REL: December 6, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180402

Ex parte Burkes Mechanical, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: Alexsie McCoy

v.

International Paper Company and Burkes Mechanical, Inc.)

(Wilcox Circuit Court, CV-18-900077)

STEWART, Justice.

Burkes Mechanical, Inc., petitions this Court for a writ of mandamus directing the Wilcox Circuit Court ("the trial court") to vacate its order denying Burkes's motion to dismiss

claims of negligence, wantonness, and the tort of outrage asserted against Burkes by Alexsie McCoy and to enter an order dismissing those claims. We deny the petition.

Facts and Procedural History

On April 6, 2018, McCoy was injured during the course of his employment as an iron worker for Burkes. According to McCoy's complaint, McCoy and two other iron workers were working in a hot, confined space at a mill owned by International Paper Company ("IP") and were using welding torches to cut heavy metal plates in IP's debarking machine. A worker employed by another company broke a welding line, which ignited the air. McCoy sustained severe burn injuries. According to McCoy, Burkes failed to notify IP, which had an emergency-medical-response team on site to address workplace injuries. According to McCoy, a Burkes employee sprayed an "improper substance" on McCoy to treat the burn injury and refused McCoy's request to cut off McCoy's shirt. McCoy further alleged that, rather than calling an ambulance, Burkes transported McCoy by private vehicle to a local doctor's office. The doctor advised that the injuries were too severe to be treated at his office and that McCoy needed to be taken

to a hospital. A Burkes employee transported McCoy to a drugstore to purchase over-the-counter burn cream and then to Grove Hill Memorial Hospital. That hospital determined that the burns were too serious to be treated there, and, as a result, McCoy was transported by ambulance to the University of South Alabama Medical Center in Mobile, where he was hospitalized for approximately one week.

On September 20, 2018, McCoy sued Burkes and other defendants[1] in the trial court seeking benefits under the Act and asserting claims of negligence, wantonness, and the tort of outrage against Burkes and the other defendants. McCoy's claims against Burkes were based on his assertions that Burkes failed to furnish appropriate medical care and to provide reasonable and prompt access to qualified health-care providers after his workplace accident. On October 24, 2018, Burkes filed an answer and asserted various affirmative defenses. That same day, Burkes filed a motion to dismiss McCoy's negligence and wantonness claims against it, asserting that § 25-5-52 and § 25-5-53, Ala. Code 1975, the exclusivity

[1]McCoy named Burkes, IP, Koldsteel, Inc., Jimmy Knight, Kevin Walls, Ruben Soto, and fictitiously named defendants. Burkes is the only defendant involved in this petition.

provisions of the Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975 ("the Act"), barred those claims. Burkes also sought the dismissal of the tort-of-outrage claim because, it asserted, McCoy had not pleaded facts sufficient to constitute the tort of outrage. On January 27, 2019, the trial court entered an order denying Burkes's motion to dismiss. Burkes timely filed a petition for the writ of mandamus in this Court.

Standard of Review

> "'The writ of mandamus is a drastic and extraordinary writ, to 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); see also Ex parte Ziglar, 669 So. 2d 133, 134 (Ala. 1995).' Ex parte Carter, 807 So. 2d [534,] 536 [(Ala. 2001)]."

Ex parte McWilliams, 812 So. 2d 318, 321 (Ala. 2001).

"This Court has repeatedly held that the denial of a motion to dismiss is reviewable by a petition for a writ of mandamus when the motion to dismiss asserts immunity under the exclusive-remedy provisions of the Workers' Compensation Act." Ex parte Tenax Corp., 228 So. 3d 387, 390-91 (Ala.

2017)(citing Ex parte McCartney Constr. Co., 720 So. 2d 910 (Ala. 1998), Ex parte Progress Rail Servs. Corp., 869 So. 2d 459 (Ala. 2003), and Ex parte Rock Wool Mfg. Co., 202 So. 3d 669 (Ala. 2016)).

> "'"'In reviewing the denial of a motion to dismiss by means of a mandamus petition, we do not change our standard of review ....'" Drummond Co. v. Alabama Dep't of Transp., 937 So. 2d 56, 57 (Ala. 2006) (quoting Ex parte Haralson, 853 So. 2d 928, 931 (Ala. 2003)).
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> "'"In Newman v. Savas, 878 So. 2d 1147 (Ala. 2003), this Court set out the standard of review of a ruling on a motion to dismiss for lack of subject-matter jurisdiction:
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> "'"'A ruling on a motion to dismiss is reviewed without a presumption of correctness. Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993). This Court must accept the allegations of the complaint as true. Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002). Furthermore, in reviewing a ruling on a motion to dismiss we will not consider whether the pleader will ultimately prevail

> but whether the pleader may possibly prevail. Nance, 622 So. 2d at 299.'
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> "'"878 So. 2d at 1148-49."
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> "'Pontius v. State Farm Mut. Auto. Ins. Co., 915 So. 2d 557, 563 (Ala. 2005). We construe all doubts regarding the sufficiency of the complaint in favor of the plaintiff. Drummond Co., 937 So. 2d at 58.'
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> "Ex parte Alabama Dep't of Transp., 978 So. 2d 17, 21 (Ala. 2007)."

Ex parte Austal USA, LLC, 233 So. 3d 975, 978-79 (Ala. 2017)(reviewing a mandamus petition that involved claims of immunity under the exclusivity provisions of the Act).

Discussion

Burkes argues that McCoy's claims of negligence and wantonness are barred by the immunity afforded to employers by §§ 25-5-52 and 25-5-53 of the Act ("the exclusive-remedy provisions"). This Court has explained that the exclusive-remedy provisions operate to limit an employer's civil liability for an employee's job-related injuries.[2] See Lowman

[2]Section 25-5-52 provides that

> "no employee of any employer subject to [the Act] ... shall have a right to any other method, form, or amount of compensation or damages for an injury or

v. Piedmont Exec. Shirt Mfg. Co., 547 So. 2d 90, 92 (Ala. 1989). For purposes of the Act, an "injury and personal injury"

> "shall mean only injury by accident arising out of and in the course of the employment .... Injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him or her and not directed against him or her as an employee or because of his or her employment. Injury does not include a mental disorder or mental injury that has neither been produced nor been proximately caused by some physical injury to the body."

§ 25-5-1(9), Ala. Code 1975. Section 25-5-1(8), Ala. Code 1975, states that the clause "'[i]njuries by an accident arising out of and in the course of the employment" "does not

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> death occasioned by an accident or occupational disease proximately resulting from and while engaged in the actual performance of the duties of his or her employment and from a cause originating in such employment or determination thereof."

Section 25-5-53 provides, among other things:

> "The rights and remedies granted in [the Act] to an employee shall exclude all other rights and remedies of the employee ... on account of injury, loss of services, or death. Except as provided in [the Act], no employer shall be held civilly liable for personal injury to or death of the employer's employee, for purposes of [the Act], whose injury or death is due to an accident ... while engaged in the service or business of the employer, the cause of which accident ... originates in the employment."

cover workers except while engaged in or about the premises where their services are being performed or where their service requires their presence as a part of service at the time of the accident."

McCoy's negligence and wantonness claims are based on the following allegations in his complaint, which must be taken as true. See Creola Land Dev., Inc. v. Bentbrooke Hous., L.L.C., 828 So. 2d 285, 288 (Ala. 2002). After McCoy suffered the burn injury, another Burkes employee sprayed an improper substance on McCoy, refused to notify IP's on-site emergency-response team of McCoy's injury, and refused McCoy's request to cut off his shirt.[3] The Burkes employee also failed to call an ambulance and, instead of taking McCoy directly to a hospital, took him first to a doctor's office. After that doctor advised that the severity of McCoy's burns required treatment at a hospital, the Burkes employee then, instead of going directly to the hospital, detoured to a drugstore to purchase over-the-counter burn cream before eventually taking McCoy to the hospital. McCoy argues that these post-accident acts and

[3]McCoy asserts that Burkes refused to notify the IP emergency-response team and "snuck" him out to avoid the potential loss of its contract with IP.

omissions did not arise out of and in the course of his employment and thus are not covered by the Act.

Citing Beard v. Mobile Press Register, Inc., 908 So. 2d 932, 935 (Ala. Civ. App. 2004), Burkes argues that §§ 25-5-52 and -53 "provide that 'the Act is the exclusive remedy when an employee is injured in an accident proximately resulting from, and that occurred while the employee was engaged in, the actual performance of the duties of his or her employment.'" (Quoting Ex parte Shelby Cty. Health Care Auth., 850 So. 2d 332, 338 (Ala. 2002).) In Beard, a coworker shot and killed an employee while they were both at work. The employee's estate sued his employer, asserting, among other claims, claims of failure to provide a safe workplace, failure to protect the employee from a criminal act, and vicarious liability for the coworker's actions. The trial court entered a summary judgment in favor of the employer based on the exclusive-remedy provisions. In affirming the judgment, the Court of Civil Appeals held that the employee's estate did not present substantial evidence demonstrating that his death did not result from an "accident" under the Act and that the exclusive-remedy provisions applied. 908 So. 2d at 937-38. The Court of Civil Appeals acknowledged, however, that "an

employer's 'intentional tortious conduct, such as intentional fraud, "committed beyond the bounds of the employer's proper role," is actionable notwithstanding the exclusivity provisions of the [Act].'" 908 So. 2d at 936 (quoting Hobbs v. Alabama Power Co., 775 So. 2d 783, 786 (Ala. 2000), quoting in turn Lowman, 547 So. 2d at 95).

Burkes also relies on Rock Wool Manufacturing Co., 202 So. 3d 669 (Ala. 2016), in arguing that the exclusive-remedy provisions are applicable even if Burkes acted intentionally in causing any injury to McCoy because the injury was the result of a workplace accident. In Rock Wool, an employee was working as a furnace operator for Rock Wool when a furnace exploded and the employee was injured. The evidence indicated that, at some point before the explosion, Rock Wool had removed from the furnace certain safety equipment that had the capacity to mitigate injury in the event of an explosion. The employee sued Rock Wool, asserting claims of negligence, wantonness, and the tort of outrage. The employee asserted that Rock Wool's conduct in removing the safety equipment was intentional. This Court explained that the action causing the employee's injury, whether negligent or intentional, was a "workplace accident" and that, as a result, the exclusive-

remedy provisions applied to bar the employee's tort claims. 202 So. 3d at 676.

McCoy, relying on Lowman, argues that the negligence and wantonness claims are based on conduct and resulting injuries occurring independently after the workplace accident and that, as a result, those claims are not barred by the exclusive-remedy provisions. More particularly, McCoy argues that his tort claims arise from the aggravated pain, suffering, and mental anguish caused by Burkes's failure to secure appropriate medical care and its failure to provide reasonable and prompt access to qualified health-care providers after McCoy's workplace accident.

In Lowman, an employee suffered an on-the-job back injury and she sought workers' compensation benefits. The employer refused to process the workers' compensation claim and told the employee to state that her injury had occurred at home. Thereafter, a coworker visited the employee in the hospital and "'threatened' [the employee] with being 'stuck with a big [medical] bill' if [the employee] did not file her disability claim as for an off-the-job injury." Lowman, 547 So. 2d at 92. The employee sued the employer, alleging fraud, conspiracy to defraud, and the tort of outrage, and the trial court entered

a summary judgment in favor of the employer, finding that the exclusive-remedy provisions barred the employee's tort claims. On appeal, this Court held that the exclusive-remedy provisions did not operate to bar the employee's claims because "[t]he relationship between the original accident, which led to [the employee's] hospitalization, and the subsequent actions of [the employer and the coworker], which are the subject matter of this action, is entirely too tenuous to bring the later activities under the coverage of workmen's compensation." 547 So. 2d at 93.

The cases relied upon by Burkes -- Rock Wool and Beard -- are factually distinguishable. Both cases involved claims related to a single injury that occurred while the employees were performing their jobs. In this case, McCoy has asserted claims based on additional injuries that he alleges arose from conduct that occurred following his workplace injury. In Rock Wool, this Court acknowledged that important factual distinction, explaining that the employee's claims in Lowman "were predicated, not on her workplace injury itself, but rather on the employer's actions following the employee's workplace injury." 202 So. 3d at 674.

Whether McCoy's claims relate to injuries that actually arose out of his employment or whether McCoy's claims relate to activities that are "too tenuous to bring the later activities under the coverage" of the Act, Lowman, 547 So. 2d at 93, is a fact-intensive inquiry. Considering the allegations in McCoy's complaint most strongly in McCoy's favor, as we must, we conclude that the trial court could have determined that McCoy's negligence and wantonness claims did not arise from "an accident proximately resulting from, and that occurred while the employee was engaged in, the actual performance of the duties of his or her employment." Ex parte Shelby Cty. Health Care Auth., 850 So. 2d 332, 338 (Ala. 2002). In light of such a determination, the exclusive-remedy provisions would not operate to bar McCoy's claims for the post-accident events.

A petitioner for the writ of mandamus bears a heavy burden of demonstrating "'"a clear legal right ... to the order sought"'" and that there was "'"an imperative duty upon the respondent to perform."'" Ex parte McWilliams, 812 So. 2d at 321 (quoting other cases). Based on these facts and the materials presented, we cannot say that Burkes met its burden of demonstrating that the trial court had an "imperative duty"

to grant its motion to dismiss. McWilliams, 812 So. 2d at 321. Accordingly, Burkes, with its reliance on a few distinguishable cases, has not demonstrated a clear legal right to have the negligence and wantonness claims against it dismissed. See Ex parte Simpson, 36 So. 3d 15, 25 (Ala. 2009)("'The burden of establishing a clear legal right to the relief sought rests with the petitioner.'"(quoting Ex parte Metropolitan Prop. & Cas. Ins. Co., 974 So. 2d 967, 972 (Ala. 2007), citing in turn Ex parte Cincinnati Ins. Cos., 806 So. 2d 376, 379 (Ala. 2001))).

With regard to McCoy's tort-of-outrage claim, Burkes does not argue that the exclusive-remedy provisions would bar that claim. Instead, Burkes argues that the tort-of-outrage claim should have been dismissed because, it asserts, the facts McCoy alleged in his complaint are insufficient to rise to the level necessary to support a tort-of-outrage claim. McCoy argues that Burkes did not argue in its motion to dismiss or in its petition for a writ of mandamus that the tort-of-outrage claim should be dismissed based on the exclusive-remedy provisions but, instead, argued that it should be dismissed for failure to state a claim, an argument that is not reviewable by mandamus. We agree. Absent a recognized

exception, the denial of a motion to dismiss is not reviewable through a petition for a writ of mandamus. See Ex parte Lincare Inc., 218 So. 3d 331, 337 (Ala. 2016). Burkes has not asked us to determine whether the tort-of-outrage claim in this circumstance is barred by the exclusive-remedy provisions, despite the existence of divergent cases on the issue, and, accordingly, we will not address it.[4] "Arguments not made as a basis for mandamus relief are waived." Simpson, 36 So. 3d at 25 (citing Ex parte Navistar, Inc., 17 So. 3d 219, 221 n. 1 (Ala. 2009)). Although Burkes attempts to gloss over this deficiency and raise the issue in its reply brief, "[w]e note 'the well-established principle of appellate review that we will not consider an issue not raised in an appellant's initial brief, but raised only in its reply brief.'" Kyser v. Harrison, 908 So. 2d 914, 917 (Ala. 2005)

[4]See Ex parte Lincare Inc., supra (holding that assault-and-battery and tort-of-outrage claims were subsumed under the exclusive-remedy provisions); Rock Wool, 202 So. 3d at 676 (granting mandamus relief upon holding that the tort-of-outrage claim, along with others, should have been dismissed based on the exclusive-remedy provisions); and Soti v. Lowe's Home Ctrs., Inc., 906 So. 2d 916, 919 (Ala. 2005)("The exclusivity provisions of Alabama's Workers' Compensation Act do not bar tort-of-outrage or fraud actions by employees."(citing Lowman, 547 So. 2d at 95)).

(quoting Brown v. St. Vincent's Hosp., 899 So. 2d 227, 234 (Ala. 2004)).

Conclusion

Burkes has not demonstrated a clear legal right to have McCoy's tort claims against it dismissed. Accordingly, we deny the petition. McWilliams, 812 So. 2d at 321.

PETITION DENIED.

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

Shaw, Bryan, and Sellers, JJ., concur in the result.

Mendheim and Mitchell, JJ., concur in part and dissent in part.

MITCHELL, Justice (concurring in part and dissenting in part).

I write to explain my view of the holdings in this case. I concur with the main opinion to the extent it denies the mandamus petition filed by Burkes Mechanical, Inc., as to the tort-of-outrage claim asserted by Alexsie McCoy. I respectfully dissent, however, to the extent the main opinion denies the mandamus petition as to McCoy's negligence and wantonness claims.

I agree with the main opinion that we need not decide whether McCoy's tort-of-outrage claim is subsumed by §§ 25-5-52 and 25-5-53, Ala. Code 1975, the exclusive-remedy provisions of the Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975 ("the Act"), because Burkes failed to make this argument in its initial appellate brief.

With regard to McCoy's negligence and wantonness claims, however, it is undisputed that his initial injury was "caused by an accident arising out of and in the course of his or her employment." § 25-5-51, Ala. Code 1975. In my view, any additional injury McCoy suffered as a result of the treatment Burkes provided in the immediate aftermath of that accident would also be an injury arising from his employment. His negligence and wantonness claims would therefore be barred by

the exclusive-remedy provisions of the Act. McCoy argues that those tort claims should be allowed based on Lowman v. Piedmont Executive Shirt Manufacturing Co., 547 So. 2d 90 (Ala. 1989), but I find that case -- in which the employer initially refused to treat the employee's workplace injury as being covered by the Act and the employer's alleged tortious conduct occurred days after the workplace accident as opposed to in the immediate aftermath -- to be distinguishable.

Mendheim, J., concurs.