Rel: October 29, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200594

Ex parte Tiffina McQueen

PETITION FOR WRIT OF MANDAMUS

(In re: Yukita A. Johnson

v.

R&L Foods, LLC, Tiffina McQueen, Michael McQueen, Michael London, and Joe Fortner)

(Montgomery Circuit Court, CV-20-901022)

WISE, Justice.

Tiffina McQueen ("the petitioner"), a defendant below, petitions this Court for a writ of mandamus directing the Montgomery Circuit Court to vacate its April 12, 2021, order directing that her compulsory counterclaims would be tried separately from the claims raised by Yukita A. Johnson, the plaintiff below. We grant the petition and issue the writ.

Procedural History

On August 14, 2020, Johnson sued R&L Foods, LLC, the petitioner, Michael McQueen ("McQueen"), Michael London, and Joe Fortner in the Montgomery Circuit Court. In her complaint, Johnson alleged that R&L Foods was "a franchisee of 'Wendy's' -- a fast food chain"; that she had worked at Wendy's restaurants for approximately 23 years; and that she had been employed by R&L Foods for approximately 17 years. Johnson alleged that, on February 4, 2020, she was working at a particular Wendy's restaurant operated by R&L Foods in Montgomery ("the restaurant"); that McQueen was the shift manger of the restaurant that day; that the petitioner was the general manager of the restaurant; and that McQueen and the petitioner were brother and sister. Johnson further alleged that, on February 4, 2020, McQueen "directed a verbal

assault of profanity and threats of violence" toward her because he believed that she was not providing adequate assistance in the restaurant; that, in response, she went outside to the parking lot of the restaurant and telephoned Joe Fortner, R&L Foods' regional manger; that she reported McQueen's behavior to Fortner; and that, because of McQueen's increasing hostility and threats of violence, she asked Fortner if she could leave and go home. Johnson alleged that Fortner told her to end the telephone call so he could call McQueen; that, a few minutes later, Fortner telephoned her and told her that he had spoken to McQueen, that it was safe for her to go back inside the restaurant, and that McQueen would not continue to threaten her or attempt to harm her; that Fortner refused to allow her to leave and go home; and that Fortner required her to go back inside the restaurant. Johnson averred that she went back inside the restaurant; that, subsequently, the petitioner arrived at the restaurant; that, when the petitioner arrived, McQueen was still berating Johnson, yelling profanity at her, and threatening her with violence; and that she reported McQueen's behavior to the petitioner. Johnson alleged that, after she reported McQueen, the petitioner started yelling profanities at

her, retrieved a handgun from a bag she was carrying, and gave the gun to McQueen. Johnson further alleged that McQueen fired several shots at her while inside the restaurant; that, as she fled from the restaurant, McQueen gave the gun to London, another employee who was working at the restaurant; and that London then fired several more shots at her from inside the restaurant. Johnson averred that customers of the restaurant and of a nearby business notified law-enforcement officers of the incident. Johnson alleged that, after the shooting, she telephoned Fortner and told him about the incident and that Fortner telephoned the petitioner and then drove to the restaurant. Law-enforcement officers arrested McQueen and London. Johnson alleged that law-enforcement officers caught the petitioner attempting to destroy video-surveillance footage of the incident and attempting to hide the handgun that was used in the incident and that the petitioner was arrested for tampering with evidence. Johnson further alleged that, unbeknownst to the law-enforcement officers, Fortner had instructed the petitioner to delete the video-surveillance footage of the incident. Johnson also alleged that, on February 6, 2020, R&L Foods terminated her employment but did not terminate the

petitioner's employment. Johnson further alleged that, in 2014, while working at a different Wendy's restaurant, the petitioner had been involved in an incident in which she had pulled a gun on a coworker after a verbal altercation and that Fortner and R&L Foods had covered up that previous incident and had transferred the petitioner to the restaurant.

In her complaint, Johnson asserted assault claims against R&L Foods, the petitioner, McQueen, and London; misrepresentation and fraudulent-inducement claims against R&L Foods and Fortner; misrepresentation and suppression claims against R&L Foods and Fortner; negligent and wanton hiring, supervision, training, and/or retention claims against R&L Foods; and tort-of-outrage claims against R&L Foods, Fortner, the petitioner, McQueen, and London. On October 21, 2020, the petitioner filed her answer to the complaint. Her answer did not include a counterclaim. However, on February 2, 2021, the petitioner filed a pleading denominated as a "counterclaim" against Johnson. In her counterclaim, the petitioner alleged her version of the events that took place at the restaurant on February 4, 2020. Specifically, the petitioner alleged that Johnson was working at the restaurant as an assistant

manger; that Johnson became involved in a verbal altercation with another employee at the restaurant; that, after her work shift ended, Johnson left the restaurant and went outside to the parking lot; that Johnson contacted other individuals believed to be relatives and/or friends of Johnson, whom the petitioner referred to as "the trespassers"; that Johnson made false statements to "the trespassers" to incite them to threaten and/or physically harm one or more of the employees working at the restaurant; that Johnson "encouraged, incited and/or directed the trespassers to improperly enter into the subject restaurant to threaten and/or physically harm one or more of the employees working at the restaurant"; that, as general manger, the petitioner was informed of the incident involving Johnson; that the petitioner drove to the restaurant and went inside; that Johnson and "the trespassers" entered the restaurant from the parking lot and acted in an abusive and threatening manner toward the petitioner and the employees who were present at the restaurant; that, on at least two occasions that day, "some or all of the trespassers entered the restaurant and acted in a abusive and threatening manner towards the employees present"; that the petitioner and others

asked Johnson and "the trespassers" to leave the restaurant; that Johnson and "the trespassers" refused to leave and continued to act in an abusive and threatening manner; that the petitioner and the other employees believed that they were in physical danger due to the conduct of Johnson and "the trespassers"; that, during an altercation, the petitioner was assaulted and struck violently multiple times; and that the petitioner sustained an injury to her shoulder. In her counterclaim, the petitioner asserted assault, negligence, wantonness, tort-of-outrage, and civil-conspiracy claims against Johnson, which were compulsory counterclaims under Rule 13(a), Ala. R. Civ. P.

On March 12, 2021, Johnson filed a motion to dismiss the petitioner's compulsory counterclaims against her because the petitioner did not include the counterclaims in her answer and because the petitioner had not filed a motion for leave to amend her answer to add the counterclaims. See Rule 13(a) and (f). Johnson further asserted that the petitioner was not entitled to amend her answer to add the counterclaims. The petitioner filed a response to the motion to dismiss, which included

a request for leave to amend her answer to add the compulsory counterclaims.

On April 1, 2021, the trial court conducted a hearing on Johnson's motion to dismiss. During the hearing, Johnson's counsel stated that, if the court was inclined to allow the petitioner to amend her answer to add the compulsory counterclaims, he would seek leave from the court to amend Johnson's complaint to add an abuse-of-process claim against the petitioner. Johnson's counsel further stated:

> "But we would be seeking leave to do that, and we would just ask that the Court would sever out [the petitioner's] counterclaim and our abuse of process claim against her, that you would sever those out for a separate trial, not for discovery purposes."

On April 12, 2021, the trial court entered an order denying Johnson's motion to dismiss the compulsory counterclaims. That order further stated: "Moreover, the compulsory counterclaim is Hereby ORDERED to be severed from the above styled case and shall be tried separately."[1]

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[1]In its order, the trial court stated that the counterclaim was "severed from the above styled case and shall be tried separately." However, that order did not direct the clerk to docket the counterclaim as a new civil action and did not order the petitioner to pay a separate filing

(Capitalization in original.) The petitioner subsequently filed her petition for a writ of mandamus in this Court.

Discussion

The petitioner argues that the trial court erred when it ordered a separate trial on her compulsory counterclaims because, she says, the compulsory counterclaims are intertwined with Johnson's claims and the petitioner's defenses to those claims.[2]

Rule 42(b), Ala. R. Civ. P., provides:

> "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or

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fee. Thus, it does not appear that the trial court actually severed the counterclaim pursuant to Rule 21, Ala. Civ. P. Rather, it appears that the substance of the trial court's action was to order separate trials of Johnson's claims and the compulsory counterclaims pursuant to Rule 42(b), Ala. R. Civ. P. See Stephens v. Fines Recycling, Inc., 84 So. 3d 867 (Ala. 2011).

[2]The petitioner asserts: "Without explanation, the Trial Court sua sponte severed [her] compulsory counterclaims from Ms. Johnson's underlying action." However, the transcript of the hearing on Johnson's motion to dismiss clearly indicates that Johnson's counsel requested that, in the event the trial court allowed the petitioner to amend her answer to add the counterclaims, the trial court order separate trials of Johnson's claims and the counterclaims.

> of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Article 1, Section 11 of the Alabama Constitution of 1901."

(Emphasis added.)

> "It is well established that mandamus is a 'drastic' and 'extraordinary' remedy that will be granted only upon a showing that the petitioner has a clear right to it. Ex parte W.Y., [605 So. 2d 1175] (Ala.1992). The trial court has wide discretion in ordering separate trials and in severing claims, and the trial court's decision in that regard will be reversed only if it abused that discretion. Ex parte R.B. Ethridge & Associates, Inc., 494 So. 2d 54 (Ala. 1986). '[A]bsent an abuse of discretion, the trial court will be allowed to "shape the order of trial" through the provisions of Rule 42, [Ala. R. Civ. P.]' Ex parte Marcrum, 372 So. 2d 313, 315 (Ala. 1979). See, also, Black v. Boyd, 251 F.2d 843 (6th Cir. 1958). Likewise, when claims have been severed pursuant to Rule 21, [Ala.] R. Civ. P., the trial judge has even more discretion to 'shape the order of trial.' "

Ex parte Humana Med. Corp., 597 So. 2d 670, 671 (Ala. 1992).

It is undisputed that the events that give rise to the claims asserted by Johnson in her complaint and the claims asserted by the petitioner in her counterclaim all relate to the incident that occurred at the restaurant on February 4, 2020. In their pleadings, Johnson and the petitioner each assert conflicting accounts as to what actually happened on that day,

which will require a factual resolution by a jury. Separate trials as to the claims Johnson raised in her complaint and the claims the petitioner raised in her counterclaim have the potential to result in inconsistent verdicts.

In Ex parte Skelton, 459 So. 2d 825 (Ala. 1984), this Court addressed the issue whether a circuit court had erred in ordering a separate trial of the claims asserted against one of several defendants in a personal-injury action. In addressing that issue, this Court noted:

> "Rule 42(b), [Ala. R. Civ. P.], provides that the trial court can order separate trials 'in the furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.' The trial court does not cite prejudice to Thomas as a ground for its order granting his motion for a separate trial. The Committee Comments to Rule 42 state that separate trials are not to be granted merely because the parties involved might prefer separate trials. Rather, '[i]t is the interest of efficient judicial administration which is to be considered.' Committee Comments, Rule 42, [Ala. R. Civ. P.] (Emphasis added.)"

459 So. 2d at 826.

Similarly, in this case, the trial court did not cite prejudice to the parties as a ground for ordering separate trials. Also, the trial court did not state that it was ordering separate trials for the convenience of the

parties or because separate trials would be "conducive to expedition and economy." Rule 42(b). Additionally, during the hearing, Johnson's counsel asserted that Johnson was seeking separate trials because "that's a lot of issues to be tried for one jury, and all kinds of confusion and prejudice and misleading things can be put out before the jury in such a case with that many moving parts."[3] That is the extent of Johnson's

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[3]In her response to this Court, Johnson argues that the trial court did not exceed its discretion in ordering separate trials because, she says, separate trials are necessary to avoid prejudice to the parties. Specifically, she asserts that she would be required to present evidence of the petitioner's prior bad acts to prove the negligent and wanton hiring, supervision, training, and/or retention claims she raised against R&L Foods in her complaint. She goes on to argue that she raised various defenses in her reply to the counterclaim and that the prior-bad-act evidence would not be admissible as to those defenses. However, Johnson did not file her reply to the counterclaim until well after the trial court had issued its order directing separate trials.

> "This Court has repeatedly recognized that in 'mandamus proceedings, "[t]his Court does not review evidence presented for the first time" ' in a mandamus petition. [Ex parte] Ebbers, 871 So. 2d [776,] 794 [(Ala. 2003)] (quoting Ex parte Ephraim, 806 So. 2d 352, 357 (Ala. 2001)). In reviewing a mandamus petition, this Court considers 'only those facts before the trial court.' Ex parte Ford Motor Credit Co., 772 So. 2d 437, 442 (Ala. 2000). Further, in ruling on a mandamus petition, we will not consider 'evidence in a party's brief that was not before the trial court.' Ex parte Pike Fabrication, Inc.,

argument regarding prejudice to the parties. Nothing in the facts before this Court demonstrates that separate trials on the claims in Johnson's complaint and the claims in the counterclaim would further the convenience of the parties, would avoid prejudice to the parties, or would be "conducive to expedition and economy." Rule 42(b). Accordingly, the trial court exceeded its discretion when it ordered separate trials in this case.

Conclusion

Based on the foregoing, we grant the petition for the writ of mandamus and direct the trial court to vacate its April 12, 2021, order to the extent that it ordered separate trials as to the claims in Johnson's complaint and the claims in the petitioner's counterclaim.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Shaw, Bryan, and Mitchell, JJ., concur.

Bolin, Sellers, Mendheim, and Stewart, JJ., concur in the result.

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859 So. 2d 1089, 1091 (Ala. 2002)."

Ex parte McDaniel, 291 So. 3d 847, 852 (Ala. 2019). Because Johnson's reply to the petitioner's counterclaim was not filed before the trial court entered its order directing separate trials, we will not consider that reply.