Rel: November 19, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200470

Ex parte Endo Health Solutions Inc. et al.

PETITION FOR WRIT OF MANDAMUS

(In re: The DCH Health Care Authority et al.

v.

Purdue Pharma L.P. et al.)

(Conecuh Circuit Court, CV-19-7)

SELLERS, Justice.

Several entities that own or operate hospitals in Alabama ("the plaintiffs") commenced an action in the Conecuh Circuit Court ("the trial

court") against manufacturers of prescription opioid medications, distributors of those medications, and retail pharmacies ("the defendants"), alleging that the defendants' marketing or selling of the medications resulted in an epidemic of opioid abuse in Alabama.[1] The

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[1]According to the complaint filed in the trial court, the plaintiffs, who are the respondents in this mandamus proceeding, are the DCH Health Care Authority; the Healthcare Authority for Baptist Health, an affiliate of UAB Health System; Medical West Hospital Authority, an affiliate of UAB Health System; Evergreen Medical Center, LLC; Gilliard Health Services, Inc.; Crestwood Healthcare, L.P.; Triad of Alabama, LLC; QHG of Enterprise, Inc.; Affinity Hospital, LLC; Gadsden Regional Medical Center, LLC; Foley Hospital Corporation; the Health Care Authority of Clarke County; BBH PBMC, LLC; BBH, WBMC, LLC; BBH SBMC, LLC; BBH CBMC, LLC; and BBH BMC, LLC.

The defendants identified as petitioners in this mandamus proceeding are Endo Health Solutions Inc.; Endo Pharmaceuticals Inc.; Par Pharmaceutical, Inc.; Par Pharmaceutical Companies, Inc.; Abbott Laboratories; Abbott Laboratories, Inc.; Allergan Finance, LLC; Allergan Sales, LLC; AmerisourceBergen Drug Corporation; Amneal Pharmaceuticals LLC; Anda, Inc.; Assertio Therapeutics, Inc., f/k/a Depomed, Inc.; Cardinal Health, Inc.; CVS Pharmacy, Inc.; CVS Indiana, L.L.C.; Johnson & Johnson; Janssen Pharmaceuticals, Inc.; Kroger Co.; Kroger Limited Partnership, II; Noramco, Inc.; Rite Aid of Alabama, Inc.; Rite Aid of Maryland, Inc.; Henry Schein, Inc.; H.D. Smith, LLC, f/k/a H.D. Smith Wholesale Drug Co.; Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Watson Laboratories, Inc.; Actavis LLC; Actavis Pharma, Inc.; Walgreen Co.; Walgreen Eastern Co., Inc.; Walmart Inc.; and Wal-Mart Stores East, LP.

plaintiffs sought to recover unreimbursed medical expenses incurred in treating individuals with opioid-related medical conditions. Among other theories of liability, the plaintiffs asserted that the defendants had created a public nuisance in the form of the epidemic.

The trial court entered a case-management order directing the parties to try each of the plaintiffs' causes of action separately. The public-nuisance claim is to be tried first and is itself to be bifurcated into two separate trials. The first trial on the public-nuisance claim is to involve "liability," and the second trial is to involve "special damage." The defendants, asserting that the trial court had erred in bifurcating the public-nuisance claim, petitioned this Court for a writ of mandamus directing the trial court to vacate the relevant portion of the case-management order. We grant the petition and issue the writ.[2]

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[2]The defendants' mandamus petition also challenges the portion of the case-management order directing the parties to try each of the plaintiffs' causes of action separately. This Court, however, by a separate order issued on July 19, 2021, summarily denied all aspects of the mandamus petition other than the portion directed at bifurcation of the public-nuisance claim.

> "Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. Generally, a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name of the state. A private nuisance gives a right of action to the person injured."

§ 6-5-121, Ala. Code 1975 (emphasis added). However, "[i]f a public nuisance causes a special damage to an individual in which the public does not participate, such special damage gives a right of action." § 6-5-123, Ala. Code 1975. Thus, a nuisance that can be considered public in nature can nevertheless be the basis of a cause of action brought by an individual plaintiff if the plaintiff incurs " 'special damage' that is different in 'kind and degree from [the damage] suffered by the public in general.' City of Birmingham v. City of Fairfield, 375 So. 2d 438, 441 (Ala. 1979); Ala. Code 1975 § 6-5-123." Russell Corp. v. Sullivan, 790 So. 2d 940, 951 (Ala. 2001). See also First Ave. Coal & Lumber Co. v. Johnson, 171 Ala. 470, 475, 54 So. 598, 600 (1911) ("A nuisance may be at the same time both of a public and of a private character."). In their complaint, the plaintiffs asserted that they had "suffered a special injury, different from

that suffered by the public at large, by individual users [of the opioid medications] and by governmental entities, namely that Plaintiffs have provided uncompensated care for patients suffering from opioid-related conditions and incurred elevated operational costs."

The trial court's case-management order provides:

> "Pursuant to Rule 42(b)[, Ala. R. Civ. P.], the Court is scheduling as Track 1 claims by the plaintiffs under the public nuisance count of the complaint. To avoid unduly burdening the jury, this issue will be bifurcated and tried in two separate and distinct phases. On May 16, 2022, this matter is scheduled for a jury trial on the issue of the defendants' liability for public nuisance. Special damage claims caused by the public nuisance, if any, shall be set for a separate jury trial upon conclusion of the initial trial phase, if necessary. All other claims brought by the Plaintiffs are stayed pending resolution of the initial public nuisance trial."

After entry of the case-management order, the defendants timely filed their petition for a writ of mandamus.[3]

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[3]Before filing their mandamus petition, the defendants filed a motion requesting that the trial court reconsider and vacate the case-management order. There is no order before us on the motion to reconsider and vacate. However, after the mandamus petition was filed, the trial court entered another case-management order setting forth a discovery schedule with respect to the public-nuisance claim. The plaintiffs, in their brief to this Court, assert that the mandamus petition should be dismissed because the defendants did not supplement their

> " 'The standard governing our review of an issue presented in a petition for the writ of mandamus is well established:
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> > " ' "[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." '
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> "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). A petition for a writ of mandamus is an appropriate means of seeking review of an order calling for separate trials. Ex parte Brookwood Med. Ctr., 994 So. 2d 264, 268 (Ala. 2008); Ex parte Skelton, 459 So. 2d 825 (Ala. 1984).

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petition to challenge the latest case-management order. However, nothing in the latest case-management order alters the portion of the earlier case-management order directing that the public-nuisance claim be tried in separate phases. In fact, the latest case-management order notes that, pursuant to the earlier case-management order, "the [trial court] has scheduled a bifurcated trial on the Plaintiffs' public nuisance claim." That aspect of the earlier case-management order has not been superseded and is still controlling in the trial court.

The defendants describe the requirement that an individual prove "special damage" to obtain a remedy for an otherwise public nuisance as implicating the individual's "standing" to seek a remedy for the nuisance. And, because "[t]he question of standing implicates the subject-matter jurisdiction of the court," Bernals, Inc. v. Kessler-Greystone, LLC, 70 So. 3d 315, 319 (Ala. 2011), and because subject-matter jurisdiction has been described as a "threshold" issue, Moore v. City of Center Point, 319 So. 3d 1223, 1228 (Ala. 2020), the defendants assert that the plaintiffs should be required to establish first that they suffered special damage from the alleged public nuisance. Thus, they argue, the trial court erred in directing that the issue of special damage be tried after the issue of the defendants' "liability."

In support of their jurisdiction-based argument, the defendants point to Russell Corp. v. Sullivan, 790 So. 2d 940, 951 (Ala. 2001), which simply acknowledges that an individual who has incurred special damage can seek to remedy a nuisance that would otherwise be considered a purely public nuisance. Russell Corp. makes no mention of standing or subject-matter jurisdiction. The defendants also point to Sloss-Sheffield Steel &

Iron Co. v. Johnson, 147 Ala. 384, 386, 41 So. 907, 908 (1906), which states:

> "The general rule is that a private individual, who suffers no damage different from that sustained by the public at large, has no standing in court for the abatement of a public nuisance; but, if he sustains an individual or specific damage in addition to that suffered by the public, he may sue to have the same abated if the remedy at law is inadequate."

Although the Court in Sloss-Sheffield did state that an individual without special damage "has no standing in court for the abatement of a public nuisance," id., the opinion in that case makes no express mention of subject-matter jurisdiction. Sloss-Sheffield does not clearly hold that an individual who brings a public-nuisance action and alleges facts that are claimed to constitute special damage, but ultimately is unable to prove those facts, lacks standing and, thus, that the trial court never acquired subject-matter jurisdiction over the action. Russell Corp. and Sloss-Sheffield are the only cases cited in the mandamus petition in support of the defendants' assertion that the plaintiffs must prove special damage to

demonstrate the "standing" necessary for the trial court to acquire subject-matter jurisdiction over the public-nuisance claim.[4]

In Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013), this Court considered two trial-court rulings in separate ejectment actions commenced pursuant to § 6-6-280(b), Ala. Code 1975, which requires a plaintiff in such an action to establish that he or she "was possessed of the premises or has the legal title thereto." The Court held that arguments asserting that the plaintiffs had failed to establish that they had possession or legal title to the properties at issue did not

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[4]In their reply brief, the defendants cite Lower Commerce Insurance, Inc. v. Halliday, 636 So. 2d 430, 432 (Ala. Civ. App. 1994), which held that a plaintiff seeking to enjoin an alleged public nuisance had failed to allege and prove special damage and therefore "did not meet her burden to show that she ha[d] standing as an individual to maintain an action to enjoin a public nuisance." Like the other cases upon which the defendants rely, there was no mention of the trial court's subject-matter jurisdiction in Lower Commerce Insurance. Likewise, two unreported cases from federal district courts applying Alabama nuisance law, although they used the term "standing" when concluding that the plaintiffs did not incur special damage, did not discuss subject-matter jurisdiction. In any event, the opinions in those cases are not binding on this Court. The other opinions in cases cited by the defendants in their reply brief that refer to an individual's "standing" to pursue a public-nuisance claim were issued by courts in other jurisdictions, are not binding here, and did not involve public-nuisance actions under Alabama law.

implicate standing and subject-matter jurisdiction. Rather, this Court held, establishing possession or legal title was simply an element of the plaintiffs' ejectment claims. In other words, if the plaintiffs in BAC Home Loans had failed to demonstrate that they had possession or legal title, they did not "have a 'standing' problem" but, instead, "a 'failure to prove one's cause of action' problem." 159 So. 3d at 46. In so holding, the Court noted that, in past decisions, the Court had "been too 'loose' in its use of the term 'standing.' " Id. at 39. The Court indicated that the concept of standing, as it affects subject-matter jurisdiction, is generally relevant only in public-law cases as opposed to private-law cases:

> "[T]he concept [of standing] appears to have no necessary role to play in respect to private-law actions, which, unlike public-law cases (for example, a suit against the Secretary of Interior to construe and enforce an environmental regulation designed to protect wildlife), come with established elements that define an adversarial relationship and 'controversy' sufficient to justify judicial intervention. In private-law actions (e.g., a claim of negligence or, as here, a statutory claim for ejectment), if the elements are met, the plaintiff is entitled to judicial intervention; if they are not met, then the plaintiff is not entitled to judicial intervention."

Id. at 44. See also Ex parte Skelton, 275 So. 3d 144, 151 (Ala. 2018) ("[T]he doctrine of standing (particularly as a jurisdictional concept) has no application in this private-law case.").

The defendants, as the petitioners, bear the burden here. We are not convinced by their arguments that the special-damage requirement is a prerequisite to an individual's obtaining standing or the court's obtaining subject-matter jurisdiction rather than simply being one of the requirements necessary for an individual to state a valid claim seeking to remedy an alleged public nuisance. See BAC Home Loans, 159 So. 3d at 45 (noting that " '[t]he question whether the law recognizes the cause of action stated by a plaintiff is frequently transformed into inappropriate standing terms' " (quoting 13A Charles Alan Wright et al., Federal Practice & Procedure § 3531 (2008))). The defendants have not demonstrated that if the plaintiffs ultimately fail to prove that they have suffered special damage, then they lack standing, as opposed to simply having failed to prove an element of their claim. Id. at 46 (overruling precedent to the extent it held "that a plaintiff in an ejectment action lacks 'standing' if it cannot prove one of the elements of its claim (namely,

legal title or the right to possession of the property) and that the trial court in turn lacks subject-matter jurisdiction over that claim").[5]

The defendants assert that, even if the special-damage requirement does not implicate what they describe as "threshold" issues of standing and subject-matter jurisdiction, the trial court nevertheless erred in ordering separate trials on "liability" and "special damage" because, they assert, the two trials will involve significant overlapping issues and evidence. We agree.

The defendants assert that "injury is an essential element on the nuisance count" and that the plaintiffs therefore "will need to prove in the liability phase that they incurred uncompensated costs [of providing medical care] proximately caused by Defendants' alleged wrongful conduct." Petition at 21. They assert that doing so will require evidence demonstrating that unreimbursed medical costs were incurred by the plaintiffs as a result of their patients' use of opioid medications, evidence of the circumstances under which patients obtained the medications, and

[5]We are not tasked in this mandamus proceeding with determining whether the plaintiffs have indeed suffered special damage.

evidence demonstrating that the defendants' conduct caused the plaintiffs to incur the costs. In their reply brief, the defendants make a related assertion that, because a defendant is liable to an individual seeking to remedy a public nuisance only if the individual can show the existence of special damage, "any trial to adjudicate Defendants' alleged liability on the public nuisance claim would have to include an adjudication of all elements of that claim, including special damages." Defendants reply brief at 8. Regarding the second trial, which, according to the case-management order at issue, will involve "[s]pecial damage claims caused by the public nuisance," the defendants assert that the plaintiffs will again be required to prove that they incurred uncompensated costs of providing medical care. Thus, according to the defendants, the two trials will essentially require presentation of the same evidence to two different juries and will result in "having two different juries consider the same question." Petition at 18.

For their part, the plaintiffs appear to suggest that the first trial will involve only the issue whether the defendants created a public nuisance, while the second trial will involve whether the plaintiffs suffered special

damage as a result of that nuisance and, if so, the amount of their damages. Although statements made by the trial-court judge during the hearing on the defendants' motion to reconsider and vacate the case-management order, see note 3, supra, could be construed as offering some support for the plaintiffs' interpretation of that order, the actual language used in the order to describe the topic of the first trial -- namely, "the defendants' liability for public nuisance" -- is certainly broad enough to include the issue of special damage. See Black's Law Dictionary 1097 (11th ed. 2019) (defining "liability" as "[t]he quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment"). It is uncontested that, for an individual plaintiff to establish that a defendant is legally accountable to, or has legal responsibility to, the plaintiff for a public nuisance, the plaintiff must prove special damage. In other words, the parties agree that the existence of special damage is an element of liability. As the defendants assert, their "liability" depends on proof that their conduct proximately caused the plaintiffs to incur uncompensated costs in treating opioid-related medical conditions and that that damage

is different in kind and degree than the damage suffered by the general public.

This Court's precedent indicates that we should construe the trial court's order based on the literal meaning of its language. See Deutsche Bank Nat'l Tr. Co. v. Karr, 306 So. 3d 882, 888 (Ala. 2020) ("In interpreting the substance of [an] order, we must examine the language used in that order. 'Judgments and decrees are to be construed like other written instruments. Schwab v. Schwab, 255 Ala. 218, 50 So. 2d 435 [(1951)]; Johnson v. Harrison, 272 Ala. 210, 130 So. 2d 35 [(1961)]. The legal effect must be declared in the light of the literal meaning of the language used.' Wise v. Watson, 286 Ala. 22, 27, 236 So. 2d 681, 686 (1970)."). Based on the literal meaning of the language used in the trial court's order, the first trial necessarily must involve the issue of special damage proximately caused by the defendants' conduct.

The plaintiffs rely in part on Coburn v. American Liberty Insurance Co., 341 So. 2d 717 (Ala. 1977), in which this Court held that a trial court had not exceeded its discretion in ordering separate trials on the issues of liability and the amount of damages in a personal-injury action involving

multiple parties and multiple theories of liability. In doing so, however, the Court offered the following word of caution:

> "Nothing contained in this opinion should be construed as approving the separation of the issues of liability and damages in personal injury cases as a matter of routine. Ordinarily, these issues are not to be separated for purposes of trial; and any speculative savings of time and expense, which may result from routine bifurcation of jury negligence trials, does not constitute sufficient grounds for exercise of the severance prerogatives of Rule 42(b)[, Ala. R. Civ. P.]. Within the spirit of Rule 42(b), separation of issues of liability from those relating to damages, while authorized, is to be ordered sparingly and in those rare and exceptional cases of which the instant case should serve as an example."

341 So. 2d at 719. Moreover, Coburn did not involve an attempt by an individual to remedy a public nuisance when the issues of liability and damages are so closely intertwined.

Rule 42(b) authorizes separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." See generally Ex parte Skelton, 459 So. 2d at 826 ("In a case such as this, a separate trial should be granted only if it appears prejudice to a defendant or inconvenience to the trial court demands such treatment."). "Although we have recognized that a trial

court has broad discretion to 'shape the order of trial' and to order severance or separate trials, Ex parte Humana Medical Corp., 597 So. 2d 670 (Ala. 1992), that discretion is not unbounded." Ex parte Daniels, 264 So. 3d 865, 870 (Ala. 2018).

In sum, for an individual plaintiff to hold a defendant liable in a public-nuisance case, the plaintiff must show the existence of special damage. This will require the plaintiffs in this case to identify and quantify all the damage caused by the defendants and the damage incurred by the plaintiffs to establish that the damage to the plaintiffs is different in kind and degree than the damage experienced by the general public. Sophisticated testimony regarding uncompensated medical costs and how those costs damaged each plaintiff in a way that was not felt by the general public must be adduced. And, the evidence needed to prove special damage that will establish "liability" in the first trial would be the same evidence required in the second trial, resulting in a duplication of effort and the squandering of judicial resources. Accordingly, conducting a trial on the issue of the defendants' "liability" for a public nuisance and a second trial on "special damage" neither avoids prejudice nor furthers

convenience, expedition, or economy. See Rule 42(b). We can only conclude that the trial court exceeded its discretion. We therefore grant the defendants' petition and issue a writ of mandamus. The trial court is directed to vacate the relevant portion of the case-management order in a manner consistent with this opinion.

PETITION GRANTED; WRIT ISSUED.

Shaw and Bryan, JJ., concur.

Bolin, J., concurs specially.

Wise and Stewart, JJ., concur in the result.

Parker, C.J., and Mendheim, J., dissent.

Mitchell, J., recuses himself.

BOLIN, Justice (concurring specially).

I agree with the main opinion that the defendants (manufacturers of prescription opioid medications, distributors of those medications, and retail pharmacies) are entitled a writ of mandamus ordering the trial court to vacate its case-management order insofar as it provides for bifurcated trials on liability for a public nuisance and, if necessary, on "special damage."

In their complaint, the plaintiffs (entities that own or operate hospitals in Alabama) alleged that they had suffered special damage from the alleged public nuisance caused by the defendants:

> "As a result of Defendants' actions, Plaintiffs have suffered a special injury, different from that suffered by the public at large, by individual users and by governmental entities, namely that Plaintiffs have provided uncompensated care for patients suffering from opioid-related conditions and incurred elevated operational costs.
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> "The public nuisance -- i.e., the opioid epidemic -- created, perpetuated, and maintained by Defendants can be abated and further recurrence of such harm and inconvenience can be abated.
>
> "Defendants should be required to pay the expenses Plaintiffs have incurred or will incur in the future to fully abate the nuisance.

> "....
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> "The acts forming the basis of the nuisance claim against the Defendants were wanton, malicious and/or attended with circumstances of aggravation.
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> "Therefore, Plaintiffs demand judgment in their favor against the Defendants for injunctive relief, abatement of the public nuisance, and for damages in an amount to be determined by a jury, together with all cost of this action, including prejudgment interest, post-judgment interest, costs and expenses, attorney fees, and such other relief as this Court deems just and equitable."

I recognize that the trial court, in its case-management order, sought to avoid overwhelming the jury with the possibility of the specter of voluminous special damages incurred by the plaintiffs. I write specially to opine that the use of a special master appointed pursuant to Rule 53, Ala. R. Civ. P., could aid the trial court and the jury in this complicated case.

> "The appointment of a special master lies within the sound discretion of the trial court, and its decision to appoint a special master should not be reversed unless the trial court clearly exceeds that discretion. Hall v. Mazzone, 540 So. 2d 1353 (Ala.1988). In a jury trial, a case should be referred to a special master only if the issues are 'complicated'; those matters to be tried without a jury are to be referred to a special master only upon finding of 'some exceptional condition' requiring such referral, unless a claim requires an

> accounting or a difficult computation of damages. We emphasize the sentence in Rule 53(b)[, Ala. R. Civ. P.,] that precedes the applicable standard (jury or nonjury) that tells us that the reference to a special master is the exception not the rule."

Ex parte Alabama State Pers. Bd., 54 So. 3d 886, 892-93 (Ala. 2010).

Assuming that a jury finds in favor of the plaintiffs on their alleged causes of action, a court-appointed special master may well be of benefit to the trial court in conserving the finite judicial resources available to it, as well as in relieving the jury of the substantial burden of hearing testimony or reviewing records pertaining to an accounting of the costs of treatment of each individual patient found to be affected.

I applaud the trial-court judge for trying to conduct the proceedings in this case in a manner that fully secures the rights of each party to this litigation while fairly limiting the jurors' time and the court's time in reaching a verdict and a judgment in this matter.