Rel: 11/06/2015

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2015-2016

1131061

Ex parte Riverfront, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Fish Market Restaurants, Inc., and George Sarris

v.

Riverfront, LLC)

(Tuscaloosa Circuit Court, CV-13-162)

PARKER, Justice.[1]

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[1]This case was originally assigned to another Justice; it was reassigned to Justice Parker on June 30, 2015.

Riverfront, LLC, petitions this Court for a writ of mandamus directing the Tuscaloosa Circuit Court to vacate its order transferring an action filed against Riverfront by Fish Market Restaurants, Inc., and George Sarris (hereinafter referred to collectively as "Fish Market") to the Etowah Circuit Court. We grant the petition and issue the writ.

Facts and Procedural History

This case first came before this Court in Ex parte Riverfront, LLC, 129 So. 3d 1008 (Ala. 2013)("Riverfront I"). In Riverfront I, we explained that Riverfront and Fish Market had entered into a lease for real property located in Gadsden. The lease contained a forum-selection clause naming Tuscaloosa County as the venue in which any litigation concerning the lease was to be brought.

As set forth in Riverfront I, a disagreement over the lease led Fish Market to file a declaratory-judgment action against Riverfront; Fish Market filed its action in the Etowah Circuit Court. In response to Fish Market's complaint, "Riverfront filed a motion to dismiss the declaratory-judgment action on the basis of improper venue or, in the alternative, to transfer the case to the Tuscaloosa Circuit Court, pursuant

to the forum-selection clause." 129 So. 3d at 1011. Significantly, Fish Market did not file a written response to Riverfront's motion, nor did Fish Market present any oral argument opposing Riverfront's motion at a hearing held on Riverfront's motion. Regardless, without stating its reasons for doing so, the Etowah Circuit Court denied Riverfront's motion. Riverfront then petitioned this Court for a writ of mandamus, which resulted in Riverfront I.

In Riverfront I, this Court determined that the lease containing the forum-selection clause was valid and that the forum-selection clause was enforceable. In determining that the forum-selection clause was enforceable, this Court held that Tuscaloosa County was not a "seriously inconvenient" forum.[2] 129 So. 3d at 1014. Regarding the issue whether the Tuscaloosa Circuit Court was a "seriously inconvenient" forum, Riverfront I noted that Fish Market "did not present any evidence or argument in the [Etowah] [C]ircuit [C]ourt

[2]Riverfront I was considered by a division of this Court consisting of Justices Stuart, Parker, Murdock, Shaw, and Bryan. Justice Parker authored the main opinion, in which Justices Stuart, Shaw, and Bryan concurred; Justice Murdock concurred in the result, with an opinion. Riverfront I is thus not a majority opinion. However, the result of the case, as to which all Justices considering the case concurred, is that the forum-selection clause in the lease is enforceable.

concerning whether the Tuscaloosa Circuit Court would be a 'seriously inconvenient' forum" and that, before this Court, "Fish Market ha[d] not presented any argument in opposition to Riverfront's argument" that Tuscaloosa County was not a "seriously inconvenient" forum. 129 So. 3d at 1014. Riverfront I concludes:

> "Riverfront has established that it has a clear legal right to the enforcement of the forum-selection clause in the lease because Fish Market has failed to establish that enforcement of the clause would be unfair or unreasonable. The [Etowah] [C]ircuit [C]ourt exceeded the scope of its discretion in denying Riverfront's motion to dismiss or, in the alternative, to transfer the case to the Tuscaloosa Circuit Court. We direct the [Etowah] [C]ircuit [C]ourt either to dismiss this cause, without prejudice, pursuant to Rule 12(b)(3), Ala. R. Civ. P., or to transfer the cause to the Tuscaloosa Circuit Court, the forum agreed to in the lease."

129 So. 3d at 1015.

On July 30, 2013, the Etowah Circuit Court transferred the action to the Tuscaloosa Circuit Court. On October 22, 2013, Fish Market filed a motion to transfer the action, then pending in the Tuscaloosa Circuit Court, back to the Etowah Circuit Court. In its motion, Fish Market noted that Riverfront I states that Fish Market failed to present any argument or evidence in the Etowah Circuit Court in response

to Riverfront's original motion to transfer, which was the subject of Riverfront I. Fish Market then argues, citing § 6-3-21.1, Ala. Code 1975, that Tuscaloosa County "would be a seriously inconvenient forum." On January 24, 2014, Riverfront filed a response to Fish Market's motion to transfer. Riverfront argued that "[t]he issue stated in [Fish Market's] Motion to Transfer has previously been litigated between the parties, and adjudicated in [Riverfront's] favor by the Alabama Supreme Court." The Tuscaloosa Circuit Court held a hearing on Fish Market's motion to transfer on April 1, 2014. Following the hearing, the parties each filed additional documents presenting arguments similar to their earlier arguments.

On May 12, 2014, the Tuscaloosa Circuit Court granted Fish Market's motion to transfer, stating:

> "Plaintiff Fish Market Restaurants, Inc. ('Fish Market'), filed this action in Etowah County on February 27, 2012. Defendant Riverfront, LLC ('Riverfront'), filed a motion to dismiss or transfer to Tuscaloosa County on March 26, 2012. The trial court denied Riverfront's motion on May 24, 2012, and Riverfront filed a [petition for a] writ of mandamus. The Alabama Supreme Court granted the writ and the case was transferred to Tuscaloosa County. The Court determined that the forum-selection clause in the lease was enforceable because Fish Market failed to establish that

enforcement of the clause would be unfair or unreasonable. The Alabama Supreme Court also noted that [Fish Market] did not argue 'that enforcement would be unreasonable on the basis that the selected forum [the Tuscaloosa Circuit Court] would be seriously inconvenient.' Ex parte Riverfront, LLC[, 129 So. 3d 1008, 1014-15] (Ala. 2013) (internal citations omitted.)

"This matter is before the court on Fish Market's motion to transfer to Etowah County based on forum non conveniens. The lease between Fish Market and Riverfront contains a forum-selection clause. However, a forum-selection clause is unenforceable if the challenging party can establish that enforcement of the clause would be 'seriously inconvenient.' Ex parte D.M. White Constr. Co., Inc., 806 So. 2d 370, 372 (Ala. 2001). Pursuant to Ala. Code [1975,] 6-3-21.1(a),

> "'With respect to civil actions filed in an appropriate venue, any court of general jurisdiction shall, for the convenience of parties and witnesses, or in the interest of justice, transfer any civil action or any claim in any civil action to any court of general jurisdiction in which the action might have been properly filed and the case shall proceed as though originally filed therein.'

"[Fish Market] cited several cases and made numerous arguments as to why Tuscaloosa County would be seriously inconvenient, and that Etowah County would be a more convenient forum. The property and restaurant which is the subject of this litigation are less than a mile from the Etowah County courthouse, yet over 100 miles from the Tuscaloosa County courthouse. The witnesses are in Etowah County. The restaurant would shut down for a day or more for the witnesses to travel from Etowah County to Tuscaloosa County. Transferring a case from one

> county to another is proper if it is more convenient for the parties and witnesses. See Ex parte Ford Motor Credit, 561 So. 2d 244, 246-247, citing Ex parte Southern Ry., 556 So. 2d [1082,] 1086 [(Ala. 1989)]: '[Section 6-3-21.1] contemplates transfer of venue from a county in Alabama where venue is proper to another county within the state where venue is also proper, but more convenient for the parties and witnesses [or in the interest of justice].'
>
> "This Court finds that the forum-selection clause in the contract is unenforceable because Tuscaloosa County would be a seriously inconvenient forum. Further, under Ala. Code [1975,] 6-3-21.1, Etowah County is more convenient for the parties and witnesses and it is in the interest of justice for the case to be transferred.
>
> "Accordingly, Plaintiff's motion to transfer is due to be GRANTED and the case is hereby TRANSFERRED to Etowah County."

(Capitalization in original.) Riverfront then petitioned this Court for a writ of mandamus directing the Tuscaloosa Circuit Court to vacate its order transferring the action back to the Etowah Circuit Court.[3]

Standard of Review

[3]Before this Court ordered Fish Market to file an answer and brief on September 22, 2014, Fish Market filed what it styled as an "Opposition to [Riverfront's] Petition for Writ of Mandamus" on July 9, 2014, and a supplement to its "opposition" on July 15, 2014. Fish Market then filed its ordered answer and brief on October 8, 2014. We will consider only the arguments raised in Fish Market's October 8, 2014, response.

> "A writ of mandamus is an extraordinary remedy, and is appropriate when the petitioner can show (1) a clear legal right 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) the properly invoked jurisdiction of the court. Ex parte Inverness Constr. Co., 775 So. 2d 153, 156 (Ala. 2000). A writ of mandamus may not be issued to control or review the exercise of discretion, except in a case of abuse. Ex parte Auto-Owners Ins. Co., 548 So. 2d 1029, 1030 (Ala. 1989)."

Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001). "[A] trial court's ruling on the question of enforcing a forum-selection clause is reviewed to determine whether in enforcing or refusing to enforce the forum-selection clause the trial court exceeded its discretion." Riverfront I, 129 So. 3d at 1011-12 (citing Ex parte D.M. White Constr. Co., 806 So. 2d 370, 372 (Ala. 2001)).

Discussion

Riverfront argues that the Tuscaloosa Circuit Court "failed to comply with this Court's mandate from Riverfront I." Riverfront states that "this Court held that the forum-selection clause is enforceable and mandated transfer of the [l]awsuit to Tuscaloosa County." Riverfront then argues that the Tuscaloosa Circuit Court considered "the same issue that was decided by this Court -- enforceability of the forum-

selection clause -- and reache[d] a contrary conclusion." Riverfront states that the Tuscaloosa Circuit Court determined that the forum-selection clause is unenforceable on the ground that Tuscaloosa County is "seriously inconvenient" as a forum. We agree with Riverfront; the Tuscaloosa Circuit Court entered an order addressing an issue this Court had already decided in Riverfront I, and it decided that issue contrary to this Court.

As set forth above, in Riverfront I, this Court concluded that the forum-selection clause was enforceable. Included within the conclusion that the forum-selection clause is enforceable is the conclusion that Tuscaloosa County is not a "seriously inconvenient" forum. In fact, Riverfront argued extensively in Riverfront I that Tuscaloosa County is not a "seriously inconvenient" forum. See Riverfront I, 129 So. 3d at 1014 (agreeing with Riverfront's argument that Tuscaloosa County is not a "seriously inconvenient" forum). We found Riverfront's argument persuasive under the following standard:

> "'"In order to demonstrate that the chosen forum is seriously inconvenient, the party challenging the clause must show that a trial in that forum would be so gravely difficult and inconvenient that the challenging party would effectively be deprived of

> his day in court. Ex parte Northern Capital Res. Corp., 751 So. 2d [12] at 15 [(Ala. 1999)]."'"

129 So. 3d at 1014 (quoting Ex parte Soprema, Inc., 949 So. 2d 907, 913 (Ala. 2006)(quoting in turn Ex parte Rymer, 860 So. 2d 339, 342-43 (Ala. 2003))).[4] Although Riverfront I is a plurality opinion, a majority of this Court agreed to the conclusion. Therefore, the mandate of this Court was that the Etowah Circuit Court transfer Fish Market's action to the Tuscaloosa Circuit Court because the forum-selection clause was enforceable and Tuscaloosa County was not a "seriously inconvenient" forum. The Etowah Circuit Court followed this Court's mandate and transferred the action to the Tuscaloosa Circuit Court. The Tuscaloosa Circuit Court's judgment, if it is allowed to stand, would abrogate this Court's mandate by requiring the Etowah Circuit Court to hear Fish Market's

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[4]We also relied upon the following portion of Ex parte D.M. White, 806 So. 2d at 372:

> "[A] ... forum-selection clause is enforceable unless the challenging party can establish that ... '"... enforcement would be unreasonable on the basis that the [selected] forum would be seriously inconvenient."' The burden on the challenging party is difficult to meet. Ex parte CTB, [Inc., 782 So. 2d 188 (Ala. 2000)]. See also Professional Ins. Corp. v. Sutherland, 700 So. 2d 347, 351 (Ala. 1997)."

action, which this Court determined the Etowah Circuit Court could not do based on the enforceable forum-selection clause in the lease.

The Tuscaloosa Circuit Court appears to be under the mistaken impression that, because Fish Market failed to assert any argument in the Etowah Circuit Court or before this Court in Riverfront I, this Court did not decide the issue whether Tuscaloosa County is a "seriously inconvenient" forum. However, this Court clearly determined that the forum-selection clause was enforceable. Necessary to, and an essential part of, our conclusion in Riverfront I is the holding that Tuscaloosa County is not a "seriously inconvenient" forum. That conclusion was reached regardless of the fact that Fish Market failed to raise the argument; Riverfront did raise the argument, and it was decided by this Court. The Tuscaloosa Circuit Court does not have the authority to overrule or disregard this Court's decision.

We note that our mandate in Riverfront I was directed to the Etowah Circuit Court and not to the Tuscaloosa Circuit Court. However, the Tuscaloosa Circuit Court's order would essentially require the Etowah Circuit Court to violate this

Court's mandate. We ordered the Etowah Circuit Court to transfer the action to the Tuscaloosa Circuit Court based on the forum-selection clause in the lease, which we held was enforceable. The Tuscaloosa Circuit Court's order transferring the action to the Etowah Circuit Court is an effort to order the Etowah Circuit Court to take action in direct contradiction of this Court's mandate to it. The Tuscaloosa Circuit Court does not have the authority to override a mandate of this Court.

Moreover, this Court's decision in Riverfront I is binding on the parties, including Fish Market:

> "As to issues actually determined by a judgment in a mandamus proceeding, the judgment is conclusive, thus precluding the parties from relitigating the same issues, and the same is true as to issues necessarily determined in the judgment. It has been held that a judgment in mandamus also precludes the litigation of issues which could have been raised and resolved in the prior proceeding, but were not in fact resolved, at least where the cause of action in the prior mandamus action is identical to that in the later action in which the res judicata effect of the judgment in the mandamus suit is invoked."

52 Am. Jur. 2d Mandamus § 469 (2011)(footnotes omitted). As set forth above, this Court did determine in Riverfront I that Tuscaloosa County is not a "seriously inconvenient" forum;

that determination is binding on the parties and may not now be relitigated. Further, Fish Market could have challenged Tuscaloosa County as a "seriously inconvenient" forum in the Etowah Circuit Court and before this Court in Riverfront I. Fish Market did not do so and may not now have a second bite at the forum apple and relitigate that issue. The matter has been decided.

In its response, Fish Market argues that the Tuscaloosa Circuit Court's order transferring the action had independent bases. First, Fish Market states that the Tuscaloosa Circuit Court's order was based on its holding that the forum-selection clause is unenforceable because the Tuscaloosa Circuit Court is a "seriously inconvenient" forum. As set forth above, this Court held in Riverfront I that the forum-selection clause is enforceable because the Tuscaloosa Circuit Court is not a "seriously inconvenient" forum. Second, Fish Market states that the Tuscaloosa Circuit Court's order is independently based on § 6-3-21.1, Ala. Code 1975, which "provides when a civil action must be transferred under the doctrine of forum non conveniens." Ex parte Indiana Mills & Mfg., Inc., 10 So. 3d 536, 539 (Ala. 2008). Fish Market

points out that Riverfront makes no argument in its mandamus petition concerning the Tuscaloosa Circuit Court's holding that Fish Market's action was due to be transferred based on § 6-3-21.1. Accordingly, Fish Market argues, Riverfront has failed to demonstrate it has a clear legal right to the relief sought because Riverfront did not make any argument concerning this independent basis for the Tuscaloosa Circuit Court's order. We do not find Fish Market's argument persuasive.

Section 6-3-21.1 is not applicable in this case. Section 6-3-21.1(a), Ala. Code 1975, states, in pertinent part:

> "With respect to civil actions filed in an appropriate venue, any court of general jurisdiction shall, for the convenience of parties and witnesses, or in the interest of justice, transfer any civil action or any claim in any civil action to any court of general jurisdiction in which the action might have been properly filed and the case shall proceed as though originally filed therein."

(Emphasis added.) Section 6-3-21.1 only applies if there is more than one court "in which the action might have been properly filed." In Riverfront I, we held that the forum-selection clause is enforceable and that the Tuscaloosa Circuit Court is the only court in which Fish Market's action against Riverfront may be prosecuted. After Riverfront I, the Etowah Circuit Court was no longer a court in which Fish

Market's action "might have been properly filed." Accordingly, there was no reason for Riverfront to address that purportedly independent basis of the Tuscaloosa Circuit Court's order because § 6-3-21.1 has no applicability in this case. Fish Market's argument is unpersuasive.

Conclusion

Based on the foregoing, we grant Riverfront's mandamus petition and direct the Tuscaloosa Circuit Court to vacate its order transferring the action to the Etowah Circuit Court.

PETITION GRANTED; WRIT ISSUED.

Stuart, Main, and Bryan, JJ., concur.

Murdock, J., concurs in part and concurs in the result.

Shaw, J., dissents.

Bolin and Wise, JJ., recuse themselves.

MURDOCK, Justice (concurring in part and concurring in the result).

I write to explain my agreement with certain aspects of the main opinion and to explain why I part company with the main opinion in certain limited respects.

First, I take note of the different purposes and natures of the "seriously inconvenient forum" test referenced in Ex parte D.M. White Construction Co., 806 So. 2d 370, 372 (Ala. 2001), and the forum non conveniens test of § 6-3-21.1(a), Ala. Code 1975. The purpose of a forum-selection clause in the first place is to allow the parties, by agreement, to override the otherwise applicable rules (whether derived from statutes or rules of procedure) regarding venue and forum selection, including the forum non conveniens test. Lest we nullify the ability of the parties to override the normal rules concerning forum non conveniens, the test for, in turn, overriding the parties' agreement as to forum necessarily must be different and more demanding than the otherwise applicable forum non conveniens rule. Indeed, we have held that, in order to satisfy the "seriously inconvenient forum" test, "the party challenging the clause must show that a trial in [the

chosen] forum would be so gravely difficult and inconvenient that the challenging party would effectively be deprived of his day in court." Ex parte Rymer, 860 So. 2d 339, 342 (Ala. 2003) (citing Ex parte Northern Capital Res. Corp., 751 So. 2d 12, 15 (Ala. 1999)).

The foregoing is an unspoken corollary of the conclusion reached in the main opinion that "[s]ection 6-3-21.1 is not applicable in this case." __ So. 3d at __. In addition to the observations made above, I agree with the grounds for this conclusion otherwise stated in the main opinion.

I also agree with the main opinion's understanding of the mandate of this Court in Ex parte Riverfront, LLC, 129 So. 3d 1008 (Ala. 2013) ("Riverfront I"). I momentarily part company with the main opinion only as to my willingness to consider certain briefs submitted by Fish Market Restaurants, Inc., and George Sarris (hereinafter referred to collectively as "Fish Market")[5] and as to one other aspect of the main opinion.

[5]I see no reason not to consider the briefs submitted to this Court by Fish Market before October 8, 2014. I respectfully disagree with the approach to the contrary noted in note 3 of the main opinion. __ So. 3d at __ n.3.

The main opinion states that "[n]ecessary to, and an essential part of, our conclusion in Riverfront I is the holding that Tuscaloosa County is not a 'seriously inconvenient' forum." __ So. 3d at __. Although I certainly would be inclined to agree that the test for determining whether a forum is "seriously inconvenient" as stated above is not met in this case based on the materials before us, I would stop short of saying that it was necessary to our judgment in Riverfront I to decide that issue. Indeed, as we noted in Riverfront I, and as the trial court in the present case reiterated, Fish Market did not argue in Riverfront I that enforcement of the forum-selection clause would violate the seriously inconvenient test. Yet it was Fish Market's burden, as the plaintiff, to have made and carried that argument in Riverfront I. Thus, I simply would say that having litigated in the Etowah Circuit Court, and ultimately in this Court, the issue of the enforceability of the forum-selection clause without the introduction of this argument, Fish Market cannot

now use this argument as a basis for a "second bite" at that issue.[6]

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[6]Justice Shaw is correct when he states in his dissent that, in Riverfront I, I declined to provide the fifth vote in support of a substantive analysis of the "seriously inconvenient forum" issue. I declined to do so because the party who had the burden of raising and pursuing that issue -- Fish Market -- had not raised and pursued it.

The fact that I did not join a substantive analysis of an issue not properly before this Court does not detract from the fact that I provided the fifth vote for the ultimate "decision" and "judgment" reached in Riverfront I. That decision and judgment -- and the mandate that resulted therefrom -- was that the forum-selection clause was enforceable and that the trial of this case must be conducted, if at all, in the Tuscaloosa Circuit Court. That is, I provided the fifth vote for the following "result" announced at the end of the opinion in Riverfront I:

> "Riverfront has established that it has a clear legal right to the enforcement of the forum-selection clause in the lease .... We direct the circuit court either to dismiss this cause, without prejudice, pursuant to Rule 12(b)(3), Ala. R. Civ. P., or to transfer the cause to the Tuscaloosa Circuit Court, the forum agreed to in the lease."

129 So. 3d at 1015.

What "law of the case" might or might not have informed the Court's "decision" or "judgment" as to where any trial must be conducted is not the same as the decision or judgment itself. The opinion in Riverfront I did not garner five votes for a substantive analysis of the "seriously inconvenient" issue, and the dissent therefore correctly observes that "[t]here [was] no 'decision' of a majority of the Court in Riverfront I rejecting an argument that 'enforcement [of the forum-selection clause] would be unreasonable on the basis

that the selected forum would be seriously inconvenient.'" ___ So. 3d at ___. But that does not mean that no decision was reached in Riverfront I as to where a trial of the case must be conducted. The order of the Court set out at the end of the opinion is no less a mandate because all the Justices voting for it did not agree on all the potential reasons therefor. Five Justices did agree on the order itself.

SHAW, Justice (dissenting).

Riverfront, LLC, petitions this Court for a writ of mandamus directing the Tuscaloosa Circuit Court to vacate its order transferring this lease dispute to the Etowah Circuit Court. A prior decision of this Court, Ex parte Riverfront, LLC, 129 So. 3d 1008 (Ala. 2013) ("Riverfront I"), enforced a forum-selection clause in the lease agreement between Riverfront and the plaintiffs below, Fish Market Restaurants, Inc., and George Sarris (hereinafter collectively referred to as "Fish Market"), and directed that the action either be transferred from Etowah County to Tuscaloosa County or be dismissed. For the reasons discussed below, I would deny the petition. Therefore, I respectfully dissent.

Facts and Procedural History

The underlying action commenced when Fish Market filed a declaratory-judgment action against Riverfront in the Etowah Circuit Court. Riverfront filed a motion challenging venue, arguing that a forum-selection clause in a lease between the parties required Fish Market's action to be filed in Tuscaloosa County. The parties disputed whether the lease containing the forum-selection clause was properly entered

into; the Etowah Circuit Court was called upon to decide whether the lease containing the clause was a product of a "meeting of the minds" between the parties. The court apparently agreed with Fish Market, that there had been no meeting of the minds, and refused to transfer the action. Riverfront petitioned for mandamus relief; Fish Market raised that same meeting-of-the-minds argument in response to the mandamus petition.

The main opinion in Riverfront I is essentially divided into two parts: the first discusses whether there was a meeting of the minds as to the lease. Specifically, Fish Market argued that there was no meeting of the minds, which argument this Court rejected. 129 So. 3d at 1013. The main opinion in that decision then turned to the second issue: Riverfront's argument "that Fish Market has failed to demonstrate that the forum-selection clause is unreasonable because Fish Market did not present any evidence or argument in the circuit court concerning whether the Tuscaloosa Circuit Court would be a 'seriously inconvenient' forum." 129 So. 3d at 1014. Citing Ex parte Soprema, Inc., 949 So. 2d 907, 913 (Ala. 2006), the main opinion in Riverfront I stated:

> "We conclude that Fish Market, the party opposing enforcement of the forum-selection clause, failed to present any evidence below or any argument before this Court '"that enforcement of the [forum-selection] clause would be unfair on the basis that the [lease] '"[w]as affected by fraud, undue influence, or overweening bargaining power or ... [that] enforcement would be unreasonable on the basis that the selected forum [the Tuscaloosa Circuit Court] would be seriously inconvenient."'"'"

Riverfront I, 129 So. 3d at 1014-15 (alterations in Riverfront I) (quoting Ex parte D.M. White Constr. Co., 806 So. 2d 370, 372 (Ala. 2001), quoting in turn other cases). This Court granted Riverfront's petition and directed the Etowah Circuit Court either to dismiss the action or to transfer it to the Tuscaloosa Circuit Court. Thereafter, the Etowah Circuit Court entered an order transferring the action to the Tuscaloosa Circuit Court.

Following the transfer, Fish Market filed in the Tuscaloosa Circuit Court a motion seeking to transfer the action back to the Etowah Circuit Court on the basis of, among other things, the doctrine of forum non conveniens. See Ala. Code 1975, § 6-3-21.1(a) ("With respect to civil actions filed in an appropriate venue, any court of general jurisdiction shall, for the convenience of parties and witnesses, or in the interest of justice, transfer any civil action or any claim in

any civil action to any court of general jurisdiction in which the action might have been properly filed and the case shall proceed as though originally filed therein."). Specifically, Fish Market contended that "Tuscaloosa County would be a seriously inconvenient forum and would effectively deny [Fish Market] the right to obtain and present testimony from a large number of witnesses."

The Tuscaloosa Circuit Court, following a hearing, granted Fish Market's motion on two alternate theories:

> "This Court finds that [(1)] the forum-selection clause in the contract is unenforceable because Tuscaloosa County would be a seriously inconvenient forum. Further, [(2)] under Ala. Code [1975,] 6-3-21.1, Etowah County is more convenient for the parties and witnesses and it is in the interest of justice for the case to be transferred."

(Emphasis added.) In response, Riverfront filed the instant petition for a writ of mandamus; we subsequently ordered answers and briefs.

Discussion[7]

[7]The main opinion sets out the correct standard of review. ___ So. 3d at ___. I see no reason to repeat it here.

After explaining how this case is eligible for mandamus review, Riverfront's entire argument on the merits of the petition is as follows:

> "Alabama law requires a trial court's strict compliance with the mandate of an appellate court. [Ex parte] Edwards, 727 So. 2d [792,] 794 [(Ala. 1998)] (holding that when an appellate court remands a case, the trial court's authority is limited to compliance with the directions provided by the appellate court). 'The appellate court's decision is final as to all matters before it, becomes the law of the case, and must be executed according to the mandate.' Ex parte Alabama Power Co., 431 So. 2d 151 (Ala. 1983). On remand, the trial court's duty is to comply with the mandate and it may not revisit or resurrect issues decided by the appellate court. Gray v. Reynolds, 553 So. 2d 79, 81 (Ala. 1989). Accord Jones v. Regions Bank, 25 So. 3d 427, 438 (Ala. 2009); Ex parte Mobil Oil Corp., 613 So. 2d 350, 352 (Ala. 1993)('On remand, a trial court is not free to reconsider issues finally decided by the appellate court and must comply with the appellate mandate.'); Erbe v. Eady, 447 So. 2d 778, 779 (Ala. Civ. App. 1984) ('[t]he trial court is not free to reconsider issues finally decided in the mandate').
>
> "In Riverfront I, this Court finally decided the issue of enforceability of the forum-selection clause. After considering the fairness and reasonableness of the forum-selection clause (i.e, whether venue in Tuscaloosa Circuit Court would be 'seriously inconvenient'), this Court held that the forum-selection clause is enforceable and mandated transfer of the Lawsuit to Tuscaloosa County. [The trial court's] Order considers the same issue that was decided by this Court -- enforceability of the forum-selection clause -- and reaches a contrary conclusion. In stark contrast to the Riverfront I mandate, [the trial court's] Order held that the

> forum-selection clause is unenforceable on the grounds that it is unreasonable ('seriously inconvenient') and transferred the Lawsuit from Tuscaloosa County.
>
> "[The trial court's] Order simply cannot be squared with the mandate from Riverfront I. This Court's instructions were clear and concise: because Riverfront has a 'clear legal right to the enforcement of the forum-selection clause' the Court required the transfer of the Lawsuit 'to the Tuscaloosa Circuit Court, the forum agreed to in the lease.' Riverfront I[, 129 So. 3d] at 1015. The Court's instructions did not allow for reconsideration of its final determination. Therefore, the Court should grant the writ and compel [the trial court] to vacate the Order."

Petition, at 15-17.

I believe that the first paragraph more or less accurately states the law: A trial court must comply with an appellate court mandate, Ex parte Edwards, 727 So. 2d 792 (Ala. 1998); an appellate court's decision is final as to all matters before it, becomes the law of the case, and must be executed by the trial court according to that mandate, Ex parte Alabama Power Co., 431 So. 2d 151 (Ala. 1983); and the trial court may not revisit or resurrect issues decided by the appellate court, Gray v. Reynolds, 553 So. 2d 79 (Ala. 1989), Ex parte Mobil Oil Corp., 613 So. 2d 350 (Ala. 1993), Erbe v. Eady, 447 So. 2d 778 (Ala. Civ. App. 1984), and Jones v.

Regions Bank, 25 So. 3d 427 (Ala. 2009). In the instant case, we must decide what the "decision" is in Riverfront I that became the "law of the case" and formed a "mandate" that the Tuscaloosa Circuit Court could not "revisit."[8] Riverfront contends, as noted above, that the decision in Riverfront I "finally decided the issue of enforceability of the forum-selection clause." As explained below, I disagree.

Riverfront I is a plurality opinion. Before deciding the issue of the enforceability of the forum-selection clause, i.e., whether it was fair and whether the selected forum (Tuscaloosa County) would be seriously inconvenient, the main opinion decided the issue whether there was a "meeting of minds" with respect to the lease that contained the forum-selection clause. That discussion ends at the bottom of page 1013 of the main opinion. The next page, 129 So. 3d at 1014, starts a discussion of whether "Fish Market has failed to

[8]The "mandate" cases cited by Riverfront all involve the context of the failure of trial courts whose judgments had previously been reversed to follow the mandate issued to them. In the present case, this Court issued a writ of mandamus to the Etowah Circuit Court; the Tuscaloosa Circuit Court was not the recipient of our writ. Riverfront cites no authority for the proposition that a writ of mandamus to one circuit court binds a different circuit court that was not a respondent in the mandamus proceedings.

demonstrate that the forum-selection clause is unreasonable because ... the Tuscaloosa Circuit Court would be a 'seriously inconvenient' forum."

In his special writing concurring in the result in Riverfront I, Justice Murdock "respectfully decline[d] ... to join the discussion in note 2 and the accompanying text of the main opinion as to whether the clause [was an outbound forum-selection clause or an inbound forum-selection clause]." In the next paragraph, he stated: "it appears to me that the only question presented in this case is the one presented by the position taken by [Fish Market] that the forum-selection clause ... was not a function of 'a clear meeting of the minds between the parties.'" 129 So. 3d at 1016 (emphasis added). Justice Murdock then discusses the meeting-of-the-minds argument and quotes several statements from the main opinion. His discussion of the last such quotation is as follows:

> "I fully agree with the statement in the main opinion that 'Fish Market has not directed this Court's attention to any authority indicating that the ... testimony of an undisputed signatory to a contract stating simply that he never received an original copy of the contract demonstrates that the parties had not mutually assented to the terms of the contract.'"

129 So. 3d at 1017. The quoted language from the main opinion appears as the last statement on page 1013. Justice Murdock's next sentence in his writing states as follows: "I believe the foregoing is sufficient analysis upon which to decide this case, and I express no agreement or disagreement with any portion of the analysis that follows the latter statement in the main opinion." Id. (emphasis added). Again, the "latter statement" is the statement that concludes page 1013. As noted above, to everything that "follows" page 1013, Justice Murdock "expressed no agreement or disagreement." As further noted above, the second portion of the main opinion addressing whether "the Tuscaloosa Circuit Court would be a 'seriously inconvenient' forum" began on page 1014. I can only read this to mean that Justice Murdock did not concur with the analysis in the main opinion on the issue whether the Tuscaloosa Circuit Court was a "convenient" forum, i.e., everything that followed page 1013. Therefore, the portion of Riverfront I addressing the issue of Fish Market's failure to challenge the enforcement of the forum-selection clause on the basis that the selected forum would be seriously inconvenient did not obtain a majority of the Court. The only holding of a

majority that can safely be discerned is that there exists a contract containing a forum-selection clause -- specifically, the main opinion, which only four members of the Court joined, and the portions of the main opinion that Justice Murdock stated that he joined: "[T]he statement in the main opinion that 'Fish Market has not directed this Court's attention to any authority indicating that ... the parties had not mutually assented to the terms of the contract," 129 So. 3d at 1017, i.e., "the only question presented in this case[:] [whether] the forum-selection clause in the January 18, 2007, contract was not a function of 'a clear meeting of the minds between the parties.'" 129 So. 3d at 1016 (emphasis added).

An opinion of this Court joined by less than five Justices is not a "decision" of this Court. See Rule 16(b), Ala. R. App. P. ("The concurrence of five justices in the determination of any cause shall be necessary and sufficient thereto ...."); First Nat'l Bank of Mobile v. Bailes, 293 Ala. 474, 479, 306 So. 2d 227, 231 (1975) (holding that an opinion joined by four of five Justices "did not constitute a holding of the Court"). Cf. Ala. Code 1975, § 12-3-16 ("The decisions of the Supreme Court shall govern the holdings and decisions

of the courts of appeals ...."), and KGS Steel, Inc. v. McInish, 47 So. 3d 780, 781 (Ala. Civ. App. 2009) (noting that only "'decisions of the majority' of the Supreme Court" are "decisions" for purposes of § 12-3-16 (quoting Willis v. Buchman, 30 Ala. App. 33, 40, 199 So. 886, 892 (1940) (opinion after remand))).[9] Nor would such decision establish the law of the case. Phoenix Ins. Co. v. Stuart, 289 Ala. 657, 664, 270 So. 2d 792, 798 (1972) (holding that where only three members of a seven-member court agreed to a certain issue, the holding was not the law of the case), and Holk v. Snider, 295 Ala. 93, 94, 323 So. 2d 425, 426 (1976) ("[T]he resolution of an issue must be concurred in by the requisite number of judges....."). There is no "decision" of a majority of the Court in Riverfront I rejecting an argument that "enforcement [of the forum-selection clause] would be unreasonable on the

[9]There is an exception. Rule 16(b), Ala. R. App. P., provides that when, by reason of disqualification, the number of Justices competent to sit in the determination of a cause is reduced, a majority shall suffice, but at least four Justices must concur. The concurrence of four Justices of a seven-member court "would suffice" as a majority only when the Court is reduced to seven members by reason of disqualification. See Ex parte State of Alabama, [Ms. 1140643, June 12, 2015] ___ So. 3d ___, ___ n.5 (Ala. 2015) (Shaw, J., dissenting). That was not the scenario in Riverfront I.

basis that the selected forum would be seriously inconvenient," Riverfront I, 129 So. 3d at 1014-15 (internal quotation marks omitted); thus, there is no mandate or law of the case as to that issue. With no decision, law of the case, or mandate, the Tuscaloosa Circuit Court was free to revisit the issue whether that circuit was a seriously inconvenient forum.

The main opinion here states that "a majority of this Court" agreed that Tuscaloosa was not a seriously inconvenient forum. It cites Riverfront I, 129 So. 3d at 1014, as stating that agreement. Justice Murdock stated, however, that he did not agree with what was on that page or the ones that followed. He even stated that a different issue, namely, a meeting of the minds, was "the only question presented in this case" and that that formed "sufficient analysis upon which to decide this case." 129 So. 3d at 1016, 1017. He thus did not cast the fifth vote necessary to form a majority on the issue whether Tuscaloosa County was seriously inconvenient as a forum.

The main opinion here takes the position that a transfer to the Etowah Circuit Court would "abrogate this Court's

mandate" in Riverfront I. ___ So. 3d at ___. As noted above, the only mandate of this Court was what five Justices agreed to: That there was a meeting of the minds on the agreement of the parties to the forum-selection clause and that the case was due to be transferred under that provision. There was no majority on the issue whether Tuscaloosa County was a seriously inconvenient forum. Although a review of whether the forum selected would be seriously inconvenient is normally a part of, or inherent in, an analysis of whether a forum-selection clause is to be enforced, Ex parte D.M. White Constr. Co., 806 So. 2d 370, 372 (Ala. 2001), Justice Murdock's special writing in Riverfront I specifically disclaimed agreement (or disagreement) as to that portion of the analysis.

In any event, Fish Market argued, and the Tuscaloosa Circuit Court addressed, an alternate theory for transferring the case not discussed in Riverfront I: That the doctrine of forum non conveniens found in Ala. Code 1975, § 6-3-21.1, required a transfer.[10] The court stated: "Further, under Ala.

[10]Section 6-3-21.1(a) states, in pertinent part: "[A]ny court of general jurisdiction shall, for the convenience of parties and witnesses, or in the interest of justice, transfer

Code [1975], § 6-3-21.1, Etowah County is more convenient for the parties and witnesses and it is in the interest of justice for the case to be transferred." There is no law of the case on the issue whether Tuscaloosa County was inconvenient under a § 6-3-21.1 analysis. And even if there was, Riverfront I in no way impacts whether the "interest of justice"--a separate analysis--would, under § 6-3-21.1, require a transfer.

Further, Riverfront wholly fails even to address the fact that the Tuscaloosa Circuit Court transferred this case pursuant to § 6-3-21.1. Fish Market argues that Riverfront did not show a clear legal right for relief on this issue because it makes no argument in its mandamus petition.[11] The main opinion in this case states in response: "We do not find Fish Market's argument persuasive." ___ So. 3d at ___. The

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any civil action or any claim in any civil action to any court of general jurisdiction in which the action might have been properly filed ...." This Code section "is 'compulsory,' Ex parte Sawyer, 892 So. 2d 898, 905 n.9 (Ala. 2004), and the use of the word 'shall' is 'imperative and mandatory.' Ex parte Prudential Ins. Co. of America, 721 So. 2d 1135, 1138 (Ala. 1998)." Ex parte Indiana Mills & Mfg., Inc., 10 So. 3d 536, 542 (Ala. 2008).

[11]Fish Market also contends that Riverfront failed to preserve the forum non conveniens challenge because it did not address it in the trial court.

analysis that follows this statement, however, does not address where in the petition Riverfront in fact made a forum non conveniens argument. It cannot, because Riverfront made no such argument. Instead, the main opinion here makes the argument on behalf of Riverfront, which is contrary to the standard for issuance of the writ: "A writ of mandamus is an extraordinary remedy, and is appropriate when the petitioner can show (1) a clear legal right to the order sought ...." Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001). Here, the main opinion is both making and addressing legal arguments for a party, which this Court has said is not its function. Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994). As this Court has stated in the context of mandamus petitions:

> "The burden of establishing a clear legal right to the relief sought rests with the petitioner. [Ex parte Cincinnati Insurance Cos., 806 So. 2d 376, 379 (Ala. 2001)]. It is not this Court's function to do independent research to determine whether a petitioner for a writ of mandamus has established a clear legal right."

Ex parte Metropolitan Prop. & Cas. Ins. Co., 974 So. 2d 967, 972 (Ala. 2007). Riverfront cannot demonstrate a clear legal

right to the relief sought if it fails to address a basis for the lower court's decision.

The main opinion curiously states that Riverfront was not, in its mandamus petition, required to challenge the trial court's application of § 6-3-21.1. Why not? Although the trial court's application of § 6-3-21.1 might be incorrect, the very purpose of mandamus review is for a petitioner to point out a lower court's error, not for this Court to independently search for such error. The main opinion in this case stands for the following proposition: A petitioner for a writ of mandamus need not raise, argue, or even mention a lower court's error if, in fact, this Court's own independent research and analysis shows that the lower court erred.

It is true that Fish Market should not be rewarded for belatedly arguing the lack of convenience of the parties after the action was transferred following Riverfront I. That said, Riverfront has not shown a decision of this Court establishing the law of the case on the issue of the relative convenience of the forums. Under the particular facts of this case, the Court should not prevent Fish Market from getting a "second bite at the apple" by making Riverfront's case for it.

Riverfront has not shown "a clear legal right to the order sought" or "an imperative duty upon the respondent to perform." Ex parte BOC, 823 So. 2d at 1272. Thus, I believe the petition is due to be denied.