IN THE MISSOURI SUPREME COURT

KEVIN DALE SEXTON

Appellant

v.

STEVE SLONIKER, HOWARD HURLBURT, AND KENT LACY

Respondents

S.C. #85803

APPELLANT'S BRIEF

Andrew J. Gelbach - MO - 26003
Attorney At Law
109 E. Market Street
P.O. Box 375
Warrensburg, MO 64093
(660) 747-5138
FAX: (660) 747-8198

TURNER & SWEENY
John E. Turner – MO - 26218
Christopher P. Sweeny – MO 44838
10401 Holmes Road, Suite 450
Kansas City, MO 64131
(816) 942-5100
FAX: (816) 942-5104

ATTORNEYS FOR APPELLANT KEVIN DALE SEXTON

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JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the Honorable Charles Atwell entered in the Circuit Court of Jackson County, Missouri. That Judgment dismissed Plaintiff/Appellant's Petition For Damages for lack of subject matter jurisdiction finding that Respondents, Steve Sloniker, Kent Lacy and Howard Hurlburt, were immune from a civil suit pursuant to the Workers' Compensation Act §287.120. The Court further found that the Workers' Compensation Act as construed and applied by *State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo.App. 1982)* was constitutional.

Appellant Sexton challenges the constitutionality of Missouri Revised Statute §287.120 as construed and applied in *State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo.App. 1982)* granting co-employees civil immunity and requiring that "something extra" must be pled to be able to sue a co-employee. Appellant asserts that the statute as construed and applied violates the Missouri Constitution, Article I, Section 14, pertaining to open courts because it arbitrarily and unreasonably bars Kevin Sexton from accessing state courts to enforce a recognized cause of action for personal injury. Pursuant to the plain language of Missouri Revised Statute §287.120, co-employees do not have any civil immunity, only employers have immunity, and therefore, the extension of immunity is unreasonable, arbitrary and unconstitutional.

This Court has exclusive appellate jurisdiction to hear this appeal pursuant to Article V, Section 3 of the Missouri Constitution. See *Kilmer v. Mun, 17 S.W.3d 545, 548 (Mo. banc 2000).*

POINTS RELIED ON WITH PRIMARY AUTHORITIES

POINT I

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CIVIL PETITION FOR DAMAGES FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE COURT MISAPPLIED THE WORKERS' COMPENSATION ACT AND INCORRECTLY FOUND THAT RESPONDENTS WERE ENTITLED TO IMMUNITY UNDER THE ACT IN THAT MISSOURI REVISED STATUTE §287.120 PROVIDES THAT EMPLOYERS CAN BE IMMUNE FROM CIVIL LIABILITY IF THE WORKERS' COMPENSATION ACT APPLIES TO THEM; THE STATUTE DOES NOT PROVIDE ANY CIVIL IMMUNITY FOR EMPLOYEES; RESPONDENTS ARE EMPLOYEES, NOT EMPLOYERS, AND THEREFORE, THEY ARE NOT ENTITLED TO IMMUNITY.

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

Sylcox v. National Lead Co., 38 S.W.2d 497 (Mo.App. 1931)

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

James v. Poppa, 85 S.W.3d 8, 10 (Mo.banc 2002)

Larson's Workers' Compensation Law, §111.04

Missouri Revised Statute §287.120

Missouri Revised Statute §287.030

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POINT II

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CIVIL PETITION FOR DAMAGES FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE COURT MISAPPLIED THE LAW AND INCORRECTLY FOUND THAT RESPONDENTS WERE ENTITLED TO THE IMMUNITY THAT WAS JUDICIALLY CREATED BY THE *BADAMI* COURT IN THAT THE IMMUNITY CREATED BY THE *BADAMI* COURT APPLIES ONLY TO CORPORATE SUPERVISORS AND OFFICERS ACTING IN THEIR SUPERVISORY CAPACITIES, NOT EMPLOYEES; RESPONDENTS HURLBURT AND LACY ARE NOT SUPERVISORS OR OFFICERS, AND THEREFORE, THEY ARE NOT ENTITLED TO THE IMMUNITY JUDICIALLY CREATED BY *BADAMI*; RESPONDENT SLONIKER WAS A SUPERVISOR BUT HE WAS NOT ACTING IN HIS SUPERVISORY CAPACITY WHEN HE NEGLIGENTLY BUILT AND INSTALLED THE GUARDRAIL AND HANDRAIL, AND THEREFORE, HE IS NOT ENTITLED TO THE IMMUNITY JUDICIALLY CREATED BY *BADAMI*.

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

Kruse v. Schieve, 213 N.W.2d 64 (Wis. 1973)

Laffin v. Chemical Supply Co., 253 N.W.2d 51 (Wis. 1977)

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

POINT III

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR DAMAGES FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE JUDICIALLY CREATED IMMUNITY FOR CO-EMPLOYEES VIOLATES THE MISSOURI CONSTITUTION'S OPEN COURTS PROVISION IN THAT IT CREATES AN ARBITRARY, VAGUE, AMBIGUOUS AND UNREASONABLE OBSTACLE FOR PEOPLE INJURED BY CO-WORKERS TO ACCESS THE COURTS.

Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599 (Mo.banc 1969)

Kilmer v. Mun, 17 S.W.3d 545 (Mo.banc 2000)

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

Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.2d 384 (Mo.banc 1991)

Missouri Constitution, Article I, § 14

POINT IV

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CIVIL PETITION FOR DAMAGES FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE PETITION STATED FACTS CONSTITUTING THE "SOMETHING EXTRA" CURRENTLY REQUIRED TO REMOVE THIS CASE FROM THE EXCLUSIVE JURISDICTION OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION IN THAT THE PETITION PLED SPECIFIC AFFIRMATIVE ACTS OF ACTIVE NEGLIGLENCE THAT 1) AMOUNTED TO MISFEASANCE, 2) BREACHED A COMMON LAW DUTY OWED TO APPELLANT SEXTON, AND/OR 3) AFFIRMATIVELY CAUSED OR INCREASED APPELLANT

SEXTON'S RISK OF INJURY AND PURSUANT TO *BADAMI*, *TAUCHERT*, AND *WORKMAN*, THOSE FACTS DEMONSTRATE "SOMETHING EXTRA." AT A MINIMUM, THESE FACTS CREATED AN ISSUE FOR A JURY.

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

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

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

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STATEMENT OF FACTS

A. INTRODUCTION

This appeal arises from the trial court's Judgment dismissing Plaintiff's Petition For Damages against three individuals for lack of subject matter jurisdiction. The trial court determined that all Respondents were entitled to civil immunity under the Workers' Compensation Act §287.120 and that Appellant's exclusive remedy was under the Workers' Compensation Act. (L.F. 863-871). Upon review of such a judgment, all of the facts stated in Plaintiff's Petition are to be taken as true. See *Workman v. Vader, 854 S.W.2d 560, 562 (Mo.App. S.D. 1993).*

B. THE PARTIES, ACCIDENT, AND INJURIES

On March 23, 1993, Appellant, Kevin Sexton, was working as a union concrete mason at the Montrose Power Plant in Montrose, Missouri. (L.F. 240). Appellant was employed by Intec Construction Company, (Intec) one of the subcontractors on the construction project. Respondents were all employed by Jenkins & Associates who was the contractor for the construction project. (L.F. 3 and 240). Respondent Sloniker worked as a supervisor for Jenkins & Associates; Respondent Hurlburt worked as a carpenter for Jenkins & Associates; and Respondent Lacy worked as a laborer for Jenkins & Associates. (L.F. 3 and 240).

On March 23, 1993, the Respondents built and installed a makeshift handrail/guardrail around an elevator shaft. (L.F. 3). The manner in which the Respondents built the handrail and guardrail violated OSHA Standards in that the rails were built with 1" x 4" lumber rather than 2" x 4" lumber. (L.F. 6). Respondents'

construction of the rails was also improper in that they only used one nail to secure each guardrail and that nail was too small to secure the wood. (L.F. 6-8). Furthermore, they built the rails using rotten wood. (L.F. 6-8). Finally, Respondents hammered the nail into the wrong side of the rails allowing the boards to pull off with little force or weight. (L.F. 7).

In addition to improperly building and installing the handrail and guardrail around the open elevator shaft, Respondents removed the cover that was protecting the open elevator shaft. (L.F. 10).

Shortly after constructing the makeshift handrail and guardrail, Respondent Sloniker directed Appellant to work in the area where the rails had been built. (L.F. 5). Although Respondents knew or should have known that the makeshift handrail and guardrail would not support a person's weight, they intentionally failed to warn Appellant or to tell Appellant of the true condition of the rails. (L.F. 10). Respondent Sloniker specifically told Appellant that it was safe to use the makeshift handrail and guardrail to climb down the elevator shaft and directed Appellant to use the makeshift handrail and guardrail. (L.F. 5 and 11).

When Appellant Sexton did use the makeshift handrail and guardrail as directed by Respondent Sloniker, the rails broke causing Appellant to fall down the open elevator shaft. (L.F. 5). As a result of the fall, Appellant suffered serious and permanent injuries,

including, among other things, anterior cruciate ligament tear, lateral meniscus tear, lateral collateral ligament tear and peroneal nerve palsy. (L.F. 11).

C. PROCEDURAL HISTORY

Appellant filed this lawsuit in the Circuit Court of Jackson County on November 30, 2000. (L.F. 1). Appellant had previously filed a different Petition for Damages against Respondents in Henry County, Missouri. (L.F. 62). Ultimately, Henry County Circuit Judge Roberts dismissed Appellant's Petition finding that Appellant's Petition failed to state the "something extra" necessary to bring Appellant's claim within the subject matter jurisdiction of the Court. (L.F. 61 and 65). Judge Roberts did not indicate that the dismissal was with prejudice; therefore, it was without prejudice. See Rule 67.03. Appellant appealed that decision and the Missouri Court of Appeals, Western District, found that based on the Petition before it, Judge Roberts did not abuse his discretion in dismissing the Petition for lack of subject matter jurisdiction. (L.F. 80-89). The Court of Appeals dealt specifically with the Petition filed in Henry County. (L.F. 80-89). The Supreme Court accepted transfer of the cause, but after the parties submitted briefs and argued the case, the Supreme Court retransferred the case to the Missouri Court of Appeals, Western District. (L.F. 94).

Based on the prior Henry County action, Respondents moved for summary judgment in the Jackson County action, arguing that Appellant's claim was barred by the doctrine of issue preclusion. (L.F. 15 and 60). Jackson County Circuit Judge Atwell overruled Respondents' Motion For Summary Judgment. (L.F. 372). Respondents filed a Petition for Writ of Prohibition, or in the Alternative for Writ of Mandamus in the

Missouri Court of Appeals. The Court of Appeals denied the Writ and Respondents then filed a Petition for Writ of Prohibition or in the Alternative, for Writ of Mandamus in this Court. That Writ was also denied. See S.C. 85121 and (L.F. 377, 464 and 741).

Respondents then moved for dismissal for lack of subject matter jurisdiction alleging that Appellant's Petition failed "to allege 'something extra' beyond the duty to provide a safe working place so as to avoid the civil law immunity afforded by the Workers' Compensation Act to defendants." (L.F. 743-744). On December 8, 2003, the trial court entered its Amended Judgment and order sustaining Respondents' Motion to Dismiss. (L.F. 863-871). This appeal followed.

* * *

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CIVIL PETITION FOR DAMAGES FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE COURT MISAPPLIED THE WORKERS' COMPENSATION ACT AND INCORRECTLY FOUND THAT RESPONDENTS WERE ENTITLED TO IMMUNITY UNDER THE ACT IN THAT MISSOURI REVISED STATUTE §287.120 PROVIDES THAT EMPLOYERS CAN BE IMMUNE FROM CIVIL LIABILITY IF THE WORKERS' COMPENSATION ACT APPLIES TO THEM; THE STATUTE DOES NOT PROVIDE ANY CIVIL IMMUNITY FOR EMPLOYEES; RESPONDENTS ARE EMPLOYEES, NOT EMPLOYERS, AND THEREFORE, THEY ARE NOT ENTITLED TO IMMUNITY.

A. STANDARD OF REVIEW

In reviewing the trial court's judgment dismissing Appellant's Petition for Damages for lack of subject matter jurisdiction, this Court is to consider all facts alleged in the Petition as true. Furthermore, all allegations and inferences reasonably drawn therefrom should be construed favorably to the Plaintiff as to determine if there is any ground for relief. Examining the evidence in this light, the Court is then to determine whether the Petition invokes principles of substantive law upon which any relief can be granted. *Pavia v. Childs, 951 S.W.2d 700, 701 (Mo.App. S.D. 1997).* The applicability or

interpretation of a statute is a question of law, and therefore, should be reviewed under the de novo standard. See *Williams v. Kimes, 996 S.W.2d 43, 44-45 (Mo.banc 1999).*

B. THE WORKERS' COMPENSATION ACT DOES NOT PROVIDE IMMUNITY FOR EMPLOYEES.

Appellant acknowledges that the Workers' Compensation Act (the Act) can provide immunity to employers from civil liability from its employees if the Act applies to the employer. *Vatterott v. Hammerts Iron Works Inc., 968 S.W.2d 120 (Mo.banc 1998).* However, nowhere in the Act has the legislature provided for civil immunity for employees. Specifically, Missouri Revised Statute §287.120 states:

> Every **employer** subject to the provisions of the 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 therefore whatsoever, whether to the employee or any other person. (emphasis added).

This section provides immunity only to employers. See *Boswell v. May Centers, Inc., 669 S.W.2d 585, 586-587 (Mo.App. 1984)* where the Court found that "the Missouri exclusive remedy provision, §287.120(1), RSMo, 1978 affords immunity **only** to the 'employer' who is defined in §287.030…." (emphasis added).

In *Boswell*, the Court of Appeals noted that the definition of employer did not include subsidiary corporations; consequently, the Court of Appeals held that a subsidiary corporation was not immune under the act. Similarly, here, the definition of employer

does not extend to employees; consequently, employees do not enjoy immunity under the act. Thus, pursuant to the plain language of the statute, co-employees are not entitled to any civil immunity under the Act.

The immunity provided to an employer under the Act is analogous to the immunity provided to sovereigns. Pursuant to Missouri Revised Statute §537.600, public entities are immune from liability in a suit for compensatory damages unless the immunity has been expressly waived. Our Courts have consistently held that while the entity is immune, its employees are not. The statute clearly provides that the immunity is applicable to the governmental entity alone. See *Rustici v. Weidemeyer, 673 S.W.2d 762, 768 (Mo.banc 1984)* and *Cole ex rel. Cole v. Warren County R.III School District, 23 S.W.3d 756, 761 (Mo.App. E.D. 2000).* In *Cole*, a bus driver argued that the statutory cap of $100,000 should be applied to him pursuant to Missouri Revised Statute §537.600. The Court rejected that argument noting that employees of governmental entities cannot utilize sovereign immunity as a defense because the defense was uniquely applicable to the entity and was not transferable to the agent of that entity. Id. at 761.

Similarly, here, the civil immunity provided by the Act is applicable only to employers. It is not transferable to agents or employees of the employer. If the legislature intended to provide civil immunity to co-employees or anyone other than employers, it could have so stated. Like the sovereign immunity statute, the Workers'

Compensation Act only provides immunity for employers where the Act applies to the employer. See *Sylcox v. National Lead Co., 38 S.W.2d 497 (Mo.App. 1931).*

In *Sylcox*, the Court of Appeals held that a bus driver who negligently operated his bus in such a fashion as to cause injury to a co-employee was liable in civil action as a third-person. The Court held that the employee was not entitled to the protection of workers' compensation immunity. Id. at 501. The Defendant argued that the injured employee should only be able to sue those persons "not in the same employ." Id. In rejecting this argument, the Court of Appeals stated:

> there is no such limitation expressed in our own act . . . and we have heretofore considered a 'third-party' as being one upon whom no liability could be entailed under the act. In other words, the whole scope and purpose of the act is to fix and determine the rights and liabilities as between employer and employee; the liability of one at common law is left unaffected by the act, except insofar as it has been expressly taken away by it; and where one has, and can have, no liability under the act, he's likewise in no position to claim any immunities under it. Id.

Sylcox was cited with approval by this Court in *Tauchert v. Boatmen's National Bank of St. Louis, 849 S.W.2d 573, 574 (Mo.banc 1993).*

Two decades after *Sylcox* was decided, this Court, citing *Sylcox*, held that a co-employee or fellow servant is a "third person" within the Workers' Compensation statute, and therefore, could be sued by a co-employee. *Schumacher v. Leslie, 232 S.W.2d 913, 917-918 (Mo.banc 1950).* This Court recognized that the holding in *Sylcox* was in harmony with the Workers' Compensation Act because the Act did not abrogate the

employee's common law rights against a "third person". Id. at 918. In fact, the Court stated that the Workers' Compensation Act indicated "an intention to preserve rather than abrogate such rights." Id. This Court went on to define "third person" as "one upon whom no liability could be entailed under the Act" and "one with whom there is no master and servant relationship under the Act." Because co-employees have no liability under the Act, they are not entitled to its benefits, i.e., immunity. Id.

Schumacher was cited with approval by this Court in both *Tauchert*, *849 S.W.2d at 574* and *James v. Poppa*, *85 S.W.3d 8, 10 (Mo.banc 2002).* In *James*, this Court noted that the Workers' Compensation Act allows common law actions against "third persons", and defined "third person" as "one with whom there is no master and servant relationship." Here, there is no dispute that there is no master and servant relationship between Appellant Sexton and the Respondents. Sexton and the Respondents were not even employed by the same employer. Consequently, the act does not prohibit a common law action against Respondents. The trial court erred in finding otherwise.

This Court's holding in *James* is difficult, if not impossible, to reconcile with this Court's decision in *State ex rel. Taylor v. Wallace*, *73 S.W.3d 620 (Mo.banc 2002).* The *Taylor* Court found that an employee who pled he was injured by a co-employee's negligent operation of a trash truck had not pled the "something more" to take it outside the protection of the Workers' Compensation Law's exclusive remedy. But the co-employee in *Taylor* had no master and servant relationship with the injured employee; thus, under the *James* Court's definition of "third person," the injured employee in *Taylor* should have been allowed to bring a common law action against his co-employee.

The decision in *James* is consistent with the plain language of the statute and this Court's prior holding in *Schumacher*. As set forth above, the *Schumacher* Court held that a co-employee or fellow servant is a "third person" within the Workers' Compensation statute, and therefore, could be sued by a co-employee. Id. at 917-918. And, like the *James* Court, defined "third person" as "one with whom there is no master and servant relationship under the Act." Id. at 918. The decision in *Taylor* fails to acknowledge the Court's previous holding in *Schumacher* and cannot be reconciled with the holding in that case or the plain language of the statute.

In addition to being contrary to the decisions in *Schumacher* and *James*, *Taylor* is also contrary to this Court's decisions in *Gardner v. Stout*, *119 S.W.2d 790, 792 (Mo. 1938)* and *Lamar v. Ford Motor Co.*, *409 S.W.2d 100, 107 (Mo. 1966).* Appellant respectfully suggests that *Taylor* should be overruled because it failed to follow this Court's prior decisions, and because it is contrary to this Court's more recent opinion in *James*.

The *Taylor* Court relied extensively on *State ex rel. Badami v. Gaertner*, *630 S.W.2d 175 (Mo.App. 1982).* *Badami* and its progeny which extend immunity to co-employees are not in harmony with the plain language of the Act, and therefore, those cases should not be followed.

C. *STATE ex rel. BADAMI V. GAERTNER* AND ITS PROGENY HAVE FAILED TO APPLY THE PLAIN LANGUAGE OF THE STATUTE, AND THEREFORE, SHOULD NO LONGER BE FOLLOWED.

As discussed above, the plain language of the statute does not extend immunity to co-employees and no such immunity was ever recognized by the early cases. Nonetheless, since the Eastern District's decision in *State ex rel. Badami v. Gaertner*, *630 S.W.2d 175 (Mo.App. E.D. 1982),* Missouri Courts have found that co-employees are immune under the Act. Relying on *Badami*, Courts now extend immunity to co-employees unless the injured employee pleads "something extra." No case prior to *Badami* ever required an injured employee to plead "something extra" to pursue a civil claim against a co-employee. *Badami* and its progeny failed to follow existing precedent and the plain language of the Act, and therefore, should no longer be followed.

The *Badami* Court acknowledged the validity of this Courts holding in *Schumacher v. Leslie*, discussed above, and noted that:

> It is accepted in the state that a co-employee, or fellow servant or foreman is a "third person" within the meaning of §287.150 in that he may be sued by an injured co-employee for his negligence resulting in a compensable injury. (citations omitted).

But the Eastern District did not apply this principle of law to the facts before it; nor did it follow the language of the Act. Rather, it set out to allegedly "fix our compensation legislation." Id. at 178.

In its analysis, the *Badami* Court noted that at the time the workers' compensation law was passed, there was a distinction between misfeasance and nonfeasance; an agent was liable to third persons, including co-employees, only for his misfeasance, but not for his nonfeasance. Id. at 177. The Court noted that this nonfeasance-misfeasance distinction was "blurred and perhaps effectively eliminated by our Courts as a viable concept in agency and tort law." Id. at 178. Citing *Giles v. Moundridge Milling Company, 173 S.W.2d 745, 751-752 (Mo. 1943)* and *Lambert v. Jones, 98 S.W.2d 752, 757-759 (Mo. 1936).* The Court further found that "this blurring and elimination of the distinction developed in agency and tort law independent of our compensation legislation," and questioned whether they "**should fix our compensation legislation** with this independently developed conceptual change." Id. at 178. (emphasis added).

According to the *Badami* Court, the blurring and elimination of the distinction occurred pursuant to cases decided in 1936 and 1943. In 1950 and 1966, this Court decided *Lamar v. Ford Motor Company, 409 S.W.2d 100 (Mo. **1966**)* and *Schumacher v. Leslie, 232 S.W.2d 913 (Mo.banc **1950**).* Appropriately, this Court did not feel compelled to "fix our compensation legislation" in those cases even though the nonfeasance-misfeasance distinction had been blurred or eliminated.

This Court, unlike the *Badami* Court, apparently recognized that it is the job of the legislature to "fix" legislation, not the Courts. As early as 1939, this Court held that it is for the legislature and not the Courts to make changes in the compensation act if any are necessary. See *State ex rel. Mills v. Allen, 128 S.W.2d 1040 (Mo. 1939).* Even if the statute needed fixing as the *Badami* Court seemed to think, it was for the legislature to

fix. See *Roberson v. State*, *989 S.W.2d 192 (Mo.App. 1999)* where the Court found that even if a statute needs alteration, it is for the legislature, and not the Court, to make it. Finally, the *Badami* Court's dissatisfaction with the statute was not a sufficient reason to ignore or distort the plain language of the statute; remedy, if any, lies with the General Assembly and not with the courts. See *Springfield General Osteopathic Hospital v. Industrial Commission*, *538 S.W.2d 364 (Mo.App. 1976).*

The *Badami* Court's alleged fixing of the compensation act was an encroachment upon the legislative powers. This Court has repeatedly noted that statutory revision is a matter within the exclusive province of the General Assembly. See, e.g., *State v. Young*, *695 S.W.2d 882 (Mo.banc 1985).* The Court has also consistently held that courts cannot read into a statute legislative intent contrary to the intent made evident by the statute's plain language, even if the Court may prefer a policy different from that enunciated by the legislature. See e.g., *Keeney v. Hereford Concrete Products, Inc.*, *911 S.W.2d 622 (Mo.banc 1995).* In other words, the Court must be guided by what the legislature said, not by what the Court thinks it meant to say and the Court may not engraft upon a statute provisions which do not appear in the explicit words or by implication from other words in the statute. See, *Metro Auto Auction v. Director of Revenue*, *707 S.W.2d 397 (Mo.banc 1986).*

Even if the legislature inadvertently, or through lack of foresight, omitted language from the Act, the Court is not entitled to supply the omitted provision or language. See *State ex rel. Mercantile National Bank at Dallas v. Rooney*, *402 S.W.2d 354 (Mo. 1966).* The Courts cannot transcend the limits of their constitutional powers

and engage in judicial legislation by supplying omissions or remedying defects in matters delegated to the legislature. See *Board of Education of City of St. Louis v. State*, *47 S.W.3d 366 (Mo.banc 2001).* Even when the Court may prefer a policy different from that enunciated by the legislature, it is not the Court's province to question the wisdom, social desirability or economic policy underlying the statute as these are matters for the legislature's determination. See *Greenlee v. Duke's Plastering Service*, *75 S.W.3d 273 (Mo.banc 2002)* and *American Standard Insurance Co., v. Hargrave*, *34 S.W.3d 88 (Mo.banc 2000).*

As the leading treatise on workers' compensation law states, "the Workers' Compensation Act takes all the time and words it needs to say precisely what it means. If it wants to say the employer is immune it says so in plain English. If it wants to go further and say co-employees are immune, it is easy enough to say that in plain English." See *Larson's Workers' Compensation Law, §111.04[3].* The author then goes on to ask why, if the legislature has not said in plain English that immunity extends to co-employees, have Courts taken it on themselves to announce that the legislature really meant that co-employees are immune. The author notes that such conduct by the Courts is "a questionable exercise in judicial legislation." Id. at § 111.03[2].

The *Badami* Court's attempt to "fix" the Workers' Compensation Act led the Court to establish the "something extra" test. As this Court noted in *Taylor*, what constitutes something extra "has not proven susceptible to reliable definition." Id. at 622. See also, Paul J. Passanante and Sara Stock, Help! We're Lost! Co-Employee Immunity in Missouri, 57 J.Mo.B. 53, 64 (2001). The confusion and inconsistent decisions caused

by this alleged "fix" of the Act illustrate why this Court prohibits judicial legislation and promulgated the rules of statutory construction discussed above.

Prior to the *Badami* decision, the test to determine if someone was liable as a "third person" was clear and simple. If the person is "one with whom there is no master and servant relationship under the Act," then the person is liable as a "third person." *Schumacher, 232 S.W.2d at 918*. The *Schumacher* case and the *Sylcox* case could not be any more clear.

Thus, Appellant requests that this Court once again set forth the black letter law that has been established in Missouri jurisprudence since 1931, which is that an injured employee may sue in civil court those with whom there is no master and servant relationship. Such black letter law was recently enunciated in *James v. Poppa* and in fact exists in the statute itself which extends immunity only to employers. See Missouri Revised Statute §287.120. Workers' compensation immunity would, therefore, not be available to employees because there is no master and servant relationship with the injured employee. Here, that means Respondents, who have no master and servant relationship with Appellant Sexton, are not immune from civil liability and the trial court erred in dismissing this case for lack of subject matter jurisdiction.

D. CONCLUSION

The Missouri Workers' Compensation Act provides civil immunity only to employers, not employees. If the legislature intended to extend immunity to employees, it could have so stated but it chose not to. Consequently, Appellant respectfully requests that this Court end the practice of finding co-employees immune under the Act. Whether or not the Plaintiff has pled "something extra" should no longer have any bearing on the application of civil immunity to co-employees.

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court and remand this case for a jury trial.

* * *

POINT II

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CIVIL PETITION FOR DAMAGES FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE COURT MISAPPLIED THE LAW AND INCORRECTLY FOUND THAT RESPONDENTS WERE ENTITLED TO THE IMMUNITY THAT WAS JUDICIALLY CREATED BY THE *BADAMI* COURT IN THAT THE IMMUNITY CREATED BY THE *BADAMI* COURT APPLIES ONLY TO CORPORATE SUPERVISORS AND OFFICERS ACTING IN THEIR SUPERVISORY CAPACITIES, NOT EMPLOYEES; RESPONDENTS HURLBURT AND LACY ARE NOT SUPERVISORS OR OFFICERS, AND THEREFORE, THEY ARE NOT ENTITLED TO THE IMMUNITY JUDICIALLY CREATED BY *BADAMI*; RESPONDENT SLONIKER WAS A SUPERVISOR BUT HE WAS NOT ACTING IN HIS SUPERVISORY CAPACITY WHEN HE NEGLIGENTLY BUILT AND INSTALLED THE GUARDRAIL AND HANDRAIL, AND THEREFORE, HE IS NOT ENTITLED TO THE IMMUNITY JUDICIALLY CREATED BY *BADAMI*.

A. STANDARD OF REVIEW

In reviewing the trial court's judgment dismissing Appellant's Petition for Damages for lack of subject matter jurisdiction, this Court is to consider all facts alleged in the Petition as true. Furthermore, all allegations and inferences reasonably drawn therefrom should be construed favorably to the Appellant as to determine if there is any ground for relief. Examining the evidence in this light, the Court is then to determine whether the petition invokes principles of substantive law upon which any relief can be

granted. *Pavia v. Childs, 951 S.W.2d 700, 701 (Mo.App. S.D. 1997).* The question presented by this point requires the interpretation of case law, and therefore, it should be reviewed de novo. Furthermore, because the facts of Appellant's Petition are to be taken as true, there is no factual dispute to be decided, and therefore, the question of subject matter jurisdiction is a question of law reviewed under the de novo standard. See, *B.C. National Banks v. Potts, 30 S.W.3d 220, 221 (Mo. App. 2000).*

B. THE *BADAMI* COURT'S JUDICIALLY CREATED IMMUNITY, IS LIMITED TO OFFICERS AND SUPERVISORY EMPLOYEES WHO ARE ACTING IN THEIR SUPERVISORY CAPACITY.

Pursuant to the plain language of the Workers' Compensation Act, immunity under the Act applies only to employers. Despite this plain language and in an attempt to "fix" the act, the *Badami* Court found that corporate officers and supervisory employees are also immune unless "something more" was shown. Because Respondents are not officers or supervisory employees, they are not entitled to immunity even under the rule enunciated in *Badami*.

In *Badami*, the Plaintiff sought to recover from the **corporate president** and **production manager** of the company. Plaintiff alleged that Defendants were negligent in failing to equip a shredding machine with certain safety devices that would have prevented his injury. Id. at 176. Plaintiff further alleged that the employer had delegated to each of the Defendants the duty of providing their fellow employees with a reasonably safe place to work and that each of the defendants were thereby responsible for the detection, correction and prevention of work practices and working conditions which

would render the plant not reasonably safe for workmen. Id. at 176. Thus, as articulated by the *Badami* Court, the issue before it was:

> whether a **supervisory** employee, including a **corporate officer** may be held personally liable for injuries sustained by a fellow employee covered by workmens' compensation where the injuries occur because of the **supervisor's** failure to perform the duty, assigned to him by the employer, to provide the fellow employee a reasonably safe place to work. Id. at 176 (emphasis added).

The question before the Court here, with respect to Respondents Hurlburt and Lacy, is not whether a supervisory employee or a corporate officer whose duty it was to provide fellow employees with a reasonably safe place to work may be held personally liable; rather, the question is whether **employees** of a contractor can be held personally liable for injuries suffered by an employee of a sub-contractor as a result of their negligent construction of a handrail.

To answer the question before it, the *Badami* Court adopted the "Wisconsin approach." Id. at 179-180 citing *Kruse v. Schieve*, *213 N.W.2d 64 (Wis. 1973).* Importantly, the issue of co-employee immunity was not before the *Kruse* Court. The parties in *Kruse* acknowledged that a third-party action "may be brought against a **co-employee** for breach of a common law duty to exercise ordinary care." Id. (emphasis added). The issue before the *Kruse* Court was whether the Workers' Compensation Act barred a third-party action against a **corporate officer**. *213 N.W.2d at 66* (emphasis added). In analyzing this issue, the *Kruse* Court stated:

> The duty of proper supervision is a duty owed by a corporate officer or supervisory employee to the employer, not to a fellow employee. Under what circumstances can a duty be owed to a fellow employee additional to and different from the duty of proper supervision that is owed to the employer by a corporate officer or supervisory employee? Clearly something extra is needed over and beyond the duty owed the employer. Id. at 67.

The *Badami* Court also cited *Laffin v. Chemical Supply Co., 253 N.W.2d 51 (Wis. 1977).* The *Laffin* Court stated the issue before it as follows:

> In this case the issue is whether acts of [the company president] and [plant supervisor] were over and beyond the duty they owed to their employer…. If they directly participated in the activity that caused the injury they would have been co-employees and as such owed a duty to [plaintiff] to exercise ordinary care. Id. at 54.

In analyzing this issue, the *Laffin* Court noted that employees are within the class of third parties who are subject to civil liability. Id. at 53. Consequently, "if a corporate officer or supervisory employee is also a co-employee, the injured employee may maintain an action against the officer or supervisory employee." Id. Here, Respondents Hurlburt and Lacy were merely employees of the contractor, not supervisors or corporate officers, and therefore, they are subject to civil liability even under the "Wisconsin approach" adopted by the *Badami* Court.

The *Laffin* Court found that an officer or supervisor "doffs the cap of officer or supervisor and dons the cap of a co-employee" when he does an "affirmative act . . .

which increased the risk of injury to the employee." Explaining this conclusion, the Court stated:

> If a corporate officer or supervisor engages in this affirmative act, he owes the involved employee a duty to exercise ordinary care under the circumstances. **This duty is over and beyond the duty of proper supervision owed to the employer. It is the duty one employee owes another**. The purpose of allowing third-party actions in addition to workers' compensation was to retain "the traditional fault concept of placing responsibility for damages sustained upon the culpable party." If an officer or supervisor breaches a personal duty, it does not offend the policy of the Workers' Compensation Act to permit recovery from the officer or supervisor. Id. at 53-54 (emphasis added).

As an example, the Court cited a case where a company president and supervisory employee negligently loaded a truck and thereby caused injury to a co-employee. The Court noted that the president and supervisor's direct involvement in loading the truck created a duty to the injured employee beyond the duty they owed to the company. Thus, the president and supervisory employee would be civilly liable. Id. at 54.

Likewise, here, Respondent Sloniker doffed the cap of a supervisor and donned the cap of a co-employee when he directly participated in building and installing the defective guardrail and handrail. Respondent Sloniker's conduct is not unlike the supervisor who negligently loaded a truck. His direct involvement in building and installing the guardrail and handrail using rotten lumber created a duty to Appellant

Sexton beyond the duty he owed to the company. Consequently, the immunity created by *Badami* does not apply to him.

In *Tauchert v. Boatmen's National Bank, 849 S.W.2d 573, 574 (Mo.banc 1993)* this Court recognized the distinction between a supervisor and a co-worker. The Court reversed the trial court for granting summary judgment in favor of an employee's foreman noting that there was an issue of fact as to whether the foreman acted "as a supervisor or a co-worker in rigging the elevator hoist system." Id. at 574. Because this issue of fact was significant enough for this Court to reverse the trial court's order granting summary judgment, it appears as though this Court recognized that if the foreman was acting as a supervisor, he may enjoy immunity under the Act unless his actions constituted "something more." However, if the foreman acted as a co-worker, then he is not entitled to immunity.

Other jurisdictions which have adopted the "Wisconsin approach" have similarly held that a co-employee does not enjoy immunity under the Act unless the co-employee is a supervisor or corporate officer. See e.g., *Suburban Hospital, Inc., v. Kirson, 763 A.2d 185 (205 Md. 2000).*

Here, Respondents Hurlburt and Lacy were not supervisors or corporate officers, and therefore, even under the "Wisconsin approach" adopted by the *Badami* Court, they are not immune from liability. Respondent Sloniker held the title of supervisor but acted as a co-employee when he directly participated in building and installing the guardrail and handrail, and therefore, he is not entitled to immunity. The trial court erred in

finding otherwise, and Appellant respectfully requests that this Court reverse the trial court.

C. CONCLUSION

As discussed in detail in Point I, the Workers' Compensation Act does not extend immunity to anyone other than the employer, and therefore, *Badami*, which extended immunity to corporate supervisors and officers, should no longer be followed. However, even if this Court chooses to continue to follow *Badami*, the Trial Court erred in finding that Respondents are immune from liability because Respondents Hurlburt and Lacy are not corporate officers or supervisors and Respondent Sloniker was not acting as a supervisor, but a co-worker, when he participated in building and installing the defective handrail and guardrail.

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court and remand this case for a jury trial.

* * *

POINT III

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CIVIL PETITION FOR DAMAGES FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE JUDICIALLY CREATED IMMUNITY FOR EMPLOYEES VIOLATES THE MISSOURI CONSTITUTION'S OPEN COURTS PROVISION IN THAT IT CREATES AN ARBITRARY, VAGUE, AMBIGUOUS AND UNREASONABLE OBSTACLE FOR PEOPLE INJURED BY EMPLOYEES TO ACCESS THE COURTS.

A. STANDARD OF REVIEW

The standard of review under Point II is de novo. *Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000).*

B. INTRODUCTION

As set forth above, the Workers' Compensation Act does not provide immunity to employees. Cases holding to the contrary should be overruled. In the event this Court does not overrule prior case law, Appellant requests that the Court limit the immunity, as the *Badami* Court intended, to corporate officers and supervisors who have been sued for breaching a duty they owed only to their employer. Finally, if the Court finds that under the current case law immunity should be extended to all employees, then Appellant requests that the Court find that the immunity violates this State's Constitution.

C. CO-EMPLOYEE IMMUNITY VIOLATES ARTICLE I SECTION 14 OF THE MISSOURI CONSTITUTION

The Constitution of this state expressly provides in Article I, Section 14 that "the Courts of justice shall be open to every person." Application of the immunity provided under the Workers' Compensation Act to co-employees eliminates this Constitutional right for those who have been injured by a co-employee. This right provided by our Constitution should not be eliminated without an express intention by the legislature to eliminate this right for a specific class of persons. There is no statute which provides that those who have been injured by a co-employee's negligence cannot bring a civil action against that employee. Consequently, this Court should enforce the right provided by our Missouri Constitution and open the courts of justice to Kevin Sexton to pursue his claim against Respondents.

Specifically, Article I, Section 14 states:

> That the Courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

As interpreted by this Court, Article I, Section 14, "applies against all impediments to fair judicial process, be they legislative or judicial in origin." See *Kilmer v. Mun*, *17 S.W.3d 545, 548 (Mo.banc 2000).* Furthermore, it "prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our Courts in order to enforce recognized causes of action for personal injury." Id. at 549. Thus, "where a barrier is erected to seeking a remedy for a recognized injury, the question is whether it is

arbitrary or unreasonable." Id. at 550. As discussed below, the common law recognizes a cause of action for employees who are injured by co-employees and the Workers' Compensation Act was not intended to and did not effect this cause of action.

In *Kilmer*, this Court found that a statute prohibiting individuals from bringing a cause of action against a person who sold liquor to an obviously intoxicated person violated the "open courts" provision of our Constitution. The Court noted, "if the 'certain remedy' has any meaning, the barrier imposed by [the statute] is invalid." Id.

Here, there is not even a statute which purportedly prohibits persons injured by a co-employee's negligence from bringing a civil cause of action against those co-employees. This prohibition was created by the Eastern District in *State ex rel. Badami v. Gaertner* and inconsistently followed and applied by other Courts thereafter. As interpreted, *Badami* extends immunity to co-employees, and thereby prevents those injured by the negligence of a co-employee from accessing our Courts unless the injured employee pleads "something more." This requirement is an unreasonable impediment or obstacle to those seeking redress for a recognized wrong, and therefore, it violates the open courts provision of our constitution. As stated in *Kilmer*, if the guarantee in our Missouri Constitution for a remedy for every injury to persons has any meaning, then persons injured by co-employees cannot be prohibited from using our Courts.

In *Schumacher v. Leslie, 232 S.W.2d 913, 917-918 (Mo.banc 1950),* this Court recognized that the Workers' Compensation Act did not abrogate an employee's common law rights against a "third person". Id. at 918. In fact, the Court stated that the Workers' Compensation Act indicated "an intention to preserve rather than abrogate such rights."

Id. The Court went on to define "third person" as "one upon whom no liability could be entailed under the Act" and "one with whom there is no master and servant relationship under the Act." Because co-employees are not liable under the Act and do not have a master/servant relationship with the injured worker, they are third persons. Id.

Because the legislature intended to preserve injured employees' common law actions against "third persons", including co-employees, it is unreasonable for our Courts to encroach upon this legislative intent and judicially create an impediment to the enforcement of that action. As this Court recognized in *Zueck v. Oppenheimer Gateway Properties, Inc.*, *809 S.W.2d 384, 390 (Mo.banc 1991),* "workers' compensation laws have not been barriers to suits by injured employees against negligent third-parties. This reflects a policy in the law 'to place the loss upon the ultimate wrongdoer.'" (citations omitted). This Court further acknowledged that tort law "ought to function to promote care and punish neglect by placing the burden of their breach on the person who can best avoid the harm." Id. at 388. The Court concluded that, "when a rule of tort liability encourages a result contrary to these policy goals, it ought to be abandoned." Id.

Providing immunity to employees for negligent conduct that causes injury to a co-employee fails to promote care or punish neglect. Furthermore, it contravenes the policy "to place the loss upon the ultimate wrongdoer." Consequently, the judicially created immunity for co-employees is unreasonable and "ought to be abandoned." Id. and *Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599 (Mo.banc 1969).*

In *Abernathy*, this Court abolished the sixty year old practice of providing immunity to charitable institutions. Id. at 601. In reaching its conclusion, the Court

stated, "immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution." Id. at 603. Consequently, the Court concluded, "to lift the mantle of immunity will tend to promote care and caution." Id. at 603-604. Continuing, the Court noted, "there are other persuasive reasons for abandoning the doctrine" including "the protection of life and limb by organized society is of greater importance to mankind than any species of charity." Id. at 604.

Likewise, here, the protection of life and limb by organized society is of greater importance to mankind than providing immunity to employees who by their negligence injure their fellow employees. Furthermore, as this Court pointed out, providing immunity to co-employees will "foster neglect and breed irresponsibility." Id. at 603. Therefore, it is unreasonable to provide immunity to negligent co-employees and bar injured employees from accessing our courts.

See also *Townsend v. Townsend, 708 S.W.2d 646 (Mo.banc 1986)* where this Court in abolishing inter-spousal immunity stated, "long established common law principles authorize courts to compel tort-feasors to compensate those they intentionally or negligently injure." Id. at 647. The Court found that there was "insufficient support remaining for the proposition that tort-feasors should escape liability for injuries they inflict because the victim happens to be their spouse…." Likewise, there is insufficient support for the proposition that a tort-feasor should escape liability for injuries they inflict because the victim happens to be their co-employee.

In rejecting the argument that allowing spouses to sue one another will damage marital harmony, this Court stated:

> nor can we foresee that personal injury suits between spouses will be any more damaging to marital harmony than the multiplicity of property and contract actions currently permitted. Indeed, to frustrate recovery where warranted arguably contributes to violent domestic disturbances. Id. at 650.

Similarly, here, it is difficult to foresee how allowing a personal injury lawsuit between co-employees would be any more damaging to the harmony of the work place than the multiplicity of property and contract actions that are permitted between co-employees. The likelihood that harmony in the workplace would be disrupted in this case and those like it is especially unlikely. Appellant and Respondents do not and did not work for the same employer; they are deemed co-employees only by the Worker's Compensation Act which provides that employees of sub-contractors are statutory employees of the contractor. Furthermore, Appellant Sexton's judgment would be paid by an insurance carrier rather than his co-employee. Thus, there is little risk of disrupting the harmony in the workplace. See *Immer v. Risko, 267 A.2d 481, 484-485 (N.J. 1970)* cited with approval by this Court in *S.A.V. v. K.G.V., 708 S.W.2d 651, 652 (Mo.banc 1986).*

Additionally, to frustrate recovery where warranted would arguably contribute to violence in the workplace between co-employees. Id. If an employee is injured at the hands of a negligent co-worker and is then denied justice in our courts, he may seek his own form of justice. Finally, if the concern over marital harmony is not sufficient to support an application of immunity, certainly the concern for harmony in the workplace cannot support the application of immunity in this case.

In a companion case to *Townsend*, the Defendant argued that abolishing inter-spousal immunity would "open the flood gates of litigation"; this Court rejected the argument. See *S.A.V. v. K.G.V., 708 S.W.2d 651, 652 (Mo.banc 1986).* The Court recognized that the flooding of the courts argument "collides with the requirement that courts must provide a forum to redress legitimate and compensable injuries." A forum to redress legitimate and compensable injuries is precisely what Appellant Sexton is seeking in this case. And any argument that ending co-employee immunity would open the flood gates of litigation should be rejected as it was in *S.A.V.*

In *Jones v. State Highway Commission, 557 S.W.2d 225 (Mo.banc 1977),* this Court abolished principles of sovereign immunity for personal torts and in so doing overruled a case that it had decided just two years earlier called *O'Dell v. School District of Independence, 521 S.W.2d 403 (Mo.banc 1975).* It is ironic that at the time of a Supreme Court trend to abolish immunities, the Court of Appeals in *Badami* created a new immunity. The above authorities demonstrate that extending immunity to co-employees is unreasonable and unwise.

The leading authority on workers' compensation law has gone even further than calling judicially created immunity unreasonable; he calls it "almost indecent." See *Larson's Workers' Compensation Law, §111.04[4]* where the author states:

> There is something almost indecent in the alacrity and zest with which some courts…sally forth to slash down substantive legal remedies that have existed for centuries for the protection of the injured and the allocation of the burden to the wrongdoer.

Our Courts have recognized *Larson's* as a "leading authority on the subject of workers' compensation." See *Gambrell v. Kansas City Chiefs Football Club, Inc.*, *562 S.W.2d 163, 166 (Mo.App. 1978).* A search on Westlaw discloses that *Larson's* treatise has been cited over 200 times by Missouri Courts, including the Supreme Court. See e.g., *Drewes v. Trans World Airlines, Inc.*, *984 S.W.2d 512, 515 (Mo.banc 1999).*

As early as 1910, the Courts of England recognized the danger in providing immunity to co-employees. In an opinion often quoted by American courts, *Lees v. Dunkerley Bros.*, *(1910 Eng.) 103 L.T. 467, 468 [1911] AC 5 (HL)* the Court stated that "**a more dangerous or mischievous principle**" could not be imagined than to say that a worker is not liable to a fellow servant for an injury caused through his negligence. (emphasis added). That would mean, the Court stated, "a free hand to everybody to neglect his duty towards his fellow servant, and escape with impunity from all liability for damages the consequences of his own carelessness…."

Based on the authorities cited above, the judicially created immunity for co-employees erects an unreasonable barrier to injured employees seeking a remedy for a recognized injury. Thus, pursuant to this Court's holding in *Kilmer*, the immunity violates the open courts provision of our constitution. Appellant respectfully requests that this Court reverse the trial court and find that co-employee immunity is unconstitutional.

D. CONCLUSION

Appellant has been turned out of court on the basis of a judicially created immunity that has no support in the plain language of the Workers' Compensation Act.

Furthermore, as evidenced by this Court's rejection of the application of sovereign immunity, charitable immunity, and inter-spousal immunity, there is no reasonable justification for this judicially created immunity. In fact, extending immunity to co-employees "fosters neglect and breeds irresponsibility." *Abernathy*, *446 S.W.2d at 603*. Thus, the obstacle created by extending immunity to co-employees is unreasonable.

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court and find the judicially created immunity is unconstitutional under Article I, Section 14 of the Missouri Constitution.

* * *

POINT IV

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CIVIL PETITION FOR DAMAGES FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE PETITION STATED FACTS CONSTITUTING THE "SOMETHING EXTRA" CURRENTLY REQUIRED TO REMOVE THIS CASE FROM THE EXCLUSIVE JURISDICTION OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION IN THAT THE PETITION PLED SPECIFIC AFFIRMATIVE ACTS OF ACTIVE NEGLIGLENCE THAT 1) AMOUNTED TO MISFEASANCE, 2) BREACHED A COMMON LAW DUTY OWED TO APPELLANT SEXTON, AND/OR 3) AFFIRMATIVELY CAUSED OR INCREASED APPELLANT SEXTON'S RISK OF INJURY AND PURSUANT TO *BADAMI*, *TAUCHERT*, AND *WORKMAN*, THOSE FACTS DEMONSTRATE "SOMETHING EXTRA." AT A MINIMUM, THESE FACTS CREATED AN ISSUE FOR A JURY.

A. STANDARD OF REVIEW

In reviewing a trial court's Judgment dismissing Sexton's Petition for lack of subject matter jurisdiction, this Court is to consider all facts alleged in the Petition as true. Furthermore, all allegations and inferences reasonably drawn thereto should be construed favorably to the Plaintiff so as to determine if there is any ground for relief. Then the Court is to determine whether the Petition invokes principles of substantive law upon which any relief can be granted. *Pavia v. Childs*, *951 S.W.2d 700, 701 (Mo.App. S.D. 1997),* citing *Workman v. Vader*, *854 S.W.2d 560, 562 (Mo.App. S.D. 1993).*

Because the facts of Plaintiff's Petition are to be taken as true, there is no factual dispute to be decided, and therefore, the question of subject matter jurisdiction is a question of law reviewed under the de novo standard. See, *B.C. National Banks v. Potts, 30 S.W.3d 220, 221 (Mo. App. 2000).*

B. INTRODUCTION

Under the plain language of the Missouri Workers' Compensation Act, a co-employee has no immunity from civil liability. As discussed above, the *Badami* Court misapplied the Act and found that supervisors and corporate officers are immune unless their negligent acts breach a common law duty owed to an employee independent of any master/servant or agent/principle relationship" or affirmatively cause or increase another employee's risk of injury. Id. at 178-179. Subsequent Courts have misapplied *Badami* and extended immunity to co-employees.

Even if this Court believes immunity should be extended to co-employees unless "something more" is pled, the trial court erred in dismissing Appellant's Petition. Appellant's Petition set forth Respondents' affirmative negligent acts that 1) amounted to misfeasance, 2) breached a common law duty owed to Appellant Sexton, and/or 3) affirmatively caused or increased Appellant Sexton's risk of injury. Therefore, Appellant satisfied *Badami's* "something more" requirement.

C. APPELLANT PLED FACTS DEMONSTRATING RESPONDENTS' MISFEASANCE, AND THEREORE, APPELLANT SATISFIED THE "SOMETHING MORE" REQUIREMENT.

As discussed above, the "something more" requirement was first set forth in *Badami*. As articulated by the *Badami* Court, the issue before it was:

> whether a supervisory employee, including a corporate officer may be held personally liable for injuries sustained by a fellow employee covered by workmens' compensation where the injuries occur because of the supervisor's **failure to perform the duty**, assigned to him by the employer, to provide the fellow employee a reasonably safe place to work. Id. at 176 (emphasis added).

The *Badami* Court concluded that "something more" than the mere failure to perform must be pled. In other words, a Defendant must be charged with misfeasance rather than nonfeasance. Id. at 178.

The *Badami* Court noted that the application of the distinction between "misfeasance" and "nonfeasance" was imprecise at times, however, "misfeasance" was found when an agent had "entered upon" the performance of his duty, and mere passive acceptance of the duty was not the beginning of performance; rather an agent "entered upon" the performance of his duty only after he committed an affirmative act in furtherance of that duty. *Badami*, 630 S.W.2d at 177. (citations omitted).

Under the "misfeasance/nonfeasance" analysis set forth in *Badami*, Kevin Sexton has stated "something extra." The *Badami* Court recognized that a co-employee has committed an act of "misfeasance" once he has committed an affirmative act in furtherance of his duty to his employer. Here, the Respondents "had entered upon" the performance of their duty to their employer by building and installing the makeshift hand and guardrails which gave way causing Appellant to fall down the elevator shaft. (L.F. 4-10) The Respondents built the hand and guardrails using rotten wood. (L.F. 6-8) Furthermore, they violated OSHA standards by building the guardrails with 1" x 4" lumber rather than 2" x 4" lumber. (L.F. 6). They only used one nail to secure each guardrail board and that nail was too small to secure the wood. (L.F. 6-8). Finally, they hammered the nail into the wrong side of the guardrail boards allowing the boards to pull off with little force or weight. (L.F. 7). Pursuant to *Badami*, Respondents' conduct was misfeasance or "something more" for which Respondents are civilly liable and the trial court erred in finding otherwise.

D. APPELLANT PLED FACTS DEMONSTRATING THAT RESPONDENTS' BREACHED A COMMON LAW DUTY OF CARE, AND THEREORE, APPELLANT SATISFIED THE "SOMETHING MORE" REQUIREMENT.

Stating its misfeasance/nonfeasance analysis another way, the *Badami* Court noted that "something more" could be shown by demonstrating that the employee breached a common law duty that was owed, regardless of any employment relationship, to his fellow employee. Id. at 178-179. Here, Respondents' duty to build the guardrail and handrail was a duty it owed only because they were assigned that duty by their employer.

Thus, if they never built the handrail and guardrail, they would not be guilty of "something more." There conduct would be nonfeasance and would not violate a common law duty of care. However, once the Respondents undertook to build the handrail and guardrail, they had a common law duty to build the rails in a non-negligent manner regardless of whether they were employees. See Restatement 2d of Torts §324A (1965).

Our case law recognizes that when one undertakes to render services, he or she must use reasonable care to perform the undertaking. See *Bowman v. McDonald's Corp.*, *916 S.W.2d 270, 287 (Mo.App. W.D. 1995)* where the Court discussed the Restatement 2d of Torts §324A (1965) and how Missouri has recognized the duty which is described in the Restatement. Section 324A of the Restatement states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The notes to §324A warn that the Restatement expresses no opinion as to whether "the making of a contract or a gratuitous promise without in any way entering upon the performance, is a sufficient undertaking to result in liability under the rules stated in this section."

Under the principles of §324A of the Restatement, if a co-employee undertakes to perform his job duties and does so in a negligent manner, then he has breached his duty to his co-employees. However, if the co-employee never undertakes to perform his duties of employment, then, pursuant to the Restatement, there may be no duty to a third person. The employee has breached his obligation to his employer, but has not breached any duty to third persons, i.e., his co-employees. Section 324A of the Restatement is consistent with the "misfeasance" and "nonfeasance" distinction that the *Badami* Court made.

Here, Respondents undertook to build and install a makeshift guardrail around an open elevator shaft. The Respondents should have recognized that this makeshift guardrail was necessary for the protection of third persons, including the employees of sub-contractors who were on the job. This included Kevin Sexton, who on March 23, 1993, was specifically told by Respondent Sloniker that it was safe to use the hand and guardrail. (L.F. 10). Unbeknownst to Appellant Sexton, Respondents built the guardrail in an improper manner with improper material. Appellant Sexton relied on the handrail and guardrails, and because of their failure, he was injured. (L.F. 10). Thus, pursuant to the principles of the Restatement, Respondents breached a common law duty owed to Appellant Sexton, and therefore, Appellant has demonstrated "something extra." See *Badami* at 178-179.

The finding of "something more" in this case is not only consistent with *Badami*, but also the Wisconsin cases upon which *Badami* relied. To decide the issue before it, the Badami Court adopted the "Wisconsin approach" and relied on *Kruse v. Schieve, 213 N.W.2d 64 (Wis. 1973)* and *Laffin v. Chemical Supply Co., 253 N.W.2d 51 (Wis. 1977).* Both *Kruse* and *Laffin* acknowledged that a third-party action may be brought against a co-employee for breach of a common law duty to exercise ordinary care. As discussed above, Respondents breached a common law duty to exercise ordinary care, and therefore, Appellant was entitled to bring this third-party action.

As an example of what constitutes "something more", the *Laffin* Court cited a case where a company president and supervisory employee negligently loaded a truck and thereby caused injury to a co-employee. The Court noted that the president and supervisor's direct involvement in loading the truck created a duty to the injured employee beyond the duty they owed to the company. Thus, the president and supervisory employee would be liable for civil damages. Id. at 54. Likewise, here, Respondents negligently built a handrail and guardrail and thereby caused injury to Appellant. The Respondents' direct involvement in building the rails created a duty to Appellant beyond the duty the Respondents owed to the company, and therefore, Appellant was entitled to bring this third-party action against the Respondents. The trial court erred in finding otherwise and Appellant respectfully requests that this Court reverse the trial court and remand this case for trial.

E. APPELLANT PLED FACTS DEMONSTRATING THAT RESPONDENTS CREATED A HAZARDOUS CONDITION OR INCREASED THE RISK OF INJURY, AND THEREFORE, APPELLANT SATISFIED THE "SOMETHING MORE" REQUIREMENT.

Where employers or co-employees create a hazardous condition, or increase the risk of injury then they are liable in a civil lawsuit notwithstanding the Workers' Compensation Act. "Such acts constitute a breach of personal duty owed to the Plaintiff and may make an employer/supervisor liable for negligence notwithstanding the Workers' Compensation Act." Id. at 701 and *Workman v. Vader, 854 S.W.2d 560, 564 (Mo.App. S.D. 1993).* This is referred to as an "affirmative negligent act." See also *Tauchert v. Boatmen's National Bank, 849 S.W.2d 573 (Mo.banc 1993).*

In the case at issue, Respondents created the hazardous condition (the makeshift hand and guardrails) which caused or contributed to cause Kevin Sexton's injuries, or, at a minimum, they increased the risk of injury, and therefore they are subject to civil liability notwithstanding the Workers' Compensation Act. Respondents built and installed the makeshift hand and guardrails which gave way causing Appellant to fall down the elevator shaft, seriously injuring him. (L.F. 4-10). The Respondents built the hand and guardrails using rotten wood. (L.F. 6-8). Furthermore, they violated OSHA standards by building the guardrails with 1" x 4" lumber rather than 2" x 4" lumber. (L.F. 6). They only used one nail to secure each guardrail board and that nail was too small to secure the wood. (L.F. 6-8). Finally, they hammered the nail into the wrong side of the guardrail boards allowing the boards to pull off with little force or weight.

(L.F. 7). The construction and installation of the hand and guardrails gave the appearance of protection and safety from falling into the elevator shaft. Consequently, Appellant, Kevin Sexton, unwittingly relied on the hand and guardrails to prevent him from falling down the elevator shaft. (L.F. 10). Respondent Sloniker told Appellant to use the hand and guardrails and that the rails were safe. (L.F. 10).

Unbeknownst to Appellant Sexton, the hand and guardrails were not capable of sustaining his weight or preventing him from falling down the elevator shaft because of rotten and defective lumber that was improperly constructed and nailed together. Had the elevator shaft not been guarded at all, Appellant, Kevin Sexton, could have better appreciated the danger presented and avoided the accident. However, because of the placement of the defectively built hand and guardrails, Appellant was led into a false sense of security. As a result of Respondents' construction and installation of the hand and guardrails, an already dangerous situation, an open elevator shaft, was made even more dangerous by giving the appearance that the elevator shaft was properly guarded.

In *Tauchert v. Boatmen's National Bank, 849 S.W.2d 573 (Mo.banc 1993),*[1] this Court reversed a trial court's order granting summary judgment for a foreman at a construction site against whom an injured worker had brought a claim for injuries. The foreman had arranged a makeshift hoist system to raise an elevator. The hoist system failed causing the elevator to fall and the Plaintiff to be injured. This Court held that the

[1] A certified copy of the *Tauchert* Second Amended Petition which this Court held stated a civil cause of action against a co-employee, is included hereto as Appendix A1-29.

creation of the hazardous condition was not merely a breach of the employer's duty to provide a safe place to work. This Court said that the foreman's act of personally arranging the makeshift/faulty hoist of the elevator constituted an affirmative negligent act outside of the scope of his responsibility to provide a safe workplace for the injured co-employee. The act of utilizing a makeshift and faulty hoist for an elevator constituted a breach of a personal duty of care owed to the Plaintiff. This Court held that the foreman was not therefore immune from civil liability under the Workers' Compensation Act citing *Craft v. Scaman, 715 S.W.2d 531 (Mo.App. E.D. 1986); Sylcox v. National Lead Co., 38 S.W.2d 497 (Mo. Stl. 1931) and Lamar v. Ford Motor Co., 409 S.W.2d 100 (Mo. Div. No. 1 1966).*[2]

Similarly, here, Respondents arranged a makeshift, defectively built hand and guardrail around an open elevator shaft. The makeshift guardrail failed causing Appellant to fall. Respondents' active conduct created the hazardous conditions or certainly increased the risk of injury particularly by using rotten lumber and 1" x 4" boards.

The *Tauchert* Court held that the creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work. The Defendant's act in

[2] The Court of Appeals, Eastern District, transferred *Tauchert* to this Court in order to re-examine the issue of co-employee liability under the Workers' Compensation Act. *State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo.App. E.D. 1982)* is not discussed or mentioned in *Tauchert*.

personally arranging the faulty hoist system for the elevator may constitute an affirmative act of negligence outside the scope of his responsibility to provide a safe work place for the Plaintiff. Id. *Tauchert* makes clear that Missouri law recognizes a civil cause of action against a fellow employee for active negligence notwithstanding the Workers' Compensation Act. Here, Kevin Sexton in his Petition alleged all Respondents committed affirmative, active and specific negligent acts in personally arranging and building the makeshift hand and guardrails out of rotten lumber and that Respondents breached a duty owed to Appellant which directly caused his injuries. (L.F. 4-10)

The *Tauchert* opinion was relied upon by the Eastern District in the case of *Workman v. Vader, 854 S.W.2d 560 (Mo.App. S.D. 1993)*[3]. The *Workman* Court reversed the trial court which had sustained a co-employee's motion to dismiss. In *Workman*, it was alleged in the Petition that the Defendant had personally thrown packing debris on the floor together with a cardboard box on top of the debris and thereafter failed to remove it or warn of its presence. The co-employee slipped on the material and sued her co-employee department manager. Count I of the *Workman* Petition For Damages has only three and one-half (3 ½) pages with only a single paragraph that pled the negligence claim. That pleading said this:

[3] A certified copy of the *Workman* Petition For Damages which the Court of Appeals held stated a cause of action against a co-employee notwithstanding the Workers' Compensation Act is included as Appendix 30 through 34.

6. That at said time and place, defendant, Linda Vader, was negligent, as more fully hereinafter set out, as follows:

   a. Failed and omitted to dispose of the packing debris, such as plastic bags or Styrofoam pieces and the cardboard box in a proper disposal bin or trash can;

   b. Failed and omitted to dispose of the packing debris, such as plastic bags or watch boxes or Styrofoam pieces and cardboard box in a trash bin or wastebasket per Wal-Mart's established policies for safety; or

   c. Failed and omitted to warn plaintiff that there was packing debris, such as watch boxes or plastic bags or Styrofoam pieces which would act as a slippery or unstable substance underneath the cardboard box."

The Court of Appeals, relying upon *Tauchert*, held that these allegations in the petition invoked a claim that the Defendant had personally breached her common law duty to exercise reasonable care in the handling or disposing of the packing materials and therefore stated a cause of action against the co-employee notwithstanding the immunity provided for under the Workers' Compensation Act. Id. at 564.

In the present case, a review of Appellant's Petition[4] discloses that specific active and affirmative allegations of negligence are made against the Respondents. The allegations in the Petition involve affirmative and active negligent acts of removing a

[4] Kevin Sexton's Petition For Damages is included in the legal file at pages 1-14.

cover that was protecting an open elevator shaft, then constructing a makeshift hand and guardrail in a defective and unsafe manner with rotten wood, with 1" x 4" boards instead of mandated 2" x 4" boards, with nails nailed in the wrong way and with nails too small to support the weight of one man. Respondents knew or should have known of the unsafe condition of the hand and guardrails; but they did not tell Appellant. In fact, Respondent Sloniker told Appellant that the rails were safe and directed Appellant to use the rails to lower himself down the elevator shaft. (L.F. 3-11). These allegations surely pled facts which if proven, will establish that Respondents negligently caused a hazardous condition and/or increased the risk of injury to Kevin Sexton.

Pursuant to *Tauchert* and *Workman* a co-worker has no immunity under the provision of the Missouri Workers' Compensation Act if the employee affirmatively caused or increased another employee's risk of injury. Appellant specifically pled that Respondents breached a duty owed to Kevin Sexton by their active and affirmative negligent conduct. Even under the *Badami* analysis, Appellant's Petition pled a civil claim for damages against Respondents. See also *Hedglin v. Stahl Specialty Company*, *903 S.W.2d 922, 927 (Mo.App. W.D. 1995), Craft v. Scaman, 715 S.W.2d 531, 537-538 (Mo.App. E.D. 1986), Biller v. Big John Tree Transplanter Mfg, 795 S.W.2d 630,632 (Mo.App. W.D. 1990), Martinez v. Midland Bank & Trust Co., 652 S.W.2d 193 (Mo.App. W.D. 1983) and Pavia v. Childs, 951 S.W.2d 700 (Mo.App. S.D. 1997).*

The averments in Sexton's current Petition are like the averments in *Workman* and *Tauchert*, discussed above. Therefore, Appellant respectfully requests that this Court reverse the trial court and remand this case for a trial on the merits.

F. CONCLUSION

The trial court dismissed Appellant's cause of action against his co-employees finding that the co-employees were immune under the Workers' Compensation Act. As set forth above, co-employees do not enjoy such civil immunity under Missouri Revised Statute §287.120. Even if this Court continues the practice of extending immunity to co-employees unless "something more" is pled, Appellant has demonstrated the "something more." Respondents removed the cover to an open elevator shaft, built and installed defective and unsafe hand and guardrails around the open elevator shaft using rotten wood, told Appellant that the rails were safe, and directed him to use the rails. This conduct amounts to misfeasance, and therefore, is "something more" pursuant to *Badami*. Respondents' conduct also breached a personal duty of care to Appellant, and therefore, is "something more." Finally, Respondents' conduct created a hazardous condition, or, at a minimum, increased the risk of injury to Appellant, and therefore, is "something more." Certainly, this should be a jury issue.

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court and remand this case for a jury trial.

CONCLUSION

The trial court erred in dismissing Appellant's Petition and depriving him of his common law rights. It is undisputed that Respondents are persons "upon whom no liability could be entailed under the Act" and persons with whom Appellant does not have an employer/employee relationship. Consequently, Respondents are "third persons" under the Act and may be sued in common law. Missouri Revised Statute §287.120 does not give the individual Respondents who are co-employees any immunity.

If this Court elects to continue to follow *Badami*, Respondents still do not qualify for immunity. *Badami* extends immunity only to supervisors who were acting in their supervisory capacity. Here, Respondents Hurlburt and Lacy were not supervisors, and therefore, they are not entitled to the immunity created by the *Badami* court. Respondent Sloniker was a supervisor but when he undertook to build and install the hand and guardrails, he doffed the cap of a supervisor and donned the cap of a co-employee; consequently, he is not entitled to the immunity created by *Badami*.

If the immunity created by *Badami* is extended to all employees then it violates this State's Constitution which provides that the Courts shall be open to provide a remedy for every wrong. Appellant has been turned out of court on the basis of a judicially created immunity that has no support in the plain language of the Workers' Compensation Act. Furthermore, as evidenced by this Court's rejection of the application of sovereign immunity, charitable immunity, and inter-spousal immunity, there is no reasonable justification for this judicially created immunity. In fact, extending immunity to co-employees "fosters neglect and breeds irresponsibility."

Finally, even if this Court extends immunity to all co-employees unless "something more" is pled, Appellant's Petition satisfied this requirement and should not have been dismissed. Appellant's Petition alleged that Respondents removed the cover to an open elevator shaft, built and installed defective and unsafe hand and guardrails around the open elevator shaft with rotten lumber, told Appellant that the rails were safe, and directed him to use the rails. This conduct amounts to the active negligence necessary to remove this case from the "exclusive jurisdiction" of the Division of Workers' Compensation even under the ***Badami*** analysis.

WHEREFORE, for any one or all of the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the trial court and remand this case for a jury trial.

RESPECTFULLY SUBMITTED,

ANDREW J. GELBACH, P.C.

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Andrew J. Gelbach - Mo - 26003
109 East Market Street
Post Office Box 375
Warrensburg, MO 64093
(660) 747-5138
FAX: (660) 747-8198

AND

TURNER & SWEENY

_____

John E. Turner - MO - 26218
Christopher P. Sweeny -MO-44838
KS 16868
10401 Holmes Road, Suite 450
Kansas City, MO 64131
(816) 942-5100
FAX: (816) 942-5104

ATTORNEYS FOR APPELLANT,
KEVIN SEXTON

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this, the Brief of Appellant, Kevin Sexton, was served upon Respondents by mailing two complete copies and a disc to Mr. John R. Loss, 700 Peck's Plaza, 1044 Main Street, Kansas City, Missouri, 64105, on the 1st day of April 2004.

_____
ANDREW J. GELBACH

AFFIDAVIT

STATE OF MISSOURI)
) SS.
COUNTY OF JOHNSON)

I, Andrew J. Gelbach, first being duly sworn upon my oath, state as follows:

1. I am a licensed attorney in the State of Missouri.

2. I am the attorney for the Appellant in this case.

3. I certify that the disk contained with this Appellant's Brief has been scanned for viruses and none was detected.

4. The Appellant's Brief includes the information required by Rule 55.03 and complies with the limitations contained in Special Rule No. 1 (b).

5. The word count of this document is 13,487.

_____
ANDREW J. GELBACH

_____
NOTARY PUBLIC

My Commission Expires: September 9, 2007.
Commissioned in Johnson County, Missouri.