

Summary of SC91834, *Staci M. Lewis, and McCartney M.E. Lewis, a minor, by and through her next friend, Burle Brown, DOT Transportation Inc. v. Nathan R. Gilmore and Buddy Freeman*

Appeal from the Linn County circuit court, Judge Gary Ravens
Argued and submitted Jan. 12, 2012; opinion issued June 12, 2012

Attorneys: The Lewises were represented by George J. Miller and Michael A. Connon of the Miller/Salsbury Law Firm in Eureka, (636) 938-6327; and Patrick M. Reidy and Anthony F. Porto III of Monaco, Sanders, Gotfredson, Racine & Barber LC in Kansas City, (816) 523-2400. Gilmore and Freeman were represented by W. James Foland and Scott D. Hofer of Foland, Wickens, Eifelder, Roper & Hofer PC in Kansas City, (816) 472-7474.

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: The surviving dependents of a man killed when the tractor trailer in which he was a passenger overturned obtained a workers' compensation award against one of the man's two employers and brought a wrongful death suit against the other employer, who had failed to carry workers' compensation insurance as required by law. The circuit court determined the civil action was barred by the workers' compensation award. In a 4-3 decision written by Chief Justice Richard B. Teitelman, the Supreme Court of Missouri reverses the circuit court's judgment and remands (sends back) the case. The plain language of the workers' compensation statute permits an employee or his dependents to elect to bring a civil action against an uninsured employer. Cases holding an employee or his dependents cannot recover on both a workers' compensation claim and a civil suit against the same uninsured employer do not apply here, as the dependents' actions were against different employers. There also is no impermissible double recovery here because any recovery by the dependents in the civil action would be subject to the other employer's subrogation rights.

Judge Mary R. Russell dissents. She would hold the statute cannot be interpreted without consideration of the election of remedies doctrine or other workers' compensation laws. The statute's purpose is not to allow an additional avenue to pursue double compensation for the same injury simply because the immediate employer fails to carry workers' compensation insurance and there is another employer who can be pursued for a remedy.

Facts: Staci Lewis' husband died when the tractor trailer in which he was a passenger overturned. The truck's driver, Nathan Gilmore, was operating the tractor trailer in the course of his employment with Buddy Freeman (who was doing business as R&F Trucking) pursuant to a contract with DOT Transportation Inc. Freeman did not carry workers' compensation insurance; DOT did. Lewis and her daughter filed a claim for workers' compensation against Freeman and DOT as well as a wrongful death action in circuit court against Freeman and Gilmore. The court stayed the wrongful death action until the labor and industrial relations commission determined whether the husband's death occurred out of and in the course of his employment. An administrative law judge entered an award in the Lewises' favor after finding that the husband was an employee of Freeman, that Freeman did not carry workers' compensation insurance even though he legally was required to do so, and that DOT was the husband's statutory employer. The administrative law judge ordered DOT to pay death and funeral benefits. DOT subsequently intervened in the Lewises' wrongful death action. The circuit court granted summary judgment

(judgment on the pleadings) in favor of Gilmore and Freeman, finding the wrongful death action was barred because the Lewises had made an election of legal remedies when they obtained the workers' compensation award against DOT. The Lewises and DOT appeal.

REVERSED AND REMANDED.

Court en banc holds: The Lewises' civil action against Freeman is not barred by their workers' compensation award against DOT. A summary judgment is affirmed if, after reviewing the record in the light most favorable to the party against whom judgment was entered, the reviewing court determines that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. The plain language of section 287.280.1, RSMo 2000, requires certain employers to carry workers' compensation. Under the statute, when an employer does not carry workers' compensation insurance, an injured employee or his dependents "may elect" one of three options, including filing a civil action against "such employer." It is undisputed that Freeman and DOT are separate entities and that each was responsible for securing workers' compensation insurance. The fact that DOT complied with section 287.280.1 and, therefore, was deemed to be the only statutory employer does not excuse Freeman from his obligation to carry workers' compensation insurance. To the contrary, the statute's plain language provides that the consequence for a failure to secure such insurance is that the employee or his dependents may file a civil action against the employer, as the Lewises did here. To hold the Lewises could not file a civil action would take away one of the options the legislature gave to an employee to seek redress against an employer who has failed to secure workers' compensation insurance. The election of remedies doctrine – which provides that pursuit of one remedy is a bar to any suit based on another, inconsistent remedy – does not apply here. The plain language of the statute provided the Lewises "may elect" to file a civil suit against Freeman as an uninsured employer. Further, cases holding an employee or his dependents cannot recover on both a workers' compensation claim and a civil suit against the same uninsured employer do not apply here, as the Lewises' actions were against different employers. There is no impermissible double recovery here because any recovery by the Lewises in the civil action would be subject to DOT's subrogation rights.

Dissenting opinion by Judge Russell: The author would not hold that section 287.280.1 allows the Lewises to pursue two remedies merely because the immediate employer lacked workers' compensation benefits and can be sued in court under the provisions of the statute. Allowing pursuit of two remedies could lead to an impermissible double recovery for a single injury that the election of remedies doctrine is designed to prevent. The author would not find that section 287.280.1 can be interpreted without consideration of the election of remedies doctrine or other workers' compensation statutes. Section 287.040.3, RSMo, provides that the "liability of the immediate employer shall be primary" when assessing workers' compensation liability to the employee and that, should any compensation be paid by those secondarily liable, the compensation paid by the secondary party "may be recovered from those primarily liable." The legislative intent of section 287.280.1 is to ensure an avenue for a workers' compensation claimant to pursue compensation when an employer fails to carry workers' compensation. The statute's purpose is not to allow an additional avenue to pursue double compensation for the same injury simply because the immediate employer fails to carry workers' compensation insurance and there is another employer who can be pursued for a remedy. The presence of two employers does not mean there are two injuries at issue that would overcome the double-compensation concerns addressed by the election of remedies doctrine.