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MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

FILED  
OCT 28 2011  
CLERK SUPREME COURT

W.D. No. 72654  
(CONSOLIDATED WITH W.D. 72629)

91834

DOT TRANSPORTATION, INC.,  
Appellant

FILED

Vs.

OCT 28 2011

NATHAN GILMORE, ET. AL.,  
Respondents

CLERK, SUPREME COURT

BRIEF OF APPELLANT DOT TRANSPORTATION, INC.

CD

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**SERVICE BRIEF**  
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## JURISDICTIONAL STATEMENT

This action involves the question of whether the Appellants Staci Lewis and McCartney Lewis, a minor, whose husband/father was killed in a work related accident, and who obtained an Award against a statutory employer (Appellant DOT Transportation, Inc.), may bring a civil action against the employer, who did not carry workers' compensation liability coverage at the time of the accident, under the provisions of Section 287.280.1 R.S. MO. Appellant DOT Transportation, Inc., the statutory employer against whom the Award was obtained in the Division of Workers Compensation was an Intervenor in the trial court action and joins in seeking review of the trial court's grant of summary judgment below. Hence, this consolidated Appeal involves the construction of a state statute.

This appeal does not involve the validity of any treaty or statute of the United States, or any statute or provision of the Constitution of this state nor does it otherwise fall within the exclusive jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction for this appeal is vested in the Missouri Court of Appeals, Article 5, Section 3, of the Missouri Constitution. Because this cause was briefed, and final judgment was entered in Linn County, jurisdiction is vested in the Missouri Court of Appeals, Western Division, R.S. Mo. §477.050.

## **STATEMENT OF FACTS**

The Appellant DOT Transportation, Inc. hereby adopts and incorporates the Statement of Facts set forth in the Appellant's Brief (sic) filed on behalf of Appellants Staci Lewis and McCartney Lewis, a minor, in Appeal No. 72629 as a fair and concise statement of the facts relevant to the question presented for determination without argument, as required by Supreme Court Rule 84.04 (c).

**POINT RELIED ON**

**THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT SECTION 287.280.1 ALLOWED APPELLANTS TO PROCEED IN A CIVIL LAWSUIT AGAINST RESPONDENT BUDDY FREEMAN FOR HIS FAILURE TO INSURE HIS LIABILITY UNDER THE MISSOURI WORKERS' COMPENSATION LAWS.**

## ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT SECTION 287.280.1 ALLOWED APPELLANTS TO PROCEED IN A CIVIL LAWSUIT AGAINST RESPONDENT BUDDY FREEMAN FOR HIS FAILURE TO INSURE HIS LIABILITY UNDER THE MISSOURI WORKERS' COMPENSATION LAWS.

Fast v. Marston, 282 S.W.3d 346, 346 (Mo. 2009);

ITT Commercial Fin. Corp. v. Mid-Am Marine Supply Corp. 854 S.W.2d 371, 376 (Mo. Banc 1993);

§287.280.1 Revised Statutes of Missouri;

§287.060 Revised Statutes of Missouri.

### Standard of Review

Appellate review of summary judgment is *de novo*. Fast v. Marston, 246 S.W.3d 346, 346 (Mo. 2009); ITT Commercial Fin. Corp. v. Mid-Am Marine Supply Corp. 854 S.W.2d 371, 376 (Mo. Banc 1993). Summary judgment is appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. ITT Commercial Fin. Corp., at 376. The movant bears the burden of establishing a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. Id., at 376-381.

As a preliminary matter, Appellant DOT Transportation, Inc. states that it concurs with and joins in the Argument set forth in the Brief submitted in this

consolidated appeal by Appellants Lonnie Lewis and Staci Lewis in its entirety and, hopefully, will not needlessly extend this Brief by repeating or rehashing the same legal arguments. Rather, DOT will seek simply to supplement the arguments already made by Co-Appellants.

Appellant DOT Transportation, Inc. was found by the Missouri Division of Workers Compensation to be the statutory employer of decedent Lonnie Lewis due to the failure of his direct employer, Defendant/Respondent Buddy Freeman, to insure his liability for workers compensation as required by §287.060 of the Revised Statutes of Missouri which requires "...every employer and every employee, except as in this chapter otherwise provided, shall be subject to the provisions of this chapter and respectively to furnish and accept compensation as herein provided." As a result of this Award, this Appellant has already paid and/or will pay in the future, several hundred thousand dollars in benefits to Appellants Staci Lewis and McCartney Lewis as a result of the death of Lonnie Lewis, all as outlined in the Award entered by the Division of Workers Compensation which is contained at pages A-6 through A-19 of the Appendix to the Appellant's Brief (sic) of Appellants Staci Lewis and McCartney Lewis.

Pursuant to §287.150 of the Revised Statutes of Missouri, this Appellant seeks to enforce its subrogation rights against the tortfeasors who caused the death of Lonnie Lewis and, thereby, when coupled with the blatant disregard of

§287.060 by Defendant/Respondent Buddy Freeman, caused this Appellant to incur the significant financial liability of the Workers Compensation Award.

Not only is the reading of §287.210.1 urged by Co-Appellants correct as a matter of statutory interpretation but to read it otherwise would lead to the most unjust result of Defendant/Respondent Buddy Freeman benefiting from the irresponsible decision to fail to insure his workers compensation liability as he will not have faced any liability from such failure in the Division of Workers Compensation or in a civil court. Such a result would be manifestly unjust and would encourage the flouting of §287.060 requiring employers to insure their liability for workers compensation.

Defendant/Respondent Freeman claims to be an employer with employer immunity, yet he did not “furnish compensation” under the Missouri Workers Compensation Law. As stated so eloquently in **Gunnett v. Girardier Bldg. and Realty Co., 70 S.W.3d 632 (Mo.App. E.D. 2002):**

Workers' compensation laws can be viewed as representing a compromise-a give and take between the employer and the employee. Workers' compensation laws provide a no-fault system of compensation for the employee. **Akers v. Warson Garden Apartments, 961 S.W.2d 50, 56 (Mo. banc 1998); Keeton, supra section 80 at 573; Larson, supra section 2.10.** The employee, who sustains an injury through an accident arising out of and in the course of employment, is provided certain compensation, without the necessity of having to prove fault on the part of the employer, and without being subject to the “unholy trinity” of common-law defenses. **See Gambrell v. Kansas City Chiefs Football Club, Inc., 562 S.W.2d 163, 165 (Mo.App.1978); Todd, 493 S.W.2d at 416; Bethel, 551 S.W.2d at 618; Akers, 961 S.W.2d at 56.** In exchange for

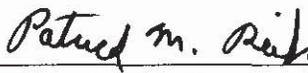
definite compensation for all work-connected injuries, the employee foregoes his right to sue his employer for negligence and to obtain the common-law measure of damages in cases where fault could be shown. Leicht v. Venture Stores, Inc., 562 S.W.2d 401, 402 (Mo.App.1978). From the employer's perspective, the employer accepts absolute liability, assuming a broader range of liability than it might have had at common law, under a fault-based system of liability. See Id., Akers, 961 S.W.2d at 56. But, in exchange, the employer is protected since the compensation under the workers' compensation statutes is the injured employee's exclusive remedy against the employer; the employer is protected from the possibility of having to pay out the full measure of common-law damages. See Leicht, 562 S.W.2d at 402; Gambrell, 562 S.W.2d at 165; § 287.120 RSMo.2000.

## CONCLUSION

Section 287.280.1 R.S. MO provides that an employee (or dependents) may elect to sue an employer in a civil proceeding where such employer has failed to maintain workers' compensation coverage. In the instant case, Appellants, including Appellant DOT Transportation, Inc., the statutory employer against whom a large Award was entered by the Division of Workers Compensation and the Intervenor in the trial court, have chosen to do so by the filing of their Petition herein on the basis that Buddy Freeman had not obtained workers' compensation liability insurance coverage and thus Appellants are properly before the Circuit Court and may proceed in a civil action against Buddy Freeman and the co-employee Nathan Gilmore.

For the foregoing reasons Appellant DOT Transportation, Inc., respectfully requests that this Court reverse the decision of the Circuit Court in granting Respondents' Motion for Summary Judgment and to remand this lawsuit with directions to proceed with trial on the merits.

Respectfully submitted,  
**MONACO, SANDERS, GOTFREDSON,  
RACINE, & BARBER, L.C.**

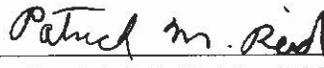
  
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**CERTIFICATION**

Comes now Patrick M. Reidy, Attorney for Appellant DOT Transportation, Inc. and hereby certifies that:

1. Appellants initial brief does not exceed 31,000 words or 2200 lines of text.
2. The number of words in the brief is 1,749.
3. The electronic copy of this brief has been scanned for viruses and it is virus-free.

**MONACO,SANDERS, GOTFREDSON,  
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**CERTIFICATE OF SERVICE**

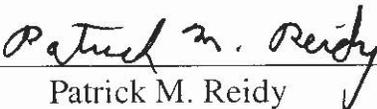
I hereby certify that an original and 7 copies of the Appellants' Brief were hand delivered on this 9<sup>th</sup> day of December, 2010, to:

Clerk of the Court of Appeals  
Missouri Court of Appeals, Western District  
1300 Oak Street  
Kansas City, Missouri 64106-2970

and copies of Appellants' Brief was mailed by U.S. Mail, postage paid, this 9<sup>th</sup> day of December 2010, to the following:

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