IN THE
SUPREME COURT OF MISSOURI

No. SC93132

JOHN TEMPLEMIRE

APPELLANT,

v.

W&M WELDING, INC.

RESPONDENT.

Appeal from the Circuit Court of Pettis County, Missouri
The Honorable Robert L. Koffman, Judge
Case No. 07PT-CC00019

Transferred from the Missouri Court of Appeals, Western District
Appeal No. WD74681

BRIEF OF AMICUS CURIAE MISSOURI ORGANIZATION OF DEFENSE LAWYERS

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Amicus Missouri Organization of Defense Lawyers ("MODL") files this Brief pursuant to Missouri Supreme Court Rule 84.05(f)(2). MODL has received consent from both Appellant John Templemire and Respondent W&M Welding, Inc. to file a brief in this matter. Amicus adopts the Appellant's jurisdictional statement and the Respondent's statement of facts as its jurisdictional statement, standard of review, and statement of facts.

INTEREST OF AMICUS CURIAE

The Missouri Organization of Defense Lawyers ("MODL") is a voluntary membership organization of Missouri lawyers who devote a substantial amount of their time to the representation of defendants and potential defendants in civil litigation either as trial lawyers or as lawyers otherwise directly involved with the defense of civil litigation. MODL tirelessly works to insure that defendants in our civil justice system receive fair and impartial treatment by juries, the judiciary and the legislature, and to enhance the knowledge and improve the skill of its members. As part of its work to insure fair and impartial treatment for defendants, MODL has filed amicus curiae briefs with the Missouri Supreme Court regarding the proper application and interpretation of Missouri statutes.

For nearly three decades, Missouri Courts have balanced the need to compensate workers for work related injuries, while at the same time adhering to the long recognized "at will" employment standard which allows Missouri businesses freedom of contract and

protection from advantageous employees. The interpretation of Section 287.780, RSMo., as enunciated by this Court and unchanged by the legislature, protects both the employers and employees of Missouri, and should not be changed. MODL attorneys regularly defend Missouri employers against claims of retaliatory discharge, and has filed this brief in order to provide this Court with an understanding of the standard as interpreted by this Court and interpreted by courts throughout the nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Circuit Court judgment and instruction was proper because the "exclusive causation" standard was properly applied. In refusing Appellant Templemire's modified verdict director that submitted the "contributing factor" language used in M.A.I. No. 31.24 instead of the "exclusive causation" standard of M.A.I. No. 23.13, the Circuit Court's holding is consistent with the legislature's intent to balance providing compensation to workers for work related injuries and not to secure job security. Stare decisis requires the Court defer to 30 years of unwavering judicial precedent and legislative re-enactment and adoption.

ARGUMENT

I. It is well established in Missouri that an employee has a cause of action against his employer for retaliation for exercising his or her worker's compensation rights; however, that claim requires an employee to prove that the discharge or discrimination shares an exclusive causal relationship with his or her exercise of worker's compensation rights. The legislature has not changed this requirement, despite 30 years of opportunity to do so. Missouri would be best served by keeping this standard intact; as it could face a litany of problems should a lesser standard be adopted.

The Statute at issue in this matter is Section 287.780, RSMo., which states: "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." Section 287.780, RSMo. This statute, which provides an employee with a cause of action for discrimination, was first enacted in 1973. Section 287.780, RSMo. (1973).

Since 1973, Missouri law has been well settled. An employee who asserts a claim for retaliatory discharge must prove that the "exclusive cause" of his discharge was for exercising his rights under the Missouri Workers Compensation Act. *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. 1984). This burden of proof was upheld by the Supreme Court in its decision of *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo.

1998), and all subsequent cases interpreting the statute's burden of proof. See, e.g. *Blair v. Steadley Company*, 740 S.W.2d 329 (Mo. App. 1987).

Appellant urges that a lighter burden of proof should become Missouri's standard for recovery, arguing that recovery should be possible when exercise of those rights under the law was simply a "contributing factor" in the decision to discharge. However, neither Appellant nor amici in his favor can show that the application of the "exclusive causation" standard is clearly erroneous or manifestly wrong, as required to overcome stare decisis, as set forth in *Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. 1998).

Being that Section 287.780, RSMo. was the first statute to create a private cause of action for employees who suffered retaliation for exercising their worker's compensation rights, it was important for the first interpreting Court to analyze the potential conflict between the statute and Missouri's employment at-will doctrine.

Missouri is an employment "at-will" state. Therefore, an employer need not have cause to discharge an employee. *See Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. banc 1985). Absent an employment contract, employees are considered to be "at will," meaning they can be discharged from employment at any time for any reason or for no reason. *Johnson v. McDonnell Douglas Corp*., 745 S.W.2d 661, 633 (Mo. 1988). This doctrine is rooted in freedom of contract and private property principles, designed to yield efficiencies across a broad range of industries." *Margiotta v. Christian Hospital Northeast Northwest*, 315 S.W.3d 342, 346 (Mo. 2010), citing James A. Sonne, Firing Thoreau: Conscience and At-Will Employment, 9 U. Pa. J. Lab. & Emp. L. 235 (2007);

Richard A. Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947, 953-58 (1984).

Moreover, in *Hansome v. Northwestern Cooperage Co*., 679 S.W.2d 273 (Mo. 1984), this Court recognized the potential conflict, and specified that the causal relationship between a claimant's exercise of his or her rights and the subsequent discharge or discrimination must be exclusive. This means that if the evidence demonstrates that the employer had cause for terminating the employment other than for the employee's exercise of his rights under the Workers' Compensation Law, the employee cannot recover. *Hansome*, 679 S.W.2d at 275-276, citing *Arie v. Intertherm, Inc*., 648 S.W.2d 142, 149 (Mo. App. 1983). The reason for the exclusivity is that Workers' Compensation Laws are intended only to compensate employees for job-related injuries; they are not intended to insure job security. *Blair v. Steadley*, 740 S.W.2d 329, 332 (Mo. App. S.D. 1987), citing *Davis v. Richmond Special Rd. Dist*., 649 S.W.2d 252, 255-56 (Mo. App. 1983); *Rodriguez v. Civil Serv. Comm'n*., 582 S.W.2d 354, 356 (Mo. App. 1979). The Court recognized that causality does not exist if the basis for discharge is valid and nonpretextual. *Hansome*, 679 S.W.2d at 275. Recognizing the need to delineate a standard which satisfied the dual interests of the statute, the *Hansome* Court outlined the elements of an action under Section 287.780, RSMo. as follows:

> To prevail in an action under § 287.780, a claimant must prove each of the following four elements: 1) claimant's status as an employee of defendant before the injury; 2) claimant's exercise of a right under workers' compensation law; 3) defendant's discharge of or discrimination against claimant; and 4) an exclusive causal relationship between claimant's exercise of his rights and defendant's discharge of or discrimination against claimant.

Hansome at 275.

While *Hansome* was the first decision to enunciate the "exclusive causation" standard, it was not the first decision to recognize that the conflict between the statute's proscription and Missouri's "at will" employment standard is best solved by requiring that the employee claiming a right to redress meet a burden of proof greater than temporal connection. In *Mitchell v. St. Louis County*, 575 S.W.2d 813 (Mo. App. E.D. 1978), Plaintiff was discharged several months after filing for workers' compensation. After her injury, Plaintiff missed many hours of work, both related and unrelated to her injury, and was fired for excessive absenteeism. Defendant's motion for directed verdict was sustained and affirmed, and the Court stated that an employer may discharge an employee for excessive absenteeism, even if the absenteeism is caused by a compensable injury. *Id*. In sustaining the verdict, the Court repeatedly referenced that Plaintiff had not provided "substantial" or "probative" evidence to support her claim, thus alluding to a heightened burden of proof for causation, not relying simply on any causal connection. *Id at 815*. Further, in *Davis v. Richmond Special Rd. Dist.*, 649 S.W.2d 252 (Mo. App.

1983), a directed verdict for defendant was sustained. After suffering a compensable injury, Davis returned to work on a trial basis, but he was discharged for being unable to perform his job. *Id*. The Court in *Davis* specifically discusses the Legislative Intent in enacting Section 287.780, RSMo., noting that the statute was penal in nature, and by its wording does not convey an intent that mere discharge gives rise to a claim against the employer. *Davis* at 255. "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*. By its very wording and the intent within, the statute requires more than a mere showing of the exercise of the right by the employee, coupled with his or her discharge from employment. *Id*.

Additionally, prior to the *Hansome* decision, in *Rodriguez v. Civil Serv. Comm'n*, 582 S.W.2d 354, 355 (Mo. App. 1979), Plaintiff was discharged because she was 'unwilling or unable to work.' *Id*. Holding for defendant, the court explained that the Compensation Act does not guarantee that an employee will be able to return to her old job, and that termination after filing for worker's compensation benefits is irrelevant to the issue of discrimination. *Id*. "Causality does not exist if the basis for discharge is valid and non-pretextual." *Id*. The holding in *Rodriguez* is important in that it incorporated a heightened standard of causation, recognizing that mere correlation between termination and the exercise of worker's compensation rights is insufficient to state a claim under Section 287.780, RSMo.

While the *Hansome* case was this Court's first opportunity to decipher the statute, it was not the last. In 1998, nearly fifteen years after the 1984 *Hansome* decision, this Court again considered the burden an employee must prove in a cause of action brought under Section 287.780, RSMo. As previously mentioned, in *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo. 1998), the Court reevaluated and confirmed that the exclusive causation standard was proper in cases arising under Section 287.780, RSMo. The Crabtree Court declared that the statutory interpretation elicited in *Hansome* was entirely consistent with the legislative intent underlying Section 287.780, RSMo.

> If there is an injustice or an absurdity, it would be for this Court to abandon the requirement that the discharge be exclusively caused by the exercise of rights pursuant to the workers' compensation law. Under that rule, an employee who admittedly was fired for tardiness, absenteeism, or incompetence at work would still be able to maintain a cause of action for discharge if the worker could persuade a fact finder that, in addition to the other causes, a cause of discharge was the exercise of rights under the workers' compensation law. Such rule would encourage marginally competent employees to file the most petty claims in order to enjoy the benefits of heightened job security.

Crabtree, 967 S.W.2d at 72.

Further, this Court in *Crabtree* opined considerably on the importance of stare decisis as it relates to the elements of Section 287.780, RSMo.:

> Once this Court by case law has resolved the elements of a cause of action pursuant to sec. 287.780, neither the trial court nor the court of appeals is free to redefine the elements in every case that comes before them. Mo. Const. art. V, sec. 2. Similarly, this Court should not lightly disturb its own precedent. Mere disagreement by the current Court with the statutory analysis of a predecessor Court is not a satisfactory basis for violating the doctrine of stare decisis, at least in the absence of a recurring injustice or absurd results.

Crabtree, 967 S.W. 2d. at 71-72. Following this prescription, Missouri Courts have consistently applied the "exclusive causation" standard since the Crabtree decision.

Here, Appellant cannot show recurring injustice or absurd results have occurred due to the "exclusive causation standard," as required to overcome the rule of stare decisis. See *Crabtree*, 967 S.W.2d at 71, 72. Instead, appellant relies upon arguments of statutory construction and purported legislative intent through changes to other statutes in its plea for a new interpretation. Such an argument is insufficient to overcome the stalwart deference to stare decisis, and would result in disastrous results for Missouri and her people. For this Court realized fifteen years ago in *Crabtree* that absurd results would result from the institution of a "causal connection" standard. "Such rule would encourage marginally competent employees to file the most petty claims in order to enjoy the benefits of heightened job security." *Crabtree*, 967 S.W.2d at 71, 72. Should these marginally competent employees file the pettiest claims, it will have the unintended effect of clogging the Circuit Court's already overly crowded docket. It will raise the

cost for an employer to hire a new employee, and may cause employers to forgo expansion of its workforce for fear of meritless, but potentially costly, retaliation claims. As seen in both Kansas City and St. Louis, additional costs and impairments to employers could cause these employers to move its job opportunities across state lines. In an already troubling economic time, fewer employment opportunities in Missouri is truly a disastrous result, especially when the suggested statutory change attempts to fix a problem that it has not proven to exist. As this Court stated in *Crabtree*, "[t]hose who disagree with the state and this Court's precedent analyzing the statute are free to seek redress in the legislative arena." *Crabtree*, supra, at 72. Since the legislature created the cause of action through statute, it is up to the legislature to review the Court's interpretation of this cause of action. Therefore, the decision of the trial court and appellate court should be affirmed.

Exceptions do exist to an employer's right to terminate his or her employees under the "at will" standard. The first exception prevents an employee from being fired because the employee is "[a] member of a protected class, such as race, color, religion, national origin, sex, ancestry, age or disability." Section 213.055, RSMo. 2005. Second, a public policy exception exists which prohibits an employer from discriminating against an employee "for refusing to perform an illegal act or reporting wrongdoing or violations of the law to superiors or third parties." *Margiotta v. Christian Hospital Northeast Northwest*, 315 S.W.3d 342 (Mo. 2010). Under these exceptions, an employee can recover damages for wrongful termination by proving that membership in a protected class or engaging in a protected activity was a "contributing factor" in the discharge.

M.A.I. 38.01; M.A.I. 38.03. However, these exceptions are clearly distinct from the retaliatory termination exception codified in Section 287.780, RSMo. Therefore, the burden of proof established for these exceptions should not be bootstrapped into claims under Section 287.780, RSMo.

Moreover, this public policy exception is very narrowly drawn. This Court clearly noted that a cause of action commenced under Section 287.780, RSMo. is distinguished from a common law public policy claim. *Margiotta v. Christian Hospital Northeast Northwest*, 315 S.W.3d 342, 346 fn. 1 (Mo. Banc 2010)("Retaliation for filing a worker's compensation action is also prohibited; however it is controlled by specific statutory authority and is distinct from other wrongful discharge actions.").

Further, there is a key distinction between whistleblower cases and workers' compensation retaliatory discharge cases. While workers' compensation claims are statutory, the whistleblower exception to the employee-at-will doctrine arises under the common law of torts. *Brenneke v. Department of Missouri*, 984 S.W.2d 134 (Mo. Ct. App. 1998). However, the key distinction between cases brought under these exceptions and causes brought under the workers' compensation law for retaliatory termination is the Court's consistent requirement that the employee prove that the exclusive cause of the discharge was for exercising his or her rights under the act. M.A.I. 38.04.

Section 287.780, RSMo., by its very terms, is distinguished from the remaining provisions of Chapter 287 due to the enactment of a civil cause of action for employees who suffer retaliation for filing worker's compensation benefits. No other provision of Chapter 287 provides original jurisdiction within the trial court. This distinction is

crucial when interpreting the applicability of other portions of Chapter 287 to Section 287.780, RSMo. In 2005, the Missouri Legislature revised the worker's compensation law. *Missouri Alliance v. Department of Labor*, 277 S.W. 3d 670, 674 (Mo. 2009) ("Senate Bills 1 and 130 amended 30 section of Chapter 287, RSMo. 2000 the Missouri Workers Compensation Law.). However, the legislature's revision was remarkably specific, and shows the legislature did not intend to alter a cause of action under Section 287.780, RSMo.

The legislation which Appellant asserts requires strict construction, therefore a change in the interpretation of Section 287.780, RSMo. is found in Section 287.800, RSMo. Section 287.800, RSMo., provides "[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly." When strictly construing the words of this section, the Court will notice that the Legislature is directing this instruction to those who have jurisdiction to provide compensation to injured workers at the time it enacted the statute, including any *reviewing* court. Section 287.800, RSMo. The trial court handling a wrongful discharge or discrimination claim is neither a court awarding benefits nor a reviewing court as defined in Section 287.800, RSMo. *Noscitur a sociis*, a maxim of statutory construction long recognized in Missouri, provides that the meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it. *State v. Bratina*, 73 S.W.3d 625, 627 (Mo. Banc 2002); *Foremost Dairies v. Thomason*, 384 S.W.2d 651, 660 (Mo. Banc 1964). Each of the terms enunciated in

Section 287. 080, RSMo., construe the provisions of the worker's compensation law for providing compensation to claimants. However, none of the specifically listed individuals or entities in Section 287.800, RSMo., construe the provisions of a cause of action for retaliatory discharge under Section 287.780, RSMo. Therefore, the strict construction language of Section 287.800, RSMo. was not intended to apply to a cause of action brought in a circuit court, as a circuit court judge was excluded from the language of Section 287.800, RSMo. This inapplicability provides further support for this Court to adhere to stare decisis.

Not only does this Court's long history of interpreting Section 287.780, RSMo. to require an exclusive causal connection, as well as the rule of stare decisis, undermine Plaintiff's argument for only a "contributing factor" standard, the actions of the Missouri Legislature also weigh in favor of affirming the exclusive causation standard. It is well established that the legislature is presumed to be aware of the state of the law at the time it enacts a statute. *Kilbane v. Director of the Department of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976). See also *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988); *In the Matter of Nocita*, 914 S.W.2d 358, 359 (Mo. banc 1996); *State v. Haskins*, 950 S.W.2d 613 (Mo. Ct. App. 1997). Therefore, the re-enactment of a statute after judicial construction is to be regarded as a legislative adoption as thus construed. *Dow Chemical Inc. v. Director of Revenue, State of Mo.*, 834 S.W. 2d 742, 745 (Mo. 1992) (It is not only the text of a statute that makes the legislative intent known, however, but the judicial decisions that construe and give effect to the statute. The construction of a statute by a court of last resort becomes a part of the statute as if it had been so amended

by the legislature)(internal citations omitted). If the Legislature desired a different interpretation, then it would have provided an explicit definition. *George v. Jones*, 317 S.W.3d 662, 668 (Mo. Ct. App. 2010); *Belcher v. State*, 299 S.W.3d 294, 296 (Mo. banc 2009); *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988) ("In construing a statute, the Court must presume the legislature was aware of the state of the law at the time of its enactment."). This Court has stated:

> It is presumed that the Legislature is acquainted with the law; that it has a knowledge of the state of it upon the subjects upon which it legislates; that it is informed of previous legislation and the construction it has received. . . . A judicial construction of a statute of long standing has force as a precedent from the presumption that the Legislature is aware of it, and its silence is a tacit admission that such construction is correct. The re-enactment of a statute after a judicial construction of its meaning is to be regarded as a legislative adoption of the statute as thus construed. So, where the terms of a statute which has received a judicial construction are used in a later statute, whether passed by the Legislature of the same State or country, or by that of another, that construction is to be given to the later statute; for if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effectuate that intention.

Strottman v. St. Louis I. M. & S. R. Co., 211 Mo. 227, 255-256, 109 S.W. 769 (Mo. 1908).

Considering the sound logic of the Court's predecessors, the Missouri Legislature was presumptively aware of the exclusive causation standard applied in *Hansome* and *Crabtree* when it reenacted Section 287.780, RSMo., without change in 2005, thereby adopting this construction of the statute. Had the legislature intended to change decades of precedent, and therefore bring about a significant change in the legal standard applied – and thereby the day to day activities of employers across the state of Missouri, it surely would have done so explicitly, at the very least in 2005. It appears that Appellant expects the Court to depart from decades of precedent despite the rule of law, solely through implication.

Assuming arguendo the Missouri Legislature had intended for strict construction to apply to Section 287.780, RSMo., which it did not, the alternative interpretive language proposed by Appellant, "causal connection" is notably absent from the statute. Section 287.780, RSMo. While the "exclusive causation" language is also absent from the statute, the continued application of the statutory interpretation first announced in *Hansome* nearly 30 years ago should not be overlooked or overturned for an alternative strained interpretation not supported by legislative intent.

Other amici note that the key word requiring interpretation is "for." See Brief of the St. Louis and Kansas City Chapters of the National Employment Lawyers Association as Amici Curiae in Support of Appellant at ¶ 14, 15. Their argument is that because there is nothing in the definition of the word "for" that requires an exclusive

causal relationship, an exclusive causal relationship was not intended by the legislature. However, interpretation by this Court and by state courts across the nation state otherwise.

A majority of states that provide a statutory cause of action for retaliatory discharge after filing worker's compensation benefits require a heightened burden of proof be shown by the employee. Several states, including Alabama, Hawaii, New Mexico, and Virginia, recognize the necessity of a higher standard overtly through the language of their statute. These states recognize that retaliatory discharge after exercise of worker's compensation rights is a unique category of employment law, as worker's compensation claims are not intended to provide heightened employment security. (See, e.g. "No employee shall be terminated by an employer *solely* because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits under this chapter;" Alabama Code Section 25-5-11.1; "It shall be unlawful for any employer to suspend or discharge any employee *solely* because the employee suffers any work injury which is compensable under this chapter and which arises out of and in the course of employment with the employer unless it is shown to the satisfaction of the director that the employee will no longer be capable of performing the employee's work as a result of the work injury and that the employer has no other available work which the employee is capable of performing," Haw. Rev. Stat. § 386-142., 278-32(2); "An employer shall not discharge, threaten to discharge or otherwise retaliate in the terms or conditions of employment against a worker who seeks workers' compensation benefits *for the sole reason* that that employee seeks workers'

compensation benefits;" N.M. Stat. § 52-1-28.2(a); "No employer or person shall discharge an employee solely because the employee intends to file or has filed a claim under the Virginia Workers' Compensation Act, or has testified or is about to testify in any proceeding under the Act. An employer is not prohibited from discharging an employee for filing a fraudulent claim." Va. Code § 65.2-308).

In further support of the necessity of a heightened standard in this case, even those state statutes highlighted by other amici, while they do not explicitly note a heightened standard of causation within the plain wording of a statute, have consistently been interpreted by their respective state courts to require a heightened standard of causation. For example, in Florida, the state legislature codified Fla. Stat. § 440.205 as follows: "An employer is not permitted to discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Worker's Compensation Law." According to the plain language of the statute, the standard for retaliation is "by reason of" a claim for compensation. *Id*. However, the Courts of Florida make it abundantly clear that an employer's desire to retaliate must be the "substantial factor" in the decision to carry out a prohibited act. *Allan v. SWF Gulf Coast, Inc.*, 535 So. 2d 638 (Fla. 1st DCA 1988); see also *Southern Freightways v. Reed*, 416 So. 2d 26 (Fla. 1st DCA 1982) ["A showing of ill motivation on the employer's part is insufficient."]. Similarly, Kentucky's statute, K.R.S. § 342.197, states "No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter." [Emphasis added.] Case law reiterates that the burden of proof encompassed in

proving an employer took inappropriate action against an employee "for" filing a retaliation claim is that the employee must prove the worker's compensation claim was the substantial and motivating factor, but for which the employee would not have been discharged. ["The question, as framed by the courts of this Commonwealth, is whether Johnson's filing of a workers' compensation claim was a substantial and motivating factor but for which he would not have been discharged." *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185 (Ky. 1993), and *Bishop v. Manpower, Inc. of Central Kentucky*, 211 S.W.3d 71 (Ky. App. 2006)]. This pattern can also be seen in states such as Maine, Montana, Oregon, and West Virginia, amongst others.[1]

Appellant's suggested "causal connection" burden is neither supported by the language of Section 287.780, RSMo., nor warranted by comparison to the holdings of other states. The decision of the trial court and appellant court should be affirmed.

[1] Me. Rev. Stat. 39-A § 353; *Lavoie v. Re-Harvest, Inc.*, 973 A.2d 760 (Me. 2009; Section 39-71-317, MCA (2010); *Lueck v. UPS*, 258 Mont. 2, 8, 851 P.2d 1041. 1045 (1993); ORS § 659A.040(1); *Lewis v. Wal-Mart Stores, Inc.*, 2009 WL 3462056 at *9 (D. Or); W. Va. Code § 23-5A-2; *Powell v. Wyo. Cablevision*, 184 W. Va. 700 (1991).

II. In the alternative, if the Court decides to abandon the "exclusive causation" standard for claims under Section 287.780, RSMo., the Court should dismiss the "causal connection" standard and instead craft a heightened standard which would fulfill the purpose of the statute and would protect both employers and workers.

There is no compelling reason for the change from an "exclusive causation" standard to merely a "causal connection" in cases brought under Section 287.780, RSMo., as requested by the Appellant for this Court to choose to reject 30 years of case law. However, should this Court decide that the exclusive causation standard, which has been the hallmark standard as enunciated in *Hansome*, confirmed in *Crabtree*, and followed consistently in this State for three decades is inconsistent with the legislature's intent, despite the legislature's refusal to change the standard, the "casual connection" standard should be summarily rejected, as its implementation is not supported by the statute and could lead to adverse and inconsistent effects for the state of Missouri.

Amicus curaie MODL suggests should this Court determine 30 years of case law interpreting Section 287.780, RSMo. be overturned, that it craft a still heightened burden of proof for employees in proving a connection between the employee's exercise of workers' compensation rights and subsequent discharge or discrimination. Such a heightened standard could be found in *Mitchell*, *supra* ("Substantial" or "probative" connection); or in *Davis*, *supra* ("precisely" for). Further, this Court could borrow a standard that is applied in multiple jurisdictions across the country to ensure that the retaliation statutes do not become de facto job security. That standard requires an

employer's exercise of rights be "substantively and significantly" connected to any discrimination or discharge. (See, e.g. Me. Rev. Stat. 39-A § 353; *Lavoie v. Re-Harvest, Inc.*, 973 A.2d 760 (Me. 2009) (The key question is whether the motivation for the employee's termination "was rooted substantially or significantly in the employee's exercise of his rights under the Workers' Compensation Act;" K.R.S. § 342.197; *Bishop v. Manpower, Inc. of Central Kentucky*, 211 S.W.3d 71 (Ky. App. 2006)). While this standard could still create some of the problems elicited *supra*, it is a far better – and more just – standard than that proposed by Appellant and other advantageous, litigious, marginal employees.

CONCLUSION

Based on the foregoing, amicus Missouri Organization of Defense Lawyers urges this Court to uphold the judgments of the lower courts and affirm the "exclusive causation" standard as the correct standard to apply in Section 287.780, RSMo. actions. This interpretation is consistent with Missouri's employment at will doctrine, while at the same time balancing the interests of Missouri workers. It is consistent with the legislative intent as elicited by this Court, and reaffirmed through thirty years of application and reverence by the Missouri Legislature. The "exclusive causation" standard should remain the causation standard in the cause of action. M.A.I. 23.13, adopted by the Court, properly submitted the elements of the cause to the jury. The trial court did not err in refusing to give the instructions offered by Appellant Templemire. However, if the Court chooses to abandon the "exclusive causation" standard, amicus urges the Court to adopt a heightened causation standard in its place to avoid potentially grave consequences.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06 (c), this brief: (1) complies with 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 5,171 words, exclusive of the section exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically via Missouri CaseNet and served, this 29th day of April, 2013 to:

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