IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel. CYNTHIA CHAPARRO,	)	
Relator,	)	Case No. SC96779
vs.	)	
HONORABLE J. DALE YOUNGS,	)	
Respondent.	)	

RESPONDENT'S BRIEF IN OPPOSITION OF RELATOR'S PETITION FOR WRIT OF MANDAMUS

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SUMMARY OF ARGUMENT

Nowhere in the specific language of the Missouri's Workers' Compensation Act ("the Act") does the Act grant a right to a jury trial ***on any*** claims. Rather, the right to a jury trial for claims under RSMo § 287.780 arises ***under the Missouri Constitution***, not the Act. Missouri law is clear that an employee may waive a right to a jury trial arising under the Missouri Constitution by agreeing to have those claims heard in an arbitration (rather than judicial) forum.

Understanding the rationale behind § 287.780 (and the "civil action for damages" afforded under that provision) requires some understanding of the purpose of the Act itself. The Act provides Missouri employees with "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." *Herschel v. Nixon,* 332 S.W.3d 129, 133 (Mo. App. W.D. 2010). The Act makes clear that an employee cannot waive claims for such benefits ***"in settlement thereof"*** without the approval of an administrative law judge ("ALJ") or the commission. *See* RSMo § 287.390.1 (emphasis added). But there is no right to a jury trial on claims for workers' compensation benefits under Chapter 287. *See State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 90 (Mo. banc 2003) ("Workers' compensation claims resolve issues of fact in administrative

proceedings, with ultimate appeals on issues of law to the court. Though the remedy is money, the awards are statutorily prescribed benefits, not damages as would be available in civil actions."). In this regard, § 287.390.1's prohibition on an employee waiving a right to benefits under the Act unless approved by an ALJ or the commission is intended to prevent employees from waiving their rights to "statutorily prescribed benefits" in their underlying "administrative proceeding" without the safeguard of having that settlement reviewed and approved by an ALJ or the commission.

Independent from the administrative scheme that provides injured workers with an easy method of recovering benefits for their injuries, however, is the Act's protection to safeguard injured workers from retaliation from exercising their right to benefits under the Act. *See* RSMo § 287.780; *Reed v. Sale Memorial Hosp. and Clinic*, 698 S.W.2d 931, 940 (Mo. App. S.D. 1985). Section 287.780 at all relevant times provides:

> "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."

Id. (emphasis added).

However, unlike the "administrative proceedings" governed by § 287.390.1 and other provisions of the Act, § 287.780 provides an employee with ***an independent tort claim*** and ***private right of action*** against an employer for alleged workers' compensation retaliation. *Reed.* 698 S.W.2d at 940; *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 376–77 (Mo. banc 2014) (emphasis added). This tort claim brings with it the prospect of the "recovery of damages by a civil action, penal in nature." *Templemire*, 433 S.W.3d at 376 (quoting *Davis v. Richmond Special Road Dist.*, 649 S.W.2d 252, 255 (Mo. App. W.D. 1983)).

While the deliberate and precise language of § 287.780 provides an employee with a "civil action for damages," nothing in either § 287.780 or elsewhere in the Act**,** in and of themselves, grants an employee a right to a jury trial on a claim arising under § 287.780. Because Missouri law is clear that "[a] strict construction of [the worker's compensation] statute presumes nothing that is not expressed," *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App.W.D.2010), the Court cannot assume that right to a jury trial arises ***specifically under Chapter 287*** unless the statute specifically provides an employee with that right. It clearly does not.

Rather than arising under Chapter 287, the right to a jury trial on a retaliatory discharge claim is a private right arising ***elsewhere*** under Missouri law – *i.e.,* the right to a jury trial is granted under Article I, Section

22 of Missouri's Constitution. *Diehl*, 95 S.W.3d at 88 ("the claim for damages under section 287.780 is nonetheless subject to the right of jury trial" under the Missouri Constitution); *see also Bertocci v. Thoroughbred Ford, Inc.*, 530 S.W.3d 543, 558 (Mo. App. W.D. 2017). ***Missouri law is clear, however, that the constitutional right to a jury trial may be waived by contract, including a contract to arbitrate claims.*** *See Malan Realty Investors, Inc. v. Harris,* 953 S.W.2d 624, 627 (Mo. banc 1997); *see also State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo banc. 2015) (holding that employee's agreement to arbitrate claims was enforceable). Because Relator's right to a jury trial arises under the Missouri Constitution – and is not a statutory right arising under Chapter 287 – the language found in § 287.390.1 – i.e., that an employee cannot "waive his or her right under this chapter" without ALJ or commission approval – is of no application to an employee's waiver of her right a jury trial on claims asserted under § 287.780.

Here, Relator voluntarily waived her constitutional right to a jury trial for all her employment-related claims by entering into a written agreement with Defendant U-Haul Company of Missouri ("U-Haul") to arbitrate any employment-related claims – including her § 287.780 claim in this case. Contrary to the assertions in Relator's brief, RSMo § 287.390.1 is inapplicable to this case because Relator has not waived ***any*** rights granted under Chapter 287. Rather, Relator has simply agreed to resolve her civil action for

damages in an arbitral forum rather than in a judicial one. ***All of Relator's rights granted under § 287.780 – i.e., her right to "a civil action for damages" – will be fully preserved in arbitration.***

Furthermore, it is well established that arbitration is favored in Missouri and that workers' statutory rights are arbitrable where, as here, a worker has consented to have them arbitrated. *See Hewitt*, 461 S.W.3d 798 (enforcing employee's agreement to arbitrate employment claims); *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136, 139 (Mo. banc 2010) (there is a strong presumption in favor of arbitrability); *Westridge Investment Group, L.P., v. McAtee,* 968 S.W.2d 243, 245 (Mo. App. W.D. 1998) ("Arbitration proceedings are favored and encouraged by the courts. The function of arbitration is to provide a speedy, efficient, and less expensive alternative to court litigation"). *See also Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997) (holding that workers' statutory rights are arbitrable if worker consents to have them arbitrated); *Gilmer v. Interstate/Johnson Lane Corp,* 500 U.S. 20, 26, 111 S. Ct. 1647, 1652, 114 L. Ed. 2d 26 (U.S. 1991) (by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354–55, 87 L. Ed. 2d 444 (1985) (same).

Finally, the Arbitration Agreement between Relator and U-Haul involves interstate commerce and is therefore subject to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). To the extent § 287.390.1 (or any section of Chapter 287) precludes the enforcement of the Arbitration Agreement between Relator and U-Haul, it is in conflict with the FAA, and therefore violates the United States Constitution's Supremacy Clause. *Bunge Corp. v. Perryville Feed & Produced,* 685 S.W.2d 837, 839 (Mo. Banc 1985).

Respondent, the Honorable J. Dale Youngs, properly enforced the Arbitration Agreement when he compelled Relator to arbitrate her § 287.780 claim in this case. Accordingly, U-Haul respectfully requests that the Court quash the previously issued preliminary writ and deny Relator's Petition for Writ of Permanent Mandamus.

STATEMENT OF FACTS

U-Haul is engaged in the self-moving business and rents trucks, trailers and other equipment for local and interstate use. (Relator's Ex. 3 at pp. 13-14, 29.) Relator began employment with U-Haul on or around May 7, 2014. (*Id.* at pp. 14, 29.)

When Relator began her employment with U-Haul, she executed U-Haul's Employment Dispute Resolution Policy ("EDR Policy"), which explained the arbitration policy and procedures of the Company and included

an agreement to arbitrate. (Relator's App at A-13.) The EDR Policy and Agreement to Arbitrate ("Arbitration Agreement") provided in pertinent part:

> The EDR applies to all U-Haul Co. of Missouri employees regardless of length of service or status, and covers all disputes relating to or arising out of an employee's employment with U-Haul Co. of Missouri or the termination of that employment. Examples of the type of disputes or claims covered by the EDR include, but are not limited to, claims for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments, state fair employment and housing acts or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations.
>
> * * *
>
> Your decision to accept employment or to continue employment with U-Haul Co. of Missouri constitutes your agreement to be bound by the EDR. Likewise, U-Haul agrees to be bound by the

> EDR. This mutual obligation to arbitrate claims means that both you and U-Haul are bound to use the EDR as the only means of resolving any employment-related disputes. This mutual agreement to arbitrate claims also means that both you and U-Haul forego any right either may have to a jury trial on claims relating in any way to your employment.
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> * * *

(*Id.*) (Emphasis in the original).

By executing the agreement, Relator acknowledged that: (1) all disputes against U-Haul, defined to include any parents, subsidiaries or affiliated companies and their employees, arising out of or relating to her employment or termination thereof would be subject to mandatory arbitration; (2) in exchange for her agreement, U-Haul also agreed to submit any claims against Relator to arbitration; and (3) both she and U-Haul were foregoing any right to a jury trial on claims related to her employment with U-Haul. (*Id.*) U-Haul terminated Relator's employment on or around August 24, 2016. (Relator's Ex. 3 at p. 29.)

On October 14, 2016, Relator filed the underlying action alleging that U-Haul violated § 287.780 in its decision to terminate her employment. (*Id.* at p. 17.) Relator amended her Petition on August 15, 2017 to assert additional claims under the Missouri Human Rights Act. (Relator's Ex. 1 at

pp. 2-8.) On August 25, 2017, U-Haul moved to compel arbitration of Relator's claims. (Relator's Ex. 2 at pp. 10-11; Relator's Ex. 3 at pp. 13-40.) On October 16, 2017, Respondent ordered the parties to arbitration. (Relator's App at A-3.) On October 20, 2017, Relator filed her Motion to Reconsider based on her assertion that her retaliatory discharge claim under § 287.780 cannot be arbitrated as a matter of law. (Relator's Ex. 9 at pp. 81-84; Relator's Ex. 10 at pp. 85-93.) On November 6, 2017, Respondent denied Relator's Motion to Reconsider. (Relator's App at A-6.)

On November 9, 2017, Relator Petitioned the Missouri Court of Appeals for the Western District for Preliminary and Permanent Writs of Mandamus. The Appellate Court denied Relator's Petition. (Respondent's App at A-3.) On November 14, 2017, Relator Petitioned this Court for Preliminary and Permanent Writs of Mandamus. This Court issued a Preliminary Writ of Mandamus on December 19, 2017. (Relator's App at A-7.)

ARGUMENT

I. Standard of Review.

The issue of whether a motion to compel arbitration should be granted is a question of law. *Triarch Industries, Inc. v. Crabtree,* 158 S.W. 3d 772, 774 (Mo. 2005); *Arrowhead Contracting Inc. v. M.H. Washington, LLC,* 243 S.W. 3d 532, 535 (Mo. App. W.D. 2008). This Court's review of that issue is,

therefore, *de novo. Id.* Similarly, the interpretation and application of the Workers' Compensation Act is a question of law the Court resolves *de novo. Ash v. Mellennium Restoration & Const.,* 408 S.W.3d 257 (Mo. App. S.D. 2013).

II. The Preliminary Writ Should Be Quashed Because § 287.780 of the Workers' Compensation Act Grants Relator the Right to a "Civil Action for Damages" and Relator Retains that Right in Arbitration.

The Missouri's Workers' Compensation Act ("the Act") provides Missouri employees with a right to recover benefits for work-related injuries. *Herschel,* 332 S.W.3d at 133. "Workers' compensation claims resolve issues of fact in administrative proceedings, with ultimate appeals on issues of law to the court. Though the remedy is money, ***the awards are statutorily prescribed benefits, not damages as would be available in civil actions***." *Diehl*, 95 S.W.3d at 90 (emphasis added). Unlike civil actions – which require no administrative oversight – the Act makes clear that an employee cannot waive claims for injury benefits *"in settlement thereof"* without the approval of an ALJ or the commission. RSMo § 287.390.1. Section 287.390.1's prohibition on an employee waiving a right to benefits under the Act, unless approved by an ALJ or the commission, is intended to prevent employees from waiving their rights to "statutorily prescribed benefits" in

their underlying "administrative proceeding" without the safeguard of having that settlement reviewed and approved by an ALJ or the commission.

The Missouri Assembly also provided additional safeguards for employees in the Act outside of the administrative proceedings governed by § 287.390.1. Relevant to this case, is the safeguard found in § 287.780, which provides employees with a remedy for retaliatory discharge arising out of an employee's exercise of rights under the Act. *Reed*, 698 S.W.2d at 940. Section 287.780 provides: "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."

However, unlike the "administrative proceedings" governed by § 287.390.1 and other provisions of the Act, § 287.780 provides an employee with ***an independent tort claim*** and ***private right of action*** against an employer for claims of workers' compensation retaliation. *Reed*, 698 S.W.2d at 940; *Templemire*, 433 S.W.3d at 376–77. This tort claim brings with it the prospect of the "recovery of damages by a civil action, penal in nature." *Templemire*, 433 S.W.3d at 376 (quoting *Davis*, 649 S.W.2d at 255).

"When interpreting the workers' compensation law, the court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and give effect to that intent if possible." *Hayes v. Show*

Me Believers, Inc., 192 S.W.3d 706, 707 (Mo. banc 2006) (quoting *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 276 (Mo. banc 2002)). This Court has long held that it is not at liberty to write into the Act, under the guise of construction, provisions which the legislature did not see fit to insert. *Sayles v. Kansas City Structural Steel Co.* 128 S.W.2d 1046, 1054 (Mo. 1939). In construing the Act, the court also takes care to avoid an interpretation that would lead to oppressive, unreasonable, or absurd results. *Elrod v. Treasurer of Mo. as Custodian of Second Injury Fund*, 138 S.W.3d 714, 716 (Mo. banc 2004).

The legislature enacted § 287.780 to provide an effective remedy for retaliatory discharge arising out of workers' exercise of rights under the Act. *Reed,* 698 S.W. 2d at 935. In *Templemire,* this Court noted that § 287.780 was amended in 1973 to provide employees with a "***private right of action***." 433 S.W.3d at 377 (emphasis added). When first interpreting the meaning of § 287.780 after the 1973 amendment, the Court of Appeals held the statute to mean "that a ***cause of action*** lies only if an employee is discharged discriminatorily by reason of exercising his or her rights." *Mitchell v. St. Louis County*, 575 S.W.2d 813 (Mo.App.E.D.1978) (emphasis added).

The 1973 amendment to the Act came about after this Court's decision in *Christy v. Petrus,* 295 S.W.2d 122 (Mo. Banc 1956). The *Christy* Court had noted that the original version of § 287.780 provided for criminal prosecution

for any violation, but did ***not*** expressly provide an employee with a "claim against the employer for damages resulting from his discharge for the reasons specified [in section 287.780]." *Id.* at 126 (emphasis added). The Court further noted that it was unable to find anything in the wording or the historical background of the statute to "indicate the legislature's intent to create a new civil claim of this nature in the discharged employee." *Id.* In the absence of such legislative intent, the Court concluded that if the legislature "desired to provide for enforcement of this section by civil action, such a provision would have been incorporated." *Id.* In response, the 1973 General Assembly amended § 287.780 to expressly provide employees with a statutory right to a civil action for damages. *Templemire*, 433 S.W.3d at 377; RSMo § 287.780 (Supp. 1978).

This begs the question: what is a "civil action" under § 287.780? Neither the Act nor the regulations promulgated thereunder define "civil action." In the absence of statutory definitions, the court may derive the plain and ordinary meaning from a dictionary and by considering the context of the entire statute in which it appears. *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 224 (Mo. banc 2007).

BLACK'S LAW DICTIONARY defines "civil action" as "an action brought to enforce, redress, or protect a private or civil right." BLACK'S LAW DICTIONARY (10th ed. 2014). Missouri courts have relied on BLACK'S LAW DICTIONARY's

definition when addressing the definition of a "civil action." *See Richter v. Union Pac. R. Co.,* 265 S.W.3d 294, 298 (Mo. App. E.D. 2008).

Other jurisdictions have similarly relied upon BLACK'S LAW DICTIONARY's definition to interpret the meaning of "civil action" when it appears in a statute. *See Lesiak v. Laskowski,* No. CV124017393S, 2013 WL 1867063, at *1 (Conn. Super. Ct. Apr. 12, 2013) (referring to BLACK'S LAW DICTIONARY to determine the meaning of "civil" and "civil action" under a statute lacking a definition for that term); *Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013) (interpreting the meaning of "civil action" in determining whether statute of limitations applies to arbitration proceedings); *State Bd. of Dentistry v. Weltman*, 649 A.2d 478, 479 (1994) (interpreting the meaning of "civil action" in dentist's complaint against state board); *Isaacs v. Beth Hamedrash Soc'y*, 19 N.Y. 584, 586 (1859) (defining a civil action as a "proceeding for the enforcement or protection of private rights and the redress of private wrongs"); *State v. Dist. Court of Eighteenth Judicial Dist. in & for Hill Cty.*, 77 Mont. 361, 251 P. 137, 140 (1926) ("A civil action is prosecuted by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong."); *Whitman v. Schlumberger Ltd.,* 793 F. Supp. 228, 231 (N.D. Cal. 1992) (defining the term "civil action" as being "prosecuted by one party against another for the

declaration, enforcement or protection of a right, or the redress or prevention of a wrong.")

The 1973 General Assembly, by its carefully chosen wording in amending § 287.780, expressly provided employees with a ***private right to "a civil action for damages"*** for retaliatory discharge arising out of their exercise of rights under the workers' compensation laws. However, ***nowhere*** in the express wording or in the historical background of the 1973 amendment is there any indication that the General Assembly intended for § 287.780 to grant employees an absolute right to a jury trial subject to § 287.390.1. Not surprisingly, ***nowhere*** in Relator's brief does she point to any such language in § 287.780 or elsewhere in Chapter 287. ***Most importantly, there is no mention of a right to a "jury trial" anywhere within Chapter 287, much less within any of the rights granted under § 287.780 or any rights subject to § 287.390.1.***

Relator correctly points out, however, that Chapter 287 is to be strictly construed. (*See* Relator's Brief, at p. 18); *see also Robinson*, 323 S.W.3d at 423 ("[a] strict construction of [the worker's compensation] statute presumes nothing that is not expressed"); RSMo § 287.800. Relator also correctly observes that the legislature chose deliberate and precise language when enacting and amending the Act, including § 287.780. Against the context of these facts and principles of statutory construction, it is determinative in U-

Haul's favor that the express language of § 287.780: (1) plainly grants Relator only a right to bring a "civil action for damages" against U-Haul which is "an action brought to enforce, redress, or protect a private or civil right," *see* BLACK'S LAW DICTIONARY; and (2) plainly ***does not*** grant Relator a "clear and unequivocal right to a jury trial" subject to § 287.390.1, as Relator has argued. (*See* Relator's Brief, at p. 6.). To construe Chapter 287 as granting within that statute a right to jury trial which cannot be waived under Section 287.390.1 would be the very type of impermissible insertion of language, under the guise of construction, which should be avoided under Missouri law. *See Sayles*, 128 S.W.2d at 1054.

Relator's right to bring a civil action under § 287.780 remains fully intact under the Arbitration Agreement. By having entered into an agreement to adjudicate her retaliation claim in an arbitral forum, Relator has not waived her right to redress of her rights under § 287.780. She has not waived her "recovery of damages . . . , penal in nature." *Templemire*, 433 S.W.3d at 376. Nor has she waived any other rights ***granted under the Act***. *Mitsubishi,* 473 U.S. at 628, 105 S. Ct. at 3354–55; *Gilmer,* 500 U.S. at 26, 111 S. Ct. at 1652. To the contrary, Relator retains fully her statutory right under the Arbitration Agreement to bring a civil action for damages against U-Haul (i.e., "an action brought to enforce, redress, or protect a private or civil right" found in BLACK'S LAW DICTIONARY) under § 287.780, albeit in an

arbitral rather than judicial forum. Because none of Relator's rights under Chapter 287 have been waived under the Arbitration Agreement, Relator's arguments regarding the application of Section 287.390.1 are without merit. The preliminary writ should be quashed and Relator's Petition for Writ of Permanent Mandamus should be denied.

III. The Right to Jury Trial is Granted Under the Missouri Constitution, Not Under § 287.780 of the Workers' Compensation Act.

As discussed above, neither § 287.780 nor any other provision of Chapter 287 provides a right to a jury trial for the "civil action" referred to in § 287.780. *Diehl,* 95 S.W.3d at 90. Rather, it is Article I, Section 22(a) of the Missouri Constitution that establishes a right to jury trial in certain civil cases. *Id.* at 87-88; *Midland Prop. Partners, LLC v. Watkins,* 416 S.W.3d 805, 811 (Mo. App. W.D. 2013). The original Missouri Constitution of 1820 provided: "That the right to a trial by jury shall remain inviolate." *Diehl*, 95 S.W.3d at 84 (quoting Article XIII, sec. 8). The right to trial by jury, where it applies, is a constitutional right, and applies "regardless of any statutory provision." *Id.* at 92 (citing *Lee v. Conran*, 213 Mo. 404, 111 S.W. 1151, 1153 (1908).

This Court, in *Diehl*, conducted a historical analysis of the right to a jury trial under Missouri law to address the question of whether statutory based claims were subject to the right of a jury trial. *Id.* at 84-85. The *Diehl*

Court relied upon this Court's analysis in *Briggs v. St. Louis & S.F. Ry. Co.,* in which the Court had determined that the constitutional right to a jury trial "is implied in all cases in which an issue of fact, *in an action for the recovery of money only*, is involved, *whether the right or liability is one at common law or is one created by statute*." *Id.* at 87 (citing 20 S.W.32, 33 (1892)) (emphasis added).

The *Diehl* Court determined that § 287.780 claims fit into the analytical framework described in the *Briggs* case. *Id.* at 88. The Court concluded that although § 287.780 claims did not exist in 1820, the statutory-based claim for damages is nonetheless a form of action categorically referred to as tort, and thus analogous to common law tort actions brought in 1820. *Id.* at 88-89. This Court therefore concluded that § 287.780 claims are "***subject to***" the right of a jury trial ***under the Missouri Constitution***. *Id.* at 88 (emphasis added).

The above analysis confirms that the right to a jury trial for statutory-based claims – including claims brought under § 287.780 – arises ***under*** Article I, Section 22(a) of Missouri's Constitution (and ***not*** under Chapter 287). *Id. Briggs,* 20 S.W. at 33. Consequently, Relator's assertion that the *legislature* granted employees with a right to a jury trial for claims under § 287.780 is just plain wrong. As discussed more fully below, Relator validly waived her constitutional right to jury trial ***arising under the***

Missouri Constitution by voluntarily consenting to arbitrate any employment-related disputes arising against U-Haul by signing U-Haul's Arbitration Agreement. Because Relator waived her right to a jury trial by and through her execution of the Arbitration Agreement, Respondent properly held her to the parties' bargain and compelled Relator to arbitrate. *Gilmer v. Interstate/Johnson Lane Corp,* 500 U.S. 20, 26, 111 S. Ct. 1647, 1652, 114 L. Ed. 2d 26 (U.S. 1991). Accordingly, Relator's preliminary writ should be quashed and Relator's Petition for Writ of Permanent Mandamus should be denied.

IV. Relator Validly Waived Her Right to a Jury Trial.

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Bertocci,* 530 S.W.3d at 555 (internal quotes and citation omitted). In an arbitration agreement, the parties not only agree to waive a jury trial, but also give up their right to present their claims to any judicial forum. *Id.* at 558.

Here, Relator voluntarily entered into a written agreement to waive her right to a jury trial and to arbitrate all claims arising out of her employment or termination of employment with U-Haul. (*See* Relator's App at A-13.) The Arbitration Agreement conspicuously notified Relator that she and U-Haul were both agreeing to arbitrate "all disputes relating to or

arising out of her employment with U-Haul or the termination of that employment." (*Id.*) The Arbitration Agreement even provided specific examples of the types of claims included in the scope of the arbitration agreement, including these applicable here: "***claims for wrongful termination of employment***, . . . ***tort claims***, . . . or any other legal or equitable claims and ***causes of action*** recognized by . . . state . . . law." (*Id.*) (emphasis added.) The agreement further stated: "This mutual agreement to arbitrate claims also means that both you and U-Haul forego any right either may have to a jury trial on claims relating in any way to your employment." (*Id.*) In sum, the Arbitration Agreement contains provisions that are "clear, unambiguous, unmistakable and conspicuous" in establishing that Relator voluntarily agreed to forgo a judicial forum and to submit her employment-related claims – including the § 287.780 retaliatory discharge tort claim now at issue – to final and binding arbitration. *Malan Realty Investors, Inc.*, 953 S.W.2d at 627.

Having made the bargain to arbitrate, Relator must be held to it, unless the legislature itself evinced an intention to preclude a waiver of judicial remedies for her § 287.780 claim. *Gilmer,* 500 U.S. at 26, 111 S. Ct. at 1652. Relator carries the burden of demonstrating that the legislature intended to preclude a waiver of a judicial forum. *Id.* If such an intention exists, it will be discoverable in the text of Chapter 287, its legislative

history, or an "inherent conflict" between arbitration and § 287.780's underlying purpose. *Id.*

Relator argues that this Court's decision in *Cook v. Hussman Corp.* is evidence of this legislature's intention to prohibit workers from voluntarily agreeing to arbitrate their § 287.780 claims. More specifically, Relator contends that the *Cook* court found that language in Section 287.390.1 precludes any waiver of judicial remedies. 852 S.W.2d 342, 344-45 (Mo.banc 1993) (*See* Relator's Brief, at p. 10). However, a review of the *Cook* decision demonstrates that it is not instructive to the issues in this case. Indeed, *Cook* solely addressed the issue of whether federal or Missouri law requires an employee to exhaust labor grievance procedures contained in a ***collective bargaining agreement*** between a union and an employer before filing suit under § 287.780. *Id* (emphasis added). The *Cook* Court concluded that "the inclusion of a grievance mechanism in a ***collective bargaining agreement*** cannot be deemed waiver, either implicit or explicit, of an ***employees' statutory right*** to bring a civil action" under § 287.780. *Id.* at 345 (emphasis added).

The *Cook* Court cited to § 287.390.1, which states: "no agreement by an employee or his dependents to waive his *rights under this chapter* shall be valid." *Id.* at 344-45; RSMo § 287.390.1. To put it simply, § 287.390.1 states that Relator cannot waive her rights under Chapter 287. Relator's rights

under the chapter are limited to: (1) her rights to the benefits prescribed under the Act; and (2) her right to a "civil action for damages" for retaliatory discharge. *Diehl*, 95 S.W.3d at 84, 90. The *Cook* Court explained that the *plain intent* of Section 287.390.1 was "to preserve the *right of action* granted by Section 287.780." *Id.* at 345 (emphasis added). As discussed above, Relator's right of action under § 287.780 remains intact under the Arbitration Agreement. She has ***not*** waived her right to a civil action for damages, nor has she waived any other rights arising under Chapter 287. Notably, ***nothing*** in *Cook* speaks to the arbitrability of retaliatory discharge claims under § 287.780. Likewise, ***nothing*** in *Cook* precludes an individual employee from doing exactly what Relator has done here: retain her statutory right to a civil action for damages for alleged workers' compensation retaliation, but waive, by contract, her constitutional right to a jury trial on that claim. *Id.*

Consequently, this Court's holding in *Cook* has ***no*** application to the issues in this case and Relator has failed to establish that the Missouri legislature intended to preclude a waiver of a judicial forum for the resolution of § 287.780 claims. Relator must be held to her bargain to arbitrate her claims pursuant to the Arbitration Agreement. U-Haul submits that the preliminary writ should be quashed and Relator's Petition for Writ of Permanent Mandamus should be denied.

V. In Any Event, the Preliminary Writ Should Be Quashed Because the Arbitration Agreement Is Subject to the Federal Arbitration Act Which Preempts Missouri Law.

A contract falls within the ambit of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") when it evidences a transaction involving commerce. *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 202 (Mo. App. E.D. 1996). The phrase "involving commerce" is broadly interpreted, and the FAA will apply in cases where the contract simply relates to commerce. *Id.* The phrase, "involving commerce," is the "functional equivalent" of the phrase, "affecting commerce," a phrase that "signals Congress' intent to exercise its Commerce Clause powers [enunciated in U.S. Const. art. I Section 8] to the full." *Paetzold,* 247 S.W.3d at 72 (citing *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)). In other words, "[a] contract comes under the Federal Arbitration Act so long as it simply relates to interstate commerce." *Woermann Constr. Co. v. Sw. Bell Tel. Co.*, 846 S.W.2d 790, 792 (Mo. App. E.D. 1993). This is true even when the relationship is less than substantial. *Duggan*, 920 S.W.2d at 202; *Woermann*, 846 S.W.2d at 792. Contracts have been held to involve interstate commerce where the United States postal system was used, employees crossed state lines, or materials were transported across state lines. *Duggan*, 920 S.W.2d at 202.

U-Haul rents trucks, trailers, and other equipment that frequently cross state lines. U-Haul, as part of its business, uses the United States postal system. Accordingly, the Arbitration Agreement is covered under the FAA. *See Duggan*, 920 S.W.2d at 202 (finding an employment agreement involved interstate commerce and the FAA applied where the company used the United States postal system and the plaintiff's position involved dealing with customers across state lines).

Under the FAA, "a written agreement to submit present or future disputes to arbitration is valid, enforceable, and irrevocable, save such grounds as exist as law or in equity for the revocation of any contract." *McIntosh v. Tenet Health Systems Hospitals, Inc./Lutheran Medical Center,* 48 S.W.3d 85, 89 (Mo. App. E.D. 2001); 9 U.S.C. § 2. A valid arbitration agreement must have language sufficient for an ordinary written contract. *Id.* That is, an arbitration agreement is valid so long as it is an agreement in writing to submit to arbitration any existing controversy arising out of a contract evidencing a transaction involving commerce. 9 U.S.C. § 2. Because the Arbitration Agreement signed by Relator is in writing and contains language sufficient for an ordinary written contract, it comports with the requirements of the FAA. *Id.*

Given that the Arbitration Agreement between Relator and U-Haul is subject to the FAA, Relator must be compelled to arbitrate her § 287.780 in

accordance with the Arbitration Agreement and the federal act, otherwise this Court will be in violation of the United States Constitution's Supremacy Clause. *Bunge Corp. v. Perryville Feed & Produce,* 685 S.W. 2d 837, 839 (Mo. banc 1985). Under the Supremacy Clause, this Court is obligated to apply the FAA, which preempts Missouri law and mandates resolution of Relator's § 287.780 claim in an arbitral forum. *Id.*

Relator argues that the FAA does not preempt the so-called "unique protections" granted to rights arising under Chapter 287. Relator again points to the language in § 287.390.1 as a prohibition against arbitrating § 287.780 claims. Both the premise and the logic of Relator's argument are flawed. It appears that Relator has a fundamental misunderstanding of what rights the legislature granted to Relator under Chapter 287. On the one hand, Chapter 287 provides ***rights to benefits*** (*i.e.* claims for compensation) prescribed under the Act for which the legislature has expressly vested the Division of Workers' Compensation with exclusive jurisdiction. *State ex. rel. Am Motorists Ins. Co. v. Ryan,* 755 S.W.2d 399, 400 (Mo. App. E.D. 1988) ("The Division of Workers' Compensation has exclusive jurisdiction over claims for injuries covered by the Act."). Because the legislature expressly vested ***exclusive jurisdiction*** of claims for benefits with a specialized tribunal these type of claims cannot be arbitrated as a matter of law. *Jiminez v. Cintas Corp.,* 475 S.W.3d 679, 688 n.6 (Mo. Ct. App. E.D. 2015) (claims for

worker's compensation benefits cannot be arbitrated as a matter of law) (emphasis added).

On the other hand, § 287.780 of the Act provides employees with a separate ***private right of action*** against an employer for retaliatory discharge arising out of the exercise of rights under the workers' compensation law. *Templemire,* 433 S.W.3d at 377; § 287.780 (emphasis added). The right of action granted by § 287.780 ***is an independent tort action***, which falls outside of the exclusive jurisdiction of the Division of Workers' Compensation. *Templemire,* 433 S.W.3d at 377 (quoting *Davis v. Richmond Special Road Dist.,* 649 S.W.2d 252 (Mo.App.W.D.1983) ("The General Assembly, by its wording of section 287.780, enacted a prohibition against employers (to the extent they might be liable for damages in a *separate civil proceeding*) not to discriminate or discharge employees because of the employee's exercise of his or her rights relative to a workers' compensation claim") (emphasis added). An employee's private tort action is subject to arbitration where the employee agrees to submit the claim to an arbitral forum. *Gilmer,* 500 U.S. at 26, 111 S.Ct. at 1652; *Mitsubishi,* 473 U.S. at 628, 105 S.Ct. at 1354-55; *Pryner,* 109 F.3d at 363. Therefore, Relator's argument that Chapter 287 grants "unique protections" to § 287.780 claims is without merit.

Even more significant, any state law (such as § 287.390.1) which attempts to preclude the enforcement of an arbitration agreement involving a

contract involving interstate commerce is in conflict with the FAA, and therefore violates the Supremacy Clause. *Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27, 29 (Mo. App. E.D. 1992) ("The court under the supremacy clause is obligated to apply federal law, and may not apply state law, substantive or procedural, which is in derogation of federal law"). To the extent § 287.390.1 precludes arbitration of Relator's § 287.780 tort claim, it is preempted by the FAA – which mandates the enforcement of the parties' Arbitration Agreement. Respondent recognized the Court's obligation to apply federal law and he properly enforced the Arbitration Agreement when he compelled Relator to arbitrate her § 287.780 claim.

CONCLUSION

The plain language of Chapter 287 does ***not*** provide Relator with an unequivocal right to have her § 287.780 tort claim heard by a jury. Rather, Relator's right to a jury trial on that claim arose under the Missouri Constitution, and not under Chapter 287. Relator voluntarily waived her constitutional right to a jury – which she had the right to do – by voluntarily entering into an agreement to arbitrate her claims. The Arbitration Agreement is covered by the FAA, which mandates enforcement of the parties' Arbitration Agreement. For the reasons stated above, Respondent's Order to Compel Arbitration of Relator's claims was proper. Therefore, the

preliminary writ should be quashed and Relator's Petition for Writ of Permanent Mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief was prepared using Microsoft Word 2013 in Century Schoolbook size 13 font, which is not smaller than Times New Roman, 13-point font.

The undersigned further certifies that this brief complies with the word limitation of Supreme Court Rule 84.06(b) and according to the word count function of Word by which it was prepared, this brief contains 7132 words, exclusive of the cover, signature block, this Certificate of Compliance, and the Certificate of Service.

The undersigned further certifies that the electronic copy of this brief filed with the Court is in PDF format, complies with Missouri Supreme Court Rules, and is virus free.

/s/ Michael L. Blumenthal
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CERTIFICATE OF SERVICE

I certify that in filing this document with the Supreme Court of Missouri through the electronic filing system, an electronic copy of this document and attached Appendix was served on counsel named below on February 22, 2018, and the undersigned counsel further certifies that he has signed the original and is maintaining the same pursuant to rule 55.03(a)

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