

Summary of SC90050, *J. Michael McCracken v. Wal-Mart Stores East, LP*
Appeal from the Greene County circuit court, Judge Thomas E. Mountjoy

Attorneys: McCracken was represented by Donald E. Woody of Hall, Ansley, Rodgers & Sweeney P.C. in Springfield, (417) 890-8700, and Wal-Mart was represented by James B. James and Kristie S. Crawford of Brown & James PC in Springfield, (417) 831-1412.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man in a personal injury action appeals the trial court's judgment granting the defendant's motion to dismiss the suit after finding the man was the defendant's statutory employee and, therefore, was required to seek relief through a workers' compensation claim rather than court action. In a unanimous decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri reverses the trial court's decision and remands (sends back) the case for further action. As to the procedure, the defendant should have asserted the man was a statutory employee as an affirmative defense that the defendant must plead and prove, although this rule will be applied prospectively only. As an affirmative defense, it can be waived but cannot be raised in a motion to dismiss. Cases to the contrary must not be followed. As to the merits, the man was not a statutory employee of the defendant.

Facts: Michael McCracken worked for Interstate Bread Company (IBC), which produced and delivered bread products. Wal-Mart contracted with IBC for the purchase and delivery of its bread products. McCracken's job was to drive a delivery truck containing IBC's products to certain Wal-Mart stores and then move racks of bread to each store's receiving area. McCracken filed a personal injury suit against Wal-Mart, alleging that his shoulder was injured when a Wal-Mart employee negligently pushed a bread rack into his shoulder in the receiving area of Wal-Mart's Neosho store. On the day the jury trial was set to begin, Wal-Mart moved to dismiss McCracken's case for lack of jurisdiction on the theory that McCracken was a statutory employee under section 287.040.1 of the workers' compensation law. Following a hearing, the trial court concluded that McCracken was Wal-Mart's statutory employee and, believing this deprived it of subject matter jurisdiction, granted Wal-Mart's motion to dismiss. McCracken appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The trial court erred in concluding that the question whether the claim before it came within the scope of the workers' compensation law affected its subject matter jurisdiction. Under article V, section 14 of the Missouri Constitution, circuit courts "have original jurisdiction over all cases and matters, civil and criminal." Prior cases holding that a trial court lacks subject matter jurisdiction to resolve a tort

claim that Missouri statutes commit to the discretion of the workers' compensation commission have confused the concept of a circuit court's subject matter jurisdiction with the separate issue of the statutory or common law authority of the court to grant relief and were overruled by this Court's opinion in *J.C.W. v. Wyciskalla*, 275 S.W. 3d 249, 253-54 (Mo. banc 2009). Wal-Mart's statutory employee defense does not affect the court's subject matter or personal jurisdiction but rather concerns its authority to act. As such, it should have been raised as an affirmative defense to the trial court's statutory authority to resolve McCracken's claim as provided in Rules 55.08 and 55.27(a). The failure to do so in future cases may constitute waiver of this defense, but because prior cases suggested the issue could be raised in a motion to dismiss, this rule is applied prospectively only. To the extent that prior cases have suggested this issue can be raised by motion to dismiss, they are overruled.

(2) The trial court erred in determining that McCracken is a statutory employee of Wal-Mart under section 287.040.1, RSMo Supp. 2006. One is a statutory employee if the work is performed pursuant to a contract, the injury occurs on or about the premises of the alleged statutory employer, and the work is in the usual course of the alleged statutory employer's business. Here, the parties dispute whether McCracken's delivery of the bread to the receiving area was in the usual course of Wal-Mart's business. This is a fact-driven inquiry. Prior cases define "usual business" as those activities that are done routinely and on a regular and frequent schedule, that the agreement between the independent contractor and the statutory employer contemplates will be repeated over a relatively short span of time, and that to be performed absent the agreement, the statutory employer would have to hire permanent employees. Excluded from this definition is specialized or episodic work that is essential to the employer but not within the employer's usual business as performed by its employees. By delivering bread, McCracken's role was to equip Wal-Mart for business, not to engage in its business himself. In this way, delivering bread is part of the regular work of IBC, not Wal-Mart, and is in the nature of specialized work that is essential to Wal-Mart but is not within Wal-Mart's usual business as performed by its employees. This holding is especially warranted in light of the legislature's amendment to the workers' compensation act requiring reviewing courts to construe the act's provisions strictly.