Rel: September 14, 2018

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2018

1161003

Ex parte Dolgencorp, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Deborah Renae Gilliam

v.

Dolgencorp, LLC)

(Tuscaloosa Circuit Court, CV-16-900392)

PER CURIAM.

Dolgencorp, LLC ("Dollar General"), the defendant below, filed a petition for a writ of mandamus requesting relief from

a discovery order entered by the Tuscaloosa Circuit Court on February 8, 2017. We grant the petition and issue the writ.

Facts and Procedural History

On March 14, 2016, Daisy Pearl White Freeman was operating her vehicle in the Northwood Shopping Center in Northport. She lost control of her vehicle, ran over the curb and onto the sidewalk, and struck Deborah Renae Gilliam, who had just walked out of a Dollar General store located in the shopping center.

On April 4, 2016, Gilliam sued Dollar General, among others, in the Tuscaloosa Circuit Court. As to Dollar General, the complaint stated claims of negligence and wantonness.

On August 10, 2016, Gilliam filed a notice of intent to serve subpoenas on nonparties Dolgencorp of New York, Inc.; Dolgen Midwest, LLC; Dolgencorp of Texas, Inc.; Dollar General Partners; DG Louisiana, LLC; and DG Retail, LLC (hereinafter referred to collectively as "the nonparty Dollar General entities"). In the subpoenas, Gilliam requested:

> "1. All photographs, surveillance video, and incident reports concerning automobiles that have struck any building owned, leased, managed or rented

> by [the nonparty Dollar General entities] for the time period March 14, 2011 to March 14, 2016.
>
> "2. All documents that describe the function, use and/or purpose of bollards used in front of any building owned, leased, managed or rented by [the nonparty Dollar General entities].
>
> "3. All correspondence of any kind between [the nonparty Dollar General entities] and [Dollar General] concerning the subject of automobiles striking Dollar General stores."

On August 24, 2016, Dollar General filed a motion to quash the nonparty subpoenas, arguing that the nonparty subpoenas were unduly burdensome.

Gilliam also filed a request for production of documents. In request no. 7, she asked that Dollar General "[p]roduce all incident reports along with photographs of any incident in the five year period leading up to the March 14, 2016 [accident] where a vehicle crashed into any Dollar General [store] in the United States." Dollar General objected to the request, arguing, among other things, that the request was overly broad and unduly burdensome. On September 2, 2016, Gilliam filed a motion to compel Dollar General to respond to, among other items, request no. 7.

On December 15, 2016, Dollar General filed a response to Gilliam's motion to compel, arguing that request no. 7 was

overly broad and unduly burdensome. In support, Dollar General attached an affidavit from Cindy Helmbrecht, who worked for Retail Risk Solutions, LLC, a wholly owned subsidiary of Dollar General Corporation, as a senior claims representative in the Dollar General Risk Management Department. She stated, in relevant part:

> "11. In developing information to assist with the responses to [Gilliam's] first set of interrogatories and requests for production to [Dollar General] in this case, I conducted a manual search for the district in which [the incident at] the subject Dollar General store occurred for other incidents wherein a vehicle crashed into a Dollar General store in the last 5 years. This district is comprised of 18 stores in Alabama, or approximately 0.001% of all Dollar General stores. This search took me approximately thirteen (13) hours to complete.
>
> "12. Based on the fact that it took me 13 hours to search for other incidents where vehicles ran into Dollar General stores in an 18 store district, I estimate that it would take approximately 9,389 hours to search for similar incidents occurring at the more than 13,000 Dollar General stores nationwide."

On December 19, 2016, Gilliam filed a reply brief in support of her motion to compel.

On December 19, 2016, the trial court conducted a hearing on Dollar General's motion to quash and Gilliam's motion to

compel. On February 8, 2017, the trial court entered an order that provided, in relevant part:

> "Having considered the arguments of the parties, the Court finds that [Gilliam's] Motion to Compel is hereby GRANTED in part and [Dollar General's] Motion to Quash is DENIED.
>
> "The scope of discovery is hereby limited in the following respects:
>
> > "RFP #7: Produce all incident reports along with photographs of any similar incident (i.e., where cars crashed into the front of a Dollar General due to no bollards) in the five year period leading up to March 14, 2016 where a vehicle crashed into a Dollar General [store] in the United States."

(Petition, Exhibit #7 (capitalization in original; emphasis added).)

On March 6, 2017, Dollar General filed a motion to reconsider and for a protective order. It asserted that the trial court's modification of the request for production would not lighten its burden because, even though the modification would limit production, it would still have to conduct the same search. Gilliam filed a response in opposition to Dollar General's motion to reconsider and for a protective order. The parties subsequently filed supplements to their motions.

On July 12, 2017, the trial court denied Dollar General's motion to reconsider. This petition followed.

Standard of Review

> "'"A writ of mandamus will be 'issued 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 United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993)."
>
> "'Ex parte Horton Homes, Inc., 774 So. 2d 536, 539 (Ala. 2000). Regarding discovery matters specifically, this Court has stated:
>
> > "'"Discovery matters are within the trial court's sound discretion, and this Court will not reverse a trial court's ruling on a discovery issue unless the trial court has clearly exceeded its discretion. Home Ins. Co. v. Rice, 585 So. 2d 859, 862 (Ala. 1991)...."'
>
> "Ex parte Guaranty Pest Control, Inc., 21 So. 3d 1222, 1225-26 (Ala. 2009)."

Ex parte Loube Consulting Int'l, Inc., 45 So. 3d 741, 747 (Ala. 2010). Finally,

> "with respect to the use of a mandamus petition to obtain appellate review of a discovery matter, this Court has stated:
>
> > "'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. The writ will not issue where the right in question is doubtful.'
>
> "Ex parte Dorsey Trailers, Inc., 397 So. 2d 98, 102 (Ala. 1981)."

Ex parte Carlisle, 26 So. 3d 1202, 1205 (Ala. 2009).

Discussion

In its petition to this Court, Dollar General argues, as it did before the trial court, that the discovery order the trial court entered is overly broad and unduly burdensome.

> "In Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810 (Ala. 2003), this Court announced that it would no longer review discovery orders pursuant to extraordinary writs. However, we did identify four circumstances in which a discovery order may be reviewed by a petition for a writ of mandamus. Such circumstances arise (a) when a privilege is disregarded, see Ex parte Miltope Corp., 823 So. 2d 640, 644-45 (Ala. 2001); (b) when a discovery order compels the production of patently irrelevant or duplicative documents the production of which clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit received by the requesting party, see, e.g., Ex parte Compass Bank, 686 So. 2d 1135, 1138 (Ala.

> 1996); (c) when the trial court either imposes sanctions effectively precluding a decision on the merits or denies discovery going to a party's entire action or defense so that, in either event, the outcome of the case has been all but determined and the petitioner would be merely going through the motions of a trial to obtain an appeal; or (d) when the trial court impermissibly prevents the petitioner from making a record on the discovery issue so that an appellate court cannot review the effect of the trial court's alleged error. The burden rests on the petitioner to demonstrate that its petition presents such an exceptional case -- that is, one in which an appeal is not an adequate remedy. See Ex parte Consolidated Publ'g Co., 601 So. 2d 423, 426 (Ala. 1992)."

Ex parte Dillard Dep't Stores, Inc., 879 So. 2d 1134, 1136-37 (Ala. 2003).

In this case, Dollar General presented evidence indicating that it would take approximately 9,389 hours to search for similar incidents that had occurred at the more than 13,000 Dollar General stores nationwide. Dollar General also indicated that a search of all incident reports over a five-year period would involve approximately 85,815 total incident reports and would cost approximately $270,000 to $300,000.

> "In Ex parte Compass Bank, 686 So. 2d 1135 (Ala. 1996), the plaintiff sought discovery of every Compass Bank customer file involving a variable annuity. Compass Bank objected on the grounds that compliance with such a request would require

> production of at least 21,246 customer files and would involve the review of files on 35,000 transactions unrelated to the plaintiff's claim. This Court overruled the trial court's order compelling production of the documents. Id. at 1138. In Ex parte Mobile Fixture & Equipment Co., 630 So. 2d 358 (Ala. 1993), this Court held that the trial court was within its discretion in denying, as overbroad, a security service's request for production of information concerning investigations, management reviews, and field audits of all employees and all customers. Id. at 360. The requested discovery would have required the review of 5,400 files and would have required the defendant to reveal the names, addresses, and telephone numbers of its customers."

Ex parte Dillard Dep't Stores, Inc., 879 So. 2d at 1138.

Even though the trial court modified the scope of discovery in this case, the discovery ordered was as oppressive and burdensome as the discovery requests in Ex parte Compass Bank, 686 So. 2d 1135 (Ala. 1996), and Ex parte Mobile Fixture & Equipment Co., 630 So. 2d 358 (Ala. 1993). Therefore, the burden on Dollar General to comply with that order was out of proportion to any benefit Gilliam would obtain from the requested information.

Conclusion

For the above-stated reasons, we conclude that Dollar General has established that it has a clear legal right to relief from the trial court's February 8, 2017, discovery

order. Accordingly, we grant the petition for a writ of mandamus and direct the trial court to modify its February 8, 2017, order with respect to request no. 7 to provide as follows:

> "RFP #7: Produce all incident reports along with photographs of any similar incident (i.e., where cars crashed into the front of a Dollar General due to a lack of bollards) in the five-year period leading up to March 14, 2016, where a vehicle crashed into a Dollar General store in the State of Alabama."

(Emphasis added.)

PETITION GRANTED; WRIT ISSUED.

Stuart, C.J., and Bolin, Sellers, and Mendheim, JJ., concur.

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

Parker, Main, and Bryan, JJ., dissent.

SHAW, Justice (concurring in the result).

The petitioner, Dolgencorp, LLC ("Dollar General"), contends that the trial court's order directing certain discovery be produced to the plaintiff, Deborah Renae Gilliam, is unduly burdensome. That order directs Dollar General to:

> "Produce all incident reports along with photographs of any similar incident (i.e., where cars crashed into the front of a Dollar General due to no bollards) in the five year period leading up to March 14, 2016 where a vehicle crashed into a Dollar General [store] in the United States."

In support of its argument, Dollar General submitted in the trial court affidavits from Cindy Helmbrecht, a then senior claims representative in Dollar General's Risk Management Department. Helmbrecht testified that the department receives incident reports from Dollar General's stores, that the narrative descriptions of incidents in the reports vary in language and terms, that the records system the department uses cannot search records by type of incident, and that the searches that will be required to answer the discovery order must be conducted manually in what appears to be a cumbersome, time-consuming process. In an attempt to respond to Gilliam's discovery request, Helmbrecht searched for applicable records in the 18-store district in which the

accident in this case occurred; it required 13 hours to complete. Given this, Helmbrecht estimated that searching the records for all of Dollar General's stores, which at that time exceeded 13,000 locations, would take 9,389 employee hours to complete. If all the employees on her team were to stop their normal work to focus on the request, she testified that the search would take some 26 weeks to perform.

Under Rule 26(b)(1), Ala. R. Civ. P.,

> "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action .... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

"Relevancy" in this context "'means relevant to the subject matter of the action'" and not whether the materials discovered would be admissible over a "relevancy" objection at trial;[1] under this analysis, "'evidence is relevant if it affords a reasonable possibility that the information sought will lead to other evidence that will be admissible.'" Zaden v. Elkus, 881 So. 2d 993, 1005 (Ala. 2003) (quoting Plitt v. Griggs, 585 So. 2d 1317, 1321 (Ala. 1991) (emphasis omitted)).

[1]See Rule 402, Ala. R. Evid.

This rule, we have stated, "'contemplates a broad right of discovery,'" and discovery "'should be permitted if there is any likelihood that the information sought will aid the party seeking discovery in the pursuit of his claim or defense. Discovery is not limited to matters that would be admissible as evidence in the trial of the lawsuit.'" Zaden, 881 So. 2d at 1005 (quoting Ex parte AMI West Alabama Gen. Hosp., 582 So. 2d 484, 485-86 (Ala. 1991). Furthermore, discovery matters are within the trial court's discretion. Ex parte Meadowbrook Ins. Grp., Inc., 987 So. 2d 540, 547 (Ala. 2007).

Rule 26(b)(1), however, is not a blank check. Among other things, a trial court exceeds its discretion when a discovery order compels the production of patently irrelevant documents that would impose a burden on the producing party far out of proportion to any benefit that the requesting party will receive. See Ex parte Dillard Dep't Stores, Inc., 879 So. 2d 1134, 1138 (Ala. 2003), and Ex parte Compass Bank, 686 So. 2d 1135, 1138 (Ala. 1996). In the context of this particular type of objection to a discovery request, I believe that we must balance the burden created by producing the

requested evidence against the "relevance" of that evidence to the subject matter of the case.

Dollar General contends that the relevancy of the requested materials is low. Gilliam argues that they might tend to show that the crash in this case was foreseeable. But Dollar General argues that in Albert v. Hsu, 602 So. 2d 895 (1992), this Court held that a driver crashing into a building is not a "foreseeable" occurrence that would give rise to a duty on the part of the building owner to protect persons in the building from such a crash. Thus, according to Dollar General, discovery of evidence indicating that vehicles had previously crashed into Dollar General stores would have limited value to Gilliam's case.

It is unclear how likely the information sought will aid Gilliam in the pursuit of her claim or lead to other admissible evidence. Unless the requested discovery reveals something unique regarding crashes into Dollar General's stores, then evidence that crashes simply occurred would not tend to show a duty owed by Dollar General different from the duty owed by any other similarly situated building owner who, as Albert holds, generally has no duty at all in respect to

vehicle crashes.[2] The likelihood of the requested discovery revealing such evidence seems low; thus, at this time, the "relevance" of the discovery sought also seems low, although the trial court, in its discretion, could have determined its relevance was not nonexistent.

As to the burden on Dollar General to produce the requested information, it is not clear to me that it is as profound as Dollar General argues. Dollar General indicates that it has 85,815 incident reports to search and that the

[2]As the instant case, Albert, and other exhibits in the materials before us show, vehicles do at times crash into retail buildings. Statistically speaking, there is a chance that a vehicle will crash into any store. Nevertheless, under Albert, such crashes are not "foreseeable" for purposes of creating a legal duty. Given that crashes do occur, and given the vast number of Dollar General's stores, it seems likely that the records Gilliam seeks will reveal other crashes at other Dollar General stores; in fact, Gilliam asserts that she has been able to find from other sources evidence of such crashes. The number of crashes might even be great, but this will likely be the case because there are a large number of Dollar General stores. In other words, there may be a lot of crashes simply because Dollar General has a lot of stores. That fact, however, will not create a duty if, statistically speaking, the chances of a vehicle crashing into a Dollar General store is the same as a vehicle crashing into any other store. It seems to me that for there to be an opportunity to distinguish Albert or to depart from its holding, the evidence sought would have to show something "unique" or different about the incidents at Dollar General's stores, such as a statistically significant greater chance or probability of crashes. A greater number of incidents alone would not show this.

cost of performing that search is estimated to be between $270,000 and $300,000. However, as best as I can tell, there was no evidence presented to the trial court to support these assertions; instead, they appear to have been made by counsel at a hearing and in the pleadings. They are not found in the affidavits or the deposition of Helmbrecht presented to the trial court. Assertions by counsel, however, are generally not considered evidence. Ex parte Merrill, [Ms. 1170216, May 18, 2018] ___ So. 3d ___, ___ n.4 (Ala. 2018) ("Motions, statements in motions, and arguments of counsel are not evidence. Westwind Techs., Inc. v. Jones, 925 So. 2d 166, 171 (Ala. 2005).").

Further, Helmbrecht's affidavit testimony, recounted above, was called into question in part by her testimony in her deposition. At that time Helmbrecht, who is an attorney, no longer worked for Dollar General and made clear that she did not want to be deposed. She was a difficult deponent. It appeared that she did not possess a complete knowledge of the ability to search incident-report records. Nevertheless, her deposition indicated how she had consulted with others in her department to arrive at her conclusion as to the capabilities

of the records system. That said, I am somewhat skeptical that an entity as large as Dollar General has no option but to use such an incapable records system and has such limited personnel available. The trial court, in its discretion, may have assigned little "weight" to the evidence describing the burden imposed on Dollar General by its discovery order.

Despite the little "weight" that can be assigned to both the burden on Dollar General and Gilliam's need for this discovery, our caselaw does indicate what could be considered "default" positions when it comes to large discovery requests. "Nationwide discovery has been held 'overly broad and ... not closely tailored to the nature of the [plaintiff's claims].'" Ex parte Vulcan Materials Co., 992 So. 2d 1252, 1263 (Ala. 2008) (quoting Ex parte Henry, 770 So. 2d 76, 80 (Ala. 2000)).

> "In Ex parte Compass Bank, 686 So. 2d 1135 (Ala. 1996), the plaintiff sought discovery of every Compass Bank customer file involving a variable annuity. Compass Bank objected on the grounds that compliance with such a request would require production of at least 21,246 customer files and would involve the review of files on 35,000 transactions unrelated to the plaintiff's claim. This Court overruled the trial court's order compelling production of the documents. Id. at 1138. In Ex parte Mobile Fixture & Equipment Co., 630 So. 2d 358 (Ala. 1993), this Court held that the trial court was within its discretion in denying, as overbroad, a security service's request for

> production of information concerning investigations, management reviews, and field audits of all employees and all customers. Id. at 360. The requested discovery would have required the review of 5,400 files and would have required the defendant to reveal the names, addresses, and telephone numbers of its customers. [The] discovery request[s] in the present case [seeking production of all documents regarding all prior claims, lawsuits, complaints regarding mistreatment and records regarding current and former employees who had been accused of mistreating others in more than 100 department stores throughout the country] are just as oppressive and burdensome as the discovery requests in both Compass Bank and Mobile Fixture."

Ex parte Dillard Dep't Stores, Inc., 879 So. 2d at 1138. See also Ex parte Orkin, Inc., 960 So. 2d 635, 642 (Ala. 2006) (holding that the production ordered by the trial court requiring review of 23,000 files was unduly burdensome).

In light of that precedent, I am persuaded that the order directing a search for incident reports in the instant case from over 13,000 nationwide stores that will take over 9,000 employee hours to perform is too broad and burdensome. Limiting the search to stores in Alabama, it appears to me, is an appropriate reduction in scope. Therefore, I concur in the result.

PARKER, Justice (dissenting).

I respectfully dissent. As the main opinion notes, "'"'[d]iscovery matters are within the trial court's sound discretion, and this Court will not reverse a trial court's ruling on a discovery issue unless the trial court has clearly exceeded its discretion. Home Ins. Co. v. Rice, 585 So. 2d 859, 862 (Ala. 1991).'"'" ___ So. 3d at ___ (quoting Ex parte Loube Consulting Int'l, Inc., 45 So. 3d 741, 747 (Ala. 2010), quoting in turn other cases). Dolgencorp, LLC ("Dollar General"), has the burden of demonstrating that the trial court exceeded its discretion in granting in part Deborah Renae Gilliam's discovery request for information pertaining to any incident in which a vehicle crashed into a Dollar General store in the past five years. To this end, Dollar General directs this Court's attention to the affidavit testimony of Cindy Helmbrecht, at the time an employee of a wholly owned subsidiary of Dollar General, in which Helmbrecht indicated that it would take her a significant amount of time to find the requested information. The trial court took Helmbrecht's affidavit into consideration and limited Gilliam's discovery request, requiring Dollar General to

produce incident reports "of any similar incident (i.e., where cars crashed into the front of a Dollar General due to no bollards)."

Helmbrecht's ability to speak authoritatively on this issue was severely undermined in her subsequent deposition. Dollar General has not presented any further evidence indicating that the trial court exceeded its discretion in ruling on the discovery matters before it, and I do not believe that Helmbrecht's affidavit testimony was adequate to satisfy Dollar General's burden of proof. In short, Dollar General has not demonstrated that it has a clear legal right to the relief it seeks; the trial court properly exercised its discretion.