Case Law Update: Second Half of 2020

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FROM THE ALABAMA SUPREME COURT

STATUTORY CONSTRUCTION
Blankenship v. Kennedy, No. 1180649 (Ala. May 29, 2020): Two rules of statutory construction are in play; the issue is which to apply. The "series qualifier" principle treats a final phrase as modifying an entire series preceding the phrase, and the "rule of last antecedent" treats the final phrase as modifying only the last in the series. The choice of rule depends on context. In this case, the Court borrowed the analysis of these competing principles in Lockhart v. United States, 136 S. Ct. 958 (2016), and applied the latter principle.

UIM; LAMBERT PROCEDURE
Turner v. State Farm Mut. Ins. Co., No. 1181076 (Ala. May 29, 2020): Under *Ex parte Allstate Ins. Co.*, 237 So. 3d at 207 (Ala. 2017), UIM carrier's payment of a *Lambert* advance "enjoin[s] the insureds' consummation of the tortfeasor's offered settlements; insured's consummating the settlement thus violated the "consent to settle" provision of the UIM policy.

STATUTORY (CONSTITUTIONAL) CONSTRUCTION
Kennamur v. City of Guntersville, No. 1180939 (Ala. May 29, 2020): Under Ala. Const. Sec. 94.01 (Amendment 772), which authorizes municipalities to enter into leases for commercial purposes "of any kind", a municipality is empowered to enter into lease of real property with a private retail enterprise.

PERSONAL JURISDICTION; EVIDENCE
Ex parte TD Bank, No. 1180998 (Ala. May 29, 2020): TD was sued for purportedly receiving a fraudulent transfer via wire. TD made initial prima facie showing that it was not subject to personal jurisdiction in an Alabama Court through generalized evidence that it had no office in Alabama, no employees, did not advertise, owned no property, and that its incoming wires are processed through a server located in Toronto, Canada. That evidence was sufficient to shift the burden to plaintiff, which offered no evidence to substantiate any allegations of actions in Alabama.

JUROR MISCONDUCT
Resurrection of Life, Inc. v. Dailey, No. 1180154 (Ala. June 5, 2020): Trial court was within its discretion in denying new trial motion based on jurors' consultation of internet sources. Mere exposure to extraneous information does not create "actual prejudice," and the trial court properly investigated the misconduct during deliberations, *voir dired* the jury, and within its discretion determined that they could render an impartial verdict.

STATUTORY CONSTRUCTION; TAXATION
Barrett v. Panama City Wholesale, Inc., No. 1190321 (Ala. June 5, 2020)
Under Ala. Code § 40-25-8, the "confiscation" statute, the ADOR may confiscate any product held for distribution on which tobacco taxes have not been paid unless, under section 40-25-8, the product is at the "primary location" of certain permitted jobbers or retailers.

CONTRACTUAL ATTORNEYS FEES

SMM Gulf Coast, LLC v. Dade Capital Corp., No. 1170743 (Ala. June 5, 2020): *De novo* review applies to a trial court's grant or denial of a request for attorneys' fees recoverable under a contract. In this case, prevailing parties were entitled to contractual attorneys' fees, and trial court erred in refusing to grant them. Where a contractual fee provision applies to a "prevailing party," that party is not required to assert entitlement to fees in a counterclaim in an action which will determine whether that party is in fact a prevailing party. The trial court may award fees and costs owed under a prevailing party provision even after final judgment, and even if the issue were not reserved. Post-judgment motions under Rule 59 were also not required to raise the issue.

FORUM NON CONVENIENS

Ex parte Allen, No. 1190276 (Ala. June 5, 2020): MVA occurred in Lee County and non-party witnesses were situated there; Plaintiff sued in Macon County(county of Plaintiff's residence). Held: interests of justice mandated transfer to Lee County under Ala. Code § 6-3-21.1, because connection to Macon County was weak and connection to Lee County was strong. Even though Plaintiff lived in Macon County, he worked in Lee County, which further attenuated the connection to Macon County.

ETHICS ACT; RETALIATION; STATUTORY CONSTRUCTION

Craft v. McCoy, No. 1180820 (Ala. June 5, 2020): Anti-retaliation provision in the Alabama Ethics Act, § 36-25-24(a) is triggered only on an act of "reporting," referring only to the filing of a Complaint with the Ethics Commission.

***CRANMAN* IMMUNITY**

Walters v. D'Andrea, No. 1190062 (Ala. June 5, 2020): Patrol officer who rear-ended motorcycle while officer was *en route* to station, having completed shift, to turn in end of day paperwork was not entitled to *Cranman* immunity because officer admitted she had completed patrol shift, was returning to precinct, and was not performing any patrol duties.

PRESERVATION OF ERROR; EVIDENCE (MVA)

Hicks v. Allstate Insurance Co, No. 1170589 (Ala. June 19, 2020): (1) Allstate did not properly preserve as error on appeal the sufficiency of evidence as to causation, for failure to move for partial JML on that ground at the close of the evidence; (2) trial court exceeded its discretion in refusing to admit mortality table into evidence for use by jury in determining damages due to alleged permanent injury, given the state of the record supporting claim to permanent spinal injury.

PREMISES LIABILITY; OPEN AND OBVIOUS

Daniels v. Wiley, No. 1190208 (Ala. June 26, 2020)

Landlord's failure to eliminate open and obvious danger does not create liability on the Landlord, when the condition is demonstrated to be open and obvious to the Tenant.

TAX SALE PROCEDURES

Stiff v. Equivest Financial, LLC, No. 1181051 (June 26, 2020): Tax sale occurring inside the Courthouse instead of "in front of the door of the Courthouse," Ala. Code § 40-10-15, is invalid.

ESTATES

Ex parte Beamon, No. 1181060 (Ala. June 26, 2020): Claim brought in Alabama Circuit Court against PR of estate probated in Georgia was in actuality a claim against the estate. Because no ancillary probate

had been commenced in Alabama, the Circuit Court lacked personal jurisdiction over the claims against the PR because the PR's letters testamentary were issued by a Georgia Court; PR had no authority to defend a lawsuit in Alabama.

RELATION BACK; FICTITIOUS PARTIES
Ex parte Russell, No. 1180317 (Ala. June 26, 2020): Because original Complaint did not state a claim against an administrator party, trial court erred in denying summary judgment to administrator defendant substituted for a fictitious party after expiration of the limitations period. As to remaining three petitioners (all of whom were added by post-limitations substitution), plaintiff exercised reasonable diligence in discovery by ascertaining their identities and timely substituting.

FORUM NON CONVENIENS
Ex parte Sanders, No. 1190478 (Ala. June 26, 2020): Plaintiff (Barbour County resident working in Macon County) was injured in Macon County accident involving other vehicles driven by Shelby County and Montgomery County drivers. One non-party witness lived in Montgomery County. Sanders sued in Macon County. Defendants moved to transfer to Montgomery County under Ala. Code § 6-3-21.1. The trial court granted a transfer, and plaintiff petitioned for mandamus. The Supreme Court granted the writ, reasoning that both Macon and Montgomery Counties were proper venues, and neither had "weak" connections to the case.

CONTRACT CONSTRUCTION
Porter v. Williamson, No. 1180355 (Ala. June 26, 2020): Though this case largely turns on its facts, in an action for specific performance, contract terms must be definite for enforcement.

MEDICAL LIABILITY; CAUSATION
Williams v. Barry, No. 1180352 (Ala. June 26, 2020): Trial court erred by granting pre-verdict JML to defendant surgeon in AMLA action arising from removal of 17-year-old's gall bladder, which turned out to be normal, following which surgery minor died later in the day of surgery. Plaintiff's expert offered direct testimony concerning breach of the applicable standard of care for failure to order ultrasound on the gall bladder prior to removal. As for proximate cause, when plaintiff's case theory is based on performance of an unnecessary medical procedure, expert testimony is not required to establish causation, though damages based on complications from the unnecessary medical procedure would require expert testimony. In this case, there was sufficient medical evidence of causation that death was proximately caused by surgeon's failure to clip the cystic artery during the procedure.

INSURANCE; FAILURE TO PROCURE AND CONTRIBUTORY NEGLIGENCE
Crook v. Allstate Indemnity Co., No. 1180996 (Ala. June 26, 2020): Exterior deck and boat dock connected by an exterior stairway to an insured home were not "attached structures" under a homeowner's policy for a lake house. Claim of negligent failure to procure insurance were barred by insured's contributory negligence in failing to read policy and ascertain limits of coverage.

***CRANMAN* IMMUNITY**
Odom v. Helms, No. 1180749 (Ala. June 26, 2020): Odom (driver) was involved in late-night interstate accident. She was transported from scene by McHenry (State Trooper) to a drop-off location at an exit. *En route*, McHenry detoured and took Odom to a wooded area, where he sexually assaulted her. Odom sued McHenry's supervisors claiming that based on McHenry's violation of the "relay" procedure governing trooper transports of motorists. The Circuit Court granted summary judgment based on *Cranman* immunity. The Supreme Court affirmed, holding that there was no evidence the supervisors

were aware of the breach of policy, and that the policy applicable to the supervisors was not a detailed checklist.

CONSERVATORSHIPS; STATUTORY CONSTRUCTION
Ex parte Bashinsky, No. 1190193 (Ala. July 2, 2020): (1) Former attorney and personal assistant for putative ward were parties entitled to bring action under the Alabama Uniform Guardianship and Protective Proceedings Act, Ala. Code §26-2A-102(a) and -133(a) (the AUGPPA), because the statute confers any "person interested in the welfare" or "any person interested in the estate, affairs, or welfare" of the putative incapacitated person authority to bring an action for guardianship or conservatorship; (2) Probate Court erred by determining that an 'emergency' existed under Ala. Code § 26-2A-107(a) because such an 'emergency' requires that there be shown a risk of substantial harm to the putative ward's health, safety, and welfare if immediate relief is not considered; (3) under Ala. Code § 26-2A-102(b) and (c), putative ward was entitled to representation by counsel in the proceedings to determine incapacity, and Probate Court erred by disqualifying counsel for putative ward and hearing the emergency petition without allowing her the opportunity to secure counsel.

BESSEMER DIVISION OF JEFFERSON COUNTY
Veitch v. Friday, No. 1180152 (Ala. June 30, 2020): The Court invalidated (on equal protection grounds) a 1953 local act, under which only electors of the Birmingham Division selected the nominees for DA for the Bessemer Division of Jefferson County.

HIPAA; EX PARTE INTERVIEWS WITH TREATING DOCTORS
Ex parte Freudenberger, No. 1190159 (Ala. June 30, 2020): Under HIPAA, defendant may conduct *ex parte* interviews with Plaintiff's treating physicians, provided the defendants first obtain a "qualified protective order" that places safeguards on the use and dissemination of the plaintiff's private medical information.

ESTATES
Brown v. Berry-Pratt, No. 1180348 (Ala. June 30, 2020): Administrator of estate had authority to sell, over heirs' objections, real property for the purposes of payment of pre- and post-death debts of the estate, including for the purpose of funding estate administration, pursuant to Ala. Code § 43-2-442.

GALs, REASONABLENESS OF ATTORNEYS' FEES
Ex parte Shinaberry, No. 1180935 (Ala. July 31, 2020): Insufficient evidence supported GAL fee, both with respect to hourly rate approved by the Court and the time expended. Fee awarded was almost twice the damages awarded the minor plaintiffs and almost twice the fee awarded the attorneys who represented the plaintiffs.

RESPONDEAT SUPERIOR; NEGLIGENT HIRING
Synergies3 Tec Services, LLC v. Corvo, No. 1170765 (Ala. August 21, 2020): (plurality panel opinion): (1) plaintiff's insurer was not real party in interest on claims against third party arising from property loss, because policy simply provided for right of reimbursement; (2) despite there being substantial evidence of conversion by alleged agent, alleged principals were entitled to JML on *respondeat superior* theory, because agent's theft was so unusual a deviation from the employee's duties, the employer benefitted in no way, and there was no evidence that employer ratified alleged agent's conduct; (3) substantial evidence supported negligent hiring claim, given agent's prior criminal theft history.

ESTATES
Holt v. Holt, No. 1190025 (Ala. August 21, 2020): Circuit Court never obtained jurisdiction over probate proceeding removed under Ala. Code § 12-11-41, due to Circuit Court's failure to enter order of removal.

ESTATES; ADMINISTRATORS AD LITEM
Ex parte Stephens, No. 1190457 (Ala. August 28, 2020): Petitioner challenging *inter vivos* transfer of funds by holder of power of attorney (who was appointed PR of estate) was entitled to order appointing administrator ad litem of estate under Ala. Code § 43-2-250 regarding the transfers, because PR had a conflict of interest regarding the issue.

NECESSARY PARTIES
Capitol Farmers Market, Inc. v. Delongchamp, No. 1190103 (Ala. August 28, 2020): Adjacent landowner potentially subject to restrictive covenants involved in litigation was a necessary party under Rule 19(a); remand was required for trial court to consider, in the first instance, whether landowner can be joined in the action.

"PROTECTIVE SERVICES;" IMMUNITY
Ex parte Smith, No. 1180834 (Ala. Sept. 4, 2020): DHR employees were entitled to immunity under the Protective Services Act, Ala. Code § 38-9-11, because they had exercised their duties in "good faith" and in compliance with the DHR Adult Policy Services Manual; the statute is not confined to situations in which investigations of abuse reports are at issue and thus extended to decision regarding placement in group home.

"AS IS" CLAUSES; CAVEAT EMPTOR
Kidd v. Benson, No. 1190413 (Ala. Sept. 4, 2020): Despite the doctrine of *caveat emptor* in real estate sales contracts (which is often contractually grafted into transactions with "AS IS" clauses, as in this case), Alabama law has recognized three exceptions: (1) if a fiduciary relationship exists between buyer and seller; (2) seller must disclose material defects affecting health or safety not known to or readily observable by buyer; and (3) seller has a duty to disclose if buyer inquires directly about a material defect or condition of the property. The plurality (three justices) concluded that "under Alabama law, when a buyer elects to purchase real property subject to an "as is" clause in the purchase agreement and neglects to inspect the property, the buyer cannot take advantage of any exceptions to the doctrine of caveat emptor."

OPEN MEETINGS
Casey v. Beeker, No. 1190400 (Ala. Sept. 4, 2020): Hearing presided over by an ALJ at the direction of the PSC under Ala. Code § 37-1-89 was not a "meeting" under the Open Meetings Act, even though the PSC commissioners themselves attended the hearing. Whether a "meeting" occurred at the hearing depends on whether the commissioners "deliberated" a matter at the hearing, which requires that information was exchanged "among" the commissioners. Ala. Code § 36-25A-2(1).

MEDICAL LIABILITY
Spencer v. Remillard, No. 1180650 (Ala. Sept. 4, 2020): Circuit Court erred by granting JML to defendant doctor at the close of Plaintiff's case: (1) the requirement in § 6-5-548(c)(4) that an expert must have "practiced in this specialty" in the year preceding the alleged breach of the standard of care refers to the actual practice of the specialty, not the exact setting in which the defendant doctor practices the specialty; (2) Plaintiff's causation expert's testimony, viewed in its entirety, was sufficient to establish a

probability "that [decedent's] cancer had not metastasized in 2009, and probability, not certainty, is what is required to present substantial evidence of causation under the AMLA."

"GOOD CAUSE" FOR AMENDMENTS
Ex parte Gulf Health Hospitals, Inc., No. 1180596 (Ala. Sept. 4, 2020): Mandamus review is not available for review of trial court's order allowing amendment to complaint for "good cause" to allege additional specific facts against the original defendant; appeal is an adequate remedy.

VENUE; PEEHIP PROGRAM
Ex parte Blue Cross and Blue Shield of Alabama, No. 1190232 (Ala. Sept. 4, 2020): Under Ala. Code § 16-25A-7(e), Montgomery Circuit Court is exclusive venue for action arising from denial of health insurance benefits under PEEHIP program covering public education employees.

PUBLIC EMPLOYMENT; IMMUNITY
Anthony v. Datcher, No. 1190164 (Ala. Sept. 4, 2020): Instructors at Junior College brought action challenging the classification of their positions for salary and credentialing. Among other holdings: (1) agency's interpretation of its own regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation, as long it is not plainly erroneous; (2) notwithstanding *Barnhart v. Ingalls*, 275 So. 3d 1112 (Ala. 2018), claims for back pay were not barred by State immunity, because the plain meaning of the existing policies required the plaintiffs to be classified in Group A, and thus they were entitled to Group A pay because there was no discretion to classify them otherwise.

INSURANCE; CONTRACT INTERPRETATION; UIM COVERAGE; "STACKING"
Mid-Century Ins. Co. v. Watts, No. 1180852 (Ala. Sept. 18, 2020): Vehicle's insurance policy provided UM coverage of $50,000 per person and $100,000 per "accident." Five vehicles were covered under the policy, and the policy contained a provision allowing stacking of benefits. Nine plaintiffs traveling in insured vehicle brought claims after accident (case involved 4 deaths and 5 injuries). Insurer contended that because the policies allowed the stacking of up to 3 UIM coverages, the maximum available coverage was $300,000 ($100,000 per accident). Injured parties contended that each of the 9 occupants of the vehicle were involved in an "accident," and thus was entitled to $150,000 for each occupant ($50,000 stacked three times) for a total coverage limit of $1.35 million. The trial court denied insurer's motion for partial summary judgment on the issue and certified the issue under Rule 5. The Supreme Court held: (1) Rule 5 certification was proper; the controlling question of law was a matter of contract interpretation and the contract's construction in a manner consistent with Ala. Code § 32-7-6(c), and there was substantial ground for difference of opinion because the question was one of first impression. (2) On the merits, the Court held that under § 32-7-6(c). "when two or more persons are injured or killed in an accident, the per accident limit of liability contained in the policy is the proper coverage limit to be applied." Thus, per accident limit of $100,000 applied, and the permissible stacking created aggregate coverage of $300,000.

RULE 19; INDISPENSABLE PARTIES
Ex parte Advanced Disposal Services South, Inc., No. 1190148 (Ala. Sept. 18, 2020): City of Tallassee (potential joint tortfeasor with Advanced) was not an indispensable party to action regarding effluent emissions pending in Macon County. Considering each of the Rule 19 factors (prejudice to the existing parties from a judgment rendered in the City's absence, the potential for avoiding prejudice in the City's absence, whether a judgment rendered in the City's absence would be adequate, and the adequacy of any remedy in the event the case is dismissed), landowner plaintiff (who sued to challenge the legality of

effluents into water) had an interest in proceeding in the chosen forum. Advanced did not demonstrate that the other factors weighed so heavily in favor of outright dismissal that the existence of an alternative forum should be controlling.

INSURANCE; MATERIAL POLICY MISREPRESENTATIONS
Protective Life Ins. Co. v. Apex Parks Group, LLC, No. 1180508 (Ala. Sept. 18, 2020): The Court reversed and rendered judgment for insurer on contract claim arising from failure to pay on $10 million "key man" policy issued to company on life of executive. CEO failed to disclose all aspects of cardiac history at the time the application was finalized, which rendered certifications of accuracy and completeness of health information false.

UM COVERAGE; POLICY INTERPRETATION
Nationwide Prop. & Cas. Ins. Co. v. Steward, No. 1190011 (Ala. Sept. 18, 2020): Accident occurring in a public ATV park occurred on a "public road" per the policy.

JEFFERSON COUNTY PROBATE PRACTICE; ALAA
McDorman v. Moseley, No. 1190819 (Ala. Sept. 18, 2020): (1) Section 4 of the Jefferson County Local Act under which Probate Courts have equity jurisdiction, which provides for appeals within 30 days, was repealed by implication through Ala. Code § 12-22-21, under which a 42-day appeal time applies; (2) probate court lacked jurisdiction to award attorney fees in a related case filed in the circuit court; (3) ALAA award of attorneys' fees incurred for defending an agreement to which the litigating party was a party was justified and adequately supported by probate court's findings.

ERISA PREEMPTION
Hendrix v. United Healthcare Ins. Co., No. 1190107 (Ala. Sept. 18, 2020): ERISA preempted claim that health insurer in employee benefit plan refused to pay a course of medical treatment recommended by treating physician which led to death of insured.

STATE AGENTS; FORESEEABILITY
Bryant v. Carpenter, No. 1180843 (Ala. Sept. 18, 2020): Plurality opinion; because detainee had no history of suicidal tendencies, and there was no evidence he manifested any such tendencies in the jailers' presence, detainee's death by suicide was not foreseeable and thus not actionable.

PRINCIPAL/AGENT
QHG of Enterprise, Inc. v. Pertuit, No. 1181072 (Ala. Sept. 25, 2020): In action by nurse against hospital for staff hospitalist's accessing nurse's records in Alabama Prescription Monitoring Drug Program, there was insufficient evidence of control or ratification to support liability of hospital on *respondeat superior* theory. Actions were not in the scope of hospitalist's employment and were unrelated to his employment. Ratification requires "full knowledge of the facts," which could not be imputed to the hospital. Claims of negligent hiring, training, and supervision were also lacking in evidence; there was no evidence indicating that hospital had notice that hospitalist might inappropriately access information in the PMDP database. The Court expressed no opinion as to the viability of common law claims which seek to incorporate the privacy provisions of HIPAA.

MEDICAL LIABILITY; EXPERTS
Hannah v. Naughton, No. 1190216 (Ala. Sept. 25, 2020): Trial court properly excluded testimony of plaintiff's expert; Ala. Code § 6-5-548(c)(3) does not allow testimony from a proffered expert who "was"

once board certified in the same specialty as the defendant health-care provider but who was no longer so certified at the time the proffered expert testified.

TRUSTS

Parris v. Ballantine, No. 1180908 (Ala. Sept. 25, 2020): Issue: "whether, under the terms of a particular trust instrument, a person adopted as an adult is considered a "lineal descendant[ ]" of a beneficiary of the trust and, thus, a beneficiary." Held: because "the law at the time the 1971 trust was executed did not allow adult adoption, [adult's] adoption as an adult in 2016 did not make him a "lineal descendant" as that term is defined in the 1971 trust."

ORAL TRUSTS

Ledbetter v. Ledbetter, No. 1180200 (Ala. Sept. 30, 2020): Proponents of an oral trust are required to prove its creation and terms by clear and convincing evidence. Ala. Code § 19-3B-407, In this case, there was substantial evidence to support the existence of an oral trust, based on (1) testimony by an attorney with whom the settlor visited regarding his consistent use of oral trusts in preparing clients to apply for life insurance.; (2) settlor's life-insurance application specified that beneficiary was to be the beneficiary of the insurance "as trustee," and (3) an unsigned trust document stated that it reflected an oral agreement between settlor and trustee.

MUNICIPAL OCCUPATIONAL TAXES

Jefferson County Board of Educ. v. City of Irondale, No. 1180752 (Ala. Oct. 23, 2020)

The Board and its employees sued the City, seeking to invalidate the City's occupational tax as imposed on public school employees. The trial court rejected the challenge. The Supreme Court affirmed in a plurality panel opinion, reasoning (1) under McPheeter v. City of Auburn, 288 Ala. 286, 259 So. 2d 833 (1972), the fact that essential government services were provided by public education employees does not exempt them from otherwise valid municipal occupational taxes; and (2) the municipal occupational tax did not create an unlawful pay disparity as prohibited by Ala. Code § 16-13-231.1(b)(2).

ARBITRATION

Fagan v. Warren Averett Companies, LLC, No. 1190285 (Ala. Oct. 23, 2020)

Employee and employer entered into agreement containing arbitration provision calling for application of AAA Commercial Arbitration Rules, and further provided that the parties would divide the costs of the arbitrator and the arbitral venue. Employee filed arbitration; AAA determined that the fee schedule for employment disputes would apply, under which filing fee would be paid $300 by employee and $1900 by employer. Employer refused to comply with AAA's administrative determination, which AAA advised was subject to review by the arbitator, and closed its file for employer's failure to advance its portion of the filing fee. Employee filed action in Circuit Court; Employer moved to compel arbitration. Employee opposed, arguing that Employer was not entitled to compel arbitration or to stay litigation because Employer was in default in arbitration (under 9 U.S.C. § 3). Trial court granted arbitration. The Supreme Court reversed, holding that Employer was in default by not complying with AAA's demand for payment, and rejecting Employer's argument that agreement to divide arbitrator fees constituted an agreement to divide all costs of arbitration, including administrative and filing fees.

UIM; OPT OUT RIGHTS

Ex parte Alfa Mut. Ins. Co., No. 1190117 9Ala. Oct. 30, 2020)

Once a UM carrier intervenes in a pending case brought by its insured against an uninsured motorist, in which the insured did not name its UM carrier as a defendant, the carrier does not have the right to opt out of the litigation. In this case, Alfa moved to intervene, which was granted, and then later sought to

opt out two weeks before trial. The Circuit Court denied Alfa that right, and Alfa petitioned for mandamus. The Supreme Court held that under Lowe v. Nationwide, once the UM carrier intervenes, the carrier may not later opt out. Instead, only a carrier named by the UM insured as a defendant has the right to opt out.

MANDAMUS REVIEW

Ex parte D.R.J., No. 1190769 (Ala. Oct. 30, 2020)

In action by plaintiff against tortfeasor and UM carrier, mandamus review was not available to challenge propriety of Circuit Court's order voiding pro tanto release with tortfeasors, because petitioners did not demonstrate that order fell within the categories of orders for which mandamus review is recognized.

CONTRACT vs. TORT

Gustin v. Vulcan Termite and Pest Control, Inc., No. 1190255 (Ala. Oct. 30, 2020)

Trial court erred by granting summary judgment to termite contract provider on breach of contract claims regarding failure to repair damage under the contract; genuine issue of fact precluded summary judgment as to whether contractual exclusion for wood in contact with soil applied. Negligence and wantonness claims were properly dismissed because duties arose solely out of contract - mere breach of contract is not a tort. Whether other alleged contractual breaches were material was issue for factfinder.

RULE 41(b) DISMISSALS

S.C. v. Autauga County Bd. of Educ., No. 1190382 (Ala. Oct. 30, 2020)

Trial court abused its discretion in dismissing case as sanction under Rule 41(b) against Plaintiff, where plaintiff's counsel merely filed a motion to continue a hearing on a motion to dismiss after one group of defendants moved for and obtained two continuances.

ATTORNEY CONDUCT (RULES OF PROFESSIONAL CONDUCT); CONTACT WITH FORMER EMPLOYEES OF OPPOSING PARTY

Ex parte The Terminix International Co., LP, No. 1180863 (Ala. Oct. 30, 2020)

Former managerial employee of Terminix was hired as consultant by law firm representing HOAs and homeowners in termite-related litigation against Terminix. Terminix moved to disqualify the law firm, contending that the law firm had violated (among other provisions) Rule 4.2(a), concerning communications with employees of an organization. The Circuit Court disagreed and denied the motion to disqualify. The Supreme Court denied mandamus relief, holding that Rule 4.2(a)'s prohibition on communications with persons represented by counsel, in the context of organizations as adverse parties, applies to current but not former employees of the organizations. From the opinion:

The petitioners argue that, while Rule 4.2(a) expressly applies to only current employees of an organization, its application should be expanded to cases in which communications have been received from a former employee. The petitioners insist that because Barnett acquired confidential knowledge about Terminix while he was employed by Terminix, under Rule 4.2(a), "Campbell Law had a duty to seek Terminix's consent before contacting Barnett and before hiring him to bean investigator and consultant." Petition, at p. 14. We disagree.

The Court specifically rejected the Alabama State Bar Disciplinary Commission's 1993 interpretation of Rule 4.2, under which there "might be" a prohibition on contact with former employees of an adverse party for "those employees who occupied a managerial level position and were involved in the underlying transaction."

Importantly in this case, there was no evidence that the former manager had any confidential information of Terminix concerning the Plaintiffs, and the undisputed evidence was that the former manager had destroyed copies of confidential materials not specifically relating to the Plaintiff.

There was no violation of the former client rule (1.9) because there was no evidence that the consultant was actually engaged in substantial litigation defense for Terminix during his employment. Citing and discussing In re RSR Corp., 475 S.W.3d 775, 776 (Tex. 2015), the Court also noted that there is a meaningful distinction between lawyer employees (employees primarily involved in lawyer-related work) and non-lawyer employees as it relates to the former client rules.

RECUSAL
Ex parte Ala. Dept. of Revenue, No. 1190826 (Ala. Oct. 30, 2020)
In a case largely turning on its facts and the unique history of Greenetrack's litigation in Greene County, the Court granted ADOR's petition for mandamus and ordered Judge Hardaway to recuse himself in a pending matter between ADOR and Greenetrack pending in the Greene Circuit Court.

ROE v. WADE (yes, that one)
Magers v. Alabama Women's Center Reproductive Alternatives, Inc., No. 1190010 (Ala. Oct. 30, 2020)
Putative father sued AWC for its role in precipitating abortion of his baby. The trial court dismissed his case. The Supreme Court affirmed for failure of the father to file a proper appellate brief under Rule 28(a)(10). In a special concurrence, Justice Mitchell (joined by Parker, Bolin, and Wise) explained his view that Roe v. Wade should be overruled.

FROM THE COURT OF CIVIL APPEALS

IMPLIED CONTRACTS
Autauga Creek Craft House, LLC v. Brust, No. 2180300 (Ala. Civ. App. May 29, 2020)
Implied contract differs from express contract only in manner in which consent is shown. Evidence supported trial court's conclusion *ore tenus* that agreement existed even absent specific agreement as to price. Trial court erred in not awarding attorneys' fees under Prompt Pay Act; remand was necessary to set amount of fees.

FRAUD; REASONABLE RELIANCE
Wood v. ADT, LLC, No. 2180739 (Ala. Civ. App. May 29, 2020): Attorney plaintiff's pre-contract receipt of information which conflicted with initial advertising information triggered duty to inquire further, such that attorney could not reasonably rely on initial alleged misrepresentations in fraud.

CHARTER SCHOOLS
Ex parte Washington County Students First, No. 2190529 (Ala. Civ. App. June 5, 2020): Alabama Administrative Procedures Act provides for judicial review of certain decisions regarding decisions of the Alabama Public Charter School Commission.

PRELIMINARY INJUNCTIONS
City of Trussville v. Personnel Board of Jefferson County, No. 2190075(Ala. Civ. App. June 12, 2020): The Circuit Court’s preliminary injunction order did not sufficiently set out the reasons for issuing the injunctions using each of the four elements required to be shown.

EJECTMENT; STRICT COMPLIANCE WITH MORTGAGE TERMS
Barnes v. US Bank, No. 2180699 (Ala. Civ. App. June 26, 2020): Failure to comply strictly with terms of notice provisions in mortgage instrument rendered foreclosure invalid, and thus relief in ejectment was improper.

DEFAULT JUDGMENT; SERVICE OF PROCESS
Slocumb Law Firm, LLC v. Greenberger, No. 2190038 (Ala. Civ. App. July 24, 2020)
Person receiving service who told process server she could accept service was shown not to be employed by defendant, and Secretary of State's records confirmed that the registered agent of the law firm was not the person receiving service. Service was therefore improper and would not support a default judgment.

DEFAULT JUDGMENT; SERVICE OF PROCESS
Slocumb Law Firm, LLC v. Greenberger, No. 2190038 (Ala. Civ. App. July 24, 2020): Although process server testified that person at law firm's office at which service was made informed the process server that she could accept service for the law firm, the evidence demonstrated that the person was never employed by the law firm, and Secretary of State's records confirmed that the registered agent of the law firm was not the person receiving service. Service was therefore improper and would not support a default judgment.

APPEALS; RULE 60
Thompson v. State, No. 2180977 (Ala. Civ. App. August 28, 2020): Filing of notice of appeal before trial court's ruling on Rule 60 motion divested the Circuit Court of any jurisdiction to rule on Rule 60 motion; appeal was therefore dismissed.

FROM THE UNITED STATES SUPREME COURT

INTERNATIONAL ARBITRATION
GE Power v. Outokumpu Stainless USA, No. 18-1048 (U.S. June 1, 2020): New York Convention does not conflict with domestic equitable estoppel doctrines, and thus enforcement of arbitration agreements by non-signatories is available in both domestic and international arbitration contexts.

STANDING; ERISA
Thole v. US Bank, No. 17-1712 (U.S. June 1, 2020): Retired Plaintiffs who have been paid all of their monthly pension benefits so far, and are legally and contractually entitled to those payments for the rest of their lives, lacked standing to sue under ERISA for mismanagement of plan assets, for want of injury in fact.

LABOR & EMPLOYMENT
Bostock v. Clayton County, No. 17-1618 (U.S. June 15, 2020): Sexual orientation and transgender discrimination constitute discrimination based on "sex" covered by Title VII. When an employer takes adverse employment action against a gay or transgender person, the employer is taking an action motivated by an animus which would not exist if the gender of the person were different, and thus the action is based on gender.

ENVIRONMENTAL LAW
US Forest Service v. Cowpasture River Preservation Assn., No. 18-1584 (U.S. June 15, 2020): Because Department of Interior's decision to assign responsibility over the Appalachian Trail to the National Park Service did not transform the trail into land within the National Park System, Forest Service had authority to issue special-use permit for a ROW for a pipeline under the trail.

DACA; ADMINISTRATIVE LAW
DHS v. Regents of Univ. of Cal. System, No. 18-587 (U.S. June 18, 2020): (1) DHS's decision to rescind the DACA program is subject to judicial review under the Administrative Procedures Act; (2) DHS's decision to rescind the program was arbitrary and capricious; judicial review of agency action is limited to the material available to the decisionmaker at the time of the agency action, but the Acting Secretary failed to consider important information available at the time.

SECURITIES
Liu v. SEC, No. 18-1501 (U.S. June 22, 2020): As "equitable relief" in civil proceedings, 15 U. S. C. §78u(d)(5), the SEC's obtaining a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is permissible.

IMMIGRATION; HABEAS CORPUS
DHS v. Thuraissigiam, No. 19-161 (U.S. June 25, 2020): 8 U. S. C. §1252(e)(2), which limits judicial review to asylum determinations in connection with removal proceedings in a petition for a writ of habeas corpus, does not violate Due Process or the Suspension Clause.

SEPARATION OF POWERS
Seila Law LLC v. CFPB, No. 19-7 (U.S. June 29, 2020): The structure of the Consumer Financial Protection Bureau's Director position (created under the Dodd-Frank Act) is unconstitutional; leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates separation of powers. However, the Director's removal protection is severable from the other provisions of the Act that establish the CFPB and define its authority.

ABORTION
June Medical Services, LLC v. Russo, No. 18-1323 (U.S. June 29, 2020): The Court invalidated a Louisiana "admitting privileges" abortion law which was almost word-for-word identical to a Texas law invalidated in *Whole Woman's Health v. Hellerstedt*, 579 U. S. --- (2016). In *Hellerstedt*, the Court invalidated the Texas law, with the Chief Justice and three other justices dissenting. In this case, the Court invalidated the Louisiana law 5-4, with the Chief Justice concurring based on *stare decisis*.

FIRST AMENDMENT (SPEECH)
Agency for International Development v. Alliance for Open Society International, No. 19-177 (U.S. June 30, 2020): Foreign citizens outside US territory do not possess rights under the US Constitution.

FIRST AMENDMENT; RELIGION
Espinoza v. Montana Dept of Revenue, No. 18-1195 (U.S. June 30, 2020): "Blaine Amendments" (existing in 30 State Constitutions) generally prohibit government aid to schools controlled in whole or in part by a church. A Montana scholarship program prohibited families from using State-sponsored scholarships at religious schools. The Court held the program unconstitutional; disqualifying otherwise eligible

recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny."

TRADEMARK
USPTO v. Booking.com, No. 19-46 (U.S. June 30, 2020): A generic name (the name of a class of products or services) is ineligible for federal trademark registration. Booking.com, however, is not necessarily generic; a term styled "generic.com" is a generic name for a class of goods or services only if the term has that meaning to consumers.

ELECTORAL COLLEGE
Chiafolo v. Washington, No. 19-465 (U.S. July 6, 2020): Nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion. The Court upheld Washington state's legislation which enforces an elector's pledge to support his party's nominee (and the state voters' choice) for President in a "faithless elector" statute.

TCPA
Barr v. American Assn. of Political Consultants, No. 19-631 (U.S. July 6, 2020): Under a 2015 amendment to TCPA, robocalls for collection of government debt are allowed. Political organizations challenged the amendment on First-Amendment content-based discrimination grounds. The Supreme Court agreed, concluding (1) the government-debt exception is content-based and thus subject to strict scrutiny, and it fails such review, and (2) the government-debt exception is severable from the remainder of the TCPA.

FREE EXERCISE; ACA
Little Sisters of the Poor v. Pennsylvania, No. 19-431 (U.S. July 8, 2020): Multiple Departments empowered the Health Resources and Services Administration with discretion to exempt religious employers, such as churches, from providing contraceptive coverage under the ACA. Pennsylvania sued, claiming regulation was unlawful because the Departments lacked statutory authority under either the ACA or the Religious Freedom Restoration Act to promulgate the exemptions. Held: regulations were within the Departments' statutory authority and were properly adopted under APA.

FIRST AMENDMENT
Our Lady of Guadalupe School v. Morrissey-Berru, No. 19-267 (U.S. July 8, 2020): Elementary school teachers at religious schools who provide some religious instruction to students, and whose employment agreements set out schools' faith-based mission and imposed commitments regarding religious instruction, worship, and personal modeling of the faith, cannot claim the protection of federal employment discrimination law under the “ministerial” exception created by case law.

PRESIDENTIAL POWERS; SUBPOENAS
Trump v. Vance, No. 19-635 (U.S. July 9, 2020): Article II and the Supremacy Clause do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.

PRESIDENTIAL POWERS; SUBPOENAS
Trump v. Mazars USA, LLP, No. 19-715 (U.S. July 9, 2020)
Congressional subpoenas to the President regarding his tax returns must appreciate the delicate balance of power among coordinate branches of government. Whether a subpoena directed at the President's personal information is "related to, and in furtherance of, a legitimate task of the Congress, courts

must take adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the unique position of the President.

FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

QUALIFIED IMMUNITY; IMPACT OF INCONCLUSIVE VIDEO RECORDINGS
Patel v. City of Madison, No. 18-12061 (11th Cir. May 27, 2020): District court properly denied summary judgment to officer in action by injured detainee in excessive force case. Video recordings from two police dashboard cameras were unable to resolve definitively the parties' dispute about whether plaintiff resisted officer's efforts to secure and frisk him.

BANKRUPTCY
In re Cumbess, No. 19-12088 (11th Cir. June 3, 2020): Under 11 U.S.C. § 365(p)(1), "[i]f a lease of personal property is rejected or not timely assumed by the trustee . . . the leased property is no longer property of the estate."

QUALIFIED IMMUNITY
King v. Pridmore, No. 18-14245 (11th Cir. June 5, 2020): King was reluctantly helping police catch fugitive (King's partner in crime); fugitive was shot thirteen times and King was shot several times and seriously injured. King sued officers, asserting § 1983 and state-law claims. The district court granted summary judgment to officers, and the Eleventh Circuit affirmed. Officers' telling King he would be charged if he did not cooperate was not unconstitutional, and there were no threats of violence against King.

LABOR & EMPLOYMENT
Fernandez v. Trees, Inc., No. 18-12239 (11th Cir. June 9, 2020): After being fired, Fernandez sued Trees for hostile work environment and national origin discrimination claims under Title VII. The district court granted summary judgment, but the Eleventh Circuit reversed as to hostile work environment. There was no direct evidence of discrimination based on hostile environment: Supervisor's statement "new policy in the company: no more Cuban people" might provide direct evidence for a failure-to-hire claim, but not for a firing claim. As to hostile work environment, however, there was substantial evidence to support both subjective hostility (based on Fernandez's perception of the environment) and the four factors for objective hostility – especially with a frequent number of derogatory terms regarding Cubans.

SANCTIONS
Hyde v. Sauta, No. 15-13010 (11th Cir. June 17, 2020): District court has the power to grant or deny sanctions (under the court's inherent powers or 28 U.S.C. § 1927) when it lacks subject-matter jurisdiction over the underlying case.

COVID; PRISON CONDITIONS
Swain v. Junior, No. 20-11622 (11th Cir. June 15, 2020): Medically vulnerable inmates who challenged the conditions of confinement at Miami's Metro West jail sought and obtained preliminary relief, enjoining the county and Junior to take a number of precautionary measures to halt COVID spread. The Eleventh Circuit reversed, holding plaintiffs did not show a substantial likelihood of success, because they had to (but did not) demonstrate defendants' deliberate indifference.

FALSE CLAIMS ACT

Ruckh v. Solus Rehabiltation, LLC, No. 18-10500 (11th Cir. June 26, 2020): (1) Litigation Funding Agreement did not vitiate Plaintiffs' standing to represent the interests of the government as a relator, because the relator retains sole authority over the litigation, financing counterparty had no power to control or influence it, and nothing in the FCA precludes such a transference. (2) Evidence was sufficient to support jury's determination of FCA liability based on false implied certification, based on plaintiff's expert's testimony and review of records which reflected upcoding and billing violations in about 1/6 of reviewed cases. Those representations were material to the government's payment decisions because different reimbursement rates applied to the codes which corresponded to greater therapeutic time. (3) Evidence of "ramping" was also sufficient; that is the impermissible, artificial timing of services to coincide with Medicare's regularly scheduled assessment periods and thereby maximize reimbursements. (4) Evidence was sufficient to impose liability on management company for "caus[ing] to be presented" false claims; deciding an issue of first impression, proximate cause standards apply to "cause to be presented" claims. Under that standard, the evidence was sufficient that management company caused the submission of false claims. Ultimately, the Court held that on remand the district court must reinstate the jury's verdict in the amount of $85,137,095 and directed the district court to enter judgment on those claims, after applying trebling and statutory penalties.

DERIVATIVE v. DIRECT CLAIMS; SECURITIES

Freedman v. majicJack VocalTec Ltd., No. 18-15303 (11th Cir. June 25, 2020): (1) The law of the state of incorporation determines whether an action is properly deemed derivative or direct, which in this case would be Israeli law. (2) Under Florida's choice of law rules (i.e. the forum court's choice of law rules), a court is to adhere to the "internal affairs" doctrine when faced with a question concerning corporate powers - which would also counsel in favor of applying Israeli law. (3) District court properly relied upon and applied English translations of two decisions rendered by the courts of Israel, under which a shareholder seeking to sue on direct claim must "sustain damage independent of the damage the company sustains[,]" whereas a claim is derivative where "all the shareholders [are generally]damaged to the same degree." (4) Claim arising from an allegedly misleading proxy statement was derivative. (5) There were no allegations of special injury, thus confirming the derivative nature of the claim.

REMOVAL

Bowling v. US Bank, No. 17-11953 (11th Cir. June 24, 2020): *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019), under which counterclaim defendant may not remove an action under 28 U.S.C. § 1441(a), abrogated *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980), the longstanding Circuit precedent authorizing removal by third-party counterclaim defendants.

QUALIFIED IMMUNITY; *MONELL*

Grochowski v. Clayton County, No. 18-14567 (11th Cir. June 22, 2020): (1) Constitution does not require in-person security screenings or consideration of violent misdemeanors before classifying a detainee for housing and cellmate assignment, and hourly rounding for supervision of prisoners is Constitutionally adequate. (2) Claims against the County failed to establish any Constitutional violation, in that jail design claim amounted to an argument that the Constitution requires continuous observation of double-celled inmates, which is does not, and inadequate funding and staffing claims failed because hourly monitoring, which is Constitutionally adequate, was funded and being performed.

STANDING

Gardner v. Mutz, No. 19-10461 (11th Cir. June 22, 2020): Individuals and organizations who objected to City’s decision to relocate Confederate monument from one city park to another lacked standing to

sue on claims that relocation violates their rights under the First Amendment's Free Speech Clause and the Fourteenth Amendment's Due Process Clause.

SOCIAL SECURITY
Noble v. Commissioner, No. 18-13817 (11th Cir. June 30, 2020): ALJ gave appropriate consideration to VA's determination of applicant's inability to work due to disability and thus entitled to veterans' benefits. Substantial evidence, in the form of the medical records that postdate the VA's decision, supported the ALJ's rejection of the VA's disability decision as determinative of whether Noble was disabled for Social Security purposes.

FORUM SELECTION CLAUSES
Deroy v. Carnival Corp., No. 18-12619 (11th Cir. June 30, 2020): Under this forum-selection clause's plain language, when jurisdiction for a claim could lie in federal district court with a correctly-pleaded claim, federal court is the only option for plaintiff.

***SPOKEO* STANDING; FDCPA**
Trichell v. Midland Credit Mgmt., Inc., No. 18-14144 (11th Cir. July 6, 2020): Plaintiffs who received debt-collection letters on time-barred debt which they claimed were misleading, but by which they themselves did not claim to have been misled, lacked Article III standing under *Spokeo*. Recognizing a Circuit split, the Court held that "a statutory violation that poses a risk of concrete harm to consumers in general, but not to the individual plaintiff, cannot fairly be described as causing a particularized injury to the plaintiff." The Court also rejected standing arguments based on claimed "informational injury."

QUALIFIED IMMUNITY
Williams v. Aguirre, No. 19-11941 (11th Cir. July 13, 2020): District court properly denied summary judgment to officers who, after firing on and injuring suspect, obtained a probable cause warrant on a bogus attempted murder charge relating to the officer, leading to suspect's 16-month detention due to an inability to make bond. The Court rejected the application of the "any-crime rule," under which an officer is not liable for malicious prosecution relating to an underlying arrest so long as probable cause existed to arrest the suspect for some crime (carrying a concealed firearm in this case). Fourth Amendment malicious prosecution requires the plaintiff to prove that the judicial determination of probable cause underlying his seizure was invalid; suspect offered substantial evidence (1) that the legal process justifying his seizure was constitutionally infirm and (2) that his seizure would not otherwise be justified without legal process.

APPELLATE JURISDICTION; MOTIONS FOR RECONSIDERATION
Corley v. Long-Lewis, Inc., No. 18-10474 (11th Cir. July 16, 2020): (1) Order granting plaintiff's voluntary dismissal without prejudice, Fed. R. Civ. P. 41(a)(2), is a "final decision[], " 28 U.S.C. § 1291. (2) There is territorial jurisdiction under 28 U.S.C. § 1294 to review an interlocutory decision by an out-of-circuit district court that merged into the final judgment of a district court inside the Circuit. (3) Plaintiff had standing to appeal from final judgment triggered by plaintiff's own voluntary dismissal, when subject of appeal was interlocutory order merged into the judgment. (4) District court acted within its discretion in refusing to consider argument made for the first time on motion for reconsideration.

RATIONAL BASIS REVIEW; STANDING
Georgia Electronic Life Safety & System Assn v. City of Sandy Springs, No. 19-10121 (11th Cir. July 17, 2020): Two alarm companies and a trade association challenged municipal ordinance subjecting alarm companies to fines when a false alarm is sounded at a serviced property. Held: there was no substantive

due process claim, because the ordinance is an economic regulation surviving rational basis review. There was no standing as to the procedural due process claim, based on insufficient procedural safeguards in the ordinance's appeal process, because Plaintiffs never attempted an appeal.

EIGHTH AMENDMENT
Mosley v. Zachary, No. 17-14631 (11th Cir. July 24, 2020): Prison official, for purposes of an Eighth Amendment deliberate indifference claim, upon being informed of an inmate's threat to kill a fellow inmate, is not necessarily required to place the at-risk inmate in immediate protective custody.

VOTING RIGHTS ACT
Greater Birmingham Ministries v. Secretary of State of Alabama, No. 18-10151 (11th Cir. June 21, 2020): The Court upheld Alabama's 2011 Photo Voter Identification Law, Ala. Code § 17-9-30, requiring voters to present photo ID when casting in-person or absentee votes.

BAR ORDERS
SEC v. Quiros, No. 19-11409 (11th Cir. July 20, 2020): District court abused its discretion in approving a settlement among some parties containing a bar order adversely impacting the claims of non-settling parties. A bar order is allowed only where "essential," and if the parties would have still resolved their dispute without entry of the bar order, the order is not essential.

QUALIFIED IMMUNITY
Williams v. Aguirre, No. 19-11941 (11th Cir. July 13, 2020): The Court rejected the "any-crime rule," under which an officer is not liable for false arrest or malicious prosecution in the § 1983 context so long as probable cause existed to arrest the suspect for some crime (carrying a concealed firearm in this case), even if it was not the crime the officer claimed had occurred (an attempted murder in this case). Substantial evidence therefore supported § 1983 malicious prosecution claim based on attempted murder charges based on demonstrably false affidavits of officers.

MARITIME LAW; NEGLIGENCE
Tesoriero v. Carnival Corp., No. 18-11638 (11th Cir. July 14, 2020): District court properly granted summary judgment to Carnival in action by passenger for negligence arising from broken cabin chair which caused her tennis elbow. The Court held: (1) Tesoriero failed to show Carnival had actual or constructive notice that the chair was broken; (2) even if *res ipsa* applied, that doctrine cannot cure a defect in notice; (3) even assuming the chair itself could have provided evidence of notice, Carnival's failure to preserve the chair was not shown to be in bad faith and is therefore not sanctionable.

APPELLATE JURISDICTION; MOTIONS FOR RECONSIDERATION
Corley v. Long-Lewis, Inc., No. 18-10474 (11th Cir. July 16, 2020): Order granting a voluntary dismissal without prejudice is a final decision for appellate jurisdiction purposes; (2) Court had territorial jurisdiction, 28 U.S.C. § 1294, to review an interlocutory decision by an out-of-circuit district court that merged into the final judgment of a district court in this Circuit; (3) appellant has standing to appeal from a final judgment accompanying an order granting his motion for a voluntary dismissal in order to obtain appellate review of previous interlocutory rulings; (4) district court was within its discretion in refusing to consider an argument made for the first time on motion for reconsideration.

RATIONAL BASIS REVIEW; STANDING
Georgia Electronic Life Safety & System Assn v. City of Sandy Springs, No. 19-10121 (11th Cir. July 17, 2020): Municipal ordinance subjecting alarm companies to fines when a false alarm is sounded at one of

the properties they service were rationally related to a legitimate interest of the City. Plaintiff alarm companies lacked standing to pursue procedural due process claim, based on insufficient procedural safeguards in the ordinance's appeal process, because plaintiffs never lost an appeal under the ordinance and never attempted one.

EIGHTH AMENDMENT
Mosley v. Zachary, No. 17-14631 (11th Cir. July 24, 2020): Prison official, for purposes of an Eighth Amendment deliberate indifference claim, upon being informed of an inmate's threat to kill a fellow inmate, is not required immediately to place the at-risk inmate in protective custody; it is a fact-intensive determination.

VOTING RIGHTS ACT
Greater Birmingham Ministries v. Secretary of State of Alabama, No. 18-10151 (11th Cir. June 21, 2020): The Court upheld Alabama's 2011 Photo Voter Identification Law, codified at Ala. Code § 17-9-30, requiring all Alabama voters to present a photo ID when casting in-person or absentee votes. Plaintiffs alleged that the law has a racially discriminatory purpose and effect that violates the United States Constitution and various provisions of the Voting Rights Act.

SOCIAL SECURITY
Goode v. Commissioner, No. 18-14771 (11th Cir. July 28, 2020): Vocational expert testimony, upon which ALJ relied in finding applicant not disabled, was not reliable for using the wrong SOC group code to determine job potentials, thus causing a substantial overstatement of potentially available jobs.

CLASS ACTIONS; ARBITRATION
Lavigne v. Herbalife, Ltd., No. 18-14048 (11th Cir. July 29, 2020): Downstream distributors sued Herbalife and a number of upstream "top distributors" ("Tops"), asserting RICO and other claims arising from the conducting of "Circle of Success" events which downstream distributors attended based on representations from Tops and Herbalife regarding how their attendance could facilitate their advancement within the organization. Herbalife and Tops moved to compel arbitration, which the district court denied. The Eleventh Circuit affirmed, holding (1) the clauses themselves did not cover claims against the Tops, and under the controlling California law applicable to the agreements, "one must be a party to an arbitration agreement to be bound by it or invoke it;" (2) because there was no contract between Tops and the Downstreams, the arbitration agreement's invocation of AAA Commercial Rules, and those rules' allowing the arbitrator to determine the arbitrator's jurisdiction (*First Options* language), did not render the question of arbitrability one for an arbitrator - the question was for the court; and (3) because the Complaint did not depend on any specific terms of the Herbalife contract, principles of equitable estoppel did not require arbitration of the claims by the Downstreams - "it is not enough that the alleged misconduct is somehow connected to the obligations of the underlying agreements; the misconduct must "be founded in or inextricably bound up with" such obligations."

EMPLOYMENT
Gogel v. Kia Motors Mfg. of Georgia, Inc., No. 16-16850 (11th Cir. July 29, 2020) (*en banc*): Gogel managed the Team Relations Department of Kia, and in that capacity heard many complaints about how women and Americans were treated. One of her job duties was to protect Kia from litigation by working to resolve internally discrimination complaints made by employees. When she experienced similar treatment herself and, in her view, had been denied a promotion because she is a woman and an American (non-Korean), she filed her own EEOC charge. Subsequent to her charge, another Kia employee Ledbetter filed her own charge based on national origin and gender discrimination. After

learning of Ledbetter's charge, Kia came to believe that Gogel had "encouraged or even solicited" Ledbetter to file her charge. Kia admits it fired Gogel for that reason. Gogel sued Kia for gender and national origin discrimination and retaliation under Title VII, as well as race and alienage discrimination and retaliation under section 1981. The District Court granted summary judgment to Kia.
On original submission, a divided panel reversed as to Gogel's retaliation claims under Title VII and § 1981. On rehearing, the *en banc* court affirmed summary judgment on the retaliation claims. Gogel's recruitment of Ledbetter to sue Kia was not itself protected activity under the opposition clause of Title VII's retaliation provision; by attempting to recruit another employee to sue Kia, Gogel's action so conflicted with her responsibilities as Team Relations manager that it cannot be considered to constitute protected activity.

FEDERAL JURISDICTION
Patel v. Hamilton Medical Center, No. 19-13088 (11th Cir. July 30, 2020): Plaintiff cannot create federal-question jurisdiction by seeking a declaration that a federal defense does not protect the defendant.

ISSUE PRECLUSION; CHOICE OF LAW
Sellers v. Nationwide Mut. Fire Ins. Co., No. 18-15276 (11th Cir. Aug. 7, 2020): When determining the preclusive effect of an earlier judgment rendered by a federal court exercising diversity jurisdiction, federal common law requires the court to adopt the rules of issue preclusion applied by the State in which the rendering court sits.

TRANSGENDER RIGHTS; SCHOOLS
Adams v. School Board of St. Johns County, FL, No. 18-13592 (11th Cir. Aug. 7, 2020): Transgender high school student socially transitioning from female to male was prohibited by public high school from using the boys' restroom; instead, student was required to use either the girls' restroom or a single-stall unisex bathroom, which student found isolating and degrading. Student, through his mother, sued, claiming that denial of access to boys' restroom violated student's Title IX and equal protection rights. After a bench trial, the district court found for plaintiff student. The Eleventh Circuit affirmed in a 2-1 decision authored by Judge Martin, in which Judge Jill Pryor joined. The majority opinion reasoned that heightened scrutiny applied to the Board policy, and that although protecting the bodily privacy of young students is undoubtedly an important government interest, the School Board failed to demonstrate a substantial relationship between excluding Mr. Adams from the communal boys' restrooms and protecting student privacy. Chief Judge William Pryor authored a lengthy dissent, arguing that the majority's analysis dismissed any sex-specific interest in bathroom privacy and jettisoned ground rules of statutory interpretation. This case appears destined for *en banc* review.

EXCESSIVE FORCE; DELIBERATE INDIFFERENCE
Patel v. Lanier County, No. 19-11253 (11th Cir. Aug. 11, 2020): Although plaintiff's detention for two hours in a van on a hot day could constitute excessive force under the facts, law was not sufficiently "clearly established" as to that claim. However, officer's failure to take action after the onset of serious adverse effects of the heat could support a deliberate indifference claim, and the law was sufficiently clearly established to support that claim.

DAMAGES (PERSONAL INJURY); MARITIME LAW
Higgs v. Costa Crociere SPA Co., No. 19-10371 (11th Cir. Aug. 14, 2020): Appropriate measure of medical damages in a maritime tort case is that reasonable value determined by the jury upon consideration of any relevant evidence, including the amount billed, the amount paid, and any expert testimony and other relevant evidence the parties may offer. "[T]he district court improperly reduced Higgs's damages

by applying a bright-line rule that would categorically limit medical damages to the amount actually paid by an insurer[.]"

QUALIFIED IMMUNITY; FOURTH AMENDMENT
Laskar v. Hurd, No. 19-11719 (11th Cir. August 28, 2020): Regarding the favorable adjudication element of common-law malicious prosecution in the context of a section 1983 claim, a number of circuits require that favorable terminations "indicate the innocence of the accused." The Court disagreed with seven sister circuits, holding that the "favorable termination" element of malicious prosecution does not have to indicate innocence of the accused, as long as the dismissal is not inconsistent with the accused's innocence - and thus a dismissal based on untimeliness qualifies for malicious prosecution.

JUDGMENT COLLECTION (ALABAMA LAW)
WM Mobile Bay Env. Center, LLC v. City of Mobile Solid Waste Authority, No. 19-10239 (11th Cir. August 26, 2020): The Court certified to the Alabama Supreme Court whether Alabama law permits a judgment creditor to execute on certain real property owned by an Alabama solid waste disposal authority - whether such property is exempt from execution under Ala. Code § 6-10-10 of the Alabama Code or, alternatively, Alabama common law.

BANKRUPTCY
In re Guillen, No. 17-13899 (11th Cir. August 25, 2020) Bankruptcy courts are not required to find some change in circumstances before permitting debtors to modify confirmed plans under 11 U.S.C. § 1329.

FTCA; CONTROLLED BURNS
Foster Logging, Inc. v. USA, No. 18-15033 (11th Cir. August 24, 2020): Foster sued USA under the FTCA, alleging negligence in the failure to control a controlled burn occurring on Fort Stewart, which then spread to Foster's land and damaged and destroyed timber. The district court dismissed the complaint based on discretionary function immunity, and the Eleventh Circuit affirmed, reasoning that the observation, monitoring, and maintenance of the controlled burn—(1) involved an element of judgment or choice; and (2) was susceptible to policy analysis, which does not require actual policy analysis be undertaken.

ERISA
Hill v. Employee Benefits Admin. Comm. of Mueller, Inc., No. 18-14026 (11th Cir. August 24, 2020): Plaintiffs who were neither laid off nor fired were not entitled to Special Early Retirement ("SER") benefits for situations where employees are laid off or terminated by a permanent plant shutdown before their normal retirement age.

CERCLA
Santiago v. Raytheon Corp., No. 18-15104 (11th Cir. August 31, 2020)
CERCLA's tolling provision for state-law based actions regarding exposures to hazardous substances does not apply to claims brought as a public liability action under the Price-Anderson Act, Pub. L. 85-256, 71 Stat. 576 (1957), as amended in 1988. See 42 U.S.C. §§ 2014(hh), 2210(n)(2). Such actions borrow their "substantive rules for decision" from the state where the incident occurred, including state statutes of limitation.

EIGHTH AMENDMENT
Hoffer v. Secretary, Fla. Dept. Corr., No. 19-11921 (11th Cir. Sept. 1, 2020): Eighth Amendment does not require Florida prison officials to treat all inmates with chronic Hepatitis C—including those who have only mild (or no) liver fibrosis—with expensive, state-of-the-art "direct acting antiviral" (DAA) drugs.

DEFAMATION; LIMITED PURPOSE PUBLIC FIGURE
Berisha v. Lawson, No. 19-10315 (11th Cir. Sept. 2, 2020): Son of former Prime Minister of Albania, who was allegedly defamed in a book that accused him of being involved in an elaborate arms-dealing scandal in the early 2000s, was at the very least a limited purpose public figure, thus requiring "actual malice" be shown by clear and convincing evidence was required to sustain a defamation claim.

QUALIFIED IMMUNITY
Cantu v. City of Dothan, No. 18-15071 (11th Cir. Sept. 3, 2020)
Officer who shot and killed decedent being arrested for (at worst) driving without a license while dropping off a stray dog at an animal shelter, and who was not resisting arrest violently, was not entitled to qualified immunity at summary judgment. Even without a case directly on point, the constitutional violation was apparent: the use of lethal force was so obviously excessive that any reasonable officer would have known that it was unconstitutional, even without pre-existing precedent involving materially identical facts."

VOTING RIGHTS
Jones v. Governor of Florida, No. 20-12003 (11th Cir. Sept. 11, 2020) (*en banc*): In 2018, Florida voters amended the State's Constitution to abrogate its historic ban on felon disenfranchisement, and to allow certain felons (excluding felons convicted of murder or sexual offenses) to be re-enfranchised "upon completion of all terms of sentence including parole or probation." The Florida Legislature passed a statute implementing this "Amendment 4" which required that "all terms of sentence" include all LFOs - legal financial obligations - including payment of court fines, costs, and restitution ordered by the criminal court. Ex-felon applicants sued, challenging the requirement that they pay their fines, fees, costs, and restitution before regaining the right to vote. The district court had granted a preliminary injunction (which was affirmed) and then, after an eight-day bench trial, found for Plaintiffs. The Eleventh Circuit took the case immediately *en banc* and held that there was no equal protection violation. The only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not. This classification does not turn on membership in a suspect class: the requirement that felons complete their sentences applies regardless of race, religion, or national origin. Because this classification is not suspect, it was reviewed for a rational basis only.

FCRA; "LEGITIMATE BUSINESS PURPOSE"
Domante v. Dish Networks LLC, No. 19-11100 (11th Cir. Sept. 9, 2020): Dish had a "legitimate business purpose" under FCRA when it obtained Domante's consumer report, after an identity thief fraudulently submitted some of Domante's personal information to Dish, thus did not violate FCRA § 1681b.

AMENDMENTS TO PLEADINGS; CONFORMITY TO EVIDENCE
John Doe #6 v. Miami-Dade County, No. 19-10254 (11th Cir. Sept. 9, 2020): District court's denial of Rule 15(b) motion for plaintiffs to assert as-applied theory of unconstitutionality when facial challenge was pleaded was not an abuse of its discretion. Plaintiffs did not give fair notice to the County of their as-applied theory of relief.

CLASS ACTION SETTLEMENTS; INCENTIVE AWARDS; NOTICE
Johnson v. NPAS Solutions, LLC, No. 18-12344 (11th Cir. Sept. 17, 2020): (1) District court's preliminary approval order schedule for class settlement violated Fed. R. Civ. P. 23(h) by requiring class members to file objections before class counsel was required to file fee petition, but that error was harmless on the facts; (2) under pre-Rule 23 precedent, incentive awards to class representatives are not permitted in class action cases, though they have become ubiquitous in modern class-action practice; (3) district court's final approval order was not sufficiently specific.

ARBITRATION; POST-ARBITRAL RELIEF
Gherardi v. Citigroup Global Markets, Inc., No. 18-13181 (11th Cir. Sept. 17, 2020): Arbitrators did not exceed their powers under FAA § 10(a)(4) in arguably construing parties' agreement.

QUALIFIED IMMUNITY; APPELLATE JURISDICTION
Hall v. Flournoy, No. 18-13436 (11th Cir. Sept. 17, 2020): There is no appellate jurisdiction over an interlocutory appeal concerning the application of qualified immunity which does not present a legal question and instead challenges only the sufficiency of evidence.

QUALIFIED IMMUNITY
Luke v. Gulley, No. 20-11076 (11th Cir. Sept. 15, 2020): In Fourth Amendment malicious prosecution claim, plaintiff had reached a compromise with the DA to obtain dismissal of underlying criminal charges. District court granted summary judgment to accusing officer, holding that underlying state court proceedings did not terminate in plaintiff's favor given the compromise. Held: disposition of the state court proceeding was not inconsistent with the plaintiff's innocence, and thus could support a Fourth Amendment malicious prosecution claim.

SECTION 1983; PRIVATE PROBATION SERVICES
Harper v. Professional Probation Services, Inc., No. 19-13368 (11th Cir. Sept. 25, 2020): Plaintiff adequately stated a claim, for Rule 12 purposes, that private probation company under contract with municipal court could be liable under § 1983 for due-process violations in unilaterally extending durations of probation, unilaterally increasing fines beyond what was ordered, and unilaterally imposing additional conditions of probation. Allegations were that PPS was not disinterested due to a financial incentive to charge more probation fees to probationers, and that it was performing a judicial function in the imposition of probation times and fines. Under facts as alleged, PPS violated duty of judicial impartiality.

HECK (no, that's not a joke)
Harrigan v. Rodriguez, No. 17-11264 (11th Cir. Oct. 13, 2020): Harrigan sued Officer Rodriguez under 42 U.S.C. § 1983, claiming Rodriguez shot him without provocation while his truck was stopped at a red light. A Florida state jury convicted Harrigan of aggravated assault and fleeing to elude among other crimes in connection with his encounter with Rodriguez. Rodriguez moved for summary judgment based on *Heck v. Humphrey*, 512 U.S. 477 (1994), claiming that the § 1983 excessive-force claim was barred because if successful, it would necessarily imply the invalidity of those convictions. The district court agreed and granted summary judgment. The Eleventh Circuit reversed, holding that both the use of allegedly excessive force and the proper convictions of Harrigan were not logically impossible to co-exist; "a jury could have found that Officer Rodriguez shot Harrigan first, and that Harrigan then committed aggravated assault and fled the scene." Heck requires that there be a logical impossibility that the state-court judgment can be valid if the section 1983 claim is successful.

CONSERVATION EASEMENTS

Pine Mountain Preserve, LLC v. CIR, No. 19-11795 (11th Cir. Oct. 22, 2020)

Under I.R.C. § 170, a landowner may take a deduction when it grants a conservation easement to a qualified land trust; to qualify, (1) the easement must impose "a restriction (granted in perpetuity) on the use which may be made of the real property[,]" I.R.C. § 170(h)(2)(C), and (2) the grant must ensure that the easement's "conservation purposes" are"protected in perpetuity." Id. § 170(h)(5)(A). The Tax Court (1) held that certain 2005 and 2006 easements were not "granted in perpetuity" because, although Pine Mountain had agreed to extensive restrictions on its use of the land, it had reserved to itself limited development rights within the conservation areas; (2) concluded that a 2007 easement complied with § 170(h)(5)(A)'s requirement that the easement's conservation purposes be "protected in perpetuity," notwithstanding its inclusion of a clause permitting the contracting parties to bilaterally amend the grant; and (3) valued the 2007 easement at $4,779,500, almost almost exactly midway between the parties' wildly divergent appraisals. The Eleventh Circuit reversed on issue (1), holding that the 2005 and 06 easements were granted in perpetuity notwithstanding the development rights; affirmed on issue (2); and reversed on issue (3), holding that the Tax Court's averaging method when faced with competing experts contravened the applicable regulations, which require valuations based on comparable sales or diminution of value findings.

PRODUCT LIABILITY; DAUBERT; EVIDENCE

Crawford v. ITW Food Eqpt. Group, LLC, No. 19-10964 (11th Cir. Oct. 21, 2020)

Crawford was operating a Hobart meat saw made by ITW, with an unguarded blade, when his arm was amputated. He sued ITW for negligent product design under Florida law. After a jury trial, Crawford and his wife were awarded $4,050,000. The Eleventh Circuit affirmed, holding *inter alia*: (1) Plaintiff's expert satisfied the Daubert standard; his theory that the design was unreasonably dangerous because it lacks an auto-deploying blade guard was based on his proposed alternative design employing a foot pedal-actived guard, which the expert had tested, and for which he had applied for a patent, and submitted it for peer review in the American Journal of Mechanical Engineering. The jury even saw a video of Barnett demonstrating the operation of his model. (2) Admission of expert's supplemental affidavit provided five months before trial was not an abuse of discretion, since ITW chose not to seek a second deposition of the expert, ITW cross-examined the expert on the supplemental report, and the facts underlying the supplemental report were well known in the industry - though the Court emphasized its holding was narrow and fact-based; (3) OSHA reports of other accidents involving meat saws were admissible under the public records exception to hearsay, Rule 803(8); the alleged untrustworthiness of OSHA investigators or their fact-finding was merely speculative and not a proper ground for objection; (4) OSHA reports concerning other accidents involving unguarded meat saw blades were relevant, in that they indicated notice of the defective design, and their probative value was not substantially outweighed by the danger of unfair prejudice.

QUALIFIED IMMUNITY

Stryker v. City of Homewood, No. 19-10495 (11th Cir. Oct. 21, 2020)

In this factually-intense case, the district court erred in granting summary judgment to officers based on qualified immunity, in action by arrestee Stryker for excessive force in connection with an accident investigation. According to Stryker's testimony, without ever informing him that he was under arrest or using any lesser force, the officer shoved him, shot him in the back with the taser, and kicked him once he fell to the ground—even though Stryker posed no threat and was (at the time of the taser use) complying with the officer's instructions. The offense for which the arrestee was charged (failing to comply with officer's instructions) was minor and did not warrant use of extreme force: "we have explicitly held—and thus clearly established—that employing a taser on a compliant, nonthreatening

suspect violates the Constitution." Further, Stryker's testimony that officers continued to beat and choke him after dragging him out of his truck (after one officer had broken through the glass) and caused the breaking of Stryker's jaw created a fact issue on excessive force, because the gratuitous continued use of force on a controlled and complying suspect clearly violates the Fourth Amendment.

LANHAM ACT

J.B. Weld Co. LLC v. The Gorilla Glue Co., No. 18-14975 (11th Cir. Oct. 20, 2020)

Weld and GG each manufacturer competing heavy-duty adhesives consisting of two separate products set in two separate tubes and packaged in a "V" configuration. Weld sued GG after GG began packaging its product similar to Weld's by using the V configuration and employing white and black tipped tubes. The district court granted summary judgment to GG on a variety of Lanham Act and Georgia law-based unfair competition claims. The Eleventh Circuit reversed in part, holding that under the seven-factor test for trade dress infringement ((1) the strength of the trade dress, (2) the similarity of design, (3) the similarity of the product, (4) the similarity of retail outlets and purchasers, (5) the similarity of advertising media used, (6) the defendant's intent, and (7) actual confusion), there was a fact issue on whether the overall design was infringing (Ed. - the packaging appears in the opinion, and from looking at it, I really don't understand how making one's product appear directly competitive with another's, while using one's own general trade dress and logos and color schemes, could be infringing or be deemed likely to confuse - they're simply competing products).

BANKRUPTCY (*BARTON* DOCTRINE); PERSONAL JURISDICTION

Tufts v. Hay, No. 19-11496 (11th Cir. Oct. 20, 2020)

Tufts (Florida lawyer) defended a client (Biltmore) in Florida litigation. Hay (a North Carolina lawyer) represented Biltmore in a Chapter 11 Bankruptcy in North Carolina. Relying on repeated representations by Hay to Tufts that the Bankruptcy Court had approved Tufts as special counsel for the debtor, Tufts continued work for the debtor. Years later, that turned out to be false - the bankruptcy court had never entered an order of approval, which then led to Tufts' having to disgorge fees. The Chapter 11 proceeding was later dismissed. Tufts then sued Hay in Florida federal district court for fraud and misrepresentation. Hay moved to dismiss for lack of personal jurisdiction, which was denied. Hay then moved to dismiss for lack of subject matter jurisdiction under the Barton doctrine, under which a plaintiff must obtain leave of the bankruptcy court before initiating an action in district court when that action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity. The district court granted that motion to dismiss, and Tufts appealed. The Eleventh Circuit reversed, holding that the Barton doctrine did not apply because the Bankruptcy Court lacked any jurisdiction due to the dismissal of the Chapter 11, and that there was personal jurisdiction under Florida's long-arm statute and due process because Hay was being sued for representations made by telephone and electronically into Florida and directed to a Florida resident, and that the exercise of jurisdiction based on those contacts, when those contacts formed the basis of the claim, was not inconsistent with due process.

JUROR MISCONDUCT; NEW TRIALS

Torres v. First Transit, Inc., No. 18-15186 (11th Cir. Oct. 20, 2020)

During voir dire in a bus accident case, two venirepersons answered no to a written question as to whether they or any close family member had ever been involved in a lawsuit. During oral voir dire, the district court asked: "Is there anyone that has been involved in a civil lawsuit that has shaped your view either negatively or positively about the legal system that you believe would have an effect on your ability to serve as a fair and impartial juror?" Again, neither juror responded affirmatively. Those venirepersons were seated on the jury. After an adverse verdict, defendant moved for new trial after

discovering that the two jurors had in fact been sued multiple times, and that the affirmative concealment suggested a lack of impartiality necessitating an evidentiary hearing. The district court denied a motion for new trial and denied an evidentiary hearing, concluding that the oral question was qualified as to whether other litigation had impressed their view of the legal system, and that there was no indication that a lack of partiality was present. The Eleventh Circuit reversed. "To obtain a new trial for juror misconduct that occurred during the jury selection process, a party must make two showings: (1) "that a juror failed to answer honestly a material question on voir dire," and (2) "that a correct response would have provided a valid basis for a challenge for cause." [A] district court must investigate juror misconduct when the party alleging misconduct makes an "adequate showing" of evidence to "overcome the presumption of jury impartiality." Thus, when a party moving for a new trial based on a juror's nondisclosure during voir dire makes a prima facie showing that the juror may not have been impartial and thus was plausibly challengeable for cause—in other words, when the moving party has presented "clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred"—the district court must hold an evidentiary hearing prior to ruling on the motion for a new trial in order to adequately investigate the alleged juror misconduct." The Court concluded:

The evidentiary hearing should include in-depth questioning of both Juror Y.C. and Juror E.S. about the prior litigation in which each was involved. At a minimum, the questioning should cover the facts of those prior cases; the identities of the lawyers, parties, and judges; the jurors' perceptions of the prior cases and of the legal system as a whole; and the outcomes of the prior cases—that is, whether the jurors prevailed or lost. The Court will need to determine whether the jurors harbor any biases—including those against the legal system itself—that would cast doubt on their fundamental ability to properly weigh the evidence and would ultimately render them partial. We expect that the result of the District Court's hearing on remand will be a full elucidation of these factual issues.

CONTINUING VIOLATION

McGroarty v. Swearingen, No. 19-10537 (11th Cir. Oct. 20, 2020)

McG sued Swearingen (the Commissioner of the Florida Department of Law Enforcement) under § 1983, contending the FDLE violated his constitutional rights by continuing to publish his personally identifiable information on FDLE's sex offender registry website even after McGroarty had completed probation and was othwerwise no longer subject to Florida registration laws.The issue is whether McGroarty's claims are barred by the applicable statute of limitations or whether there was a continuing violation of law. The Eleventh Circuit held that the continuing violation theory did not apply, because McGroarty "has alleged a continuing harm (which does not extend the limitations period), not a continuing violation (which may extend the period)." The standard for when a § 1983 claim accrues is well settled in our circuit. "The statute of limitations on a section 1983 claim begins to run when 'the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.'" Van Poyck, 646 F.3d at 867 (quoting McNair v. Allen, 515 F.3d 1168, 1173 (11th Cir. 2008)). As to which facts a plaintiff must know, we have said "[p]laintiffs must know or have reason to know that they were injured, and must be aware or should be aware of who inflicted the injury." Rozar v. Mullis, 85 F.3d 556, 562 (11th Cir. 1996).

***SPOKEO* STANDING; FACTA**

Muransky v. Godiva Chocolatier, Inc., No. 16-16486 (11th Cir. Oct. 30, 2020) (en banc)

In a long-awaited case concerning Article III standing, the Court held that the violation of a statute for which Congress has provided a remedy - in this case, a merchant's printing a credit card receipt without proper truncation of numbers in violation of the Fair and Accurate Credit Transactions Act's

amendments to FCRA - does not in itself confer Article III standing on a litigant. The litigant must instead plead and prove concrete and real injury resulting from the statutory violation. The Court thus vacated the district court's approval of a class-action settlement, which had been reached while the 2016 U.S. Supreme Court's Spokeo case was under submission and was prompted in part by an imminent decision in that case, due to a lack of subject matter jurisdiction over the case. Of no small moment, in this case Muransky was actually handed the credit card receipt, so there was no enhanced risk of identity theft resulting from the FACTA violation (which was historically the argument for concrete harm in FACTA cases). There are a total of 148 pages of opinion-writing in this case.

VOTING RIGHTS ACT; DISTRICTING

Wright v. Sumter County Bd. of Elections & Registration, No. 18-11510 (11th Cir. Oct. 27, 2020)

When the Georgia Legislature altered a County's School Board districting from 9 members (consisting of persons elected from each of 9 districts) to 7 members (5 elected from districts and 2 elected at-large), a local minister brought this action, alleging that the districting and the creation of the at-large seats diluted the strength of black voting, in violation of Section 2 of the VRA. The district court agreed after a four-day bench trial, and it enjoined further elections using the new system and, eventually, redrew districts into a seven-district format, with one representative to be elected from each. The County appealed. The Eleventh Circuit affirmed. The controlling law comes from Thornburg v. Gingles, 478 U.S. 30, 79 (1986), under which a plaintiff alleging vote dilution must satisfy “the three now-familiar Gingles factors: (1) that the minority group is ‘sufficiently large and geographically compact to constitute a majority in a single-member district;’ (2) that the minority group is ‘politically cohesive;’ and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority’s preferred candidate.” Once those are established, "[t]he statutory text directs us to consider the ‘totality of circumstances’ to determine whether members of a racial group have less opportunity than do other members of the electorate.” League of United Latin Am. Citizens v. Perry (LULAC), 548 U.S. 399, 425–26 (2006). The "totality of circumstances" in turn are evaluated using the nine so-called "Senate Factors" (from the Senate Report of the VRA). Application of these factors and the district court's fact-finding are reviewed only for "clear error" - and that is largely what this case turns on, the standard of review.

RECENT CRIMINAL DECISIONS

FROM THE UNITED STATES SUPREME COURT

INEFFECTIVE ASSISTANCE
Andrus v. Texas, 140 S. Ct. 1875 (2020): Capital murder defendant's defense counsel rendered ineffective assistance by failing to investigate mitigating evidence and by not rebutting aggravating evidence during the sentencing phase of trial.

HABEAS PETITIONS
Banister v. Davis, 140 S. Ct. 1698 (2020): Motion to alter or amend a court's judgment in federal habeas proceedings under Fed. R. Civ. P. 59(e) does not constitute a second or successive habeas petition under 28 U.S.C. § 2244(b).

INDIAN SOVEREIGNTY; TREATIES
McGirt v. Oklahoma, No. 18-9526 (U.S. July 9, 2020)
Under the Major Crimes Act, 18 U. S. C. §1153(a), land reserved for the Creek Nation since the 19th century remains "Indian country," such that prosecutions of Native Americans allegedly committing crimes in the "Indian country" must take place in federal court. (This apparently means that about half of the State of Oklahoma constitutes "Indian country" as well.)

FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

SENTENCING; FIRST STEP ACT
USA v. Tigua, No. 19-10177 (11th Cir. June 26, 2020): The Act's amendment of the statutory safety-valve provision "shall apply only to a conviction entered on or after the date of [its] enactment" on December 21, 2018. First Step Act § 402(b). Held: defendant who has pleaded guilty before enactment of the First Step Act but is sentenced after its enactment does not qualify for the safety valve.

FIRST STEP ACT; RESENTENCING
USA v. Denson, No. 19-11696 (11th Cir. June 24, 2020): The Act does not require district courts to hold a hearing with the defendant present before ruling on a defendant's motion for a reduced sentence under the Act.

FIFTH AMENDMENT
McKathan v. US, No. 17-13358 (11th Cir. Aug. 12, 2020): McKathan faced a "classic penalty situation" under *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984). when his probation officer asked him to answer questions that would reveal he had committed new crimes. Such a "classic penalty situation" arises when a person must choose between incriminating himself, on the one hand, or suffering government-threatened punishment for invoking his Fifth Amendment privilege to remain silent, on the other. In those circumstances, the statements are inadmissible in a subsequent prosecution for the crimes confessed, because in such circumstances the Fifth Amendment privilege is "self-executing."

FROM THE ALABAMA SUPREME COURT

BAIL
Ex parte Barnes, No. 1180802 (Ala. June 5, 2020): Trial court could not *sua sponte* revoke non-capital murder defendant's bail, because record did not show failure to comply with or violation of conditions

of release or any misrepresentations or omissions when bail was initially granted. Defendant's decision to change defense counsel and request to continue were not sufficient grounds to revoke his bail.

DOUBLE JEOPARDY
Ex parte Blackman, No. 1190105 (Ala. June 12, 2020): Trial court's *sua sponte* withdrawal of defendant's guilty plea subjected defendant to double jeopardy. Defendant could obtain mandamus relief even though petition was untimely filed, because double jeopardy claim implicated trial court's jurisdiction.

DIRECT CONTEMPT
Ex parte Dearman, No. 1180911 (Ala. June 26, 2020): The Court reversed the Circuit Court's order of direct contempt against attorney for interposing objection based on evidentiary rules at probation revocation hearing, at which Rules of Evidence do not apply. Attorney's actions were not sufficient to rise to the level of disturbing the business of the Court.

TERRY STOPS
Ex parte Gardner, No. 1190172 (Ala. Sept. 28, 2020): Officer's seizure of contraband during Terry stop, discovered by a "grabbing" and manipulation of the material while in the pocket of the defendant, contravened the "plain feel" doctrine, under which the object detected by a pat-down must be immediately apparent as being contraband.

FROM THE COURT OF CRIMINAL APPEALS

VEHICULAR HOMICIDE
State v. K.E.L., CR-18-1177 (Ala. Crim. App. July 10, 2020): Although defendant possessed standing to challenge the vehicular homicide statute, Ala. Code § 32-5A-190.1, as unconstitutionally vague, she was not entitled to dismissal of her charge: statute's phrase "may be guilty of homicide by vehicle" can be reasonably construed as mandatory (i.e., "is guilty") in order to effectuate the legislative intent.

FELONY MURDER; INEFFECTIVE ASSISTANCE
Contreras v. State, CR-19-0298 (Ala. Crim. App. July 10, 2020): Ala. Code § 13A-6-2(a)(3)'s residual clause defining felony murder as an act causing death while committing "any other felony clearly dangerous to human life" is not unconstitutionally vague, because Alabama "uses real-world conduct, not an idealized version of the crime," to gauge the crime's risk. Defense counsel was not ineffective by not raising this claim.

INEFFECTIVE ASSISTANCE
Brooks v. State, CR-16-1219 (Ala. Crim. App. July 10, 2020): Defense counsel was not ineffective by not challenging the legality of the defendant's arrest; arresting officers acted within limited scope of authority given to private citizens to arrest when they conducted a warrantless arrest outside of their jurisdiction.

RECKLESS MANSLAUGHTER
Grant v. State, CR-18-0355 (Ala. Crim. App. July 10, 2020): Trial court properly instructed the jury regarding the lesser-included offense of reckless manslaughter. The evidence showed that the defendant led another defendant to the victim's home, as if "leading the slaughterer to the lamb[,]" and the other defendant killed the victim.

HEARSAY
Baggett v. State, CR-18-1097 (Ala. Crim. App. July 10, 2020): Sex abuse victim's prior written statements were not hearsay under Ala. R. Evid. 801 (d)(1)(B), because he was subject to cross-examination and the statements were offered to rebut a charge of recent fabrication or improper influence or motive.

"STAND YOUR GROUND"
Robertson v. State, CR-18-0476 (Ala. Crim. App. July 10, 2020): Though it instructed the jury regarding self-defense, trial court erred by not also giving an instruction regarding the "Stand Your Ground" defense under Ala. Code § 13A-3-23 in this manslaughter case.

SOLICITATION TO COMMIT MURDER
Lang v. State, CR-18-0612 (Ala. Crim. App. May 29, 2020): The court reversed and rendered the defendant's conviction of solicitation to commit murder; evidence regarding his prior antagonism toward the victim did not establish his commission of the offense.

NEW TRIAL
Ex parte State, CR-19-0588 (Ala. Crim. App. May 29, 2020): State was not entitled to mandamus relief from the trial court's grant of defendant's timely motion for a new trial following his capital murder conviction; authority to grant a new trial falls "almost entirely" within trial court's discretion.

COMMUNICATION TO CLERGY PRIVILEGE
Lane v. State, CR-15-1087 (Ala. Crim. App. May 29, 2020): Trial court properly refused to permit defendant to invoke the communications-to-clergy privilege under Ala. R. Evid. 505. Chaplain could properly testify that the defendant sought his assistance in collecting proceeds of victim's life-insurance policy; conversation was for secular purposes not related to religious or spiritual concerns.

SIXTH AMENDMENT
Morgan v. State, CR-18-0169 (Ala. Crim. App. May 29, 2020): While defendant has a right under the Sixth Amendment to set the objective of his defense, defense counsel does not violate that right by advising the trial court, but not the jury, that he believes that self-defense, rather than absolute innocence, is his only viable defense.

SENTENCING; PLEA AGREEMENTS
Saulter v. State, CR-18-0986 (Ala. Crim. App. May 29, 2020): Trial court abused its discretion in refusing to permit defendant to withdraw guilty plea after not sentencing him consistent with his plea agreement.

TERRORIST THREAT
N.C. v. State, CR-17-1134 (Ala. Crim. App. May 29, 2020): Evidence that a juvenile posted photo of mass shooting in private social media conversation, then deleted it when he saw it was not received as a joke, did not suffice to constitute "terroristic threat" under Ala. Code § 13A-10-15 (a).

SEARCH AND SEIZURE
Earl v. State, CR-18-0332 (Ala. Crim. App. May 29, 2020): Use of drug-sniffing dog to sniff the door seams of an apartment constituted an illegal warrantless search.

PAROLE
P.C. v. State, CR-19-0297 (Ala. Crim. App. May 29, 2020): Defendant was entitled to withdraw guilty plea

to allowing a child to engage in the production of obscene matter, a violation of Ala. Code § 13A-12-196, because he was not advised that he would be ineligible for parole under Ala. Code § 15-22-27.3.

HEARSAY; PROBATION REVOCATION
Nguyen v. State, CR-19-0450 (Ala. Crim. App. Aug. 14, 2020): Hearsay evidence may not form the sole basis for revocation.

SANCTIONS
State v. Stafford, CR-19-0187 (Ala. Crim. App. Sept. 11, 2020): Circuit Court improperly dismissed assault charge arising from DFS's destruction of BAC results; "extreme sanction" of dismissal was not warranted where the potential prejudice from the loss of the evidence could be remedied by lesser means. There was no showing that the State acted in bad faith or that the defendant's trial would be rendered fundamentally unfair without the evidence.

RULE 404(b)
Horvat v. State, CR-18-1118 (Ala. Crim. App. Sept. 11, 2020): Evidence that defendant had entered the child victim's bedroom and bed on several occasions before the offenses took place was properly admitted to prove motive.

CONSENT
S.M.B. v. State, CR-18-1129 (Ala. Crim. App. Aug. 14, 2020): The court rejected juvenile's contention that victim consented to sexual intercourse, noting that other, lesser sexual activity to which the victim consented did not negate the State's evidence that she did not consent to intercourse.

RULE 32
Ex parte Mays, CR-19-0104 (Ala. Crim. App. Aug. 14, 2020): Trial court improperly rejected (on successive petition grounds) defendant's sixth petition where it raised a jurisdictional substantive-competency claim different than what had been alleged in a prior petition.

INEFFECTIVE ASSISTANCE
Coan v. State, CR-19-0138 (Ala. Crim. App. Sept. 11, 2020): Petition failed to show that counsel rendered ineffective assistance by "promising" the jury during opening statements that he would testify but ultimately resting the defense's case without his testimony, because no specific claim of prejudice was raised.

SPLIT SENTENCE
Smith v. State, CR-19-0621 (Ala. Crim. App. Sept. 11, 2020): Rule 32 granted on defendant's claim that he had been erroneously sentenced under the Split Sentence Act, Ala. Code § 15-18-8; trial court was required by § 15-18-8(a)(2) to impose three-year split terms on his twenty-year sentences rather than five-year split terms.

CONSTRUCTIVE POSSESSION
Brooks v. State, CR-18-1171 (Ala. Crim. App. Sept. 11, 2020): Defendant's close proximity to a cigarette pack containing illegal drugs within a vehicle, without more, was insufficient to show his constructive possession of the drugs.