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 ORGANIZATION OF DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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

DANIEL E. SCHNURBUSCH

RYNEARSON, SUESS, SCHNURBUSCH & CHAMPION
500 N. Broadway, Ste. 1550
St. Louis, MO 63102
314-421-4430 (telephone)
314-421-4431 (fax)
E-Mail: dschnurbusch@rssclaw.com

Attorney for Amicus Curiae
Missouri Organization of Defense Lawyers

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INTEREST OF THE AMICUS CURIAE

The Missouri Organization of Defense Lawyers (MODL) is a professional organization of over 1,300 lawyers in Missouri who are involved in defending litigation, including medical negligence litigation, involving Missouri citizens and health care providers. Two of MODL's stated goals are to eliminate court congestion and delays in civil litigation and to promote improvements in the administration of justice. To that end, MODL members work to advance and exchange information, knowledge and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to elevate the standards of trial practice in this state. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individuals. MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

MODL members are interested in this case because it is a case of first impression involving the interpretation of RSMo. § 287.120.1 which could significantly affect the manner in which liability is established against co-employee defendants under Missouri's Worker's Compensation law. MODL is concerned that Respondent's and Amicus Curiae's arguments misconstrue the statute and, if accepted, would upend established Missouri authority, greatly relax the immunity afforded to co-employee defendants, and

expose co-employees to possible liability far beyond what the General Assembly intended.

MODL urges this Court to reverse the trial court's denial of Appellants' motions for directed verdict and for judgment notwithstanding the verdict because it is vital to preventing an unprecedented expansion of the class of defendants exposed to personal liability as a result of workplace accidents.

CONSENT OF THE PARTIES

MODL has received from consent from all parties to file this amicus brief in accordance with Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure and that it would be filed at the time of Appellants' reply brief.

JURISDICTIONAL STATEMENT

MODL adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

MODL adopts Appellant's Statement of Facts.

POINT RELIED ON

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT/ APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JNOV BECAUSE PLAINTIFF/RESPONDENT FAILED TO MAKE A SUBMISSIBLE CASE OF CO-EMPLOYEE LIABILITY UNDER THE COMMON LAW IN THAT THE PLAIN LANGUAGE OF R.S.M.O. § 287.120.1 (2012) MERELY OPERATES AS A RELEASE AND DOES NOT IMPOSE LIABILITY SO THAT GENERAL NEGLIGENCE LAW STILL REQUIRES THAT EDWARDS HAVE BREACHED AN INDEPENDENT PERSONAL DUTY SEPARATE FROM HIS EMPLOYER'S NONDELEGABLE DUTIES TO PROVIDE A SAFE WORKPLACE IN A WAY THAT WAS NOT REASONABLY FORESEEABLE TO HIS EMPLOYER; AND THE STATUTE REQUIRES A SHOWING OF THE DEFENDANT'S MENTAL STATE OF "PURPOSEFULLY"; AND PUBLIC POLICY SUPPORTS APPELLANT'S POSITION.

RSMo. § 287.120.1 (2012)

Halsey v. Townsend Corp. of Indiana, 20178 WL 218945 (E.D. Mo. 2017)

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Hedglin v. Stall Specialty Company, 903 S.W.2d 922 (Mo. App. W.D. 1995)

McComb v. Norfus, 541 S.W.3d 550 (Mo. 2018)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT/ APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JNOV BECAUSE PLAINTIFF/RESPONDENT FAILED TO MAKE A SUBMISSIBLE CASE OF CO-EMPLOYEE LIABILITY UNDER THE COMMON LAW IN THAT THE PLAIN LANGUAGE OF R.S.M.O. § 287.120.1 (2012) MERELY OPERATES AS A RELEASE AND DOES NOT IMPOSE LIABILITY SO THAT GENERAL NEGLIGENCE LAW STILL REQUIRES THAT EDWARDS HAVE BREACHED AN INDEPENDENT PERSONAL DUTY SEPARATE FROM HIS EMPLOYER'S NONDELEGABLE DUTIES TO PROVIDE A SAFE WORKPLACE IN A WAY THAT WAS NOT REASONABLY FORESEEABLE TO HIS EMPLOYER; AND THE STATUTE REQUIRES A SHOWING OF THE DEFENDANT'S MENTAL STATE OF "PURPOSEFULLY"; AND PUBLIC POLICY SUPPORTS APPELLANT'S POSITION.

1. Standard of Review is *de novo*.

Review of the trial court's decision to grant or deny a motion for directed verdict depends on whether the plaintiff made a submissible case. *Johnson v. Auto Handling Corp.*, 523 S.W.3d 452, 459 (Mo. 2017) (internal quotation omitted). "Whether the plaintiff made a submissible case is a question of law subject to *de novo* review." *D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899, 904 (Mo. 2010).

"A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Dodson v. Ferrara*, 491 S.W.3d 542, 551 (Mo. 2016). Although the court "views the evidence in a light most favorable to the plaintiff" and disregards evidence that is unfavorable to the verdict, mere speculation by the plaintiff is not enough to make a submissible case. *Johnson*, 523 S.W.3d at 459. The Court will "not supply missing evidence or give the plaintiff the benefit of unreasonable,

speculative, or forced inferences." *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. E.D. 1997). "A submissible case is not made if it solely depends on evidence which equally supports two inconsistent and contradictory inferences constituting ultimate and determinative facts because liability is then left in the realm of speculation, conjecture and surmise." *Steward v. Baywood Villages Condo. Ass'n*, 134 S.W.3d 679, 682 (Mo. App. E.D. 2004). The standard of review for denial of a motion for judgment notwithstanding the verdict is essentially the same as for review of a denial of a motion for directed verdict. *Boyer v. Sinclair & Rush Inc.*, 67 S.W.3d 627, 632 (Mo. App. E.D. 2002). Appellant challenged the submissibility of Plaintiff/Respondent's case in his motion for directed verdict (LF 645) and in his motion for judgment notwithstanding the verdict (LF 685), thereby preserving the issue for appeal.

Moreover, statutory interpretation is purely an issue of law that the court reviews *de novo*, *State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 34 (Mo. 2008), and statutory exceptions must be construed narrowly. *Tipton v. Barton*, 747 S.W.2d 325, 330 (Mo. App. E.D. 1988). In interpreting Section 287.120.1—an exception to the general rule of no co-employee liability—this Court "must ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. 1997) (internal quotation omitted). Appellant preserved the issue by challenging the submissibility of Plaintiff/Respondent's case under

Section 287.120 in his motion for directed verdict (LF 639) and in his motion for judgment notwithstanding the verdict (LF 679).

2. RSMo. § 287.120.1's creates a statutory release and does not abrogate the common law nondelegable duty analysis.

Respondents and Amicus Curiae argue, in effect, that RSMo. § 287.120.1 following the 2012 amendments now lays out the test for the imposition of co-employee liability in derogation of the common law test restricting co-employee liability only to those circumstances in which the co-employee breaches an independent personal duty outside the scope of his or her employer's nondelegable duties to maintain a safe workplace for its employees. This interpretation simply misreads the statute, and in doing so attempts to apply a strained construction in conflict with decades of Missouri appellate and Supreme Court precedent.

The relevant portion of the RSMo. § 287.120.1 reads as follows:

> 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**.
>
> RSMo. § 287.120.1. (emphasis added)

Thus, the statute clearly and unambiguously *releases a co-employee from liability* unless the exception applies. Importantly, the statute does not purport to automatically extend liability to the employee if the strictures of the exception are satisfied; rather, it merely explains that an employee "shall *not be released* from liability" if the exception

applies. Quite clearly, not being released from liability and actually having liability imposed are two entirely distinct concepts. For example, even if a given claim could in theory be brought because the defendant is not released from all liability, it does not necessarily follow that the claim would be successful: the claim could be barred by the statute of limitations, an affirmative defense could apply, the plaintiff could suffer from evidentiary impairments, and so on. Applying the limitations of strict construction as the worker's compensation law requires, the plain language of RSMo. § 287.120.1 makes clear that it simply releases the co-employee from all liability to the employee by operation of law, unless the exception applies, and nothing more. By its terms, the satisfaction of the statutory exception merely shatters the co-employee's shield; it is still the burden of the plaintiff to drive in the sword.

As such, despite Respondent and the other Amicus Curiae's protestations to the contrary but as properly recognized by the Eastern District Court of Appeals' ruling in this case, "the 2012 amendment to § 287.120.1 did not abrogate the common law." *Brock v. Dunne*, 2018 WL 4309412, *5 (Mo. App. E.D. 2018). As noted further by the Court of Appeals in this case, "[w]hen a statute does not clearly and unambiguously create a cause of action, Missouri courts will not find that a common law claim has been abrogated[.]" *Id.* at *6 (quoting cases thereafter). Moreover, that RSMo. § 287.120.1 does not create a cause of action abrogating the common law has been recognized by multiple Missouri state and federal courts. *Ibid*. ("Of great importance is the fact that the language only refers to when an employee is either ***released*** or ***not released*** from liability." (emphasis is

the court's)); *see also Halsey v. Townsend Corp. of Indiana*, 20178 WL 218945 (E.D. Mo. 2017); *Sherman v. Tyson Foods, Inc.*, 2017 WL 5957769, at *3 (W.D. Mo. 2017) ("[T]he legislature's 2012 modification [to § 287.120] … excludes co-employees from liability under the Workers' Compensation Act, and purports to limit [though not eliminate] co-employees' potential for liability under the common law.").

If the foregoing were not enough, the General Assembly quite clearly demonstrated *in the Worker's Compensation Law* that it knows how to properly abrogate case law, as they did in a recent revision to the statutory scheme. For example, in RSMo. § 287.020, the General Assembly wrote "In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: Bennett v. Columbia Health Care and Rehabilitation, 80 S.W.3d 524 (Mo. App. W.D. 2002) …" There, the General Assembly explicitly identified the areas of the common law with which they were not satisfied, including individual cases listed by name, and directed, clearly and concisely, that they no longer be followed. That was not what was done in relation to Section 287.020.1.

When, then, does this exception apply to dissolve the statutory release of liability? Where "the employee engaged in an **affirmative negligent act** that **purposefully and dangerously caused or increased the risk of injury**." RSMo. § 287.120.1 (emphasis added). Appellant's articulation of the elements of the exception is instructive. *See*

Appellant's Substitute Brief. "In order to avoid immunity [i.e., the release], there must be: (1) an affirmative negligent act; (2) that purposefully; (3) and dangerously; (4) caused or increased the risk of injury." *Id.* at 32.

3. The common law duty owed by co-employees is modified by the nondelegable duty analysis.

The analysis does not stop there, however. Because the statute does not itself impose or otherwise create liability but merely operates to raise or lower a co-employee's statutory shield (i.e., the release), even if Plaintiff/Respondent were somehow able to prove all of the elements required for the application of the exception to the statutory release of co-employee liability, he must still develop a submissible case of liability. In most cases (including this one), developing a submissible liability case will mean returning to the common law of negligence, which – over decades of Missouri appellate and Supreme Court authority – has come to include the understanding that a duty in negligence may only be established as against a negligent co-employee where that duty is a personal duty owed independently from the employer's nondelegable duties to provide a safe workplace and save employees free of reasonably foreseeable risks. *See* Appellant's Substitute Brief, at 18-19 (collecting cases). In that way, the common law duty analysis as against a co-employee is a modified form of the default duty analysis MATA seeks apply, including the conditioned understanding that such a duty may only exist where it exists outside the scope of the employer's nondelegable duties.

Moreover, the exception to the statute's release of liability requires an "affirmative *negligent* act[.]" RSMo. § 287.120.1. This implies and requires proof of negligence,

including the requirement of a duty at common law. How could an act be "negligent" if all of the elements of negligence were not present? In this way, even the express language of the statute leaves room for the original common law understanding at issue. Respondent appears to acknowledge this when he admits that "[o]f course, legal duty is always an element of the tort action and remains an issue for the courts in a 2012-amendment co-employee liability case." *See* Substitute Brief of Respondent, at 9. At common law, however, the duty of a co-employee to his fellow employees did not include the duty to perform the employer's nondelegable duties, as those duties necessarily derive from, and are not independent of, the master-servant relationship. *See, e.g., Peters v. Wady Industries, Inc.*, 489 S.W.3d 784, 794-95 (Mo. banc 2016). By its terms, then, the statute still requires resorting to the common law of negligence and the modified co-employee duty analysis built up over the years.

Respondent attempts to circumvent the conclusion that RSMo. § 287.120.1 does not abrogate the common law by arguing that "the statute so narrowly limits the cases of actionable co-employee conduct that the issue of duty is now dramatically simplified … Under the 2012 statute, the issue of co-employee legal duty can be determined by answering: (1) does the claim involve co-employees and (2) is there sufficient evidence to submit a claim to the jury that the defendant's conduct rose to the level of: 'an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury'. If the answer to both is in the affirmative, then the 'reasonable foreseeability' test is superfluous." *See* Respondent's Substitute Brief, at 9-10. Respondent then attempts

to "illustrate by syllogism," contending that since "(a) A common law co-employee duty always exists for (b) acts not reasonably foreseeable to the employer. (c) 'Affirmative negligent acts' are never (b) reasonably foreseeable to the employer. Therefore: (a) A common law co-employee duty always exists for (c) 'affirmative negligent acts'." *Id*. at 10.

This syllogism and the conclusion it draws is patently incorrect. First, Respondent misstates the law, without citation, in suggesting that it is the foreseeability of the *acts* that is relevant for purposes of determining the scope of the employer's duty to provide a safe workplace. But, the Missouri Supreme Court has made clear, time and again, that it is the foreseeability of the risk or hazard that is relevant for determining when the employer's nondelegable duties to provide a safe workplace have been implicated: "The cases discussing and applying the 'fellow servant' rule and the 'nondelegable duty' exclusion to that rule are legion, but the common thread running throughout them is that the employer has a nondelegable duty to protect employees from reasonably foreseeable hazards in the workplace." *Connor v. Ogletree*, 542 S.W.3d 315, 323 (Mo. banc 2018) (emphasis added).

This distinction between foreseeable acts and foreseeable hazards is important because although the co-employee would of course foresee of his or her own acts, it could be the case that the dangers associated with a workplace *hazard* may not be reasonably foreseeable to *either* the employer or the co-employee. One could envision scenarios in which injuries occur to an employee by freak accident due to the presence of

a hazard not reasonably foreseeable either to the employer or to the co-employee. Under such circumstances, *no one* would owe a duty to keep the plaintiff safe from injury. If there could exist hazards reasonably foreseeable neither to the employer nor to the co-employee, then the first premise of Respondent's syllogism is simply false: it is not true that a common law co-employee duty *always* exists for hazards or risks not reasonably foreseeable to the employer. There could be scenarios where the hazard or risk is not reasonably foreseeable to either. At this step in the analysis, Respondent's syllogism collapses and the conclusion that a common law co-employee duty always exists for affirmative negligent acts can no longer obtain.

Even if the first premise in Respondent's syllogism were for some reason correct, Respondent's reliance on *Burns v. Smith*, 214 S.W.3d 335 (Mo. banc 2007) for the second premise that affirmative negligent acts (within the meaning of the statute) are never reasonably foreseeable to the employer is misplaced. Respondent seizes upon the following dicta in *Burns*: "Consistent with the *Badami/Taylor* line of cases, the notion of an affirmatively negligent act—the 'something more'—can best be described as an affirmative act that creates additional danger beyond that normally faced in the job-specific work environment. This description satisfies the concern that although there must be an independent duty to the injured co-employee, that duty cannot arise from a mere failure to correct an unsafe condition and must be separate and apart from the employer's nondelegable duty to provide a safe workplace." *Id.* at 338. However, no Missouri case, state or federal, has interpreted this dicta in *Burns* to mean that all affirmatively negligent

acts create an independent duty on the part of the co-employee and fall outside the scope of the employer's nondelegable duties. The reason for this is easily discernible: there are affirmatively negligent acts that add additional danger beyond that normally faced in the job-specific environment that could fall explicitly within one of the commonly delineated nondelegable duties or which are otherwise reasonably foreseeable to the employer. For reference, the employer's explicitly recognized nondelegable duties have been stated as follows:

1. The duty to provide a safe place to 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 fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

Parr v. Breeden, 489 S.W.3d 774, 779 (Mo. banc 2016) (citing William L. Keeton, Prosser and Keeton on the Law of Torts, section 80 at 569 (5th ed. 1984)); *Kelley v. DeKalb Energy Co.*, 865 S.W.2d 670, 672 (Mo. banc 1993).

A co-employee could undertake affirmative negligent acts that increase the danger beyond that ordinarily present in the job-specific environment in relation to each and every one of these specific duties, and yet each have been held unambiguously to constitute the nondelegable duties of the employer or to be otherwise reasonably foreseeable risks of the workplace as a matter of law. For example, a co-employee at an

electrical utilities company could supply a subordinate with a cherry picker the co-employee knows is dangerously defective; this might constitute an affirmatively negligent act that subjected the employee to danger not otherwise accompanying that line of work, and yet such equipment provision would fall squarely within the employer's nondelegable duty to provide safe equipment for its employees' work. Similarly, a co-employee at a metals smelting plant could instruct an employee to ignore the well-known safety rule that requires employees to wear certain protective gear; this might constitute an affirmatively negligent act that subjected the employee to danger not otherwise accompanying that line of work, and yet such instruction would fall squarely within the employer's nondelegable duty to promulgate and enforce rules making the work safe. Moreover, that a manager may knowingly risk the use of a suspect piece of equipment or instruct an employee to occasionally disregard a safety rule are hazards that are well within the realm of the employer's reasonable foreseeability.

Of course, there are also affirmatively negligent acts that purposefully increase workplace danger within the meaning of RSMo. § 287.120.1 *that do not* fall within the scope of the employer's nondelegable duties and which are risks not reasonably foreseeable to the employer. It is this latter category of risks for which the exception to the statutory release of liability would apply and for which liability may permissibly attach to a negligent co-employee under the common law. Interestingly, MATA in its Amicus Brief properly identified a number of such cases. *See Burns v. Smith*, 214 S.W.3d 335 (Mo. banc 2007) (because supervisor welded a hole in rusted water pressure tank and

instructed plaintiff to run it till it blows, supervisor engaged in an affirmative act of negligence increasing the risk of injury to plaintiff that was outside the scope of the employer's duty to provide a safe workplace); *Tauchert v. Boatman's National Bank of St. Louis*, 849 S.W.2d 573 (Mo. banc 1993) (supervisor rigged a make-shift hoist system to raise an elevator cab up an elevator shaft, which failed injuring plaintiff who was standing on top of the cab, which the court held to be an affirmative act which increased the risk of injury and was outside the scope of the employer's duty to provide a safe workplace); *Hedglin v. Stall Specialty Company*, 903 S.W.2d 922, 927 (Mo. App. W.D. 1995) (co-employee ordered 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; such conduct was an affirmative act increasing risk of injury that was outside the scope of the employer's duty to provide a safe workplace). Clearly, the conduct of the co-employees at issue in cases like *Burns*, *Tauchert*, or *Hedglin* was the sort which is affirmatively negligent and drastically increases the danger of the job above what would ordinarily be concomitant to the nature of the work. However, it would take tortured reasoning indeed to fit any of that conduct within the scope of an employer's nondelegable duties as cited above, and injuries resulting from this sort of obscure and dangerous conduct would certainly not be reasonably foreseeable to an employer.

That being said, MATA's comparison of Edwards' conduct in this case to those it cites as exemplars of affirmatively negligent conduct exposing a co-employee to liability is misconceived. Specifically, *Burns*, *Tauchert*, and *Hedglin* all involved conduct by

employees that had nothing to do with an employer's nondelegable duties of promulgating or enforcing rules, providing equipment or tools, providing a sufficient number of fellow workers, and so on, and it strains credulity to suggest that the conduct at issue in those cases – spot welding a pressurized tank and specifically instructing the employee to run it until it blows, jury rigging an elevator car, and hanging an unrestrained employee over a hot vat of boiling water – would be reasonably foreseeable to any employer. Those were unusual, highly dangerous acts and instructions by co-employees bordering on the bizarre. By contrast, the evidence in the record in this case demonstrates that, as noted by Appellants in their Substitute Brief, "[i]njuries to laborers like Plaintiff working around the laminating machine were foreseeable to JMC, as the decals on the machine and the JMC safety rules illustrate." Appellant's Substitute Brief, at 22. Likewise, "the obviously foreseeable nature of Plaintiff's accident is bolstered by the undisputed fact that Plaintiff was injured about one month earlier when his clothing was pulled into another pinch point caused by moving rollers on another JMC laminating machine." *Ibid*. For more evidence supporting that the risk to Plaintiff/Respondent in this case was within the employer's nondelegable duties and was reasonably foreseeable and, in fact, foreseen, we would further refer this Court's attention to Appellant's Substitute Briefing. *Id.* at 23-24. On this point, the Court of Appeals erred in its analysis.

Respondent and Amicus Curiae are similarly mistaken when they assert that this Court's decisions in *McComb v. Norfus*, 541 S.W.3d 550 (Mo. 2018), *Conner*, and *Fogerty v. Armstrong*, 541 S.W.3d 544 (Mo. 2018), which were tasked with addressing

suits falling within the 2005-2012 window, "repeatedly and conspicuously recognized that the common law reasonable foreseeability analysis is not applicable in post-2012-amendment cases." *See* Respondent's Substitute Brief, at 11; MATA Amicus Brief, at 15. Although it is true that the *McComb* court limited its holding to injuries occurring before the 2012 amendments took effect, and it is true that the *Connor* court referenced older decisions of *Parr* and *Peters* as limiting their holdings to suits accruing between 2005-2012, it in no way follows that these rulings and the legal propositions on which there were based no longer persist following the 2012 amendments. As this Court is well aware, canons of judicial decision-making encourage courts to only decide the issues before them. Because *McComb*, *Conner*, and *Fogerty* did not involve injuries following the 2012 amendments, those cases should not be read as precluding application of the common law following the 2012 amendments, and nothing in any of those cases requires such a finding. Those cases simply did not need to, nor did they, address the sustained vitality of the common law following 2012.

4. RSMo. § 287.120.1 requires that the co-employee purposefully cause or increase the risk of injury.

Both Respondent and MATA express concern that Appellant's arguments in relation to the "purposefully" requirement in RSMo. § 287.120.1's statutory exception to the co-employee release of liability would convert the rule into requiring a showing of an intentional tort. For the reasons that follow, this concern is unwarranted.

As quoted above, RSMo. § 287.120.1 articulates an exception to the statutory release of liability as against co-employees, which states that the release applies in the

face of an "affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." Before proceeding, it should be noted that MATA's reading of the statute is incorrect. Specifically, MATA argues as follows:

> 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.
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> MATA Amicus Brief, at 19.

This argument fails for the following reason. Although "purposefully" is indeed an adverb, an "affirmative negligent act" is a noun, which is not among the list of parts of speech properly modified by an adverb. A proper reading of the statute illuminates that the terms "purposefully and dangerously" are intended to modify "caused or increased the risk of injury." Thus, in engaging in an affirmative negligent act, it must be the purpose of the co-employee to cause or increase the risk of injury, and that causation or increase in the risk of injury must be done "dangerously."[1] Therefore, the relevant inquiry is not whether it was Edwards' purpose to commit the negligent act; rather, the question is whether it was Edwards' purpose to *cause or increase the risk of injury*. This does not require that Edwards *intended* injury. One can commit an act which he or she intends to increase the risk but which he or she does not intend to cause injury.

[1] Appellant discusses the proper application of the term "dangerously" in Appellants' Substitute Brief, at 36-37.

The best example of this distinction was in *Burns*, in which the co-employee directed an employee to 'run it till it blows' in reference to the welded piece of machine equipment (discussed in greater detail in Appellants' Brief at 35-36). Under those circumstances, surely the co-employee did not intend to injure the plaintiff; but it can fairly be said that it was his purpose to cause or increase the risk of injury. Additionally, this would not be an impossible showing. Negligent co-employees can of course have multiple motivations: even where a particular course of workplace conduct may in fact be intended to enhance efficiency in disregard for the risks, it can still properly be recognized that the co-employee would appreciate, even if done in pursuit of efficiency, that such conduct would be substantially likely cause or increase the risk of injury. Under such circumstances, it can properly be said that it would be an employee's "purpose" to cause or increase the risk of injury, even if there was no purpose to actually cause the injury itself. Thus, Respondent and MATA's concern that this reading would convert the exception into requiring an intentional tort is unfounded.

5. Missouri Public Policy Favors broad co-employee immunity.

Despite MATA's public policy argument that those responsible for negligent conduct ought to be those held liable, which is an unassailable general precept, the unambiguous language of the Workers' Compensation law and the common law history accompanying it serve as a preferable and more particularized basis for ascertaining the more nuanced public policy of Missouri.

The basic principles of tort law, which MATA has correctly identified, could be said to internalize the harmful externalities produced by people that are the result of their misconduct. It was this principle that for so long guided the employer/employee relationship in the liability context, as well as the liability rule that governs many of our private interactions. It was not until 1911 that a US Worker's Compensation law passed constitutional muster in Wisconsin.[2] The work comp system was enacted to exchange a certainty of payment for workplace injuries for a mandatory release of civil liability as against employers and co-employees. This trade-off has sometimes been referred to as "the compensation bargain." One of the problems this solved was that of employers becoming insolvent as a result of high personal injury damage awards. This trade-off helped to ensure the security of guaranteed compensation to injured workers, but individual immunity has been considered the necessary corollary to that collective, guaranteed liability.

The work comp system has greatly enhanced the efficiency of resolving workplace injuries, lowered litigation costs, shielded employers and co-employees from catastrophic liability, and allowed workers a certainty of compensation that provides stability to them and their families that might otherwise be precarious in the face of protracted litigation involving, for example, an employee who can no longer work. This grand compensation trade-off has been the public policy of nearly (or perhaps all) states in the US, as well as in most or all industrialized nations around the world. Unambiguously, then, the public policy of Missouri has been to uproot and disregard the common law tort principles that

[2] Worker's Compensation History: The Great Tradeoff!, *Insurance Journal*. 19 March 2015.

MATA articulates and to adopt a new, statutory scheme for resolving compensation for workplace injuries.

This scheme whereby employers and co-employees have been shielded from liability in exchange for the certainty of payment to the injured worker has worked and remained a stable fixture of American and Missouri law for generations. Adopting Respondent's and MATA's position regarding the interpretation of the law and the abrogation of the common law tests for reasonable foreseeability and an employer's nondelegable duties would upend all of that, leading to a cataclysmic shift in the adjudication of workplace injuries while simultaneously exposing an enormous, new class of co-employee defendants to possible personal liability for which current forms of common personal insurance coverage would be unlikely to apply due to the business-related nature of the injuries and exclusions therein (auto, homeowners, etc.). Would employees now be required to acquire some totally new form of personal business-risk insurance to shield themselves for personal liability potentially incurred as a result of their workplace negligence?

Although the specific statistics are unknown to this author, it seems plausible that the overwhelming majority of workplace accidents resulting from the acts of a co-employee would fall within the nondelegable duties of an employer. Adopting Respondent's and MATA's position would have a profound negative effect on Missouri employees, employers, and citizens more broadly and would serve as a sweeping alteration to the legal landscape governing Missouri workplace accidents. For that reason,

MODL humbly submits that the public policy of Missouri favors the interpretation of the law as laid out in Appellants' briefing and in this briefing, and Respondent's and MATA's interpretation should be rejected.

CONCLUSION

In light of the foregoing, it is evident that the legislature did not intend to abrogate the common law in its 2012 amendments to § 287.120.1; it created a statutory release of liability for co-employees for which an exception exists allowing liability to attach under limited circumstances. Even where the exception to the release applies, however, in order to establish liability, plaintiffs must still resort to the common law, including the requirement that a co-employee may not be subject to liability unless it breaches an independent duty owed outside the employment relationship or where the nature of the hazard was so unforeseeable to the employer as to take the conduct outside the scope of an employer's nondelegable duty to provide a reasonably safe workplace. Further, the "purposefully" language in the statute does not require the demonstration of an intentional tort but merely that the co-employee purposefully cause or increase the risk of harm. Lastly, the public policy of Missouri favors the foregoing interpretation.

For all of the foregoing reasons, Appellant is entitled to a judgment notwithstanding the verdict or, alternatively, to a new trial. Therefore, MODL, as Amicus Curiae, requests this Court reverse the judgment of the trial court and either: (1) remand this case for entry of judgment in favor of Defendant; or, in the alternative, (2) remand this case for a new trial on all issues.

Respectfully submitted,

RYNEARSON, SUESS, SCHNURBUSCH & CHAMPION, L.L.C.

BY: *__/s/ Daniel E. Schnurbusch__*

Daniel E. Schnurbusch #69331
Attorney for Amicus Curiae
Missouri Organization of Defense Lawyers
500 N. Broadway, Suite 1550
St. Louis, MO 63102
(314) 421-4430
(314) 421-4431/fax
E-Mail: dschnurbusch@rssclaw.com

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, that it was served on all parties via the electronic filing system, and that the brief contains approximately 6248 words (as determined by Microsoft Office Word software).

/s/ Daniel E. Schnurbusch

Daniel E. Schnurbusch #69331
Attorney for Amicus Curiae
Missouri Organization of Defense Lawyers
500 N. Broadway, Suite 1550
St. Louis, MO 63102
(314) 421-4430
(314) 421-4431/fax
E-Mail: dschnurbusch@rssclaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 29th 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:

Mr. Patrick K. Bader
Mr. Jacob C. Murov
230 South Bemiston Avenue, Suite 560
St. Louis, MO 63105
Attorneys for Plaintiff/Respondent

Mr. Brian R. Shank
Evans & Dixon, LLC
211 North Broadway, Suite 2500
St. Louis, MO 63102
bshank@evans-dixon.com
Attorneys for Defendant/Appellant

/s/ Daniel E. Schnurbusch
Daniel E. Schnurbusch #69331
Attorney for Amicus Curiae
Missouri Organization of Defense Lawyers