IN THE
MISSOURI SUPREME COURT

No. SC 90050

J. MICHAEL MCCRACKEN,

Plaintiff/Appellant,

vs.

WAL-MART STORES EAST, LP,

Defendant/Respondent.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
HONORABLE THOMAS E. MOUNTJOY, CIRCUIT JUDGE, DIVISION FOUR
CASE NO. 105CC4142

RESPONDENT'S SUBSTITUTE BRIEF

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ABBREVIATIONS:

"A."	Appendix to Respondent's Brief
"App. Sub. Br."	Appellant's Substitute Brief
"L.F."	Legal File

STATEMENT OF FACTS

A Statement of Facts must be a "fair and concise statement of the facts relevant to the questions presented for determination without argument." Mo. S. Ct. R. 84.04(c). Appellant J. Michael McCracken's ("Appellant McCracken") statement of facts does not satisfy this requirement. It presents only Appellant McCracken's evidence. Appellant McCracken omits entirely the evidence that Respondent Wal-Mart Stores East, LP ("Respondent Wal-Mart") offered and that the trial court received and relied on in dismissing Appellant McCracken's cause of action. Respondent Wal-Mart submits this complete Statement of Facts pursuant to Rule 84.04(f).

A. Introduction

Appellant McCracken appeals the trial court's dismissal of his cause of action against Respondent Wal-Mart for lack of subject matter jurisdiction. (L.F. 239-243). This dismissal arose out of Respondent Wal-Mart's motion to dismiss on the grounds Missouri's Workers' Compensation Law provides Appellant McCracken's exclusive remedy. (L.F. 26-175; L.F. 238).

B. Respondent Wal-Mart's Business.

Wal-Mart Stores, Inc., which is Respondent Wal-Mart's parent company, was a publicly traded corporation in 2004. (L.F. 120). Wal-Mart Stores, Inc. operates retail stores in various formats around the world that provide a broad assortment of merchandise. (L.F. 120). The Wal-Mart Stores segment, which includes Respondent Wal-Mart, is the largest segment of Wal-Mart Stores, Inc.'s business and in 2004

accounted for 67.3% of Wal-Mart Stores, Inc.'s sales. (L.F. 120). In 2004 Supercenters averaged approximately 187,000 square feet in size and offered a wide assortment of general merchandise and a full-line supermarket. (L.F. 120; L.F. 126). Offering a variety of consumer packaged goods for sale to its customers was an integral and essential part of Respondent Wal-Mart's business in November 2004. (L.F. 120).

In 2004 approximately 81% of the Wal-Mart Stores segment's purchases of merchandise were shipped from its 99 distribution centers, of which thirty-four were grocery distribution centers. (L.F. 127). The balance of merchandise purchased was shipped directly to stores from suppliers. (L.F. 127).

C. Respondent Wal-Mart had a contract with Appellant McCracken's employer to supply bread products and provide services associated with those products.

In November 2004, Respondent Wal-Mart operated a retail store in Neosho, Missouri that was known as Wal-Mart Supercenter #17. (L.F. 185-189). Wal-Mart Supercenter #17 offered a variety of products to its customers, including bread products, which were supplied by various vendors. (L.F. 185-189). Respondent Wal-Mart and Appellant McCracken's employer, Interstate Brands Corporation ("IBC"), had a Supplier Contract that became effective on October 6, 2003. (L.F. 197; L.F. 219). This contract stated that it remained in effect for one year. (L.F. 197-202). 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. (L.F. 103, The Deposition of Danny Townsend ("Townsend Deposition"), page 7, lines 21-23; L.F. 104, Townsend Deposition, page 9, lines 2-9; L.F. 105, Townsend Deposition, page 13, lines 4-7, page 14, lines 13-21; L.F. 185-189). Among the types of bread products supplied by IBC to Wal-Mart Supercenter #17 were bread products bearing the Wal-Mart brand, which is "Great Value." (L.F. 103, Townsend Deposition, page 8, lines 1-7; L.F. 126). IBC bread products with the "Great Value" label are held out to the public as being "marketed by" Wal-Mart Stores, Inc. (L.F. 233-237).

The "Great Value" bread products were delivered to Wal-Mart Supercenter #17 by an IBC transport driver. (L.F. 103, Townsend Deposition, page 8, lines 1-7). In delivering the "Great Value" bread products, the transport driver utilized IBC's equipment and/or Respondent Wal-Mart's equipment. (L.F. 185-189). The "Great Value" bread products were then placed in a specific, designated location in the receiving area to later be checked-in and stocked by an IBC salesman. (L.F. 103-104, Townsend Deposition, page 8, lines 1-7, page 9, lines 10-14; L.F. 185-189). An IBC salesman came to Wal-Mart Supercenter #17 on a regular basis to check-in IBC's bread products and then move those items onto the sales floor. (L.F. 185-189). Members of Respondent Wal-Mart's management staff had the authority to direct IBC employees with respect to their activities while at Wal-Mart Supercenter #17, and occasionally made contact with a Sales Manager of IBC to report issues and concerns with salesmen and transport drivers. (L.F. 185-189). Respondent Wal-Mart's management staff was never required to take

further action after reporting an issue to an IBC Sales Manager because the concerns were soon addressed. (L.F. 185-189).

Respondent Wal-Mart's management also made contact with an IBC Sales Manager at times to ensure that Wal-Mart Supercenter #17 was sufficiently stocked with IBC bread products. (L.F. 185-189). In the event IBC failed to provide a sufficient stock of IBC bread products at Wal-Mart Supercenter #17, Respondent Wal-Mart's management could obtain bread products by (1) obtaining the bread products from another Wal-Mart store within the same geographic market area; (2) obtaining the bread products from another Wal-Mart store outside the geographic market area; and (3) utilizing the Wal-Mart Market Manager responsible for Wal-Mart stores to employ a variety of resources available to him. (L.F. 185-189).

D. Appellant McCracken was injured while performing work pursuant to a contract between his employer and Respondent Wal-Mart.

In November 2004, Appellant McCracken was employed by IBC as a transport driver. (L.F. 12-17; L.F. 185-189). In making deliveries of "Great Value" 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, 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, McCracken Deposition, page 53, line 25 through page 54, line 20). On

occasion, Wal-Mart Supercenter #17's employees assisted IBC transport drivers, including Appellant McCracken, with the unloading of full bread racks from IBC's trucks and loading empty bread racks back into the truck. (L.F. 72, Deposition of McCracken, page 73, line 2 through page 74, line 19; L.F. 164, Transcript of the Testimony of Alicia Hammack ("Hammack Deposition"), page 7, lines 1-23; L.F. 166, Hammack Deposition, page 16, line 12 through page 17, line 22). In addition to assisting IBC transportation drivers in moving bread racks, Wal-Mart Supercenter #17's employees unloaded other products from delivery trucks and transported those products throughout the store. (L.F. 148-149, Transcript of the Testimony of Jacqueline McGee ("McGee Deposition"), page 6, lines 1-5, page 9, line 14 through page 10, line 2; L.F. 149-150, McGee Deposition, page 11, line 22 through page 12, line 15; L.F. 185-189).

Appellant McCracken's Petition claims he was injured on November 19, 2004 on Respondent Wal-Mart's premises while in the course and scope of his employment with IBC. (L.F. 12-17). At the time of his injury, Appellant McCracken was staging empty bread racks on a ramp directly outside Wal-Mart Supercenter #17's receiving roll-up door. (L.F. 70-71, McCracken Deposition, page 65, line 18 through page 68, line 11). The empty bread racks had been placed in front of the roll-up door because Appellant McCracken planned to transport the empty bread racks through the inside of Wal-Mart Supercenter #17's receiving area to his truck at the dock. (L.F. 12-17; L.F. 64, McCracken Deposition, page 40, line 22- page 41, line 5). He was struck in the shoulder by one of the empty bread racks when it was pushed out of the doorway by Respondent

Wal-Mart's receiving clerk. (L.F. 12-17; L.F. 70, McCracken Deposition page 67, lines 6-23). As a result of the injuries Appellant McCracken sustained on Respondent Wal-Mart's premises, Appellant McCracken filed a claim with the Missouri Division of Workers' Compensation and received workers' compensation payments from IBC. (L.F. 46-47; L.F. 48-49; L.F. 50).

E. The trial court dismissed Appellant McCracken's action for lack of subject-matter jurisdiction on the grounds Appellant McCracken was Respondent Wal-Mart's statutory employee.

On August 25, 2005, Appellant McCracken filed his Petition against Wal-Mart Stores, Inc. (L.F. 1; L.F. 12). The parties subsequently stipulated to the substitution of Respondent Wal-Mart as the proper party defendant. (L.F. 23-24). On March 3, 2008, Respondent Wal-Mart filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction and Suggestions in Support. (L.F. 6; L.F. 26). After the filing of briefs on the matter, the Court held a hearing on Appellant Wal-Mart's Motion to Dismiss for Lack of Subject Matter and Suggestions in Support on March 24, 2008. (L.F. 8). On April 9, 2008, the trial court sustained Appellant Wal-Mart's motion to dismiss via docket entry. (L.F. 9). The trial court entered its Order and Judgment dismissing Appellant McCracken's cause of action against Respondent Wal-Mart on April 11, 2008. (L.F. 9; L.F. 240).

Appellant McCracken appealed the trial court's ruling. (L.F. 9; L.F. 239-243). Finding that the trial court had subject matter jurisdiction, the Court of Appeals reversed the trial court's ruling, and remanded the case for further proceedings not inconsistent

with its opinion. *McCracken v. Wal-Mart Stores East, LP*, 2009 WL 464860 at *1, *3 (Mo.App. 2009). The Court of Appeals did not decide the issue of whether Appellant McCracken was Respondent Wal-Mart's statutory employee. *Id.* at *1.

On March 10, 2009, Respondent Wal-Mart filed its motion for rehearing and application for transfer to the Supreme Court in the Court of Appeals, which were denied on March 17, 2009. On March 31, 2009, Respondent Wal-Mart filed its Application for Transfer in this Court, which was sustained on May 5, 2009.

POINTS RELIED ON

I. The trial court did not err in dismissing Appellant McCracken's personal injury action against Respondent Wal-Mart because pursuant to § 287.120 R.S.Mo. (2000) the trial court no longer had subject matter jurisdiction once it determined an employer/employee relationship existed between Appellant McCracken and Respondent Wal-Mart for the purposes of Missouri's Workers' Compensation Law.

Goodrum v. Asplundh Tree Expert Company, 824 S.W.2d 6 (Mo. banc 1992)

Killian v. J & J Installers, Inc., 802 S.W.2d 158 (Mo. banc 1991)

De May v. Liberty Foundry Co., 37 S.W.2d 640 (Mo. 1931)

II. The trial court did not abuse its discretion in dismissing Appellant McCracken's personal injury action against Respondent Wal-Mart for lack of subject-matter jurisdiction because it appears from the preponderance of the evidence that Missouri's Workers' Compensation Law is the exclusive remedy for Appellant McCracken, a statutory employee of Respondent Wal-Mart, in that the undisputed evidence established:

A. Appellant McCracken was performing work pursuant to a contract between his employer and Respondent Wal-Mart at the time of his injury;

B. Appellant McCracken's injury occurred on Respondent Wal-Mart's premises; and

C. The duties provided pursuant to the contract between Respondent Wal-Mart and Appellant McCracken's employer, which included the unloading of bread products, were part of Respondent Wal-Mart's usual business and, absent the contract Respondent Wal-Mart would have had to assign those duties to its permanent employees.

Bass v. National Super Markets, Inc., 911 S.W.2d 617 (Mo. banc 1995)

Augur v. Norfolk Southern Railway Co., 154 S.W.3d 510 (Mo.App. W.D. 2005)

Busselle v. Wal-Mart, 37 S.W.3d 839 (Mo.App. S.D. 2001)

DuBose v. Flightsafety Intern., Inc., 824 S.W.2d 486 (Mo.App. E.D. 1992)

ARGUMENT

Standard of Review

As recently as 2007, this Court held that "a motion to dismiss for lack of subject matter jurisdiction is an appropriate means of raising the workers' compensation law, chapter 287, as a defense to a common law tort action." *Harris v. Westin Management Co. East*, 230 S.W.3d 1, 2-3 (Mo. banc 2007). This has been the appropriate method for raising the defense for over twenty years. See *Id.*; *James v. Poppa*, 85 S.W.3d 8 (Mo. banc 2002); *State ex rel. McDonnell Douglas Corp. v. Ryan*, 745 S.W.2d 152 (Mo. banc 1988). Under this jurisdictional analysis, when an action arising from the plaintiff's employment is filed in the circuit court, the court must decide as an initial matter whether it has jurisdiction to address the issues raised. *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617, 621 (Mo. banc 1995). Missouri's Workers' Compensation Law "supplants the common law in determining the remedies for on-the-job injuries." *Vatterott v. Hammerts Iron Works, Inc.*, 968 S.W.2d 120, 121 (Mo. banc 1998). Section 287.040 of Missouri's Workers' Compensation Law extends coverage to certain constructive employment relationships in which employers have work done by contract. *Id.*

The question of whether a trial court has subject matter jurisdiction may be raised at any time, including for the first time on appeal. *Vance Bros., Inc. v. Obermiller Const. Services, Inc.*, 181 S.W.3d 562, 564 (Mo. banc 2006). A trial court is required to dismiss the action if it "appears" by the parties' suggestions or otherwise that the court lacks subject matter jurisdiction. *Harris*, 230 S.W.3d at 3; Mo. R. Civ. Pro. 55.27(g)(3) (2008).

"As the term 'appears' suggests, the quantum of proof is not high; it must appear by the preponderance of the evidence that the court is without jurisdiction." *Harris*, 230 S.W. 3d at 3. The movant is not required to show by unassailable proof that there is no material issue of fact because the circuit court decides only the preliminary question of its own jurisdiction. *State ex rel. J.E. Jones Constr. Co. v. Sanders*, 875 S.W.2d 154, 157 (Mo.App. E.D. 1994).

The Workers' Compensation Act directs the courts to construe the act liberally "with a view to the public welfare." *Vatterott*, 968 S.W.2d at 121 (quoting § 287.800 R.S.Mo. (1994)). Under this liberal construction of the Act, if jurisdiction is in doubt the circuit court should resolve the issue in favor of applying the Act. *Bass*, 911 S.W.2d at 619. "This law of construction may limit a particular individual's recovery, but it ensures that more individuals enjoy the protection intended by the Workers' Compensation Law." *Vatterott*, 968 S.W.2d at 121.

Whether a court has subject matter jurisdiction is "a question of fact left to the sound discretion of the trial court." *Owner Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc.*, 133 S.W.3d 162, 166 (Mo.App. S.D. 2004). When the trial court resolves the question of jurisdiction, the appellate court reviews that decision for an abuse of discretion. *Id.* A circuit court abuses its discretion only when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. *Seldomridge v. General Mills Operations, Inc.*, 140 S.W.3d 58, 62 (Mo.App. W.D. 2004). If reasonable minds

could differ about the propriety of the circuit court's action, then it cannot be said the circuit court abused its discretion. *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 151 (Mo. banc 1998).

The Court of Appeals has stated that the appropriate method for raising the defense of Missouri's Workers' Compensation Law is as an affirmative defense in a responsive pleading. *McCracken*, 2009 WL 464860, *2. The burden of establishing the affirmative defense rests upon the defendant. *Roberts v. Epicure Foods Company*, 330 S.W.2d 837, 839 (Mo. 1960). A defendant may obtain summary judgment based on an affirmative defense if it shows "there is no genuine dispute as to the existence of *each* of the facts necessary to support the movant's properly-pleaded affirmative defense." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993). The standard of review of a grant of summary judgment is *de novo*. *Id.* at 376.

I. The trial court did not err in dismissing Appellant McCracken's personal injury action against Respondent Wal-Mart because pursuant to § 287.120 R.S.Mo. (2000) the trial court no longer had jurisdiction once it determined an employer/employee relationship existed between Appellant McCracken and Respondent Wal-Mart for the purposes of Missouri's Workers' Compensation Law.

The trial court sustained Respondent Wal-Mart's motion to dismiss for lack of subject matter jurisdiction, which was based on the grounds Appellant McCracken was

Respondent Wal-Mart's statutory employee pursuant to § 287.120[1]; therefore, Appellant McCracken's exclusive remedy was through Missouri's Workers' Compensation Law. The Court of Appeals found that § 287.120 did not countermand "the subject matter jurisdiction otherwise granted to the circuit court to hear and decide a common law tort action by article V, section 14" of the Missouri Constitution, citing to *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253-54 (Mo. banc 2009). *McCracken*, 2009 WL 464860 at *3. The Court of Appeals held the trial court had subject matter jurisdiction to hear and decide Appellant's cause of action even though the trial court determined Appellant McCracken's exclusive remedy was through Missouri's Workers' Compensation Law. *Id.*

Section 287.120 provides that the rights and remedies granted to an employee in Missouri's Workers' Compensation Law "shall exclude all other rights and remedies of the employee . . . at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by [Chapter 287]." § 287.120.2. In *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 159-161 (Mo. banc 1991), this Court outlined the method in which section 287.120[2] is to be applied to cases filed in circuit court. Pursuant to the analysis in *Killian*, the circuit court has authority to determine whether an employer/employee relationship exists; however, the circuit court may not determine whether the employee's injuries resulted from an accident within the

[1] All references to statutes are to R.S.Mo. 2000, unless otherwise indicated.

[2] § 287.120 R.S.Mo. (1986).

meaning of Missouri's Workers' Compensation Law, because that issue requires the expertise of the Commission. *Id.* at 160, 161. Whether the employee's injuries arose out of an accident can only be determined by the Commission. *Id.* In the case at hand, the trial court determined it no longer had subject matter jurisdiction because an employer/employee relationship existed between Appellant McCracken and Respondent Wal-Mart. The determination of whether Appellant McCracken's injuries arose out of an accident can only be made by the Commission.

This Court determined that § 287.120 as applied in *Killian* did not violate Article V, Section 14 of the Missouri Constitution in *Goodrum v. Asplundh Tree Expert Company*, 824 S.W.2d 6 (Mo. banc 1992). In that case, the defense of the exclusivity of Missouri's Workers' Compensation Law was raised in a motion to dismiss for lack of subject matter jurisdiction. *Id.* at 7. The trial court granted the motion to dismiss despite the constitutional challenges raised by the plaintiff. *Id.* at 7, 11. This Court first noted that the legislature has "denominated the workers' compensation scheme as the mandatory procedure for all work-related accidental claims," which is within the legislature's inherent power. *Id.* at 11. This Court further noted that the legislature's inherent power is only limited by the Constitution. *Id.*

Article V, § 14 governs the jurisdiction of circuit courts, and provides that "[t]he circuit courts shall have original jurisdiction over all cases and matters, civil and criminal." *Id.* at 12 (quoting Mo. Const. Art. V, § 14). In *Goodrum*, this Court noted that it originally decided in *De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 653 (Mo. 1931)

that Missouri's Workers' Compensation Law, which at that time allowed for an appeal of the Commission's decisions to the circuit court, did not violate Article V, § 14. *Goodrum*, 824 S.W.2d at 11. When *Goodrum* was decided, the current version of Section 287.490.1 was in effect, which also allows for an appeal of the Commission's decisions to the circuit court. *Id.* at 11; § 287.490 R.S.Mo. This Court held that although Section 287.490.1 tightly limits the functions of the circuit court to that of an appellate review function, Missouri's Workers' Compensation Law does not interfere with the circuit courts' original jurisdiction as granted in Article V, Section 14 of the Missouri Constitution. *Goodrum*, 824 S.W.2d at 11.

When *De May* was decided, Article V, § 14 provided: "The circuit court shall have original jurisdiction over all criminal cases not otherwise provided for by law, exclusive original jurisdiction in all civil cases not otherwise provided for, and concurrent and appellate jurisdiction as provided by law." *Goodrum*, 824 S.W.2d at 12 (quoting Mo. Const. Art. V § 14 (1945)). Based on an amendment in 1976, that omitted the language "not otherwise provided for" the plaintiff in *Goodrum* argued that the amendment demanded that the circuit court at least have concurrent jurisdiction with the Commission to determine whether the injury arose out of an accident. *Goodrum*, 824 S.W.2d at 12. This Court rejected that argument, refusing to "read the amendment as a constraint upon the previously established power of the administrative agencies." *Id.*

This Court's decision in *Goodrum* demonstrates the trial court acted properly when it entered a judgment of dismissal upon finding Appellant McCracken's exclusive

remedy was through Missouri's Workers' Compensation Law. This Court has already determined that the Commission's exclusive jurisdiction to determine whether Appellant McCracken's injuries rose out of an accident within the meaning Missouri's Workers' Compensation Law does not infringe on the trial court's original jurisdiction. See *Id.* at 11-12. Therefore, the trial court's dismissal for lack of subject matter jurisdiction should be affirmed.

II. The trial court did not abuse its discretion in dismissing Appellant McCracken's personal injury action against Respondent Wal-Mart for lack of subject-matter jurisdiction because it appears by the preponderance of the evidence that Missouri's Workers' Compensation Law provides the exclusive remedy for Appellant McCracken, a statutory employee of Respondent Wal-Mart, in that the undisputed evidence established:

A. Appellant McCracken was performing work pursuant to a contract between his employer and Respondent Wal-Mart at the time of his injury;

B. Appellant McCracken's injury occurred on Respondent Wal-Mart's premises; and

C. The duties provided pursuant to the contract between Respondent Wal-Mart and Appellant McCracken's employer were part of Respondent Wal-Mart's usual business and, absent the contract

Respondent Wal-Mart would have had to assign those duties to its permanent employees.

1. Introduction

Appellant McCracken appeals the trial court's dismissal of his personal injury action for lack of subject-matter jurisdiction based on the exclusivity of the Missouri's Workers' Compensation Law. When the evidence before the trial court is examined, only one conclusion may be drawn – the trial court did not abuse its discretion in finding that Appellant McCracken was Respondent Wal-Mart's statutory employee. Therefore, the trial court's order dismissing Appellant McCracken's action for lack of subject-matter jurisdiction should be affirmed.

Section 287.040 of the Missouri Revised Statutes defines those relationships that create constructive or statutory employment for purposes of workers' compensation under Missouri law. Section 287.040.1 provides:

> Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.
>
> § 287.040.1.

Section 287.040.1 creates a constructive employment relationship in order to extend coverage of the Workers' Compensation Act to employers who have work done pursuant to a contract. *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532, 534 (Mo. banc 1988). For the purposes of the Workers' Compensation Act, statutory employment exists when the following three elements are present: "(1) the work is performed pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and (3) the work is in the usual course of business of the alleged statutory employer." *Bass*, 911 S.W.2d at 619-20. In applying these elements, "each case must be determined on its own facts and the court must recognize the 'real roles and relationships' of the parties as they relate to the purpose of the statute." *Wilson v. Unistrut Service Co. of St. Louis, Inc.*, 858 S.W.2d 729, 731-32 (Mo.App. W.D. 1993).

Appellant McCracken fits squarely within each of these three elements. There is no dispute that he was performing work pursuant to a contract between his employer and Respondent Wal-Mart on Respondent Wal-Mart's premises when he was injured. (App. Sub. Br. 16). There can also be no real dispute that Appellant McCracken was performing work within Respondent Wal-Mart's usual business at the time of the injury. Therefore, Appellant McCracken is Respondent Wal-Mart's statutory employee and his exclusive remedy is the Missouri Workers' Compensation Law.

2. Appellant McCracken's injury occurred while he was performing work pursuant to a contract on Respondent Wal-Mart's premises.

There is no dispute that Appellant McCracken's injury occurred while he was performing work on Respondent Wal-Mart's premises pursuant to a contract between his employer, Interstate Brands Corporation ("IBC"), and Respondent Wal-Mart. (App. Sub. Br. 16). Respondent Wal-Mart and IBC were operating under a contract whereby IBC supplied bread products and ordered, delivered, marketed, and stocked bread products at Respondent Wal-Mart's stores, and Respondent Wal-Mart allowed IBC's employees on its property to perform these duties. (L.F. 185-189; L.F. 104, Townsend Deposition, page 9, lines 2-9). "Contract" under § 287.040.1 has been interpreted broadly and includes any oral or written contract, expressed or implied. *State ex rel. J.E. Jones Construction Co.*, 875 S.W.2d at 157.

3. The work being performed by Appellant McCracken at the time of his injury was in the usual business of Respondent Wal-Mart.

The only element in dispute is the third element, which is whether Appellant McCracken was doing work in the usual course of Respondent Wal-Mart's business when he was injured. For the purposes of § 287.040, an employer's "usual business" is defined as those activities "(1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement."

Bass, 911 S.W.2d at 621. This definition articulates the legislature's intent in adopting the statutory employment provision "without sweeping within its reach specialized or episodic work that is essential to the employer but not within the employer's usual business as performed by its employees." *Id.* If the work is not an isolated or specialized job, but is regularly and continuously performed as an integrated part of the employer's usual business, the "usual business" requirement is satisfied. *Anderson v. Benson Mfg. Co.*, 338 S.W.2d 812, 815 (Mo. 1960).

In *Bass*, this Court analyzed the third element of the statutory employer defense. 911 S.W.2d at 619. The facts established in *Bass* were that Building Butlers, Inc. ("BBI") orally contracted with National Super Markets to furnish personnel and provide janitorial services, including floor maintenance. *Id.* at 618. BBI assigned Kenneth Bass to perform routine janitorial services at one of National Super Markets' stores. *Id.* Mr. Bass was later killed during a robbery at the store to which he was assigned. *Id.* Mr. Bass' survivors filed a wrongful death action against National Super Markets, alleging National Super Markets failed to provide adequate security to protect Mr. Bass. *Id.* After the trial, the trial court sustained National Super Markets' motion for judgment notwithstanding the verdict, finding that it lacked subject matter jurisdiction. *Id.*

The plaintiffs initially argued that the usual business of National Super Markets was to "buy, sell, manufacture, process, and otherwise deal in groceries, produce, meat and general merchandise." *Id.* at 620. The plaintiffs further argued that because BBI used specialized equipment to perform its duties, it was clear that National Super Markets

was not in the business of cleaning floors. *Id.* The court found that if not for the contract between BBI and National Super Markets, National Super Markets would have been required to either assign floor care duties to its staff or hire additional staff to maintain its floors; therefore, Mr. Bass was National Super Market's statutory employee at the time of his death. *Id.* at 622.

In this case Appellant McCracken was clearly performing work in the usual course of Respondent Wal-Mart's business when he was injured. Like National Super Markets, Respondent Wal-Mart operates retail stores, including Wal-Mart Supercenter #17 in Neosho, Missouri. (L.F. 120; L.F. 185-189). Offering its customers a variety of products, including bread products, remains an integral and essential part of Respondent Wal-Mart's business. (L.F. 120; L.F. 185). To accomplish this, Respondent Wal-Mart contracted with vendors, including IBC, to supply certain bread products. (L.F 197-202; L.F. 185-189). In addition to supplying bread products, the contract required IBC to perform certain services, such as ordering, delivering, stocking, and marketing the bread products. (L.F. 104, Townsend Deposition, page 9, lines 2-9; L.F. 185-189). Although Respondent Wal-Mart's main business was not making bread products, keeping a sufficient supply of bread products on its shelves was an essential part of its business.

To accomplish the aforementioned contractual duties, IBC employed transport drivers, including Appellant McCracken, to deliver certain bread products to Wal-Mart Supercenter #17. (L.F. 103-104, Townsend Deposition, page 8, lines 1-7; L.F. 12-17; L.F. 185-189). Transport drivers used equipment owned by IBC or Respondent Wal-

Mart to unload the bread products. (L.F. 186). Once the bread products were unloaded, the transport driver placed the bread products in a designated location in the receiving area to later be checked-in, stocked, and merchandised by an IBC salesman. (L.F. 103-104, Townsend Deposition, page 8, lines 1-7, page 9, lines 10-14; L.F. 185-189). These services were necessary for the continued operation and success of Respondent Wal-Mart's store.

The Court of Appeals examined the statutory employee relationship in relation to Respondent Wal-Mart's business in *Busselle v. Wal-Mart*, 37 S.W.3d 839 (Mo.App. S.D. 2001). In that case Wal-Mart appealed the Commission's award for the claimant. *Id.* at 840. The claimant was an electrician who worked for a variety of customers, including Wal-Mart. *Id.* The claimant performed occasional electrical work at Wal-Mart's stores in Bolivar, Missouri and Buffalo, Missouri under separate contracts, changing ballasts in fluorescent light fixtures. *Id.* The claimant did not have a regular schedule for inspecting or changing the ballasts and only changed the ballasts when the store contacted him, which was "usually about every week or two." *Id.* at 840-41.

The Bolivar store had more than one hundred lights, and the store had the ballasts and fluorescent light bulbs changed whenever the bulbs burned out. *Id.* In accordance with the claimant's contract with Wal-Mart, Wal-Mart provided the ballasts, light tubes, ladder, and an employee to assist. *Id.* The claimant used his own pliers and screwdrivers. *Id.* The claimant was injured when he was trying to change a light bulb in the automotive section of the store. *Id.* The Court of Appeals held that the claimant was Wal-Mart's

statutory employee because the claimant was routinely called to perform the work; Wal-Mart anticipated the work would be needed on a regular basis; and prior to contracting with the claimant, Wal-Mart's regular employees performed the work. *Id.* 843.

Like the claimant's work in *Busselle*, the services provided by IBC's employees, including Appellant McCracken, were routinely performed. (L.F 185-187) The need for bread products and the services performed by IBC's employees were also anticipated by Respondent Wal-Mart, as evidenced by Respondent Wal-Mart's contract with IBC. (L.F. 197-202; L.F. 219-230; L.F. 185-187). Like the claimant in *Busselle*, Appellant McCracken used both IBC and Respondent Wal-Mart's equipment to unload bread products. (L.F. 185-187) Finally, Respondent Wal-Mart has permanent employees who unloaded products into the store's receiving area on a daily basis. (L.F. 185-187; L.F. 148-149, McGee Deposition, page 6, lines 1-5, page 9, line 14 through page 10, line 2; L.F. 149-150, McGee Deposition, page 11, line 22 through page 12, line 15). Therefore, it is clear Appellant McCracken was performing work in the usual business of Respondent Wal-Mart at the time of his injury.

Appellant McCracken attempts to define the relationship between Respondent Wal-Mart and IBC as merely that of a purchaser and seller, and argues that § 287.040 does not apply to "injured delivery persons of sellers of goods." (App. Sub. Br. 17). None of the cases cited by Appellant McCracken are applicable to this case. Three of the cases cited by Appellant McCracken for the proposition that a plaintiff who is injured while delivering goods on behalf of his employer cannot be the purchaser's statutory employee are not

applicable because those cases turn on the finding that the work was not being performed pursuant to a contract between the plaintiff's employer and the alleged statutory employer. *Martinez v. Nationwide Paper*, 211 S.W.3d 111 (Mo.App. S.D. 2006); *Shipley v. Gipson*, 773 S.W.2d 505 (Mo.App. E.D. 1989); *Ferguson v. Air-Hydraulics Co.*, 492 S.W.2d 130 (Mo.App. 1973). Appellant's Substitute Brief admits there is no dispute Appellant McCracken was performing work pursuant to a contract at the time of his injury. (App. Sub. Br. 16). The only issue raised by Appellant McCracken's Substitute Brief is whether "at the time of the injury, the work being performed by appellant was in the usual course of business of the respondent." (App. Sub. Br. 17).

The remaining cases cited by Appellant McCracken have no bearing on this case because the contracts involved in those cases only required the seller to supply products to the purchaser and did not require any services in relation to the products other than delivery. *Martinez*, 211 S.W.3d 111 (Mo.App. S.D. 2006); *Looper v. Carroll*, 202 S.W.3d 59 (Mo.App. W.D. 2006); *Shipley*, 773 S.W.2d 505 (Mo.App. E.D. 1989); *Lyon v. J.E. Dunn Construction Company*, 693 S.W.2d 169 (Mo.App. W.D. 1985); *Ferguson*, 492 S.W.2d 130 (Mo.App. 1973); *Wallace v. Porter DeWitt Const. Co.*, 476 S.W.2d 129 (Mo.App. 1971); *Counts v. East Perry Lumber Co.*, 462 S.W.2d 141 (Mo.App. 1970). The contracts between the purchaser and the seller did not require the seller to provide services such as stocking or ordering the product. *Id.* Furthermore, both *Shipley* and *Ferguson* have been overruled to the extent they hold that the work must have been performed pursuant to a contract delegating to another the performance of the usual operations of the

employer's business. *McGuire*, 756 S.W.2d at 535. Finally, many of these cases can be distinguished because unlike the case at hand, in those cases there was no evidence that the alleged statutory employer had ever hired permanent employees to perform the work being done at the time of the injury. See *Looper*, 202 S.W.3d 59; *Romero v. Kansas City Station Corp.*, 98 S.W.3d 129 (Mo.App. WD. 2003); *Lyon*, 693 S.W.2d 169; *Counts*, 462 S.W.2d 141.

Appellant McCracken relies heavily on *Martinez*; however, that case clearly has no application here. *Martinez* involved an appeal of the Commission's denial of a claim for workers' compensation benefits from Nationwide Paper ("Nationwide"). *Martinez*, 211 S.W.3d at 113. Nationwide distributed paper products. *Id.* Nationwide contacted its vendors when it needed a shipment of product. *Id.* at 114. The vendor was then responsible for delivering the product to the warehouse and unloading the product when it arrived. *Id.* The vendor usually contracted with a common carrier to deliver the product, who sometimes would contract with a "lumper" to unload the product. *Id.* A "lumper" is "an individual who contracts with a truck driver to unload trucks." *Id.* At the time of the injury, the vendor had contracted with a common carrier to transport and unload the vendor's products at Nationwide's warehouse. *Id.* at 116. The common carrier's driver hired the claimant to work as a lumper for the unloading of the vendor's products at Nationwide's warehouse. *Id.* at 117. Nationwide had no involvement in the vendor's contract with the common carrier or the common carrier's contract with the claimant. *Id.* There was no contract between Nationwide and the lumper's employer. *Id.*

The claimant argued that he was entitled to benefits because he was performing work pursuant to a contract, and that it was not required that the work was being done pursuant to a contract with Nationwide. *Id.* at 115-16. The Court of Appeals rejected that argument finding that the relevant inquiry was (1) whether Nationwide routinely unloaded paper products from trucks delivering paper products to its warehouse and (2) whether Nationwide assigned that duty to another contractor who subsequently hired the claimant. *Id.* The appellate court found that because Nationwide did not have a contractual duty to unload the paper products and that Nationwide had never voluntarily performed that duty, the claimant was not injured while carrying out a duty routinely performed by Nationwide that had been assigned to another contractor. *Id.* at 117. As a result, the appellate court held that the claimant failed to prove the first element of the test for statutory employment. *Id.* The appellate court did not reach the issue of whether the claimant was performing work in the usual business of the alleged statutory employer. *Id.* 117.

There is no "litmus paper" test for determining whether a particular type of work is within the usual business carried on at a particular place; rather, "each case must be determined upon its own peculiar facts." *Ferguson*, 492 S.W.2d 130, 135-36 (Mo.App. 1973) (overruled on other grounds). Appellant McCracken's argument would fail even if the law of Missouri was that a seller's delivery driver cannot be the purchaser's statutory employee because the contract between Respondent Wal-Mart and IBC required IBC to provide both bread products and services related to those products. (L.F. 185-187; L.F. 104, Townsend Deposition, page 9, lines 2-9) 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. See *DuBose v. Flightsafety Intern., Inc.*, 824 S.W.2d 486, 490 (Mo.App. E.D. 1992).

The plaintiff in *DuBose* was on the defendant's premises to perform warranty adjustments and testing on a visual system component sold to the defendant by the plaintiff's employer. *Id.* at 487. The contract between the defendant and the plaintiff's employer provided for both the sale of components and for maintenance and engineering services. *Id.* at 487-88. Like Appellant McCracken, the plaintiff argued that § 287.040 did not encompass transactions between buyers and sellers. *Id.* at 489. The appellate court found that the contract between the defendant and the plaintiff's employer involved more than a purchase contract between a purchaser and seller of goods because the plaintiff's employer had agreed to provide maintenance and engineering services on the components for a period of time. *Id.* As a result § 287.040 applied to the contract between the defendant and the plaintiff's employer. *Id.*

The court then examined whether the work being performed was in the defendant's usual business. *Id.* at 490. The parties agreed that at the time of the alleged injury the plaintiff was performing work on components of a flight simulator machine which the defendant sold. *Id.* The evidence in that case showed that the defendant's employees regularly performed work on the flight simulators and that the defendant's employees would have performed the work done by the plaintiff if not for the contract. *Id.* As a

result, the plaintiff was the defendant's statutory employee, and his sole remedy was the Workers' Compensation Act. *Id.* at 490-91.

The evidence in this case is that Respondent Wal-Mart's permanent employees did all of the services provided by IBC's employees in relation to other products. Respondent Wal-Mart's parent company employed its own truck drivers to deliver products from its distribution centers. (L.F. 127). Respondent Wal-Mart also had permanent employees at Wal-Mart Supercenter #17 whose duties were to unload and stock products delivered to the store. (L.F. 148-149, McGee Deposition, page 6, lines 1-5, page 9, line 14 through page 10, line 2; L.F. 149-150, McGee Deposition, page 11, line 22 through page 12, line 15; L.F. 185-189). The fact that IBC employed two employees to accomplish its duties under the contract does not change the fact that the contract required IBC to provide services in addition to bread products. Appellant McCracken was not acting simply as a delivery driver or a common carrier at the time of his injury. He was carrying out one of a number of the services IBC was required to perform pursuant to its contract with Respondent Wal-Mart.

Appellant McCracken also cites to *Parker v. National Super Markets, Inc.*, 914 S.W.2d 30, 32 (Mo.App. E.D. 1995), which held that a Pepsi delivery driver was not a statutory employee of the supermarket to whom he was making a delivery. The Court of Appeals' holding was based on the fact that under the terms of the contract between Pepsi and the supermarket, the supermarket's employees were not allowed to deliver or shelve Pepsi products. *Parker*, 914 S.W.2d at 31-32; *Augur v. Norfolk Southern Railway Co.*,

154 S.W.3d 510, 517 (Mo.App. W.D. 2005). The court in *Parker* essentially drew the conclusion that if the Pepsi distributor did not deliver the Pepsi products, the supermarket would not be able to sell those products. 914 S.W.2d at 31-32. In drawing this conclusion the appellate court presumed the supermarket chain would not have been authorized by Pepsi's parent company, PepsiCo, to take delivery of, stock, and merchandise Pepsi products by any other means. *Id.*

Parker was examined by the Court of Appeals in *Augur*. *Augur*, 154 S.W.3d 510. In that case, the defendant owned and operated an inbound automotive distribution facility. *Id.* The plaintiff was employed by a company that contracted with the defendant to load and unload vehicles shipped by rail and place the vehicles in a storage area. *Id.* The plaintiff alleged that while he was unloading vehicles at a ramp, he climbed down a ladder and his foot got tangled in a lantern that was hanging from the ladder. *Id.* The appellate court found that the while the contract between the plaintiff's employer and the defendant specifically required the plaintiff's employer to unload and load vehicles, the contract did not prohibit the defendant's employees from unloading vehicles from its railcars. *Id.* at 517. The appellate court held that the plaintiff was the defendant's statutory employee because at the time of the alleged injury he was performing work in the usual course of the defendant's business. *Id.*

This case can be distinguished from *Parker* on similar grounds. Appellant McCracken was unloading "Great Value" bread products at Wal-Mart Supercenter #17 when he was injured. (L.F. 103, Townsend Deposition, page 8, lines 1-7). There is no

evidence in this case that Wal-Mart Supercenter #17 would not be able to sell "Great Value" bread products if not for Respondent Wal-Mart's contract with IBC. "Great Value" is a Wal-Mart brand. (L.F. 126). IBC was not the only vendor who could provide "Great Value" products, as Respondent Wal-Mart could have contracted with another vendor for the manufacturing of "Great Value" bread products or made the products itself.

Whether evidence exists demonstrating that Respondent Wal-Mart's employees delivered "Great Value" bread products is irrelevant because Wal-Mart Supercenter #17 has not had to confront such an issue with respect to delivery of "Great Value" bread products. Respondent Wal-Mart had numerous options available to it to secure bread products from various sources other than by way of this particular vendor's delivery. The fact that Respondent Wal-Mart had not had to resort to other measures is more a testament to the importance of Respondent Wal-Mart's business to IBC, rather than any assumption that Wal-Mart Supercenter #17 would not have "Great Value" bread products in the absence of this particular vendor. Furthermore, there is nothing indicating that Respondent Wal-Mart could not have transported "Great Value" products to its store on its own. This is evinced by details in its 10-K report which provides the following details concerning its distribution:

> Approximately 81% of the Wal-Mart Stores segment's purchases of merchandise were shipped from Wal-Mart's 99 distribution centers, of which 37 are general merchandise distribution centers, 34 are grocery

> distribution centers, seven are clothing distribution centers and 16 are specialty distribution centers. The balance of merchandise purchased was shipped directly to stores from suppliers. In addition to serving the Wal-Mart Stores segment, some of our grocery distribution centers also serve our SAM'S CLUB segment for perishable items. ... The 99 distribution centers are located throughout the continental United States.
>
> (L.F. 127).

Finally, there is no evidence that IBC would not have allowed Respondent Wal-Mart's permanent employees to unload or stock "Great Value" bread products. The evidence is that Respondent Wal-Mart's employees have assisted IBC transport drivers, including Appellant McCracken, in unloading bread products in the past. (L.F. 72, Deposition of McCracken, page 73, line 2 through page 74, line 19; L.F. 164, Hammack Deposition, page 7, lines 1-23; L.F. 166, Hammack Deposition, page 16, line 12 through page 17, line 22). The facts presented in *Parker* are not present in this case.

This case is more analogous to *Gianino v. American Can Company*, 600 F.Supp. 191 (D.C. Mo. 1985), in which a federal district court interpreted Missouri law. The plaintiff in *Gianino* was injured while unloading empty pallets at the defendant's plant pursuant to a contract between the defendant and the plaintiff's employer. *Id.* at 192. The defendant's employees regularly worked beside the plaintiff in unloading empty pallets and were working beside him at the time of his injury. *Id.* at 194. The court noted that the defendant's business was to manufacture and sell cans, and found that "the process of

feeding empty wooden pallets into defendant's plant, so that they could be loaded with cans for shipment to its customers" was part of the usual business of the defendant. *Id.* Likewise, in this case there can be no question that unloading and stocking products into Wal-Mart Supercenter #17 is part of Respondent Wal-Mart's usual business, as Respondent Wal-Mart already has employees who perform those tasks in relation to other products.

Finally, this issue was recently decided by the United States District Court for the Eastern Division of Missouri in relation to an alleged injury by a Coca-Cola employee delivering soda to another one of Respondent Wal-Mart's stores. See *Modzinski v. Wal-Mart Stores, Inc.*, 2008 WL 111282 (E.D. Mo. 2008). In that case, the plaintiff was working at Respondent Wal-Mart's store as a merchandiser pursuant to a contract between Respondent Wal-Mart and Coca-Cola. *Id.* at *1. The court found that the plaintiff's duties as a merchandising representative; which included routinely ordering products, stocking products, inventorying stock, and replenishing the supply of products on shelves; were all within the usual business of Respondent Wal-Mart. *Id.* at *3. The court further noted that the plaintiff's "routine and repetitious tasks regarding Coca-Cola products appear to be identical to the tasks of [Respondent Wal-Mart's] other employees *vis-à-vis* other products sold by [Respondent Wal-Mart] in its retail store." *Id.* As such, the court held that Plaintiff was Defendant's statutory employee and that the court lacked subject matter jurisdiction. *Id.*

Like the Coca-Cola merchandiser in *Modzinski*, Appellant McCracken and IBC's other employees routinely order, unload, stock, inventory and replenish IBC bread products at Wal-Mart Supercenter #17. (L.F. 185-189). These routine and repetitious tasks performed by IBC in relation to its bread products are identical to the tasks performed by Respondent Wal-Mart's employees at Wal-Mart Supercenter #17 in relation to other products. (L.F. 185-189). Therefore, there can be no doubt that Appellant McCracken was performing work in the usual business of Respondent Wal-Mart when he was injured.

When all of the evidence is considered, it is clear that Appellant Wal-Mart was performing work in Respondent Wal-Mart's usual business when he was injured. Maintaining a sufficient supply of bread products on the shelves of Wal-Mart Supercenter #17 was in integral part of Respondent Wal-Mart's business. IBC's employees routinely delivered, unloaded, stocked, and merchandised its bread products at Wal-Mart Supercenter #17. (L.F.). Absent its contract with IBC, Respondent Wal-Mart would have been required to assign these duties to its permanent employees who already performed these duties in relation to other products. Because Appellant McCracken was doing work routinely performed by Respondent Wal-Mart's permanent employees, there can be no doubt that he was performing work in the usual business of Respondent Wal-Mart when he was injured.

4. Conclusion

To qualify as a statutory employer such that Appellant McCracken is barred from

bringing his common-law personal injury action, Respondent Wal-Mart was required to show by a preponderance of the evidence that Appellant McCracken (1) was performing work under a contract, (2) injured on Respondent Wal-Mart's premises, and (3) performing work in Respondent Wal-Mart's usual business. The trial court did not abuse its discretion in finding that Respondent Wal-Mart satisfied this burden.

There is no dispute that Appellant McCracken was performing work on Respondent Wal-Mart's premises when he was injured. Respondent Wal-Mart established that the work performed by Appellant McCracken was routinely done on a regular and frequent schedule over a short span of time and, absent the contract with IBC, Respondent Wal-Mart would have been required to either assign the work to its permanent employees or hire additional employees perform the work.

Under these circumstances, the trial court did not abuse its discretion in dismissing Appellant McCracken's personal injury action for lack of subject matter jurisdiction. The undisputed evidence established all of the elements for statutory employment under § 287.040. Therefore, as it "appears" from the record that Appellant McCracken's exclusive remedy rests with the Labor and Industrial Relations Commission under Chapter 287, the trial court's order dismissing Appellant McCracken's action should be affirmed.

CONCLUSION

Defendant/Respondent Wal-Mart Stores East, LP respectfully requests the Court to affirm the trial court's order of dismissal of Plaintiff/Appellant J. Michael McCracken's action for lack of subject matter jurisdiction.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that two copies of Respondent's Substitute Brief and a CD containing same were deposited on this 12th day of June 2009, in the United States Mail, postage prepaid, addressed to: Donald E. Woody, attorney for Appellant, at Hall, Ansley, Rodgers & Sweeney, P.C., 3275 East Ridgeview, P.O. Box 4609, Springfield, MO 65808.

Kristie S. Crawford #52039

Subscribed and sworn to before me this 12th day of June 2009.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Respondent's Substitute Brief includes the information required by Rule 55.03.

2. The Respondent's Substitute Brief complies with the limitations contained in Rule 84.06;

3. The Respondent's Substitute Brief, excluding cover page, signature blocks, certificate of compliance, affidavit of service, table of contents, and table of authorities, and appendix contains 8,214 as determined by the word-count tool contained in the Microsoft Word 2000 software and 693 lines as determined by the line-count tool contained in the Microsoft Word 2000 software with which this Respondent's Brief was prepared; and

4. The computer disk accompanying Respondent's Substitute Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

Kristie S. Crawford #52039

APPENDIX

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