Rel: September 3, 2021

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1200452

Ex parte Deborah Hillard and Holland Hillard Warr

PETITION FOR WRIT OF MANDAMUS

(In re: Deborah Hillard

v.

Rik Tozzi)

(Jefferson Circuit Court, CV-16-312)

SELLERS, Justice.

Deborah Hillard and Holland Hillard Warr jointly petitioned this Court for a writ of mandamus, raising numerous issues. We ordered

answers and briefs on one issue raised by Warr: whether the Jefferson Circuit Court erred in denying her summary-judgment motion on the counterclaim brought against her by her former husband, Rik Tozzi, which Warr asserts is barred by principles of res judicata. Warr specifically requests that we issue the writ of mandamus directing the circuit court to grant her summary-judgment motion. We deny the petition as to that issue. Moreover, because, in our order of April 28, 2021, we ordered answers and briefs as to only that one issue, we implicitly denied the petition as to the other issues raised by Hillard and Warr. See Ex parte Carson, 945 So. 2d 448, 449 (Ala. 2006).

Warr and Tozzi married in July 2011. Shortly before their marriage, Warr's house was destroyed by a tornado. Warr used insurance proceeds from the loss to purchase and begin remodeling a house in which she and Tozzi planned to live. It appears that title to the new house was vested solely in Warr's name.

Apparently the insurance proceeds were insufficient to promptly complete the remodeling, and, in September 2012, Warr's mother, Deborah Hillard, sent Tozzi an email indicating that Hillard was going to

provide $140,000 to "tide [Warr] over." Attached to the email was a draft promissory note providing that the funds were to be repaid to Hillard within 90 days. Although the original draft of the promissory note identified both Warr and Tozzi as borrowers, Tozzi removed Warr's name and accompanying signature line and signed his name to the promissory note as the sole borrower. According to Tozzi, Hillard represented to him when she sent the draft promissory note that she needed the promissory note executed immediately for tax purposes, that she had been unable to locate Warr to obtain her signature, that Tozzi would not personally have to repay the loan, and that the loaned funds would be repaid to Hillard from the proceeds from the eventual sale of the house.

Thereafter, Hillard arranged for $140,000 to be transferred from a trust, of which Hillard was a beneficiary, to a bank account held jointly by Hillard and Warr. The money was then transferred to a different bank account also held jointly by Hillard and Warr, which the parties have referred to as the "house account." Funds in the house account were used to pay for the remodeling of Warr's new house. Tozzi had no ownership interest in either of the referenced bank accounts or the house.

In February 2014, Tozzi initiated divorce proceedings in the Tuscaloosa Circuit Court. During those proceedings, Tozzi asserted that he should not be required to repay the money allegedly due Hillard pursuant to the promissory note because the funds had been used solely to improve Warr's house and because he had contributed his own funds toward those improvements. He asked the domestic-relations court to treat the funds allegedly due under the promissory note as a joint marital debt and to order them to be repaid from the proceeds from the sale of Warr's house. The domestic-relations court, however, declined Tozzi's request and, in April 2019, entered a divorce judgment declaring in part that "each party shall be liable for any debts in his or her own name." It appears that that portion of the divorce judgment was based on a prenuptial agreement entered into by Tozzi and Warr, which made each party responsible for his or her personal debts.

During the pendency of the divorce proceedings, Hillard initiated a collections action against Tozzi in the Tuscaloosa Circuit Court. She stated causes of action alleging breach of the promissory note and money had and received. At some point, Hillard's action was transferred to the

Jefferson Circuit Court where, in December 2016, Tozzi filed a counterclaim against Hillard. He also added Warr as an additional counterclaim defendant at that time.

Pursuant to his counterclaim, Tozzi alleged that Hillard had fraudulently induced Tozzi to execute the promissory note by misrepresenting that he would not have to repay the money loaned, by misrepresenting that Hillard needed a promissory note only for tax purposes, and by misrepresenting that Hillard had been unable to locate Warr to obtain her signature on the promissory note. Tozzi also asserted that Hillard had fraudulently suppressed the fact that the money would be deposited into a bank account held jointly by Hillard and Warr. Additionally, Tozzi alleged that Warr had conspired with Hillard to fraudulently induce Tozzi to sign the promissory note as the sole borrower and had fraudulently suppressed the fact that the money was deposited into a bank account held by Warr and Hillard.[1]

[1]Tozzi later amended his counterclaim to allege that Hillard had been unjustly enriched because the loaned funds had been deposited in her own bank account.

Warr moved for a summary judgment on Tozzi's counterclaim, arguing in part that it is barred by principles of res judicata based on the earlier divorce proceedings. The trial court denied Warr's motion, and she timely filed the instant petition for a writ of mandamus.

> "A petition for a writ of mandamus is an appropriate method by which to seek this Court's review of the denial of a motion to dismiss or for a summary judgment predicated on the doctrine of res judicata. Ex parte LCS Inc., 12 So. 3d 55, 56 (Ala. 2008) (citing Ex parte Sears, Roebuck & Co., 895 So. 2d 265 (Ala. 2004)). See also Ex parte Jefferson Cnty., 656 So. 2d 382 (Ala. 1995).
>
> > " 'The standard governing our review of an issue presented in a petition for the writ of mandamus is well established:
> >
> > > " ' "[M]andamus 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 Cupps, 782 So. 2d 772, 774-75 (Ala. 2000) (quoting Ex parte Edgar, 543 So. 2d 682, 684 (Ala. 1989))."

Ex parte Webber, 157 So. 3d 887, 891 (Ala. 2014).

"Res judicata and collateral estoppel are two closely related, judicially created doctrines that preclude the relitigation of matters that have been previously adjudicated or, in the case of res judicata, that could have been adjudicated in a prior action.

> " 'The doctrine of res judicata, while actually embodying two basic concepts, usually refers to what commentators label "claim preclusion," while collateral estoppel ... refers to "issue preclusion," which is a subset of the broader res judicata doctrine.'

"Little v. Pizza Wagon, Inc., 432 So. 2d 1269, 1272 (Ala. 1983) (Jones, J., concurring specially). See also McNeely v. Spry Funeral Home of Athens, Inc., 724 So. 2d 534, 537 n.1 (Ala. Civ. App. 1998). In Hughes v. Martin, 533 So. 2d 188 (Ala. 1988), this Court explained the rationale behind the doctrine of res judicata:

> " 'Res judicata is a broad, judicially developed doctrine, which rests upon the ground that public policy, and the interest of the litigants alike, mandate that there be an end to litigation; that those who have contested an issue shall be bound by the ruling of the court; and that issues once tried shall be considered forever settled between those same parties and their privies.'

"533 So. 2d at 190. The elements of res judicata are

> " '(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions.'

> "Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998). 'If those four elements are present, then any claim that was, or that could have been, adjudicated in the prior action is barred from further litigation.' 723 So. 2d at 636. Res judicata, therefore, bars a party from asserting in a subsequent action a claim that it has already had an opportunity to litigate in a previous action."

Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d 507, 516-17 (Ala. 2002).

Warr has not shown that, in the divorce action, Tozzi asserted or fully litigated the allegedly fraudulent acts and omissions surrounding the advent of the promissory note. It does not appear that Tozzi's tort-based assertions in the present case, namely, that Warr suppressed material information and participated in a conspiracy to fraudulently induce him to sign the promissory note as the sole borrower, were made in the divorce action or addressed in the divorce judgment, which made no specific mention of the promissory note. Even so, Warr asserts that the doctrine of res judicata precludes a party from litigating not only matters that have been previously adjudicated, but also matters that could have been adjudicated in a prior action. This Court does not doubt that the domestic-relations court could have taken into account Tozzi's fraud and

conspiracy allegations, had he made them, in exercising its discretion in dividing the parties' marital property and debt. See Coleman v. Coleman, 566 So. 2d 482, 485 (Ala. 1990) (indicating that, in a divorce action, the trial court "can consider the conduct of the parties during the marriage when awarding alimony and dividing the marital property"). According to Warr, because Tozzi could have made his fraud and conspiracy allegations in the divorce action, he is barred from raising them as tort claims in the present case.

Warr bears the burden in seeking a writ of mandamus. Ex parte Glover, 801 So. 2d 1, 6 (Ala. 2001) ("The petitioner bears the burden of proving each of [the] elements [establishing entitlement to mandamus relief] before the writ will issue."). In her petition, Warr does not provide meaningful discussion of precedent dealing specifically with the ability of a party in a divorce action to pursue tort claims in a separate action against the other party to the divorce action. For example, in Coleman, supra, this Court held that a former wife was barred from suing her former husband in tort based on an allegation that he had infected her with a sexually transmitted disease during their marriage because she

had entered into a settlement agreement in connection with previous divorce proceedings, which was incorporated into the parties' final divorce judgment, that provided that each party released the other from "any and all claims and demands." 566 So. 2d at 483. The Court in Coleman noted as follows regarding the state of the law with respect to a party's ability to sue his or her former spouse based on acts or omissions that occurred during the marriage:

> "The present state of the law in Alabama concerning the issue of whether a wife is barred from bringing a tort action against her former husband for acts that occurred during their marriage is gleaned from a well-established line of cases. See Ex parte Harrington, 450 So. 2d 99 (Ala. 1984); Jackson v. Hall, 460 So. 2d 1290 (Ala. 1984); Weil v. Lammon, 503 So. 2d 830 (Ala. 1987); and Smith v. Smith, 530 So. 2d 1389 (Ala. 1988).
>
> "In Ex parte Harrington, 450 So. 2d 99 (Ala. 1984), we permitted a wife to file a tort action for assault and battery in one county, even though she had filed a divorce complaint in another county. In her tort action she alleged the same operative facts concerning the violence perpetrated on her by her former husband that she had alleged in her divorce action. The tort action was filed before a final judgment was entered in the divorce case, there was no settlement agreement of the parties in the case, and the issue of assault and battery had not been completely litigated.

"In Jackson v. Hall, 460 So. 2d 1290 (Ala. 1984), we did not allow a wife to pursue a tort action for assault and battery against her former husband. Prior to filing her tort action, she had entered into a settlement agreement in the divorce action in full and final settlement of 'all property matters and other matters between the parties.' In Jackson, we said:

> " 'The question here, however, is whether or not that action is barred under the material before the trial court on the summary judgment motion. The answer to this question depends upon the construction of the agreement of the parties and the effect of the divorce decree.
>
> " '....
>
> " 'This agreement was merged into the divorce decree and thus became a part of that decree, final and not subject to modification. Thus, the question of liability for a pre-existing cause of action for an assault by one spouse against the other was decided in the divorce action.'

"460 So. 2d at 1292 (citations omitted).

"In Weil v. Lammon, 503 So. 2d 830 (Ala. 1987), we did not allow a wife to pursue a tort action for fraud and misrepresentation against her former husband. We noted that the wife had asserted the alleged fraud and misrepresentation in support of her claim for alimony, and we held that the wife was barred by reason of the principle of res judicata. We expressly noted that Weil did not overrule Ex parte Harrington, but left open a field of operation where there had not been a settlement of all claims by the parties, or a claim

> fully litigated in a divorce case that had proceeded to a final judgment.
>
> "Finally, in Smith v. Smith, 530 So. 2d 1389 (Ala. 1988), we did not allow a wife to pursue a tort action for assault and battery against her former husband. The tort action was filed before a final judgment in the divorce case was entered. However, the parties had entered into extensive settlement negotiations, and the trial judge was aware of the fact that the former husband was attempting to provide for his former wife's medical expenses. In light of the circumstances of the case, we held that the former wife was estopped from relitigating matters that were settled in the divorce action. 530 So. 2d at 1391.
>
> "Those cases, read together, do not establish a general rule that a divorce action routinely precludes a former spouse from suing the other in tort based upon acts that occurred during the marriage. Rather, each case must be examined on its own facts and circumstances."

566 So. 2d at 484-85. See also Ex parte Howle, 776 So. 2d 133 (Ala. 2000) (discussing Harrington, Jackson, Weil, Smith, and Coleman and concluding that a former wife was precluded from pursuing a tort claim alleging assault and battery against her former husband because she had expressly raised the particular instance of assault and battery in support of her claim for alimony in the divorce action, had been awarded compensation by the domestic-relations court for medical expenses

incurred because of the assault and battery, and had accepted payment of that award by the former husband).

In a special concurrence in Weil v. Lammon, 503 So. 2d 830 (Ala. 1987), Justice Adams noted his "opinion that actions for divorce are sui generis" and that "[t]o rule that in every divorce case a party's cause of action must be litigated in that proceeding, of necessity, would deny the right to trial by jury." 503 So. 2d at 832 (Adams, J., concurring specially). In Osborne v. Osborne, 216 So. 3d 1237 (Ala. Civ. App. 2016), the Court of Civil Appeals held that a former wife was not barred from pursuing a tort action alleging assault and battery against her former husband because, even though she had presented evidence of the assault and battery in a prior divorce action, she had not sought damages in the divorce action aimed at compensating her for injuries she had suffered as a result of the assault and battery, the assault and battery claim had not been "fully litigated in the divorce action," and the domestic-relations court had not awarded the former wife compensation for her injuries. The court in Osborne also pointed to Justice Adams's special concurrence in Weil regarding the right to a jury trial in tort actions and concluded that

"a divorcing spouse should not be required to include tort claims in a divorce action." 216 So. 3d at 1246. See also Abbott v. Williams, 888 F.2d 1550, 1554 (11th Cir. 1989) (concluding that "Alabama precedent does not establish a bright-line rule that a divorce judgment automatically precludes one former spouse from suing the other in tort based upon conduct which occurred during the marriage," that "each such case [must] be examined on its own facts and circumstances," and that "a case is within the 'field of operation' left open by [Ex parte] Harrington[, 450 So. 2d 99 (Ala. 1984),] if a settlement agreement, merged into a final divorce judgment, did not cover the tort claim, or if all elements of the tort claim were not fully litigated and decided in the divorce action, even though the divorce action has proceeded to final judgment").

Thus, Alabama has a line of precedent dealing specifically with whether a former spouse can pursue tort claims against his or her former spouse based on acts or omissions that occurred during the marriage. In her petition for a writ of mandamus, Warr does not discuss any of that precedent. The only arguably relevant divorce-related case Warr cites in her petition is Turenne v. Turenne, 884 So. 2d 844, 849 (Ala. 2003), which

she quotes only for the proposition that "fraud actions ... are within the ancillary jurisdiction of the domestic relations division" of a circuit court. But she provides no discussion of the details of Turenne, which involved assertions of fraudulent inducement and suppression in connection with a divorce settlement agreement that had been incorporated into a divorce judgment.

In her reply brief, Warr acknowledges Weil, 503 So. 2d at 832, which she quotes for the proposition that "there is no reason why all known claims between spouses in a divorce action should not be settled in that litigation," and Ex parte Howle, 776 So. 2d at 135, which she quotes for the proposition that "[t]he first three elements [of the doctrine of res judicata] are clearly satisfied -- the divorce judgment is a prior judgment on the merits rendered by a court of competent jurisdiction in an action between the same parties." But Warr does not provide meaningful discussion of the precedent she cites or the other relevant precedent noted above. She has not established that the instant case is controlled by opinions holding that a former spouse was barred from pursuing a tort claim against the other former spouse based on conduct that occurred

before a divorce. For example, she has not shown that the allegedly tortious acts and omissions surrounding the execution and delivery of the promissory note were fully litigated in the divorce action or that Tozzi's tort allegations were resolved by a settlement agreement entered in the divorce action or by the final divorce judgment.

The writ of mandamus is a drastic and extraordinary remedy. Webber, 157 So. 3d at 891. It should be issued only where the petitioner has demonstrated a clear legal right to the relief sought below. Id. Because Warr has not demonstrated a clear legal right to a judgment in her favor on Tozzi's counterclaim based on principles of res judicata, we deny the petition.

PETITION DENIED.

Parker, C.J., and Wise, Bryan, Stewart, and Mitchell, JJ., concur.

Bolin, Shaw, and Mendheim, JJ., concur in the result.