

IN THE SUPREME COURT OF THE STATE OF MISSOURI

CASE NO. SC87773

STATE EX. REL. MW BUILDERS, INC.,

Relator,

vs.

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

Respondent.

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

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

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TABLE OF CONTENTS

Table of Contents	2
Table of Authorities	3
Argument	4
Certificate of Service and Compliance	18

TABLE OF AUTHORITIES

Cases:	Page(s):
<i>Boatman v. Superior Outdoor Advertising Co.</i> , 482 S.W.2d 743 (Mo. App. 1972)	13
<i>Horner v. Hammond</i> , 916 S.W.2d 810 (Mo. App. 1996)	9, 10
<i>Logan v. Show-me Electric Coop.</i> , 122 S.W.3d 670 (Mo. App. 2003)	10, 11
<i>Sargent v. Clements</i> , 88 S.W.2d 174 (Mo. 1935)	10
<i>Seeley v. Anchor Fence Co.</i> , 96 S.W.3d 809 (Mo. App. 2002)	12
 Statutes:	
§ 287.040, RSMo. 2000	4, 14
§ 287.120, RSMo. 2000	4, 14
 Supreme Court Rules:	
Rule 74.04	6, 15, 17

ARGUMENT

Plaintiffs Randy and Patricia Pivaler (“Pivaler”) fail in Respondent’s Brief to cite a reported case in which a Missouri appellate court has found that a general contractor was *not* the statutory employer of its subcontractor’s employee. Instead, Pivaler sets forth the applicable statutory employment standards and points to isolated contractual provisions without consideration of what actually occurred on the construction site.

Pivaler emphasizes Northwest Missouri State University’s (“University”) “right” to control the project and premises, yet all property owners possess such rights during construction projects, and the “right” to control does not equate to actual control of the project and premises; therefore, Pivaler’s argument trivializes the immunity granted to general contractors from such civil lawsuits under §§ 287.040 and 287.120, RSMo. 2000. Pivaler further complains that he was not afforded an opportunity to conduct discovery even though Pivaler had more than six months to conduct discovery yet failed to engage in any such discovery.

The uncontested facts demonstrate that the University did not control the daily activities of Relator MW Builders, Inc. (“Relator” or “MW Builders”), and, furthermore, the construction site was under the exclusive control of MW Builders, and the general public did not have an equal right to use the premises. Therefore, this Court should make absolute its preliminary writ of prohibition and prohibit Respondent from taking any action in the Underlying Case other than dismissing Pivaler’s claims against MW Builders with prejudice.

I. Standard of Review

Piveral argues on behalf of Respondent that the proper standard of review is for abuse of discretion. *See* Respondent's Brief at 8. Piveral had **six weeks** to file a sur-reply in opposition to MW Builders' motion to dismiss, yet Piveral failed to file additional briefing with the Trial Court. Consequently, the facts presented through Robert Kimmig's affidavit attached to MW Builders' reply suggestions in support of its motion to dismiss should be deemed uncontested. Those facts are as follows:

- MW Builders was hired by the University to coordinate all of the general construction activities for the residence halls;
- Representatives of the University visited the construction site weekly to review the progress of the Project;
- Representatives of the University generally left construction of the residence halls to MW Builders and were interested only in the result of the work;
- The University did not control the daily activities on the construction site or the means and methods of construction; rather, MW Builders controlled the daily activities of the construction site;
- The University did not direct MW Builders or its subcontractors on how to build residence halls; rather, the University's architects provided MW Builders with plans and specifications, and it was up to MW Builders to construct the residence halls; and,

- 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 5, Appendix, A87-A88).

Piveral also failed to address the below statements in Peter Kelley's affidavit attached to MW Builders' suggestions in support of its motion to dismiss; instead, Piveral indicates that he did not have sufficient information to admit or deny the statements in the affidavit. *See* Respondent's Brief at 9. However, Piveral received documents informally requested from MW Builders, never served written discovery on MW Builders, never requested a single deposition from MW Builders, did not submit an affidavit stating which facts essential to justify opposition to MW Builders' motion could not be presented, and did not seek "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had" Missouri Supreme Court Rule 74.04(f). Therefore, the following facts in Peter Kelley's affidavit should be deemed uncontested, to wit:

- MW Builders, Inc.'s usual business is general construction contracting;
- On March 12, 2003, MW Builders, Inc. entered into a construction contract with owner NMSU wherein MW Builders would "furnish all labor and materials and perform all work required for furnishing and installing all labor, materials, equipment and transportation and everything necessarily inferred from the general nature and tendency of the plans and specifications for the proper execution of the

work for Residence Halls - Phase I, drawings and addendums all as prepared by [the architect], and shall do everything required by this Agreement, General Conditions of the contract, specifications, and drawings and all other contract documents.”;

- On March 12, 2003, MW Builders entered into a “Standard Form of Subcontract” (“Masonry Subcontract”) for the Project with Northwest Missouri Masonry, Inc. (“NMM”);
- Exhibit A to the Masonry Subcontract states that NMM “shall furnish all layout, labor, material, tools, equipment and supervision required to perform *Masonry & Cast Stone*, in its entirety per plans, specifications, Missouri Labor Standards Annual Wage Order No. 9 and the state of Missouri requirements.”;
- Plaintiff Randy Piveral was an employee of NWMM at the time of the accident alleged in the Petition;
- Plaintiff Randy Piveral’s accident occurred while improvements were being erected on the NMSU Project by MW Builders and NWMM;
- Masonry work is typical in constructing buildings and is routinely performed on construction projects on which MW Builders is contracted;
- Masonry work is an essential aspect of MW Builders’ business as certain buildings cannot be built without it;
- Masonry work is conducted on a regular and frequent schedule on construction projects and was being done on a regular schedule on the University project;

- If MW Builders had not hired NMM, the masonry work would have required MW Builders to hire permanent employees to perform such work;
- The Masonry Subcontract obligated NMM to “begin work as soon as instructed to do so by MW [Builders] and shall carry the same forward promptly, efficiently and at a speed as required to satisfy the project schedule and that will not damage or delay MW.”; and,
- The Masonry Subcontract incorporated the Prime Contract, which provided that Building 2 was to be substantially complete by June 21, 2004.

(Exhibit 4, Appendix, A26-A28).

This Court should deem these facts uncontested and review the issue of the University’s alleged control over the project and premises *de novo*. Even if this Court applies an abuse of discretion standard, the facts and arguments presented by MW Builders reveal that Respondent abused her discretion in denying MW Builders’ motion to dismiss. Respondent’s order denying MW Builders’ motion to dismiss is “clearly against the logic of the circumstances.” Respondent’s Brief at 9.

II. MW Builders is Pival’s Statutory Employer

Pival argues in his response brief that MW Builders is not his statutory employer because the University retained significant control over the project and the premises on which the work was being performed. *See* Respondent’s Brief at 10.

A. MW Builders was an Independent Contractor Under § 287.040.3, RSMO. 2000, Because the University Did Not Control the Daily Activities of MW Builders

Piveral argues that the University “specifically reserved the right to give all orders,” “maintained the right to control the project,” “had the right to govern and control” MW Builders’ dismissal, had the “right to instruct MW Builders,” “maintained the right to have access to the work,” “had the right to direct MW Builders,” and required MW Builders to follow policies regarding affirmative action, prevailing wages, progress schedules, meetings, and conferences. Respondent’s Brief at 13-16.

The above “rights” reserved by the University in its contract with MW Builders, however, are not sufficient to disqualify MW Builders as an independent contractor. In *Horner v. Hammond*, 916 S.W.2d 810, 816 (Mo. App. 1996), cited in Respondent’s Brief, the Court of Appeals held that the test is whether the owner controlled the **daily activities** of the general contractor during construction.

In this case, the uncontested evidence before the Trial Court reflected that the University did not control the daily activities of MW Builders during construction of the residence hall. MW Builders presented evidence that representatives of the University visited the construction site *weekly* to review the *progress* of the Project, and 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. **(Exhibit 5, Appendix, A87-A88)**. Pivaler has not contradicted these facts.

Furthermore, the Court of Appeals in *Horner* cited *Sargent v. Clements*, 88 S.W.2d 174 (Mo. 1935), which found an independent contractor relationship when the control exercised by the owner had to do with the result sought and not with the method or manner in which the contractor was to do the work. In this case, the uncontested evidence before Respondent, including the contract provisions cited by Pivaler, reflects that the University was concerned with the result of construction, rather than the method and manner of construction.

MW Builders presented evidence 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 5, Appendix, A87-A88)**. MW Builders presented further evidence that the University did not direct MW Builders or its subcontractors on how to build residence halls; rather, the University's architects provided MW Builders with plans and specifications, and it was up to MW Builders to construct the residence halls. *See id.* Pivaler have not contradicted these facts.

Pivaler may argue that the inclusion of contractual provisions regarding affirmative action, prevailing wages, and other such requirements reflect that the University was indeed concerned with the method and manner of construction. However, the Court of Appeals' holding in *Logan v. Show-me Electric Coop.*, 122 S.W.3d 670, 676 (Mo. App. 2003), reveals that the contractual provisions are not conclusive on the issue

of whether the owner “substantially controlled” the physical activities of the employees of the independent contractor or the details of the manner in which the work was done. Specifically, the Court of Appeals held as follows:

The contract obligated Irby to use and follow Sho-Me's detailed parts lists, specifications, construction drawings, and staking sheets. But, a contract that requires an independent contractor to use specified materials, follow detailed construction documents, and adhere to directives about the sequence of work are not sufficient to show an owner is so substantially involved in overseeing construction as to justify imposing liability on the owner.

Id. at 677.

Furthermore, the contractual provisions cited by Pivaler are common in construction contracts, and Pivaler’s conclusion that the University controlled the daily activities of MW Builders because the University retained certain rights under the contract would create civil liability for general contractors and undermine § 287.040.3, which immunizes general contractors from civil claims by employees of subcontractors. For example, prevailing wage provisions are mandatory in public contracts, § 290.250, RSMo. 2000, and a general contractor would *never* be a statutory employer of its subcontractor’s employee under Pivaler’s analysis.

MW Builders previously cited several Missouri cases finding that a general contractor is the statutory employer of a subcontractor’s employee, and MW Builders is unable to locate case law supporting Pivaler’s argument in this case. In fact, Pivaler has

not cited a single case in which a Missouri court has ruled that a general contractor was *not* a statutory employee of its subcontractor's employee. Although Pivaler sets forth the rule regarding an owner's control over construction activities, this would be the first known Missouri appellate court case in which a general contractor was not a statutory employee of its subcontractor's employee.

**B. The Injury Occurred On or About the Premises of MW Builders
Under § 287.040.1, RSMo. 2000, Because the Premises Were
Temporarily Under the Exclusive Control of MW Builders and the
General Public Did Not Have an Equal Right to Use the Premises**

Pivaler next argues that MW Builders is not a statutory employer under § 287.040.1 because MW Builders was not in “exclusive possession or control” of the premises insofar as the University “maintained the right to give all ‘orders and direction’,” maintained the right to determine the acceptability of the work, and “maintained the right to enter the premises at all times.” Respondent's Brief at 20 (emphasis added). Yet, Pivaler again fails to cite a single case in which a Missouri appellate court has held that a general contractor was not in exclusive possession or control of a construction site.

Pivaler references the generic phrase, “exclusive possession or control,” but he does not discuss how Missouri courts have interpreted this phrase. In *Seeley v. Anchor Fence Co.*, 96 S.W.3d 809, 818 (Mo. App. 2002) (overruled on other grounds), the Court

of Appeals held, “It is settled law that the word ‘premises’ as so used should **not** be given a narrow or refined construction. Rather, in keeping with both the spirit and specific direction of the Workmen's Compensation Act, the word ‘premises’ should be liberally construed and applied.” (Quotations and citations omitted) (emphasis added).

In *Boatman v. Superior Outdoor Advertising Co.*, 482 S.W.2d 743, 745 (Mo. App. 1972), for example, the Court of Appeals held,

‘Premises’ includes locations that *temporarily* may be under the exclusive control of the statutory employer by virtue of the work being done, and ‘exclusive control’ indicates such a control in the ‘premises’ by the statutory employer that the *general public does not have an equal right to use* them along with the employer and the independent contractor.

(Citations omitted).

In *Boatman*, a contract between a restaurant and a painter required the painter to return whenever the restaurant indicated such services were required. *Id.* When the painter returned to the area of the restaurant being painted, the painter was under a right exclusive to it and not available to the general public. *Id.* The Court of Appeals looked beyond the contract documents to the circumstances of the accident and control of the premises in holding that the restaurant was the statutory employer of the painter. *Id.* at 746. In this case, the residence halls under construction were temporarily under the exclusive control of MW Builders, and the general public did not have an equal right to

use the premises. Consequently, MW Builders was a statutory employer at the time of the accident under § 287.040.1.

Finally, Piveral's argument that the premises were not in MW Builders' "exclusive possession or control" because the University maintained "the right to enter the premises at all times would trivialize the immunity granted to general contractors from such civil lawsuits under §§ 287.040 and 287.120. Respondent's Brief at 20. In other words, in order for a general contractor to be immune from civil liability under Piveral's analysis, the owner must be barred from entering his or her own property while construction is underway. Piveral's position is unrealistic and untenable.

III. Piveral Were Afforded Sufficient Opportunity and Chose Not to Conduct Discovery in the Underlying Case

Piveral argues throughout Respondent's brief that "no meaningful discovery" has been conducted, he was "not afforded an opportunity to investigate or even respond to [Relator's affidavits] at the trial court level," and he has not had an opportunity to depose representatives of MW Builders. *See* Respondent's Brief at 18, 30.

These arguments should be rejected insofar as Piveral received documents informally requested from MW Builders, never served written discovery on MW Builders, never requested a single deposition from MW Builders, did not submit an affidavit stating which facts essential to justify opposition to MW Builders' motion could

not be presented, and did not seek “a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had” Rule 74.04(f).

Piveral, furthermore, did not seek an extension in which to conduct discovery in order to respond to MW Builders’ motion to dismiss, nor did Piveral identify any specific discovery needed to respond to MW Builders’ motion. Finally, Piveral had six weeks to file a sur-reply in opposition to MW Builders’ motion to dismiss, yet Piveral failed to file additional briefing.

Piveral, instead, filed his suggestions in opposition to MW Builders’ motion to dismiss and vaguely asserted that he was “without sufficient information to admit or deny” some of the facts asserted by MW Builders. Piveral’s suggestion that he was not afforded an opportunity to investigate or even respond to MW Builders’ affidavits at the trial court level is disingenuous and should be rejected.

IV. Piveral Waived Any Argument Regarding the Affidavits Cited by Relator When Piveral Failed to Raise Such Arguments in the Trial Court

Piveral finally raises objections for the first time in Respondent’s Brief regarding the affidavits attached to MW Builders’ motion to dismiss and reply suggestions in support of MW Builders’ motion to dismiss. Insofar as Piveral did not assert these arguments in the Trial Court, Respondent’s ruling on MW Builders’ motion to dismiss could not have been based on the alleged inadequacies in the affidavits. Furthermore, Piveral had ample time to conduct discovery or test the veracity of the affiants, yet

Pivaler took no action. Therefore, Pivaler's arguments concerning the affidavits should be rejected.

Pivaler's argument, nonetheless, is without legal support. Pivaler argues that it is "extremely important" to note that the affiants are representatives of MW Builders. Pivaler further contends that the affiants did not have "personal knowledge of the business of the University or any association with University," and MW Builders has not produced an affidavit from any representative of the University." Respondents' Brief at 24-25. Pivaler cites no authority for the proposition that the issue of the University's alleged control of the project and premises requires the testimony of the University. This argument, instead, is designed to undermine affidavits presenting facts which Pivaler did not address in the Underlying Case. The affidavits present facts supporting MW Builders' status as Pivaler's statutory employer, and these facts have not been controverted.

Finally, even if Respondent denied MW Builders' motion to dismiss based on Pivaler's argument that the case was not ripe for dismissal due to the lack of discovery completed, Respondent erred insofar as Pivaler had ample opportunity to conduct discovery and chose not to engage in such discovery. As discussed in Section III above, Pivaler failed to state which facts essential to justify opposition to MW Builders' motion could not be presented in response to the same, and Pivaler did not seek "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had"

Rule 74.04(f). Any ruling denying MW Builders' motion to dismiss on this basis is "clearly against the logic of the circumstances." Respondent's Brief at 23.

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

Respectfully submitted,

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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 hand-delivered, this 26th day of December, 2006, to:

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Furthermore, the undersigned certifies that: (1) Relator's Brief complies with the limitations contained in Rule 84.06 (excluding the cover, certificate of service and compliance, signature block and appendix, there are 3,263 words in Relator's Reply Brief); (2) the name and version of the word processing software used to prepare Relator's Reply Brief is Microsoft Word; and, (3) the e-mail provided to this Court containing Relator's Reply Brief has been scanned for viruses and is virus-free pursuant to Rule 84.06(h).

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