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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACQUELINE ANDERSON SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

DAVID ROBERSON,	)	
	)	
Plaintiff,	)	**CIVIL ACTION NO. 01-CV-2019-901210**
	)	
vs.	)	
	)	
DRUMMOND COMPANY, INC. and BALCH & BINGHAM, LLP,	)	**ORAL ARGUMENT REQUESTED**
	)	
	)	
Defendants.	)	
	)	

DRUMMOND COMPANY, INC.'S MOTION TO DISMISS

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COMES NOW Drummond Company, Inc. ("Drummond") and, pursuant to Rule 12(b) of the Alabama Rules of Civil Procedure, requests that Plaintiff's Complaint be dismissed in its entirety.

SUMMARY OF THE ARGUMENT

Plaintiff David Roberson ("Plaintiff"), a former Drummond Company, Inc. ("Drummond") employee, alleges that Balch & Bingham, LLP ("Balch") misrepresented the legality of paying the Oliver Robinson Foundation, thereby resulting in Plaintiff's criminal conviction and the termination of his employment. The Complaint does not allege any wrongdoing on the part of Drummond. Rather, Plaintiff alleges that Drummond is vicariously liable for Balch's misrepresentation, which Balch made during the course of its legal representation of Drummond related to an EPA matter in North Birmingham. Accordingly, and a threshold matter, if the claims against Balch are due to be dismissed for any reason, they are also due to be dismissed against Drummond as a matter of law. *Alfa Life Ins. Corp. v. Jackson*, 906 So. 2d 143, 155 (Ala. 2005). Regardless, Plaintiff's novel theory of liability fails to state a claim against Drummond for the following reasons.

First, Plaintiff's claims are barred by the *Hinkle* Rule, which provides that "[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or part on an illegal or immoral act or transaction to which he is a party." *Hinkle v. Railway Express Agency*, 6 So. 2d 417, 421 (1942). The Complaint alleges that the payments to the Oliver Robinson Foundation were "bribery," and it also alleges that Plaintiff "approv[ed] Drummond's payment of Balch invoices seeking reimbursement for what turned out to be bribes to the aforementioned state legislator." Doc. 2 (Compl.) at ¶¶ 3 & 5. The Complaint further alleges that Plaintiff was convicted of conspiracy, bribery, wire fraud, and money laundering arising out of his involvement in those

payments. *Id.* at ¶ 7. Bribery and fraud are crimes of moral turpitude under Alabama law, and Plaintiff's claims in this lawsuit all indisputably arise directly out of his conviction for these crimes. All of his claims are therefore barred as a matter of law.

Second, Plaintiff is collaterally estopped from claiming either that he reasonably relied on Balch's misrepresentation or that Balch's legal advice caused his damages, which are indispensable elements of his fraud and negligence claims. In his federal criminal trial, Plaintiff argued that he relied on Balch's representation that paying the Oliver Robinson Foundation was legal and ethical. The federal jury nevertheless convicted Plaintiff, and in doing so necessarily rejected his "advice of counsel" defense and its underlying premise—that he relied on Balch's legal advice and that he approved the payments to the Oliver Robinson Foundation because of this advice. To succeed on any of his claims in this lawsuit, Plaintiff must now re-litigate that identical issue and obtain the exact opposite result. The doctrine of collateral estoppel bars him from doing so.

Third, the Complaint should be dismissed because it is an impermissible collateral attack on a judgment rendered by the United States District Court for the Northern District of Alabama. Plaintiff's established remedy—which he is currently pursuing—is a direct appeal of his conviction in the Eleventh Circuit Court of Appeals, not a civil lawsuit for monetary damages in Jefferson County Circuit Court. Alabama law, as well as the principles of federalism and comity, preclude such a collateral attack and compel the dismissal of this lawsuit.

Fourth, and as is explained in Balch's motion to dismiss, Plaintiff's claims are time-barred.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Plaintiff is a former Drummond employee. Doc. 2 (Compl.) at ¶ 4. While Plaintiff was still a Drummond employee, Drummond hired Balch to represent Drummond in relation to an EPA investigation of a site located in Jefferson County, Alabama. *Id.* at ¶¶ 2 & 3. During the course of its legal representation of Drummond, "Balch, as Drummond's agent, engaged a seemingly legitimate local foundation the Oliver Robinson Foundation, which was controlled by a respected Alabama state legislator, to conduct an ostensibly innocent campaign directed toward the community, the State of Alabama, and the EPA." *Id.* at ¶ 3.

"In November 2014," Balch "assured Plaintiff Roberson, who as an employee of Drummond's, that there was no legal problem with these efforts; that they were legal and ethical." *Id.* at ¶ 4. Plaintiff alleges that he "reasonably relied upon Balch's representation to his detriment by refraining from objecting to the campaign and approving Drummond's payment of Balch invoices seeking reimbursement for what turned out to be bribes to the aforementioned state legislator." *Id.* at ¶ 5. *See also id.* at ¶ 6.

[1] Because this is a motion to dismiss, Drummond's arguments are premised on the assumption that the allegations of the Complaint are true. *Ex parte Walker*, 97 So. 3d 747, 749 (Ala. 2012). The statements of fact in this section of Drummond's motion are drawn from the Complaint, Doc. 2, or from sources that are subject to judicial notice, or from material referenced in the Complaint. *See J.J. v. J.B.*, 30 So. 3d 453, 457 n.2 (Ala. Civ. App. 2009) (trial court properly took notice of related proceedings); *Garrett v. Gilley*, 488 So. 2d 1360, 1362 (Ala. 1986) (quoting *Butler v. Olshan*, 191 So. 2d 7, 13 (Ala. 1966)) ("With respect to judicial notice by a court of its own records, the rule in Alabama is not that in all cases the court may notice the record of other proceedings therein, even between the same parties and involving the same subject matter; *but, where a party refers to such other proceeding or judgment in his pleading for any purpose, the court, on demurrer by the other party, may and should take judicial notice of the entire proceeding insofar as it is relevant to the question of law presented.*'") (emphasis supplied by *Garrett*); *Snider v. Morgan*, 113 So. 3d 643, 648 (Ala. 2012) ("[T]he motions to dismiss were not converted to motions for a summary judgment, because the exhibits set out above were specifically referenced in Jeff's complaint and, thus, were not matters outside the pleading); *Lewis v. First Tuskegee Bank*, 964 So. 2d 36, 39 n.1 (Ala. Civ. App. 2007) (quoting *Banks, Finley, White & Co. v. Wright*, 864 So. 2d 324, 327 (Ala. Civ. App. 2001)) ("'[D]ocuments attached to a motion to dismiss are considered a part of the pleadings if those documents were specifically referred to in the plaintiff's complaint and are central to the claim being brought.'").

On September 27, 2017, Plaintiff and Joel Gilbert—the Balch attorney who allegedly made the representation—were both indicted on federal criminal charges under 18 U.S.C. §§ 371, 666(a), 1343, 1346 and 1956(h) relating to the payments made to the Oliver Robinson Foundation. *Id.* at ¶ 7. On July 20, 2018, "[a] jury returned a verdict finding both the Balch attorney and the Plaintiff guilty on all counts." *Id.* Both the Balch attorney and Plaintiff appealed their convictions to the Eleventh Circuit, and those appeals are pending.

On March 15, 2019, Plaintiff filed this civil lawsuit against Drummond and Balch. The lawsuit alleges that Balch was Drummond's agent and that Drummond is liable "under respondeat superior" for Balch's acts or omissions. *Id.* at ¶ 1. Drummond is not alleged to have made any misrepresentations or otherwise committed any wrongful act or omission. Rather, Drummond's alleged liability depends entirely on the acts or omissions of Balch, its purported agent. The Complaint does not contain any specific counts, but instead "demands judgment against the Defendants for $50,000,000 for negligence, fraud and suppression, as well as for implied indemnity." *Id.* at 3.

LEGAL ARGUMENT

I. PLAINTIFF'S CLAIMS ARE BARRED BY THE *HINKLE* RULE.

> The *Hinkle* rule, which originates from the Alabama Supreme Court case *Hinkle v. Ry. Express Agency*, stands for the proposition that "[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or in part on an illegal or immoral act or transaction to which he is a party." 6 So. 2d 417, 421 (Ala. 1942). The *Hinkle* rule "derives principally not from consideration for the defendant, but from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government." *Oden v. Pepsi Cola Bottling Co.*, 621 So. 2d 953, 955 (Ala. 1993) (citations omitted).

Colonial BancGroup Inc. v. PricewaterhouseCoopers LLP, No. 2:11-CV-746-BJR, 2017 WL 8890271, at *30 (M.D. Ala. Dec. 28, 2017).

Alabama courts consistently apply the *Hinkle* Rule to preclude tort plaintiffs from recovering civil damages where their claims are based, in whole or in part, on their participation in crimes of moral turpitude.[2] For example, in *Oden v. Pepsi Cola Bottling Co. of Decatur, Inc.*, the plaintiff's decedent was killed when a vending machine tipped over and crushed him while he was attempting to steal drinks from the machine. 621 So. 2d 953 (Ala. 1993). The decedent's father sued both the bottling company and the vending machine manufacturer alleging negligent, wanton and defective design, labeling and installation of the vending machine. *Id.* at 954. Relying on *Hinkle*, the trial court granted summary judgment in the defendants' favor, and the plaintiff appealed. The Alabama Supreme Court affirmed, holding as follows:

> Because the parties do not dispute the fact that Mark was stealing drinks from the vending machine when it fell on him, we conclude that the judgment in favor of Vendo and Pepsi was proper. In *Hinkle v. Railway Express Agency,* 242 Ala. 374, 6 So. 2d 417 (1942), this Court stated: "A person cannot maintain a cause of action if, in order to establish it, he must rely in whole or part on an illegal or immoral act or transaction to which he is a party." 242 Ala. at 379, 6 So. 2d at 421. We interpret the rule in *Hinkle* to bar any action seeking damages based on injuries that were a direct result of the injured party's knowing and intentional participation in a crime involving moral turpitude.
>
> [. . .]
>
> This rule promotes the desirable public policy objective of preventing those who knowingly and intentionally engage in an illegal or immoral act involving moral turpitude from imposing liability on others for the consequences of their own behavior. Even so, such a rule derives principally not from consideration for the defendant, "but from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government." *Bonnier v. Chicago, B. & Q. R.R.,* 351 Ill.App. 34, 51, 113 N.E.2d 615, 622 (1953), *rev'd on other grounds,* 2 Ill.2d 606, 119 N.E.2d 254, *cert. denied,* 348 U.S. 830, 75 S.Ct. 53, 99 L.Ed. 655 (1954) (citations omitted).

[2] The *Hinkle* Rule is also routinely applied to bar recovery on claims arising out of illegal contracts. *E.g., White-Spunner Constr., Inc. v. Construction Completion Co., LLC*, 103 So. 3d 781 (Ala. 2012).

Id. at 954–55.[3]

Similarly, in *Ex parte W.D.J.*, the Alabama Supreme Court relied on *Hinkle* to reverse and remand the trial court's award of restitution to the plaintiff. 785 So. 2d 390 (Ala. 2000). In that case, the plaintiff—who was 21 years old—was a passenger in a car driven by the 16 year old defendant. *Id.* at 391. Both the 16 year old defendant driver and the plaintiff were "drinking beer out of the same bag" at the time of the accident. *Id.* The trial court awarded the passenger plaintiff restitution, the Alabama Court of Criminal Appeals affirmed, and the 16 year old defendant driver petitioned the Alabama Supreme Court for certiorari. The Alabama Supreme Court reversed, citing *Oden* and *Hinkle*, and held that the plaintiff was barred from recovering:

> [T]his Court has held that "[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or in part on an illegal or immoral act or transaction to which he is a party." *Hinkle v. Railway Express Agency,* 242 Ala. 374, 378, 6 So. 2d 417, 421 (1942). In *Oden v. Pepsi Cola Bottling Co.,* 621 So. 2d 953 (Ala. 1993), this Court stated that the purpose of the *Hinkle* rule is to ensure that "'*those who transgress the moral or criminal code shall not receive aid from the judicial branch of government.*'" 621 So. 2d at 955 (citations omitted) (emphasis added). Because McKinley knowingly and intentionally participated in W.D.J.'s crime of drinking and driving, Alabama law prohibits McKinley from recovering any damages "for the consequences of [his] own behavior." Thus, the trial court's award of restitution to McKinley violates the restriction of restitution to damages that he could "recover against the defendant in a civil action arising out of" W.D.J.'s criminal behavior.

Id. at 393.

More recently, in *Rape v. Poarch Band of Creek Indians*, the Alabama Supreme Court held that a *Hinkle* Rule "defect is so fundamental that we may raise the issue ex mero motu." 250 So. 3d 547, 563 (Ala. 2017). The court affirmed the Montgomery County Circuit Court's dismissal

[3] *Oden* emphasized that "[m]any other jurisdictions apply a similar rule" and cited to half a dozen cases from other jurisdictions that barred plaintiffs from asserting claims which relied, in whole or in part, on those plaintiffs' participation in criminal activity. *Id.* Those cases make clear that this widely accepted rule "is grounded in public policy and holds that a claimant whose injuries are the direct result of his commission of what is judged to be a serious crime or illegal conduct is not entitled to recover. It involves preclusion of recovery at the very threshold of plaintiff's application for judicial relief." *Barker v. Kallash*, 63 N.Y.2d 19, 26, 468 N.E.2d 39, 42 (1984).

of the plaintiff's complaint and observed that his claims—to the extent they arose out of his participation in illegal gambling operations not located on Indian land—failed as a matter of law under the *Hinkle* Rule:

> "A person cannot maintain a cause of action if, in order to establish it, he must rely in whole or in part on an illegal or immoral act or transaction to which he is a party. 1 Corpus Juris Secundum, Actions, page 996, § 13; 1 Corpus Juris page 957, § 52. An analogy is presented with respect to an illegal contract, where the plaintiff fails if, in order to prove his case, he must resort to such contract. 13 Corpus Juris, page 503, section 445, 17 C.J.S., Contracts, § 276. These principles apply whether the cause of action is in contract or in tort. 1 Corpus Juris Secundum, Actions, page 999, § 13."

Hinkle v. Railway Express Agency, 242 Ala. 374, 378, 6 So. 2d 417, 421 (1942). "'Moreover, this Court has held that "[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or in part on an illegal or immoral act or transaction to which he is a party." *Limestone Creek Developers, LLC v. Trapp*, 107 So. 3d 189, 193 (Ala. 2012) (quoting *Ex parte W.D.J.*, 785 So. 2d 390, 393 (Ala. 2000), quoting in turn *Hinkle*, 242 Ala. at 378, 6 So. 2d at 421). "[S]uch a rule derives principally ... [']from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government.'" *Oden v. Pepsi Cola Bottling Co. of Decatur*, 621 So. 2d 953, 955 (Ala. 1993) (quoting *Bonnier v. Chicago, B. & Q. R.R.*, 351 Ill.App. 34, 51, 113 N.E.2d 615, 622 (1953)).

[. . .]

> Thus, similar to the plaintiff in *Bay Mills*, Rape ultimately could receive no relief based on the fact that his claims arose on land not properly considered Indian country, because that very fact would create its own bar to relief from this Court.

Id. at 563–64.

Alabama federal courts have also consistently found state law claims to be barred by the *Hinkle* Rule where those claims were based, in whole or in part, on a plaintiff's participation in fraudulent or criminal conduct. *Dapremont v. Overcash, Walker & Co., P.C.*, No. Civ.A. 99-0353-BH-M, 2000 WL 1566532, at *3, 7 (S.D. Ala. Oct. 4, 2000) (plaintiff, who was "indicted, tried and convicted on four counts of tax evasion," was barred by the *Hinkle* Rule from asserting claims for negligence, fraudulent suppression and accounting malpractice against the accounting firm and

CPA that prepared his company's tax returns); *Colonial BancGroup Inc.*, 2017 WL 8890271, at *30-38 (plaintiff's claims for professional negligence against defendant accounting firm were barred by the *Hinkle* Rule because the plaintiff participated in the fraud).

As the above authority uniformly provides, "'[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or part on an illegal or immoral act or transaction to which he is a party.'" 1 Ala. Pers. Inj. & Torts § 3:19 (2018 ed.) (quoting *Oden*, 621 So. 2d at 944). The Complaint alleges that the payments to the Oliver Robinson Foundation were "bribery," and further alleges that Plaintiff "approv[ed] Drummond's payment of Balch invoices seeking reimbursement for what turned out to be bribes to the aforementioned state legislator." Doc. 2 (Compl.) at ¶¶ 3 & 5. The Complaint also alleges that Plaintiff was convicted of violating 18 U.S.C. §§ 371 (conspiracy), 666(a) (bribery), 1343 (wire fraud), and 1956(h) (money laundering) due to his involvement in those payments. *Id.* at ¶ 7.[4] Bribery and fraud are crimes of moral turpitude under Alabama law. *Ex parte James*, 713 So. 2d 869, 909 (Ala. 1997) (bribery); *State ex rel. Garrett v. McPeters*, 56 So. 2d 102, 103-04 (Ala. 1951) (same); *Irvin v. State*, 203 So. 2d 283, 287-88 (Ala. Ct. App. 1967) (fraud). As the allegations of the Complaint make clear, the damages allegedly sustained by Plaintiff are a direct result of what a federal jury has already found was his knowing participation in these crimes. Plaintiff's claims are therefore barred as a matter of law by the *Hinkle* Rule and must be dismissed.

[4] The fact that Plaintiff appealed his conviction is inapposite, as it is well settled that "a judgment will operate as res judicata, notwithstanding that it is on appeal 'when the appellate court action is based *on a review of the record made below*.'" *Cashion v. Torbert*, 881 So. 2d 408, 414-15 (Ala. 2003) (quoting *Ala. Power Co. v. Thompson*, 32 So. 2d 795, 800 (Ala. 1947)). *See also Fidelity Standard Life Ins. Co. v. First Nat. Bank & Trust Co. of Vidalia, Georgia*, 510 F.2d 272, 272 (5th Cir. 1972) (the fact a judgment may be subject to a pending appeal "does not affect the judgment's binding force in a second court as to all issues, including that of jurisdiction"). Nor can Plaintiff use this state court proceeding to collaterally attack the validity of a federal district court judgment. *See* Section IV *infra*.

II. PLAINTIFF'S CLAIM FOR "IMPLIED INDEMNITY" FAILS AS A MATTER OF LAW.

In addition to being barred by the *Hinkle* Rule, Plaintiff's claim for "implied indemnity" (or common law indemnity) is also due to be dismissed because his conviction precludes this claim as a matter of law:

> Generally, under Alabama law, and with certain exceptions, joint tortfeasors are not entitled to common-law indemnity or contribution. See *Humana Medical Corp. v. Bagby Elevator Co.,* 653 So. 2d 972, 974 (Ala. 1995); *Parker v. Mauldin,* 353 So. 2d 1375, 1377 (Ala. 1977) ("The general rule is that joint tort-feasors are not entitled to indemnity or contribution."). In *Vandiver v. Pollak,* 107 Ala. 547, 553, 19 So. 180, 182 (1895), this Court explained that the basis of this prohibition is found in the maxim *ex turpi causa non oritur actio:*
>
> > "As a general principle of the common law it is often stated that indemnity or contribution will not be enforced as between joint wrong-doers. The reason underlying the principle is, that courts will not lend assistance to him who founds his cause of action on an immoral or illegal act—'*Ex turpi causa, oritur non actio.*' A trespasser confessing that he has injured or taken the property of another, is not entitled to the assistance of courts, instituted as well for the protection of property as for the protection of persons, to recover indemnity or contribution from his associates in the trespass."

Holcim (US), Inc. v. Ohio Cas. Ins. Co., 38 So. 3d 722, 727 (Ala. 2009). *See also Allstate Ins. Co. v. Amerisure Ins. Companies*, 603 So. 2d 961, 963 (Ala. 1992) (no right of indemnity where "the payor is barred by the wrongful nature of his conduct"). In the instant matter, Plaintiff's indemnity claim is "found[ed] . . . on an immoral or illegal act" in which a federal court determined Plaintiff participated. *Holcim*, 38 So. 3d at 727. Accordingly, he is barred from asserting a claim for "implied indemnity."

III. PLAINTIFF'S CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL.

Plaintiff's claims also fail as a matter of law because he is collaterally estopped from claiming that (1) he reasonably relied on Balch's misrepresentation that it was "legal and ethical" to pay the Oliver Robinson Foundation, or (2) that this misrepresentation caused his damages. During his criminal trial, Plaintiff argued that he could not be criminally liable because he relied

on the advice of Balch as to the legality of paying the Oliver Robinson Foundation. The jury rejected that defense, and convicted Plaintiff on all counts. He is collaterally estopped from attempting to re-litigate that issue here.

A. The legal framework of the doctrine of collateral estoppel.

> "Res judicata and collateral estoppel are two closely related, judicially created doctrines that preclude the relitigation of matters that have been previously adjudicated or, in the case of res judicata, that could have been adjudicated in a prior action.
>
> > "'The doctrine of res judicata, while actually embodying two basic concepts, usually refers to what commentators label 'claim preclusion,' while collateral estoppel ... refers to 'issue preclusion,' which is a subset of the broader res judicata doctrine.'"
>
> [. . .]
>
> For the doctrine of collateral estoppel to apply, the following elements must be established:
>
> > "'(1) that an issue in a prior action was identical to the issue litigated in the present action; (2) that the issue was actually litigated in the prior action; (3) that resolution of the issue was necessary to the prior judgment; and (4) that the same parties are involved in the two actions.'
> >
> > *Smith v. Union Bank & Trust Co.,* 653 So. 2d 933, 934 (Ala. 1995). '"Where these elements are present, the parties are barred from relitigating issues actually litigated in a prior [action]." ' *Smith,* 653 So. 2d at 934 (quoting *Lott v. Toomey,* 477 So. 2d 316, 319 (Ala. 1985))."'
>
> *Biles v. Sullivan,* 793 So. 2d 708, 712 (Ala. 2000). "Only issues *actually decided* in a former action are subject to collateral estoppel." *Leverette ex rel. Gilmore v. Leverette,* 479 So. 2d 1229, 1237 (Ala. 1985) (emphasis added). The burden is on the party asserting collateral estoppel to prove that the issue it is seeking to bar was determined in the prior adjudication.

Lee L. Saad Const. Co. v. DPF Architects, P.C., 851 So. 2d 507, 517-520 (Ala. 2002).

Application of the doctrine is a question of law. *EB Investments, L.L.C. v. Atlantis Development, Inc.*, 930 So. 2d 502, 507 (Ala. 2005) (citing *Walker v. Blackwell*, 800 So. 2d 582, 587 (Ala. 2001)). Additionally, "'a judgment will operate as res judicata or estoppel

notwithstanding an appeal when the appellate court action is based on a review of the record made below.'" *Cashion v. Torbert*, 881 So. 2d 408, 414-15 (Ala. 2003) (quoting *Alabama Power Co. v. Thompson*, 32 So. 2d 795, 800 (1947)). *See also Ex parte Chestnut*, 208 So. 3d 624, 636 (Ala. 2016) (same); *Jaffree v. Wallace*, 837 F.2d 1461, 1466 (11th Cir. 1988) (same rule under federal common law).

B. The legal framework applied to the allegations of the Complaint

i. The issue in Plaintiff's prior federal criminal action is identical to the issue in this state court civil action.

The jury in Plaintiff's federal criminal case was tasked with deciding, *inter alia*, whether Plaintiff relied on Balch's representation that paying the Oliver Robinson Foundation was legal, as this was a necessary element of Plaintiff's advice of counsel defense. *U.S. v. Parker*, 839 F.2d 1473, 1482 n.6 (11th Cir. 1988) ("To succeed with a defense of good faith reliance on the advice of counsel, the defendant must show that 1) he fully disclosed all relevant facts to this counsel and 2) he relied in good faith on his counsel's advice.").

Plaintiff's claims in this case similarly depend on Balch's representation that paying the Oliver Robinson Foundation was legal and ethical. According to the Complaint, "Balch . . . assured Plaintiff Roberson . . . that there was no legal problem with these efforts; that they were legal and ethical." Doc. 2 (Compl.) at ¶ 4. Plaintiff also alleges he "reasonably relied upon Balch's representation to his detriment." *Id.* at ¶¶ 5 & 6.

Regardless of whether his claims are characterized as being for fraudulent misrepresentation or fraudulent suppression, Plaintiff must show that he reasonably relied on Balch's representation. *Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 421 (Ala. 1997) (to state a claim for fraudulent misrepresentation, a plaintiff must allege reasonable reliance); *Mike Brooks Car World, Inc. v. Sudduth*, 54 So. 3d 364, 370 (Ala. 2010) (fraudulent suppression claim requires

reasonable reliance). To the extent the Complaint can be construed as alleging a claim for common law "negligence," Plaintiff must show that Balch's negligent legal advice caused his injuries. *DGB, LLC v. Hinds*, 55 So. 3d 218, 234-35 (Ala. 2010) (to state a claim for negligence, a plaintiff must allege a duty, breach, causation and damage). *See also Yarbrough v. Eversole*, 227 So. 3d 1192, 1198 (Ala. 2017) (legal malpractice actions based on negligence are subject to a "but for" causation standard). The only allegation of causation in the Complaint is that Plaintiff relied on Balch's advice to his detriment.

Accordingly, both the federal criminal case and this state court civil lawsuit involve the identical issue: whether Plaintiff relied on Balch's misrepresentation.

ii. The issue of whether Plaintiff relied on Balch's misrepresentation was litigated in the federal criminal case.

This issue was litigated in Plaintiff's federal criminal case, notwithstanding Plaintiff's allegation that "the Balch attorney blocked, on Sixth Amendment grounds, the Plaintiff's evidence at trial supporting his advice-of-counsel defense[.]" Doc. 2 (Compl.) at ¶ 7.[5] Because the Complaint specifically references the Plaintiff's federal criminal indictment, the trial, and the resulting verdict, *see id.*, this Court can consider that material when deciding this motion to dismiss. *See* footnote 1 *supra*. The federal trial transcript reflects that Plaintiff's criminal defense

[5] Whether the federal district court erred in excluding this evidence and whether the jury considered the Plaintiff's advice of counsel defense are distinct issues. Plaintiff has forcefully argued in his appeal to the Eleventh Circuit that the exclusion of certain evidence hampered his advice of counsel defense. Ex. 1 (Roberson's 11th Circuit Brief) at Section III. As the United States Supreme Court has held, however, the *res judicata* effect of another court's judgment as to a particular issue does not depend on whether the issue was decided without error. Rather, it depends only on whether the issue was decided, regardless of whether it was decided rightly or wrongly. *See Federated Dep't Stores, Inc. v. Moitie*, 101 S. Ct. 2424, 2428, 452 U.S. 394, 398 (1981) (doctrine of res judicata is not dependent on whether "the judgment may have been wrong or rested on a legal principle subsequently overruled in another case . . . an 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of their right to rely upon the plea of res judicata.... A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action].' We have observed that '[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert.'") (citations omitted).

counsel argued to the jury that Plaintiff relied on Balch's misrepresentation and therefore lacked the requisite specific intent to be convicted:

> What about the advice of counsel concept? That's another reason, aside from the first, which is there's no agreement in this case, for you to have a reasonable doubt about what's going on here. And it's critical from my perspective because it shows that my client thought and everybody else thought that this whole contract with the Foundation was proper, was lawful, et cetera.
>
> Even if you find we gave a thing of value in the Foundation contract to Oliver, it doesn't make any difference. Even if the advice that Joel Gilbert and Balch & Bingham gave to my client was wrong, it makes no difference. Because for my client to be in a conspiracy, he's got to knowingly, willfully and corruptly agree to break the law.
>
> And hiring lawyers, hiring a law firm that has an exceptional reputation and the best, most competent lawyers in the state to deal not only with Superfund litigation and every other aspect of it, but has the best ethics lawyers in the state, who know all about dealing with public officials and what the lines are there in a difficult situation, that's who we hired. That's who we hired, Balch & Bingham.
>
> [. . .]
>
> We asked Balch & Bingham. Mike Tracy told you. Okay. It Joel says, "I think it would be a good idea for us to hire the Foundation to do community outreach work." And Mike Tracy asks him in front of my client [David Roberson], in front of Blake Andrews, who was the assistant general counsel of Drummond at the time, "Is it legal to do this? Is it ethical to do this?"
>
> And Joel Gilbert said to him then, at the end of 2014 yes, and yes. And Joel Gilbert, in my cross-examination of him on Tuesday, said yes and yes again. Absolutely, yes. And that he had checked on it internally at Balch, and he knew it was okay. And he knew it was okay.
>
> [. . .]
>
> And as I said, even if Joel were mistaken about that, we, the client, would still be operating in good faith because we were relying on counsel to do the job that they were hired to do.
>
> [. . .]
>
> My client's not a lawyer. Mr. Tracy is not a lawyer. The lawyers in-house at Drummond were relying – they didn't have any expertise to deal with Superfund issues. They didn't have the expertise in ethics that the people in Balch did. They

> did have law degrees. They did have a basic understanding of what these rules are all about for sure. But they're all relying on Drummond in the context of this case. And they trusted Drummond – excuse me – Balch's advice implicitly. Period. They trusted the advice because they had no reason not to trust the advice after they had asked the red flag question. You're going to work with a legislator. You're going to pay his foundation money. Is it okay? Is it legal? Is it ethical?
>
> And you should find Joel Gilbert and my client, in particular, not guilty for the very reason that we relied on the advice of counsel, and he believed the advice was good and was sound.

Ex. 2 (Trial Transcript Excerpts in *United States v. Joel Iverson Gilbert*, Case NO. 2:17-CR-419-AKK-TMP) at 4521:25-4522:21; 4523:17-4524:3; 4525:11-14; 4527:2-19; *see also id.* at 4161:2-6 ("Q. Okay. So you would agree with me that it was reasonable for Drummond and for my client [Roberson] to believe that you had checked this out and Balch was telling them in good faith that this was okay? You agree with me on that? A. [Gilbert]. Absolutely, yes.").

iii. Resolution of this issue was necessary to the prior judgment.

The Complaint alleges that Plaintiff was convicted of "violating 18 U.S.C. §§ 371, 666(a), 1343, 1346, and 1956 (h)." Doc. 2 (Compl.) at ¶ 7. By convicting Plaintiff of these crimes, the federal jury necessarily rejected Plaintiff's defense that "he relied in good faith on his counsel's advice." *Parker*, 839 F.2d at 1482 n.6. Stated differently, the jury in Plaintiff's federal criminal case necessarily found that (1) Plaintiff did not rely on Balch's representation that paying the Oliver Robinson Foundation was "legal and ethical," Doc. 2 (Compl.) at ¶¶ 4-5, and (2) this legal advice did not cause Plaintiff to approve the payments to the Oliver Robinson Foundation.

iv. There is an identity of the parties.

Plaintiff was a party to the federal criminal case, and he is the party against whom the doctrine of collateral estoppel is being asserted in this action. Accordingly, the identity of the parties requirement is clearly satisfied. *See Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 725-26 (Ala. 1990) ("[T]he 'party identity criterion of *res judicata* does not require complete identity,

but only that the party against whom *res judicata* is asserted was either a party or in privity with a party to the prior action.' . . . Because Jackson was a party to both actions, and is the party against whom *res judicata* is asserted, the party identity criterion is met.") (citation omitted).

* * *

For the reasons set forth above, Plaintiff is collaterally estopped from claiming that he relied on Balch's misrepresentation or that it caused his damages. All of his claims therefore fail as a matter of law and are due to be dismissed.

IV. PLAINTIFF'S COMPLAINT IS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE FEDERAL DISTRICT COURT'S JUDGMENT.

Alabama courts have long held that litigants are not permitted to collaterally attack judgments rendered by courts of competent jurisdiction by filing ancillary lawsuits:

> Where the court trying the case has jurisdiction of the subject-matter and the parties, as here, the judgment, although irregular in form, or erroneous, is conclusive, so long as unreversed, and cannot be attacked collaterally. *Wyman v. Campbell*, 6 Port. 219, 31 Am.Dec. 677; *Lawson v. Alabama Warehouse Company*, 73 Ala. 289; *Pollard v. American, etc., Mtg. Co.*, 103 Ala. 289, 16 So. 801.
>
> Any attempt to impeach or annul a judgment other than by a direct proceeding in the court that rendered the judgment before the expiration of the term at which it was rendered is a collateral attack on such judgment. *Johnson v. Johnson*, 182 Ala. 376, 62 So. 706.
>
> This judgment condemned the bale of cotton to the satisfaction of appellee's debt and costs and the cotton was ordered sold. The judgment not having been reversed or annulled on direct attack, the claim of exemptions came too late to be available to appellant under section 7896 of the Code of 1923. *Lackland v. Rodgers*, 113 Ala. 529, 21 So. 341. We have noted the case of *Kennedy v. First National Bank*, 107 Ala. 170, 18 So. 396, 36 L.R.A. 308, but that case in no way changes or modifies the rule laid down in *Lackland v. Rodgers*, supra.
>
> The judgment in the original attachment suit having been pleaded in bar of appellant's claim to the cotton levied on and ordered sold, and the evidence without conflict on this point establishing this plea, the errors of the court, if any, in its rulings on other pleas and the admission of evidence, could not have injuriously affected appellant's case. The court could not have rendered judgment other than as here recorded.

Hill v. Hooper, 110 So. 323, 324 (Ala. Ct. App. 1926).

This rule has been applied in various contexts, including cases in which civil plaintiffs were trying to collaterally attack their prior criminal convictions. *Greenhill v. Bear Creek Dev. Auth.*, 519 So. 2d 938, 939 (Ala. 1988) ("Instead of appealing his criminal conviction, the plaintiff chose to challenge the validity of that conviction in a collateral civil proceeding seeking declaratory relief and damages. It is a well settled rule that a judgment of a court that has jurisdiction of the subject matter and the parties and possesses the power to render the particular judgment is immune from collateral attack."). *See also Dothard v. Ridgeway*, 309 So. 2d 468, 470 (Ala. 1975) (plaintiff's mandamus petition in which he sought to compel the Director of the Alabama Department of Public Safety to issue him a driver's license amounted to an improper collateral attack on his criminal conviction for drunk driving); *In re McDonald*, 296 So. 2d 141, 142 (Ala. 1974) (affirming the disbarment of an attorney following a criminal conviction for bribery, and holding that "where, as here, the judgment is not void on its face, no collateral attack may be made on the validity of the judgment in a 'show cause' disbarment proceeding. To hold otherwise not only would pre-empt the Court of Criminal Appeals of its exclusive criminal jurisdiction, but it also would require a determination by this Court on the merits of the case in the absence of a full record of the proceedings below.").

Plaintiff's claims in this case are an impermissible collateral attack on a judgment rendered by the United States District Court for the Northern District of Alabama, as they implicitly—if not explicitly—ask this Court to find that he was wrongly convicted. Plaintiff's established remedy—which he is currently pursuing—is a direct appeal of his conviction in the Eleventh Circuit Court of Appeals, not a civil lawsuit for monetary damages in Jefferson County Circuit Court. For this additional reason, Plaintiff's Complaint should be dismissed in its entirety.

V. PLAINTIFF'S CLAIMS ARE TIME-BARRED.

Drummond adopts and incorporates Balch's arguments with respect to Plaintiff's claims being time-barred.

Moreover, and as explained above, Drummond is not alleged to have made any misrepresentation or otherwise committed any wrongful act or omission. *See* Doc. 2 (Compl.) *generally*. Rather, Drummond's alleged liability depends entirely on the acts or omissions of Balch, its alleged agent. Accordingly, to the extent this Court accepts any of Balch's arguments for dismissal, Drummond is also due to be dismissed as a matter of law. *Jackson*, 906 So. 2d at 155 ("[W]e conclude that the dismissal with prejudice of the tort claims against the agent English exonerated the principal Alfa from vicarious liability for those alleged torts and entitled Alfa to a JML on the tort claims."). *See also* 2A C.J.S. Agency § 464 ("Generally, a principal may not be held vicariously liable for the tort of an agent when the agent has been exonerated by an adjudication of nonliability. It follows that where the principal is asked to respond to damages solely on account of the agent's negligence, a judgment dismissing the agent, but holding the principal liable, is generally inconsistent."); 1 Ala. Pers. Inj. & Torts § 2:2 (2018 ed.) ("[A] principal cannot be held vicariously liable for the torts of its agents where the agents have been exonerated on the merits, as a matter of law.").

WHEREFORE, for the reasons set forth above, Drummond respectfully requests this Honorable Court to enter an Order dismissing all claims against Drummond, with prejudice.

ORAL ARGUMENT RESPECTFULLY REQUESTED

DATED: April 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **April 18, 2019** I electronically filed the foregoing using the AlaFile system which will send notification of this filing to the following AlaFile participants:

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