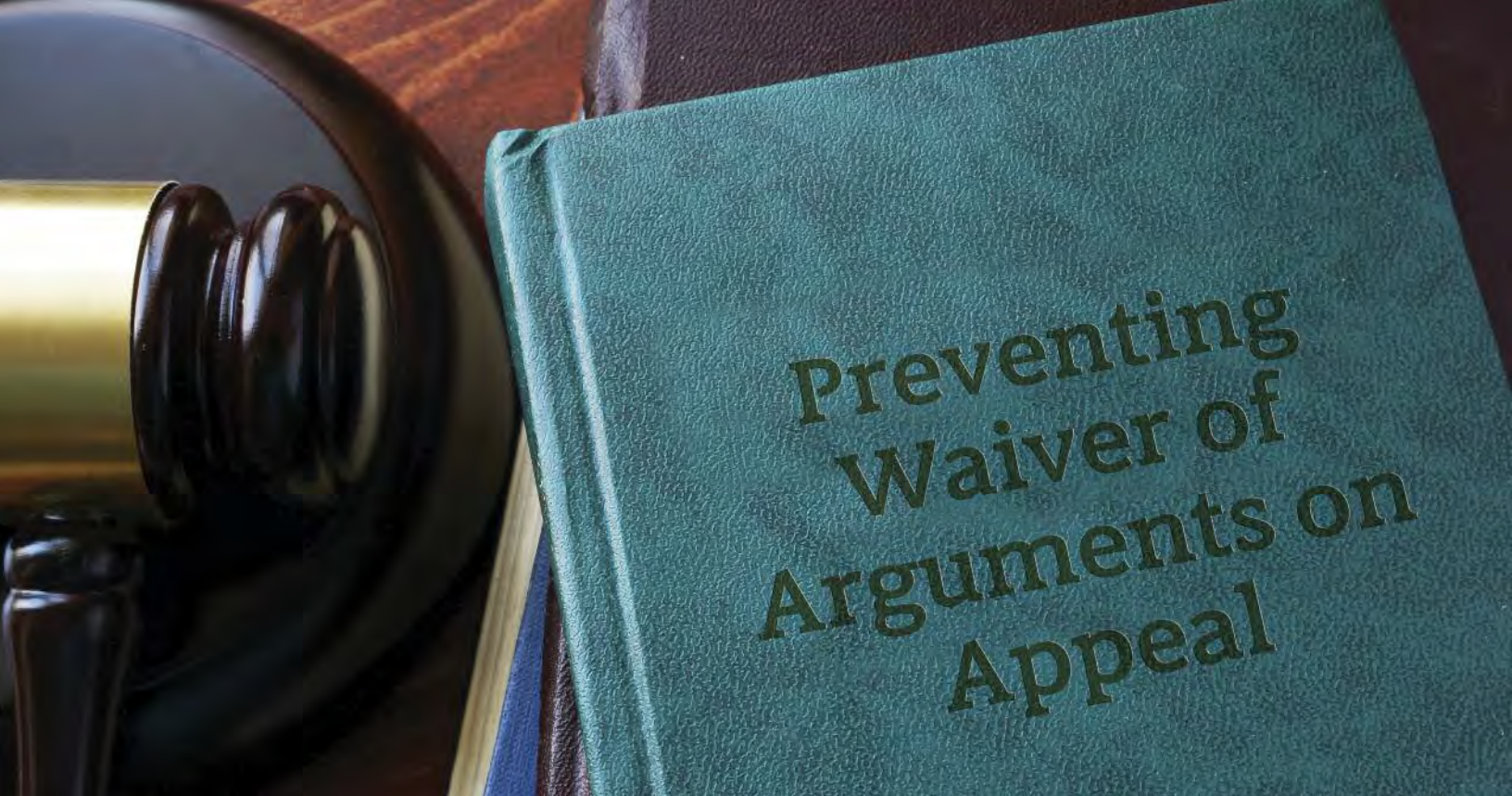
But in case anybody is looking to hire me to argue their case in the Supreme Court, I'm not available. ▲

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### Allan R. Chason



Allan Chason practices at Chason & Chason PC in Bay Minette. He received his undergraduate degree in 1972 and his law degree in 1976, both from the University of Alabama.



# Preventing Waiver of Arguments on Appeal

*By Ed R. Haden, Jason B. Tompkins and Robert V. Baxley*

Years of litigation can end based on one waiver at trial or on appeal.<sup>1</sup> Whether and how an appellate court applies the principles of waiver to deny review of an question or issue is governed by “no general rule,” but is left “primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases.” *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The appellate court’s discretion, in turn, may be guided by the competing policies of fairness to the opposing party, the regard for the trial court’s role, the caseload of the appellate court, the importance of the issue, and the practical realities of trial work,

among others.<sup>2</sup> In some appeals, this can boil down to the standard of waiver employed by the individual appellate judge to whom the case is assigned.

In an adversarial system of justice it is generally considered fair to afford the opposing party the opportunity to respond.<sup>3</sup> Appellate courts are loath to reverse a trial court based on an argument that the trial court has not had an opportunity to rule on.<sup>4</sup> And because of heavy caseloads, appellate judges generally do not have the time to canvass the record or to conduct extensive legal research to determine if a party’s argument should prevail.

On the other hand, when an issue is of sufficient importance to the development of the law, an appellate court may address an otherwise inadequately preserved issue.<sup>5</sup> Similarly, to preserve an issue, appellate judges may not require a perfect objection or argument in the midst of the hectic realities of trial.

In balancing those policies, individual appellate judges may have different standards for concluding that an argument or issue is waived. When different individual standards combine with collegial deference to the writing judge, the strictness of waiver can vary from case to case on the same court depending on which judge writes the opinion, unless the court adopts a uniform standard.

Because counsel cannot control the strictness with which an appellate court will apply waiver principles, it is prudent to adhere to a standard that would survive a strict review on appeal. This article addresses the general principles for when and how to raise arguments in civil and criminal cases to avoid waiver of an argument or issue on appeal.

## When and How to Raise Arguments

As a starting point to avoid waiver, an argument should be raised in the trial court with citations to record evidence and supporting law, raised in time for one's opponent to respond, ruled upon by the trial court, and raised in one's initial appellate brief with citations to the record on appeal and supporting law.<sup>6</sup> One should

not assume that a footnote or a single sentence is enough to preserve an important issue at any stage of litigation. Counsel should also take care to comply with the rules at each stage of the litigation process, beginning with the complaint.

## Preserving Error in the Trial Court

### Complaint (Civil Cases)

In general, a claim must appear on the face of the well-pleaded complaint, or it is waived.<sup>7</sup> Three specific rules also have an impact on the prevention of waiver. First, even where a claim is omitted from a complaint, it can be salvaged under Rule 15(b) of the Alabama Rules of Civil Procedure by being tried with the consent of the other party or upon a motion to conform the pleadings to the evidence.<sup>8</sup>

Second, when the constitutionality of a statute or municipal ordinance is at issue in an Alabama court, the attorney general must be notified of the issue and action.<sup>9</sup> To be effective, the notice must be given in time for the attorney general to participate and act on it.<sup>10</sup> Without the required notification, the trial court has no subject matter jurisdiction, any ruling on the case will be void, and no appeal can be taken.<sup>11</sup>

Third, for claims against a municipality, a plaintiff should notify that municipality within two years of the accrual of a claim for payment (six months in the case of a tort claim).<sup>12</sup> Otherwise, the claim is barred.<sup>13</sup>

### Motion to Dismiss (Civil Cases)

As a general rule, under Alabama Rule of Civil Procedure 12(b), certain defenses (*i.e.*, lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service) generally should be raised in a motion to dismiss.<sup>14</sup> If that defense is made by motion, it must be made before any responsive pleading.<sup>15</sup> If a motion to dismiss based on lack of personal jurisdiction is denied and mandamus relief is sought and denied, there is nothing to prevent a future challenge to personal jurisdiction on appeal.<sup>16</sup>

### Motions to Dismiss and Other Challenges to the Indictment and Grand Jury Proceedings (Criminal Cases)

Challenges to grand jury proceedings must be raised in a motion to dismiss the indictment filed after the indictment is returned, but before the defendant is arraigned.<sup>17</sup> A challenge to the indictment itself must also be raised in a pretrial motion to dismiss, but the Alabama Rules of Criminal Procedure provide that it can be done *at* and not just before the arraignment.<sup>18</sup> Any plea to an indictment at arraignment, whether guilty or not guilty, waives any challenge to the validity of the indictment or the sufficiency of the evidence considered by the grand jury unless that challenge is specifically reserved with leave of the trial court.<sup>19</sup>

### Interlocutory Appeals (Civil Cases)

The failure to file an interlocutory appeal generally does not result in waiver of an issue in a later appeal from a final judgment.<sup>20</sup> The Supreme Court of Alabama

has held that the failure to file a petition for a writ of mandamus does not waive the right to challenge the denial of a trial by jury.<sup>21</sup> With respect to the defense of improper venue, however, Alabama law is not settled. On the one hand, Alabama Code § 6-8-101 expressly provides that this defense can be appealed after a final judgment. On the other hand, *Ex parte Children’s Hospital of Alabama*, 721 So. 2d 184, 191 n.10 (Ala. 1998), states that a failure to seek interlocutory review of a denial of a motion to dismiss for improper venue may waive that defense. Although *Ex parte Children’s Hospital* does not address § 6-8-101, it would seem that the express words of the statute should prevail in a case where the statute is properly raised and argued.

## In addition to pleading affirmative defenses, counsel should remember to deny factual allegations in his answer.

Where an interlocutory appeal is taken by means of a petition for a writ of mandamus, a statement of good cause should be included if the petition is not filed within 42 days of the ruling or order that is the subject of the petition.<sup>22</sup> Otherwise, the right to petition for relief is waived.<sup>23</sup>

### Answer (Civil Cases)

Typically, “when a party has failed to plead an affirmative defense, it is deemed to have been waived.”<sup>24</sup> The Supreme Court of Alabama has explained:

Once an answer is filed, if an affirmative defense is not pleaded, it is waived. The defense may be revived if the adverse party offers no objection; or if the party who should have pleaded it is allowed to amend his pleading; or if the defense appears on the face of the complaint.<sup>25</sup>

Once waived, a defendant cannot revive an affirmative defense, even at summary judgment.<sup>26</sup> Further, counsel must be specific in identifying the affirmative defense. In *Pinigis v. Regions Bank*, 942 So. 2d 841, 847–48 (Ala. 2006), for example, the court held that a party had waived an affirmative defense by pleading the “statute of limitations” instead of the more precise

term “statute of repose.” And in *Ex parte Seriana*, No. 1180104, 2019 WL 988465, at \*3–4 (Ala. Mar. 1, 2019), the court explained that it is not enough to “reserve the right” to amend an answer to raise a defense instead of actually asserting a certain defense.

In addition to pleading affirmative defenses, counsel should remember to deny factual allegations in his answer. *Failure to do so could result in an effective waiver of a defense.* For example, in *Matthews v. Alabama Agricultural and Mechanical University*, 787 So. 2d 691, 697–98 (Ala. 2000), state university defendants did not file an answer or any other pleading denying the allegations in the plaintiff’s complaint. The plaintiff had alleged that the defendants had acted willfully, maliciously, fraudulently, and beyond their authority, and the defendants presented no evidence that they were exercising a discretionary function. *Id.* Because the university defendants relied solely on the pleadings, the burden never shifted to the plaintiff to show that immunity did not apply. *Id.* The Alabama Supreme Court held that the defendants were not entitled to sovereign immunity or to discretionary-function immunity. *Id.*

Nonetheless, where an affirmative defense is argued at trial and the opposing party is not prejudiced, the supreme court has held that the defense was not waived by a failure to include it in the answer.<sup>27</sup> Instead, the trial court was allowed to rule that the pleadings were amended to conform to the evidence under Rule 15.<sup>28</sup>

### Preserving the Right to Appeal from a Guilty Plea (Criminal Cases)

To appeal a conviction entered on a guilty plea, a defendant must

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do two things. First, he must preserve the specific issue he intends to appeal by raising the issue in the trial court and obtaining an adverse ruling *before* entering the guilty plea.<sup>29</sup> Second, the defendant must expressly reserve the right to appeal before entering his guilty plea. Otherwise, the defendant “is presumed to have abandoned all non-jurisdictional defects that occurred before the plea.”<sup>30</sup>

### Summary Judgment (Civil Cases)

At the summary judgment stage, waiver principles turn on whether the argument is raised by the winner or loser in the trial court and how the argument was made in that trial court. The loser at summary judgment can raise on appeal only those arguments that he made to the trial court.<sup>31</sup> By contrast, the winner at summary judgment can raise any argument on appeal, even new ones. As the Alabama Supreme Court explained with respect to affirming trial courts generally:

[T]his Court will affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court. This rule fails in application only where due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment, or where a summary-judgment movant has not asserted before the trial court a failure of the non-movant’s evidence

on an element of a claim or defense and therefore has not shifted the burden of producing substantial evidence in support of that element . . . .<sup>32</sup>

Counsel must also take care how he makes his argument to the trial court. It may take more than one sentence to preserve an argument (both in the trial court and on appeal).<sup>33</sup> And every motion for summary judgment must include a narrative statement of the facts citing the evidence in the record before the trial court. Failure to comply with the specific citation rule may result in the reversal of the summary judgment.<sup>34</sup> Finally, if counsel intends to argue that a critical piece of evidence supporting his opponent’s summary judgment motion was not authenticated or is inadmissible, counsel must object in the trial court on that ground, or the objection is waived, absent a gross miscarriage of justice.<sup>35</sup>

### Challenges to Jurors’ Qualifications to Serve

A party must question jurors about their qualifications because failure to do so may constitute invited error, and the challenge based on qualifications will be waived on appeal.<sup>36</sup>

### Batson Challenges (Criminal Cases)

Timing is crucial on any challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). To preserve a *Batson* challenge to the state’s peremptory strike of a venire member, the objection must be made before the trial court swears in the petit jury and before it dismisses the venire.

Once an objection is made, the Alabama Court of Criminal Appeals explained in *Shanklin v.*

*State* the three-step burden shifting framework to preserve the issue for review:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

187 So. 3d 734, 764 (Ala. Crim. App. 2014) (citations and quotation marks omitted).

### Objections to Evidence

Evidentiary objections can be made by a motion *in limine* or during the trial itself. When the trial

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court denies a motion *in limine* to exclude evidence, the disappointed movant must object again when that evidence is introduced at trial to preserve his objection for appeal.<sup>37</sup>

When the trial court grants a motion *in limine*, the disappointed non-movant must attempt to offer his evidence again at trial, making a proffer to preserve the exclusion ruling for appeal.<sup>38</sup> Dean Gamble has explained, however, that when a ruling on a motion *in limine* is “prohibitive” (that is, it prohibits the party opposing the motion from offering or mentioning the evidence at trial without obtaining permission from the judge), a proffer of evidence at trial is not required.<sup>39</sup>

To preserve an evidentiary objection for appellate review, the objection made at trial must be timely, state specific grounds, and result in a ruling that affects a substantial right of the appellant.<sup>40</sup> Where the trial court excludes evidence, the party who wishes to present that evidence must make a proffer of that evidence on the record and state the purpose for which it is offered so that the appellate court will be able to assess the admissibility of the evidence on appeal.<sup>41</sup> Whatever grounds are stated in support of the objection or the admission of evidence in the trial court (both during the trial and in a motion *in limine*) are the grounds upon which the appellate court will review the merits of the objection; the appellate court will not consider grounds raised for the first time on appeal.<sup>42</sup>

In a criminal trial, an adverse ruling on a motion to suppress before trial is considered final and need not be objected to during trial.<sup>43</sup> Although a motion to suppress may also be made during trial, it must be raised by an objection before the evidence is introduced.<sup>44</sup>

A defendant may preserve the right to appeal an adverse ruling on a motion to suppress even when entering a guilty plea. As noted above, though, he must expressly reserve the right to appeal that issue before entering the guilty plea or have an agreement with the state allowing him to do so.<sup>45</sup>

### **Motion for a Judgment as a Matter of Law during Trial (Civil Cases)**

Usually challenges to the sufficiency of the evidence must be made twice—once at the close of evidence and again post-judgment.<sup>46</sup> If, however, a defendant moves for judgment as a matter of law (“JML”) at the close of the plaintiff’s case and that motion is denied, and then the defendant elects to offer evidence as part of its defense, the defendant waives any argument that the trial court erred in denying the motion for JML at the close of the plaintiff’s evidence.<sup>47</sup> Instead, the appellate court will review the record as of the close of all of the evidence.<sup>48</sup>

Rule 50(a)(2) of the Alabama Rules of Civil Procedure provides that a motion for JML “shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.”

### **Motion for Judgment of Acquittal (Criminal Cases)**

A motion for judgment of acquittal tests the sufficiency, not the weight, of the evidence.<sup>49</sup> (Like civil cases, for bench trials it is also necessary to file a motion for a new trial to preserve the sufficiency of the evidence as an issue for appeal.<sup>50</sup>) Unlike motions for judgment as a matter of law in civil cases, it is not necessary to move

for a judgment of acquittal before submission of the case to the factfinder to preserve the issue for appeal.<sup>51</sup> The Alabama Rules of Criminal Procedure allow a defendant to preserve the sufficiency of the issue through a motion made at the end of the state’s evidence, at the close of the evidence, or even after the verdict is entered.<sup>52</sup> If done post-judgment, the motion for judgment of acquittal must be made within 30 days after the sentence is imposed.<sup>53</sup> A post-judgment motion for judgment of acquittal is deemed denied by operation of law 60 days after the sentence is imposed, although the time may be extended with the express consent of the parties noted in the record.<sup>54</sup> The clock on filing a notice of appeal would start thereafter.

### **Jury Instructions (Civil Cases)**

Submitting jury instructions is not enough to preserve error in the trial court’s failure to give those instructions.<sup>55</sup> Rule 51 of the Alabama Rules of Civil Procedure provides that:

No party may assign as error the giving [of] or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless [1] that party objects thereto before the jury retires to consider its verdict, [2] stating the matter objected to and the grounds for the objection.

In other words, “[b]y failing to object before the jury retires to deliberate, a party waives any error in the court’s instructions.”<sup>56</sup> With respect to the specificity of the grounds given, “Rule 51 does not contemplate that the objecting party, in order to preserve for appellate review an erroneous

instruction, deliver a discourse on the applicable law of the case.”<sup>57</sup>

On the other hand, a general objection based on “not giving the requested charges” is insufficient.<sup>58</sup>

### Post-Judgment Motions (Civil Cases)

To challenge the evidence supporting a judgment, the conduct of trial, the legality of the judgment or the entry of a default judgment, counsel must file a post-judgment motion. When a party fails to file a timely motion with the trial court to set aside the dismissal of its action, for example, an appellate court may consider related issues to be interlocutory in character and therefore unreviewable on appeal.<sup>59</sup>

The supreme court has explained:

The rationale behind . . . the general rules regarding the necessity for post-trial motions is that, ordinarily, issues not raised before the trial court may not be raised for the first time on appeal. This principle assures proper development of the record in the court below and places the primary responsibility on the trial judge to determine whether the sanction of dismissal for failure to comply with discovery orders is merited. The procedure affords the trial court, which has a feel of the case, an opportunity to correct its own errors and prevent the hardships of an appeal.<sup>60</sup>

In addition, Rule 50(b) of the Alabama Rules of Civil Procedure provides that to challenge the sufficiency of the evidence for sending a claim to the jury, a party must file a renewed motion for judgment as a matter of law (JML) after the judgment is entered. In

## To challenge the evidence supporting a judgment, the conduct of trial, the legality of the judgment or the entry of a default judgment, counsel must file a post-judgment motion.

general, there must be a JML made at the close of the plaintiff’s evidence and a renewed JML motion after judgment that makes the same arguments in order to avoid waiving the arguments.<sup>61</sup> There are two exceptions to that two-motion requirement. First, a post-judgment JML motion challenging the sufficiency of evidence supporting an award of punitive damages does not require a JML motion at the close of the evidence.<sup>62</sup> Second, a post-judgment JML motion about a pure question of law does not require a JML motion at the close of all the evidence.<sup>63</sup>

Although the original JML motion can be made orally, Rule 50(b) specifies that for a post-judgment JML motion, there must be “service and filing.” Where the renewed JML motion fails to challenge the sufficiency of the evidence, such challenge is waived for appellate review.<sup>64</sup> A general challenge, such as the “evidence is insufficient to support [the] plaintiff’s alleged claims that the defendants, separately or severally, wrongfully interfered with any

business [or contractual] relationship the plaintiff . . . had with [the defendant],” has been held sufficient because it “challenged the sufficiency of the evidence as to each element of the tortious-interference claim.”<sup>65</sup> Justice Lyons has recommended:

[C]aution dictates that defendant’s motion for JML assert that there is no legally sufficient evidentiary basis for a reasonable jury to find for the plaintiff on each count of the complaint, on each claim, on each element of each claim, on each material factual allegation, and on each item of damages sought. The motion should further assert that the evidence establishes each of the defendant’s affirmative defenses and each element thereof. The motion should also cite supporting legal authority where appropriate.<sup>66</sup>

There is one crucial distinction between how a motion for JML is handled in jury trials and bench trials. “[W]hen the trial court has made no written findings of fact in a non-jury trial, a party must move for a new trial in order to preserve for review a question relating to the sufficiency or weight of the evidence.”<sup>67</sup>

To challenge error made in the conduct or result of a trial, a motion for a new trial must be made *after* the judgment. A request for remittitur (*i.e.*, to accept a lower damages amount or a new trial),<sup>68</sup> an argument regarding juror misconduct,<sup>69</sup> an argument that jury instructions were improper,<sup>70</sup> etc. should be made through a timely filed Rule 59 motion.

Rule 50(c)(1) provides that “[i]f the renewed motion for judgment as a matter of law is granted, the

court shall also rule on the motion for a new trial. . . . In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial.” If the trial court fails to make the conditional ruling on the new trial motion:

[T]he movant [should] point out that error to the trial court and/or to the appellate court, and the failure to do so would constitute a waiver of the motion for a new trial . . . . Alabama caselaw also provides for an exception to the rule stated above, an exception that allows an appellate court on its own motion to remand the action for the trial court to rule on the motion for a new trial if the movant has argued the merits of the motion at trial and on appeal.<sup>71</sup>

In other instances, for example, where the trial court grants a new trial on one ground and does not rule on alternative grounds for new trial, Rule 50(c) does not require the trial court to rule on the alternative grounds for a new trial.

Post-judgment motions also may present a second chance to raise a new legal argument. A trial judge has the discretion to consider a new argument in a post-judgment motion, but is not required to do so.<sup>72</sup>

### **Motion for a New Trial (Criminal Cases)**

In a criminal trial, motion for a new trial is one of the only ways for a criminal defendant to challenge the weight or credibility of the evidence after a conviction by a jury. Appellate courts, however, are loath to overturn a jury verdict on this basis. In *Campos v. State*, the court of criminal appeals explained that:

**Where there is ample evidence offered by the state to support a verdict, it should not be overturned even though the evidence offered by the defendant is in sharp conflict therewith and presents a substantial defense.**

An appellate court may interfere with the jury’s verdict only where it reaches a clear conclusion that the finding and judgment are wrong. . . . A verdict on conflicting evidence is conclusive on appeal. Where there is ample evidence offered by the state to support a verdict, it should not be overturned even though the evidence offered by the defendant is in sharp conflict therewith and presents a substantial defense.

217 So. 3d 1, 12 (Ala. Crim. App. 2015). To preserve the weight of the evidence issue for appeal, a defendant must file a motion for a new trial that specifically argues that the verdict or judgment is against the weight of the evidence.<sup>73</sup>

A motion for a new trial may also be filed to preserve other errors affecting the fairness or impartiality of a trial, such as

cumulative prosecutorial misconduct, juror misconduct, or ineffective assistance of trial counsel.<sup>74</sup>

Any motion for a new trial must be filed within 30 days from the date that the sentence is imposed.<sup>75</sup> Any motion for a new trial that is not ruled on by the trial court within 60 days after the imposition of a sentence is deemed denied unless it is extended by consent of both parties and noted in the record.<sup>76</sup>

### **Objections to Sentencing (Criminal Cases)**

Defendants often enter plea agreements with the understanding that the state or the government will recommend a certain sentence. If that agreement requires an appeal waiver, however, the defendant will waive any challenge to his sentence should the trial court impose a different sentence unless he specifically conditions the appeal waiver on the court imposing the sentence recommended for him by the state or the government.<sup>77</sup>

Preserving a challenge to a sentence requires filing a motion to modify the sentence within 30 days after it is imposed.<sup>78</sup> Objections to a sentence that is outside the statutory limit, however, are jurisdictional in nature and can be raised at any time, even on appeal.<sup>79</sup> And preserving an objection that the state failed to notify the defendant that he would be sentenced as a habitual felon must be made at the time of sentencing.<sup>80</sup>

## **Preserving Error on Appeal**

### **Notice of Appeal**

In federal court, mentioning one issue or one order in the notice of



appeal may result in the exclusion of other issues and orders.<sup>81</sup> Under the Alabama Rules of Appellate Procedure, however, the designation of a particular order from which the appeal is taken does not limit the scope of appellate review.<sup>82</sup>

However, every party in a multi-party suit must be listed on the notice of appeal to be a part of the appeal in Alabama appellate courts, and an appellant cannot use “et al.” to avoid naming every party specifically. Otherwise, claims against those omitted parties will be waived. Under Rule 3(c) of the Alabama Rules of Appellate Procedure, simply listing “et al.” is not sufficient. To illustrate, in *Naman v. Chiropractic Life Center, Inc.*, No. 1170934, 2019 WL 1975408, at \*3 (Ala. May 3, 2019), the court struck “et al.” from an appellant’s notice of appeal under Rule 3(c). Because the notice had identified only “Chiropractic Life Center, Inc., et al.” as the appellee, the court held that only the specifically named party was part of the appeal, and only the order as it related to that party could be reviewed. *Id.*

The rule in federal courts is the opposite. After bad experiences with not allowing appellants to appeal for multiple parties by including “et al.” in the notice of appeal, the federal courts amended Federal Rule of Appellate Procedure 3.<sup>83</sup> So on a notice of appeal in federal court, an appellant is expressly allowed the use of “et al.” instead of naming multiple parties.

### Record on Appeal

The appellant generally has the obligation to show in the record that an issue was preserved and that evidence supports a finding of error.<sup>84</sup> Exceptions may exist if the

appellee argues that there is no record support for the appellant’s contentions, and the appellant subsequently files a transcript supplementing its position.<sup>85</sup> Similarly, if the appellee cites to exhibits not contained in the record, the burden shifts to the appellee to supplement the record with the exhibits on which he relies.<sup>86</sup>

Federal Rule of Appellate Procedure 10(c), (d), and (e) and Alabama Rule of Appellate Procedure 10(d), (e), and (f) generally provide that where a transcript or portion of the record is lost, the aggrieved party may file a motion to supplement or correct the record.<sup>87</sup> If the other party objects, however, the trial court will rule on whether any supplement or correction is warranted.<sup>88</sup> If your opponent and the trial judge fail to remember your cross-examination of the key witness the way you remember it, your case, like the record, may be lost.

### Acceptance of Payment/ Benefit of Judgment on Appeal

Acceptance of the benefits of a judgment may also waive the right to appeal—or cross-appeal—adverse portions of that judgment.<sup>89</sup> This rule “prevents a party from drawing a judgment into question to the prejudice of his adversary after he has coerced its execution or accepted its benefits.”<sup>90</sup> This “acceptance of benefits” doctrine does not apply “when the party voluntarily pays the judgment [or] the opposing party will suffer no injury.”<sup>91</sup>

### Cross-Appeal

If the appellee seeks to expand his rights beyond those provided in the trial court’s judgment, the appellee generally must cross-

appeal.<sup>92</sup> If there is dissatisfaction with any part of the judgment as entered, it may be wise to bring a cross-appeal.<sup>93</sup> No cross-appeal is required, though, if the judgment is “not really adverse to” the appellee.<sup>94</sup> So, for example, no cross-appeal is required where “a defendant prevails at trial and on appeal argues that the trial court improperly denied it a directed verdict.”<sup>95</sup> The appellee is also free to challenge the reasoning of the trial court without filing a cross-appeal so long as it leads to the same result.<sup>96</sup> One example is when a trial court finds that a plaintiff has failed to prove an essential element of his case, the defendant may argue on appeal that the plaintiff failed to establish other necessary elements as well.

### Brief on Appeal

Although an appellate court will not reverse the trial court’s judgment on a ground not raised below, an appellee can defend the trial court’s ruling based on argument that was not raised in that court.<sup>97</sup> That is because an appellate court reviews a trial court’s judgment—not its reasoning. As a result, the court of appeals may affirm if the trial court’s judgment is based on any valid legal ground.<sup>98</sup> In doing so, the appellate court will assume that the trial court made findings of fact necessary to support its judgment, even if there is an absence of specific findings of fact.<sup>99</sup> A corollary to that rule is that an argument not raised before an intermediate appellate court cannot be raised to a supreme court.<sup>100</sup> However, the issue of subject matter jurisdiction—the power of the court to hear the case—may be raised for the first time on appeal, unlike other issues.<sup>101</sup>

In addition, the general principle that a new argument cannot be raised by the appellant on appeal has a few important qualifications and exceptions. For example, “[a]lthough this Court has often stated that we will not reverse a judgment based on an argument made for the first time on appeal, we have never held that a party cannot cite in its appellate brief additional or different authorities in support of an argument initially made to the trial court.”<sup>102</sup>

While a number of opinions state that “arguments” that must be made in the trial court to be made on appeal, the more precise rule is that a “question” or “issue” must be raised or advocated in the trial court to be raised or advocated on appeal. The Alabama Supreme Court has explained the difference between making additional arguments and raising new questions on appeal:

[T]he rule upon which the dissent attempts to rely is one that generally prevents an appellant from raising on appeal a *question* or *theory* that has not been preserved for appellate review, not the provision to a higher court of an additional *specific reason* or *authority* for a theory or position asserted by the party in the lower court. The fundamental rule in this regard, as stated in *Corpus Juris Secundum*, is that a “higher court normally will not consider a *question* which the intermediate court could not consider.” 5 C.J.S. *Appeal and Error* § 977 (2007). However, “[a]lthough on appeal from an intermediate court the higher court may be limited to the *questions of law* raised or argued at the trial, it is not limited to the *arguments* there

presented.” 5 C.J.S. *Appeal and Error* § 978 (2007) (emphasis added). In other words, “[n]ew *arguments* or *authorities* may be presented on appeal, although no new *questions* can be raised.” 4 C.J.S. *Appeal and Error* § 297 (emphasis added).<sup>103</sup>

Even if counsel preserves an argument or issue at the trial level, he must take several additional steps to preserve error on appeal. First, he must comply with Rule 28 of the Alabama Rules of Appellate Procedure. In drafting the statement of facts in the brief, Rule 28(a)(7) requires “[a] full statement of the facts relevant to the issues presented for review, with appropriate references to the record . . . .” Rule 28(a)(10) requires that the argument section of the brief contain “citations to the cases, statutes, other authorities and parts of the record relied on . . . . Citations shall reference the specific page number(s) that relate to the proposition for which the case is cited.” And Rule 28(g) provides: “If reference is made to evidence, it shall be made to the pages of the clerk’s record or reporter’s transcript at which the evidence was identified, offered, and received or rejected.”

Rule 28 is no mere formality. The Alabama Supreme Court has stated: “[Appellant], in his brief, has failed to include any citations to authorities or reference to the record in support of this argument as required by Rule 28(a)[10], . . . . Consequently, we will not consider this issue.”<sup>104</sup> The supreme court has reminded counsel that “it is neither this Court’s duty nor its function to perform all the legal research for an appellant.”<sup>105</sup>

Every lawyer knows that any legal argument needs to cite some case, statute, or other legal author-

ity, but the bottom line is that facts need authority too. Every sentence in the “Statement of Facts” should be followed by a citation to the record on appeal, as should every factual assertion made in the argument section of the brief.

In addition, Rule 28(k) allows an appellant to adopt by reference an argument contained in the brief of his co-appellant. The appellant, of course, must have made that argument below.<sup>106</sup> Incorporation by reference of arguments made in a trial brief, however, is not allowed.<sup>107</sup>

Some federal authority holds that in an appellate brief, an argument must be raised in the statement of issues, or it will be deemed waived.<sup>108</sup> The Supreme Court of Alabama has held that when a party made an assertion about a contested issue in its statement of facts, but did not mention—much less cite any authority for—that issue in the issue or argument sections of its initial appellate brief or its reply brief, the party waived that argument.<sup>109</sup>

Second, the argument in the brief must adequately connect the legal rule to the facts of the case. An argument is sufficient when counsel clearly explains how the facts of his case are connected to the rule of law cited in support of the argument. Clarity is crucial. Failure to be exact may result in waiver of the argument. For example, under the Alabama Medical Liability Act, a petitioner sought mandamus to change venue from the Bessemer Division to the Birmingham Division, where the acts occurred.<sup>110</sup> The supreme court, however, concluded that the argument in the brief was insufficient and was therefore waived:

The hospital and Pszyk do not demonstrate, they only presume, that the requirement of

§ 6-5-546 that an action under the AMLA be brought “in the county wherein the act or omission . . . actually occurred” likewise requires that the action be brought in the judicial division in which the act or omission actually occurred. Because the hospital and Pszyk have not argued that § 6-5-546 requires that the Bessemer Division be treated as a separate county, they have not demonstrated a clear legal right to relief insofar as they argue that § 6-5-546 requires a transfer of the case to the Birmingham Division.<sup>111</sup>

Similarly, the supreme court found waiver because of an insufficient argument in a case where a party “attempt[ed] in her brief to raise issues relating to due process” and cited a case related to that issue but did “not discuss, in any meaningful way, how [that case] support[ed] her positions on appeal.” The court held that a “vague comment” referring to due process issues was not enough to preserve those issues.<sup>112</sup>

In addition to making an argument that connects the legal rule to the facts in the case, if counsel wants the appellate court to overrule precedent, he must ask it to do so.<sup>113</sup> That allows for the parties to argue whether *stare decisis* should apply.<sup>114</sup>

Third, the appellant must be wary of harmless error. If the ruling does not harm the appellant, then there is no need to reverse. Rule 45 of the Alabama Rules of Appellate Procedure provides that there will be no reversal in a civil or criminal case unless “the error complained of has probably injuriously affected substantial rights of the parties.” For example, where the admission of testimony was error but not harmful to the appel-

Every sentence in the “Statement of Facts” should be followed by a citation to the record on appeal, as should every factual assertion made in the argument section of the brief.

lant (such as through a curative instruction to the jury or due to the fact that identical evidence was appropriately admitted elsewhere), the appellate court will not reverse.<sup>115</sup>

### Reply Brief

If an argument is not raised in the opening brief, generally it cannot be raised in the reply brief.<sup>116</sup> There is authority, however, holding that an appellant can respond in a reply brief to issues raised for the first time in the appellee’s brief.<sup>117</sup> In fact, if an appellee does raise an issue for the first time in its brief, failure to respond at all to that issue may result in waiver.<sup>118</sup>

### Amicus Briefs

An *amicus* brief may raise only issues raised in the brief of the party that the *amicus* is supporting.<sup>119</sup> Further, because *amicus* briefs are subject to the brief format requirements applicable to the briefs of the parties, they should also cite to the law and to the record.<sup>120</sup>

## Preserving Error Following An Appellate Decision

### Application for Rehearing

There are also waiver pitfalls to avoid after an appellate court issues its decision. If a party applies for rehearing, it must be based only on “arguments that . . . were raised in the [party’s] original brief submitted to the Court.” *Nationwide Retirement Solutions, Inc. v. PEBCO, Inc.*, 161 So. 3d 1141, 1149 (Ala. 2014). The Alabama Supreme Court has explained that it “cannot be held in error for overlooking or misapprehending points of law or facts that were not argued on original submission.” *Id.* at 1150. Any matters raised in the application for rehearing must be “reiterated and adequately argued” in the brief in support of the application or “they are deemed waived.”<sup>121</sup>

Although new arguments generally cannot be raised in an application for rehearing, the Alabama Supreme Court has addressed an argument on rehearing that an appellate decision should be applied prospectively.<sup>122</sup> An appellate court can also use rehearing to clarify the scope of its decision.<sup>123</sup> In addition, if the court bases its ruling on law not argued in the parties’ briefs on appeal, the application for rehearing will be the only place that an argument against that legal principle can be made.

### Petition for Certiorari—Alabama

Issues must be set forth in the petition for certiorari and, if granted, argued in the supporting brief.<sup>124</sup> If

conflict with a prior opinion is the grounds for the petition, the petitioner should quote the excerpts from the court of appeals' opinion that conflict with another prior opinion or should state that Rule 39(a)(1)(D) 2 of the Alabama Rules of Appellate Procedure applies and should explain with particularity how the decision at issue conflicts with a prior opinion.<sup>125</sup>

### Petition to Certiorari—United States Supreme Court

The Supreme Court of the United States has explained that “[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim ‘federal.’”<sup>126</sup> Failure to do so can result in a waiver of certiorari review.<sup>127</sup>

### Rule 32 Petition (Criminal Cases)

After a criminal defendant's conviction is affirmed on direct review, the criminal defendant may challenge his conviction or sentence on collateral review in Alabama courts under Rule 32 of the Alabama Rules of Criminal Procedure. If Rule 32 relief is denied by the Alabama courts, the defendant may seek federal habeas relief in federal courts. “[F]ederal courts require a petitioner to present his claims to the state court ‘such that a reasonable reader would under each claim’s particular legal basis and specific factual foundation.’”<sup>128</sup> That requires the argument and facts supporting it to be presented to the state court in a straightforward and clear manner. Otherwise, what could be a

For its part, a court should work to employ a uniform standard in deciding waiver issues to ensure due process for litigants and restraint by the judiciary.

colorable habeas claim could be waived years before.

### Law of the Case

Once a trial court has ruled on a matter adversely to a party and an appeal of judgment occurs, counsel for that party should argue against that ruling in the appeal if his client is not prepared to live with it throughout the litigation. “[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.”<sup>129</sup> Further, if a judgment is vacated on appeal without addressing an argument raised in a party's brief, counsel for that party should raise the issue again on remand to avoid waiver in any subsequent appeal.<sup>130</sup>

## Conclusion

To avoid waiver of an argument or issue, counsel should review the general principles above as well as special rules that may apply to the


particular argument or issue advanced given the procedural posture of the case. Counsel should present an argument with citations to the record evidence and supporting law and should do so in time for opposing counsel to respond and for the court to rule.

For its part, a court should work to employ a uniform standard in deciding waiver issues to ensure due process for litigants and restraint by the judiciary. On one hand, the less “perfect” the form of an argument, the more difficult it is for a court to analyze and rule on it. On the other hand, it is “good” policy to decide a case “on its merits”<sup>131</sup> and the hectic give-and-take of trial does not often lend itself to perfection. As long as an adequate, though imperfect, argument is timely made and not abandoned, a uniform standard should lean towards addressing the merits. Such a uniform standard would ensure that the desire for the perfect does not become the enemy of the good. ▲

### Endnotes

1. An earlier version of this article appeared in the May 2007 issue of *The Alabama Lawyer*. This article owes much to the outstanding outline prepared by former Associate Justice Bernard Harwood of the Supreme Court of Alabama, J. Bernard Harwood, *Preserving Error in Civil Cases*, CLE Outline (Dec. 17, 2004) (hereinafter “Harwood”), to a joint outline the prepared with former Associate Justice Harold See, Harold See and Ed Haden, *Preventing Waiver in Civil Cases*, CLE Outline (Feb. 9, 2007) (hereinafter “See & Haden”), and to Ed R. Haden, *Alabama Appellate Practice* §§ 1.03–1.04 (Lexis 2019).
2. See, e.g., *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F. 3d 622, 625–29 (1<sup>st</sup> Cir. 1995) (listing considerations that might affect the general rules of waiver); *See & Haden*, at 2–3.
3. See *Ex parte Knox*, 201 So. 3d 1213, 1219 (Ala. 2015) (Shaw J., concurring) (“[F]airness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond . . .”) (quotation marks omitted); *Harwood*, at 1–2.
4. *Juris v. Inamed Corp.*, 685 F. 3d 1294, 1325 (11<sup>th</sup> Cir. 2012) (“If a party hopes to preserve a claim, argument, theory, or defense on appeal, she must first clearly present it to the district court, that is, in such a way as to afford the district court an opportunity to recognize

- and rule on it.”) (quotation marks omitted); *id.* (“A federal appellate court will not, as a general rule, consider an issue that is raised for the first time on appeal.”) (quotation marks omitted).
5. See, e.g., *Selma Med. Ctr., Inc. v. Fontenot*, 824 So. 2d 668, 693 (Ala. 2001) (Woodall, J., dissenting) (stating that “the hospital did not present a flow-of-commerce argument to the trial court” where the majority ruled on that issue).
  6. See generally *Crutcher v. Wendy’s of N. Ala., Inc.*, 857 So. 2d 82, 97 (Ala. 2003).
  7. See, e.g., *Byrd v. Lamar*, 846 So. 2d 334, 341 (Ala. 2002) (“Because Byrd did not properly allege a fraudulent-misrepresentation claim in his complaint, we affirm the summary judgment . . .”).
  8. See *Scrushy v. Tucker*, 70 So. 3d 289, 313–14 (Ala. 2011) (affirming trial court’s allowance of amendment of pleadings).
  9. See Ala. Code § 6-6-227; *N. Ala. Real Estate Group, LLC v. Pineda*, 266 So. 3d 719, 723 (Ala. Civ. App. 2018) (“If the party challenging the constitutionality of a statute fails to serve the attorney general, as required by Ala. Code 1975, § 6-6-227, the trial court has no jurisdiction to decide the constitutional claims.”).
  10. *Smith v. Renter’s Realty*, No. 2180405, 2019 WL 3050389, at \*4 (Ala. Civ. App. July 12, 2019).
  11. See *id.*; see also *Terry v. City of Decatur*, 601 So. 2d 949, 950–51 (Ala. 1992).
  12. See Ala. Code § 11-47-23.
  13. See *Chavers v. City of Mobile*, 142 So. 3d 494, 503 (Ala. 2013) (“[T]he City’s negligent maintenance of that ditch, we conclude that Chavers’s evidence was sufficient to raise a genuine issue of material fact as to whether she incurred damage during the six months preceding the filing of the notice of claim pursuant to § 11-47-23.”).
  14. See *Sverdrup Tech., Inc. v. Robinson*, 36 So. 3d 34, 41 (Ala. 2009).
  15. See *Ex parte Mundi*, 161 So. 3d 241, 244 (Ala. Civ. App. 2014) (“We note that Rule 12(b) provides that, when a defense is raised by a motion, the motion is to be filed before the first responsive pleading. However, this court has previously held that a motion raising a Rule 12(b) defense filed after a first responsive pleading, even if improperly filed, could reasonably be considered an amendment of the responsive pleading, as long as there is no prejudice to the other party.”).
  16. See *Ex parte McClinnis*, 820 So. 2d 795, 798 (Ala. 2001).
  17. See Ala. R. Crim. P. 12.9.
  18. See Ala. R. Crim. P. 15.2, 15.3.
  19. See *Ware v. State*, 472 So. 2d 447, 448 (Ala. Crim. App. 1985) (“It appears that the appellant, at arraignment, pleaded not guilty to the indictment. This is a plea to the merits of the indictment and waives kinds of challenges to the validity thereof unless specifically reserved with leave of court. No inquiry into the sufficiency of the evidence considered by a grand jury which returned an indictment may be had.”) (citation omitted); see also *Edwards v. State*, 379 So. 2d 336, 338 (Ala. Crim. App. 1979) (“[A] plea to the merits [of an indictment] admits the validity of an indictment.”).
  20. See *Ex parte Puccio*, 923 So. 2d 1069, 1077 (Ala. 2005) (denying mandamus relief to defendant on a challenge to personal jurisdiction, but noting that defendant could try again if further discovery demonstrated that personal jurisdiction did not exist).
  21. *Nationwide Mut. Fire Ins. Co. v. Pabon*, 903 So. 2d 759, 765 (Ala. 2004) (stating that “review by a petition for a writ of mandamus is not the sole means of review available to a party whose jury demand has been denied”).
  22. Rule 21(a)(3), Ala. R. App. P. (“If a petition is filed outside this presumptively reasonable time (*i.e.*, generally 42 days), it shall include a statement of circumstances constituting good cause for the appellate court to consider the petition . . .”).
  23. See *Ex parte Troutman Sanders, LLP*, 866 So. 2d 547, 549–50 (Ala. 2003).
  24. *Travelers Indem. Co. of Conn. v. Worthington*, 252 So. 2d 645, 658 (Ala. 2017).
  25. *Adams v. Tractor & Equip. Co., Inc.*, 180 So. 3d 860, 868 (Ala. 2015) (quoting *Wallace v. Alabama Ass’n of Classified Sch. Employees*, 463 So. 2d 135, 136–37 (Ala. 1984)) (internal citations omitted).
  26. *Pinigis v. Regions Bank*, 942 So. 2d 841, 847 (Ala. 2006).
  27. See *Winkleblack v. Murphy*, 811 So. 2d 521, 530 (Ala. 2001).
  28. *Id.*
  29. See *Mitchell v. State*, 913 So. 2d 501, 505 (Ala. Crim. App. 2005) (“To preserve an issue for appellate review, the issue must be timely raised and specifically presented to the trial court and an adverse ruling obtained.”); see also *Ginn v. State*, 894 So. 2d 793, 804 (Ala. Crim. App. 2004).
  30. *Mitchell*, 913 So. 2d at 505; see also *Ginn*, 894 So. 2d at 804.
  31. See *Turner v. Westhampton Court, LLC*, 903 So. 2d 82, 88 (Ala. 2004) (“Because the [appellants] failed to raise before the trial court [at the summary judgment stage] the only argument that they raise on appeal . . . they have waived that argument, and we will not address it.”).
  32. *Liberty Nat’l. Life Ins. Co. v. Univ. of Ala. Health Servs. Found., P.C.*, 881 So. 2d 1013, 1020 (Ala. 2003) (citations omitted).
  33. See *Davis v. J.F. Drake St. Tech. Coll.*, 854 So. 2d 1151, 1157 (Ala. Civ. App. 2002) (holding that one-sentence assertion in trial brief was insufficient to preserve argument for appeal).
  34. See *Kelmore, LLC v. Ala. Dynamics, Inc.*, 20 So. 3d 783, 790 (Ala. 2009); *Stokes v. Ferguson*, 952 So. 2d 355, 358 (Ala. 2006).
  35. See *Kelly v. Panther Creek Plantation, LLC*, 934 So. 2d 1049, 1053 (Ala. 2006); *Inline Elec. Supp. Co., Inc. v. Eskildsen*, 198 So. 3d 524, 528 (Ala. Civ. App. 2015) (“Because Inline did not move to strike the affidavit at issue, this court will not hold the trial court in error for considering that affidavit in determining whether to enter a summary judgment.”).
  36. See generally *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997).
  37. See *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 52 (Ala. 2001).
  38. *Owens-Corning Fiberglass Corp. v. James*, 646 So. 2d 669, 673 (Ala. 1994); see also *Stamp v. Jackson*, 887 So. 2d 274, 279 (Ala. Civ. App. 2003) (same); *Harwood*, at 2–6.
  39. Charles Gamble, *The Motion in Limine: A Pretrial Procedure That Has Come of Age*, 33 Ala. L. Rev. 1, 16 (1981); see also *Harwood*, at 10–13 (quoting *Boros v. Baxley*, 621 So. 2d 240, 244 n.3 (Ala. 1993) (quoting, in turn, Gamble); *Ex parte Sysco Food Servs. of Jackson, LLC*, 901 So. 2d 671, 674 (Ala. 2004).
  40. See *Brown v. K&M Tree Servs., Inc.*, 258 So. 3d 35, 362 (Ala. Civ. App. 2018) (“K&M did not object to the admission of [the witness’s] testimony at trial and therefore waived any argument regarding its admissibility.”); see also *Harwood*, at 2–6.
  41. See *Pensacola Motor Sales, Inc. v. Daphne Auto., LLC*, 155 So. 3d 930, 937 (Ala. 2013) (holding that a party must offer contested evidence at trial “and obtain a specific adverse ruling in order to preserve the issue for appellate review”).
  42. *T.J. v. Winston Cty. Dep’t of Human Res.*, 233 So. 3d 361, 367 (Ala. 2017).
  43. See *Hawkins v. State*, 615 So. 2d 651, 653 (Ala. Crim. App. 1992).
  44. See *Lewis v. State*, 27 So. 3d 600, 602 (Ala. Crim. App. 2008).
  45. *Ginn*, 894 So. 2d at 804 (“[B]ecause Ginn did not expressly reserve the right to appeal the trial court’s denial of his motion to suppress before he entered his pleas and be-



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- cause there is no indication in the record that there was a preexisting agreement between the parties that Ginn was reserving the right to appeal the suppression issue, this issue is not properly before this Court for review.”).
46. See *Merchants FoodService v. Rice*, No. 1170282, 2019 WL 988894, at \*13 (Ala. Mar. 1, 2019).
  47. See *Alabama Power Co. v. Aldridge*, 854 So. 2d 554, 561 (Ala. 2002).
  48. *Id.*
  49. *Zumbado v. State*, 615 So. 2d 1223, 1241 (Ala. Crim. App. 1993).
  50. See *N.K.H. v. State*, 873 So. 2d 258, 259–60 (Ala. Crim. App. 2003) (“[W]hen the trial court has made no written findings of fact in a nonjury trial, a party must move for a new trial in order to preserve for review a question relating to the sufficiency or weight of the evidence.”)
  51. Ala. R. Crim. P. 20.3(b)(1).
  52. *Caver v. State*, 219 So. 2d 1, 8 (Ala. Crim. App. 2016).
  53. See Ala. R. Crim. P. 20.3(b)(1).
  54. See Ala. R. Crim. P. 20.3(f)(1).
  55. See *Regions Bank v. Plott*, 897 So. 2d 239, 246 (Ala. 2004).
  56. *Adriatic Ins. Co. v. Willingham*, 567 So. 2d 1282, 1282 (Ala. 1990) (citations omitted).
  57. *Ware v. Timmons*, 954 So. 2d 545, 560 (Ala. 2006); see also Rule 51, Ala. R. Civ. P. cmt. (“Grounds must be stated in other than general terms but the requirement of ‘distinctly’ stating grounds as is required by the federal rule, has not been preserved. The word ‘distinctly’ has been deleted not for the purpose of opening the door for general objections, but rather, to avert undue requirements of specificity under an unnecessarily technical appellate construction of the word ‘distinctly.’”).
  58. *Ne. Ala. Reg’l Med. Ctr. v. Owens*, 584 So. 2d 1360, 1364 (Ala. 1991).
  59. See *Green v. Taylor*, 437 So. 2d 1259, 1260 (Ala. 1983) (stating that “[b]ecause the Greens did not timely file a motion to set aside the dismissal of their action, the question of whether the trial court erred in that regard is not properly before us” and holding that “other issues presented for our review cannot be considered because they are of an interlocutory character”).
  60. See *id.*
  61. Charles A. Wright & Arthur R. Miller, 9B *Federal Practice & Procedure* § 2536 (3d ed.).
  62. *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018, 1032 (Ala. 1993).
  63. *Merchants FoodService*, No. 1170282, 2019 WL 988894, at \*10 n.13 (“[I]ssues relating to the sufficiency of the evidence require a motion at the conclusion of all the evidence, but issues relating to pure questions of law do not.”) (quoting *A.T. Stephens Enters., Inc. v. Johns*, 757 So. 2d 416, 419 (Ala. 2000) (holding that a ruling on a JML motion made at the close of the plaintiff’s evidence where there was not a JML motion made at the close of all the evidence was allowed where the JML motion involved only a pure question of law)).
  64. *Sears*, 630 So. 2d at 1027.
  65. *BellSouth Mobility, Inc. v. Cellulink, Inc.*, 814 So. 2d 203, 213 (Ala. 2001).
  66. Justice Champ Lyons, Jr. & Deborah Alley Smith, *Post-Judgment Motions*, CLE Outline, at 6–7 (Feb. 2005).
  67. *Ex parte James*, 764 So. 2d 557, 559 (Ala. 1999).
  68. See *Keibler-Thompson Corp. v. Steading*, 907 So. 2d 435, 443 (Ala. 2005).
  69. Rule 59 (f), Ala. R. Civ. P.
  70. See *Parker Bldg. Serv. Co., Inc. v. Lightsey*, 925 So. 2d 927, 933 (Ala. 2005).
  71. *Johns*, 757 So. 2d at 421.
  72. *Alfa Mut. Ins. Co. v. Culverhouse*, 149 So. 3d 1072, 1078 (Ala. 2014).
  73. See, e.g., *Lewis v. State*, 659 So. 2d 183, 185 (Ala. Crim. App. 1994) (“The issue of the weight of the evidence is preserved by a motion for a new trial, stating that the verdict is contrary to law or the weight of the evidence.”) (quotation marks omitted).
  74. See, e.g., *Ex parte Tomlin*, 540 So. 2d 668, 672 (Ala. 1988) (holding that the cumulative effect of prosecutorial misconduct warranted a new trial); *Thompson v. State*, 153 So. 3d 84, 131 (Ala. Crim. App. 2012) (concluding that juror misconduct was grounds for a new trial); *Moody v. State*, 95 So. 3d 827, 841 (Ala. Crim. App. 2011) (explaining that a claim of ineffective assistance of trial counsel can be raised in a motion for a new trial).
  75. See Ala. R. Crim. P. 24.1(b).
  76. See Ala. R. Crim. P. 24.4.
  77. See *United States v. Lewis*, 928 F. 3d 980, 986 (11th Cir. 2019) (“If Lewis had wanted the appeal waiver to be conditioned on the court imposing the sentence that the government recommended for him, he should have bargained for that.”); see also *Pate v. State*, 884 So. 2d 1, 2 (Ala. 2003) (holding that by agreeing to “not attack [his] guilty plea in any way, directly or collaterally, including but not limited to . . . appeal,” the defendant waived his right to appeal his sentence as part of his plea agreement); *Kyzer v. State*, 484 So. 2d 1202, 1203 (Ala. 1986) (“[B]y waiving his right to appeal, the appellant waived his right to have the sentence reviewed.”).
  78. See *Eller v. State*, 187 So. 3d 1184, 1187 (Ala. Crim. App. 2014) (“[A] circuit court has no jurisdiction to modify a legal sentence more than 30 days after that sentence is imposed.”); *Kyzer*, 484 So. 2d at 1203 (“The trial judge correctly held that he was without jurisdiction to modify the two-year-old sentence because the motion was not timely made within thirty days of pronouncement.”).
  79. See *Ex parte Batey*, 958 So. 2d 339, 341–42 (Ala. 2006).
  80. See *Steele v. State*, 911 So. 2d 21, 31 (Ala. Crim. App. 2004) (“Because Steele did not object to the State’s failure to provide him with a copy of the Ohio conviction prior to the hearing, Steele has waived this issue.”).
  81. See, e.g., *Pope v. MCI Telecomm. Corp.*, 937 F. 2d 258, 266 (5th Cir. 1991) (“[W]hen an appellant chooses to designate specific determinations in his notice of appeal— rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal.”) (internal quotation marks omitted).
  82. See Rule 3(c), Ala. R. App. P. (“The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Such designation of judgment or order shall not, however, limit the scope of appellate review.”); see also *Clements v. Webster*, 425 So. 2d 1058 (Ala. 1982) (stating that notice of appeal did not limit appeal to either final judgment or order denying new trial).
  83. See 16A Charles Alan Wright, et al, *Federal Practice & Procedure* § 3949.4 (2008).
  84. See *Empiregas, Inc. of Ardmore v. Hardy*, 487 So. 2d 244, 251 (Ala. 1985) (“[T]his court will not assume error, and the burden is on the appellant to affirmatively demonstrate from the record that an error was committed by the trial court.”) (quotation marks omitted).
  85. See *Smith v. Village of Maywood*, 970 F. 2d 397, 399 (7th Cir. 1992) (explaining that after court of appeals denied appellee’s motion to dismiss appeal for appellant’s late filing of transcript, appellee had burden to supplement record to support her position).
  86. *United States v. Coveney*, 995 F. 2d 578, 586–88 (5th Cir. 1993).
  87. See *Perkins v. Perkins*, 465 So. 2d 414, 415 (Ala. Civ. App. 1984) (“When the official record is unavailable, reconstructions of the record on appeal by the parties is an accepted procedure.”).
  88. See Rule 10(c), Fed. R. App. P.; Rule 10(d), Ala. R. App. P.; *Pickett v. Pickett*, 792 So. 2d 1124, 1126 (Ala. Civ. App. 2001) (“No Alabama caselaw addresses whether a party to an appeal may challenge a trial court’s approved statement of the evidence.”).
  89. *Bentley Sys., Inc. v. Intergraph Corp.*, 922 So. 2d 61, 70 (Ala. 2005).
  90. *Rice v. State Farm Fire & Cas. Co.*, 578 So. 2d 1064, 1064–65 (Ala. 1991).
  91. *Bentley Sys.*, 922 So. 2d at 70.
  92. See 19 Moore’s *Federal Practice* § 205.04[2] (3d ed. 2004) (“If an appellee argues error below that calls into question the merits of the judgment, that claim must be made by cross-appeal; if an appellee merely urges affirmance of the judgment, even though based on arguments made in the alternative or rejected or ignored below, no cross-appeal is necessary.”); see also *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 479 (1999); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1926); *Ex parte P&H Constr. Co.*, 723 So. 2d 45, 48–49 (Ala. 1988)
  93. See 19 Moore’s *Federal Practice* § 205.04[2] (3d ed. 2004).
  94. *Compare Hawkins v. League*, 398 So. 2d 232, 235 (Ala. 1981) (holding that a cross-appeal was not required of an issue “not really adverse to” the appellee), with *Hitt v. State of Ala. Pers. Bd.*, 873 So. 2d 1080, 1088 (Ala. 2003).
  95. *Williams v. BIC Corp.*, 771 So. 2d 441, 445 (Ala. 2000).

96. See *Sanchez-Velasco v. Sec'y Dep't of Corr.*, 287 F.3d 1015, 1016 (11<sup>th</sup> Cir. 2002) ("An appellee may, without cross-appealing, urge in support of a result that has been appealed by the other party on any ground leading to the same result, even if that ground is inconsistent with the district court's reasoning.")
97. *Smith v. Equifax Servs., Inc.*, 537 So. 2d 463, 465 (Ala. 1988).
98. *Id.*
99. *Hinds v. Hinds*, 887 So. 2d 267, 272 n.2 (Ala. Civ. App. 2003).
100. See *Ex parte LaCoste*, 733 So. 2d 889, 894 (Ala. 1998); cf. United States National Institute of Trial Advocacy commentary Fed. R. App. P. 28 ("An issue not raised in appellant's opening brief may be deemed waived—mentioning it in a footnote is not enough!").
101. *Reynolds v. Colonial Bank*, 874 So. 2d 497, 503 (Ala. 2003) (holding that the absence of subject matter jurisdiction may be raised for the first time on appeal); see also *Mays v. Trinity Prop. Consultants, LLC*, No. 2170867, 2019 WL 1090487, at \*3 n.2 (Ala. Civ. App. Mar. 8, 2019) ("[T]he absence of subject matter jurisdiction may be raised for the first time on appeal.") (quotation marks omitted); but see *Jefferson Cty. Comm'n v. ECO Preservation Servs., L.L.C.*, 788 So. 2d 121, 127 (Ala. 2000) (overruling an application for rehearing and reasoning that "[t]his lack-of-jurisdiction argument was not raised before the trial court or before this Court on original submission").
102. *Precision Gear Co. v. Cont'l Motors, Inc.*, 135 So. 3d 953, 959 (Ala. 2013) (footnote omitted).
103. See *Ex parte Jenkins*, 26 So. 3d 464, 473 n.7 (Ala. 2009)
104. *Tallant v. Grain Mart, Inc.*, 432 So. 2d 1251, 1253 (Ala. 1983). See *Totten v. Lighting & Supply, Inc.*, 507 So. 2d 502, 503 (Ala. 1987) ("[T]his Court is not under a duty to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to an appeal.")
105. *Kyser v. Harrison*, 908 So. 2d 914, 917 (Ala. 2005) (quotation marks omitted).
106. See *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 94, 93 So. 548, 555 (1921) ("The plumbing company's defense was conducted separately, and these appellants have no right to the benefit of an objection taken [o]n behalf of the plumbing company only.")
107. *Bentley Sys., Inc.*, 922 So. 2d at 85.
108. See, e.g., *Adams-Arapahoe Joint Sch. Dist. v. Continental Ins. Co.*, 891 F.2d 772, 776 (10<sup>th</sup> Cir. 1989) ("An issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal.")
109. See *Callaway v. Whittenton*, 892 So. 2d 852, 858 (Ala. 2003).
110. *Ex parte Children's Hosp. of Ala.*, 931 So. 2d 1, 8 (Ala. 2005).
111. *Id.*
112. *Spradlin v. Spradlin*, 601 So. 2d 76, 78–79 (Ala. 1992).
113. See *Ex parte Hanna Steel Corp.*, 905 So. 2d 805, 808 (Ala. 2004).
114. *Id.* at 810 (Lyons, J., concurring in result).
115. See *Chandler v. State*, 910 So. 2d 108, 112 (Ala. Civ. App. 2004) (holding in condemnation of land case, "we conclude that the trial court's admission of Clemmons's testimony amounted to harmless error and that, therefore, the judgment based on the jury's verdict is due to be affirmed").
116. *Har-Mar Collisions, Inc. v. Scottsdale Ins. Co.*, 212 So. 3d 892, 901 n.4 (Ala. 2016) ("[T]his Court will not address arguments raised for the first time in an appellant's reply brief.")
117. See *United States v. Rodriguez*, 15 F.3d 408, 414–15 n.7 (5<sup>th</sup> Cir. 1994); Charles Alan Wright, et al., 16AA Federal Practice & Procedure § 3974.3 (4<sup>th</sup> ed. 1999) ("[A] reply brief is allowed . . . to address new issues raised in the appellee's brief . . .").
118. See *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 609 (2d Cir. 1999) (holding that the appellant waived an argument where its reply brief failed to respond to appellee's contrary assertions and did not otherwise point to any evidence disputing those assertions).
119. See *Anderson v. Smith*, 148 So. 2d 243, 245 (Ala. 1962) (because "[a]n amicus curiae is limited to the issues made by the parties to a suit," an issue waived by aggrieved party "cannot be injected" by amicus into appellate proceedings); *Lanzi v. Ala. Dep't of Rev.*, 968 So. 2d 18, 21 n.1 (Ala. Civ. App. 2007) (explaining that the court would not consider an issue raised by an amicus curiae when the appellant "waived that issue by declining to argue it in his brief").
120. Rule 29, Ala. R. App. P. ("The [amicus] brief shall follow the form prescribed for the brief of an appellee.")
121. *Birmingham News Co. v. Horn*, 901 So. 2d 27, 77 (Ala. 2004).
122. See *Professional Ins. Corp. v. Sutherland*, 700 So. 2d 347, 351–52 (Ala. 1997).
123. See, e.g., *CSX Transp., Inc. v. Ala. Dep't of Rev.*, 891 F.3d 927, 928 (11<sup>th</sup> Cir. 2018) ("CSX Transportation, Inc. . . . filed a petition for rehearing after we issued a substitute opinion granting the State's petition for rehearing. We issued that substitute opinion to clarify that the water carrier exemption from the sales and use tax applies only when those carriers purchase or use diesel fuel to ship freight interstate, as opposed to shipping it intrastate.")
124. *L.E.O. v. A.L.*, 61 So. 3d 1058, 1060 (Ala. Civ. App. 2010) (Moore, J., concurring) ("The supreme court also held that on certiorari review, the supreme court would consider only questions treated in the opinion of the Court of Appeals that were challenged in the petition and that were argued in the brief filed in support of the petition.") (citing *Kelley v. Osborn*, 113 So. 2d 192, 192 (Ala. 1959)); see also Rule 39(b)(4), Ala. R. App. P.
125. See 39(a)(1)(D), Ala. R. App. P.
126. *Howell v. Mississippi*, 543 U.S. 440, 444, 125 S. Ct. 856, 859 (2005).
127. *Id.*
128. *French v. Warder, Wilcox State Prison*, 790 F.3d 1259, 1270–71 (11<sup>th</sup> Cir. 2015) (quoting *Kelly v. Sec'y of Dept. of Corr.*, 377 F.3d 1317, 1344–45 (11<sup>th</sup> Cir., 2004)).
129. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); see also *Yates v. El Bethel Primitive Baptist Church*, 847 So. 2d 331, 333 (Ala. 2002); but see *Ex parte Third Generation, Inc.*, 855 So. 2d 489, 491 n.4 (Ala. 2003) ("[O]ne of the difficulties with TGI's law-of-the-case argument is Ala. Code 1975, § 12-2-13, which appears to negate any binding effect of the 'law-of-the-case' doctrine as it applies to this Court . . .").
130. *United States v. Smith*, 401 F.3d 497, 498–99 (D.C. Cir. 2005) (stating that the defendant's "election not to re-raise the challenge below means that he has failed to preserve it for appellate review.")
131. See Rule 1, Ala. R. App. P., cmt. ("As is the case with the ARCP, it is the policy of these rules to disregard technicality and form in order that a just, speedy and inexpensive determination of every appellate proceeding on its merits may be obtained.") (emphasis added).

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## Ed R. Haden



Ed Haden is a partner at Balch & Bingham LLP in Birmingham. Before joining the firm, he served as the Nominations and Constitutional Law Counsel on the U.S. Senate Judiciary Committee for Chair Orrin Hatch and as Chief Counsel of the Courts Subcommittee for Sen. Jeff Sessions. Haden also clerked for the Hon. E. Grady Jolly. He serves as chair of the Standing Committee on the Alabama Rules of Appellate Procedure.

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## Jason B. Tompkins



Jason Tompkins serves as chair of the issues and appeals practice at Balch & Bingham LLP in Birmingham and as vice chair of the Alabama State Bar Appellate Practice Section. Before joining the firm, he was a law clerk for the Hon. Karon Bowdre. In 2010, he was special counsel to the U.S. Senate Judiciary Committee for Ranking Member Jeff Sessions during the nomination of Elena Kagan to the U.S. Supreme Court.

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## Robert V. Baxley



Robert Baxley is an associate at Balch & Bingham LLP in Birmingham. Before joining the firm, he was a law clerk for the Hon. Ed Carnes.



# Alabama's Class Action Statute Turns 20: A Defense Retrospective

By Michael R. Pennington, Scott Burnett Smith and Hunter W. Pearce

This year marks the 20<sup>th</sup> anniversary of Alabama's class action reform statute,

1999 Ala. Laws 329–32 (S.B. 72), now known as Alabama Code §§ 6-5-640 to -42. The law was passed in response Alabama's tumultuous reign as the class action mecca for the plaintiffs' bar in the 1990s. During that time, mere allegations of predominance and superiority were often accepted to satisfy Rule 23 of the Alabama Rules of Civil Procedure on the theory that hearings and evidence were not necessary prerequisites to class certification. See, e.g., *Ex parte First Nat'l Bank of Jasper*, 717 So. 2d 342 (Ala. 1997).

Compounding the resulting *in terrorem* effect of class certification on

the defendant, only plaintiffs got to appeal adverse class certification decisions as of right, so defendants' only hope of reversal of class certification before final judgment depended upon the Alabama Supreme Court granting a writ of mandamus—an extraordinary remedy. *Butler v. Audio/Video Affiliates, Inc.* 611 So. 2d 330, 331 n.1 (Ala. 1992).

Worse, Alabama was the home of the “drive-by” class certification. Trial courts presented with class action complaints were routinely convinced that it was necessary to conditionally certify the class action at the outset to protect the court's jurisdiction and exclude any other courts presented with similar claims. See, e.g., *Ex parte Voyager Guar. Ins. Co.*, 669 So. 2d 198 (Ala. Civ. App. 1996) (holding that the



defendant was not entitled to writ of mandamus ordering trial court to vacate conditional order of class certification issued 19 days after service of complaint and before any defendant had entered appearance); *Ex parte State Mut. Ins. Co.*, 715 So. 2d 207 (Ala. 1997) (explaining that, in class actions, a trial court should consider protecting its jurisdiction in deciding whether to enjoin competing action).

In fact, in those days, one of the authors of this article had a case in which the class was certified the day before the complaint was filed. In some state trial courts, a plaintiffs' attorney could get a class conditionally certified the same day he filed the complaint simply by walking the complaint and a proposed order up to the judge. See Victor E. Schwartz, Mark A. Behrens, & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 494, 499–501 (2000); see also *Mitchell v. H & R Block*, 783 So. 2d 812, 818 (Ala. 2000) (Hooper, C.J., dissenting) (describing the practice of “drive-by” certification). Sometimes the plaintiffs' lawyer forgot to stop by the clerk's office to file the complaint on the way up to see the judge, and had to remedy the oversight the next day.

For lawyers, the '90s were in some ways the golden age of practicing law in Alabama. For defense lawyers, the opportunities for employment were high, the intellectual challenges were great, and there was a premium for creative lawyers who could find a way to make lemonade out of the lemons. For the plaintiffs' bar, the opportunities to achieve class certification and the multimillion dollar settlement pressure that class certification often brought were never greater.

But for businesses, the '90s were difficult, and Alabama's class action landscape was a big reason why. And when corporate America finally had enough and banded together to do something about it, they convinced Alabama's electorate that the judicial climate in Alabama was a job-killer. All of a sudden tort reform came to the South. And with it came Alabama's class action statute.

## The Primary Changes Imposed by Alabama's Class Action Statute

In 1999, the Alabama Legislature significantly reformed the way class actions are conducted in state courts. Alabama Code §§ 6-5-641 and 6-5-642 elimi-

nated many of the abuses that previously characterized the class certification process.

First, the legislature prohibited trial courts from certifying a class before the defendant had a chance to respond to the complaint and conduct discovery on class certification issues. § 6-5-641(b). Trial courts are now required to confer with the parties, set a discovery schedule, and allow at least 90 days of class discovery before holding a hearing on class certification, with merits discovery generally postponed until after certification upon request of a party. *Id.* The parties now have the right to a full hearing to present evidence in support of or in opposition to class certification. § 6-5-641(d). And trial courts, after performing a rigorous analysis of Rule 23's requirements, are now required to put their reasons for certifying or declining to certify a class in writing, addressing all the Rule 23 factors and evidence relevant to each. § 6-5-641(e).

Perhaps more importantly, defendants are no longer required to overcome the high bar of mandamus review to reverse a class certification decision. Both sides now have the benefit of appeal as of right from class certification orders, to be exercised within 42 days of an order certifying or declining to certify a class. § 6-5-642. And if a party chooses not to appeal, or unsuccessfully appeals, on an interlocutory basis, the party can revisit the issue on appeal from final judgment. *Id.* All trial court proceedings are automatically stayed during the pendency of an interlocutory appeal of a class certification decision. *Id.*

## The Statute as Applied

Almost right away, the Alabama Supreme Court made clear it intended to enforce these reforms strictly.

In an early decision enforcing the statute, the court held the trial court must conduct a “formal evidentiary hearing” on class certification. *Bill Heard Chevrolet v. Thomas*, 819 So. 2d 34, 40 (Ala. 2001). The plaintiff bears the burden of offering “sufficient evidence of the Rule 23 criteria,” and the defendant must be given “an opportunity to offer evidence in opposition.” *Id.* at 40–41. The evidence must also “be referenced in the trial court's order” for class certification to be proper. *Id.* at 40.

To remove all doubt on the scope of the hearing mandated by § 6-5-641(d), the court has held, “[t]he issues to be addressed at that hearing, through the presentation of evidence and legal argument, include the “claims, defenses, relevant facts and applicable substantive law” of each claim the plaintiffs seek to

have certified for class treatment and how they relate to the relevant criteria of Ala. R. Civ. P. 23.” *Id.* at 42 (citations omitted).

If the trial court fails to hold the required hearing or certifies the class before the deadline for defendant’s offer of proof, the supreme court will often reverse the trial court. *See id.*; *Disch v. Hicks*, 900 So. 2d 399, 406 (Ala. 2004); *Gen. Motors Acceptance Corp. v. City of Red Bay*, 825 So. 2d 746, 749 (Ala. 2002). And if the plaintiff changes the class definition after the hearing, the trial court must convene a new hearing on the revised class. *Baldwin Mut. Ins. v. Edwards*, 63 So. 3d 1268, 1271–72 (Ala. 2010).

The supreme court also demands a “rigorous analysis” of Rule 23’s elements, consistent with the statute. The rigorous analysis required has a dual nature that looks beyond the pleadings. On one hand, the trial court must understand “the claims, defenses, relevant facts, and applicable substantive law” presented by the complaint and answer. *Bill Heard*, 819 So. 2d at 41 (citations omitted). On the other hand, the trial court must analyze how the legal “elements” of those claims and defenses “bear upon the criteria set forth in Rule 23.” *Id.* Putting the two halves together, “[i]t is only by specifically discussing the elements of each claim [and defense] in the context of the Rule 23 criteria that the trial court may determine whether the plaintiffs can establish the Rule 23(a) and Rule 23(b) elements of class certification.” *Id.* at 42. If the trial court’s analysis fails to be so searching—by, say, failing to examine how the plaintiffs could prove the elements of a fraud claim, a product liability claim, or a medical malpractice claim class-wide, as opposed to case by case—then the supreme court has shown a willingness to vacate class certification. *See Houston Cty. Health Care Auth. v. Williams*, 961 So. 2d 795, 805, 812–16 (Ala. 2006); *Ex parte Caremark RX, Inc.*, 956 So. 2d 1117, 1126 (Ala. 2006).

By contrast, when the claims of each class member “hinge on a common question of law, will require the same proof, and the answer to that question will not vary from one class member to the next,” then the supreme court will defer to the trial court’s analysis of the evidence and certification of the class. *Barnhart v.*

## Alabama’s class action common law now draws a hard line against class certification where liability depends on individualized proof.

*Ingalls*, 275 So. 3d 1112, 1129 (Ala. 2018) (affirming class certification of uniform claims for employee benefits under state statute). *See also CIT Commc’n Fin. Corp. v. McFadden, Lyon & Rouse*, 37 So. 3d 114, 124–25 (Ala. 2009) (affirming certification of claims under standard lease agreement).

The “rigorous analysis” requirement also heightens the standard of review on appeal. While class certification orders are reviewed for abuse of discretion, the supreme court reviews the trial court’s application of Rule 23’s procedural requirements *de novo*. *Compass Bank v. Snow*, 823 So. 2d 667, 671 (Ala. 2001). Reversal of class certification will result whenever the plaintiffs fail to carry their evidentiary burden of proof under Rule 23 and §

6-5-641(e). *Id.* at 804–05; *Smart Prof’l Photocopy v. Childers-Sims*, 850 So. 2d 1245, 1248 (Ala. 2002). If the trial court fails to properly analyze the legal requirements of Rule 23(a) or Rule 23(b), the supreme court will not give deference to the trial court. *See Smart Prof’l*, 850 So. 2d at 1252; *Reynolds Metals Co. v. Hill*, 825 So. 2d 100, 104–08 (Ala. 2002); *Atlanta Cas. Co. v. Russell*, 798 So. 2d 664, 668 (Ala. 2001).

Alabama’s class action common law now draws a hard line against class certification where liability depends on individualized proof. A putative class action against GMAC over force-placed insurance turned on individualized proof. Liability on each class member’s claim, each member’s ability to overcome a voluntary payment defense, and resolution of GMAC’s counterclaim for money still owed required individualized inquiries into the unique situation of each plaintiff. *Gen. Motors Acceptance Corp. v. Massey*, 893 So. 2d 314, 319–20 (Ala. 2004). *See also U-Haul of Ala. v. Johnson*, 893 So. 2d 307, 312–13 (Ala. 2004) (vacating class certification due to individualized voluntary payment defense). A consumer loan class action alleging breach of fiduciary duty by a defendant bank likewise requires individualized proof. In that case, each plaintiff must present proof that he reposed trust in the bank, relied on the bank for financial advice, or had some other special relationship that created a fiduciary duty. Such individualized proof precludes class certification. *Univ. Fed. Credit Union*

*v. Grayson*, 878 So. 2d 280, 291 (Ala. 2003). *See also State Farm Fire & Cas. Co. v. Evans*, 956 So. 2d 390, 402 (Ala. 2006) (vacating class certification because proving payment by mistake was unique to each class member); *Smart Prof'l*, 850 So. 2d at 1249 (vacating due to individualized proof needed to establish claims of unjust enrichment, money had and received, and payment by mistake).

In the language of Rule 23, individualized issues mean there are no issues “common to the class” (23(a)(2)), the named plaintiff’s claims are not “typical of the claims or defenses of the class (23(a)(3)), the common issues do not “predominate over any questions affecting only individual members” (23(b)(3)), and class adjudication is not “superior” to individual adjudication (23(b)(3)).

Fraud claims are even less likely to be certified for class treatment because the elements of fraud typically require individualized proof. A fraudulent misrepresentation claim requires proof that the defendant made a false statement and that the plaintiff reasonably relied on that false statement, proof that will usually be unique to each class member. For that reason, the Alabama Supreme Court decertified a class of policyholders who sued Alfa for fraud in marketing minimum-payment plan insurance policies. *See Alfa Life Ins. Corp. v. Hughes*, 861 So. 2d 1088 (Ala. 2003). There, the court found that Alfa agents’ written and oral sales pitches and reliances on them were not uniform, making the issue of misrepresentation an individualized one. *Id.* at 1098.

An oft-argued exception to the general rule that fraud claims are not suitable for class adjudication is when the same fraudulent statement was made to all class members. The court has observed that if the plaintiff can prove that the misrepresentations “were uniform or part of a standardized sales pitch,” the “lack of uniformity of representation” obstacle to certification is eliminated. *Id.* at 1097–98 (citing *Household Retail Servs., Inc.*, 744 So. 2d 871, 878–79 (Ala. 1999)). But the hurdle of varying reliance remains. In *Hughes*, the court emphasized that even if Alfa had made the same pitch to each policyholder, proving each class member’s reliance “require[d] individualized inquiry as to whether that reliance was reasonable” under the circumstances. *Hughes*, 861 So. 2d at 1100. *See also Reynolds Metals*, 825 So. 2d at 105 (vacating certification of fraud claim based on single statement to all class members because reliance element still required testimony from each member); *Snow*, 823 So. 2d at 674 (vacating certification because proof of knowledge of and reliance on

bank’s check-posting policy was unique to each class member).

For fraudulent suppression claims, the plaintiff must prove that, in addition to reliance, the defendant had a duty to disclose. The court has called that a circumstances-dependent question that also requires individualized proof which generally defeats class certification. *See Grayson*, 878 So. 2d at 290 (vacating certification because proof that bank undertook a duty to disclose a filing fee to its members was unique to each member); *Snow*, 823 So. 2d at 674 (stating that whether bank defendants had a duty to disclose and breached that duty to customers “are also individual issues that are inappropriate for class certification”).

Finally, calculating damages in fraud cases adds yet another layer of individualized questions the court must weigh when considering whether individual or common issues predominate. *See Regions Bank v. Lee*, 905 So. 2d 765, 776 (Ala. 2004) (noting that, for bondholders’ fraud claim, calculating damages required proof of the value of each bond at different points in time).

Breach of contract claims are also ill-suited to class treatment when the contract is oral or ambiguous. In those cases, individual circumstances relevant to whether there was a “meeting of the minds” will often defeat predominance. For example, in *Reynolds Metals*, the court vacated an order certifying a class of employees who claimed that a manager breached an oral promise he made regarding severance benefits. *Reynolds Metals*, 825 So. 2d at 102–03. The court decertified the class because the plaintiffs failed to show that: (1) all class members were present when the promise was made, (2) they understood the statement and its implications the same way, and (3) they all relied upon the statement the same way. *Id.* at 106. Without such a showing, too many individualized questions remained to certify a class. *See id.* at 108. *See also Hughes*, 861 So. 2d at 1101 (vacating certification of breach of contract claim because the circumstances surrounding the formation of the contract were different for each named plaintiff); *Snow*, 823 So. 2d at 677 (vacating certification of breach of contract claim because proof would require individual inquiry into each member’s understanding of defendant’s practice, course of dealing, and oral statements).

Even when there is a written contract, if the meaning of a provision is ambiguous, individualized questions concerning how each member interpreted that provision may preclude predominance. *See Gen. Motors Acceptance Corp. v. Dubose*, 834 So. 2d 67, 73 (2002) (decertifying class of automobile lessors who

sued General Motors for breach of an ambiguous lease provision because “resolving this ambiguity requires the finder of fact to determine how each class member has interpreted the ambiguous language”).

## Other Themes in the Court’s Class Decisions Of the Last Two Decades

Other common themes also emerge from a review of the court’s class decisions since the 1999 statute.

For example, individualized defenses and counterclaims can defeat class certification in a couple of different ways. In *Atlanta Casualty Co. v. Russell*, 798 So. 2d 664 (Ala. 2001), the court found that a negotiated policy endorsement unique to the plaintiffs destroyed adequacy of representation and rendered plaintiffs’ declaratory judgment and restitution claims atypical of the class of persons who had purchased otherwise similar policies lacking the endorsement.

In *Baldwin Mutual Insurance Co. v. McCain*, 260 So. 2d 801 (Ala. 2018), the court ruled that because the named plaintiff’s claims are subject to the unique defense of *res judicata* by virtue of prior litigation, and plaintiff’s claims were not typical of the claims of the putative class, class certification was an abuse of discretion.

In *Banker v. Circuit City Stores, Inc.*, 7 So. 3d 992 (Ala. 2008), the court affirmed denial of class certification in a case asserting Magnuson Moss Act claims based on purchase of written extended service plan for a computer monitor the terms of which were allegedly orally misrepresented. Plaintiff sought to recover the cost of the plan, but in plaintiff’s case, the plan had already been performed by defendant as allegedly orally misrepresented, and a replacement monitor had been provided to plaintiff even though the plan terms did not so provide. From the standpoint of injury in fact and damages, these circumstances not common to the class as a whole rendered plaintiff’s claims atypical of the class he purported to represent.

In *General Motors Acceptance Corp. v. Massey*, 893 So. 2d 314, 319–20 (Ala. 2004), the court construed both the Alabama class action statute and Alabama Rule 23 itself to mean that the plaintiff’s evidentiary submission in support of class certification and the trial court’s rigorous analysis that follows “cannot ignore” the question of counterclaims and defenses potentially applicable to some class members, such as

the inherently individualized voluntary payment defense and potential individualized delinquency counterclaims that class certification of the excessive premium and illusory coverage claims regarding “forced placed collateral protection insurance” on loan accounts might engender in that case.

Similar holdings regarding the need to evaluate all Rule 23 factors in light of potentially applicable individualized defenses and counterclaims were made in *U-Haul Co. of Alabama v. Johnson*, 893 So. 2d 307 (Ala. 2004); *General Motors Acceptance Corp. v. City of Red Bay*, 825 So. 2d 746, 749 (Ala. 2002); and *Alfa Life Ins. Corp. v. Johnson*, 822 So. 2d 400 (Ala. 2001).

A number of federal courts recently have adopted a “certify now, have individualized hearings or find other solutions to manageability or ascertainability issues later” approach to class certification. *See, e.g., Martin v. Behr Dayton Thermal Prods. LLC*, 896 F. 3d 405 (6<sup>th</sup> Cir. 2018), *cert. denied*, 139 S. Ct. 1319 (2019); *Briseno v. ConAgra Foods, Inc.*, 844 F. 3d 1121 (9<sup>th</sup> Cir. 2017); *Rikos v. Procter & Gamble Co.*, 799 F. 3d 497 (6<sup>th</sup> Cir. 2015). Some have even accepted summaries or assurances of class counsel as evidence in support of class certification. *See, e.g., Pena v. Taylor Farms Pac., Inc.*, 305 F.R.D. 197, 205 (E.D. Cal. 2015) (holding that “evidence presented in support of class certification need not be admissible at trial” (quoting *Pedroza v. PetSmart, Inc.*, No. 11–298, 2013 WL 1490667, at \*1 (C.D. Cal. Jan. 28, 2013)), *aff’d*, 690 F. App’x 526 (9<sup>th</sup> Cir. 2017).

But in light of Alabama’s class action statute, the Alabama Supreme Court has held differently. For example, in *National Security Fire & Casualty Co. v. DeWitt*, 85 So. 3d 355 (Ala. 2011), in which class certification had been granted in a class action challenging failure to include general contractor profit in the calculation of “actual cash value” for purposes of homeowners’ claim even though review of every claim file was admittedly still going to be necessary, the court explained that:

In determining whether the questions of law or fact common to the class members predominate over those questions that affect only individual class members, the court must initially identify the substantive law applicable to the case and identify the proof that will be necessary to establish the claim.... The mandate to identify the “substantive law applicable to the case” requires more than a simple statement of which state’s law governs; the trial court is required to identify the elements of the claims to be certified and to discuss, in the context

of the class certification criteria, the proof the plaintiffs must present to establish each of those elements. It is only by specifically discussing the elements of each claim in the context of the Rule 23 criteria that the trial court may determine whether the plaintiffs can establish the Rule 23(a) and 23(b) elements of class certification.... In connection with the plaintiffs' burden to demonstrate that class certification is proper, "[t]he trial court may not merely rely on assurances of counsel that any problems with predominance or superiority ... can be overcome.... .If serious manageability problems exist, it is no answer to say that they will be resolved later in some unexplained or uncertain manner."

*Id.* at 369–70 (internal citations omitted). Other post-statute cases with language to the same effect include *Snow*, 823 So. 2d at 675, *Bill Heard Chevrolet*, 819 So. 2d at 41, and *Houston County Health Care Authority*, 961 So. 2d at 805–06.

Standing has been another regular focus of the court in these cases. The court has been careful to distinguish the plaintiff's standing (which it says goes to whether the plaintiff is a proper party to bring the type of claim at issue) from his mere failure to state a claim (which the court says looks at the viability of the claim itself). See *Wyeth v. Blue Cross & Blue Shield of Ala.*, 42 So. 3d 1216, 1220 (Ala. 2010).

But when satisfied that plaintiff has no standing individually, the court consistently refuses to allow that person to represent any class. See, e.g., *Houston Cty. Healthcare Auth.*, 961 So. 2d at 805–06 (citations omitted). The court has repeatedly explained that "[i]f a named plaintiff has not been injured by the wrong alleged in the complaint, then no case or controversy is presented and the plaintiff has no standing to sue either on his own behalf or on behalf of a class." *CIT Commc'n*, 37 So. 3d 122 (quoting *Kid's Care, Inc. v. Ala. Dep't of Human Res.*, 843 So. 2d 164, 167 (Ala. 2002)).

Likewise, deprivation of the named plaintiff's standing after suit through the doctrine of mootness eliminates the ability of the court to consider the question of class certification. See, e.g., *Pharmacia Corp. v. Suggs*, 932 So. 2d 95, 98–99 (Ala. 2005) (named plaintiff's acceptance of settlement offer deprived

The court has stated that putative class members who would not have standing cannot be included in a certified class.

them of standing to represent a class). *Compare Avis Rent A Car Sys., Inc. v. Heiman*, 876 So. 2d 1111 (Ala. 2003) (car renter had standing to assert unjust enrichment claims on a class basis even though a third party reimbursed her for the fee challenged).

The court has stated that putative class members who would not have standing cannot be included in a certified class. See *Houston Cty. Healthcare Auth.*, 961 So. 2d at 810–812 (finding that a suppression, products liability, and medical malpractice "exposure to fungus" class of all breast augmentation patients of a cosmetic surgery clinic during a certain period, alleging conditions in which breast enhancements were done rendered patients subject to

fungal infections, was improperly certified, in part because those who had not suffered infection or undergone explanation of their implants had no standing to sue and could not be included in any such class).

Some types of classes are inappropriate when the primary relief sought is money damages. Under Rule 23(b)(1), a trial court may certify a class where prosecution by separate actions would risk subjecting the defendant to conflicting standards of conduct or harm the nonmember-plaintiffs' ability to protect their interests. Under Rule 23(b)(2), certification may be appropriate where the plaintiffs' claims are of such a nature that injunctive or declaratory relief would be appropriate for the class as a whole.

While Rule 23(c)(2) allows members to opt out of a 23(b)(3) class, "[n]o corresponding provision exists allowing Rule 23(b)(1) and (b)(2) class members to opt out of a putative class action." *Ryan v. Patterson*, 23 So. 3d 12, 18 (Ala. 2009). Consistent with the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Alabama Supreme Court has made clear that a class seeking primarily money damages may not be certified under the "non-opt-out" provisions of 23(b)(2) or the inconsistent adjudication prong of 23(b)(1). See *Ryan*, 23 So. 3d at 18; *Funliner of Ala., L.L.C. v. Pickard*, 873 So. 2d 198, 208–09 (Ala. 2003).

At least absent a "limited fund" situation, see *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Alabama Supreme Court has made clear that the appropriate vehicle for a money-damages class action is Rule 23(b)(3),

and that money damages will not be deemed incidental to injunctive or declaratory relief if individual hearings are necessary to determine damages.

## Practice Pointers Found in the Court's 21st Century Class Action Decisions

The Alabama Supreme Court's class action decisions over the last 20 years also reveal a few practice pointers.

In *Ryan v. Patterson*, 23 So. 3d 12, 18 (Ala. 2009), the court held that where a class settlement explicitly states that no class member may object on behalf of anyone but himself, that is enforceable and will prevent an objector from objecting as putative representatives of a group and deprive those vicariously objected for of standing to appeal. In any class settlement, it is good practice to include a similar provision for both opt-outs and objections, along with a requirement that each person objecting or opting out must personally sign the objection or opt-out request.

In *Perdue v. Green*, the court confirmed a somewhat expansive view of when common fund attorneys' fees are appropriate: "[T]he common-fund doctrine does not apply only if a fund is 'created'; instead, the principle [is] designed to compensate an attorney whose services on behalf of his client operated to create, discover, increase, preserve, or protect a fund to which others may also have a claim." 127 So. 3d. 343, 399 (Ala. 2012). Presaging sentiments now expressed in the most recent amendments to Federal Rule 23 regarding class settlements, this case also explicitly held that a class settlement can treat class members differently as long as doing so is equitable in light of all the circumstances, and that class settlements can include relief not even sought in the complaint. *Id.* at 404-05.

In *Hall v. Environmental Litigation Group, P.C.*, the court reminded practitioners that if you seek to attack the class allegations of a complaint at the pleading

In any class settlement, it is good practice to include a similar provision for both opt-outs and objections, along with a requirement that each person objecting or opting out must personally sign the objection or opt-out request.

stage, doing so by filing a Rule 12(b)(6) rather than through a motion to strike class allegations under Rule 12(f) and Rule 23(c) and (d), then the court will analyze the class allegations under the easier-for-plaintiff-to-satisfy state-law standard under Rule 12(b)(6). 248 So. 3d 949, 957-958 (Ala. 2017). That standard is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. *Id.* at 957 (quotation omitted). Invoking the motion to strike alternative and invoking the "persuasive authority" federal courts have developed under their materially identical versions of Rules 12(f) and 23(c) and (d) would seem the wiser choice.

Commentators have long mused about the possibility of defendant class certification, a creature so rarely materializing in practice that some call it the "unicorn" of class action practice. *See, e.g.,* Michael R. Pennington & Scott Burnett Smith, *Two Wrongs Don't Make a Right, But a Few More Can Make a Unicorn*, DECLASSIFIED (May 9, 2019), <https://www.classactiondeclassified.com/2019/05/two-wrongs-dont-make-a-right-but-a-few-more-can-make-a-unicorn/>.

In *Funliner of Alabama, L.L.C. v. Pickard*, 873 So. 2d 198 (Ala. 2003), the court analyzed some of the many problems associated with attempting to certify such classes and found it inappropriate for claims involving both injunctive relief and damages. The opinion also identified the inclusion of emotional distress claims in a complaint as particularly fatal to class certification.

Finally, a number of the court's opinions strongly discourage the practice of trial courts allowing one of the parties to draft orders granting or denying certification. *See, e.g., CIT Comm'n*, 37 So. 3d at 122; *Bill Heard Chevrolet*, 819 So. 2d at 41. While the court generally does not reverse on that ground alone, the practice seems to guarantee increased appellate scrutiny. A better practice would be for the trial court to ask both sides to submit proposed orders, and allow both sides to comment on the opponent's proposed

order, and for the court to then use one or the other only as a starting point for an opinion edited to be the work product of the court. *See CIT Commc'n*, 37 So. 3d at 122.

## Some Final Thoughts

The class certification opinions issued by Alabama's high court in the last 20 years number in the low 30s as of the date of this article. Of course, that low number is not due entirely to the passage of Alabama's class action statute.

First, this article has only examined reported class action opinions of the Alabama Supreme Court, and a number of class certification appeals and other class related appeals during this have either been deflected for decision by the Alabama Court of Civil Appeals or decided without opinion.

Second, while one may suspect that the Alabama class action statute has caused many in the plaintiffs' bar to migrate elsewhere in search of their class action mecca, the federal Class Action Fairness Act of 2005 (CAFA) made it much rarer for any class action to stay in state court by making most of them removable if any plaintiff is of diverse citizenship from any defendant.

In the wake of CAFA, the Eleventh Circuit has proven to be more class friendly than many realized. Many plaintiff's lawyers now file initially in Alabama federal courts. *See, e.g., Klay v. Humana*, 382 F. 3d 1241 (11<sup>th</sup> Cir. 2004), *cert. denied sub nom. United-Health Grp., Inc. v. Klay*, 125 S. Ct. 877 (2005).

In federal court, there still is no appeal as of right from class certification, and discretionary appeals under Fed. R. Civ. P. 23(f) are sparingly granted. So while class actions may not bloom quite as profusely in the state courts of Alabama as they did in the 1990s, they continue to bloom elsewhere, both within and without the boundaries of Alabama, subject to one big caveat: the United States Supreme Court has made clear that, with rare exceptions, pre-dispute arbitration agreements with class action waivers must be enforced. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). This means that today, unlike 20 years ago, most consumer cases that make it to class certification are those where the defendant was unable or unwilling to insist upon an arbitration agreement with a class action waiver in connection with the product or transaction in question.

Still, for the Alabama class action practitioner, there will always be opportunities. The categories of defendants unable to utilize arbitration are many, the

creativity of the Alabama plaintiff's bar is second to none, and the increasing globalization of the practice of law gives Alabama class action defense practitioners opportunities to apply the lessons learned in Alabama in other venues around the country.

And here at home, while there have been more published opinions vacating class certification or affirming denial of class certification, several of the Alabama Supreme Court's class decisions over the last 20 years have in fact approved of class certifications in whole or in part. *See, e.g., Barnhart v. Ingalls*, 275 So. 3d 1112 (Ala. 2018); *Hall v. Envntl. Litig. Grp., P.C.*, 248 So. 3d 949 (Ala. 2017); *Perdue v. Green*, 127 So. 3d 596 (Ala. 2014); *CVS Caremark Corp. v. Lauriello*, 175 So. 3d 596 (Ala. 2014); *CIT Commc'n Fin. Corp. v. McFadden, Lyon & Rouse, L.L.C.*, 37 So. 3d 114 (Ala. 2009).

If getting class actions certified is now a little harder than walking a proposed order up to the judge's office on the same day you file a complaint, that doesn't mean there aren't still opportunities for good lawyers on both sides of the "v." to shine. ▲

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### Michael R. Pennington



Mike Pennington is a partner at Bradley Arant in Birmingham. He is the founder and co-chair of the firm's class and complex litigation group, with 30 years of experience defending class actions nationwide.

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### Scott Burnett Smith



Scott Smith is a partner at Bradley Arant in Huntsville and the founder and chair of the firm's appellate litigation group. He is a Fellow in the American Academy of Appellate Lawyers and has handled more than 200 appeals in federal and state appellate courts, including over 35 class action appeals. He has also testified before the Advisory Committee on the Federal Rules of Civil Procedure on appellate review of class actions.

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### Hunter W. Pearce



Hunter Pearce is an associate at Bradley Arant in Huntsville and a member of the firm's litigation practice group. Before joining the firm, Pearce clerked for the U.S. District Court for the Middle District of Alabama, where he served Chief Judge W. Keith Watkins and Senior Judges Myron H. Thompson and W. Harold Albritton, III.



# Northern District of Alabama Magistrate Judges, a Critical Article I Extension of an Article III Court

*By Robert E. Battle and Adam P. Plant*

Justice Sotomayor wrote in a 2015 opinion that,

“without the distinguished service of” federal magistrate judges, “the work of the federal court system would grind nearly to a halt.” That holds true in the Northern District of Alabama.

The Federal Judicial Center says there are 541 full-time magistrate judges authorized for fiscal year 2019, five of whom are on the Northern District bench. This is a sharp increase since 1971, when there were only 61 full-time magistrate judges. Nationally, magistrate

judges disposed of 1,182,422 matters during the 2018 fiscal year.

Magistrate judges in the Northern District of Alabama are in the center of both civil and criminal cases. In 2015, magistrate judges in the Northern District became a regular fixture in the random “wheel” assignment of civil cases in equal proportion to the district judges. If the parties consent to the magistrate judge assigned to the case, the magistrate judge handles the case through judgment. The rate of consent for magistrate judges is about 60 percent in the Northern District. In criminal cases, magistrate judges actively manage grand jury months and deal with significant pretrial and evidentiary matters.



Northern District magistrate judges resolved 6,649 cases during the 2017 fiscal year, so there is a good chance one of these folks will touch your case in some way if you litigate here. This article pulls back the curtain a little bit on our local magistrate judges.



### Judge T. Michael Putnam

“I have had a job, of one kind or another, since I was 16 years old,” said Magistrate Judge T. Michael Putnam from his chambers. “My first job, when I was 16, was at a Jack’s hamburgers in Phenix City.” Judge Putnam, then a student at Central High School, said “my principal qualification was that I was capable of physically making change.”

In a work life that started at Jack’s and on ladders as a housepainter in southeast Alabama, then transitioned into a robust federal court civil trial practice in Florence, Judge Putnam has set the benchmark for longevity as a federal magistrate

judge. He entered active service on February 9, 1987 and officially retired during the summer of 2019, before this article was published.

During those three decades as a judge, Judge Putnam handled many high-profile cases in the Northern District of Alabama. Of the thousands of cases on which he has worked—including the securities fraud trial of Richard Scrushy, the Blue Cross Antitrust MDL, the Eric Rudolph pretrial criminal matters—“the ones that I always remember are the ones that I recommended granting habeas corpus relief to a prisoner. There have only been three or four of them over the 32 years that I’ve been doing this, but those are the ones I remember.”

“It may be many years after the fact,” but “our constitutional system has ways of correcting its errors.”

The most troubling cases also provide valuable instruction to lawyers. “Being a lawyer, you owe to the client and to the profession your full judgment and experience and effort” because the lawyer is the only thing standing between that client and real harm. “As a lawyer, you have to give your best effort.”

A belief in the fundamental dignity of litigants and the high honor of an oath to protect the Constitution of the United States is the cornerstone of Judge Putnam’s approach to his work. “The Federal judicial system is the crown jewel of what dispute resolution can be. And I hate to reduce it to just dispute resolution, but it has a degree of formality, and fairness,

and gravity to bring to the resolution of a dispute between people.”

“I grew up reading about *Brown v. Board of Education* and various other fundamental cases about human dignity, and human freedom, and human rights. That seemed to me to be a very important part and mission of the Federal court system.”

“I have tried every day to remember that person is a human being,” rather than becoming jaded to plaintiffs in Section 1983 prisoner litigation or habeas cases. He urges his clerks and staff “to look for those needles in the haystack”—cases where a prisoner in a Section 1983 case or who filed a habeas petition can articulate a meritorious claim—simply because the volume of those cases is overwhelmed by those with little substantive merit. “If a habeas case comes in, I will read every word that the plaintiff submits to the court. I don’t take shortcuts, even though I know that takes longer to resolve a case.” Judge Putnam says this dedication is “the only way I know to ensure that the volume simply doesn’t overwhelm the oath I took to defend the Constitution.”

Judge Putnam brings the same dedication to garden-variety civil litigation, as well. “I tell people in civil cases at scheduling conferences that, if you file a summary judgment motion and attach a deposition transcript, I’m going to read the deposition.”

Judge Putnam is the longest-serving magistrate judge in the history of the Northern District of

Alabama, and among the longest-serving in the Eleventh Circuit. “I’m going to leave with 32 years of experience here. A year later, Judge Ott will leave with more than 20 years’ experience here. What that does is it takes some of the firsthand history away. But it doesn’t take away from the skill and talent of the remaining people to do the job. I have full faith that the job will continue to be done at a very high level.”

Even before his retirement, “Judge Proctor [was] already threatening to recall” Judge Putnam to complete the Blue Cross antitrust case. Recall, for lack of a better term, is the magistrate judge’s equivalent of senior status for a district judge. In that case, Magistrate Judge Putnam already has handled more than four years’ worth of discovery issues.

Judge Putnam’s three decades of public service in the Northern District have been a great example of a judge not allowing his docket to overwhelm his oath.



**Judge John England III**

Magistrate Judge John England III is a member of one of the most distinguished families in the history of the Alabama State Bar. So, in the Northern District of Alabama you might get conflicting answers when you ask “will the real Judge England please stand up?”

Judge John England Jr. is a state circuit court judge in Tuscaloosa County and a former associate justice of the Alabama Supreme Court. April England-Albright practiced as a civil rights lawyer at the prominent Selma firm formerly known as Chestnut, Sanders, Sanders, Pettaway, Campbell & Albright. She is now a supervisory attorney at the U.S. Department of Education in Atlanta. Judge England’s younger brother, Chris, is a member of the Alabama Legislature where he represents House District 70 as one of our 18 lawyer-legislators. Columnist Kyle Whitmire described Rep. England as “smart. He’s honest. And he’s plain spoken. In short, he doesn’t fit” in the Alabama Legislature. So there is a fair bit of achievement when the family sits around the table at holiday meals.

When Magistrate Judge England calls his docket, though, he is without a doubt the “real” Judge England. “Being a judge, at some point, was something that I always thought about—primarily because I watched my dad take the bench and serve the citizens of Tuscaloosa for a number of years.” Judge England applied to become a federal magistrate judge “as a way to consider my career in public service” which began with his service in the U.S. Army Reserves He joined

the Reserves as a student at Central High School of Tuscaloosa, and continued all the way through his time as an Assistant U.S. Attorney and First Assistant U.S. Attorney for the Northern District. “From 1988 through 1995, which was my second year of law school, I was active in the Reserves.” Judge England also was a private practice civil litigator in Huntsville after law school.

Judge England said his judicial philosophy is to try and get cases right, to call balls and strikes. “Diversity of ideas and experiences is valuable on the bench. Everybody that appears in front of me has a different experience” that brings them to court. He is a firm believer that lawyers can resolve most of the intra-case disputes that arise by using an old-fashioned phone call, rather than trading barbs via email.

Judge England says now that he is on the bench he fully appreciates how difficult the job of judging is, particularly in criminal cases. “I had to make sure when I came in that, despite my 13 years of prosecutorial experience that I was looking at things with an unbiased lens when it came to making decisions that affected someone’s freedom or someone’s privacy. I used to advocate for a position, now I’m trying to do justice.”

Presiding over cases from beginning to end is not a guarantee. “All of us have to prove that we know what we’re doing when we’re assigned these cases,” and litigants and lawyers had to litigate cases with Judge England to build their trust in him. “I knew folks and had practiced with folks, and lawyers

here knew I had walking-around sense. Magistrate judges are uniquely situated, because to preside over a case from beginning to end, we have to have consent of the parties.”

Judge England, like his colleagues, is in the rotation for case assignment. At any one time, they can be assigned to more than 200 civil cases, including those they handle independently and those on which they are jointly assigned with a district judge. In criminal cases, magistrate judges are assigned to grand jury duty on a monthly basis. Each indicted case from that grand jury session will be assigned to one magistrate judge who handles all of the criminal cases from that month. Being assigned as the “duty judge” also adds to the workload. “I plan with duty months in mind,” which are determined a year ahead of time.

“When I graduated the law school” at the University of Alabama “in 1996, it was the first time that a second-generation African-American law student graduated.” Judge England says his father’s example was critical to his understanding of what was possible. “My situation was nowhere close to as difficult as his was—plus, I able to see someone not just to achieve, but to achieve a very high level of success. So I knew what was possible.” Judge England believes it is important for students who have not seen a parent achieve a legal education to see what is possible, and the bar can play a critical role in reaching out to talented young people who might have the aptitude and interest to enter the law.



### Judge Staci G. Cornelius

Before taking the bench in April 2014, Magistrate Judge Staci G. Cornelius tried more than 200 civil and criminal cases to juries in various state and federal courts. This background gave her a good working knowledge of court rules and practice. It also gave her insight into how to be an effective judge: “I know firsthand the importance of preparation and hard work—for both the attorneys and the court—and I try to bring the work ethic I developed as a trial lawyer to my duties as a judge.”

Judge Cornelius grew up in Natchitoches, Louisiana. Natchitoches, the oldest settlement acquired in the Louisiana Purchase, was the location where *Steel Magnolias* was filmed (and some of Judge Cornelius’s family appeared in the film). Judge Cornelius left Natchitoches to attend the University of Alabama and graduated with bachelor’s degrees in English and international relations in 1989. She earned her J.D. from Alabama in 1992.

After law school, Judge Cornelius spent a year as a special master for

domestic relations cases in Montgomery County District Court. She then worked at the Jefferson County District Attorney’s office. During six years as a state prosecutor, she tried approximately 150 felony jury trials, many of which involved violent crimes.

Judge Cornelius left the district attorney’s office in 1999 for a private civil litigation practice focused primarily on insurance defense cases. From 2005 through 2007, Judge Cornelius was recognized as one of the most prolific trial attorneys in Alabama by the *Alabama Jury Verdict Reporter*. In 2008, Judge Cornelius moved to another firm, which offered her a broad range of civil practice. Some of her defense cases included medical malpractice, products liability, dram shop and liquor liability, and bad faith and extra-contractual claims. Judge Cornelius tried 68 civil jury cases to verdict in private practice. She also was an adjunct trial advocacy instructor at Cumberland Law School for most of that time.

After 13 years in private practice, Judge Cornelius returned to her roots as a prosecutor. She became an Assistant U.S. Attorney in the Northern District in 2012. As an AUSA, Judge Cornelius managed investigations and prosecuted a wide variety of federal cases, including healthcare fraud, financial fraud, immigration, and computer crimes.

Judge Cornelius was selected from approximately 50 applicants to become a magistrate judge. She sought the position because of her interest in public service and because she believed her experience

made her a well-suited candidate to be a judge.

Judge Cornelius misses “the everyday interaction a litigator has with opposing counsel, clients, and colleagues,” but she likes being a judge. “I like that my job is to get it right. My objective is to reach the result dictated by the facts and law—gone are the days of having to advocate for a client even when the facts and the law aren’t on my side.”

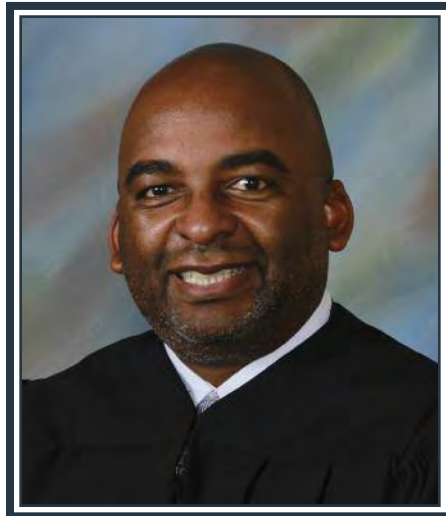
She says her varied background “has served me well and set me up with a solid foundation from which to grow in my legal knowledge.” And Judge Cornelius is quick to point out that her fellow judges in the Northern District are an invaluable resource: “I work with a very collegial group, whose generosity with their time, wisdom, and advice makes a great job even better.”

Judge Cornelius spends approximately 35 percent of her time on criminal matters. In the Northern District, the grand jury meets monthly and arraignments are in the middle of the month. The magistrate judges participate in a rotation where each is assigned criminal cases one month out of every five months.

Judge Cornelius is considered a “lawyer’s judge.” She recalls how difficult it can be to juggle cases in private practice or as a prosecutor and encourages lawyers to actively involve the court in case-management issues. Judge Cornelius is known to be reasonable with the parties regarding extending deadlines, but is mindful of moving along her docket. She often grants oral argument and will meet with lawyers in chambers rather than in the courtroom.

Judge Cornelius allows lawyers to attend conferences by telephone, and she is willing to consider allowing parties to participate in the hearing by videoconference if they are located outside of Birmingham.

Judge Cornelius mediates on average eight to 10 cases a year. She only gets to try two to three cases a year. She does not force parties to mediate and wishes she could try more cases because she misses jury trials.



### **Judge Herman N. “Rusty” Johnson, Jr.**

Judge Rusty Johnson has served as a magistrate judge since June 2017, and his chambers are in Huntsville. Before taking the bench, Judge Johnson clerked for federal judges for two years, and spent more than eight years in private practice and another eight as a law professor.

“Teaching for eight-plus years, on the heels of my eight-plus years in civil litigation, prepared me well for this position, especially for my civil duties as my practice involved

primarily federal civil practice, and then I taught the gamut of civil litigation courses for years, including Civil Procedure, Evidence, Equitable Remedies, Complex Litigation, Federal Courts, Civil Rights, and Employment Law.”

As to criminal matters, Judge Johnson notes “the hallmark of my teaching experience was preparation, as several sources inform new law professors that preparation for teaching new courses takes four to 10 hours of work per class session. I took that same approach to preparing for the criminal aspects of my position, which has served me well.”

Judge Johnson, the son of a farmer, grew up in rural Blackville, South Carolina, a town of approximately 5,000. His high school class had less than 100 students. Judge Johnson has fond memories of his childhood there, “[w]e worked hard and played hard out in the fields and on the farm. As you can imagine, we did not have much by way of entertainment, so we fashioned our own. It impacted my future by instilling in me the values of industry (hard work), modesty (everyone knew each other, so conceit was not a treasured attitude), and community (working together to tackle tough tasks).”

Judge Johnson attended governor’s school while he was in high school, and attended Duke University as an undergraduate on a prestigious Benjamin N. Duke Scholarship. Judge Johnson earned an economics degree from Duke in 1991.

Judge Johnson did not go straight to law school from college,

but spent several years in service. He served internationally as a Peace Corps volunteer in Mali where he focused on small business development and worked to establish financial institutions to encourage investment. Afterward, he worked as a legal assistant in South Carolina processing Manville asbestos claims, and he then led an AmeriCorps team in Charleston, South Carolina.

Judge Johnson earned a joint M.A. in international and public affairs and J.D. from Columbia. At Columbia, he was a Harlan Fiske Stone Scholar and earned several prestigious fellowships. He was a member of the *Columbia Human Rights Law Review*. He also continued his commitment to service while he pursued his education at Columbia. He administered a legal clinic for the homeless in New York City, and he served as a human rights fellow in Greenville, Mississippi and at EJI in Montgomery. In conjunction with his international affairs education, he worked as a fellow in dispute resolution in South Africa.

While these experiences were formative and show his commitment to public service, Judge Johnson notes that impartiality is “a more important virtue” in his role as a magistrate judge. “Regardless of life experience, impartiality requires a judge to consider the perspectives and experiences of all of the parties in particular conflicts and to adjudge objectively based upon those considerations.”

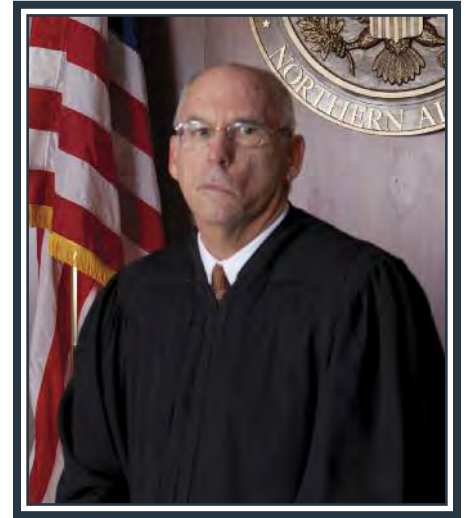
Judge Johnson noted that civility among lawyers and litigants is important to him. He encourages

lawyers to fight about the merits of a case, and not demonize opposing counsel or parties. He emphasized that this works both ways, and believes judges should be courteous to lawyers.

Judge Johnson continues to conduct research on a daily basis, a tribute to his time as a law professor. “I thoroughly enjoy legal research and writing, especially novel issues that require formulation of the correct research question and engagement with the most appropriate sources. Even if the issues are not novel, I enjoy the exercise of constructing a logical argument based upon the facts at hand and the applicable legal principles.” Given his affinity for research, Judge Johnson advises lawyers to be prepared for him to have conducted his own research on pending issues.

Like other magistrate judges, Judge Johnson is more flexible in granting extensions of deadlines than Article III judges. Judge Johnson rarely has oral argument, and does not conduct in-person status or scheduling conferences. Instead, he conducts most regular court business telephonically. He also does not require summary judgment briefs to conform to the infamous Appendix II requirements used by other judges.

Unlike the other magistrate judges in the Northern District, Judge Johnson is assigned a substantial criminal docket each month because Redstone Arsenal and the 40,000 federal employees who work there are right outside his front door. Judge Johnson spends a considerable amount of his time on criminal matters, including all misdemeanors originating on Redstone Arsenal.



### Chief Judge John E. Ott

Chief Magistrate Judge John E. Ott was appointed to the bench in 1998, and the man known as “All-Night Ott” comes by his nickname honestly. He is known as a masterful mediator and encourages litigants to explore resolution early on in a case. Magistrate Judge England says he learned how to mediate a case by “tagging along” with Judge Ott. “When I tagged along with Judge Ott, we stayed until 2 a.m. I was tired. The parties were tired. We were all exhausted, but we got it done.”

One significant benefit to the 2015 order that placed magistrate judges on the assignment wheel is that if the parties consent to allow a magistrate judge to handle a civil case, a specific fellow magistrate judge will perform courtesy mediations on those cases. The magistrate judges have a weekly meeting during which they discuss various issues, including the need for such mediations. This contrasts with the Article III judges, who can only refer a limited number of cases each year for mediation by magistrate judges.

Judge Ott believes in mediation “because it allows the parties to resolve their disputes amicably, more quickly, with less costs, and more control of the outcome.” He spends an average of one day a week mediating cases, and his longest mediation has been ongoing for two years and is still continuing. Judge Ott has mediated several high-profile cases, including the Huntsville school desegregation case, the Jefferson County sewer case, a number of class actions involving the Alabama Department of Corrections, and class actions involving the Birmingham Municipal Court practices. He has helped mediate and settle approximately 750 cases during his time as a magistrate judge.

Before he burned the midnight oil mediating cases as a magistrate judge in the Northern District, Judge Ott grew up in sunny Winter Park, Florida and earned a B.A. in criminal justice from the University of Central Florida magna cum laude. Judge Ott moved to Birmingham for law school and has been a Birmingham resident since he graduated from Cumberland Law School in 1981.

Judge Ott has spent his career as a public servant. After law school, he clerked for the magistrate judges in the Northern District for two years. He then spent 15 years as an AUSA in the Northern District. Judge Ott began as a prosecutor in the criminal division, eventually rising to the rank of criminal division chief. He was an Executive AUSA and had oversight responsibility for litigation. Judge Ott personally tried approximately 75 cases. As a magistrate judge for the past two decades, Judge Ott has presided over another approximately 75

trials in both civil and criminal matters. So, even though he’s known as a master of alternative dispute resolution, Judge Ott knows what juries might do with a case tried to verdict.

Judge Ott believes in service to his community, and he is active in his church. He is known as a great neighbor to those around him and shows a degree of compassion, servanthood and loyalty not always found in lawyers. Judge Ott’s life evidences his belief that civic engagement builds the credibility of the courts with the public and helps judges understand the needs and dynamics of the community. He is a fellow of both the Birmingham Bar Foundation and the Alabama Law Foundation.

Judge Ott is eligible to retire in June 2020, but his youthful vigor shows he is nowhere near the end of his contributions to the community. The sidewalks around the Downtown Y are used to his regular trips between the courthouse and his daily workouts.

He helps shape the future of the legal profession by serving as a trial ad instructor at Cumberland. He has also served as an adjunct faculty member at UAB, teaching courses in trial techniques and advocacy, criminal evidence, e-discovery and social media, and dispute resolution. He also often presents continuing legal education courses for attorneys on ethics and professionalism, trial advocacy, evidence, mediation, and employment law, including his annual Ott Dog Luncheon for the Birmingham Bar.

Judge Ott says he loves “interacting with lawyers and members of the public (in mediation).” Not surprisingly, Judge Ott often sets motion hearings. Judge Ott primarily

conducts his hearings in the courtroom, while he holds status conferences in his chambers. Judge Ott is known for being prepared, and he will notify counsel ahead of time if there is an issue he would like to have addressed at a hearing. It takes lots of daylight preparation, after all, to be All-Night Ott. ▲

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**Postscript:** Between the date this article was completed and the date it was published, Magistrate Judge Gray M. Borden of the Middle District of Alabama was appointed to replace Judge Putnam. For a profile of Judge Borden written by Rudy Hill, please refer to the September 2018 issue of *The Alabama Lawyer*.

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## Robert E. Battle



Bob Battle is a founding partner of Battle & Winn LLP in Birmingham and has practiced there for 23 years, since his clerkship for the Hon. Ira DeMent. He is the former chair of the Federal Practice Section of the Birmingham Bar Association.

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## Adam P. Plant



Adam Plant practices with Battle & Winn LLP in Birmingham. Before joining the firm, he served as a deputy solicitor general for the State of Alabama and clerked for the Hon. William H. Pryor Jr. While attending law school, he was editor in chief of the *Alabama Law Review*.



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**Lightfoot, Franklin & White LLC** announces that **Charles M. Hearn, Jackson E. Knouse, Jordan Patterson,** and **Matthew J. Winne** joined as associates in the Birmingham office.

**King Simmons Ford & Spree PC** announces the opening of an office in Daphne and that **Lindsey Simmons** will be a partner there.

**Maynard Cooper & Gale PC** announces that **Allison W. Smalley** joined of counsel, **David R. Kinman** and **Richard J. Marsden** as shareholders, and **Charlie Kelley, Molli Masaniai, Jonathan Mayhall, Ashton Taylor, Noah West,** and **Caleb Wolanek** as associates.

**McGlinchey Stafford PLLC** announces that **Ross Benson** and **Lacy Triplett** joined as associates in the Birmingham office.

**Starnes Davis Florie LLP** announces that **Catherine G. Kirkland** and **Christine A. Clolinger** joined the Mobile office.

**Watkins & Eager** announces that **Austin S. Sistrunk** joined as an associate in the Birmingham office.

**Wolfe, Jones, Wolfe, Hancock, Daniel & South LLC** of Huntsville announces that **T. Riley Wolfe** and **Zachary L. Guyse** joined as associates. ▲



## IMPORTANT NOTICES

- ▲ **Alabama Lawyers Hall of Fame**
- ▲ **Judicial Award of Merit**
- ▲ **Local Bar Award of Achievement**
- ▲ **J. Anthony “Tony” McLain Professionalism Award**
- ▲ **William D. “Bill” Scruggs, Jr. Service to the Bar Award**
- ▲ **ASB Women’s Section—Request For Nominations**
- ▲ **Notice of Election and Electronic Balloting**

# Alabama Lawyers Hall of Fame

May is traditionally the month when new members are inducted into the Alabama Lawyers Hall of Fame, which is located at the state Judicial Building. The idea for a hall of fame first appeared in 2000 when Montgomery attorney Terry Brown wrote state bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the state bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of Alabama.

The implementation of the idea of an Alabama Lawyers Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004.

A 12-member selection committee consisting of the immediate past-president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the Board of Bar Commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society and the executive secretary of the Alabama State Bar meets annually to consider the nominees and to make selections for induction.

Inductees to the Alabama Lawyers Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement—leadership, service, mentorship, political courage or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year, at least one of the inductees must have been deceased a minimum of 100 years to give due recognition to historic figures as well as the more recent lawyers of the state.



The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. We need nominations of historic figures as well as present-day lawyers for consideration. Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form from the bar's website and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the Judicial Building and profiles of all inductees are found at [www.alabar.org/about/alabama-lawyers-hall-of-fame](http://www.alabar.org/about/alabama-lawyers-hall-of-fame).

Download an application form at <https://www.alabar.org/about/alabama-lawyers-hall-of-fame> and mail the completed form to:

Sam Rumore  
Alabama Lawyers Hall of Fame  
P.O. Box 671  
Montgomery, AL 36101

**The deadline for submission is March 1.**

## Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through **March 15**. Nominations should be mailed to:

Phillip W. McCallum  
P.O. Box 671  
Montgomery, AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation. The award will be presented during the Alabama State Bar's Annual Meeting.

Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

## Local Bar Award of Achievement

The Local Bar Award of Achievement recognizes local bars for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's Annual Meeting.

Local bar associations compete for these awards based on their size—large, medium or small.

The following criteria are used to judge the applications:

- The degree of participation by the individual bar in advancing programs to benefit the community;
- The quality and extent of the impact of the bar's participation on the citizens in that community; and
- The degree of enhancements to the bar's image in the community.

**To be considered for this award, local bars must complete and submit an application by June 1.** Applications may be downloaded from [www.alabar.org/about/awards-recognitions/](http://www.alabar.org/about/awards-recognitions/) or obtained by contacting Ashley Penhale at (334) 269-1515 or [ashley.penhale@alabar.org](mailto:ashley.penhale@alabar.org).

## J. Anthony "Tony" McLain Professionalism Award

**The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the J. Anthony "Tony" McLain Professionalism Award through March 15.**

Nominations should be prepared on the appropriate nomination form available at [www.alabar.org](http://www.alabar.org) and mailed to:

Phillip W. McCallum  
P.O. Box 671  
Montgomery, AL 36101-0671

The purpose of the J. Anthony "Tony" McLain Professionalism Award is to honor the leadership of Tony McLain and to encourage the emulation of his deep devotion to professionalism and service to the Alabama State Bar by recognizing outstanding, long-term and distinguished service in the advancement of professionalism by living members of the Alabama State Bar.

Nominations are considered by a five-member committee which makes a recommendation to the Board of Bar Commissioners with respect to a nominee or whether the award should be presented in any given year.

(Continued from page 81)

## William D. “Bill” Scruggs, Jr. Service to The Bar Award

**The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the William D. “Bill” Scruggs, Jr. Service to the Bar Award through March 15.** Nominations should be prepared on the appropriate nomination form available at [www.alabar.org](http://www.alabar.org) and mailed to:

Phillip W. McCallum  
P.O. Box 671  
Montgomery, AL 36101-0671

The Bill Scruggs Service to the Bar Award was established in 2002 to honor the memory of and accomplishments on behalf of the bar of former state bar President Bill Scruggs. The award is not necessarily an annual award. It must be presented in recognition of outstanding and long-term service by living members of the bar of this state to the Alabama State Bar as an organization.

Nominations are considered by a five-member committee which makes a recommendation to the Board of Bar Commissioners with respect to a nominee or whether the award should be presented in any given year.

## ASB Women’s Section—Request For Nominations

The Women’s Section of the Alabama State Bar is accepting nominations for the following awards:

### **Maud McLure Kelly Award**

This award is named for the first woman admitted to practice law in Alabama and is presented each year to a female attorney who has made a lasting impact on the legal profession and who has been a great pioneer and leader in Alabama. The Women’s Section is honored to present an award named after a woman whose commitment to women’s rights was and continues to be an inspiration for all women in the state.

Previous recipients include Justice Janie Shores (ret.), Miss Alice Lee, Miss Nina Miglionico, Judge Phyllis Nesbitt, Mahala Ashley Dickerson, Dean Camille Cook, Jane Dishuck, Louise Turner, Frankie Fields Smith, Sara Dominick Clark, Carol Jean Smith, Marjorie Fine Knowles, Mary Lee Stapp, Ernestine Sapp, Judge Caryl Privett (ret.), Judge Sharon G. Yates (ret.), Martha Jane Patton, Alyce Manley Spruell, and Merceria L. Ludgood. The award will be presented at the Maud McLure Kelly Luncheon at the 2020 Alabama State Bar Annual Meeting.

### **Susan Bevill Livingston Leadership Award**

This is the fifth year to solicit nominations for this award for the Women’s Section in memory of Susan Bevill Livingston, who practiced at Balch & Bingham. The recipient of this award must demonstrate a continual commitment to those around her as a mentor, a sustained level of leadership throughout her career and a commitment to her community in which she practices, such as, but not limited to, bar-related activities, community service and/or activities which benefit women in the legal field and/or in her community. The candidate must be or have been in good standing with the Alabama State Bar and has at least 10 years of cumulative practice in the field of law. This award may be given posthumously. This award will be presented at a special reception. Judge Tammy Montgomery, Maibeth Porter, Kathy Miller, and Allison Skinner were prior recipients.

#### **Submission deadline is March 15.**

Please submit your nominations to Elizabeth Smithart, chair of the Women’s Section, at [esmithart@yahoo.com](mailto:esmithart@yahoo.com). Your submission should include the candidate’s name and contact information, the candidate’s current CV and any letters of recommendations. If a nomination intends to use letters of recommendation previously submitted in 2019, please note your intentions.

## Notice of Election and Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners* that the election of these officers

will be held beginning Monday, May 18, 2020, and ending Friday, May 22, 2020.

On the third Monday in May (May 18, 2020), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 1, 2020) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 22, 2020) immediately following the opening of the election.

## Nomination and Election of President-Elect

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of February 1, 2020, and shall possess a current privilege license or special membership. Candidates must be nominated by petition of at least 25 Alabama State Bar members in good standing. Such petitions must be filed with the secretary of the Alabama State Bar no later than 5:00 p.m. on February 3, 2020.

## Nomination and Election of Board of Bar Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:

- 8<sup>th</sup> Judicial Circuit
- 10<sup>th</sup> Judicial Circuit, Place 4
- 10<sup>th</sup> Judicial Circuit, Place 7
- 10<sup>th</sup> Judicial Circuit, Bessemer Cutoff
- 11<sup>th</sup> Judicial Circuit
- 13<sup>th</sup> Judicial Circuit, Place 1
- 13<sup>th</sup> Judicial Circuit, Place 5
- 15<sup>th</sup> Judicial Circuit, Place 5
- 17<sup>th</sup> Judicial Circuit
- 18<sup>th</sup> Judicial Circuit, Place 1
- 18<sup>th</sup> Judicial Circuit, Place 3
- 19<sup>th</sup> Judicial Circuit
- 21<sup>st</sup> Judicial Circuit
- 22<sup>nd</sup> Judicial Circuit
- 23<sup>rd</sup> Judicial Circuit, Place 1

- 28<sup>th</sup> Judicial Circuit, Place 2
- 30<sup>th</sup> Judicial Circuit
- 31<sup>st</sup> Judicial Circuit
- 33<sup>rd</sup> Judicial Circuit
- 34<sup>th</sup> Judicial Circuit
- 35<sup>th</sup> Judicial Circuit
- 36<sup>th</sup> Judicial Circuit
- 40<sup>th</sup> Judicial Circuit
- 41<sup>st</sup> Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2020 and vacancies certified by the secretary no later than March 15, 2020. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 24, 2020).

## Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 3, 6 and 9. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2020.

## Submission of Nominations

Nomination forms, declaration of candidacy forms and applications for at-large commissioner positions must be submitted by the appropriate deadline and addressed to:

Phillip W. McCallum  
P.O. Box 671  
Montgomery, AL 36101-0671

These forms may also be sent by email to [elections@alabar.org](mailto:elections@alabar.org) or by fax to (334) 261-6310.

***It is the candidate's responsibility to ensure the secretary receives the nomination form by the deadline.***

Election rules and petitions for all positions are available at [www.alabar.org](http://www.alabar.org). ▲



## DISCIPLINARY NOTICES

- ▲ Notices
- ▲ Reinstatement
- ▲ Suspensions
- ▲ Public Reprimands

### Notices

- **William Joseph Gibbons, Jr.**, who practiced in Huntsville and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2019, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2018. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 2019-578] Disciplinary Commission, Alabama State Bar
- **Joshua Joseph Gotlieb**, who is licensed to practice in Alabama and also practiced in Atlanta, Georgia, and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2019, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2018. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 2019-579] Disciplinary Commission, Alabama State Bar
- **James Patrick Hackney**, who is licensed to practice in Alabama and also practiced in Denver, Colorado, and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2019, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2018. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 2019-582] Disciplinary Commission, Alabama State Bar
- **Kimberly Hallmark**, who practiced in Albertville and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2019, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2018. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 2019-583] Disciplinary Commission, Alabama State Bar
- **Chase Russell Hutcheson**, who practiced in Muscle Shoals and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2019, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2018. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 2019-586] Disciplinary Commission, Alabama State Bar

- **Philip John Motches**, who practiced in Birmingham and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2019, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2018. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 2019-601] Disciplinary Commission, Alabama State Bar
- **Clarence Richard, III**, who is licensed to practice in Alabama and also practiced in Alpharetta, Georgia, and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2019, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2018. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 2019-612] Disciplinary Commission, Alabama State Bar
- **Rebecca Lynn Sherman**, who is licensed to practice in Alabama and also practiced in San Francisco, California, and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2019, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2018. Noncompliance

with the MCLE requirements shall result in a suspension of her license. [CLE No. 2019-618] Disciplinary Commission, Alabama State Bar

## Reinstatement

- **Kristofor Wyatt Kavanaugh**, who formerly practiced in Northport, was reinstated to the practice of law in Alabama by order of the Supreme Court of Alabama, effective August 13, 2019. Kavanaugh petitioned for reinstatement to the practice of law in Alabama on May 22, 2019 and was subsequently reinstated by order of the Supreme Court of Alabama. [Rule 28, Pet. No. 2019-734]

## Suspensions

- The Alabama Supreme Court issued an order suspending Greenville attorney **Heather Leigh Friday Boone** from the practice of law in Alabama for two years, effective August 9, 2020. The Alabama Supreme Court entered its order based upon the Disciplinary Board's order, wherein the board found Boone guilty of violating Rules 1.3 [Diligence], 1.4(a) [Communication], 1.16(d) [Declining or Terminating Representation], and 8.4(g) [Misconduct], Alabama Rules of

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(Continued from page 85)

Professional Conduct. In April 2017, a client retained Boone to file an uncontested divorce. The client paid Boone a total of \$895, and the client and his wife signed all of the necessary paperwork. Thereafter, the client repeatedly attempted to contact Boone between May 2017 and August 2018 for a status update, but Boone failed to return the client's telephone calls. In August 2018, the client and his wife learned Boone never filed the uncontested divorce. To date, Boone has failed to communicate with the client or refund any portion of the fee. After receiving the client's complaint, the Alabama State Bar repeatedly ordered Boone to file a written response to the bar complaint, which she failed to do. [ASB No. 2018-1219]

- The Alabama Supreme Court issued an order suspending former Florence attorney **Barry Neal Brannon** from the practice of law in Alabama for 33 months, retroactive to the effective date of Brannon's transfer to inactive status on November 22, 2016. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order, wherein Brannon admitted to violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15(a) [Safekeeping Property], 1.16(d) [Declining or Terminating Representation], and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. Brannon admitted to accepting unearned fees. Brannon subsequently transferred to inactive status, effective November 22, 2016. As a result, Brannon was unable to perform the work for which he was paid, failed to timely refund the unearned fees, and failed to timely notify his clients of his inability to continue his representation of them. [ASB Nos. 2016-1566, et al.]
- On March 23, 2019, the Disciplinary Board issued reciprocal discipline to Louisiana attorney **Lauren G. Coleman** in the form of a suspension from the practice of law in Alabama for one year and one day, which will be held in abeyance while Coleman serves a one-year probationary term, effective August 23, 2019. On February 11, 2019, the Louisiana Supreme Court issue an order suspending Coleman for one year and one day, to be held in abeyance while Coleman serves a one-year probationary term for employing a disbarred attorney as a paralegal in Coleman's law firm, violating Rule 5.5, Louisiana Rules of Professional Conduct. Coleman also will be required to pay any costs taxed against her pursuant to Rule 33, Alabama Rules of Disciplinary Procedure, including but not limited to a \$1,000 administrative fee. [Rule 25(a), Pet. No. 2019-273]
- Indiana attorney **Michael Ray Jeffries** received reciprocal discipline in the form of a three-year suspension on July 8, 2019. On August 21, 2018, the Indiana Supreme Court issued an order suspending Jeffries for three years for failure to cooperate with an investigation in that state, violating Rules 1.3, 1.4(a)(3), 1.8(a)(2), 1.15(a), 3.2, 7.1, 8.1(b), and 8.4(c), Indiana Professional Conduct Rules, and Rules 23(29)(a)(2) and 23(29)(a)(5), Indiana Admissions and Discipline Rules. Jeffries is also required to pay any costs taxed against him pursuant to Rule 33, Alabama Rules of Disciplinary Procedure, including but not limited to a \$1,000 administrative fee. [Rule 25(a), Pet. No. 2018-1123]

## Public Reprimands

- On September 6, 2019, the Disciplinary Commission of the Alabama State Bar issued a public reprimand with general publication to **John Tracy Fisher, Jr.** for violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15(a) and (e) [Safekeeping Property], and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. In 2015, a client retained Fisher to represent her in seeking a court order allowing her to relocate with her minor child. Fisher failed to adequately communicate with the client regarding the date of the hearing, her alleged request to dismiss her request to relocate, and the issue of fees in the matter. Fisher also failed to timely and diligently forward the final order in the matter to the client. The client paid Fisher an initial retainer of \$4,500 to represent her in the matter. Fisher failed to place the unearned portion of the retainer in trust and failed to maintain individual client ledgers as required by Rule 1.15(e), Alabama Rules of Professional Conduct. Additionally, Fisher deposited personal funds into his trust account on multiple occasions and made personal payments directly from that account. [ASB Nos. 2016-1191 and 2016-1196]
- On September 6, 2019, Denver, Colorado attorney **David Jeffrey Furtado**, who is also licensed in Alabama, received reciprocal discipline of a public reprimand with general publication, as ordered by the Disciplinary Board of the Alabama State Bar, for violating Rule 8.4(c) [Misconduct], Alabama Rules of Professional Conduct. Furtado's misconduct was related to his representation of medical marijuana dispensaries. Furtado failed to disclose to Wells Fargo Bank that he opened two accounts in 2013 on behalf of medical-marijuana companies. At the time, Wells Fargo did not allow

accounts to be opened for medical-marijuana businesses. [Rule 25(a), Pet. No. 2019-274]

- Daphne attorney **John Daniel Hawke** received a public reprimand without general publication on September 6, 2019 for violating Rules 1.1 [Competence]; 1.15(a), 1.15(c), 1.15(d), and 1.15(f) [Safekeeping Property]; and 8.4(a), 8.4(b), 8.4(c), 8.4(d), and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. In ASB Nos. 2017-1098 and 2018-761, Hawke failed to use a trust account for two years, accepted client retainers over the phone, deposited funds into his personal account without passing the funds through the firm's operating account, arrived late or failed to appear in court appearances, and failed to pay 2016 payroll taxes after he withheld the taxes from employees' paychecks. Hawke also mishandled a custody dispute in which he represented his former employee, failed to appear in court, and failed to communicate with opposing counsel. In ASB No. 2017-1335, the Alabama Court of Criminal Appeals issued an order removing Hawke as appellate counsel in an appeal from the Baldwin County Juvenile Court. Hawke requested five extensions to file the appellant's brief, all of which the Alabama Court of Criminal Appeals granted. Hawke thereafter filed a motion to transmit original items from the trial court and a motion to stay the briefing schedule. The Alabama Court of Criminal Appeals granted Hawke an additional five days. Nevertheless, Hawke failed to file proof on

time and received yet another deficiency notice. The Alabama Court of Criminal Appeals ultimately removed Hawke from the case. With this conduct Hawke violated Rules 1.1 [Competence]; 1.15(a), 1.15(c), 1.15(d), and 1.15(f) [Safekeeping Property]; and 8.4(a), 8.4(b), 8.4(c), 8.4(d), and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct, by failing to provide competent representation, failing to hold client property in connection with representation separate from his own property, making a disbursement of uncollected client funds, failure to properly deposit and withdraw client funds from a client trust account, and engaging in conduct adversely reflecting on his fitness to practice law. Hawke is also required to pay any costs taxed against him pursuant to Rule 33, Alabama Rules of Disciplinary Procedure, including but not limited to a \$1,000 administrative fee. [ASB Nos. 2017-1098, 2017-1335, and 2018-761]

- Birmingham attorney **Woodrow Eugene Howard III** received a public reprimand without general publication for violating Rules 8.4(d) and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct, on September 6, 2019. Howard was appointed personal representative of an estate. One of the heirs petitioned the probate court to remove Howard as personal representative citing his failure to communicate with the heirs, the fact that the estate was pending for four years, and that Howard's license was suspended. The probate judge ordered Howard to respond and appear at a hearing. Howard

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filed an emergency continuance, which the court denied. He failed to file a response or appear as ordered. The court removed him as personal representative and revoked his letters testamentary. The court also issued a deadline for him to file a final settlement for the estate, which he failed to meet. As a result, the court sanctioned Howard. [ASB No. 2018-25]

- Mobile attorney **Marcus E. McCrory** received a public reprimand without general publication on September 6, 2019 for violating Rules 3.3(a) [Candor Toward the Tribunal], 5.3 [Responsibilities Regarding Non-Lawyer Assistance], and 8.4(c), 8.4(d), and 8.4(g) [Misconduct], Alabama Rules of Disciplinary Procedure. McCrory was hired to probate an estate in 2016. His secretary initially notarized and filed consents and waivers dated September 12, 2016. Because the administrator died, the probate court appointed a new administrator, after which McCrory obtained new consents and waivers from the heirs at law. His secretary allegedly notarized the new consents and waivers in December 2016. There was only one piece of real property in the estate, and McCrory filed a petition for sale, along with consents and waivers from the two heirs, dated August 21, 2017. Again, McCrory's secretary notarized these documents. The probate court granted the petition for sale on December 18, 2017. On January 5, 2018, the widow of one of the heirs called the probate court and spoke with the clerk, who informed her that she would receive the money from the sale. In that conversation, the widow advised the clerk that her husband passed away in February 2017, seven months before McCrory's secretary notarized his signature. As a result, the clerk contacted McCrory and forwarded the matter to the chief clerk and the probate judge. The judge immediately issued a show cause order, cancelled the order for the petition for sale, and suspended letters of administration. After investigating, McCrory believed the deceased heir signed the consent and waiver in December 2016, but not notarized. When his secretary was filing the petition for sale, she observed that consent and waiver not dated or notarized, and took it upon herself to notarize and backdate them to August 21, 2017. At the show cause hearing, McCrory testified he thought the deceased heir signed the consent and waiver in December 2016, but not notarized until August 17, 2017, and attributed this to "an administrative oversight." His secretary admitted the deceased heir was not present on August 21, 2017 when she notarized his signature. On January 30, 2018, the probate court issued an order noting there was no evidence offered that the heir was ever present in Mobile County when he signed the consents and waivers. The court offered McCrory's

secretary an opportunity to resign her notary, which she did at the conclusion of the hearing. McCrory is also required pay any costs taxed against him pursuant to Rule 33, Alabama Rules of Professional Conduct, including but not limited to a \$1,000 administrative fee. [ASB No. 2018-45]

- Haleyville attorney **Jerry Dean Roberson** received a public reprimand with general publication on September 6, 2019 for violating Rules 1.1 [Competence], 1.3 [Diligence], 1.4 [Communication], and 8.4(a) and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct, in ASB No. 2016-334. A client hired Roberson to represent her in an appeal in a child custody matter and was paid \$3,000. The court scheduled and continued three separate court dates. The client experienced difficulty contacting Roberson, and he failed to respond to her attempts. Additionally, Roberson allowed the time to file the client's appeal to lapse. In ASB No. 2016-334, Roberson violated Rules 1.1 [Competence], 1.3 [Diligence], 1.4(a) [Communication], and 8.4(a) and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. Here, a client hired Roberson to represent her son on a rape charge and paid Roberson a \$5,000 retainer. Roberson failed to communicate with the client and her son for a year. He eventually visited the client's son in prison and indicated he would attempt to move the case forward. Many court dates were continued. However, another attorney informed the client that Roberson was suspended. In ASB No. 2016-334, Roberson violated Rules 3.3(a)(1) [Candor Toward the Tribunal], 3.4(c) [Fairness to Opposing Party and Counsel], 4.1(a) [Truthfulness in Statements to Others], 5.5(a) [Unauthorized Practice of Law], 7.3(a) [Direct Contact with Prospective Clients], and 8.4(a), 8.4(c), 8.4(d), and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. A potential witness informed opposing counsel that Roberson contacted him regarding a matter; Roberson advised the witness that he was on inactive status, stated he was about to get his license back, and that he was assisting counsel of record. Roberson confirmed he spoke with the potential witness, but explained it was only to make an appointment for new counsel who was very busy at the time. Additionally, he admitted participating in a telephone hearing with United States District Court Judge Scott Coogler in this matter on January 9, 2017, but failed to identify himself on the phone call. At the close of the hearing, opposing counsel notified Judge Coogler that Roberson was on the line. When the court questioned Roberson about his licensure status, he advised it was inactive, but anticipated it would be restored later that week. [ASB Nos. 2016-334, 2016-405, and 2017-69]





## MEMORIALS

**Crouch, James Michael**

Birmingham  
Admitted: 1974  
Died: October 16, 2019

**Davis, Thomas Logan**

Birmingham  
Admitted: 2005  
Died: September 2, 2019

**Davis, William Van**

Pell City  
Admitted: 1982  
Died: September 4, 2019

**Edwards, William Jackson, III**

Mobile  
Admitted: 1954  
Died: September 27, 2019

**Horn, Hon. Alwin Earl, III**

Birmingham  
Admitted: 1968  
Died: September 18, 2019

**Lacy, Hugh Gale**

Huntsville  
Admitted: 1990  
Died: August 28, 2019

**Melvin, Lisa Hagood**

Prattville  
Admitted: 2003  
Died: September 13, 2019

**Mills, William Hayes**

Birmingham  
Admitted: 1956  
Died: October 17, 2019

**Reed, Mark Benjamin**

Daphne  
Admitted: 1976  
Died: September 30, 2019

**Scott, Clarence William, Jr.**

Pell City  
Admitted: 1959  
Died: September 14, 2019

**Scott, Curtis Laverne**

Opelika  
Admitted: 2002  
Died: May 12, 2019

**Sharp, Charles Eugene**

Birmingham  
Admitted: 1956  
Died: October 11, 2019

**Taul, Thomas McRae, III**

Fairhope  
Admitted: 1977  
Died: October 17, 2019

**Underwood, Hon. William Sidney, Jr.**

Tuscaloosa  
Admitted: 1987  
Died: September 22, 2019



**Othni J. Lathram**  
Director, Legislative Services Agency  
[olathram@lsa.state.al.us](mailto:olathram@lsa.state.al.us)

For more information,  
visit [www.lsa.alabama.gov](http://www.lsa.alabama.gov).



**Gregory P. Butrus**  
Balch & Bingham

## LEGISLATIVE WRAP-UP

# The Race to 1,000

This past month the State of Alabama concluded a three-year celebration of its bicentennial. The events celebrated the people, places, and stories of our great state. As lawyers, one of the most interesting events of the bicentennial was the display of Alabama's Defining Documents by the Alabama Department of Archives and History. This exhibit included all six of Alabama's constitutions and the ordinance of secession. If you were not able to see this display in person, it is well worth getting a copy of the exceptionally well-done exhibit catalogue which contains a wealth of material and historical information about these governing documents and the circumstances surrounding their adoption.<sup>1</sup>

After having the privilege of seeing these historical documents in person, I did a great deal of reflecting on the work that has been done through the years to understand, amend, and reform our current constitution that was drafted and ratified in 1901. Over the years, parts of that Constitution and various amendments to it have been the subject of this column many times; however, those pieces have usually focused on fairly discrete issues. This month, I thought it might be helpful to share more context and information on the trends of amendments to the Constitution. This work was painstakingly gathered and presented in chart form with invaluable assistance by Greg Butrus.<sup>2</sup>

### Number of Amendments

One of the most common talking points regarding the Constitution of 1901 is its length. It is often said that it is the longest in the world. We have not independently verified that fact, but we have looked at the number and frequency of its amendments. There are currently 946 ratified amendments with 20 more that have already been passed by the legislature and are pending ratification by the voters. Of the total, 723, or more than three-quarters of the total amendments, are local constitutional amendments. A local constitutional amendment is one that only applies to one political subdivision (typically single county or municipality) and not the state as a whole. Typically, these amendments must only be ratified by the residents of the affected area.

### Timing of Amendments

It is also interesting to look at the timing and trends regarding the adoption of amendments. Table A reflects the passage of amendments by decade. As is shown, nearly half of the local amendments and approximately one-third of the statewide amendments have been ratified in the last 30 years, with 119 total amendments having been ratified in this decade alone. This demonstrates that both the legislature and the residents of Alabama are finding increasing need and willingness to amend our core governing document in order to address an issue.

**Table A: Alabama Local & Statewide CAs Ratified by Decade (1901–2018)**

TIME PERIOD		LOCAL AMENDMENTS			STATEWIDE AMENDMENTS		
	Decade	Local CAs Ratified	% of Total Local CAs Ratified	% of Total Local CAs Ratified During Time Period	Statewide CAs Ratified	% of Total Statewide CAs Ratified	% of Total Statewide CAs Ratified During Time Period
~ 50 years	1901-1909	0	0%	45 Amendments or 6.5% over 50 years	1	0%	36 Amendments or 16% over 50 years
	1910-1919	3	0.5%		2	1%	
	1920-1929	8	1%		8	4%	
	1930-1939	8	1%		12	5%	
	1940-1949	26	4%		13	6%	
~ 30 years	1950-1959	35	5%	218 Amendments or 30% over 30 years	25	11%	82 Amendments or 37% over 30 years
	1960-1969	131	18%		40	18%	
	1970-1979	52	7%		17	8%	
~ 20 years	1980-1989	90	12.5%	221 Amendments or 30.5% over 20 years	34	15%	59 Amendments or 26% over 20 years
	1990-1999	131	18%		25	11%	
18 years	2000-2009	149	21%	239 Amendments or 33% already in 18 years	17	8%	46 Amendments or 21% already in 18 years
	2010-2018	90	12%		29	13%	
		<b>723*</b>			<b>223*</b>		

\* As of December 18, 2019, a total of 946 amendments to the Alabama Constitution have been ratified since 1901. Some statewide amendments also have local applications. For example, Amendment No. 556 authorizes conveyance of property from the Alabama State Docks Department to the Florence-Lauderdale County Port Authority, the Decatur-Morgan County Port Authority, and the Huntsville-Madison County Marina and Port Authority.

Source(s): Ala. Const. Disposition Table (Westlaw) (available with subscription at <https://goo.gl/XL3jDV>); Local Laws Index, Legis. Serv. Agcy. (2017) (available at [http://lsa.state.al.us/PDF/LRS/local\\_laws/local.laws.index.2017.pdf](http://lsa.state.al.us/PDF/LRS/local_laws/local.laws.index.2017.pdf)); Alabama Election Results ([https://elections.ap.org/al/election\\_results/2018-11-06/state/AL](https://elections.ap.org/al/election_results/2018-11-06/state/AL)).

## Rate of Ratification

Another interesting trend is that of ratification rates of proposed constitutional amendments. Remember that the adoption of a constitutional amendment is a two-step process: (1) Passage through the legislature by a three-fifths margin in each chamber and (2) Ratification by a simple majority of those persons voting in a properly called election. Since 1992, 80 percent of all amendments passed by the legislature have been ratified. That number is slightly lower for local amendments and slightly higher for statewide amendments. Table B shows the details of these statistics.

**Table B: Alabama Statewide and Local Elections Passage by Year (1992–2018)**

Year	Statewide Proposed	Statewide Passed	% Statewide Passed	Local Proposed	Local Passed	% Local Passed	Total Proposed	Total Passed	% Total Passed
1992	2	2	100%	9	6	67%	11	8	73%
1994	4	4	100%	26	18	69%	30	22	73%
1996	5	4	80%	17	15	88%	22	19	86%
1998	11	10	91%	35	33	94%	46	43	93%
1999	3	1	33%	3	2	67%	6	3	50%
2000	14	14	100%	35	28	80%	49	42	86%
2002	4	3	75%	34	31	91%	38	34	89%
2003	1	0	0%	N/A	N/A	N/A	1	0	0%
2004	8	3	38%	27	17	63%	35	20	70%
2006	4	3	75%	22	19	86%	26	22	85%
2007	2	2	100%	2	2	100%	4	4	100%
2008	6	5	83%	29	20	69%	35	25	71%
2010	5	0	0%	38	24	63%	43	24	56%
2012	12	11	92%	19	14	74%	31	25	81%
2014	6	6	100%	4	4	100%	10	10	100%
2016	15	15	100%	22	21	95%	37	36	97%
2018	4	4	100%	15	14	93%	19	18	95%
<b>Total</b>	<b>106</b>	<b>87</b>	<b>82%</b>	<b>337</b>	<b>268</b>	<b>79.5%</b>	<b>443</b>	<b>356</b>	<b>80%</b>

Red shading indicates that fewer than 2/3 of the proposed CAs were approved in that year

Source(s): Ala. Sec’y of State, Proposed Constitutional Amendments (<http://arc-sos.state.al.us/cgi/elactnum.mbr/output>); Ala. Sec’y of State, Election Information (<https://sos.alabama.gov/alabama-votes/voter/election-information>); additional archival materials on file. This chart is accurate as to each election reflected; however, there are some results not available at this source so this chart may not reflect the entirety of amendments for this period of time.

## Conclusion

The Alabama Constitution of 1901 is one of the most complex and controversial governing documents in history. It is a constitution that is living and breathing, not just through its use and interpretation, but because we are continually adding to it. We hope you find this context to be useful and interesting as we race toward the adoption of 1,000 amendments. ▲

## Endnotes

1. We the People: Alabama’s Defining Documents written by Scotty E. Kirkland, designed by Georgia Ann Conner Hudson, foreword by Steve Murray is available from the Alabama Department of Archives and History.
2. Thanks to Chase Espy for his research assistance in sorting through years of election returns.



**Wilson F. Green**

*Wilson F. Green is a partner in Fleenor & Green LLP in Tuscaloosa. He is a summa cum laude graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at his alma mater, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation.*



**Marc A. Starrett**

*Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.*

## RECENT CIVIL DECISIONS

# From the Alabama Supreme Court

### Rule 11; Relation Back

#### **McKenzie v. Janssen Biotech, Inc., No. 1170787 (Ala. Sept. 27, 2019)**

Trial court acted within its discretion in striking original complaint under Rule 11(a) because it was not signed by counsel, was riddled with factual errors, and appeared to be lifted from a complaint in an out-of-state court. Because original pleading was stricken, amendment to pleading filed four months later did not relate back.

### Municipal Immunity

#### **Ex parte City of Tuskegee, No. 1180474 (Ala. Sept. 27, 2019)**

Municipality was entitled to substantive immunity for failure to inspect premises before landlord leased premises to tenant, and to municipal immunity (under Ala. Code § 11-47-190) for claims of negligent inspection of a premises and negligent failure to maintain sufficient hydrant pressure, which negligence allegedly caused occupant's death in a house fire.

### Arbitration; Post-Judgment Motions

#### **SAI Montgomery BCH, LLC v. Williams, No. 1180220 (Ala. Oct. 18, 2019)**

Plaintiff's motion seeking to vacate the trial court's order granting defendants' motion to compel arbitration, filed within 30 days after entry of the trial court's order and not alleging "extraordinary circumstances," was in fact a Rule 59 motion and not a Rule 60 motion (as filed). Trial court was without jurisdiction to grant the motion for relief from the order when the motion remained pending for more than 90 days under Rule 59.1.

### Probate

#### **Norwood v. Barclay, No. 1180281 (Ala. Oct. 18, 2019)**

This appeal involves the construction of Ala. Code §§ 43-8-224 ("the anti-lapse statute"), § 43-8-222 (the "intent statute"), alongside § 43-8-44 (the "escheat statute"). Testator devised entire estate to sister in her will, which contained express disinheritance provision for all other heirs. Testator died; will was admitted to probate, and PR appointed. Nieces appeared (children of sister), arguing that sister predeceased testator, and thus they should take under the anti-lapse statute. PR opposed, arguing that clear intent of testator, which controls under the intent statute, was to exclude nieces, and thus that estate escheats to the state under the escheat statute. Probate court agreed with PR, holding that the court could not apply the anti-lapse statute without rewriting the will, contrary to the express intentions of the testator. The supreme court

reversed. Relying on the general disfavor with which the law views escheats, the court held that since the sister was alive at the time the will was executed, the testator could have included language preventing the operation of the anti-lapse statute, which she did not do. Thus, the anti-lapse statute applied, and the nieces take all.

## Statutory Construction

### *Recherche, LLC v. Baldwin County Elec. Membership Corp.*, No. 1171144 (Ala. Oct. 18, 2019)

Under Ala. Code § 37-6-20, revenues of an electric membership cooperative in excess of certain delineated line items may be “distributed” using a “capital credit” allocation and crediting method.

## Municipalities; De-Annexation

### *Courtyard Manor Homeowners Assn., Inc. v. City of Pelham*, No. 1180683 (Ala. Oct. 18, 2019)

Under Ala. Code § 11-42-200, city council is vested with authority to consider de-annexation, but the statute does not contemplate the petition mechanism for considering such matters. Annexation matters involve a council’s use and exercise of legislative authority, which is entitled to the highest degree of deference.

## Guardian Ad Litem Appointments

### *Ex parte CityR Eagle Landing, LLC*, No. 1180630 (Ala. Oct. 25, 2019)

(1) Appointment of GAL is the proper subject of potential mandamus relief, and (2) Ala. Code § 26-2A-52 did not authorize appointment of a GAL, where there had been no determination, as required by the statute itself, “that representation of the interest [of the minor] otherwise would be inadequate” (in this case, there was no conflict between the minors and their parents).

## Mayor/Council Relations

### *Melton v. Bouie*, No. 1180324 (Ala. Oct. 25, 2019)

Under Ala. Code § 11-43-5, council has authority to appoint a tax collector, chief of police, and chief of fire within the statutory phrase “provide for.”

## Product Liability; Drug Cases

### *Forest Laboratories, LLC v. Feheley*, No. 1180387 (Ala. Oct. 25, 2019)

Ala. Code § 6-5-530, passed in 2015, abrogated *Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014), under which brand-name prescription drug manufacturer could potentially be



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liable on a failure to warn claim where the plaintiff was taking a medication manufactured by the generic manufacturer, but using the same warnings as those used by the brand-name manufacturer.

## UM/UIM

**Cowart v. GEICO Casualty Co., No. 1171126 (Ala. Oct. 25, 2019)**

Plurality opinion; insurer's policy allowed for the possibility that an automobile could be both an insured auto and an "uninsured auto," because the latter term in the policy included an auto being driven without the owner's permission. There was substantial evidence that the auto (wife's Jeep) was being driven by husband without her permission, when he ran over and injured her while intoxicated.

## Mootness

**Magic City Capital, LLC v. Twickenham Place Partners, LLC, No. 1180215 (Ala. Oct. 25, 2019)**

Action to enforce security interest became moot when underlying debt was paid off.

## Commercial Landlord Tenant

**LNM1, LLC v. TP Properties, Inc., No. 1170708 (Ala. Nov. 1, 2019)**

Commercial tenant breached material term of convenience store and gas station lease in failing to procure certain insurance coverages, including liquor liability coverage and environmental coverage, for landlord's protection, and undisputed evidence indicated that landlord could not obtain retroactive coverage to provide protection to landlord.

## Venue; Insurance; Corporations

**Ex parte Allstate Ins. Co., No. 1180624 (Ala. Nov. 8, 2019)**

Under Ala. Code § 6-3-7(a), a "substantial part of the acts or omissions" giving rise to a claim refers to the wrongful acts or omissions of the corporate defendant, not where the injury occurred. Act or omission for the insurer defendant's refusal to defend or indemnify plaintiff insured in an underlying lawsuit occurred where the insurer made its coverage decisions, not in the venue where the underlying action was filed (which was also where the underlying accident occurred).

## Workers' Compensation; Exclusivity and Parent Entities

**Ex parte Ultratec Special Effects, Inc., No. 1180180 (Ala. Nov. 8, 2019)**

In a plurality opinion interpreting Ala. Code § 25-5-1(4), the net effect is that parent corporation could be liable in tort, notwithstanding the exclusivity provisions of the Act, for injuries and death suffered by subsidiary's employees for the parent's independent conduct.

## Venue; Corporations

**Ex parte Road Gear Truck Equipment, LLC, No. 1170238 (Ala. Nov. 15, 2019)**

Plurality opinion; corporate defendant was "doing business by agent" in a county by having its products resold through a reseller in that county. Doing business by "agent" under Ala. Code § 6-3-7 does not mean that the "agent" has to be an agent under common-law principal-agent tests.

## State-Agent Immunity

**Ex parte Kelley, No. 1170988 (Ala. Nov. 15, 2019)**

Parent and DHR worker were entitled to parental immunity on all negligence claims; DHR worker was not entitled to *Cranman* immunity, however, because there was a fact dispute regarding her failure to conduct ISP (individualized service plan) review regarding the sickle cell condition as required by DHR policies.

## Service of Process; Corporations

**Woodruff Brokerage Company, Inc. v. Beatty, No. 1180349 (Ala. Nov. 22, 2019)**

Service on corporate defendant was improper because the address card was directed to the corporation and not a natural person as registered agent; "the certified-mail return receipt was addressed merely to Woodruff Brokerage and was not addressed to an individual as required by Rule 4(c)(6)."

## ERISA; Prenuptial Agreements

**Moore v. Moore, No. 1180482 (Ala. Nov. 22, 2019)**

29 U.S.C. § 1055 requires execution of spousal waivers effectuate spousal disclaimers of proceeds to 401(k) and pension plans. But the lack of a valid ERISA waiver affects only to whom the plan administrator must distribute funds in an ERISA. Thus, lack of a valid ERISA waiver does not bar a suit by husband's estate against wife for breach of prenuptial agreement under state common-law theories after distribution.

## Service of Process; Arbitration

**Ali v. Williamson, No. 1170896 (Ala. Nov. 22, 2019)**

Trial court lacked *in personam* jurisdiction over party added to arbitral proceeding after arbitration was compelled, but

which party was never joined and served in the judicial proceeding, and therefore acted improperly in entering default judgment against that party.

## Discovery; Insurance

***Ex parte Dow Corning Alabama, Inc., No. 1171118 (Ala. Nov. 25, 2019)***

In action by Dow against Alabama Electric for reimbursement of defense and indemnity costs relating to an underlying lawsuit, Dow did not waive attorney-client privilege regarding case evaluations concerning the underlying case. The determination of whether Dow acted reasonably and in good faith in settling underlying action (necessary for the indemnity claim) is objective in nature, and thus trial court erred in ordering production of case evaluation materials. This is a four-justice plurality opinion.

## Administrative Law

***City of Wetumpka v. Alabama Power Co., No. 1170992 (Ala. Nov. 25, 2019)***

City sued APCO challenging its decision to refuse to relocate overhead electrical facilities in city's downtown area at APCO expense. The circuit court dismissed the case, finding that it was within the exclusive jurisdiction of the Alabama Public Service Commission ("the PSC"). The supreme court

affirmed, holding the city was challenging the service regulations of the PSC, and the PSC has exclusive jurisdiction to adjudicate such challenges.

## Historical Monuments

***State v. City of Birmingham, No. 1180342 (Ala. Nov. 25, 2019)***

Among other holdings, municipality had no First Amendment rights against the state, because the state created the municipality, and therefore the court rejected a First Amendment challenge interposed by the municipality to the state's historic monuments act, Ala. Code § 41-9-232(a) regarding city's placement of a plywood screen around a Confederate monument (in Linn Park).

# From the Court of Civil Appeals

## Contributory Negligence and Causation

***Hawkins v. Simmons, No. 2180244 (Ala. Civ. App. Oct. 4, 2019)***

Although Ala. Code § 32-5A-215(c) requires that a pedestrian on a road without sidewalks proceed on the left side of

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the road, a jury question was presented as to the question of proximate cause in action by pedestrian against motorist, given the totality of evidence presented and the circumstances of the accident (especially that the pedestrian had had no problems being seen by other motorists).

## Workers' Compensation

**AMEC Foster Wheeler Kamtech, Inc. v. Chandler, No. 2180101 (Ala. Civ. App. Oct. 4, 2019)**

Among other holdings: (1) Employer failed to demonstrate that injured worker's average weekly wage for work performed after injury was higher than his pre-injury wage under the return to work statute, Ala. Code § 25-5-57(a)(3) so as to bar recovery vocational disability; and (2) Last-injurious-exposure rule did not assign responsibility for any injury or permanent partial vocational disability to any subsequent employer.

## Administrative Law

**Smith v. LeFleur, No. 2180375 (Ala. Civ. App. Oct. 11, 2019)**

(1) Residents had standing to challenge ADEM's alternative cover-materials ("ACM") rules, based on evidence that the landfills' use of tarps instead of earth to cover the solid waste attracted vultures and feral dogs to the site and emitted odors, depriving the residents of use and enjoyment of their property; and (2) the ACM rules impermissibly enlarge upon statutory law, which requires that solid waste be covered by earth.

## Unlawful Detainer

**Nest Two Ventures, LLC v. Capps, No. 2180597 (Ala. Civ. App. Oct. 11, 2019)**

District court had no authority to transfer unlawful-detainer action to circuit court.

## Workers' Compensation

**Enterprise Leasing Company-South Central LLC v. Drake, No. 2180627 (Ala. Civ. App. Oct. 11, 2019)**

Sufficient evidence supported trial court's conclusion that injury to employee's right knee was causally connected to his compensable injury to his left knee.

## Outrage and Fraud; Workers' Compensation Claim Handling

**Swain v. AIG Claims, Inc., No. 2180336 (Ala. Civ. App. Oct. 18, 2019)**

Tort claims arising from handling of comp claim are not barred by the exclusivity provisions of the Act when they

produce an injury not covered by the Act. This requires a proximate cause analysis regarding the injury typically not appropriate for a Rule 12 dismissal.

## Forfeiture

**Wilson v. State, No. 2180453 (Ala. Civ. App. Oct. 25, 2019)**

Issue concerns what monies are subject to forfeiture when held in an account in which "clean money" and "dirty money" are commingled, and in which deposits and withdrawals are made. Appellant failed to offer supporting authority for the alternative method proposed by appellant (last in, first out) for distinguishing clean money from dirty money.

## Tax Sales; Redemption by Mortgagee

**US Bank v. Trimble, No. 2180742 (Ala. Nov. 1, 2019)**

Mortgagee's action to recover real estate from tax-sale purchaser under Ala. Code § 40-10-83 was timely when brought five years after the tax sale.

# From the United States Supreme Court

The Court's new term began in October. No decisions had been reported as of press time.

# From the Eleventh Circuit Court of Appeals

## Judicial Immunity; Qualified Immunity

**Washington v. Rivera, No. 17-13811 (11<sup>th</sup> Cir. Sept. 25, 2019)**

State probation officer was not entitled to judicial or quasi-judicial immunity in applying for arrest warrant for probationer for non-payment of a fine when probationer had in fact paid; actions in obtaining an arrest warrant are not core judicial functions triggering such immunities. However, officer was entitled to qualified immunity on section 1983 claim based on unlawful seizure of the person, because



no clearly established law required the officer to investigate further beyond his available records before applying for the warrant.

## FOIA

### ***Broward Bulldog, Inc. v. USDOJ, No. 17-13787 (11<sup>th</sup> Cir. Sept. 23, 2019)***

Newspaper sued under FOIA for FBI documents relating to 9/11 Commission work. The district court granted summary judgment in favor of the government for most of the redactions to the produced documents, but ordered the government to disclose personal information redacted under Exemptions 6 and 7(C), as well as confidential-source information redacted under Exemption 7(D). The Eleventh Circuit affirmed in most respects in a 50-plus page opinion (with a 20-plus page dissent), but reversed the district court's rulings regarding redactions under Exemptions 7(C), 7(D), and 7(E).

## **Class Actions; Common-Fund Fees in Statutory Fee Cases; Incentive Awards to Representatives; Class-Action Settlements; Standing**

### ***Muransky v. Godiva Chocolatier, Inc., No. 16-16486 (11<sup>th</sup> Cir. Oct. 3, 2018, rehearing sua sponte granted April 22, 2019; VACATED FOR EN BANC REHEARING October 4, 2019)***

There is no decision yet, but this will be an important one to watch, addressing Article III standing to assert a statutory claim (under the FACTA provisions of the Fair Credit Reporting Act) after *Spokeo, Inc. v. Robins*, 578 U.S. \_\_\_, 136 S. Ct. 1540 (2016), as well as other class-action related issues.

## Bankruptcy

### ***In re Thompson, No. 18-11885 (11<sup>th</sup> Cir. Oct. 7, 2019)***

The "lack-of-knowledge" requirement that is explicitly contained in one subsection of the bankruptcy statute, 11 U.S.C. § 727(d)(1), is not to be read into the adjacent subsection of the same statute, 11 U.S.C. § 727(d)(2), thereby barring revocation of a discharge of debt.

## **Product Liability; Experts; Sanctions**

### ***Taylor v. Mentor Worldwide, LLC, No. 16-17147 (11<sup>th</sup> Cir. Oct. 8, 2019)***

This is a bellwether surgical mesh case. Plaintiff sued for injuries resulting from the implantation of surgical mesh used to treat urinary incontinence. After consolidation into an MDL, Taylor's case was selected as a bellwether trial, the result of which was a substantial judgment for plaintiff. The Eleventh Circuit affirmed in a split rationale decision, with Judge Julie Carnes specially concurring and (now Senior) Judge Tjoflat biting dissenting. The important holding is that the trial court did not abuse its discretion in refusing to strike expert testimony not disclosed in Rule 26 report, because defendant asked for and obtained an overnight continuance to prepare cross-examination on expert's undisclosed opinion, and because defendant never moved for mistrial.

## Fair Housing Act

### ***NAACP v. City of LaGrange, No. 18-10053 (11<sup>th</sup> Cir. Oct. 10, 2019)***

Plaintiffs may potentially state a claim under § 3604(b) of the FHA based on a disparate impact allegation regarding the city's requirements for procuring utility services in housing already secured: "§ 3604(b) encompasses some post-acquisition conduct and that the basic utility services in question here fall within the scope of services covered by § 3604(b)."

## Younger Abstention

### ***Tokyo Gwinnett, LLC v. Gwinnett County, No. 17-11871 (11<sup>th</sup> Cir. Oct. 11, 2019)***

Adult retailer sought money damages and declaratory relief concerning legality of certain adult-retail ordinances. The bottom-line holdings are these: (1) the court affirmed the district court's dismissal of retailer's claim for compensatory damages relating to the repealed ordinances; (2) the court reversed the dismissal of retailer's request for a declaratory judgment regarding whether its sale of sexual devices constitutes a lawful prior nonconforming use authorized under the repealed ordinances and whether the new ordinances' failure to include provisions grandfathering in prior lawful uses violates federal and state law; (3) district court abused

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its discretion by abstaining under *Younger* from hearing retailer's claims stemming from the county's new ordinances.

### Fourth Amendment; Qualified Immunity

#### ***Bailey v. Swindell*, No. 18-13572 (11<sup>th</sup> Cir. Oct. 16, 2019)**

Even if deputy sheriff had probable cause to arrest (or "arguable" probable cause in the qualified immunity context), deputy crossed the bright constitutional line when he entered the house without a warrant and thereby lost qualified immunity.

### Judicial Estoppel

#### ***Smith v. Haynes & Haynes, LLC*, No. 17-14150 (11<sup>th</sup> Cir. Oct. 15, 2019)**

Under *Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11<sup>th</sup> Cir. 2017) (en banc) ("*Slater II*"), defendant claiming judicial estoppel for failure to schedule a claim in bankruptcy must show an intent to make a mockery of the judicial system under the facts and circumstances. In this case (decided below before *Slater II*), the record contained insufficient evidence of plaintiff's knowledge of the claim she was asserting and other surrounding circumstances at the time of the bankruptcy filing, such as whether her bankruptcy counsel advised of her ongoing obligation to update schedules (in a Chapter 13), and the fact that the Chapter 13 plan was a 100 percent payout plan—thus evincing a lack of motive or intent to defraud creditors.

### Qualified Immunity; Issue Preclusion

#### ***Hunter v. City of Leeds*, No. 17-11939 (11<sup>th</sup> Cir. Nov. 1, 2019)**

In appeal from the denial of qualified immunity to officers involved in a chase which ended in officer's firing of 10 rounds on plaintiff, the court reversed the district court's denial of qualified immunity with respect to the non-shooting officers, but affirmed the denial with respect to the firing officer. The court reasoned: (1) plaintiff's plea in state court to a menacing charge arising from the incident, in which the plaintiff agreed that he pointed a pistol at the firing officer, was preclusive as to the fact the plaintiff pointed to pistol at the officer, but was not preclusive as to the multiple factual scenarios (at least three) in which plaintiff allegedly pointed the pistol, and thus a fact question arose as to when the pistol was pointed for purposes of determining the officer's entitlement to immunity; (2) there was no Fourth Amendment violation with respect to the initial firing of shots by the officer in the circumstances of the chase, which was attendant

to a call for a child being held hostage; but (3) second firings of weapon presented fact issue as to whether the presence of threat had been eliminated, given testimony that plaintiff had dropped his weapon, and he was not a risk of flight under the circumstances. The court reversed the denial of qualified immunity as to the non-firing officers, however. The court equated Alabama's discretionary function (*Cranman*) and peace officer immunity to the qualified immunity analysis (Ed.: which may be convenient shorthand, but is not entirely accurate), holding that the firing officer was not entitled to immunity on state-law claims but that the non-firing officers were so entitled.

### Fair Housing Act

#### ***Yarbrough v. Decatur Housing Authority*, No. 17-11500 (11<sup>th</sup> Cir. Oct. 29, 2019)**

After the *en banc* court (931 F.3d 1322 (11<sup>th</sup> Cir. 2019)) overruled *Basco v. Machin*, 514 F.3d 1177 (11<sup>th</sup> Cir. 2008), the panel on remand held that sufficient evidence supported the authority's to terminate Yarbrough's housing voucher issued under Section 8.

### Qualified Immunity

#### ***Carruth v. Bentley*, No. 18-12224 (11<sup>th</sup> Cir. Nov. 7, 2019)**

Former CEO of state-regulated credit union failed to state claims against governor and governor's legal advisor for alleged constitutional wrongs stemming from Board of Alabama Credit Union Administration to take over credit union, and even if claims were stated, defendants were entitled to qualified immunity.

### Class Actions; Article III Standing; Predominance

#### ***Cordoba v. DirecTV*, No. 18-12077 (11<sup>th</sup> Cir. Nov. 15, 2019)**

Putative TCPA class consisting of recipients of unwanted telemarketing calls included a mix of persons with and without Article III standing, which the district court improperly did not consider in assessing the propriety of certification. Such a mixture of persons with and without standing creates a predominance problem under Rule 23(b)(3). "[T]he district court must consider under Rule 23(b)(3) before certification whether the individualized issue of standing will predominate over the common issues in the case, when it appears that a large portion of the class does not have standing, as it seems at first blush here, and making that determination for these members of the class will require individualized inquiries."

## Standing

### ***Debernardis v. IQ Formulations, LLC, No. 18-11778 (11<sup>th</sup> Cir. Nov. 14, 2019)***

Plaintiffs plausibly alleged they suffered economic loss when they purchased supplements that were worthless since they were banned under the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et seq.

## First Amendment

### ***Cambridge Christian School v. Florida High School Athletic Assn., No. 17-12802 (11<sup>th</sup> Cir. Nov. 13, 2019)***

At a high school championship game sanctioned by FHSAA but with two Christian schools as competitors, the schools asked to conduct a joint prayer over the loudspeaker before the game; the association denied the request. One school (Cambridge) sued, asserting First Amendment free speech and free exercise claims. The trial court dismissed the complaint. The Eleventh Circuit reversed in part, holding that free speech and free exercise claims were viable based on the limited record: "The question of whether all speech over the microphone was government speech is a heavily fact-intensive one that looks at the history of the govern-

ment's use of the medium for communicative purposes, the implication of government endorsement of messages carried over that medium, and the degree of government control over those messages."

## FCRA; FDCPA

### ***Pinson v. JP Morgan Chase Bank, No. 16-17107 (11<sup>th</sup> Cir. Nov. 12, 2019)***

Plaintiff did not show "least sophisticated consumer" would believe a third party was involved in collecting a debt, where "Chase Home Finance" was collecting for JP Morgan Chase, thus defeating FDCPA claim. However, consumer stated plausible claim against bank "furnisher" under FCRA based on allegations that consumer notified CRA of the dispute three separate times.

## CAFA; Amount in Controversy

### ***Anderson v. Wilco Life Ins. Co., No. 19-14127 (11<sup>th</sup> Cir. Nov. 22, 2019)***

In putative class action for declaratory and injunctive relief against insurer regarding cost of policy renewals, plaintiff's seeking equitable relief to reinstate lapsed policies should



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be aggregated, and the face value of the policies exceeded the \$5 million CAFA threshold.

### First Amendment Retaliation

**Demartini v. Town of Gulf Stream, No. 17-14177 (11<sup>th</sup> Cir. Nov. 21, 2019)**

In a 73-page thorough analysis of First Amendment retaliation claims and the but-for causation standard of *Mt. Healthy* and its progeny, the Court affirmed the trial court's dismissal of First Amendment retaliation claims, premised upon town's filing of a RICO action against plaintiff and other related persons and entities which were barraging town with public-records requests and lawsuits relating to same.

## RECENT CRIMINAL DECISIONS

# From the Court of Criminal Appeals

### Theft of Property

**Robertson v. State, CR-18-0156 (Ala. Crim. App. Sept. 20, 2019)**

Defendant's taking money from her volunteer fire department and using those funds for unauthorized expenditures did not constitute a taking of property "from the person of another" for first degree theft under Ala. Code § 13A-8-3(a).

### Arrest on Capias Warrant; Suppression

**Berry v. State, CR-18-0233 (Ala. Crim. App. Sept. 20, 2019)**

Drug evidence resulting from the defendant's arrest on outstanding capias warrants should have been suppressed; arresting officer did not possess the warrants, and because they did not stem from the commission of a felony or misdemeanor, the arrest did not fall within the warrantless arrest exception under Ala. Code § 15-10-3(a)(6).

### Double Jeopardy; Concurrent Sentences

**Smith v. State, CR-17-0845 (Ala. Crim. App. Sept. 20, 2019)**

Defendant's convictions of theft and burglary arising from the same facts did not violate double jeopardy. However, it remanded for the imposition of concurrent sentences on those convictions, finding that the circuit court may sentence

a defendant for both burglary and theft if the sentences are made concurrent rather than consecutive.

### Plain Feel Doctrine

**Gardner v. State, CR-18-0368 (Ala. Crim. App. Sept. 20, 2019)**

Defendant's arrest for unlawful possession of a controlled substance was proper. Arresting officer's pat down for weapons revealed bulge with "crunchy" texture that was readily apparent to be methamphetamine.

### Prior Bad Acts; Double Jeopardy

**Kemp v. State, CR-18-0362 (Ala. Crim. App. Sept. 20, 2019)**

In this domestic violence/felony murder case the court found no violation of Ala. R. Evid. 404(b) in the admission of evidence showing that the home of the victim's friend was burned shortly before the fatal attack. Evidence did not implicate the defendant as a suspect in the fire, and circuit court gave limiting instruction to the jury regarding the evidence. While the court affirmed the defendant's domestic violence conviction and one felony murder conviction arising from the death of his victim's unborn baby, it vacated a second felony murder conviction arising from the same act as constituting double jeopardy.

### Controlled Substances

**Cunningham v. State, CR-18-0551 (Ala. Crim. App. Sept. 20, 2019)**

Unlawful possession of controlled substance may serve as a lesser-included offense of unlawful distribution of controlled substance.

### Rule 32; Successive Petitions

**McAnally v. State, CR-18-0656 (Ala. Crim. App. Sept. 20, 2019)**

Circuit court could apply preclusion provisions of Ala. R. Crim. P. 32.2 regardless that the state did not respond to petition; state's failure to respond to the petition did not constitute a waiver of the preclusion provisions. The court also expressly overruled prior caselaw that, prior to the 2002 amendment of Ala. R. Crim. P. 32.2(a)(4), had held that a claim raised in a previous petition must have been decided on its merits before it is subject to preclusion as successive. The amendment abrogated the requirement that a claim raised in a previous petition must have been decided on its merits before it is subject

to preclusion under Ala. R. Crim. P. 32.2(a)(4) or 32.2(b), “at least with respect to non-jurisdictional claims.”

## Expungement

**Ex parte Steinberg, CR-17-1157 (Ala. Crim. App. Sept. 20, 2019)**

If no objection is filed, circuit court must grant a petition to expunge if reasonably satisfied petitioner has met the statutory requirements. The petitioner’s innocence or the ability to pay for pretrial diversion are not factors for consideration in that decision. However, circuit court has discretion over the number of cases that may be expunged after the petitioner’s first case is expunged.

## Hearsay; Excited Utterance

**Jackson v. State, CR-16-1039 (Ala. Crim. App. Sept. 20, 2019)**

Admission of a statement by the victim’s child made approximately three hours after she witnessed her mother’s death was not improper. At the time of the statement the child remained under prolonged stress from what she had seen, and it thus fell within the “excited utterance” hearsay exception of Ala. R. Evid. 803 (2).

## Criminal Record Information

**Alexander v. State, CR-17-1175 (Ala. Crim. App. Sept. 20, 2019)**

For purposes of the offense of obtaining criminal offender record information by false pretenses under Ala. Code § 41-9-601, “criminal offender record information” encompasses any knowledge, facts, or data stored in a tangible or electronic medium relating to a criminal offender, including the offender’s Social Security number.

## Sexual Assault; Forcible Compulsion

**Black v. State, CR-18-0315 (Ala. Crim. App. Oct. 25, 2019)**

For proof of rape, sodomy, and sexual abuse, “forcible compulsion” is applicable in any case where defendant who sexually assaults a child exercised a position of domination and control over the child, regardless whether the defendant is the child’s parent.

## Accomplices

**Hubbard v. State, CR-17-1122 (Ala. Crim. App. Oct. 25, 2019)**

State sufficiently proved defendant was guilty of capital murder through accomplice liability under Ala. Code § 13A-2-23,

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where evidence showed defendant asked fellow gang members to kill victim, provided rifle for shooting, and rode with co-defendants to the area where victim was killed.

### Burglary

#### **Tate v. State, CR-18-0378 (Ala. Crim. App. Oct. 25, 2019)**

For proof of burglary under Ala. Code § 13A-7-5, state is not required to demonstrate who holds legal title to the burglarized building or dwelling or the exact nature of the victim's ownership interest. Instead, it need only show that victim had a right to possess or occupy the building and that defendant did not have ownership or a right of possession or occupancy.

### Juvenile Capital Murder

#### **Boyd v. State, CR-18-0288 (Ala. Crim. App. Oct. 25, 2019)**

The court rejected the notion that a jury, rather than the circuit court, should determine whether to sentence a capital murder juvenile offender to life imprisonment without the possibility of parole. The court will not second guess the legislature's decision to authorize the circuit court to sentence the juvenile offender, absent a constitutional problem with that procedure.

### Breaking and Entering Vehicle

#### **Baise v. State, CR-18-0616 (Ala. Crim. App. Oct. 25, 2019)**

Defendant's climbing underneath a car and using a saw to remove its catalytic converter constituted breaking and entering of the vehicle under Ala. Code § 13A-8-11(b). ▲

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