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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Ex parte Savannah Dail and Cindy Dail

PETITION FOR WRIT OF MANDAMUS

**(In re: Brittany Tarice Jordan, individually and on behalf of
her minor child, Caden Jordan**

v.

Diane Reilly Tyner, Savannah Leigh Dail, and Cindy Dail)

(Montgomery Circuit Court, CV-19-900703)

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STEWART, Justice.

Savannah Dail and Cindy Dail ("the Dails") petition this Court for a writ of mandamus directing the Montgomery Circuit Court ("the trial court") to dismiss the claims asserted against them by Brittany Tarice Jordan, in her individual capacity.¹ Because Jordan's amended complaint does not relate back to the filing of the original complaint pursuant to Rule 15, Ala. R. Civ. P., we grant the petition and issue the writ.

Facts and Procedural History

On April 21, 2017, the parties were involved in an automobile accident involving several other vehicles. On April 19, 2019, Jordan filed a complaint in the trial court on behalf of herself and Caden Jordan, her minor child, asserting claims of negligence and wantonness against Diane Tyner, the individual driving the automobile that collided with the rear of Jordan's automobile. Jordan's complaint did not designate or allege a cause of action against any fictitiously named defendants.

¹Jordan also asserted claims on behalf of her minor child, Caden Jordan. The Dails do not seek to have the action dismissed against them insofar as it relates to those claims. Accordingly, this opinion applies only to Jordan's individual claims.

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On April 28, 2020, Jordan filed an amended complaint, asserting additional claims of negligence and wantonness against the Dails. The Dails filed a motion to dismiss Jordan's claims against them, alleging that the claims were barred by the applicable statute of limitations and that the amended complaint did not relate back to the filing of the original complaint. Jordan filed a response to the Dails' motion to dismiss, asserting that, although the Dails were listed on an incident and offense report concerning the accident, the report did not indicate that they were at fault and that Jordan did not learn of the Dails' fault in the accident until discovery had been conducted. Jordan relied on Rule 15(c)(3), Ala. R. Civ. P., in asserting that the amended complaint related back to the filing of the original complaint. Jordan also asserted that the Dails would not be prejudiced by having to defend against Jordan's claims because, she asserted, the Dails had been named as defendants in a separate action and she could intervene in that action.

The Dails filed a reply to Jordan's response, to which they attached the incident and offense report that they asserted identified Savannah

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Dail as the "prime contributing unit" to the accident.² The Dails also argued that Jordan's amended complaint could not relate back to the filing of the original complaint under Rule 15(c) because Jordan had not designated a fictitiously named defendant in the original complaint.

The trial court held a hearing on the motion to dismiss and, afterward, denied the motion. Because the trial court had before it the incident and offense report that was not part of the pleadings, we treat the motion to dismiss as a motion for a summary judgment. See Ex parte Gray, 308 So. 3d 4, 6 n.3 (Ala. 2020)(citing Ex parte Novus Utils., Inc., 85 So. 3d 988, 995 (Ala. 2011))("Because the trial court had before it materials outside the pleadings that it did not expressly decline to consider, [the defendant's] motion to dismiss was converted into a motion for a summary judgment.").

Standard of Review

In Ex parte Profit Boost Marketing, Inc., 254 So. 3d 862, 866 (Ala. 2017), this Court reiterated that filing a petition for the writ of mandamus

²The incident and offense report is not included as an exhibit to the Dails' petition. Jordan, however, does not dispute the Dails' assertions.

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is the proper method for seeking review of the denial of a motion to dismiss or a summary judgment based on the applicability of Rule 15(c)(3), the rule upon which Jordan relies in asserting that her amended complaint relates back to the filing of the original complaint. Accordingly, the Dails have properly invoked this Court's jurisdiction by filing their mandamus petition.

" " 'A writ of mandamus is an extraordinary remedy, and it "will be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon 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." " Ex parte Monsanto Co., 862 So. 2d 595, 604 (Ala. 2003) (quoting Ex parte Butts, 775 So. 2d 173, 176 (Ala. 2000), quoting in turn Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993)). ...' "

Ex parte Profit Boost Mktg., 254 So. 3d at 866 (quoting Ex parte Novus Utils., Inc., 85 So. 3d at 995).

Discussion

In their petition, the Dails argue that Jordan's amended complaint adding them as defendants was barred by the two-year limitations period

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prescribed in § 6-2-38, Ala. Code 1975.³ Relying on Ex parte Profit Boost Marketing, the Dails contend that Jordan did not designate any fictitiously named defendants in her original complaint, that the Dails were added, not substituted, as defendants one year after the applicable limitations period had expired and that, therefore, none of the provisions of Rule 15(c) apply to permit Jordan's amended complaint to relate back to the filing of the original complaint. Therefore, they argue, because the limitations period expired before they were added as defendants, they are entitled to a writ of mandamus directing the trial court to dismiss Jordan's claims against them.

Jordan argues that, because the original complaint was timely filed, she was permitted to add parties to her existing claims because, she contends, the statute of limitations governs when an action must be commenced, not when the correct parties must be ascertained or otherwise included in a complaint. Jordan asserts that her amended complaint

³Section 6-2-38(l) provides that "[a]ll actions for an injury to the person or rights of another not arising from contract and not specifically enumerated in this section shall be brought within two years."

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complies with Rule 15(c) and that, therefore, it relates back to the filing of the original complaint.

Rule 15(c) provides:

"An amendment of a pleading relates back to the date of the original pleading when

"(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

"(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, except as may be otherwise provided in Rule 13(c)[, Ala. R. Civ. P.,] for counterclaims maturing or acquired after pleading, or

"(3) the amendment, other than one naming a party under the party's true name after having been initially sued under a fictitious name, changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the applicable period of limitations or one hundred twenty (120) days of the commencement of the action, whichever comes later, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the

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action would have been brought against the party,
or

"(4) relation back is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h)[, Ala. R. Civ. P.]." ⁴

In Ex parte Profit Boost Marketing, this Court considered a situation similar to the one in the present case. The plaintiffs in that case added a new defendant to the action, rather than substituting a defendant for an incorrectly named defendant or a fictitiously named defendant, after the limitations period had expired. In holding that Rule 15(c)(3) was inapplicable, this Court explained that Rule 15(c)(3) "applies to a plaintiff's attempt to amend in order to correctly identify a defendant included in or contemplated by the plaintiff's original complaint." Profit Boost Mktg., 254 So. 3d at 870.

⁴Rule 9(h), Ala. R. Civ. P., provides that, "[w]hen a party is ignorant of the name of an opposing party and so alleges in the party's pleading, the opposing party may be designated by any name, and when that party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name."

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Jordan contends that, unlike the plaintiffs in Profit Boost Marketing who did not meet the elements of Rule 15(c)(3), she has satisfied the requirements of the rule. Despite Jordan's assertions, it is undisputed that the original complaint did not designate fictitiously named defendants as parties and that Jordan's amended complaint added the Dails as parties, rather than substituting them for incorrectly named parties, after the limitations period had expired, while maintaining her claims against Tyner, the original defendant. Thus, it is apparent that the Dails were not "included in or contemplated by [Jordan's] original complaint." Profit Boost Mktg., 254 So. 3d at 870. Accordingly, Rule 15(c)(3) does not apply to permit Jordan's amended complaint to relate back to the filing of her original complaint.

Moreover, as this Court noted in Profit Boost Marketing, Rule 15(c)(3) "limits application of the relation-back principles to situations where the party added by the amendment received notice of the commencement of the action either before the expiration of the applicable limitations period or within 120 days of the filing of the complaint initiating the action." Id. The Dails assert that they did not receive notice

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of Jordan's original complaint before the expiration of the limitations period or within 120 days of the filing of the complaint. Jordan responds by asserting that the Dails were defendants in another action brought by a different plaintiff stemming from the accident underlying Jordan's action and that, therefore, the Dails would not be prejudiced by defending against her claims. However, there is no indication that the Dails received notice of the institution of this action within the periods prescribed by Rule 15(c)(3), and Jordan does not assert that they did. Thus, even if Rule 15(c)(3) applied to the present case, the limitations of the rule would not authorize the relation back of Jordan's amended complaint.

Relying on Dannelley v. Guarino, 472 So. 2d 983, 986 (Ala. 1985), Jordan also argues that her amended complaint relates back because, she says, although she knew the identity of the Dails at the time she filed the original complaint because they were listed on the incident and offense report, she did not know that the Dails caused her injuries until she conducted discovery. Dannelley, however, is wholly distinguishable from the present case. In Dannelley, the plaintiffs actually designated fictitiously named parties in their original complaint, and they substituted

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defendants for those fictitiously named parties in an amended complaint. This Court specifically stated that "the substitution must relate back under Rule 9(h), [Ala.]R.Civ.P., pursuant to Rule 15(c), [Ala.]R.Civ.P." Id. at 984. Although it appears that Jordan is relying on the relation-back principles under Rule 15(c)(4), Jordan does not cite that rule and, instead, argues that Rule 9(h) is inapplicable because she knew the identities of the Dails when she filed the original complaint.⁵ Insofar as Jordan relies on Rule 15(c)(4), that rule is inapplicable because Jordan did not substitute the Dails for fictitiously named defendants.

Further, it is undisputed that Jordan was aware of the Dails' identities and of their involvement in the accident at the time she filed her original complaint. Moreover, as noted above, the Dails asserted that the incident and offense report identified Savannah Dail as the "prime contributing unit" to the accident, and Jordan does not contest that

⁵Jordan also asserts, without citing any supporting authority, that if she had designated fictitiously named parties in the original complaint without believing there were other liable parties, the Dails would have argued that the original complaint was a frivolous filing, thus potentially subjecting her to damages under the Alabama Litigation Accountability Act, §12-19-270 et seq., Ala. Code 1975.

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assertion. In Ex parte VEL, LLC, 225 So. 3d 591, 602 (Ala. 2016), this Court concluded that, because the plaintiff "was not ignorant of [a defendant's] identity before the statute of limitations expired, [relation back did not apply and] the circuit court had no discretion other than to grant [the defendant's] summary-judgment motion in its favor on the statute-of-limitations ground." This Court has repeatedly held that a plaintiff who possesses information regarding a potential defendant's identity has a duty to investigate to determine whether a cause of action exists against that potential defendant. In Ex parte Ismail, 78 So. 3d 399, 408 (Ala. 2011), we concluded that relation-back principles did not apply because the plaintiffs in that case, who possessed a doctor's name by virtue of medical records, had notice that that doctor may have been involved in the treatment of one of the plaintiffs and, thus, that the plaintiffs were required to expend some effort to determine what involvement that doctor had. In Weber v. Freeman, 3 So. 3d 825, 833 (Ala. 2008), this Court held that, where a plaintiff knew of a defendant's involvement in her son's treatment, "it was incumbent upon her, before the statute of limitations on her claim expired, to investigate and evaluate

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the claim to determine who was responsible for [her son's] death." Likewise, in Harmon v. Blackwood, 623 So. 2d 726, 727 (Ala. 1993), this Court held that "the plaintiff failed to meet the criteria for invoking the relation-back principles of Rule 9(h) and Rule 15(c)" because, even though he knew the name of the physician and his involvement in treating his son before the limitations period had expired, he did not investigate and evaluate his claim to determine who was responsible and to ascertain whether there was evidence of medical malpractice. In Ex parte Snow, 764 So. 2d 531, 537 (Ala. 1999), this Court held that, even though the plaintiff in that case might not have known the significance of information he had regarding two defendants' involvement in his injury, "it was incumbent upon [him] to learn of that significance" before the limitations period expired. Accordingly, even if Jordan had substituted the Dails for fictitiously named defendants, Jordan's amended complaint would not relate back to the filing of the original complaint because Jordan knew the identities of the Dails and of their involvement in the accident but neglected her duty to investigate to determine their potential liability for her injury before the limitations period expired.

Conclusion

Jordan's amended complaint, insofar as Jordan asserted claims against the Dails, does not relate back to the filing of the original complaint under Rule 15(c). The Dails have demonstrated a clear legal right to have Jordan's claims against them dismissed, and, accordingly, the trial court is directed to dismiss Jordan's claims against the Dails.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur.