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# **SUPREME COURT OF ALABAMA**

**OCTOBER TERM, 2020-2021**

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**1190576**

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**Ex parte Linda Steinberg, individually and as sole remaining member and representative of Mendelson Properties, LLC**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Linda Steinberg, individually and as sole remaining member and representative of Mendelson Properties, LLC**

**v.**

**Lisa Daugherty et al.)**

**(Etowah Circuit Court, CV-18-900932)**

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BRYAN, Justice.

Linda Steinberg, individually and as the sole remaining member and representative of Mendelson Properties, LLC, petitions this Court for a writ of mandamus directing the Etowah Circuit Court to vacate its order staying the proceedings in her civil case against several defendants. One of the defendants, Lisa Daugherty, moved the trial court to stay discovery regarding discovery requests that had been issued to her on the ground that such a stay was needed to protect her constitutional right against self-incrimination. The trial court granted that motion, but it also stayed the entire case. Because the trial court had before it no evidence supporting the stay, we grant the petition and issue the writ.

Steinberg was a resident at the Oak Landing Specialty Care/Oak Landing Assisted Living facility, where Daugherty was employed. After Steinberg left the facility in late 2018, she sued Daugherty, alleging several claims based on allegations that Daugherty had exploited her financially. Steinberg also sued several other entities and individuals allegedly involved in exploiting Steinberg: Tinsley, Inc., d/b/a Oak Landing Assisted Living; Tinsley, Inc., d/b/a Oak Landing Specialty Care;

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Jerry Paul Tinsley; Melissa Tinsley; Linda Hopper; Regions Bank; Wells Fargo Bank, National Association; Goggans Group, Inc.; Tommie Jacob Goggans III; and Jerenita Johnson. Steinberg alleged claims in her individual capacity and in her capacity as the sole remaining member and representative of Mendelson Properties, LLC, an entity she alleged had been damaged by the defendants' actions.

On March 3, 2020, Daugherty filed a motion seeking to stay discovery regarding discovery requests that had been issued to her "pending the outcome of a federal criminal investigation and potential indictment against" her. In her motion, Daugherty summarily asserted that the allegations against her in the civil action are identical to those in a federal criminal investigation. Daugherty further asserted that, although a "previously issued criminal information issued against [her] has been withdrawn and no indictment has yet to issue, [her] criminal attorney has represented that the threat of indictment is still present." Thus, Daugherty contended that she should not be required to respond to discovery requests in the present case because, she said, her having to do so would infringe on her right against self-incrimination guaranteed by

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the Fifth Amendment to the United States Constitution. Importantly, Daugherty did not support the assertions made in her motion to stay with any evidence.

Two days later, on March 5, 2020, the trial court entered a short order staying the entire case. Steinberg subsequently filed a motion asking the trial court to reconsider its decision to stay the case. On April 16, 2020, Steinberg filed her petition for a writ of mandamus with this Court. The materials before us indicate that, on June 23, 2020, the trial court held a hearing to consider Steinberg's challenge to the stay. The following day, the trial court entered a motion denying Steinberg's request to lift the stay.

Although the June 23 hearing and the entry of the June 24 order occurred after Steinberg had filed her mandamus petition with this Court, the trial court had jurisdiction to hold the hearing and to enter the order. As this Court has explained:

"The filing of a petition for the writ of mandamus does not divest the trial court of jurisdiction or stay the case.' Ex parte Spencer, 111 So. 3d 713, 716 n.1 (Ala. 2012). If the petitioner does not ask this Court to stay the lower court proceedings, the trial court has jurisdiction to reconsider the

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challenged order; if the trial court grants the relief that is sought in this Court in the mandamus petition, then the petition may be mooted. Ex parte Southeastern Energy Corp., 203 So. 3d 1207, 1212 (Ala. 2016)."

Ex parte McDaniel, 291 So. 3d 847, 851 n.2 (Ala. 2019).

"A petition for a writ of mandamus is a proper method by which to challenge a trial court's decision on a motion to stay a civil proceeding when a party to that proceeding is the subject of a criminal investigation. See, e.g., Ex parte Rawls, 953 So. 2d 374 (Ala. 2006); Ex parte Weems, 711 So. 2d 1011 (Ala. 1998)."

Ex parte McDaniel, 291 So. 3d at 851.

"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 United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993)."

Ex parte Empire Fire & Marine Ins. Co., 720 So. 2d 893, 894 (Ala. 1998).

" '[T]he purpose of our review is to determine only if the petitioner has shown that the trial court exceeded the discretion accorded it in determining whether to grant the requested stay.' " Ex parte McDaniel, 291 So. 3d at 851 (quoting Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)).

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The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." That right applies to both criminal cases and civil cases; the Fifth Amendment

" ' not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' "

Ex parte Rawls, 953 So. 2d 374, 379-80 (Ala. 2006) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)). "A court has the discretion to stay civil proceedings, to postpone civil discovery, or to impose protective orders and conditions in the face of parallel criminal proceedings against one of the parties when the interests of justice seem to require." Ex parte Ebbers, 871 So. 2d 776, 787-88 (Ala. 2003). A party requesting a stay of a civil case on the basis of the Fifth Amendment must " 'clearly demonstrate' " that the party " 'is the subject of an ongoing, and overlapping, criminal investigation.' " Ex parte McDaniel, 291 So. 3d at 853 (quoting Ex parte Ebbers, 871 So. 2d at 785). In Ex parte Rawls, *supra*, this Court stated

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that a court addressing whether a civil case should be stayed pending the completion of a criminal case should consider:

"(1) whether the civil proceeding and the criminal proceeding are parallel, see Ex parte Weems, 711 So. 2d 1011, 1013 (Ala. 1998); (2) whether the moving party's Fifth Amendment protection against self-incrimination will be threatened if the civil proceeding is not stayed, see Ex parte Windom, 763 So. 2d 946, 950 (Ala. 2000); and (3) whether the requirements of the balancing test set out in Ex parte Baugh, 530 So. 2d [238,] 244 [(Ala. 1988)], and Ex parte Ebbers, 871 So. 2d 776, 789 (Ala. 2003), are met."

953 So. 2d at 378.

Steinberg argues that the order staying the case should be vacated because, she says, the trial court was not presented with any evidence that satisfied the requirements for issuing a stay. We agree. A party seeking a stay on Fifth Amendment grounds must, as an initial matter, present evidence establishing the existence of a "parallel" criminal proceeding. In Ex parte McDaniel, this Court discussed the evidence required to show that a criminal investigation is a parallel proceeding:

"Generally, in cases in which this Court has found that civil and criminal proceedings were 'parallel' for purposes of requesting a stay of the civil proceeding, there was clear evidence demonstrating that both proceedings shared overlapping acts or incidents. See, e.g., Ex parte Decatur City

Bd. of Educ., 265 So. 3d 1254 (Ala. 2018) (holding that a civil proceeding and a criminal proceeding were parallel when both proceedings were premised upon identical allegations and documents from both proceedings discussed overlapping acts); Ex parte Antonucci, 917 So. 2d [825,] 830 [(Ala. 2005)] (holding that the party moving for a stay had 'clearly demonstrated the existence of an ongoing criminal investigation' by presenting affidavits from his criminal-defense counsel, who testified that his client was the subject of a criminal investigation, noted his communications with law-enforcement officials who confirmed the investigation, and demonstrated that the criminal investigation 'stems from the very conduct complained of in the civil proceedings'); [Ex parte] Ebbers, 871 So. 2d [785,] 790–91 [(Ala. 2003)] (noting that the party moving for a stay provided, among other things, an affidavit by his criminal-defense attorney detailing the criminal investigation and its relationship to the civil proceedings); and Ex parte Coastal Training Inst., 583 So. 2d [979,] 982, 983 [(Ala. 1991)] (holding that 'the trial judge had sufficient evidence' to issue a stay when affidavits from counsel and other materials made 'it obvious that the material facts in this civil action would also be material and potentially incriminating in the criminal action')."

291 So. 3d at 853-54 (concluding that a federal criminal investigation was not a "parallel proceeding" when the only evidence presented about the investigation was a "very general" target letter informing a defendant that he was the target of a criminal investigation).

In this case, the materials before us contain no actual evidence indicating that a "parallel" criminal proceeding exists regarding

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Steinberg's allegations against Daugherty. In her motion seeking a stay, Daugherty summarily asserted that the allegations against her in the civil action are identical to those in a federal criminal investigation. She further asserted that, although a "previously issued criminal information issued against [her] has been withdrawn and no indictment has yet to issue, [her] criminal attorney has represented that the threat of indictment is still present." However, those statements are simply assertions that are unsupported by any evidence; such assertions do not "clearly demonstrate[]," Ex parte McDaniel, 291 So. 3d at 853 (emphasis omitted), the existence of a criminal proceeding parallel to this civil proceeding. See Ex parte Merrill, 264 So. 3d 855, 860 n.4 (Ala. 2018) ("Motions, statements in motions, and arguments of counsel are not evidence."); and American Nat'l Bank & Trust Co. of Mobile v. Long, 281 Ala. 654, 656, 207 So. 2d 129, 132 (1968) (stating that an "unsworn statement of counsel was not evidence") . "' [ A ] motion to stay civil discovery during the pendency of a parallel criminal proceeding is not properly granted upon speculative or conclusory grounds.'" Ex parte McDaniel, 291 So. 3d at 854 (quoting Ex parte Ebbers, 871 So. 2d at 788,

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quoting in turn Ex parte Hill, 674 So. 2d 530, 533 (Ala. 1996)). Based on the lack of evidence in this case, we conclude that Daugherty has not established that there is a parallel criminal proceeding, i.e., she has not demonstrated the existence of the first factor under the three-part test in Ex parte Rawls. Thus, we conclude that she was not entitled to a stay of this case and that the trial court exceeded its discretion in ordering the stay.<sup>1</sup>

Accordingly, we grant the petition for a writ of mandamus and direct the trial court to vacate its order staying the case.

PETITION GRANTED; WRIT ISSUED.

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

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<sup>1</sup>For the reasons discussed above, the second issue for consideration discussed in Ex parte Rawls, i.e., whether Daugherty's right against self-incrimination is actually threatened by the civil proceeding, plainly has not been established in Daugherty's favor. Further, there is no need to discuss the third issue for consideration discussed in Ex parte Rawls, i.e., whether Daugherty met the requirements of the balancing test found in Ex parte Baugh, 530 So. 2d 238, 244 (Ala. 1998), and Ebbbers, 871 So. 2d at 789. See, e.g., Ex parte McDaniel, 291 So. 3d at 855 n.3 (pretermittting discussion of the third factor under Ex parte Rawls), and Ex parte Butts, 183 So. 3d 931 (Ala. 2015) (same).

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Mitchell, J., recuses himself.