IN THE SUPREME COURT OF MISSOURI

S.C. No.: 96042

Nadine McComb,
Appellant,

vs.

Gregory Norfus and David Cheese,
Respondents.

SUBSTITUTE RESPONDENTS' BRIEF OF GREGORY NORFUS AND DAVID CHEESE

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Introduction

The instant wrongful death action arises from a fatal motor vehicle accident occurring when Edward McComb ("Decedent"), slid off an icy highway while performing his duties as a courier for St. Mary's Hospital ("St. Mary's" or "employer"). The issue herein is one of law: did Edward McComb's supervisory co-employees, Gregory Norfus and David Cheese, owe a common law personal duty of care to Decedent, independent of the master servant relationship, and separate from the employer's non-delegable duties, including the duty to provide a safe workplace? The answer to that question is no. Thus, the Court must affirm the 6-30-14 Judgment, granting summary judgment in favor of the co-employee Defendants.

Edward McComb worked for St. Mary's as a courier in the shipping department. As a courier, Decedent transported various items, including equipment and medical supplies, to hospitals and clinics affiliated with St. Mary's in the mid-Missouri area. Decedent traveled a route which departed from Jefferson City, Missouri, and proceeded to stops west and south, before returning north to Jefferson City. Gregory Norfus is shipping department supervisor at St. Mary's, and on 1-26-09, was Edward McComb's direct supervisor. (L.F.57-58,105-106,109). On that date, David Cheese was director of material management at St. Mary's, reporting superior for Gregory Norfus, and Decedent's manager. On 1-26-09, Edward McComb was scheduled to work as a courier on a shift from 3:30 p.m. to 11:30 p.m. (L.F.19,47-48,57,106,109).

While working in the course and scope of his employment as a courier on the evening of 1-26-09, Edward McComb was involved in a single vehicle accident. As Decedent was driving on U.S. 54, his truck slid off the right side of the highway, and overturned down a steep embankment. As a result of the accident, Decedent suffered blunt trauma to the head, chest, and extremities. Edward McComb was survived by his widow, Nadine McComb. (L.F.56,59,107,175-179).

Nadine McComb filed a First Amended Petition for damages for Wrongful Death ("First Amended Petition") against Defendants Gregory Norfus and David Cheese. (L.F.56-77). The First Amended Petition contained counts of general negligence and counts of "something more allegations" against each Defendant. As to general negligence, Plaintiff averred Defendant Norfus committed:

> "the following negligent actions which caused or contributed to cause the injuries to and the death of decedent Edward McComb to wit:
>
> a. That the defendant Gregory Norfus directed and sent the decedent Edward McComb on his route on the afternoon of January 26, 2009 aware of the storm and road conditions that then existed.
>
> b. That the defendant Gregory Norfus kept the decedent Edward McComb on his route during the afternoon and evening of January 26, 2009 while aware of the storm and road conditions that then existed.

c. That by sending the decedent on his route the defendant failed to maintain a safe place to work for decedent Edward McComb.

d. That by keeping the decedent on his route the defendant failed to maintain a safe place to work for decedent Edward McComb.

e. Failed to implement and/or follow safety guidelines governing the deployment of couriers in conditions involving hazardous and dangerous road conditions including ice and snow slick roadways.

30. As a direct and proximate result of the defendant Gregory Norfus' actions and omissions as set forth above, the decedent Edward McComb died." (L.F.62-63).

Plaintiff made substantially identical allegations of general negligence against Defendant Cheese. (L.F.66-68).

Count I of the First Amended Petition, entitled "something more allegations," averred:

"19. That the defendant Gregory Norfus directed and sent the decedent Edward McComb on his route on the afternoon of January 26, 2009 aware of the storm and road conditions that then existed.

20. That the defendant Gregory Norfus kept the decedent Edward McComb on his route during the afternoon and evening of January 26, 2009 while aware of the storm and road conditions that then existed.

21. That said actions and omissions were something more, something extra, affirmatively negligent actions, and grossly negligent, reckless and tortuous [sic] acts which caused or contributed to cause the injuries to and the death of decedent Edward McComb.

22. That the actions of the defendant Gregory Norfus created a hazardous condition that was not merely a breach of the duty to provide a safe place to work, but were rather breaches of a personal duty of care to decedent Edward McComb.

23. That the actions and omissions went well beyond a breach of generally [sic] supervision and safety, specifically and affirmatively; increased Edward McComb's risk of injury and death, created a hazardous and dangerous condition beyond the usual requirements of decedent Edward McComb's employment, breached the personal duty that is [sic] basis for co-employee liability, caused injury, damage and death to decedent Edward McComb.

24. That the defendant Gregory Norfus was a supervisor who owed a personal duty of care to decedent Edward McComb, separate and apart from the employer's non-delegable duty to provide a reasonably safe work environment.

> 25. As a direct and proximate result of the defendant Gregory Norfus's [sic] actions and omissions as set forth above, the decedent Edward McComb died." (L.F.59-61).

Plaintiff made substantially identical averments of "something more allegations," against Defendant Cheese. (L.F.64-66).

Defendants Norfus and Cheese moved for summary judgment, contending Plaintiff McComb failed to allege the breach of a personal duty of care owed by either Defendant to Edward McComb, and all the allegations of negligence against them involved St. Mary's non-delegable duty to provide a safe workplace. Norfus and Cheese averred summary judgment was appropriate, since there was no material fact which could support a reasonable inference that either Defendant owed Decedent a personal duty of care, which existed independent of St. Mary's duty to provide a safe workplace. (L.F.78-104). On 3-28-14, the parties appeared before the Honorable Jon Beetem, and presented arguments on Defendants' Motion For Summary Judgment. (Tr. 1-29).

In its 6-30-14 Judgment, the trial court found the duties which Defendants Norfus and Cheese allegedly violated were the non-delegable duties of the employer, and did not constitute an independent duty of care owed by the co-employees at common law. Finding there was no genuine issue of material fact; the trial court held Defendants Norfus and Cheese were entitled to judgment as a matter of law on the First Amended Petition. Plaintiff appealed the 6-30-14 Judgment. (L.F.266, 267-282).

In its 4-21-15 Opinion, the Western District reversed the trial court's 6-30-14 Judgment, finding there existed a genuine issue of material fact as to whether Defendants

Norfus and Cheese were simply carrying out the employer's non-delegable duty to maintain a safe work environment when they directed Decedent to drive his courier route despite inclement winter weather, thus precluding summary judgment.

Defendants Norfus and Cheese filed a Motion For Re-Hearing/Alternative Application for Transfer with the Western District, which it denied on June 2, 2015.

Thereafter, Defendants filed an Application for Transfer. On 6-30-16, the instant Court granted transfer. The Court ordered the cause re-transferred to the Western District, for reconsideration in light of its recent decisions in ***Peters v. Wady Industries, Inc.***, 489 S.W.3d 784,793-794 (Mo.banc.2016); and ***Parr v. Breeden***, 489 S.W.3d 774,779 (Mo.banc.2016).

Western District's Opinion

On 9-6-16, the Western District issued its Opinion ("Opinion"), reversing the trial court's grant of summary judgment, and remanding the case for further proceedings. Contravening this Court's directive in its 6-30-16 Order, that the Western District view the First Amended Petition under the analytical framework of ***Peters*** and ***Parr,*** the Opinion relied upon ***Leeper v. Asmus***, 440 S.W.3d 478,485 (Mo.App.W.D.2014), even though ***Parr*** rejected the factual analysis adopted in ***Leeper***. The Opinion holds the threshold question of whether a workplace injury is attributable to a breach of the employer's non-delegable duties is a question of fact. Relying on ***Leeper***, the Opinion finds the starting point is to first determine whether a workplace injury is attributable to a *breach* of the employer's non-delegable duty, and this causation (as opposed to *existence*) determination is a question of fact.

On appeal, plaintiff argued summary judgment was improper, since there existed a genuine dispute of material fact regarding whether Defendants Norfus and Cheese were simply carrying out St. Mary's non-delegable duty to maintain a safe work environment or whether they breached a personal duty of care owed to decedent, when they directed him to drive his route in bad weather conditions. The Western District agreed. (Op., 4).

It observed Decedent's fatal accident occurred in 2009, when the law regarding co-employee liability was in a state of flux. Citing ***Robinson v. Hooker***, 323 S.W.3d 418 (Mo.App.W.D.2010), the Opinion found the liberal construction mandate in the pre-2005 version of Section 287.800 led courts to broadly construe the term "employer" in the exclusivity provision to also exempt co-employees from liability, except where the co-employee engaged in something more than a breach of the employer's non-delegable duty to provide a safe workplace. (Op., 4). ***Robinson*** held an employee retained a common law right of action against co-employees who did not fall squarely within the Act's definition of "employer". ***Hansen v. Ritter***, 375 S.W.3d 201 (Mo.App.W.D.2012), found co-employees did not independently owe a duty to fellow employees to perform the employer's non-delegable duties, and at common law, it was only when a co-employee had violated an independent duty to an injured employee that the co-employee would be answerable for the consequences of his negligence. (Op., 5-6).

In ***Leeper v. Asmus***, 440 S.W.3d 478, the Western District found ***Hansen*** left questions unanswered. Specifically, ***Hansen*** did not definitively determine the precise parameters of a co-employee's personal duties to a fellow employee sufficient to support an actionable claim of negligence. After noting some workplace injuries at common law

could not be attributed to a breach of the employer's non-delegable duties, and were instead attributable to the fault of a co-employee, ***Leeper*** held that to assign responsibility for a workplace injury at common law, "the necessary starting point was to first determine whether the injury was *caused* by a breach of the employer's non-delegable duties." ***Leeper*** ruled that, for workplace injuries occurring between the effective dates of the 2005 and 2012 amendments to the Act, the common law had to be applied in determining whether a co-employee owed a duty of care in negligence. (Op., 6).

The Opinion finds that in ***Peters***, the Supreme Court overruled ***Leeper***, but only "to the extent that it holds that the existence of a duty is not purely a question of law. [Citation omitted]. All other parts of our ***Leeper*** decision remain good law, including our holdings that 'the starting point is to first determine whether a workplace injury is attributable to a breach of the employer's non-delegable duties' and that this causation (as opposed to existence) determination 'is a question of fact.'" The Opinion concludes the threshold question is whether a workplace injury is attributable to a breach of the employer's non-delegable duties, which is a question of fact. (Op., 7).

This determination is unique to the workplace. It is influenced by the nature of employer's work; the risk and perils attendant to doing the employer's work as directed; whether the instrumentalities of the work are safe; whether a co-employee causing injury is acting as directed by the employer; whether the methods for performing the work are safe; the competency of the employees hired to perform the work; the training of the employees; the rules and regulations of the workplace adopted by the employer to protect workers from the risk and perils of the work about which the employer should have

known; the communication and enforcement of these rules and regulations; and other facts or circumstances which might tend to establish the existence of a risk or peril which, through the exercise of ordinary care, the employer could reasonably have acted to prevent. (Op., 7). If, after considering all of the relevant facts and circumstances, an employee's workplace injury can be attributed to the employer's breach of a non-delegable duty, a negligent employee owes no duty to the injured employee as a matter of law. The Opinion concludes the relevant facts and circumstances herein are still in dispute and, therefore, summary judgment was improper. (Op., 8).

The Opinion finds the instant facts distinguishable from those in ***Parr***. It reasons that in ***Parr***, the issue was whether the plaintiffs had adequately alleged the *existence* of a duty on the part of the co-employees, which was separate and distinct from the employer's non-delegable duty to maintain a safe workplace. The Opinion concludes the issue herein is not whether there *existed* a duty of care, but rather, what the *scope* of that duty was, and whether Decedent's co-employees were acting within or outside the scope of their employer's duty to maintain a safe workplace at the time of Decedent's death. (Op., 8 n.9).

Again relying on ***Leeper***, the Opinion finds an employer has a duty to provide a safe method of work by prescribing rules sufficient for its orderly and safe management. However, the rule that the master is bound to see the environment in which a servant performs his duties is kept in a reasonably safe condition is not applicable where that environment becomes unsafe, solely through the default of the servant himself, or his fellow employees. (Op., 8-9). The Opinion concludes that in the context of the instant

case, where the hospital employed individuals to work as couriers, the risk posed to drivers during inclement weather was "obvious and foreseeable." Therefore, the Opinion reasons, the scope of the employer's duty to provide a safe workplace included the need for policies to address this obvious, foreseeable risk. To determine whether employee's death was attributable to the breach of the employer's non-delegable duty, or if it was attributable to a personal duty owed to Decedent by Norfus or Cheese, or both, there were several questions which had to be answered. (Op., 9).

The first question, the Opinion finds, is if St. Mary's had a policy regarding whether couriers should be sent on their route during inclement weather. Relying on ***Leeper***, the Opinion concludes St. Mary's should have had such a policy in order to comply with its non-delegable duty to ensure the instrumentality at issue (Decedent's vehicle) was safely used. The Opinion reasons if St. Mary's did not have such a policy, employee's death would be attributable to the employer's failure to discharge its non-delegable duties to provide Decedent with a safe workplace and ensure work instrumentalities were safely used, and Norfus and Cheese would face no personal liability. (Op., 9-10).

If St. Mary's had such a policy, the second question to be determined was whether Norfus and Cheese followed that policy by sending and keeping Decedent on his route during the hazardous weather conditions present on 1-26-09. If so, according to ***Leeper***, the Opinion finds employee's death would be attributable to St. Mary's non-delegable duty to ensure the workplace was safe. If not, however, the employee's death may have been attributable to a personal duty owed by his co-employees. (Op., 10).

The third question to be determined was if St. Mary's had a policy which required the termination of courier service during certain inclement weather situations, whether Norfus and Cheese violated that policy by sending and keeping Decedent on his courier route, and whether their actions, alone, rendered Decedent's otherwise safe work environment unsafe. If so, the Opinion concludes, employee's death was likely attributable to a personal duty owed to him by Norfus and Cheese, subjecting them to potential liability under the common law. (Op., 11).

The Opinion finds, given the timing of the ***Leeper*** decision in relation to the filing of Defendants' Suggestions In Support Of and Plaintiff's Opposition To Summary Judgment in the trial court, the parties did not focus on the scope of the employer's non-delegable duty to provide a safe workplace, as related to either the existence or the effect of any policy regarding couriers driving in unsafe weather conditions. Finding this matter remained in dispute; the Opinion concludes summary judgment was not appropriate. (Op., 11).

While the co-employee Defendants asserted St. Mary's had no policy regarding couriers driving in inclement weather conditions, the Opinion finds Decedent's *job description* suggested St. Mary's might, in fact, have had some relevant policy provisions in place. The Opinion concludes there is an unresolved dispute regarding the material fact of whether St. Mary's had applicable rules or regulations in effect, and whether the co-employee Defendants complied with such existing rules or regulations. It finds, "the factual issue regarding the *scope* of St. Mary's non-delegable duty to provide a safe workplace remains in dispute." Until that question is answered, the Opinion concludes, it

is impossible to determine whether employee's death was due to a breach of St. Mary's non-delegable duties, or to the breach of a personal duty owed to Decedent by the co-employee Defendants. Thus, the Opinion holds Norfus and Cheese were not entitled to summary judgment. (Op., 11-12).

On 9-20-16, Defendants Norfus and Cheese filed their Motion For Re-Hearing and/or Transfer To The Court En Banc or for Transfer to The Missouri Supreme Court, which the Western District overruled on 11-1-16. Thereafter, Defendants Norfus and Cheese filed their Application for Transfer, which the Court granted on 12-21-16.

STANDARD OF REVIEW

Nadine McComb appeals the trial court's 6-30-14 Judgment, granting summary judgment in favor of Defendants Norfus and Cheese. Pursuant to **Rule** 74.04(a), any party seeking to recover on a claim, counterclaim, or cross-claim may move, with or without supporting affidavits, for summary judgment on all or any part of the pending issues. **Rule** 74.04(a). Summary judgment allows a trial court to enter judgment without further delay in cases where there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. ***Montgomery v. South County Radiologists***, 49 S.W.3d 191,193 (Mo.banc.2001).

Appellate review of the grant of summary judgment is *de novo*. ***Rice v. Shelter Mutual Ins.***, 301 S.W.3d 43,46 (Mo.banc.2009). The propriety of summary judgment is purely an issue of law. ***Ziglin v. Players MH***, 36 S.W.3d 786,788-789 (Mo.App.E.D.2001). The standard of review on appeal from a grant of summary judgment is no different from that which is used by the trial court to determine the propriety of sustaining the motion initially. ***ITT Commercial Financial Corp. v. Mid-America Marine Supply ("ITT")***, 854 S.W.2d 371,376 (Mo.banc.1993). The appellate court reviews the record in the light most favorable to the party against whom summary judgment was entered. ***Id.***; ***Inman v. St. Paul Fire and Marine Ins.***, 347 S.W.3d 569,578 (Mo.App.S.D.2011). That party is accorded the benefit of all reasonable inferences from the record. ***Extended Stay v. International Placement Services***, 375 S.W.3d 834,841 (Mo.App.E.D.2012). Facts contained in affidavits or otherwise in support of the party's motion are accepted as true, unless contradicted by the moving

party's response to the summary judgment motion. ***ITT***, 854 S.W.2d at 376. The appellate court will affirm the trial court's judgment, where the pleadings, depositions, affidavits, answers to interrogatories, exhibits, and admissions establish no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. ***Beyerbach v. Girardeau Contractors***, 868 S.W.2d 163,165 (Mo.App.E.D.1994).

The party moving for summary judgment has the burden of establishing it is entitled to judgment, as a matter of law. ***ITT***, 954 S.W.2d at 382. Evidence in the record which presents a genuine issue of material fact will defeat a movant's right to summary judgment. ***Id.*** Within this context, a "**genuine issue**" is one which implies the issue or dispute is real and substantial, one consisting not nearly of conjecture, theory or possibilities. ***ITT***, 854 S.W.2d at 378. The dispute must not be simply argumentative, frivolous, or imaginary. ***ITT***, 854 S.W.2d at 382; ***Rice v. Hodapp***, 919 S.W.2d 240,243 (Mo.banc.1996). There is a genuine issue for trial when competent materials in the record show plausible, but contradictory accounts of necessary facts. ***Risher v. Farmers Ins.***, 200 S.W.3d 84,88 (Mo.App.E.D.2006).

A defending party may establish a right to judgment by showing: 1) facts which negate any one of the elements of plaintiff's cause of action; 2) the non-movant, after an adequate time for discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of plaintiff's elements; or 3) there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. ***ITT***, 854 S.W.2d at 381. Once the movant has established a right to judgment as a matter of law,

the non-movant must demonstrate one or more of the material facts asserted by the movant as not in dispute is, in fact, genuinely disputed. ***Meramec Valley R-III S.D v. City Of Eureka***, 281 S.W.3d 827,835 (Mo.App.E.D.2009). The non-movant cannot simply rest on pleadings to survive summary judgment. ***Id.*** Rather, the non-moving party must use affidavits, depositions, answers to interrogatories or admissions, to demonstrate the existence of a genuine issue for trial. ***Id.***

POINT RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS NORFUS AND CHEESE AND THE 6-30-14 JUDGMENT MUST BE AFFIRMED, SINCE THE FIRST AMENDED PETITION DID NOT STATE A COMMON LAW NEGLIGENCE ACTION AGAINST THE CO-EMPLOYEE DEFENDANTS, FOR THE REASONS THAT ALL OF THE DUTIES PLAINTIFF ASCRIBED TO DEFENDANTS NORFUS AND CHEESE FELL WITHIN EMPLOYER ST. MARY'S NON-DELEGABLE DUTIES, INCLUDING THE DUTY TO PROVIDE A SAFE WORKPLACE; PLAINTIFF FAILED TO ALLEGE AN AFFIRMATIVE ACT BY EITHER CO-EMPLOYEE DEFENDANT, WHICH INCREASED THE RISK OF INJURY TO DECEDENT; AND PLAINTIFF FAILED TO ALLEGE OR SHOW DEFENDANTS NORFUS AND CHEESE OWED DECEDENT A PERSONAL DUTY OF CARE, OUTSIDE THE SCOPE OF THE MASTER-SERVANT RELATIONSHIP.

Peters v. Wady Industries, Inc., 489 S.W.3d 784 (Mo.banc.2016);

Parr v. Breeden, 489 S.W.3d 774 (Mo.banc.2016);

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

Tauchert v. Boatmen's Natl. Bank of St. Louis, 849 S.W.2d 573 (Mo.banc.1993).

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS NORFUS AND CHEESE AND THE 6-30-14 JUDGMENT MUST BE AFFIRMED, SINCE THE FIRST AMENDED PETITION DID NOT STATE A COMMON LAW NEGLIGENCE ACTION AGAINST THE CO-EMPLOYEE DEFENDANTS, FOR THE REASONS THAT ALL OF THE DUTIES PLAINTIFF ASCRIBED TO DEFENDANTS NORFUS AND CHEESE FELL WITHIN EMPLOYER ST. MARY'S NON-DELEGABLE DUTIES, INCLUDING THE DUTY TO PROVIDE A SAFE WORKPLACE; PLAINTIFF FAILED TO ALLEGE AN AFFIRMATIVE ACT BY EITHER CO-EMPLOYEE DEFENDANT WHICH INCREASED THE RISK OF INJURY TO DECEDENT; AND PLAINTIFF FAILED TO ALLEGE OR SHOW DEFENDANTS NORFUS AND CHEESE OWED DECEDENT A PERSONAL DUTY OF CARE, OUTSIDE THE SCOPE OF THE MASTER-SERVANT RELATIONSHIP.

Introduction

The trial court did not err in granting summary judgment in favor of the co-employee Defendants. All the duties ascribed to Defendants Norfus and Cheese in the First Amended Petition were part and parcel of the employer's non-delegable duties, including the duty to provide a safe workplace. Plaintiff has failed to allege a personal duty owed by the Defendants to Decedent, independent of the master-servant relationship, or an affirmative act by either Defendant, increasing the risk of injury to

Decedent. The First Amended Petition fails as a matter of law. To understand why that is the case, it is necessary to review the history of the Missouri Workers' Compensation Act, and the exclusivity provision, Section 287.120, which affords immunity to employers from common law negligence liability.

Recovery By Injured Employees And Passage Of The Act

Prior to the enactment of workers' compensation laws, an employee's only hope for redress for injuries sustained on the job was at common law. ***Gunnett v. Girardier Building And Realty***, 70 S.W.3d 632,635 (Mo.App.E.D.2002). However, the employee was met with the "unholy trinity" or "wicked sisters" of common law defenses, namely, assumption of the risk, contributory negligence, and the fellow-servant doctrine. ***Id.***;***1A Larson***, Workers' Compensation Law, § 4.30. As a result, recoveries by injured workers were few and far between. ***Gunnett***, 70 S.W.3d at 635; ***Larson***, § 4.50.

Missouri enacted the Workers' Compensation Act ("Act") in 1926. Prior to that, an employer was not liable for injuries to an employee caused by the negligent acts of a fellow-servant. ***State ex rel Badami v. Gaertner***, 630 S.W.2d 175,177 (Mo.App.E.D.1982); ***Robinson***, 323 S.W.3d at 422; ***Bender v. Kroger Grocery & Baking***, 276 S.W. 405,406 (Mo.1925). To obviate the harshness of such a rule, it was recognized a co-employee could function in a dual capacity – as a fellow-servant or as a "vice principal" for the master. ***Badami***, 630 S.W.2d at 177. In the latter position, a co-employee's negligence was not the negligence of a fellow-servant, but rather, the negligence of the master himself. ***Id.***

An employer's responsibility at common law was to discharge five specific duties relevant to safety. ***Hansen***, 375 S.W.3d at 208; ***Gunnett***, 70 S.W.3d at 638 n.8; ***Kelso v. W.A. Ross Constr.***, 85 S.W.2d 527-534 (Mo.1935). Those duties are: 1) the duty to provide a safe workplace; 2) the duty to provide safe tools and equipment for the work; 3) the duty to give warning to employees about the existence of dangers of which the employee might reasonably be expected to remain in ignorance or could not reasonably be expected to be aware; 4) the duty to provide a sufficient number of suitable competent fellow employees; and 5) the duty to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety. ***Hansen***, 375 S.W.3d at 208; ***Gunnett***, 70 S.W.3d at 638.

Even if the employer assigned the performance of these non-delegable duties to an employee, the employer remained liable for any breach of those duties. ***Peters***, 489 S.W.2d at 795; ***Parr***, 489 S.W.3d at 779. At common law, a servant to whom performance of the master's non-delegable duties was delegated was treated as the functional equivalent of the master. ***Hansen***, 375 S.W.3d at 209-210. An employer remained liable to the injured employee for a breach of the employer's non-delegable duties. ***Id.*** Under the common law, co-employees did not owe fellow employees a legal duty to perform the employer's non-delegable duties. ***Hansen***, 375 S.W.3d at 218. The non-delegable duties were the duties of the employer to his employees, and not fellow servants to each other. ***Hansen***, 375 S.W.3d at 210; quoting ***Kelso***, 85 S.W.2d at 534. The rationale for refusing to impose on co-employees a legal duty to fellow employees to

perform an employer's non-delegable duties was grounded in the recognition that said duties often concerned matters beyond the control of individual employees. ***Id.***

The duty of the master to provide a reasonably safe place to work for its employees was a non-delegable duty. ***Id.***; ***Bender***, 276 S.W. at 406. Thus, when the master utilized an employee to perform this non-delegable duty, that employee was not functioning as a fellow-servant, but as the master himself. Upon failure of that employee to perform the duty, liability attached to the master for injuries to third parties or other employees. ***Badami***, 630 S.W.2d at 177-178. Under the common law as it existed at the time of the passage of the Act, the duty to provide a safe place to work was upon the employer, not the employee. ***Id.*** An employee chosen to implement this duty owed his duty to the employer, and incurred no personal liability for failure to fulfill his duty to provide a reasonably safe place to work. ***Id.***

Passage of the Missouri Workers' Compensation Act was not meant to be a supplement to the common law. Rather, the Act was wholly substitutional in character, and created entirely new rights and remedies. ***Gunnett***, 70 S.W.3d at 636.

Fellow Employees As Third Parties

Workers' compensation laws, such as the Missouri Act, address the rights and responsibilities between the employer and employee for work injuries. Such laws are not meant to be a substitute for common-law actions for those people not comprehended within the law. ***Gunnett***, 70 S.W.3d at 636. The Missouri Act did not take away an employee's right to bring a common-law action against an offending third person. ***Id.***; ***Schumacher v. Leslie***, 232 S.W.2d 913,916 (Mo.1950). Thus, an employee was free to

bring a common-law action against negligent third parties. ***Gunnett***, 70 S.W.3d at 636; ***Zueck v. Oppenheimer Gateway Properties***, 809 S.W.2d 384,390 (Mo.banc.1991).

Sylcox v. National Lead, 38 S.W.2d 497,502 (1931) recognized a co-employee could be a "third party" under the Act, and thus, amenable to an action at common law. ***Badami***, 631 S.W.2d at 178. ***Sylcox***, ***Schumacher***, and similar authorities held a co-employee, fellow-servant, foreman, or supervisor was a third person who could be sued by an injured employee for his negligence, resulting in a compensable injury. ***Badami***, 630 S.W.2d at 177. The Act did not disturb the common-law relationship between co-employees. ***Badami***, 630 S.W.2d at 178-179;***Sylcox***, 38 S.W.2d at 502. ***Sylcox*** articulated the rule that an employee became liable to a fellow employee when he breached a common law duty owed to the fellow employee, independent of any master-servant or relationship. ***Id.*** Under ***Sylcox*** and related authorities, a defendant employee does not enjoy employer immunity under the Act, where the conduct of that employee is in breach of a duty which he owes, without regard to whether he is an employee or agent of another. ***Badami***, 630 S.W.2d at 179.

Badami And The Something Extra Standard

Badami held charging the employee chosen to implement the employer's duty to provide a reasonably safe place to work merely with the general failure to fulfill that duty charged no actionable negligence. ***Badami***, 630 S.W.2d at 180. ***Badami*** reflected the principle that if a co-employee was negligent in his discharge of the employer's non-delegable duty, that co-employee could not be held personally liable for his negligent performance of that duty. ***Gunnett***, 70 S.W.3d at 638. When an employee failed to

perform the employer's non-delegable duty, the failure was that of the employer, not the employee. ***Id.*** Since the failure was that of the employer, and since recovery under the Act was the employee's exclusive remedy vis-a-vis his employer, a co-employee performing the non-delegable duty of the employer was entitled to the benefit of the employer's immunity from common law negligence suits under the Act. ***Id.***

As ***Badami*** acknowledged, a supervisory employee performed in a dual capacity. He had immunity under the Act where his negligence was based on the general, non-delegable duty of the employer. However, he did not have immunity where he engaged in an affirmative act, causing or increasing the risk of injury. ***Badami***, 630 S.W.2d at 179. As articulated by ***Badami***, "something extra" was required beyond a breach of the duty of general supervision and safety, since that duty was owed to the employer, not the employee. ***Badami***, 630 S.W.2d at 179-180. The extent and nature of the "something extra", ***Badami*** held, could only be determined on a case-by-case basis. The focus was to be on the existence of, and most important, the nature of the duty involved. ***Badami***, 630 S.W.2d at 180-181;***Gunnett***, 70 S.W.3d at 638. Under the ***Badami*** approach, a supervisory employee was subject to liability for negligence only if he breached a duty of care which he personally owed to the plaintiff. ***Id.***

The Affirmative Act Standard

Following ***Badami***, ***Craft v. Scaman***, 715 S.W.2d 531,537 (Mo.App.E.D.1986), held the "something extra" required to impose tort liability on a co-employee included any affirmative act, taken while the employee was acting outside the scope of the employer's responsibility, which breached a personal duty of care which the co-employee

owed to the fellow employee. ***Id.*** Post-***Craft***, Missouri courts acknowledge for a co-employee to be held liable, he must have breached a personal duty of care which he owed to the injured employee. ***Gunnett***, 70 S.W.3d at 638. ***Tauchert v. Boatmen's National Bank Of St. Louis***, 849 S.W.2d 573,574 (Mo.banc.1993), recognized the distinction between a breach of the employer's duty to provide a safe workplace, and a breach of a personal duty of care. In the latter case, there was no immunity afforded by the Act. ***Tauchert***, 849 S.W.2d at 574.

These decisions recognized a co-employee could not be held personally liable in carrying out the employer's non-delegable duty. ***Gunnett***, 70 S.W.3d at 641; ***Tauchert***, 849 S.W.2d at 574; ***Craft***, 715 S.W.2d at 537. Rather, to maintain an action against a co-employee, the injured worker had to demonstrate circumstances showing a personal duty of care owed by the defendant to the worker, separate and apart from the employer's non-delegable duties, and that breach of this personal duty proximately caused the worker's injuries. ***Id.*** A personal duty existed where the co-employee engaged in an affirmative act, outside the scope of the employer's non-delegable duties, directed at a worker, increasing the risk of injury. By engaging in a direct, affirmative act, the co-employee owed a personal duty to exercise ordinary care under the circumstances, and to refrain from conduct which might reasonably be foreseen to cause injury to another. ***Id.***

Under ***Badami*** and ***Tauchert***, a co-employee could not be sued, unless there was a showing of something more than a breach of the employer's duty to provide a safe workplace. ***Badami***, 630 S.W.2d at 180; ***Robinson***, 323 S.W.3d at 423; ***State ex rel Taylor v. Wallace***, 73 S.W.3d 630,622 (Mo.banc.2002) (overruled on other grounds by

McCracken v. Walmart Stores East, LP, 298 S.W.3d 473,478-479 (Mo.banc.2009)). This required proof a co-employee engaged in an affirmative act, which purposefully and dangerously caused or increased the risk of injury. ***Robinson***, 323 S.W.3d at 423; ***Taylor***, 73 S.W.3d at 622.

The 2005 Amendments To The Act

Prior to 2005, Section 287.800 mandated all provisions of the Act were to be liberally construed. **RSMo** §287.800.1. Under this standard, Missouri courts broadly interpreted the Act to extend benefits to the largest possible class, and resolved any doubts as to the right of compensation in favor of the injured employee. ***Robinson***, 323 S.W.3d at 423; ***Schuster v. State Div. Of Emp. Sec.***, 972 S.W.2d 377,384 (Mo.App.E.D.1998).

In 2005, the Missouri legislature amended multiple provisions of the Act, altering the standards governing the compensability of workplace injuries. Among the amendments to the Act was a change in Section 287.800. As amended, Section 287.800 requires courts construe provisions of the Act strictly. **RSMo** §287.800.1 (2005); ***Robinson***, 323 S.W.3d at 423. This change requires Missouri courts to use the principles of strict construction in applying all provisions of the Act. ***Id.***

Strict construction of a statute presumes nothing which is not expressed therein. ***Robinson***, 323 S.W.3d at 423. Strict construction means the Act can be given no broader application than is warranted by its plain and unambiguous terms, and operation of the Act is to be confined to matters affirmatively pointed out by its terms, and to cases which

fall fairly within its letter. ***Id.***; ***Allcorn v. Tap Enterprises***, 277 S.W.3d 823,828 (Mo.App.S.D.2009).

Robinson v. Hooker

At the time of the 2005 amendments, the exclusivity provision of the Act, Section 287.120, provided every employer subject to the provisions of the Act shall be liable to furnish compensation for personal injury or death of the employee by accident arising out of and in the course of employment, and "shall be released from all other liability therefore whatsoever, whether to the employee or any other person." **RSMo** §287.120.1 (2005). Viewing the exclusivity provision through the lens of strict construction, ***Robinson*** determined Section 287.120 addressed only an *employer's* liability under the Act for accidents arising out of and in the course of employment, and only released *employers* from all other liability for work-related accidents. ***Robinson***, 323 S.W.3d at 423 ;***Peters***, 489 S.W.3d at 790. The express language of Section 287.120 being silent as to co-employees, and co-employees not falling within the statutory definition of "**employer,**" ***Robinson*** held Section 287.120, as amended, did not release co-employees from liability resulting from work-related accidents. ***Id.***

Robinson reasoned co-employee immunity primarily arose from a judicial construct in ***Badami***, which had to be re-evaluated, based upon the principles of strict construction. Specifically, the liberal application and extension of employer immunity to co-employees, as set forth in ***Badami*** and its pre-2005 progeny, was no longer applicable. ***Robinson***, 323 S.W.3d at 424. Co-employees did not fall within the statutory definition of an "**employer**" as a person using the services of another for pay, and having five or

more employees. Strict application of the definition of "**employer**" required the court to further conclude co-employees were not entitled to invoke employer immunity under Section 287.120. ***Id.*** Immunity only applied to those who qualified as an "**employer**" under the Act. ***Robinson***, 323 S.W.3d at 425.

Since Section 287.120, as amended, did not release co-employees from liability, injured employees retained their common law rights and remedies against co-employees. ***Peters***, 489 S.W.3d at 790; ***Robinson***, 323 S.W.3d at 425 (employees retained a common law right of action against co-employees who did not fall squarely within the statutory definition of "**employer**"). Section 287.120 thus permitted employees to pursue civil actions against persons not covered by the Act. ***Peters***, 489 S.W.3d at 790. Under strict construction mandated by the 2005 amendments, co-employees no longer enjoyed immunity, and the exclusivity provision of the Act did not preclude an injured employee from pursuing a common law negligence action against a co-employee. ***Id.***

Robinson did not comment on the contours of a co-employee's common law liability for the negligent injury of fellow employees in the workplace. ***Hansen***, 375 S.W.3d at 207. To the contrary, ***Robinson*** observed Section 287.120.2 implicitly allowed an injured employee to pursue civil remedies for claims against parties not covered by the Act. ***Id.***; ***Robinson***, 323 S.W.3d at 424. Section 287.120.2 provided the Act shall represent the employee's exclusive rights and remedies at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by the Act. Thus, a right or remedy available at common law to an injured person was not affected by the exclusivity provision of the Act, unless the right or

remedy was being asserted against an "**employer,**" as that term was statutorily defined. ***Hansen***, 375 S.W.3d at 207.

Since strict construction of the statutory definition of "**employer**" did not include co-employees, the exclusivity provision of the Act did not negate the rights or remedies of an injured person against co-employees, available at common law or otherwise. ***Id.*** Conversely, the exclusivity provision did not expand or modify the rights or remedies of an injured person against co-employees beyond those available at common law. ***Id.*** Thus, ***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 law were not barred by the exclusivity provision of the Act. ***Id.***

Hansen v. Ritter

Hansen v. Ritter, 375 S.W.3d at 208, explored the rights and remedies of an injured person against co-employees available at common law. ***Hansen***, 375 S.W.2d at 207-208. ***Hansen*** recognized the requirements of a common law negligence action applied when an employee or their dependents brought a negligence action against a co-employee. Petitions asserting claims of negligence against co-employees arising out of workplace injuries were subject to the analysis applicable to all claims of negligence. Namely, did the petition assert facts which invoked principles of substantive law, upon which relief can be granted. ***Hansen***, 375 S.W.3d at 208. Thus, a plaintiff asserting a common law negligence action against a co-employee for injuries sustained in the workplace had to plead and prove the elements of negligence. ***Hansen***, 375 S.W.3d at 208. This included the burden of demonstrating the co-employee owed a personal duty

of care to the injured employee, outside the scope of the master-servant relationship. ***Hansen***, 375 S.W.3d at 216-217. Under the common law, an employee could be liable for injuries to another employee caused by the breach of a duty of care owed by the employee, independent of the master-servant relationship. ***Hansen***, 375 S.W.3d at 213; ***Peters***, 489 S.W.3d at 795; ***Parr***, 489 S.W.3d at 779.

As in other common law actions, the threshold matter was to establish the existence of a duty owed by the co-employee. ***Hansen***, 375 S.W.3d at 208. It was not simply the existence of a duty on the part of the co-employee, but the nature of the duty involved, which was vital in determining whether the co-employee could be held liable. ***Id.***. The existence of a duty was unique among the elements of negligence, because it was a question of law for the court to decide. ***Id.***

A co-employee's personal duties to fellow employees did not include a legal duty to perform the non-delegable duties belonging to the employer under the common law. ***Hansen***, 375 S.W.3d at 217. The law imposed upon the master certain duties regarding the safety of his servants, which he could delegate to another, but by doing so, he was no wise discharged from the responsibility of their proper performance. ***Hansen***, 375 S.W.3d at 208; quoting ***Edge v. Southwest Missouri Elec. Rwy. Co.***, 104 S.W. 90,97 (Mo.1907).

Because a co-employee did not owe fellow employees the duty to perform an employer's non-delegable duties independent of the master-servant relationship, said duties were not the personal duties of the co-employee, and thus, could not support an actionable claim for negligence. ***Hansen***, 375 S.W.3d at 215. ***Gunnett*** recognized a co-

employee could not be held personally liable for his negligence in carrying out the employer's non-delegable duties, whether it be the employer's duty to provide its employees with a reasonably safe place to work, or any other non-delegable duty. ***Id.***; ***Gunnett***, 70 S.W.3d at 641. Even though an employee owed no duty to fellow employees to perform an employer's non-delegable duties, there were circumstances which gave rise to co-employee liability for negligence. ***Hansen***, 375 S.W.3d at 210.

To maintain an action against a co-employee, the injured worker had to demonstrate circumstances showing a personal duty of care owed by the defendant to the injured worker, separate and apart from the employer's non-delegable duties. ***Id.*** A co-employee had to owe a personal duty of care to the third party, independent of the master-servant relationship, to support an actionable claim of negligence. ***Hansen***, 375 S.W.3d at 215-216. Under common law, co-employees were liable to their fellow employees for breaches of a duty independent of the master-servant relationship. ***Id.***

An injured employee could not maintain a common law negligence action against a co-employee when the duty breached was part of the employer's non-delegable duty to provide a safe workplace. Any tasks necessarily attendant to the provision of a safe workplace were chargeable to the employer's non-delegable duty, even if negligently performed. ***Hansen***, 375 S.W.3d at 215.

This Court's recent decisions in ***Parr*** and ***Peters*** set forth the parameters of common law liability for injuries caused by co-employee negligence in actions for injuries arising between the 2005 amendments to the Act, whereunder the exclusivity provision did not expressly release co-employees from liability resulting from work

accidents, and the 2012 amendments to the exclusivity provision, which explicitly conferred co-employee immunity, except where the co-employee engaged in an affirmative, negligent act, which purposefully and dangerously caused or increased the risk of injury. **RSMo** §287.120.1.

Parr v. Breeden

Parr v. Breeden, 489 S.W.3d at 781-782, held a truck driver's supervisory co-employees did not owe the driver a duty separate and distinct from the employer's non-delegable duty to provide a safe workplace, and therefore, the Act precluded a wrongful death action against the co-employees following a fatal accident. While driving a commercial motor vehicle for Breeden Transportation, Parr was killed when his truck was involved in a single-vehicle accident. Subsequently, Parr's dependents brought a wrongful death action against three of decedent's supervisory co-employees–Breeden, Cogdill, and Buttry. In their wrongful death petition, plaintiffs alleged the defendants had a duty to provide a safe work environment to decedent, to monitor decedent's physical condition to determine whether he was fit to drive a tractor-trailer, and to determine whether decedent was in compliance with Federal Motor Carrier Safety Administration ("FMCSA") regulations. ***Parr***, 489 S.W.3d at 776-777.

The co-employee defendants moved for summary judgment, asserting the uncontroverted facts showed they did not breach their duty to provide a safe work environment. Alternatively, the co-employee defendants averred the petition failed to state a cause of action for negligence, since it did not allege they committed an

affirmative act outside the scope of the employer's non-delegable duty to provide a safe workplace. ***Parr***, 489 S.W.3d at 777.

In response, plaintiffs asserted the co-employee defendants breached their duty to decedent by keeping him on the road without a medical evaluation; by failing to inquire whether decedent had a health condition which would have contributed to two prior single vehicle accidents; and in placing decedent back on the road when they knew or should have known he was not safe to operate a motor vehicle. ***Id.*** In support of their arguments, plaintiffs submitted a health report, showing decedent smoked, was overweight, and was suffering from severe coronary artery disease, diabetes, obesity, probable sleep apnea, and had a prescription for an anti-diabetic drug. ***Id.*** Additionally, plaintiff submitted portions of deposition testimony, in which the co-employee defendants admitted to being partly responsible for making sure each of Breeden Transportation's drivers was safe to operate a commercial motor vehicle. The trial court sustained the co-employee defendants' motion for summary judgment, and plaintiffs appealed. ***Id.***

On transfer, the instant Court affirmed the trial court's judgment. Plaintiffs argued the trial court erred in granting summary judgment, because genuine disputes of material fact existed as to the co-employee defendants' negligence, since the defendants admitted they had a duty to ensure all of Breeden's drivers were safe to operate a commercial motor vehicle, the defendants knew or should have known decedent could not safely operate a commercial motor vehicle, and defendants caused decedent's death by placing him on the road the night of the fatal accident. ***Parr***, 489 S.W.3d at 778. Plaintiffs

contended there was a genuine dispute of material fact regarding whether the co-employee defendants breached their duties, separate and apart from the employer's non-delegable duty. Since both arguments involved the question of whether the co-employee defendants owed decedent a duty, the Court considered the issues together. ***Id.***

Even though the fatal accident occurred in the course of Parr's employment for Breeden Transportation, the Act did not preclude plaintiffs from bringing a common law action for negligence against the decedent's co-employees, if they could show the co-employees owed a duty to decedent, separate and distinct from Breeden Transportation's non-delegable duties. ***Id.*** At issue was the existence of a duty owed by the co-employee defendants. ***Parr***, 489 S.W.3d at 778-779.

Relying on the companion case of ***Peters v. Wady Industries***, 489 S.W.3d 784, the Court held under common law, an employee may be liable for injuries to another employee caused by the breach of a duty of care owed by the employee, independent of the master-servant relationship. ***Parr***, 489 S.W.3d at 779. In other words, the liability of the servant resulted from the breach of a duty owed to the third party under the law, which made him liable, without regard to whether he was the servant or agent of another. ***Id.*** When the co-employee was performing the employer's non-delegable duty to provide a safe workplace, however, liability attached to the employer, not the co-employee. ***Id.*** While plaintiffs asserted the co-employee defendants had a duty to ensure every driver who drove for Breeden Transportation was safe to operate a commercial motor vehicle, and a duty under federal regulations to disqualify any driver who might be suffering from a condition which impaired his ability to safely operate a commercial motor vehicle,

these duties fell squarely within Breeden Transportation's duty to provide a safe workplace. ***Id.***

Plaintiffs argued that, given the co-employee defendants' admissions and pursuant to FMCSA regulations, the duty to ensure drivers were safe to operate commercial motor vehicles belonged to the defendants personally, and were not a part of Breeden Transportation's duty to provide a safe workplace. To support their argument, plaintiffs relied on the co-employee defendants' deposition testimony, in which each testified he or she had an ongoing duty to make sure drivers working for Breeden Transportation were safe to operate commercial motor vehicles. The existence of a duty was purely a question of law. The court was not bound by stipulations or concessions regarding such legal questions. ***Id.*** Furthermore, admissions of the existence of a duty within the context of the co-employee defendants' understanding of their respective job responsibilities at Breeden Transportation did not prove the existence of a duty owed by the defendants, separate and distinct from Breeden Transportation's non-delegable duty to provide a safe workplace. ***Parr***, 489 S.W.3d at 780.

Likewise, plaintiff's argument federal regulations imposed duties on the co-employee defendants, which were separate and distinct from Breeden Transportation's non-delegable duty to provide a safe workplace, was without merit. ***Id.*** FMSCA regulations prohibited a motor carrier, such as Breeden Transportation, from allowing a driver to operate a commercial motor vehicle when the driver was not physically qualified, which required the driver to not have a history of or be currently diagnosed with certain medical conditions, including diabetes and cardiovascular disease. A motor

vehicle carrier could not permit a driver to operate a commercial motor vehicle when the driver's ability to drive was impaired by fatigue, illness, or any other condition. ***Id.***

Plaintiffs contended because the duty under the federal regulations to ensure safe and qualified drivers was imposed on employees of motor carriers, the defendants personally owed decedent the duty to ensure he was safe to operate a commercial motor vehicle. ***Id.*** The Court rejected plaintiff's argument safety regulations imposed a duty, separate and distinct from Breeden Transportation's non-delegable duty to provide a safe workplace. ***Parr***, 489 S.W.3d at 781. The regulations were promulgated to minimize dangers to the health of operators of commercial motor vehicles. Therefore, the duty to follow and enforce those regulations resulted from the master-servant relationship, and were part of the employer's non-delegable duty to enforce rules of conduct designed to keep employees safe. ***Id.***

To maintain a negligence action against Parr's co-employees, plaintiffs had to show the co-employee defendants breached a duty separate and distinct from Breeden Transportation's non-delegable duty to provide a safe workplace for its employee drivers. The duties which plaintiffs contended were breached were not separate and distinct from Breeden Transportation's non-delegable duty to provide a safe workplace. Moreover, the co-employee defendants' admissions they were responsible for the safety of Breeden Transportation's drivers, and federal regulations requiring employers to ensure the safety of drivers, did not impose a separate and distinct duty on the co-employee defendants, when those duties were part of Breeden Transportation's non-delegable duty to provide a safe workplace. ***Parr***, 489 S.W.3d at 782.

Notwithstanding the only duties plaintiffs alleged were owed by the co-employee defendants were the non-delegable duties of Breeden Transportation, plaintiffs argued summary judgment was not appropriate, asserting the existence of duty depended on a factual issue, which had to be resolved first. In so arguing, plaintiffs relied upon ***Leeper v. Asmus***. ***Leeper*** held before a court could determine whether a co-employee owed a duty in negligence at common law (a question of law), the court must first determine whether the workplace injury was attributable to the employer's breach of a non-delegable duty, a question of fact. ***Parr***, 489 S.W.3d at 781; citing ***Leeper***, 440 S.W. 3d at 488.

However, ***Leeper***'s holding in this regard was premised upon its misreading of ***Kelso v. W.A. Ross Construction***, 85 S.W.2d 527,536-537 (Mo.1935). ***Parr***, 489 S.W.3d at 781. In holding the existence of a co-employee's duty depended on the *factual inquiry* of whether the injury was caused by an employer's breach of a non-delegable duty, ***Leeper*** erroneously concluded ***Kelso*** stood for the proposition it was for the jury to first determine whether the workplace injury could be attributed to the employer's breach of non-delegable duties, and resolution of that issue would control whether the co-employee could be liable in negligence. ***Parr***, 489 S.W.3d at 781; citing ***Leeper***, 440 S.W.3d at 486. However, ***Leeper***'s conclusion in this regard was inconsistent with the Supreme Court's analysis in ***Kelso***. ***Parr***, 489 S.W.3d at 781.

Kelso ruled providing a safe method of work was included in the employer's non-delegable duty to provide a safe workplace, and whether the employer *breached* that duty was a question for the jury, and thus, a question of fact. ***Parr***, 489 S.W.3d at 782; citing

Kelso, 85 S.W.2d at 534-535. However, ***Kelso*** did not hold the existence of a co-employee's duty depended upon the jury's resolution of whether the employer breached its non-delegable duty, but instead, found there was sufficient evidence in the record, from which a jury could find such a breach had occurred. ***Parr***, 489 S.W.3d at 782; citing ***Kelso***, 82 S.W.2d at 536-537. In ***Parr***, the issue was whether the co-employee defendants owed decedent a duty, which was separate and distinct from Breeden Transportation's non-delegable duty. It was well established that *existence* of a duty was purely a question of law. ***Parr***, 489 S.W.3d at 782.

In a separate Opinion concurring with the result reached in the principal Opinion, Judge Fischer stated he would overrule the decision in ***Leeper***. Judge Fischer would continue to apply the "something extra" test, consistent with its well-established meaning in the Court, relying on ***Peters***. That is, an employee could sue a fellow employee only for affirmative negligent acts outside the scope of an employer's responsibility to provide a safe workplace. ***Parr***, 489 S.W.3d at 782-783.

Peters v. Wady Industries

Peters v. Wady Industries, 489 S.W.3d at 800, was the companion case to ***Parr***. At issue in ***Peters*** was whether an employee stated a negligence claim against a supervisory co-employee. Curt Peters and Patrick Terrio were employed by Tramar Contracting, a company specializing in providing services and products to general contractors in the construction industry. Among its services, Tramar delivered dowel baskets, 200-pound rebar paver baskets used in concrete construction, manufactured by Wady Industries. ***Peters***, 489 S.W.3d at 787. Wady Industries shipped the dowel baskets

to Tramar, stacked one on top of the other, without warning, bracing, or other precautionary measures. On arriving at Tramar, the dowel baskets were kept in this stacked manner in a staging area until they were needed. Once needed, the dowel baskets were moved from the staging area to a specified construction site in the same stacked manner in which they were shipped by Wady Industries. ***Id.***

Terrio, a project manager for Tramar, had received warnings from other employees about the potential safety hazards posed by stacked dowel baskets. Despite these warnings, on 9-24-08, Terrio ordered dowel baskets be delivered to a construction site on a Tramar flatbed truck while kept in the stacked manner in which they were sent to Tramar. A row of baskets fell from the flatbed truck onto Peters, causing catastrophic injuries. ***Peters***, 489 S.W.3d at 787-788.

Curt Peters filed suit against Wady Industries and Terrio. In his negligence claim against Terrio, Curt Peters alleged Terrio was negligent, in that he breached his duty to exercise reasonable care in allowing the baskets to be transported on a flatbed truck while stacked at a level which exceeded a safe height; in failing to ensure the baskets were properly braced or secured for transportation and unloading; in failing to provide sufficient and adequately trained help; in failing to provide a proper area for unloading of baskets; in failing to heed the warnings of employees about stacked baskets; in allowing the unsafe course to become standard operating procedure; in ordering and directing Curt Peters to load, stack, transport and unload baskets in the aforementioned unsafe manner; and in ordering and directing Curt Peters to load, transport, and unload baskets in the aforementioned manner, in violation of OSHA regulations. ***Peters***, 489 S.W.3d at 788.

In his answer to the petition, Terrio raised several affirmative defenses. Among them were the defenses Peters' claims were barred by the exclusivity provision of the Act, and Peters' petition failed to state a cause of action. Terrio filed a motion to dismiss Peters' petition for lack of subject matter jurisdiction. He argued Peters' claims fell within the exclusive purview of the Act, because Peters did not allege any conduct by Terrio which lay outside of Tramar's non-delegable duty to provide a safe workplace. The trial court sustained Terrio's motion to dismiss. It found Peters failed to aver Terrio owed a duty independent of Tramar's non-delegable duty to provide a safe workplace. Because Peters pled facts establishing only duties which were part of Tramar's non-delegable duty to provide a safe workplace, his petition failed to state a negligence cause of action. After Peters appealed, the majority affirmed, and the dissenting judge certified the case for transfer. ***Id.***

On transfer, the Court affirmed the trial court's judgment. ***Peters***, 489 S.W.3d at 800. In his motion to dismiss, Terrio argued the Act provided the exclusive remedy for Peters' claim. Terrio averred employer immunity under the Act extended to co-employees in negligence actions when it was alleged the co-employee failed to maintain a safe work environment. At the time Peters was injured, the Act provided no immunity to co-employees from common law negligence actions. ***Peters***, 489 S.W.3d at 789. Section 287.120.1 addressed only an *employer*'s liability under the Act for accidents arising out of and in the course of employment, and only released employers from all other liability for work-related injuries. That statutory provision was silent as to co-employees. ***Peters***, 489 S.W.3d at 789-790. Since Section 287.120 did not release co-

employees from liability when Peters was injured, Peters retained his rights and remedies at common law against any co-employee. ***Peters***, 489 S.W.3d at 790. When Peters was injured, the plain language of the exclusivity provision did not preclude him from pursuing a common law negligence claim against Terrio. ***Id.***

Despite the plain language of the exclusivity provision, Missouri courts had previously held, in limited circumstances, an employer's immunity under the Act extended to co-employees. ***Id.*** The holding that immunity extended to co-employees was inconsistent with established workers' compensation precedent, and resulted in the adoption of a standard not supported under any construction of the Act's exclusivity provision. ***Peters***, 489 S.W.3d at 791.

As the Court observed, Missouri's workers' compensation laws were initially found to protect only employers, and did not prohibit injured employees from bringing common law actions against negligent third parties, including co-employees. ***Peters***, 489 S.W.3d at 791. It was not until ***Badami*** that a Missouri court extended an employer's immunity under the Act to co-employees. ***Badami*** found a co-employee had immunity under the Act when discharging the employer's non-delegable duties, and "something more" than a failure to fulfill the employer's duty to provide a safe workplace had to be charged to find actionable negligence. ***Peters***, 489 S.W.3d at 792.

However, instead of analyzing the liability of co-employees in terms of whether the co-employee breached a common law duty owed to the fellow employee, independent of any master-servant relationship, ***Badami*** analyzed whether the co-employee fit within employer immunity under the Act. ***Id.*** While the result of the "something more" test was

consistent with the common law principle that a co-employee could not be held liable for breaching an employer's non-delegable duty to provide a safe workplace, the extension of immunity to co-employees under the Act was inconsistent with the plain language of the exclusivity provision. Section 287.120, as written, released *employers* from all other liability for work-related accidents. A court could not read or add co-employees into the language of the statute to grant them the same immunity from common law actions granted to employers under the exclusivity provision. Thus, at that time of Peter's injuries, Section 287.120 did not provide immunity to co-employees such as Terrio. ***Id.***

In 2012, the Missouri legislature amended the exclusivity provision. As amended, the Act provided immunity to co-employees, except where the employee engaged in an affirmative negligent act which purposefully and dangerously caused or increased the risk of injury. Thus, the holding that the Act's exclusivity provision provided no immunity to co-employees was limited to injuries occurring before the 2012 amendments. ***Peters***, 489 S.W.3d at 793.

Since the Act afforded Terrio no immunity from a common law negligence action, the Court had to determine whether Peters pleaded facts in his petition sufficient to state a negligence action against Terrio. In his motion to dismiss, Terrio contended Peters failed to state a claim of negligence against him, since Peters failed to allege Terrio owed a duty, separate and distinct from Tramar's non-delegable duty to provide a safe workplace. The trial court sustained Terrio's motion to dismiss on this ground. ***Id.***

Peters claimed the allegations in his petition stated a common law claim of negligence against Terrio. Terrio contended the duties Peter alleged he breached were

part of Tramar's non-delegable duty to provide a safe workplace, and thus, did not constitute duties owed by him to Peters at common law. ***Peters***, 489 S.W.3d at 793-794.

Originally at common law, the extent of an employee's liability to third persons, including co-employees, depended on whether the employee's conduct was categorized as misfeasance (negligent performance of a duty) or nonfeasance (failure to perform a duty). With respect to nonfeasance, the duties owed by an agent to a principle included the duty to perform the principle's non-delegable duties. ***Peters***, 489 S.W.3d at 794. ***Lambert v. Jones***, 98 S.W.2d 752,757 (Mo.1936), held the misfeasance-nonfeasance dichotomy was a fictitious distinction, which could only result in confusion. To eliminate any confusion, the Court clarified the test for when an employee could be liable to third persons. Under that test, a servant was liable for acts or omissions causing injury to third persons whenever he was guilty of such negligence as would create liability to another person if no relation of master and servant existed between him and someone else. ***Id.*** In other words, the liability of the servant resulted from the breach of a duty owed to the third party under the law, which made him liable without regard to whether he was the servant or agent of another. Following ***Lambert***, employees were liable at common law to third persons, including co-employees, for breaching a legal duty owed independently of the master-servant relationship. ***Peters***, 489 S.W.3d at 794-795.

The standards set forth in ***Lambert*** did not alter a co-employee's liablity with respect to carrying out the employer's non-delegable duties. ***Peters***, 489 S.W.3d at 795. Inherently, a co-employee's breach of the employer's non-delegable duty to provide a safe workplace did not constitute the breach of a duty owed independently of the master-

servant relationship. If co-employees were assigned to perform the employer's non-delegable duties, it was solely by virtue of the master-servant relationship. Absent the master-servant relationship, a co-employee would have no duty to perform the employer's non-delegable duties. It followed, then, that a legal duty owed by a co-employee to a third person was a duty separate and distinct from the employer's non-delegable duty. ***Id.***

Under Missouri law, it was well established an employer owed certain non-delegable duties to its employees with respect to safety, and even if an employer assigned the performance of those duties to an employee, the employer remained liable for any breach of such duties. ***Id.*** Included within the employer's duty to provide a safe workplace was a duty to see instrumentalities of the workplace were used safely. The manner in which instrumentalities were used could make a place safe or unsafe as a place of work, and therefore, the duty to see that instrumentalities were safely used might become the most important element in the safety of a workman in his place of work. The scope of the employer's duty to provide a safe workplace was dependent on several factors, including the nature of the employer's work, and the risks associated with that work. However, an employer's duty to provide a safe workplace was not unlimited. Employers were not insurers of the safety of their employees. ***Id.***; ***Peters***, 489 S.W.3d at 795-796.

The Supreme Court's analysis in ***Marshall v. Kansas City***, 296 S.W.2d 1 (Mo.1956) exemplified the distinction between an employer's non-delegable duty to provide a safe workplace and a co-employee's duty arising from transitory risks in how the co-employee carried out the details of his work. ***Peters***, 489 S.W.3d at 796. In

Marshall, the plaintiff was injured when his co-employee shook a compressor hose to remove the kinks, causing plaintiff to trip. In holding plaintiff's injuries resulted from the co-employee's negligence, not the employer's breach of its non-delegable duty to provide a safe workplace, the court reasoned plaintiff's injury came about because of the co-employee's negligent use of the hose, not because it was defective. ***Id.***

Marshall demonstrated when an employee's injuries resulted from the tools furnished, the place of work, or the manner in which the work was being done, the injuries were attributable to a breach of the employer's non-delegable duty to provide a safe workplace. Conversely, when the injuries resulted from a co-employee's negligence in carrying out the details of the work, the injuries were attributable to the co-employee's breach of a duty, separate and distinct from the employer's non-delegable duty to provide a safe workplace. ***Peters***, 489 S.W.3d at 796. Under common law, co-employees were liable to their fellow employees for breaches of a duty owed independent of the master-servant relationship – that is, a duty separate and distinct from the employer's non-delegable duties – including instances where injury resulted from transitory risks created by the co-employee's negligence in carrying out the details of the work. ***Id.***

Prior to the 2012 amendments, co-employees did not have immunity under the Act, and were subject to liability at common law for their actions. ***Badami*** created the "something more" test as a means of providing immunity to co-employees under the Act when the co-employee was discharging the employer's non-delegable duty to provide a safe workplace. ***Id.*** Thereafter, Missouri appellate courts used the "something more" test as a limitation on co-employee immunity under workers' compensation. ***Peters***, 489

S.W.3d at 796-797; citing ***Taylor***, 73 S.W.3d at 622-623. Even though courts used ***Badami***'s "something more" test to determine immunity under the Act, the "something more" analysis was consistent with common law co-employee liability principles. Thus, cases applying the "something more" test could still prove instructive in the common law analysis. ***Peters***, 489 S.W.3d at 797.

In adopting the "something more" test as a means of determining when immunity applied to co-employees, ***Badami*** relied upon the common law principles that the duty to provide a safe workplace was the employer's and could not be delegated to employees, and co-employees were liable to fellow employees for misfeasance. ***Id.*** While the distinction between misfeasance and nonfeasance had been effectively eliminated in tort law, the distinction remained for purposes of determining whether co-employees were entitled to immunity under the Act. The courts' continued recognition of the distinction between misfeasance and nonfeasance resulted in their adoption of an approach which required an affirmative act for co-employees to be held liable. Nonetheless, ***Badami***'s conclusion that charging the employee chosen to implement employer's duty to provide a safe workplace merely with the general failure to fulfill that duty charged no actionable negligence, and something more had to be charged, accurately reflected the common law regarding a co-employee's duty. Thus, to the extent cases applying the "something more" test required more than allegations of the failure to fulfill the employer's non-delegable duty to provide a safe workplace, they were consistent with the common law. ***Id.***

However, cases applying the "something more" test frequently required an affirmative act, which was a vestige of the distinction between misfeasance and

nonfeasance. ***Id.*** Contrary to the post-***Taylor*** "something more" test, common law did not limit a co-employee's liability to conduct which was purposeful, inherently dangerous, or directed to the injured employee. ***Peters***, 489 S.W.3d at 798. To the extent the "something more" test required affirmative conduct for the co-employee to be liable, and to the extent the post-***Taylor*** "something more" test required purposeful and dangerous conduct, the tests conflicted with common law, and were not to be applied to co-employee liability cases arising before the 2012 amendments. ***Peters***, 489 S.W.3d at 800.

Applying the common law, the allegations in Peters' petition failed to allege the breach of a duty owed by Terrio, separate and distinct from Tramar's duty to provide a safe workplace. ***Peters***, 489 S.W.3d at 788-789. In his general allegations relevant to claims against Wady Industries, as well as Terrio, Peters alleged that, despite warnings from Tramar employees regarding the safety hazards posed by the stacked dowel baskets, Terrio ordered the baskets be sent to the job site on a flatbed truck stacked in an unsafe manner, without bracing or any other safety precautions. In his negligence count against Terrio, Peters alleged Terrio had a duty to exercise reasonable care for the safety of others, including Curt Peters, at all times. Peters averred Terrio breached that duty by allowing the dowel baskets to be stacked in an unsafe manner, without bracing or other safety precautions; by failing to provide sufficient and adequately trained help to transport the baskets; and by not providing a proper area to unload the baskets. The duty to provide safe equipment, a sufficient number of competent employees, and a safe place to unload the baskets fell squarely within Tramar's duty to provide a safe workplace.

Peters, 489 S.W.3d at 799. Such duties could not constitute a duty separate and distinct from the employer's non-delegable duty to provide a safe work environment. ***Id.***

Additionally, Peters alleged Terrio breached his duty to exercise reasonable care for the safety of others, by directing Peters to load, stack, transport and unload the baskets in an unsafe manner, and in violation of OSHA regulations. Peters asserted the breach did not fall under Tramar's non-delegable duties, because an employer's non-delegable duty to provide a safe workplace was not applicable where that environment became unsafe solely through the default of the servant himself, or his fellow employees. Essentially, Peters argued Terrio created the unsafe environment in which he was injured, when he directed Peters to deliver and unload the baskets while the baskets were stacked in an unsafe manner, despite being warned of the danger. ***Id.***

While an employer's non-delegable duty to provide a safe workplace did not include transitory risks arising from an employee's negligence in carrying out the work, the pleadings did not support Peters' assertion on appeal, that this was a situation in which an unsafe work environment resulted from Terrio negligently carrying out the details of his work. Rather, the allegations pertained to Terrio, in his supervisory role as project manager, negligently carrying out Tramar's non-delegable duty to provide a safe workplace. ***Id.***

Significantly, the pleadings indicated the allegedly unsafe stacking of the baskets constituted the ordinary manner of work at Tramar. As ***Kelso*** explained, part of an employer's duty in providing a safe work environment was providing a safe method of work. Peters alleged the manner in which Terrio directed him to load, stack, and

transport the dowel baskets was unsafe. The allegations as to the unsafe stacking of the dowel baskets went to the manner in which the work was being performed under Tramar's standard operating procedures. Because providing a safe method of work was encompassed in the employer's non-delegable duty to provide a safe workplace, such allegations were insufficient to establish Terrio owed a duty to Peters, independent of the master-servant relationship. This was a classic case of a supervisory employee breaching the employer's non-delegable duty to provide a safe workplace. ***Id.***

While Terrio was allegedly responsible for the unsafe manner in which the work was routinely performed, it was Tramar's non-delegable duty to provide a safe work environment, and Tramar breached that duty where it charged an employee with the responsibility to provide a reasonably safe work environment, but the employee did not so provide. ***Peters***, 489 S.W.3d at 799-800. The allegations in the petition were that Peters was ordered and directed to conduct work in the allegedly unsafe manner in the course of business. These allegations were distinguishable from instances in which a co-employee negligently carried out some detail or aspect of his work. ***Peters***, 489 S.W.3d at 800.

In ***Tauchert***, the plaintiff was injured when an elevator fell several stories, due to a co-employee's negligence in using a faulty, makeshift hoist system to raise the elevator for its final inspection. The co-employee's actions went beyond the employer's duty to provide a safe workplace, and constituted a breach of the co-employee's personal duty of care owed to the plaintiff. Therein, Peters failed to allege any such similar aspect or detail of the work which Terrio negligently carried out, other than that in his role as a

project manager. Terrio negligently performed Tramar's non-delegable duty to provide a safe manner or place of work. Accordingly, Peters' petition failed to state a cause of action for negligence against Terrio, since Peters failed to allege any duty of care owed by Terrio, separate and distinct from Tramar's non-delegable duty to provide a safe workplace. ***Id.***

All Of The Allegations Against The Co-Employee Defendants

Involved The Employer's Non-Delegable Duties

The trial court did not err in granting summary judgment in favor of Defendants Norfus and Cheese, and its 6-30-14 Judgment, finding Defendants were entitled to judgment as a matter of law on the First Amended Petition, must be affirmed. All the allegations against Defendants Norfus and Cheese, whether those of "general negligence" or the "something more allegations," involved non-delegable duties chargeable to employer St. Mary's.

Plaintiff's First Amended Petition against the co-employee Defendants is subject to the pedantic analysis applicable to all claims of negligence: Does the First Amended Petition assert facts which invoke principles of substantive law, upon which relief can be granted? ***Hansen***, 375 S.W.3d at 208. The requirements of a common law negligence action apply where, as here, an employee or his dependents bring a negligence action against a co-employee. ***Gunnett***, 70 S.W.3d at 637-638.

Plaintiff was required to plead and prove the elements of negligence. ***Hansen***, 375 S,.W.3d at 216-217. To state a common law negligence action, Plaintiff had to establish the existence of a duty on the part of the Defendants to protect Decedent from injury;

failure of the Defendants to perform that duty; and that the Defendants' failure proximately caused Decedent's fatal injuries. ***Hansen***, 375 S.W.3d at 208; ***Krause v. U.S. Truck***, 787 S.W.2d 708,710 (Mo.banc.1990); ***Hoffman v. Union Electric Co.***, 176 S.W.3d 706,708 (Mo.banc.2005); ***Martin v. City Of Washington***, 848 S.W.2d 487,493 (Mo.banc.1993).

Whether a co-employee can be held liable for injuries to a fellow employee will depend on the facts and circumstances of each case. ***Gunnett***, 70 S.W.3d at 632. Once the facts and circumstances are known, whether a personal duty exists in any particular situation is a question of law, to be determined by the court. ***Gunnett***, 70 S.W.3d at 639; **W. Keeton, Prosser & Keeton On Torts** §37 (5th Ed.). The court must determine whether, based on the facts and evidence, such a relation exists between the parties that the community will impose a legal obligation on one for the benefit of the other or, more simply, whether the interest of the plaintiff which has suffered invasion is entitled to legal protection at the hands of the defendant. ***Gunnett***, 70 S.W.3d at 639. This is entirely a question of law, to be determined by reference to the body of statutes, rules, principles, and precedents which make up the law. A duty may be imposed by the legislature or the common law, based on the relationship between the parties, or imposed by a court under the circumstances of a given case, based upon what the tortfeasor knew or should have known. ***Id.***

To state a negligence claim against the co-employee Defendants, Plaintiff had the burden of demonstrating the Defendants owed a personal duty to Decedent, outside the scope of the master-servant relationship. ***Hansen***, 375 S.W.3d at 216-217; ***Parr***, 489

S.W.3d at 782. Specifically, Plaintiff was required to allege and show the Defendants owed a duty to Decedent under the law, which made them liable, without regard to whether they were the servants of employer St. Mary's. ***Hansen***, 375 S.W.3d at 216-217; ***Peters***, 489 S.W.3d at 794-795; ***Parr***, 489 S.W.3d at 779. As in other common law negligence actions, the **threshold matter** in the instant cause was the existence of a duty on the part of the co-employee Defendants. ***Hansen***, 375 S.W.3d at 208; quoting ***Krause***, 787 S.W.3d at 710. In determining whether Plaintiff stated a cause of action against the Defendants for negligence, the initial determination was whether Norfus and Cheese owed a personal duty[1] to Decedent, which was separate and distinct from the

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[1] In ruling the determination of whether a duty exists is a factual, not a legal inquiry, the Opinion contravenes longstanding precedent from this Court, holding the existence of a duty is purely a question of law. ***Hoffman***, 176 S.W.3d at 708; ***Kibbons v. Union Electric***, 823 S.W.2d 485,489 (Mo.banc.1992); ***Lopez v. Three Rivers Electric Cooperative***, 26 S.W.3d 151,155 (Mo.banc.2000).

The Opinion erroneously conflates the issue of the existence of a duty with the issue of whether a breach of that duty has occurred. The existence of a duty is a question of *law* for the court. ***Id.*** The Opinion places the cart before proverbial horse. It seeks to determine the issue of causation, whether the breach of the alleged duty caused the Decedent's fatal injury, prior to undertaking the threshold determination of whether Defendants had a personal duty of care to Decedent in the first instance. The existence of a duty, and whether a breach of that duty caused the injury are separate inquiries, both of

which must be satisfied to set forth a negligence action. ***Peters***, 489 S.W.3d at 793-794. In seeking to resolve the factual issue of breach, without first determining the threshold issue of whether Defendants had a duty to Decedent, separate and distinct from the employer's non-delegable duties, the Opinion *presumes* the existence of a common law duty owed to Decedent. ***Id.***; ***Parr***, 489 S.W.3d at 778.

While the Opinion finds ***Parr*** to be distinguishable, ***Parr*** is on point, and requires an affirmance of the trial court's Judgment. As in ***Parr***, the pivotal question herein is whether Defendants owed Decedent a duty, which was separate and distinct from the employer's non-delegable duties, including the duty to provide a safe workplace. This question is one of law. ***Parr***, 489 S.W.3d at 781. ***Leeper*** concluded while duty was a question of law, whether a co-employee owed a duty was dependent on whether the injury was caused by the co-employee's breach of a non-delegable duty, which was a question of fact. ***Peters*** overruled ***Leeper***, to the extent it held the existence of a duty is not purely a question of law. ***Peters***, 489 S.W.3d at 794, n.8. ***Parr*** rejected the ruling in ***Leeper*** that the existence of a co-employee's duty depended on the *factual inquiry* of whether plaintiff's injury was caused by the employee's breach of a non-delegable duty. ***Parr***, 489 S.W.3d at 781. ***Parr*** held the issue of whether an employee owed a co-employee a duty which was separate and distinct from the employer's non-delegable duty was an issue of law. ***Parr***, 489 S.W.3d at 792. The Opinion follows the holding in ***Leeper*** that the determination of whether a duty exists is a factual, not a legal inquiry, a ruling ***Parr*** rejects. ***Parr***, 489 S.W.3d at 782.

employer's non-delegable duties, including the duty to provide a safe workplace. ***Parr***, 489 S.W.3d at 782; ***Peters***, 489 S.W.3d at 793. Resolution of this question was central to determining whether the co-employee Defendants had a right to judgment as a matter of law on the First Amended Petition. ***Carmen***, 406 S.W.3d at 76.

In her First Amended Petition, Plaintiff avers the co-employee Defendants sent, directed and kept Decedent on his carrier route, even though they were aware of the storm and road conditions facing Decedent. These allegations merely averred duties which were part and parcel of St. Mary's non-delegable duties. ***Hansen***, 375 S.W.3d at 207. On reviewing the allegations in the First Amended Petition against Defendants Norfus and Cheese, it becomes readily apparent the duties which the Defendants allegedly breached were all related to or derived from the employer's non-delegable duties to provide a safe work environment, and to promulgate and enforce safety rules. ***Hansen***, 375 S.W.3d at 208;***Gunnett***, 70 S.W.3d at 638.

In sending, directing, and keeping Decedent on his courier route, Defendants Norfus and Cheese were merely exercising that duty or authority delegated to them by the employer. Directing employee to complete his carrier route was the normal job duty of both Defendants, attendant to performing St. Mary's business, as directed by the employer. ***Parr***, 489 S.W.3d at 782; ***Peters***, 489 S.W.3d at 795; ***Hansen***, 375 S.W.3d at 207. The First Amended Petition alleges nothing more than that the co-employee Defendants instructed Decedent to perform his job duties on the day of the accident. These allegations show Defendants Norfus and Cheese were exercising the duties

delegated to them as supervisors by employer St. Mary's. ***Id.*** Those duties would not exist, absent the master-servant relationship. ***Peters***, 489 S.W.3d at 795.

Count I of the First Amended Petition alleged Defendant Norfus was a supervisor, who owed a personal duty of care to Decedent, separate and apart from the employer's non-delegable duty to provide a reasonably safe work environment. Similarly, Count III of the First Amended Petition averred Defendant Cheese was a supervising manager, who owed a personal duty of care to Decedent, separate and apart from the employer's non-delegable duty to provide a reasonably safe work environment. (L.F.61,65).

These assertions suggest Defendants Norfus and Cheese owed a personal duty of care to Decedent, simply because they were his supervisors. However, no caselaw authority of this Court, or the Missouri Court Of Appeals, so holds. Both ***Peters*** and ***Parr*** addressed the duties of supervisory employees. Neither decision held a personal duty of care, sufficient to support a common law negligence action, attaches to the co-employee of an injured worker, simply because that co-employee is a supervisor, or works in a supervisory capacity. ***Parr***, 489 S.W.3d at 781-782; ***Peters***, 489 S.W.3d at 800.

That the co-employee Defendants were Decedent's supervisors did not impose on them a personal duty of care. The supervisory duties of Defendants Norfus and Cheese were assumed or undertaken by them merely by going to work. ***Hansen***, 357 S.W.3d at 218-219. Those supervisory duties were nothing more than exercising the duties delegated to them by St. Mary's, including the non-delegable duty to provide a safe workplace. The supervisory status of Norfus and Cheese, alone, does not give rise to a

personal duty of care, from which a common law negligence action arises. ***Hansen***, 375 S.W.3d at 218-219. The mere fact a co-employee works in a supervisory capacity does not confer on them a personal duty of care towards their fellow employees. Nor does the fact an employee is a supervisor or works in a supervisory capacity impose on that employee an additional duty of care to provide a safe work environment, outside of, or apart from, the employer's non-delegable duty in that respect. That a co-employee defendant is a supervisor, in and of itself, is insufficient to meet the burden of demonstrating the co-employee owed a personal duty of care to the injured worker. To the extent the allegations in Counts I and III of the First Amended Petition suggest otherwise, they are without basis in Missouri law. ***Id.***

It is undisputed Decedent's job required him to travel a courier route. (L.F172-173,182-190). The duty to ensure Decedent's workplace-his route-was safe clearly fell within the rubric of the employer's non-delegable duties. ***Hansen***, 375 S.W.3d at 208; ***Peters***, 489 S.W.3d at 794-795; ***Parr***, 489 S.W.3d at 779. The duties Plaintiff ascribes to Defendants Norfus and Cheese in the First Amended Petition are part and parcel of the employer's non-delegable duty to provide a safe work environment. ***Hansen***, 375 S.W.3d at 207.

The facts in ***Hansen*** are analogous to those before the Court, and require an affirmance of the trial court's 6-30-14 Judgment. Therein, Hursman was killed in a workplace accident while working for Wire Rope Corporation. He died when a guard gave way as he was leaning over a wire-stranding machine, causing him to become entangled in the moving parts of the machine. ***Hansen***, 375 S.W.3d at 203. Hursman's

mother, Hansen, filed a wrongful death action, naming the employer, and the manufacturer of the wire stranding machine as defendants. Hansen also named as defendants Snyder, employer's corporate safety manager, and Ritter, employer's operation manager. ***Hansen***, 375 S.W.3d at 203-204.

Plaintiff's petition alleged Snyder and Ritter each owed the following duties to Hursman: each had a duty and/or undertook to provide Wire Rope's employees with a safe working environment, which included making hazardous conditions safe and warning employees of unsafe or hazardous conditions; 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; each was an agent of the employer, who undertook to act for the employer under such circumstances that each defendant had a duty to take some action for the protection of the person or tangible things of the employer's employees and other individuals present in the employer's manufacturing facilities; and 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 plant maintenance, to detect and correct dangerous conditions at the plant, and to warn plant employees of such dangerous and hazardous conditions. The petition averred Snyder and Ritter were negligent, and failed to use reasonable care, and breached these duties, each of which involved either a failure to recognize, address, protect Hursman from, or warn Hursman about, alleged deficiencies in the design, use and/or maintenance of the wire stranding machine. ***Hansen***, 375 S.W.3d at 204.

Snyder and Ritter moved to dismiss, asserting the petition did not allege facts showing they owed Hursman a personal duty of care. The trial court granted the motion to dismiss. It held each duty plaintiff alleged Snyder and Ritter had breached was a part of the employer's non-delegable duty to make the workplace safe, and employees did not owe fellow employees the duty to perform the employer's non-delegable duties. The Petition failed to state a cause of action for negligence against Snyder and Ritter. ***Hansen***, 375 S.W.3d at 204-205.

The Western District affirmed. On appeal, the issue was whether the trial court erred in ruling co-employees did not owe a personal duty to fellow employees to perform the employer's non-delegable duty to provide a safe workplace. ***Hansen***, 375 S.W.3d at 206. In their motion to dismiss, Snyder and Ritter argued the petition did not state facts establishing they owed a personal duty to protect Hursman from injury. ***Hansen***, 375 S.W.3d at 206. During argument of the motion, the trial court asked plaintiff what duties Snyder and Ritter had to the injured employee. Plaintiff acknowledged the only duties ascribed to Snyder and Ritter in the petition were part and parcel of the employer's non-delegable duty to provide a safe workplace. ***Hansen***, 375 S.W.3d at 206. The duties Hansen attributed to Snyder and Ritter were subsumed within the employer's non-delegable duty to provide a safe work environment. Thus, the court did not need to determine the precise contours of the common law duty co-employees owed to one another in the workplace. Rather, it only needed to determine whether a duty to perform the employer's non-delegable duty was included within those contours. ***Hansen***, 375 S.W.3d at 208.

The court concluded that at common law, a co-employee who had violated an independent duty to an injured employee was answerable to such person for the consequences of his negligence. However, a co-employee's independent duties owed to fellow employees did not include the duty to perform the employer's non-delegable duties, as those duties necessarily derived from, and were not independent of, the master-servant relationship. ***Hansen***, 375 S.W.3d at 213-214. The court held that under the common law, a co-employee's personal duties to fellow employees did not include a legal duty to perform the employer's non-delegable duties. Unless a petition asserted a personal duty owed by co-employee, which existed independent of the employer's non-delegable duties, and thus, a duty which would exist independent of the master-servant relationship, the petition would not survive a motion to dismiss for failure to state a cause of action for negligence. ***Hansen***, 375 S.W.3d at 216-217.

As the Supreme Court first clearly stated in ***Kelso***, co-employees did not owe fellow employees the legal duty to perform the employer's non-delegable duties. Since then, no Missouri case had ever imposed liability on a co-employee for negligent performance of an employer's non-delegable duties. ***Hansen***, 375 S.W.3d at 218.

The duties ascribed to Snyder and Ritter in the Amended Petition were part and parcel of the employer's non-delegable duty to provide a safe workplace. The duties were, as Hansen conceded, duties delegated to Snyder and Ritter by the employer, and assumed or undertaken by Snyder and Ritter merely by going to work. The petition did not assert Snyder and Ritter owed personal duties to Hursman, independent of the employer's non-delegable duties, or of the master-servant relationship. As a matter of

law, the petition failed to state facts sufficient to establish the existence of a cognizable legal duty owed by Snyder and Ritter, an essential element of an actionable negligence claim. ***Hansen***, 375 S.W.3d at 219.

Hansen is on point, and demonstrates the trial court did not err in granting summary judgment to the co-employee Defendants. The duties which the First Amended Petition ascribed to Defendants Norfus and Cheese are subsumed within the employer's non-delegable duties. Accordingly, this Court, like the Western District in ***Hansen***, need not determine the precise contours of the common law duty co-employees owe to one another in the workplace. ***Hansen***, 375 S.W.3d at 208. As ***Hansen*** teaches, the co-employee Defendants' independent duties owed to Decedent did not include the duty to perform the employer's non-delegable duties, including the duty to provide a safe workplace. That duty necessarily derived from, and was not independent of, the master-servant relationship between the co-employee Defendants and employer St. Mary's. ***Hansen***, 375 S.W.3d at 214. As Decedent's employer, St. Mary's had a duty to provide Decedent with a safe workplace. This duty was non-delegable. Any breach of that duty was attributable to the employer, not Defendants Norfus and Cheese. ***Peters***, 489 S.W.2d at 795; ***Parr***, 489 S.W.3d at 779; ***Hansen***, 375 S.W.3d at 209-210.

In Counts II and IV of the First Amended Petition, Plaintiff avers Defendants Norfus and Cheese failed to implement safety guidelines, which governed the deployment of couriers. (L.F.63,67). These allegations do not charge actionable negligence against the Defendants. Like the duty to provide a safe workplace, the duty to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety is a non-

delegable duty of the employer. ***Hansen***, 375 S.W.3d at 208; ***Gunnett***, 70 S.W.3d at 638. Assuming, *solely for the sake of argument*, Defendants failed to implement or enforce safety policies regarding the deployment of couriers in inclement weather conditions, any liability for this failure attached to employer St. Mary's, not to the co-employee Defendants. Under the common law, Defendants Norfus and Cheese did not owe Decedent a legal duty to perform the employer's non-delegable duty in regard to the formulation and enforcement of safety policies. ***Hansen***, 375 S.W.3d at 218.

In her Substitute Appellant's Brief, Plaintiff McComb goes on at length about St. Mary's alleged inclement weather policy. She argues there was evidence the employer's policy required the co-employee Defendants to pull Decedent from his route during inclement weather conditions. Plaintiff avers the Defendants "did not even consult the employer's inclement weather policy" when directing Decedent to remain on his route. Relying on this purported policy, Plaintiff contends Defendants Norfus and Cheese were not entitled to summary judgment, because there remained a factual dispute about whether Defendants were following the employer's inclement weather policy when they ordered Decedent to drive through the storm. She asserts if the Defendants were simply conducting their employer's business, as the employer instructed, they could not be personally liable at common law. However, Plaintiff posits, if the co-employee Defendants acted in a "rogue fashion" contrary to St. Mary's alleged inclement weather policy, then they negligently carried out some detail or aspect of their work, rendering them personally liable. (App.Sub.Br., 1-2,8-9). McComb asserts Defendants "abandoned and ignored" St. Mary's inclement weather policy when they ordered Decedent to operate

his vehicle in bad weather. Plaintiff contends there is a factual dispute about the parameters of employer's inclement weather policy, and whether that policy required Defendants to pull employee from his route during the ice storm. (App.Sub.Br., 9-10).

Plaintiff's assertions in this regard are contrary to the position she took at oral argument before the Western District. As a review of the Western District's Opinion indicates, during oral argument *both* parties agreed employer St. Mary's did not have a policy regarding whether couriers were to maintain their routes during inclement weather. (Op., 10 n.11). Since Plaintiff's argument, as set forth in her Substitute Appellant's Brief, is premised on the existence of an inclement weather policy, that argument is inconsistent with her prior position and admission in this cause, and as such, it must be rejected.

What is the inclement weather policy which serves as the basis for the arguments in Plaintiff's Brief? A review of the record demonstrates what Plaintiff labels an employer policy is nothing more than a job description for couriers working at St. Mary's.

This is made evident by Plaintiff's argument there was evidence the employer's policy required Defendants to order Decedent to remain on his delivery route, despite the icy road conditions. "For example, McComb's job description contains verbage that he 'complete tasks in inclement weather'." (App.Sub.Br., 1-2). What is referenced herein is Decedent's job description, not an employer policy. (L.F.182-190).

Plaintiff again refers to Decedent's job description in discussing an admission purportedly made by Defendant Cheese. She states: "there is also evidence that the employer's policy required Respondents to pull McComb from his route during icy conditions. Respondent Cheese admitted that McComb's job description actually did *not*

require McComb to perform deliveries when roads were iced over." (App.Sub.Br., 2). In discussing the employer's alleged inclement weather policy, Plaintiff referenced that portion of Decedent's job description involving "Code Operation Weather Warning/Watch." She states Decedent's job description required he clear snow and frost from both vehicles for STAT runs in winter months, and required he complete tasks in inclement weather. (App.Sub.Br., 5). (L.F.182-190).

Plaintiff asserts "there is a factual dispute about the parameters of the employer's inclement weather policy." (App.Sub.Br., 9). In reality, there is no factual dispute. What Plaintiff relies on in her Appellant's Brief, and what she refers to as St. Mary's inclement weather policy, is nothing more than Decedent's job description. (L.F.182-190). Given this fact, and given the fact Plaintiff admitted employer did not have an inclement weather policy during oral argument before the Western District, Plaintiff's argument that the co-employee Defendants acted in violation of this alleged inclement weather policy are without support in the record, and must be rejected.

Assuming, *arguendo*, employee's job description constitutes a safety policy of the employer, that policy, as Plaintiff's admits, required Decedent to drive in inclement weather. (App.Sub.Br., 1-2,5-6,12). (L.F.182-190). In directing employee to complete his carrier route on the day of the accident, the co-employee Defendants did not engage in conduct which served to increase Decedent's risk of injury, or which created an additional danger, beyond that normally faced in Decedent's job as a courier for St. Mary's. Employee's courier job necessitated he drive in inclement weather conditions. ***Gunnett***, 70 S.W.3d at 640-641; ***Tauchert***, 849 S.W.2d at 574; ***Burns***, 214 S.W.3d at 338.

Under common law, co-employees are only liable to their fellow employees for breach of a duty *independent* of the master-servant relationship, i.e., duties separate and distinct from the employer's non delegable duties. An injured employee cannot maintain a common law negligence action against a co-employee where, as here, the duties allegedly breached are part of the employer's non-delegable duties to provide a safe workplace and to promulgate and enforce safety rules. ***Peters***, 489 S.W.3d at 796; ***Parr***, 489 S.W.3d at 782. Any tasks necessarily attendant to the provision of a safe workplace and the creation and enforcement of safety rules are chargeable to the employer's non-delegable duty. ***Hansen***, 375 S.W.3d at 215. The supervisors St. Mary's chose to implement its non-delegable duties, Defendants Norfus and Cheese, owed their duty to the employer, not to Decedent. ***Peters***, 489 S.W.3d at 797. Thus, any failure by the co-employee Defendants to fulfill St. Mary's non-delegable duties must be imputed to the employer. ***Peters***, 489 S.W.3d at 796; ***Hansen***, 375 S.W.3d at 218.

In Counts I and III of the First Amended Petition, Plaintiff avers the actions of the co-employee Defendants "created a hazardous condition that was not merely a breach of the duty to provide a safe place to work, but were rather breaches of a personal duty of care" to Decedent. Relatedly, Plaintiff avers the actions and omissions of the Defendants "created a hazardous and dangerous condition beyond the usual requirements" of Decedent's employment. (L.F.60,65). Absent in the First Amended Petition, however, are any averments describing the nature of the alleged "hazardous condition", and indicating the purported hazardous condition was anything other than an unsafe work environment. (L.F.56-77).

The only hazardous condition which existed at the time of Decedent's fatal accident on 1-26-09 was that of snow and ice on the roads, caused by snow and inclement winter weather. Per the facts as alleged in Plaintiff's First Amended Petition, it was this hazardous condition created by the winter storm on 1-26-09, which caused the highway on which Decedent was driving to be slick and icy. Decedent slid off the right side of the highway, and overturned down a steep embankment, due to the icy roadway. (L.F.59,174-179). None of the actions, or any alleged failure to act, on the part of either co-employee Defendant on 1-26-09 created the hazardous condition giving rise to Decedent's fatal accident. That hazardous condition was created by winter weather, a situation entirely beyond the control of the Defendants. ***Hansen***, 375 S.W.3d at 210;***Kelso***, 85 S.W.2d at 534. Nothing the co-employee Defendants did, or did not do, on 1-26-09 served to create the severe winter weather or the icing on the highway on which Decedent was traveling when the accident occurred. Simply put, neither Defendant Norfus nor Defendant Cheese did *anything* to cause or contribute to cause this hazardous condition. ***Id.***

The instant facts stand in contrast to those in ***Hedglin v. Stahl Specialty Co.***, 903 S.W.2d 922,924 (Mo.App.W.D.1995). In ***Hedglin***, the dependents of a deceased worker filed a civil action against the employee's supervisor, after the employee fell into a vat of scalding water at work. In their petition, plaintiffs averred the supervisor rigged a forklift with a cable or chain and ordered the deceased to suspend himself by it over scalding water. ***Hedglin***, 903 S.W.2d at 927.

Similarly, in ***Burns v. Smith***, 214 S.W.3d 335,338-339 (Mo.banc.2007), a supervisor applied a weld to a water pressure tank, over an area of the tank which had become corroded and rusted through to the extent it had developed holes which leaked pressurized water, and directed plaintiff to "run it till it blows," which the tank did, violently exploding and injuring plaintiff. The weld the co-employee defendant placed over the corrosion and rust on the tank increased the risk of violent explosion of the water pressure tank and plaintiff's injuries. The water pressure tank, after being welded in this fashion, represented a hazardous condition. ***Burns***, 214 S.W.3d at 339-340.

Absent in the First Amended Petition are any allegations Defendant Norfus, Cheese, or both, engaged in any conduct which created a hazardous condition of the nature of the hoist and welded water pressure tank in ***Hedglin*** and ***Burns***. Plaintiff failed to allege or demonstrate any hazardous condition created by the actions of the co-employee Defendants, such as would support a common law negligence action against them. ***Id.***; ***Hedglin***, 903 S.W.2d at 927.

In Counts I through IV of the First Amended Petition, Plaintiff avers the co-employee Defendants directed, sent and kept Decedent on his route on the afternoon of 1-26-09 "aware of the storm and the road conditions that then existed." (L.F.60,62,64,66). Assuming, *solely for the sake of argument*, Defendants Norfus and Cheese knew of the dangers Decedent faced in completing his courier route, this knowledge did not impose on them a common law personal duty of care to employee. The duty to make the workplace safe from known dangers is a non-delegable duty owed by the employer, not by co-employees. ***Gunnett***, 70 S.W.3d at 638; ***Hansen***, 375 S.W.3d at 208-209.

For example, ***Amesquita v. Gilster-Mary Lee Corp.***, 408 S.W.3d 293,303 (Mo.App.E.D.2013), affirmed the dismissal of negligence claims against co-employees, based on plaintiff's exposure to diacetyl at a popcorn production facility. While it could be inferred from plaintiff's petition the employee defendants knew of the dangers of diacetyl exposure, and failed to protect plaintiff from those dangers, the duty to make the workplace safe from known dangers was a non-delegable duty owed by the employer, not co-employees. Amesquita failed to allege actionable negligence, because the co-employee defendants did not have an independent duty, despite allegations that they knew or should have known of the dangers diacetyl presented. ***Id.*** An employee's negligent failure to discharge the employer's non-delegable duty to make the work place safe is not actionable against the employee, because the duty is owed by the employer, in this case, St. Mary's. ***Gunnett***, 70 S.W.3d at 638; ***Amesquita***, 408 S.W.3d at 303.

For a co-employee defendant to be personally liable to a fellow employee for injuries suffered in the scope and course of employment, the co-employee defendant must have done something beyond performing or failing to perform normal job duties. An employee may sue a fellow employee for affirmative negligent acts outside the scope of an employer's responsibility to provide a safe workplace. ***Tauchert***, 849 S.W. 2d at 574. A personal duty arises out of circumstances where the co-employee engages in an affirmative act, outside the scope of the employer's non-delegable duties, directed at a worker, increasing the risk of injury. ***Gunnett***, 70 S.W.3d at 641; ***Tauchert***, 849 S.W.2d at 574 (the action in question must be an affirmative negligent act, one that affirmatively causes or increases a fellow employee's risk of injury, or a breach of a personal duty

owed to the plaintiff). For engaging in a direct, affirmative act, the co-employee owes a personal duty to exercise ordinary care under the circumstances, and to refrain from conduct which might reasonably be foreseen to cause injury to another. ***Gunnett***, 70 S.W.3d at 641.

The question of what constitutes an affirmative negligent act has not proven susceptible of reliable definition. Missouri courts have essentially applied the rule on a case-by-case basis, with close reference to the facts in each individual case. ***Taylor***, 73 S.W.3d at 622. There must be some affirmative act of the co-employee defendant, which increases the risk of injury to the employee. ***Gunnett***, 70 S.W.3d at 640.

The notion of an affirmatively negligent act can best be described as an affirmative act which creates additional danger, beyond that normally faced in the job's specific work environment. ***Burns***, 214 S.W.3d at 338. The requirement of an affirmative negligent act satisfies the concern that although there must be an independent duty to the injured employee, that duty cannot arise from a mere failure to correct an unsafe condition, and must be separate and apart from the employer's non-delegable duty to provide a safe workplace. ***Id.*** An affirmative negligent act is not synonymous with *any* negligent act, since the law requires a purposeful act directed at a co-employee. ***Nowlin ex rel Carter v. Nichols***, 163 S.W.3d 575,579 (Mo.App.W.D.2005); ***Risher v. Golden***, 182 S.W.3d 583,587 (Mo.App.E.D.2005). The First Amended Petition fails to charge the co-employee Defendants with an affirmative negligent act, which increased the risk of injury to Decedent.

The activities of the co-employee Defendants, as alleged in the First Amended Petition, stand in contrast to those before the court in ***Tauchert***, 849 S.W.2d at 574. Tauchert was injured as he was standing on top of an elevator cab when it fell 5 or 6 floors to the bottom of an elevator shaft. ***Tauchert***, 849 S.W.2d at 573. At the time he was injured, Tauchert was employed by Westinghouse Electric as a helper. He was assisting Ritz, the on-sight foreman, in performing the final checkout of a parking garage elevator system. In the process of the checkout, Ritz arranged a make-shift hoist system to raise the elevator. This hoist arrangement failed, causing the elevator to fall, resulting in Tauchert's injuries. ***Tauchert***, 849 S.W.2d at 574. The creation of a hazardous condition was not merely a breach of an employer's duty to provide a safe workplace. Ritz' alleged act of personally arranging the faulty hoist system for the elevator could constitute an affirmative negligent act outside the scope of his responsibility to provide a safe workplace for Tauchert. Such an act constituted a breach of a personal duty of care owed to the plaintiff. ***Id.***

Relying on ***Tauchert***, ***Hedglin***, 903 S.W.2d at 927, held an injured employee could recover against a co-employee who created a hazardous condition. Hedglin died after he fell into a vat of scalding water while working at Stahl Specialty plant. Plaintiffs contended Hedglin fell into the vat while carrying out the orders of his supervisor, Corkran. In their amended petition, plaintiffs alleged Corkran deliberately, intentionally, and in conscious disregard for Hedglin's safety, subjected Hedglin to the extreme and unreasonable risk of injury or death. They averred Corkran ordered and directed Hedglin to undertake responsibilities which created a separate and extreme risk of injury and

death, far beyond that anticipated or contemplated by the ordinary duties and responsibilities of Hedglin's position of employment, as a helper. Specifically, plaintiffs asserted Hedglin was directed to remove a screen or grate from an agitator which was submerged in a cooling vat filled with scalding water. The vat was not drained. Using a forklift with a cable or chain, Hedglin was ordered or directed to climb to the top of the vat, which was unguarded and unprotected for human use, and hang from the forks of the forklift in order to lift the grate out of the vat of scalding water. At the time Hedglin was injured, Corkran was operating the forklift from which Hedglin was hanging. ***Hedglin***, 903 S.W.2d at 924.

The trial court dismissed the action against Hedglin's supervisor. The Western District reversed. ***Hedglin***, 903 S.W.2d at 926. It noted a fellow employee could be subject to liability if he affirmatively committed negligent acts outside the scope of an employer's responsibility to provide a safe workplace. Plaintiffs satisfied this requirement. They alleged Corkran, contrary to his obligation to assure Hedglin a safe workplace, personally arranged an extremely dangerous scheme to remove a screen or grate from the vat by hanging Hedglin from a forklift. These facts were similar to those in ***Tauchert***. ***Hedglin***, 903 S.W.2d at 926-927. Plaintiffs' contention that Corkran rigged a forklift with a cable or chain and ordered Hedglin to suspend himself on the cable or chain would satisfy the affirmative negligence ***Tauchert*** described. These allegations were sufficient to withstand a motion to dismiss. ***Hedglin***, 903 S.W.2d at 927.

Like ***Hedglin*** and ***Tauchert***, ***Pavia v. Childs***, 951 S.W.2d 700,702 (Mo.App.S.D.1997), involved an affirmative negligent act by a co-employee, constituting

a breach of a personal duty owed to a fellow worker. Pavia was a grocery store bagger employed at Smitty's No. 9 Store. Childs was the store manager. Plaintiff averred while he was acting under Childs' supervision and direction, Childs instructed him to assist in obtaining certain store items stocked in the store's warehouse area. Pavia alleged he was directed to stand upon a wooden pallet, under which Childs inserted the forks of a forklift, and elevated Pavia to a height of approximately 15 feet above the level of the warehouse's concrete floor. Pavia fell off the wooden pallet to the floor, sustaining serious injuries. In his petition, Pavia alleged Childs caused and increased the risk of his injuries in certain particulars, including that the forklift was not designed for raising personnel and it was dangerous and likely to cause harm to Pavia by doing so, and there were no safety precautions or devices used to prevent Pavia from falling. ***Pavia***, 951 S.W.2d at 701.

While charging the employee with a general failure to fulfill the employer's duty to provide a reasonably safe place to work was not sufficient to avoid the bar of the Act, the creation of a hazardous condition was not merely a breach of an employer's duty to provide a safe place to work. Such conduct constituted a breach of a personal duty owed to the plaintiff, and could make an employee/supervisor liable for negligence, notwithstanding the Act. Relying on ***Tauchert*** and ***Hedglin***, ***Pavia*** found the petition stated a claim on which relief could be granted. The facts alleged showed an affirmative negligent act by Childs, creating a dangerous condition, beyond the responsibility of the employer to provide a safe workplace. ***Pavia***, 951 S.W.2d at 702.

The First Amended Petition fails to allege any conduct, by either Defendant Norfus or Cheese, of the nature alleged in ***Tauchert***, ***Hedglin***, and ***Pavia***. Rather, Plaintiff merely avers the co-employee Defendants directed, sent, and kept Decedent on his courier route. These allegations aver nothing more than that the co-employee Defendants provided supervisory direction to Decedent. However, the provision of supervisory direction to an employee is not sufficient to establish a personal duty on the part of a co-employee defendant, sufficient to give rise to a common law negligence action. ***Lyon v. McLaughlin***, 960 S.W.2d 522,526 (Mo.App.W.D.1998).

Unlike the facts present in ***Tauchert***, ***Hedglin*** and ***Pavia***, Plaintiff has failed to allege the co-employee Defendants were present with Decedent and performing an act or operating a piece of machinery which resulted in Decedent's injury, or that those co-employee Defendants created a dangerous condition which a reasonable person would recognize as hazardous beyond the usual requirements of the employment. Plaintiff failed to allege any affirmative act undertaken by either Norfus or Cheese, outside the scope of the employer's responsibility to provide a safe workplace, or which does not implicate the employer's duty to provide a safe workplace. Absent herein is any purposeful act by the co-employee Defendants, directed at Decedent, which affirmatively caused or increased Decedent's risk of injury. ***Gunnett***, 70 S.W.3d at 641; ***Hansen***, 375 S.W.3d at 217.

Plaintiff has failed to allege circumstances showing a personal duty of care owed by Defendants Norfus and Cheese to Decedent, separate and apart from employer St. Mary's non-delegable duties, including the duty to provide a safe workplace. ***Gunnett***, 70

S.W.3d at 641. In the First Amended Petition, Plaintiff has not alleged that either Defendant engaged in any affirmative act outside their employment duties, which created an additional danger or made Decedent's job more dangerous than it otherwise was. ***Gunnett***, 70 S.W.3d at 641; ***Hansen***, 375 S.W.3d at 217. Decedent was a courier. Driving in inclement weather and in difficult roadway conditions were risks inherent in that position. (L.F.182-190). Averments that Defendants Norfus and Cheese sent, directed, and kept employee on his courier route relate only to St. Mary's duty to provide a safe workplace. Plaintiff's First Amended Petition merely charged that Norfus and Cheese, the employees chosen to implement St. Mary's duty to provide a reasonably safe workplace, failed fulfill that duty. As such, it charges no actionable negligence against the Defendants. ***Badami***, 630 S.W.2d at 180.

That the First Amended Petition describes the actions of Norfus and Cheese as being "something more, something extra, affirmatively negligent," "reckless" and tortious acts which caused or contributed to cause the injuries to and death of Decedent does not change this fact. Simply labeling Counts I and III of the Amended Petition as "something more" or describing the alleged acts of Defendants Norfus and Cheese as being "affirmatively negligent" is insufficient to allege actionable negligence against those Defendants. These descriptive terms are unsupported by the pleaded facts, and are the conclusions of the Plaintiff, and are not to be considered in determining whether she has stated an actionable claim for negligence. ***State ex rel Tax Commission v. Briscoe***, 457 S.W.2d 1,5 (Mo.banc.1970).

In her Substitute Appellant's Brief, Plaintiff posits many cases decided before ***Peters***, which remained good law, compelled a reversal of the 6-30-14 Judgment in favor of Defendants. She asserts in such cases, the co-employee did not carry on business as usual, as directed by the employer, but rather, acted outside the norm in a manner which caused plaintiff to encounter the danger which led to the injury. In support of this proposition, Plaintiff cites ***Tauchert***, 849 S.W.2d at 574; ***Pavia***, 951 S.W.2d at 701; ***Hedglin***, 903 S.W.2d at 927; ***Burns***, 214 S.W.3d at 340; and ***Workman v. Vader***, 854 S.W.2d 560,564 (Mo.App.S.D.1993). (App.Sub.Br., 11-12). However, ***Tauchert***, ***Hedglin***, ***Burns***, and ***Pavia*** are distinguishable. In each of those cases, the co-employee defendant created a hazardous condition, which increased the risk of injury to their fellow employee.

Workman, 854 S.W.2d at 564, also falls within this mold. It held a jewelry department employee at a discount store who was allegedly injured when she stepped on the edge of a cardboard box behind a counter, slipped and lost her balance, stated a negligence claim against her co-employee. Averments in the petition indicated the co-employee's affirmative acts caused or increased the risk of Workman's injury. Workman alleged the co-employee personally threw packing debris on the floor, together with a cardboard box placed on top of the debris, and thereafter, failed to remove it, or warn plaintiff of its presence. These acts, the court found, did not indicate a general non-delegable duty of the employer, but rather, charged that the defendant personally breached a common law duty to exercise reasonable care in handling or disposing of the packing materials and cardboard box. The acts of the defendant as alleged, if proven,

could constitute the breach of a personal duty of care owed to plaintiff. ***Workman***, 854 S.W.2d at 564.

The instant case does not involve a scenario wherein the co-employee defendants personally arranged a dangerous scheme, which directly placed their fellow employee in danger. ***Hedglin***, 903 S.W.2d at 926-927; ***Pavia***, 951 S.W.2d at 702. The acts of Defendants Norfus and Cheese in directing, sending, and keeping Decedent on his route are in no way comparable to the acts of the co-employee defendants in ***Tauchert***, ***Burns***, ***Hedglin***, and ***Pavia***. Instructing the employee to complete his job duties is in no way analogous to rigging a forklift with a cable or chain and ordering a co-employee to suspend himself by use of that rigging over a vat of boiling liquid, using a forklift to elevate a fellow employee to a height of 15 feet above the level of a concrete floor, or defectively welding a boiler which the co-employee was required to operate. And, unlike ***Workman***, the instant facts do not involve a situation where a co-employee negligently carried out the details of the work. ***Workman***, 854 S.W.2d at 564.

In ***Tauchert***, ***Burns***, ***Hedglin***, ***Pavia*** and ***Workman***, the co-employee defendants engaged in an affirmative act, by which they created a hazardous condition which resulted in harm to a fellow employee. The hazardous condition resulting in Decedent's fatal accident was ice on the highway on which he was driving. That hazardous condition was not created or caused by any act of Defendants Norfus, Cheese, or both, but rather, by inclement weather, a situation entirely out of the control of the co-employee Defendants. The allegations in the First Amended Petition do not rise to the level of affirmative negligent acts, increasing the risk of injury to a co-employee, of the nature of

those at issue in ***Pavia***, 951 S.W.2d at 702; ***Hedglin***, 903 S.W.2d at 927; ***Tauchert***, 849 S.W.2d at 574; and ***Burns***, 214 S.W.3d at 339-340. Plaintiff's reliance on these decisions is misplaced.

Rather, the allegations in the First Amended Petition fit squarely within the non-delegable duties of employer St. Mary's, including the duties to provide a safe place to work and to promulgate and enforce rules governing employee safety. ***Hansen***, 375 S.W.3d at 208; ***Gunnett***, 70 S.W.3d at 638. The co-employee Defendants did not owe an independent, personal duty of care to Decedent to perform the non-delegable duties of the employer. ***Hansen***, 375 S.W.3d at 217. All the allegations against the Defendants in the First Amended Petition being related to or arising from the employer's non-delegable duties, those allegations fail to set forth a common law action for negligence against Defendants Norfus and Cheese. ***Id.*** Plaintiff has failed to allege any duty owed by the co-employee Defendants, separate and distinct from the employer's non-delegable duties, including the duty to provide a safe workplace.

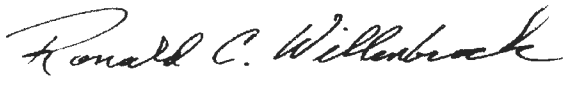
All the duties the First Amended Petition ascribes to Defendants Norfus and Cheese are part and parcel of the employer's non-delegable duties. As such, the First Amended Petition failed to state facts sufficient to establish the existence of a cognizable legal duty owed by those Defendants, and failed as a matter of law. ***Hansen***, 375 S.W.3d at 219; ***Peters***, 489 S.W.3d at 788-789; ***Parr***, 489 S.W.3d at 782. The trial court's 6-30-14 Judgment, granting summary judgment in favor of the co-employee Defendants, must be affirmed. ***Id.***

CONCLUSION

The 6-30-14 trial court's Judgment must be affirmed. All the duties which the First Amended Petition ascribes to Defendants Norfus and Cheese are part and parcel of the employer's non-delegable duties, including the duties to provide a safe workplace and to promulgate and enforce safety policies. Plaintiff has failed to allege an affirmative negligent act on the part of the co-employee Defendants, outside the scope of the employer's non-delegable duties, increasing the risk of injury to Decedent. The First Amended Petition fails to aver circumstances showing a personal duty of care owed by the co-employee Defendants, independent of the master-servant relationship. Accordingly, the First Amended Petition fails to state a common law negligence action against Defendants Norfus and Cheese, and the trial court did not err in granting summary judgment in favor of the Defendants.

Respectfully submitted,

Evans & Dixon LLC



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CERTIFICATE OF SERVICE

A copy of the foregoing document was filed with the Missouri electronic filing system this 20th day of March, 2017, which will send a copy to: Ms. Rachel Lynn Roman, Mr. David M. Zevan, and Mr. Kevin J. Davidson, attorneys for Appellant, at One North Taylor Avenue, St. Louis, Missouri 63108; and Mr. Tommie A. Harsley, III, co-counsel for Appellant, at 8200 Olive Boulevard, St. Louis, Missouri 63132.

/s/ Mary Anne Lindsey

CERTIFICATE OF COMPLIANCE

This Brief complies with Rule 84.06(b)(1) and contains 19,726 words. To the best of my knowledge and belief, the copy of the Substitute Respondents' Brief forwarded to the Clerk of the Court, via electronic mail, in lieu of a floppy disc or CD, has been scanned for viruses, and is virus-free.

/s/ Mary Anne Lindsey

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