APPEAL NO. SC 96030

IN THE SUPREME COURT OF MISSOURI

MATTHEW FOGERTY,

Plaintiff/Appellant,

v.

LARRY MEYER,

Defendant/Respondent.

On Appeal from the Circuit Court of St. Louis County
State of Missouri
The Honorable Mark D. Seigel, Circuit Judge
Circuit Court Cause No. 12SL-CC03281

RESPONDENT LARRY MEYER'S SUBSTITUTE BRIEF

Kathleen Schlef Hamilton, No. 51974
Bradley M. Zaffiri, No. 63632
HEPLERBROOM LLC
211 North Broadway, Ste. 2700
St. Louis, MO 63102
(314) 241-6160
(314) 241-6116 Fax
ksh@heplerbroom.com
bzaffiri@heplerbroom.com
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

RULES, STATUTES AND OTHER AUTHORITIES

STATEMENT OF FACTS

Appellant Matthew Fogerty ("Fogerty") and Respondent Larry Meyer ("Meyer") were carpenters and co-employees of Wright Construction Services. (L.F. 9, 99, 110, 111, 113, 131, 145). On October 20, 2011, Fogerty and Meyer were installing a stone fountain at Logan College for Wright Construction Services. (L.F. 9, 110, 112, 114, 117). Their superintendent, Rick Armstrong, gave Fogerty and Meyer a set of blueprints and directed them to build the fountain. (L.F. 136-137, 147-148). To build the fountain, Fogerty and Meyer moved stones from their pallets to the area of the fountain using a Takeuchi 230 track front loader outfitted with forks (the "forklift"), which Meyer operated. (L.F. 11, 112, 114). Fogerty testified that Meyer was in charge of the layout and making the decision as to what stone to pick and what they were going to do. (L.F. 117).

Meyer has operated front loaders for over 20 years. (L.F. 146). Meyer had experience in operating the Takeuchi 230 and received on-the-job training in doing so. (L.F. 135; 154, 155-156). Meyer had used forks on these types of machines more than ten times. (L.F. 147). Plaintiff and Meyer were directed by their superintendent Rick Armstrong to build the fountain using the front loader outfitted with forks with no direction as to the proper manner in which to construct the fountain. (L.F. 136-137, 147-48). No instruction on the proper manner to transport the stones was provided even though none of the workers – Rick Armstrong, Plaintiff, nor Meyer – had ever built a fountain or worked with stones like those at issue previously. (L.F. 117, 137, 138, 152).

At the time of the incident, a single stone hung from one of the forks by a strap, which Meyer asked Fogerty to keep from swaying. (L.F. 11, 118-119, 128, 147, 149, 150). Fogerty testified that Meyer made the decision to carry one stone with one strap, and Fogerty did not voice any concerns about that. (L.F. 118). However, both Fogerty and Meyer strapped the stone onto the fork immediately before the incident occurred. (L.F. 128).

It is undisputed that Meyer did not direct Fogerty to walk under the forks; this was Fogerty's decision. (L.F. 128). Fogerty placed his left hand on top of the stone strapped to the left fork and walked underneath the right fork of the forklift. (L.F. 11, 119-121, 149-150). The forks then dropped suddenly down onto Fogerty's back, pushing him into the ground. (L.F. 11, 119-121, 151). Fogerty alleges he sustained injuries to his back and right knee. (L.F. 11, 16, 21).

In the ensuing personal injury action, Meyer moved for summary judgment on Fogerty's negligence claim, arguing that the duty to operate the forklift in a safe manner was one of the employer's non-delegable duties and, therefore, Meyer could not face personal liability. (L.F. 94-98). The Circuit Court granted Meyer's Motion for Summary Judgment and an appeal to the Court of Appeals for the Eastern District followed. (L.F. 216). The Court of Appeals reversed the summary judgment in an opinion dated September 20, 2016. The motion for rehearing and application for transfer to this Court was denied by the Court of Appeals on October 26, 2016, but this Court sustained Meyer's application for transfer filed in this Court on December 20, 2016.

ARGUMENT

I. The judgment of the trial court should be affirmed because the undisputed material facts demonstrate that Meyer did not breach any independent duty owed separate and apart from Wright Construction Services' nondelegable duties, in that Fogerty's injuries were the result of Wright Construction Services' failure to provide a safe workplace, a safe method of work, and a sufficient number of suitable co-employees, in addition to the failure to promulgate rules and standards for performing the assigned task.

A. Standard of Review

When considering an appeal from a summary judgment, the Court reviews the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). The facts set forth in support of a party's motion are taken as true unless contradicted by the non-movant's response to the summary judgment motion. *Id*.

This Court's review of Meyer's Motion for Summary Judgment is *de novo*. *Id*. The criteria on appeal for testing the propriety of summary judgment are no different from those employed by the trial court in determining whether to grant the motion initially. *Ackerman Buick, Inc. v. General Motors Corp.*, 66 S.W.3d 51, 53 (Mo.App.E.D. 2001). Whether summary judgment is proper is purely an issue of law. *Id*.

Summary judgment will not be set aside on review if it is supportable on any theory. *City of Washington v. Warren County*, 899 S.W.2d 863, 868 (Mo. banc 1995). The theory need not be one raised or argued by either party and may be raised *sua sponte* by either the

trial court or the appellate court, provided the court incorporates principles raised in the petition. *Id.*

Moreover, unlike an appellant, a respondent in a summary judgment proceeding is permitted to raise a new theory on appeal for the purpose of sustaining a favorable judgment. *Sheedy v. Missouri Highways and Transp. Comm'n*, 180 S.W.2d 66, 71 (Mo.App.S.D. 2005). The trial court's entry of summary judgment should be sustained even if the theory on which the case is disposed was not presented to the trial court. *Ackerman*, 66 S.W.3d at 60; *Guy v. City of St. Louis*, 829 S.W.2d 66, 69 (Mo.App.E.D. 1992); *Westbrook v. Mack*, 575 S.W.2d 921, 923-24 (Mo.App.E.D. 1978).

B. Under Missouri law, an employee is not liable for injuries to a co-employee when the injuries result from the failure of the employer to discharge its nondelegable duty to provide a safe workplace and safe method of work.

Employers in Missouri owe their employees certain nondelegable duties related to workplace safety. This Court has recognized at least five such nondelegable duties: 1) the duty to provide a safe place to work, which includes providing a safe method of 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 employees; and 5) the duty to promulgate and enforce rules for the conduct of employees which would make the work safe. *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784, 795; 799 (Mo. banc 2016).

These duties are "nondelegable" in that "even if an employer assigns the performance of those duties to an employee, the employer remains liable for any breach of such duties." *Id*.

When an employer fails to discharge any one of these duties and a worker is injured on the job, Missouri's Workers' Compensation Act (the "Act") requires employers to provide benefits to the injured worker. In exchange, the employer is granted immunity against tort claims for those injuries. Section 287.120, RSMo (Cum. Supp. 2005)[1]. However, for workplace injuries occurring between 2005 and 2012, the Act is silent as to the liabilities and immunities of co-employees alleged to be responsible for a worker's injuries.

In *State ex. rel Badami v. Gaertner*, the Missouri Court of Appeals for the Eastern District extended the Act's immunity to co-employees. The court held that a co-employee enjoyed immunity under the Act for injuries that occurred while the co-employee was discharging the employer's nondelegable duties unless "something more" than the failure to carry out the employer's duties was alleged; namely, "an affirmative act causing or increasing the risk of injury." 630 S.W.2d 175, 179-80 (Mo. App. E.D. 1982).

In *Peters* and *Parr v. Breeden*, this Court examined *Badami* and the cases that followed in its footprint and held that "[w]hile the 'something more' test proved consistent with the common law principle that co-employees cannot be liable for breaching an employer's nondelegable duty to provide a safe workplace, the extension of 'immunity' to

[1] Further statutory references are to RSMo. (Supp. 2005), unless otherwise noted.

co-employees under the workers' compensation law was inconsistent with the plain language of the exclusivity provisions." 489 S.W.3d 784, 793 (Mo. banc 2016); 489 S.W.3d 774 (Mo. banc 2016).

This Court held that, in lieu of applying *Badami*'s "something more" test, courts should consider a claim for co-employee liability during this period as it would any common law negligence claim. *Parr*, 489 S.W.3d at 779. "Under the common law, an employee may be liable for injuries to another employee caused by a breach of a duty of care owed by the employee independent of the master-servant relationship." *Id.*

While this Court expressly disavowed the application of *Badami* to the extent that decision resulted in the requirement of an "affirmative act" causing or increasing the risk of harm to the employee, the Court held that *Badami*'s ultimate conclusion that "something more" must be charged than merely the violation of an employer's nondelegable duty "accurately reflects the common law regarding co-employee liability." *Peters*, 489 S.W.3d at 797. Accordingly, if a co-employee is assigned to perform an employer's nondelegable duties (such as providing a safe method of work), performance of those duties derives solely from the master-servant relationship, and a co-employee cannot be liable for the breach of such duty. *Id*. at 795.

In other words, a co-employee may be liable if the injured plaintiff can make a "common law claim of negligence" by demonstrating that: (1) the defendant had a duty to the plaintiff; (2) the defendant failed to perform that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injury. *Parr*, 489 S.W.3d at 778. A co-employee's potential liability is limited to only those situations in which the employee

owed a duty separate and distinct from the employer's nondelegable duties. *Id*. at 778; *citing Peters*, 489 S.W.3d at 795.

"Inherently, a co-employee's breach of the employer's nondelegable duty to provide a safe workplace does not constitute a breach of a duty owed independently of the master-servant relationship." *Peters*, 489 S.W.3d at 795. Consequently, an 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. *Id*. at 796.

C. Under Missouri law, an employer has a nondelegable duty to provide a "safe method of work," which Wright Construction Services failed to discharge.

"Included within the employer's duty to provide a safe workplace is a duty to see that instrumentalities of the workplace are safely used" and to provide a "safe method of work." *Peters*, 489 S.W.3d at 795, 799. This principle recognizes the reality that "the manner in which instrumentalities are used may make a place safe or unsafe as a place of work, and, therefore, the duty to see that instrumentalities are safely used may become the most important element in the safety of a workman in his place of work." *Id*. Thus, "when 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 nondelegable duty to provide a safe workplace." *Id*. at 796 (emphasis added).

The duty to see that instrumentalities are safely used includes the duty to issue "general orders for the guidance of servants" and "particular orders with reference to the

details of the work during its progress." *Kelso v. W. A. Ross Const.*, 85 S.W.2d 527, 535 (Mo. 1935). However, "[a] master's duty does not end with prescribing rules calculated to secure the safety of employees. It is equally binding on him honestly and faithfully to require their observance." *Id*. at 536. In failing to provide any instruction as to the safe manner of work, the employer breaches its duty to provide a safe workplace. *Peters*, 489 S.W.3d at 799.

Peters is instructive. There, the plaintiff was an employee of a construction supply company who suffered serious injuries when a pile of dowel baskets fell from the back of a flatbed truck and crushed him. 489 S.W.3d at 787. The plaintiff filed suit against his project manager, alleging that the project manager was negligent in nine different ways: (1) allowing the baskets to be transported on a truck while stacked at a level that exceeded a safe height; (2) failing to insure that the baskets were properly braced or secured; (3) failing to provide sufficient help; (4) failing to provide adequately trained help; (5) failing to provide a proper area for the unloading of the baskets; (6) failing to heed warnings of employees about the baskets; (7) allowing the unsafe course to become standard operating procedure; (8) ordering and directing plaintiff to load, stack, transport, and unload the baskets in the aforementioned unsafe manner; and (9) ordering and directing plaintiff to load, stack, transport, and unload the baskets in the aforementioned unsafe manner in violation of OSHA regulations. *Id*. at 799.

The project manager moved to dismiss on the basis that the petition only alleged conduct which would amount to the project manager's breach of one of the employer's nondelegable duties, as opposed to the breach of an independent duty owed by the project

manager individually. *Id*. at 787. The trial court sustained the project manager's motion and dismissed the plaintiff's claims. *Id.*

On appeal, this Court affirmed the trial court's dismissal, holding that the plaintiff's allegations of negligence against the project manager clearly alleged the violation of only nondelegable duties owed by the employer. For example, it was the employer's duty to ensure that the plaintiff was provided with safe equipment, a sufficient number of competent employees, and a safe work environment. *Id*. The allegations did not support the plaintiff's contention that an unsafe work environment resulted from the project manager negligently carrying out the details of his work, as prescribed by the employer. Rather, the allegations pertain to the project manager, in his supervisory role, negligently carrying out the employer's nondelegable duty to provide a safe workplace. *Id*. at 799. The allegations reflected "a classic case of a supervisory employee breaching the employer's non-delegable duty to provide a safe workplace." *Id*.

Further, dismissal was appropriate because the allegations as to the unsafe stacking of the baskets went to the manner in which the work was being performed: **"Because providing a safe method of work is encompassed in the employer's nondelegable duty to provide a safe workplace, such allegations are insufficient to establish [the project manager] owed a duty to [the plaintiff] independently of the master-servant relationship."** *Id*. (emphasis added). Thus, while the project manager was "allegedly responsible for the unsafe manner in which the work was routinely performed, it is [the employer's] nondelegable duty to provide a safe work environment." *Id*. at 799-800.

Applying *Peters* to this matter, it is clear that Meyer is entitled to summary judgment. The employer, Wright Construction Services, owed a nondelegable duty to Fogerty and Meyer to provide a safe place to work; to provide a safe method of work; to provide safe equipment for work; to give warning of dangers of which the employees might reasonably be expected to remain in ignorance; to provide a sufficient number of suitable and competent fellow servants; and to promulgate and enforce rules for the conduct of employees which would make the work safe. Charging Meyer with the failure to fulfill these duties charges no actionable negligence. *Id*. at 797.

Peters reiterates that included within the employer's duty to provide a safe workplace is a duty to see that instrumentalities of the workplace are used safely and that the manner of the work itself is safe, so any failure on Meyer's part to perform those duties falls squarely on the shoulders of Wright Construction Services. *Id*. at 795, 799.

Like the plaintiff in *Peters* who alleged the project manager directed him to transport and unload the dowel baskets in an unsafe manner, Fogerty alleges that Meyer ordered and directed him to conduct work in an unsafe manner by directing Fogerty to "strap stones to the forklift with only one strap and in a manner that was not safe for the transportation of such large stones" and by directing Fogerty to "walk next to the fork truck and balance the stone while the fork truck was moving when it was not reasonably safe to do so." (L.F. 11, 16; A.B. 4-5). These allegations, as well as the evidence presented on summary judgment, 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. *Peters*, 489 S.W.3d. at 799.

It is also undisputed that both Fogerty and Meyer were provided with no instruction as to how to safely conduct their work. (L.F. 117). This distinguishes this case from instances in which a co-employee negligently carried out some detail or aspect of his work which made a safe manner of work – as instructed by an employer – unsafe. *Peters*, 489 S.W.3d. at 800. To the extent there was a breach of any duty, it was the nondelegable duty of Wright Construction Services to provide a safe method of work and to ensure the safe use of instrumentalities required to perform that work, as opposed to an independent duty owed by Meyer personally. In failing to provide any instruction on the proper manner to transport the stones, Wright Construction Services failed to discharge its nondelegable duty to provide a safe method of work. The fact that there was no safe manner of work established by the employer is made even more troubling in light of the fact that none of the workers – Rick Armstrong, Fogerty, nor Meyer – had ever built a fountain or worked with stones like those at issue previously. (L.F. 117, 137, 138, 152).

Meyer 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. As a matter of public policy, if Meyer can be independently liable under the circumstances of this case, then an employer can fail to establish a safe method of work, leaving its employees on their own to figure out and accomplish an employer-ordered task, and escape responsibility for wholly failing to discharge its nondelegable duty to provide a safe workplace. Such an outrageous outcome cannot be supported by the common law, which *Peters* and *Parr* made clear establishes that an employer owes continuing nondelegable duties to its employees with

respect to safety and that, even if an employer assigns the performance of those duties to an employee, the employer remains liable for any breach of such duties. *Peters* at 795. It was the fact that the employer in *Peters* failed to provide a safe manner of work that made the actions of the project manager in maintaining the unsafe manner of work the actions of the employer in failing to provide a safe workplace. *Id*. at 787.

Fogerty also alleges that Meyer was negligent in operating the forklift though not qualified to do so. (L.F. 11, 16). Again, it was Wright Construction Services' nondelegable duty to provide Fogerty with a sufficient number of suitable fellow servants. *Peters*, 489 S.W.3d at 795. Meyer may not be held liable for the employer's failure to provide suitable co-workers for the task. The *Peters* Court addressed this precise allegation – that the project manager breached a duty to exercise reasonable care by "failing to provide sufficient and adequately trained help to transport the baskets" – and held that the duty to provide "a sufficient number of competent employees" to carry out a task "fall[s] squarely within the employer's duty to provide a safe workplace." 489 S.W.3d at 799. Thus, Meyer cannot be held liable under this theory because it was exclusively the duty of Wright Construction Services to provide them with competent and suitable co-employees for the assigned task.

Now, Fogerty has changed his argument in claiming that Meyer was properly trained for the task at hand in an attempt to remove liability from the employer. (A.B. 23). However, this change in position fails to address the crux of the issue – that the employer is the one responsible for establishing the safe method of moving stones from various locations to build the fountain. There was no ordinary manner of work established such

that a risk in the details of that work can establish an independent duty of Meyer separate and apart from the employer's nondelegable duty to provide a safe workplace.

Finally, Fogerty alleges that Meyer was negligent in lowering the forks without taking any steps to warn or protect him from being impacted by the forks. (L.F. 11, 16). This part of his argument has not changed. Yet, it was the duty of Wright Construction Services to give warning of dangers of which the employee might reasonably be expected to remain in ignorance. *Peters*, 489 S.W.3d at 795. It was also the duty of Wright Construction Services to prescribe particular orders with reference to the details of work, to require their observance, and to advise of any warnings. *Kelso*, 85 S.W.2d at 535-36. A failure to warn Fogerty of the dangers of walking under the forks of an operational forklift is a failure of the employer. *Id*.; *Peters*, 489 S.W.3d at 795. Fogerty's allegations of negligence are all allegations of failures of the employer.

In contrast, the decision by the Missouri Court of Appeals in *Leeper v. Asmus* demonstrates the circumstances under which a co-employee faces liability for breaching an independent duty owed by the co-employee individually. 440 S.W.3d 478, 482 (Mo. App. W.D. 2014). There, the plaintiff alleged he was injured when a co-employee failed to follow specific instructions provided by his employer for the fitting of a 500-pound pipe on a drilling rig. *Id*. at 495-96. On a motion to dismiss, the trial court dismissed the plaintiff's claims, holding that the plaintiff failed to allege conduct beyond the breach of the employer's nondelegable duties. *Id*.

The Western District reversed finding that the co-employee's deviation from the safe manner of work directed by the employer may have resulted in an independent duty

under common law. *Id*. at 495. Specifically, the allegations supported a conclusion that a safe drilling rig, safe methods for operation of the drilling rig, and a sufficiently trained operator of the drilling rig, were only made unsafe because the co-employee failed to follow specific instructions imposed to insure safe operation of the drilling rig. *Id*. at 496.

Leeper supports the entry of summary judgment in favor of Meyer by emphasizing the fact that the employer was alleged to have discharged all of its nondelegable duties by providing the plaintiff with safe equipment, a properly trained co-employee, and specific instructions for the safe operation of the drilling rig. *Id*. Here, in direct contrast, the record reflects that Wright Construction Services provided no instruction on the safe transfer of the stones and construction of the fountain, and, therefore, had not discharged its nondelegable duties to provide a safe workplace. (L.F. 117).

In an effort to paint this as a "transitory risk" case, Fogerty focuses on his allegation that the accident was brought about by Meyer's "decision 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…" (A.B. 23)(Emphasis in original). However, what Fogerty fails to recognize is that, even if Meyer was motivated by a desire to complete the job faster and instructed Fogerty to walk in front of and under the forks, this allegation does not support a finding that this created a transitory risk because the undisputed material facts demonstrate that Wright Construction Services provided no guidance on how to complete the task. (L.F. 136-137, 147-148). The undisputed fact is that Fogerty is the one who determined that he would walk under the forks; yet, Fogerty continues to argue that Meyer

directed him to walk under the forks. (L.F. 128). Regardless of this incorrect statement of the facts, Meyer did not create a transitory risk by deviating from a safe method of work established by the employer, as did the employee in *Leeper*. On the contrary, Meyer and Fogerty were left to their own devices to come up with a method of transporting the stones – which is a nondelegable duty owed by Wright Construction Services.

While *Peters*, *Parr*, and *Leeper* clearly establish that a co-employee may be liable under the common law without proof of "affirmative" or "inherently dangerous conduct," the *Peters* Court made clear that the "something more" analysis of *Badami* is consistent with common law co-employee liability principles. *Peters*, 489 S.W.3d at 797.

Pursuant to common law, then, it was Wright Construction Services' nondelegable duty to ensure a safe workplace, which duty includes ensuring not only that a safe method of work is implemented and that safe operation of equipment is performed, but also that rules and instructions ensuring the safe manner of work and safe operation of the instrumentalities are provided and followed. Fogerty and Meyer, having received no instruction from the employer on how to safely transport the stones, were left without a safe workplace and safe instrumentalities with which to perform the work.

This is not a case where an established manner of work as determined by the employer in order to keep employees safe was subsequently made unsafe by Meyer's actions. In fact, the lack of any direction, protocol, or procedures for the safe use of the forklift in transporting the stones and in constructing the fountain created the hazard. Fogerty's injuries resulted from the breach of the employer's duty to provide a safe

workplace, and, in particular, to provide a safe method of work and to ensure the safe use of the forklift. Accordingly, Meyer is entitled to judgment as a matter of law.

D. An employee's alleged negligent operation of machinery on the jobsite charges no actionable negligence against the employee because the duty to operate machinery safely is an extension of the employer's duty to provide a safe workplace.

In addition to the foregoing, the judgment of the trial court should be affirmed because this Court and the Courts of Appeals in the Eastern, Western, and Southern Districts have all recognized that "[a] simple allegation of negligent operation of machinery or a vehicle is not 'something more' than an allegation of a breach of duty to maintain a safe working environment." *Nowlin ex rel. Carter v. Nichols*, 163 S.W.3d 575, 580 (Mo. App. W.D. 2005); *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 622 (Mo. banc 2002); *Carman v. Wieland*, 406 S.W.3d 70, 79 (Mo. App. E.D. 2013); *Evans v. Wilson, et al.*, No. SD33209, 2016 WL 4990251 (Mo. App. S.D. 2016), *transfer ordered* (December 20, 2016).

This Court's decision in *Taylor* involved a plaintiff who was injured while riding as a passenger on a trash truck when the plaintiff's co-employee/driver struck a mailbox causing plaintiff to fall from the truck and suffer permanent injuries to his head, neck, and lower back. 73 S.W.3d at 621. The plaintiff brought a negligence action against his co-employee, alleging the co-employee: 1) failed to keep a careful lookout; 2) carelessly and negligently struck a mailbox while driving; and 3) carelessly and negligently drove too close to a fixed object. *Id*. at 622. The co-employee moved to dismiss the action on the

grounds that the plaintiff's exclusive remedy was within the Workers' Compensation Act. The trial court denied the co-employee's motion, who then sought a writ of prohibition to prevent the trial court from proceeding further with the case. *Id*. at 621.

On consideration of the petition for a writ of prohibition, this Court affirmed that "an allegation that an employee failed to drive safely in the course of his work and injured a fellow worker is not an allegation of 'something more' than a failure to provide a safe working environment." *Id*. Accordingly, the Court made absolute its preliminary writ of prohibition.

Similarly, in *Carman* the plaintiff was injured when her co-employee backed a fire truck over her, causing serious injuries. 406 S.W.3d at 72. The plaintiff filed suit against the co-employee, alleging that the co-employee "negligently operated a motor vehicle" and "created a hazardous environment." *Id*. at 76. On appeal of the grant of summary judgment in favor of the co-employee, the Missouri Court of Appeals for the Eastern District examined *Taylor* and its progeny, noting that Missouri courts have consistently held that an allegation that a co-employee negligently operated a vehicle or machinery is not "something more" than an allegation of the breach of the employer's non-delegable duty to provide a safe working environment. *Id*. at 78.

With these principles in mind, the Court of Appeals affirmed summary judgment in favor of the co-employee, noting that the plaintiff "alleged nothing more than that the defendant negligently drove the fire truck," and holding that "a co-employee owes to a fellow employee no common-law duty to exercise ordinary care and safety requiring the co-employee to refrain from operating a vehicle in a negligent manner when driving in the

course of his work. As a matter of law, that responsibility is subsumed within an employer's non-delegable duty to provide a safe working environment. **The duty here to operate the fire truck in a safe manner was owed to the plaintiff by the employer."** *Id*. at 78-79 (emphasis added); *see also Nowlin ex rel. Carter v. Nichols*, 163 S.W.3d 575, 580 (Mo. App. W.D. 2005)(allegation that co-employee was negligent in leaving a running bulldozer at the top of a hill, causing it to roll down and crush the plaintiff, did not allege "something more" than breach of the duty to provide a safe working environment).

Finally, and most recently, the Missouri Court of Appeals for the Southern District issued its opinion in *Evans*, the appeal of which is currently pending before this Court, Case No. SC95997. The facts and allegations of *Evans* are strikingly similar to those presented by this appeal. There, the plaintiff was involved in the construction of an apartment complex. 2016 WL 4990251 at *1. He and his co-employee were moving trusses on the jobsite. The co-employee was driving a forklift with the load of trusses balanced on the forks. The plaintiff walked ahead and to the side of the forklift, balancing the load. The plaintiff alleged he was injured when the co-employee "negligently drove the forklift over a rock, causing the load to shift and pull [the plaintiff] toward the forklift, which struck him and ran over his foot." *Id*. at *1. The trial court granted summary judgment in favor of the co-employee, ruling that "safe forklift operation fell within the employer's non-delegable duty to provide a safe working environment." *Id*.

On appeal, the Court of Appeals correctly noted, consistent with *Peters*, that the "so-called 'something more' cases are correct to the extent they require, for co-employee liability, something more than an alleged failure to fulfill the employer's non-delegable

duty to provide a safe workplace." *Id.* at *2. The court then affirmed summary judgment in favor of the co-employee, holding that the plaintiff's "bad-driving allegations allege nothing more than a failure to provide a safe working environment." *Id.* "A simple allegation of negligent operation of machinery or a vehicle is not 'something more' than an allegation of a breach of duty to maintain a safe working environment." *Id.* at *2. This result recognizes that "an employee's duty to drive safely is merely an extension of the duty to maintain a safe work environment." *Id.*

The facts and issues presented by this appeal are identical to those considered in *Taylor*, *Carman*, and *Evans*. Here, the undisputed facts demonstrate that Fogerty was walking in front of the forklift and underneath one of the forks when the forks suddenly, and with no intent on Meyer's part, dropped down on top of him, pushing him to the ground. (L.F. 11, 119-121, 151).

These facts and allegations do not support a finding that Meyer breached an independent personal duty owed to Fogerty, as is required to hold him personally liable for Fogerty's injuries. *Peters*, 489 S.W.3d at 796. Rather, even if Meyer was negligent in the manner in which he operated the forklift, his duty to operate the forklift safely "is merely an extension of the duty to maintain a safe work environment." *Evans*, 2016 WL 4990251 at *2. The allegation that Meyer negligently caused the forks to be lowered while operating the forklift is no different than the plaintiff's allegation in *Taylor* that the co-employee drove too close to a mailbox, or the plaintiff's allegation in *Carman* that the co-employee negligently backed the fire truck over her foot, or the plaintiff's allegation in *Evans* that

the co-employee negligently caused the plaintiff to be run over by a forklift under essentially the same facts as those at issue here.

Fogerty attempts to downplay the significance of these holdings, and in particular the significance of *Evans*, by arguing that *Taylor* and *Carman* rely on the now-defunct standard of "purposeful, affirmatively dangerous conduct" in determining that the duty to operate machinery in a safe manner is subsumed under the employer's nondelegable duty to provide a safe workplace. (A.B. 21-22). This position is a strained reading of *Taylor* and *Carman*. While it is true those cases discuss the "purposeful, affirmative" conduct standard, the cases all expressly recognize that the safe operation of machinery on the job is merely an extension of the employer's nondelegable duty to provide a safe workplace. Thus, the affirmative conduct standard was not the deciding factor in those cases; rather, the deciding factor was the fact that it is the employer's responsibility to see that machinery is safely operated. Moreover, this Court expressly recognized in *Peters* that the "something more" cases remain viable to the extent they recognize that employees cannot face personal liability for injuries that result from the failure of the employer to provide a safe place to work and a safe method to perform the work. 489 S.W.3d at 797. The Court of Appeals' decision in *Evans* is consistent with this Court's holdings in *Peters* and *Parr* and *Peters*' assessment of *Taylor*.

Because any duty of Meyer to operate the forklift in a safe manner is not an independent personal duty, but rather is subsumed within and "merely an extension of" the employer's non-delegable duty to provide a safe working environment, the trial court's entry of summary judgment in favor of Meyer should be affirmed.

CONCLUSION

The judgment of the trial court should be affirmed because the undisputed material facts conclusively demonstrate that Meyer did not breach an independent, personal duty owed to Fogerty. Rather, the incident was the result of Wright Construction Services' failure to discharge its nondelegable duties to provide a safe workplace, a safe method of work, instructions for carrying out the work, and suitable co-employees. To the extent Meyer was discharging these duties on behalf of Wright Construction Services, he can face no personal liability. Because Fogerty and Meyer were provided with no direction or method of moving the stones, any risks created by Meyer were not "transitory" deviations from an employer-mandated safe method of work. Moreover, Missouri courts have consistently held that the duty to safely operate machinery is but an extension of the employer's nondelegable duty to provide a safe workplace.

Accordingly, this Court should affirm the trial court's entry of summary judgment in favor of Meyer.

Respectfully submitted,

/s/ Kathleen Schlef Hamilton
Kathleen Schlef Hamilton, No. 51974
Bradley M. Zaffiri, No. 63632
HEPLERBROOM LLC
211 North Broadway, Ste. 2700
St. Louis, MO 63102
(314) 241-6160
(314) 241-6116 Fax
ksh@heplerbroom.com
bzaffiri@heplerbroom.com
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondent's Brief complies with Rule 55.03 and with the limitations contained in Missouri Supreme Court Rule 84.06(b), and that the Brief, excluding the cover, the certificate of service, this certificate, and the signature block contains 5,944 words (as determined by Microsoft Word 2010 software).

Respectfully submitted,

/s/ Kathleen Schlef Hamilton
Kathleen Schlef Hamilton, No. 51974
Bradley M. Zaffiri, No. 63632
HEPLERBROOM LLC
211 North Broadway, Ste. 2700
St. Louis, MO 63102
(314) 241-6160
(314) 241-6116 Fax
ksh@heplerbroom.com
bzaffiri@heplerbroom.com
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 17, 2017 the foregoing document was filed with the Missouri Supreme Court via the CM/ECF system, which will send notification of such filing(s) to the following: Michael Gross, *Attorney for Plaintiff/Appellant.*

Respectfully submitted,

/s/ Kathleen Schlef Hamilton
Kathleen Schlef Hamilton, No. 51974
Bradley M. Zaffiri, No. 63632
HEPLERBROOM LLC
211 North Broadway, Ste. 2700
St. Louis, MO 63102
(314) 241-6160
(314) 241-6116 Fax
ksh@heplerbroom.com
bzaffiri@heplerbroom.com
Attorneys for Respondent