REL: August 30, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180658

Ex parte Barton J. Weeks and Weeks Engineering Construction and Consulting, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Rustic Mountain Restoration, LLC

v.

Barton J. Weeks and Weeks Engineering Construction and Consulting, LLC)

(Shelby Circuit Court, CV-18-900066)

EDWARDS, Judge.

Barton J. Weeks ("Weeks") and Weeks Engineering Construction and Consulting, LLC ("WECC"), seek a writ of mandamus directing the Shelby Circuit Court ("the trial court") to vacate its order denying their motion for a summary judgment on the ground that the trial court lacked subject-matter jurisdiction, based on a purported lack of standing, over an action commenced by Rustic Mountain Restoration, LLC ("RMR"), against Weeks and WECC and to enter an order granting their motion.

Facts and Procedural History

The dispute arises from a purported roofing agreement between Weeks and RMR, Rustic Mountain Roof & Restoration, or Rustic Mountain Roof & Restoration, LLC ("RMRR"), all of which are apparently owned by Andrew Davenport. Rustic Mountain Roof & Restoration and RMRR are sometimes hereinafter referred to collectively as "the affiliated entities." Pursuant to the purported roofing agreement, RMR or one of the affiliated entities was to roof a house owned by Weeks ("the Weeks

property") and located in Shelby County.[1] The price for the roofing work on the Weeks property was $15,640.

On January 5, 2018, Rustic Mountain Roof & Restoration filed a mechanic's and materialman's lien in the Shelby Probate Court against the Weeks property. The lien form was executed by Davenport, as owner, and avers that Rustic Mountain Roof & Restoration entered into a written agreement with Weeks to roof the Weeks property for $15,640, that Rustic Mountain Roof & Restoration completed that work, and that it had not been paid.

On January 23, 2018, RMR filed a complaint in the trial court against Weeks and WECC, each of which is described as "Defendant." RMR alleged that, "[o]n or about October 16, 2017, Defendant hired [RMR] to []roof a house owned by Defendant Weeks" at an "agreed upon price ... [of] $15,640," that "[w]ork on the roof began on November 20, 2017, and was completed on December 7, 2017," and that "Defendant has refused to pay [RMR] for the materials supplied and work performed." RMR's complaint included claims against Weeks and

[1]The Weeks property was actually the second of two properties that were the subject of roofing agreements between RMR or the affiliated entities and Weeks. It is undisputed that Weeks paid for the roofing services performed on the other property.

WECC for alleged breach of contract and for work and labor performed. RMR requested a judgment against Weeks and WECC for $15,640.

Weeks and WECC filed an answer denying the pertinent allegations of the complaint, and Weeks filed a counterclaim alleging that WECC had no ownership interest in the Weeks property and that Weeks had not entered into any agreement with RMR. Instead, according to Weeks, he had entered into an agreement with one of the affiliated entities for the roofing of the Weeks property.[2] Weeks alleged that the affiliated entities appeared to be doing business under the name of RMR, that the roof at issue had not been properly installed, and that damage had been caused to the Weeks property by one of the affiliated entities. Weeks also alleged that neither RMR nor either of the affiliated entities possessed a license from the State Home Builders Licensure Board. See Ala. Code 1975,

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[2]Weeks's counterclaim further noted that

> "Weeks had never heard of [RMR] prior to the Complaint being filed in this matter. All of Weeks's dealings have been with Rustic Mountain Roof & Restoration and/or [RMRR]. Should the Court deem [RMR], [RMRR], and Rustic Mountain Roof & Restoration are one and the same, Weeks hereby asserts a counterclaim as to not be foreclosed from asserting the same."

§ 34-14A-3. Weeks asserted claims against RMR alleging breach of the contract by one of the affiliated entities, various forms of negligence, misrepresentation/fraud, breach of warranty, and slander of title.

On February 18, 2019, Weeks and WECC filed a motion for a summary judgment regarding RMR's claims.[3] In pertinent part, Weeks and WECC contended that they had not entered into an agreement with RMR but that, even if they had entered into such an agreement, RMR could not pursue its claims because Ala. Code 1975, § 34-14A-14(d), provides that "[a] residential home builder, who does not have the license required, shall not bring or maintain any action to enforce the provisions of any contract for residential home building which he or she entered into in violation of this chapter." See also Ala. Code 1975, § 34-14A-2(11) (defining "residential home builder" to "include[] a residential roofer when the cost of the undertaking exceeds two thousand five hundred dollars ($2,500)"). Weeks and WECC further contended that, to the extent the trial court might allow RMR to amend its complaint to substitute one of the affiliated entities as the plaintiff

[3]Weeks also sought a summary judgment regarding his claim of slander of title.

those entities likewise were unlicensed and could not pursue the claims asserted in the complaint. According to Weeks and WECC, the trial court had no subject-matter jurisdiction over the claims at issue based on lack of standing.

In support of their motion for a summary judgment, Weeks and WECC submitted an affidavit from J.R. Carden, Jr., who averred that he is "the Executive Director and Custodian of Records of the Home Builders Licensure Board" and that neither RMR nor RMRR had ever been "a licensee of the [Home Builders Licensure] Board."[4] Carden further averred, in pertinent part, that RMRR had been "identified as an unlicensed builder due to unlicensed builder activity at" the Weeks property and that, "[o]n August 6, 2018, [RMRR] [had] entered into an Administrative Resolution through which [it] agreed to pay ... a $1,000.00 administrative fine, thus resolving [its] violation."[5] In the Administrative Resolution, a copy of which also was submitted in support of Weeks and WECC's motion

[4]Weeks and WECC actually submitted Carden's affidavit with their reply to RMR's response to their motion for a summary judgment. See infra.

[5]Carden also averred that RMRR had entered into an Administrative Resolution and paid a $1,000 fine for its work on the other property owned by Weeks. See note 1, supra.

for a summary judgment, RMRR admitted that it had "acted as a residential home builder, as that term is defined in Ala. Code § 34-14A-2(10) (1975)" in performing work at the Weeks property, that RMRR was "required to be licensed" by the Home Builders Licensure Board and "did not hold such a license," and that RMRR did "not qualify for an exemption as stated in Ala. Code § 34-14A-6 (1975)." The Administrative Resolution was executed by Davenport, on behalf of RMRR.

RMR filed a response to Weeks and WECC's motion for a summary judgment. In the response, RMR contended that Weeks was a licensed residential homebuilder, that RMR had entered into an agreement to roof the Weeks property, and that,

> "[p]rior to beginning work on [the Weeks property,] ... Weeks repeatedly assured [RMR] all permits and licensures would be handled by him through his company and [RMR] had zero reason to doubt his word because [Weeks] was a licensed home builder [and] had been in the construction industry twice as long as [RMR]. (Exhibit D). Whether [RMR] was working under [Weeks's or WECC's] Alabama Home Builder's License is a genuine question of material fact that should be determined by the trier of fact."

Exhibit D, which RMR submitted in support of its response to the motion for a summary judgment, is an affidavit from Davenport. Davenport averred that he is the owner of RMR and:

> "3. I met ... Weeks when he inspected a roof my company installed. We struck up a conversation

> wherein he offered to sell me a camera used in the construction industry to detect leaks. We exchanged information during the course of purchasing ... Weeks's camera; he asked if I would be interested in roofing two properties he owned. ... Weeks stated that he had made insurance claims for hail damage. We went over the specifics and I agreed to perform the job.
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> "4. Prior to starting any work permits and licenses were discussed. ... Weeks is a licensed Alabama Home Builder and Remodeler and assured me I could work under his license. ... Weeks also stated that he was close friends with the Home Owner Association President and that he would take care of any issues with the HOA. ... Weeks is very knowledgeable about construction and the roofing process.[6] Therefore, a lot of information you go over with a typical homeowner was not necessary. ... Weeks knew exactly what he wanted and was extremely specific as to the job details."

Davenport further averred that RMR completed the first roofing job and that Weeks had paid him for that work, see note 1, supra, but, he averred, Weeks refused to pay for the work on the Weeks property.

In their reply to RMR's response, Weeks and WECC submitted an affidavit from Weeks in which he denied Davenport's assertion that Weeks or WECC had agreed that RMR or either of the affiliated entities could work under the license of Weeks or WECC. Weeks and WECC's reply further

[6]A copy of Weeks's curriculum vitae was also submitted in support of RMR's response.

asserted that, even if RMR's contention were true, "it makes no difference as [RMR] (or [the affiliated] entities) has already admitted it engaged in the practice of home building without the required license, paid a fine for doing the same, and was ordered not to conduct any home building without obtaining the required license." Weeks and WECC further contended in their reply that RMR was judicially estopped from arguing that it could operate under any license held by Weeks or WECC because of the Administrative Resolution Davenport had executed acknowledging that RMRR did not have the license necessary for the work on the Weeks property. Weeks and WECC further noted that no exception applied that would have allowed RMR to perform the work on the Weeks property.

On April 5, 2019, the trial court entered an order denying Weeks and WECC's motion for a summary judgment. Weeks and WECC filed the present petition for a writ of mandamus; they contend that the trial court lacked subject-matter jurisdiction and, thus, that it erred by denying their motion for a summary judgment because, they say, pursuant to § 34-14A-14(d), RMR lacked standing to pursue its claims.

Standard of Review

> "'Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'"

Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003) (quoting Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)). "Subject to certain narrow exceptions ..., because an 'adequate remedy' exists by way of an appeal, the denial of ... a motion for a summary judgment is not reviewable by petition for writ of mandamus." Ex parte Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 761–62 (Ala. 2002); see also Ex parte University of S. Alabama, 183 So. 3d 915, 918 (Ala. 2016). One of those narrow exceptions is when a trial court lacks subject-matter jurisdiction. See, e.g., Ex parte Sanderson, 263 So. 3d 681, 685 (Ala. 2018).

Weeks and WECC rely on several precedents of this court for the proposition that, pursuant to § 34-14A-14(d), a trial court lacks subject-matter jurisdiction on the basis of lack of standing when a plaintiff lacks the license required by § 34-14-5(a), Ala. Code 1975, and does not satisfy any exemption found in § 34-14A-6, Ala. Code 1975. See Milloy v. Woods, 23

So. 3d 48, 52 (Ala. Civ. App. 2009); and Hollinger v. Wells, 3 So. 3d 216, 221 (Ala. Civ. App. 2008). See also King v. Riedl, 58 So. 3d 190, 195 (Ala. Civ. App. 2010); and Hooks v. Pickens, 940 So. 2d 1029, 1033 (Ala. Civ. App. 2006).

Regarding the issue of standing, the supreme court has recently and repeatedly clarified that the doctrine of standing, as a jurisdictional concept, remains applicable in public-law cases, see, e.g., Ex parte Carter, [Ms. 1160887, July 27, 2018] ___ So. 3d ___, ___ (Ala. 2018), and Ex parte Merrill, 264 So. 3d 855, 863 (Ala. 2018), but generally has no application, as a jurisdictional concept, in private-law cases such as the present case. See, e.g., Ex parte Skelton, [Ms. 1160641, Oct. 26, 2018] ___ So. 3d ___, ___ (Ala. 2018); Norvell v. Norvell, [Ms. 1170544, Oct. 19, 2018] ___ So. 3d ___, ___ (Ala. 2018); Nichols v. HealthSouth Corp., [Ms. 1151071, March 23, 2018] ___ So. 3d ___, ___ n.2 (Ala. 2019); Ex parte Wilcox Cty. Bd. of Educ., 218 So. 3d 774, 780 n.7 (Ala. 2016); Cadence Bank, N.A. v. Goodall-Brown Assocs., L.P., 178 So. 3d 814, 829 n.22 (Ala. 2014); Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013); and Ex parte

MERSCORP, Inc., 141 So. 3d 984, 992 (Ala. 2013).[7] See generally Jerome A. Hoffman, The Malignant Mystique of "Standing", 73 Ala. Law. 360, 362 (2012) ("Lack of statutory authorization best supports analysis as the lack of a claim upon which relief can be granted, that is, a claim under Rule 12(b)(6), [Ala. R. Civ. P.,] not a claim over which the forum court lacks subject matter jurisdiction, that is, not a claim under Rule 12(b)(1)[, Ala. R. Civ. P.]. To invoke the word 'standing,' with all of its federal constitutional law baggage, creates the risk that this public law proposition will spread to private law contexts where it never belongs ...." (quoted and cited with approval in Ex parte BAC, 159 So. 3d at 46)).

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[7]The supreme court apparently has recognized an exception to the above-referenced precedents when a wrongful-death action is filed by a person other than the personal representative of a decedent's estate. See Ex parte Continental Motors, Inc., 270 So. 3d 1148, 1152 (Ala. 2018); Ex parte Hubbard Props., Inc., 205 So. 3d 1211, 1213 (Ala. 2016). This observation is in no way intended as a comment on the propriety of those decisions, particularly in light of the numerous precedents recognizing the unique and statutory nature of that type of private-law action.

Also, a reference to standing, as a matter of subject-matter jurisdiction, appears in dicta in Barnhart v. Ingalls, [Ms. 1170253, Nov. 21, 2018] ___ So. 3d ___, ___ (Ala. 2018).

As the supreme court explained in Ex parte MERSCORP, the fact that a particular plaintiff has no "legislatively created 'private right of action'" "go[es] to the viability of the plaintiff['s] legal theories, not an issue of 'standing' to assert those theories." 141 So. 3d at 992. The supreme court continued:

> "We previously have observed that 'our courts too often have fallen into the trap of treating as an issue of "standing" that which is merely a failure to state a cognizable cause of action or legal theory, or a failure to satisfy the injury element of a cause of action.' Wyeth[, Inc. v. Blue Cross & Blue Shield of Alabama], 42 So. 3d [1216,] 1219 [(Ala. 2010)]. See also Steele v. Federal Nat'l Mortg. Ass'n, 69 So. 3d 89 (Ala. 2010) (quoting and relying upon Wyeth for the above-stated principle); Ex parte Kohlberg Kravis Roberts & Co., 78 So. 3d [959,] 979 [(Ala. 2011)] (quoting at length from Wyeth with approval). In Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013), this Court recently rejected the notion that questions, not unlike those raised here, regarding the cognizability of the plaintiffs' legal theories, or claims, are 'standing' issues rather than 'cause of action' issues. We again reject that notion. Accordingly, the efforts to frame the questions before us as questions of standing and to thereby implicate the subject-matter jurisdiction of the trial courts must fail."

141 So. 3d at 992.

Based on the foregoing, we must deny Weeks and WECC's petition seeking a writ of mandamus directing the trial court to vacate the denial of their motion for a summary judgment

regarding RMR's claims because RMR lacked standing and to enter a summary judgment in their favor. That issue is not a matter of subject-matter jurisdiction but, rather, is a matter of whether RMR has a cognizable claim.[8] See Ex parte Rhodes, 144 So. 3d 316, 319 (Ala. 2013). Because Weeks and WECC do not argue that mandamus relief should be available on any ground other than a lack of standing, we deny the petition.

PETITION DENIED.

Thompson, P.J., and Moore, J., concur.

Hanson, J., concurs specially.

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

[8]"Subject-matter jurisdiction concerns a court's power to decide certain types of cases." Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006).

HANSON, Judge, concurring specially.

I concur in the main opinion, but write specially to address footnote 7 therein, which briefly addresses the approach of our supreme court regarding the propriety of mandamus review as to wrongful-death actions that have purportedly been initiated by persons other than the pertinent decedents' "personal representative[s]" (see generally Ala. Code 1975, § 6-5-410 (wrongful-death statute applicable to adult decedents); cf. Ala. Code 1975, § 6-5-391 (allowing parents of minor decedents a six-month priority over personal representatives in initiating wrongful-death actions)).

Although the two opinions cited in footnote 7 use the term "standing" to express the nature of challenges to the propriety of initiation of wrongful-death actions by unauthorized persons, I would suggest that the supreme court's approach to permitting immediate mandamus review in wrongful-death cases is consistent with the principles that a wrongful-death cause of action is purely statutory in nature, arising only after a decedent's death stemming from a wrongful act, and that timely initiation of a civil action by the legislatively appointed agent to vindicate that cause of action must occur; otherwise, an action purporting to invoke

the rights created and specified in the wrongful-death statutes is a complete nullity over which a trial court can acquire no subject-matter jurisdiction. See Steele v. Steele, 623 So. 2d 1140, 1141 (Ala. 1993), and Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465, 466 (Ala. 1979); see also Northstar Anesthesia of Alabama, LLC v. Noble, 215 So. 3d 1044, 1051 (Ala. 2016) (per curiam opinion of four justices), and id. at 1052-53 (Shaw, J., concurring in the result). As our supreme court, commenting upon § 6-5-391 as previously codified, observed in Giles v. Parker, 230 Ala. 119, 159 So. 826 (1935), Alabama statutes allowing recovery on a theory of wrongful death are "in derogation of the common law, creating a new punitive liability not recognized by the common law, and will not be extended by construction beyond the reasonable import of" the language of the pertinent statutes. 230 Ala. at 123, 159 So. at 829; see also Arnold v. State, 353 So. 2d 524, 526 (Ala. 1977) (noting general principle that "[s]tatutes in derogation or modification of the common law are strictly construed").

Because of the twin principles that "the question of subject-matter jurisdiction is reviewable by a petition for a writ of mandamus," Ex parte Flint Constr. Co., 775 So. 2d 805,

808 (Ala. 2000), and that trial courts lack such subject-matter jurisdiction to hear wrongful-death actions except to the extent that the statutes authorizing them are strictly followed, I perceive no irreconcilable inconsistency in our supreme court's approaches to the availability of mandamus review in statutorily created wrongful-death actions and in civil actions generally. That said, footnote 7 of the main opinion expressly disavows any comment on the correctness of the two opinions of our supreme court cited therein, and further acknowledges "the unique and statutory nature" of wrongful-death actions. ___ So. 3d at ___. In light of that disavowal and acknowledgment, I am content to concur in the main opinion.