

Summary of SC96030, *Matthew Fogerty v. Rick Armstrong and Larry Meyer*

Appeal from the St. Louis County circuit court, Judge Mark D. Seigel

Argued and submitted April 13, 2017; opinion issued March 6, 2018

Attorneys: Fogerty was represented by Michael Gross of the Michael Gross Law Office in St. Louis, (314) 863-5887, and Richard T. Grossman of the Grossman Law Firm in St. Louis, (314) 261-7323. Meyer was represented by Kathleen Schlef Hamilton and Bradley M. Zaffiri of HeplerBroom LLC in St. Louis, (314) 241-6160.

This summary is not part of the opinion of the Supreme Court. It has been prepared by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Court and should not be quoted or cited.

Overview: An injured worker appeals the circuit court's judgment in favor of his coemployee, whom he sued for his injuries. In a decision joined by four other judges and written by Judge Paul C. Wilson, the Supreme Court of Missouri affirms the judgment. The coemployee's negligence was a breach of the company's nondelegable duty to provide a safe workplace. Because the company failed to provide a safe manner and means for the work, both the coemployee's negligence in deciding how to do so and the worker's resulting injury were reasonably foreseeable to the company.

Judge George W. Draper III concurs in result. Although he agrees nothing in the record demonstrates the coemployee took any action outside the company's nondelegable duties to provide a safe method of work to complete the work assignment, he disagrees with the principal opinion's new foreseeability analysis and is concerned it will preclude all coemployee liability.

Facts: Wright Construction Company assigned its employees Matthew Fogerty and Larry Meyer to install a fountain at a construction site in October 2011. The company provided the employees with a blue print for the fountain but no detailed instructions for how to construct the fountain, which would require the employees to move large stones. Neither employee knew how to install a fountain. Meyer decided to use a front loader to move the stones, although he never had used such equipment in this manner before. He suggested using a strap to sling a stone beneath one of the front loader's forks and asked Fogerty to walk beside the stone to keep it from swinging as Meyer drove the front loader up a rough, muddy area of the construction site. While moving one of the stones, Fogerty stepped beneath one fork to steady the stone slung from the other fork. As he did so, Meyer unexpectedly allowed the forks to drop, and a fork hit Fogerty in the back and drove him to his knees. Fogerty filed and settled a workers' compensation claim for injuries and later filed a personal injury suit against Meyers. The circuit court sustained Meyer's motion for summary judgment (judgment on the court filings, without a trial). Fogerty appeals.

AFFIRMED.

Court en banc holds: The circuit court properly granted summary judgment to Meyers because Meyer's negligence was a breach of the company's nondelegable duty to provide a safe workplace. At the time of the accident, an employee could sue a coemployee for negligence only if the employee could show the coemployee breached a duty separate and distinct from the

employer's nondelegable duty to provide a safe workplace. As this Court explained in its 2016 decision in *Peters v. Wady Industries Inc.*, an employer's duty in providing a safe workplace includes providing a safe method of work. If it is reasonably foreseeable that employees may be harmed in the absence of a safe manner and means for performing their work, the employer has a nondelegable duty to provide those manner and means for its employees. Assigning to an employee the responsibility for fulfilling this duty does not alter the nondelegable nature of the duty, and a coemployee's negligence in fulfilling that duty is not actionable under *Peters* and its companion decision, *Parr v. Breeden*. As explained in *Conner v. Ogletree*, SC95995, also decided today, *Parr* and *Peters* focus on the conduct of the coemployee, who is presumed negligent. As *Conner* explains, the only thing that matters in applying *Parr* and *Peters* is whether the duty the coemployee breached was part of the employer's nondelegable duty to protect employees from reasonably foreseeable risks in the workplace. Because the company failed to provide a safe manner and means for installing the fountain, both Meyer's negligence in deciding how to do so and Fogerty's resulting injury were reasonably foreseeable to the company.

Opinion concurring in result by Judge Draper: The author believes the principal opinion applies a new foreseeability standard announced in *Conner v. Ogletree*, SC95995, also decided today, expanding an employer's nondelegable duties to any foreseeable act. He believes this standard is unnecessary and will preclude coemployee liability forever and so writes separately to preserve the right to find coemployee liability in limited circumstances. Although he disagrees with the principal opinion's foreseeable analysis, the author agrees with the result. The company did not provide a safe method of work to complete the work assignment, and nothing in the record demonstrates Meyer took any action outside the company's nondelegable duties.