

**IN THE SUPREME COURT OF MISSOURI**

**STATE OF MISSOURI,  
ex rel. CYNTHIA CHAPARRO**

**Relator,**

**v.**

**HONORABLE J. DALE YOUNGS,**

**Respondent.**

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**Case No. SC96779**

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**Petition for Writ of Permanent Mandamus filed against Honorable J. Dale Youngs,  
Judge of Division 6, Sixteenth Circuit Court of Jackson County, Missouri**

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**BRIEF OF RELATOR CYNTHIA CHAPARRO**

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## **I. JURISDICTIONAL STATEMENT**

This Court is vested with the authority to issue and determine original and remedial writs by the Missouri Constitution. Mo. Const. art. V, § 4.1. This matter involves an Amended Order to Compel Arbitration issued by Respondent, the Honorable J. Dale Youngs, on October 16, 2017. This Order is contrary to Missouri law because Relator has a clear and unequivocal right to a right to a trial by a jury of her peers. The Western District of the Missouri Court of Appeals denied Relator's Petition for Preliminary and Permanent Writs on November 9, 2017. This Court issued a Preliminary Writ of Mandamus on December 19, 2017. Relator now seeks a Permanent Writ of Mandamus.

## **II. STATEMENT OF FACTS**

Relator Cynthia Chaparro is a Missouri worker. (Exhibits<sup>1</sup> at 43). In early March 2014, Relator began working at the warehouse of U-Haul Company of Missouri ("Defendant"), the Defendant in the underlying case (*Id.* at 43). Relator worked for Prologistix, a staffing agency, but performed the same tasks she would later be assigned as an employee of Defendant. (*Id.*). Prologistix trained its employees that were assigned to work at Defendant's warehouse in two groups: one for English-speakers and one for Spanish-speakers. (*Id.*). Relator was assigned to the Spanish-speaking group and was trained in that group at Defendant's warehouse. (*Id.*). Once Relator was hired by

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<sup>1</sup> Exhibits filed with Relator's initial Petition for Preliminary and Permanent Writs of Mandamus.

Defendant, she did not require additional training because of the training performed by Prologistix. (*Id.*).

On May 5, 2014, Relator and several other former Prologistix employees began working directly for Defendant. (*Id.*). On May 7, 2014, Relator was required to electronically sign several documents to facilitate her transition to working for Defendant. (*Id.* at 44; App.<sup>2</sup> at A-12). Amongst these documents was an election to receive payment as direct deposits, a form for ordering company uniforms, a safety pledge, and a document that gave up any right to a jury trial for intentional torts committed by Defendant, Defendant's Employment Dispute Resolution Policy ("EDR"). (Exhibits at 44, App. at A-13).

The EDR incorporated the American Arbitration Association rules by reference. (Exhibits at 35; App. at A-13). The EDR is governed by the Federal Arbitration Act, as Defendant conducts business which affects interstate commerce. (Exhibits at 28-29, A-12). The EDR purports to submit "all disputes relating to or arising out of employment with [Defendant]" to binding arbitration. (Exhibits at 35; App. at A-13). The lone exception noted is for "charges filed with the National Labor Relations Board." (Exhibits at 35; App. at A-13).

On December 23, 2014, Relator suffered a work-related injury. (Exhibits at 3). Relator exercised her rights granted by the Workers' Compensation Law of Missouri. (*Id.*). Relator's Claim for Compensation concerning this injury was properly submitted to

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<sup>2</sup> Appendix to Relator's Brief.

the Missouri Department of Labor and Industrial Relations, Division of Workers' Compensation. (*Id.*). Relator began treating with an authorized care provider and her Claim for Compensation is still ongoing. (*Id.*).

On August 24, 2016, immediately after informing her supervisor that pain from her work-related injury was preventing her from performing her assigned tasks, Defendant discharged Relator from employment. (*Id.*).

Relator filed her First Amended Petition in the underlying action on August 15, 2017. (*Id.* at 1). Defendant filed a Motion to Compel Arbitration and to Dismiss, along with Suggestions in Support thereof, on August 25, 2017. (*Id.* at 9, 12). Relator filed her Response on September 7, 2017. (*Id.* at 41). Both Relator and Defendant were permitted to file supplemental briefs, and all briefs were submitted on or before September 26, 2017. (*Id.* at 54, 65). No hearing was held on this matter and Respondent considered only the documentary evidence contained in the exhibits attached to Relator's Petition for Preliminary and Permanent Writs of Mandamus. (*Id.* at 77).

On October 16, 2017, Respondent issued both an Order and an Amended Order. (*Id.*; App. at A-3). This Amended Order granted Defendant's Motion in part, compelling Relator to arbitrate both of her claims against Defendant. (Exhibits at 80; App. at A-5). The Amended Order also stayed the proceedings in Circuit Court. (Exhibits at 80; App. at A-5).

Relator filed a Motion to Reconsider on October 20, 2017. (Exhibits at 81). This Motion did not ask Respondent to revisit the past issues, but brought a new issue to Respondent's attention: Missouri law does not allow an employee to "bargain away" the



rights granted by Section 287.780. (*Id.* at 83). As Section 287.780 creates a "civil action for damages" for an aggrieved employee and a "civil action for damages" carries with it a right to trial by jury, Relator was without the ability to agree to submit potential claims arising in violation of Section 287.780 to arbitration. (*Id.* at 87-88).

Respondent issued a second Order on November 6, 2017, denying Plaintiff's Motion to Reconsider and thus compelling Relator to submit her Section 287.780 claim to arbitration. (*Id.* at 100; App. at A-6). This Court issued a Preliminary Writ of Mandamus on December 19, 2017. (App. at A-7).

### **III. POINT RELIED ON**

Relator is entitled to an order prohibiting Respondent from compelling arbitration of Relator's Section 287.780 claim, because employees cannot waive rights granted by Chapter 287, including the right to a jury trial inherent in the civil action for damages granted by Section 287.780, in that the General Assembly has granted special protections to rights granted by the Workers' Compensation Law of Missouri, including Section 287.780 claims, which prohibit Relator from preemptively waiving her right to a trial by jury before such right exists.

Mo. Rev. Stat. § 287.390

Mo. Rev. Stat. § 287.780

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)

*Cook v. Hussmann Corp.*, 852 S.W.2d 342, 344-45 (Mo. 1993)

## **IV. ARGUMENT AND LEGAL AUTHORITY**

### **1. Introduction**

For nearly a century, the General Assembly has granted unique protections to rights arising under Chapter 287, the Workers' Compensation Law of Missouri. Relator was injured at work and exercised her rights under Chapter 287. Relator was then terminated for exercising those same rights, giving rise to a claim under Section 287.780. Defendant argues that Relator waived the right to a trial by a jury of her peers that is granted by Section 287.780, by electronically signing an agreement to arbitrate before any discrimination occurred. However, this agreement to arbitrate constitutes an agreement to waive rights granted by Chapter 287, and thus, is invalid as a matter of law.

Respondent disagreed with this argument and issued an Order compelling Relator to forego her right to a jury trial. This Order is contrary to the General Assembly's clear language used in Section 287.390, this Court's decision in *Cook v. Hussmann Corp.*, 852 S.W.2d 342, 344-45 (Mo. 1993), and the spirit of the Workers' Compensation Law of Missouri itself. The Federal Arbitration Act also does not support the conclusion that an employee can waive the rights granted by Chapter 287, and thus does not preempt Missouri law on this issue. Thus, this Court's Preliminary Writ of Mandamus should be made absolute and Relator's right to a trial by jury restored.

### **2. Standard of Review**

"Whether a trial court should have granted a motion to compel arbitration is a question of law." *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 510 (Mo. 2012). Questions of law are reviewed *de novo*. *Id.* "[A] writ of mandamus is an appropriate

mechanism to review whether a motion to compel arbitration was improperly sustained."

*State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 805 (Mo. 2015).

**3. Section 287.780 grants a civil action for damages, which includes a right to jury trial.**

"A litigant seeking 'relief by mandamus must allege and prove that [s]he has a clear, unequivocal, specific right to a thing claimed.'" *Id.* at 806. Section 287.780 grants "a civil action for damages" to any employee that is discharged for exercising rights under Chapter 287. Mo. Rev. Stat. § 287.780.<sup>3</sup> "Actions that carried a right to jury trial at common law were civil actions for damages." *Dodson v. Ferrara*, 491 S.W.3d 542, 555 (Mo. 2016). Thus, even though "[t]his claim for retaliation did not exist in 1820[,] the claim for damages under Section 287.780 is nonetheless subject to the right of jury trial." *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 88 (Mo. 2003). Accordingly, one such right granted by Section 287.780 is a right to a jury trial, and like all other rights under Chapter 287, it cannot be "bargained away." Mo. Rev. Stat. § 287.390.1.

**4. The General Assembly has granted unique protections to rights arising under Chapter 287.**

The Workers' Compensation Law is the product of compromise between Missouri workers and Missouri employers. *Gunnnett v. Girardier Bldg. & Realty Co.*, 70 S.W.3d

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<sup>3</sup> Unless otherwise indicated, all references and citations to Revised Missouri Statutes are to the versions which existed on August 24, 2016, the date upon which Relator's discharge from employment was communicated and thus, the date her claim accrued under Section 287.780.

632, 636 (Mo. Ct. App. 2002). Employers gave up the requirement that an employee prove negligence or culpability to recover for her injuries. *Id.*; *see also* Mo. Rev. Stat. § 287.120. In exchange, employers received greatly limited potential liability, which is strictly outlined and controlled by the Law. *Gunnnett*, 70 S.W.3d at 636; Mo Rev. Stat. §§ 287.120, 287.149. Put another way, employees gave up the ability to be made completely whole for an easier path to recovery. *Gunnnett*, 70 S.W.3d at 636.

This comprise is a great triumph for both employers and employees alike, which is attested to by the fact that every state has adopted such a system. 99 C.J.S. *Workers' Compensation* § 82 (2017). "Missouri's Workers' Compensation Law was adopted by the legislature in 1925, approved by the voters of Missouri in 1926, and became effective in 1927." *Gunnnett*, 70 S.W.3d at 635 n.2. However, the General Assembly foresaw that some employers would not appreciate the great benefits this delicate balance offered. *See Christy v. Petrus*, 295 S.W.2d 122, 126 (Mo. 1956) (en banc), *superseded by statute*, Mo. H.B. 79 (1973). These unsavory employers would look for ways to prevent employees from pursuing the rights granted by the Law. *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 378 (Mo. 2014), *superseded by statute*, Mo. S.B. 43 (2017). To combat this, Section 287.780 (and its predecessor, which was included in the original 1926 law) were added. *See Christy*, 295 S.W.2d at 126. However, the original incarnation allowed only for a criminal prosecution under Section 287.780. *Id.* In *Christy v. Petrus*, this Court noted:

We can hardly conceive of the legislature making such careful provision for the rights and compensation of injured employees covered by the Act and yet omitting a specific provision for recovery of damages for wrongful

discharge if there had been any intent to *create such a right*.

*Id.* (emphasis added).

After *Christy*, the General Assembly heeded the call to action issued by this Court, amending Section 287.780 in 1973 to completely eliminate the criminal action and instead grant the right to "a civil action for damages." Mo. H.B. No. 79 (1973) (codified as amended at Mo. Rev. Stat. § 287.780 (2017)). Thus, unlike other types of discrimination, no state agency prosecutes these employers. *See, e.g.*, Mo. Rev. Stat. § 213.030 (bestowing powers to investigate and prosecute claims of discrimination under the Missouri Human Rights Act to the Missouri Commission on Human Rights). This is even in contrast to other provisions of the Workers' Compensation Law, which still allow for criminal prosecution by the State. *See* Mo. Rev. Stat. § 287.380. Instead, the General Assembly placed the entire burden of enforcement upon to the employee alone to pursue this civil action to remedy discrimination. *Templemire*, 433 S.W.3d at 377 ("By its wording, section 287.780 is, to the extent of authorizing recovery of damages by a civil action, penal in nature") (internal quotations omitted).

The General Assembly carefully guards the delicate balance struck by the Law. *See, e.g., Robinson v. Hooker*, 323 S.W.3d 418, 423-24 (Mo. Ct. App. 2010), *superseded by statute*, Mo. H.B. 1540 (2012) (amended within two legislative sessions); *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 903 (Mo. 2007), *superseded by statute*, Mo. H.B. 1883 (2008) (amended within one legislative session); *Templemire, Inc.*, 433 S.W.3d at 378, *superseded by statute*, Mo. S.B. 43 (2017) (amended within three legislative sessions). The view of the legislature is that the balance is best protected by ensuring

Chapter 287 is strictly adhered to, rather than being malleable between individual employers and employees. *See* Mo. Rev. Stat. § 287.390.1. To this end, employers and employees are not free to create “a la carte” workers’ compensation agreements. *Id.* (“no agreement by an employee or his or her dependents to waive his or her rights under this chapter shall be valid”). This includes the enforcement mechanism placed upon aggrieved employees. *See Templemire*, 433 S.W.3d at 377.

Additionally, the General Assembly has commanded that the Law be strictly construed by the Division of Workers’ Compensation, the Labor and Industrial Relations Commission, and Missouri courts. Mo. Rev. Stat. § 287.800.

**5. These unique protections apply to the civil action granted by Section 287.780, including the right to a jury trial.**

One example of the unique protections is that Claims for Compensation cannot be submitted to arbitration as a matter of law. *Jimenez v. Cintas Corp.*, 475 S.W.3d 679, 688 n.6 (Mo. Ct. App. 2015). This authority comes from Section 287.390.1, which prevents this change of forum. Subdivision 1 of Section 287.390 reads, in part:

Parties to claims hereunder may enter into voluntary agreements in settlement thereof, but no agreement by an employee or his or her dependents to waive his or her rights under this chapter shall be valid, nor shall any agreement of settlement or compromise of any dispute or claim for compensation under this chapter be valid until approved by an administrative law judge or the commission, nor shall an administrative law judge or the commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter.

Mo. Rev. Stat. §287.390.1. This first sentence contains four commands. *Id.* First, parties are entitled to settle claims arising under Chapter 287. *Id.* Second, employees cannot

waive rights<sup>4</sup> granted under Chapter 287. *Id.* Third, any settlement or compromise of a Claim for Compensation must be approved by an administrative law judge or the Labor and Industrial Relations Commission. *Id.* Finally, the settlement of a Claim for Compensation must be in accordance with the rights of the parties. *Id.*

These final two commands deal exclusively with Claims for Compensation, which are granted further protections above and beyond other claims arising under the Chapter. *Id.* (compare "parties to *claims hereunder* may enter into voluntary agreements in settlement thereof" and "nor shall any agreement of settlement or compromise of any dispute or *claim for compensation under this chapter* be valid").

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<sup>4</sup> It is important to draw a distinction between waiving a right and a waiving a claim. *See, cf. Fair v. Williams WPC-I, Inc.*, 332 F.3d 316, 320 (5th Cir. 2003) (drawing distinction between inability to waive FMLA rights and ability to settle FLMA claims). Section 287.780 grants a *right* to a civil action for damages. Mo. Rev. Stat. § 287.780. Once that right materializes, the employee then has a claim, which may be freely disregarded, waived, or prosecuted, as the aggrieved employee sees fit. *See cf. Dougherty v. Teva Pharm. USA, Inc.*, No. 05-2336, 2007 WL 1165068 at \*6 (E.D. Pa. Apr. 9, 2007) (noting claims materialize from rights and “by electing to waive or settle a claim that has accrued, an employee is not waiving any proscriptive or substantive rights under the FMLA”).

Section 287.390.1, despite its long and misleading title,<sup>5</sup> actually applies to both Claims for Compensation and all other rights arising under Chapter 287. *Id.* This is clear from subdivision 1's plain language: "no agreement by an employee or his or her dependents to waive his or her ***rights under this chapter*** shall be valid." *Id.* (emphasis added). This Court interpreted that language to apply to *all sections* of Chapter 287, specifically including Section 287.780:

Moreover, the rights protected by § 287.780 cannot be bargained away. The Workers' Compensation Act provides that "no agreement by an employee or his dependents to waive his rights under this chapter shall be valid." The plain intent of this statute is, *inter alia*, to preserve the right of action granted by § 287.780.

*Cook v. Hussmann Corp.*, 852 S.W.2d 342, 344-45 (Mo. 1993) (internal citations omitted).

*Cook* dealt with two challenges to an employee bringing a claim for retaliatory discharge under Section 287.780. *Id.* at 344. Cook was fired after exercising rights granted by Chapter 287. *Id.* at 343. Her employer was granted summary judgment on two grounds: claims under Section 287.780 were preempted by the National Labor Relations Act because a collective bargaining agreement offered Cook relief and Cook failed to exhaust administrative remedies by failing to bring her claim under the grievance procedure required by the collective bargaining agreement. *Id.* at 344. This Court found

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<sup>5</sup> "Compromise settlements, how made—validity, effect, settlement with minor dependents—employee entitled to one hundred percent of offer, when—settlement after reaching maximum medical improvement." Mo. Rev. Stat. § 287.390.1.



no preemption, as Section 287.780 is a "separate and independent" claim outside of any collective bargaining agreement. *Id.* Relying on this same point, this Court noted that there was no procedure to exhaust because the retaliatory discharge claim was independent of the collective bargaining agreement. *Id.*

At this point, the *Cook* Court could have stopped, as the issues before the Court had been resolved. However, this Court went a step further and offer an additional, independent justification for its holding, adding the following:

Moreover, the rights protected by § 287.780 cannot be bargained away. The Workers' Compensation Act provides that "no agreement by an employee or his dependents to waive his rights under this chapter shall be valid". The plain intent of this statute is, *inter alia*, to preserve the right of action granted by § 287.780. Thus, under Missouri law, the inclusion of a grievance mechanism in a collective bargaining agreement cannot be deemed to be a waiver, either implicit or explicit, of the employees' statutory right to bring a civil action for retaliatory discharge or discrimination. Accordingly, we hold that a § 287.780 suit may be brought without first invoking or exhausting the collective bargaining grievance process. The grant of summary judgment based on appellant's failure to grieve her discharge was in error.

*Id.* at 344-45 (internal citation omitted). Thus, this Court also supported its determination that, a Section 287.780 action shall not be forced to be subject to an exhaustion requirement on another, independent ground: simply put, Chapter 287 doesn't allow an employee to bargain away rights granted by the Chapter.

Admittedly, this reading of Section 287.390 may seem a bit unnatural, based upon the much more common application of Section 287.390 to administratively pursued Claims for Compensation. However, three authorities make such a reading mandatory. First, a careful reading of the statute shows deliberate and precise language chosen by the

General Assembly. The General Assembly uses the term "claim for compensation" in some provisions of Section 287.390.1, but used the broader language of "rights under this chapter" when dealing with waivers by an employee. Second, this Court's direct and unequivocal interpretation of the language of Section 287.390.1—"no agreement by an employee or his dependents to waive his rights under this chapter shall be valid"—applies to the rights granted by Section 287.780. *Cook*, 852 S.W.2d at 344-45. Third, the General Assembly's addition of Section 287.800 in 2005 cements this interpretation by requiring that all provisions of Chapter 287 be strictly construed. Thus, the General Assembly supports the analysis used in *Cook* to be construe the statute to mean *exactly* what it says: "rights under *this chapter*" cannot be waived. Mo. Rev. Stat. § 287.390.1 (2017); *see cf.* *Robinson v. Hooker*, 323 S.W.3d at 423-24.

The material facts in this case are not in dispute; the legal ability of Relator to waive any rights under Chapter 287—including the right to a jury trial granted by Section 287.780—is the sole question before this Court. The General Assembly has chosen to place the civil action for damages of retaliatory discharge within Chapter 287, which has great implications on the amount of protection that civil action will receive. *See, e.g., Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1246 (8th Cir. 1995) (holding claims under Section 287.780 are not removable to federal courts because they "aris[e] under the workmen's compensations laws" of Missouri) compared to *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 725 (7th Cir. 1994) (claim for wrongful termination did not "aris[e] under the workmen's compensations laws" of Illinois because it was not codified, but was a common law claim).

Respondent's attempt to force Relator to arbitrate her claim pursuant to a preemptive waiver of her rights under Chapter 287 is invalid as a matter of law. The rights granted by Chapter 287, including the right to a civil action for damages and its corresponding right to trial by jury are beyond the bargaining power of Relator before her claim existed. Relator would be free to agree to arbitrate now that her claim has materialized, but the General Assembly has established the right to a jury trial as an intricate part of the rights granted pursuant to Chapter 287. Thus, Relator is not free to waive the right to any portion of the civil actions for damages granted by Section 287.780. Even though the EDR may be enforceable as to Relator's other claims against Defendant, Relator's Section 287.780 claim is outside of the legal scope of the EDR.<sup>6</sup> Therefore, this Court's Preliminary Writ of Mandamus should be made permanent.

#### **6. The Federal Arbitration Act does not preempt these protections.**

“The Federal Arbitration Act governs the applicability and enforceability of

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<sup>6</sup> As discussed *supra* in Note 4, Relator is free to agree to waive her right to a jury trial now that her claim has accrued. It is certainly true that “arbitration is a matter of consent, not coercion.” *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 49 (Mo. 2017) (internal quotations omitted). However, the consent at issue here deals with waiving a *right* inherent in the civil action for damages granted by Section 287.780; the EDR could allow for arbitration once a *claim* has accrued. *See* Mo. Rev. Stat. 287.390.1; *cf. Fair*, 332 F.3d at 320 (holding once a right to a claim materializes under FMLA, aspects of the claim can be freely waived and bargained away).

arbitration agreements in all contracts involving interstate commerce.” *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 431 (Mo. 2015). The thrust of the Act is simply to ensure that arbitration agreements are placed on “equal footing with other contracts.” *Robinson v. Title Lenders, Inc.*, 364 S.W.3d at 512-13. Thus, arbitration agreements can be invalidated “upon such grounds as exist at law or in equity.” 9 U.S.C. § 2 (2012). Courts apply state law in making the determination of whether or not such grounds exist. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Thus, invalidation of an arbitration agreement by state law is appropriate, so long as the law does not “apply only to arbitration” and does not “derive [its] meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011).

The United States Supreme Court has acknowledged that not all “controversies implicating statutory rights are suitable for arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); *see also Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 784-85 (9th Cir. 2002) (agreeing with state court opinion that workers’ compensation claims are “an improper subject matter for arbitration”). Further, “[t]he exercise of State authority in a field traditionally occupied by State law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress.” *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part). Missouri courts have agreed with this proposition, noting that some “types of claims cannot be arbitrated as a matter of law.” *Jimenez*, 475 S.W.3d at 688 n.6.

The unique protections granted to rights arising under Chapter 287 are not

preempted by the Federal Arbitration Act. Section 287.390.1 treats arbitration agreements like any other contract to waive rights arising under Chapter 287. The law does not single out arbitration, but instead places arbitration on identical footing with other contracts—precisely what the Federal Arbitration Act requires. The purpose of Section 287.390 is to prevent the bargaining away of *any rights* granted by Chapter 287. An agreement to place a Section 287.780 action in a different forum is just as invalid as an agreement allowing the employer to not furnish medical treatment to an injured worker.

Defendant's actions clearly indicate agreement with this proposition: Defendant never attempted to force Relator's pursuit of medical treatment, off-work benefits, or permanent partial disability benefits to arbitration. (Exhibits at 3). Instead, Defendant is arguing for a demarcation of the various rights granted under Chapter 287, and nothing in the language of Chapter 287 supports this division of rights granted. Thus, if the unique protections granted to rights arising under Chapter 287 are preempted by the Federal Arbitration Act, they are preempted altogether.

No other determination can be, based upon the clear language of Section 287.390.1: the Section speaks of "rights under *this chapter*," rather than identifying specific rights over others. Thus, only two options can exist. First, these unique protections are either completely preempted and invalid, leading to the absurd result that an arbitrator can decide a Claim for Compensation while a Circuit Court cannot. Second, and more naturally, these protections are not preempted, and an employee cannot bargain

away the right to a jury trial.<sup>7</sup>

Further, rights under Chapter 287 are precisely the type of statutory rights that the United States Supreme Court has indicated as being not suitable for arbitration. This is because there is no other area of law that is more "traditionally occupied by state law" than workers' compensation benefits. There is no other area of law that is more closely monitored, amended, and tended to by the General Assembly. And there is no reason to exclude the enforcement mechanism of the civil action for damages granted by Section 287.780 from all other rights granted by Chapter 287.

Therefore, the Federal Arbitration Act does not preempt the unique protections granted by Chapter 287, including those found in Section 287.390. The EDR, like any agreement to waive a right guaranteed by Missouri's Workers' Compensation Law, is void on grounds that existed at law.

## **V. CONCLUSION**

Relator has a clear, unequivocal right to have her cause of action founded upon Section 287.780 to be heard by a jury. Respondent's issuance of the Amended Order unjustly denies this right. Respondent erred in ruling that Relator's claim under Section 287.780 could be arbitrated as a matter of law.

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<sup>7</sup> As discussed, *supra* Note 4, nothing would prevent an employee from electing to arbitrate a claim once it has arisen. It is the waiver of a right that Section 287.390.1 prohibits, not the waiver of any aspect of a claim that has arise from such a right. *See id.*

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this brief complies with the limitations contained in Rule 84.06(b) and that entire brief contains 5,363 words, as counted using Microsoft Word. The brief is being electronically filed with the Court on this 2nd day of February, 2018. The electronic copy has been scanned by appropriate software and found to contain no computer viruses or malware.

/s/ Robert A. Bruce  
Attorney for Relator

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this brief and the accompanying appendix thereto, are being filed electronically with the Court on this 2nd day of February, 2018, and being served by the Court's electronic filing system upon attorneys for Relator.

/s/ Robert A. Bruce  
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