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 REPLY BRIEF

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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)

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

Leeper v. Ausmus, 440 S.W.3d 478 (Mo.App. W.D. 2014)

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.

Mr. Fogerty takes no issue with the foundation principle invoked by Mr. Meyer: "[A]n injured employee cannot maintain a common law negligence action against a co-employee when the duties breached were part of the employer's nondelegable duty to provide a safe workplace and a safe method of work." Resp.'s Br. 7 (citing *Peters v.*

Wady Industries, Inc., 489 S.W.3d 784, 796 (Mo. 2016). To be sure, Mr. Fogerty cited *Peters* for this proposition early in the argument section of his own opening brief. Appellant's Br. 14-15. Mr. Fogerty also agrees with Mr. Meyer's suggestion that the employer's nondelegable duty includes "'a duty to see that instrumentalities of the workplace are safely used' and to provide a 'safe method of work.'" Resp.'s Br. 7 (quoting *Peters,* 489 S.W.3d at 795, 799).

Mr. Fogerty and Mr. Meyer differ about the application of these principles to the summary judgment record in this case. According to Mr. Meyer, Mr. Fogerty's allegations and the evidence placed before the Circuit Court "clearly speak to 'the manner in which the work was being performed; and, therefore, allege only a breach of the employer's nondelegable duty to provide a safe workplace.'" *Id.* at 10. This is the bottom line of Mr. Meyer's position: that under the common law any injury inflicted by one employee upon another through negligence in "the manner in which the work was being performed" is subsumed under the employer's nondelegable duty to provide a safe workplace. That is not what this Court held 80 years ago in *Kelso v. W.A. Ross Construction Co.,* 85 S.W.2d 527 (Mo. 1935), or more recently in *Peters v. Wady Industries, Inc.,* 489 S.W.3d 784 (Mo. 2016).

More particularly Mr. Meyer argues that the summary judgment record in this case establishes only a breach of the employer's duty "to provide a safe method of work and to ensure the safe use of instrumentalities required to perform that work," and fails to show the breach of "an[y] independent duty owed by Mr. Meyer personally." *Id.* at 11. Mr. Meyer explains: "[Respondent] did not deviate from a standard manner of safe work set

up by the employer and create a transitory risk in carrying out only details of the work, because there was no safe manner of work established from which he could deviate." *Id.*

This argument is made in defiance of the record and the governing standard of review—which requires that the record be viewed in the light most favorable to the party against whom summary judgment was granted. *Eastern Missouri Coaltion of Police v. City of Chesterfield,* 386 S.W.3d 755, 759 (Mo. 2012). The evidence before the Circuit Court was more than sufficient to support findings that (1) Mr. Meyer's and Mr. Fogerty's employer had fully discharged its duty to furnish a safe work environment, including the provision of proper equipment and a trained operator for the routine task of moving construction materials from one place on a construction site to another, and (2) Mr. Fogerty's injury occurred after Mr. Meyer deviated unforeseeably from the safe routine that had been observed by the construction supervisor and went haywire with the controls of the frontloader.

Rick Armstrong, the site supervisor, testified that the Wright Construction Company's safety manual provides: "Only qualified, trained personnel are permitted to operate machinery or equipment." LF 140. He testified that a worker would be qualified to operate the forklift after "a day or two on the job," explaining that "[i]t's pretty simple." LF 142. Mr. Meyer testified that he had worked with this Takeuchi frontloader on more than 10 prior occasions, had been working with frontloaders since his youth on a farm, and had operated similar vehicles on previous jobs for this employer. LF 196-97. Mr. Armstrong had arranged for this frontloader to be at the Logan College site for the

specific purpose of moving the stones that would be used to construct the fountain. LF 137.

As a construction supervisor Mr. Armstrong considered the fountain project to be work within the normal scope of a carpenter's job. LF 136-37. The frontloader was the only feasible method for moving the stones at the Logan College site: when Mr. Armstrong was asked whether a crane, boom, or dolly could have been used instead, he replied that they could not. LF 137-38. Asked specifically whether there would have been "any other method besides using these straps with this machine to move the stone," Mr. Armstrong answered: "No, sir." LF 138. When he was questioned about the condition of the work site, Mr. Armstrong said: "I would describe it as rough terrain, but extremely typical of any construction site … Nothing out of the ordinary." LF 137-38. He considered Mr. Meyer's and Mr. Fogerty's task of moving stones across a construction site as "so common"—as common as "somebody walk[ing] by your office." LF 138.

Mr. Armstrong testified that he had seen the straps hanging from the forks of the frontloader and was not surprised that Mr. Meyer and Mr. Fogerty were using straps secured to the forks to move the stones. LF 138. Mr. Armstrong had observed Mr. Meyer and Mr. Fogerty using the frontloader to move the stones prior to the accident. LF 138. He stated: "[T]he times I did see them move the stones, [Mr. Fogerty] wasn't underneath the load." LF 138. That methodology was not dangerous exactly because "anyone with any common sense whatsoever would know not to get underneath a load …, whether it be the fork or the stone." LF 138. Nor was there any need for standing next to the load in

this case until Mr. Meyer implemented his own speeded up methodology. Mr. Armstrong testified that he never heard of any other accident with the forklift being operated by anyone. LF 143.

The record affords no support for Mr. Meyer's contention that what went wrong in this case was his employer's failure to establish a safe manner of work or ensure the safe use of instrumentalities rather than his own "deviat[ion] from a standard manner of safe work set up by the employer." Resp.'s Br. 11. The employer provided proper equipment for Mr. Meyer and his co-worker Mr. Fogerty to safely complete the routine construction site task of moving heavy stones from one location to another. It had a published safety rule that precluded the operation of that equipment by untrained personnel, and it provided a fully trained worker—Mr. Meyer—to operate that equipment. The project supervisor observed the work being done in the only feasible way and in a safe and proper way: straps were hung from the forks of the frontloader, the frontloader was being used to transport stones suspended from those straps, nobody was walking under the forks, and Mr. Meyer had not yet started doing whatever singularly unexpectable thing he eventually would do to bring the forks down suddenly and without warning on Mr. Fogerty's shoulders and back.

The negligence established by evidence in the present summary judgment record is *not* that of Mr. Meyer's and Mr. Fogerty's employer. Rather it is a pristine illustration of the circumstance that this Court lately has identified as actionable co-worker negligence:

> The employer's duty to provide a safe workplace is not unlimited … [H]is 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.

Peters, 489 S.W.3d at 795-96 (internal citations and quotation marks omitted). As *Peters* explained, "[e]mployers are not insurers of the safety of employees." Id. at 795. The summary judgment record is replete with evidence that Mr. Meyer's and Mr. Fogerty's employer discharged its nondelegable duty to provide a reasonably safe work environment at its Logan College construction site, supplied proper instrumentalities for the performance of the stone-moving task, limited the operation of those instrumentalities to trained personnel and supplied a well-trained operator, and observed the obvious and safe method in which the task was being performed prior to the accident that injured Mr. Fogerty.[1]

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[1] Mr. Meyer argues that Mr. Fogerty has alleged "that Meyer was negligent in operating the forklift though not qualified to do so." Resp.'s Br. 12 (citing LF 11, 16). Mr. Meyer's citation is to Mr. Fogerty's petition. In the end the evidence established that Mr. Meyer *was* a suitable operator for the frontloader that his employer supplied for the stone-moving task. As Mr. Meyer points out in his statement of the standard of review, (1) the criteria for testing the propriety of summary judgment on appeal are no different from those employed by the trial court in determining whether to grant the motion in the first instance, and (2) the reviewing court reviews the record in the light most favorable to

Mr. Meyer's contention that the injury here resulted from the employer's failure "to warn Fogerty of the dangers of walking under the forks of an operational forklift" again finds no support in the record. Mr. Armstrong testified that ""anyone with any common sense whatsoever would know not to get underneath a load …, whether it be the fork or the stone." LF 138. The employer's safety manual requires that tools be operated only by qualified and trained personnel, and in this instance the employer certainly provided a trained and experienced operator. LF 140, 196-97. If a construction employer must foresee every nutty decision that a properly trained employee might make while carrying out the details of routine work, safety manuals are going to become encyclopedias, construction workers are going to spend all of their time reading them, and nothing is going to get built. Again, Mr. Meyer's conduct in this case is a textbook example of the co-employee negligence that *Peters* recognized as actionable under the common law. *Peters,* 489 S.W.3d at 795-96.

Mr. Meyer's reliance on *Leeper v. Ausmus,* 440 S.W.3d 478 (Mo.App. W.D. 2014), is misplaced. The analysis that resulted in reversal there is consistent with the analysis of the Court of Appeals in reversing the summary judgment granted against Mr. Fogerty.

Leeper correctly recognized that for workplace injuries occurring between the effective dates of the 2005 and 2012 amendments of the Workers Compensation Act, "the

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the party against whom judgment was entered. Resp.'s Br. 3 (citing *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. 1993)).

common law, and not the refined 'something more' test, must be applied to determine whether a co-employee owes a duty of care in negligence." *Id.* at 493-94. The Court of Appeals characterized the determination of "whether a workplace injury is attributable to a breach of the employer's nondelegable duties" as "a question of fact." *Id.* at 494 (citing *Kelso v. W. A. Ross Construction Co.,* 85 S.W.2d 527, 534-36 (Mo. 1935)). It identified that question as whether the injured employee was exposed to dangers that the employer could have avoided by the exercise of reasonable care. *Id.* at 495 (citing *Kelso,* 85 S.W.2d at 536).

As Mr. Meyer acknowledges, *Leeper* reversed summary judgment in favor of the employer because the record supported a finding that the employer had discharged its nondelegable duties by providing safe equipment, a properly trained co-employee, and specific instructions for the safe operation of a technical and complex drilling rig. Resp.'s Br. 14; *Leeper,* 440 S.W.3d at 494-96. Mr. Meyer's insistence that the record in this case stands "in direct constrast" and proves that the employer had not discharged its nondelegable duty cannot be sqiared with the record or the standard of review.

As demonstrated in this reply brief and Mr. Fogerty's opening brief, the record is replete with evidence that the employer discharged its nondelegable duties—providing a safety regulation requiring that the frontloader only be operated by a trained driver, supplying the frontloader that was the *only* appropriate instrumentality for the work at hand as well as the trained operator, and observing the initial phase of that work and seeing that it was being done safely—in particular, that no worker was walking underneath the forks and that the forks were not being dropped inappropriately and

without warning. Further, the record in this case establishes that the task at hand was routine and the operation of the frontloader was simple and safe—until Mr. Meyer engaged in unforeseeable negligent conduct.

Leeper also rejected the notion that a worker never can have liability under the common law for conduct amounting to his performance of or failure to perform a job duty—an argument inherent in the position advocated by Mr. Meyer in this case:

> The principle that the performance or failure to perform a job duty will never support a duty of care independent of the employer's nondelegable duties has no support at common law. Nearly every co-employee negligence case will involve the co-employee's performance, or failure to perform, a job duty.

Id. at 494. *Leeper* also rejected the notion that co-employee negligence in the operation of a vehicle or other instrumentality of work inevitably is a component of the employer's nondelegable duties. *Id.* at 495. In short, *Leeper* can offer Mr. Meyer no comfort.

One concurring opinion in *Peters* explicitly recognized the common law liability of an employee "not to act affirmatively to expose [a fellow employee] to an unreasonable risk of harm not reasonably foreseeable to the employer." 489 S.W.3d at 801 (Wilson, J., concurring). This is precisely what Mr. Meyer did—twice.

First, Mr. Meyer asked Mr. Fogerty to assist him by steadying the stone as Mr. Meyer drove the frontloader over rough terrain. In order to provide that assistance, Mr. Fogerty had to walk in front of the vehicle and in immediate proximity to the suspended stone:

> [Mr. Meyer] was kind of complaining that he was having stability problems … He asked me …, Matt, come back here, and I need you to stabilize that stone for me for a minute while I'm drifing up with it. I said okay. 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.

LF 182-83. That the risk created by Mr. Meyer's need and request was "not reasonably foreseeable to the employer" is clear from Mr. Armstrong's testimony that "you don't have to be smart to know don't get underneath the load, you know, that's dangerous," and "anyone with common sense whatsoever would know not to get underneath … the fork or the stone." LF 138.

Second, with Mr. Fogerty walking underneath a fork in front of the vehicle and despite his own years of experience operating a frontloader, Mr. Meyer caused the forks to lower suddenly, repeatedly, and without warning—striking Mr. Fogerty again and again and causing his injury. Mr. Armstrong's and Mr. Meyer's testimony provides ample proof that this risk was "not reasonably foreseeable to the employer":

- The employer's safety manual provided: "Only qualified, trained personnel are permitted to operate machinery or equipment." LF 140.
- Mr. Armstrong stated that operating the Takeuchi frontloader is "pretty simple" and "not too complicated," and a worker would be qualified to operate it after "a day or two on the job." LF 141. There is no evidence to the contrary.

• Mr. Meyer testified that worked with this Takeuchi frontloader on more than 10 prior occasions, had been working with frontloaders since his youth on a farm, and had operated similar vehicles on previous jobs for this employer. LF 196-97.

• Mr. Armstrong never heard of any other accident with the Takeuchi frontloader regardless of who was operating it, and never heard of Mr. Meyer's involvement in any other accidents "with either this frontloader or anything similar while he worked for Wright." LF 142.

Mr. Meyer acted affirmatively to expose Mr. Fogerty "to an unreasonable risk of harm not reasonably foreseeable to the employer." His negligence is actionable under the reasoning of that concurring opinion as well as the majority opinion.

CONCLUSION

The judgment of the Circuit Court should be reversed for the reasons set forth in the Appellant's Brief and this Reply 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 3,511 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. 15.31 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 February 27, 2017, to be served by that system upon all counsel of record in this appeal.

/s/ Michael Gross