IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

RUSSELL EVANS	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No.: SD 33209
	)	
MONTE BARRETT and RON WILSON,	)	
	)	
	)	
Respondents	)	

APPEAL FROM
THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT

BRIEF OF APPELLANT RUSSELL EVANS

APPELLANT REQUESTS ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JURISDICTIONAL STATEMENT

This is a civil action filed in the Circuit Court of Greene County, Missouri, by the Plaintiff/Appellant Russell Evans against Defendants/Respondents Monte Barrett and Ron Wilson for personal injury arising out of an occurrence where Defendant Barrett ran over Appellant's leg while Defendant Barrett was operating a forklift on a jobsite. Respondent Wilson was Respondent Barrett's and Appellant's supervisor. Respondents filed Motions for Summary Judgment. The trial court found in favor of Respondents on their Motion for Summary Judgment and entered a judgment finding that Respondents were not civilly liable to Appellant because Respondents were immune from liability as co-employees. Appellant filed a timely notice of appeal and perfected the appeal to this Court. This case does not fall within the exclusive jurisdiction of the Missouri Supreme Court under Article 5, § 3 of the Missouri Constitution and, therefore, this Court has jurisdiction.

STATEMENT OF FACTS

Plaintiff Russell Evans, appellant, worked for Wilco Contractors in November of 2009. (LF 369) Respondent Ron Wilson was the president and owner of Wilco, a construction contractor. (LF 369) Respondent Monte Barrett also worked for Wilco in November of 2009. (LF 375) Plaintiff Evans sued both Monte Barrett and Ron Wilson for injuries he sustained at work that occurred on November 25, 2009, while working at a construction site on Scenic Street. (LF 368, 374)

Beginning in late October of 2009, Plaintiff Evans worked for Wilco at a site on Scenic Street. (LF 369) On five occasions, Plaintiff Evans worked with Defendant Barrett operating a "tag line" to lift trusses up to the building. (LF 370) During the process, Defendant Barrett operated a forklift, which lifted the trusses up to the desired location, while Plaintiff Evans held the tagline, which was attached to the trusses. Plaintiff Evans walked alongside the forklift holding the tagline to stabilize the trusses while they were being lifted into position. (LF 369, 375) On November 26, 2009, Plaintiff Evans was walking alongside and in front of the forklift when the trusses shifted, pulling Plaintiff Evans in front of the forklift. Defendant Barrett drove the forklift over Plaintiff Evan's leg, injuring him. Plaintiff Evans testified that the forklift hit a rock, which caused the trusses to shift and pull him in front of the forklift via the tag line. (LF 369-370, 375-376)

On the day of the incident, Defendant Wilson ordered Defendant Barrett to get the trusses to the top of the building. (LF 371) However, Defendant Wilson was not working in the vicinity of Plaintiff Evans or Defendant Barrett at the time of the occurrence. (LF 370) Defendant Wilson's only instruction to Defendant Barrett on the date of the incident was at

the beginning of the day when he instructed Defendant Barrett to "get those [trusses] up there with that gable to those guys." (LF 371) When Defendant Barrett ran over Plaintiff Evan's leg, Defendant Wilson was not directing Plaintiff Evans or Defendant Barrett. (LF 317)

At the time of the incident, Defendant Wilson was OSHA-certified to operate a fork lift on a jobsite with other workers. (LF 456) Defendant Barrett had received training and had been certified to operate a forklift approximately ten years before the occurrence, but at the time of the occurrence, Defendant Wilson was the only employee of Wilco who was a certified forklift operator. (LF 150-151) After Plaintiff Evans was injured and while Plaintiff Evans was being transported to the hospital, Defendant Wilson told Plaintiff Evans that if anyone asked, Plaintiff Evans was to tell them that he, Defendant Wilson, was driving the forklift. (LF 457-458) Defendant Wilson does not recall making such a statement, and Defendant Barrett does not recall hearing such a statement. (LF 383, deposition pages 11-12; LF 425, deposition pages 77-78)

On January 27, 2014, the Honorable Michael J. Cordonnier granted summary judgment motions filed by Defendants Ron Wilson and Monte Barrett. With respect to Defendant Wilson, Judge Cordonnier determined that Plaintiff Evans did not plead or prove "any act of negligence that may be considered 'something more' than the alleged failure to provide competent fellow employees, or the alleged failure to provide a safe workplace." Judge Cordonnier concluded that the failure to provide competent employees was subsumed under the five specifically delineated duties of an employer to provide a safe workplace. (LF 481; A-2) Plaintiff Evans does not appeal Judge Cordonnier's judgment with respect to Defendant Wilson. With respect to Defendant Barrett, Judge Cordonnier concluded "the duty

to operate a forklift in a safe manner was owed to Plaintiff by the employer. That duty was non-delegable. Because Plaintiff failed to allege any duty independent of the employer's non-delegable duty to provide a safe working environment, summary judgment is appropriate." (LF 484; A 5) Plaintiff Evans appeals the trial court's summary judgment in favor of Defendant Barrett.

POINT RELIED ON

The trial court erred in granting Defendant Barrett's Motion for Summary Judgment because under the common law applicable at the time of the occurrence, a co-employee who violates a duty of care he owes to his fellow employee is civilly liable for injuries caused to that employee when

a. the co-employee's negligence occurs in circumstances such that the co-employee would owe a duty of care to his fellow employee under the common law regardless of the employment relationship, and

b. the injured employee was not injured due to a failure of the employer to discharge it's non-delegable responsibility to provide a safe workplace, i.e., i. safe premises, ii. safe tools, iii. proper warnings, iv. sufficient and competent employees and v. appropriate safety rules,

in that

Defendant Barrett failed to keep a careful lookout and ran over Plaintiff Evan's leg while operating a forklift on a construction site off the employer's premises, and Defendant Barrett was in no way engaged in any non-delegable duty of the employer to provide a safe workplace, but was engaged in the same work as Plaintiff Evans.

Hansen v. Ritter, 375 S.W.3d 201 (Mo.App. W.D. 2012)

Robinson v. Hooker, 323 S.W.3d 418 (Mo.App. W.D. 2010)

State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo.App. E.D. 1982)

Kelso v. W.A. Ross Const. Co., 337 Mo. 202, 85 S.W.2d 527 (Mo. 1935)

§ 287.120 RSMo.

§ 287.800 RSMo.

ARGUMENT

Point Relied On

The trial court erred in granting Defendant Barrett's Motion for Summary Judgment because under the common law applicable at the time of the occurrence, a co-employee who violates a duty of care he owes to his fellow employee is civilly liable for injuries caused to that employee when

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Defendant Barrett failed to keep a careful lookout and ran over Plaintiff Evan's leg while operating a forklift on a construction site off the employer's premises, and Defendant Barrett was in no way engaged in any non-delegable duty of the employer to provide a safe workplace, but was engaged in the same work as Plaintiff Evans.

Introduction

This appeal presents the Court with the question of the proper standard for determining the liability of a co-employee[1] for injuries caused by that co-employee's negligence to a fellow employee. The standard of review applicable to a question of law is *de novo*. *City of Kansas City v. Chastain,* 420 S.W.3d 550, 555 (Mo.banc 2014)[2] Appellant submits that the proper test for liability of a co-employee causing injury to his fellow employee due to his negligence is the approach set forth by the Western District in *Hansen v. Ritter,* 375 S.W.3d 201 (Mo.App. W.D. 2012) and clarified in *Leeper v. Asmus,*-- S.W.3d –; 2014 WL 2190966

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[1] The term co-employee is generally used to refer to the employee that the plaintiff has charged with negligence. For clarity sake, in this brief, Appellant will refer to an employee charged with negligence as a co-employee or defendant employee, and an employee alleging injury as a fellow employee, an injured employee or plaintiff employee.

[2] While there essentially no pertinent facts in dispute, " '[t]he record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and the party is entitled to the benefit of all reasonable inferences.'" *Central Trust And Investment Co. v. Signalpoint Asset Mgt, LLC*, 422 S.W.3d 312, 320 (Mo.banc 2014) (*quoting Goerlitz v. City of Maryville*, 333 S.W.3d 450, 453 (Mo.banc 2011)

(Mo.App. W.D. 2014)[3]. The *Hansen* test provides the appropriate test in light of the abrogation of the judicial extension of the employer's immunity under the Workers Compensation Act (hereinafter, Act). Under the *Hansen* test, if the co-employee defendant committed an act that under the common law is a tort and independent of any safe work place duty of the employer, then that co-employee is civilly liable to the plaintiff. The Western District approach assesses the co-employee's liability under common law principles that preceded the passage of the Act and continued to evolve even thereafter. Those common law principles remained in effect until the employer's immunity from civil suit was judicially extended to co-employees in *State ex rel. Gaertner v. Badami* (Mo.App. E.D. 1982).

Here, the negligent acts took place after the 2005 amendments, which effectively abrogated the judicial extension of the employer's immunity by requiring a strict construction of the statute in determining the scope of the coverage provided. §287.800.1. However, those negligent acts were prior to the 2012 amendment to the Act that made a qualified extension of the employer's immunity from civil suit to employees. §287.120.1.[4] During this gap period,

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[3] As of the time of the filing of this brief, *Leeper* is not final because a motion for rehearing is pending. Nevertheless, *Leeper* is undoubtedly a clarification by the Western District of its holding in *Hansen*. As will be discussed in later in this brief, the Eastern District interpreted *Hansen* differently than the Western District intended. Citations are to Westlaw and that opinion is included in the appendix.

[4] The current Act reads, in pertinent part: "Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable . . . and

the pre-2005 liberal construction of the Act extending the employer's immunity to employees and the 2012 amendments statutorily setting the standard for the civil liability for co-employees are inapplicable. *See Leeper,* 2014 WL 2190966 at 1. And, if this Court returns to the common law principles that were recognized by Missouri courts concerning the liability of co-employee before the judicial extension of immunity under the Act, Defendant Barrett has clearly committed a negligent act independent of the employer's non-delegable duty to provide a safe workplace.

In order to determine the appropriate standard for co-employee liability since the time that our legislature required a strict construction of the Act but before the Act itself established the parameters of civil liability of co-employees, a discussion of the historical basis for an employer and employee's civil liability for work place injuries is warranted. Currently, there is a disagreement between the Western and Eastern District Courts of Appeal regarding the standard for co-employee liability, as the Western District poignantly notes in *Leeper*, 2014 WL 2190966, 15 – 16. In both *Leeper, supra.,* and *Hansen, supra.*, the Western District has endorsed what will be referred to as the "independent duty test"; whereas, the Eastern District follows the "something more" test, which requires the plaintiff employee prove "an affirmative act directed at a particular employee that places the co-employee's conduct

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. . . shall be released from all other liability whatsoever . . . ***except*** that an employee shall not be released from liability for injury or death ***if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. . . .***" 287.120(1) (*emphasis added*)

outside the scope of the employer's non-delegable duties." *Carman v. Wieland*, 406 W.3d 70, 77 (*citing Gunnett v. Girardier Bldg. & Realty, Co.*, 70 S.W.3d 632, 641 (Mo.App. E.D. 2002)). Implicit in the something more test is that the conduct be so far outside an employee's normal performance of her duties that those acts are "affirmatively dangerous". *State ex rel. Wallace v. Taylor*, 73 S.W.3d 620, 622 (Mo.banc 2002) In *Leeper*, the Western District opined that the most recent iteration of the something more test by the Eastern District in *Carman, supra.,* and *Amesquita v. Gilster Mary Lee Corp.*, 408 S.W.3d 293, 303 (Mo.App. E.D. 2013) would "abrogate co-employee negligence at common law by requiring a co-employee to act outrageously, recklessly and intentionally—and thus in a manner outside the scope and course of his duties." *Leeper*, 2014 WL 2190966 at 15.

Historical Background

Before the effective date of the Act in 1927, an employee who was injured on the job could bring a common law action for negligence against his employer and fellow employees; however, there were limits on the liability of both. To sue the employer for the act of a co-employee, the injured employee had to show that the co-employee was discharging a non-delegable duty of the employer. *Hansen*, 375 S.W.3d at 210 n. 11 (*citing Parker v. Nelson Grain & Milling*, 330 Mo. 95, 48 S.W.2d 906, 908-909 (1932)) With respect to suing a co-employee, the plaintiff had to show that the co-employee owed a duty of care independent of the employer's non-delegable duty to provide a safe work place—a duty that existed in common law between the two parties regardless of the employment relationship. *Logsdon v. Duncan,* 293 S.W.2d 944 (Mo. 1956). In any event, an injured employee had to show a breach of a duty of care, either by the employer or by the co-employee, in order to recover for

injuries sustained in the workplace. Missouri's adoption of the Act in 1926 (effective 1927) allowed employees covered by the Act to receive compensation from the employer regardless of whether the injured employee could show a breach of a duty of care. The Act reflected a trade-off: an employer covered by the Act was immune from civil suit for workplace injuries, and an employee was merely required to show the injury arose out of the course and scope of employment as opposed to proving negligence. *Robinson v. Hooker*, 323 S.W.3d 418, 422-23 (Mo.App. W.D. 2010). However, the Act provided that "third parties" continued to be liable for injuries caused by their negligence, and co-employees were deemed to be "third persons" under the Act. *Badami*, 630 S.W.2d at 177 (Mo.App. E.D. 1982), *Sylcox v. National Lead Co.*, 225 Mo.App. 543, 28 S.W.2d 497 (E.D. 1931).

Common Law Limits on Employer and Employee's Liability in Tort for Negligence

Nevertheless, a co-employee's liability for negligence was not unlimited, but that liability was limited by agency principles. Because both employers and employees could opt out of coverage by the Act for many years after its enactment, courts continued to be confronted with the issue of an employer's liability for work place injuries. *See, e.g., Frazier v. Ford*, 396 Mo. 62, 276 S.W.2d 95 (Mo.banc 1955) (Employee who had opted out of the Act sued employer at common law for negligence.) The court's analysis of the employer's liability turned on whether the employee plaintiff was injured by a co-employee who was performing a non-delegable duty of the employer to provide a safe work place, or if that co-employee merely performed his job negligently. *Kelso v. W.A. Ross Const. Co*, 337 Mo. 202, 85 S.W.2d 527, 535-536 (Mo. 1935) Usually, that non-delegable duty specifically involved

providing a safe work place, but not always; it may also involve the employer's duty to direct the employee in his work. *Thomas v. American Sash & Door Co*, 321 Mo. 1024, 14 S.W.2d 1, 2-3 (Mo.banc 1929) However, once a fellow servant undertook the employer's non-delegable duty to direct another servant in his work, the fellow servant providing the direction had to do so in a non-negligent manner, and the master, i.e, employer, was responsible if the fellow servant failed to do so. *Id.* at 4.

Employer's Civil Liability for Violation of Non-Delegable Duty

At common law, an employer was responsible for the acts of its co-employees for injury to other employees when those co-employees were performing a non-delegable duty of the employer. One such duty is the duty to provide a safe workplace.[5] At common law, the duty to provide a safe workplace was comprised of five specific duties:

> (1) to provide a safe workplace; (2) to provide safe equipment in the workplace; (3) to warn employees about . . . dangers of which the employees could not reasonably be expected to be aware; (4) to provide a sufficient number of competent employees; and (5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing employee safety.

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[5] It is more accurate to think of the legal responsibility as being non-delegable. The performance of the duty is almost always delegated to an employee—often a managerial employee, *see e.g., Badami* —but the responsibility for the failure to meet that duty is non-delegable. *Hansen*, 375 S.W.3d at 208, *citing Edge v. Sw. Mo. Elec. Ry. Co.*, 206 Mo. 471, 104 S.W. 90, 97 (1907)

Hansen, 375 S.W.3d at 208 (*citing Gunnett v. Girardier Bldg. & Realty, Co.*, 70 S.W.3d 632, 638, n. 8) (Mo.App. E.D. 2002).

On the other hand, when a co-employee was not engaged in a non-delegable duty of the employer but through his negligence caused injury to his fellow employee, the employer was not civilly liable for the acts of the negligent co-employee. If an employee sued an employer civilly for personal injury resulting from the negligence of a co-employee, the employer could raise the affirmative defense that the co-employee was acting as a "fellow servant". *Hansen*, 375 S.W.3d at 209, FN 11, (citations omitted) By definition, a fellow servant was not acting as an agent of the employer for the purpose of discharging a non-delegable of the employer. *Marshall v. Kansas City*, 296 S.W.2d 1, 2-3 (Mo. 1956) When an employee sued an employer at common law, whether the master violated the duty to provide a safe workplace was a jury question. *Kelso*, 85 S.W.2d at 536.

The Fellow Servant Affirmative Defense

The fellow servant affirmative defense was grounded in agency principles: the employer/master was not liable for the acts of co-employees acting as fellow servants, because that employee was doing that work that she owed to the employer, not discharging the employer's non-delegable duty to its employees. *Kelso*, 85 S.W.2d 527, 535-536 (Mo. 1935) Inherent in the definition of a fellow servants was the idea that the two employees were doing work of a similar nature, such that neither employee would be deemed to be the master. Moreover, the courts also looked to who was in the best position to provide for the safety of the workers on the jobsite, the employer or the employees themselves. *Daniels v. Banning*, 329 S.W.2d 647, 651 (Mo. 1959), *Kelso*, 85 S.W.2d at 535. Even more fundamental was that

the fellow servant's performance of her normal job duties is distinguishable from the employer's non-delegable duty to provide a safe workplace. *See e.g., Marshall*, 296 S.W.2d at 3. (Court distinguished a job negligently done from the non-delegable duty to provide a safe workplace.)

The safety concern reflected a policy consideration that coincided with agency principles: when a co-employee functioned as a fellow servant, the co-employee and her co-workers were deemed to be in the best position to prevent injury to each other. *Daniels,* 329 S.W.2d at 651 and *Kelso*, 85 S.W.2d at 535. The rationale behind the rule may be best illustrated and articulated in *Logsdon v. Duncan*, 293 S.W.2d 944 (Mo. 1956). In *Logsdon*, an employee sued a co-employee who negligently dislodged a brick from a chimney atop a two-story building. The brick fell and hit the plaintiff employee standing on the ground below. The plaintiff also sued another co-employee who failed to shout a warning that the brick may fall from the roof. *Id.* at 948. In affirming a verdict in favor of the plaintiff against the co-employee who dislodged the brick, the court stated:

> This is an action by an employee against two of his fellow employees . . . governed by the most elemental principles of tort liability. For their mutual safety all employees are necessarily dependent upon the care they exercise with respect to one another and by reason of their relationship each employee owes to his fellow workman the duty to "to exercise such care in the prosecution of their work as men of ordinary prudence use in the like circumstances, and he who fails in that respect is responsible for the resulting physical injury to his fellow servant."

Id. at 949. (citations omitted) By comparison, the court determined that another co-employee who the plaintiff alleged failed to provide a warning to persons below that bricks were being thrown off the roof did not violate any personal duty—such a duty would clearly be subsumed under the duty to provide a safe workplace. *Id.* at 590. The court recognized in *Logsdon* that in some instances, the failure that causes injury to an employee results from the employer's failure to provide a safe workplace—whether it is the failure to provide safe equipment or warn of dangers on the job. In other instances, a co-employee may have failed to do her job in a safe and prudent manner despite the fact the employer did all that was required of it to provide for a safe workplace.

When the breach of the co-employee alone causes injury to another employee, the employer was not liable under common law, but the co-employee was. *Marshall, supra.,* provides just such an example. The plaintiff employee sued the employer when he was injured stepping over an air compressor hose attached to a jack hammer. As the plaintiff stepped over the hose, another employee shook the hose to get a kink out. *Marshall, 296 S.W.2d* at 2. The appellate court set aside a jury verdict in favor of the plaintiff against the employer because it determined there was no evidence that the employer breached its duty to provide a safe work place: "[Plaintiff's] injury came about by reason of [co-employee's] negligent use of the hose and not because it was defective." *Id.* at 3.

Where the injury took place as well as how the injury took place was an important consideration. The fact the injury took place off of the employer's premises was relevant to whether the employer itself was liable for a breach of its non-delegable duty to provide a safe work place, because the employer would generally have more control over its own premises.

Constructions sites presented their own particular issue. Our Supreme Court stated in *Kelso*: "In construction where conditions are constantly changing, the duty of providing a safe place of work cannot be imposed to the same extent as in the case of work done in a more permanent location . . . because it is impossible to keep the . . . actual physical location in which the work is done, as safe as a place in a completed structure." The court went on to state the employer may then be responsible for establishing (or failing to establish) a process or rules for conducting work safely in a complex work environment. *Id.* at 217. Hence, whether the employer breached its duty to promulgate and enforce rules for the safe performance of work became the relevant inquiry. *Id.*

Under certain circumstance, a vehicle could be considered the workplace. And, if a co-employee did something to render the vehicle unsafe, the employer could be liable for the co-employee's negligence. For example, in *Bender v. Kroger*, 310 Mo. 488, 276 S.W. 405, 407 (Mo 1925) the employer was held liable for a co-employee's failure to chock the wheels of a trailer. The plaintiff employee was injured when he entered the trailer to unload and the trailer rolled forward. The co-employee's failure to chock the wheels was not deemed to fall within the fellow servant doctrine, but it was deemed to be the co-employee's failure to perform the employer's non-delegable duty to provide a safe work place. The court reasoned that the truck represented the employee's place of work when he entered the truck to unload. *Id.* at 407.

Vice Principals and Fellow Servants

The fellow servant affirmative defense was bottomed on agency principles that differentiated the role of vice principals—essentially management employees—from those

employees doing the general work of the employer, or fellow servants. In agency law, a vice principal was an agent or employee of the employer who acted in the employer's stead, e.g., directing other employees in their works. *Thomas* 14 S.W.2d at 3. Although supervisors and management employees would generally be deemed vice principals, even lower-level employees who were charged with directing other employees on the job could be deemed a vice principal relative to those actions. For example, an employee who ran a ripsaw and directed a new laborer assisting him was deemed to be acting as a vice principal to the extent he provided direction. As such, the ripsaw operator was deemed to be performing the employer's duty to "direct and control other servants in the branch of the master's business . . . ." *Id.* Moreover, the court implicitly recognized that certain employees could in some aspects be considered a fellow servant vis-à-vis their co-workers, while in other instances, be considered a vice principal. The court explained that the distinction of vice principal and fellow servant turned on the circumstances under which the two employees interacted. Once an employee was deemed to be a vice principal relative to his fellow employee, the vice principal assumed the employer's responsibility of providing a safe work place. *Id.* at 4.

Nonfeasance Versus Misfeasance

The court in *Hansen* tracked the development of co-employee liability, recognizing that liability principles were consistent with agency law, and that the law of liability in the workplace evolved with the law of agency. In delving into that history, the court noted: "At the beginning of the twentieth century, the conduct of co-employees was divided into two categories—nonfeasance, the failure to perform a duty, and misfeasance, the negligent performance of a duty. (citations omitted) The distinction defined the boundary of co-

employee liability to fellow employees." The master/employer was liable for both the servant's nonfeasance and misfeasance. But with respect to the employee's liability to third parties, he was only liable for his misfeasance. The same nonfeasance/misfeasance distinction applied to co-employee liability: a co-employee was liable to his fellow employee when he negligently performed a duty causing injury, but not as a result of the failure to perform a required duty. *Hansen*, 375 S.W.3d at 210-211 (*citing McGinnis v. Chicago Rock Island & Pac. Ry. Co.*, 200 Mo. 347, 98 S.W. 590, 592; *Jewell v. Kansas City Bolt & Nut Co.*, 231 Mo. 176, 132 S.W. 703, 711 (1910) This distinction was still a part of the law at the time the Act became effective. *Id.* at 211. However, the agency law continued in its evolution after the Act's adoption, and our Supreme Court concluded less than 10 years after the Act became effective that the "dichotomy [between nonfeasance and misfeasance] was 'a fictitious distinction, which can only result in confusion' as acts of omission or commission could fall into either category.'" *Id.* at 212 (*citing Lambert v. Jones*, 339 Mo. 677, 98 S.W.2d 752 757 (1936)). Ultimately, our Supreme Court concluded:

> It would seem, however that the test, which would be most reasonable, which would really eliminate the confusion resulting from attempting to classify various acts or omissions of agents or employees as misfeasance or nonfeasance, and by which all situations could be more clearly and correctly solved, would be the rule that ***a servant*** or agent ***is liable for acts or omissions causing injury to third persons whenever***, under the circumstances, ***he owes a duty of care in regard to such matters to such third persons.***

Hansen, 375 at 212 (***emphasis added***) (*quoting Lambert*, 98 S.W.2d at 759) Hence, our Supreme Court abandoned the nonfeasance and misfeasance distinction and adopted the independent duty test that was the standard for determining liability for co-employees in *Daniels, Logsdon, Banning, Marshall and Thomas, supra.*

***Badami* and Something More**

Coverage under the Act eventually became mandatory. At the time that the Eastern District addressed the issue of co-employee liability in *Badami,* there had been little, if any, discussion by Missouri appellate courts of co-employee liability in the last 20 years leading up to the decision. Because the court's formulation of a new rule for co-employee liability in *Badami* was a product of its facts, an in-depth discussion is warranted. The circumstances under which the plaintiff was injured provide a clear illustration of why the acts of the co-employee's fell under the employer's non-delegable responsibility to provide a safe workplace. Moreover, while the rule of *Badami* made sense in the context of its facts, it was nonetheless, unnecessary. *Hansen*, 375 S.W.3d at 214. (The court noted that *Badami* would have been decided the same way by applying common law agency principles, and that the 'something more' test added nothing to the common law.")

In *Badami*, the plaintiff stuck his hand into an unguarded shredding machine. He brought a civil suit against two supervisory employees, the corporate president and the production manager, alleging that the employer "delegated to each of the defendants the duty of providing their fellow employees with a reasonably safe place to work . . .." Based on the pleadings, the defendants did not have a connection with the occurrence other than being charged with the duty to "provide the fellow employee a reasonably safe place to work."

Badami, 630 S.W.2d at 176. After setting forth the facts pled, the court framed the issue before it: ". . . *whether a supervisory employee, including a corporate officer*, may be held personally liable for injuries sustained by a fellow employee . . . where the injuries occur because of the supervisor's failure to perform the duty, assigned to him by the employer, to provide the fellow employee a reasonably safe place to work." *Id.* at 176. (*emphasis added*) The court acknowledged that an employee is liable when he breaches a duty at common law owed to a fellow employee independent of the duty to provide a safe work place. *Id.* at 179. However, because the pleadings themselves did nothing more than allege a breach of the duty to provide a safe workplace, the court had sufficient basis to hold that the supervisory employees did not breach any independent duty. *Hansen*, 375 S.W.3d at 214.

The *Badami* court did discuss the common law as it applied to the employer's liability to its employees before and after the adoption of the Act; however, the court turned its analysis from whether the duty breached was a non-delegable duty of the employer, to older decisions that attempted to distinguish active negligence or "misfeasance" from passive negligence, or "nonfeasance". The court noted that "[u]nder criticism, the distinction was blurred and perhaps effectively eliminated by our courts as a viable concept in agency and tort law." Ultimately, the court concluded that the "blurring and elimination of the distinction developed in agency and tort law independent of our compensation legislation . . ." left the Act in a state of disrepair regarding co-employee liability. *Id.* at 178.

The court then pondered whether it should "fix our compensation legislation . . ." due to confusion in the law that developed after its enactment. *Id.* The court answered its own

question in the affirmative, and after reviewing various state approaches to supervisory employees' civil liability, the court adopted a new rule based on Wisconsin law:

> [W]e find the approach developed by the Wisconsin Courts comes closest to defining the intent of our legislature. Charging the employee chosen to implement the employer's duty to provide a reasonably safe work place merely with the general failure to fulfill that duty charges no actionable negligence. *Something more must be charged.*

Id. at 180. (*emphasis added*) That "something more" was "an affirmative negligent act causing or increasing the risk of injury." *Id.* at 179.

Badami intended to prohibit lawsuits against supervisory or management employees merely because those employees were charged with the general duty to insure a safe work place. To this extent, *Badami* is perfectly consistent with *Hansen*, where the plaintiff employee merely alleged a failure by vice principals of the employer to carry out the non-delegable duty to provide a safe work place. *Hansen*, however, based its result on common law agency principles. For this reason, the Western District, as discussed in *Robinson, supra., Hansen, supra.,* and *Leeper, supra.,* failed to see the need for *Badami's* solution of the judicial construct extending the employer's immunity under the Act to co-employees. In fairness, there is nothing in the *Badami* decision to indicate the court intended to prohibit lawsuits based on a fellow servant's breach of a duty of care independent of the employer's non-delegable duty to provide a safe workplace. In explaining the necessity for adopting the rule, the court stated:

> Under the present industrial operations, *to impose upon executive officers or supervisory personnel personal liability for an accident arising out of a condition at a place of employment* which a jury may find to be unsafe would almost mandate that the employer provide indemnity to such employees. That would effectively destroy the immunity provisions of the workmen's compensation law.

Id. at 180. (*emphasis added*)

Crucial to *Badami's* holding is the fact that it involved vice principals, unlike *Sylcox* and *Logsdon*, *supra.*, both of which involved fellow servants. The co-employees in *Sylcox* and *Logsdon* worked in close proximity with the plaintiff, ostensibly on a daily basis, such that their failure to use reasonable care in *the performance of their normal job duties would foreseeably result in injury to the plaintiffs.* In *Badami*, and as will later be seen in *Hansen*, *supra.*, the co-employees were supervisory employees, who would be unlikely to have any direct contact with the plaintiffs; the only acts chargeable to the co-employees in *Hansen* and *Badami* were in their role as vice principals, discharging the employer's non-delegable duty to provide a safe work place.

Appellant submits the *Badami* court was cognizant of this when it limited the scope of the "something more" test to supervisory and management employees charged with failing to insure safe working conditions. The court never expressly addressed the liability of "fellow servants", who through their own negligence cause injury to other employees. Also, the court cited an earlier co-employee liability case, *Sylcox, supra.,* for the proposition that co-employees were third persons under the Act who remained liable for injuries caused to fellow

employees. (In *Sylcox*, a co-employee bus driver was held to be independently liable for injuries caused to a passenger employee who was injured when the driver accelerated while the injured employee was disembarking from the bus, *Sylcox,* 38 S.W.2d at 502) The *Badami* court explained that *Sylcox* "simply articulated the rule that an employee becomes liable to a fellow employee when he breaches a common law duty owed to the fellow employee independent of the master-servant or agent principal relationship." *Id.* at 180.

Not long after *Badami*, courts still talked of a personal duty of care, and viewed that duty of care as it applied to vice principals different than fellow servants, as vice principals were inherently engaged in the employer's non-delegable duty to provide a safe workplace. For example, in *Craft v. Scaman,* 715 S.W.2d 531 (Mo. App. ED 1986), the defendant was a corporate officer who intervened at the plaintiff's work station to try to "fix" the machine on which the plaintiff was working. The defendant then ordered the plaintiff to continue working, and the machine caught fire, injuring both the plaintiff and the defendant. *Id.* at 533. All parties agreed that the event was covered by workers compensation, but the plaintiff argued that because the corporate president was acting as a co-employee (aka, fellow servant), and not as the employer, to wit, as a vice principal, the defendant remained liable to the plaintiff for a common law tort as a third person under the Act. *Id.* at 535-536. The court agreed, and it discussed *Badami*, pointing out that *Badami* addressed the liability of corporate officers. The court noted that "something more" was not an intentional act, and it disagreed with another appellate decision that interpreted something more to be an intentional act, as well as the extension of the intentional act or something more standard to co-employees, as opposed to limiting it

management employees. The court stated: "An analysis of the Wisconsin cases relied upon in *Badami* indicates such an extension is unwarranted." *Id.* at 537.

Moreover, in commenting on *Craft*, the court in *Stanislaus v. Parmalee Indus., Inc.*, 729 S.W.2d 543, 546 (Mo. App. W.D. 1987) stated that "the supervisor was liable in tort to his fellow employee because when he negligently . . . applied friction to the spinning reel of [a] fuse . . . he doffed his supervisory cap and donned the cap of a co-employee, which caused him to be a 'third person' under the Worker's Compensation Law. Both *Craft* and *Stanislaus* recognized the difference in the liability of co-employee/fellow servants, and management employee/vice principals, and how their inherent roles in the workplace affected their liability for negligent torts involving co-workers. *Badami* previously had recognized this distinction as well, but sometime after the *Badami*, *Craft* and *Stanislaus*, the distinction was lost. Our Supreme Court's decision in *Taylor, supra.*, signaled the complete elimination of the distinction and the abrogation of the fellow servant doctrine as part of the rule of tort liability for negligence in the workplace.

The Expansion of the Something More Test to Fellow Servants

Missouri courts have struggled over the years in formulating a clear test for co-employee liability but the facts in *Badami* neither required nor warranted the judicial legislation of a new test. *Badami's* something more test may have been a logical extension of agency principles if limited strictly to management employees—vice principals who inherently act as an extension of the employer—but the something more test swallowed the common law fellow servant and independent duty rule. Courts after *Badami* expanded its

something more test beyond the limited fact pattern of management employees or vice principals charged with merely failing in the employer's non-delegable responsibility to provide a safe work place. The Western District in *Leeper* referred to this expansion as the "refined something more test", which led to irreconcilable results when nearly identical fact patterns were decided under the common law independent duty test and the "refined something more test." *Leeper*, 2014 WL 2190966 at 12- 14.

Nowhere is that inconsistency more evident than in *Taylor*, *supra.*, a 2002 Missouri supreme court decision, and *Quinn v. Clayton Construction Co., Inc.*, 111 S.W.3d 428 (Mo.App. E.D. 2003). In *Taylor*, the plaintiff employee was injured while riding on the back of a trash truck when the co-employee driver struck a mailbox. *Taylor*, 73 S.W.3d at 621. The Supreme Court began its analysis by stating " '. . . an employee may sue a fellow employee for affirmative negligent acts outside the scope of an employer's responsibility to provide a safe work place.'" *Id.* at 621-622. (*quoting Kelley v. DeKalb Energy Co.,* 865 S.W.2d 670, 672 (Mo.banc 1993)[6] The Court then noted that "[t]he question of what

[6] Ironically, the court's citation to *Kelley*, *supra.,* in footnote 6 also cites although does not quote *Badami, supra*; as noted previously, in *Badami*, the facts and the court's explanation of the rule adopted were strictly limited to supervisory/management employees, or vice principals, not "fellow employees." In *Kelley*, the plaintiff sued employees who designed a "corn flamer", a tool used for "flaming corn plants just enough to retard their growth . . ." that exploded. The identity and position of those fellow employees is not discussed in detail, but

constitutes an 'affirmative negligent act' has not proven susceptible of reliable definition, and Missouri courts have essentially applied the rule on a case-by-case basis . . .." Thereafter, the Court discussed five cases in footnote 7, all decided after *Badami*, applying the something more test." *Id.* at 622. What the Court's analysis in *Taylor* shows is that after *Badami* and its judicial extension of the employer's immunity to co-employees, most Missouri courts eventually abandoned the common law independent tort analysis and applied the *Badami* something more test. Not only did most courts apply the rule of *Badami* beyond its facts—they also lost sight of the fact that the express statement of the *Badami* rule was limited to management or supervisory employees who were functioning solely as vice principals in carrying out the employer's non-delegable responsibility to provide a safe work place.

In *Quinn,* the Eastern District held that a co-employee who threw a piece of angle iron off of the roof of a construction site without warning, striking a fellow employee below, was not civilly liable to the injured employee, because the plaintiff's "claims amounted to nothing more than an allegation that [defendant co-employees] failed to discharge their duty to safely throw iron from the roof." 11 S.W.3d 428, 433-34. The *Quinn* court explained that the co-employee had not engaged in "an affirmative act directed at [the injured employee] that increased risk of injury." The logic and result are impossible to reconcile with the

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the employer had been using those flamers for four years. The court's decision in *Kelley* could easily be reconciled with the independent duty test in that the co-employee's design of the corn flamer fell under the employer's non-delegable duty to provide safe tools.

independent duty analysis employed by our Supreme Court nearly 50 years earlier when it held that a co-employee who dislodged a brick from the roof of a building that fell onto the head of a fellow employee below breached a common law duty of care to the injured employee distinguishable from the employer's duty to provide a safe work place. *Logsdon*, 293 S.W.2d at 949-950. The Western District's conclusion in *Leeper* that the "refined something more test" and the common law independent duty test were incompatible and would lead to different results on the same facts is illustrated by these cases. *Leeper,* 2014 WL 2190966 at 13-14.

Case Law Support in the Southern District for the Independent Duty Test

The Western District in *Leeper* cited a Southern District case, *Workman v. Vader*, 854 S.W.2d 560 (Mo.App. S.D. 1993) for further proof that the common law duty test could not be reconciled with the refined something more test. In *Workman*, an injured employee sued a fellow employee who threw packing materials on the floor behind the counter. The plaintiff employee was injured when she slipped on the packing materials. *Leeper*, 2014 WL 2190966 at 14, (*citing Workman* 854 S.W.2d at 561). The trial court dismissed the plaintiff's petition, but the Southern District reversed and remanded, basing its decision on common law principles that the co-employee violated a duty owed to fellow employees. *Workman*, 854 S.W.2d at 564. The Western District in *Leeper* explained how the Southern District's analysis was at odds with decisions from the Eastern District, which used the refined something more test:

> The Southern District concluded the act of throwing the cardboard on the floor did " 'not involve a general nondelegable duty of the employer,' but instead the

co-employee's common law duty to exercise reasonable care. (*Workman*, 854 S.W.2d at 564) In *Gunnett*, the Eastern District explored several 'something more' cases, and acknowledged that the imposition of a common law duty in *Workman* could not be reconciled with the 'something more' test because the co-employee's conduct in *Workman* was not purposeful, affirmative conduct directed at another employee. *Gunnett*, 70 S.W.3d at 640, n. 9.

Leeper, 2014 WL 2190966 at 14. The Western District's discussion of *Workman* may reflect both a difference in how the Southern District at that time approached the issue of co-employee liability compared to the Eastern District, as well the fact that decisions closer in time to *Badami* and before *Taylor* were more apt to fall back to common law tort principles and limit *Badami's* rule to its particular facts and express holding i.e., the liability of managerial employees whose only alleged breach of duty was the failure to provide a safe work place.

***Robinson*: Recognition of the Act's Abrogation of *Badami's* Judicial Extension of Employer's Immunity**

Because *Badami*'s extension of the employer's immunity under the Act involved the judicial expansion of the definition of an employer to include co-employees, the Western District determined in *Robinson* that *Badami's* judicial extension of the employer's immunity could not survive the 2005 Amendments, which required a strict construction of its terms. §287.800.1 The Western District's decision in *Robinson* also squared with the "long-standing principle that close questions regarding the existence of common law rights should weigh in favor of retaining the common law right of action. *Id.* at 425, n. 4, (*citing Distefano v. Saint-*

Gobain Calmar, Inc., 272 S.W.3d 207, 211-12 (Mo.App. 2008); *Looper v. Carroll*, 202 S.W.3d 48, 64, n. 6 (Mo.App. 2006) In *Robinson*, the Western District acknowledged what all courts who have extensively studied the history of co-employee liability have acknowledged: at common law, both before and after the adoption of the Act, a co-employee was a third person who could be sued for ordinary negligence by a fellow employee, provided that the co-employee breached a duty of care independent of the employer's non-delegable responsibility to provide a safe work place. *Badami's* something more test, and later cases that expanded the reach and scope of the test, clearly derogated the common law right of injured employees to sue co-employees who breached a common law duty of care.

The Western District Adopts the Independent Duty Test: *Hansen v. Ritter*

While some may have believed that *Robinson* allowed injured employees to sue a co-employee for a breach of any duty of care that proximally caused injury, the Western District disabused that notion in *Hansen, supra.* The *Hansen* court engaged in a lengthy review of the development of the common law liability of one employee to another and the effect of *Badami's* adoption of the something more test, but the court's extensive analysis addressed a very limited issue: whether "the precise contours of the common law duty co-employees owe to one another in the work place [includes] a duty to perform the employer's non-delegable duty . . . ." *Hansen*, 375 S.W.3d at 208.[7]

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[7] The plaintiff's allegation in *Hansen* and *Badami* are nearly identical in this respect: they both involve a "supervisor's failure to perform the duty, assigned to him by the employer, to provide the fellow employee's a reasonably safe place to

In *Hansen*, the plaintiff filed a wrongful death action arising out of the death of her son on a jobsite. She named the employer's corporate safety manager and operations manager as defendants, alleging that they each had a duty to provide a safe working environment and partake in safe work practices. What is significant about the Amended Petition was that it failed to make any specific allegations concerning how the defendants owed any duty to the decedent other than the duty to provide a safe workplace.[8] The trial court granted the

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work." *Badami*, 630 S.W.2d at 176. In *Hansen*, the defendants were the corporate safety manager and operations manager; and in *Badami*, the defendants were the corporate president and the production manager.

[8] The petition alleged the following duties of the two defendants:

(a) Each "had a duty and/or undertook to provide [Employer's] employees with a safe working environment, which included making hazardous conditions safe and warning employees of unsafe or hazardous condition present in [Employer's] facilities."

(b) Each "had a duty to detect, correct and prevent work practices and working conditions which would render the plant not reasonably safe for its employees."

(c) Each "was an agent of [Employer] who undertook to act for [Employer] under such circumstances that [each] had a duty to take some action for the protection or tangible things of [Employer's] employees and other individuals present in [Employer's manufacturing facilities."

defendants' motion to dismiss for failure to state an actionable claim, and the plaintiff appealed. *Hansen*, 375 S.W.3d at 203-4 Hence, the issue for the court of appeals was whether the defendant supervisory employees owed a duty of care to their fellow employees to provide a safe work place independent of the employer's non-delegable duty.

Ultimately, the *Hansen* court concluded that the "underlying (and long standing) common law principle that a co-employee owes no duty to fellow employees to perform an employer's non-delegable duties remains good law." *Id.* at 216 (*citing Badami* and *Stanislaus,* 729 S.W.2d at 546. The touchstone for whether a cause of action exists is if the co-employee was merely performing a non-delegable duty of his employer, or if he injured his fellow worker by breaching a duty that existed independent of the master-servant relationship. *Hansen* builds upon *Robinson,* concluding that "*Robinson* neither created nor defined the rights or remedies of an injured person against co-employees but merely acknowledged that whatever rights and remedies were available 'at common low or otherwise' were not barred by the exclusivity provision of the Act." *Hansen,* 375 S.W.3d at 207. The *Hansen* court specifically does not state what acts are actionable, but it requires that a petition must allege

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(d) Each had a duty and/or undertook a duty to work in conjunction with and direct [the other] and other employees of the plant whose duties included the implementation of safety provisions and performance of the plant maintenance, to detect and correct dangerous conditions at the plant and to warn plant employees of such dangerous and hazardous conditions."

that the co-employee owed a duty to the injured person *independent* of the employer's non-delegable duties. *Id.* at 216-17.

The Eastern District Continues to Follow Something More: *Carman v. Wieland*

In *Hansen*, the Western District provided arguably the most thorough discussion yet of the evolution of the common law concerning co-employee liability in explaining its conclusion that the independent duty test was well-founded in the common law. While many readers believed that *Hansen* indicated a departure from the something more test as it developed after *Badami*, the Western District's discussion of post-*Badami* something more cases—most notably *Taylor, supra.,*—arguably confused the issue. Hence, the Eastern District's decision one year after *Hansen* in *Carman, supra.,* still purported to follow *Hansen*'s independent duty test while at the same time fully endorsing the something more test.[9] In *Carman*, a firefighter sued a co-employee and fellow firefighter who backed a fire truck over her, resulting in serious injury. *Id.* at 72. The defendant firefighter filed for a motion for summary judgment on two grounds: 1. The statute of limitations applicable to sheriffs, coroners and other officers barred the claim; and 2. That the defendant firefighter was merely discharging the employer's non-delegable duty to provide a safe workplace when he backed the truck up over the plaintiff. The appellate court determined that a firefighter was not an "officer" as defined by a statue granting officers a limited immunity, and hence the

[9] Many after *Carman* maintained that the tests in *Hansen* and *Carman* are irreconcilable; the Western District itself agrees, as the same panel who decided *Hansen* expressly stated in *Leeper*, 2014 WL 2190966 at 13.

plaintiff's claim was not barred by the statute of limitations; however, the court also held plaintiff merely alleged a breach of the employer's non-delegable duty to provide a safe work place. The court affirmed the summary judgment on those grounds. *Id.* at 72-73.

The plaintiff argued that "the defendant's duty to operate the vehicle with the highest degree of care exists independent of any duty imposed on the defendant by his employer . . . [and] the defendant owed this duty to the general public, including plaintiff, regardless of whether the defendant was on the job site or on the public roadways." Moreover, the plaintiff concluded that "because the safe operation of a motor vehicle is not among the employer's non-delegable duties, it is a personal duty owed by the defendant, fully independent of any master-servant relationship." *Id.* at 76. While such an argument would make sense under the independent duty test set out in *Hansen*, the Eastern District in *Carman* disagreed. Essentially the court held that driving, or presumably performing any job function safely, is part of the employer's non-delegable responsibility. Moreover, the court deemed its holding consistent with *Hansen*:

> . . . [a] fundamental question . . . is whether a duty exists between the parties at common law. *Hansen* states that *Badami* drew the line of common-law duty and immunity under the Act co-extensively. 375 S.W.3d at 216. But *Hansen* also recognized that while the abrogation of *Badami's* judicial construct eliminated immunity under the Act for a co-employee who fails to perform the employer's non-delegable duty, *Badami's* acknowledgment of the underlying common law principle that a co-employee owes no duty to fellow employees to

perform an employer's non-delegable duties remains good law. (*citing Hansen,* 375 S.W.3d at 216)

Id. at 78, n. 4. Even though the Eastern District in *Carman* purports to follow the Western District's decision in *Hansen* and appears to implicitly acknowledge that *Badami's* judicial extension of the employer's immunity under the Act to co-employees is no longer valid, the Eastern District then looks solely to post-*Badami* decisions to determine the common law duties between co-employee's. In particular, the court cited *Taylor*, *supra.*, a co-employee driving case as well as *Nowlin ex rel Carter v. Nichols*, 163 S.W.3d 575, 580 (Mo.App. W.D. 2005) (The plaintiff's allegation that a co-employee negligently operated a bulldozer and ran over and killed a co-worker failed to allege "something more".) The *Hansen* court's earlier citation to these cases was quizzical as it could have been taken to mean that those cases were in harmony with *Hansen.* Appellant submits a close reading of *Hansen* would prove otherwise, as *Leeper* would later show.

***Leeper v. Asmus*: The Western District and Eastern District Are in Conflict**

The Western District put to rest the question of whether *Carman* was consistent with or contradicted *Hansen* with its decision in *Leeper* on May 27, 2014, expressly stating its disagreement with *Carman* concerning the appropriate test for co-employee liability. The Western District saw *Carman* as a continuation of a "refined something more test" that evolved after *Badami.* Moreover, the Western District characterized *Carman* and a subsequent Eastern District decision, *Amesquita, supra.,* as at odds with the common law regarding agency principles and co-employee liability: "The principle that the performance or failure to perform a job will never support a duty of care independent of the employer's non-

delegable duty has no support in the common law." *Leeper*, 2014 WL 2190966 at 15. (*italics* original) The court made the unequivocal statement that a co-employee merely doing his job ***could*** be liable to a fellow employee; something more in the form of an affirmative negligent act directed at the injured employee that increased the risk of injury in the workplace ***is not*** the appropriate test for co-employee liability under the common law. *Id.*

In *Leeper*, the plaintiff employee was injured when he and a co-employee were working together guiding a 500-pound pipe into the tower of a drilling rig. The plaintiff employee was guiding the pipe while the co-employee was operating the rig. The pipe was loosely secured with a cable, and when the co-employee began to lift the pipe with a winch, the pipe broke loose and fell on the plaintiff employee, crushing his arm. *Id.* at 2. The co-employee moved to dismiss an amended petition because "the plaintiff did not establish the first essential element of a claim of negligence—the existence of a duty—because [plaintiff] did not allege that [defendant] committed a purposeful, affirmative act directed at [plaintiff]." The *Leeper* court, which was the same panel as *Hansen*, again began its analysis with an in-depth discussion of the common law of co-employee liability both before and after the Act. This time the court focused significantly on the *employer's* liability at common law. By identifying those non-delegable duties or responsibilities of the employer, the court was able to determine if any remaining duty of care that was breached in causing the injury was one that arose between the two employees themselves. *Id.* at 5-10.

The *Leeper* court's reliance on common law agency principles is reflected by the steps it enumerates to determine if a duty of care was one between the two employees or was one subsumed within the employer's non-delegable duty to provide a safe work place: "Plainly,

the starting point is to first determine whether a workplace injury is attributable to a breach of the employer's nondelegable duties, a question of fact." *Id.* at 10.

The Eastern and Western Districts Views of Agency Principles and Duty

Both the Eastern and Western District purport to view a co-employee's liability to fellow employee's for work place injuries as based on agency principles. However, their analyses part ways when they each look to whether the duties and agency relationship is viewed in only the context of the relationship between the employer and employee—the Western District approach—or if the agency principles are viewed in light of the employer and employees relationship to persons outside the employment relationship—the Eastern District approach. In other words, the Western District follows the common law approach to determine common law tort liability for both the employer and a co-employee. As noted in *Kelso*, "[t]he fellow servant rule is said to be a 'departure from the ancient rule of respondeat superior.'" *Id.* at 537. Nevertheless, it was a well-established part of the common law. The Western District approach acknowledges that a fellow servant/co-employee performing a job other than the employer's non-delegable duty to provide a safe work place is not the employer's agent vis-à-vis his fellow servant; that fellow servant/co-employee's failure to use due care not to harm his fellow worker results in the co-employee's liability—not the employer's liability.

The Eastern District focuses more on general agency principles and almost exclusively on how those principles apply when looking at the co-employee as an agent of the master in relation to the general public—not in relation to fellow employees. This explains the Eastern District's failure to account for the fellow servant doctrine as an exception to normal agency

law. For example, in *Carman,* the court neither mentions nor discusses the fellow servant doctrine. This is despite the fact that the fellow servant doctrine specifically addresses the liability of employers to employees, and it does so by analyzing whether the independent negligence of a fellow servant caused the injury to the plaintiff.

In considering agency principles involving an employer's liability to the general public, unquestionably a fellow servant/co-employee performing the ordinary work assigned to him by the employer is the employer's agent. And, under agency principles, the employer is liable for injuries caused by that employee's negligence while performing duties in the normal course and scope of the employee's employment. *Daughtery v. Allee Sports Bar and Grill*, 260 S.W.3d 869, 872 (Mo.App. W.D. 2008) However, in common tort law, that is with respect to injuries caused *to persons who are not also employees*. *Id.* As to its employees, the employer's common law liability was for injuries caused by co-employees, whether fellow servants or vice principals, performing the employer's non-delegable duty to provide a safe workplace. *Kelso*, 85 S.W.2d at 534- 535.

Plaintiff Evans was injured after the 2005 Amendments to the Act abrogated the judicial extension of the employer's immunity, but before the Act itself did so in 2012 in a limited fashion by codifying the something more test. During that time, the Act did not extend the employer's immunity from civil suits to co-employees. Hence, a co-employee who through his own negligence causes injury to another employee is civilly liable for those injuries provided that co-employee was not in the performance of the specific non-delegable duties of the employer to provide a safe workplace. This is the Western District approach, and Appellant submits the Western District approach is the proper approach and the one that

tracks the common law liability of employers and co-employees by focusing on their relationship and duties to each other, and not on duties owed to third persons who are unrelated to the event and injury.

Different Relationships Within the Workplace

While not expressly stated in the cases, employers and employees owe each other a variety of duties as a result of the employment relationship. Most employers are in business to provide goods and services to the general public, and those employers hire employees to provide these goods and services. For example, Kraft produces cheese and various cheese products at its plant that are available for sale at the supermarket. Kraft hires various individuals to run machines to make cheese products, sell those products and deliver them to customers. An employee operating a machine slicing cheese is performing the work in which Kraft is engaged, and that employee is doing that work which he owes to his employer, Kraft, in exchange for his pay check. The same is true as to the co-workers who process the cheese, package it, deliver it to supermarkets or warehouses, etc. Those employees are fellow servants engaged in the common work of Kraft. *Daniels*, 329 S.W.2d at 51.

However, Kraft and other large corporate employers employ other persons in order to discharge the duty to provide a safe workplace. When the plant safety manager determines what rules are necessary for the safe operation of the plant, e.g., whether a machine needs a particular guard, *see e.g. Badami,* and *Hansen*, or what protective clothing or eyewear employees need, *see e.g.*, *Stanislaus,* 729 S.W.2d at 546, the safety manager is discharging that duty of the employer to its employees. Or, in common law agency terms, the safety manager is a vice-principal, and she is performing the non-delegable duty of the employer to

provide a safe workplace. The safety manager should insure that the cheese slicing machine is properly guarded so as not to amputate workers' appendages; however, the employee who is operating the cheese slicer also owes a duty of care to insure he operates it non-negligently and does not, through his negligence, injure any of his co-workers, *see e.g. Marshall*, 296 SW.2d at 203. When assessing the duties owed by co-employees to fellow employees in light of the employer's non-delegable duty to provide a safe workplace, it only makes sense to view the employer and employee as two separate entities with duties to each other. A co-employee should be viewed as an agent of the employer, and hence the employer itself, only in certain circumstances where the co-employee is performing the employer's non-delegable duties, foremost being the duty to provide a safe workplace.

When evaluating the employer's liability for the acts of its employees for injuries caused to the general public, the aforementioned perspective and the fellow servant doctrine have no place in the analysis. This is because an employee is an agent of her employer in her interactions with other parties; hence, an employee merely doing her job can be deemed to acting as the employer. Furthermore, this makes sense because the employer's liability to someone outside the employment relationship is the issue. For example, a company representative who sells product and makes deliveries is doing the employer's work when she travels to a customer's site and delivers product and takes orders. While the sales representative is acting as an agent of the employer in performing those job duties, she is acting as an extension of the employer relative to that third party, the customer. If in the course and scope of making a delivery she is involved in a motor vehicle collision, the employer is liable to that third party under the common law. However, if that same employee

returns to the warehouse and begins to operate a forklift to assist in loading more product on her truck in order to make more deliveries, she has a different relationship as it pertains to the employer's liability for her negligence at common law. The sales representative and the warehouseman helping to load the truck are performing duties they owe to the employer—to do their job of selling and delivering product to their customer. If the sales representative runs over the warehouseman with the forklift, she is the furtherance of those duties she owes the employer, not in those duties owed by the employer to the employees of a safe work place. The sales manager, in operating the forklift, is not functioning as an extension of the employer vis-à-vis her co-worker.

In the example above, the two employees are acting as fellow servants, neither directing the other in the performance of the job duty, and both doing that work which they owe the employer. Now assume that the sales representative operating the fork lift did so in a non-negligent manner; however, the warehouseman is injured because he is standing on a dock plate, which unbeknownst to either he or the forklift driver is defective, and the dock plate crashes to the ground, crushing his leg. The duty to provide a safe work place and safe equipment is one of the employer's non-delegable duties it employees. Under common law principles, the employer would be responsible for the breach, regardless of to whom the employer assigned that performance of the duty. However, an individual employee—including an individual employee charged with the duty to insure the workplace is safe—would not personally liable. Even where the warehouseman could identify an employee, for example, the safety manager, who was responsible for insuring the safety of the warehouse and show that the dock plate failure was due to the failure of the safety manager to do his job,

the safety manager would have no personal liability. The safety manager duties in that regard were those of the employer to provide a safe workplace. Also, in performing those duties, the safety manager would be acting as a vice principal, a representative of the employer in performing those duties an employer owes to its employees—or, in agency terms, to the fellow servants. *Hansen,* 375 S.W.3d at 210 n. 11.

Hence, under the Eastern District's approach, it is only when a co-employee acts in a manner that is so inconsistent with his job duties that the employee cannot be said to carrying out the employer's non-delegable duties that the co-employee has done "something more"; in that instance, the co-employee becomes personally liable for injuries caused to fellow employees by his negligence. *Carman,* 406 S.W.2d at 77. The problem with this analysis is it fails to view co-employee liability in the context of the common law agency principles in which it evolved, and it fails to differentiate the duties of a co-employee performing the duties of his job—duties the employee owes the employer—from a co-employee performing the non-delegable duty of the employer. The Western District in *Leeper* noted this anomaly when it pointed out the Eastern District's recent decision in *Amesquita* used the wrong analysis when it held that " '[i]n order for an employee to become personally liable to a co-employee for injuries suffered in the scope and course of employment, the employee must have done 'something more' beyond performing or failing to perform normal job duties[.]" (*emphasis the court's*) (*citing Amesquita*, 408 S.W.3d at 303.) It was in this context that the Western District in *Leeper* stated, "The principle that the performance or failure to perform a job duty will never support a duty of care independent of the employer's non-delegable duties has no support at common law." *Leeper*, 2014 WL 2190966, at 15.

Master-Servant and Agency Principles Relative to Third Parties

The Eastern District's approach more closely tracks cases where courts have had to decide if an employee's conduct was so far removed from the normal course and scope of his job duties as to be unexpected and unforeseeable, in which case, the employer would not be liable under the theory of *respondeat superior*. *Noah v. Ziehl*, 759 S.W.2d 905 (Mo.App. E.D. 1988) provides such an example. In *Noah*, the plaintiff, a patron at a bar, sued the bar for injuries sustained in a fight outside the bar with the bar bouncer. The plaintiff and the bouncer fought because of plaintiff's behavior toward the bouncer's girlfriend. *Id.* at 906-908. In determining whether the defendant, the bar owner, was responsible for the acts of the bouncer, the court turned to agency principles: "If the employee is actually engaged in and about the employer's business and is carrying out these purposes, the employer is held responsible under the doctrine of *respondeat superior*." This is true even "[i]f the act [while] fairly and naturally incident to the employer's business although mistakenly or ill advisedly done, . . . did not arise wholly from some external, independent or personal motive . . . ." *Id* at 910. The court concluded that the bouncer exceeded the scope of his employment when he assaulted the plaintiff concerning a personal matter, not concerning matters pertaining to the business of the bar. *Id.* at 912.

The employer's liability to a member of the public turns on whether the employee was acting in the course and scope of his employment. *Daughtery*, 260 S.W.3d at 872. This is in stark contrast to the fellow servant doctrine which provided that the master was not obligated to protect its employees " ' . . . from the transitory risks which are created by the negligence of the servants themselves in carrying out the details of that work.'" *Kelso,* 85 S.W.2d at 535-

536. There must be some breach of the employer's non-delegable duty to provide a safe workplace in order for the employer to be liable for an injury to an employee by a co-employee. *Id.* By contrast, relative to third parties, an employer is liable under the doctrine of *respondeat superior* "despite the absence of any negligence on its part." *Daughtery*, 260 S.W.3d at 872.

The something more test as it evolved after *Badami* required an act by the employee that so deviated from the employer's normal job duties as to be "purposeful, affirmatively dangerous conduct . . .." *Taylor*, 73 S.W.3d at 622. *Leeper* correctly reads the refined something more test to require "a co-employee to act outrageously, recklessly or intentionally—and thus in a manner that is effectively outside the scope and course of his duties." *Leeper,* 2014 WL 2190966 at 15. Under the Eastern District's refined something more test, an employee would only be deemed to be liable and acting outside of his duty to provide a safe workplace if his conduct was so outrageous and dangerous that it could not be seen as a risk attendant to doing his job. Examples of affirmative acts deemed to meet this standard include such egregious conduct as requiring an employee to work suspended over a vat of scalding water, *Hedglin v. Stahl Specialty Co.,* 903 S.W.2d 922, 923 (Mo.App. W.D. 1995), requiring an employee to run a steam powered water pressure tank with a faulty weld "till it blows" *Burns v. Smith,* 214 S.W.3d 335, 337 (Mo.banc 2007), and jerry-rigging a hoist system used to carry an employee six floors, *Tauchert v. Boatman's National Bank of St.*

Louis, 849 S.W.2d 573, 574 (Mo.banc 1993)[10] While such an approach is consistent with the circumstances where the employer itself was no longer responsible for the acts of its employee to a member of the public—a criminal act that was so outrageous as to be unforeseeable by the employer, *Inman v. Rodriguez*, 371 S.W.3d 921 924 (Mo.App. S.D. 2012), it is completely at odds with the common law of employer liability and the fellow servant doctrine.

Law-Fact Analysis

Here, Plaintiff Evans and Defendant Barrett were working together on the same job, lifting the trusses to the roof of the building. The two had performed this task on numerous occasions over the five-week period preceding the occurrence. (LF 370) Each had a separate function in performing the common task: Defendant Barrett drove the forklift and Plaintiff Evans held the tagline (LF 369-370); however, there is nothing to indicate that Defendant Barrett was acting as a vice principal either in performing any non-delegable duty of his employer to provide a safe work place or in directing Plaintiff Evans in his work. Unlike in *Thomas*, *supra.,* Defendant Barrett was not directing Plaintiff Evans in his work, and hence, Defendant Barrett did not undertake the duty to provide a safe workplace that is inherent with the responsibility to direct other employees. *Thomas*, 14 S.W.2d at 3-4. Or stated in another way, Defendant Barrett was doing the job he owed his employer, which was to assist in constructing an apartment building on site. In no way was Defendant Barrett responsible for

[10] Appellant submits that the conduct in *Hedglin*, *Burns* and *Tauchert* was so outrageous as to be reckless and arguably criminal.

discharging any of his employer's five non-delegable duties to provide a safe work place. He was working on a job site, not providing for its safety; he was using equipment provided by Wilco that was safe, it was merely his negligent use of the equipment that resulted in Plaintiff Evan's injury. *See e.g., Marshall, supra.* Additionally, unlike in *Bender* or even *Taylor* and *Carman*, the forklift was not the jobsite or even on the employer's premises; it was merely a tool to be used on a construction jobsite. Finally, there was no failure by the employer to warn Plaintiff Evans of dangers of which he was not aware, to provide a sufficient number of competent employees[11] or to promulgate or enforce safety rules.

Defendant Barrett violated a common law duty to keep a careful lookout, a duty he owed to any person working close enough to be injured by the forklift, specifically, Plaintiff Evans. Wilco did not delegate to Defendant Barrett any of its non-delegable duties to provide a safe work place. While Wilco certainly hoped that Defendant Barrett would act in a careful, non-negligent manner on the jobsite, the duty to do so was one Defendant Barrett owed to those Defendant Barrett may injure—whether third persons or fellow servants—not to his employer.

The facts here are similar to those in *Leeper*. Both involve two employees working together to lift a heavy item using a machine operated by the co-employee—in *Leeper*, a

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[11] Plaintiff Evans did bring a claim against Ron Wilson for directing an employee who was not OSHA-certified to operate a forklift working next to other employees (LF 19-20); however, there is no evidence that Defendant Barrett was not properly trained, merely that he lacked certification at the time of the occurrence.

winch, and here, a forklift. Both Plaintiff Evans and the plaintiff in *Leeper* were injured due to the negligence of co-employee's operating machines with which the plaintiffs were working proximity to the defendants. The allegations in *Leeper* and the facts in the record here are sufficient to support the breach of an independent duty of care by the co-employee that resulted in injury to the plaintiffs.

Arguably, the *Badami* court never intended to extend its something more test—an affirmative negligent act increasing the risk of injury in the workplace—to fellow servants. *Badami's* something more test would make some sense if applied just to vice principals or management employees, who by definition are the functional equivalent of the employer, and who fail in their function as the employer by taking affirmative acts increasing the risk of injury in the work place. While the something more test may be the rule adopted by our legislature as to all employees with the 2012 Amendment to the Act, the rule has no basis in the common law relative to fellow servants under well-established agency principles. It should not be applied here.

Conclusion

When our legislature amended the Worker's Compensation Act in 2005 and required that its terms be strictly construed, *Badami's* construction of the Act that defined a co-employee as the employer for extending the employer's immunity to civil suit to co-employee's was abrogated. Employees were once again "third persons" who could be sued for their negligence when it caused injury to a fellow employee. However, a return to the common law did not mean a co-employee was liable for any negligent act; a co-employee

was only liable when he breached a duty of care that he owed personally to his fellow employee. This meant that when a co-employee was engaged in performing the employer's non-delegable duty to provide a safe workplace, the co-employee, under agency principles, was not personally liable, but the co-employee's negligence in performing the employer's non-delegable duty to provide a safe workplace rendered the employer itself liable for injuries sustained by the injured employee. A co-employee doing his normal job duties, that which he owed the employer—not that which an employer owed to all of its employees—was liable for his failure to use reasonable care in the discharge of those duties just as he would be if the employment relationship did not exist. The more mundane and normal the task, i.e., the more it comprised the co-employee's normal job function, the more that the co-employee would be deemed to have violated a duty he owed to his fellow employee. In fact, when an employer was sued at common law for an injury caused on the workplace, the employer could raise the affirmative defense that a fellow servant's negligence caused the injury. The fellow servant affirmative defense was predicated on the fact that a fellow servant was engaged in the work he owed the employer to do the job, distinct from the duty he owed his fellow worker not to act negligently and injure him. The employer's duty to all worker's to provide a safe workplace was and is distinguishable, although by necessity the performance of that duty was delegated to employees to perform.

When an employee violates a duty of the employer to provide a safe workplace, the liability for the injury is the employer's, whether covered by the Act now or under common law before the Act and before it became mandatory. When the co-employee's breach is of his normal job duties and not the employer's duty to provide a safe workplace, the co-employee

was liable under the common law for the injury caused. This is true up to time of *Badami's* judicial extension of the employer's immunity under the Act, and after 2005, when Amendments to the Act required its terms be strictly construed. While a 2012 amendment to the Act effectively re-instated the employer's immunity to fellow employees, the event here occurred during a time that co-employee liability should be determined under the common law independent duty test. Defendant Barrett failed to act in an ordinarily careful and prudent manner in doing the job owed to his employer, and that failure caused injury to Plaintiff Evans, who was engaged in the same employment of lifting trusses to a building.

Defendant Barrett is legally responsible for the injury caused to Plaintiff Evans under the common law principles in effect at the time of the injury. Plaintiff Evans has even dismissed his claim against Defendant Wilson, as Defendant Wilson had a duty to insure the workplace as the president of the company, but the injuries to Plaintiff Evans were not from a failure to provide a safe workplace, but due to a failure of a co-employee in the workplace to do his job safely.

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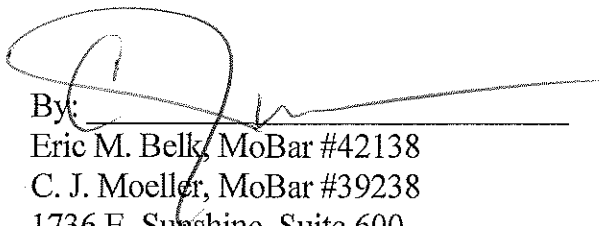

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

Come now C. J. Moeller and hereby certifies, pursuant to Rule 84.06(b) as follows:

1. That this brief includes the information required by Rule 55.03.
2. That this brief complies with the limitations contained in Rule 84.06(b).
3. That this brief is in 13pt font, Times New Roman in Microsoft Word format.
4. That there are 13,569 words and 1,112 lines as relied upon by Microsoft Word contained in this brief.

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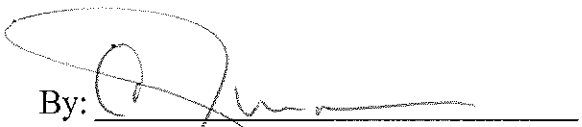

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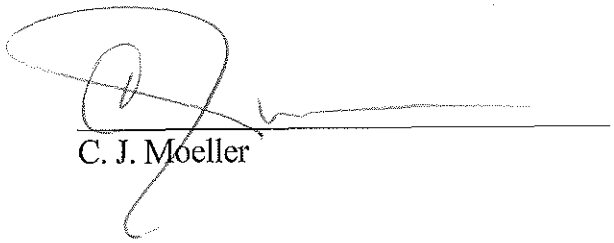
CERTIFICATE OF SERVICE

I certify that I served this Appellant's on Ms. Jackie Kinder, counsel for Respondent, through the Missouri courts' electronic filing system, as set forth in Rule 103.08, on July 2, 2014.



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