Rel: April 30, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190567

Ex parte Edward Wrenn and David Wrenn

PETITION FOR WRIT OF MANDAMUS

(In re: Jeffrey E. Wright

v.

A-1 Exterminating Company, Inc., et al.)

(Etowah Circuit Court, CV-12-900782)

SELLERS, Justice.[1]

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[1]This case was originally assigned to another Justice on this Court; it was reassigned to Justice Sellers on March 17, 2021.

Edward Wrenn ("Edward") and David Wrenn ("David") petition this Court for a writ of mandamus directing the Etowah Circuit Court to vacate an order requiring Edward and David to disclose their personal income-tax returns to plaintiff Jeffrey E. Wright and to enter a protective order shielding the tax returns from production. We grant the petition and issue the writ.

Wright alleges that he contracted with A-1 Exterminating Company, Inc. ("A-1 Exterminating"), for periodic termite treatments of his house. Over the course of several decades of treatments, Wright says, A-1 Exterminating used a "watered-down pesticide so weak that it may only kill ants and 'maybe' spiders." A-1 Exterminating allegedly concealed this practice from him until recently. As a result, Wright contends that his house is infected by termites and has been damaged by termites. Wright sued Edward, David, A-1 Exterminating, A-1 Insulating Company, Inc., and Wrenn Enterprises, Inc., alleging breach of warranty, breach of contract, negligence, and wantonness.[2]

[2]Edward and David each own 50% of Wrenn Enterprises, Inc., which in turn owns A-1 Exterminating. Wright alleged in his complaint that A-1

Wright sought to represent a class consisting of himself and other A-1 Exterminating customers allegedly harmed by the defendants' actions. In support of his request to certify a class, Wright alleged that a "limited fund" existed that would support a class action under Rule 23(b)(1)(B), Ala. R. Civ. P. That rule provides that a class action is appropriate when "adjudications with respect to individual members of the class ... would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." According to Wright, the class he proposes fits within the limited-fund framework because the total amount of potential judgments against the defendants exceeds their ability to pay. Accordingly, Wright says, adjudications in favor of individual members of the proposed class would impair the other potential members' ability to recover.

Insulating Company, Inc., "controls A-1 Exterminating." Wright also sued Terry Buchanan, who apparently was an employee of A-1 Exterminating. The materials before the Court indicate that, after this action was commenced, Buchanan died and all claims against him were dismissed.

Wright sought production of several years' worth of Edward's and David's personal income-tax returns, which Edward and David say they filed jointly with their spouses. Wright sought the tax returns because, he claims, they will help establish that the defendants' assets are insufficient to satisfy the proposed class members' potential judgments and will therefore support his assertion that a limited-fund class should be certified.

The trial court initially entered an order ruling that Edward and David would not be required to produce their tax returns. Later, however, the trial court granted a motion to compel filed by Wright, which sought production of tax returns and other materials. Edward and David moved the trial court to enter a protective order. The trial court, however, denied that motion, and Edward and David filed the instant mandamus petition.

"[M]andamus is a drastic and extraordinary writ" that will issue only when 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). This Court will review by mandamus petition a trial court's discovery order that allegedly disregards a privilege. Ex parte Action Auto Sales, Inc., 250 So. 3d 536, 539 (Ala. 2017).

In Action Auto Sales, this Court stated as follows regarding the "qualified privilege" from discovery that tax returns enjoy:

> "The Court in [Ex parte Morris, 530 So. 2d 785 (Ala. 1988),] noted that some federal courts had recognized a 'qualified privilege' for tax records, which 'impos[ed] high standards of relevancy before parties will be ordered to reveal such records.' 530 So. 2d at 788. Such a qualified privilege was, according to those courts, justified by '"the sensitive information contained [in tax records] and the public interest to encourage the filing by taxpayers of complete and accurate returns."' Id. (quoting Mitsui & Co. v. Puerto Rico Water Res. Auth., 79 F.R.D. 72, 80 (D.P.R. 1978)). The Court also noted that the United States Court of Appeals for the Third Circuit, in reviewing an order compelling nonparties to disclose their gross incomes, had observed:
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> > "'"It can scarcely be denied that public exposure of one's wallet or purse is, in the abstract, an invasion of privacy. Nor can it be denied that private individuals have legitimate expectations of privacy regarding the precise amount of their incomes. Unless placed in issue, as in litigation, in a loan application, or when a federal statute or regulation may require publication of annual compensation, for instance, individuals employed in the private sector expect that the amount of their income need be divulged only to the taxing

> authorities, and to them with an expectation of confidentiality." '
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> "530 So. 2d at 788 (quoting DeMasi v. Weiss, 669 F.2d 114, 119 (3d Cir. 1982))."

250 So. 3d at 539. Although the records sought in Action Auto Sales and Ex parte Morris, 530 So. 2d 785 (Ala. 1988), were those of a nonparty to the litigation, "the qualified privilege may extend, in appropriate cases, to parties to a suit." Ex parte Alabama State Univ., 553 So. 2d 561, 562 (Ala. 1989).[3]

In Morris, the Court quoted Tele-Radio Systems Ltd. v. De Forest Electronics, Inc., 92 F.R.D. 371, 375 (D. N.J. 1981), for the proposition that, " '[u]nless "clearly required in the interests of justice, litigants ought not to be required to submit [tax] returns as the price for bringing or

[3]It is certainly worth noting that the tax returns at issue in this case do indeed affect the privacy interests of nonparties to the litigation, namely, the wives of Edward and David, who filed tax returns jointly with their spouses. See Van Westrienen v. Americontinental Collection Corp., 189 F.R.D. 440, 441 (D. Or. 1999) (indicating that the production of joint tax returns is particularly disfavored). Tax returns may also contain information about other nonparties, such as minor children or employees of the taxpayer.

defending a lawsuit." ' " 530 So. 2d at 788. The Court in Morris, again quoting Tele-Radio Systems, 92 F.R.D. at 375, observed that, " '[w]here ... the information sought is otherwise available, and [litigants] have not made their income an issue in the case, the income tax returns are not properly discoverable.' " Id. See also Ex parte Alabama State Univ., 553 So. 2d at 562 (noting that a litigant must "show a compelling need" for income-tax records).

As Edward and David point out, income-tax returns identify the source and amount of income for a particular tax year, as opposed to assets and liabilities. They also contain significant personal and confidential information wholly unrelated to assets and liabilities. Thus, Edward's and David's tax returns are not "highly" relevant to Wright's theory that a class should be certified because the defendants have limited assets available to satisfy potential judgments. See generally Van Westrienen v. Americontinental Collection Corp., 189 F.R.D. 440, 441 (D. Or. 1999) (indicating that tax returns contain confidential information and suggesting that a litigant's ability to satisfy a judgment is better demonstrated by financial statements).

Before directing the disclosure of tax returns, trial courts should carefully consider the private nature of the information contained in the returns, the specific information sought by a litigant, and whether that information can be obtained from a different source. For tax returns to be discoverable, they must be highly relevant, the litigant seeking their disclosure must show a compelling need for them, and their disclosure must be clearly required in the interests of justice. Action Auto Sales, 250 So. 3d at 539; Morris, 530 So. 2d at 788; Alabama State Univ., 553 So. 2d at 562. Those standards have not been met in this case. Accordingly, we grant the petition and issue a writ of mandamus directing the trial court to vacate its order requiring disclosure of Edward's and David's tax returns and to enter a protective order shielding those returns from production.[4]

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[4]The Court notes that Edward and David question the appropriateness of using a limited-fund theory to certify a class in an action alleging "unliquidated" tort claims. Thus, they say, Wright is not entitled to the tax returns even if the returns could possibly be deemed sufficiently relevant to, and necessary to support, a theory alleging that there are limited funds available to satisfy potential judgments in favor of class members. Because we conclude that Wright did not overcome the qualified privilege applicable to tax returns and is therefore not entitled

PETITION GRANTED; WRIT ISSUED.

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

Shaw, Mendheim, and Mitchell, JJ., dissent.

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to their disclosure, we pretermit any discussion of the appropriateness of certifying a class based on a limited-fund theory in this case.

MITCHELL, Justice (dissenting).

I respectfully dissent on two grounds.

A. The Majority Opinion Does Not Adhere to Our Court's Mandamus Framework for Deciding Discovery Issues

A writ of mandamus is a "drastic and extraordinary remedy" to be issued only when the petitioner has established a "clear legal right" to the order it seeks. Ex parte Sanderson, 263 So. 3d 681, 688 (Ala. 2018) (emphasis omitted). And it's especially tough to obtain a writ of mandamus for a discovery order -- because trial courts have wide latitude in overseeing discovery. See Ex parte Carlisle, 26 So. 3d 1202, 1205 (Ala. 2009) (" 'The utilization of a writ of mandamus to compel or prohibit discovery is restricted because of the discretionary nature of a discovery order. The right sought to be enforced by mandamus must be clear and certain with no reasonable basis for controversy about the right to relief.' " (citation omitted)); see also Ex parte Maple Chase Co., 840 So. 2d 147, 149 (Ala. 2002) (recognizing that trial courts have "broad discretion in ruling on discovery matters"). Thus, mandamus relief is appropriate for a discovery order only when the trial court " 'clearly exceed[s] its

discretion' " and the petitioner has no adequate remedy by appeal. Ex parte Guaranty Pest Control, Inc., 21 So. 3d 1222, 1225 (Ala. 2009) (citation omitted; emphasis added). That means we will consider whether a trial court has clearly exceeded its discretion only in limited circumstances, including when, as alleged here, the trial court has disregarded a privilege or compelled the production of "patently irrelevant" documents. See id. at 1226.

Given these principles, we should give a trial court a high degree of deference when examining a discovery ruling on mandamus. And for good reason -- " 'our judicial system cannot afford immediate mandamus review of every discovery order.' " Id. (citation omitted). As an appellate court, we are poorly positioned to micromanage discovery skirmishes. Here, for example, Edward Wrenn and David Wrenn say they have produced "thousands of pages" of asset-related discovery. Yet we are not privy to that discovery -- we have only what was submitted to us with the mandamus petition. Trial judges, on the other hand, are much closer to the facts, parties, and discovery in each case. That's why " 'the trial court is in a better position to make discovery determinations than we are.' " Ex

parte Alabama Dep't of Mental Health, 819 So. 2d 591, 594 (Ala. 2001) (citation omitted).

The majority opinion gives little to no deference to the trial court. Although it recites the general mandamus standard, it ignores the principles that caution against issuing a writ of mandamus to override discovery orders. Instead, the majority opinion puts this Court in the trial court's shoes and considers the discovery request anew, giving no consideration to whether the Wrenns have carried their heavy burden of demonstrating that the trial court clearly exceeded its "very broad" discretion in denying their proposed protective order. This encourages litigants to view this Court not as a guardian against clear abuses of the discovery process, but as a second bite at the apple. Our judicial system should not have to bear that burden.

B. The Majority Opinion Holds that the Wrenns' Tax Returns Are Irrelevant Without Fully Grappling With Why the Returns Were Sought and How Confidentiality Concerns Could Be Addressed

For the tax returns to be discoverable, the majority opinion holds, "they must be highly relevant, the litigant seeking their disclosure must show a compelling need for them, and their disclosure must be clearly

required in the interests of justice." ___ So. 3d at ___. Additionally, the majority opinion holds that trial courts must consider whether the information sought in the tax returns "can be obtained from a different source." ___ So. 3d at ___.

The majority opinion concludes that Jeffrey Wright's request for the Wrenns' tax returns fails this test. It cites two reasons: (1) "income-tax returns identify the source and amount of income for a particular tax year, as opposed to assets and liabilities," ___ So. 3d at ___, and (2) the tax returns potentially contain confidential and irrelevant information, including potential information about the Wrenns' spouses and children. Neither of these reasons is sufficient to issue a writ of mandamus.

First, Wright is not seeking the Wrenns' tax returns solely to identify assets. Rather, he says he is seeking them because he believes they could help "determine the veracity of the other financial information produced in the case and could reveal the disposal of assets in anticipation of litigation" (Wright's brief at 23) and that they can show "how much money was diverted from [A-1 Exterminating Company, Inc.,] into the individuals' pockets" (Wrenns' petition at exhibit 29). The majority

opinion does not explain how or where this information would otherwise be discoverable or why the trial court clearly exceeded its discretion in light of Wright's stated reasons.

Second, discovery material often contains irrelevant personal, financial, and confidential information in documents that otherwise contain relevant information. But that is no objection to the production of that material. Litigators routinely balance relevancy and confidentiality considerations by entering into agreements or by seeking tailored discovery orders. These solutions can, for example, impose penalties for disclosure of confidential information outside the case, limit review of information to attorneys only (as opposed to the parties they represent), provide for relevancy redactions, or incorporate in camera review when necessary. There is no indication that the Wrenns sought any of those protections for their tax returns, and they (along with the majority opinion) fail to explain why those protections would be insufficient here. See Hunt v. Windom, 604 So. 2d 395, 398 (Ala. 1992) (holding that trial court, in entering protective order, "exercised its discretion in a balanced way in permitting some discovery by the plaintiff"

of tax returns while "severely limiting access to them" to protect their confidentiality); see also Ex parte Morris, 530 So. 2d 785, 793 (Ala. 1988) (Beatty, J., dissenting) (noting that petitioner failed to seek any order limiting use of the tax returns and that, if trial court believed production of the tax returns would be prejudicial or burdensome, it could have exercised its discretion to limit their use as necessary).

C. Conclusion

In sum, there is no basis to conclude that the trial court clearly exceeded its discretion. Wright sought the Wrenns' tax returns for the purpose of establishing a "limited fund" class action.[5] He says that the tax returns could help determine the veracity of other financial information produced in discovery thus far, reveal the possible disposal of A-1 Exterminating's assets in anticipation of litigation, and show whether and

[5]The Wrenns argue that Wright's limited-fund theory, based on Ortiz v. Fibreboard, 527 U.S. 815 (1999), is inapplicable because this case involves unliquidated claims. But Ortiz did not resolve that issue, and neither has this Court. Because it is neither necessary nor appropriate to address that issue of first impression to resolve a discovery dispute -- especially when the trial court has not yet ruled on it -- I would not reach that issue here.

how much money was diverted from A-1 Exterminating to the Wrenns. Given the trial court's proximity to the facts, the parties, and the "thousands of pages" of asset-related discovery in this case, it is in a far better position than this Court to determine whether there is a compelling need for the tax returns and whether their probative value outweighs any prejudice or burden to the Wrenns. And given the materials before us and the deference due to a trial court in a discovery dispute, I see no reason to conclude that the trial court clearly exceeded its discretion.[6] I would therefore deny the petition for the writ of mandamus.

[6]Thus, I would also reject the Wrenns' argument that the trial court erred because their tax returns are "patently irrelevant."