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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

This is an action for a remedial writ seeking to enjoin the Respondent, the Honorable Barbara W. Wallace of the Circuit Court of St. Louis County, from proceeding with this case because Relator, Gerry Taylor, is afforded immunity from common-law liability under the Missouri Workers' Compensation Act, Mo. Rev. Stat. §287.120 (2000). Relator moved to dismiss for lack of subject matter jurisdiction on August 7, 2001, but the motion was denied by Respondent on August 30, 2001. Thereafter, Relator filed for a remedial writ with the Missouri Court of Appeals for the Eastern District, which was denied on August 2, 2001. On October 22, 2001, Relator filed his application for writ in this Court, which issued its preliminary writ on November 20, 2001. This Court has jurisdiction under Mo. Const., Art. 5, §4(1) to issue remedial writs.

STATEMENT OF FACTS

On January 29, 2001, plaintiff William Smith ("Smith") filed a personal injury lawsuit against Relator Gerry Taylor ("Taylor") and Browning-Ferris Industries, n/k/a Midwest Waste, Inc. ("BFI"), in the Circuit Court of St. Louis County. (A1-4). Smith's claim for personal injuries arose out of a vehicular accident which occurred on December 31, 1996 in St. Louis County, Missouri. (A1-4). According to Plaintiff's Petition, plaintiff was a "trash helper," Relator was the operator of a trash truck , and both were employees of BFI. (A1-4, ¶¶ 1, 3). Smith sued Taylor for ordinary negligence for allegedly striking a mailbox and causing injury to Smith. (A1-4, ¶7). Although BFI was an original defendant to this lawsuit, plaintiff voluntarily dismissed BFI on May 4, 2001. (A5). Plaintiff did file for and did receive workers' compensation benefits from BFI following this incident. (A12-13).

On August 7, 2001, Relator filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction maintaining that he was afforded immunity from common-law liability under the Missouri Workers' Compensation Act, Mo. Rev. Stat. §287.120 (2000), as a co-employee of plaintiff (A6-8). On August 30, 2001, Respondent denied Relator's Motion to Dismiss. (A9).

Relator filed Petition for Writ of Prohibition with the Missouri Court of Appeals for the Eastern District, which was denied on October 2, 2001. (A10).

On October 22, 2001, Relator filed a Petition for Writ of Prohibition in this Court, and the Court issued its Preliminary Order on November 20, 2001. (A11).

POINT RELIED ON

RELATOR GERRY TAYLOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING WITH THIS CASE BECAUSE:

1. RELATOR TAYLOR IS AFFORDED IMMUNITY FROM COMMON-LAW LIABILITY PURSUANT TO THE MISSOURI WORKERS' COMPENSATION ACT, MO. REV. STAT. §287.120 (2000), IN THAT RELATOR IS A NON-SUPERVISORY, CO-EMPLOYEE OF WILLIAM SMITH, WHO HAS FAILED TO ALLEGE SOMETHING MORE THAN THE FAILURE TO PROVIDE A SAFE WORK PLACE AGAINST RELATOR AS A RESULT OF A VEHICULAR ACCIDENT.

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

Shelter Mut. Ins. Co. v. Gebhards, 947 S.W.2d 132 (Mo.App. 1997)

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

Lyon v. McLaughlin, 960 S.W.2d 522 (Mo.App. 1998)

Missouri Workers' Compensation Act, Mo. Rev. Stat. §287.120 (2000)

ARGUMENT

POINT I.

RELATOR GERRY TAYLOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING WITH THIS CASE BECAUSE:

A. RELATOR TAYLOR IS AFFORDED IMMUNITY FROM COMMON-LAW LIABILITY PURSUANT TO THE MISSOURI WORKERS' COMPENSATION ACT, MO. REV. STAT. §287.120 (2000), IN THAT RELATOR IS A NON-SUPERVISORY, CO-EMPLOYEE OF WILLIAM SMITH, WHO HAS FAILED TO ALLEGE SOMETHING MORE THAN THE FAILURE TO PROVIDE A SAFE WORK PLACE AGAINST RELATOR AS A RESULT OF A VEHICULAR ACCIDENT.

Standard of Review

In deciding whether to grant a remedial writ, this Court construes a petition for a writ liberally, accepting all properly pleaded allegations as true. State ex rel. Mo. Dept. of Agr. v. McHenry, 687 S.W.2d 178, 184 (Mo. 1985) (en banc). This Court is limited to review of the record made in the trial court below and will determine whether there was any competent evidence to support the finding. State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 69 (Mo.App. 1997). In a prohibition proceeding, the burden is on the petitioning party to show that the trial court exceeded its jurisdiction. State ex rel. Vanderpool Feed & Supply Co. v. Sloan, 628 S.W.2d 414, 416 (Mo.App. 1982). Prohibition is appropriate where

the trial court lacks the power to act as contemplated. State ex rel. Riverside Joint Venture v. Missouri Gaming Com'n, 969 S.W.2d 218, 221 (Mo. 1998) (en banc).

On August 7, 2001, Relator Gerry Taylor filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and claimed that he was entitled to immunity from common-law liability under the Missouri Workers' Compensation Act, Mo. Rev. Stat. §287.120 (2000) ("the Act"), as a non-supervisory, co-employee of plaintiff. Section 287.120 provides in part:

> "1. Every employer is subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person ...
>
> 2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee ... separation between 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 this chapter."

Missouri courts have routinely held that an employee's rights under the Act are exclusive and supplant the employee's common law rights. State ex rel. Badami v. Gaertner, 630 S.W.2d 175, 180 (Mo.App. 1982). Because the employer has a duty to provide a reasonably safe place to work, any claim arising from a breach of that duty has been held to fall within the exclusive provisions of the Act. Kelley v. DeKalb Energy Co., 865 S.W.2d 670, 672 (Mo. 1993) (en banc). Although Missouri courts have, under certain circumstances, held that a co-employee is a "third person" within the meaning of Mo. Rev. Stat.

§287.150 (2000), and, therefore, subject to civil liability, a plaintiff must allege and prove "something more" than the failure to provide a safe work place. Badami, 630 S.W.2d at 180-181. The analysis can only be performed on a case-by-case basis. Id. at 181.

As noted in Judge James M. Smart, Jr.'s concurring opinion in Hedglin v. Stahl Specialty Co., 903 S.W.2d 922, 928 (Mo.App. 1995), Missouri is in the distinct minority of jurisdictions which allow, under certain circumstances, injured employees to sue co-employees for negligence.[1] Unlike other states, Missouri has not codified by statute the exact circumstances in which a co-employee is liable to an injured worker. Those states that have enacted a statutory exception to co-employee immunity require something more than ordinary negligence, sometimes requiring intentional torts.[2] Id. Although a specific statutory scheme has not been adopted in Missouri, the Badami standard requires "something more" than a failure to provide a safe work place.

In the context of automobile accidents involving co-employees or co-workers, "something more" is still required in order to subject that employee or worker to liability. Shelter Mut. Ins. Co. v. Gebhards,

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[1]Citing Arthur Larson, The Law of Workmen's Compensation, §72 (1994 Supp.).

[2]"States with statutory provisions excepting intentional torts are Alabama, Arizona, California, Connecticut, Florida, Hawaii, Idaho, Iowa, Louisiana, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, Oregon, Pennsylvania, South Dakota, Texas, West Virginia, Wisconsin, and Wyoming. States that have carved out an intentional tort exception through judicial decision are Alaska, Illinois, Indiana, Michigan, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Utah, and Washington."

947 S.W.2d 132 (Mo.App. 1997). In this case, the Missouri Court of Appeals for the Western District analyzed whether or not a driver of a motor vehicle could be liable to a passenger while both were performing work duties for their mutual employer. Shelter, the insurer for the driver, attempted to deny coverage under the fellow employee exclusion. Id. at 133. The Court in upholding the fellow employee exclusion also reviewed the case in the context of the Act, and held that plaintiff did not allege any act which affirmatively increased plaintiff's risk of injury or include anything beyond the fact that the motor vehicle crashed into a bridge, so, therefore, plaintiff's only remedy was under the Act. Id. at 134.

Similarly, in Collier v. Moore, 21 S.W.3d 858 (Mo.App. 2000), plaintiff and defendant were employees of Trans World Airlines and were operating separate vehicles on a tarmac when they collided during a snow storm. Id. at 860. In this case, the defendant, a supervisor, was called to a gate and was operating a vehicle when he struck the plaintiff, a co-employee, who was operating a baggage tug. Id. In analyzing whether or not plaintiff could recover from a co-employee, the Missouri Court of Appeals for the Eastern District held that the defendant was executing his supervisory duties as prescribed by his employer and, therefore, his actions did not constitute anything more than a failure to fulfill his duty to implement his employer's duty to provide a reasonably safe work environment. Id. at 861-862. Since plaintiff did not allege "something more," the defendant was held to be immune from personal liability under the Act.

Although Plaintiff Smith attempts to draw a distinction between an employee's status as either a fellow employee or supervisor, Missouri case law has not created separate standards to be applied with regard to immunity. In fact, Missouri courts have continually proclaimed the rule that common-law liability for breach of a duty to provide a safe working environment extends to any employee charged with carrying out the employer's duty. Lyon v. McLaughlin, 960 S.W.2d 522, 525 (Mo.App. 1998). In Lyon, the

plaintiff was injured while working on a broken conveyor. The plaintiff's supervisor ordered that plaintiff attempt to pry open the cover of the conveyor, which plaintiff subsequently did leading to a back injury. Id. at 524. Plaintiff alleged that his supervisor was liable for allegedly increasing the risk of injury by implementing this plan to repair the conveyor and thereby creating a hazardous condition. Id. at 525. The Court, however, held that the defendant's supervisor was not liable because the plaintiff had failed to plead "something more" beyond a breach of general supervision and safety. Id. at 526. Relying on previous decisions, the Lyon court held that the Petition must allege "an affirmative negligent act (committed by the co-employee) outside the scope of the employer's responsibility to provide a safe place." Id. (citing Tauchert v. Boatmen's Nat'l Bank of St. Louis, 849 S.W.2d 573, 574 (Mo. 1993) (en banc)). The Court noted that plaintiff failed to establish an issue of material fact regarding the "something more" requirement and held that plaintiff's injuries fell within the exclusivity provision of the Act. Id. at 526-27.

In cases which hold the "something more" element has been met, the supervisor or co-employee personally participated in the "something more" by directing the employee to engage in dangerous situations that reasonable persons would recognize as hazardous and beyond the usual requirements of employment. In Hedglin v. Stahl Specialty Co., 903 S.W.2d 922, 927 (Mo.App. 1995), the supervisor was held liable when he personally arranged for an employee to be dangled from the tines of a forklift over a vat of scalding water into which the employee subsequently fell and died. The Court held that the supervisor's acts affirmatively caused his co-employee's injury and he was not entitled to the same immunity as the employer. Id. Similarly, in Craft v. Scaman, 715 S.W.2d 531, 537-38, (Mo.App. 1986), the president of a fireworks company was held personally liable for his employee's injuries when he personally held a board

against a spinning spool of fuse to prop it up, causing the fuse to catch fire and burning the employee operator. Id.

Likewise, in the Tauchert decision, *supra*, the Missouri Supreme Court allowed a plaintiff to sue a co-employee relating to a make-shift hoist system used to raise an elevator which later fell and injured plaintiff. Tauchert, 849 S.W.2d at 573. The co-employee's act of personally arranging the faulty hoist system could constitute an affirmative negligent act outside the scope of his responsibility to provide a safe work place for plaintiff and, therefore, could impose personal liability on the co-employee. Id.

Because Smith has not alleged any act on the part of Taylor which affirmatively increased Smith's risk of injury or otherwise alleged anything other than the trash truck striking a mail box, Taylor is entitled to immunity under the Act. Much like the Collier and Gebhards decisions, *supra*, Smith has not alleged "something more" beyond a co-employee's alleged failure to implement the employer's duty of providing a safe work place. Badami, 630 S.W.2d at 180. At the time of this incident, Taylor was performing his duties as a trash truck operator as "commissioned by BFI" (A1-4, ¶5). Moreover, Taylor was alleged to have been traveling on the regular route in Fenton, Missouri (A1-4, ¶5). Certainly, as the employer for both Taylor and Smith, BFI expected Taylor and Smith to discharge their respective duties in a safe and efficient manner. Assuming arguendo that Taylor failed to fulfill his duties as required by BFI, Taylor's alleged failure to operate the trash truck safely is equivalent to BFI not providing plaintiff with a safe work place. This responsibility applies equally to BFI and Taylor such that Smith's remedy is solely under the Act while immunity extends not only to BFI but to Taylor who was charged with carrying out BFI's duty to provide a safe work place.

To the extent there exists a distinction to be drawn between supervisors and co-employees, the Court should utilize the "something more" standard or, perhaps, utilize an even higher standard for mere co-employees. Missouri courts seemingly impose liability against supervisors in those situations where supervisors wield power and influence over subordinates who are unreasonably placed at risk. Inherent in an employment relationship is an expectation by the supervisor that a subordinate will not only complete the normal duties required of the employment, but also to follow the instruction given by the supervisor. Because supervisors have the power to issue orders to subordinates, Missouri courts may be swayed by the fact that subordinates, either for fear of losing his/her job or facing some other disciplinary action if the order is not followed, will attempt to complete the order regardless of the risk involved. With little to no bargaining power, an employee can be placed in an unsafe and dangerous situation and ultimately this may explain why Missouri courts impose liability at all against supervisors. Arguably, a mere co-employee could not normally increase the risk of injury to a fellow employee since there is no chain of command between the employees nor is there the expectation that one employee will attempt to undertake a dangerous work activity for fear of retribution. Logic dictates that in the event the Court distinguishes between supervisors and co-employees that the standard, at a minimum, should include "something more" in order to impose liability against a co-worker.

In the instant case, Smith was clearly performing his duties as a trash helper and Taylor, in turn, was performing his duties as the operator of the trash truck. Plaintiff has not alleged in his Petition that Taylor in any way ordered Smith to fulfill his duties as a trash helper by directing or ordering him in such a way that ultimately increased his risk of injury. Taylor's acts viewed in light most favorable to plaintiff simply establishes, at best, a breach of a duty to keep the trash truck under control and in a proper location on the

road. Without more, this is a work-related incident for which Smith has received compensation under the Act. To allow Smith to pursue a civil lawsuit against Taylor would amount to a duplicative recovery for the same injury.

CONCLUSION

For all the foregoing reasons, this Writ of Prohibition should be made permanent, thereby enjoining Respondent from proceeding further in this matter, because Relator Gerry Taylor is afforded common-law liability under the Act in that plaintiff has failed to allege "something more" against Relator beyond the duty to provide a safe work place.

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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 18th day of January, 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
>
> William K. Meehan, Attorney for Plaintiff, 7711 Carondelet, Suite 400, Clayton, Missouri 63105 (314) 725-5150

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 3,293 words, exclusive of the cover, signature block, certificate of service, and certificate of compliance. This brief was prepared using WordPerfect 7.0, and the word count was calculated by WordPerfect 7.0.

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 January 18, 2002, using Norton AntiVirus Corporate Edition, Version 7.51, with virus definitions updated through January 18, 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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