AlaFile E-Notice

01-CV-2015-900190.00

Judge: CAROLE C. SMITHERMAN

To: ROBERT ENTREKIN LUSK JR.
rlusk@lusklawfirmllc.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

BURT W NEWSOME ET AL V. CLARK ANDREW COOPER ET AL
01-CV-2015-900190.00

The following matter was FILED on 9/28/2015 4:29:28 PM

C001 NEWSOME BURT W

C002 NEWSOME LAW LLC

MOTION TO AMEND

[Filer: LUSK ROBERT ENTREKIN JR.]

Notice Date: 9/28/2015 4:29:28 PM

ANNE-MARIE ADAMS
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
716 N. RICHARD ARRINGTON BLVD.
BIRMINGHAM, AL 35203

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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
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STATE OF ALABAMA
Unified Judicial System

Revised 3/5/08

01-JEFFERSON ☐ **District Court** ☑ **Circuit Court**

Case CV20

BURT W NEWSOME ET AL V. CLARK ANDREW COOPER ET AL

CIVIL MOTION COVER SHEET

Name of Filing Party: C001 - NEWSOME BURT W
C002 - NEWSOME LAW LLC

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.
ROBERT ENTREKIN LUSK JR.
P O BOX 1315
FAIRHOPE, AL 36533

Attorney Bar No.: LUS005

☐ Oral Arguments Requested

TYPE OF MOTION

Motions Requiring Fee

- ☐ Default Judgment ($50.00)
- ☐ Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Judgment on the Pleadings ($50.00)
- ☐ Motion to Dismiss, or in the Alternative Summary Judgment($50.00)
- ☐ Renewed Dispositive Motion(Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Summary Judgment pursuant to Rule 56($50.00)
- ☐ Motion to Intervene ($297.00)
- ☐ Other _____ pursuant to Rule _____ ($50.00)

*Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

☐ Local Court Costs $ 0.00

Motions Not Requiring Fee

- ☐ Add Party
- ☑ Amend
- ☐ Change of Venue/Transfer
- ☐ Compel
- ☐ Consolidation
- ☐ Continue
- ☐ Deposition
- ☐ Designate a Mediator
- ☐ Judgment as a Matter of Law (during Trial)
- ☐ Disburse Funds
- ☐ Extension of Time
- ☐ In Limine
- ☐ Joinder
- ☐ More Definite Statement
- ☐ Motion to Dismiss pursuant to Rule 12(b)
- ☐ New Trial
- ☐ Objection of Exemptions Claimed
- ☐ Pendente Lite
- ☐ Plaintiff's Motion to Dismiss
- ☐ Preliminary Injunction
- ☐ Protective Order
- ☐ Quash
- ☐ Release from Stay of Execution
- ☐ Sanctions
- ☐ Sever
- ☐ Special Practice in Alabama
- ☐ Stay
- ☐ Strike
- ☐ Supplement to Pending Motion
- ☐ Vacate or Modify
- ☐ Withdraw
- ☐ Other _____ pursuant to Rule _____ (Subject to Filing Fee)

Check here if you have filed or are filing contemoraneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees) ☐

Date: 9/28/2015 4:23:53 PM

Signature of Attorney or Party: /s/ ROBERT ENTREKIN LUSK JR.

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

ELECTRONICALLY FILED
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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

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:

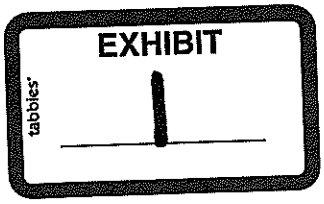
1. My name is Robert E. Lusk, Jr., and I have personal knowledge of the facts stated herein.

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

ELECTRONICALLY FILED
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").

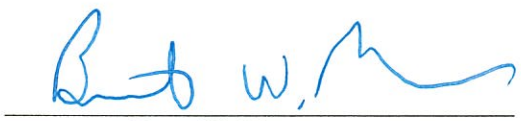
On December 19, 2012, I was scheduled to appear at a hearing in Pell City, St. Clair County, Alabama. When I exited my office and approached my vehicle, John Bullock ("Bullock") exited his vehicle, which was parked in backwards adjacent to my vehicle and had been there for approximately one hour, and 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

EVENT

1 ORI #	2 Date of Report	3 Time of Report	4 Type Report	5 Supplement Date	6 Agency Case Number	7 Suffix
AL059000O	01 30 12	17 25	☐ Incident ☒ Offense ☐ Supplement		26120795	

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

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	23 Age
☒ M ☐ F	☒ W ☐ A ☐ B ☐ I	☐ Hispanic ☐ Other	☐ Multiple Victims ☐ LE Officer	45

24 Offender Suspected of Using	25 Gang	26 Hate Bias	27 Bias Code
☐ Alcohol ☐ Drugs ☐ Computer Equipment ☒ N/A	☐ Juvenile Gang ☐ Adult Gang ☒ None/Unknown	☐ Yes ☐ No	

28 Domestic Violence ☐ No ☐ Yes

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	34 Location Type (Circle)		
(1) Clear 2 Cloudy 3 Rain 4 Fog 5 Snow 6 Hail 7 Unknown	01 Terminal 02 Bank 03 Bar 04 Church 05 Commercial 06 Construction 07 Conv Store 08 Dept Store	09 Drug Store 10 Field/Woods 11 Govt/Public Building 12 Supermarket 13 Highway/Street 14 Hotel/Motel 15 Jail/Prison 16 Lake/Waterway	17 Liquor Store (18) Parking Lot/Garage 19 Storage Facility 20 Residence/Home 21 Restaurant 22 School/College 23 Service/Gas Station 24 Specialty Store 25 Other/Unknown

35 Occurred from MM/DD/YY	36 Time of Event	37 Day of Week	41 # Premises Entered
01 30 12	16 50 ☐ AM ☐ PM ☒ MIL	S 1 M 2 T 3 W 4 T 5 F 6 S 7	(Burglary)
38 Occurred to MM/DD/YY	**39 Time of Event**	**40 Day of Week**	
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, 02 Alcohol, 03 Autos, 04 Bicycles, 05 Buses, 06 Clothes, 07 Computer, 08 Consumables, 09 Credit Card, 10 Drugs, 11 Drug Equip, 12 Farm Equip, 13 Firearms, 14 Gambling Equipment, 15 Heavy Construction, 16 Household Goods, 17 Jewelry, 18 Livestock, 19 Merchandise, 20 Money, 21 Negotiable Instrument, 22 Non-negotiable Instru, 23 Office Equipment, 24 Other Motor Vehicle, 25 Purse/Wallet, 26 Radios/TV/VCR, 27 Recordings, 28 RV's, 29 Structure - Single Occupancy Dwelling, 30 Structure - Other Dwelling, 31 Structure - Other Commercial, 32 Structure - Industrial/ Manufacturing, 33 Structure - Public/Community, 34 Structure - Storage, 35 Structure - Other, 36 Tools - Power/Hand, 37 Trucks, 38 Vehicle Parts/Accessories, 39 Watercraft, 77 Other

VEHICLES

50 Stolen Vehicle Only	Area Stolen	51 Ownership verified by:	52 Veh. Categories
	☐ Residence ☐ Business ☐ Rural	☐ Tag Receipt ☐ Title ☐ Bill of Sale ☐ Other	☐ 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	Warrant Number
	☐ Yes ☐ No	

Motor Vehicle Recovery Only Required For 24XX UCR Code	66 Stolen in your jurisdiction?	67 Recovered in your jurisdiction?
	☐ Yes ☐ No Where?	☐ Yes ☐ No Where?

ADMINISTRATION

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

74 Case Status	75 Multiple Cases Closed Listed Above ☐ Multiple Cases Closed Listed On Supplement ☐	79 Reporting Officer	Officer ID Number
(1) Pending 2 Inactive 3 Closed		A MITCHELL	453

76 Entered NCIC/ACJIC	77 Case Disposition	78 Exceptional Clearance (Circle One)	80 Assisting Officer	Officer ID Number
☐ Yes ☐ No	1 Cleared by Arrest (Juvenile) 2 Cleared by Arrest (Adult) 3 Unfounded 4 Exceptional Clearance 5 Administratively Cleared	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		

Date (MM/DD/YY)	NIC/AIN #:	81 Supervisor Approval	Officer ID Number
			240

82 Watch Commander ____ Officer ID Number

EXHIBIT A

ACJIC - 11-05

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): 01 30 12
84 Time of Report: 17 25 ☐AM ☐PM ☒MIL
85 Agency Case Number: 2012007955
86 Suffix:
87: ☐Offender ☒Suspect ☐Missing Person ☐Check if Multiple

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

VICTIM INFORMATION

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

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

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

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

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

123 Place of Occurrence (Enter exact street address here.): 194 NARROWS DRIVE BHAM, AL 35242
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: EAST

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

SUSPECT INFORMATION

132 Off #: 1
133 Name (Last, First, Middle): SEIEK, ALFRED WALLACE
134 SFX:
135 Alias:
136 Social Security #: 421-44-3471
137 Race: ☒W ☐B ☐A ☐I
138 Sex: ☒M ☐F
139 Date of Birth: 05 07 35
140 Age: 76
141 Address (Street, City, State, Zip): 7091 BETHEL ROAD DORA, AL 35062
142 HGT: 6'2"
143 WGT: 190
144 Ethnicity: ☐Hispanic ☐Other
145 Language: ☒English ☐Spanish ☐Other
146 Probable Destination:
147 Eye: BRO
148 Hair: GRY
149 Complexion: MED
150 Armed: ☒Yes ☐No Weapon
151 Clothing:
152: ☐Scars ☐Marks ☐Tattoos ☐Amputations
153: ☐Arrested ☐Dual Arrest (Domestic Violence) ☒Wanted

154 Off #:
155 Name (Last, First, Middle):
156 SFX:
157 Alias:
158 Social Security #:
159 Race: ☐W ☐A ☐B ☐I
160 Sex: ☐M ☐F
161 Date of Birth:
162 Age:
163 Address (Street, City, State, Zip):
164 HGT:
165 WGT:
166 Ethnicity: ☐Hispanic ☐Other
167 Language: ☐English ☐Spanish ☐Other
168 Probable Destination:
169 Eye:
170 Hair:
171 Complexion:
172 Armed: ☐Yes ☐No Weapon
173 Clothing:
174: ☐Scars ☐Marks ☐Tattoos ☐Amputations
175: ☐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 SEIEK. AL FRED TOLD MR. NEWSOME THAT THIS WAS THE LAST TIME HE WAS GOING TO FUCK HIS WIFE OVER AND MEN POINTED AN UNK. TYPE FIREARM AT HIM. MR. NEWSOME THEN RAN AROUND THE BUILDING AND INTO HIS OFFICE. MR. SEIEK WAS GONE PRIOR TO MY ARRIVAL.

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

☐Continued on Supplement

204 Continued on Supplement: ☐Yes ☒No
205 Assisting Agency ORI:
206 Assisting Agency Case Number:
207 SFX:
208 Warrant Signed: ☐Yes ☐No Warrant #:
209 Add. Cases Closed Narrative: ☐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 - 11-06

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	

OFFNDR

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) SU1 Also Known As						Home Address	
Seier, Alfred Wallace						*7091 Bethel Road, Dora, AL 35062*	
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

NARRATIVE

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 Selco

ELECTRONICALLY FILED
5/8/2012 4:16 PM
DC-2012-000431.00
CIRCUIT COURT OF
SHELBY COUNTY, ALABAMA
MARY HARRIS, CLERK

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 Mavis 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 24 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: _____.
$_____ 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
tabbies
B

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

ELECTRONICALLY FILED
4/4/2014 2:58 PM
58-DC-2013-001434.00
CIRCUIT COURT OF
SHELBY COUNTY, ALABAMA
MARY HARRIS, CLERK

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA

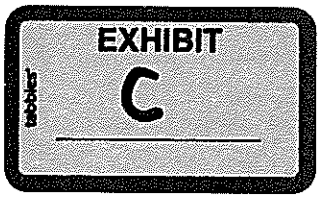
STATE OF ALABAMA	)	
	)	
V.	)	Case No.: DC-2013-001434.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

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>

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Thank You.

Shelby County Inmates

NEWSOME, BURTON WHEELER

05/02/2013 05/02/2013

MENACING

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

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

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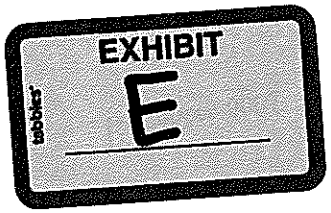

Cooper, Clark

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
& 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
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EXHIBIT
F

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
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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

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