ALABAMA SURVEY

An Annual Compendium of State-Centric Legal Developments*

i. Determining Partiality: Constructive Knowledge of Conflicts for Prospective Arbitrators

In *Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Co.*, the Supreme Court of Alabama held that actual knowledge of an arbitrator's conflict of interest was not required for a finding of partiality.[1] In deciding the case, the court interpreted the "evident partiality" ground for vacating an arbitration award embedded within Section 10(a)(2) of the Federal Arbitration Act[2] to be satisfied without an arbitrator's possession of actual knowledge of a conflict of interest; absent actual knowledge, constructive knowledge is sufficient.[3] The court's decision, premised on a Ninth Circuit case, *Schmitz v. Zilveti*,[4] adopted a "reasonable impression of partiality" standard as sufficient for achieving the "evident partiality" requirement of Section 10(a)(2).[5]

Prior to the economic downturn of late-2007 and 2008, the Municipal Workers Compensation Fund ("Fund") entered into investment contracts with both Morgan Keegan and Morgan Asset Management ("MAM"), whereby the Fund was to place its members'

---

* The Editors extend a special thanks to **Wilson F. Green** and **Marc A. Starrett** for their guidance, suggestions, and input regarding this year's *Survey* subjects. Mr. Green is a partner in Fleenor & Green LLP in Tuscaloosa. He is a summa cum laude graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000–09, Green served as adjunct professor at the law school, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation. Mr. Starrett is an Assistant Attorney General for the State of Alabama who has represented the State in hundreds of criminal appeals and habeas corpus proceedings, including the appeal of Bobby Frank Cherry from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.

[1] Mun. Workers Comp. Fund, Inc. v. Morgan Keegan & Co., No. 1120532, 2015 WL 1524911, at *27 (Ala. Apr. 3, 2015).

[2] 9 U.S.C. § 10(a)(2) (2012).

[3] *Mun. Workers Comp. Fund*, 2015 WL 1524911, at *27.

[4] Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994).

[5] *Mun. Workers Comp. Fund*, 2015 WL 1529411, at *27; *see also* Waverlee Homes, Inc. v. McMichael, 855 So. 2d 493, 508 (Ala. 2003).

payments with MAM, with Morgan Keegan serving as a broker-dealer to invest the placed funds.[6] Following the "Great Recession," the Fund suffered substantial losses in its invested funds, which the Fund alleged were due to the decisions of Morgan Keegan to invest its money in risky investments, particularly investments that had exposure to the subprime mortgage market.[7] Further, the Fund claimed that both Morgan Keegan and MAM failed to properly disclose material facts relating to the chosen investments.[8] As a result, the Fund filed arbitration proceedings against both companies, claiming, among other causes of action, breach of fiduciary duty, negligence, fraud, and violations of the Alabama Securities Act.[9]

Prior to enlistment on FINRA's roster of arbitrators, prospective arbitrators, pursuant to FINRA guidelines, submit disclosure reports including detailed biographical information.[10] While in the process of selecting an arbitrator, the parties possess the ability to review a prospective arbitrator's disclosure report.[11] The three panelists chosen answered on their respective questionnaires that no conflicts of interest existed; namely, that each had no ongoing or past business relationships with the Fund, MAM, or Morgan Keegan.[12] Following the arbitration proceedings, the panel issued an award in favor of Morgan Keegan and MAM, denying each of the Fund's claims.[13] Subsequently, the trial court overseeing the proceedings granted judgment confirming the panel's award.[14]

Following entry of judgment by the trial court, the Fund moved to have the award in favor of Morgan Keegan and MAM vacated on grounds that two of the chosen panelists had failed to disclose material and relevant information which may have affected their ability to be impartial.[15] Of particular concern was the relationship between one panelist, Kunis, and both Morgan Keegan and Morgan Keegan's counsel, the law firm of Greenberg Traurig.[16] After entry of the trial court's judgment, the Fund discovered that Kunis had been a partner and employee of an investment outfit, Maxim Group, which had a

---

[6] *Mun. Workers Comp. Fund*, 2015 WL 1524911, at *1.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at *2.
[11] *Id.*
[12] *See Mun. Workers Comp. Fund*, 2015 WL 1524911, at *4.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at *5.

close and ongoing relationship with Morgan Keegan.[17] Additionally, Maxim Group had retained Greenberg Traurig as its ongoing legal counsel.[18] Kunis disclosed neither fact during the arbitration panel selection phase.[19]

The Fund, in its motion to have the award vacated, relied on both FINRA disclosure rules and Section 10(a)(2) of the Federal Arbitration Act, arguing that Kunis's failure to properly disclose his past relationships with both Maxim Group and Greenberg Traurig constituted bias, thus providing proper grounds for vacating the award.[20] The trial court determined that prior to being selected as a panelist, Kunis had no specific, actual knowledge of Maxim Group's past affiliation with either Morgan Keegan or Greenberg Traurig.[21] Although the court stated that Kunis may have discovered the existence of the conflicts had he taken affirmative steps to investigate, it declined to find that constructive knowledge of the business relationships, and therefore bias, could be imparted to Kunis.[22] Consequently, the trial court found that no impression of bias on Kunis's behalf could be shown that was "definite, direct, and capable of demonstration."[23]

On appeal, the Supreme Court of Alabama examined the trial court's determination that actual knowledge of a conflict of interest by a panelist was the exclusive means of demonstrating "evident partiality" under Section 10(a)(2) of the Federal Arbitration Act.[24] Relying on its own precedent in *Waverlee Homes, Inc. v. McMichael*,[25] the court stated that any showing of bias under Section 10(a)(2) must be "*direct, definite, and capable of demonstration*, as distinct from a 'mere appearance' of bias that is remote, uncertain, and speculative."[26] In citing *Waverlee*, the court acknowledged that it had previously adopted the Ninth Circuit Court of Appeals' decision in *Schmitz v. Zilveti*[27] establishing a "reasonable impression of partiality" standard applicable to nondisclosure cases involving potential arbiters, distinct from cases involving a showing of "actual bias."[28]

---

[17] *Id.* at *4.
[18] *Mun. Workers Comp. Fund*, 2015 WL 1524911, at *5.
[19] *Id.* at *4.
[20] *Id.* at *5.
[21] *Id.* at *8.
[22] *Id.*
[23] *Id.*
[24] *See Mun. Workers Comp. Fund*, 2015 WL 1524911, at *19.
[25] 855 So. 2d 493 (Ala. 2003).
[26] *Mun. Workers Comp. Fund*, 2015 WL 1524911, at *19 (quoting *Waverlee Homes*, 855 So. 2d at 508).
[27] 20 F.3d 1043 (9th Cir. 1994).
[28] *See Mun. Workers Comp. Fund*, 2015 WL 1529411, at *19–20 (citations omitted).

Following announcement of the applicable standard, the court stated that because a "reasonable impression of partiality" would suffice to satisfy the "evident partiality" requirement of Section 10(a)(2), Kunis's actions would have to be re-examined to see if such an impression was established.[29] In so doing, the court determined that pursuant to FINRA guidelines, as a prospective arbitrator, Kunis was under a duty to make reasonable efforts to learn of and disclose the existence of "any circumstances which might preclude [Kunis] from rendering an objective and impartial determination in the proceeding."[30] Due to this ongoing duty, the court stated that constructive knowledge of the ongoing, extensive relationships between Maxim Group, Morgan Keegan, and Greenberg Traurig could properly be imparted onto Kunis.[31] Consequently, the court held that Kunis's constructive knowledge and failure to take affirmative steps to investigate established a "reasonable impression of partiality" which, when examined, displayed bias which was "direct, definite, and capable of demonstration," as required by *Waverlee*.[32] The court, upon making its finding that constructive knowledge could be imputed to Kunis, reversed the trial court's award in favor of Morgan Keegan and MAM, and remanded the case to the trial court for further proceedings relating to additional issues raised by the Fund on appeal.[33]

Following this decision, prospective arbitrators should take proactive care when discerning and disclosing potential conflicts of interest. In choosing to accept the duty-to-investigate approach adopted in the majority of United States Circuit Courts,[34] the Supreme Court of Alabama established a framework whereby the lack of actual knowledge of a conflict of interest will no longer suffice to defeat a challenge of partiality under Section 10(a)(2)[35] of the Federal Arbitration Act.[36] Adoption of the aforementioned framework imputing constructive knowledge of conflicts of interest on prospective arbitrators can be viewed as promoting over-disclosure should uncertainty arise as to the actual existence of such conflicts. Requiring such liberal disclosure strives to place each party to an arbitration proceeding on equal footing in choosing their panel, furthering equity and minimizing the potential for awards to be overturned on subsequent appeal.

---

[29] *Id.* at *27.
[30] *Id.*
[31] *Id.* at *28 (citing *Schmitz*, 20 F.3d at 1048–49).
[32] *See id*. (citations omitted).
[33] *Id.*
[34] *See, e.g.*, *Schmitz*, 20 F.3d at 1048.
[35] 9 U.S.C. § 10(a)(2) (2012).
[36] *See Mun. Workers Comp. Fund Inc.*, 2015 WL 1529411, at *27.

—Patrick J. Perry

ii. Cash or Check? Medium of Exchange Not a Fatal, Material Variance in Indictments for Stolen Funds

In *Hall v. State*[37] the Alabama Court of Criminal Appeals held the variance between an indictment alleging the theft of United States currency and evidence of check theft presented at trial is not a material variance that affects the substantial rights of a defendant.[38] The ruling affirmed the circuit court's judgment and overturned several prior state court holdings establishing that checks are not encompassed by the terms "lawful currency" or "money," and that where an indictment alleges theft of currency or money while the evidence established the theft of checks, the variance is considered fatal.[39]

Hall held the position of commander at a chapter of the Disable American Veterans ("DAV"), along with three other elected officers.[40] The bylaws of the organization state that each elected officer will render his services gratuitously, without reimbursement for any expenses unless expressly authorized by the commander at a regular chapter meeting.[41] Additionally, the bylaws state that no officer has the authority to incur expenses without a majority vote of the chapter at a regular meeting to approve the expenditure.[42] At one meeting, Hall announced he had solicited a donation of $1,500 from the Dothan mayor that was to reimburse Hall for expenses he incurred in the performance of his duties as commander.[43] The junior vice commander told Hall at the meeting that he could not claim the money for himself without properly following the bylaws of the DAV.[44] Hall failed to provide receipts or any documentation itemizing the expenses he wished to be reimbursed for, and it was not approved at the meeting.[45] However, on March 28, 2013, Hall cashed a check from the chapter in the amount of $1,500 that was signed by him and coun-

---

[37] No. CR-14-0627, 2015 WL 4876357 (Ala. Crim. App. Aug. 14, 2015).
[38] *Id.*
[39] *See Ex parte* Airhart, 477 So. 2d 979, 980–81 (Ala. 1985); Delevie v. State, 686 So. 2d 1283, 1285 (Ala. Crim. App. 1996); Airhart v. State, 388 So. 2d 211, 213 (Ala. Crim. App. 1979).
[40] *Hall*, 2015 WL 4876357 at *1.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at *2.

tersigned by the chapter's treasurer.[46] Upon discovering the check, the other officers demanded Hall reimburse the $1,500, but Hall refused.[47] On February 20, 2014, the Houston County Grand Jury charged Hall with second-degree theft, stating Hall "knowingly obtain[ed] or exert[ed] unauthorized control of UNITED STATES CURRENCY."[48]

Hall's counsel moved for a judgment of acquittal claiming a fatal variance existed between the indictment, which alleged theft of U.S. currency, and the evidence produced at trial, which established he had improperly taken a check.[49] Hall argued the evidence did not establish that he knowingly obtained or exerted unauthorized control over currency.[50] The circuit court denied the motion, and the jury found Hall guilty of second-degree theft of property.[51] Hall's sole contention on appeal to the Alabama Court of Criminal Appeals was that his motion for judgment of acquittal was improperly dismissed because of the existence of a fatal variance between the indictment and the evidence at trial that was prejudicial to his substantial rights.[52]

The court of criminal appeals upheld the circuit court in claiming the variance was not material by following the recent precedent set by the Alabama Supreme Court.[53] In *State v. Roffler*[54] the court held that an indictment is legally sufficient even if it does not include the medium of exchange so long as the amount taken is alleged.[55]

The court noted the medium of exchange involved does not determine the value of the amount of funds, and the interchangeability of the various mediums makes describing the medium of exchange in the indictment immaterial.[56] The court of criminal appeals found the reasoning in *Roffler* to be relevant and binding in determining whether a variance is fatal.[57] Because the *Roffler* court found the listing of the medium of exchange on an indictment to be immaterial, the variance between Hall's indictment alleging a theft of currency and the evidence proving a theft of a check could not be considered a material

---

[46] *Hall*, 2015 WL 4876357 at *1.
[47] *Id.* at *2.
[48] *Id.* at *1.
[49] *Id*. at *2.
[50] *Id.*
[51] *Id.*
[52] *Hall*, 2015 WL 4876357 at *2.
[53] *Id.* at *5 (citing State v. Roffler, 69 So. 3d 255, 229–31 (Ala. 2010)).
[54] 69 So. 3d 225.
[55] *Id.* at 231.
[56] *Id.* at 230–31.
[57] *Hall*, 2015 WL 4876357 at *5.

variance that affected his substantial rights.[58]

Although Hall's indictment alleged his theft of U.S. currency and the evidence at trial proved he exerted unauthorized control over a check, the court held this was not a material variance that prejudiced his ability to prepare his defense, and his conviction would not be overturned.[59] This cemented the ruling in *Roffler* that the medium of exchange is immaterial in an indictment.[60] As long as the amount of money is identified, a defendant has adequate notice of the charges in order to prepare his or her defense and to avoid double jeopardy.

—David Manush

iii. AMLA Inapplicable in Allegations of Health-Care Provider Sexual Misconduct that Bears No Connection to Health-Care Services Provided

In *Ex parte Vanderwall*[61] the Alabama Supreme Court held that the Alabama Medical Liability Act ("AMLA") does not apply to claims of sexual misconduct against health-care providers when the sexual assault bears no relation to the medical services provided.[62] *Vanderwall* limits the application of the AMLA to medical malpractice actions pertaining to *medical* injuries and overrules prior Alabama Supreme Court decisions regarding sexual assault.[63]

On November 12, 2009, M.C. arrived for back pain treatment with physical therapist Vanderwall at Tallassee Rehabilitation, P.C.[64] Vanderwall led M.C. to an examination room, where he instructed her to put on a gown.[65] M.C. took off her jacket and shirt, but left her bra and pants on underneath the gown.[66] M.C. stated that when Vanderwall returned to the room he removed her bra, pants, and the gown, and "placed his fingers into her buttocks and genitals."[67] M.C. testified that she was "shocked and scared by Vanderwall's actions

---

[58] *Id.*
[59] *Id.*
[60] *See id.*
[61] No. 1130036, 2015 WL 5725153 (Ala. Sept. 30, 2015).
[62] *Id.* at *13; The AMLA governs the burden of proof required for claims against health care providers. *Id.* The AMLA holds the standard of proof shall be proof by substantial evidence, and limits discovery for plaintiffs against health-care providers. *See* ALA. CODE §§ 6-5-548, 6-5-549, 6-5-551 (2014).
[63] *Vanderwall*, 2015 WL 5725153, at *10, 14 (Murdock, J., concurring)
[64] *Id.* at *1 (majority opinion).
[65] *Id.*
[66] *Id.*
[67] *Id.*

and that she did not know what to do."[68] Vanderwall denied the alleged misconduct and testified "any and all transactions and interactions . . . were in connection with the rendition of physical therapy services."[69]

M.C. filed a complaint against Vanderwall and Tallassee Rehabilitation claiming assault and battery against Vanderwall and alleging negligent or wanton hiring against Tallassee Rehabilitation, alleging that Vanderwall "molested at least two other women in 2009 while administering physical therapy" treatment.[70] In addition to the complaint, M.C. propounded interrogatories, two of which mentioned the previous sexual abuse.[71] On August 30, 2010, Vanderwall filed objections to the discovery requests, claiming the AMLA prohibits discovery regarding "any other act or omission or from introducing at trial evidence of any other act or omission."[72] In a motion to compel discovery, M.C. contended that because the action was for assault and battery rather than a medical malpractice case, the AMLA would not be applicable to deny the pertinent discovery requests.[73]

The trial court granted M.C. partial summary judgment, finding the AMLA did not apply to the case at bar.[74] Additionally, the trial court granted M.C.'s motion to compel discovery.[75] Vanderwall then appealed the partial summary judgment and petitioned the Alabama Supreme Court for a writ of mandamus directing the trial court to vacate both the partial summary judgment and the order granting M.C.'s motion to compel discovery of other acts of sexual misconduct.[76]

The court denied Vanderwall's appeal, determining a declaratory judgment is not a final judgment and thus is not appealable.[77] The court asserted such a determination does not constitute an adjudication of a claim for relief.[78] Furthermore, the court found a writ of mandamus was inappropriate because Vanderwall would have an adequate remedy by way of appeal once a final judgment was entered.[79]

Most notably, the Alabama Supreme Court diverged from its previous interpretation of the AMLA and its application in suits

---

[68] *Id.*
[69] *Vanderwall*, 2015 WL 5725153, at *1.
[70] *Id.*
[71] *Id.*
[72] *Id.* at *2.
[73] *Id.*
[74] *Id.* at *3.
[75] *Vanderwall*, 2015 WL 5725153, at *3.
[76] *Id.*
[77] *Id.* at *5.
[78] *Id.*
[79] *Id.* at *6.

against health-care professionals.[80] Previously, the Alabama Supreme Court would apply the AMLA to sexual misconduct cases of health-care providers if: 1) the sexual assault occurred within the doctor's office; and 2) the defendant was providing professional services.[81] For example, in *Mock v. Allen*, the court held actions that occurred during the course of medical treatment are covered under the AMLA.[82] Thus, sexual assault that occurred during medical treatment would be held to standards of proof governed by the AMLA.[83] In *Vanderwall*, however, the court stated, "We cannot in good conscience . . . adhere to the rule articulated in *Mock* and *O'Rear* . . . the doctrine of stare decisis does not prevent this Court's reexamination of [this implausible rule]."[84] The court continued, "We do not believe the legislature intended for the protections afforded under the AMLA to apply to health-care providers who are alleged to have committed acts of sexual assault; such acts do not, by any ordinary understanding come within the ambit of 'medical treatment' or 'providing professional services.'"[85] Thus, because M.C.'s sexual misconduct claims against Vanderwall do not qualify as a provision of medical services, the court found the AMLA does not apply in this case.[86] Therefore, the court dismissed Vanderwall's appeal of the partial summary judgment and denied the petition for a writ of mandamus.[87]

The Alabama Supreme Court ultimately rejected all prior case law barring discovery of sexual misconduct that plainly occurs beyond the scope of medical treatment by the AMLA.[88] Furthermore, the court's decision in *Vanderwall* is consistent with decisions in other jurisdictions that exclude sexual molestation from the ordinary understanding of providing medical services.[89] Moving forward, *Vanderwall* will benefit plaintiffs alleging sexual misconduct against health-care providers, and will hinder health-care providers who wish to evade discovery.

—Anna Akers

---

[80] *Id.* at *9–10.
[81] *Vanderwall*, 2015 WL 5725153, at *10.
[82] *Id.* at *9–10.
[83] *Id.*; *see also* Mock v. Allen, 783 So. 2d 828 (Ala. 2000), *abrogated by Vanderwall*, 2015 WL 5725153; O'Rear v. B.H., 69 So. 3d 106 (Ala. 2011), *abrogated by Vanderwall*, 2015 WL 5725153.
[84] *Vanderwall*, 2015 WL 5725153 at *10.
[85] *Id.*
[86] *Id.* at *11.
[87] *Id.* at *14.
[88] *Id.*
[89] *Id.* at *12–13.

iv. Indefensible Waiver of Closing Argument Constitutes Deficient Performance to Support Ineffective Assistance of Counsel Claim

In *Ex Parte Whited*,[90] the Supreme Court of Alabama held that a waiver of closing argument by defense counsel may constitute ineffective assistance of counsel.[91] The potential effect of *Ex Parte Whited* should not be understated, as waiver of closing argument is a strategic trial decision, and ineffective strategic trial decisions typically do not result in the grant of a new trial. Looking forward, *Ex Parte Whited* may well have opened the door to an uptick in litigation whereby convicted individuals seek new trials due to ineffective strategic decisions made by trial counsel.

Defendant Howard Carl Whited allegedly sodomized a thirteen-year-old girl at her home on May 19, 2005.[92] The young girl, referred to as "M.H.", testified that Whited and two other men dragged her from her bed and subjected her to several non-consensual sexual acts.[93] During Whited's trial, his attorney presented numerous pieces of exculpatory evidence, including evidence that established an alibi on the night in question and medical evidence that M.H. and the alleged co-assailants had a sexually transmitted illness that Whited did not possess.[94] Further, on cross-examination, M.H. testified that she could not see the faces of the men who dragged her from her bed, as it was dark in the room.[95]

At the close of trial, the prosecutor gave an impassioned closing argument, during which the prosecutor discussed the highly vulnerable state of a thirteen-year-old girl in her own home, and recounted every gruesome detail of the alleged crime.[96] At the end of the closing argument, the prosecutor tearfully asked the jury to remember how "ugly" Whited's actions were, and classified those actions as a "crime."[97] Following the prosecution's closing argument, Whited's defense attorney waived his closing argument in a purportedly strategic move.[98] The jury returned a verdict finding Whited guilty of first-

---

[90] No. 1130686, 2015 WL 480837 (Ala. Feb. 6, 2015).
[91] *Id.* at *16.
[92] *Id.* at *1–2.
[93] *See id.* at *2.
[94] *See id.* at *2–3.
[95] *Id.* at *2.
[96] *Whited*, 2015 WL 480837, at *14–15.
[97] *Id.* at *15.
[98] *Id.* at *5.

degree sodomy.[99] Whited filed a motion for a new trial based on multiple ineffective-assistance-of-counsel claims, including a claim that his counsel was ineffective by waiving his closing argument.[100]

The Court of Criminal Appeals held that, according to the *Strickland* standard announced by the United States Supreme Court, Whited's counsel was not ineffective.[101] Quoting *Strickland*, the court stated that it must give a "'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight."[102] Furthermore, the Criminal Court of Appeals stated that the fact that trial counsel could not recall when he made the decision to waive closing argument was inconsequential, because "[i]f the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."[103]

Whited petitioned the Supreme Court of Alabama for a writ of certiorari, and the court granted the petition.[104] Quoting the two-prong test of *Strickland*, the Supreme Court of Alabama stated that:

> [T]he defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[105]

The court also maintained that when it reviews a claim of ineffective assistance of counsel, it "indulges a strong presumption that counsel's conduct was appropriate and reasonable."[106]

However, the court found that Whited's trial counsel decided to waive his closing argument before hearing the prosecution's closing argument, and as a result, Whited's attorney could not have made an informed "strategic decision."[107] The court found this particularly problematic in light of the State's passionate closing argument and the

---

[99] *Id.* at *4.
[100] *Id.*
[101] *Id.* at *6 (citations omitted).
[102] *Whited*, 2015 WL 480837, at *5 (quoting Strickland v. Washington, 466 U.S. 688, 689 (1984)).
[103] *Id.* (quoting Davis v. State, 9 So.3d 539, 546 (Ala. Crim. App. 2008)).
[104] *Id.* at *1.
[105] *Id.* at *7 (quoting *Strickland*, 466 U.S. at 687).
[106] *Id.* (citations omitted).
[107] *Id.* at *11.

paucity of reasons Whited's trial attorney gave for waiving his closing argument.[108] The court reiterated the lower court's noting that the purpose of waiving closing argument is to prevent the prosecution from making a passionate and persuasive rebuttal, but since the prosecution had already made a passionate and persuasive closing argument against Whited, closing argument for the defense was needed in this instance.[109] Furthermore, Whited had several persuasive arguments against his guilt, including medical evidence and an alibi.[110] These considerations tended to satify the first prong of *Strickland*.

In sum, the court stated that Whited's trial counsel failed to "'marshal the evidence' in his favor by presenting to the jury the rather strong arguments available to Whited from which the jury could determine the relative weaknesses of the State's case . . . ."[111] So, due to the strength of Whited's exculpatory evidence, there was a "reasonable probability that . . . the result of the proceeding would have been different."[112] Thus, the second prong of *Strickland* was fulfilled.[113] The Court, holding that the two *Strickland* prongs were satisfied, reversed and remanded the case, and granted Whited's motion for a new trial.[114]

The Supreme Court of Alabama's decision may have unintentionally far-reaching implications of opening the door to collateral attacks of certain convictions based on the inadvisable trial tactics of counsel. There were, however, a number of strong arguments that Whited's attorney could have made in support of his client's innocence: no physical evidence implicated Whited; important exonerating evidence was not recounted for the jury; there were key inconsistencies in the victim's testimony; etc. At a minimum, attorneys representing clients accused of sexual felonies and other crimes that are especially emotional or sensitive should take care not to prematurely or irresponsibly forgo closing arguments, as the court made clear that "the importance of a closing argument cannot be overstated."[115]

—Hayden Bashinski

---

[108] *Whited*, 2015 WL 480837, at *16.
[109] *Id.* at *15–16.
[110] *Id.* at *16.
[111] *Id.*
[112] *Id.* (quoting *Strickland*, 466 U.S. at 694).
[113] *See id.*
[114] *Whited*, 2015 WL 480837, at *16.
[115] *Id.* at *8.

v. Plaintiffs Must Directly Challenge Delegation Provisions in Arbitration Agreements to Challenge Arbitrability

In *Parnell v. CashCall, Inc.*[116] the Eleventh Circuit Court of Appeals held that absent a "direct challenge" that separately attacks the validity of the arbitration agreement from the validity of the contract as a whole, courts must treat the agreement's provision as valid and allow the arbitrator to determine the issue of arbitrability.[117] The issue before the Eleventh Circuit was not an issue of first impression. In its decision, the Eleventh Circuit overruled the preceding district court decision that denied CashCall's motion to stay proceedings and compel arbitration, and ruled on the validity of the arbitration agreement.[118]

Prior to filing suit against CashCall, Joshua Parnell was experiencing "less-than-ideal" financial circumstances when he witnessed a television advertisement for short-term loans from a South Dakota company, Western Sky Financial, LLC ("Western Sky").[119] After seeing the advertisement by Western Sky, Mr. Parnell went to his computer, applied for a loan, and was approved for a loan of $1000 within 10 minutes of his application.[120] When Mr. Parnell received all necessary paperwork from Western Sky, he filled out all needed information and signed all necessary pages that included a document titled "Western Sky Consumer Loan Agreement" ("Loan Agreement").[121] The Loan Agreement included certain terms of the agreement including the annual percentage rate, 232.99%, and the finance charge.[122] The most important aspect of the Loan Agreement to the case was the agreement to arbitrate any potential disputes between the parties.[123] Under the subsection "*Arbitration Defined,*" the arbitration agreement defined "dispute" as "any controversy or claim between you and Western Sky or the holder or servicer of the note."[124] Furthermore, the arbitration agreement refined the definition of "dispute" to include "any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement."[125]

Prior to making his first repayment, Mr. Parnell was informed by

---

[116] 804 F.3d 1142 (11th Cir. 2015).
[117] *Id.* at 1148.
[118] *Id.* at 1146.
[119] *Id.* at 1144.
[120] *Id.*
[121] *Id.* at 1144–46.
[122] *Parnell*, 804 F.3d at 1145.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 1145, 1148.

Western Sky that his debt was transferred to CashCall.[126] Parnell filed suit in state court after making his last payment on the loan.[127] He alleged that CashCall and Western Sky exploited tribal sovereign immunity and illicitly avoided federal and state regulation.[128] Subsequently, CashCall removed the case to the Northern District of Georgia and made a motion to compel arbitration.[129] The district court denied CashCall's motion and ruled that it had jurisdiction to determine the validity of the arbitration agreement and contract as a whole.[130]

In overruling the district court, the Eleventh Circuit illustrated that there is "a clear presumption—'a national policy'—in favor of arbitration."[131] In addition, the Eleventh Circuit stated that the Federal Arbitration Act ("FAA") governs the loan agreement because the parties conducted their business through the means of interstate commerce.[132] As such, the Supreme Court of the United States has held that parties may agree to commit threshold determinations to an arbitrator, such as whether the agreement is valid and enforceable.[133] The Supreme Court has also stated that these "delegation provisions" are severable from the underlying arbitration agreement and thus, the plaintiff must "challenge the delegation provision *specifically*."[134] Therefore, when an arbitration agreement contains a delegation provision and the plaintiff raises a challenge to the contract as a whole, federal courts may not review the plaintiff's claim because it has been committed to the power of the arbitrator.[135]

In furthering its holding, the Eleventh Circuit stated that "[w]hen federal courts interpret arbitration agreements, state contract law governs and directs the courts' analyses of whether the parties committed an issue to arbitration."[136] Upon examining the arbitration using Georgia's "plain meaning rule," the Eleventh Circuit found that the arbitration agreement contained an express delegation provision that

---

[126] *Id.* at 1145.
[127] *Id.*
[128] *Parnell*, 804 F.3d at 1145; *see* GA. CODE ANN. § 16–17–2 (2015).
[129] *Parnell*, 804 F.3d at 1145.
[130] *Id.* at 1145–46.
[131] *Id.* at 1146 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)); *accord* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 338–39 (2011); Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010); Inetianbor v. CashCall, Inc. 768 F.3d 1346, 1349 (11th Cir. 2014).
[132] *Parnell*, 804 F.3d at 1146; *see* 9 U.S.C. § 2 (2012).
[133] *Parnell*, 804 F.3d at 1146; *see Rent-A-Center*, 561 U.S. at 68–70.
[134] *Parnell*, 804 F.3d at 1146; *see Buckeye*, 546 U.S. at 445; *Rent-A-Center*, 561 U.S. at 72.
[135] *Parnell*, 804 F.3d at 1146–47.
[136] *Id.* at 1147 (citations omitted).

was "capable of only one reasonable interpretation."[137]

In its holding that a plaintiff must "challenge the delegation provision specifically," the Eleventh Circuit has furthered the previous holdings of the Supreme Court and made them more concrete within the Eleventh Circuit.[138] The decision from *Parnell v. CashCall* will likely have a marginal effect on the way Alabama courts handle jurisdictional questions in determining the validity of the arbitration agreement because the Alabama Supreme Court has found similar opinions of the Eleventh Circuit persuasive.[139] The Eleventh Circuit, in the hopes of furthering judicial economy, instructed the lower court to abide by the terms of the contracted for agreement.[140]

—Christian W. Borek

vi. Applicability of Alabama's "Savings Clause" to "Derivative" Claims

In *Limon v. Sandlin*[141] the Alabama Supreme Court reversed and remanded a trial court's Rule 12(b)(6) dismissal of a party's fraud, negligence, and other tort-based claims on statute-of-limitations grounds as error,[142] holding that all of the plaintiffs' claims could be saved under the tolling provision in Section 6-2-3 of the Alabama Code.[143] This ruling is noteworthy because the Supreme Court allowed all claims, not solely the fraud claim, to be saved under the tolling provision.[144]

Evangeline and Eladio Limon, the plaintiffs and parents of a minor girl, sued minor boy named Will, along with his parents, William Ellis Ogburn, Sr. and Sandra Sandlin.[145] The plaintiffs' daughter, a minor, was romantically involved with Will, and "during the course of their relationship, [she] became pregnant by [him]."[146] In December 2011, the defendants obtained Mr. and Mrs. Limon's permission

---

[137] *Id.*; *see* City of Decatur v. DeKalb Cty., 713 S.E.2d 846, 849 (Ga. 2011) ("if the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, that interpretation must control . . . .").

[138] *See Parnell*, 804 F.3d at 1147.

[139] *See* CitiFinancial Corp. v. Peoples, 973 So. 2d 332, 338–40 (Ala. 2007).

[140] *Parnell*, 804 F.3d at 1149.

[141] No. 1140544, 2015 WL 6443202 (Ala. Oct. 23, 2015).

[142] *Id.* at *4.

[143] *Id.* at *1 n.5, *4 ("In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action." (citing ALA. CODE § 6-2-3 (2014))).

[144] *Id.* at *4.

[145] *Id.* at *1.

[146] *Id.*

to take their daughter on a trip to New York, ostensibly to meet some of Will's family and to watch Broadway shows, but in reality to have an abortion performed without parental consent.[147] Unlike Alabama, no parental-notification law for minors seeking an abortion existed in New York at the time.[148] Upon returning from the trip, the daughter isolated herself from her parents, started using drugs, and dropped out of school.[149] Despite their best efforts, this behavior prevented the plaintiffs from finding out the actual events of the December 2011 New York trip until May 2013.[150]

On April 17, 2014, the plaintiffs sued the defendants for fraud, negligence, outrage, and "'interference with parental rights.'"[151] Plaintiffs alleged that they were unable to discover the injury within two years of the abortion because of their daughter's psychological difficulty and because they lacked actual knowledge of the real reason for the New York trip.[152] Will and his mother, Sandra Sandlin, moved for a more definite statement regarding the fraud count.[153] They also averred that the plaintiffs could have discovered the truth about the New York trip had they inquired further about the daughter's noticeably altered behavior.[154] In June 2014, the trial court dismissed all claims except for the fraud claim as untimely.[155] The trial court then dismissed the fraud count on the grounds that it lacked the requisite specificity under Rule 9(b) of the Alabama Rules of Civil Procedure.[156] After the plaintiffs filed an amended complaint, the trial court dismissed the entire action with prejudice.[157]

Applying the standard of review established in *Nance v. Matthews*, where a 12(b)(6) "dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief,"[158] the Alabama Supreme Court reversed and remanded the case.[159] The court relied upon

---

[147] *Limon*, 2015 WL 6443202, at *1.

[148] *Id.*; *see* ALA. CODE § 26-21-3 (2009) ("[N]o physician shall perform an abortion upon an emancipated minor unless the physician or his or her agents first obtain the written consent of either parent or the legal guardian of the minor.").

[149] *Limon,* 2015 WL 6443202, at *1.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Limon,* 2015 WL 6443202, at *2.

[156] *Id.* (citing ALA. R. CIV. P. 9(b)).

[157] *Id.*

[158] *Id.* at *2 (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

[159] *Id.* at *5.

its prior ruling in *DGB, LLC v. Hinds*, noting that the plaintiffs had "alleged [much] more than just the circumstances of their discovery of their claims and that the defendants concealed them."[160] Because § 6-2-3 applies to the fraudulent concealment of the existence of a cause of action, it may apply even to claims not related to fraud if the plaintiffs adequately plead the fraudulent concealment.[161]

Following this decision, lower courts deciding cases based upon fraud or fraudulent concealment will have to be vigilant to consider all that is specifically alleged in initial pleadings. The Alabama Supreme Court's holding in *Limon* did not establish a new standard for reviewing Rule 12(b)(6) dismissals regarding fraudulent concealment claims.[162] However, the court did strengthen and reaffirm the standard set forth in prior decisions, mainly that the tolling provision's savings clause applies not only to fraud counts, but also to the other non-fraud tort based claims set forth in the complaint.[163]

—Rebecca M. Guidry

vii. The Child Sexual Abuse Victim Protection Act of 1989 & the Confrontation Clause

In *D.L.R. v. State*[164] the Alabama Court of Criminal Appeals held that an Alabama trial court did not violate D.L.R.'s rights under the Sixth Amendment Confrontation Clause or Section 15–25–32(1) of the Alabama Code by admitting out-of-court statements made by a child under twelve, who was the alleged victim of sexual abuse as defined in Section 13A–6–69.1 of the Alabama Code.[165] In addition, the Alabama Court of Criminal Appeals agreed with the trial court's determination that there was sufficient evidence to deny a motion for a judgment of acquittal.[166] This case is important because the holding supports a broad interpretation of Section 15-25-31 of the Alabama Code, allowing the admission of *any* out-of-court statements made by an alleged sexual abuse victim under twelve, provided that the child is in court and subject to cross examination by the opposing party.[167]

D.L.R. was convicted of sexually abusing his four-year-old daughter, "K.R.", in 2014.[168] At the time of the trial, K.R. was seven

---

[160] *Id.* at *4 (quoting DGB, LLC v. Hinds, 55 So. 3d 218, 226–27 (Ala. 2010)).
[161] *Limon,* 2015 WL 6443202, at *4; *see DGB*, 55 So. 3d at 225–26.
[162] *See Limon,* 2015 WL 6443202, at *4.
[163] *See id.* at *4–5.
[164] No. CR-13-1530, 2015 WL 4876364 (Ala. Crim. App. Aug. 14, 2015).
[165] *Id.* at *4–5; *see* ALA. CODE § 13A-6-69.1 (2015); § 15-25-31 (2011).
[166] *D.L.R.*, 2015 WL 4876364, at *7–8.
[167] *Id.* at *5.
[168] *Id.* at *1.

years old.[169] The prosecution called numerous witnesses, all of whom testified regarding out of court statements made by K.R. at various times. K.R.'s daycare teacher and the owner of the daycare testified that K.R. told them through words and pictures that D.L.R. had "put his butt on her face" and "would take his [K.R. pointed to a drawing of a penis] and put it in [her] mouth."[170] The pictures that K.R. had drawn at daycare were admitted into evidence.[171]

"M.S.", K.R.'s maternal grandmother and guardian at the time of trial, was also called as a witness and provided testimony that K.R. was distraught for five or six months after moving away from her father.[172] In addition, M.S. testified that K.R. previously stated that her father "hurted [sic] her," and that one time, D.L.R. took K.R. to a theme park and promised that he would never hurt her again.[173] In addition to the foregoing testimony, the trial court admitted various other hearsay statements made by K.R., elicited from testimonies from "A.R." (K.R.'s mother) and an investigator for the Sheriff's department.[174]

Between the witnesses called by the prosecution, K.R. was repeatedly called as a witness.[175] The direct and cross-examination testimony elicited from K.R. was frequently difficult to understand and often contradictory.[176] Despite K.R.'s numerous times on the witness stand, she testified "she did not remember making the statements to her maternal grandmother or to [the daycare staff] concerning the alleged abuse by her father."[177] Further, she stated that "she did not remember talking to [the investigator], [counselors], or to anybody else about the alleged abuse by her father."[178] Lastly, K.R. testified that "she did not remember drawing any of the pictures concerning the alleged abuse."[179]

On appeal D.L.R. argued that K.R.'s out-of-court statements should not have been admitted because the admission of the statements violated his rights under the Confrontation Clause.[180] However, Alabama has a special statute that allows these out-of-court state-

---

[169] *Id.*
[170] *Id.* at *1, *3.
[171] *Id.*
[172] *D.L.R.*, 2015 WL 4876364, at *1, *3.
[173] *Id.*
[174] *See id.* at *3–4.
[175] *Id.* at *1, *4.
[176] *Id.* at *1–2, *4.
[177] *Id.* at *4.
[178] *D.L.R.*, 2015 WL 4876364, at *4.
[179] *Id.*
[180] *Id.*

ments under certain circumstances for children who are victims of sexual abuse.[181] Section 15–25–31 of the Alabama Code states:

> An out-of-court statement made by a child under 12 years of age at the time of the proceeding concerning an act that is a material element of any crime involving child physical offense, sexual offense, and exploitation, as defined in Section 15–25–39, which statement is not otherwise admissible in evidence, is admissible in evidence in criminal proceedings, if the requirements of Section 15–25–32 are met.[182]

Further, Section 15–25–32 of the Alabama Code provides:

> An out-of-court statement may be admitted as provided in Section 15–25–31, if: (1) The child testifies at the proceeding, or testifies by means of video tape deposition as provided by Section 15–25–2, or testifies by means of closed circuit television as is provided in Section 15–25–3, and at the time of such testimony is subject to cross-examination about the out-of-court statements.[183]

Thus, the court reasoned that the Confrontation Clause did not place any limitations on the admission of out-of-court statements, provided the specific requirements of Section 15-25-32 are met.[184] The court reasoned that, because K.R. testified at trial, "neither the Confrontation Clause of the Sixth Amendment nor § 15–25–32(1) barred the admission of her out-of-court statements."[185]

While D.L.R. argued that K.R. was not actually subject to cross-examination because she repeatedly testified that she did not remember the out-of-court statements, the court differentiated between an *effective* cross-examination and the *opportunity* to cross-examine,[186] ultimately holding that D.L.R.'s rights under the Sixth Amendment Confrontation Clause were not violated because K.R. was indeed subject to cross-examination.[187]

D.L.R.'s third argument on appeal was that the trial court erred in not granting his motion for acquittal.[188] D.L.R. stated in his brief, "[i]n the instant case, there is not one single instance when the child states that [D.L.R.] touched her sexual or other intimate parts. By the clear meaning of the statute, the child's sexual parts must have been

---

[181] *See* ALA. CODE § 15-25-31 (2011).
[182] *Id.*
[183] § 15-25-32(1).
[184] *D.L.R.*, 2015 WL 4876364, at *5.
[185] *Id.*
[186] *Id.* (internal citations omitted) (citing King v. State, 929 So.2d 1032, 1037 (Ala. Crim. App. 2005)).
[187] *Id.* ("The fact that K.R. testified that she could not remember her out-of-court statements does not mean that defense counsel did not have the opportunity to cross-examine her or that she was not 'subject to cross-examination.'").
[188] *Id.* at *6.

touched."[189] The Alabama Code states: "[a] person commits the crime of sexual abuse of a child less than 12 years old if he or she, being 16 years old or older, subjects another person who is less than 12 years old to sexual contact."[190] Further, sexual contact is defined as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party."[191] In order to convict D.L.R. of sexual abuse, the prosecutor was required to show that D.L.R. subjected K.R. to sexual contact.[192] The court clarified Section 13A-6-60(3) of the Alabama Code, stating that the person who subjects a minor to sexual contact does not have to be the same person who touches the sexual parts.[193] Therefore, D.L.R. could be convicted regardless of whether or not he personally touched anything.[194] Satisfied that the prosecution met its burden of proof, the Alabama Court of Criminal Appeals held that the trial court did not err in denying D.L.R.'s motion for acquittal.[195]

Using the above reasoning, the court found that the Confrontation Clause guarantees the right to a cross-examination, but not an *effective* cross-examination:[196] "The fact that K.R. testified that she could not remember her out-of-court statements does not mean that defense counsel did not have the opportunity to cross-examine her or that she was not 'subject to cross-examination.'"[197] In affirming the trial court's rulings, the Alabama Court of Criminal Appeals essentially reiterated that Alabama's noted statutory hearsay exceptions for statements made by underage victims of sexual misconduct satisfy the Confrontation Clause. Neither the state statutes nor the Sixth Amendment barred the admission of the seven-year-old victim's hearsay statements in this case, as no restrictions were placed on the defendant's ability to question her.

—Adam Buddenbohn

vii. Statute Criminalizing Carrying of A Pistol on Private Property Failed to Provide for A Punishment, & Accordingly Unconstitutional

In *Ex parte Tulley*[198] the Alabama Supreme Court reversed the

---

[189] *Id.* (citation omitted).
[190] ALA. CODE § 13A–6–69.1 (2015).
[191] § 13A–6–60(3).
[192] *D.L.R.*, 2015 WL 4876364, at *7.
[193] *Id.*
[194] *Id.*
[195] *Id.* at *8.
[196] *Id.* at *5.
[197] *Id.*
[198] No. 1140049, 2015 WL 5192182 (Ala. Sept. 4, 2015).

Court of Criminal Appeals' decision to affirm the conviction of defendant Tulley for carrying a pistol "on premises not his own."[199] The court held the underlying state statute[200] prohibiting such conduct was facially unconstitutional because it did not provide a punishment for violations, and that the municipality did not cure the resulting due process violation by including a punishment in its own ordinance incorporating the constitutionally deficient state statute.[201] Accordingly, the court determined the trial court lacked jurisdiction to convict the defendant.[202] Importantly, because Section 13A-11-52 of the Alabama Code is unconstitutional, any Alabama municipal ordinance which has adopted the statute is void and unenforceable by extension.

On March 31, 2011, Jason Dean Tulley entered a Jacksonville, Alabama credit union while carrying an unconcealed pistol on his hip.[203] A security officer at the credit union informed Tulley that he needed to disarm himself.[204] Although Tulley was argumentative, he took the pistol to his vehicle as the officer requested.[205] Tulley was arrested a few days later and charged with carrying a pistol on premises not his own, under Section 13A-11-52 of the Alabama Code.[206] Tulley was convicted in the Jacksonville Municipal Court and subsequently appealed to the Calhoun Circuit Court.[207] The conviction was upheld following a bench trial, and Tulley appealed that conviction to the Alabama Court of Criminal Appeals.[208]

In his appeal, Tulley argued that § 13A-11-52 was unconstitutionally vague because the statute did not provide a punishment provision and did not determine whether violation of the statute should be classified as a misdemeanor, felony, or violation.[209] Tulley further argued that the city had violated his rights to due process.[210] The Court of Criminal Appeals acknowledged the history of § 13A-11-52 and conceded the punishment provision was repealed with the codification of the 1940 revision.[211] However, the court determined that Tulley was not convicted under § 13A-11-52, but rather City Ordinance No.

---

[199] *Id*. at *10.
[200] ALA. CODE § 13A-11-52 (2006).
[201] *See Tulley*, 2015 WL 5192182, at *8–10.
[202] *Id.*
[203] *Id.* at *3.
[204] *Id.*
[205] *Id.*
[206] *Id*.
[207] *Tulley*, 2015 WL 5192182, at *3.
[208] *Id*.
[209] *Id.*
[210] *Id.*
[211] *Id.* at *4.

O-514-10, which adopted § 13A-11-52 by general reference and then established a punishment for violating the ordinance.[212] The court reasoned the ordinance declared the conduct described in § 13A-11-52 to be an offense against the city, and appropriately provided a punishment for the offense.[213] Therefore, the Court of Criminal Appeals upheld the conviction.[214] However, the Alabama Supreme Court reversed the decision because the ordinance did not cure the unconstitutionality of § 13A-11-52.[215]

The Alabama Supreme Court began its discussion by analyzing the authority of municipalities, noting that a municipality may only exercise powers that are (a) expressly granted to it by the Legislature; (b) implied or incidental to such expressly conferred powers; or (c) are imperative to the objects of the municipality.[216] Further, the Legislature does not have power to authorize a municipality to make laws which conflict with the general laws of the state.[217] However, an ordinance may expound upon the provisions of a statute by providing more restrictions than the statute establishes without conflict.[218] Additionally, the court opined that it is permissible for a city ordinance to establish punishments different from those that the state prescribes for a given crime if "the municipality does not exceed the legislative authority granted it."[219]

In this case, the city exceeded its authority by incorporating a state statute that was facially unconstitutional.[220] Section 13A-11-52 was unconstitutional because the Legislature failed to provide a sentencing provision in the statute.[221] The majority concluded that although the city ordinance adopted by reference state misdemeanors, violations, and offenses, and also provided a punishment when those acts occurred in the city's jurisdiction, the inclusion of a punishment in the ordinance did not remedy the unconstitutionality of the state statute.[222] Relying on three decisions[223] in which certain criminal

---

[212] *Id.*
[213] *Tulley*, 2015 WL 5192182, at *5.
[214] *Id.* at *1.
[215] *Id.* at *10.
[216] *Id.* at *7 (citing Phenix City v. Putnam, 109 So. 2d 836, 838 (Ala. 1959)).
[217] *Id.* (citation omitted).
[218] *Id.* (citing Congo v. State, 409 So. 2d 475, 478 (Ala. Crim. App. 1981)).
[219] *Tulley*, 2015 WL 5192182, at *7 (citation omitted).
[220] *Id.*
[221] *Id.* at *9.
[222] *Id.*
[223] Reed v. State, 372 So. 2d 876, 878 (Ala. 1979); Crane v. State, 964 So. 2d 1254, 1255 (Ala. Crim. App. 2007); Casey v. State, 925 So. 2d 1005, 1006 (Ala. Crim. App. 2005).

statues were deemed unconstitutional and therefore void,[224] the court determined that the statute cannot be applied under any circumstances—the constitutional deficiencies affected the court's jurisdiction to render a judgment against Tulley or similarly situated defendants.[225] Therefore, the Alabama Supreme Court remanded the case to the Court of Criminal Appeals to reverse and remand the case to the trial court.[226]

Notably, Justices Stuart and Shaw filed dissenting opinions,[227] respectively arguing (a) that the majority's declaring § 13A-11-52 a nullity "does not pertain to the jurisdiction of the municipal court or the circuit court;"[228] and (b) that Jacksonville's prescribing a punishment for the underlying offense indeed cured any due process violations in the incorporated state statute.[229] This holding obviously has significant implications for other municipalities that have incorporated and used § 13A-11-52 to prosecute defendants, and it will surely encourage the legislature to amend the statute consistent with the opinion. The decision also garnered acclaim from certain gun rights advocates.

—Dustin Key

ix. Consumer Fraud: Federal Class Action Rules Trump Alabama's ADTPA Prohibition of Class Actions

In *Lisk v. Lumber One Wood Preserving, LLC* the Eleventh Circuit Court of Appeals held that the provision of the Alabama Deceptive Trade Practices Act ("ADTPA"), which bars the presentation of consumer fraud claims in private class actions,[230] does not apply in federal court.[231] The court reversed and remanded the United States District Court of Northern Alabama's decision to dismiss such a class action.[232] In reversing the district court's decision, the Eleventh Circuit determined that FED. R. CIV. P. 23[233] overrides the ADTPA pro-

---

[224] *See Tulley,* 2015 WL 5192182, at *10 (citations omitted).
[225] *Id.*
[226] *Id.*
[227] Both of which Justice Murdock joined.
[228] *Id.* at *11 (Stuart, J., dissenting).
[229] *Id.* at *12 (Shaw, J., dissenting).
[230] ALA. CODE § 8-19-10(f) (2002) ("A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class; provided, however, that the office of the Attorney General or district attorney shall have the authority to bring action in a representative capacity on behalf of any named person or persons.").
[231] Lisk v. Lumber One Wood Preserving, LLC, 792 F.3d 1331, 1336 (11th Cir. 2015).
[232] *Id.* at 1339.
[233] FED. R. CIV. P. 23 (specifying conditions for commencing class action suits).

hibition and allows private consumer fraud class actions in federal court.[234] Determining whether Rule 23 displaces the contrary ADTPA provision was a matter of first impression for the Eleventh Circuit.[235]

The underlying dispute originated from a contract that Robert Lisk entered into with Clean Cut Fence Company ("Clean Cut") for the installation of a fence.[236] The contract stated that "[a]ll fencing materials [were] warranted only through their respective manufacturers."[237] Lumber One Wood Preserving, LLC ("Lumber One"), the manufacturer of the wood that Clean Cut used, warranted that the wood was treated with MCA technology.[238] MCA-treated wood remains free from rot for at least fifteen years; however, Lisk's fence posts rotted within three years of installation.[239] Lisk learned that other customers were experiencing similar problems and filed a class action on behalf of a nationwide class of all purchasers of Lumber One's defectively treated wood.[240]

Lisk invoked federal jurisdiction under the Class Action Fairness Act and asserted claims against Lumber One under Alabama law, including ADTPA violations and breach of express warranty.[241] In response, Lumber One moved to dismiss on the following grounds: "the ADTPA does not authorize a private class action, that the complaint does not adequately plead an express warranty that runs to a remote purchaser, that dismissal of the defective claims would leave pending only an ADTPA individual claim, and that this would leave no basis for federal jurisdiction."[242] The district court granted Lumber One's motion to dismiss and Lisk appealed.[243]

On appeal the Eleventh Circuit addressed the issue of whether FED. R. CIV. P. 23 applied or was displaced by the contrary provision of the ADTPA.[244] Under the ADTPA, consumers are provided with a private right of action against a person who violates the statute.[245] However, private individuals do not have the authority to pursue class

---

[234] *Lisk*, 792 F.3d at 1335.
[235] *Id.* at 1334–35.
[236] *Id.* at 1333.
[237] *Id.*
[238] *Id.* (noting Lumber One's website, advertisements, and product labels stated that the wood was treated with MCA technology).
[239] *Id.* at 1333.
[240] *Lisk*, 792 F.3d at 1333.
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.* at 1334.
[245] ALA. CODE § 8-19-10 (2002).

actions under the ADTPA, as that authority is reserved for the Alabama Attorney General or a district attorney.[246] Rule 23, on the other hand, allows class actions in federal court as long as the specified conditions are met.[247] Because the case was brought in federal court, the Eleventh Circuit held that Rule 23 applied, rendering the ADTPA prohibition on private consumer fraud class actions inapplicable.[248]

In reaching this holding, the Eleventh Circuit relied on precedent set by the United States Supreme Court in *Shady Groves Orthopedic Assocs., P.A. v. Allstate Ins. Co.*[249] At issue in *Shady Groves*, as in *Lisk*, was which provision controlled—Rule 23 or a state law that similarly prohibited pertinent class actions.[250] The Supreme Court invoked the federal Rules Enabling Act[251] and held that Rule 23 controlled.[252] Under the federal Rules Enabling Act, "a federal rule applies in any federal lawsuit, and thus displaces any conflicting state provision, so long as the federal rule does not 'abridge, enlarge or modify any substantive right.'"[253] In *Lisk*, Lumber One's substantive obligation was to make accurate representations about the wood that it manufactured.[254] Lisk and other consumers were afforded the substantive right was to obtain wood that complied with Lumber One's representations.[255] Because Rule 23 did not "abridge, enlarge or modify" any of these substantive rights and obligations, the Eleventh Circuit held that Rule 23 governed the action.[256]

Additionally, the Eleventh Circuit addressed the issue of whether Lisk adequately stated a claim for relief as a third-party beneficiary of Lumber One's express warranty.[257] The court held that Lisk's complaint adequately stated an express-warranty claim on which relief could be granted.[258] In reaching this holding the court asserted that Lisk's complaint explicitly alleged the three elements of a third-party-

---

[246] *Id.*
[247] *Lisk*, 792 F.3d at 1334 (citing FED. R. CIV. P. 23).
[248] *See id.* at 1336.
[249] *Id.* at 1334–35 (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010)).
[250] *Id.* at 1335.
[251] 28 U.S.C. § 2072 (2012).
[252] *Shady Grove Orthopedic Assocs.*, 559 U.S. at 408.
[253] *Lisk*, 792 F.3d at 1335 (quoting 28 U.S.C. § 2072 (2012)).
[254] *Id.* at 1337.
[255] *Id.* "A 'substantive right' is one that inheres in 'the rules of decision by which [the] court will adjudicate [the petitioner's] rights.'" *Id.* (alteration in original) (quoting Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1361 (11th Cir. 2014)).
[256] *Id.* at 1338.
[257] *Id.*
[258] *Lisk*, 972 F.3d at 1339.

beneficiary claim;[259] alleged Lumber One's intent generally;[260] included facts that allowed the court to draw a reasonable inference that Lumber One was liable;[261] and included allegations plausibly suggesting entitlement to relief.[262] Further, the court drew support from *Harris Moran Seed Co. v. Phillips*, which provided that a "'court [may] look at the surrounding circumstances' in determining whether an end user is a third-party beneficiary."[263]

Lisk has established a basis for individuals in Alabama to maintain private consumer fraud class actions in federal court.[264] The Eleventh Circuit held that a private class action arising from an Alabama consumer fraud claim could proceed in federal court despite a state statute expressly forbidding as much.[265] Moving forward, this case may have the effect of displacing other state statutes that conflict with the federal rules in such a way.[266] As the court stated: "The goal of national uniformity that underlies the federal rules ought not be sacrificed on so insubstantial a ground."[267]

—Kayla A. Currie

x. Ala. Court Determines Ga. Court Lacked Subject-Matter Jurisdiction in Same-Sex Adoption Decree Notwithstanding Full Faith & Credit Clause

In *Ex parte E.L.*[268] the Supreme Court of Alabama reversed a judgment of the Alabama Court of Civil Appeals that gave full faith and credit to a Georgia court's 2007 adoption decree.[269] The court determined that the full faith and credit clause did not bar a review of the case because the petition centered on a jurisdictional issue rather

---

[259] *Id.* at 1338 (In a third party-beneficiary claim a "complainant mush show: 1) that the contracting parties intended, at the time of the contract was created, to bestow a direct benefit upon a third party; 2) that the complainant was the intended beneficiary of the contract; and 3) that the contract was breached.") (quoting Sheetz, Aiken & Aiken, Inc. v. Spann, Hall, Ritchie, Inc. 512 So. 2d 99, 101–02 (Ala. 1987)).

[260] *Id.* at 1338 (citing FED. R. CIV. P. 9(b)).

[261] *Id.* (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

[262] *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007)).

[263] *Id.* at 1339 (quoting Harris Moran Seed Co. v. Phillips, 949 So. 2d 916, 920–21 (Ala. Civ. App. 2006) (alteration in original)).

[264] *Lisk*, 972 F.3d at 1336.

[265] *Id.*

[266] *See id.* at 1333 (detailing the direct conflict between Fed. R. Civ. P. 23 and the Alabama Deceptive Trade Practices Act).

[267] *Id.* at 1336.

[268] No. 1140595, 2015 WL 5511249 (Ala. Sept. 18, 2015).

[269] *Id.* at *10–11.

than a review of the case's merits.[270] This decision represents a significant application of the full faith and credit clause for the State of Alabama, and potentially a key precedent for permitting challenges to adoption decrees many years after they have been issued.

In 2006, same-sex partners and Alabama residents, E.L. and V.L., sought a jurisdiction in which V.L. could adopt E.L.'s three biological children.[271] The couple found that jurisdiction in Fulton County, Georgia, but Georgia law required that they be residents of the county for at least six months before petitioning for adoption.[272] Accordingly, the couple leased a house in Fulton County, but continued residing in Alabama.[273] In April 2007, V.L. petitioned the court for adoption.[274] E.L. consented but did not surrender her own parental rights.[275] In May 2007, a Georgia court issued the adoption decree.[276] The couple separated in 2011, and in 2013, V.L. petitioned the circuit court in Jefferson County, Alabama to recognize her parental rights and grant her access to the children.[277] Upon transfer, the Jefferson County Family Court recognized the Georgia adoption and awarded V.L. visitation rights.[278] On appeal, the Alabama Court of Civil Appeals found that the Georgia judgment was valid and subject to enforcement in Alabama.[279] The Supreme Court of Alabama granted certiorari to determine the validity of that judgment.[280]

The Supreme Court of Alabama recognized two major issues in its review of the case. First, it questioned whether Georgia's six-month statute of limitations on adoption contests barred E.L.'s petition to nullify the decree.[281] Second, if the statute did not bar the contest, the court would decide whether there was a legitimate claim that the Georgia court lacked subject-matter jurisdiction over the initial adoption.[282] E.L. alleged the Georgia court lacked jurisdiction because (a) Georgia does not allow second-parent adoptions by non-spouses "without first terminating the parental rights of the current parents;" and (b) the couple did not satisfy Georgia's residency re-

---

[270] *Id.* at *10.
[271] *Id.* at *1.
[272] *Id.*
[273] *Id.*
[274] *E.L.*, 2015 WL 5511249, at *1.
[275] *Id.*
[276] *Id.*
[277] *Id.* at *2.
[278] *Id.*
[279] *Id.*
[280] *E.L.*, 2015 WL 5511249, at *2.
[281] *Id.* at *6–7.
[282] *Id.* at *7.

quirement.[283] However, V.L. countered that both arguments are merit-based, and were therefore barred by the full faith and credit clause.[284]

The court began its analysis by acknowledging that the full faith and credit clause prohibits the review of the merits of foreign judgments but allows review of a rendering court's subject-matter jurisdiction.[285] Therefore, the court concluded that Alabama courts could only review a legitimate challenge to the Georgia court's subject-matter jurisdiction.[286] The court noted that Section 9-11-60(d)(1) of the Georgia Code allows a judgment to be set aside based upon lack of subject-matter jurisdiction at any time.[287] However, O.C.G.A. § 19-8-18(e) prohibits any judicial challenge of an adoption that is filed more than six months after the adoption becomes final.[288] The court's decision hinged, therefore, on its interpretation of which Georgia statute controlled.

V.L. contended that a Georgia court would enforce the decree notwithstanding a lack of subject-matter jurisdiction because § 19-8-18(e) would bar a challenge arising six years after the adoption.[289] However, E.L. argued that subsection (e) was inapplicable because it only applies to adoption decrees issued pursuant to subsection (b), requiring the termination of current parental rights before a non-spouse can be granted adoptive rights.[290] Thus, E.L. asserted that subsection (e)'s limitation did not apply, and that the court's subject-matter jurisdiction could be challenged under the more lenient § 9-11-60(d)(1).[291]

In the similar case of *Wheeler v. Wheeler*[292] the Supreme Court of Georgia denied certiorari to a biological mother seeking to void a second-parent adoption granted to her same-sex ex-partner.[293] Observing that the majority did not specifically address the issue, the Alabama Supreme Court looked to the comments of the dissent.[294] Justice Carley explained that subsection (b) of the statute was inapplicable because the parental rights of the living parent were not

---

[283] *Id.* at *7–8.
[284] *Id.* at *7.
[285] *Id.* at *3.
[286] *E.L.*, 2015 WL 5511249, at *3.
[287] *Id.* at *4.
[288] *Id.* at *5.
[289] *Id.*
[290] *Id.* at *6–8.
[291] *Id.* at *4, 6.
[292] Wheeler v. Wheeler, 642 S.E.2d 103 (Ga. 2007).
[293] *E.L.*, 2015 WL 5511249, at *7.
[294] *Id.*

terminated.[295] Justice Carley reasoned, "'[b]ecause subsection (b) is inapplicable, the six-month limitation in subsection (e) clearly does not bar the motion to set aside.'"[296] The Supreme Court of Alabama adopted this analysis of § 19-8-18(b), and concluded that a Georgia court would allow a party to challenge the subject-matter jurisdiction of an adoption decree if the statutory requirements in subsection (b) were not satisfied.[297]

The court next questioned whether E.L. presented a claim that actually disputed the Georgia court's jurisdiction.[298] E.L.'s argument was two-fold: 1) A Georgia court can only exercise subject-matter jurisdiction over adoption issues when the requirements of the adoption statutes are met; and 2) those requirements were not met because the statutes do not allow a non-spouse to adopt a child before parental rights are terminated.[299] The court recognized that the allegations regarding the statutory requirements were immaterial unless they implicated the Georgia court's subject-matter jurisdiction.[300]

The court found that E.L.'s claims did, in fact, implicate the subject-matter jurisdiction of the Georgia court because that jurisdiction is derived directly from Georgia's adoption statutes.[301] The court reasoned that a court's subject-matter jurisdiction over an adoption petition is conditional on satisfying the statute's express terms.[302] The statute requires the termination of existing parental rights before a court may grant adoptions to non-spouses, and it was undisputed that E.L.'s parental rights were never terminated.[303] Therefore, the court found that the Georgia court's judgment was void because it was not empowered to enter the decree; the full faith and credit clause did not require Alabama courts to recognize the judgment; and the case should be remanded to the Alabama Court of Civil Appeals.[304]

The Supreme Court of Alabama's application of the full faith and credit clause in *Ex parte E.L.* creates key precedent in the arena of adoption law for the State of Alabama. The significance of the decision is perhaps most apparent within the comments of the Justice Shaw, the opinion's sole dissenting justice. Justice Shaw argues that the decision "creates a dangerous precedent that calls into question

---

[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *E.L.*, 2015 WL 5511249, at *8.
[300] *Id.* at *9.
[301] *Id.* at *10.
[302] *Id.*
[303] *Id.*
[304] *Id.*

the finality of adoptions in Alabama" because "[a]ny irregularity in a probate court's decision in an adoption would now arguably create a defect in that court's subject-matter jurisdiction."[305] While the full effects of this decision are not yet clear, it does raise new family law questions regarding the permanency of adoption decrees.

—Jonathan A. Griffith

xi. Nursing Home Arbitration Agreement Unenforceable Where Mentally Incompetent Decedent's Mother Signed as Personal Representative but Lacked Legal Authority to Bind Decedent.

In *Diversicare Leasing Corp. v. Hubbard* the Alabama Supreme Court held that a nursing home resident was not bound to an arbitration agreement with the nursing home because he was not mentally competent, and was therefore incapable of authorizing his mother, who did not have power of attorney, health-care sponsorship, or legal guardianship, to execute the arbitration agreement on his behalf.[306] The court undertook a thorough review of the case law at issue and clarified the important distinction between competent and incompetent residents of nursing homes when determining whether an individual acting on behalf of a resident could bind the resident to arbitration provisions in admission agreements.[307]

Johnathan Hubbard was admitted to Canterbury Healthcare Facility ("Canterbury") for long-term care in the nursing facility.[308] Johnathan was diagnosed with cerebral palsy at a young age and suffered from developmental delays that rendered him unable to care for himself.[309] His mother, Betty Hubbard, testified that at the time of his admittance, Johnathan "was unable to make decisions for himself and was unable to appoint another person to make decisions for him."[310] Therefore, Betty executed an admission agreement and arbitration agreement upon Johnathan's admission to Canterbury, signing as the "Resident's Representative," defined as:

> the resident's Legal Guardian, Attorney-in-Fact, Power of Attorney, or Health Care Sponsor. In the event a representative with such legal authority does not exist, the Resident may authorize a duly appointed

---

[305] *E.L.*, 2015 WL 5511249, at *14 (Shaw, J., dissenting).
[306] Diversicare Leasing Corp. v. Hubbard, No. 1131027, 2015 WL 5725116, at *12–13 (Ala. Sept. 30, 2015).
[307] *Id.* at *10–11.
[308] *Id.* at *1.
[309] *Id.*
[310] *Id.*

> person such as the Responsible Party to serve as his/her Representative and to sign this agreement on his/her behalf.[311]

Canterbury's arbitration agreement defined "Responsible Party" as "an individual or family member who agrees to assist [Canterbury] in providing for [the resident's] healthcare and maintenance."[312] The arbitration agreement further provided that, "If Resident is unable to consent or sign this Agreement, this Agreement shall be executed by Resident's Representative."[313]

Johnathan died on February 21, 2011, after his transfer to a local hospital where he was diagnosed with sepsis.[314] As the personal representative of Johnathan's estate, Betty sued Canterbury, asserting a wrongful death claim.[315] Canterbury moved the trial court to compel arbitration of the wrongful death claim and to stay the claim pending such arbitration.[316] Canterbury appealed the trial court's denial of its motion to compel arbitration and stay the proceedings.[317]

Reviewing the relevant case law on the subject, the Supreme Court of Alabama focused heavily on the plurality decision of *Noland Health Services, Inc. v. Wright*, in which the court determined that the distinguishing factor in determining whether to enforce an arbitration agreement executed by a resident's representative is the existence of mental incapacities that prevent the resident from acquiescing to an individual acting on their behalf.[318] Considering that Johnathan was twenty-one years old, mentally incompetent, and incapable of authorizing Betty to act on his behalf at the time of his admittance to Canterbury, the court held that Johnathan could not be bound by Betty's signing the arbitration agreement as the "Resident's Representative."[319]

Furthermore, the court highlighted the principle that, "if a deceased nursing-home resident was bound to an arbitration agreement, so too would be the personal representative of that resident's estate

---

[311] *Id.* at *1–2.
[312] *Diversicare*, 2015 WL 5725116, at *2.
[313] *Id.*
[314] *Id.* at *3.
[315] *Id.*
[316] *Id.*
[317] *Id*.
[318] *Diversicare*, 2015 WL 5725116, at *7 (citing Noland Health Servs., Inc. v. Wright, 971 So. 2d 681, 685–86 (Ala. 2007) (concluding that "[the daughter-in-law's] signature in the capacity of next friend, or 'responsible party,' was ineffective to bind [the resident] or her personal representative to the agreement.")). *See also* Tenn. Health Mgmt., Inc. v. Johnson, 49 So. 3d 175, 180–81 (Ala. 2010) (recognizing the *Noland* plurality distinction between the signing of arbitration agreements on behalf of competent and incompetent nursing home residents).
[319] *Diversicare*, 2015 WL 5725116, at *12–13.

regardless of whether that personal representative was a signatory to the arbitration agreement in some capacity other than the resident's legal representative."[320] Therefore, the court held that Betty was not bound by the arbitration agreement in her capacity as Johnathan's personal representative because she signed the agreement only in the capacity of Johnathan's relative or next friend.[321]

In keeping with previous decisions, including *Noland*, the Alabama Supreme Court reiterated the principle that mentally incompetent residents are not capable of authorizing an individual to act on their behalf.[322] Furthermore, *Diversicare* addressed prior variable case law, holding that where a resident is not bound because they are incapable of authorizing one to act on their behalf, one attempting to act on their behalf by signing an arbitration agreement is also not bound by such an agreement as the personal representative of the resident's estate.[323] Providing a thorough look at the existing law on this subject, this decision reiterates established law and clears up areas of inconsistency regarding when mentally incompetent residents and their personal representatives may be bound to an agreement.

—Jordan Jackson

xii. Interns v. Employee: Eleventh Circuit Embraces Updated "Primary Beneficiary" Test

In *Schumann v. Collier Anesthesia, P.A.*[324] the Eleventh Circuit held that determining whether student interns working to obtain professional certifications are "employees" under the Fair Labor Standards Act ("FLSA") depends on who constitutes the "primary beneficiary" in such an arrangement—i.e., whether the employer or the intern benefits most from the internship. The Eleventh Circuit appears to be only the second circuit to perceive a need for such an updated test for an FLSA "employee,"[325] which could result in the Supreme Court revisiting this issue in the near future if the circuits continue to depart from the Supreme Court's older holding. The opinion has a particular significance for Birmingham's healthcare industry, which utilizes similar arrangements.

---

[320] *Id.* at *16 (citing Entrekin v. Internal Med. Assocs. of Dothan, P.A., 689 F.3d 1248, 1257–59 (11th Cir. 2012)).
[321] *Id.*
[322] *Id.* at *13–14.
[323] *Id.* at *16.
[324] 803 F.3d 1199, 1202 (11th Cir. 2015).
[325] *See* Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015).

Specifically, the Eleventh Circuit vacated a decision from a Middle District of Florida granting summary judgment to the defendants (a college and an anesthesia clinic), rejecting the plaintiffs' (students at the college serving as unpaid interns at the clinic) claims that the defendants failed to pay minimum and overtime wages owed under the FLSA while they completed clinical internships required for their eventual licensing as nurse anesthetists.[326] The dispute largely hinged on whether nursing students serving as unpaid interns qualified as "employees" for purposes of FLSA, which would qualify the students for mandatory wage benefits.[327] The Eleventh Circuit, in vacating the district court's summary judgment for the defendants, stressed that it was not deciding whether or not the students were employees, but instead, found that this case demonstrated the need to rework the decades-old test that courts previously used to classify employees from nonemployees.[328]

The FLSA statutory definition of "employee" is vague, but Supreme Court's holding in the 1947 case of *Walling v. Portland Terminal Co.*[329] provides some instructive clarity. In *Portland Terminal,* a railroad company ran a one-week training program where participants learned how to serve as brakemen for the railroad. Participants were not guaranteed jobs, but they did have to complete the course to be eligible for the job.[330] The Supreme Court, persuaded by evidence showing that the unpaid trainees tended to hinder normal rail yard operations more than help them, found that FLSA did not affect companies providing free training that was comparable to what trainees could also receive in trade schools.[331] In the sixty-eight years since *Portland Terminal,* courts have decided FLSA employment disputes by considering any factors that point to the "primary beneficiary" of the training, consistent with the spirit of the *Portland Terminal* holding.[332] The *Portland* primary-beneficiary test was also the primary source for the U.S. Department of Labor's FLSA guidance, articulated in its Field Operations Handbook, which provided a laundry list of factors that courts often use to identify FLSA employees.[333]

Using these factors, the district court in *Schumann* found that the nursing students were not employees under FLSA and granted sum-

---

[326] *Schumann*, 803 F.3d at 1202.
[327] *Id.* at 1204.
[328] *Id.* at 1215.
[329] Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947) (defining '"employee'" as "any individual employed by an employer").
[330] *Id.* at 149.
[331] *Id.* at 150, 153.
[332] *Schumann*, 803 F.3d at 1209.
[333] *Id.* at 1208–09.

mary judgment for the defendants.[334] The Eleventh Circuit, however, was unpersuaded. It first noted that the Labor Department's guidelines, which were not formal rules, had persuasive value, but were not owed legal deference.[335] It then considered how *Portland* should be applied in a modern economy that was quite different from the economy in which *Portland* was decided.[336]

The Eleventh Circuit took extensive guidance from a recent holding from the Second Circuit considering the same issue.[337] Both circuits were concerned with the changing economic nature of internships; namely, that internships are longer-term than the one-week program in *Portland Terminal,* and modern internships are often required components of state licensure requirements, which could potentially enrich employers.[338] Additionally, many internships today are not equivalent to what students could find in trade schools. The Second Circuit, in an effort to articulate a modern-day form of the primary-beneficiary test, provided a non-exhaustive list of seven factors that would be used to determine the primary beneficiary in an employer-intern relationship. These factors included considerations such as: 1) the expectations regarding compensation; 2) the realism of the training; 3) the integration of the internship with the school's curriculum; 4) the internship's correspondence with the academic calendar; 5) the limited duration of the internship; 6) the extent that the interns' presence displaces normal paid employees; and 7) the nonexpectations of the intern regarding a paid job at the end of the internship.[339] The Eleventh Circuit further noted that the factors were simply a starting point, and that courts must perform a '"weighing and balancing [of] all of the circumstances,' including . . . other considerations not expressed in [these] seven factors."[340] The court then remanded the case for the district court to consider whether the anesthesiology interns were FLSA employers under this new test.[341]

Schumann represents an effort by the courts to update the criteria that courts will use to identify FLSA employees, but the change in the law may prove to be more stylistic than substantive. The *Schumann* court stressed that the new factors were not exhaustive, that courts should still consider all circumstances, and that factors should be

---

[334] *Id.* at 1207.
[335] *Id.* at 1209.
[336] *Id.* at 1210 (quoting *Glatt*, 791 F.3d at 384, "the facts of [Portland] do not necessarily 'reflect [] the role of internships in today's economy . . . .'").
[337] *See id.* at 1210–13 (citing *Glatt*, 791 F.3d at 384).
[338] *Schumann*, 803 F.3d at 1204–05, 1210.
[339] *Id.* at 1211–12 (citing *Glatt*, 791 F.3d at 384).
[340] *Id.* at 1212 (quoting *Glatt*, 791 F.3d at 384).
[341] *Id.* at 1215.

placed through a judicial balancing test. Between these qualifiers, the new rule does not appear to provide any more predictability than the old tests, and the articulation of the factors, in all likelihood, amounts to an official list of what courts were already implicitly considering in FLSA analyses. Nevertheless, lawyers who advise healthcare providers that utilize unpaid student interns should take notice of *Schumann*. Although the outcome of FLSA cases may not noticeably change, lawyers in states under the Second and Eleventh Circuits can at least point their clients toward a court-sanctioned list of factors that will guide FLSA inquiries.

—Chip Slawson

xii. Contracted Resource Officers Deemed "School Employees" for Purposes of Alabama Code Section Covering "Sexual Offenses by School Employees"

In *Bonds v. State*[342] the Alabama Court of Criminal Appeals held that a Dothan High School resource officer who was an employee of the city's police department was nonetheless deemed a "school employee" for the purposes of an Alabama Code section that prohibits school employees from engaging in sexual acts with students under nineteen years old.[343] The decision is significant because the court found an employee-employer arrangement that technically did not exist under a traditional understanding of what constitutes a school employee.[344]

While on duty at Dothan High School, Bonds had sex with a sixteen-year-old student in his office at the school.[345] Bonds filed a motion to dismiss the ensuing indictment on the grounds that he was not a school employee as defined in Section 13A-6-81 of the Alabama Code.[346] Section 13A-6-81 prohibits "a school employee [from] engaging in a sex act . . . with a student under the age of 19 years," and does not recognize consent as a defense.[347] Bonds presented evidence to support the argument that he was not a school employee because he was hired, managed, and compensated by the City of Dothan and Dothan Police Department—not the school or the Dothan Board of Education.[348]

---

[342] No. CR-13-1570, 2015 WL 5511511 (Ala. Crim. App. Sept. 18, 2015).

[343] *Id.* at *1. *See also* ALA. CODE § 13A-6-80 (2010) (listing "resource officer" as an example of a school employee for the purposes of the statute).

[344] *Bonds*, 2015 WL 5511511, at *6 (Welch, J., dissenting).

[345] *Id.* at *1.

[346] *Id.*

[347] *Id.* (citing ALA. CODE § 13A-6-81 (2010)).

[348] *Id.*

An agreement between the Dothan Board of Education and the Dothan Police Department explicitly stated that resource officers were to remain under the employment of the police department and were not employees of the school board.[349] However, the Houston County Circuit Court denied Bonds's motion to dismiss.[350] Bonds then entered a guilty plea, reserving his right to appeal the adverse ruling on his motion to dismiss, and received a sentence of ten years of imprisonment.[351] The Court of Criminal Appeals affirmed the circuit court and upheld Bonds's conviction, holding that a school resource officer was a school employee for the purposes of § 13A-6-81.[352]

In upholding the circuit court's decision, the appellate court relied on the plain meaning of the statute.[353] While the statute does not specifically define "school employee," its "Applicability" section provides: "For purposes of this article, school employee includes a teacher, school administrator, student teacher, safety or *resource officer*, coach, and other school employee."[354] The court thus found that a simple reading of this provision leads to the conclusion that Bonds was a school employee.[355] Bonds argued that the court should not consider the titles enumerated in § 13A-6-80, but should instead look to his employment agreement to determine the true nature of his employment.[356] According to the court, however, the inclusion of § 13A-6-80 amounted to a clear expression of legislative intent to include positions that did not meet a "traditional, technical definition of employment by a school's administration . . . ."[357] Additionally, the court reasoned that if "school employee" only meant traditional "school employees," then § 13A-6-80 would be unnecessary, and there would be no need for the legislature to include the positions therein.[358] Finally, the court suggested Bonds's interpretation of the statute would defeat the primary purpose of the statute: preventing those in authority positions at schools from having sexual interactions with students.[359]

Bonds v. State's broad reading of "school employee" ensures that those in authoritative positions at schools cannot escape criminal lia-

---

[349] *Id.* at *2.
[350] *Bonds*, 2015 WL 5511511, at *2.
[351] *Id.* at *1–2.
[352] *Id.* at *1.
[353] *Id.* at *2.
[354] *Id.* at *3; ALA. CODE § 13A-6-80 (2010) (emphasis added).
[355] *Bonds*, 2015 WL 5511511, at *3.
[356] *Id.*
[357] *Id.*
[358] *Id.* at *4.
[359] *Id.*

bility for having sexual relations with students just because they are not directly employed by a school board. Alabama law allows schools and boards of education to either hire their own resource officers or contract with local police departments to provide resource officers.[360] This holding refuses to distinguish between these two types of employment arrangements for school safety officers and exposes either to the same level of criminal liability. Under this ruling, the Alabama Court of Criminal Appeals made it clear that § 13A-6-81 prohibits *any* type of school employee—volunteer, unpaid, or hired through the police department—from engaging in a sex act with a student under the age of nineteen.

—Zach Mardis

xiv. Element of Forcible Compulsion May Now Be Established by "Implied Threats" of Juvenile Offender in Position of Trust with Child Victim

In *Higdon v. State*[361] the Alabama Supreme Court reviewed whether implied threats by a juvenile in a position of trust with a victim were sufficient to constitute "forcible compulsion" in a prosecution for first-degree sodomy by forcible compulsion.[362] The State of Alabama petitioned the Alabama Supreme Court to review a decision of the Alabama Court of Criminal Appeals after the Court of Criminal Appeals found that implied threats in this context were insufficient to establish forcible compulsion.[363] In so doing, the State of Alabama requested that the court overrule *Ex parte J.A.P.*,[364] the precedent case principally relied upon by the Court of Criminal Appeals.[365] The court reviewed the trial court's finding *de novo* because the issue was purely a question of law.[366] The Alabama Supreme Court held that regardless of a defendant's age, a court may take a variety of factors into account when reviewing the sufficiency of the evidence from which a jury may infer forcible compulsion, including the defendant's

---

[360] *See* ALA. CODE § 16-1-44.1(a) (2013); *Bonds*, 2015 WL 5511511, at *6 (Welch, J., dissenting).
[361] No. 1140635, 2015 WL 4162930, at *1 (Ala. July 10, 2015).
[362] *Id.* at *2.
[363] *Id.* at *1–*2.
[364] *Ex parte* J.A.P., 853 So. 2d 280 (Ala. 2002), *overruled by* Higdon v. State, No. 1140635, 2015 WL 4162930 (Ala. July 10, 2015).
[365] *Higdon*, 2015 WL 4162930, at *1–2.
[366] *Id.* at *2.

position of authority and control over the victim.[367] As a result, the decision of the Court of Appeals was reversed and remanded for further proceedings.[368]

In the summer of 2012, Higdon worked as an intern at a day care facility.[369] During his employment, Higdon accompanied a child, K.S. to the restroom where Higdon pulled down the child's pants, touched the child's penis and performed oral sex on the child.[370] Higdon told K.S. not to tell anyone about what had taken place in the bathroom.[371] Another child also reported Higdon's inappropriate actions to authorities.[372] Higdon was charged with first-degree sodomy of K.S., a child under twelve years old,[373] and first-degree sodomy by forcible compulsion.[374] At trial Higdon was convicted on both counts.[375] On appeal to the Court of Criminal Appeals, the court upheld Higdon's conviction for first degree sodomy, and reversed his conviction for first degree sodomy by forcible compulsion.[376]

On appeal before the Supreme Court of Alabama, the State contended that the court should overrule *Ex parte J.A.P.*, which prevented the State from proving the element of forcible compulsion through evidence of implied threats in cases where the defendant is a juvenile in a position of trust or authority over the child victim.[377] The court first explained that to establish a prima facie case of first-degree sodomy, the State must present evidence that "the defendant engaged in sexual intercourse by forcible compulsion, i.e., that the defendant engaged in sexual intercourse under circumstances in which the victim earnestly resisted the act or was threatened into the sexual act."[378] Next the court defined forcible compulsion as "[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person."[379]

---

[367] *Id.* at *3.
[368] *Id.* at *4.
[369] *Id.* at *1.
[370] *Id.*
[371] *Higdon*, 2015 WL 4162930, at *1.
[372] *Id.*
[373] A person commits the crime of first degree sodomy if "[h]e, being 16 years old or older, engages in deviate sexual intercourse with a person who is less than 12 years old." ALA. CODE § 13A-6-63(a)(3)(2010).
[374] *Higdon*, 2015 WL 4162930, at *1.
[375] *Id.*
[376] *Id.*
[377] *Id.* at *1–2.
[378] *Id.* at *2 (*citing* ALA. CODE § 13A–6–63 (2010)).
[379] *Id.* (*citing* ALA. CODE § 13A–60–60(8) (2010)).

The court then reviewed the prior decisions of *Powe v. State*[380] and *Ex parte J.A.P.*[381] to aid its analysis.[382] The court observed that its holding in *Powe* "establishe[d] a mechanism by which the unique relationship between children and the *adults* who exercise a position of domination and control over them may be taken into consideration in determining whether the element of forcible compulsion has been established."[383] The court next explained that its subsequent holding in *Ex parte J.A.P.* limited the holding in *Powe* "*only* to cases involving the sexual assault of children *by adults* who exercised positions of domination and control over the children."[384] The court characterized its holding in *Ex parte J.A.P.* as "'a bright line' rule that shifted the focus with regard to the trial court's determination of the sufficiency of the evidence of forcible compulsion away from the perspective of the child, instead focusing the determination solely on the offender's age."[385]

The court retreated from its earlier position in *Ex parte J.A.P.* and found that when a trial court determines the sufficiency of the evidence of forcible compulsion by implied threat, the focus should be on the perspective of the child victim.[386] The court placed emphasis on the court's earlier reasoning in *Powe*, that when a defendant in a role of authority over the child instructs a child to submit to acts, there is an implied threat of discipline if the child refuses.[387] The court's decision was further buttressed by its earlier reasoning in *Powe* that "[i]f the victim is young, inexperienced, and perhaps ignorant of the 'wrongness' of the conduct, the child may submit to acts because the child assumes that the conduct is acceptable or because the child does not have the capacity to refuse."[388] The court criticized its holding in *Ex parte J.A.P* as "'unjustly limit[ing]'" the effect of the definition of forcible compulsion by an implied threat and '"inappropriately'" shifting the trial court's" focus away from the victim.[389]

In overruling *Ex parte J.A.P.* the court sought to return to "an approach more consonant with the statutory definition of forcible compulsion and the principles set forth in [sic] *Powe* in conducting a forcible-compulsion analysis when a defendant, regardless of his or

---

[380] Powe v. State, 597 So. 2d 721 (Ala. 1991).
[381] *Ex parte* J.A.P., 853 So. 2d 280 (Ala. 2002).
[382] *Higdon*, 2015 WL 4162930, at *2–3.
[383] *Id.* at *2 (quoting *Powe*, 597 So. 2d at 729) (emphasis added).
[384] *Id.* at *3 (quoting *Ex parte J.A.P.*, 853 So. 2d at 284) (emphasis in original).
[385] *Id.*
[386] *Id.*
[387] *Id.*
[388] *Higdon*, 2015 WL 4162930, at *3 (quoting *Powe*, 597 So. 2d at 728–29).
[389] *Id.*

her age, exercises a position of domination and control over a child."[390] As a result, a trial court, when determining the sufficiency of the evidence of an implied threat from which a jury may infer forcible compulsion, may consider from the young victim's perspective factors such as the difference in age and physical maturity between the victim and the defendant, as well as the defendant's position of domination or control over a child.[391]

—S. Kyle Weaver

xv. Clarity on College Students Establishing Residency for Voting Eligibility under Alabama Law

In *Horwitz v. Kirby* the Alabama Supreme Court concluded that a number of University of Alabama students failed to properly establish the requisite domicile needed to be eligible to vote in the August 27, 2013, Tuscaloosa Board of Education election.[392] As a result of the court's holding, the Tuscaloosa Circuit Court's decision to deny Horwitz's contest was reversed and remanded.[393]

Pursuant to Section 11-46-69 of the Alabama Code,[394] Kelly Horwitz, a candidate for District 4 of the Tuscaloosa Board of education, filed a statement of contest with the Tuscaloosa Circuit Court regarding the August 27, 2013, election for a seat on the board.[395] After conducting a hearing regarding Horwitz's contest, the trial court decided to divide the proceedings into two phases. During Phase I, "the evidence of the legality or illegality of the ballots challenged by Horwitz would be presented to the trial court . . . by way of affidavits to be collected from challenged voters."[396] If eighty-seven of the contested votes were found to have been placed illegally—the number by which Kirby won the election—Phase II of the proceedings would then require the voters to testify for whom they had voted, pursuant to Section 17-16-42[397] of the Alabama Code.[398]

After reviewing the affidavits that had been distributed to the contested voters, the trial court found that "no more than 70 illegal

---

[390] *Id.* at *3.
[391] *Id.*
[392] Horwitz v. Kirby, No. 1130246, 2015 WL 5725127, at *1, *12 (Ala. Sept. 30, 2015).
[393] *Id.* at *17.
[394] ALA. CODE § 11-46-69.
[395] *Horwitz*, 2015 WL 5725127, at *1.
[396] *Id.* at *2.
[397] ALA. CODE § 17-16-42.
[398] *Horwitz*, 2015 WL 5725127, at *2.

votes had been cast in the election" and denied Horwitz's contest.[399] Because the total of illegal votes reached only seventy, Phase II of the proceedings was not conducted. Horwitz appealed this decision and the Alabama Supreme Court granted cert, deciding to conduct a de novo review of the trial court's decision, rather than the ore tenus standard of review suggested by Kirby. [400]

The court's analysis of the legality of the challenged voters revolved primarily upon those challenged based on residency.[401] According to Section 11-46-38 of the Alabama Code, in order to vote in an election an individual must have "*resided* in the county 30 days and in the ward 30 days prior to the election."[402] In order to "reside" in a place, an individual must first establish "domicile."[403] After considering various precedent regarding the factors of establishing domicile, the court acknowledged two components that should be used to determine whether or not domicile had been established: 1) physical residence in a place; and 2) "a decided intention to abandon one's former domicile" and a "certain state of mind as to making a new locale one's home."[404] Furthermore, the court determined that, when conflict arises between a voter's "self-serving statement" regarding domicile and other evidence presented by the adverse party, there is a presumption against a change of domicile, especially in cases involving "students who attend college somewhere other than their hometowns."[405]

After reviewing the affidavits completed by the challenged voters, the court concluded that all but three of the 108 ballots challenged based on the residency requirement to have been placed illegally.[406] This decision relied largely on the principle emphasized in previous cases "that a person can have only one domicile and that, once a domicile is acquired, it is presumed to be a person's domicile until a new domicile is gained in fact and intent."[407] Because all but three of the students in question failed to display the requisite intention to live in Tuscaloosa for an unlimited time or to make it their permanent residence, the court concluded that the students were still domiciled in their former places of residence (i.e., their hometowns), and thus inel-

---

[399] *Id.* at *3.
[400] *Id.* at *3–4.
[401] *Id*. at *4.
[402] ALA. CODE § 11-46-38(b) (emphasis added).
[403] *Horwitz*, 2015 WL 5725127, at *4–5.
[404] *Id.* at *5–6.
[405] *Id.* at *7–12.
[406] *Id*. at *10.
[407] *Id*.

igible to vote in the August 27, 2013 election.[408]

In addition to the court's analysis of the residency issue, the court briefly entertained Horwitz's contention that a number of the votes were illegal due to misconduct.[409] Because there had been no offer of inducement to vote for a particular candidate, the trial court concluded that the votes should not be invalidated on the basis of misconduct. Due to the lack of admissible evidence presented by Horwitz, the Alabama Supreme Court upheld the trial court's decision on this issue, holding that "the trial court did not err in concluding that Horwitz failed to prove the illegality of votes based on misconduct in the form of bribery."[410]

In conclusion, the court found that 159 of the contested ballots should have been rejected and remanded the case back to the trial court for the purposes of conducting Phase II, which consists of issuing subpoenas to the voters whose ballots were found to be illegal in order to determine for whom they had voted for.[411] The conclusion reached by the court mirrored one reached several years ago in *Ex parte Coley*,[412] further supporting the state of Alabama's stance regarding the status of residency of college students for both the purposes of voting and for determining jurisdiction: Where facts regarding a student's intent to abandon their former permanent residence and establish a permanent one in the college town at issue are conflicting, "'the presumption is strongly in favor of an original, or former, domicile, as against an acquired one.'"[413]

—Riley Murphy

xvi. Electronic Bingo Unambiguously Deemed Illegal

In *Houston County Economic Development Authority v. State* the Supreme Court of Alabama held that electronic bingo was illegal under state law, notwithstanding certain local constitutional amendments that allow charitable bingo games.[414] The court noted that the term "bingo," as defined in Section 45-35-150(1) of the Alabama Code,[415] "refers to '[t]he game, commonly known as bingo, where numbers or

---

[408] *Id.* at *11.
[409] *Horwitz*, 2015 WL 5725127, at *15.
[410] *Id.* at *16.
[411] *Id.* at *17, *2.
[412] *Ex parte* Coley, 942 So. 2d 349 (Ala. 2006).
[413] *Horwitz*, 2015 WL 5725127, at *8 (quoting *Coley*, 942 So.2d at 354).
[414] Houston Cty. Econ. Dev. Auth. v. State, 168 So. 3d 4, 19 (Ala. 2014) [hereinafter "*Houston Cty. EDA*"].
[415] ALA. CODE § 45-35-150(1).

symbols on a card are matched with numbers or symbols selected at random.'"[416] The court ruled that this definition of state-authorized bingo should be narrowly construed as an exception to general constitutional bans on lotteries,[417] and that electronic bingo machines are essentially illegal slot machines for the purposes of Alabama antigambling laws.

On July 25, 2012, Houston County Sheriff's Office, the Alabama Department of Public Safety, and the Office of the Alabama Attorney General searched and confiscated illegal gaming devices, tables, cash, and documents from Center Stage Alabama ("Center Stage"), a bingo gaming facility.[418] The Houston County Economic Development Authority ("HEDA"), Center Stage's owner, moved to intervene when the State initiated civil forfeiture proceedings over the seized equipment and cash.[419] The trial court found that the gaming devices were illegal and that the state's seizures were permissible.[420] HEDA's post-judgment motion was denied, and HEDA appealed.[421]

On appeal HEDA argued that the trial court erred by determining that the Center Stage gaming devices were illegal.[422] Slot and gambling machines are illegal in the State of Alabama under Section 13A-12-27 of the Alabama Code and the state constitution. HEDA maintained that its machines honored a local constitutional amendment permitting certain charity bingo operations within the county. The court's analysis relied on *Barber v. Cornerstone CommunityOutreach, Inc.*, where it previously held that "the term 'bingo' 'was intended to reference the game commonly or traditionally known as bingo.'"[423] The *Cornerstone* court identified a non-exhaustive list of factors that a game must possess in order to qualify as "legal bingo" in keeping with the noted local amendments:

> 1. Each player uses one or more cards with spaces arranged in five columns and five rows, with an alphanumeric or similar designation assigned to each space.
>
> 2. Alphanumeric or similar designations are randomly drawn and announced one by one.
>
> 3. In order to play, each player must pay attention to the values an-

---

[416] *Houston Cty. EDA*, 168 So. 3d at 9 (quoting ALA. CODE § 45-35-150(1)). Amendment 569 permits bingo to be played in Houston County under certain circumstances, which is an exception to ALA. CONST. art. IV, § 65. *Id*.

[417] *Id.* at 10, 19.

[418] *Id.* at 7.

[419] *Id.*

[420] *Id.* at 8.

[421] *Houston Cty. EDA*, 168 So. 3d at 8.

[422] *Id.* at 9.

[423] *Id.* at 10 (citing *Cornerstone*, 42 So. 3d 65, 87 (Ala. 2010)).

> nounced; if one of the values matches a value on one or more of the player's cards, the player must physically act by marking his or her card accordingly.
>
> 4. A player can fail to pay proper attention or to properly mark his or her card, and thereby miss an opportunity to be declared a winner.
>
> 5. A player must recognize that his or her card has a 'bingo,' i.e., a predetermined pattern of matching values, and in turn announce to the other players and the announcer that this is the case before any other player does so.
>
> 6. The game of bingo contemplates a group activity in which multiple players compete against each other to be the first to properly mark a card with the predetermined winning pattern and announce that fact.[424]

The *Houston Cty. EDA* court found no error as to the trial court's determination that the first *Cornerstone* factor was not met,[425] rejecting HEDA's argument that electronic bingo grids satisfied this first prong.[426] As to the second factor, HEDA argued that the trial court erred "by finding that the games were not bingo on the ground that [the games] are not conducted 'by an actual physical, living announcer or caller' who randomly draws and announces, one-by-one, the applicable alphanumeric designations."[427] The court countered that "the game commonly or traditionally known as bingo" does in fact require "meaningful human interaction," which electronic bingo machines did not provide.[428] Third, the trial court concluded that the third element was not met because the individual playing the game does not have the ability to physically mark the alphanumeric combination called out.[429] HEDA contended that nothing in *Cornerstone* required the player to physically mark the alphanumeric combinations called out.[430] The court disagreed and found that the third element implied that the player must physically mark the alphanumeric combination.[431]

The court continued to systematically apply and analyze the *Cornerstone* factors in light of the facts before it, and unambiguously held that games played on machines do not comport with *Cornerstone* and are not permissible "bingo" under local amendments:

---

[424] *Id.* at 10–11 (quoting *Cornerstone*, 42 So. 3d at 86).

[425] The trial court found that "[a]n animated portrayal of a Bingo Card does not satisfy the Bingo Card requirement of *Cornerstone*." *Id.* at 13.

[426] *Id.*

[427] *Houston Cty. EDA*, 168 So. 3d at 13.

[428] *Id.* at 14.

[429] *Id.* at 15.

[430] *Id.*

[431] *Id.*

> [W]e reiterate today that the game traditionally known as bingo is not one played by or within an electronic or computerized machine, terminal, or server, but is one played outside of machines and electronic circuitry. It is a group activity, and one that requires a meaningful measure of human interaction and skill. This includes attentiveness and discernment and physical, visual, auditory, and verbal interaction by and between those persons who are playing and between the players and a person commonly known as the "announcer" or "caller," who is responsible for calling out the randomly drawn designations and allowing time between each call for the players to check their cards and to physically mark them accordingly. In accordance with the previously stated list of characteristics, each player purchases and plays the game on one or more cards that, in a county such as Houston County (in which the amendment does not expressly permit "electronic marking machines"), are not electronic devices or electronic depictions of playing surfaces but are actual physical cards made of cardboard, paper, or some functionally similar material that is flat and is preprinted with the grid and the designations referenced above.[432]

In sum, by affirming the trial court's order that Center Stage's gaming equipment, documents, and money be destroyed or forfeited to the state, *Houston Cty. EDA* seems to foreclose on electronic bingo gaming in the state of Alabama under any circumstances. The decision is the latest in a string of similar interpretations of local bingo amendments in Greene, Lowdes, Jefferson, and Macon Counties that also resulted in forfeitures. Accordingly, absent a contrary legislative response in the future, electronic bingo operations are patently illegal.

—*Scotch Ritchey*

---

[432] *Id.* at 18.