

***McCracken v. Wal-Mart Stores East, LP 298 S.W.3d 473  
(Mo.BANC 2009)***

In this recent opinion, the Missouri Supreme Court overruled all cases holding the applicability of the Workers' Compensation Act (the "Act") is a matter of a trial court's subject matter jurisdiction. Instead, a defendant must raise and preserve applicability of the Act and the exclusive jurisdiction of the Labor and Industrial Relations Committee as an affirmative defense in its responsive pleading.

In *McCracken*, a deliveryman employed by Interstate Brands Corporation, brought a personal injury action against Wal-Mart for injuries allegedly incurred when a store employee pushed a bread rack into the deliveryman's shoulder. The trial court dismissed the action, holding it lacked subject matter jurisdiction over the claim because *McCracken* was Wal-Mart's statutory employee under section 287.040.1 of the Act, and as a result, the Labor and Industrial Relations Commission had exclusive jurisdiction of the claim.

The Supreme Court held the question of whether someone is a statutory employee under the Act or whether the Act otherwise applies is not a matter of subject matter jurisdiction subject to a motion to dismiss. Rather, the applicability of the Act is a matter to be raised by an affirmative defense. Failure to timely raise the applicability of the Act may constitute, as with any affirmative defense, a waiver of that defense.

Here, *McCracken* filed a civil negligence suit in a circuit court that has personal jurisdiction over him and Wal-Mart. As such, the circuit court had constitutional jurisdiction to hear his claim. It erred, therefore, in dismissing *McCracken's* claim for lack of jurisdiction once it determined *McCracken* was a statutory employee of Wal-Mart. Rather, the issue should have been raised as an affirmative defense to the circuit court's statutory authority to proceed with resolving the claim. In light of such a properly raised affirmative defense, it would have been up to the trial court to determine if it truly has before it a case failing within the statutory exception to the normal rule that tort cases are determined by the circuit court.

Because many recent cases incorrectly suggest the applicability of the Act is an issue of subject matter jurisdiction, the court specifically held the matter will be treated as preserved in all cases pending in the state as of the date of the opinion. For all cases filed in the future, however, the court held the applicability of the Act must be raised by affirmative defense and is not a question of subject matter jurisdiction.

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