IN THE
MISSOURI SUPREME COURT

APPEAL NO. SC90050

J. MICHAEL MCCRACKEN,
Appellant

vs.

WAL-MART STORES EAST, LP
Respondent

Appeal from the Circuit Court of Greene County, Missouri
The Honorable Thomas E. Mountjoy
Case No. 105CC4142

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This began as an appeal from an order by the Honorable Thomas E. Mountjoy, Circuit Judge, Division 4, of Greene County, Missouri dismissing plaintiff's petition for lack of subject matter jurisdiction because jurisdiction is vested exclusively in the Missouri Division of Workers' Compensation by virtue of Section 287.040(1), R.S.Mo. (2004). The appeal was within the general appellate jurisdiction of the Missouri Court of Appeals, pursuant to Article V, Section 3 of the Constitution of Missouri, because this case does not involve the validity of a treaty or statute of the United States, or the validity of a statute or provision of the constitution of this state, or the construction of any revenue law, or the title to any state office. As the Circuit Court of Greene County, Missouri is located within the territorial jurisdiction of the Missouri Court of Appeals, Southern District, this appeal was properly before that court.

After oral argument, the Missouri Court of Appeals, Southern District, rendered its opinion in this case in *J. Michael McCracken v. Wal-Mart Stores East, L.P.*, No. SD29087 on February 25, 2009. Thereafter, respondent Wal-Mart filed its motion for rehearing or to transfer to the Missouri Supreme Court before the Court of Appeals on March 10, 2009, and both of those requests were denied on March 17, 2009. After respondent Wal-Mart filed its Application for Transfer with the Missouri Supreme Court pursuant to Rule 83.04, Mo.R.Civ.P. (2009), on March 31, 2009, transfer was granted by this Court on May 5, 2009 pursuant to Article V, Section 10 of the Constitution of Missouri and Rule 83.04, Mo.R.Civ.P., 2009. As a result of the transfer, pursuant to

Article V, Section 10 of the Missouri Constitution, this Court has jurisdiction to dispose of this case, in its entirety, as if it were an original appeal to the Missouri Supreme Court.

STATEMENT OF FACTS[1]

Respondent (Wal-Mart) contracted with Interstate Brands Corporation (IBC) for the purchase and delivery of certain bread products at its Neosho, Missouri Supercenter. (L.F. 26, Vol. I – Defendant's Motion to Dismiss, paragraph 3; L.F. 186, Vol. I – Affidavit of Henry Wallace, paragraph 10; L.F. 197, Vol. I – Supplier Agreement). Appellant (McCracken) worked for IBC as a delivery person. (L.F. 58, Vol. I – McCracken Depos., page 18, lines 6-17). IBC produced and delivered bakery products such as breads, buns, etc. (L.F. 103, Vol. I, Townsend Depos., page 8, lines 1-7). On October 19, 2004, McCracken was in the process of delivering his employer IBC's bread products to Wal-Mart's Neosho store and was in the process of putting empty bread racks on a concrete pad so he could eventually load the empty bread racks onto his truck when he was injured. (L.F. 63-64, Vol. I – McCracken Depos., page 39, line 4 – page 41, line 20; L.F. 67, Vol. I – McCracken Depos., page 53, line 22 – page 54, line 20; L.F. 41, Vol. I – Plaintiff's Petition, paragraphs 5-7).

Wal-Mart never had provided McCracken with any instructions on how he was to perform his delivery to it. (L.F. 69, Vol. I – McCracken Depos., page 62, line 16 – page 63, line 7). McCracken was provided with a notebook of instructions by his employer, IBC, with respect to the deliveries on his route, including his delivery to Wal-Mart. (L.F.

[1] The two-volume legal file is cited by volume and page number as "L.F. ____, Vol. ____."

61-62, Vol. I – McCracken Depos., page 31, line 18 – page 32, line 4). McCracken had made delivery to the Wal-Mart store three days before he was injured, and on approximately 10-12 other occasions prior to his injury, when he acted as a relief driver during the regular driver's vacation. (L.F. 66, Vol. I – McCracken Depo., page 50, lines 4-15).

On August 25, 2005, McCracken filed a two-count petition alleging the negligent and/or intentional acts of Wal-Mart's employee in causing his injuries while he was delivering bread products for his employer. (L.F. 1, Vol. I, Docket Sheet; L.F. 12, Vol. I – Petition). The parties stipulated to the substitution of the respondent as the proper party defendant. Wal-Mart filed its answer to McCracken's petition on September 29, 2005 and did not raise the issue of statutory employee under Section 287.040(1), R.S.Mo. (2004) in the answer or by separate motion. (L.F. 18-22, Vol. I, Defendant's Answer to Plaintiff's Petition) (L.F. 23, Vol. I). The count of the petition (Count II) alleging an intentional tort was voluntarily dismissed without prejudice by McCracken on the morning that the jury trial of the case was to begin. (L.F. 25). McCracken was compensated by his employer, IBC, under a workers' compensation claim that listed his employer as IBC. (L.F. 46, 50, Vol. I).

On the day the jury trial was to begin, March 3, 2008, Wal-Mart first raised the claim that the trial court had no subject matter jurisdiction because Section 287.040(1) applied when it filed its Motion to Dismiss For Lack of Subject Matter Jurisdiction and Suggestions in Support. (L.F. 6, Vol. I; L.F. 26, Vol. I). The trial court continued the trial to permit McCracken's counsel to respond to the motion, which he did. (L.F. 6, Vol.

I, L.F. 176, Vol. I). After a hearing where oral argument was presented to the trial court, (L.F. 8, Vol. I), the trial court entered its order and judgment sustaining Wal-Mart's motion and dismissing McCracken's petition (Count I) for lack of subject matter jurisdiction. (L.F. 238, Vol. II). The appeal of that order and judgment to the Court of Appeals, Southern District, by McCracken followed. (L.F. 239, Vol. II).

The Court of Appeals rendered its opinion in this matter on February 25, 2009. (Appendix A-3) wherein it found that the circuit court had subject matter jurisdiction and reversed the judgment of the trial court dismissing appellant's petition for lack of subject matter jurisdiction and remanded the case to the trial court for further proceedings not inconsistent with its opinion.

Respondent Wal-Mart claims the Court of Appeals opinion is in direct conflict with this Court's decision in *Goodrum v. Asplundt Tree Expert Company*, 824 S.W.2d 6 (Mo.banc 1992), and the opinion reverses over 20 years of procedural law allowing the defense of Sections 287.040(1) and 287.120, R.S.Mo. to be raised by motion to dismiss for lack of subject matter jurisdiction. (Appendix A-9 – Application For Transfer).

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE TRIAL COURT DOES HAVE SUBJECT MATTER JURISDICTION OF PLAINTIFF'S PETITION IN THAT THIS IS A CIVIL ACTION BROUGHT PURSUANT TO ARTICLE V, SECTION 14 OF THE MISSOURI CONSTITUTION.

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo.banc 2009)

Roberts v. Epicure Foods Company, 330 S.W.2d 837 (Mo. 1960)

Simmons v. Kansas City Jockey Club, 66 S.W.2d 119 (Mo. 1933)

II

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION, REGARDLESS OF THE PROCEDURAL PATH USED TO RAISE THE UNDERLYING ISSUE, BECAUSE THE PREPONDERANCE OF EVIDENCE DOES NOT DEMONSTRATE THAT APPELLANT WAS A "STATUTORY EMPLOYEE" OF RESPONDENT UNDER SECTION 287.040(1), R.S.MO. (2004) IN THAT, AS A DELIVERY PERSON FOR A SUPPLIER OF GOODS TO RESPONDENT, APPELLANT'S DUTIES WERE NOT PERFORMED IN THE USUAL COURSE OF RESPONDENT'S BUSINESS.

Section 287.040(1), R.S.Mo. (2004).

Martinez v. Nationwide Paper, 211 S.W.3d 111 (Mo.App.S.D. 2006).

Wallace v. Porter DeWitt Construction Co., 476 S.W.2d 129 (Mo.App.S.D. 1971).

Shipley v. Gipson, 773 S.W. 2d 505 (Mo.App.E.D. 1989).

Looper v. Carroll, 202 S.W.3d 59 (Mo.App.W.D. 2006).

ARGUMENT

Standard of Review

If the procedural path to be followed in addressing the applicability of Section 287.040(1), R.S.Mo. (2004) to a given case is that of a lack of subject matter jurisdiction, the standard of review would be as follows: A lawsuit should be dismissed whenever it "appears" that the trial court lacks subject matter jurisdiction. *State ex rel. Jones Construction Company v. Sanders*, 875 S.W.2d 154, 157 (Mo.App. E.D. 1994); Mo.R.Civ.P. Rule 55.27(g)(3) (2009). The initial burden to show that the trial court lacks subject matter jurisdiction is on the movant. *Shaver v. First Union Realty Management, Inc.*, 713 S.W.2d 297, 299 (Mo.App. S.D. 1986). The party raising the defense must show by a preponderance of evidence that the court lacks jurisdiction. *Sanders*, 875 S.W.2d at 157. This Court must sustain the trial court's finding that it did not have subject matter jurisdiction unless the trial court abused its discretion. *James v. Union Electric Co.*, 978 S.W.2d 372, 374 (Mo.App. E.D. 1998). Judicial discretion is abused when the trial court's 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**.** *Anglim v. Missouri Pacific Railroad Company***,** 832 S.W.2d 298, 303 (Mo.banc 1992).

If the procedural path to be followed in addressing the applicability of Section 287.040(1), R.S.Mo. (2004) to a given case is an affirmative defense, to be pleaded pursuant to Rule 55.08, Mo.R.Civ.P. (2009) and to be ruled on in a motion for summary

judgment that the affirmative defense applies as a matter of law, pursuant to Rule 74.04, Mo.R.Civ.P. (2009), the standard of review of this Court would be different.

Wal-Mart would initially carry the burden of proof of establishing the affirmative defense. *Roberts v. Epicure Foods Company*, 330 S.W.2d 837, 839 (Mo. 1960). When raised as a bar by Wal-Mart by motion for summary judgment, Wal-Mart would then have to establish its motion for summary judgment on its affirmative defense of Section 278.040(1) only if there is no genuine issue as to any material fact, and summary judgment should be granted as a matter of law. Rule 74.04(c)(3); *Lumbermens Mutual Cas. Co. v. Thornton*, 92 S.W.3d 259, 262 (Mo.App.W.D. 2002). The standard of review of the grant of summary judgment is de novo because the propriety of entering summary judgment is a question of law, and no deference is given to the trial court's determination. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 376(Mo.banc 1993).

Although the workers' compensation act must be liberally construed in favor of employees to secure its benefits to the greatest number, since the workers' compensation law is in derogation of the common law, the act must be strictly construed where existing common law rights and remedies are affected. *Owner Operator Ind. Drivers Assoc. Inc. v. New Prime, Inc.*, 133 S.W.3d 162, 169 (Mo.App.S.D. 2004).

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE TRIAL COURT DOES HAVE SUBJECT MATTER JURISDICTION OF PLAINTIFF'S

PETITION IN THAT THIS IS A CIVIL ACTION BROUGHT PURSUANT TO ARTICLE V, SECTION 14 OF THE MISSOURI CONSTITUTION.

The trial court dismissed appellant's petition for lack of subject matter jurisdiction on the basis that appellant was the statutory employee of respondent under Section 287.040(1), R.S.Mo. (2004) and therefore, appellant's only remedy is under the workers' compensation provisions of Section 287.010, et seq. R.S.Mo.

However, this Court addresses the whole issue of subject matter jurisdiction in *J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo.banc 2009). Accordingly, Missouri courts recognize only two kinds of jurisdiction: subject matter jurisdiction and personal jurisdiction. *In re Marriage of Hendrix*, 183 S.W.3d 582, 587-88 (Mo. banc 2006). These are the only two kinds of jurisdiction for Missouri circuit courts and they are based on constitutional principles. *J.C.W.* at 252. Subject matter jurisdiction is governed by Article V, Section 14 of the Missouri Constitution which provides, in relevant part, that "[t]he circuit courts shall have original jurisdiction over all cases and matters, civil and criminal…"

Recognizing that numerous cases have, over the years, purported to recognize a third concept of "jurisdictional competence," which has been confused with subject matter jurisdiction, *Id* at 254, this Court undertakes to clarify the difference between statutes that restrict claims for relief and subject matter jurisdiction. This Court states, at 254:

> "[Be]cause the authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction, there is no

constitutional basis for this third jurisdictional concept for statutes that would bar litigants from relief. Elevating statutory restrictions to matters of 'jurisdictional competence' erodes the constitutional boundary established by article V of the Missouri Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter jurisdiction of the clarity that the constitution provides. If 'jurisdictional competence' is recognized as a distinct concept under which a statute can restrict subject matter jurisdiction, the term creates a temptation for litigants to label every statutory restriction on claims for relief as a matter of jurisdictional competence. Accordingly having fully considered the potential ill effects of recognizing a separate jurisdictional basis called jurisdictional competence, the courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is no third category of jurisdiction called 'jurisdictional competence.'"

This Court states that it is clear that neither the courts nor the legislature owns the concept of subject matter jurisdiction, which is truly a function of the Missouri Constitution. *Id.* at 254.

Therefore, when a statute speaks in jurisdictional terms or can be interpreted in such terms, such as Section 287.120 R.S.Mo. ("Every employer subject to the provisions of this chapter…shall be released from all other liability therefor whatsoever . . . . The rights and remedies herein granted to an employee shall exclude all other rights and

remedies of the employee . . .".), it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief that courts may grant. *Id.* at 255.

This Court concludes that as to subject matter jurisdiction, if the case is a civil case, the circuit court has subject matter jurisdiction and thus has authority to hear the dispute. *Id.* at 254.

In applying *J.C.W.* to the present case, the Missouri Court of Appeals, Southern District, in its opinion, determined that respondent Wal-Mart's motion to dismiss asserted that the exclusive workers' compensation remedy provided by Section 287.120 deprived the trial court of subject matter jurisdiction. While that statute may or may not ultimately operate to bar appellant from any relief on his claim, it does not deprive the trial court of its constitutionally granted subject matter jurisdiction to hear and decide appellant's tort claim, and therefore the trial court erred in dismissing appellant's petition "for lack of subject matter jurisdiction." *McCracken v. Wal-Mart Stores East,* No. SD29087, at *2-3.

The Court of Appeals also suggested that, because of the rationale of *J.C.W.*, the analytical foundation for using a motion to dismiss for lack of subject matter jurisdiction is no longer a viable procedure and that procedure should no longer be followed. *Id.* at *3.

The Court of Appeals concluded that "the question as to whether or not the Work[ers'] Compensation Act, section 287.010 et seq. is applicable to a claim for which recovery is sought in a common law action is an affirmative defense and the burden of

establishing same rests upon the defendant," citing *Roberts v. Epicure Foods Company*, 330 S.W.2d 837, 839 (Mo. 1960).

In *Roberts*, this Court states, in relevant part, at 839:

"The first point briefed is that the matters relied upon in the motion constitute affirmative defenses which should have been pleaded in defendants' answer and cannot be properly raised in a motion to dismiss. We agree with that contention."

Once respondent Wal-Mart raises the issue by affirmative defense, the issue may be dealt with by motion for summary judgment. Rule 74.04, Mo.R.Civ. (2009).

For all of the foregoing reasons, the trial court erred in dismissing appellant's petition for lack of subject matter jurisdiction and the trial court's ruling in that regard should be reversed as decided by the Court of Appeals, Southern District.

II

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION, REGARDLESS OF THE PROCEDURAL PATH USED TO RAISE THE UNDERLYING ISSUE, BECAUSE THE PREPONDERANCE OF EVIDENCE DOES NOT DEMONSTRATE THAT APPELLANT WAS A "STATUTORY EMPLOYEE" OF RESPONDENT UNDER SECTION 287.040(1), R.S.MO. (2004) IN THAT, AS A DELIVERY PERSON FOR A SUPPLIER OF GOODS TO RESPONDENT, APPELLANT'S DUTIES WERE NOT PERFORMED IN THE USUAL COURSE OF RESPONDENT'S BUSINESS.

Although appellant agrees with the Court of Appeals, Southern District that the trial court erred in dismissing the appellant's petition for lack of subject matter jurisdiction, that still leaves unresolved the underlying issue: i.e., whether or not appellant's claim is barred by the application of Section 287.040(1), R.S.Mo. (2004).

In order for this Court to reach that underlying issue, appellant is willing to concede that it is unnecessary for respondent to have to plead the statute as an affirmative defense before this Court can address its applicability in this limited instance.

Because of the overwhelming burden the trial court's error has cost appellant in terms of the time lapse and expense, appellant respectfully requests that this Court address the underlying issue now because it can be decided regardless of the parties' respective burden of proof on the issue and regardless of the procedural posture used by the parties to reach the issue.

Appellant submits that regardless of these issues, it is clear that appellant's claim is not so barred because of the undisputed underlying facts and because of existing law.

Section 287.040(1) takes away the common law rights of employees for negligence of certain third parties by defining the third parties as statutory employers, even though they are not actual employers. *Huff v. Union Electric Company*, 598 S.W.2d 503, 511 (Mo.App. E.D. 1980). The purpose of the statute is to prevent employers from circumventing the requirements of the workers' compensation law by hiring independent contractors to perform work the employer would otherwise perform. *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo.banc 1995). Therefore, the statutory employment doctrine only applies to "certain constructive employment

relationships in which employers have work done by contract." *Vatterott v. Hammerts Iron Works, Inc.*, 968 S.W.2d 120, 121 (Mo.banc 1998).

The proponent of a claim of the existence of statutory employer status bears the burden of proving that the injured person was a statutory employee of the putative statutory employer. *Martinez v. Nationwide Paper*, 211 S.W.3d 111, 115 (Mo.App.S.D. 2006). To establish the status of statutory employer, the proponent of that status must establish: (a) the work was performed pursuant to a contract, (b) the injury occurred on or about the premises of the alleged statutory employer, and (c) the work is in the usual course of business of the alleged statutory employer. *Bass,* 911 S.W.2d at 619-20.

As used in Section 287.040(1), the term "usual business" is defined as "those activities: (1) that are routinely done, (2) on a regular and frequent schedule, (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time, and (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement." *Bass,* 911 S.W.2d at 621. Each case is determined on its own particular facts and there is no "litmus paper" test for determining what particular work is within the scope of the usual operation of the business. *Lyon v. J.E. Dunn Constr. Co.*, 693 S.W.2d 169, 171 (Mo.App.W.D. 1985).

There is no dispute here as to subparagraph (a) and (b) – that the work was performed pursuant to a contract and that appellant was injured on respondent's premises. However, respondent has not met its burden of proving, by a preponderance of the

evidence, that the last element exists in this case: that at the time of the injury, the work being performed by appellant was in the usual course of business of the respondent.

The seller-purchaser relationship between appellant's employer IBC and respondent squarely places it within the holdings of an entire line of cases that have held that Section 287.040(1), is clearly not applicable to injured delivery persons of sellers of goods even when they are injured on the purchasers' premises.

The most recent case espousing this view is *Martinez v. Nationwide Paper*, 211 S.W.3d 111 (Mo.App.S.D. 2006). In that case, the injured worker was a lumper (unloader) who contracted with the supplier's driver to unload his truck at the purchaser's place of business. *Id.* at 114.

In that case, the Court held that since the alleged statutory employer did not have a contractual duty to unload the paper products it bought from its supplier, the injured worker who contracted with the supplier's driver was not injured while carrying out a duty routinely performed by the alleged statutory employer. *Martinez,* 211 S.W.3d at 117. Most importantly, however, the court notes in *Martinez* at 116:

> '[A] contract for the sale and purchase of a product even though it includes the delivery and unloading of the product upon the premises of the purchaser, does not render the seller's delivery man a statutory employee of the purchaser.' *Shipley v. Gipson*, 773 S.W.2d 505, 507 (Mo.App. 1989); see also *DuBose v. FlightSafety International, Inc.*, 824 S.W.2d 486, 489 (Mo.App. 1992); *Ferguson*, 492 S.W.2d at 136-137; *Wallace v. Porter DeWitt Constr. Co.*, 476 S.W.2d 129, 131-32 (Mo.App. 1971).

It is also foot-noted in *Martinez* that, although the Missouri Supreme Court had overruled part of *Ferguson v. Air-Hydraulics Company*, cited supra in *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532 (Mo.banc 1988), "*Ferguson* remains good law, however, with respect to the proposition that a person who is injured on the buyer's premises while unloading the seller's goods pursuant to the purchase agreement does not become the buyer's statutory employee." *Id.* at 117, fn 4.

That is precisely the situation here. McCracken was the delivery person for IBC who was injured delivering bread products purchased by respondent to respondent's Neosho store. He thereby did not become respondent's statutory employee.

In *Wallace v. Porter DeWitt Construction Co.*, 476 S.W.2d 129 (Mo.App.S.D. 1971), a gasoline tank truck driver-delivery person, who was delivering and filling the defendant's heavy pieces of machinery on site on a regular basis, was determined by the appellate court not to be a statutory employee of the defendant. *Id.* at 134. In so holding, the appellate court recognized that, in the final analysis, the relationship between the gasoline supplier and the alleged statutory employer was simply that of buyer and seller, with the supplier selling and delivering fuel into the tanks of the alleged statutory employer in the same fashion that the purchaser of gasoline at a filling station has the fuel he purchases delivered into the tank of his automobile. *Id.* The appellate court concluded that the work in which the supplier was engaged did not enter directly into the commercial function of the buyer's usual business, but merely afforded facilities and casual convenience for the conduct of that business. *Id.* In other words, in that case, the supplier's role was to facilitate the buyer's business, but it was not to work in or

participate in the actual operation of the usual business that buyer carried on upon its premises. *Id.*

In *Shipley v. Gipson*, 773 S.W.2d 505 (Mo.App.E.D. 1989), the issue was whether an employee of a logging company who was delivering logs to a saw mill was the statutory employee of the saw mill where his foot was crushed. The appellate court emphasized that "faithful application of the statute [§287.040(1)] as written and intended [requires] recognizing the real roles and relationship of the parties" *Id.* at 507 quoting *Wallace*, cited supra. The court held that the logging company employee was not a statutory employee under Section 287.040(1). In so holding, the court in *Shipley* determined that "[A] contract for the sale and purchase of a product even though it includes the delivery and unloading of the product upon the premises of the purchaser, does not render the seller's delivery man a statutory employee of the purchaser." *Id.* at 507.

The court in *Shipley* goes on to state, at 508:

> Performance of work which merely carries out the duties assigned by the employee's direct employer, even though it incidentally benefits the statutory employer, is not work performed pursuant to a contract for the delegation of the latter's usual business operations to an independent contractor.

In *Ferguson v. Air Hydraulics Company*, 492 S.W.2d 130 (Mo.App.E.D. 1973), a driver-delivery person employed by a trucking company was injured while steel he was delivering was being unloaded at the defendant's place of business. In holding that the

delivery person was not the statutory employee of the defendant where the steel was being delivered, the court opined that in order to satisfy the requirements of the statute, the work performed by the employee must be for the primary benefit of the alleged statutory employer and not merely work which carries out the duties assigned to the employee by his direct employer. *Id.* at 137.

In *Ferguson*, the injured worker was doing work primarily for the benefit of his employer, and only incidentally for the benefit of the purchaser. *Id.* The court also acknowledged the fact that the injured worker was injured while helping the purchaser's employees unload the steel and thus was engaged in the usual work of the steel purchaser, did not make him a statutory employee. *Id.* To be such, the court reasoned, the work of the injured employee had to be primarily for the benefit of the purchaser and in the course of its business. *Id.* In applying the same standard as the earlier cited cases, the court states, at 137:

> [T]he relationship, as stated, was that of buyer and seller rather than one of a contract to unload. In delivering the steel Ferguson was required to assist in unloading of the goods under his union contract.

In *Looper v. Carroll*, 202 S.W. 3d 59 (Mo.App.W.D. 2006), the appellate court held that a drywall supplier's delivery person who was injured on the premises of the general contractor-purchaser of the drywall while unloading the drywall was not a statutory employee of the general contractor-purchaser under Section 287.040(1). *Id.* at 63. After citing several other cases as precedent for its ruling, the court indicated that the alleged statutory employer failed to show that the delivery of the product occurred in the

operation of the alleged statutory employer's usual business. *Id.* The court noted that the injured person received no detailed instructions from the purchaser as to where to place the drywall or how to apportion it. *Id.* There was no evidence that the drywall purchaser's employees ever performed the injured person's work of delivering drywall to these premises, or that after the injured person's accident, the drywall purchaser hired any employees to do that work. *Id.* Consequently, the court held that there was no basis for finding that the injured person who sued the general contractor-purchaser was his statutory employee. *Id.*

There are other cases which have also essentially held or alluded to the fact that the delivery person of a seller who is injured on a purchaser's premises is not the statutory employee of the purchaser under Section 287.040(1). See *Romero v. Kansas City Station Corp.*, 98 S.W.3d 129, 138 (Mo.App.W.D. 2003); *Dubose v. FlightSafety International, Inc.*, 824 S.W.2d 486, 489 (Mo.App.E.D. 1992); *Lyon v. J.E. Dunn Constr. Co.*, 693 S.W.2d 169, 171 (Mo.App.W.D. 1985); *Counts v. East Perry Lumber Company*, 462 S.W.2d 141, 145 (Mo.App.E.D. 1970).

Finally, in a case very similar to the current case, the Eastern District Court of Appeals in 1995 held that a soft drink delivery person injured from a fall on a loading dock at one of the defendant's chain of grocery stores was not a statutory employee of the grocery store. *Parker v. National Super Markets, Inc.*, 914 S.W.2d 30, 32 (Mo.App.E.D. 1995). In that case, plaintiff was the route delivery person employed by a Pepsi-Cola distributor which delivered Pepsi-Cola to a large number of companies in its service area,

including the defendant's store in Cape Girardeau. Plaintiff was delivering Pepsi to that store when he stepped on a metal plate and was injured on the loading dock. *Id.* at 31.

The defendant contended that because 80% of the products delivered to its Cape Girardeau store were delivered by employees of defendant, such deliveries as the plaintiff was making were in its usual course of business. *Id.* It claimed the products delivered by the defendant's employees were those which came from the defendant's warehouse in St. Louis. *Id.* However, the court notes that products which were delivered directly to the defendant's store by vendors of products such as beer, soda, bread, and snacks were never delivered by defendant's employees because the arrangements were for those vendors to deliver those products. *Id.* There, the court, rather than citing any of the above cases concerning seller-purchaser contracts, states at 31-32:

> There is no evidence that vendors would have allowed defendant's employees to make such deliveries, there was no evidence that defendant's employees ever had made such deliveries, and there was evidence that no deliveries of Pepsi product had ever been made by defendant's employees. The very nature of the agreement between Marion Pepsi and defendant was that Marion Pepsi supplied its product to the store, unloaded its product and shelved it using its employees. Defendant failed to establish that plaintiff was its statutory employee. [Emphasis supplied]

To paraphrase the court in *Parker*, the very nature of the agreement between IBC and respondent was that IBC supplied its product to the respondent's Neosho store, unloaded its products, and shelved its products using its (IBC's) employees. Appellant

was merely carrying out his duties as an employee of IBC, at its direction, in delivering the product his employer IBC sold to respondent. There is no evidence that appellant's employer, IBC, would have allowed respondent's employees to make appellant's deliveries, and there is no evidence that respondent's employees had ever made such deliveries. Consequently, under all of the foregoing cases, including *Parker*, it has not been established by a preponderance of the evidence that appellant was respondent's statutory employee. Because it has not been established by a preponderance of the evidence that appellant was respondent's statutory employee, the trial court should not have dismissed appellant's petition.

CONCLUSION

The circuit court has subject matter jurisdiction over appellant's personal injury suit. The circuit court's dismissal of appellant's petition for lack of subject matter jurisdiction was error under these circumstances. The decision of the trial court should be reversed. Because the preponderance of the evidence is that appellant was not a statutory employee of respondent, this Court should decide that issue in favor of appellant and against respondent.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

COMES NOW Donald E. Woody, of the law firm of HALL, ANSLEY, RODGERS & SWEENEY, P.C., of lawful age and having been duly sworn, states that this Brief complies with the limitations contained in Mo.R.Civ.P. Rule 84.06(b) (2009).

I further state that the number of words contained in this Brief are 5,918, the number of lines contained in this Brief are 629, and that this Brief was prepared and formatted in Microsoft Word.

I further state that a CD disk containing the Brief is being filed herewith, and said disk is CD-R, compact disc recordable. I further state that the disc has been scanned for viruses and that it is virus-free.

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

Donald E. Woody, being of lawful age and being first duly sworn upon his oath, states that he is the attorney and agent above named, and the facts and matters as stated above are true according to his best information, knowledge and belief.

_____
DONALD E. WOODY

Subscribed and sworn to before me this _____ day of May, 2009.

_____
Notary Public

My Commission Expires:

CERTIFICATE OF SERVICE

COMES NOW Donald E. Woody, of the law firm of HALL, ANSLEY, RODGERS & SWEENEY, P.C., of lawful age and having been duly sworn, states that Appellant's Substitute Brief in the within cause was by him hand-delivered or mailed, postage prepaid, by United States Mail, to the following named persons at the addresses shown, all on the _____ day of May, 2009.

2 copies James B. James, Esq.
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STATE OF MISSOURI)
) ss.
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_____
DONALD E. WOODY

Subscribed and sworn to before me this _____ day of May, 2009.

_____
Notary Public

My Commission Expires:

APPENDIX