REL: October 18, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180336

Orethaniel Swain

v.

AIG Claims, Inc., The Insurance Company of the State of Pennsylvania, Sandra Thomas, Coventry Health Care Workers' Compensation, Inc., and Jackie Angeles

Appeal from Jefferson Circuit Court
(CV-18-902406)

HANSON, Judge.

Orethaniel Swain appeals from a judgment of the Jefferson Circuit Court dismissing, pursuant to Rule 12(b)(6), Ala. R. Civ. P., his claims alleging intentional infliction of

emotional distress, fraud, and conspiracy on the part of defendants AIG Claims, Inc. ("AIG"), The Insurance Company of the State of Pennsylvania ("ICSP"), Sandra Thomas, Coventry Health Care Workers' Compensation, Inc. ("Coventry"), and Jackie Angeles ("the defendants"). For the following reasons, we reverse the judgment of dismissal and remand the case for further proceedings.

Facts and Procedural History

On December 11, 2017, Swain was injured while working within the line and scope of his employment with Imerys USA, Inc. ("Imerys"). Swain claims to have suffered both physical and mental injuries, including post-traumatic stress disorder ("PTSD"), as a result of a workplace accident that, he says, was compensable under the Alabama Workers' Compensation Act, Ala. Code 1975, § 25-5-1 et seq. ("the Act"). On June 14, 2018, Swain commenced this action against AIG, Thomas, Coventry, and Angeles. Swain later amended his complaint to add ICSP as a defendant and to assert a claim for workers' compensation benefits against ICSP; as finally amended, the complaint asserted claims of intentional infliction of emotion distress, fraud, and conspiracy against all defendants.

According to the complaint, ICSP provided workers' compensation coverage to Imerys; AIG was the workers' compensation claims administrator for ICSP; Thomas was the insurance adjuster employed by AIG assigned to Swain's claim; Coventry was a claims-management company retained by AIG; and Angeles, an employee of Coventry, was assigned as the "nurse case manager" for Swain's claim.

Swain's allegations, as ultimately and finally set forth in his third amended complaint, may be summarized as follows: On December 11, 2017, Swain was injured at work when a large electrical circuit breaker exploded. Swain's injuries from the accident included physical injuries to his head, lungs, neck, back, and pelvic region. Swain also asserts that the accident caused him to suffer PTSD and anxiety. Swain was initially required to seek treatment through his personal doctors under his health-insurance coverage. On January 23, 2018, however, Angeles met with Swain regarding his workers' compensation claim. Angeles informed Swain that she would be serving as his nurse, would handle making all of his necessary doctor appointments, and would generally make sure he received the care he needed to treat his work-related injuries.

According to the complaint, Angeles informed Swain that she was working on his behalf and not the insurance company's or his employer's behalf.

The defendants sent Swain for treatment to Dr. Bruce Romeo. Dr. Romeo provided some treatment for Swain's respiratory problems and referred Swain to an eye doctor. Dr. Romeo, however, did not provide any treatment for Swain's other problems. Rather, Dr. Romeo ordered Swain back to work with restrictions. Swain contends that he was unable to do anything at work other than sit in a chair throughout the workday and that his working conditions exacerbated his mental-health issues. Swain became concerned that he was not receiving the treatment he needed, and on February 15, 2018, Swain retained legal counsel to assist him with his workers' compensation claim. Swain's counsel began sending letters and e-mails to the defendants with increasing urgency regarding Swain's mental and emotional state and requesting that Swain be seen by a neurologist or a neuropsychologist. The defendants were informed that Swain was suffering from obvious symptoms of PTSD, was under extreme distress, and was in need of treatment.

On March 24, 2018, Swain was referred by the defendants to a neurologist. On April 24, 2018, the neurologist examined Swain and determined that he required treatment by a psychiatrist or a neuropsychiatrist. Swain's counsel made numerous attempts to secure approval from the defendants for the referral made by the neurologist by means of telephone and electronic correspondence, but his calls and e-mails were met with no response from the defendants. Swain's counsel informed the defendants in telephone messages and e-mails that Swain was suffering and urgently needed psychiatric or neuropsychiatric care.

On May 21, 2018, Swain was again seen by Dr. Romeo. Despite being informed by Swain of his continuing symptoms and the neurologist's determination that Swain required psychiatric or neuropsychiatric treatment, Dr. Romeo placed Swain at maximum medical improvement ("MMI") and sent him back to work without restrictions. That same day, and allegedly as a result of the defendants' and Dr. Romeo's actions, Swain suffered a mental breakdown. He was treated at the emergency department of Brookwood Medical Center in Birmingham and was admitted to the behavioral-health-care unit of the hospital,

where he was treated with a full regimen of psychiatric services for nine days. Swain alleges that he is now required to see a psychiatric specialist on an outpatient basis and that medical professionals have directed him not to return to work.

Swain alleges that his mental breakdown and his ongoing need to receive specialized psychiatric treatment is the result of the defendants' handling of his workers' compensation claim. Swain contends that the defendants, by their conduct, are guilty of the intentional infliction of emotional distress or, as it is commonly referred to in our caselaw, the tort of outrage. See generally American Rd. Serv. Co. v. Inmon, 394 So. 2d 361 (Ala. 1980) (recognizing existence of tort recovery for intentional infliction of emotional distress). With regard to that claim, he has alleged, among other things, that the defendants never intended to provide him with adequate treatment and that the defendants conspired with Dr. Romeo to have him erroneously placed at MMI and to have him over medicated so as to mask certain untreated conditions. Furthermore, Swain alleged:

> "The [d]efendants utterly refused to send ... Swain to a specialist in psychiatry and denied him

> reasonable and necessary treatment so [his] psychiatric and physical injuries would become worse and cause him to become so sick and frustrated that he would agree to resolve his workers' compensation claim for less than the benefits to which he is entitled. [He] ... was caused by the [d]efendants' misconduct to suffer a mental breakdown and a new and more severe condition."

As to his fraud claim, Swain alleges that Angeles affirmatively misrepresented (a) that she would be his nurse and working on his behalf; (b) that she would get him set up for treatment for all of his injuries and get him "sent to all the right doctors"; and (c) that she would talk to the doctors and "insurance company" (presumably AIG or ICSP) for the purpose of making sure he received care and that his care would proceed smoothly. Swain also alleges that the defendants suppressed the facts (a) that Angeles and Coventry were not working for his interests, but for the interests of AIG, ICSP, Thomas, and Imerys; (b) that Dr. Romeo was serving the interests of the defendants and not Swain; (c) that the goal of ICSP was to save money on Swain's claim irrespective of the extent of any treatment needed by Swain; (d) that the defendants did not intend to authorize treatment for psychiatric care; and (e) that the defendants intended to ensure Swain's return to full-duty work at the May 21, 2018,

appointment with Dr. Romeo. Swain contends that, had he known that the defendants were going to persist in refusing to send him to a psychiatric specialist, "he would have found his own psychiatric specialist much sooner and he would have been properly treated, thereby preventing the new and more severe condition." Swain further alleges that the defendants conspired together, along with Dr. Romeo, to deny him the proper medical care needed to treat his injuries, particularly with regard to the PTSD and other mental injuries.

After Swain had filed his complaint, which additionally sought an award of benefits from ICSP under the Act, each defendant moved, pursuant to Rule 12(b)(6), Ala. R. Civ. P., to dismiss Swain's tort claims. The defendants argued that Swain's claims were governed by the Act and that, pursuant to § 25-5-77(a), Ala. Code 1975, Swain could seek judicial vindication of his allegations that he had not been provided necessary medical treatment only after having sought a second opinion from an authorized physician selected from a panel of four physicians. The defendants also argued that, even accepting the facts in Swain's complaint as true, he could not

satisfy the elements of fraud, the tort of outrage, or conspiracy.

On November 5, 2018, the trial court granted the motions to dismiss Swain's tort claims against all the defendants. On November 9, 2018, the trial court directed the entry of a final judgment of dismissal pursuant to Rule 54(b), Ala. R. Civ. P., in favor of Coventry and Angeles. On November 12, 2018, Swain moved to voluntarily dismiss his sole remaining claim -- the claim for workers' compensation benefits against ICSP. That motion was granted on November 12, 2018. Swain timely filed his notice of appeal on December 12, 2018, and Swain's appeal was transferred to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Standard of Review

The standard of review applicable to a ruling on a motion to dismiss for failure to state a claim is well settled:

> "'On appeal, a dismissal is not entitled to a presumption of correctness. The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. In making this determination, this Court does not consider whether the

> plaintiff will ultimately prevail, but only whether she may possibly prevail. We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'"

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 791 (Ala. 2007) (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).[1]

Analysis

Swain contends that the trial court erred in dismissing his tort claims against the defendants. The trial court cited two primary rationales in dismissing Swain's tort claims. First, it concluded that § 25-5-77(a) barred the claims. Second, it held that Swain could not establish essential elements of each of his tort claims. We address those rationales, in turn.

First, Swain contends that the trial court was wrong to dismiss his claims on the basis of § 25-5-77(a). The argument

[1]Covenant and Angeles attached a document to their motion to dismiss titled "consent to release of information." The attachment of that document did not require conversion of those parties' motion to dismiss into a summary-judgment motion because the document was specifically referenced in Swain's complaint. See Snider v. Morgan, 113 So. 3d 643, 648 (Ala. 2012).

that § 25-5-77(a) precludes Swain's tort claims is best summarized by the trial court's order granting Coventry and Angeles's motion to dismiss. The trial court reasoned:

> "Under Section 25-5-77(a) of the Alabama Code, the employer or workers['] compensation carrier has the right to select the treating physician, here Dr. Romeo. If the employee believes that needed treatment is not being provided by the treating physician, the employee may so advise the employer and the employee shall be entitled to select a new treating physician from a panel of four physicians selected by the employer. .... Before seeking judicial vindication of what the employee deems necessary, the employee must first pursue a second opinion from an authorized panel of four physicians. According to [the] [c]omplaint and as acknowledged by his counsel at the hearing, [Swain] failed to pursue a second opinion as to his medical treatment needs from an authorized panel of four physicians pursuant to Section 25-5-77. Having failed to seek a second opinion from a panel of four physicians, [Swain] is not permitted to seek judicial vindication of his claim in court. For this reason, all of the [tort] claims in the ... [c]omplaint fail to state a claim upon which relief can be granted, and [the] [c]omplaint must be dismissed."

The assertion that § 25-5-77(a) bars Swain's tort claims may be more broadly understood as an argument that Swain's claims fall under, and are governed by, the provisions of the Act. Indeed, if the Act applies to Swain's claims, his tort claims would be subject to the immunity and exclusive-remedy provisions of the Act, regardless of his compliance with the

provisions of § 25-5-77(a). For example, § 25-5-53, Ala. Code 1975, provides, in part:

> "The rights and remedies granted in this chapter [i.e., the Act] to an employee shall exclude all other rights and remedies of the employee ... at common law .... Except as provided in this chapter, no employer shall be held civilly liable for personal injury to or death of the employer's employee, for purposes of this chapter, whose injury or death is due to an accident or to an occupational disease while engaged in the service or business of the employer, the cause of which accident or occupational disease originates in the employment. In addition, immunity from civil liability for all causes of action except those based upon willful conduct shall also extend to the workers' compensation insurance carrier of the employer; to a person, firm, association, trust, fund, or corporation responsible for servicing and payment of workers' compensation claims for the employer; [and] to an officer, director, agent, or employee of the carrier, person, firm, association, trust, fund, or corporation ...."

See also § 25-5-11(a), Ala. Code 1975 ("[T]he injured employee ... may bring an action against any workers' compensation insurance carrier of the employer or any person, firm, association, trust, fund, or corporation responsible for servicing and payment of workers' compensation claims for the employer ... only for willful conduct which results in or proximately causes the injury or death."); § 25-5-1(4), Ala. Code 1975 (defining "employer" and noting that the employer's

insurer is "entitled to the employer's rights, immunities, and remedies under" the Act, except as provided by § 25-5-11).[2] Here, the defendants clearly fall within the limited immunity protections granted by the Act. Thus, notwithstanding the defendants' specific reliance upon § 25-5-77(a), the proper inquiry is far simpler: Does the Act apply to Swain's tort claims? If so, those claims are barred by the exclusivity/immunity provisions of the Act.

The seminal case regarding whether the Act bars tort claims arising from the handling of a workers' compensation claim is Lowman v. Piedmont Executive Shirt Manufacturing Co., 547 So. 2d 90 (Ala. 1989). In Lowman, an employee was injured in the line and scope of her employment. The employer refused to process the employee's workers' compensation claim and

[2]We note that Swain does not contend on appeal that the defendants' conduct was "willful conduct" as defined by the Act, such that his action for civil damages against the defendants is not barred by the exclusivity/immunity provisions of the Act. Rather, he relies solely on the broad assertion that the tort-of-outrage, fraud, or conspiracy claims are not barred by the Act. "'An argument not made on appeal is abandoned or waived.'" Muhammad v. Ford, 986 So. 2d 1158, 1165 (Ala. 2007) (quoting Avis Rent A Car Sys., Inc. v. Heilman, 876 So. 2d 111, 1124 n. 8 (Ala. 2003)). Accordingly, we conclude that Swain has waived any specific argument that his tort claims amount to claims alleging "willful" conduct under the Act.

instructed her to fill out a claim form stating that she had actually been injured at home. Later, a representative of the employer visited the employee in the hospital and threatened her with the responsibility for paying her large medical bills if she did not file her disability claim as stemming from an off-the-job injury. The employee brought tort claims against her employer, alleging fraud, conspiracy to defraud, and the tort of outrage. The trial court entered a summary judgment in favor of the employer on those tort claims.

On appeal, our supreme court in Lowman concluded that the tort claims related to the employer's handling of the employee's workers' compensation claim were not barred by the exclusivity/immunity provisions of the Act. The court noted that "the exclusive remedy provisions were not designed to shield an employer or its insurer from the entire field of tort law"; rather, the court held, the exclusivity provisions of the Act "apply only to limit the liability of an employer or its insurer to the statutorily prescribed claims for job-related injuries," 547 So. 2d at 92, and "the exclusivity provisions of the Act do not afford protection for injuries not caused by a job-related accident." Id. at 93. The court

concluded that the employer's alleged postaccident tortious conduct was not an "accident" compensable under the Act. The court reasoned that "[t]he relationship between the original accident, which led to [the employee]'s hospitalization, and the subsequent actions of [the employer], which are the subject matter of this action, is entirely too tenuous to bring the later activities under the coverage of [the law of] workmen's compensation." 547 So. 2d at 93. Thus, our supreme court concluded that the provisions of the Act did not preclude the employee's claims of fraud, conspiracy, and the tort of outrage.

Lowman is sometimes cited by our supreme court for the proposition that "[t]he exclusivity provisions of [the] Act do not bar tort-of-outrage or fraud actions by employees." Soti v. Lowe's Home Ctrs., Inc., 906 So. 2d 916, 919 (Ala. 2005) (citing Lowman); see also, e.g., ITT Specialty Risk Servs., Inc. v. Barr, 842 So. 2d 638, 646 (Ala. 2002) (quoting Hobbs v. Alabama Power Co., 775 So. 2d 783, 786 (Ala. 2000), quoting in turn Lowman, 547 So. 2d at 95) (noting that our supreme court "'has recognized that 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]'"); Gibson v. Southern Guar. Ins. Co., 623 So. 2d 1065, 1066 (Ala. 1993) ("[T]he intentional tort of outrageous conduct and the tort of intentional fraud are not barred by the exclusivity provisions of the Act and can exist in a workers' compensation setting." (citing Lowman)). Such broad statements are, however, an oversimplification. Indeed, Lowman cautioned against discarding immunity merely because a plaintiff uses "'magic words'" like "outrageous" or "intentional" in a complaint, 547 So. 2d at 94 (quoting 2A A. Larson, The Law of Workmen's Compensation § 68.34(c) (1988)), and our supreme court has since clarified that an intentional-tort claim does not circumvent the exclusivity/immunity provisions of the Act when the tortious conduct leads to a covered injury. In Ex parte Progress Rail Services Corp., 869 So. 2d 459, 470 (Ala. 2003), our supreme court explained:

> "[W]hile recognizing the immunity an employer enjoys with respect to an employee's on-the-job injury, the [Lowman] Court declared the principle ... that the exclusivity provisions do not apply if an employee's injury falls outside the coverage of the Act. As Lowman declared, 'an employer is protected from tort liability only as to injuries expressly covered by the language of the Act.' 547 So. 2d at 93.

> Therefore, the statement in Lowman that 'intentional tortious conduct ... committed beyond the bounds of the employer's proper role is actionable,' 547 So. 2d at 95 (emphasis supplied), does not support the different proposition ... that intentional tortious conduct committed within the bounds of the employer's proper role is actionable."

869 So. 2d at 470; see also Ex parte Rock Wool Mfg. Co., 202 So. 3d 669, 673 (Ala. 2016) ("Lowman is best characterized, not as an exception to the immunity granted by the exclusive-remedy provisions of the [Act], but rather as a factual scenario in which the exclusive-remedy provisions of the [Act] simply did not apply because there was no 'accident' that brought the case under the coverage of the [Act]."); Hudson v. Renosol Seating, LLC, 73 So. 3d 1267, 1273 (Ala. Civ. App. 2011) (recognizing that Progress Rail "stands for the proposition that when an employee's claim is otherwise within the scope of the Act, the exclusivity provisions cannot be avoided by the mere expedient of alleging that conduct of the employer giving rise to the claim was willful or intentional"). Thus, it is clear that Swain cannot avoid the application of the exclusivity/immunity provisions of the Act merely by pleading the existence of outrageous or fraudulent

conduct on the part of the defendants. Rather, he must show that his injury falls outside the coverage of the Act.

Determining whether an injury is covered by the Act, however, is not always a straightforward inquiry. Here, Swain has clearly alleged that he suffered compensable physical and mental injuries arising from his workplace accident, the recovery in tort for which is barred by the exclusivity/immunity provisions of the Act. He has also alleged "new" mental injuries that, he contends, were caused by the defendants' postaccident tortious conduct. Determining whether the allegedly new postaccident mental injuries are sufficiently related to the job-related physical injuries such that they are barred by the exclusivity/immunity provisions of the Act requires a proximate-cause analysis. Judge Moore has explained:

> "Originally, the courts took a rather broad view of the causal relationship necessary to activate the exclusivity provisions. If the nonphysical injury would not have occurred but for the physical injury, the employee would be precluded from seeking a civil remedy for the nonphysical tort. Eventually, however, the Supreme Court of Alabama [in Lowman] determined that the 'but for' analysis could lead to preposterous results and held that a civil action for a nonphysical tort would lie when the relationship between the physical injury and the alleged tort was only tenuous at best. In other

> words, a claim for nonphysical injuries would be barred only if the nonphsyical injuries were proximately caused by the physical injuries. That final approach is most logical because the Act only covers psychic injuries proximately caused by a personal injury due to an accident arising out of and in the course of the employment."

2 Terry A. Moore, Alabama Workers' Compensation § 20:11 (2d ed. 2013) (emphasis added; footnotes omitted). Whether Swain's alleged new mental injuries can be considered proximately caused by his workplace accident, however, presents an issue of fact that is generally not appropriate for resolution on a Rule 12(b)(6) motion to dismiss. See Wilbanks v. United Refractories, Inc., 112 So. 3d 472, 474 (Ala. 2012) (noting that the question of proximate cause is ordinarily one for the finder of fact).

In this case, Swain has asserted claims on theories of intentional infliction of emotional distress, fraud, and conspiracy based on the defendants' postaccident handling of his workers' compensation claim. Swain has alleged that he has suffered mental anguish and emotional distress as a proximate result of the defendants' conduct, injuries that he contends are distinct from those he suffered as a result of his alleged on-the-job accident. On the authority of Lowman

and its progeny, we must conclude that there is at least a possibility that Swain's tort claims are not barred by the provisions of the Act, such as § 25-5-77(a).

We next turn to the alternative basis cited in the trial court's judgment -- that Swain cannot establish necessary elements of each of his alleged tort claims. Initially, we note that one of the concerns addressed by Lowman was that, by recognizing that intentional tortious conduct could be actionable outside the aegis of the Act, claimants would seek to transform compensation claims into tort claims merely by invoking terms like "fraudulent" and "outrageous." Our supreme court, quoting a noted workers' compensation law treatise, cautioned:

> "'It seems clear that a compensation claimant cannot transform a simple delay in payments into an actionable tort by merely invoking the magic words "fraudulent, deceitful and intentional" or "intentional infliction of emotional distress" or "outrageous" conduct in his complaint. The temptation to shatter the exclusiveness principle by reaching for the tort weapon whenever there is a delay in payments or a termination of treatment is all too obvious, and awareness of this possibility has undoubtedly been one reason for the reluctance of courts to recognize this tort except in cases of egregious cruelty or venality.'"

547 So. 2d at 94 (quoting Larson, The Law of Workmen's Compensation § 68.34(c)). Thus, a higher burden of proof applies to alleged intentional-tort claims arising out the handling of a workers' compensation claim:

> "Because, by this opinion, we recognize that intentional tortious conduct (i.e., intentional fraud) committed beyond the bounds of the employer's proper role is actionable, we deem it appropriate to address the standard of proof to be applied in determining whether a claim is due to be presented to a jury. In order to insure against borderline or frivolous claims, we believe, in view of the exclusivity clause, that a plaintiff, in order to go to the jury on a claim, must make a stronger showing than that required by the 'substantial evidence rule' as it applies to the establishment of jury issues in regard to tort claims generally. See [Ala.] Code 1975, § 12-21-12. Therefore, we hold that in regard to a fraud claim against an employer, a fellow employee, or an employer's insurer, in order to present a claim to the jury, the plaintiff must present evidence that, if accepted and believed by the jury, would qualify as clear and convincing proof of fraud."

Lowman, 547 So. 2d at 95.

Nevertheless, the question whether a plaintiff has met the burden of proof sufficient to support a tort-of-outrage claim or a fraud claim is typically appropriately addressed at the summary-judgment stage rather than at the pleading stage. Indeed, nearly all the reported Alabama appellate cases concerning tort-of-outrage and fraud claims arising from the

handling of workers' compensation claims have addressed the propriety of summary judgments. See, e.g, Soti, 906 So. 2d at 922-24; Barr, 842 So. 2d at 645; Ex parte Crawford & Co., 693 So. 2d 458 (Ala. 1997); Clark v. Liberty Mut. Ins. Co., 673 So. 2d 395 (Ala. 1995); Gibson, 623 So. 2d at 1067; Gibbs v. Aetna Cas. & Sur. Co., 604 So. 2d 414, 417 (Ala. 1992); Farley v. CNA Ins. Co., 576 So. 2d 158, 160 (Ala. 1991); Wooley v. Shewbart, 569 So. 2d 712, 717 (Ala. 1990); Garvin v. Shewbart, 564 So. 2d 428, 431 (Ala. 1990); Lowman, 547 So. 2d at 95; Reid v. Aetna Cas. & Sur. Co., 692 So. 2d 863 (Ala. Civ. App. 1997); and Jones v. Crawford & Co., 693 So. 2d 454, 457 (Ala. Civ. App. 1995), rev'd on other grounds, 693 So. 2d 458 (Ala. 1997). At the pleading stage, however, sufficiency of proof is not a salient issue. In order to survive a motion to dismiss for failure to state a claim, a plaintiff need only establish a mere possibility that the plaintiff might prevail, and all doubts regarding the sufficiency of the complaint are construed in the plaintiff's favor. Ex parte Austal USA, LLC, 233 So. 3d 975, 981 (Ala. 2017). "[A] Rule 12(b)(6) dismissal is proper '"only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim

that would entitle the plaintiff to relief."'" Id. (quoting Knox v. Western World Ins. Co., 893 So. 2d 321, 322 (Ala. 2004), quoting in turn Nance v. Matthews, 622 So. 2d at 299). "If [a court] finds itself in doubt as to whether the plaintiff could prove such a set of facts, the motion to dismiss for failure to state a claim upon which relief can be granted must be denied." Trabits v. First Nat'l Bank of Mobile, 295 Ala. 85, 90, 323 So. 2d 353, 358 (1975). In short, a plaintiff is generally given a chance to prove the facts supporting the elements of the pleaded claim. Hill v. Kraft, Inc., 496 So. 2d 768, 771 (Ala. 1986).

Specifically, with regard to the tort-of-outrage claim, in order to prevail, Swain must ultimately prove as follows:

> "[O]n a tort-of-outrage claim, a plaintiff is required to prove that the defendant's conduct: '"(1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it."' Harrelson v. R.J., 882 So. 2d 317, 322 (Ala. 2003) (quoting Thomas v. BSE Indus. Contractors, Inc., 624 So. 2d 1041, 1043 (Ala. 1993)).
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> > "'"Any recovery must be reasonable and justified under the circumstances, liability ensuing only when the conduct is extreme. By extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds

> of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."'
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> "Travelers Indem. Co. of Illinois v. Griner, 809 So. 2d 808, 810 (Ala. 2001) (quoting American Road Serv. Co. v. Inmon, 394 So. 2d 361, 365 (Ala. 1980))(citations omitted)."

Soti, 906 So. 2d at 919-20.

In both Travelers Indemnity Co. of Illinois v. Griner, 809 So. 2d 808, 810 (Ala. 2001), and Continental Casualty Insurance Co. v. McDonald, 567 So. 2d 1208 (Ala. 1990), our supreme court affirmed judgments finding that a defendant had committed the tort of outrage in situations where workers' compensation benefits were purposefully withheld in order to pressure a claimant into agreeing to a settlement. Those cases have since been summarized by our supreme court as follows:

> "In Griner, an employee, Griner, sustained serious on-the-job injuries. 809 So. 2d at 809. However, the employer's workers' compensation carrier and claims administrator either delayed payment or refused payment altogether for Griner's reasonable and necessary medical expenses. Specifically, funds to provide certain necessary medical devices as well as treatment for depression were denied for approximately five years. The defendants knew that they were obligated to provide those devices and treatment and knew that Griner was in pain, but continued to deny this care in an effort to pressure Griner to agree to a nominal settlement. 809 So. 2d

> at 811-12. This Court held that the defendants' actions were sufficient to support a jury's finding that their conduct was extreme and outrageous. Id. at 812.
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> "In McDonald, a workers' compensation carrier, CNA, delayed appropriate payments and authorization for medical services for McDonald, an injured employee. 567 So. 2d at 1210. This Court has subsequently described the evidence presented in that case as follows:
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> > "'McDonald had numerous problems with CNA's failure to authorize the most basic of claims for over five years. CNA then used the results of its failure to pay to coerce McDonald into settling with CNA for an amount much smaller than his medical needs would have required. McDonald presented evidence demonstrating that he faced severe pain every day and that CNA took advantage of his pain by ceasing to pay for his pain medication. The evidence supported the finding that CNA intentionally caused McDonald severe emotional distress and that it attempted to use that distress for its gain.'
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> "ITT Specialty Risk Servs., Inc. v. Barr, 842 So. 2d 638, 646 (Ala. 2002)."

Soti, 906 So. 2d at 920 (emphasis omitted). Furthermore, McDonald is recognized as "'the minimum threshold that a defendant must cross in order to commit outrageous conduct.'" Barr, 842 So. 2d at 644 (quoting State Farm Auto. Ins. Co. v. Morris, 612 So. 2d 440, 443 (Ala. 1993)).

In this case, Swain has alleged the existence of a number of facts similar to the facts in McDonald and Griner. Among other things, he has alleged that the defendants intentionally refused to approve necessary treatments, despite their knowledge that he was suffering severe pain and mental anguish, and that they did so hoping he would agree to resolve his workers' compensation claim for less than the benefits to which he was entitled. Furthermore, Swain has alleged conduct that arguably goes beyond the conduct of the defendants in McDonald and Griner. For example, Swain contends that the defendants conspired to influence Dr. Romeo's treatment of Swain, which, Swain alleges, included the intentional overprescription of certain medications intended to mask his mental condition and to prevent necessary treatment. Even recognizing that the conduct in this case is not alleged to have persisted for the extended lengths of time that were present in McDonald and Griner, the court, viewing all the allegations of the complaint most strongly in Swain's favor, cannot say that there is no possibility that he might prevail on his claim alleging intentional infliction of emotional distress.

We reach the same conclusion with regard to Swain's claim of intentional fraudulent misrepresentation and fraudulent suppression. In order to prevail on a claim of fraud based upon an affirmative misrepresentation, a plaintiff must establish the following:

> "'(1) a false representation (2) of a material existing fact (3) relied upon by the plaintiff (4) who was damaged as a proximate result of the misrepresentation. If fraud is based upon a promise to perform or abstain from performing in the future, two additional elements must be proved: (1) the defendant's intention, at the time of the alleged misrepresentation, not to do the promised act, coupled with (2) an intent to deceive.'"

Deng v. Scroggins, 169 So. 3d 1015, 1024 (Ala. 2014) (quoting Coastal Concrete Co. v. Patterson, 503 So. 2d 824, 826 (Ala. 1987)). The elements of fraudulent suppression are:

> "'(1) [T]hat the defendant had a duty to disclose a material fact; (2) that the defendant concealed or failed to disclose this material fact; (3) that the defendant's concealment or failure to disclose this material fact induced the plaintiff to act or to refrain from acting; and (4) that the plaintiff suffered actual damage as a proximate result of being induced to act or to refrain from acting.'"

Barr, 842 So. 2d at 646 (quoting Ex parte Walden, 785 So. 2d 334, 338 (Ala. 2000)).

In this case the defendants argue that Swain cannot establish that he reasonably relied upon any alleged

misrepresentations. Specifically, they contend that, according to Swain's own allegations, on February 15, 2018, within a few weeks of Swain's meeting with Angeles, he had obtained his own legal counsel, who thereafter began requesting that Swain be sent to a neurologist or neuropsychiatrist and questioning both the treatment being provided to Swain as well as the motives of Dr. Romeo and the defendants. Thus, they argue that Swain will not be able to establish reasonable reliance on any alleged misrepresentation because, they contend, Swain must have been relying on his attorney's guidance. Although the facts may ultimately bear the defendants' arguments out, "[w]hether a plaintiff has reasonably relied on a defendant's misrepresentation is usually a question of fact." McIver v. Bondy's Ford, Inc., 963 So. 2d 136, 142-43 (Ala. Civ. App 2007). Here, Swain has expressly alleged that the defendants misrepresented and suppressed their intentions to refuse him necessary care; that Swain, notwithstanding his counsel's involvement and in reliance upon those misrepresentations and suppressions, delayed seeking further treatment until he was ultimately required to seek treatment in a hospital emergency room; and

that he suffered injury as a proximate result. Viewing the allegations of the complaint most strongly in favor of Swain, we cannot say that there is no possibility that he will be able to establish reasonable reliance on the defendants' alleged misrepresentations or inducement to act occasioned by the defendants' alleged suppressions.

The defendants also argue that Swain's misrepresentation claim involves allegations regarding future conduct and is, therefore, a claim of promissory fraud, which requires a showing that, at the time of any alleged misrepresentation, the defendants did not have the intention to perform the act and had an intent to deceive. The defendants contend that Swain has not specifically alleged that the defendants lacked intent to perform or that they had an intent to deceive him. As such, they contend that the dismissal of the misrepresentation and suppression claim must be affirmed. We disagree. Viewing the allegations of Swain's complaint most strongly in his favor, those allegations may be fairly construed as asserting, amongst other things, that the defendants misrepresented that they intended to provide him

proper care (and/or suppressed a contrary intention) and that they did so with the intent to deceive him.[3]

AIG, ICSP, and Thomas also separately contend that the misrepresentation and suppression claim was due to be dismissed against them because the factual allegations of the complaint do not support imputing any of the alleged conduct to them. Swain's complaint, however, expressly alleges that Angeles made her alleged statements to Swain on behalf of, and as an agent or employee of, all the defendants pursuant to authority granted her by all the defendants. Moreover, all the defendants are directly alleged to have fraudulently suppressed information that Swain contends they had a duty to disclose. Thus, we reject AIG's, ICSP's, and Thomas's contention that Swain's factual allegations of fraud do not support the fraud claim against each of them individually.

Finally, the trial court dismissed the civil-conspiracy claim for the sole reason that the underlying tort claims were dismissed. See Goolesby v. Koch Farms, LLC, 955 So. 2d 422,

[3]The defendants have not asserted in their briefs to this court that Swain's fraud claim fails to meet the pleading requirements of Rule 9(b), Ala. R. Civ. P. We note that that rule provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally."

430 (Ala. 2006) ("A civil conspiracy cannot exist in the absence of an underlying tort."). No arguments have been asserted by the defendants specifically regarding the conspiracy claim. Thus, because we hold that it was error to dismiss Swain's fraud and tort-of-outrage claims, we likewise reverse the trial court's dismissal of the conspiracy claim.

Conclusion

We conclude that there is at least a possibility that Swain's tort-of-outrage, fraud, and conspiracy claims are not barred by the Act. Nor are we convinced "beyond doubt" that Swain can prove no set of facts in support of those claims. If Swain is ultimately unable to adduce clear and convincing proof supporting his tort claims against the defendants, or is unable to demonstrate that he suffered injuries falling outside the Act, a summary judgment in favor of the defendants may well be proper. See, e.g., Lowman, 547 So. 2d at 95 (quoting Carpentino v. Transport Ins. Co., 609 F. Supp. 556, 562 (D. Conn. 1985)) ("'[P]rompt resolution of the meritless action is readily available by a motion for [a] summary judgment.'"); Trabits, 295 Ala. at 91, 323 So. 2d at 358 (noting that a court denying a Rule 12(b)(6) motion is not

precluded from entering a summary judgment concluding that the complainant is not entitled to relief). Nevertheless, under the applicable standard of review in this case, the judgment dismissing Swain's tort claims pursuant to Rule 12(b)(6) was in error. Accordingly, the judgment of the trial court is reversed, and the case is remanded for further proceedings.

REVERSED AND REMANDED.

Thompson, P.J., and Donaldson, J., concur.

Moore, J., concurs in part and concurs in the result, with writing.

Edwards, J., concurs in the result, without writing.

MOORE, Judge, concurring in part and concurring in the result.

I. The Allegations in the Complaint

In his third amended complaint ("the complaint") filed in the underlying civil action, Orethaniel Swain asserts, among other things, tort-of-outrage, fraud, and conspiracy claims against The Insurance Company of the State of Pennsylvania ("ICSP"), AIG Claims, Inc. ("AIG"), Sandra Thomas, Coventry Health Care Workers' Compensation, Inc. ("Coventry"), and Jackie Angeles (hereinafter referred to collectively as "the defendants"). Swain alleges that, on December 11, 2017, he received various physical and psychological injuries as the result of an electrical explosion arising out of and in the course of his employment with Imerys USA, Inc. ("Imerys"). ICSP was the workers' compensation insurance carrier for Imerys at the time of the accident. AIG acted as the third-party administrator for workers' compensation claims insured by ICSP under its policy with Imerys, and it employed Thomas as a claims adjuster. Coventry supplied case-management services to AIG and employed Angeles as a case-management

nurse. Swain also alleges that the defendants conspired together to administer his workers' compensation claim in an outrageous and fraudulent manner so as to cause him severe emotional distress and to deprive him of certain rights and benefits to which he was entitled under the Alabama Workers' Compensation Act ("the Act"), § 25-5-1 et seq., Ala. Code 1975.

Specifically, Swain alleges that, as a result of his work-related accident, he received injuries to his head, eyes, lungs, neck, lower back, and pelvis and mental injuries, which he described as post-traumatic stress disorder ("PTSD") and anxiety. Swain initially obtained medical treatment from a local hospital, and subsequently through doctors who were paid through his personal health insurance, subject to co-pays and deductibles paid by Swain himself, which have yet to be reimbursed. Swain returned to work for a period, but he informed his superiors in late December 2017 or early January 2018 that he could not continue working because of his physical and mental injuries.

On January 23, 2018, Angeles met with Swain to obtain his approval for her to serve as his case-management nurse. At

that meeting, Angeles induced Swain to sign an agreement allowing her to act as his case-management nurse by allegedly informing Swain that she would be working on his behalf, and not on the behalf of Imerys or "the insurance company," handling his medical appointments and making sure that he "got sent to the right doctors for [his] injuries." Angeles also told Swain that she would be obtaining his medical records and communicating with his doctors and "the insurance company" "for the purpose of making sure he received care and to make sure it went smoothly."

Angeles arranged an appointment for Swain with Dr. Bruce Romeo, who was designated as Swain's authorized treating physician. Swain visited Dr. Romeo the first time on February 2, 2018, and a second time on February 14, 2018. Dr. Romeo opined that Swain could return to work in a seated position only, although, according to Swain, at that time, Dr. Romeo had addressed only his respiratory ailments and his eye problems, without treating his other injuries. Swain questioned Angeles, who, Swain alleges, informed Swain "not to worry and that he would be treated for all of his problems, but that they are just going to focus initially on [your] eyes

and respiratory problems," which, she said, Dr. Romeo characterized as the most important issues. Becoming concerned that "something might be wrong" and that Angeles "may now be backing from her representations to him," Swain retained an attorney, H.E. Nix, to represent his interests regarding the workers' compensation claim.

On February 15, 2018, Nix sent a letter to Thomas, describing Swain's medical condition, opining that Swain had suffered an "extreme neurological and emotional injury," and requesting that Swain "be sent to [a] neurologist ... and that the neurologist seriously consider send[ing] [Swain] for evaluation [by] a neuropsychologist." On March 6, 2018, Nix informed Angeles in a telephone call that Swain's pharmacist believed that Swain was receiving too much sleep medication from Dr. Romeo, which Swain's "own doctor confirmed." Swain alleges that he was being overmedicated in order to mask his psychiatric symptoms and to prevent his receiving proper care. On March 7, 2018, Nix sent a letter to Angeles, expressing "the fact" that Dr. Romeo was a "pro-company doctor" who "would primarily be concerned with saving money for AIG and not concerned with treating [Swain]." Nix requested that,

because Swain was receiving inadequate care from Dr. Romeo, Swain be referred to a pulmonologist and a neurologist. On March 22, 2018, Nix sent an e-mail to Thomas and Angeles, complaining that Swain was experiencing pain and anxiety while working light duty in a seated position. After the letters and e-mails were "ignored," Nix sent another letter on March 24, 2018, stating that, although he is not a doctor, it was "undersigned counsel's belief" that Swain's respiratory problems could be related to his anxiety and stating that "[Swain] desperately needs specialized care from a psychiatrist and other doctors." Nix also requested that Swain be excused from working, which Nix claimed Swain was "being made to do by the [workers' compensation insurance] carrier," because the duties of the job were aggravating his pain and anxiety. Nix stated that, upon being excused from work, Swain should receive temporary-total-disability benefits until he recovered sufficiently to be able to work again.

Swain was eventually referred to "Dr. Caballero," a neurologist in Birmingham, rather than to a neurologist in Sylacauga as he had requested because it was closer to his home. On April 24, 2018, Nix sent an e-mail to Angeles, with

a copy to Thomas, asserting that Dr. Caballero had referred Swain to a psychiatrist or neuropsychiatrist. In that letter, Nix accused Angeles and Thomas of intentionally abusing Swain by causing him "tremendous additional stress and worry" as a result of their "unlawful" conduct in failing to send Swain to a mental-health specialist. On April 28 and May 10, 2018, Nix followed up with e-mails to Angeles and Thomas, respectively, seeking a response to his demand that Swain be seen by a psychiatrist or neuropsychiatrist.

On May 11, 2018, Brent Tyra, an attorney, sent Nix an e-mail informing Nix that he would be representing AIG with regard to Swain's workers' compensation claim and requiring that any further communication from Nix be directed to Tyra. On May 12, 2018, Nix sent an e-mail to Tyra, requesting Swain's medical records and seeking Tyra's "thoughts" on the previous requests for a referral of Swain to a neuropsychiatrist. Tyra did not respond to that e-mail or subsequent multiple telephone calls from Nix.

On May 21, 2018, Swain visited Dr. Romeo. Angeles talked with Dr. Romeo outside of Swain's presence both before and after that visit. Swain alleges that he informed Angeles and

Dr. Romeo of his ongoing symptoms and problems "to no avail." At that visit, Dr. Romeo determined that Swain had reached maximum medical improvement, that Swain had no permanent impairment, and that Swain could be released to return to work, which Angeles communicated to Nix in an e-mail. After leaving Dr. Romeo's office, Swain

> "suffered an even more severe attack of PTSD, anxiety, and despair because of the outrageous treatment and refusal of [the defendants] in this case to send [Swain] to a proper specialist for his mental and emotional problems and because he was being sent by [the defendants] back into an impossible work situation."

Swain went to the emergency room at Brookwood Medical Center and was admitted to the psychiatric or behavioral unit, where he received "a full regimen of psychiatric services for nine (9) days," being released on May 30, 2018, with instructions not to return to work and to see a psychiatrist on an outpatient basis. Swain alleges that that psychiatric treatment was caused by the defendants' refusal to send him to a qualified mental-health specialist. On June 14, 2018, Nix sent a letter to Tyra demanding, among other things, that AIG pay for the treatment he received at Brookwood Medical Center, that AIG provide ongoing treatment for Swain's physical and

mental injuries, and that AIG "restore" Swain's temporary-total-disability benefits because Swain's psychiatrist had opined that Swain could not work.

Swain alleges that Angeles, in coordination with the other defendants, misled him regarding her true allegiances and her true intention to deprive him of reasonably necessary medical care, most particularly for his alleged psychiatric injuries. Swain alleges that the defendants never intended to provide him with the care he needed. Swain further alleges that the defendants conspired to commit acts of outrageous conduct, including: (a) failing to reimburse him and his private health insurer for the costs of the medical treatment he obtained before January 23, 2018; (b) deceiving him as to Angeles's true role as "the medical adviser for AIG for the purposes of denying reasonably necessary medical care to [Swain]" and their intent not to send him to "the right doctors" for treatment of all his work-related injuries; (c) putting him "in an untenable position in attempting to prove that he was entitled to" certain benefits under the Act; (d) refusing to provide him reasonably necessary medical and psychiatric treatment, even when referred for such care by Dr.

Caballero; (e) forcing him to return to work with knowledge that the work environment exacerbated his physical and mental problems; (f) refusing to respond to Nix's correspondence and requests for medical records; (g) retaining counsel to create a "stone wall" between Nix, Swain, and the defendants; and (h) attempting to put Swain at maximum medical improvement and back to work without restrictions in order to deprive him of disability benefits. Swain also alleges that the defendants knew he was in a vulnerable emotional and psychological condition but used their power and control over the workers' compensation claims-administration process to intentionally, recklessly, and callously inflict emotional distress upon him in an effort "to cause him to become so sick and frustrated that he would agree to resolve his workers' compensation claim for less than the benefits to which he is entitled." Swain alleges further that, as a result of the defendants' conduct, he suffered a severe mental breakdown and "a new and more severe condition."

Swain alleges that the defendants had a duty to inform him that their goal was to save money on the workers' compensation claim by depriving Swain of reasonably necessary

medical care and by forcing him to prematurely return to work. According to Swain, although the defendants never intended to provide him psychiatric care by a specialist or to refer him to a pulmonologist, they suppressed that information, causing Swain to forgo necessary psychiatric care until he suffered "a new and more severe condition" for which he was treated at Brookwood Medical Center. Swain further alleges that the defendants refused to disclose that Dr. Romeo was a doctor who served their interests and not the interests of Swain, that they never intended to honor Dr. Caballero's referral, and that they intended to get Swain back to full-duty work at the May 21, 2018, appointment with Dr. Romeo.

II. Procedural History

In two separate motions, the defendants moved the Jefferson Circuit Court ("the trial court") to dismiss the tort claims for failing to state a claim upon which relief could be granted. See Rule 12(b)(6), Ala. R. Civ. P. After holding a hearing on the defendants' motions, the trial court entered two judgments on the same date dismissing the tort claims made against the defendants. Swain subsequently voluntarily dismissed his remaining claim, which was against

ICSP for workers' compensation benefits. Swain filed a timely notice of appeal to the Alabama Supreme Court; that court subsequently transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

III. Issues on Appeal

On appeal, Swain argues that the trial court erred by failing to convert the motions to dismiss into motions for a summary judgment, by applying the wrong standard when reviewing the motions to dismiss, and by granting the motions to dismiss.

IV. Analysis

A. Method of Review

I agree with the main opinion that the trial court did not err in failing to convert the motions to dismiss into motions for a summary judgment. Rule 12(b), Ala. R. Civ. P., provides, in pertinent part:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, [Ala. R. Civ. P.,] and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Swain argues that the trial court violated Rule 12(b) by considering an exhibit entitled "consent to release of information," which Coventry and Angeles attached to their motion to dismiss. However, in the complaint, Swain specifically claimed that Angeles had fraudulently induced him to sign that consent form. "'[D]ocuments attached to a motion to dismiss are considered a part of the pleadings if those documents were specifically referred to in the plaintiff's complaint and are central to the claim being brought.'" Lewis v. First Tuskegee Bank, 964 So. 2d 36, 39 n.1 (Ala. Civ. App. 2007) (quoting Banks, Finley, White & Co. v. Wright, 864 So. 2d 324, 327 (Ala. Civ. App. 2001)). Thus I agree that the trial court did not err in considering the consent form without converting the motions to dismiss into motions for a summary judgment.

B. The Effect of § 25-5-77(a), Ala. Code 1975, and the Exclusivity Provisions of the Act

Swain next argues that the trial court erred in dismissing his claims on the basis that they were barred by § 25-5-77(a), Ala. Code 1975. Section 25-5-77(a) provides, in pertinent part:

> "If the employee is dissatisfied with the initial treating physician selected by the employer and if further treatment is required, the employee may so advise the employer, and the employee shall be entitled to select a second physician from a panel or list of four physicians selected by the employer."

In Ex parte Southeast Alabama Medical Center, 835 So. 2d 1042 (Ala. Civ. App. 2002), then Judge Murdock, writing for this court, stated that § 25-5-77(a) "indicates that before an employee may seek judicial vindication of his or her view of what medical treatment is reasonably necessary, the employee must first pursue a second opinion from an authorized physician selected from a panel of four physicians as described." 835 So. 2d at 1046. The defendants argue in their motions to dismiss that, based on Ex parte Southeast Alabama Medical Center, before Swain could file a civil action against them for the failure of the defendants to provide him reasonably necessary medical treatment, he had to first follow the panel-of-four procedure set forth in § 25-5-77(a). Because Swain does not allege in the complaint that he requested a panel of four, the defendants reason that he has not stated a claim upon which relief can be granted.

In its judgments, the trial court agreed with that argument. The trial court relied on that reasoning as the sole basis for dismissing the tort claims against AIG, ICSP, and Thomas, stating in the judgment granting their motion to dismiss: "Having failed to seek a second opinion from a panel of four physicians, Swain is not permitted to seek judicial vindication of his claim in court." The trial court also used that reasoning as one of the grounds for granting the motion to dismiss filed by Angeles and Coventry, stating: "[Swain's] failure to comply with the requirements of ... § 25-5-77(a) and express dissatisfaction with the authorized treating physician and request a panel of four is fatal to [Swain's] claims for the alleged failure to provide reasonable, necessary and related treatment."

Swain argues that the trial court erred in determining that § 25-5-77(a) barred the tort claims asserted against the defendants. The main opinion circumvents this specific argument by recasting the issue as being whether Swain's claims are barred by §§ 25-5-52 and 25-5-53, Ala. Code 1975, the exclusivity provisions of the Act. ___ So. 3d at ___. However, in their motions to dismiss, the defendants only

tangentially mention the exclusivity provisions contained in §§ 25-5-52 and 22-5-53 for the point that the request for a panel of four under § 25-5-77(a) is the exclusive statutory remedy for an employee who is dissatisfied with the treatment plan of his authorized treating physician. In the judgment granting the motion to dismiss filed by AIG, ICSP, and Thomas, the trial court refers to the exclusivity provisions for the same point; the other judgment does not refer to the exclusivity provisions at all. In his brief to this court, Swain argues that the trial court erred in determining that "a request for a panel of four is a precondition to filing an outrage, fraud, and conspiracy case in the circumstances set forth" in the complaint. The parties refer to the exclusivity provisions throughout their briefs to this court solely as part of their arguments as to the preclusive effect of § 25-5-77(a) on Swain's right to maintain his tort claims. I believe that this court, as a court of review, should limit its analysis to that issue because it is the question that was litigated by the parties and decided by the trial court.

Section 25-5-77(a) grants to employees the right to reasonably necessary medical treatment for work-related

injuries. The last sentence of § 25-5-77(a) provides that "[a]ll cases of dispute as to the necessity and value of the [medical] services shall be determined by the tribunal having jurisdiction of the claim of the injured employee for compensation." That language gives employees a judicial remedy to enforce the right to reasonably necessary medical treatment. The excerpt from Ex parte Southeast Alabama Medical Center quoted above suggests that an employee may not access that remedy unless the employee has first exhausted his or her right to a panel of four granted by § 25-5-77(a). However, I do not agree that that excerpt from Ex parte Southeast Alabama Medical Center accurately states the law.

Section 25-5-77(a) provides that an employee "may" advise the employer of dissatisfaction with the authorized treating physician and demand a panel of four. The use of the term "may" in a statute generally is considered permissive, rather than mandatory, when only private rights are at stake. See Alabama State Bd. of Health ex rel. Baxley v. Chambers Cty., 335 So. 2d 653 (Ala. 1976). Nothing in the language of § 25-5-77(a) implies that the legislature intended to require an employee to first exhaust the panel-of-four procedure as a

predicate to obtaining judicial relief for the alleged failure of an employer to furnish reasonably necessary medical treatment. In fact, the last sentence of § 25-5-77(a) provides that "[a]ll" cases of disputes as to medical necessity may be decided by the court, not just those cases in which the employee has first exhausted his or her right to a panel of four. See Ex parte Beshears, 669 So. 2d 148, 150 (Ala. 1995) ("Statutes are to be considered as a whole, and every word given effect if possible."). Notably, in Ex parte Southeast Alabama Medical Center, Judge Murdock did not rely on any rules of statutory construction or any precedent when reaching his conclusion, which can be described only as obiter dictum, a nonbinding judicial comment not essential to the decision in the case. See Ex parte Patton, 77 So. 3d 591, 596 (Ala. 2011).[4]

[4]Ex parte Southeast Alabama Medical Center decides solely the issue whether an employee must exhaust the review-and-appeals procedures set forth in the utilization-review regulations adopted by the former Department of Industrial Relations before challenging an adverse utilization-review determination in court. The issue whether an employee must exhaust the panel-of-four procedure before the employee may file a civil action based on the alleged failure of an authorized treating physician to provide the employee reasonably necessary medical treatment was not before the court.

The law provides that an employee who claims that his or her employer is not providing reasonably necessary medical treatment for a work-related injury may submit that dispute to the proper court for resolution, regardless of whether the employee has first complied with the panel-of-four procedure set forth in § 25-5-77(a). The Act gives the employee alternatives to pursue -- either exercise the right to a panel of four, if such right remains extant, or submit the dispute to the appropriate court for determination. The trial court in this case erred in concluding otherwise. The main opinion does not address that error, but a majority of the court should take this occasion to clarify the law given that the trial court in this case so heavily relied upon Ex parte Southeast Alabama Medical Center in making its determination that Swain's claims were barred by his failure to follow the panel-of-four procedure set forth in § 25-5-77(a).

The defendants do not specifically argue that the judicial remedy provided in § 25-5-77(a) constitutes the exclusive remedy for an employee claiming that he or she has been denied reasonably necessary medical treatment. Instead, the defendants assert that, under their theory, Swain could

not maintain his civil action alleging fraud and outrageous conduct because he had failed to comply with the panel-of-four procedure contained in § 25-5-77(a). In the judgment granting the motion to dismiss filed by ICSP, AIG, and Thomas, the trial court relied solely on its erroneous legal conclusion that the failure of Swain to exhaust his right to a panel of four pursuant to § 25-5-77(a) barred the tort claims made by Swain in the complaint. That judgment should be reversed. The judgment granting the motion to dismiss filed by Coventry and Angeles also concluded that § 25-5-77(a) barred Swain's tort claims, but the trial court further determined in that judgment that Swain had failed to allege sufficient facts to support his claims alleging fraud and outrageous conduct and that his civil-conspiracy claim failed because of his failure to state a viable claim alleging fraud and outrageous conduct. I now address those conclusions.

C. The Tort-of-Outrage Claim

In regard to the tort-of-outrage claim, the trial court concluded that Swain had not alleged sufficient facts to sustain the claim because, the court determined, Swain was essentially claiming that the defendants had failed to

authorize Swain's referral to a mental-health specialist. The trial court concluded that

> "failure to authorize a referral, as complained of in this case, does not amount to conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. ITT Specialty Risk Servs, Inc. v. Barr, 842 So. 2d 638, 645 (Ala. 2002). Moreover, ... a carrier's selecting and following a treating physician's recommendation constitutes insisting on one's rights in a legally permissible way. Gibson v. Southern Guaranty Ins. Co., 623 So. 3d 1065, 1067 (Ala. 1993). And doing so is not outrageous conduct, Garvin v. Shewbart, 564 So. 2d 428-431 [(Ala. 1990)]."

Swain argues that the trial court erred in construing the complaint so narrowly and in making the legal determination that the facts as alleged did not state a claim alleging outrageous conduct.

Swain is correct that the trial court erred to the extent it construed the complaint as alleging only that the defendants had failed to authorize referrals to specialists to treat his work-related injuries. Swain alleges that the defendants knew he was in a vulnerable emotional and psychological condition but used their power and control over the workers' compensation claims-administration process to intentionally, recklessly, and callously inflict emotional

distress upon him in an effort "to cause him to become so sick and frustrated that he would agree to resolve his workers' compensation claim for less than the benefits to which he is entitled." Swain alleges that, in addition to the failure to authorize the referrals he requested, the defendants: (a) failed to promptly reimburse him and his private health insurer; (b) deceived him as to their intent to deny him reasonably necessary medical care by qualified specialists; (c) put him "in an untenable position in attempting to prove that he was entitled to" workers' compensation benefits; (d) forced him to return to work with knowledge that the work environment exacerbated his physical and mental problems; (e) refused to respond to Nix's correspondence and requests for medical records; (f) retained counsel to create a "stone wall" between Nix, Swain, and the defendants; and (g) attempted to put Swain at maximum medical improvement and back to work without restrictions in order to deprive him of disability benefits. The issue before this court is whether those allegations state a cause of action for the tort-of-outrage.

In American Road Service Co. v. Inmon, 394 So. 2d 361, 362 (Ala. 1980), the supreme court adopted the "tort of

outrageous conduct" as defined in the Restatement (Second) of Torts § 46 (1948):

> "'One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.'"

To plead a tort-of-outrage claim under the Inmon standard, the plaintiff must allege facts showing that the defendant committed extreme and outrageous conduct intentionally or recklessly to cause severe emotional distress to the plaintiff. See generally Jackson v. Colonial Baking Co., 507 So. 2d 1310 (Ala. 1987).

As Inmon provides, "[b]y extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." 394 So. 2d at 365 (citing Comment d., Restatement, supra). That standard does not permit recovery for "'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" 394 So. 2d at 364-65 (quoting Comment e., Restatement, supra). A tort-of-outrage claim conduct does not lie when the plaintiff alleges only that the defendant "'has

done no more than to insist upon [its] legal rights in a permissible way.'" 394 So. 2d at 368 (quoting Comment g., Restatement, supra).

The supreme court has recognized that outrageous conduct occurs when a defendant employs "'barbaric methods ... to coerce an insurance settlement.'" Wilson v. University of Alabama Health Servs. Found., P.C., 266 So. 3d 674, 677 (Ala. 2017) (quoting Potts v. Hayes, 771 So. 2d 462, 465 (Ala. 2000)). In Continental Casualty Insurance Co. v. McDonald, 567 So. 2d 1208 (Ala. 1990), the supreme court affirmed a judgment entered on a jury's verdict, finding that Continental Casualty Insurance Company ("CNA"), a workers' compensation insurance carrier, had committed the tort of outrage. Robert McDonald received a severe back injury in a work-related accident. McDonald agreed to settle his claim. The terms of his settlement obligated McDonald's employer, who was insured by CNA, to provide lifetime future medical treatment. CNA confirmed by investigation and surveillance that McDonald was suffering from constant moderate to severe disabling back pain as a result of his work-related injury, which CNA estimated would require future medical expenses of $75,000. CNA

instituted an action plan to get McDonald to settle his future medical claims for a small lump sum. Over the course of five years, CNA continuously delayed payment for McDonald's undisputed authorized reasonably necessary medical treatment, which led McDonald to increase his narcotic dependency and caused him emotional strain when his health-care providers threatened him with collection actions and ceased filling his pain-medication prescriptions. CNA finally refused to authorize the installation of an in-home hot tub for McDonald that had been prescribed by his authorized treating physician. CNA disputed the necessity of the device, arguing for less costly alternatives even after the doctor had explained that those alternatives were not viable. McDonald sued CNA, alleging outrageous conduct, and the trial court in that case entered a judgment on a jury's verdict in his favor, which the supreme court affirmed.

The supreme court held that "there is clearly a threshold beyond which an insurance company's recalcitrance must go before it crosses into outrageous conduct." 567 So. 2d at 1216. In arguing that he had presented sufficient evidence to support the judgment, McDonald noted:

> "'The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.'"

567 So. 2d at 1219 (quoting Comment e., Restatement (Second) of Torts § 46 (1965)). The McDonald court observed:

> "'The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity.'"

Id. (quoting Comment f., Restatement (Second) of Torts § 46 (1965)). The supreme court determined that the jury could have determined from the evidence that CNA indisputably knew that McDonald urgently needed daily pain relief from his work-related injuries, but was abusing its authority over the medical-claims process to unjustifiably delay and deny him reasonably necessary medical treatment in an impermissible manner for an improper motive.

McDonald "has come to represent the minimum threshold that a defendant must cross in order to commit outrageous conduct." Gibbs v. Aetna Cas. & Sur. Co., 604 So. 2d 414, 415 (Ala. 1992). Since deciding McDonald, the supreme court has affirmed only one other judgment entered on a jury verdict

finding that a workers' compensation insurance carrier committed outrageous conduct -- Travelers Indemnity Co. of Illinois v. Griner, 809 So. 2d 808 (Ala. 2001) -- which involved conduct almost identical to that in McDonald. In Griner, Travelers Indemnity Company of Illinois ("Travelers") and Crawford & Company ("Crawford") agreed to furnish reasonably necessary future medical treatment in a court-approved settlement with Sidney Griner. Following a spinal-fusion surgery, Griner required a hospital bed, a whirlpool tub, and psychotherapy, all of which Travelers and Crawford refused to authorize. Travelers and Crawford agreed that they had a legal obligation to furnish and pay for reasonably necessary medical treatment prescribed by Griner's authorized treating physician, but they nevertheless refused to pay for the medical devices and services prescribed by Griner's authorized treating physician although they had no information suggesting the devices and services were not reasonably necessary. According to Griner's authorized treating physician, the failure to provide the devices and services worsened the depression Griner suffered resulting from his chronically painful back injury. Angela McDonald, the claims

adjuster, testified that, although the medical devices and services had not been authorized, they also had not been denied. The evidence showed, however, that it had been over five years since the first prescriptions had been submitted for authorization. The supreme court determined that the evidence was sufficient to show that Travelers and Crawford had breached the settlement agreement, unnecessarily causing Griner severe pain, sleep deprivation, depression, and hardship for five years. McDonald testified that she had approached Griner about settling the case. Griner testified that, at one point, he became so frustrated that he had offered to settle his claim for approximately one-third of the reserves established by Travelers and Crawford, but, according to her notes, McDonald had "simply chuckled and stated we're not interested in anything near that." When McDonald later broached the subject again, Griner refused to settle. The supreme court concluded:

> "The evidence showed that Travelers and Crawford, even though they acknowledged that they were contractually obligated to provide medical care for Griner, did withhold reasonable and necessary items ordered by authorized treating physicians, knowing that their doing so would cause Griner pain and frustration and could lead him to agree to a minimal settlement. Thus, the evidence was

> sufficient for the jury to find that the conduct of Travelers and Crawford was 'so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as utterly intolerable in a civilized society.' Inmon, 394 So. 2d at 365. See Continental Cas. Ins. Co. v. McDonald, 567 So. 2d at 1219."

809 So. 2d at 812.

Other than Griner, the supreme court has repeatedly "declined to find outrageous conduct within the context of the denial of workers' compensation benefits, consistently distinguishing McDonald on its facts." Wiggins v. Risk Enter. Mgmt. Ltd., 14 F. Supp. 2d 1279, 1284 (M.D. Ala. 1998). Thus, whether an injured employee has stated a claim alleging outrageous conduct depends on whether the specific facts alleged in the complaint meet the elements of a tort-of-outrage claim. In this case, Angeles and Coventry argued in their motion to dismiss that Swain did not plead sufficient facts that the defendants committed "conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Inmon, 394 So. 2d at 365. Swain counters that the facts alleged in his

complaint make out a prima facie case of the tort of outrage under McDonald and Griner.

Unlike in McDonald and Griner, this case does not involve the alleged breach of a settlement agreement requiring the defendants to provide reasonably necessary medical treatment. However, § 25-5-77(a) imposes upon the employer and its workers' compensation insurance carrier the duty to furnish reasonably necessary medical treatment for work-related injuries independent of any agreement between the parties.

> "Generally speaking, an employee covered by the Act is entitled to the medical benefits set out in Ala. Code 1975, § 25-5-77, if: (1) the employee has sustained an injury due to an accident arising out of and in the course of the employment; (2) the employee notifies the employer of the accident and injury; (3) medical benefits are reasonably necessary to treat the work-related injury; and (4) medical benefits are authorized by the employer."

Ex parte City of Prattville, 56 So. 3d 684, 688-89 (Ala. Civ. App. 2010). In Griner, the supreme court recognized that a workers' compensation claims administrator cannot arbitrarily deny authorization for reasonably necessary medical treatment prescribed by an authorized treating physician. 809 So. 2d at 811.

In this case, Dr. Romeo was appointed as Swain's authorized treating physician. Under Alabama law, "it is the role of the authorized treating physician to direct the medical treatment of the injured employee." Ex parte El Reposo Nursing Home Grp., Inc., 81 So. 3d 370, 374 (Ala. Civ. App. 2011). An employer or its workers' compensation claims administrator cannot usurp the authority of the authorized treating physician to direct the course of an injured employee's medical treatment. See City of Auburn v. Brown, 638 So. 2d 1339 (Ala. Civ. App. 1993). As the trial court correctly concluded, no outrageous conduct occurs by following the treatment plan of an authorized treating physician in a legally permissible manner. See Garvin v. Shewbart, 564 So. 2d 428 (Ala. 1990).

The complaint alleges that Dr. Romeo did not refer Swain to a mental-health specialist or a pulmonologist. Angeles and Coventry argue that the defendants did not commit outrageous conduct simply by failing to make the referrals requested by Swain, which, as alleged in the complaint, were never recommended by Dr. Romeo. See ITT Specialty Risk Servs., Inc. v. Barr, 842 So. 2d 638, 645 (Ala. 2002) (holding that "the

failure to authorize a referral alone" does not constitute outrageous conduct). They also argue that they did not commit outrageous conduct by failing to honor the referral allegedly made by Dr. Caballero because, they say, he was, by Swain's allegation, only the "authorized treating physician (neurologist)" with no authority to make referrals for psychiatric care. See Ex parte Imerys USA, Inc., 75 So. 3d 679 (Ala. Civ. App. 2011) (holding that specialist authorized to treat employee upon referral from authorized treating physician has no authority to refer employee for treatment by another doctor outside of specialist's field so long as original authorized treating physician remains in control of employee's overall medical-treatment plan). Swain attached to the complaint a letter from Nix, in which Nix asserted that, because Swain was in "obvious" need of mental-health treatment, the defendants had a duty to refer Swain for psychiatric care despite Dr. Romeo's decision not to make that referral. Swain does not cite any legal authority to support that position. Cf. Rayford v. Lumbermens Mut. Cas. Co., 44 F.3d 546, 549 (7th Cir. 1995) (construing Indiana law) ("The employer is not required to take the employee's word for it

when he requests that it furnish treatment in addition to that already provided; nor is it required to act on the request of a third party."). Angeles and Coventry are correct insofar as they argue that the defendants had the legal right and obligation to follow Dr. Romeo's recommendations regarding the referrals, not those of Dr. Caballero or Nix. As Inmon holds, a claim alleging outrageous conduct does not lie when the plaintiff alleges only that the defendant "'has done no more than to insist upon [its] legal rights in a permissible way.'" 394 So. 2d at 368 (quoting Comment g., Restatement (Second) of Torts, § 46 (1948)).

Swain argues, however, that Barr is distinguishable, because, he says, the denial of his requested medical care was committed unlawfully, in an impermissible manner, and for an improper motive. Specifically, Swain alleges that the defendants, specifically Angeles and Thomas, assumed control over his medical treatment. In paragraph 3 of the complaint, Swain alleges that Angeles not only communicated with Swain's authorized physicians, but also directed the physicians, while managing Swain's medical care. Swain asserts that Angeles often met privately with Dr. Romeo before and after his

medical visits. Construing the allegations in the complaint most strongly in Swain's favor, see Little v. Robinson, 72 So. 3d 1168, 1171 (Ala. 2011), Swain asserts that Angeles, in furtherance of a conspiracy among the defendants, improperly influenced Dr. Romeo to limit the scope of the treatment provided to Swain in an effort to save costs on the claim and ultimately extort an insufficient settlement from Swain, which, of course, would not be permissible. To say the least, it would be most unusual if Dr. Romeo had violated his professional ethics to allow the defendants to dictate Swain's medical treatment, see Reid v. Aetna Cas. & Sur. Co., 692 So. 2d 863 (Ala. Civ. App. 1997) (finding insufficient evidence that case-management nurse had overridden the authorized treating physician's medical-treatment plan as part of a cost-savings scheme as alleged by injured employee in tort-of-outrage claim), but, in reviewing the granting of a motion to dismiss, this court does "'not consider whether the plaintiff will ultimately prevail, but only whether [he] may possibly prevail.'" Little, 72 So. 3d at 1172 (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

Swain also alleges that Angeles and the other defendants, not Dr. Romeo, controlled the decisions over whether Swain would to return to work on light duty and whether he would return to work without restrictions on May 21, 2018. According to Swain, the defendants, knowing that Swain remained physically and mentally unable to work and that the work environment and work duties increased his physical pain and triggered his PTSD, forced Swain to return to work anyway. In Lee v. Lee, 469 So. 2d 558 (Ala. 1985), an injured employee and her husband complained that the employee's co-employees and her employer's workers' compensation carrier

> "'negligently or wantonly conspired to force/coerce one or more of the medical doctors treating the [injured employee], to make the [injured employee] go back to work before she was physically able or capable, so as to enable the said Defendants to deprive the [injured employee] of all or most of the workmen's compensation benefits lawfully owed her.'"

469 So. 2d at 559. The supreme court summarily affirmed a judgment dismissing the complaint for failing to state an actionable claim outside of the exclusivity provisions of the Act. In Jackson v. Colonial Baking Co., 507 So. 2d 1310 (Ala. 1987), an employee filed a complaint alleging that certain co-employees had ordered him to clean exhaust fans, knowing that

he had developed a work-related respiratory problem and that it would be dangerous for him to undertake that activity. When he refused, the co-employees cut his hours to diminish his wages. The supreme court affirmed a summary judgment entered in favor of the employer and the co-employees, concluding that the complaint did not state a claim alleging outrageous conduct. Swain alleges much of the same conduct found insufficient to state an actionable claim in Lee and Jackson, but the claims in those cases were not bolstered by the further allegations made by Swain in this case. As the supreme court held in McDonald, isolated acts of misconduct by a defendant may not be sufficient to state a claim alleging outrageous conduct, but a defendant may "cross the threshold" into outrageous conduct through repeated acts intended to inflict emotional distress on an injured employee. Again, the applicable standard of review, see Little, compels the conclusion that the allegations that the defendants "forced" Swain to return to work under intolerable conditions, when considered with the other facts alleged, could be considered outrageous conduct.

Swain also alleges that the defendants had not yet reimbursed him or his private health-insurance carrier for the medical expenses paid by them, that the defendants required him to travel outside Sylacauga for his medical care, that the defendants "stonewalled" him and Nix, particularly when AIG retained Tyra, and that Tyra did not respond to Nix's requests for medical records, which, Swain says, hampered Nix's ability to assist Swain with his case. Those acts alone would not support a tort-of-outrage claim, which does not cover mere annoyances, petty oppressions, or other trivialities, Inmon, supra; see also Ex parte Crawford & Co., 693 So. 2d 458, 459 (Ala. 1997) (claims-adjusting firm was entitled to a summary judgment when the only evidence of outrageous conduct consisted of the fact that the firm had delayed payment to authorized health-care providers with knowledge that it caused the injured worker frustration and with an intent to coerce the injured worker into a settlement of future medical benefits); Farley v. CNA Ins. Co., 576 So. 2d 158, 160 (Ala. 1991) (evidence that workers' compensation insurer's employees displayed an unsympathetic attitude toward the claimant, gave her "'the runaround,'" delayed payment of her medical bills,

and did not always authorize treatment that claimant sought did not cross the threshold into outrageous conduct), but, as Swain argues, he pleaded those additional facts to show the concerted effort the defendants had made to inflict emotional distress upon him.

Angeles and Coventry correctly point out that McDonald and Griner involved egregious misconduct committed over the course of five years. In Wooley v. Shewbart, 569 So. 2d 712, 717 (Ala. 1990), the supreme court summarized McDonald as a case in "which the jury reasonably could have found that CNA had engaged over an extended time in an effort to coerce McDonald to settle his workmen's compensation benefits for an unfairly low lump-sum payment." Similarly, in Soti v. Lowe's Home Centers, Inc., 906 So. 2d 916, 920 (Ala. 2005), the supreme court affirmed a summary judgment for the defendant, despite some evidence indicating that the facts of that case mirrored McDonald, on the ground that the workers' compensation claims administrator for the employer "did not engage in a long-standing practice of denying or delaying Soti's benefits." 906 So. 2d at 921. The supreme court emphasized that Soti had filed suit "only six weeks" after the

claims administrator had first received a request for authorization for Soti's recommended hernia-repair surgery, during which time the claims administrator was seeking clarification of whether the hernia was a compensable injury. 906 So. 2d at 22.

In this case, Swain does not allege a long-standing practice of delaying and denying authorized medical treatment, but that fact, in and of itself, does not defeat his claim. In McDonald, the supreme court reasoned that the tort of outrage should not be invoked until all efforts to resolve the differences over the need for reasonably necessary medical treatment have proven futile over the course of time. 567 So. 2d at 1216. Swain has alleged that, over the course of several months, the defendants deliberately ignored his and Nix's repeated requests for Swain's referral to a mental-health specialist, compelling him to obtain psychiatric treatment on his own because any further attempts to resolve their differences had already proven futile. Under McDonald, those facts support the tort-of-outrage claim.

In my opinion, the supreme court would view the allegations made by Swain as stating a tort-of-outrage claim

despite the factual distinctions in this case and McDonald. Swain has alleged that the defendants committed unlawful activity in dictating Dr. Romeo's treatment plan or that they insisted on their legal rights in an impermissible manner so that it could be inferred that they committed "conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Inmon, 394 So. 2d at 365. Therefore, for the foregoing reasons, I agree that the judgment dismissing the tort-of-outrage claim against Angeles and Coventry should also be reversed.

D. The Fraud Claim

The trial court determined that Swain did not state a fraud claim because he failed to allege reasonable reliance, an essential element of any type of fraud action under Alabama law. See Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997). "Reliance requires that the misrepresentation actually induced the injured party to change its course of action." Hunt Petroleum Corp. v. State, 901 So. 2d 1, 4 (Ala. 2004).

The reliance must be reasonable under the circumstances. Parham, supra.

Swain claims in the complaint that he relied on the alleged fraudulent misrepresentations made by Angeles by first signing an agreement that allowed Angeles to become his nurse. In their motion to dismiss, Angeles and Coventry argue that the consent form signed by Swain does not actually authorize Angeles to become Swain's nurse. However, by signing the consent form, Swain agreed that Angeles and Coventry could disclose his private health information "on my behalf" "to facilitate the services provided to me in connection with my claim ...." Swain alleges that he signed the agreement with the understanding that Angeles would be acting on his behalf as his nurse, as she had represented to him in their meeting on January 23, 2018.

Swain further alleges that he relied on Angeles to provide him with "the right doctors" to treat all of his work-related injuries, thereby forgoing any action to independently and promptly secure his own psychiatric care. Specifically, in paragraph 50 of the complaint, Swain alleges:

> "If Mr. Swain had known the truth about the information suppressed and hidden from him, he would

> have taken action to protect himself before the May 21, emergency psychiatric breakdown."

In paragraph 51, Swain further alleges:

> "If [Swain] had known that the [defendants] were going to persist in refusing to send him to a psychiatric specialist as requested, he would have found his own psychiatric specialist much sooner and he would have been properly treated, thereby preventing the new and more severe condition."

In Reid, supra, this court affirmed a summary judgment on a fraud claim because "[t]he worker presented no evidence of what possible beneficial treatments she was not allowed to seek" by the allegedly fraudulent conduct of the defendant case-management nurse. 692 So. 2d at 865. In this case, Swain specifies that Angeles misled him into foregoing immediate psychiatric treatment that would have helped him.

The defendants point out that Swain alleges that he became concerned that he was not receiving the treatment he needed and retained an attorney on February 15, 2018, only three weeks after Swain first met with Angeles. They assert that Swain's attorney thereafter repeatedly questioned the treatment Swain was receiving and repeatedly requested a referral to a mental-health specialist. The defendants argue that those facts show that Swain was not relying on any fraud

they allegedly committed in foregoing psychiatric treatment. However, Swain alleges that no one ever responded to his attorney's correspondence; he does not allege that he was ever definitively informed that the psychiatric treatment he was requesting was being denied. Swain claims that he continued to forgo obtaining any mental-health care until he finally broke down on May 21, 2018. Swain alleges sufficient facts to show that he reasonably relied on the alleged fraud of Angeles and Coventry, as well as the other defendants.[5]

For the foregoing reasons, I believe that Swain did sufficiently allege reliance on the alleged fraud of the defendants so that the judgment dismissing the fraud claim against Angeles and Coventry should be reversed.

E. The Civil-Conspiracy Claim

Finally, the trial court dismissed the civil-conspiracy claim on the ground that Swain had not sufficiently pleaded the underlying torts of fraud and the tort of outrage. See

[5]I do not address the additional elements of promissory fraud as does the main opinion, see ___ So. 3d at ___, because the trial court did not base either of the dismissal judgments on the failure of Swain to allege sufficient facts of those elements. For the same reason, I also do not address the argument made by ICSP, AIG, and Thomas that fraud cannot be imputed to them.

Goolesby v. Koch Farms, LLC, 955 So. 2d 422, 430 (Ala. 2006) ("A civil conspiracy cannot exist in the absence of an underlying tort."). Because I believe that Swain did allege sufficient facts to sustain his tort-of-outrage and fraud claims, I agree that the judgments should be reversed to allow Swain to proceed with a claim of civil conspiracy.

V. Conclusion

I concur that the trial court did not err in failing to convert the defendants' motions to dismiss into motions for a summary judgment. I also concur that the judgments of dismissal should be reversed, but only for the reasons set forth in this special writing.