STATE OF MAINE
THE SUPREME JUDICIAL COURT SITTING AS THE LAW COURT
Docket No.: PORSC-CV-22-243

ROBERT CLARKE AND BOB'S LLC

Appellants

v.

LAUREEN FAMA

Appellee

JOINT BRIEF OF APPELLANTS

On Appeal from the Cumberland County Superior Court

Docket No.: CUM-23-409

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Statement of Facts and Procedural History

The issues in this appeal stem from the trial court's (*Cashman*, J.) denial of Robert Clarke's (hereinafter, "Mr. Clarke") and Bob's LLC's (hereinafter, "Bob's") Motions for Summary Judgment. The following facts are derived from the trial court's order denying Bob's and Mr. Clarke's Motions for Summary Judgment, which facts the Court found were material and not in dispute.

Appellee/Plaintiff Laureen Fama (hereinafter, "Ms. Fama") is the personal representative of the estate of her deceased husband[1], Elliot Fama (herein after "Mr. Fama"). (A. 7). Mr. Fama died after an altercation with his co-worker, Mr. Clarke, which caused Mr. Fama to fall over and sustain injuries that lead to his death. (A. 7). Mr. Fama, Mr. Clarke, and two other individuals present at the time of the altercation worked for Sanford Contracting, a company principally located in Billerica, Massachusetts. (A. 7). At the time of the altercation in this case, Mr. Clarke, Mr. Fama, and their co-employees were staying at a nearby hotel while working on a multi-day project at Maine Medical Center in Scarborough, Maine. (A. 7).

On October 28, 2020, Mr. Fama, Mr. Clarke, and two additional co-workers returned to the hotel, for which their employer was paying. (A. 7). After Mr. Clarke and Mr. Fama each drank alcoholic beverages in the hotel parking lot, the

[1] Plaintiffs Laureen Fama individually and as Personal Representative of the Estate of Elliot Fama are collectively referred to in this brief as "Ms. Fama".

four co-workers were served food and alcohol at the Copper Smith Tavern in South Portland, which was attached to their hotel. (A. 7). Outside the Tavern, Mr. Clarke struck Mr. Fama, knocking him over and causing Mr. Fama to fall on the pavement and hit his head. (A. 7-8). Fama later died of his injuries. (A. 8).

A Massachusetts workers' compensation claim against Sanford Contracting was filed by Ms. Fama on behalf of Mr. Fama following Mr. Fama's death. (A. 8). That claim was accepted and settled by way of a $400,000 payment to Ms. Fama. (A. 8). The Massachusetts Department of Industrial Accidents Division of Dispute Resolution approved the worker's compensation settlement on December 14, 2022. (A. 8). The applicable settlement agreement states that "this settlement shall redeem liability for the payment of medical benefits and vocational rehabilitation benefits with respect to [the] injury." (A. 8). The agreement was to have "full faith and credit for these injuries in all other jurisdictions." (A. 8).

Following the worker's compensation settlement, Ms. Fama filed an Amended Complaint against Mr. Clarke alleging battery (Count IV) and filed Counts against Bob's, which owns the Coppersmith Tavern, for Liquor Liability pursuant to 28-A M.R.S. §§ 2501-2520 (Count I); Wrongful Death and Conscious Pain and Suffering (Count II) and Loss of Consortium (Count III). (A. 8, 15-21). Both Mr. Clarke and Bob's moved for summary judgment arguing that the worker's compensation settlement agreement and applicable law afforded Mr.

Clarke immunity from suit, and if Mr. Clarke is immune from suit, Bob's cannot be liable as a matter of law due to the liquor liability acts exclusivity and named and retrained provisions. (A. 3, 8). Ms. Fama opposed summary judgment arguing that a dispute of material fact existed as to whether *Mr. Fama's* injuries occurred during the course and scope of *Mr. Fama's* employment with Sanford Contracting. (A. 4).

The trial court (*Cashman*, J.) issued an order on the briefs and did not hold oral argument. (A. 5, 7-13). In analyzing the pure issue of law presented, the trial court denied summary judgment concluding that a dispute of material fact existed as to whether *Mr. Clarke* was acting in the course and scope of *Mr. Clarke's* employment at the time of Mr. Fama's injuries, which precluded the statutory grant of co-employee immunity to Mr. Clarke. (A. 11-13). The Court further concluded that because a dispute of fact existed to Mr. Clarke's entitlement to immunity, Bob's claim necessarily failed. (A. 12-13).

Both Bob's and Mr. Clarke moved the Court to reconsider or alter or amend its Order. (A. 5). The bases for that request were: (1) Ms. Fama's failure to address or assert any argument pertaining to the relevance of whether Mr. Clarke was acting in the course and scope of Mr. Clarke's employment at the time of Mr. Fama's injuries, an issue which was raised for the first time by the trial court in its July 28, 2023 Order; (2) with respect to co-employee immunity, both Maine and Massachusetts law focus only on whether an employee's injuries occurred during

the course and scope of *the injured employee's* employment; (3) the case law cited by the trial court for the first time in its July 28, 2023 Order actually support granting summary judgment; and (4) Based on the trial court's findings of undisputed facts in the July 28, 2023 Order, as a matter of law Robert Clarke is entitled to immunity pursuant to 39-A M.R.S. § 104, which in turn requires judgment for both Bob's and Mr. Clarke. (A. 5, 14). The Court denied the Motion by Order dated October 4, 2023. (A. 14).

Mr. Clarke and Bob's filed timely notices of appeal and a motion to permit this interlocutory appeal. (A. 5-6). Ms. Fama opposed the request to permit the interlocutory appeal, and this Court ordered that the parties address this court's ability to address the merits of this interlocutory appeal in their briefs. (A. 6).

Issue Presented for Review

I. Whether an exception to the final judgment rule permits this Court to address the merits of this interlocutory appeal.

II. Whether the Trial Court erred in failing to conclude Mr. Clarke is entitled to co-employee immunity pursuant to 39-A M.R.S. § 104.

III. Whether the Trial Court erred in concluding that Bob's was not entitled to judgment as a matter of law pursuant to Maine's Liquor Liability Act.

Standard of Review

This Court reviews a trial court's decision on a motion for summary judgment *de novo*, taking the facts in the light most favorable to the non-moving party. *See Morgan v. Kooistra*, 2008 ME 26, ¶ 19, 941 A.3d 447. Summary

judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* A dispute of material fact exists when the factfinder must choose between competing versions of the truth. *Id.*

Summary of the Argument

The questions posed in this appeal are (1) whether this Court should address the merits of this interlocutory appeal; (2) whether Mr. Clarke is entitled to co-employee immunity pursuant to 39-A M.R.S. § 104; and (3) whether Ms. Fama's liquor liability claim violates Maine's named and retained mandate.

The answer to the first question is an unequivocal "yes". This Court has been clear that several exceptions to the final judgment rule exist, and those exceptions permit this Court to address the merits of an otherwise interlocutory order. All of the judicially-created exceptions to the final judgment rule apply to the claims addressed in the trial court order at issue. Specifically, this Court has been clear that where the denial of a motion for summary judgment pertains to issues of privilege and/or immunity from suit, this Court will review such decisions even if when that order is otherwise interlocutory. *See Morgan*, 2008 ME 26, ¶ 18, 941 A.3d 447. Therefore, this Court should address the merits of this appeal.

The Answer to the second question is likewise an unequivocal "yes". Maine law is clear that an employer and any co-employees are entitled to immunity from suit for injuries sustained by an employee or co-employee during the course and scope of that injured employee's employment. The trial court in this case found it was undisputed that Mr. Fama's injuries and death arose out of and in the course and scope of his employment with Sanford Contracting. It likewise found that Mr. Clarke was employed by Sanford Contracting and was a co-employee of Mr. Fama at the time of his injuries and death. These were the only findings necessary to establish Mr. Clarke's entitlement to immunity. Because the trial court *did* make these findings, it was an error of law for the trial court to conclude that a dispute of fact existed precluding Mr. Clarke's entitlement to immunity.[2]

Finally, given that the Answers to questions one and two are both "yes", the answer to question three, as a matter of law, must likewise be "yes". Maine's Liquor Liability Act mandates that a Plaintiff name and retain the intoxicated tortfeasor in addition to the servers of the alcohol for a liquor liability claim to be viable. *See* 28-A M.R.S. § 2512(1). This Court has been clear that based on the plain language of the Liquor Liability Act, to be "named and retained" for purposes

[2] The conclusion that immunity exists for Mr. Clarke is bolstered by the fact that Sanford Contracting's worker's compensation insurers paid worker's compensation benefits to Ms. Fama and settled the worker's compensation claim with Ms. Fama for the damages, injuries, and expenses resulting from the October 28, 2020 incident. The damages, injuries, and expenses subject to the worker's compensation settlement are the exact same damages, injuries, and expenses she seeks to recover again in her lawsuit against Bob's and Mr. Clarke. (A. 5 n.2).

of Section 2512(1), the alleged intoxicated tortfeasor must be named as a real party in interest and must have an actual financial stake in the litigation until its conclusion. Because Mr. Clarke is immune from suit, he cannot be named and retained for purposes of Ms. Fama's liquor liability claim. As such, Ms. Fama's claims against Bob's fail as a matter of law.

ARGUMENT

A. *This Court Should Address the Merits of this Appeal as Several Exceptions to the Final Judgment Rule Pertain to the Interlocutory Order at Issue.*

In most circumstances, "the final judgment rule prevents a party from appealing a trial court's decision before a final judgment has been rendered." *Fiber Materials, Inc. v. Subilia,* 2009 ME 71, ¶ 12, 974 A.2d 918. There are three exceptions, however, to the final judgment rule: the death knell exception, the collateral order exception, and the judicial economy exception. *Id.* ¶ 7. All three exceptions apply to the July 28, 2023 Order in this case and are addressed below.

Prior to reaching the three widely recognized exceptions applicable to the interlocutory order in this case, Appellants note that this Court has been clear that where the denial of a motion for summary judgment pertains to issues of privilege and/or immunity from suit, this Court will review such decisions even when they are interlocutory. *See Morgan*, 2008 ME 26, ¶ 18, 941 A.3d 447; *see also Hawkes v. Commercial Union Ins. Co.*, 2001 ME 8, ¶ 19, 764 A.2d 258 (holding

interlocutory appeal properly before the court involving issues of a previously executed release and immunity afforded by the worker's compensation act). Indeed, this Court has long recognized that although an appeal from the denial of a motion for summary judgment is generally interlocutory and barred by the final judgment rule, "appeals based on the denial of a dispositive motion asserting immunity from suit are immediately reviewable. *See Rodriguez v. Town of Moose* River, 2007 ME 68, ¶ 16, 922 A.3d 484. These cases alone militate in favor of reaching the merits of the appeal in this case. Nevertheless, as discussed below, the remaining three exceptions to the final judgment rule likewise establish that this Court should reach the merits of this appeal.

i. The Death Knell Exception

The death knell exception "allows a party to appeal an interlocutory order immediately if 'substantial rights of a party will be irreparably lost if review is delayed until final judgment.'" *United States of America, Dep't of Agriculture, Rural Housing Service v. Carter,* 2002 ME 103, ¶12, 799 A.2d 1232, 1235 (quoting *Webb v. Haas,* 1999 ME 74, ¶ 5, 728 A.2d 1261, 1264, quoting *Cook v. Cook,* 574 A.2d 1353, 1354 (Me.1990)). A right is "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." *Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 14, 974 A.2d 918. "Put differently, where an interlocutory order has the

practical effect of permanently foreclosing relief on a claim, that order is appealable." *Id.* (citation omitted). Cost or delay alone is insufficient to establish the irreparable loss of a right. *Dairyland Ins. Co. v. Christensen,* 1999 ME 160, ¶ 8, 740 A.2d 43, 45; *see* Alexander, *Maine Appellate Practice* § 304(a) at 203 (2008).

Here, Mr. Clarke's entitlement to immunity will be irreparably lost if the merits of this appeal are not reached. That is, he loses his statutorily granted immunity from suit, and will be forced to litigate a case and incur expenses, costs, and attorney fees that he is statutorily immune from incurring. Mr. Clarke would not have an effective remedy if the interlocutory determination were vacated after a final disposition of the entire litigation given that the entire purpose of immunity from suit would have been defeated by that time and there would be no recourse for the fees and expenses incurred. Therefore, the Death Knell exception applies to Mr. Clarke's claims in this case. Similarly, Bob's loses its immunity from the underlying action if the merits of this appeal are not reached. If Clarke is immune from suit as required by Maine and Massachusetts law, then the Liquor Liability Claim against Bob's necessarily fails as a matter of law. *See* 28-A M.R.S. § 2512(1); *Swan v. Sohio Oil Co.*, 618 A.2d 214 (Me. 1992); *Douglass v. Kenyon Oil Co., Inc.*, 618 A.2d 220 (Me. 1992). Both Clarke's entitlement to immunity and the violation of the named and retained provisions of Maine's Liquor Liability Act are

pure issues of law, and do not present fact issues for juror determination, despite the trial court's conclusion to the contrary.

ii. The Collateral Order Exception

The collateral order exception "applies 'when the appellant can establish that (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.'" *Bond v. Bond,* 2011 ME 105, ¶ 11, 30 A.3d 816, 820-21 (quoting *Fiber Materials, Inc. v. Subilia,* 2009 ME 71, ¶ 25, 974 A.2d 918 (quotation marks omitted)). Because "[t]he collateral order exception is closely related to the death knell exception," *id*., ¶11, 30 A.3d at 820, it is unavailable to the Claimant for many of the same reasons the death knell exception is unavailable to him.

The July 28, 2023, Order forecloses Clarke's statutorily granted immunity as noted above, and requires him to endure trial and litigation costs when he is statutorily immune from suit as a matter of law.[3] That issue, and the interplay with the Liquor Liability Act's "Named and Retained" requirement has never been addressed by this Court, and therefore presents a matter of first impression.

[3] Ms. Fama previously argued, with a citation to *Carter*, 2002 ME 103, 199 A.3d 1232 and *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) that litigation costs cannot constitute an irreparable injury to an appellant's rights. What Ms. Fama failed to observe is that neither case she cited dealt with immunity from suit. As noted above, this Court has previously held that an interlocutory appeal is proper when the issue of an appellant's statutory right to immunity is implicated, which is exactly the situation presented int his appeal.

Finally, the decision, namely, whether Clarke is immune from suit and the effect of that immunity on the liquor liability act's named and retained requirement is separable from the gravamen of the merits of the underlying liquor liability claim and battery claim asserted by Ms. Fama against Bob's and Mr. Clarke.

iii. The Judicial Economy Exception

The judicial economy exception "is available in those rare cases in which appellate review of a non-final order can establish a final, or practically final, disposition of the entire litigation." *Subilia*, 2009 ME 71, ¶ 26, 974 A.2d 918 (quotation marks omitted). It applies "only when a decision on the appeal . . . regardless of what it is, would effectively dispose of the entire case." *Id.*

Again, the issues presented by this appeal are pure issues of law on a largely undisputed record. Indeed, the trial court's findings made in the July 28, 2023 Order compelled judgment for both Bob's and Mr. Clarke as a matter of law. It was the trial court, *sua sponte*, that raised an issue—which had not been addressed by Ms. Fama in opposing summary judgment—to create the "fact dispute" used to deny summary judgment. The "fact dispute", however, was immaterial to the legal issues presented on summary judgment. Application of the statutory grant of co-employee immunity and that interplay with Maine's liquor liability statute presents a discrete legal issue of apparent first impression that merits consideration by this Court and has the potential to dispose of the entire litigation.

Therefore, this Court should reach the merits of this appeal. The Order at issue implicates a statutory grant of immunity that would otherwise be lost without judicial review, and the entirety of the appeal deals with pure and discrete issues of law.

B. *Mr. Clarke is Entitled to Co-Employee Immunity Pursuant to Maine Law.*

Although the trial court found that Mr. Clarke's entitlement to immunity would be the same pursuant to either Massachusetts or Maine worker's compensation law, (A. 11-12), Appellants nevertheless first address the choice of law analysis herein. As discussed below, Maine law applies to the claims in this case, which law confirms Mr. Clarke's entitlement to immunity.[4]

i. Choice of Law

Ms. Fama asserted several claims against Bob's and Mr. Clarke in her Amended Complaint. (A. 15-21). As to Bob's, Ms. Fama asserted one count for liquor liability, one count for loss of consortium, and one count for wrongful death, all of which invoked Maine statutes. (A. 18-20). As to Mr. Clarke, Plaintiff asserted a single count of battery. (A. 21).

[4] Ms. Fama did not oppose Appellants' position that Maine law applies to the claims in this case. To the contrary, the entirety of the arguments and case law cited by Ms. Fama in opposing summary judgment cited Maine case law and Maine statutes. By way of her arguments and opposition, Ms. Fama acknowledges that Maine law applies to the immunity claims at issue. Ultimately, and as discussed in more detail in Part iii, below, even if Massachusetts law applied, Mr. Clarke would still be entitled to immunity.

In determining which states laws apply, this Court has adopted a "most significant contacts and relationships" approach. *Flaherty v. Allstate Ins. Co.*, 2003 ME 72, ¶ 16, 822 A.2d 1159 (citing with approval the Restatement (second) Conflict of Laws §§ 145, 146 (1971)). "[I]n an action for personal injury the local law of the state where the injury occurred determines the rights and liabilities of the parties, *unless* with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties . . . ." *Id.*

Here, there is no dispute that the incident and injuries occurred in Maine. (A. 7-8, 23, 26). Thus, Maine law controls. This Court need go no further to determine that Maine law applies to Ms. Fama's claims against Mr. Clarke and Bob's in this case. Even if this Court were to consider whether another state might have a more significant interest, that analysis only underscores that Maine law should apply.

This Court recognized several factors bearing on the most significant relationship analysis. These factors include (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of the parties; and (4) the place where the relationship, if any, between the parties is centered. *Id.* ¶ 12.

Here, all factors weigh in favor of applying the laws of the State of Maine. First, it is undisputed that the injury occurred in Maine. (A. 7-8, 23, 26). Similarly, the place where the conduct giving rise to the injury occurred is likewise, Maine.

(A. 7-8, 23, 26). The altercation took place at a hotel which was down the road from the job site in Maine where both Mr. Fama and Mr. Clarke had been working. (A. 7-8, 23, 26). Although Mr. Fama and Mr. Clarke were Massachusetts residents, they had been staying at the hotel in Maine for several days while they worked on the jobsite at Maine Medical Center in Scarborough. (A. 7-8, 23, 26). This factor, therefore, favors application of Maine law. Finally, the place where the relationship, if any, centered is likewise Maine. Mr. Fama and Mr. Clarke were working and staying in Maine at the time of the incident at issue. (A. 7-8, 23, 26). The incident itself happened in Maine after the men had dinner at a restaurant attached to their hotel in Maine. (A. 7-8, 23, 26). Mr. Clarke and Mr. Fama typically went to dinner at the Tavern after working their job in Maine. (A. 7-8, 23, 26). Finally, Ms. Fama filed her Amended Complaint against Bob's invoking Maine's liquor liability statute and wrongful death statute, which again favors application of Maine law. *See Flaherty* , 2003 ME 72, ¶¶ 20-21, 822 A.2d 1159 (observing that where a Maine statute is invoked as part of a lawsuit that fact weights in favor of Maine's interest and application of Maine law); (A. 18-20).[5]

Because the incident causing the injuries in this case occurred in Maine, while Mr. Fama and Mr. Clarke were staying and working in Maine, and because Ms. Fama invokes Maine's liquor liability and wrongful death statutes, Maine has

[5] All of the facts contained in this paragraph were admitted by Ms. Fama in her Opposing Statement of Material Fact. (A. 25-26).

the most significant interest in this litigation and Maine law applies to Plaintiff's claims.

ii. Based on the Findings of Undisputed Facts Applied to Maine Law, Mr. Clarke is Entitled to Co-Employee Immunity in this Case.

In her Amended Complaint, Ms. Fama asserts a single count of Battery against Mr. Clarke as a result of the October 28, 2020 incident occurring in South Portland, Maine. (A. 21). Because Mr. Clarke and Mr. Fama were co-employees on assignment in Maine for their employer at the time of incident, and because Ms. Fama received worker's compensation benefits for the injuries sustained by Mr. Fama as a result of that incident, Ms. Fama's claims against Mr. Clarke are barred.

Pursuant to Maine's Workers' Compensation Act in order for an injury to be compensable, the employee must "1) suffer a personal injury, 2) that arises out of and 3) in the course of employment." *Knox v. Combined Ins. Co. of America,* 542 A.2d 363, 366 (Me. 1988). Ultimately, this Court need not address whether Mr. Fama was entitled to worker's compensation benefits for injuries sustained during the course and scope of his employment with Sanford Contracting. This fact is not in dispute because Sanford Contracting's worker's compensation insurers paid worker's compensation benefits and settled the worker's compensation claim with Ms. Fama for the damages, injuries, and expenses resulting from the October 28, 2020 incident. (A. 7-8, 11); *see also* **Exhibit E** to Defendants' Joint Statement of Material Facts. Thus, the only question is whether the worker's compensation

payments made as a result of the injuries sustained by Mr. Fama in the course of his employment with Sanford Contracting entitles Mr. Clarke to co-employee immunity.

The Maine Worker's Compensation Act provides immunity from liability for claims of personal injuries or death as between employees and as between employees and employers for damages covered by worker's compensation insurance. Specifically, 39-A M.R.S. § 104 provides:

> 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 or under sections 901 to 908; Title 14, sections 8101 to 8118; and Title 18-C, section 2-807, involving personal injuries sustained by an employee arising out of and in the course of employment, or for death resulting from those injuries. An employer that uses a private employment agency for temporary help services is entitled to the same immunity from civil actions by employees of the temporary help service as is granted with respect to the employer's own employees as long as the temporary help service has secured the payment of compensation in conformity with sections 401 to 407. "Temporary help services" means a service where an agency assigns its own employees to a 3rd party to work under the direction and control of the 3rd party to support or supplement the 3rd party's work force in work situations such as employee absences, temporary skill shortages, seasonal work load conditions and special assignments and projects. *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, or for death resulting from those injuries* . . . .

Id. (emphasis added).

In *Cole v. Chandler*, 2000 ME 104, 752 A.2d 1189 this Court explained that it "consistently applied a broad and encompassing construction to the exclusivity provision [of the Act]" and has "refused to carve out an exception for intentional torts" or "require [] that the excluded claims be [otherwise] compensable." *Id.* at ¶ 10, 12. In considering whether a claim is barred by the Act, the law requires a court to look at "the gist of the action and the nature of the damage sought to determine whether the claim for injury is excluded." *Id.* at ¶ 13.

Any argument by Ms. Fama that Mr. Fama's injuries and death did not arise out of or in the course and scope of his employment with Sanford Contracting simply does not pass muster. Ms. Fama submitted a claim to Sanford Contracting's worker's compensation insurers arguing that Mr. Fama's injuries and death *did arise* out of his employment with Sanford Contracting. (A. 7-8, 11). In response, Sanford Contracting's worker's compensation insurers accepted, settled, and paid the worker's compensation claim submitted by Ms. Fama for the damages, injuries, and expenses resulting from the October 28, 2020 incident. (A. 7-8, 11). Because the claim was accepted and paid by Sanford Contracting's worker's compensation insurers, and because Mr. Clarke and Mr. Fama were co-employees at the time of the injuries and damages at issue, Mr. Clarke is entitled to co-employee immunity pursuant to 39-A M.R.S. § 104. (observing that exemptions from liability provided by the Act "apply to *all employees*, supervisors, officers and

directors *of the employer for any personal injuries arising out of and in the course of employment, or for death resulting from those injuries*") (emphases added).

Contrary to the trial court's conclusion, whether Mr. Clarke was acting in the course and scope of *his* employment at the time of Mr. Fama's injuries is not necessary to determine his entitlement to immunity. The statutory language is clear that immunity is afforded to *all employees* of an employer for *any* personal injuries arising out of or in the course and scope of employment, or for death resulting from those injuries. 39-A M.R.S. § 104. The fact that this case involves an intentional tort does not change that analysis. *See Li v. C.N. Brown Company*, 645 A.3d 606, 607-609 (Me. 1994) (observing that immunity granted by Worker's Compensation Act applies to intentional torts).

The existence of immunity in this case is highlighted by the fact that Ms. Fama did not name Sanford Contracting as a defendant in this lawsuit. The clear reason being that under Maine law, the workers' compensation payments made to her on behalf of Sanford Contracting insulates Sanford Contracting from any civil liability for Mr. Fama's injuries. If Ms. Fama had named Sanford Contracting as a defendant in this case, there would be no question that, based on the workers' compensation payments previously made, Sanford Contracting was immune from the tort claims asserted by Ms. Fama. As noted above, the law dictates the same result for Sanford Contracting's employee, Mr. Clarke.

Simply stated, Title 39-A M.R.S. § 104 provides a broad grant of immunity to *all* co-employees, which grant focuses only on whether an employee's injuries occurred during the course and scope of *that employee's* employment. *See* 39-A M.R.S. § 104 (observing that exemptions from liability provided by the Act "apply to ***all employees***, supervisors, officers and directors of the employer for any personal injuries arising out of and in the course of employment, or for death resulting from those injuries"); *Procise v. Elec. Mut. Liab. Ins. Co.*, 494 A.2d 1375, 1383 (Me. 1985) (observing that the Act was specifically amended to provide immunity to co-employees for injuries and death arising from employment). Based on the trial court's findings of undisputed facts in the July 28, 2023 Order (A. 7-8), Mr. Fama's injuries occurred during the course and scope of his employment with Sanford Contracting, Mr. Clarke is a co-employee, and Ms. Fama received worker's compensation benefits as a result of Mr. Fama's injuries. (A. 7-8, 11). Based on those findings of undisputed facts, Mr. Clarke, as a matter of law, is entitled to immunity as a co-employee pursuant to 39-A M.R.S. § 104.

iii. The Trial Court's Order Denying Summary Judgment Incorrectly Applies Maine and Massachusetts Law to the Undisputed Facts in this Case.

As noted above, application of Maine law to the undisputed facts found by the trial court confirms that Mr. Clarke is immune from the tort claim asserted against him by Ms. Fama. Despite making all of the findings necessary to confirm

Mr. Clarke's entitlement immunity, the trial court nevertheless denied summary judgment. In denying summary judgment, the Court concluded that a dispute of material fact existed as to whether Mr. Clarke was acting in the course and scope of *Mr. Clarke's* employment at the time of Mr. Fama's injuries in this case. This was an error of law for several reasons.

First, it was Ms. Fama's burden in opposing summary judgment to establish prima facie evidence for each element of her claims. *First Citizens Bank v. M.R. Doody, Inc.*, 669 A.2d 743, 744 (Me. 1995) (observing that a party opposing summary judgment may not rest upon bare allegations, but instead must come forward with competent and admissible evidence to support each element of their claims). To establish a viable tort claim against Mr. Clarke, Ms. Fama needed to establish Mr. Clarke is not entitled to co-employee immunity. The sole argument asserted by Ms. Fama to establish Mr. Clarke was not entitled to co-employee immunity was her contention that *Mr. Fama's* injuries did not occur in the course and scope of *Mr. Fama*'s employment with Sanford Contracting. The trial court disagreed with Ms. Fama's argument and found that it was undisputed that Mr. Fama's injuries *did* in fact occur during the course and scope of his employment. (A. 7-8). The Court went on to find that that Mr. Fama and Mr. Clarke were co-workers and that the binding worker's compensation settlement agreement for Mr.

Fama's injuries was valid and enforceable. (A. 7-8, 11-12). As noted above, these were the only findings necessary to establish Mr. Clarke's entitlement to immunity.

Not once did Ms. Fama argue that Mr. Clarke was not acting in the course and scope of his employment at the time of Mr. Fama's injuries or that such a finding was necessary for his statutory immunity.[6] As such, any argument on that issue was waived by Ms. Fama as she did not present facts or argument to create a dispute of fact on this issue. *See York Hospital v. Dep't of Health & Human Servs*., 2008 ME 165, ¶ 29, 959 A.2d 67, 73 ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived" (citing *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290)). In any event, as discussed above and herein, this fact is neither material nor in dispute for purposes of Mr. Clarke's entitlement to immunity.

Second, despite the trial court's conclusion to the contrary, the immunity afforded to Mr. Clarke is not a fact issue for juror determination but is a pure issue of law. If it were otherwise, immunity would be meaningless and all co-employees would be forced to litigate their entitlement to immunity before a fact finder, which defeats the entire purpose of immunity from suit. *See* 39-A M.R.S. § 104 (observing that exemptions from liability provided by the Act "apply to *all employees*, supervisors, officers and directors *of the employer for any personal*

[6] Given the $400,000.00 worker's compensation settlement paid to Ms. Fama, any such argument would have been unavailing.

injuries arising out of and in the course of employment, or for death resulting from those injuries"); *see also Li v. C.N. Brown, Co.*, 645 A.3d 606, 608. (observing that this Court consistently applies a broad and encompassing construction of the exclusivity provisions and immunity provisions of the Worker's Compensation Act). Again, if the trial court's conclusion in this case were accepted as true, the specific and unambiguous grant of co-employee immunity in 39-A § 104 would be rendered superfluous. *See Attorney General v. Sanford*, 2020 ME 19, ¶ 19, 225 A.3d 1026 (observing that courts should not interpret a statute in such a way as to render some words or provisions meaningless).

Fourth, the case law cited by the trial court—purportedly to support its conclusion that a fact issue existed precluding Mr. Clarke's entitlement to immunity—is inapplicable to the facts of this case. This is true pursuant to both the Maine and Massachusetts case law cited by the trial court.

With respect to Maine law, the trial court (A.12), but not Ms. Fama, cited *Procise v. Elec. Mut. Liab. Ins. Co.*, 494 A.2d 1375 for the proposition that co-employee immunity only applies when the potentially liable employee was acting within the scope of his employment. That case, however, involved a claim that did not implicate the newly enacted 39-A M.R.S. § 104, which *does not* carry any mandate that the potentially liable employee be acting within the scope of his employment. Indeed, this Court in *Procise* was clear that the co-employee

immunity provided by Section 104 did not apply to the claims in that case given that cause of action accrued before the statute's amendment. *Id.* at 1383. Thus, *Procise* has no bearing on the issues in this appeal, and pursuant the statutory scheme applicable to the claims in this case, Maine law does not require that Mr. Clarke was acting in the course and scope of his employment for the statutory grant of immunity to apply.

With respect to Massachusetts law, the trial court (A.12), but not Ms. Fama, cited *Estate of Moulton v. Puopolo*, 5 N.E. 3d 908, 920 n.16 (Mass 2014) for the proposition that co-employee immunity only applies where the potentially liable employee was acting within the scope of his employment.[7] The case cited by the

[7] Appellants note, as discussed in Section *i.* above, Massachusetts law does not apply to the claims at issue in this appeal. As such, the Massachusetts case law cited by the trial court, which is specific to the Massachusetts' Worker's Compensation Statutes, has no bearing on the claims at issue in this appeal, which claims are governed by Maine's Worker's Compensation Statutes. Even if that case law were applicable, however, Mr. Clarke would still be entitled to immunity.

The seminal Massachusetts case on co-employee immunity is *Fredette v. Simpson*, 797 N.E.2d 899 (Mass. 2003). There, the court laid out the test for whether an employee is entitled to co-employee immunity. The court observed:

> The test for coemployee immunity has sometimes been expressed as an inquiry whether the coemployee, if injured in the same accident, would have been entitled to workers' compensation, and if not, then such coemployee could not be said to have acted in the course of employment. See *Meade v. Ries,* 642 N.W.2d 237, 244 (Iowa 2002); *Blank v. Chawla,* 234 Kan. 975, 982, 678 P.2d 162 (1984); *Jackson v. Hutchinson,* 453 S.W.2d 269, 270 (Ky.1970). This is essentially the same rule that this court recognized in *Mulford v. Mangano,* 418 Mass. 407, 409 & n. 2, 636 N.E.2d 272 (1994) (coemployee immunity rule under G.L. c. 152 "involves the same 'course of employment' standard that determines whether an employee is acting in the course of employment and thus is entitled to workers' compensation").

Id. 904 n. 7. Given that Mr. Fama and Mr. Clarke we engaged in the exact same conduct at the time of Mr. Fama's injuries and given that worker's compensation benefits were paid as a result of Mr. Fama's injuries, common sense dictates that Mr. Clarke would also have been entitled to benefits if he was the

Puopolo court in n.16, however, specifically states that while a tort action may be maintained against a fellow employee who commits an intentional tort that is in no way within the scope of employment, "a suit for an intentional tort in the course of the employment relationship is barred by the exclusivity provision of the Workmen's Compensation Act unless the employee has reserved a right of action pursuant to G.L. c. 152 § 24". *See Anzalone v. Massachusetts Bay Transp. Authority*, 526 N.E.2d 246, 249 (Mass 1988). There is no evidence in the summary judgment record that Plaintiff reserved a right of action against Mr. Clarke pursuant to G.L. c. 152 § 24, because no such evidence exists. There is likewise no evidence in the summary judgment record that any action by Mr. Clarke was taken outside the course and scope of his employment with Sanford Contracting.[8] In any event, it would have been Ms. Fama's burden in opposing summary judgment to present such evidence, a burden she clearly failed to carry. *See York Hospital v. Dep't of Health & Human Servs*., 2008 ME 165, ¶ 29, 959 A.2d 67, 73) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed

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one ultimately injured in the altercation. As such, pursuant to the test set forth in *Fredette*. Therefore, even if Massachusetts law applied to the issues in this appeal, Mr. Clarke would still be entitled to co-employee immunity.

[8] Indeed, only contrary evidence exists. Ms. Fama's sole argument in opposing summary judgment was that *Mr. Fama*'s injuries did not occur in the course and scope of his employment. The trial court found it was undisputed that those injuries did in fact occur in the course and scope of Mr. Fama's employment. The trial court likewise found it was undisputed that the worker's compensation claim submitted by Ms. Fama for Mr. Fama's injuries was submitted, accepted, settled, and paid. (A. 8, 11).

argumentation, are deemed waived" (citing *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290)).

Finally, the trial court's discussion of potential worker's compensation liens underscores Mr. Clarke's entitlement to immunity. (A. 12 n.3.) The worker's compensation carriers in this case waived their right to recover the worker's compensation payments made to Ms. Fama for Mr. Fama's injuries and death. (A. 24, 27, 30-31). The obvious reason for this waiver is the recognition that both Sanford Contracting and Mr. Clarke are immune from suit because of those worker's compensation payments. 39-A M.R.S. § 104. Thus, the lien waiver supports the existence of immunity. If Ms. Fama recovers damages against Mr. Clarke, which she is attempting to do in this case, she will be receiving a double recovery. That is, any potential judgment in this case would enable Ms. Fama to recover for the same damages she has already been compensated for given that the worker's compensation carriers waived their right to recover those payments.[9] (A. 24, 27, 30-31).

It was an error of law for the trial court to deny Mr. Clarke's Motion for Summary Judgment. Based on the undisputed facts found by the trial court, namely, that Mr. Clarke and Mr. Fama were co-employees of Sanford Contracting

[9] The trial court found it was undisputed that the injuries and damages subject to the worker's compensation settlement are the exact damages Ms. Fama seeks to recover in her lawsuit against Bob's and Mr. Clarke. (A. 11 n.2).

at the time of Mr. Fama's injuries(A. 7-8), that Mr. Fama's injuries occurred during the course and scope of his employment with Sanford Contracting (A. 7-8), and that Ms. Fama received worker's compensation benefits as a result the injuries sustained by Mr. Fama (A. 7-8, 11), Mr. Clarke is entitled to immunity as a matter of law.

C. ***Because Mr. Clarke is Entitled to Co-Employee Immunity, Ms. Fama's Claims Against Bob's Fail as a Matter of Law.***

i. The Named and Retained Mandate; 28-A M.R.S. § 2512

Pursuant to the Maine's Liquor Liability Act, "[n]o action against a server may be maintained unless the . . . intoxicated individual . . . is named as a defendant in the action and is retained in the action until the litigation is concluded by trial or settlement. *See* 28-A M.R.S. § 2512. The intoxicated individual and any server are each severally liable, and not jointly liable, for the percentage of the plaintiff's damages that corresponds to each defendant's percentage of fault as determined by a court or jury. *Id.*

The legislature explained that this provision exists because the intoxicated individual should be made to bear his share of responsibility and must remain in the suit until it is concluded.[10] *See The Dram Shop Act and Liquor Liability Law in*

[10] A Court can always consider legislative history as it would precedent cited by parties. *See Wawenock, LLC v. Dep't of Transportation*, 2018 ME 83, ¶ 13, 187 A.3d 609 ("No matter what materials are directed to a court's attention, the court's review of any and all legislative history information in the course of its own evaluation of the law is not any more limited than a court's review of precedent identified by the parties.")

Maine: Report of a study by the Joint Standing Committee on Legal Affairs, 112th Legis. (1986). The named and retained requirement is an important aspect of a liquor liability claim because liability is several, as opposed to joint and several, and a jury is required to apportion fault between the intoxicated individual and servers of alcohol. *Id.* The Committee noted that this might discourage settlement but ultimately decided that a sacrifice in settlement should be made for the increase in fairness shown to both the Plaintiff and the servers of alcohol. *Id.* "The Committee agreed that the intoxicated individual who directly caused the injuries should be made to bear his share of the damages." *Id.*

Consistent with the statutory language and legislative history, this Court previously observed that the named and retained provision requires more than simply "naming" the intoxicated individual in a lawsuit. That individual must have a real financial stake in the litigation in order to be deemed "named and retained" in that litigation for purposes of the Act's mandate.

In *Swan v. Sohio Oil Co.*, 618 A.2d 214 (Me. 1992) this Court addressed the named and retained statutory requirement in the context of a previously released "intoxicated" tortfeasor. In that case, the injured Plaintiffs settled and released their claims against a minor they claimed was impaired by liquor purchased at Sohio Oil. They then commenced a liquor liability claim against Sohio Oil and

named the intoxicated minor as a Defendant in name only. Both the intoxicated minor and Sohio moved to dismiss. The trial court granted the intoxicated minor's motion in light of the prior release. The trial court also dismissed the claim against Sohio because the Liquor Liability Act was the sole basis for liability against Sohio, and that Act made the intoxicated minor an indispensable party to the litigation against Sohio.

On Appeal, this Court concluded, among other things, that the release of an intoxicated individual mandated dismissal of action against Sohio because the Liquor Liability Act was the exclusive vehicle for that claim. *Id.* Relying solely on the plain language of the statute, this Court held that an intoxicated individual is not "retained in the action" within the meaning of section 2512(1) unless the person is retained as a real party in interest with a financial stake in the litigation until its conclusion. This Court further stated that because plaintiffs settled their claims with the intoxicated minor, the suit against Sohio was barred. This Court went on to state that the limits of the statute cannot be stretched to accommodate the nominal joining of a released party. *Id.* Section 2512(1) would be meaningless if it could be easily avoided by suing the released party as a "nominal" defendant. *Id.* In that same case, this Court declined to amend the statute by judicial fiat and affirmed the dismissal of the lawsuit against Sohio. *Id.* at 216-17.

Pursuant to Section 2512(1), Mr. Clarke, the alleged intoxicated patron, is a necessary and indispensable party for Ms. Fama's liquor liability claim against Bob's. *See Sohio Oil Co.*, 618 A.2d at 216-17. As detailed in Part B, above, Mr. Clarke is immune from Ms. Fama's tort claims against him as a result of the prior workers' compensation settlement and his statutory entitlement to co-employee immunity. *See* 39-A M.R.S.A. §104; *see also Boyce v. Potter*, 642 A.2d 1342 (Me. 1994); and *Easler v. Dodge*, 1999 ME 140, 738 A.2d 837 (co-worker immune from suit where injury to complainant arose out complainant's employment).[11]

As a result of Mr. Clarke's statutory immunity, and as was the case in *Sohio*, Mr. Clarke is merely a party to the above-captioned action in name only, with no financial stake in the outcome of the litigation. That is, Mr. Clarke has not been "retained in the action" within the meaning of section 2512(1) because he is not a real party in interest with any financial stake in the litigation as required by the Maine's Liquor Liability Act and confirmed by this Court in *Sohio. See* 28-A M.R.S. § 2512 (1).[12] Therefore, because Mr. Clarke is a necessary and

[11] Again, the simple fact that the worker's compensation claim was accepted, settled, and paid to Ms. Fama demonstrates that there remains no dispute about whether the tort committed by Mr. Clarke occurred in the course and scope of Mr. Clarke's and Mr. Fama's employment with Sanford Contracting. *See* **Exhibit E** to DSMF.

[12] Again, the Committee was clear that this requirement was established to ensure that "the intoxicated individual who directly caused the injuries should be made to bear his share of the damages." *See The Dram Shop Act and Liquor Liability Law in Maine*: Report of a study by the Joint Standing Committee on Legal Affairs, 112th Legis. (1986). Because of the immunity afforded to Mr. Clarke, there is simply no scenario where he would be required to bear his share of the alleged damages in this case, which runs afoul the purpose and intent of this statutory amendment.

indispensable party for purpose of Ms. Fama's liquor liability claim, and because Mr. Clarke is immune from suit with no financial stake in the litigation, Ms. Fama's liquor liability claim against Bob's violates the named and retained mandate, and her claim against Bob's fails as a matter of law. *See Douglass v. Kenyon Oil Co., Inc.*, 618 A.2d 220 (Me. 1992) (where intoxicated individual had no financial stake in litigation, he was not a real party in interest as required to comply with the named and retained requirement of the Liquor Liability Act).[13]

ii. The Exclusivity Mandate; 28-A M.R.S § 2511

In addition to a liquor liability claim against Bob's LLC, Ms. Fama also asserted claims for wrongful death pursuant to 18-C M.R.S. § 2-807, 2-807(3) and loss of consortium pursuant to 14 M.R.S. § 302. (A. 18-20). Plaintiff plead these as separate standalone counts in her Amended Complaint. *Id*. Because the Liquor Liability Act is the sole vehicle to assert a claim against Bob's LLC for injuries and damages arising from alleged overservice of alcohol, Counts II and III fail as a matter of law.

The Liquor Liability Act provides that "[t]his Act is the exclusive remedy against servers who may be made defendants . . . for claims by those suffering damages based on the servers' service of liquor." *See* 28-A M.R.S. § 2511. In

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[13] In Opposing Bob's Motion for Summary Judgment, Ms. Fama did not present any argument or authority that her claim against Bob's could survive summary judgment if Mr. Clarke is entitled to immunity. This failure is tantamount to a concession that if Mr. Clarke is immune from suit, then Ms. Fama's liquor liability claim against Bob's fails as a matter of law.

addition to this clearly stated statutory mandate, the case law is likewise clear and unequivocal that the Liquor Liability Act claim is the sole basis for liability against Bob's LLC.[14] *See Sohio*, 618 A.2d at 220 (the Maine Liquor Liability Act is the exclusive remedy against servers of alcohol for claims by persons suffering damages based on the service of alcohol; all common law causes of action have been extinguished); *Peters v. Saft*, 597 A.3d 50 (Me. 1991) (The exclusivity provision in the Act is constitutional and rationally related to the stated goal of making the liability of the server predictable, while at the same time giving victims a cause of action that was heretofore unclear); *see also Jackson v. Tedd-Lait Post No. 75 American Legion*, 1999 ME 26, 723 A.3d 1220 (exclusivity provision of Liquor Liability Act barred separate negligence claim against bar).

The entirety of the claims against Bob's are based on damages that Ms. Fama alleges resulted from the service of alcohol. (A. 15-21). Thus, the sole vehicle for Ms. Fama to assert a claim against Bob's for those damages is the Liquor Liability Act, and Ms. Fama's separate counts for Wrongful Death pursuant to 18-C M.R.S. § 2-807, 2-807(3) (Count II) and Loss of Consortium pursuant to 14 M.R.S. 302 (Count III) fail as a matter of law.

[14] The legislative history confirms this fact, noting that "it is the intent of the Committee, therefore, to designate this law as the only remedy for injured parties against licensees who serve liquor to visibly intoxicated individuals." *The Dram Shop Act and Liquor Liability Law in Maine*: Report of a study by the Joint Standing Committee on Legal Affairs, 112th Legis. (1986).

On Summary Judgment, the trial court incorrectly concluded that Ms. Fama's claims did not violate the exclusivity provisions set forth in Section 2511 because she brought "Counts II and III via the MLLA's section 2508, which allows damages for property damage, bodily injury, and death, and under the wrongful death and survival laws." (A. 13). Although it is true such damages are recoverable in a liquor liability claim, those damages are subject to the damages cap provided by Section 2509. Counts II and III specifically reference Maine's wrongful death statute pursuant to 18-C M.R.S. § 2-807, 2-807(3), which carried—at the time of pleading—a damages cap of $750,000, and loss of consortium statute pursuant to 14 M.R.S. § 302, which has no cap on damages, both of which run afoul the damages cap set forth in Section 2509. Ms. Fama does not possess separate claims for wrongful death or loss of consortium. Instead, she possesses at most a single claim against Bob's LLC, which is a claim for liquor liability pursuant to 28-A M.R.S. § 2501. That claim is contained in Count I of the Amended Complaint. (A. 18). If Ms. Fama can establish liability and damages pursuant to that claim, as explained in Section 2508, she can recover for wrongful death and loss of consortium. The separate counts for loss of consortium and wrongful death plead in her Amended Complaint, however, is a clear violation of the exclusivity provision of the Liquor Liability Act. Therefore, it was an error of

law for the trial court to deny summary judgment to Bob's on Counts II and III of the Amended Complaint.

D. The Trial Court Abused its Discretion Denying Appellants' Motion to Reconsider.

"Motions for reconsideration of an order shall not be filed unless required to bring to the court's attention an error . . . or new material that could not previously have been presented". *See* M.R. Civ. P. 7(b)(5). This Court reviews a trial court's ruling on a motion for reconsideration or a motion to alter or amend a judgment for an abuse of discretion. *See Shaw v. Shaw*, 2003 ME 153, ¶ 7, 839 A.2d 714. A review for an abuse of discretion involves three questions: (1) whether the court's factual findings are supported by the record; (2) whether the court understood the law applicable to the exercise of its discretion; and (3) whether court's weighting of the applicable facts and choices was within the bounds of reasonableness. *See Green Tree Servicing, LLC v. Cope*, 2017 ME. 68, ¶ 12, 158 A.3d 931.

Appellants adopt and incorporate the arguments set forth in sections B and C of this brief. With respect to Mr. Clarke, the finding that a dispute of material fact existed with respect to his entitlement to co-employee immunity was not supported by the summary judgment record. (Blue Br. 12-33). In fact, only contrary facts existed in the summary judgment record. More importantly, the court simply misunderstood the applicable law governing co-employee immunity. The issue the trial court determined precluded summary judgment for Mr. Clarke, namely,

whether Mr. Clarke was acting in the course and scope of his employment at the time of Mr. Fama's injuries, is not a prerequisite to his statutory immunity, and is therefore immaterial for purposes of the Motion for Summary Judgment. This fact is confirmed by this Court's precedent and a plain reading of Section 104.

With respect to Bob's Motion, the trial court likewise denied that motion based on facts not supported by the record and a misapplication of the law to those facts. Maine law unambiguously provides Mr. Clarke immunity from the tort claim filed against him by Ms. Fama. As a result, he cannot be named and retained as a matter of law for purposes of Ms. Fama's liquor liability claim against Bob's. This too, is consistent with application of the undisputed facts in the summary judgment record to Maine law.

Therefore, it was an abuse of discretion for the trial court to deny Appellants' Motion to Reconsider.

CONCLUSION

The issues in this appeal are pure issues of law dealing with Appellants' statutory grants of immunity. As such, and in accordance with this Court's precedent, although the Order at issue is interlocutory, this Court can and should address the merits of this appeal. *See Morgan*, 2008 ME 26, ¶ 18, 941 A.3d 447; *Hawkes v. Commercial Union Ins. Co.*, 2001 ME 8, ¶ 19, 764 A.2d 258.

Moreover, the record on summary judgment is largely undisputed. Based on the undisputed findings of fact in the trial court's order (A. 7-8), it was an error of law to deny Mr. Clarke's Motion for Summary Judgment. The undisputed facts applied to Maine law confirm that Mr. Clarke is entitled to co-employee immunity pursuant to 39-A M.R.S. § 104.

Finally, because Mr. Clarke is entitled to immunity, it was an error of law for the trial court to deny Bob's motion for summary judgment. Ms. Fama possesses a single claim against Bob's pursuant to Maine law. That is a liquor liability claim pursuant to 28-A M.R.S. § 2501, *et seq*. Maine's Liquor Liability Act mandates that Ms. Fama name and retain Mr. Clarke in the litigation until its conclusion. Again, because Mr. Clarke is immune from suit and entitled to judgment as a matter of law on the single tort claim asserted against him, Ms. Fama's liquor liability claim against Bob's violates the named and retained requirement of the Maine Liquor Liability Act and fails as a matter of law.

WHEREFORE, Appellants respectfully request that this Court:

1. Vacate the trial court's order denying summary judgment to Robert Clarke and Bob's LLC;

2. Remand this case to the Superior Court with instructions to enter judgment in favor of Robert Clarke who is immune from suit pursuant to 39-A M.R.S. §104; and

3. Remand this case to the Superior Court with instructions to enter judgment in favor of Bob's LLC given that Robert Clarke's immunity from suit is fatal

to Plaintiffs' Liquor Liability Claim against Bob's pursuant to 28-A M.R.S. § 2512(1).

Dated at Portland, Maine, this 12th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 12th day of February, 2024, caused two (2) copies of the Appellees' Brief to be served upon the following persons via U.S. Mail, First Class, postage pre-paid and by email.

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