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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2011-2012

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Ex parte Secretary of Veterans Affairs, an officer of the United States of America

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: Frank S. Smith, Jr.

v.

Secretary of Veterans Affairs, an officer of the United States of America)

(Jefferson Circuit Court, Bessemer Division, CV-09-504; Court of Civil Appeals, 2100194)

BOLIN, Justice.

On April 23, 2009, the Secretary of Veterans Affairs ("the Secretary"), an officer of the United States of America, sued Frank S. Smith, Jr. ("Frank"), in the Jefferson Circuit Court, stating a claim of ejectment and seeking possession of Frank's house in Bessemer.[1] On August 3, 2010, the trial court entered an order, granting the Secretary's motion for a summary judgment. Frank appealed the summary judgment to the Court of Civil Appeals, which reversed the summary judgment and remanded the action for further proceedings. See Smith v. Secretary of Veteran Affairs, [Ms. 2100194, June 24, 2011] ___ So. 3d ___ (Ala. Civ. App. 2011). We granted the Secretary's petition for certiorari review. We reverse and remand.

I. Factual Background and Procedural History

The facts and procedural history of this case are set forth in detail in the Court of Civil Appeals' opinion:

> "Frank purchased a house located on 9th Court South in Bessemer ('the house') in 1998. In connection with the purchase, Frank, joined 'pro forma' by his wife, Juliet L. Smith ('Juliet'), mortgaged the house to Franklin American Mortgage Company ('Franklin') to secure the payment of a

[1]The Secretary also named Frank's wife, Juliet Smith, in the action. However, she was never served.

promissory note evidencing a debt in the principal amount of $60,690.

"On April 23, 2009, the Secretary sued Frank and Juliet, stating a claim of ejectment and seeking possession of the house. As the factual basis of his claim, the Secretary alleged that the mortgage had been assigned to him; that he had sold the house at a foreclosure sale on February 22, 2007; that he had purchased the house at the foreclosure sale; that the auctioneer who had sold the house at the foreclosure sale had executed an auctioneer's deed conveying the house to the Secretary; that the Secretary had demanded in writing that Frank and Juliet vacate the house; and that Frank and Juliet had failed to vacate the house.

"Juliet had vacated the house before the Secretary filed his ejectment action, and she was never served with process. Frank, however, still lived in the house, and he was served. Answering, Frank denied the allegations of the complaint and asserted various affirmative defenses, which included '[d]efective notice,' '[d]efective sale,' and '[w]rongful foreclosure.'

"The Secretary moved for a summary judgment, asserting that, as a matter of law, he was entitled to possession of the house because, he said, he owned legal title to the house by virtue of the auctioneer's deed. In support of his motion, the Secretary submitted an affidavit signed by Scott Hiatt, which stated:

> "'My name is Scott Hiatt, and I am Assistant Vice President and Attorney in Fact for Bank of America, N.A. In my employment capacity, I am personally familiar with the account of Frank S. Smith, Jr. and Juliet L. Smith ....

"'On February 22, 2007, Plaintiff, Bank of America, N.A., sold at foreclosure the following real property located in Jefferson County, Alabama:

"'[legal description of the house];

"'Pursuant to power of sale contained in a promissory note and mortgage executed by Frank S. Smith, Jr. and Juliet L. Smith dated December 29, 1998, to and in favor of Franklin American Mortgage Company by instrument recorded in ... the records in the Office of the Judge of Probate, Jefferson County, Alabama, which mortgage was subsequently assigned to The Secretary of Veterans Affairs, an Officer of the United States of America by instrument recorded ... and re-recorded in ... the said Probate Court Records.

"'Frank S. Smith, Jr. and Juliet Smith defaulted in the payments of said indebtedness and the Secretary of Veterans Affairs commenced foreclosure with written notices to Frank S. Smith, Jr. and Juliet Smith and due newspaper publication in The Alabama Messenger.

"'Said real property was sold at foreclosure February 22, 2007, for a successful bid of $66,097.50, paid by The Secretary of Veterans Affairs, Purchaser. Frank S. Smith, Jr. and Juliet Smith were notified of said foreclosure sale by letter dated February 28, 2007, sent by certified mail of the foreclosure proceeding and [Frank S. Smith and Juliet Smith] were given ten (10) days to vacate said property.'

"(Emphasis added.) Along with Hiatt's affidavit, the Secretary submitted an uncertified copy of the mortgage; uncertified copies of the subsequent assignments of the mortgagee's rights under the mortgage, which included an assignment to the Secretary; an uncertified copy of the auctioneer's deed; an unauthenticated copy of an affidavit by the publisher of the Alabama Messenger; and an unauthenticated copy of a letter dated February 28, 2007, from an attorney representing the Secretary and addressed to Frank and Juliet at the house, which informed them that the Secretary had purchased the house at the foreclosure sale on February 22, 2007, and demanded that they vacate the house within 10 days.

"Frank opposed the summary-judgment motion by filing a pleading titled 'Defendant's Response to Plaintiff's Motion for Summary Judgment.' In his response, Frank argued, among other things, that the Secretary had failed to establish that he was entitled to possession of the house because, Frank said, the Hiatt affidavit did not comply with Rule 56(e), Ala. R. Civ. P., because, Frank said, (1) it did not state how Hiatt, as an officer of, and attorney-in-fact for, Bank of America, N.A. ('Bank of America'), had acquired personal knowledge of the information recited in his affidavit, (2) it did not affirmatively show that Hiatt was competent to testify to that information, and (3) it was not accompanied by sworn or certified copies of the documents to which it referred.

"Following a hearing, the trial court entered a summary judgment in favor of the Secretary on August 3, 2010, without stating its rationale. On August 31, 2010, Frank filed a Rule 59, Ala. R. Civ. P., postjudgment motion, which the trial court denied on October 13, 2010."

___ So. 3d at ___ (footnote omitted).

II. Appeal Before the Court of Civil Appeals

Frank argued before the Court of Civil Appeals that Scott Hiatt's affidavit did not comply with Rule 56(e), Ala. R. Civ. P., because, he said:

> "(1) [The affidavit] did not state how Hiatt, as an officer of, and attorney-in-fact for, Bank of America had acquired personal knowledge of the information recited in his affidavit; (2) [the affidavit] did not affirmatively show that Hiatt was competent to testify to that information; and (3) [the affidavit] was not accompanied by sworn or certified copies of the documents referred to in the affidavit."

___ So. 3d at ___. The Secretary, on the other hand, argued that Frank had waived his objection to Hiatt's affidavit and to the unsworn, uncertified, and unauthenticated documents that supported the affidavit because, he said, Frank did not move the trial court to strike them.[2] The Court of Civil Appeals concluded that Frank was not required to move the

[2]Rule 56(e), Ala. R. Civ. P., provides, in pertinent part:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

trial court to strike the Hiatt affidavit and the supporting documents because Frank had objected to the inadmissibility of the affidavit and the supporting documents in his pleading titled "Defendant's Response to Plaintiff's Motion for Summary Judgment." The Court of Civil Appeals reversed the judgment of the trial court, relying upon Ex parte Elba General Hospital & Nursing Home, Inc., 828 So. 2d 308 (Ala. 2001)(noting that an objection to a trial court's consideration of unauthenticated materials submitted in support of a summary-judgment motion need not be in any particular form). The Court of Civil Appeals stated:

> "In the case now before us, although Frank did not move to strike Hiatt's affidavit and the unsworn, uncertified, and unauthenticated documents that accompanied it, Frank's response to the summary-judgment motion called the trial court's attention to the inadmissibility of the affidavit and those documents by objecting to them and stating the grounds of the objection. Therefore, we find no merit in the Secretary's argument that Frank waived his objection to the Hiatt affidavit and the documents that accompanied it because he failed to move to strike them. See Ex parte Elba Gen. Hosp. & Nursing Home, Inc."

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

III. Standard of Review

> "The standard of review applicable to a summary judgment is well established:

> "'The principles of law applicable to a motion for summary judgment are well settled. To grant such a motion, the trial court must determine that the evidence does not create a genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. When the movant makes a prima facie showing that those two conditions are satisfied, the burden shifts to the nonmovant to present "substantial evidence" creating a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); § 12-21-12(d), Ala. Code 1975. Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assur. Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).
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> "'In our review of a summary judgment, [either on a direct appeal or on a certiorari review,] we apply the same standard as the trial court. Ex parte Lumpkin, 702 So. 2d 462, 465 (Ala. 1997). Our review is subject to the caveat that we must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412, 413 (Ala. 1990).'
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> "Ex parte Alfa Mut. Gen. Ins. Co., 742 So. 2d 182, 184 (Ala. 1999)."

Ex parte Elba Gen. Hosp. & Nursing Home, Inc., 828 So. 2d at 311. In addition, "[o]n appeal, this Court reviews a summary

judgment de novo ... and affords no presumption of correctness to the trial court's ruling on questions of law ...." Board of Trs. of Univ. of Alabama v. American Res. Ins. Co., 5 So. 3d 521, 526 (Ala. 2008).

IV. Discussion

We granted the Secretary's petition for certiorari review to address the issue whether Frank's failure to file a written motion to strike the Hiatt affidavit waived for appellate review any issue regarding the trial court's consideration of that affidavit. In reversing the trial court's summary judgment in favor of the Secretary, the Court of Civil Appeals interprets Ex parte Elba General Hospital to mean that an objection to a defective affidavit, without a formal motion to strike the affidavit, will suffice to preserve for appellate review any issue regarding the trial court's consideration of the defective affidavit in determining that there was no genuine issue of material fact. In Ex parte Elba General Hospital, the defendant nursing home filed a motion for a summary judgment accompanied by the affidavit Marie Lepore, R.N. The trial court entered a summary judgment in favor of the nursing home. The plaintiff, Gerald H. Nelson, filed a

motion to alter, amend, or vacate the judgment, in which he stated that he had argued that at the summary-judgment hearing he had made an oral motion to strike portions of the Lepore affidavit. The trial court denied Nelson's motion to alter, amend, or vacate the judgment, and Nelson appealed to the Court of Civil Appeals. The Court of Civil Appeals acknowledged that Nelson had failed to object to the Lepore affidavit. The Court of Civil Appeals, nevertheless, reversed the summary judgment in favor of the nursing home, concluding that the Lepore affidavit was inadmissible and that enforcing Nelson's failure to object would result in a "gross miscarriage of justice." 828 So. 2d at 311. This Court reversed the judgment of the Court of Civil Appeals, concluding that Nelson had failed to preserve for appellate review the issue whether the Lepore affidavit was defective. This Court elaborated:

> "Although Nelson stated in his motion to alter, amend, or vacate the judgment that during the hearing on the motion for summary judgment he had made an oral motion to strike Lepore's affidavit, Elba General, in its brief before us, emphatically denies that Nelson made such a motion. Nelson has not contradicted this denial in his brief before us. The record provides no indication that the trial court ruled on any such motion. This Court's review is limited to matters contained in the record, and

> nothing in the record, other than the statement in Nelson's postjudgment motion, supports the view that Nelson ever made such a motion. ...
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> "....
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> "On the question whether a trial court should consider a defective affidavit introduced in support of a motion for summary judgment and not objected to by the opposing party, we have consistently held that a failure to object constitutes a waiver of the right to object to the affidavit and that in the absence of an objection the trial court may properly consider such an affidavit, even if an objection alleging the particular defect would clearly have been proper. See Lennon v. Petersen, 624 So. 2d 171 (Ala. 1993); Cain v. Sheraton Perimeter Park S. Hotel, 592 So. 2d 218 (Ala. 1991); Morris v. Young, 585 So. 2d 1374 (Ala. 1991); Perry v. Mobile County, 533 So. 2d 602 (Ala. 1988). An objection need not be made in any particular form. See McMillian v. Wallis, 567 So. 2d 1199, 1205 (Ala. 1990) (holding that a party must 'call the [trial] court's attention' to the fact that a deposition or affidavit is inadmissible and that by failing to do so a party waives any objection to the court's considering the affidavit or deposition)."

Id. at 312-13.

In Perry v. Mobile County, 533 So. 2d 602 (Ala. 1988), this Court adopted the following language from C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 2738 (2d ed. 1983):

> "'A party must move to strike an affidavit that violates Rule 56(e); if he fails to do so, he will waive his objection and, in the absence of a "gross miscarriage

> of justice," the court may consider the defective affidavit. This principle applies to affidavits containing evidence that would not be admissible at trial as well as to affidavits that are defective in form. The motion to strike must be timely, [and] the decision on that question is left to the discretion of the trial judge. It is clear that a motion to strike presented for the first time on appeal comes too late.
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> "'The court will disregard only the inadmissible portion of the challenged affidavit and consider the rest of it.... [A] motion to strike should specify the objectionable portions of the affidavit and the grounds for each objection. A motion asserting only a general challenge to an affidavit will be ineffective.'"

533 So. 2d at 604-05 (emphasis added).

Cases decided after Perry have not always been clear in holding that a party challenging the admissibility of an affidavit must object to the affidavit and move to strike it. See Ex parte Diversey Corp., 742 So. 2d 1250, 1253-54 (Ala. 1999)(holding that "the court can consider inadmissible evidence if the party against whom it is offered does not object to the evidence by moving to strike it"); Elizabeth Homes, L.L.C. v. Cato, 968 So. 2d 1, 4 (Ala. 2007)("[I]f an affidavit or the documents attached to an affidavit fail to comply with [Rule 56(e), Ala. R. Civ. P.,] the opposing party

must object to the admissibility of the affidavit or the document and move to strike."); Ware v. Deutsche Bank Nat'l Trust Co., [Ms. 1100822, June 17, 2011] ___ So. 3d ___ (Ala. 2011)(party challenging admissibility of affidavit and supporting documents pursuant to Rule 56(e) must object thereto and move to strike); but see Blackmon v. Brazil, 895 So. 2d 900, 903 n.2 (Ala. 2004)("Although the plaintiffs argue on appeal that these two affidavits and the listing contract were inadmissible, the plaintiffs did not raise such objections in the trial court. Therefore, the plaintiffs waived their objections to this evidence."); Ex parte Unitrin, Inc., 920 So. 2d 557, 560 (Ala. 2005)("Unitrin did not object to the admissibility of any of the materials attached to Ware's memorandum. Consequently, these materials are properly before us."). We take this opportunity to reaffirm the holding in Perry that a party must move the trial court to strike any evidence that violates Rule 56(e), Ala. R. Civ. P.[3] An objection to the inadmissible evidence alone is not

[3]Generally, a written motion to strike would be required. However, if a hearing on the summary-judgment motion were transcribed or if the trial court's order reflected that an oral motion to strike was made, then an oral motion would be sufficient.

sufficient. The motion to strike brings the objection to the trial court's attention and requires action on the part of the trial court to properly preserve the ruling on appeal.

In the instant case, Frank did object to the admissibility of the Hiatt affidavit and to the documents supporting that affidavit in his pleading titled "Response to Defendant's Motion for Summary Judgement." However, he did not move the trial court to strike the affidavit. Therefore, no ruling on the issue was invoked. Because Frank failed to move the trial court to strike the Hiatt affidavit and the unsworn, uncertified, and unauthenticated documents that accompanied that affidavit, he waived any objection on appeal regarding the trial court's consideration of the affidavit and supporting documents. Accordingly, any issue regarding the admissibility of the Hiatt affidavit was not preserved for review by the Court of Civil Appeals and cannot stand as the basis for that court's reversal of the trial court's judgment.

V. Conclusion

The judgment of the Court of Civil Appeals is reversed, and the case is remanded to the Court of Civil Appeals for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Woodall, Stuart, Main, and Wise, JJ., concur.

Parker, Murdock, and Shaw, JJ., dissent.

MURDOCK, Justice (dissenting).

I respectfully dissent. A majority of the Court today concludes that a party's otherwise adequate objection to evidence submitted in support of a motion for a summary judgment is not sufficient to preserve an issue for appellate review. Instead, the majority insists, the objecting party also is required to file with the trial court a motion to strike the allegedly objectionable evidence in order to preserve the objection. This additional requirement seems unnecessary and overly formalistic. It finds no support in the language of the Alabama Rules of Civil Procedure; it is not dictated by cases construing those rules; and, in fact, it is contrary to sound Alabama precedent and to the majority of analogous federal cases. Indeed, I believe this additional requirement serves no significant purpose other than creating an unnecessary trap for practitioners and, in turn, their clients.

First, nothing in the Alabama Rules of Civil Procedure requires the filing of a motion to strike evidence submitted in relation to a summary-judgment motion. The pertinent portion of Rule 56(e), Ala. R. Civ. P., simply states:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

The rule does not specify how a party should bring to the trial court's attention deficiencies in the supporting evidence offered by the opposing party. Given that the fact-finder on a motion for a summary judgment is the trial judge rather than a jury, I fail to see the need for a specific requirement that a party file a motion to strike such evidence when the party already has stated its objections to the evidence to the trial judge. What is the purpose of objecting to evidence presented to a judge if not to ask that judge not to consider it?

Indeed, requiring a motion to strike in order to preserve an otherwise adequate objection to submitted evidence conflicts with the purpose of the Alabama Rules of Civil Procedure. Rule 1(c), Ala. R. Civ. P., provides that "[t]hese rules shall be construed and administered to secure the just,

speedy and inexpensive determination of every action." The Committee Comments on 1973 Adoption to Rule 1(c) explain:

> "It has been said that the policy of rules such as these is to disregard technicality and form in order that the civil rights of litigants may be asserted and tried on the merits. Mitchell v. White Consolidated, Inc., 177 F.2d 500 (7th Cir. 1949), cert. denied 339 U.S. 913, 70 S.Ct. 574, 94 L.Ed. 1339. The last sentence of this rule, read in conjunction with Rules 8(f) [construction of pleadings] and 61 [harmless error], states a mandate of construction of the rules which is intended to implement that policy."

(Emphasis added.) The approach adopted by the majority today, in my view, amounts to adding "technicality and form" where they are not necessary. A motion to strike is not necessary in order to inform the trial court of the ground for the objection, and it is not necessary in order to make clear what evidence the trial court was left to consider in the event it sustained that objection.

I have searched both the Alabama and federal cases for support for the majority's approach. I have found no case that expressly grapples with the issue whether, in addition to an otherwise adequate objection, a motion to strike is necessary and that has held that such a motion is necessary. To the contrary, all the cases I have found in which a court

has taken the time to expressly analyze the issue have concluded that a motion to strike is not necessary.

As the main opinion notes, there are several reported Alabama cases decided subsequent to this Court's decision in Perry v. Mobile County, 533 So. 2d 602 (Ala. 1988), that suggest that a motion to strike is a requirement. None of these cases, however, expressly grapples with the issue before us today: whether a motion to strike must be added to an otherwise adequate objection in order to preserve an issue for appellate review. This is no doubt the case because, for all that appears from the opinions issued in these cases, there was no objection of any nature in the trial court to the evidence sought to be excluded. See, e.g., Ware v. Deutsche Bank Nat'l Trust Co., [Ms. 1100822, June 17, 2011] ___ So. 3d ___, ___ (Ala. 2011) (stating that the plaintiff "did not challenge this affidavit in the trial court," thereby suggesting that no objection to the affidavit was made in the circuit court); SSC Selma Operating Co. v. Gordon, 56 So. 3d 598, 603 (Ala. 2010) (stating that the plaintiff neither made an objection to nor filed a motion to strike an arbitration

agreement);[4] Cartwright v. Maitland, 30 So. 3d 405, 409 (Ala. 2009) (stating that "[t]he Maitlands did not specifically object in the trial court to the admission of Keith's affidavit, nor did they move to strike it from the record" (emphasis added)); Elizabeth Homes, L.L.C. v. Cato, 968 So. 2d 1, 5 (Ala. 2007) (noting that the plaintiffs did not object or move to strike the unauthenticated document submitted in support of the affidavit); Ex parte Diversey Corp., 742 So. 2d 1250, 1253 (Ala. 1999) (noting that the defendant did not reply to the plaintiff's response to its motion for a summary judgment and thus no objection or motion to strike was filed regarding the allegedly problematic affidavit); and Berry Mountain Mining Co. v. American Res. Ins. Co., 541 So. 2d 4, 5 (Ala. 1989) (stating that the defendant "failed to move to

[4]The Court in SSC Selma Operating Co. stated that "even if Mrs. Gordon had objected to the admissibility of the copy of the arbitration agreement, it is undisputed that Mrs. Gordon did not file a motion to strike the arbitration agreement. Therefore, we will consider the evidence." 56 So. 3d at 603. The Court also stated, however, that Gordon "did not argue that the copy of the arbitration agreement attached to the motion was not admissible." Thus, the case represents the circumstance where a party neither makes an objection to, nor moves to strike, objectionable evidence. Moreover, the Court's opinion quoted Elizabeth Homes, L.L.C. v. Cato, 968 So. 2d 1, 5 (Ala. 2007), for the proposition that a motion to strike is required; Cato is a case in which no objection or motion to strike was filed.

strike the unauthenticated documents" that supported the plaintiff's motion for a summary judgment and the Court therefore considered the documents as evidence; the Court also quoted from Perry the portion of Federal Practice and Procedure in issue; it is not clear from the facts whether the defendant objected in any form to the unauthenticated documents).

In any event, the suggestion in Alabama cases that have come after Perry that a motion to strike is necessary is a notion that is traceable to Perry. Like those subsequent cases, however, Perry itself did not involve an objection of any nature in the trial court. See 533 So. 2d at 604 (stating that "no ruling on the matter was invoked" and that "[t]he issue of the admissibility of the evidence ... was raised ... for the first time on appeal"). Nor does Perry expressly consider whether, had such an objection been made, it would have been sufficient to preserve the issue. Instead, Perry stands as a source of this requirement in some cases simply because the Perry Court chose to quote the predecessor of the following passage from Federal Practice and Procedure:

> "A party must move to strike an affidavit that violates Rule 56(e).[51] The failure to do so will

> result in the waiver of the objection and, in the absence of 'a gross miscarriage of justice,'[52] the court may consider the defective affidavit. This principle applies to affidavits containing evidence that would not be admissible at trial,[53] as well as to affidavits that are defective in form.[54] The motion to strike must be timely,[55] but the rules do not prescribe a specific period within which it should be made so the decision on that question is left to the discretion of the trial judge.[56] On the other hand, it is clear that a motion to strike presented for the first time on appeal comes too late.[57]
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> "The court will disregard only the inadmissible portions of a challenged affidavit and consider the rest of it.[58] ... It follows that a motion to strike should specify the objectionable portions of the affidavit and the grounds for each objection. A motion asserting only a general challenge to an affidavit will be ineffective."

10B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2738, at 372-77 (3d ed. 1998)) (emphasis added; text of footnotes omitted) (quoted in Perry as it read in 1983 edition,[5] 533 So. 2d at 604-05).

The problem with relying on Perry for the proposition at issue -- aside from the fact that Perry itself did not involve any objection at all in the trial court and that the Court

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[5]The 1983 edition of this passage as quoted in Perry is no different in any material respect from the current version set out in the text of this writing.

therefore found it unnecessary to, and did not, engage in any consideration of whether an objection would have been sufficient -- is that none of the cases Federal Practice and Procedure cite for the proposition that "[a] party must move to strike an affidavit that violates Rule 56(e)" actually stand for that proposition. See Federal Practice and Procedure § 2738 n. 51. Many of them stand in fact for the contrary proposition, a fact to which I will return.

In the present case, the Court of Civil Appeals unanimously concluded that a motion to strike is not necessary where the objection otherwise interposed to the trial judge is adequate. That court's opinion and Smith's brief to this Court invoke this Court's decision in Ex parte Elba General Hospital & Nursing Home, Inc., 828 So. 2d 308 (Ala. 2001). In Elba General, this Court clearly explained:

> "On the question whether a trial court should consider a defective affidavit introduced in support of a motion for summary judgment and not objected to by the opposing party, we have consistently held that a failure to object constitutes a waiver of the right to object to the affidavit and that in the absence of an objection the trial court may properly consider such an affidavit, even if an objection alleging the particular defect would clearly have been proper. See Lennon v. Petersen, 624 So. 2d 171 (Ala. 1993); Cain v. Sheraton Perimeter Park S. Hotel, 592 So. 2d 218 (Ala. 1991); Morris v. Young,

> 585 So. 2d 1374 (Ala. 1991); Perry v. Mobile County, 533 So. 2d 602 (Ala. 1988). An objection need not be made in any particular form. See McMillian v. Wallis, 567 So. 2d 1199, 1205 (Ala. 1990) (holding that a party must 'call the [trial] court's attention' to the fact that a deposition or affidavit is inadmissible and that by failing to do so a party waives any objection to the court's considering the affidavit or deposition)."

Id. at 312-13 (emphasis added).

Although Smith does not ask expressly ask us to overrule Perry or those cases that have since quoted from or relied upon it, for the reasons previously discussed I find limited, if any, precedential value in Perry and those subsequent cases. What Smith does ask us to do is follow the rationale and holding in Ex parte Elba General Hospital. Given this argument by Smith, especially in the context of this Court's obligation to exposit Alabama law correctly for future cases (not to mention the fact that our embrace of Smith's argument will serve only to result in an affirmance of the court below), I see no reason why this Court should have any hesitation today to embrace the holding in Ex parte Elba General Hospital.

As I noted earlier, I have found no Alabama or federal case that, having expressly analyzed the issue, has reached

the conclusion that a motion to strike must be added to an otherwise adequate objection in order to preserve that objection for appellate review. As already discussed, those Alabama cases that nonetheless contain verbiage to the effect that a motion to strike is required are, for all that appears, not cases in which an objection was made but there was no motion to strike. Moreover, at the end of the day, the questionable verbiage in all of those cases ultimately is traceable to Perry and its quotation of Federal Practice and Procedure. A discussion of Federal Practice and Procedure and applicable federal cases is set out below.

Turning first to those federal cases cited in note 51 of § 2738 of Federal Practice and Procedure for the proposition, as quoted in Perry, that "[a] party must move to strike an affidavit that violates Rule 56(e)," it is important to note that in many of those cases the opposing party did move to strike. Thus, whether an objection was sufficient absent a motion to strike was not in issue. See, e.g., Londrigan v. Federal Bureau of Investigation, 670 F.2d 1164, 1174 (D.C. Cir. 1981); Servants of Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560, 1564 (D. N.M. 1994); Johnson v. Scotty's,

Inc., 119 F. Supp. 2d 1276, 1281 (M.D. Fla. 2000); Canning v. Star Publ'g Co., 19 F.R.D. 281, 283 (D. Del. 1956); and Ernst Seidelman Corp. v. Mollison, 10 F.R.D. 426, 427 (S.D. Ohio 1950). Moreover, in Lacey v. Lumber Mutual Fire Insurance Co. of Boston, 554 F.2d 1204, 1205 (1st Cir. 1977), another case cited in note 51, the defendants made no objection or motion to strike the affidavit in the trial court.[6] Thus, similar to the situation in Perry, in Lacey there was no occasion to consider whether an objection was sufficient to apprise the trial judge of alleged deficiencies in the opposition's evidentiary support under Rule 56.

Moreover, the remaining cases cited in note 51 actually state that either an objection or a motion to strike is sufficient to preserve the issue. See Noblett v. General Elec. Credit Corp., 400 F.2d 442, 445 (10th Cir. 1968) (stating that "[a]n affidavit that does not measure up to the standards of [Rule] 56(e) is subject to a motion to strike; and formal defects are waived in the absence of a motion or other objection" (emphasis added)); Auto Drive-Away Co. of

[6]The Lacey court quoted the same passage from § 2738 of Federal Practice and Procedure as did the Perry Court.

Hialeah, Inc. v. I.C.C., 360 F.2d 446, 448-49 (5th Cir. 1966) (observing that "the defendants failed to object to the introduction or use of the affidavit and exhibits below. An affidavit that does not measure up to the standards of Rule 56(e) is subject to a timely motion to strike. In the absence of this motion or other objection, formal defects in the affidavit ordinarily are waived." (footnote omitted and emphasis added)); and United States ex rel. Austin v. Western Electric Co., 337 F.2d 568, 575 (9th Cir. 1964) (relating that "[n]o objection was interposed to the use of this declaration at the hearing on the motion for summary judgment, and counsel for both parties referred to the declaration in their oral argument to the trial court. The declaration would have been subject to a motion to strike. Had appellees made such a motion or otherwise objected to the use of the declaration, the defect could have been remedied by appellants filing an affidavit in lieu of the declaration." (emphasis added)).

Further still, in the extended discussion of this issue that follows note 51, Federal Practice and Procedure describes the decisions of several federal appellate courts that

indicate that a proper objection is sufficient to preserve issues for appeal:

> "A failure to object to the admission of an affidavit that is objectionable under Rule 56 standards permits the court to consider the affidavit. ... Becker v. Koza, D.C. Neb. 1971, 53 F.R.D. 416....
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> "....
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> "In Klingman v. National Indem. Co., C.A. 7th, 1963, 317 F.2d 850, 854, defendant objected to plaintiff's affidavit filed in opposition to the motion for summary judgment for failing to meet the personal knowledge requirement of Rule 56(e). The defendant did not contest the truth of the affidavit nor did he raise his objection in the district court. The court stated: 'It is settled law that testimony to which no objection is made may be considered by the trier of fact. We conclude that analogous rule is applicable here. On a motion for summary judgment, if no objection is made to an affidavit which is objectionable under Rule 56(e), the affidavit may be considered by the court in ruling on the motion.'
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> "....
>
> "The nonmoving party waived the right to raise on appeal the issue whether an affidavit filed in support of a motion for summary judgment was timely when the nonmovant neither moved to strike the affidavit nor raised an objection to its consideration and similarly waived the issue whether an unsworn affidavit filed in support of the motion rendered the motion deficient by failing to make a timely objection in the district court. McCloud

> River R.R. Co. v. Sabine River Forest Prods., Inc., C.A. 5th, 1984, 735 F.2d 879."

Federal Practice and Procedure § 2738 nn. 52, 53, and 55 (emphasis added).

The cases cited in Federal Practice and Procedure are not unusual in stating that an objection is sufficient to inform the trial judge that a supporting affidavit does not meet the requirements of Rule 56. Several other federal cases have expressed the same rule. The United States Court of Appeals for the First Circuit, in declining an invitation to adopt the exact wording of the passage from Federal Practice and Procedure quoted in Lacey, succinctly expressed the reasoning of these courts, explaining:

> "We believe that what is required to preserve a party's rights vis-à-vis an allegedly deficient affidavit is for the dissatisfied party to (a) apprise the trial court, in a conspicuous manner and in a timely fashion, that she considers the affidavit defective, and (b) spell out the nature of the ostensible defects clearly and distinctly. Whether the dissatisfied party fulfills these requirements by means of a motion to strike or in some substantially equivalent way (say, by an objection or, as here, in a legal memorandum urging the granting of summary judgment notwithstanding the affidavit) is of little moment."

Perez v. Volvo Car Corp., 247 F.3d 303, 314 (1st Cir. 2001) (emphasis added). See, e.g., Wiley v. United States, 20 F.3d 222, 226 (6th Cir. 1994) (concluding that "[i]f a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and we will review such objections only to avoid a gross miscarriage of justice" (emphasis added)); Williams v. Evangelical Ret. Homes of Greater St. Louis, 594 F.2d 701, 703 (8th Cir. 1979) (recounting that "[t]he general rule is that defects in the form of the affidavits are waived if not objected to at the trial court level. Absent a motion to strike or other timely objection, the trial court may consider a document which fails to conform to the formal requirements of Rule 56(e)." (emphasis added)); Scharf v. United States Attorney General, 597 F.2d 1240, 1243 (9th Cir. 1979) (noting that, "[g]enerally, ... formal defects [in an affidavit] are waived absent a motion to strike or other objection, neither of which occurred here" (emphasis added)); Associated Press v. Cook, 513 F.2d 1300, 1303 (10th Cir. 1975)

("[t]he record does not disclose that Cook filed a motion to strike or otherwise objected to the affidavits [based on the lack of personal knowledge]. Under these circumstances any formal defects contained in the affidavits are deemed to be waived and the trial court may consider them in ruling on the summary judgment motions." (emphasis added)); Klingman v. National Indem. Co., 317 F.2d 850, 854 (7th Cir. 1963) (stating that, "[o]n a motion for summary judgment, if no objection is made to an affidavit which is objectionable under Rule 56(e), the affidavit may be considered by the court in ruling on the motion" (emphasis added)); and Interstate Gov't Contractors, Inc. v. Johnson Controls, Inc., 186 F.R.D. 694, 697 (M.D. Ga. 1999) (rejecting the plaintiff's affidavit presented in opposition to summary judgment "for failing to comply with Rule 56(e)" when the objection to the affidavit was made by the defendant in its reply brief).

When objections are made to evidence other than affidavits, the authorities are equally, if not more, clear that a motion to strike is unnecessary. Indeed, Federal Practice and Procedure itself simply states that "uncertified or otherwise inadmissible documents may be considered by the

court [on a motion for a summary judgment] if not challenged. The objection must be timely or it will be deemed to have been waived." 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2722, at 384-85 (3d ed. 1998) (emphasis added). See, e.g., MSK EyEs Ltd. v. Wells Fargo Bank, Nat'l Ass'n, 546 F.3d 533, 543 n.6 (8th Cir. 2008) ("We note unsworn statements are ordinarily inadmissible hearsay and do not constitute competent evidence that can be considered under Fed. R. Civ. P. 56(e). However, 'otherwise inadmissible documents may be considered by the court if not challenged.'" (quoting Federal Practice and Procedure § 2722)(emphasis added)); In re Unisys Sav. Plan Litig., 74 F.3d 420, 437 n.12 (3d Cir. 1996) ("Unisys argues that we may not consider Mr. Gottheimer's report because it was not in the form of a sworn affidavit as required by the Fed. R. Civ. P. 56(e). Unisys, however, did not move to strike nor did it otherwise object to Dr. Gottheimer's report in the district court." (emphasis added)); H. Sand & Co. v. Airtemp Corp., 934 F.2d 450, 455 (2d Cir. 1991) (finding that an "objection" to unauthenticated documents in support of a motion for a summary judgment was not made in the district court and therefore it came too

late); Capobianco v. City of New York, 422 F.3d 47, 55 (2d Cir. 2005) (finding that district court abused its discretion in concluding that reports submitted in opposition to a motion for a summary judgment were "'inadmissible as unsworn statements'" because "neither side objected to the admissibility of the reports" (emphasis added)); Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 37-38 (D.C. Cir. 1987) (quoting Federal Practice and Procedure for the proposition that "'inadmissible documents may be considered by the court if not challenged'"); Burnett v. Stagner Hotel Courts, Inc., 821 F. Supp. 678, 683 n. 2 (N.D. Ga. 1993), aff'd, 42 F.3d 645 (11th Cir. 1994) (finding that plaintiffs' exhibit failed to meet the requirements of Rule 56(e), after the defendant had challenged the exhibit in its reply brief); and Cinocca v. Baxter Labs., Inc., 400 F. Supp. 527, 530 (E.D. Okla. 1975) (explaining that "[t]he materials submitted by Travenol in support of its Motion are not verified by affidavit. However, as Plaintiff has not objected to this defect and treats the Agreement as the true and correct contract for acquisition of substantially all assets as

entered into by Travenol and Surgitool the Court will consider the Agreement for purposes of this Motion." (emphasis added)).

The number of federal cases stating that an objection is sufficient is not surprising, given that before Rule 56, Fed. R. Civ. P., was amended in December 2010, there was a split in the federal circuits regarding whether a motion to strike was even appropriate outside the context of objections to pleadings under Rule 12(f), Fed. R. Civ. P.[7] As one treatise

[7]Rule 12(f), Fed. R. Civ. P., provides that a

> "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
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> > "(1) on its own; or
> >
> > "(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading."

Rule 12(f), Ala. R. Civ. P., is similar and reads as follows:

> "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty (30) days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

has observed, "[p]rior to the 2010 Amendments [to the Federal Rules of Civil Procedure], the courts were ... divided as to whether an improper affidavit could be challenged on a motion to strike." Steven Baicker-McKee, William M. Janssen & John B. Corr, Federal Civil Rules Handbook 2012 1135-36 (2012). The reason was that, as one court explained, "neither the text of Rule 56 nor of Rule 12(f) authorizes use of motions to strike for th[e] purpose" of striking evidence in support of a motion because "Rule 12(f) read literally only provides for motions to strike directed at 'pleadings,' which an affidavit is not ... and Rule 12's focus on 'redundant, immaterial[,] impertinent or scandalous matter' does not appear germane to the purpose of [a party's] Motion to Strike incompetent or inconsistent affidavit averments." Dragon v. I.C. Sys., Inc., 241 F.R.D. 424, 425 (D. Conn. 2007). The plaintiff in Dragon had argued to the court that "the Second Circuit actually requires a motion to strike affidavits defective under Rule 56(e) to avoid waiver of the issue," but the court rejected that argument, observing that in the cases cited by the plaintiff "no objection had been made below by any means -- in briefings or a motion to strike -- to the form of the unsworn

written statements attached to the party's sworn affidavit." 241 F.R.D. at 426 n.2. See also, e.g., Pilgrim v. Trustees of Tufts Coll., 118 F.3d 864, 868 (1st Cir. 1997), abrogation on other grounds recognized in Crowley v. L.L. Bean, Inc., 303 F.3d 387, 406 (1st Cir. 2002) (stating that "Rule 12(f) applies only to pleadings and has no applicability to motions made in pursuit of or in opposition to summary judgment").[8]

In sum, consideration of the text and purposes of state and federal rules of procedure and of Alabama and federal cases leads me to conclude that the law does not require, and there is no sound reason that it should require, a motion to strike in addition to an otherwise properly made and preserved objection to evidence submitted in relation to a motion for a summary judgment. When a proper objection is made and preserved in the record, the trial court will be given adequate opportunity to consider the objection and the

[8]The recently amended version of Federal Rule 56 and the Advisory Committee Note to it now make clear that a motion to strike is not desired, at least for certain objections. Rule 56(c)(2), Fed. R. Civ. P., states that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." The Advisory Committee Note to this subsection expressly states that "[t]here is no need to make a separate motion to strike" in order to effectuate such an objection.

appellate court will be adequately informed of the basis for the objection. If and to the extent the objection is sustained, we may and should assume, without requiring the "technicality and form" of an additional motion to strike, that the trial court did not consider the objected-to evidence. To the extent the trial court overrules an objection, we may assume the converse. Again, requiring more serves only to create an unnecessary trap for the practitioner and, in turn, his or her client. I believe that the Court of Civil Appeals has the correct, and more commonsensical, view of this issue, and I therefore would affirm its judgment.

Parker and Shaw, JJ., concur.