Appendices

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Appendix A

Rel: August 23, 2024

Notice: This unpublished memorandum is being issued to the parties and to the trial-court judge. The memorandum is not subject to dissemination or publication and shall not be made a part of the public court record by the trial-court clerk. This unpublished memorandum should not be cited as precedent. See Rule 54, Ala. R. App. P. Rule 54(d) states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar." Notwithstanding the foregoing, a party may quote or cite this unpublished memorandum in an application for rehearing or a petition for a writ of certiorari arising from this decision.

ALABAMA COURT OF CIVIL APPEALS
SPECIAL TERM, 2024

CL-2024-0453

Lisa Antoine
Oxmoor Preservation/One, LLC
Appeal from Jefferson Circuit Court,
Bessemer Division (CV-22-900157)

MEMORANDUM DECISION

CL-2024-0453

EDWARDS, Judge.

Lisa Antoine, proceeding pro se, appeals from a judgment entered by the Bessemer Division of the Jefferson Circuit Court ("the trial court") on February 14, 2024, dismissing her March 2022 complaint seeking damages from Oxmoor Preservation/One, LLC, for continuous trespass, negligence, and continuous nuisance ("the 2022 claims").

Oxmoor raised in its answer the affirmative defense of res judicata, presumably based on a March 2011 judgment that was entered in Antoine's previous action against Oxmoor and other defendants; that judgment was, by and large, affirmed by this court in Antoine v. Oxmoor Preservation/One, LLC, 130 So. 3d 1204, 1208 (Ala. Civ. App. 2012) ("Antoine I"). The record in this action does not contain a motion to dismiss or a motion for a summary judgment filed by Oxmoor. However, the trial court held a hearing on "all pending motions" on February 7, 2024, at which it apparently heard arguments of Oxmoor's counsel regarding the doctrine of res judicata before entering its February 14, 2024, order dismissing the 2022 claims.

This is the sixth appearance of Antoine in this court regarding appellate proceedings related to the March 2011 judgment. See Antoine v. Oxmoor Preservation/One LLC, 356 So. 3d 658 (Ala. Civ. App. 2021) ("Antoine V") (dismissing by order an appeal from an order denying

CL-2024-0453 Antoine's third Rule 60, Ala. R. Civ. P. , motion directed to the March 2011

judgment); Antoine v. Johnson, 231 So. 3d 286 (Ala. Civ. App. 2016) (table) ("Antoine IV") (affirming by unpublished order a summary judgment entered in favor of the various defendants, including Oxmoor, on claims brought against them by Antoine in a new action commenced in 2013 based on, among other grounds, the doctrine of res judicata); Antoine v. Oxmoor Preservation/One, LLC, 231 So. 3d at 286 (Ala. Civ. App. 2016) (table) ("Antoine III") (dismissing an appeal from an order denying Antoine's second Rule 60, Ala. R. Civ. P., motion directed to the March 2011 judgment); Antoine v. Johnson, 177 So. 3d 484 (Ala. Civ. App. 2014) (table) ("Antoine II"); and Antoine I (affirming, by and large, the March 2011 judgment and the denial of Antoine's first Rule 60(b) motion directed to that judgment).

We set out some of the history of Antoine's various actions relating to her property in the no-opinion memorandum circulated in Antoine IV:

> "Antoine I involved claims of trespass to property, injury to property, and nuisance asserted by Antoine against Oxmoor, JRC, Regions Bank, the City of Birmingham, the Johnsons, and Hager Company, Inc. ('HCI'), and counterclaims alleging negligence and trespass asserted by Oxmoor against Antoine in the 2009 action. Antoine, 130 So. 3d at 1208. The claims against the City, Regions Bank, and the Johnsons were disposed of before the action came to trial.
>
> "The 2009 action arose from a dispute over flooding on Antoine's lot and Antoine's claimed right to divert surface water and to cause ponding on neighboring subdivision lots

by increasing the elevation of the rear of her lot, which is adjacent to lots owned by Oxmoor. Id. The trial court entered a judgment in favor of Oxmoor, JRC, and HCI on all claims and, among other things, awarded Oxmoor $35,000 in damages and ordered the parties to binding arbitration to assist in determining a plan to construct a drain way to resolve the drainage problem created by Antoine. Id. at 1208-09. Oxmoor, HCI, and Antoine filed postjudgment motions, which were denied, and Antoine appealed the judgment to this court. Id. at 1209.

"While her appeal from the March 15, 2011, judgment was pending, Antoine sought, and was granted, leave to file a Rule 60(b), Ala. R. Civ. P. , motion with the trial court. Id. The Rule 60(b) motion asserted that the March 15, 2011, judgment was not final because it had failed to adjudicate her claims against JRC, an argument we rejected because the judgment stated that Antoine's claims were denied without limitation. Antoine also alleged that Oxmoor and HCI had committed intrinsic and extrinsic fraud when they claimed that a natural drain way existed through Lot 35 when the certified subdivision plat (which she now refers to as the allegedly fraudulent survey) did not denote a drainage easement or natural drain way. She further challenged the topographic maps admitted into evidence by Oxmoor and HCI because, she alleged, they were either not properly certified or had failed to contain allegedly required information. The trial court denied the Rule 60(b) motion, Antoine appealed, and

> this court consolidated the two appeals. Id. at 1210.
>
> "On July 20, 2012, this court issued a decision affirming all aspects of the March 15, 2011, judgment in favor of the defendants other than the provision referring the parties to binding arbitration; we reversed that portion of the judgment and instructed the trial court to instead refer the parties to a special master. Id. at 1219. We also affirmed the denial of the Rule 60(b) motion. Id. Antoine sought rehearing of this court's decision, which this court overruled, and she sought certiorari review, which was denied in May 2013. Further proceedings were had in the trial court, and Antoine has continued to resist efforts to correct the drainage problems caused by her actions...."
>
> (Footnote omitted.)

In its order dismissing Antoine's 2022 claims, the trial court set out the elements of res judicata, which are: "(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions." Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998). On appeal, Antoine attacks only one of the elements of res judicata. Specifically, she contends that the March 2011 judgment addressing her claims against Oxmoor and the other defendants was a void judgment and therefore cannot be used as a basis for concluding that the doctrine of res judicata applies to bar the 2022 claims. We disagree.

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First, Antoine appears to contend that this court's order in Antoine V, which dismissed her appeal from the denial of her third Rule 60(b) motion, declared that the March 2011 judgment was void. Although the dismissal order in Antoine V indicated that the appeal was being dismissed because it had been taken from a void judgment, the judgment to which the order referred was not the March 2011 judgment, which had been affirmed in 2012, but the January 2021 order denying Antoine's third Rule 60(b) motion. Thus, Antoine's contention that the March 2011 judgment was determined to be void by this court is incorrect.

Antoine next contends that the March 2011 judgment is void because, she says, the trial court deprived her of due process by applying the incorrect law regarding surface water to arrive at its March 2011 judgment. A trial court's error in the application of law to the claims and issues presented at trial is not a denial of due process. Neal v. Neal, 856 So. 2d 766, 781 (Ala. 2002) (quoting Halstead v. Halstead 53 Ala. App. 255, 256, 299 So. 2d 300, 301 (1974)) (" 'It is claimed that the judgment is void because it does not comply with the law of the State of Alabama. The simple fact that a court has erroneously applied the law does not render its judgment void.'" see also S.C.H. v. L.A. 334 So. 3d 500, 503 (Ala. Civ. App. 2020) (quoting Bowen v. Bowen, 28 So. 3d 9, 15 (Ala. Civ. App. 2009) ('[E]rrors in the application of the law by the trial court do not render a judgment void.' In rejecting a similar argument to the one being made by Antoine, our supreme court explained:

CL-2024-0453

> "Petitioner, in argument, seems to contend that, when there is no evidence to support a verdict, it is the duty of appellate courts to so declare, and that a failure to reverse or vacate such a judgment is a denial of due process of law under the Fourteenth Amendment of the Federal Constitution. Such position is untenable. It would strike down the entire system of appellate courts, a part of our constitutional system of government. Due process of law is provided when the party is given full opportunity to present the questions of law and fact in the trial court, with the right to reserve questions for review, and have them reviewed by the appellate courts. All this is provided for by law in an orderly administration of justice."

Life & Cas. Ins. Co. of Tennessee v. Womack, 228 Ala. 70, 151 So. 880, 880-81 (1933). Simply put, "even an erroneous application of law does not render a judgment void for purposes of res judicata." Crooked Creek Props., Inc. v. Ensley, 380 Fed. Appx. 914, 917 (11th Cir. 2010) (citing Neal, 856 So. 2d at 781).

Moreover, in our resolution of Antione's first appeal in Antoine I, we addressed Antoine's challenge to the trial court's use of the "civil law rule" as opposed to the "common law rule" relating to surface water. We rejected Antoine's argument because she had never argued to the trial court that the "common law rule" existed, much less applied to the issues before the trial court. See Antoine I, 130 So. 3d at 1213. Thus, our resolution of that issue became law of the case. "Under the doctrine of the 'law of the case', whatever is once established between the same

parties in the same case continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case." Southern United Fire Ins. Co. v. Purma, 792 So. 2d 1092, 1094 (Ala. 2001) (quoting Blumberg v. Touche Ross & Co., 514 So. 2d 922, 924 (Ala. 1987)). Antoine cannot now argue that the March 2011 judgment was void based on a legal argument that has been rejected by this court.

Having rejected Antoine's legal arguments for the reversal of the trial court's order dismissing the 2022 claims, we affirm that order.

AFFIRMED BY UNPUBLISHED MEMORANDUM.

Moore, P.J., and Hanson, Fridy, and Lewis, JJ. concur.

Appendix B

IN THE SUPREME COURT OF ALABAMA

November 8, 2024

SC-2024-0680

Ex parte Lisa Antoine PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Lisa Antoine v. Oxmoor Preservation/One, LLC) (Jefferson Circuit Court, Bessemer Division: CV22-900157; Civil Appeals: CL-2024-0453).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on November 8, 2024:

Writ Denied. No Opinion. Wise, J. Parker, C.J., and Sellers, Stewart, and Cook, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

Megan B. Rhodebeck

Clerk, Supreme Court of Alabama

Appendix C

The Alabama Court of Civil Appeals

NATHAN P. WILSON
CLERK

LYNN DEVAUGN
ASSISTANT CLERK

300 DEXTER AVENUE
MONTGOMERY, ALABAMA 36104-3741
TELEPHONE 334-229-0733

November 8, 2024

CL-2024-0453

Lisa Antoine v. Oxmoor Preservation/One, LLC (Appeal from Jefferson Circuit Court, Bessemer Division: CV-22-900157).

CERTIFICATE OF JUDGMENT

The appeal(s) in the above cause(s) having been duly submitted, IT IS CONSIDERED, ORDERED, AND ADJUDGED that the judgment of the court below was affirmed on August 23, 2024, and that the application for rehearing filed on September 6, 2024, was overruled on September 27, 2024.

The petition for a writ of certiorari filed by the appellant(s) in the Supreme Court of Alabama on October 7, 2024, was denied on November 8, 2024. The certificate of judgment is being issued on this day.

IT IS FURTHER ORDERED that the costs of the appeal(s) are taxed against the appellant(s) and sureties as provided by Rule 35, Ala. R. App. P.

Nathan P. Wilson, Clerk

Appendix D

The Alabama Court of Civil Appeals

NATHAN P. WILSON
CLERK

LYNN DEVAUGN
ASSISTANT CLERK

300 DEXTER AVENUE
MONTGOMERY, ALABAMA 36104-3741
TELEPHONE 334-229-0733

September 27, 2024

CL-2024-0453

Lisa Antoine v. Oxmoor Preservation/One, LLC (Appeal from Jefferson Circuit Court, Bessemer Division: CV-22-900157).

ORDER

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Application for Rehearing Overruled. No opinion written on rehearing.

Moore, P.J., and Edwards, Hanson, Fridy, and Lewis, JJ., concur.

Nathan P. Wilson, Clerk

Appendix E

IN THE SUPREME COURT OF ALABAMA

June 13, 2024

SC-2024-0189

Lisa Antoine v. Oxmoor Preservation/One, LLC (Appeal from Jefferson Circuit Court: CV-22-900157).

ORDER

IT IS ORDERED that the above-styled cause is DEFLECTED to the Alabama Court of Civil Appeals pursuant to S 12-2-7 (6), Ala. Code 1975.

IT IS FURTHER ORDERED that further proceedings in this cause shall be filed with the Court of Civil Appeals pursuant to the rules of procedure applicable to that court.

Witness my hand and seal this 13th day of June, 2024.

Megan B. Rhodebeck

Clerk of Court,
Supreme Court of Alabama

FILED
June 13, 2024
Clerk of Court
Supreme Court of Alabama

Appendix F

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

ANTOINE LISA HOPE, Plaintiff,	)	
	)	Case No.:
	)	CV-2022-900157.00
OXMOOR PRESERVATION /ONE, LLC, Defendant.	)	

ORDER

Case came before the Court on February 4, 2024 along with CV-2009-001259. Plaintiff appeared pro se. Defendant appeared via attorney of record. Based upon the arguments presented the Court finds that (1) there is a prior decision rendered by a court of competent jurisdiction in case CV-2009-001259; (2) there was a final judgment on the merits; (3) that the parties were identical in both suits; and (4) the prior and present cause of actions are the same.

Case is hereby dismissed as res judicata.

Cost taxed as paid.

DONE this 14th day of February, 2024

/s/ DAVID J HOBDY
CIRCUIT JUDGE

Appendix G

130 So.3d 1204 (2012)

Lisa ANTOINE

v.

OXMOOR PRESERVATION/ONE, LLC; Johnson Realty Company, Inc.; and Hager Company, Inc.

2100839 and 2110139.

Court of Civil Appeals of Alabama.

July 20, 2012.

Rehearing Applications Denied September 14, 2012.

Certiorari Denied May 10, 2013 Alabama Supreme Court 1120015.

1208 *1208 Kenneth J. Lay of Wooten Hood & Lay, LLC, Birmingham, for appellant.

Guy V. Martin, Jr., of Martin, Rawson & Woosley, P.C., Birmingham, for appellees Oxmoor Preservation/One, LLC, and Hager Company, Inc.

THOMAS, Judge.

Lisa Antoine and her husband, Ronald Glenn, purchased Lot 35 in the Highland Manor at Oxmoor Landing subdivision ("the subdivision") in November 2007. Antoine and Glenn built a house on Lot 35. After they built the house, Antoine and Glenn began experiencing problems with flooding in their yard caused by the overflow of water from neighboring lots and with an influx of mud and sediment that overflowed from neighboring Lot 40. Oxmoor Preservation/One, LLC ("Oxmoor"), is the owner of Lots 36, 37, 38, and 39 ("the Oxmoor lots") in Oxmoor Landing. Johnson Realty Company, Inc. ("Johnson"), was the developer of the subdivision

and, at one time, owned Lot 40. Hager Company, Inc. ("HCI"), was the engineering company used by Johnson in designing the subdivision.

Antoine and Glenn sued Oxmoor, Johnson, and HCI, among other defendants who were later dismissed from the action, alleging trespass to property, injury to real property, and nuisance. Oxmoor counterclaimed, asserting a trespass and a negligence claim against Antoine and Glenn, based upon its allegation that Antoine and Glenn had elevated the rear portion of their lot when they built her house, which had resulted in an obstruction of the natural flow of surface waters from the Oxmoor lots. After a trial in December 2010, the trial court entered a detailed judgment in March 2011, finding against Antoine and Glenn on their claims for relief and in favor of Oxmoor on its counterclaims. The March 2011 judgment reads, in part:

"1. [Antoine and Glenn's] claims for relief are denied as the Court finds that they have failed to meet their burden to reasonably satisfy the Court of the truthfulness of their claims.

"2. Judgment is entered in favor of ... Oxmoor ... and HCI ... on their Counterclaims and against [Antoine and Glenn] in the amount of $35,000.00 compensatory damages.[1]

"3. [Antoine and Glenn] are permanently enjoined from obstructing the free flow of surface waters draining from Oxmoor's upper land, being Lots 36, 37, 38 and 39, over [their] land, being Lot 35, to Oxmoor's lower land, being Lot 34, all such lots being part of Highland Manor at Oxmoor Landing Phase One, Sector One, Map Book 216, Page 13, in the Probate Court of Jefferson County, Alabama, Bessemer Division.

"4. [Antoine and Glenn] are ordered to abate the obstruction from such drain way by constructing and permanently maintaining a drain way (whether ditch or other facility) on Lot 35 along an appropriate course, and of a sufficient size and structure, to drain all surface waters that may reasonably be expected to drain from Oxmoor's upper land, and to conduct them through Lot 35 to Lot 34. Such work shall be performed according to sound engineer[ing] principles and at [Antoine and Glenn's] expense.

"5. [Antoine and Glenn] and [Oxmoor and HCI] are to, within thirty days after this Order is non-
1209 appealable to a high *1209 Court, meet together and [Antoine and Glenn] [are] to share their plans on how to effectuate the mandates of Paragraph 4 above regarding the construction of the drain way. Should [Oxmoor and HCI] have objection regarding the same, the issue of how the drain way is to be constructed shall be submitted to binding arbitration by a neutral to be mutually agreed upon by the parties, and if there be no agreement, selection of the arbitrator by the Court. The costs of such arbitration shall be borne by [Antoine and Glenn]. [Oxmoor and HCI] shall inform [Antoine and Glenn] in writing the date that they consider this Order to be non-appealable which is generally, but not always, the 43rd day after the date this Order is entered if there are no post trial motions filed; or the 43rd day after the date any post-trial motions are denied.

"6. The construction of the drain way shall be completed within four months after the day the parties meet and agree on [Antoine and Glenn's] plan of action in accord with paragraph 5 above or within four months after the arbitrator issues

his decision regarding how the drain way is to be constructed.

"7. Should [Antoine and Glenn] fail to construct the drain way pursuant this order within the above stated parameters and time frame, [Oxmoor and HCI] shall be authorized to enter upon [Antoine and Glenn's] property and construct the drain way in such a way as they deem to be in accordance with sound engineering principles.

"8. Should [Oxmoor and HCI] be required to build the drain way they shall be entitled to reimbursement from [Antoine and Glenn] for all costs related to the same. Should [Antoine and Glenn] fail to timely reimburse [Oxmoor and HCI] for such expenses, [Oxmoor and HCI] shall have access to all legal means available to a judgment creditor including but not limited to the entry of a monetary judgment against [Antoine and Glenn]; garnishment and contempt proceedings; and the filing of any appropriate lien.

"9. Costs of this action are taxed against [Antoine and Glenn].

"10. Any requested relief not granted herein shall be deemed denied."

Both Antoine and Oxmoor and HCI filed postjudgment motions directed to the March 2011 judgment.[2] Antoine attached several documents that had not been introduced as evidence at trial to her postjudgment motion; Oxmoor and HCI successfully moved the trial court to strike those documents. After both postjudgment motions were denied, Antoine and Glenn appealed to this court.[3] The appeal was assigned case number 2100839 ("the nuisance appeal").

The trial court determined that Oxmoor and HCI were not responsible for causing water to trespass onto Lot 35. The trial court also determined that Antoine and Glenn had created a nuisance by obstructing the flow of surface water across Lot 35, that Oxmoor was due damages for the nuisance, and that Antoine and Glenn should be responsible for building a drain way to drain the surface waters across Lot 35. Under the March 2011 judgment, the only issue left for further determination is the exact plan for the drain way to abate the nuisance, a matter the trial court desired the parties to determine or, if agreement was not possible, an arbitrator to decide. Thus, we conclude that the March 2011 judgment is a final judgment capable of supporting an appeal.

We turn now to Antoine's arguments regarding the merits of the trial court's March 2011 judgment. She argues that the trial court used an incorrect legal standard to evaluate surface-water rights, that it erred when it failed to award her damages for nuisance, that it erred when it failed to award her damages for continuing trespass, and that the trial court erred when it ordered her to "make corrections" to her property and to allow water to flow over her property. She further complains that the trial court erred by ordering the parties to attend binding arbitration to determine the proper manner in which to build the drain way. Finally, she argues that the trial court erred in failing to hold a hearing on her postjudgment motion.

Because it is the easiest of her arguments with which to dispense, we first address Antoine's argument that the trial court erred by failing to hold a hearing on her postjudgment motion.

Antoine did not request a hearing in her postjudgment motion. Our appellate courts have consistently held that the failure to request a hearing in a postjudgment motion waives the right to such a hearing under Rule 59(g), Ala. R. Civ. P. *Greene v. Thompson*, 554 So.2d 376, 381 (Ala.1989); *Frederick v. Strickland*, 386 So.2d 1150, 1152 (Ala.Civ. App.1980). Thus, the trial court committed no error in failing to hold a hearing on Antoine's postjudgment motion.

We now turn to Antoine's substantive argument concerning the law applicable to surface-water rights.

1213 Antoine *1213 argues that the trial court improperly applied the "civil law rule" to determine that Antoine had obstructed the flow of surface water and to thus conclude that she owed damages to Oxmoor and that she should be required to construct a drain way to drain the surface water. Under the "civil law rule," which governs surface waters on property in rural areas, "land is legally subservient to the natural flowage of surface water and the lower landowner may not disrupt the flow of [surface] water to the upper owner's detriment." *City of Mountain Brook v. Beatty*, 292 Ala. 398, 404, 295 So.2d 388, 392 (1974). However, in urban or developed areas, the "common law rule," also known as the "common enemy rule," governs the treatment of surface water by property owners. *Beatty*, 292 Ala. at 404, 295 So.2d at 392. Under the "common law rule," "surface water is regarded as a common enemy, and every landowner has the right, as a general rule, to take any measures necessary for the protection of his own property." *Id.*

Oxmoor and HCI argue that Antoine has presented the legal argument that the trial court applied the incorrect rule regarding surface water too late because she did not raise it until she filed her Rule 60(b) motion. Oxmoor and HCI rely on the principle of law permitting, but not requiring, a trial court to consider a legal argument raised for the first time in a postjudgment or Rule 60(b) motion. *See Diamond v. Aronov*, 621 So.2d 263, 267 (Ala. 1993); *Green Tree Acceptance, Inc. v. Blalock*, 525 So.2d 1366, 1369 (Ala.1988). Thus, they argue, the trial court did not abuse its discretion in failing to entertain Antoine's new legal argument.

In fact, however, based on our review of the records in the both actions, Antoine never once made the argument to the trial court that the "common law rule" as opposed to the "civil law rule" regarding surface water should have been applied to this case.[7] Instead, Antoine argued in her Rule 60(b) motion that, because her property lies in a subdivision, the dispute regarding the surface water should have been governed by subdivision regulations. An appellate court cannot consider an argument asserted for the first time on appeal. *Shiver v. Butler Cnty. Bd. of Educ.*, 797 So.2d 1086, 1088 (Ala.Civ.App.2000) ("Even if a particular issue is raised at the trial level, an appellate court may review that issue only on the theory on which it was tried and on which the judgment was rendered."). Thus, we conclude that Antoine cannot now assert her legal argument that the trial court should have applied the "common law rule" regarding surface water to the dispute between her and Oxmoor and HCI.

Antoine next argues that the trial court erred in determining that she was not entitled to damages for the continuing trespass caused by the water from the ponding on the Oxmoor lots extending to the back of Lot 35. As Oxmoor and HCI point out, Antoine's argument fails because the trial court determined that her actions, and not the actions of Oxmoor and HCI, created the ponding on the Oxmoor lots and the back of Lot 35. "Trespass requires an intentional act by the defendant." *Russell Corp. v. Sullivan*, 790 So.2d 940, 945 (Ala.2001). That is, Antoine was required to prove that Oxmoor or HCI "intentionally cause[d] some 1214 `substance' or `thing' to enter" upon Lot 35. *Born v.* *1214 *Exxon Corp.*, 388 So.2d 933, 934 (Ala. 1980). Because the trial court determined that Antoine's actions had caused the ponding, it necessarily determined that neither Oxmoor nor HCI had intentionally caused the water to encroach on Lot 35. Accordingly, the trial court did not err by failing to award Antoine damages for trespass.[8]

Antoine further argues that the trial court erred by failing to award her damages for the nuisance caused by the ponding. Antoine's nuisance argument suffers the same fate as her trespass argument. Regarding nuisance actions, our supreme court has explained:

"Ala.Code 1975, § 6-5-120, has been liberally interpreted to effect its broadly stated purpose (providing a remedy for 'anything that works hurt, inconvenience or damage to another'). See *McCraney v. City of Leeds*, 239 Ala. 143, 194 So. 151 (1940); and *Baldwin v. McClendon*, 292 Ala. 43, 288 So.2d 761 (1974). We also agree that 'anything' (i.e., a nuisance, public or private) may

consist of conduct that is intentional, unintentional, or negligent. Indeed, it may even consist of activities that are conducted in an otherwise lawful and careful manner, as well as conduct that combines with the culpable act of another, so long as it works hurt, inconvenience, or damage to the complaining party. *Restatement (Second) of Torts* § 821B (1979). See, also, *Alabama Power Co. v. Stringfellow*, 228 Ala. 422, 153 So. 629 (1934).

"This does not mean, however, that the plaintiff is not required to prove against the defendant the elements of legal duty and causal relation between the conduct or activity complained of and the hurt, inconvenience, or damage sued for. That which works hurt to another, to satisfy the statutory definition of a nuisance, must comport with the classical tort concepts of duty and causation. See *Lauderdale County Board of Education v. Alexander*, 269 Ala. 79, 110 So.2d 911 (1959) (holding that the statutory definition of nuisance is declaratory of the common law and does not supersede the common law as to the other conditions and circumstances constituting a nuisance under the common law). *Thus, we must look to the particular facts of each case to determine whether the party charged with creating and maintaining a nuisance has engaged in a course of conduct, or has permitted to exist a set of circumstances, that, in its natural and foreseeable consequences, proximately caused the hurt, inconvenience, or damage complained about.*"

Tipler v. McKenzie Tank Lines, 547 So.2d 438, 440-41 (Ala.1989) (emphasis added). The trial court determined that Antoine's actions caused the ponding on the Oxmoor lots and, necessarily,

concluded that assuming that the surveying standards apply to the topographic maps entered into evidence and that those maps violate the surveying standards,[9] we are not convinced that the trial court abused its discretion in denying Antoine relief under Rule 60(b)(3). The trial court is given much discretion in determining whether a party has "engaged in fraud or other misconduct" such that relief under Rule 60(b)(3) is warranted. *Pacifico*, 562 So.2d at 179. The trial court must have concluded, and we cannot disagree, that Antoine did not clearly and convincingly prove that Oxmoor and HCI "engaged in fraud or other misconduct" by introducing the topographic maps into evidence. Thus, we cannot conclude that the trial court erred in denying Antoine's Rule 60(b)(3) motion insofar as it was based on this ground.

Conclusion

We have determined that the trial court erred in referring the parties to binding arbitration in the March 2011 judgment, and, therefore, that judgment is reversed and the cause is remanded with instructions that the trial court amend the March 2011 judgment to refer the parties to a special master under Rule 53. In all other respects, the March 2011 judgment is affirmed. The October 2011 judgment denying Antoine's Rule 60(b) motion is also affirmed.

2100839 — AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

2110139 — AFFIRMED.

THOMPSON, P.J., and PITTMAN and MOORE, JJ., concur.

BRYAN, J., concurs in the result, without writing.

[1] We note that HCI asserted no counterclaims against Antoine and Glenn. However, no party challenges this aspect of the trial court's judgment.

[2] Antoine purported to seek postjudgment review on Glenn's behalf, as well as on her own behalf; however, only Antoine signed the postjudgment motion. Because Antoine is not an attorney, she was not permitted to represent Glenn's interests in court or to file the postjudgment motion on his behalf. *Beasley v. Poole*, 63 So.3d 647, 649-50 (Ala.Civ. App.2010). Oxmoor and HCI moved to strike

Antoine's postjudgment motion insofar as Antoine purported to act on Glenn's behalf, and the trial court properly struck the motion insofar as it was filed on Glenn's behalf.

[3] Oxmoor and HCI filed a cross-appeal, which they have since withdrawn.

[4] Antoine later filed a suggestion of death in this court in the nuisance appeal. Based on statements made in the hearing on the Rule

60(b) motion, it appears that no estate was opened for Glenn. Because, according to the statements made at the Rule 60(b) hearing, Lot 35 was owned jointly with a right of survivorship, Antoine is now the sole owner of the property and thus is the only appellant in the nuisance appeal.

[5] Johnson failed to appear or participate at trial. It has also failed to file a brief with this court.

[6] At the conclusion of her argument that the trial court's failure to address the claims against

Johnson prevents the March 2011 judgment from being final, Antoine makes a one-paragraph argument that the trial court erred in not entering a judgment against Johnson for its failure to appear or defend at trial. Antoine cites no authority for this argument, and, therefore, we decline to address it. Rule 28, Ala. R.App. P.; *White Sands Group, L.L.C. v. PRS II, LLC*, 998 So.2d 1042, 1058 (Ala.2008) ("Rule 28(a)(10) requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position. If they do not, the arguments are waived.").

[7] Oxmoor and HCI, in their response to Antoine's Rule 60(b) motion, did discuss, in general terms, the "common law rule" and the "civil law rule" regarding surface water. The hearing on the Rule 60(b) motion contains no reference to the rules governing surface water.

[8] At the conclusion of her argument on her trespass claim, Antoine states that the trial court erred in not awarding her damages for injury to real property under Ala.Code 1975, § 6-5-210. Antoine makes no argument concerning the elements of a cause of action under § 6-5-210, and we therefore do not consider her "argument" further. Rule 28; *White Sands Group*, 998 So.2d at 1058.

Appendix H
SC-2024-0189

IN THE SUPREME COURT OF ALABAMA

Lisa Antoine,
Appellant,

v.

Oxmoor Preservation/One, LLC
Appellee.

ON APPEAL FROM
THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION
CV-22-900157

Brief of Appellant Lisa Antoine

ORAL ARGUMENT REQUESTED

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The Appeals Court concluded that the CV-2009 judgment was a void judgment based on the denial of Antoine's due process; whereby, the Circuit Court's ruling did not apply relevant facts and evidence (specifically Antoine's and Oxmoor's lots are in the city of Birmingham) presented in court to the correct, corresponding Alabama law and rules (specifically common law/common enemy rule).

By ruling in case CV-2009 that 1) Antoine is permanently enjoined from obstructing the free flow of surface waters draining from Oxmoor's upper land, which includes Lot 39, over Antoine's land, being Lot 35, to Oxmoor's lower land, 2) Antoine must abate the obstruction from such drain way by constructing and permanently maintaining a drain way on Lot 35 to drain all surface waters that may reasonably be expected to drain from Oxmoor's upper land and to conduct them through Lot 35, 3) Oxmoor is authorized to enter upon Antoine's property and construct the drain way, 4) Antoine is required to reimburse Oxmoor for all costs related to the drain way construction, and 5) Oxmoor is authorized, if Antoine does not reimburse Oxmoor, to use all legal means available to a judgment creditor including but not limited to the entry of a monetary judgment against Antoine; garnishment and contempt proceedings; and the filing of any appropriate lien, *Antoine v. Oxmoor Preservation/One, LLC*, 130 So. 3d 1204, 1208-1209 (Ala. Civ. App. 2012), the Circuit Court violated Alabama's common enemy rule for surface water rights in cities and thereby Antoine's due process guaranties in case CV-2009 under the Fourteenth Amendment of the United States Constitution.

Due process is a constitutional provision that prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property. Black's Law Dictionary 228 (3rd ed. 2006) Due process guarantees that legal matters be resolved according to federal and state rules and laws and that individuals be treated fairly. The Circuit Court in case CV-2009 did not resolve the legal matter according to Alabama laws for surface water rights in cities and in turn treated Antoine unfairly and violated Antoine's civil rights for Equal Protection Under the Law.

Because of the Circuit Court's violation of Antoine's surface water rights on her property in the city of Birmingham, the Circuit Court acted in a manner inconsistent with due process; thereby, rendering the judgment in case, CV-2009 a void judgment.

The Circuit Court in its judgment for case CV-2009 acted and ruled in a manner inconsistent with Antoine's due process. Due process requires that each individual is treated fairly according to state and federal laws and rules. The relevant evidence and facts in case CV-2009 showed that Antoine's and Oxmoor's properties were located in the city of Birmingham, Alabama (an incorporated area). Yet, the Circuit Court violated Antoine's due process by ruling as if Antoine's and Oxmoor's properties were in a rural area (an unincorporated area).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of May, 2024, I served the foregoing brief on counsel of record for Appellee as listed below by U. S. mail postage prepaid.

William Kent Upshaw
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Lisa Antoine

Appellant

Appendix I
CL-2024-0453

IN THE ALABAMA COURT OF CIVIL APPEALS

Lisa Antoine,
Appellant,

v.

Oxmoor Preservation/One, LLC,
Appellee.

ON APPEAL FROM
THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION
CV-22-900157

Application for Rehearing and Brief in Support of Application for Rehearing

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Antoine further stated that the mandate of the trial court was unjust because it violates Alabama law for surface water rights and in turn Antoine's civil rights for Equal Protection Under the Law (U.S. Constitution, Amendment 14)

It is clear that the March 2011 judgment violates Antoine's Equal Protection Rights Under the Law. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution mandates that "no state shall deny to any person within its jurisdiction the equal protection of the laws". This means that individuals in similar situations should be treated equally and not subjected to unfair discrimination. The March 2011 judgment clearly denies Antoine equal protection of the law (Alabama common law for surface water rights in cities)

The law of the case doctrine never ever applies when the judgment is a clear error of law and egregiously violates a parties Equal Rights Under the Law protection.

Allowing the March 2011 judgment to stand after 13 years violates Antoine's Equal Protection Under the Law constitutional right and is a disgrace.

Certificate of Service

I certify that on the 3rd day of September, 2024, I served the foregoing brief on counsel of record for the Appellees by electronic mail.

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Lisa Antoine
Appellant

Appendix J

Notice: This petition should be made available to the public.

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT NO.

Lisa Antoine,
Petitioner
(In re: Lisa Antoine v. Oxmoor Preservation/One, LLC)

Appeal from the
Circuit Court of Jefferson County,
Alabama Bessemer Division
(CV-22-900157)

Petition for Writ of Certiorari
to the Alabama Court of Civil Appeals
(CL-2024-0453)

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The law of the case doctrine never applies when the judgment is a clear error of law and violates a parties Equal Rights Under the Law protection.

Certificate of Service

I certify that on the 3rd day of October, 2024, I served the foregoing petition on counsel of record for the Appellees by electronic mail.

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Lisa Antoine

Petitioner
Lisa Antoine, PhD

Appendix K

IN THE ALABAMA COURT OF CIVIL APPEALS

LISA ANTOINE, RONALD GLENN, APPELLANTS,	)	CIVIL APPEALS NO.:
	)	2100839
	)	2110139
V.	)	
	)	CIRCUIT COURT NO.:
OXMOOR PRESERVATION/ ONE, THE JOHNSON REALTY CO. INC., HAGER COMPANY,) INC., APPELLEES.	)	CV-2009-1259

ON APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA BESSEMER DIVISION

BRIEF FOR APPELLANTS

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STATEMENT OF ISSUES

I. WHETHER THE TRIAL COURT ERRED WHEN IT APPLIED AN INCORRECT LEGAL STANDARD IN THIS CASE WHEN IT USED THE CIVIL RULE INSTEAD OF THE COMMON LAW RULE REGARDING SURFACE WATER RIGHTS?

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing brief on counsel of Record for Appellee as listed below by U.S. Mail postage prepaid, this 28th day of February, 2012.

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/s/ Kenneth J. Lay

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