IN THE SUPREME COURT OF MISSOURI
SC97542

DANNY BROCK,
Respondent,

v.

PETER DUNNE, Defendant ad Litem for MARK EDWARDS, Deceased,
Appellant

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF RESPONDENT

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
The Honorable Nancy Watkins McLaughlin, Circuit Judge

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INTEREST OF THE AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a non-profit organization consisting of approximately 1400 trial attorneys in Missouri and other states. For more than half a century, MATA members have advanced the interests and protected the rights of individuals throughout the State of Missouri. MATA members have dedicated themselves to promoting the administration of justice, preserving the adversary system, and ensuring that those citizens of our state with a just cause will be afforded access to our courts.

MATA members are interested in this case because it is a case of first impression involving the interpretation of R.S.Mo. § 287.120.1 which could affect the rights and remedies of Missouri's citizens who are injured or killed while on the job due to purposeful affirmative negligent acts of their co-workers. They are concerned that appellant is suggesting R.S.Mo. § 287.120.1 as amended in 2012 requires proof that the co-employee's actions are unforeseeable to the plaintiff's employer and requires proof of intent to injure plaintiff in direct contravention to the plain language of the statute. Such an interpretation would adversely affect the rights and remedies of our citizens and violate Missouri public policy.

This Amicus Curiae brief is submitted in support of the Respondent and addresses the issues presented for review in a broader and different perspective than the perspectives presented by the parties.

CONSENT OF THE PARTIES

MATA has received consent from counsel for Appellants and from counsel for Respondent to file this amicus brief in accordance with Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure.

JURISDICTIONAL STATEMENT

MATA adopts Respondent's Jurisdictional Statement.

STATEMENT OF FACTS

MATA adopts Respondent's Statement of Facts.

POINT RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JNOV BECAUSE PLAINTIFF MADE A SUBMISSIBLE CASE PURSUANT TO R.S.MO. § 287.120.1(2012) IN THAT THE PLAIN LANGUAGE OF THE STATUTE AND GENERAL NEGLIGENCE LAW DO NOT REQUIRE THAT EDWARDS' CONDUCT BE UNFORESEEABLE TO HIS EMPLOYER; PLAINTIFF HAS ESTABLISHED A DUTY ON THE PART OF EDWARDS UNDER GENERAL NEGLIGENCE LAW; PLAINTIFF NEED NOT PROVE THE APPELLANT INTENDED FOR THE INJURY TO OCCUR; AND REQUIRING A SHOWING THAT EDWARDS' CONDUCT FALLS OUTSIDE THE SCOPE OF AN EMPLOYER'S RESPONSIBILITY TO PROVIDE A SAFE WORK PLACE WOULD VIOLATE MISSOURI PUBLIC POLICY.

R.S.Mo. § 287.120.1 (2012)

Burns v. Smith, 214 S.W.3d 335 (Mo. banc 2007)

Conner v. Ogletree, 542 S.W.3d 315 (Mo. banc 2018)

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Young v. Boone Elec. Coop., 462 S.W.3d 783 (Mo.App.W.D. 2015)

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Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.3d 384 (Mo. 1991).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JNOV BECAUSE PLAINTIFF MADE A SUBMISSIBLE CASE PURSUANT TO R.S.MO. § 287.120.1(2012) IN THAT THE PLAIN LANGUAGE OF THE STATUTE AND GENERAL NEGLIGENCE LAW DO NOT REQUIRE THAT EDWARDS' CONDUCT BE UNFORESEEABLE TO HIS EMPLOYER; PLAINTIFF HAS ESTABLISHED A DUTY ON THE PART OF EDWARDS UNDER GENERAL NEGLIGENCE LAW; PLAINTIFF NEED NOT PROVE THE APPELLANT INTENDED FOR THE INJURY TO OCCUR; AND REQUIRING A SHOWING THAT EDWARDS' CONDUCT FALLS OUTSIDE THE SCOPE OF AN EMPLOYER'S RESPONSIBILITY TO PROVIDE A SAFE WORK PLACE WOULD VIOLATE MISSOURI PUBLIC POLICY.

Standard of Review

A case may not be submitted to the jury unless each and every fact essential to liability is predicated on legal and substantial evidence. ***Klotz v. St. Anthony's Medical Center***, 311 S.W.3d 752, 769 (Mo.banc. 2010) citing ***Houghton v. Atchison, Topeka & Santa Fe R.R.Co.***, 446 S.W.2d 406, 409 (Mo.banc 1969); ***Giddens v. Kansas City S.Ry.Co.***, 29 S.W.3d 813, 818 (Mo.banc 2000). When determining the sufficiency of evidence to support a jury's verdict, "the evidence is viewed in the light most favorable to the result reached by the jury. ***Id.*** The Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support

the jury's conclusion. ***Id.***

Here, the Appellant is asking this Court to reverse the judgment in favor of Plaintiff on the basis that Plaintiff failed to make a submissible case of co-employee liability under the common law, in that Edwards did not owe a common law duty to Plaintiff because Plaintiff's injury was reasonably foreseeable to JMC (Edwards' employer) and Edwards did not owe an independent, personal duty of care separate and distinct from JVC's five nondelegable duties to provide a safe work place. Appellant further argues that Plaintiff did not make a submissible case under R.S.Mo. § 287.120.1 because Plaintiff failed to establish purposeful state of mind on Edwards' part.

Such an argument disregards the plain language of R.S.Mo. § 287.120.1 and the long history of general negligence law. Further, imposing an additional duty not included in the statute requiring the conduct of the co-employee to be unforeseeable to the employer would improperly immunize people who engage in affirmative negligent acts which purposefully and dangerously cause or increase the risk of injury to Missouri's workers despite the legislature's plain language in refusing immunity for such conduct.

Finally, such a finding would contravene the purpose of tort law and would, in essence, vitiate accountability for people who engage in egregious negligent conduct.

Consequently, the Trial Court did not err in denying Defendant's Motions for Directed Verdict and For JNOV because Plaintiff made a submissible case pursuant to R.S.Mo. § 287.120.1(2012) in that Plaintiff has established a duty on the part of Edwards under general negligence law; the plain language of the statute and general negligence law do not require that Edwards' conduct be unforeseeable to his employers; Plaintiff

need not prove Appellant intended for the injury to occur; and requiring a showing that Edwards' conduct falls outside the scope of an employer's responsibility to provide a safe work place would violate Missouri public policy.

History of Co-Employee Liability Law

Prior to 2012, there was a long history of cases concerning when an employee of an employer can be held liable to another worker for injuries or death. Prior to 2005, this Court adopted the "something more doctrine" in co-employee liability cases. ***See State ex rel Taylor v. Wallace***, 73 S.W.3d 620 (Mo.banc 2002). In ***Taylor***, this Court held the "something more" test required evidence of "purposeful affirmative conduct." ***Id.*** at 622. Following ***Taylor***, this Court clarified the ***Taylor*** standard defining the "something more" test as "an affirmative act that creates additional danger beyond that normally faced in the job-specific environment." ***Burns v. Smith***, 214 S.W.3d 335, 338 (Mo.banc 2007). The cases involving co-employee liability, however, being so fact-specific, often brought about inconsistent results. ***Groh v. Kohler***, 148 S.W.3d 11 (Mo.App. 2004).

In 2005, the legislature amended the Workers Compensation Act requiring courts to strictly construe the statute, rather than to liberally construe the statute. Thus, the "something more" doctrine was abolished. ***See Robinson v. Hooker***, 323 S.W.3d 418, 423 (Mo.App.W.D. 2010). In response to ***Robinson*** and the inconsistent results, in 2012, the legislature again amended the Workers Compensation Act to specifically set forth when an employee could be held liable for injuries or damages to a fellow employee. R.S.Mo. § 287.120.1.

Following the holding in ***Robinson*** and before the 2012 amendments took effect,

this Court has held that for injuries occurring between 2005 and 2012, a co-employee can only be liable for such injuries if the employer (prior to workers compensation) would not have been liable because the co-employee breached a duty unrelated to the master-servant relationship or committed a breach of workplace safety that was so unforeseeable to the employer as to take it outside the employer's nondelegable duty to provide a reasonably safe workplace. ***Conner v. Ogletree***, 542 S.W.3d 315, 319 (Mo. banc 2018); ***Parr v. Breeden***, 489 S.W.3d 744, 782 (Mo. banc 2016).

This Court is now, for the first time, being called to interpret the 2012 legislation concerning co-employee liability.

The 2012 amendment to R.S.Mo. § 287.120.1 specifically sets forth when an employee can be held liable for injuries or damages to a fellow employee. The statute reads, in part, as follows:

> "1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment. Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, **except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or**

increased the risk of injury…." R.S.Mo. § 287.120.1 (emphasis added).

Thus, the legislature has now codified when a co-employee is immune from suit and, more importantly, provided a specific standard by which to judge when a co-employee is not immune from suit. Consequently, all of the precedent involving co-employee liability prior to the 2012 amendments to R.S.Mo. § 287.120.1 no longer applies. The legislature has definitively defined liability of co-employees. This Court has acknowledged the same repeatedly in the ***Conner*** opinion, supra.

Interpretation of the Legislation

With the enactment of § 287.120.1 (2012), the legislature has clearly set forth when a co-employee is not immune from suit. As indicated, a co-employee is immune from suit, along with his/her employer, "for any injury or death for which compensation is recoverable under this [workers compensation] chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury…." R.S.Mo. § 287.120.1. The plain language of the statute provides that immunity is not granted to a co-employee who "engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." The plain language of the statute does not require that the negligent act be outside the scope of an employer's responsibility to provide a safe place of work.

When interpreting statutes, it is the role of the judiciary to enforce laws enacted by the General Assembly and to effectuate the legislature's intent. Courts must look to the plain language of the statute and when the words are clear, the courts must apply the "plain meaning of the law." ***Bateman v. Rinehart***, 391 S.W.3d 441, 446 (Mo.banc 2013); ***Macon Cty. Emergency Servs. Board v. Macon Cty Comm'n***, 485 S.W.3d 353, 356 (Mo.banc 2016). As this Court has held, "proper statutory construction starts with the words in the statute…. In most cases, it ends there as well." ***In Re: M.D.R.***, 124 S.W.3d 469, 472 (Mo.banc 2004). See also ***Young v. Boone Elec. Coop.***, 462 S.W.3d 783, 791(Mo.App.W.D. 2015).

"When interpreting a statute, the Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." ***Bateman v. Rinehart***, 391 S.W.3d 441, 446 (Mo.banc 2013) citing ***Wehrenberg, Inc. v. Director of Revenue***, 352 S.W.3d 336, 367 (Mo.banc 2011).

Because R.S.Mo. § 287.120.1 is part of the Workers Compensation Act, it is to be strictly construed. ***Young***, 462 S.W.3d at 792. In 2005, the legislature mandated that the Workers Compensation law be strictly construed. ***Id.*** citing ***Robinson v. Hooker***, 323 S.W.3d 418, 423 (Mo.App.W.D. 2010). "The rule of strict construction of a statute presumes **nothing** that is not expressed….The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used." ***Id.*** (citations omitted).

The plain and unambiguous language of the statute provides that a co-employee is

not immune from suit or released from liability when the employee engaged in "an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." Construing this statute strictly as mandated, the plain language of the statute does not require that the negligent act be outside the scope of an employer's responsibility to provide a safe place of work. Further, by adding the word "negligent" to define "affirmative act," the legislature did not intend to require a plaintiff to prove the defendant acted with the intent to injure.

There is no dispute that R.S.Mo. § 287.120.1 applies to the instant cause of action. However, relying on ***Conner***, Appellant suggests that Plaintiff/ Respondent must still establish that a co-employee owed a duty to Plaintiff that is separate and distinct from the employer's duty to provide a safe place of work and that the only way a Plaintiff can establish such a duty is to establish that the breach of workplace safety was so unforeseeable to the employer that its breach takes it outside the employer's nondelegable duty to provide a reasonably safe workplace. However, Appellant fails to acknowledge that ***Conner*** specifically limits such a requirement to cases accruing between 2005 and 2012. ***Conner***, 542 S.W.3d at 324.

The legislature was aware of the state of co-employee law prior to enacting the statute; and, in enacting the 2012 amendment to address co-employee liability, it specifically chose the circumstances in which co-employee liability must be imposed: when an employee engages in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. We must presume that the legislature chose its words deliberately. Here, the legislature chose to exempt a co-employee from

workers compensation immunity when that co-employee engages in an affirmative negligent act which purposefully and dangerously caused or increased the risk of injury. Because the language, "affirmative acts that purposefully and dangerously increase the risk of injury" is a phrase that has been used repeatedly by courts in co-employee liability cases, we must presume that the legislature was familiar with such language when it chose the language contained in this statute. ***Young,*** 462 S.W.3d at 797-798.

However, the legislature specifically chose not to include language in the statute requiring the affirmative negligent acts are outside the scope of an employer's responsibility to provide a safe work place. If the legislature had intended this Court to continue the rule applying co-employee liability for negligent acts only when such acts are "outside the scope of any employer's responsibility to provide a safe work place," it could have easily included such language. ***See Young***, 462 S.W.3d at 797-798, fn. 15.

Edwards Owed Plaintiff a Duty Under General Negligence Law

Missouri law is clear that in any tort action in negligence, the plaintiff must establish the existence of a duty on the part of the defendant to protect the plaintiff from injury, that the defendant failed to perform that duty, and the defendant's failure proximately caused injury to the plaintiff. ***L.A.C. v. Ward Parkway Shopping Center Co.***, 75 SA.W.3d 247, 257 (Mo.banc 2002). Under traditional principles of negligence, "a duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury." ***Id.*** at 257. The scope of a person's duty is "whether a reasonably prudent person would have anticipated danger and provided against it." ***Cupp v. Nat'l R.R. Passenger Corp.***, 138 S.E.3d 766, 772

(Mo.App.E.D. 2004). Therefore, with the 2012 amendments to § 287.120.1, the issue of whether a co-employee owes a duty to a plaintiff is not whether the injury was unforeseeable to the employer; the issue is whether the injury was foreseeable to the co-employee whose affirmative negligent conduct is at issue in the case.

Thus, in determining whether an employee owes a duty to another employee under the statute, the rules of general negligence apply and duty is shown by establishing the injury was foreseeable to the defendant. Once duty is established, the legislature clearly and unambiguously set forth the limited circumstances of when an employee is excepted from immunity—when he or she has "engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." R.S.Mo. § 287.120.1.

Missouri courts have addressed what constitutes affirmative negligent acts which increase the risk of injury many times in co-employee cases. ***See Burns v. Smith,*** 214 S.W.3d 335 (Mo.banc. 2007); ***Hedglin v. Stall Specialty Company***, 903 S.W.2d 922, 927 (Mo.App.W.D. 1995) ***Tauchert v. Boatman's National Bank of St. Louis***, 849 S.W.2d 573, 574 (Mo.banc 1993); ***Workman v. Vader***, 854 S.W.2d 560, 564 (Mo.App.S.D. 1993)(leaving a cardboard box on the floor of a jewelry store constituted an affirmative negligent act increasing the risk of injury).

In ***Burns***, the court found that because the supervisor welded a hole in a rusted water pressure tank and instructed the plaintiff to run it till it blows, the supervisor engaged in an affirmative act of negligence which increased the risk of injury to the plaintiff. ***Burns,*** 214 S.W.3d at 339.

In ***Tauchert,*** the supervisor rigged a make-shift hoist system which the court held to be an affirmative act which increased the risk of injury to plaintiff. ***Tauchert***, 849 S.W.2d at 574.

In ***Hedglin***, the employee ordered the plaintiff to hang onto the forks of a forklift over a vat of scalding water in order to remove a screen from the top of the vat. The court found such conduct to be an affirmative act increasing the risk of injury. ***Hedglin***, 903 S.W. 2d at 927

In each of the factual scenarios, the employee either created the dangerous condition, or affirmatively ordered the co-worker to perform an unsafe task. In other words, the employee was actively negligent. Similarly, in the instant matter, Edwards created the dangerous condition by removing the guard and requiring Plaintiff/Appellant to clean the bottom roller while the laminating machine was still in operation. In fact, the conduct of Edwards was drastically worse than in any of the prior "something more" cases in that he admitted that he should not remove safety equipment, was aware of rules and warnings forbidding it, knew that Plaintiff could not have been injured if the guard had been left in place, but engaged in this conduct anyway.

Such conduct certainly falls within the well-described affirmative negligent acts which purposefully and dangerously increased the risk of injury to Plaintiff/Respondent pursuant to § 287.120.1.

R.S.Mo. § 287.120.1 Does Not Require A Finding Of Intent

Appellant suggests to this court that R.S.Mo. § 287.120.1 requires evidence of a "purposeful state of mind on Edwards' part." ***See*** Appellant's Brief, p. 33. In doing so, it

appears that Appellant is suggesting that Plaintiff must prove Edwards intended injury to plaintiff. However, the plain language of the statute indicates that a co-employee's conduct must be a purposeful affirmative **negligent** act. Specifically, the statute exempts co-employees from immunity when he or she "engaged in an affirmative negligent act that purposefully and dangerously caused or increases the risk of injury." R.S.Mo. § 287.120.1 (emphasis added). "Purposefully" is an adverb. An adverb is a word that "modifies a verb, an adjective, another adverb, a preposition, a phrase, a clause or a sentence…. **Merriam Webster Dictionary.** The use of the word "that" between the phrase "affirmative negligent act" and "purposefully", clearly establishes that the word "purposefully" modifies the "affirmative negligent act." Therefore, the plaintiff need only prove that Edwards' conduct was purposeful, not that the plaintiff's injury was purposeful. Otherwise, the word "negligent" in the statute would be superfluous in that the plaintiff would now have to prove an intentional tort or a criminal act.

At the time the legislature enacted the 2012 amendments to R.S.Mo. § 287.120.1, it was aware that this Court in ***State ex rel Taylor v. Wallace*** held the "something more" test for co-employee liability required "purposeful affirmative conduct." ***State ex rel Taylor v. Wallace***, 73 S.W.3d 620, 622 (Mo.banc 2002). The legislature was also aware that following ***Taylor***, this Court clarified the ***Taylor*** standard in ***Burns***, holding the "something more" test is best defined as "an affirmative act that creates additional danger beyond that normally faced in the job-specific environment." ***Burns v. Smith***, 214 S.W.3d 335, 338 (Mo.banc 2007).

However, when the legislature enacted the 2012 amendments to R.S.Mo. §

287.120.1, it chose what words to include in the amendment, and what words not to include in the amendment. The legislature did not choose the ***Taylor*** "something more" test verbatim in the statute. While the "something more" test of ***State ex rel Taylor*** required "a purposeful affirmative act," the legislature chose to add the word "negligent" to the legislation. "When interpreting a statute, the Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." ***Bateman v. Rinehart***, 391 S.W.3d 441, 446 (Mo.banc 2013) citing ***Wehrenberg, Inc. v. Director of Revenue***, 352 S.W.3d 336, 367 (Mo.banc 2011). By adding the word "negligent," the legislature clearly intended that purposeful **negligent** conduct of a co-employee exempted said co-employee from immunity. "Negligence is 'conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.'" ***Gibson v. Brewer***, 952 S.W.2d 239, 246 (Mo.banc 1997) citing ***Restatement (Second) of Torts*** § 282 (1965). There is no requirement to prove "intent" in negligence claims. ***Warner v. Southwestern Bell Tel. Co.***, 428 S.W.2d 596, 603 (Mo. 1968). Negligence can either be active negligence or passive negligence. Active negligence or affirmative negligence refers to the creation of a condition which causes injury; whereas passive negligence refers to the failure to discover and correct conditions. ***Cunningham v. Hayes***, 463 S.W.2d 555, 559-560 (Mo.App.W.D. 1971); ***State ex rel Laclede Gas Co.***, 468 S.W.2d 693, 698 (Mo.App.E.D. 1971). Thus, a purposeful affirmative negligent act is a purposeful "actively" negligent act, such as purposefully choosing to remove a safety guard; whereas, a purposeful act involving passive negligence would include purposefully failing to warn another that the safety

guard had been removed. Purposefulness of conduct can be inferred from the evidence. ***Truck Ins. Exchange v. Pickering***, 642 S.W.2d 113, 116 (Mo.App.W.D. 1982). One need not show the actual state of mind of the actor. ***Id.***

Whether such conduct is purposeful is a question of fact. ***American Family Mut. Ins. Co. v. Pacchetti***, 808 S.W.2d 369, 371 (Mo.banc 1991).

The Appellant relies on the case of ***Laut v. City of Arnold*** in support of its position. ***Laut v. City of Arnold***, 491 S.W.3d 191 (Mo.banc 2016). In ***Laut***, the court addressed a statute assessing civil penalties, costs and attorney's fees for purposeful or knowing violations of § 610.027. Specifically, the statute indicated "upon a finding…that a public governmental body has purposefully violated §§ 610.010 to 610.026…" ***Id.*** at 198. Therefore, the word "purposefully" was modifying the violation of a statute. The ***Laut*** court held a "purposeful violation occurs when the party acts with 'a conscious design, intent, or plan' to violate the law and d[id] so 'with awareness of the probable consequences.'" ***Id***. Thus, the Court was providing a definition for when a government purposefully violates the law.

The statute at issue does not address the purposeful violation of law. It involves a "purposeful" "affirmative negligent act." Therefore, the definition used by ***Laut*** has no application to the instant matter. Rather, the statute at issue in this case clearly addresses purposeful affirmative negligent act.

In the instant matter, there was sufficient evidence to support a finding that Edwards' actions were purposeful. He knew that the safety guard was not to be removed while the machine was in operation but he chose to do so. He knew that the machine was

not to be cleaned while the machine was in operation but he chose to do so. This evidence strongly supports a finding that Edwards' conduct was purposeful.

Public Policy

If this Court finds that, under the 2012 amendment to R.S.Mo. § 287.120.1, in order to pursue a cause of action against a co-employee, a plaintiff must establish that the injury to the plaintiff was due to the breach of the co-employee outside of the employer's duty to provide a safe work place by establishing that plaintiff's injury was not foreseeable to plaintiff's employer, such a finding would contravene the very purpose of tort law and would, in essence, vitiate accountability for people who engage in purposeful affirmative negligent conduct.

This Court has held tort law is:

> 'to afford compensation for injuries sustained by one person as a result of the [negligent] conduct of another.' [citations omitted.] To achieve this objective, courts and legislatures have established rules of liability. These rules ought to function to promote care and punish negligence by placing the burden of their breach on the person who can best avoid the harm. When a rule of tort liability encourages a result contrary to these policy goals, it ought to be abandoned.

Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.3d 384, 388 (Mo.1991).

If this Court applies the logic of the Appellant in this matter, it would do exactly what the Court in ***Zueck*** has proscribed: it would encourage a result contrary to the policy goals of tort law in that it would fail to promote care and fail to punish affirmative and purposeful negligent conduct.

In the instant matter, the evidence establishes that Edwards violated multiple safety policies when he removed the safety guard while the machine was in operation with the rollers moving and instructed Plaintiff/Respondent to take a rag and put his hand directly over the pinch point to clean glue off the bottom roller. Such conduct violated the safety rules of the employer and violated the cleaning instructions for the machine. Edwards knowingly chose to violate these safety rules when he ordered Plaintiff to clean the moving rollers with the safety guard removed while the machine was in operation.

This affirmative and purposeful negligent conduct on the part of Edwards is the very conduct tort law is intended to prevent. Further, such conduct falls squarely within the plain language of the 2012 amendment to R.S.Mo. § 287.120.1. The evidence of such conduct is certainly sufficient to submit the question to a jury as to whether Edwards' conduct constituted an affirmative negligent act which purposefully and dangerously increased the risk of injury to the plaintiff.

CONCLUSION

The plain language of R.S.Mo. § 287.120.1 does not require a finding that a co-employee's conduct be unforeseeable to his employer in order to be exempt from workers' compensation immunity; nor does the statute require a showing of intent to injure. Further, imposing an additional duty not included in the statute requiring the conduct of the co-employee to be unforeseeable to the employer would improperly immunize people who engage in affirmative negligent acts which purposefully and dangerously cause or increase the risk of injury to Missouri's workers despite the legislature's plain language in refusing immunity for such conduct. Finally, such a finding would contravene the purpose of tort law and would, in essence, vitiate accountability for people who engage in egregious negligent conduct.

Therefore, we strongly urge this Honorable Court affirm the Trial Court's Judgment in this matter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and that the brief contains 5,348 words (as determined by Microsoft Office Word software).

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2019, I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Missouri using the CM/ECF system. The undersigned also certifies that the following participants in this case are registered electronic filing system users and that service of the foregoing will be accomplished by the Court's electronic filing system:

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