Rel: December 2, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

1210235

Ex parte Jeffrey Varoff

PETITION FOR WRIT OF MANDAMUS

(In re: Clifford Bufford

v.

Ed Bledsoe et al.)

(Lee Circuit Court, CV-19-900125)

MITCHELL, Justice.

After Clifford Bufford, an employee of Borbet Alabama, Inc., injured his left arm in a workplace accident, he sued seven of his co-employees claiming that his injury was the result of their willful conduct. The co-employees sought summary judgment, arguing that they were immune from suit under Alabama's Workers' Compensation Act ("the Act"), § 25-5-1 et seq., Ala. Code 1975, because, they said, there was no evidence to support Bufford's claims. Bufford voluntarily dismissed his claims against all the defendants except the petitioner, maintenance supervisor Jeffrey Varoff. The Lee Circuit Court then denied Varoff's motion for summary judgment. He now asks this Court for a writ of mandamus directing the trial court to enter judgment in his favor on the basis of the immunity afforded by the Act. We grant the petition and issue the writ.

Facts and Procedural History

Bufford worked as a maintenance technician at the Borbet wheel-manufacturing facility in Auburn for about 12 years. One of his duties was servicing the recycling system that transformed metal chips and shavings created during manufacturing back into usable material. As part of that recycling process, scrap metal was deposited into the

recycling system, where it was cleaned and sorted before entering the VSS300, a large box-shaped machine with an auger at the bottom. The auger and a vacuum then pulled the scrap metal through the VSS300 as the metal continued on toward the foundry, where it was melted down and purified.

The VSS300 stopped working with some regularity; Bufford says that he typically had to service it two or three times a week. A common problem for the VSS300 was a clog causing a loss of suction around the auger. Employees remedied this by turning off the power to the system at the main panel, then removing the lid of the VSS300 and manually removing the scrap metal and any foreign objects that might be creating the clog. The employee then turned the power to the system back on at the main panel and returned to the VSS300 to verify whether the system now had suction. If suction was restored, the employee then turned off the power again and replaced the VSS300's lid before powering the system on a final time and placing the recycling system back online.

On the day of his accident, Bufford was notified by radio that the VSS300 needed servicing. When he went to the machine, he recognized that it was clogged. He therefore shut off the power at the main panel

and began removing material from the machine.[1] Once he was done, he turned the power back on and returned to the VSS300 to determine if suction had been restored. While looking into the machine, he rested his left arm on the edge so that he could peer in and listen for the vacuum. Somehow, Bufford's sleeve was caught by the auger's tip and his arm was pulled into the machine, where it was twisted and cut by the auger. Bufford suffered injuries to his hand and forearm that have since required multiple surgeries.

Bufford filed a claim against Borbet for workers' compensation benefits; that claim was ultimately settled. Those benefits are generally an employee's only remedy for an on-the-job injury, see § 25-5-53, Ala. Code 1975, but Bufford later sued seven of his co-employees under § 25-5-11(b), Ala. Code 1975, which provides an exception to that rule when an employee's injuries are caused by a co-employee's "willful conduct." Bufford specifically alleged that his co-employees had committed willful conduct "by removing and/or altering the safety guards and devices on the VSS300 machine and knowingly requiring [him] to perform his job

[1]The lid was already off the VSS300 when Bufford arrived; the materials before us do not indicate who removed it.

duties without this equipment." See § 25-5-11(c)(2), Ala. Code 1975 (defining "willful conduct" to include "[t]he willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from the removal"). The safety guard that was allegedly removed was the VSS300's lid.

After extensive discovery, the co-employees moved the trial court to enter summary judgment in their favor, arguing among other things that Bufford's claim of willful conduct was not supported by the evidence and that, "[a]bsent such willful conduct, the co-employees have complete immunity from civil liability from all causes of action." Motion for summary judgment, p. 6 (citing Powell v. United States Fid. & Guar. Co., 646 So. 2d 637, 638 (Ala. 1994)).[2] They first argued that there was no evidence indicating that any of them had removed the lid to the VSS300.

[2]The dissent states that "Varoff did not argue below that Bufford's claim is barred by the immunity provisions of the Act," ___ So. 3d at ___. That would certainly come as a surprise to the trial court, which, in its order denying summary judgment, expressly recognized that Varoff was making an immunity argument, stating: "Varoff argues that Bufford cannot establish willful conduct as required by § 25-5-11(c)(2) and that, absent willful conduct, he is immune under the Alabama Workers' Compensation Act." (Emphasis added.)

And, second, they argued that removal of the VSS300's lid had been done for the purpose of repairing the machine and that the removal therefore could not constitute willful conduct under § 25-5-11(c)(2), which expressly precludes a finding of willful conduct when a safety device or guard was removed "for the purpose of repair of the machine."

Before filing a response, Bufford dismissed his claims against all his co-employees except Varoff. Bufford then filed a response maintaining his position that Varoff's knowledge of the allegedly unsafe procedure for servicing the VSS300 rendered him liable under § 25-5-11(b). See, e.g., Harris v. Gill, 585 So. 2d 831, 837 (Ala. 1991) (explaining that a supervisor could be liable under § 25-5-11 when he or she has knowledge that a safety guard has been bypassed because "to hold otherwise would contravene public policy; it would allow supervisory employees to instruct their employees to perform a certain operation after a safety device related to that operation had been removed"). Bufford further argued that simply unclogging the VSS300 was not a "repair" for § 25-5-11(c)(2) purposes and that, in any event, he had already removed the clog and completed any "repair" at the time he was injured.

Following a hearing, the trial court denied Varoff's summary-judgment motion, holding that there were material questions of fact about "whether Bufford's actions constitute 'maintenance,' 'repair,' or simply 'unclogging/unjamming'; whether that activity had been completed when he was injured; [and] Varoff's knowledge (or lack thereof) of various practices as to the running of the machine …." Varoff now petitions this Court for mandamus review.

Standard of Review

This Court typically does not conduct mandamus review of a trial court's denial of a motion for summary judgment. Ex parte Simpson, 36 So. 3d 15, 22 (Ala. 2009). But an exception exists when summary judgment has been sought on immunity grounds. Id. Here, the Act expressly immunizes employees from suits by their co-employees stemming from on-the-job accidents unless there is some evidence of the defendant employee's willful conduct. See § 25-5-53 (explaining that the rights and remedies granted injured employees by the Act generally "exclude all other rights and remedies of the employee" and that "immunity from civil liability for all causes of action except those based upon willful conduct shall also extend … to an … employee of the same

employer" (emphasis added)); see also Powell v. United States Fid. & Guar. Co., 646 So. 2d at 638 ("In 1985 … the legislature passed Act 85-41, Ala. Acts 1985, which extensively amended [the Act] and added to it a qualified immunity for all co-employees."). Mandamus review is therefore appropriate to the extent Varoff argues he was entitled to summary judgment based on the immunity afforded by the Act. See also Ex parte Salvation Army, 72 So. 3d 1224, 1227-28 (Ala. Civ. App. 2011) (reviewing this Court's precedent and rejecting the contention "that the denial of a summary-judgment motion grounded on a claim of immunity under the exclusive-remedy provisions [of the Act], as opposed to some other types of immunity, is not reviewable by mandamus petition").

Accordingly, Varoff bears the burden of establishing (1) a clear legal right to immunity under the Act; (2) that the trial court has refused to enter a judgment in his favor on that basis; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of this Court. Ex parte KKE, LLC, 295 So. 3d 26, 29 (Ala. 2019) (setting forth the mandamus standard). The only disputed issue before us is whether Varoff is entitled to immunity under the Act or whether Bufford's claim

against him falls within the willful-conduct exception to that immunity.[3] We therefore focus our inquiry on that issue.

Analysis

Employees injured in on-the-job accidents are generally limited to recovering workers' compensation benefits from their employer in accordance with the Act. See Richardson v. PSB Armor, Inc., 682 So. 2d 438, 440 (Ala. 1996) ("The [Act] provides an exclusive remedy for the employee injured in a workplace accident ...."). But § 25-5-11(b) provides that "[i]f personal injury ... to any employee results from the willful conduct ... of any ... employee of the same employer ..., the employee

[3]Bufford has argued that Varoff waived his right to claim immunity under the Act because he did not assert immunity as an affirmative defense in his answer to Bufford's complaint. But while an employer's immunity under the exclusive-remedy provisions of the Act is generally an affirmative defense, see, e.g., Ex parte Drury Hotels Co., 303 So. 3d 1188, 1193 (Ala. 2020), Varoff's claim to immunity here is not. Varoff is not saying that he is entitled to relief under § 25-5-11(c)(2) even if everything Bufford has alleged is true; rather, he is arguing that he is entitled to relief because Bufford cannot support his allegation of willful conduct. Thus, properly viewed, Varoff's immunity claim is a "negative defense" as opposed to an "affirmative defense." See Ex parte Gadsden Country Club, 14 So. 3d 830, 834 (Ala. 2009) ("An affirmative defense is distinguishable from a negative defense in that an affirmative defense raises new matters that, assuming the allegations in the complaint to be true, constitute a defense to the action and have the effect of defeating the plaintiff's claims on the merits while a negative defense simply seeks to refute an essential allegation of the plaintiff's complaint.").

shall have a cause of action against the person …." (Emphasis added.) Section 25-5-11(c) defines what constitutes "willful conduct" for purposes of this exception. Among other things, it includes "[t]he willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from the removal." § 25-5-11(c)(2). But "removal of a guard or device shall not be willful conduct unless the removal did, in fact, increase the danger in the use of the machine and was not done for the purpose of repair of the machine." Id. (emphasis added).

Varoff says that it is undisputed that the lid was removed from the VSS300 "for the purpose of repair" when Bufford was injured and that the removal therefore cannot be the basis for a willful-conduct claim under § 25-5-11(b). Bufford disputes this but argues that, in any event, whether his servicing of the VSS300 constituted a "repair" and, if so, whether he had completed that "repair" at the time of his injury are factual questions that can be resolved only by a jury. These outstanding factual issues, he argues, make summary judgment inappropriate. The trial court agreed. We do not.

This Court's decision in Ex parte Coleman, 145 So. 3d 751, 759 (Ala. 2013), is instructive. Coleman involved the application of § 32-5A-7, Ala. Code 1975, which permits the driver of an authorized emergency vehicle to disregard traffic regulations under certain circumstances, but only when the driver of the vehicle "is making use of an audible signal." § 32-5A-7(c). The parties in Coleman disputed whether a court or a jury should decide "whether a single 'yelp' of a siren constitutes 'making use of an audible signal' under § 32-5A-7." 145 So. 3d at 759. This Court concluded that the underlying inquiry was essentially a question of statutory interpretation: What does the phrase "making use of an audible signal" mean? Id. Accordingly, that question was for a court to decide, not a jury. Id.; see also Ex parte Quick, 23 So. 3d 67, 70 (Ala. 2009) ("The interpretation of a statute presents a question of law ….").

Here we are confronted with the question of what it means for a safety device to be removed "for the purpose of repair." Like the inquiry in Coleman, this is fundamentally a question of statutory interpretation. It is therefore a question of law for a court to decide, not a jury. Quick, 23 So. 3d at 70. Because this is a legal inquiry -- not a factual inquiry --

the trial court erred by concluding that there was a material question of fact that rendered the entry of a summary judgment inappropriate.

We thus turn to the meaning of the phrase "for the purpose of repair" in § 25-5-11(c)(2). Varoff states that when the VSS300 became clogged and stopped working, there was no way to get it working again without removing the lid. Therefore, he argues, the lid was clearly removed "for the purpose of repair" when Bufford was injured. Bufford acknowledged in his deposition that there was no way to unclog the VSS300 with the lid on the machine. But he also explained that he did not consider simply unclogging the VSS300 to be a repair; rather, in his view, "[a] repair is something when the machine has got something broke in it."

"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning …." IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992). Varoff argues that the natural, plain, ordinary, and commonly understood meaning of the word "repair" clearly encompasses the activity in which Bufford was engaged when he was injured. As support for his argument, Varoff quotes Pritchett v. State Farm Mutual Automobile Insurance Co.,

834 So. 2d 785, 791 (Ala. Civ. App. 2002), in which the Court of Civil Appeals referenced three sources discussing the plain meaning of the term "repair." First, the Pritchett court quoted Black's Law Dictionary 1298 (6th ed. 1990), which defines the term repair as meaning "[t]o mend, remedy, restore, renovate. To restore to a sound or good state after decay, injury, dilapidation, or partial destruction." Second, the Pritchett court quoted Merriam-Webster's Collegiate Dictionary 988 (10th ed. 1999), which similarly defines repair to mean "to restore by replacing a part or putting together what is torn or broken: Fix." And, finally, the Pritchett court quoted the Supreme Court of Delaware, which explained in O'Brien v. Progressive Northern Insurance Co., 785 A.2d 281, 290 (Del. 2001), that, "[i]n the common usage, the word 'repair' means to fix by replacing or putting together what is broken, or, as the court in Carlton v. Trinity Universal Ins. Co., [32 S.W.3d 454, 464 (Tex. App. 2000)], stated, 'to bring back to good or useable condition.'"

For his part, Bufford does not cite any sources to support his stated understanding of the term "repair." Rather, he cites two cases in which employees sued co-employees after they were injured performing work tasks that he says were similar to unclogging; he notes that in neither of

those cases was there any discussion of whether those activities constituted a repair. See Bailey v. Hogg, 547 So. 2d 498, 499 (Ala. 1989) (employee sued co-employee after the employee was injured while cleaning out a silo); and Haddock v. Multivac, Inc., 703 So. 2d 969, 970 (Ala. Civ. App. 1996) (employee sued co-employee after the employee was injured while "attempting to clear a jam" in a sausage-biscuit-packaging machine). Thus, Bufford appears to be arguing that our courts have implicitly recognized a distinction between unclogging/cleaning and making a repair.

Bufford reads too much into Bailey and Haddock. He is correct that there is no discussion in either of those cases about whether removal of the relevant safety guards was done for the purpose of repair. But that absence is not because those courts had implicitly concluded that unclogging or cleaning can never constitute a repair for § 25-5-11(c)(2) purposes. Rather, it is attributable to the fact that the defendant co-employees never argued that those safety guards had been removed for the purpose of repair.[4] Accordingly, the Bailey and Haddock courts had

[4]This is likely because the facts of those cases would not have supported such an argument -- the safety guard in Bailey was never

no reason to discuss whether the injured employees in those cases were engaged in a "repair" when they were injured.

While Bailey and Hogg do not support Bufford's position, the burden is still on Varoff to establish a clear legal right to the relief he seeks. We must therefore determine whether as a matter of law Bufford's work unclogging the VSS300 constituted a repair. The essential facts are undisputed. Bufford acknowledged in his deposition that he was "[g]etting the machine back in operation" when he was unclogging the VSS300. And he recognized that while the VSS300 was not working before he unclogged it, it appeared to be working properly after he removed the clog. It is therefore undisputed that, by unclogging the VSS300, Bufford fixed it and restored it back to a good and usable condition. In light of the plain meaning of the term "repair" as discussed in Pritchett, we think it clear that Bufford's unclogging of the VSS300 did in fact constitute a repair for § 25-5-11(c)(2) purposes.

Foreseeing that we might reach this conclusion, Bufford argues in the alternative that he was already done repairing the VSS300 when he

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installed, 547 So. 2d at 499, while the safety guard in Haddock was permanently bypassed, 703 So. 2d at 972.

was injured -- which means, according to him, that Varoff cannot rely on § 25-5-11(c)(2). We are not convinced by this argument. Section 25-5-11(c)(2) provides that the removal of a safety guard does not constitute willful conduct if the safety guard is removed "for the purpose of repair of the machine." Even if we accepted Bufford's argument that he was no longer repairing the VSS300 when he was injured, the fact remains that the lid was off the machine "for the purpose of repair" when he was injured. Thus, the removal of that lid does not constitute willful conduct and cannot serve as the basis of a claim against a co-employee under § 25-5-11(c).

Conclusion

After Bufford was injured in a workplace accident, he sued his co-employee Varoff under § 25-5-11(b), alleging that the accident was caused by Varoff's willful conduct. But because there is no evidence that would support a finding that Varoff had engaged in willful conduct as that term is described in § 25-5-11(c), Varoff is immune from liability under § 25-5-53. Accordingly, the trial court erred by denying Varoff's motion for summary judgment. His petition is therefore granted, and the trial court

is directed to vacate its order denying Varoff's motion and to enter an order granting the same.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, and Sellers, JJ., concur.

Mendheim, J., dissents, with opinion, which Wise, Bryan, and Stewart, JJ., join.

MENDHEIM, Justice (dissenting).

I respectfully dissent because this case does not present an issue appropriate for mandamus review. The main opinion asserts that this case is one in which "summary judgment has been sought on immunity grounds," ___ So. 3d at ___, thereby allowing this Court to review the denial of Jeffrey Varoff's summary-judgment motion on a petition for the writ of mandamus. See Ex parte Rizk, 791 So. 2d 911, 912 (Ala. 2000)("While the general rule is that the denial of a motion for summary judgment is not reviewable, the exception is that the denial of a motion for summary judgment grounded on a claim of immunity is reviewable by petition for writ of mandamus."). I disagree with the main opinion's assessment that Varoff, a defendant below, sought summary judgment on immunity grounds. As will be demonstrated below, there is no question of immunity presented in this case.

The sole issue presented in this case is whether the plaintiff Clifford Bufford presented substantial evidence to support each element of the claim he asserted against Varoff under § 25-5-11(b), Ala. Code 1975, a part of the Alabama Workers' Compensation Act ("the Act"), § 25-5-1 et seq., Ala. Code 1975. In proving his § 25-5-11(b) claim, Bufford is not

required to present substantial evidence concerning an issue of immunity; this case does not involve the immunity provisions of the Act (§§ 25-5-52 and 25-5-53, Ala. Code 1975). I do not believe that it is necessary or wise to expand the scope of this Court's mandamus review to include what amounts to a run-of-the-mill denial of a motion for a summary judgment.

Bufford, an employee of Borbet Alabama, Inc. ("Borbet"), suffered a workplace injury. Bufford filed a claim against Borbet seeking workers' compensation benefits, which Borbet ultimately paid Bufford pursuant to a settlement agreement. Of course, the settlement of Bufford's claim for workers' compensation benefits triggered application of the immunity provisions in the Act, but a careful reading of the relevant provision demonstrates that immunity is not at issue in the case that is presently before this Court.

Section 25-5-53 provides, in pertinent part:

> "The rights and remedies granted in [the Act] to an employee shall exclude all other rights and remedies of the employee … at common law, by statute, or otherwise on account of injury, loss of services, or death. Except as provided in [the Act], no employer shall be held civilly liable for personal injury to or death of the employer's employee, for purposes of [the Act], whose injury or death is due to an accident or to an occupational disease while engaged in the

> service or business of the employer, the cause of which accident or occupational disease originates in the employment. In addition, immunity from civil liability for all causes of action except those based upon willful conduct shall also extend … to an … employee of the same employer."

(Emphasis added.) In reading the plain language of § 25-5-53, it is clear that Borbet is entitled to immunity from any action brought against it by Bufford. Borbet is not, however, a party in this case. The plain language of § 25-5-53 also makes clear that the immunity from civil liability afforded to Borbet also extends to Borbet's employees. However, § 25-5-53 clearly excepts causes of action against Borbet's employees that are based upon willful conduct. In other words, § 25-5-53 does not provide to Borbet's employees immunity from causes of action that are based on willful conduct. A clear reading of the plain language of § 25-5-53 indicates that the immunity afforded in § 25-5-53 does not apply to Bufford's claim against Varoff because Bufford has alleged and, according to the trial court, has presented substantial evidence indicating that Varoff's willful conduct caused his workplace injury.

In fact, § 25-5-11(b) expressly allows Bufford's cause of action against Varoff. Section 25-5-11(b) provides: "If personal injury … to any employee results from the willful conduct … of any … employee of the

same employer …, the employee shall have a cause of action against the person …." Under the plain language of § 25-5-11(b), Bufford must present substantial evidence indicating that (1) he suffered a personal injury (2) that was caused by the willful conduct (3) of one of his co-employees. Those elements do not require Bufford to provide substantial evidence concerning an issue of immunity, and the legislature expressly excepted claims brought under § 25-5-11 from the immunity provisions of the Act.

This Court's decision in Padgett v. Neptune Water Meter Co., 585 So. 2d 900 (Ala. 1991), demonstrates that a claim brought under § 25-5-11 does not involve the immunity provisions of the Act. In Padgett, an employee suffered a workplace injury and commenced an action against his employer seeking workers' compensation benefits. The employee also commenced a second action against his employer and against one of his co-employees. In the second action, the employee asserted a § 25-5-11 claim against his co-employee, alleging that the co-employee's willful conduct had caused his workplace injury, and alleged that the employer was liable under the doctrine of respondeat superior. The trial court entered summary judgments in favor of the co-employee and the

employer and made those judgments final pursuant to Rule 54(b), Ala. R. Civ. P. The employee appealed.

On appeal, this Court first considered the employee's claim of respondeat superior against the employer. The employer argued that the employee's claim against it was barred by the immunity provisions of the Act. This Court agreed, stating:

> "In the recent case of Johnson v. Asphalt Hot Mix, 565 So. 2d 219 (Ala. 1990), this Court stated that § 25-5-11, Ala. Code 1975, does not provide an action against an employer. Section 25-5-11(a) provides that actions may be maintained against those parties that may be jointly liable with the employer, provided that if the other party is a coemployee, then his actions, in order to give rise to liability, must be willful. Section 25-5-11 does not affect the immunity provided by §§ 25-5-52 and 25-5-53."

Padgett, 585 So. 2d at 901 (emphasis added). This Court concluded that the immunity provisions of the Act barred the employee's second action against the employer and affirmed the trial court's summary judgment in favor of the employer. Significantly, this Court expressly stated that § 25-5-11 does not affect the immunity provisions of the Act.

This Court then considered the employee's § 25-5-11 claim against the co-employee. This Court provided the following framework for its analysis of the employee's § 25-5-11 claim:

> "The trial court also entered a summary judgment in favor of [the employee's co-employee]. [The employee] argues that he has shown evidence sufficient to defeat [the co-employee's] motion for summary judgment.
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> "Summary judgment is appropriate upon a showing that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. Rule 56, A[la]. R. Civ. P. In reviewing a trial court's entry of a summary judgment, this Court will view the evidence in a light most favorable to the nonmovant and will resolve all reasonable doubts against the movant. Fincher v. Robinson Brothers Lincoln-Mercury, Inc., 583 So. 2d 256 (Ala. 1991). The present action was filed in October 1987; therefore, the applicable standard of review is the 'substantial evidence' rule. See § 12-21-12, Ala. Code 1975. '[S]ubstantial evidence is 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.' West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).
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> "Section 25-5-11 provides that an employee who receives benefits under the Alabama Workmen's Compensation Act can recover against an 'officer, director, agent, servant or employee of the same employer' only 'for [actions of] willful conduct which [result] in or proximately [cause] the injury or death.' Therefore, we must determine whether there is substantial evidence that [the employee] was injured as a result of [the co-employee's] 'willful conduct.'"

585 So. 2d at 901-02. This Court analyzed the evidence in the record and concluded that the employee had failed to present substantial evidence to support the "willful conduct" element of his § 25-5-11 claim. In analyzing the employee's § 25-5-11 claim against the co-employee, this

Court did not consider the immunity provisions of the Act; immunity has no application to § 25-5-11 claims. Instead, this Court considered only whether the employee had presented substantial evidence in support of each element of his claim.

The analysis set forth in Padgett makes clear that the immunity provisions of the Act do not apply to § 25-5-11 claims. The issue at the summary-judgment stage of the proceedings in a case in which a § 25-5-11(b) claim has been asserted is to determine whether the plaintiff has presented substantial evidence in support of each element of the claim, none of which involve immunity. In fact, that is the exact argument made by Varoff in his motion for a summary judgment. Varoff asserted the following argument in his summary-judgment motion:

> "Clifford Bufford … claims that … Jeffrey Varoff … [is] responsible for [Bufford's] injuries. In this brief, [Varoff] will explain why a trial is unnecessary because [Bufford's] claims against [Varoff] fail as a matter of law. [Bufford] attempts to proceed on a theory of co-employee liability pursuant to Ala. Code § 25-5-11. However, [Bufford] fails to establish a prima facie claim under [§ 25-5-11(b)] because there was no willful conduct by [Varoff] as contemplated by the statute. Accordingly, [Varoff is] due a full and final summary judgment dismissing [Bufford's] complaint."

Varoff did not argue below that Bufford's claim is barred by the immunity provisions of the Act; instead, Varoff properly argued that Bufford had

failed to present substantial evidence in support of his claim, thereby, Varoff argued, entitling him to a summary judgment in his favor.[5]

Additionally, the trial court did not base its denial of Varoff's summary-judgment motion on the immunity provisions of the Act. As noted by the main opinion, the trial court denied Varoff's summary-judgment motion by "holding that there were material questions of fact about 'whether Bufford's actions constitute "maintenance," "repair," or simply "unclogging/unjamming"; whether that activity had been completed when he was injured; [and] Varoff's knowledge (or lack thereof) of various practices as to the running of the machine ….'" ___ So. 3d at ___. The parties did not address immunity, and the trial court

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[5]The main opinion notes that Varoff did make a general statement in his summary-judgment motion that, "[a]bsent such willful conduct, [Varoff has] complete immunity from civil liability from all causes of action." See ___ So. 3d at ___. That statement is true, but it does not indicate that Varoff is arguing immunity as a defense to Bufford's § 25-5-11(b) claim in the present case. As explained above, immunity is not a defense to a claim asserted against a co-employee under § 25-5-11(b); such claims are expressly excepted from the immunity provisions of the Act. Accordingly, immunity is not at issue in this case. But Varoff is correct in stating that, if Bufford cannot prove his § 25-5-11(b) claim, the immunity provisions of the Act do immunize him from any other civil liability related to Bufford's workplace injury. Varoff did not argue below that he is immune from Bufford's § 25-5-11(b) claim based on the immunity provisions of the Act.

did not base its judgment on immunity. Instead, the issue was simply whether Bufford had presented substantial evidence supporting each element of his § 25-5-11(b) claim.

A sentence in the main opinion's conclusion demonstrates its fundamental misunderstanding of this area of the law. The main opinion concludes that, "because there is no evidence that would support a finding that Varoff engaged in willful conduct …, Varoff is immune from liability under § 25-5-53." ___ So. 3d at ___. However, the immunity set forth in § 25-5-53 is not a defense to a claim brought under § 25-5-11; those claims are expressly excepted from such immunity. Contrary to what the main opinion states, Varoff is not immune from liability under § 25-5-53 because Bufford failed to present substantial evidence indicating that Varoff acted with willful conduct. Rather, the immunity from civil liability afforded to Varoff under § 25-5-53 is unrelated to Bufford's § 25-5-11 claim against Varoff, and if Varoff is not liable to Bufford, it is because Bufford failed to prove his § 25-5-11 claim. But that issue -- whether Bufford has presented substantial evidence in support of his § 25-5-11 claim -- does not involve immunity and is not one appropriate for mandamus review.

The main opinion's misinterpretation of the relevant portions of the Act has led it to incorrectly frame the dispositive issue in this case as whether Varoff is entitled to immunity from Bufford's § 25-5-11(b) claim. As thoroughly explained above, the immunity provisions of the Act do not bar claims brought under § 25-5-11(b). The main opinion's improper insertion of the issue of immunity into this case will certainly be problematic down the road because, essentially, every case in which a § 25-5-11(b) claim survives summary judgment will now be subject to review by mandamus petition rather than on appeal. No good argument has been presented to expand the scope of our mandamus review by creating another exception. The general rule that the denial of a motion for summary judgment is not reviewable by a petition for a writ of mandamus should apply in this case. Accordingly, I respectfully dissent and would deny Varoff's petition for a writ of mandamus. The issue presented by Varoff does not involve immunity.

Wise, Bryan, and Stewart, JJ., concur.