

IN THE SUPREME COURT OF MISSOURI

Case No. SC98251

STATE OF MISSOURI ex rel. BEUTLER, INC. d/b/a GEORGE J. SHAW
CONSTRUCTION CO. and BRIAN HENDERSON

Relators,

v.

THE HONORABLE SANDRA C. MIDKIFF, Circuit Judge, assigned to the Circuit
Court of Jackson County (Div. 1), Sixteenth Judicial Circuit,

Respondent.

Original Proceeding in Mandamus

**BRIEF OF RESPONDENT THE HONORABLE SANDRA C. MIDKIFF IN
OPPOSITION TO WRIT OF MANDAMUS**

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JURISDICTIONAL STATEMENT

Pursuant to Article V, Section 4 of the Constitution of the State of Missouri and Missouri Supreme Court Rules 84 and Rule 94, this Court is authorized to issue and determine original remedial writs, such as the writ of mandamus requested by Relators in this case. However, an extraordinary remedial writ is not the appropriate remedy for the problems Relators allege because the current case involves novel issues, because Respondent has not exceeded her jurisdictional authority, because an adequate remedy is otherwise available to Relators, and for other reasons stated in Respondent's Arguments, below. *See infra* Point Relied on I, A. and B., pages 11 to 16.

SUPPLEMENTAL STATEMENT OF FACTS

In the Underlying Case¹, Plaintiff Joshua McArthur (“Plaintiff McArthur”) alleges that he was injured by the negligence of Relators Beutler, Inc. d/b/a George J. Shaw Construction Co. (“Shaw”) and Brian Henderson (Defendants in the Underlying Action) on September 30, 2016.² At the time of the injury, Shaw had been engaged to carry out part of the construction of the Cerner Trails Campus in Kansas City, Missouri.³ As part of the activities for which it was hired, Plaintiff alleges that Shaw was engaged in the operation of hauling materials to and from the Cerner Trails Campus over the public roads of Kansas City, Missouri by motor vehicle.⁴

Defendant-Relators allege that Shaw subcontracted with subcontractor C-Sharp, an owner and operator of his own truck, to aid in the hauling of materials excavated from the Cerner Trails Construction site.⁵ C-Sharp in turn subcontracted with Midwest Contracting Services, LLC d/b/a R&B Trucking (“R&B”) to aid in the hauling of materials excavated from the Cerner Trails Construction site.⁶ At the time of the alleged injury, Plaintiff McArthur was employed as a dump truck driver by R&B and Defendant-Relator Brian Henderson was employed to operate an excavator by Defendant-Relator Shaw.⁷

¹ McArthur v. Beutler, Inc. d/b/a George J. Shaw Construction Co. and Brian Henderson, Case No. 1816-CV05095, now pending before the Honorable Sandra C. Midkiff in the Sixteenth Judicial Circuit of Jackson County, in Kansas City, Division 1.

² Plaintiff’s Petition for Damages, Ex. 1 to Relators’ Original Petition, pg. EX-0003

³ Affidavit of Mark Teahan, Ex. 4 to Relators’ Original Petition, pg. EX-0029

⁴ Affidavit of Joshua McArthur, Ex. 6 to Relators’ Original Petition, pg. EX-0079 to EX-0080, paras. 2 and 6.

⁵ Affidavit of Mark Teahan, Ex. 4 to Relators’ Original Petition, pg. EX-0029, paras. 4 and 5.

⁶ Affidavit of Rhonda Shoemaker, Ex. 7 to Relators’ Original Petition, pg. EX-0098, paras. 4 and 5

⁷ Affidavit of Rhonda Shoemaker, Ex. 7 to Relators’ Original Petition, pg. EX-0098, para. 5; Affidavit of Mark Teahan, Ex. 4 to Relators’ Original Petition, pg. EX-0029, para. 7

Defendant-Relators filed a motion for summary judgment and argue they are immune from liability in the underlying case because Shaw qualifies as the statutory employer of Plaintiff McArthur pursuant to Mo. Rev. Stat. § 287.040, paragraphs 1 and 2.⁸ Plaintiff McArthur responded that, among other reasons, Defendant-Relators do not qualify as statutory employers because the exception to statutory employment outlined in subpart § 287.040.4, applies.⁹ Respondent denied Defendant-Relators' motion for summary judgment because questions of material fact relating to the applicability of § 287.040.4 were at issue.¹⁰

In particular, Respondent found that material facts at issue included whether or not Shaw was a for-hire motor carrier that transported property over public roads.¹¹ Despite the allegation of Shaw's Vice President, Mark Teahan, that they did not transport property or passengers over public roads as a part of the Cerner Trails Campus construction project¹², Plaintiff's work, allegedly subcontracted up the line through Shaw, included the transportation of property (excavated material) over public roads.¹³ Additionally, the Scope of Work in Shaw's subcontract agreement included "[d]umpsters and/or trucks required to haul off and legally dispose of all materials demolished and/or

⁸ See generally Defendant-Relators' Legal Memorandum in Support of Summary Judgment, Ex. 5 to Relators' Original Petition, pg. EX-0048

⁹ See generally Plaintiff's Response to Motion for Summary Judgment, Ex. 6 to Relators' Original Petition, pg. EX-0063

¹⁰ See generally Order Overruling Defendants' Motion for Summary Judgment, Ex. 10 to Relators' Original Petition, pg. EX-0138

¹¹ Order Overruling Defendants' Motion for Summary Judgment, Ex. 10 to Relators' Original Petition, pg. EX-0139.

¹² Affidavit of Mark Teahan, Ex. 8 to Relators' Original Petition, pg. EX-0121, para. 3.

¹³ GMP Subcontract Sum & Scope of Work, Ex. 4 to Relators' Original Petition, pg. EX-0042; Affidavit of Joshua McArthur, Ex. 9 to Relators' Original Petition, pg. EX-0135 to EX-0136, paras. 2 and 6.

removed under this scope of work.”¹⁴ Also, Shaw not only has a USDOT number, but also operates to transport property interstate under that USDOT number.¹⁵

It is undisputed that C-Sharp, the subcontractor of Plaintiff’s direct employer, was an owner-operator and R&B, Plaintiff’s direct employer, was a for-hire motor carrier.¹⁶ These undisputed facts as well as the disputed facts in the preceding paragraph relate directly to the applicability of § 287.040.4.

Relators’ original Petition for Writ of Mandamus filed before the Western District Court of Appeals was denied on November 26, 2019. Relators filed this original Petition for Writ of Mandamus on December 10, 2019. This Court’s preliminary Writ of Mandamus was issued on February 4, 2020. Respondent’s Writ Return was filed on March 5, 2020 and Relators’ Brief was filed on April 6, 2020.

¹⁴ GMP Subcontract Sum & Scope of Work, Ex. 4 to Relators’ Original Petition, pg. EX-0042.

¹⁵ Company Snapshot, Ex. 8 to Relators’ Original Petition, pg. EX-0124.

¹⁶ Defendant’s Motion for Summary Judgment Reply Brief, Ex. 8 to Respondents’ Original Petition, pg. EX-0106, paras. 3 and 4; Plaintiff’s Sur-Reply in Response to Defendants’ Motion for Summary Judgment, Ex. 9 to Relators’ Original Petition, pg. EX-0133.

POINTS RELIED ON

I. RELATORS ARE NOT ENTITLED TO AN EXTRAORDINARY WRIT OF MANDAMUS OR PROHIBITION BECAUSE THE CIRCUMSTANCES WARRANTING AN EXTRAORDINARY WRIT ARE NOT PRESENT IN THAT RELATORS DO NOT HAVE AN ESTABLISHED RIGHT TO ENFORCE, RELATORS WILL NOT SUFFER IRREPARABLE HARM, AND RESPONDENT DID NOT EXCEED HER AUTHORITY AND JURISDICTION.

II. RELATORS ARE NOT ENTITLED TO A PERMANENT WRIT OF MANDAMUS OR PROHIBITION COMPELLING RESPONDENT TO GRANT SUMMARY JUDGMENT IN THE UNDERLYING CASE BECAUSE STRICT CONSTRUCTION OF MO. REV. STAT. § 287.040.4 DISQUALIFIES RELATORS FROM THE STATUTORY EMPLOYMENT DEFENSE AND BECAUSE PLAINTIFF MCARTHUR’S CONSTITUTIONAL RIGHT TO TRIAL BY JURY IS VIOLATED BY APPLICATION OF THE STATUTORY EMPLOYMENT DEFENSE IN THIS CASE. (Responsive to Relators’ Point Relied on I)

Mo. Rev. Stat. § 287.040.4

Mo. Rev. Stat. § 287.800

Mo. Const. Article I, Section 22

ARGUMENT

I. RELATORS ARE NOT ENTITLED TO AN EXTRAORDINARY WRIT OF MANDAMUS OR PROHIBITION BECAUSE THE CIRCUMSTANCES WARRANTING AN EXTRAORDINARY WRIT ARE NOT PRESENT IN THAT RELATORS DO NOT HAVE AN ESTABLISHED RIGHT TO ENFORCE, RELATORS WILL NOT SUFFER IRREPARABLE HARM, AND RESPONDENT DID NOT EXCEED HER AUTHORITY AND JURISDICTION.

A. A Writ of Mandamus Is Not Warranted Because Relators Do Not Have An Established Right to Enforce and Because Respondent Was Properly Operating Within Her Authority.

“A writ of mandamus is a hard and fast unreasoning writ, and is reserved for extraordinary emergencies.” *Norval v. Whitesell*, 605 S.W.2d 789, 791 (Mo. banc 1980).

“There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus.” *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 66 (Mo. 1980).

Mandamus exists only to enforce a “a clear, unequivocal, and specific right.” *State ex rel. Chassaing v. C. Mummert III*, 887 S.W.2d 573, 76 (Mo. banc 1994). It is not intended to establish a legal right, “but only to compel performance of a right that already exists.” *Id.* The purpose of the writ of mandamus is to execute, not to adjudicate. *State ex rel. Commissioners of the State Tax Comm’n v. Schneider*, 609 S.W.2d 149, 151 (Mo. banc 1980). Its purpose is for situations “when the law, in the ordinary methods of its procedure, is powerless to grant relief.” *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 826 (Mo. 2015). In *Chassaing*, mandamus was “clearly inappropriate” where the issue was novel and had not been decided by a Missouri Court. 887 S.W.2d at 576–77.

Furthermore, A writ of mandamus will not lie to “control the discretion of a court . . .

acting within its jurisdiction.” *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell et al.*, 426 S.W.2d 11, 14 (Mo. 1968).

Although Relators cite numerous instances of Missouri Courts dealing with Mo. Rev. Stat. § 287.040’s statutory employment provisions, Relators cannot point to an authority where the post-2012 amendments to the 287.040.4 exception to statutory employment has been addressed by a Missouri Court. As in *Chassaing*, so here: a novel issue is involved and thus a writ of mandamus is not appropriate.

The current case is also distinguishable from the cases cited by Relators, *State ex rel. Mo. Hwy. & Transp. Comm’n v. Dierker*, 961 S.W.2d 58 (Mo. 1998) and *State ex rel. Bd. Of Trustees of North Kansas City Memorial Hosp. v. Russell*, 843 S.W.2d 353 (Mo. 1992). Both *Dierker* and *Russell* involved situations where a party that claimed sovereign immunity was denied that defense by the trial judge on their motion for summary judgment. In these cases, if sovereign immunity were to apply, the claiming parties would be outside the jurisdiction of the trial court and not subject to the judge’s authority. However, *McCracken v. Wal-Mart Stores East*, 298 S.W.3d 473, 75 (Mo. banc 2009) has made it clear that the statutory employment defense created by Missouri’s workers’ compensation chapter is *not* a matter of jurisdiction. Rather, it is an affirmative defense. In our case, there is neither a clearly established right nor a potential lack of jurisdiction. Thus, a writ of mandamus would not be appropriate.

B. A Writ of Prohibition Is Not Warranted Because Respondent Properly Acted Within Her Authority and Jurisdiction And Respondents Will Not Suffer Irreparable Harm.

As it is within the discretion of the Court to treat a writ of mandamus as a writ of prohibition, Relators' entitlement to a writ of prohibition is discussed as well. As with a writ of mandamus, so also a writ of prohibition is an extreme remedy. It is "an extraordinary remedy" that "is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. 1991). Prohibition is a discretionary writ, not a writ of right. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 69 (Mo. banc 1999). Within the Court's discretion, a writ of prohibition may be appropriate:

(1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.

State ex rel. Johnson & Johnson v. Burlison, 567 S.W.3d 168, 171 (Mo. 2019).

"Prohibition will not be granted except when usurpation of jurisdiction or an act in excess of jurisdiction is clearly evident." *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. 2014). Generally, "[i]f the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate." *Chassaing* at 77. As an extraordinary remedial writ, it is not even intended to remedy all errors: "[p]rohibition cannot be used as a substitute for an appeal to undo erroneous judicial proceedings that have already been accomplished." *Douglas Toyota III* at 52. Rather, "[t]o depart from the usual application of prohibition [to jurisdictional trial court errors], however, requires a 'peculiarly limited situation[]' where some 'absolute irreparable harm may come to a litigant if some spirit

of justifiable relief is not made available to respond to a trial court's order.'" *Id.*

Prohibition is reserved for "questions of significance fail otherwise to obtain judicial review." *Id.*

Where litigation is "patently unwarranted" and "a defendant is clearly entitled to immunity," prohibition may be appropriate. *Russell* at 55. However, where the matter at hand is an issue of first impression and would benefit from the full record that would be developed at trial, caution is advised. *See State ex rel. General Elec. Co. v. Gaertner*, 666 S.W.2d 764, 769 (Mo. 1984) (J. Blackmar, concurring). Prohibition is not appropriate to require a trial court to enter summary judgment in favor of a party "whenever there is the slightest doubt as to the material facts. *State ex rel. McDonnell Douglas Corp. v. Gaertner*, 601 S.W.2d 295, 98 (Mo. App. E.D. 1980). The investigation and findings of fact made by a trial court in coming to a decision should not lightly be undermined. *See State ex rel. American Family Ins. v. Clark*, 106 S.W.3d 483, 497 (Mo. 2003) (J. Teitelman, dissenting); *Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 743 (Mo. 2004) (J. Teitelman, dissenting).

In this case, Respondent's basic authority to review facts at issue and make a determination on a motion for summary judgment is not at issue. Respondent's jurisdiction over the parties and matters in the Underlying Case have not been questioned. Prohibition would not be appropriate because Respondent had the authority and jurisdiction to take the action with which Relators take issue. The first two bases for a writ of prohibition, then, do not apply here.

Neither is the third basis for a writ of prohibition present. The Underlying Case is and has been on the verge of trial for over a year with the original trial date set for March 2019. Discovery has been closed for over a year. The only pending matter was the Defendant-Relators' motion for summary judgment, and now, Defendant-Relators' petition for writ of mandamus. The time and expense of litigation has already almost been spent. However, Defendant-Relators are seeking a short-cut to their desired result rather than utilizing the proper measure: appeal. In this case, Defendant-Relators are not clearly entitled to immunity. The application of the § 287.040.4 exception to statutory employment is a novel issue, so the full record developed by a trial would serve as a benefit to all parties and any reviewing court to fully examine the matter. Contrary to the circumstances for which a writ of prohibition was intended, the issues of the Underlying Case are perfectly suited for judicial review without a writ of prohibition.

Without a lack of authority, a usurpation of jurisdiction, or irreparable harm, there is no basis for a writ of prohibition in this case. Respondent's consideration of parties' extensive briefing, conduction of oral arguments, and months of deliberation on Defendant-Relators' motion for summary judgment should not so quickly cast aside. In determining that material facts were at issue in the Underlying Case after careful consideration, Respondent has appropriately wielded her judicial authority. A drastic, extraordinary remedial writ is not appropriate to address such an appropriate and normal use of a trial judge's authority, with an alternative remedy readily available and a novel question of law at issue.

For these reasons, Relators' Writ of Mandamus should be denied and the Preliminary Writ of Prohibition should be quashed.

II. RELATORS ARE NOT ENTITLED TO A PERMANENT WRIT OF MANDAMUS OR PROHIBITION COMPELLING RESPONDENT TO GRANT SUMMARY JUDGMENT IN THE UNDERLYING CASE BECAUSE STRICT CONSTRUCTION OF MO. REV. STAT. § 287.040.4 DISQUALIFIES RELATORS FROM THE STATUTORY EMPLOYMENT DEFENSE AND BECAUSE PLAINTIFF MCARTHUR'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY IS VIOLATED BY APPLICATION OF THE STATUTORY EMPLOYMENT DEFENSE IN THIS CASE. (Responsive to Relators' Point Relied on I)

A. Standard of Review for Summary Judgment

A trial court's denial of summary judgment is reviewed on appeal using essentially a de novo standard. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 76 (Mo. banc 1993). Summary judgment is appropriate only when the movant has shown that there is no genuine issue as to any material fact and that said movant is entitled to judgment as a matter of law. Missouri Supreme Court Rule 74.04(c)(6). The burden is on the moving party to show that there is no genuine issue of material fact, and that he or she is entitled to judgment as a matter of law. *Maryland Casualty Co. v. Martinez*, 812 S.W.2d 876, 879 (Mo. App. 1991). A genuine issue exists where the record contains competent materials that show two plausible, but contradictory, accounts of essential facts. *ITT Commercial* at 381. An appellate court shall also afford the non-moving party of a summary judgment motion all reasonable inferences. *Id.* at 376.

On a motion for summary judgment, the non-movant is accorded the benefit of all reasonable inferences and the record should be viewed in the light most favorable to the non-movant. *Id.* at 376. The phrase, “in the light most favorable to the non-movant,” means that the movant bears the burden of establishing a right to judgment as a matter of law; any evidence in the record that presents a genuine dispute as to material facts defeats the movant’s prima facie showing. *Id.* at 382. “Summary judgment is a drastic remedy and is inappropriate unless the prevailing party has shown that he is entitled to judgment as a matter of law.” *Maryland Casualty* at 879.

B. Strict Construction of Mo. Rev. Stat. § 287.040.4 Disqualifies Relators from the Statutory Employment Defense.

Prior to Missouri’s 2005 amendments to the workers’ compensation chapter, Mo. Rev. Stat. § 287.800 required that all provisions of the workers’ compensation chapter be construed liberally “with a view to the public welfare.” Mo. Rev. Stat. § 287.800 (1994). However, after Missouri’s adoption of comparative fault in the 1983 *Gustafson v. Benda* Supreme Court decision, subsequent courts have noted that the policy rationale behind liberally construing worker’s compensation law in favor of statutory employment was made “less compelling.” *Bass v. Nat’l Super Mkts.*, 911 S.W.2d 617, 19 (Mo. banc 1995). Noting that, post-comparative fault adoption, an injured worker often prefers civil suit over the application of worker’s compensation law, the *Bass* court reluctantly applied liberal construction of the worker’s compensation law as was then required by statute. *Id.*

Missouri’s 2005 amendments to the worker’s compensation law overturned this regime by amending parts of the law to its current form requiring strict construction of

the worker's compensation chapter. Mo. Rev. Stat. § 287.800 (2005); *see also* *McCracken* at 481 ("The shift in course alluded to in Bass has occurred. The General Assembly has amended the Act to require that 'reviewing courts shall construe the provisions of th[e] [Act] strictly.'"). The amendments in 2005 "narrowed" the scope of employer immunity "by the new lens of strict construction." *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 20 (Mo. App. 2011) (quoting *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. 2010) (overruled on other grounds)) (emphasis added).

In addition to the "lens" of strict construction, the meaning and interpretation of Missouri's workers' compensation statutes is determined using canons of construction for statutory interpretation. "Absent a statutory definition, the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Akins v. Dir. Of Revenue*, 303 S.W.3d 563, 65 (Mo. 2010). If something is not expressed, it is not presumed. *See Shaw v. Mega Industries, Corp.*, 406 S.W.3d 466, 69 (Mo. App. 2013) quoting *KCP & L* at 17–18. "Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning . . . [even] under the guise of discerning legislative intent." *KCP & L* at 27. Even if a court believes to know the legislature's "true" intent behind a statute, the court cannot rewrite the statute to effectuate that purpose if the plain language of the statute is unambiguous. *See id.*

The "plain and ordinary meaning" of the words used in the statute are presumed to be the intent of the legislature and the court looks beyond the words of the statute only

when the plain and ordinary meaning would lead to an absurd or illogical result. See *Shaw v. Mega Industries* at 17–18. An “absurd or illogical result” may mean that a statute is in direct conflict with another statute and/or the entire purpose of the act of which it is a part. See *Anderson v. Ken Kauffman & Sons Excavating*, 248 S.W.3d 101 (Mo. App. 2008). In *Anderson*, the statute under scrutiny, if read literally, effectively stated that “Missouri’s Workers’ Compensation Law is applicable to all cases falling within its provisions, except those cases falling within its provisions.” *Anderson* at 107.

In 2012, Missouri enacted further changes to the workers’ compensation chapter. In particular to this case, the new text of Mo. Rev. Stat. § 287.040.4 was added:

The provisions of this section shall not apply to the relationship between a for-hire motor carrier operating within a commercial zone as defined in section 390.020 or 390.041 or operating under a certificate issued by the Missouri department of transportation or by the United States Department of Transportation, or any of its subagencies, and an owner, as defined in section 301.010, and operator of a motor vehicle.

(2017) (emphasis added). This exception has not yet been dealt with by a Missouri court. However, as there are definitions provided referenced in the statute and elsewhere in the workers’ compensation chapter, those also may be considered in determining the meaning of the statute. A motor carrier, according to Mo. Rev. Stat. § 390.020.18 is “any person engaged in the transportation of property or passengers, or both, for compensation or hire, over the public roads of this state by motor vehicle.” A commercial zone as defined by Mo. Rev. Stat. § 390.020.4 includes “any municipality within this state.” An operator is “any person who operates or drives a motor vehicle.” Mo. Rev. Stat. § 301.010.43.

In this case, Defendant-Relators rely on the first two paragraphs of § 287.040 to qualify themselves as Plaintiff McArthur's statutory employer. However, Plaintiff McArthur argues that the application of § 287.040.4 to the current situation exempts himself from the exclusive remedy provisions attending the statutory employment defense. It is undisputed by both sides that C-Sharp is an owner and operator of a motor vehicle and R&B was a for-hire motor carrier operating within a commercial zone.¹⁷ Plaintiff McArthur has demonstrated that Shaw is also a for-hire motor carrier, as contemplated by paragraph 4: Shaw's own Company Snapshot demonstrates that they are engaged in the transportation of property.¹⁸ Although transportation of property is not their primary business, Shaw's company snapshot indicates that they do transport some property as part of the jobs for which they are hired, thus, for hire.¹⁹ This is further bolstered by the affidavit of Plaintiff McArthur that describes the work that he was doing based on the subcontract his employer allegedly had with Shaw: hauling earth—property—over public roads in a commercial zone (the City of Kansas City) for hire.²⁰

Based on the plain and ordinary meaning of § 287.040.4, then, the other provisions of 287.040 **do not apply** to the R&B/C Sharp relationship *or* to the C Sharp/Shaw relationship. The theory of statutory employment is based on an unbroken relationship between Shaw and Plaintiff. However, two of the links in Shaw's alleged "privity of contract" are statutorily disqualified. Not only are the contractual links broken, but the

¹⁷ Defendant's Motion for Summary Judgment Reply Brief, Ex. 8 to Respondents' Original Petition, pg. EX-0106, paras. 3 and 4; Plaintiff's Sur-Reply in Response to Defendants' Motion for Summary Judgment, Ex. 9 to Relators' Original Petition, pg. EX-0133

¹⁸ Company Snapshot, Ex. 8 to Relators' Original Petition, pg. EX-0124.

¹⁹ Company Snapshot, Ex. 8 to Relators' Original Petition, pg. EX-0124.

²⁰ Affidavit of Joshua McArthur, Ex. 6 to Relators' Original Petition, pg. EX-0079 to EX, paras. 2 and 6).

provisions of 287.040—including section .2 drawing the connection between independent subcontractors and their subcontractors’ employees—“**shall not apply.**” (emphasis added). Based on the plain language of the statute on which they rely for their defense, Shaw cannot qualify as the statutory employer of Plaintiff.

Defendant-Relators argue that, because Plaintiff McArthur himself is not an owner-operator, the exception does not apply to the relationship between Shaw and Plaintiff. However, Defendants’ argument does not consider that without the relationships between Shaw and C-Sharp and C-Sharp and R&B, *there is no relationship between Shaw and Plaintiff*. The language of the statutory exception states that “[t]he provisions of this section shall not apply” to the described relationships. Such “provisions” include the “subcontractors’ employees’ section” Mo. Rev. Stat. § 287.040.2 and § 287.040.1 relied on by Defendants to establish Shaw’s statutory employment status. This statute must be strictly construed. Mo. Rev. Stat. § 287.800.1.

Defendant-Relators disagree with this interpretation and argue at length that it “distorts the statute’s purpose,” but, as in *KCP & L*, it would not be appropriate to “read into” the statute the intent that Defendant-Relators *think* the legislature intended. This interpretation of the statute is not wholly unprecedented, as *KCP & L* demonstrates by showing that there are exceptions to the workers’ compensation chapter’s exclusive remedy provisions. *KCP & L* at 29. Even if the outworking of this statute results in the disadvantage of future parties, Justice Fischer has previously cautioned that “this Court is obligated to adhere to the words of the statute, and any adjustments . . . must be made by the General Assembly.” *Strauser v. Martinez* at 805 (J. Fischer, concurring).

The statutory employment provisions of § 287.040 were not enacted to protect the interests of employers and subcontractors. Rather, the longstanding purpose of the statutory employment provisions in 287.040 is “to prevent employers from circumventing the requirements of the Act by hiring independent contractors to perform work the employer would otherwise perform.” *Bass v. Nat’l Super Markets* at 619. Statutory employment was intended as a shield for the employers of subcontractors, not as a sword to fend off civil liability. Unfortunately, this is how it is most frequently used. Through the lens of strict construction, based on the plain language of the statute, and in consideration of the purpose of the statutory employment provisions, Relators are exempted not entitled to summary judgment in favor of their civil immunity and the preliminary writ of prohibition should be quashed.

C. The Application of the Statutory Employment Defense in the Underlying Case Violates Underlying Plaintiff’s Constitutional Right to a Trial by Jury.

The right to trial by jury is guaranteed by Article I, Section 22 of the Missouri Constitution. (“[T]he right of trial by jury as heretofore enjoyed shall remain inviolate.”). “[A]s heretofore enjoyed” means the right applies to causes of action tried by juries analogous to actions brought at the time of Missouri’s original 1820 Constitution. *See State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 86 (Mo. 2003). This has been interpreted to include civil actions for damages, otherwise known as torts. *Id.* at 87. It is recognized that because the workers’ compensation regime abrogates an employee’s cause of action against his *employer* under common law, the employee is not guaranteed the right to trial by jury for injuries falling within the workers’ compensation scheme. *See generally*

DeMay v. Liberty Foundry Co., 37 S.W.2d 640 (Mo. 1931). However, the workers' compensation regime does not replace an employee's cause of action against a *third party* for negligence. See Mo. Rev. Stat. § 287.150 (assigning subrogation rights for third party liability claims); see e.g., *Tillman v. Cam's Trucking*, 20 S.W.3d 579 (Mo. App. 2000) (dealing with a "set off" against an injured worker's judgment after a successful third party liability claim). A statute that abrogates the right to trial by jury for an existing cause of action infringes on a Constitutional right, and therefore must yield to the right. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 642 (Mo. 2012) referencing *Missouri Alliance for Retired Am. v. Dept. of Labor and Indust. Relations*, 277 S.W.3d 670, 682 (Mo. banc 2009).

Plaintiff's claim against Shaw is a civil action for damages—a tort—based in negligence. If Shaw is declared Plaintiff's employer, it is only based on the legal fiction—non-existent at common law—of statutory employment. At common law, Shaw is a third party against whom Plaintiff may claim civil damages for negligence. Plaintiff has a constitutional right to a trial by jury for this claim. Defendants' entire basis of their motion for summary judgment is the statutory employer defense derived from Mo. Rev. Stat. § 287.120 in conjunction with § 287.040 (1)–(2). If these provisions were to be applied to this case, Plaintiff's right to a jury trial for a claim that is recognized and exists under Missouri law would be violated—completely abrogated. In fact, the rights of all employees who are injured by the negligence of a statutory employer or an employee of a statutory employer—where the negligence does not rise to the high bar for co-employee

liability—their claims cannot succeed and there remains no remedy for the civil damages arising from that category of negligence.

Over the years, the *quid pro quo* “bargain” between employees and employers in the original 1926 workers’ compensation laws were enacted has eroded. Less and less an adequate exchange by employees of their right to bring a civil suit in exchange for a no-fault right to recovery, the workers’ compensation regime has more recently been amended to reduce the amount and likelihood of a employee’s right to recover. The “certain remedy” of a right to recovery has been reduced to “a privilege that exists only by virtue of legislative whim.” *Missouri Alliance v. Dept. of Labor*, 277 S.W.3d 670, 682 (Mo. 2009) (J. Teitelman, dissenting). In light of the trend of the workers’ compensation law against the rights of the worker, an injured worker’s constitutional right to a trial against a third party for personal injuries negligently inflicted should not be so easily dismissed.

CONCLUSION

Relators' are not entitled to an extraordinary remedial writ—of mandamus or of prohibition—because Relators do not have an established right to enforce, because Respondent has not exceeded her jurisdictional authority, and because Relators will not suffer irreparable harm without the issuance of the writ. The preliminary writ of prohibition should be quashed because, based on strict construction of Mo. Rev. Stat. § 287.040.4, Relators are not statutory employers of underlying Plaintiff McArthur, and thus they are not entitled to immunity from civil suit. Finally, the writ should be quashed because the application of the statutory employment provisions in this case violate Plaintiff McArthur's Constitutional right to a trial by jury. Based on the foregoing, Respondent requests that this Court quash its preliminary writ of prohibition.

Respectfully submitted,

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RULE 84.06 CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel hereby certifies that this brief includes the information required by Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(a) and (b). In compliance with Rule 84.06(b), this brief contains 5,892 words, excluding the cover page, this certificate of service and compliance, signature block, and appendix.

The undersigned counsel hereby certifies that the Brief of Respondent The Honorable Sandra C. Midkiff in Opposition to Writ of Mandamus and the appendix thereto was served by delivering the same via U.S. Mail, postage prepaid and via electronic mail on this 24th day of April, 2020, to:

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