Case No. SC 93132

IN THE SUPREME COURT OF MISSOURI

JOHN TEMPLEMIRE,

Appellant,

v.

W&M WELDING, INC.,

Respondent.

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF APPELLANT

Appeal from the Pettis County Circuit Court
Eighteenth Judicial Circuit
Honorable Robert L. Koffman, Circuit Judge

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INTEREST OF THE AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a non-profit, professional organization consisting of approximately 1,300 trial attorneys in Missouri. For over fifty years, MATA lawyers have worked to advance the interests and protect the rights of individuals across our State. In doing so, MATA's membership strives to promote the administration of justice, preserve the adversary system, and ensure that those citizens of our State with a just cause will be afforded access to our courts.

One of MATA's chief concerns is access to civil justice. For workers injured on the job, that justice is available through Missouri's comprehensive workers' compensation administrative system. But access to that system is chilled, if not outright denied, when an employee must choose between exercising his or her rights under the Workers' Compensation Law and facing summary discharge or other employment discrimination for having done so. The legal standard for applying Mo. Rev. Stat. § 287.780's anti-retaliation provision is important to the workers of Missouri and deserves critical examination. MATA has filed this amicus brief to provide the Court with the historical background of cases leading to the adoption and retention of the exclusive causation standard in order to assist the Court in its examination of that standard.

CONSENT OF PARTIES

Counsel for both parties have consented to the filing of this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The law abhors a right without a remedy "as nature does a vacuum." *Reilly v. Reilly*, 14 Mo. App. 62, 64 (1883). The exclusive causation standard previously adopted by this Court does not provide injured workers with a practical remedy to vindicate their right against discharge or discrimination for exercise of their workers' compensation rights. This standard is not contained in the plain language of Mo. Rev. Stat. § 287.780.[1] Rather, it was created by this Court and is therefore a part of our common law. This Court has long acknowledged its role as the arbiter of the common law. *See Lambing v. Southland Corp.*, 739 S.W.2d 717, 718 (Mo. 1987). And it is the prerogative of this Court, when justified, to modify "that great body of rules, doctrine and tradition as the needs of advancing society dictate." *Id.*

The exclusive cause standard is based on antiquated concepts of employment law, faulty assumptions, and is inconsistent with this Court's other employment law precedents. As such, this Court should exercise its prerogative in this case to abolish the exclusive causation requirement. *See Helsel v. Noellsch*, 107 S.W.3d 231, 231 (Mo. 2003) (abolishing common law tort of seduction).

[1] All citations to Mo. Rev. Stat. § _____ are to the current version unless otherwise indicated.

ARGUMENT

I. Historical Development Of The Exclusive Causation Standard

A historical review of the development of the exclusive causation standard in workers compensation retaliation cases illuminates the issues considered in this case and reveals that the challenged standard arose under specious circumstances and no longer comports with well-accepted precepts of Missouri employment law.

A. In 1926, Missouri citizens pass the Workers' Compensation "Grand Bargain" by popular referendum.

By popular referendum in 1926, the people of Missouri became the 43rd state to adopt a comprehensive workers' compensation program. *See* R. Robert Cohn, *History of Workmen's Compensation Law,* Preface to Chapter 287, 15 V.A.M.S. 20-24 (1965). The purpose of the Workers' Compensation Law is to "provide a simple and nontechnical method of compensation for injuries sustained by employees through accident arising out of and in the course of employment and to place the burden of such losses on industry." *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 821 (Mo. banc 2003) (quoting *Bethel v. Sunlight Janitor Serv.*, 551 S.W.2d 616, 618 (Mo. banc 1977). This system replaced common law claims with an administrative remedy to provide certain, albeit limited, compensation for injuries arising from work, regardless of fault. *See Bass v. National Super Markets, Inc.,* 911 S.W.2d 617, 619 (Mo. banc 1995).

B. The Grand Bargain of Workers' Compensation includes a prohibition against retaliation.

Since its inception, the Workers' Compensation Law has included a prohibition against an employer discharging or "in any way" discriminating against any employee for exercising any of his rights under that law. *See* Mo. Rev. Stat. § 287.780; RSMo. § 3725 (1939); RSMo. § 3335 (1929). Such a long-standing prohibition reflects the strong public policy of our state. Other than granting a private right of action in 1973, the General Assembly has left the prohibition undisturbed for the last 85 years. Rather, the interpretation and evolution of Mo. Rev. Stat. § 287.780 has been wholly guided by the courts.

Mo. Rev. Stat. § 287.780 was first analyzed by the Supreme Court of Missouri in *Christy v. Petrus*, 365 Mo. 1187, 1190 (1956). At that time, and as originally enacted, § 287.780 made it a misdemeanor to "discharge or in any way discriminate against" an employee for pursuing his or her rights under the Workers' Compensation Law. *See* Mo. Rev. Stat. § 287.780 (1949). The issue in *Christy* was whether or not § 287.780 conferred a private right of civil action to a discharged employee. *See Christy*, 365 Mo. at 1189. The Supreme Court ruled that it did not. *Id.* at 1194. As such, there was no discussion of what the causation standard should be.

In 1973, the General Assembly amended § 287.780 by adding a second sentence, to wit, "Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer." *See* 1973 H.B. 79.

C. The courts issue guidance on making a submissible claim for workers compensation retaliation.

Mitchell v. St. Louis County

Rodriguez v. Civil Service Commission

The first appellate case to consider the private cause of action was *Mitchell v. St. Louis County*, 575 S.W.2d 813 (Mo. Ct. App. 1978). In that case, the court of appeals affirmed a directed verdict for the employer when the Plaintiff only alleged:

(1) that she had been discharged for absence due to a work related injury; and

(2) that her employment was covered by the workers' compensation law.

Id. at 815. The court of appeals held that the critical element of discrimination was missing from both the point relied on and the evidence. *Id.* As such the directed verdict was affirmed. *Id.* Of course, such a result is dictated by the plain language of Mo. Rev. Stat. § 287.780 because there was no claim by the employ that she attempted to "exercise any of [her] rights under this chapter."

The next case to consider Mo. Rev. Stat. § 287.780 was *Rodriguez v. Civil Service Commission*, 582 S.W.2d 354 (Mo. Ct. App. 1979). In *Rodriguez*, the plaintiff claimed that because he was fired during the forty week "healing period" provided by Mo. Rev.

Stat. 287.190 (1975)[2] that the discharge violated Mo. Rev. Stat. § 287.780. *Rodriguez*, 582 S.W.2d at 355. The court noted that plaintiff's argument would imply that the Workers Compensation Law granted "employees an absolute right to retain their jobs for forty weeks after the work-related injury so long as they are unable to return to work." *Id.* Looking to the plain language of the statute, the court held that § 287.190 was to provide compensation to an injured employee, not guarantee continued employment. *Id.* As such, the employee's discharge during the healing period was "irrelevant to the issue of discrimination." *Id.* at 356. Since the record was devoid of any other evidence of discrimination, the court concluded, like in *Mitchell*, that the "critical element of proof under § 287.780" was missing.

Notably, *Rodriguez* was not an appeal from a civil cause of action for discrimination under Mo. Rev. Stat. § 287.780. Rather, it was an appeal from the circuit court's judgment sustaining an administrative decision of the City of St. Louis' Civil Service Commission. *See Rodriguez*, 582 S.W.2d at 355.[3] As such, and despite later

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[2] The operative language regarding a "40-week healing period" at issue in *Rodriguez* has since been removed by the legislature. *See* Mo. Rev. Stat. § 287.190.

[3] *See also Green v. City of St. Louis*, 870 S.W.2d 794, 798 (Mo. Ct. App. 1994) (recognizing that the City of St. Louis' Civil Service Commission provides its employees an administrative remedy "separate and distinct" from the remedies provided by Missouri state statutes).

decision relying on it, the *Rodriguez* opinion is of limited value in defining the contours of a civil action under Mo. Rev. Stat. § 287.780.

D. The Court of Appeals issues guidance on how to properly instruct the jury on Workers Compensation retaliation claims but declines to clarify the causation standard.

Henderson v. St. Louis Housing Authority

Following *Mitchell* and *Rodriguez*, courts struggled to develop the appropriate instruction to give in a case alleging violation of Mo. Rev. Stat. § 287.780. *See Henderson v. St. Louis Housing Authority*, 605 S.W.2d 800, 803 (Mo. Ct. App. 1979) (noting there was no approved jury instruction at that time). In *Henderson*, the plaintiff proffered an instruction apparently drawn from the plain language of the statute. *Id.* at 803. Specifically, the plaintiff proffered an instruction that read as follows:

> Your verdict must be for plaintiff if you believe:
>
> First, the plaintiff was employed by the defendant, and
>
> Second, at the time plaintiff was employed by the defendant, plaintiff exercised his rights under the workmen's compensation law of Missouri, and
>
> Third, as a direct result of plaintiff exercising his rights under the workmen's compensation law of Missouri, defendant discharged plaintiff, and
>
> Fourth, as a direct result of such discharge, plaintiff sustained damage.

Id. The court of appeals held that the second prong of this instruction was too broad because it did not specify which rights the employee alleged to have exercised. *Id.* at 804. Accordingly, the case was reversed and remanded. *Id.* But the court did not

address the "direct result" language used by the trial court in the fourth prong of the instruction.[4]

E. The Eighth Circuit affirms the grant of a new trial in a Workers Compensation retaliation case because inflammatory evidence was improvidently admitted and, in so doing, does not rule on the causation standard.

Russell v. United Parcel Service

In *Russell v. United Parcel Service*, 666 F.2d 1188 (8th Cir. 1981), the United States Eighth Circuit Court of Appeals reviewed post-trial rulings of a federal trial court. *Id.* at 1189. In *Russell*, the jury returned a verdict for the plaintiff on her § 287.780 claim. *Id.* But the trial court sustained the defendant's post-verdict motion for judgment N.O.V. and, alternatively, for new trial. *Id.* The court reversed the J.N.O.V. but sustained the order granting a new trial. *Id.* at 1192. The Eighth Circuit did not discuss the causation standard under § 287.780, but rather reviewed each of the trial court's rulings in turn.

[4] This Court has since clarified the usage of "direct result" instructions regarding causation in common law negligence claims, explaining that if there are multiple proximate causes of an injury, then the "direct result" language in the instruction should be modified to "directly caused or contributed to cause." *See Carlson v. K-Mart Corp.*, 979 S.W.2d 145, 148 (Mo. banc. 1998).

First, the *Russell* court considered whether the J.N.O.V. was providently granted. *Id.* In doing so, the court recounted its limited standard of review. *Id.* at 1191 n.5. Specifically, the court noted that it had to consider the evidence in the light most favorable to the plaintiff since the plaintiff prevailed with the jury and give the plaintiff's case every benefit of the doubt. *Id.* Naturally, under this standard, the court only recounted the plaintiff's case. The court concluded that the plaintiff had made a submissible case. *Id.* at 1191.

Next, the *Russell* court considered the defendant's motion for new trial. *See Russell*, 666 F.2d at 1191. The injury that gave rise to the workers' compensation claim was the rape at gunpoint of the employee. *Id.* at 1189. The trial court conceded that it admitted evidence concerning the rape "that was highly prejudicial and of questionable relevancy" to the question of whether the employee was discriminatorily discharged. *Id.* at 1191. Once the verdict was in, the trial court found that it would be a manifest injustice to allow the sizeable verdict to stand when it was likely based on the improper evidence. *Id.* Noting that the standard of review – abuse of discretion – on this motion "is far different" from the one utilized for a J.N.O.V, the Eighth Circuit agreed that it was not an abuse of discretion to grant the new trial. *Id.*

The *Russell* court never says whether the defendant came forward with some other reason for the termination, or indeed, whether the defendant presented any evidence at all. Rather, it specifically approved the trial court's finding that "the verdict was against the great weight of the evidence." *Id.* at 1191. As such, *Russell* cannot plausibly be relied on as establishing the standard of causation under § 287.780.

F. The Court of Appeals issues decisions describing the employee's burden of proof under Mo. Rev. Stat. § 287.780 that do not include the exclusive causation requirement.

Arie v. Intertherm, Inc.

McKiness v. Western Union Telephone Company

The first case to discuss the standard of causation for a claim under Mo. Rev. Stat. § 287.780 is *Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (Mo. Ct. App. 1983). In that case, the court affirmed a jury verdict in favor of a discharged employee. *Id.* at 159. In doing so, the Court of Appeals recited the holdings, discussed above, from *Mitchell* and *Rodriguez* that "the mere filing of a claim and subsequent discharge for absenteeism due to a work-related injury creates no cause of action." *Id.* at 149. The court went on to explain that the employee has to plead and prove that she was discharged "for exercising any of her rights under the Workers' Compensation Law." *Id.*

The *Arie* court described an employee's burden of proof, and the employer's burden of rebuttal in relatively simple terms.

> A cause of action lies only where the employee pleads and proves that she was discharged for exercising any of her rights under the Worker's Compensation Law. If the evidence demonstrates that the employer had just cause for terminating the employment, other than for the employee's exercise of her rights under the Worker's Compensation Law, then the employee cannot recover under this alternative of § 287.780 RSMo. 1978.

Id. at 149. The court had no citation for the burden-shifting framework enunciated and there is no analysis beyond that quoted above. *Id.* Rather, the court concluded that there was substantial evidence to support the jury's verdict that the plaintiff had been discharged for exercising her Chapter 287 rights and affirmed the verdict. *Id.* at 152.

In *McKiness v. Western Union Tel. Co.*, 667 S.W.2d 738 (Mo. Ct. App. 1984), the Court of Appeals affirmed the dismissal of the plaintiff's petition for discrimination under § 287.780. *Id.* at 742. The court first found that the plaintiff had stated a cause of action in his petition. *Id.* at 740. But the petition was dismissed because the employee had failed to exhaust his remedies under his union's collective bargaining agreement. *Id.* The court's ruling that the petition was sufficient is what is important for the purpose of the case *sub judice*.

The *McKiness* court began its review of the petition by stating four elements for a cause of action under § 287.780. Specifically, the court stated that a plaintiff must allege:

1) she was employed by defendant;

2) she exercised a right conferred by the workmen's compensation law;

3) she was discharged; and

4) defendant's discriminatory motive.

See McKiness, 667 S.W.2d at 740. This definition of the cause of action is consistent with the appellate courts' prior pronouncements on § 287.780. But it does not discuss what evidence of causation is required for a plaintiff to prevail. *Id.*

Like in *Russell*, the procedural posture of *McKiness* is important. *McKiness* was decided on a motion to dismiss. *See McKiness*, 667 S.W.2d at 740. Therefore, the court

limited its analysis to whether the petition stated a cause of action. *Id.* Accordingly, there was no occasion for the court to review what evidence, if any, the defendant may have had for other non-discriminatory reasons for the termination. And *McKiness* cannot be read as establishing a causation standard, much less requiring a showing of exclusive cause.

G. The Court of Appeals introduces a requirement that the discrimination be proved by "direct evidence."

Davis v. Richmond Special Road District

Perhaps the most important case in the development of the exclusive causation standard is *Davis v. Richmond Special Rd. Dist.*, 649 S.W.2d 252 (Mo. Ct. App. 1983). Like in *Mitchell*, the plaintiff again argued that the termination of an employee during the "healing period" stated in § 287.190 evidenced a discriminatory discharge prohibited by § 287.780. The *Davis* court began its analysis by noting that there was no direct evidence of discriminatory discharge in the case. *Id.* Rather, the plaintiff suggested that the alleged discrimination could be shown by indirect evidence or inference. *Id.* This suggestion was flatly rebuffed by the court. *Id.* at 255-56.

The *Davis* court reasoned that to permit "indirect evidence or inference" was to "discard the requirement of discrimination as a required element of a plaintiff's claim under § 287.780." *Id.* at 254. More important to its determination, the court believed that the plaintiff's *per se* reading of § 287.190 and § 287.780 in combination would put employers in the untenable position of having to insure an injured employees subsequent return to work by holding a job open for the employee "*ad infinitum*." *Davis*, 649

S.W.2d at 255. The court went to some effort to explain why plaintiff's contention was incorrect and to explain the showing required by § 287.780. *Id.*

First, the court stated that a prevailing employee would have to show a 'precise' causal relationship between exercise of workers' compensation rights and the discharge:

> the statute reveals a legislative intent that there must be a casual relationship between the exercise of the right by the employee and his discharge by his employer arising precisely from the employee's exercise of his rights, and upon proof, that the discharge was related to the employee's exercise of his or her rights.

Id. Later in the same paragraph, the court recast the causation element in terms that could be read to require exclusive causation, or could be read to require proximate causation:

> Stated another way, the legislative intent conveyed by the statute is to authorize recovery for damages if, upon proof, it be shown that the employee was discriminated against or discharged *simply because* of the exercise of his or her rights regarding a workers' compensation claim.

Id. (emphasis added). Finally, the court enunciated a standard that seems to be more fairly read to require proximate causation:

> The intent of the statute would be expressed more clearly if it was worded to read: An employer shall be subject to damages in a civil action brought by his employee if said employer discriminates or discharges the employee because the employee pursues his or her workers' compensation rights.

In sum, *Davis* took a very narrow view of the type of evidence required to show discrimination. And *Davis* can be fairly read to require exclusive causation. Or it can just as fairly be read to only require proximate causation. To the extent that the court intended to adopt a "exclusive" causation standard, that decision was premised on the faulty reasoning that allowing proof of indirect or inferential evidence was tantamount to ignoring the discrimination element of the claim. *Id.* at 254. Of course, as described *infra*, the great weight of authority now supports the opposite conclusion; courts routinely allow a plaintiff to contend the stated reason for a termination is pretext and present "circumstantial" evidence demonstrating discrimination.

H. This Court adopts the *Davis* direct evidence requirement by announcing the exclusive causation standard.

Hansome v. Northwestern Cooperage Company

This Court first considered the causation standard for a claim under § 287.780 in *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. 1984). In that case, the Court affirmed a jury verdict in favor of the plaintiff-employee. In finding that the plaintiff made a submissible case for the jury, the Court announced that section 287.780 has four elements:

(1) plaintiff's status as employee of defendant before injury,

(2) plaintiff's exercise of a right granted by Chapter 287,

(3) employer's discharge of or discrimination against plaintiff, and

(4) an exclusive causal relationship between plaintiff's actions and defendant's actions.

Id. at 275. In stating these factors, the court cited to *Davis*, *Rodriguez*, and *Mitchell*. *Id.* But as explained above, these cases do not require an exclusive causal relationship between the discharge or discrimination and the exercise of workers' compensation rights.

In footnote 2 of the *Hansome* opinion, this Court explained that § 287.780 was a limited exception to the employment at-will doctrine. *See Hansome*, 679 S.W.2d at 275 n.2. Again, the Court repeated the requirement for an "exclusive causal relationship." *Id.* But it did so without an explanation of where the "exclusive" requirement came from. Rather, the Court briefly reviewed the evidence of *Mitchell*, *Rodriguez*, and *Davis*. Of course, as explained above, neither the facts nor legal analyses of those cases infer the high bar of "exclusive causation."

Next, the *Hansome* court "illustrated plaintiff's burden" by reference to four cases – *Russell, Henderson, Arie,* and *MicKiness*. But again, none of these cases relied on by the Court in its illustration used an exclusive causation standard. Nor can any of these cases be fairly read to require such a showing. After the *Hansome* decision, the exclusive causation that has since been imposed on claims brought under § 287.780 as the common law pronouncement by this Court.

I. Based on *stare decisis*, this Court declines to modify the exclusive causation interpretation of section 287.780.

Crabtree v. Bugby

In *Crabtree v. Bugby*, 967 S.W.2d 66, 71 (Mo. 1998), this Court reversed a jury verdict based on instructional error. *Id.* at 71. The Court held that jury instructions for claims under section 287.780 must include the "exclusive causation" requirement stated in *Hansome*. *Id.* at 71. In reversing a Court of Appeals decision that upheld an instruction that did not include the "exclusive causation requirement," the Court emphasized that it would be up to this Court to abandon this rule if there was an injustice or absurdity. *Id.* at 72. This Court indicated that its prior decisions should be not disturbed lightly and that redress might be possible in the legislature. *Id.* This Court has not since issued an opinion analyzing the exclusive causation standard as applied to § 287.780 since *Crabtree*.[5] And that brings us to the case at bar.

[5] The Court has issued other opinions that acknowledge, without substantial analysis, the exclusive causation rule. *See, e.g.*, *Hayes v. Show Me Believers, Inc.*, 192 S.W.3d 706 (Mo. 2006).

II. This Court has the authority to abolish the common law standard of requiring exclusive causation under § 287.780.

This Court is the custodian of our common law. *See Townsend v. Townsend*, 708 S.W.2d 646, 650 (Mo. 1986) (recognizing this Court's authority to abrogate the doctrine of interspousal immunity). And it has long "filled-in the gaps" of statutes by resort to the common law. *See Butler v. Imhoff*, 238 Mo. 584, 591 (1911). As such, it has the authority to alter or abrogate a common law doctrine absent contrary legislative direction if that doctrine "can no longer be justified." *Id.* The exclusive causation requirement is such a standard that we can no longer justify.

In *Helsel v. Noellsch*, 107 S.W.3d 231 (Mo. banc 2003), this Court abolished the common law tort of alienation of affection. The court noted that it was appropriate to abolish the common law tort because it was premised on (1) antiquated legal concepts; (2) faulty assumptions; and (3) was inconsistent with other precedent. *Id.* at 232. As described below, the exclusive causation standard for § 287.780 is similarly flawed.

A. The exclusive causation standard was borne from the antiquated notion that direct evidence was required to prove employment discrimination.

As explained above, the decision in *Davis v. Richmond Special School Dist.*, and its requirement for direct evidence was really the genesis of the exclusive causation standard. But it is now well-recognized by Missouri courts that indirect evidence may be used to prove employment discrimination. *See Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. banc 2009) (noting the discrimination "cases are inherently fact-based and often depend on inferences rather than on direct evidence."). In fact, the Court of

Appeals has since specifically recognized the use of indirect evidence in a claim under § 287.780. *See St. Lawrence v. TWA, Inc.*, 8 S.W.3d 143, 149 (Mo. Ct. App. 1999) ("Proof of exclusive causation [in a claim under § 287.780] is necessarily indirect because the employer is not likely to admit that retaliation was his motive."). The *Davis* court's erroneously limited view of what evidence could be relied on to prove a claim for retaliatory discharge under the Workers' Compensation Law formed the basis of this Court's holding in *Hansome*. This undercuts the legal foundation for the exclusive causation standard and mitigates in favor of the Court setting aside *stare decisis* to reconsider the causation standard for § 287.780 anew.

B. The exclusive causation standard is premised on the faulty assumption that any lower standard would convert the Workers' Compensation Law to a "job security act" and encourage frivolous claims.

The early cases to consider how to apply § 287.780 were very concerned that the Workers' Compensation Law not become a "job security act" that would prevent an employer from being able to discipline or discharge an employee who had suffered a work injury. *See Davis*, 649 S.W.2d at 256. At the time, § 287.780 was one of only a few statutes that limited an employer's common law right to terminate an employee at will. *See, e.g., Dake v. Tuell*, 687 S.W.2d 191, 192 n.3 (Mo. 1985) (listing § 287.780 and the service letter statute as statutory exceptions to the common law at will doctrine). Modern individual employment law was in its infancy in Missouri and the courts' concerns were understandable. These concerns, though, have been proven unwarranted.

Since *Davis*, the legislature has passed the Missouri Human Rights Act ("MHRA") which prohibits employment discrimination for a number of protected classes. *See* Mo. Rev. Stat. § 213.055; 1986 S.B. 513. The MHRA further provides protection for employees that undertake certain protected activities. *See* Mo. Rev. Stat. § 213.070; 1986 S.B. 513. Moreover, the legislature has also recognized nearly a score of other discrete protected characteristics and activities.[6] And this Court has recognized a

[6] *See* Mo. Rev. Stat. § 188.105 (passed in 1986 – prohibiting discrimination for refusing to participate in abortions); Mo. Rev. Stat. § 494.460 (passed in 1989 – prohibiting discrimination for serving on a jury); Mo. Rev. Stat. § 105.467 (passed in 1991 – providing state employees with whistle-blower protection for reporting conflicts of interest in lobbying); Mo. Rev. Stat. § 287.310 (passed in 1992 – prohibiting discrimination of injured worker for taking action that might require self-insured employer to pay a deductible); Mo. Rev. Stat. § 404.872 (passed in 1992 – prohibiting discrimination against an employee for refusing to withdraw life-sustaining treatment based on religious views); Mo. Rev. Stat. § 454.645 (passed in 1993 – prohibiting discrimination for having a child support health benefit order); Mo. Rev. Stat. § 595.209 (passed in 1993 – prohibiting discrimination for witness, victim or family member of victim for honoring subpoena in a criminal matter); Mo. Rev. Stat. § 288.375 (passed in 1994 – prohibiting discrimination for testifying in employment security hearings); Mo. Rev. Stat. § 105.267 (passed in 1995 – prohibiting retaliatory discharge of certified disaster service volunteers); Mo. Rev. Stat. § 209.162 (passed in 1996 – prohibiting

public policy exception to that at-will doctrine. *See Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010). Industry and commerce have continued in Missouri even in the face of these varied protections. The assumption that permitting the robust enforcement of anti-discrimination laws will inextricably lead to the abrogation of at-will employment is faulty.

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discrimination against the disabled for the use of assistive devices or service dogs); Mo. Rev. Stat. § 375.1306 (passed in 1998 – prohibiting genetic discrimination); Mo. Rev. Stat. § 334.021 (passed in 2001 – prohibiting discrimination by hospitals between medical doctors and doctors of osteopathy); Mo. Rev. Stat. § 115.102 (passed in 2002 – prohibiting discharge and employment discrimination for being an election judge); Mo. Rev. Stat. § 537.053 (passed in 2002 – prohibiting discharge for refusing to serve alcohol to a visibly intoxicated person); Mo. Rev. Stat. § 191.908 (passed in 2007 – providing whistleblower protection for reporting Medicaid fraud); Mo. Rev. Stat. § 162.068 (passed in 2011 – providing whistleblower protection for school employees who report sexual misconduct of teachers or other school employees); and Mo. Rev. Stat. § 84.342 (passed in 2012 – providing whistle-blower protection for municipal police officers).

C. Exclusive causation is inconsistent with the accepted law of our State.

The exclusive causation standard under § 287.780 is unique in Missouri employment law. The MHRA was originally analyzed by standards adopted by the federal courts. *See, e.g., Midstate Oil Co. v. Missouri Com. on Human Rights*, 679 S.W.2d 842, 845 (Mo. 1984). This framework was later abandoned in favor of the "contributing factor test." *See Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 820 (Mo. banc 2007). Similarly, this Court has rejected the exclusive causation standard in favor of the contributing factor test in "public policy exception" cases. *See Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 94-95 (Mo. 2010). As such the exercise of workers' compensation rights is simply not afforded the same level of protection as the activities protected by the MHRA and the public policy exception to the at-will employment doctrine. Further, the fact that the legislature has passed a variety of anti-retaliation statutes (*see* note 6, *supra*), counsels in favor of the Court providing a consistent set of standards for enforcing those rights. There is no justification for workers' compensation retaliation to be subject to a different standard than other similar claims and the exclusive causation standard should be abandoned.

III. The plain language of § 287.780 supports abandoning the exclusive causation standard.

While axiomatic, it bears repeating that "[t]he primary rule in statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." *801 Skinker Blvd. Corp. v. Dir. of Revenue*, 2013 Mo. LEXIS 5 (Mo.

banc Jan. 8, 2013). The Court should give effect to every word, clause, sentence, and provision of the statute under consideration. *See id.* at *9. Nowhere in § 287.780 do the words "exclusive" or "sole" appear.

"To read words and concepts into our statutes that the general assembly did not write shows disrespect both for the general assembly and the common law, which the legislature has the power expressly to displace." *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 69-70 (Mo. banc 2000). This is particularly true when, as here, the statute must be construed "strictly." Mo. Rev. Stat. § 287.800.1.

Strict construction of the Workers' Compensation Act since the amendments of 2005 has been said to mean "that the statute can be given no broader an application than is warranted by its plain and unambiguous terms." *Pennewell v. Hannibal Reg'l Hosp.*, 2013 Mo. App. LEXIS 111, *7 (Mo. Ct. App. Jan. 29, 2013). And it has been held that the requirement for strict construction does not just apply to certain subsets of Chapter 287. *See State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 20 (Mo. Ct. App. 2011). Rather, all of the "the provisions of [the] chapter" must be strictly construed. *See* Mo. Rev. Stat. § 287.780. Of course, § 287.780 is a part of Chapter 287, and it reads as follows:

> No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

The Court's decision in *Hansome* simply does not strictly construe the language "in any way" contained in § 287.780. Certainly, an employer that has two reasons for firing an employee, one of which was due to his exercise of workers compensation rights and the other being some petty violation of a work rule, still *in some way* discriminates against that employee, though the discrimination is not the sole cause for the termination. The plain language of the statute indicates that conduct is prohibited. But *Hansome's* policy-based construction reads out the "in any way discriminate" language and replaces it with the phrase "exclusively," yielding the following result:

> No employer or agent shall discharge or ~~**in any way**~~ discriminate against any employee **[exclusively]** for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

Such a construction is not justified and is certainly not a strict construction of the statute's language as written.

IV. Sound public policy counsels in favor or abolishing the exclusive causation standard.

The Missouri Workers' Compensation Law is an important element to our state's civil justice system. When our state decided that workers would give up certain civil remedies in favor of an administrative system, the "Grand Bargain" was struck. Like any bargain, the workers' compensation system must balance the rights of the parties to that bargain. But when our State's workers must choose between seeking benefits on the one

hand and running the risk of being terminated for having done so, the system is out of balance.

Since its inception, Missouri's Workers' Compensation Law has, on its face, prohibited an employee from being discharged or discriminated against for exercising workers' compensation rights. But the protection is eviscerated by the exclusive causation standard because it is practically impossible for an employee to ever make the required showing. *See Fleshner*, 304 S.W.3d at 93 (noting that an employer could almost always find "some other reason" to combine with the prohibited one to defeat a retaliation claim that requires a showing of exclusive causation). As such, the Court should overturn its prior holding in *Hansome* and announce a rule that gives effect to the language of the statute and provides Missouri's workers the protection they deserve.

CONCLUSION

The exclusive causation standard for proving workers' compensation-related retaliation was developed prior to the advent of modern employment law as we now know it. As recognized in *Crabtree*, the doctrine of *stare decisis* dictates that prior pronouncements by this Court should not be lightly disturbed. *See Crabtree*, 967 S.W.2d at 72. But the Court's duty to the common law and the people of Missouri requires more than unquestioning loyalty to prior decisions. Rather, this Court should, as it did in *Helsel*, update the common law.

An objective review of the case law interpreting § 287.780 reveals that, though there may be explanations for the decisions reached, there are important jumps in the legal logic that produced the exclusive causation standard. Alone, these logical

inconsistencies should themselves be enough to overcome *stare decisis*. Beyond that, the law has greatly developed in the nearly 30 years since the *Hansome* decision was handed down. Clearly, the *Hansome* decision stands apart from other decisions of this Court on the question of what is necessary to prove unlawful employment discrimination. As such, the Court should look at § 287.780 anew and evaluate what the appropriate statutory standard is based on the entire body of Missouri law.

Of course, once the Court decides to reconsider the exclusive causation standard, it should start with the plain language of § 287.780. And reading a requirement of exclusive cause into § 287.780 ignores the statute's plain language and renders it inconsistent with Missouri's other employment law protections. Accordingly, this Court should do what it did in *Fleshner* and reject the exclusive causation standard in favor of the contributing factor test enunciated in *Daugherty*.

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Respectfully Submitted,

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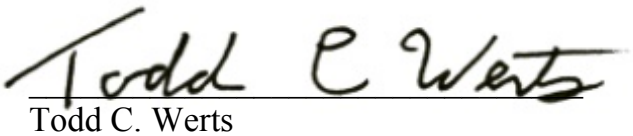
CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and that the brief contains 6,744 words (as determined by Microsoft Office Word 2007 software).



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing was served using the Court's electronic filing system this 8th day of April, 2013 upon:

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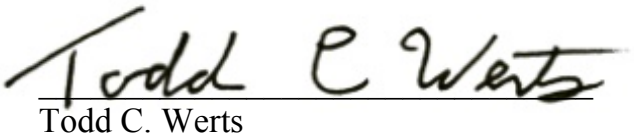

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