NO. SC94393

IN THE SUPREME COURT OF MISSOURI

PAIGE PARR, JERIMY MOREHEAD, and CHARLES PARR,

Plaintiffs/Appellants,

vs.

CHARLES BREEDEN, WENDY COGDILL, and MELANY BUTTRY,

Defendants/Respondents.

Appeal from the Circuit Court of New Madrid County, Missouri
Cause No.: 10NM-CV00258
The Honorable Fred W. Copeland

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INTRODUCTION

Kevin Parr was a truck driver for Breeden Transportation, Inc. (L.F. 30; 87-88). On November 2, 2007, following a medical examination by an independent physician, Mr. Parr was certified as physically fit to operate commercial motor vehicles in accordance with Federal Motor Carrier Safety Administration Regulations, 49 CFR § 391.1, *et seq*. (L.F. 31). In fact, Mr. Parr received a two-year certificate; the maximum length for certification. (L.F. 77). Less than six months later, on April 28, 2008, Mr. Parr was operating a tractor-trailer for Breeden Transportation, Inc., on Interstate 55 when he was involved in a fatal single-vehicle accident. (L.F. 30; 87). This lawsuit ensued.

PLEADINGS

Plaintiffs Paige Parr, Jerimy Morehead, and Charles Parr filed this wrongful death lawsuit against Charles Breeden, Wendy Cogdill n/k/a Wendy Cogdill Knaup, and Melany Buttry (incorrectly named in the pleadings as "Melanie"). (L.F. 10-13). Mr. Breeden, Ms. Cogdill and Ms. Buttry were all employees of Breeden Transportation, Inc. and co-employees of Mr. Parr. (L.F. 87-88). Breeden Transportation, Inc. is a trucking company. (L.F. 88). Plaintiffs' Second Amended Petition contains two counts—Count I entitled "Something More" and Count II

entitled "General Negligence." (L.F. 29-34). The allegations in Appellants' Second Amended Petition in the instant case relative to duty are as follows:

> Defendants had a duty to provide a safe working environment to Kevin Parr, to monitor the physical condition of Kevin Parr to determine whether he was fit to drive a tractor-trailer, and to determine whether Kevin Parr was in compliance with Federal Motor Carrier Safety Administration Regulations.

(L.F. 30, ¶ 9). Plaintiffs further allege that Mr. Breeden, Ms. Cogdill and Ms. Buttry breached their duty because they knew, or should have reasonably known, that Mr. Parr suffered from sleep apnea, diabetes, an enlarged heart, coronary heart disease, and was at a high risk for both falling asleep and/or suffering a cardiac event while operating a tractor-trailer, despite the Medical Examination Report that Mr. Parr did not suffer from any of these conditions. (L.F. 31; 75-77). Plaintiffs also allege that Mr. Breeden, Ms. Cogdill and Ms. Buttry knew, or should have reasonably known, that Mr. Parr was unfit to drive a commercial vehicle and that he did not meet the minimum qualification standards for drivers set forth in the Federal Motor Carrier Safety Regulations, 49 CFR § 391.1, *et seq*. (L.F. 31). Plaintiffs allege that as a result of Mr. Parr's physical condition, he fell asleep and/or suffered a cardiac or other health event which caused him to lose control of his tractor-trailer on April 28, 2008, thus causing his fatal accident. (L.F. 31).

MOTION FOR SUMMARY JUDGMENT

On February 17, 2012, after discovery was concluded, Defendants filed a Joint Motion for Summary Judgment. (L.F. 47-83). The grounds for the summary judgment motion included a lack of a duty, other than the employer's non-delegable duties, and, based on the undisputed evidence, the lack of a breach of any duty owed by Defendants. (L.F. 48-50).

Defendants' Motion for Summary Judgment was supported by the affidavits of Charles Breeden, Wendy Cogdill and Melany Buttry and the Medical Examination Report for Commercial Driver Fitness Determination dated November 2, 2007 for Mr. Parr. (L.F. 72-83). As discussed above, less than six months before the fatal accident, Mr. Parr underwent an independent medical examination to determine whether he was physically fit to operate a commercial motor vehicle in accordance with the Federal Motor Carrier Safety Administration Regulations. (L.F. 75-77). The Medical Examination Report states that Mr. Parr had no health history of heart disease, heart attack, other cardiovascular condition, diabetes, sleep disorders, pauses in breathing while asleep, daytime sleepiness or loud snoring among other conditions. (L.F. 75; 89-90). In fact, Mr. Parr certified that the health history section was complete and accurate. (L.F. 75). The Medical Examination Report indicates that Mr. Parr checked "yes" in response to narcotic or habit-forming drug use. (L.F. 75). The Medical Examination Report further

provides under the section entitled "Medical Examiner's Comments on Health History" that "[t]he medical examiner must review and discuss with driver any 'yes' answers and potential hazards of medication, including over-the-counter medications, while driving." This section includes the handwritten notation "smokes." (L.F. 75). The report of the medical examiner, David Pfefferkorn, M.D., further indicates that the examination included testing of Mr. Parr's vision, hearing, blood pressure and pulse rate. (L.F. 76). The recorded values for blood pressure, 110/80, and pulse rate, 68, were within the acceptable range and qualified Mr. Parr for a two-year certification. (L.F. 76). In addition, under the "Laboratory and Other Test Findings" section, the results of the urinalysis indicate that Mr. Parr's protein, blood and sugar readings were all "Neg." (L.F. 76).

In addition to the laboratory and testing information, the report indicates that a physical examination was conducted. (L.F. 77). The information in this section indicates that no heart murmurs, extra sounds, enlarged heart, pacemaker, or implantable defibrillator were found. (L.F. 77). Further, the report indicates that no abnormalities were found with regard to the lungs and respiratory system. (L.F. 7). The report provides under "General Appearance" that the examining physician is to check for the following: "marked overweight, tremor, signs of alcoholism, problem drinking or drug abuse." Dr. Pfefferkorn's only notation under this category is "overweight." (L.F. 77). There is no indication of alcohol or drug use.

(L.F. 77). Dr. Pfefferkorn certified that Mr. Parr met the standards set forth in 49 CFR § 391.1, and qualified Mr. Parr for a two-year certificate, the longest period of time permitted. (L.F. 77). In addition to the report and certification by Dr. Pfefferkorn, the affidavits filed in support of the motion for summary judgment stated that Mr. Breeden, Ms. Cogdill and Ms. Buttry, co-employees of Mr. Parr, were not aware of any cardiac event and/or health-related issues that Mr. Parr suffered from following his November 2007 certification. (L.F. 72-74; 79; 83).

Plaintiffs requested and received additional time to respond to Defendants' Motion for Summary Judgment. (L.F. 6). Plaintiffs obtained additional discovery and subsequently filed their opposition to the Motion for Summary Judgment on May 7, 2012. (L.F. 6-7; 87-149).

In Plaintiffs' response, Plaintiffs admitted that Mr. Parr was certified by an independent medical examiner as physically fit to operate a commercial motor vehicle. (L.F. 89). Plaintiffs also admitted that the Medical Examination Report indicated that Mr. Parr did not have a history of heart disease, heart attack, other cardiovascular condition, diabetes, sleep disorders, pauses in breathing while asleep, daytime sleepiness, or loud snoring, among other conditions. (L.F. 89-90). In denying the statements that Charles Breeden, Wendy Cogdill, and Melany Buttry were not aware of any health-related incidents suffered by Kevin Parr from the period of November 3, 2007, until the date of his death or any time in Mr.

Parr's life, Plaintiffs cited to Mr. Parr's affirmative response to the question regarding use of narcotics or habit-forming drugs that was explained by Dr. Pfefferkorn as "smoking." (L.F. 90-92). Plaintiffs' response to the summary judgment also referenced deposition testimony from Ms. Buttry that "a *motor carrier* has a continuing duty to make sure that its drivers are healthy, even following a physician certification," and testimony of Wendy Cogdill that "there are circumstances under which a *carrier* is required to look beyond a physician's certification." (L.F. 91-92) (emphasis supplied).

Finally, Plaintiffs' response to the summary judgment motion also asserted that Mr. Parr had been involved in two prior accidents and that Charles Breeden, Wendy Cogdill and Melany Buttry "never sought to have Kevin Parr medically certified again or inquired into his health condition." (L.F. 94). Contrary to Plaintiffs' assertions in their response, the undisputed facts established that the first accident occurred prior to Dr. Pfefferkorn's examination and certification of Mr. Parr as physically fit to operate a commercial motor vehicle. (L.F. 75-77; 94; 157). Thus, Mr. Parr's health was evaluated and he was certified as physically fit to operate a commercial motor vehicle after the accident. Furthermore, it is undisputed that the first accident was caused by an oncoming vehicle that crossed the center-line and encroached into Mr. Parr's lane of travel. (L.F. 157). Mr. Parr

swerved to avoid the oncoming vehicle and Mr. Parr's vehicle struck a utility pole. (L.F. 121-22; 157). The road was described as very wet and narrow. (L.F. 123)

On December 31, 2012, the Honorable Fred Copeland granted Defendants' Motion for Summary Judgment and entered summary judgment for Melany Buttry, Charles Breeden, and Wendy Cogdill. (L.F. 8; 163). On January 9, 2013, Plaintiffs filed a Motion to Alter, Amend, Modify, Correct or Reconsider Judgment and/or New Trial. (L.F. 164-174). Plaintiffs' motion attached a copy of additional excerpts of the depositions of Melany Buttry, Charles Breeden Wendy Cogdill and the deposition of Plaintiffs' retained expert, William Hampton. (L.F. 175-209). These documents were not previously filed with the trial court. (L.F. 100-149). The depositions of Melany Buttry, Charles Breeden, and Wendy Cogdill were taken prior to the filing of Plaintiffs' original Response to Defendants' Motion for Summary Judgment. (L.F. 100, 115, 130). In fact, different portions of these depositions were filed as exhibits to Plaintiffs' original Response to the Motion for Summary Judgment. (L.F. 87-149).

Defendants filed a response to Plaintiffs' Motion to Alter, Amend, Modify, Correct or Reconsider Judgment and/or for New Trial. (S.L.F. 001-009). In their response, Defendants opposed Plaintiffs filing additional portions of the depositions of Melany Buttry, Charles Breeden and Wendy Cogdill and the deposition of Plaintiffs' expert witness, William Hampton, after the Defendants'

Motion for Summary Judgment was fully briefed, argued, submitted and granted. (S.L.F. 001-009).

On February 22, 2013, the Honorable Fred Copeland denied Plaintiffs' Motion to Reconsider. (L.F. 9). On March 4, 2013, an Order and Judgment was entered in favor of Defendants. (L.F. 210). Thereafter, on March 8, 2013, Plaintiffs filed their Notice of Appeal. (L.F. 211-15). The Missouri Court of Appeals affirmed the grant of summary judgment in favor of Defendants in its Majority Opinion. In his Dissenting Opinion, the Honorable William W. Francis, Jr. transferred this case to this Court under Rule 83.03.

ARGUMENT

I. STANDARD OF REVIEW.

The standard of review for appeals from the grant of summary judgment is essentially *de novo*. *Hargis v. JLB Corp.*, 357 S.W.3d 574, 577 (Mo. 2011). The appellate court "will review the record in the light most favorable to the party against whom judgment was entered." *Id*. at 577. "Summary judgment shall be entered if 'there is no genuine issue as to any material fact and … the moving party is entitled to judgment as a matter of law'." *Id*. (quoting Rule 74.04 (c)(6)). "A 'genuine issue' is a dispute that is real, not merely argumentative, imaginary or frivolous." *ITT Commercial Fin. Corp. v. Mid-Am Marine Supply Corp.*, 854 S.W.2d 371, 382 (Mo. banc 1993). Summary judgment allows the court to enter judgment, without delay, where the moving party demonstrates a right to judgment as a matter of law based on the facts as to which there is no genuine dispute. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376; *see also* Rule 74.04(c).

A defending party need not controvert *each* element of the non-movant's claim in order to establish a right to summary judgment. *Id*. Rather, a defending party moving for summary judgment may establish a right to judgment by showing facts that negate any one of the claimant's elements. *Fetick v. American Cyanamid Co.*, 38 S.W.3d 415, 418 (Mo. banc 2001). Once the defending party has established the right to summary judgment, the burden shifts to the plaintiff, whose

only recourse to avoid summary judgment is to establish "by affidavit, depositions, answers to interrogatories, or admissions on file that one or more of the material facts shown by movant to be above any genuine dispute is, in fact, generally disputed." *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381 (emphasis in original). Plaintiffs' failure to do so mandates summary judgment. *Id*. Furthermore, affidavits and other materials filed after the time permitted by Rule 74.04, and, in particular, after the motion is ruled on, are not timely-filed and may not be considered. *Mueller v. Bauer*, 54 S.W.3d 652, 658 (Mo. App. E.D. 2001).

The movant is not required to establish a right to summary judgment by "unassailable proof." *Id*. at 378. Furthermore, summary judgment should not be viewed as a disfavored procedural shortcut, but rather as an essential tool used to avoid the expense and delay of meritless claims. *Id*. at 376.

Finally, "[a]n order of summary judgment may be affirmed under any theory that is supported by the record." *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010) [internal citation and question omitted].

II. THE GRANT OF SUMMARY JUDGMENT WAS PROPER BECAUSE UNDER THE LAW AND UNDISPUTED FACTS PLAINTIFFS ARE UNABLE TO ESTABLISH THAT DEFENDANTS OWED THEIR CO-EMPLOYEE A PERSONAL DUTY, INDEPENDENT OF THEIR EMPLOYMENT, AND A

BREACH OF SUCH A DUTY (RESPONSE TO PLAINTIFFS' POINT I).

The trial court properly granted summary judgment on Plaintiffs' claims in the present case because based on the undisputed facts and pleadings, Plaintiffs cannot establish the required elements of their cause of action, including the elements of duty and breach.

A. <u>Summary Judgment was Proper on Plaintiffs' Negligence Claim Because Plaintiffs are Unable to Establish a Duty as a Matter of Law</u>.

Three elements must be established for a common law negligence claim. These elements are: (1) the existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) the defendant's failure to perform that duty; and (3) the plaintiff's injury was proximately caused by the defendant's failure. *Krause v. U.S. Truck Co.*, 787 S.W.2d 708, 710 (Mo. banc 1990). These requirements apply when an injured worker seeks to bring a negligence action against his co-employee. *Gunnett v. Girardier Bldg. and Realty Co*., 70 S.W.3d 632 (Mo. App. E.D. 2002); *Hansen v. Ritter*, 375 S.W.3d 201, 208 (Mo. App. W.D. 2012). "Thus, as in other common law actions, the threshold matter is to establish the existence of a duty owed by the co-employee." *Hansen*, 375 S.W.3d at 208.

1. Existence of Duty is a Question of Law.

The question of duty is central to whether a party has a right to judgment as a matter of law. *Carman v. Wieland*, 406 S.W.3d 70, 76 (Mo. App. E.D. 2013). Duty is unique among the elements of a negligence claim because existence of a duty is purely a question of law to be decided by the court. *Aaron v. Havens*, 758 S.W.2d 446, 447 (Mo. banc 1988); *Leeper v. Asmus*, 440 S.W.3d 478, 482 (Mo. App. W.D. 2014) (quoting *Hansen v. Ritter*, 375 S.W.3d 201, 208 (Mo. App. W.D. 2012)). Duty is not established by a party's testimony or the testimony of a retained expert; rather, it is an issue of law to be determined by the Court based on the circumstances of the case and relationship of the parties. *See Burns v. Black & Veatch Architects, Inc.*, 854 S.W.2d 450, 453 (Mo. App. W.D. 1993) (duty is a matter of law that cannot be established by expert opinion). Therefore, Plaintiffs' repeated reliance on the testimony of their retained expert, William Hampton, and deposition testimony of the Defendants as establishing a duty, is simply misplaced.

Furthermore, as discussed more fully below, it is not simply the existence of a duty on the part of the co-employee, but the nature of the duty involved which is key to determining whether a co-employee may be held liable. *Gunnett*, 70 S.W.3d at 637; *see also Hansen* 375 S.W.3d at 208. In other words, the touchstone of co-employee liability is "whether the alleged negligence occurred in the performance of a non-delegable duty of the employer as opposed to arising out of an obligation

owed to the injured employee." *Gunnett*, 70 S.W.3d at 637. Therefore, in cases against co-employees, the critical issue is the ***nature*** of the duty not its mere existence. Here, the duties Plaintiffs ascribe to Defendants are subsumed within the employer's non-delegable duties.

2. Non-Delegable Duties of Employer.

For over a century, Missouri common law has imposed certain duties on an employer regarding the safety of its employees, "which he may delegate to another, but by doing so he is in no wise discharged from the responsibility of their proper performance." *Edge v. Southwest Mo. Elec. Ry. Co.*, 206 Mo. 471, 104 S.W. 90, 97 (1907).

> An employer's responsibility at common law was to discharge five specific duties relevant to safety: (1) to provide a safe workplace; (2) to provide safe equipment in the workplace; (3) to warn employees about the existence of dangers of which the employees could not reasonably be expected to be aware; (4) to provide a sufficient number of competent fellow employees; and (5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety.

Gunnett, 70 S.W.3d at 638 n. 8; *see also Kelso v. W.A. Ross Const. Co.*, 337 Mo. 202, 85 S.W.2d 527 (1935) ("'The more specific duties which arise from the

general duty of an employer to use reasonable care are: to see that the place of work is reasonably safe; to see that suitable instrumentalities are provided; and to see that those instrumentalities are safely used.'") (quoting *Schaum v. Southwestern Bell Tel. Co.*, 336 Mo. 228, 78 S.W.2d 439, 442 (1934)). "Providing a safe place to work is just one of the non-delegable duties an employer owes its employees—a duty which the employer may not escape by delegating the task to someone else." *Gunnett*, 70 S.W.3d at 638.

Under common law, an employee to whom performance of the employer's non-delegable duties was delegated was treated as the functional equivalent of the employer.

> A servant intrusted with the performance of the master's personal duties is, in regard to those duties, a vice principal or representative of the master, and his acts as such, whether of omission or commission, are the acts of the principal; and, if negligently performed, the principal is liable for all injuries that may naturally flow therefrom, and he must answer in damages to the injured servant the same as if he had committed the act in person.

Edge, 104 S.W. at 97, *see also Mitchell v. Polar Wave Ice & Fuel Co.*, 206 Mo. App. 271, 227 S.W. 266, 269 (1921) ("It makes no difference at what point in the

scale of employment a master goes to find a servant to perform for him a particular duty to other servants, for, when the master selects that servant to act for him in the performance of that duty, then such servant becomes the master's alter ego as to that particular duty."); *Bender v. Kroger Grocery & Baking Co.*, 310 Mo. 488, 276 S.W. 405, 408 (1925) ("[T]o the extent of the discharge of [employer's non-delegable duties] by the middle man [employee], [the employee] stands in the place of the master, but as to all other matters he is a mere servant.").

Thus, at common law, the negligence of an employee in performing an employer's non-delegable duties did not affect an injured employee's right to seek recovery from the employer. In *Bender,* an injured employee sued his employer for "failing to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work." 276 S.W. at 405. This Court discussed whether the negligence of another employee in causing the injury could be charged to the employer. *Id.* In addressing the question, this Court observed:

> The duty of the master to exercise ordinary care to furnish his servant a reasonably safe place in which to work is one of the duties owing by the master to his servant, ***which cannot be delegated*** to a fellow servant so as to relieve the master from liability for the negligent performance by such servant of an act constituting part of such duty of the master.

Id. at 406 (emphasis added). This Court then examined the act of the negligent employee to determine whether it "was an act affecting the safety of the place where plaintiff was directed to work." *Id.* This Court concluded that the negligent employee's act "affected the security of the place wherein plaintiff was instructed to work, in a negligent manner. For that negligence [employer] was liable, regardless whether or not [the negligent employee] was ordinarily a fellow servant of the plaintiff." *Id.* at 408. Significantly, this Court endorsed the following principle:

> The [employer is] liable for the negligent performance of any act directed by it to be performed by any employee, whether of high or the most lowly degree, which affected the safety of [the place of work]. The duty of exercising ordinary care to keep such place reasonably safe [is] a continuing and nondelegable duty. For the negligent act of the employee, to whom such duty was assigned, the defendant [employer] is liable.

Id. Though an employer remains liable to an injured employee for breach of the employer's non-delegable duties, even where the negligence of a co-employee is the cause of the breach, the pressing question is whether the negligent co-employee is also liable. At early common law, the answer to this question was no. The "nondelegable duties are duties of the employer to his employees ***and not of fellow***

servants to each other." *Kelso*, 85 S.W.2d at 534 (emphasis added). In fact, for almost 80 years, since this Court's decision *Kelso*, the common law has consistently held that co-employees do not owe fellow employees the legal duty to perform the employer's non-delegable duties. Therefore, it is not simply the existence of a duty on the part of the co-employee, but the nature of the duty involved which is the key in determining whether a co-employee may be held liable. *Gunnett*, 70 S.W.3d at 638.

Although the test and analyses have evolved over time, the core principal has not wavered – an employee does not owe fellow employees a legal duty to perform an employer's non-delegable duty. At the beginning of the twentieth century, the conduct of co-employees was divided into two categories—nonfeasance and misfeasance. *See, e.g., McGinnis v. Chicago R.J. & Ry. Co.*, 200 Mo. 347, 98 S.W. 590, 592 (1906); *Jewell v. Kansas City Bolt & Nut Co.*, 231 Mo. 176, 132 S.W. 703, 711 (1910). The distinction defined the boundary of co-employee liability to fellow employees.

> There are two classes of cases ... one wherein the master is held liable for the nonfeasance or negligent failure of the servant to perform a duty, and the other where the master is held liable for the misfeasance, or negligent performance of a duty. In the one case the servant simply negligently fails to do what should have

> been done, and in the other he negligently does what should have been done and properly done. ***In the first class of cases the servant is not liable to third parties,*** but the master under the rule of respondeat superior is liable. ***In the second class both are liable to third parties;*** the servant because he actually does the wrongful act occasioning the injury, the master because, under the rule of respondeat superior, he is liable for the negligent act of the agent done within the scope of his employment, and in the course and performance of his master's business.

McGinnis, 98 S.W. at 592 (emphasis added); *see also Jewell*, 132 S.W. at 711 ("[T]he law is well settled in this state that the foreman is not liable in damages for personal injuries sustained by a servant of the master in consequence of the foreman's nonfeasance or mere neglect of duty.").

Nonfeasance, or the failure to perform a duty, "'refer[red] to the omission on the part of the agent to perform a duty ***which he owes to the principal by virtue of the relationship existing between them.***'" *McCarver v. St. Joseph Lead Co.*, 216 Mo. App. 370, 268 S.W. 678, 690 (1925) (quoting 7 Labatt's Master and Servant 7974) (emphasis added). The duties owed by an agent to a principal included the duty to perform the principal's non-delegable duties. *See State ex rel. Badami v.*

Gaertner, 630 S.W.2d 175, 177 (Mo. App. E.D. 1982) (observing that at common law, nonfeasance results in agent's liability only to his principal); *Stanislaus v. Parmalee Indus., Inc.*, 729 S.W.2d 543, 546 (Mo. App. W.D. 1987) (holding duties alleged in petition were "all acts of omission of duties owed" by co-employee to his employer).

Thus, at early common law, there was a recognized "distinction between a breach of the employer's duty to provide a safe workplace," which could not result in a co-employee's liability to an injured co-worker, "and a breach of a personal duty of care," which could result in a co-employee's liability to an injured co-worker. *Gunnett,* 70 S.W.3d at 639 (citing *Tauchert v. Boatmen's Nat'l Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo. banc 1993)).

The distinction between nonfeasance and misfeasance as the means of defining co-employee liability continued after the Workers' Compensation Act was adopted in 1929. For example, in *Sylcox v. Nat'l Lead Co*., 38 S.W.2d 497, 501 (Mo. App. E.D. 1931), the Court observed that the Act's exclusivity provision applies "only to rights and remedies theretofore existing in favor of the employee against his employer, and does not serve to take away the employee's common-law right of action against the offending third party." Specifically, the Court held:

> [T]he whole scope and purpose of the act is to fix and determine the rights and liabilities as between employer and

> employee; the liability of one at common law is left unaffected by the act, except in so far as it has been expressly taken away by it; and where one has, and can have, no liability under the act, he is likewise in no position to claim any immunities under it.

Id. The Court concluded that co-employees are "third parties" within the meaning of the Act and remain exposed to suit insofar as otherwise available at common law. *Id*. In describing the "common-law right" to pursue a co-employee, the Court restated the boundaries of liability along the nonfeasance/misfeasance line:

> [T]here is no doubt that at common law one servant is liable to another for his own misfeasance, and there is nothing in the Compensation Act which destroys such liability, or in any way disturbs the common-law relationship existing between coemployees.... The right of the injured employee to sue the third person depends upon whether the latter is subject to the act. Since the coemployee whose misfeasance produces the injury is not subject to the act, he must be regarded as a "third party," and therefore amenable to an action at common law.

Id. at 502. Thus, the adoption of the Workers' Compensation Act in 1929 had no impact on the common law as it related to an injured employee's right to sue a negligent co-employee for misfeasance (negligent performance of a duty) but not for nonfeasance (negligent failure to perform a duty, including the employer's non-delegable duties).

Over time, Missouri courts shifted the focus of the analysis to whether a co-employee owed an injured third party a legal duty of care. *See Lambert v. Jones*, 339 Mo. 677, 98 S.W.2d 752, 757 (1936). In *Lambert*, this Court articulated the following test to determine when a duty of care is owed by an employee to a co-employee:

> In short, [an employee] would be liable whenever he is guilty of such negligence as would create a liability to another person ***if no relation of master and servant or principal and agent existed between him and someone else.***

Id. (emphasis added).

Lambert's shifted emphasis to determining whether a legal duty exists independent of a master-servant relationship as a means of demarcating liability to injured third parties did not modify the common law with respect to workplace injuries. *Hansen v. Ritter*, 375 S.W.3d at 213.

> Co-employees do not independently owe a duty to fellow employees to perform the employer's non-delegable duties. If co-employees are assigned to perform the employer's non-delegable duties, it is solely by virtue of the master-servant relationship. Stated differently, a co-employee has no duty to perform the employer's non-delegable duties independent of the master-servant relationship. Thus, the employer's non-delegable duties are not duties owed by co-employees to fellow employees "under the law" as to subject a co-employee to liability "*without regard to whether he is the servant ... of another or not.*"

Id. (quoting *Lambert*, 98 S.W.2d at 757) (emphasis in original).

3. The 2005 Amendments to the Workers' Compensation Act Have Not Altered the Common Law Non-Delegable Analysis of Co-Employee Liability.

The 2005 amendments to the Workers' Compensation Act required the Act to be strictly construed. § 287.800 R.S.Mo. (Cum. Supp. 2012). In *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010), the Western District found the change to strict construction eliminated the immunity previously afforded to co-employees under the Workers' Compensation Act and restored the remedy against

co-employees as it existed under common law. *Id.* at 423-25. In response to the decision in *Robinson*, the Legislature amended the Act in 2012 to expressly extend immunity to co-employees, unless the co-employee "engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." Section 287.120 (Cum. Supp. 2013).

In *Hansen*, the Western District clarified its decision in *Robinson*. The *Hansen* Court explained that *Robinso*n did not comment on the contours of a co-employee's common law liability for the negligent injury of fellow employees in the workplace. *Hansen*, 375 S.W.3d at 207-08. Thus, *Robinson* did not alter the co-employee's defense of no liability when carrying out the employer's non-delegable duties. Rather, as held in *Gunnett, supra*, the basis for the defense lies in the common law, not the statutory provisions of the Workers' Compensation Act.

The decision in *Hansen* reaffirmed the common law principle that a co-employee owes no "independent" or "personal" duty to a fellow employee to perform the employer's non-delegable duties:

> Because a co-employee does not owe fellow employees the duty to perform an employer's non-delegable duties independent of the master-servant relationship, said duties are not personal duties of the co-employee and cannot support an actionable claim of negligence.

Hansen, 375 S.W.2d. at 214. In *Hansen*, the Court affirmed the dismissal of a wrongful death action brought by the mother of a deceased employee against two co-employees of the deceased employee. The deceased employee died when a guardrail gave way as he was leaning over a wire-stranding machine causing him to become entangled in the machine's moving parts. *Id*. The petition in *Hansen* alleged that the co-employees undertook to provide a safe working environment, including correcting hazardous conditions and warning employees of unsafe conditions. *Id*. at 204. The Court held that the co-employees owed no personal duty to provide a safe workplace. *Id*. at 219.

In *Carman*, 406 S.W.3d at 77-78, the Eastern District agreed with the Western District's analysis in *Hansen* and affirmed summary judgment in favor of the defendant co-employee holding that the plaintiff was unable to establish an independent duty by the co-employee to exercise ordinary care and safety. Similarly, in *Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W.3d 293 (Mo. App. E.D. 2013), the Appellate Court affirmed the dismissal of negligence claims against co-employees based on the plaintiffs' exposure to diacetyl at a popcorn production facility. In affirming the dismissal, the Court noted that despite the plaintiffs' allegations that the co-employee defendants knew or should have known that the diacetyl and its related compounds could become airborne in the work environment and that a closed system was required to prevent inhalation, the only

duty relevant to plaintiffs' allegations was the employer's non-delegable duty to provide a reasonably safe work environment. *Id*. at 303. The Appellate Court concluded that no actionable negligence was alleged because the co-employee defendants did not have an independent personal duty despite allegations that the co-employees knew or should have known of the dangers present. *Id*.

4. Plaintiffs' Allegations Regarding Duty Fall Squarely Within an Employer's Non-Delegable Duties and, therefore, Fail to Satisfy the Threshold Requirement.

Plaintiffs' arguments and allegations fail to establish an independent personal duty owed by the co-employee Defendants. The duties alleged in the present case fall squarely within the non-delegable duties of the employer, including the duty to provide a safe workplace, safe equipment, competent employees, to warn employees about the existence of dangers and to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety. The duties alleged in Plaintiffs' Second Amended Petition are: (1) Defendants had a duty to provide a safe working environment to Kevin Parr; (2) Defendants had a duty, to monitor the physical condition of Kevin Parr to determine whether he was fit to drive a tractor-trailer; and (3) Defendants had a duty to determine whether Kevin Parr was in compliance with the Federal Motor Carrier Safety Administration Regulations. (L.F. 30).

Missouri courts have consistently held such duties fall within an employer's non-delegable duties and are insufficient to impose liability on a co-employee. Furthermore, and most importantly for purposes of this appeal, the undisputed facts and the summary judgment record establish that Plaintiffs cannot establish a personal duty on behalf of the Defendants outside of the employer's non-delegable duties.

Missouri cases offer guidance as to when a personal duty will be found on the part of a co-employee. First, Missouri courts have consistently held that the failure to provide a safe workplace is a non-delegable duty of the employer. *See e.g. Hansen*, 375 S.W.3d at 208. Second, Missouri courts have held that providing supervisory direction to an employee is insufficient to establish a personal duty. *See e.g. Lyon v. McLaughlin*, 960 S.W.2d 522, 526 (Mo. App. W.D. 1998). In addition, enforcement of rules for the purpose of enhancing safety is expressly recognized as an employer's non-delegable duty under Missouri law. *See Gunnett*, 70 S.W.3d at 638 and cases cited therein.

In the present case, Plaintiffs' allegations of failure to provide a safe working environment, to monitor the physical condition of Mr. Parr to determine whether he was fit to drive a tractor-trailer and to determine whether Mr. Parr was in compliance with the Federal Motor Carrier Safety Administration Regulations, are encompassed by the employer's non-delegable duties and do not constitute

affirmative personal duties of co-employee Defendants independent of the master-servant relationship. Furthermore, there is no allegation that any Defendant directed Mr. Parr to engage in any activity outside of his normal duties of driving a truck. *Id*. Rather, Plaintiffs contend that Defendants were negligent in failing to provide a safe work place, in supervising and monitoring Mr. Parr and in enforcing safety rules. As discussed above, such activities have consistently been found insufficient as a matter of law to establish an independent, affirmative duty on the part of a co-employee.

5. Authorities cited by Plaintiffs Fail to Establish the Requisite Affirmative Personal Duty Necessary for an Action against a Co-Employee.

a. Deposition Testimony Submitted after Grant of Summary Judgment Should Not be Considered.

Plaintiffs' reliance on the provisions of the Federal Motor Carrier Safety regulations and the testimony of their retained expert, William Hampton, in an attempt to establish a personal duty on the part of Defendants is misplaced. First, the deposition of William Hampton was initially presented to the trial court after the court granted summary judgment in favor of the Defendants. (L.F. 163, 179-208). Defendants filed their motion for summary judgment on February 17, 2012. (L.F. 47-83). Plaintiffs requested and received additional time to respond to

Defendants' motion for summary judgment. (L.F. 6). Plaintiffs filed their response to the motion which included select portions of certain depositions on May 7, 2012. (L.F. 87–149). Plaintiffs did not file an affidavit of their expert witness, William Hampton, with their response. *Id.* In fact, Plaintiffs did not file the unsigned November 6, 2012 deposition of William Hampton with the trial court until after the court granted Defendants' motion for summary judgment on December 31, 2012. (L.F. 163-209). Plaintiffs first filed the unsigned deposition transcript of William Hampton when they filed their Motion to Alter, Amend, Modify, Correct or Reconsider Judgment and/or New Trial on January 9, 2013. *Id.* Eventually, the signature page for the deposition was filed on February 13, 2013. (L.F. 209).

Missouri courts have consistently held that depositions and affidavits filed with the trial court after it has ruled on a motion for summary judgment should not be considered. *See Mueller v. Bauer*, 54 S.W.3d 652, 657-58 (Mo. App. E.D. 2001). Accordingly, the testimony of William Hampton and the additional testimony of Melany Buttry and Charles Breeden that was filed for the first time after summary judgment was granted were not properly before the trial court and should not be considered on appeal. *Id.*

Second, as discussed *infra*, duty is not established by a party's testimony or the testimony of a retained expert; rather, it is an issue of law to be determined by

the court based on the circumstances of the case and relationship of the parties. *See Burns*, 854 S.W.2d at 452-53 (duty is a matter of law that cannot be established by expert opinion). Accordingly, contrary to Plaintiffs' contentions on appeal, the opinions of William Hampton do not establish a duty on the part of Defendants. Further, since the existence of duty is an issue of law not fact, any statement by Defendants in their deposition concerning their opinions as to their respective duties are not statements of fact within their personal knowledge and therefore, do not constitute binding admissions of the existence of a personal and affirmative duty. *See Jockel v. Robinson*, 484 S.W.2d 227 (Mo. 1972).

b. The Testimony of Plaintiffs' Retained Expert Witness and Defendants Fails to Establish a Personal Duty Independent of Defendants' Employment.

In addition, the cited testimony does not support Plaintiffs' contention that any of the Plaintiffs had a personal, independent duty to provide Mr. Parr a safe workplace, monitor Mr. Parr's health condition and enforce safety regulations. For example, the actual testimony of Mr. Breeden and Melany Buttry was that Charles Breeden, Melany Buttry and Wendy Cogdill "share responsibility for making sure the drivers Breeden Transportation put [sic] out on the road are safe and able to operate the truck safely." (L.F. 116, 103). This testimony does not create an issue

of material fact or establish a legal duty on the part of Charles Breeden, Melany Buttry and Wendy Cogdill, independent of their employment. Rather, the responsibility described is entirely dependent upon their employment. Similarly, the cited testimony of Melany Buttry that was presented following the entry of summary judgment was insufficient to establish an independent, personal duty. Specifically, Melany Buttry testified that regulations require the ***carrier*** to conduct an investigation of an accident to determine if it was preventable. (L.F. 175). Once again, such testimony is wholly insufficient to establish a personal, independent duty on the part of Melany Buttry.

Furthermore, the so-called "admissions" of the co-employees regarding the placement of qualified and healthy drivers cannot be taken as judicial admissions on the existence of their duty under the law, a question for the Court to decide, or even as an admission of fact. As discussed above, only statements of fact, within the personal knowledge of the declarant, can be considered admissions. Just as an expert may not establish the existence of a legal duty, neither can a layperson establish or create a duty by their testimony.

c. Federal Motor Carrier Safety Regulations Do Not Establish a Personal Duty, Independent of Defendants' Employment.

Similarly, Plaintiffs' contention that the provisions of the Federal Motor Carrier Safety Regulations establish a personal duty on the part of co-employees that is independent of an employer's duty to provide a safe workplace, provide competent employees, and enforce safety rules, is unavailing. Plaintiffs fail to cite any authority that supports their contention. Plaintiffs cite *Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.3d 820 (Mo. App. E.D. 2005) for the contention that the Federal Motor Carrier Safety Regulations establish a personal, affirmative duty of one co-worker to another. However, Plaintiffs' reliance on *Payne* is misplaced.

First, the Court in *Payne* was applying Arkansas law. Second, *Payne* did not involve a case in which the existence of duty was at issue. Nor did it involve the duties owed by one co-employee to another co-employee. Instead, in *Payne*, a train engineer brought a personal injury action against the owner of a tractor-trailer seeking recovery for a collision that occurred at a railroad crossing. The existence of a duty by the driver of the tractor trailer was not at issue in *Payne*. Rather, the issue on appeal was the propriety of the trial court admitting testimony by the corporate designee of the defendant tractor-trailer owner. The testimony at issue concerned a provision of the Federal Motor Carrier Safety Regulations and whether the driver complied with a particular Regulation. The Regulation required all drivers of a commercial motor vehicle to stop the commercial motor vehicle within 50 feet, and not closer than 15 feet, of the railroad track before crossing the

track. The Appellate Court held that the trial court properly admitted the testimony as evidence of negligence, even though a violation of the Regulation was not included in the pleadings. However, contrary to Plaintiffs' assertions, the Court did not hold that the regulations established whether a driver of a tractor-trailer owed a duty as the existence of a duty was not at issue in that case, as it is here.

Plaintiffs' reliance on *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. banc 1995) is also misplaced. The decision in *McHaffie*, dealt with the admissibility of federal regulations at trial. *McHaffie* did not address or hold whether a federal regulation may be utilized to establish the existence of a personal legal duty of an employee. In fact, this Court held that evidence of the lack of testing, inexperience, failure of a driver to maintain log books on unrelated trips and the employer's failure to maintain adequate records were not relevant to a negligence claim against the individual driver, although they may be relevant to a negligent entrustment claim against the employer.

Moreover, courts have repeatedly recognized that the Federal Motor Carrier Safety Regulations do not create a private cause of action for personal injuries; rather, any cause of action created by the regulations is limited to commercial disputes. *See e.g.*, *Stewart v. Mitchell Transp*., 241 F.Supp.2d 1216 (D. Kan. 2002) ("Section 14704(a)(2) creates a private right of action for damages in commercial disputes involving violations of the Motor Carrier Act and its regulations, but not

for personal injury actions such as the one in this case."); *Schramm v. Foster*, 341 F.Supp.2d 536, 547 (D. Md. 2004) ("[Section 14704(a)(2)] was intended to apply only to commercial damages, not personal injuries."); *Crosby v. Landstar*, 2005 WL 1459484 (D. Del. June 21, 2005) ("Section 14704 does not give this court jurisdiction over negligence claims.").[1] Accordingly, the regulations do not establish duties independent of the duties recognized under Missouri common law on negligence claims, such as here. In fact, Plaintiffs' Second Amended Petition does not assert a claim under the Federal Motor Safety Regulations, only common law negligence and "something more."

Furthermore, the Regulations themselves fail to establish an independent duty between co-employees of a motor carrier. The only regulation referenced in

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[1] One district court found a right to bring an action for personal injuries under the Interstate Transportation Act in *Marrier v. New Penn Motor Express, Inc*., 140 F. Supp. 2d 326 (D. Vermont 2001). In that case a dock worker, who suffered exposure to toxic chemicals while unloading a motor carrier's truck, was permitted to bring an action against a motor carrier for failing to provide safe and adequate equipment. However, the case did not involve a claim against a co-employee or personal duties of an employee of a motor carrier to fellow employees. Significantly, other courts have declined to follow the decision in *Marrier*.

Plaintiffs' Second Amended Petition is 49 CFR § 391.11. Section 391.11 entitled "General Qualifications of Drivers" provides:

> (a) A person shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle. Except as provided in § 391.63, a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless that person is qualified to drive a commercial motor vehicle.
>
> (b) Except as provided in subpart G of this part, a person is qualified to drive a motor vehicle if he/she—
>
> > (4) Is physically qualified to drive a commercial motor vehicle in accordance with subpart E—Physical Qualifications and Examinations of this part;

The physical qualifications for drivers are set forth in 49 CFR § 391.41. Section 391.41 provides in pertinent part:

> (a)(1)(i) A person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so, and, except as provided in paragraph (a)(2) of this section, when on-duty has on his or her person the original, or a copy, of a current medical

> examiner's certificate that he or she is physically qualified to drive a commercial motor vehicle.

Section 391.41 provides further in subpart 3 as follows:

> (3) A person is physically qualified to drive a commercial motor vehicle if:
>
> (i) That person meets the physical qualification standards in paragraph (b) of this section and has complied with the medical examination requirements in § 391.43;

Accordingly, based on the undisputed facts, Mr. Parr met the physical qualifications standards as he complied with the medical examination requirements and was certified by a licensed medical examiner as required under 49 CFR § 391.43. In addition, the Medical Examination Report stated, as certified by Mr. Parr, that he had no medical history or clinical diagnosis for the conditions set forth in paragraph (b). Furthermore, the above Regulations do not impose a personal duty on Charles Breeden, Melany Buttry or Wendy Cogdill.

Finally, Plaintiffs' reliance on 49 CFR § 392.1 is misplaced. First, § 392.1 is contained in a different Part of the Federal Motor Carrier Safety Regulations than the regulations concerning driver qualifications and physical qualification

standards. The placement of 49 CFR § 392.1 is critical in that Section 392.1 is expressly limited to the rules contained in Part 392. Section 392.1 states:

> Every motor carrier, its officers, agents, representatives, and employees responsible for management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, shall be instructed in and comply with the rules ***in this part***.

(Emphasis added). Accordingly, this Section does not address or apply to the other Parts of the Federal Motor Carrier Safety Regulations upon which Plaintiffs rely, such as Parts 390 and 391. Second, § 392.1 simply does not alter Missouri common law and create a new duty on the part of one co-employee to another co-employee of a motor carrier. The Regulation requires that certain employees be instructed on, and comply with, the rules in Part 392. Furthermore, assuming, *arguendo*, that it could support the imposition of a duty, any such duty is not independent of the individual's employment. Rather, the duty, if any, is directly related to and is based on the individual's employment and the employer's non-delegable duty to rules to enhance safety. The Regulation does not impose or create a personal, independent duty on employees' and the motor carrier employer's non-delegable duties. Furthermore, Plaintiffs have not cited any

authority to support their contention that the regulations create a personal duty independent of their employment.

Moreover, Plaintiffs cannot contend with any sincerity that Mr. Parr's individual co-employees had an "independent" or "personal" duty to second-guess the medical doctor who interviewed, examined, and certified Mr. Parr healthy enough to drive a truck. A single accident, or even a couple of accidents blamed by Mr. Parr on an oncoming vehicle that enters his traffic lane or on fatigue, cannot be sufficient to impose a personal and independent duty on co-employees to question his health or medical conditions that were fully examined and discussed with him by a doctor, a mere six months before. The Federal Motor Carrier Safety Regulations do not make physicians out of co-employees.

Also, any right of Melany Buttry, Charles Breeden or Wendy Cogdill to inquire into a co-employee's health or medical conditions is limited by privacy laws, and their right to intrude on Mr. Parr's health conditions is no greater than, and in fact is inherent in, whatever limited authority they may have under the same Federal Motor Carrier Safety Regulations. In that light, it must be clear that the "duty" they may have under those Regulations is dependent, not independent, on their status as employees of the motor carrier. In other words, whatever duty they have to "enforce" the health regulations is exclusively a result of their employment, not independent of it. Melany Buttry, Charles Breeden and Wendy

Cogdill would not have any right to ask Mr. Parr anything about his health or medical condition outside of their own employment status. Therefore, the duty is entirely dependent on their status as co-employees, not independent or personal in any way, and therefore, not a basis for imposing liability on a co-employee. Furthermore, this falls within the employer's non-delegable duty to enforce rules regarding employee conduct for purposes of enhancing safety.

Additionally, the Federal Motor Carrier Safety Regulations do not transform an employer's "non-delegable" duty into a "delegable" duty. Under the cited provisions, the motor carrier could not escape liability or responsibility for compliance with the Regulations, simply because their officers, employees and other representatives also have a duty to comply. The motor carrier could not say that it delegated its duty of instruction and compliance to its employees, and thereby abrogate its own responsibility. The employees are only responsible for compliance because of their employment relationship with the motor carrier. In other words, making the co-employees responsible for compliance does not amount to a "delegation" of those duties and an abrogation of the motor carrier's duties to its own drivers. Under this analysis, the Federal Motor Carrier Safety Regulations do not impose an independent or personal duty on the co-employees to perform the non-delegable duties enforcing safety regulations or rules of the motor carrier.

If Plaintiffs' argument, that all employees have an independent duty under 49 CFR § 392.1 (Appellants' Substitute Brief, pp. 15-16), were to be accepted, then in every trucking accident, every employee of the trucking company would be liable for any damages resulting from any violation of that Regulation. The employing motor carrier would not be liable, because, under Plaintiffs' argument, the carrier had a delegable duty that it successfully delegated to its employees. This certainly cannot be a proper interpretation of § 392.1 and Missouri law. Therefore, the only other interpretation is that the motor carrier retains its non-delegable duty, and the co-employees have no independent, personal duty to perform the employer's non-delegable duty.

Therefore, the trial court properly granted summary judgment as Plaintiffs cannot establish the requisite duty or breach for imposing liability on Mr. Parr's co-employees.

6. Plaintiffs are Unable to Establish Defendants Breached a Duty as a Matter of Law.

Even if it were assumed, *arguendo*, that Defendants had a personal duty, independent of their employment, to provide a safe work environment, monitor the health of their co-employee, and enforce motor carrier safety rules, which Defendants deny for the reasons discussed above, summary judgment remains proper as Plaintiffs are unable to establish that Defendants breached such a duty.

The fitness of truck drivers is monitored by the certification process set forth in the Federal Motor Carrier Safety Administration Regulations, 49 CFR § 391.1, *et seq.*, which require drivers to be certified at least every two years. The specific regulations are discussed more fully *infra*. However, a driver is not allowed to operate a commercial motor vehicle until certified as physically fit by a licensed medical examiner. Federal Motor Carrier Safety Administration Regulations, 49 CFR § 391.41. (L.F. 59). The purpose of the medical examination is to detect the presence of physical, mental, or organic conditions of such a character and extent as to affect the driver's ability to operate a commercial motor vehicle safely. 49 CFR § 391.43 (L.F. 60). In the instant case, Mr. Parr was certified by an independent medical examiner on November 2, 2007, for the full two-year certification period, which is the maximum amount of time allowed for certification. (L.F. 75-77). In fact, Plaintiffs' own expert, William Hampton, testified that Mr. Parr was certified to operate a commercial vehicle the entire time he was employed by Breeden Transportation, Inc. (L.F. 193).

Plaintiffs essentially argue that the co-employee Defendants should not have relied on the federally mandated medical certification process and inquired further into Mr. Parr's personal health information to determine if it was safe to permit him to perform his job as a truck driver. Section 2 of the standard Medical Examination Report form, entitled "Health History," requires the driver to answer

"yes" or "no" to a series of health-related questions. (*See* L.F. 75; Appendix A-1). Any "yes" answers must be discussed by the independent medical examiner and indicated in the section immediately below. *Id*. Mr. Parr's Medical Examination Report indicates that Mr. Parr did not have a history of heart disease, heart attack, other cardiovascular conditions, diabetes, and/or sleep-related conditions. *Id*. The report further indicates that Mr. Parr had a history of "narcotics or habit forming drug use." (L.F. 75; Appendix A-1). Plaintiffs' argument that this establishes a breach of duty is disingenuous. Plaintiffs neglect to mention that the affirmative answer to "narcotics or habit forming drug use" was explained by the medical examiner as reflected in the Medical Examination Report. (L.F. 75; Appendix A-1). The explanation listed by the medical examiner for this response was that Mr. Parr "smokes." *Id*. Despite the fact that Mr. Parr disclosed no medical condition and despite the medical examiner's determination and certification of Mr. Parr as physically fit to operate a commercial motor vehicle, Plaintiffs argue that the affirmative answer given by Mr. Parr was a "red flag" without giving consideration to the "yes" answer and the remaining information on the form. The answer was based upon the fact that Mr. Parr "smokes"—hardly a disclosure warranting a "red flag." (*See* L.F. 75; Appendix A-1).

Moreover, Plaintiffs suggest that it was revealed ***after the fatal incident*** that Mr. Parr suffered from potentially disqualifying health conditions, such as

diabetes, coronary artery disease, hypertension, and possibly sleep apnea. (Appellants' Substitute Brief p. 20). Again, commercial drivers are required to discuss their health history with medical examiners. In fact, Mr. Parr denied having any of the aforementioned health conditions during his November 2007 examination and signed the form certifying the accuracy of the information provided to the medical examiner. (L.F. 75-77). In addition, the laboratory and test results did not indicate that Mr. Parr was suffering from these conditions. *Id.* Furthermore, the medical examine did not reveal these conditions. *Id.* Plaintiffs essentially contend that motor carriers and, in this case, their employees, cannot rely on the certification process established by the Regulations or on the truthfulness of certifications given by their employees. This is simply not the law and fails to establish that summary judgment was improper.

It is undisputed that Mr. Parr was medically certified to operate a commercial motor vehicle at all times as Plaintiffs' own expert concedes. (L.F. 193). It is also undisputed that Defendants did not have knowledge that Mr. Parr suffered from any health conditions. (L.F. 89-92) (Plaintiffs only dispute whether or not Defendants should have known). In fact, any potentially disabling health conditions were not known until after the fatal accident. Plaintiffs admit this. (Appellants' Substitute Brief, p. 19). Mr. Parr was in the best position to know of his own health conditions, and, if he truly did suffer from potentially disqualifying

conditions, he was either unaware of such conditions or purposefully concealed their existence. For example, Plaintiffs contend that Mr. Parr had a prescription for Januvia, an anti-diabetic drug, at the time of the accident. *Id.* at p. 5. However, as previously discussed, the Medical Examination Report indicates that Mr. Parr had no health history of or laboratory results indicating diabetes or of the other health conditions Plaintiffs allege should have been known to Defendants. (L.F. 75-77).

Furthermore, the fact that Mr. Parr had two prior accidents does not indicate that he had a health condition that impaired his abilities to operate a commercial motor vehicle. Mr. Parr's first accident predated the November 2007 medical certification and occurred when Mr. Parr had to swerve his vehicle to avoid an oncoming vehicle that had crossed the center-line and entered Mr. Parr's lane of traffic. (L.F. 121-23). The second accident on April 11, 2008, occurred because Mr. Parr "dozed off." (L.F. 126). There is no evidence that either accident was caused by a health condition. Regardless, Mr. Parr remained certified to operate a commercial vehicle at all times, as Plaintiffs' expert agrees. (L.F. 193).

Finally, the cited testimony of Charles Breeden, Melany Buttry and Wendy Cogdill cannot be construed as an admission by Charles Breeden, Melany Buttry and Wendy Cogdill respectively of a breach of a duty. A question of fact might arise on the issue of breach, if a duty was established, if the co-employees sent a driver out on the road when he had a recent stroke or heart attack, or if he was

suffering from the flu or severe abdominal problems that showed conspicuous manifestations, or if he had a head injury, two broken legs, blindness in one eye, or any other acute or chronically disabling condition. But, it is illogical to argue, and unreasonable to conclude, that these co-employees, with no medical education and no legal training, admitted having a legal duty to understand that dozing off on one occasion a few weeks earlier is a sign of the "hidden" or concealed health conditions that were subsequently discovered in the post-mortem investigation of Mr. Parr's accident.

III. PLAINTIFFS ARE ALSO UNABLE TO ESTABLISH "SOMETHING MORE" (RESPONSE TO PLAINTIFFS' POINT II).

In Point II, Plaintiffs raise many of the same arguments that are addressed in Point I. Defendants will attempt to not reassert responses to those same arguments again in this Point. Instead, in the interest of judicial economy, Defendants adopt and incorporate by reference the arguments contained above and will address the additional arguments raised in Appellants' Point II below.

Initially, Defendants respectfully suggest that the issue of "something more" is not reached in this case because Plaintiffs are unable to meet the threshold issue, which is determinative here; namely whether the Defendants' conduct was independent of their employer's non-delegable duties. As discussed above, the

2005 amendments to the Workers' Compensation Act require the Act to be strictly construed. Section 287.800 R.S.Mo. (Cum. Supp. 2012). In *Robinson*, the Western District found the change to strict construction eliminated the immunity previously afforded to co-employees under the Workers' Compensation Act and restored the remedy against co-employees as it existed under common law. *Id*. at 423-25. Therefore, the Court suggested that the "something more" exception no longer applied. *Id*.

In *Hansen*, the Western District clarified its decision in *Robinson* and confirmed that a "co-employee's duties owed to fellow employees do not include the duty to perform the employer's non-delegable duties, as those duties necessarily derive from, and not independent of, the master-servant relationship." 375 S.W.3d at 214. The *Hansen* Court explained that *Robinso*n did not comment on the contours of a co-employee's common law liability for the negligent injury of fellow employees in the workplace. *Id*. at 207. Therefore, *Robinson* did not alter the co-employee's defense of no liability when carrying out the employer's non-delegable duties. Rather, as held in *Gunnett, supra*, the basis for this defense lies in the common law, not the statutory provisions of the Workers' Compensation Act.

Thus, the decision in *Hansen* reaffirmed the common law principle that a co-employee owes no "independent" or "personal" duty to a fellow employee to perform the employer's non-delegable duties. 375 S. W.3d at 214. In *Hansen*, the

Court held than even under the 2005 amendments, a plaintiff must allege "something more" than a breach of an employer's non-delegable duties to establish a duty to support a claim against a co-employee.

In *Leeper*, *supra*, the Western District did not overrule its decision in *Hansen.* Rather, the decision in *Leeper* reinforces the principle that the threshold issue is whether the injury is attributable to a breach of the employer's non-delegable duty. *Leeper*, 440 S.W.3d at 483-484. *Leeper* further confirms that, if a workplace injury is "attributable in any manner" to the employer's non-delegable duties, then the co-employee "can owe no duty of care in negligence, and the co-employee's negligence is chargeable to the employer." *Id.* at 496, n. 16. Furthermore, risks that are attendant to performing the employer's work ***as directed*** are necessarily subsumed within the employer's non-delegable duties, and cannot support an independent personal duty owed by a co-employee. *Kelso,* 85 S.W.2d at 534. As in *Hansen*, the issue of "something more" is not reached in the present case because, as discussed above, the allegations of duty fall squarely within the employer's non-delegable duties – the duty to provide a safe workplace and duty to enforce safety rules.

Even, assuming *arguendo,* that the injury to Kevin Parr was not attributable in any manner to the employer's non-delegable duties, Missouri cases demonstrate that "something more" is not present here. In *Leeper*, the Western District

disagreed with decisions by this Court and other Districts of the Missouri Court of Appeals with respect to what constitutes "something more." 440 S.W.3d at 445. The *Leeper* Court suggested that the "refined something more" test was based on a liberal construction of the Workers' Compensation Act. *Id*. The *Leeper* Court explained that a strict construction of the Workers' Compensation Act required a different test for "something more." *Id*. That test is whether "the [employer] ... expose[d] the [employee], in the discharge of his duty, to perils and dangers against which the master [could have] guard[ed] by the exercise of reasonable care." *Id*. at 495 (quoting *Moles v. Kansas City Stock Yards Co. of Me.*, 434 S.W.2d 752, 754 (Mo. App. W.D. 1968)). In other words, if the employer has established a reasonably safe workplace, safe methods of operation, sufficiently trained and competent employees, and the workplace was rendered unsafe by the acts of a co-employee, "something more" is present. *Id*.

In the present case, Plaintiffs allege that Defendants had a duty to provide a safe working environment to Kevin Parr, to monitor the physical condition of Kevin Parr to determine whether he was fit to drive a tractor-trailer, and to determine whether Kevin Parr was in compliance with Federal Motor Carrier Safety Administration Regulations. These allegations contend that the employer exposed Mr. Parr to perils and damages which Plaintiffs suggest could have been prevented or guarded against by retraining, ordering further medical examinations,

and/or requiring re-certification following Mr. Parr's second accident. Thus, even under the standard or test suggested by the Court in *Leeper*, "something more" is simply not present.

Furthermore, under the refined standard utilized in cases such as *Carman*, *Amesquita*, *Taylor* and *Burns v. Smith*, 214 S.W.3d 335 (Mo. banc 2007), "something more" is clearly not present based on the undisputed facts. These decisions, as well as others, hold that in order for a co-employee to be personally liable, the co-employee must have done "something more" beyond performing or failing to perform normal job duties. These cases hold that a co-employee must have engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. For example, in *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922, 927 (Mo. App. W.D. 1995), a supervisor was found to owe a personal duty to a subordinate where the supervisor personally arranged for the employee to be dangled from the tines of a forklift over a vat of scalding water into which the employee fell and died. Similarly, in *Craft v. Scaman*, 715 S.W.2d 531, 537-38 (Mo. App. E.D. 1986), the president of a fireworks company was found to have liability for an employee's injuries where the president personally held a board directly against a spinning spool of fuse to prop it up and the fuse caught fire and burned the employee that was operating the machine. In *Amesquita*, 408 S.W.3d at 303, the Eastern District affirmed the grant of a motion to dismiss a

petition asserting a claim of co-employee negligence. The court held that "[i]n order for an employee to become personally liable to a co-employee for injuries suffered in the scope and course of employment, the employee must have done ***'something more' beyond performing or failing to perform normal job duties***[.]" (emphasis added).

In *Burns v. Smith*, *supra* at 336, the president of an employer personally welded over a corroded and rusted area of a salvage water pressure tank and directed the plaintiff to "run it until it blows." This Court held that this affirmative act was sufficient to establish a personal duty. *Supra* at 339. Finally, in *Pavia v. Childs*, 951 S.W.2d 700, 702 (Mo. App. S.D. 1997), a manager of a grocery store was found to have a personal duty when the manager was operating a forklift to elevate an employee 15 feet off the floor to reach items in the warehouse.

The facts of this case simply do not parallel those giving rise to "something more." Here, co-employee Defendants' alleged failure to provide a safe working environment, to monitor Mr. Parr's health during the six months after his certification medical examination, and to ensure Mr. Parr's compliance with safety regulations is insufficient to satisfy either version of the "something more" test. Plaintiffs' allegations in their Second Amended Petition concerning failure to provide a safe working environment and enforce safety regulations have been consistently held to fall within the employer's non-delegable duties to provide for

the safety of its employees. This Court directly addressed this issue in *Taylor* and found that such allegations of negligence do not constitute "something more" as they are not purposeful, affirmatively dangerous conduct creating an additional danger beyond that normally faced in the job-specific work environment. 73 S.W.3d at 622.

More significantly, Plaintiffs have alleged nothing more than Defendants breached the employer's non-delegable duties: (1) to provide a safe workplace; (2) to provide safe equipment in the workplace; (3) to warn employees about the existence of dangers which the employees could not reasonably be expected to be aware; (4) to provide a sufficient number of competent fellow employees; and (5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety. (L.F. 29-34). As such, the threshold issue has not been met and the issue of "something more" is not reached. In the present case, there is no genuine dispute of material fact, and Plaintiffs' suit is barred against Defendants based on the lack of a personal, independent duty and inability to establish "something more."

Plaintiffs' conclusory allegation that Defendants' actions constituted "something more" is wholly insufficient to establish liability. First, conclusory allegations by their very nature are insufficient to establish the necessary facts to support a claim. *See Hall v. Podleski*, 355 S.W.3d 570, 578 (Mo. App. S.D. 2011).

Second, based on the undisputed facts, Plaintiffs cannot establish under Missouri law the essential element of duty to support their claims for negligence or "something more" against Defendants. As discussed above, Plaintiffs' reliance on the deposition of their expert witness, William Hampton, is misplaced. First, the deposition was not filed until after summary judgment was granted. (L.F. 163; 179-208). Second, the opinions and conclusions of an expert witness do not establish a duty which is a question of law for the Court. Furthermore, the citations to excerpts of Defendants' testimony of Defendants fail to establish a duty.

Finally, Plaintiffs mistakenly argue that summary judgment is improper because the 2012 Amendments to the Workers' Compensation Act may not be applied retroactively. Plaintiffs' argument fails to recognize that summary judgment is not dependent on the Workers' Compensation Act or any amendments thereto. The more fundamental question, which the trial court addressed in entering summary judgment, is whether a duty exists between the parties at common law. The common law principle that a co-employee owes no duty to fellow employees to perform an employer's non-delegable duties remains good law and exists independently of the Workers' Compensation Act. *See Carman*, 406 S.W.3d at 78, n.4.; and *Leeper*, 440 S.W.3d at 489.

Because Plaintiffs cannot demonstrate all of the elements to support their cause of action, the claim fails as a matter of law and the trial court's granting of summary judgment should be affirmed on that basis.

CONCLUSION

For the foregoing reasons, the judgment granting Defendants Charles Breeden, Wendy Cogdill n/k/a Wendy Cogdill Knaup, and Melany Buttry's Motion for Summary Judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

COME NOW counsel for Defendants/Respondents Charles Breeden, Wendy Cogdill n/k/a Wendy Cogdill Knaup, and Melany Buttry, and for their Certificate of Compliance, state as follows:

1. The undersigned do hereby certify that Defendants/Respondents' Brief includes the information required by Rule 55.03.

2. The undersigned do hereby certify that Defendants/Respondents' Brief complies with the limitations contained in Rule 84.06(b), and contains 12,352 words.

3. Microsoft Word 2010 was used to prepare Defendant/Respondent's Brief.

/s/ Michael S. Hamlin

CERTIFICATE OF SERVICE

I hereby certify that Respondents' Substitute Brief was filed electronically with the Clerk of the Court this 18th day of December, 2014, to be served by operation of the Court's electronic filing system upon the following or U.S. mail for parties not registered with CM/ECF:

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