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# SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

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1191073

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**Ex parte Jane Doe, individually and as mother and next friend  
of her minor children, Judy Doe and John Doe**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Jane Doe, individually and as mother and next friend of  
her minor children, Judy Doe and John Doe**

**v.**

**Campus Evolution Villages, LLC, et al.)**

**(Tuscaloosa Circuit Court, CV-20-900175)**

WISE, Justice.

1191073

Jane Doe ("Doe"), individually and as mother and next friend of her minor children, Judy Doe and John Doe, petitions this Court for a writ of mandamus directing the Tuscaloosa Circuit Court to vacate its August 18, 2020, order staying all discovery in this case. We grant the petition and issue the writ.

### Facts and Procedural History

On August 25, 2019, Doe was dropping off her children to stay with a friend at the Campus Evolution Villages apartments in Tuscaloosa. Doe alleges that, while she was in the common area of the apartments, Tereza Demone Jones assaulted her and raped her in front of her children and then fled the scene. Jones was later arrested and is being prosecuted by the State of Alabama for first-degree rape, a violation of § 13A-6-61(a)(1), Ala. Code 1975.

On February 14, 2020, Doe sued Campus Evolution Villages, LLC; Pinnacle Campus Living, LLC ("Pinnacle"); Pinnacle Property Management Services, LLC; Jones; and various fictitiously named defendants in the Tuscaloosa Circuit Court. On April 23, 2020, Doe amended the complaint to dismiss Pinnacle Property Management

1191073

Services, LLC, and Campus Evolution Villages, LLC, without prejudice and to substitute CEV Tuscaloosa, LLC; Signal 88, LLC; Gulf South Security Solutions, LLC ("Gulf South"); and CEV Tuscaloosa, LP, for fictitiously named defendants. The amended complaint included counts alleging assault and battery, invasion of privacy, and the tort of outrage against Jones and counts alleging negligence and/or wantonness and negligence and/or wantonness based on a premises-liability theory against CEV Tuscaloosa, LLC, CEV Tuscaloosa, LP, Pinnacle, Signal 88, and Gulf South.

On July 31, 2020, Doe filed a motion for the entry of a default against Jones. She alleged that the summons, complaint, and amended complaint had been served on Jones on June 16, 2020, and that he had not answered or otherwise responded.

On August 13, 2020, Gulf South and Pinnacle filed a joint motion to stay the civil action pending the outcome of the criminal proceeding against Jones. They alleged that no discovery had been conducted in the case; that Doe and the defendants would need to conduct discovery relating to the incident, including taking the deposition of Jones; and that,

1191073

because any such deposition would involve questions relating to the matters at issue in the criminal proceeding, conducting discovery in this case must be stayed until the criminal proceeding is concluded. Gulf South and Pinnacle also alleged that this civil proceeding and the criminal proceeding against Jones are parallel; that Jones's privilege against self-incrimination under the Fifth Amendment to the United States Constitution would be threatened if he is called for a deposition in this case while the criminal proceeding is still pending; and that the factors in the balancing test set forth in Ex parte Baugh, 530 So. 2d 238, 244 (Ala. 1988), and Ex parte Ebbers, 871 So. 2d 776, 789 (Ala. 2003), weigh in favor of allowing the criminal proceeding to be concluded before conducting discovery in this proceeding.

On August 18, 2020, the trial court granted the motion to stay. On that same date, it denied Doe's motion for the entry of a default against Jones.

On August 24, 2020, Doe filed a motion to reconsider both orders and asked the trial court to enter an order allowing her to pursue discovery and permitting the circuit clerk to enter a default against Jones. On

1191073

September 2, 2020, the trial court denied Doe's motion to reconsider. This petition followed.

### Standard of Review

"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).

" "A writ of mandamus is an extraordinary remedy that is available when a trial court has exceeded its discretion. Ex parte Fidelity Bank, 893 So. 2d 1116, 1119 (Ala. 2004). A writ of mandamus is 'appropriate when the petitioner can show (1) a clear legal right 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) the properly invoked jurisdiction of the court.' Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001)."

" 'Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005).'

"Rawls, 953 So. 2d at 377. '[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

1191073

grant the requested stay.' Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)."

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

### Discussion

Doe argues that the trial court exceeded its discretion by granting Gulf South and Pinnacle's motion to stay based on speculation that Jones might assert his Fifth Amendment privilege against self-incrimination in response to discovery, or questioning he might face in a deposition, that might be served on him in this case. Specifically, she contends that Gulf South and Pinnacle "cannot assert the Fifth Amendment for Jones and [that] they failed to present evidence that Jones had asserted or would assert his Fifth Amendment right against self-incrimination in response to discovery that might, at some point in the future, be served on him in this case, so as to justify the stay imposed by the trial court." We agree that Gulf South and Pinnacle cannot assert the Fifth Amendment on behalf of Jones.

1191073

In Ex parte Rawls, 953 So. 2d 374, 378 (Ala. 2006), this Court set forth the following method for determining whether a stay is warranted when a Fifth Amendment privilege against self-incrimination is invoked:

"This Court stated in Ex parte Baugh, 530 So. 2d 238, 241 (Ala. 1988):

" 'Under the Fifth Amendment to the Constitution of the United States, "no person ... shall be compelled in any criminal case to be a witness against himself." The privilege against self-incrimination must be liberally construed in favor of the accused or the witness, Hoffman v. United States, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951), and is applicable not only to federal proceedings but also to state proceedings, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). "The fact that the privilege is raised in a civil proceeding rather than a criminal prosecution does not deprive a party of its protection." Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir. 1979), citing with approval Lefkowitz v. Cunningham, 431 U.S. 801, 9[7] S. Ct. 2132, 53 L. Ed. 2d 1 (1977); McCarthy v. Arndstein, 266 U.S. 34, 45 S. Ct. 16, 69 L. Ed. [] 158 (1924).'

"The United States Constitution, however, does not mandate that under all circumstances the civil proceedings in which the privilege against self-incrimination is asserted be stayed; whether to stay those proceedings is within the trial court's discretion.

" ' While the Constitution does not require a stay of civil proceedings pending the outcome of potential criminal proceedings, a court has the discretion to postpone civil discovery when "justice requires" that it do so "to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c), Ala. R. Civ. P.'

"Ex parte Coastal Training Inst., 583 So. 2d 979, 980-81 (Ala. 1991).

"In the present case, three issues must be addressed to determine if a stay in the civil ... proceedings based on Fifth Amendment concerns in a pending criminal action is warranted: (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 at 244, and Ex parte Ebbers, 871 So. 2d 776, 789 (Ala. 2003), are met."

953 So. 2d at 378.

Although the parties dispute whether this civil proceeding and the criminal proceeding against Jones are parallel, we need not resolve that dispute because the issue as to who could properly file the motion for a stay based on Fifth Amendment principles is dispositive in this case.

1191073

Jones, the only defendant against whom criminal charges have been filed regarding the underlying incident, had not filed an appearance in this civil action and had not invoked his Fifth Amendment privilege against self-incrimination when Gulf South and Pinnacle filed their motion for a stay. Instead, Gulf South and Pinnacle, which are corporations, filed the motion to stay based on speculation that Jones might later invoke his Fifth Amendment privilege against self-incrimination in response to discovery in this civil action.<sup>1</sup> However,

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<sup>1</sup>We note that Gulf South and Pinnacle attached to their answer to Doe's petition for a writ of mandamus a document indicating that, months after Doe filed her petition in this Court, Jones filed in the trial court a "Notice of Invocation of 5th Amendment Right to Remain Silent in Civil Case." However,

"[t]his 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., 859 So. 2d 1089, 1091 (Ala. 2002)."

1191073

"[i]t has long been settled in federal jurisprudence that the constitutional privilege against self-incrimination is 'essentially a personal one, applying only to natural individuals.' It 'cannot be utilized by or on behalf of any organization, such as a corporation.' United States v. White, 322 U.S. 694, 698, 699 (1944)."

George Campbell Painting Corp. v. Reid, 392 U.S. 286, 288-89 (1968).

Also, as this Court explained in Ex parte Ebbers, 871 So. 2d 776, 801-02

(Ala. 2003):

"The Bank defendants enjoy no Fifth Amendment privilege. See George Campbell Painting Corp. v. Reid, 392 U.S. 286, 288, 88 S. Ct. 1978, 20 L. Ed. 2d 1094 (1968) (the constitutional privilege against self-incrimination does not enure to the benefit of any organization such as a corporation). 'The privilege against self-incrimination is available only to natural persons. Corporations, therefore, are excluded generally from asserting the privilege.' Charles W. Gamble, McElroy's Alabama Evidence § 373.01, p. 1594 (5th ed. 1996)."

Gulf South and Pinnacle did not have their own Fifth Amendment privilege to assert, and they could not assert Fifth Amendment protections on behalf of Jones. Compare Ex parte Windom, 763 So. 2d 946, 950 (Ala.

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Ex parte McDaniel, 291 So. 3d 847, 852 (Ala. 2019). Therefore, we have not considered that document in reviewing this petition, and we do not address the issue whether Jones would be entitled to a stay if he requested one in the trial court.

1191073

2000) ("This Court cannot issue a writ of mandamus based upon the allegation of one party to a civil action that the other party may in that civil action use the discovery process to interfere with a pending criminal proceeding."). Therefore, the trial court exceeded its discretion in granting their motion for a stay.

### Conclusion

For the above-stated reasons, we conclude that Doe has established that she has a clear legal right to relief from the trial court's August 18, 2020, order granting Gulf South and Pinnacle's motion to stay. Accordingly, we grant Doe's petition for the writ of mandamus and direct the trial court to vacate the August 18, 2020, order staying this case.

PETITION GRANTED; WRIT ISSUED.

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

Mitchell, J., dissents.

1191073

MITCHELL, Justice (dissenting).

The hurdle to obtain mandamus relief in this case is high. Mandamus is an "extraordinary writ" to be issued only when the petitioner has established a "clear legal right" to the order she seeks. Ex parte Edgar, 543 So. 2d 682, 684 (Ala. 1989). And it's particularly difficult to obtain a writ of mandamus concerning a trial court's decision to issue a stay -- because, under Rule 26(c), Ala. R. Civ. P., trial courts have "the discretion to stay civil proceedings, to postpone civil discovery, or to impose protective orders" when "the interests of justice seem to require." Ex parte Ebbers, 871 So. 2d 776, 787-88 (Ala. 2003); see also Ex parte Rawls, 953 So. 2d 374, 393 (Ala. 2006) (Nabers, C.J., dissenting) ("The trial court is in a far better position than is this Court to know the status of its docket [and] the progress of the case to this point .... There is every reason to allow the trial court broad discretion in [deciding whether to issue a stay]."). I do not believe the petitioner cleared the mandamus hurdle here.

The majority opinion grants mandamus relief based on Rawls. In that case, this Court established the following three-part test "to

1191073

determine if a stay in the civil divorce proceedings based on Fifth Amendment concerns in a pending criminal action is warranted": (1) whether the civil proceeding and the criminal proceeding are parallel; (2) whether the moving party's Fifth Amendment privilege against self-incrimination will be threatened if the civil proceeding is not stayed; and (3) whether the requirements of the balancing test set out in Ex parte Baugh, 530 So. 2d 238 (Ala. 1988), and Ebbbers are met. Rawls, 953 So. 2d at 378. Rawls developed the second element of this test based on Ex parte Windom, 763 So. 2d 946 (Ala. 2000). But a close review of Windom reveals why I believe it's wrong to apply Rawls here.

In Windom, a defendant in a civil action moved to stay that case while a criminal action against the plaintiff was pending. Id. at 948. The trial court denied the motion. Id. at 948. This Court then denied the civil defendant's petition for mandamus in part because there was no "Fifth Amendment right against self-incrimination on the part of [the civil defendant] that could be violated" and the civil plaintiff (and criminal defendant) had "waived his Fifth Amendment right against

1191073

self-incrimination." Id. at 950. In other words, no one's Fifth Amendment rights were at risk.

Not so here. In this case, Pinnacle Campus Living, LLC ("Pinnacle") and Gulf South Security Solutions, LLC ("Gulf South"), which are defendants below, have a legitimate concern that Jones's invocation of his Fifth Amendment privilege against self-incrimination will impair their ability to mount a defense to the petitioner's claims. And while Rawls adopted the second prong of its three-part test based on Windom, Rawls did not turn on that issue. Instead, this Court held in Rawls that the moving party, a civil defendant in one action and a criminal defendant in another, had demonstrated that his Fifth Amendment privilege against self-incrimination would be threatened if the divorce proceedings were not stayed. In short, Rawls -- and our cases that come after it -- do not address how a trial court should consider a corporate defendant's motion to stay when the assertion of Fifth Amendment rights by a criminal defendant might impede its ability to obtain discovery essential to its defense.

1191073

But this Court's decision in Ebbers does address that issue. In Ebbers, this Court analyzed the corporate defendants' argument that another party's invocation of his Fifth Amendment rights would prevent the corporate defendants from obtaining discovery necessary to defend themselves. Ebbers, 871 So. 2d at 797. This Court acknowledged that, as corporate entities, the defendants had no Fifth Amendment rights, but it did not reject their argument out-of-hand. Instead, this Court evaluated the defendants' arguments under the "good cause shown" standard of Rule 26(c), noting that trial courts have "broad power ... to control the discovery process." Id. at 802.

In my view, applying Ebbers here would be more consistent with the broad discretion we typically give trial courts to stay cases or discovery. Pinnacle and Gulf South's argument is, at bottom, the same as the corporate defendants' argument in Ebbers. They contend that, without Jones's testimony, it will be difficult to mount a defense against the petitioner's claims. And it's easy to see why it would be difficult -- Jones, the alleged perpetrator, is the central actor in the events that gave rise to the petitioner's claims of negligence and wantonness against the

1191073

defendants. For those reasons, I would take the same approach that this Court took in Ebbers and evaluate whether Pinnacle and Gulf South have demonstrated good cause for a stay. Given the discretion afforded to the trial court in making that determination, the trial court's proximity to the issues and dynamics of the litigation, and the centrality of Jones's alleged conduct, I cannot conclude that the trial court exceeded its discretion by granting a stay. Consequently, I would hold that the petitioner has not demonstrated a clear legal right to the order she seeks and would deny the petition. I respectfully dissent.