Rel: 03/15/2013

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2012-2013

1111541

Ex parte Alamo Title Company

PETITION FOR WRIT OF MANDAMUS

(In re: P.B. Surf, Ltd.

v.

Guy A. Savage et al.)

(Jefferson Circuit Court, CV-11-904034)

MAIN, Justice.

Alamo Title Company ("Alamo"), a Texas corporation, petitions this Court for a writ of mandamus directing the

Jefferson Circuit Court to vacate its order denying Alamo's motion to dismiss an action filed against it by P.B. Surf, Ltd. ("P.B. Surf"), a Florida limited partnership, and to enter an order dismissing the action for lack of personal jurisdiction. We grant the petition and issue the writ.

I. Factual Background and Procedural History

This dispute concerns the disbursement of proceeds from the sale of the San Paloma apartment complex in Houston, Texas. According to P.B. Surf, at the time the San Paloma sale was scheduled to close in late October 2011, a dispute arose over who was entitled to the net proceeds of the sale and where the net proceeds were to be deposited after the closing. On October 28, 2011, after the closing, Alamo wired a portion of the net proceeds from the San Paloma sale to a Birmingham Wells Fargo bank account pursuant to instructions from several of the sellers.

P.B. Surf filed a verified complaint against Alamo, as the escrow agent, and several other defendants, alleging, among other things, conspiracy. Alamo moved the trial court, pursuant to Rule 12(b)(2), Ala. R. Civ. P., to dismiss P.B. Surf's claims against it for lack of personal jurisdiction,

attaching to its motion the affidavit of David Pitschmann, the senior vice president and co-general counsel for Alamo. Before the trial court ruled on Alamo's motion to dismiss, P.B. Surf filed an amended complaint, which was not verified, alleging various claims against Alamo, as the escrow agent, and several other defendants, including Guy A. Savage, and G.J. Willem Noltes, who both had an ownership interest in one of the companies that was involved in the sale of the San Paloma apartment complex, alleging that there was a conspiracy among the defendants in the wiring of funds from Alamo to the Birmingham Wells Fargo bank account. In its amended complaint, P.B. Surf alleged that Alamo was partially responsible for what it alleged was the improper distribution of the proceeds among Savage, Noltes, and P.B. Surf. The amended complaint contains the following factual averments:

> "15. P.B. Surf is a limited partnership operated by David A. Brannen and other partners.
>
> "16. Investment Realty Holdings, LLC is jointly owned by Savage and Noltes, each owning a fifty percent (50%) interest in the entity.
>
> "17. P.B. Surf and Investment Realty Holdings, LLC are the only members of Investment Realty Series II, LLC ('IRS-II'). P.B. Surf owns a sixty-percent (60%) interest in IRS-II, and Investment Realty Holdings, LLC owns the remaining forty-percent (40%)

interest in IRS-II. P.B. Surf provided the only capital used to create the entity, investing approximately $5,900,000.00 in cash. Investment Realty Holdings, LLC, Savage and Noltes did not provide any equity contribution to IRS-II.

"18. In February 2007, P.B. Surf and Investment Realty Holdings, LLC entered into an Operating Agreement to govern the operation of IRS-II. That agreement controls and governs the parties' relationship with respect to all business matters as it relates to the operation of the San Paloma property, the sale of which forms the basis of the present dispute between the parties.

"19. The IRS-II Operating Agreement provides that P.B. Surf made the only cash contribution to the entity. Further, the Operating Agreement provides that, upon the sale of the San Paloma property, which is considered a 'Capital Transaction', all monies are to be distributed as follows: first, an 11% return on its approximate $5.9 million investment was to be paid to P.B. Surf; second, P.B. Surf was entitled to a full repayment of its approximate $5.9 million investment; third, only after P.B. Surf had been paid both of these sums, any remaining funds were to be allocated between P.B. Surf and [Investment Realty Holdings, LLC,] according to their respective interests in IRS-II, such that P.B. Surf would receive 60% and [Investment Realty Holdings, LLC,] would receive 40% of any remaining amount.

"20. IRS-II then entered into a contract with WCSE San Paloma, LLC whereby they created San Paloma Investments, LLC. Each entity held a fifty-percent (50%) interest in San Paloma Investments, LLC.

"21. San Paloma Investments, LLC then entered into a partnership agreement with Paloma General Partner, LLC, creating San Paloma Partners, L.P. San Paloma Investments, LLC was a ninety-nine percent

(99%) limited partner in the entity, with Paloma General Partner, LLC acting as a one percent (1%) general partner.

"22. San Paloma Partners, L.P. was created to, and did in fact, purchase, own, and operate certain real property located in Texas referred to by the parties as 'San Paloma.' The sale of this property in October 2011 and the subsequent distribution of the sales proceeds are the subject of this lawsuit.

"The Closing of San Paloma

"23. The San Paloma deal resulted in substantial financial loss to P.B. Surf, which had contributed the entire capital amount (approximately $5.9 million) used to purchase San Paloma.

"24. On or about July 27, 2011, San Paloma Partners entered into a purchase and sale agreement with ISBI San Paloma, LLC, successor-by-assignment to Francis Property Management, Inc. ('ISBI'), whereby San Paloma Partners agreed to sell the San Paloma property to ISBI (the 'San Paloma Sale'). P.B. Surf's consent was required to sell the San Paloma property, as provided for in the IRS-II Operating Agreement.

"25. As a result of the San Paloma Sale, P.B. Surf stood to realize a loss of more than $5 million.

"26. On October 27, 2011, the San Paloma Sale was scheduled to close. Over the course of the day, due to Defendant Noltes, a dispute arose over who was entitled to the net proceeds of the sale and where the net proceeds were to be deposited after the sale closed.

"27. During the afternoon of October 27, 2011, P.B. Surf and Savage, through their attorney Patrick Hayes, consistently maintained that P.B. Surf was

entitled to receive the entire net proceeds from the San Paloma Sale based on the relevant operating agreements, as provided above. The sale resulted in approximately $3.8 million in net proceeds, held in two portions: (1) $1,561,704.80 was held by Grandbridge Real Estate Capital, LLC, and is not the subject of this lawsuit, and (2) $2,277,057.08 was held in escrow by Alamo Title and is the subject of this lawsuit. Pursuant to the operating agreement, P.B. Surf was entitled to 100% of both sums of money.

"28. As a result of a dispute created by Defendant G.J. Willem Noltes during the closing on October 27, 2011, P.B. Surf, Savage, and Noltes, all acting through their counsel, agreed that, instead of wiring the Net Proceeds to a particular person or entity, Defendant Alamo Title Company (the company that held approximately $2.3 million of the net proceeds from the sale) would interplead the Net Proceeds in Court in Texas so that the proper distribution of the net proceeds could be determined by a judge. Given the dispute over the distribution of the Net Proceeds, this agreement was required in order to close the sale of San Paloma. Absent this agreement, the sale would not have closed.

"29. All parties to the present dispute were in agreement with this proposed course of conduct and, as of the close of business on October 27, 2011, P.B. Surf had been informed and believed that the contemplated Texas interpleader would occur based on the parties' agreement and written confirmation delivered to Alamo Title Company, coupled with Alamo's consent to this arrangement and planned interpleader action.

"30. Unbeknownst to P.B. Surf, however, Savage and Noltes began immediately conspiring to seize control of the Net Proceeds before Alamo could interplead the funds into a Texas court. Savage and Noltes both admitted, under oath, that on the

afternoon and evening of October 27, 2011, Savage and Noltes discussed ways by which they could obtain the Net Proceeds from Alamo and prevent P.B. Surf from obtaining any of the Net Proceeds. Savage and Noltes agreed to meet in Birmingham, Alabama on the following morning, October, 28, 2011, to determine how they could instruct Alamo to wire the funds to an account controlled by Savage.

"October 28, 2011

"31. On the morning of October 28, 2011, without the knowledge or participation of P.B. Surf, Savage and Noltes accomplished their plan. On that morning, Noltes and Savage called Alamo, purporting to act on behalf of San Paloma Partners. Noltes and Savage first called Alamo by telephone and instructed Alamo to wire the funds into a Wells Fargo account in Birmingham, Alabama, which was in the name of San Paloma Partners, L.P. At that time, Savage was the only signatory on the bank account, but Noltes insisted later that morning at the Wells Fargo bank branch that Savage add him as a signatory that day, which Savage did. Noltes and Savage confirmed their verbal instruction to Alamo in writing, via email, that same morning.

"32. Neither P.B. Surf, David Brannen, nor Patrick Hayes (attorney for both P.B. Surf and Savage) were copied on these October 28, 2011 correspondences from Savage and Noltes to Alamo, nor otherwise informed of the instructions given to Alamo. Savage and Noltes purposefully and admittedly concealed their actions from P.B. Surf, Brannen, and Hayes.

"33. That same morning, without consulting or notifying P.B. Surf, David Brannen or Patrick Hayes, Alamo wired the Net Proceeds to the Birmingham Wells Fargo account, to which only Savage and Noltes had access. Alamo had actual knowledge that P.B. Surf claimed an interest in these funds, as Attorney

> Patrick Hayes had informed Alamo, in writing, the previous day that the money was due to be paid to P.B. Surf. Alamo did not request either a certificate of incumbency or a formal letter from Savage or Noltes, nor, presumably, did Alamo consult with its counsel concerning Savage's and Noltes's instruction, despite the inconsistency of their instruction in light of the written agreement reached just one day earlier between all of the parties. Nor did Alamo inform Patrick Hayes or Noltes's attorney of the instructions given to it by Savage and Noltes that morning. Instead, based on a brief telephone call and email, Alamo simply wired the funds without informing P.B. Surf or its counsel of the instructions given to it by Savage and Noltes.
>
> "34. Upon the deposit of the funds in the Wells Fargo account, Savage and Noltes immediately withdrew $2.1 million, the vast majority of the funds, depositing these funds in personal bank accounts outside the reach of P.B. Surf, and in some cases, later transferred the funds to bank accounts outside the jurisdiction of the United States."

In its amended complaint, P.B. Surf sought injunctive and declaratory relief. In addition, the counts in the amended complaint alleged against Alamo (1) negligence, (2) wantonness, (3) breach of contract, (4) breach of fiduciary duty, (5) fraud, (6) conversion, and (7) conspiracy, among others. In particular, as to conspiracy, P.B. Surf's amended complaint avers, in pertinent part:

"COUNT IX: CONSPIRACY

"....

"91. Defendants conspired among themselves to wrong, injure, damage, defraud and/or deceive P.B. Surf, and/or to convert the Net Proceeds.

"92. Defendants have taken action and committed acts in furtherance of said conspiracy or conspiracies to the detriment of P.B. Surf. These actions include, but are not limited to, the following:

"(a) Savage and Noltes instructing Alamo to wire the funds to the Wells Fargo account;

"(b) Alamo's wiring of the money to the Wells Fargo account;

"(c) Noltes's and Savage's withdrawing the money from the Wells Fargo account;

"(d) Noltes's and Savage's transferring the money to personal accounts;

"(e) Noltes, Savage, Kent Suttles Noltes, Tamela Savage, Investment Realty, LLC, Power Force, LLC, and/or Power Force Apparel, LLC spending portions of the Net Proceeds on personal debts, liabilities, and/or investments or other matters unrelated to the San Paloma venture;

"(f) Savage, Noltes, Kent Suttles Noltes, Tamela Savage, Investment Realty, LLC, Power Force, LLC, and/or Power Force Apparel, LLC maintaining control of and/or withholding the money from P.B. Surf.

> "93. Through their conspiracy, Defendants have caused P.B. Surf to suffer significant and continuous damage, injury, and loss."

The amended complaint asserted that venue for the action was proper in Jefferson County, Alabama, because, it stated, "a substantial part of the events or omissions giving rise to the claim occurred in Jefferson County."

Alamo filed a motion to dismiss P.B. Surf's amended complaint on the basis that the trial court lacked personal jurisdiction, both general and specific, over Alamo. See Rule 12(b)(2), Ala. R. Civ. P. Alamo also filed a supplement to its motion to dismiss. Attached to the supplement was the affidavit of Pitschmann. The affidavit stated:

> "• Alamo has never conducted business, solicited business, or otherwise engaged in any persistent course of conduct within the State of Alabama;
>
> "• Alamo has never been registered or qualified to do business in the State of Alabama, and has never maintained a registered agent for service of process in the State of Alabama;
>
> "• Alamo has never consented to personal jurisdiction in any courts in the State of Alabama, has never been a litigant in the courts of the State of Alabama, has never availed itself of the courts of the State of Alabama, has not received any financial or other benefits, privileges, subsidies, incentives, compensation, or protection from the State of Alabama, and has never paid any taxes in the State of Alabama;

"• Alamo has never had any offices or facilities of any kind located within the State of Alabama, and has never performed any services in the State of Alabama;

"• Alamo has never had any employees or agents within the State of Alabama;

"• Alamo has never had any interest in, has never used, and has never owned any real estate, personal property, or other assets, including any product or parts inventory, located in the State of Alabama;

"• Alamo has never maintained any telephones, computers or servers, fax machines, routers, or other electronic equipment in the State of Alabama;

"• Alamo has never had any bank accounts located within the State of Alabama, has never borrowed any money from any bank located within the State of Alabama, and has never applied for or guaranteed any loan from any bank located within the State of Alabama;

"• Alamo has never directed any marketing, advertising, demonstrations, or solicitations toward anyone in the State of Alabama;

"• Alamo has never met or communicated with P.B. Surf in Alabama or in relation to any Alabama transaction;

"• Alamo has never had any dealings of any kind with P.B. Surf in Alabama or in relation to any Alabama transaction;

"• Alamo has never traveled to the State of Alabama by means of any officer, director or agent in any way authorized to act or transact business; and

"• Alamo has never paid any taxes or fees in the State of Alabama; and

> "• Alamo played no role in the division of the proceeds from the sale of the San Paloma apartments."

Pitschmann's affidavit also stated:

> "5. Alamo did not conspire with any of the Defendants, or any other person or entity, to wrong, injure, damage, defraud, and/or deceive P.B. Surf, and/or to convert the 'Net Proceeds,' as P.B. Surf alleges in the Amended Complaint.
>
> "6. Alamo did not stand to benefit in any way from the distribution of the Net Proceeds to San Paloma Partners, LLP ('San Paloma Partners'), Guy Savage ('Savage'), or Willem Noltes ('Noltes'). It gained nothing from making the distribution.
>
> "7. Alamo transferred the Net Proceeds to the proper entity at the proper bank account. The Net Proceeds were transferred to the seller San Paloma Partners' bank account at Wells Fargo; the Wells Fargo bank account had been recently identified by Patrick Hayes, an attorney representing Savage and P.B. Surf's principal David Brannen during the closing, on the afternoon of October 27, 2011.
>
> "8. Alamo properly followed Savage and Noltes's instructions on the morning of October 28, 2011, which it was specifically authorized to do. Savage and Noltes instructed Alamo to distribute the Net Proceeds Alamo held to the Seller's Wells Fargo bank account on the morning of October 28, 2011. Savage and Noltes had the power to do so because they were officers of [IRS-II] and because they owned and controlled IRS-II's managing member Investment Realty Holdings, LLC. As [P.B. Surf] alleges in its Amended Complaint, '[i]n February 2007, P.B. Surf and Investment Realty Holdings, LLC entered into an Operating Agreement to govern the operation of IRS-II. That agreement controls and governs the parties' relationship with respect to all business

> matters as it relates to the operation of the San Paloma property, the sale of which forms the basis of the present dispute between the parties.'"

P.B. Surf filed a response to Alamo's motion to dismiss. In that response, P.B. Surf argued that its complaint, which detailed the real-estate services provided and the disbursement of a portion of the proceeds to two of the sellers by transferring the funds to an Alabama bank account and asserted a claim of conspiracy, established personal jurisdiction. P.B. Surf did not file an affidavit or other evidence to substantiate the factual allegations in its complaint, but it did request the opportunity to conduct jurisdictional discovery "to determine Alamo's contacts with Alabama and to challenge the affidavits of David Pitschmann that Alamo filed in support of its Motion to Dismiss and Supplement."

On July 20, 2012, the trial court denied Alamo's motions to dismiss P.B. Surf's amended complaint, stating:

> "The Court is satisfied and does hereby find, among others, that the actions of [Alamo] in causing the electronic transfer of approximately $2.2 million net dollars from a Texas bank to an Alabama bank in direct contravention and violation of the agreement of the parties made during the closing of a real estate transaction handled by [Alamo] in Texas, ... was sufficient to satisfy the minimal contact

> doctrine and place the said ALAMO TITLE COMPANY on notice that it could reasonably anticipate being haled into Court in the State of Alabama by [P.B. Surf] who had made claim to the funds directly to the ALAMO TITLE COMPANY defendant during the said closing. Further, [Alamo] was on notice of the claims to the funds made by [P.B. Surf] and NOLTES and SAVAGE which led to the agreement that the funds would be interpled into Court in Texas for determination of the ownership and ultimate disposition of the same. But for the uncontroverted acts of the defendant, ALAMO TITLE COMPANY, it is more likely than not that these parties would not be before this Court today. ... [T]his Court hereby holds that it does possess the requisite jurisdiction over the defendant, ALAMO TITLE COMPANY."

(Capitalization in original.) Alamo moved the trial court to reconsider, arguing that P.B. Surf had not met its evidentiary burden and that Alamo lacked sufficient contacts with Alabama to support a finding of personal jurisdiction on the basis of the conspiracy claim.[1] Alamo petitioned this Court for a writ of mandamus.

II. Standard of Review

A Rule 12(b)(2) motion tests the court's exercise of personal jurisdiction over a defendant. See Rule 12(b), Ala. R. Civ. P. "'[A] petition for a writ of mandamus is the

[1]Alamo states that, as of the filing of its mandamus petition, the trial court had not ruled on its motion to reconsider.

proper device by which to challenge the denial of a motion to dismiss for lack of in personam jurisdiction.' Ex parte Dill, Dill, Carr, Stonbraker & Hutchings, P.C., 866 So. 2d 519, 525 (Ala. 2003)." Ex parte McNeese Title, LLC, 82 So. 3d 670, 673 (Ala. 2011). We review such a petition pursuant to the following standard of review:

> "'"The writ of mandamus is a drastic and extraordinary writ, to be 'issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.' Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993); see also Ex parte Ziglar, 669 So. 2d 133, 134 (Ala. 1995)." Ex parte Carter, [807 So. 2d 534,] 536 [(Ala. 2001)].'
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> "Ex parte McWilliams, 812 So. 2d 318, 321 (Ala. 2001)."

Ex parte Bufkin, 936 So. 2d 1042, 1044 (Ala. 2006). "'An appellate court considers de novo a trial court's judgment on a party's motion to dismiss for lack of personal jurisdiction.'" Ex parte Lagrone, 839 So. 2d 620, 623 (Ala. 2002) (quoting Elliott v. Van Kleef, 830 So. 2d 726, 729 (Ala. 2002)). But see Allsopp v Bolding, 86 So. 3d 952, 957-58 (Ala. 2011) (recognizing that deference is due to pertinent

trial court factual findings to the extent those findings are based on evidence received ore tenus).

Additionally, the appropriate analysis and the parties' respective evidentiary burdens on a personal-jurisdiction issue are well settled. "'"The plaintiff has the burden of proving that the trial court has personal jurisdiction over the defendant."'" Ex parte McNeese Title, 82 So. 3d at 674 (quoting Ex parte Excelsior Fin., Inc., 42 So. 3d 96, 103 (Ala. 2010), quoting in turn J.C. Duke & Assocs. Gen. Contractors, Inc. v. West, 991 So. 2d 194, 196 (Ala. 2008)).

> "'"'In considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253 (11th Cir. 1996), and Cable / Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829 (11th Cir. 1990), and "where the plaintiff's complaint and the defendant's affidavits conflict, the ... court

> must construe all reasonable inferences in favor of the plaintiff." Robinson, 74 F.3d at 255 (quoting Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990))."

> "'Wenger Tree Serv. v. Royal Truck & Equip., Inc., 853 So. 2d 888, 894 (Ala. 2002) (quoting Ex parte McInnis, 820 So. 2d 795, 798 (Ala. 2001)). However, if the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, "the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint." Mercantile Capital, LP v. Federal Transtel, Inc., 193 F. Supp. 2d 1243, 1247 (N.D. Ala. 2002)(citing Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000)). See also Hansen v. Neumueller GmbH, 163 F.R.D. 471, 474-75 (D. Del. 1995)("When a defendant files a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2), and supports that motion with affidavits, plaintiff is required to controvert those affidavits with his own affidavits or other competent evidence in order to survive the motion.") (citing Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984))."

> "Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 229-30 (Ala. 2004)."

Ex parte Excelsior Fin., Inc., 42 So. 3d at 103.

III. Analysis

Alamo essentially makes two arguments for the trial court's lack of personal jurisdiction over it. First, Alamo argues that it showed that the trial court lacked both general and specific jurisdiction over it and that P.B. Surf did not satisfy its burden of substantiating the jurisdictional allegations of its complaint. In particular, Alamo contends that it is a Texas corporation with no offices, employees, or business operations in Alabama and that its only contact with Alabama came when two defendants in this case, Savage and Noltes, contacted an Alamo employee and, as authorized representatives of the seller, instructed Alamo to wire approximately $2.2 million in sale proceeds to the seller's bank account in Alabama. Alamo argues that this limited one-time transaction and its nominal contact with Alabama are insufficient to satisfy the due-process requirements of the Constitution and to justify an Alabama court's exercising personal jurisdiction over it. Second, Alamo argues that P.B. Surf's conspiracy allegations in its amended complaint are insufficient to establish jurisdiction. Alamo denies that it was a part of any conspiracy when it instructed its bank to wire the net proceeds in its possession to the Wells Fargo

account in Alabama owned by the seller, San Paloma Partners. We consider these arguments in turn.

Rule 4.2(b), Ala. R. Civ. P., permits Alabama courts to exercise personal jurisdiction over an out-of-state defendant. It provides, in pertinent part, as follows:

> "(b) Basis for Out-of-State Service. An appropriate basis exists for service of process outside of this state upon a person or entity in any action in this state when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the Constitution of the United States ...."

Regarding Rule 4.2(b), this Court has said:

> "In accordance with the plain language of Rule 4.2, both before and after the 2004 amendment, Alabama's long-arm rule consistently has been interpreted by this Court to extend the jurisdiction of Alabama courts to the permissible limits of due process. Duke v. Young, 496 So. 2d 37 (Ala. 1986); DeSotacho, Inc. v. Valnit Indus., Inc., 350 So. 2d 447 (Ala. 1977). As this Court reiterated in Ex parte McInnis, 820 So. 2d 795, 802 (Ala. 2001) (quoting Sudduth v. Howard, 646 So. 2d 664, 667 (Ala. 1994)), and even more recently in Hiller Investments Inc. v. Insultech Group, Inc., 957 So. 2d 1111, 1115 (Ala. 2006): 'Rule 4.2, Ala. R. Civ. P., extends the personal jurisdiction of the Alabama courts to the limit of due process under the federal and state constitutions.' (Emphasis added.)"

Ex parte DBI, Inc., 23 So. 3d 635, 643 (Ala. 2009). See also Ex parte McNeese Title, 82 So. 3d at 673.

> "'Two types of contacts can form a basis for personal jurisdiction: general contacts and specific contacts. General contacts, which give rise to general personal jurisdiction, consist of the defendant's contacts with the forum state that are unrelated to the cause of action and that are both "continuous and systematic." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 9, 415, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984); [citations omitted]. Specific contacts, which give rise to specific jurisdiction, consist of the defendant's contacts with the forum state that are related to the cause of action. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-75, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985). Although the related contacts need not be continuous and systematic, they must rise to such a level as to cause the defendant to anticipate being haled into court in the forum state. Id.'

"Ex parte Phase III Constr., Inc., 723 So. 2d 1263, 1266 (Ala. 1998) (Lyons, J., concurring in the result). Furthermore, this Court has held that, for specific in personam jurisdiction, there must exist 'a clear, firm nexus between the acts of the defendant and the consequences complained of.' Duke v. Young, 496 So. 2d 37, 39 (Ala. 1986). See also Ex parte Kamilewicz, 700 So. 2d 340, 345 n. 2 (Ala. 1997).

"In the case of either general in personam jurisdiction or specific in personam jurisdiction, '[t]he "substantial connection" between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State.' Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). This

> purposeful-availment requirement assures that a defendant will not be haled into a jurisdiction as a result of '"the unilateral activity of another person or a third person."' Burger King, 471 U.S. at 475, 105 S.Ct. 2174, quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).
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> "Only after such minimum contacts have been established does a court then consider those contacts in the light of other factors--such as the burden on the defendant of litigating in the forum state and the forum state's interest in adjudicating the dispute, Burger King, 471 U.S. at 476-77, 105 S.Ct. 2174--to determine whether the exercise of personal jurisdiction over the nonresident defendant comports with '"traditional notions of fair play and substantial justice."' Brooks v. Inlow, 453 So. 2d 349, 351 (Ala. 1984), quoting International Shoe [Co. v. Washington], 326 U.S. [310] at 316, 66 S.Ct. 154 [(1945)]. See also Burger King, 471 U.S. at 476-77, 105 S.Ct. 2174."

Elliott v. Van Kleef, 830 So. 2d at 730–31.

A defendant is constitutionally amenable to a forum's specific jurisdiction if it possesses sufficient minimum contacts with the forum to satisfy due-process requirements and if the forum's exercise of jurisdiction comports with "'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). See Ex parte Kohlberg Kravis Roberts & Co., 78 So. 3d 959, 972 (Ala. 2011) (quoting Ex parte McInnis, 820 So. 2d at 795, 802–03

(2001)). This two-part test embodies the controlling due-process principle that a defendant must have "fair warning" that a particular activity may subject it to the jurisdiction of a foreign sovereign. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). See Ex parte Kohlberg Kravis Roberts & Co., 78 So. 3d at 970.

We first consider Alamo's contention that the trial court lacked both general and specific jurisdiction over it. In response to Alamo's argument, P.B. Surf acknowledges that the trial court lacked general jurisdiction over Alamo.[2] The issue before this Court, therefore, is one of specific, not general, personal jurisdiction.

Over the course of the development of minimum-contacts analysis following International Shoe Co. and its progeny, this Court, in Elliott v. Van Kleef, supra, and its progeny, has essentially formulated a test for ascertaining whether there are sufficient minimum contacts for a court to exercise specific personal jurisdiction over a nonresident defendant:

[2]In addition, the relevant evidence submitted by Alamo in Pitschmann's affidavits does not support a finding of general personal jurisdiction.

(1) The nonresident defendant's contacts must be related to the plaintiff's cause of action or have given rise to it. Ex parte Kohlberg Kravis Roberts & Co., 78 So. 3d at 971 (citing Burger King Corp. v. Rudzewicz, 471 U.S. at 472). (2) By its contacts the nonresident defendant must have purposefully availed itself of the privilege of conducting business in the forum state.[3] Ex parte City Boy's Tire & Brake, Inc., 87 So.

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[3]In Burger King Corp., the United States Supreme Court explained that to be purposeful, the out-of-state defendant's contacts with the forum state must be deliberate and substantial, rather than accidental or random:

> "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, Keeton v. Hustler Magazine, Inc., 465 U.S. [770], at 774 [(1984)]; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. [286,] 299 [(1980)], or of the 'unilateral activity of another party or a third person,' Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. [408,] 417 [(1984)]. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State. McGee v. International Life Insurance Co., 355 U.S. [220], 223 [(1957)]; see also Kulko v. California Superior Court, supra, 436 U.S. [84], 94 [(1978)]. Thus where the defendant 'deliberately' has engaged in significant activities within a State, Keeton v. Hustler Magazine, Inc., supra, 465 U.S., at 781, or has created 'continuing obligations' between himself and residents of the forum, Travelers Health Assn. v. Virginia, 339 U.S. [643], at 648 [(1950)], he manifestly has availed

3d 521, 529 (Ala. 2011). See Hanson v. Denckla, 357 U.S. 235, 253 (1958); see also Burger King, 471 U.S. at 474-75. (3) The nonresident defendant's contacts with the forum must be "such that the nonresident defendant "'should reasonably anticipate being haled into court'" in the forum state." Ex parte Excelsior Fin., Inc., 42 So. 3d at 101 (quoting Burger King Corp., 471 U.S. at 473, quoting in turn World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980)). See, e.g., Elliott v. Van Kleef, supra.

Considering the minimum-contacts analysis in the context of specific personal jurisdiction, this Court concludes that the requisite minimum contacts for the trial court's exercise of specific jurisdiction over Alamo do not exist. First, the allegations in the amended complaint and the evidence before the court establish that, as a result of the Alamo's performance as escrow agent in the underlying transaction, Alamo had telephone and electronic-mail communications with

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> himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well."

471 U.S. at 475–76 (footnote omitted).

Savage and Noltes. Alamo, at the direction of Savage and Noltes, two of several sellers, wired sale proceeds from its bank account in Texas to a bank account in Alabama. All these contacts with Alabama were for the purpose of completing the real-estate transaction at issue and form the predicate of P.B. Surf's cause of action. Therefore, the first prong of the minimum-contacts analysis for specific personal jurisdiction is satisfied because Alamo's contacts with Alabama are related to P.B. Surf's cause of action.

However, P.B. Surf's assertion of personal jurisdiction fails when the second prong of the minimum-contacts analysis is considered. "The issue of personal jurisdiction '"stands or falls on the unique facts of [each] case."'" Ex parte Citizens Prop. Ins. Corp., 15 So. 3d 511, 515 (Ala. 2009) (quoting Ex parte I.M.C., Inc., 485 So. 2d 724, 725 (Ala. 1986)). The evidence before this Court gives no indication that Alamo "purposefully availed" itself of the protection of the laws of Alabama or that it should reasonably have expected to be haled into court here. As previously noted, Alamo had virtually no contact with Alabama other than telephone and electronic-mail communications and the wiring of funds from the Texas bank account to the Alabama bank account in relation

to the real-estate transaction. See, e.g., Elliott v. Van Kleef, 830 So. 2d at 731 ("[T]he telephone calls, fax transmissions, and letters from Kizer and Elliott to Van Kleef are irrelevant to whether personal jurisdiction over Van Kleef exists, because these calls and faxes were 'the unilateral activity of another person.'" (quoting Burger King Corp., 471 U.S. at 475)), and Kittle Heavy Hauling v. Gary A. Rubel, Inc., 647 So. 2d 743, 744 (Ala. Civ. App. 1994) ("The use of an interstate facility (i.e., telephone) is an ancillary factor and does not, alone, provide the requisite minimum contacts."). See also Ex parte No. 1 Steel Prods., Inc., 76 So. 3d 805, 812 (Ala. 2011) ("We have in previous cases explicitly recognized that a one-time contract for the purchase of goods is an insufficient basis for jurisdiction."); Vista Land & Equip., L.L.C. v. Computer Programs & Sys., Inc., 953 So. 2d 1170, 1177 (Ala. 2006) ("[O]ur caselaw does not authorize the exercise of personal jurisdiction over a nonresident defendant solely on the basis of contracts it may have entered into with Alabama parties; rather, such jurisdiction is authorized when there is an ongoing contractual relationship supported by the additional contacts that are incidental to such a relationship."). Alamo

is not incorporated, licensed, registered, or authorized to do business in Alabama. Alamo does not have offices, agents, or bank accounts in Alabama, nor does it have officers or employees located in Alabama. There is no evidence indicating that any Alamo employee traveled to Alabama in connection with this transaction. Moreover, there is simply no evidence indicating that Alamo initiated any contact whatsoever with Alabama concerning the real-estate transaction at issue. The evidence establishes that Alamo was contacted in Texas by Savage and Noltes, two of the sellers involved in this transaction, who contacted Alamo from Alabama. Further, none of the closing documents were executed in or delivered to Alabama, the escrow funds were not held in Alabama, the real property was not sold to a purchaser in Alabama, and the real-estate transaction was not closed in Alabama. Finally, the real property, the San Paloma apartment complex, was located in Texas, not Alabama. Cf. Bowling v. Founders Title Co., 773 F.2d 1175 (11th Cir. 1985) (finding that Alabama had personal jurisdiction over a California defendant who made misrepresentations by telephone and mail to an Alabama plaintiff regarding a transaction the out-of-state defendant knew involved the sale of land located in Alabama).

Alabama courts have recognized that, in an appropriate case, specific jurisdiction can be based upon the purposeful conspiratorial activity of a nonresident defendant aimed at an Alabama plaintiff. See Ex parte Reindel, 963 So. 2d 614, 622–24 (Ala. 2007), and Ex parte Barton, 976 So. 2d 438, 443-44 (Ala. 2007). To establish personal jurisdiction under a conspiracy theory, "'the plaintiff must plead with particularity "the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy."'" Ex parte McInnis, 820 So. 2d at 806–07 (quoting Jungquist v. Sheikk Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997)). The elements of civil conspiracy in Alabama are: (1) concerted action by two or more persons (2) to achieve an unlawful purpose or a lawful purpose by unlawful means. Luck v. Primus Auto. Fin. Servs., Inc., 763 So. 2d 243, 247 (Ala. 2000).

> "'"[I]f the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, 'the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint.' Mercantile Capital, LP v. Federal

> Transtel, Inc., 193 F. Supp. 2d 1243, 1247 (N.D. Ala. 2002) (citing Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F. 3d 1247, 1249 (11th Cir. 2000)). See also Hansen v. Neumueller GmbH, 163 F.R.D. 471, 474-75 (D. Del. 1995) ('When a defendant files a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2) [i.e., for lack of personal jurisdiction], and supports that motion with affidavits, plaintiff is required to controvert those affidavits with his own affidavits or other competent evidence in order to survive the motion.')(citing Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984))."
>
> "'Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 229-30 (Ala. 2004) (footnote omitted).'
>
> "Ex parte Unitrin, Inc., 920 So. 2d 557, 560-61 (Ala. 2005)."

Ex parte United Ins. Cos., 936 So. 2d 1049, 1053-54 (Ala. 2006). See also Ex parte Excelsior Fin., Inc., 42 So. 3d at 101.

P.B. Surf's complaint, as amended, alleges that Alamo was a part of the conspiracy because it wired the net proceeds of the sale into an Alabama bank account. In support of its motion to dismiss, Alamo submitted an affidavit stating (1) that "Alamo did not conspire with any of the defendants, or

any other person or entity, to wrong, injure, damage, defraud, and/or deceive P.B. Surf, and/or to convert the 'Net Proceeds'"; (2) that Alamo followed Savage's and Noltes's direction on the morning of October 28, 2011, who, as sellers, had the authority to instruct Alamo; (3) that Alamo transferred the net proceeds from the real-estate closing to the proper entity at the proper bank account; (4) that the Wells Fargo bank account had been recently identified by Patrick Hayes, an attorney representing Savage and P.B. Surf's principal David Brannen during the closing, on the afternoon of October 27, 2011; and (5) that Alamo did not stand to benefit in any way from the distribution of the net proceeds to San Paloma Partners, L.P., Savage, or Noltes. This affidavit testimony was sufficient to shift the burden to P.B. Surf to present evidence substantiating that jurisdiction existed over Alamo under a conspiracy theory. See Excelsior Fin., 42 So. 3d at 103; Ex parte Covington Pike Dodge, 904 So. 2d 226, 229-30 (Ala. 2004). However, P.B. Surf did not submit any affidavits or other evidence to rebut the prima facie showing made by Alamo. Consequently, we conclude that the trial court erred in denying Alamo's motion to dismiss the action against it for lack of personal jurisdiction. Thus,

Alamo's petition for a writ of mandamus establishes a clear legal right to the dismissal of the complaint as to it to the extent that personal jurisdiction was alleged in the complaint to have been based upon a civil conspiracy.

Considering the quality, nature, and extent of Alamo's contacts with Alabama, as well as the association between those contacts and the instant litigation, this Court finds that none of Alamo's contacts with Alabama can support a finding of purposeful activity invoking the benefits and protections of Alabama courts. Although Alamo's contacts were tangentially related to Alabama, this Court finds that the "'nature and quality and the circumstances of their commission' create only an 'attenuated' affiliation with" Alabama. Burger King Corp., 471 U.S. at 476 n. 18 (citations omitted).

In sum, P.B. Surf has acknowledged that Alamo's contacts with Alabama were not continuous and systematic so as to support the trial court's exercise of general personal jurisdiction over Alabama. This Court concludes, based on an analysis of minimum-contacts factors, that the trial court's exercise of specific personal jurisdiction over Alamo is also unsupported. Therefore, the petition for a writ of mandamus

filed by Alamo establishes a clear legal right to the dismissal of the complaint on the basis that the trial court lacked personal jurisdiction over it.

IV. Conclusion

For the reasons set out above, we grant the petition for the writ of mandamus and direct the trial court to vacate its order denying Alamo's motion to dismiss and to enter an order dismissing P.B. Surf's claims against Alamo on the basis that it lacks personal jurisdiction.

PETITION GRANTED; WRIT ISSUED.

Stuart, Bolin, Parker, Wise, and Bryan, JJ., concur.

Murdock, J., concurs specially.

Moore, C.J., dissents.

MURDOCK, Justice (concurring specially).

I concur fully in the main opinion. I write separately to address the two grounds upon which Chief Justice Moore in Part II of his dissenting opinion finds mandamus to be an inappropriate remedy in this case.

A. Rule 5 "Permissive" Appeal as an Alternative "Adequate Remedy"

In Part II.A, the dissent concludes that mandamus is unavailable in a case such as this because Alamo Title Company ("Alamo") could have sought permission to appeal the trial court's interlocutory order denying its motion for dismissal based on lack of personal jurisdiction. In this regard, the dissent begins by comparing certain standards relating to mandamus and to Rule 5, Ala. R. App. P., permissive appeals and concluding that Rule 5 has a "far lower threshold of review." ___ So. 3d at ___. With respect, I submit that the comparison made is inapt.

Specifically, the standard referenced for mandamus relief -- a "clear legal right" to the relief -- is the standard for actually "winning" relief in the appellate court. The standard referenced for Rule 5 -- that there be a controlling question of law as to which there is "substantial ground for

difference of opinion" -- is merely the standard that must be met to get one's grievance before the appellate court in the first place.

Further, the approach suggested by the dissent would mean that mandamus relief would be more freely available to litigants before the Court of Civil Appeals and the Court of Criminal Appeals, courts in which Rule 5 relief is not applicable under our rules, than to litigants before this Court.

More fundamentally, Rule 5 is indeed limited to rulings involving "questions of law" and, specifically, unsettled questions for which there is a ground for substantial difference of opinion. Such uncertainty simply is not characteristic of most disputes over subject-matter jurisdiction, in personam jurisdiction, immunity, venue, discovery, and fictitious-party practice in the context of a statute-of-limitations concern, all of which are subjects as to which legal principles are well established and as to which we repeatedly have held that mandamus relief may be appropriate. Instead, the types of disputes listed above typically turn, as does the dispute in the present case, on whether the trial court has exceeded its discretion in

deciding whether the evidence presented justifies factual findings sufficient to meet a well settled legal standard.

Finally, but perhaps most importantly, there is no right to a Rule 5 certification. Granting "permission" to appeal an interlocutory order is within the wide discretion of the trial judge, and a question exists as to whether appellate relief would even be available on the ground that the trial court exceeded some measure of discretion.[4] Even if the trial court gives its consent, this Court must agree to accept the question certified. See Rule 5(c), Ala. R. App. P. I fail to see how that to which a party has no right can be deemed a true "remedy."

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[4]In Ex parte Liberty National Life Insurance Co., 825 So. 2d 758 (Ala. 2002), only three of the eight sitting Justices agreed that mandamus would lie to direct a trial court to certify a legal question for interlocutory review when the trial court had refused to do so. Two Justices, Johnstone and Harwood (the author of Ex parte Showers, 812 So. 2d 277 (Ala. 2001), upon which the three Justices in the plurality relied) wrote separately to explain that a Rule 5 certification was entirely discretionary "in the opinion of the judge" and that an appellate court simply could not force a trial court judge to hold any certain opinion. If Justices Johnstone and Harwood have correctly assessed the wording in Rule 5, there is no right to an interlocutory appeal, and, therefore, a party aggrieved by some interlocutory order of the trial court has no ability to seek an interlocutory appeal no matter how unreasonable the trial judge's refusal to certify the question.

B. "Further Litigation in the Trial Court" (and Eventually Taking an Appeal) as an "Adequate Remedy"

In Ex parte L.S.B., 800 So. 2d 574 (Ala. 2001), this Court held that the standard for whether some remedy other than mandamus is "adequate" is not whether there simply is some other remedy, e.g., an eventual appeal, but whether that other remedy is "adequate to prevent undue injury." 800 So. 2d at 578. As a result, the Court noted that mandamus would lie to address certain discovery disputes, to enforce compliance with the court's mandate, to enforce a right to a jury trial, and to vacate certain interlocutory rulings in divorce cases. Id. at 578. All of these -- indeed, virtually any ground for mandamus relief -- could eventually be raised in an appeal from a final judgment. Yet we do not consider this to be an "adequate" remedy in many cases.

Long before L.S.B. was decided, this Court discussed the requirement that the alternative remedy be adequate to avoid the particular harm at issue:

> "[T]he appeal must be an adequate remedy[;] it must be capable of protecting parties from the injury immediately resulting from the error of the court. While the error in refusing a dismissal for want of security for costs, may be available on error for the reversal of a judgment, obviously, an appeal is

> not an adequate remedy. The citizen is compelled into litigation with a non-resident, pending the further continuance of the suit and the appeal, without indemnity against the costs, the evil the statute intends to avoid. Hence, it has been the uniform course of decision that mandamus is an appropriate remedy to compel the dismissal of such suit."

First Nat'l Bank of Anniston v. Cheney, 120 Ala. 117, 121-22, 23 So. 733, 734 (1898) (citations omitted).

The view expressed in Cheney is consistent with the view expressed elsewhere:

> "It is the mere inadequacy and not the mere absence of all other legal remedies, and the danger of the failure of justice without it, that must usually determine the propriety of the writ. Where none but specific relief will do justice, specific relief should be granted if practicable, and when a right is single and specific it usually is practicable.
>
> "To supersede the remedy by mandamus a party must not only have a specific, adequate, legal remedy, but one competent to afford relief upon the very subject of his application."

2 W.F. Bailey, A Treatise on the Law of Habeas Corpus and Special Remedies 825-26 (1913) (emphasis added).

In the present case, the position expressed in Part II.B of the dissent is that mandamus does not lie to remedy the trial court's failure to dismiss the claims against Alamo for lack of in personam jurisdiction because Alamo has available

to it the following alternative and allegedly adequate remedy: "'continu[ing] to challenge personal jurisdiction in ... answers to the complaint and by motions for summary judgment or at trial'" and, if unsuccessful in all of these, pursuing an appeal. ___ So. 3d at ___ (quoting Ex parte United Insurance Cos., 936 So. 2d 1049, 1056 (Ala. 2006)). Although the dissent cites Ex parte United Insurance Cos. for the proposition that the petitioner can in fact continue to challenge personal jurisdiction in these ways, that case does not stand for the proposition that the right to do so in a case challenging in personam jurisdiction is an "adequate remedy" that justifies the refusal of the appellate court to hear a mandamus petition.

Indeed, the very reason for the limited exceptions we have carved out to the general rule that interlocutory denials of motions to dismiss and motions for a summary judgment cannot be reviewed by way of a petition for a writ of mandamus is that there are certain defenses (e.g., immunity, subject-matter jurisdiction, in personam jurisdiction, venue, and some statute-of-limitations defenses) that are of such a nature that a party simply ought not to be put to the expense and effort of litigation. The cases recognizing the availability

of mandamus relief as to such matters are countless.[5] Further, we have not been asked to overrule any of these cases.

Nor do I believe we should consider overruling this precedent, even in a case in which we might be asked to do so. It simply is not an "adequate remedy" -- i.e., as stated in Ex parte L.S.B., a remedy "adequate to prevent undue injury" or, as Bailey states, a remedy "competent to afford relief upon the very subject of his application" -- to say to a party that has no meaningful contact with the State of Alabama or who, under our precedents, is protected by sovereign immunity from even going through litigation much less from liability that he or she must simply "further litigate" the case and one day take an appeal. In a given case, such an approach could subject a defendant to years of litigation, hundreds of thousands of dollars in attorney fees and other litigation

[5]Among the many dozens upon dozens of cases that could be cited for the availability of mandamus relief in such cases are the two referenced by the majority opinion: Ex parte McNeese Title, LLC, 82 So. 3d 670, 673 (Ala. 2011), which quotes Ex parte Dill, Dill, Carr, Stonbraker & Hutchings, P.C., 866 So. 2d 519, 525 (Ala. 2003), for the principle that "'a petition for writ of mandamus is a proper device by which to challenge the denial of a motion to dismiss for lack of in personam jurisdiction.'"

expenses, the time, effort, and expense of traveling to Alabama from elsewhere in the country for depositions and hearings (in the case of the party with no contact with the State), and a cloud of uncertainty and worry hanging over the party's business or personal affairs all this time. I cannot agree that further litigation and an eventual appeal serves as an "adequate remedy" that meets these "subjects."

Main, J., concurs.

MOORE, Chief Justice (dissenting).

I respectfully dissent from the issuance of a writ of mandamus in this case for two reasons: (1) the contacts of Alamo Title Company with Alabama are sufficient to establish personal jurisdiction, and (2) Alamo's failure to apply to the trial court for a permissive appeal violates a key requisite for mandamus: the absence of another adequate remedy, e.g., an appeal.

The threshold for issuing a writ of mandamus is high.

> "Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995).

Granting Alamo's petition for a writ of mandamus ignores Alamo's wrongful conduct in transferring to Alabama funds Alamo knew were, by agreement, to be interpleaded into a court in Texas, a finding made by the trial court in denying Alamo's motion to dismiss.

I. Clear Legal Right to Relief Sought

I begin with a look at certain undisputed facts omitted from the analysis in the majority opinion, facts that refute

the picture of Alamo as a merely "accidental" defendant forced to defend a case in a distant state resulting from a single random contact.

A. Omitted Facts

The amended complaint states that on the day of the closing, October 27, 2011, the plaintiff, P.B. Surf, Ltd., and defendants Guy A. Savage and G.J. Willem Noltes agreed that Alamo "would interplead the net proceeds in Court in Texas so that the proper distribution of the net proceeds could be determined by a judge." The amended complaint further states:

> "All parties to the present dispute were in agreement with this proposed course of conduct and, as of the close of business on October 27, 2011, P.B. Surf had been informed and believed that the contemplated Texas interpleader would occur based on the parties' agreement and written confirmation delivered to Alamo Title Company, coupled with Alamo's consent to this arrangement and planned interpleader action."

Nonetheless, the day following the closing, without informing P.B. Surf, Alamo, at the request of Savage and Noltes, wired the closing funds of $2,277,057.08 to a bank account in Birmingham controlled by Alabama resident Savage on which Noltes was a co-signatory. Savage and Noltes then withdrew the funds from the Birmingham account and deposited them in accounts beyond the reach of P.B. Surf. According to

the relevant operating agreement that bound P.B. Surf and certain entities controlled by Savage and Noltes, P.B. Surf was entitled to the proceeds of the sale.

On July 3, 2012, the trial court entered a consent judgment in favor of P.B. Surf and against defendant Savage, his wife Tamela Savage, and other related entities in the amount of $2.5 million. In entering the judgment, the court relied on oral testimony and evidence provided at hearings and on P.B. Surf's amended complaint.

Additional proceeds of the sale in the amount of $1,561,704.80 were under the control of Grandbridge Real Estate Capital, LLC. Savage and Noltes sought to convince Grandbridge to wire the funds it was holding to them also. The amended complaint states: "Grandbridge, however, refused to release the monies it held based on a simple phone call." Instead it interpleaded the money into the registry of the United States District Court for the Northern District of Alabama.

Savage and Noltes did not copy P.B. Surf on any of their communications to Alamo. Despite having actual knowledge confirmed in writing that P.B. Surf claimed an interest in the sale proceeds it was holding, Alamo did not inform P.B. Surf

of the communications from Savage and Noltes, but simply followed their e-mail and telephone instructions to wire the money to an account at Wells Fargo in Birmingham controlled by Savage. P.B. Surf did not learn that the funds had been wired until two or three days later when its attorney contacted Alamo about the status of the Texas interpleader action. Savage and Noltes refused to return the proceeds of the sale, prompting this lawsuit.

B. Jurisdictional Analysis

1. Alamo's alleged negligence

Alamo claims in its opening brief that it had no knowledge of the wrongdoing of Savage and Noltes and that it was merely an innocent intermediary in an "accidental or random" contact with an Alabama bank and that its act of "merely wiring money into an account in the forum state" is insufficient to support personal jurisdiction. But Alamo does concede that it "acknowledged and agreed ... to interplead the proceeds at issue." By completely omitting from its analysis any mention of the October 27 understanding that Alamo would interplead the funds, the majority opinion portrays the wiring of the funds to Birmingham on October 28 as a simple, routine, and proper response to directions from Savage and Noltes,

"who, as sellers, had the authority to instruct Alamo." ___ So. 3d at ___.

Other facts also militate against a ready acceptance of the portrayal in the majority opinion of Alamo's role. The trial court has now entered a consent judgment against Savage for $2.5 million. Grandbridge Real Estate Capital, the other real-estate-servicing agent in the sale, did interplead $1.5 million of the proceeds. These two acts support P.B. Surf's contention that Alamo's disbursement of funds was not merely ministerial but at a minimum constituted negligence.

As the trial court stated in its order denying Alamo's motion to dismiss, Alamo's transfer of the sale proceeds was "in direct contravention and violation of the agreement of the parties made during the closing." Further, P.B. Surf "had made claim to the funds" directly to Alamo during the closing. Finally, Alamo was "on notice" of the competing claims, "which led to the agreement that the funds would be interpled into Court in Texas."

Alamo's wiring of the funds in violation of the agreement to interplead the funds and without any notice to P.B. Surf resulted, as the trial court found, in Savage and Noltes's taking "substantial portions of the money so transferred for

their own personal and business usages." Under these facts found by the trial court, P.B. Surf's negligence claim against Alamo had prima facie validity.[6] In its amended complaint P.B. Surf alleged that Alamo "owed a duty of reasonable care to P.B. Surf when disbursing the proceeds from the San Paloma sale, especially given the notice the Defendants, including Alamo Title Company, received of P.B. Surf's claim to the disputed funds." As P.B. Surf also alleged:

> "Defendants breached the duty owed to P.B. Surf when it recklessly, carelessly, negligently, and/or wantonly distributed the proceeds from the San Paloma sale at Noltes' and Savage's instruction, without notice to P.B. Surf or its representative, despite being on notice that the proper distribution of the funds was in dispute."

Under applicable law, the trial court properly exercised jurisdiction over Alamo to answer for its alleged negligence.

2. Applicable law

a. Assessing the allegations

The plaintiff has the burden of proving that the trial court has personal jurisdiction over the defendant. Ex parte

[6]P.B. Surf's amended complaint also alleged conspiracy against Alamo. Because the trial court found jurisdiction without reference to the conspiracy allegations, the consideration of those allegations is not essential to this analysis.

Covington Pike Dodge, Inc., 904 So. 2d 226, 229 (Ala. 2004). When considering a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for want of personal jurisdiction, "'"a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits, and 'where the plaintiff's complaint and the defendant's affidavits conflict, the ... court must construe all reasonable inferences in favor of the plaintiff.'"'" Id. (quoting Wenger Tree Serv. v. Royal Truck & Equip., Inc., 853 So. 2d 888, 894 (Ala. 2002) (quoting other cases)).

To contradict P.B. Surf's amended complaint, Alamo supplied the affidavit of its co-general counsel David Pitschmann. The affidavit explained in detail that prior to the wiring of the funds in this matter, Alamo had no contact whatsoever with the State of Alabama. Further, Alamo "played no role in the division of the proceeds"; it transferred the proceeds "to the proper entity at the proper bank account"; and it "properly followed Savage and Noltes' instructions on the morning of October 28, 2011, which it was specifically authorized to do." These latter statements contradict the complaint, which alleges that Alamo transferred the funds in

violation of the agreement to interplead the funds and without notice to the other seller claiming a right to the funds.

Insofar as the complaint and Pitschmann's affidavit conflict, the court "'"'must construe all reasonable inferences in favor of the plaintiff.'"'" Covington Pike Dodge, 904 So. 2d at 229 (quoting Wenger Tree Serv., 853 So. 2d at 894). P.B. Surf's amended complaint adequately pleaded negligence, a reasonable inference from Alamo's actions. The trial court was not in error in construing the conflict between the complaint and Alamo's affidavit in favor of P.B. Surf. Further, by omitting from its affidavit all mention of the interpleader agreement, Alamo conceded the correctness of P.B. Surf's allegations on this point for purposes of the motion to dismiss. "'[A] court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits.'" Id.[7]

[7]Because the trial court found in P.B. Surf's favor, it did not address P.B. Surf's request for jurisdictional discovery on the relationship between Alamo, Savage, and Noltes. Because this Court has found that the record as it currently exists does not support jurisdiction over Alamo, it should merely remand for P.B. Surf to conduct jurisdictional discovery rather than issuing the writ outright. "[C]ourts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is 'clearly frivolous.'" Ex parte Bufkin, 936 So. 2d 1042, 1048 (Ala. 2006) (citations and some

By omitting salient facts regarding the agreement to interplead the funds, the majority opinion improperly weighted the analysis in favor of Alamo.

b. Personal-jurisdiction law

Alabama's long-arm rule extends as far as the federal Due Process Clause permits. Rule 4.2(b), Ala. R. Civ. P. Under federal precedent, a single tortious act in the forum state can subject an out-of-state defendant to personal jurisdiction. "So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 n.18 (1985). "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 112 (1980) (plurality opinion) (citation omitted). The negligent or wanton wiring of $2.2 million in closing proceeds to a Birmingham bank account controlled by an Alabama resident, who then withdraws the funds to the detriment of a legitimate

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internal quotation marks omitted).

claimant, is an action purposefully directed toward Alabama. In McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957), the Court found that execution of a single contract with an in-state resident sufficed to permit jurisdiction over an out-of-state insurance company. The trial court reasonably construed the actions of Alamo in this matter as creating a substantial connection with Alabama. As the trial court stated: "But for the uncontroverted acts of Alamo, these parties would not be before this Court today."

An out-of-state defendant's acts must also be such that the defendant could reasonably foresee being held accountable in the courts of the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Knowing of the agreement to interplead the closing proceeds and then deliberately wiring those funds to Alabama rather than into the designated Texas court, Alamo should have been aware that P.B. Surf could well challenge its action in the venue to which the proceeds were sent. "Crucial to the analysis is the element of foreseeability of the consequences of the defendant's activities. There must be a clear, firm nexus between the acts of the defendant and the consequences complained of in order

to establish the necessary contacts." Duke v. Young, 496 So. 2d 37, 39 (Ala. 1986). That nexus exists here.

Whether personal jurisdiction exists is a fact-specific inquiry. A defendant who engages in tortious activity within this State should not be able to claim a jurisdictional bar to avoid liability. "We cannot allow a culpable defendant to manipulate our decisions on in personam due process to effect a shield against his improper conduct." Shrout v. Thoren, 470 So. 2d 1222, 1225 (Ala. 1985). Although the merits of P.B. Surf's claim against Alamo were not adjudicated below, the unrebutted allegations of wrongdoing and the reasonable inferences arising from conflicting facts are sufficient to support jurisdiction on a motion to dismiss.

Because the trial court reasonably assumed jurisdiction, Alamo had no clear legal right to an order of dismissal, and the petition should be denied.

II. Other Adequate Remedy

Apart from the merits of P.B. Surf's jurisdictional arguments, mandamus relief is inappropriate here because Alamo has adequate alternative remedies. "A writ of mandamus will issue only in situations where other relief is unavailable or is inadequate, and it cannot be used as a substitute for

appeal." Ex parte Empire Fire & Marine Ins. Co., 720 So. 2d 893, 894 (Ala. 1998).

A. Permissive Interlocutory Appeal

Because the amount in controversy exceeded $50,000, Alamo had available the alternative of seeking certification from the trial court for a permissive appeal.[8] Such an appeal has a far lower threshold of review. Rather than having to demonstrate a "clear legal right," the proposed appellant, apart from urging the efficiency of an immediate appeal, need only allege the existence of "a controlling question of law as to which there is substantial ground for difference of opinion." Rule 5(a), Ala. R. App. P. In this case, the controlling question of law would be whether, upon application of the minimum-contacts analysis, the trial court has personal jurisdiction over Alamo.

Because Rule 5, Ala. R. App. P., is a specific limited alternative to attacking an interlocutory order by a petition

[8]"A party may request permission to appeal from an interlocutory order in civil actions .... Appeals of interlocutory orders are limited to those civil cases that are within the original appellate jurisdiction of the Supreme Court." Rule 5(a), Ala. R. App. P. All civil cases in which the amount claimed exceeds $50,000 fall within this category. See §§ 12-2-7(1) and 12-3-10, Ala. Code 1975.

for a writ of mandamus, it should logically, when other requirements for an appeal are met,[9] be a prerequisite to seeking mandamus relief. See Crawford v. Springle, 631 So. 2d 880, 882 (Ala. 1993) ("Where statutes in pari materia are general and specific, the more specific statute controls the more general statute."); Ex parte Ward, 89 So. 3d 720, 727 (Ala. 2011) ("When construing rules, this Court has applied the rules of construction applicable to statutes. Ex parte State ex rel. Daw, 786 So. 2d 1134, 1136 (Ala. 2000)."). Both Rule 5 (permissive appeal) and Rule 21, Ala. R. App. P. (applications for mandamus and other extraordinary writs), provide means for appellate review of an interlocutory order. "Statutes should be construed together so as to harmonize the provisions as far as practical." Ex parte Jones Mfg. Co., 589 So. 2d 208, 211 (Ala. 1991). Thus, Rule 5 and Rule 21 should be construed to harmonize their application, the specific rule (permissive appeal) taking priority, where available, over the general remedy of mandamus.

Additionally, such an approach will promote harmony and efficiency within the judicial system. By requiring a party to

[9]E.g., when the amount in controversy exceeds the jurisdictional amount. See supra note 8.

initially resort to Rule 5, this Court will demonstrate its respect for the jurisdiction of the trial courts, reserving the extraordinary remedy of mandamus for truly extraordinary situations. When the ordinary remedy of permissive appeal is accessible, the extraordinary remedy of mandamus should abate.

B. Further Litigation in the Trial Court

Denial of Alamo's motion to dismiss does not limit its capacity to further challenge jurisdiction pretrial or during trial. "[T]he trial court's denial of the petitioners' motions to dismiss for lack of personal jurisdiction is interlocutory and preliminary only. The petitioners can continue to challenge personal jurisdiction in their answers to the complaint and by motions for a summary judgment or at trial." Ex parte United Ins. Cos., 936 So. 2d 1049, 1056 (Ala. 2006). Alamo thus also had the alternative remedy of continuing to litigate the personal-jurisdiction issue in the trial court. If it were successful on the merits, the issue would be moot. Otherwise, absence of personal jurisdiction could be grounds for an appeal from an adverse final judgment.

III. Conclusion

Alamo lacked a clear legal right to the relief sought and also had other alternative avenues for relief by way of an

appeal. Therefore, I respectfully dissent from the Court's issuance of a writ of mandamus reversing the trial court's order.