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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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**Ex parte Nationwide Agribusiness Insurance Co. and The
Hartford Steam Boiler Inspection and Insurance Co.**

PETITION FOR WRIT OF MANDAMUS

(In re: Josh Hopkins and Kristy Hopkins

v.

Nationwide Agribusiness Insurance Co. et al.)

(Marshall Circuit Court, CV-16-18)

MAIN, Justice.

Nationwide Agribusiness Insurance Co. ("Nationwide") and
The Hartford Steam Boiler Inspection and Insurance Co.

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("Hartford") petition this court for a writ of mandamus directing the Marshall Circuit Court to rule on their pending motion for a change of venue from Marshall County to Morgan County. We grant the petition and issue the writ.

I. Facts and Procedural History

Josh Hopkins and Kristy Hopkins are poultry farmers who own four poultry houses in Morgan County. In September 2015, the Hopkinses discovered that approximately 20,000 chickens had died in one of their poultry houses. According to the Hopkinses, temperature-monitoring equipment in the poultry house malfunctioned, and, as a result, the temperature rose to levels the chickens could not endure. The Hopkinses contend that the equipment malfunction was a result of electrical problems in the poultry house -- problems they have since discovered are also present in two of their other poultry houses. They contend that Total Radio Service, Inc. ("Total Radio"), a company located in Marshall County, had negligently performed electrical servicing work on the three poultry houses before the incident.

At the time of the incident, the poultry houses were insured by Nationwide and/or Hartford. The insurance policy

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was sold to the Hopkinses by Randy Jones & Associates, Inc. ("Jones"), an insurance agency with its principal office in Marshall County. Although Nationwide paid a portion of the claim, the Hopkinses assert that the payment was insufficient and that Nationwide and Hartford have wrongfully denied coverage relating to the malfunctioning equipment caused by electrical problems in two poultry houses.

On June 30, 2016, the Hopkinses filed this suit in the Marshall Circuit Court against Nationwide, Hartford, Jones, and Total Radio. The Hopkinses have asserted claims against Nationwide and Hartford alleging breach of contract, bad faith, and fraud. They alleged suppression and conspiracy against Nationwide, Hartford, and Jones. They asserted claims of negligent procurement against Jones and negligence against Total Radio. Finally, they asserted that Nationwide was vicariously liable for Jones's alleged negligent procurement.

At the time the action was filed, venue in the Marshall Circuit Court was proper under § 6-3-7, Ala. Code 1975, because both Total Radio's and Jones's principal offices were located in Marshall County. The Hopkinses, however, ultimately moved to dismiss both Total Radio and Jones. Total

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Radio was dismissed without prejudice on December 13, 2017, and Jones was dismissed with prejudice on February 23, 2018.

On February 27, 2018, Nationwide and Hartford filed a notice of removal in the United States District Court for the Northern District of Alabama on the basis that the dismissal of Total Radio and Jones created complete diversity of citizenship between the Hopkinses and Nationwide and Hartford. The federal court remanded the case on July 17, 2018. On July 20, 2018, the trial court entered an order setting the case for trial on October 15, 2018.

On July 24, 2018, Nationwide and Hartford moved the trial court to transfer this action to the Morgan Circuit Court. Nationwide and Hartford argued that because Total Radio and Jones had been dismissed, a change of venue was required by Rule 82(d)(2), Ala. R. Civ. P.¹

¹Rule 82(d)(2) provides, in part:

"(A) Voluntary Dismissal. When a defendant whose presence made venue proper as to the entire action at the time of the commencement of the action is subsequently dismissed on notice or motion of the plaintiff, the court, ... on motion of all remaining defendants, shall transfer the action to a court in which the action might have been properly filed had it been initially brought against the remaining defendants alone"

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On August 7, 2018, the trial court entered an order continuing the trial setting to November 13, 2018, and setting a pretrial conference for October 26, 2018, at which time it would hear all pending motions, including the motion for a change of venue. The order also set a deadline for filing dispositive motions and ordered the parties to conduct mediation. Nationwide and Hartford moved the trial court to reconsider its order setting their motion for a change of venue for a hearing on October 26, 2018. Nationwide and Hartford noted that the hearing date was only 18 days before the trial setting and argued that the delay in hearing their motion would effectively require them to complete discovery, file dispositive and pretrial motions, conduct mediation, and prepare for trial, all before their change-of-venue motion was heard.

On August 22, 2018, the trial court entered an order confirming that the October 26, 2018, hearing would proceed as scheduled, but it ordered that it would rule on the venue issue first and that, should it decide to grant the motion for a change of venue, it would not rule on any further pending motions and would continue the trial setting.

Nationwide and Hartford filed this petition on August 23, 2018. On September 28, 2018, this Court entered an order staying all proceedings in the trial court.²

II. Standard of Review

"Mandamus is a drastic and extraordinary writ, to be issued only where 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 Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). "When we consider a mandamus petition relating to a venue ruling, our scope of review is to determine if the trial court [exceeded] its discretion, i.e., whether it exercised its discretion in an arbitrary and capricious manner." Id. Our review is further limited to those facts that were before the trial court. Ex parte American Resources Ins. Co., 663 So. 2d 932, 936 (Ala. 1995)."

Ex parte Southeast Alabama Timber Harvesting, LLC, 94 So. 3d 371, 373 (Ala. 2012) (quoting Ex parte National Sec. Ins. Co., 727 So. 2d 788, 789 (Ala. 1998)).

III. Analysis

In this case, Nationwide and Hartford seek a writ compelling the trial court to promptly rule on their pending motion for a change of venue. Nationwide and Hartford rely

²Citing our order staying the proceedings, on October 15, 2018, the trial court entered an order canceling the pretrial hearing and trial date.

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principally on our recent decision in Ex parte International Paper Co., [Ms. 1170458, April 27, 2018] __ So. 3d __ (Ala. 2018).

In International Paper, a third-party defendant, International Paper Company ("IPC"), moved to dismiss the claims asserted against it on the ground that venue was improper based on an outbound forum-selection clause. The trial court, however, refused to rule on the motion, merely taking it "under advisement," all the while shepherding the case toward an impending trial date. IPC petitioned for a writ of mandamus directing the trial court to rule on its motion. Initially, we held that a petition for a writ of mandamus was an appropriate method by which to seek review of the trial court's decision not to rule on the motion. Although we noted that mandamus will not issue to compel the exercise of discretion by a trial court in a particular manner, we concluded that "a writ of mandamus compelling the circuit court to exercise its discretion by ruling on the motion to dismiss based on improper venue before proceeding further is appropriate under these circumstances." __ So. 3d at __. We then issued the writ. We explained:

"In the present case, the circuit court left pending IPC's motion to dismiss asserting improper venue, but ordered that final discovery on the merits was to be completed by February 28, 2018, that all motions for a summary judgment were to be filed by March 26, 2018, and that the trial was to be held on May 21, 2018. IPC argues that venue is a threshold issue, citing Thompson v. Skipper Real Estate Co., 729 So. 2d 287 (Ala. 1999) (noting, in discussion of issue whether defendant had substantially invoked the litigation process, that a defendant has a right to determine venue before asserting a demand for arbitration), and Ex parte Windom, 776 So. 2d 799 (Ala. 2000) (holding that venue is a threshold matter that must be raised at the beginning of litigation and that a trial court should rule on a motion for a change of venue as expeditiously as possible). ... IPC argues that requiring it to participate in the litigation process while failing to rule on the motion to dismiss requires that it either waive the right to conduct discovery and to formulate an adequate defense or waive the right to enforce the outbound forum-selection clause, based on Ex parte Spencer, 111 So. 3d 713 (Ala. 2013) (holding that a party may waive a forum-selection clause by substantially invoking the litigation process).

"....

"Here, the circuit court exceeded its discretion by failing to rule on, and instead 'taking under advisement,' the motion to dismiss the third-party complaint based on improper venue while allowing discovery on the merits to proceed and setting deadlines for summary-judgment motions and setting the trial date. Therefore, we issue the writ and direct the circuit court to issue an order addressing the merits of IPC's motion to dismiss based on improper venue. ..."

___ So. 3d at ___.

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In this case, by deferring its ruling on venue until the pretrial hearing, the trial court effectively required that Nationwide and Hartford complete discovery, prepare dispositive and other pretrial motions, mediate the case, and prepare for trial before it would resolve the venue question. Under these facts, our analysis in International Paper controls. Venue is a threshold matter, and, "as a general rule, a trial court should rule on a motion alleging improper venue as expeditiously as possible." Ex parte Windom, 776 So. 2d 799, 803 (Ala. 2000). Therefore, a trial court should, generally, not wait until the pretrial hearing to consider a motion for a change of venue.³ Accordingly, we issue the writ and direct the trial court to rule on Nationwide and Hartford's motion for a change of venue as soon as practicable. See Ex parte Monsanto Co., 794 So. 2d 350, 356 (Ala. 2001) (directing the trial court to dispose of the motion for a change of venue as the first order of business).

³Given that the time for filing a motion for a change of venue under Rule 82(d)(2) depends on the date of the dismissal of the party that made venue proper, we recognize that a pretrial hearing may indeed be an appropriate and "expeditious" time to hear the motion. In this case, however, it was not.

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We express no opinion on the merits of the motion for a change of venue.

PETITION GRANTED; WRIT ISSUED.

Stuart, C.J., and Bolin, Parker, Wise, Bryan, and Sellers, JJ., concur.

Shaw and Mendheim, JJ., dissent.

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MENDHEIM, Justice (dissenting).

I respectfully dissent. The Court orders "the trial court to rule on Nationwide [Agribusiness Insurance Co. ('Nationwide')] and [The] Hartford [Steam Boiler Inspection and Insurance Co. ('Hartford')] 's motion for a change of venue as soon as practicable." ___ So. 3d at ___. My review of the record indicates that this is what the trial court was attempting to accomplish when this Court ordered answer and briefs and stayed the trial court from taking further action, including ruling on the motion for a change of venue.

On July 20, 2018, the trial court granted Josh and Kristy Hopkins's motion to set the case for trial, and the court set the case for trial on October 15, 2018. The court also set a pretrial conference for October 3, 2018.

On July 24, 2018, Nationwide and Hartford filed their motion to transfer the case to Morgan County. On July 26, 2018, they filed a motion requesting that the trial court set a hearing on their motion for a change of venue "within the next 14 days to ensure the case can proceed as expeditiously as possible within the proper venue."

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On August 7, 2018, the trial court entered an order that states:

"The Court has before it [Nationwide and Hartford's] Motion to Transfer Venue. ... The Court will hear the Motion to Transfer Venue on October 26, 2018, at 10:30 a.m. ... [The Hopkinses'] counsel shall file their response in opposition prior to the hearing.

"The Court also has before it [Nationwide and Hartford's] Motion to Continue the October 15, 2018, trial setting. The Court takes full notice that [Nationwide and Hartford] have repeatedly engaged in efforts to delay the ultimate outcome of this case. Despite the delays and because of the agreement of the parties, the Court will continue the October 15, 2018, trial setting to November 13, 2018.

"Pre-Trial conference is set on October 26, 2018, at 10:30 a.m. ... The Court will hear all pending motions, and any new motions filed prior to. The Court has allocated half a day to hear the Pre-Trial and all pending motions.

"Dispositive Motions deadline has been set numerous times. The new deadline is September 28, 2018. The responding party shall file their response by October 19, 2018.

"The parties are ORDERED to conduct mediation prior to the date of the Pre-Trial Conference hearing date. The parties should agree upon a mediator and report to the Court by August 20, 2018, the name of the mediator. Should the parties be unable to agree upon a mediator, the Court will appoint a mediator."

(Capitalization in original.)

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On August 10, 2018, Nationwide and Hartford filed a motion requesting that the trial court reconsider the scheduled day for the hearing on their motion for a change of venue and that it set the motion for a change of venue for a hearing to be held "within seven days." Nationwide and Hartford noted that October 26, 2018, was "only 18 days before trial and that, "[m]eanwhile, the Court's Order requires the parties to complete discovery, brief dispositive motions, and conduct mediation before the threshold issue of venue is decided."

On August 17, 2018, the Hopkinses filed a response to the motion to reconsider. The response states, in part:

"[The Hopkinses] agree that this Court should rule on the pending Motion to Transfer prior to issuing any Orders on other motions. However it should be noted, no other motions are pending. Additionally, all discovery has been completed in conformity with prior Orders of the Court over the last 800 days."

On August 22, 2018, the trial court entered an order confirming the October 26, 2018, hearing date and stating that Nationwide and Hartford should be prepared to discuss "the issue of waiver." The order further clarified the status of the case by noting (1) that the current trial setting was not the first, (2) that no motion other than the motion for a

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change of venue was pending, and (3) that, "[g]iven the length of this case, most if not all discovery should be complete."

Based on the foregoing, the trial court specifically indicated that it was prepared to rule on the motion for a change of venue sufficiently in advance of the November 13, 2018, trial setting. See, e.g., *Tomlin v. State*, 909 So. 2d 213, 233 (Ala. Crim. App. 2002)) ("The trial court has great discretion in determining matters of court scheduling and court procedures."). There is no evidence in the record indicating that the trial court was attempting to delay its ruling or defer ruling until the eve of trial, so as to prejudice Nationwide and Hartford. And I do not believe Nationwide and Hartford have otherwise demonstrated that the trial court has exceeded its discretion by failing to set an earlier date for the hearing on the motion for a change of venue. In other words, they have not demonstrated a clear legal right to a hearing before October 26, 2018.

Also, the trial court's actions in *Ex parte International Paper Co.*, [Ms. 1170458, April 27, 2018] ___ So. 3d ___ (Ala. 2018), were different than the trial court's actions in the present case. First, in *International Paper*, there was no

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indication that the parties had substantially completed discovery when the motion to enforce an outbound forum-selection cause was filed. Second, in *International Paper*, the trial court conducted a hearing on the venue issue, and, instead of ruling on the motion to transfer, it specifically refused to issue a ruling and denied a motion to continue the trial. Neither of those circumstances is found in the present case. This Court specifically held that the trial court's error in *International Paper* was its refusal to timely rule on the venue issue after the court had conducted a hearing. ___ So. 3d at ___. The trial court in the present case has not yet held a hearing, and it has not refused to rule on the motion for a change of venue. In fact, the trial court was attempting to hold a hearing and rule on the motion when this Court, at Nationwide and Hartford's request, issued our September 28, 2018, order staying all further proceedings in the trial court. Further, the trial court in the present case specifically indicated its intention to rule on the motion for a change of venue before trial. As a result, the practical effect of this case is that this Court is ordering

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the trial court to do what it was attempting to do before we stayed it from acting at Nationwide and Hartford's request.

Shaw, J., concurs.