

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

DOCKET NO. **SC88352**

DAVID HARRIS,

Plaintiff/Appellant

v.

WESTIN MANAGEMENT EAST, INC., and
JEREMY NEU

Defendant/Respondent

On Transfer from the Missouri Court of Appeals
Eastern District

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

This Reply Brief is filed pursuant to Supreme Court Rule 83.08(b) and (c)(3).

STATEMENT OF FACTS

Plaintiff/Appellant Harris makes no further addition to his Statement of Facts. However, Appellant does here object strongly to the entirely argumentative and one-sided “Statement of Facts” filed by Defendant/Respondent Westin. “The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument.” Supreme Court Rule 84.04(c). Respondent cited no facts supportive of the opposing position, and argumentatively presented the extraordinarily selective facts it included. It appears that most, if not all, of Westin Management’s two paragraphs of facts are argument that a prior Workers Compensation Claim form constitutes substantial, determinative admissions by Harris, and the assertion that Harris had filed a “premises liability claim” in his civil matter. [Resp. Brief p.6-7]. The first of these is wholly argumentative, and the second is just not true.

POINTS RELIED ON

I.

THE “DOCTRINE OF PRIMARY JURISDICTION” IS NOT IN DISPUTE IN THIS CASE, AND THE ISSUE IS THE STANDARD TO BE APPLIED WHEN THE JURISDICTION OF THE COURT IS CHALLENGED IN ACCORD WITH THE WORKERS COMPENSATION ACT AND WHEN THERE IS AFFIRMATIVE EVIDENCE THAT THE PLAINTIFF WAS NOT IN THE SCOPE AND COURSE OF EMPLOYMENT NOR ON THE PREMISES OF EMPLOYER AND NO SUBSTANTIVE EVIDENCE DEMONSTRATES A REAL ISSUE AS TO ANY EXCEPTION.

Crow v. Kansas City Power and Light Co., 174 S.W.3d 523 (Mo.App. W.D. 2005)

James v. Poppa, 85 S.W.3d 8 (Mo. banc 2002)

Kunce v. Junge Baking Co., 432 S.W.2d 602 (Mo.App. 1968)

II.

THIS COURT SHOULD CONSIDER APPELLANT’S CLAIMS AS TO A LACK OF REMEDY AND THE ARGUMENTS UNDERLYING THE CONSTITUTIONAL ISSUES.

STANDARD OF REVIEW

Appellant put forth in his Brief the position that this Court's review in this matter is *de novo* as to the question of law presented regarding the dismissal for lack of subject matter jurisdiction. *Ryan ex rel. Estate of Reece v. Reece*, 31 S.W.3d 82, 86 (Mo.App. W.D.2000), and as to constitutional provisions, this Court applies a broader construction due to their more permanent character, giving due regard to the primary objectives of the constitutional provision under scrutiny. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 899 (Mo. banc 2006); *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991). This is noted here because, while Westin Management appears to agree on the standard at one point [Resp.Brief p. 9], it later states that Harris has failed to "clearly articulate" the applicable standard, and suggests the cases cited are not "pertinent." [Resp.Brief p. 16]. Appellant is unable to discern the error, if any, but will be pleased to yield if a different standard is proper. However, it is believed that Respondent is mixing up the "standard of review" with the standard to be applied by a trial court in its initial determination.

ARGUMENT

Plaintiff/Appellant Replies here solely to address perceived misstatements and novel arguments within Defendant/Respondent's Brief.

I.

THE “DOCTRINE OF PRIMARY JURISDICTION” IS NOT IN DISPUTE IN THIS CASE, AND THE ISSUE IS THE STANDARD TO BE APPLIED WHEN THE JURISDICTION OF THE COURT IS CHALLENGED IN ACCORD WITH THE WORKERS COMPENSATION ACT AND WHEN THERE IS AFFIRMATIVE EVIDENCE THAT THE PLAINTIFF WAS NOT IN THE SCOPE AND COURSE OF EMPLOYMENT NOR ON THE PREMISES OF EMPLOYER AND NO SUBSTANTIVE EVIDENCE DEMONSTRATES A REAL ISSUE AS TO ANY EXCEPTION.

Respondent Westin spends considerable effort in arguing the existence of the “doctrine of primary jurisdiction,” which “doctrine” is simply not challenged as a general principle of law in this matter. The legal issues here are, 1) whether the trial court abused its discretion in this case, and 2) the standard to be applied by the trial court in determining whether a threshold challenge has been made, and whether the judicial branch has any authority over its own jurisdiction at all.

As to the relevant question of the integrity of the civil courts and the threshold standards, it is well established that “the circuit court is not only the arbiter of the law, but the facts necessary to decide the question.” *Kesterson v. Wallut*, 116 S.W.3d 590, 594 (Mo.App. W.D.2003). While it is not set out as such in Westin Management’s Brief, it appears their dispute is with the remainder of the standard. In this regard, Respondent

does not really cite challenging authority against the right of the civil court to retain the right to exercise its discretion over this as a fact question. *Crow v. Kansas City Power and Light Co.*, 174 S.W.3d 523, 528 (Mo.App. W.D. 2005). Nor is there substantive challenge to the strong authority establishing a threshold, as low as it may be, that the basis for dismissal is that it “must appear by the preponderance of the evidence that the court is without jurisdiction.” *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002)(emphasis added).

There Are No “Disputed Facts” as to the Substantive Issues

In attempting to manufacture some “disputed facts,” Westin Management can only cite to one point, the filing of a pro-se Claim form by Harris. This is in no way a disputed “fact,” although Westin cites to its one argument based on this point in no less than six different places. Other than Westin’s improper reference to an alleged “premises liability” count, Respondent raises no other points in dispute for either the Court or the Commission.

Westin’s argument regarding the effect of the pro-se Workers Compensation claim form illustrates precisely the inherent and unresolvable contradiction in its position. Six times within its Brief, Westin argues that the fact that Harris signed a Claim form is an admission that there is jurisdiction within the jurisdiction of the Workers Compensation Act. [Resp.Brief pp. 6-7,12,13,19,21,27]. Westin bases this argument on the fact that, above the line for signature there appear the printed words “Claim is hereby made for all

compensation as provided in the Missouri Workers' Compensation law relating to injury (or death) of the employee by accident arising out of an in the course of the employment." [Resp.Brief p. 6-7, 13,19, and Respondent's Appendix A3]. There is really no other point relied on by Respondent (other than the "premises liability" misrepresentation) to argue a reason to send the matter to the Commission.

The Claim form (form WC-21) is the only way for anyone except an employer to place a matter before the Division of Workers' Compensation. The form must be signed, and the pre-printed lettering relied on by Westin is built-in. [L.F. p.27-28]. If any of the arguments of Westin are to be believed, there is in fact no possible manner in which a civil plaintiff can place the issue of jurisdiction before the Division without a full admission that he or she is subject to the exclusive jurisdiction of the Act.

This is not a small matter. Appellant asserts that there is in fact no alternative except where the parties themselves agree to circumvent the procedures. In this case, Westin Management relies on the technical requirements of filing a claim, and the mandated language of the Claim form to bootstrap an otherwise completely unsupported argument for jurisdiction. First, Westin argues that any suggestion of Workers' Compensation exclusivity mandates the trial court dismiss in favor of the Commission. Second, Westin argues that the very filing of the Claim before the Commission proves (or at least supports) a finding of exclusive jurisdiction. This aggressively offensive use of the exclusivity provisions of the Act should not be acceptable, and indeed would lead to

immunity for defendants wherever they could raise the slightest question of jurisdiction.

The other “disputed fact” that Westin suggests supports the need for Commission expertise is the alleged inclusion of a “premises liability” count in the underlying Petition. [Resp.Brief p. 13, 28]. As the Appellate Court properly held, there is no actual premises liability claim within the Petition, and no allegations are made within the Petition that would suggest the elements of such a claim. In fact, examination of the pleading shows that the sole allegations of negligence in the “premises liability” count involve assertions that Westin Management failed to have signs to warn their valet drivers to proceed with caution, and that the public street had no signs to warn the general public to watch out for Westin’s drivers entering the public road. [L.F. p. 145]. These are actually just additional negligence counts, and there is not one single allegation, or even a suggestion, at any point in the pleadings that Harris was ever on Westin’s premises. The allegations of Count VI of the Second Amended Petition (or its predecessor pleadings) simply are not premises liability claims, regardless of the poorly chosen heading.

Westin is well aware of this. It is improper for Respondent to suggest there is anything in this suggesting that Harris was “thereby acknowledging he was on” Westin’s premises. [Resp. Brief p. 13,28]. Westin mysteriously pushes the limits of this misleading position by then declaring that “there would be no premises liability if his destination was an entrance around the corner.” [Resp. Brief. p. 28]. In fact, it is entirely

undisputed that Harris was in a vehicle being driven past the Westin on the way to the employee entrance which was completely on the other side of the building “around the corner.” [Police Report, A-8-A-11; Affidavit of Harris, A-16,17; Admissions by Westin, A-33; Depo. of Melodee Lee, A-29]. This attempt to manufacture facts or issues cannot be the basis for determination of the jurisdiction of the courts.

At this point, Westin Management is wholly without a basis to suggest any reason for the trial court to dismiss this matter. Indeed, there is some speculation that somehow something to do with the “walkway” across Spruce Street could have been construed by the Commission to be an “extended premises” sufficient to trigger the need for Commission expertise. But speculation is all that is offered. There is not one single case offered by Westin, and Harris is unaware of any after extensive searching, that suggests the possibility that a vehicle, driven by a non-employee, traveling on a public street, not stopped, not engaged in parking nor discharge of passengers, not entering the premises of the employer, not subject in any way to control or direction by the employer, and not on an assigned route to the workplace, could ever be considered to be on the “extended premises” of the employer simply by virtue of having crossed perpendicularly over a walkway maintained by the employer for pedestrians. These are truly the undisputed facts the trial court had before it. However, the court also had before it the undisputed facts that Harris was not at work, had not reported for work, was himself not on an assigned route to work, that there are no exceptions to the “coming and going” rule of exclusion

here, and that there is no allegation by anyone that the “walkway” had anything to do with the accident.

While the “preponderance of the evidence” standard is proper and practical, this case does not even have a trace of evidence to suggest the Commission has a role. The trial court followed the correct procedure by allowing the matter to be subject to discovery and to be argued and briefed by the parties below. However, the trial court failed to find any facts creating an issue to be determined by the Commission, and so did abuse its discretion in dismissal.

In another case and a different context, some of Respondent’s speculated situations could indeed mandate a dismissal in favor of the Commission. In *this case however*, those arguments are facetious and disingenuous because at the time the trial court heard the Motion arguments, and now as well, the actual facts were well set out by extensive Discovery. There was no need to speculate on whether Harris’ pro-se claim suggested he was “on the premises” because Westin had deposed Harris, they had examined the police report, the parties had deposed the actual witnesses and the relevant representatives of Westin Hotel as well. They *knew* the accident occurred in the middle of the public street. They *knew* Harris was not attempting to enter the premises from the area near the accident but rather was required to enter at a point requiring his ride to take him around two more corners. They *knew* there was no causal relationship to the alleged “walkway.” And there was no need to speculate on whether Harris’ claim created a

question as to whether he was working at the time because they *knew* there was no suggestion whatsoever that Harris was in the course and scope of employment at the time of the accident. At the time the trial court erred in dismissing this cause, there were no relevant undisputed facts, and other than the undisputed point that Harris was an employee of Westin, there were no facts at all to support the dismissal. Above all, Westin has no basis to stand before this Court and state that the pro-se Claim suggests Harris was on the premises, or entering the premises, or that he was in the course or scope of employment. Because they *know* that is not true.

Mis-statements of Law

Respondent Westin cites *State ex rel Consumer Adjustment Co. v Anderson*, 815 S.W.2d 84, 85-6 (Mo.App. 1991) for the proposition that “a record showing a plaintiff has filed both a common law tort action and a compensation claim based on the same incident is sufficient to require the trial court to dismiss in favor of the Commission’s primary jurisdiction.” [Resp. Brief p. 11]. While there are numerous mis-statements as to the cases cited, this statement is certainly worthy of response. The *Anderson* case is not long. But nowhere within its two pages does it contain such an assertion. The *Anderson* plaintiff had filed both a workers compensation claim and a Count in a civil suit for injuries received during an assault at work. However, the *Anderson* court noted clearly and up front that Anderson’s “Count II alleges that while at work for [Consumer], Plaintiff was assaulted by a co-worker...” *Anderson*, 815 S.W.2d at 85 (emphasis added).

This is another of many cases holding that the determination of whether an injury is due to accident or intentional act, *where it is acknowledged that the injury was on the job*, is a question for the Commission. It did not discuss the relationship, if any, to the filing of a Claim.

II. THIS COURT SHOULD CONSIDER APPELLANT'S CLAIMS AS TO A LACK OF REMEDY AND THE ARGUMENTS UNDERLYING THE CONSTITUTIONAL ISSUES.

Appellant must concede that trial counsel in this matter did not anticipate, and did not file, constitutional challenges at the Motion hearing on Respondent's Motion to Dismiss. In this case, this should not keep this Court from reviewing the essential issues to fair determination of the case. While there are constitutional dimensions to the problems presented by the current legislative court scheme, the failings pointed out in Point III of Appellant's Brief are also founded on the substance of the law at issue. As to the constitutionality arguments, Appellant concedes that these were raised on Appeal.

If this Court finds it improper to consider the violations of the Missouri Constitution in this matter, the Court should still consider the arguments underlying those points because, as a matter of statutory construction, they demonstrate the wholly contradictory and abusive circumstances that arise if the civil courts are deprived of the ability to even assess their own jurisdiction, or if the standard is lowered to require a mere suggestion of the lack of jurisdiction by a defendant without even the minimal

threshold determination which has been properly required.

In this regard, Respondent's arguments demonstrate how wildly a defendant may swing the sword of exclusive jurisdiction if the Courts abandon their capacity to determine a threshold for their own jurisdiction. Respondent disregards each and every failing of the legislative scheme to provide any remedy under the circumstances of this case.

CONCLUSION

For the reasons stated above, Plaintiff prays this Court find in favor of Plaintiff and hold that jurisdiction of this matter does lie in the Circuit Court and Order this case be remanded for further proceedings in the Circuit Court, for costs of the proceedings, and for such other relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing document were served by U.S. mail, postage prepaid, this ____ day of _____, 2007, to Mara Cohara, Lathrop & Gage L.C., 2345 Grand Blvd., Kansas City, MO 64108-2684, Telephone: 816-292-2000; Fax: 816-292-2001, attorneys for all defendants.

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(c)

I, David N. Damick, counsel for Plaintiff/Appellant herein, do certify that:

1. The attached Brief of Appellant includes the information required by Rule 55.03;
2. The attached Brief of Appellant complies with the limitations contained in Rule 84.06(b);
3. The number of words in the attached Brief of Appellant is 3208, inclusive of cover, certificate of service, this certificate, signature block and appendix, as determined by WordPerfect 8;
4. The diskette accompanying this Brief pursuant to Rule 84.06(g) has been scanned for viruses and the undersigned certifies that to the best of his knowledge, information and belief, is virus-free.

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