

**IN THE
MISSOURI SUPREME COURT**

APPEAL NO. SC90050

**J. MICHAEL MCCRACKEN,
Appellant**

vs.

**WAL-MART STORES EAST, LP
Respondent**

**Appeal from the Circuit Court of Greene County, Missouri
The Honorable Thomas E. Mountjoy
Case No. 105CC4142**

APPELLANT'S SUBSTITUTE REPLY BRIEF

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RESPONDENT'S STATEMENT OF FACTS

In response to appellant's statement of facts, respondent accuses appellant of not presenting a "fair and concise statement of the facts" because appellant does not present both appellant's and respondent's evidence. Respondent then proceeds to set out a statement of facts, which only presents its alleged evidence, thereby doing the very thing it accuses appellant of having done. Appellant's statement of facts does set forth a fair and concise statement of the facts relevant to the question at hand. More importantly, certain of respondent's statements of fact are legal conclusions, vague and ambiguous, speculative, and unsupported by any admissible evidence.

All of the statements of fact set forth under the subheading "B. Respondent Wal-Mart's Business" (Pages 9-10 of respondent's Substitute Brief) are based on respondent's Exhibit G, Form 10-K attached to respondent's initial "Motion To Dismiss For Lack of Subject Matter Jurisdiction" (L.F. 116-143, Vol. I). This document is not authenticated, certified, or supported by any affidavit or other foundation. Not being properly before the court, these statements of fact should not be considered by this Court in ruling on this appeal. Rule 55.28, Mo.R.Civ.P. (2009).

The "Affidavit of Henry Wallace," respondent's Exhibit J (L.F. 185-189, Vol. I), upon which many of respondent's statements of fact are based, as set forth under the subheading, "C. Respondent Wal-Mart had a contract with Appellant McCracken's employer to supply bread products and provide services associated with those products," is not based on the personal knowledge of the affiant. The affidavit posits many

conclusions but few facts. Therefore, the affidavit is inadequate to support many of respondent's statements of fact. *Conway v. Royalite Plastics, LTD*, 12 S.W.3d 314, 318 (Mo. banc 2000) (proper function of affidavit is to state facts, not conclusions); *Austin v. Trotter's Corporation*, 815 S.W.2d 951, 955 (Mo.App.S.D. 1991).

Affidavits used to support motions to dismiss for lack of subject matter jurisdiction are subject to the same requirements that apply to affidavits used to support motions for summary judgment, which are contained in Mo.R.Civ.P. Rule 74.04(e) (2009). *Wood v. Procter & Gamble Mfg. Co.*, 787 S.W.2d 816, 820 (Mo.App.E.D. 1990).

Rule 74.04(e) requires that:

Supporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

A number of the statements of fact set forth by respondent, based on Wallace's affidavit, are insufficient because they are not facts but actually conclusions. *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 635 (Mo.App.E.D. 2005).

For instance, the Affidavit alleges, in part:

* * *

“10. Wal-Mart Store #17 contracts with Interstate Brands Corporation for the sales, delivery, and *merchandising* of the *majority* of Interstate Brands Corporation’s bread products which are sold at Wal-Mart Store #17.

* * *

16. I and other members of my management staff within Wal-Mart’s Store #17 have the *authority* to *direct* Interstate Brands Corporation’s employees with respect to their *activities* while at Wal-Mart Store #17.

* * *

21. I am aware of numerous options as a Store Co-Manager for Wal-Mart to ensure that Wal-Mart Store #17 is sufficiently stocked with Interstate Brands Corporation’s bread products in the event the steps taken, as mentioned above, are not successful. These measures include the following:

- a. Securing Interstate Brands Corporation’s bread products by way of another, Wal-Mart store’s current stock, within the same geographic market area;
- b. Securing Interstate Brands Corporation’s bread products by way of another, Wal-Mart store’s current stock, outside of the geographic market area;
- c. Utilize the Wal-Mart Market Manager, *who is responsible* for Wal-Mart stores, *to employ a variety of resources that are available to him.*

* * *

24. The work that was performed by the transportation driver, J. Michael McCracken, were [*sic*] *routine, frequent, and regular contractual duties*, which, in the absence of the agreement, between Wal-Mart Store #17 and Interstate Brands

Corporation, *would have required Wal-Mart Store #17 to hire permanent employees to perform.*

* * *

26. I as a Wal-Mart Store Co-Manager understand that ensuring sufficient stock of merchandise for sale in its stores is a *priority*. I understand that if I am unable to ensure stock of Interstate Brands Corporation's bread products from the local Interstate Brands Corporation distributor that *Wal-Mart has sufficient resources* to ensure Interstate Brands Corporation's bread products will be available for sale, regardless of its specific source, in the Wal-Mart store in which I am Co-Manager."

[Emphasis added] (L.F. 186-188, Vol. I)

All of these allegations are conclusions rather than facts and are insufficient to support respondent's statements of fact. Also, it is unclear in the affidavit to what the affiant is referencing when he refers to "the contract" or "the agreement," since the written contract identified as respondent's Exhibit K¹ (L.F. 219-230, Vol. II) was not identified in, attached to, or made a part of the affidavit, and it is not even mentioned as being in effect at the time of event or applying to this case in any way either in the affidavit or in respondent's Substitute Brief.

The only other affidavit filed by respondent to support its Motion to Dismiss For Lack of Subject Matter Jurisdiction, the affidavit of attorney Kristie Crawford, respondent's Exhibit L, (L.F. 231-237, Vol. II) is based entirely on her purchasing a loaf

¹ The same Supplier Agreement also appears at L.F. 197-208, Vol. I & II.

of bread and some hot dog buns at a Springfield, Missouri, Wal-Mart, an event that occurred on March 21, 2008, not November 19, 2004 when appellant was injured. Therefore any statements of fact based upon this event or the documents generated by this event attached to her affidavit lend no reliability, credibility, or support to what the state of facts were when the appellant was injured. Any statements of fact based upon this affidavit should, therefore, be disregarded (page 11 of respondent's Substitute Brief).

Furthermore, some of the additional statements of fact made by respondent are not supported by the sources cited. For instance, respondent states on pages 10-11 of its Substitute Brief, "In November 2004, Respondent Wal-Mart and IBC were operating under a contract whereby IBC sold, delivered, stocked, merchandised and inventoried certain bread products at Respondent Wal-Mart's stores, including Wal-Mart Supercenter #17." Respondent cited as the sole source of this statement, the deposition of Danny Townsend, page 7, lines 21-23, page 9, lines 2-9, page 13, lines 4-7, page 14, lines 13-21 (L.F. 103-105, Vol. I). However, what Mr. Townsend, another IBC employee, in fact testified to at those places in his deposition is as follows:

Q In Joplin. And how long have you been delivering IBC products in Neosho?

A I got that route in August of '97.

(L.F. 103, Vol. I)

Q So when you arrive at the Wal-Mart in Neosho, [at the time of his deposition on February 20, 2008] can you tell me kind of what you do?

A I just get there and I do my counts, my on-hands, look for stale, and get my racks together and go outside, pull my Wonder product and go back in and then get it all checked in and then go back up and stock it and put it all on the shelf, and what I can't get on the shelf, I put it in the back. I have an area I put it.

[Bracketed material added] (L.F. 104, Vol. I)

Q Okay. And do you recall Mr. McCracken being the transport driver for deliveries at Wal-Mart Neosho on November 19th, 2004?

A Yes.

(L.F. 105, Vol. I)

Q. (By Ms. Crawford) And did you speak to Mr. McCracken when he first arrived at the store?

A No, ma'am.

Q What were you doing?

A I was in the aisle working my Wonder product.

Q And is it your understanding that an incident occurred on November 19th, 2004, between a Wal-Mart employee and Mr. McCracken?

A Yes.

(L.F. 105, Vol. I)

There is no relationship between these sources for the statement of fact and the statement of fact recited by respondent.

This is only one example where the statement of fact is not supported by the cited references.

Finally, some of respondent's statements of fact are vague and ambiguous or are clearly based on speculation. For example, respondent alleges on pages 10-11 of its Substitute Brief that "IBC . . . merchandised . . . certain bread products . . ." What does "merchandised" mean? It is defined in Webster's New World Dictionary as "1. to buy and sell 2. to promote the sale of." What respondent means by "merchandised" is unclear. Another example is that respondent states on page 11 of its Substitute Brief that "Members of Respondent Wal-Mart's management staff had the authority to direct IBC employees with respect to their activities . . ." (L.F. 187, Vol. I, Affidavit of Henry Wallace, paragraph 16). What does "authority to direct . . . their activities" mean? What facts are established by this vague statement? If respondent is attempting to establish by this statement of fact that control or right to control the injured person by the respondent is helpful to its position that respondent is appellant's statutory employer, that appears to not be the case. See, *Dillard v. Leon Dickens/Forklift of Cuba*, 869 S.W.2d 317, 319 (Mo.App.S.D. 1994). Another example is on page 11 of respondent's Substitute Brief, where respondent alleges, "Members of Respondent Wal-Mart's management staff . . . occasionally made contact with a Sales Manager of IBC to report issues and concerns with salesmen and transport drivers." (L.F. 187, Vol. I, Affidavit of Henry Wallace, paragraph 19). What actual facts are established by this vague and ambiguous statement? What does it mean, "to report issues and concerns with . . . transport drivers?" How is this statement relevant to this case?

With regard to being speculative, although respondent's Co-Manager of the Neosho Wal-Mart never had any problem with appellant's employer, IBC, sufficiently stocking his store with bread products (L.F. 187, Vol. I, Affidavit of Henry Wallace, paragraph 20), respondent speculates in one of its statements of fact as to what it "could have done" in the event IBC failed to provide a sufficient stock of bread. (Page 12 of respondent's Substitute Brief; L.F. 187-88, Vol. I, Affidavit of Henry Wallace, paragraph 21). In so speculating, respondent states that one of the ways it could deal with that event, which had never happened, would be "utilizing the Wal-Mart Market Manager responsible for Wal-Mart stores to employ a variety of resources available to him." (Page 12 of respondent's Substitute Brief). What does that mean? What specific actual fact is established by that hypothetical statement?

For all of the foregoing reasons, many of respondent's statements of fact are conclusions and not facts, are vague and ambiguous, are irrelevant, are speculative, or are not supported by any admissible evidence and, therefore, should not provide the basis for any decision in this case.

Appellant does agree with and also adopts respondent's statement of fact on page 12 of its Substitute Brief as follows:

In making deliveries of [IBC] products to Wal-Mart Supercenter #17, Appellant McCracken would (1) drive his truck to the dock; (2) move the empty bread racks from the receiving roll-up door to his truck at the dock; (3) unload racks full of bread products from his truck; and (4) load the empty bread racks into his truck. (L.F. 63-64, Vol. I, Transcript of the

Testimony of J. Michael McCracken (“McCracken Deposition”), page 39, lines 4-22, page 40, line 15 through page 41, line 20; L.F. 67, Vol. I, McCracken Deposition, page 53, line 25 through page 54, line 20).

REPLY ARGUMENT

I

THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S PETITION FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE TRIAL COURT DOES HAVE SUBJECT MATTER JURISDICTION OF PLAINTIFF’S PETITION IN THAT THIS IS A CIVIL ACTION BROUGHT PURSUANT TO ARTICLE V, SECTION 14 OF THE MISSOURI CONSTITUTION.

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo.banc 2009)

Although respondent fails to explicitly state it, it is apparent from its application to transfer and its Substitute Brief, respondent clearly questions whether all of the prior case precedent that has developed around the assertion of the workers’ compensation law as a defense to a common law tort action on the ground of lack of subject matter jurisdiction by the circuit court should be abandoned or rejected in the face of this court’s decision in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo.banc 2009).

Respondent’s whole attack is that once the trial court determined, on the basis of its motion to dismiss for lack of subject matter jurisdiction, that appellant was respondent’s statutory employee, the trial court lost subject matter jurisdiction over the case and the trial court can not determine if appellant’s injuries arose out of an accident. (respondent’s Substitute Brief, page 20, Point Relied on I).

Respondent cites two Missouri Supreme Court cases to support its position in this regard but neither case does support its position.

In *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, (Mo. banc 1991), injured employee sued his admitted employer claiming his employer intentionally injured him. *Id* at 159. The parties agreed that the employee/employer relationship existed between the parties. *Id*. The trial court sustained the employer's motion to dismiss for lack of subject matter jurisdiction. *Id*. This Court determined in *Killian* that the circuit court has the authority to determine the existence of an employer/employee relationship. *Id*. at 160.

Respondent cites *Goodrum v. Asplundh Tree Expert Company*, 824 S.W.2d 6 (Mo.banc 1992) for the proposition that Section 287.120, R.S.Mo., as applied in *Killian*, does not violate Article V, Section 14 of the Missouri Constitution. (respondent's Substitute Brief, page 22). In *Goodrum*, the parents of deceased employee sued their late son's employer alleging both negligence and intentional tort. *Id*. at 7. Employer filed a motion to dismiss for lack of subject matter jurisdiction based on Section 287.120, R.S.Mo., to which plaintiffs countered with constitutional challenges to Section 287.120, R.S.Mo., including a claim that it violates Mo. Constitution Article V, Section 14, granting exclusive jurisdiction of all cases and matters to the circuit courts. *Id*. This Court held in *Goodrum* that the Workers' Compensation Commission's exclusive jurisdiction to determine the existence of an accident under Section 287.120, R.S.Mo. does not violate Article V, Section 14, citing *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931). *Id*. at 11.

In this case, despite respondent's suggestion to the contrary, there is no claim that Section 287.040(1), R.S.Mo. violates Article V, Section 14 of the Missouri Constitution as contended in *Killian and Goodrum*.

Rather, the Missouri Court of Appeals, Southern District, in applying the rationale of *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo.banc 2009) to the facts of this case, determined that respondent can no longer use the vehicle of a motion to dismiss for lack of subject jurisdiction to assert the affirmative defense of the application of Section 287.040(1) R.S.Mo. to this action. *McCracken v. Wal-Mart Stores East*, 2009 WL 464860 (Mo.App.S.D. 2009), at *3. It appears that respondent must assert the application of statutory employee under Section 287.040(1), R.S.Mo., as an affirmative defense in its responsive pleading. *Id.* at *2. Because the procedures of raising the workers' compensation defense of *Killian and Goodrum* are premised upon the same legal basis as those cases cited by the Southern District Court of Appeals of *Parmer v. Bean*, 636 S.W.2d 691 (Mo.App.E.D. 1982), *Shaver v. First Union Realty Mgmt., Inc.*, 713 S.W.2d 297 (Mo.App.S.D. 1986); *State ex rel. McDonnell Douglas Corp. v. Ryan*, 745 S.W.2d 152 (Mo.banc 1988), *James v. Poppa*, 85 S.W.3d 8 (Mo.banc 2002) and *Harris v. Westin Management Co. East*, 230 S.W.3d 1 (Mo.banc 2007), to the extent that those cases suggest a motion to dismiss for lack of subject matter jurisdiction based on the application of Section 287.040(1), R.S.Mo., as being the proper procedure, it would appear that they should no longer be followed in view of *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo.banc 2009).

THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S PETITION REGARDLESS OF THE PROCEDURAL PATH USED TO RAISE THE UNDERLYING ISSUE BECAUSE THE PREPONDERANCE OF EVIDENCE DOES NOT DEMONSTRATE THAT APPELLANT WAS A “STATUTORY EMPLOYEE” OF RESPONDENT UNDER SECTION 287.040(1), R.S.MO. (2004) IN THAT, AS A DELIVERY PERSON FOR A SUPPLIER OF GOODS TO RESPONDENT, APPELLANT’S DUTIES WERE NOT PERFORMED IN THE USUAL COURSE OF RESPONDENT’S BUSINESS.

Section 287.040(1), R.S.Mo. (2004).

Martinez v. Nationwide Paper, 211 S.W.3d 111 (Mo.App.S.D. 2006).

Wallace v. Porter DeWitt Construction Co., 476 S.W.2d 129 (Mo.App.S.D. 1971).

Shiple v. Gipson, 773 S.W. 2d 505 (Mo.App.E.D. 1989).

Looper v. Carroll, 202 S.W.3d 59 (Mo.App.W.D. 2006).

A. Respondent’s attempt to distinguish appellant’s cases actually fortifies appellant’s position.

Respondent attempts to distinguish all of appellant’s cited cases only on their facts. However, note that respondent is unable to distinguish the legal principle that forms the basis of all of appellant’s cited cases from the situation here. That legal principle is still the law where the relationship between appellant’s employer, IBC, and respondent was essentially that of seller (or supplier) and buyer (L.F. 26, Vol. I - Defendant’s Motion To Dismiss, paragraph 3; L.F. 197, Vol. I – Supplier Agreement). That legal principle is that an injured person does not become a statutory employee where

he was injured on purchaser's premises while acting as the delivery person of the supplier of products to a purchaser.

Respondent does not cite this Court to a single Missouri appellate decision in which any Missouri appellate court has held otherwise.

Therefore, what respondent attempts to do is to characterize appellant's work for his employer, IBC, as something more than just delivery of product for a supplier to respondent by trying to couch IBC's duties under its contract as also the provision of "something more" than just supplying and delivering bread products. Terms such as "order," "merchandise," "inventory," "stock" are used by respondent to attempt to distinguish this case from a simple situation of buyer and seller, purchaser and supplier. However, careful review of the contents of all of the depositions of the IBC employees and respondent's employees attached to respondent's Motion to Dismiss For Lack of Subject Matter Jurisdiction will not reveal anyone who, or any testimony that, claims that appellant did any more than deliver and unload his employer, IBC's bread products at the purchaser's (respondent's) store using his own equipment. (L.F. 52-115; L.F. 144-175, Vol. I).

Respondent argues that there is some special significance to the fact that appellant's employer, IBC, was delivering bread product labeled "Great Value," a Wal-Mart brand. However, this fact does not change that appellant is still just a delivery person delivering his employer's product, regardless of what it is labeled, to a purchaser of that product under all of the cases cited by appellant. What name the product is called

does not alter the relationship between appellant's employer (a supplier) and respondent (a purchaser).

What is important to note is that the statute on which respondent bases its motion in this case, Section 287.040(1), R.S.Mo., provides, in essence, that the respondent shall be the statutory employer of an injured person, "when injured ...on...the premises of the employer while [the injured person is] doing work which is in the usual course of his [respondent's] business." [Bracketed material supplied] In other words, what is determinative of the issue is whether appellant was performing work that is in the usual course of respondent's business at the time of his injury. *Wallace v. Porter DeWitt Construction Co.*, 476 S.W.2d 129, 131 (Mo.App.S.D. 1971). It is not important whether work performed by another employee of appellant's employer, IBC, may have been in the usual course of respondent's business, such as witness and IBC employee Danny Townsend (L.F. 102-115) or any other IBC employees or transport drivers (L.F. 186-187).

There is no question that, at the time appellant was injured, appellant was arranging IBC's empty bread racks preparatory to him unloading the bread products from his truck. (L.F. 63-64, Vol. I – McCracken Deposition, page 39, line 4 – page 41, line 20; L.F. 67, Vol. I – McCracken Deposition, page 53, line 22 – page 54, line 20; L.F. 41, Vol. I – Plaintiff's Petition, paragraphs 5-7; respondent's Substitute Brief, page 13). There is no dispute about this. All of the various cases cited by appellant have held, stated, or alluded to the fact that a delivery person, such as appellant, of a seller or supplier, such as IBC, who is injured on the purchaser's premises, such as respondent's

premises, while unloading products is not the statutory employee of the purchaser under Section 287.040(1), R.S.Mo. *Martinez v. Nationwide Paper*, 211 S.W.3d 111 (Mo.App.S.D. 2006); *Wallace v. Porter DeWitt Construction Co.*, 476 S.W.2d 129 (Mo.App.S.D. 1971); *Shipley v. Gipson*, 773 S.W. 2d 505 (Mo.App.E.D. 1989); *Looper v. Carroll*, 202 S.W.3d 59 (Mo.App.W.D. 2006); *Romero v. Kansas City Station Corp.*, 98 S.W.3d 129, 138 (Mo.App.W.D. 2003); *DuBose v. FlightSafety International, Inc.*, 824 S.W.2d 486, 489 (Mo.App.E.D. 1992); *Lyon v. J.E. Dunn Constr. Co.*, 693 S.W.2d 169, 171 (Mo.App.W.D. 1985); *Counts v. East Perry Lumber Company*, 462 S.W.2d 141, 145 (Mo.App.E.D. 1970).

The work appellant was performing when he was injured (L.F. 63-64. Vol. I – McCracken Deposition, p. 39, line 4 – page 41, line 20; L.F. 67, Vol. I – McCracken Deposition, page 53, line 22 – page 54, line 20; L.F. 41, Vol. I – Plaintiff’s Petition, paragraphs 5-7), was work to carry out the duties assigned to him by his direct employer, IBC, not respondent, (L.F. 61-62, Vol. I – McCracken’s Deposition, page 31, line 18 – page 32, line 4; L.F. 69, Vol. I – McCracken Deposition, page 62, line 16 – page 63, line 7) even though it incidentally may have benefited respondent. That work clearly was not the usual business of respondent under this entire line of cases.

B. Respondent’s cited cases do not conflict with appellant’s position and point relied on.

None of the Missouri appellate cases cited by respondent neutralize the appellant’s contention in this case as supported by the statement in *Martinez v. Nationwide Paper*, 211 S.W.3d 111 (Mo.App.S.D. 2006) at 116, that:

[A] contract for the sale and purchase of a product even though it includes the delivery and unloading of the product upon the premises of the purchaser, does not render the seller's delivery man a statutory employee of the purchaser.

In fact, a number of respondent's cited cases actually support appellant's position.

First is *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617 (Mo.banc 1995), also cited by appellant. The facts in *Bass* are clearly distinguishable from the facts here. In *Bass*, the deceased employee was clearly not a delivery person. He delivered, unloaded, and stocked nothing for a supplier of products to the defendant. He was hired by his employer to provide janitorial services to the defendant's floors throughout the defendant's store every night after the defendant's store closed. *Id.* at 618.

As a consequence of the difference in the fact situation, none of the cases cited by appellant are even mentioned or addressed in *Bass*. This Court, in *Bass*, addressed only cases with similar fact situations to its fact situation. In that case, this Court concluded that because the specific work performed by the deceased employee was required to be specifically performed by the defendant by applicable Missouri Department of Health regulations, the deceased employee was a statutory employee of the defendant. *Id.* at 622. Such is not the case here. If respondent did not have the arrangements with IBC to manufacture, sell, deliver, and stock certain bread products, it would obviously be able to hire another vendor or supplier to provide those services rather than be compelled to hire its own employees to perform those services and manufacture, supply and deliver bread

products. Also, nothing compelled the respondent here to provide those services like the state health regulations in the *Bass* case.

Nothing contained in *Bass* is at odds with *Martinez*, cited *supra*, or the other cases supporting appellant's position here.

Respondent cites *Busselle v. Wal-Mart*, 37 S.W.3d 839 (Mo.App.S.D. 2001) as a case where the appellate court examined a statutory employee relationship specifically with respect to respondent's business. However, that case involved an entirely different contractual relationship between the injured person's employer and respondent's parent company. That case did not involve a situation of the delivery person of a seller of goods who was injured on the buyer's property, such as occurred here and in virtually all of the cases cited by appellant. Rather, it involved an electrician who performed service work only for respondent's parent company changing burned-out fluorescent light bulbs and ballasts in two Wal-Mart stores. *Id.* at 840-41. In that instance, the injured person provided only his pliers, a screwdriver, his electrician's license and his maintenance services while Wal-Mart provided the replacement ballasts, the light tubes, the ladder, and a Wal-Mart employee to assist him in his work. *Id.* at 841. The plaintiff was injured while changing out a light fixture in the automotive section of one of the stores. *Id.*

In that case, apparently, the injured employee did not have his own or any other applicable worker's compensation coverage for his injuries, so he filed his claim for worker's compensation coverage against Wal-Mart. *Id.* at 840. Ironically, respondent's parent company argued in that case, to avoid having to provide worker's compensation benefits, that it was not the statutory employer. *Id.* Now it argues the complete opposite

position. Also, of particular interest to the court in that case was the fact that, prior to hiring the injured person as an electrician to perform this work, that same work was done by regular Wal-Mart employees and it still had one of its regular employees specifically assigned to continuously help the electrician. *Id.* at 843.

In that case, the court looked at the legislative intent of Section 284.040(1) and it concluded that “[d]enying compensation would be contrary to the legislature’s intent in adopting Section 287.040 – ‘to prevent employers from avoiding their duties under the Act by contracting out work that their employees would normally do.’” *Id.* In this case, the legislative intent of Section 284.040(1) is not fulfilled by permitting respondent to use the statute to avoid its common law liability for its employee’s actions against third parties since it will not have to provide appellant with worker’s compensation benefits in any event because those were already provided to him by his employer, IBC (L.F. 50, Vol. I). Actually, respondent is not within that class of persons that the statute was intended to protect by its application here. In fact, the contrary result occurs by applying the statute since the employee (appellant) actually loses his common law rights by the statute’s application here.

Respondent cites *DuBose v. FlightSafety Intern., Inc.*, 824 S.W. 2d 486 (Mo.App.E.D. 1992) for the proposition that “A purchaser of goods may be found to be the statutory employer of the seller’s employee when the contract for the sale of the goods includes services.” (Respondent’s Substitute Brief, page 34-35). Actually *DuBose* was cited in *Martinez* to support the same proposition which appellant advances here and which is stated above. *Martinez* at 116. In *DuBose*, the court states at 489:

In the present case, however, the contract involved more than a purchase agreement between a buyer and seller of goods. McDonnell agreed to provide maintenance and engineering services on the components sold for a period of time and Mr. DuBose was servicing a component pursuant to this obligation when he was injured.

The court concluded in that case that, because defendant's employees also maintained and serviced its product, the actual product that the defendant was selling was being serviced and maintained by the employee at the time of injury, ensuring the quality of defendant's product was obviously within the usual course of the defendant's business, and thus the defendant was the statutory employer of the injured person. *DuBose* at 490. However, such is not the case here. Appellant's employer did not provide maintenance and warranty servicing of its bread goods like in *DuBose*. Appellant was not injured performing any maintenance or service work on the bread goods. The fact situation and circumstances were entirely different in *DuBose* than in the instant case.

Respondent also cites *Augur v. Norfolk Southern Railway Co.*, 154 S.W.3d 510 (Mo.App.W.D. 2005) in support of its contention.

In *Augur*, the defendant railroad owned and operated an inbound automotive distribution facility which contracted with a company to load and unload vehicles shipped by rail to its facility and to place the vehicles in storage. *Id.* at 512. The injured employee of the company hired to load and unload the cars was hurt in the process of unloading cars. *Id.* The employees of the contracting company in *Augur* were

responsible for working to load and unload vehicles from railcars at the defendant's facility five days a week, eight hours a day. *Id.* at 516.

The court in *Augur*, after discussing the case of *Parker v. National Super Markets, Inc.*, 914 S.W.2d 30 (Mo.App.E.D. 1995) cited by appellant, distinguishes it from the situation there by pointing out that the defendant's own employees could also load and unload vehicles from the defendant's rail cars if it chose to do so. *Id.* at 517. The court indicated that its fact situation was more similar to another case, *State ex rel. MSX Intl., Inc. v. Dolan*, 38 S.W.3d 427 (Mo.banc 2001), in which the defendant contracted with a company to supply employees to regularly work in the defendant's plant on production lines that manufactured wheel assemblies for another company, Chrysler Corporation. *Id.* at 429. The court in *Dolan* recognized that the defendant would have had to hire its own employees to work its own production lines if it did not contract with the plaintiff's employer for plaintiff to work the defendant's production line. *Id.* As a result, the court in *Augur* held that the plaintiff was a statutory employee. *Id.* at 517.

In any event, the *Augur* case, again, did not involve an injured delivery person of a supplier of goods or products to a purchaser, as in this case.

The only other two cases which respondent cites are federal district court cases.

Neither of these cases has any precedential value to this Court since they are district court cases rather than federal appellate cases. They are akin to Missouri circuit court opinions. Neither of these cases is instructive to this Court because they are federal cases, not Missouri cases. See, *Mika v. Central Bank of Kansas City*, 112 S.W.3d 82, 88

(Mo.App.W.D., 2003); *Godat v. Mercantile Bank of Northwest County*, 884 S.W.2d 1,4 fn. 4 (Mo.App.E.D. 1994).

In *Gianino v. American Can Company*, 600 F. Supp. 191 (D.C.Mo. 1985), the federal district judge who decided that case indicates, in distinguishing its facts from those in *Ferguson v. Air-Hydraulics Company*, 492 S.W.2d 130 (Mo.App.E.D. 1973), that the relationship between the plaintiff's employer, Manufacturers Cartage Company, and the defendant "was not that of a buyer and seller of goods but that of delivering defendant's goods to its customers and of returning defendant's pallets to its plant, a relationship that obviously included unloading," which encompassed the usual operation of defendant's business. *Id.* at 194. The judge also distinguished the facts of *Gianino* from the situation in *Wallace v. Porter DeWitt Construction Co.*, 476 S.W.2d 129 (Mo.App.S.D. 1971) by recognizing that in *Wallace* the relationship between the plaintiff's employer and the defendant in that case was akin to that of a buyer and seller and because the plaintiff "was not to work or participate in the actual operation of the usual business of the defendant." *Id.* In the instant case, the relationship between plaintiff's employer, IBC and respondent is that of seller or supplier and buyer (L.F. 26, Vol. I – Defendant's Motion to Dismiss, paragraph 3; L.F. 197, Vol. I – Supplier Agreement) so it does not fall within the realm of the situation that existed in *Gianino*.

In *Modzinski v. Wal-Mart Stores, Inc.*, 2008 WL 111282 (E.D.Mo. 2008)², the district judge does not recognize, cite or distinguish any of cases cited by appellant in arriving at his decision except for *Looper v. Carroll*, 202 S.W.3d 59 (Mo.App.W.D.

² This case is not cited in any regular reporting service other than Westlaw.

2006). It is as if none of those opinions exist to him. With respect to *Looper*, it is cited in *Modzinski* for the three prong test of when there exists a statutory employer as set forth in *Bass. Id.* at 2. The fact that *Looper*'s holding is contrary to this judge's decision is not even mentioned by this judge.

Finally, *Modzinski* is clearly distinguishable from the current situation in that the injured employee in that case was a "merchandiser" who was employed by a Coca-Cola distributor but who actually, physically worked in the defendant's Wal-Mart store. *Modzinski* at 1. There, plaintiff was struck by a ladder while he was conducting inventory in defendant's store. *Id.* at 1. The injured employee's duties required him to inventory stock, order products when needed, and replenish the supply of the product on the shelves in defendant's store using the defendant's equipment. *Modzinski* at 4.

Appellant did none of those tasks. All he did was deliver and unload his employer's product at respondent's store, (L.F. 63-64, Vol. I – McCracken Deposition, page 39, line 4 – page 41, line 20; L.F. 67, Vol. I – McCracken Deposition, page 53, line 22 – page 54, line 20; L.F. 41, Vol. I – Plaintiff's Petition, paragraphs 5-7) using his own equipment (L.F. 64, Vol. I – McCracken Deposition, page 42, lines 5-6). The circumstances here are entirely different than in *Modzinski*.

Neither of respondent's cited federal cases is similar to or controlling here.

CONCLUSION

The circuit court has subject matter jurisdiction over appellant's personal injury suit, despite respondent's claim that Section 287.040(1), R.S.Mo., applies. Therefore, the

circuit court's dismissal of appellant's petition for lack of subject matter jurisdiction was error.

Regardless of which standard of review is applied, the preponderance of the evidence is that appellant was not a statutory employee of respondent. Therefore, this Court should find that issue in favor of appellant and against respondent.

Respectfully submitted,

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