

IN THE SUPREME COURT OF THE STATE OF MISSOURI

CASE NO. SC87773

STATE EX. REL. MW BUILDERS, INC.,

Relator,

vs.

**THE HONORABLE SANDRA C. MIDKIFF,
Judge of the Circuit Court of Jackson County, Missouri, Division 1**

Respondent.

**PETITION IN PROHIBITION FROM THE CIRCUIT COURT OF JACKSON
COUNTY, MISSOURI, SIXTEENTH JUDICIAL CIRCUIT, DIVISION 1
The Honorable Sandra C. Midkiff, Circuit Judge**

**BRIEF OF RELATOR
MW BUILDERS, INC.**

BATY, HOLM & NUMRICH, P.C.

**Theresa A. Otto, Esq. (#43453)
John J. Gates, Esq. (#51280)
4600 Madison Avenue, Suite 210
Kansas City, MO 64112-3012
Telephone: 816-531-7200
Telecopy: 816-531-7201**

ATTORNEYS FOR RELATOR

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JURISDICTIONAL STATEMENT

This matter involves the question of whether The Honorable Sandra C. Midkiff (“Respondent”) exceeded her jurisdiction in denying MW Builders, Inc.’s (“Relator” or “MW Builders”) motion to dismiss for lack of subject matter jurisdiction in direct opposition to Missouri’s Workers’ Compensation Law (Chapter 287, RSMo. 2000), which provides a statutory employer with immunity for such actions (§§ 287.040 and 287.120, RSMo. 2000), thereby allowing Randy and Patricia Piveral (“Plaintiffs”) to continue prosecution of a civil lawsuit for personal injuries sustained by plaintiff Randy Piveral (“Piveral”) while he was working within the course and scope of his employment for a subcontractor of Relator, a general contractor, and hence involves the validity of a statute of the State of Missouri.

This Court has jurisdiction under the Missouri Constitution, Article V, §§ 3 and 4.1, and Missouri Supreme Court Rule 84, as well as §§ 530.010 and 530.090, RSMo. 2000, to hear and decide whether Respondent, by issuance of her May 25, 2006 order denying Relator’s motion to dismiss for lack of subject matter jurisdiction, exceeded her jurisdiction.

This is a petition for writ of prohibition pursuant to Missouri Supreme Court Rules 84 and 97. On May 25, 2006, Respondent issued an Order denying Relator’s motion to dismiss for lack of subject matter jurisdiction. **(Exhibit 1, Appendix, A1)**. On June 8, 2006, Relator filed a petition for a writ of prohibition with suggestions in support in the Missouri Court of Appeals, Western District. **(Exhibit 2, Appendix, A2)**. On June 12,

2006, the Missouri Court of Appeals, Western District, denied Relator's petition for writ of prohibition. (**Exhibit 3, Appendix, A24**). On June 19, 2006, Relator filed a petition for writ of prohibition with suggestions in support in this Court. On August 22, 2006, this Court granted a preliminary writ of prohibition. On November 2, 2006, Plaintiffs filed an answer on behalf of the Respondent.

The proper remedy to contest the denial of a writ of prohibition is to request an extraordinary writ from a higher court and not a direct appeal. *See* § 530.020, RSMo. 2000; *Office of Public Counsel v. Missouri Public Service Comm'n*, 741 S.W.2d 114, 115 (Mo. App. 1987); *State ex rel. Arnett v. Greer*, 921 S.W.2d 128, 129 (Mo. App. 1996).

STATEMENT OF FACTS

I. Factual History

On February 19, 2003, Relator MW Builders, Inc.'s ("Relator" or "MW Builders"), whose usual business is general construction contracting, entered into a construction contract for a project (the "Project") at Northwest Missouri State University (the "University") in Maryville, Nodaway County, Missouri, wherein MW Builders would "furnish all labor and materials and perform all work required for furnishing and installing all labor, materials, equipment and transportation and everything necessarily inferred from the general nature and tendency of the plans and specifications for the proper execution of the work for Residence Halls - Phase I, drawings and addendums all as prepared by [the architect], and shall do everything required by this Agreement,

General Conditions of the contract, specifications, and drawings and all other contract documents.” (Exhibit 4, Appendix, A39, A41). Portions of the Contract Form have been redacted for proprietary purposes.

On March 12, 2003, MW Builders entered into a “Standard Form of Subcontract” (“Masonry Subcontract”) for the Project with Northwest Missouri Masonry, Inc. (“NMM”). *See id.* at A46. Exhibit A to the Masonry Subcontract states that NMM “shall furnish all layout, labor, material, tools, equipment and supervision required to perform *Masonry & Cast Stone*, in its entirety per plans, specifications, Missouri Labor Standards Annual Wage Order No. 9 and the state of Missouri requirements.” *See id.* at A60.

The Masonry Subcontract obligated NMM to “begin work as soon as instructed to do so by MW [Builders] and shall carry the same forward promptly, efficiently and at a speed as required to satisfy the project schedule and that will not damage or delay MW.” *See id.* at A49. The Masonry Subcontract incorporated the Prime Contract, which provided that Building 2 was to be substantially complete by June 21, 2004. *See id.* at A42 and A47

Masonry work is typical in constructing buildings and is routinely performed on construction projects on which MW Builders is contracted. *See id.* at A40. Masonry work is an essential aspect of MW Builders’ business as certain buildings cannot be built without it. *See id.* Masonry work is conducted on a regular and frequent schedule on construction projects and was being done on a regular schedule on the University project.

See id. If MW Builders had not hired NMM, the masonry work would have required MW Builders to hire permanent employees to perform such work. *See id.*

MW Builders was hired by the University to coordinate all of the general construction activities for the residence halls. **(Exhibit 5, Appendix, A87).** Representatives of the University visited the construction site weekly to review the progress of the Project. *See id.* Representatives of the University generally left construction of the residence halls to MW Builders and were interested only in the result of the work. *See id.* The University did not control the daily activities on the construction site or the means and methods of construction; rather, MW Builders controlled the daily activities of the construction site. *See id.* at A88 The University did not direct MW Builders or its subcontractors on how to build residence halls; rather, the University's architects provided MW Builders with plans and specifications, and it was up to MW Builders to construct the residence halls. *See id.* During construction, the University had relinquished control of the construction site, and MW Builders was in charge of the construction project and responsible for all construction activities. *See id.*

On September 11, 2003, plaintiff Randy Pivaler ("Pivaler"), an employee of NMM, sustained personal injuries when he fell from scaffolding while erecting improvements on Building 2 on the Project. **(Exhibit 6, Appendix, A92).**

II. Procedural History

On August 24, 2005, Plaintiffs filed their "Petition for Damages" naming as defendants, MW Builders, Summit Specialty Productions, Inc. (scaffolding supplier),

NMM, Stephen K. Sears (co-employee), and Charles W. Sears (co-employee). (**Exhibit 6, Appendix, A89**). Pivaler alleges that, on or about September 9, 2003, MW Builders erected the scaffolding and/or its subcontractors erected the scaffolding under the control or supervision of MW Builders and at the direction of MW Builders at the northwest corner of Building 2. *See id.* at A92. Plaintiffs allege that MW Builders was negligent when it failed to properly erect or supervise the erection of the scaffolding, knew or should have known that the scaffolding was unsafe, failed to ensure compliance with OSHA, failed to inspect the scaffolding, failed to install or post warnings regarding the unsafe condition of the scaffolding, and/or failed to install any type of safety system. *See id.* at A93.

On October 13, 2005, Relator filed its Answer to the Petition. (**Exhibit 7, Appendix, A106**). On January 17, 2006, Relator filed a motion to dismiss arguing that it was the general contractor on the project and was plaintiff Randy Pivaler's statutory employer pursuant to §§ 287.040.1 and 287.040.3, and, consequently, jurisdiction rested solely with the Labor and Industrial Relations Commission, and the Circuit Court lacked subject matter jurisdiction over the Action. (**Exhibit 4, Appendix, A25**). On March 27, 2006, Plaintiffs filed their suggestions in opposition to Relator's motion to dismiss. (**Exhibit 8, Appendix, A117**). Plaintiffs argued that Relator was not an independent contractor and Plaintiff was not injured on or about Relator's premises. Plaintiffs further stated that Kansas law applies and additional discovery was needed. Plaintiffs, however,

did not explain how Kansas law supported their argument, and Plaintiffs did not specifically identify the discovery needed.

On April 11, 2006, Relator filed its reply suggestions in support of the motion to dismiss. **(Exhibit 5, Appendix, A77)**. Relator responded directly to Plaintiffs' two substantive arguments, explained that Kansas law supports statutory employment under the circumstances, and pointed out that the Plaintiffs never sought discovery. Plaintiffs did not file sur-reply suggestions in opposition to Relator's motion to dismiss. Respondent did not conduct a hearing or hold oral arguments. On May 25, 2006, Respondent issued an Order denying Relator's motion to dismiss. **(Exhibit 1, Appendix, A1)**.

On June 8, 2006, Relator filed a petition for a writ of prohibition with suggestions in support in the Missouri Court of Appeals, Western District. **(Exhibit 2, Appendix, A2)**. On June 12, 2006, the Missouri Court of Appeals, Western District, denied Relator's petition for writ of prohibition. **(Exhibit 3, Appendix, A24)**.

On June 19, 2006, Relator filed a petition for writ of prohibition with this Court. On August 22, 2006, this Court granted a preliminary writ of prohibition. On November 2, 2006, Plaintiffs filed an answer on behalf of the Respondent.

POINTS RELIED ON

I.

Relator is entitled to an order prohibiting Respondent from doing anything other than vacating Respondent's May 25, 2006 order denying Relator's motion to dismiss, and thereafter entering an order sustaining said motion to dismiss, because Respondent is without subject matter jurisdiction as to Plaintiffs' claims against Relator and thus Respondent exceeded her jurisdiction in denying Relator's motion to dismiss, in that Plaintiff Randy Piveral was the statutory employee of Relator at the time of the accident and injuries alleged and, therefore, Missouri's Workers' Compensation Law vests exclusive jurisdiction over Plaintiffs' claims against Relator with the Missouri Labor and Industrial Relations Commission and not with Respondent.

Cases

Horner v. Hammond, 916 S.W.2d 810 (Mo. App. 1996)

Vatterot v. Hammerts Iron Works, Inc., 968 S.W.2d 120 (Mo. banc 1998)

Logan v. Show-me Electric Coop., 122 S.W.3d 670 (Mo. App. 2003)

Statutes

§ 287.040

§ 287.120

ARGUMENT

I.

Relator is entitled to an order prohibiting Respondent from doing anything other than vacating Respondent's May 25, 2006 order denying Relator's motion to dismiss, and thereafter entering an order sustaining said motion to dismiss, because Respondent is without subject matter jurisdiction as to Plaintiffs' claims against Relator and thus Respondent exceeded her jurisdiction in denying Relator's motion to dismiss, in that Plaintiff Randy Piveral was the statutory employee of Relator at the time of the accident and injuries alleged and, therefore, Missouri's Workers' Compensation Law vests exclusive jurisdiction over Plaintiffs' claims against Relator with the Missouri Labor and Industrial Relations Commission and not with Respondent.

I. Standard of Review

A motion to dismiss for lack of subject matter jurisdiction is an appropriate means of raising the Workers' Compensation Law as a defense to a common law tort action. *See Gabler v. McColl*, 863 S.W.2d 340, 342 (Mo. App. E.D. 1993). A Court should grant a motion to dismiss when "it appears" that the Court lacks subject matter jurisdiction. *See* Rule 55.27(g)(3). As the term "appears" suggests, the quantum of proof is not high. *See Parmer v. Bean*, 636 S.W.2d 691, 694 (Mo. App. E.D. 1982). The party raising the defense must show by a preponderance of the evidence that the court is without subject matter jurisdiction. *See Gabler*, 863 S.W.2d at 342.

The question of whether there is subject matter jurisdiction is usually a question of fact left to the sound discretion of the trial judge. *See Parmer*, 636 S.W.2d at 696. Under Rules 55.27 and 55.28, the Court may review affidavits, exhibits and evidence on the question of jurisdiction. *See id.* The Missouri Supreme Court “has noted that the worker’s compensation act is to be liberally construed with a view to the public welfare, and in instances where a question of jurisdiction is in doubt, it should be held in favor of the Labor and Industrial Relations Commission.” *State ex rel. MSX International, Inc. v. Dolan*, 38 S.W.3d 427, 429 (Mo. banc 2001).

“Prohibition lies to prevent circuit courts from exercising jurisdiction over actions where workers’ compensation provides the exclusive remedy; subject matter jurisdiction over such matters properly lies in the Labor and Industrial Relations Commission.” *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 621 (Mo. banc 2002). Prohibition is particularly appropriate when the trial court, in a case where the facts are uncontested, wrongly decides a matter of law thereby depriving a party of an absolute defense. *See State ex rel. Feldman v. Lasky*, 879 S.W.2d 783, 784-85 (Mo. App. 1994); *State ex rel. Nixon v. Westbrooke*, 143 S.W.3d 737, 739 (Mo. App. 2004).

While the standard of review for such motions is typically an abuse of discretion standard, the Plaintiffs have not addressed the facts asserted in Relator’s motion to dismiss and reply suggestions in support of Relator’s motion to dismiss; therefore, the facts presented above should be deemed *uncontested*. Consequently, the proper standard of review for this Court is to determine this question of law *de novo*. *See Ford Motor Co.*

v. *City of Hazelwood*, 155 S.W.3d 795, 798 (Mo. App. 2005) (“[W]here the facts relevant to subject-matter jurisdiction are uncontested, the court’s review is *de novo*.”).

II. Argument

A. MW Builders is Pivaler’s Statutory Employer

The Missouri Workers’ Compensation Act defines statutory employment in section 287.040, RSMo. 2000. The relevant subsections of the statute are as follows:

1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on ***shall be deemed an employer*** and shall be liable under this chapter to such contractor, his subcontractors, and ***their employees***, when injured or killed ***on or about the premises*** of the employer while doing work which is in the usual course of his business.

3. The provisions of this section shall not apply to the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor but ***such independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors when employed on or about the premises where the principal contractor is doing work.***

(Emphasis added). Section 287.120 provides for employer immunity in civil cases and states as follows:

1. *Every employer subject to the provisions of this chapter* shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and ***shall be released from all other liability therefor whatsoever, whether to the employee or any other person.***

2. *The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.*

(Emphasis added).

As Pivaler's statutory employer, MW Builders is immune from common law liability to the Plaintiffs. "Missouri Workers' Compensation Law preempts judicial resolution of tort claims arising 'out of and in the course of' employment." *State ex rel. Larkin v. Oxenhandler*, 159 S.W.3d 417, 420 (Mo. App. 2005). "The Workers' Compensation Law provides for the exclusive rights and remedies of injured workers." *Groh v. Kohler*, 148 S.W.3d 11, 13 (Mo. App. 2004). "Section 287.120 gives an employer immunity from common law liability." *Sexton v. Jenkins & Associates*, 41 S.W.3d 1, 5 (Mo. App. 2000). The Missouri Supreme Court "has noted that the worker's compensation act is to be liberally construed with a view to the public welfare, and in

instances where a question of jurisdiction is in doubt, it should be held in favor of the Labor and Industrial Relations Commission.” *State ex rel. MSX International, Inc. v. Dolan*, 38 S.W.3d 427, 429 (Mo. banc 2001).

In *State ex rel. Tri-County Elec. Co-op. Ass’n v. Dial*, 192 S.W.3d 708, 711 (Mo. banc 2006), this Court recently re-emphasized this general prohibition regarding civil claims by an employee against an employer and held that the issue of whether such a claim falls outside the scope of the workers’ compensation law *shall* be determined by the Labor and Industrial Relations Commission, thus eliminating any doubt in Missouri case law regarding exceptions to employer immunity.

1. MW Builders was an Independent Contractor under Section 287.040.3

Section 287.040.3 requires MW Builders to demonstrate that it was an independent contractor while improvements were being erected on the construction site, and Pivaler, who was employed by a subcontractor of MW Builders, was injured while on or about the construction site. Pivaler’s only argument in the Trial Court against application of § 287.040.3 was that MW Builders was not an independent contractor because the University “retained significant control over the project and the premises on which the work was being performed.” (**Exhibit 8, Appendix, A117-A118**).

Pivaler cited several contract provisions without reference to the day-to-day construction activities, and Pivaler cited one Missouri case, *Horner v. Hammond*, in arguing that the University retained significant control over the premises. 916 S.W.2d

810 (Mo. App. 1996). Contractual provisions, however, cannot be read in isolation and must be viewed as part of a larger analysis of whether a landowner controls construction. *See, e.g., Logan v. Show-me Electric Coop.*, 122 S.W.3d 670, 676 (Mo. App. 2003) (contract that required an independent contractor to use specified materials, follow detailed construction documents, and adhere to directives about the sequence of work was not sufficient to show that owner was substantially involved in overseeing construction). Furthermore, the *Horner* case contains facts virtually identical to the present case and actually found an independent contractor relationship, thus supporting Relator's position.

In *Horner*, the plaintiffs were injured while erecting steel on a construction site when the structure on which they were standing collapsed. *See id.* at 813. The plaintiffs were employees of the structural steel subcontractor, and they filed a civil lawsuit against the landowner (Hammons) and the general contractor with whom their employer contracted (Tweedy). *See id.* The court of appeals found that Hammons hired Tweedy to coordinate all of the general construction activities for the hotel. *See id.* at 816. Hammons rarely came to the site and generally left construction up to Tweedy. The plaintiffs failed to demonstrate that "Hammons *controlled the daily activities* of Tweedy in construction of the hotel," and confirmed the trial court's conclusion that Tweedy was an independent general contractor retained by the owner to erect the hotel. *Id.* (emphasis added).

Piveral cites numerous contract provisions in support of his argument that MW Builders was “subject to the control of” the University. (**Exhibit 8, Appendix, A117-A121**). For example, Piveral points out that the Director of Purchasing for the University shall give “orders and directions,” and the University had the right to fire incompetent subcontractors, access the work, and order repairs. *See id.* Furthermore, the University required MW Builders to abide by affirmative action rules, prevailing wage laws, and submit data to the University. *See id.* MW Builders was also required to attend periodic meetings with the University. *See id.*

Piveral’s narrow analysis ignores what actually occurred on the Project. *See Logan, supra*, at 676. MW Builders’ employees were at the construction site on a daily basis during construction. MW Builders was hired by the University to coordinate all of the general construction activities for the residence halls. Representatives of the University visited the construction site weekly to review the progress of the Project. Representatives of the University generally left construction of residence halls to MW Builders and were interested only in the result of the work.

The University did not control the daily activities on the construction site or the means and methods of construction; rather, MW Builders controlled the daily activities of the construction site. The University did not direct MW Builders or its subcontractors on how to build residence halls; rather, the University’s architects provided MW Builders with plans and specifications, and it was up to MW Builders to construct the residence halls. During construction, the University had relinquished control of the construction

site, and MW Builders was in charge of the construction project and responsible for all construction activities.

The similarities between the *Horner* case and the present case are highlighted on the following page.

<u>Horner v. Hammond</u>	<u>The Present Case</u>
Plaintiff injured while erecting steel on a construction site when the structure on which he was standing collapsed	Pivaler injured while laying brick on a construction site when the scaffolding on which he was standing collapse
Plaintiff was employee of structural steel subcontractor	Pivaler was employee of masonry Subcontractor
Owner hired general contractor to coordinate all of the general construction activities for the hotel	University hired MW Builders to coordinate all of the general construction activities for the residence halls
Owner occasionally visited the construction site	Representatives of the University visited the construction site weekly to review the progress of the Project
General contractor was in charge of construction project and responsible for all construction activities	MW Builders was in charge of the construction project and responsible for all construction activities
Owner generally left construction up to general contractor and did not dictate the details of the operation to general contractor	Representatives of the University generally left construction of residence halls to MW Builders and were interested only in the result of the work; University did not direct MW Builders or its subcontractors on how to build residence halls

In Horner, the court of appeals was analyzing the statutory employment issue under § 287.040.1, **not** § 287.040.3. The *Horner* court defined an independent contractor as “one who contracts to perform work according to his own methods without being subject to the control of his employer except as to the result of his work.” *Id.* at 816. If one looks only at the definition of “independent contractor” contained in the *Horner* case, there can be no question that MW Builders performed the work according to its own methods and the University only controlled the result of MW Builders’ work. While Piveral accurately recites the definition of an independent contractor found in the *Horner* case, he ignores the court’s holding in *Horner*: the owner must control “*the daily activities*” of the general contractor. *See id.* It is uncontested that the University simply did not control the daily activities of MW Builders. Under § 287.040.3, MW Builders was a statutory employer of Mr. Piveral.

The Missouri Supreme Court has held that § 287.040.3 constitutes “an independent and alternative statutory basis for a constructive employment relationship.” *Vatterot v. Hammerts Iron Works, Inc.*, 968 S.W.2d 120, 122 (Mo. banc 1998). In other words, an alleged statutory employer need not satisfy both §§ 287.040.1 and -.3. *See id.* at 122-23. Numerous Missouri cases support the conclusion that the general contractor is the statutory employer of a subcontractor’s injured employee. *See, e.g., Quinn v. Clayton Const. Co.*, 111 S.W.3d 428, 433 n.3 (Mo. App. 2003) (“As the general contractor, Clayco was a statutory employer of James Quinn. Section 287.040.3 RSMo. 2000”); *Gunnett v. Girardier Bldg. and Realty Co.*, 70 S.W.3d 632, 641 n.12 (Mo. App. 2002)

(“Gunnnett was employed by the roofing sub-contractor for the project. As such, the general contractor was a statutory employer of Gunnnett, and defendant a supervisor. *See* Section 287.040.3”); *Sexton v. Jenkins & Assoc., Inc.*, 41 S.W.3d 1, 5 (Mo. App. 2000) (independent general contractor was “the statutory employer of Sexton under § 287.040.3 as a matter of law”).

2. The Injury Occurred On or About the Premises of MW Builders Under § 287.040.1

Missouri courts have summarized the statutory employer relationship under § 287.040.1 as existing when: (1) the work is performed pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and, (3) the work is in the usual course of the alleged statutory employer’s business. *See, e.g., State ex rel. MSX International, Inc.*, 38 S.W.3d at 429. Pivaler’s only argument that MW Builders is *not* a statutory employer under § 287.040.1 is similar to Pivaler’s argument relating to § 287.040.3 insofar as Pivaler alleges that “the premises” were not in the “possession and control” of MW Builders.

In *Horner*, the plaintiff argued that the premises were not “owned” by the general contractor. The Court of Appeals held that “ownership of the property is not required to establish that work was being performed ‘on or about the premises’ of a statutory employer.” Indeed, the test is *not* whether Pivaler was injured on land *owned* by MW Builders. Rather, the test is whether the property owner had relinquished possession and control of the premises to MW Builders, and whether MW Builders was in charge of the

construction project and responsible for all construction activities. *See Horner*, 916 S.W.2d at 817.

In *Horner*, “Tweedy was the general contractor in charge of the construction project and responsible for all construction activities. Hammons had relinquished possession and control of the premises to Tweedy, and Tweedy retained [the plaintiffs’ employer] to erect the structural steel. [The plaintiffs] were then injured on the construction site while performing their job duties for [their employer].” *Id.* The court of appeals held that the plaintiffs were injured “on or about the premises” of the general contractor. In the present case, MW Builders was the general contractor and in charge of construction. The University relinquished possession and control, and the tradesmen were necessarily on the construction site in order to perform their work.

B. Kansas Law Further Supports Prohibition

Piveral argued in the Trial Court that Kansas law should apply to the analysis of whether he was a statutory employee of MW Builders because the contract between MW Builders and Piveral’s employer, NMM, contains a choice of law provision requiring claims between MW Builders and NMM to be governed by Kansas law. (**Exhibit 8, Appendix, A127**). However, Piveral was not a party to the contract between MW Builders and NMM. *See JTL Consulting, LLC v. Shanahan*, 190 S.W.3d 389, 399-400 (Mo. App. 2006) (In order for a third party to be able to enforce a contract, the contract terms must clearly express that the contracting parties intended the third party to have the right to maintain an action on the contract.). Furthermore, Piveral has not explained why

Kansas substantive law would give the Circuit Court subject matter jurisdiction in this case. Even if this Court applies Kansas law in the present case, Piveral's claims against MW Builders should still be dismissed.

In *Robinett v. Haskell Co.*, 12 P.3d 411 (Kan. 2000), the Kansas Supreme Court discussed this issue at length in holding that a general contractor is immune from civil liability to the employee of a subcontractor. Under K.S.A. § 44-503(g), where the subcontractor is subject to the Kansas workers' compensation law and has secured the payment of compensation for all persons for whom the subcontractor is required to secure such compensation, then "the principal [i.e., general contractor] shall not be liable for any compensation . . . and such person shall have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act." The Court in *Robinett* held, "Immunity advances the entire purpose of [§ 44-503] by encouraging principal contractors to fulfill their ultimate responsibility for coverage by providing for such coverage in their negotiations with subcontractors." *Id.* at 420. In the present case, MW Builders required Piveral's employer to provide workers' compensation for its employees. *See* Exhibit 4, Appendix, at 113.

The Supreme Court of Kansas in *Robinett* concluded as follows:

Given the primary responsibility of the principal to either provide workers compensation coverage or contract for it to be provided by the subcontractor, the remaining contingent liability of the principal, the lack of any express language

governing third-party tort liability in K.S.A.1999 Supp. 44-503, and the fact that immunity furthers the policy of the statute to ensure that workers are not deprived of workers compensation coverage, we conclude that in passing K.S.A.1999 Supp. 44-503, *the legislature did not intend to subject principal contractors to tort liability for injuries to the employees of subcontractors, even where the principal contractor is not liable for workers compensation benefits because such coverage is secured by the subcontractor.*

Id. at 420. The Kansas statutory employment standard is governed by statute and makes no distinction regarding ownership of the premises or control of the work. The Kansas Supreme Court has interpreted the statute to immunize general contractors from tort liability for injuries to employees of subcontractors. Therefore, dismissal is appropriate under Kansas law.

C. Plaintiff Patricia Pivaler's Loss of Consortium Claim Also Fails

Plaintiff Patricia Pivaler's claim for loss of consortium in Count VI of Plaintiffs' Petition fails for the same reasons as her husband's claims. *See, e.g., Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001) (A spouse cannot bring a consortium claim if it is derivative to the other spouse's workers' compensation claim); *see also* K.S.A. § 44-503. Insofar as the Circuit Court lacks subject matter jurisdiction over plaintiff Randy Pivaler's claim, and jurisdiction over his claim rests solely with the Labor and Industrial Relations Commission, plaintiff Patricia Pivaler's claim must also be dismissed.

III. Conclusion

MW Builders is a statutory employer of Mr. Pivaler pursuant to §§ 287.040.1 and .3, RSMo. 2000. As a statutory employer, MW Builders is immune from common law liability to the Plaintiffs, and jurisdiction rests solely with the Labor and Industrial Relations Commission. Respondent lacks subject matter jurisdiction over Counts I and VI in Plaintiffs' Petition. Finally, plaintiff Patricia Pivaler's loss of consortium claim fails for the same reasons as her husband's claim. Therefore, Counts I and VI of Plaintiffs' Petition should have been dismissed.

CONCLUSION

WHEREFORE, Relator prays for this Court to enter an Order making absolute its preliminary writ prohibiting Respondent from doing anything other than vacating the May 25, 2006 order overruling Relator's Motion to Dismiss with Suggestions in Support, and thereafter dismiss Relator as a party from Case No. 0516-CV24691 in the Circuit Court of Jackson County, Missouri, at Kansas City, and for whatever further relief the Court deems just and proper.

Respectfully submitted,

BATY, HOLM & NUMRICH, PC

Theresa A. Otto, Esq. (#43453)

John J. Gates, Esq. (#51280)

4600 Madison, Suite 210

Kansas City, Missouri 64112

Telephone: (816) 531-7200

Telecopy: (816) 531-7201

ATTORNEYS FOR RELATOR
DEFENDANT MW BUILDERS, INC.

CERTIFICATE OF SERVICE AND COMPLIANCE

I do hereby certify that one (1) copy of the above and foregoing, along with one (1) floppy disk containing a copy of the same, was mailed, this 28th day of November, 2006, to:

The Honorable Sandra C. Midkiff
Circuit Court of Jackson County
Division 1
415 East 12th Street
Kansas City, Missouri 64106
Telephone: 816-881-3601
Telecopy: 816-881-3732
RESPONDENT

John H. Norton, Esq. (#28025)
Kathryn S. Perkins, Esq. (#56836)
NORTON & NORTON, P.C.
6000 N. Oak Trafficway, #201
Kansas City, MO 64118
Telephone: 816-454-5800
Telecopy: 816-454-5016
ATTORNEYS FOR RESPONDENT
AND PLAINTIFFS

Richard F. Lombardo, Esq.
Charles H. Stitt, Esq.
SHAFFER LOMBARDO SHURIN
911 Main St., Suite 2000
Kansas City, MO 64106
Telephone: 816-931-0500
Telecopy: 816-931-5775
ATTORNEYS FOR DEFENDANTS
NORTHWEST MISSOURI MASONRY, INC.,
STEPHEN K. SEARS and CHARLES W. SEARS

Joseph J. Roper, Esq.
Lynn Weddle Judkins, Esq.
FOLAND, WICKENS
3000 Commerce Tower
911 Main Street
Kansas City, MO 64105-2009
Telephone: 816-472-7474
Telecopy: 816-472-6262
ATTORNEY FOR DEFENDANT
SUMMIT SPECIALTY PRODUCTS, INC.

Furthermore, the undersigned certifies that: (1) Relator's Brief complies with the limitations contained in Rule 84.06 (excluding the cover, certificate of service and compliance, signature block and appendix, there are 5,418 words in Relator's Brief); (2) the name and version of the word processing software used to prepare Relator's Brief is Microsoft Word; and, (3) the diskette provided to this Court has been scanned for viruses and is virus-free.

Theresa A. Otto, Esq. (#43453)