IN THE MISSOURI SUPREME COURT

MICHAEL E. CONNER,	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. SC95995**
	)	
DALE OGLETREE, *et al.*,	)	
	)	
Respondents.	)	

APPELLANT'S SUBSTITUTE REPLY BRIEF

Appeal from the Civil Division of the
Circuit Court of Wright County, Missouri
44th Judicial Circuit
Honorable R. Craig Carter

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SUMMARY OF REPLY BRIEF

Defendants' Dale Ogletree ("Ogletree") and Scott Kidwell ("Kidwell") (collectively "Defendants") argument can be boiled down to two statements: (1) the workplace was so dangerous that it could not be made safe, thus a co-employee could never have a personal duty of care to a co-employee; and (2) Plaintiff Michael Conner ("Conner" or "Plaintiff") was also negligent, so his claim must be barred. Defendants' arguments simply prove too much. Defendants claim that because they were working around electricity, which can be dangerous, the workplace was never safe to begin with. Under this reasoning, since the workplace was not safe at the start, none of the actions or inactions of the Defendants in carrying out the details of their work could result in personal liability. Thus, when the workplace can be described as "inherently dangerous" co-employee liability cannot exist. That is not what this Court held in *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784 (Mo. banc 2016), and it is not consistent with how this Court and the Courts of Appeal have dealt with similar situations. A co-employee's failure to follow workplace rules is exactly the type of "negligence in carrying out the details of the work" which is outside of the employer's non-delegable duties.

Defendants' next argument is contributory negligence. Defendants contend that since Plaintiff also had a duty under the workplace rules to test the wires and ground the system, his failure to do so (along with the failure of Defendants to also do so), bars his claims. Missouri long-ago abandoned contributory negligence and adopted comparative fault in *Gustafson v. Benda*, 661 S.W.2d 11, 16 (Mo. banc 1983). Any question of

whether Plaintiff bears any fault is an issue of comparative fault to be determined by the jury.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Defendants' statements of fact are largely inoffensive, though clearly slanted in their favor. However, Plaintiff must point out that Defendants' listing of the Workers Compensation "benefits" Plaintiff received after his injury is entirely irrelevant to the issues before this Court. At first blush it may look like quite a bit, but Plaintiff has received significantly less income from workers compensation than he made as a lineman and now he is a quadriplegic (from $950.00 in income per week to $698.19 in Permanent Total Disability payments). A quadriplegic requires a tremendous amount of medical care that a non-injured person would never require, and this care is very expensive. Plaintiff's receipt of $227,540.65 in disability payments as of March 2014 for an injury that occurred in December 2007 is woefully inadequate to compensate him for his economic losses even if the medical expenses are disregarded. Defendants admit this by listing the amount of his life care plan. It does not even approach compensating him for his pain, suffering, and loss of enjoyment of life. There is no set of circumstances where Defendants can rationally contend that Plaintiff's receipt of workers compensation benefits makes him somehow whole.

REPLY TO RESPONDENTS' BRIEFING ON ARGUMENT

A. Co-employee liability does not disappear when the workplace is "inherently dangerous."

Defendants' arguments are contradictory. On the one hand they claim that because of the presence of electricity, the workplace can never be safe, thus they can never have a personal duty to Plaintiff. Working around electricity can be entirely safe, and the employer provided rules, equipment, and sufficient fellow workers to make it safe. Defendants also claim, however, that their failure to follow the workplace rules which required them to open the switches, ground the system, and test the lines before allowing anyone to work, was a mere failure to perform the employer's non-delegable duty to provide a safe work place. Both arguments boil down to the claim that the workplace was never safe to begin with, so co-employee liability cannot attach. This is not a correct application of the law, however.

Defendants acknowledge that the employer has the following specific non-delegable duties:

1. The duty to provide a safe place to work.
2. The duty to provide safe appliances, tools, and equipment for work.
3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of suitable fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make this work safe.

Peters v. Wady Industries, Inc., 489 S.W.3d 784,795 (Mo. banc 2016). Defendants are apparently contending that, since electricity is dangerous, the first duty can never be met, thus there is never an opportunity for the Defendants to breach a personal duty. This is an overstatement.

While electricity can certainly be dangerous, when the proper tools are used and the rules are followed, it is perfectly safe to work around electricity. Defendants acknowledge as much in their Motions for Summary Judgment when they state, "There was no danger at the job site other than the danger that normally goes with working on power lines." (LF 70, 95) The workplace rules promulgated by the employer clearly contemplate working on both energized and deenergized systems. (LF 619-627) The purpose of the rules is to keep the employees safe. (LF 522)

The non-delegable duties as outlined in *Peters* work in concert to make the workplace safe for the employees. The first duty, a safe place to work, contemplates a workplace either free from hazards or with those hazards adequately addressed via the remaining specific duties. Thus, the workplace is made safe by the provision of "safe appliances, tools and equipment for work"; by giving "warning of dangers of which the employee might reasonably be expected to remain in ignorance"; by providing "a sufficient number of suitable fellow servants"; and by promulgating and enforcing "rules for the conduct of employees which would make this work safe." This Court in *Peters* makes this clear: "[W]hen an employee's injuries result from the tools furnished, the place of work, or the manner in which the work was being done, the injuries are attributable to a breach of the employer's non-delegable duty to provide a safe

workplace." *Id.* Defendants end their inquiry here, however, with the claim that the workplace was never made safe or was inherently dangerous. This Court in *Peters* does not end the inquiry here, however. "When, however, 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.*

The evidence as presented shows, and Defendants admit, that they failed to follow the workplace rules promulgated by the employer which would have prevented Plaintiff from making unprotected contact with an energized line. Intercounty Electric did everything it could do, in this situation, to make the workplace safe for its employees. It provided an adequate number of employees, sufficient equipment and tools for them to complete the job safely, and rules to allow its employees to work around both energized and de-energized lines safely. (LF 77-78, 167-71, 339, 353-55, 366-69, 370-73, 401-07, 410-13, 420-21, 561-758). The danger presented at the job site was caused by Defendants negligently failing to perform their duties pursuant to the rules promulgated by the employer, namely, failing to open the switches, ground the system, and test the system to be sure it was deenergized. (LF 359, 407, 417-18, 453, 619-20, 627, 633-36).

Defendants contend that the use of the phrase "transitory risks" necessarily requires that the job site be rendered entirely safe by the employer before an employee can create an additional danger thus leading to liability. They claim that here, where the job site was never safe (either because electricity is inherently dangerous or because the Defendants failed to follow workplace safety rules), Plaintiff's injuries could not have

been caused by a "transitory risk" because the danger was already there. This is a far too narrow reading of *Peters*. The term "transitory risk" as used in *Peters* makes clear that a "transitory risk" is created by the co-employee's "negligence in carrying out the details of the work." *Peters*, 489 S.W.3d at 796. *Peters* does not go on to define every instance of what negligently carrying out the details of the work means. Defendants describe these transitory risks as only arising once the workplace is rendered entirely safe by the employer. However, this Court describes these risks as arising from negligent performance of the details of the work by a co-employee.

Defendants' attempt to characterize the workplace rules as operating as a delegation of the employer's non-delegable duty, thus negating any personal duty on the part of the co-employees, does not insulate them from liability. The salient point from *Peters* is whether an employee negligently performed the details of his or her work. Under Defendants' argument, any deviation from the workplace rules by a co-employee relates back to the employer's duty to provide a safe workplace and does not lead to liability for a co-employee. The logical extension of this argument, then, is that the employer becomes the sole guarantor of employee safety because, even when it provides all of the tools, rules and employees necessary for safe work, an employee's failure to use these items as required only creates liability for the employer. This is not consistent with *Peters* or Missouri common law relating to co-employee liability.

As discussed thoroughly in Appellant's Substitute Brief, the Courts of Appeal have tried to determine when an employee negligently performs the details of their work. The consensus from the Eastern and Western Districts appears to include under

"negligent performance of the details of the work" those situations where an employer promulgates workplace safety rules for all employees to follow or the work involves the operation of a vehicle and the injury results from the failure to follow these rules or operate the vehicle carefully, except in instances where the rules are habitually broken and the employer is aware of this. *See Abbott v. Bolton*, 500 S.W.3d 288, 293 (Mo.App. E.D. 2016); *Fowler v. Phillips*, -- S.W.3d – (2016), Case No. ED100801, 2016 WL 4442319; *Fogerty v. Armstrong*, -- S.W.3d – (2016), Case No. ED100947, 2016 WL 5030379; *Garrett v. Brown*, -- S.W.3d – (2016), Case No. WD78443, 2016 WL 46264726; *McComb v. Norfus*, -- S.W.3d – (2016), Case No. WD77761, 2016 WL 4626520. Defendants also address *Bierman v. Violette*, -- S.W.3d – (2017), Case No. ED 100946, 2017 WL 582665, and *Nolen v. Bess*, -- S.W.3d – (2016), Case No. ED 101591, 2016 WL 6956755, which do not deal directly with employer promulgated rules or operation of a vehicle. However, the holdings in both are instructive. In *Bierman*, the Eastern District found that the employee's injuries resulted from a co-employee's negligence in carrying out the details of the work by failing to render a ladder safe to use after removing it and putting it back. 2017 WL 582665 *4. The failure to make a ladder safe for a co-employee to use is very similar to Plaintiff's claims here that Defendants failed to use the tools and rules provided by the employer to make certain that the power lines were deenergized.

In *Nolen*, the Eastern District found that the co-employee's removal of rails from bleachers at a sports arena and requiring the plaintiff to clean those bleachers was a violation of a personal duty owed to plaintiff. 2016 WL 6956755 *3. The Eastern

District found that the employer, Southeast Missouri State University, provided safe tools and a safe workplace by equipping the bleachers with rails. *Id.* It was the co-employee's removal of the rails, i.e., failure to use employer provided equipment, which led to the plaintiff's injuries. *Id.* Defendants in this case also failed to use employer provided equipment to make certain that the lines were deenergized. It was their negligent failure to perform the details of the work, as required by their workplace rules, which resulted in Plaintiff's quadriplegia.

Defendants attempt to differentiate each of these cases, however, their arguments are essentially the same: in all of these cases, the workplaces were safe to begin with and only made dangerous by the employee's negligent carrying out of the details of the work. As noted above, Plaintiff disputes the notion that the workplace could never be safe, thus co-employee liability can never attach. Each of these cases involve specific instances where a co-employee failed to adhere to the details of their work. The details may be slightly different -- failing to abide by employer rules, failing to operate a vehicle carefully, failing to make a ladder safe, or failing to use employer provided safety equipment -- but the result was the same. If the co-employee had complied with the workplace rules, had replaced the ladder in a safe condition, had operated a vehicle carefully and prudently, or had simply used the employer provided safety equipment, the individual plaintiffs would not have been injured.

A common argument raised by defendants in these cases is that it is always an either/or situation, meaning, the injury is always caused by a violation of the employer's non-delegable duty or the co-employee's breach of a personal duty. As the court in

Bierman discussed, this goes to causation, and not duty. 2017 WL 582665. Missouri has pattern instructions that allow the trier of fact to determine which of several actions or inactions caused the plaintiff's injury. *Id.*; *see also* MAI 19.01, Verdict Directing Modification – Multiple Causes of Damage. Even in the situation where there is an argument that both the employer's non-delegable duty and a personal duty of a co-employee were breached, the trier of fact is equipped to make this determination, keeping in mind that the negligence need not be the only cause of injury, "as long as it is one of the efficient causes thereof, without which the injury would not have resulted." *United Missouri Bank, N.A. v. City of Grandview*, 105 S.W.3d 890, 896 (Mo.App. W.D. 2003)(*quoting Martin v. Mo. Highway & Transp. Dep't*, 981 S.W.2d 577, 584 (Mo.App. W.D. 1998). Generally, causation should be left to the trier of fact. *Id.*

Defendants' primary argument, that the workplace was never safe to begin with, thus co-employee liability can never attach, is directly refuted by one of the cases this Court cited in *Peters* as an example of a breach of a personal duty. In *Peters*, this Court found that the facts and circumstances described in *Tauchert v. Boatmen's National Bank of St. Louis*, 849 S.W.2d 573 (Mo. banc 1993), "could constitute a breach of the co-employee's personal duty of care owed to the plaintiff ." 489 S.W.3d at 800. In *Tauchert*, the plaintiff was working on top of an elevator cab suspended five or six floors above the bottom of an elevator shaft. *Tauchert*, 849 S.W.2d at 573. The elevator cab was held aloft by a "make-shift hoist system" arranged by a co-employee. *Id.* at 574. The plaintiff was injured when this make-shift hoist system failed and the elevator cab fell to the ground. *Id.* This Court found that the allegation that the co-employee personally

arranged the faulty hoist system could constitute an act outside of the employer's duty to provide a safe workplace. *Id.* Just as Defendants here claim that working around electricity is always dangerous, they must also admit that working on top of an elevator cab suspended five or six floors above an open shaft is also inherently dangerous. This Court did not find that the inherent danger of working five or six floors suspended above an open shaft made the workplace so unsafe as to alleviate a co-employee from liability as Defendants would have the Court do here. On the contrary, it cited this case as one of those older cases which, though decided under the "affirmative negligent act" standard, meet the requirements for co-employee liability under *Peters*.

This case comes down to what exactly negligent failure to carry out the details of the work means. When the employer provides adequate numbers of co-employees, tools, equipment, and promulgates rules for its employees to follow, and the co-employees themselves choose not to follow these rules or use the tools provided to them, they have negligently failed to carry out the details of their work. That is exactly what happened here. Defendants failed to use the tools provided by their employer to confirm that the correct switches were opened, and also failed to use the tools to test the line, ground the line, and isolate the system. (LF 359, 407, 417-18, 453, 619-20, 627, 633-36). Defendants failed to comply with workplace rules requiring them to confirm that the correct switches were opened and to ground, test, isolate, and tag open the system which, as Defendants readily admit, were put in place to make the workplace safe. (LF 619-20, 829). Thus, Defendants' failure to carry out the details of their work by complying with the workplace rules and using the proper employer provided equipment to deenergize the

lines created the transitory risk that the lines would be energized when Plaintiff began working. Thus, Defendants breached a personal duty owed to Plaintiff.

B. Contributory Negligence Is Not a Defense to Co-Employee Liability

Defendants' other primary argument is that Plaintiff was obligated to comply with the same rules as Defendants and failed to do so as well, thus, he is barred from recovering against them. Defendants are contending that, if they were negligent in failing to follow the workplace rules then Plaintiff was also negligent, and is barred from recovering. This is a classic contributory negligence defense. However, Missouri did away with contributory negligence years ago.

In *Gustafson v. Benda*, 661 S.W.2d 11, 16 (Mo. banc 1983), this Court supplanted all contributory negligence doctrines and defenses with a comprehensive system of comparative fault. It appended the Uniform Comparative Fault Act to its opinion. *Id.* at 17. The trier of fact is to determine the relative fault of the parties, including the plaintiff, and assign a percentage of fault to each party. *Id.* at 21; *see also* MAI 37.01 – Verdict Directing Modification. The court, then, computes the damages. *Id.*; s*ee also* MAI 37.03 – Damages. Missouri has since done away with contributory negligence even in cases involving only economic losses. *Children's Wish Foundation Intern., Inc. v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648, 652 (Mo. banc 2011).

If, as Defendants claim, Plaintiff was also negligent in failing to carry out the details of his work, then it would be proper to submit the issue of comparative fault to the trier of fact. However, any attempt by Defendants to argue or claim that Plaintiff's alleged failure to follow the same rules they were required to follow bars him from

recovering against them is an incorrect statement of the law and has been incorrect since 1983.

CONCLUSION

Plaintiff has adequately plead and offered evidence that Defendants negligently carried out the details of their work by failing to properly use employer provided tools and failing to follow workplace rules promulgated by their employer to keep them safe. Defendants' response is that the workplace was always dangerous, so no co-employee liability may attach, and that Plaintiff failed to follow the same workplace rules. As Plaintiff has shown, just because the workplace is allegedly dangerous, co-employee liability does not disappear. Co-employee liability arises when a co-employee negligently carries out the details of the work, regardless of how allegedly dangerous the workplace may be. Additionally, contributory negligence has not been the law in Missouri since 1983. If Plaintiff was negligent, as Defendants claim, that is an issue of comparative fault for the trier of fact. The Court should reverse the trial court's entry of summary judgment and remand this case for trial.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants, pursuant to Rule 84.06(c), hereby certifies to this Court that:

1. The brief filed herein on behalf of Appellants contains the information required by Rule 55.03.

2. The brief complies with the format requirements of Rule 30.06 and 84.06(a) and (b).

3. The number of words in this brief, according to the word processing system used to prepare this brief, is 3,551, exclusive of the cover, certificate of service, this certificate and the signature block.

Respectfully submitted,

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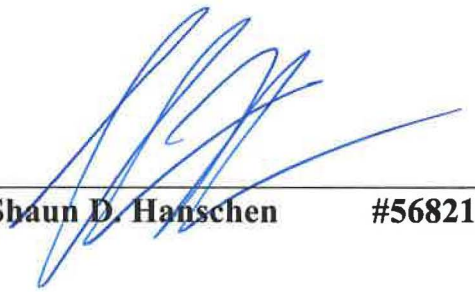
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been sent via the Court's electronic filing system to the attorneys for Defendants, Mr. Terry M. Evans, Andereck, Evans, Widger, Johnson & Lewis, LLC, 119 E. Main St., Smithville, MO 64089 on the 28th day of March, 2017.



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