THE SUPREME COURT OF MISSOURI

No. SC 96030

MATTHEW FOGERTY

Appellant

vs.

RICK ARMSTRONG, et al.

Respondents

Appeal from the Circuit Court of St. Louis County
The Honorable Mark D. Seigel, Circuit Judge

SUBSTITUTE BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from the final judgment in a civil case. Matthew Fogerty filed suit against Rick Armstrong and Larry Meyer. He sought damages for personal injuries that he attributed to the defendants' negligent acts. Mr. Fogerty dismissed his claim against Mr. Armstrong.

On October 4, 2013, the Circuit Court granted Mr. Meyer's motion for summary judgment. LF 216. Mr. Fogerty filed his motion for a new trial on Monday, November 4, 2013. LF 217-19. On December 18, 2013, the Circuit Court denied Mr. Fogerty's motion. LF 220. Mr. Fogerty filed his notice of appeal to the Missouri Court of Appeals, Eastern District, on Monday, December 30, 2013. LF 221-23.

The Court of Appeals reversed the judgment of the Circuit Court in an opinion issued on September 20, 2016. Mr. Meyer filed a motion for rehearing and application for transfer to this Court in the Court of Appeals on October 3, 2016. The Court of Appeals denied both requests on October 26, 2016. Mr. Meyer filed his application for transfer to this Court in this Court on November 9, 2016. This Court sustained that application in an order entered on December 20, 2016.

This appeal does not involve the validity of a treaty or statute of the United States, a statute or provision of the Constitution of this state, or title to any state office, nor is it a case in which the punishment of death was ordered. As provided in Mo. Const. art. V, §§ 3 and 15, original jurisdiction of this appeal was vested in the Missouri Court of Appeals. In accordance with Mo. R. Civ. P. 83.04, this Court transferred the appeal after opinion by the Court of Appeals and after that Court's denial of a timely application for transfer.

STATEMENT OF FACTS

Matthew Fogerty filed a petition to recover damages after he was injured at a job site. LF 10-26. Mr. Fogerty was a carpenter working for Wright Construction Company. LF 10. He sued Rick Armstrong and Larry Meyer, who were employed by the same company. LF 10-11. Mr. Armstrong was a project superintendent and Mr. Meyer was a carpenter and project supervisor. LF 10-11. Mr. Fogerty was injured on October 20, 2011, while moving large stones from one place to another on the job site under the supervision of his co-employee Mr. Meyer.. LF 10-11. The accident occurred when he was walking in front of a frontloader being operated by Mr. Meyer, as directed by Mr. Meyer, and Mr. Meyer caused the forks of the frontloader to strike him on the shoulders suddenly and repeatedly. LF 10-11.

A. Mr. Meyer's Motion for Summary Judgment

Mr. Meyer premised his motion for summary judgment upon the following contention:

> Since the undisputed material facts fail to set forth any duty owed independently by Defendant Meyer, separate and apart from the non-delegable duty of employer Wright Construction Company to supervise and provide a safe workplace … Defendant Meyer is entitled to summary judgment.

LF 96-97.

B. Summary Judgment Record[1]

1. Mr. Fogerty's Deposition Testimony

Mr. Fogerty testified that he was working as a carpenter for Wright Construction Company at the time of his injury. LF 174-75. He never had been a foreman or supervisor during his employment with that company. LF 174-75. At the time of his injury Mr. Fogerty was working on a construction project at the Logan College campus. LF 176. He described his principal work at the college:

> They were doing just a big addition they had built there, and they were doing all the commercial carpentry aspects of it, such as like doors and jambs and hardware, backing throughout the building, just various things, lots of various things going on.

LF 176.

Mr. Fogerty testified that his work and crew assignments had varied. "We would not always be the same … crew. They would just move guys around where they needed them." LF 177. He was assigned to work at the Logal College site frequently and obtained his assignment from Mr. Armstrong upon arrival for each day's work. LF 177. At the time of his injury Mr. Fogerty was working with Mr. Meyer to move large stones

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[1] Both defendants moved for summary judgment. LF 36-38, 94-99. Mr. Fogerty dismissed his claim against Mr. Armstrong prior to any summary judgment ruling. LF 159-60. The Circuit Court resolved the remaining claims by granting Mr. Meyer's motion. LF 216.

from "various places" on the campus to the site of a new fountain. LF 181. Mr. Fogerty recalled that they may have been working at that task for one week by the time of his injury. LF 181.

Mr. Fogerty said that Mr. Armstrong checked on the progress of the stone-moving job regularly: "Larry would tell him what he was doing and what he had in mind and stuff." LF 181, 186. Mr. Meyer had blueprints that he and Mr. Fogerty "worked off of," with Mr. Fogerty as Mr. Meyer's "wingman." LF 181. According to Mr. Fogerty, Mr. Meyer made "the decision as to what stone we were going to pick up, what we were going to do." LF 181.

Initially Mr. Meyer and Mr. Fogerty used both forks on the lift to suspend a stone for transportation across the construction site:

> We would take two straps, and they both would have kind of like loops on them that are sewn on. We would loop the cable through there … choking the cable. We would attach two of these to a stone, one on each fork. Then we'd transport it like that.

LF 181. Mr. Fogerty testified that this method of carriage balanced the stone, "cradling one stone with two straps." LF 181-82.

Mr. Meyer was dissatisfied with their progress using that method and decided to try transporting two stones at a time, suspending each stone by a single strap hung from one fork or the other. LF 182. Mr. Fogerty testified that this system proved unwieldy because the stones "were kind of crashing into one another." LF 182. On the morning of Mr. Fogerty's injury, Mr. Meyer decided to move just one stone at a time but to suspend

that stone with a single strap hanging off one of the forks. LF 182. Mr. Fogerty recalled Mr. Meyer saying: "I can make better time I think just moving back and forth like that." LF 182.

At the time of the accident Mr. Meyer was driving the fork lift up a roughly graded and very muddy part of the construction site. LF 182-83. He was having difficulty controlling the vehicle because of the terrain and the weight of the stone. LF 182-83. Mr. Fogerty testified that "the stone was swinging pretty heavily." LF 183. He recalled Mr. Meyer's instruction to him:

> "Matt, come back here, and I need you to stabilize that stone for me a minute while I'm driving up with it" … I went back there. The stone was way off center … I tried with my hands to sort of stabilize that weight as he was driving along. All of a sudden, it's like everything happened so quickly. The stone kind of dropped out from underneath my hand. Like in an instant. I heard him at the same time kind of scream, "Look out." At that time, the fork slammed me in the back, just drove me hard like down on both knees, and I was in shock … I heard him yelling and screaming … As I was getting up off my knees, I was kind of up on my knees on the ground. All of [a] sudden the forks were coming back down on my back again … It was pushing me into the ground.

LF 182-83.

Mr. Fogerty described the subsequent impacts of the forks as he attempted again and again to get up:

> This time it was doing … a pancake type motion on my back—pow, pow, pow, one after another. It was pushing me. It's a hydraulic piece of equipment. It was pushing me into the ground. So my hands, I could feel all the pressure on my hands and face. It was immense. I thought I got to get prone. It would have broke my arms and legs or something. So I was trying to get my arms and legs flat as prone as I could. He was screaming hysterically at the equipment. I guess he was freaking out over the controls and didn't know what he was doing. Anyway, after it did the pancake thing, it just did one hard push, one hard press. I was getting ready at that point, here it comes, the hydraulics of something must have come out. I felt the full weight of this steel. I was trying to lay as flat as I could. Here it comes. It was pushing me into the mud. I could feel it. It was pushing me into the dirt … [My face] was to the side, turned my head while waiting for the full impact of this thing. Suddenly … it was off me. This weight was all off me. I was in shock.

LF 185.

Mr. Fogerty testified that at the time of the accident his back was turned to Mr. Meyer and Mr. Meyer was driving the lift forward. LF 184. When he was asked whether the stone had fallen out of the cable loop, Mr. Fogerty answered: "No. What happened was the equipment, he had hit the wrong controls. The equipment came down." LF 185.

Mr. Fogerty testified that he was in pain but continued to work on the day of the accident. LF 186. He experienced "a lot of pain and stiffness." LF 186. The next day

he was in "terrible pain" and unable to return to work. LF 187. He was evaluated and treated for an injury to his ribs at an urgent care facility. LF 189. Another physician ordered imaging of his knee and physical therapy, treated the knee injury with one or two injections, and limited Mr. Fogerty's work to "light duty." LF 189-90. Mr. Fogerty testified that he attended physical therapy sessions for his knee "two or three times per week" but did not get any relief from the injury. LF 190. He described his knee injury: "[I]t was swollen … and just had a lot of pain and stiffness. My mobility was a wreck, you know." LF 189. An orthopedic surgeon operated on the knee, and Mr. Fogerty remained under that surgeon's care at the time of his deposition. LF 190.

Mr. Fogerty continued to experience pain in his knee every day through the time of his deposition. LF 191. He said:

> It's painful to walk on it for long durations, climbing stairs, or going down stairs is very painful with it. I can't kneel on the knee any more. If I kneel on it, I have really bad pain … I don't really do things … such as yard work … Pushing the mower, I get a lot of pain with that … I try to stay away from things that bother it.

LF 191. Mr. Fogerty testified that two physicans have advised him that he is no longer capable of employment as a carpenter. LF 191. He had been working as a carpenter for "probably 30 years" at the time of his injury. LF 175.

2. Mr. Meyer's Deposition Testimony

Mr. Meyer was still working as a carpenter for Wright Construction Company at the time of his deposition. LF 195. He had completed a carpentry apprenticeship, tested

into his first job as a journeyman carpenter, and had received subsequent training on the job. LF 195-96. His work at the Logan College construction site initially consisted of "[j]ust general carpenter work on the inside of the building." LF 197.

Mr. Meyer testified that at some point Mr. Armstrong told him that he needed to start working on the outdoor fountain project. LF 197. He said the stones that he and Mr. Fogerty were to move weighed "anywhere from a hundred to 300 pounds" and had been too heavy for two men to lift. LF 198. 202. Mr. Meyer testified that he had worked with the front loader on more than 10 occasions. LF 197. He had been working with front loaders since his youth on a farm and had operated similar vehicles on previous jobs as well for Wright Construction Company. LF 196.

When Mr. Meyer was asked what had caused the forks of the front loader to come down and strike Mr. Fogerty, he answered: "I don't know … I don't know what happened. I really don't." LF 196. Asked whether he had control of the machine at the time of the accident, Mr. Meyer responded: "I thought I did. I mean, evidently I—" LF 200. He testified that there had been nothing wrong with the machinery when the accident occurred. LF 201, 204.

The terrain that Mr. Meyer was crossing in the front loader at the time of the accident was rough and made a large stone suspended from a single strap swing back and forth. LF 199. Mr. Meyer testified that he had called for Mr. Fogerty's assistance in steadying the stone just before the accident: "I asked him to keep it from swaying." LF 199-200. Mr. Meyer recalled that he was driving the fork lift at the time of the accident and that Mr. Fogerty was walking in front of the vehicle to hold the load steady: "He is, I

guess, next to the stone, underneath the forks. so it would be the driver's side, underneath." LF 199-200. Mr. Meyer testified: "He was walking … with the load. Not facing me." LF 201. When he was asked whether Mr. Fogerty had been directly in front of him or "at an angle coming off the corner of this machine," Mr. Meyer answered: "Directly in front." LF 201.

Mr. Meyer testified that at the time of the accident he perceived no "safety concern" in Mr. Fogerty's presence directly beneath the forks in front of the moving vehicle. LF 202. When he was asked whether he perceived reason for such concern by the time of his deposition, he answered: "By far, yes." LF 202. He acknowledged that the position of Wright Construction Company regarding the accident "is that Matt Fogerty should never have been underneath those forks," and that "common knowledge" and "common sense" required that conclusion. LF 206.

3. The Circuit Court's Summary Judgment Rulings

The Circuit Court granted Mr. Meyer's motion for summary judgment without explanation. LF 216. Mr. Fogerty filed a motion for a new trial. LF 217-19. His motion alleged that the ruling was erroneous for the following reason:

> [T]he summary judgment evidence … was sufficient to support a finding that Mr. Meyer committed one or more affirmative acts that subjected Mr. Fogerty to "additional danger beyond that normally faced in the[ir] job-specific work environment, *Burns v. Smith,* 214 S.W.3d 335, 338 (Mo. 2007), and that Mr. Meyer's conduct caused Mr. Fogerty's injury.

LF 28. The Circuit Court denied that motion as well. LF 220.

4. The Court of Appeals' Analysis

The Court of Appeals reversed the judgment of the Circuit Court. *Fogerty v. Armstrong,* 2016 WL 5030379 (Mo. App. E.D. Sept. 20, 2016). A unanimous panel began its analysis by acknowledging two recent decisions of this Court:

> During the pendency of this appeal, the Missouri Supreme Court issued decisions in *Parr v. Breeden,* 489 S.W.3d 774, 778-79 (Mo. 2016), and *Peters v. Wady Industries, Inc.,* 489 S.W.3d 784, 795-96 (Mo. 2016), finding employees may be liable at common law for injuries to a co-employee caused by their negligent actions if the plaintiff can demonstrate the defendant violated a personal duty of care separate from the employer's duty to provide a safe workplace … Under *Parr* and *Peters,* co-employees acting negligently within the scope of their employment are not granted immunity under the 2005 version of the Workers' Compensation Act … for injuries caused by their negligent conduct committed between 2005 and 2012.

Fogerty at *2.

Continuing its analysis, the Court of Appeals noted this Court's recognition of the employer's non-delegable duty to provide a safe work environment, which includes the duties of (1) providing a safe place to work, (2) providing safe appliances, tools, and equipment, (3) giving warnings of dangers the employee might reasonably be unaware of, (4) providing a sufficient number of suitable fellow employees, and (5) promulgating and enforcing rules for the conduct of employees that would make their work safe. *Id.* (citing

Peters, 489 S.W.3d at 795). And the Court of Appeals noted the limitation that this Court had recognized for the scope of that non-delegable duty:

> The employer's duty to provide a safe workplace is not unlimited, however, and unless the employer is directing the work, employer's "obligation to protect his servant does not extend to protecting them from the transitory risks which are created by the negligence of the servants themselves in carrying out the details of that work."

Id. (quoting *Peters,* 489 S.W.3d at 795-96).

Applying those principles to the record in this case, the Court of Appeals concluded that Mr. Fogerty had "sufficiently asserted violations of [Mr. Meyer's] personal duty of care for which he could be liable at common law," and that the Circuit Court had erred in granting Mr. Meyer's motion for summary judgment:

> Appellant's negligence claim asserted Respondent had a duty to operate the forklift in a reasonably safe manner and that Respondent breached this duty by lowering the forks without taking any steps to warn or protect Appellant from being impacted by the forks. This is not an allegation of a violation of employer's non-delegable duty to provide a safe work environment, but rather a claim that Respondent was negligent in the operation of an employer-provided tool and in the carrying out of the details of the work.

Id. at *3.

POINT RELIED ON

The Circuit Court erred in granting Mr. Meyer's motion for summary judgment and in denying Mr. Fogerty's motion for a new trial because Mr. Meyer failed to establish that there was no genuine issue as to any material fact and that he was entitled to judgment as a matter of law, and the judgment thus violated Mo. R. Civ. P. 74.04(c)(6), in that (A) a workman's supervisor or co-employee has the duties, independent of any nondelegable duty of his employer, to (1) operate the instrumentalities of his work in a reasonably safe manner and (2) to provide a prompt warning to his fellow workman of imminent danger created by his own conduct; (B) the summary judgment record included evidence sufficient to support findings that (1) Mr. Meyer was negligent in his operation of a frontloader when he suddenly caused the forks to lower and strike Mr. Fogerty repeatedly as he walked in front of the vehicle and under its forks, and in failing to provide any timely warning of the danger he thus created, (2) Mr. Meyer thereby breached those duties of care, and (3) Mr. Meyer's negligence caused Mr. Fogerty's injury; and (C) the record was insufficient to entitle Mr. Meyer to judgment as a matter of law and thus deprive Mr. Fogerty of the opportunity to have the controverted matters of fact resolved by trial.

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

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

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

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

ARGUMENT

The Circuit Court erred in granting Mr. Meyer's motion for summary judgment and in denying Mr. Fogerty's motion for a new trial because Mr. Meyer failed to establish that there was no genuine issue as to any material fact and that he was entitled to judgment as a matter of law, and the judgment thus violated Mo. R. Civ. P. 74.04(c)(6), in that (A) a workman's supervisor or co-employee has the duties, independent of any nondelegable duty of his employer, to (1) operate the instrumentalities of his work in a reasonably safe manner and (2) to provide a prompt warning to his fellow workman of imminent danger created by his own conduct; (B) the summary judgment record included evidence sufficient to support findings that (1) Mr. Meyer was negligent in his operation of a frontloader when he suddenly caused the forks to lower and strike Mr. Fogerty repeatedly as he walked in front of the vehicle and under its forks, and in failing to provide any timely warning of the danger he thus created, (2) Mr. Meyer thereby breached those duties of care, and (3) Mr. Meyer's negligence caused Mr. Fogerty's injury; and (C) the record was insufficient to entitle Mr. Meyer to judgment as a matter of law and thus deprive Mr. Fogerty of the opportunity to have the controverted matters of fact resolved by trial.

Standard of Review

"The trial court makes its decision to grant summary judgment based on the pleadings, record submitted, and the law; therefore, tis Court need not defer to the trial court's determination and reviews the grant of summary judgment de novo." *Central*

Trust and Investment Co. v. Signalpoint Asset Management LLC, 422 S.W.3d 312, 319 (Mo. 2014). When the propriety of summary judgment is challenged on appeal, this Court "reviews the record in the light most favorable to the party against whom judgment was entered." *Eastern Missouri Coaltion of Police v. City of Chesterfield,* 386 S.W.3d 755, 759 (Mo. 2012). Summary judgment is only proper "when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Id.*

Argument

Matthew Fogerty alleged that he was injured while moving large stones from one place on a construction site to another under the direction of co-employee Larry Meyer. LF 10-11. The accident occurred during 2011. LF 10-11. Mr. Fogerty's and Mr. Meyer's employer had provided a properly functioning frontloader and an experienced operator—Mr. Meyer—for the stone-moving task. LF 196-97, 201, 204. That the equipment and the workmen assigned to the job were capable of safe operation is evident from the incident-free transport of one "cradled" stone at a time for some days prior to Mr. Meyer's decision to speed up the process. LF 181-82. Mr. Fogerty was injured when Mr. Meyer caused the forks of the frontloader to drop suddenly and without warning while Mr. Fogerty was walking in front of the vehicle and underneath one of the forks—steadying the load as requested by Mr. Meyer. LF 10-11.

In *Peters v. Wady Industries, Inc.,* 489 S.W.3d 784 (Mo. 2016), and *Parr v. Breeden,* 489 S.W.3d 774 (Mo. 2016), this Court clarified Missouri law regarding the liability of workers for negligent injury of their co-employees occurring between 2005

and 2012. *Peters* explained that the exclusive remedy provision of Mo. Rev. Stat. § 287.120 was amended in 2005. The new law immunized employers but not co-employees from common law liability for the negligent injury of workers, and thus "did not release co-employees from any liability resulting from [a] work-related accident." 489 S.W.3d at 789-90. *Peters* concluded: "Because at the time of Mr. Peters' injuries section 287.120.1 did not release a co-employee from any liability, Mr. Peters retained his rights and remedies at common law against any co-employee." *Id.* at 790.[2]

Peters recognized that under the common law employers have certain non-delegable duties and that employees can have no personal liability for their negligence in carrying out those duties. Id. at 794-95. This Court explained: "It follows, then, that a legal duty owed by a co-employee to a third person is a duty separate and distinct from an employer's non-delegable duties." *Id.* at 795. *Peters* identified an employer's non-delegable duties as (providing a safe place to work, (2) providing safe tools and equipment for work, (3) warning of hidden dangers, (4) providing a sufficient number of suitable fellow servants, and (5) promulgating and enforcing safety rules. Id.

But the Court recognized in *Peters* that "[t]he employer's duty to provide a safe workplace "is not unlimited," and that "[e]mployers are not insurers of the safety of

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[2] This Court explained that further amendment of the statute in 2012 "does provide immunity to co-employees except when 'the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.'" *Peters,* 489 S.W.3d at 793 (quoting Mo. Rev. Stat. § 287.120.1).

employees." *Id.* at 795-96 (quoting *Graczak v. City of St. Louis,* 202 S.W.2d 775, 777 (Mo. 1947)). In the part of its analysis most pertinent to this case, the Court reiterated a longstanding principle:

> Except in the cases in which the master himself is directing the work in hand, his obligation to protect his servants does not extend to protecting them from the transitory risks which are created by the negligence of the servants themselves in carrying out the details of that work.

Id. (quoting *Kelso v. W.A. Ross Construction Co.,* 85 S.W.2d 527, 534-36 (Mo. 1935)). *Peters* explained:

> When … the employee's injuries result from a co-employee's negligence in carrying out the details of the work, the injuries are 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.

Id. at 796.

In *Parr* this Court again recognized that workers injured in the course of their employment "are not precluded under the workers' compensation law from bringing a common law action for negligence against … co-employees," provided that they "show the co-employees owed a duty separate and distinct from the employer's non-delegable duties." *Id.* at 778. *Parr* explained that "[w]hen the co-employee is performing the employer's non-delegable duty to provide a safe workplace …, liability attaches to the employer, not the employee." *Id.* at 780. But when injury results from the breach of a

duty owed by that employee to his co-worker "independent of the master-servant relationship," the negligent co-employee is liable. *Id.*

Mr. Parr worked as a commercial truck driver. *Id.* at 776. He was killed when the truck he was driving for his employer was involved in a single-vehicle accident. *Id.* at 776-77. That was Mr. Parr's third single-vehicle accident in two years. *Id*. at 777. Mr. Parr's survivors brought a wrongful death action against three supervisory co-employees. *Id.* They alleged that Mr. Parr's supervisors had been negligent in failing to provide him with a safe working environment, monitor his physical condition to determine whether he was fit to perform his job, and determine whether he was in compliance with specific federal regulations for truck drivers. *Id.*

The defendants moved for summary judgment. They contended that the plaintiffs had failed to allege an affirmative act of negligence outside the scope of an employer's nondelegable duty to provide a safe workplace. *Id.* The trial court granted the defendants' motion. *Id.* at 777, 782. This Court affirmed, holding that the duties relied on by the plaintiffs "fall squarely within the [trucking company employer's] duty to provide a safe workplace." *Id.* at 779. *Parr* based that conclusion on the duties identified by the plaintiffs in their response to the defendant's summary judgment motion:

> [T]he plaintiffs asserted the defendants "had a duty to insure that every driver that drove for Breeden Transportation was safe to operate a commercial motor vehicle" and had a duty under federal regulations to disqualify a driver who may be suffering from a condition that would impair the driver's ability to safely operate a commercial motor vehicle.

Id.

The allegations of negligence in this case are different. Mr. Fogerty alleged that Mr. Meyer "dropped the forks down onto [his] back, driving [him] into the ground" and causing his injury. LF 10. His petition charged that Mr. Meyer "had a duty to operate the fork truck in a reasonably safe manner" and that he breached that duty when he "lowered the forks … without taking any steps to warn or protect [Mr. Fogerty] from being impacted by the forks." LF 10-11. In his response to Mr. Meyer's motion for summary judgment, Mr. Fogerty cited evidence that "[t]he forks … lowered suddenly due to operator error by Defendant Larry Meyer, causing injuries to Plaintiff's back and right knee," and that "Defendant Meyer failed to take any steps to warn or protect Plaintiff from being impacted by the forks." LF 163.

The Court of Appeals for the Eastern District applied a key element of the *Peters* analysis to reverse summary judgment in favor of the defendant co-employee in *Abbott v. Bolton,* 500 S.W.3d 288 (Mo.App. E.D. 2016). The defendant in that case negligently drove a dump truck over a fellow workman's foot. *Id.* at 289. The trial court agreed with the defendant's argument that he had "no independent duty to exercise ordinary care outside the employer's non-delegable duty to provide a safe workplace." *Id.* The Court of Appeals reversed, holding:

> Where the employee is negligent on his own in carrying out the details of the work, any resulting injuries are attributable to the employee's breach of his or her separate and distinct common-law duty of care.

Id. at *3-4 (citing *Peters,* 489 S.W.3d at 795-96).

The parallel between the co-employee's negligent operation of a motor vehicle while carrying out his employer's work in *Abbott* and Mr. Meyer's negligent operation of the frontloader in this case is unmistakable, although the negligence in this case transcended bad driving. Indeed, the same Court reversed the Circuit Court's grant of summary judgment in favor of Mr. Meyer in this case.

In *Evans v. Wilson,* 2016 WL 4990251 (Mo.App. S.D. Sept. 19, 2016), the Court of Appeals for the Southern District found no liability for a worker whose negligent operation of a forklift injured his co-employee. As thoughtfully reasoned as that opinion may be, its reliance on this Court's opinion in *State ex rel. Taylor v. Wallace,* 73 S.W.3d 620 (Mo. 2002), is misplaced, and its analysis—premised on the notion that *Taylor* and its progeny in progression of "something more" analyses were not affected by the 2005 amendment of § 287.120 and survived *Peters* and *Parr* fully intact—should not prevail.

The plaintiff in *Evans* was injured when a forklift operated by a fellow worker struck him and rolled over his foot. *Evans,* 2016 WL 4990251 at *1. The forklift was carrying a load of trusses. The plaintiff was walking ahead of and to the side of the vehicle. He was holding a tag line that was connected to both the forklift and the trusses to stabilize the load as it was moved. According to the plaintiff, the driver negligently drove the vehicle over a rock, causing the load to shift and pull the plaintiff toward the forklift, which struck him and ran over his foot. *Id.*

The petition alleged that the forklift operator had been inadequately trained and was not licensed or certified to drive the vehicle, that their supervisor knew of those

deficiencies and nonetheless directed that co-worker to operate the forklift near the plaintiff and other workers, and that the operator had been negligent in his operation of a vehicle for which he had no training. *Id.* The trial court granted the forklift operator's motion for summary judgment. That court concluded that safe forklift operation fell within the employer's non-delegable duty to provide a safe working environment, and that the plaintiff thus had failed to allege a breach of any independent duty owed to him by his co-worker. *Id.*

The Court of Appeals affirmed. Its analysis of the "bad-driving allegations" was based on this Court's declaration in *Taylor* that "[a] simple allegation of negligent driving by a co-employee … is not 'something more' than an allegation of a breach of the duty to maintain a safe working environment.'" *Evans* at *2 (quoting *Taylor,* 73 S.W.3d at 622-23). *Evans* noted the opinions of the Court of Appeals for the Western District in *Nowlin ex rel. Carter v. Nichols,* 163 S.W.3d 575, 580 (Mo.App. W.D. 2005), and *State ex rel. Larkin v. Oxenhandler,* 159 S.W.3d 417, 422 (Mo.App. W.D. 2005), and the Court of Appeals for the Eastern District in *Carman v. Wieland,* 406 S.W.3d 70, 79 (Mo.App. E.D. 2013), each of which had relied upon *Taylor* in holding that a charge of negligent operation of a vehicle or machinery alleged the "something more" required to subject a negligent co-worker to liability for an on-the-job injury. *Evans* at *2-3.[3]

[3] *Evans* chastised the judges of the Court of Appeals for the Eastern District for its "failure to acknowledge their … *Carman* holding or our supreme court's *Taylor* ruling in two seemingly contrary decisions last month." *Evans,* 2016 WL 4990251 at *3 n. 6

After *Peters,* at least with respect to claims arising from the time the legislature amended § 287.120 in 2005 until it amended the statute again in 2012, *Taylor* cannot be the categorical determinant of whether a worker injured by the negligence of a fellow worker can recover damages from that worker. *Peters* recognized *Taylor* as one of a line of cases that sought to channel or refine the "something more" test first set forth in *State ex rel Badami v. Gaertner,* 630 S.W.2d 175 (Mo.App. E.D. 1982). Noting that "cases applying *Badami's* 'something more' test repeatedly required an affirmative act," *Peters* repudiated that requirement for cases—such as those arising between 2005 and 2012—"in which the common law applies." 489 S.W.3d at 797.

Peters noted that *Taylor* had reached its conclusion that the defendant co-employee was immune from liability—and the proposition that negligent driving could not constitute the "something more" required for co-employee liability under the common law—by "reason[ing] that negligent driving was 'not the kind of purposeful, affirmatively dangerous conduct that Missouri courts have recognized as moving a fellow employee outside the protection of the Workers' Compensation Law's exclusive remedy provisions.'" *Id.* at 797-98. This Court made it clear in *Peters* that the "affirmative act" requirement inherent in its *Taylor* analysis—and in "something more" cases that followed

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(citing *Fowler v. Phillips,* 2016 WL 4442319 (Mo.App.E.D. Aug. 23, 2016), and *Abbott, supra). Fowler* and *Abbott* were post-*Peters* opinions. The Court of Appeals for the Eastern District presumably found *Peters* and its repudiation of *Taylor's* "affirmative act" requirement controlling. *See* argument at pp. 21-22, *infra.*

Taylor—was incorrect: "Contrary to the post-*Taylor* 'something more' test, common law does not limit a co-employee's liability to conduct that is purposeful, inherently dangerous, or directed to the injured employee." *Id.* at 798. Again, in *Peters* this Court drew the line clearly enough between co-employee negligence that is subsumed within an employer's non-delegable duty to provide a safe workplace and actionable co-employee negligence:

> Except in the cases in which the master himself is directing the work in hand, his obligation to protect his servants does not extend to protecting them from the transitory risks which are created by the negligence of the servants themselves in carrying out the details of that work.

Id. at 795-96.

Peters concluded that the plaintiffs' petition had failed to allege the breach of a duty owed by the injured plaintiff's work supervisor that was separate and distinct from their employer's non-delegable duty to provide a safe workplace. *Id.* at 798-99. After recognizing that "the employer's non-delegable duty … does not include transitory risks arising from an employee's negligence in carrying out his or her work," this Court held that the plaintiffs had alleged only a "classic case of a supervisory employee breaching the employer's … duty to provide a safe workplace." *Id*. at 799. The Court explained:

> In their petition, the Peterses allege that the baskets arrived from the supplier stacked without warning, bracing, or other precautionary measures; that the baskets were kept in the same stacked fashion in the staging area of the construction site until needed; and that, once needed, the baskets would

> be moved to the job site in the same manner in which they arrived. The Peterses also allege that [the project manager] was responsible for the manner in which the baskets were loaded, stacked, and transported. The Peterses further allege that stacking, loading, and transporting of the bsakets in such a fashion had "become standard operating procedure" [for the employer].

Id. at 799. *Peters* concluded that the pleadings thus established "that the allegedly unsafe stacking of the baskets constituted the [employer's] ordinary manner of work" *Id.*

The present case is different. The summary judgment record here is replete with support for finding that Mr. Fogerty's employer provided proper equipment and, in Mr. Meyer, an experienced operator for the job of moving a number of large stones from various locations on the Logan College campus to the site at which a new fountain was to be built. There was nothing routine about Mr. Meyer's decisions to get the job done faster by hanging those heavy stones in an expedient way that caused them to sway, or to direct Mr. Fogerty to walk *in front of the frontloader* and *under the forks,* steadying the load over rough terrain, or to do whatever he did that caused the hydraulic forks to drop suddenly and repeatedly onto Mr. Fogerty's shoulders and back.[4] In fact this was a

[4] Mr. Meyer's deposition testimony established that it was "common knowledge" that under Wright Construction Company policy "Matt Fogerty should never have been underneath those forks." LF 206.

"classic case" of "transitory risks … created by the negligence of [a fellow servant] in carrying out the details of [the employer's] work." *Peters,* 489 S.W.3d at 795-96.

Peters and *Parr* make it clear that the Circuit Court erred in granting summary judgment in favor of Mr. Meyer. Those decisions remove any doubt that could have existed regarding Mr. Fogerty's entitlement to prosecute an action for negligence based on a duty owed to him by Mr. Meyer independent of their employer's non-delegable duty. Mr. Meyer's conduct in in suddenly lowering the forks and failing to provide any warning of the imminent risk of injury, after having requested that Mr. Fogerty walk in front of his forklift and under one of its forks, constituted co-employee "negligence in carrying out the details of the work." *Peters,* 489 S.W.3d at 795-96. The common law affords no immunity from liability for that negligence.

CONCLUSION

The judgment of the Circuit Court should be reversed for the reasons set forth in this brief. The case should be remanded to that Court for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief contains all of the information required by Mo. R. Civ. P. 55.03 and complies with the limitations provided by Mo. R. Civ. P. 84.06(b), in that the brief contains 6,868 words exclusive of its cover, the required certificates, and the signature block. Counsel has relied upon the word-counting utility of Microsoft Word for Mac v. 15.30 in making this certification.

/s/ Michael Gross

CERTIFICATE OF FILING AND SERVICE

The undersigned counsel certifies that this document was submitted to the Court through its electronic filing system on January 30, 2017, to be served by that system upon all counsel of record in this appeal.

/s/ Michael Gross