IN THE
SUPREME COURT OF MISSOURI

No. SC87264

DONNELL HAYES

Appellant/Plaintiff

v.

SHOW ME BELIEVERS, INC.

Respondent/Defendant

Appeal from the Circuit Court of St. Charles County
Eleventh Judicial Circuit
State of Missouri

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal arises from Respondent's retaliatory discharge of Appellant on the basis of Appellant's prior filing of workers' compensation claims and the determination of whether Respondent was a responsible employer under Revised Missouri Statute §287.780 (Chapter 287, R.S.Mo. 2000). Therefore, jurisdiction lies in the Missouri Supreme Court pursuant to Article V, §3 of the Missouri Constitution, because this case involves the validity of a state statute, and under Missouri Supreme Court Rule 84 as well as § 512.160, R.S.Mo. 2000.

STATEMENT OF FACTS

Appellant was employed as an indoor football player in 2001 and 2002 by a team named the River City Renegades. (L.F.27 & 32). It was during these years that he sustained the injuries that gave rise to the relevant workers' compensation claims, Injury Numbers 01-164757 and 02-068466 respectively. (L.F.13). Respondent took over the team in the second half of their season in 2002, with Ed Watkins assuming the position of President, and finished out that season under the name River City Renegades using the same players and facilities. President Ed Watkins maintained control of the team for the 2003 season and he changed the team name to the Show Me Believers. (L.F.36). Appellant signed a contract to play for the Show Me Believers in 2003 before being terminated. (L.F.16). Appellant was informed of his termination by the team general manager, Lloyd Wideman. (L.F.36). Mr. Wideman told Appellant that he was being terminated because of his past workers' compensation claims and their worry that if he was injured he would bring a claim against the team again. (L.F.36).

Respondent and the former team known as the River City Renegades both used many of the same players, coaches, facilities, and doctors, and they both played in the same league against almost identical competition with merely minor

changes that were due to new teams joining the league and the folding of some existing teams. (L.F.36).

Appellant filed his First Amended Petition for damages pursuant to R.S.Mo. §287.780 against Respondent in the Circuit Court of St. Charles County in the State of Missouri. (L.F.13). On October 14, 2004, the Circuit Court granted Respondent's Motion for Summary Judgment as a Matter of Law without allowing an examination into the connections between Respondent and the named employer on Appellant's prior workers' compensation claims. (L.F.63-66).

On September 13, 2005, the Missouri Court of Appeals, Eastern District entered its order and opinion declaring that the trial court did not err in granting summary judgment to Respondent employer because of the rule of law set out in *Hansome v. Northwest Cooperage Co.*, 679 S.W.2d 273 (Mo. Banc 1984) that an employee cannot recover under R.S.Mo. 287.780 unless he proves that the discriminating employer is the same employer as the one against whom employee exercised his rights under Chapter 287.

Appellant applied for Transfer to the Supreme Court for Reconsideration on November 15, 2006. The Supreme Court, sustained Appellant's application to transfer the above entitled cause and issued its Order on January 31, 2006.

POINTS RELIED ON

I. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT EMPLOYEE WAS EMPLOYED BY AN EMPLOYER DIFFERENT THAN RESPONDENT AT THE TIME OF CLAIMS THAT WERE THE BASIS OF EMPLOYEE'S DISCRIMINATORY DISCHARGE BECAUSE R.S.Mo. §287.780 SAYS THAT: "NO EMPLOYER OR AGENT SHALL DISCHARGE OR IN ANY WAY DISCRIMINATE AGAINST ANY EMPLOYEE FOR EXERCISING ANY OF HIS RIGHT UNDER THIS CHAPTER." (Emphasis added).

Davis v. Richmond Special Road District, 649 S.W.2d 252 (Mo.App. 1983)

Gonzalez-Centeno v. North Central Kansas Regional Juvenile Detention Facility, 278 Kan. 101 P.3d 1170 (Kansas Supreme Court 2004)

Pierson v. Treasurer, State of Missouri, 126 S.W.3d 386 (Mo.banc 2004)

Bruner v. GCGW, Inc., 880 So.2d 1244, (The Florida First District Court of Appeals 2004)

II. EVEN IF ITEM 1 OF THE "TEST" ARTICULATED IN HANSOME IS THE LAW IN MISSOURI, THE CIRCUIT COURT STILL ERRED IN SUSTAINING THE MOTION FOR SUMMARY JUDGMENT BECAUSE WHETHER OR NOT THE RESPONDENT WAS A SUCCESSOR CORPORATE ENTITY TO THE RIVER CITY RENEGADES WAS A QUESTION OF MATERIAL FACT ON THE RECORD THAT SHOULD HAVE BEEN LEFT FOR TRIAL AND NOT DECIDED AS A MATTER OF LAW BY THE COURT.

Null v. K&P Precast, Inc., 882 S.W.2d 705 (Mo.App. E.D. 2000)

Custom Furs v. Hopper Furs, Ltd., 923 S.W.2d 505 (Mo.App. 1996)

Ernst v. Ford Motor Co., 813 S.W.2d 910 (Mo.App. 1991)

Brockmann v. O'Neill, 565 S.W.2d 796 (Mo.App. 1978)

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT EMPLOYEE WAS EMPLOYED BY AN EMPLOYER DIFFERENT THAN RESPONDENT AT THE TIME OF CLAIMS THAT WERE THE BASIS OF EMPLOYEE'S DISCRIMINATORY DISCHARGE BECAUSE R.S.Mo. § SAYS THAT: "NO EMPLOYER OR AGENT SHALL DISCHARGE OR IN ANY WAY DISCRIMINATE AGAINST ANY EMPLOYEE FOR EXERCISING ANY OF HIS RIGHT UNDER THIS CHAPTER." (Emphasis added).

In Missouri courts, "An employee has a cause of action for wrongful discharge if he or she was discharged for: "… (4) filing a workers' compensation claim." *Dunn v. Enterprise Rent-A-Car Co.*, 170 S.W.3d 1 (Mo.App.E.D. 2005) citing *Porter v. Reardon Mach.Co.*, 962 S.W.2d (Mo.App.W.D. 1998) at 935-936. The right of employees to file a claim for wrongful discharge for filing a workers' compensation claim is established by R.S.Mo. §287.780 which states "No employer or agent shall discharge or in any way discriminate against any

employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer".

In the instant case the trial court ruled that R.S.Mo. §287.780 did not apply and granted Respondent's Motion for Summary Judgment, thereby effectively eliminating Appellant's cause of action against his employer. In so ruling the trial court relied solely upon Respondent's claim that Appellant, in seeking redress for his retaliatory discharge by his employer under R.S.Mo. §287.780, did not meet the burden of proof for the "first element" of a "test" established in *Hansome v. Northwest Cooperage Co.*, 679 S.W.2d 273, and *Wiedower v. ACF Industries, Inc.*, 715 S.W.2d 303 which articulate a four-prong "test" to define eligibility under the statute. *Hansome* holds that:

> "The action authorized by this statute has four elements:
>
> (1) Appellant's status as employee of Respondent before injury,
>
> (2) Appellant's exercise of a right granted by Chapter 287,
>
> (3) employer's discharge of or discrimination against Appellant, and
>
> (4) an exclusive causal relationship between Appellant's actions and Respondent's actions." *Hansome*, l.c. 275.

However, notwithstanding the creation of this test, the value of these cases as precedent in the instant case is limited by the fact that neither of these cases address the element upon which the trial court in the instant case based its ruling - plaintiff's status as employee of defendant before injury (the first element of the test.) Instead, both cases were decided based on the fourth element of the test and both cases gave only cursory treatment to the first element.

Appellant's status as an employee of Respondent at the time of the injury was NOT an issue in *Hansome*. That case focused entirely on the question of whether or not the "sole" cause of the discharge was Appellant's exercise of his rights under the workers' compensation law. Therefore, the *Hansome* court's statement that an employee of the defendant employer at the time the employee made the workers' compensation claim that was the basis for his discriminatory discharge was dicta.

The case of *Wiedower v. ACF Industries Inc*., 715 S.W.2D 303 (Mo.App.E.D. 1986) followed *Hansome* and reiterated the four point "test" but once again the case focused entirely on the question of whether or not the "sole" cause of the discharge was Appellant's exercise of his rights under the workers' compensation law. Therefore, once again, the *Wiedower* court's statement that Appellant must be an employee of the Respondent at the time Appellant made the

workers' compensation claim that was the basis for his discriminatory discharge was dicta.

Hansome does not explain why it concluded that the legislature intended R.S.Mo. §287.780 to permit subsequent employers to discriminate against employees for filing claims against predecessor employers. Subsequent cases have not clarified this issue.

All precedent cases Appellant has found for employment discrimination[1] under R.S.Mo. §287.780 address elements three and/or four of the *Hansome* test, namely the exclusive causal relationship between the employee's discharge and his/her filing a claim or the nature of the discharge itself. Appellant has found no Missouri case in which the employment status of the Appellant by a prior employer was raised as a defense to a claim under R.S.Mo. §287.780. Appellant

[1] The only case to address liability of an employer under R.S.Mo. §278.780, is *Null v. K&P Precast, Inc.*, 882 S.W.2d 705 (Mo.App. E.D. 2000) discussed infra. *Null* does not discuss or mention the *Hansome* test but it denies the argument of a corporation which sought exemption under the statute by claiming that it was not the original employer against whom the claim was made. *Null* held that R.S.Mo. §287.780 imposes liability to successor corporations of an employer against whom the original workers' compensation claim was filed, when they have a financial interest in the subsequent corporation.

believes this is the first case where that specific issue has been put to this court for consideration.

"The legislature has specifically directed that Chapter 287 is to be liberally interpreted in favor of promoting the public welfare. As this Court has noted, this rule of construction was intended to prevent the judge-made rules limiting employer liability to their employees from operating to undermine the broad policy goal of protecting workers announced in Chapter 287." Justice White's dissenting opinion in *Crabtree v. Bugby*, 967 S.W.2d 66, 74 (Mo.banc 1998) citing R.S.Mo. §287.780 and *Bass v. Nat'l Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo. banc 1995).

Hansome does not define or explain or provide any rationale for its pronouncement that the legislative intent for R.S.Mo. §287.780 mandates Appellant's status as an employee of Respondent in order to file a claim for retaliatory discharge under this statute, nor does it define, explain, or provide any rationale as to when subsequent employers become exempt from qualifying as "any employer" under the statute. Although *Hansome* cites *Davis v. Richmond Special Road District*, 649 S.W.2d 252 (Mo.App. 1983) and *Mitchell v. St. Louis County*, 575 S.W.2d 813 (Mo.App. 1978) as the foundation upon which it draws the limits to establish the elements of its four prongs for retaliatory discharge

under R.S.Mo. §287.780, there is nothing in either of those decisions which directly says that a discrimination or retaliatory discharge claim is strictly restricted to the employer for whom the employee was employed prior to his injury. Whether an employer can avoid liability for workers' compensation claims by simply changing its name has yet to be decided in Missouri.

Additionally, *Davis* distinguishes that the legislature specifically chose not only to restrict the discrimination against an employee during the pendency of their workers' compensation claim, but to also restrict such discrimination following the resolution of the claim. This strongly suggests that it is the intent of the legislative that a subsequent employer is not exempt from a claim for retaliatory discharge if the subsequent employer violates the terms set forth in R.S.Mo. §287.780. *Davis* states:

> "In its enactment of § 287.780, **the General Assembly did not prohibit (although it could have) the discharge of employees merely during the pendency of a claim for workers' compensation.** On the other hand, the General Assembly, by its wording of §287.780, enacted a prohibition against employers (to the extent they might be liable for damages in a separate civil proceeding) not to discriminate or

> discharge employees because
>
> of the employee's exercise of his or her rights relative to a workers' compensation claim. Stated another way, the legislative intent conveyed by the statute is to authorize recovery for damages if, upon proof, **it be shown that the employee was discriminated against or discharged simply because of the exercise of his or her rights regarding a workers' compensation claim**." *Davis v. Richmond Special Road District*, 649 S.W.2d 252 (Mo.App. 1983); at 255. (Emphasis added).

The *Davis* court does not touch upon or dwell on the status of the employer but instead focuses on the merits of the claim itself and whether or not there is a causal connection between the discharge or discrimination and the filing of the claim. This reasoning must also be applied to subsequent employers.

The plain language of the statute states: "**No employer** (not 'the' employer against whom an employee files a workers' compensation claim) or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or

discriminated against shall have a civil action for damages against his employer". R.S.Mo. §287.780. (Emphasis and parenthetical notes added).

"Workers' compensation law is entirely a creature of statute, and when interpreting the law, the Court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and give effect to that intent if possible." *Pierson v. Treasurer, State of Missouri*, 126 S.W.3d 386 (Mo.banc 2004) citing *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 276 (Mo. banc 2002). Appellant's research has failed to produce any Missouri precedent cases defining or interpreting the legislative intent of the term "employer" in R.S.Mo. §287.780 under the plain language of the statute. Appellant believes that this issue is one of first impression in Missouri.

Between 1983 and 2005, seven other states, Oklahoma, Kansas, Michigan, Illinois, Tennessee, Florida and Kentucky, all of which had statutes similar to R.S.Mo. §287.780 as well as precedent cases with elements very similar to the one in *Hansome*, ruled on the question of whether a subsequent employer may discriminate against an employee who filed a workers' compensation claim against a prior unrelated employer. Of those seven, six have held that there **is** a cause of action for retaliatory discharge against **subsequent employers** who discriminate against an employee for a history of prior workers' compensation

claims. Only the Court in Kentucky held that this law does not extend to a subsequent employer.

In *Nelson Steel Corp. v. McDaniel*, 898 S.W.2d 66 (Ky.1995), the Kentucky Supreme Court, in a four to three opinion (Stumbo, J. dissenting), concluded although precedent prohibited an employer from punishing a worker for seeking workers' compensation benefits from that employer, rising workers' compensation insurance rates furnished a legitimate economic reason to permit an employer to fire an employee who had applied for workers' compensation while working for a prior employer. Many of the cases cited below have read this opinion and found it unpersuasive.

In Missouri, the legislative intent expressed in Missouri's Second Injury Fund statute not only provides a rebuttal to the Kentucky court's reasoning in *Nelson*, it strengthens Appellant's contention that the legislative intent behind the Second Injury Fund reinforces the rationale that subsequent employers are not exempt from discrimination claims under R.S.Mo §287.780. Courts have held that "The purpose of the Fund is to encourage employment of disabled workers by reducing the liability of their employers." *Wuebbeling v. Treasurer of the State of Missouri*, 898 S.W.2d 615, 618 (Mo.App.E.D. 1995). "The purpose of the fund is to encourage the employment of individuals who are already disabled

from a preexisting injury, regardless of the type or cause of that injury." *Boring v. Treasurer of Missouri*, 947 S.W.2d 483, 487-88 (Mo.App.E.D. 1997). Therefore, interpreting the legislative intent of R.S.Mo. §287.780 to apply **only** to employers against whom the employee originally filed his/her workers' compensation claim is contradictory to the legislative intent behind the creation and perpetuation of the Second Injury Fund which has long been held as established specifically to deter the discrimination of disabled workers by subsequent employers.

Tennessee, Oklahoma, Michigan, Illinois Florida and Kansas courts have also examined this issue and found that public policy dictates that subsequent employers not be allowed to discriminate against any employees for having filed a prior workers' compensation claim.

In *Hayes v. Computer Sciences Corporation*, et al. 2003 WL 113457 (Tenn. Ct. App.),[2] the Tennessee Court of Appeals considered this issue under an employment discrimination statute which had been interpreted by *Anderson v.*

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[2] This case is an unpublished decision which has been cited by the Supreme court of Kansas in *Gonzalez-Centeno v. North Central Kansas Regional Juvenile Detention Facility*, 278 Kan. 101 P.3d 1170 (Kansas Supreme Court 2004) which is discussed in greater detail *infra*.

Standard Register Co., 857 S.W.2d 555 (Tenn.1993) to have the requirements remarkably similar to those established in *Hansome.* The court in *Anderson* held that "[T]he following elements are found to establish a cause of action for discharge in retaliation for asserting a workers' compensation claim: (1) The Appellant was an employee of the Respondent at the time of the injury; (2) the Appellant made a claim against the Respondent for workers' compensation benefits; (3) the Respondent terminated the Appellant's employment; and (4) the claim for workers' compensation benefits was a substantial factor in the employer's motivation to terminate the employee's employment." *Anderson* at 558.

The *Hayes* court held however, that "Clearly, at least two of these factors would not apply to a retaliatory discharge by a subsequent employer. However, we believe that a cause of action would exist in this case under the last two requirements" . . . "and further that the basis of enforcing a retaliatory discharge claim against a subsequent employer … is (1) necessary to enforce the duty of the employer; (2) to secure the rights of the employee; and (3) to carry out the intention of the legislature. …Such a cause of action is clearly supported by both the Workers' Compensation Act and public policy." *Id*.

The Oklahoma Court of Appeals also faced a similar "test" as the one in

Hansome, on whether or not a subsequent employer met the criteria as "employer" under its workers' compensation statute and held that a subsequent employer must not discriminate against an employee because of her previous unemployment claim. *Taylor v. Cache Creek Nursing Center*, 891 P.2d 607 (Okla.1994). The facts in *Taylor* regarding the "subsequent" employer are very similar to that of the Respondent and the River City Renegades. In *Taylor*, the employee was employed by a nursing home where she injured herself in January of 1989 and filed a workers' compensation claim. Cache Creek purchased the nursing home in April of 1990 and rehired her along with most of the other workers who were previously employed at the facility. In July of 1990, she was discharged and subsequently brought a claim that she was discriminated because she had filed a workers' compensation claim.

The four prongs required to prove a retaliatory discharge claim in Oklahoma stated that an employee seeking remedy under must establish (1) employment; (2) an on-the-job injury; (3) medical treatment putting the employer on notice or the good-faith start of workers' compensation proceedings; and (4) consequent termination of employment. *Taylor*, 891 P.2d at 610. The relevant Oklahoma workers' compensation statute states, "No person, firm, partnership or corporation may discharge any employee because the employee has in good faith

filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted in good faith, any proceeding under the provisions of this title...." 85 O.S.1991 § 5. In *Taylor*, the Oklahoma Court of Appeals held that "The clear intent of the Retaliatory Discharge Act is "to prohibit discrimination against employees who either initiated or participated in workers compensation proceedings." *Ingram v. Oneok, Inc.*, 775 P.2d 810, 811 (Okla.1989). Exempting subsequent employers from the statute would allow them to defeat the Legislature's intent by firing or threatening to fire workers who had exercised their statutory rights. Additionally, such an exemption could readily discourage employees from exercising those rights. Therefore, we hold 85 O.S. Supp.1993 § 5 does apply to successor business employers." *Taylor*, 891 P.2d at 610.

The Michigan Court of Appeals also faced this question in *Goins v. Ford Motor Co.*, 347 N.W.2d 184 (1983). The Michigan Court of Appeals held that under prior case law it was "contrary to public policy for an employer to discharge an employee in retaliation for filing a workers' compensation claim." The court then stated that, "[t]he public policy extends to situations such as this where the employee argues an unlawful or retaliatory discharge because he or she filed a workers' compensation claim against any employer, including a previous employer." *Goins*, 347 N.W.2d 184 (1983) at 193 and 194.

The Appellate Court of Illinois faced this issue in *Darnell v. Impact Industries, Inc.*, 119 Ill. App. 3d 763, 767 457 N.E.2d 125 (1983). The employee in *Darnell,* had worked for Impact Industries, Inc. ("Impact") for one day when she was fired. Impact learned from another employee that she had filed a workers' compensation claim with her previous employer. Although the Court referred the case back to the trial court for a jury's resolution of fact issues in the case, it nevertheless held that "Arguably, the principles enunciated by the court in *Kelsay v. Motorola, Inc.* (1978), 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353, are applicable to the instant case. *Kelsay* established that "an employer's otherwise absolute power to terminate an employee at will" should not be exercised to prevent the employee from asserting his statutory rights under the Workmen's Compensation Act. (74 Ill.2d 172, 181, 23 Ill.Dec. 559, 384 N.E.2d 353.) Although in the case at bar Appellant fully exercised her rights under the Act prior to commencing work with Impact, she did allege that she was fired for exercising her statutory rights under the Act (Ill.Rev.Stat.1981, ch. 48, par. 138.4(h))." *Id* at 126.

The *Bruner v. GCGW, Inc.*, 880 So.2d 1244, (The Florida First District Court of Appeals 2004) also held that a subsequent employer could not discriminate against an employee for having filed a previous workers'

compensation claim. *Bruner* interpreted section 440.205, Florida Statutes (2000) which states "No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law" *Id*. at 1246. It held, "Appellee would have us construe section 440.205 as providing for a civil cause of action only as to an employer against whom a workers' compensation claim is filed. However, to read the statute in such a way, especially given the language, "no employer," would be to add restrictive language to the statute, which is something that we are not at liberty to do.… We, therefore, conclude that section 440.205, which is clear and unambiguous, provides for a civil cause of action against an employer who discharges an employee for having filed a workers' compensation claim against a previous employer." *Bruner*, at 1247 and further elaborated "We note, however, that even if we were to find section 440.205 ambiguous with respect to the issue at hand, legislative intent and public policy would still lead us to the same result. " *Id.*

Also in 2004, the Supreme Court of Kansas considered the issue of retaliatory discharge against an employer other than the employer against whom a workers' compensation claim was, or might be asserted, in *Gonzalez-Centeno v. North Central Kansas Regional Juvenile Detention Facility*, 278 Kan. 101 P.3d

1170 (Kansas Supreme Court 2004) In the absence of any precedent cases on this issue in Kansas, the Kansas Supreme Court reasoned "In this case of first impression, we turn to decisions from other states' courts" *Id.* at 429. It held, "We nevertheless find the reasoning of the majority of courts from other jurisdictions that have addressed the issue is persuasive, and we are convinced that the reasoning applies as well to the circumstances of the present case. We affirm the district court's ruling recognizing a retaliatory discharge cause of action against an employer other than the one against which the workers' compensation claim was filed. " *Id.* at 433, 434.

While none of these cases are binding on Missouri courts, Appellant urges that in this case of first impression in Missouri they provide persuasive arguments for defining the prohibition against wrongful discharge in R.S.Mo §287.780 as applying to all employers, whether current or subsequent. In the *absence of applicable precedent* in the Missouri courts, the analysis and public policy discussions in all of these cases direct this Court to hold that exempting subsequent employers from the statute would allow them to defeat the Legislature's intent by firing or threatening to fire workers who had exercised their statutory rights. Such an exemption could readily discourage employees from exercising those rights and obviate the purpose and intent of the Workers'

Compensation Act.

Alternatively, Appellant contends that neither *Hansome* nor *Wiedower* provide any rationale for their interpretation of legislative intent to dictate that an employer must be **the** employer at the time of the workers' compensation injury to be liable for a claim retaliatory discharge under the statute. Requiring the Appellant to meet element one of this test would defeat the purpose of R.S.Mo §287.780 by allowing an employer to terminate an employee based solely on the employee's rightful actions of filing workers' compensation claims. Therefore, this element of the *Hansome* test should be eliminated.

Appellant respectfully submits that courts should not be imposing restrictions upon that limited right that were not intended by the legislature. The plain simple language of the statute should be enforced as written. Allowing and sanctioning the wrongful behavior of retaliatory discharge by an employer simply because the employer against whom the claim was filed may not have been the employer who retaliated against the employee defeats the employee protection purposes of the statute.

II. EVEN IF ITEM 1 OF THE "TEST" ARTICULATED IN HANSOME IS THE LAW IN MISSOURI THE CIRCUIT COURT STILL ERRED IN SUSTAINING THE MOTION FOR

SUMMARY JUDGMENT BECAUSE WHETHER OR NOT THE RESPONDENT WAS A SUCCESSOR CORPORATE ENTITY TO THE RIVER CITY RENEGADES WAS A QUESTION OF MATERIAL FACT ON THE RECORD THAT SHOULD HAVE BEEN LEFT FOR TRIAL AND NOT DECIDED AS A MATTER OF LAW BY THE COURT.

Appellant contends that Respondent is not an entirely separate entity from the River City Renegades, and is a successor employer of Appellant under R.S.Mo. §288.110, which states:

> " Any individual, type of organization or employing unit which has acquired substantially all of the business of an employer, excepting in any such case any assets retained by such employer incident to the liquidation of his obligations, and in respect to which the division finds that immediately after such change such business of the predecessor employer is continued without interruption solely by the successor, shall stand in the position of such predecessor employer in all respects."

The Missouri Supreme Court interpreted this statute in *Division of*

Employment Security v. Taney County District R-III, et al., 992 S.W.2d 393, at 395, construing the terms "acquired," "business," and "substantially all," and finding that a school district stood in the place of another school district because it clearly acquired "substantially all" of the other school district's business. The Missouri Court of Appeals defined a successor employer's liability regarding workers' compensation claims in *Null v. K&P Precast, Inc.*, 882 S.W.2d 705 (Mo.App. E.D. 2000). In *Null* it held that under R.S.Mo. §287.780, successors of an employer against whom the original workers' compensation claim was filed, who have a financial interest in the enterprise, incur the original employers' workers' compensation liability. In *Custom Furs v. Hopper Furs, Ltd*., 923 S.W.2d 505 (Mo.App. 1996), the Court held that a company stood in the place of another for purposes of the Employment Security Law because if there was substantial and competent evidence that the successor company acquired substantially all of the original company's business assets when it purchased the inventory, accounts receivable, and goodwill and operated the business under the same name for several months.

In the case at bar, Respondent had a substantial financial interest in continuing the former corporation's business and thereby is subject to the former team's workers' compensation liabilities under *Null.* Furthermore, Respondent

acquired substantially all of the former team's business; Respondent employed substantially the same players, coaches, facilities, and doctors, and played in the same league as its predecessor and played against almost the identical competition. (L.F.36). Additionally, when Respondent took over the Renegades in the second half of their 2002 season, with Ed Watkins assuming the position of President, the role he previously held, it completed the season under the name River City Renegades using the same players and facilities. Thereby, Appellant contends Ed Watkins maintained control of the team for 2003, and then changed the team name to the Show Me Believers. (L.F.36) Thus, Show Me Believers "stood in the place" of the original team. Respondent not only shared a financial interest in the original franchise, it acquired substantially all of the original company's business assets, inventory, accounts receivable, and goodwill and operated the business under the same name for several months. Therefore, in the case at bar, under §288.110, *Null* and under *Custom Furs*, Respondent is clearly a "successor" employer, and is thereby liable to Appellant for retaliatory discharge pursuant to §287.780.

Appellant also contends that Respondent is liable to Appellant for wrongful discharge under the theory of corporate successor liability. The general theory of tort liability for corporate successors is analogous and instructive in this case. It

is well settled that generally corporate successors are not liable in tort for the liabilities of their predecessor corporations. However, there are four exceptions where the successor may be held liable: 1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; or (4) where the transaction is entered into fraudulently in order to escape liability for such debts. *Ernst v. Ford Motor Co.,* 813 S.W.2d 910 (Mo.App. 1991).

Appellant contends that in this case, Respondent meets the third exception in *Ernst* because "the purchasing corporation was a mere continuation of the selling corporation." Respondent took control of its predecessor, the River City Renegades, in the midst of the 2002 season. It did not change its name or identity until the subsequent year. During the remainder of the 2002 it continued to be called the River City Renegades using the same players, facilities, and schedule as the Renegades. (L.F. 38-50). After it represented itself as the River City Renegades to thousands of fans who attended these games Respondent clearly continued the activities of the selling corporation for a significant period of time. (L.F. 38-50).

In *Brockmann v. O'Neill,* 565 S.W.2d 796 (Mo.App. 1978) the Missouri

Court of Appeals examined the application of exception three under *Ernst*. In that case the transferor and transferee corporations were both in the business of general electrical contracting. The directors, primary officers and major stockholders of the transferor, at the time it ceased doing business, were also two of the incorporators, directors and major shareholders of the transferee at the time of its incorporation. The business operations of both corporations were exactly the same, namely they used the same trucks, equipment, labor force and supervisors. Additionally, at the time of the changeover, the transferee took over performance of the transferor's contracts without giving notice to the contractors and without even notifying the employees. The *Brockmann* court held that there was a "continuation" of the transferor corporation and, therefore, the transferee corporation was liable on a promissory note executed by the transferor.

Similarly, in the case at bar, both the transferor and the transferee were engaged in the professional indoor football business, both transferor and the transferee used the same equipment, followed the same schedule, had much of the same staff and management. Therefore, pursuant to *Brockmann*, Respondent's acquisition of the Renegades qualifies as a mere continuation of the selling corporation and complies with exception No. 3 in and *Ernst*. Therefore, Respondent is clearly liable under the theory of corporate successor liability.

The trial court erred in granting its Motion for Summary Judgment when it granted Respondent an extreme and drastic remedy without considering the legal merits of successor employer liability under *Null*, or of corporate successor liability under *Ernst*, without a clear precedent defining the limits of element one of the *Hansome* test. Rule 74.04(c)(3) directs that "Summary judgment is granted only where no genuine issue of material fact exists, and judgment is proper as a matter of law. *Rodgers v. Czamanske*, 862 S.W.2d 453, 457 (Mo.App. 1993). "Summary judgments are "extreme and drastic remed(ies). Trial courts must use "great care" when considering them." *ITT Commercial Finance Corp., v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371,377 (Mo. banc. 1993). "A trial court may properly grant a summary judgment if, as a matter of law, the movant is undisputedly entitled to judgment and there are no genuine disputes over any material facts. *Id.* at 376. "A genuine issue of material fact exists where the record contains competent evidence that two plausible but contradictory accounts of essential facts exist. The record is reviewed in the light most favorable to the party against whom judgment was entered, and that party is given the benefit of all reasonable inferences from the record." *Id.*

In the case at bar, Appellant's evidence on the record clearly presents competent evidence of two plausible but contradictory facts, and therefore it

should be given the benefit of all reasonable inferences from the record. The trial Court did not use great care in Summary Judgment against Appellant and therefore this Court should remand this case to the Circuit Court for trial by jury.

CONCLUSION

Allowing an employer to terminate an employee based solely upon prior workers' compensation claims, even if the claims were made against a different employer, circumvents the purpose of the workers' compensation protections and R.S.Mo. §287.780. Furthermore, nothing in *Hansome* or in *Wiedower* provides a rationale or even defines the terms of the 1st element of a claim under this statute, nor do they stand for the proposition that legislative intent dictates that this statute only include current employers. Therefore, the Court is free to reach the rationale conclusion that the statute applies to subsequent employers as well. Alternatively, there is reason to believe that Appellant provided adequate evidence that Respondent had sufficient connections with the River City Renegades to be held liable to Appellant by a jury for retaliatory discharge on the theories of successor employer liability or corporate successor liability under R.S.Mo. §288.110.

WHEREFORE Appellant respectfully asks this Court to overturn the Circuit Court's Summary Judgment against Appellant, to rule that an employer

need not be the employer at the time of an employees filing of a workers' compensation claim to be liable for retaliatory discharge under R.S.Mo §287.780, and to remand this matter to the Circuit Court for trial by jury on the issues.

Rule 84.06(c) CERTIFICATE

The undersigned certifies that Plaintiff/Appellant's Brief complies with the limitations contained in Rule 84.06(c) and Rule 360; and the number of words in the brief is 6540. In preparing this certificate, the undersigned has relied on the word count of the word processing system used to prepare the brief. The word processing system is Microsoft Word 2000.

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AFFIDAVIT OF SERVICE

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

Comes now Daniel J. McMichael, and being duly sworn upon his oath, states that on the 17th day of March, 2006, two copies of Appellant's Brief and a disc of said Brief which has been scanned for viruses and is virus-free have been served upon the parties addressed to: Mr. Richard D. Sabbert, Attorney for Defendant, 309 N. Main St., St. Charles, MO 63301.

_____
Daniel J. McMichael

Subscribed and sworn to before me this 17th day of March, 2006.

_____
Notary Public

My Commission Expires:

APPENDIX

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