

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2012-2013

1120227

Ex parte Donald Ray Hicks

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS**

(In re: Bona Faye Hicks

v.

Donald Ray Hicks)

**(DeKalb Circuit Court, CV-09-4;
Court of Civil Appeals, 2110408)**

PER CURIAM.

The petition for the writ of certiorari is denied.

1120227

In denying the petition for the writ of certiorari, this Court does not wish to be understood as approving all the language, reasons, or statements of law in the Court of Civil Appeals' opinion. Horsley v. Horsley, 291 Ala. 782, 280 So. 2d 155 (1973).

WRIT DENIED.

Stuart, Bolin, Parker, Murdock, Main, and Wise, JJ., concur.

Shaw, J., concurs specially.

Moore, C.J., dissents.

Bryan, J., recuses himself.*

*Justice Bryan was a member of the Court of Civil Appeals when that court considered this case.

1120227

SHAW, Justice (concurring specially).

I concur in denying the petition for the writ of certiorari. In the underlying case, Bona Faye Hicks and Dennis Hicks¹ sued Donald Ray Hicks regarding a dispute over the location of a property line. The trial court entered a judgment in 2009 requiring Donald to relocate a boundary-line fence.

In August 2010, Bona Faye filed what is described in the Court of Civil Appeals' opinion as a "motion for contempt, sanctions, and specific performance," asserting that Donald had failed to comply with the trial court's 2009 judgment.² Hicks v. Hicks, [Ms. 2110408, September 14, 2012] ____ So. 3d ____, ____ (Ala. Civ. App. 2012). On October 5, 2011, the trial court found that Donald had in fact complied with the judgment and denied the motion. Bona Faye subsequently filed a "motion to alter, amend, or vacate," asserting that the trial court lacked subject-matter jurisdiction to enter its

¹Dennis died while this case was pending in the trial court.

²It appears that Bona Faye's motion was filed under the case number of the original action--CV-09-4--and was not assigned a new case number, indicating that no "new" action was filed.

1120227

October 5, 2011, decision denying her motion because no filing fee had been paid upon the filing of the "motion for contempt, sanctions, and specific performance." Donald, the nonmovant, apparently then paid the filing fee.

On appeal to the Court of Civil Appeals, Bona Faye contended, as she had below, that the trial court lacked subject-matter jurisdiction to issue its October 5, 2011, decision because no filing fee had been paid when the "motion for contempt, sanctions, and specific performance" was initially filed. Proceeding under the premise, as argued by the parties, that a filing fee was required for the trial court to obtain subject-matter jurisdiction to rule upon that motion, the Court of Civil Appeals undertook to determine whether the presumed lack of subject-matter jurisdiction at the outset of Bona Faye's motion, because she paid no filing fee, could be cured by Donald's subsequent payment of that filing fee. That court, in a plurality decision, decided that Donald's subsequent payment of the filing fee did not afford the trial court jurisdiction and dismissed the appeal with instructions for the trial court "to vacate all orders

1120227

stemming from the filing of Bona Faye's motion for contempt, sanctions, and specific performance." ___ So. 3d at ___.

Donald petitions for certiorari review, contending that the Court of Civil Appeals erred in holding that the filing fee must be paid at the outset of the case and could not be paid at a later time. I see no probability of merit in Donald's petition. See Rule 39(f), Ala. R. App. P. (providing that this Court may issue the writ of certiorari if it "concludes that there is a probability of merit in the petition"). This is not because I agree with the rationale of the Court of Civil Appeals, nor is it because I do not believe that the allegations in the petition show no potential merit in the issue argued; instead, I reject the premise that a filing fee was actually required in this case. Specifically, trial courts retain "residual jurisdiction" to enforce their previous, final judgments. George v. Sims, 888 So. 2d 1224, 1227 (Ala. 2004) ("[A] trial court has 'residual jurisdiction or authority to take certain actions necessary to enforce ... a final judgment'" (quoting Helms v. Helms' Kennels, Inc., 646 So. 2d 1343, 1347 (Ala. 1994))). Here, Bona Faye's motion "for contempt, sanctions, and specific

1120227

performance" appears--from the limited facts before us--to be an attempt to have the trial court enforce its previous judgment requiring Donald to move the boundary-line fence. To the extent that that is what Bona Faye requested, the trial court retained "residual" jurisdiction to require Donald to do what the court's final judgment required of him.

Both parties' arguments in the Court of Civil Appeals were premised on a filing fee being required in order to move the trial court to enforce its 2009 judgment. I note that the cases cited in the Court of Civil Appeals' opinion for that proposition -- Odom v. Odom, 89 So. 3d 121 (Ala. Civ. App. 2011), and Vann v. Cook, 989 So. 2d 556 (Ala. Civ. App. 2008) -- are both domestic-relations cases. As noted in both of those decisions, Ala. Code 1975, § 12-19-71(a)(7), requires a filing fee for petitions to "enforce an existing domestic relations court order." (Emphasis added.) That Code section would not apply to require a filing fee in this case, which appears to involve an order in a property-line dispute, not a domestic-relations order.³ Further, G.E.A. v. D.B.A., 920 So.

³Both Bona Faye and Donald have the last name "Hicks," raising the possibility that they could be related and that the dispute in this case might in fact stem from a prior domestic-relations case. However, I note that the trial

1120227

2d 1110 (Ala. Civ. App. 2005), cited in the Court of Civil Appeals' opinion, was also a domestic-relations case, but it cited Opinion by the Clerk, 381 So. 2d 58, 59 (Ala. 1980), for the proposition that a filing fee was required. As the Court of Civil Appeals recently noted, that Clerk's Opinion was superseded, at least in part, in 1994 by the adoption of Rule 70A, Ala. R. Civ. P., governing contempt in civil cases. See Austin v. Austin, [Ms. 2120102, May 10, 2013] ___ So. 3d ___ (Ala. Civ. App. 2013).⁴ For all that appears, the authorities cited for the proposition that a filing fee was required for Bona Faye's motion are inapplicable in this case.

From the limited materials before me, I would conclude that the trial court retained jurisdiction to entertain Bona

court's case designation, containing a "CV" prefix, indicates that the underlying action was a civil action, not a domestic-relations case, which would have been given a "DR" prefix. Further, Bona Faye's appeal was transferred from this Court to the Court of Civil Appeals pursuant to Ala. Code 1975, § 12-2-7(6), which authorizes the transfer of "any civil case."

⁴In certain situations, such as if a contempt proceeding is brought in the form of a counterclaim or cross-claim, the payment of a filing fee might be required. See Rule 70A(c)(1) (providing that a proceeding based on constructive contempt may be filed in the form of a counterclaim or a cross-claim) and Ala. Code 1975, § 12-19-71(a)(8) (providing for a filing fee to be paid with the filing of a counterclaim or a cross-claim).

1120227

Faye's "motion for contempt, sanctions, and specific performance" and, thus, that no filing fee was required. However, I cannot reverse the judgment of the Court of Civil Appeals on this ground, because it is not argued to this Court in the petition stating the reasons this Court should issue the writ of certiorari. It is well settled that this Court will not reverse a lower court's decision on an issue not raised on appeal. Hart v. Pugh, 878 So. 2d 1150, 1157 (Ala. 2003) ("[W]hen we are asked to reverse a lower court's ruling, we address only the issues and arguments the appellant chooses to present."), and Thompson v. Skipper Real Estate Co., 729 So. 2d 287, 289 n.2 (Ala. 1999) ("Although this Court will affirm an order of the trial court on a ground not asserted below, ... this Court will not reverse a trial court's judgment on a ground that has never been raised."). This is true even if the argument would support a finding that a lower court had subject-matter jurisdiction. Crutcher v. Williams, 12 So. 3d 631, 635 (Ala. 2008) ("[T]his Court is not obligated to embark on its own expedition beyond the parties' arguments in pursuit of a reason to exercise jurisdiction. The burden of establishing the existence of subject-matter jurisdiction

1120227

falls on the party invoking that jurisdiction."). This Court has no duty to perform a party's legal research and cannot advocate legal arguments on any party's behalf. Spradlin v. Birmingham Airport Auth., 613 So. 2d 347, 348 (Ala. 1993); see also Schiesz v. Schiesz, 941 So. 2d 279, 289 (Ala. Civ. App. 2006) ("It is not the function of [an appellate] court to advocate a position on behalf of an appellant or to create a legal argument for the appellant."). The issue actually raised in Donald's certiorari petition--whether a filing fee must be paid at the initiation of an action or whether it can be paid at a later time for purposes of bestowing on a trial court subject-matter jurisdiction--is an interesting one; however, because a resolution of that issue would be of no consequence, any discussion of it by this Court would be dictum. See Black's Law Dictionary 454 (6th ed. 1990) (defining "dictum" as "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand ..., [which] lack the force of an adjudication").

It is true that the Court of Civil Appeals' decision will stand in this case because the dispositive issue was not

1120227

presented to this Court; however, such a result is not unique. This Court is routinely constrained to allow lower-court decisions to stand because the parties to the appeal have not placed before us the proper argument, even when we might believe those decisions to be erroneous. See, e.g., Ex parte McKinney, 87 So. 3d 502, 509 n.7 (Ala. 2011) (calling into question prior caselaw but refusing to overrule that caselaw because "this Court has long recognized a disinclination to overrule existing caselaw in the absence of either a specific request to do so or an adequate argument asking that we do so").

1120227

MOORE, Chief Justice (dissenting).

I dissent from the Court's decision to deny the petition for the writ of certiorari in this case, because I conclude that Donald Ray Hicks raised a valid conflict between prior decisions and the Court of Civil Appeals' decision that merits this Court's review. The issue in this case is whether the failure to pay a filing fee in the trial court is a jurisdictional defect that deprives a court of subject-matter jurisdiction. The Court of Civil Appeals concluded that the trial court lacked subject-matter jurisdiction because Bona Faye Hicks did not pay a filing fee when she filed a motion for contempt. The Court of Civil Appeals dismissed Bona Faye's appeal on that basis. Hicks v. Hicks, [Ms. 2110408, September 14, 2012] ___ So. 3d ___ (Ala. Civ. App. 2012).

In his certiorari petition to this Court, Donald argues that the Court of Civil Appeals' decision conflicts with De-Gas, Inc. v. Midland Resources, 470 So. 2d 1218 (Ala. 1985), by improperly expanding the holding in that case. The Court in De-Gas stated that "the payment of the fees required by § 12-19-70[, Ala. Code 1975,] or the filing of a court-approved verified statement of substantial hardship is

1120227

a jurisdictional prerequisite to the commencement of an action for statute of limitations purposes." 470 So. 2d at 1222 (emphasis added). Donald argues in his petition that the Court of Civil Appeals applied an incorrectly expanded holding in De-Gas by holding that the failure to pay a filing fee deprives the trial court of subject-matter jurisdiction. In so doing, the Court of Civil Appeals followed a line of its own cases construing De-Gas with similar breadth. See, e.g., Odom v. Odom, 89 So. 3d 121 (Ala. Civ. App. 2011), Vann v. Cook, 989 So. 2d 556 (Ala. Civ. App. 2008), and Farmer v. Farmer, 842 So. 2d 679 (Ala. Civ. App. 2002). Donald also asks the Court to overrule our decision in Johnson v. Hetzel, 100 So. 3d 1056 (Ala. 2012), which followed the Court of Civil Appeals' expansion of the holding in De-Gas.

Presiding Judge Thompson dissented below and specifically urged this Court to reexamine our holding in Hetzel and

"to consider whether, in this case, the main opinion again improperly expands the holding of De-Gas to hold that, in all cases, a failure to pay a filing fee under § 12-19-70[, Ala. Code 1975,] divests the circuit court of subject-matter jurisdiction over an action."

Hicks, ___ So. 3d at ___. Judge Thompson raised several valid concerns. First, he pointed out that the statute of

1120227

limitations is an affirmative defense that does not implicate a trial court's subject-matter jurisdiction. Second, he noted that this Court in De-Gas did not hold that the trial court lacked subject-matter jurisdiction over the action because the plaintiff had failed to pay the filing fee, only that the action was barred by the statute of limitations. Third, he points out that the filing-fee statute, § 12-19-70, Ala. Code 1975, involves court finances and has nothing to do with a court's subject-matter jurisdiction.⁵

I agree with Judge Thompson's concerns regarding De-Gas, Hetzel, and cases that have, in my opinion, improperly expanded the holding in De-Gas. This Court in De-Gas used the filing-fee requirement to determine whether a case had been "commenced" within the limitations period and referred to the fee as a "jurisdictional prerequisite."⁶ Thereafter, the Farmer, Odom, and Vann decisions expanded upon the holding in

⁵Judge Thompson, with admirable contrition, noted that he had voted with the majority in Odom, Vann, and Farmer but that he now believes those opinions to be in error.

⁶The De-Gas Court used the term "jurisdictional" in this one sentence only and did not otherwise discuss this issue in terms of the trial court's subject-matter jurisdiction. The isolated use of the term "jurisdictional" here, therefore, appears anomalous and, at most, dicta.

1120227

De-Gas and made the failure to pay a filing fee in any case a bar to subject-matter jurisdiction. This Court in Hetzel appeared to endorse the expansion of the holding in De-Gas. But see Espinoza v. Rudolph, 46 So. 3d 403 (Ala. 2010) (noting that failure to pay a filing fee with counterclaims is not a jurisdictional defect and that the trial court may make such orders as reasonable and necessary to ensure payment). I join Judge Thompson in the belief that this Court and the Court of Civil Appeals have erroneously confused subject-matter jurisdiction and filing-fee requirements in cases applying the holding in De-Gas. I urge this Court to consider this issue in a future case.