



AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: BARNES NOEL STEVEN
nbarnes@ago.state.al.us

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

STATE OF ALABAMA ET AL V. AMERICAN PLUMBING AND SEPTIC SERVICE, LLC E
11-CV-2018-900431.00

The following matter was FILED on 8/31/2018 3:09:32 PM

D001 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC

D002 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC

D004 PESNELL JESSICA

D005 PESNELL RICHARD G

D003 PESNELL RICHARD JOSHUA

MOTION TO STRIKE

[Filer: NOVAK TABOR ROBERT III]

Notice Date: 8/31/2018 3:09:32 PM

KIM MCCARSON
CIRCUIT COURT CLERK
CALHOUN COUNTY, ALABAMA
25 WEST 11TH STREET
ANNISTON, AL, 36201

256-231-1750
Kim.McCarson@alacourt.gov



ELECTRONICALLY FILED
8/31/2018 3:08 PM
11-CV-2018-900431.00
CIRCUIT COURT OF
CALHOUN COUNTY, ALABAMA
KIM MCCARSON, CLERK

STATE OF ALABAMA
Unified Judicial System
11-CALHOUN
Revised 3/5/08
 District Court Circuit Court

Cas
CV21

STATE OF ALABAMA ET AL V. AMERICAN
PLUMBING AND SEPTIC SERVICE, LLC E

CIVIL MOTION COVER SHEET

Name of Filing Party: D001 - AMERICAN PLUMBING AND SEPTIC
SERVICE, LLC
D002 - AMERICAN PLUMBING AND SEPTIC
SERVICE, LLC
D003 - PESNELL RICHARD JOSHUA
D004 - PESNELL JESSICA
D005 - PESNELL RICHARD G

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.
TABOR R. NOVAK III
100 BROOKWOOD PLACE, 7TH FLOOR
BIRMINGHAM, AL 35209
Attorney Bar No.: NOV003

Oral Arguments Requested

TYPE OF MOTION

Motions Requiring Fee

Motions Not Requiring Fee

- Default Judgment (\$50.00)
Joinder in Other Party's Dispositive Motion
(i.e. Summary Judgment, Judgment on the Pleadings,
or other Dispositive Motion not pursuant to Rule 12(b))
(\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative
Summary Judgment (\$50.00)
- Renewed Dispositive Motion (Summary
 Judgment, Judgment on the Pleadings, or other
Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56 (\$50.00)
- Motion to Intervene (\$297.00)
- Other _____
pursuant to Rule _____ (\$50.00)

*Motion fees are enumerated in §12-19-71(a). Fees
pursuant to Local Act are not included. Please contact the
Clerk of the Court regarding applicable local fees.

Local Court Costs \$ 0

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other _____
pursuant to Rule _____ (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees)

Date:
8/31/2018 3:07:23 PM

Signature of Attorney or Party
/s/ TABOR R. NOVAK III

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.
**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.



IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs.

**AMERICAN PLUMBING AND SEPTIC
SERVICE, LLC, et al,**

Defendants.

CASE NO CV18-900431

**DEFENDANTS’ MOTION TO STRIKE THE PLAINTIFF’S
AFFIDAVITS FILED IN SUPPORT OF COMPLAINT**

Come now American Plumbing and Septic Service, LLC, American Drain Cleaning & Plumbing Service, Richard J. Pesnell, Jessica Pesnell, and Richard G. Pesnell (collectively “Defendants”), by and through the undersigned counsel, and hereby file this Motion to Strike the Plaintiff’s, the State of Alabama’s, thirty-two (32) Affidavits filed in support of its Complaint.

INTRODUCTION

On August 3, 2018, Plaintiff filed the original Complaint in this matter and with thirty-two (32) Affidavits as “State’s Exhibit” 1-32 (hereinafter “State’s 32 Affidavits”). Many of the statements in the State’s 32 Affidavits are inadmissible due to the Affiant’s lack of personal knowledge. Other statements constitute inadmissible expert opinions or legal conclusions, and are completely irrelevant to the issues in this case. At their core, the State’s 32 Affidavits do not contain factual testimony, but rather argument or attempt to give expert opinions. As made repeatedly clear by the Alabama Supreme Court, “[t]he affidavit is no place for ultimate facts and conclusions of law, nor for argument of the

party's cause." *Ex parte Head*, 572 So. 2d 1276, 1279–80 (Ala. 1990) (quoting *Osborn v. Johns*, 468 So. 2d 103, 108 (Ala. 1985)).

LEGAL ARGUMENT- GENERALLY

The vast majority of the statements in the State's 32 Affidavits are patently inadmissible. For many of the statements in the State's 32 Affidavits, the individual affiants do not possess the requisite personal knowledge, and their Affidavits are replete with inadmissible expert opinions and legal conclusions, as well as statements that are completely irrelevant to the issues in this case. In addition to being irrelevant, the State's 32 Affidavits are hearsay or are based on hearsay. The State's 32 Affidavits are expressly premised on what the Affiants were ostensibly told by third parties and the purported "perception" of third parties. As such, the State's 32 Affidavits are inadmissible under Ala. R. Evid. 801 & 802. *See also Ex parte Head*, 572 So. 2d at 1279–80. Accordingly, this Court should strike the State's 32 Affidavits in their entirety.

The State's 32 Affidavits also contain "beliefs" and legal conclusions which are not admissible. *Ex parte Head*, 572 So. 2d at 880 ("This Court has consistently held that a conclusory statement based upon the affiant's 'information and belief,' does not comply with Rule 56(e)'s requirement of 'personal knowledge.'"). An affidavit is not a proper filing for a party to argue relevancy or make other legal arguments. *Ex parte Dial*, 387 So. 2d at 880-81 ("It has long been the law that a witness may not give his opinion on a question of law or upon matters which involve questions of law."); *Osborn v. Johns*, 468 So. 2d at 108 ("The affidavit is no place for ultimate facts and conclusions of law, nor for argument of the party's cause.") (citations omitted). An affidavit is not a proper filing for a party to

offer its analysis of the legal merit of the opposing party's argument, or make his own legal arguments. *Id.*; 2A C.J.S. Affidavits § 39 ("Counsel's legal arguments and conclusions are not the proper subject matter of an affidavit. It is not the function of an affidavit to bring legal arguments before a trial court as that is the function of a memorandum of law. Legal arguments and summations in affidavits will be disregarded by the courts.")

Finally, the Affiants in the in the State's 32 Affidavits have little or no personal knowledge about their statements making them inadmissible. *Ex parte Head*, 572 So. 2d at 880; *see, e.g., Van Voorst v. Federal Exp. Corp.*, 16 So. 3d 86, 90-92 (Ala. 2008) (affirming the trial court's order striking the plaintiff's affidavit which was, *inter alia*, "replete with legal conclusions"); *Ex parte Head*, 572 So. 2d at 1281-82 (affidavits not based on "personal knowledge" are inadmissible). As such, all State's 32 Affidavits should be struck generally and entirely from the record of this matter.

LEGAL ARGUMENT- SPECIFICALLY

Alternatively, to the extent this Court does not strike the State's 32 Affidavits in their entirety, the Defendants request that the Court strike the following statements and not consider them in any ruling(s) in this case:

Nancy Armstrong (State's Exhibit 1)- paragraphs 2, 3, 4, 5, 6, 8, 10, 11, 12, and 13

Gary W. Atchley, Sr. (State's Exhibit 2)- paragraphs 2, 3, 5, and 6

Charlene Avery (State's Exhibit 3)- paragraphs 1, 2, 3, 4, 5, 6, and 7

Tiffany Baker (State's Exhibit 4)- paragraphs 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 20 (twice), 21, and attachments thereto including statement of Nicholas Arnold

Kenneth Barnett (State's Exhibit 5)- paragraphs 2, 3, 5, and 6

Sharon Bates (State's Exhibit 6)- paragraphs 1, 2, 4, 7, 8, 10, 11, and 12

Dr. Roger Buck (State's Exhibit 7)- paragraphs 2, 3, 4, and 5

Lois Cannon (State's Exhibit 8)- paragraphs 1, 2, 4, 5, and 6

Randy Carroll (State's Exhibit 9)- paragraphs 1, 3, 4, and 5

Mariene Carson (State's Exhibit 10)- paragraphs 2, 3, 4, and 5

Dana Rebecca Cleveland (State's Exhibit 11)- paragraphs 1, 2, 3, 4, 6, 7, and 8

Connie Elder (State's Exhibit 12)- paragraphs 1, 2, and 3

Carol Farrell (State's Exhibit 13)- paragraphs 2, 3, 4, 5, and

Perry Grissom (State's Exhibit 14)- paragraphs 3, 4, 5, and 6

Austin Hix (State's Exhibit 15)- paragraphs 3, 4, 5, and 6

Keith Ingram (State's Exhibit 16) - paragraphs 2, 3, 4, 5, 6, and 7

Joseph Kennedy (State's Exhibit 17) – paragraphs 4, 6, 7, 8, 9 and 10

Linda Lambert (State's Exhibit 18) – paragraphs 3, 4 and 5

Cynthia Mahaffey (State's Exhibit 19) - paragraphs 2, 4, 5 and 6

Donna Maynard (State's Exhibit 20) – paragraphs 2, 3, 4, 5, 6, 7 and 8

Stuart McCormack (State's Exhibit 21) – paragraphs 2, 5, 6, and 7

Shirley McKerley (State's Exhibit 22) - paragraphs 1, 2, 3, 4, 5, 6 and 8

Scott Naden (State's Exhibit 23) – paragraphs 1, 2, and 4

Kenneth Patterson (State's Exhibit 24) – paragraphs 2, 3, 5, 8, 9, 11, 13, 14, 15, and 16

Fred Pope (State's Exhibit 25) – paragraphs 2, 3, 6, and 7

Gerald Price (State's Exhibit 26) – paragraphs 1, 2, 3, 4, 6, 7, 8, 9 and 10

Donald Vaughn (State's Exhibit 27) – paragraphs 1, 3, and 4

Bernard Versansky (State's Exhibit 28) – paragraphs 1, 2, 3, 4, 5, 6, 7, and 8

Kristie Whitaker (State's Exhibit 29) – paragraphs 2, 3, 4, 5, 6, 7, 8, 10, 11 and 12

Danny Whitt (State's Exhibit 30) – paragraphs 3, 4, 5, 7, 8, 9, 10, 11, and 12

Maura Williams (State's Exhibit 31) – paragraphs 2, 3, 4, 5, 6, and 7

WHEREFORE, for the reasons set forth above, the Defendants request that the Court strike the State's 32 Affidavits in their entirety or, in the alternative, that this Court strike the portions of the State's 32 Affidavits set forth above.

Respectfully submitted,

/s/ Tabor R. Novak III

Tabor R. Novak III (ASB-3580-B60N)

J. Scott Dickens (DIC023)

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I electronically filed the foregoing with the Clerk of the Court using the Ala-File system to the following:

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/s/ Tabor R. Novak III
Tabor R. Novak III (ASB-3580-B60N)