MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-23-409

LAUREEN FAMA,
Individually and
as Personal Representative of the Estate of Elliot Fama

Appellee

v.

ROBERT CLARKE AND BOB'S LLC

Appellants

ON APPEAL FROM THE CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF APPELLEES: LAUREEN FAMA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF ESTATE OF ELLIOT FAMA

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. Procedural History

Plaintiff/Appellee, Laureen Fama, individually and as Personal Representative of the Estate of Elliot Fama (hereafter referred to as "Fama"), filed her First Amended Complaint against Defendants/Appellants Bob's, LLC and Robert Clarke ("Clarke") (collectively referred to as "Defendants" and "Appellants") on August 19, 2022. (A. 2, 15-21.) The five-count Amended Complaint alleged the following: (1) Count I – Maine Liquor Liability Act pursuant to 28-A M.R.S. §§ 2501 *et seq.* as to Bob's, LLC; (2) Count II – Wrongful Death pursuant to 18-C M.R.S. § 2-807 *via* 28-A M.R.S. § 2508 as to Bob's, LLC; (3) Count III – Wrongful Death, Conscious Pain and Suffering pursuant to 18-C M.R.S. § 2-807(3) *via* 28-A M.R.S. § 2508; (4) Count IV – Loss of Consortium pursuant to 14 M.R.S. § 302 *via* 28-A M.R.S. § 2508 as to Bob's, LLC; and (5) Count IV – Battery as to Clarke. (A. 15-21.)[1]

On March 10, 2023, Defendants both filed a Motion for Summary Judgment (the "MSJs") as to all claims with one Joint Statement of Material Facts. (A. 3, 22-24.) In Clarke's Motion, he argued that he is not liable for Eliot Fama's ("Mr. Fama") injuries because the Maine's Worker's Compensation Act and the associated co-

[1] For clarity, there are five counts even though it appears at first glance that there are four labeled counts. (A. 18-21.) The counts are mislabeled in the Amended Complaint as Count I, Count II, Count II [sic], Count III [sic], and Count IV [sic]. (*Id.*)

employee immunity doctrine bar Plaintiff's claims against him. (A. 9.) In its motion, Bob's, LLC's fully adopted and incorporated the legal arguments presented in Clarke's motion, and argued that once Clarke is dismissed, Bob's LLC must be dismissed because of the named and retained requirement of the Maine Liquor Liability Act ("MLLA"). (*Id.*)

On April 10, 2023, Plaintiff filed an opposition and an additional statement of facts regarding the death-causing events, arguing that the MSJs must fail because the co-employee immunity only applies to injuries that arise out of and in the course of employment under 39-M.R.S. § 104, and that the record supports that Mr. Fama's injuries did not arise out of and in the course of employment. (A. 10, 25-29).

By Order dated July 28, 2023, this Court denied Defendants' MSJs, finding that a "[s]ettlement of workers' compensation claims between injured employee and employer does not foreclose employees' ability to pursue damages from third parties. Whether Clarke was acting within the scope of his employment as to trigger co-employee immunity remains an open question of fact." (A. 5, 7-13.) On August 11, 2023, the Defendants filed a Joint Motion to Amend the 7/23/23 Order. (A. 5.) The Court denied Defendants' Joint Motion to Amend on October 4, 2023. (A. 14.) A notice of this appeal was filed on October 16, 2023. (A. 5.)

B. Circumstances Surrounding Mr. Fama's Death-Causing Injuries

On October 28, 2020, Mr. Fama and Clarke, were both employed by Sanford Contracting, which operates out of Massachusetts. (A. 32). Clarke worked as a carpenter and Mr. Fama worked as a pile driver, which included the responsibilities of welding, cutting, and torch work. (A. 32-33). On October 28th, Sanford Contracting had six (6) employees performing construction work on the VA Hospital in Scarborough, Maine. (A. 33.) While Mr. Fama and Clarke originally met each other as co-workers, their relationship developed into a friendship in 2016. (*Id.*)

Sanford Contracting had a rule that employees were not supposed to drink while on the jobsite. (*Id.*) This rule was in effect on October 28, 2020. (*Id.*) Sanford Contracting did not have any rules regarding drinking while *off* duty or after work. (*Id.*) While Sanford Contracting offered to pay for a local hotel room at Howard Johnson for its employees working in Scarborough, staying at the hotel was optional and they were *not* required to stay at a hotel. (A. 23, 34) In fact, of the six (6) Sanford Contracting employees working on the VA Hospital jobsite on October 28, 2020, two commuted to the jobsite at various times throughout the week and did not stay at the Howard Johnson hotel. (*Id.*) For example, one Sanford Contracting employee, never stayed at the hotel, while another stayed at the hotel some nights, but not others, so he could help his wife with a newborn. (A. 34.) Clarke made the decision himself to stay at the hotel with the other Sanford Contracting employees, some of

which were also his friends. (A. 34-35.)

On October 28, 2020, the Sanford Contracting employees worked from 7:00 a.m. to 3:00 p.m. (A. 35) *After finishing work* at the Maine Medical Center job in Scarborough, Clarke drove Mr. Fama and another employee from work back to their hotel. (*Id.*). *After work*, Mr. Fama and Clarke then purchased a twelve pack of Bud Light and each drank six beers in the parking lot of the hotel. (*Id.*). *After work*, Clarke also consumed a nip of Fireball. (*Id.*). Sanford Contracting did not have any say or power to direct where the employees ate dinner – Mr. Fama made the decision where the group ate dinner. (*Id.*) After splitting the twelve pack, Clarke believes he went to shower before going to Coppersmith's Tavern. (A. 36.) Clarke testified that he arrived at Coppersmith's Tavern at 4:15 p.m. and had dinner with Mr. Fama and another employee. (*Id.*) Clarke told a police officer that he had six beers while at Coppersmith's Tavern that night. (*Id.*) Clarke also testified that he assumed he consumed all eight (8) of the Bud Lights on his bar tab at Coppersmith's Tavern. (*Id.*). Clarke testified that the Coppersmith bar tab was paid at 7:46 p.m. (*Id.*)

Shortly after leaving Coppersmith's Tavern after dinner, Clarke and Mr. Fama went outside to smoke cigarettes. (*Id.*) Clarke got into an argument with Mr. Fama, and Clarke punched Mr. Fama. (*Id.*) Mr. Fama later died from his injuries from the punch. (*Id.*)

C. Worker's Compensation Settlement Agreement

A worker's compensation claim was filed in Massachusetts on behalf of Mr. Fama following his death. (A. 23.) The worker's compensation claim was originally denied based on a claim that Mr. Fama was not acting in the course and scope of his employment at the time of his injury and death. (A. 24.) Fama and the worker's compensation insurer engaged in dispute resolution relative to the claim. (*Id.*) The Estate of Elliot Fama ultimately settled the worker's compensation claim by agreement. (*Id.*) The settlement agreement of the worker's compensation claim was approved by the Massachusetts Department of Industrial Accidents Division of Dispute Resolution on December 14, 2022. (*Id.*) The settlement agreement redeemed liability for certain specific provisions of Massachusetts Worker's Compensation Act, specifically providing that:

> Liability has **NOT** been established by standing decision of the Board, the Reviewing Board, or a court of Commonwealth and this settlement shall redeem liability for the payment of medical benefits and vocational benefits with respect to such injury.
>
> This agreement redeems liability under Chapter 152, including § 28, 31, 33, 34, 35, § 36. This agreement to have full faith and credit for these injuries in all other jurisdictions.

(26-27.)

The settlement documents further provide that "The insurer agrees to waive their right to recovery under Ch. 152 § 15."

ISSUES PRESENTED FOR REVIEW

I. WHETHER CLARKE'S AND BOB'S JOINT APPEAL IS IMMEDIATELY APPEALABLE UNDER AN EXCEPTION TO THE FINAL JUDGMENT RULE.

II. WHETHER THE SUPERIOR COURT CORRECTLY CONCLUDED THAT, ON THE RECORD BEFORE IT, CLARKE WAS NOT ENTITLED TO CO-EMPLOYEE IMMUNITY AS A MATTER OF LAW.

III. WHETHER THE SUPERIOR COURT CORRECTLY CONCLUDED THAT, ON THE RECORD BEFORE IT, THE NAMED AND RETAINED DOCTRINE OF THE MAINE LIQUOR LIABILITY ACT DID NOT APPLY AS A MATTER OF LAW.

IV. WHETHER THE SUPERIOR COURT PROPERLY DENIED APPELLANTS' MOTION TO AMEND.

STANDARD OF REVIEW

With few exceptions, this Court declines to hear interlocutory appeals because of the final judgment rule. *See Town of Otis v. Derr*, 2001 ME 151, ¶ 2, 782 A.2d 788, 789. Those exceptions are the judicial economy, death knell and collateral order exceptions. *Id.* ¶ 2, 782 A.2d at 789 n.1. As analyzed below, Defendants' co-employee immunity claim does not invoke any exception.

However, if this Court finds that an exception to the final judgment rule applies to this case, then it will review the denial of summary judgment *de novo,* for errors of law, by independently viewing the evidence in the light most favorable to Fama as the non-moving party. *Morgan v. Kooistra,* 2008 ME 26, ¶ 19, 941 A.2d 447,

453; *Sanford v. Town of Shapleigh*, 2004 ME 73, ¶ 6, 850 A.2d at 328; Roy, 1999 ME 74, ¶ 18, 728 A.2d at 1267. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to [in the required statement of material facts] show that there is no genuine issue as to any material facts set forth in those statements and that any party is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c) (alteration added). "A material fact is one that could potentially affect the outcome of the suit, and [a] genuine issue of material fact exists when the evidence requires a fact-finder to choose between competing versions of the truth." *Scott v. Fall Line Condo. Ass'n*, 2019 ME 50, P 5, 206 A.3d 307; M. R. Civ. P. 56(c).

SUMMARY OF ARGUMENT

The Court does not need to reach the merits of the Superior Court's Order on the MSJs at this stage because the present appeal is interlocutory and does not fall within any exception to the final judgment rule.

But even if this Court determines it has jurisdiction to hear Appellants' interlocutory appeal, it should affirm the Superior Court's Summary Judgment Order. Defendants' MSJs failed because the trial court could not determine as a matter of law if the injuries that resulted in Mr. Fama's death arose out of and in course of his employment. Under Maine law, Defendant Robert Clarke ("Mr. Clarke") can only be shielded by Maine's Worker's Compensation co-employee

immunity if the injury arose out of and in the course of employment. *See* 39-A M.R.S. § 104. Likewise, Defendant Bob's LLC cannot be shielded by the named and retrained doctrine because the co-employee immunity does not apply as a matter of law.

The parties do not dispute that an altercation occurred after work between Clarke and Mr. Fama at a bar owned by Bob's LLC, in which Clarke punched Fama causing Mr. Fama to fall and strike his head. (A. 25-29.) The parties agree that this strike resulted in Mr. Fama's death. (*Id*.) The parties also agree that a worker's compensation claim was denied on a claim that Mr. Fama was not acting in the course and scope of his employment at the time of his injury. (*Id.* 24, 26.)

Despite the parties' agreements on these matters, Defendants content that the injury arose out of and in the course of employment by virtue of Mr. Fama's estate reaching a worker's compensation settlement agreement with his employer and worker's compensation insurer. (*Id.* 24.) This settlement did not contain any findings of fact, findings of liability, or findings related to legal issues. (*Id.* 26-27.)

As demonstrated in *Wessner v. Montgomery* below, Maine courts allow cases involving personal injury, in which the injured party received worker's compensation benefits, to proceed against a co-employee when there are facts in the record that the injury did not arise out of and in the course of employment. In her opposition to Defendants' MSJs, Fama put several additional material facts into the

record that support a finding that Mr. Fama's injuries did not arise out of and in the course of his employment. In consideration of all of the facts before it, the trial court correctly found that it could not decide whether co-employee immunity applied as a matter of law because there was an open question of fact on whether Mr. Fama's injury arose out of and in the course of his employment.

LEGAL ARGUMENT

I. APPELLANTS' INTERLOCUTORY APPEAL SHOULD BE DISMISSED BECAUSE NO EXCEPTION TO THE FINAL JUDGMENT RULE APPLIES.

Appellants' appeal is interlocutory and meets no exception to the final judgment rule and should therefore be dismissed. "It is a long-standing rule that a party may not appeal a decision until a final judgment has been rendered in the case." *Irving Oil Ltd. V. ACE INA Ins.*, 2014 ME 62 ¶ 8, 91 A.3d 594 (citation and quotation marks omitted). "A final judgment . . . is a decision that fully decides and disposes of the entire matter pending before the court, . . . leaving no questions for the future consideration and judgment of the court . . . ." *Carroll v. Town of Rockport*, 2003 ME 135, ¶ 16, 837 A.2d 148. Interlocutory appeals are only permitted "in special circumstances." *O'Connor*, 2008 ME at P 3, 951 A.2d 78 (citation and quotation marks omitted). The court recognized three exceptions to the final judgment rule: (1) the collateral order exception, (2) the death knell exception, and (3) the judicial economy exception. *United States, Dep't of Agric., Rural Hous. Serv.*

v. Carter, 2002 ME 103, ¶ 7, 799 A.2d 1232.

This Court routinely dismisses such interlocutory appeals because they do not meet an exception to the final judgment rule. *See e.g. Carter*, 2002 ME 103, ¶13, 799 A.2d 1232 (dismissing an interlocutory appeal because no exceptions to the final judgment rule applied); *Cumberland Farms, Inc. v. Everett*, 600 A.2d 398, 399 (Me. 1991); *Lewis v. Keegan*, 2006 ME 93, ¶17 903 A.2d 342 (dismissing an interlocutory appeal request to review an order denying summary judgment); *Wilcox v. City of Portland*, 2009 ME 53, ¶ 13, 970 A.2d 295 (dismissing an interlocutory appeal where immunity under Maine Tort Claims Act was at issue because it turned on issues of fact).

For this Court to accept appellate jurisdiction and reach the merits of an interlocutory appeal, Appellants must establish that one of the three judicially recognized exceptions to the final judgment rule applies. *Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 12, 974 A.2d 918. No exception applies to this case. Here, Appellants wrongly argue that all three exceptions apply, so each is analyzed in turn below.

a. The Collateral Order Exception Does Not Apply

Appellants do not meet all three requirements of the collateral order exception. To trigger the collateral order exception to the final judgment rule, the Appellants "must establish three things: (1) the decision is a final determination of a claim

separable from the gravamen of the litigation; (2) it presents a major unsettled question of law; and (3) it would result in irreparable loss of the rights claimed, absent immediate review." *Carter*, 2002 ME 103 at ¶ 8, 799 A.2d 1232. All three elements must be met. *Id.*

Here, the determination of workers' compensation co-employee immunity and whether the injury arises out of the course of employment is admittedly an issue separable from the wrongfully death, battery, loss of consortium, and liquor liability claims at the heart of this litigation. However, Appellants fail to meet elements (2) and (3) of the collateral order exception. First, the Order on MSJs does not present a major unsettled area of law. The decision was based solely on the trial court's determination that there was an open issue of fact on whether the injury triggered co-employee immunity. It is not unsettled law that the co-employee immunity doctrine only applies where the injuries arise out of and in the course of employment. *See* 39-A M.R.S. § 104.

Second, Appellants' rights will not be irreparably lost if not allowed to immediately appeal the denial of summary judgment. As noted in *Carter,* the burden of having "to participate in a trial cannot, in and of itself, be the basis for invoking the collateral order exception because it is a burden common to every party whose motion for summary judgment is denied." 2002 ME 103 at 10 8, 799 A.2d 1232. Furthermore, "[i]f the expense of litigation were a sufficient reason for granting an

exception to the final judgment rule, the exception might well swallow the rule." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985) (quoting *Lusardi v. Xerox Corp*., 747 F.2d 174, 178 (3rd Cir. 1984)). Consequently, the Appellants do not meet the elements of the collateral order exception to the final judgment rule.

b. The Death Knell Exception Does Not Apply

For the death knell exception to apply, Appellants must show that they will each "irreparably lose a substantial right, meaning a loss of the rights, property, or claim at issue, if that party cannot appeal until a final judgment has been entered." *Bank of New York v. Richardson*, 2011 ME 38, P 10, 15 A.3d 756. "The exception is only available when the injury to the [appellant]'s claimed right would otherwise be imminent, concrete, and irreparable." *Carter*, 2002 ME 103, ¶ 12, 799 A.2d 1232. A right will be irreparably lost if the appellant would not have an effective remedy if the interlocutory determination were to be vacated after a final disposition of the entire litigation. *Id.*

Although in some cases the determination of qualified immunity can trigger the death knell exception, not all issues of immunity invoke the exception to the final judgment rule. *Compare Andrews v. Dep't of Env't Prot.,*1999 ME 198, ¶ 5, 716 A.2d 212 (permitting interlocutory appeal of the denial of a motion for a summary judgment by the Department of Environmental Protection based on a claim of

qualified immunity), *with*, *Wilcox v. City of Portland*, 2009 ME 53, ¶ 13, 970 A.2d 295 (dismissing an interlocutory appeal where immunity under Maine Tort Claims Act was at issue). Not all denials of summary judgment based on immunity are immediately appealable by an interlocutory appeal. In *Wilcox*, this Court dismissed the City's request for interlocutory appeal that was based on a denial of immunity pursuant to the Maine Tort Claims Act. 2009 ME 53, ¶ 13, 970 A.2d 295. In that case, this Court reasoned, in part, that:

> We also note that, in this case, the trial court did not decide, as a matter of law, whether the key immunity provisions of the Maine Tort Claims Act did or did not apply. Instead, the court determined that there are factual disputes that need to be resolved regarding the applicability of the "lease" and "discretionary function" exceptions, whether the IMT was a public building, and whether the portion of the premises causing the injury was controlled by the City or by private entities, before the court could address the legal issues relating to immunity.

Id. In *Gilbert v. Maheux*, this Court found that in determining whether to award compensation "the ultimate conclusion whether an employee is injured by an accident arising out of and in the course of his employment may be a question of law, one primarily of fact, or a mixed question of law and fact, depending on the total situation on a case by case basis." 391 A.2d 1203, 1206 (Me. 1978). In this case, the facts in the summary judgment record presented to the trial court open questions of fact for which it could not make a determination as a matter of law. *See e.g. Cole v. Chandler*, 2000 ME 104, ¶ 14, 752 A.2d 1189; *Comeau v. Maine Coastal*

Servs., 449 A.2d 362, 366 (Me. 1982); *Knox v. Combined Ins. Co.,* 542 A.2d 363 (Me. 1988); *Tibbetts v. St. Joseph Hosp*., 2007 Me. Super. LEXIS 159, *8.

There is no dispute in this case that the Workers' Compensation Act provides for co-employee immunity when the injury arises out of and in the course of employment. However, unlike the qualified immunity in *Andrews*¸ the trial court found that the issue of "co-employee immunity remains an open question of fact." (A. 12.) Like *Wilcox*, the trial court did not decide, as a matter of law, whether co-employee immunity applied or did not apply. Rather, it acknowledged that a genuine question of fact existed on whether the injury arose out of and in the course of employment – a prerequisite for co-employee immunity. Given that that the applicability of co-employee immunity in this summary judgment record turned on factual determinations, the denial of summary judgment is not immediately appealable.

c. The Judicial Economy Exception Does Not Apply

This case is not ripe for appeal under the "judicial economy exception." The judicial economy exception applies when resolution of the appeal can 'establish a final, or practically final, disposition of the entire litigation' and the interests of justice require that an immediate review be undertaken. *Trump v. Sec'y of State*, 2024 ME 5, ¶ 18, 307 A.3d 1089 (*citing State v. Maine State Employees Asso.,* 482 A.2d 461, 464 (Me. 1984)); *see also Carter*, 2002 ME 103, ¶ 13, 799 A.2d 1232. To apply,

two criteria must be met: (1) immediate review would "effectively dispose of the entire case"; and (2) "the interests of justice require that an immediate review be undertaken." *Estate of Dore v. Dore*, 2009 ME 21, ¶ 14, 965 A.2d 862, 866 (*quoting Bruesewitz v. Grant*, 2007 ME 13, ¶ 6, 912 A.2d 1255, 1257).

"[T]he availability of the judicial economy exception does not depend on [this Court] deciding the case in a certain way[.]" *Maples v. Compass Harbor Vill. Condo. Ass'n*, 2022 ME 26, ¶ 17 n.9, 273 A.3d 358. With respect to the first requirement of the judicial economy exception, "a party need only demonstrate that, in at least one alternative, our ruling on appeal might establish a final, or practically final, disposition of the entire litigation." *Id.*

The judicial economy exception does not apply because Count IV of the Amended Complaint which alleges loss of consortium by Lauren Fama pursuant to 14 M.R.S. § 302 *via* 28-A M.R.S. § 2508 against to Bob's, LLC still survives if this Court reversed the trial court's order on the MSJs. "Maine's loss of consortium statute provides an individual with a wholly separate and independent right of recovery." *Parent v. E. Me. Med. Ctr.,* 2005 ME 112, ¶ 14, 884 A.2d 93; *see McKellar v. Clark Equipment Co.,* 472 A.2d 411, 416 1984 Me. LEXIS 639 (Me. 1984) (discussing that when the legislature enacted former Me. Rev. Stat. Ann. tit. 19, § 167-A (now Me. Rev. Stat. Ann. tit. 14, § 302), a spouse "gained the right to present a claim for loss of consortium in such negligence actions against [the other

spouse]'s fellow employees."); *see generally Dionne v. Libbey-Owens Ford Co*., 621 A.2d 414, 417-418, 1993 Me. LEXIS 17, *8-10 ("Our Legislature, by the enactment of section 167-A against the background of the Workers' Compensation Act and specifically its section 68 lien, establishes a separate right to the wife and we hold that damages recovered by the wife are her property not subject to her husband's employer's section 68 lien."). "A consortium claim against the fellow employee will not necessarily result in an indirect action against the employer[,]" and here the claim has not implicated Sanford Contracting. *See McKellar v. Clark Equipment Co.,* 472 A.2d at 416 (Me. 1984). In Maine, third party claims are permitted. *See* 39-A M.R.S. § 107. Ms. Fama's claim against Bob's LLC, which implicates the personal conduct of Clarke when he was not acting within the scope of his employment, should be viewed independent of the Estate's claims and will survive an alternative ruling. A reversal of the trial court's order as to Clarke does not dispose of the entire case, and therefore the judicial economy exception does not apply.

II. THE SUPERIOR COURT CORRECTLY DENIED SUMMARY JUDGMENT BECAUSE WORKER'S COMPENSATION DOES NOT SHIELD CLARKE FROM CIVIL LIABILITY AS A MATTER OF LAW ON THIS RECORD.

a. Co-Employee Immunity

The Trial Court correctly denied summary judgment because it could not be determined as a matter of law whether Mr. Fama's death arose out of and in the course of employment. Here, it is undisputed that Fama entered a workers'

compensation settlement agreement in the State of Massachusetts with the employer, Sanford Contracting, and the worker's compensation insurer. (A. 24, 26.)[2] There is also no dispute that Fama and Clarke were employees at Sanford Contracting. (A. 22-23.) Therefore, the only issue for this Court to decide is whether the worker's compensation settlement agreement automatically triggered, as a matter of law, full and unfettered immunity from personal liability for Clarke when there are facts in the record that could, when viewed in the non-movant's favor, support a determination that the injuries did not arise out of and in the course of employment.

In Maine, Section 104 of the Worker's Compensation Act provides that:

> An employer who has secured the payment of compensation in conformity with sections 401 to 407 is exempt from civil actions, either at common law . . ., involving personal injuries sustained by an employee arising out of and in the course of employment . . . . These exemptions from liability apply to all employees, supervisors, officers and directors of the employer for any personal injuries *arising out of and in the course of employment* . . . .

[2] In their Brief, Defendant's argue that Maine law should apply. Fama does not object to Maine law applying to the merits of the lawsuit. Choice of law was not argued by either party at the summary judgment level. However, in its Order on the MSJs, the Trial Court clearly acknowledges that there is some potential choice of law questions here that weren't addressed in Defendants' MSJs or Fama's Opposition. Massachusetts law could arguably apply to the issue of workers' compensation immunity. All of the death causing events may have occurred in Maine, but the case involves a Massachusetts Workers' Compensation settlement agreement that went before the Massachusetts Workers' Compensation Board. However, as discussed below, the co-employee immunity outcome here is the same regardless of which worker's compensation act the court applies because each provides co-employee immunity when the injury arose out of and in the course (or "scope" in Massachusetts) of employment. Here, such a determination is an open question of fact and could not be decided as a matter of law on the record that was before the trial court, regardless of which state's law applies.

39-A M.R.S. § 104 (emphasis added); *See Wessner v. Montgomery*, 2003 Me. Super. LEXIS 67, *11-12 (Me. Super. April 21, 2003) ("Under the dual persona doctrine, a co-employee or officer of an employer is not entitled to immunity under the Worker's Compensation Act if that putative defendant is sued and may be liable 'in a separate and distinct capacity' from the one associated with his employment.").

Although this Court has "consistently applied a broad and encompassing construction to the exclusivity provision[,]" it has also established a limitation that the injury must have arose out of and in the course of employment. *See Cole v. Chandler*, 2000 ME 104, ¶¶ 10-11, 752 A.2d 1189 (quoting *Li v. C.N. Brown Co.*, 645 A.2d 606 (Me. 1994)). The determination of whether the injuries were suffered while at work "turns on an issue of fact." *Id.* ¶ 14 (*citing Comeau v. Maine Coastal Servs.,* 449 A.2d 362, 366 (Me. 1982)) (citations omitted); *see Tibbetts v. St. Joseph Hosp*., 2007 Me. Super. LEXIS 159, *8 (discussing that the Worker's Compensation immunity and exclusivity defense is "intensively driven by facts."). In making this determination, "[t]he question is whether the injury 'occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto.'" *Id. (quoting Hebert v. International Paper Co.,* 638 A.2d 1161, 1162 (Me. 1994)). "These 'arising out of' and 'in the course of' elements, when viewed in a consolidated way, result in compensation coverage (and, conversely,

employer immunity from civil liability) for 'injuries suffered *while* and *because* [the employees] were at work.'" *Wessner v. Montgomery*, 2003 Me. Super. LEXIS 67, *5 (*quoting Comeau v. Maine Coastal Services*, 449 A.2d 362, 366 (Me. 1982)) (emphasis and alterations in original).

The court weighs many "[f]actors . . . in determining whether an injury 'arises out' of and in the 'course of" employment' . . . ." *Tibbetts v. St. Joseph Hosp*., 2007 Me. Super. LEXIS 159, *7-8. Although not an exclusive list, these factors include:

> "Whether at the time of the injury the employee was promoting an interest of the employer or the activity of the employee directly or indirectly benefited the employer;" 2) "Whether the activities of the employee work to the benefit or accommodate the needs of the employer;" 3) "Whether the activities were within the terms, conditions or customs of the employment, or acquiesced in or permitted by the employer;" 4) "Whether the activity of the employee serves both a business and personal purposes, or represents an insubstantial deviation from the employment;" 5) "Whether the hazard or causative condition can be viewed as employer or employee created;" 6) "Whether the actions of the employee were unreasonably reckless or created excessive risks or perils;" 7) "Whether the activities of the employee incidental to the employment were prohibited by the employer either expressly or implicitly;" 8) "Whether the injury occurred on the premises of the employer."

Id. (*quoting Comeau,* 449 A.2d at 367).

For example, in *Wessner v. Montgomery*, the Superior Court denied summary judgment, finding that the record revealed a genuine issue of material fact on whether the employee's injury arose out of the employment. 2003 Me. Super. LEXIS

67, *5-7. In that case, the plaintiff was an employee of a golf club and the defendant was the club's president. *Id.* *1. During the plaintiff's lunch break, he took a golf cart off of the employer's property to a general store. *Id.* *1-2. At the store, the plaintiff and defendant were involved in an altercation causing the plaintiff to suffer an injury. *Id.* *2. The golf club filed a notice of claim for Worker's Compensation benefits and the employee/plaintiff submitted some of his medical bills to the Worker's Compensation carrier which were paid for by the carrier. *Id.* *3. After receiving Worker's Compensation payment for medical bills, the Plaintiff brought a civil lawsuit against the defendant/club president who then filed a motion for summary judgment, arguing that he was immune from civil liability pursuant to Section 104. *Id.*

In deciding the motion, the court stated that the "question is whether on this record there is a genuine factual dispute affecting the defendant's argument that the plaintiff sustained his injuries arising out of and in the course of his employment at the golf club." *Id.* *5. In considering the following factors, the court denied summary judgment, finding that the record did not conclusively support that the injury arose out of, or had its origin in, the employment:

> On the one hand, at least part of the relationship between the parties derived from their common affiliation with the golf course, and there had been a history of some disagreement or animosity between them arising from issues relevant to the golf club. Further, one can argue that

> the plaintiff was present at the store for reasons incidental to his employment. . . .
>
> [On the other hand,] [t]he parties were at the store for personal reasons. The plaintiff was taking a lunch break during his workday. Although arguably incidental to his job, that circumstance creates a measure of distance from his employment conditions. Further, to the extent revealed by the record at bar, the circumstances of the incident are too ambiguous to establish as a matter of law that the injury had its cause in the plaintiff's employment. The record may suggest but does not establish that the defendant's alleged conduct resulting in personal injury to the plaintiff arose from or was created by the latter's employment at the golf club.

Id. *5-6. In denying summary judgment, the court found that the "record reveal[ed] a genuine issue of material fact on this element of the defendant's immunity defense, requiring a factfinder's assessment." *Id.* *6.

The court in *Wessner* further analyzed the dual persona doctrine, in which "a co-employee or officer of an employer is not entitled to immunity under the Worker's Compensation Act if that putative defendant is sued and may be liable 'in a separate and distinct capacity' from the one associated with his employment." *Id.* at 11-12. The court found that "the record on summary judgment le[ft] room for a genuine factual contention that the defendant's actionable conduct violated duties that were completely divorced from circumstances inherent in the parties' employment." *Id.* at *12.

As analyzed in the next section, Fama has presented facts that the death arose from a non-work related event, completely divorced from circumstances inherent to Mr. Fama's and Clarke's employment. *Contra e.g*. *Gordan v. Cummings*, 2000 ME 68, ¶¶12-13, 756 A.2d 942 (upholding the granting of a summary judgment based on Section 104 because the Plaintiff "did not present any evidence to establish that her IIED claim arose from a non-work-related event."). Given these facts, the trial court could not conclusively find that the injury arose out of, or had its origin in, the employment at Sanford Contracting.

b. Record before the Court

Here, much like the record in *Wessner*, the record reveals evidence that Mr. Fama's injury did not arise out of and in the course of employment. The factors set out in *Comeau* clearly support the conclusion this Mr. Fama's injury did not occur in the course of his employment. At the time that Mr. Clarke punched Mr. Fama, the men had been off duty for several hours. (A. 29-31.) The men had driven from the jobsite to their hotel where they showered and began drinking. (*Id*.) The men ate at a restaurant of their choosing and paid for their own drinks. (*Id.*) At the time the injury occurred, the men were off of the jobsite premises and were not engaged in activities to benefit or promote an interest of Sanford Contracting. (*Id*.) In fact, Sanford Contracting had a rule that the employees were not allowed to drink while at a jobsite but did not have any rules regarding employees drinking while *off* duty

or after work. (*Id*.) The men were engaged in activities that served personal purposes and would have been expressly prohibited by Sanford Contracting during working hours. (*Id.*) The activities the men were engaged in when the injury occurred (i.e. drinking at a bar), were far outside of the scope of their job responsibilities for Sanford Contracting that were limited to carpentry and pile driving. (*Id.*) The record before the trial court presented a genuine question on whether the injuries that resulted in Mr. Fama's death arose out of and from the course of his employment. If anything, the record supports a finding that Clarke's actionable conduct violated duties that were completely divorced from circumstances inherent in he and Mr. Fama's employment. *See Wessner*, 2003 Me. Super. LEXIS 67, *11-12. Fama presented facts in the summary judgment record that the injuries causing Mr. Fama's death did not occur while and because he was at work, but instead occurred off the jobsite premises and during Mr. Fama's and Clarke's personal time. (A. 29-31.) The trial court correctly determined that it could not determine as a matter of law whether the injuries arose out of and in the course of employment.

c. Worker's Compensation Settlement Agreement

Fama's settlement agreement with the employer and worker's compensation insurer does not, as a matter of law, preclude her action against Clarke individually. Such an interpretation of the co-employee immunity would render the terms "arose out of and in the course of employment" meaningless. In *Wessner*¸ the fact that the

injured party collected Worker's Compensation benefits from his employer's insurer was immaterial to whether the injury occurred in the course of his employment. *See Wessner*, 2003 Me. Super. LEXIS 67. Despite accepting benefits, the court permitted the plaintiff/employee to pursue his action against the defendant/employee because there was a genuine issue of material fact on whether the plaintiff's injury occurred in the course of employment. *Id.* In *Wessner* there was a question on whether the dual persona doctrine applied. *Id.* *11-12. Similarly here, there are many facts in the record that create a question whether Clarke's conduct was completely divorced from circumstances inherent in the parties' employment. Here, Defendants argue that the injury must have *arose out of and in the course of employment* by virtue of Fama entering a settlement agreement with the employer, Sanford Contracting, and its worker's compensation insurer. As demonstrated by the plaintiff's acceptance of worker's compensation benefits in *Wessner*, Defendants' argument fails.

Tellingly, the worker's compensation insurer denied Fama's worker's compensation claim because it claimed that Mr. Fama was not acting in the course and scope of his employment at the time of the injury. (A. 23-24, 26.) Fama and the insurer then engaged in settlement negotiations through dispute resolution relative to the claim. (*Id.*) A settlement agreement was then reached and approved by the Massachusetts Department of Industrial Accidents Division of Dispute Resolution. (*Id.*) The terms of the negotiated Settlement Agreement redeemed liability for certain

specific provisions of Massachusetts Worker's Compensation Act, specifically providing that:

> Liability has **NOT** been established by standing decision of the Board, the Reviewing Board, or a court of Commonwealth and this settlement shall redeem liability for the payment of medical benefits and vocational benefits with respect to such injury.
>
> This agreement redeems liability under Chapter 152, including § 28, 31, 33, 34, 35, § 36. This agreement to have full faith and credit for these injuries in all other jurisdictions.

(26-27.) The settlement documents further provide that "The insurer agrees to waive their right to recovery under Ch. 152 § 15."[3]

The Settlement Agreement, a negotiated contract, does not preclude a claim against Clarke in his individual capacity. First, Clarke was not a signatory of the settlement agreement and nothing in the summary judgment record would support such a finding. Second, the settlement agreement cannot have any preclusive affect because it explicitly does not establish any liability on either party and it makes no findings of fact – in fact, it specifically provides that "Liability has **NOT** been

[3] Section 15 of Massachusetts Workers' Compensation provides that:

> Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee shall be entitled, without election, to the compensation and other benefits provided under this chapter. . . .
>
> The sum recovered shall be for the benefit of the insurer, unless such sum is greater than that paid by it to the employee, in which event the excess shall be retained by or paid to the employee.

Mass. Gen. Laws ch. 125, § 15.

established[.]" (R. 26-27.) Third, contrary to Defendants' suggestion, an insurer's statutory entitlement to worker's compensation liens on third-party recoveries does not support a finding of co-employee immunity in this case. In its Order on the MSJs, the trial court generally discusses a potential lien by the insurer and employer for any recovery Fama might receive from third-party tortfeasors. (A. 12.) However, in the settlement agreement between Fama and the insurer, the insurer agreed to waive its right to any potential lien. The parties to the settlement agreement specifically agreed that "[t]he insurer agrees to waive their right to recovery under ch. 152, § 15." As cited by the trial court, "approved settlement agreements are binding as to matters agreed upon, and principles of contract govern their interpretation." *Soucy v. Sullivan & Merritt*, 1999 ME 1, ¶ 7, 722 A.2d 361 (citing *Dufault v. Midland-Ross of Can., Ltd.,* 380 A.2d 200, 205 (Me. 1977)). Here, that negotiated contractual term involving the insurer's waiver of its right to recovery provided consideration for the agreement between Fama, Sanford Contracting, and the insurer. Even so, whether Fama actually realizes any recovery from a third-party tortfeasor is irrelevant to the issue of co-employee immunity.

The worker's compensation settlement agreement, does not, as a matter of law, preclude a third-party action against Clarke. The analysis on whether co-employee immunity applies is limited to a factual analysis on whether Mr. Fama's injuries *arose out of and in the course of employment*. The summary judgment record

before the trial court clearly established that this is an open question of fact that could not be decided as a matter of law.

d. Massachusetts Law

Although both parties agree that Maine law applies to Fama's claims, the result is the same if Massachusetts Law is applied to the worker's compensation immunity issue – Clarke is not entitled to co-employee immunity as a matter of law. In Massachusetts, "co-employees are immune from personal suit when they injure a fellow employee while acting within the course of their employment and in furtherance of the employer's interest." *Schilling v. Chatham Five Star LLC*, 186 F. Supp. 3d 58, 63 (D. Mass. 2016.) (internal quotation omitted). Similar to the superior court's order denying summary judgment in *Wessner,* the Massachusetts Supreme Court has stated that, "an injured employee is not precluded from receiving workers' compensation payments and also recovering damages from a coemployee who committed an intentional tort which 'was in no way within the scope of employment furthering the interests of the employer.'" *Estate of Moulton v. Purpolo*, 5 N.E.3D 908, 920 n.16 (Mass. 2014) (citing Mass. Gen. Law ch. 152, § 15). The MSJs fail for all of the reasons discussed above, namely because there are facts in the record that, Clarke, a Sanford Contracting employee, committed an intentional tort that was in no way within the scope of his employment or furthering the interests of Sanford Contracting. The denial of summary judgment in this case was proper.

III. THE NAMED AND RETAINED DOCTRINE DOES NOT SHIELD BOB'S LLC BECAUSE THE EXCLUSIVITY PROVISION DOES NOT APPLY AS A MATTER OF LAW TO THE FACTS IN THIS RECORD.

Bob's LLC's fully adopted Clarke's argument regarding co-employee immunity, and then argued that it is protected from suit because Clarke, an intoxicated tortfeasor, cannot be named and retrained if he is protected by 39-A M.R.S.A § 104. This argument fails for all of the reasons discussed above, namely that Clarke is not entitled to summary judgment because the worker's compensation exemption for co-employees only applies to injuries that arise out of and in the course of employment, and that this is an open issue of fact that could not be decided as a matter of law. Here, Defendants cannot demonstrate as a matter of law that co-employee immunity applies. The record contains facts that support a finding that Mr. Fama's death resulted from injuries that did not arise out of and in the course of his employment.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' JOINT MOTION TO AMEND THE 7/28/23 ORDER.

On August 11, 2023, Defendants jointly moved the court to amend its July 28, 2023 order pursuant to M.R. Civ. P. 59, which the trial court denied. This Court reviews such denials "for an abuse of discretion a court's ruling on both a motion for reconsideration of an order and a motion to alter or amend a judgment." *U.S. Bank Nat'l Ass'n v. Manning*, 2020 ME 42, ¶ 32, 228 A.3d 726. M.R. Civ. P. 59. In each

instance, this Court's review "involves three questions: (1) whether the court's factual findings are supported by the record according to the clear error standard, (2) whether the court understood the law applicable to the exercise of its discretion, and (3) whether the court's weighing of the applicable facts and choices was within the bounds of reasonableness." *Id.*

Pursuant to M. R. Civ. 59(e), "A motion to alter or amend the judgment shall be filed not later than 14 days after entry of the judgment. A motion for reconsideration of the judgment shall be treated as a motion to alter or amend the judgment." Here, the trial court denied summary judgment, it did not enter a judgment. The trial court did not abuse its discretion in denying the Motion to Amend because there was no judgment to amend. *See Geary v. Stanley Med. Research Inst.*, 2008 ME 9, ¶ 10, 939 A.2d 86 (stating that a denial of a motion for summary judgment is not a final judgment).

The trial court also did not abuse its discretion if the Defendants' Motion to Amend is considered a motion for reconsideration. The Defendants argue that the Court should have reconsidered its Order on the MSJs because it was an error to consider whether Robert Clarke was acting in the scope of his employment when the injury occurred. This argument presumably comes from the trial court's statement that "[w]hether Clarke was acting within the scope of his employment so as to trigger co-employee immunity remains an open question of fact." (A. 12.) Earlier in the

Order, the Court acknowledged that the parties disputed "whether the *injuries* happened during the scope of employment." The standard that triggers co-employee immunity is very clearly whether there are "personal injuries sustained by an employee arising out of and in the course of employment, or for death resulting from those injuries." 39-A M.R.S. § 104.

In this instance, where the injured employee, Mr. Fama, and the alleged tortfeasor, Mr. Clarke, were both employed by the same employer, determining whether co-employee immunity applies equally implicates facts on whether the injury arose out of and in the course of Fama's employment and whether the tort was committed within the scope of Clarke's employment. As demonstrated in the court's analysis in *Wessner*, consideration of the tortfeasors conduct is necessary when evaluating the dual persona doctrine and the *Comeau* factors. In opposition, Fama introduced several additional facts that strongly support that Mr. Fama's injuries did not arise out of and in the course of his employment with Sanford Contracting, those facts equally apply to whether Mr. Fama's injuries were caused by Clarke in the scope of Clarke's employment. Whether Clarke struck Mr. Fama in the scope of his employment is one of many factors that can be considered in determining whether the injury arose out of and in the course of employment to trigger co-employee immunity. Therefore, the Court did not abuse its discretion in denying the Motion to Amend.

V. FAMA WAS NOT REQUIRED TO PRESENT PRIMA FACIE EVIDENCE FOR EACH ELEMENT OF HER CLAIMS IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

In their brief, Defendants erroneously argue that "it was Ms. Fama's burden in opposing summary judgment to establish prima facie evidence for each element of her claims." (Defs' Brief at 20.) Defendants further argue that "[t]o establish a viable tort claim against Mr. Clarke, Ms. Fama needed to establish Mr. Clarke is not entitled to co-employee immunity." This is a complete misstatement of the law and of Fama's burden in opposing Defendants' MSJs.

Here, Defendants each moved for summary judgment on a defensive claim of worker's compensation co-employee immunity and therefore bear the burden of establishing the defensive claim. "When the party moving for summary judgment bears the burden on a claim or defense, the moving party must establish the existence of each element of the claim or defense without dispute as to any material fact in the record in order to obtain summary judgment." *State v. Tucci*, 2017 Me. Super. LEXIS 236, *4 (August 2, 2017) (citing *Cach, LLC v. Kulas*, 2011 ME 70, ¶ 8, 21 A.3d 1015). "If the motion for summary judgment is properly supported, then the burden shifts to the non-moving party to respond with specific facts indicating a genuine issue for trial in order to avoid summary judgment." *Id.* (citing M.R. Civ. P. 56(e)). Defendants' bear the burden to establish the existence of facts for the co-employee immunity defense. In opposition, Fama then met her

burden by presenting material facts that rebut the narrow immunity claims raised in Defendants' MSJs.

Further, Fama has no obligation to present prima facie evidence for each element of the claims alleged in her complaint. Defendants' cite to *First Citizens Bank v. M.R. Doody, Inc.*, to argue that Plaintiffs have an affirmative burden to establish prima facie evidence of each element of their claims in opposition. However, *First Citizens Bank* provides that "[a] party opposing a motion for a summary judgment must come forward with competent and admissible evidence *in response to the motion*." *First Citizens Bank v. M.R. Doody, Inc*., 669 A.2d 743, 744 (Me. 1995) (emphasis added) In *First Citizens Bank*, the non-moving party provided no evidence in response to a motion for summary judgment by completely failing to file any opposition or statement of facts. *Id.* Here, Fama presented admissible evidence through her Opposition to Defendants' Joint Statement of Facts and her Additional Statement of Material Facts that specifically and directly responded to the narrow legal issues raised by Defendants. Defendants did not argue in their Motions that Plaintiff's claims fail because Plaintiff did not establish the elements of her claims[4], rather Defendants only argued that Plaintiff's claims fail because of the statutory co-employee immunity doctrine. Plaintiff specifically responded to

[4] By failing to argue these issues in their Motion for Summary Judgment, the Defendants have waived these arguments on appeal.

Defendants' arguments regarding the co-employee immunity doctrine and the Maine Liquor Liability Act by putting forth competent and admissible evidence that demonstrates factual questions on whether Fama's injury arose out of and in the course of employment. Therefore, Plaintiff has met all of her burdens to defeat Defendants' MSJs.

CONCLUSION

For the foregoing reasons, the denial of summary judgment should be affirmed because the issue of co-employee immunity cannot be decided as a matter of law.

Dated this 2nd day of April, 2024 at Saco, Maine.

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CERTIFICATE OF SERVICE

I, Jana L. Kenney, hereby certify that (2) two copies of the foregoing Appellee's Brief were served upon all parties of record or their counsel by Electronically and by First Class Mail this 2nd day of April, 2024.

/s/ Jana L. Kenney

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