REL: January 21, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200002

David Roberson

v.

Balch & Bingham, LLP

Appeal from Jefferson Circuit Court
(CV-19-901210)

On Application for Rehearing

PER CURIAM.

The Court's opinion of July 23, 2021, is withdrawn, and the following is substituted therefor.

David Roberson appeals from a judgment of the Jefferson Circuit Court, which was certified as final pursuant to Rule 54(b), Ala. R. Civ. P., dismissing his claims against Balch & Bingham, LLP ("Balch"), on the basis that those claims were barred by the limitations periods contained in the Alabama Legal Services Liability Act ("the ALSLA"), § 6-5-570 et seq., Ala. Code 1975. We reverse the judgment of the circuit court and remand the cause for further proceedings consistent with this opinion.

I. Facts

David Roberson filed his initial complaint on March 15, 2019, against Balch and his former employer, Drummond Company, Inc. ("Drummond").[1] The operative complaint for purposes of this appeal is

[1]Anna Roberson, David's wife, was listed as an appellant on the notice of appeal. She was named as a plaintiff for the first time in the third amended complaint. Anna was included as a party only with respect to Count XII -- the last count listed in the complaint -- which asserted a claim of promissory fraud. The promissory-fraud claim was pleaded against only Drummond. Therefore, we treat David Roberson as the sole appellant for purposes of this appeal, and we have restyled the appeal accordingly.

Roberson's third amended complaint, and the facts alleged in that complaint, primarily as they relate to Balch, were as follows:

> "1. At all times relevant to this case, Joel Gilbert ('Gilbert') was a registered lobbyist and the agent of Defendant Balch & Bingham, LLP ('Balch'), and his acts and omissions described herein were committed pursuant to and in the course of that agency relationship, or Balch has ratified, approved, and adopted his acts. ...
>
> "2. At all times relevant to this case, Defendant Balch was the agent of Defendant Drummond Company, Inc. ('Drummond'), and its acts and omissions described herein were committed pursuant to and in the course of that agency relationship, or Drummond has ratified, approved, and adopted Balch's acts. ...
>
> "3. At all times relevant to this case, Blake Andrews ('Andrews' or 'General Counsel') was the General Counsel and agent of Defendant Drummond ....
>
> "4. At all times relevant to this case, Mike Tracy ('Tracy') was the CEO and agent of Defendant Drummond ....
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> "5. At all times relevant to this case until February 7, 2019, David Roberson ... was a Vice-President with Drummond. Roberson was subordinate to Andrews and Tracy, and he was required to perform duties and responsibilities assigned to him by Andrews and Tracy. [Roberson] is not a lawyer and has no legal training concerning the matters described herein.
>
> "....

"7. In late 2013 the Environmental Protection Agency ('EPA') proposed placing a particular site in Jefferson County, Alabama on a National Priorities List ('NPL'); this was a prelude to designating Drummond as a [Potentially] Responsible Party [('PRP')] for the cleanup costs at the site. The cleanup costs were estimated at over $100 million ....

"8. Joel Gilbert was a registered lobbyist employed by Balch & Bingham, LLP, and Drummond hired Balch & Bingham to create and implement a public-relations campaign that would prevent the placement of the site on the National Priorities List and the designation of Drummond as a Responsible Party. Balch & Bingham never functioned as Roberson's attorney nor was Roberson or Drummond ever a legal services client of Balch & Bingham for or concerning the acts and omissions on which [Roberson's] claims are based. ... Finally, Balch & Bingham was not functioning as Drummond's legal counsel for or concerning the acts and omissions on which [Roberson's] claims are based.

"9. Balch, as Drummond's agent, devised a public relations plan ('the Plan') to employ a seemingly-legitimate local foundation, the Oliver Robinson Foundation ('the Foundation'), to conduct a seemingly-innocent campaign directed toward the community, the State of Alabama, and the EPA. Oliver Robinson was a respected state legislator, and he controlled the Foundation.

"10. Under the Plan, Oliver Robinson and the Foundation would (a) seek to convince the residents of North Birmingham not to have their property tested for toxins, such as lead and arsenic, and (b) Trey Glenn and Scott Phillips would seek by lobbying [the Alabama Department of Environmental Management] to prevent the State of Alabama from giving the legally required assurances to the EPA that

the state would cover the required 10% of the cleanup costs that could not be recovered from PRPs.

"11. In November 2014, before implementation of the Plan, [Roberson] asked Gilbert if he had inquired with the ethics lawyers at Balch & Bingham whether the Plan was legal and ethical. Gilbert represented to [Roberson] that Balch's in-house ethics attorneys had reviewed the Plan and determined that it was legal.

"12. On or about February 12, 2015, Gilbert and Balch prepared a contract between Balch and the Foundation. [Roberson] did not participate in preparing the contract, and he did not see the contract until the summer of 2018 -- during his criminal trial.

"13. Balch thereafter made payments to the Foundation under the contract and submitted invoices to Drummond for reimbursement.

"14. Blake Andrews, General Counsel for Drummond ..., represented to [Roberson] that he was 'confused' by having to process the Balch invoices for the Foundation as well as other Balch invoices. Consequently, he asked and directed [Roberson] to process Balch's invoices for payments to the Foundation.

"15. [Roberson], having been assured by Gilbert that Balch's in-house ethics attorneys had reviewed the Plan and determined that it was legal and ethical, did not know that the payments were illegal. Consequently, he performed his duties for Drummond exactly as instructed by Drummond's General Counsel, and he approved reimbursements to Balch for payments to the Foundation."

(Emphasis added.) In Count VII of the third amended complaint, Roberson specifically alleged:

> "66. In June 2016, after the conviction of State Representative [Mike] Hubbard for ethics violations, [Roberson] again asked Gilbert if Balch's in-house ethics attorneys had any 'problem' with the Plan or his association with it since [Roberson] is also a registered lobbyist.
>
> "67. Gilbert again represented to [Roberson] that he had checked with [Balch ethics attorneys] Greg Butrus and Chad Pilcher and there was no problem with what they were doing.
>
> "68. Gilbert's representations were false, and he made the misrepresentations willfully to deceive, recklessly without knowledge, or by mistake, but with the intent that [Roberson] act on the representations."

Continuing with the general factual allegations in the third amended complaint, Roberson asserted:

> "16. During Balch's implementation of the Plan, Balch's in-house ethic's attorneys [in February 2017] had informed Gilbert that, in fact, Robinson had and was acting illegally in performing duties under the Plan. Both Balch and Drummond failed to notify [Roberson] of these facts or take any remedial or corrective action. ...
>
> "17. On September 27, 2017, Balch attorney Gilbert and [Roberson, among others,] were indicted for violating 18 U.S.C. §§ 371, 666(a), 1343, 1346, and 1956(h), but neither Drummond Corporation nor Balch & Bingham, LLP, was indicted.

"18. The indictment charged that the payments to the Foundation were bribes, and it charged that [Roberson] was guilty of criminal conduct because he had 'caused Drummond Company to pay' Balch's invoices for payments to the Foundation -- as instructed by Drummond's General Counsel.

"19. The case against [Roberson] and Gilbert was tried in the United States District Court in Birmingham in June-July 2018. As was his constitutional right, [Roberson] elected not to testify at trial.

"20. During the trial, the prosecution read in evidence the following sentence from a summary of [Roberson's] statement to the FBI: 'After the Hubbard trial, Roberson considered what they were doing, i.e., contracting with a state representative, in light of the ethics law but determined that the area targeted by the campaign was not in Robinson's district.'

"21. [Roberson] then sought to introduce the balance of the summary, which included the following: Roberson stated that they (Drummond) have always been very careful, and he (Roberson) has a reputation to maintain. Roberson had a conversation with Gilbert about ethics considerations. Roberson wanted to know if it was a problem for him (Roberson) to be associated with the effort because he was a lobbyist. Gilbert later told Roberson that he had checked with Greg Butrus and Chad Pilcher at Balch and there was no problem with what they were doing.

"22. The indicted Balch attorneys blocked admission of this evidence, arguing that it violated their Fifth and Sixth Amendment rights. Exclusion of this evidence allowed the U.S. Attorney to falsely argue at closing that [Roberson] had

> never asked Joel Gilbert at Balch & Bingham whether the Plan to pay the Foundation was legal.
>
> "23. On July 20, 2018, the jury convicted [Roberson] and Gilbert on all counts."

On May 27, 2021, the United States Court of Appeals for the Eleventh Circuit affirmed Roberson's convictions on all counts. See United States v. Roberson, 998 F.3d 1237 (11th Cir. 2021).

As already noted, on March 15, 2019, Roberson commenced an action against Balch and Drummond in the Jefferson Circuit Court. In his initial complaint, Roberson asserted claims of negligence, fraud, suppression, and "implied indemnity" against Balch and Drummond. On April 18, 2019, Balch filed a motion to dismiss the complaint in which it argued that Roberson's claims were barred by the statute of limitations and the rule of repose contained in the ALSLA, that Roberson's action was prohibited under the rule first enunciated in Hinkle v. Railway Express Agency, 242 Ala. 374, 6 So. 2d 417 (1942),[2] that Roberson was collaterally

[2]This Court has explained: "We interpret the rule in Hinkle to bar any action seeking damages based on injuries that were a direct result of the injured party's knowing and intentional participation in a crime involving moral turpitude." Oden v. Pepsi Cola Bottling Co. of Decatur,

estopped from arguing that he had relied upon the advice of counsel because that issue allegedly had been resolved in Roberson's federal criminal trial, and that Balch had owed no duty to Roberson because Drummond, not Roberson, was Balch's client. Balch attached some exhibits to its motion to dismiss, including transcript excerpts of witness testimony from Roberson's criminal trial. Drummond also filed a motion to dismiss the complaint, and it attached as exhibits to its motion a copy of Roberson's appellate brief to the Eleventh Circuit Court of Appeals in the federal criminal case and transcript excerpts from the criminal trial.

Roberson amended his initial complaint twice, expanding upon the factual allegations and retooling the assertion of his claims against each defendant. Balch filed motions to dismiss each of those complaints, repeating the arguments from its original motion to dismiss, and attaching more exhibits from Roberson's federal criminal trial.

On November 11, 2019, Roberson filed the operative third amended complaint. With respect to Balch, Roberson repeated claims of

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621 So. 2d 953, 955 (Ala. 1993).

misrepresentation and concealment that he had first asserted in his earlier amended complaints. Specifically, Roberson asserted a claim of misrepresentation and a claim of concealment based on his allegation that in November 2014 he had asked Joel Gilbert, an attorney employed by Balch, whether Gilbert had asked Balch's in-house ethics attorneys if the scheme described in Roberson's third amended complaint ("the plan") was legal and that Gilbert allegedly had lied by responding that he had checked and that the plan was legal. Similarly, Roberson asserted a claim of misrepresentation and a claim of concealment based on his allegation that he had asked Gilbert the same question in June 2016 and Gilbert allegedly had replied with the same response. Finally, Roberson asserted another claim of concealment based on his allegation that Gilbert had learned from a Balch ethics attorney in February 2017 that at least one action taken by state representative Oliver Robinson was illegal but had failed to inform Roberson of that information. The third amended complaint also contained two new concealment claims. Count X alleged concealment by Balch:

> "88. As part of its public relations campaign to defeat the EPA in North Birmingham and at the request of Joel Gilbert of Balch Bingham, David Roberson, on behalf of Drummond Company, wrote a $5,000.00 check to be used to purchase 100 fifty dollar gift cards to Burlington Coat Factory to be used to purchase winter coats for kids in North Birmingham.
>
> "89. Unbeknownst to Plaintiff Roberson as Joel Gilbert concealed this information from [Roberson], Balch and Oliver Robinson had agreed for [Robinson] to keep $2,500.00 out of the $5,000.00. [Roberson] did not learn of this hidden fact until his criminal trial in July of 2018. [Roberson] suffered damages as a result of Balch's concealment of it allowing [Robinson] to keep half of the $5,000.00 as the prosecution in Roberson's criminal trial used this $2,500.00 payment to Oliver Robinson as damaging evidence against Roberson in his criminal trial to help it obtain a conviction against him. Roberson did not even know that Robinson had kept half of the coat money per his agreement with Balch attorney Gilbert until this came out at the criminal trial."

Count XI alleged concealment by Balch and Drummond:

> "90. Balch & Bingham, LLP contracted with Trey Glenn (who invoiced Balch under the company name of Southeast Engineering & Consulting, LLC and directed the payments to Scott Phillips) to lobby the Alabama Department of Environmental Management (or 'ADEM') to oppose the EPA in listing the North Birmingham site on the National Priorities List. The Balch invoices to Drummond seeking reimbursement for the payments to Trey Glenn and Scott Phillips were paid by Drummond General Counsel Blake Andrews and approved by Drummond CEO Mike Tracy. At the time that Scott Phillips and Trey Glenn were receiving money from Balch via Drummond to lobby ADEM on a policy

> matter involving the listing of North Birmingham as a Superfund site, Scott Phillips was on the Alabama Environmental Management Commission (or 'AEMC'). The AEMC is the entity that oversees ADEM.
>
> "91. Neither Glenn nor Phillips, while they were lobbying ADEM about it opposing the EPA's listing of North Birmingham as a Superfund site, disclosed to ADEM the existence of their contract with Balch & Bingham or that they were indirectly being paid by Drummond Company.
>
> "92. Balch and Drummond Company concealed from Roberson that Drummond was paying Phillips (who was on the AEMC), pursuant to a contract with Balch, to lobby the entity in which the AEMC supervises (ADEM). Roberson suffered damages as a result of Balch and Drummond's concealment of their payments to Glenn and Phillips as their testimony that Drummond was paying Phillips to lobby ADEM when he was on the commission that supervises ADEM was very damaging to Roberson at his criminal trial and was used in part by the prosecution to convict Roberson even though he had no knowledge of this scheme and even though Glenn's and Phillips's invoices were being paid by Balch and reimbursed by Blake Andrews and Mike Tracy."

The third amended complaint also specifically alleged that Gilbert was a registered lobbyist, that he had acted in that capacity in carrying out Balch's responsibilities for the plan, that neither Roberson nor Drummond was a legal-services client of Balch, and that Balch was not performing

legal services in carrying out its contract with Drummond concerning the plan.

On November 22, 2019, Balch filed a motion to dismiss the third amended complaint in which it repeated all the arguments it had presented in its previous motions to dismiss. The motion relied on exhibits submitted in support of previously filed motions to dismiss, and Balch also submitted new exhibits. On November 25, 2019, Roberson filed a motion to strike the exhibits Balch had filed in support of its motion to dismiss the third amended complaint. On the same date, Roberson filed his response in opposition to Balch's motion to dismiss the third amended complaint. Similarly, Drummond filed a motion to dismiss the third amended complaint, and Roberson filed a response in opposition and a motion to strike the exhibits submitted in support of that motion to dismiss.

On August 25, 2020, the circuit court entered an order ruling on all outstanding motions except the defendants' motions to dismiss the third amended complaint. In doing so, the circuit court concluded that the third amended complaint properly replaced Roberson's previous complaints, and

the circuit court therefore determined that the defendants' motions to dismiss the previous complaints were moot and that Drummond's motion to strike the third amended complaint was due to be denied. The circuit court also expressly ruled that "any matters presented to the Court outside the pleadings are EXCLUDED for purposes of the Defendants' Motions to Dismiss." (Capitalization in original.) It therefore granted Roberson's motions to strike exhibits submitted by Balch and Drummond in support of their motions to dismiss. On August 27, 2020, the circuit court held a hearing on the motions to dismiss.

On September 14, 2020, the circuit court entered a judgment granting Balch's motion to dismiss all claims asserted against it in Roberson's third amended complaint. The circuit court began its analysis by observing that Roberson's

> "complaint contains factual allegations and conclusory statements, and the Court's analysis must necessarily include whether the Alabama Legal Services Liability Act ('ALSLA') applies to and governs the factual allegations ... and whether [Roberson's] evolved classification of Gilbert's role, and Defendant Balch's, was that of providing public-relations work instead of and to the exclusion of legal work to Defendant Drummond and its employee [Roberson]."

The circuit court noted that Roberson had conceded that Balch was, in fact, a legal-service provider and that his complaint "refers to the ethics attorneys at Defendant Balch, from whom [Roberson] wanted Gilbert to inquire about the legality of the Plan." The circuit court therefore concluded that "[w]hile [Roberson,] in his Third Amended Complaint, attempts to re-characterize the role of Joel Gilbert as that of a lobbyist, rather than an attorney," Roberson,

> "by inquiring of Gilbert and Defendant Balch's ethics' attorneys, via Gilbert, believed that he was consulting a lawyer(s) [Gilbert and Balch's ethics' lawyers] in their capacity as lawyers, and [Roberson], at that time, manifested his intention to seek professional legal advice. The Court FINDS that the herein alleged claims against Defendant Balch are classified collectively as a legal service liability action, pursuant to ALSLA, as defined in Section 6-5-572, and Section 6-5-573 ...."

(Capitalization in original.) The circuit court then applied the statute of limitations relevant to "legal service liability actions" contained in § 6-5-574(a), Ala. Code 1975,[3] to Roberson's claims against Balch:

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[3]Section 6-5-574(a) provides:

> "(a) All legal service liability actions against a legal service provider must be commenced within two years after

> "The Court FINDS that the act or omission or failure giving rise to the [Roberson's] claims against Defendant Balch occurred in November 2014. The Court FINDS that, at the latest, [Roberson] should have reasonably discovered the facts giving rise to the alleged claims herein against Defendant Balch at the time of [Roberson's] and Gilbert's indictments, to wit: September 27, 2017. The Court FINDS that the herein Complaint had to have been filed no later than March 27, 2018, to fall within the statute of limitations, pursuant to ALSLA, Section 6-5-574. [Roberson's] original Complaint was filed March 15, 2019."

(Capitalization in original.) Concerning the rule of repose contained in § 6-5-574(a), the circuit court also added that "certainly the herein claim[s] could not have been commenced, in any event, later than November 30, 2018 (the Court uses the date November 30, since no specific day in November [2014] was asserted)." Because the circuit court determined

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> the act or omission or failure giving rise to the claim, and not afterwards; 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."

that all of Roberson's claims against Balch were barred by the limitations periods provided in the ALSLA, it dismissed all of Roberson's claims against Balch. The circuit court also certified the judgment as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P., finding that the judgment disposed of all the claims against Balch and that there was no just reason for delay in entering a final judgment.

II. Standard of Review

As we noted in the rendition of facts, Balch filed, and the circuit court granted, a motion to dismiss all the claims against Balch based on the limitations periods in the ALSLA.

> "The standard of review applicable to motions to dismiss is well settled:
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> > " 'It is a well-established principle of law in this state that a complaint, like all other pleadings, should be liberally construed, Rule 8(f), Ala. R. Civ. P., and that a dismissal for failure to state a claim is properly granted only when it appears beyond a doubt that the plaintiff can prove no set of facts entitling him to relief. Winn-Dixie Montgomery, Inc. v. Henderson, 371 So. 2d 899 (Ala. 1979). Stated another way, if under a provable set of facts, upon any cognizable theory of law, a complaint states a claim upon which relief could be granted, the complaint should not be dismissed. Childs v.

> Mississippi Valley Title Insurance Co., 359 So. 2d 1146 (Ala. 1978).
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> > " 'Where a [Rule] 12(b)(6)[, Ala. R. Civ. P.,] motion has been granted and this Court is called upon to review the dismissal of the complaint, we must examine the allegations contained therein and construe them so as to resolve all doubts concerning the sufficiency of the complaint in favor of the plaintiff. First National Bank v. Gilbert Imported Hardwoods, Inc., 398 So. 2d 258 (Ala. 1981). In so doing, this Court does not consider whether the plaintiff will ultimately prevail, only whether he has stated a claim under which he may possibly prevail. Karagan v. City of Mobile, 420 So. 2d 57 (Ala. 1982).'
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> "Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985)."

Pearce v. Schrimsher, 583 So. 2d 253, 253-54 (Ala. 1991).

In noting our standard of review for this appeal, we observe that in its appellate brief Balch repeatedly urges this Court to consider the exhibits that were attached to motions to dismiss filed in the circuit court. We reject Balch's invitation to consider any of those exhibits given that the circuit court expressly stated in its August 25, 2020, order that it was excluding all materials outside of the pleadings in deciding the motions to dismiss. Because the circuit court in its discretion elected not to consider

the exhibits, we will not do so in reviewing the circuit court's judgment. See, e.g., Ex parte Price, 244 So. 3d 949, 955 (Ala. 2017).

On a related note, after briefing was completed in this appeal, Balch filed with this Court what it styled as a "Letter of Supplemental Authority," invoking Rule 28B, Ala. R. App. P., as a basis for the filing. That rule allows for a party to "promptly advise the clerk of the appellate court in which the proceeding is pending by letter" if "pertinent and significant authority comes to a party's attention after the party's brief has been filed." Roberson has filed a motion to strike Balch's letter because, he says, Balch does not present any new authority; rather, Roberson asserts, Balch seeks to contend that a misquotation of a case in Balch's appellate brief[4] that Roberson highlighted in his reply brief[5] was an "accidental and unintentional ... mistake" rather than a deliberate misquotation, even though Balch had employed the same misquotation in its circuit court filings and Roberson had drawn attention to it at that

[4]The opinion that is misquoted is San Francisco Residence Club, Inc. v. Baswell-Guthrie, 897 F. Supp. 2d 1122, 1179 (N.D. Ala. 2012). See Balch's brief, p. 39.

[5]See Roberson's reply brief, p. 14.

time as well. We agree with Roberson that Balch's letter is not a "notice of supplemental authority" as allowed by Rule 28B, and Balch offers no other authority for what actually appears to be, as Roberson says, an attempt by Balch "to get the last word on issues argued in [Roberson's] reply brief." Accordingly, we grant Roberson's motion to strike Balch's letter filing.

We also observe that we do not believe that the circuit court's certification of its judgment as final under Rule 54(b) was improper. It is undeniable that Roberson's claims against Balch and Drummond are substantially interrelated. This Court has noted:

> "In considering whether a trial court has exceeded its discretion in determining that there is no just reason for delay in entering a judgment, this Court has considered whether 'the issues in the claim being certified and a claim that will remain pending in the trial court " 'are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results.' " ' Schlarb[v. Lee], 955 So. 2d [418] at 419-20 [(Ala. 2006)] (quoting Clarke-Mobile Counties Gas Dist. v. Prior Energy Corp., 834 So. 2d 88, 95 (Ala. 2002), quoting in turn Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373, 1374 (Ala. 1987)."

Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1263 (Ala. 2010). In this instance, the circuit court's dismissal of all the claims against Balch was

based on the applicability of the ALSLA's limitations periods, a conclusion that was, in turn, based on facts pertinent only to Balch, i.e., its status as a legal-service provider and its alleged provision of legal advice to Roberson. It is true that Drummond also argued in its motion to dismiss the third amended complaint that some claims against it were due to be dismissed based on the applicability of the ALSLA's limitations periods, but Drummond's arguments regarding the applicability of those limitations periods were based on its own alleged actions, not those of Balch. Thus, there is no risk of inconsistent results in this case because the basis for the dismissal of the claims against Balch was truly independent of the claims asserted against Drummond.

III. Analysis

Roberson contends that the circuit court made three fundamental errors in dismissing his claims against Balch. First, he argues that the circuit court erred by concluding that his claims were subject to the ALSLA. Second, he argues that, even if the ALSLA applies to his claims, the circuit court erred by concluding that the triggering date for the running of ALSLA's limitations periods was the date of Gilbert's alleged

misrepresentation to Roberson in November 2014, rather than the date Roberson sustained an injury from Balch's actions, which Roberson contends was the date he was indicted on federal criminal charges. Third, Roberson argues that, even if the triggering date for claims under the ALSLA is the date of the alleged act or omission of the legal-service provider rather than the date of the plaintiff's injury, "each misrepresentation or concealment creates a separate claim -- even if the misrepresentation or concealment is identical to a prior misrepresentation or concealment that is barred by the statute of limitations." Roberson's brief, p. 21. If Roberson is correct, some of Balch's alleged misconduct occurred within the ALSLA's statute-of-limitations period. However, we consider it necessary to address only Roberson's first argument. This is so because we conclude that Roberson was not the recipient of legal services and thus is not subject to the limitations periods set forth in the ALSLA.[6]

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[6]On original submission, this Court determined that Roberson's claims were not subject to the limitations periods set forth in the ALSLA because he was not a client of Balch; however, this Court also went further and approved a ground for affirming the circuit court's judgment

This appeal arises from a judgment granting Balch's motion to dismiss Roberson's third amended complaint. As previously noted in Part II of this opinion, addressing the standard of review to be applied by this Court, in considering whether a complaint is sufficient to withstand a motion to dismiss under Rule 12(b)(6), Ala. R. Civ. P., a court "must accept the allegations of the complaint as true." Creola Land Dev., Inc. v. Bentbrooke Hous., L.L.C., 828 So. 2d 285, 288 (Ala. 2002). See also Smith v. National Sec. Ins. Co., 860 So. 2d 343, 345 (Ala. 2003) (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)) (" 'The appropriate standard of review under Rule 12(b)(6)[, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [it] to relief.' ").

For the purposes of this appeal, the following facts must therefore be taken as true:

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that was not relied upon by the circuit court -- the absence of any remedy available to Roberson outside the ALSLA. The application for rehearing challenged this Court's holding that Roberson had no remedy outside the ALSLA.

(1) Roberson is not a client of Balch.

(2) Roberson never asked Gilbert for an opinion on the legality of his conduct.

(3) Roberson asked Gilbert if certain attorneys employed by Balch had rendered an opinion on the legality of his conduct.

(4) Balch never rendered an opinion on the legality of Roberson's conduct.

(5) Gilbert lied about the existence of a favorable opinion having been reached by such attorneys.

(6) Gilbert accepted a check for $5,000 from Drummond, Roberson's employer, which Roberson approved and which was payable to Balch, for the purpose of a fund-raising campaign to purchase "winter coats for kids," and Gilbert, without the knowledge of Roberson, had agreed that Oliver Robinson, a member of the Alabama Legislature, could keep half the proceeds of the check.[7]

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[7]Subsequent references in this opinion to the alleged conduct of Balch or its attorneys should not be viewed as an endorsement of the truth of Roberson's allegations; we simply review Roberson's third amended complaint on the assumption that the facts alleged within it can be

Roberson did not pursue a remedy under the ALSLA in his third amended complaint. In his principal brief, Roberson argues, as he did in the circuit court:

> "Although Balch is a 'legal service provider,' the complaint does not show that Roberson was Balch's 'client,' that Balch provided 'legal services' to Roberson, or that Roberson's claims 'arise from' Balch's legal services. Balch thus failed to show that Roberson's claims are subject to the ALSLA. Consequently, Judge Johnson erred in granting Balch's motion to dismiss."

Roberson's brief, p. 22. Rather than plead a claim under the ALSLA, Roberson alleged claims of common-law fraud against Balch in his third amended complaint.[8]

Turning to the reach of the ALSLA, one need go no further than the title of the act, the Alabama Legal Services Liability Act, to see that it is all about "legal services." (Emphasis added.) The Cambridge Dictionary

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proven.

[8]Although earlier iterations of his complaint may have invoked the ALSLA, any apparent inconsistency in Roberson's various pleadings is expressly authorized by Rule 8(e)(2), Ala. R. Civ. P. ("A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds, or on both.").

defines "legal services" as "work done by a lawyer for a client." Cambridge Business English Dictionary 487 (2011). Common sense dictates that a lawyer serves the lawyer's client, not the parties with whom the lawyer may come in contact while serving the client.

Section 6-5-672(1), Ala. Code 1975, defines a "legal service liability action" as an action alleging 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." Section 6-5-672(3)a. states that the standard of care applicable to a legal-service provider is "that level of such reasonable care, skill, and diligence as other similarly situated legal service providers in the same general line of practice in the same general locality ordinarily have and exercise in a like case." (Emphasis added.) Practice "in a like case" neither embraces an attorney's false statements or intentional failures to disclose material facts to a nonclient nor makes such activities the rendition of legal services. Because "legal services" are by definition services rendered by a lawyer to a client, fraudulent activities in dealings with a third party

with whom the lawyer may come in contact during the discharge of the lawyer's duties to a client are not "legal services."

Faithful to this text, this Court has construed the ALSLA to prevent a client from bringing any action against an attorney for conduct related to the provision of legal services under any theory of recovery outside the ALSLA. Sessions v. Espy, 854 So. 2d 515 (Ala. 2002). Nonclients, on the other hand, have tried to sue an attorney under the ALSLA for conduct stemming from an attorney's practice of law for a client, and this Court has consistently held that nonclients have no right to sue an attorney under the ALSLA. See Brackin v. Trimmier Law Firm, 897 So. 2d 207 (Ala. 2004), Robinson v. Benton, 842 So. 2d 631 (Ala. 2002),[9] and Shows

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[9]The dissenting opinion relies on Robinson as authority for the proposition that a tort claim brought under the ALSLA by a nonclient against an attorney is barred because of the absence of an attorney-client relationship. Robinson involved an action brought by a nonclient against an attorney under the ALSLA, seeking to establish that he was owed a duty by the attorney. This Court affirmed the judgment dismissing the nonclient's complaint because, this Court determined, the attorney owed no duty to the nonclient and therefore could not be guilty of legal malpractice. The dissent, discussing Robinson, states:

> "Robinson's action clearly alleged that the attorney had provided legal services that had harmed him -- thus his action

v. NCNB National Bank of North Carolina, 585 So. 2d 880, 882 (Ala. 1991).[10]

> was governed by the ALSLA -- but his tort claims were barred because the attorney-client relationship existed between the testatrix and the attorney, not between Robinson and the attorney."

___ So. 3d at ___ (emphasis added).

First, it is noteworthy that Roberson's third amended complaint in this action does not rely on a tort claim alleging ineffective legal services under the ALSLA; it asserts common-law fraud claims, a significant difference from the complaint in Robinson, in which the nonclient sought relief under the ALSLA. Second, contrary to the implication in the foregoing quote from the dissent, Robinson does not hold that the ALSLA was the exclusive remedy of the nonclient. The action was "governed by the ALSLA," as is stated in the dissent, ___ So. 3d at ___, only because it had been pleaded under the ALSLA.

This Court in Robinson noted that the nonclient had argued on appeal that his negligence claim against the attorney fell outside the ALSLA. However, this Court expressly declined to address that issue because it had not been asserted in the trial court. See Robinson, 842 So. 2d at 637-38.

[10]None of these cases disallowing a nonclient a remedy under the ALSLA deals with a nonclient's right to assert a claim under a theory outside the ALSLA. The dissent fails to cite a single case in which this Court has addressed the issue whether a nonclient can sue, alleging a common-law fraud claim, and found such a claim unavailable. It attempts to dismiss the absence of precedent disallowing a nonclient's right to assert a claim under a theory outside the ALSLA as "a curious omission if such was actually permissible." ___ So. 3d at ___. The absence of

In Kinney v. Williams, 886 So. 2d 753 (Ala. 2003), an attorney "assured" two couples (one clients and one nonclients) that a road to property they were purchasing was "private." Id. at 754. After they purchased the property and found otherwise, both couples sued the attorney. The trial court entered a summary judgment in favor of the attorney as to the claims of both the clients and the nonclients. On appeal, this Court affirmed the summary judgment on the clients' claims based on the applicability the statute of limitations set forth in the ALSLA. However, this Court reversed the summary judgment on the nonclients' claims, allowing their fraud claims against the attorney to proceed.

The attorney in Kinney argued in his brief that the nonclients' fraud claims were subsumed by the ALSLA and were therefore also subject to

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presentation of an issue for review is the appropriate way to understand the absence of existence of precedent. Furthermore, the absence of precedent is more likely a function of the implausibility of such a theory and, concomitantly, the absence of gratuitous dicta supporting it. In such instances, opposing authority for a novel view leaves one with the necessity to seek support beyond legal precedent, such as a commonsense view from a definition in a dictionary.

the bar of the statute of limitations. This Court in Kinney stated: "The sole ground of [the attorney's] motion for a summary judgment on the [nonclients'] claims was ... the absence of an attorney-client relationship ...." Id. at 755. This Court in Kinney further stated:

> "The [nonclients] do not base their standing on any client-attorney relationship with [the attorney]. Rather, the [nonclients] rely on Potter v. First Real Estate Co., 844 So. 2d 540 (Ala. 2002), which bases a plaintiff's standing to sue for fraud on the defendant's knowledge of the plaintiff's interest in the matter misrepresented or concealed and on the plaintiff's exposure to and reliance on the fraudulent conduct."

886 So. 2d at 755.

After discussing Potter v. First Real Estate Co., 844 So. 2d 540 (Ala. 2002), including its reference to a contractual relationship not being necessary to maintain an action alleging fraud, the Court in Kinney held:

> "The [nonclients] in the case before us have the same kind of standing. Although [the attorney] was not their attorney, he knew their interest in the property and in the private status of the road, and he directed his misrepresentations to the [nonclients] as well as to his clients .... Therefore, the trial court erred in entering a summary judgment in favor of [the attorney] on the [nonclients'] fraud claims."

886 So. 2d at 756. Inherent in the conclusion that the nonclients' fraud claims could proceed was the determination that the attorney's assuring the nonclients that the road was "private" was not the rendition of legal services to a client. "No client" properly means no legal services.[11]

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[11]The dissent dismisses Kinney's recognition of the availability of a fraud claim against an attorney by a nonclient arising out of the attorney's activities in representing a client by focusing on the close relationship between the clients and the nonclients in Kinney and their commonality of interest and then concluding that such a relationship constitutes an exceptional circumstance. Then, perhaps anticipating that its reliance on close relationships falls apart when one considers the relationship between Drummond and its officer, Roberson, the dissent cites cases recognizing that when an attorney represents a corporation, its officers are not clients. Of course, in Kinney the nonclients were also not represented by the attorney, and this Court allowed their fraud claims to go forward.

Kinney is also contrary to the dissenting opinion's plea for dominance of substance over form as a basis for characterizing Roberson's fraud claims in the third amended complaint as ALSLA claims, regardless of the absence of any reliance on the ALSLA in that complaint. The complaint in Kinney did not invoke the ALSLA. The attorney in Kinney argued on page 28 of his principal brief, "Plaintiffs' claims in this action are clearly brought pursuant to the ALSLA under which claims against attorneys are limited to those arising from receipt of legal services." See Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 66 n.2 (Ala. 2010) ("[T]his Court may take judicial notice of its own records in another proceeding ...."). This Court in Kinney, by allowing the nonclients' fraud claims to proceed, did not view the nonclients' claims as stemming from the receipt of legal services and thereby declined the attorney's invitation to recast the claims

Kinney does not stand alone. In Bryant v. Robledo, 938 So. 2d 413 (Ala. Civ. App. 2005), the nonclients sued an attorney to recover $15,000 they had paid the attorney to provide legal services to the client, who was the father of one of the nonclients, alleging that the attorney had made false representations that had induced them to enter into a contract with the attorney to provide legal services to the client. The trial court entered a summary judgment for the nonclients, and the attorney appealed. The Court of Civil Appeals held that an attorney-client relationship is "[a]n essential element of a claim under the ALSLA" and that, as a result, the nonclients lacked "standing" to pursue their breach-of-contract claim under the ALSLA. Id. at 418. Nevertheless, the nonclients were not left without a remedy. The nonclients also contended that the attorney had known at the time that he had requested payment of the $15,000 by the

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as being subject to the ALSLA. The same result is appropriate in this proceeding. Otherwise, if recasting such claims is appropriate in all actions by nonclients against lawyers arising from a lawyer's rendition of legal services to a client, regardless of the language in the complaint, Kinney must be expressly overruled because this Court, as previously noted, did not there accept the attorney's argument that the nonclients' claims were subject to the ALSLA.

nonclients that the client was incompetent and could not contract for legal representation. Id. at 419. The Court of Civil Appeals held that the nonclients had produced substantial evidence to support that contention. Id. at 422. Although then Judge Bryan, in a special writing concurring in the result in part and dissenting in part, argued that "the absence of evidence of an attorney-client relationship ... was fatal to the [nonclients'] fraud claim as pleaded," 938 So. 2d at 423, a majority of the court nevertheless concurred to affirm the summary judgment against the attorney on the nonclients' fraud claim. Id. at 422.

In Fogarty v. Parker, Poe, Adams & Bernstein, L.L.P., 961 So. 2d 784 (Ala. 2006), the nonclients sued attorneys asserting, among other things, fraud, alleging that the attorneys had "misrepresented to [the nonclients] Alabama law by stating that under Alabama law the [nonclients] were not entitled to review the books and records" of a majority shareholder in a venture in which the nonclients were minority shareholders. Id. at 786. The venture was failing and the nonclients had become suspicious of the activities of the majority shareholder. The attorneys represented the majority shareholder and, as noted above,

denied the nonclients access to the books and records. The attorneys moved to dismiss the nonclients' complaint on the ground that "the [nonclients'] claims arose out of the rendition of legal services" and that the ALSLA provided their exclusive remedy. Id. at 787. They also asserted, however, that since "the [nonclients] were not clients of [the attorneys], ... [the attorneys] owed no legal duty to the [nonclients]." Id. This Court rejected those arguments and held that the nonclients' fraud claims were not legal-malpractice claims. The Court held: "The ALSLA applies only to allegations of legal malpractice, i.e., claims against legal-service providers that arise from the performance of legal services ...." Id. at 788. This Court in Fogarty also noted: "After a thorough examination of the language of the entire act, this Court [in Cunningham v. Langston, Frazer, Sweet & Freese, P.A., 727 So. 2d 800, 804 (Ala. 1999),] held that 'the ALSLA does not apply to an action filed against a "legal service provider" by someone whose claim does not arise out of the receipt of legal services.' " Id. at 789. Consequently, this Court held, the lack of an attorney-client relationship did not bar the nonclients' fraud claims asserted independently of the ALSLA. Id. at 793.

In Ex parte Daniels, 264 So. 3d 865 (Ala. 2018), the nonclient was a parent of a decedent. The attorneys had represented the other parent in a wrongful-death action concerning the defendant's death and, upon settlement, had distributed the settlement proceeds to the other parent. The nonclient sued the attorneys alleging fraud arising from their role in handling the wrongful-death action. This Court discussed the rendition of legal services as a prerequisite to the applicability of the ALSLA. The Court, in an opinion authored by Justice Main, held:

> "Specifically, [the nonclient] contends that the circuit court incorrectly applied § 6-5-579(a)[, Ala. Code 1975,] to his claims against the [attorneys] because (1) the [attorneys] did not render legal services to him, and, thus, he says, the ALSLA is not applicable, and (2) his claims against [the surviving parent] are not an 'underlying action' as defined by the ALSLA. We agree.
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> "In Cunningham v. Langston, Frazer, Sweet & Freese, P.A., 727 So. 2d 800 (Ala. 1999), this Court reviewed the language and purpose of the ALSLA and concluded that 'the ALSLA does not apply to an action filed against a "legal service provider" by someone whose claim does not arise out of the receipt of legal services.' 727 So. 2d at 804. Stated another way, 'the ALSLA applies only to lawsuits based on the relationship between "legal service providers" and those who have received legal services.' 727 So. 2d at 805. See also Brackin v. Trimmier Law Firm, 897 So. 2d 207, 229 (Ala. 2004) ('An attorney-client relationship is an essential element of a

> claim under the [ALSLA]."); Robinson v. Benton, 842 So. 2d 631 (Ala. 2002). Here, it is undisputed that the [attorneys] did not provide legal services to [the nonclients]. Accordingly, his claims against the [attorneys] are not governed by the ALSLA."

264 So. 3d at 869 (emphasis added). " '[T]he relationship between "legal service providers" and those who have received legal services' " noted in Daniels is the attorney-client relationship, and in the absence of such a relationship, the ALSLA simply does not apply. Kinney, Robledo, Fogarty, and Daniels all recognized the availability of a fraud claim by a nonclient against an attorney for activities stemming from the attorney's activities while representing a client.

IV. Conclusion

The trial court's order dismissing Roberson's third amended complaint against Balch is reversed, and the cause is remanded for further proceedings consistent with this opinion.

APPLICATION GRANTED; OPINION OF JULY 23, 2021, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.

Stewart, J., and Lyons,* Main,* and Welch,* Special Justices, concur.

Parker, C.J., and Mendheim, J., and Baschab,* Special Justice, dissent.

Bolin, Shaw, Wise, Bryan, Sellers, and Mitchell, JJ., recuse themselves.

*Retired Associate Justice Champ Lyons, Jr., Retired Associate Justice James Allen Main, Retired Judge Samuel Henry Welch, and Retired Judge Pamela Willis Baschab were appointed to serve as Special Justices in regard to this appeal.