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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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**Ex parte Alfa Mutual Insurance Company**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Danielene Myricks**

**v.**

**Kelisha Saulsberry and Alfa Mutual Insurance Company)**

**(Jefferson Circuit Court, CV-18-901464)**

MITCHELL, Justice.

Alfa Mutual Insurance Company ("Alfa") intervened in a lawsuit brought by its insured, Danielene Myricks, against

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Kelisha Saulsberry, an uninsured motorist. Two weeks before the scheduled trial, Alfa moved to opt out of the lawsuit, citing Lowe v. Nationwide Insurance Co., 521 So. 2d 1309 (Ala. 1988). The Jefferson Circuit Court issued an order granting that motion, but it later vacated its order and required Alfa to continue participating in the case as a named defendant. Alfa now asks this Court to direct the trial court to allow it to opt out. Because Alfa has not established a clear legal right to intervene in the lawsuit and then opt out before trial, we deny Alfa's petition.

#### Facts and Procedural History

Myricks sued Saulsberry for allegedly causing an April 2016 motor-vehicle accident in Birmingham. Saulsberry was uninsured when the accident occurred, and she retained Legal Services Alabama to defend her in the lawsuit.

Myricks was insured by Alfa at the time, and her policy included uninsured-motorist benefits. She did not name Alfa as a defendant, but she did notify Alfa of the filing of the lawsuit. Alfa then filed a motion to intervene. In that motion, Alfa stated that there was a "possibility that prior to trial, [it] will opt out of the lawsuit." Myricks did not

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object to Alfa's intervention generally, but she did object to Alfa's apparent attempt to reserve the right to later opt out of the case. In her opposition to Alfa's motion to intervene, Myricks argued that, "[b]y the plain language of Lowe, Alfa may not intervene and then later opt out." The trial court allowed Alfa to intervene but acknowledged Myricks's right to "renew her objection on the stated grounds if and when Alfa attempts to later opt out of this case."

About two weeks before trial was scheduled to begin, Alfa filed a motion to opt out of the case, which the trial court granted the same day. The next day, Saulsberry's counsel filed a motion to withdraw, noting that new attorneys would represent her going forward. Myricks then asked the trial court to vacate its order allowing Alfa to opt out. The trial court granted Myricks's motion to vacate, holding that "Alfa is once again a named Defendant in this case and shall participate in trial ...." Alfa then filed its petition in this Court.<sup>1</sup>

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<sup>1</sup>Myricks opposes the petition; Alfa has not filed a reply.

Standard of Review

"A petition for a writ of mandamus is the appropriate means for challenging a trial court's refusal to grant [an uninsured-motorist] carrier the right to opt out of litigation pursuant to Lowe." Ex parte Geico Cas. Co., 58 So. 3d 741, 743 (Ala. 2010). "[M]andamus is a drastic and extraordinary writ" that should 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 Edgar, 543 So. 2d 682, 684 (Ala. 1989). As the petitioner, Alfa bears the burden of establishing a clear legal right to the relief it seeks. Ex parte Metropolitan Prop. & Cas. Ins. Co., 974 So. 2d 967, 972 (Ala. 2007).

Analysis

Alfa asks this Court to "issue a writ allowing [it] to opt out of participation of trial, and further allow [its] Counsel to defend [Saulsberry] at trial." Alfa's petition, p. 22. Because Alfa's second request hinges on whether it may

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opt out of the lawsuit,<sup>2</sup> we first consider whether Alfa has met its burden of establishing a clear legal right to opt out after intervening in the lawsuit. We hold that Alfa has not met its burden and, thus, deny the petition.

In Lowe, this Court addressed for the first time whether an insured motorist may file a claim against his or her liability provider in an underlying lawsuit against the negligent, underinsured motorist. This Court answered that question by establishing the following procedure:

"A plaintiff is allowed either to join as a party defendant his own liability insurer in a suit against the underinsured motorist or merely to give it notice of the filing of the action against the motorist and of the possibility of a claim under the underinsured motorist coverage at the conclusion of the trial. If the insurer is named as a party, it would have the right, within a reasonable time after service of process, to elect either to participate in the trial (in which case its identity and the reason for its being involved are proper information for the jury), or not to participate in the trial (in which case no mention of it or its potential involvement is permitted by the trial court). Under either election, the insurer would be bound by the factfinder's decisions on the issues of liability and damages. If the insurer is not joined but

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<sup>2</sup>See Driver v. National Sec. Fire & Cas. Co., 658 So. 2d 390, 395 (Ala. 1995) ("Understanding the need for the uninsured motorist insurance carrier to protect its interests, we hold that once the carrier opts out of the trial under Lowe, it may, in its discretion, hire an attorney to represent the uninsured motorist defendant.").

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merely is given notice of the filing of the action, it can decide either to intervene or to stay out of the case. The results of either choice parallel those set out above -- where the insurer is joined as a party defendant. Whether the choice is timely made is left to the discretion of the trial court, to be judged according to the posture of the case."

Lowe, 521 So. 2d at 1310.<sup>3</sup>

According to Alfa, this passage means that, once a nonparty insurer decides to intervene in a case, "Lowe would apply as if the insurer was originally named in the suit, meaning the insurer would still have the choice on whether to participate or not participate in the trial." Alfa's petition, pp. 12-13. Specifically, Alfa contends that, where Lowe stated that the "results of either choice parallel those set out above," this Court was "referring to an insurance carrier's right to eventually opt out of participation from trial." Id., p. 15.

That interpretation of Lowe is wrong. The error seems to stem from a misreading of the following sentence in Lowe: "The results of either choice parallel those set out above -- where the insurer is joined as a party defendant." Lowe, 521 So. 2d

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<sup>3</sup>Although Lowe concerned an underinsured motorist, "[o]ur analysis in Lowe and its progeny applies equally to underinsured and uninsured motorists." Ex parte Electric Ins. Co., 164 So. 3d 529, 530 (Ala. 2014).

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at 1310. The "results" to which Lowe refers are whether the insurer's identity will be made available to the fact-finder and the fact that the insurer will be bound by the fact-finder's findings on liability and damages regardless. See Ex parte State Farm Mut. Auto. Ins. Co., 674 So. 2d 75, 76 (Ala. 1995) (quoting Lowe and noting that, whether the insurer is named as a defendant or not, the insurer's identity and role are available to the jury if the insurer decides to participate in trial). Thus, the word "results" does not refer to a defendant insurer's option to opt out.

Examining the complete passage of Lowe makes this reading even clearer. In Lowe, this Court emphasized that a plaintiff, at the outset, may "either" name the insurer as a defendant "or" give the insurer notice of the filing of the lawsuit. Once the plaintiff makes that election, the ball is in the insurer's court. If the insurer has been named as a defendant, the insurer can "either" participate in trial "or" not participate in trial (i.e., opt out). In parallel fashion, if the insurer has not been named as a defendant but is given notice that the suit has been filed, the insurer can "either" intervene "or" stay out of the case. In or out --

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that is the only choice Lowe gives the insurer under either scenario. See Ex parte Aetna Cas. & Sur. Co., 708 So. 2d 156, 158 (Ala. 1998) (noting that defendant insurer's attempt to reserve a right to opt in after opting out was "inconsistent with the procedure set forth in Lowe"); Edgar, 543 So. 2d at 685 (stating that defendant insurer's attempt to reserve the right to continue participating in discovery after opting out "is just the opposite of the procedure that was sanctioned in Lowe"). Lowe does not provide a nonparty insurer with another election once the insurer chooses to intervene -- and Alfa does not convincingly point to any authority that says otherwise.<sup>4</sup>

In short, Alfa has not identified -- and this Court is not aware of -- any binding authority giving a nonparty insurer the right to intervene in an uninsured-motorist suit

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<sup>4</sup>Alfa cites State Farm, but that case does not bolster its argument. In State Farm, this Court merely reiterated the procedure prescribed by Lowe. See State Farm, 674 So. 2d at 76 (noting that, whether the plaintiff joins her insurer as defendant or gives it notice of the case, the insurer "is given the option to 'either ... participate in the trial (in which case its identity and the reason for its being involved are proper information for the jury), or not to participate in trial (in which case no mention of it or its potential involvement is permitted by the trial court)'" (quoting Lowe, 521 So. 2d at 1310)).



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and then opt out before trial. Thus, Alfa has not shown that it has a clear legal right under Lowe to opt out after intervening, and its petition must be denied. Because Alfa will remain a named defendant under the trial court's order, its request to have its counsel represent Saulsberry moving forward is moot.

#### Conclusion

Because Alfa has not established that it has a clear legal right to intervene in an uninsured-motorist lawsuit and then opt out before trial, we deny Alfa's petition for a writ of mandamus.

PETITION DENIED.

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

Bolin, J., concurs in the result.