Rel: October 25, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180630

Ex parte CityR Eagle Landing, LLC, and Foresite Realty Management, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Tiffany Adams et al.

v.

CityR Eagle Landing, LLC, et al.)

(Montgomery Circuit Court, CV-16-202)

BOLIN, Justice.

CityR Eagle Landing, LLC ("CityR"), and Foresite Realty Management, LLC ("Foresite"), have petitioned this Court for

a writ of mandamus directing the Montgomery Circuit Court to vacate its order appointing Kia Scott as guardian ad litem for certain minor parties to the underlying action against CityR and Foresite. We grant the petition and issue the writ.

Facts and Procedural History

On April 4, 2016, residents of Eagle Landing Apartments, an apartment complex owned by CityR and managed by Foresite, sued CityR and Foresite, among others. They asserted claims of breach of contract, breach of implied warranty, negligence, wantonness, premises liability, negligent hiring, trespass, and nuisance, all arising out of conditions at the apartment complex. The residents were adults living in the apartments with their minor children, who were represented in the action by their parents. All the residents were represented by legal counsel.

On August 10, 2017, additional residents of the apartment complex owned by CityR and managed by Foresite sued CityR and Foresite along with additional defendants. Those residents' claims also arose out of conditions at the apartment complex. Those residents were adults, and the minor resident children

were represented by their parents. All of those residents were represented by legal counsel.

On October 14, 2017, 14 minor residents, represented by their parents and by counsel, along with CityR and Foresite, filed a joint motion seeking a dismissal based on a pro ami settlement in the first lawsuit.[1] On December 6, 2017, the trial court appointed a guardian ad litem to aid the court in determining if the settlement was fair to the 14 minor residents.[2] The parties in both the first lawsuit and the second lawsuit filed a joint motion to consolidate the cases.

On January 11, 2018, the guardian ad litem filed a report indicating that she did not have enough information to determine whether the settlement was fair to the 14 minor residents. On February 21, 2018, the guardian ad litem filed a motion in both lawsuits seeking to be appointed as guardian ad litem for all the minor residents in both lawsuits, not

[1]A pro ami settlement is a settlement involving an infant or minor.

[2]A hearing is required to determine whether a settlement is in the best interest of a minor before a valid and binding pro ami consent judgment for the amount of the settlement can be entered. Abernathy v. Colbert Cty. Hosp. Bd., 388 So. 2d 1207 (Ala. 1980).

just the 14 minor residents who had entered into the pro ami settlement with the defendants. In support of her motions, the guardian ad litem cited § 26-2A-52, Ala. Code 1975. The guardian ad litem also asked the court to consolidate the two lawsuits. On March 7, 2018, CityR and Foresite filed a motion in both lawsuits opposing the appointment of the guardian ad litem for all the minor residents, arguing that there was nothing to indicate that the parents and their legal counsel's representation of the minor residents was somehow inadequate.

On March 26, 2018, the trial court held a hearing on pending motions. At the hearing, the trial court denied the joint motion, filed by CityR and Foresite and the 14 minor plaintiffs, for a stipulation of dismissal as a result of the settlement, on the basis of "the guardian ad litem's recommendation to the court." After a discussion of other matters, the following exchange occurred among the guardian ad litem, plaintiffs' counsel, CityR and Foresite's counsel, and Judge Hardwick:

> "[GUARDIAN AD LITEM]: Your Honor, if I may. There is actually a motion before the Court to extend the GAL [guardian ad litem] representation. Currently, Your Honor has -- or the Court has ordered representation for about 11 of the children that are attached to the case based on the

plaintiffs' joint motion that was previously before the Court and denied. But there are some additional 40 plus children that are a part of this matter. And my concern would be that if their parents are not questioned on the record about any medical issues that developed that these children -- at the time that they lived in the apartment during the condition, that it would hurt or preclude the GAL from being able to act in their best interest when it comes to settlement.

"THE COURT: Well, nobody's filed a motion for appointment of guardian ad litem in those matters.

"[GUARDIAN AD LITEM]: I filed a motion.

"THE COURT: You can't -- you can't file a motion. You can't invite yourself to the party as I understand the law, now.

"[GUARDIAN AD LITEM]: Yes, Your Honor.

"THE COURT: So it perhaps would be incumbent upon the plaintiffs or the defendants for just adjudication, we need a guardian ad litem on these matters. That's the way it normally goes. So, really, in essence, if they don't want to be sued twice, if they don't want to be sued when these children reach the age of majority, who said -- Craig Allred [plaintiffs' counsel] just -- just blew the case. And they come back and they sue y'all again. That's what could happen. So I -- not my concern; not my concern. Hint, hint. So, all right. Anything else? So those ones you don't represent, okay, when they reach the age of majority, they can go out and hire themselves a lawyer and sue on their own behalf.

"[GUARDIAN AD LITEM]: Yes, Your Honor.

"THE COURT: Isn't that right?

"[COUNSEL FOR CITYR AND FORESITE]: Well, we suggested that in the event a guardian is needed, when they continue, then the case is settled, that's the time to put the guardian in place.

"THE COURT: Well, you can, but what if it's not settled? And what if it goes to trial and as minors, you know, the parents, they're going to come back and argue, you know, my momma and daddy didn't have good sense hiring Mr. Allred to sue in this case. What do you say?

"MR. ALLRED: Well, Your Honor, I believe there's also some caselaw out there in famous words, but I believe there's some caselaw that says that the guardian ad litem is supposed to be appointed for all major stages of the litigation if there's a minor involved, so that would be our concern with not having a guardian ad litem in the case.

"THE COURT: You want a guardian ad litem for the minors?

"MR. ALLRED: I -- I think it would be a good idea.

"THE COURT: Let's not make it an idea, now. I don't deal with ideas, now.

"MR. ALLRED: I think it would be the safe thing to do.

"THE COURT: I understand, but I need to hear the magic word.

"MR. ALLRED: A yes?

"THE COURT: No. As plaintiffs' counsel --

"MR. ALLRED: That would be our preference, yes, sir.

"THE COURT: No. I need to hear the magic words. We move the Court --

"MR. ALLRED: Well, if we could all agree on it --

"THE COURT: You don't have to agree. You don't have to agree.

"MR. ALLRED: Well, if we could talk about it and get some sort of agreement --

"THE COURT: No. We're not going to talk about it. It's time -- not time to talk about it, now.

"MR. ALLRED: Okay.

"THE COURT: Now, listen. I've invited them, and not only did they say no, but they said hell no. All right.

"MR. ALLRED: Well, let --

"THE COURT: Now, it's not incumbent -- you know, you can get sued, too.

"MR. ALLRED: Yes, sir, absolutely. We're going to avoid that.

"THE COURT: Well, say the magic word.

"MR. ALLRED: May we consider that and file something with the Court?

"THE COURT: Say the magic words.

"MR. ALLRED: Well, we would move the Court to appoint a guardian ad litem.

"THE COURT: Granted. Ms. Scott, you're appointed.

"[GUARDIAN AD LITEM]: Thank you."

The trial court did not enter a written order denying the joint motion for a stipulation of dismissal of the 14 minor residents who had entered into the pro ami settlement with the defendants.[3] Also, the trial court did not enter a written order appointing the guardian ad litem to represent the minor residents in the ongoing litigation. On April 11, 2018, the trial court entered an order granting the parties' motion to consolidate the two lawsuits.[4]

On July 31, 2018, the trial court held a hearing on pending motions. During that hearing, the parties again discussed the guardian ad litem's motion to represent the minor residents in the ongoing litigation. CityR and Foresite

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[3]Rule 58(a), Ala. R. Civ. P., provides:

> "(a) Rendition of Orders and Judgments. A judge may render an order or a judgment: (1) by executing a separate written document, (2) by including the order or judgment in a judicial opinion, (3) by endorsing upon a motion the words 'grant,' 'denied,' 'moot,' or words of similar import, and dating and signing or initialing it, (4) by making or causing to be made a notation in the court records, or (5) by executing and transmitting an electronic document to the electronic-filing system."

[4]In April 2018, a different trial judge was sitting in the cases.

asserted that there had been no showing that the minor residents were not being adequately represented by their parents and their legal counsel. The guardian ad litem again asserted authority under § 26-2A-52. She also requested "stand-in assistance" when she could not be present for a hearing or a deposition involving the minor residents. Following the hearing, the trial court entered an order granting the joint motion for a stipulation of dismissal of the 14 minor residents based on the pro ami settlement agreement. On March 8, 2019, CityR and Foresite filed a motion again opposing the appointment of the guardian ad litem for the remaining minor residents, arguing that the minor residents were adequately represented by their parents and legal counsel. On March 11, 2019, the trial court held another hearing at which the parties discussed the appointment of the guardian ad litem to represent the remaining minor residents in the ongoing litigation. On April 4, 2019, the trial court entered an order appointing the guardian ad litem to represent the minor residents. CityR and Foresite timely filed this petition.

Standard of Review

> "'"Mandamus 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 Novartis Pharm. Corp., 975 So. 2d 297, 299 (Ala. 2007)(quoting Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003), quoting in turn Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)).

> "'"In cases involving the exercise of discretion by an inferior court, [the writ of] mandamus may issue to compel the exercise of that discretion. It may not, however, issue to control or review the exercise of discretion, except in a case [where the trial court has exceeded its discretion]."'"

Ex parte Monsanto Co., 794 So. 2d 350, 351-52 (Ala. 2001) (quoting Ex parte Auto-Owners Ins. Co., 548 So. 2d 1029, 1030 (Ala. 1989), quoting in turn Ex parte Edgar, 543 So. 2d 682, 685 (Ala. 1989)).

In Thornton v. First National Bank of Birmingham, 291 Ala. 233, 279 So. 2d 496 (1973), this Court issued a writ of mandamus to direct the trial court to rescind its order appointing a guardian ad litem for an incompetent person over whom the trial court did not have jurisdiction. See also Ex parte C.L.L.M., 256 So. 3d 1192 (Ala. Civ. App. 2018)(denying

the father's petition for a writ of mandamus directing the trial court to vacate an order transferring case when no guardian ad litem had been appointed for the minor in a parentage proceeding before a change of venue because the child had not been made a party to the proceeding and the father had failed to present any argument that the child was inadequately represented).

Discussion

CityR and Foresite argue that the appointment of the guardian ad litem was unnecessary because, they say, there was no showing that a guardian ad litem was needed to protect the interests of the minor residents during the ongoing litigation. They argue that the minor residents' interests were aligned with the interests of their parents/guardians, who also lived in the same apartment complex. The plaintiffs were also represented by legal counsel. They argue that the guardian ad litem's reliance on § 26-2A-52 is misplaced.

We agree with CityR and Foresite that the guardian ad litem's reliance on § 26-2A-52 in this proceeding is misplaced. Section 26-2A-52 provides:

> "At any point in a proceeding, a court may appoint a guardian ad litem to represent the

> interest of a minor or other person if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests."

Section 26-2A-52 concerns guardians and conservators in protective proceedings and is part of the Alabama Uniform Guardianship and Protective Proceedings Act, § 26-2A-1 et seq., Ala. Code 1975. Section 26-2A-20(3), Ala. Code 1975, defines "court" as "a probate court of this state." See also Sears v. Hampton, 143 So. 3d 151, 157 (Ala. 2013)(noting that § 26-2A-52 "allows the probate court to appoint a guardian ad litem '[a]t any time in a proceeding'"). The Alabama Uniform Guardianship and Protective Proceedings Act was inapplicable to the civil proceedings before the trial court in this case.

We recognize that Rule 17(c), Ala. R. Civ. P., provides for the appointment of a guardian ad litem in certain situations. Rule 17(c) provides:

> "(c) Minors or Incompetent Persons. Whenever a minor has a representative, such as a general guardian or like fiduciary, the representative may sue in the name of the minor. Whenever an incompetent person has a representative such as a general guardian or a like fiduciary, the representative may sue or defend in the name of the incompetent person. If a minor or an incompetent person does not have a duly appointed

> representative, that person may sue by that person's next friend. The court shall appoint a guardian ad litem (1) for a minor defendant, or (2) for an incompetent person not otherwise represented in an action and may make any other orders it deems proper for the protection of the minor or incompetent person. When the interest of an infant unborn or unconceived is before the court, the court may appoint a guardian ad litem for such interest. Moreover, if a case occurs not provided for in these rules in which a minor is or should be made a party defendant, or if service attempted upon any minor is incomplete under these rules, the court may direct further process to bring the minor into court or appoint a guardian ad litem for the minor without service upon the minor or upon anyone for the minor."

(Emphasis added.)

Rule 17(c) is inapplicable here because the minor residents are not defendants in the cases. Additionally, Rule 17 addresses the "real party in interest" in a lawsuit. Rule 17(c) provides, in part, that "[w]henever a minor has a representative, such as a general guardian or like fiduciary, the representative may sue in the name of the minor." Authorized representatives, including parents, may sue on behalf of minors.

In Burke v. Smith, 252 F.3d 1260, 1264 (11th Cir. 2001), Linda Burke, the wife of the decedent, brought an action on her minor daughter's behalf as well as in her capacity as the

personal representative for the decedent's estate. The defendants settled the case, but the release was signed solely by the wife in her capacity as "Administratrix of the Estate" of the decedent and the wife individually. The minor daughter, Tammy, did not sign the release, nor did the wife sign the settlement in her capacity as "next friend" of the minor daughter. The case was dismissed pursuant to the settlement and a stipulation of dismissal. After reaching the age of majority, Tammy filed a motion in the original lawsuit claiming the judgment of dismissal was void because a guardian ad litem had not been appointed for her and no hearing had been held to determine whether the settlement was fair. The district court granted the motion and reinstated the case as to Tammy. In addressing whether the district court should have appointed a guardian ad litem during litigation and before the settlement, the United States Court of Appeals for the Eleventh Circuit explained:

> "It is well established that '[t]he appointment of a guardian ad litem is a procedural question controlled by Rule 17(c) of the Federal Rules of Civil Procedure.' Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 38 (5th Cir. 1958). Rule 17(c) provides in part:

> "'The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. Fed. R. Civ. P. 17(c). Rule 17(c) does not require that a district court appoint a guardian ad litem in all cases. See Roberts, 256 F.2d at 39. Rather, "Rule 17(c) authorizes the district court to appoint a guardian ad litem 'for an infant ... not otherwise represented in an action....'" Croce v. Bromley Corp., 623 F.2d 1084, 1093 (5th Cir. 1980)(citing Fed. R. Civ. P. 17(c)). In the present case, Tammy was "otherwise represented" by her mother who brought this action on her behalf. Thus, Rule 17(c) did not require the court to appoint a guardian ad litem. See Croce, 623 F.2d at 1093 (holding that failure to appoint guardian ad litem did not constitute error where minor was represented by mother bringing action on his behalf).'

"Furthermore, unless a conflict of interest exists between the representative and minor, a district court need not even consider the question whether a guardian ad litem should be appointed. See id. Generally, when a minor is represented by a parent who is a party to the lawsuit and who has the same interests as the child there is no inherent conflict of interest. See id.; see also Gonzalez v. Reno, 86 F. Supp. 2d 1167, 1185 (S.D. Fla. 2000), aff'd 212 F.3d 1338 (11th Cir. 2000)('[W]hen a parent brings an action on behalf of a child, and it is evident that the interests of each are the same, no need exists for someone other than the parent to represent the child's interests under Rule 17(c).'). Where it is evident that a conflict of interest exists between the parent and minor, however, the district court has a duty to determine whether a

> guardian ad litem is needed. See In re Chicago, Rock Island & Pac. R.R. Co., 788 F.2d 1280, 1282 (7th Cir. 1986)('If there was some reason to think that [the infant's] mother would not represent [the infant's] interests adequately, the district court would, we may assume, be required (and certainly would be empowered) to appoint a guardian ad litem to represent [the infant].').
>
> "Here, Tammy's mother was a party to the lawsuit and had similar interests as Tammy. Therefore, we perceive no inherent conflict of interest between Tammy and her mother as representative. Furthermore, although Tammy alleges that her mother never gave her a share of the settlement proceeds, we cannot conclude from the record that an actual conflict existed at the time the case was before the district court. Accordingly, we hold that the district court was not required to consider whether or not the appointment of a guardian ad litem was necessary."

Burke, 252 F.3d at 1264. The district court had not erred in not appointing a guardian ad litem because Tammy was represented by her mother, who brought the action on Tammy's behalf. Furthermore, no evidence suggested that a conflict of interest existed between the mother and the minor daughter. Although Tammy alleged that her mother never gave her a share of the settlement proceeds, the Eleventh Circuit Court of Appeals could not conclude from the record that an actual conflict existed at the time the case was before the federal district court. However, the Eleventh Circuit went on to determine that the federal district court, at the time of the

settlement, should have conducted a fairness hearing as required under Alabama law to make a settlement binding on a minor party, and it set aside the consent judgment as to all the plaintiffs.

In the present case, the trial court exceeded its discretion in appointing the guardian ad litem to represent the minor residents when there was no conflict of interest between the minor residents and their parents. At this point in the proceedings, such a practice would allow a stranger to the parent-child relationship to have the right to represent the parent's child in a legal action.[5] In the present case, the parents' interests are aligned with those of their children. Both the parents and the children reside in the apartment complex that is the subject of the litigation. The trial court exceeded its discretion in replacing the parent with the guardian ad litem without a showing of a conflict of interest. When the interests of the parent and child are

[5]Rule 17(c), Ala. R. Civ. P., provides that a representative of a minor may sue in the name of the minor, but it does not confer upon the representative a right to practice law on behalf of the minor. Chambers v. Tibbs, 980 So. 2d 1010 (Ala. Civ. App. 2007).

aligned, there is no need for someone other than the parent to represent the child's interest under Rule 17(c).

The confusion in this case arises from the requirements of a pro ami hearing and the role the guardian ad litem may serve when the parents, on behalf of their children, enter into a settlement that binds the children. In Maryland Casualty Co. v. Tiffin, 537 So. 2d 469, 471 (Ala. 1988), this Court stated:

> "This Court has recognized the special nature of an attempted settlement of a minor's claim. Before such a settlement can be approved, there must be a hearing, with an extensive examination of the facts, to determine whether the settlement is in the best interest of the minor. Large v. Hayes, 534 So. 2d 1101 (Ala. 1988); Abernathy v. Colbert County Hospital Board, 388 So. 2d 1207 (Ala. 1980); Tennessee Coal, Iron & R.R. Co. v. Hayes, 97 Ala. 201, 12 So. 98 (1892)."

In Abernathy v. Colbert County Hospital Board, 388 So. 2d 1207, 1209 (Ala. 1980), the Court quoted, with approval, the following from Tennessee Coal, Iron & R.R. v. Hayes, 97 Ala. 201, 12 So. 98 (1892):

> "'The Court may, upon being advised of the facts, upon hearing the evidence, enter up a valid and binding judgment for the amount so attempted to be agreed upon, but this is not because of the agreement at all —- that should exert no influence —- but because it appears from the evidence that the

> amount is just and fair, and a judgment therefor will be conservative of the minor's interests.'"

(Emphasis omitted.)

Burlington Northern R.R. v. Warren, 574 So. 2d 758 (Ala. 1990), involved a case in which the pro ami settlement hearing was inadequate. This Court explained:

> "[W]e conclude that the hearing conducted on January 2, 1980, failed to meet the standard set out above for determining whether the settlement was in the best interest of the deceased's children. There is no record of what the judge asked the plaintiff at the January 2, 1980, hearing, but at trial Burlington's lawyer and Byrd [an agent for Burlington,] and the plaintiff all testified as to what the judge had asked her.
>
> "The plaintiff testified that the judge merely asked her whether she understood that the settlement offer would be all of the money she could ever get from Burlington and Kershaw [Manufacturing Company] due to her husband's death. Byrd testified that the judge asked the plaintiff some additional questions regarding her age, her educational background, the number of dependents she had, and whether she had consulted an attorney. Burlington's lawyer testified that the judge also asked the plaintiff whether she wanted to settle the case for $150,000 and whether she had ever had any mental problems.
>
> "There is no evidence in the record that the judge conducted a hearing 'with an extensive examination of the facts to determine whether the settlement was in the best interest of the minor[s].' Maryland Cas. Co.[v. Tiffin, 537 So. 2d 469, 471 (Ala. 1988)]. The testimony in this case shows that the judge was concerned about the plaintiff but did not focus on whether the proposed

> settlement would be in the best interest of the children. The hearing was conducted in the judge's chambers, not open court, with only the plaintiff, Burlington's lawyer, Byrd, and the judge present. Moreover, there is no record of what transpired at the hearing in the judge's chambers. The January 2, 1980, settlement hearing, with the subsequent judgment, was not a valid pro ami proceeding conducted to determine whether the settlement would be in the children's best interest.
>
> "The law requires a more extensive hearing than is indicated here to determine whether a settlement is in the best interest of the minor. '[A] judgment entered on a compromise of an infant's claim is erroneous, and may be set aside where the court has made no examination or investigation of the facts to determine whether the compromise is for the best interest of the infant.' Abernathy [v. Colbert County Hospital Board, 388 So. 2d 1207, 1209 (Ala. 1980),] quoting 42 Am.Jur.2d Infants § 47 (1978). There is nothing in the record to indicate that there was any investigation of the facts to determine whether the settlement would be in the best interest of the minors. Therefore, under Alabama law, the January 2, 1980, settlement proceeding was invalid as a pro ami proceeding on behalf of the children, and the consent judgment obtained as a result of that settlement would be voidable as to the four minor children."

574 So. 2d at 761-62.

In Large v. Hayes, 534 So. 2d 1101 (Ala. 1988), a minor was represented by attorneys who obtained a personal-injury settlement that was approved at a pro ami hearing; at the hearing, the attorney fee was set in accordance with the contingent-fee contract signed by the minor's parent and

guardian. Subsequently, the guardian ad litem and her father as next friend brought an action to set aside the judgment that set the attorney fee. The trial court entered an order against the attorneys for $59,516 and forfeited all future monthly fees that the attorneys were to receive under the order entered in the pro ami hearing. In reversing, this Court wrote:

> "Even in cases involving injuries to minors, the civil court system must not be a carousel to be jumped on or off at the whim or fancy of dissatisfied litigants. There must be an ordered, formal, and final path from allegation of injury to adjudication of fact. Otherwise, the rights of plaintiffs and defendants would remain in flux and create a chaotic environment at odds with the very purposes of civil law."

534 So. 2d at 1107.

In a pro ami hearing, the guardian ad litem does not authorize or consent to the settlement. Instead, the guardian ad litem prepares a report with a recommendation on whether the proposed settlement is in the best interest of the minor based on the claims, injuries, and future needs of the minor and the guardian ad litem's experience in the area of personal injury.

In the present case, with nothing before us to reflect a conflict of interest between any parent and child involved as parties in the litigation, and no proposed settlement agreement currently before the trial court for review, there is no need for a guardian ad litem for the remaining minors at this stage of the proceedings. Accordingly, we grant the petition and issue the writ, directing the trial court to rescind its order of April 4, 2019, appointing the guardian ad litem to represent the remaining minor residents.

PETITION GRANTED; WRIT ISSUED.

Shaw, Wise, Sellers, and Mendheim, JJ., concur.

Parker, C.J., and Bryan, Stewart, and Mitchell, JJ., concur in the result.