IN THE SUPREME COURT OF MISSOURI

No. 84011

State of Missouri *ex rel.*

GERRY TAYLOR,

Petitioner-Relator

vs.

HONORABLE BARBARA W. WALLACE,
JUDGE OF THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI,

Respondent.

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent agrees with the jurisdictional statement of the Relator with the exception that Respondent takes the position that Gerry Taylor is not afforded any immunity from common-law liability and contends that the Court properly ruled on the motion to dismiss for lack of subject matter jurisdiction on August 7, 2001.

STATEMENT OF FACTS

Respondent agrees with the Statement of Facts set forth on page 4 of the Relator's Brief.

POINT RELIED UPON

RELATOR GERRY TAYLOR IS NOT ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM PROCEEDING WITH THIS CASE BECAUSE:

A. THE REMEDY OF PROHIBITION IS INAPPROPRIATE IN THE CURRENT ACTION BECAUSE RELATOR HAS AN ADEQUATE REMEDY ON APPEAL AND WILL NOT SUFFER IRREPARABLE HARM WHERE THE CLAIMED IMMUNITY IS NOT CLEAR AND NO IMPORTANT QUESTION OF LAW HAS BEEN PRESENTED THAT WOULD OTHERWISE ESCAPE REVIEW BY THIS COURT;

State ex rel. Bates v. Rea, 922 S.W.2nd 430 (Mo. App. SD 1996)

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.banc 1994)

State ex rel. Dixon v. Darnold, 939 S.W.2d 66 (Mo.App. 1997)

State ex rel. Noranda Aluminum Inc. v. Rain,706 S.W.2d 861, 862 (Mo.banc 1986)

State ex rel. Riverside Joint Venture v. Missouri Gaming Commission, 969 S.W.2d 218 (Mo.banc 1998)

Rule 74.06 Missouri Rules of Civil Procedure (2001)

Rule 72 Missouri Rules of Civil Procedure (2001)

B. RELATOR TAYLOR IS NOT ENTITLED TO THE STATUTORY IMMUNITY FROM COMMON LAW LIABILITY FOUND IN SECTION §287.120 (2000) OF THE MO. REV. STAT. BECAUSE THE CO-EMPLOYEE, WILLIAM SMITH, HAS SUFFICIENTLY ALLEGED AN INDEPENDENT DUTY OF CARE UNDER THE PROVISIONS OF SECTION §304.012 OF THE MO. REV. STAT. TO EXERCISE THE HIGHEST DEGREE OF CARE ON THE ROADWAY WHICH IS IN ADDITION TO THE DUTY TO PROVIDE A SAFE WORK PLACE AND IS A SEPARATE AND INDEPENDENT DUTY OF CARE OWED BY THE RELATOR TO THE CO-EMPLOYEE WILLIAM SMITH.

Collier v. Moore, 21 S.W.3d 858 (Mo.App. 2000)

Lamar v. Ford Motor Company, 409 S.W.2d 100 (Mo. 1966)

Logsdon v. Duncan, (Mo. 1956)

Schumacher v. Leslie, 232 S.W.2d 913 (Mo.banc 1950)

Shelter Mutual Insurance Company v. Gebhards,

947 S.W.2d 132 (Mo.App. ED 1997)

State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo.App. ED 1982)

Sylcox v. National Lead Company, 138 S.W.2d 497 (Mo.App. 1931)

Tauchert v. Boatmen's National Bank, 849 S.W.2d 573 (Mo.banc 1993)

Workman v. Vader, 854 S.W.2d 560 (Mo.App. SD 1993)

Mo. Rev. Stat. §287.120 (2000)

Mo. Rev. Stat. §287.150 (2000)

Mo. Rev. Stat. §304.012 (1996)

ARGUMENT

POINT I.

RELATOR GERRY TAYLOR IS NOT ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM PROCEEDING WITH THIS CASE BECAUSE:

A. THE REMEDY OF PROHIBITION IS INAPPROPRIATE IN THE CURRENT ACTION BECAUSE RELATOR HAS AN ADEQUATE REMEDY ON APPEAL AND WILL NOT SUFFER IRREPARABLE HARM WHERE THE CLAIMED IMMUNITY IS NOT CLEAR AND NO IMPORTANT QUESTION OF LAW HAS BEEN PRESENTED THAT WOULD OTHERWISE ESCAPE REVIEW BY THIS COURT;

Standard of Review

This Court, in deciding whether or not to make the preliminary writ of prohibition absolute, the Court presumes that the underlying decision made by the Trial Court was appropriate and the burden of persuading this Court that the Trial Court exceeded its jurisdiction is on the moving party, herein the Relator. State ex rel. Dixon v. Darnold, 939 S.W.2d 66 (Mo.App. SD 1997). The Court is limited to the record that was developed in the Trial Court below, however, the record under review in a prohibition proceeding must be sufficiently developed so that a review

in Court can make a proper determination as to the correctness of the Trial Court's ruling. State ex rel. Dixon *supra*.

Both this Court and the underlying Appellate Districts of this State have long held that prohibition is a powerful writ divesting the body against whom it is directed to cease further activities and, accordingly, the remedy is used sparingly and only in three rare categories of cases. State ex rel. Riverside Joint Venture v. Missouri Gaming Commission, 969 S.W.2d 218 (Mo.banc 1998). The first instance is that prohibition will lie where judicial or quasi judicial body lacks personal jurisdiction over a party. The second instance where prohibition is appropriate is where a lower court lacks the power to act as contemplated, and finally prohibition will issue in those limited situations where an absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to the trial court's order. State ex rel. Riverside Joint Venture, *supra*. The corollary to this rule is that writs of prohibitions are not substitutes for interlocutory review or an end around the normal appellate process. State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.banc 1994); State ex rel. Noranda Aluminum Inc. v. Rain, 706 S.W.2d 861, 862 (Mo.banc 1986).

In the instant case, the Relator contends that he will be unfairly required to defend co-employee William Smith's action for negligence and will be somehow

denied the right to appeal in the event of an adverse judgment. This contention is simply ludicrous in light of the fact that he would have an opportunity to file a motion for summary judgment under Rule 74.04 of the Missouri Rules of Court, file a motion for directed verdict of the close of the plaintiff's evidence and the close of all evidence under Rule 72.01 of the Missouri Rules of Court, and ultimately file a motion for a new trial and a notice of appeal to the appropriate district court of appeal in the event of an adverse judgment.

The Relator does not fall into any of the three commonly recognized instances for a writ of prohibition because this case does not involve any type of quasi-judicial body which lacks personal jurisdiction, nor does it notice the trial court lack the requisite power to act as contemplated and, as plaintiff has demonstrated, there is no irreparable harm as the plaintiffs can interpose the defense of exclusive remedy at any stage of the proceedings.

Indeed, as will later be demonstrated, all of the cases addressing the issue of co-employee liability for torts have been reached the appellate courts as a result of either summary judgment motions or appeals from trial court judgments. In all of the cases cited by the Relator herein, the trial court resolved the issue after developing some evidentiary record. This is significant because here the Relator seeks the provisional remedy of an extraordinary writ based upon solely the

Plaintiff's petition. Co-employee contends that this is inappropriate, and that based on the proceedings thus far, the trial court has acted correctly in denying the motion to dismiss for lack of subject matter jurisdiction. Moreover, the extraordinary writ of prohibition should only be granted where a clear right to such relief exists. State ex rel. Bates v. Rea, 922 S.W.2d 430, 431 (Mo. App. SD 1996). The following discussion in Point II. will demonstrate that Relator's right to the writ is far from being clear on unequivocal.

POINT II.

B. RELATOR TAYLOR IS NOT ENTITLED TO THE STATUTORY IMMUNITY FROM COMMON LAW LIABILITY FOUND IN SECTION §287.120 (2000) OF THE MO. REV. STAT. BECAUSE THE CO-EMPLOYEE, WILLIAM SMITH, HAS SUFFICIENTLY ALLEGED AN INDEPENDENT DUTY OF CARE UNDER THE PROVISIONS OF SECTION §304.012 OF THE MO. REV. STAT. TO EXERCISE THE HIGHEST DEGREE OF CARE ON THE ROADWAY WHICH IS IN ADDITION TO THE DUTY TO PROVIDE A SAFE WORK PLACE AND IS A SEPARATE AND INDEPENDENT DUTY OF CARE OWED BY THE RELATOR TO THE CO-EMPLOYEE WILLIAM SMITH.

Missouri has long recognized that co-employees could bring suit against a fellow employee for personal negligence and breach of their duty towards the injured co-worker. This Court in its decision in Logsdon v. Duncan, 293 S.W.2d 944 (Mo. 1956) upheld that right by stating

> And while the instance in rather infrequent, it is nevertheless governed by the most elemental principles of tort liability. For the mutual safety of all employees are necessarily dependent upon the care they exercise with respect to one another and by the reason of their relationship, each employee owes to his fellow workman the duty to exercise such care in the prosecution of their work as men of ordinary prudence use in like circumstances and he who fails in that respect is responsible for the resulting physical injury to his fellow servant (citations omitted).

293 S.W.2d at 949.

In almost any instance where this Court or a lower appellate court has addressed this situation, the right of a co-employee to bring suit for the affirmative negligence of a co-employee has been upheld. Indeed, this Court most recently addressed the issue of whether or not such causes of action were viable in Tauchert v. Boatmen's National Bank, 849 S.W.2d 573 (Mo.banc 1993). In Tauchert, this Court overruled a trial court's grant of summary judgment based upon a claim that

the negligence cause of action was barred by the exclusive remedy provisions of Section §287.120 as argued by the Relator herein. In reversing the trial court's judgment, this Court ruled that there was a cause of action against a fellow employee for active negligence and that issues of material fact remained. 849 S.W.2d at 514. In Tauchert, this Court found that a supervisor's instructions to an employee to climb a rigged elevator hoist system that resulted in his death was active negligence beyond the mere duty to provide a safe work place. In Tauchert, the employee's supervisor was held liable, but generally, supervisory employees are the only ones afforded the immunity under the provisions of Section §287.120 and §287.150.

Section §287.150 authorizes liability causes of action against third persons but does not define the term "third persons". Case law has developed to exempt suervisory employees in accidents involving unsafe work place conditions. Workman v. Vader, 854 S.W.2d 560 (Mo.App. SD 1993). In Workman, the Court of Appeals reversed a summary judgment by holding that the co-employee's alleged negligence if proved was outside the general immunity. The Court in Workman entered into a long and well-reasoned discussion of co-employee liability in Missouri citing the similar cases of State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo.App ED 1982) Schumacher v. Leslie, 232 S.W.2d 913 (Mo.banc 1950)

Lamar v. Ford Motor Company, 409 S.W.2d 100 (Mo. 1966) and Sylcox v. National Lead Co., 38 S.W.2d 497 (Mo.App. 1931). The Workman Court focused on the language that the failure to provide a reasonably safe place to work was insufficient to impose liability on a co-employee but that where the negligence went beyond the employer's duty to provide a reasonably safe work place, then there was actionable negligence against a co-employee. 854 S.W.2d 562.

In Workman, the alleged negligence involved co-employees who created a defective and dangerous condition on the premises of the employer that resulted in injury to the co-employee. In the instant case, plaintiff has alleged a motor vehicle liability theory to impose liability on the co-employee. In both cases, the actionable negligence asserted is beyond the simple duty to provide a safe work place and encompasses a personal duty to the injured worker by the co-employee, Logson, *supra*. These types of co-employee claims have always been held to be actionable under Missouri law see State ex rel. Badami, Tauchert and Workman, *supra*. Indeed, the principles of Tauchert hold that if the plaintiff's allegations charge the defendant with a breach of a personal duty of care then the negligent co-employee/defendant is liable to the injured co-worker and is not provided the protection of the provision of Section §287.120, Workman 854 S.W.2d at 564; Tauchert 849 S.W.2d at 574.

In the instant case, the co-employee meets the "something more" requirement where his allegations accuse Relator of a breach of the statutory duty of care found under Section §304.012 Mo. Rev. Stat. which requires all motorists to exercise the highest degree of care when operating a motor vehicle on the roadways of Missouri. §304.012 provides as follows

> Every person operating a motor vehicle on the roads and highways of this State shall drive the vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person and shall exercise the highest degree of care.

Section 304.012 RSMo. 1996, as amended.

The injured employee in the instant case has alleged in his petition three separate and distinct violations of this statutory duty in that the defendant failed to keep a careful lookout, struck a mailbox off the travelled portion of the roadway, and drove too closely to a fixed object. See Relator's Exhibits A1 through A4. Said allegations are allegations of a breach of a personal duty owed by Relator to the injured co-employee William Smith, as well as the obligation of the Relator to exercise the highest degree of care under his statutory duty imposed under Section 304.012. Under the principles espoused in Tauchert, Badami and Workman, *supra*, courts must examine the claimed act of negligence to determine if it meets the following standard, to wit:

> The "something extra" required to impose tort liability includes any affirmative act taken while the officer is acting outside the scope of the employer's responsibility, that breaches a personal duty of care the officer owes to a fellow employee.

854 S.W.2d at 563.

In Tauchert, Badami and Workman, actionable negligence was allowed against co-employees in accidents occuring in the work place where the co-employee performed an affirmative act of negligence. Workman, 854 S.W.2d at 563. Similarly, in the instant case, the employer had no duty to exercise the highest degree of care in the operation of the trash/truck vehicle, but did have the duty to provide a safe and properly maintained trash truck. Relator, however, possessed an independent and non delegable duty to exercise the highest degree of care in the operation of that motor vehicle pursuant to common law and the provisions of Section §304.012. The co-employee in this case did not allege any negligent condition respecting the mechanical operation of the trash truck which arguably was the employee's work place. Accordingly, Relator is not afforded any safe harbor under Section §287.120 because he has breached his personal duty owed to the injured co-employee outside the general duty to provide a safe work vehicle (i.e. a trash truck).

The Relator has cited several recent cases which he contends support his position. These cases can be easily distinguished. The first case is Collier v. Moore, 21 S.W.3d 858 (Mo.App. 2000). This case involves the operation of a luggage tug on a private airfield during a snow storm. Accordingly, the provisions of Section §304.012 would not apply and this case can be distinguished from the case at bar because the instant case occurred on a public roadway and therefore there is no question that the Relator was obligated to carry out the duty imposed by Section §304.012, namely the exercising the highest degree of care in the operation of a motor vehicle.

The second case cited by the Relator is Shelter Mutual Insurance Company v. Gebhards, 947 S.W.2d 132 (Mo.App. ED 1997). In Shelter Mutual, *supra*, the Plaintiffs argued the applicability of an insurance policy exclusion for fellow servant torts. The only language in that opinion that was favorable to the Relator is dicta at the end of the case where the reviewing court indicated that the only allegation of negligence by Plaintiff was that the co-employee driver was responsible for operation of the motor vehicle. Neither the opinion nor the record in that case indicates that there were any specific actions of negligence nor was the issue of the co-employee's duty imposed under Section §304.012 raised.

In the instant case, Relator Taylor was obligated by Section §304.012 to exercise the highest degree of care while operating a motor vehicle on a public roadway. It is undisputed that he did not do so, and the co-employee's petition in the instant case clearly alleges breach of Relator's personal duty of care. Plaintiff has met the "something more" requirement in that he has pled the breach of a personal duty as opposed to the breach of the general duty to provide a safe work place. Accordingly, the Relator is not afforded the safe harbor immunity under Section §287.120 or §287.150 and, therefore, Relator is liable to the co-employee Plaintiff in the instant case.

CONCLUSION

This Court having been fully advised as to the applicable law, the writ of prohibition should be resolved and the trial court should be allowed to proceed with the trial of this matter, because the Relator Gerry Taylor is not afforded any immunity from common law liability under Section §287.120 or §287.150 because Plaintiff has alleged something more than the Relator's obligation to provide a reasonably safe work place.

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BY:_____

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CERTIFICATE OF SERVICE

One spiral-bound copy of the above and foregoing brief, and one copy on 3.5" diskette, have been mailed, postage prepaid, this 9th day of February, 2002, to:

Honorable Barbara W. Wallace, Judge of the Circuit Court of St. Louis County, Missouri, Division 13, St. Louis County Courts Building, 7900 Carondelet Avenue, Clayton, Missouri 63105 (314) 615-1513

Daniel T. Rabbitt, Attorney for Relator, 800 Market Street, Suite 2300, St. Louis, Missouri 63101-2608

CERTIFICATE OF COMPLIANCE

I hereby certify the following:

1. This brief is in compliance with the requirements of Mo. R. Civ. P. 55.03.

2. This brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b).

3. This brief contains 3,249 words, exclusive of the cover, signature block, certificate of service, and certificate of compliance. This brief was prepared using WordPerfect 9.0, and the word count was calculated by WordPerfect 9.0.

4. The file containing this brief, and the respective diskettes filed with the Court and/or served on the parties were scanned for viruses on February 8, 2002, using Norton AntiVirus 2002 8.0 Beta, with virus definitions updated through February 8, 2002, the most recent date for which virus definitions were available, and the file and diskettes have been found to be virus-free.

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