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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Ex parte Petway Olsen, LLC

PETITION FOR WRIT OF MANDAMUS

**(In re: Grelinda Lee and Linda Eubanks-Hill, as personal
representatives of the Estate of Camlyn Jacob Devon Lee,
deceased, et al.)**

v.

Valisha D. Cartwell et al.)

**(Jefferson Circuit Court, Bessemer Division
CV-17-900193)**

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WISE, Justice.

Petway Olsen, LLC, a law firm, petitions this Court for a writ of mandamus directing the Jefferson Circuit Court to set aside its order granting the motion filed by Mercedes-Benz USA, LLC ("MBUSA"), seeking to disqualify the firm from representing the plaintiffs in the underlying case and to enter an order allowing the firm to represent the plaintiffs.

Facts and Procedural History

On February 23, 2017, Valisha D. Cartwell was driving a 1998 Mercedes ML320. As Cartwell was pulling into a parking space in front a dental office operated by Vital Smiles Alabama, P.C., the vehicle suddenly accelerated and crashed into the front of the dental office, killing six-year-old Camlyn Jacob Devon Lee and injuring others.

On March 8, 2017, Grelinda Lee, as personal representative of the estate of Camlyn Jacob Devon Lee ("the estate"), sued Cartwell and Tiffany N. Dixon, the owner of the Mercedes ML320, and fictitiously named defendants, asserting a wrongful-death claim. On October 23,

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2017, Lee and additional plaintiffs Linda Eubanks-Hill, as co-personal representative of the estate; Linda Eubanks-Hill, individually and as the guardian and next friend of Ikinda Hill, a minor; and Amauri Amison (hereinafter collectively referred to as "the plaintiffs") filed a first amended complaint. In the first amended complaint, the plaintiffs added Cal-Mid Properties, L.P.; Brookhill Capital Resources, Inc.; Midfield Properties, LLC; and, Vital Smiles Alabama, P.C., as defendants, and asserted various claims against them.

On April 26, 2018, the plaintiffs filed a second amended complaint in which they added Mercedes-Benz U.S. International, Inc. ("MBUSI"), and MBUSA as defendants. In their second amended complaint, they alleged that, as Cartwell was parking on the day in question, the Mercedes ML320 "began to accelerate on its own, crashing into the Vital Smiles dental office." They further alleged:

"19. The subject Mercedes ML320 and its component parts were defective and unreasonably dangerous because the Mercedes ML320's accelerator was prone to cause the subject vehicle to accelerate to high rates of speed on its own causing the risk of collision.

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"20. At the aforesaid time and place, and for sometime prior thereto, MBUSI and MBUSA Defendants were engaged in the business of designing, manufacturing, testing, marketing, selling and/or distributing subject vehicles throughout the United States, including the State of Alabama, for use by the general public. MBUSI and MBUSA designed, manufactured, tested, marketed, distributed, and/or sold the subject vehicle.

"....

"22. The subject vehicle was not reasonably safe when used in a foreseeable manner. To the contrary, it was in a defective condition unreasonably dangerous to the human body when being so used. The subject vehicle's defects include the drive systems being prone to instances of unintended acceleration. The design of the subject vehicle was defective and unreasonably dangerous. The subject vehicle was also manufactured and assembled in a defective and unreasonably dangerous manner. The warnings and instruction accompanying the subject vehicle were also inadequate and also rendered them defective and unreasonably dangerous."

The plaintiffs asserted against MBUSA and MBUSI a claim under the Alabama Extended Manufacturer's Liability Doctrine and negligence and wantonness claims. Those claims were based on MBUSI's and MBUSA's designing, testing, manufacturing, marketing, and selling of the Mercedes ML320 involved in the accident. The second amended complaint was signed by D. Bruce Petway of Petway Olsen and included the names of

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other attorneys with different law firms who were also representing the plaintiffs.

On May 29, 2018, MBUSI and MBUSA filed their answers to the second amended complaint. Both MBUSI and MBUSA asserted as a defense that Petway Olsen was "disqualified [from representing the plaintiffs] because one of its members [was] a former in-house attorney and general counsel for MBUSI."

On June 11, 2018, MBUSI filed a motion to disqualify Petway Olsen from representing the plaintiffs. Specifically, it asserted that Janet Olsen was a member of Petway Olsen and that she was married to Bruce Petway; that Olsen was former general counsel for MBUSI; and that, in that capacity, Olsen

"was privy to vast amounts of MBUSI's privileged, proprietary, and confidential information that could be used to MBUSI's extreme disadvantage in the instant case, and there is a substantial relationship between Plaintiff's [sic] action against MBUSI and Olsen's former representation."

In support of its motion, MBUSI attached an affidavit from Richard J. Clementz, who was then general counsel for MBUSI. Bruce Petway, on

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behalf of Petway Olsen, filed a response to MBUSI's motion to disqualify and attached an affidavit from Olsen in support of that response.

The trial court conducted a hearing on MBUSI's motion to disqualify. It continued the hearing to allow the parties to obtain an ethics opinion from the Alabama State Bar regarding Petway Olsen's representation of the plaintiffs in this case. The parties attempted to obtain an opinion from the Alabama State Bar, but the Alabama State Bar responded that it would not provide a written opinion in response to the inquiry.

On August 30, 2019, the plaintiffs filed a motion to dismiss MBUSI from this case with prejudice, which the trial court granted on that same day. On November 20, 2019, MBUSA filed a motion to disqualify Petway Olsen. In support of its motion, MBUSA attached a second affidavit from Clementz and an affidavit from Audra D. Dial, assistant general counsel for MBUSA.

Bruce Petway, on behalf of Petway Olsen, filed a response to MBUSA's motion to disqualify. In his response, Petway asserted that MBUSA had waived its right to seek disqualification of Petway Olsen because its motion was not timely. He also asserted that MBUSA had

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failed to satisfy its burden of establishing that Petway Olsen should be disqualified. In support of his response, Petway filed a new affidavit from Olsen.

MBUSA filed a reply to Petway's response. In support, MBUSA attached an affidavit from William G. Ross, a professor at Cumberland School of Law at Samford University. In that affidavit, Ross stated:

"[I]t is my opinion that the court should disqualify plaintiffs' counsel because the representation of the plaintiffs by Ms. Olsen and [Petway Olsen] would violate Rule 1.9 of the Alabama Rules of Professional Conduct insofar as this lawsuit is 'substantially related' to matters upon which Ms. Olsen worked while she was in-house counsel for Mercedes-Benz U.S. International, Inc. (MBUSI) between 1996 and 2002 and general counsel for MBUSI from 2002 until 2004. It is also my opinion that Rule 1.10[, Ala. R. Prof. Cond.,] compels disqualification of [Petway Olsen] because Ms. Olsen's disqualification is imputed to the law firm in which she is a partner."

On January 3, 2020, after conducting a hearing, the trial court granted MBUSA's motion to disqualify Petway Olsen. Petway Olsen then filed this petition for a writ of mandamus.

Standard of Review

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"A petition for the writ of mandamus is a proper method for reviewing a motion to disqualify an attorney. Ex parte Central States Health & Life Co., 594 So. 2d 80 (Ala. 1992).

"The writ of mandamus is an extraordinary writ and will be issued only when the petitioner has shown a clear, indisputable right to the relief sought."

Ex parte Intergraph Corp., 670 So. 2d 858, 860 (Ala. 1995).

Discussion

In its petition, Petway Olsen argues that MBUSA did not timely file its motion to disqualify and that it, therefore, waived its right to seek Petway Olsen's disqualification in this case.

In Intergraph, this Court addressed the timeliness of a motion to disqualify. In that case, Randolph C. Marks, d/b/a Historic Architectural Resource, sued Intergraph Corporation on December 17, 1993. When Marks filed his complaint, he was represented by Crowson Partners, P.C. Timothy Crowson, who was the senior partner in that firm, had been employed by Intergraph as in-house legal counsel approximately seven years before he established the firm. Marks also sought to retain Donovan Conwell, a Florida attorney, as legal counsel in his lawsuit against Intergraph. In March 1994, Crowson moved for the pro hac vice

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admission of Conwell. He also filed an amended complaint and requested documents and answers to interrogatories from Intergraph. During a June 6, 1994, meeting of the trial judge, Crowson, and the attorneys for Intergraph regarding discovery, Intergraph did not object to the court's admitting Conwell as additional counsel for Marks. Diane Hargrave, then an employee of Intergraph's legal department, was also present at the meeting. Hargrave had worked for Crowson when he was in-house counsel at Intergraph. However, Hargrave did not object to Crowson's or Conwell's involvement in the case. On June 13, 1994, Intergraph filed a motion to disqualify both Crowson and Conwell. The trial court disqualified Crowson, but allowed Conwell to continue representing Marks. Intergraph filed a petition for a writ of mandamus asking this Court to order that Conwell also be disqualified. Marks filed a petition for a writ of mandamus asking this Court to order that both Crowson and Conwell be allowed to represent him. In his petition, Marks argued that Intergraph had waived its right to object to their representation because it had failed to do so in a timely manner. This Court addressed this issue as follows:

"[T]here is a question whether the former client has waived the right to disqualify the former attorney. See Hall v. Hall, 421 So. 2d 1270 (Ala. Civ. App. 1982); Cox v. American Cast Iron Pipe Co., 847 F.2d 725 (11th Cir. 1988). Prior Alabama case law indicates that laches may bar a disqualification motion if the delay in filing the motion was intentional.

" Hall arose out of a divorce case. The wife had been represented in an uncontested divorce by the attorney now representing her ex-husband in a child custody modification hearing. The Court of Civil Appeals held that the former client had waived her right to object to her attorney's subsequent representation of her former husband by not objecting until after the trial.

"In Cox, the defendant in a sexual discrimination case objected to an attorney who had previously represented it but who had later formed a partnership with another attorney now representing the plaintiffs on appeal in the sexual discrimination action. The defendant was held to have waived the right to object because it had not objected earlier when it was informed of the proposed partnership, but had waited 18 months before filing the motion to disqualify. Additionally, the defendant had not objected when the newly formed law partnership represented other plaintiffs in a different sexual discrimination action against that defendant.

"We hold that the trial court erred in disqualifying Crowson. One should file a motion to disqualify within a reasonable time after discovering the facts constituting the basis for the motion. It is undisputed that Intergraph knew when Marks filed his action that Crowson had previously worked for Intergraph as in-house counsel. Intergraph should have objected to Crowson's involvement at the very beginning, instead of allowing the case to proceed for six months while

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discovery was ongoing and the case was being prepared for trial."

Intergraph, 670 So. 2d at 860 (emphasis added).

In this case, the plaintiffs filed their second amended complaint adding MBUSI and MBUSA on April 26, 2018. The plaintiffs were represented by Petway at that time. MBUSA and MBUSI filed their answers on May 29, 2018. In the answers, MBUSA and MBUSI asserted, as a defense, that Petway Olsen was disqualified because one of its members was a former in-house attorney and general counsel for MBUSI. On June 11, 2018, MBUSI filed a motion to disqualify Petway Olsen. In his affidavit submitted in support of that motion, Clementz stated:

"Ms. Olsen also assisted another Defendant in this case -- Mercedes Benz USA, LLC (MBUSA) -- in responding to discovery and formulating litigation defense strategies in product liability suits involving Mercedes-Benz M-Class vehicles."

Based on the foregoing, MBUSA knew of the possible grounds for disqualification at the time it filed its answer to the second amended complaint or, at the very latest, at the time MBUSI filed its motion to disqualify. However, MBUSA did not join MBUSI's motion to disqualify

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or file its own motion to disqualify at that time. Rather, it waited approximately 17 to 18 months to file its motion to disqualify. Thus, MBUSA did not file its motion to disqualify within a reasonable time after discovering the facts constituting the basis for that motion. Additionally, in its response to MBUSA's motion to disqualify, Bruce Petway asserted that

"[t]he Plaintiffs relied on MBUSA's absence of any objection to Petway [Olsen] representing the Plaintiffs in dismissing MBUSI, believing this would satisfy all concerns that had been raised by any Party to this action."

Therefore, Petway argued, the plaintiffs would be unduly prejudiced if MBUSA's untimely motion to disqualify was granted.

We conclude that MBUSA did not timely file its motion to disqualify Petway Olsen from representing the plaintiffs. Therefore, it waived any objection to Petway Olsen's representation of the plaintiffs. Accordingly, the trial court erred when it granted MBUSA's motion to disqualify Petway Olsen.

Conclusion

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The trial court erred when it granted MBUSA's motion to disqualify Petway Olsen from representing the plaintiffs. Accordingly, we grant Petway Olsen's petition for writ of mandamus and direct the trial court to vacate its order granting MBUSA's motion to disqualify and to permit Petway Olsen to represent the plaintiffs.¹

PETITION GRANTED; WRIT ISSUED.

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

Sellers, J., concurs in the result.

Bolin and Mitchell, JJ., dissent.

¹Based on our holding that MBUSA waived its objection to Petway Olsen's representation of the plaintiffs, we pretermitt discussion of the remaining arguments raised by the parties.

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MITCHELL, Justice (dissenting).

The majority concludes that Mercedes-Benz USA, LLC ("MBUSA"), waived its right to seek the disqualification of Petway Olsen, LLC, by failing to file a timely motion asserting that Petway Olsen should be disqualified. See, e.g., Ex parte Intergraph Corp., 670 So. 2d 858, 860 (Ala. 1995) (recognizing that "laches may bar a disqualification motion if the delay in filing the motion was intentional"). The majority therefore grants Petway Olsen's petition and issues a writ directing the trial court to vacate its order disqualifying Petway Olsen from representing the plaintiffs in their wrongful-death action against MBUSA and the other defendants. I respectfully dissent.

This Court has recently confirmed that "rulings on a motion to disqualify counsel are within the discretion of the trial court." Ex parte Terminix Int'l Co., LP, [Ms. 1180863, October 30, 2020] ___ So. 3d ___, ___ (Ala. 2020); see also Ex parte Utilities Bd. of City of Tuskegee, 274 So. 3d 229, 232 (Ala. 2018) (explaining that a trial court has the authority and the discretion to disqualify counsel for violating the Alabama Rules of Professional Conduct). Moreover, we have repeatedly held that the

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applicability of the doctrine of laches is dependent upon the particular facts and circumstances of each case and that the decision whether to apply the doctrine lies squarely within the sound discretion of the trial court. See, e.g., L.B. Whitfield, III Family LLC v. Whitfield, 150 So. 3d 171, 180 (Ala. 2014). Applying these principles here, I believe we should defer to the decision of the trial court, which has overseen this litigation for almost three years and is in the best position to determine whether MBUSA's motion to disqualify Petway Olsen was filed within a reasonable time. The materials before us establish the following timeline:

April 26, 2018: MBUSA and its corporate sibling Mercedes-Benz U.S. International, Inc. ("MBUSI") are added as defendants in this action.

May 29, 2018: Both MBUSA and MBUSI file answers in which they assert that "Petway Olsen, LLC is disqualified because one of its members is a former in-house attorney and general counsel for MBUSI."

June 11, 2018: MBUSI files a motion to disqualify Petway Olsen.

July 17, 2018: After holding a hearing on MBUSI's motion, the trial court stays all discovery so that the parties can seek an ethics opinion from the Alabama State Bar.

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August 30, 2019: The plaintiffs move to dismiss MBUSI with prejudice, and the trial court grants that motion.

September 10, 2019: Nearly 14 months after discovery was stayed, the Bar informs the parties that it will not issue a formal ethics opinion addressing Petway Olsen's involvement.

November 20, 2019: MBUSA files its own motion to disqualify Petway Olsen.

Thus, MBUSA first made known its position that Petway Olsen should be disqualified in the initial pleading it filed after being added as a defendant. Although it did not file its own motion to disqualify for approximately another 18 months, the case was stayed for almost that entire time so that MBUSI's motion to disqualify could be decided. MBUSA states in its response to the plaintiffs' petition that it did not file its own motion to disqualify at the same time as MBUSI because it "reasonably expected that a ruling on MBUSI's motion to disqualify would resolve the conflict issue -- [Petway Olsen] would or would not be disqualified from representing [the] plaintiffs." MBUSA's response, p. 9. The trial court apparently accepted MBUSA's asserted reason for the delay. I cannot conclude that it exceeded its discretion in doing so.

Bolin, J., concurs.