IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

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

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

REPLY BRIEF OF APPELLANT RUSSELL EVANS

APPELLANT REQUESTS ORAL ARGUMENT

ERIC M. BELK, Missouri Bar No. 42138
C.J. Moeller Missouri Bar No. 39238
1736 E. Sunshine, Suite 600
Springfield, Missouri 65804
(417) Telephone
(417) 889-9229 Fax
cjm@bradbradshaw.com
ATTORNEY FOR PLAINTIFF/APPELLANT

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POINT RELIED ON

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

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

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

in that

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

ARGUMENT

Introduction

In his Reply brief, Appellant/Plaintiff (hereinafter, Plaintiff) will limit himself to addressing the two most recent decisions regarding co-employee liability, *Parr v. Breeden*, 2014 WL 3864710 (Mo.App. S.D.) (Francis, Jr., J. dissenting) and *Peters v. Wady Industries*, 2014 WL 4412193 (Mo.App. E.D.) (Norton, J. dissenting) as well as responding to the arguments raised by Defendant/Respondent in his brief. Plaintiff discerns two fundamental arguments in Defendant Barrett's brief: First, that *Leeper v. Asmus,* 2014 WL 2190966 (Mo.App. W.D.) is not and should not be the law in Missouri. (Respondent's Brief pp. 2, 8, 22-24) Second, even if *Leeper* is the law, *Leeper* requires that the defendant co-employee failed to follow an instruction from the employer that increased the risk of injury in the workplace to the plaintiff. (Respondent's Brief p. 2, 7-8) First, Plaintiff submits that *Leeper* represents the better rule regarding co-employee liability for the period of time from 2005 until the 2012 Amendments to the Act. Moreover, from Plaintiff's review of the recent Southern District decision, *Parr, supra.,* Plaintiff believes both the majority and the dissent have endorsed the independent duty test over the "refined something more test."[1] Finally, the independent duty test as set

[1] Judge Francis certified that the majority's opinion incorrectly failed to follow *Leeper*, *supra.*, and transferred the matter to the Supreme Court pursuant to Rule 83.03. However, Plaintiff views the disagreement between the majority and the dissent not as to whether the common law independent duty test is the appropriate test, but how the

forth in *Leeper* does not require that the defendant co-employee failed to follow an instruction from the employer that increased the risk of injury to the plaintiff. There is no such requirement in the test set out by the court in *Leeper*. The fact that the co-employee was instructed to do the job properly but did so negligently was significant in showing that the methodology of the employer was safe, and the fault for causing the plaintiff's injuries was exclusively the negligence of defendant co-employee in failing to secure the cable lifting a pipe that fell on the plaintiff. *Leeper*, 2014 WL 2190966 at *1-2, 16-17.

What is by now clear is the Western District has announced a different rule than the Eastern District relative to co-employee liability. The Western District rule can best be described as the independent duty rule; the Eastern District's rule, the "refined something more test."[2]

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independent duty test applies to alleged negligent acts that violate federal regulations and that support the tort of negligent entrustment. (*See Parr*, 2014 WL 3864710 at * 3, 21(Majority cites *Leeper, supra*., with approval in analysis; dissent argues allegations support independent duty under Missouri common law.)

[2] Plaintiff from now on will refer to the Eastern District test as the "refined something more" test in acknowledgment of the Western's District's conclusion the initial something more test correctly stated the law, but subsequent refinements did not. *Leeper*, 2014 WL 2190966 at * 12 ("post-*Badami* refinements of the 'something more' test operated to immunize co-employees from liability for ordinary negligence by narrowing recovery . . . to outrageous or reckless conduct directed at a particular employee.")

Parr v. Breeden

Plaintiff and Defendant disagree as to whether the majority opinion in *Parr* reflects its endorsement of the independent duty test or the refined something more test. Although this Court is better acquainted than either Plaintiff or Defendant with the facts of *Parr*, the decision merits discussion to the extent that its facts are distinguishable from the facts here. Understandably, the majority in *Parr* looked at the facts under both the refined something more test and the independent duty rule before concluding that the plaintiffs failed to state based on the negligence of a co-employee.

Although the plaintiffs' allegations in *Parr* are not factually similar to *Badami* and *Hansen*, the defendants in *Parr* were vice-principals, which is significant in a common law analysis of a defendant co-employee's liability.[3] In *Parr*, two surviving children and the father of a deceased over-the-road truck driver alleged that three management employees were negligent in dispatching the decedent when he was not physically fit to drive. Plaintiffs alleged that those three employees, the president of the trucking company, the safety director, and an employee charged with ensuring that the company's drivers complied with health and safety regulations, " '*had a duty to provide a safe working environment* to [decedent], to monitor [his] physical condition . . . to determine

[3] Plaintiff directs the Court to his first brief, pages 19-23, regarding the significance of the distinction between vice-principals and fellow servants, recalling simply that vice-principals were generally charged with performing those duties and responsibilities belonging to the employer and acted as the employer in that regard.

if he was fit to drive . . . and to determine [his] compliance with the Federal Motor Carrier Safety Administration Regulations.'" *Parr*, *1. (*emphasis added*)[4] Based on the unsettled question of what is the proper standard for co-employee liability, the plaintiffs attempted to allege a cause of action based both on a breach of an independent duty as well as the something more test.

Plaintiff believes it is significant that the majority cites *Badami* only to note that the survivors claimed to have alleged a cause of action under the "something more doctrine" or "the common law as set forth in *Hansen*." *Parr*, 2014 WL 3864710 at * 3. Thereafter, the majority analyzes the facts under both *Hansen* and *Leeper* and makes no reference to any of *Badami's* progeny. In fact, the majority even states "[t]he 'something more' standard is not part of the common law, and a co-employee may owe an independent duty to another co-employee under the common law only when the co-employee's 'workplace injury is in no way attributable to the employer's breach of its non-delegable duties.'" *Id.* at * 4 (*citing Leeper*, 2014 WL 2190966 at *1-2, *13, *17 & n. 16.)

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[4] The majority concluded the duties described fall into the employer's non-delegable duty to enforce safety rules. *Id.* * 4-5. *Cf. Hansen*, 375 S.W.3d at 204, and *Badami*, 630 S.W.2d at 176, both involving allegations of failures by supervisory employees to insure the safety of the workplace. *Hansen*, 375 S.W.3d at 217; *Badami*, 630 S.W.2d at 179. *See also* Appellant's first brief, pp. 25-28, 36-38)

In the present case before this Court, there is no indication that Plaintiff sustained injury due to a failure by the employer or an employee carrying out a non-delegable duty of the employer. There is no evidence in the record that 1. the premises was unsafe; 2. the tools provided were unsafe; 3. there was a failure to warn Plaintiff of dangers he could not anticipate; 4. the other employees on the job were insufficient or incompetent; or 5. the employer failed to promulgate or enforce necessary safety rules. Such an analysis is consistent with the independent duty test, which is why the majority in *Parr* listed these five duties of the employer, and noted *Hansen*'s caveat: "a co-employee's independent duties owed to fellow employees do not include the duty to perform the employer's non-delegable duties." *Parr*, 2014 WL 3864710 at * 4. (*citing Hansen*, 375 S.W.3d at 213-14, 217, and *Leeper,* 2014 WL 2190966, at *4) The acts of supervisory employees insuring compliance with federal laws aimed at increasing safety in the workplace presents a very different case than a fellow employee operating a forklift negligently. The status of the defendants in *Parr* and their alleged negligent acts bear a much closer resemblance to those allegations in *Badami* and *Hansen*, to wit, supervisory employees who failed in their non-delegable duty to provide a safe workplace. *See Badami*, 630 S.W.2d at 176, *see Hansen*, 375 S.W.3d at 204.

While the Southern District goes on to state that *Leeper* is not controlling, the majority's analysis indicates *Leeper* is not controlling because the facts are not consistent

with the facts in *Leeper* such that *Leeper's* rule applies.[5] Judge Francis's dissent addresses how the independent duty rule and the duties imposed under our Supreme Court's holding in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo.banc 1995) indicate a duty on the employee defendants recognizable at common law regardless of the employment relationship. *Parr* 2014 WL 2014 WL at *20-21. However, Plaintiff sees that debate as far different than whether the independent duty test is the proper test, and the facts of *Parr* and the distinctions drawn relative to what constitutes an independent duty under its facts are not apropos to the facts here.

***Peters v. Wady:* Refined Something More Test Questioned in Eastern District**

On September 9, 2014, the Eastern District handed down *Peters v. Wady Industries, Inc.*, 2014 WL 4412193, (Mo.App. E.D.) (Norton, J., dissenting)[6], the most recent appellate decision concerning co-employee liability in Missouri. In *Peters*, the

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[5] Even though courts have cited the employer's five non-delegable duties to provide a safe workplace en route to deciding the case under the refined something more standard, *see e.g., Carman*, 406 S.W.3d at 76, 78-79, Plaintiff cannot see the relevancy of those five duties to the refined something more test, which is more concerned with the affirmative nature of the act, whether it was specifically directed at a particular employee and whether the conduct increased the risk of injury in the work place. *See Leeper*, 2014 WL 2190966 at *11-12.

[6] Judge Norton certified that the majority's decision was contrary to *Leeper* and transferred the cause to the Supreme Court.

majority analyzed the facts under both the "refined something more test" as well as the independent duty test before concluding that the plaintiff's cause of action should be dismissed. In his dissent, Judge Norton disagreed with the majority's opinion that the court need not determine whether *Leeper, supra.,* or *Carman, supra.,* supplied the appropriate test for co-employee liability, as well as the majority's conclusion the plaintiff failed to state a claim under either standard. Judge Norton first sets forth his reasons why he believes that *Leeper* better represents Missouri law[7], and he then goes on to apply the *Leeper* test to the allegations in the plaintiff's petition.

In *Peters*, the plaintiff worked for a company that transported large baskets, dowels, that weighed 200 pounds, and are used in concrete construction. The plaintiff alleged that the baskets arrived from the manufacturer stacked in an unsafe manner, and that the defendant, the plaintiff's supervisor, failed to order the baskets be stacked in a safer manner at the construction site where they were to be used; this was despite complaints from other employees voicing safety concerns. The plaintiff was injured when the dowels fell off the truck and landed on him at a construction site. *Peters*, 2014 WL 4412193 at * 1. The majority concluded that regardless of whether it applied the refined something more test or the independent duty test, the result was the same: the petition failed to state a claim. The majority reasoned that the failure to insure that the baskets were safely stacked on the jobsite pled only a violation of the employer's non-

[7] While Plaintiff agrees with Judge Norton's conclusion, those same arguments were covered in Plaintiff's first brief, the *Leeper* decision, and Judge Francis' dissent in *Parr*.

delegable duty to provide a safe workplace—opining that under *Leeper,* "if the employer is 'on the hook' at all, the employee is off." *Id.* at 3, n.6.

Judge Norton dissented, arguing not only that the Eastern District should adopt *Leeper's* independent duty test, but further arguing that under the independent duty test, the plaintiff had succeeded in pleading a cause of action. Judge Norton opined that the first amended petition alleged facts, that given their broadest intendment, establish that the defendant's actions alone created the unsafe condition in the workplace and ultimately caused plaintiff's injury. *Peters*, 2014 WL 4412193 at 6.

At first blush, it may seem that an employee responsible for determining how goods are stacked in the workplace is clearly discharging the employer's non-delegable duty to provide a safe workplace, and, consistent with the majority's determination, even if the independent duty test is applied, the allegation is nothing more than failing to provide for the safety of the premises. *Id.* at 3, n. 6. However, Plaintiff agrees with Judge Norton that the factual record is underdeveloped to make that determination. How the dowels were to be stacked at a construction site off of the employer's premises may be part and parcel of insuring the employer's non-delegable duty to provide a safe workplace, or it may merely be the result of an employee acting independently in accomplishing his job duties as a fellow servant. To determine which characterization best applies requires more context. As noted by the Western District in *Leeper*, quoting generously from *Kelso*, " '[f]or example, a locomotive, which is clearly a piece of machinery so far as the engineer and fireman are concerned, is just as clearly something which makes the place of work unsafe as regards a trackman who is rundown by it.'"

Leeper, 2014 WL 2190966 at 9 (*quoting Kelso v. W.A. Ross Constr. Co.*, 85 S.W.2d 527, 534-36. (Mo. 1935) Moreover, in *Kelso*, which was discussed at length in Appellant's first brief, one of the issues the court worked through was whether the plaintiff was injured solely through the negligence of a fellow servant negligently performing his job duties, or if the injury resulted from how the employer directed its employees to do the job. *Kelso*, 85 S.W.2d at 535-536.

In both *Parr* and *Peters* the facts and allegations pled did not as clearly reflect an independent duty of the defendant co-employee as here. However, in both cases the plaintiffs' petitions were dismissed; hence, the dissents' argument that the plaintiffs did not have the opportunity to develop the facts sufficient for rigorous analysis under the independent duty test and common law duty analysis is not a baseless claim.

No Requirement of Allegation Co-Employee Failed to Follow Instructions

Defendant Barrett further and erroneously argues that even if *Leeper* is the law, *Leeper* requires that the co-employee defendant failed to follow an instruction of the employer, and that failure caused an additional danger to the plaintiff. (Respondent's Brief pp. 7-9) What is clear from even a casual reading of *Leeper* is that the independent duty analysis begins with a determination of whether the employer itself failed in its duty to provide a safe workplace, thus causing the plaintiff's injury. *Leeper*, 2014 WL 2190966 at *10. The fact that the employer had specifically directed a co-employee in the safe method for doing his job is germane to the employer's blamelessness in the plaintiff's resultant injury. In other words, it was relevant evidence; not an element a

plaintiff is required to show in proving the violation of an independent duty by co-employee.

Here, Plaintiff has alleged and adduced facts that Defendant Barrett drove a forklift negligently by failing to keep a careful lookout, driving too fast and running over him. (LF 18) Moreover, the fact that Defendant Barrett could not stop his forklift before running over Plaintiff's leg when Plaintiff was pulled into the path of the forklift, supports the inference of Defendant Barrett's personal negligence. There is no evidence in the record or before the Court that shows that Plaintiff's injury was the result of the employer's negligence. Plaintiff's injuries were caused by Defendant Barrett's violation of his personal duty to operate a forklift in a non-negligent manner so as not to cause injury to Plaintiff. To the extent that the independent duty test is the appropriate test for co-employee liability, Plaintiff has put forth evidence sufficient for a jury to find that Plaintiff's injuries were caused by the negligence of Defendant Barrett alone—and no other party.

Under *Leeper*, it is clear that there is no requirement that the defendant co-employee failed to follow a direct instruction from his employer at the time that the plaintiff was injured. What is important is whether or not the employer in some way provided unsafe equipment, unsafe methods of performance of the work, and in some fashion was responsible for causing the injury; or, whether it was the negligent performance of the job by the co-employee that resulted in the injury to the plaintiff. Had the defendant in *Leeper* performed his job as directed, but the method of doing the work was dangerous or the equipment failed, the result likely would have been different. The

Leeper court makes clear that an employee who merely does her normal job duties negligently *may* be civilly liable to an employee she injures: "The principal that the performance or failure to perform a job duty will never support a duty of care independent of the employer's non-delegable duties has no support in the common law." *Leeper*, 2014 WL 2190966 at *15.

Defendant attempts to parse out another portion of the *Leeper* analysis and turn it into an element of a cause of action: "Significant to the plaintiff's success in *Leeper* was that he alleged that the accident happened in a manner that was not a normal risk of the work being performed." (Respondent' Brief, p. 9) (*citing Leeper*, 2190966 at * 17) Again, the focus of the court was to determine what was the cause of the plaintiff's injury: some failure with respect to a non-delegable duty of the employer, or through the negligence of a fellow servant performing his job duties. In this context, the court stated: "[Leeper's] allegations support a conclusion that a safe drilling rig, safe methods of operation, and a sufficiently trained operator . . . were only made unsafe" because of the defendant's negligence. *Id.* The court ruled out other causes of the injury, causes which fell within the penumbra of the employer's non-delegable duty to provide a safe workplace, and thereafter concluded that the facts alleged could support the conclusion that the plaintiff was injured by the ordinary negligence of the co-employee defendant.

The court in *Leeper* cited extensively from *Kelso*, *supra*., and emphasized in bold face and italics a statement that summed up the respective duties of the employer and co-employees concerning the duty to insure the safety of the workplace:

> ***Except in cases in which the master is himself 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. In other words, the rule that the master is bound to see that the environment in which a servant performs his duties is kept in a reasonably safe condition is not applicable where the environment becomes unsafe solely through the default of that servant himself, or of his fellow employees . . .***

Leeper, 2014 WL 2190966 at * 9(***emphasis original***) (*citing Kelso* 85 S.W.2d at 535-536)

A Place for the Independent Duty and the Refined Something More Test

During the period from 2005 to 2012, there may be a place for both the independent duty test as well as the something more test—if that test is restricted to its original holding. The independent duty test flows from common law agency rules within the workplace, and it has it basis in the agency relationship of the employer and its employees within that work environment. *Hansen*, 375 S.W.3d at 208-211. Generally, the employees charged with performing the employer's non-delegable duties are vice-principals—employees who by definition are a representative of the employer vis-à-vis other employees in the workplace. *Id.* at 210, n. 11. This was the factual context in

which *Badami* was decided; the rule of *Badami* as stated by the court[8] is specifically directed at management employees, *Badami*, 630 S.W.2d at 178-180. The rule so limited makes sense: a supervisory employee who, instead of performing those duties necessary to insuring the safety of the workplace affirmatively commits a negligent act directed at a particular employee, increasing the risk of injury to that employee, has ceased to discharge the duties assigned him. In this limited situation, the *Badami* something more test makes sense. However, when extended to a fellow servant doing a job that poses no risk of injury to his fellow employees absent his individual negligence, the refined

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[8] The statement of the issue by the Badami court limited its holding to supervisory employees:

> The question we are confronted with is whether a supervisory employee, including a corporate officer, maybe be held personally liable for injuries sustained by a fellow employee covered by worker's compensation where the injuries occur because of the supervisor's failure to perform the duty, assigned to him by the employer, to provide the fellow employee a reasonably safe place to work." The court goes on to state "[t]he question has never been decided in this state . . ."

Id. at 176. However, at the time that *Badami* was decided, the liability of fellow servants for their common law negligence had been decided before, decided in favor of holding the fellow servant liable to an injured worker for breach a common law duty of care. *Id.* at 178-79 (*citing Sylcox v. National Lead Co.*, 224 Mo.App. 543, 38 S.W.2d 497 (1931)).

something more test strips those fellow employees injured through the negligence of their co-employee of a right of action that existed under the common law and continued even after the adoption of the Act. The common law right of recovery against a negligent co-employee continued until cases after *Badami* made the something more test ubiquitous in the workplace. The common law independent duty test should continue to be the law until such time that the Act was amended to extend a qualified immunity to co-employees.

Conclusion

This appeal requires the Southern District to choose between two distinct tests regarding whether a co-employee is liable for injury caused to another employee at the workplace: the independent duty test, and the refined something more test. Plaintiff believes that the independent duty test presents the test most consistent with the common law and agency principles that have traditionally governed employer and employee liability in the workplace. Unlike the refined something more test, the independent duty test does not derogate the common law right to sue third persons, including co-employees, which was a part of the Act until 2012. *See Robinson v. Hooker*, 323 S.W.3d 418, 425, n. 4 (Mo.App. W.D. 2010). (The court noted that the interpretation of the Act that retained the common law right of an employee against co-employees "is consistent with the long-standing principle that close questions regarding the existence of common law rights should weigh in favor of retaining the common law right." (citations omitted))

Under the independent duty rule, the rule adopted by the Western District in *Leeper*, *supra.*, and the rule that best reflects the common law of co-employee liability

both before and after the Act, Plaintiff has plead a cause of action. The facts in the record before this Court reflect that a reasonable juror could conclude that Plaintiff's injuries were caused solely by the failure of Defendant Barrett to operate his forklift in a safe manner.

ERIC M. BELK, P.C.

By: _____

Eric M. Belk, MoBar #42138
C. J. Moeller, MoBar #39238
ATTORNEYS FOR APPELLANT
1736 E. Sunshine, Suite 600
Springfield, MO 65804
(417)889-1992 phone
(417)889-9229 fax

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

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

1. That this brief includes the information required by Rule 55.03.

2. That this brief complies with the limitations contained in Rule 84.06(b).

3. That this brief is in 13pt font, Times New Roman in Microsoft Word format.

4. That there are 4,511 words and 450 lines as relied upon by Microsoft Word contained in this brief.

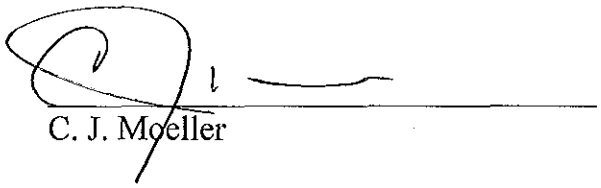
ERIC M. BELK, P.C.

By: _____

Eric M. Belk, MoBar #42138
C. J. Moeller, MoBar #39238
1736 E. Sunshine, Suite 600
Springfield, MO 65804
(417)889-1992 phone
(417)889-9229 fax
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that I served this Appellant's Reply Brief on Ms. Jackie Kinder, counsel for Respondent, through the Missouri courts' electronic filing system, as set forth in Rule 103.08, on September 30, 2014.



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