IN THE MISSOURI SUPREME COURT

No. SC 87279

STATE EX. REL. TRI-COUNTY ELECTRIC COOPERATIVE ASSOCIATION,

Relator

vs.

THE HONORABLE GARY DIAL,
Presiding Judge of the Circuit Court of Schuyler County, Missouri
Division 3

Respondent

PETITION IN PROHIBITION FROM THE CIRCUIT COURT OF SCHUYLER COUNTY, MISSOURI FIRST JUDICIAL CIRCUIT, DIVISION 3
The Honorable Gary Dial, Circuit Judge

REPLY BRIEF OF RELATOR TRI-COUNTY ELECTRIC COOPERATIVE, ASSOCIATION

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ARGUMENT

The Brief of Respondent has within it many different points of argument, but one prevailing theme: Ignore the existing laws of the State of Missouri and attempt to set forth and establish, in direct conflict with existing and settled law, a new avenue of recovery against Missouri employers who are currently protected from tort actions by Missouri's Workers' Compensation Law.

Abuse of Discretion by Respondent

Respondent attempts to establish that the September 19, 2005 order, wherein Respondent denied Relator's Motion to Dismiss for Lack of Subject Matter Jurisdiction, was not an abuse of discretion. Respondent fails. Respondent's September 19, 2005 order was, in light of the allegations, affidavits and evidence presented for Respondent's consideration, clearly against the logic of the circumstances and was so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. See *Burns v. Employer Health Services, Inc.* 976 S.W.2d 639, 641 (Mo.App. 1998).

A motion to dismiss should be granted when it appears that the trial court lacks subject matter jurisdiction. *James v. Union Electric Co.,* 978 S.W.2d 327, 374 (Mo.App. 1998). "As the term 'appears' suggests, the quantum of proof is not high." *Burns* at 641. *(*quoting *Parmer v. Bean,* 636 S.W.2d 691, 694 (Mo.App. 1982). The party raising the defense must show by a preponderance of the evidence that the trial court is without subject matter jurisdiction. *James* at 374. The quantum of proof is not great and a preponderance of the evidence that the court is without jurisdiction is the measure. *Romero v. Kansas City Station Corp.,* 98 S.W.3d 129, 134 (Mo.App. W.D. 2003). When suggestion of the parties

or otherwise demonstrates to the court that it lacks jurisdiction over the subject matter, the court is to dismiss the petition. *Romero* at 133.

In determining whether it has jurisdiction, the trial court may consider affidavits, exhibits, and evidence pursuant to Missouri Supreme Court Rules 55.27 and 55.28. *Burns,* 976 S.W.2d at 641. The Workers' Compensation Law is to be liberally interpreted, and where there is doubt regarding a question of jurisdiction, it should be resolved in favor of the Labor and Industrial Relations Commission rather than the circuit court. *State ex rel. Larkin v. Oxenhandler,* 159 S.W.3d 417, 421 (Mo.App. W.D.2005); *Nowlin v. Nichols,* 163 S.W.3d 575, 578 (Mo.App. 2005); *Sexton v. Jenkins & Assocs. Inc.,* 41 S.W.3d 1, 4 (Mo.App. W.D.2000).

Respondent's Brief quotes a portion of Judge Dial's September 19, 2005 order in support of the contention that Respondent Dial carefully considered Relator Tri-County's Motion to Dismiss:

> "What is at issue for the finder of fact is whether or not a **co-employee** personally took part in an affirmative act by creating a hazardous condition outside the scope of the responsibility to provide a safe work place that violated a **personal duty of care**. These allegations, if proven, would create that 'something extra' beyond a breach of general supervision. Therefore, this Court finds that the allegations in the Petition, if proven, would confer subject matter jurisdiction with this Court." *(Emphasis Added).*

An examination of Respondent's order, including the above quoted portion, reveals that Respondent did not carefully consider the evidence before him, the preponderance of which clearly established that the circuit court is without jurisdiction as to Relator Tri-County. This evidence included, but was not limited to, numerous affidavits in support of Relator's Motion to Dismiss and Plaintiffs' own petition wherein it was pleaded that Tri-County was the employer of the decedent who was at the time of his death, acting within the scope and course of his duties of employment with Relator Tri-County. **(Relator's Exhibit 8, Appendix, pp. A154-A160; Relator's Exhibit 4, Appendix, pp. A98-A99)**.

In fact, the order, including the above quoted portion, indicates that Respondent Dial considered the circuit court's subject matter jurisdiction over the co-employee only and not the employer, Relator Tri-County. Respondent addresses the test ("something extra") for establishment of a personal duty by one employee to another co-employee, not the employer. Neither plaintiffs' petition nor plaintiffs' counsel in argument at the hearing on the motion to dismiss have ever set forth affirmative negligent acts of the employer, Relator Tri-County, that are beyond the employer's non-delegable duty to provide a safe work place and therefore create any duty beyond the non-delegable duties between the employer and decedent employee. Accordingly, Respondent's September 19, 2005 order does not set forth the specific grounds for denying Relator's Motion to Dismiss as it pertains to the employer Tri-County Electric Cooperative Association, but instead focuses on the co-employee "something extra" test.

Respondent abused his judicial discretion, as his September 19, 2005 order denying Relator's Motion to Dismiss for Lack of Subject Matter Jurisdiction is clearly

against the logic of the circumstances then before the court and is so arbitrary and unreasonable so as to shock the sense of justice and clearly indicates a lack of careful consideration by Respondent.

Non-Delegable Duties

The theme of ignoring existing Missouri law and legal precedent in an attempt to create new law continues in Respondent's brief, wherein in support of the contention that Respondent Dial's September 19, 2005 order was not arbitrary and unreasonable Respondent sets forth an erroneous legal conclusion on current Missouri law by stating: "The trier of fact can find that Tri-County and/or Tri-County's supervisor Newland's affirmative negligent actions, if proven true, are breaches of Tri-County's duty, separate and apart from the non-delegable duties Tri-County owed to Watson." **(Respondent's Brief, pp. 13-14)**.

The employer's responsibility at common law was to discharge five specific duties relevant to safety: (1) to provide a safe workplace; (2) to provide safe equipment in the workplace; (3) to warn employees about the existence of dangers of which the employees could not reasonably be expected to be aware; (4) to provide a sufficient number of competent fellow employees; and (5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety. *Gunnett v. Girandier Building and Realty Co*., et al., 70 S.W.3d 632, 638 (Mo.App. 2002).

The co-employee, Defendant Newland's alleged affirmative negligent actions are of no relevance to the determination of a duty, if any, owed by Tri-County to its employees beyond the non-delegable duty to provide a safe work place. Newland's

actions can only give rise to a personal duty owed by Newland to his fellow, co-employee. An employee owes a personal duty of care to a co-employee when the employee engages in conduct that is outside the scope of the employer's standard non-delegable duties. *Nowlin* at 578; G*unnett* at 641. Otherwise, the employee is deemed to be breaching the employer's non-delegable duties, and is therefore entitled to the benefit of the employer's immunity from civil tort actions under the workers' compensation law. *Gunnett* at 642; *Nowlin* at 578.

Exclusive Remedy: Workers' Compensation

The exclusive remedy for injury or death of an employee from an accident arising out of and in the course of employment is a claim for compensation under chapter 287. *Lovelace v. Long John Silver's, Inc.*, 841 S.W.2d 682, 686 (Mo.App. W.D.1992). The Workers' Compensation law, however, bars common law suits for only those damages covered by the Law and for which compensation is made available under its provisions. *Gambrell v. Kansas City Chiefs Football Club, Inc.*, 562 S.W.2d 163, 165 (Mo.App. 1978).

"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 arising out of and in the course of the employee's employment, **and shall be released from all other liability therefor whatsoever, whether to the employee or any other person**." (§287.120.1, RSMo.2000*, Emphasis Added).*

Respondent's brief sets forth the following citation in support of the erroneous proposition that the Missouri legislature did not intend for the Missouri Workers' Compensation Act to subvert tort actions that may arise between an employer and employee:

> "The Workers' Compensation Law is fully substitutional in character; an injured workers' common law rights are supplanted and superseded thereby, but only if the Act is applicable. See *Killian v. J & J Installers, Inc.,* 802 S.W.2d 158, 160 (Mo.banc 1991); *Deckard v. O'Reilly Automotive, Inc.,* 31 S.W.3d 6, 14 (Mo.App. W.D.2000)."

As they do in other portions of their brief, Respondent fails to include the next, clarifying sentence within *Killian* which states: "This, of course, is the meaning of Section 287.120.2." *Killian* at 160. Section 287.120.2 states: "The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs, or next kin, at common law or otherwise…" (§287.120.2 RSMo. 2000). Likewise, Respondent fails to include the preceding sentence within *Deckard* which states: "With the Workers' Compensation Law, the legislature provided a remedy for injury or death of an employee from an accident arising out of and in the course of employment." *Deckard* at 14.

Respondent's citations to *Deckard* and *Killian* are not helpful to the determination of any duty, beyond the non-delegable duties, owed by Tri-County to its employees. The *Deckard* case concerned the issue of whether an employee could bring an action for

defamation against his former employer under the theory that defamation was not a wrong or injury comprehended within Missouri's workers' compensation law. *Deckard v. O'Reilly Automotive, Inc.,* 31 S.W.3d 6 (Mo.App. W.D.2000). *Killian* concerned an employer accused of committing intentional acts with the specific intent to inflict harm upon a specific employee. *Killian v. J & J Installers, Inc.,* 802 S.W.2d 158 (Mo.banc 1991). The fact patterns of both cases bear no resemblance to the facts in the present matter.

Missouri's Workers' Compensation Law provides the exclusive remedy for employees against employers, such as Relator Tri-County, for injuries covered by its provisions, and subject matter jurisdiction over such matters properly lies only in the Labor and Industrial Relations Commission. *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 621 (Mo. banc 2002); *Hedglin v. Stahl*, 903 S.W.2d 922, 926 (Mo.App. W.D.1995); *Kelley v. DeKalb Energy Company*, 865 S.W.2d 670, 672 (Mo. banc 1993).

Respondent, by citing to the *Killian* case indirectly asserts and raises an exception to the tort liability immunity provided to employers under the Missouri Workers' Compensation Law. This exception to the employer's immunity is totally separate and apart from the "something extra" test used to determine the existence of a duty on the part of a co-employee who has committed negligent acts outside the scope of an employer's responsibility to provide a safe workplace. Common law tort liability may be imposed upon an employer for intentionally inflicting injury on an employee thereby making the cause of the injury "nonaccidental" and beyond the exclusivity provisions of §287.120 RSMo. 2000. *McCoy v. Liberty Foundry Company*, 635 S.W.2d 60, 62 (Mo.App. 1982).

"Thus, for employer conduct to be actionable as a "nonaccidental" cause of injury, the employer must intentionally act with the specific purpose of thereby injuring the employee." *Id.; Stonebarger v. Emerson Electric Company*, 668 S.W.2d 187, 188 (Mo.App. 1984); *Speck v. Union Electric Co.,* 741 S.W.2d 280, 282 (Mo.App. 1987). Plaintiffs' within their petition have not pleaded any allegations against Relator that decedent's injuries were as a result of nonaccidental, intentional acts by Relator for the specific purpose of injuring the employee, Steven Watson. Accordingly, the allegations of plaintiffs' petition fail to overcome the employer immunity from tort liability as provided to Relator by Missouri's Workers' Compensation Law.

Employer Immunity

As stated within page 18 of Respondent's brief: "The Watsons seek to hold Tri-County responsible for Newland and/or Tri-County's affirmative negligent acts which arise separate and apart from Tri-County's common law duty to provide a safe place to work to decedent Watson." This statement is erroneous and in conflict with case law precedent and the existing law of Missouri. But hypothetically, if the statement was a correct statement of the law, Plaintiffs' petition is devoid of any allegations of affirmative negligent acts arising separately and apart from Relator Tri-County's non-delegable duties to its employees, including plaintiffs' decedent.

Furthermore, Respondent by way of a protracted discussion of *Gunnett v. Girardier Bldg. and Realty Co.,* 70 S.W.3d 632 (Mo.App. 2002), attempts to effectively destroy the immunity from tort liability as currently provided to employers in Missouri

who fall under the scope of coverage of Workers' Compensation. Specifically, Respondent states:

> "The court (in Gunnett) noted that when an employee fails to perform the employer's non-delegable duty, the failure is that of the employer, not the employee. Gunnett, 70 S.W.3d at 638. Similarly, it should follow that a co-employee's breach of a duty other than a non-delegable duty can also be the failure of the employer."

Once again, examination of the *Gunnett* decision reveals that the next sentence following that sentence cited by Respondent is helpful in understanding the true holding of the court in *Gunnett* and defeats the assertion of Respondent that the employer should be responsible for an employee's breach of a duty other than a non-delegable duty:

> "Since the failure is that of the employer, and since recovery under workers' compensation law is the employee's exclusive remedy vis-à-vis his employer, a co-employee performing a non-delegable duty of the employer is entitled to the benefit of the employer's immunity from common-law negligence suits under workers' compensation law." *Gunnett* 70 S.W.3d at 638.

Open Courts Clause

Respondent further argues that Article I, Section 14 of Missouri's Constitution vests subject matter jurisdiction over this matter within the circuit courts of Missouri, and not the Missouri Labor & Industrial Relations Commission. However, the open courts clause is not a basis for creating rights, remedies or new causes of action. Rather, it

protects citizens in enforcing rights already recognized by law. *Schulte v. Missionaries of La Salette Corp.*, 352 S.W.2d 636, 641 (Mo. 1961), *overruled on other grounds, Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599, 606 (Mo. banc 1969). Furthermore, Respondent has waived any such constitutional argument as constitutional issues are waived if not raised at the first available opportunity. *Meadowbrook County Club v. Davis*, 384 S.W.2d 611, 612 (Mo. 1964); *State v. Thompson*, 627 S.W.2d 298, 303 (Mo. banc 1982).

No Employer Liability/Indemnification of Employee

Finally, Respondent's brief challenges Relator to cite to a case which precludes an action against the employer for an employee's breach of the employee's personal duty owed to a co-employee while acting in the scope of the employee's employment. This challenge exposes the flawed legal logic that permeates Respondent's brief. No such case exists. The reason for the non-existence of any such case is that if the employee owes a personal duty to his co-employee the employee has established such a personal duty only by ordering or directing the injured co-employee to undertake actions which created a separate and extreme risk of injury and death, far beyond that anticipated or contemplated by the ordinary duties and responsibilities of the injured co-worker's employment and therefore beyond the employer's non-delegable duty to provide a safe work place. *Hedglin*, 903 S.W.2d at 927.

Conversely, Respondent can not and indeed failed to cite any case law precedent permitting an action against the employer for an employee's breach of the employee's personal duty owed to a co-employee.

Concisely stated, Respondent is attempting to argue that an employee of Relator was acting within the scope of his employment. That this employee at the same time was acting in such a manner so as to give rise to a personal duty of care owed by the employee to another co-employee. Furthermore, Respondent is attempting to establish that in addition to the employee who created and subsequently breached a personal duty of care, the employee's employer should be held responsible for the employee's breach of the employee's personal duty of care owed to the fellow worker.

Respondent's argument is in disharmony with existing and settled law and goes against the purposes for which workers' compensation was long ago enacted in the State of Missouri. As stated within *Gunnett,* 70 S.W.3d at 636:

> "In creating these new rights and remedies, workers' compensation laws can be viewed as representing a compromise - a give and take between the employer and the employee. Workers' compensation laws provide a no-fault system of compensation for the employee. *Akers v. Warson Garden Apartments*, 961 S.W.2d 50, 56 (Mo. banc 1998); Keeton, *supra* section 80 at 573; Larson, *supra* section 2.10. The employee, who sustains an injury through an accident arising out of and in the course of employment, is provided certain compensation, without the necessity of having to prove fault on the part of the employer, and without being subject to the 'unholy trinity' of common-law defenses. *See Gambrell v. Kansas City Chiefs Football Club, Inc*., 562 S.W.2d 163, 165 (Mo.App. 1978); *Todd v. Goostree,* 493 S.W.2d 411, 416 (Mo.App. 1973); *Bethel v. Sunlight Janitor*

Service, 551 S.W.2d 616, 618 (Mo.banc 1977); *Akers*, 961 S.W.2d at 56. In exchange for definite compensation for all work-connected injuries, the employee foregoes his right to sue his employer for negligence and to obtain the common-law measure of damages in cases where fault could be shown. *Leicht v. Venture Stores, Inc.*, 562 S.W.2d 401, 402 (Mo.App. 1978). From the employer's perspective, the employer accepts absolute liability, assuming a broader range of liability than it might have had at common law, under a fault-based system of liability. *See* Id.; Akers, 961 S.W.2d at 56. But, in exchange, the employer is protected since the compensation under the workers' compensation statutes is the injured employee's exclusive remedy against the employer; the employer is protected from the possibility of having to pay out the full measure of common-law damages. *See Leicht,* 562 S.W.2d at 402; *Gambrell,*562 S.W.2d at 165; Section 287.120, RSMo. 2000."

Respondent is attempting to require that all Missouri employers indemnify their employee who has committed a negligent act outside the scope of the employer's responsibility to provide a reasonably safe work place. If allowed to occur such indemnification would violate the compromise between employers and employees and effectively destroy the immunity provisions of Missouri's Workers' Compensation Law. *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo.App. 1982).

"If the employer must provide a defense and offer indemnity to its employees who are sued, the employer will, after first paying the worker's compensation claim, then also

pay the additional compensation awarded in the tort claim. This will undermine the immunity provisions of the worker's compensation laws." *Hedglin,* 903 S.W.2d at 929.

CONCLUSION

WHEREFORE, Relator prays this Court to enter an Order prohibiting Respondent from doing anything other than vacating Respondent's September 19, 2005 order overruling Relator's Motion to Dismiss for Lack of Subject Matter Jurisdiction as it pertains to Relator, and thereafter dismiss Relator as a party from Circuit Court of Schuyler County, case number 05SY-CV00037.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that one (1) complete copy and a computer disk containing one (1) complete electronic copy of this Reply Brief of Relator in Microsoft Word 2002 format, were mailed, U. S. Mail, postage pre-paid, this 20th day of March, 2006, to:

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Furthermore, the undersigned certifies that: (1) Relator's Brief complies with the limitations contained in Rule 84.06; (excluding the cover, certification of service and compliance and signature block there are 3,128 words in Relator's Reply Brief; the name and version of the word processing software used to prepare Relator's Brief is Microsoft Word 2002; and the diskette provided to this Court has been scanned for viruses and is virus free.

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