

No. SC 87279

**IN THE
MISSOURI SUPREME COURT**

STATE EX. REL. TRI-COUNTY ELECTRIC COOPERATIVE ASSOCIATION,

Relator

vs.

**THE HONORABLE GARY DIAL,
Presiding Judge of the Circuit Court of Schuyler County, Missouri
Division 3**

Respondent

BRIEF OF RESPONDENT

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**ATTORNEYS FOR RESPONDENT
Honorable Gary Dial and for
Gary and Martha Watson**

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STATEMENT OF FACTS

Steve Watson ("Watson"), the decedent, was employed by Relator Tri-County Electric Cooperative Association ("Tri-County") as a lineman/journeyman. On August 4, 2004 Watson was called at home at approximately 7:30 p.m. to assist in making repairs to Tri-County's power line at or near Flax Trail Road off Highway FF in Putnam County, Missouri.

Bobby Newland ("Newland"), a Tri-County employee was the supervisor/foreman working with and directing Watson's activities. Watson was instructed by Newland to climb the electrical pole without proper protection to make the necessary repairs to a live power line containing 7,200 volts of electricity. While making the repairs, Watson was electrocuted and sustained serious injuries which ultimately led to his death.

Newland, owing a separate duty to Watson, was guilty of a number of affirmative negligent acts which led to Watson's death. (Relator's Exhibit 7, Appendix, A125-142) (Respondent's Exhibit C, Appendix, A80-A97).

On July 5, 2005, Gary and Martha Watson, the natural parents of Watson, filed their Petition for Damages in the Circuit Court of Schuyler County, Missouri, Case No: 05SY-CV00037. (Relator's Exhibit 4, Appendix, A97-102).

On August 10, 2005 Tri-County and Newland filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, (Relator's Exhibit 5, pp. A103-108) along with Suggestions in Support of their Motion. (Relator's Exhibit 6, pp. A109-115).

On September 1, 2005, Gary and Martha Watson filed Suggestions in Opposition to Relator's Motion to Dismiss. (Relator's Exhibit 7, Appendix, A116-142).

Relator's Motion to Dismiss was called, heard and argued before Respondent the Honorable Gary Dial, on September 1, 2005. (Respondent's Exhibit A, Appendix, A1-A23). During oral argument, Respondent Dial asked Tri-County's counsel if certain alleged actions, if true, would be sufficient to take this case outside the scope of the Missouri Workers' compensation law. Tri-County's attorney stated that he was not aware of any evidence of any of these actions but stated "if he (Newland) affirmatively ordered him (Watson) to do something without safety equipment, yes your honor, absolutely."

During oral argument Tri-County's attorney asked the Court to put its ruling on hold so he could file additional suggestions after reviewing Plaintiffs' Suggestions in Opposition to Relator's Motion to Dismiss. The Court granted this request. (Respondent's Exhibit A, Appendix, A21). On September 14, 2005, Tri-County filed its additional Suggestions in Support of its Motion to Dismiss. (Relator's Exhibit 8, Appendix, A143-164)

The Honorable Gary Dial entered his Order overruling Tri-County's Motion to Dismiss on September 19, 2005. (Relator's Exhibit 1, Appendix, A1-2). Tri-County then filed its Answer to Plaintiffs' Petition choosing to proceed with the case on its merits. (Relator's Exhibit 9, Appendix, A165-168).

Tri-County and Newland filed a Petition for Writ of Prohibition along with their Suggestions in Support with the Missouri Court of Appeals, Western District. (Relator's Exhibit 2, Appendix, A3-95). That Writ sought was based upon the same grounds as the present Writ. Gary and Martha Watson filed an Answer (Respondent's Exhibit B, Appendix, A24-A54) and Suggestions in Opposition to the Writ on behalf of themselves

and Respondent Dial. (Respondent's Exhibit C, Appendix, A55-A97). The Missouri Court of Appeals, Western District, entered an Order denying Tri-County and Newland's Petition for Writ of Prohibition on November 18, 2005. (Relator's Exhibit 3, Appendix, A169).

On November 28, 2005 Tri-County and Newland filed a Petition for Writ of Prohibition and Suggestions in Support with this Court. (Relator's Exhibit 11, Appendix, A170-193). On December 5, 2005 Respondents' filed their Suggestions in Opposition to the Writ of Prohibition. (Respondent's Exhibit E, Appendix A105-A122).

On December 20, 2005, this Court denied Newland's Petition for Writ of Prohibition, but issued a Preliminary Writ of Prohibition in favor of Tri-County (Relator's Exhibit 12, Appendix, A194-196). On January 18, 2006 Respondent filed an Answer to the Petition for Writ of Prohibition. (Respondent's Exhibit D, Appendix, A98-A104).

Relator has added as Exhibit 13, pp. A196-197, a report of injury which was not before Respondent Dial and therefore should be stricken from this writ.

POINTS RELIED ON

I.

Relator is not entitled to an Order prohibiting Respondent Dial from doing anything other than vacating Respondent's September 19, 2005 order overruling Relator's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and thereafter entering an order sustaining said motion as to Relator, because Relator has failed to prove Respondent Dial abused his discretion when ruling on Relator's Motion to Dismiss for Lack of Subject Matter Jurisdiction in that Respondent Dial carefully considered the record before him in ruling on Relator's Motion to Dismiss and, further, Tri-County failed to meet its burden of proof on its Motion to Dismiss before the Respondent Dial.

Cases

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

Craft v. Scaman, 715 S.W.2d 531, 535 (Mo.App.E.D. 1986)

Workman v. Vader, 854 S.W.2d 560, 562 (Mo.App.S.D. 1993)

II.

Relator is not entitled to an Order prohibiting Respondent Dial from taking any further action in this matter or requiring Respondent Dial to enter an Order dismissing Plaintiffs' Petition as to Tri-County because Tri-County failed to meet its burden of proof to establish that the Missouri Workers Compensation Law vested exclusive jurisdiction of Plaintiffs' claim with the Missouri Labor & Industrial Relations Commission in that Tri-County's and Newland's affirmative negligent

actions, as the supervisor and agent of Tri-County, were breaches of Tri-County's duties beyond Tri-County's non-delegable duties owed to Watson and, therefore, would not be covered by the exclusivity provision of the Missouri Workers Compensation Law.

Cases

Killian v. J&J Installers, Inc., 802 S.W.2d 158, 160 (Mo.banc 1991);

Deckard v. O'Reilly Automotive, Inc., 31 S.W.3d 6, 14 (Mo.App.W.D. 2000).

Gunnnett v. Girardier Bldg. and Realty Co., 70 S.W.3d 632 (Mo.App.E.D. 2002).

Kelly v. DeKalb Energy Company, 865 S.W.2d 670, 672 (Mo.banc 1993).

State ex rel Taylor v. Wallace, 73 S.W.3d 620, 621 (Mo.banc 2002).

Tauchert v. Boatmen's Nat. Bank of St. Louis, 849 S.W.2d 573, 574 (Mo. banc 1993)

ARGUMENT

I.

Relator is not entitled to an Order prohibiting Respondent Dial from doing anything other than vacating Respondent's September 19, 2005 order overruling Relator's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and thereafter entering an order sustaining said motion as to Relator, because Relator has failed to prove Respondent Dial abused his discretion when ruling on Relator's Motion to Dismiss for Lack of Subject Matter Jurisdiction in that Respondent Dial carefully considered the record before him in ruling on Relator's Motion to Dismiss and, further, Tri-County failed to meet its burden of proof on its Motion to Dismiss before the Respondent Dial.

Standard of Review

The standard of review of Respondent Dial's Order denying Tri-County's Motion to Dismiss for Lack of Subject Matter Jurisdiction is for an abuse of discretion. Burns v. Employer Health Services, Inc., 976 S.W.2d 639, 641 (Mo.App.W.D. 1998). To find the trial court abused its discretion is a high standard. The trial court only abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration on the part of the Court. Burns v. Employer Health Services, Inc., 976 S.W.2d at 641-642.

Subject Matter Jurisdiction

Both parties agree that a Motion to Dismiss for Lack of Subject Matter Jurisdiction is the correct method to raise as a defense to a tort action the exclusivity provisions/jurisdiction of the Missouri Workers Compensation Law.

Both parties further agree that the party raising the defense (Tri-County) bears the burden of showing the trial court that it is without subject matter jurisdiction. Burns v. Employer Health Services, Inc., 976 S.W.2d at 641; Craft v. Scaman, 715 S.W.2d 531, 535 (Mo.App.E.D. 1986).

The determination of whether a case falls within the exclusive jurisdiction of the Missouri Labor & Industrial Relations Commission is a question of fact. Burns v. Employer Health Services, Inc., 976 S.W.2d at 641. All facts alleged in a plaintiffs' Petition should be construed as true and in favor of the plaintiffs when considering a Motion to Dismiss for lack of subject matter jurisdiction. See Workman v. Vader, 854 S.W.2d 560, 562 (Mo.App.S.D. 1993).

When a trial court's jurisdiction turns on a factual determination the decision should be left to the sound discretion of the trial court. Burns v. Employer Health Services, Inc., 976 S.W.2d at 641.

Abuse of Discretion

Tri-County must prove to this Court that Judge Dial abused his discretion when he denied Tri-County's Motion to Dismiss before this Court should issue a permanent Writ

of Prohibition. Tri-County must carry the burden of proof in this writ and it fails to do so in this case.

Tri-County must prove and this Court could only find that Respondent Dial abused his discretion if (1) the Respondent Dial lacked careful consideration in making his decision, and (2) his decision is so arbitrary and unreasonable that it shocks the sense of justice.

Respondent Dial Carefully Considered Tri-County's Motion to Dismiss

Tri-County fails to prove that Respondent Dial lacked careful consideration in making his decision. The record clearly establishes that Respondent Dial gave Tri-County the full opportunity to present its motion and carefully considered the motion in reaching his decision.

Respondent Dial provided Tri-County with the opportunity for oral argument. Tri-County's attorney had all the time it needed to argue its points. Tri-County had the chance to reply to the Watsons' counsel's oral arguments. In fact, the hearing shows that Respondent Dial and Tri-County's counsel discussed this matter and Respondent Dial questioned Tri-County's counsel about the affirmative negligent acts and how those acts would take this matter outside the workers' compensation exclusivity provisions. (Respondent's Exhibit A, Appendix, A16-A18). In fact, Tri-County's counsel admitted that the negligent affirmative acts of Newland, if true, would bring the matter outside the exclusivity provision of the Workers Compensation Act. (Respondent's Exhibit A, Appendix, A18).

Respondent Dial also gave Tri-County's attorney the opportunity to file additional suggestions. Respondent Dial indicated he was going to read both parties' cases and suggestions along with Tri-County's later filed suggestions. (Respondent's Exhibit A, Appendix, A21).

Respondent Dial's Order of September 19, 2005 is not a perfunctory order merely denying the Motion. Respondent Dial carefully and correctly set out the applicable law, which party bears the burden of proof, the quantum of proof needed, etc. (Relator's Exhibit 1, Appendix, A1). Respondent Dial carefully reviewed and his Order sets forth the negligent affirmative allegations of Plaintiffs' Petition. His Order clearly states that he had reviewed Tri-County's pleadings. (Relator's Exhibit 1, Appendix, A1-2).

Respondent Dial then found:

"What is at issue for the finder of fact is whether or not a co-employee personally took part in an affirmative act by creating a hazardous condition outside the scope of the responsibility to provide a safe work place that violated a personal duty of care. These allegations, if proven, would create that 'something extra' beyond a breach of general supervision. Therefore, this Court finds that the allegations in the Petition, if proven, would confer subject matter jurisdiction with this Court."

The record clearly indicates Respondent Dial (1) carefully considered and applied the correct law, (2) fully considered the record before him, (3) gave both Parties the full opportunity to present and brief all matters to him and (4) gave the Parties the opportunity to be heard before making his decision. Tri-County's Petition for Writ of

Prohibition fails on the ground that Respondent Dial failed to carefully consider Tri-County's Motion to Dismiss.

Tri-County Failed to Meet its Burden of Proof on its Motion to Dismiss

Respondent Dial found Tri-County "failed to show by a preponderance of the evidence that this Court is without subject matter jurisdiction." (Relator's Exhibit 1, Appendix A2). Tri-County had the burden to carry its motion. It failed. Respondent Dial denied the Motion to Dismiss for Lack of Subject Matter Jurisdiction but left open the option for Tri-County the opportunity to come back at a later date to reassert the motion if Plaintiffs cannot prove the allegations of their Petition. (Relator's Exhibit 1, Appendix, A1-2).

Tri-County fails to establish in their Writ that it met its burden of proof at the trial court level. Tri-County's Petition for Writ of Prohibition fails on this ground.

Tri-County Failed to Prove that Respondent Dial's Order was Arbitrary and Unreasonable

Tri-County must prove that Respondent Dial's decision is so arbitrary and unreasonable that it shocks the senses of justice. Tri-County's Petition for Writ of Prohibition fails to meet this burden of proof.

Respondent Dial's decision was not arbitrary or unreasonable. The decision was based on correct Missouri law for the reasons fully set forth below in Argument II. Respondent Dial's decision still requires Plaintiffs to prove the allegations of their Petition. The trier of fact can find that Tri-County and/or Tri-county's supervisor Newland's affirmative negligent actions, if proven true, are breaches of Tri-County's

duty, separate and apart from the non-delegable duties Tri-County owed to Watson. Only breaches of Tri-County's non-delegable duties fall within the exclusivity provision of the Workers' Compensation Act.

II.

Relator is not entitled to an Order prohibiting Respondent Dial from taking any further action in this matter or requiring Respondent Dial to enter an Order dismissing Plaintiffs' Petition as to Tri-County because Tri-County failed to meet its burden of proof to establish that the Missouri Workers Compensation Law vested exclusive jurisdiction of Plaintiffs' claim with the Missouri Labor & Industrial Relations Commission in that Tri-County's and Newland's affirmative negligent actions, as the supervisor and agent of Tri-County, were breaches of Tri-County's duties beyond Tri-County's non-delegable duties owed to Watson and, therefore, would not be covered by the exclusivity provision of the Missouri Workers Compensation Law.

Missouri's Workers Compensation Act

Missouri's Workers Compensation statute and law is known as the Workers' Compensation Law, 287.010 et seq. R.S.Mo. 2000. Tri-County's basis for seeking this Writ of Prohibition is that decedent Watson was an employee of Tri-County and therefore the exclusivity provision of §287.120 R.S.Mo. 2000 precludes any actions against Tri-County, the employer.

Tri-County fails to recognize only Tri-County's breaches of its common law, non-delegable duties are covered by the exclusivity provision of the Act.

The Workers' Compensation Law is fully substitutional in character; an injured worker's common law rights are supplanted and superseded thereby, **but only if the Act is applicable**. (Emphasis added). See Killian v. J&J Installers, Inc., 802 S.W.2d 158, 160 (Mo.banc 1991); Deckard v. O'Reilly Automotive, Inc., 31 S.W.3d 6, 14 (Mo.App.W.D. 2000). The legislature did not intend for the Act to subvert every common law tort action that may arise between an employer and an employee. Deckard v. O'Reilly Automotive, Inc., 31 S.W.3d at 15.

Tri-County's Brief, pp. 17-18 cites a variety of cases but the underlying theme in each case is the same. The employer has a non-delegable duty to provide "a reasonably safe place to work." See Kelly v. DeKalb Energy Company, 865 S.W.2d 670, 672 (Mo.banc 1993). The Workers' Compensation Law provides the exclusive remedy for breaches of the employer's non-delegable duties because only these cases "are covered by its provisions." State ex rel Taylor v. Wallace, 73 S.W.3d 620, 621 (Mo.banc 2002).

This Court noted in Kelly, that the employer has this non-delegable duty to provide a reasonable safe place to work. Suits for breach of this duty (failure to provide a reasonable safe place to work) are excluded by the Workers' Compensation Law. Kelly v. DeKalb Energy Company, 865 S.W.2d at 672. This Court did go on to note that an employee may sue a fellow employee for affirmative negligent acts outside the scope of the employer's responsibility to provide a safe place to work. Kelly v. DeKalb Energy Company, 865 S.W.2d at 672. This Court never addressed the issue of whether these recognized affirmative negligent actions outside the scope of the employer's responsibility to provide a safe place to work can form the basis of an action by an

employee against an employer. The Kelly Court did not permit a separate action against the co-employee but only because the negligence alleged was part of the employer's non-delegable duty to provide a safe work place. Kelly v. DeKalb Energy Company, 865 S.W.2d at 672.

In State ex rel Taylor v. Wallace, 73 S.W.3d 620 (Mo.banc 2002) this Court noted that the Workers' Compensation Law provides the exclusive remedy against an employer for injuries "covered by its provisions." Employers and co-employees are exempt from civil lawsuits when there is a breach "of the duty to maintain a safe working environment." Actions that are based upon a breach of a duty to maintain the safe work environment are preempted by the Workers' Compensation Act. Affirmative negligent acts outside the scope of the employer's responsibility "to provide a safe workplace" are not preempted. State ex rel Taylor v. Wallace, 73 S.W.3d at 621-622.

Tri-County's position is that decedent Watson's injuries were caused by an incident arising out of and in the course and scope of his employment with Relator. Tri-County stops its inquiry at this point. The inquiry however should not stop at this point. It is not simply enough that the decedent died in an incident arising out of or in the course of his employment. Rather, the Workers' Compensation Law only provides the exclusive remedy for injuries against an employer for breaches of the employer's common law duties to provide an employee with a safe place to work.

The exclusivity of the Act, and therefore the employer's immunity under the Act is based strictly upon a breach of the employer's non-delegable duties. Gunnnett v. Girardier Bldg. and Realty Co., 70 S.W.3d 632 (Mo.App.E.D. 2002). In Gunnnett, the Court of

Appeals discussed in detail the intended scope of the immunity to be afforded by the Workers' Compensation Law. It also detailed a historical review of the Workers' Compensation Law. The Gunnnett court noted that when an injured party brings a common law negligence action, the plaintiff must "establish the existence of a duty on the part of the defendant to protect plaintiff from injury, failure of the defendant to perform that duty and that the plaintiff's injury was proximately caused by the defendant's failure." Gunnnett, 70 S.W.3d at 637. While discussing actions against co-employees the Gunnnett court noted it is not merely the existence of a duty on the part of the co-employee, but the nature of the duty involved which is key in determining whether a co-employee may be held liable. The court noted that the touchstone of co-employee common law liability is "whether the negligence occurred in the performance of a non-delegable duty of the employer as opposed to arising out of an obligation owed to the injured employee." The former are excluded by the Act while the latter are not precluded. The court then cited a number of Missouri cases which hold co-employees are not liable when their negligence is based upon the failure to discharge the employer's non-delegable duty. The court noted that when an employee fails to perform the employer's non-delegable duty, the failure is that of the employer, not the employee. Gunnnett, 70 S.W.3d at 638. Similarly, it should follow that a co-employee's breach of a duty other than a non-delegable duty can also be the failure of the employer.

The Gunnnett court went on to note in FN8 that the employer's responsibility in common law was to discharge five specific duties relevant to safety: (1) to provide a safe workplace; (2) to provide safe equipment in the workplace; (3) to warn employees about

the existence of dangers of which the employees could not reasonably be expected to be aware; (4) to provide a sufficient number of competent fellow employees; and (5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety. Gunnett, 70 S.W.3d at 638. The Gunnett court noted that this Court distinguished between a breach of an employer's duty to provide a safe workplace and a breach of a personal duty of care. Breaches of a personal duty of care are not afforded the immunity of the Workers' Compensation Act. Gunnett, 70 S.W.3d at 638-639 citing Tauchert v. Boatmen's Nat. Bank of St. Louis, 849 S.W.2d 573, 574 (Mo. banc 1993).

Plaintiffs' Petition in the underlying case seeks to recover damages for Newland's breach of his personal duty owed to decedent Watson and the affirmative negligent actions which violated that duty. The Watsons seek to hold Tri-County responsible for Newland and/or Tri-County's affirmative negligent acts which arise separate and apart from Tri-County's common law duty to provide a safe place to work to decedent Watson.

The Watsons are Entitled to Bring this Action Under the Missouri Constitution

Article I, Section 14 of the Missouri Constitution provides that "the Courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."

While the open-court provision of the Missouri State Constitution is not violated by granting to the Labor & Industrial Labor Commission the jurisdiction to determine an employer's breach of its common law duties, the open-court provision would be violated by seeking to prevent Gary and Martha Watson the right to bring a common law action

for actions by Newland as Watson's supervisor and the agent of Tri-County and/or Tri-County itself for actions that are not considered breaches of Tri-County's common law duties owed to Watson. While the Workers' Compensation Act is generally liberally construed, any attempt to limit the Watsons' right under the Missouri Constitution to avail themselves of the courts of this state should be strictly construed against extending the exclusivity provision of the Act.

Newland owed a personal duty to decedent Watson, a point that cannot be disputed. Newland's negligent affirmative acts which breached that personal duty can still be performed while working as a supervisor and/or agent of Tri-County. These affirmative negligent acts and breach of the personal duties are not breaches of Tri-County's common law duties owed to Watson. Therefore, the exclusivity of the Workers' Compensation Law does not apply to Newland's breaches of its personal duty and Tri-County's responsibility for Newland's breach of his personal duty.

Tri-County can cite to this Court no case which precludes an action against Tri-County for Newland's breach of his personal duty to decedent Watson while in the scope of his employment with Tri-County. Tri-County can cite this Court no case that precludes the Watsons' direct action against Tri-County for Tri-County's breach of a duty owed to Watson beyond the duties of common law to provide a safe place to work. The Missouri Workers' Compensation Law's exclusivity provision only applies to Tri-County's breaches of its common law duties to Watson. Tri-County has failed to carry its burden at the trial court level or at this level. Tri-County's Petition for Writ of Prohibition must be denied.

CONCLUSION

Tri-County failed to establish that Respondent Dial abused his discretion in ruling on its Motion to Dismiss. The record clearly shows that Respondent Dial carefully considered the record, gave the parties full opportunity to present this matter and thoughtfully rendered an opinion. The Watson's Petition alleges breaches of duties owed to the decedent Watson other than Tri-County's common law non-delegable duties. Jurisdiction over this matter lies in the Missouri Courts, not with the Missouri Labor and Industrial Relations Commission. Respondent therefore requests that the Preliminary Writ of Prohibition be dissolved and return this matter to the Honorable Dial for resolution of all further matters.

Respectfully submitted,
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Gary and Martha Watson

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that one (1) complete copy and a computer disk containing one (1) complete electronic copy of this Brief of Respondent in Microsoft Word 2003 format, were mailed, U.S. Mail, postage pre-paid, this __ day of March, 2006, to:

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Furthermore, the undersigned certifies that: (1) Brief of Respondent complies with the limitations contained in Rule 84.06; excluding the cover, certification of service and compliance, signature block and appendix there are 4,694 words in Brief of Respondent; the name and version of the word processing software used to prepare Brief of Respondent is Microsoft Word 2003; and the diskette provided to this Court has been scanned for viruses and is virus free.

Mark P. Dupont, Mo Bar #32005