Case Number: SC-2023-0354

IN THE SUPREME COURT OF ALABAMA

John R. Cooper, in his official capacity as Director of the Alabama Department of Transportation

Appellant/Defendant,

v.
The Baldwin County Bridge Company, LLC

Appellee/Defendant,

On Appeal from the Circuit Court of Montgomery County

MOTION TO APPEAR AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND BRIEF BY THE ASSOCIATION OF COUNTY COMMISSIONS OF ALABAMA

MARY MARGARET WILLIAMS FIEDLER
General Counsel
Association of County Commissions of Alabama
2 N. Jackson St., Ste. 701
Montgomery, Al 36104
(334) 263-7594 (T)
mfiedler@alabamacounties.org

KENDRICK E. WEBB
JAMIE H. KIDD FRAWLEY
Webb McNeill Walker, P.C.
One Commerce Street, Ste 700
Montgomery, AL 36104
(334) 262-1850 (T)
(334) 262-1889 (F)
kwebb@wmwfirm.com
jfrawley@wmwfirm.com

ATTORNEYS FOR AMICUS CURIAE ASSOCIATION OF COUNTY COMMISSIONS OF ALABAMA

ORAL ARGUMENT NOT REQUESTED

MOTION BY THE ASSOCIATION OF COUNTY COMMISSIONS OF ALABAMA TO APPEAR AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT, JOHN R. COOPER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ALABAMA DEPARTMENT OF TRANSPORTATION

COMES NOW the Association of County Commissions of Alabama ("ACCA") and hereby respectfully files this Motion for Leave to Appear as Amicus Curiae in support of the Appellant John R. Cooper, in his official capacity as Director of the Alabama Department of Transportation. In support of this Motion, the ACCA states as follows:

1. The ACCA was formed in 1929 to serve as an educational, technical, legal, legislative, and public policy resource for Alabama's sixty-seven counties. Each county commission in the state is a member.

2. In submitting this amicus brief, the ACCA takes no position on the issue of whether the construction of the publicly funded bridge in question is a wise use of resources, or whether Director Cooper acted in "bad faith" as that term is used by Appellee the Baldwin County Bridge Company and the Circuit Court of Montgomery County. The ACCA's position is instead that these substantive issues are questions of policy and politics, and, as such, that they are beyond the bounds of judicial powers as set forth in the Alabama Constitution of 1901.

3. Counties, through their commissions and officials, have a broad range of authority and responsibility under Alabama law, specifically including "general superintendence of the public roads, bridges, and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable." Ala. Code § 23-1-80 (1975). County commissions have both "legislative and executive powers" in regard to the building and maintenance of public roads, bridges, and ferries. *Id.*

4. It is well-established that the doctrine of separation of powers as enshrined in Ala. Const. Art. III, § 42 applies to forbid courts from interfering with counties' exercise of their legislative and executive powers to the same extent as it protects the State legislative and executive branches. *See, e.g., Morgan County Commission v. Powell*, 292 Ala. 300, 305, 293 So.2d 830, 834 (1974); *Wright v. Pickens County*, 268 Ala. 50, 104 So.2d 907 (1958). Judicial review of legislative and executive action is therefore extremely limited; a court cannot enjoin an entity or official's exercise of its discretionary authority unless it is so outrageous that it is arbitrary and capricious or was the product of fraud or corruption. *See, e.g.*, *City of Huntsville v. Smartt*, 409 So.2d 1353, 1357 (Ala. 1982),

Wright, 268 Ala. at 55, 104 So.2d at 912; *Pruett v. Las Vegas, Inc.*, 261 Ala. 557, 561-62, 74 So.2d 807, 810 (1954).

5. The circuit court's conception of a "bad faith" injunction represents an unprecedented expansion of judicial review of administrative decisions. This Court has explicitly held that "it is not for [a litigant] or a court of equity to usurp the prerogatives of the Highway Department as to a determination of the public need for a highway or as to its location," *Pruett*, 261 Ala. at 563, 74 So.2d at 811 – and yet, that is precisely what the circuit court has done in this case by holding that the new bridge is not really needed. Further, it has effectively created a new cause of action for "bad faith" that would allow a court to enjoin an authorized administrative act merely because it disagrees with an official's opinions.

6. The ACCA respectfully urges this Court to reject the circuit court's approach. First and foremost, it is contrary to law. Second, the circuit court's approach threatens to flood the courts with litigation brought by people who are merely unhappy with a county's decisions (and there is almost always somebody who will disagree with any decision). The necessity of defending against these suits will greatly increase the tangible

and intangible costs associated with building and maintaining roads and bridges, all at the expense of the citizens of Alabama.

7. No party or person will be prejudiced by the filing of this brief. The ACCA has been accepted as amicus parties previously in federal and state court in cases involving important questions affecting their members. *See, e.g., Wheeler v. George*, 39 So.3d 1061 (Ala. 2009).

8. The ACCA believes that the circuit court's approach so clearly violates established Alabama law that oral argument is not necessary to reverse the preliminary injunction entered in this case. If oral argument were to be granted, the ACCA respectfully requests that it be allowed to participate in the argument in order to discuss the issues raised herein.

WHEREFORE, because the analytical approach taken by the circuit court in this case is contrary to law and would be significantly detrimental to counties' ability to carry out their various duties and responsibilities under Alabama law, the Association of County Commissions of Alabama hereby respectfully request that this Court grant them permission to enter an appearance as Amicus Curiae in support of the Appellant, John R. Cooper, in his official capacity as Director of the Alabama Department of Transportation.

Wherefore, the Association of County Commissions of Alabama hereby respectfully moves that it be given leave to file the amicus curiae brief submitted conditionally with this motion.

Respectfully submitted, this 22nd day of June, 2023.

/s/MARY MARGARET WILLIAMS FIEDLER
MARY MARGARET WILLIAMS FIEDLER
General Counsel
Association of County Commissions of Alabama
2 N. Jackson St., Ste. 701
Montgomery, Al 36104
(334) 263-7594 (T)
mfiedler@alabamacounties.org

/s/JAMIE H. KIDD FRAWLEY
KENDRICK E. WEBB
JAMIE H. KIDD FRAWLEY
Webb McNeill Walker, P.C.
One Commerce Street, Ste 700
Montgomery, AL 36104
(334) 262-1850 (T)
(334) 262-1889 (F)
kwebb@wmwfirm.com
jfrawley@wmwfirm.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATION OF COUNTY COMMISSIONS OF ALABAMA

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that the Motion, filed on behalf of Amicus Curiae, the Association of County Commissions of Alabama, complies with Rule 32 in that it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word and contains no more than 2,000 words. This Motion, beginning with the phrase "Comes Now…" and concluding with the line "Wherefore, the Association of County Commissions of Alabama…" contains 831 words, exclusive of the items set forth in Ala. R. App. Pro. 32(c).

Respectfully submitted, this 22nd day of June, 2023.

s/Jamie H. Kidd Frawley
KENDRICK E. WEBB (WEB022)
JAMIE H. KIDD FRAWLEY (HIL060)
WEBB MCNEILL WALKER, P.C
One Commerce Street, Suite 700
Montgomery, AL 36104
(334) 262-1850 (T)
(334) 262-1889 (F)
kwebb@wmwfirm.com
jfrawley@wmwfirm.com

/s/MARY MARGARET WILLIAMS FIEDLER
MARY MARGARET WILLIAMS FIEDLER
General Counsel
Association of County
Commissions of Alabama
2 N. Jackson St., Ste. 701
Montgomery, Al 36104
(334) 263-7594 (T)
mfiedler@alabamacounties.org

ATTORNEYS FOR AMICUS CURIAE ASSOCIATION OF COUNTY COMMISSIONS OF ALABAMA

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STATEMENT REGARDING ORAL ARGUMENT

It is the position of the Association of County Commissions of Alabama that the circuit court's approach so clearly violates established Alabama law that oral argument is not necessary to reverse the preliminary injunction entered in this case. If oral argument were to be granted, the ACCA respectfully requests that it be allowed to participate in the argument in order to discuss the issues raised herein.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

SUMMARY OF THE ARGUMENT

The preliminary injunction entered by the circuit court in this case is a novel and unauthorized interference with the discretion vested in the Director of the Department of Transportation by Alabama law. Judicial review of legislative or executive actions is extremely limited by the doctrine of separation of powers as enshrined in the Alabama Constitution of 1901. The judicial branch simply does not have the authority to determine whether the "Cooper Bridge," as the circuit court refers to the disputed bridge, is a good idea and/or a wise use of resources – not even, or perhaps especially, if its determination is couched as being a question of "bad faith," as that term is colloquially used.

Further, a request for injunctive relief cannot create its own cause of action. This Court has only recognized a cause of action for "bad faith" in the special context of an insurer's breach of its contract with an insured. The nebulous claim cobbled together by the circuit court from the exception to State immunity, the federal court *Younger* abstention doctrine, and the common understanding of the term "bad faith" is unnecessary, unsupported by Alabama law, and will only create chaos.

ARGUMENT

I. THE DOCTRINE OF SEPARATION OF POWERS FORBIDS THE JUDICIAL BRANCH FROM EXERCISING LEGISLATIVE AND EXECUTIVE POWERS.

The doctrine of separation of powers is explicitly enshrined in the Alabama Constitution of 1901, as follows:

> To the end that the government of the State of Alabama may be a government of laws and not of individuals, and except as expressly directed or permitted in this constitution, the legislative branch may not exercise the executive or judicial power, the executive branch may not exercise the legislative or judicial power, and the judicial branch may not exercise the legislative or executive power.

Ala. Const. Art. III, § 42.[1] "In Alabama, separation of powers is not merely an implicit 'doctrine' but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns." *Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002).

This Court has discussed the importance of the jurisdictional limits on the judiciary's authority to review discretionary executive/administrative decisions on multiple occasions:

[1]The separation of powers provision was previously contained in Art. III, § 43; it was reworded and moved to its current position in 2016 by Al. Const. Amend. No. 905.

> Many cases have been before this court in which the acts of governing bodies of counties and cities have been attacked as illegal because of alleged abuse of discretion, arbitrary action having no due regard to the public interest and the public trust committed to them.
>
> ***In all such cases it becomes manifest at once that, if entertained, the court must enter upon an inquiry whether the contract was in fact well advised, the result of fair judgment having a basis of reason***. These are matters committed by law to the governing body of the city. Great care must be exercised by the courts not to usurp the functions of other departments of government. No branch of government is so responsible for the autonomy of the several governmental units and agencies as the judiciary. Accordingly, it has been many times declared the courts cannot and will not interfere with the discretion vested in the governing body of a municipality.
>
> So, it must be regarded as settled that the court will not interfere by injunction except in case of corruption, fraud, or bad faith, the equivalent of fraud.
>
> Courts should not under the guise of existing judicial power usurp merely administrative functions by setting aside a lawful administrative order upon the court's conception as to whether the administrative power has been wisely executed.
>
> The judicial branch of government was not intended to be and will not presume to act as a super agency to control, revise, modify, or set at naught the lawful acts of administrative agencies. It is under restraint (§ 4[2], Constitution 1901) from imposing its methods or substituting its judgment for that of the executive and legislative branches of the government.

Finch v. State, 271 Ala. 499, 503-504, 124 So. 2d 825, 829-830 (1960) (quoting *Van Antwerp v. Board of Com'rs of City of Mobile*, 217 Ala. 201,

206, 115 So.239, 243 (1928)) (other internal citations omitted) (emphasis added); *see also State v. $233,405.86*, 203 So.3d 816, 828-29 (Ala. 2016); *Ex parte City of Birmingham*, 624 So.2d 1018 (Ala. 1993); *Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So.2d 907, 910-11 (1992); *Etowah County Commission v. Hayes*, 569 So.2d 397 (1990); *Barber v. Covington County Com'n*, 466 So.2d 945, 946-47 (Ala. 1985); *Nelson & Robbins v. Mund*, 273 Ala. 91, 94, 134 So.2d 749, 752 (1961); *Wright v. Pickens County*, 268 Ala. 50, 104 So.2d 907 (1958); *Goodwin v. State Board of Administration*, 212 Ala. 453, 455, 102 So.718, 719 (1925).

This principle has been specifically discussed in the context of a challenge to the construction of bridges and roads, including as follows:

> A court of equity, at the suit of a taxpayer, may restrain by injunction the misappropriation of county funds by county officials; but no power exists in a court of equity to compel county commissioners in the exercise of their discretion in the conduct of the county's business. When a court of equity undertakes to review the action of boards of revenue or courts of county commissioners, a question of jurisdiction is presented; and unless the jurisdictional facts are alleged, and the charge thereon is made of fraud, corruption, or unfair dealing, jurisdiction of the subject-matter is not acquired. The bill in this cause falls short of such jurisdictional averment. The Walker county law and equity court could not review the finding of the court of county commissioners, on the necessity for the bridges, or on the sufficiency of the plans and specifications therefor.

O'Rear v. Sartain, 193 Ala. 275, 288, 69 So. 554, 558 (1915); and,

> The matter of locating, constructing and maintaining highways is not a function of the courts. In that matter the Highway Director exercises an administrative and quasi-legislative function which, when free from fraud or corruption, cannot be reviewed by the courts. *Bouchelle v. State Highway Commission*, 211 Ala. 474, 100 So. 884 [(1924)]. And we have said that 'A court of equity is without jurisdiction to determine the question of the public need for a highway.' *Alabama Great Southern R. Co. v. Denton*, 239 Ala. 301, 195 So. 218, 221 [(1940)].

Pruett v. Las Vegas, Inc., 261 Ala. 557, 562-63, 74 So.2d 807, 810 (1954).

This Court has also repeatedly discussed the importance of the doctrine of separation of powers in the context of statutory interpretation. *See, e.g.*, *Gulf Shores Board of Education v. Mackey*, No. 1210353, __So.3d__, 2022 WL 17843037 at *10 (Ala. Dec. 22, 2022).

Admittedly, "bad faith" is sometimes – but not always – listed in this Court's description of the limited circumstances that can justify judicial review of legislative or executive discretion. *See Van Antwerp*, 217 Ala. at 206, 115 So.at 243; *Cf. Bentley v. County Commission for Russell County*, 264 Ala. 106, 109, 84 So.2d 490, 493 (1955) ("Our cases are to the effect that the action of a county governing body in the exercise of discretionary powers vested in it is not subject to judicial review except for fraud, corruption or unfair dealing.") The cases that include "bad faith" in the statement of the standard for judicial review of a

discretionary administrative/executive action are clear that the bad faith at issue must be "the equivalent of fraud." *State ex rel. Baxley v. Givhan*, 292 Ala. 533, 536, 297 So.2d 357, 536 (1974); *see also, e.g., Piggly Wiggly No. 208, Inc.*, 601 So.2d at 910 (quoting *Finch v. State*, *supra*); *E.C. Herbert v. State Oil and Gas Board*, 287 Ala. 221, 250 So.2d 597 (1971); *Johnston v. Alabama Public Service Commission*, 287 Ala. 417, , 421, 252 So.2d 75, 78 (1971) (per curiam); *Rogers v. City of Mobile*, 277 Ala. 261, 282, 169 So.2d 282, 302 (1964) (collecting cases); *Pilcher v. City of Dothan*, 207 Ala. 421, 424, 93 So.16, 19 (1922).

Bad faith that is the "equivalent of fraud" ordinarily requires credible proof of personal gain, i.e., corruption. *See, e.g.*, *State ex rel. Baxley v. Givhan*, 292 Ala. 533, 537-38, 297 So.2d 357, 360-61 (1974); *Wright*, 268 Ala. at 56, *Board of Revenue of Covington County v. Merrill*, 193 Ala. 521, 530-31, 68 So. 971, 974-75 (1915). In the absence of such evidence, the test for upholding administrative action against a claim that it was done "arbitrarily, capriciously, in bad faith, or as a part of fraud" is simply whether any reasonable basis exists for the action; if, so, then a court does not have jurisdiction to enter an injunction. *City of Huntsville v. Smartt*, 409 So.2d 1353, 1357 (Ala. 1982); *see also Pilcher*, 207 Ala. at 426, 427, 93 So. at 21, 22 ("When good faith in the exercise of a

discretion…is manifested, or when fraud or abuse of discretion is shown, are necessarily chiefly matters of opinion, at least until the circumstances disclose such departure from reason and relation as to shock the judgment, to indicate an improper motive…Presumably the [] government intended and intends, in this matter, to observe, in good faith, the Constitution and laws of this state…Bad faith cannot be imputed without substantial reason.") This review must be done based on the record, without probing into individual officials' subjective motivations, lest it cross the jurisdictional line into a substantive review of the merits.[2] *Id.*; *Givhan*, 292 Ala. at 537, 297 So.2d at 360-61 ("If in instances as here, where fraud is not evident, the court sets itself up as a reviewing authority…litigation could result seeking this court's supervision and revision of activity that rightfully is the responsibility and prerogative of the governmental agencies and bodies concerned. This we are without constitutional authority to do and will not undertake to do."); *see also*, *e.g.*, *State ex rel. Austin v. City of Mobile*, 248 Ala. 467, 472, 28 So.2d 177, 181

[2]The irrelevancy of subjective motivations (excepting corruption) is shown by the fact that an *ultra vires* act cannot be justified by an official's good faith.

(1946) (stating that judicial review is limited to records and proceedings of governmental body).

The primary basis for the circuit court's ruling in this case is its factual finding that the Cooper Bridge is a bad idea. The circuit court made extensive factual findings, apparently based in part on credibility determinations, that the bridge is not needed and that there are other, better ways to relieve any problems that may exist because of traffic congestion. The circuit court stated that, given "ALDOT's limited resources and the need for improvements for bridges across the State of Alabama, the court is very disturbed that Director Cooper is using over $120 million of taxpayer dollars to build a bridge that his own experts concede would do no more to alleviate traffic on Highway 59 than the proposed bridge that BCBC offered to build at no expense to the Alabama taxpayers." (Corrected Order on Plaintiff's Motion for Preliminary Injunction, pg. 4.) **As stated in the Motion, *supra*, the ACCA takes no position on the merits of the dispute between the parties**. The ACCA's position is instead that, pursuant to the above-cited law, the question of whether the Cooper Bridge is a good idea and/or a wise use of resources is beyond the purview of the judicial branch.

In finding bad faith, the circuit court first relies on what it terms the "*Ex parte ALDOT*" standard, derived from *Ex parte Alabama Dept. of Transp.*, 143 So.3d 730 (Ala. 2013). The Court held in that case that a circuit court had jurisdiction to entertain a claim against Director Cooper for injunctive relief when it alleged that he acted fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of law. 143 So.3d at 741. The circuit court's reliance on this case is flawed for two reasons: first, as discussed in Section II of this brief, an allegation that one has acted "fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of law" is not in and of itself a cause of action. It is merely an allegation of the specific motive required to invoke the court's jurisdiction over claims made against a State official. The underlying cause of action discussed against Director Cooper in *Ex parte Alabama Dept. of Transp.* is a taking caused by the overflow of polluted water onto the plaintiff's property. 143 So. 3d at 740-41. Second, *Ex parte Alabama Dept. of Transp.* does not contain any substantive discussion of the standard for finding that Director Cooper has acted in bad faith.

The circuit court's opinion then turns to cases concerning the federal courts' jurisdiction to enjoin State court criminal proceedings under the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). The

Younger abstention doctrine is based on principles of federalism and comity. It prohibits federal courts from interfering in state criminal proceedings in the absence of extraordinary circumstances showing that "the threat to the plaintiff's federally protected rights…cannot be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46. *Younger'* states that one such extraordinary circumstance would be if a plaintiff could provide evidence that the state prosecution was being brought in bad faith, as part of a concerted effort to strip them of rights protected by the federal constitution in violation of the Supremacy Clause. *Id.* at 46-49.

There is a certain analytical parallel between *Younger* abstention and State immunity. Both doctrines start from the premise that a court should not entertain a claim against a state official unless there is a 'plus factor,' e.g., a credible allegation of bad faith. Again, the circuit court's discussion of cases in which lower federal courts have enjoined state courts proceedings conflates the claim/cause-of-action with the plus factor that justifies court action. Federal courts do not (or at least should not) intervene in state court proceedings merely because of vague notions of individualized "bad faith" on the part of the defendant officials; rather, they intervene only when there is evidence of a violation of the plaintiff's

constitutional rights that cannot be expected to be cured in the state proceeding. For example, in *Nobby Lobby, Inc. v. City of Dallas*, 767 F.Supp. 801 (N.D. Tex. 1991), the district court issued a preliminary injunction against a city's repeated seizures of the plaintiff's equipment and criminal prosecutions of its employees in a case alleging a violation of the plaintiff's First Amendment rights. The finding of "bad faith" was based on the fact that the city had continued to engage in this conduct even after a published opinion by the United States Court of Appeals for the Fifth Circuit had established that "there was no tenable legal foundation for the City's seizure of video and computer equipment," and even though they did not have a reasonable expectation of successful prosecutions. 767 F.Supp. at 806-807.

But unlike Alabama's doctrine of separation of powers, the voluntarily assumed limitations on the equity powers of federal courts who apply *Ex parte Younger* abstention are not jurisdictional. *See, e.g.*, *Krahm v. Graham*, 461 F.2d 703, 708-709 (9th Cir. 1972). It is frankly rather disturbing as a matter of principle that a circuit court in Alabama would cite cases from federal district courts in other states and the United States Court of Appeals for the Ninth Circuit to justify an expansion of judicial authority.

Finally, the circuit court cited the "commonly accepted ordinary meaning of the term 'bad faith,'" defined by Black's Law Dictionary as conduct carried out with "dishonesty of belief, purpose, or motive." The citation of this definition ultimately proves too much. As discussed *supra*, the limited "bad faith" that justifies judicial intervention in the legislative or executive branches' affairs is very different than the various types of bad faith that may constitute the tort of bad faith in the insurance context. *See State Farm Fire & Cas. Co. v. Slade*, 747 So.2d 293 (Ala. 1999) (discussing varieties of tort of bad faith insurance claims). For example, while an administrative agency's interpretation of a statute is entitled to "great weight" when reviewing the legitimacy of executive action, *Robinson v. City of Montgomery*, 485 So.2d 695, 697 (Ala. 1986), an insurance contract will be construed against the insurer, so that an insurer who relies on an ambiguous clause to deny coverage may find themselves liable for the tort of bad faith regardless of the purity of their subjective beliefs, *Blackburn v. Fidelity and Deposit Co. of Maryland*, 667 So.2d 661, 669 (Ala. 1995).

The circuit court has overstepped the boundaries imposed on the exercise of judicial power by Ala. Const. Art. III, § 42. The ACCA therefore respectfully urges this Court to reject the circuit court's novel "bad faith"

analysis and hold that the well-established principles of Alabama law discussed *supra* continue to govern challenges to the legitimacy of official action.

II. THERE IS NO GENERIC CAUSE OF ACTION FOR A "BAD FAITH INJUNCTION" UNDER ALABAMA LAW.

In addition to violating the doctrine of separation of powers, the circuit court's creation of a free-floating "bad faith injunction" claim, unmoored from the typical confines of a claim alleging arbitrary and capricious official action, is also problematic from a cause-of-action standpoint. Even though there is an implied covenant of good faith and fair dealing in all contracts in Alabama, this court has consistently refused to recognize a cause of action for "bad faith" outside of the specific insurer/insured relationship. *Peninsular Life Ins. Co. v. Blackmon*, 476 So.2d 87 (Ala. 1985); *Kennedy Elec. Co. v. Moore-Handley, Inc.*, 437 So.2d 76 (Ala. 1983). The difference arises largely from the special nature of the relationship between an insurer and insured versus the more tenuous relationship between parties to an ordinary contract or transaction. *Brown-Marx Associates, Ltd. v. Emigrant Sav. Bank*, 527 F.Supp. 277, 282-83 (N.D. Ala. 1981), *cited in Kennedy Elec. Co., supra.* Like the implied covenant of good faith in contracting, the general duty of good

faith owed by a public entity or official in Alabama is rather nebulous and is owed to the public at large, not to any particular person. *See, e.g.*, *City of Orange Beach v. Boles*, Nos. 1210055, 1210056, __So.3d__, 2023 WL 4038455 (June 16, 2023) (not yet released for publication) (holding that a city had substantive immunity from property owner's claim that it was required to conduct a meter-release inspection). And like a claimed violation of the implied covenant of good faith, a violation of this "duty" does not justify relief in and of itself without some other independent wrong, e.g., a taking or trespass.

The circuit court's reliance on the so-called "exceptions" to State immunity for actions taken by a State official, specifically including actions for an injunction brought against a State official who is alleged to have acted "fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law" to find such a claim is misplaced. These "exceptions" do not create a cause of action. The term "exception" is somewhat of a misnomer: "in actuality, these actions are simply not considered to be actions 'against the State' for § 14 purposes." *Ex parte Alabama Dept. of Transportation*, 143 So.3d at 735, n.1. The fact that § 14 does not bar a particular type of claim does not mean that a cause of action is automatically available; it merely means that a plaintiff may

bring a certain claim if the underlying wrong – whatever that might be – not only occurred, but was done fraudulently, in bad faith, beyond an official's authority or under a mistaken interpretation of law. *Cf. Lewis v. Fraunfelder*, 796 So.2d 1067 (Ala. 2000) (holding that Ala. Code § 6-5-370 merely abrogated the common-law rule of suspension forbidding a civil action based on actions amounting to a felony without prosecution of the offender so as to allow existing causes of action; it did not create a cause of action). In other words, the exceptions to State immunity only remove a barrier from an already existing road to the courthouse. They do not pave a new way.

An injunction is an equitable remedy that may be available for certain causes of action. *See* Ala. Code § 6-6-500 *et seq*. (1975). It is not a cause of action in and of itself. *See, e.g., Wootten v. Ivey*, 877 So.2d 585 (Ala. 2003) (holding that a judge could not issue an injunction as a remedy for an alleged nuisance despite the jury's determination that the plaintiff was not entitled to any damages because the nuisance did not exist); *Lesley v. City of Montgomery*, 485 So.2d 1088 (Ala. 1986) (holding that previous action seeking an injunction was *res judicata* in suit brought seeking damages on the same theory because the injunctive claim and legal claim were simply remedies for a single cause of action); *Moates v.*

City of Andalusia, 254 Ala. 629, 630, 49 So.2d 294, 295 (1950) (stating that a complainant had the burden of showing "an equitable cause of action, or a justiciable controversy, as to which he had the right to invoke the court's intervention); *Turner v. City of Mobile*, 135 Ala. 73, 108-109, 33 So. 132 (1902) ("In other words, a court of equity cannot exercise its jurisdiction for the prevention of a multiplicity of suits in cases where the plaintiff invoking such jurisdiction has not any prior cause of action, either equitable or legal…"). The Eleventh Circuit Court of Appeals has stated this principle as follows:

> First, any motion or suit for either a preliminary or permanent injunction must be based upon a cause of action, such as a constitutional violation, a trespass, or a nuisance. "There is no such thing as a suit for a traditional injunction in the abstract. For a traditional injunction to be even theoretically available, a plaintiff must be able to articulate a basis for relief that would withstand scrutiny under Fed.R.Civ.P. 12(b)(6) (failure to state a claim)." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir.2004). An injunction is a "remedy potentially available only after a plaintiff can make a showing that some independent legal right is being infringed—if the plaintiff's rights have not been violated, he is not entitled to any relief, injunctive or otherwise." *Id.* at 1098.

Alabama v. U.S. Army Corps of Engineers, 424 F.3d 1117, 1127 (11th Cir. 2005).

Thus, bad faith is the standard of intent necessary to avoid the bar of State immunity, and an injunction is the remedy. What is missing from

this injunction is the wrong itself. As currently conceptualized by the circuit court, a bad faith injunction claim appears to be a kind of catch-all to stop any activity that a plaintiff does not like that might not quite meet the elements of any other particular claim recognized by Alabama law. It is worth noting that the circuit court seems to imply at points in its order that other established legal rights may have been violated, e.g., interference with vested contractual rights and/or tortious interference with business, and, of course, the Baldwin County Bridge Company has also alleged a claim for inverse condemnation. Such claims should be explicitly raised and argued on their own merits according to the elements of each such claim.

The ACCA therefore respectfully requests that this Court reject the novel approach advocated by the Baldwin County Bridge Company and adopted by the Circuit Court of Montgomery County. Mere disagreement with an official's opinion of the appropriate course of action on an issue committed to his discretion is not a valid cause of action under Alabama law, and it is also beyond the scope of the courts' subject matter jurisdiction. The Cooper Bridge may indeed be a bad idea and/or a poor use of the State's limited resources. The Circuit Court of Montgomery

County is not, however, the appropriate forum to consider these issues, at least as they have currently been presented to and decided by that court.

CONCLUSION

Amicus Curiae, the Association of County Commissions of Alabama, hereby respectfully submits that the Preliminary Injunction entered by the Circuit Court of Montgomery County in this case is contrary to well-established principles of Alabama law governing the review of official executive/administrative action.

Respectfully submitted, this 22nd day of June 2023.

/s/MARY MARGARET WILLIAMS FIEDLER
MARY MARGARET WILLIAMS FIEDLER
General Counsel
Association of County Commissions of Alabama
2 N. Jackson St., Ste. 701
Montgomery, Al 36104
(334) 263-7594 (T)
mfiedler@alabamacounties.org

/s/JAMIE H. KIDD FRAWLEY
KENDRICK E. WEBB
JAMIE H. KIDD FRAWLEY
Webb McNeill Walker, P.C.
One Commerce Street, Ste 700
Montgomery, AL 36104
(334) 262-1850 (T)
(334) 262-1889 (F)
kwebb@wmwfirm.com
jfrawley@wmwfirm.com

ATTORNEYS FOR AMICI CURIAE
ASSOCIATION OF COUNTY COMMISSIONS OF ALABAMA

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that Brief, filed on behalf of Amicus Curiae, Association of County Commissions of Alabama, complies with Ala. R. App. Pro. 27, 28, and 32 in that it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word and contains no more than 14,000 words. This Brief, beginning with the section entitled "Summary of the Argument" and concluding with the line "Respectfully Submitted" contains 4,073 words, exclusive of the items set forth in Ala. R. App. Pro. 32(c).

Respectfully submitted, this 22nd day of June, 2023.

/s/MARY MARGARET WILLIAMS FIEDLER
MARY MARGARET WILLIAMS FIEDLER
General Counsel
Association of County Commissions of Alabama
2 N. Jackson St., Ste. 701
Montgomery, Al 36104
(334) 263-7594 (T)
mfiedler@alabamacounties.org

/s/JAMIE H. KIDD FRAWLEY
KENDRICK E. WEBB
JAMIE H. KIDD FRAWLEY
Webb McNeill Walker, P.C.
One Commerce Street, Ste 700
Montgomery, AL 36104
(334) 262-1850 (T)
(334) 262-1889 (F)
kwebb@wmwfirm.com
jfrawley@wmwfirm.com

ATTORNEYS FOR AMICI CURIAE
ASSOCIATION OF COUNTY COMMISSIONS OF ALABAMA

CERTIFICATE OF SERVICE

I certify that on this 22nd day of June 2023, I electronically filed the foregoing Joint Motion and Amici Curiae Brief by the Association of County Commissions of Alabama in Support of Appellant with the Supreme Court of Alabama, and further certify that on this same date I served the foregoing via electronic mail, upon all other parties addressed as follows:

James A. Bradford (BRA007)
Michael Taunton (TAU008)
Madison Field
BALCH & BINGHAM LLP
1901 6th Avenue N., Suite 1500
Birmingham, AL 35203
Telephone: (205) 226-3407
Facsimile: (205) 488-5888
jbradford@balch.com
mtaunton@balch.com
mfield@balch.com
Attorney for Appellant / John R Cooper

W. Joseph McCorkle, Jr. (MCC056)
Dorman Walker (WAL086)
BALCH & BINGHAM LLP
Post Office Box 78 (36101)
105 Tallapoosa Street, Suite 200
Montgomery, AL 36104
Telephone: (334) 834-6500
Facsimile: (334) 269-3115
jmccorkle@balch.com
dwalker@balch.com
Attorneys for Appellant / John R Cooper

William F. Patty (PAT038)
Kaasha D. Griffin (BEN082)
Alabama Department of Transportation
1409 Coliseum Boulevard, Rm 147
Montgomery, AL 36110
Telephone: (334) 242-6350
Facsimile: (334) 264-4359
pattyw@dot.state.al.us
griffink@dot.state.al.us

Joseph C. Espy III
Benjamin J. Espy
William M. Espy
Flynn Mozingo
MELTON, ESPY & WILLIAMS, P.C.
P.O. Drawer 5130
Montgomery, AL 36103
Telephone: 334-263-6621
Facsimile: 334-263-7252

Attorneys for Appellant / John R. Cooper

jespy@mewlegal.com
bespy@mewlegal.com
wespy@mewlegal.com
fmozingo@mewlegal.com
Attorneys for Appellee/ The Baldwin County Bridge Company, LLC

Peter W. Tomlinson
Clint W. Morrison
Isaac J. Weingram
Shelley Attadgie
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York City, New York 10036
Telephone: (212) 336-2977
pwtomlinson@pbwt.com
cwmorrison@pbwt.com
ijweingram@pbwt.com
sattadgie@pbwt.com
Attorney for Appellee / The Baldwin County Bridge Company, LLC

Clifford C. Brady
Brady Martin, LLP
63 Royal Street, Suite 1201
Mobile, AL 36602
Telephone: (251) 405-0077
cliff@bradymartinlaw.com
Attorney for Appellee / The Baldwin County Bridge Company, LLC

Robert E. Poundstone IV
BRADLEY ARANT BOULT CUMMINGS, LLP
445 Dexter Avenue Suite 9075
Montgomery, AL 36104
Telephone: (334) 956-7700
bpoundstone@bradley.com
Attorneys for Scott Bridge Company, LLC

Marc James Ayers
BRADLEY ARANT BOULT CUMMINGS, LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
Telephone: (205) 521-8000
mayers@bradley.com
Attorneys for Scott Bridge Company, LLC

/s/Jamie H. Kidd Frawley
Of Counsel