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JURISDICTIONAL STATEMENT

Relator incorporates by reference his previous Jurisdictional Statement and notes that the remedial writ filed with the Missouri Court of Appeals for the Eastern District was denied on October 2, 2001.

STATEMENT OF FACTS

As Respondent has adopted Relator's Statement of Facts, Relator incorporates by reference his previous Statement of Facts.

REPLY POINT RELIED ON

REPLY POINT I.

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

1. THE REMEDY OF PROHIBITION IS APPROPRIATE SINCE RESPONDENT LACKS SUBJECT MATTER JURISDICTION IN THAT RELATOR TAYLOR IS AFFORDED IMMUNITY FROM COMMON-LAW LIABILITY PURSUANT TO THE MISSOURI WORKERS' COMPENSATION ACT, MO. REV. STAT. §287.120 (2000);

State ex rel. St. Louis State Hosp. v. Dowd, 908 S.W.2d 738 (Mo.App. 1995)

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

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

State ex rel. Bernero v. McQuillin, 152 S.W. 347 (Mo. 1912) (en banc)

State v. Godfrey, 883 S.W.2d 550, 551 (Mo.App. 1994)

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

2. 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 TAYLOR 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 AS A RESULT OF A VEHICULAR ACCIDENT.

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

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

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

Tauchert v. Boatmen's Nat'l Bank of St. Louis, 849 S.W.2d 573 (Mo. 1993) (en banc)

Virginia D. v. Madesco Investment Corp., 648 S.W.2d 881 (Mo. 1983) (en banc)

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

REPLY ARGUMENT

REPLY POINT I.

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

A. THE REMEDY OF PROHIBITION IS APPROPRIATE SINCE RESPONDENT LACKS SUBJECT MATTER JURISDICTION IN THAT RELATOR TAYLOR IS AFFORDED IMMUNITY FROM COMMON-LAW LIABILITY PURSUANT TO THE MISSOURI WORKERS' COMPENSATION ACT, MO. REV. STAT. §287.120 (2000).

Standard of Review

Relator incorporates by reference his prior statement of the Standard of Review.

Reply Argument

Although Respondent is correct in her assertion that prohibition should be used sparingly, prohibition is always the appropriate remedy "where it appears on the face of the pleadings that the defendant is immune from suit as a matter of law." State ex rel. St. Louis State Hosp. v. Dowd, 908 S.W.2d 738, 740 (Mo.App. 1995); State v. Godfrey, 883 S.W.2d 550, 551 (Mo.App. 1994). Since the Relator is entitled to immunity, it is not necessary to proceed through trial and appeal to enforce that protection. Id.

The Supreme Court of Missouri in the case of State ex rel. Bernero v. McQuillin, 152 S.W. 347, 351 (Mo. 1912) (en banc), applied the following "unbending test" with regard to a writ of prohibition:

> Has the Court, complained of, jurisdiction to do what it is about to do? It matters little whether it is in fault in proceeding without any jurisdiction at all, or (as put in some cases) in excess of its jurisdiction; the writ will go in either event. So, in a given case, though the Court has general jurisdiction of that class of cases, if it is about to do in that case some particular important thing which it has no judicial power to do, the writ has been allowed.

Contrary to Respondent's assertions, prohibition lies not only where a court lacks personal jurisdiction but also when a court lacks jurisdiction over the subject matter. State ex rel. Riverside Joint Venture v. Missouri Gaming Com'n, 969 S.W.2d 218, 221 (Mo. 1998) (en banc). Relator has consistently maintained that the Respondent lacked subject matter jurisdiction based upon the immunity provided by the Missouri Workers' Compensation Act, Mo. Rev. Stat. §287.120 (2000), (hereinafter "the Act"). The record clearly demonstrates that it was the lack of subject matter jurisdiction on which Relator relied with regard to his Motion to Dismiss and which was also the basis for the Petition for Writ of Prohibition which was filed both with the Missouri Court of Appeals for the Eastern District and again in this Court.

The Respondent contends that the Relator has not satisfied one of the "three commonly recognized instances" for the issuance of a writ of prohibition, but then fails to correctly identify those instances, which include not only lack of personal jurisdiction but also lack of subject matter jurisdiction. Riverside Joint Venture, 969 S.W.2d at 221. As cited by both the Respondent and the Relator, the decision of State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo. 1982), serves to undermine Respondent's contention that

all of the cases addressing the issue of co-employee liability [for torts] have reached the appellate courts as a result of either a summary judgment motion or an appeal from a judgment. The Badami decision, perhaps the seminal decision on this issue, reached the Missouri Court of Appeals through a writ of prohibition. There is no requirement that the trial court has to develop some "evidentiary record" before issuing a writ of prohibition.

The writ of prohibition is the only adequate remedy for Relator. Otherwise, Relator would be compelled to engage in discovery, incur expenses, try the case, and then pursue an appeal with the risk of having to do it all over again. It is far better use of judicial resources to resolve the immunity issue now rather than waste time and resources in discovery and possible trial, especially if the trial court lacks subject matter jurisdiction as Relator maintains. As was demonstrated in Relator's Brief and again as set forth below, Relator is afforded immunity from common-law liability pursuant to the Act and, as a consequence, the Respondent should be prohibited from proceeding with this case.

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

. 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 TAYLOR 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 AS A RESULT OF A VEHICULAR ACCIDENT.

The Act was designed to place the burden of employment accidents upon the employer and ultimately the public. State ex rel. Feldman v. Hon. Herbert Lasky, 879 S.W.2d 783, 785 (Mo.App. 1994). In furtherance of this law, an employee is entitled to recover for such work-related accidents without the necessity of establishing negligence while at the same time an employer cannot raise certain defenses, including contributory negligence, assumption of the risk, and the fellow servant doctrine. In exchange, the employer receives immunity from general tort liability. The purpose of the Act is not to transfer the burden of industrial accident from one employee to another. Badami, 630 S.W.2d at 180. However, this is exactly what plaintiff has attempted to do in the instant case in that Relator Taylor's actions, at best, constitute a failure to fulfill the duty to implement BFI's duty to provide a reasonably safe work place. Without "something more" than the mere failure of Relator Taylor to fulfill this duty, Taylor is immune from civil liability.

Although Respondent argues that active negligence is sufficient to impose liability against Relator Taylor, Respondent then concedes that the "something more" standard applies and that Plaintiff Smith has satisfied this standard pursuant to Mo. Rev. Stat. §304.012 (1996). Smith's Petition as well as the record in general are completely devoid of any reference to §304.012 or any so-called duty upon Relator Taylor to exercise the highest degree of care in the operation of a motor vehicle. (A1-4). Relator Taylor acknowledges that there are references to specific allegations of negligence in plaintiff's petition but specifically disputes that there are any references to any standard of care including the highest degree of care. (emphasis added) (A1-4).

Even assuming arguendo that Gerry Taylor owed Plaintiff Smith the highest degree of care, Respondent confuses the standard of care with the standard set forth in Badami. The Badami decision does not stand for the proposition that "something more" than ordinary negligence or ordinary care must be alleged in order to impose liability, but rather that "something more" than the mere failure to provide a safe work place is required. Badami, 630 S.W.2d 180-181. "Something more" has been described as an affirmative negligent act which "affirmatively causes or increases his/her fellow employee's risk of injury." Tauchert v. Boatmen's Nat'l Bank of St. Louis, 849 S.W.2d 573 (Mo. 1993) (en banc); see also Felling v. Ritter, 876 S.W.2d 2, 5 (Mo.App. 1994). In the instant case, Smith has not alleged any act which affirmatively increased Smith's risk of injury; rather, Smith only maintains that Taylor was responsible for driving the truck when the accident occurred. Whether or not the highest degree of care or some other standard applies is not relevant or material to the analysis. Negligence is negligence and there are no legal degrees of negligence. Virginia D. v. Madesco Investment Corp., 648 S.W.2d 881, 886 (Mo. 1983) (en

banc). Therefore, Smith cannot establish something more by simply alleging a given standard of care, but instead must plead something more which affirmatively increases the risk of injury to Smith.

The standard of care applicable to a given defendant does not increase the risk of injury to a co-employee. If the Court would follow Respondent's position, the standard would not only be arbitrary depending upon where a work-related automobile accident occurred (public or private road/highway) but would, in effect, eliminate the something more standard established in Badami. In short, the standard of care applicable would govern whether or not liability is imposed, and in those situations where an automobile accident occurs involving co-employees, absolute liability would be imposed against a co-employee, at least when the accident occurred on a public road or highway in the state of Missouri. Given that liability would be imposed in all such circumstances, this would be akin to the Louisiana approach which was specifically discussed and rejected by the court in Badami.

Respondent has attempted to distinguish several cases involving work-related automobile accidents which specifically address immunity under the Act. First, in the case of Collier v. Moore, 21 S.W.3d 858 (Mo.App. 2000), Respondent states that this case is "easily distinguished" on the basis that the accident in Collier occurred on a private air field while the accident in the instant case occurred on a public roadway. Beyond the fact that Plaintiff Smith's own Petition fails to allege the appropriate standard of care, the Court in Collier did not decide the issue according to §304.012 or some other standard of care. Perhaps there is a distinction to be drawn between supervisors and mere co-employees but clearly the case cannot be distinguished for the reasons set forth by Respondent. In conformity with Badami, the Court in Collier analyzed the case in terms of the "something more" and held that because the co-employee failed to implement his employer's duty to provide a reasonably safe work environment, no liability was imposed

against the co-employee. Id. at 862. There is absolutely no reference to §304.012 or any other standard of care that may apply.

The other case that Respondent attempts to distinguish is Shelter Mut. Ins. Co. v. Gebhards, 947 S.W.2d 132 (Mo.App. 1997), on the basis that the reasoning set forth in the Court's opinion was "dicta." Respondent provides no support for this position. In fact, the opposite holds true based upon the fact that the parties stipulated that the employer employed between 30 and 40 persons at the time of the accident. Id. at 134. Furthermore, the parties also stipulated that the employer was subject to the provisions of the workers' compensation statutes, again suggesting that immunity under the Act was an issue. The Court devoted several paragraphs to the issue, citing Mo. Rev. Stat. §287.120 (2000) in analyzing the case with respect to the "something more" standard, which was not satisfied by the injured employee. Beyond the exclusions contained in Shelter's policy, the Court provided an alternative basis for denying recovery against a co-employee who was responsible for driving the truck when it crashed into a bridge. Because plaintiff was not able to establish something more which affirmatively caused or increased the risk of injury, liability was not imposed against the co-employee.

As in Badami, Plaintiff Smith received benefits from his employer (BFI) under the Act and then brought suit against a co-employee, Relator Taylor, claiming that Smith was injured as a result of Taylor's negligence. Because Smith has not alleged "something more" which caused or increased the risk of injury to Smith, Smith's allegations constitute no more than Relator Taylor's alleged failure to implement his employer's duty to provide a safe work place. Hence, Relator Taylor is immune from civil liability.

CONCLUSION

For all the reasons stated above, as well as previously, 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 Reply Brief, and one copy on 3.5" diskette, have been mailed, postage prepaid, this 20th 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

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CERTIFICATE OF COMPLIANCE

I hereby certify the following:

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

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

3. This Reply Brief contains 2,737 words, exclusive of the cover, signature block, certificate of service, and certificate of compliance. This Reply Brief was prepared using WordPerfect 7.0, and the word count was calculated by WordPerfect 7.0.

4. The file containing this Reply Brief, and the respective diskettes filed with the Court and/or served on the parties were scanned for viruses on February 20th, 2002, using Norton AntiVirus Corporate Edition, Version 7.51, with virus definitions updated through February 20th, 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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