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# SUPREME COURT OF ALABAMA

**OCTOBER TERM, 2019-2020**

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**1180871**

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**Ex parte Allstate Property and Casualty Insurance Company**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Danielle Carter**

**v.**

**Alvin Lee Walker)**

**(Macon Circuit Court, CV-13-900170)**

SELLERS, Justice.

Allstate Property and Casualty Insurance Company ("Allstate") petitions this Court for a writ of mandamus

directing the Macon Circuit Court to grant Allstate's request for a jury trial in an action pending in that court. We grant the petition and issue the writ.

In August 2013, a vehicle occupied by Danielle Carter was involved in an accident with a vehicle being driven by Alvin Lee Walker. Carter sued Walker, alleging negligence and wantonness in the operation of his vehicle. In the same action, Carter also sued her underinsured-motorist carrier, Allstate, seeking underinsured-motorist benefits. In her complaint, Carter demanded a jury trial. Likewise, Allstate demanded a jury in its answer to the complaint.

Pursuant to Lowe v. Nationwide Insurance Co., 521 So. 2d 1309 (Ala. 1988), Allstate opted out of active participation in the litigation. Opting out under Lowe keeps the jury in a vehicle-accident action from learning that insurance coverage might be available to pay damages. 521 So. 2d at 1310 (noting that, when an insurer opts out, "no mention of it or its potential involvement is permitted by the trial court"). Allstate, however, is still bound by a judgment as to Walker's liability and Carter's damages. 521 So. 2d at 1310 (holding that an insurer electing not to participate in the trial is,

nevertheless, "bound by the factfinder's decisions on the issues of liability and damages").

As the trial date approached, Carter and Walker decided that they would rather try the case without a jury. Allstate, however, demanded a jury trial. The trial court denied Allstate's demand and set the case for a nonjury trial. Allstate then filed the instant mandamus petition.

Mandamus is available for reviewing the denial of a jury-trial demand. Ex parte Acosta, 184 So. 3d 349, 351 (Ala. 2015). Rule 38(a), Ala. R. Civ. P., provides that "[t]he right of trial by jury as declared by the Constitution of Alabama or as given by a statute of this State shall be preserved to the parties inviolate." See also Ala. Const. 1901, Art. I, § 11 ("[T]he right of trial by jury shall remain inviolate."). Under Rule 38(d), Ala. R. Civ. P., if a party demands a jury trial in writing, that demand cannot be withdrawn without the consent of all the parties. Allstate has not withdrawn its jury demand or consented to a nonjury trial.[1]

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[1]There are some opinions indicating that, when an insurer opts out under Lowe, it is no longer a party to the case. See Ex parte Edgar, 543 So. 2d 682, 684 (Ala. 1989); Ex parte Aetna Cas. & Sur. Co., 708 So. 2d 156, 158 (Ala. 1998). Later

Carter argues that an insurer opting out of participation in the litigation under Lowe cannot force the parties the vehicle-accident action to participate in a jury trial. As noted, however, even though Allstate opted out, it is still bound by any judgment on liability and damages, which obviously affects its contractual responsibility to pay underinsured-motorist benefits. Although opting out under Lowe precludes an insurer from actively participating in the trial of the vehicle-accident action, this Court has acknowledged that insurers that have opted out are not totally without means to protect their interests with respect to liability and damages. Specifically, the Court has held that an uninsured-motorist carrier should be allowed to hire an attorney to represent the defendant in the vehicle-accident action. Ex parte State Farm Mut. Auto. Ins. Co., 674 So. 2d

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opinions, however, make clear that an insurer that opts out is still technically a party. See Ex parte Boles, 720 So. 2d 911, 914 (Ala. 1998) ("Although Edgar and Aetna speak of the insurer's being 'dismissed' from the pending action, it is clear that, pursuant to Lowe, State Farm has simply withdrawn from the litigation by exercising its option 'not to participate in the trial.'"); Nationwide Mut. Fire Ins. Co. v. Austin, 34 So. 3d 1238, 1240 (Ala. 2009) ("As contemplated in Lowe, Nationwide[, which had opted out under Lowe,] remained a party defendant ...."). Thus, even though Allstate has opted out under Lowe, it is still a party.

75, 77 (Ala. 1995); Driver v. National Sec. Fire & Cas. Co., 658 So. 2d 390, 395 (Ala. 1995). That right is based simply on the insurer's interest in defending against liability and damages. That interest also weighs in favor of allowing Allstate to insist that a jury determine Walker's liability and Carter's damages, which will be binding on Allstate for purposes of providing underinsured-motorist benefits.

Lowe itself demonstrates that there is a strong policy in Alabama against tainting a jury with knowledge of the possible availability of insurance to cover a party's damages. Indeed, in a prior proceeding between these same parties, this Court agreed with Allstate's argument that it "possessed a clear legal right to have [its] liability to pay [underinsured-motorist] benefits, if any, determined by a jury whose verdict would not be influenced by evidence of insurance coverage." Ex parte Allstate Prop. & Cas. Ins. Co., 237 So. 3d 199, 206 (Ala. 2017) (emphasis added).[2] Cf. Pi Kappa Phi Fraternity v.

[2]The prior mandamus proceeding between these parties involved the issue whether the trial court could enforce a settlement agreement between Carter and Walker and dismiss Walker from the action without Allstate's consent, even though Allstate had "fronted" Carter the amount of the settlement funds offered by Walker pursuant to Lambert v. State Farm Mutual Automobile Insurance Co., 576 So. 2d 160 (Ala. 1991). The prior proceeding did not expressly involve the question

Baker, 661 So. 2d 745, 747-48 (Ala. 1995) (acknowledging that evidence of a defendant's liability insurance is typically not admissible). There is also a strong policy of preserving the right to have a jury determine the extent of a party's liability. Ala. Const. 1901, Art. I, § 11; Rule 38, Ala. R. Civ. P. Accordingly, we hold that Allstate can insist that a jury determine liability and damages and, at the same time, keep its involvement from the jury pursuant to the opt-out procedure adopted in Lowe.[3]

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whether Allstate could insist on a jury trial after opting out under Lowe.

[3]Moya v. Canterbury, 124 So. 3d 747 (Ala. Civ. App. 2013), upon which Carter relies, is distinguishable. In that case, the plaintiffs, who were involved in a car accident, sued the driver of the other vehicle. They also named their own insurer as a defendant, seeking uninsured/underinsured-motorist benefits. The plaintiffs did not make a jury demand in their complaint. In its answer to the complaint, the insurer demanded a jury trial. The other defendant, however, did not demand a jury in his subsequently filed answer. After the insurer opted out pursuant to Lowe, the other defendant insisted on a jury trial, relying on the insurer's demand for a jury and Rule 38. The trial court denied the defendant's jury demand and held a bench trial. The Court of Civil Appeals affirmed the trial court's judgment. Carter suggests that the defendant in Moya could not rely on the insurer's jury demand because that demand was no longer effective after the insurer opted out under Lowe. She argues that, similarly, Allstate's jury demand in the present case was rendered ineffective after it opted out. We disagree with Carter's reading of Moya. The Court of Civil Appeals in Moya pointed to Hester v. Posey, 684 So. 2d 1347, 1349 (Ala. Civ. App.

PETITION GRANTED; WRIT ISSUED.

Bolin, Wise, Mendheim, Stewart, and Mitchell, JJ., concur.

Parker, C.J., and Shaw and Bryan, JJ., dissent.

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1996), for the proposition that "'all of the parties to the action who are interested in the issues for which [a] jury trial has been demanded may rely on that demand and need not make an additional demand of their own.'" (quoting 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2318 (1971)). The court in Moya held that the defendant in that case could not rely on the insurer's jury demand because he had "not argue[d] that he had any interest in the outcome of the uninsured/underinsured-motorist claims against [the insurer]." 124 So. 3d at 750. The court did not hold that the insurer's jury demand was no longer effective after the insurer opted out of the litigation.

BRYAN, Justice (dissenting).

A petition for a writ of mandamus is a request for extraordinary relief. Ex parte Williams, 775 So. 2d 146, 147 (Ala. 2000). Because the relief requested in a petition for a writ of mandamus is extraordinary, the petitioner necessarily has a high burden of proving a right to that relief. See Williams, 775 So. 2d at 147 ("[A] writ of mandamus provides extraordinary relief and ... one petitioning for a writ of mandamus must show: (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty on the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."). The petitioner in the present case, Allstate Property and Casualty Insurance Company, attempted to demonstrate that it was entitled to mandamus relief in this case by submitting a three-page argument to this Court that cited, primarily, Rules 38 and 39, Ala. R. Civ. P. The petitioner's argument has not convinced me that it is entitled to the extraordinary relief requested in this petition.

First, although the petitioner remains a nominal party to the action below, it has not demonstrated that its previous demand for a jury trial remains effective, given that the petitioner made the deliberate and strategic choice to opt out of the litigation after making that jury demand. Further, although I agree with the majority "that there is a strong policy in Alabama against tainting a jury with knowledge of the possible availability of insurance to cover a party's damages," ___ So. 3d at ___, it is unclear how this particular policy provides the petitioner with the right to demand a jury in a trial it has intentionally chosen not to participate in. Additionally, although I agree with the majority that this State also has "a strong policy of preserving the right to have a jury determine the extent of a party's liability," ___ So. 3d at ___, it is unclear from the arguments in the petition, or from the majority opinion, how the petitioner's decision to waive its right to participate in the litigation below does not amount to a waiver of the right to determine how the litigation proceeds after it makes the decision to opt out of participating in the litigation. Surely, an insurance company that makes the strategic decision

to opt out of litigation under Lowe v. Nationwide Insurance Co., 521 So. 2d 1309 (Ala. 1988), waives a number of substantive and constitutional rights that it would have otherwise been entitled to exercise had it chosen to participate in the litigation. Finally, neither the petition nor the majority opinion discusses the extent of the insurer's "right to a jury trial" under the circumstances presented in this case. Is it simply the right to demand that the plaintiff and any remaining defendants participate in a jury trial? Does the insurance company now have a right to participate in voir dire and the selection of the jury that it is now entitled to demand, despite its decision to opt out of participating in the litigation?

These issues and unanswered questions lead me to conclude that the petitioner has not demonstrated a clear legal right to the relief sought. In a future case, where a serious attempt has been made by the petitioner to address these issues, I could be persuaded to conclude that an insurance company, under the circumstances presented in this case, has a clear legal right to demand a jury trial. Because, however, the petitioner in this case has not met its burden of

demonstrating a clear legal right to relief, I respectfully dissent.

Parker, C.J., concurs.