Rel: February 28, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1181010

Ex parte Drury Hotels Company, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Maritza Diaz

v.

Drury Hotels Company, LLC)

(Montgomery Circuit Court, CV-18-902336)

BRYAN, Justice.

Drury Hotels Company, LLC ("Drury"), petitions this Court for a writ of mandamus directing the Montgomery Circuit Court

to dismiss Maritza Diaz's tort claims against Drury. Drury contends that Diaz's tort claims are barred by the exclusive-remedy provisions in the Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975 ("the Act"). We deny the petition.

Diaz was employed as a housekeeper at Drury's hotel in Montgomery. In her complaint, Diaz alleged that she was working at the hotel when she was attacked by an unknown assailant. Diaz alleged that the assailant "sexually assaulted and robbed [her] by placing a knife to her throat, threatening to harm [her], attempting to force [her to] have sexual intercourse and taking approximately $200 in property from [her]." Diaz further claimed that the assault caused her serious bodily injuries, emotional distress, and mental anguish.

In December 2018, Diaz sued Drury, alleging claims of negligence and wantonness based on allegations that Drury had failed to provide a secure workplace. Diaz also alleged a claim of negligence based on the theory of premises liability, and she alleged claims against fictitiously named parties. As an alternative to her tort claims, Diaz also alleged a claim

for workers' compensation benefits under the Act if her injuries are in fact covered under the Act.

Drury filed a motion to dismiss under Rule 12(b)(6), Ala. R. Civ. P., asserting that the exclusive-remedy provisions of the Act bar Diaz's tort claims against Drury. That is, Drury argued that the benefits provided under the Act are Diaz's exclusive remedy against Drury. Diaz later amended her complaint to add a tort-of-outrage claim against Drury. On June 14, 2019, Drury filed a second motion to dismiss under Rule 12(b)(6), asserting that the tort-of-outrage claim is also barred by the exclusive-remedy provisions found in the Act. On August 1, 2019, the trial court entered a short order denying the "motion to dismiss." Drury asked the trial court to clarify whether the order was intended to deny the first motion to dismiss the initial tort claims, the second motion to dismiss the tort-of-outrage claim, or both motions. During a hearing on September 3, 2019, the trial court clarified that the August 1 order denied only the first motion to dismiss the initial tort claims. The trial court stated that it was "seriously considering" dismissing the tort-of-outrage claim but that it would reserve ruling on the motion to dismiss that

claim until "some discovery" is conducted. On September 11, 2019, Drury filed a petition for a writ of mandamus in the Court of Civil Appeals. The Court of Civil Appeals concluded that it lacked appellate jurisdiction and transferred the petition to this Court. This Court has jurisdiction to review a trial court's decision concerning whether an employer is entitled to immunity under the exclusive-remedy provisions of the Act. See, e.g., Ex parte Rock Wool Mfg. Co., 202 So. 3d 669 (Ala. 2016).

"[T]he denial of a motion to dismiss is reviewable by a petition for a writ of mandamus when the motion to dismiss asserts immunity under the exclusive-remedy provisions of the ... Act." Ex parte Tenax Corp., 228 So. 3d 387, 390-91 (Ala. 2017).

> "The writ of mandamus is an extraordinary legal remedy. Ex parte Mobile Fixture & Equip. Co., 630 So. 2d 358, 360 (Ala. 1993). Therefore, this Court will not grant mandamus relief unless the petitioner shows: (1) a clear legal right to the order sought; (2) an imperative duty upon the trial court to perform, accompanied by its refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the Court. See Ex parte Wood, 852 So. 2d 705, 708 (Ala. 2002)."

Ex parte Davis, 930 So. 2d 497, 499 (Ala. 2005).

The First Motion to Dismiss

As noted, the first motion to dismiss sought to have dismissed Diaz's claims of negligence and wantonness based on an alleged failure to provide a secure workplace and of negligence based on the theory of premises liability, and the trial court denied that motion. Drury argues that those tort claims should have been dismissed because, Drury says, the claims are barred by the exclusive-remedy provisions in the Act, §§ 25-5-52 and -53, Ala. Code 1975. Those provisions state that, if an employee's injury or death is covered by the Act, the Act provides the employee's exclusive remedy for that injury or death. The first provision, § 25-5-52, states that the Act provides the exclusive remedy "for an injury or death occasioned by an accident or occupational disease proximately resulting from and while engaged in the actual performance of the duties of his or her employment and from a cause originating in such employment or determination thereof." Similarly, § 25-5-53 provides that, except as provided for under the Act, no employer shall be civilly liable for an employee's injury or death that 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." Drury argues that Diaz sustained her injuries while working for Drury and, therefore, that benefits under the Act are her only possible remedy against Drury.

Thus, the substantive issue is whether Diaz's injuries are covered by the Act. If the injuries are covered by the Act, Diaz's tort claims against Drury are barred by the exclusive-remedy provisions, but if the injuries are not covered by the Act, her tort claims would not be barred. In her complaint, Diaz alleged that her injuries were caused by an unknown assailant. Injuries caused by a willful assault on an employee may be compensable under the Act. See, e.g., Dean v. Stockham Pipe & Fittings Co., 220 Ala. 25, 123 So. 225 (1929) (concluding that a night watchmen's death was compensable under the version of the Act then applicable when the death was caused by a workplace attack by an unknown assailant). The Act contains a provision, § 25-5-1(9), Ala. Code 1975, addressing the compensability of injuries caused by such an assault. Section 25-5-1(9) first defines an "injury" as "only injury by accident arising out of and in the course

of the employment." That provision later states that "[i]njury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him or her and not directed against him or her as an employee or because of his or her employment." Thus, if an attack on an employee is considered a personal attack unrelated to the employment, injuries caused by that attack would not be covered by the Act, and, therefore, the exclusive-remedy provisions would not bar tort claims against the employer seeking damages for those injuries.

Drury, citing cases like Dean, supra, and Ex parte N.J.J., 9 So. 3d 455 (Ala. 2008), maintains that Diaz's workplace attack caused alleged injuries that arise out of and in the course of her employment, i.e., that the attack was not motivated by a personal reason. Drury discusses the substantive law, but, significantly, Drury does not evaluate how we should review the case in light of the relevant procedural framework, i.e., the denial of a Rule 12(b)(6) motion to dismiss. That omission leaves some unaddressed considerations.

An employer's immunity under the exclusive-remedy provisions is an affirmative defense. Bechtel v. Crown Cent. Petroleum Corp., 451 So. 2d 793, 795 (Ala. 1984) ("[W]e hold that the defense of statutory employer immunity is an affirmative defense in Alabama ...."). In its first motion to dismiss, Drury argued that the affirmative defense applied, but the trial court denied the motion. Although Drury does not make this observation, we note that "'a dismissal under Rule 12(b)(6) may be based on an affirmative defense when the defense is clear from the face of the pleadings.'" Ex parte Scannelly, 74 So. 3d 432, 438 (Ala. 2011) (quoting 1 Moore's Federal Rules Pamphlet § 12.4[5][b], p. 186 (2010)) (emphasis omitted); see also Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 791 (Ala. 2007) ("[A] party can obtain a dismissal under Rule 12(b)(6), Ala. R. Civ. P., on the basis of an affirmative defense when '"the affirmative defense appears clearly on the face of the pleading."'" (quoting Jones v. Alfa Mut. Ins. Co., 875 So. 2d 1189, 1193 (Ala. 2003), quoting in turn Braggs v. Jim Skinner Ford, Inc., 396 So. 2d 1055, 1058 (Ala. 1981))). Thus, to establish a clear right to mandamus relief as to the initial tort claims, Drury

would need to show that the exclusive-remedy defense is clear from the face of the complaint. That matter in turn would concern consideration of the assault provision found in § 25-5-1(9), discussed above, which would be a fact-based inquiry. Drury also would need to address those issues in light of our standard for reviewing the denial of a Rule 12(b)(6) motion, which tests the sufficiency of the allegations in the complaint. "In reviewing the denial of a motion to dismiss by means of a mandamus petition, we do not change our standard of review." Ex parte Haralson, 853 So. 2d 928, 931 (Ala. 2003).

> "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."

Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993) (citations omitted).

However, Drury presents no argument or caselaw discussing those crucial procedural issues. "'When an appellant [or

petitioner] fails to properly argue an issue, that issue is waived and will not be considered.' 'An appeals court will consider only those issues properly delineated as such, and no matter will be considered on appeal [or mandamus review] unless presented and argued in brief.'" Tucker v. Cullman-Jefferson Counties Gas Dist., 864 So. 2d 317, 319 (Ala. 2003) (quoting Asam v. Devereaux, 686 So. 2d 1222, 1224 (Ala. Civ. App. 1996), and Braxton v. Stewart, 539 So. 2d 284, 286 (Ala. Civ. App. 1988), respectively (emphasis omitted)). "'It is well established that it is not the function of an appellate court to create, research, or argue an issue on behalf of the [petitioner].'" Mottershaw v. Ledbetter, 148 So. 3d 45, 54 (Ala. 2013) (quoting Gonzalez v. Blue Cross/Blue Shield of Alabama, 760 So. 2d 878, 883 (Ala. Civ. App. 2000)). A writ of mandamus is an extraordinary writ that will be issued only when the petitioner establishes a "clear legal right" to relief. Ex parte Davis, 930 So. 2d at 499. Here, although Drury discusses the substantive law regarding the affirmative defense of employer immunity, Drury fails to discuss it within the necessary procedural framework, i.e., the denial of a Rule 12(b)(6) motion. Accordingly, we conclude that Drury has

failed to establish a clear legal right to relief regarding the trial court's denial of its first motion to dismiss.

The Second Motion to Dismiss

Drury also argues that Diaz's tort-of-outrage claim should be dismissed. As noted, after Drury filed its first motion to dismiss, Diaz amended her complaint to add the tort-of-outrage claim. Drury then filed a second motion to dismiss addressing only the tort-of-outrage claim. Although the trial court denied the first motion to dismiss, the trial court has not yet ruled on the second motion to dismiss. Instead, the trial court stated that it was "seriously considering" dismissing the tort-of-outrage claim but that it would reserve deciding that issue until some discovery is conducted. Because the trial court has not decided the second motion to dismiss, there is no decision regarding the merits of Drury's motion for this Court to review. See, e.g., Ex parte Veteto, 230 So. 3d 401, 403 (Ala. Civ. App. 2017) ("[T]he trial court has not yet entered written orders on the motions .... Therefore, there are no adverse rulings for this court to consider at this time. Moreover, it is the duty of this court to review the propriety of orders and judgments made in the

trial court; this court cannot issue rulings on the motions pending before the trial court."); and CSX Transp., Inc. v. Day, 613 So. 2d 883, 884 (Ala. 1993) ("[I]t is familiar law that an adverse ruling below is a prerequisite to appellate review."). Because there is no adverse ruling to review, we will not further address Drury's argument that the second motion to dismiss is due to be granted.

Drury argues, in the alternative, that we should issue a writ of mandamus compelling the trial court to rule on Drury's second motion to dismiss. In support of its argument, Drury cites cases in which a writ of mandamus issued to compel a trial court to rule on a motion for a change of venue after the trial court had failed to make such a ruling. See Ex parte RM Logistics, Inc., 280 So. 3d 439 (Ala. Civ. App. 2019); Ex parte Nationwide Agribusiness Ins. Co., 276 So. 3d 674 (Ala. 2018); and Ex parte International Paper Co., 263 So. 3d 1035 (Ala. 2018). The results in those decisions reflect the "'general rule [that] a trial court should rule on a motion alleging improper venue as expeditiously as possible.'" Ex parte Nationwide Agribusiness, 276 So. 3d at 678 (quoting Ex parte Windom, 776 So. 2d 799, 803 (Ala. 2000)). However,

this case concerns a Rule 12(b)(6) motion to dismiss a particular claim; it does not concern a venue question. Drury cites no authority establishing that it has a clear legal right to mandamus relief under the circumstances here.

Given the procedural posture of this case and the arguments presented to us, we conclude that Drury has not established a clear legal right to mandamus relief. Thus, we deny Drury's petition for a writ of mandamus. Our decision is based on the proceedings as they currently exist. We make no conclusion regarding whether Drury may ultimately be entitled to immunity under the exclusive-remedy provisions of the Act.

PETITION DENIED.

Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.