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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACQUELINE ANDERSON SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

DAVID ROBERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. CV-2019-901210**
	)	
DRUMMOND COMPANY, INC.; AND BALCH & BINGHAM, LLP,	)	**ORAL ARGUMENT RESPECTFULLY REQUESTED**
	)	
	)	
Defendants.	)	

MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant Balch & Bingham, LLP ("Balch" or "Defendant") respectfully requests this Honorable Court to enter an Order dismissing all claims against Balch because:

(a) Plaintiff David Roberson ("Roberson") failed to timely file his Complaint within any applicable statutes of limitations, and his filing falls outside of the Alabama Legal Services Liability Act's statute of repose;

(b) Balch represented Drummond Company, Inc. ("Drummond"), and owed no duty to Roberson individually;

(c) All of Roberson's claims are barred by the *Hinkle* Rule because of Roberson's own wrongdoing and criminal conviction; and

(d) Alabama law does not permit recovery for implied indemnity when the party to be indemnified (Roberson) is at fault.

See *Ala. R. Civ. P.* 12(b)(6). In further support of this Motion, Balch respectfully states as follows:

INTRODUCTION

On March 15, 2019, Roberson filed this lawsuit against Balch and Drummond. Drummond is a former Balch client. (Complaint ¶ 3.) Roberson is a former Drummond officer in charge of governmental relations. (Complaint ¶ 4.) Drummond sought to prevent the United

States Environmental Protection Agency ("EPA") from placing a site in North Birmingham (the "North Birmingham Site") on its National Priorities List ("NPL"), to avoid being held responsible for environmental cleanup costs at the site. (Complaint ¶ 2.)

Drummond hired Balch as its legal counsel. (Complaint ¶ 3.) Roberson alleges that Balch engaged in a scheme to retain State Representative Oliver Robinson to assist in community relations efforts with residents near the North Birmingham Site. (Complaint ¶ 3.) Balch paid the Oliver Robinson Foundation a monthly fee, and the payments were reimbursed by Drummond. (Complaint ¶ 3.) Roberson expressly alleges that in November 2014, Balch told Roberson that the payments to the Foundation would be legal and ethical. (Complaint ¶ 4.) Roberson was in charge of governmental relations for Drummond and, according to the Alabama Ethics Commission's publicly available electronic records, Roberson has been a registered lobbyist with the State of Alabama since 2008[1]. And yet, Roberson claims he relied on Balch's

[1] *See* relevant portions of transcript of the trial in *USA v. Gilbert, et al.*, United States District Court for the Northern District of Alabama, Case No. 2:17-cr-00419-AKK, pp. 1468, 1687, attached hereto as **Exhibit A**. The trial transcript, including exhibits (or relevant portions thereof), may be referenced and attached hereto without converting this motion into one for summary judgment under the general Alabama and federal rule that documents attached to a motion to dismiss and central to a complaint may be considered on a motion to dismiss as part of the pleadings. *See Snider v. Morgan*, 113 So. 3d 643, 648 (Ala. 2012) ("[T]he motions to dismiss were not converted to motions for a summary judgment, because the exhibits set out above were specifically referenced in Jeff's complaint and, thus, were not matters outside the pleading); *Donoghue v. American Nat'l Ins. Co.*, 838 So.2d 1032, 1035 (Ala.2002) (adopting the rule from federal cases "precluding conversion when the exhibits in question are referred to in, and are central to, the plaintiff's complaint"). *See also Lewis v. First Tuskegee Bank*, 964 So.2d 36, 39 n. 1 (Ala.Civ.App.2007) ("'[D]ocuments attached to a motion to dismiss are considered a part of the pleadings if those documents were specifically referred to in the plaintiff's complaint and are central to the claim being brought.'" (quoting *Banks, Finley, White & Co. v. Wright*, 864 So.2d 324, 327 (Ala.Civ.App.2001))."). In *Jackson v. City of Argo*, 2019 WL 281302 *5 n.8 (N.D. Ala. Jan. 22, 2019), the Court noted that a motion to dismiss is not converted to one for summary judgment "where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim. . ." (quoting *Brooks v. Blue Cross Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997)). The Court in *Jackson* went on to state: "[t]hat is true here, since Jackson references the trial and Captain Wells's testimony in several paragraphs of his amended complaint . . . and the content and outcome of the trial are central to several of Jackson's claims." *Jackson*, 2019 WL 281302 at *5 n.8. The Complaint refers to the indictment--"on September 27, 2017, a federal grand jury returned a six-count indictment" (Complaint ¶ 7). The Complaint also refers to the trial evidence -- "After the Balch attorney blocked, on Sixth Amendment grounds, the Plaintiff's evidence at trial supporting his advice-of-counsel defense, a jury returned a verdict finding both the Balch attorney and the Plaintiff guilty on all counts." (Complaint ¶ 7.)

representations, did not object to, and approved Drummond's reimbursing Balch for the payments to the Oliver Robinson Foundation. (Complaint ¶ 5.) The payments to the Oliver Robinson Foundation, and work by Robinson on Drummond's behalf, resulted in Roberson (and Balch partner Joel Gilbert) being convicted of six federal bribery and conspiracy violations. (Complaint ¶ 7.)

Roberson's claims are founded upon the 2014 legal advice allegedly provided by Balch to Roberson[2]. (Complaint ¶ 4.) The Alabama Legal Services Liability Act ("ALSLA"), ALA. CODE § 6-5-570, *et seq.*, is the sole and exclusive cause of action against legal service providers. ALA. CODE § 6-5-573 ("Any action against a legal service provider in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider's violation of the standard of care applicable to a legal service provider. A legal service liability action embraces all claims for injuries or damages or wrongful death whether in contract or in tort and whether based on an intentional or unintentional act or omission.") Claims under the ALSLA must be filed within two years of the alleged wrongdoing (ALSLA statute of limitations).

In addition, Rule 201 of the Alabama Rules of Evidence permits this Court to take judicial notice of the referenced Alabama Ethics Commission records, which include publicly-available filings by Roberson and other registered lobbyists.

[2] Because Roberson argued that he relied on bad legal advice in his criminal trial, he is collaterally estopped from making that argument in this case. In his federal criminal case, Roberson argued that he relied on the advice of counsel (i.e., Balch partner Joel Gilbert). (*See U.S. v. Gilbert, et al*, July 2, 2018, Trial Tr. 1395, 1399, 1401-1404, 1446-49 (Tracy Test.); July 16, 2018, Trial Tr. 3868-69, 3930-36 (Gilbert Test.); 4523-27 (Asbill Closing Arg. for Roberson). The district court instructed the jury on Roberson's advice-of-counsel defense. (*U.S. v. Gilbert, et al*., July 18, Trial Tr. 4384 ("Evidence that a defendant in good faith followed the advice of counsel would be inconsistent with the unlawful intent required for each charge in this case."). The jury rejected that defense and found him guilty of conspiring with Gilbert to bribe Oliver Robinson, bribery, three counts of honest services wire fraud, and conspiracy to money launder. (Indictment; Roberson Verdict Form.)

The federal district court's judgment of conviction, finding Roberson guilty on all counts, means that the jury necessarily rejected his advice-of-counsel defense. Roberson had the opportunity and did litigate that he relied on the advice of counsel (i.e., Joel Gilbert of Balch) in the criminal case. He lost. Roberson is collaterally estopped from re-litigating his supposed reliance on advice of counsel in this malpractice case. *See Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 726 (Ala. 1990); *Ex parte Flexible Prod.* Co., 915 So. 2d 34, 48 (Ala. 2005); *Fid.-Phenix Fire Ins. Co. of New York v. Murphy*, 146 So. 387, 392 (Ala. 1933); *Wolfson v. Baker*, 623 F.2d 1074, 1080-81 (5th Cir. 1980) (holding prior criminal conviction established defense in civil case under collateral estoppel).

Although there is a six-month discovery rule for the statute of limitations under the ALSLA, in no event may a claim (whether discovered or not) be asserted more than four years after the alleged wrongdoing (ALSLA statute of repose). Roberson's fundamental allegation that in November 2014, Balch gave bad legal advice (Complaint ¶ 4), which resulted in Roberson being convicted of violations of federal bribery laws, is fatal to his claims which were not filed until March 15, 2019. In addition, Roberson's receipt and response to a federal subpoena in January 2017 (more than two years before the filing of his Complaint) put Roberson on notice of the alleged bad advice and suppression. As a result, Roberson's claims against Balch are time-barred – under the ALSLA and also under common law principles – and therefore due to be dismissed with prejudice. In addition, even assuming the Complaint was timely filed, Roberson's claims are due to be dismissed because Balch owed no duty to a non-client. Roberson's criminal convictions also bar his claims as a matter of Alabama law and policy. Finally, Roberson's implied indemnity claim is due to be dismissed because Roberson individually is at fault for his part in the conduct that resulted in his criminal conviction.

STATEMENT OF FACTS

1. Roberson purports to assert four causes of action: negligence, fraud, suppression, and implied indemnity against Balch and Drummond. (Complaint, *ad damnum*.)

2. Roberson's claims against Balch are:

- Drummond hired then-Balch partner Joel Gilbert as its legal counsel in defending against the U.S. Environmental Protection Agency's ("EPA's") efforts to place the North Birmingham Site on the NPL.[3] (Complaint ¶¶ 2-3.) Roberson, then a

[3] Exhibit DX 0538-001 to the transcript of the trial in *USA v. Gilbert, et al.*, United States District Court for the Northern District of Alabama, Case No. 2:17-cr-00419-AKK, is a letter from the EPA to the mayor of Tarrant stating that the EPA tested the area in Tarrant being considered for inclusion in the 35th Avenue Superfund Site. (*See* **Exhibit B**, attached hereto.) The EPA's test results showed that the area did not have enough pollutants to be included in the Superfund site and, therefore, the EPA stated that it would conduct no further activities in Tarrant.

Drummond employee, worked with Balch on the North Birmingham matter. (Complaint, generally.)

- Balch paid the Oliver Robinson Foundation a monthly fee pursuant to a consulting contract and, in exchange, then-state legislator Oliver Robinson assisted Balch in community relations efforts. (Complaint ¶ 3.)

- In November 2014, then-Balch partner Joel Gilbert told Roberson that the foregoing plan was legal. (Complaint ¶ 4.)

- Roberson claims he relied upon the November 2014 representation, and did not object to the plan. (Complaint ¶ 5.)

- On September 27, 2017, a federal grand jury indicted Roberson and Joel Gilbert for violations of federal law. (Complaint ¶ 7.)

- At trial, the jury returned a verdict finding both Roberson and Gilbert guilty on all counts, and Roberson was subsequently sentenced to 30 months in prison. (Complaint ¶ 7.)

- As a result of Balch's plan, Roberson alleges he lost his job, his reputation was destroyed, and he faces 30 months in prison. (Complaint ¶¶ 8-9.)

3. The Complaint also alleges that Balch failed to disclose that one of its in-house ethics lawyers "advised attorneys within the law firm that the scheme they had come up with to defeat the EPA on behalf of Drummond was illegal." (Complaint ¶ 6.) However, the Balch lawyer involved in this allegation testified at the criminal trial that (a) the plan to pay the Oliver Robinson Foundation and have Oliver Robinson participate in community relations efforts appeared to be proper and legal; and (b) Oliver Robinson would be in violation of a state (not federal) ethics law if he used his state House letterhead to write a letter for private sector work. (*See* **Exhibit A**, pp. 3422-3425.) Roberson does not allege that he has ever been charged with, or found guilty of, violating any state ethics law.

4. In January 2017, Roberson was personally involved in Drummond's response to a subpoena from federal authorities in connection with an investigation into the Oliver Robinson matter. (*See* **Exhibit A**, p. 1189.)

5. The November 2014 advice that the Oliver Robinson plan was legal occurred more than four years prior to the filing of this lawsuit. (Complaint ¶ 4.)

ARGUMENT

Roberson's claims are founded upon legal services Balch provided to its client (Drummond). All legal actions against a lawyer or firm acting as a "legal service provider" are unified as a single form of action and cause of action "exclusively" governed and controlled by the ALSLA. *See* ALA. CODE § 6-5-570, *et seq.*; *San Francisco Residence Club, Inc. v. Baswell-Guthrie, et al.,* 897 F. Supp. 2d 1122 (N.D. Ala. 2012); *Sessions v. Espy*, 854 So. 2d 515 (Ala. 2002); *Cunningham v. Langston, Frazer, Sweet & Freese, P.A.*, 727 So. 2d 800 (Ala. 1999); *Borden v. Clement*, 261 B.R. 275 (N.D. Ala. 2001). The provisions of the ALSLA, including the applicable statute of repose and statute of limitations, govern here. Roberson's claims are all time-barred under the ALSLA, because more than four years before he filed his Complaint, Roberson received the allegedly bad legal advice upon which he bases his claims.

I. Roberson's Claims Are Exclusively Governed by the ALSLA

All claims against attorneys and law firms arising out of the provision of legal services are governed by the Alabama Legal Services Liability Act, ALA. CODE § 6-5-570, *et seq.*:

> It is the intent of the Legislature to establish a comprehensive system governing all legal actions against legal service providers. . . . [T]his article provides a complete and unified approach to legal actions against legal service providers and creates a new and single form of action and cause of action exclusively governing the liability of legal service providers known as a legal service liability action and provides for the time in which a legal service liability action may be brought and maintained is required.

ALA. CODE § 6-5-570. Section 6-5-573 further confirms that there shall be "only one" cause of action against attorneys and law firms:

> **There shall be only one form and cause of action against legal service providers** in courts in the State of Alabama and it shall be known as the legal service liability action and shall have the meaning as defined herein.

ALA. CODE § 6-5-573 (emphasis added). The Advisory Committee's Notes to Rule 502 of the Alabama Rules of Evidence (Attorney-Client Privilege) explain that "[t]he term 'legal services' is to be defined broadly to include, among other things, the providing of mere legal advice." *Ala. R. Evid*. 502, Advisory Committee's Notes. The ALSLA further defines "legal service liability action" and "legal service provider" as follows:

> (1) LEGAL SERVICE LIABILITY ACTION. Any action against a legal service provider in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider's violation of the standard of care applicable to a legal service provider. A legal service liability action embraces all claims for injuries or damages or wrongful death whether in contract or in tort and whether based on an intentional or unintentional act or omission. A legal services liability action embraces any form of action in which a litigant may seek legal redress for a wrong or an injury and every legal theory of recovery, whether common law or statutory, available to a litigant in a court in the State of Alabama now or in the future.
>
> (2) LEGAL SERVICE PROVIDER. Anyone licensed to practice law by the State of Alabama or engaged in the practice of law in the State of Alabama. The term legal service provider includes professional corporations, associations, and partnerships and the members of such professional corporations, associations, and partnerships and the persons, firms, or corporations either employed by or performing work or services for the benefit of such professional corporations, associations, and partnerships including, without limitation, law clerks, legal assistants, legal secretaries, investigators, paralegals, and couriers.

ALA. CODE § 6-5-572. "From these Code sections, it is clear that the ALSLA applies to all

actions against 'legal service providers' alleging a breach of their duties in providing legal services." *Sessions v. Espy*, 854 So. 2d 515, 522 (Ala. 2002) (holding that all of the following claims were subsumed by the ALSLA: "(1) a breach of a legal duty (this count presumably brought under the common law); (2) a breach of a legal duty (this count brought under the Alabama Legal Services Liability Act ("ALSLA"), § 6–5–570 *et seq.*, ALA. CODE 1975); (3) misrepresentation; (4) suppression; and (5) negligence. Each claim was alleged to have arisen out of an attorney-client relationship between the Sessionses and Sessions Feeds, Inc., on the one hand, and Espy and Espy & Metcalf, P.C., on the other."). Nowhere does the ALSLA limit its application and scope only to a client.

Even in cases where a non-client has sought recovery for common law tort claims, Alabama courts have still held that the ALSLA applies. See *San Francisco Residence Club, Inc. v. Baswell-Guthrie*, 897 F. Supp. 2d 1122, 1178-79 (N.D. Ala. 2012) (granting summary judgment on claims by a non-client against real estate closing attorneys because the ALSLA was the sole and exclusive remedy, where the claims arise from the alleged negligent provision of legal services). As the Court observed in *Baswell-Guthrie*:

> It is not disputed that [the defendant attorneys acted] as closing attorneys for the transactions at issue, or that they held and eventually disbursed plaintiffs' escrow funds. Thus, there is no question that those defendants were providing "legal services" when they committed the acts alleged by plaintiffs . . . **Plaintiffs' claims against those attorneys – regardless of whether the claims are framed under the Alabama Legal Services Liability Act, or as a common-law negligence claim, or as "escrow agent liability" – are claims that arose out of the provision of legal services by Alabama legal-services-providers. And in this State, it is the strong public policy that all such actions should be brought under, and governed by, the [ALSLA]**.

Baswell-Guthrie, 897 F. Supp. 2d at 1179 (emphasis added).

Roberson's claims in this case fall squarely within the express language of the ALSLA.

Roberson alleges that he received and relied upon the very advice provided by Balch to its client, Drummond, and believed that the plan (to pay the Oliver Robinson Foundation and have Robinson assist in community relations efforts in the North Birmingham matter) was legal. (Complaint ¶¶ 4-5.) Roberson's claims against Balch are the very type of claim that the Alabama Legislature expressly intended to be governed by the ALSLA.

II. The ALSLA's Four-Year Statute of Repose and Two-Year Statute of Limitations Bar Roberson's Claims Because the Allegedly Bad Legal Advice Was Given in November 2014 – More Than Four Years Before Roberson Filed This Lawsuit.

The ALSLA, Alabama Code § 6-5-574(a) provides a two-year statute of limitations, a six-month discovery rule, and a four-year statute of repose for ALSLA actions:

> (a) All legal service liability actions against a legal service provider must be commenced within **two years after the act or omission or failure giving rise to the claim**, and not afterward; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within **six months from the date of such discovery** or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that **in no event may the action be commenced more than four years after such act or omission or failure**; except, that an act or omission or failure giving rise to a claim which occurred before August 1, 1987, shall not in any event be barred until the expiration of one year from such date.

ALA. CODE § 6-5-574 (emphasis added). The Alabama Supreme Court has interpreted § 6-5-574 to mean the statute of limitations begins to run on the date of the attorney's or firm's "act or omission." *Ex Parte Panell*, 756 So. 2d 862 (Ala. 1999); *see also Dennis v. Northcutt*, 887 So. 2d 219 (Ala. 2004); *Wesson v. McCleave, Roberts, Shields*, 810 So. 2d 652 (Ala. 2001); *Ex Parte Seabol*, 782 So. 2d 212 (Ala. 2000).

A. The ALSLA's two-year statute of limitations bars Roberson's claims because they arise from the act of providing legal advice in November 2014.

The determination that an attorney or firm's act or omission creates a cause of action for legal malpractice and thus starts the statute of limitations running was first adopted in *Ex Parte Panell*, *supra*. In *Panell*, the Alabama Supreme Court interpreted ALA. CODE § 6-5-574 to hold the statute of limitations for a legal malpractice claim "begins to run, when 'the act or omission or failure giving rise to the claim' occurs, and not when the client first suffers actual damage." 756 So. 2d at 868 (citing ALA. CODE § 6-5-574(a)). The "act or omission" rule, as so pronounced, replaced the "damage rule." *See Michael v. Beasley*, 583 So. 2d 245 (Ala. 1994).

In *Panell*, the plaintiff sued his former attorney alleging the attorney negligently handled a dispute between plaintiff and his former business partner. *Panell*, 756 So. 2d 862. The plaintiff claimed that in March 1993, he hired an attorney to sue the former business partner. *Id.* In June 1993, before the attorney filed the plaintiff's suit, the partner sued the plaintiff. *Id.* After suit was filed, the plaintiff instructed his attorney to file an Answer and Counterclaim. *Id.* The attorney did not file an Answer or Counterclaim, but did file a Motion to Dismiss. *Id.*

The Motion to Dismiss in *Panell* was heard September 22, 1993. During the hearing, counsel for both parties discussed settlement. *Id.* The plaintiff alleged that his attorney agreed to a settlement that day without his consent. *Id.* On October 5, 1993, per the terms of the alleged settlement agreement, the plaintiff executed warranty deeds conveying his interest in certain real property. *Id.* On January 31, 1994, the trial court noted the settlement on the Case Action Summary. *Id.* The trial court dismissed the case on August 18, 1994. *Id.*

On January 30, 1996, the plaintiff sued the attorney for legal malpractice. *Id.* The attorney moved for summary judgment, arguing the claims were time barred by the two-year statute of limitations set forth in ALA. CODE § 6-5-574. *Id.* at 862-63. The trial court granted the

Motion for Summary Judgment, and the Alabama Court of Civil Appeals affirmed the ruling on appeal without opinion. *Id.* at 864.

The Alabama Supreme Court in *Panell* agreed and held the statute of limitations on the legal malpractice claim began to run when the attorney committed the alleged wrongful act or omission on which the plaintiff based the Complaint. *Id.* at 868 (*citing* ALA. CODE § 6-5-574(a)). Specifically, the Court ruled the statute of limitations began to run September 23, 1993, the date the attorney reduced the alleged settlement agreement to writing, or, at the latest, October 5, 1993, when the plaintiff executed the warranty deeds transferring the property. *Id.* at 869. The Court stated it must literally apply the ALSLA's statutory language, which requires suit to be filed no later than two years after the act or omission. *Id.* at 868. Thus, the Court held that since the plaintiff failed to file suit within two years of the attorney's negligent act, the case was properly dismissed. *Id.*

Roberson's claims are barred by the two-year statute of limitations because he filed this lawsuit on March 15, 2019 – more than two years after the receipt of the allegedly bad legal advice, and the beginning of the criminal conspiracy of Roberson, Gilbert and Oliver Robinson, both of which occurred in November 2014.

B. The ALSLA's six-month discovery rule does not save Roberson's claims because he received a Grand Jury subpoena in January 2017, but did not file this lawsuit until March 15, 2019.

The ALSLA statute of limitations does provide for a limited, six-month "discovery" exception if the "cause of action is not discovered and could not reasonably have been discovered" within the two-year time period; in such a case, the action "may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier." ALA. CODE § 6-5-574.

Applying the ALSLA's six-month discovery rule to extend the limitations period well beyond two years, Roberson was criminally convicted on July 20, 2018 – more than six months before he filed this lawsuit. He knew or should have discovered the facts leading to his claim more than two years before filing suit. It is difficult to imagine an event more conclusively putting Roberson on notice of his claims that Balch's advice about the legality of paying Oliver Robinson was incorrect.

Well before July 20, 2018, the trial transcript reflects that by January 2017, Roberson and Drummond received a subpoena for documents from federal authorities investigating the Oliver Robinson matter. (*See* **Exhibit A**, p. 1189.) Roberson was involved in gathering documents and responding to the subpoena. He was therefore on notice by January 2017 that Gilbert's alleged representations about the legality of the Oliver Robinson arrangement may not have been correct or complete. The 6-month discovery rule then expired no later than July 2017.

C. The ALSLA's four-year statute of repose bars Roberson's claims because he filed this lawsuit more than four years after the act of providing legal advice occurred in November 2014.

Regardless of when a plaintiff claims he learned of an alleged act or omission, the ALSLA does not allow a claim for legal malpractice to be filed more than four years after the alleged act or omission: "[I]n no event may the action be commenced more than four years after such act or omission or failure . . . ." ALA. CODE § 6-5-574; *see also, e.g., Ex Parte Seabol*, 782 So. 2d 212, 214 (Ala. 2000) (holding "[a]ny action filed beyond the two-year limit must be filed within four years of the wrongful act or omission regardless of whether the client has suffered damages. Therefore, [plaintiff], at the most, had four years in which to file his claim"); *Denbo v. DeBray*, 968 So. 2d 983, 990 (Ala. 2006) (holding "[l]ikewise the four-year absolute bar of § 6-5-574(a) and (b) is applicable").

In *Baugher v. Beaver Construction Co*., the Alabama Supreme Court explained the difference between a statute of limitations, which runs from accrual, and a statute of repose, which has no relationship to discovery, stating as follows with respect to this issue:

> [T]he statute in this case is a statute of repose. *Black's Law Dictionary* defines "statute of repose" as "a statute that bars a suit a fixed number of years after the defendant acts in some way…A statute of repose limits the time within which an action may be brought and is not related to the accrual of any cause of action; **the injury need not have occurred** much less have been discovered.

Baugher v. Beaver Constr. Co., 791 So. 2d 932, 937 n. 1 (Ala. 2000) (emphasis added).

The Alabama Supreme Court frequently recognizes the connections between the analysis of the statute of limitations in medical malpractice actions and that in legal malpractice actions, emphasizing the ALSLA "is clearly modeled after the Alabama Medical Liability Act" since "the operative language of § 6-5-574 in the ALSLA is similar to that of § 6-5-482 in the Alabama Medical Liability Act." *Ex Parte Panell*, 756 So. 2d at n. 4 (quoting *Michael v. Beasley*, 583 So. 2d at 250). In light of the similar analysis of the two statutes of limitations, which the Alabama Supreme Court recognizes, the Alabama Supreme Court's recent discussion of the statute of repose in *Cutler v. Univ. of Ala. Health Svcs. Foundation, P.C.*, 215 So. 3d 1065 (Ala. 2016) is instructive.

In *Cutler,* the plaintiff suffered a head injury in 2005. 215 So. 3d 1065 (Ala. 2016). In 2005, an MRI showed a tumor on his brain, but the physician did not inform him of the tumor. The plaintiff alleged:

> Defendants **negligently failed to make this disclosure** to [Cutler] and **negligently failed to follow up** on this concerning finding and **failed to give any instructions to [Cutler] to have any further follow-up and/or treatment**. Defendants negligently failed to have neurosurgery contact [Cutler] with these concerns and findings.... As a proximate consequence, thereof, [Cutler]

> was left ignorant of this tumor/lesion; the **tumor/lesion continued to grow and become malignant** during this period of ignorance without any demonstrable signs or symptoms to his detriment . . . .

Cutler, 215 So. 3d at 1067 (emphases added).

In 2015, ten years after the plaintiff initially suffered his head injury, he had a seizure and filed the lawsuit against the physician. The physician moved to dismiss, citing the Medical Liability Act's four-year statute of repose. The Complaint alleged that the plaintiff suffered an "injury" from the growth of an undiagnosed brain tumor within the four years following the alleged "act or omission" of medical malpractice. *Id*. at 1071. The trial court dismissed the plaintiff's medical malpractice case based on his own pleadings. *Id*. The Alabama Supreme Court affirmed that dismissal on appeal, holding as follows:

> Based on this averment [of an "injury"], the trial court concluded that, regardless of the date of the discovery of any injury, the statute of repose would have begun to run...and would have expired [before suit was filed]. We agree.

Id. at 1071. In further explaining why the claim was time-barred, the Court set out and embraced Justice Harwood's previous analysis that "awareness" of injury is unimportant, stating as follows:

> Manifest in this sense does not mean that the injured person must be personally aware of the injury or must know its cause or origin. All that is required is **that there be in fact an injury manifested**, even if the injured person is ignorant of it for some period after its development.

Id. at 1072 (emphasis added) (citing *Cline v. Ashland, Inc.*, 970 So. 2d 755, 773 (Ala. 2007) (Harwood, J., dissenting).

Similarly, the statute of repose plainly bars Roberson's claims. The legal advice upon which Roberson claims to have relied – in which Balch allegedly represented that the plan to use

Oliver Robinson and pay his foundation was legal – occurred in November 2014. (Complaint ¶4.) Under *Cutler*, there was an injury in November 2014, even if Roberson did not know he had committed a criminal act. *Id*. at 1072. And even if there were further related assurances or suppressions related to the November 2014 conspiracy, *Cutler* mandates that the four-year statute of repose began to run in November 2014. *Id*. The ALSLA's four-year statute of repose precluded any claim after November 2018. Because Roberson did not file this lawsuit until March 15, 2019, his claims are barred.

Using any of the foregoing dates, Roberson's Complaint is barred by the ALSLA's two-year statute of limitations, six-month discovery rule, and four-year statute of repose.

III. The Applicable Statutes of Limitations for Common Law Negligence and Fraud Claims Also Bar Roberson's Claims.

Even if Roberson's claims are analyzed under a common-law tort theory, they are time-barred. The statute of limitations applicable to a negligence claim is two years. ALA. CODE § 6-2-38 (1975). "Alabama has no discovery rule that would operate to toll the running of the limitations period" on a negligence claim. *Boyce v. Cassese*, 941 So. 2d 932, 946 n.2 (Ala. 2006). Roberson expressly alleges that the negligent legal advice was made in November 2014. A two-year statute of limitations expired in November 2016. Therefore, Roberson's negligence claim, if viewed as sounding in the common law instead of the ALSLA, is time-barred.

The statute of limitations for fraud also is two years (ALA. CODE § 6-2-38(l)), which begins to run when a plaintiff is aware of facts that would "provoke inquiry in the mind of a [person] of reasonable prudence, and which, if followed up, would have led to the discovery of the fraud." *Auto-Owners Ins. Co. v. Abston*, 822 So. 2d 1187, 1195 (Ala. 2001) (quoting *Willcutt v. Union Oil Co.*, 432 So. 2d 1217, 1219 (Ala. 1983)). The question of when a plaintiff discovered or should have discovered fraud may be decided as a matter of law in cases where

"the plaintiff actually knew of facts that would have put a reasonable person on notice of the fraud." *Ex parte Alabama Farmers Co-op, Inc.*, 911 So. 2d 696, 703 (Ala. 2004) (quoting *Barlow v. Liberty Nat'l Life Ins. Co.*, 708 So. 2d 168, 173, 174 (Ala. Civ. App. 1997)). Roberson had information that should have reasonably provoked inquiry about the alleged fraud and suppression more than two years before he filed his Complaint. Specifically, as early as January 2017, he received and personally helped respond to a subpoena from the government seeking Drummond's documents as part of an investigation about the Oliver Robinson arrangement. (*See* **Exhibit A**, p. 1189.)

IV. Roberson's Claims Fail Because Balch Owed No Duty to Roberson.

Claims arising from the provision of legal services are governed by the ALSLA. To make a claim under the ALSLA, a plaintiff must show a duty owed by the attorney to the plaintiff who received legal services. *See Cunningham v. Langston, Frazer, Sweet & Freese, P.A.,* 727 So. 2d 800, 803 (Ala. 1999).

In *Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002), a disappointed heir sued the decedent's attorney for not following the decedent's instructions to destroy her will. Had the will been destroyed, the plaintiff would have inherited more under the intestate laws. The Alabama Supreme Court noted that the claim was for faulty legal services and thus fell under the ALSLA. The Court then referenced and agreed with cases from other jurisdictions, finding that a lawyer "owes no duty except that arising from contract or from a gratuitous undertaking," and third parties have no standing to sue attorneys who allegedly commit legal malpractice:

> We find the reasoning stated in these cases most persuasive. The change Robinson advocates implies the result that "attorneys would be subject to almost unlimited liability." Accordingly, we decline to change the rule of law in this state that bars an action for legal malpractice against a lawyer by a plaintiff for whom the

> lawyer has not undertaken a duty, either by contract or gratuitously.

Robinson, 842 So. 2d at 637 (internal citations omitted). In short, without an attorney-client relationship, the plaintiff failed to establish that the attorney owed him a duty under the ALSLA.

Similarly, Roberson was not (nor does he allege that he was) Balch's client, and therefore Balch has no attorney-client relationship with Roberson. *See* Ala. R. Prof. Cond. 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); Ellen J. Bennett, et al., Annotated Model Rules of Professional Conduct Rule 1.13, Annotation (a) pp. 231-32 (ABA Eighth ed. 2015) ("Rule 1.13 clarifies that a lawyer employed or retained by an organization represents the organization itself, not the individual constitutes who act for it."); Restatement of the Law Governing Lawyers § 96 cmt. b (2000) ("By representing the organization, a lawyer does not thereby also from a client-lawyer relationship with all or any individuals employed by it or who direct its operations or who have an ownership or other beneficial interest in it, such as shareholders."). Without an attorney-client relationship, Balch did not undertake any duty toward Roberson, and Roberson's claims fail as a matter of law. Allowing Roberson to proceed with common law claims for bad legal advice is just the kind of "unlimited liability" the Alabama Supreme Court attempted to guard against in *Robinson*. The only way Roberson can get around the duty element of his claims is to claim some duty existed to the client's employee, which falls under the ALSLA. Alabama law does not permit him to assert common-law claims against Balch.

V. Roberson's Claims Are Barred by the Doctrine of *In Pari Delicto* and the *Hinkle* Rule.

Roberson was individually indicted, tried and convicted for his own violation of federal bribery laws. Roberson now asserts civil damage claims against Balch arising out of the exact

same facts that resulted in his criminal conviction. All of the claims against Balch are barred by the doctrine of *in pari delicto* and the *Hinkle* Rule, because of Roberson's criminal conviction for his actions in the underlying criminal matter. The doctrine of *in pari delicto* stands for the proposition that "where the fault is mutual, the law will leave the case as it finds it." *Tucker v. Ernst & Young, LLP*, 159 So. 3d 1263, 1269 (Ala. 2014). Alabama's *Hinkle* Rule provides that "[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or in part on an illegal or immoral act or transaction to which he is a party." *Id.* (*quoting Hinkle v. Railway Express Agency*, 6 So. 2d 417, 421 (Ala. 1942)). *See also Oden v. Pepsi Cola Bottling Co. of Decatur, Inc.*, 621 So. 2d 953 (Ala. 1993) (affirming summary judgment for defendant vending machine company where minor was killed by falling machine while attempting to steal soft drinks from it). Roberson explicitly alleges that he was indicted, tried and found guilty of violating federal law. (Complaint ¶¶ 5, 7.) Alabama law expressly prohibits Roberson, convicted as a felon for the very conduct he undertook, from asserting claims against Balch.

VI. Roberson's Implied Indemnity Claim is Barred Because Roberson's Conviction Resulted from His Own Wrongful Conduct

Roberson purports to assert an implied indemnity claim against both defendants. (Complaint, *ad damnum*.) There are no specific allegations supporting an implied indemnity claim against Balch. Even if there were, the claim must fail based on Roberson's own conviction in the underlying criminal matter, and because he has not alleged that he has been required to pay out money by a judgment of a court.

Similar to the *Hinkle* Rule, "under Alabama law, the doctrine [of implied indemnity] permits recovery only when the party to be indemnified is 'without fault.'" *Price v. CTB, Inc.*, 168 F. Supp. 2d 1299, 1302 (M.D. Ala. 2001). Put another way:

> It is a well-recognized rule that an implied contract of indemnity arises in favor of a person who **without any fault on his part** is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, the former having a right of action against the latter for indemnity. . . This right of indemnity is based on the principle that everyone is responsible for his own negligence, and if another has been **compelled by the judgment of a court having jurisdiction to pay the damages which ought to have been paid by the wrongdoer** they may be recovered from him.
>
> This general rule sets out three prerequisites to a right of recovery: (1) **that the indemnitee be without fault**, (2) that the indemnitor be the party responsible, or primarily liable, and (3) **that the indemnitee has been required to pay out money by a judgment of a court**.

Allstate Ins. Co. v. Amerisure Ins. Companies, 603 So. 2d 961, 963 (Ala. 1992) (quoting *Travelers Indemnity Co. v. Firestone Tire & Rubber Co.*, 360 F. Supp. 1328, 1329 (S.D. Ala. 1973)). (Emphasis added.) Similarly, common law indemnity does not lie if "the payor is barred by the wrongful nature of his conduct." *Allstate*, 603 So. 2d at 963 (quoting Restatement of Restitution § 76 (1937)). Roberson was indicted and found guilty of six counts of violation of federal law. (Complaint ¶ 7.)

Alabama law does not hold employers civilly liable under a *respondeat superior* theory for the criminal acts of employees where the employer had no prior notice of the criminal act. *See Hargrove v. Tree of Life Christian Day Care Center,* 699 So. 2d 190, 195 (Ala. 1996) (holding university not liable for professor's murder of student during discussion of student performance of practice debate). Roberson's implied indemnity claim is therefore due to be dismissed.

CONCLUSION

Roberson's claims are based on legal advice Balch allegedly provided to its client, Drummond, in November 2014, and on which Roberson allegedly relied. The ALSLA is

Roberson's sole and exclusive remedy against Balch. Because the subject legal advice was given more than four years ago, and because any applicable six-month discovery rule time limit has also expired, Roberson's claims are barred by the ALSLA's four-year statute of repose, two-year statute of limitation, six-month discovery rule, and four-year statute of repose. Roberson's claims also are untimely under Alabama common law, because the alleged advice occurred in November 2014, and Roberson was put on notice of Joel Gilbert's alleged fraud/suppression in January 2017 when Roberson received and responded to a federal subpoena in the underlying criminal matter. Roberson's claims also are due to be dismissed because Balch owed no duty to Roberson, a non-client. Finally, all of Roberson's claims are barred by virtue of Roberson's own wrongful conduct, which resulted in his indictment and conviction for violation of federal bribery laws.

WHEREFORE, PREMISES CONSIDERED, Defendant Balch respectfully requests this Honorable Court to enter an Order dismissing all claims against it as a matter of law.

ORAL ARGUMENT RESPECTFULLY REQUESTED

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