IN THE SUPREME COURT OF MISSOURI

NO. 96042

NADINE MCCOMB

Appellant

vs.

GREGORY NORFUS and DAVID CHEESE

Respondents.

On Appeal from the Circuit Court of Cole County
Case No. 12AC-CC00041
The Honorable Jon Beetem

APPELLANT'S SUBSTITUTE BRIEF

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INTRODUCTION

On January 26, 2009, Governor Nixon declared a state of emergency due to a severe winter storm that had encased most of Missouri's roadways in ice. Edward McComb was scheduled to make runs with his employer's delivery truck that day. McComb's supervisors, Respondents Norfus and Cheese, knew about the winter storm. Nonetheless, they ordered McComb into the delivery vehicle and onto his route. During the ice storm, Respondents learned in a phone call with McComb that conditions were poor and that his windshield was freezing. Respondents, not bothering to check their employer's inclement weather policy, ordered McComb to motor through the storm. Soon thereafter, the ice storm claimed McComb's life as his delivery truck spun out of control on Highway 54, overturned, and crushed him to death.

Respondents are not entitled to summary judgment because there remains a factual dispute about whether Respondents were following their employer's inclement weather policy when they ordered McComb to drive through the storm. If Respondents were simply conducting their employer's business as their employer instructed, then they cannot be personally liable at common law. *See Peters v. Wady Indus. Inc.*, 489 S.W.3d 784, 800 (Mo. 2016). However, if Respondents acted in rogue fashion contrary to the employer's inclement weather policy, then they "negligently carried out some detail or aspect of [their] work" and they will be personally liable. Id.

There is evidence that the employer's policy required Respondents to order McComb to remain on his delivery route despite the icy road conditions. For example, McComb's job description contains verbiage that he "complete tasks in inclement

weather." (L.F. 189). If Respondents were simply following company policy when they kept McComb on his route, then they were "ordered to conduct work in the allegedly unsafe manner in the course of business" and cannot face any personal liability under common law. Id.

However, there is also evidence that the employer's policy required Respondents to pull McComb from his route during icy conditions. Respondent Cheese admitted that McComb's job description actually did *not* require McComb to perform deliveries when roads were iced over. (L.F. 263). Respondent Cheese also testified that he had authority from his employer to pull McComb from his route on account of the ice storm that led to McComb's death. (L.F. 263). Respondents also acknowledge they did not even consult the employer's inclement weather policy when ordering McComb to remain on his route. (L.F. 258 at ¶¶ 17-20). If Respondents acted in rogue fashion when they ordered McComb to motor through the ice storm, McComb's subsequent death would have resulted "from a co-employee's negligence in carrying out the details of the work" and Respondents will be personally liable under common law. Id. It is impossible to know whether Respondents acted in rogue fashion because the parameters of the employer's inclement weather policy are in dispute. Summary judgment is therefore improper in favor of Respondents, as the trier of fact must resolve this factual issue.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case based on this Court's Order of December 20, 2016 granting Respondents' application to transfer. This action is one involving the question of whether the Respondents' actions in sending McComb on his route and then

failing to remove him from the route amounted to a non-delegable duty of Respondents' employer or amount to a personal duty owed to McComb.

STATEMENT OF FACTS

Roles of Norfus, Cheese and McComb

On January 26, 2009, the decedent, Edward McComb (hereinafter "McComb"), was employed by St. Mary's Health Center in Jefferson City as an evening courier. (L.F. 255). The evening courier's duties included delivering supplies to outlying affiliated clinics and picking up mailbags and specimens from the clinics and returning them to St. Mary's Health Center in Jefferson City. (L.F. 256).

Gregory Norfus was McComb's immediate supervisor. (L.F. 255). David Cheese was supervisor to Norfus and McComb. (L.F. 256). Norfus was responsible for overseeing approximately eight employees in January 2009. (L.F. 256). Norfus assigned duties to employees working in the warehouse department, including McComb. (L.F. 256). If Norfus had a question regarding an employee or issue, he would contact Cheese to discuss it. (L.F. 256).

The Decision to Keep McComb on His Route

On January 26, 2009, McComb was scheduled to work 3:30 p.m. to 11:30 p.m. (L.F. 257). McComb was not scheduled to deliver any lifesaving supplies to the clinics, nor was he scheduled to deliver or pick up any "STAT" items. (L.F. 257). Prior to the beginning of McComb's shift on January 26, 2009, Norfus became aware through other employees that a severe winter storm was coming through the area. (L.F. 257). Norfus then called Cheese and asked Cheese if he wanted McComb to go out on his route. (L.F.

257). The reason Norfus was asking Cheese whether McComb should go on his route was because of poor weather conditions. (L.F. 257). Despite this, Cheese told Norfus to send McComb on the route. (L.F. 260).

Cheese had a window in his office and was able to observe the weather conditions outside at the time of Norfus's call. (L.F. 258). Cheese also had a computer in his office with access to Internet and email. (L.F. 258). However, Cheese did not consult with anyone before making the decision to send McComb on his route. (L.F. 258). Cheese did not get on his computer to check the weather forecast before making the decision to send McComb on his route. (L.F. 258). Cheese did not recall calling any of the clinics to determine the importance of the items scheduled for delivery and pick-up on January 26, 2009. (L.F. 258). Cheese did not recall contacting any of the clinic managers on January 26, 2009 to determine if the deliveries and pick-ups could wait until the weather cleared. (L.F. 258). Cheese was aware that McComb's route on January 26, 2009 would require him to drive for several hours north, south, east and west of Jefferson City. (L.F. 259). Cheese was also aware that McComb's route would require him to drive in the dark by himself. (L.F. 259).

On January 26, 2009, the Governor of Missouri, Jay Nixon, declared a State of Emergency. (L.F. 259). The Governor declared that the ongoing and forecast severe storm systems caused, or had the potential to cause, damages associated with snow, freezing rain, sleet, and ice impacting communities throughout the state of Missouri. (L.F. 259). The Governor also declared that the severe weather that began on January 26, 2009, and continued, had the potential to create a condition of distress and hazard to the safety,

welfare and property of the citizens of the state of Missouri beyond the capabilities of some local jurisdictions and other established agencies. (L.F. 259).

According to Cheese, when a state of emergency is declared with respect to winter weather conditions, motorists should stay off the road unless absolutely necessary. (L.F. 259-60). Despite this, on January 26, 2009 at approximately 3:00 p.m., Cheese told Norfus to send McComb on the route. (L.F. 260). Norfus agreed with Cheese's direction to send McComb out on the route on January 26, 2009. (L.F. 260). Norfus assigned McComb to go on his route that day. (L.F. 260).

At 6:51 p.m., Norfus called McComb while McComb was out on his route. (L.F. 260). During the call, McComb told Norfus that his windshield was freezing up. (L.F. 260). Norfus was concerned for McComb's safety. (L.F. 260). After his conversation with McComb, Norfus called Cheese. (L.F. 261). Norfus informed Cheese that McComb's windshield was freezing. (L.F. 261). Norfus requested permission from Cheese to pull McComb off the route. (L.F. 261). However, Cheese declined Norfus permission to pull McComb off the route. (L.F. 261).

The Employer's Inclement Weather Policy

McComb's job description entailed "Departmental Safety" standards that included "Code Operation Weather Warning / Watch." (L.F. 184). McComb's job description required that he clear "snow/frost from both vehicles for STAT runs in winter months." (L.F. 187). McComb's job description also required that he "complete tasks in inclement weather." (L.F. 189). Respondents deny violating any safety policy with respect to their decision to keep McComb on his route (L.F. 51, Respondent's denial of Count IV,

Paragraph 44(e) of Amended Petition), but Respondents also acknowledge they did not even consult the policy when ordering McComb to remain on his route. (L.F. 258 at ¶¶ 17-20). Respondents personally took it upon themselves to send McComb on the route. (L.F. 260 at ¶¶27-29).

Cheese admitted that on January 26, 2009, he had authority to pull McComb off his route. (L.F. 263). According to Cheese, McComb's courier job description did *not* require him to perform deliveries or pickups in severe winter weather or when a state of emergency had been declared. (L.F. 263).

McComb's Death

At approximately 10:35 p.m., McComb's wife, Nadine McComb, called Norfus to tell him that the Highway Patrol called her and notified her that Edward McComb was in an accident and "it didn't look good." (L.F. 261). A police report from the Missouri Highway Patrol indicates that McComb's vehicle slid off the right side of the highway in Miller County and overturned several times down a steep embankment before coming to rest in a pasture. (L.F. 261). The police report indicates it took the Highway Patrol 40 minutes to arrive at the scene. (L.F. 261).

McComb was pronounced dead at Lake Regional Hospital at 11:09 p.m. on January 26, 2009. (L.F. 262). Norfus and Cheese met at St. Mary's Health Center at approximately 12:50 a.m. on January 27, 2009. (L.F. 262). According to Norfus, the roads were icy and slushy. (L.F. 262). Norfus and Cheese arrived at Lake Regional Hospital at approximately 2:00 a.m. (L.F. 262). It took Norfus and Cheese two times longer than normal to drive from St. Mary's Health Center in Jefferson City to Lake Regional Hospital in Osage Beach.

(L.F. 262). It took Norfus and Cheese almost two hours to drive back from Lake Regional Hospital to St. Mary's Health Center. (L.F. 262).

Relevant Procedural History

On February 10, 2014, Norfus and Cheese filed a motion for summary judgment premised on Missouri Supreme Court Rule 74.04. (L.F. 78). The motion was heard on March 28, 2014, and an Order granting the motion was entered on June 30, 2014. (Tr. 1-30, L.F. 266) The trial court found that the "duties allegedly violated by the Defendants are non-delegable duties of the employer and do not constitute an independent duty of care owed by a co-employee at common law." (L.F. 266). A Notice of Appeal was filed July 28, 2014. (L.F. 267). On September 6, 2014, the Court of Appeals reversed the Circuit Court's entry of summary judgment in favor of Respondents. On December 20, 2016, this Court sustained Respondents' application for transfer of this case from the Court of Appeals to the Supreme Court.

POINT RELIED ON

The trial court erred in entering summary judgment in favor of Respondents Norfus and Cheese because a genuine issue of material fact exists for a jury as to whether McComb's death was attributable to his employer's non-delegable duties.

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

ARGUMENT

The trial court erred in entering summary judgment in favor of Respondents Norfus and Cheese because a genuine issue of material fact exists for a jury as to whether McComb's death was attributable to his employer's non-delegable duties.

A. Standard of Review

"The trial court makes its decision to grant summary judgment based on the pleadings, record submitted, and the law; therefore, this Court need not defer to the trial court's determination and reviews the grant of summary judgment *de novo*." *Goerlitz v. City of Maryville,* 333 S.W.3d 450, 452-53 (Mo. banc 2011). "Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that movant is entitled to judgment as a matter of law." *Id.* In reviewing whether a trial court properly granted summary judgment, this Court must "review the record in the light most favorable to the party against whom judgment was entered." *Zafft v. Eli Lilly*, 676 S.W.2d 241, 244 (Mo. banc 1984). The non-movant is accorded all reasonable inferences from the record. *Martin v. City of Washington*, 848 S.W.2d 487, 489 (Mo. banc 1993). Based on the *de novo* standard of review, Appellant's claimed error is preserved for this Court's review.

B. There is a factual dispute as to whether McComb's death resulted from Respondents' Breach of the Common Law Duty of Care.

Summary judgment is improper in favor of Respondents because there remains a factual dispute about whether Respondents adhered to their employer's inclement weather policy when they ordered McComb to drive through the ice storm. If Respondents acted in contravention of the policy, then they were negligent in the manner in which they conducted their work, and they breached a duty separate and distinct from the employer's nondelegable duties. *Peters v. Wady Indus., Inc.,* 489 S.W.3d 784 (Mo. banc. 2016).

Whether a personal duty exists depends on the particular facts and circumstances of each case. *Rischer v. Golden*, 182 S.W.3d 583, 587 (Mo. App. 2005).

In *Peters*, a stack of 200lb. dowel baskets were delivered to the plaintiff's employer in a "stacked" formation. *Id.* at 787. The plaintiff's supervisor ordered that the baskets be kept in stacked formation and placed onto a flatbed truck. *Id.* The dowel baskets thereafter fell from the truck, striking and injuring the plaintiff while he was at work. *Id*, at 788. The plaintiff sued his supervisor. The Circuit Court dismissed the petition and found that the plaintiff failed to allege that the supervisor owed a duty independent of the employer's nondelegable duty to provide a safe workplace. The Court of Appeals affirmed the dismissal, as did this Court.

This Court noted that the plaintiff's claims were properly dismissed because "The pleadings… indicate that the allegedly unsafe stacking of the baskets ***constituted the ordinary manner of work*** at [the employer]." *Peters*, 489 S.W.3d at 799 (emphasis added). This Court explained, "The allegations… were that [the supervisor] was ordered and directed to conduct work in the allegedly unsafe manner in the course of business. These allegations distinguish this case from instances in which a co-employee negligently carried out some detail or aspect of his work." *Id*, at 800.

In the instant case, there is evidence that precisely the opposite happened- Respondents appear to have abandoned and ignored the employer's inclement weather policies when they ordered McComb to operate his vehicle in weather bad enough to constitute a state of emergency. At minimum, there is a factual dispute about the parameters of the employer's inclement weather policy and whether the policy required Respondents to pull McComb from

his route during the ice storm. Summary judgment is therefore improper in favor of Respondents.

When a plaintiff establishes that his injury resulted from a co-employee's negligence rooted in a violation of workplace rules, the co-employee is personally liable under common law. *Fowler v. Phillips*, 2016 WL 4442319 *3 (Mo.Ct.App. 2016) *citing Peters*, 489 S.W.3d at 794. In *Fowler*, the co-employee defendant violated workplace rules when, in contravention of company policy, she drove a vehicle out of the workplace car wash tunnel without honking first. *Id.* at *1. As she was exiting the car wash, the co-employee struck and injured the plaintiff. *Id.* The circuit court entered summary judgment for the co-employee finding that the co-employee owed no personal duty of care, but the Court of Appeals reversed and held, "Appellants' claims… stem from their allegations that [co-employee] violated [employer's] workplace rules by failing to stop at the stop sign, failing to honk when exiting the carwash… these allegations… violated [co-employee's] personal duty of care towards [plaintiff]." *Id.* at *3.

Many cases decided prior to *Peters* that remain good law compel a reversal of the Circuit Court's entry of summary judgment in favor of Respondents. In each such case, the co-employee does not "carry on business as usual" as directed by the employer but rather acts "outside the norm" in a manner that causes the plaintiff to encounter the danger that led to the injury. Co-employees, in such situations, are personally liable under common law. *Tauchert v. Boatmen's National Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo. banc 1993); *See also Pavia v. Childs*, 951 S.W.2d 700, 701 (Mo Ct. App. 1997) (co-employee duty exists where defendant fashioned a makeshift man-lift with forklift and

pallet, from which Plaintiff fell, because the defendant "creat[ed] a hazardous condition beyond the responsibility of the employer to provide a safe workplace"); *Workman v. Vader*, 854 S.W.2d 560, 564 (Mo. Ct. App. 1993) (co-employee duty exists where: "defendant personally had thrown packing debris on the floor together with a cardboard box atop the debris and thereafter failed to remove it or warn of its presence"); *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922, 927 (Mo. Ct. App. 1995) (co-employee duty exists where supervisor "rigged a forklift with a cable or chain" to lift the plaintiff); *Burns v. Smith*, 214 S.W.3d 335, 340 (Mo. 2007) (Supreme Court affirming verdict against supervisor where co-employee duty existed because supervisor created a defective weld and instructed plaintiff to run a pressurized water tank "till it blows").

In *Tauchert*, 849 S.W.2d at 574, this Court reversed summary judgment in favor of a co-employee-defendant. There, in a construction work setting, the supervisor-defendant acted on his own accord to alter the hoisting system of an elevator and the plaintiff was injured when the system failed. *Id.* The supervisor thereby caused the plaintiff to encounter a danger that would not have existed had the supervisor carried on business as usual. *Id.* Under those facts, this Court held that the:

> act of personally arranging the faulty hoist system for the elevator may constitute an affirmative negligent act outside the scope of his responsibility to provide a safe workplace for plaintiff. Such acts constitute a breach of personal duty of care owed to plaintiff. These actions may make an employee/supervisor liable for negligence and are not immune from liability under the workers' compensation act.

Id. Just as the supervisor caused the injured plaintiff to encounter the danger, Respondents caused McComb to encounter the dangerous road conditions that ended McComb's life. If Respondents acted contrary to the employer's inclement weather policy in forcing McComb to remain on his route, they face personal liability and summary judgment is improper in their favor.

It is impossible to know whether Respondents acted in rogue fashion because there is a factual dispute about the parameters of the employer's inclement weather policy. McComb's job description required that he clear "snow/frost from both vehicles for STAT runs in winter months." (L.F. 187). McComb's job description also required that he "complete tasks in inclement weather." (L.F. 189).

Appellant can point to evidence that indicates the employer's policy required Respondents to pull McComb from his route. Respondents acknowledge they did not even consult the policy before ordering McComb to remain on his route. (L.F. 258 at ¶¶ 17-20). Cheese later admitted that he had authority to pull McComb off his route due to the ice storm. (L.F. 263). Cheese also conceded that McComb's courier job description did *not* require him to perform deliveries or pickups in severe winter weather or when a state of emergency had been declared. (L.F. 263).

Given the conflicting evidence about the parameters of the employer's inclement weather policy, summary judgment is improper as genuine issues of material fact exist whether the Respondents breached their personal duty of care to McComb.

CONCLUSION

The trial court erred in granting summary judgment for Norfus and Cheese. Appellant requests this Court reverse the decision of the trial court and remand this case back to the trial court for further proceedings.

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	)	**Appellate Case No. WD77761**
	)	
vs.	)	**Civil Case No. 12AC-CC00041**
	)	
GREGORY NORFUS and DAVID CHEESE,	)	
	)	
Respondents.	)	

Appellant's Certificate of Compliance

COMES NOW Appellant and certifies that Appellant's Substitute Brief complies with the limitations contained in Rules 84.06(b) and 55.03. Appellant's Substitute Brief contains 3,281 words and 274 lines. Counsel for Appellant relied upon the word and line count of her word processing system in making this certification.

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