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 RELATORS BEUTLER, INC. d/b/a GEORGE J. SHAW CONSTRUCTION CO. AND BRIAN HENDERSON

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Jurisdictional Statement

This action for a permanent Writ of Mandamus presents the question of whether Relators Beutler, Inc. d/b/a George J. Shaw Construction Co. ("Shaw") and Brian Henderson are immune from suit under Mo. Rev. Stat. §§ 287.040 and 287.120, as the statutory employer and statutory co-employee, respectively, of the plaintiff in the underlying lawsuit,[1] Joseph McArthur, at the time of his alleged injury.

Article V, Section 4, of the Constitution of the State of Missouri and Supreme Court Rules 84 and 94 authorize this Court to issue and determine original remedial writs. This Court has held that where "a defendant is immune from suit as a matter of law, and the trial court refuses to grant summary judgment, a writ of mandamus is appropriate." *State ex rel. Mo. Hwy. & Transp. Comm'n v. Dierker*, 961 S.W.2d 58, 60 (Mo. 1998) (en banc). In such a case, mandamus is the appropriate remedy because, as this Court has noted, "a defendant who is clearly entitled to immunity should not be required to proceed through trial and appeal in order to enforce that protection." *Id.* (citing *State ex rel. Bd. of Trustees v. Russell*, 843 S.W.2d 353, 355 (Mo. 1992) (en banc). Here, a permanent Writ of Mandamus is necessary to enforce Relators' statutory immunity rights, because Respondent has refused to grant summary judgment in their favor in the underlying action.

[1] Case No. 1816-CV05095, now pending before Division One of the Sixteenth Judicial Circuit, Jackson County, Missouri (at Kansas City)

Statement of Facts

Relators are the named defendants in a personal injury action filed by Plaintiff Joshua McArthur in the Jackson County Circuit Court. Respondent is presiding over that underlying action in her capacity as Circuit Judge appointed to Division One of the Sixteenth Judicial Circuit. McArthur alleges he was injured in the course of his work on a commercial construction project, and he is seeking civil damages in addition to the workers' compensation benefits he has already collected (and is continuing to receive, in the form of medical benefits). Pursuant to Supreme Court Rule 74.04, Relators sought summary judgment in the underlying action because, under the plain language of the Missouri Workers' Compensation Law, they are both immune from civil liability for this workplace injury—Shaw, because it was McArthur's statutory employer, and Henderson, because he was a statutory co-employee.

Despite this statutory immunity, Respondent has refused to grant Relators' motion for summary judgment and has denied it on erroneous grounds. Because Relators have a clear statutory right to immunity, the appropriate remedy is for this Court to make permanent its Preliminary Writ of Mandamus and direct Respondent to uphold Relators' immunity rights and to enforce the Workers' Compensation Law of this state by entering summary judgement in Relators' favor in the underlying action.

Relators' filed their original Petition for Writ of Mandamus before the Western District Court of Appeals on November 26, 2019, which was summarily denied by that court on December 2, 2019. Realtors' original Petition for Writ of Mandamus was then filed in this Court on December 10, 2019. On February 4, 2020, this Court entered its

preliminary Writ of Mandamus. Respondent's Writ Return was filed on March 5, 2020.

Point Relied On

1. Relators are entitled to a permanent writ of mandamus compelling Respondent to grant summary judgment in their favor in the underlying case (Case No. 1816-CV05095) because they are immune from civil liability as the statutory employer and statutory co-employee of the underlying plaintiff.

Mo. Stat. Rev. § 287.040

Mo. Stat. Rev. § 287.120

Anderson v. Steurer, 391 S.W.2d 839 (Mo. 1965)

Bass v. Nat'l Super Mkts., 911 S.W.2d 617 (Mo. 1995) (en banc)

Argument

I. Standard of review

When a petition for writ of mandamus challenges the denial of a motion for summary judgment based on civil immunity, the appellate court will review the record de novo and apply the same standard it would use for appeal of a final order granting summary judgment. *State ex rel. Mo. Hwy. & Transp. Comm'n*, 961 S.W.2d at 60.

Summary judgment should be entered when "there is no genuine issue as to any material fact and [...] the moving party is entitled to judgment as a matter of law." Rule 74.04. *See also State ex rel. Koster v. Olive*, 282 S.W.3d 842, 846 (Mo. 2009) (en banc). A motion for summary judgment "need not rest on unassailable proof." *Wood & Huston Bank v. Malan*, 815 S.W.2d 454, 457 (Mo. App. W.D. 1991). To overcome a defendant's motion for summary judgment, a plaintiff must offer more than mere allegations, denials, doubts, or speculation; he or she must set forth specific facts that demonstrate the existence of a genuine dispute as to a material fact. *Id.* Material facts are those of such probative value as would control or determine the litigation. *Id.* For a "genuine issue" of material fact to exist, the record must contain materials evidencing two plausible, but contradictory, accounts of the essential facts. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 382 (Mo. 1993) (en banc). If the plaintiff's "genuine issues" of material fact are merely argumentative, imaginary, or frivolous, then summary judgment in the defendant's favor is proper. *Id.*

II. Relators are entitled to a permanent Writ of Mandamus compelling Respondent to grant summary judgment in their favor in the underlying case (Case No. 1816-CV05095) because they are immune from civil liability as the statutory employer and statutory co-employee of the underlying plaintiff.

Under Missouri's Workers' Compensation Law, in exchange for providing mandatory workers' compensation coverage—without regard to fault—employers are granted immunity from civil lawsuits arising out of workplace injuries. *See generally* Mo. Rev. Stat. § 287.120. The relevant statutory language reads as follows:

> **1.** Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment. Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and

> dangerously caused or increased the risk of injury. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.
>
> **2.** The rights and remedies herein granted to an employee ***shall exclude all other rights and remedies*** of the employee, the employee's spouse, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such injury or death by accident or occupational disease, except such rights and remedies as are not provided for by this chapter.

Mo. Rev. Stat. § 287.120 (emphasis added). The statute establishes workers' compensation as the exclusive remedy for workplace injury claims and grants to employers and co-employees immunity from civil liability for such claims. As this Court has previously put it, "The Workers' Compensation Law supplants the common law in determining remedies for on-the-job injuries." *Vatterott v. Hammerts Iron Works, Inc.*, 968 S.W.2d 120, 121 (Mo. 1998) (en banc).

Although Section 287.120 sets forth the workers' compensation obligations and civil immunity protections applicable to "employers" and their employees, Section 287.040 extends those obligations and protections to so-called "statutory employers." *See generally* Mo. Rev. Stat. § 287.040. This section reads, in relevant part:

1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and ***shall be liable under this chapter to such contractor, his subcontractors, and their employees***, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

2. The provisions of this section shall not apply to the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor but ***such independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors*** when employed on or about the premises where the principal contractor is doing work.

3. [Establishing priority of liability for workers' compensation benefits among direct and statutory employers.]

4. The provisions of this section shall not apply to ***the relationship*** between ***a*** for-hire motor carrier operating within a commercial zone […] 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 […] and operator of a motor

vehicle.

Mo. Rev. Stat. § 287.040 (emphasis added). The relevant subsections are discussed individually below.

"Section 287.040.1 takes away the common law rights of ***employees*** for negligence of certain ***third parties*** by defining the ***third parties*** as statutory employers, even though they are not actual [direct] employers." *Huff v. Union Elec. Co.*, 598 S.W.2d 503, 511 (Mo. App. E.D. 1980) (emphasis added). *See also Bass v. Nat'l Super Mkts.*, 911 S.W.2d 617, 619 (Mo. 1995) (en banc). This Court has previously observed that statutory employment under Paragraph 1 has three elements: "(1) the work is performed pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and (3) the work is in the usual course of business of the alleged statutory employer." *Bass*, 911 S.W.2d at 621.

The next paragraph goes on to directly address statutory employment in the specific context of a commercial construction project like the one at issue here. *See generally* Mo. Rev. Stat. § 287.040.2. Paragraph 2 provides that an independent construction contractor "shall be deemed to be the ***employer*** of the ***employees*** of his subcontractors and their subcontractors when employed on or about the premises where the principal contractor is doing the work." Mo. Rev. Stat. § 287.040.2 (emphasis added). Missouri case law is clear that statutory employer status applies not only to top-level general contractors, but also to any intermediate subcontractors who, in turn, hire their own subcontractors, *et cetera* on down the chain. *Anderson v. Steurer*, 391 S.W. 839, 845-46 (Mo. 1965) (considering and expressly rejecting the argument that "principal

contractor" language means that only general contractors, and not intermediate subcontractors, are entitled to immunity as statutory employers).

Paragraph 3 establishes an order of priority in determining who will be responsible for paying workers' compensation benefits when an injured worker may be covered both by a direct employer and by other statutory employers.

Finally, Paragraph 4 of Section 287.040 contains a narrow carve-out providing that certain for-hire motor carriers are not to be considered the statutory employers of any motor vehicle owner-operators driving on their behalf.

A. Shaw was McArthur's statutory employer and Henderson was his co-employee.

All of the facts relevant to defendants' Motion for Summary Judgment are undisputed in the underlying lawsuit.

It is undisputed that McArthur's claims in the underlying lawsuit arise from a workplace injury he allegedly sustained on September 30, 2016, while he was working at a commercial construction project in Kansas City, Jackson County, Missouri. (Exhibit 1, pp. EX-0003-EX-0007, ¶¶ 5-23; Exhibit 6, pp. EX-0063-EX-0064, ¶ 1.) It is undisputed that Relator Brian Henderson was employed by Shaw as an equipment operator and had been assigned to perform excavation work at the project for Shaw. (Exhibit 6, p. EX-0065, ¶ 8.)

It is undisputed that Shaw performed its work at the project pursuant to a written subcontract with the general contractor, J.E. Dunn Construction Co. ("Dunn"), which had been hired by the project's owner. (Exhibit 6, p. EX-0064, ¶ 2.) It is undisputed that

Shaw entered into a separate oral agreement with C-Sharp Trucking ("C-Sharp"), pursuant to which C-Sharp agreed to perform a portion of the construction work at the Project for which Shaw had contracted with Dunn. (Exhibit 6, p. EX-0064, ¶¶ 4-5.) It is undisputed that C-Sharp, in turn, entered into a separate oral agreement with R&B Trucking ("R&B"), under which R&B agreed to perform a portion of the work for which C-Sharp had contracted with Shaw. (Exhibit 6, pp. EX-0064-EX-0065, ¶¶ 6-7.)

It is undisputed that R&B employed plaintiff Joshua McArthur and assigned him to drive one of its commercial dump trucks to haul material excavated by Shaw on or from the construction project, and that the alleged injury occurred within the course and scope of that employment. (Exhibit 6, p. EX-0065, ¶ 9; Exhibit 8, p. EX-0106, ¶¶ 2-4.)

These undisputed facts place this case squarely within the statutory employment relationship described in the first two paragraphs of Section 287.040.

i. Paragraph 2 of Section 287.040 addresses the specific circumstances of the underlying case and also makes Shaw a statutory employer.

Paragraph 2 of Section 287.040—addressing the specific context of commercial construction projects—is the most clearly applicable part of the statute.[2] Shaw was

[2] The paragraph in question reads:

> **2.** The provisions of this section shall not apply to the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor

undisputedly an independent contractor and, therefore, "shall be deemed to be the employer of the employees of [Shaw's] subcontractors and [Shaw's subcontractors'] subcontractors" when employed at the construction site. *See* Mo. Rev. Stat. § 287.040.2. McArthur was undisputedly engaged in work for his direct employer, R&B, at the construction site at the time of his injury. R&B was undisputedly a subcontractor of C-Sharp, which was Shaw's subcontractor. This is the archetypal statutory employment scenario contemplated under Section 287.040.2.

The Missouri Supreme Court case of *Anderson v. Steurer* is instructive, in part because it involves a multi-layered contractual arrangement similar to the one presented here. *See generally* 391 S.W.2d 839, 840-45 (Mo. 1965). In that case, a general contractor, Moeller Construction, entered into a subcontract with the defendant, Steurer, to perform lathing and plastering work on a commercial construction project. *Id.* at 841. Steurer self-performed the plastering portion of its work but hired a sub-subcontractor, Stroup Lathing Company, to do the lathing portion of the work. *Id.* The plaintiff, Emil Anderson, was an employee of Stroup Lathing Company who was injured while performing lathing work on the job. *Id.* at 840.

> but ***such independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors*** when employed on or about the premises where the principal contractor is doing work. (emphasis added)

Anderson sued Steurer, but Steurer claimed immunity as a statutory employer under Section 287.040. *Id.* at 840-41. The plaintiff argued that statutory employer status applies only to a general contractor, not to an intermediate subcontractor like Steurer (or, in the case at bar, like Shaw). *Id.* at 845. The trial court disagreed and granted summary judgment to the defendant, from which the plaintiff appealed. *Id.* at 840. Framing the issue identically to the question presented here, this Court considered and expressly rejected the plaintiff's argument:

> The precise question with which we are confronted herein is this: In those instances where an owner is having improvements erected, demolished, altered or repaired by an independent contractor, do the provisions of § 287.040 […] make intermediate subcontractors which are between the general contractor and the subcontractor at the bottom of the chain occupy a status of statutory employer of the employees of their subcontractors?
>
> […]
>
> Plaintiff contends that subparagraph (3) of § 287.040 [now subparagraph (2)] makes only the general contractor a statutory employer of the employees of his subcontractors and that intermediate subcontractors are not accorded such status. We cannot agree. Subparagraph (3) […] says that the "independent contractor" is deemed the employer of

> employees of subcontractors "when employed on or about the premises where the *principal* contractor is doing work" (emphasis supplied [by court].) This indicates that the "independent contractor" and the "principal contractor" are not necessarily one and the same. The "principal contractor" doing the work for the owner is an independent contractor, but an independent contractor need not be the "principal contractor." Each subcontractor in the chain actually would be an independent contractor. If we construe the term "independent contractor" as meaning each subcontractor in the chain, rather than principal contractor, as plaintiff would do, each such subcontractor then would be the statutory employer of the employees of any subcontractors under him. This would mean the legislature gave the same immunity and treatment to all those on whom it imposed secondary liability for [workers'] compensation. […] We think the proper interpretation is the one we have made. […] We hold that Steurer was a statutory employer of plaintiff.

Id. at 844-46.

As was the case in *Anderson*, the plaintiff here claims to have been injured while working for a "bottom level" sub-subcontractor, due to the alleged negligence of an intermediate subcontractor, which was situated up the contractual chain from his direct

employer. In essentially every material way, this case is indistinguishable. Yet Respondent reached a different result in the underlying case than this Court did in *Anderson*.

ii. Shaw also qualifies as a statutory employer under the more general rule expressed in Paragraph 1 of Section 287.040.

The first paragraph of the statutory employment statute establishes a general rule that, although not specific to commercial construction projects, also applies here.[3] There are three elements to statutory employment under this rule: "(1) the work is performed pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and (3) the work is in the usual course of business of the alleged statutory employer." *Bass*, 911 S.W.2d at 621. All three are satisfied.

First, the work being performed by McArthur at the time of his alleged injury was being performed pursuant to contracts between Dunn and Shaw, between Shaw and C-

[3] The paragraph in question reads:

> **1.** Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

Sharp, and finally between C-Sharp and R&B (McArthur's direct employer). If it were not for the contractual arrangements running from Shaw to McArthur's direct employer (R&B), McArthur would not have been at the construction site and in a position where he could sustain the injuries alleged.

Second, the alleged injury occurred at the "premises of the alleged statutory employer"—that is, at the construction site. By statute, a construction contractor's "premises" include the construction sites where its work is performed. *See* Mo. Rev. Stat. § 287.040.2 (providing that an "independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors when employed ***on or about the premises where the principal contractor is doing work***" (emphasis added)).

Finally, the work in question is within Shaw's usual course of business. The "usual business" of a statutory employer includes activities "(1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement." *Bass*, 911 S.W.2d at 621. As an excavation contractor, Shaw routinely contracts for hauling and, indeed, contracted for that work with Dunn for this project. Shaw elected to subcontract that work to C-Sharp, who did the same to R&B, McArthur's direct employer. Without C-Sharp and R&B, Shaw would have needed permanent employees to perform that work.

Because the elements of statutory employment were established by undisputed

fact, Relators are immune from civil liability and Respondent has an obligation to enforce that immunity by granting their motion for summary judgment.

iii. Henderson is entitled to the same immunity as Shaw.

The very same statute that grants civil immunity to employers extends that immunity to individual co-employees like Henderson:

> Any employee of [an employer or statutory employer] ***shall not be liable*** for any injury or death for which compensation is recoverable under [the Workers' Compensation Law] and every employer and employees of such employer ***shall be released from all other liability whatsoever***, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.

Mo. Rev. Stat. § 287.120.1 (emphasis added).

Since the relevant portion of the statute was amended in 2012, Missouri Courts have interpreted it to expressly provide immunity to employees when the statute is applicable. *E.g. Mems v. LaBruyere*, No. ED106319, 2019 Mo. App. LEXIS 809, *18 (Mo. App. E.D. May 21, 2019) *transfer granted* No. SC98011, 2019 Mo. LEXIS 333 (Mo. Sept. 3, 2019) (noting that the purpose of the 2012 amendment was "to reestablish co-employee statutory immunity with one exception," as described in the

statute). Employees of a claimant's statutory employer are entitled to this immunity to the same extent as employees of the claimant's direct employer. *See Pauley v. Ball Metal Bev. Container Corp.*, 46 F.3d 1069, 1074 (8th Cir. 2006). For the reasons discussed above, Shaw is a statutory employer, and the statute is applicable; Henderson is therefore equally immune from civil liability as a co-employee.

The only exception to this statutory immunity for co-employees applies in the rare situation where the co-employee "engaged in an affirmative negligent act that ***purposefully*** and dangerously caused or increased the risk of injury." *See* Mo. Rev. Stat. § 287.120.1 (emphasis added). Neither McArthur nor Respondent have alleged that this exception applies here.[4]

B. Respondent has improperly refused to enforce Relators' immunity rights.

Relators sought summary judgment in the underlying action asserting their immunity from civil liability pursuant to Missouri's Workers' Compensation Law because of Relators' status as McArthur's statutory employer and co-employee and based upon the undisputed facts set forth above and in their Motion and briefing in the circuit

[4] Because this exception was not invoked by McArthur in the underlying action and was not cited as a basis to support Respondent's order denying the motion for summary judgment, Relators will not belabor the exception here; a full discussion of why it does not apply can be found, however, in Relators' original motion for summary judgment briefing filed in the circuit court below. (Exhibit 5, pp. EX-0056-EX-0058.)

court below. (*See generally* Exhibits 4, 5, 7, and 8.) The motion was fully briefed in January of 2019, and on November 1, 2019—almost eleven months later—Respondent finally entered an order denying Relators' Motion for Summary Judgment. (*See generally* Exhibit 10.) This ruling lacks valid legal support, misconstrues, misinterprets, and misapplies the relevant statutory language, and improperly deprives Relators of their immunity rights.

i. The exception found at Section 287.040.4 is inapplicable.

Respondent's ruling focuses on the final paragraph of Section 287.040, which excludes from the statutory employment regime the relationship between a for-hire motor carrier and a motor vehicle owner-operator.[5] *See generally* Mo. Rev. Stat. § 287.040.4. Because she found that R&B was a "for-hire motor carrier" and C-Sharp was an "owner-operator," Judge Midkiff concluded that the relationship between those two companies

[5] The paragraph in question reads:

> **4.** 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. (emphasis added)

"negates the protections from civil liability claimed by Shaw." This conclusion distorts both the language and purpose of the statute's exception from the statutory employment relationship applicable to a for-hire motor carrier and an owner-operator.

Paragraph 4 says that the statutory employment rules established in Section 287.040 "shall not apply to ***the*** relationship between ***a*** for-hire motor carrier […] and ***an*** owner […] and operator of a motor vehicle." This means that a for-hire motor carrier is not to be considered the statutory employer of an owner-operator with whom it may contract. In short, Paragraph 4 provides that for-hire motor-carriers are not responsible for workers' compensation claims by independent owner-operators, nor are they entitled to immunity from civil lawsuits for negligence brought against them by those owner-operators.

The first major problem with Respondent's construction of Section 287.040 is that it ignores language specifically applicable to the construction industry in favor of other language that is directed at certain specific relationships common in the transportation industry. It is a fundamental principle of statutory construction that "however inclusive may be the general language of a statute, it will not be held to apply to a matter ***specifically dealt with in another part of the same enactment***." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (citations omitted and emphasis added). In Section 287.040, Paragraph 2 establishes statutory employment rules in the context of construction projects where "improvements are being erected, demolished, altered or repaired by an independent contractor," while Paragraph 4 limits statutory employment in the transportation industry by excluding the relationship between "a for-

hire motor carrier operating within a commercial zone […] or operating under a certificate issued by the Missouri [or] United States Department[s] of Transportation" and a motor-vehicle owner-operator hired by that carrier. Here, the underlying lawsuit relates to a construction-site injury that occurred during excavation operations. Yet Respondent relies on language that has little, if any, bearing on the construction industry to negate the protections specifically granted to commercial construction contractors like Shaw.

Even if Respondent's analysis of Paragraph 4 were appropriate, it is focused on the wrong relationship entirely. According to Respondent's Order, the "for-hire motor carrier" was R&B (plaintiff's direct employer), while the "owner-operator" was purportedly C-Sharp (the intermediate subcontractor between Shaw and R&B).[6] (Ex. 10,

[6] Although it should have been irrelevant to the summary judgment analysis, for the reasons discussed herein, this conclusion itself is specious. Even if C-Sharp met the statutory definition of "owner" of ***other*** motor vehicles on the construction site, it was neither the owner nor the operator of the dump truck that plaintiff was operating at the time of McArthur's alleged injury. To the contrary, it is undisputed both that the dump truck McArthur was driving at the time of his alleged injury was owned by R&B—not C-Sharp—and that the operator of that dump truck was McArthur (an R&B employee)—again, not C-Sharp. For C-Sharp to have been operating ***that*** dump truck, it would have to have qualified as his employer—a somewhat ironic twist, given that the point of

p. EX-0141, ¶¶ 10-11.) But the question here is not whether R&B qualifies as a statutory employer of C-Sharp. (In fact, it is difficult to imagine how such a relationship could ever be relevant to statutory employment questions, given that neither R&B nor C-Sharp are individual employees capable of suffering an on-the-job injury.) Instead, the proper question is whether ***Shaw*** is the statutory employer of ***McArthur***. Paragraph 4 has no bearing whatsoever on that question. The only relationship to be addressed is the relationship between the contractor (as the putative statutory employer—i.e. Shaw) and the employee of his subcontractors or their subcontractors (as the putative statutory employee—i.e. McArthur). Section 287.040.4 addresses only one relationship to which statutory employment does not apply, and the relationship between Shaw and McArthur plainly does not fall within the parameters of that exclusion. For this subsection to apply, Shaw would have to have been a for-hire motor carrier—which it is not[7]—and McArthur

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describing C-Sharp as an "owner-operator" in the first place was to deny the existence of any statutory employment relationship.

[7] Shaw was licensed through the US Department of Transportation as a ***private*** carrier, which is a classification separate and distinct from that of a "for hire" motor carrier. (Ex. 8, p. EX-0107, ¶ 1.) *Compare* Mo. Stat. Rev. § 390.020.23 (defining "private carrier" to include any entity that "transports property by motor vehicle where such transportation is incidental to or in furtherance of his commercial enterprises") *with* Mo. Stat. Rev. § 390.020.18 (defining "motor carrier" as an entity "engaged in the transportation of

would have to have been a motor vehicle owner-operator at the time of the injury—which he was not[8]. Paragraph 4 is wholly inapplicable to the relationship between McArthur and Shaw, which is the only relationship at issue in this analysis.

Respondent further contorts the statute by reversing the respective rolls of a "for-hire motor carrier" and a "motor vehicle owner-operator." Liability for workers' compensation benefits or civil damages for workplace injuries can run only in one direction: from the employer or statutory employer (or, in the context of this paragraph, a for-hire motor carrier) to the potential statutory employee (or, in this context, the owner-operator). When those roles are reversed, Section 287.040.4 loses all purpose and meaning. A for-hire motor carrier is never going to find itself trying to recover workers' compensation benefits from an owner-operator with whom it has contracted, as the carrier itself is not an individual employee who can sustain a workplace bodily injury covered by the worker's compensation statutes of this state.

Yet Respondent's Order makes just such a reversal of roles. In the underlying construction project, it was C-Sharp (the purported "owner-operator," under Respondent's interpretation) that hired R&B (the "for-hire motor carrier," according to Respondent). This transactional structure makes no sense in the paradigm of Paragraph

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property or passengers, or both, for compensation or hire, over the public roads of this state by motor vehicle [including] both common and contract carriers").

[8] McArthur was the driver – operator – of a dump truck at the time of his alleged injury, but the owner of that dump truck was R&B – not McArthur. (Ex. 8, p. EX-0106, ¶¶ 2-4.)

4, relating to the obligation for payment of worker's compensation benefits, because motor carriers are the entities that would hire independent owner-operators, and it is those owner-operators who might be injured while driving for the for-hire motor-carriers. By contrast, the transactional arrangement described in the paradigm of Paragraph 2—which is specific to commercial construction projects like the one at issue here—makes sense when applied in the construction industry. Here, Shaw is an independent contractor, C-Sharp is an intermediate subcontractor, and R&B is the bottom-tier subcontractor; the employees of C-Sharp and R&B are deemed employees of Shaw for purposes of liability for workers' compensation benefits (subject, of course, to the priorities of liability set forth in Paragraph 3 of the statute) and the civil immunity granted by the Workers' Compensation Law.

Another fatal flaw in Respondent's reasoning is apparent from her Order's obvious inconsistency both with the undisputed facts and with her own observations earlier in that same Order. To be clear: the existence of subcontractor relationships between Shaw, C-Sharp, and R&B has ***never*** been in dispute; it was flatly admitted in McArthur's response to the original motion for summary judgment. (Ex. 6, pp. EX-0064-EX-0065, ¶¶ 4-7.) At one point, Respondent's Order even acknowledges this fact, stating: "The parties agree that C-Sharp Trucking entered into a separate oral agreement with R&B Trucking, under which R&B agreed to perform a portion of the work for which Sharp [sic] had contracted […]." (Ex. 10, p. EX-0140, ¶ 7.) But on the very next page, the Order contradicts both the undisputed facts and Respondent's prior statement by alleging that "the factual record here fails to establish a subcontractor relationship

between C-Sharp Trucking and R&B Trucking" and concluding that "instead, Section 287.040.4 applies." (Ex. 10, p. EX-0141, ¶ 12.) The trial court's Order seems to assume that if anywhere in the line of subcontractors there exists both a "for-hire motor carrier" and an "owner operator," then all statutory employment relationships anywhere in the chain are automatically negated. This assumption is neither logical nor legally supported and clearly contrary to the legislature's purpose and intent, expressed in Missouri's Worker's Compensation Law.

Even assuming, *arguendo*, that the requirements of 287.040.4 were satisfied here, that would still not create a genuine dispute as to the existence of a subcontractor relationship between C-Sharp and R&B. Simply put, whether C-Sharp was an "owner-operator" or R&B was a "for-hire motor carrier" does not preclude there being a subcontractor relationship between the two companies.[9] Yet Respondent distorts the elements and language of the "for-hire motor carrier" exception, observing that one company was purportedly an "owner-operator" and another a "for-hire motor carrier," in order to manufacture a dispute of fact over the existence of a subcontractor relationship that the parties had never disputed in the first place—a relationship, in fact, that plaintiff directly admitted.

[9] There is no reason to assume that an entity being registered as a "for-hire motor carrier" would negate its status as a "subcontractor," and Respondent's Order offers no explanation for why that would be the case. A company—like R&B, in this case—can be both a "for-hire motor carrier" and a "subcontractor" at the same time.

If Respondent's interpretation—that no statutory employment can exist if R&B is a "for-hire motor carrier" and C-Sharp is an "owner-operator"—were correct, the result would be a serious impairment of the workers' compensation rights of employees like McArthur. This is because, while statutory employers are granted civil immunity, the other side of that coin is that they are secondarily liable to provide workers' compensation to their statutory employees in the event workers' compensation cannot be recovered from the direct employer. *See* Mo. Rev. Stat. § 287.040.3 (establishing the hierarchy of liability for workers' compensation between direct and statutory employers). By Respondent's reasoning, if McArthur's direct employer, R&B, had failed to carry workers' compensation insurance or otherwise was unable to pay his workers' compensation benefits, he would not have been able to recover workers' compensation benefits from C-Sharp or, for that matter, from Shaw or from the project's general contractor, J.E. Dunn. In such a scenario, under Respondent's interpretation, those upstream contractors would not qualify as statutory employers, not because McArthur himself chose to do business as an independent owner-operator as envisioned in the exception set forth in Paragraph 4 of the statute, but rather simply because there happened to be both a "for-hire motor carrier" and an "owner-operator" somewhere within the contractual chain of multiple contractors and subcontractors. This cannot have been and clearly was not the legislature's intent in drafting and enacting Section 287.120.

Respondent's Order focuses on the wrong statutory language entirely, and it misapplies even that provision. In doing so, Respondent has erroneously deprived Realtors of the immunity to which they are entitled under the Workers' Compensation

Law of this state.

ii. Relators have properly pleaded and preserved their immunity defenses.

Although her Order does not go so far as to state that any defenses have been waived, Respondent's Order also states that the statutory employment defense "is not affirmatively plead [sic] in Defendants' Amended Answers." (Ex. 10, p. EX-0143.) This is apparently a reference to the fact that the affirmative defenses in question mentioned a lack of subject matter jurisdiction, a former standard for evaluating statutory employment defenses, which has since been modified. *Cf. McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 479 (Mo. 2009) (overruling prior cases that had decided the statutory employer defense on a subject matter jurisdiction basis, instead of as an affirmative defense that must be pleaded, but not changing the elements of the defense). But when this Court ruled that statutory employment was not to be treated as a question of subject matter jurisdiction, it also held that "a party properly may raise the [statutory employment defense] as an affirmative defense as provided in Rules 55.08 and 55.27(a)." *Id.* That is exactly what Relators did in their responsive pleadings in the underlying action.

In their respective Amended Answers, Relators alleged as affirmative defenses that McArthur "was [Shaw's] statutory employee," and that therefore his claims against Relators were "barred by the workers' compensation exclusivity doctrine." In support of these affirmative defenses, Relators specifically alleged that: "(a) the work being performed by [McArthur] at the time of the alleged incident and injury that is the subject of [the Underlying Action] was being performed pursuant to a contract; (b) the alleged

injury claimed by [McArthur] occurred on or about premises on which [Shaw] was performing work pursuant to the contract; […] (c) the work performed by [McArthur] was within the usual course of business of [Shaw]; [and, in the case of Henderson] (d) as an employee of [Shaw], [Brian Henderson] is shielded from liability as a co-employee pursuant to R.S.Mo. § 287.120.1 and the statutory employer doctrine of Missouri." (Exhibit 2, EX-0014, ¶ 23; Exhibit 3, EX-0020-EX-0021, ¶ 21.) No one could possibly doubt that these defenses are an invocation of the Workers' Compensation Law's immunity protection for statutory employers and co-employees.

Critically, Missouri is a ***fact***-pleading state. *ITT Comm'l Fin. Corp.*, 854 S.W.2d at 379-80; Rule 55.08 ("A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the ***facts*** showing that the pleader is entitled to the defense or avoidance.") (emphasis added). What matters is that a responsive pleading states the ultimate ***facts*** giving rise to affirmative defenses, not that it invokes the currently accepted rule of law or that it refrains from using any potentially outdated legalese. *See Sivigliano v. Harrah's N. Kan. City Corp.*, 188 S.W.3d 46, 48-49 (Mo. App. W.D. 2006) (holding that how a pleading labels its legal theories is irrelevant, as long as the necessary facts are included). The summary judgment analysis is also supposed to be focused on the ***facts*** alleged, not on the manner in which causes of action or defenses are named. *ITT Comm'l Fin. Corp.*, 854 S.W.2d at 380 ("The purpose of summary judgment under Missouri's ***fact***-pleading regime is to identify cases (1) in which there is no genuine dispute as to the ***facts*** and (2) the ***facts*** as admitted show a legal right to judgment for the movant.").

It is not entirely clear from the trial court's Order whether a supposed failure to properly plead these defenses was intended to be an independent reason to justify the denial of Relators' motion for summary judgment, but if it was, it would be an improper one. Both defendants' pleadings called out the statutory employment defense by name and effect, cited the statute by number, and—most importantly—included a statement of the factual basis for the defense. That is precisely what Missouri law requires.

Conclusion

Based on the foregoing, Relators ask this Court to make permanent its Preliminary Writ of Mandamus and direct Respondent to enter summary judgment in favor of Relators in case no. 1816-CV05095, which remains pending before Respondent in Division 1 of the Circuit Court for Jackson County, Missouri, Sixteenth Judicial Circuit.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Hal D. Meltzer, hereby certify as follows:

a) The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word 2016 in Times New Roman, size 13 font, and, excluding the cover page, the signature block, the table of contents, the table of authorities, and this certificate of compliance and service, it contains 6,579 words.

b) Pursuant to Supreme Court Rule 84.06(c), one correct copy of this brief and the appendix thereto was served this 6th day of April, 2020, as follows:

All filings were sent via UPS delivery to:
The Honorable Sandra C. Midkiff
Jackson County Courthouse – Division One
415 East 12th Street, 4th Floor
Kansas City, MO 64106

All filings were sent electronically via email to:
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