IN THE MISSOURI SUPREME COURT

ERIC D. BURNS,	)	
	)	
Respondent,	)	
	)	
v.	)	S.C. No. 87789
	)	S.D. No. 26889
LYNN M. SMITH,	)	
	)	
Appellant.	)	
	)	

Appeal from the Honorable William Roberts
Circuit Court of St. Clair County
Case No. 02-CV-205824

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Jurisdiction is proper in this Court in that this case was transferred to this Court by the Court of Appeals for the Southern District under Mo. Sup. Court Rule 83.03 on June 19, 2006.

STATEMENT OF FACTS

I. INTRODUCTION

This appeal presents two issues: whether Respondent Lynn Smith was entitled to immunity on the grounds that workers' compensation was plaintiff Eric Burns' exclusive remedy for his workplace injury, and whether Burns should have been allowed to recover prejudgment interest without pleading or otherwise making a claim for it until after trial. The principal issue relates to whether Burns pleaded or proved sufficient facts to meet the "something more" element required of "purposeful, affirmatively dangerous conduct" that would move Smith, a fellow employee, outside the protection of the workers' compensation law. *See, e.g., State ex rel Taylor v. Wallace*, 73 S.W.3d 620 (Mo. banc 2002). Burns was injured when a welded water-tank on a concrete mixer truck exploded. Smith did not appeal the trial court's finding of negligence, so that issue is not before the Court. This statement of facts, therefore, sets forth only facts relevant to the issue of

purposeful and affirmatively dangerous conduct, not to any issue of garden-variety negligence.[1]

II. BACKGROUND

Plaintiff Eric Burns was employed by Kennon Redi-Mix, Inc., as a concrete mixer truck driver. (L.F. 62). Respondent Lynn Smith was Burns' supervisor at Kennon Redi-Mix. (L.F. 62).

At some time at least a month or two prior to April 7, 2000, Smith placed a weld upon a water pressure tank on one of the concrete trucks owned by Kennon Redi-Mix. (L.F. 62). He was patching a line of holes that were leaking water from the tank. *(Id).* (L.F. 62). The weld was placed upon a corroded and rusted area of the tank. *(Id).* (L.F. 62). Welding a leaking water tank was a common practice at Kennon Redi-Mix, and amongst other ready-mix companies. (Tr. 475, ln. 5-18).

The trial court found that Smith instructed Burns to "run it till it blows" after placing the weld on the tank.[2] (L.F. 62). Smith drove the truck with the welded

[1] Smith sets forth this context explicitly in light of Burns' claim that Smith's Statement of Facts as presented to the Southern District was inadequate.

[2] Smith strongly disputed making the statement at trial. For purposes of the standard of appellate review, Smith acknowledges that the trial court found the statement was made as a matter of fact. However, acknowledging that finding for

water tank, as did his brother and employee Steve Viles and possibly others. (Tr. 476, ln. 14.18).

III. COMMON PRACTICE IN THE INDUSTRY

Welding a water tank on a concrete truck is a common practice in the industry. (Tr. 310, LN. 15-23; 312, LN. 12-20). The basic test as to whether or not a tank can be welded is whether or not the weld holds and the tank can be pressurized without leaking. (Tr. 313, ln. 13-24; 476, ln. 9-13). If there is sufficient metal of sufficient thickness to hold the weld, then the weld holds when the tank is pressurized. (Tr. 475, ln. 8-18). To the contrary, if the tank does not have sufficient metal to hold the weld, then the weld fails when the tank is pressurized. (Tr. 476, ln. 9-13).

Joe Fischer (Smith's expert), who had been in the industry for 18 years, testified that he was not nervous around welded tanks and had no idea that a welded tank could explode and injure someone. (Tr. 308, ln. 8-12; 312, ln. 12-17; 313, ln. 9-12). He also testified that he would not have let his employees use welded tanks if he thought they were unsafe. (Tr. 314, ln. 9-12).

Smith drove all of the trucks operated by the company, including the truck primarily driven by Burns after the weld was performed. (Tr. 95, ln. 2-9; 476, ln.

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purposes of appellate review should not be deemed an admission by Smith in the event of any retrial or other proceeding.

14-18). He had welded patches on water tanks before. (Tr. 475, ln. 5-18). The only time there had been a problem with a patched tank was when Burns left a tank pressurized -- contrary to Kennon policy -- over the weekend. (Tr. 140, ln. 3-6; 152, ln. 1-20; 152, ln. 25 - 153, ln. 3; 465, ln. 19 - 466, ln. 23; 470, ln. 12-22). That tank leaked out, but no one was injured. (Tr. 470, ln. 23-25). In Smith's experience, a welded tank would leak, not explode in an injurious fashion. (Tr. 92, ln. 13-16; 111, ln. 23-25; 497, ln. 4-6). Smith testified that he neither expected nor intended for Burns to be injured after welding the tank. (Tr. 79, ln. 21-25).

Kennon employees Tom Cheek, Steve Viles, and Mike Wyrick testified by deposition. Cheek was present when Smith welded the tank but never thought about it after it was done. (Tr. 130, ln. 16-22). Viles testified he had seen two other tanks welded. (Tr. 136, ln. 6-12). Both of those tanks continued to function after they were welded. (Tr. 136, ln. 19-22). He was not aware of any water tanks other than this one ever exploding. (Tr. 144, ln. 11-14).

At the time of trial, Smith's brother, Larry Smith, was driving a truck for Kennon Redi-Mix. (Tr. 450, ln. 12-18). The water tank on his truck had sprung a leak. (Tr. 450, ln. 24 - 451, ln. 21). Smith gave Larry Smith the option of having a new tank placed on the truck, or a weld placed on the leaking tank. (Tr. 479, ln. 7 - 480, ln. 5). Larry Smith chose to have the leaking tank welded. (Tr. 479, ln. 19-24). Because of what had happened to Burns' tank, Larry Smith took the water

tank to a professional welder to perform the weld. (Tr. Tr. 478, ln. 15 - 479, ln. 2). The professional welder did exactly what Lynn Smith had done -- brushed off the area and welded it. (Tr. 452, ln. 17 - 454, ln. 18).

Smith did testify that, in hindsight, he would not have welded this water tank. (Tr. 99, ln. 5-14). He based that opinion on the extent of the rust in the tank that was not visible until after the rupture. (Tr. 99, ln. 9 to 100, 1). He indicated that he knew of no way to look inside a tank through a 3-1/2 to 4 inch opening that is covered by a flap, particularly where the tanks are baffled inside in a way that would prevent inspection. (Tr. ln. 15 to 101, ln. 1; 101, ln. 8 to 102, ln. 6).

IV. AN ENGINEER'S VIEW

Plaintiff presented testimony from an engineer, Professor John Hamilton. (Tr. 242-273). The engineer testified, and the Court found, that the weld placed upon the tank over the corrosion and rust caused the violent explosion of the tank. (L.F. 62; Tr. 261, ln. 9-23). However, the engineer did not testify, because he did not have sufficient foundation, that a reasonable person in Smith's position would know that such a weld would be dangerous. (Tr. 261, ln. 24 - 266, ln. 1).

V. THE ACCIDENT

On April 7, 2000, Burns was getting into the truck to move it. (L.F. 62). He had left the water tank pressurized, contrary to Kennon's and industry practice, when he returned to the plant. (L.F. 62; Tr. 309, ln. 16 to 310, ln. 1; 465, ln. 19 -

466, ln. 22). As he reached up to open the door to move the truck, the water tank exploded, and the band holding the tank to the truck hit him in the thigh. (L.F. 62; Tr. 76, ln. 14-23; 126, ln. 20 to 127, ln. 3; 401, ln. 3-14). The fact that Burns had left the tank pressurized after partially emptying it of water so that it was filled with air was significant. (Tr. 477, ln. 11-14). Plaintiff sustained an injury as a result of the rupture. (L.F. 62).

There was no dispute that Burns was covered by workers' compensation. The issue before the Court was whether he had sufficiently alleged the "something more" to escape the exclusive remedy provision. (*E.g.*, Tr. 446, ln. 14 - 449, ln. 22).

After the accident, Burns underwent surgery to have a pin or plate placed in his thigh. The purpose of the pin was to support the bone while the bone healed. (Tr. 183; Videotape of Dr. McClain - not transcribed; A-14).[3] Dr. McClain, Burns' treating doctor, testified that Burns' action in breaking the pin in his leg (at the time of the dog incident set forth below) caused his chances of recovery to diminish. (Tr. 183).

[3] The video of Dr. McClain's deposition was played at trial but not transcribed. Relevant pages of his deposition are in the Appendix at pp. A-14-16.

VI. BURNS' TESTIMONY

Burns' testimony at trial included the admission that he had testified falsely during his deposition. At trial, he described an incident where the plate first placed in his hip broke. He stated in his deposition that he was walking with his wife, and there was a dog running about. (Tr. 406, ln. 3-4). Then he testified at trial that "that thing with the dog had happened." (Tr. 406, ln. 12). As another witness had already testified, Burns reached across his walker and yanked into the air by a collar a dog that came up to his knee. (Tr. 205, ln. 12-16; 206, ln. 7-12; 207, ln. 17 - 208, ln. 19). Burns admitted that in his deposition testimony, he stated that he was walking with his wife. (Tr. 407, ln. 11-17). That was not correct. (Tr. 407, ln. 18-19).

In addition, Burns testified on direct exam that his monthly cost for prescriptions was between $1,000.00 and $1,500.00 a month. (Tr. 415, ln. 11-13). However, on cross-examination, he admitted that the total amount of prescription bills divided by the number of months since the accident actually averaged out to $797.98, which Burns admitted was quite a bit less than the amount he had just testified to on direct. (Tr. 423, ln. 21 - 425, ln. 18). This overestimation was made more egregious by the fact that the average monthly amount included expensive IV antibiotics that he had received in the past after his hospitalizations but was not currently receiving. (Tr. 424, ln. 17-21). Burns also identified a document that he

had filled out representing that his total monthly cost for prescriptions was $582.70 per month. (Tr. 425, ln. 19 - 426, ln. 16). He admitted filling out that questionnaire to give his economics expert information to calculate his damages based upon that figure of less than $600.00 per month. (Tr. 426, ln. 17-22).

Burns also admitted that Smith never asked him to do anything at Kennon that Smith was not doing himself with the exception of two activities not relevant to this case. (Tr. 427, ln. 16-23). Burns never made any safety complaints while he worked at Kennon. (Tr., 464, ln. 608). Burns also admitted that Lynn Smith routinely drove most of the trucks at the time of the accident. (Tr. 427, ln. 24 - 428, ln. 2).

Burns further admitted that he did not say anything to Smith about Smith's decision to weld the leaking tank on the truck. (Tr. 429, ln. 16-24). Burns did have a conversation about that leak with another employee, Tom Cheek, in which Cheek thought the weld would last a few days, but Burns thought it would last less time than that. (Tr. 429, ln. 25 - 430, ln. 6).

Burns was then asked about the exchange he testified to between himself and Smith about running the tank until it blows. (Tr. 430, ln. 13-17). When asked at trial what his understanding was of Smith's meaning of the statement "run it 'til it blows", Burns testified "just basically that, run it 'til it blows." (Tr. 430, ln. 18-20). However, in his deposition prior to trial, Burns admitted that he had testified

that his understanding of Smith's meaning was "run it till it blows, ***use it until you can't use it no more***." (Tr. 430, ln. 21 - 431, ln. 8 (emphasis added). Burns also admitted that after the weld had been placed, he expressed no concerns about the tank or the weld to Smith. (Tr. 431, ln. 13-16).

VII. THE TRIAL COURT'S JUDGMENT

The trial court found that "the danger and risk of an exploding water pressure tank that had been welded over rust and corrosion was hazardous beyond the usual requirements of Plaintiff's employment driving a concrete mixer truck." (L.F. 63). The trial court further found that Smith committed "affirmative negligent acts of welding over the corrosion and rust on the water pressure tank, which caused or increased the risk of injury to Plaintiff beyond the usual hazards of Plaintiff's employment, and directing Plaintiff to "run it till it blows", thereby subjecting Plaintiff to such increased risk of injury." (L.F. 64). The trial court specifically noted that this second finding was in response to Smith's request for findings of fact. *(Id).*

The trial court then concluded that Smith's actions in welding over the rust and corrosion on the leaking water pressure tank and directing Burns to "run it till it blows" were affirmative negligent acts, separate and independent from an employer's duty to provide a reasonably safe work place, because those acts caused or increased the risk of injury to plaintiff beyond the hazards normally

associated with his employment. (L.F. 64, 66). Nowhere did the trial court either find or conclude that a reasonable person would have recognized the risk as hazardous beyond the usual requirements of employment for a cement truck driver. (L.F. 62-67).

VIII. PREJUDGMENT INTEREST

Burns did not plead a specific claim for pre-judgment interest. Instead, he only asserted a general claim for relief, (L.F. *9-15*). After trial, for the first time, Burns requested prejudgment interest and sought a hearing in order to present facts to support such a claim, (L.F. *38*).

Smith's counsel did advise the trial court that it could award prejudgment interest despite Burns' failure to request it prior to trial under the authority of this Court's prior decision in *Call v. Herd*, 925 S.W.2d 840 (Mo. banc 1996). Smith seeks a change in the law on this point and did so at the Court of Appeals below. The Southern District did not reach this issue in its opinion.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT INSTEAD OF DISMISSING THE CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT, AS A MATER OF LAW, THE AFFIRMATIVE ACTS FOUND BY THE TRIAL COURT DO NOT MEET THE LEGAL STANDARD REQUIRED THAT A REASONABLE PERSON WOULD RECOGNIZE THEM AS HAZARDOUS AND BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT.

A. Standard of Review

Murphy v. Carron, 536 S.W.2d 30 (Mo. Banc 1976).

Hinnah v. Director of Revenue, 77 S.W.3d 616 (Mo. Banc 2002).

Verdoorn v. Director of Revenue, 119 S.W.3d 543 (Mo. Banc 2003).

City of Kansas City v. Hon, 972 s.W.2d 407 (Mo.App.W.D. 1998)

B. Workers' Compensation Is the Exclusive Remedy

State ex rel. Taylor v. Wallace, 73 S.W.3d 620 (Mo. Banc 2002).

Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670 (Mo. App. S.D. 2002).

Gunnett v. Girardier Building & Realty Co., 70 S.W.3d 632 (Mo. App. E.D. 2002).

Sexton v. Jenkins & Assocs., Inc., 41 S.W.3d 1 (Mo. App. W.D. 2000).

Mo. Rev. Stat. §287.120.

C. In Spite of a Direct Request, the Trial Court Was Unable to Find That a Reasonable Person Would Have Known That Using a Welded Water Tank Was Hazardous and Beyond the Usual Requirements of Employment.

See I. B., *supra*

D. The Court Should End or Limit the Exception to Fellow-Employee Immunity Where a Plaintiff Has Received the Benefits of Workers' Compensation

State ex rel. Taylor v. Wallace, 73 S.W.3d, 620 (Mo. Banc. 2002)

Meerbrey v. Marshall Field & Co., 139 Ill.2d 455 (1990)

Taylor v. Linville, 656 S.W.2d 368 (Tenn. 1983)

Simmons First Nat'l Bank v. Thompson, 285 Ark. 275,686 S.W.2d 415 (1985)

II. THE TRIAL COURT ERRED IN AWARDING JUDGMENT INSTEAD OF DISMISSING THIS CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT NO SUBSTANTIAL EVIDENCE SHOWS THAT A REASONABLE PERSON WOULD HAVE RECOGNIZED THE "AFFIRMATIVE ACTS" OF WELDING A RUSTED WATER TANK AND CONTINUING TO USE IT WERE HAZARDOUS BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT AS A CEMENT-TRUCK DRIVER.

A. Standard of Review

See I. A., *supra*

See I. B., *supra*

B. No Substantial Evidence Supported a Finding, if One Is Implied, That a Reasonable Person Would Have Known That Using a Patched Water Tank Was Hazardous Beyond the Usual Requirements of Employment

See I. B., *supra*

Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670 (Mo. App. S.D. 2003).

Verdoorn v. Director of Revenue, 119 S.W.3d 543 (Mo. Banc 2003).

C. Respondent's Efforts to Turn This Case Into One for Engineering Malpractice Did Not Establish That an Ordinarily Careful Person Would Have Known That Patching a Water Tank was Hazardous Beyond the Usual Requirements of Employment

Holland by and Through Gardner v. W.A.S.T., 833 S.W.2d 23 (Mo. App. E.D. 1992).

Sexton v. Jenkins & Assocs., 41 S.W.3d 1 (Mo. App. W.D. 2000).

Lyon v. McLaughlin, 960 S.W.2d 522 (Mo. App. W.D. 1998).

III. THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST IN THAT BURNS DID NOT SEEK SUCH RELIEF UNTIL AFTER TRIAL BECAUSE SMITH WAS PREJUDICED FROM HIS RELIANCE ON THE PLEADINGS AS SETTING FORTH THE REMEDIES SOUGHT BY PLAINTIFF AND THE ISSUES RIPE FOR DECISION.

A. Standard of Review

Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795 (Mo. App. E.D. 2005).

City of Springfield v. Gee, 149 S.W.3d 809 (Mo. App. 2004).

B. The Court Should Not Allow a Windfall in The Form of Relief Beyond The Scope of The Pleadings

Call v. Herd, 925 S.W.2d 840 (Mo. Banc 1996).

Springfield Land & Development Co. v. Bass, 48 S.W.3d 620 (Mo. App. S.D. 2001).

Werremeyer v. K.C. Auto Salvage Co., Inc., 134 S.W.3d 633 (Mo. Banc 2004).

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT INSTEAD OF DISMISSING THE CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT, AS A MATER OF LAW, THE AFFIRMATIVE ACTS FOUND BY THE TRIAL COURT DO NOT MEET THE LEGAL STANDARD REQUIRED THAT A REASONABLE PERSON WOULD RECOGNIZE THEM AS HAZARDOUS AND BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT.

A. Standard of Review

In a court tried case, the standard of review is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. Banc 1976). The Court will affirm the judgment unless the judgment is 1) not supported by substantial evidence, 2) is against the weight of the evidence, or 3) it erroneously declares or applies the law. *See Furlong Companies v. City of Kansas City*, 189 S.W.2d 157 (Mo. Banc 2006). The Court will defer to the trial court's findings of fact but does not defer to the trial court's determinations of law. *See City of Kansas City v. Hon,* 972 S.W.2d 407 (Mo. App. W.D. 1998). This Court gives deference to the trial court's findings of fact only where the evidence is conflicting. *See id.* Issues of law are reviewed

de novo. *See Utility Serv. & Maint. v. Noranda Aluminum*, 163 S.W.3d 910 (Mo. Banc 2005).

Substantial evidence is that evidence which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case. *See Kennedy v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809 (Mo. Banc 2003). The weight of the evidence is determined by its effect in inducing belief. *See Jerry Masonry, Inc. v. Crossland Constr. Co., Inc.*, 171 S.W.3d 81 (Mo. App. S.D. 2005). *See also Walters v. Walters*, 181 S.W. 3d 135, 138 (Mo. App. W.D. 2005). A judgment will be set aside in this ground only with caution. *See Sangamon Assoc. v. Carpenter 1985 Family*, 165 S.W.3d 141 (Mo. Banc 2005). In making this determination, the Court will view the evidence and reasonable inferences drawn therefrom in the light most favorable to the trial court's judgment. *See In re P.L.O.* 1315 S.W.3d 782 (Mo. Banc 2004).

Further, the Court defers to the trial court's determination of credibility. However, where evidence is uncontroverted or admitted so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court's judgment. *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. Banc 2002). *See also Verdoorn v. Director of Revenue*, 119 S.W.3d 543, 545 (Mo. Banc 2003). This principle is true because a trial court is not free to disregard unequivocal and uncontradicted evidence that supports the appealing party's

contentions. *See Verdoorn*, 159 S.W.2d at 517-18. In other words, the standard of review does not allow an appellate court to disregard uncontroverted evidence. *See id.*

B. Workers' Compensation Is the Exclusive Remedy

Eric Burns was injured in the course and scope of his employment and received workers' compensation benefits. The primary issue on this appeal is whether or not Burns can escape from workers' compensation as his exclusive remedy. In other words, he seeks to be an exception to the general rule. *See Leicht v. Venture Stores, Inc.*, 562 S.W.2d 401, 402 (Mo. App. 1978).

By statute, an employer is generally immune from suit for negligence for such an injury. *See* Mo. Rev. Stat. §287.120; *Hartman v. Kintz*, 832 S.W.2d 9 (Mo. App. E.D. 1992). The immunity provisions of the Workers' Compensation Act extend to a co-employee or supervisor (such as Smith) when implementing (or failing to implement) the employer's "non-delegable duty to provide a reasonably safe work place." *Sexton v. Jenkins & Assocs., Inc.*, 41 S.W.3d 1, 5 (Mo. App. W.D. 2000); *Collier v. Moore*, 21 S.W.3d 858 (Mo. App. E.D. 2000).

The Workers' Compensation Act should be literally interpreted, and "liberal construction requires that where a question of jurisdiction is in doubt, it should be held to be in favor of the [Labor and Industrial Relations] Commission." *See Sexton*, 41 S.W.3d at 6 (quotations omitted). Even if this rule of construction or

the requirement that questionable jurisdictional cases should be dismissed out of court "may limit a particular individual's recovery," [they] "ensure[s] that more individuals enjoy the protection intended" by the law. *See id.*

In order to avoid the exclusive remedy provisions of workers' compensation, an employee seeking to bring a tort action against a fellow employee or supervisor must allege affirmative negligent acts that are outside the scope of an employer's responsibility to provide a safe workplace. *See State ex rel. Taylor v. Wallace*, 73 S.W.3d, 620, 621-22 (Mo. Banc 2002). The question of what constitutes an affirmative act must be determined on a case by case basis. *See id.*

In *Taylor*, the plaintiff was a passenger in a trash truck being driven by a co-employee. The allegations were that the driver failed to keep a careful lookout, carelessly and negligently struck a mailbox while driving, and carelessly and negligently drove too close to a fixed object. The Missouri Supreme Court found that "these claims amount to no more than the allegation that defendant negligently failed to discharge his duty to drive safely." *Id.* This alleged failure is not the kind of "***purposeful, affirmatively dangerous conduct*** that Missouri courts have recognized as moving a fellow employee outside the protection of the Workers' Compensation Law's exclusive remedy provisions." *Id.* (emphasis added).

This Court addressed the issue of what constitutes the necessary "something extra" beyond the duty of general supervision and safety in *Logan v. Sho-Me*

Power Elec. Coop., 122 S.W.3d 670 (Mo. App. S.D. 2003). The *Logan* Court affirmed that this determination is made on a case by case basis and found that the "something extra" includes "any affirmative act taken while the supervisor is acting outside the scope of the employer's duty to provide a reasonably safe environment, that breaches a personal duty of care the supervisor owes to a fellow employee." *Id.* at 678, *citing Collier*, 21 S.W.3d at 861.

In *Logan*, the employee was electrocuted. His parents sued his supervisor alleging that the supervisor directed the decedent to work around an energized power line and authorized the line to be energized during the work. *See Logan*, 122 S.W.3d at 678. The *Logan* Court noted:

> Generally, cases in which the "something extra" element has been found are those in which supervisors personally took part in the "affirmative act" by directing employees to engage in dangerous activity ***that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment.***

Id. at 678 (emphasis added). The *Logan* Court affirmed the trial court's dismissal for lack of subject matter jurisdiction because directing an employee to work around an energized power line did not rise to the standard of conduct necessary to escape workers' compensation as the exclusive remedy. *See id.* at 679.

Neither party to this action has cited a case that is factually on point involving welding of a water tank. The case that seems most analogous, however, is *Gunnett v. Girardier Building & Realty Co.*, 70 S.W.3d 632 (Mo. App. E.D. 2002) .

In *Gunnett*, the injured employee fell through a skylight opening in the roof. The foreman who was sued had covered that hole with a piece of plywood. Instead of attaching the plywood to the exterior surface from above the roof, he attached the plywood to the underside of the roof. *See Gunnett*, 70 S.W.3d at 641. The trial court dismissed, and the Court of Appeals affirmed.

The *Gunnett* court found that the individual defendant was performing a routine job-site task – covering a hole in the roof, similar to repairing a water tank – in a manner that was allegedly unsafe and inappropriate. The plywood was attached underneath the roof instead of over it. By affidavit, the defendant testified that he did so because the roof flashing had not yet been installed and to avoid having the roofer toss the plywood off the roof when preparing to install the flashing. In other words, the defendant believed that he had attached the plywood reasonably. That case is similar to this one because Smith welded the water tank at question in order to seal a small leak. His testimony, and that of expert witness Joseph Fischer who is also the owner of a company operating eight concrete ready-mix facilities, establish a reasonable expectation that such repairs were properly

performed and, that if the welds failed in such circumstances, they would only result in a leak, not an explosion. There was no testimony, and absolutely no evidence, that Smith believed he was creating an unreasonable hazard in welding the water tank. To the contrary, he drove the truck with the welded tank, and at the time of trial, his brother was driving a truck with a similarly welded water tank. Fischer testified that he would not have let his employees use trucks with welded water tanks -- which he did -- if he thought they were dangerous.

A recently decided case -- since judgment was entered in this case -- is also helpful with this analysis. *See Nowlin v. Nichols*, 163 S.W.3d 575 (Mo. App. W.D. 2005). In that wrongful death case, the owner of the business that employed the decedent was named as a defendant. The allegations against him were that he directed the decedent to assist in extricating a stuck bulldozer and then climbed down from a second bulldozer that was uphill, leaving it running. The decedent died when he was crushed between the two bulldozers after the uphill one rolled down the incline. *See id.* at 577-79.

The Western District noted the requirement that all doubts had to be resolved in favor of the Commission and against jurisdiction. *See id.* at 578. The Court further noted the requirement that the supervisor direct the employee to engage in conduct "that a ***reasonable person would recognize*** as inherently dangerous and beyond the usual requirement of the employment." *Id.* at 578

(emphasis added). The plaintiff argued that the supervisor committed a sufficient affirmative act by "getting off of the working bulldozer leaving the motor running while [decedent] was standing [downhill and] between the two bulldozers." *Id.* at 579. The Western District disagreed, holding that while the supervisor may have been careless, he had not committed a sufficient affirmative act to be held liable. *See id.* at 580.

The main question for this Court to determine, as a matter of law, is whether or not the trial court's finding that Smith's affirmative negligent acts of welding over the corrosion and rust on the water tank and directing plaintiff to "run it 'til it blows," "which caused or increased the risk of injury to plaintiff beyond the usual hazards of plaintiff's employment" are sufficient to meet this Court's requirement as set forth in *Logan* that a supervisor must direct an employee to engage in dangerous activity ***"that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment" in the absence of any such evidence or finding.*** *Logan*, 122 S.W.3d at 678 (emphasis added); *Nowlin*, 163 S.W.3d at 578 (same). It is not. The Court must reverse the judgment and remand with instructions to the trial court to dismiss the case.

C. In Spite of a Direct Request, the Trial Court Was Unable to Find That a Reasonable Person Would Have Known That Using a Welded Water Tank Was Hazardous and Beyond the Usual Requirements of Employment

Prior to trial, Smith requested the Court to make findings of fact of what constituted the affirmative act(s) of directing plaintiff to engage in dangerous activities that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment under this Court's decision in *Logan*. (L.F. 33). The trial court recognized that request in its findings of fact. (L.F. 61). The trial court did find that the weld placed by Smith on the tank caused the violent explosion and plaintiff's injuries. (L.F. 62, ¶7). The trial court further found that the weld increased the risk of the violent explosion of the tank. (L.F. 62, ¶8). The trial court even found that the danger and risk of the exploding tank that had been welded over rust and corrosion was hazardous beyond the usual requirements of plaintiff's employment driving a concrete mixer truck. (L.F. 63 at ¶11). In making these findings, and in response to Smith's request, the trial court specifically found two affirmative negligent acts: welding over the corrosion and rust on the water tank, and telling plaintiff to "run it till it blows." (L.F. 64 at ¶21).

Critically, however, ***nowhere*** in its findings of fact and conclusions of law did the trial court find that Smith or ***any*** reasonable person would recognize this

increased risk as hazardous and beyond the usual requirements of the employment. (L.F. 62-67). No one testified at trial that a reasonable person in the ready-mix industry, or in Smith's shoes, would have recognized such a hazard. Even Burns failed to, as he admitted that he never complained about the weld or Smith's decision to weld the tank, and that he thought Smith only meant him to use the tank until it couldn't be used anymore. (Tr.) Without such evidence and a finding, the facts as found simply do not measure up to the standard set forth by the Court in *Logan.* Therefore, workers' compensation was Burns' exclusive remedy, and the case must be dismissed on remand for lack of subject matter jurisdiction.

D. The Court Should End, or Limit to Intentional Torts the Exception to Fellow-Employee Immunity Where a Plaintiff Has Received the Benefits of Workers' Compensation.

This Court most recently set forth and discussed the parameters of the exception to the exclusive remedy provision of the workers' compensation statutory scheme for a fellow employee in *State ex rel. Taylor v. Wallace,* 73 S.W.3d, 620 (Mo. Banc. 2002). The scope of such immunity has reached this court at least once since in a case that was decided on a procedural issue. *See Sexton v. Jenkins & Assocs., Inc.*, 152 S.W.3d 270 (Mo. Banc. 2005) (finding that dismissal of a prior lawsuit by plaintiff on grounds that workers' compensation was the exclusive remedy precluded a subsequent suit; Teitelman, J., in

concurrence, addressed the scope of the exception). At the time of trial, (May, 2004 – two years after *Taylor*) at least six appellate decisions had been published in the state addressing the scope of the exemption after this court's opinion in *Taylor*. *See Logan v. Show-Me Power Electric Coop*, 122 S.W.3d 670 (Mo. App. S.D. 2003) (exclusive remedy); *Kesterson v. Wallut*, 116 S.W.3d 590 (Mo. App. W.D. 2003) (exclusive remedy); *Brown v. Roberson*, 111 S.W.3d 422 (Mo. App. E.D. 2003) (exclusive remedy); *Quinn v. Clayton Construction Co., Inc.*, 111 S.W.3d 428 (Mo. App. E.D. 2003) (exclusive remedy); *Gunnett v. Girardier Building & Realty Co.*, 70 S.W.3d 632 (Mo. App. E.D. 2002); and *Logston v. Killinger*, 69 S.W.3d 529 (Mo. App. S.D. 2002) (not exclusive). Since trial, at least five more appellate decisions addressing the scope of the exemption have been published by the courts of appeals in the state. *See Groh v. Kohler*, 148 S.W.3d 11 (Mo. App. W.D. 2004) (not exclusive); *Graham v. Geise*, 149 S.W.3d 459 (Mo. App. E.D. 2004) (exclusive remedy), *State ex rel. Larkin v. Oxenhandler*, 159 S.W.3d 417 (Mo. App. W.D. 2005) (exclusive remedy); *Nowlin ex rel. Carter v. Nichols*, 163 S.W.3d 575 (Mo. App. W.D. 2005) (exclusive remedy); *Risher v. Golden*, 182 S.W.3d 583 (Mo. App. E.D. 2005) (exclusive remedy). In addition, at least one federal court has addressed the issue. *See Simpson v. Niagra Machine & Tool Works*, Case No. 05-1122-CV-W-FJG (W.D. Mo. January 24, 2006). These cases are in addition to the present one, which has also resulted in an opinion from

an appellate court, and a recently reported but not yet final decision in *Arnwine v. Tribil*, WD 65506 (Mo.App.W.D. June 30, 2006) (exclusive remedy as to three employees and not exclusive as to one).

In other words, twelve or thirteen cases have resulted in appellate opinions on this issue in fewer than five years.[4] In all likelihood, there are numerous other cases pending at the trial court level raising these same issues. Counsel for plaintiffs and defendants alike cannot predict accurately enough to avoid protracted litigation how this "case-by-case" rule is going to apply on a given set of facts. Courts are having to devote extensive resources to resolving these claims, and defendants are deprived of the benefits of the exclusive remedy and certain freedom from suit that was part of the bargain behind the statutory scheme.

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[4] At least one other case debating the impact of the exclusive remedy rule upon the trial court's jurisdiction but not directly addressing the scope of that exemption has also reached an appellate court. *See Vulgamott v. Perry*, 154 S.W.3d 382, 387-88 (Mo.App.W.D.2005). This Court also had to address a claim that the rule applied to an employer as well as an employee in *State ex rel Tri-County Elec. v. Dial*, 192 S.W.3d 708, 710-11 (Mo. Banc 2006) (acknowledging "something extra" requirement for suits against fellow employees but declining to extend it to claims against employers).

Other states also have dealt with the issue of immunity relating to claims against fellow employees. In the states surrounding Missouri, Burns' claims would have been barred in at least seven of them, and most likely in the eighth as well. Starting to the north, Iowa addresses this issue by statute and provides that workers' compensation is the exclusive remedy for claims against fellow employees except as to their gross negligence that amounts to wanton neglect. *See Forbes v. Hadenfeldt,* 648 N.W.2d 124, 126 (2002). Burns' petition, which did not allege gross negligence or wanton neglect, would not have stated a claim against Smith under Iowa law.

Moving clockwise, the State of Illinois prohibits claims by an injured employee against fellow employees by statute, unless the claim arises out of an intentional tort. *See Valentino v. z,* 337 Ill.App.3d, 461, 473, 785 N.E.2d 891 (2003). An injured employee may not bring a claim against a fellow employee for a negligent injury even if it arises out of wanton and willful negligence. *See Meerbrey v. Marshall Field & Co.,* 139 Ill.2d 455, 469 (1990). Burns' claim against Smith would, therefore, have failed as a matter of law Illinois.

In Kentucky, an employee is prohibited from suing a fellow employee except where fellow employee committed a "willful and unprovoked [act of] physical aggression" against the injured party. *See Haines v. Bell South Telecom*,

133 S.W.3d 497, 499-500 (Ky.App.2004). Burns' claim against Smith would, therefore, have failed as a matter of law in Kentucky.

In Tennessee, the situation is similar to Missouri. The workers' compensation statutes do not explicitly bar actions against fellow employees. *See Taylor v. Linville*, 656 S.W.2d 368, 370 (Tenn. 1983) . However, an employee who accidentally or negligently injures a fellow employee is protected and shielded from such claims. *See id.* at 369. The injured employee may sue if the injury is intentional, or if the fellow employee was acting outside the scope of employment. *See id. See Also Hubbell v. Dyer Nursing Home*, 188 S.W.3d 525, 538 (Tenn. 2006) . Burns' claim against Smith would, therefore, have been barred in Tennessee.

In Oklahoma, immunity extends to fellow employees by statute. *See American Agency Systems, Inc. v. Marceleno*, 53 P2d. 929, 933 (Ok.App.2001) . Burns' claim against Smith would have been barred in Oklahoma, as well.

Kansas also addresses this situation by statute and goes to an extreme. An employee may not maintain an action against a fellow employee even if the action was an intentional tort. *See Scott v. Hughes*, 132 P3d 889 (Kan. 2006) , and, *Rajala v. Doresky*, 661 P2d 1251 (Kan. 1983) . Burns' claim against Smith would, therefore, have failed in Kansas.

Nebraska also prohibits claims against fellow employees. *See Plock v. Crossroads Joint Venture*, 239 Neb.2d 211, 475 N.W.2d 105 (1991) . The only exception is for "willful and unprovoked physical aggression." *See* NE St. § 48-111. Thus Burns' claim against Smith would have failed in Nebraska, as well.

Arkansas has a rule similar to Missouri: supervisory employees are immune from liability for claims that they failed to provide a safe place to work. *See Simmons First Nat'l Bank v. Thompson*, 285 Ark. 275,686 S.W.2d 415 (1985) , *and Rea v. Fletcher*, 39 Ark.App.9, 8325 S.W.2d 513, 515 (1992) . In *Rea*, a fellow employee who allegedly acted recklessly in giving the plaintiff a ride to the jobsite and causing him to fall off the tailgate by making a dangerous "jackrabbit start" was immune. *See Rea*, 832 S.W.2d at 515. In *Fore v Circuit Court of Izard County*, 282 Ark. 13, 727 S.W.2d 840, 843 (1987) , a supervisory employee was deemed immune from suit for allegedly causing dynamite to explode by negligently keying a microphone in the absence of allegations of willful or intentional conduct. In *Simmons*,[5] supervisory employees were deemed immune for allowing chemicals to mingle in a sewer, and poisonous gas to enter the work place through an open grate. *See* 686 S.W.2d at 417. As the Arkansas Supreme Court has noted, the "general purpose" of the workers' compensation act was to

[5] The Arkansas Supreme Court cited and relied on *State ex rel. Badami v. Gaertner*, 630 S.W. 2d 175 (Mo.App.1982) . *See Simmons*, 686 S.W.2d at 417.

shift "the burden of all work-related injuries from individual employers and employees to the consuming public." *Brown v. Finney*, 326 Ark. 691, 932 S.W.2d 769, 771 (1996) (fellow employee held immune). Therefore, Burns' claim against Smith would have failed in Arkansas just as it does in Missouri.

In short, Burns' claim against Smith would have failed as a matter of law in all the surrounding states, and that result could easily have been predicted without litigation in at least seven of them. Enforcing the current rule most recently set forth in *Taylor* or clarifying the rule – to eliminate or reduce litigation and to increase parties' ability to predict outcomes – by limiting claims against fellow employees to intentional torts would give the same result: immunity. Allowing an employee who receives workers' compensation from his employer to sue a fellow employee for intentional[6] injury provides a bright-line rule that would reduce uncertainty, allow an injured party to pursue extra-statutory relief for egregious conduct, and protect the workplace and fellow employees from negligence claims designed to do an end-run around the Legislature's determination of what constitutes an appropriate remedy for a workplace injury.

[6]Smith is not suggesting a claim for intentional tort against the employer, a jurisdictional determination that would eliminate workers' compensation recovery belonging to the Commission, merely a claim of intentional tort against the fellow employee.

Burns' case against Smith fails as a matter of law because Smith is entitled to immunity where Burns received the full benefits of his statutory remedy of workers' compensation. The Court should reverse the judgment entered below and should remand the case with directions to dismiss it and/or enter judgment in favor of defendant.

II. THE TRIAL COURT ERRED IN AWARDING JUDGMENT INSTEAD OF DISMISSING THIS CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT NO SUBSTANTIAL EVIDENCE SHOWS THAT A REASONABLE PERSON WOULD HAVE RECOGNIZED THE "AFFIRMATIVE ACTS" OF WELDING A RUSTED WATER TANK AND CONTINUING TO USE IT WERE HAZARDOUS BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT AS A CEMENT-TRUCK DRIVER.

A. Standard of Review

Smith incorporates the standard of review set forth at Argument Section I.A., *supra.*

B. No Substantial Evidence Supported a Finding, if One Is Implied, That a Reasonable Person Would Have Known That Using a Patched Water Tank Was Hazardous Beyond the Usual Requirements of Employment

If this Court assumes that the trial court's findings somehow implied a finding that a reasonable person would have recognized the increased risk from welding a water tank in order to patch a leak in it, that finding is not supported by substantial evidence and should be overturned as against the weight of the evidence. Multiple employees of Kennon Redi-Mix testified by deposition at trial concerning other instances in which Kennon Redi-Mix had used patched water tanks on its concrete mixer trucks. Smith himself testified that he had performed such patches on previous occasions. Fischer testified it was Smith's and Fischer's understanding and belief that, if the weld took, then there was sufficient metal to perform the weld. If, on the other hand, there was not sufficient metal to hold the weld, then the tank would leak immediately.

Furthermore, Smith's brother, Larry Smith, testified. He also worked for Kennon Redi-Mix. The water tank on the truck that he primarily drove at the time of trial had sprung a leak. Lynn Smith gave Larry Smith the option of having a new tank placed, or having a weld performed to patch the water tank. Larry Smith chose to have the tank welded. He himself took it to a professional welder, in light

of Burns' accident. The professional welder did exactly what Lynn Smith had done in welding the tank: brushed it off and welded it. Larry Smith was driving that vehicle at the time of trial. No one testified that his decision to use a welded water tank instead of a new one was unreasonable.

Furthermore, Lynn Smith testified that he drove all of the trucks owned by Kennon Redi-Mix at various points. He believed that he had driven Burns' truck with the patched water tank. Burns testified that Smith routinely drove most of the trucks. (Tr. 427, ln. 24 to 428, ln. 2) There was no indication that Smith believed using such a water tank was in any way dangerous. To the contrary, Smith testified that prior to this incident, he had never seen a tank explode like this one or even talked to anyone who had. (Tr. 479, ln. 4-6). He had also driven other trucks with water tanks patched with a weld.

Even Burns admitted that, he never "said anything to [Smith] about his decision to weld that tank" and that he did not "express any concerns about that tank or that weld" to Smith. (Tr. 429, ln. 22-24; 451, ln. 13-16). Thus Burns admitted that he could not have believed that the welded tank was dangerous, or he would have expressed his concerns as he did on other occasions. (*E.g.*, Tr. 438, ln. 9-14).

Finally, Joseph Fischer testified. Mr. Fischer was head of a company that owned a number of ready-mix plants similar to Kennon. He testified that it was

Fischer Concrete's practice to weld water tanks in order to patch leaks. His testimony completely concurred with that of Smith. Fischer believed that, if the tank had sufficient metal to be welded, then the weld would hold. The proper test was simply to pressurize the tank, and if the weld was not going to hold, then the tank would spring a leak. He had never worried about an explosion from a patched tank in his 20+ years in the industry. He also allowed his employees to drive trucks with welded tanks, which he would not have done had he thought there was any danger.

The only possible evidence to the contrary was Burns' testimony that Smith told him to "run it till it blows." The trial court chose to believe this testimony despite Burns' admission that he admitted lying under oath during his deposition and his attempts to exaggerate his bills that were exposed during trial. However, even if Smith did make such a statement, that statement meant only that the tank should be used until it sprang another leak. (Tr. 476, ln. 25 - 477, ln. 3). Even Burns admitted that he thought Smith mean "use it until you can't use it no more." (Tr. 430, ln. 21 - 431, ln. 8). The Court must not disregard this uncontradicted evidence that no one thought this welded tank was hazardous prior to its rupture. *See, e.g., Verdoorn*, 119 S.W.3d at 545.

In summary, substantial evidence does not exist in the record which would support a finding that any reasonable person knew that a weld on a leaking water

tank would increase the hazard beyond the normal scope of employment. Smith testified that he drove the truck with the patched tank; his brother at the time of trial was driving a truck with a similarly patched tank; Fischer testified that it was his company's practice to patch water tanks in the same fashion. Other Kennon employees testified about the use of welded tater tanks without expressing safety concerns. There is no evidence that any of these reasonable men anticipated an increased hazard from a patched tank. That is the required finding under this Court's opinion in *Logan*. *See Logan*, 122 S.W.3d at 678. The Court must find that workers' compensation is the exclusive remedy and order this action dismissed on remand.

C. Respondent's Efforts to Turn This Case Into One for Engineering Malpractice Did Not Establish That an Ordinarily Careful Person Would Have Known That Patching a Water Tank was Hazardous Beyond the Usual Requirements of Employment

In an effort to avoid the fact that no ***reasonable*** person would have anticipated the alleged hazard from a welded water tank, plaintiff brought in an engineer as an expert. Professor Hamilton was a professor of engineering who admitted that he knew nothing about how small companies like Kennon are run or what is the usual practice in the ready-mix industry. The trial court actually precluded his testimony for lack of foundation as to what an ordinary person in

Smith's position would have known concerning the dangers of welding a rusted and corroded water tank. The fact that an engineer believed that such a weld resulted in an increased danger was, as the trial court correctly ruled, irrelevant where the defendant was not an engineer but instead an ordinary man.

The case closest on point to this one on this issue is *Holland by and through Gardner v. W. A. S. T., Inc.*, 833 S.W.2d 23 (Mo. App. E.D. 1992) . In that case, the plaintiff was an air-cargo handler. He was injured when a cargo container shifted and rolled from the trailer he was towing. He sued an engineer employed by his employer, alleging that the engineer negligently designed the container trailers and failed to meet certain safety requirements. The Eastern District Court of Appeals specifically found that the alleged engineering malpractice was not sufficient to escape the exclusive remedy of workers' compensation. Thus, even if Smith had committed engineering malpractice in this case by welding the water tank, that fact still would not be sufficient to create subject matter jurisdiction in the trial court.

Of course, the standard for an engineering-malpractice claim is not the appropriate standard to apply in this case. Smith never claimed to be an engineer. The question is whether an employee is directed to "engage in dangerous conditions that a ***reasonable person would recognize as hazardous*** beyond the usual requirements of employment." *Sexton,* 41 S.W.3d at 5 (emphasis added);

Lyon v. McLaughlin, 960 S.W.2d 522, 526 (Mo. App. W.D. 1998) (requiring finding that supervisor directed employee to "engage in dangerous conditions that a ***reasonable person would recognize as hazardous*** and beyond the usual requirements of the employment"). (Emphasis added). Thus, Professor Hamilton's testimony is not sufficient evidence to support the judgment, and the Court should remand with instructions to the trial court to dismiss this case.

III. THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST IN THAT BURNS DID NOT SEEK SUCH RELIEF UNTIL AFTER TRIAL BECAUSE SMITH WAS PREJUDICED FROM HIS RELIANCE ON THE PLEADINGS AS SETTING FORTH THE REMEDIES SOUGHT BY PLAINTIFF AND THE ISSUES RIPE FOR DECISION.

A. Standard of Review

The Court need not reach this issue since no judgment should ever have been entered against Smith. If the Court does, however, reach this issue, Smith is asking for a change in the current law that allows a plaintiff to amend his pleadings after trial in order to obtain relief that had not previously been sought. This request is made under authority of Missouri Supreme Court Rule 55.03(b)(2) . As such, the standard of review should be *de novo* because Smith is not challenging the trial court's discretionary decision but is instead asking for a change in the law that

allowed the trial court the discretion to make that decision. *Cf. Utility Ser. & Maint. v. Noranda Aluminum,* 163 S.W.3d 910, 913 n. 2 (issues of law are reviewed *de novo*); *Delta Airlines, Inc. v. Dir. of Revenue*, 908 S.W.2d 353 (Mo. Banc. 1995) n. 2 (issues of law are reviewed *de novo*).

B. The Court Should Not Allow a Windfall in The Form of Relief Beyond The Scope of The Pleadings

Burns did not request prejudgment interest in the petition on file before the case was tried to the Court, nor did he offer any evidence at trial to support such a claim. (L.F. 9-15; Tr.). Approximately six weeks after trial, however, he filed a motion to include prejudgment interest in the judgment. (L.F. 38). The trial court held a hearing on that motion on July 6, 2004 and then granted that motion when it entered its judgment on March 9, 2005. (L.F. 4 & 67).

It is true that Missouri currently allows a claim for prejudgment interest under Mo. Rev. Stat. §408.040.2 to be made without a specific claim in the pleadings. *See Call v. Herd,* 925 S.W.2d 840, 853-54 (Mo. Banc 1996) . That laxity is in direct contradiction to the generally established rule of law that courts have power to decide only those questions which are presented by the parties in their pleadings. *See, e.g., Springfield Land & Development Company v. Bass,* 48 S.W.3d 620, 630 (Mo. App. S.D. 2001).

The purpose of §408.040 is to compensate claimants for the cost of money damages incurred due to delay of litigation, and to promote settlement by discouraging unfair benefits from the delay of litigation. *See, e.g., Werremeyer v. K. C. Auto Salvage Co., Inc.*, 134 S.W.3d 633, 636-37 (Mo. Banc 2004) . Nothing in the statute addresses when a plaintiff must make known that he or she will pursue such a claim in court proceedings. Requiring a plaintiff to give notice prior to trial of all the claims and issues to be presented at trial is hardly an unfair burden, particularly where plaintiff is represented by counsel and where the trial court has almost unlimited discretion to allow amendment of pleadings at any time prior to trial.

To the contrary, allowing plaintiffs to sandbag a defendant by failing to request prejudgment interest in their pleadings does not deter delay of litigation but instead precludes a defendant from adequately evaluating a plaintiff's total demand. It is not as if an award of prejudgment interest is automatic if a plaintiff prevails; clearly, effort is required to comply with the statute and to prove that compliance to the trial court. There is no reason not to require a plaintiff to put a defendant on notice prior to trial -- when settlement negotiations may be ongoing -- that one of the claims is for prejudgment interest. Allowing sandbagging of this nature in no way furthers the purpose of the statute.

The Court should reconsider this point of law and should require a plaintiff to plead a specific request for prejudgment interest before allowing an award to be made post-trial. Such a rule would be more fair to all parties by requiring the parties to specify the issues to be determined in court prior to the time trial commences.

CONCLUSION

WHEREFORE, because the judgment of the court below fails to make the necessary finding that a reasonable person knew or would have known that the patched water tank was hazardous beyond the usual scope of the work environment, or in the alternative that any such implied finding (if one is deemed to exist) is an abuse of discretion and not supported by substantial evidence, the Court should reverse the judgment and order the Circuit Court to dismiss the case for lack of jurisdiction. Further, in the event the Court allows the judgment below to stand, the Court should reverse the award of prejudgment interest because plaintiff failed to request such relief prior to trial, thus prejudicing defendant.

RULE 84.06(C) CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief complies with Rule 84.06(b) in that it does not exceed 31,000 words because, exclusive of cover, certificate of service, this certificate, signature block and appendix, it contains 10,559 words as counted by Microsoft Word. In addition, the disk accompanying this Brief has been scanned by, and is virus-free, according to Symantec Anti-Virus.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and nine copies of the above and foregoing Respondent's Brief, together with a disk containing such brief pursuant to Rule 84.06(g), was filed in the Missouri Supreme Court, Missouri Supreme Court Building, 207 W. High Street, P.O. Box 150, Jefferson City, MO 65102 and that two true and correct copies of the above foregoing Appellant's Brief, including the brief on disk, was mailed, U. S. Mail, first class postage prepaid, on this 8th day of August, 2006, to:

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APPENDIX

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