

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 , DIVISION1
The Honorable Sandra C. Midkiff, Circuit Judge**

BRIEF OF RESPONDENT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

Factual History:

On February 19, 2003, Realtor, MW Builders, Inc, (hereinafter sometimes referred to as “MW Builders” or “Relator” or “Defendant”) entered into a construction contract with Northwest Missouri State University (hereinafter sometimes referred to as “the University” or “NMSU” or “Owner”). (Exhibit 4, Appendix, A41). The construction contract provided for the construction of Residence Halls to be completed on the University campus. The contract documents between the University and Relator included the University’s Project Manual (hereinafter sometimes referred to as “Project Manual”). (Exhibit 8, Appendix, A131-A165).

The General Conditions Section, Article 3, Paragraph “A” of the Project Manual included among other provisions a provision that, “ The Director ¹ ...shall give all orders and

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“Director” under the general conditions of the contract is defined as follows: “Whenever the term ‘Director’ is used herein, it shall mean the Director of Purchasing, or Buyer, or designated representative of Northwest Missouri State University. The Director is the agent of the Owner” (the Project Manual, General Conditions, Article 1- Definitions, Paragraph

directions contemplated under the contract [relative to the execution of the work...."] (Emphasis Added) (Exhibit 8, Appendix, A136).

On March 12, 2003, MW Builders entered into a subcontract with Northwest Missouri Masonry, Inc. (Hereinafter sometimes referred to as "Northwest Missouri Masonry") (Exhibit 4, Appendix, A46). Plaintiff, Randy Piveral (hereinafter sometimes referred to as "Plaintiff" or "Piveral") was employed by Northwest Missouri Masonry as a mason. On September 11, 2003, while acting in the course and scope of his employment with Northwest Missouri Masonry, Plaintiff Randy Piveral suffered personal injury when the scaffolding he was work on collapsed. (Exhibit 6, Appendix, A89).

Procedural History:

In addition to Realtor's statement of Procedural history, Respondent would offer the following:

1. On January 17, 2006, Relator filed a motion to dismiss arguing that it was Plaintiff, Randy Piveral's, statutory employer and therefore, the circuit court lacked subject matter jurisdiction and exclusive jurisdiction rested with the Labor and Industrial Relations Commission. (Exhibit 4, Appendix, A 25).
2. The exhibits attached to Relator's Motion to Dismiss were: An affidavit of Peter Kelley, The contract form between the University and MW Builders, and the

(A)(f))

subcontract between MW Builders and Northwest Missouri Masonry. (Exhibit 4, Appendix, A39-A76).

3. On February 24, 2006, in follow up to various telephone conferences between counsel for Plaintiff Piveral and MW Builders, counsel for Plaintiff Piveral directed correspondence to counsel for MW Builders expressing the need to obtain additional documents and exhibits referenced in the contract documents in order to respond to the Motion to Dismiss. The correspondence also confirmed the agreement between counsel that Plaintiff Piveral would have 10 days from the receipt of the documents to file his Response brief. (Exhibit 5, Appendix, A85).
4. On March 13, 2006, counsel for MW Builders directed correspondence to Plaintiff Piveral's counsel enclosing four additional sets of documents including, the Residence Halls Phase 1 Project Manual. (Exhibit 5, Appendix, A86) and Exhibit 8, Appendix, A131).
5. On March 27, 2006, Plaintiff Piveral Filed his response to MW Builder's Motion to Dismiss. (Exhibit 8, Appendix, A117).
6. On May 26, 2006, Respondent entered her Order denying MW Builder's Motion to Dismiss. (Exhibit 1, Appendix, A1).

POINTS RELIED ON

Point Relied on I. Relator is not entitled to an order requiring Respondent to vacate her order of May 25, 2006 denying Relator's motion to dismiss, Respondent has subject matter jurisdiction as to Plaintiffs' claims against Relator and thus Respondent was within her jurisdiction in denying Relator's motion to dismiss, in that Randy Piveral was not a statutory employer of Relator under §287.040.3 RSMo or §287.040.1 RSMo at the time of his injury and, therefore, Missouri's Workers' Compensation Law is not Plaintiff's exclusive remedy and jurisdiction lies properly with Respondent.

(Responds to Relators Point Relied On I)

Cases:

Baker v. Iowa-Missouri Walnut Log. Co., 270 S.W.2d 73, 76 (Mo. App. 1954)

Horner v. Hammons, 916 S.W.2d 810, 817 (Mo.App.1995)

Parmer v. Bean 636 S.W.2d 691,694 (Mo.App. 1982)

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 857 (Mo.banc.2001).

Statutes:

§ 287.040 RSMo.2000

Point Relied on II. The Respondent did not abuse her discretion or exceed her

jurisdictional authority in denying Relator's Motion to Dismiss because Relator's did not meet its burden of proof in that the affidavits they submitted in support of their contentions were faulty.

Cases:

Derfelt v. Yocom, 692 S.W.2d 300, 301 (Mo.1985).

Gabler v. McColl, 863 S.W.2d 340, (Mo.App.1993).

Quelle Quiche, Ltd. v. Roland Glass Foods, Inc., 926 S.W.2d 211. (Mo.App.1996)

St. Charles v. Dardenne Realty Co., 771 S.W.2d 828, 830-831(Mo. 1989)

ARGUMENT

Point Relied on I. Relator is not entitled to an order requiring Respondent to vacate her order of May 25, 2006 denying Relator's motion to dismiss, Respondent has subject matter jurisdiction as to Plaintiffs' claims against Relator and thus Respondent was within her jurisdiction in denying Relator's motion to dismiss, in that Randy Piveral was not a statutory employer of Relator under §287.040.3 RSMo or §287.040.1 RSMo at the time of his injury and, therefore, Missouri's Workers' Compensation Law is not Plaintiff's exclusive remedy and jurisdiction lies properly with Respondent

(Responds to Relators Point Relied On I)

I. Standard of Review:

Respondent disagrees with Relator's assertion that the proper standard of review in this matter is de novo. Instead, Respondent would state that the proper standard of review for issuance of a writ of prohibition is abuse of discretion. This Court has determined that a writ of prohibition is considered a discretionary writ used to prevent "an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo.banc.2001).

With regard to a motion to dismiss for lack of subject matter jurisdiction, the

movant bears the burden of showing that the Court is without jurisdiction by a preponderance of the evidence. *Gabler v. McColl*, 863 S.W.2d 340, (Mo.App.1993).The question of whether the Missouri Workers Compensation Act will pre-empt a common law tort action, thereby depriving the Court of subject matter jurisdiction, is a question of fact to be left to the discretion of the trial judge. *Parmer v. Bean* 636 S.W.2d 691,694 (Mo.App. 1982).This Court has stated, “if a court is entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court.” *State ex rel K-Mart Corp v. Holliger*, 986 S.W2d 165,169 (Mo. banc 1999).

The threshold for determining that the Court has abused its discretion is high, “discretion is abused only if the Court’s ruling is clearly against the logic of the circumstances.” *Morrow v. Zigaitis*, 608 S.W.2d 427,428 (Mo.App.1980). Further, “if reasonable men could differ about the ruling then it is not an abuse of discretion.” *Id.*

Relator has acknowledged that the standard of review for issuance of a writ is “typically” an abuse of discretion, however they allege that in this instance the standard should instead be de novo because the facts are “uncontested”. Respondent strongly disagrees with this assertion. In response to many of Relator’s statements of “uncontroverted facts” Plaintiff Pivaler responded that due to lack of discovery completed in the case, he was without sufficient information to admit or deny the statements. However, Plaintiff Pivaler specifically denied Relator’s

statement of uncontroverted fact contained in ¶ 6 of their Motion to Dismiss which alleged that MW Builders was an independent contractor on the NMSU Project (Exhibit 8, Appendix, A119). Additionally, Piveral specifically denied Relator's statement of uncontroverted fact contained in ¶ 8 of their Motion to Dismiss which alleged that the property owner, NMSU, had relinquished possession and control of the premises (Exhibit 8, Appendix, A119).

Relator has incorrectly asserted that the facts are uncontested. Not only are the facts essential to the issues in this case contested, they are clearly in dispute. Therefore, the proper standard of review to be applied in the present case is abuse of discretion.

II. Argument:

A. MW Builders is Not Piveral's Statutory Employer:

Relator asserted in its Motion to Dismiss that they fall under the exclusive remedy of the Missouri Workers Compensation law because they are Plaintiff, Randy Piveral's, statutory employer under §§287.040.1 and 287.040.3 RSMo 2000. However, a careful review of the contract documents (Exhibit 8, Appendix, A41-76, A131-186) indicates that Relator is not able to meet the necessary requirements in order to assert the statutory employer defense under either §287.040.1 or §287.040.3 RSMo (2000).

A review of these documents reveals that Northwest Missouri State University (hereinafter referred to as "University") retained significant control over the project and the premises on which the work was being performed. This exercise of control contradicts the

existence of an independent contractor relationship as required under §287.040.3 and §287.040.1 RSMo 2000. It also prevents MW Builders from meeting the “premises” requirement necessary to establish statutory employer under §287.040.1 RSMo (2000).

The question of whether the Missouri Workers Compensation Act will pre-empt a common law tort action, thereby depriving the Court of subject matter jurisdiction, is a question of fact to be left to the discretion of the trial judge. *Parmer v. Bean* 636 S.W.2d 691,694 (Mo.App. 1982). In this case there are numerous facts which tend to show that subject matter jurisdiction is appropriate in this Court. However, due to the lack of discovery completed in this case and the lack of opportunity to explore many key factual elements of the case there remain many questions of fact that simply have no evidence or support one way or the other.

1. MW Builders is Not a Statutory Employer Under 287.040.3 RSMo 2000:

Despite the fact that Respondent has not had an opportunity to conduct any depositions in this case in order to fully investigate the circumstances and details surrounding the University building project, based on the information currently available, primarily the contract documents, it is clear that MW Builders was not an “independent contractor” of the University. An independent contractor is defined 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.” *Horner v. Hammons*, 916 S.W.2d 810, 817 (Mo.App.1995) (Emphasis Added).

There are numerous references throughout the contract documents (Exhibit 8,

Appendix, A41-76, A131-186) that clearly indicate that MW Builders remained substantially under the control and direction of Northwest Missouri State University while performing work under the contract. There is no absolute formula for determining independent contractor status, instead, “each case involving the question of whether a person is an independent contractor or employee must depend on its own facts.” *Sargent v. Clements*, 88 S.W.2d 174.

When reading the contract documents as a whole, the control and continued involvement of the University over the Relator becomes clear. There are several specific portions of the contract documents that highlight this fact. This control becomes apparent when reviewing the University’s Project Manual (hereinafter “Project Manual”), General Conditions Section, Article 3, Paragraph “A” which provides in part, “The Director² ...shall give all orders and directions contemplated under the contract **[relative to the execution of the work....]**” (Emphasis Added) (Exhibit 8, Appendix, A136). Again, an independent contractor is defined as, “one

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“Director” under the general conditions of the contract is defined as follows: “Whenever the term ‘Director’ is used herein, it shall mean the Director of Purchasing, or Buyer, or designated representative of Northwest Missouri State University. The Director is the agent of the Owner” (the Project Manual, General Conditions, Article 1-Definitions, Paragraph (A)(f))

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.”

Pursuant to this provision of the Project Manual, the University specifically retained the right to give all orders relative to the execution of work, therefore the University’s control was not limited to the result of the work, but also clearly encompassed the execution. This provision is in direct conflict with the very definition of an independent contractor. There is simply no way that MW Builders could have been in control of the methods of their work when the University declared that it was the party responsible for giving all orders relative to the work.

While the above provision alone would appear to directly contradict any assertion of an independent contractor relationship, there are various other contractual provisions that also argue against an independent contractor relationship, including, Article 3, Paragraph “B” which provides:

“The Director may file a written notice to the Contractor to dismiss forthwith any of his subcontractors, superintendents, foremen, workers, watchmen or other employees whom the Director may deem incompetent, careless or hindrance to proper or timely execution of the work, and Contractor shall comply with such notice as promptly as practicable without detriment to the work or its progress.” (Exhibit 8, Appendix, A136).

This provision shows that even after work had begun, the University

maintained the right to control the project, including the right to control any subcontractors to the project. This provision also makes it clear that if, during the course of the project, the University was unsatisfied with any of the MW Builders workers, the University had the right to govern and control their dismissal. *Id.* This included the right to instruct MW Builders to dismiss the individual or individuals as promptly as possible. *Id.* Additionally, MW Builders was not allowed to change any of the previously approved subcontractors without written approval of the University, again, showing control over the Project being maintained by the University. (See, Project Manual, Article 23, Paragraph A). (Exhibit 8, Appendix, A157)

Other factors which show the University's retained control included, among other things: the University maintained the right to have access to the work at all times while it was in preparation and progress (Project Manual, Article 4, Paragraph A) (Exhibit 8, Appendix, A136); the University had the right to direct MW Builders to uncover any completed work. If an error was found in the work that was not corrected at once, the University had the right to hire someone else to correct the work (Project Manual, Article 4, Paragraphs E-F) (Exhibit 8, Appendix, A137) MW Builders was required to notify the University at least three days before undertaking certain types of work, including placing concrete (Project Manual, Article 4, Paragraph G) (Exhibit 8, Appendix, A137).

The University required that MW Builders maintain and submit to them in writing an affirmative action program (Project Manual, Article 6, Paragraph A)

(Exhibit 8, Appendix A137); the University required that MW Builders pay its laborers prevailing wages (Project Manual, Article 11, Paragraph A) Exhibit 8, Appendix A139); MW Builders was regularly required to provide the University with progress schedules, payrolls and any other data the University requested concerning the work being performed (Project Manual, Article 11, Paragraph B) (Exhibit 8, Appendix, A139); MW Builders was also required upon request to submit to the University all time cards, invoices, payrolls, profit and loss statements and all other direct or indirect costs associated with the work. (Project Manual, Article 11, Paragraph C) (Exhibit 8, Appendix 140).

To the extent the contract designated that certain products or supplies were to be used, MW Builders was not allowed to substitute any article, device, product, material, fixture, etc. unless they sought and receive written approval from the University. (Project Manual, Article 16, Paragraphs A-C) (Exhibit 8, Appendix A145).

This is yet another factor showing that MW Builders was not in control and was not allowed to perform the work according to their own methods.

Additionally, the University required that MW Builders attend regular meetings and conferences. In addition to the pre-construction conference, MW Builders was required to attend pre-installation conferences prior to beginning certain construction activities. (Project Manual, Section 01200-Project Meetings, Paragraphs 1.3 & 1.4, Pre-Construction Conferences and Pre-Installation Conferences). (Exhibit 8, Appendix 162-163) The University also required that MW Builders conduct regular

progress meetings every other week. (Project Manual, Section 01200-Project Meetings, Paragraph 1.5, Progress Meetings) (Exhibit 8, Appendix 164). Finally, the University required that MW Builders hold monthly coordination meetings in addition to the meetings discussed above, (Project Manual, Section 01200-Project Meetings, Paragraph 1.6, Coordination Meetings) (Exhibit 8, Appendix A164-165). The University was to have a representative present at all of those meetings to supervise and participate, again showing their control on a regular basis.

While the contract documents between the University and MW Builders are replete with examples of the University's control, the retention of control by the University is also evident in the Subcontract between MW Builders and Northwest Missouri Masonry. By including these provisions in their subsequent contractual agreement with Northwest Missouri Masonry, MW Builders acknowledged that the University was largely in control of the project and method in which the work was to be performed. For example, Paragraph 1.8 of the Subcontract indicated that Northwest Missouri Masonry was required to "perform all work... under the direction and to the satisfaction of MW Builders, **Owner** and Architect." (Emphasis added) (Exhibit 8, Appendix, A168).

Under the Subcontract Northwest Missouri Masonry was not allowed to employ any workers that were not approved of by MW Builders or the University, again showing that the University maintained significant control over the project including the workers used to complete the project. (See Subcontract Section 17.1

Exhibit 8, Appendix, A175). Paragraph 7 of Exhibit B, of the Subcontract recognized the University's control by providing that it would be mandatory for subcontractors to attend weekly project meetings "as required by the Owner". In addition to these specific examples, the "Owner" is mentioned numerous other times throughout the Subcontract.

Seemingly realizing the impact of these contractual provisions, Relator cites *Logan v. Show-Me Electric Coop.* as authority that contractual provisions can not be read in isolation and must be read as part of a larger analysis. 122 S.W.3d 670,676 (Mo.App.2003). In *Logan*, the Court determined that the fact that contractor was required to use specified materials, follow detailed construction documents, and adhere to directives regarding the sequence of the work was not sufficient to show the owner exercised control. *Id.* *Logan* is obviously distinguishable from the present case because in addition to the provisions present in *Logan*, the contract in issue contains additional statements that tend to show control, including a provision that the owner will give all orders relative to the completion of the work.

In a further attempt to rebut the clear contractual language, Relator attempts to factually compare the case of *Hornor v. Hammons* to the present case and even provided a chart setting forth the alleged comparisons. However, Relator's factual account of the present case is not substantiated and not supported by the record.

For example, Relator states that in the present case, "Representatives of the University visited the construction site weekly to review the progress of the Project."

Despite appearing in Respondent's statement of facts, the parties have not engaged in any discovery to prove or disprove this statement. The only factual support for this statement, and most of the other statements relied on by Relator, is contained in an Affidavit signed by Robert Kimming, who was apparently the President of MW Builders at the time of the events in question. Curiously, this affidavit appeared in the record for the first time in Relator's Reply Brief to their Motion to Dismiss and therefore, Plaintiff was not afforded an opportunity to investigate or even respond to these statements at the trial court level. Equally important is the fact that Mr. Kimming is a MW Builders employee and not an employee of the University and therefore, he would not have direct personal knowledge of the University's actions.

Relator also argues that *Horner* requires that the owner must show control of "daily activities." There is no proper evidence before the Court in this case that indicates that a representative of the University was not present daily on the job site to "give orders relative to the execution of the work", as provided for in the contract. The only evidence we have on the subject is the language of the contracts which tend to show that the University maintained a substantial and active presence in the project.

All of the above mentioned factors as well as other contract provisions not specifically mentioned herein indicate that MW Builders was simply not in control of the work and was not permitted to perform the work according to their own methods. Therefore, MW Builders simply does not fall within the definition of an independent

contractor. Because MW Builders is not an independent contractor, they do not qualify as a statutory employer under §287.040.3 or §287.040.1 RSMo. 2000.

2. MW Builders is Not a Statutory Employer Under §287.040.1, RSMo 2000.

There is no evidence in this case that the work being done by MW Builders was being done “on or about the premises” of MW Builders so as to satisfy the requirements of §287.040.1 RSMo 2000. In order for work to be done “on or about the premises” as required by §287.040.1 RSMo 2000, the premises must be in possession and control of the alleged statutory employer. The test is “whether the property owner had relinquished possession and control of the premises to [MW Builders]...” *Horner v. Hammons*, 916 S.W.2d 810, 817 (Mo.App.1995).

As evidenced by various provisions throughout the prime contract between the University and MW Builders and the subcontract between MW Builders and Northwest Missouri Masonry, the University was still exercising substantial control over the premises and the project. Many aspects of control discussed herein above are also directly relevant and have application with respect to this issue.

The Project Manual, General Conditions, Article 3, set forth the rights and responsibilities of the University through the director and designer under the terms of the contract. Article 3 provides as follows:

“A. The Director and/or Designer acting for the Director shall give all orders and directions contemplated under the contract relative

to the execution of the work. The Director, normally represented by the Designer shall determine the amount, quality, acceptability and fitness of kind of work and materials which are to be paid for under this contract. In the event any questions shall arise between the parties here to, relative to the contract or specifications, determination or decision of the Director or his representative shall be a condition precedent to the right of the Contractor to receive any money or payment for work under the contract affected in any manner or to extent by such question.” (See, Project Manual, General Conditions, Article 3-Rights and Responsibilities of Director and Designer, Exhibit 8, Appendix, A136).

This section alone makes it clear that University, through its agent maintained a significant amount of control. They maintained the right to give all “order and directions” under the contract. They also maintained the right to determine the amount, quality, acceptability and fitness of the work under the contract, again showing that they retained control of the project. And, more importantly, their failure to relinquish control directly prevented MW Builders from being in exclusive possession of the premises.

Again, in order for the “premises” to be considered those of MW Builders instead of the Owner, the University, the premises had to be in the “exclusive possession or control” of MW Builders. *Baker v. Iowa-Missouri Walnut Log. Co.*, 270

S.W.2d 73, 76 (Mo. App. 1954). MW Builders was not in exclusive possession or control of the premises because University maintained the right to enter the premises at all times. This lack of possession and control was further evidenced, by the Project Manual, General Conditions, Article 4, "Inspection of Work". Article 4, Section A. provides:

"The Director and any of the Directors representative's [**shall [at all times have access to the work]**] whenever it is in preparation or progress, and Contractors shall provide proper facilities for such access and for inspection and supervision." (Emphasis added) (Exhibit 8, Appendix A136)

In ¶ 8 of the Uncontroverted Material Facts in Relator's Motion to Dismiss they alleged that the University had relinquished possession and control of the project, however, this allegation was specifically denied by Plaintiff and there is no evidence to support this contention, in fact, the terms of the contract clearly indicate otherwise.

It is clear from these contract provisions that MW Builders did not have possession and control of the premises because the University had not relinquished the same. Therefore, MW Builders fails to meet one of the key elements, the "premises" element, required to qualify as a statutory employer as defined and proscribed under §287.040.1, RSMo 2000.

B. Plaintiff Patricia Pivaler's Loss of Consortium Claim does not Fail
(Responds to Relators Subparagraph C)

For the reasons addressed by Respondent in Points Relied on I and II, this cause does not fall within the exclusive jurisdiction of the Labor and Industrial Relations Commission. Proper subject matter jurisdiction with respect to Plaintiff Randy Piveral's claim lies with the Circuit Court of Jackson County and therefore, Plaintiff Patricia Piveral's loss of consortium claim should also survive.

Point Relied on II. The Respondent did not abuse her discretion or exceed her jurisdictional authority in denying Relator's Motion to Dismiss because Relator's did not meet its burden of proof in that the affidavits they submitted in support of their contentions were faulty.

I. Standard of Review:

Respondent disagrees with Relator's assertion that the proper standard of review in this matter is de novo. Instead, Respondent would state that the proper standard of review for issuance of a writ of prohibition is abuse of discretion. This Court has determined that a writ of prohibition is considered a discretionary writ used to prevent "an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo.banc.2001).

With regard to a motion to dismiss for lack of subject matter jurisdiction, the movant bears the burden of showing that the Court is without jurisdiction by a preponderance of the evidence. *Gabler v. McColl*, 863 S.W.2d 340,

(Mo.App.1993).The question of whether the Missouri Workers Compensation Act will pre-empt a common law tort action, thereby depriving the Court of subject matter jurisdiction, is a question of fact to be left to the discretion of the trial judge. *Parmer v. Bean* 636 S.W.2d 691,694 (Mo.App. 1982).This Court has stated, “if a court is entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court.” *State ex rel K-Mart Corp v. Holliger*, 986 S.W2d 165,169 (Mo. banc 1999).

The threshold for determining that the Court has abused its discretion is high, “discretion is abused only if the Court’s ruling is clearly against the logic of the circumstances.” *Morrow v. Zigaitis*, 608 S.W.2d 427 (Mo.App.1980). Further, “if reasonable men could differ about the ruling then it is not an abuse of discretion.” *Id.*

Relator has acknowledged that the standard of review for issuance of a writ is “typically” an abuse of discretion, however they allege that in this instance the standard should instead be de novo because the facts are “uncontested”. Respondent strongly disagrees with this assertion. In response to many of Relator’s statements of “uncontroverted facts” Plaintiff responded that due to lack of discovery completed in the case, he was without sufficient information to admit or deny the statements. However, Plaintiff specifically denied Relator’s statement of uncontroverted fact contained in ¶ 6 of their Motion to Dismiss which alleged that MW Builders was an independent contractor on the NMSU Project (Exhibit 8,

Appendix, A119). Additionally, Plaintiff specifically denied Relator's statement of uncontroverted fact contained in ¶ 8 of their Motion to Dismiss which alleged that the property owner, NMSU, had relinquished possession and control of the premises (Exhibit 8, Appendix, A119).

Relator has incorrectly asserted that the facts are uncontested. Not only are the facts essential to the issues in this case contested, they are clearly in dispute. Therefore, the proper standard of review to be applied in the present case is abuse of discretion.

II. Argument:

With regard to a motion to dismiss for lack of subject matter jurisdiction, the movant bears the burden of showing that the Court is without jurisdiction by a preponderance of the evidence. *Gabler v. McColl*, 863 S.W.2d 340, (Mo.App.1993). In the present case, the "facts and circumstances" necessary to prove that Respondent acted outside of her jurisdiction are still substantially in dispute and do not "unequivocally" provide grounds for dismissal. *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo.1985).

In order to meet their burden and establish that Respondent lacked jurisdiction, the Relator must establish certain facts. Specifically, they must establish that MW Builders was an independent contractor and to establish that it must be established that the University relinquished control of the project. Seemingly realizing that these facts are essential to proving the Court lacked jurisdiction, Relator sets these "facts" out in their statement of facts and offers the affidavits of Robert Kimming and Peter

Kelley in support thereof. However, many of these “facts” are actually conclusions of law and are further based on speculation and hearsay.

Further, it is extremely important to note that Mr. Kimming and Mr. Kelley are employees and former employees of Relator, MW Builders. There is no evidence that Mr. Kimming or Mr. Kelley have any personal knowledge of the business of the University or any association with University. Nor has Relator produced an affidavit from any representative of the University. Instead, Relator tried to circumvent the necessity of obtaining an affidavit from a University representative with personal knowledge of the relevant facts by substituting affidavits of their own employees. This flaw in their method of proof is demonstrated by the affidavit’s of Robert Kimming and Peter Kelley, discussed below.

Affidavit of Robert Kimming:

The affidavit of Robert Kimming sets forth, among others, the following “facts”:

1. “MW Builders was hired by the University to coordinate all of the general construction activities for the residence halls.”
2. “Representatives of the University visited the construction site weekly to review the progress of the Project.”
3. “Representatives of the University generally left construction of the residence halls to MW Builders and were interested only in the result of the work.”

4. “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.”
5. “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.”
6. “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.” (Exhibit 8, Appendix, A87).

In order to be properly admissible, “affidavits must be made on personal knowledge, shall set forth facts as would be admissible into evidence, shall show affirmatively that the affiant is competent to testify on the matters therein.” *St. Charles v. Dardenne Realty Co.*, 771 S.W.2d 828, 830-831 (Mo. 1989). Yet, many of the statements in Mr. Kimming’s affidavit could not be based on personal knowledge and instead call for him to speculate.

For example, Mr. Kimming states that “Representatives of the University generally left construction of the residence halls to MW Builders and were interested only in the result of the work.” (Exhibit 8, Appendix, A87) However, Mr. Kimming is an employee of MW Builders and not the University, which begs the question, how

could Mr. Kimming have personal knowledge of what the University's interests in the projects were?

Mr. Kimming states that the University had relinquished possession and control of the construction site. (Exhibit 8, Appendix, A88) Again, Mr. Kimming is not a representative of the University and would not be the proper authority on whether the University had in fact relinquished possession and control.

Mr. Kimming also states that "Representatives of the University visited the construction site weekly to review the progress of the Project." (Exhibit 8, Appendix, A87) One can assume from this statement that Mr. Kimming was personally aware of a representative of the University visiting the job site at least once a week. However, because the record does not contain an affidavit from a representative of the University, we are unable to determine whether a representative visited more than once a week and Mr. Kimming simply wasn't aware of it. Further, the contract documents allow for University representative to do far more than "review the progress of the project" and therefore it would be speculation on Mr. Kimming's part to assume that the only purpose of the visits was to "review the progress of the project."

It is also important to note that the affidavit of Mr. Kimming was presented for the first time as an exhibit to Relator's Reply to their Motion to Dismiss and was not even submitted with their original motion. Because Mr. Kimming's affidavit was only submitted with Relator's reply, Plaintiff was not even afforded an opportunity to

address it or otherwise respond to it at the trial court level.

Affidavit of Peter Kelley

The affidavit of Peter Kelley sets forth, among others, the following statements:

1. "I have personal knowledge of the information stated in this affidavit."
2. "I am employed as President of MW Builders, Inc."
3. "MW Builders, Inc.'s usual business is general construction contracting."
4. On March 12, 2003, MW Builders, Inc. was hired as an independent contractor by Northwest Missouri State University (NMSU) to build residence halls on NMSU's campus in Maryville, Missouri (the NMSU Project)."
5. "On March 12, 2003, MW Builders, Inc. subcontracted Northwest Missouri Masonry, Inc. to perform masonry work on the NMSU Project."
6. "On September 11, 2003, MW Builders, Inc. and Northwest Missouri Masonry, Inc. were erecting improvements on the NMSU Project."
7. "On September 11, 2003, NMSU had relinquished possession and control of the premises."
8. "Masonry work is typical in constructing buildings and is routinely performed on construction projects for which MW Builders, Inc. is contracted."
9. "Masonry work is an essential aspect of MW Builders, Inc.'s business as certain buildings cannot be built without it."
10. "Masonry work is conducted on a regular and frequent schedule on

construction project and was being done on a regular schedule on the NMSU Project.”

11. “If MW Builders, Inc. had not subcontracted Northwest Missouri Masonry, Inc., the masonry work on the NMSU Project would have required MW Builders, Inc. to hire permanent employees to perform such work.” (Exhibit 8, Appendix, A39-40)

Relator has offered two affidavits of their own employees purporting to have personal knowledge of the facts surrounding this incident, yet only one of them, Robert Kimming, was the President at the time of the events in question. In his affidavit, Mr. Kelley states that he is the President of MW Builders as of January 12, 2006, but we have no information regarding whether Mr. Kelley was even employed by MW Builders at the time of the incident on September 11, 2003. Presumably, if Mr. Kelley was employed by MW Builders at the time of the event in question his affidavit would have stated so. Therefore, it seems unlikely that Mr. Kelley would have personal knowledge of the events in question if he was not even employed by MW Builders at the time.

Despite this lack of personal knowledge, Mr. Kelley’s affidavit contains the only sworn statement that MW Builders was hired as an independent contractor. Mr. Kimming, who was the President of MW Builders at the time of the events in question, does not offer any statement that MW Builders was an independent contractor. Therefore, the only declaration of independent contractor status

presented by the Relator is contained in the affidavit of an individual who was not even employed by MW Builders during the relative time period.

Additionally, similar to Mr. Kimming's affidavit, Mr. Kelley's affidavit contains a statement that NMSU, the University, had relinquished possession and control of the premises to MW Builders. (Exhibit 8, Appendix, A39) However, not only did Mr. Kelley not work for NMSU at the time so as to have knowledge of the University's actions, it is not apparent from his affidavit that he even worked for MW Builders at the time.

It is reasonable to assume that in reviewing Relator's affidavits in support of their position, Respondent was also struck by the inherent flaws in the affidavits. The only support for Relator's allegations appear in the affidavits of two affiants who could not be considered to have personal knowledge of the "facts" to which they attest. Stated another way, Relators entire argument that MW Builders is an independent contractor and that the University did not maintain control is based on "facts" unilaterally asserted through affidavits of their own representatives.

It is well established that, "when affidavits are presented in connection with motion to dismiss for lack of personal jurisdiction to resolve matter not appearing on record, trial court may believe or disbelieve any statements made within those affidavits; it is within sole discretion of trial court to make such factual determinations. *Quelle Quiche, Ltd. v. Roland Glass Foods, Inc.*, 926 S.W.2d 211. (Mo.App.1996). Based on this information it is not difficult to discern why

Respondent made a determination that Relator had not met its burden of proof on the Motion to Dismiss and therefore denied said motion.

Additionally, it is important to note that there has been no meaningful discovery conducted so far with respect to the underlying claim. Plaintiff's have not had an opportunity to conduct the depositions of any parties or other individuals with direct knowledge of the key issues. Most glaringly, Plaintiff's have not had the opportunity to take the depositions of any representatives of MW Builders, including Mr. Kimming or Mr. Kelley.

The only party that can properly determine whether the University had in fact relinquished control of the project is the University. Yet, no party has taken a deposition or provided an affidavit from Northwest Missouri State University so as to determine their intentions with respect to the project. Therefore, there is no evidence available that is sufficient to prove that the University had relinquished control, and in fact, many of provisions of the contract documents indicate the contrary.

It is also reasonable to assume that Respondent denied Defendant's Motion to Dismiss because she realized that due to the lack of discovery completed, the case was simply not ripe for dismissal. To dismiss Plaintiff's claim against MW Builders without affording him an opportunity to undergo discovery to prove or disprove the essential facts would deny him his right to have his cause heard.

At this point, the "facts and circumstances" of the case do not "unequivocally demonstrate" that jurisdiction properly lies with the Labor and Industrial Relations

Commission. Until such time as the parties have had an opportunity to engage in discovery to fully investigate the validity of the statements relied on by Relator as facts, granting Relator's motion to dismiss would be premature and inappropriate. Further, once the parties have had an opportunity to engage in this necessary discovery, Relator will not be without a remedy as they will have an opportunity to file the appropriate motion, ie. a motion for summary judgment.

"A writ of prohibition is an extraordinary remedy to correct and prevent the exercise of extrajudicial power, it is not a writ of right and should not be employed for correction of alleged or anticipated judicial errors, and does not lie for grievances which may be adequately redressed in the ordinary course of judicial proceedings." *Kinsley v. State of Missouri*, 448 S.W.2d 890, 892 (Mo.1970). If, after engaging in discovery, the facts of the case show that jurisdiction is not proper and Relator has a true grievance, that grievance can be adequately addressed through a Motion for Summary Judgement. Therefore, issuance of a writ of prohibition is simply not proper at this time.

III. Conclusion:

The contract documents available at this time make it clear that MW Builders in not the statutory employer Randy Pivaler under either §§287.040.1 and 287.040.3 RS Mo. 2000. As set forth above, Northwest Missouri State University retained a significant amount of control over this entire project. They specifically retained control of the method in which the work would be completed by reserving the right to

give all “order and directions relative to the execution of the work.” Because MW Builders did not have control over the method in which the work would be done, they are unable to claim independent contractor status sufficient to meet the requirements of §287.040.3 RSMo 2000. Additionally, MW Builders is unable to assert that they were in exclusive possession and control of the premises because the University retained the right to enter the premises at all times for inspection and supervision. Thereby preventing “statutory employer” status under §287.040.1 and .3 RSMo 2000.

The present case is a classic example of what is wrong with current litigation practice in this state. Too often, parties file a motion to dismiss with supporting affidavits at a point too early in the process to determine if the case is ripe for dismissal. This represents a fundamental flaw in entire litigation process by allowing Defendant’s to file motions to dispose of cases prior to any discovery being completed. This puts litigants in a situation where they are forced to respond to and defend a motion without being afforded the opportunity to engage in necessary discovery.

When essential discovery has not been completed prior to filing a motion to dismiss, the result is the conundrum we are presented with in the present case. Realizing the lack of necessary information available in this case, the Relator has tried to remedy the problem by introducing this necessary information through affidavits of their own employees when these individuals clearly do not possess the

requisite personal knowledge to properly attest to these facts.

A writ is considered an extraordinary remedy to be used to prevent manifest injustice. Parties should not prematurely file a motion to dismiss when no discovery has been completed and there are apparent factual disputes that directly relate to the merits of the motion. Further, attempting to take a writ after said motion is denied creates an undue burden on the Appellate Court system and is a waste of Appellate Court resources. Further, Relator's untimely attempt to procure a writ has unnecessarily delayed the discovery and the progression of the underlying litigation and well as the time and resources of the parties.

WHEREFORE, for the foregoing reasons, Plaintiff, Randy Piveral, respectfully requests this Honorable Court enter an Order Denying Relator, MW Builder's, request for issuance of a permanent writ of prohibition and thereby affirm Respondent's order denying Defendant's Motion to Dismiss Counts I and IV of Plaintiff's Petition for Damages and for such other and further relief as the Court shall deem just and proper under the premises.

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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 14th day of December, 2006 to:

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Furthermore, the undersigned certifies that: (1) Respondent'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 7,211 words in Respondent's Brief); (2) the name and version of the word processing software used to prepare Respondent's Brief is Microsoft Word; and (3) the diskette provided to this Court has been scanned for viruses and is virus-free.

Kathryn S. Perkins #56836

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 , DIVISION1
The Honorable Sandra C. Midkiff, Circuit Judge**

APPENDIX OF RESPONDENT

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