IN THE MISSOURI SUPREME COURT

KEVIN DALE SEXTON
Appellant

v.

STEVE SLONIKER, HOWARD HURLBURT AND KENT LACY
Respondents

S.C. 385803

RESPONDENTS' BRIEF

Andrew J. Gelbach, #26003
Attorney at Law
10 East Market Street
P. O. Box 375
Warrensburg, MO 64093
Phone: 660-747-5138
Fax: 660-747-8198

John R. Loss, #26053
John M. Brigg, #49441
Benjamin & Loss, P.C.
1044 Main Street, Suite 700
Kansas City, MO 64105
Phone: 816-471-8100
Fax: 816-221-7886

John E. Turner, #26218
Christopher P. Sweeny, #44838
Turner & Sweeney
10401 Holmes Road, Suite 450
Kansas City, MO 64131
Phone: 816-942-5100
Fax: 816-942-5104

ATTORNEYS FOR APPELLANT KEVIN SEXTON

ATTORNEYS FOR RESPONDENTS STEVE SLONIKER, HOWARD HURLBURT and KENT LACY

Kevin Dale Sexton v. Steve Sloniker, et al.

S.C. #85803

TABLE OF CONTENTS

Table of Contents 1

Table of Cases and Other Authorities 4

Jurisdictional Statement 8

Points Relied Upon With Primary Authorities 9

Statement of Facts 17

Argument 19

Point I 19

A. Standard of Review 19

B. The Workers' Compensation Law Does Provide Immunity for Employees Where the Employee is Charged With a Breach of the Non-delegable Duty of His Employer to Provide a Safe Workplace 24

C. *State ex. rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo.App. 1982) and Its Progeny Have Applied the Plain Language of the Statute and Should be Followed 29

D. Conclusion 33

Point II 35

A. Standard of Review 35

B. The Immunity Granted by R.S.Mo. § 287.120 is not Dependent on the Employee's Capacity; Rather, the Immunity Extends to All Employees who are Engaged in Performing a Non-Delegable Duty of the Employer 36

Point III 40

A. Standard of Review . . . . .

B. This Court Lacks Jurisdiction to Decide Appellant's Constitutional Challenge to R.S.Mo. § 287.120 Because Appellant Failed to Raise the Challenge at the First Opportunity 41

C. The Missouri Constitution Prohibits Laws that Arbitrarily or Unreasonably Bar Individuals From Accessing the Courts to Enforce Recognized Causes of Action; The Constitution Does Not Prohibit the Legislature From Modifying or Abolishing a Cause of Action That Had Been Recognized by the Common Law or by Statute 42

Point IV 47

A. Standard of Review 47

B. Introduction 48

C. Appellant Failed to Plead Facts Charging More than the Mere

Failure of the Employer's Duty to Provide a Reasonably Safe Place to Work; As a Result, Appellant Failed to Allege Something Extra as Required by *Badami* 49

Conclusion 57

Certificate of Service 59

Affidavit 60

Kevin Dale Sexton v. Steve Sloniker, et al.
S.C. #85803

TABLE OF CASES AND OTHER AUTHORITIES

Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 605-6 (Mo. *banc* 1969) 14, 45

Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 905 Mo. *banc* 1992) 13, 43

Anders v. A.D. Jacobson, Inc., 972 S.W.2d 612, 615

(Mo.App. 1998) 9, 12, 15, 19, 35, 47

Bass v. Nat'l Super Markets, Inc., 911 S.W.2d 617 (Mo. *banc* 1995) 9, 20, 24

Baulding v. Barton Co. Mut. Ins. Co., 666 S.W.2d 948, 51 Mo.App. 1984) 13, 42

Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 828 (Mo. *banc* 1991) 13, 40, 42, 43

Blumhardt v. Hartung, 283 N.W.2d 299 (S.D. 1979) 11, 31

Burns v. Employer Health Serv., Inc., 976 S.W.2d 639, 641

(Mo.App. 1998) 9, 12, 15, 19, 20, 35, 36, 47, 48

Collier v. Moore, 21 S.W.3d 858, 861 (Mo.App. 2000) 10, 28

Collier v. Wagner Castings Co., 700 Ill.App.3d 233, 26 Ill.Dec. 641,

388 N.E.2d 265 (1979) 4, 11, 31

Craft v. Scaman, 715 S.W.2d 531, 536 (Mo.App. 1986) 10, 29

Davis v. Henry, 936 S.W.2d 862 (Mo.App. 1997) 10, 16, 28, 53, 54

Dawley v. Thisius, 304 Minn. 453, 231 N.W.2d 555 (1975) 11, 31

Dunn v. Peabody Coal Co., 855 F.2d 426, 428 (7th Cir. 1988) 10, 25

Felling v. Ritter, 876 S.W.2d 2, 5 (Mo.App. 1994) 10, 16, 27, 28, 50, 51

Gabler v. McColl, 862 S.W.2d 340, 343 (Mo.App. 1993) 10, 15, 28, 50

Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 10 (Mo. *banc* 1992) 14, 44

Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 62 (Mo. *banc* 1989) 13, 43

Hedglin v. Stahl Specialty Company, 903 S.W.2d 922

(Mo. App. 1995) 10, 16, 25, 29, 52, 53

J.M.F. v. Emerson, 768 S.W.2d 579 (Mo.App. 1989) 10, 16, 28, 54, 55, 56

Jackson v. Wilson, 581 S.W.2d 39, 42 (Mo.App. 1979) 10, 25

James v. Poppa, 85 S.W.3d 8 (Mo. *banc* 2002) 11, 33

Jones v. State Hwy. Commission, 557 S.W.2d 225, 228 (Mo. *banc* 1977) 14, 45, 46

Kelley v. DeKalb Energy Co., 865 S.W.2d 670, 672 (Mo. *banc* 1993) 10, 26, 28, 32

Kerrigan v. Errett, 256 N.W.2d 394 (Iowa 1977) 11, 31

Killian v. J & J Installers, Inc., 802 S.W.2d 158, 161 n.1

(Mo. *banc* 1991) 10, 13, 26, 41, 42

Kilmer v. Mun, 17 S.W.3d 545 (Mo. *banc* 2000) 14, 45

Kruse v. Schieve, 61 Wis.2d 421, 213 N.W.2d 64 (Wis. 1973) 11, 12, 31, 37

Laffin v. Chemical Supply Co., 253 N.W.2d 51 (Wis. 1977) 12, 37, 38

Leicht v. Venture Stores, Inc., 562 S.W.2d 401, 402 (Mo.App. 1978) 13, 43

Linsin v. Citizens Elec. Co., 622 S.W.2d 277, 281 (Mo.App. 1981) 14, 44

Lyon v. McLaughlin, 960 S.W.2d 522, 525 (Mo.App. 1989) 10, 27, 28

McClelland v. Ozenberger, 841 S.W.2d 227, 231 (Mo.App. 1992) 9, 21

Miller v. McDonnell Douglas Corp., 896 S.W.2d 734, 736

(Mo.App. 1995) 9, 12, 15, 19, 35, 47

Neal v. Oliver, 246 Ark. 377, 438 S.W.2d 313 (1969) 11, 31

Ochoa v. Ochoa, 71 S.W.3d 593, 595 (Mo. *banc* 2002) 9, 20

O'Dell v. School District of Independence, 521 S.W.2d 403, 410 (Mo. *banc* 1975),

(J.Finch dissenting) 14, 46

Pavia v. Childs, 951 S.W.2d 700 (Mo.App. 1997) 16, 52

Ringeisen v. Insulation Services, Inc., 539 S.W.2d 621, 626 (Mo.App. 1976 . . . . . 10, 24

Riverside-Quindaro Bend Levee Dist. v. Intercontinental Engineering Mfg. Corp.,

121 S.W. 3d 531, 533 (Mo. *banc* 2003) 13, 40

Seaboard Coastline R. Co. v. Smith, 359 S.O.2d 427 (Fla. 1978) 14, 44

Sexton v. Jenkins, 41 S.W.3d 1

(Mo.App. 2003) (*Sexton I*) 9, 12, 15, 21, 22, 23, 24, 27, 28, 38, 50, 51, 52, 53, 57

Stanislaus v. Parmalee Industries, Inc., 729 S.W.2d 543, 544 (Mo.App. 1987) 10, 28, 29

State ex. rel. Badami v. Gaertner, 630 S.W.2d 175

(Mo.App. 1982) 10, 12, 15, 17, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 49, 57

State ex. rel. Chang v. Ely, 26 S.W.3d 214, 217 (Mo.App. 2000) 10, 29

State ex. rel. Feldman v. Lasky, 879 S.W.2d 783, 785 (Mo.App. 1994) 10, 29

State ex. rel. J.E. Jones Const. Co. v. Sanders, 875 S.W.2d 154, 156-157

(Mo.App. 1995) 9, 12, 15, 19, 20, 35, 36, 47, 48

State ex. rel. Maryland Heights Concrete Contractors, Inc. v. Ferriss,

588 S.W.2d 489, 491 (Mo. *banc* 1979) 14, 44

State ex.rel. Rival Co. v. Gant, 945 S.W.2d 475, 476 (Mo.App. 1997) 9, 12, 1, 19, 35, 47

State ex. rel. Taylor v. Wallace, 73 S.W.3d 620, 622 (Mo. *banc* 2002) 10, 22, 28, 32, 33

State v. Graham, 13 S.W.2d 290, 293 (Mo. *banc* 2000) 9, 21, 22, 24

Steele v. Eaton, 130 Vt. 1, 285 A.2d 749 (1971) 11, 31

Tauchert v. Boatmen's Nat. Bank, 849 S.W.2d 573 (Mo. *banc* 1993) 12, 16, 38, 52, 53

Townsen & Townsen, 708 S.W.2d 646, 469 (Mo. *banc* 1989) 14, 45

Vaughn v. Jernigan, 144 Ga.App. 745, 242 S.E.2d 482 (1978) 11, 31

Wilson v. Hasvold, 86 S.D. 286, 194 N.W.2d 251 (1972) 11, 31

Wiley v. Shank & Flattery, 848 S.W.2d 2, 5 (Mo.App. 1992) 14, 44

Williams v. Kimes, 996 S.W.2d 43, 44-45 (Mo. *banc* 1999) 9, 20

Workman v. Vader, 854 S.W.2d 560 (Mo.App. 1993) 10, 16, 28, 52, 53

Zurich Ins. Co. v. Scofi, 366 So.2d 1193 (Fla.App. 1979) 11, 31

Missouri Constitution, Article 5, § 3 . . . . . 8, 13, 41

R.S.Mo. § 287.010, *et seq.* 8, 9, 12, 15, 19, 20, 33, 35, 47

R.S.Mo. § 287.120

. . . . . 8, 9, 12, 13, 15, 20, 23, 26, 27, 29, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46, 48, 57, 58

R.S.Mo. §287.120.1 . . . . . 13, 43, 44

R.S.Mo. § 287.800 . . . . . 9, 20, 24

Rule 55.27 (g)(3) 9, 12, 15, 19, 35, 47

JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of The Honorable Charles Atwell in the Circuit Court of Jackson County, Missouri. Judge Atwell dismissed appellant's petition for damages for lack of subject matter jurisdiction. The trial court based its decision on its finding that the appellant's exclusive remedy was under the Workers' Compensation Law, R.S.Mo. § 287.010, *et seq.*

Appellant seeks review by this Court pursuant to Article 5, § 3 of the Missouri Constitution. Pursuant to that section, appellant challenges the constitutionality of R.S.Mo. § 287.120 by claiming that the statute violates the open court provisions of the Constitution. But appellant has failed to raise this challenge at the first possible moment, and it is now too late for appellant to raise that challenge at this point. Because appellant has waived this argument, this Court has no jurisdiction over this appeal. Rather, the Missouri Court of Appeals, Western District, pursuant to the general jurisdiction of Article 5, § 3 of the Constitution of the State of Missouri, properly has jurisdiction over this appeal. As such, this appeal should be dismissed.

POINTS RELIED UPON WITH PRIMARY AUTHORITIES

POINT I

THE TRIAL COURT DID NOT MISAPPLY THE WORKERS' COMPENSATION ACT, AND, THUS, CORRECTLY FOUND THAT RESPONDENTS WERE ENTITLED TO IMMUNITY.

R.S.Mo. § 287.010, *et seq*.

Miller v. McDonnell Douglas Corp., 896 S.W.2d 734, 736 (Mo.App. 1995)

State ex. rel. J.E. Jones Const. Co. v. Sanders, 875 S.W.2d 154, 156-157 (Mo.App. 1994)

Anders v. A.D. Jacobson, Inc., 972 S.W.2d 612, 615 (Mo.App. 1998)

State ex. rel. Rival Co. v. Gant, 945 S.W.2d 475, 476 (Mo.App. 1997)

Rule 55.27(g)(3)

Burns v. Employer Health Serv., Inc., 976 S.W.2d 639, 641 (Mo.App. 1998)

R.S.Mo. § 287.120

Ochoa v. Ochoa, 71 S.W.3d 593, 595 (Mo. *banc* 2002)

Williams v. Kimes, 996 S.W.2d 43, 44-45 (Mo. *banc* 1999)

R.S.Mo. § 287.800

Bass v. Nat'l Super Markets, Inc., 911 S.W.2d 617, 619 (Mo. *banc* 1995)

Sexton v. Jenkins & Associates, Inc., 41 S.W.3d 1 (Mo.App. 2000) (hereinafter "*Sexton I*")

McClelland v. Ozenberger, 841 S.W.2d 227, 231 (Mo.App. 1992)

State v. Graham, 13 S.W.3d 290, 293 (Mo. *banc* 2000)

State ex. rel. Taylor v. Wallace, 73 S.W.3d 620, 622 n. 7 (Mo. *banc* 2002)

Ringeisen v. Insulation Services, Inc., 539 S.W.2d 621, 626 (Mo.App. 1976)

Hedglin v. Stahl Specialty Company, 903 S.W.2d 922 (J. Smart concurring) (Mo.App. 1995)

Dunn v. Peabody Coal Co., 855 F.2d 426, 428 (7th Cir. 1988)

Jackson v. Wilson, 581 S.W.2d 39, 42 (Mo.App. 1979)

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

Killian v. J & J Installers, Inc., 802 S.W.2d 158, 161 (Mo. *banc* 1991)

(J. Blackmar concurring)

Kelley v. DeKalb Energy Co., 865 S.W.2d 670, 672 (Mo. *banc* 1993)

Lyon v. McLaughlin, 960 S.W.2d 522, 525 (Mo.App. 1989)

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

Collier v. Moore, 21 S.W.3d 858, 861 (Mo.App. 2000)

Davis v. Henry, 936 S.W.2d 862 (Mo.App. 1997)

Gabler v. McColl, 862 S.W.2d 340, 343 (Mo.App. 1993)

J.M.F. v. Emerson, 768 S.W.2d 579 (Mo.App. 1989)

Stanislaus v. Parmalee Industries, Inc., 729 S.W.2d 543, 544 (Mo.App. 1987)

Craft v. Scaman, 715 S.W.2d 531, 536 (Mo.App. 1986)

State ex. rel. Chang v. Ely, 26 S.W.3d 214, 217 (Mo.App. 2000)

State ex. rel. Feldman v. Lasky, 879 S.W.2d 783, 785 (Mo.App. 1994)

Felling v. Ritter, 876 S.W.2d 2, 5 (Mo.App. 1994)

Kruse v. Schieve, 61 Wis.2d 421, 213 N.W.2d 64 (Wis. 1973)

Neal v. Oliver, 246 Ark. 377, 438 S.W.2d 313 (1969)

Collier v. Wagner Castings Co., 700 Ill.App.3d 233, 26 Ill.Dec. 641, 388 N.E.2d 265 (1979)

Kerrigan v. Errett, 256 N.W.2d 394 (Iowa 1977)

Zurich Ins. Co. v. Scofi, 366 So.2d 1193 (Fla.App. 1979)

Vaughn v. Jernigan, 144 Ga.App. 745, 242 S.E.2d 482 (1978)

Dawley v. Thisius, 304 Minn. 453, 231 N.W.2d 555 (1975)

Wilson v. Hasvold, 86 S.D. 286, 194 N.W.2d 251 (1972)

Blumhardt v. Hartung, 283 N.W.2d 299 (S.D. 1979)

Steele v. Eaton, 130 Vt. 1, 285 A.2d 749 (1971).

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

POINT II

IMMUNITY UNDER R.S.MO. § 287.120 IS NOT LIMITED TO CORPORATE SUPERVISORS AND OFFICERS ACTING IN A SUPERVISORY CAPACITY; INSTEAD THE IMMUNITY EXTENDS TO ALL EMPLOYEES CHARGED WITH CARRYING OUT THE EMPLOYER'S NON-DELEGABLE DUTY TO PROVIDE A SAFE WORK PLACE.

R.S.Mo. § 287.120

R.S.Mo. § 287.010, *et seq.*

Miller v. McDonnell Douglas Corp., 896 S.W.2d 734, 736 (Mo.App. 1995)

State ex. rel. J.E. Jones Const. Co. v. Sanders, 875 S.W.2d 154, 156-157 (Mo.App. 1994)

Anders v. A.D. Jacobson, Inc., 972 S.W.2d 612, 615 (Mo.App. 1998)

State ex. rel. Rival Co. v. Gant, 945 S.W.2d 475, 476 (Mo.App. 1997)

Rule 55.27(g)(3)

Burns v. Employer Health Serv., Inc., 976 S.W.2d 639, 641 (Mo.App. 1998)

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)

Sexton v. Jenkins & Associates, Inc., 41 S.W.3d 1 (Mo.App. 2000)

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

POINT III

APPELLANT FAILED TO RAISE THE CONSTITUTIONAL CHALLENGE TO R.S.MO. § 287.120 AT THE EARLIEST OPPORTUNITY, THUS WAIVING THAT CHALLENGE TO THE STATUTE. FURTHER, THE IMMUNITY AFFORDED BY R.S.MO. § 287.120 TO CO-EMPLOYEES IS CONSTITUTIONAL IN THAT IT DOES NOT CREATE AN UNREASONABLE OR ARBITRARY PROCEDURAL BARRIER TO THE ENFORCEMENT OF A RECOGNIZED CAUSE OF ACTION; RATHER, R.S.MO. § 287.120 HAS STATUTORILY MODIFIED A CAUSE OF ACTION THAT HAD BEEN RECOGNIZED AT COMMON LAW.

R.S.Mo. § 287.120

Missouri Constitution, Article 5, § 3

Riverside-Quindaro Bend Levee Dist. v. Intercontinental Eng'g Mfg. Corp., 121 S.W.3d 531,

533 (Mo. *banc* 2003)

Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 828 (Mo. *banc* 1991)

Killian v. J & J Installers, Inc., 802 S.W.2d 158, 161 n. 1 (Mo. *banc* 1991)

Baulding v. Barton Co. Mut. Ins. Co., 666 S.W.2d 948, 951 (Mo.App. 1984)

Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 905 (Mo. *banc* 1992)

Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 62 (Mo. *banc* 1989)

R.S.Mo. § 287.120.1

Leicht v. Venture Stores, Inc., 562 S.W.2d 401, 402 (Mo.App. 1978)

Wiley v. Shank & Flattery, 848 S.W.2d 2, 5 (Mo.App. 1992)

Linsin v. Citizens Elec. Co., 622 S.W.2d 277, 281 (Mo.App. 1981)

State ex. rel. Maryland Heights Concrete Contractors, Inc. v. Ferriss, 588 S.W.2d 489, 491 (Mo. *banc* 1979)

Seaboard Coastline R. Co. v. Smith, 359 So.2d 427 (Fla. 1978)

Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 10 (Mo. *banc* 1992)

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

Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 605-6 (Mo. *banc* 1969)

Townsen & Townsen, 708 S.W.2d 646, 649 (Mo. *banc* 1989)

Jones v. State Hwy. Commission, 557 S.W.2d 225, 228 (Mo. *banc* 1977)

O'Dell v. School District of Independence, 521 S.W.2d 403, 410 (Mo. *banc* 1975)

(J. Finch dissenting)

POINT IV

THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S PETITION FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE APPELLANT FAILED TO ALLEGE ANY NEGLIGENT ACTS ON THE PART OF THE INDIVIDUAL RESPONDENTS WHICH COULD BE DEEMED TO FALL OUTSIDE THE SCOPE OF THE EMPLOYER'S DUTY TO PROVIDE A SAFE WORKPLACE, AND, ACCORDINGLY, THE RESPONDENTS WERE PROPERLY AFFORDED IMMUNITY FROM CIVIL SUIT UNDER THE WORKERS' COMPENSATION ACT.

R.S.Mo. § 287.010, *et seq.*

Miller v. McDonnell Douglas Corp., 896 S.W.2d 734, 736 (Mo.App. 1995)

State ex. rel. J.E. Jones Const. Co. v. Sanders, 875 S.W.2d 154, 156-157 (Mo.App. 1994)

Anders v. A.D. Jacobson, Inc., 972 S.W.2d 612, 615 (Mo.App. 1998)

State ex. rel. Rival Co. v. Gant, 945 S.W.2d 475, 476 (Mo.App. 1997)

Rule 55.27(g)(3)

Burns v. Employer Health Serv., Inc., 976 S.W.2d 639, 641 (Mo.App. 1998)

R.S.Mo. § 287.120

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

Sexton v. Jenkins & Associates, Inc., 41 S.W.3d 1 (Mo.App. 2000)

Gabler v. McColl, 863 S.W.2d 340, 343 (Mo.App. 1993)

Felling v. Ritter, 876 S.W.2d 2, 5 (Mo.App. 1994)

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

Hedglin v. Stahl Specialty Company, 903 S.W.2d 922 (Mo. App. 1995)

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

Pavia v. Childs, 951 S.W.2d 700 (Mo. App. 1997)

Davis v. Henry, 936 S.W.2d 862 (Mo. App. 1997)

J.M.F. v. Emerson, 768 S.W.2d 579 (Mo.App. 1989)

STATEMENT OF FACTS

For purposes of this appeal, respondents accept appellant's description of the underlying facts, which consist simply of a recital of the allegations in the subject petition.

Procedural History

In order to place this appeal in the proper context, respondents have attached an Appendix (A.1-*et seq.*) to this Brief containing appellant's briefs filed in the Henry County appeal (A.1-A. 47), and appellant's Substitute Briefs filed in this Court after the Court accepted transfer of the appeal of the dismissal of the Henry County petition (A.82-A.170).

By means of the Supplemental Legal File, respondent also places before the Court not only the Henry County petition, but also the Reply filed by appellant to respondents' answer (S.L.F.31-S.L.F.32). As is evident, appellant in his reply does not raise a constitutional challenge nor does he do so in the subsequent pleadings filed in response to respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction. (S.LF.35-S.L.F.65).

In the Substitute Brief filed in this Court in the Henry County Appeal, appellant argued for the first time that "the *Badami*'s court's restriction on co-employees access to our courts is unconstitutional." (A.109-A.111). This Court heard argument on April 21, 2001. Following that argument, the court transferred the Henry County appeal back to the Missouri Court of Appeals, Western District. (A.204). That court then published, without change, its previously issued opinion, affirming the dismissal of the Henry County petition on the grounds that appellant's petition failed to invoke the subject matter jurisdiction of the circuit court. (A.205).

The record before this Court reveals that appellant did not raise his constitutional challenge at the very first opportunity, and has waived his right to present this issue to this Court.

As stated in the description of the procedural history provided by appellant, a "different" petition was filed in Jackson County, which is the subject of this appeal. A review of the Henry County petition previously dismissed (S.L.F.3-S.L.F.25) and the Jackson County petition considered here (L.F.1-L.F.14) reveals that said petitions are almost identical except for a few additional allegations. In fact, appellant does not challenge the finding by the trial court that:

> The new allegations before this Court may be reduced to the general allegation that the defendants negligently told the plaintiff that it was safe to use the handrail to get from the second to the first floor when the defendants knew or should have known that it was not safe. (L.F.868).

Therefore, this appeal must be considered within this limited factual context.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT MISAPPLY THE WORKERS' COMPENSATION LAW, AND, THUS, CORRECTLY FOUND THAT RESPONDENTS WERE ENTITLED TO IMMUNITY.

A. STANDARD OF REVIEW

1. Liberal Construction of R.S.Mo. § 287.010, *et. seq.*

When the Missouri Workers' Compensation Law, R.S.Mo. § 287.010 *et seq.* applies, it provides the exclusive remedy, and an injured worker may not pursue common law remedies. *Miller v. McDonnell Douglas Corp*., 896 S.W.2d 734, 736 (Mo.App. 1995) (abrogated on other grounds). A motion to dismiss for lack of subject matter jurisdiction is the proper method to raise the defense of the exclusivity of workers' compensation law. *State ex. rel. J.E. Jones Const. Co. v. Sanders*, 875 S.W.2d 154, 156-157 (Mo.App. 1994); *Anders v. A.D. Jacobson, Inc.*, 972 S.W.2d 612, 615 (Mo.App. 1998).

"The trial court should grant a motion to dismiss when it appears, by a preponderance of the evidence, that the court lacks subject matter jurisdiction." *State ex. rel. Rival Co. v. Gant*, 945 S.W.2d 475, 476 (Mo.App. 1997); Rule 55.27(g)(3). "As the term 'appears' suggests the quantum of proof is not high." *Burns v. Employer Health Serv., Inc.*, 976 S.W.2d 639, 641 (Mo.App. 1998) (citations omitted). Defendants are not required to show by unassailable proof that there is no material issue of fact because the trial court decides only

the preliminary question of its own jurisdiction, which is not a decision on the merits and is without res judicata effect. *State ex. rel. J.E. Jones Const. Co.*, 875 S.W.2d at 157.

The determination of whether a case falls within the exclusive jurisdiction of the Division is a question of fact. *Burns*, 976 S.W.2d at 641. "When the court's jurisdiction turns on a factual determination the decision should be left to the sound discretion of the trial judge." *Id.* (quotations omitted). The review, then, for appellate courts is for an abuse of discretion. "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." *Id.* (quotations omitted).

Appellant argues that the trial court erred in interpreting R.S.Mo. § 287.120. Statutory interpretation is a question of law. *Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo. *banc* 2002). A question of law is reviewed under the de novo standard. *Williams v. Kimes*, 996 S.W.2d 43, 44-45 (Mo. *banc* 1999). But, in undertaking its review, this Court shall liberally construe the Workers' Compensation Law, R.S.Mo. § 287.010, *et seq.*, with a view to the public welfare as required by R.S.Mo. § 287.800. Liberal construction of the law requires that "where a questions of jurisdiction is in doubt, it should be held to be in the favor of the [Labor and Industrial Relations] Commission." *Bass v. Nat'l Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo. *banc* 1995) (citations omitted).

2. Law of the Case

In addition, this Court, as did the trial court, must treat the decision in *Sexton v. Jenkins & Associates, Inc.*, 41 S.W.3d 1 (Mo.App. 2000) (hereinafter "*Sexton I*") as the law of the case. *McClelland v. Ozenberger*, 841 S.W.2d 227, 231 (Mo.App. 1992). Under this doctrine, the appellate decision in *Sexton I* becomes the law of the case in subsequent proceedings in the same case and precludes reexamination of issues decided in the original appeal. *McClelland*, 841 S.W.2d at 231. In other words, to the extent that the petition before the appellate court in *Sexton I* raises the same issues as the petition before this Court, *Sexton I* constitutes the law of the case.

In fact, the opinion in *Sexton I* constitutes the law of the case for all points presented and decided by the Court of Appeals, as well as for all matters that arose prior to its issuance that might have been raised but were not. *State v. Graham*, 13 S.W.3d 290, 293 (Mo. *banc* 2000). The law of the case doctrine prevents successive direct appeals not authorized by statute. *Id.*

In *Graham*, this Court had before it a challenge to the sentencing of a criminal defendant following a 1998 Court of Appeals decision. This Court found that the Court of Appeals had erred in its 1998 decision but denied the appeal on the ground that the law of the case doctrine was dispositive. In so holding, this Court noted that neither the state nor the defendant had sought transfer of the 1998 appellate decision and, therefore, had acquiesced in that decision, rendering the Missouri Supreme Court without discretion to alter the previous decision. *Id.* at 293. "Appellate courts have discretion not to apply the doctrine when there is a mistake, a manifest injustice, or an intervening change of law." *Id.*

Here, appellant was granted transfer to this Court, after the Missouri Court of Appeals, Western District, first issued its opinion in *Sexton I.* (A.80). The Court then ordered briefing and conducted oral argument, after which it sent the matter back to the Court of Appeals without decision. (A.204). The Court of Appeals then published its opinion in *Sexton I* that had been issued before transfer. (A.205).

Appellant cites to no authority permitting successive direct appeals because there is none. This Court, by its retransfer, and the Court of Appeals, Western District established as the law of this case that the Henry County petition fails to state a civil cause of action. There has been no mistake, manifest injustice, or intervening change of law since *Sexton I* was published. In fact, this Court has cited *Sexton I* with approval in *State ex. rel. Taylor v. Wallace*, 73 S.W.3d 620, 622 n. 7 (Mo. *banc* 2002) ("No liability for employees who designed and built elevator shaft railing"). As will be demonstrated later, sound public policy and statutory directives mandate that this Court affirm the trial court which properly found that the Jackson County petition failed to state a civil cause of action as well.

Of particular note is the fact that the constitutional challenge made in Point III of Appellant's Brief had previously been made in Appellant's Substitute Brief filed in *Sexton I*, Case No. S.C.#83236, and was part of the case when this Court transferred the matter back to the Court of Appeals without decision. (A.109-A.111)

Accordingly, the law of the case doctrine precludes this Court's review of the following issues, all of which were decided by *Sexton I*:

a. Civil law immunity under R.S.Mo. § 287.120 extends to any employee charged with carrying out the employer's duties;

b. A co-employee loses that immunity only if he affirmatively causes or increases his fellow employee's risk of injury; and

c. All of the allegations in the Henry County Petition (which are repeated in the Petition before this Court) regarding improper construction, improper materials, failure to meet OSHA guidelines, failure to provide a safe way between floors, and failure to warn of danger do not constitute affirmative negligent acts required to overcome defendants' immunity.

Sexton, 41 S.W.3d at 5-6.

As determined by the trial court—and unchallenged by appellant—the only "new allegations" in the Jackson County petition at issue here are:

a Respondents affirmatively represented to appellant on the date of the accident that the guard rail was safe to use; and

b. Respondent Sloniker directed appellant to use the guardrail.

(L.F.868)

Again, under the law of the case doctrine, this Court need not address these issues because they constitute matters which could have been alleged in the Henry County petition, but were not. *Graham*, 13 S.W.3d at 293. As a result, this Court, under the doctrine, has no discretion to revisit the ruling of *Sexton v. Jenkins & Assoc., Inc.*, 41 S.W.3d 1 (Mo.App. 2000).

Respondent will respond again to the points made in appellant's brief—all of which have been previously considered and rejected by the appellate court—to demonstrate why it is important that the trial court be affirmed.

B. THE WORKERS' COMPENSATION LAW DOES PROVIDE IMMUNITY FOR EMPLOYEES WHERE THE EMPLOYEE IS CHARGED WITH A BREACH OF THE NON-DELEGABLE DUTY OF HIS EMPLOYER TO PROVIDE A SAFE WORKPLACE.

1. Legislative Intent.

The Missouri Legislature passed the Workers' Compensation Law in order to provide compensation to workers without the considerations of negligence and common-law defenses. In adopting these laws, the legislature directed that "[a]ll provisions of this act shall be liberally construed with a view to public welfare." R.S.Mo. § 287.800. Liberal construction requires that "where a question of jurisdiction is in doubt, it should be held to be in the favor of the [Labor and Industrial Relations] commission." *Bass v. Nat'l Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo. *banc* 1995) (citing *Ringeisen v. Insulation Services, Inc.*, 539 S.W.2d 621, 626 (Mo.App. 1976)).

2. Immunity to Civil Liability Under Workers' Compensation Law Not Analogous to Sovereign Immunity.

Appellant argues here, as he did in his appeal of the Henry County litigation, that immunity to civil liability under the workers' compensation law is analogous to sovereign

immunity, which has been limited to governmental entities only. This analogy misses the mark by a wide margin. The general purpose of the workers' compensation law was to substitute a new system of rights and remedies for the common law in order to provide a "uniform, speedy, and cost efficient" mechanism of getting benefits into the hands of injured employees. *Hedglin v. Stahl Specialty Company*, 903 S.W.2d 922, 929 (J. Smart concurring) (Mo.App. 1995), *citing Dunn v. Peabody Coal Co.*, 855 F.2d 426, 428 (7th Cir. 1988). The basic purpose of the act was to place the cost of industrial accidents on industry by eliminating fault as a basis for liability. This purpose is undermined where the cost of such accidents is shifted from one employee to another, as urged by appellant here. *Id*.

Sovereign immunity had no such purpose. Rather, as observed by the court in *Jackson v. Wilson*, 581 S.W.2d 39, 42 (Mo.App. 1979), the sovereign immunity doctrine rested "upon the tenuous ground that the 'king could do no wrong,' a rare and frankly unexplainable surviving vestige of monarchical power. It served to protect the impersonal body politic of government itself from tort liability." Because of these vastly different underpinnings, appellant's analogy must fail.

3. Case Law Consistent with Legislative Intent.

Appellant then again argues that the line of cases beginning with *State ex. rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo.App. 1982) in effect constitute "judicial legislation" inconsistent with the purpose of the legislature when it enacted the workers' compensation

law. Appellant makes the simplistic argument that because R.S.Mo. § 287.120 does not make specific reference to "co-employees," that co-employees are not entitled to the civil immunity provided by the statute.

This argument must fail for a number of reasons. First of all, it ignores the fundamental precept that a corporate employee, existing as a legal fiction, can only discharge its duties through the physical acts of its employees. In other words, a corporate employer can act only through natural persons. *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 161 (Mo. *banc* 1991) (J. Blackmar concurring).

An employer has a non-delegable duty to provide a safe workplace for its employees. *Kelley v. DeKalb Energy Co.*, 865 S.W.2d 670, 672 (Mo. *banc* 1993). It can only discharge this duty through the acts of its employees. Appellant would limit the immunity to the corporate entity alone. Such a construction of the workers' compensation law is absolutely antithetical to its purpose and has been repeatedly rejected by our courts, beginning with *State ex. rel. Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo.App. 1982), which stated:

> Under present day industrial operations, to impose upon executive officers or supervisory personnel personal liability for an accident arising from a condition at a place of employment which a jury may find to be unsafe would almost mandate that the employer provide indemnity to such employees. That would effectively destroy the immunity provision of the workmen's compensation law.

In *Badami*, defendants were the president of the company and an officer. The same principle applies to respondents who were co-employees. To mandate that their employer

provide indemnity to them for conditions in the workplace would effectively negate the purpose of the workers' compensation law.

Furthermore, the law of case, as set forth in *Sexton I*, similarly rejected appellant's contention that R.S.Mo. § 287.120 provides no immunity to employees under any circumstance to actions by plaintiffs injured in the workplace.

In particular, the court in *Sexton I* stated that:

> As a statutory employer, Jenkins (defendants' employer) had a duty to provide a safe working environment. *Lyon v. McLaughlin*, 960 S.W.2d 522, 525 (Mo.App. 1989). This duty is not delegable. *Id.* Section 287.120 gives an employer immunity from common liability for breaches of this duty. *Id.* This immunity extends to any employee charged with carrying out the employer's duties. *Felling v. Ritter*, 876 S.W.2d 2, 5 (Mo.App. 1994).

Sexton, 40 S.W.3d at 5.

The court in *Sexton I* went on to hold that:

> A co-employee's failure to perform a duty delegated to him by his employer does not give rise to a cause of action by a fellow employee who was injured because of the failure. *Id.* However, a co-employee loses this immunity if he affirmatively causes or increases his fellow employee's risk of injury. *Lyon*, 960 S.W.2d. at 525. A plaintiff's petition must charge "something extra"

beyond a breach of general supervision and safety for the co-employee to be liable.

Id.

The above summary of the law finds its origin in *State ex. rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo.App. 1982) and the numerous cases which have followed it since that date.[1]

[1]The following list of cases, while no means exhaustive, demonstrate the consistency of Missouri courts in upholding and applying *Badami*: *State ex. rel. Taylor v. Wallace*, 73 S.W.3d 620, 622 (Mo. *banc* 2002); *Kelley v. DeKalb Energy Co.*, 865 S.W.2d 670, 672 (Mo. *banc* 1993); *Lyon v. McLaughlin*, 960 S.W.2d 522, 525 (Mo.App. 1998); *Workman v. Vader*, 854 S.W.2d 560, 562 (Mo.App. 1993); *Collier v. Moore*, 21 S.W.3d 858, 861 (Mo.App. 2000); *Davis v. Henry*, 936 S.W.2d 862, 864 (Mo.App. 1997); *Felling v. Ritter*, 876 S.W.2d 2, 5 (Mo.App. 1994); *Gabler v. McColl*, 863 S.W.2d 340, 343 (Mo.App. 1993); *J.M.F. v. Emerson*, 768 S.W.2d 579, 581 (Mo.App. 1989); *Stanislaus v. Parmalee Industries, Inc.*, 729 S.W.2d 543, 544 (Mo.App. 1987); *Craft v. Scaman*, 715 S.W.2d 531, 536 (Mo.App. 1986); *State ex. rel. Chang v. Ely*, 26 S.W.3d 214, 217 (Mo.App. 2000); *Hedglin v. Stahl Specialty Company*, 903 S.W.2d 922, 928 (Mo.App. 1995); *State ex. rel. Feldman v. Lasky*, 879 S.W.2d 783, 785 (Mo.App. 1994). In contrast, a KeyCite check on *Badami* reveals no negative history.

C. *STATE EX. REL. BADAMI v. GAERTNER*, 630 S.W.2d 175 (Mo.App. 1982) AND ITS PROGENY HAVE APPLIED THE PLAIN LANGUAGE OF THE STATUTE AND SHOULD BE FOLLOWED.

In his effort to get this Court to depart from this established Missouri jurisprudence, appellant argues that the court in *State ex. rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo.App. 1982) and subsequent cases have failed to properly apply the language of R.S.Mo. § 287.120. As the following discussion of the *Badami* decision reveals, this contention is entirely without merit.

In that case, the plaintiff brought suit against his employer's president and production manager for negligence arising from their alleged failure to equip a shredding machine with certain safety devices which would have prevented plaintiff's injury. Defendants moved to dismiss the petition for lack of subject matter jurisdiction because of immunity under the workers' compensation law. Upon the indication by the trial court that it intended to overrule the motion, defendants obtained a preliminary writ of prohibition preventing the trial court from proceeding. This writ was made absolute by the Court of Appeals in the *Badami* decision.

In so doing, the court held:

> Charging the employee chosen to implement the employer's duty to provide a reasonabe safe place to work merely with the general failure to fulfill that duty charges no actionable negligence. Something more must be charged.

Badami v. Gaertner, 630 S.W.2d at 180.

The manner in which the court reached this decision demonstrates the impotency of appellant's attack on its rationale.

The court began with an examination of master-servant law as it existed at the time the workers' compensation statute was enacted. This case law held that the duty of the master to provide a reasonable safe workplace was a non-delegable duty. *Id*. at 177. When a master utilized an employee to perform this non-delegable duty, the employee who did so was not functioning as a fellow servant, but as the master himself. *Id*. If the employee failed to perform that duty, the master was liable for injuries to third-parties or other employees. *Id*. (citations omitted).

With this background, the court in *Badami* then looked to foreign law for guidance and concluded that there was a distinct split between the jurisdictions. One line of cases extended to an employee absolute immunity from any liability to co-employees regardless of the nature of the negligence. The court rejected this approach as contrary to Missouri law. *Id*. at 179.

The court then considered the approach articulated in *Kruse v. Schieve*, 61 Wis.2d 421, 213 N.W.2d 64 (1973), which had been adopted that time by at least eight other jurisdictions at the time.[2]

---

[2]Arkansas, *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969); Illinois, *Collier v. Wagner Castings Co.*, 700 Ill.App.3d 233, 26 Ill.Dec. 641, 388 N.E.2d 265 (1979); Iowa, *Kerrigan v. Errett*, 256 N.W.2d 394 (Iowa 1977); Florida, *Zurich Ins. Co. v. Scofi*, 366 So.2d 1193 (Fla.App. 1979); Georgia, *Vaughn v. Jernigan*, 144 Ga.App. 745, 242 S.E.2d 482 (1978); Minnesota, *Dawley v. Thisius*, 304 Minn. 453, 231 N.W.2d 555 (1975); South

Under this approach, immunity attached to the employee under the workers' compensation law where the employee had allegedly breached a non-delegable duty of the employer, but did not protect the employee where it was alleged that he had done an affirmative act causing or increasing the risk of injury. *Id*. at 179. The court described this affirmative act as "something extra"—that is, beyond the breach of duty of general supervision and safety owed to the employer, not the employee. *Id.*

The court in *Badami* concluded that this approach came closest to effectuating the intent of the legislature at the time it enacted our workers' compensation statutory scheme. *Id*. at 80. Appellant would have this Court believe that the court in *Badami* set out to "fix" the workers' compensation law and attempted to substitute its beliefs for that of the legislature. A cursory review of that opinion reveals that the *Badami* court had no such intention or agenda. Rather, it adopted an approach consistent with the unchallenged principles of master-servant law and the plain language of the statute. In this regard, the court noted:

> The purpose of the Act was not to transfer the burden of industrial accidents from one employee to another. Clearly, plaintiff's suit here is an attempt to do that.

Id. at 180.

Similarly, appellant here attempts to transfer the burden of this workplace injury from appellant to respondents, contrary to the purpose of the workers' compensation statute.

Dakota, *Wilson v. Hasvold*, 86 S.D. 286, 194 N.W.2d 251 (1972); *Blumhardt v. Hartung*, 283 N.W.2d 299 (S.D. 1979); and Vermont, *Steele v. Eaton*, 130 Vt. 1, 285 A.2d 749 (1971).

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). This Court did not overturn that line of cases, but applied the principle to preclude plaintiff's civil claim. "Suits against employees personally for breach of the duty to maintain a safe working environment are preempted by the workers' compensation remedy . . . " *Taylor*, 73 S.W.3d at 621. In fact, appellant does not even present a close question. The Missouri Courts' adherence to *Badami* remains steadfast and unbroken.

Appellant then claims that *Taylor* is at odds with *James v. Poppa*, 85 S.W.3d 8 (Mo. *banc* 2002). In *James*, the plaintiff never alleged that the defendant doctor was an employee. Instead, the pleadings showed defendant to be an independent doctor who treated plaintiff's injuries only because a doctor selected by plaintiff's employer referred plaintiff to him for a second opinion. *Id*. at 9-10. "[N]o evidence in the record suggests that (defendant) is (employer's) agent or employee. . . Based upon these allegations, Dr. Poppa is a 'third person' . . . not immune from civil suit." *Id*. As such, that case did not address a situation where a party brought suit against statutory co-employees. Obviously, that holding does not apply here.

D. CONCLUSION

The purpose of the Missouri Workers' Compensation Law, R.S.Mo. § 287.010, *et seq.*, is to place the cost of industrial accidents on the employer by eliminating fault as a basis for liability. Appellant would have this Court shift the cost of workplace accidents from one employee to another. To permit appellant to go forward on the petition at issue would allow appellant to negate the purpose of the Missouri Workers' Compensation Law.

The petition at issue charges respondents with creating an unsafe condition in the workplace. As established in *State ex. rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo.App. 1982) and the unbroken line of cases which have followed its holding, including the trial court here, these allegations do not invoke the subject matter jurisdiction of the circuit court. Accordingly, the ruling of the trial court dismissing appellant's petition for lack of subject matter jurisdiction should be affirmed.

POINT II

IMMUNITY UNDER R.S.MO. § 287.120 IS NOT LIMITED TO CORPORATE SUPERVISORS AND OFFICERS ACTING IN A SUPERVISORY CAPACITY; INSTEAD THE IMMUNITY EXTENDS TO ALL EMPLOYEES CHARGED WITH CARRYING OUT THE EMPLOYER'S NON-DELEGABLE DUTY TO PROVIDE A SAFE WORK PLACE.

A. STANDARD OF REVIEW

When the Missouri Workers' Compensation Law, R.S.MO. § 287.010 *et seq.* applies, it provides the exclusive remedy, and an injured worker may not pursue common law remedies. *Miller v. McDonnell Douglas Corp*., 896 S.W.2d 734, 736 (Mo.App. 1995) (abrogated on other grounds). A motion to dismiss for lack of subject matter jurisdiction is the proper method to raise the defense of the exclusivity of workers' compensation law. *State ex. rel. J.E. Jones Const. Co. v. Sanders*, 875 S.W.2d 154, 156-157 (Mo.App. 1994); *Anders v. A.D. Jacobson, Inc.*, 972 S.W.2d 612, 615 (Mo.App. 1998).

"The trial court should grant a motion to dismiss when it appears, by a preponderance of the evidence, that the court lacks subject matter jurisdiction." *State ex. rel. Rival Co. v. Gant*, 945 S.W.2d 475, 476 (Mo.App. 1997); Rule 55.27(g)(3). "As the term 'appears' suggests the quantum of proof is not high." *Burns v. Employer Health Serv., Inc.*, 976 S.W.2d 639, 641 (Mo.App. 1998) (citations omitted). Defendants are not required to show by unassailable proof that there is no material issue of fact because the trial court decides only

the preliminary question of its own jurisdiction, which is not a decision on the merits and is without res judicata effect. *State ex. rel. J.E. Jones Const. Co.*, 875 S.W.2d at 157.

The determination of whether a case falls within the exclusive jurisdiction of the Division is a question of fact. *Burns*, 976 S.W.2d at 641. "When the court's jurisdiction turns on a factual determination the decision should be left to the sound discretion of the trial judge." *Id.* (quotations omitted). The review, then, for appellate courts is for an abuse of discretion. "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." *Id.* (quotations omitted).

B. THE IMMUNITY GRANTED BY R.S.MO. § 287.120 IS NOT DEPENDENT ON THE EMPLOYEE'S CAPACITY; RATHER THE IMMUNITY EXTENDS TO ALL EMPLOYEES WHO ARE ENGAGED IN PERFORMING A NON-DELEGABLE DUTY OF THE EMPLOYER.

Appellant next argues that, in the event the court chooses not to overturn 22 years of consistent Missouri case law, it should interpret *State ex. rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo.App. 1982) to be limited only to corporate supervisors or officers acting in a supervisory capacity. While the defendants in the *Badami* decision were a corporate president and a production manager, appellant's reading of the *Badami* decision is neither fair nor accurate. Accordingly, appellant's contention that respondents have no immunity because they were allegedly acting as employees instead of supervisors or officers for Jenkins & Associates must be rejected.

In urging this distinction without a difference, appellant again tortures 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), both cited by *Badami*. Appellant suggests that these cases turn on the label given to the defendant, rather than the nature of the act of negligence charged. These cases, however, do not so hold.

In *Kruse*, the plaintiff employee sued both the president of the company and the vice-president in charge of engineering for negligence in, among other respects, allowing a guard to be removed from a machine, which subsequently caused her injury. In *Laffin*, defendants were the president and plant superintendent who were charged with negligently designing and installing a bulk storage system which when it was punctured sprayed plaintiff with sulphuric acid.

In both cases, the Wisconsin Supreme Court held that the petitions allege breach of the duty to supervise and duty to provide a safe place of employment, duties owed by the employer to the employee. *Kruse*, 213 N.W.2d at 67; *Laffin*, 253 N.W.2d at 53. When an officer or a supervisor fails to perform the employer's duty, the failure is that of the employer, not the officer or supervisor. *Laffin*, 253 N.W.2d at 53. As stated in *Laffin*:

> The policy behind the law is that worker's compensation is the exclusive remedy against an employer, and if there is a failure of an officer *or employee* to perform a duty owed to the employer, the employee's recourse is solely against the employer.

Laffin, 253 N.W.2d at 358. (Emphasis added).

The Wisconsin decisions establish that it is the nature of the act, not the title of the actor, which determines the existence of immunity. Therefore, under the law of the case as set forth in *Sexton v. Jenkins & Associates, Inc.*, 41 S.W.3d 1 (Mo.App. 2000), the allegations that respondents breached the duty of their employer to provide appellant a safe workplace renders workers' compensation as appellant's exclusive remedy.

In *Tauchert v. Boatmen's Nat. Bank*, 849 S.W.2d 573 (Mo. *banc* 1993), there is no language supporting appellant's claim that this Court indicated that a supervisor had immunity but a co-worker did not. The plain language of the opinion negates this reading:

> Defendant's alleged act of personally arranging the faulty hoist system for the elevator may constitute an affirmative negligent act outside the scope of his responsibility to provide a safe workplace for plaintiff. Such acts constitute a breach of personal duty of care owed to plaintiff. These actions may make an employee/supervisor liable for negligence and are not immune from liability under the workers' compensation act.

Id. at 574.

Again, whether a defendant is nominally a co-employee or a corporate officer makes no difference; a defendant is subject to common law liability only where he commits a breach of duty of care to plaintiff independent of his employer's duty to provide a safe workplace, i.e., "something extra." When a defendant fails to perform an employer's duty, as alleged here, recourse is solely against the employer. And, pursuant to R.S.Mo. § 287.120, workers' compensation law provides the exclusive remedy against an employer.

POINT III

APPELLANT FAILED TO RAISE THE CONSTITUTIONAL CHALLENGE TO R.S.MO. § 287.120 AT THE EARLIEST OPPORTUNITY, THUS WAIVING THAT CHALLENGE TO THE STATUTE. FURTHER, THE IMMUNITY AFFORDED BY R.S.MO. § 287.120 TO CO-EMPLOYEES IS CONSTITUTIONAL IN THAT IT DOES NOT CREATE AN UNREASONABLE OR ARBITRARY PROCEDURAL BARRIER TO THE ENFORCEMENT OF A RECOGNIZED CAUSE OF ACTION; RATHER, R.S.MO. § 287.120 HAS STATUTORILY MODIFIED A CAUSE OF ACTION THAT HAD BEEN RECOGNIZED AT COMMON LAW.

A. STANDARD OF REVIEW

This Court reviews its own jurisdiction to hear appeals sua sponte. See *Riverside-Quindaro Bend Levee Dist. v. Intercontinental Eng'g Mfg. Corp*., 121 S.W.3d 531, 533 (Mo. *banc* 2003).

Further, a statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution; it should be enforced by the courts unless its plainly and palpably affronts fundamental law embodied in the constitution. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. *banc* 1991). When the constitutionality of a statute is attacked, the burden is upon the party claiming the statute is unconstitutional to prove the statute is unconstitutional. *Id.* at 828-29.

B. THIS COURT LACKS JURISDICTION TO DECIDE APPELLANT'S CONSTITUTIONAL CHALLENGE TO R.S.MO. § 287.120 BECAUSE APPELLANT FAILED TO RAISE THE CHALLENGE AT THE FIRST OPPORTUNITY.

As previously raised in respondents' motion to dismiss this appeal to this Court, this Court lacks jurisdiction to hear this appeal because appellant failed to raise the constitutional challenge to the statutory immunity provided by the Workers' Compensation Law. Article 5, § 3 of the Missouri Constitution provides that the Supreme Court shall have exclusive appellate jurisdiction in all cases involving the validity of a Missouri statute. But constitutional issues are waived if not raised at the first available opportunity. See *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 161 n. 1 (Mo. *banc* 1991).

Killian faced almost the identical situation as here. In *Killian*, appellants argued that the Workers' Compensation Law violated the open courts provision of the Missouri Constitution. Appellants raised it for the first time on transfer of the case from the Appeals Court to this Court. *Id.* As a result, this Court held that "the [constitutional] issue has not been preserved for our consideration." *Id.*

Here, appellant first filed this cause of action in Henry County on March 16, 1998. (S.L.F.3-S.L.F.25). In their answer, respondents raised the defense of exclusive jurisdiction of the Missouri Workers' Compensation Law. (S.L.F.26-S.L.F.30). Appellant failed to raise a constitutional challenge to that affirmative defense in his reply to respondent's answer. (S.L.F.31-32). Neither did appellant move to strike the exclusive jurisdiction defense. By

such inaction, he waived his right to challenge the validity of the statute. *Baulding v. Barton Co. Mut. Ins. Co.*, 666 S.W.2d 948, 951 (Mo.App. 1984).

Rather, appellant raised the constitutional challenge to R.S.Mo. § 287.120 for the first time when this Court accepted direct transfer of the matter after the Western District Court of Appeals affirmed the Henry County decision. (A.82-A.170). As in *Killian*, the constitutional issue raised by appellant had not been preserved for this Court's consideration in the first appeal to this Court. And appellant may not raise it now. As a result, this Court has no jurisdiction to hear this appeal.

C. THE MISSOURI CONSTITUTION PROHIBITS LAWS THAT ARBITRARILY OR UNREASONABLY BAR INDIVIDUALS FROM ACCESSING THE COURTS TO ENFORCE RECOGNIZED CAUSES OF ACTION; THE CONSTITUTION DOES NOT PROHIBIT THE LEGISLATURE FROM MODIFYING OR ABOLISHING A CAUSE OF ACTION THAT HAD BEEN RECOGNIZED BY THE COMMON LAW OR BY STATUTE.

An important distinction is drawn between a statute that creates a condition precedent to the use of the courts to enforce a valid cause of action (which violates the open courts provision) and a statute that simply changes the common law by eliminating a cause of action that has previously existed at common law or under some prior statute. *Blaske*, 821 S.W.2d at 832-33. As stated another way, statutes imposing procedural bars to access to the courts are to be distinguished from statutes that change the common law by the elimination or limitation of a cause of action. The former are impermissible; the latter are a valid exercise

of a legislative prerogative. *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 905 (Mo. *banc* 1992).

This Court in *Blaske* faced a statute of repose that eliminated a cause of action for personal injury or wrongful death against designers and builders ten years after completion of construction. This Court held that the statute did not violate the Constitution because it did not bar access to the courts to a person with a valid cause of action; rather, it simply modified the common law to provide that a cause of action did not exist after ten years. *Id.* at 833. "The right of access means simply the right to pursue in the courts the causes of action that the substantive law recognizes." *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. *banc* 1989).

Here, the legislature, by R.S.Mo. § 287.120.1, provided an employer with immunity from civil law actions by an employee against an employer and co-employees for accidents for work-connected injuries in exchange for definite compensation for these injuries. See *Leicht v. Venture Stores, Inc.*, 562 S.W.2d 401, 402 (Mo.App. 1978). As a result, the application of immunity by statute does not present procedural bars to a recognized cause of action; instead, the statute eliminates civil actions against an employer.

When faced with constitutional challenges to R.S.Mo. § 287.120, Courts have held that the statute survives constitutional scrutiny. See *Wiley v. Shank & Flattery,* 848 S.W.2d 2, 5 (Mo.App. 1992); *Linsin v. Citizens Elec. Co.*, 622 S.W.2d 277, 281 (Mo.App. 1981); *State ex. rel. Maryland Heights Concrete Contractors, Inc. v. Ferriss*, 588 S.W.2d 489, 491 (Mo. *banc* 1979). In *Ferriss,* this Court held the statute is clear and unambiguous; it operates to

release the employer from all other liability. *Id*. at 490. In that case, this Court adopted the reasoning in *Seaboard Coastline R. Co. v. Smith*, 359 So.2d 427 (Fla. 1978):

> The Workmen's Compensation Act, by its express terms, replaces tort liability with strict liability for payment of the statutory benefits without regard to fault . . . Such immunity is the *heart and soul of* this legislation which has, over the years been of highly significant social and economic benefit to the working man, the employer and the State. (Emphasis added.)

Id. at 490-91. See also *Linsin v. Citizens Elec. Co.*, 622 S.W.2d at 281 (rejecting constitutional challenge to R.S.Mo. § 287.120.1 based on the holding in *Ferriss* without additional comment).

This Court once again faced the contention that the dismissal of a civil petition pursuant to R.S.Mo. § 287.120 violated the open courts provision. This Court stated that the immunity granted by the statute is an exercise of legislative authority rationally justified by the end sought, and hence valid against the constitutional challenge. *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 10 (Mo. *banc* 1992).

In contrast, appellant relies heavily on this Court's decision in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. *banc* 2000) for his stance that immunity under the workers' compensation statute violates the constitution. In that case, this Court held that the Dram Shop Act was unconstitutional because a civil remedy was dependent upon a prosecution and conviction of the offending liquor licensee. *Id*. at 551-52. This dependence on the discretion of the prosecuting attorney, which is wholly exempt from review, violates separation of powers, and

arbitrarily and unreasonably bars recognized causes of action. *Id.* *Kilmer* also held the provision giving the discretion to the executive branch violates the separation of powers because the determination of whether a civil claim for relief exists is properly within the province of the legislature, or in the absence of legislature enactment, with the court as a matter of common law. *Id.* at 552.

The legislature by R.S.Mo. § 287.120 has granted immunity from civil liability to employers for work-connected injuries. Appellant's action is not contingent on the discretion of the executive branch; rather, the legislature has modified a cause of action that had been recognized by common law prior to the enactment of the Workers' Compensation Law. Thus, *Kilmer* has no application.

For the same reason, appellant's reliance on *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599, 605-6 (Mo. *banc* 1969) (elimination of the judicially created charitable immunity); *Townsen & Townsen*, 708 S.W.2d 646, 649 (Mo. *banc* 1989) (elimination of common law doctrine of inter-spousal immunity); and *Jones v. State Hwy. Commission*, 557 S.W.2d 225, 228 (Mo. *banc* 1977) (abrogation of sovereign immunity after finding it existed as decisional law) (holding superseded by statute) is misplaced. In each of those cases, the courts held that the immunity eliminated was created by the judiciary not the legislature.

Where, as here, the immunity is based on statute, a court may not abolish it by judicial decision unless the statute creating the doctrine is unconstitutional. *O'Dell v. School District of Independence*, 521 S.W.2d 403, 410 (Mo. *banc* 1975) (J. Finch dissenting). That is not the

case here. The immunity under R.S.Mo. § 287.120 is constitutional under consistent and well-established legal precedent and principle.

POINT IV

THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S PETITION FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE APPELLANT FAILED TO ALLEGE ANY NEGLIGENT ACTS ON THE PART OF THE INDIVIDUAL RESPONDENTS WHICH COULD BE DEEMED TO FALL OUTSIDE THE SCOPE OF THE EMPLOYER'S DUTY TO PROVIDE A SAFE WORKPLACE, AND, ACCORDINGLY, THE RESPONDENTS WERE PROPERLY AFFORDED IMMUNITY FROM CIVIL SUIT UNDER THE WORKERS' COMPENSATION LAW.

A. STANDARD OF REVIEW

When the Missouri Workers' Compensation Law, R.S.Mo. § 287.010, *et seq.* applies, it provides the exclusive remedy, and an injured worker may not pursue common law remedies. *Miller v. McDonnell Douglas Corp.*, 896 S.W.2d 734, 736 (Mo.App. 1995) (abrogated on other grounds). A motion to dismiss for lack of subject matter jurisdiction is the proper method to raise the defense of the exclusivity of workers' compensation law. *State ex. rel. J.E. Jones Const. Co. v. Sanders*, 875 S.W.2d 154, 156-157 (Mo.App. 1994); *Anders v. A.D. Jacobson, Inc.*, 972 S.W.2d 612, 615 (Mo.App. 1998).

"The trial court should grant a motion to dismiss when it appears, by a preponderance of the evidence, that the court lacks subject matter jurisdiction." *State ex. rel. Rival Co. v. Gant*, 945 S.W.2d 475, 476 (Mo.App. 1997); Rule 55.27(g)(3). "As the term 'appears' suggests the quantum of proof is not high." *Burns v. Employer Health Serv., Inc.*, 976 S.W.2d 639, 641 (Mo.App. 1998) (citations omitted). Defendants are not required to show by

unassailable proof that there is no material issue of fact because the trial court decides only the preliminary question of its own jurisdiction, which is not a decision on the merits and is without res judicata effect. *State ex. rel. J.E. Jones Const. Co.*, 875 S.W.2d at 157.

The determination of whether a case falls within the exclusive jurisdiction of the Division is a question of fact. *Burns*, 976 S.W.2d at 641. "When the court's jurisdiction turns on a factual determination the decision should be left to the sound discretion of the trial judge." *Id.* (quotations omitted). The review, then, for appellate courts is for an abuse of discretion. "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." *Id.* (quotations omitted).

B. INTRODUCTION

Following the statutory mandate to liberally construe the Workers' Compensation Law, a well-reasoned interpretation of R.S.Mo. § 287.120 provides immunity to co-employees charged with executing the non-delegable duty of the employer to provide a safe work place.

As will be seen, appellant's allegations merely allege a failure to provide a safe work place. None of the allegations in appellant's petition allege "something extra" beyond the duty to provide a safe work place.

C. APPELLANT FAILED TO PLEAD FACTS CHARGING MORE THAN THE MERE FAILURE OF THE EMPLOYER'S DUTY TO PROVIDE A REASONABLY SAFE PLACE TO WORK; AS A RESULT, APPELLANT FAILED TO ALLEGE SOMETHING EXTRA AS REQUIRED BY *BADAMI*.

Contrary to appellant's assertion, *State ex. rel. Badami v. Gaertner*, 630 S.W.2d 175 (MoApp. 1982) does not hold that a defendant charged with misfeasance has no immunity but a defendant charged with nonfeasance does. Rather, *Badami* recognized that the nonfeasance-misfeasance distinction was becoming blurred as it faced the situation before it. *Badami* held that, in order to pursue a civil lawsuit against a co-employee, the injured party must charge the employee with something more than the failure to provide a reasonably safe work place, a duty delegated to him by the employer. *Id*. at 180-81. Appellant's contention that respondents "had entered upon" construction of the guardrail does not supply facts needed to subject respondents to common law liability.

Appellant then argues that respondents breached a common law duty, regardless of any employment relationship, by building a guardrail and handrail. But appellant explicitly acknowledges that respondents had only built the handrail because they were assigned that duty by their employer. Clearly, the employer had chosen respondents to perform the employer's non-delegable duty to provide a safe workplace. The situation fits squarely within the holding of *Badami.*

Further, *Sexton v. Jenkins & Associates, Inc.*, 41 S.W.3d 1 (Mo.App. 2000) addressed the same allegations that appellant claims constitute misfeasance: building a makeshift guardrail, using rotten wood, using a 1" x 4" instead of a 2" x 4" in violation of OSHA regulations, using only one nail to secure the guardrail board, and hammering the nail into the wrong side of the guardrails. *Sexton* held that the allegations relate to the employer's general duty to provide a safe work place, and do not state a cause of action against the individual

respondents. *Id.* at 6. Under the law of the case doctrine, these allegations fail as a matter of law to invoke civil jurisdiction.

The Court in *Sexton* then noted that generally courts have recognized the "something extra" element when the supervisor or co-worker was present with the plaintiff *and* was performing an act or operating a piece of equipment that resulted in the injury, or employees were directed by their supervisors to engage in dangerous conditions that a reasonable person would recognize as hazardous beyond the usual requirements of employment. *Sexton*, 41 S.W.3d at 5.

The Court cited to the following cases in holding that the allegations of the Henry County petition, which are repeated in the subject petition, did not allege "something extra.:" *Gabler v. McColl*, 863 S.W.2d 340, 343 (Mo.App. 1993)(injured employee's claims that president of company carelessly and negligently designed, engineered, assembled, built, maintained and inspected an elevator/dumbwaiter did not amount to "something extra" beyond the employer's duty to provide a safe workplace); *Felling v. Ritter*, 876 S.W.2d 2, 5 (Mo.App. 1994) (deceased employee's family claimed supervisors were negligent in failing to install a guard or safety switch on a rewinder machine did not amount to "something extra" beyond the employer's duty to provide a safe workplace). *Id.* at 6.

The petition now before this Court differs from the petition before the Court of Appeals in *Sexton v. Jenkins & Associates, Inc.*, 41 S.W.3d 1 (Mo. App. 2001) in the following respects:

A. Respondents affirmatively represented to appellant on the date of the accident that it was safe to use the hand rail and guardrail as well as safe to use the elevator shaft and certain scaffolding; and

B. Respondent Sloniker affirmatively directed appellant to use the hand and guardrail on the date of the accident.

(L.F.868).

The allegations in the present petition, that respondents intentionally directed appellant to use the guardrail when moving from the second floor to the first and representing to him it was safe, are simply a recasting of the failure to warn and failure to provide a safe way between floors allegations found wanting in *Sexton*. (L.F. 868).

None of the "new" allegations come close to the conduct found sufficient to be "something extra" in the following cases cited by *Sexton*:

1. *Tauchert v. Boatmen's Nat. Bank of St. Louis*, 849 S.W.2d 573 (Mo. *banc* 1993) (foreman negligently rigged a hoist to test an elevator with employee);

2. *Hedglin v. Stahl Specialty Company*, 903 S.W.2d 922 (Mo. App. 1995) (supervisor negligent for arranging employee to be dangled from tines of a forklift over a vat of scalding water);

3. *Workman v. Vader*, 854 S.W.2d 560 (Mo. App. 1993) (co-employee negligent in throwing packaging materials on floor causing employee to slip);

4. *Pavia v. Childs*, 951 S.W.2d 700 (Mo. App. 1997) (manager of grocery store negligent in operating a forklift to elevate an employee 15 feet off of the floor to reach items in warehouse).

Id. at 5. None of the actions described in those cases had anything to do with providing a safe work place. In the present case, the construction by respondents of a guardrail around an elevator shaft in this matter has everything to do with providing a safe workplace.

The new allegations do not maintain that anyone was present with appellant at the time of the injury and performing an act or operating a piece of equipment that resulted in the injury as required by *Sexton*. Respondents were not "operating" the guardrail or performing an act that resulted in injury. Appellant cannot allege an act by any respondent that caused the injury outside of providing a safe work place.

Appellant has stated in an affidavit that he had conversations with respondents concerning how appellant was to get from the second floor to the first *safely* after pouring concrete. (L.F. 784-85) In these conversations, all respondents, appellant alleges, told him to use the guardrail to get from floor to floor. What could possibly relate more to respondents' duty to provide a safe work place than those referenced discussions? Appellant's own affidavit explicitly indicates that the direction to use the guardrail was to provide appellant with a safe way from floor to floor in an attempt to provide a safe work place.

Nor does the "new" petition allege that appellant was directed to engage in dangerous conditions that a reasonable person would recognize as beyond the usual requirements of employment. *Sexton*, 41 S.W.3d at 5. Instead, at best, the new allegations simply make

additional allegations of the failure by respondents to discharge their duty to provide a safe work environment.

Such was the holding in *Davis v. Henry*, 936 S.W.2d 862 (Mo. App. 1997). In that case, the plaintiff Davis was injured while driving a truck pursuant to orders from Henry, the president of his employer. After collecting workers' compensation benefits, he sued Henry personally, alleging acts of negligence on his part. The trial court granted Henry's motion to dismiss for lack of subject matter jurisdiction. The Court of Appeals affirmed.

After citing *Hedglin*, *Workman*, and *Tauchert* as examples of the "something extra" needed to impose personal liability, the court held that the two actions taken by defendant Henry alleged by plaintiff did not constitute "something extra." The court found that plaintiff's petition alleged the following conduct by defendant Henry:

1. Henry ordered Davis to pick up the load with a truck which Henry knew or should have known was incapable of transporting a load of such weight; and
2. Henry negligently and carelessly failed to adequately instruct Davis of the dangers associated with towing a hauler containing 35 tons.

The Court of Appeals concluded that these actions "constitute nothing more than a failure by Henry to discharge his duty of providing a safe work environment." *Id.* at 864.

The same can be said of the allegations in the petition now faced by this Court. These allegations can be reduced to the charge that respondents negligently directed appellant to use the guardrail, much like ordering Davis to use an unsafe truck, and represented to appellant that the guardrail was safe, much like failing to instruct of dangers of hauling. These allegations

do not provide the "something extra" element but simply are different expressions of the claim that respondents failed to provide a safe work environment.

In finding defendant immune from liability, the Court of Appeals in *Davis v. Henry* relied on the decision in *J.M.F. v. Emerson*, 768 S.W.2d 579 (Mo.App. 1989). In that case, plaintiff brought a suit stating several allegedly negligent acts committed by the president of her employer after plaintiff cut her finger with a medical instrument used to draw blood from an AIDS-infected patient. First, plaintiff alleged that her employer's president, Dr. Emerson, knew she was inadequately trained as to the handling AIDS-infected blood samples but still directed her to draw blood from an infected patient. Second, Dr. Emerson did not appoint himself or a registered nurse to draw blood from the AIDS patient. Third, Dr. Emerson instructed plaintiff to use a lancet, an improper and unsafe instrument, to draw the blood instead of a syringe. Fourth, Dr. Emerson initiated a discussion regarding the disposal of the instruments used to draw the blood which confused plaintiff at the time of the disposal of the instruments. The Court of Appeals held that each of the acts alleged were within Dr. Emerson's non-delegable duty of safe and proper supervision which was owed to his employer. *Id.* at 581-82.

The same analysis applies to the facts in this case. Appellant alleges that respondents did "something extra" by directing appellant to use the guard rail when it was defective and affirmatively telling appellant it was safe to use the railing. (L.F. 6) This allegation mirrors *J.M.F.*'s allegation that plaintiff was negligently directed to draw blood when it was, due to her training, unsafe for her to do so. The president's actions in directing plaintiff to draw blood

and the direction here to use the railing may violate an employer's duty of safe and proper supervision, but it does not provide the "something extra" needed for personal liability.

Further, appellant here alleges that respondents failed to tell appellant that the guardrail was defective and, as a result, increased the risk of injury to appellant. Also, appellant alleges that respondents affirmatively represented to appellant that it was safe to use the guardrail and failed to provide any other means to get from the second floor to the first floor. (L.F.10-LF.11). Again, the Court of Appeals faced nearly identical issues in *J.M.F.*: plaintiff was *instructed* to use unsafe instruments when safer instruments were available. The Court of Appeals held that such allegations did not plead actionable negligence; likewise, appellant's allegations that respondents directed appellant to use the guardrail do not plead actionable negligence.

Clearly, the trial court's dismissal here followed established Missouri precedent. Appellant's petition did not allege anything more than the mere failure to provide a safe work place. The trial court well-reasoned opinion does not "[shock] the sense of justice"
and does not "[indicate] a lack of careful consideration."

CONCLUSION

This Court need not reach the merits of appellant's argument. First, appellant waived his constitutional challenge to R.S.Mo. § 287.120 by failing to raise it at the first opportunity. Further, the law of the case precludes re-litigation of all issues decided by *Sexton v. Jenkins & Associates, Inc.*, 40 S.W.3d 1 (Mo.App. 2000) as well as all points raised for the first time here.

In any event, Missouri law, since the *Badami* decision, has consistently held that immunity under the Workers' Compensation Law applies to co-employees. In so doing, Missouri Courts have followed the legislative language and intent, and promoted the policy of the statute by expanding the scope of the act.

Missouri law has also held that the immunity under the Workers" Compensation Law is dependent on the nature of the negligent act alleged. Immunity extends to the failure to properly discharge an employer's duty to provide a safe work place; immunity is not dependent on the capacity of the employee alleged to be negligent.

Further, appellant's constitutional challenge to R.S.Mo. § 287.120 fails also. A Missouri statute may limit a cause of action recognized previously by common law or a statute. R.S.Mo. § 287.120 does precisely that–it does not impose a procedural bar to right of access to the Courts to pursue a cause of action recognized by the substantive law.

Finally, appellants allegations fail to allege that respondents did "something extra" beyond a breach of general supervision and safety. As such, respondents are entitled to immunity under R.S.Mo. § 287.120.

Wherefore, respondents ask this Court to dismiss this appeal or, in the alternative, to affirm the trial court's dismissal of appellant's present action for lack of subject matter jurisdiction.

Respectfully submitted,

_____

John R. Loss, Bar #26053
John M. Brigg, Bar #49441
BENJAMIN & LOSS, P.C.
700 Peck's Plaza
1044 Main Street
Kansas City, MO 64105
Phone: 816-471-8100
Fax: 816-221-7886
ATTORNEYS FOR RESPONDENTS
STEVE SLONIKER, HOWARD
HURLBURT, and KENT LACY

CERTIFICATE OF SERVICE

I do hereby certify that this Respondents' Brief was served upon appellant by mailing two copies and a disc to each this ____ day of April, 2004:

Andrew J. Gelbach, Esq.
Professional Corporation
P. O. Box 375
Warrensburg, MO 64093

and

John E. Turner, Esq.
TURNER & SWEENY
10401 Holmes Road, Suite 450
Kansas City, MO 64131
ATTORNEYS FOR APPELLANT

_____

John R. Loss

AFFIDAVIT

STATE OF MISSOURI)
) ss:
COUNTY OF JACKSON)

I, John R. Loss, first being duly sworn upon my oath, state as follows:

1. I am a licensed attorney in the State of Missouri with Benjamin & Loss, P.C., Missouri Bar No. 26053, 1044 Main, Suite 700, Kansas City, Missouri 64105, phone number 816-471-8100, and fax number 816-221-7886.

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

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

4. The Respondents' Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06.

5. The work count of this document is 12,058.

_____
John R. Loss

Subscribed and sworn to before me this ____ day of _____, 2004.

_____
Notary Public

My Commission Expires:

_____