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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Ex parte Dalton Teal

PETITION FOR WRIT OF MANDAMUS

(In re: Paul Thomas

v.

**Black Mark 2, LLC, d/b/a Black Market Bar & Grill; Dalton Lee
Teal; George Cowgill; and Elise Yarbrough)**

(Jefferson Circuit Court, CV-13-45 and CV-13-902154)

PER CURIAM.

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Dalton Teal, a defendant in a personal-injury action pending below, petitions this Court for a writ of mandamus directing the Jefferson Circuit Court to vacate its partial summary judgment in favor of the plaintiff, Paul Thomas, pursuant to which it struck Teal's affirmative defenses of self-defense and statutory immunity. We grant the petition and issue the writ.

Facts

In the late evening of December 31, 2012, and into the early morning of January 1, 2013, Thomas, accompanied by his friend Brian Pallante,¹ was present at Black Market Bar & Grill ("Black Market"), a bar in Birmingham. On that occasion, an altercation arose between Pallante and Teal on the Black Market premises. As recounted by Teal in subsequent deposition testimony, during that altercation, Pallante, who is physically larger than Teal, first "shoved [Teal] down" in the outside smoking area

¹Pallante, who apparently changed his last name subsequent to the events underlying this action, is also referred to in the materials before this Court as "Brian Felton," his prior name. To remain consistent with our opinion in a prior appellate proceeding in this case, see Ex parte Cowgill, 301 So. 3d 116 (Ala. 2020), we refer to him in this opinion as "Pallante."

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of the bar and then, approximately one minute later, "lifted [Teal] up" by the neck, "slammed" Teal against an interior wall of the bar, and proceeded to "chok[e]" Teal for approximately 20 to 30 seconds. According to Teal, he feared for his personal safety during those events. The altercation resulted in Pallante and Teal being separated by Black Market staff; Pallante and Thomas then departed the premises via the front door, and Teal left via the back door.

Following his exit, Teal waited on a nearby bench for friends who had accompanied him. Within minutes of their exit from Black Market, Pallante and Thomas again encountered Teal, who looked up from his cellular telephone to see that both Pallante and Thomas "were coming at [him]." At that time, Pallante allegedly initiated another confrontation. As described by Teal, Pallante grabbed Teal by the neck, slammed Teal over the back of the bench to the ground, and again began choking him. Thomas's later testimony stated that the two men appeared to be "trying to finish what had been started ... inside [Black Market]."

During that struggle, Pallante was described as being to the side of Teal but with his upper body located over Teal. According to Teal,

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Thomas, who Teal denied having previously seen at any point during the events of that evening and who is also physically larger than Teal,² "came at [Teal] when [Pallante] did" and, according to Teal, remained "leaned over" from the waist with his hands on his knees "right beside [Pallante]." Thomas, who admittedly approached Pallante and Teal in a purported attempt to separate them, also admitted that he remained within "arm's length" -- or, as Teal estimated, "a couple of feet" from Teal's legs -- of the struggling Teal and Pallante. Although acknowledging that Thomas never spoke to or touched him, Teal testified that he "felt threatened just by somebody else being there."

According to Teal, while Pallante was on top of him, his arms were flailing and he was unable either to breathe or to speak. Thomas similarly confirmed that Teal was on his back on the ground with Pallante above him and that Pallante was obviously "getting the better of" Teal in the struggle. Teal testified that, as Pallante continued to choke him, he again

²The materials before this Court suggest that Teal is approximately 5'3" tall and weighs 150 pounds, that Thomas is approximately 6'2" tall and weighs 240 pounds, and that Pallante is approximately 5'10" tall and weighs 200 pounds.

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feared for his life. He indicated that, after having been choked for approximately 15 to 20 seconds, he realized that he was not going to be able to get up and became "afraid that they were going to kill [him]." At that point, Teal drew a pistol and fired a single shot in an effort "to get them off of [him]." Teal, who indicated that his ability to aim his weapon was affected by the fact that Pallante had "[Teal's] arm pinned down," missed Pallante, at whom Teal was apparently aiming, but the shot struck Thomas in the abdomen, seriously injuring him.

Thomas's testimony confirmed that he was standing near Pallante when he was shot; however, Thomas was unable to recall whether he was actually moving toward Pallante and Teal at that time. He estimated that Pallante and Teal had been struggling for around 37 seconds at the time Teal fired the shot.

Following an investigation of the above-described events by the Birmingham Police Department, the Jefferson County District Attorney declined to bring criminal charges against Teal based on the conclusion that Pallante's actions had "led to the shooting that injured [Thomas]."

Procedural History

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Thomas filed a personal-injury action against Teal and other defendants. As to Teal, Thomas's complaint alleged claims seeking to recover damages for assault and battery, negligence, and wantonness. In his answer, Teal pleaded various affirmative defenses, including self-defense and the related defense of statutory immunity provided in § 13A-3-23, Ala. Code 1975.

Following pretrial discovery, Thomas filed a motion "to dismiss" several of the affirmative defenses included in Teal's answer, including those premised on a theory of self-defense.³ Specifically, as to Teal's claim of self-defense, Thomas asserted:

³Because the motion sought a dispositive ruling on the basis of evidence outside the pleadings, we construe it as a motion seeking the entry of a partial summary judgment. Rule 56(a), Ala. R. Civ. P. ("A party seeking to recover upon a claim ... may ... move ... for a summary judgment in the party's favor upon all or any part thereof." (emphasis added)). See also 5C Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, Federal Practice and Procedure § 1381 (3d ed. 2004 & 2020 Supp.) ("Some difficulty is encountered in dealing with those defenses that are sufficient as a matter of pleading, but are not supported by the facts. ... The appropriate remedy appears to be a motion for a partial summary judgment under Rule 56(a), which will enable the [trial] court to enter an order indicating that the defense no longer is in controversy.").

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"Any claim that Teal acted in self-defense or is afforded immunity from criminal or civil liability for the injuries and damages he inflicted on Thomas is erroneous. Teal has no justifications or excuses of self-defense or collateral defenses claimed with reference to Thomas because there is no defense for injuring an innocent victim."

In response, Teal argued that, because the evidence supported a reasonable inference that Thomas was also "coming at [Teal]" with Pallante and was present for and involved in the physical altercation between Teal and Pallante, both Thomas's involvement in that altercation and Teal's entitlement to the defenses of self-defense and statutory immunity were questions to be resolved by the trier of fact.

The trial court entered a lengthy order "striking" certain of Teal's defenses, including those dependent on Teal's assertion that he had acted in self-defense, which were, specifically, his 6th and 13th affirmative defenses. As a result, Teal filed the instant mandamus petition; this Court subsequently ordered answers and briefs.

Standard of Review

"This Court has stated:

"Mandamus is an extraordinary remedy and will be granted only where there is "(1) a clear legal

right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

"Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003) (quoting Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala.1991)). A trial court's disallowance of a party's affirmative defense is reviewable by a petition for a writ of mandamus. See Ex parte Neely Truck Line, Inc., 588 So. 2d 484 (Ala. Civ. App. 1991)."

Ex parte Buffalo Rock Co., 941 So. 2d 273, 277 (Ala. 2006). Because the disallowance of Teal's affirmative defenses was by a partial summary judgment, see note 3, supra, we review the trial court's judgment de novo:

""This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material

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fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[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 Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

"Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004))."

Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

Discussion

In his petition, Teal argues that he presented substantial evidence indicating that he acted in legally justified self-defense, as defined by § 13A-3-23, and that he was entitled to have a jury, rather than the trial court on a motion for a partial summary judgment, determine the issue. Teal further contends, based on his purported showing of self-defense, that he is also entitled to have the jury determine whether he is statutorily immune from the civil judgment Thomas seeks. As to both arguments, we agree.

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Section 13A-3-23(a) provides, in pertinent part:

"(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he or she may use a degree of force which he or she reasonably believes to be necessary for the purpose. A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense ... if the person reasonably believes that another person is:

"(1) Using or about to use unlawful deadly physical force."

(Emphasis added.) Further, § 13A-3-23(d)(1) provides: "A person who uses force, including deadly physical force, as justified and permitted in this section is immune from criminal prosecution and civil action for the use of such force, unless the force was determined to be unlawful."⁴

(Emphasis added.) According to the plain text of this provision, a person is immune from civil action only if that person uses force "as justified and permitted in" § 13A-3-23. Thus, an individual may use deadly physical force on "another person" in self-defense, but, under § 13A-3-23(a)(1), that

⁴Before an amendment to § 13A-3-23 effective August 1, 2016, which added what are now subdivisions (d)(2)-(d)(4), what is now § 13A-3-23(d)(1) was § 13A-3-23(d).

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other person must be one who the individual claiming to act in self defense "reasonably believes" is using, or is "about to use," unlawful deadly physical force.

The trial court rejected Teal's reliance on § 13A-3-23(a) and (d)(1). Citing the definitions of "deadly physical force" and "physical injury" provided by the legislature in §13A-1-2, Ala. Code 1975, the trial court explained as follows:

"Whether [Pallante] was choking Teal or not, [Pallante] was causing physical injury to Teal, and it was most certainly reasonable for Teal to believe he was in further danger, i.e., imminent danger, that [Pallante] would choke him to death. Therefore, under § 13A-3-23(a)(1) as a matter of law, Teal was justified in using whatever force against [Pallante] he reasonably believed necessary to defend himself.

"However, Teal argues § 13A-3-23(d)(1) affords him immunity in this action brought by Thomas, even though Teal admitted under oath Thomas did not touch Teal in any way, [and] that no part of their bodies made contact. ... But it must be considered that § 13A-3-23(a) clearly refers to the 'imminent use' of physical force, which under any reasonable definition would include force displayed without making physical contact, [for example,] pointing a loaded gun at someone or telling someone that you are about [to] harm them. However, also under § 13A-3-23(a), Teal must have a reasonable belief he was under a threat of imminent unlawful force from Thomas that could cause him physical injury, possibly serious physical injury.

"Teal's own testimony establishes undisputed significant material facts sufficient to establish that, as a matter of law, he had no reason to fear that Thomas was imminently about to cause him physical injury. Teal testified he felt threatened by [Pallante] and Thomas, but could not articulate why he felt Thomas specifically threatened him, only that Thomas was present when [Pallante] attacked Teal. ... Neither Thomas nor Teal said anything to each other, so Thomas did not verbally threaten harm to Teal. ... Also, while not an exhibit to Thomas's [motion to strike Teal's defenses] or Teal's response, the record of this action contains the handwritten note of the City of Birmingham Police Officer who interviewed [an eyewitness], who was present during the altercation outside of ... Black Market..., and the Court considers it. The note reads in part, '[Pallante] is wrestling ... with ... Teal ... telling/asking him something about disrespecting him. [Thomas] was standing over [Pallante].'

"This is undisputed testimony that while [Pallante] held Teal to the ground with at least one hand around Teal's neck for a brief amount of time, Thomas stood still, leaning over [Pallante]. ... Given all of this, the Court determines any belief Teal had that Thomas was about to harm him was unreasonable. Thus, the deadly force Teal used against Thomas was neither justified nor excused and was unlawful. Therefore, the immunity afforded under § 13A-3-23(d)(1) is unavailable to Teal in this lawsuit."

(Footnotes and capitalization omitted.)

Relying on the foregoing findings, the trial court further concluded that Teal's allegedly unreasonable belief as to the potential of imminent harm from Thomas "essentially makes Thomas 'another person' as used

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in § 13A-3-21(b), [Ala. Code 1975]." That Code section states: "If a person is justified or excused in using force against a person, but he recklessly or negligently injures or creates a substantial injury to another person, the justifications afforded by this article [i.e., Title 13A, Chapter 3, Article 2] are unavailable in a prosecution for such recklessness or negligence." Relying on its finding that, based on the established lack of physical contact between Thomas and Teal, Teal's evidence failed to establish the necessary "imminent fear of Thomas using physical force upon [Teal]," the trial court struck Teal's affirmative defenses relying on self-defense principles and § 13A-3-23. We disagree with the trial court's reasoning.

In his motion to strike, which, as noted above, we consider a motion for a partial summary judgment, Thomas argued that Teal is unable to demonstrate any basis for a reasonable belief that Thomas was about to cause Teal harm at the time of the shooting. Specifically, Thomas argued that, while Pallante was actually employing force against Teal, Thomas remained a mere innocent bystander. In support of his motion, Thomas relied upon, among other things, evidence of his alleged distance from Teal at the time of Teal's final altercation with Pallante as well as

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testimony indicating that Thomas neither spoke to, nor threatened, nor physically touched Teal before being shot. That evidence in support of Thomas's motion shifted the burden to Teal to present substantial evidence establishing that Teal reasonably believed that, at the time he employed deadly physical force against Thomas, he was being or was about to be subjected to unlawful deadly physical force by Thomas. See Brown, supra.

In his petition, Teal argues that his testimony presented to the trial court clearly indicated that he felt sufficiently threatened by Thomas's approach and remaining presence during the final physical altercation between Teal and Pallante to justify his use of deadly physical force, thus creating a genuine issue of material fact. In response to Thomas's motion, Teal cited the obvious size difference between himself and the more physically imposing Thomas and Pallante. See note 2, supra. Teal further pointed to the fact that, as acknowledged by Thomas, he struggled to defend himself against Pallante during the physical altercation and the fact that he was unable to speak while being choked by Pallante. Further, the evidence established that, at the time Teal fired the shot, Thomas

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remained within arm's length of the ongoing physical altercation between Teal and Pallante, leaning over Teal. Teal testified that, based on the foregoing circumstances, he believed that Thomas was joining or intended to join in Pallante's physical assault. Also according to Teal, during his struggle with Pallante, he "felt threatened" by Thomas's undisputed proximity and feared "they were going to kill [him]." That testimony constitutes substantial evidence indicating that Teal could have reasonably believed that his use of force was "justified" under § 13A-3-23(a)(1).

To demonstrate that § 13A-3-23(a)(1) is applicable and to defeat Thomas's properly supported motion for a partial summary judgment, Teal was required to produce substantial evidence indicating that he reasonably believed that Thomas was using, or was about to use, unlawful deadly physical force. Viewing the evidence in the light most favorable to Teal, which our standard of review of a summary judgment requires, see Brown, supra, we hold that a fair-minded person could reasonably infer from Teal's evidence that Teal believed that Thomas was joining -- or was about to join -- Pallante's attack on Teal and was about to use the same

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level of physical force against Teal that Pallante was using.⁵ In other words, a fair-minded person could reasonably infer that Thomas was "about to use unlawful deadly physical force" against Teal as defined in § 13A-3-23(a)(1). In reaching the opposite conclusion, the trial court did not review the evidence in the light most favorable to Teal. The trial court thus erred in holding that Thomas was entitled to a judgment as a matter of law on Teal's self-defense claim under § 13A-3-23(a)(1), that, pursuant to § 13A-3-21(b), a claim of self-defense was not available to Teal, and that Teal could not assert a claim of immunity under § 13A-3-23(d)(1). Instead, because genuine issues of material fact exist regarding these issues, they are for the trier of fact to resolve.

In his response to this petition, Thomas argues that Teal cannot claim that he was acting in self-defense against Thomas because Teal testified in a deposition that he was attempting to shoot Pallante. However, Teal also testified as follows:

⁵The parties present no argument or dispute that holding a person down and choking him or her to the point that he or she cannot breathe does not constitute the use of deadly physical force.

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"[Counsel:] At the time that you fired, were you trying to shoot [Pallante]?"

"[Teal:] I was just trying to get him off of me. I was afraid they were going to kill me. So I was just trying to get them off of me. I wasn't aiming to kill anybody. I was just trying to save my own life."

(Emphasis added.)

The entirety of Teal's testimony indicated that he feared both Pallante and Thomas, that he possessed limited ability to aim and maneuver, and that he fired his weapon in the general upward direction of both men with the goal of "get[ting] them off of [him]," i.e., to stop the use of deadly physical force against him. Further, there is substantial evidence indicating that Teal reasonably believed that Thomas was about to use, or to join Pallante in the use of, unlawful deadly physical force. In light of these facts, we see nothing indicating that Teal's testimony requires a judgment as a matter of law in Thomas's favor or that § 13A-3-23(a) denies an individual the right to claim self-defense when an attempt to use force against an attacker injures an alleged co-attacker.

In a related argument, Thomas cites Lacy v. State, 629 So. 2d 688, 689 (Ala. Crim. App. 1993), for the proposition that "a claim of self-defense

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necessarily serves as an admission that one's conduct was intentional. ... A person simply cannot negligently or recklessly defend himself." In that case, the court held that a claim of self-defense was inapplicable to charges of reckless manslaughter and criminally negligent homicide. Id. In this case, Teal's testimony indicates that he acted intentionally. At best, whether Teal actually acted negligently or recklessly is a disputed issue of fact. Therefore, we see no merit in this argument.

Conclusion

Based on the foregoing, we hold that Teal presented substantial evidence demonstrating the existence of genuine issues of material fact regarding whether he was entitled to assert the affirmative defense of self-defense to Thomas's tort claims and whether he was entitled to statutory immunity under § 13A-3-23(d)(1).⁶ Therefore, the trial court erred in entering a partial summary judgment striking Teal's affirmative defenses premised on a theory of self-defense. Accordingly, Teal has

⁶We express no opinion on the potential merit of Teal's affirmative defenses premised on a theory of self defense; instead, we simply hold that Teal is entitled, under the present facts, to present those defenses to the jury for consideration.

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demonstrated a clear legal right to the relief he has requested. We therefore grant Teal's petition and issue a writ of mandamus directing the trial court to vacate its "Order on Motion to Dismiss Affirmative Defenses" to the extent that it struck the 6th and 13th affirmative defenses alleged in his answer.⁷

PETITION GRANTED; WRIT ISSUED.

Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Parker, C.J., concurs specially.

⁷In the partial summary judgment as to which Teal seeks mandamus review, the trial court also struck other affirmative defenses alleged in Teal's answer, including the defenses of contributory negligence, assumption of the risk, and sudden emergency; however, Teal does not challenge the striking of those other defenses in his petition.

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PARKER, Chief Justice (concurring specially).

I agree with the main opinion, but I write to address the additional problem of the circuit court's erroneous interpretation of the statutes relating to self-defense. The circuit court ruled that, if a person uses force in justified self-defense and accidentally injures a bystander, the statutes do not protect the person from a civil claim by the bystander. Under the language of the statutes, the opposite is true.

The self-defense statute provides:

"(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he or she may use a degree of force which he or she reasonably believes to be necessary for the purpose. ...

"....

"(d)(1) A person who uses force, including deadly physical force, as justified and permitted in this section is immune from criminal prosecution and civil action for the use of such force, unless the force was determined to be unlawful."

§ 13A-3-23, Ala. Code 1975 (emphasis added). With that language, subsection (a) first recognizes a justification: a person is justified in "using physical force upon another person" in self-defense or defense of another

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against what the first person reasonably believes to be "the use or imminent use of unlawful physical force by that other person." Subdivision (d)(1) then defines the set of legal actions to which the resulting immunity applies: if a person "uses force ... as justified and permitted in" subsection (a), the person "is immune from criminal prosecution and civil action for the use of such force."

Importantly, although subsection (a) limits the underlying justification to a person's use of force against a perceived attacker, subdivision (d)(1) does not limit the resulting immunity to applying only to legal claims by the attacker. In particular, the immunity is not limited by subsection (a)'s references to "upon another person" and "by that other person." Rather, those phrases specify the circumstances in which use of force is justified -- the type of factual scenario that qualifies a person for the immunity. Those phrases do not define the category of legal claims to which the immunity applies; that is the role of subdivision (d)(1). And subdivision (d)(1) makes self-defense immunity applicable to all claims

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that are "for the use of such [justified] force," which necessarily includes claims by bystanders who are injured by that force.⁸

Further, the circuit court incorrectly relied on a provision in another section, regarding injuries to bystanders:

"Danger to innocent persons. If a person is justified or excused in using force against a person, but he recklessly or negligently injures or creates a substantial injury to another person, the justifications afforded by this article [including self-defense] are unavailable in a prosecution for such recklessness or negligence."

⁸Florida's self-defense statute (before amendments) was substantially similar to Alabama's, and commentators have interpreted that Florida statute as applying to civil claims by bystanders. See Fla. Stat. § 776.032(1) (2005) ("A person who uses force as permitted in [Florida statutes regarding self-defense, defense of others, and defense of property] is justified in using such force and is immune from criminal prosecution and civil action for the use of such force"); Hunter G. Cavell, Reasonable Belief: A Call to Clarify Florida's Stand Your Ground Laws, 50 Crim. L. Bull., Issue No. 1, art. 6 (2014) ("[A] person who reasonably believes he or she is in danger of imminent death or severe bodily harm is not concerned with the possibility of a civil suit ..., but merely survival. Under this logic, if a person fires a gun and hits an innocent bystander, the bystander is barred from suing the defendant under [Florida's self-defense statute]."); Zachary L. Weaver, Florida's "Stand Your Ground" Law: The Actual Effects and the Need for Clarification, 63 U. Miami L. Rev. 395, 416 (2008) ("[I]f a person using deadly force is protected by [Florida's self-defense statute], then ... innocent bystanders who become victims are prohibited from filing civil suits").

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§ 13A-3-21(b) (emphasis added). That bystander provision functions as an exception to the above-discussed immunity provided by § 13A-3-23(d)(1). However, the bystander provision's use of the word "prosecution" limits the exception to criminal cases.

It is true that "prosecution" can sometimes refer to the process of civil litigation. See Black's Law Dictionary 1385 (rev. 4th ed. 1968) and countless cases referring to a plaintiff's "lack (or want) of prosecution" of a civil case. But the meaning of a statutory word is necessarily determined from its context, including its usage in surrounding statutes. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (Thomson/West 2012) ("A word or phrase is presumed to bear the same meaning throughout a text"); 2A Norman J. Singer & Shambie Singer, Statutes and Statutory Construction § 46:6 (7th ed. 2014) ("Identical words used in different parts of the same, or a similar, statute usually have the same meaning."); Startley Gen. Contractors, Inc. v. Water Works Bd. of Birmingham, 294 So. 3d 742, 753-55 (Ala. 2019) (plurality opinion) (illustrating application of this principle). "Prosecution" is used nine other times in Chapter 3 of the Criminal Code

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("Defenses"). In every instance, it clearly refers to criminal prosecution. See §§ 13A-3-1(a) ("prosecution for any crime"), -2(b) ("prosecution for that offense"), (c) ("Involuntary intoxication is a defense to prosecution if as a result the actor lacks capacity ... to appreciate the criminality of his conduct"), -3 ("prosecution of any person as an adult"), -23(d)(1) ("criminal prosecution"), (2) ("criminal prosecution"), (3) ("criminal prosecution"), -30(a) ("It is a defense to prosecution that the actor engaged in the proscribed conduct"), (d) ("prosecution for ... murder ... or ... any killing of another under aggravated circumstances"). Most notably, "prosecution" is used to mean criminal prosecution in subdivision (d)(1) itself. As previously noted, subdivision (d)(1) declares that a person who acts in self-defense "is immune from criminal prosecution and civil action." § 13A-3-23(d)(1) (emphasis added). Different terms within a statute are presumed to mean different things. See Trott v. Brinks, Inc., 972 So. 2d 81, 85 (Ala. 2007). By using separate terms for criminal and civil proceedings, subdivision (d)(1) makes clear that "prosecution" refers only to criminal proceedings. And because the bystander provision functions

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as an exception to subdivision (d)(1), it is only logical that "prosecution" have the same meaning in both.⁹

This meaning of "prosecution" in the bystander provision is further confirmed by the fact that the provision is patterned after Model Penal Code § 3.09(3):

"When the actor is justified under Sections 3.03 to 3.08 [(providing various defenses)] in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons."

⁹Of course, when the Legislature enacted subdivision (d)(1) to grant both criminal and civil immunity, the Legislature could have amended the bystander provision (enacted about 30 years earlier) to except from that immunity civil claims by bystanders. But the Legislature did not, and courts ought not read into a statute words that are not there, see Ex parte Smiths Water & Sewer Auth., 982 So. 2d 484, 488 (Ala. 2007) ("[W]e presume that a difference in wording, especially in provisions within similar statutes, reflects a difference in meaning. ... '[W]here there is a "material alteration in the language used in the different clauses, it is to be inferred" that the alterations were not inadvertent.' " (quoting House v. Cullman Cnty., 593 So. 2d 69, 75 (Ala. 1992), quoting in turn Lehman, Durr & Co. v. Robinson, 59 Ala. 219, 235 (1877))); Scalia & Garner, *supra*, at 93-100; Singer & Singer, *supra*, §§ 46:6, 51:2.

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Model Penal Code § 3.09(3) (Am. Law. Inst. 1962) (emphasis added). The Explanatory Note to § 3.09 indicates that "prosecution" means a criminal proceeding: "Subsection (3) states that the existence of justification for the use of force against a person under Sections 3.03 to 3.08 does not preclude liability for offenses of recklessness or negligence against innocent third parties." I Model Penal Code and Commentaries 147 (Am. Law Inst. 1985) (emphasis added).

Accordingly, the bystander provision's use of "prosecution" limits its exception to criminal cases, and the circuit court erred in ruling that the provision carves out bystanders' civil claims from the self-defense immunity provided by subdivision (d)(1).

The main opinion does not cast any doubt on this interpretation of the statutes relating to self-defense, because the opinion resolves the case on the alternative basis that there was evidence that Paul Thomas was not a bystander and that Dalton Teal intended to shoot him. Yet I have taken this opportunity to clarify the application of the statutes, in the hope that trial courts will avoid the errors committed by the circuit court in this case.