

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

=====
COMPLETE TITLE OF CASE

ORLANDO FORTENBERRY,

Appellant,

v.

FREDRICK A. BUCK, D.O.,

Respondent.

DOCKET NUMBER WD70490

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: March 16, 2010

Appeal from

The Circuit Court of Clay County, Missouri
The Honorable Larry D. Harman, Judge

APPELLATE JUDGES

Division Three: Thomas H. Newton, Chief Judge, and Mark D. Pfeiffer and Karen King Mitchell, Judges

ATTORNEYS

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MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

ORLANDO FORTENBERRY,)
)
Appellant,)
v.)
FREDRICK A. BUCK, D.O.,)
)
Respondent.)

OPINION FILED:
March 16, 2010

WD70490

Clay County

Before Division Three Judges: Thomas H. Newton, Chief Judge, and
Mark D. Pfeiffer and Karen King Mitchell, Judges

This is a negligence case where the plaintiff alleges that he was injured by the acts of his co-employee. The circuit court dismissed the lawsuit for lack of subject matter jurisdiction. In light of *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 474-79 (Mo. banc 2009), we reverse and remand with instructions to apply the standard applicable to motions for summary judgment.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Division Three holds:

The circuit court granted Defendant Fredrick Buck's motion to dismiss for lack of subject jurisdiction. Traditionally, when section 287.120 has been raised by the defendant, courts have applied the standard of review applicable to a motion to dismiss for lack of subject matter jurisdiction. *See, e.g., Nowlin ex rel. Carter v. Nichols*, 163 S.W.3d 575, 577 (Mo. App. W.D. 2005). Under that standard, the circuit court should dismiss when it "appears" that the court lacks subject matter jurisdiction. *Id.* at 577-78. "As the term 'appears' suggests, the quantum of proof is not high and can be satisfied with a preponderance of evidence that the court is without jurisdiction." *Id.* at 578. However, the Supreme Court of Missouri clarified in *McCracken* that section 287.120 does not affect the circuit court's subject matter jurisdiction. 298 S.W.3d at 479.

Accordingly, a motion to dismiss based on the exclusivity provision of the workers' compensation statute can no longer be granted using the "appears" standard that applies to motions to dismiss for lack of subject matter jurisdiction. *See id.*

Instead, workers' compensation exclusivity must be raised as an affirmative defense. *Id.* It follows that a defendant, seeking a pre-trial dismissal based on workers' compensation exclusivity, must file a motion for summary judgment.¹ In order to grant summary judgment based on section 287.120, the court must find that there is no genuine dispute as to the existence of each of the facts necessary to support the defendant's affirmative defense. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993).

Accordingly, we reverse and remand with instructions to apply the appropriate standard to Buck's motion to dismiss.

Opinion by: Karen King Mitchell, Judge

March 16, 2010

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THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.

¹ When the applicability of section 287.120 appears from the face of the petition, a defendant can also properly file a motion to dismiss for failure to state a claim upon which relief can be granted, *see* Rule 55.27(a)(6), or for judgment on the pleading pursuant to Rule 55.27(b) if the affirmative defense appears from the petition and other pleadings.