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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2008-2009

1070173

Ex parte N.J.J.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(In re: N.J.J.)

v.

Wesfam Restaurants, Inc., d/b/a Burger King)

(Madison Circuit Court, CV-05-1732;
Court of Civil Appeals, 2060444)

PER CURIAM.

N.J.J. filed a complaint in the Madison Circuit Court, seeking worker's compensation benefits from Wesfam

1070173

Restaurants, Inc., d/b/a Burger King ("Burger King"). After a nonjury trial, the trial court found that N.J.J. had not sustained a compensable injury under § 25-5-1(9), Ala. Code 1975, because, it reasoned, her injuries were caused by the acts of third parties who intended to injure her for reasons personal to her and not directed against her as an employee or because of her employment. Specifically, the trial court found that the attack as a result of which N.J.J. was injured was racially motivated. N.J.J. appealed. The Court of Civil Appeals affirmed the trial court's judgment, without an opinion. N.J.J. v. Wesfam Rests., Inc. (No. 2060444, October 12, 2007), ___ So. 2d ___ (Ala. Civ. App. 2007) (table). This Court granted certiorari review and held oral argument. However, after reviewing the record and the briefs of the parties, we now quash the writ.

N.J.J. worked for Burger King for 19 years. She was a restaurant manager for 10 of those 19 years. During the early morning of August 11, 2002, N.J.J. was assaulted while attempting to unlock the Burger King restaurant on Memorial Parkway in Huntsville. N.J.J. was grabbed by two white males who pulled her behind the Burger King building. The two men

1070173

physically and sexually assaulted N.J.J. A third man acted as a lookout during the assault. After she was discovered, N.J.J. was transported by ambulance to Huntsville Hospital, where she was treated for multiple injuries sustained during the attack, including abrasions and lacerations to her body, face, and genitals.

N.J.J. testified that, during the attack, the attackers repeatedly stated: "We'll show you what we do to nigger lovers." N.J.J., who is white, testified that shortly before the attack she had banned the man who acted as the lookout from the Burger King restaurant for setting a napkin holder on fire. N.J.J. testified that before the attack she had never seen the two men who attacked her. N.J.J. identified D.S. as the man who had acted as the lookout. N.J.J. testified that, during the attack, D.S. did not make any statements regarding his earlier ejection from the Burger King restaurant. No evidence was presented of any statements made during the attack that would indicate that the attack was related to N.J.J.'s employment. N.J.J. testified that D.S. asked the two attackers, who were burning her with a cigarette, not to do so and ultimately asked the two attackers to leave.

1070173

Records from the Huntsville Police Department contain the results of a polygraph test administered to D.S. as part of the investigation of the attack. During the polygraph test, D.S. was asked whether he was present when N.J.J. was assaulted and whether he participated in any manner in the assault. He answered in the negative to both questions, and the test did not indicate any deception.¹

The standard of review on appeal in a worker's compensation case is well settled:

"'[W]e will not reverse the trial court's finding of fact if that finding is supported by substantial evidence--if that finding is supported by "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved."'

"Ex parte Trinity Indus., Inc., 680 So. 2d 262, 268-69 (Ala. 1996) (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)). However, 'an appellate court's review of the proof and [its] consideration of other legal issues in a workers' compensation case shall be without a presumption of correctness.' Ex parte American Color Graphics, Inc., 838 So. 2d 385, 387-88 (Ala. 2002) (citing § 25-5-81(e)(1), Ala.Code 1975))."

¹The polygraph results were admitted as part of the evidence in this worker's compensation case.

1070173

Ex parte Southern Energy Homes, Inc., 873 So. 2d 1116, 1121 (Ala. 2003).

The Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975, is intended to make workers' compensation the exclusive remedy for most job-related injuries. The Act excludes from its provisions an injury caused by the act of a third party who intends to injure the employee because of reasons personal to the employee and not directed against him or her as an employee or because of his or her employment or where the attack had no relationship to the employment. § 25-5-1(9), Ala. Code 1975; see also Jacobs v. Bowden Elec. Co., 601 So. 2d 1021 (Ala. Civ. App. 1992). In other words, an employee's injury caused by the willful act of a third person arises out the employment and is compensable under the Workers' Compensation Act only if the willful act was directed against the employee because of his or her employment, and this requirement is met if there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.

In Dean v. Stockham Pipe & Fittings Co., 220 Ala. 25, 123 So. 225 (1929), this Court analyzed § 36(j) of the Workmen's

1070173

Compensation Act in effect at that time. That subdivision was very similar to § 25-5-1(9), Ala. Code 1975. Under § 36(j), an injury was not compensable if it was "'caused by the act of a third person or fellow employee, intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment.'" 220 Ala. at 27, 123 So. at 226. Similarly, § 25-5-1(9), provides, in pertinent part:

"Injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him or her and not directed against him or her as an employee or because of his or her employment."

In Dean, a night watchman was robbed and murdered while he was on duty. The trial court denied compensation to the watchman's widow, holding that the sole motive of the murder was to rob the night watchman of his personal belongings. This Court reversed the judgment of the trial court and held that determining the motive for the injury did not end the inquiry. This Court held that the night watchman's injury was compensable, although the attacker had no motive to injure the employer, because the peculiar hazards of being a night watchman not only furnished the occasion and opportunity for

1070173

the robbery and the murder, but also suggested the opportunity for robbery; thus, the Court reasoned, his employment contributed to the injury. This Court specifically found a causal connection between the type of employment and the robbery/murder.

In the present case, substantial evidence supports the trial court's factual finding that the assault was not directed against N.J.J. because of her employment but was instead instigated by racial motives. Among other things, the trial court's finding is supported by the fact that racial slurs were directed at N.J.J. during the attack and by the lack of any statements made during the attack that would indicate that the attack was related to N.J.J.'s employment. The facts that a restaurant manager is periodically required to unlock a restaurant in the early morning hours and that the manager might be forced to confront a customer at the restaurant as part of his or her duties are not peculiar hazards that would suggest an unusually high opportunity for the manager to be the victim of a sexual assault in contrast to the robbery and murder of the night watchman in Dean. Where the criminal act is accomplished for reasons personal to

1070173

the victim, though the employment may give the assailant a convenient opportunity for committing the crime, the injury does not arise out the employment within the meaning of the Workers' Compensation Act. Here, the fact that N.J.J. had to open the store in the early morning hours gave the assailants the opportunity to surprise N.J.J. when she was alone and to commit this grotesque assault, but the trial court's finding that the assailants acted for personal reasons is supported by the evidence, including the racial slurs.

WRIT QUASHED.

See, Lyons, Stuart, Bolin,² and Parker, JJ., concur.

Smith, J., concurs in the rationale in part and concurs in the result.

Woodall and Murdock, JJ., concur in the result.

Cobb, C.J., dissents.

²Although Justice Bolin did not sit for oral argument of this case, he has viewed the video recording of that oral argument.

1070173

SMITH, Justice (concurring in the rationale in part and concurring in the result).

I concur with the main opinion's holding that the trial court's factual findings are not due to be disturbed.

In this worker's compensation case the employee, N.J.J., seeks worker's compensation benefits as a result of injuries sustained in a sexual assault that occurred as N.J.J. arrived at work at an early hour. Employers often pay workers' compensation to employees for injuries that occur as the result of an on-the-job assault--including sexual assaults. However, this case involves a unique exception to that rule found in our workers' compensation law.

Not every injury that occurs on-the-job qualifies as a compensable injury under our workers' compensation law. One such exception applies in this case: An "injury" for purposes of workers' compensation "does not include an injury caused by the act of a third person ... 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." Ala. Code 1975, § 25-5-1(9) (emphasis added). Essentially, when a person assaults a worker for "personal" reasons and not because she is an employee or because of her

1070173

employment, then our workers' compensation law does not require the employer to provide benefits.

In this case N.J.J. was a manager of a Burger King fast-food restaurant owned by her employer, Wesfam Restaurants, Inc. N.J.J. had recently returned to work after suffering a back injury. In the early morning hours of August 11, 2002, N.J.J. was brutally attacked and sexually assaulted while attempting to enter the restaurant.³

N.J.J. identified a patron of the restaurant, D.S., as the lookout for the attackers. N.J.J. told police investigators that although she recognized D.S., who had been barred from the restaurant, she had not seen him "in a couple of months." At trial, however, N.J.J. testified that "in August of 2002," "shortly" before the attack, she had barred D.S. from the restaurant because he had set a napkin holder on fire.⁴ When questioned by police, D.S. produced an alibi for

³The time of the attack is unclear from the record. N.J.J. testified at trial that she left home at 3:30 a.m. and that she lived nearby. Police investigation records indicate that N.J.J. stated that she arrived at the restaurant at a "little before" 4:00 a.m. The police report indicates that N.J.J. was assaulted after 4:00 a.m.

⁴The trial court's order inexplicably appears to state that this incident occurred "earlier that day."

1070173

the night of the attack. Additionally, the police records in the criminal investigation of the rape, which were admitted into evidence without objection, contain the results of three tests conducted during a polygraph examination of D.S. performed by the Huntsville Police Department. The results indicated "no deception" when D.S. was asked if he had participated in the assault. Apparently, no charges were filed against D.S., and N.J.J.'s attackers are still at large.

According to N.J.J.'s complaint, she suffered pain and other psychological and physical injuries as a result of the assault. Wesfam paid N.J.J. temporary-total-disability benefits until September 2004. When Wesfam's workers' compensation carrier eventually stopped paying benefits, N.J.J. filed the underlying action seeking additional benefits.

At trial, Wesfam argued that the attack against N.J.J. was motivated by personal reasons. Wesfam thus argued that there was no "injury" as defined by § 25-5-1(9) and that worker's compensation benefits were not due to be paid. Specifically, Wesfam pointed to evidence indicating that N.J.J.'s attackers said to her at the beginning of the attack

1070173

that "they were going to show [her] what they do to nigger lovers" and repeated similar statements during the attack.⁵

Here, the trial court was called upon by N.J.J. and Wesfam to determine whether the attack against N.J.J. resulted from "personal" reasons and not because of N.J.J.'s employment. Because this determination of fact was made by the trial judge based in part on live in-court testimony, the ore tenus rule applies. Thus, the trial court's findings are presumed correct:

"The trial court heard this case without a jury. Where evidence is presented to the trial court ore tenus, the court's findings of fact are presumed correct; its findings will not be disturbed except for a plain and palpable abuse of discretion."

Ex parte Squires, 960 So. 2d 661, 664 (Ala. 2006) (quoting Squires v. City of Saraland, 960 So. 2d 651, 656 (Ala. Civ. App. 2005), quoting in turn Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994)). Furthermore, in a worker's compensation case, this Court "must view the facts in the light most favorable to the findings of the trial court." Ex parte Professional Bus. Owners Ass'n Workers' Comp. Fund, 867 So. 2d 1099, 1102 (Ala. 2003).

⁵The record indicates that N.J.J. is white and her husband is black.

1070173

Because the trial court's factual findings are presumed correct under the ore tenus rule, this Court cannot conclude that the trial court was wrong unless it can say that those findings "are clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. Jasper City Council v. Woods, 647 So. 2d 723, 726 (Ala. 1994)." Carquest Auto Parts & Tools of Montgomery, Alabama, Inc. v. Waite, 892 So. 2d 422, 424 (Ala. Civ. App. 2004). Finally, the trial court's findings of fact are not to be disturbed if those findings are supported by substantial evidence. Williams v. Union Yarn Mills, Inc., 709 So. 2d 71, 72 (Ala. Civ. App. 1998).

It was N.J.J.'s burden at trial to prove that she sustained an injury for purposes of the Workers' Compensation Act, Ala. Code 1975, § 25-5-1 et seq. Additionally, it was N.J.J.'s burden to establish that the injury was not the result of "reasons personal" or that the attack was directed against her as an employee or because of her employment. In entering a judgment for Wesfam, the trial court stated:

"After due consideration of all of the evidence and having observed the demeanor of [N.J.J.] from the witness stand and in the courtroom and having made due inquiry into [N.J.J.'s] claim and the

1070173

credibility and defenses of [Wesfam], the court makes the following determination:

"....

"... The Court finds that based upon the evidence presented at trial, the assault of [N.J.J.] was motivated by reasons personal to the attackers and was not directed against [N.J.J.] as an employee of [Wesfam] or because of her employment with [Wesfam]."

On appeal, the Court is called upon to decide if the trial court erred in determining:

1. That the attackers intended to injure N.J.J. because of "reasons personal," and
2. that the attack was not directed against N.J.J. as an employee of Wesfam or because of her employment with Wesfam.

The evidence presented in this case is sparse: N.J.J. briefly testified at trial, and the trial court accepted into evidence--without objection--certain police records and medical records. After reviewing the record, I cannot conclude that the trial court's findings "are clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence."

As to the first finding, testimony at trial indicated that the attack on N.J.J. was racially motivated. As to the second factor, the Chief Justice notes that the record

1070173

contains substantial evidence indicating that N.J.J.'s employment, which placed her in the restaurant parking lot in the early morning hours, exposed N.J.J. to an increased risk of attack. Specifically, the Chief Justice finds that "it can readily be inferred" that the parking lot was a place where N.J.J.'s attackers could more easily carry out the assault.

However, in reviewing ore tenus findings in a worker's compensation case, this Court is to "view the facts in the light most favorable to the findings of the trial court," Professional Business Owners, 867 So. 2d at 1102, and not to make inferences of fact that would call the trial court's findings into question. Therefore, I cannot make the inference the Chief Justice makes that N.J.J.'s employment exposed her to an increased danger of assault. Further, N.J.J. testified that the area where she was initially accosted was "well-lit," requiring her attackers to remove her to a more concealed place. The police report indicated that the "parking lot" in which the attack took place was lighted by artificial lighting. Additionally, there is no evidence indicating that N.J.J. was required to report to work at such an early hour or that Wesfam even knew she was doing so. An

1070173

assistant manager at the restaurant, who was interviewed by the police regarding the attack, indicated that N.J.J. "normally" did not arrive at work until 5:00 a.m., when two employees would open the restaurant. Another employee stated that N.J.J. changed her schedule the day before the attack so that she would start work at 4:00 a.m. instead of 5:00 a.m. These facts, viewed with the presumption of correctness accorded to the findings of the trial court, tend to indicate that the parking lot posed no increased danger of assault and that N.J.J.'s employment did not require her to be in the parking lot at that time.

I voted to grant certiorari review in this case because I was concerned that the trial court erred in determining that the attack was not directed against N.J.J. because of her employment. Specifically, it appeared to me during this Court's preliminary examination of the petition for certiorari review that D.S. could have participated in the attack because N.J.J. had banned him from the restaurant or that N.J.J.'s employment had contributed to the attack because she was required to be in a dangerous place when opening the restaurant. In this case, however, the trial court found

1070173

otherwise. There is evidence to support its conclusion. Although I might have decided the facts differently, the standard of review does not allow me to substitute my own judgment for the trial court's.

I am convinced that a female employee who is raped while reporting to work during early morning hours can demonstrate at trial that her job exposed her to an increased risk of an attack. Given that the trial court's findings in this case are presumed correct and construing the facts in a light most favorable to the trial court, I cannot conclude that the trial court's decision is plainly and palpably wrong, clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. Therefore, I must concur to quash the writ.

1070173

MURDOCK, Justice (concurring in the result).

I concur in the result based on principles articulated in Dean v. Stockham Pipe & Fittings Co., 220 Ala. 25, 28, 123 So. 225, 227 (1929), including those articulated in the following queries posed in Dean:

"[D]id the fact and nature of the employment, not only furnish the opportunity, but suggest the opportunity? Did the employment mark the deceased as the special victim of the robbery? Was he murdered because he was Mr. Dean, or because he was a night watchman, an easy mark, because of the conditions of his employment?"

(Emphasis added.)

Here, the fact and nature of N.J.J.'s employment may have "furnished the opportunity" for her attack; they did not "suggest the opportunity" in the causal sense contemplated by Dean. In other words, there was substantial evidence from which the trial court could conclude that it was not N.J.J.'s "employment [that] mark[ed her] as the special victim" of the attack, but that she was attacked because of reasons personal to her (in the words of Dean, "because [s]he was [N.J.J.]"), and not "because of the conditions of h[er] employment."

As the Dean court explained: "'The rational mind must be able to trace the resultant injury to a proximate cause set in

1070173

motion by the employment, and not by some other agency.'" 220 Ala. at 28, 123 So. at 227 (quoting Madden Case, 222 Mass. 487, 111 N.E. 379 (1916)). Here, the trial court, based on substantial evidence, traced N.J.J.'s injury not to "a proximate cause set in motion by her employment," but to one set in motion by "some other agency," i.e., the personal animus of N.J.J.'s attackers identified by the trial court.

1070173

COBB, Chief Justice (dissenting).

I respectfully dissent from this court's decision to quash the writ in this case. I would review the decision of the Court of Civil Appeals. I believe substantial evidence demonstrates that N.J.J.'s workplace created an increased danger of an assault, that no substantial evidence supports the trial court's conclusion to the contrary, and that N.J.J. is entitled to worker's compensation benefits.

In August 2002, N.J.J. was 38 years old and was employed by Wesfam Restaurants, Inc., d/b/a Burger King ("Burger King"), as the store manager for the Burger King restaurant on South Memorial Parkway in Huntsville. Sometime during August 2002, a shift manager reported to N.J.J. that some teenagers were making noise in the dining room of the restaurant. N.J.J. approached the teenagers and saw that one of them had set a napkin holder on fire. N.J.J. recognized D.S. as the one in the group who lit the fire. N.J.J. told D.S. to leave. N.J.J. had never talked to D.S. outside the restaurant and did not know him from anywhere else.

On August 11, 2002, N.J.J. went to work between 3:30 and 4:30 a.m. to do office paperwork. The record reflects that,

1070173

on the days when N.J.J. did not arrive at work early to do paperwork, she reported to work at 5:00 a.m. N.J.J. testified about the reason for her early arrival at work on August 11, 2002, as follows:

"It was on a Sunday morning and I came in early to do paperwork. We usually have a day manager that would come in at 7:00 to do the paperwork, but I came in as a restaurant manager and did it before we opened -- or planned on doing it before we opened. So I allowed myself the extra time. I did that often."

When N.J.J. arrived at work that morning, she drove around the restaurant looking for suspicious activity. Seeing nothing suspicious, she parked her car and began walking to the doors of the restaurant. As N.J.J. was attempting to enter the restaurant, two white males whom N.J.J. had never seen before grabbed her and forced her behind the restaurant. The area behind the restaurant between the back of the building and the dumpster was "a well-lit area," so the men pushed N.J.J. farther into the dumpster area near some concrete barriers. As they forced N.J.J. behind the restaurant, the two men told N.J.J. they were going to show her "what they do to nigger-lovers," and they repeated this statement several times during the attack. The two men hit,

1070173

slapped, and verbally berated N.J.J., ripped and cut her clothes off, and smashed her face against a wall. They burned her with cigarettes and cut her with a knife, and they raped her. A third man, whom N.J.J. recognized as D.S., served as a lookout while the two strangers assaulted her.

N.J.J.'s attackers did not make any specific statements during the attack to indicate that they felt she was a "nigger lover" because of the way she treated employees or customers at the Burger King restaurant. N.J.J.'s attackers also did not make any specific statements during the attack to indicate that they felt she was a "nigger lover" because she, a white woman, was married to an African-American man. The attackers also did not state whether they knew N.J.J.'s husband was an African-American. N.J.J. recognized D.S. solely from her interaction with him at the restaurant, and she had never seen the two assailants before.

A Burger King employee discovered N.J.J. lying unconscious and partially clothed in the shrubbery outside the dumpster area around 5:15 a.m. on the morning of the attack. A three-foot-long metal dustpan handle was in N.J.J.'s vagina. An ambulance took her to Huntsville Hospital, where she was

1070173

treated for injuries sustained during the assault. The doctors removed the metal dustpan handle from N.J.J.'s vagina and treated her other injuries, including abrasions and lacerations to her body, face, and genitals. N.J.J. subsequently underwent psychiatric treatment and was treated for back injuries sustained in the attack.

N.J.J. believes the attackers assaulted her because she banned D.S. from the restaurant, although her attackers made no references to the napkin-burning incident or to the fact that she had banned D.S. from the restaurant. During the ensuing police investigation, D.S. gave police an alibi for the time of the incident. The police contacted one of D.S.'s friends to investigate his alibi. The friend stated that he telephoned his girlfriend's house between 5:00 and 5:30 a.m. on August 11, 2002, and spoke to D.S., who was there. The police did not verify D.S.'s alibi for the time of the attack. D.S. also took a polygraph test, which did not indicate that he was being deceptive when D.S. denied participating in the attack. D.S. was not prosecuted. The only disputed issue of fact in this case is whether D.S. was present during the attack. Burger King questions whether D.S. was present during

1070173

the attack, while N.J.J. testified unequivocally that he was. The trial court's order makes clear that the trial court did not resolve this dispute in reaching its findings. The trial court noted evidence indicating that D.S. gave the police an alibi and that a polygraph test indicated no deception when D.S. denied being present during the attack. However, the trial court also noted N.J.J.'s testimony that D.S. was present and "asked the two attackers not to burn [N.J.J.] with a cigarette and further asked the two attackers to leave."⁶

After a nonjury trial, the trial court in N.J.J.'s worker's compensation action found that N.J.J. did not sustain a compensable injury under § 25-5-1(9), Ala. Code 1975, because, it reasoned, her injuries were caused by the acts of

⁶Because the trial court expressly based its findings of fact and conclusions of law both on evidence indicating that D.S. was present and on evidence indicating that D.S. was not present, I cannot conclude that the trial court found that D.S. was not present during the attack. However, even if the trial court had so found, such a finding would not affect my analysis or conclusion. Although D.S.'s presence or absence during the attack is relevant to whether N.J.J.'s attack was motivated by reasons personal to her attackers, it is not determinative as to whether, by placing N.J.J. in the parking lot in the early morning hours, N.J.J.'s job "as a restaurant manager" subjected N.J.J. to a hazard of assault she would not be exposed to equally apart from her employment. See Dallas Mfg. Co. v. Kennemer, 243 Ala. 42, 44, 8 So. 2d 519, 520 (1942).

1070173

third parties who intended to injure her for reasons personal to them and not directed against her as an employee or resulting from her employment.

The Court of Civil Appeals affirmed the trial court's judgment, without an opinion. N.J.J. v. Wesfam Rests., Inc., d/b/a Burger King (No. 2060444, October 12, 2007), __ So. 2d __ (Ala. Civ. App. 2007) (table).

I note the following standard of review applies when an appellate court reviews a worker's compensation case: "An appellate court reviews the burden of proof applied at trial and other legal issues in workers' compensation claims without a presumption of correctness." Ex parte USX Corp., 881 So. 2d 437, 441 (Ala. 2003) (citing Ala. Code 1975, § 25-5-81(e)(1)); Ex parte Drummond Co., 837 So. 2d 831, 832 (Ala. 2002). However, "[i]n reviewing pure findings of fact, the finding of the circuit court shall not be reversed if that finding is supported by substantial evidence." § 25-5-81(e)(2), Ala. Code 1975.

Under § 25-5-1(9), Ala. Code 1975, known as Alabama's "special-assault statute," the Workers' Compensation Act does not apply to and a claimant will be denied benefits for an

1070173

"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."

(Emphasis added.)

By operation of the word "and" in the above-quoted portion of § 25-5-1(9), Ala. Code 1975, the special-assault statute will not bar worker's compensation benefits in this case if N.J.J.'s injuries were not "caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him or her" or if the injurious acts were "directed against [N.J.J.] as an employee or because of ... her employment." Harris v. Sloss-Sheffield Steel & Iron Co., 222 Ala. 470, 471, 132 So. 727, 727 (1931) (noting that the special-assault statute "does not exclude all cases where the assault is 'intended to injure the employee because of reasons personal to him,' but adds: 'And not directed against him as an employee, or because of his employment'" (quoting Ala. Code 1923, § 7596(J)⁷)); Dean v. Stockham Pipe & Fitting Co., 220 Ala. 25, 123 So. 225 (1929);

⁷Now codified as § 25-5-1(9), Ala. Code 1975.

1070173

1 Terry A. Moore, Alabama Workers' Compensation § 10:31 (1998).

Our courts have developed a test for determining whether injurious acts of third parties are "directed against [the worker] as an employee or because of his or her employment." § 25-5-1(9), Ala. Code 1975. "To prove that the assault was directed at the employee as an employee or because of the employment, the claimant must show a causal relation between the employment and the assault." Moore, § 10:24. "[T]he assault will be considered an accident arising out of the employment if the employment subjected the employee to a hazard of assault he or she would not be exposed to equally apart from his or her employment." Id. "The employment may materially increase the risk of assault in essentially two ways: the nature of the employment duties may naturally expose the employee to a greater probability of being assaulted or the environment in which the employee works may subject the worker to an increased risk of assault." Id. § 10:25 (citing Southern Cotton Oil Co. v. Bruce, 249 Ala. 675, 32 So. 2d 666 (1947); Dallas Mfg. Co. v. Kennemer, 243 Ala. 42, 8 So. 2d 519 (1942); Howard Odorless Cleaners, Inc. v.

1070173

Blevins, 237 Ala. 210, 186 So. 141 (1939); Republic Iron & Steel Co. v. Ingle, 223 Ala. 127, 134 So. 878 (1931); Southern Ry. v. Brown, 223 Ala. 140, 134 So. 643 (1931); Dean v. Stockham Pipe & Fittings Co., 220 Ala. 25, 123 So. 225 (1929); and McLaughlin v. Davis Lumber Co., 220 Ala. 440, 125 So. 608 (1929)).

A long history of caselaw in our state has consistently applied the principle that, in the absence of some causal connection between the injury and the employment, the mere fact that the employment put the employee in the place where he or she was injured is not sufficient to demonstrate that an employee was attacked "because of his or her employment," § 25-5-1(9), Ala. Code 1975. See Harris v. Sloss-Sheffield Steel & Iron Co., 222 Ala. at 471, 132 So. at 727; Jacobs v. Bowden Elec. Co., 601 So. 2d 1021 (Ala. Civ. App. 1992); and Dallas Mfg. Co. v. Kennemer, supra.

However, our courts have also long recognized that an employee is attacked "because of his or her employment," within the meaning of the special-assault statute, when the employment not only furnishes the setting and opportunity for the attack, but also exposes the worker "to a danger

1070173

materially in excess of that to which people commonly in that locality are exposed when not situated as [the injured employee] was in the course of his employment." Dallas Mfg. Co. v. Kennemer, 243 Ala. at 44, 8 So. 2d at 520. Therefore, when an employee demonstrates that the workplace setting itself increased the risk that the worker would be the victim of an of attack or injury caused by a third party, then the employee has demonstrated the requisite causal link between the employment and the injury, and the special-assault statute does not exclude the worker from eligibility for worker's compensation benefits, even if the attacker's motivation was entirely personal. See, e.g., Dean v. Stockham Pipe & Fitting Co., 220 Ala. at 29, 123 So. at 228 (finding that the predecessor to the special-assault statute did not bar recovery where a night watchman was robbed and murdered for reasons entirely personal to the attacker, because the night watchman's job placed him alone on the employer's premises at night with money in his pocket, "thus furnishing an opportunity for robbery without interference -- a risk beyond the common risk" (quoting Lanni v. Amsterdam Bldg. Co., 217 A.D. 278, 216 N.Y.S. 763 (1926)); but see Dallas Mfg. Co. v.

1070173

Kenemer, supra (holding that no causal relation existed between the employment and injury where the injured employee was struck by an errant bullet from the pistol of the angry wife of another employee who came to the workplace and attempted to shoot a third employee with whom she had been having an affair, because the employment did not "specially expose [the injured employee] to a hazard of this sort"), and Harris v. Sloss-Sheffield Steel & Iron Co., supra (finding that the predecessor to the special-assault statute barred recovery where the employee did not show that a workplace injury was caused by an increased risk of injury inherent in the workplace); cf. Southern Cotton Oil Co. v. Bruce, 249 Ala. 675, 679-80, 32 So. 2d 666, 679-80 (1947) (noting that "'the employment caused the exposure to the risk'" of a fatal gunshot wound caused when a boy playing with a pistol accidentally shot an employee whose job required him to carry and be around pistols; the Court reasoned that firearm accidents are "unquestionably a hazard peculiar to the employment of a ... person whose duties require the use of firearms"); Boris Constr. Co. v. Haywood, 214 Ala. 162, 106 So. 799 (1925) (holding that a delivery truck driver's

1070173

employment "caused the exposure to the risk" of injury, where a small boy accidentally shot and killed the truck driver in front of the employer's place of business while the truck driver was stepping into his delivery truck to make a delivery for the employer); and Ex parte Rosengrant, 213 Ala. 202, 104 So. 409 (1925) (holding that a causal relation existed between an employee's gunshot wound and the employment because the employee's job, which caused him to be among barges tallying lumber as it was removed from a barge, exposed him to "hazards from loafing and working crews" on other boats to which he would not otherwise have been exposed).

In this case, the trial court found that the attack on N.J.J. was "racially motivated." A finding that an attack was "racially motivated" does not answer the legal question of whether "the employment subjected [N.J.J.] to a hazard of assault ... she would not be exposed to equally apart from ... her employment." Moore, § 10:24. If workplace hazards were a contributing factor in the attack, then, as a matter of law, the injurious acts were "directed against N.J.J. as an employee or because of her employment," regardless of whether

1070173

the attackers' motivation was "personal to them" and "racial."
See Dean, supra; Harris, supra.

I recognize that N.J.J. could have developed the record more fully as to whether the dangers inherent in the parking lot of the Burger King restaurant when she arrived in the darkness of the early morning were factors that increased her risk of attack beyond that of a normal citizen not employed as a manager of a fast-food restaurant. However, the record contains substantial evidence indicating that N.J.J.'s employment, which placed her in the Burger King parking lot in the early morning hours, did expose N.J.J. to an increased risk of attack. N.J.J.'s undisputed testimony established that she was acting in her position "as restaurant manager" when she arrived at the Burger King restaurant between 3:30 and 4:00 a.m. to report to work. From the facts presented, it can readily be inferred that the parking lot of the Burger King restaurant was a place where three men had little difficulty carrying out an extensive, coordinated, terrible assault on N.J.J. without detection between 3:30 a.m. and 4:00 a.m. Moreover, the fact that N.J.J. felt the need to drive around the parking lot looking for suspicious activity before

1070173

getting out of her car demonstrates that a reasonable person who was familiar with the parking lot of the Burger King restaurant and the surrounding environment would understand that the parking lot posed an increased hazard of an attack at that time of the morning.⁸ Thus, although N.J.J. could have developed a more elaborate record as to the fact that the parking lot posed an increased hazard in the pre-dawn hours, the record contains substantial evidence indicating that N.J.J.'s early-morning work environment increased her risk of being attacked and that her duties "as restaurant manager" placed her in that environment at that time.

Moreover, in similar cases, our courts have not required expert testimony, local crime statistics, or other such evidence to establish that, when workplace conditions place the employee alone on the employer's premises at night, the workplace creates an increased risk that the employee will be attacked. Rather, this Court has stated, as a matter of law and reason, that "'crimes of violence flourish under cover of the night and darkness,'" Dean, 220 Ala. at 29, 123 So. at 228

⁸I note, however, unlike the usual rules of tort liability, the Workers' Compensation Act does not require that injuries must be foreseeable to be compensable. See Moore § 10:4.

1070173

(quoting Heidemann v. American Dist. Tel. Co., 230 N.Y. 305, 308, 130 N.E. 302, 303 (1921) (Cardozo, J.)). In Dean, for example, this Court adopted the reasoning of another court that, where a night watchman's "'employment placed him alone on the premises with his wages in his pocket,'" the employment thus "furnishe[d] an opportunity for robbery without interference -- a risk beyond the common risk." 220 Ala. at 29, 123 So. at 228 (quoting Lanni v. Amsterdam Bldg. Co., 217 A.D. at 279, 216 N.Y.S. at 764); cf., e.g., Bruce, 249 Ala. at 680, 32 So. 2d at 670 ("When guns are handled shooting accidents can be expected. Such an accident is unquestionably a hazard peculiar to the employment of a ... person whose duties require the use of firearms."); Rosengrant, 213 Ala. at 205, 104 So. at 412 (observing that the injured employee's "duties ... called him to this place, where ... barges with crews were coming and going. This exposed him to hazards from loafing and working crews on these boats, to which he would not otherwise have been subjected.").

I also note that N.J.J. could have more fully developed the record with regard to whether, as the manager of the Burger King restaurant, she was required to obtain Burger

1070173

King's approval of her work hours and whether Burger King generally made a practice of reviewing or approving her work schedule in advance. N.J.J. could also have created a more complete record as to whether, as is often the case with restaurant managers, she was responsible for setting the work schedules of all store employees, including her own. Nevertheless, I respectfully disagree with Justice Smith's conclusion that, when viewed in the light most favorable to the trial court's findings, evidence indicating that N.J.J. set her own schedule on the day of the attack, combined with a lack of evidence of whether Burger King acquiesced in N.J.J.'s practice of "often" arriving at work early to do paperwork, provides reasonable support for the trial court's judgment.

In this regard, Justice Smith finds significance in statements of other Burger King employees included in the police report of the assault. Those statements convey that, before the day of the attack, N.J.J. changed her work schedule so that she would start work at 4:00 a.m. on the day of the attack instead of her usual 5:00 a.m. start time. Although I agree that this evidence reasonably supports the inference

1070173

that N.J.J. set her own schedule to arrive early on the day of the attack,⁹ this evidence simply does not shed any light on whether N.J.J. was (or was not) required to schedule an early arrival for the day of the attack. Therefore, I cannot agree with Justice Smith that such evidence reasonably supports the inference that N.J.J.'s employment did not require her to be at work at 4:00 a.m.¹⁰

In fact, the only evidence as to whether N.J.J. was operating within her job responsibilities and requirements as a restaurant manager in arriving early to complete paperwork was N.J.J.'s testimony that she "came in as a restaurant manager and did [the paperwork] before we opened -- or planned on doing it before we opened. So I allowed myself the extra

⁹As Justice Smith notes, at the trial in this case the entire police report of the investigation into the assault was admitted into the record without objection.

¹⁰Moreover, I see no reason to interpret the workers' compensation statute so as to punish an employee for arriving at work early to perform her duties for the employer's benefit where there is no evidence that early arrival is prohibited. Ex parte Ruggs, [Ms. 1061379, August 22, 2008] __ So. 2d __, __ (Ala. 2008) ("'[C]ourts must liberally construe the workers' compensation law 'to effectuate its beneficent purposes,' although such a construction must be one that the language of the statute 'fairly and reasonably supports.'").

1070173

time. I did that often." That evidence is uncontradicted and leaves no room for an inference that N.J.J.'s early arrival was not a function of her responsibilities "as a restaurant manager." See § 25-5-1(9), Ala. Code 1975 ("'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment").

Justice Smith and Burger King also rely on testimony from N.J.J. that the restaurant parking lot was "well-lit" as substantial evidence indicating that N.J.J. was not exposed to an increased risk of attack by being in the parking lot between 3:30 and 4:00 a.m. However, N.J.J. did not testify that the parking lot was "well-lit," only that a portion of the parking lot was "well-lit." The record contains no evidence as to whether the level of lighting in the Burger King parking lot made the parking lot safe for workers arriving in the pre-dawn hours. Even if I were to speculate that the lighting in the parking lot ameliorated the risk of attack to some degree, the record contains no evidence indicating that the lighting in the parking lot so reduced the risk of attack in the pre-dawn hours that N.J.J.'s risk of attack was no greater than that of other people in the area

1070173

"not situated as [s]he was in the course of [her] employment."
Dallas Mfg. Co. v. Kennemer, 243 Ala. at 44, 8 So. 2d at 520
(emphasis added). Thus, the fact that the parking lot was
"well-lit," even if true, does not reasonably support the
trial court's conclusion that N.J.J.'s injury was not caused
by her employment.

In sum, substantial evidence exists in this record
indicating that, by placing N.J.J., a female, alone in the
Burger King parking lot around 3:30 a.m., N.J.J.'s employment
furnished an opportunity for rape and assault without
interference, a risk that exceeded the risk that N.J.J. would
have been subjected to in other employment. Cf. Dean, 220
Ala. at 29, 123 So. at 228. Conversely, the record contains
no evidence to support a finding that the parking lot did not
pose a risk of rape and assault materially in excess of that
faced by ordinary citizens not reporting to work in the
parking lot of a Burger King fast-food restaurant alone at
3:30 in the morning. See Dallas Mfg. Co. v. Kennemer, 243
Ala. at 44, 8 So. 2d at 520. On this record, a conclusion by
the trial court that the parking lot did not create an

1070173

increased risk of attack would have been unsupported by the evidence and plainly erroneous.

I share Justice Smith's respect for the ore tenus rule and her concern that this Court must never substitute its judgment for the trial court's by failing to draw all reasonable factual inferences favorable to the trial court's factual findings. However, the ore tenus standard of review does not permit this Court to affirm a trial court's judgment when, "after considering all the evidence and all reasonable inferences that can be drawn therefrom, [this Court] concludes that the judgment is plainly and palpably wrong, manifestly unjust, or without supporting evidence." Boggan v. Judicial Inquiry Comm'n, 759 So. 2d 550, 555 (Ala. 1999) (emphasis added). I conclude that the trial court erred in finding that N.J.J.'s employment did not subject her to an increased risk of attack because I find no evidence in the record that reasonably supports that conclusion, not because I have reweighed conflicting evidence to find that, on balance, another conclusion or inference is more probable. See Friedman v. Friedman, 971 So. 2d 23, 28 (Ala. 2007) ("Appellate courts do not sit in judgment of disputed evidence

1070173

that was presented ore tenus before the trial court. ...[I]t is not within the province of the appellate court to reweigh the testimony and substitute its own judgment for that of the trier of fact. ...[A]n appellate court may not substitute its judgment for that of the trial court. To do so would be to reweigh the evidence, which Alabama law does not allow." (internal quotation marks omitted)).

Finally, I note that policy concerns do not preclude a holding that a worker attacked on workplace property while arriving at (or leaving) work at night is entitled to workers' compensation benefits if the environment increases the risk of attack. Such a holding would be consistent with Alabama law governing which workplace injuries are compensable under the Workers' Compensation Act.

"Generally, Alabama law has held that injuries sustained in accidents that occur while an employee is traveling to and from work are not covered under the Act because those injuries do not meet the 'arising out of and in the course of employment' requirement. Alabama courts have carved out only a few exceptions to this general rule:

"'Such exceptions include situations where ... the accident occurs on the employer's property or on public property that is tantamount to the employee's ingress to and egress from the employer's property'

1070173

"An additional exception to the general rule arises when an employee, during his travel to and from work, is engaged in some duty for his employer that is in furtherance of the employer's business."

Ex parte Shelby County Health Care Auth., 850 So. 2d 332, 336 (Ala. 2002) (emphasis added) (citations omitted); cf. Hughes v. Decatur Gen. Hosp., 514 So. 2d 935, 937 (Ala. 1987) ("Most courts consider parking lots owned or maintained by an employer as part of the employer's premises whether the lots are within the main company premises or separated from it."); Thompson v. Anserall, Inc., 522 So. 2d 284, 286 (Ala. Civ. App. 1988) ("'[T]he employment is not limited by the actual time when the workman reaches the scene of his labor and begins it nor when he ceases, but includes a reasonable time, space, and opportunity before and after while he is at or near his place of employment.'" (quoting Barnett v. Britling Cafeteria Co., 225 Ala. 462, 463, 143 So. 813, 813 (1932))).

If the special-assault statute operates to exclude injuries such as those suffered by N.J.J. from the definition of injuries compensable under the Workers' Compensation Act, then employers will be liable for such injuries, if at all, under the broader remedies afforded by tort law, rather than for the more limited recovery available under the Workers'

1070173

Compensation Act. Lowman v. Piedmont Exec. Shirt Mfg. Co., 547 So. 2d 90, 93 (Ala. 1989) ("[I]f an accident is not compensable because it is outside the coverage of the Act, then the exclusive remedy provisions of the Act are also inapplicable. Thus, an employer is protected from tort liability only as to injuries expressly covered by the language of the Act."); cf., e.g., Rose v. Cadillac Fairview Shopping Ctr. Props. (De.) Inc., 668 A.2d 782 (Del. Super. Ct. 1995) (holding that the Delaware workers' compensation statute was the exclusive remedy and barred the tort action of a Sears Roebuck & Co. employee who was abducted from her employer's parking lot and raped when she arrived 55 minutes early to work).

In conclusion, this case is indistinguishable from Dean. In Dean, the night watchman had something his attackers wanted -- his money, which he was carrying on his person. Because of his service to his employers, he was in a place of increased vulnerability that suggested to the robbers the opportunity to capitalize on their wholly personal desire to rob Mr. Dean. Likewise, in this case, N.J.J. had something personal to her that her attackers wanted. Although evidence exists that

1070173

could support a finding that the attackers wanted to retaliate against N.J.J. for banning D.S. from the restaurant, substantial evidence supports the trial court's conclusion that N.J.J.'s attackers' motivation was entirely personal, regardless of whether her attackers wanted to molest her because she was a female or because of some desire to exact vengeance on N.J.J. because they perceived her as "nigger-lover."¹¹ However, the evidence in this case leads only to the conclusion that, because of her service to her employer, N.J.J. was in a place of increased vulnerability that suggested to the attackers the opportunity to capitalize on their personal desire to rape and attack her. The attackers knew N.J.J. was alone in an isolated parking lot, and this exposure incident to her employment furnished and suggested to

¹¹I note, however, that the record contains absolutely no evidence indicating why the attackers called N.J.J. a "nigger-lover." If D.S. was present during the attack, her only acquaintance with the attackers came from a brief interaction through her employment that had nothing to do with her personal life. If, as Burger King argues, D.S. was not present during the attack, then the record shows that N.J.J.'s attackers were entirely strangers to her. In either case (and especially if D.S. was not present), there is not substantial evidence from which to conclude that the attackers could have known N.J.J. was married to an African-American or how she treated African-Americans apart from her employment.

1070173

the attackers their opportunity, and so had a causal connection with the assault. Cf. Dean, 220 Ala. at 28, 123 So. at 227 (distinguishing Common Sch. Dist. v. District Court, 168 N.W. 555 (Minn. 1918)). "If the hazard peculiar to the employment is a contributing cause, it matters not whether violence was directed to [the employee] as an employee." Dean, 220 Ala. at 28, 123 So. at 227 (emphasis added). Therefore, as in Dean, the special-assault statute does not operate as a bar to worker's compensation benefits.

Because substantial evidence demonstrates that N.J.J.'s workplace created an increased risk of attack, and because substantial evidence does not exist upon which the trial court could have concluded otherwise, I believe the trial court's judgment is plainly and palpably wrong, and the Court of Civil Appeals erred in affirming the trial court's order denying N.J.J. worker's compensation benefits based on the special-assault statute. Accordingly, I respectfully dissent.