NO. _____

IN THE ALABAMA COURT OF CRIMINAL APPEALS

EX PARTE BURTON WHEELER NEWSOME, Petitioner

(In re: State of Alabama

v.

Burton Wheeler Newsome, Defendant,
Circuit Court of Shelby County
Case Number CC 2015-000121)

PETITION OF BURTON WHEELER NEWSOME FOR THE WRIT OF CERTIORARI, OR IN THE ALTERNATIVE, FOR THE WRIT OF MANDAMUS

TO THE HONORABLE H. L. CONWILL, CIRCUIT JUDGE
AND THE HONORABLE MARY H. HARRIS, CIRCUIT CLERK

(VOLUME 3 of 4)

ATTORNEY FOR PETITIONER
BURTON WHEELER NEWSOME:

G. Houston Howard II (HOW015)
27582 Canal Road, Unit 2710
Orange Beach, Al 36561
Telephone: (334) 462-5844
Fax: (205) 747-1971
Email: Ghhowardii@aol.com

EXHIBITS IN THIS VOLUME

10. The "Response of Burt W. Newsome to Motion of John Bullock to Use Contents of Expunged File" delivered to Bonita Davidson on June 1, 2016, after the Circuit Clerk refused to accept the document for filing.

Exhibits to the "Response of Burt W. Newsome" ***continued from volume 2:***

R. "Order on Petition for Expungement of Records" in *State v. Newsome*, CC 2015-000121, Shelby County, filed September 10, 2015.....159

S. "Plaintiff's [Newsome's] Motion to Alter, Amend, or Vacate Judgment, or in the Alternative, to Grant a New Trial" in *Newsome v. Bullock* CV 2015-900190, Jefferson County, filed and served electronically on September 28, 2015.....161-185, 208-231.[1]

T. Order Granting Newsome's "Motion to Alter, Amend, or Vacate Orders of Dismissal" in *Newsome v. Bullock*, CV 2015-900190, Jefferson County, filed December 16, 2015.....232

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Z. Alabama Law Enforcement Agency, "Criminal Record Expungement FAQ".....243

11. The "Response of Burt W. Newsome to Claiborne Seier's 'Petition to Set Aside Expungement Pursuant to Ala. Code § 15-27-17 and Joinder in Victim's Motion'" delivered to Bonita Davidson on June 1, 2016, after the Circuit Clerk refused to accept documents for filing.

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[1]Pages 186-207 are duplicate pages of the rule 59 motion erroneously copied into certified exhibit 10.

12. Newsome's "Motion to Expunge" delivered to Bonita Davidson on June 2, 2016, after the Circuit Clerk refused to accept documents for filing.

AUG 2 4 2015

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

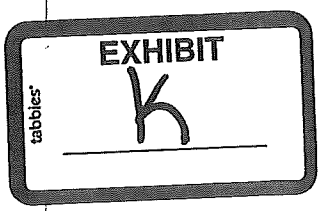
State of Alabama,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. CC-2015-000121.00
	)	
Burton Wheeler Newsome,	)	
	)	
Defendant.	)	
	)	
	)	

Victim's Objection to Petition for Expungement of Records

COMES NOW, John F. Bullock, Jr., victim in DC-2013-1434, and objects to Plaintiff's Petition for Expungement of Records pursuant to Ala. Code § 15-27-5.

Mr. Bullock strongly objects to the expungement of Burt Newsome's criminal record. Since the dismissal of the case against Newsome, Newsome has instituted unsuccessful legal action against Mr. Bullock in clear contravention of his agreement. The case against John Bullock, 01-CV-2015-900190.00 – Burt Newsome and Newsome Law, LLC, v. Clark Andrew Cooper, Balch & Bingham, LLP, Clairborne P. Seier, and John Franklin Bullock, Jr., was dismissed on a Rule 12(b) Motion to Dismiss by Judge Carol Smitherman. *See* Exhibit A. Nevertheless, Newsome has filed motion to reinstate and motion to compel discovery even after dismissal, Newsome's actions have caused and continue to cause Mr. Bullock to endure spurious and protracted proceedings and incur unnecessary legal fees. In short, Newsome's bad behavior against Mr. Bullock continues.

WHEREFORE, PREMISES CONSIDERED, John Bullock objects to Plaintiff's



Petition for Expungement of Records and requests that this Court deny the same at the hearing on said Petition.

Respectfully submitted,

/s/ James E. Hill, Jr.
JAMES E. HILL (HIL005),
Attorney for John W. Bullock

OF COUNSEL:

HILL, WEISSKOPF & HILL, P.C.
2603 MOODY PARKWAY, SUITE 200
P.O. BOX 310
MOODY, ALABAMA 35004
(205) 640-2000

I hereby certify that the above statements are to the best of my knowledge accurate and true.

John W. Bullock, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2015, I electronically filed the foregoing with the Clerk of the Court using the AlaFile system which will send notification of such filing to all parties, and I hereby certify that, to the best of my knowledge and belief, there are no non-AlaFile participants to whom the foregoing is due to be mailed by way of the United States Postal Service.

A. Gregg Lowery
Assistant District Attorney

William R. Justice
ELLIS, HEAD, OWENS, & JUSTICE
P.O. Box 587
Columbiana, AL 35051

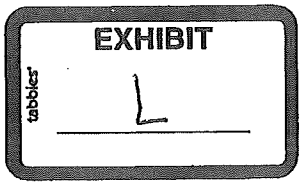
/s/ James E. Hill, Jr.
OF COUNSEL

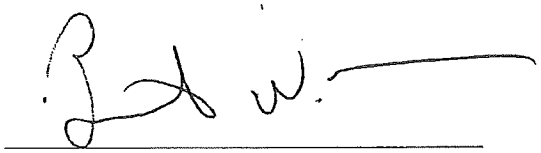
STATE OF ALABAMA)
)
SHELBY COUNTY)

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared Burt Newsome, who being known to me and being first duly sworn and under oath, deposes and says as follows:

"My name is Burt W. Newsome and I am a resident of Shelby County, Alabama and over nineteen years of age. On August 31, 2015, I was present at the hearing on my Petition for Expungement before the retired Honorable Judge Dan Reeves. John Bullock and his attorney James Hill were also present at the hearing. Attorney Hill argued on behalf of his client that the expungement should not be granted because I had filed a civil action against Mr. Bullock in Jefferson County, Alabama and also that his client (Bullock) should be able to use the expunged documents in the pending civil case. The Assistant District Attorney who was at the hearing filed a pleading during the hearing that erroneously stated that menacing was not an expungable offense and was a violent crime. Judge Reeves denied my expungement petition initially based on the arguments set out in the Assistant District Attorney's motion. My attorney Bill Justice filed a Motion To Reconsider which pointed out that menacing was a misdemeanor and was an expungable offense under Alabama's new expungement statute, and that the charges against me had been dismissed. Judge Reeves granted the motion to reconsider and my expungement petition. I never pled guilty to any of the criminal charges filed against me by John Bullock as the charges were false.





Burt W. Newsome

STATE OF ALABAMA)
COUNTY OF SHELBY)

I, the undersigned authority, a Notary Public in and for said County and State, hereby certify that Burt W. Newsome, whose name is signed to the foregoing affidavit, and who is known to me, acknowledged before me on this day, that being informed of the contents of this affidvait, he acknowledged its truthfulness and executed the same voluntarily on the day the same bears

date.

Sworn to and subscribed before me on this the 31st day of May, 2016.

Notary Public

My commission expires: 11/6/19

ASHLEY BROOKE YEAGER
MY COMMISSION EXPIRES
November 6, 2019
NOTARY PUBLIC
STATE OF ALABAMA

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
vs.	)	CASE NO: CC-2015-121
	)	
BURTON WHEELER NEWSOME,	)	
	)	
Defendant,	)	

STATE'S RESPONSE TO PETITION FOR EXPUNGEMENT OF RECORDS

Comes now the State of Alabama, by and through A. Gregg Lowrey, Assistant District Attorney for the Eighteenth Judicial Circuit, and states as follows:

1. The State of Alabama objects to Plaintiff's Petition for Expungement of Records.
2. The Petitioner was charged with the crime of Menacing, which involved him pointing a pistol at the victim.
3. This crime is considered a violent crime pursuant to 12-25-32(14).
4. Subsection 46 (b)(1) states "The basis for defining these offenses as violent is that each offense meets at least one of the following criteria: Has as an element, the use, attempted use, or threatened use of a deadly weapon or dangerous instrument or physical force against the person of another.
5. Therefore, since this crime is considered a violent offense it may not be expunged.

THEREFORE, the State of Alabama objects to this Honorable Court granting said Petition for Expungement of Records.

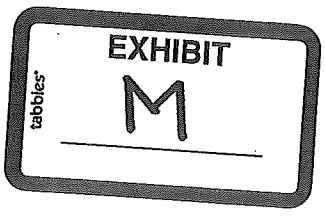
Respectfully submitted on this the 31th day of August 2015.

/s/ A. Gregg Lowrey
A. Gregg Lowrey
Assistant District Attorney

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been served upon Petitioner by hand delivery on this the 31th day of August 2015.

/s/ A. Gregg Lowrey
A. Gregg Lowrey
Assistant District Attorney



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CIRCUIT COURT OF
SHELBY COUNTY, ALABAMA
MARY HARRIS, CLERK

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

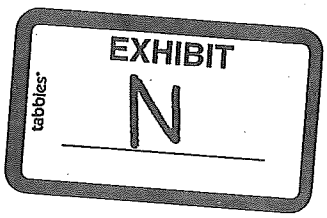
STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-2015-000121.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

ORDER

The State having reviewed the Petition for Expungement and having noted a deficiency or otherwise has filed an objection thereto, (the victim identified in the warrant has also filed an objection). The Court having considered the same, the Courts finds the underlying offense (Menacing) is a crime excluded from those the court may expunge. The court hereby DENIES the Petition for Expungement.

DONE this 31st day of August, 2015.

/s/ DAN REEVES
CIRCUIT JUDGE



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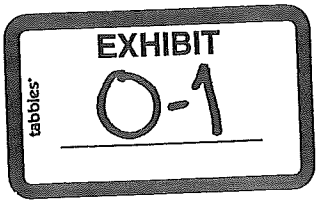
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

NEWSOME BURT W, NEWSOME LAW LLC, Plaintiffs,	)	
V.	)	Case No.: CV-2015-900190.00
COOPER CLARK ANDREW, BALCH & BINGHAM LLP, SEIER CLAIBORNE P, BULLOCK JOHN FRANKLIN JR., ET AL, Defendants.	)	

CERTIFICATION OF FINAL JUDGMENT UNDER RULE 54(B)

On May 7, 2015, this court entered orders "pursuant to rule 12 (B)" granting motions to dismiss the plaintiffs' claims against Claiborne P. Seier and John Franklin Bullock, Jr. The plaintiffs filed a Motion to Reconsider on June 2, 2005, and the court has this day denied that Motion. The court finds that the plaintiffs' claims against the remaining defendants, Cooper and Balch-Bingham, are separate and distinct from their claims against Seier and Bullock. Further, there are no remaining claims in this action against Seier and Bullock, and they have asserted no claims against any other party to this suit.



BASED ON THE FOREGOING, the court does hereby expressly determine that there is no just reason to delay entering final judgment in favor of Claiborne P. Seier and John Franklin Bullock, Jr., pending the resolution of the other claims in this action, and the court does expressly direct the entry of final judgment, and it does hereby enter final judgment, in favor of said defendants pursuant to rule 54 (b) of the Alabama Rules of Civil Procedure.

DONE this 31st day of August, 2015.

/s/ CAROLE C. SMITHERMAN
CIRCUIT JUDGE

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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

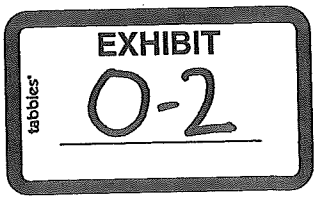
NEWSOME BURT W, NEWSOME LAW LLC, Plaintiffs,	)	
V.	)	Case No.: CV-2015-900190.00
COOPER CLARK ANDREW, BALCH & BINGHAM LLP, SEIER CLAIBORNE P, BULLOCK JOHN FRANKLIN JR., ET AL, Defendants.	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This action, which was filed by Burt W. Newsome and Newsome Law, LLC ("collectively the "Newsome Defendants") came before this Court on a Motion for Summary Judgment filed by Defendants Clark Andrew Cooper ("Cooper") and Balch & Bingham LLP ("B&B") (collectively, the "B&B Defendants"). This Court has heard argument on multiple occasions regarding this case, has reviewed the applicable law, and has reviewed all evidence submitted by the parties. Having considered the written submissions, along with argument, the Court determines as follows:

1. The Complaint filed against the B&B Defendants contains counts for intentional interference with business and contractual relations, defamation, conspiracy and vicarious liability/respondeat superior.

2. The intentional interference claims fail as a matter of law because the Newsome Defendants have "presented no evidence to support a finding of the third element of intentional interference – that Cooper intentionally interfered with Newsome's employment relationship" with the financial institutions complained of—Iberiabank Corp., Renasant Bank, or Bryant Bank. *Hurst v. Alabama Power Company*, 675 So. 2d 397, 399 (Ala. 1996).



3. The defamation count fails as a matter of law because falsity of the alleged defamatory statement is one of the five elements the Newsome Defendants were required to show to establish a *prima facie* action for defamation. See, e.g., *Ex parte Crawford Broad. Co.*, 904 So. 2d 221, 225 (Ala. 2004): thus, "[t]ruth is a complete and absolute defense to defamation. . . . .Truthful statements cannot, as a matter of law, have defamatory meaning." *Federal Credit, Inc. v. Fuller*, 72 So. 3d 5, 9-10 (Ala. 2011). While Newsome's arrest did not constitute evidence of wrongdoing, the arrest itself is a fact, and Cooper's email correspondence attaching Newsome's mug shot was a true event, which occurred in time.

4. Newsome's conspiracy count fails as a matter of law for a number of reasons, including because a) until Newsome filed this lawsuit, Cooper had never met the other alleged defendant "co-conspirators" in this matter; and b) the Deferred Prosecution Agreement and Release, executed by Newsome, extends to release any of Cooper's alleged conduct.

5. Lastly, the Newsome Defendants' vicarious liability/respondeat superior count fails as a matter of law against the B&B Defendants because Newsome has provided absolutely no evidence or pleadings that Cooper is liable for any wrongdoing whatsoever.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all claims against Clark Andrew Cooper and Balch & Bingham LLP are hereby dismissed with prejudice, costs taxed as paid.

DONE this 31st day of August, 2015.

/s/ CAROLE C. SMITHERMAN
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE ALABAMA,	)	
v.	)	CASE NO. CC-2015-000121
BURTON WHEELER NEWSOME,	)	
Defendant.	)	

MOTION TO ALTER, AMEND, OR VACATE JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR A NEW HEARING ON THE PETITION

STATEMENT OF THE FACTS

Comes now Burton Wheeler Newsome (hereinafter "Newsome") and moves the court to Alter, Amend, or Vacate its judgment dated August 31, 2015, denying his Petition for Expungement, or in the alternative, to grant him a new hearing on his Petition. As grounds for this motion, he respectfully shows the court the following:

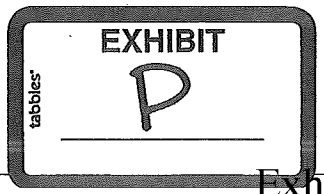
1. On February 19, 2015, Newsome filed a petition to expunge the record of his arrest for the misdemeanor of "menacing" (See Ala. Code § 13A-06-23). He filed that petition on a form prepared by the "State of Alabama Unified Judicial System" (Exhibit 1, pages 6-7 *infra*).

2. The petition was served on the District Attorney of Shelby County on April 28, 2015 (Exhibit 2, page 8 *infra*).

3. Neither the district attorney nor the victim filed an objection within the 45 days allowed by section 15-27-3(c).

4. The district attorney first objected to the expungement on July 10, 2015; this was more than 60 days after service on her (Exhibit 3, page 9 *infra*). Newsome moved to strike the objection as untimely (Exhibit 4, page 9 *infra*).

5. At 9:01 A.M. on August 31, 2015 – after the 8:30 scheduled hearing on Newsome's petition – the District Attorney filed a second objection, asserting that menacing "is considered a



violent offense [and] it may not be expunged." (Exhibit 5, page 11 *infra*). At the hearing, Newsome objected to the State's objection as untimely and argued that the expungement statute did not address violent offenses in cases such as this one.

6. The court accepted the assertions in the District Attorney's second objection: "the Court finds the underlying offense (Menacing) is a crime excluded from those the court may expunge. The court hereby DENIES the Petition for Expungement" (Exhibit 6, page 12 *infra*).

ARGUMENT

A. Only Non-Violent Felonies May Be Expunged, but Any "Misdemeanor" May Be Expunged.

In arguing that "violent misdemeanors" are excluded from the expungement statute, the District Attorney misstated the requirements of section 15-27-1 (expungement of misdemeanors) with the requirements of section 15-27-2 (expungement of felonies).

The statute on felonies begins, "A person who has been charged with **a felony offense, except a violent offense** as defined in section 12-25-32(14), may file a petition . . . to expunge records relating to the charge. . . ." (Ala. Code § 15-27-2) (Exhibit 7, page 13 *infra*).

The statute on misdemeanors contains no exception for "violent offenses." It begins, "A person who has been charged with a misdemeanor criminal offense . . . may file a petition . . . to expunge records relating to the charge. . . ." (Ala. Code § 15-21-1(a) (Exhibit 8, page 14 *infra*).

As a matter of law, the records of Newsome's arrest for "menacing" may be expunged under section 15-21-1(a). The complaint for Newsome's arrest alleges that he was charged with a misdemeanor (Exhibit 9, page 15 *infra*). The court erred in holding that "the underlying offense (Menacing) is a crime excluded from those the court may expunge."

B. The District Attorney and Bullock "Waived the Right to Object" to Newsome's Petition by Failing "To File a Written Objection" to the Petition within 45 after the District Attorney Was Served.

Under section 15-27-3(c), the District Attorney and the victim were required to file any objection to Newsome's Petition for Expungement within 45 days after the District Attorney was served with the petition:

> The district attorney and the victim shall have a period of 45 days to file a written objection to the granting of the petition or the district attorney shall be deemed to have waived the right to object (Exhibit 10, page 16 *infra*).

Neither the District Attorney nor Bullock filed a "written objection" to Newsome's Petition within this time limit. The Alabama Expungement Act provides no procedure for extending the time for objections. As a matter of law, the failure of the District Attorney and the alleged victim "to file a written objection" with the 45-day time limit "waived [their] right to object."

The objection filed on July 10, 2015, came more than 60 days after the District Attorney was served with the Petition (Exhibit 3, page 9 *infra*). It was too late and of no effect. Similarly, the objection filed at 9:01 A.M. on August 31, 2015 (the morning of the hearing) came more than 120 days after the District Attorney was served with the Petition (Exhibit 5, page 11 *infra*). It was also too late and of no effect.

C. ***When No Objection is Filed, "the Court Shall Grant the Petition if . . . the Petitioner Has Complied with and Satisfied the Requirements of [the] Chapter."***

Section 15-27-5(d) provides the procedure when neither the prosecuting authority nor the victim files an objection to the Petition for Expungement:

> If no objection to a petition is filed by the prosecuting authority or victim, the court having jurisdiction over the matter may rule on the merits of the petition without setting the matter for hearing. In such cases, the court shall grant the petition if it is reasonably satisfied from the evidence that the petitioner has complied with and satisfied the requirements of this chapter. (Exhibit 11, page 17 *infra*).

Since neither the District Attorney nor the victim filed an objection within the time limit, and since an objection not so filed "shall be deemed waived," this section applies.

The only statutory "requirement" for expungement of "a misdemeanor criminal offense" is that the petitioner fall in one of four categories:

> (a) A person who has been charged with a misdemeanor criminal offense, a violation, a traffic violation, or a municipal ordinance violation may file a petition in the criminal division of the circuit court in the county in which the charges were filed, to expunge records relating to the charge in any of the following circumstances:
>
> (1) When the charge is dismissed with prejudice.
>
> (2) When the charge has been no billed by a grand jury.
>
> (3) When the person has been found not guilty of the charge.
>
> (4) When the charge was dismissed without prejudice more than two years ago, has not been refiled, and the person has not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous two years (Ala. Code § 15-27-1) (Exhibit 10)

Newsome falls within section 15-27-1(a)(1). The misdemeanor charges against him were dismissed with prejudice on April 4, 2014. The order states, "[T]his case is DISMISSED with prejudice" (Exhibit 12, page 18 *infra*).

Since Newsome "has complied with and satisfied the requirements of [the] chapter" on expungement, "the court shall grant the petition. . . ." As a matter of law, Newsome is due to have the record of his arrest expunged under section 15-27-1(a)(1).

WHEREFORE, Burton Wheeler Newsome respectfully moves the court to VACATE its order dated August 31, 2015, denying his petition for expungement, and to enter an order GRANTING THE PETITION as required by section 15-27-5(d). A proposed order is filed herewith.

s/ William R. Justice
William R. Justice (JUS001)

ELLIS, HEAD, OWENS & JUSTICE
P.O. Box 587
Columbiana, AL 35051
phone: (205) 669-6783
fax: (205) 669-4932
email: wjustice@wefhlaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 2nd day of September 2015 filed the foregoing with the Clerk of the Court using the Alabama Judicial System electronic filing system, which will send notification of such filing to those parties of record who are registered for electronic filing, and further certify that those parties of record, or their attorneys, who are not registered for electronic filing have been served by sending this date a copy of the same by first class U.S. mail, postage prepaid, and addressed to them is followed:

A. Gregg Lowery
Assistant District Attorney
Courthouse, 112 N. Main Street
Columbiana, AL 35051

James E. Hill, Jr.
Hill, Weisskopf & Hill
Moody Professional Building
2603 Moody Parkway
Suite 200
Moody, AL 35004

s/ Willliam R. Justice

State of Alabama Unified Judicial System Form CR-65 7/2014	**PETITION FOR EXPUNGEMENT OF RECORDS**	Case No. DC-2015-001434 CC 15-191

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
(Name of County)

☑ STATE OF ALABAMA v. BURTON W. NEWSOME
Defendant/Petitioner

☐ MUNICIPALITY OF _____ v. _____
Defendant/Petitioner *(Name of Municipality)* *(Name)*

CASE NUMBER DC-2015-001434

CHARGE MENACING

(Name or Describe the Offense; Only One Offense per Petition)

I, the above-named Defendant/Petitioner, was charged with the above-named Offense which is:

RECEIVED & FILED
DEC 19 2015
MARY H. HARRIS
CIRCUIT & DISTRICT COURT CLERK
SHELBY COUNTY

☑ a misdemeanor criminal offense,

☐ a violation,

☐ a traffic violation,

☐ a municipal ordinance violation,

☐ a non-violent felony,

I hereby file this petition with the circuit court in order to have the records relating to the above charge expunged for one of the following circumstances:

☑ The charge was dismissed with prejudice.

☐ The charge was no billed by a grand jury.

☐ I was found not guilty of the charge.

☐ *(Non-felony only)* The charge was dismissed without prejudice more than two years ago and was not refiled, and I have not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous two years.

☐ *(Non-violent felony only)* The charge was dismissed after successful completion of a drug court program, mental health court program, diversion program, veteran's court, or any court-approved deferred prosecution program after one year from successful completion of the program.

EXHIBIT 1

State of Alabama Unified Judicial System Form CR-65 7/2014	**PETITION FOR EXPUNGEMENT OF RECORDS**	Case No. DC-2013-001434 CC15-121

☐ *(Non-violent Felony only)* The charge was dismissed without prejudice more than five years ago, was not refiled, and I have not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous five years.

☐ *(Non-violent Felony only)* Ninety days have passed from the date of dismissal with prejudice, no-bill, acquittal, or nolle prosequi and the charge has not been refiled.

Attached to this petition is a certified record of arrest, disposition, or the case action summary from the appropriate agency for the court record I seek to have expunged, as well as a certified official criminal record obtained from the Alabama Criminal Justice Information Center.

I am providing the following additional information as required by Act # 2014-292 (codified at Ala. Code 1975, § 15-27-1 et seq.): I was charged with menacing and a warrant was issued for my arrest. On May 2, 2014, I was arrested by a Shelby County Deputy and booked into Shelby County Jail.

_____ *(specify what criminal charges from the record are to be considered, further specify the agency or department that made the arrest and any agency or department where the petitioner was booked or was incarcerated or detained pursuant to the arrest or charge sought to be expunged).* Further, I have satisfied and paid in full all terms and conditions, including court-ordered restitution, including interest, to any victim or the Alabama Crime Victims Compensation Commission, as well as court costs, fines, or statutory fees ordered by the sentencing court to have been paid, absent a finding of indigency by the court.

I swear or affirm, under the penalty of perjury, that I have satisfied the requirements set out in Act # 2014-292 (codified at Ala. Code 1975, § 15-27-1 et seq.) that I ☑ have not ☐ have previously applied for an expungement in any other jurisdiction, specifically

_____

_____ and, if I have applied for an expungement in any other jurisdiction, the expungement was previously ☐ granted ☐ denied.

2/6/2015
Date

Signature of Petitioner

SWORN TO AND SUBSCRIBED BEFORE ME:

2/6/2015
Date

Person Authorized to Administer Oath

Notary Public Alabama State at Large
My Commission Expires October 4, 2016

State of Alabama
Unified Judicial System
Form C-15 Rev. 7/97

ORDER OF SERVICE AND RETURN

Case Number
DC-2013-001434

IN THE DISTRICT COURT OF SHELBY ALABAMA

State of Alabama (Plaintiff) v. Burton N. Newsome (Defendant)

RECEIVED & FILED
APR 17 2015
MARY H. HARRIS
CIRCUIT & DISTRICT COURT CLERK
SHELBY COUNTY

(For Juvenile cases only):
In the Matter of

TO ANY SHERIFF OF THE STATE OF ALABAMA OR ANY OTHER AUTHORIZED PERSON:

You are hereby commanded to deliver the attached document(s), namely

Petition for Expungement of Records

to (name) Jill H. Lee, District Attorney of Shelby County
at home address (including city, state, and zip code) 112 N. Main Street
Columbiana, AL 35051
and make return to this court.

4-17-15
Date

Mary H. Harris
Signature of Court Clerk

By

RETURN ON SERVICE

I hereby certify that I personally delivered a copy of the attached document(s)
to Shelby, Alabama to:
(Name of County or Municipality)

Name: Tina Oaks
Address: 112 N. Main St.
City/State/Zip Code: Columbiana, AL 35051
Address of Server: 350 Medow Rd
City/State/Zip Code: Columbiana, AL 35051

on (Date) 4/20/15

Signature of Server

Type of Process Server

RECEIVED AND FILED
MARY H. HARRIS
APR 30 2015
CIRCUIT & DISTRICT
COURT CLERK
SHELBY COUNTY

DOCUMENT 16

EXHIBIT 2

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
vs.	)	CASE NO: CC-2015-121
	)	
BURTON WHEELER NEWSOME,	)	
	)	
Defendant,	)	

STATE'S RESPONSE TO PETITION FOR EXPUNGEMENT OF RECORDS

Comes now the State of Alabama, by and through A. Gregg Lowrey, Assistant District Attorney for the Eighteenth Judicial Circuit, and states as follows:

1. The State of Alabama and the victim in the underling case objects to Plaintiff's Petition for Expungement of Records, pursuant to Section 15-27-5, Code of Alabama.

THEREFORE, the State of Alabama objects to this Honorable Court granting said Petition for Expungement of Records.

Respectfully submitted on this the 10th day of July 2015.

/s/ A. Gregg Lowrey
A. Gregg Lowrey
Assistant District Attorney

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been served upon Petitioner by E-File on this the 10th day of July 2015.

/s/ A. Gregg Lowrey
A. Gregg Lowrey
Assistant District Attorney

EXHIBIT 3

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. CC 2015-000121
	)	
BURTON WHEELER NEWSOME,	)	
	)	
Defendant.	)	

MOTION TO STRIKE

Comes now Defendant Burton Wheeler Newsome and moves to strike the objections filed by the State of Alabama and filed by John F. Bullock, and in support thereof states as follows:

1. Defendant filed a Petition for Expungement of Records on February 19, 2015.

2. The State of Alabama by the Shelby County District Attorney filed an objection to the petition on July 10, 2015.

3. John F. Bullock, the alleged victim, purportedly filed an objection to the petition on or about August 20, 2015.

4. Pursuant to § 15-27-3(c), Code of Ala. 1975, as amended, the district attorney and the victim have a period of 45 days to file a written objection to the petition or be deemed to have waived the right to object.

WHEREFORE, Defendant moves the Court to strike the objections filed by the State of Alabama and John F. Bullock as being untimely.

s/ William R. Justice
William R. Justice (JUS001)
Attorney for Defendant

EXHIBIT 4

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
Plaintiff,	)	
vs.	)	CASE NO: CC-2015-121
BURTON WHEELER NEWSOME,	)	
Defendant,	)	

STATE'S RESPONSE TO PETITION FOR EXPUNGEMENT OF RECORDS

Comes now the State of Alabama, by and through A. Gregg Lowrey, Assistant District Attorney for the Eighteenth Judicial Circuit, and states as follows:

1. The State of Alabama objects to Plaintiff's Petition for Expungement of Records.
2. The Petitioner was charged with the crime of Menacing, which involved him pointing a pistol at the victim.
3. This crime is considered a violent crime pursuant to 12-25-32(14).
4. Subsection 46 (b)(1) states "The basis for defining these offenses as violent is that each offense meets at least one of the following criteria: Has as an element, the use, attempted use, or threatened use of a deadly weapon or dangerous instrument or physical force against the person of another.
5. Therefore, since this crime is considered a violent offense it may not be expunged.

THEREFORE, the State of Alabama objects to this Honorable Court granting said Petition for Expungement of Records.

Respectfully submitted on this the 31th day of August 2015.

/s/ A. Gregg Lowrey
A. Gregg Lowrey
Assistant District Attorney

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been served upon Petitioner by hand delivery on this the 31th day of August 2015.

/s/ A. Gregg Lowrey
A. Gregg Lowrey
Assistant District Attorney

EXHIBIT 5

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	) Case No.:	CC-2015-000121.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

ORDER

The State having reviewed the Petition for Expungement and having noted a deficiency or otherwise has filed an objection thereto, (the victim identified in the warrant has also filed an objection). The Court having considered the same, the Courts finds the underlying offense (Menacing) is a crime excluded from those the court may expunge. The court hereby DENIES the Petition for Expungement.

DONE this 31st day of August, 2015.

/s/ DAN REEVES
CIRCUIT JUDGE

DOCUMENT 18

EXHIBIT 6

§ 15-27-2. Petition to expunge records - Felony offense

(a) A person who has been charged with a felony offense, except a violent offense as defined in Section 12-25-32(14), may file a petition in the criminal division of the circuit court in the county in which the charges were filed, to expunge records relating to the charge in any of the following circumstances:

(1) When the charge is dismissed with prejudice.

(2) When the charge has been no billed by a grand jury.

(3) When the person has been found not guilty of the charge.

(4)

a. The charge was dismissed after successful completion of a drug court program, mental health court program, diversion program, veteran's court, or any court-approved deferred prosecution program after one year from successful completion of the program.

b. Expungement may be a court-ordered condition of a program listed in paragraph a.

(5) The charge was dismissed without prejudice more than five years ago, has not been refiled, and the person has not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous five years.

(6) Ninety days have passed from the date of dismissal with prejudice, no-bill, acquittal, or nolle prosequi and the charge has not been refiled.

(b) The circuit court shall have exclusive jurisdiction of a petition filed under subsection (a).

Cite as Ala. Code § 15-27-2 (1975)

DOCUMENT 18

EXHIBIT 7

§ 15-27-1. Petition to expunge records - Misdemeanor criminal offense, traffic violation, municipal ordinance violation

(a) A person who has been charged with a misdemeanor criminal offense, a violation, a traffic violation, or a municipal ordinance violation may file a petition in the criminal division of the circuit court in the county in which the charges were filed, to expunge records relating to the charge in any of the following circumstances:

(1) When the charge is dismissed with prejudice.

(2) When the charge has been no billed by a grand jury.

(3) When the person has been found not guilty of the charge.

(4) When the charge was dismissed without prejudice more than two years ago, has not been refiled, and the person has not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous two years.

(b) The circuit court shall have exclusive jurisdiction of a petition filed under subsection (a).

Cite as Ala. Code § 15-27-1 (1975)

History. Added by Act 2014-292, § 1, eff. 7/7/2014.

DOCUMENT 18

EXHIBIT 8

ALABAMA JUDICIAL INFORMATION SYSTEM

* * * IN THE DISTRICT COURT OF SHELBY COUNTY * * *

AGENCY NUMBER: 201209077 WARRANT NUMBER: WR 2013 000171.00
OTHER CASE NBR:

C O M P L A I N T

BEFORE ME THE UNDERSIGNED JUDGE/CLERK/MAGISTRATE OF THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA, PERSONALLY APPEARED BULLOCK JOHN FRANKLI WHO BEING DULY SWORN DEPOSES AND SAYS THAT HE/SHE HAS PROBABLE CAUSE FOR BELIEVING, AND DOES BELIEVE THAT BURTON WHEELER NEWSOME DEFENDANT, WHOSE NAME IS OTHERWISE UNKNOWN TO THE COMPLAINANT, DID WITHIN THE ABOVE NAMED COUNTY AND

DID ON OR ABOUT 12/19/2012, BY PHYSICAL ACTION, INTENTIONALLY PLACE OR ATTEMPT TO PLACE JOHN FRANKLIN BULLOCK OR IN FEAR OF IMMINENT SERIOUS PHYSICAL INJURY BY AIMING A HANDGUN AT THE VICTIM & TELLING HIM TO RETURN TO HIS VEHICLE,
IN VIOLATION OF 13A-006-023 OF THE CODE OF ALABAMA, AGAINST THE PEACE AND DIGNITY OF THE STATE OF ALABAMA.

COMPLAINANT'S SIGNATURE

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 14 DAY OF JANUARY, 2013.

~~CLERK/MAGISTRATE~~ OF DISTRICT COURT

CHARGES: MENACING 13A-006-023 M MISDEMEANOR

WITNESS FOR THE STATE

BULLOCK JOHN FRANKLI/

OPERATOR: SRC DATE: 01/14/2013

DOCUMENT 18

EXHIBIT 9

§ 15-27-3. Submission of sworn statement and records; service

(a) A petition filed under this chapter shall include a sworn statement made by the person seeking expungement under the penalty of perjury stating that the person has satisfied the requirements set out in this chapter and whether he or she has previously applied for an expungement in any jurisdiction and whether an expungement has been previously granted.

(b) The petitioner shall include a certified record of arrest, disposition, or the case action summary from the appropriate agency for the court record the petitioner seeks to have expunged as well as a certified official criminal record obtained from the Alabama Criminal Justice Information Center. In addition to setting forth grounds for the court to consider, the petitioner shall specify what criminal charges from the record are to be considered, further specify the agency or department that made the arrest and any agency or department where the petitioner was booked or was incarcerated or detained pursuant to the arrest or charge sought to be expunged.

(c) A petitioner shall serve the district attorney, the law enforcement agency, and clerk of court of the jurisdiction for which the records are sought to be expunged, a copy of the petition, and the sworn affidavit. The district attorney shall review the petition and may make reasonable efforts to notify the victim if the petition has been filed seeking an expungement under circumstances enumerated in paragraph a. of subdivision (4) of Section 15-27-2 involving a victim that is not a governmental entity. The district attorney and the victim shall have a period of 45 days to file a written objection to the granting of the petition or the district attorney shall be deemed to have waived the right to object. The district attorney shall serve the petitioner or the petitioner's counsel a copy of the written objection.

Cite as Ala. Code § 15-27-3 (1975)

History. Added by Act 2014-292, §3, eff. 7/7/2014.

EXHIBIT 10

§ 15-27-5. Objections; hearing; ruling

(a) If the prosecuting authority or victim files an objection to the granting of a petition under this chapter, the court having jurisdiction over the matter shall set a date for a hearing no sooner than 14 days from the filing of the objection. The court shall notify the prosecuting authority and the petitioner of the hearing date. In the discretion of the court, the court shall consider the following factors:

(1) Nature and seriousness of the offense committed.

(2) Circumstances under which the offense occurred.

(3) Date of the offense.

(4) Age of the person when the offense was committed.

(5) Whether the offense was an isolated or repeated incident.

(6) Other conditions which may have contributed to the offense.

(7) An available probation or parole record, report, or recommendation.

(8) Whether the offense was dismissed or nolle prossed as part of a negotiated plea agreement and the petitioner plead guilty to another related or lesser offense.

(9) Evidence of rehabilitation, including good conduct in prison or jail, in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful business or employment history, and the recommendation of his or her supervisors or other persons in the community.

(10) Any other matter the court deems relevant, which may include, but is not limited to, a prior expungement of the petitioner's records.

(b) A hearing under subsection (a) shall be conducted in a manner prescribed by the trial judge and shall include oral argument and review of relevant documentation in support of, or in objection to, the granting of the petition. The Alabama Rules of Evidence shall apply to the hearing. Leave of the court shall be obtained for the taking of witness testimony relating to any disputed fact.

(c) There is no right to the expungement of any criminal record, and any request for expungement of a criminal record may be denied at the sole discretion of the court. The court shall grant the petition if it is reasonably satisfied from the evidence that the petitioner has complied with and satisfied the requirements of this chapter. The court shall have discretion over the number of cases that may be expunged pursuant to this chapter after the first case is expunged. The ruling of the court shall be subject to certiorari review and shall not be reversed absent a showing of an abuse of discretion.

(d) If no objection to a petition is filed by the prosecuting authority or victim, the court having jurisdiction over the matter may rule on the merits of the petition without setting the matter for hearing. In such cases, the court shall grant the petition if it is reasonably satisfied from the evidence that the petitioner has complied with and satisfied the requirements of this chapter. The court shall have discretion over the number of cases that may be expunged pursuant to this chapter after the first case is expunged.

Cite as Ala. Code § 15-27-5 (1975)

History. Added by Act 2014-292, §5, eff. 7/7/2014.

EXHIBIT 11

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	) Case No.:	DC-2013-001434.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

ORDER

Pursuant to earlier written agreement, with no objection by A.D.A. Willingham, this case is DISMISSED with prejudice. Apply cash bond.

DONE this 4th day of April, 2014.

/s/ RONALD E. JACKSON
DISTRICT JUDGE (amh)

DOCUMENT 18

EXHIBIT 12

ELECTRONICALLY FILED
9/2/2015 9:14 AM
58-CC-2015-000121.00
CIRCUIT COURT OF
SHELBY COUNTY, ALABAMA
MARY HARRIS, CLERK

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA Plaintiff,	)	
V.	)	**Case No.:** CC-2015-000121.00
NEWSOME BURTON WHEELER Defendant.	)	

ORDER ON PETITION FOR EXPUNGEMENT OF RECORDS

ORDER ON PETITION FOR EXPUNGMENT OF RECORDS

This case comes before the Court on the motion of Burton Wheeler Newsome (or "Newsome") to Alter, Amend, or Vacate its order dated August 31, 2015, denying his Petition for Expungement of Records related to his arrest for the misdemeanor of menacing. UPON CONSIDERATION thereof, the motion be and hereby is GRANTED, and the order dated August 31, 2015, be and hereby is VACATED and Newsome's Petition for Expungement of Records is GRANTED.

Upon consideration of the motion and the matters of record in this case, the court hereby finds as follows:

1. "Menacing" is a "misdemeanor criminal offense," and records concerning a charge of menacing are subject to expungement under section 15-27-1 of the Alabama Code.

2. The District Attorney of Shelby County was served with Newsome's Petition for Expungement on April 28, 2015.

3. Neither the district attorney nor the victim filed any objection to the Petition for Expungement within 45 days as required by section 15-27-3(c) of the Alabama Code. Consequently, they "have waived the right to object."

4. The record in this case reflects that the misdemeanor charge against Newsome was dismissed with prejudice by the District Court of Shelby County, Alabama, on April 4, 2014.

5. Newsome has therefore satisfied the requirements for expungement under section 15-27-1 et seq.

BASED ON THE FOREGOING, it is therefore ORDERED by the court as follows:

1. The Petition for Expungement of Records filed by Burton Wheeler Newsome is GRANTED.

2. All "records" concerning the charge, arrest, and incarceration of Burton Wheeler Newsome, on the misdemeanor of menacing be and hereby are EXPUNGED.

3. The charge and arrest subject to this order are further identified as case number DC 2013-001434 in the District Court of Shelby County Alabama, which case originated with a complaint signed by John Franklin Bullock, Jr., on January 14, 2013, alleging that Newsome committed the crime of "menacing" in violation of section 13A-6-23 of the Alabama Code.

4. The "records" subject to this order include but are not limited to "arrest records," "booking or arrest photographs," "index references such is the State Judicial Information Services or any other governmental index references for public records search," and all "other data, whether in documentary or electronic form relating to the arrest or charge," as provided in section 15-27-9 of the Alabama Code.

5. Pursuant to section 15-27-6 of the Alabama Code, the District Court of Shelby BE AND HEREBY IS ORDERED TO EXPUNGE any and all "records" of the charge, arrest and incarceration except as otherwise provided in sections 15-27-6 and 15-27-10 of the Alabama Code.

6. Pursuant to section 15-27-6 of the Alabama Code, "any other agency or official" having custody of any such records BE AND HEREBY IS ORDERED TO EXPUNGE any and all "records" of the charge, arrest and incarceration except as otherwise provided in sections 15-27-6 and 15-27-10 of the Alabama Code.

DONE this[To be filled by the Judge].

/s/[To be filled by the Judge]

CIRCUIT JUDGE

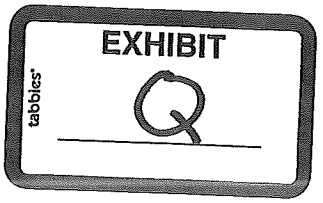
IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

State of Alabama,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. CC-2015-000121.00
	)	
Burton Wheeler Newsome,	)	
	)	
Defendant.	)	
	)	
	)	

Victim John Bullock's Response to Defendant Burton Wheeler Newsome's Motion to Alter, Amend, or Vacate Judgment, or in the Alternative, Motion for a New Hearing on the Petition

COMES NOW, John F. Bullock, Jr., victim in DC-2013-1434, and objects to Defendant's Motion to Alter Amend or Vacate Judgment, or in the Alternative, Motion for a New Hearing on the Petition for Expungement of Record pursuant to Ala. Code § 15-27-5.

Defendant Newsome's motion should be denied because it is without merit. This Court, pursuant to its power under Title 15, Chapter 27 of the Alabama Code elected to hold a hearing upon Defendant Newsome's Petition for Expungement of Record. At that hearing, the Court heard argument from both sides and took proffered testimony. Upon due reflection and consideration, the Court denied Defendant's petition pursuant to clear discretion afforded to it under Alabama Code Section 15-27-5. Defendant's motion is without merit and misstates the law as the Court is in no instance required to grant any petition for expungement as is further explained below. For these reasons, as well as those outlined in the following paragraphs, Defendant's motion is without merit and



should be DENIED.

Mr. Bullock's objection to Defendant Newsome's Petition for Expungement was filed timely filed because the statute does not provide that the victim waives their right to file the same after 45 days. *See* Ala. Code § 15-27-3(c). Alabama Code § 15-27-3(c) provides both the district attorney and victim "shall have a period of 45 days to file a written objection to the granting of the petition *or the district attorney shall be deemed to have waived the right to object.*" ALA. CODE § 15-27-3(c). Defendant Newsome argues that neither the district attorney's office or Mr. Bullock objected in writing within 45 days so the district attorney was deemed to have waived their right to do so. Def. Mtn. Pgs 3-4. The statute, much like Defendant's argument, only says that the district attorney is deemed to have waived their right to object if a written objection is not filed within 45 days. Ala. Code § 15-27-3(c) and Def. Mtn. generally. Neither the statute nor Defendant's argument address the Victim's right to object being deemed waived. While the statutory language provides a period after which the district attorney is deemed to have waived its objections if the district attorney or victim(s) do not object, it does not provide the same waiver for the victim. The statute is silent as to whether the victim is ever deemed to have waived that right before the matter of expungement is decided. The statute only speaks to waiver of the district attorney's right to object and never the victim's. Thus, the Legislature has granted victims a right to object and also seen fit to allow the same to continue beyond the rights of the district attorney, perhaps to account for the lack of notice required to be given to victims. Thus, victim, John Bullock's objection was timely and had effect.

Even if Court agrees with Defendant Newsome that the objections filed should

not be given effect, Defendant's position that the Court is required to expunge Defendant's misdemeanor charge when not objected to is flatly wrong and ridiculously at odds with the language of the statute. Defendant cites § 15-27-5(d) which he believes requires the Court to grant a his petition for expungement of a misdemeanor charge when neither the district attorney or victim file objections, timely or otherwise. There are several distinct problems with this interpretation. First, Defendant's interpretation is plainly not what the legislature intended when it passed the statute. Defendant relies upon the second of two sentences, taken out of context from § 15-27-5, reading:

> If no objection to a petition is filed by the prosecuting authority or victim, the court having jurisdiction over the matter may rule on the merits of the petition without setting the matter for hearing. In such cases, the court shall grant the petition if it is reasonably satisfied from the evidence that the petitioner has complied with and satisfied the requirements of this chapter.

ALA. CODE § 15-27-5(d). This language, quoted by Defendant in support of his position, clearly states that if no objections are filed "the court having jurisdiction over the matter ***may*** rule on the merits of the petition without setting the matter for hearing." ALA. CODE § 15-27-5(d). The "may" language is key. Defendant's argument that the rest of the section applies would be correct if the Court had elected to rule on the expungement without holding a hearing. The Court, however, did not make such an election because it chose to set a hearing and the plain language in the statute in no way requires the Court to rule on an expungement without first setting a hearing. Thus, the remainder of section 15-27-5(d) does not apply and Defendant's argument to the contrary is wrong.

Even if the Court were required to apply the second half of § 15-27-5(d), Defendant would still not be entitled to expungement. The statutory language upon which

Defendant Newsome relies, in an obvious attempt to mislead the court, for the proposition that the Court must grant his motion absent any objection, in fact, merely outlines what the court is to do if no objections are filed and and the Court chooses not to hold a hearing. The statute does not in any way require the Court the grant an expungement. Defendant in his second to last paragraph posits that:

> Since Newsome "has complied with and satisfied the requirements of [the] chapter" on expungement, "**the court shall grant the petition. . . .**" As a matter of law, Newsome is due to have the record of his arrest expunged under section 15-27-1(a)(1).

Def. Mtn. Pg 4. If Defendant had continued the rest of the language of the bolded sentence rather than conveniently place an ellipses in the place most profitable to his argument the sentence would read "the court shall grant the petition *if it is reasonably satisfied* from the evidence that petitioner has complied with and satisfied the requirements of this chapter." ALA. CODE § 15-27-5(d). The "if reasonably satisfied" language obviously contemplates that the Court will retain its discretion to review the evidence presented and determine for itself whether such evidence is sufficient to comply with the statute. The statute obviously does not require the court to enter an expungement unless it is reasonably satisfied that the statute has been complied with.

To reiterate, Section 15-27-5(d) should not even be a factor because it only applies where the Court has decided not to set the matter for a hearing after receiving no objection to defendant's petition. That is not the case here. The State and the Victim both filed objections, so the whole subjection (d) of § 15-27-5 is inapplicable. If the Court accepts Newsome's proposition that those objections were untimely and waived, then § 15-27-5(d) is *still* not applicable. A necessary precondition of subsection (d) is the the Court electing not to have a hearing. *See* ALA. CODE § 15-27-5(d) (stating "the court

having jurisdiction over the matter *may* rule on the merits without setting the matter for hearing. In such cases, the court shall grant the petition if it is reasonably satisfied from the evidence that the petitioner has complied with and satisfied the requirements of this chapter.") If a court elects to rule on the merits of the case after having a hearing the language of the second sentence would not apply because the two preconditions would not be satisfied. That was precisely the case here. The Court elected to have a hearing before ruling on the petition. Thus the preconditions of no objections filed and ruling without a hearing were not present and therefore the rest of § 15-27-5(d) would not apply.

The Court must also consider the rest of § 15-27-5. Subsection (a) outlines several factors which "*In the discretion of the court*, the court shall consider. . . ." This discretionary language again gives credence to the notion that the Legislature granted the Court significant discretion as to when to exercise its new found power of expungement.

Most damning to Defendant's argument is ALA. CODE § 15-27-5(c), which Defendant also conveniently left out of his motion. This section states:

> **There is no right to the expungement of any criminal record, and any request for expungement of a criminal record may be denied at the sole discretion of the court.** The court shall grant the petition *if it is reasonably satisfied* from the evidence that the petitioner has complied with and satisfied the requirements of this chapter. *The court shall have discretion* over the number of cases that may be expunged pursuant to this chapter after the first case is expunged. The ruling of the court shall be subject to certiorari review and *shall not be reversed absent a showing of an abuse of discretion.*

ALA. CODE § 15-27-5(c) (emphasis added). The above quoted language plainly states the exact opposite of Mr. Newsome's claim that the court must grant his expungement as a matter of law. Section 15-27-5(c), and the whole of Chapter 27, is littered with blatant indications that the trial court has discretion to decided whether or not to grant an expungement. This Court, based on the above, properly exercised its discretion to hold a hearing, take evidence at that hearing, and ultimately deny Defendant's petition.

WHEREFORE, PREMISES CONSIDERED, Victim, John F. Bullock, objects to Defendant Burton Wheeler Newsome's Motion to Alter, Amend, or Vacate Judgment, or in the Alternative, Motion for a New Hearing on the Petition for Expungement of Record and requests that this Court deny the same.

Respectfully submitted,

JAMES F. HILL (HIL005),
Attorney for John F. Bullock

OF COUNSEL:

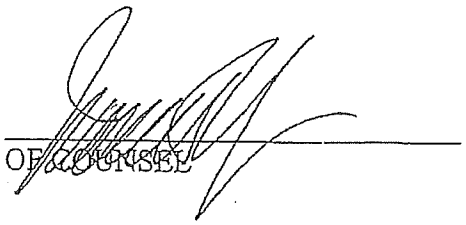
HILL, WEISSKOPF & HILL, P.C.
2603 MOODY PARKWAY, SUITE 200
P.O. BOX 310
MOODY, ALABAMA 35004
(205) 640-2000

CERTIFICATE OF SERVICE

I hereby certify that on September ___, 2015, I electronically filed the foregoing with the Clerk of the Court using the AlaFile system which will send notification of such filing to all parties, and I hereby certify that, to the best of my knowledge and belief, there are no non-AlaFile participants to whom the foregoing is due to be mailed by way of the United States Postal Service.

A. Gregg Lowery
Assistant District Attorney

William R. Justice
ELLIS, HEAD, OWENS, & JUSTICE
P.O. Box 587
Columbiana, AL 35051



ELECTRONICALLY FILED
9/10/2015 8:02 AM
58-CC-2015-000121.00
CIRCUIT COURT OF
SHELBY COUNTY, ALABAMA
MARY HARRIS, CLERK

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-2015-000121.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

ORDER ON PETITION FOR EXPUNGEMENT OF RECORDS

ORDER ON PETITION FOR EXPUNGMENT OF RECORDS

This case comes before the Court on the motion of Burton Wheeler Newsome (or "Newsome") to Alter, Amend, or Vacate its order dated August 31, 2015, denying his Petition for Expungement of Records related to his arrest for the misdemeanor of menacing. UPON CONSIDERATION thereof, the motion be and hereby is GRANTED, and the order dated August 31, 2015, be and hereby is VACATED and Newsome's Petition for Expungement of Records is GRANTED.

Upon consideration of the motion and the matters of record in this case, the court hereby finds as follows:

1. "Menacing" is a "misdemeanor criminal offense," and records concerning a charge of menacing are subject to expungement under section 15-27-1 of the Alabama Code.

2. The District Attorney of Shelby County was served with Newsome's Petition for Expungement on April 28, 2015.

3. Neither the district attorney nor the victim filed any objection to the Petition for Expungement within 45 days as required by section 15-27-3(c) of the Alabama Code. Consequently, they "have waived the right to object."

4. The record in this case reflects that the misdemeanor charge against Newsome was dismissed with prejudice by the District Court of Shelby County, Alabama, on April 4, 2014.

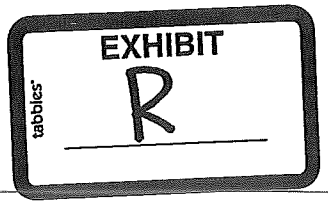
5. Newsome has therefore satisfied the requirements for expungement under section 15-27-1 *et seq.*

BASED ON THE FOREGOING, it is therefore ORDERED by the court as follows:

1. The Petition for Expungement of Records filed by Burton Wheeler Newsome is GRANTED.

2. All "records" concerning the charge, arrest, and incarceration of Burton Wheeler Newsome, on the misdemeanor of menacing be and hereby are EXPUNGED.

3. The charge and arrest subject to this order are further identified as case number DC 2013-001434 in the District Court of Shelby County Alabama, which case



originated with a complaint signed by John Franklin Bullock, Jr., on January 14, 2013, alleging that Newsome committed the crime of "menacing" in violation of section 13A-6-23 of the Alabama Code.

4. The "records" subject to this order include but are not limited to "arrest records," "booking or arrest photographs," "index references such is the State Judicial Information Services or any other governmental index references for public records search," and all "other data, whether in documentary or electronic form relating to the arrest or charge," as provided in section 15-27-9 of the Alabama Code.

5. Pursuant to section 15-27-6 of the Alabama Code, the District Court of Shelby BE AND HEREBY IS ORDERED TO EXPUNGE any and all "records" of the charge, arrest and incarceration except as otherwise provided in sections 15-27-6 and 15-27-10 of the Alabama Code.

6. Pursuant to section 15-27-6 of the Alabama Code, "any other agency or official" having custody of any such records BE AND HEREBY IS ORDERED TO EXPUNGE any and all "records" of the charge, arrest and incarceration except as otherwise provided in sections 15-27-6 and 15-27-10 of the Alabama Code.

DONE this 10th day of September, 2015.

/s/ DAN REEVES
CIRCUIT JUDGE

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01-CV-2015-900190.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

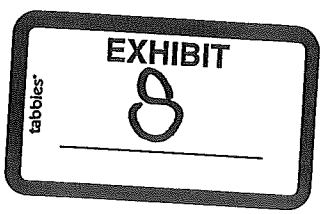
IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

BURT W. NEWSOME and NEWSOME LAW, LLC	)	
Plaintiffs,	)	
v.	)	Case No.: CV 2015- 900190.00
CLARK ANDREW COOPER ET AL	)	
Defendants.	)	

PLAINTIFFS' MOTION TO ALTER, AMEND,
OR VACATE ORDERS OF DISMISSAL,
OR IN THE ALTERNATIVE, TO GRANT A NEW TRIAL

Come now the plaintiffs, Burt W. Newsome and Newsome Law LLC, and move the court pursuant to rule 59 of the *Alabama Rules of Civil Procedure* to alter, amend, or vacate the orders dated August 31, 2015, dismissing all of the plaintiffs' claims against all defendants and denying their motion to reconsider the dismissal of their claims against defendants Bullock and Seier, or in the alternative, to grant them a new trial. This motion is based on all documents of record and the Affidavit of Robert E. Lusk, Jr. (Exhibit 1) and the Affidavit of Burt W. Newsome (Exhibit 2) and the attachments thereto (exhibits A-H), all of which are attached hereto and filed herewith. As grounds for this motion, the plaintiffs show the court the following, separately and severally:

1. The court erred in granting the Motions to Dismiss of the defendants Claiborne P. Seier and John W. Bullock, Jr, and in denying the Plaintiffs' Motions to Reconsider the Dismissals, because the sole basis asserted for dismissal was a "Deferred Prosecution and Release Agreement," and this was not a sufficient ground or basis to dismiss the plaintiffs' claims, for the reasons stated below, separately and severally:



(a) Count XIII of the Amended Complaint alleges that "the defendants John Bullock and/or Claiborne Seier . . . made false representations to Newsome regarding the true nature of his criminal charges," thereby inducing him to sign the release (Document 69, ¶ 97). "A release obtained by fraud is void." *Taylor v. Dorough,* 547 So. 2d 536, 540 (Ala. 1989).

In ruling on a motion to dismiss, the "court must accept the allegations of the complaint as true." *Ex parte Retirement Systems of Alabama,* S.C. No. 1140170 (Ala. June 12, 2015). The defendants did not file a Motion for Summary Judgment, supported by affidavits or other evidentiary material, rebutting the plaintiffs' claims of fraud. "A summary-judgment movant does not discharge his initial burden to challenge the sufficiency of the evidence of a nonmovant's claim by simply ignoring the claim." *Free v Lasseter*, 31 So. 3d 85, 90 (Ala. 2009). As a result, there was no valid basis for dismissing the plaintiffs' claims.

The court considered an almost identical fact situation in *Underwood v. Allstate Insurance Co.*, 590 So. 2d 258 (Ala. 1991). The plaintiffs sued Allstate for uninsured motorist benefits; Allstate filed a Motion to Dismiss supported by a release; and the plaintiffs alleged that the release was procured by fraud. The trial court dismissed the plaintiffs' case, but the Alabama Supreme Court reversed:

> The plaintiffs, Anthony D. Underwood and Maureen K. Underwood, sued Allstate Insurance Company for uninsured motorist benefits for personal injuries suffered by Mr. Underwood and loss of consortium suffered by Mrs. Underwood.
>
> Allstate filed a motion to dismiss the Underwoods' complaint pursuant to Ala. R. Civ. P., Rule 12(b)(6), and submitted a release of the uninsured motorist benefits signed by the Underwoods and stating on its face that it was a "full and final" settlement of all claims. Allstate claimed it had reimbursed the deductible to the Underwoods and had settled the uninsured motorist claim for personal injury.
>
> The trial court held a hearing on Allstate's motion but took no testimony, and neither party filed any affidavits. In response to Allstate's motion, the Underwoods filed no counter-affidavits, but did obtain permission from the court to amend their complaint to allege that the release was procured by fraud. Subsequently, Allstate filed another motion to dismiss,

> restating the same grounds it had previously stated, and attached to the motion the same draft and release that it had attached to its first motion. Allstate filed no affidavits or other evidence to negative the allegations in the amended complaint that the release was obtained by fraud.
>
> The court conducted another hearing on Allstate's motion. No testimony was taken and no affidavits were filed at this hearing either. The trial court granted Allstate's motion, and the Underwoods appealed.
>
> Because Allstate filed matters outside the pleadings in support of its Rule 12(b)(6) motion, we treat it as a Rule 56 motion for summary judgment. As previously stated, Allstate supported its Rule 12(b)(6) motion only with the settlement draft and the release signed by the Underwoods . . .
>
> Had Allstate in this case filed admissible evidence in support of its motion for summary judgment, as permitted by Rule 56, setting out all of the representations it had made before the execution of the release, and that the evidence negatived the Underwoods' allegations that the release was procured by fraud, then the Underwoods could not have relied upon the mere allegations of their amended complaint. *Cf. Ray v. Midfield Park, Inc., supra.* Allstate did not do this; therefore, it failed to sustain its burden of showing that no genuine issue of fact remained in the case.
>
> Based on the foregoing, the judgment of the trial court is due to be, and it is hereby, reversed, and the cause is remanded (590 So. 2d at 258-59).

Factually, this case is indistinguishable from *Underwood.* The plaintiffs filed a complaint just as in *Underwood*; the defendants filed a motion to dismiss and a release just as in *Underwood*; the plaintiffs amended their complaint and alleged fraud just as in *Underwood*; and the defendants failed to rebut the plaintiffs' fraud claim just as in *Underwood.*

(b) Count XII of the Amended Complaint alleges, "Newsome was unaware of the conspiracy to bring false criminal charges against him at the time he signed the release" (Document 69, ¶ 95). "Although parties may execute an agreement that will release claims or damages not particularly contemplated, the parties' intent to do so must be clearly expressed in the agreement." *Minnifield v. Ashcraft*, 903 So. 2d 818, 827 (Ala. Civ. App. 2004).

The release does not express an intent to release "unknown claims," and the defendants offered no evidence to rebut plaintiffs' allegation that he was unaware of the conspiracy to falsely

charge him with a crime when he signed the release. "A summary-judgment movant does not discharge his initial burden to challenge the sufficiency of the evidence of a nonmovant's claim by simply ignoring the claim." *Free v Lasseter*, 31 So. 3d 85, 90 (Ala. 2009).

(c) The release on which the defendants rely is a "release-dismissal agreement." "In exchange for this release, this case will be either dismissed immediately, or pursuant to conditions noted above." The United States Supreme Court considered the validity of such agreements in *Town of Newton v. Rumery*, 107 S. Ct. 1187 (1987).

The court held that the validity of such agreements must be determined on a case-by-case basis. The plurality opinion found that the particular release in that case was enforceable because three factors were satisfied: "[W]e conclude that [1] this agreement was voluntary, [2] that there is no evidence of prosecutorial misconduct, and [3] that enforcement of this agreement would not adversely affect the relevant public interests" (107 S. Ct. at 1195). The proponent of such a release must "prove" these three factors as a condition of enforcement (107 S. Ct. at 1196). The defendants offered no evidence to meet this burden of proof.

In *Couglen v. Coots*, 5 F.3d 970, 973 (6th Cir. 1993), the Sixth Circuit reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement. The court held,

> [T]he *Rumery* opinion instructs us that before a court properly may conclude that a particular release-dismissal agreement is enforceable, it must specifically determine that (1) the agreement was voluntary; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement will not adversely affect relevant public interests. The burden of proving each of these points falls upon the party in the Sec. 1983 action who seeks to invoke the agreement as a defense.
>
> Here, the district court did not conduct the analysis called for by *Rumery*. Instead, the court concluded that "such releases have been held not to be against public policy in . . . *Rumery*," and, in effect, treated the release as presumptively valid.

In *Patterson v. City of Akron*, No. 13-4321 (6th Cir. July 22, 2015), the Sixth Circuit again reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> *Rumery* requires that, in order for a court to find lack of prosecutorial misconduct, the party invoking a release-dismissal agreement as a defense must present evidence of a legitimate criminal justice reason for conditioning the plea agreement on a release.

In *Cain v. Borough*, 7 F.3d 377, 383 (3rd Cir. 1993), the Third Circuit reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> As we have explained, because the District Attorney made no case-specific showing that the public interest was served by obtaining the release, the district court erred by determining that as a matter of law the public interest requirement was satisfied. We will reverse the grant of summary judgment for the defendants . . .

Finally, in *Stamps v. Taylor*, 218 Mich. App. 626, 635, 554 N.W.2d 603, 607 (1996), the Michigan court reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> In the present case, the trial court did not analyze the relevant factors established by *Rumery*. Instead, the trial court upheld the release simply because it was applicable and unambiguous. Accordingly, we reverse and remand with instructions for the trial court to make the specific evaluations called for by this opinion.

These cases establish that the burden of proof imposed by *Rumery* is an evidentiary burden and that a release itself cannot meet that burden. The defendants must offer evidence. Although *Rumery* was a 1983 action, the plaintiff's claims were similar to those asserted by Newsome. The plaintiff in *Rumery* "alleged that the town and its officers had violated his constitutional rights by arresting him, defaming him, and imprisoning him falsely." Newsome alleges that Bullock and Seier maliciously prosecuted him (count I), abused the legal process for an improper purpose (count II), and caused him to be falsely imprisoned (count III).

This court should apply the *Rumery* analysis to the validity the of release-dismissal agreement just as the Michigan court did in *Stamps*. Here, the defendants offered no evidence to prove compliance with any of the *Rumery* factors. Consequently, the court erred in relying on the release as basis for dismissing the plaintiffs' claims

2. The court erred in dismissing the plaintiffs' claim that the release was obtained by fraud (counts XII-XIII) because no party filed a Motion to Dismiss, Motion for Judgment on the Pleadings, or Motion for Summary asserting any ground or reason that the fraud counts should be dismissed. The court's dismissal of these counts without such a motion denied the plaintiffs due process of law.

In *Moore v. Prudential Residential Services Ltd*, 849 So. 2d 914, 927 (Ala. 2002), the court held, "The trial court violates the rights of the nonmoving party if it enters a summary judgment on its own, without any motion having been filed by a party."

3. Section 15-27-6 of the Alabama Code provides that anyone who "uses" the contents of an expunged file without a court order is guilty of a Class B misdemeanor. The "Deferred Prosecution and Release Agreement" on which the court based its dismissal of the claims against Bullock and Seier is part of the "file" concerning Newsome's arrest, and that file has been expunged. As a matter of the public policy expressed in the expungement statute, "expunged records" are not a lawful basis for dismissing Newsome's claims.

The records and file concerning Newsome's arrest for menacing were expunged by order of the Circuit Court of Shelby County on September 10, 2015, in case number CC 2015-000121.00 **(See Order of Circuit Court of Shelby County, Alabama directing that any and all records of the charge, arrest and incarceration be expunged attached as Exhibit "H" to the Newsome Affidavit)**. Section 15-27-6(b) of the Alabama Code states, "After the expungement of records pursuant to subsection (a), the proceedings regarding the charge shall be deemed never to have occurred." Section 15-27-16(a) further provides,

> Notwithstanding any other provision of this chapter, an individual who knows an expungement order was granted pursuant to this chapter and who intentionally and maliciously divulges, makes known, reveals, gives access to, makes public, uses, or

> otherwise discloses the contents of an expunged file without a court order, or pursuant to a provision of this chapter, shall be guilty of a Class B misdemeanor.

"Use" of the "Deferred Prosecution and Release Agreement" is now a criminal offense. The expungement statute expresses a broad, social policy to restore the former, criminal defendant to the condition that would have existed if no criminal charge had ever been filed. Dismissing Newsome's claims arising from an expunged arrest – or permitting the prior dismissal to stand – based on a release that has itself been expunged thwarts the policy of the expungement statute.

4. The court erred in holding that "Deferred Prosecution and Release Agreement" operated to release Claiborne P. Seier because the document applies only to named entities or parties, and Seier is not named in the document as a party or beneficiary.

Section 885(1) of the *Restatement (Second) of Torts* states, "A valid release of one tortfeasor from liability for a harm, given by the injured party, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."[1] The release contains no agreement to discharge Seier.

5. The court erred in holding that "Deferred Prosecution and Release Agreement" operated to release Claiborne P. Seier because the document does not release the "agents and employees" of "complainants [or] witnesses.

Although the release reflects an intent to release the "agents and employees" of "Shelby County," "the Sheriff of said County," "law enforcement or investigative agencies," and "the public defender," the release does not discharge the "agents and employees" of any other entity:

> The Defendant does hereby grant a full, complete and absolute release of all civil and criminal claims stemming directly or indirectly from this case to the State of Alabama, its agents and employees; to Shelby County, Alabama, its agents and employees, including, but not limited to the Sheriff of said County, his agents and employees, to any other law

[1] The Alabama court relied on section 885 of the *Restatement* in *Ex parte Goldsen*, 783 So. 2d 53, 55 (Ala. 2000), and *Lowry v. Garrett*, 792 So. 2d 1119, 1122 (Ala. Civ. App. 2001).

> enforcement or investigative agencies, public or private, their agents and employees; **or to any other complainants, witnesses, associations, corporations, groups, organizations or persons in any way related to this matter**, to also include the Office of the Public Defender of Shelby County, Alabama, its agents and employees, from any and all actions arising from the instigation, investigation, prosecution, defense, or any other aspect of this matter.

No evidence was offered that Seier was an "agent or employee" of "Shelby County," "the Sheriff of said County," "law enforcement or investigative agencies," or "the public defender." Further, there no evidence that he fell within any other group of persons released.

6. The court in holding that the "Deferred Prosecution and Release Agreement" operated to release Claiborne P. Seier because he offered no evidence to meet the evidentiary burden established in Pierce v. Orr, 540 So. 2d 1363 (Ala. 1989), that applies when an unnamed third-party claims the benefit of a release:

> Henceforth, unnamed third-parties, referred to in the release as "any and all parties" or by words of like import, who have paid no part of the consideration and who are not the agents, principals, heirs, assigns of, or who do not otherwise occupy a privity relationship with, the named payors, must bear the burden of proving by substantial evidence that they are parties intended to be released, i.e., that their release was within the contemplation of the named parties to the release (540 So. 2d at 1367).

Seier offered no evidence to meet this burden of proof; moreover, the release does not even use the generic "any and all parties."

7. The court erred in granting summary judgment for Clark Andrew Cooper and Balch & Bingham, LLP (hereafter "the Balch defendants" or "Cooper/Balch") without a hearing and without setting a date by which the plaintiffs must submit evidence or argument in opposition to the motion. Such action violated rules 56 and 78 of the Alabama Rules of Civil Procedure and the plaintiffs' right to due process of law.

Rule 56(c)(2) requires a hearing on motions for summary judgment, and it requires that the defending party be given notice of the deadline for submitting materials in opposition to the motion:

> The motion for summary judgment, with all supporting materials, including any briefs, shall be served at least ten (10) days before the time fixed for the hearing, except that a court may conduct a hearing on less than ten (10) days' notice with the consent of the parties concerned. Subject to subparagraph (f) of this rule, any statement or affidavit in opposition shall be served at least two (2) days prior to the hearing.

The *Committee Comments* to rule 78 state, "It is to be noted that the last sentence of the rule prohibits the granting of a motion seeking final judgment, such as a motion for summary judgment, without giving the parties an opportunity to be heard orally."

In this case, no hearing was held on the Motion for Summary Judgment filed by the Balch defendants, and no date was set by which the plaintiffs must submit argument or evidence in opposition to the motion. Trial courts have frequently been reversed for entering summary judgments under these circumstances. *Burgoon v. Alabama State Department of Human Resources*, 835 So. 2d 131 (Ala. 2002) ("The trial court erred, therefore, in granting the motions to dismiss the claims against all individual defendants in their individual capacities without conducting a hearing"); *Shaw v. State ex rel. Hayes*, 953 So. 2d 1247, 1251 (Ala. Civ. App. 2006) ("[T]he trial court erred in failing to hold a hearing on the State's summary-judgment motion before entering a summary judgment . . ."); *Miles v Foust*, 889 So. 2d 591, 594 (Ala. Civ. App. 2004) ("Rule 56 provides that the parties are entitled to a hearing on a summary-judgment motion"); *Van Knight v. Smoker*, 778 So. 2d 801, 805 (Ala. 2000) ("Rule 56 (c), Ala. R. Civ. P., itself entitles the parties to a hearing on a motion for summary judgment"); *Moore v. Prudential Residential Services Limited Partnership*, 849 So. 2d 914, 927 (Ala. 2002) ("Rule 56 requires, at the least, that the nonmoving party be provided with notice of a summary-judgment motion and

be given an opportunity to present evidence in opposition to it . . ."); *Moore v. GAB Robins North America, Inc.*, 840 So. 2d 882, 884 (Ala. 2002) ("[T]o cut off Moore's opportunity to make a showing of disputed facts to the trial court is to prevent him from having his day in court"); *Elliott Builders, Inc. v. Timber Creek Property Owners Association*, 128 So. 3d 755, 765 (Ala. Civ. App. 2013) ("We conclude that Elliott Builders and Elliott are entitled to an opportunity to make a showing of disputed facts . . ."); *Hooks v. Pettaway*, 102 So. 3d 391, 393 (Ala. Civ. App. 2012) ("Although Hooks may not ultimately prevail in opposing the motion for summary judgment, she is entitled to an opportunity to respond to the motion").

8. The court erred in ruling on the Balch defendants' motion for summary judgment before requiring Renasant Bank to produce the correspondence from or to the Balch defendants that the plaintiffs had subpoenaed.

When the court entered summary judgment in this case, the plaintiffs' Motion to Compel discovery from Renasant Bank was pending. The court denied that motion as "moot" after entering summary judgment. In *Ex parte Williams*, 617 So. 1032, 1035-36 (Ala. 1992), the court held,

> "If the trial court from the evidence before it, or the appellate court from the record, can ascertain that the matter subject to production was crucial to the non-moving party's case (*Parrish v. Board of Commissioners of Alabama State Bar*, 533 F.2d 942 (5th Cir. 1976)), or that the answers to the interrogatories were crucial to the non-moving party's case (*Noble v. McManus*, 504 So.2d 248 (Ala.1987)), then it is error for the trial court to grant summary judgment before the items have been produced or the answers given.

This analysis is directly applicable to this case. On March 11, 2015, the plaintiffs filed Notice of Intent to Serve a Subpoena on Renasant for all correspondence *to or from* the Balch defendants concerning Newsome. The information sought included,

> Certified copies of all correspondence, cards, letters, emails, text messages or other documents [to] Renasant Bank, and/or John Bentley, president of Renasant Bank, and/or Bill Stockton, Chief Credit Officer for Renasant Bank, and/or any other bank officer have received from or sent to Clark Andrew Cooper and/or Balch and Bingham, LLP, and/or any of its agents or employees touching or concerning Burt W. Newsome and/or Newsome

> Law LLC in which reference is made to any case or pending legal matter in which Burt W. Newsome and/or Newsome Law LLC represents the individual recipient and/or sender and/or Renasant Bank, or to which any photo and/or likeness of Burt W. Newsome was attached. From January 30, 2012 through the date of your response (Document 103).

The subpoena was issued on March 31, 2015 (Document 103), and Renasant was served on April 16, 2015 (Documents 134, 219).

The documents sought were identical to documents that Cooper admitted sending to Iberia and Bryant Bank; namely, emails soliciting Newsome's pending cases and emails stating that "this [his arrest] will affect his law license" (Document 50, Exhibits A-B, 001-007). J. D. May of Renasant told Newsome that "Cooper was constantly asking for business," and Bill Stockton of Renasant told Newsome that Cooper had sent Renasant an email about his arrest. Plaintiff's Supplemental Response to Defendant's First Set of Consolidated Set of Consolidated Discovery Requests, No. 11 (Filed with Defendant's Motion for Summary Judgment). These documents were crucial to Newsome's claims for defamation and tortious interference.

Renasant did not, however, respond to the subpoena. Instead, it provided the Balch defendants an affidavit from John Bentley, its "Regional Area President," and they filed the affidavit with their Motion for Summary Judgment on August 12, 2015. In the affidavit, Bentley states, "I never received an email from Clark Cooper or anyone at Balch & Bingham LLP related to Burt Newsome's May 2, 2013 arrest."

Bentley's failed, however, to address the broader issues in the case. He did not state that Renasant never received and did not have any "email from Clark Cooper or anyone at Balch & Bingham LLP related to Burt Newsome's May 2, 2013 arrest," and he did not state that Renasant had never received and did not have any emails from the Balch defendants soliciting employment in cases where Newsome was representing Renasant. These were crucial questions.

On August 14, 2015, the plaintiffs filed a Motion to Compel Production from Renasant (Document 218), and on August 19, 2015, their attorney, Robert E. Lusk, Jr., filed an affidavit pursuant to rule 56(f). Lusk stated that the plaintiffs' had served Renasant with a subpoena for documents on April 16, 2015, that it had "failed to respond or produce any documents requested," that Renasant had provided an affidavit to the Balch defendants, that they had filed the affidavit in support of their Motion for Summary Judgment, and that the plaintiffs had filed a Motion to Compel Renasant to produce the documents requested in their subpoena. Lusk "request[ed] that all the Defendants' pending Motions for Summary Judgment, Motions for Judgment on the Pleadings and Motions To Dismiss be denied or at least continued until Plaintiffs have been allowed to conduct all their discovery needed to present their case" (Document 226). The court denied this request by entering summary judgment for the Balch defendants

Clearly, the records sought by the plaintiffs from Renasant were crucial to their claims for defamation and intentional interference. The court erred in ruling on the Balch defendants' Motion for Summary Judgment without first requiring Renasant to produce the subpoenaed documents.

9. The court erred in entering summary judgment for the Balch defendants on the plaintiffs' defamation claim because the motion for summary judgment did not rebut the factual basis for the claim; namely, that Cooper sent emails to Newsome's banking clients "questioning the effect of Newsome's arrest on his license to practice law and intentionally casting Newsome and Newsome Law in a bad light."

(a) The Complaint

Count IX of the complaint alleged that Cooper defamed the plaintiffs by publishing emails "questioning the effect of Newsome's arrest on his license to practice law":

> 50. . . . Clark Cooper sent emails and/or other communications to officers and bank officials with Iberiabank Corp, Renasant Bank, and Bryant Bank containing a copy of

> Newsome's mug shot, asking if they had seen Newsome's mug shot, and questioning the effect of Newsome's arrest on his license to practice law and intentionally casting Newsome and Newsome Law in a bad light.
>
> 51. Newsome was not convicted on the criminal charges, which were dismissed with prejudice on or about April 1, 2014. . . .
>
> 83. By engaging in the above conduct, Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 separately or severally made a false and defamatory statement concerning the Plaintiff.

(b) The Answer and Emails

In their answer, the Balch defendants admitted that Cooper emailed Brian Hamilton of Iberiabank and informed him of Newsome's arrest; they also attached copies of these emails to their answer. The documents show that Cooper emailed Newsome's mug shot to Hamilton at 4:29 p.m. on May 4, 2013, and stated, "Have you seen this? Not sure how it's going to affect his law license. Bizarre."

Six minutes later – before Hamilton responded – Cooper emailed him a second time, quoted the statute on menacing (section 13A-6-23), and stated, "It is a class B misdemeanor. Not sure how this will affect his law license. . . ." (Answer, Document 50, exhibit A, Cooper 001-003).

In addition, "Bill Stockton [of Renasant] told Newsome that John Bentley [of Renasant] received an email from Cooper regarding Newsome's arrest immediately after the arrest. Both Stockton and Bentley admitted they received the email from Cooper" (Plaintiffs' Supplemental Response to Defendant's First Set of Consolidated Discovery Requests, No. 11 (Filed with Defendants' Motion for Summary Judgment). These emails were the subject of the plaintiffs' subpoena to Renasant (Document 103) and their Motion to Compel Renasant to respond to the subpoena (Documents 218-220), which were discussed in the last paragraph (See paragraph 8 above).

(c) The Plaintiffs' Interrogatory Answers

The Balch defendants propounded an interrogatory to the plaintiffs asking them the basis for their defamation claim, and the plaintiffs stated that their claim was based on Cooper's implication that Newsome's arrest would have a negative effect on his ability to represent clients.

> **INTERROGARY 2.** Identify each and every fact that you contend supports your claim in connection to the Defamation claim, as alleged in count IX in the Complaint, with respect to Clark Cooper.
>
> **RESPONSE:** The copies of my [*sic*] emails with statements implying the arrest would have some negative impact on my law license and ability to represent clients. The rapid sending of my mug shot after my arrest and the specific targeting of common clients.

The Balch defendants filed these interrogatory answers with their motion for summary judgment.

(d) The Motion for Summary Judgment

In their Motion for Summary Judgment, the Balch defendants argued that Newsome's defamation count was due to be dismissed only because Newsome had in fact been arrested:

> While Newsome's arrest may not constitute evidence of wrongdoing, the arrest itself is a fact: the May 4, 2013 Email containing Newsome's mug shot is irrefutably truthful because Newsome's arrest, which gave rise to the creation of the mug shot, was in fact an event that occurred in time. Unless Newsome is claiming he was not arrested, or that the person in the mug shot is an imposter, his defamation claim fails as a matter of law.

The defendants did not address Newsome's claims that the emails contained "statements implying the arrest would have some negative impact on [his] license and ability to represent clients." "A summary-judgment movant does not discharge his initial burden to challenge the sufficiency of the evidence of a nonmovant's claim by simply ignoring the claim." *Free v Lasseter*, 31 So. 3d 85, 90 (Ala. 2009). As a result, the Balch defendants presented no basis for dismissing the plaintiffs' defamation claim.

(e) The Summary-Judgment Order

The order granting summary judgment tracked the defendants' argument; the Balch defendants had no liability because Newsome was in fact arrested:

> The defamation count fails as a matter of law because falsity of the alleged defamatory statement is one of the five elements the Newsome Defendants [*sic*] were required to show to establish a prima facie action for defamation. See, e.g., *Ex parte Crawford Broad. Co.*, 904 So. 2d 221, 225 (Ala. 2004): thus, "[t]ruth is a complete and absolute defense to defamation. . . . Truthful statements cannot, as a matter of law, have defamatory meaning." *Federal Credit, Inc. v. Fuller*, 72 So. 3d 5, 9-10 (Ala. 2011). While Newsome's arrest did not constitute evidence of wrongdoing, the arrest itself is a fact, and Cooper's email correspondence attaching Newsome's mug shot was a true event, which occurred in time.

(f) The Plaintiffs' Argument

This dismissal of Newsome's defamation claim was erroneous because the claim was not based solely on Cooper's publication of Newsome's mug shot; the claim was based on Cooper's "statements implying the arrest would have some negative impact on [his] law license and ability to represent clients" (Answer to Interrogatory 2; Complaint ¶ 50).

These "statements" included Cooper's statements that he was "[n]ot sure how it's going to affect his law license. Bizarre" and that he was "[n]ot sure how this will affect his law license." These statements implied three facts that were not true:

> 1. That Newsome was in fact guilty of menacing – otherwise, his arrest would have no effect on his law license.
>
> 2. That Newsome had violated the *Rules of Professional Responsibility* – otherwise, his arrest would have no effect on his law license.
>
> 3. That "this will affect his law license"– otherwise, why speculate "how this will affect his license"?

Defamation may be based the implication of "false facts." In *Liberty National Life Ins. Co. v. Daughtery*, 840 So. 2d 152, 160 (Ala. 2002), the court held, "We conclude that Hartley's statement implied that Daughtery had committed the crime of theft." In *Age-Herald Pub. Co. v. Waterman*, 202 Ala. 665, 81 So. 621, 626 (Ala. 1919), the court held, "It was for the jury to determine whether in fact the publication was libelous in its implications to the plaintiff, Waterman."

In *Bowling v. Pow*, 293 Ala. 178, 183, 301 So. 2d 55 (1974), the Supreme Court summarized,

> Defamation does not necessarily involve opprobrious or scurrilous language. It is often elegant, refined and scholarly in essence and environment, and some of the best linguists have engaged in and been victims of it. The parties hereto can find distinguished company, as evidenced by *Cooper v. Greeley*, 1 Denio 347 (N.Y. 1845), in which the words of Horace Greeley concerning James Fenimore Cooper, 'He will not bring the action in New York, for we are known here, nor in Otsego, for he is known there' were held defamatory as imputing a bad reputation to Cooper in Otsego, an example of defamation by indirection by suave implication.

"A question, like a statement of belief or opinion, though not phrased in the form of a declaration of fact, may imply the existence of a false and defamatory fact." *Keohane v. Stewart*, 882 P.2d 1293, 1302 (Colo. 1994). "The form of the language used is not controlling, and there may be defamation by means of a question, an indirect insinuation, an expression of belief or opinion or sarcasm or irony. The imputation may be carried quite indirectly . . ." *Kelly v. Iowa State Education Ass'n*, 372 N.W.2d 288, 295 (Iowa App. 1985) (quoting *Prosser on Torts*)

"A defamatory statement, 'He is a womanizer,' or 'she is a tramp,' would not become less so if phrased, 'Is he a womanizer?' or 'Is she a tramp?'" *Locricchio v. Evening News Ass'n,* 434 Mich. 84, 476 N.W.2d 112, 142 (1991). Cooper's defamatory statements that "it's going to affect his law license" and "this will affect his law license" were not rendered non-defamatory by the prefatory "how."

Bill Hamilton of Iberia clearly understood Cooper's defamatory meaning. He scheduled a meeting with Newsome to discuss "the impact" on his law license:

> Brian Hamilton and Mark Reiber [of Iberia] had lunch with Newsome and advised that Hamilton had received an email from Cooper regarding Newsome's arrest and they were concerned about the impact on Newsome's license to practice law and his ability to continue to represent the bank. Reiber said they did not want to embarrass Newsome, but they had received his mugshot; Brian Hamilton stated he received the mug shot within a week of Newsome's arrest and that it came from Cooper.

Plaintiff's Supplemental Response to Defendant's First Set of Consolidated Set of Consolidated Discovery Requests, No. 11 (Filed with Defendant's Motion for Summary Judgment).

Although Newsome to date has been able to salvage his relationship with Iberia, he was not able to salvage a large portion of his relationship with Renasant. His income from Renasant Bank for Birmingham related matters was $59,588.96 in 2012, but it declined to $32,985.00 in 2013 (the year of Cooper's email), and it plummeted to $5,494.50 in 2014 (Exhibit 2 to Plaintiff's Supplemental Response to Defendant's First Set of Consolidated Set of Consolidated Discovery Requests, No. 11 (Filed with Defendant's Motion for Summary Judgment)).

"One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession . . . is subject to liability without proof of special harm." *Restatement (Second) of Torts* § 573 (quoted in *Tanner v. Ebbole*, 88 So. 3d 856, 864 (Ala. Civ. App. 2011)). If the defamation is in writing, then it is *libel per se*. *Browning v. Birmingham News*, 348 So. 2d 455, 459 (Ala. 1977).

In *Butts v. Weis*, 346 So. 2d 422, 422-23 (Ala. 1977), the plaintiff alleged the defendant had defamed him by saying that he "was not a duly qualified attorney and that [he] was not licensed to practice law within the State of Alabama." The trial court dismissed the complaint, but the Supreme Court reversed: "[T]hese authorities . . . hold that no proof of special damages is necessary in order to recover damages for slander affecting a person's business or profession" (346 So. 2d at 423).

In *Blevins v. W. F. Barnes Corp.*, 768 So. 2d 386 (Ala. Civ. App. 1999), the plaintiff alleged that the defendant had defamed him by accusing him of conduct that violated the *Rules of*

Professional Conduct. The trial court granted summary judgment, but the Court of Civil Appeals reversed:

> The comments contained in the letter are quite capable of harming Blevins in his profession. As an attorney, Blevins is subject to the *Rules of Professional Conduct*. . . . The allegations that Blevins discerned Barnes's financial state and then conspired with his employee to bring a false and frivolous lawsuit to coerce from Barnes a payment of $25,000 are broad enough to charge Blevins with professional misconduct. We conclude that the language in the letter is capable of a defamatory meaning (768 So. 2d at 392).

Illustration 4 under section 573 of the *Restatement (Second) of Torts* is, "A, says to B that C, a lawyer is ignorant and unqualified to practice law. A is subject to liability to C without proof of special harm."

A jury may reasonably find from the evidence that Cooper's statements implied that Newsome was guilty of menacing, that he had violated the *Rules of Professional Conduct*, and "it's [his arrest is] going to affect his law license." The Balch defendants offered no evidence that these "facts" were true.[2] Newsome was not convicted of menacing; no charges have ever been filed against him for violating the *Rules of Professional Conduct*; the false criminal charges were ordered expunged from his record by the Circuit Court of Shelby County, Alabama and his license has never been suspended or revoked. *See* Exhibit 2 (Affidavit of Burt W. Newsome).

10. The court erred in entering summary judgment for the Balch defendants on plaintiffs' claims for "Intentional Interference with Business or Contractual Relationships" for the reasons stated below:

(a) The Complaint

[2] "When the publication is libelous per se, the law presumes it to be false . . ." *Ponder v. Lake Forest Property Owner's Ass'n*, No. 2130790 (Ala. Civ. App. June 26, 2015) (*quoting McGraw v. Thomason*, 265 Ala. 635, 93 So. 2d 741, 742 (1957)).

Count VI of the complaint asserted a claim against Cooper for "Intentional Interference with [the Plaintiffs'] Business or Contractual Relationship" with Iberiabank. The complaint alleges,

> 52. . . . Clark Cooper improperly sent other emails and/or communications to officers and bank officials referencing specific cases in which Newsome was appearing as counsel for the bank and requesting work from Newsome's client knowing that the client was represented by Newsome in the matter. . . .
>
> 64. Plaintiffs re-allege the material allegations of paragraphs 1-52 as if fully set forth herein.
>
> 65. Plaintiffs had a valid and existing business and contractual relationship with Iberiabank Corp.
>
> 66. Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 knew of the Plaintiffs' valid and existing business and contractual relationship with Iberiabank Corp.
>
> 67. Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 were strangers to the business and contractual relationship between the Plaintiffs and Iberiabank Corp.
>
> 68. Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 separately and/or severally and/or collectively, intentionally and wrongfully interfered with the said business and contractual relations.

Counts VII and VIII asserted similar claims against Cooper for interference with the plaintiffs' business relationships with Renasant Bank and Bryant Bank.

(b) The Defendants' Answer and Emails

In their answer, the Balch defendants admitted that Newsome had business or contractual relationships with Iberia, Renasant, and Bryant (Answer, Document 50, ¶¶ 65, 71, 77), and they admitted that Cooper knew about these relationships (Answer, Document 50, ¶¶ 66, 72, 78). They also admitted that Cooper sent emails to Iberiabank and Bryant Bank soliciting business in cases where Newsome represented the banks. They attached emails to their answer (Answer, Document 50, Exhibits A-B, Cooper 0001-007). Cooper's correspondence with Renasant Bank was the subject of the plaintiffs' subpoena to Renasant discussed in paragraph 8 above.

(c) The Motion Summary Judgment

In *White Sands Group, L.L.C. v. PRS, L.L.C.*, 32 So. 3d 5 (Ala. 2009),[3] the Alabama Supreme Court redefined the elements of a claim for intentional interference:

> [T]he elements of the tort are (1) the existence of a protectable business relationship; (2) of which the defendant knew; (3) to which the defendant was a stranger; (4) with which the defendant intentionally interfered; and (5) damage (32 So. 3d at 14).

Proof that the interference was "improper" (or unjustified)[4] is not an element of the plaintiff's claim; it is an affirmative defense.[5]

The Balch defendants sought summary judgment on the ground that they had not "intentionally interfered" with the plaintiffs' business relationships:

> Newsome's claims for intentional interference fail "because [he] has presented **no evidence** to support a finding of the third element — that [Cooper] intentionally interfered with [Newsome's] employment relationship" with Iberiabank Corp., Renasant Bank, or Bryant Bank. *Hurst v. Alabama Power Company*, 675 So. 2d 397, 399 (Ala. 1996) (emphasis added). "Certainly, [Newsome] presented no evidence of **intentional** interference." *Id.* at 400 (emphasis added).
>
> The May 4, 2013 email to Iberiabank Corp. executive Brian Hamilton was an attorney-client communication between Cooper and his current client, Iberiabank Corp. Tab 1, ¶ 4. No rule of law or professional ethics bars Cooper's ability to communicate with his client on any topic whatsoever. Similarly, the Case Summary Emails were attorney-client communications between Cooper and current clients of B&B. As such, the specific restraints governing communications with prospective clients contained in Alabama Rule of Professional Conduct 7.3 are not applicable, and it stands to reason there would necessarily be no intentional interference (Document 189 at 6-7) (underlining added; boldface in Defendants' Motion).

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[3] The Balch defendants quoted the elements of intentional interference from *Gross v. Lowder Realty Better Homes & Gardens*, 494 So. 2d 590, 597 (Ala. 1986), but *White Sands* overruled *Gross* and removed any requirement that a plaintiff's prove that the interference was "improper" as part of his *prima facie* case (32 So. 3d at 14).

[4] "The restatement utilizes the term 'improper' to describe actionable conduct by a defendant. Non-justification is synonymous with 'improper.' If a defendant's interference is unjustified under the circumstances of the case, it is improper. The converse is also true" *(White Sands*, 32 So. 3d at 13).

[5] "[W]e consider it now to be well settled that the absence of justification is no part of a plaintiff's prima facie case in proving wrongful interference with a business or contractual relationship. Justification is an affirmative defense to be pleaded and proved by the defendant" (*White Sands*, 32 So. 3d at 12).

(d) The Summary-Judgment Order

The court adopted only the first paragraph of the Balch defendants' argument; they did not intentionally interfere:

> The intentional interference claims fail as a matter of law because the Newsome Defendants [*sic*] have "presented no evidence to support a finding of the third element of intentional interference – that Cooper intentionally interfered with Newsome's employment relationship" with the financial institutions complained of – Iberiabank Corp., Renasant Bank, or Bryant Bank (Document 235, ¶ 2).

(e) The Plaintiffs' Argument

The basis of the court's ruling is exceedingly narrow. "Interference' is "the act of meddling in another's affairs."[6] Under the *Restatement*,[7]

> There is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract. The interference is often by inducement. The inducement may be by any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus, it may be a simple request or persuasion exerting moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made.

Restatement (Second) of Torts § 566, Comment k.

Interference is intentional "if the actor intends to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." *Restatement (Second) of Torts* § 566B, Comment d; see § 566, Comment j.

Cooper's emails show clearly that he intentionally interfered with the plaintiffs' relationships with Iberia and Bryant Bank:

January 30, 2013, email from Cooper to Brian Hamilton of Iberiabank:

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[6] Bryan A. Garner, ed., *Black's Law Dictionary* 937 (10th ed. 2014).

[7] The Alabama Supreme Court evaluates interference claims under the *Restatement (Second) of Torts*. *See White Sands Group, L.L.C. v. PRS, L.L.C.*, 32 So. 3d 5, 13-15 (Ala. 2009)

> "I see Burt Newsome has filed a claim for Iberia against Print One. Is there anything you recommend I do to assist me in obtaining more files from Iberia?" (Document 50, exhibit B, Cooper – 0005).
>
> ***July 24, 2013, email from Cooper to David Agree of Bryant Bank:***
>
> "I see that the below suit was filed by Newsome. Anything I can do so that I could work with you?" The email listed the case name as "*Bryant Bank v. Landsouth Contractors, Inc.*, CV 58-CV- 13-900835" (Document 50, exhibit B, Cooper – 0006).
>
> ***November 7, 2014, email from Cooper to Brian Hamilton of Iberiabank:***
>
> "I noticed that the below case was recently filed by Iberia in Jefferson County. If you think I could reach out to anyone else in your department to build a relationship, please let me know. They may be happy with counsel they are using for smaller deals." The email listed the case name as "*IberiaBank v. John C. Wicker*, 01-CV-14-904617," and it listed "Burt Newsome" as Iberia's attorney (Document 50, exhibit B, Cooper – 007).

Cooper "meddl[ed]" in the plaintiffs' cases; he "request[ed]" employment in those cases; and he did this intentionally. That is, Cooper knew that he was "meddling" in Newsome's cases; he listed Newsome as the bank's attorney in each email.

The Balch defendants cited no legal authority that Cooper's solicitation of the plaintiffs' clients was not "intentional interference." Cooper's solicitations were substantially identical to solicitations found actionable in *Fred Siegel Co., L.P. v. Arter & Hadden*, 85 Ohio St. 3d 171, 707 N.E.2d 853 (1999):

> In her letters to Siegel clients [the defendant] not only provided information as to her change of law firms, but also expressed a willingness to continue providing legal services at the new firm ("I would like for us to continue our professional relationship. When you need assistance or have questions, please contact me."). She thereby solicited Siegel clients to change legal representation. (707 N.E.2d at 858).

The court erred in holding that no evidence was presented "that Cooper intentionally interfered with Newsome's employment relationship[s]." The Balch defendants admitted interference in their answer by attaching Cooper's emails, and they filed the answer and emails with their Motion for Summary Judgment. "Where the evidentiary matter submitted in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied

even if no opposing evidentiary matter is presented." *Miles v. Foust*, 889 So. 2d 591, 595 (Ala. Civ. App. 2004) (quoting prior cases).

Although not adopted by the court, the Balch defendants argued that "no rule of law or professional ethics bars Cooper's ability to communicate with his client on any topic whatsoever . . . and it stands to reason there would necessarily be no intentional interference" (Document 189, at 6-7). Cooper confuses the question of whether a defendant has "intentionally interfered" with the question of whether intentional interference is "improper" or "unjustified."[8]

In any event, the Balch defendants made no contention that they are or have ever been the only attorney for Iberia, Renasant, or Bryant Bank. To contrary, they admitted that they are merely one of many firms who represent these banks in specific cases:

> 65. Defendants admit that Newsome, along with other lawyers throughout the State of Alabama including Cooper and other lawyers at Balch, have done some legal work for Iberiabank Corp. . . .
>
> 71. Defendants admit that Newsome, along with other lawyers throughout the State of Alabama including Cooper and other lawyers at Balch, have done some legal work for Renasant Bank. . . .
>
> 77. Defendants admit that Newsome, along with other lawyers throughout the State of Alabama including lawyers at Balch, have done some legal work for Bryant Bank (Answer, Document 50).

Under these circumstances, Rule 7.3(b) of the *Rules of Professional Conduct* prohibited Cooper from soliciting these banks in cases where he knew they were represented by Newsome:

> **(b) Written Communication**

[8] Sections 766, 766A, and 766B of the *Restatement* all state that "[o]ne who intentionally and improperly interferes" is subject to liability. "Intentional inference" and "improper interference" are, however, separate requirements for liability. Section 767 of the Restatement illustrates this: "In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation is improper or not, consideration is given to the following factors [listing seven factors]."

> (1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if: . . .
>
> > (iv) the written communication concerns a specific matter, and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter. . . .

Even if Cooper and Balch could ethically solicit the banks for business in general, that is not what they did here. In each email, Cooper mentioned Newsome by name; he referred to a specific case in which Newsome represented the bank; and he solicited employment by the bank. This conduct is in clear violation of rule 7.3(b).

These ethical violations are evidence that Cooper's "intentional interference" was "improper" or "unjustified." Alabama has adopted section 767 of *Restatement*,[9] and comment c to that section states,

> Violation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with plaintiff's contractual relations was improper or not.

In *Fred Siegel Co., L.P. v. Arter & Hadden*, 85 Ohio St. 3d 171, 707 N.E.2d 860 (1999), the court held, "The standards of the Disciplinary Rules are relevant to, but not determinative of, the propriety of an attorney's conduct for purposes of a tortious interference with contract claim."

A jury may reasonably find from the evidence that Cooper's emails to Iberia, Bryant, and Renasant were "intentional interference" with the plaintiffs' business relationships with these banks. A jury may also reasonably find that Cooper's conduct was "improper" and "unjustified" because he violated rule 7.3(b) of the *Rules of Professional Responsibility* and because he defamed the plaintiffs (*See* paragraph 9 above).

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[9] *White Sands Group, L.L.C. v. PRS, L.L.C.*, 32 So. 3d 5 (Ala. 2009).

11. The court erred in entering summary judgment on the plaintiffs' conspiracy count because the evidence established genuine issues of material fact on the plaintiffs' claims for defamation and interference, and the purpose of the conspiracy count was to preserve the plaintiffs' right to substitute non-parties for fictitious parties if such parties became known during the discovery process.

(a) The Complaint

Count X of the complaint alleged that Cooper conspired with various fictitious parties to interfere with the plaintiffs' business relationships and to defame them; the complaint did not allege that Cooper conspired with Bullock or Seier:

> 83. Fictitious Defendants 5-15 conspired with each other and/or with Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 to intentionally interfere with a business or contractual relation and/or engage in defamation and as a proximate consequence of the Defendants' conduct Plaintiffs have suffered damages to their character, good name, reputation, good will, loss of business, loss of business income, loss of future business, loss of business opportunity, emotional distress and mental anguish, and have otherwise been injured and damaged.

(b) The Motion for Summary Judgment

Cooper argued that that the conspiracy count should be dismissed because it "stemm[ed]" from the menacing case:

> Because his conspiracy count is undisputedly a "civil claim . . . stemming directly or indirectly from [the criminal menacing] case," it is directly within the scope of the released claims contemplated by the Deferred Prosecution Agreement and Release. Moreover, as an alleged co-conspirator, Cooper is clearly a "person[] in any way related to this matter." As such, Cooper must correspondingly be deemed a released person under the terms of the Deferred Prosecution and Release Agreement.

(c) The Summary-Judgment Order

The court's reason for dismissing the conspiracy count was as follows:

> Newsome's conspiracy count fails as a matter of law for a number of reasons, including because a) until Newsome filed this lawsuit, Cooper had never met the other alleged

charge him with a crime when he signed the release. "A summary-judgment movant does not discharge his initial burden to challenge the sufficiency of the evidence of a nonmovant's claim by simply ignoring the claim." *Free v Lasseter*, 31 So. 3d 85, 90 (Ala. 2009).

(c) The release on which the defendants rely is a "release-dismissal agreement." "In exchange for this release, this case will be either dismissed immediately, or pursuant to conditions noted above." The United States Supreme Court considered the validity of such agreements in *Town of Newton v. Rumery*, 107 S. Ct. 1187 (1987).

The court held that the validity of such agreements must be determined on a case-by-case basis. The plurality opinion found that the particular release in that case was enforceable because three factors were satisfied: "[W]e conclude that [1] this agreement was voluntary, [2] that there is no evidence of prosecutorial misconduct, and [3] that enforcement of this agreement would not adversely affect the relevant public interests" (107 S. Ct. at 1195). The proponent of such a release must "prove" these three factors as a condition of enforcement (107 S. Ct. at 1196). The defendants offered no evidence to meet this burden of proof.

In *Couglen v. Coots*, 5 F.3d 970, 973 (6th Cir. 1993), the Sixth Circuit reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement. The court held,

> [T]he *Rumery* opinion instructs us that before a court properly may conclude that a particular release-dismissal agreement is enforceable, it must specifically determine that (1) the agreement was voluntary; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement will not adversely affect relevant public interests. The burden of proving each of these points falls upon the party in the Sec. 1983 action who seeks to invoke the agreement as a defense.
>
> Here, the district court did not conduct the analysis called for by *Rumery*. Instead, the court concluded that "such releases have been held not to be against public policy in . . . *Rumery*," and, in effect, treated the release as presumptively valid.

In *Patterson v. City of Akron*, No. 13-4321 (6th Cir. July 22, 2015), the Sixth Circuit again reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> *Rumery* requires that, in order for a court to find lack of prosecutorial misconduct, the party invoking a release-dismissal agreement as a defense must present evidence of a legitimate criminal justice reason for conditioning the plea agreement on a release.

In *Cain v. Borough*, 7 F.3d 377, 383 (3rd Cir. 1993), the Third Circuit reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> As we have explained, because the District Attorney made no case-specific showing that the public interest was served by obtaining the release, the district court erred by determining that as a matter of law the public interest requirement was satisfied. We will reverse the grant of summary judgment for the defendants . . .

Finally, in *Stamps v. Taylor*, 218 Mich. App. 626, 635, 554 N.W.2d 603, 607 (1996), the Michigan court reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> In the present case, the trial court did not analyze the relevant factors established by *Rumery*. Instead, the trial court upheld the release simply because it was applicable and unambiguous. Accordingly, we reverse and remand with instructions for the trial court to make the specific evaluations called for by this opinion.

These cases establish that the burden of proof imposed by *Rumery* is an evidentiary burden and that a release itself cannot meet that burden. The defendants must offer evidence. Although *Rumery* was a 1983 action, the plaintiff's claims were similar to those asserted by Newsome. The plaintiff in *Rumery* "alleged that the town and its officers had violated his constitutional rights by arresting him, defaming him, and imprisoning him falsely." Newsome alleges that Bullock and Seier maliciously prosecuted him (count I), abused the legal process for an improper purpose (count II), and caused him to be falsely imprisoned (count III).

This court should apply the *Rumery* analysis to the validity the of release-dismissal agreement just as the Michigan court did in *Stamps*. Here, the defendants offered no evidence to prove compliance with any of the *Rumery* factors. Consequently, the court erred in relying on the release as basis for dismissing the plaintiffs' claims

2. The court erred in dismissing the plaintiffs' claim that the release was obtained by fraud (counts XII-XIII) because no party filed a Motion to Dismiss, Motion for Judgment on the Pleadings, or Motion for Summary asserting any ground or reason that the fraud counts should be dismissed. The court's dismissal of these counts without such a motion denied the plaintiffs due process of law.

In *Moore v. Prudential Residential Services Ltd*, 849 So. 2d 914, 927 (Ala. 2002), the court held, "The trial court violates the rights of the nonmoving party if it enters a summary judgment on its own, without any motion having been filed by a party."

3. Section 15-27-6 of the Alabama Code provides that anyone who "uses" the contents of an expunged file without a court order is guilty of a Class B misdemeanor. The "Deferred Prosecution and Release Agreement" on which the court based its dismissal of the claims against Bullock and Seier is part of the "file" concerning Newsome's arrest, and that file has been expunged. As a matter of the public policy expressed in the expungement statute, "expunged records" are not a lawful basis for dismissing Newsome's claims.

The records and file concerning Newsome's arrest for menacing were expunged by order of the Circuit Court of Shelby County on September 10, 2015, in case number CC 2015-000121.00 **(See Order of Circuit Court of Shelby County, Alabama directing that any and all records of the charge, arrest and incarceration be expunged attached as Exhibit "H" to the Newsome Affidavit)**. Section 15-27-6(b) of the Alabama Code states, "After the expungement of records pursuant to subsection (a), the proceedings regarding the charge shall be deemed never to have occurred." Section 15-27-16(a) further provides,

> Notwithstanding any other provision of this chapter, an individual who knows an expungement order was granted pursuant to this chapter and who intentionally and maliciously divulges, makes known, reveals, gives access to, makes public, uses, or

> otherwise discloses the contents of an expunged file without a court order, or pursuant to a provision of this chapter, shall be guilty of a Class B misdemeanor.

"Use" of the "Deferred Prosecution and Release Agreement" is now a criminal offense. The expungement statute expresses a broad, social policy to restore the former, criminal defendant to the condition that would have existed if no criminal charge had ever been filed. Dismissing Newsome's claims arising from an expunged arrest – or permitting the prior dismissal to stand – based on a release that has itself been expunged thwarts the policy of the expungement statute.

4. The court erred in holding that "Deferred Prosecution and Release Agreement" operated to release Claiborne P. Seier because the document applies only to named entities or parties, and Seier is not named in the document as a party or beneficiary.

Section 885(1) of the *Restatement (Second) of Torts* states, "A valid release of one tortfeasor from liability for a harm, given by the injured party, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."[1] The release contains no agreement to discharge Seier.

5. The court erred in holding that "Deferred Prosecution and Release Agreement" operated to release Claiborne P. Seier because the document does not release the "agents and employees" of "complainants [or] witnesses.

Although the release reflects an intent to release the "agents and employees" of "Shelby County," "the Sheriff of said County," "law enforcement or investigative agencies," and "the public defender," the release does not discharge the "agents and employees" of any other entity:

> The Defendant does hereby grant a full, complete and absolute release of all civil and criminal claims stemming directly or indirectly from this case to the State of Alabama, its agents and employees; to Shelby County, Alabama, its agents and employees, including, but not limited to the Sheriff of said County, his agents and employees, to any other law

[1] The Alabama court relied on section 885 of the *Restatement* in *Ex parte Goldsen*, 783 So. 2d 53, 55 (Ala. 2000), and *Lowry v. Garrett*, 792 So. 2d 1119, 1122 (Ala. Civ. App. 2001).

> enforcement or investigative agencies, public or private, their agents and employees; **or to any other complainants, witnesses, associations, corporations, groups, organizations or persons in any way related to this matter,** to also include the Office of the Public Defender of Shelby County, Alabama, its agents and employees, from any and all actions arising from the instigation, investigation, prosecution, defense, or any other aspect of this matter.

No evidence was offered that Seier was an "agent or employee" of "Shelby County," "the Sheriff of said County," "law enforcement or investigative agencies," or "the public defender." Further, there no evidence that he fell within any other group of persons released.

6. The court in holding that the "Deferred Prosecution and Release Agreement" operated to release Claiborne P. Seier because he offered no evidence to meet the evidentiary burden established in Pierce v. Orr, 540 So. 2d 1363 (Ala. 1989), that applies when an unnamed third-party claims the benefit of a release:

> Henceforth, unnamed third-parties, referred to in the release as "any and all parties" or by words of like import, who have paid no part of the consideration and who are not the agents, principals, heirs, assigns of, or who do not otherwise occupy a privity relationship with, the named payors, must bear the burden of proving by substantial evidence that they are parties intended to be released, i.e., that their release was within the contemplation of the named parties to the release (540 So. 2d at 1367).

Seier offered no evidence to meet this burden of proof; moreover, the release does not even use the generic "any and all parties."

7. The court erred in granting summary judgment for Clark Andrew Cooper and Balch & Bingham, LLP (hereafter "the Balch defendants" or "Cooper/Balch") without a hearing and without setting a date by which the plaintiffs must submit evidence or argument in opposition to the motion. Such action violated rules 56 and 78 of the Alabama Rules of Civil Procedure and the plaintiffs' right to due process of law.

Rule 56(c)(2) requires a hearing on motions for summary judgment, and it requires that the defending party be given notice of the deadline for submitting materials in opposition to the motion:

> The motion for summary judgment, with all supporting materials, including any briefs, shall be served at least ten (10) days before the time fixed for the hearing, except that a court may conduct a hearing on less than ten (10) days' notice with the consent of the parties concerned. Subject to subparagraph (f) of this rule, any statement or affidavit in opposition shall be served at least two (2) days prior to the hearing.

The *Committee Comments* to rule 78 state, "It is to be noted that the last sentence of the rule prohibits the granting of a motion seeking final judgment, such as a motion for summary judgment, without giving the parties an opportunity to be heard orally."

In this case, no hearing was held on the Motion for Summary Judgment filed by the Balch defendants, and no date was set by which the plaintiffs must submit argument or evidence in opposition to the motion. Trial courts have frequently been reversed for entering summary judgments under these circumstances. *Burgoon v. Alabama State Department of Human Resources*, 835 So. 2d 131 (Ala. 2002) ("The trial court erred, therefore, in granting the motions to dismiss the claims against all individual defendants in their individual capacities without conducting a hearing"); *Shaw v. State ex rel. Hayes*, 953 So. 2d 1247, 1251 (Ala. Civ. App. 2006) ("[T]he trial court erred in failing to hold a hearing on the State's summary-judgment motion before entering a summary judgment . . ."); *Miles v Foust*, 889 So. 2d 591, 594 (Ala. Civ. App. 2004) ("Rule 56 provides that the parties are entitled to a hearing on a summary-judgment motion"); *Van Knight v. Smoker*, 778 So. 2d 801, 805 (Ala. 2000) ("Rule 56 (c), Ala. R. Civ. P., itself entitles the parties to a hearing on a motion for summary judgment"); *Moore v. Prudential Residential Services Limited Partnership*, 849 So. 2d 914, 927 (Ala. 2002) ("Rule 56 requires, at the least, that the nonmoving party be provided with notice of a summary-judgment motion and

be given an opportunity to present evidence in opposition to it . . ."); *Moore v. GAB Robins North America, Inc.*, 840 So. 2d 882, 884 (Ala. 2002) ("[T]o cut off Moore's opportunity to make a showing of disputed facts to the trial court is to prevent him from having his day in court"); *Elliott Builders, Inc. v. Timber Creek Property Owners Association*, 128 So. 3d 755, 765 (Ala. Civ. App. 2013) ("We conclude that Elliott Builders and Elliott are entitled to an opportunity to make a showing of disputed facts . . ."); *Hooks v. Pettaway*, 102 So. 3d 391, 393 (Ala. Civ. App. 2012) ("Although Hooks may not ultimately prevail in opposing the motion for summary judgment, she is entitled to an opportunity to respond to the motion").

8. The court erred in ruling on the Balch defendants' motion for summary judgment before requiring Renasant Bank to produce the correspondence from or to the Balch defendants that the plaintiffs had subpoenaed.

When the court entered summary judgment in this case, the plaintiffs' Motion to Compel discovery from Renasant Bank was pending. The court denied that motion as "moot" after entering summary judgment. In *Ex parte Williams*, 617 So. 1032, 1035-36 (Ala. 1992), the court held,

> "If the trial court from the evidence before it, or the appellate court from the record, can ascertain that the matter subject to production was crucial to the non-moving party's case (*Parrish v. Board of Commissioners of Alabama State Bar*, 533 F.2d 942 (5th Cir. 1976)), or that the answers to the interrogatories were crucial to the non-moving party's case (*Noble v. McManus*, 504 So.2d 248 (Ala.1987)), then it is error for the trial court to grant summary judgment before the items have been produced or the answers given.

This analysis is directly applicable to this case. On March 11, 2015, the plaintiffs filed Notice of Intent to Serve a Subpoena on Renasant for all correspondence *to or from* the Balch defendants concerning Newsome. The information sought included,

> Certified copies of all correspondence, cards, letters, emails, text messages or other documents [to] Renasant Bank, and/or John Bentley, president of Renasant Bank, and/or Bill Stockton, Chief Credit Officer for Renasant Bank, and/or any other bank officer have received from or sent to Clark Andrew Cooper and/or Balch and Bingham, LLP, and/or any of its agents or employees touching or concerning Burt W. Newsome and/or Newsome

> Law LLC in which reference is made to any case or pending legal matter in which Burt W. Newsome and/or Newsome Law LLC represents the individual recipient and/or sender and/or Renasant Bank, or to which any photo and/or likeness of Burt W. Newsome was attached. From January 30, 2012 through the date of your response (Document 103).

The subpoena was issued on March 31, 2015 (Document 103), and Renasant was served on April 16, 2015 (Documents 134, 219).

The documents sought were identical to documents that Cooper admitted sending to Iberia and Bryant Bank; namely, emails soliciting Newsome's pending cases and emails stating that "this [his arrest] will affect his law license" (Document 50, Exhibits A-B, 001-007). J. D. May of Renasant told Newsome that "Cooper was constantly asking for business," and Bill Stockton of Renasant told Newsome that Cooper had sent Renasant an email about his arrest. Plaintiff's Supplemental Response to Defendant's First Set of Consolidated Set of Consolidated Discovery Requests, No. 11 (Filed with Defendant's Motion for Summary Judgment). These documents were crucial to Newsome's claims for defamation and tortious interference.

Renasant did not, however, respond to the subpoena. Instead, it provided the Balch defendants an affidavit from John Bentley, its "Regional Area President," and they filed the affidavit with their Motion for Summary Judgment on August 12, 2015. In the affidavit, Bentley states, "I never received an email from Clark Cooper or anyone at Balch & Bingham LLP related to Burt Newsome's May 2, 2013 arrest."

Bentley's failed, however, to address the broader issues in the case. He did not state that Renasant never received and did not have any "email from Clark Cooper or anyone at Balch & Bingham LLP related to Burt Newsome's May 2, 2013 arrest," and he did not state that Renasant had never received and did not have any emails from the Balch defendants soliciting employment in cases where Newsome was representing Renasant. These were crucial questions.

On August 14, 2015, the plaintiffs filed a Motion to Compel Production from Renasant (Document 218), and on August 19, 2015, their attorney, Robert E. Lusk, Jr., filed an affidavit pursuant to rule 56(f). Lusk stated that the plaintiffs' had served Renasant with a subpoena for documents on April 16, 2015, that it had "failed to respond or produce any documents requested," that Renasant had provided an affidavit to the Balch defendants, that they had filed the affidavit in support of their Motion for Summary Judgment, and that the plaintiffs had filed a Motion to Compel Renasant to produce the documents requested in their subpoena. Lusk "request[ed] that all the Defendants' pending Motions for Summary Judgment, Motions for Judgment on the Pleadings and Motions To Dismiss be denied or at least continued until Plaintiffs have been allowed to conduct all their discovery needed to present their case" (Document 226). The court denied this request by entering summary judgment for the Balch defendants

Clearly, the records sought by the plaintiffs from Renasant were crucial to their claims for defamation and intentional interference. The court erred in ruling on the Balch defendants' Motion for Summary Judgment without first requiring Renasant to produce the subpoenaed documents.

9. The court erred in entering summary judgment for the Balch defendants on the plaintiffs' defamation claim because the motion for summary judgment did not rebut the factual basis for the claim; namely, that Cooper sent emails to Newsome's banking clients "questioning the effect of Newsome's arrest on his license to practice law and intentionally casting Newsome and Newsome Law in a bad light."

(a) The Complaint

Count IX of the complaint alleged that Cooper defamed the plaintiffs by publishing emails "questioning the effect of Newsome's arrest on his license to practice law":

> 50. . . . Clark Cooper sent emails and/or other communications to officers and bank officials with Iberiabank Corp, Renasant Bank, and Bryant Bank containing a copy of

> Newsome's mug shot, asking if they had seen Newsome's mug shot, and questioning the effect of Newsome's arrest on his license to practice law and intentionally casting Newsome and Newsome Law in a bad light.
>
> 51. Newsome was not convicted on the criminal charges, which were dismissed with prejudice on or about April 1, 2014. . . .
>
> 83. By engaging in the above conduct, Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 separately or severally made a false and defamatory statement concerning the Plaintiff.

(b) The Answer and Emails

In their answer, the Balch defendants admitted that Cooper emailed Brian Hamilton of Iberiabank and informed him of Newsome's arrest; they also attached copies of these emails to their answer. The documents show that Cooper emailed Newsome's mug shot to Hamilton at 4:29 p.m. on May 4, 2013, and stated, "Have you seen this? Not sure how it's going to affect his law license. Bizarre."

Six minutes later – before Hamilton responded – Cooper emailed him a second time, quoted the statute on menacing (section 13A-6-23), and stated, "It is a class B misdemeanor. Not sure how this will affect his law license. . . ." (Answer, Document 50, exhibit A, Cooper 001-003).

In addition, "Bill Stockton [of Renasant] told Newsome that John Bentley [of Renasant] received an email from Cooper regarding Newsome's arrest immediately after the arrest. Both Stockton and Bentley admitted they received the email from Cooper" (Plaintiffs' Supplemental Response to Defendant's First Set of Consolidated Discovery Requests, No. 11 (Filed with Defendants' Motion for Summary Judgment). These emails were the subject of the plaintiffs' subpoena to Renasant (Document 103) and their Motion to Compel Renasant to respond to the subpoena (Documents 218-220), which were discussed in the last paragraph (See paragraph 8 above).

(c) The Plaintiffs' Interrogatory Answers

The Balch defendants propounded an interrogatory to the plaintiffs asking them the basis for their defamation claim, and the plaintiffs stated that their claim was based on Cooper's implication that Newsome's arrest would have a negative effect on his ability to represent clients.

> **INTERROGARY 2.** Identify each and every fact that you contend supports your claim in connection to the Defamation claim, as alleged in count IX in the Complaint, with respect to Clark Cooper.
>
> **RESPONSE:** The copies of my [*sic*] emails with statements implying the arrest would have some negative impact on my law license and ability to represent clients. The rapid sending of my mug shot after my arrest and the specific targeting of common clients.

The Balch defendants filed these interrogatory answers with their motion for summary judgment.

(d) The Motion for Summary Judgment

In their Motion for Summary Judgment, the Balch defendants argued that Newsome's defamation count was due to be dismissed only because Newsome had in fact been arrested:

> While Newsome's arrest may not constitute evidence of wrongdoing, the arrest itself is a fact: the May 4, 2013 Email containing Newsome's mug shot is irrefutably truthful because Newsome's arrest, which gave rise to the creation of the mug shot, was in fact an event that occurred in time. Unless Newsome is claiming he was not arrested, or that the person in the mug shot is an imposter, his defamation claim fails as a matter of law.

The defendants did not address Newsome's claims that the emails contained "statements implying the arrest would have some negative impact on [his] license and ability to represent clients." "A summary-judgment movant does not discharge his initial burden to challenge the sufficiency of the evidence of a nonmovant's claim by simply ignoring the claim." *Free v Lasseter*, 31 So. 3d 85, 90 (Ala. 2009). As a result, the Balch defendants presented no basis for dismissing the plaintiffs' defamation claim.

(e) The Summary-Judgment Order

The order granting summary judgment tracked the defendants' argument; the Balch defendants had no liability because Newsome was in fact arrested:

> The defamation count fails as a matter of law because falsity of the alleged defamatory statement is one of the five elements the Newsome Defendants [*sic*] were required to show to establish a prima facie action for defamation. See, e.g., *Ex parte Crawford Broad. Co.*, 904 So. 2d 221, 225 (Ala. 2004): thus, "[t]ruth is a complete and absolute defense to defamation. . . . Truthful statements cannot, as a matter of law, have defamatory meaning." *Federal Credit, Inc. v. Fuller*, 72 So. 3d 5, 9-10 (Ala. 2011). While Newsome's arrest did not constitute evidence of wrongdoing, the arrest itself is a fact, and Cooper's email correspondence attaching Newsome's mug shot was a true event, which occurred in time.

(f) The Plaintiffs' Argument

This dismissal of Newsome's defamation claim was erroneous because the claim was not based solely on Cooper's publication of Newsome's mug shot; the claim was based on Cooper's "statements implying the arrest would have some negative impact on [his] law license and ability to represent clients" (Answer to Interrogatory 2; Complaint ¶ 50).

These "statements" included Cooper's statements that he was "[n]ot sure how it's going to affect his law license. Bizarre" and that he was "[n]ot sure how this will affect his law license." These statements implied three facts that were not true:

> 1. That Newsome was in fact guilty of menacing – otherwise, his arrest would have no effect on his law license.
>
> 2. That Newsome had violated the *Rules of Professional Responsibility* – otherwise, his arrest would have no effect on his law license.
>
> 3. That "this will affect his law license"– otherwise, why speculate "how this will affect his license"?

Defamation may be based the implication of "false facts." In *Liberty National Life Ins. Co. v. Daughtery*, 840 So. 2d 152, 160 (Ala. 2002), the court held, "We conclude that Hartley's statement implied that Daughtery had committed the crime of theft." In *Age-Herald Pub. Co. v. Waterman*, 202 Ala. 665, 81 So. 621, 626 (Ala. 1919), the court held, "It was for the jury to determine whether in fact the publication was libelous in its implications to the plaintiff, Waterman."

In *Bowling v. Pow*, 293 Ala. 178, 183, 301 So. 2d 55 (1974), the Supreme Court summarized,

> Defamation does not necessarily involve opprobrious or scurrilous language. It is often elegant, refined and scholarly in essence and environment, and some of the best linguists have engaged in and been victims of it. The parties hereto can find distinguished company, as evidenced by *Cooper v. Greeley*, 1 Denio 347 (N.Y. 1845), in which the words of Horace Greeley concerning James Fenimore Cooper, 'He will not bring the action in New York, for we are known here, nor in Otsego, for he is known there' were held defamatory as imputing a bad reputation to Cooper in Otsego, an example of defamation by indirection by suave implication.

"A question, like a statement of belief or opinion, though not phrased in the form of a declaration of fact, may imply the existence of a false and defamatory fact." *Keohane v. Stewart*, 882 P.2d 1293, 1302 (Colo. 1994). "The form of the language used is not controlling, and there may be defamation by means of a question, an indirect insinuation, an expression of belief or opinion or sarcasm or irony. The imputation may be carried quite indirectly . . ." *Kelly v. Iowa State Education Ass'n*, 372 N.W.2d 288, 295 (Iowa App. 1985) (quoting *Prosser on Torts*)

"A defamatory statement, 'He is a womanizer,' or 'she is a tramp,' would not become less so if phrased, 'Is he a womanizer?' or 'Is she a tramp?'" *Locricchio v. Evening News Ass'n,* 434 Mich. 84, 476 N.W.2d 112, 142 (1991). Cooper's defamatory statements that "it's going to affect his law license" and "this will affect his law license" were not rendered non-defamatory by the prefatory "how."

Bill Hamilton of Iberia clearly understood Cooper's defamatory meaning. He scheduled a meeting with Newsome to discuss "the impact" on his law license:

> Brian Hamilton and Mark Reiber [of Iberia] had lunch with Newsome and advised that Hamilton had received an email from Cooper regarding Newsome's arrest and they were concerned about the impact on Newsome's license to practice law and his ability to continue to represent the bank. Reiber said they did not want to embarrass Newsome, but they had received his mugshot; Brian Hamilton stated he received the mug shot within a week of Newsome's arrest and that it came from Cooper.

Plaintiff's Supplemental Response to Defendant's First Set of Consolidated Set of Consolidated Discovery Requests, No. 11 (Filed with Defendant's Motion for Summary Judgment).

Although Newsome to date has been able to salvage his relationship with Iberia, he was not able to salvage a large portion of his relationship with Renasant. His income from Renasant Bank for Birmingham related matters was $59,588.96 in 2012, but it declined to $32,985.00 in 2013 (the year of Cooper's email), and it plummeted to $5,494.50 in 2014 (Exhibit 2 to Plaintiff's Supplemental Response to Defendant's First Set of Consolidated Set of Consolidated Discovery Requests, No. 11 (Filed with Defendant's Motion for Summary Judgment)).

"One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession . . . is subject to liability without proof of special harm." *Restatement (Second) of Torts* § 573 (quoted in *Tanner v. Ebbole*, 88 So. 3d 856, 864 (Ala. Civ. App. 2011)). If the defamation is in writing, then it is *libel per se*. *Browning v. Birmingham News*, 348 So. 2d 455, 459 (Ala. 1977).

In *Butts v. Weis*, 346 So. 2d 422, 422-23 (Ala. 1977), the plaintiff alleged the defendant had defamed him by saying that he "was not a duly qualified attorney and that [he] was not licensed to practice law within the State of Alabama." The trial court dismissed the complaint, but the Supreme Court reversed: "[T]hese authorities . . . hold that no proof of special damages is necessary in order to recover damages for slander affecting a person's business or profession" (346 So. 2d at 423).

In *Blevins v. W. F. Barnes Corp.*, 768 So. 2d 386 (Ala. Civ. App. 1999), the plaintiff alleged that the defendant had defamed him by accusing him of conduct that violated the *Rules of*

Professional Conduct. The trial court granted summary judgment, but the Court of Civil Appeals reversed:

> The comments contained in the letter are quite capable of harming Blevins in his profession. As an attorney, Blevins is subject to the *Rules of Professional Conduct*. . . . The allegations that Blevins discerned Barnes's financial state and then conspired with his employee to bring a false and frivolous lawsuit to coerce from Barnes a payment of $25,000 are broad enough to charge Blevins with professional misconduct. We conclude that the language in the letter is capable of a defamatory meaning (768 So. 2d at 392).
> Illustration 4 under section 573 of the *Restatement (Second) of Torts* is, "A, says to B that C, a lawyer is ignorant and unqualified to practice law. A is subject to liability to C without proof of special harm."

A jury may reasonably find from the evidence that Cooper's statements implied that Newsome was guilty of menacing, that he had violated the *Rules of Professional Conduct*, and "it's [his arrest is] going to affect his law license." The Balch defendants offered no evidence that these "facts" were true.[2] Newsome was not convicted of menacing; no charges have ever been filed against him for violating the *Rules of Professional Conduct*; the false criminal charges were ordered expunged from his record by the Circuit Court of Shelby County, Alabama and his license has never been suspended or revoked. *See* Exhibit 2 (Affidavit of Burt W. Newsome).

10. The court erred in entering summary judgment for the Balch defendants on plaintiffs' claims for "Intentional Interference with Business or Contractual Relationships" for the reasons stated below:

(a) The Complaint

[2] "When the publication is libelous per se, the law presumes it to be false . . ." *Ponder v. Lake Forest Property Owner's Ass'n*, No. 2130790 (Ala. Civ. App. June 26, 2015) (*quoting McGraw v. Thomason*, 265 Ala. 635, 93 So. 2d 741, 742 (1957)).

Count VI of the complaint asserted a claim against Cooper for "Intentional Interference with [the Plaintiffs'] Business or Contractual Relationship" with Iberiabank. The complaint alleges,

> 52. . . . Clark Cooper improperly sent other emails and/or communications to officers and bank officials referencing specific cases in which Newsome was appearing as counsel for the bank and requesting work from Newsome's client knowing that the client was represented by Newsome in the matter. . . .
>
> 64. Plaintiffs re-allege the material allegations of paragraphs 1-52 as if fully set forth herein.
>
> 65. Plaintiffs had a valid and existing business and contractual relationship with Iberiabank Corp.
>
> 66. Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 knew of the Plaintiffs' valid and existing business and contractual relationship with Iberiabank Corp.
>
> 67. Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 were strangers to the business and contractual relationship between the Plaintiffs and Iberiabank Corp.
>
> 68. Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 separately and/or severally and/or collectively, intentionally and wrongfully interfered with the said business and contractual relations.

Counts VII and VIII asserted similar claims against Cooper for interference with the plaintiffs' business relationships with Renasant Bank and Bryant Bank.

(b) The Defendants' Answer and Emails

In their answer, the Balch defendants admitted that Newsome had business or contractual relationships with Iberia, Renasant, and Bryant (Answer, Document 50, ¶¶ 65, 71, 77), and they admitted that Cooper knew about these relationships (Answer, Document 50, ¶¶ 66, 72, 78). They also admitted that Cooper sent emails to Iberiabank and Bryant Bank soliciting business in cases where Newsome represented the banks. They attached emails to their answer (Answer, Document 50, Exhibits A-B, Cooper 0001-007). Cooper's correspondence with Renasant Bank was the subject of the plaintiffs' subpoena to Renasant discussed in paragraph 8 above.

(c) The Motion Summary Judgment

In *White Sands Group, L.L.C. v. PRS, L.L.C.*, 32 So. 3d 5 (Ala. 2009),[3] the Alabama Supreme Court redefined the elements of a claim for intentional interference:

> [T]he elements of the tort are (1) the existence of a protectable business relationship; (2) of which the defendant knew; (3) to which the defendant was a stranger; (4) with which the defendant intentionally interfered; and (5) damage (32 So. 3d at 14).

Proof that the interference was "improper" (or unjustified)[4] is not an element of the plaintiff's claim; it is an affirmative defense.[5]

The Balch defendants sought summary judgment on the ground that they had not "intentionally interfered" with the plaintiffs' business relationships:

> Newsome's claims for intentional interference fail "because [he] has presented **no evidence** to support a finding of the third element — that [Cooper] intentionally interfered with [Newsome's] employment relationship" with Iberiabank Corp., Renasant Bank, or Bryant Bank. *Hurst v. Alabama Power Company*, 675 So. 2d 397, 399 (Ala. 1996) (emphasis added). "Certainly, [Newsome] presented no evidence of **intentional** interference." *Id.* at 400 (emphasis added).
>
> The May 4, 2013 email to Iberiabank Corp. executive Brian Hamilton was an attorney-client communication between Cooper and his current client, Iberiabank Corp. Tab 1, ¶ 4. No rule of law or professional ethics bars Cooper's ability to communicate with his client on any topic whatsoever. Similarly, the Case Summary Emails were attorney-client communications between Cooper and current clients of B&B. As such, the specific restraints governing communications with prospective clients contained in Alabama Rule of Professional Conduct 7.3 are not applicable, and it stands to reason there would necessarily be no intentional interference (Document 189 at 6-7) (underlining added; boldface in Defendants' Motion).

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[3] The Balch defendants quoted the elements of intentional interference from *Gross v. Lowder Realty Better Homes & Gardens*, 494 So. 2d 590, 597 (Ala. 1986), but *White Sands* overruled *Gross* and removed any requirement that a plaintiff's prove that the interference was "improper" as part of his *prima facie* case (32 So. 3d at 14).

[4] "The restatement utilizes the term 'improper' to describe actionable conduct by a defendant. Non-justification is synonymous with 'improper.' If a defendant's interference is unjustified under the circumstances of the case, it is improper. The converse is also true" *(White Sands*, 32 So. 3d at 13).

[5] "[W]e consider it now to be well settled that the absence of justification is no part of a plaintiff's prima facie case in proving wrongful interference with a business or contractual relationship. Justification is an affirmative defense to be pleaded and proved by the defendant" (*White Sands*, 32 So. 3d at 12).

(d) The Summary-Judgment Order

The court adopted only the first paragraph of the Balch defendants' argument; they did not intentionally interfere:

> The intentional interference claims fail as a matter of law because the Newsome Defendants [*sic*] have "presented no evidence to support a finding of the third element of intentional interference – that Cooper intentionally interfered with Newsome's employment relationship" with the financial institutions complained of – Iberiabank Corp., Renasant Bank, or Bryant Bank (Document 235, ¶ 2).

(e) The Plaintiffs' Argument

The basis of the court's ruling is exceedingly narrow. "Interference' is "the act of meddling in another's affairs."[6] Under the *Restatement*,[7]

> There is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract. The interference is often by inducement. The inducement may be by any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus, it may be a simple request or persuasion exerting moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made.

Restatement (Second) of Torts § 566, Comment k.

Interference is intentional "if the actor intends to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." *Restatement (Second) of Torts* § 566B, Comment d; see § 566, Comment j.

Cooper's emails show clearly that he intentionally interfered with the plaintiffs' relationships with Iberia and Bryant Bank:

January 30, 2013, email from Cooper to Brian Hamilton of Iberiabank:

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[6] Bryan A. Garner, ed., *Black's Law Dictionary* 937 (10th ed. 2014).

[7] The Alabama Supreme Court evaluates interference claims under the *Restatement (Second) of Torts*. *See White Sands Group, L.L.C. v. PRS, L.L.C.*, 32 So. 3d 5, 13-15 (Ala. 2009)

> "I see Burt Newsome has filed a claim for Iberia against Print One. Is there anything you recommend I do to assist me in obtaining more files from Iberia?" (Document 50, exhibit B, Cooper – 0005).
>
> ***July 24, 2013, email from Cooper to David Agree of Bryant Bank:***
>
> "I see that the below suit was filed by Newsome. Anything I can do so that I could work with you?" The email listed the case name as "*Bryant Bank v. Landsouth Contractors, Inc.*, CV 58-CV- 13-900835" (Document 50, exhibit B, Cooper – 0006).
>
> ***November 7, 2014, email from Cooper to Brian Hamilton of Iberiabank:***
>
> "I noticed that the below case was recently filed by Iberia in Jefferson County. If you think I could reach out to anyone else in your department to build a relationship, please let me know. They may be happy with counsel they are using for smaller deals." The email listed the case name as "*IberiaBank v. John C. Wicker*, 01-CV-14-904617," and it listed "Burt Newsome" as Iberia's attorney (Document 50, exhibit B, Cooper – 007).

Cooper "meddl[ed]" in the plaintiffs' cases; he "request[ed]" employment in those cases; and he did this intentionally. That is, Cooper knew that he was "meddling" in Newsome's cases; he listed Newsome as the bank's attorney in each email.

The Balch defendants cited no legal authority that Cooper's solicitation of the plaintiffs' clients was not "intentional interference." Cooper's solicitations were substantially identical to solicitations found actionable in *Fred Siegel Co., L.P. v. Arter & Hadden*, 85 Ohio St. 3d 171, 707 N.E.2d 853 (1999):

> In her letters to Siegel clients [the defendant] not only provided information as to her change of law firms, but also expressed a willingness to continue providing legal services at the new firm ("I would like for us to continue our professional relationship. When you need assistance or have questions, please contact me."). She thereby solicited Siegel clients to change legal representation. (707 N.E.2d at 858).

The court erred in holding that no evidence was presented "that Cooper intentionally interfered with Newsome's employment relationship[s]." The Balch defendants admitted interference in their answer by attaching Cooper's emails, and they filed the answer and emails with their Motion for Summary Judgment. "Where the evidentiary matter submitted in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied

even if no opposing evidentiary matter is presented." *Miles v. Foust*, 889 So. 2d 591, 595 (Ala. Civ. App. 2004) (quoting prior cases).

Although not adopted by the court, the Balch defendants argued that "no rule of law or professional ethics bars Cooper's ability to communicate with his client on any topic whatsoever . . . and it stands to reason there would necessarily be no intentional interference" (Document 189, at 6-7). Cooper confuses the question of whether a defendant has "intentionally interfered" with the question of whether intentional interference is "improper" or "unjustified."[8]

In any event, the Balch defendants made no contention that they are or have ever been the only attorney for Iberia, Renasant, or Bryant Bank. To contrary, they admitted that they are merely one of many firms who represent these banks in specific cases:

> 65. Defendants admit that Newsome, along with other lawyers throughout the State of Alabama including Cooper and other lawyers at Balch, have done some legal work for Iberiabank Corp. . . .
>
> 71. Defendants admit that Newsome, along with other lawyers throughout the State of Alabama including Cooper and other lawyers at Balch, have done some legal work for Renasant Bank. . . .
>
> 77. Defendants admit that Newsome, along with other lawyers throughout the State of Alabama including lawyers at Balch, have done some legal work for Bryant Bank (Answer, Document 50).

Under these circumstances, Rule 7.3(b) of the *Rules of Professional Conduct* prohibited Cooper from soliciting these banks in cases where he knew they were represented by Newsome:

(b) Written Communication

[8] Sections 766, 766A, and 766B of the *Restatement* all state that "[o]ne who intentionally and improperly interferes" is subject to liability. "Intentional inference" and "improper interference" are, however, separate requirements for liability. Section 767 of the Restatement illustrates this: "In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation is improper or not, consideration is given to the following factors [listing seven factors]."

> (1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if: . . .
>
> > (iv) the written communication concerns a specific matter, and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter. . . .

Even if Cooper and Balch could ethically solicit the banks for business in general, that is not what they did here. In each email, Cooper mentioned Newsome by name; he referred to a specific case in which Newsome represented the bank; and he solicited employment by the bank. This conduct is in clear violation of rule 7.3(b).

These ethical violations are evidence that Cooper's "intentional interference" was "improper" or "unjustified." Alabama has adopted section 767 of *Restatement*,[9] and comment c to that section states,

> Violation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with plaintiff's contractual relations was improper or not.

In *Fred Siegel Co., L.P. v. Arter & Hadden*, 85 Ohio St. 3d 171, 707 N.E.2d 860 (1999), the court held, "The standards of the Disciplinary Rules are relevant to, but not determinative of, the propriety of an attorney's conduct for purposes of a tortious interference with contract claim."

A jury may reasonably find from the evidence that Cooper's emails to Iberia, Bryant, and Renasant were "intentional interference" with the plaintiffs' business relationships with these banks. A jury may also reasonably find that Cooper's conduct was "improper" and "unjustified" because he violated rule 7.3(b) of the *Rules of Professional Responsibility* and because he defamed the plaintiffs (*See* paragraph 9 above).

---

[9] *White Sands Group, L.L.C. v. PRS, L.L.C.*, 32 So. 3d 5 (Ala. 2009).

11. The court erred in entering summary judgment on the plaintiffs' conspiracy count because the evidence established genuine issues of material fact on the plaintiffs' claims for defamation and interference, and the purpose of the conspiracy count was to preserve the plaintiffs' right to substitute non-parties for fictitious parties if such parties became known during the discovery process.

(a) The Complaint

Count X of the complaint alleged that Cooper conspired with various fictitious parties to interfere with the plaintiffs' business relationships and to defame them; the complaint did not allege that Cooper conspired with Bullock or Seier:

> 83. Fictitious Defendants 5-15 conspired with each other and/or with Defendant Clark Cooper and/or Fictitious Defendants 1–4, and/or Fictitious Defendants 16-26 to intentionally interfere with a business or contractual relation and/or engage in defamation and as a proximate consequence of the Defendants' conduct Plaintiffs have suffered damages to their character, good name, reputation, good will, loss of business, loss of business income, loss of future business, loss of business opportunity, emotional distress and mental anguish, and have otherwise been injured and damaged.

(b) The Motion for Summary Judgment

Cooper argued that that the conspiracy count should be dismissed because it "stemm[ed]" from the menacing case:

> Because his conspiracy count is undisputedly a "civil claim . . . stemming directly or indirectly from [the criminal menacing] case," it is directly within the scope of the released claims contemplated by the Deferred Prosecution Agreement and Release. Moreover, as an alleged co-conspirator, Cooper is clearly a "person[] in any way related to this matter." As such, Cooper must correspondingly be deemed a released person under the terms of the Deferred Prosecution and Release Agreement.

(c) The Summary-Judgment Order

The court's reason for dismissing the conspiracy count was as follows:

> Newsome's conspiracy count fails as a matter of law for a number of reasons, including because a) until Newsome filed this lawsuit, Cooper had never met the other alleged

defendant "co-conspirators" in this matter; and b) the Deferred Prosecution Agreement and Release, executed by Newsome, extends to release any of Cooper's alleged conduct.

(d) The Plaintiffs' Argument

This finding is erroneous for four reasons. First, the conspiracy counts stands or falls with the plaintiffs' defamation count and their interference count; the count alleges that Cooper conspired with fictitious parties to "intentionally interfere with a business or contractual relation and/or engage in defamation." Because genuine issues of material fact exist on the plaintiffs' claims for interference and defamation (see paragraphs 9-10 above), the court erred in entering summary judgment on the plaintiffs' claims for conspiracy to interfere and defame.

Second, contrary to the Balch defendants' argument and the court's finding, the conspiracy count (count X) does not allege that the Cooper conspired with the other named defendants; the court's finding that the alleged conspiracy was between Cooper and the other named defendants contradicts the court's finding in the Certification of Final Judgment under Rule 54(b): "The court finds that the plaintiff's claims against the remaining defendants, Cooper and Balch-Bingham, are separate and distinct from their claims against Seier and Bullock" (Document 237).

Third, the "Deferred Prosecution and Release" is not enforceable for the reasons stated in paragraphs 1-3 above. Finally, even if release were enforceable, the Balch defendants are not entitled to claim its alleged protection for the reasons stated in paragraphs 4-6 above. They not parties to or beneficiaries of the release, and they offered no evidence to meet the burden established in *Pierce v. Orr*, 540 So. 2d 1363 (Ala. 1989), for an "unnamed third party" to claim the benefit of a release. The plaintiff's claims for "interference" and defamation are not "claims stemming directly or indirectly from this case"; that is, the criminal prosecution of Newsome. For instance, Cooper's email dated January 30, 2013, soliciting Newsome case against Print One from Iberia was written before Newsome was arrested on May 2, 2013 (Answer, Document 50, exhibit B, Cooper – 005).

12. The court erred in entering summary judgment on the plaintiffs' count for respondeat superior/vicarious liability because the evidence established that genuine issues of material fact existed on the plaintiffs' claims for defamation and interference, and Balch-Bingham is liable for the conduct of its partner Cooper in defaming Newsome and in soliciting his clients.

(a) The Complaint

Count XI alleges that Balch & Bingham is liable for Cooper's wrongful conduct based on respondeat superior:

> 90. While engaging in the above conduct, Defendant Clark Cooper and/or Fictitious Defendants 1–4 and/or Fictitious Defendants 5-15 and/or Fictitious Defendants 16-26 separately or severally were acting in the line, course and scope of their authority and capacity as a partner and/or employee and/or agent of Defendant Balch and/or Fictitious Defendants 1-4 and, therefore, Defendant Balch and/or Fictitious Defendants 1-4 are vicariously liable for the acts committed and complained of herein.

(b) The Motion for Summary Judgment

Balch concedes in its motion that "an employer will be vicariously liable for the torts of his employee while committed within the line and scope of the employment." Its only argument was, "Newsome has provided absolutely no evidence that Cooper is liable for any wrongdoing whatsoever." (Document 189, at 9).

(c) The Summary-Judgment Order.

The court granted summary judgment, holding,

> Lastly, the Newsome Defendants' vicarious liability/respondeat superior count fails as a matter of law against the B&B Defendants because Newsome has provided absolutely no evidence or pleadings that Cooper is liable for any wrongdoing whatsoever (Document 235, ¶ 5).

(d) The Plaintiffs' Argument.

Based on the reasons stated in paragraphs 8-9 above, genuine issues of material fact exist on the plaintiffs' claims against Cooper for defamation and interference. A partnership is liable

for the torts of its partners. *Atlantic Glass Co. v. Paulk*, 83 Ala. 404 (1888) (libel). Consequently, the court erred in dismissing the plaintiffs' respondeat-superior claim against Balch-Bingham.

13. The court erred in awarding John Bullock attorney's fees – and retaining jurisdiction to award further attorney's fees – because no evidence or legal authority established that the action was filed "without substantial justification"; the court did not find that the action was filed "without substantial justification"; no evidence was presented concerning the factors a court must consider before awarding attorney fees; and the court did not "specifically set forth the reasons for [its] award" of attorney's fees.

Section 12-19-273 provides in part, "When granting an award of costs and attorneys' fees, the court shall specifically set forth the reasons for such award and shall consider the following factors, among others, in determining whether to assess attorneys' fees and costs and the amount to be assessed [listing twelve factors]."

In *Pacific Enterprises Oil Co. v. Howell Petroleum Corp*, 614 So. 2d 409, 418-19 (Ala. 1993), the court held that a court awarding fees must give the "legal or evidentiary support" for its award:

> [W]e will require a trial court making the "without substantial justification" determination to make its determination, the ground or grounds upon which it relies, and the legal or evidentiary support for its determination, a part of the record, either by drafting a separate written order or by having these findings transcribed for the official record. This process will aid the appellate courts of this State during review. In this case, we cannot determine upon what basis, or upon what legal or evidentiary points, the trial court based its determination that Terras asserted Rule 60(b) "new matters" were "without substantial justification." Accordingly, we reverse the trial court's determination . . . ."

In *Mahoney v. Loma Alta Property Owners Ass'n*, 72 So. 3d 649, 654-55 (Ala. Civ. App. 2011), the court held,

> In this case, the trial court did not set forth any reasons for its award relating to the 12 factors listed in § 12-19-273. A trial court's failure to specifically set forth reasons for the amount of its award under the ALAA is reversible error. *See Schweiger v. Town of Hurtsboro*, 68 So. 3d 181, 187 (Ala. Civ. App.2011) (reversing a trial court's award under

> the ALAA and remanding the cause "for the trial court to make the necessary findings on the record or by separate order" to support its award); *Belcourt v. Belcourt*, 911 So. 2d 735, 738 (Ala. Civ. App. 2005) (reversing an award of an attorney fee under the ALAA and remanding the cause because the trial court failed to set forth its reasoning in support of its award); and *Williams v. Capps Trailer Sales, Inc.*, 607 So. 2d 1272, 1276 (Ala. Civ. App. 1992) (reversing an award under the ALAA and remanding the cause for the trial court "to reconsider the amount of attorney fees . . . and to issue a statement of the reasons for the amount in compliance with § 12-19-273").

The order awarding attorney's fees contains no finding that the action was filed without substantial justification; it does not reflect that the court considered the factors in section 12-19-273; and it does not state any "legal or evidentiary support for its determination":

> The Motion of Defendant, John Bullock, for reconsideration of the denial of attorney fees incurred by him in this litigation is granted. John Bullock is hereby awarded $4,500.00 in legal fees for the defense of this lawsuit. The Court retains jurisdiction of the amount of attorney fees awarded herein as same may need to be reconsidered in the event that Mr. Bullock continues to expend monies in the defense of an appeal of this case (Document 241).

Moreover, Bullock failed to offer any evidence concerning the twelve factors in section 12-19-273; consequently, his claim for attorney's fees was due to be denied as a matter of law.

WHEREFORE, the plaintiffs respectfully move the court to alter, amend, or vacate (1) the order dated August 31, 2015, granting the Motion for Summary Judgment filed by Clark Andrew Cooper and Balch & Bingham, LLP, (2) the order dated August 31, 2015, denying the plaintiffs' motion to reconsider the orders dismissing John Franklin Bullock, Jr., and Claiborne P. Seier, (3) the orders dated August 31, 2015, denying the plaintiffs' motion to compel discovery, and (4) the order dated August 31, 2015, awarding Bullock attorney's fees of $4500 and reserving jurisdiction to award further fees. Alternatively, the plaintiffs move the court to grant them a new trial or hearing because the expungement of the file concerning Newsome's arrest bars the use of the "Deferred Prosecution and Release Agreement" in this case. The plaintiffs further move the court

to reinstate all of their claims as to all parties, to grant their motions to compel discovery from Renasant, Bullock, and Gaxiola, and to deny Bullock's motion for award of attorney's fees.

Respectfully submitted this the 28th day of September 2015.

/s/ Robert E. Lusk, Jr.
ROBERT E. LUSK, JR. (LUS005)
Attorney For Plaintiffs BURT W. NEWSOME
AND NEWSOME LAW, LLC

LUSK LAW FIRM, LLC
P. O. Box 1315
Fairhope, AL 36533
251-471-8017
251-478-9601 Fax
rlusk@lusklawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that I have filed electronically and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 28th day of September 2015.

S. Allen Baker
Amelia K. Steindorff
Balch & Bingham
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203

James E. Hill, Jr.
Hill, Weisskopf & Hill
Moody Professional Building
2603 Moody Parkway
Suite 200
Moody, AL 35004

Robert Ronnlund
P.O. Box 380548
Birmingham, AL 35238

/s/ Robert E. Lusk, Jr.
ROBERT E. LUSK, JR. (LUS005)
Attorney for Plaintiffs

ELECTRONICALLY FILED
9/28/2015 4:29 PM
01-CV-2015-900190.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

BURT W. NEWSOME; NEWSOME LAW, LLC, Plaintiffs v. CLARK ANDREW COOPER; ET AL Defendants	)	Case No.: CV 2015- 900190.00

AFFIDAVIT OF ROBERT E. LUSK, JR.

Before the undersigned Notary Public for the State of Alabama at Large personally appeared Robert E. Lusk, Jr., who says on oath as follows:

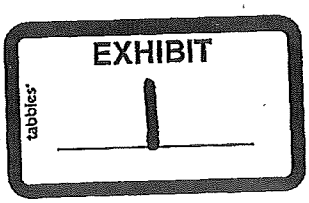
1. My name is Robert E. Lusk, Jr., and I have personal knowledge of the facts stated herein.

2. I am over 19 years of age; I am an attorney licensed to practice law in the State of Alabama; and I am the plaintiffs' attorney of record in this case.

3. On July 29, 2015, the court entered an order directing the attorneys to submit "proposed orders" on three pending motions within fourteen days. The three motions, as stated in the order, were (a) a Motion to Dismiss/Motion for Summary Judgment by Clark Andrew Cooper and Balch & Bingham, LLP, (b) a Motion to Dismiss the Counterclaim of Clark Andrew Cooper and Balch & Bingham, LLP, and (c) Plaintiff's' Motion to Reconsider or in the Alternative Motion for Certification under ARCP 54(b). (Document 180).

4. On August 12, 2015, Clark Cooper and Balch Bingham filed a second Motion for Summary Judgment (Document 189).

5. On August 21, 2015, I filed a Motion to the Strike the second Motion for Summary Judgment on the grounds that rule 56(c)(2) requires all material supporting such a motion to be



filed ten days before the hearing, that a hearing had previously been held on the first Motion for Judgment filed by Cooper/Balch, and that the second Motion for Summary Judgment filed by Cooper/Balch was an improper attempt to supplement its prior motion – after the hearing had been held (Document 230).

6. The court never held a hearing on the second Motion for Summary Judgment filed by Cooper/Balch (Document 189) or Plaintiffs' Motion to Strike (Document 230), and the court the never entered an order setting a date by which the plaintiffs were required to submit evidence or argument in opposition to the second Motion for Summary Judgment filed August 12, 2015. The plaintiffs had no notice of when they must submit evidence or argument in opposition to the Motion for Summary Judgment, and they had no opportunity to be heard before the court granted the Motion for Summary Judgment on August 31, 2015.

7. One of the motions pending when the court entered Summary Judgment for Cooper/Balch was the Plaintiffs' Motion to Compel Renasant Bank to Respond to [Their] Subpoena. (Documents 218, 103), which had been served on April 16, 2015 (Documents 134, 219). The documents sought by that motion, and in the subpoena to Renasant, were the following:

> Certified copies of all correspondence, cards, letters, emails, text messages or other documents Renasant Bank, and/or John Bentley, president of Renasant Bank, and/or Bill Stockton, Chief Credit Officer for Renasant Bank, and/or any other bank officer have received from or sent to Clark Andrew Cooper and/or Balch and Bingham, LLP, and/or any of its agents or employees touching or concerning Burt W. Newsome and/or Newsome Law LLC in which reference is made to any case or pending legal matter in which Burt W. Newsome and/or Newsome Law LLC represents the individual recipient and/or sender and/or Renasant Bank, or to which any photo and/or likeness of Burt W. Newsome was attached. From January 30, 2012 through the date of your response (Document 103).

The information sought in the subpoena to Renasant was critical to the plaintiffs' ability to respond to the Motion for Summary Judgment because it could have contained direct evidence

that Clark Cooper defamed the plaintiffs and interfered with their contractual or business relationship with Renasant. Moreover, there is reason to believe that such evidence exists, because Burt W. Newsome stated in his interrogatories answers that managerial employees of Renasant had told him that Clark Cooper had emailed Renasant about his arrest and solicited Renasant's business.

Dated this the 25th day of September 2015.

ROBERT E. LUSK, JR.
Attorney for Plaintiffs

SWORN TO AND SUBSCRIBED before me on this the 25th day of September 2015.

NOTARY PUBLIC, STATE OF ALABAMA AT LARGE

My commission expires: _____ (Seal)

Haley A. Hernandez
My Commission Expires
04/02/2018

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9/28/2015 4:29 PM
01-CV-2015-900190.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

STATE OF ALABAMA)
)
SHELBY COUNTY)

AFI

BEFORE ME, the undersigned authority, personally appeared Burt Newsome, who being known to me and being first duly sworn, deposes and says as follows:

"My name is Burt W. Newsome and I am a resident of Shelby County, Alabama and over nineteen years of age. I am an attorney licensed in the State of Alabama. I represented Aliant Bank, now known as USAmeriBank, against Sharyn K. Lawson, the common law wife of Alfred Wallace Seier, in *Aliant Bank v. Sharyn K. Lawson*, 01-CV-2010-902033, Circuit Court of Jefferson County, Alabama.

On October 5, 2010, I obtained a judgment against Sharyn K. Lawson and began post-judgment collection efforts. On January 30, 2012 after I had recently noticed up his wife for post judgment deposition and was garnishing her wages, Alfred Wallace Seier ("Seier") was waiting on me in the parking lot outside of my office in his vehicle parked backwards adjacent to my vehicle. When I came out of my office, Seier exited his vehicle and blocked me from entering my vehicle. He then pointed a .38 pistol at me and told me I would "never fuck with his wife again." I was unarmed and barely escaped by dodging behind my vehicle and running behind the office building to get to the backdoor where I was able to call the Shelby County Sheriff's Department (Exhibit "A"). On February 2, 2012, I filed a criminal complaint against Seier and he was arrested, tried and convicted of menacing on May 8, 2012, in *State of Alabama v. Alfred Wallace Seier*, 58-DC-2012-000431, in the District Court of Shelby County, Alabama (Exhibit "B").

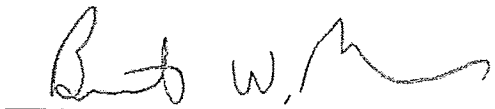
On December 19, 2012, I was scheduled to appear at a hearing in Pell City, St. Clair County, Alabama. When I exited my office and approached my vehicle, John Bullock ("Bullock") exited his vehicle, which was parked in backwards adjacent to my vehicle and had been there for approximately one hour, and blocked me from entering my vehicle. Bullock's conduct was identical to that of Seier's and I was afraid for my safety. I had a pistol permit and was carrying a .22 caliber pistol which I took out of my coat pocket and held pointed downwards by my side. I

EXHIBIT 2 tabbies

asked Bullock to close the door of his car so that I could open my door and get in my car. He did and I entered my vehicle and left to Pell City. I never made any threats, verbal or otherwise, towards Mr. Bullock and he never acted afraid. In fact, he was still at my office condominium complex when I returned from Court in Pell City over two hours later. I did not commit the crime of menacing and/or any other type of crime.

Unbeknownst to me, Bullock filed a criminal complaint against me for menacing on January 14, 2013, almost a month later. On May 2, 2013, I was stopped for a minor traffic violation and was arrested on the menacing warrant. Bullock dropped the charges in *State of Alabama v. Burton W. Newsome*, 58-DC-2013-001434 in the District Court of Shelby County, Alabama after I refused to plead guilty and/or sign any document stating that I had done anything wrong and/or violated any laws. The charges against me were dismissed on April 4, 2014 (Exhibit "C").

I later discovered Clark Cooper of Balch & Bingham, LLP had emailed a picture of my mugshot to common clients of ours and questioned my license to practice law after my arrest on the false charges (Exhibit "D"). I also learned he was emailing my clients on actual cases that I had already been retained on and was asking to do work on them (Exhibits "E-G"). I was never charged with any disciplinary violation by the Bar Association and no proceeding was ever brought to revoke or suspend my license. My license has never been revoked or suspended. The false charges against me in *State of Alabama v. Burton W. Newsome*, 58-DC-2013-001434 in the District Court of Shelby County, Alabama, were ordered expunged by the Circuit Court of Shelby County, Alabama, under Alabama's new expungement statute (Exhibit "H"). All of the above statements are true and correct and stated as facts."



Burt W. Newsome

STATE OF ALABAMA)
COUNTY OF SHELBY)

I, the undersigned authority, a Notary Public in and for said County and State, hereby certify that Burt W. Newsome, whose name is signed to the foregoing affidavit, and who is known to me, acknowledged before me on this day, that being informed of the contents of the conveyance,

he executed the same voluntarily on the day the same bears date.

Given under my hand and official seal, this 25th day of September, 2015.

Notary Public

My commission expires: Jennifer Choi Notary Public Alabama State at Large My Commission Expires October 4, 2016

DOCUMENT 265

ALABAMA UNIFORM INCIDENT/OFFENSE REPORT

1 ORI #	2 Date of Report	3 Time of Report	4 Type Report	5 Supplement Date	6 Agency Case Number	7 Suffix
AL 0590000	01 30 12	17 : 25 AM PM MIL	Incident / Offense / Supplement		20120795	

8 Agency Name	9 Sector
SHELBY COUNTY SHERIFF'S OFFICE	EAST

EVENT

10 Type of Incident or Offense	11 Degree (Circle)	12 UCR Code	13 State Code/Local Ordinance
☐ Felony ☒ Misdemeanor ☐ Attempted ☑ Completed — MENACING	1 2 3		13A-6-23
14 Type of Incident or Offense	15 Degree (Circle)	16 UCR Code	17 State Code/Local Ordinance
☐ Felony ☐ Misdemeanor ☐ Attempted ☐ Completed	1 2 3		

18 Place of Occurrence ☐ Check here if event occurred at victim's residence: 194 HARROWS DRIVE BHAM, AL 35242

If offense occurred at victim's residence, then only the approximate location should be listed in this section. (For example, a block number should be entered.) If the offense occurred elsewhere, then the specific address should be listed here.

Victim Demographics (Where victim is an individual)

19 Sex	20 Race	21 Ethnicity	22 Multiple Victims	23 Age
☑ M ☐ F	☒ W ☐ A ☐ B ☐ I	☐ Hispanic ☐ Other	☐ LE Officer	45

24 Offender Suspected of Using: ☐ Alcohol ☐ Drugs ☐ Computer Equipment ☒ N/A

25 Gang: ☐ Juvenile Gang ☐ Adult Gang ☒ None/Unknown

26 Hate Bias: ☐ Yes ☐ No

27 Bias Code:

28 Domestic Violence: ☐ Yes ☐ No

29 Point of Entry	30 Method of Entry	31 Local Use	32 Lighting
☐ Door ☐ Roof ☐ Window ☐ Other	☐ Forcible ☐ Attempted Forcible ☐ No Force		1 Natural 2 Moon (3) Artificial Exterior 4 Artificial Interior 5 Unknown

33 Weather: (1) Clear 2 Cloudy 3 Rain 4 Fog 5 Snow 6 Hail 7 Unknown

34 Location Type (Circle):

01 Terminal	09 Drug Store	17 Liquor Store	
02 Bank	10 Field/Woods	(18) Parking Lot/Garage	
03 Bar	11 Govt/Public Building	19 Storage Facility	
04 Church	12 Supermarket	20 Residence/Home	
05 Commercial	13 Highway/Street	21 Restaurant	
06 Construction	14 Hotel/Motel	22 School/College	
07 Conv Store	15 Jail/Prison	23 Service/Gas Station	
08 Dept Store	16 Lake/Waterway	24 Specialty Store	
		25 Other/Unknown	

35 Occurred from MM/DD/YY	36 Time of Event	37 Day of Week	38 Occurred to MM/DD/YY	39 Time of Event	40 Day of Week	41 # Premises Entered (Burglary)
01 30 12	16 : 50 AM PM ☒ MIL	S 1 M ☒ 2 T 3 W 4 T 5 F 6 S 7	01 30 12	17 : 10 AM PM ☒ MIL	S 1 M ☒ 2 T 3 W 4 T 5 F 6 S 7	

42 Type Criminal Activity: B Buying/Receiving C Cultivating/Manu D Distributing/Selling E Exploiting Children O Operating/Promoting P Possessing/Concealing T Transporting/Importing U Using/Consuming

43 Victim Type: (I) Individual B Business F Financial (Bank) G Government R Religious Org S Society

PROPERTY

44 Loss Code	45 Property Code	46 Qty	47 Property Description (Include Make, Model, Size Type, Serial #, Color, Drug Type, Drug Qty, Etc.)	48 Dollar Value Stolen	48 Dollar Value Damaged	49 Recovered Date	49 Recovered Value
			☐ Continued on Supplement				

Loss Code (Enter letter in loss code column): S Stolen; R Recovered; D Damaged/Destroyed; C Confiscated/Seized; B Burned; F Forged/Counterfeited; N None

Property Code (Enter # in property type column):

01 Aircraft	07 Computer	16 Household Goods	25 Purse/Wallet	34 Structure - Storage	
02 Alcohol	08 Consumables	17 Jewelry	26 Radios/TV/VCR	35 Structure - Other	
03 Autos	09 Credit Card	18 Livestock	27 Recordings	36 Tools - Power/Hand	
04 Bicycles	10 Drugs	19 Merchandise	28 RV's	37 Trucks	
05 Buses	11 Drug Equip	20 Money	29 Structure - Single Occupancy Dwelling	38 Vehicle Parts/Accessories	
06 Clothes	12 Farm Equip	21 Negotiable Instrument	30 Structure - Other Dwelling	39 Watercraft	
	13 Firearms	22 Non-negotiable Instru	31 Structure - Other Commercial	77 Other	
	14 Gambling Equipment	23 Office Equipment	32 Structure - Industrial/ Manufacturing		
	15 Heavy Construction	24 Other Motor Vehicle	33 Structure - Public/Community		

VEHICLES

50 Stolen Vehicle Only; Area Stolen: ☐ Residence ☐ Business ☐ Rural

51 Ownership verified by: ☐ Tag Receipt ☐ Title ☐ Bill of Sale ☐ Other

52 Veh. Categories: ☐ Recovered ☐ Victim's Vehicle ☐ Abandoned ☐ Stolen ☐ Suspect's Vehicle ☐ Unauthorized Use

53 Vehicle Year	54 Vehicle Make	55 Vehicle Model	56 Number Veh Stolen	57 Vehicle Description

58 Vehicle Style	59 Vehicle Color	60 License	61 LST	62 LIY	63 Tag Color
	Top ____ Bottom ____				

64 Vehicle VIN Number

65 Warrant Signed ☐ Yes ☐ No — Warrant Number

Motor Vehicle Recovery Only Required For 24XX UCR Code

66 Stolen In your jurisdiction? ☐ Yes ☐ No Where?

67 Recovered In your jurisdiction? ☐ Yes ☐ No Where?

ADMINISTRATION

68 Case #	69 SFX	70 Case #	71 SFX	72 Case #	73 SFX

74 Case Status: (1) Pending 2 Inactive 3 Closed

75 Multiple Cases Closed Listed Above ☐ Multiple Cases Closed Listed On Supplement ☐

76 Entered NCIC/ACJIC ☐ Yes ☐ No — Date (MM/DD/YY) — NIC/AIN #:

77 Case Disposition: 1 Cleared by Arrest (Juvenile); 2 Cleared by Arrest (Adult); 3 Unfounded; 4 Exceptional Clearance; 5 Administratively Cleared

78 Exceptional Clearance (Circle One): A Suspect/Offender Dead; B Prosecution Declined/Other Prosecution; C Extradition Denied; D Victim Refused to Cooperate; E Juvenile (No Custody); F Death of Victim

79 Reporting Officer: A MITCHELL — Officer ID Number: 453

80 Assisting Officer — Officer ID Number

81 Supervisor Approval — Officer ID Number: 240

82 Watch Commander — Officer ID Number

EXHIBIT A

ACJIC - 11-05

Exhibit 10 to Newsome Petition 220

DOCUMENT 265

THIS SIDE OF FORM IS CONFIDENTIAL UNLESS RELEASED AT THE DISCRETION OF THE CHIEF LAW ENFORCEMENT OFFICER

Incident/Offense Report - Continued

83 Date of Report (MM/DD/YY)	84 Time of Report	85 Agency Case Number	86 Suffix	87
01 / 30 / 12	17 : 25 ☐AM ☐PM ☒MIL	2012007995		☐Offender ☒Suspect ☐Missing Person ☐Check if Multiple

88 Reported By (Last, First, Middle Name)	89 Suffix	90	91 Home Phone	92 Work Phone / 93 Other Phone
☒Victim Or		☒Resident ☐Non-Resident		

VICTIM INFORMATION

94 Victim #	95 Victim (Last, First, Middle Name)	96 Suffix	97 Address (Street, City, State, Zip)	98 Home Phone	99 Work Phone / 100 Other Phone
1	NEWSOME, BURTON WHEELER		7450 DUNHAVANT VALLEY RD. LEEDS, AL 35094	205-699-8511	205-657-6579

101 Employer/School	102 Occupation	103 Address (Street, City, State, Zip)	104 Work Phone / 105 Other Phone
NEWSOME LAW FIRM	ATTORNEY	194 NARROWS DR. SUITE 103 BHAM, AL 35242	205-747-1970

106 Sex	107 Race	Language	108	109 HGT	110 WGT	111 Date of Birth	112 Age	113 Victim SSN	114 Complainant SSN
☒M ☐F	☒W ☐A ☐B ☐I	☒English ☐Spanish ☐Other		508"	180	09/04/46	45	255-27-7001	

115	116 Ethnicity	117 Injury	118 Offender known to victim?	119 Victim was? (Explain Relationship.)	120 Relationship Code
☐Multiple Victims ☐LE Officer	☐Hispanic ☐Other	☐Yes ☒No	☒Yes ☐No	BUSINESS ASSOCIATE	

121 Weapons Used	122 Description of Weapons/Firearms/Tools Used in Offense
☒Firearm ☐Knife ☐Hands, Fist, Feet, Voice, etc. ☐Other Dangerous	☒Handgun ☐Rifle ☐Shotgun ☐Unknown Describe: UNK. TYPE OF FIREARM

123 Place of Occurrence (Enter exact street address here.)	124 Type Injury: ☒N None ☐I Internal Injury ☐M Minor Injury ☐T Loss of Teeth ☐B Broken Bones ☐L Severe Laceration ☐O Other Major Injury ☐U Unconscious	125 Sector
194 NARROWS DRIVE BHAM, AL 35242		EAST

126 Circumstances: Homicide & Assault / 127 Location: Rape	128 Assault	129 Treatment for Assault?	130 Verify for Rape Exam?	131 Treatment for Rape?
	☐Simple ☐Aggravated	☐Yes ☐No	☐Yes ☐No	☐Yes ☐No

SUSPECT INFORMATION

132 Off #	133 Name (Last, First, Middle)	134 SFX	135 Alias	136 Social Security #	137 Race	138 Sex	139 Date of Birth	140 Age
1	SEIER, ALFRED WALLACE			421-44-3471	☒W ☐A ☐B ☐I	☒M ☐F	05/07/35	76

141 Address (Street, City, State, Zip)	142 HGT	143 WGT	144 Ethnicity	145 Language
7091 BETHEL ROAD DORA, AL 35062	6'2"	190	☐Hispanic ☐Other	☒English ☐Spanish ☐Other

146 Probable Destination	147 Eye	148 Hair	149 Complexion	150 Armed
	BRO	GRY	MED	☒Yes ☐No Weapon

151 Clothing	152	153
	☐Scars ☐Marks ☐Tattoos ☐Amputations	☐Arrested ☐Dual Arrest (Domestic Violence) ☒Wanted

154 Off #	155 Name (Last, First, Middle)	156 SFX	157 Alias	158 Social Security #	159 Race	160 Sex	161 Date of Birth	162 Age
					☐W ☐A ☐B ☐I	☐M ☐F		

163 Address (Street, City, State, Zip)	164 HGT	165 WGT	166 Ethnicity	167 Language
			☐Hispanic ☐Other	☐English ☐Spanish ☐Other

168 Probable Destination	169 Eye	170 Hair	171 Complexion	172 Armed
				☐Yes ☐No Weapon

173 Clothing	174	175
	☐Scars ☐Marks ☐Tattoos ☐Amputations	☐Arrested ☐Dual Arrest (Domestic Violence) ☐Wanted

WITNESSES

Name (Last, First, Middle)	Sex	Race	Date of Birth	Address	Contact Telephone Numbers
176	177 ☐M ☐F	178 ☐W ☐A ☐B ☐I	179	180	181 Home / 182 Work / 183 Other
184	185 ☐M ☐F	186 ☐W ☐A ☐B ☐I	187	188	189 Home / 190 Work / 191 Other
192	193 ☐M ☐F	194 ☐W ☐A ☐B ☐I	195	196	197 Home / 198 Work / 199 Other

200 Witness # 1 SSN	201 Witness # 2 SSN	202 Witness # 3 SSN

NARRATIVE

203

MR. NEWSOME STATED THAT HE WAS WALKING TO HIS VEHICLE AND SAW SOMEONE WALKING TOWARDS HIM. MR. NEWSOME THEN RECOGNIZED THE PERSON TO BE ALFRED SEIER. ALFRED TOLD MR. NEWSOME THAT THIS WAS THE LAST TIME HE WAS GOING TO FUCK HIS WIFE OVER AND THEN POINTED AN UNK. TYPE FIREARM AT HIM. MR. NEWSOME THEN RAN AROUND THE BUILDING AND INTO HIS OFFICE. MR. SEIER WAS GONE PRIOR TO MY ARRIVAL.

MR. NEWSOME IS AN ATTORNEY FOR A BANK THAT IS SUING AL'S WIFE.

☐Continued on Supplement

204 Continued on Supplement	205 Assisting Agency ORI	206 Assisting Agency Case Number	207 SFX	208 Warrant Signed / Warrant #	209 Add. Cases Closed Narrative
☐Yes ☒No				☐Yes ☐No	☐Y ☐N

I hereby affirm that I have read this report and that all the information given by me is correct to the best of my knowledge. I will assume full responsibility for notifying the agency if any stolen property or missing person herein reported is returned.

210 Signature

211 Local Use

212 State Use

ACJIC - 11-08

Exhibit 10 to Newsome Petition 221

Incident / Investigation Report

Shelby County Sheriff's Office

OCA: *2012-00795*

DRUGS

Status Codes: L = Lost S = Stolen R = Recovered D = Damaged Z = Seized B = Burned C = Counterfeit / Forged F = Found U = Unknown

Status	Quantity	Type Measure	Suspected Drug Type	

OFFENDR

Offender(s) Suspected of Using	Offender 1 SU1	Offender 2	Offender 3	Primary Offender Resident Status
☐ Drugs ☑ N/A	Age: *76* Race: *W* Sex: *M*	Age: Race: Sex:	Age: Race: Sex:	☐ Resident
☐ Alcohol	Offender 4	Offender 5	Offender 6	☑ Non-Resident
☐ Computer	Age: Race: Sex:	Age: Race: Sex:	Age: Race: Sex:	☐ Unknown

SUSPECT

Name (Last, First, Middle) *Seier, Alfred Wallace* — Home Address *7091 Bethel Road, Dora, AL 35062*

SU1 Also Known As

Occupation — Business Address

DOB. / Age	Race	Sex	Hgt	Wgt	Build	Hair Color *Gray Or...*	Eye Color *Brown*
5/7/1935 / *76*	*W*	*M*	*6'02*	*190*	Hair Style	Hair Length	Glasses

Scars, Marks, Tatoos, or other distinguishing features (i.e. limp, foreign accent, voice characteristics)

Hat	Shirt/Blouse	Coat/Suit	Socks
Jacket	Tie/Scarf	Pants/Dress/Skirt	Shoes

Was Suspect Armed?	Type of Weapon	Direction of Travel	Mode of Travel

VYR	Make	Model	Style/Doors	Color	Lic/Lis	Vin

Suspect Hate / Bias Motivated: ☐ Yes ☑ No — Type:

WITNESS

Name (Last, First, Middle)	D.O.B.	Age	Race	Sex

Home Address	Home Phone	Employer	Phone

NARRTIVE

MR. NEWSOME STATED THAT HE WAS WALKING TO HIS VEHICLE AND SAW SOMEONE WALKING TOWARDS HIM. MR. NEWSOME THEN RECOGNIZED THE PERSON TO BE ALFRED SEIER. ALFRED TOLD MR. NEWSOME THAT THIS WAS THE LAST TIME HE WAS GOING TO FUCK HIS WIFE OVER AND THEN POINTED AN UNK. TYPE FIREARM AT HIM. MR. NEWSOME THEN RAN AROUND THE BUILDING AND INTO HIS OFFICE. MR. SEIER WAS GONE PRIOR TO MY ARRIVAL.

MR. NEWSOME IS AN ATTORNEY FOR A BANK THAT IS SUING AL'S WIFE.

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA TRIAL (MISDEMEAN

STATE OF ALABAMA v. Alfred Seipo

This matter comes before the Court for trial on a complaint against the Defendant for the misde
Menacing in violation of Section 13A-6-23 Code of Alabama, 1975. The Defendant has been duly advised of all relevant constitutional, substantive and procedural rights in this matter, including the right to appeal the judgment of this court, is ✓ represented by counsel: Barry Ellis and has NOT waived the right to the same. The facts in this matter are NOT stipulated.

After hearing all the evidence and arguments duly presented, THE COURT FINDS THE DEFENDANT ✓ GUILTY ✓ AS CHARGED, OR _____.

The Defendant is hereby **SENTENCED** to a term of 30 days (at hard labor if allowed by law) for Shelby County, Alabama, which will ✓ be suspended for 2-4 mos Suspended Sentence will _____ be UA supervised by Shelby County Community Corrections. Supervision will last until all ordered programs are complete and all ordered costs are paid. The Defendant will be awarded all entitled **JAIL TIME CREDIT**. Said sentence will NOT run concurrently with that imposed in Any other Case. The Defendant also is ordered to pay the following amounts by the dates given below.

$_____ in further **RECOUPEMENT** to the Fair Trial Tax Fund by: _____.
$ 238 in **COURT COSTS** by: _____.
$ 20 in **JAIL HOUSING COSTS** by: _____ AND ALL MEDICAL EXPENSES incurred while in jail.
$ 25 to the **CRIME VICTIMS COMPENSATION FUND** by _____.
$ 50 as a **FINE** by: _____.
$_____ in **RESTITUTION** to: _____ by: _____.
$ 333 as **ADDITIONAL FEES** in accord with **ALABAMA CODE** §36-18-7(a) and § 12-19-181 by: _____.
$ 333 **TOTAL DUE** by: within 90 days.

All payments must be made to the COURT CLERK by cash, money order, or certified check, paid at the Shelby County Courthouse or mailed to: **P.O. BOX 1810, COLUMBIANA, AL. 35051. The Defendant shall put the above case number on all payments and keep all receipts.** The Defendant shall pay these amounts as ordered, including supervision fees, and complete the tasks otherwise ordered, and comply with all the provisions checked below as conditions of any suspended sentence, probation, parole, work release, SIR or any other similar program. **Failure to pay or perform by the dates given may result in the revocation of any probation and the reinstatement of any sentence which was originally suspended in this case.**

(✓) Obey all laws and ordinances and, in so far as possible, maintain a full time job or full time student status.
(✓) Avoid any and all contact with: Burt Newsome, his residence or place of business.
( ) Serve _____ consecutive days (at hard labor if allowed by law) in the Shelby County Jail _____, and Jail Time Credit will _____ be applied toward this portion of the sentence.
( ) Serve _____ days at the Shelby County Work Release Center, each day to be served from 8:00 A.M. to 4:00 P.M. on the following days: _____. Defendant is ordered to pay $25.00 fee for each day of service at the Center, which is to be paid daily when Defendant arrives at the Center.
( ) Complete _____ hours of community service and give the Court proof of the same by: _____.
( ) Complete a Defensive Driving Course, _____ and provide proof of completion to the Court by: _____.
( ) Report to and successfully complete a drug and/or alcohol treatment program as directed by the CRO and appear in court to provide proof of the same on: _____ at _____. Defendant shall _____ pay for the program.
( ) The Defendant's driver's license/privilege shall be suspended for _____ months from the date of judgment.
( ) _____

ORDER OF COURT

The Defendant has **14 DAYS** to perfect any appeal. Appeal bond is set at $ 2,000. Any fines, fees, costs, etc., not specifically taxed herein, are hereby remitted. The Court Clerk shall furnish a copy of this order to Defendant.

DONE AND ORDERED: 05-08-12 Ron Jackson
HONORABLE RONALD E. JACKSON, DISTRICT JUDGE

A COPY OF THIS ORDER PROVIDED TO DEFT. THIS DATE BY: REJ.

EXHIBIT B

MISD-TRI.ORD (REV. 10-6-08)

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA

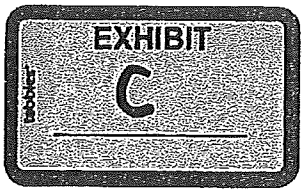
STATE OF ALABAMA	)	
	)	
V.	) Case No.:	DC-2013-001434.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

ORDER

Pursuant to earlier written agreement, with no objection by A.D.A. Willingham, this case is DISMISSED with prejudice. Apply cash bond.

DONE this 4th day of April, 2014.

/s/ RONALD E. JACKSON
DISTRICT JUDGE (amh)



Cooper, Clark

From:	Cooper, Clark
Sent:	Saturday, May 04, 2013 5:40 PM
To:	Hamilton, Brian
Subject:	Re: Burt Newsome arrested for menacing

Agreed. I'm going to see what I can find out.

On May 4, 2013, at 5:37 PM, "Hamilton, Brian" <Brian.Hamilton@iberiabank.com> wrote:

> Great mugshot. With the suit on, I bet he was in court or something. My guess is he threatened to kick someone's a$$.
>
> Sent with Good (www.good.com)
>
> -----Original Message-----
> **From:** Cooper, Clark [ccooper@balch.com]
> **Sent:** Saturday, May 04, 2013 04:35 PM Central Standard Time
> **To:** Hamilton, Brian
> **Subject:** Re: Burt Newsome arrested for menacing
>
> Section 13A-6-23 - Menacing.
>
> (a) A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury.
>
> It is a class B misdemeanor. Not sure how this will affect his law license
>
> On May 4, 2013, at 4:29 PM, "Cooper, Clark" <ccooper@balch.com<mailto:ccooper@balch.com>> wrote:
>
> Have you seen this? Not sure how it's going to affect his law license. Bizarre
>
> Clark A. Cooper, Partner, Balch & Bingham LLP
> 1901 Sixth Avenue North • Suite 1500 • Birmingham, AL 35203-4642
> t: (205) 226-8762 f: (205) 488-5765 e: ccooper@balch.com<mailto:ccooper@balch.com>
> www.balch.com<http://www.balch.com>
> ~~
>
> <image001.png>

message and kindly notify the sender by reply email. Please advise immediately if you or your employer do not consent to Internet email for messages of this kind. Opinions, conclusions and other information in this message that do not relate to the official business of the bank shall be understood as neither given nor endorsed by it.
Thank You.

Cooper, Clark

From:	Cooper, Clark
Sent:	Friday, November 07, 2014 8:54 AM
To:	Brian Hamilton (Brian.Hamilton@iberiabank.com)
Subject:	Case filed by Iberia in Jefferson County

Hello Brian,

I noticed that the below case was recently filed by Iberia in Jefferson County. If you think I should reach out to anyone else in your department to build a relationship, please let me know. They may be happy with counsel they are using for smaller deals.

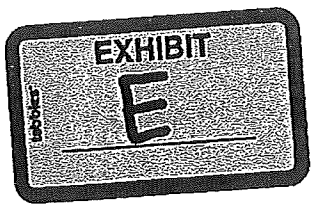
Thanks

Clark

IberiaBank v. John C. Wicker; The Wicker Agency Inc. 11/6/2014 01-CV-14-904617 (Birmingham)	Contract. Defendants owe plaintiff more than $100,000 for default on a loan.	Burt Newsome

BALCH
& BINGHAM LLP

Clark A. Cooper, Partner, Balch & Bingham LLP
1901 Sixth Avenue North • Suite 1500 • Birmingham, AL 35203-4642
t: (205) 226-8762 f:(205) 488-5765 e: ccooper@balch.com
www.balch.com



Cooper, Clark

From:	Cooper, Clark
Sent:	Wednesday, July 24, 2013 10:50 AM
To:	David Agee
Subject:	Suit filed by Bryant Bank

Hello David,

I hope you are doing well. I see that the below suit was filed by Newsome. Anything I can do so that I could work with you?

Thanks

Clark

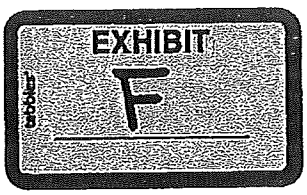
Shelby County
Shelby

Bryant Bank
v.
Landsouth Contractors Inc.
7/19/2013 58-CV-13-900835 Conwill
(Shelby)

Breach of contract, Defendant

BALCH

Clark A. Cooper, Partner, Balch & Bingham LLP
1901 Sixth Avenue North • Suite 1500 • Birmingham, AL 35203-4642
t: (205) 226-8762 f: (205) 488-5765 e: ccooper@balch.com
www.balch.com



From: Cooper, Clark [mailto:ccooper@balch.com]
Sent: Wednesday, January 30, 2013 4:19 PM
To: Hamilton, Brian
Subject: Iberia

Brian,

I see that Bert Newsome has filed a claim for Iberia against Print One. Is there anything you recommend I do to assist me in obtaining more files from Iberia?

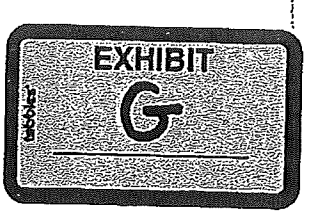
Thanks and no word from Benton yet

Clark

BALCH
& BINGHAM LLP

Clark A. Cooper, Partner, Balch & Bingham LLP
1901 Sixth Avenue North • Suite 1500 • Birmingham, AL 35203-4642
t: (205) 226-8762 f: (205) 488-5765 e: ccooper@balch.com
www.balch.com

Internet Email Confidentiality
Privileged/Confidential information may be contained in this message. If you are not the addressee indicated in this message (or responsible for delivery of the message to such person), you may not copy or deliver this message to anyone. In such case, you should destroy this message and kindly notify the sender by reply email. Please advise immediately if you or your employer do not consent to Internet email for messages of this kind. Opinions, conclusions and other information in this message that do not relate to the official business of the bank shall be understood as neither given nor endorsed by it.
Thank You.



originated with a complaint signed by John Franklin Bullock, Jr., on January 14, 2013, alleging that Newsome committed the crime of "menacing" in violation of section 13A-6-23 of the Alabama Code.

4. The "records" subject to this order include but are not limited to "arrest records," "booking or arrest photographs," "index references such is the State Judicial Information Services or any other governmental index references for public records search," and all "other data, whether in documentary or electronic form relating to the arrest or charge," as provided in section 15-27-9 of the Alabama Code.

5. Pursuant to section 15-27-6 of the Alabama Code, the District Court of Shelby BE AND HEREBY IS ORDERED TO EXPUNGE any and all "records" of the charge, arrest and incarceration except as otherwise provided in sections 15-27-6 and 15-27-10 of the Alabama Code.

6. Pursuant to section 15-27-6 of the Alabama Code, "any other agency or official" having custody of any such records BE AND HEREBY IS ORDERED TO EXPUNGE any and all "records" of the charge, arrest and incarceration except as otherwise provided in sections 15-27-6 and 15-27-10 of the Alabama Code.

DONE this 10th day of September, 2015.

/s/ DAN REEVES
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-2015-000121.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

ORDER ON PETITION FOR EXPUNGEMENT OF RECORDS

ORDER ON PETITION FOR EXPUNGMENT OF RECORDS

This case comes before the Court on the motion of Burton Wheeler Newsome (or "Newsome") to Alter, Amend, or Vacate its order dated August 31, 2015, denying his Petition for Expungement of Records related to his arrest for the misdemeanor of menacing. UPON CONSIDERATION thereof, the motion be and hereby is GRANTED, and the order dated August 31, 2015, be and hereby is VACATED and Newsome's Petition for Expungement of Records is GRANTED.

Upon consideration of the motion and the matters of record in this case, the court hereby finds as follows:

1. "Menacing" is a "misdemeanor criminal offense," and records concerning a charge of menacing are subject to expungement under section 15-27-1 of the Alabama Code.

2. The District Attorney of Shelby County was served with Newsome's Petition for Expungement on April 28, 2015.

3. Neither the district attorney nor the victim filed any objection to the Petition for Expungement within 45 days as required by section 15-27-3(c) of the Alabama Code. Consequently, they "have waived the right to object."

4. The record in this case reflects that the misdemeanor charge against Newsome was dismissed with prejudice by the District Court of Shelby County, Alabama, on April 4, 2014.

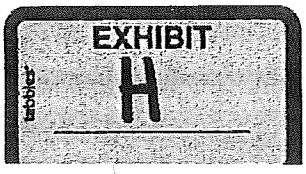
5. Newsome has therefore satisfied the requirements for expungement under section 15-27-1 *et seq.*

BASED ON THE FOREGOING, it is therefore ORDERED by the court as follows:

1. The Petition for Expungement of Records filed by Burton Wheeler Newsome is GRANTED.

2. All "records" concerning the charge, arrest, and incarceration of Burton Wheeler Newsome, on the misdemeanor of menacing be and hereby are EXPUNGED.

3. The charge and arrest subject to this order are further identified as case number DC 2013-001434 in the District Court of Shelby County Alabama, which case



ELECTRONICALLY FILED
12/16/2015 1:43 PM
01-CV-2015-900190.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

NEWSOME BURT W, NEWSOME LAW LLC, Plaintiffs,	)	
V.	)	Case No.: CV-2015-900190.00
COOPER CLARK ANDREW, BALCH & BINGHAM LLP, SEIER CLAIBORNE P, BULLOCK JOHN FRANKLIN JR., ET AL, Defendants.	)	

ORDER

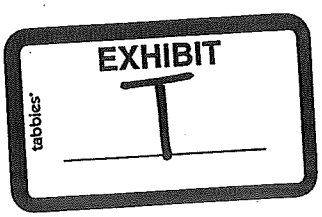
Before the Court is Plaintiff's Motion to Alter, Amend or Vacate Orders of Dismissal or in the Alternative, to Grant a New Trial.

Having carefully considered the pleadings, law and oral arguments of counsel, the Court ORDERS, ADJUDGES and DECREES as follows:

1. Plaintiff's Motion to Alter, Amend or Vacate is hereby granted.

2. The Plaintiff is allowed to conduct discovery and present evidence as to the release-dismissal agreement.

3. The Order granting Motion for Summary Judgment of Clark Andrew Cooper & Balch is hereby vacated and set aside. A hearing will be



conducted as to the provisions of the Summary Judgment as filed by Clark Andrew Cooper and Balch & Bingham, LLP.

4. The Order entered by this Court on September 1, 2015, dismissing the counterclaim of Clark Andrew Cooper and Balch & Bingham, LLP, is hereby vacated and set aside, and the counterclaim is reinstated.

5. The Court's Order entered August 31, 2015, awarding John Bullock attorney fees is hereby set aside.

6. The Court's Order entered May 7, 2015, dismissing John Franklin Bullock, Jr., is hereby set aside and all claims are hereby reinstated. Said Defendant is allowed thirty days to file an answer.

7. The Court's Order entered May 7, 2015, dismissing Claiborne P. Seier is hereby set aside with all claims reinstated. Said Defendant is allowed thirty days to file an answer.

DONE this 16th day of December, 2015.

/s/ CAROLE C. SMITHERMAN
CIRCUIT JUDGE

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246 Va. 396 (Va. 1993)

436 S.E.2d 610

Robert J. EIN

v.

COMMONWEALTH of Virginia.

No. 930094.

Supreme Court of Virginia.

November 5, 1993.

[436 S.E.2d 611]

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John M. DiJoseph, Arlington (Sattler & DiJoseph on briefs), for appellant.

Kathleen B. Martin, Asst. Atty. Gen. (Stephen D. Rosenthal, Atty. Gen., on brief), for appellee.

David D. Hudgins, Alexandria, Paul T. Emerick, Springfield, Hudgins, Carter & Coleman, Alexandria, on brief, amicus curiae in support of appellee.

Robert Ellis; Louise DiMatteo; Siciliano, Ellis, Dyer & Boccarosse, Fairfax, on brief), amicus curiae in support of appellee.

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Present: All the Justices.

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STEPHENSON, Justice.

The sole issue in this appeal is whether the trial court had jurisdiction to declare void and vacate its previous order that expunged certain police and court records.

Upon allegations made by Charlotte D. Barry and Ann M. Lewis and after an investigation by the Arlington County Police Department, Robert John Ein was charged with aggravated sexual battery of his five-year-old daughter. Following a trial in the Circuit Court of Arlington County, Ein was acquitted of the charge on May 17, 1992.

On July 14, 1992, Ein filed a petition in the Circuit Court of Arlington County, pursuant to Code § 19.2-392.2, requesting the expungement of the police and court records pertaining to the charge. As required by the statute, the Commonwealth was named the respondent in the proceeding, and notice of the proceeding was given to the Arlington County Commonwealth's Attorney. In its answer, the Commonwealth objected to the expungement "on the ground that the continued existence and possible dissemination of information relating to the arrest of [Ein] have not and would not cause circumstances which would constitute a manifest injustice to [Ein]."

Page 398

Following a hearing on September 23, 1992, the circuit court ordered the expungement of the records, finding that "the continued existence and possible dissemination of information relating to [Ein's arrest] may cause circumstances that constitute a manifest injustice to [Ein]." The Commonwealth did not appeal from the expungement order.

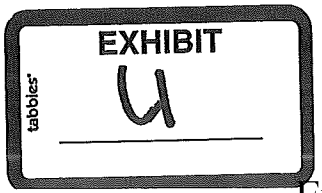
Prior to the expungement hearing, Ein had filed a civil action in the Circuit Court of Arlington County, which was removed to the United States District Court for the Eastern District of Virginia, against Barry and Lewis, alleging malicious prosecution, intentional infliction of emotional distress, and conspiracy in relation to the sexual battery charge. Ein had not informed the court conducting the expungement hearing about his pending civil action.

In early November 1992, Barry and Lewis filed motions for disclosure of the expunged records, claiming that the records were "germane and of the highest importance" to them in their defense of the civil action. They further claimed that their defense would be "seriously jeopardized without immediate access to [the] records."

On November 12, 1992, the trial court conducted a hearing on the motions which consisted only of a colloquy between counsel and the court. No evidence was presented. Throughout the hearing, the trial court questioned whether it had jurisdiction to hear the motions because more than 21 days had expired since the entry of the expungement order. Rule 1:1. [1]

[436 S.E.2d 612] Counsel for Barry and Lewis stated that they were not seeking an order "reversing" the expungement order; rather, they only sought access to the records for use in the civil action. Counsel contended that Code § 19.2-392.3 gave the court jurisdiction to grant the relief sought.

The trial court rejected this contention. The court



correctly observed that Code § 19.2-392.3 authorizes only a Commonwealth's Attorney to petition for access to expunged records when the records are needed for a pending criminal investigation in which life

Page 399

or property will be jeopardized without immediate access to the records. [2]

Ultimately, however, the trial court concluded that Barry and Lewis were entitled to notice of the expungement proceeding because they were defendants in Ein's civil action and, therefore, would be "aggrieved" persons under Code § 19.2-392.2(F). The court further stated from the bench that "[k]eeping that information [of the pending civil action] from the Court not only creat[ed] a suspicion of fraud, but it also was improper" in relation to Barry and Lewis.

Consequently, on November 12, 1992, the trial court entered two essentially identical orders. The orders read, in pertinent part, as follows:

IT APPEARING TO THE COURT that Robert J. Ein obtained the order of expungement after the commencement of his civil action against [Barry and Lewis] in this Court, ...; and

IT FURTHER APPEARING TO THE COURT that the Arlington County criminal records contain information pertinent to the pending civil matter; and

IT FURTHER APPEARING TO THE COURT that Robert J. Ein knew at the time the order of expungement was entered that [Barry and Lewis] would be aggrieved pursuant to VA CODE § 19.2-392.2(F), but that Robert J. Ein failed to give notice to [Barry and Lewis], or any other interested party, of his request for the order of expungement; and

IT FURTHER APPEARING TO THE COURT that manifest injustice would result from the enforcement of the order of expungement, which was procured in contravention of the statement of policy set forth in VA CODE § 19.2-392.1; and so it is hereby

Page 400

ORDERED, ADJUDGED and DECREED that this Court's Order dated September 23, 1992 is void ab initio, that jurisdiction resides in this Court to grant the relief requested, and that [Barry and Lewis] shall be granted access to any and all records of Arlington County relating to the criminal proceedings against Robert J. Ein.

We awarded Ein an appeal from these orders. We also permitted Barry and Lewis to file amicus briefs.

Ein, relying upon Rule 1:1, contends that, because more than 21 days had expired after entry of the expungement order, the trial court lost jurisdiction of the matter and could not modify, vacate, or suspend the order. The Commonwealth contends, on the other hand, that the trial court correctly ruled that the expungement order was void and, therefore, subject to attack. Each party states accurate principles of law. Therefore, we must decide which principle is applicable in the present case.

The trial court ruled that the expungement order was void because Ein failed to give Barry and Lewis, who would be parties "aggrieved" pursuant to Code § 19.2-392.2(F), notice of the proceeding. However, we find nothing in the expungement statutes that would have required Ein to give notice to Barry and Lewis. Code § 19.2-392.2(D) provides that "[a] copy of the [expungement] petition shall be served on the attorney for the Commonwealth of the ... county in which the petition is **[436 S.E.2d 613]** filed." Subsection F of Code § 19.2-392.2 provides that the Commonwealth shall be made the party defendant to the expungement proceeding. Subsection F further provides that "[a]ny party aggrieved by the decision of the court [respecting the expungement order] may appeal, as provided by law in civil cases." The trial court's reliance upon subsection F is misplaced because subsection F merely defines who may appeal the court's judgment. Clearly, only the Commonwealth was entitled to notice of the expungement proceeding. Therefore, the expungement order was not void for Ein's failure to give notice to Barry and Lewis.

The Commonwealth, however, claims that the expungement order was void, and subject to collateral attack, because Ein committed a fraud on the court in failing to disclose that Barry and Lewis were defendants in his civil action then pending. Our reading of the record does not indicate that the trial court made a finding of fraud on the court. The trial court's order does not reflect such a

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finding. Furthermore, although the trial court stated from the bench that keeping from the court the information about the civil action created a "suspicion" of fraud, a suspicion of fraud is not a finding of fraud.

Additionally, even if the trial court's remark could be construed as a finding of fraud, the record does not support such a finding. The law does not presume fraud; to the contrary, the presumption is always in favor of innocent conduct. *Jenkins v. Trice,* 152 Va. 411, 429-30, 147 S.E. 251, 257 (1929). Moreover, the burden is upon the party alleging fraud to prove it by clear and convincing evidence,

Winn v. Aleda Const. Co., 227 Va. 304, 308, 315 S.E.2d 193, 195 (1984), and, in the present case, the trial court heard no evidence. Clearly, neither the Commonwealth nor Barry and Lewis carried their burden of proving fraud by clear and convincing evidence. Therefore, the expungement order was not void for fraud on the court.

Consequently, we hold that the trial court did not have jurisdiction to vacate the expungement order. Accordingly, we will reverse and vacate the trial court's judgment and reinstate the expungement order.

Reversed and final judgment.

Notes:

[1] Rule 1:1, in pertinent part, provides as follows:

All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer.

[2] A court's authority to permit a "review" of an expunged police or court record is strictly limited to the provisions of Code § 19.2-392.3. That section merely empowers a Commonwealth's Attorney to seek such a review when the record is "needed by a law-enforcement agency for the purposes of employment application as an employee of a law-enforcement agency or for a pending criminal investigation [provided] the investigation will be jeopardized or that life or property will be endangered without immediate access to the record."

Maryland Statutes

CRIMINAL PROCEDURE

Title 10. CRIMINAL RECORDS

Subtitle 1. EXPUNGEMENT OF POLICE AND COURT RECORDS

Current through available acts from the 2016 Legislative Session effective on or before July 1, 2016

§ 10-108. Opening, review, or disclosure of expunged records

(a)

A person may not open or review an expunged record or disclose to another person any information from that record without a court order from:

(1)

the court that ordered the record expunged; or

(2)

the District Court that has venue in the case of a police record expunged under § 10-103 of this subtitle.

(b)

A court may order the opening or review of an expunged record or the disclosure of information from that record:

(1)

after notice to the person whom the record concerns, a hearing, and the showing of good cause; or

(2)

on an ex parte order, as provided in subsection (c) of this section.

(c)

(1)

The court may pass an ex parte order allowing access to an expunged record, without notice to the person who is the subject of that record, on a verified petition filed by a State's Attorney alleging that:

(i)

the expunged record is needed by a law enforcement unit for a pending criminal investigation; and

(ii)

the investigation will be jeopardized or life or property will be endangered without immediate access to the expunged record.

(2)

In an ex parte order, the court may not allow a copy of the expunged record to be made.

(d)

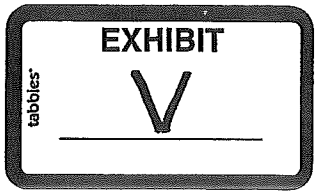
(1)

A person who violates this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 1 year or both.

(2)

In addition to the penalties provided in paragraph (1) of this subsection, an official or employee of the State or a political subdivision of the State who is convicted under this section may be removed or dismissed from public service.

Cite as Md. Code, CP § 10-108



NEW JERSEY PERMANENT STATUTES

Title 2C. THE NEW JERSEY CODE OF CRIMINAL JUSTICE

Chapter 2C:52. Definition of expungement

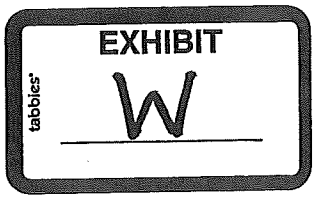
Current through L. 2016, c. 1.

§ 2C:52-19. Order of superior court permitting inspection of records or release of information; limitations

Inspection of the files and records, or release of the information contained therein, which are the subject of an order of expungement, or sealing under prior law, may be permitted by the Superior Court upon motion for good cause shown and compelling need based on specific facts. The motion or any order granted pursuant thereto shall specify the person or persons to whom the records and information are to be shown and the purpose for which they are to be utilized. Leave to inspect shall be granted by the court only in those instances where the subject matter of the records of arrest or conviction is the object of litigation or judicial proceedings. Such records may not be inspected or utilized in any subsequent civil or criminal proceeding for the purposes of impeachment or otherwise but may be used for purposes of sentencing on a subsequent offense after guilt has been established.

Cite as N.J.S. § 2C:52-19

History. L.1979, c.178, s.126, eff. Sept. 1, 1979.



Louisiana Statutes

Code of Criminal Procedure

Title 34.

Current through Acts 1-16, 18-26, 28-32 of the 2016 Regular Legislative Session

Article 973. Effect of expunged record of arrest or conviction

A.

An expunged record of arrest or conviction shall be confidential and no longer considered to be a public record and shall not be made available to any person or other entity except for the following:

(1)

To a member of a law enforcement or criminal justice agency or prosecutor who shall request that information in writing, certifying that the request is for the purpose of investigating, prosecuting, or enforcing criminal law, for the purpose of any other statutorily defined law enforcement or administrative duties, or for the purposes of the requirements of sex offender registration and notification pursuant to the provisions of R.S. 15:540 et seq.

(2)

On order of a court of competent jurisdiction and after a contradictory hearing for good cause shown.

(3)

To the person whose record has been expunged or his counsel.

(4)

To a member of a law enforcement or criminal justice agency, prosecutor, or judge, who requests that information in writing, certifying that the request is for the purpose of defending a law enforcement, criminal justice agency, or prosecutor in a civil suit for damages resulting from wrongful arrest or other civil litigation and the expunged record is necessary to provide a proper defense.

B.

Upon written request therefor and on a confidential basis, the information contained in an expunged record may be released to the following entities that shall maintain the confidentiality of such record: the Office of Financial Institutions, the Louisiana State Board of Medical Examiners, the Louisiana State Board of Nursing, the Louisiana State Board of Dentistry, the Louisiana State Board of Examiners of Psychologists, the Louisiana Board of Pharmacy, the Louisiana State Board of Social Work Examiners, the Emergency Medical Services Certification Commission, Louisiana Attorney Disciplinary Board, Office of Disciplinary Counsel, the Louisiana Supreme Court Committee on Bar Admissions, the Louisiana Department of Insurance, the Louisiana Licensed Professional Counselors Board of Examiners, or any person or entity requesting a record of all criminal arrests and convictions pursuant to R.S. 15:587.1, or as otherwise provided by law.

C.

Except as to those persons and other entities set forth in Paragraph A of this Article, no person whose record of arrest or conviction has been expunged shall be required to disclose to any person that he was arrested or convicted of the subject offense, or that the record of the arrest or conviction has been expunged.

D.

Any person who fails to maintain the confidentiality of records as required by the provisions of this Article shall be subject to contempt proceedings.

E.

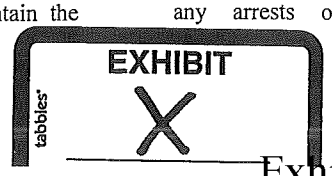
Nothing in this Article shall be construed to limit or impair in any way the subsequent use of any expunged record of any arrests or convictions by a law enforcement agency, criminal justice agency, or prosecutor including its use as a predicate offense, for the purposes of the Habitual Offender Law, or as otherwise authorized by law.

F.

Nothing in this Article shall be construed to limit or impair the authority of a law enforcement official to use an expunged record of any arrests or convictions in conducting an investigation to ascertain or confirm the qualifications of any person for any privilege or license as required or authorized by law.

G.

Nothing in this Article shall be construed to limit or impair in any way the subsequent use of any expunged record of any arrests or convictions by a "news-gathering



organization". For the purposes of this Title, "news-gathering organization" means all of the following:

(1)

A newspaper, or news publication, printed or electronic, of current news and intelligence of varied, broad, and general public interest, having been published for a minimum of one year and that can provide documentation of membership in a statewide or national press association, as represented by an employee thereof who can provide documentation of his employment with the newspaper, wire service, or news publication.

(2)

A radio broadcast station, television broadcast station, cable television operator, or wire service as represented by an employee thereof who can provide documentation of his employment.

H.

Nothing in this Article shall be construed to relieve a person who is required to register and provide notice as a child predator or sex offender of any obligations and responsibilities provided in R.S. 15:541 et seq.

History. Added by Acts 2014, No. 145, s. 1, eff. 8/1/2014.

Expungement arrest sheds light on state law

By: ERIC MANN | April 20, 2016

While still facing a possible $500 fine and up to a year in jail for publishing expunged legal records on his website, blogger John Caylor is now dealing with a civil lawsuit over the same matter.

Caylor appears to be the first person in Alabama arrested under a 2014 law allowing people who have arrest records for non-violent offenses expunge those records. But the law also criminalized publication of such records, a situation that creates potential First Amendment issues and could put news organizations in danger of arrest for publishing factual information.

Caylor will appear in Daphne City Court May 3 to determine his fate regarding the publication of Mobile-area attorney Thomas Scott Smith III's expunged court file on his website, www.insider-magazine.com (http://www.insider-magazine.com).

Smith had Caylor arrested March 30. In addition Smith has filed a civil suit in Baldwin County Circuit Court seeking a declaratory judgment that would require the permanent removal of the records from the website. The complaint also asks that Caylor be permanently restrained from republishing those documents and required to surrender all copies of the materials in his possession.

According to the law, sponsored as a bill by former State Sen. Roger Bedford (D-Russellville), persons charged with certain misdemeanor criminal offenses, traffic violations or municipal ordinance violations may apply to have their record expunged. Those charged with non-violent felonies can also seek an expungement if the charge was dismissed with prejudice, no-billed by a grand jury, the person was found not guilty of the charge or the charge was dismissed without prejudice more than two years ago and has not been refiled, or in the case of a pre-trial diversion program.

Bedford is now a practicing attorney in Russellville after serving as District 6 senator from 1994 to 2014. Last week, he recalled the debates over his bill in 2014.

"For several years I had people calling me who applied for jobs but were not being hired because they had charges on their record that had been dismissed," Bedford said. "These were people who had made a mistake in high school or college, or people who were in the wrong place at the wrong time. At the time, there was no mechanism in Alabama to have those records expunged."

The former senator used the example of four teenagers riding in a car in which the driver has a stash of marijuana under his seat that his three passengers are unaware of.

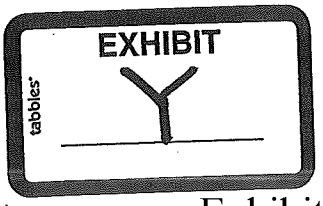
"All four passengers could be charged with possession, even if only one person in the car knew the drug was there," Bedford said. "This bill protects the others in the car from having this arrest on their record."

In Smith's case, he was arrested in 2001 when he was 21 and charged with possession of methamphetamine, according to court records. His case was dismissed after he completed a pre-trial diversion program.

Until the law was passed, Alabama residents had no way to have such records removed from the public eye. Bedford said he studied similar laws in other states and proposed a bill with what he thought were the best parts of those laws.

According to Bedford, the law protects people who were in the wrong place at the wrong time from having arrests show up on applications for employment or school.

"Alabama's law is much more narrow on what can be expunged than other states," Bedford said. "The good news is, there is now a law in place that allows expungement in some cases."



After an expungement, the court records in question are deemed to have never existed. It requires court and law enforcement agencies to deny the existence of expunged court records, even though the records are actually stored by the state. The law reads: "Except as provided in this chapter, the court and other agencies shall reply to any inquiry that no record exists on the matter."

Bedford said the bill passed the Senate with no major hurdles, but in the House there was mixed support after a handful of law enforcement agencies and district attorneys expressed concerns about the bill, based on the fact they would not be privy to information in the event someone with an expunged record is charged with new crimes in the future.

The law requires expunged records to be kept by the Alabama Criminal Justice Information Center where they are accessible only with a court order. The records include arrest reports, booking and arrest photographs, as well as computer database records of the state. The state retains a copy of the case indefinitely.

"One important thing to note about the law is that it does not allow expungement for anyone who was actually convicted of a crime," Alabama Law Institute Director Othni Lathram said. "That's a common misconception about the law." But what makes this law different from most is it carries a criminal penalty for publication.

According to section 15-27-16 of the Alabama code, anyone who knowingly divulges, gives access to or makes public the contents of an expunged court record without a court order is guilty of a Class B misdemeanor. This issue can present "prior restraint" issues for a news agency covering someone with an expunged record.

Gregg Leslie, legal defense director of the Reporters Committee for Freedom of the Press, said publishing court records should never be a crime unless a reporter does something illegal to obtain them.

"Expungement statutes should only keep the court from releasing them, but they don't create an Orwellian memory hole where the information must be treated as if it never existed," Leslie said. "Such statutes are a problem because the government of course keeps that information and can use it against people, while the statute just means that the people will not know what information the government keeps on citizens."

Lathram argued that the state's law requires a number of hurdles to be cleared before anyone can face criminal charges for publishing expunged records.

"First of all, they have to know the records they published were expunged," Lathram said. "It has to be done with malicious intent. There are people out there who publish mugshots and things on the web, and sometimes they unknowingly publish the information of people who've had their records expunged, but you have to prove it was malicious. There is a pretty high standard you have to cross."

At press deadline this week, Caylor had not removed Smith's expunged court file from his website, www.insider-magazine.com (http://www.insider-magazine.com).

Information Home
Information Home

Information Links
Alabama Tinting Regulations
ATV Safety
Child Passenger Restraint Law
EEOP Report Request
Personnel Killed in the Line of Duty
Speed Limits
Volunteer Firefighter
Criminal Record Expungement

Alerts
Amber Alerts Search
Blue Alerts Search
Emergency Missing Child Alerts Search
Missing Senior Alerts Search
Subscribe To Alerts
Unsubscribe From Alerts
Amber Alert Info
Blue Alert Info
Emergency Missing Child Alert Info
Missing Senior Alert Info

Quick Links
Sex Offender Registry
Child Passenger Restraint Law
Community Information Center
Missing Child/Adult Search
Fatality Victims Memorial
Online Driver Records
Pay Tickets Online
Training for Law Enforcement Agencies
ATV Safety
Driver License Manuals
Driver License Forms
CDL Self Certification
Recruiting Information
ICAC

External Links
TSA's Application for a Hazardous Material Endorsement (HME)
Click It or Ticket Campaign
Mandatory Liability Insurance Act
Gulf Oil Spill Information
National Sex Offender Registry
Public Record Center
Alabama State Personnel Department

Criminal Record Expungement FAQ

Back to Criminal Record Expungement Page

What is expungement?
The removal of criminal charges from a person's criminal history record accessible for public purposes, such as an employee background check. Expungement is not applicable to a criminal conviction or any violation of the statutes, rules or regulations of the Alabama Securities Commission. Any expunged records are still available to the court or law enforcement.

Can a conviction be expunged?
No. Only charges for non-felonies or non-violent felonies under certain circumstances may be expunged. See the checklist for the specific list of charged offenses that may be expunged.

What if my official criminal history record does not show a charge for an offense that I know I have received?
Not all charges show up on a person's criminal history record for a variety of reasons. Older records were not always sent to ALEA for entry into the state's criminal history database. Some charges are not automated in which case procedures have been put in place to catch these files while being converted to electronic format. Some records have not yet been sent to ALEA and, on occasion, records may be lost or destroyed at the local level. Even if the charge does not appear on a certified criminal history record, a record may still exist in a local law enforcement agency, a prosecutor's file or a court record system. These records may still be accessible or eventually sent to ALEA for inclusion into the official record. If a petitioner knows of a record, even though it does not show up, that person should still file for the expungement to prevent these records from being sent to ALEA at a later date. If granted, the record will be officially removed from any agency for public dissemination.

Can a police department or court keep a record of an expunged charge?
Any criminal justice agency with records on an expunged charge, such as arrest records, booking or arrest photos, or references in the State Court's Information System, must be forwarded to ALEA. However, a law enforcement agency or official, district attorney or a prosecuting authority, the Alabama Department of Forensic Sciences, or the Department of Human Resources may maintain an investigative file, report, case file, or log which may include any evidence, biological evidence, photographs, exhibits, or information in documentary or electronic form. Once an order of expungement is issued, though, this information cannot be disseminated for a non-criminal justice purpose.

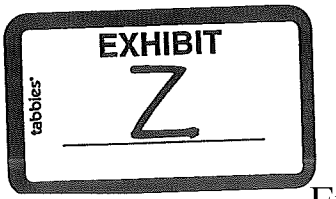
Who can see an expunged record?
Expunged records may not be used for any non-criminal justice purpose and may only be made available to criminal justice agencies upon acknowledgement of an investigation or other criminal matter involving the person related to the expungement

Do I have to divulge that I have been charged for an offense that has been expunged?
The petitioner whose record was expunged does not have to disclose that fact on an application for employment, credit, or other type of application. However, the petitioner whose record was expunged shall have the duty to disclose the fact of the record and any matter relating thereto to any government regulatory or licensing agency, any utility and its agents and affiliates, or any bank or other financial institution. In these circumstances, the government regulatory or licensing agency, utility and its agents and affiliates, or the bank or other financial institution shall have the right to inspect the expunged records after filing notice with the court. A person applying for a position as a law enforcement or corrections officer must disclose and provide a copy of the expungement to the agency.

Will an expunged criminal charge show up on an employee background check?
Once an order of expungement is granted, that offense will no longer be part of a publically accessible record used for employee background checks.

Does an expungement apply to a non-government background check service?
An order of expungement does not necessarily apply to an unofficial 3rd party background service. However, if a petitioner provides notice to the service that an expungement has been granted, the record may no longer be intentionally disseminated by that entity.

Does an expungement restore my rights to carry a firearm?
An expungement order shall not entitle an individual to ship, transport, possess, or receive a firearm. Any person whose record of conviction is expunged may have his or her right to ship, transport, possess, or receive a firearm restored by a Certificate of Pardon with Restoration of Civil and Political Rights from the Alabama Board of Pardons



and Paroles.

EXHIBIT 11 TO NEWSOME'S PETITION

The "Response of Burt W. Newsome to Claiborne Seier's 'Petition to Set Aside Expungement Pursuant to Ala. Code § 15-27-17 and Joinder in Victim's Motion'" delivered to Bonita Davidson on June 1, 2016.

STATE OF ALABAMA
COUNTY OF SHELBY

AFFIDAVIT

Before me, the undersigned authority, personally appeared William R. Justice, who being known to me and being by me first duly sworn, deposed and said as follows:

My name is William R. Justice. I am a practicing attorney with the law firm Ellis, Head, Owens & Justice in Columbiana, Shelby County, Alabama. At all time pertinent to the matters covered by this Affidavit, I was representing Burton Wheeler Newsome in an expungement proceeding related to Case No. CC 2015-000121 in the Circuit Court of Shelby County, Alabama.

On June 1, 2016, I appeared in the Shelby County Courthose with a document entitled Response of Burt W. Newsome to Claiborne Seier's "Petition to Set Aside Expungement Pursuant to Ala. Code § 15-27-15 and Joinder in Victim's Motion" consisting of 15 pages and 9 pages of exhibits, a true and correct copy of which is attached to this affidavit. I went to Judge Conwill's office and left a copy of the attached document with his legal assistant, Bonita Davidson.

This the 10th day of June, 2016.

William R. Justice

Sworn to and subscribed before me
this 10th day of June, 2016.

Notary public

My commission expires: 09-09-2019

TAMMY L. SEALE NOTARY PUBLIC ALABAMA STATE AT LARGE

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. CC 2015-000121
	)	
BURTON WHEELER NEWSOME,	)	
	)	
Defendant.	)	

RESPONSE OF BURT W. NEWSOME TO CLAIBORNE SEIER'S "PETITION TO SET ASIDE EXPUNGEMENT PURUANT TO ALA. CODE § 15-27-15 AND JOINDER IN VICTIM'S MOTION"

I. SUMMARY OF ARGUMENT

On September 10, 2015, this court expunged the records of John Bullock's prosecution of Burt W. Newsome for menacing. The documents expunged included a "dismissal & release order" dated November 12, 2013, that purports to release "all [of Newsome's] civil and criminal claims stemming directly or indirectly" from his prosecution.

Claiborne Seier seeks to vacate the expungement on the ground that it was based on "false pretenses." He apparently contends that the certification in Newsome's expungement petition – that he had "satisfied the requirements" of the Act -- was false because he was then suing Bullock in violation of the "dismissal & release order" (**Exhibit 1**).

Seier's Petition is due to be dismissed or denied for the following reasons, separately and severally.

First, the "dismissal & release order" – on which Seier bases his arguments – is unenforceable as a matter of law. It can't form the basis for a claim of "false pretenses."

Second, Seier has no standing to contest the expungement order; he has no statutory right to participate in the case.

Third, Seier has no standing to enforce or claim the benefit of the "dismissal & release order." He didn't sign it, and it doesn't list him as a beneficiary.

Finally, the expungement was not based on "false pretenses." The court was fully aware of Newsome's civil action when it granted the expungement.

Seier also "joins in . . . Bullock's pending motion to allow the use of [Newsome's expunged] records . . . in the related civil action." In response to this argument, Newsome incorporates herein that document filed simultaneously and titled, "Response of Burt W. Newsome to Motion of John Bullock To Use Contents of Expunged File" (hereinafter "Newsome's Response to Bullock"). Lettered exhibits cited herein are those exhibits attached to *Newsome's Response to Bullock.* Numbered exhibits cited herein are attached hereto.

II. STATEMENT OF FACTS

Newsome adopts herein the "The Statement of Facts" in ***Newsome's Response to Bullock***. He responds below to specific misstatements of fact in Seier's Petition:

A. Newsome Did Not Illegally "Produce[] and Brandish[] a Weapon while Threatening Victim John Bullock.

Seier alleges, "On or about December 19, 2012, defendant Burt Newsome illegally produced and brandished a weapon while threatening Victim John Bullock in a parking lot" (Seier Petition, ¶ 1). Seier has presented no evidence to support this allegation, and it is not true.

B. Newsome Did Not Plead Guilty to Any Offense.

Seier alleges, "On or about November 12, 2013, Defendant Burt Newsome pled guilty and entered into a deferred prosecution agreement" (Seier Petition, ¶ 2). Newsome did not plead guilty, and there is no "deferred prosecution agreement." On November 12, 2013, Newsome signed a "dismissal and release order." Under the terms of order, the criminal prosecution would be dismissed if Newsome had no further incidents before April 1, 2014, and paid certain fees

(Exhibit 1). There was, however, no "guilty plea" that was "withheld. If Newsome been arrested on a new offense or failed to pay the fees, then Newsome would have simply stood trial.

C. Whether Newsome Can Prove the Charges in His Civil Case Is Irrelevant to the Questions before this Court.

Seier alleges, "To date, Newsome has produced absolutely no evidence of any conspiracy or even a relationship of any kind between Balch, Bullock, or Seier . . ." (Seier Petition, ¶ 6). This is irrelevant to the questions Seier attempts to raise in his Petition; namely, whether the expungement should be vacated because it was obtained by "false pretenses" or whether Seier should be permitted to use expunged documents in the Newsome's civil suit.

In any event, Newsome has outlined substantial evidence that Seier and Bullock conspired to frame him (**Newsome Response to Bullock**, ¶¶ 4-13). Seier has objected to Newsome's subpoena for his telephone records (and his attorney has contacted the phone companies and instructed them not to respond to the subpoenas) – which could show irrefutable evidence -- and the court has not yet ruled on Newsome's motion to compel.

D. Newsome Produced the Expungement Petition to Seier's Attorney on April 21, 2015 – Long before the Hearing on August 31, 2015.

Seier alleges that he "was given no notice of this [Expungement] Petition or the hearing thereon" (Seier Petition, ¶ 8). Seier is incorrect.

On April 21, 2015, Newsome served discovery responses in the civil suit stating that he had filed a petition for expungement. The Petition for Expungement was attached to the discovery responses, and it was served on all parties electronically – including Seier's attorney[1]

[1] Ala. R. Civ. P. 5(d) ("All discovery material may be served electronically using the court's electronic filing system.").

(**Exhibit F**, Interrogatory 28). Seier did not attempt to intervene or otherwise participate in the Expungement Proceeding. In any event, and as shown below, Seier had no right to notice of Newsome's Petition for Expungement.

E. Newsome Has Not Waived the Benefit of the Expungement.

Seier alleges, "Newsome has waived any protections afforded to him with respect to his now-expunged records by placing his arrest and plea at issue in the pending civil action" (Seier Petition, ¶ 11).

Statutes in Tennessee[2] and Louisiana[3] permit the use of expunged records when the criminal defendant becomes a plaintiff in a civil action based on the same transaction as the criminal prosecution. Senator Bedford – the sponsor of the Alabama Act – "studied similar laws in other states," (**Exhibit Y**), but the bill he introduced – and the law enacted – does not contain a similar provision. The Alabama Act limits *use* of expunged documents to *criminal-justice purposes*:

> Such records may not be used for any non-criminal justice purpose and may only be made available to criminal justice agencies upon acknowledgment of an investigation or other criminal matter involving the person related to the expungement (Ala. Code § 15 - 27-7(a)).

Seier seeks to use the expunged release for a "non-criminal justice purpose"; he seeks to use it in Newsome's civil action. **The statute specifically prohibits this.**

III. ARGUMENT

Seier's argument that the Expungement Petition was "granted" based on "false pretenses" assumes that the "dismissal & release order" was enforceable and effective when Newsome filed suit against Bullock, that Newsome's filing of the civil suit was a non-compliance with the

[2] Tenn. Code Ann. § 40-35-313(b); see Rodriguez v. State, 437 S.W.3d 450, 456 n. 5 (Tenn. 2014) (quoting prior version of act)
[3] La. Code Crim. P. art. 973A(2).

Expungement Act, that he (Seier) has standing to raise this violation and enforce the "dismissal & release order," and this Court was not aware of the civil suit when it granted the expungement. Each of these assumptions is false.

A. The "Dismissal & Release Order" Is Not Enforceable.

1. The "dismissal & release order" is not enforceable because part of the consideration was Newsome's "agreement" not to file any "criminal claims." The "dismissal & release order" purports to grant "a full, complete, and absolute Release of all [of Newsome's] civil and criminal claims . . ." A "criminal claim" is a "criminal prosecution." *See City of Mobile v. Cooks,* 915 So. 2d 29, 32 (Ala. 2005) (referring to criminal prosecution as a "criminal claim"); *Wade v. Collier*, 783 F.3d 1081, 1087 n.3 (7th Cir. 2015) (referring to criminal prosecution as a "criminal claim"); the order thus purports to bar Newsome from filing criminal charges based upon his arrest and prosecution.

The agreement that Newsome surrender "criminal claims" is illegal. "A person commits the crime of compounding if he gives or offers to give or accepts or agrees to accept any pecuniary benefit or other thing of value in consideration for: (1) refraining from seeking prosecution of a crime. . . ." (Ala. Code § 13A-10-7).

This illegality renders the "dismissal & release order" unenforceable in its entirety. In *Raia v. Goldberg*, 33 Ala. App. 435, 34 So. 2d 620, 623 (1948), the court held,

> It has long been settled in this State that if an agreement express or implied to suppress a criminal prosecution forms even a part of the consideration of a contract, the transaction is against public policy, and the courts will not enforce it. . . .
>
> That which renders the transaction illegal is an agreement express or implied not to prosecute.

In *Baker v. Citizens Bank of Guntersville*, 282 Ala. 33, 208 So. 2d 601 (1968), the court applied this rule:

If the consideration for the note and mortgage was in part illegal, it avoided the whole note and mortgage. *Wynne v. Whisenant,* 37 Ala. 46, 48.

That a contract, the consideration of which is in part illegal, is invalid and cannot be enforced at law, is a question too well settled to admit of doubt. *Petit's Adm'r v. Petit's Distributees,* 32 Ala. 288; 1 Brick. Dig. 282, § 116. Neither can it be doubted that a contract based upon a promise or agreement to conceal or keep secret a crime which has been committed is opposed to public policy and offensive to the law. *Clark v. Colbert,* 67 Ala. 92; *Moog v. Strang,* 69 Ala. 98; *U.S. Fidelity & Guar. Co. v. Charles,* 131 Ala. 658, 31 So. 558, 57 L.R.A. 212. And it makes no difference if the contract contains an additional consideration that is legal and valuable. Whenever a crime is committed, and especially one that involves moral turpitude, the public good calls for a prosecution of the guilty party, and any effort to prevent the punishment of the offender by suppression or concealment is opposed to public policy. *Folmar v. Siler,* 132 Ala. 297, 302, 303, 31 So. 719. *See also*: *People's Bank & Trust Co. v. Floyd,* 200 Ala. 192, 75 So. 940; and *Orman v. Scharnagel,* 210 Ala. 381, 98 So. 123.

If part of the consideration for execution of the note and mortgage by W. D. Baker was the promise by Moore that the prosecution of Baker's daughter or her husband, or both, would be continued and finally suppressed, then the note and mortgage are against public policy and unenforceable. . . .

On the evidence which we have set out, we are of opinion that the conclusion is required that part of the consideration for the note and mortgage was the agreement stated by Moore to Baker to effect that, if Baker signed the note and mortgage, Moore would see that the case was continued from time to time, with the further assurance that upon payment of the mortgage indebtedness the bank would not prosecute them unless forced to do so by the state and "I had the agreement of the Solicitor that whatever we decided would be done."

This is a promise to continue the criminal cases upon execution of the note and mortgage and not to prosecute if the note and mortgage debt were paid. Baker did execute the note and mortgage and Moore did continue the case against Lessie Mays several times because of the agreement which the parties had.

The consideration was in part illegal and avoided the whole note and mortgage.

If Bullock fabricated the charge of menacing, as Newsome alleges, then Bullock committed perjury when he signed the warrant; the "dismissal & release order" purports to prohibit Newsome from prosecuting this criminal offense – or any other criminal offense arising from his arrest. This "agreement" is in direct violation of section 13A-10-7 and renders the

"dismissal & release order" unenforceable in its entirety. "[I]t makes no difference if the contract contains an additional consideration that is legal and valuable." *Baker v. Citizens Bank of Guntersville*, 282 Ala. at 39, 208 So. 2d at 606.

2. The "dismissal & release order" was an interlocutory order that terminated when the criminal prosecution was dismissed. "[A]n interlocutory order [is] one that [does] not dispose of all the issues before the court . . ." *Walker v. State*, 127 So. 3d 437, 439 (Ala. Crim. App. 2012). The "dismissal & and release order" was an interlocutory order; it "did not dispose of all the issues before the court. It required Newsome to appear in court again on April 1, 2014, or suffer arrest (**Exhibit 1**).

All issues in the case were, however, disposed of on April 4, 2014, when the court dismissed the case with prejudice. "Pursuant to earlier written agreement, with no objection by A.D.A. Willingham, this case is DISMISSED with prejudice. Apply cash bond" (**Exhibit 2**).

This order did not state that the "dismissal & release order" would survive the dismissal of the case. Consequently, and as a matter of law, the "dismissal & release order" became unenforceable when the case was dismissed with prejudice. In *KLR v. KGS*, No. 2140882 (Ala. Civ. App. Jan. 8, 2016), the court held,

> "As a general rule, interlocutory orders become unenforceable upon a final judgment of dismissal." *Ex parte W.L.K.*, 175 So.3d 652, 661 (Ala. Civ. App. 2015) (citing *Maddox v. Maddox*, 276 Ala. 197, 199,160 So.2d 481, 483 (1964) (discussing *Duss v. Duss*, 92 Fla. 1081, 111 So. 382 (1927))). Generally, the dismissal of an action operates to annul previously entered orders, rulings, or judgments. *See Ex parte Sealy, L.L.C.*, 904 So. 2d 1230, 1236 (Ala. 2004) (quoting 27 C.J.S. *Dismissal and Nonsuit* § 39 (1959)) (holding that a voluntary dismissal renders the proceedings a nullity and "'carries down with it previous proceedings and orders in the action'"). . . .
>
> The order of the juvenile court dismissing the action for lack of subject-matter jurisdiction dissolved the orders that are the subject of this appeal (See **Exhibit 3**).

This rule also applies in criminal cases. In *Ronning v. Yellowstone County*, 360 Mont. 108, 253 P.3d 818 (2011), the court held that a plea agreement did not survive the entry of judgment:

> Upon sentencing, a plea agreement terminates. That is, once each party has fulfilled its obligations under the agreement (each party has performed), the plea agreement has served its purpose and any duties under the contract are discharged. See *Restatement (Second) of Contracts* § 235 (1981). The controlling document becomes the judgment and sentence, which embodies the plea agreement in whatever form the court accepted (360 Mont. at 111, 253 P.3d at 821).

In *State v. Anaya*, 95 Wn. App. 751, 976 P.2d 1251, 1256 (Wash. App. Div. 1, 1999), the court held a no-contact order did not survive dismissal of the prosecution: "[W]e hold that the no-contact order entered at arraignment against Anaya expired upon the dismissal of the underlying domestic violence charge." *See also State v. Feliciano*, 81 P.3d 1184 (Hawaii 2003) (restitution order did not survive expiration of defendant's probation).

As a matter of law, the dismissal of criminal case on April 4, 2014, "operate[d] to annul previously entered orders, rulings, or judgments" – including the "dismissal & release order" on which Seier bases his arguments. Even if the "dismissal & release order" was originally valid, it ceased to be enforceable when the criminal prosecution was dismissed.

B. Seier Has No Standing To Attack the Expungement Order.

Section 15-27-3(c) identifies the persons and entities who are entitled to "notice" of an expungement action:

> A petitioner shall serve the district attorney, the law enforcement agency, and clerk of court of the jurisdiction for which the records are sought to be expunged, a copy of the petition, and the sworn affidavit. The district attorney shall review the petition and may make reasonable efforts to notify the victim if the petition has been filed seeking an expungement under circumstances enumerated in paragraph a. of subdivision (4) of Section 15-27-2 involving a victim that is not a governmental entity.

Persons such as Seier – who are not listed in the statute – are not entitled to notice, and they may not contest an order granting an expungement. In *Ein v. Commonwealth*, 246 Va. 396, 436 S.E.2d 610 (1993) the plaintiff was granted an expungement while his civil action for malicious prosecution was pending. The court held that the plaintiff's failure to notify the civil defendants of his Expungement Petition did not render the expungement void:

> The trial court ruled that the expungement order was void because Ein [the plaintiff] failed to give [the defendants] Barry and Lewis, who would be parties "aggrieved" pursuant to Code § 19.2-392.2(F), notice of the proceeding. However, we find nothing in the expungement statutes that would have required Ein to give notice to Barry and Lewis. Code § 19.2-392.2(D) provides that "[a] copy of the [expungement] petition shall be served on the attorney for the Commonwealth of the . . . county in which the petition is filed." Subsection F of Code § 19.2-392.2 provides that the Commonwealth shall be made the party defendant to the expungement proceeding. Subsection F further provides that "[a]ny party aggrieved by the decision of the court [respecting the expungement order] may appeal, as provided by law in civil cases." The trial court's reliance upon subsection F is misplaced because subsection F merely defines who may appeal the court's judgment. Clearly, only the Commonwealth was entitled to notice of the expungement proceeding. Therefore, the expungement order was not void for Ein's failure to give notice to Barry and Lewis. (246 Va. At 400, 436 S.E.2d at 612-13)

In *Hunt v. Pennsylvania State Police of Commonwealth*, 983 A.2d 627 (Pa. 2009), the court held that the State Police had no standing to contest an expungement because the statute did not require that they be given "notice" of the proceeding:

> With respect to the State Police's standing, as the words employed in a statute are the clearest indication of the legislature's intention, we first direct our attention to the language of the CHRIA. The statute itself confers standing on the district attorneys of the various counties for purposes of expungement, but does not confer standing on the State Police:
>
> > The court shall give ten days prior notice to the district attorney of the county where the original charge was filed of any applications for expungement under the provisions of subsection (a)(2) [relating to a court order requiring expungement of nonconviction data].
>
> 18 Pa. C. S. A. § 9122(f) (emphasis added).
>
> Related thereto, the General Assembly requires notice to be provided to the State Police only *after* an expungement has been granted. 18 Pa. C. S. A. § 9122(d) ("Notice of

> expungement shall promptly be submitted to the central repository which shall notify all criminal justice agencies which have received the criminal history record information to be expunged."). Considering Section 9122, read as a whole, it is plain the General Assembly intended that the district attorney of the county where the original charge was filed has standing to challenge an application for expungement. Moreover, by providing notice to the State Police, as the central repository, only *after* an expungement order is granted, CHRIA does not contemplate State Police standing to challenge an expungement application. The General Assembly certainly knows how to confer standing upon a party. We conclude that the language of CHRIA itself compels a finding that the State Police does not possess standing to challenge an expungement order.

In *State v. Taylor*, 146 So. 3d 862, 865 (La. App. 4 Cir. 2014), the court held that DPS has no standing to contest an expungement because the statute did not require that they be noticed:

> Louisiana Revised Statute 44:9B(2) provides that the trial court "shall order all law enforcement agencies to expunge the record" where the trial court finds the defendant is entitled to relief "after a contradictory hearing with the district attorney and the arresting law enforcement agency." There is no mention in the [2014-0217 La. App. 4 Cir. 6] statute that DPS must be noticed. Accordingly, we find that the legislature did not intend for DPS to be a necessary party to an expungement proceeding.

These cases are directly applicable here. A person such as Seier, who is not named in the statute and who was not a party to expungement itself, has no standing to attack an expungement order after it is granted.

C. Seier Has No Standing to Claim the Benefit of the "Dismissal & Release Order."

Seier seeks to set aside the Expungement so he can claim third-party beneficiary protection under the expunged "dismissal & release order." As matter of law, Seier cannot claim such protection. The court in *Ronning v. Yellowstone County*, 360 Mont. 108, 111, 253 P.3d 818, 821 (2011), rejected an argument similar to Seier's:

> Plea agreements are contracts and are generally governed by contract principles. *State v. Rardon*, 2005 MT 129, ¶ 18, 327 Mont. 228, 115 P.3d 182. However, a plea agreement is a unique kind of contract. It is an agreement between a prosecutor and a defendant for the sole purpose of settling a pending criminal charge, or charges, against the defendant. *See* § 46-12-211, MCA. Unlike other contracts, a plea agreement is not self-executing; it is

contingent on approval by the court. The court is not bound by a plea agreement, and it may be accepted or rejected, in whole or in part. *Id.* Upon sentencing, a plea agreement terminates. That is, once each party has fulfilled its obligations under the agreement (each party has performed), the plea agreement has served its purpose and any duties under the contract are discharged. See Restatement (Second) of Contracts § 235 (1981). The controlling document becomes the judgment and sentence, which embodies the plea agreement in whatever form the court accepted.

In this case, the plea agreement was between Kapsa and Yellowstone County. Yellowstone County agreed to dismiss five charges in exchange for Kapsa's nolo contendere plea to one charge, and to recommend a certain sentence and conditions. Kapsa agreed to plead nolo contendere to one charge, and, upon acceptance of that plea, to join Yellowstone County in a petition to dispose of the seized evidence (the dogs) to a rescue organization for adoption, to certain limitations on animal ownership, and to pay restitution as ordered by the court. The parties to the plea agreement did all they were obligated to do. Kapsa did not and has not alleged Yellowstone County violated the agreement, or vice versa. Kapsa was sentenced and the criminal case is now closed, thus the plea agreement has terminated.

Ronning and Dennehy cannot be intended third party beneficiaries of the contract (the plea agreement) because it is has terminated. The only possible way Ronning and Dennehy could be intended third party beneficiaries is if the District Court's order named them as such. Without a court order naming them as intended third party beneficiaries, they would only be, at the very most, incidental beneficiaries. Incidental beneficiaries have no right to enforce the contract. Restatement (Second) of Contracts § 315.

The analysis in *Ronning* is directly applicable to this case. Seier was not a party to the "dismissal & release order," and he is not named as a third-party beneficiary of the order. In addition, the order itself has terminated; it was replaced by an order of dismissal dated April 4, 2013, which states, "Pursuant to earlier written agreement, with no objection by A.D.A. Willingham, this case is DISMISSED with prejudice. Apply cash bond" (**Exhibit 2**).

D. The Expungement Petition Was Not "Filed" or "Granted" under "False Pretenses."

Section 15-27-17 states, "Upon determination by the court that a petition for expungement was filed under false pretenses and was granted, the order of expungement shall be reversed and the criminal history record shall be restored to reflect the original charges."

Seier alleges that Newsome filed his Petition for Expungement under "false pretenses" and that this requires "the expungement order [to] be set aside." He contends that Newsome falsely represented that "all terms and conditions of his underlying agreement and sentence had been completed," when in fact he was "in direct violation of the Deferred Prosecution and Release Agreement through his civil action against [Bullock]" (Seier Petition, ¶ 9-10).

Seier is wrong on the facts. There is no document titled a "Deferred Prosecution and Release Agreement," and Newsome did not represent that "all terms . . . of his underlying agreement had been completed." Finally, there was no "underlying . . . sentence." Newsome was not convicted; the case was dismissed with prejudice (**Exhibit 2**).

Newsome did, however, certify in his Expungement Petition, "I swear or affirm, under the penalty of perjury, that I have satisfied the requirements set out in Act # 2014-292 (codified at Ala. Code 1975, § 15-27-1 et seq.) [and] that I have not previously applied for an expungement. . . ." (**Exhibit E**, page 2). But Seier has not identified any requirement of the expungement act that Newsome had not "satisfied."

Seier's argument is reducible to this: *the "dismissal & release order" contained a release, and Newsome concealed from the court the fact that he was then suing Bullock.* Seier is, however, again wrong on the facts.

The court was fully aware of Newsome's civil action when it granted his Petition for Expungement. On August 24, 2015, Bullock objected to the expungement because "Newsome ha[d] instituted unsuccessful legal action against [him]" and had "filed [a] motion to reinstate" the action (**Exhibit K**). At the hearing on the petition, Bullock's attorney argued that the expungement should not be granted because [Newsome] had filed a civil action against Mr. Bullock (**Exhibit L**) and that if the Court were to grant the expungement petition – Bullock

should be able to use the expunged documents in the civil case. Bullock lost both of these arguments.

The expungement statute does not define "false pretenses," but caselaw does. In *Lambert v. State*, 55 Ala. App. 242, 314 So. 2d 318, 320 (Ala. Crim. App. 1975), the court summarized,

> The offense of false pretense . . . consist[s] of (1) the pretense, (2) its falsity, (3) obtaining property by reason of the pretense, (4) knowledge on the part of the accused of the falsity of the pretense, and (5) intent to defraud.
>
> *Beaty [v. State*, 48 Ala. App. 699, 267 So.2d 490 (Ala. Crim. App. 1972)], holds that a conviction cannot be sustained without proof that there was a reliance on the false representation, and it in fact induced the injured party to part with the goods.

To the extent Newsome's "certification" is read as implying that he had not sued Bullock – *which is quite a stretch* – a claim of "false pretenses" may not be based on a representation "where the victim [here, "the court"] knew the representation to be false and did not believe or rely upon the false representation . . ." *Yeager v. State*, 500 So. 2d 1260, 1267 (Ala. Crim. App. 1986); *See also Graham v. State*, 346 So. 2d 471, 472 (Ala. Crim. App. 1977) ("But Everett, in unloading the gasoline, did not rely on what defendant represented about this check. Such reliance is necessary."). As shown above, when the court granted Newsome's expungement petition, it knew that he was then suing Bullock – because Bullock objected to the petition on this ground.

As a matter law, Newsome's representation that he had complied with the terms of the act was not a "false pretense" that induced the court to grant his petition. The court considered and rejected the arguments that Seier now makes -- that the pendency of Newsome's suit was a reason to deny the Expungement Petition

IV. CONCLUSION

For the reasons stated above, Claiborne Seier's "Petition To Set Aside Expungement Puruant To Ala. Code § 15-27-15 and Joinder In Victim's Motion" is due to be DENIED.

This the 1st day of June 2016.

William R. Justice (JUS001)
Attorney for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June 2016, I have hand delivered a copy of the above document to the counsel listed below or a clerk or person in charge of their offices:

State of Alabama
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James E. Hill, Jr.
Attorney for John W. Bullock
Hill, Weisskopf & Hill, P.C.
P.O. Box 310
Moody, AL 35004

WILLIAM R. JUSTICE

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA DI

STATE OF ALABAMA V. Burton Wheeler Newsome CASE NO. DC 2013-1434

This matter comes before the Court by the specific AGREEMENT of the parties. The Defendant is ✓ present, is ✓ represented by counsel and has Not knowingly and voluntarily waived the right to the same. After due consideration and pursuant to said agreement, all of the following as specifically noted below is hereby ORDERED, ADJUDGED and DECREED.

( ) This matter is Dismissed with ____ prejudice.

(X) This matter is Continued until 4/01/14 9:00 then to be Dismissed with ✓ prejudice, provided that the defendant have no further incidents/arrests

( ) This matter is placed on the Administrative Docket until _____, then to be Dismissed with ____ prejudice, provided that _____

( ) DEFENDANT MUST APPEAR IN COURT ON THE ABOVE DATE.

(X) COURT COSTS ARE TAXED AS FOLLOWS:

$ _____ in further Recoupment to the Fair Trial Tax Fund _____
$ 368.00 in Court Costs including $100.00 Bail Bond Fee _____
$ 20.00 as Jail Housing Costs and all jail Medical Expenses _____
$ 25.00 to the Crime Victims' Compensation Fund _____
$ _____ to the Forensic Science Trust Fund (Act No. 93-733 does ____ apply) _____
$ _____ in Restitution to _____
$ _____ as Worthless Check Cost (IWC #_____) _____

✓ $ 413.00 TOTAL to be deducted from Cash Bond

PAYMENT MAY BE MADE BY CERTIFIED CHECK, MONEY ORDER, OR IF IN PERSON BY CASH TO COURT CLERK, P.O. BOX 1810, COLUMBIANA, AL. 35051. THE ABOVE CASE NUMBER SHOULD APPEAR ON ALL PAYMENTS NOTE: IF THE DEFENDANT FAILS TO MAKE SUCH PAYMENTS AND FAILS TO APPEAR IN COURT ON THE ABOVE DATES SHOWN, THIS MATTER WILL NOT BE DISMISSED AND AN ARREST WARRANT AND BOND FORFEITURE CAN BE ISSUED FOR THE DEFENDANT.

The Defendant does hereby grant a full, complete and absolute Release of all civil and criminal claims stemming directly or indirectly from this case to the State of Alabama, its agents and employees, including, but not limited to the District Attorney for Shelby County, Alabama, his agents and employees; to Shelby County, Alabama, its agents and employees, including, but not limited to the Sheriff of said County, his agents and employees, to any other law enforcement or investigative agencies, public or private, their agents and employees; to any other complainants, witnesses, associations, corporations, groups, organizations or persons in any way related to this matter, to also include the Office of the Public Defender of Shelby County, Alabama, its agents and employees, from any and all actions arising from the instigation, investigation, prosecution, defense, or any other aspect of this matter. The Defendant freely makes this release knowingly and voluntarily. In exchange for this release, this case will be either dismissed immediately, or pursuant to conditions noted above

ANY FEES OR COSTS NOT SPECIFICALLY TAXED ABOVE ARE HEREBY REMITTED.

The foregoing duly reflects the Agreement of the parties as entered above and as attested by their signatures below

Complaining Witness _____ District Attorney _____ Defendant _____ Defendant's Attorney _____

Done and ordered: 11-12-13

DISTRICT JUDGE (SHELBY COUNTY)

D&RORDER(3-11-05)

EXHIBIT 1

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA

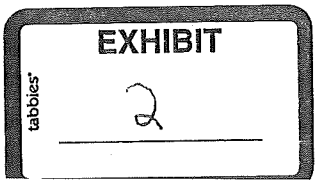
STATE OF ALABAMA	)	
	)	
V.	)	Case No.: DC-2013-001434.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

ORDER

Pursuant to earlier written agreement, with no objection by A.D.A. Willingham, this case is DISMISSED with prejudice. Apply cash bond.

DONE this 4th day of April, 2014.

/s/ RONALD E. JACKSON
DISTRICT JUDGE (amh)



KeyCite Yellow Flag - Negative Treatment
Distinguished by Noland Hosp. Shelby, LLC v. Select Specialty Hospitals, Inc., Ala.Civ.App., September 18, 2015

904 So.2d 1230
Supreme Court of Alabama.

Ex parte SEALY, L.L.C.
(In re Sealy, L.L.C.
v.
Napoleon Banks).

1031820.
|
Dec. 30, 2004.

Synopsis
Background: Vendor of real property petitioned for writs of mandamus and prohibition to compel the Circuit Court, Hale County, No. CV-03-152, Marvin Wayne Wiggins, J., to vacate judgment for purchaser on vendor's breach-of-contract and fraud claims.

Holdings: The Supreme Court, Woodall, J., held that:

[1] judgment purporting to dismiss vendor's claims with prejudice was not effective, and

[2] trial court lacked jurisdiction to enter judgment for purchaser.

Petition granted; writs issued.

West Headnotes (8)

[1] **Mandamus**
Nature and scope of remedy in general

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

7 Cases that cite this headnote

[2] **Mandamus**
Vacation of judgment or order

Mandamus will lie to direct a trial court to vacate a void judgment or order.

9 Cases that cite this headnote

[3] **Prohibition**
Nature and scope of remedy

Prohibition
Existence and Adequacy of Other Remedies

Prohibition is an extraordinary writ, and will not issue unless there is no other adequate remedy.

1 Cases that cite this headnote

[4] **Prohibition**
Want or Excess of Jurisdiction

Prohibition is proper for the prevention of a usurpation or abuse of power where a court undertakes to act in a manner in which it does not properly have jurisdiction.

3 Cases that cite this headnote

[5] **Prohibition**
Remedy by appeal, certiorari, or writ of error in general

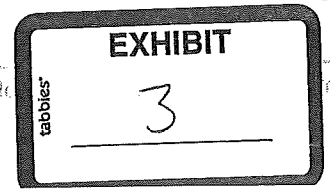
Prohibition
Want or Excess of Jurisdiction

A writ of prohibition will issue only if the pleadings show on their face that the lower court does not have jurisdiction, and in such instance, the act of the usurping court is wholly void, and will not support an appeal.

1 Cases that cite this headnote

[6] **Pretrial Procedure**
Operation and Effect

Order allegedly granting purchaser's motion for dismissal for failure to state a claim was not a valid judgment that dismissed vendor's claims with prejudice; notation was made on motion



docket sheet, which was a "separate written document" that was never filed in clerk's office, as required to be effective. Rules Civ.Proc., Rule 58.

1 Cases that cite this headnote

[7] **Pretrial Procedure**
⇨ Effect

Trial court lacked jurisdiction to enter judgment for purchaser on vendor's breach-of-contract and fraud claims after vendor voluntarily dismissed action without prejudice; at time of dismissal, purchaser had not filed answer to vendor's complaint or motion for summary judgment. Rules Civ.Proc., Rule 41(a)(1).

6 Cases that cite this headnote

[8] **Judgment**
⇨ Mode of rendition

Judgment
⇨ Proceedings for entry

Judgment
⇦ Making and filing

A trial court may "render" a judgment by making a notation on the case action summary, and such a notation constitutes the "entry" of the trial court's judgment; however, a judgment evidenced by a separate written document becomes effective only upon the filing of that document in the clerk's office. Rules Civ.Proc., Rule 58.

Cases that cite this headnote

Attorneys and Law Firms

***1231** W. Cameron Parsons and Randal Kevin Davis of Davidson, Wiggins, Jones & Parsons, P.C., Tuscaloosa, for petitioner.

Christopher A. Thigpen, Tuscaloosa, for respondent.

Opinion

WOODALL, Justice.

Sealy, L.L.C. ("Sealy"), petitions this Court for writs of mandamus and prohibition, directing the Hale Circuit Court to vacate its order dismissing with prejudice Sealy's action against Napoleon Banks and restraining that court from considering an award of attorney fees and costs. We grant the petition and issue the writs.

On October 3, 2003, Sealy sued Banks in the Tuscaloosa Circuit Court. Its complaint contained the following pertinent factual averments:

> "3. On or about the 16th day of June, 2003, in Tuscaloosa, Alabama, [Sealy] agreed to sell to [Banks] a house located at 1919 6th Avenue East, Tuscaloosa, Alabama, for $20,000.00....
>
> "4. [Banks] delivered to [Sealy] payment by check in the amount of $20,000.00. Upon presentment for payment of said check, the check was dishonored by [Banks's] bank and returned to [Sealy].
>
> "5. [Banks] has breached his agreement by tendering a worthless instrument in the amount of $20,000.00 to [Sealy]."

Sealy sought damages under theories of breach of contract and fraud.

On October 31, 2003, Banks filed a "Motion to Dismiss and/or Transfer Venue." More specifically, Banks asserted that the "complaint fail[ed] to state a claim upon which relief [could] be granted," and that venue was proper only in Hale County. On November 17, 2003, Sealy filed an amended complaint, as well as a response to Banks's motion. The amended complaint added three counts specifically averring misrepresentation. On November 25, 2003, Banks moved to strike portions of the amended complaint. On December 9, 2003, the Tuscaloosa Circuit Court transferred the case to Hale County.

On December 16, 2003, Banks moved the Hale Circuit Court to strike portions of the amended complaint. In that motion, Banks also requested in general terms an award of "attorney's fees and costs; and ... [a]ny further relief as [the court deemed] just and proper." On January 13, 2004, the Hale Circuit Court conducted a hearing, which Sealy did not attend.

On January 22, 2004, Banks filed a "Motion to Retain Jurisdiction," advising the court that Sealy was still filing motions in the *Tuscaloosa* Circuit Court. On January 28, 2004, the Hale Circuit Court granted the "motion to retain jurisdiction." Also in that order, the court indefinitely extended the "period to formally answer the complaint."

On February 13, 2004, Sealy filed in the Hale Circuit Court a "notice of dismissal," stating: "The Plaintiff gives Notice of Dismissal of this cause without prejudice pursuant to [Ala. R. Civ. P. 41(a).] The Plaintiff would show that Plaintiff has *not been served with an Answer from the Defendant, nor has Plaintiff been served with a Motion for Summary Judgment.*" (Emphasis added.) On February 20, 2004, the trial court stamped and signed the notice: "Motion granted ... case dismissed."

On March 16, 2004, Banks filed an answer, and asserted counterclaims alleging fraud and breach of contract. The same day, Banks also served Sealy's counsel ***1232** with interrogatories and requests for production. On March 22, 2004, Sealy sent a letter brief to the court, stating, in pertinent part:

> "[Sealy] filed a Notice of Dismissal under Rule 41(a)(1) on February 13, 2004. At the time of the filing of said Notice of Dismissal [Banks] had not filed an Answer to [Sealy's] Complaint, nor a Motion for Summary Judgment; this is not in dispute. Consequently, the law is clear, that upon the filing of the Notice of Dismissal, the case was in fact dismissed, and therefore there was no necessity for this matter to be placed on the court's motion docket. Further, by operation of law upon the occurrence of the dismissal caused by the filing of the Notice of Dismissal, no pleadings filed after said notice can be considered by the court, whether the pleading was an Answer, a Counterclaim, or Motion for Summary Judgment."

On August 12, 2004, the Hale Circuit Court entered an order purporting to dismiss Sealy's action *with prejudice.* The order stated, in pertinent part:

> "[T]he court finds, as did the Tuscaloosa County Circuit Court ..., that this court is and was the proper venue for this action as of the date of filing of the complaint; and further that all pending motions and defenses of [Banks] were properly before this court, submitted and considered without opposition, response or appearance by [Sealy] *at the motion hearing of January 13, 2004,* and that *[Banks's] motions and arguments were well taken and granted as of January 13, 2004.* Consequently, the court finds that *[Sealy's] Notice of Dismissal* and [Banks's] counterclaim both were *untimely at the time of filing;* and it is therefore,
>
> "ORDERED, ADJUDGED and DECREED that judgment is hereby entered in favor of [Banks] and against [Sealy].
>
> "IT IS FURTHER ORDERED, ADJUDGED and DECREED that this matter is set for hearing the 23rd day of September, 2004, ... on [Banks's] request for attorney's fees and cost of court."

(Emphasis added.)

[1] **[2]** Contending that the August 12, 2004, order is void, Sealy filed this petition on August 25, 2004, seeking (1) a writ of mandamus "compelling the circuit court of Hale County to vacate its August 12, 2004, order," and (2) a writ of prohibition restraining the court from "taking any further action in the case, specifically to not hold any further hearings or enter any further orders [regarding attorney fees and costs] in this matter." On October 5, 2004, this Court ordered Banks to answer the petition and to brief the issues.

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

Ex parte Ocwen Federal Bank, FSB, 872 So.2d 810, 813 (Ala.2003)(quoting *Ex parte Alfab, Inc.,* 586 So.2d 889, 891 (Ala.1991)). Mandamus will lie to direct a trial court to vacate a void judgment or order. *Ex parte Chamblee,* 899 So.2d 244, 249 (Ala.2004).

[3] **[4]** **[5]** Like mandamus, prohibition is an extraordinary writ, "and will not issue unless there is no

other adequate remedy." *Ex parte K.S.G.*, 645 So.2d 297, 299 (Ala.Civ.App.1992) (citing *Ex parte Strickland*, 401 So.2d 33 (Ala.1981)). "Prohibition is proper for the prevention of a usurpation ***1233** or abuse of power where a court undertakes to act in a manner in which it does not properly have jurisdiction." *Ex parte K.S.G.*, 645 So.2d at 299. A writ of prohibition will issue "[o]nly if the pleadings show on their face that the lower court does not have jurisdiction." *Ex parte Perry County Bd. of Educ.*, 278 Ala. 646, 651, 180 So.2d 246, 250 (1965). "In such instances, the act of the usurping court is wholly void, and will not support an appeal." *Id.*

[6] Banks contends that this action was, in reality, *dismissed with prejudice* by an order *entered at the motion hearing on January 13, 2004,* that is, before Sealy filed its notice of dismissal. Bank's brief, at 8–9. Thus, he insists, Sealy's *notice of dismissal* and the subsequent order purporting to "grant" the dismissal were void.

In support of this argument, Banks produced, in materials accompanying his respondent's brief, "exhibit 12," which purports to be a copy of an order entered on January 13, 2004. The handwritten "order" states: "All parties appear to have been notified. There is no notice to continue or any contact from [Sealy's] counsel. [Banks] and his counsel were present. *[Banks's] motions* are granted. The other issue regarding attorney's fees will be ruled upon once the jurisdictional issue is resolved." (Emphasis added.) It was initialed by the trial judge.

Banks contends that one of the "motions" purportedly granted on January 13, 2004, was the "Motion to Dismiss and/or Transfer Venue" he filed in the Tuscaloosa Circuit Court on October 31, 2003. In particular, he argues that the January 13, 2004, order granted that portion of the October 31, 2003, motion seeking *dismissal for failure to state a claim.*

In its reply brief, Sealy contends that exhibit 12 is a "document that has never before been seen by Sealy," and that it was not "a part of the court file on August 16, 2004, [when] Sealy reviewed and copied the complete court file located at the Hale County Circuit Clerk's office." Sealy's reply brief, at 1. Additionally, Sealy states:

> "[Exhibit 12] ... appears to be a 'motion docket' sheet for a motion 'day' set by the Circuit Court of Hale County for January 13, 2004....
>
> "[It] contains what appears to be some *handwritten notes* indicating that the Hale County Circuit Court granted some 'motions' of Defendant Banks. The 'note' is *apparently* initialed by Judge Marvin Wiggins and dated for January 13, 2004. *However, the document at issue bears no indication of [its] being 'filed' and no certification stamp indicating that it is indeed a record that is contained in the court file maintained by the Hale County Circuit Court Clerk's Office.* Further, this 'order' does not appear anywhere on the case action summary sheet for the Hale County action."

Sealy's reply brief, at 1–2 (emphasis in original; footnote omitted). Sealy argues that exhibit 12 is not an entry of a judgment of dismissal. For the following reasons, we agree.

Ala. R. Civ. P. 58 governs the rendition and entry, as well as the form and sufficiency, of judgments. Rule 58(a) provides:

> "A judge may render an order or judgment: (1) by notation thereof upon bench notes without any other or further written document or (2) by executing a separate written document, or (3) by including the order or judgment in the opinion or memorandum, or (4) by simply appending to the opinion or memorandum or including therein direction as to the order or judgment sought to be entered."

Rule 58(c) provides, in pertinent part: "Notation of a judgment or order on separately ***1234** maintained bench notes or in the civil docket or the filing of a separate judgment or order *constitutes the entry of the judgment* or order." (Emphasis added.)

[7] [8] "A judgment is effective at the time of its notation in the civil docket or its notation on separately maintained bench notes *or upon the filing of a separate* judgment or order." Rule 58, Committee Comments on 1973 Adoption. Thus, "[a] trial court may 'render' a judgment by making a notation on the case action summary, and such a notation constitutes the 'entry' of the trial court's judgment." *Overy v. Murphy*, 827 So.2d 804, 805 (Ala.Civ.App.2001). However, a judgment evidenced by a "separate written document" becomes effective *only upon the filing of that document in the clerk's office. Ex parte Wright*, 860 So.2d 1253, 1254 (Ala.2002); *Allstate Ins. Co. v. Coastal Yacht Servs., Inc.*, 823 So.2d 632, 633 (Ala.2001); *Smith v. Jackson*, 770 So.2d 1068, 1071–72 (Ala.2000).

In this case, the January 13, 2004, order was not written on the case action summary sheet. [1] It was merely a notation on a "separate written document," namely, a computer printout of a daily docket list. There is no evidence indicating that the document was ever filed in the office of the clerk of the Hale Circuit Court. Thus, assuming that it otherwise satisfied all the elements of a valid judgment, see Jerome A. Hoffman & Sandra C. Guin, *Alabama Civil Procedure* § 8.6 (1990), the judgment the docket list purports to evidence was not effective. We therefore agree with Sealy that its action was not dismissed on January 13, 2004.

Sealy next argues that "[s]ince the Hale County action remained pending [on] February 12, 2004, and since [Banks] had not filed an answer or a motion for summary judgment, Sealy [had the right] ... to dismiss its action pursuant to Rule 41(a)(1) by filing a *notice of dismissal* on February 13, 2004." Sealy's reply brief, at 7 (emphasis in original). Sealy insists that "any action by the Hale County Circuit Court after Sealy filed its notice of dismissal on February 13, 2004, is null and void." *Id.* at 8. We agree.

Rule 41(a)(1) and (2), Ala. R. Civ. P., provides, in pertinent part:

"*(a) Voluntary Dismissal: Effect Thereof.*

"(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of this state, an action *may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment,* whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, *the dismissal is without prejudice* ....

"(2) By Order of Court. *Except as provided in paragraph (1) of this subdivision of this rule,* an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action may be dismissed but the counterclaim shall remain pending for adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

***1235** (Emphasis added.) "The committee comments to Rule 41 state that this rule is substantially the same as the federal rule, and we normally consider federal cases interpreting the federal rules of procedure as persuasive authority." *Hammond v. Brooks,* 516 So.2d 614, 616 (Ala.1987).

It is well settled that "[d]ismissal on motion under [*subdivision (2)* of Rule 41(a)] is within the sound discretion of the court." *Bevill v. Owen,* 364 So.2d 1201, 1202 (Ala.1979); see also *MetFuel, Inc. v. Louisiana Well Serv. Co.,* 628 So.2d 601 (Ala.1993). By contrast, review of a dismissal pursuant to *subdivision (1)* is *de novo.* See *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel,* 2 F.3d 544, 545 (4th Cir.1993); *Matthews v. Gaither,* 902 F.2d 877, 879 (11th Cir.1990). This is so, because "Rule 41(a)(1) affords the plaintiff an *unqualified right* to dismiss" its action before the filing of an answer or a summary-judgment motion. *Clement v. Merchants Nat'l Bank of Mobile,* 493 So.2d 1350, 1353 (Ala.1986) (emphasis added); see also *Marex Titanic, Inc.,* 2 F.3d at 546. Conversely, Rule 41(a)(1) affords the trial court *no discretion.* See *Williams v. Ezell,* 531 F.2d 1261, 1264 (5th Cir.1976).

The effect of a notice of dismissal pursuant to Rule 41(a)(1) was succinctly explained in *Reid v. Tingle,* 716 So.2d 1190, 1193 (Ala.Civ.App.1997). There, the Court of Civil Appeals said:

"A voluntary dismissal under Ala. R. Civ. P. 41 terminates the action when the notice of the plaintiff's intent to dismiss is filed with the clerk. See ... *Hammond v. Brooks,* 516 So.2d 614 (Ala.1987). The committee comments to Rule 41, Ala. R. Civ. P., note that the rule is 'substantially the same as the corresponding federal rule.' See Ala. R. Civ. P. 41, Committee Comments on 1973 Adoption. In interpreting F.R. Civ. P. 41(a)(1), the Fifth Circuit stated:

" 'Rule 41(a)(1) is the shortest and surest route to abort a complaint when it is applicable. So long as plaintiff has not been served with his adversary's answer or motion for summary judgment he need do no more than file a *notice* of dismissal with the Clerk. *That document itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play.* This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. *There is not even a perfunctory*

order of court closing the file. Its alpha and omega was the doing of the plaintiff alone.'

"*American Cyanamid Co. v. McGhee,* 317 F.2d 295, 297 (5th Cir.1963)."

716 So.2d at 1193 (second emphasis added).

Although cases involving a Rule 41(a)(1) dismissal "are not perfectly analogous to cases in which the ... court lacks subject matter jurisdiction, both contexts present the question of the court's continuing power over litigants who do not, or no longer, have a justiciable case before the court." *Chemiakin v. Yefimov,* 932 F.2d 124, 128 (2d Cir.1991). Thus, it is sometimes stated that a Rule 41(a)(1) dismissal deprives the trial court of "jurisdiction" over the "dismissed claims." *Duke Energy Trading & Mktg., L.L.C. v. Davis,* 267 F.3d 1042, 1049 (9th Cir.2001); see *Safeguard Business Sys., Inc. v. Hoeffel,* 907 F.2d 861, 864 (8th Cir.1990); see also *Gambale v. Deutsche Bank AG,* 377 F.3d 133, 139 (2d Cir.2004); *Netwig v. Georgia Pacific Corp.,* 375 F.3d 1009, 1011 (10th Cir.2004); *Meinecke v. H & R Block of Houston,* 66 F.3d 77, 82 (5th Cir.1995); *Williams v. Ezell,* 531 F.2d 1261, 1264 (5th Cir.1976) ("The court had no power or discretion to deny plaintiffs' right to dismiss or to attach any condition ***1236** or burden to that right. That was the end of the case and the attempt to deny relief on the merits and dismiss with prejudice was void.").

Similarly stated, "[t]he effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought." *In re Piper Aircraft Distrib. Sys. Antitrust Litig.,* 551 F.2d 213, 219 (8th Cir.1977). Moreover, " '[i]t carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim.' " *Id.* (quoting 27 C.J.S. *Dismissal and Nonsuit* § 39 (1959)). In particular, "Rule 41(a)(1)(i)[, Fed.R.Civ.P.,] prevents an award of 'costs' against the party who dismisses the suit voluntarily. Only the filing of a second suit on the same claim allows the court to award the costs of the first case. See Rule 41(d)[, Fed.R.Civ.P.]...." *Szabo Food Serv., Inc. v. Canteen Corp.,* 823 F.2d 1073, 1077 (7th Cir.1987).

In opposition to these principles, Banks cites *Harvey Aluminum, Inc. v. American Cyanamid Co.,* 203 F.2d 105 (2d Cir.1953), a "vintage [case] support [ing] the notion that, when a case has advanced substantially beyond the pleadings, so that the merits of the controversy have been 'squarely raised,' a voluntary dismissal may no longer be obtained by the plaintiff." *Woody v. City of Duluth,* 176 F.R.D. 310, 314 (D.Minn.1997) (discussing *Harvey*). However, "*Harvey* has received a 'cool reception' " in the federal circuits, *Johnson Chemical Co. v. Home Care Prods., Inc.* 823 F.2d 28, 30 (2d Cir.1987) (quoting *Thorp v. Scarne,* 599 F.2d 1169, 1175 (2d Cir.1979)), abrogated on other grounds, *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), and, even in its *own* circuit, has been "limited to its 'extreme' facts." *Johnson Chemical,* 823 F.2d at 30 (quoting *Santiago v. Victim Serv. Agency of the Metropolitan Assistance Corp.,* 753 F.2d 219, 222 (2d Cir.1985), overruling on other grounds recognized by *Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt. Dist.,* 71 F.3d 1053 (2d Cir.1995)). Banks's reliance on *Harvey* is misplaced.

In this case, it is undisputed that neither an answer nor a motion for a summary judgment was filed before Sealy filed its notice of dismissal on February 13, 2004. That notice *ipso facto* deprived the trial court of the power to proceed further with the action and rendered all orders entered after its filing void. Moreover, the notice "carried down with it [all] *previous* proceedings and orders in the action, and all pleadings, both of [Sealy] and [Banks], and all issues, with respect to [Sealy's] claim," *In re Piper Aircraft,* 551 F.2d at 219 (emphasis added), including the request for attorney fees and costs set forth in Banks's December 16, 2003, motion to strike. Thus, the trial court was without jurisdiction to enter its August 12, 2004, order rendering a judgment in favor of Banks and purporting to reserve for further consideration Banks's request for attorney fees and costs.

We therefore issue a writ of mandamus directing the trial court to vacate all orders entered after February 13, 2004, and a writ of prohibition restraining the trial court from considering the request for attorney fees and costs.

PETITION GRANTED; WRITS ISSUED.

NABERS, C.J., and HOUSTON, SEE, LYONS, BROWN, JOHNSTONE, HARWOOD, and STUART, JJ., concur.

All Citations

904 So.2d 1230

EXHIBIT 12 TO NEWSOME'S PETITION

Newsome's "Motion to Expunge" delivered to Bonita Davidson on June 2, 2016.

STATE OF ALABAMA
COUNTY OF SHELBY

AFFIDAVIT

Before me, the undersigned authority, personally appeared William R. Justice, who being known to me and being by me first duly sworn, deposed and said as follows:

My name is William R. Justice. I am a practicing attorney with the law firm Ellis, Head, Owens & Justice in Columbiana, Shelby County, Alabama. At all time pertinent to the matters covered by this Affidavit, I was representing Burton Wheeler Newsome in an expungement proceeding related to Case No. CC 2015-000121 in the Circuit Court of Shelby County, Alabama.

On June 2, 2016, I appeared in the Shelby County Courthose with a document entitled Motion to Expunge consisting of 3 pages and 2 pages of exhibits, a true and correct copy of which is attached to this affidavit. I went to Judge Conwill's office and left a copy of the attached document with his legal assistant, Bonita Davidson.

This the 10th day of June, 2016.

William R. Justice

Sworn to and subscribed before me
this 10th day of June, 2016.

Notary public

My commission expires: 09-09-2019

SEAL

TAMMY L SEALE NOTARY PUBLIC ALABAMA STATE AT LARGE

Exhibit 12 to Newsome Petition 001

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. CC 2015-000121
	)	
BURTON WHEELER NEWSOME,	)	
	)	
Defendant.	)	

MOTION TO EXPUNGE

Comes now the Defendant and moves the Court to expunge all pleadings and records relating to the above styled case. As grounds for this motion the Defendant shows the court the following:

1. Section 15-27-6(a) of the Alabama Code provides, "[U]pon the granting of a petition pursuant to this chapter, the court, pursuant to Section 15-27-9, shall order the expungement of all records in the custody of the court and any records in the custody of any other agency or official, including law enforcement records . . ."

2. On September 10, 2105, Honorable Judge Reeves of Circuit Court of Shelby County entered an order expunging "[a]ll records concerning the charge, arrest, and incarceration of Burton Wheeler Newsome, on the misdemeanor of menacing . . ." The records "expunged" included all "data, whether in documentary or electronic form relating to the arrest or charge." A true and correct copy of the order of expungement is attached hereto as "Exhibit 1."

3. Section 15-27-16(a) further provides, "[A]n individual who knows an expungement order was granted pursuant to this chapter and who intentionally and

maliciously divulges, makes known, reveals, gives access to, makes public, uses, or otherwise discloses the contents of an expunged file without a court order, or pursuant to a provision of this chapter, shall be guilty of a Class B misdemeanor."

4. The deadline to file post-trial motions has passed. The time for filing such motion expired on October 12, 2015 (Ala. R. Civ. P. 59(b)).

5. Section 15-27-5(c) provides a trial court's ruling on a Petition for Expungement is "subject to certiorari review." The Court of Criminal Appeals has held that the procedure is governed by rule 21 of the *Alabama Rules of Appellate Procedure*. "The writ shall comply in form and timing with Rule 21(a), Ala. R. App. P." *Bell v. State*, CR -15- 0618 (Ala. Crim. App. April 29, 2016), slip op. at 4-5. Under rule 21(a), "The petition shall be filed within a reasonable time. The presumptively reasonable time for filing a petition seeking review of an order of a trial court or of a lower appellate court shall be the same as the time for taking an appeal." The time for taking an appeal is 42 days from the date of the order. The deadline to file a petition for certiorari with any appellate court has expired on October 22, 2015 (Ala. R. App. P. 4(a)).

5. The purpose of pleadings being filed by John F. Bullock, Jr. and Claiborne Seier is to simply put the expunged records back into the public domain.

WHEREFORE, THE PREMISES CONSIDERED, Defendant respectfully requests that this Court enter an Order expunging all pleadings filed in this case consistent with the Court's prior Order granting the Expungement Petition.

Respectfully submitted this the 2nd day of June, 2016.

William R. Justice (JUS001)
Attorney for Defendant

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P.O. Box 587
Columbiana, AL 35051
phone: (205)669-6783
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2016, I have hand delivered a copy of the above document to the counsel listed below or a clerk or person in charge of their offices:

State of Alabama
A. Gregg Lowery
Assistant District Attorney
P.O. Box 706
Columbiana, AL 35051

James E. Hill, Jr.
Attorney for John W. Bullock
Hill, Weisskopf & Hill, P.C.
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Moody, AL 35004

Robert Ronnlund
2450 Valleydale Road
Hoover, AL 35244

William R. Justice

DOCUMENT 265

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-2015-000121.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

ORDER ON PETITION FOR EXPUNGEMENT OF RECORDS

ORDER ON PETITION FOR EXPUNGMENT OF RECORDS

This case comes before the Court on the motion of Burton Wheeler Newsome (or "Newsome") to Alter, Amend, or Vacate its order dated August 31, 2015, denying his Petition for Expungement of Records related to his arrest for the misdemeanor of menacing. UPON CONSIDERATION thereof, the motion be and hereby is GRANTED, and the order dated August 31, 2015, be and hereby is VACATED and Newsome's Petition for Expungement of Records is GRANTED.

Upon consideration of the motion and the matters of record in this case, the court hereby finds as follows:

1. "Menacing" is a "misdemeanor criminal offense," and records concerning a charge of menacing are subject to expungement under section 15-27-1 of the Alabama Code.

2. The District Attorney of Shelby County was served with Newsome's Petition for Expungement on April 28, 2015.

3. Neither the district attorney nor the victim filed any objection to the Petition for Expungement within 45 days as required by section 15-27-3(c) of the Alabama Code. Consequently, they "have waived the right to object."

4. The record in this case reflects that the misdemeanor charge against Newsome was dismissed with prejudice by the District Court of Shelby County, Alabama, on April 4, 2014.

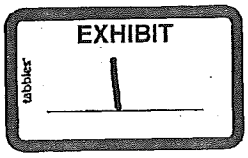
5. Newsome has therefore satisfied the requirements for expungement under section 15-27-1 *et seq.*

BASED ON THE FOREGOING, it is therefore ORDERED by the court as follows:

1. The Petition for Expungement of Records filed by Burton Wheeler Newsome is GRANTED.

2. All "records" concerning the charge, arrest, and incarceration of Burton Wheeler Newsome, on the misdemeanor of menacing be and hereby are EXPUNGED.

3. The charge and arrest subject to this order are further identified as case number DC 2013-001434 in the District Court of Shelby County Alabama, which case



originated with a complaint signed by John Franklin Bullock, Jr., on January 14, 2013, alleging that Newsome committed the crime of "menacing" in violation of section 13A-6-23 of the Alabama Code.

4. The "records" subject to this order include but are not limited to "arrest records," "booking or arrest photographs," "index references such is the State Judicial Information Services or any other governmental index references for public records search," and all "other data, whether in documentary or electronic form relating to the arrest or charge," as provided in section 15-27-9 of the Alabama Code.

5. Pursuant to section 15-27-6 of the Alabama Code, the District Court of Shelby BE AND HEREBY IS ORDERED TO EXPUNGE any and all "records" of the charge, arrest and incarceration except as otherwise provided in sections 15-27-6 and 15-27-10 of the Alabama Code.

6. Pursuant to section 15-27-6 of the Alabama Code, "any other agency or official" having custody of any such records BE AND HEREBY IS ORDERED TO EXPUNGE any and all "records" of the charge, arrest and incarceration except as otherwise provided in sections 15-27-6 and 15-27-10 of the Alabama Code.

DONE this 10th day of September, 2015.

/s/ DAN REEVES
CIRCUIT JUDGE