

IN THE MISSOURI SUPREME COURT OF MISSOURI

STACI LEWIS, ET AL,	)	
	)	
Appellants,	)	No. SC91834
	)	
-vs-	)	
	)	
NATHAN GILMORE, ET AL,	)	
	)	
Respondents.	)	

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Appeal from the 9<sup>th</sup> Judicial Circuit Court of Linn County, Missouri

The Honorable Gary Ravens

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RESPONDENTS' SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

This is an appeal from a grant of summary judgment in favor of the Respondents. The motion was granted by the Honorable Gary E. Ravens, Circuit Court of Linn County. This Court sustained Respondents' Application for Transfer. Therefore, this Court has jurisdiction. Mo. Const. art. V, § 10.

## STATEMENT OF FACTS

Appellants Staci Lewis and minor McCartney Lewis filed a wrongful death suit against Nathan Gilmore and Buddy Freeman doing business as R & F Trucking. (L.F. 2).<sup>1</sup> The basis for that suit was a truck accident in March 2004, that caused the death of Lonnie Lewis. (L.F. 11-15). At the time of the accident, Lewis was riding as a passenger in a truck driven by Nathan Gilmore. (L.F. 11-15). Lewis and Gilmore were employed by Buddy Freeman doing business as R & F Trucking. (L.F. 11-15). When the accident occurred, Gilmore was operating the truck pursuant to a contract between Freeman and DOT Transportation, Inc. (hereinafter “DOT”). (L.F. 11-15).

Appellants’ counsel thereafter filed a claim for compensation with the Missouri Department of Labor and Industrial Relations, causing the civil suit to be stayed pending a decision on that claim. (L.F. 2, 24, 29). The workers’ compensation claim was filed against Buddy Freeman doing business as R & F Trucking and DOT. (L.F. 24).

A hearing was held in February 2010, at the Division of Workers Compensation. (L.F. 44). An administrative law judge thereafter issued findings of fact and conclusions of law, including findings and conclusions that Freeman

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<sup>1</sup> All citations to the record will be as follows: the legal file will be cited as “L.F.” followed by the page number, Plaintiffs/Appellants brief will be cited as “App. Br.” followed by the page number.

did not carry workers' compensation insurance and that DOT was Lewis' statutory employer. (L.F. 44-55). The ALJ ordered DOT to pay benefits to Lewis and suggested that DOT could seek indemnity from Freeman. (L.F. 44-55).

After the entry of the workers' compensation award, DOT intervened in the underlying civil suit. (L.F. 108).

Defendants Gilmore and Freeman moved for summary judgment. (L.F. 33). In May 2010, the Circuit Court granted summary judgment in favor of Gilmore and Freeman, finding that Plaintiffs/Appellants had made an election of remedies when they obtained a workers' compensation award:

In this case, Plaintiff has elected to proceed to collect compensation under Chapter 287 and was successful by their own admission.

They can no longer maintain this action.

(L.F. 79).

## ANALYSIS

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS GILMORE AND FREEMAN BECAUSE PLAINTIFFS MADE AN ELECTION OF REMEDIES IN THAT PLAINTIFFS OBTAINED A WORKERS' COMPENSATION AWARD, WHICH, IN TURN, PRECLUDES A CIVIL SUIT AGAINST DEFENDANTS.

### A. INTRODUCTION

Appellants are asking this Court to overturn the trial court's grant of summary judgment and to remand this case with directions to proceed on the merits of the case.

### B. STANDARD FOR REVIEW

Appellants' standard of review provides no guidance for this Court's review; although it is a correct statement of law, it is merely commentary on the propriety of summary judgment.

"Summary judgment is appropriate only where the moving party has demonstrated that there is no genuine dispute as to the facts and that the facts as admitted show a legal right to judgment for the movant." *Moore Auto. Group, Inc. v. Goffstein*, 301 S.W.3d 49, 53 (Mo. banc 2009) (internal citations omitted); *see also Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. banc 2009).

"The propriety of summary judgment is purely an issue of law, and this Court's review is essentially de novo." *Goffstein*, 301 S.W.3d at 53. Specifically,

the issue on appeal is a matter of law: whether Appellants made an election of remedies precluding this suit. As noted, following summary judgment, the standard of review for an issue of law is de novo. *Conseco Fin. Servs. Corp. v. Mo. Dep't of Rev.*, 195 S.W.3d 410, 414 (Mo. banc 2006) (“Summary judgment is proper only where there is no issue of material fact and a party is entitled to judgment as a matter of law. Here, the issue is one of statutory interpretation, which is an issue of law. This Court, therefore, reviews the grant of summary judgment de novo”).

**C. PLAINTIFF’S SUIT IS BARRED BY THE ELECTION OF  
REMEDIES DOCTRINE**

Appellants have already obtained an award for workers’ compensation for the wrongful death of Lewis. (L.F. 44-55). They now claim that section 287.280 permits a successive wrongful death suit against Gilmore and Freeman. Appellants’ civil suit is barred by the election of remedies doctrine and the trial court made no error in granting summary judgment in favor of Gilmore and Freeman.

Lewis sustained fatal injuries on the job and his employer did not carry workers’ compensation insurance. When this fact pattern occurs, section 287.280.1 gives injured workers three choices: (1) they can file a civil suit, (2) file a claim under Chapter 287, or (3) make a claim against the second injury fund. Section 287.280.1 states:

If the employer or group of employers fail to comply with this section, an injured employee or his dependents *may elect after the injury either to bring an action against such employer or group of employers to recover damages for personal injury or death* and it shall not be a defense that the injury or death was caused by the negligence of a fellow servant, or that the employee had assumed the risk of the injury or death, or that the injury or death was caused to any degree by the negligence of the employee; *or to recover under this chapter with the compensation payments commuted and immediately payable; or, if the employee elects to do so, he or she may file a request with the division for payment to be made for medical expenses out of the second injury fund as provided in subsection 5 of section 287.220.*

(emphasis added).

Here, Appellants chose to file a claim for workers' compensation and eventually obtained a judgment against DOT as the statutory employer. (L.F. 44-45). This election to file a claim for workers' compensation now precludes Appellants' civil suit.

“[T]he purpose of the doctrine of election of remedies is to prevent double redress for a single wrong.” *Skandia America Reinsurance Corp. v. Fin. Guardian Group & World American Underwriters*, 857 S.W.2d 843, 846 (Mo. App. 1993). “There is no doubt but if there are two or more inconsistent remedies available, the

election to pursue the one is a bar to any suit based upon the other. That is well settled law in this State.” *U.S. Fidelity & Guar. v. Fidelity Nat’l Bank & Trust, Co.*, 109 S.W.2d 47, 48 (Mo. 1937). A civil suit and a claim for workers’ compensation based on the same wrongful death are inconsistent remedies. Section 287.280, RSMo 2000.

Missouri’s case law is clear that once an election has been made and satisfaction obtained, a second suit based on the same injury is barred:

Once an election has been made, and a party has obtained full satisfaction from one remedy, his cause of action ends and he can assert it no further. The rule is stated to be that when full satisfaction has been had from one or two or more inconsistent remedies, a party can no longer assert his cause of action through another. To summarize: The weight of authority in this and other jurisdictions seems unquestionably to be that when one elects to pursue one of two or more inconsistent remedies, with full knowledge of all facts, and receives full satisfaction therefrom, he can longer assert his cause of action and his adversary may assert the election as a defense even though such adversary has suffered no detriment, and may have, in fact, profited thereby.

*U.S. Fidelity & Guar.*, 109 S.W.2d at 49.

Appellants concede that they have had full satisfaction when they state they have received monetary value from DOT. (App. Br. at 14).

More recent Missouri cases state that the election doctrine should not be applied in a mechanistic fashion, but rather the courts should consider the “practicalities and equities of the case” when determining whether the doctrine should apply. *Skandia America Reinsurance Corp.*, 857 S.W.2d at 845.

Appellants’ civil suit is exactly the type of inconsistent remedy that the election of remedies doctrine seeks to preclude. *U.S. Fidelity & Guar.*, highlights this principle.

In *U.S. Fidelity & Guar.*, a surety company executed a bond to indemnify a construction company against the dishonest acts of its employees. 109 S.W.2d at 47. Thereafter an employee began forging checks. *Id.* at 48. Upon discovery of the loss, the construction company notified the embezzler’s surety of the loss, provided proof and demanded payment. *Id.* The loss was paid. *Id.*

Then, the plaintiff obtained an assignment of the construction company’s rights and attempted to sue the bank for its role in the losses sustained in the scheme. *Id.* After a bench trial, the Supreme Court of Missouri affirmed a defense verdict in favor of the bank based by applying the election of remedies doctrine. *Id.* at 48-50. In so doing, the Court found that the construction company had two choices when it discovered the embezzlement: (1) pursue the embezzler and the embezzler’s surety or (2) pursue the bank. *Id.* at 48. The construction company made its election against the embezzler’s surety, and the construction company and its successor in interest, the plaintiff, was thereafter barred from pursuing the bank. *Id.* at 48-50. In other words, the new suit was barred by the

election doctrine in that a claim and recovery had already been had based on the underlying cause of action – the plaintiff was seeking a successive impermissible claim for a cause of action on which the construction company had already recovered.

The case at hand is analogous to *U.S. Fidelity & Guar.*, in that Appellants have already obtained a claim and recovery for the wrongful death of Lewis. Specifically, the claim for workers’ compensation alleged that Lewis was injured in a truck collision. (L.F. 24, 37). In granting a workers’ compensation award, it is clear that Gilmore, Freeman and DOT’s responsibility stems from the March 2004 accident that caused Lewis’ death. (L.F. 44-55). Impermissibly, Appellants’ amended pleadings show they seek to recover against Gilmore and Freeman, alleging Lewis’ wrongful death occurred out of the same March 2004 accident. (L.F. 11-16).

Missouri has applied the election doctrine to workers’ compensation cases without distinction from its application in other areas of the law. *See e.g., Bailey v. McClelland*, 848 S.W.2d 46, 48 (Mo. App. 1993) (“A binding election under the Workers’ Compensation Act is generally the same as other areas of the law”); *Brookman v. Henry Transp.*, 924 S.W.2d 286, 289 (Mo. App. 1996) (Russell, J.) (Observing that the election doctrine bars a subsequent action if a party makes a binding election).

A simple application of Missouri law to these facts results in the conclusion that Appellants’ civil suit is barred by the election of remedies doctrine because

Appellants are seeking double redress for the same wrong. *See e.g., Skandia America Reinsurance Corp.*, 857 S.W.2d at 846. Appellants recovered a workers' compensation award against Respondents for the death of Lewis and they cannot now seek a successive civil judgment against Respondents for the death of Lewis. To allow such proceedings would be a double recovery in complete disregard the "practicalities and equities of the case." *Id.* at 845.

Appellants argue that nothing in section 287.280 limits their suit against Gilmore and Freeman because the only monetary value Plaintiffs have received was from DOT, the statutory employer. Appellants further argue that no released opinions control this case and that a harmonized reading and statutory construction of section 287.280 results in the conclusion that nothing bars Plaintiffs' civil suit.

To start, there is no ambiguity in the statute and none is alleged, and any attempt at the construction of section 287.280 would be misplaced as its meaning is plain to any reader. *See e.g., Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 665 (Mo. banc 2010) (There is no need to resort to statutory interpretation if the statute is unambiguous). Moreover, Appellants' argument does not grasp the

interplay between section 287.280 and the doctrine of the election of remedies.<sup>2</sup> Section 287.280 merely sets out an injured employee's options when his or her employer fails to maintain workers' compensation insurance. The statute gives no directives, as Appellants suggest, relating to limiting or expanding an employee's recovery. Instead, the statute itself sets out a plaintiff's options after injury, and the election doctrine, a common-law doctrine, comes into play only if and when a plaintiff attempts to recover twice for the same injury.

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<sup>2</sup> This argument was also the basis for Respondents' Application for Transfer. The Western District determined that the "every employer" language in section 287.280 allows Appellants to bring a successive civil suit. The error in that conclusion is that the "every employer" language in the statute has a clear, specific and limited purpose: it merely states that "every employer" subject to the workers' compensation statute must purchase insurance from an authorized carrier or participate in some type of group insurance. Furthermore, section 287.280 is unambiguous in its use of the word "either," which a plain reading indicates that a Plaintiff can only elect one theory of recovery. *See* section 287.280 and *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683, 688-89 (Mo. banc 2010) ("The legislature did not provide statutory guidance, so this Court's task is to determine what the legislature intended from the plain meaning of the phrase. If the legislature does not expressly define statutory language, it is given its plain and ordinary meaning, as typically found in the dictionary").

Appellants next argue that fundamental fairness and similar policy concepts allow Plaintiffs' civil suit because Gilmore and Freeman have yet to suffer any economic losses or damages as a result of Lewis' death. This argument is also without merit.

It makes no difference whether Appellants' have collected any monies from Respondents. Once a party has elected a remedy and has received satisfaction, he or she can no longer assert a cause of action and an "adversary may assert the election as a defense even though such adversary has suffered no detriment, and may have, in fact, profited thereby." *U.S. Fidelity & Guar.*, 109 S.W.2d at 49.

The fact that Gilmore and Freeman have yet to suffer any economic losses or damages does not change the fact that Appellants have already been compensated for Lewis' death and that the election doctrine prevents their subsequent civil suit.

Furthermore, Freeman may yet suffer economic damages. Appellant DOT has a subrogation right against Freeman. Section 287.040.3 grants DOT, as a secondary employer, the opportunity to pursue an indemnity action against Freeman as Mr. Lewis' primary employer. The ALJ recognized this. (L.F. 53, "[DOT] may be able to seek indemnity from Buddy Freeman"). Thus, Freeman could still suffer economic damages. Additionally, and in strong favor of the trial court's application of the election doctrine, if DOT were to assert its indemnity right and Appellants were allowed to proceed civilly, Freeman could suffer two

judgments for the same cause of action. The doctrine of election of remedies is intended to preclude inequities such as the one sought here.

**D. GILMORE, AS A COEMPLOYEE, IS PROTECTED BY THE  
ELECTION DOCTRINE**

Respondent acknowledges its duty of candor to the tribunal and addresses the following issue even though it has not been raised by Appellants. That issue is: whether summary judgment in favor of Gilmore, the co-employee, was proper in light of *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. 2010).

*Robinson*, was released from the Western District in August 2010 and is now final. This Court denied the Application for Transfer.

The plaintiff in *Robinson* was injured at work, allegedly due in part to the negligence of a co-employee. *Id.* at 421. After settling with his employer for workers' compensation benefits, the plaintiff filed suit against his co-employee. *Id.*

The defendant successfully filed a motion to dismiss, but the Court of Appeals reversed and found that as a result of a 2005 amendment requiring strict construction of the workers' compensation laws, co-employees could be sued for injuries they negligently inflict on other co-employees. *Id.* at 424-25. Specifically, the Court of Appeals found that employees could no longer enjoy the protections of the exclusive remedy provision because, "a co-employee would not fall within th[e] statutory definition of an 'employer.'" *Id.* at 424.

*Robinson* then goes on to hold that the plaintiff's petition was not barred by res judicata because the parties were different, "There is a clear lack of identity between the two proceedings." *Id.* at 425.

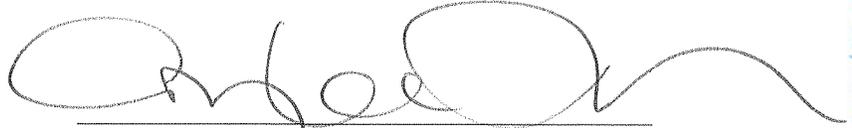
A party could read *Robinson* as allowing a workers' compensation action against an employer and then a successive civil action against a co-employee. Nowhere, however, does *Robinson* contemplate the election doctrine. As already stated above, the primary aim of the election doctrine is to ensure that a plaintiff does not realize multiple or successive recoveries based on one injury. Here, Plaintiffs have received satisfaction for the wrongful death of Lewis. (App. Br. at 14). It makes no difference that Plaintiffs will not recover any money directly from Gilmore because once a party has elected a remedy and has received satisfaction, he or she can no longer assert a cause of action; an "adversary may assert the election as a defense even though such adversary has suffered no detriment, and may have, in fact, profited thereby." *U.S. Fidelity & Guar.*, 109 S.W.2d at 49.

In arriving at its conclusion, the *Robinson* court was not presented with the election doctrine and, as a result, it does not control this case. Moreover, *Robinson* did not and could not overrule *U.S. Fidelity & Guar.*, a case from the Supreme Court of Missouri that prohibits the type of recovery sought against Gilmore.

CONCLUSION

In light of the foregoing, the trial court did not err in granting summary judgment in favor of Defendants.

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE AND SERVICE**

The undersigned hereby certifies as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. Including the cover page, the signature block, the acknowledgement, this certification, and the certificate of service, the brief contains 3,640 words, which does not exceed the words allowed for a brief under Rule 84.

2. A true and correct copy of the attached brief was delivered to the following counsel via the e-file system utilized by the Court:

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