REL: December 11, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190224

City of Birmingham

v.

Keishana Jenkins, as the widow of Grady Jenkins, deceased, and as the mother and next friend of Kennedy Grace Jenkins, Khloe Jenkins, and Grayson Julian Jenkins, the minor children of Grady Jenkins

Appeal from Jefferson Circuit Court (CV-17-90498)

PER CURIAM.

The City of Birmingham ("the employer") appeals from an order of the Jefferson Circuit Court ("the trial court") denying its motion for a summary judgment and entering, on its own motion, a summary judgment awarding Keishana Jenkins, Kennedy Grace Jenkins, Khloe Jenkins, and Grayson Julian Jenkins ("the dependents") benefits under the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq., on account of the death of Grady Jenkins ("the employee").[1] We affirm the judgment insofar as it denied the employer's motion for a summary judgment; we reverse the judgment insofar as it entered a summary judgment for the dependents and remand the case for a trial on the merits.

Procedural Background

On the morning of November 1, 2017, the employee was shot and killed by an unknown assailant while working for the employer. On

[1]The judgment orders that all benefits shall be paid directly to Keishana Jenkins, the employee's widow, for her personal benefit and for the benefit of the other dependents, who were minor children of the employee. See Ala. Code 1975, § 25-5-60(1)c.

November 22, 2017, Keishana Jenkins, the employee's widow, filed a complaint against the employer seeking workers' compensation benefits. The complaint was later amended to add claims on behalf of the other dependents, the minor children of the employee.[2] On September 18, 2019, after discovery was completed, the employer filed a motion for a summary judgment. The dependents filed a response to the motion on October 10, 2019, to which they attached various exhibits and deposition transcripts. The employer moved to strike the deposition transcripts. On December 5, 2019, after holding oral arguments on the employer's motion, the trial court denied the employer's summary-judgment motion and its motion to strike and entered a summary judgment awarding the dependents workers' compensation benefits. The employer timely appealed.

Issues

The employer argues that the trial court erred in denying its motion to strike, in denying its motion for a summary judgment, and in entering

[2]The amended complaint also named Ray Jenkins, another child of the employee, as a plaintiff, but the trial court ultimately denied Ray Jenkins any benefits on the basis that he was no longer a minor, and he has not appealed.

a summary judgment awarding workers' compensation benefits to the dependents.[3]

Analysis

A. The Evidence

1. The Motion to Strike

Before reciting the evidence, we first address the motion to strike filed by the employer. In ruling on a motion to strike evidence submitted in opposition to a motion for a summary judgment, a trial court has great discretion, and its determination on that issue will not be disturbed on appeal absent an abuse of that discretion. See Van Voorst v. Federal Express Corp., 16 So. 3d 86, 92 (Ala. 2008). Therefore, we proceed to

[3]Although the denial of a summary-judgment motion is generally not appealable, " '[a]n 'appeal from a pretrial final judgment disposing of all claims in the case ... entitles [the appellant], for purposes of [appellate] review, to raise issues based upon the trial court's adverse rulings, including the denial of [the appellant's] summary-judgment motions." ' " Nationwide Mut. Ins. Co. v. David Grp., Inc., 294 So. 3d 732, 734 (Ala. 2019) (quoting Barney v. Bell, 172 So. 3d 849, 856 (Ala. Civ. App. 2014), quoting in turn Lloyd Noland Found., Inc. v. City of Fairfield Healthcare Auth., 837 So. 2d 253, 263 (Ala. 2002)).

determine whether the trial court abused its discretion in denying the motion to strike.

The employer moved to strike the entire deposition transcripts of Marlon Clayton, a coworker of the employee, Michelle Taylor, the administrator of the employer's workers' compensation program, and Matt Graham, a former claims supervisor for the company that adjusted the employer's workers' compensation claims.[4] The employer argued that Rule 56, Ala. R. Civ. P., does not authorize a party to submit deposition transcripts as evidence in opposition to a motion for a summary judgment. In support of its argument, the employer relied on Furin v. City of Huntsville, 3 So. 3d 256, 263-64 (Ala. Civ. App. 2008), in which this court stated:

> "On appeal, the plaintiffs argue that the trial court erred in striking the transcripts because, they say, Rule 56, Ala. R.

[4]The employer also moved to strike the entire deposition transcript of Michael Reese, another coworker of the employee, but it does not argue on appeal that the trial court erred in failing to strike that transcript, so any objection to the admissibility of the Reese deposition is waived. See Ex parte Martin, 775 So. 2d 202, 206 (Ala. 2000) (quoting Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982)) (" 'When an appellant fails to argue an issue in [his] brief, that issue is waived.' ").

> Civ. P., 'explicitly contemplates that depositions are to be submitted in opposition to affidavits.' However, our supreme court has stated: 'Rule 56, Ala. R. Civ. P, requires that a motion for summary judgment be supported by facts that would be "admissible in evidence." Hearsay statements that do not fall within an exception are inadmissible and cannot be used as evidence to defeat a properly supported summary-judgment motion.' Aldridge v. DaimlerChrysler Corp., 809 So. 2d 785, 797 (Ala. 2001).
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> "Rule 802, Ala. R. Evid., provides: 'Hearsay is not admissible except as provided by these rules, or by other rules adopted by the Supreme Court of Alabama or by statute.' Rule 801(c), Ala. R. Evid., defines hearsay as a 'statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' The Curry and Ming deposition transcripts are hearsay within the definition of Rule 801 and are inadmissible under Rule 802, unless they fall within an exception to that rule."

However, the employer failed to explain the context of that passage from Furin.

Furin involved an attempt by landowners who were parties in one civil action to use the deposition testimony of Charles Ming and John Curry taken in a separate civil action involving different parties. The Madison Circuit Court struck the Ming and Curry deposition transcripts as inadmissible hearsay under Rules 802 and 804, Ala. R. Evid. On

appeal, this court treated the deposition transcripts as testimony given in a former trial or action, the admissibility of which was governed by Rule 804(b)(1). This court determined that the landowners had failed to show that Ming and Curry were unavailable or that the depositions had been taken in litigation involving substantially the same parties and substantially the same issues, as required by Rule 804(b)(1). We further rejected the landowners' argument that the deposition excerpts were admissible through Rule 32(a)(3)(B), Ala. R. Civ. P. This court stated:

> "[W]e have not found any case applying Rule 32 to allow the admission of a deposition transcript as the plaintiffs suggest: in a subsequent, separate action when the party submitting the transcript was not a party to the original action and when the party submitting the transcript never attempted to depose the witness. The plaintiffs have not directed this court to any such authority.
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> "....
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> "We do not believe that Rule 32 was intended to be applied in a situation such as this, where the deposition was taken in a separate action."

3 So. 3d at 266.

Unlike in Furin, the depositions of Clayton, Taylor, and Graham were taken in this action, during which the employer was represented and

allowed to question the witnesses regarding the issues relevant to the controversy between the dependents and the employer. The employer does not cite any authority precluding a party from submitting deposition transcripts in such circumstances. To the contrary, in a summary-judgment proceeding, Rule 56(c), Ala. R. Civ. P., specifically authorizes a party to submit "portions of discovery materials" -- such as deposition testimony -- in support of its narrative summary of what it considers to be the undisputed material facts. Like with an affidavit, a deposition transcript must "set forth such facts as would be admissible evidence," Rule 56(e), Ala. R. Civ. P., but, in this situation, that limitation refers to the admissibility of the content of the deposition as if the witness was testifying live at trial. See generally Dunaway v. King, 510 So. 2d 543, 545 (Ala. 1987) ("While Rule 56, Ala. R. Civ. P., permits evidence in the form of depositions, answers to interrogatories, admissions on file, and affidavits to be submitted in support of, or in opposition to, a summary judgment motion, that evidence must, nevertheless, conform to the requirements of Rule 56(e) and be admissible at trial."). The employer does not point to any particular statements within the depositions that it

considers to be hearsay. Therefore, we hold that the trial court did not err in denying the motion to strike the deposition transcripts of Clayton, Taylor, and Graham on hearsay grounds.

The employer also moved to strike excerpts from the deposition transcript of Sgt. Talana Brown, the former homicide detective who investigated the death of the employee, in which she testified regarding, among other things, Birmingham crime rates. Sgt. Brown testified as a representative of the employer, pursuant to Rule 30(b)(6), Ala. R. Civ. P., which provides, in pertinent part:

> "A party may in the party's notice and in a subpoena name as the deponent a ... governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more ... persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. ... The persons so designated shall testify as to matters known or reasonably available to the organization. ..."

The employer argues that the dependents did not request a deposition on the subject of municipal crime statistics and that the employer did not designate Sgt. Brown to testify on that subject. For that reason, the employer maintains that any testimony given by Sgt. Brown regarding the

crime rate in the area where the employee was killed constitutes inadmissible hearsay. The employer has not cited any legal authority to support the proposition that a statement made by a Rule 30(b)(6) representative regarding a subject outside the scope of the designated subject matter is hearsay that cannot be used in summary-judgment proceedings. "It is well settled that this court will not consider issues for which no legal arguments are developed and for which no authority is offered to support the appellant's contentions." May v. May, 292 So. 3d 385, 388 (Ala. Civ. App. 2019) (discussing Ala. R. App. P., Rule 28(a)(10)). Thus, we conclude that the employer has no t demonstrated that the trial court erred in refusing to strike the excerpts from Sgt. Brown's deposition testimony.

Lastly, the employer moved to strike excerpts of the deposition transcript of Marilyn Johnson, who is identified in the record as a manager of the employer's benefits, occupational health, safety, and wellness division. The employer argued that the Johnson deposition excerpts should be stricken for the same reason it moved to strike the excerpts of Sgt. Brown's deposition transcript, which ground we have

already rejected. In addition, on appeal, the employer notes that the dependents quoted the excerpts from the Johnson deposition in their brief opposing the employer's motion for a summary judgment but that they did not attach the deposition excerpts as an exhibit, as required by Rule 56(c)(1) ("Any supporting documents that are not on file shall be attached as exhibits."). However, the employer did not move the trial court to strike the excerpts from Johnson's deposition on that ground; therefore, it has waived any objection to the consideration of the excerpts on that ground, allowing this court to consider that evidence on appeal. See SSC Selma Operating Co. v. Gordon, 56 So.3d 598, 602 (Ala. 2010). Thus, we conclude that the trial court did not err in denying the employer's motion to strike the excerpts from Johnson's deposition.

2. The Facts

The evidence filed in support of and in opposition to the employer's motion for a summary judgment that this court may consider is as follows. The employer retained the employee as a laborer working in the employer's horticulture department. His duties included operating a riding lawn mower owned by the employer to cut grass on properties

within the city limits of Birmingham. At approximately 6:30 a.m. each morning, the laborers in the horticulture department would report for duty at a central location. A supervisor would then assign the horticulture crew to work in a designated area in the city. The crew would decide amongst themselves who would operate the riding lawn mower and who would perform the other duties.

On the morning of November 1, 2017, Michael Johnson ("the supervisor"), the employee's supervisor, directed the horticulture crew to "sweep" the Wylam neighborhood in west Birmingham. The supervisor testified in his deposition that the crew had not been informed in advance that they would be working in the Wylam neighborhood that day. The crew traveled together to the Wylam neighborhood and began working on lots in the area, with the employee operating the riding lawn mower. At approximately 10:30 a.m., the supervisor instructed the employee and Michael Reese, a coworker of the employee, to cut and clear a residential lot located on 8th Avenue that was located across the street from Wylam Elementary School. The lot contained a house with boarded windows that appeared to be unoccupied, although no one knocked on the door to check

for occupants. The house divided the lot into a front yard and a backyard; the backyard was partially surrounded by a fence with gate access.

The employee immediately responded to the supervisor's instruction by moving the riding lawn mower to the backyard, while Reese began picking up trash in the front yard. Reese testified that the neighborhood, which was largely residential, was very quiet at that time, with not much traffic flowing. Reese testified that, although he had not been next to the employee, he had been in a position to hear any conversation or commotion occurring in the backyard but had not heard anything other than the running lawn mower.

Approximately one or two minutes after Reese and the employee separated, Reese heard the sound of four or five gunshots emanating from the backyard area. Reese testified that, after a brief hesitation to assure that the shooting had stopped, he went to the backyard, where, he said, he found the employee, who was alone, sitting atop the lawn mower with a bullet wound to the back of his head and taking his final breaths. The lawn mower had bullet holes in the rear of the mower and in the back of the seat. The supervisor testified that the employee had partially cut the

grass in the backyard and that the levers of the lawn mower were locked, indicating that the employee had stopped the machine before he was shot.

Reese and the supervisor testified that they did not hear anyone threaten the employee before the assault. The employee had $700 cash in his pocket that was undisturbed at the time of his death. A police investigation did not uncover any witnesses to the shooting. Sgt. Brown testified that a man in the area had indicated that he had seen another man drive off immediately after the shooting, but the police could not locate any video footage of the crime, so it was possible that the shooter might have left on foot. Sgt. Brown did not inspect the house at the site of the shooting to determine if anyone was present there at the time. The police had not identified any suspects when Sgt. Brown moved from her position as a homicide investigator in 2018, and the crime was no closer to being solved when she was reassigned than it had been when she initiated the investigation.

The dependents sought workers' compensation benefits from the employer, but the claim was denied. Marilyn Johnson testified that injuries and deaths might occur to employees on the job from unusual

occurrences for which workers' compensation benefits should be awarded, but, she said, the employer's third-party workers' compensation claims administrator had denied the dependents' claim based on its determination that the assault upon the employee did not arise out of his employment as a laborer. Matt Graham, a former claims supervisor for the third-party administrator, testified that the claim was denied on the instructions of the employer based on the lack of any evidence of a confrontation or the theft of the employer's property and also because a newspaper article had suggested that the police were investigating the death as a possible "targeted shooting." Sgt. Brown stated that detectives had interviewed the employee's family and that someone had mentioned that it sounded like the employee had been the victim of a "hit," but she characterized that comment as rumor and speculation and stated that the investigation had not uncovered any evidence indicating that the employee had been targeted for reasons personal to him. Reese and the supervisor testified that they had no knowledge that the employee had been killed for personal reasons. Michelle Taylor, who was in charge of administering the employer's workers' compensation program in 2017,

testified in her deposition that the employer had no documents or information indicating that the employee was intentionally killed due to anything in his past or for personal reasons. Taylor stated that, because the shooter had not been identified, the employer was unaware of the motive for the assault.

In the course of discovery, the dependents questioned some of the witnesses regarding the danger of an employee being assaulted and killed while working as a laborer for the horticulture department in general and while working in the Wylam neighborhood in particular. Reese described the Wylam neighborhood as a "bad neighborhood," but he testified that, in the 10 years he had been working with the horticulture crew, no one had physically threatened him. The supervisor testified that, in November 2017, the Wylam neighborhood had a reputation for a high crime rate and that landscaping equipment was regularly stolen from trucks throughout the city, which, he said, had caused him to warn the crew members to be wary of their surroundings. He stated, however, that he had never heard about anyone physically threatening a public-works employee and that he had not received any complaints from his employees

about working in the Wylam neighborhood. The supervisor testified that gunshots would sometimes be heard in the Wylam neighborhood while the crew was working there, but, he said, in the 15 years that he had worked in that neighborhood, no other employee had been shot.

Sgt. Brown had patrolled the Wylam neighborhood between 2004 and 2010 and testified that, at that time, the area had had a bad reputation for having a high crime rate for violent crimes, including murder. When informed that only two other murders had occurred in the area in 2017 before the employee was shot, Sgt. Brown opined that the murder rate was neither high nor low for that period. Sgt. Brown also testified that the Wylam neighborhood contained numerous abandoned houses that were known to be used by vagrants and for illegal drug activity. Sgt. Brown also clarified that the Wylam neighborhood rarely experienced a homicide during the daytime and that the police had not observed any other criminal activity in the neighborhood on the morning the employee was killed.

B. The Motion for a Summary Judgment

In its judgment, the trial court denied the employer's motion for a summary judgment and entered a summary judgment in favor of the dependents, although they had not moved the court for such relief. A trial court may sua sponte grant a motion for a summary judgment for the nonmovant when all the parties have had an opportunity to be heard, no genuine issue of material fact exists, and the nonmovant is entitled to a judgment as a matter of law. See First Citizens Bank of Luverne v. Jack's Food Sys., Inc., 602 So. 2d 374 (Ala.1992). The employer argues that the facts are not in dispute but that the law as applied to those facts dictated that a summary judgment should have been entered in favor of the employer, not the dependents. However, this court concludes, based on our de novo review and using the same summary-judgment standards applied by the trial court, see Patrick v. Miller, 440 So. 2d 1096 (Ala. Civ. App. 1983) (holding that Rule 56 applies in workers' compensation cases), that a genuine issue of material fact exists, precluding a summary judgment for either party.

The employer does not dispute that the employee died as the result of an assault that occurred in the course of his employment, but the employer maintains that the assault did not arise out of the employment. More specifically, the employer contends that, because the employee was slain by an unknown assailant for unknown reasons, the employee died as the result of an unexplained assault, which, the employer maintains, is not compensable under Alabama's workers' compensation law. On the other hand, the dependents argue that the circumstantial evidence indicates that the employee was the victim of a criminal assault that occurred in a dangerous working environment, which, the dependents argue, render his death compensable under Alabama's workers' compensation law.

In Alabama, the workers' compensation law regarding the compensability of injuries resulting from assaults is governed by a special statute, Ala. Code 1975, § 25-5-1(9), which provides, in pertinent part: "Injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him or her and not directed against him or her as an employee

r:or because of his or her employment." Section 25-5-1(8) defines the general statutory requirement set forth in Ala. Code 1975, § 25-5-51, that, in order for an employer to be liable for workers' compensation benefits for the death of an employee, the death must have been "caused by an accident arising out of and in the course of his or her employment." See Dean v. Stockham Pipe & Fittings Co., 220 Ala. 25, 27, 123 So. 225, 226 (1929) (construing Ala. Code 1923, § 7596(j), a predecessor statute to § 25-5-1(9), which excluded from coverage an injury "caused by the act of a third person or fellow employee, intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment"). Section 25-5-1(9) excludes from coverage assaults on employees motivated by personal reasons, with no causal connection to the employment, see Ex parte N.J.J., 9 So. 3d 455, 457 (Ala. 2008), but includes in coverage assaults committed against an employee because of his or her status as an employee, see, e.g., Lawler & Cole CPAs, LLC v. Cole, 267 So. 3d 311 (Ala. Civ. App. 2018), or because the hazardous duties or dangerous environment of the employment increases the risk of injury by assault. See Republic Iron & Steel Co. v. Ingle, 223

Ala. 127, 128, 134 So. 878, 880 (1931) (construing Ala. Code 1923, § 7543 et seq., which included § 7596(j)). Section 25-5-1(9) does not specifically address unexplained assaults with no obvious personal or employment connection, but, in Ex parte Coleman, 211 Ala. 248, 100 So. 114 (1924) (construing Ala. Code 1923, § 7596(j)), the supreme court determined that an unexplained assault is not compensable.

In Ex parte Coleman, Nellie Coleman's husband was found dead at his job station in a mine during his working hours. His head was bruised and his body had been set on fire due to the homicidal acts of an unknown assailant. On those facts, the Tuscaloosa Circuit Court denied compensation. On appeal, the supreme court said:

> "The burden is on the plaintiff to reasonably satisfy the trial court that the accident arose out of and in the course of the workman's employment, and, where there is any substantial legal evidence in support of the finding of the trial court, the judgment, whether affirmative or negative, will not be disturbed on appeal. From the fact alone of a willful assault upon the workman, it cannot be presumed that it arose out of his employment. That conclusion must be drawn, if at all, from the circumstances of the case, or from the testimony of witnesses, tending to show the causal relation of the employment to the injury; and 'the rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency.'

> Madden's Case, 222 Mass. 487, 495, 111 N.E. 379, 383, L.R.A. 1916D, 1000 [(1916)], quoted with approval in Garrett v. Gadsden Cooperage Co., 209 Ala. 223, 96 South. 188 [(1923)]; Ex parte Majestic Coal Co., 208 Ala. 86, 91, 93 South. 728 [(1922)].
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> "The character of the wounds on the head of deceased refutes the theory of plaintiff's counsel that he could have been killed by falling forward on the machinery, and, we think, compels the conclusion that he was deliberately and intentionally killed by a human assailant, and there is an entire absence of evidence to support the required inference that the assault grew out of the employment as its juridical cause. As said in State ex rel., etc., v. District Court, 140 Minn. 470, 475, 168 N.W. 555, 556, 15 A.L.R. 579, 583 [(1918)]:
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> > "'The employment may have given the occasion, and without the employment there might have been no opportunity, but there was no causal connection between the employment and the criminal act of the unknown assailant.'
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> "Our conclusion is that the material findings of the trial court are well supported by the evidence, and under our rule of review by certiorari cannot be set aside."

211 Ala. at 249- 50, 100 So. at 115.

In the leading treatise on the subject of American workers' compensation law, the authors describe an unexplained assault as a "neutral assault" that is neither inherently occupational nor inherently private. See 1 Arthur Larson & Lex K. Larson, Larson's Workers'

Compensation Law § 8.03[1] (Matthew Bender & Co. 2014). According to that treatise, a "minority of jurisdictions are inclined to regard the neutral category [of assaults] as noncompensable, for want of affirmative proof of distinctive employment risk as the cause of the harm," while a "growing majority[] sometimes expressly appl[ies] the positional or but-for test [that] makes awards for such injuries [compensable] when sustained in the course of employment." Id.

Alabama follows the minority rule. Ex parte Coleman explicitly rejects the theory that an employer may be liable for workers' compensation benefits when the employment only places the employee in the position where the assault occurred. In Ex parte Patton, 77 So. 3d 591 (Ala. 2011), our supreme court maintained its rejection of the positional-risk or but-for test in determining whether an accident arises out of the employment. Unlike the law in many other jurisdictions, Alabama law does not provide for a presumption that an injury received by an employee during the course of the employment also arises out of the employment, which is often the basis for awarding compensation for injuries resulting from unexplained assaults in those jurisdictions. See Padilla v. Twin City

Fire Ins. Co., 324 S.W.3d 507, 514-15 (Tenn. 2010) (discussing the Larson treatise and noting that "many of the cases finding compensability are based ... on a statutory presumption that an assault occurring on the work premises is work-related ...."). Under Alabama law, the claimant must show a definite causal connection between the conditions under which the work is required to be performed and the assault. See Ex parte N.J.J., 9 So. 3d at 457. Generally speaking, a causal connection exists when the assault proceeds from a hazard to which an injured employee would not have been equally exposed apart from the employment. See Southern Cotton Oil Co. v. Bruce, 249 Ala. 675, 680, 32 So. 2d 666, 670 (1947). To prove legal causation, a party seeking workers' compensation benefits must show that the performance of the duties of the employment exposed the employee "'to a danger or risk materially in excess of that to which people not so employed are exposed [ordinarily in their everyday lives].' " Ex parte Trinity Indus., Inc., 680 So. 2d 262, 266 (Ala. 1996) (quoting City of Tuscaloosa v. Howard, 55 Ala. App. 701, 705, 318 SO. 2d 729, 732 (Civ. 1975)). As a result, no recovery can be had for an unexplained injury.

See Slimfold Mfg. Co. v. Martin, 417 So. 2d 199, 200 (Ala. Civ. App. 1981) (denying workers' compensation benefits for unexplained fall).

In McGaughy v. Allied Products Co., 412 So. 2d 803, 805 (Ala. Civ. App. 1982), which the trial court cited in its judgment as support for its award of benefits to the dependents, the minor children of Rodney McGaughy, an employee of Allied Products Company, brought a workers' compensation claim against the company after McGaughy was killed from a gunshot wound inflicted by a co-employee. The Shelby Circuit Court denied compensation. On appeal, this court determined that, immediately before the assault, the co-employee who shot McGaughy had been involved in a physical altercation with McGaughy's brother, who also worked for the company. Although McGaughy was not involved in that altercation, which arose out of a dispute about work rules, McGaughy had been in the area. Just before the shooting, as the co-employee was fleeing McGaughy's brother, a bucket of bolts fell near McGaughy. The co-employee responded to the noise caused by the bucket's falling by firing his weapon at McGaughy, who some witnesses testified resembled his

brother. This court determined that the assault had arisen out of the employment and was not due to personal enmity.

In McGaughy, the co-employee shot and killed McGaughy during a work-related dispute with McGaughy's brother that had escalated into a physical altercation. In Alabama, as a general rule, assaults motivated by work-related disputes are considered compensable. See Beverly v. Ruth's Chris Steak House, 682 So. 2d 1360 (Ala. Civ. App. 1996). McGaughy can be read as expanding coverage to include injuries to a bystander to a work-related dispute, compare Sloss-Sheffield Steel & Iron Co. v. Harris, 218 Ala. 130, 132, 117 So. 755, 756 (1928) (denying coverage in similar circumstances), or as including assaults upon an employee by mistake as compensable accidents, see 1 Terry A. Moore, Alabama Workers' Compensation § 10:29 (2d ed. 2013), but McGaughy does not hold that an unexplained assault is compensable, which would impermissibly contradict Ex parte Coleman. See Ala. Code 1975, § 12-3-16 ("The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals ...."). In McGaughy, this court summarized the applicable law as follows:

> "A wilful assault by a co-employee may be compensable under the Alabama workmen's compensation statute. Garrett v. Gadsden Cooperage Co., 209 Ala. 223, 96 So. 188 (1923). However, the fact of a wilful assault alone does not conclusively establish that the assault arose out of the employee's employment. That conclusion must be drawn from the circumstances of each case. Sloss-Sheffield Steel & Iron Co. v. Harris, 218 Ala. 130, 117 So. 755 (1928). The fact that the assailant and the employee were on the employer's premises at the time of the altercation, and engaged in the performance of work, is not conclusive."

412 So. 2d at 807-08. When deciding Ex parte Coleman, our supreme court applied those same principles to reach its conclusion that an unexplained assault is not compensable, and the supreme court continues to follow those principles when analyzing assault cases in the workers' compensation context. See, e.g., Ex parte N.J.J., supra.

At trial, the burden of proof would rest on the dependents to prove by a preponderance of the evidence that the assault was directed against the employee in his status as an employee or because of the employment and not against the employee for personal reasons. See Dean, 220 Ala. at 27, 123 So. at 226 (rejecting argument that the employer has the burden of proving an assault is personal in nature so as to avoid workers' compensation liability), and Ala. Code 1975. § 25-5-81(c) (generally

requiring facts essential to workers' compensation liability to be proven by a preponderance of the evidence). Accordingly, at the summary-judgment stage, the employer was not required to present affirmative evidence that the assault upon the employee was personal in nature; rather, the employer could, as it did, move for a summary judgment on the ground that the dependents could not discharge their burden of proving that the assault resulted from an occupational hazard. Ex parte General Motors Corp., 769 So. 2d 903, 909 (Ala.1999). In its motion for a summary judgment, the employer argued that, in the absence of evidence of an identified witness or suspect and motivation for the crime, the dependents could not prove that the assault had been committed against the employee because of his status as a member of the employer's horticulture crew or because of the conditions of his employment, leaving the death of the employee a noncompensable unexplained assault.

To withstand the employer's motion for a summary judgment, the dependents were required to present substantial evidence showing that the assault arose out of the employment. "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the

exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). Alabama's workers' compensation law does not require that facts essential to recovery be proven by an eyewitness but allows circumstantial evidence to prove a causal connection between the employment and the injury. See Southern Cotton Oil Co. v. Wynn, 266 Ala. 327, 96 So. 2d 159 (1957). The dependents presented circumstantial evidence designed to show that the assault on the employee was not truly an unexplained assault, but that the assault had a definite causal connection to the employment, which, the dependents asserted, had increased the risk that the employee would be subjected to the criminal assault that befell him. See Dean, supra. The dependents showed that the employee was routinely called to work near abandoned homes in high crime areas like the Wylam neighborhood. The dependents pointed out that it would be unlikely that a gunman with a personal vendetta against the employee would have known to find the employee at the shooting location because even the employee had not known that he was going to be there until earlier that morning. The

dependents argued that the circumstances showed that the employee was shot in a random act of violence by one of the criminal elements in the Wylam neighborhood.

When viewed in a light most favorable to the dependents, the circumstantial evidence presented by the dependents might be considered substantial evidence in support of their theory sufficient to withstand the employer's motion for a summary judgment, see Guck v. Daniel & Son, Inc., 848 So. 2d 1001, 1002 (Ala. Civ. App. 2002), but that evidence is not conclusive as to the issue of the compensability of the death of the employee. The evidence is conflicting as to at least three critical points. First, the issue whether the employment increased the risk of an assault was not without dispute. Although some evidence indicated that, in general, gunfire and assaults occurred in the Wylam area at a greater rate than in other parts of Birmingham, other evidence revealed that the murder rate in that area was not particularly high in 2017, that the primary criminal threat to the horticulture crew was theft, that no other member of the horticulture crew had been physically threatened or assaulted despite working in the public for many years, that homicides

rarely occurred in the Wylam neighborhood in the daytime, and that the neighborhood was peaceful before the shooting of the employee with no criminal activity having been detected.

Second, the question whether the employee was the victim of a random criminal attack remains solely a matter of inference. Reese testified that, leading up to the shooting, he had been in a position to hear any conversation or commotion in the backyard where the employee was working, but had heard only the sound of the lawn mower running, indicating that no oral confrontation had occurred to instigate the assault. The employee was not robbed and no equipment was stolen, suggesting that the employee was not defending his or the employer's property when he was shot. The dependents did not produce any direct evidence indicating that the house where the employee was working was an occupied "drug house." A reasonable fact-finder assessing the weight of the evidence could conclude that the evidence does not preponderate in favor of the dependents' theory and that the assault remains unexplained.

Third, the possibility that the employee was assaulted for personal reasons has not been decisively excluded. The dependents presented

evidence indicating that none of the deposition witnesses or the police had any knowledge that the employee was killed for personal reasons. That evidence might mean that no one had a personal reason for shooting the employee, but it might also mean that the witnesses simply did not know the circumstances that led to the shooting and had no information as to whether the assault was due to personal reasons. The uncertain state of the evidence might lead a reasonable fact-finder to conclude that the dependents did not prove that the assault was not committed against the employee for personal reasons.

When no witness can describe how an injury or death occurred in the course of the employment, compensation may be awarded when the circumstantial evidence leads only to an inference of an employment connection. See Ex parte Patterson, 561 So. 2d 236 (Ala. 1990). "' " [W]hen the facts, although undisputed[,] are such that reasonable men may reasonably and conscientiously arrive at opposite conclusions from them, such facts present, not a question of law for the court, but a question of fact for the determination of the jury."' " Cooper v. State, 393 So. 2d 495, 497 (Ala. Crim. App. 1981) (quoting Pate v. State, 32 Ala. App.

365, 366, 26 So. 2d 214, 215 (1946), quoting in turn Stearns v. State, 4 Ala. App. 154, 155, 58 So. 124, 124 (1912)); see also Folmar v. Montgomery Fair Co., 293 Ala. 686, 309 So. 2d 818 (1975) (holding that, when reasonable persons could differ on inferences to be drawn from undisputed facts, summary judgment is inappropriate). In this case, the evidence leads to conflicting inferences as to the nature of the assault, and such conflicts cannot be resolved in a summary-judgment proceeding. See Martin v. Auto-Owners Ins., 57 Ala. App. 489, 492–93, 329 So. 2d 547, 551 (Civ. 1976) (noting that, at the summary-judgment stage, "[t]he trial judge's role is not to resolve ... factual issues, but to determine if a triable issue exist."). The trial-court judge, as the fact-finder in a workers' compensation case, see Ala. Code 1975, § 25-5-81(a), is charged with resolving conflicting inferences from the evidence only through a trial on the merits. See Guck, supra. During oral arguments on the motion for a summary judgment, the trial-court judge stated as follows:

> "... [Y]ou're talking to the finder of fact right now. Summary judgment, when you're talking about a bench trial, is a little different animal from summary judgment when you're talking about, you know, a jury trial. Because in that

situation, I'm having to decide whether a jury should hear this." However, at the summary-judgment stage, a trial-court judge is precluded from deciding issues of disputed fact, even in workers' compensation cases, when the judge will be the ultimate fact-finder. See Courtaulds N. Am., Inc. v. Lott, 403 So. 2d 240, 242 (Ala. Civ. App. 1981) (holding in a workers' compensation case that "[i]t is well-settled that a trial judge may not resolve factual issues on motion for summary judgment").

A motion for a summary judgment may be granted only when the undisputed material facts show that the movant is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. In this case, neither side has proven a right to a judgment as a matter of law; instead, they have shown only that a genuine issue of material fact exists as to the compensability of the employee's death resulting from an assault on the employee.

Based on the foregoing, we conclude that the trial court did not err in denying the employer's motion for a summary judgment, and we affirm that part of the judgment. We further conclude that the trial court erred in entering a summary judgment in favor of the dependents. We therefore

reverse the summary judgment in favor of the dependents and remand the case for a trial on the merits.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Moore, Donaldson, and Hanson, JJ., concur.

Thompson, P.J., and Edwards, J., concur in the result, without writings.