IN THE MISSOURI SUPREME COURT

KEVIN DALE SEXTON

Appellant

v.

STEVE SLONIKER, HOWARD HURLBURT, AND KENT LACY

Respondents

S.C. #85803

APPELLANT'S REPLY BRIEF

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REPLY 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.

Respondents acknowledge that this Point is to be reviewed under the de novo standard. (See Respondents' Brief at 20).

B. THE LAW OF THE CASE DOCTRINE DOES NOT APPLY TO THIS CASE.

Respondents argue that "this Court … must treat the decision in Sexton v. Jenkins & Associates, Inc., 41 S.W.3d 1 (Mo.App. 2000)…as the law of the case." (See Respondents' Brief at 21). This argument fails for several reasons.

First, in McClelland v. Ozenberger, 841 S.W.2d 227, 231 (Mo.App. 1992), cited by Respondents, the Court explained that the law of the case doctrine only applies "in subsequent proceedings in the **same** cause." In McClelland, as with every case in which the "law of the case doctrine" has been applied, the case was remanded after an Appellate decision. Here, this is not the same cause of action that was decided in Sexton v. Jenkins & Associates, Inc., 41 S.W.3d 1. Furthermore, the Court of Appeals in that case did not remand the case to the trial court. Rather, the Court of Appeals affirmed the trial court's dismissal of Appellant's Petition in that case. Appellant then filed a new Petition in the Jackson County Circuit Court. Because this is not the same Petition or cause as the Henry County case which was dismissed without prejudice, the law of the case doctrine does not apply to the Jackson County case.

See also State v. Graham, 13 S.W.3d 290, 293 (Mo.banc 2000) cited by Respondents at page 21 of their Brief. In that case, this Court specifically stated, "the doctrine provides 'that a previous holding in a case constitutes the law of the case and precludes re-litigation of that issue **on remand** and subsequent appeal.'" (emphasis added). This cause of action is not on remand from Sexton v. Jenkins & Associates, Inc., 41 S.W.3d 1 (Mo.App. 2000); rather, it is a new case based on a new Petition and not subject to the law of the case doctrine.

For a case with almost identical facts, see *Brown v. Kirkham, 23 S.W.3d 880 (Mo.App. 2000).* In that case, the trial court entered summary judgment against the Plaintiff and the Court of Appeals affirmed. Plaintiff then filed her second petition with the trial court. The trial court found that the law of the case doctrine barred the Plaintiff's second petition. The Court of Appeals disagreed. Id. at 883. Citing *McClelland v. Ozenberger*, the Court of Appeals noted that "under the doctrine, the Appellate decision becomes the law of the case in subsequent proceedings *in the same cause*." (original emphasis). The Court concluded, "the law of the case doctrine does not apply in the present case because [plaintiff's] petition in this case is separate from the petition in [the first action], and is not part of that case." Id. Likewise, here, Appellant's Petition in this case is separate from his Petition in the Henry County action. Thus, the law of the case doctrine does not apply.

Secondly, even if *Sexton v. Jenkins & Associates, Inc.* is the "law of this case," this Court has discretion not to apply the law of the case doctrine where there is a mistake, manifest injustice, or an intervening change of law. *State v. Graham, 13 S.W.3d at 293*. On page 22 of their Brief, Respondents acknowledged that "Appellate Courts have **discretion** not to apply the doctrine..." Furthermore, the doctrine does not apply if the former ruling was palpably wrong or where injustice would be done by adhering to the earlier adjudication. See *Davis v. General Electric Company, 991 S.W.2d 699, 703 (Mo.App. 1999)* (citations omitted).

Here, as demonstrated by this Brief and Appellant's original Brief, the Court of Appeals' decision was a mistake, palpably wrong, and resulted in a manifest injustice to Appellant Sexton. Depriving injured employees of their common law right of action against negligent co-employees is manifest injustice. Thus, even if *Sexton I* is the law of the case, it should not be followed.

Finally, contrary to Respondents' argument, not all of the Points raised in Appellant's Brief have previously been considered and rejected by the Appellate Court. As demonstrated by the Supplemental Legal File assembled by the Respondents, the Appellant's Brief to the Court of Appeals in the Henry County case did not raise the points raised in Points I, II and III of this brief.

For the reasons stated above, this Court is not bound by the decision in *Sexton v. Jenkins & Associates, Inc.*.

C. THE PLAIN LANGUAGE OF THE WORKERS' COMPENSATION ACT DOES NOT EXTEND IMMUNITY TO CO-EMPLOYEES.

As Appellant set forth in his original Brief, the Workers' Compensation Act does not extend immunity to co-employees. Respondents have failed to point to any language in the statute which suggests that co-employees are entitled to civil immunity. In an attempt to overcome the plain language of the Act, Respondents argue that the Act must be liberally construed. Whether liberally or strictly construed, the Act does not provide civil immunity to co-employees.

As our Courts have consistently held, unless constitutionally infirm, the Court is obligated to follow and apply the law as written by the legislature. See *State v. Williams*, *24 S.W.3d 101, 115 (Mo.App. 2000).* Missouri Revised Statute §287.120 provides that "every employer" who is subject to the Workers' Compensation Act is immune from all other liability. In Missouri Revised Statute §287.030 the legislature has defined the term "employer." The legislature's definition of employer does not include employees. Where terms of the statute are defined by the legislature, the Court is bound to follow the legislature's definition. See *Jones v. Director of Revenue*, *832 S.W.2d 516, 517 (Mo. banc 1992).* Applying the Act as written, including the definition of "employer," it is clear that co-employees do not have civil immunity under the Act. Liberal construction of the Act does not change this result.

Furthermore, liberal construction of the Act would be contrary to the recent Court of Appeals opinions in *Howell v. Lone Star Industries, Inc.*, *44 S.W.3d 874, 877 (Mo.App. 2001*) (emphasis added) and *Seldomridge v. General Mills Operations, Inc., W.D. 63127 (March 30, 2004).* Those Courts found that the Workers' Compensation Act "**must** be strictly construed when existing common law rights are affected." And when there is a close question, the Court should lean in favor of retaining the common law right of action. Id. at 878 (emphasis added). These opinions are consistent with this Court's decision in *Estate of Williams v. Williams*, *12 S.W.3d 302, 307 (Mo.banc 2000)* where the Court found that no statute should be construed to alter the common law further than the words import. And when doubt exists about the meaning or intent of words in a statute,

the words should be given the meaning which makes the least, rather than the most, change in the common law. Id.

Cases like *Badami*, *630 S.W.2d 175 (Mo.App. E.D. 1982)* that extend civil immunity to co-employees have failed to follow the plain language of the statute and the legislature's definition of employer. Furthermore, those cases have failed to construe the Act so that it had the least impact on an injured employees' common law rights. Consequently, those cases should no longer be followed.

D. *BADAMI* ENCROACHED UPON THE LEGISLATIVE POWERS WHEN IT ATTEMPTED TO "FIX" THE COMPENSATION ACT.

Respondents do not dispute Appellant's argument that a Court's attempt to "fix" legislation is an improper encroachment upon the legislative powers. Rather, on page 32 of their Brief, Respondents argue that the *Badami* Court did not set out to "fix" the Workers' Compensation Act. Specifically, Respondents state:

> "Appellant would have this Court believe that the Court in *Badami* set out to "fix" the Workers' Compensation Law and attempt to substitute its belief for that of the legislature. A cursory review of that opinion reveals that the *Badami* Court had no such intention or agenda."

Perhaps Respondents' cursory review of *Badami* did not reveal that the Court set out to "fix" the Workers' Compensation Act, but a thorough review does. As set forth in Appellant's original Brief, the *Badami* Court specifically stated, "Our question here is

whether we should **fix** our compensation legislation with this independently developed conceptual change." Id. at 178 (emphasis added).

Respondents argue that this Court "considered" the *Badami* holding in both *Kelley v. DeKalb Energy Co., 865 S.W.2d 670, 672 (Mo.banc 1993)* and *State ex rel. Taylor v. Wallace, 73 S.W.3d 620, 621-22 (Mo.banc 2002).* (Respondents' Brief at 32). While it is true that this Court cited *Badami* in both *Kelley* and *Taylor*, there is no indication that this Court *considered* the *Badami* holding. In fact, the *Taylor* Court's citation of *Badami* in support of its decision demonstrates that this Court must not have examined or considered the holding in *Badami* because the *Badami* decision defeats rather than supports the decision in *Taylor*.

The *Badami* Court cited *Sylcox v. National Lead Co., 38 S.W.2d 497 (Mo.App. 1931)* with approval. 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 a civil action as a third-person. *Sylcox* has not been overruled or even criticized; rather, it has been cited with approval by this Court in *Tauchert*. The *Badami* Court found that *Sylcox* "simply articulated the rule that an employee becomes liable to a fellow employee when he breaches a common law duty owed to the fellow employee independent of any master/servant or agent principal relation." Id. at 179. Thus, *Badami* acknowledged that the negligent operation of a motor vehicle satisfies the something more requirement because the fellow employee breached a common law duty owed to the

injured co-employee. Id. at 179. Thus, if the *Taylor* Court had actually considered the holding in *Badami*, it would not have reached the conclusion it did.[1]

E. IN ADDITION TO BEING CONTRARY TO THE PLAIN LANGUAGE OF THE ACT, EXTENDING IMMUNITY TO CO-EMPLOYEES IS CONTRARY TO PUBLIC POLICY.

Respondents seem to argue that applying the plain language of the Act would be contrary to the intent of the Act. First, the intent of the legislature is found in the plain language of the statute; it is not determined by looking beyond the statute's plain language. Second, this Court has specifically found that the plain language of the Workers' Compensation Act indicates "an intention to preserve rather than abrogate common law actions against third persons." See *Schumacher v. Leslie, 232 S.W.2d 913, 917-918 (Mo.banc 1950),* where this Court recognized that the Act did not abrogate an employee's common law rights against a "third person". Id. at 918. In fact, the Court stated that the Act indicated "an intention to preserve rather than abrogate such rights," and defined "third person" to include co-employees. Id. at 917-918. Thus, extending immunity to co-employees defeats rather than furthers the policy behind the Act.

Furthermore, as the Supreme 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

[1] This Court was asked to reconsider this very point in Vulgamott v. Perry, S.C.85539.

omitted). The *Zueck* 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."

Although the *Badami* Court may have found that the purpose of the Act "was not to transfer the burden of industrial accidents from one employee to another;" this Court found that the Act reflects a policy in the law "to place the loss upon the ultimate wrongdoer." Consequently, if the ultimate wrongdoer happens to be a co-employee, the loss ought to be placed upon him, particularly where there is liability insurance available to fully compensate the injured person. And any law that encourages a result contrary to this policy should be abandoned. See *Zueck*, *809 S.W.2d at 388*.

Finally, as cited by Appellant in his first brief this Court has abolished immunity in many different contexts because "immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution." *Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 603 (Mo.banc 1969).* Consistent with this policy, this Court noted that the mutual safety of all employees depends upon the care they exercise towards each other,

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This issue is pending currently in the Western District.

and therefore, an employee who acts in a negligent manner is civilly liable for any resulting injuries to his fellow servant. *Logsdon v. Duncan, 293 S.W.2d 944, 949 (Mo. 1956)* (citations omitted). The legislature apparently recognized this truth and chose not to provide immunity under the Act to co-employees. Thus, holding negligent co-employees civilly liable is not only consistent with the plain language of the Act, it is consistent with Missouri public policy.

Respondents' argument that immunity should extend to them because an employer can act only through its employees was made and rejected in *Sylcox v. National Lead Co., 38 S.W.2d 497, 501 (Mo.App. 1931).* In *Sylcox*, the Defendant argued that the negligent fellow-employee "is but the agency or instrumentality through which the employer acts," and therefore, immunity should extend to the negligent fellow-employee. The Court found the argument to be "illogical" when taken to its ultimate conclusion. Id. Similar arguments have also been advanced and rejected with respect to sovereign immunity. See *Cottey v. Schmitter, 24 S.W.3d 126, 128-129 (Mo.App. W.D. 2000)* and *Cole ex rel. Cole v. Warren County R-III School Dist., 23 S.W.3d 756, 761 (Mo.App. E.D. 2000).*

* * *

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.

Contrary to Respondents' assertion, an abuse of discretion standard is not the appropriate standard of review for this Point. The facts at issue here are undisputed. In fact, Respondents accepted for the purposes of this appeal Appellant's statement of the

underlying facts. (Respondents' Brief at 17). Where the evidence is uncontroverted, the Court of Appeals gives no deference to the trial court's judgment and the standard of review is de novo. See *Mansfield v. Director of Revenue, 82 S.W.3d 225, 227 (Mo.App. 2002).* Consequently, this Court should reach its own conclusions about the application of the law to the facts. Id. and *Litton v. Kornbrust, 85 S.W.3d 110, 114 (Mo.App. 2002).* Finally, because there is no factual dispute to be decided, 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 SOMETHING MORE TEST HAS NOT BEEN CONSISTENTLY APPLIED AND IT IS TIME FOR A BRIGHT LINE TEST.

Respondents argue throughout their Brief that *Badami* has been consistently applied for twenty-two years. (See Respondents' Brief at 28 and 36). As stated by Paul J. Passanante and Sara Stock in their article, Help! We're Lost! Co-Employee Immunity in Missouri, 57 J.Mo.B. 53, 64 (2001), "No intellectually honest person can read the cases on the subject [of co-employee immunity] and determine with a reasonable degree of legal certainty, when co-employees do and do not enjoy workers' compensation immunity." In Judge Smart's concurring opinion in *Hedglin v. Stahl Specialty Co., 903 S.W.2d 922, 927 (Mo.App. 1995),* he described the something more test as "vague and not 'easily applied.'" In *State ex rel. Taylor v. Wallace, 73 S.W.2d 620, 622 (Mo.banc 2002),* the Supreme Court noted that something more "has not proven susceptible of reliable definition…." Thus, *Badami* has not been consistently applied. Rather, it has created a

vague test that has caused confusion among practitioners and the Courts. It is time for this Court to set forth a bright-line test and end the confusion caused by *Badami*.

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*. This same bright-line test was recently enunciated by this Court in *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." Providing immunity only to those with whom there is a master and servant relationship provides a simple bright-line test for Courts to apply and is consistent with the statute itself which extends immunity only to employers. See Missouri Revised Statute § 287.120.

C. *BADAMI'S* JUDICIALLY CREATED IMMUNITY EXTENDS ONLY TO SUPERVISORS OR CORPORATE OFFICERS.

In response to Appellant's argument that *Badami* extended immunity only to supervisory employees, Respondents' claim that Appellant's reading of *Badami* is "neither fair nor accurate." (See Respondents' Brief at 36). However, after making this accusation, Respondents do not discuss or address the decision in *Badami*; nor do they undertake any analysis of what the allegedly fair and accurate reading of *Badami* is. The *Badami* Court itself framed the issue before it as:

> Whether **supervisory** employees, including a **corporate officer**, may be held personally liable for injuries sustained by a fellow employee covered by workmans' compensation where the injuries occurred 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).

Thus, it is clear, that the holding in *Badami* applied only to supervisory employees. See *Collier v. Moore, 21 S.W.3d 858, 861 (Mo.App. E.D. 2000).*

In *Collier*, the Eastern District, citing *Badami*, stated, "we have extended an employer's immunity from common law liability granted under §287.120 to a **supervisor** chosen to implement the employer's non-delegable duty to provide a reasonably safe work environment charged with failure to fulfill that duty." Id. at 861. The Court went on to note that "where an injured employee charges a **supervisor** chosen to implement the employer's duty to provide a reasonably safe work environment with 'something more' and simply failure to fulfill that duty, the supervisor may be held personally liable under §287.150." Id. In a footnote to that quote, the *Collier* Court noted that a **co-employee** is a third person within the meaning of §287.150, and therefore, can "be sued by an injured co-employee for his or her **negligence** resulting in a compensable injury." Id. at 861 n.3.

The *Collier* Court clearly distinguished between co-employees and supervisors. Supervisors can only be sued if "something more" is shown; whereas co-employees can

be sued for "negligence resulting in a compensable injury." In other words, the immunity created by *Badami* extends only to supervisory employees, not co-employees.

See also *Craft v. Scaman, 715 S.W.2d 531, 537 (Mo.App. E.D. 1986).* In that case, the Court first noted that a co-employee is a "third person" within the meaning of §287.150 and can be sued "by an injured co-employee if his **negligence** causes a compensable accident." Id. at 536 citing *Badami* (emphasis added). The Court then stated, "in *Badami*, this Court considered whether a **corporate officer** may be held personally liable as a **co-employee** for a compensable injury sustained by a fellow employee." Id. (emphasis added). Quoting *Laffin*, the Court stated, "It is when the officer or supervisor doffs the cap of officer or supervisor and dons the cap of co-employee that he may be personally liable for injuries caused." Id. at 537. Again, the Court makes it clear that supervisors may enjoy immunity while co-employees do not.

Craft and *Collier* were both decided by the Eastern District, the same Court that decided *Badami*. Thus, Appellant's argument that *Badami* extended immunity only to supervisory employees is fair, accurate, and supported by the Eastern District's own interpretation of that decision.

Because *Badami* purportedly adopted the "Wisconsin approach", the *Craft* Court undertook to examine various Wisconsin cases in which Wisconsin Courts have found that "something more" was proved to impose liability upon corporate officers. Id. at 537. The *Craft* Court cited *Hoeverman v. Feldman, 265 N.W. 580 (Wis. 1936)* where "a corporate president was held liable for carelessly **directing** the plaintiff employee to

operate a machine in a particular manner." Id. at 537 (emphasis added). The Court further cited *Wasley v. Kosmatka, 184 N.W.2d 821 (Wis. 1971)* where "a corporate officer negligently operated a boom truck which caused the employee's death." Finally, *Craft* cited *Pitrowski v. Taylor, 201 N.W.2d 52 (Wis. 1972)* where "the accident occurred while the company president was assisting an employee in loading the truck." Id. at 537.

Turning to the facts before it, the *Craft* Court found that when the defendant corporate officer "assisted plaintiff in attempting to fix the broken machine, he had indisputably doffed a supervisory cap and donned the cap of a co-employee." Id. at 537-538. Consequently, the Court found that the president was liable as a "third person" under the Workers' Compensation Act. Id.

Respondents further argue that the distinction between a co-employee and a supervisory employee is "a distinction without a difference" and accuses Appellant of torturing the holding in *Kruse v. Schieve, 213 N.W.2d 64 (Wis. 1973)* and *Laffin v. Chemical Supply Co., 253 N.W.2d 51 (Wis. 1977).* (See Respondents' Brief at 37). The *Laffin* Court specifically found that, "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. at 53. The *Laffin* Court further stated, "it is when the officer or supervisor doffs the cap of officer or supervisor and dons the cap of co-employee that he may be personally liable for injuries caused." Id. Thus, it is incomprehensible how Respondents could argue that the distinction between supervisors and co-employees is a distinction without a difference. Furthermore, these quotes from the *Laffin* Court

demonstrate that Appellant did not torture or otherwise mischaracterize the holding in that case.

In *Kruse*, the Court specifically stated, "liability of a corporate officer in a third party action must derive from acts done by such officer in the capacity of a co-employee, and may not be predicated upon acts done by such officer in his capacity as a corporate officer." Id. at 67. Thus, contrary to Respondents' argument, the *Kruse* Court did make a distinction between supervisors and co-employees. The distinction is so significant that if the supervisor is acting as a co-employee, he no longer has immunity under the Act. The second major heading in the *Kruse* case asks, "HOW DOES A CORPORATE OFFICER BECOME ALSO A CO-EMPLOYEE?" (all caps in original). Respondents apparently overlooked this heading in all caps, and therefore, did not see that the *Kruse* Court believed there was a distinction with a difference between supervisors and co-employees.

Finally, and most importantly, this Court in *Tauchert v. Boatmen's National Bank, 849 S.W.2d 573, 574 (Mo.banc 1993)* recognized the distinction between a supervisor and a co-worker. In reversing a trial court's summary judgment in favor of a foreman, this Court noted that there was an issue of material fact. Id. at 574. The Court described the issue of material fact as "whether Ritz acted as a supervisor or co-worker in rigging the elevator hoist system." Id. Thus, there must be a distinction with a difference between a supervisor and a co-worker if that issue of fact was significant enough to reverse the trial court's decision.

As demonstrated by the decisions above, the ***Badami*** Court's judicially created immunity extends only to supervisory employees. To hold those employees civilly liable, something more must be shown. The judicially created immunity does not extended to co-employees. Co-employees remain civilly liable for negligent acts resulting in injury to co-employee. Here, Respondents' negligent acts resulted in injury to Appellant, and therefore, they are civilly liable. The trial court erred in finding otherwise and Appellant respectfully requests that the trial court be reversed.

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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. THIS ISSUE WAS RAISED AT THE EARLIEST OPPORTUNITY IN THIS CASE.

Respondents acknowledge that Appellant raised this issue in his Petition in this case; however, Respondents argue that because Appellant did not raise this issue in a different case, it has not been preserved. There is no support for this argument and Respondents' reliance on *Killian v. J&J Installers, Inc., 802 S.W.2d 158 (Mo. banc 1991)* is misplaced. In *Killian*, the Plaintiff attempted to raise a constitutional issue for the first time in the Supreme Court. Such is not the case here. Appellant asserted this constitutional issue in his petition, and therefore, it has been properly preserved.

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

Respondents assert that the Workers' Compensation Act, as it relates to employer immunity, has been reviewed and found constitutional. (See Respondents' Brief at 44). Appellant acknowledges that the immunity as applied to employers has been found to be constitutional; however, no case has addressed the issue of whether extending immunity to co-employees violates Article I, Section 14 of the Missouri Constitution.

None of the cases cited by Respondents addressed the constitutionality of extending immunity to co-employees. And the Court's rationale for upholding the constitutionality of employer immunity under the Act does not apply to co-employees. In upholding the constitutionality of employer immunity, this Court noted that the Act "substitutes for the **employers**' common law liability for damages to an injured employee an absolute duty to pay the prescribed compensation, broadening [the employer's] duty to pay compensation to include injuries for which [the employer] otherwise would not be required to respond." See *State ex rel. Maryland Heights Concrete Contractors, Inc., v. Ferriss, 588 S.W.2d 489, 491 (Mo. 1979)* (emphasis added). This rationale does not extend to employee immunity. The Act does not provide a substitute remedy for an employee's common law action against a negligent co-employee.

A negligent co-worker has no duties or obligations under the Act. This is the very reason why the Supreme Court in *Schumacher v. Leslie, 232 S.W.2d 913 (Mo.banc 1950)* found that co-employees are not entitled to immunity under the Act. Because they do not

share the burdens of the Act, they should not enjoy the benefits of the Act. Id. at *918* cited with approval in *James v. Poppa, 85 S.W.3d 8, 10 (Mo.banc 2002).*

On page 46 Respondents argue that the cases cited by Appellant do not apply because the immunity at issue in those cases was created by the judiciary, not the legislature. Co-employee immunity was not created by the legislature; it was created by the Eastern District Court of Appeals in *Badami*. Thus, this Court has the power to and should abolish co-employee immunity.

Respondents acknowledge that under Article I, Section 14 "the right of access means simply the right to pursue in courts the causes of action the substantive law recognizes." (See Respondents' Brief at 43). This is precisely what Appellant is seeking in this case. It is undisputed that the substantive law recognizes a cause of action against individuals whose failure to exercise ordinary care results in injury to another. Appellant is attempting to pursue in Court his cause of action for Respondents for their failure to exercise ordinary care. If, as Respondents acknowledge, Article I, Section 14 is meant to protect the enforcement of these rights and allow access to pursue these rights, then extending immunity to Respondents in this case violates Article I, Section 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.

A. STANDARD OF REVIEW.

Contrary to Respondents' assertion, an abuse of discretion standard is not the appropriate standard of review for this Point. The facts at issue here are undisputed. In fact, Respondents accepted for the purposes of this appeal, Appellant's description of the underlying facts. Where the evidence is uncontroverted, the Court of Appeals gives no deference to the trial court's judgment and the standard of review is de novo. See *Mansfield v. Director of Revenue*, *82 S.W.3d 225, 227 (Mo.App. 2002).* Consequently,

this Court should reach its own conclusions about the application of the law to the facts. Id. and *Litton v. Kornbrust, 85 S.W.3d 110, 114 (Mo.App. 2002).* Finally, because there is no factual dispute to be decided, the question of subject matter jurisdiction is a question of law requiring de novo review. See, *B.C. National Banks v. Potts, 30 S.W.3d 220, 221 (Mo.App. 2000).*

B. AN ACT OF MISFEASENCE SATISFIES THE SOMETHING MORE REQUIREMENT.

Respondents do not dispute that Appellant's Petition sufficiently pled acts of misfeasance. Rather, Respondents argue that charging a Defendant with misfeasance does not satisfy the "something more" requirement. The *Badami* Court concluded that a supervisory employee must be charged with "something more" than the general failure to perform his duties. *630 S.W.2d at 180*. In other words, the supervisory employee must be charged with misfeasance rather than nonfeasance. Appellant's allegations of misfeasance, therefore, satisfy the "something more" requirement. See also *Stanislaus v. Parmalee Industries, Inc., 729 S.W.2d 543 (Mo.App. 1987)*

In *Stanislaus*, an employee sued his manager for personal injuries claiming that the manager failed to obtain and properly inspect safety glasses. The trial court granted summary judgment to Defendant and the injured employee appealed. The Court of Appeals noted, "*the question here is whether the pleadings alleged any negligent act of misfeasance*, i.e., an affirmative act above and beyond mere *nonfeasance*, i.e., a failure to act…" Id. (emphasis added). The Court concluded that the allegations in the petition

constituted "mere nonfeasance," and therefore, the injured employee was limited to the Workers' Compensation Act. Thus, where, as here, the pleadings demonstrate misfeasance, the injured employee is not limited to the Workers' Compensation Act.

C. RESPONDENTS BREACH OF A COMMON LAW DUTY IS "SOMETHING MORE."

Respondents do not dispute that Appellant's Petition alleged facts demonstrating that Respondents breached a common law duty owed to Appellant. Rather, Respondents argue this situation fits squarely within the holding in *Badami* because the handrail was built by Respondents only because they were assigned that duty. (See Respondents' Brief at 49). No case has held, and Respondents cite none, that an injured employee must demonstrate that the negligent co-employee was performing an act that had not been assigned to him by his employer.

D. NIETHER PRESENCE NOR OPERATION OF A PIECE OF EQUIPMENT MUST BE PLED TO PROVE SOMETHING MORE.

Respondents argue that to prove "something more" Appellant had to plead that Respondents were present with him at the time of the injury and performing an act or operating a piece of equipment that resulted in his injury at the time he was injured. Respondents rely on *Sexton v. Jenkins & Associates, Inc.*, *41 S.W.3d 1, 5 (Mo.App. 2000)* for this argument. This argument demonstrates the utter confusion caused by the something more test and the illogical requirements some Courts have resorted to. Taking Respondents' argument to its logical conclusion, an employee who planted a bomb at his

place of employment and then left before the bomb exploded would not be guilty of "something more" because the employee would not have been present with all of his co-employees at the time the bomb went off, nor would he have been performing an act or "operating" the bomb when it exploded.

A less extreme example is provided by *Workman v. Vader*, *854 S.W.2d 560 (Mo.App. 1993).* Respondents cite this case on the very page they assert the argument that the negligent co-employee must be present with the injured employee and operating a piece of equipment at the time of injury. In *Workman v. Vader*, the supervisor was held liable as a third person for throwing packing materials on the floor causing an employee to slip and fall. There is no evidence in *Workman* that the supervisor was actually present with the injured employee at the time he fell and it is obvious that the supervisor was not "operating" the packing materials that were on the floor. Thus, neither presence with the injured employee, nor operation of a piece of equipment is necessary to demonstrate "something more."

E. RESPONDENTS DID "SOMETHING MORE" BY DIRECTING APPELLANT TO ENGAGE IN A DANGEROUS ACTIVITY THAT A REASONABLE PERSON WOULD RECOGNIZE AS HAZARDOUS BEYOND THE USUAL WORK REQUIREMENTS.

As Respondents note on page 53 of their Brief, the *Sexton v. Jenkins & Associates, Inc., 41 S.W.3d 1, 5 (Mo.App. 2000)* Court found that something extra could be shown by pleading that "employees were directed to engage in dangerous conditions that a reasonable person would recognize as hazardous beyond the usual requirements of employment." Id. at 5. Here, Appellant alleged that Respondents knew or should have known that the handrails they built would not support a person's weight; yet, they intentionally failed to warn Appellant or tell Appellant of the true condition of the handrail. (L.F.10). In fact, they specifically told Appellant that it was safe to use the handrail and directed Appellant to use the handrail. (L.F. 5 and 11). Respondents told Appellant to use the handrail to lower himself from the second floor to the first floor even though they knew the handrail was made of rotten lumber and would not support Appellant's weight.

The above allegations demonstrate that Appellant was directed to engage in a dangerous condition that a reasonable person would recognize as hazardous beyond the usual requirements of employment. Therefore, Appellant's allegations satisfy the "something more" requirement.

Respondents' reliance on *Davis v. Henry, 936 S.W.2d 862 (Mo.App. 1997)* and *J.M.F. v. Emerson, 768 S.W.2d 579 (Mo.App. 1989)* is misplaced. In both of those cases, the injured employee attempted to sue the **president** of his employer. The president in both of those cases had the obligation of safe and proper supervision of employees. There is no evidence in the record, and Respondents have cited none, demonstrating that Respondents were charged with any duty of safe and proper supervision. Furthermore, in both of those cases, the Plaintiff alleged only that he or she was instructed to perform an act that the president knew or should have known was unsafe. Here, Appellant alleged not only that he was instructed to use the guardrails which Respondents knew were unsafe, but he was specifically told that they were safe. This additional allegation is not present in either *J.M.F.* or *Davis*.

F. RESPONDENTS CREATED AN UNSAFE CONDITION IN THE WORK PLACE WHICH IS "SOMETHING MORE."

Respondents admit on page 33 of their Brief that Appellant's Petition charged Respondents with creating a hazardous condition. Specifically, Respondents stated, "The petition at issue **charges Respondents with creating an unsafe condition in the work place**." This is the exact definition of something more. See *Tauchert v. Boatmen's National Bank, 849 S.W.2d 573, 574 (Mo.banc 1993)* where this Court found, "the creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work." See also *Workman v. Vader, 854 S.W.2d 560 (Mo.App. 1993),* discussed above, where the Court of Appeals, relying on *Tauchert*, held that Plaintiff's

allegation sufficiently pled that Defendant had created a hazardous condition, and therefore, Plaintiff satisfied the "something more" test.

As admitted by Respondents, Appellant's Petition charges Respondents with creating an unsafe condition in the work place. Pursuant to *Tauchert* and *Workman*, this charge is sufficient to satisfy the "something more" test. The trial court erred in finding otherwise, and Appellant respectfully requests that the trial court be reversed and the cause remanded for trial.

CONCLUSION

For the reasons stated above and in Appellant's first Brief, Appellant respectfully requests that this Court reverse the trial court and remand this case for trial.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this, the Reply 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 13th day of May 2004.

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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 Reply Brief has been scanned for viruses and none was detected.

4. The Appellant's Reply Brief includes the information required by Rule 55.03 and complies with the limitations contained in Supreme Court Rule Number 84.06(b) and (c).

5. The word count of this document is 7,464.

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ANDREW J. GELBACH

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NOTARY PUBLIC

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