SUPREME COURT OF MISSOURI

PAIGE PARR, JERIMY MOREHEAD and **CHARLES PARR,**	)	
Plaintiffs/Appellants,	)	
vs.	)	Appeal No. **SC94393**
CHARLES BREEDEN, WENDY COGDILL and **MELANIE BUTTRY,**	)	
Defendants.	)	

APPEAL FROM THE CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI

34TH JUDICIAL CIRCUIT

HONORABLE FRED W. COPELAND

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal from summary judgment entered on March 4, 2013 by the Circuit Court of New Madrid County, Missouri in favor of Defendants Charles Breeden, Wendy Cogdill and Melanie Buttry (collectively "Defendants") and against Plaintiffs Paige Parr, Jerimy Morehead, and Charles Parr (collectively "Plaintiffs"). Plaintiffs filed a timely Notice of Appeal on March 7, 2013. The issue on appeal is whether a genuine issue of material fact exists regarding Defendants' duties owed to Plaintiffs' decedent Kevin Parr and the breach of those duties.

On August 6, 2014, the Court of Appeals, Southern District, issued its opinion affirming the Circuit Court's Judgment. Hon. William W. Francis, Jr., in his dissenting opinion, certified that the majority's opinion was contrary to a previous opinion of an appellate court in Missouri, specifically, the opinion in *Leeper v. Asmus*, 440 S.W.3d 478 (Mo. App. W.D. 2014). Pursuant to Rule 83.03 and Hon. William W. Francis, Jr.'s Order, the case was transferred to this Court. This Court acknowledged acceptance of the case on August 18, 2014.

STATEMENT OF FACTS

Kevin Parr was employed by Breeden Transportation, Inc., a trucking company subject to the Federal Motor Carrier Safety Administration Regulations. (LF 64) Defendants were employees and/or officers of Breeden Transportation, Inc. (LF 64) On April 28, 2008, Kevin Parr was driving northbound on Interstate 55 hauling anhydrous ammonia when he was involved in a single vehicle accident that resulted in his death. (LF 87) Plaintiffs Paige Parr, Jerimy Morehead, and Charles Parr (collectively "Plaintiffs or Appellants") filed this lawsuit against Defendants Charles Breeden, Wendy Cogdill and Melanie Buttry (collectively "Defendants" or "Respondents") after the death of Kevin Parr. (LF 87) Appellants are the members of the class entitled to bring a wrongful death action.

Respondents were the co-employees of Kevin Parr. Charles Breeden was the president of Breeden Transportation, Inc. He testified that he is ultimately responsible to make certain that all drivers are safe to operate commercial motor vehicles. (LF 90, 102 - 103) Melanie Buttry was also an employee of Breeden Transportation. She testified that it was part of her job to make certain that a driver was safe to operate a commercial motor vehicle. (LF 88, 102 - 103) Wendy Cogdill was an employee of Breeden Transportation with the responsibility to make sure that Breeden Transportation only put drivers on the road who were safe to operate commercial vehicles. (LF 102 – 103) These three employees shared responsibility for ensuring that all drivers were safe to drive commercial vehicles.

A. Federal Regulations.

The Federal Motor Carrier Safety Regulations place the duty to make certain that drivers are safe to operate commercial motor vehicles on the motor carrier's employees. First, 49 C.F.R. § 390.11 states that whenever "a duty is prescribed for a driver or a prohibition imposed upon the driver, it shall be the duty of the motor carrier to require observance of such duty or prohibition." The enforcement of these duties and prohibitions is placed on the employees of the motor carrier in 49 C.F.R. § 392.1. It is the duty of "every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers" to be instructed in and comply with these regulations. *Id.*

Federal Motor Carrier Regulations specifically require that, when a driver has a history of diabetes, hypertension, respiratory dysfunction, or heart disease, the driver should be disqualified from operating a motor vehicle or additional steps must be taken by a motor carrier to ensure that the driver remains qualified despite the driver's health condition(s). *See* 49 C.F.R. § 391.41(b). The regulations also require a driver to be removed from the road when his or her ability to operate a vehicle is impaired by fatigue, illness, or any other cause. *See* 49 C.F.R. § 392.3. The regulations require Respondents to perform an investigation of any accident involving its vehicle or driver. *See* 49 C.F.R. § 390.15. This includes the requirement that Respondents make an initial decision as to whether a new medical certification is required to determine that the driver is fit after

returning from an accident or illness. (LF 168, 185)

In adopting the motor carrier safety statutes and regulations, Congress specifically stated that one of the purposes of the commercial motor vehicle safety subchapter (49 U.S.C. §§ 31131 et seq) is: "to *minimize the dangers to the health of operators of commercial motor vehicles* and other employees whose employment directly affects motor carrier safety." *See* 49 U.S.C. § 31131(a)(2)(emphasis added). Congress also found that "enhanced protection of the health of commercial motor vehicle operators is in the public interest." *See* 49 U.S.C. § 31131(b)(3).

B. Parr's Driving History and Health.

Kevin Parr was involved in three (3) single-vehicle accidents while employed by Breeden Transportation. The first occurred on December 22, 2006, the second on April 11, 2008, and the final, fatal accident occurred on April 28, 2008. (LF 94) Kevin Parr admitted to falling asleep and thus causing the second accident of April 11, 2008. (LF 167) Kevin Parr's final, fatal accident occurred just seventeen (17) days after his second accident. (LF 94) Respondents never sought to have Kevin Parr medically recertified nor did they inquire into his health following either the wreck on December 22, 2006 or the wreck on April 11, 2008, even though Melanie Buttry was aware that Mr. Parr was using narcotics or habit forming drugs as of November 7, 2007 and Mr. Parr indicated that he fell asleep while driving during the day. (LF 166)

Respondents Breeden, Cogdill and Buttry had a duty to ensure that every driver operating a vehicle owned by Breeden Transportation was able to operate that vehicle

safely at all times. (LF 92-93) The Respondents were required to monitor drivers and be aware of whether a driver suffered from a health condition that could cause him or her to be an unsafe driver. (LF 93, 166) At the time of the fatal accident, Kevin Parr was suffering from severe coronary artery disease, diabetes, obesity, probable sleep apnea, and had a prescription for Januvia, an anti-diabetic drug. (LF 93) Respondents never asked Kevin Parr about his health conditions, his use of narcotics or habit forming drugs, and did not follow-up with him after either of his previous accidents. (LF 93)

Kevin Parr received his final certified Department of Transportation physical on November 2, 2007. (LF 89). The Medical Examination Record produced by the medical examiner showed Kevin Parr used habit forming or narcotic drugs. (LF 89) Medical experts retained by both Appellant Paige Parr and Respondent Breeden Transportation, Inc. testified that Kevin Parr was suffering from significant disqualifying health problems at the time of his death. (LF 93) Dr. Marc Eckstein testified that Kevin Parr was suffering from severe coronary artery disease, diabetes, and obesity at the time of the accident. (LF 93) Dr. Stephen Schuman testified that Kevin Parr suffered from obesity, hypertension, probable sleep apnea and hyperlipidemia and was given a prescription for the anti-diabetic drug Januvia. (LF 93)

C. Respondents' Testimony.

Respondent Melanie Buttry stated that it was part of her job duties to be aware of whether a driver had a health condition that may affect his or her ability to operate a truck. (LF 92) Ms. Buttry admitted that she would be concerned if a driver had a history

of using substances that may cause him or her to be dizzy or drowsy and that she should pay closer attention to that driver. (LF 92) She also testified that a motor carrier has a continuing duty to make sure that its drivers are healthy, even following a physician certification. (LF 92) Ms. Buttry was aware that Kevin Parr's physician certification showed the use of narcotic or habit forming drugs, yet she did not ask Kevin about this or conduct any follow-up with Kevin or his physician, even following two single vehicle accidents in the year and a half preceding the fatal accident on April 28, 2008. (LF 92) Melanie Buttry admitted that she had a right to inquire into whether a driver was suffering from hypertension, diabetes or coronary artery disease, but she never bothered to ask Kevin if he suffered from any of these conditions. (LF 92)

Respondent Charles Breeden had an ongoing duty to ensure that all drivers he put on the road were safe to operate a vehicle. (LF 90-91) Mr. Breeden testified that it would concern him if a driver was suffering from hypertension, diabetes or coronary artery disease, but he did not bother to determine whether Kevin Parr suffered from any of these conditions or took medications to treat these conditions. (LF 90-91) Additionally, Respondent Charles Breeden should have been aware that Kevin Parr was using narcotic or habit forming drugs as of November 2, 2007, as it was noted on Mr. Parr's medical recertification. (LF 90-91)

Though Federal Regulations require her to be aware of drivers with disqualifying conditions, Respondent Wendy Cogdill stated that it would not disturb her if a driver was suffering from hypertension, coronary artery disease or diabetes while he was on the

road. (LF 91) Wendy Cogdill admitted that there are circumstances, such as knowledge of a driver's health problems, under which she is required to look beyond a physician's certification. (L.F. 91) However, she took no action to determine if Kevin suffered from any of these conditions, took medication for these conditions or was impaired by the use of narcotics or habit forming drugs. (LF 91) Wendy Cogdill should also have been aware that Kevin Parr was using narcotic or habit forming drugs as of November 2, 2007, as it was noted on Mr. Parr's medical recertification. (LF 90-91, 93-93, 166)

The Respondents made no effort to determine whether Mr. Parr was suffering from a disqualifying condition or was unable to safely operate a vehicle after they were presented with evidence on his November 2, 2007 medical recertification that he was using habit forming or narcotic drugs and his admission that he fell asleep at the wheel and caused the April 11, 2008 accident. (LF 93-94)

D. Appellants' Expert Testimony.

Mr. William Hampton, an expert in the transportation industry, testified that the Respondents had a duty pursuant to 49 C.F.R. § 391 to make certain that a driver was safe to operate a commercial motor vehicle, even if the driver had an approved medical certification. (LF 167) Mr. Hampton offered the opinion that the Respondents were required to conduct some sort of follow-up after the previous accidents, including additional training and investigation to determine what caused the accidents, whether the accidents were preventable and to evaluate whether the driver was safe to continue to operate a commercial motor vehicle. (LF 168) Respondents did not bother to conduct any

sort of follow-up to determine whether Kevin Parr was safe to operate a commercial vehicle following any of his accidents. (LF 166)

Mr. Hampton's opinions are based upon federal regulations which require a motor carrier to perform an investigation of any accident involving its vehicle or driver under 49 C.F.R. § 390.15. (LF 168) Federal regulations also require that the motor carrier make an initial determination of whether a new medical certification is required to determine whether a driver is fit after returning from an accident or illness. (LF 168) Respondents should have developed a safety training program to make Kevin Parr aware of the hazards of roll-overs, speed space management, fatigue, driver awareness and distracted driver training. (LF 168) Since Respondents chose to allow Kevin Parr to operate a motor vehicle after the accident of April 11, 2008, at minimum they were required to provide him with new and additional safety training. (LF 168) The Respondents should have required Mr. Parr to be recertified after he admitted to falling asleep at the wheel and causing a wreck as that could have been the result of an illness. (LF 168-169) However, Respondents failed to have Kevin Parr medically recertified when Mr. Parr admitted to falling asleep. (LF 168-69)

Decedent Kevin Parr suffered from serious health conditions which inhibited his ability to drive. Kevin Parr suffered from severe coronary artery disease, diabetes, obesity, hypertension, hyperlipidemia and probable sleep apnea at the time of his death. (LF 93) In addition, Parr used narcotics or habit forming drugs. (LF 93) Such conditions should have made Parr disqualified from driving a commercial motor vehicle transporting

hazardous materials.

Mr. Hampton testified that Respondents, by their failure to take the steps to either remove Kevin Parr from the road, to have him medically recertified, or to provide him with additional training following the multiple accidents, caused or contributed to cause the accident on April 28, 2008, which resulted in Mr. Parr's death. (LF 168) Mr. Hampton described the decision by Respondents to put Kevin Parr back on the road following the April 11, 2008, accident as reckless and indifferent to Mr. Parr's safety. (LF 168) He also testified that if they had not acted in a reckless manner, Mr. Parr would not have been driving the truck on April 28, 2008 and would not have suffered the fatal accident. (LF 169)

E. Procedural History.

On or about February 17, 2012, Respondents filed their Motion for Summary Judgment. (LF 6) On March 27, 2012, the Court allowed Appellants additional time to file their response. (LF 6) On or about May 7, 2012, Appellants filed their Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, including Appellants' Response to Defendants' Statement of Material Facts and Statement of Additional Material Facts. (LF 7) On May 21, 2012, Respondents filed their Reply Memorandum in Support of Summary Judgment. (LF 7) On July 10, 2012, the parties argued the Motion for Summary Judgment, and it was taken under advisement. The parties continued to litigate the case, including Respondents taking the deposition of Appellants' retained expert William Hampton on November 6, 2012. (LF 8, 179) On

December 31, 2012, the Trial Court entered an Order sustaining Respondents' Motion for Summary Judgment. (LF 8) The Trial Court did not set forth the grounds for the entry of summary judgment in its docket entry. (LF 8)

Appellants filed a Motion to Alter, Amend, Modify, Correct, Reconsider, and/or for New Trial on January 9, 2013. (LF 8) On February 22, 2013, the Trial Court denied Appellants' Post-Trial motion by docket entry. (LF 9) As no final judgment had been entered in the case, Appellants requested that the Trial Court file a separate document, entitled judgment, so that an appeal could be perfected. On March 4, 2013, the Trial Court entered final judgment. (LF 8, 210) On March 7, 2013, a timely Notice of Appeal on behalf of Appellants was filed with the Court. (LF 211) This appeal followed.

POINTS RELIED ON

I.

The trial court erred in entering summary judgment in favor of Respondents Charles Breeden, Wendy Cogdill and Melanie Buttry, because a genuine question of material fact existed as to Respondents' negligence in that Respondents admitted that they have a duty to ensure that every driver who drove for Breeden Transportation was safe to operate a commercial motor vehicle, that Respondents knew or should have been aware of Kevin Parr's inability to safely operate a commercial motor vehicle due to his health condition and two previous single vehicle accidents within the eighteen months preceding his fatal accident, that Kevin Parr's death resulted from Respondents placing him on the road on April 28, 2008, and that Appellants suffered damages as a result.

Martin v. City of Washington, 848 S.W.2d 371 (Mo. banc 1993)

Payne v. Cornhusker Motor Lines, Inc., 177 S.W.3d 820 (Mo.App. E.D. 2005)

McHaffie v. Bunch, 891 S.W.2d 822, 828 (Mo. banc 1995)

II.

The trial court erred in entering summary judgment in favor of Respondents because there was at minimum a genuine issue of material fact as to whether Respondents breached their individual duties, separate and apart from the non-delegable duties of an employer, which arose from federal regulations in that Respondents failed to take steps to either remove Kevin Parr from the road, have

him medically recertified, or provide him with additional training following his multiple accidents, thus causing or contributing to cause the accident resulting in Kevin Parr's death on April 28, 2008.

49 C.F.R. § 390-92

Robinson v. Hooker, 323 S.W.3d 418 (Mo.App. W.D. 2010).

Leeper v. Asmus, 440 S.W.3d 478 (Mo. App. W.D. 2014).

Kelso v. W.A. Ross Const. Co., 85 S.W.2d 527, 534 (Mo. 1935).

ARGUMENT

I.

The trial court erred in entering summary judgment in favor of Respondents Charles Breeden, Wendy Cogdill, and Melanie Buttry, because a genuine question of material fact existed as to Respondents' negligence in that Respondents admitted that they have a duty to ensure that every driver who drove for Breeden Transportation was safe to operate a commercial motor vehicle, that Respondents knew or should have been aware of Kevin Parr's inability to safely operate a commercial motor vehicle due to his health condition and two previous single vehicle accidents within the eighteen months preceding his fatal accident, that Kevin Parr's death resulted from Respondents' placing him on the road on April 28, 2008, and that Appellants suffered damages as a result.

A. Standard of Review.

Summary judgment is only appropriate where, on the undisputed material facts in the record, the movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 85 S.W.2d 371, 376 (Mo.banc 1993). A defendant is only entitled to summary judgment where it shows:

> (1) facts that negate any one of the claimant's elements facts; (2) that the non-movant, after an adequate period of discovery, has not been able to produce and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or

(3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense.

Id. at 381. The facts are viewed in the light most favorable to the non-moving party and the non-moving party receives the benefit of all reasonable inferences from the record. *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 453 (Mo. banc 2011).

B. Argument.

In their First Point Relied On, Appellants address the evidence to support each of the elements of a negligence claim. In their Second Point Relied On, the Appellants specifically address the duty questions raised by Respondents and the Court of Appeals. Appellants presented ample evidence of all four (4) elements of negligence. At minimum a genuine issue of material fact exists as to whether Respondents owed a duty to decedent Kevin Parr, whether they breached that duty, and whether the breach of that duty was the proximate cause of decedent's death.

In a negligence action, the plaintiff is obligated to show that (1) the defendants owed a duty to plaintiff; (2) the defendant breached that duty; and (3) the defendant's breach of the duty was the proximate cause of the injury. *Martin v. City of Washington*, 848 S.W.2d 371, 376 (Mo. banc 1993). This Court is obligated to view the evidence in the light most favorable to Appellants and give them the benefit of all reasonable inferences therefrom. *Goerlitz*, 333 S.W.3d at 453. Appellants both pled and offered evidence to support each of these elements.

i. Duty and Breach.

Respondents clearly and unambiguously admitted that they had an individual duty to make sure that all drivers for Breeden Transportation were safe to operate a commercial vehicle. Respondent Charles Breeden testified that he had an ongoing duty to ensure that all drivers he put on the road were safe to operate a vehicle. (LF 90-91, 116-117) Respondent Melanie Buttry testified that she had a duty to make sure that all drivers were safe to operate a commercial vehicle. (LF 114) Appellants' expert witness William Hampton also testified that the Respondents had a duty to make sure that all drivers for Breeden Transportation were safe to operate a commercial vehicle. (LF 167, 181) The reason that the Respondents, and Appellants' expert, offered this testimony regarding Respondents' duty is that the Federal Motor Carrier Safety Regulations place this duty squarely on the employees of the motor carrier. *See* 49 C.F.R. § 390.11; 49 C.F.R. § 392.1; 49 C.F.R. § 391.41(b); 49 C.F.R. § 392.3.

a. Evidence of Duty.

Missouri law is clear that federal motor carrier safety regulations can be used as evidence of a duty in a negligence action. *Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.3d 820, 837-38 (Mo.App. E.D. 2005). This Court, in fact, has stated as follows with regard to the duties imposed by federal motor carrier regulations:

> The evidence here, viewed in a light most favorable to the plaintiff, indicates that Farmer had driven more than the time permitted by the Department of Transportation on the date of the collision. As a result, he

> may have been fatigued. The jury might infer that the fatigue affected Farmer's attention and reactions.

McHaffie v. Bunch, 891 S.W.2d 822, 828 (Mo. banc 1995). This court also recognized that evidence of a driver's "lack of testing, inexperience, his failure to properly maintain log books on unrelated trips, and his employer's failure to maintain adequate records" was irrelevant to the issue of the driver's negligence, but directly relevant to a claim for negligent entrustment. *Id.* at p. 827. Federal Motor Carrier Safety Regulations are clearly relevant to establishing duty under Missouri law.

Without question there is a clearly established duty on the part of the Respondents and, at minimum, there is evidence in the record to create a genuine issue of material fact as to the existence of this duty.

Respondents argued in their motion for summary judgment that simply making sure Mr. Parr was medically certified relieved them of any further duties to make certain that he was safe to operate a vehicle. (LF 52 – 53). Respondents' contention is that, because of the medical certification, they were entitled to ignore any information regarding Mr. Parr's safety that they later learned. But, the Respondents' own admissions established that their duties extended beyond merely making certain that a driver had a current medical certification. Melanie Buttry admitted that she had an ongoing duty to make sure that drivers are healthy and safe to operate a commercial vehicle, even after a physician's exam is complete. (LF 89) Charles Breeden testified that this duty was ongoing as well. (LF 90, 116-117) Wendy Cogdill also admitted that

there are circumstances which require a motor carrier to look beyond the physician's certification. (LF 91) *See Richey v. Philipp*, 259 S.W.3d 1, 13 (Mo.App. W.D. 2008) (Admission of duty by defendant precludes deciding issue as a matter of law). Appellants' expert William Hampton also testified that this duty extended beyond merely having a physician's certification. (LF 167)

b. Parr's use of narcotic or habit forming drugs.

The circumstances of this case required Respondents to do more than simply rely on the physician's certification completed in November 2007. Respondents were under a duty to be aware of whether their drivers suffered from health problems which could potentially disqualify them from operating a vehicle. (LF 88-89, 166) Respondents, by their own admission, had a duty to inquire further when they knew or should have known of the dangerous conditions affecting Kevin Parr. This duty to inquire further should have been triggered by multiple occurrences. First, the medical examination completed by the physician clearly stated that Mr. Parr used narcotic or habit forming drugs. (LF 75) Narcotics are well-known for causing harmful side effects such as drowsiness and dizziness. The information provided on the Medical Examination Report should have been a red flag for any supervisor or overseer of an employee driving an 18-wheeler filled with hazardous materials. However, Charles Breeden and Wendy Cogdill testified that they were unaware of this finding by the physician, even though it was written on the report. (LF 90 – 91) Melanie Buttry testified that she was aware of this finding, but did not ask Kevin Parr about it nor did she follow up with the physician, even though she

admitted that she would be concerned if a driver had a history of using substances that may cause him or her to be dizzy or drowsy and that she would pay closer attention to this driver. (LF 88, 92)

Respondents argued in their reply memo in support of summary judgment that they were unaware of Mr. Parr's use of narcotic or habit forming drugs. (LF 155, 158-59) It is well established that a party's knowledge may be shown by either direct evidence or "reasonable inferences drawn from the circumstances surrounding the incident." *See, e.g., State v. Buhr*, 169 S.W.3d 170, 177 (Mo.App. W.D. 2005). Respondents' testimony shows that, at minimum, they should have been aware of this use and at least inquired as to what he was using. None of the Respondents took any action to determine whether Mr. Parr was actually using narcotics or habit forming drugs. (LF 90-91) The evidence in the record shows that the medical certification stating that Mr. Parr was a user of narcotic or habit forming drugs was in his driver file, but none of the Respondents even bothered to inquire of Mr. Parr or the physician as to what this meant or if it created a problem. This is especially concerning given that the medical exam occurred after the first, single vehicle accident.

Respondents argued in their Reply that the smoking comment found at the bottom of the medical report explains the checked box for narcotics or habit forming drug use, therefore eliminating the need to question either Mr. Parr or the examining physician as to whether Mr. Parr was using any other narcotic or habit forming drugs. (LF 159) While the narcotic or habit forming drug use history has a "yes" checked, there are no

comments to explain what the narcotic is, its duration, etc. (LF 75) There was a specific box directly below the history box to elaborate on any yes answers, which was left blank. (LF 75). Smoking is only listed once on the medical report under the general comment section, not in the elaboration box. (LF 75) Non-moving parties are entitled to have the evidence viewed in the light most favorable to them and receive the benefit of all reasonable inferences from the record. *Goerlitz*, 333 S.W.3d at 453. A jury or a finder of fact must resolve the issue of what Respondents should have known based on the medical certification. Accordingly, a genuine issue of material fact exists as to Respondents' knowledge that Mr. Parr used narcotics or habit forming drugs, and Respondents were thus obligated to inquire further as to what the indication on the report meant.

c. Respondents' awareness of Parr's previous accidents.

Respondents were further put on notice of Mr. Parr's inability to safely operate a vehicle due to the fact that he was involved in two (2) single vehicle accidents within the eighteen (18) months preceding the final, fatal accident which occurred just seventeen (17) days after the second accident. Respondents all testified that they were aware of the previous accidents. (LF 94) Respondents were obligated by federal law to conduct an investigation of any accident involving one of their vehicles or drivers. *See* 49 C.F.R. § 390.15. Respondents, however, did not bother to determine, after either of the first two accidents, whether Mr. Parr was suffering from any health condition that may have contributed to the accident. (LF 88-89, 90-92, 94) Respondents did not attempt to have Mr. Parr medically recertified after the accidents. (LF 94)

d. Parr suffered from multiple disqualifying health conditions.

Mr. Parr stated that the cause of the second accident, on April 11, 2008, was that he fell asleep while driving. (LF 94) Even when Mr. Parr stated that he fell asleep at the wheel, Respondents made no inquiry into whether he was getting proper rest or was suffering from some sort of condition that could contribute to his falling asleep at the wheel. (LF 94) After the fatal accident on April 28, 2008, it was revealed that Mr. Parr suffered from severe coronary artery disease, hypertension (high blood pressure), diabetes, probable sleep apnea, and obesity. (LF 93) High blood pressure, coronary artery disease, diabetes, and sleep apnea are all conditions that can potentially disqualify a driver. *See* 49 C.F.R. § 391.41(b). Respondent Charles Breeden admitted that he would be very concerned if one of their drivers was suffering from any of these conditions. (LF 90 – 91) In spite of federal regulations requiring her to be aware of drivers' health, Wendy Cogdill testified that it would not concern her if one of the drivers suffered from these disqualifying conditions. (LF 92) Yet even after two single vehicle accidents, the second of which Mr. Parr admitted occurred because he fell asleep at the wheel, Respondents conducted no follow up or inquiry to determine whether Mr. Parr suffered from any medical condition which may have caused him to fall asleep while driving. (LF 94)

This is in spite of the fact that Melanie Buttry testified that part of her job duties included being aware of whether a driver had a health condition that may affect his ability to operate a truck. (LF 92, 101-102) She also testified that she had the right to

inquire as to whether Mr. Parr was suffering from any type of disqualifying condition, yet she did not bother to do so following either of the first two accidents. (LF 92, 104-107, 111) The evidence in the record clearly establishes that Respondents were put on notice of a problem with Mr. Parr, at the latest, following the second accident on April 11, 2008. Respondents had both the right and the duty to inquire into his condition following this accident to make sure he was safe to operate a commercial vehicle. No action was taken, however.

e. Appellant's Expert Witness offered his opinion as to what Respondents should have done following the accidents.

Appellants' expert witness, William Hampton, testified that Respondents were required by federal regulations to conduct a follow up investigation after each of Mr. Parr's accidents and provide Mr. Parr with additional training. (LF 168) However, Respondents completely failed to do so. (LF 168) Mr. Hampton stated that Respondents should have required Mr. Parr to be medically re-certified after he admitted to falling asleep at the wheel and causing the April 11, 2008, accident. (LF 167-168) At minimum, Respondents were required to provide Mr. Parr with new and additional training in the safe operation of a commercial motor vehicle following the accident of April 11, 2008. (LF 168) They should have also developed a safety training program to make certain Mr. Parr was aware of the hazards of roll-overs, speed space management, fatigue, driver awareness, and distracted driver training. (LF 169) Respondents completely failed to do any of these things to follow up or otherwise address the two single vehicle accidents

prior to April 28, 2008.

There was a multitude of evidence in the record to establish a genuine issue of material fact as to whether Respondents were aware that Mr. Parr was suffering from some sort of condition prior to the fatal accident of April 28, 2008, which should have caused them to have Mr. Parr re-evaluated, to provide additional training, or to have him medically recertified, instead of merely putting him back out on the road. The Respondents cannot rest simply on the argument "he was medically certified." They admitted they had duties to look beyond this certification, they admitted that the conditions from which Mr. Parr suffered would have concerned them, and they admitted that they knew, or should have known, of his narcotic or habit forming drug use and two previous single vehicle accidents, the second of which Mr. Parr stated was caused by him falling asleep at the wheel. At bare minimum, a finder of fact must decide the factual dispute.

ii. Causation.

There was also sufficient evidence in the record to show that Respondents' failure to take any action, following the second accident on April 11, 2008, proximately caused the fatal accident of April 28, 2008. Appellants' expert William Hampton testified that Respondents, by their failure to take the steps to either remove Kevin Parr from the road, have him medically recertified, or to provide him with additional training following the multiple accidents, caused the accident on April 28, 2008, which resulted in Kevin Parr's death. (LF 169, 188-190) This testimony, by a qualified expert, at minimum creates a

genuine issue of material fact as to whether Respondents' actions, or failure to act, caused Kevin Parr's death. Further, there can be no dispute that if Mr. Parr had not been driving a commercial vehicle on April 28, 2008, the accident would not have occurred. At minimum there is a factual dispute as to whether Respondents violated federal motor carrier safety regulations. Violations of safety rules are actionable in Missouri. In fact, violations of safety rules have been found to be sufficient to not only submit negligence to the jury, but also punitive damages. *See First Nat. Bank of Fort Smith v. Kansas City Southern Ry. Co.*, 865 S.W.2d 719, 729 - 730 (Mo.App. W.D. 1993).

iii. Damages.

As far as the final negligence element, damages, there has never been a dispute that Appellants suffered damage. Kevin Parr died as a result of the accident on April 28, 2008. Section 537.090, RSMo., sets forth the categories of damages available to wrongful death plaintiffs, including services, consortium, companionship, comfort, instruction, and support. Appellants are the daughter Paige Parr (a minor at the time of the accident), the son Jerimy Morehead, and the father Charles Parr. (LF 10 – 11). Respondents will dispute the amount of damages, but there is no dispute that damages exist due to the accident.

C. Conclusion.

Appellants presented sufficient evidence to establish a genuine issue of material fact as to each of the elements of negligence. Respondents' own testimony and federal regulations clearly establish a duty on the part of Respondents to make certain that Kevin

Parr was safe to operate a truck. Respondents' testimony reveals that they were aware of the two accidents prior to the fatal accident, but did not even inquire as to whether Mr. Parr's health might have contributed to these accidents, even after he admitted to falling asleep at the wheel. Respondents received the medical certification which listed use of narcotic or habit forming drugs by Mr. Parr, yet none of them even bothered to ask him what he was using. Appellants' expert testified that the two accidents should have put Respondents on notice of a problem with Mr. Parr and required them to take additional action, either by removing him from the road or providing him with additional safety training. By failing to do any of this, Respondents' inaction caused the fatal accident of April 28, 2008. Appellants clearly met their burden to defeat Respondents' motion for summary judgment. This Court should reverse the judgment of the trial court and remand this case for trial.

II.

The trial court erred in entering summary judgment in favor of Respondents because there was at minimum a genuine issue of material fact as to whether Respondents breached their individual duties, separate and apart from the non-delegable duties of an employer, which arose from federal regulations in that Respondents failed to take the steps to either remove Kevin Parr from the road, have him medically recertified, or provide him with additional training following his multiple accidents, thus causing or contributing to cause the accident resulting in Kevin Parr's death on April 28, 2008.

A. Standard of Review.

The standard of review is the same as the standard in Point One.

B. Argument.

This case was filed as a "something more" claim against Mr. Parr's supervisors. (LF 10–13). Following the decision in *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App. W.D. 2010), recognizing that, under the strict construction applied to the Workers Compensation Law, co-employees were not immune from suit, Appellants amended their Petition to assert additional, common law negligence claims against Respondents. (LF 23 – 28, 29 – 34) Appellants' Second Amended Petition, after substituting Paige Parr[1] for her next friend, Janett Waid, is the controlling Petition.

It is possible that the Trial Court determined that Appellants' common law negligence claim against Respondents failed to state a claim against co-employees under the decision by the Western District Court of Appeals in *Hansen v. Ritter*, 375 S.W.3d 201 (Mo.App. W.D. 2012). This determination would be incorrect, however, due to specific federal regulations placing a duty on the Respondents to make certain that all drivers were safe to operate commercial vehicles. Additionally, the Trial Court could have determined that the "something more" claim pled by Appellants failed or that

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1 Paige Parr was a minor at the time that suit was filed, accordingly her mother, Janett Waid, acted as Next Friend. Upon reaching the age of majority, Paige Parr was substituted as a party plaintiff for her mother.

summary judgment was appropriate on this claim. This is also error in that Appellants' expert testified that Respondents' instruction of Mr. Parr to operate a commercial motor vehicle on April 28, 2008, was dangerous and reasonably recognizable by Respondents to be hazardous and beyond the usual requirements of employment. (LF 205-206)

C. History of Co-Employee Liability.

The Legislature's adoption of the 2005 amendments to the Workers' Compensation law effectively returned Missouri to the common law of co-employee negligence. *See Leeper v. Asmus*, 440 S.W.3d 478, 483 (Mo. App. W.D. 2014). The Western District, in its opinion in *Leeper*, gave a thorough summary of the state of the common law relating to co-employee liability prior to the adoption of the Workers Compensation Act and judicial creation of immunity for injuries caused by the negligence of co-employees. *See Leeper,* 440 S.W.3d at 484-487; *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 179 (Mo.App. E.D. 1982).

At common law, "employers owed employees the general duty to exercise ordinary care to protect employees from the foreseeable risks and perils of employment. *See Leeper,* 440 S.W.3d at 484. In *Kelso v. W.A. Ross Const. Co.*, 85 S.W.2d 527, 534 (Mo. 1935), this Court stated that, in the context of the master servant relationship, the more specific duties were: "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. These non-delegable duties are duties of the employer to his employees and not of fellow servants to each other." (internal citations omitted)

The *Leeper* court recognized five specific non-delegable duties:

1. The duty to provide a safe place to work.

2. The duty to provide safe appliances, tools, and equipment for the work.

3. The duty to give warning of dangers of which the employee might reasonably be expected to remain ignorant.

4. The duty to provide a sufficient number of suitable fellow employees.

5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

See Leeper, 440 S.W.3d at 484.

> Since negligence in a master servant case depends upon the existence of a duty on the part of the master, 'the ultimate question to be first determined in every case is whether the master is guilty of a breach of duty to the servant who brings the action.'

Kelso, 85 S.W.2d at 534 (Mo. 1935) (quoting 3 Labatt's Master & Servant, 2390, § 898). Employees could not be held liable for the breach of the employer's non-delegable duties as "employees have no meaningful ability to control whether an employer's nondelegable duties will be performed." See *Leeper*, 440 S.W.3d at 484.

However, the employer's nondelegable duties are not unlimited. "At common law, '[e]mployers are not insurers of the safety of employees.'" *See Leeper*, 440 S.W.3d

at 485 (*quoting Graczak v. City of St. Louis*, 202 S.W.2d 775, 777 (Mo. 1947)). The law has always been that a co employee is liable to his fellow employee when his negligence causes injury or death. Please see e.g. *Lees v. Dunkerly Bros.*, (1910 Eng.) 103 L.T. 467, 468 [1911] AC 5 (HL)("[A] more dangerous or mischievous principal" could not be imagined than to say that a worker is not liable to a fellow servant for an injury caused through his negligence, as this would mean a "free hand to everybody to neglect his duty towards his fellow servant, and escape with impunity from liability for damages the consequence of his own carelessness"). The *Leeper* court stated, "It follows that some workplace injuries at common law could not be attributed to a breach of the employer's nondelegable duties, and were instead attributable to the fault of the injured employee or of a co-employee." *Leeper,* 440 S.W.3d at 485. The initial inquiry, thus, is whether the injury was caused by a breach of a non-delegable duty. *Id.; see also Kelso*, 85 S.W.2d at 534 (Mo. 1935).

At common law, then, in order to determine whether an injury resulted from a non-delegable duty of an employer, or from a separate duty owed by a co-employee, the finder of fact must engage in a detailed, factual analysis to determine which duty was breached. This Court in *Kelso* acknowledged the complicated and difficult interplay between the types of facts which tend to establish whether the injury resulted from a non-delegable duty or a separate duty. *Kelso*, 85 S.W.2d at 534-535. It stated,

> Except in cases in which the master is himself directing the work in hand, his obligation to protect his servants does not extend to protecting them

> from the transitory risks which are created by the negligence of the servants themselves in carrying out the details of that work. In other words, the rule that the master is bound to see that the environment in which a servant performs his duties is kept in a reasonably safe condition is not applicable where that environment becomes unsafe solely through the default of that servant himself, or of his fellow employees.

Id. at 535-536. It follows, as the Court in *Leeper* found, that a finder of fact must first determine the breach that caused the injury, whether that of a non-delegable duty or a personal duty owed by the co-employee. *See Leeper,* 440 S.W.3d at 488-489.

Following the adoption of the Workers Compensation law, employers were immune from claims resulting from injuries to employees which arose from their non-delegable duties. *See Sylcox v. National Lead Co.*, 38 S.W.2d 497, 501 (Mo.App. St.L. 1931). The *Sylcox* court stated,

> For instance, it stands decided that provision of [the act] to the effect that the rights and remedies therein granted to the employees shall exclude all other rights and remedies at common law or otherwise, 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.

Id. The Workers Compensation law left in place common law remedies that were available between co-employees, however. *Id.*; *see also Hansen v. Ritter*, 375 S.W.3d

201, 207 (Mo.App. W.D. 2012). The *Sylcox* court recognized this distinction as early as 1931. In *Sylcox*, the plaintiff sued both his employer, National Lead Co., and a co-employee bus driver for injuries sustained when the plaintiff was injured stepping off of a bus. *Sylcox*, 37 S.W.2d at 498-99. The Court of Appeals found that the Workers Compensation Act did not bar claims against co-employees as they are "third parties" under the Act. *Id.* at 501-02. It was not until 1982 that co-employees were considered "employers" under the Act.

In *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo.App. E.D. 1982), the Eastern District Court of Appeals, after an examination of the history of the Workers Compensation law and previous decisions interpreting when a co-employee may be held liable, effectively subsumed co-employees into the definition of "employer."

> The purpose of the Act was not to transfer the burden of industrial accidents from one employee to another . . . Under present day industrial operations, to impose upon executive officers or supervisory personnel personal liability for an accident arising from a condition at a place of employment which a jury may find to be unsafe would almost mandate that the employer provide indemnity to such employees. That would effectively destroy the immunity provisions of the workers compensation law.

Id. The Court found that employees charged with implementing the employer's duty to maintain a safe workplace were not subject to suit and, in order to actually maintain such a suit "something more" must be alleged and determined on a case-by-case basis. *Id.* at

180-181.

Following *Badami*, the courts continued to recognize that a co-employee could be held liable for violations of personal duties. This Court, in *Tauchert v. Boatmen's Nat. Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo. banc 1993), recognized that acts of a co-employee, "outside of the scope of his responsibility to provide a safe workplace" constitute "a breach of a *personal* duty of care owed to plaintiff. These actions may make an employee/supervisor liable for negligence and are not immune from liability under the workers' compensation act."

In *Gunnett v. Girardier Building and Realty Co.*, 70 S.W.3d 632, 641 (Mo.App. E.D. 2002), the Eastern District Court of Appeals also dealt with co-employee liability. After examining previous case law, it stated,

> So, then, summarizing, a co-employee cannot be held personally liable for his negligence in carrying out the employer's non-delegable duties, whether it be the employer's duty to provide its employees with a reasonably safe place to work, or any other non-delegable duty. To maintain an action against a co-employee, the injured worker must demonstrate circumstances showing a personal duty of care owed by defendant to the injured worker, separate and apart from the employer's non-delegable duties, and that breach of this personal duty proximately caused the worker's injuries.

Id.

D. 2005 Amendments to the Workers' Compensation Act.

When the legislature adopted the 2005 amendments to the Workers Compensation law, it imposed a requirement of strict construction of the law on the Courts. *See* Section 287.800, RSMo. The Western District, in *Robinson*, interpreted the new strict construction requirement and found that, due to this strict construction, co-employees were no longer immune from suit. *Robinson*, 323 S.W.3d at 424-25. Under strict construction, only an "employer" is released from liability and "employer" does not include "co-employees." *Id.* Accordingly, a "co-employee" is not entitled to the immunity from suit under the Workers Compensation law that is extended to "employers." *Id.* at 425.

The Western District once again addressed co-employee liability in *Hansen v. Ritter*, 375 S.W.3d 201 (Mo.App. W.D. 2012). In *Hansen*, the Court determined that, even after the decision in *Robinson v. Hooker* and the legislature's 2005 amendments to the Workers Compensation law, co-employees are not subject to suits which allege merely the failure on the part of the co-employees to maintain a safe work place. *Id.* at 214. An employer's duty to maintain a safe workplace is non-delegable to an employee, accordingly, a co-employee does not owe an individual duty to maintain a safe work place for another co-employee. *Id.* at 213-214. The Court further found that the "something more" doctrine remains viable even after the amendments to the Workers Compensation law. *Id.* at 214 - 217. In *Hansen*, the only violations of duties pled by the plaintiff were for failure to maintain a safe workplace. *Id.* at 219. The plaintiff did not

assert personal duties independent of the employer's duty to maintain a safe workplace. *Id.*

During the pendency of this appeal, the Western District issued its opinion *Leeper v. Asmus*, 440 S.W.3d 478 (Mo. App. W.D. 2014), addressing the difficulties with co-employee liability. In *Leeper*, the Western District examined the common law and its previous decisions in *Robinson* and *Hansen*, before holding that

> before a court can determine whether a co-employee owes a duty in negligence at common law (a question of law), it must first be determined whether the workplace injury is attributable to the employer's breach of a non-delegable duty, a question of fact unique to the workplace, and influenced by, among other things: the nature of the employer's work; the risks and perils attendant to doing the employer's work as directed; whether the instrumentalities of the work are safe; whether a co-employee causing injury was acting as directed by the employer; whether the methods for performing the work are safe; the competency of the employees hired to perform the work; the training of employees; the rules and regulations of the workplace adopted by the employer to protect workers from the risks and perils of the work about which the employer should have known; the communication and enforcement of these rules and regulations; and other facts or circumstances which might tend to establish the existence of a risk or peril that, through the exercise of ordinary care, the employer could

> reasonably have acted to prevent. If, after considering all relevant facts and circumstances, an employee's workplace injury can be attributed to the employer's breach of a non-delegable duty, then the negligent co-employee owes no duty as a matter of law. Conversely, if an employee's workplace injury is not attributable to the employer's breach of a non-delegable duty, then a negligent co-employee may owe a legal duty to the injured employee.

Id. at 488-489.

The Western District found that the common law, as described above, governs co-employee liability, and not the "something more" doctrine. *Id.* at 493-494. It further found that "[d]etermining whether a workplace injury is attributable to a breach of the employer's nondelegable duties *is a question of fact*." *Id.* (emphasis added) It declined to follow the Eastern District's rulings in *Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W.3d 293, 303 (Mo.App. E.D. 2013)(affirming the dismissal of co-employee liability claims on the basis that only co-employee claims which alleged "something more" are permitted) and *Carman v. Wieland*, 406 S.W.3d 70, 78 - 79 (Mo.App. E.D. 2013) (finding that co-employees do not owe a common-law duty to use ordinary care in the operation of a motor vehicle as this duty is subsumed in the employer's non-delegable duty to provide a safe working environment). *Id.* at 494-495.

E. Application to the Instant Case.

Appellants have shown that the instant case meets all of the criteria described by the Western District for a co-employee claim under the 2005 Amendments and prior to the 2012 Amendments to the Worker's Compensation statutes. This is not a run-of –the-mill workplace safety claim; it is a question of whether the Respondents complied with the duties imposed on them personally by 49 C.F.R. § 392.1.[2] Appellants have alleged and offered evidence to establish violations of federal regulations on the part of the Respondents, specifically regulations 49 C.F.R. § 391.41(b) and 392.3. Respondents breached their duty as supervisors in the workplace under the Federal Motor Carrier Safety Regulations, the federal rules and regulations governing their business. As the employees of a motor carrier, Respondents had the responsibility under Federal Regulation 49 C.F.R. § 391.1 to ensure that Kevin Parr was safe to operate a commercial motor vehicle, and clearly failed in that duty. The motor carrier safety regulations establish the "personal duty" described in *Tauchert*, *Hansen*, and *Leeper*, under which a

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2 The Court of Appeals, in its decision, stated that Appellants' first raised the issue of whether Respondents complied with the Federal Motor Carrier Safety Regulations in their Motion to Alter Judgment. *See* Opinion, p. 4. However, Appellants' raised this issue first in their Petition and also raised arguments as to compliance with the regulations in their response to Respondents' Motion for Summary Judgment. *See* L.F. 30, 33, 93.

co-employee can be held liable.

Federal Motor Carrier Safety Regulations clearly and succinctly assign the duties established by the regulations, and the enforcement of those duties, to individual employees of the motor carrier such as Respondents. As discussed in Appellants' First Point Relied On, multiple Missouri cases have found that the Federal Motor Carrier Safety Regulations provide, at minimum, evidence of duty. *See Payne*, 177 S.W.3d at 837-38; *McHaffie*, 891 S.W.2d at 827 – 828.

Further, there is no dispute that the Federal Motor Carrier Safety Regulations are the supreme law of the land when it comes to the safety duties and obligations of motor carriers. The Motor Vehicle Safety Act, which encompasses motor carrier safety statutes and regulations, contains a preemption clause. *See* 49 U.S.C. § 30103(b). The preemption clause allows a state to adopt or continue a motor vehicle safety standard "only if the standard is identical to the standard prescribed under [chapter 49]." *Id.* The regulations specifically encompass this preemption by stating that the states may enforce laws relating to safety, so long as those laws do not prevent full compliance with the regulations. *See* 49 C.F.R. § 390.9.

First, 49 C.F.R. § 390.11 states that whenever "a duty is prescribed for a driver or a prohibition imposed upon the driver, it shall be the duty of the motor carrier to require observance of such duty or prohibition." The enforcement of these duties and prohibitions is then placed squarely on the shoulders of the employees of the motor carrier in 49 C.F.R. § 392.1. It states that it is the duty of "every motor carrier, its

officers, agents, representatives, and employees responsible for the management, maintenance, operation or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers" to be instructed in and comply with these regulations. *Id.* Appellants expect that Respondents will argue, as they have previously, that the provisions of 49 C.F.R. §392.1 are limited to only §392.1-392.96. However, the motor carrier safety regulations are much broader than Respondents would have this Court believe. "The rules in Subchapter B of this chapter are applicable to all employers, *employees*, and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. §390.3(a) (emphasis added). A close examination of the regulations contained in Parts 390-399 makes clear that the regulations are intended to apply and be applied by employees of motor carriers as well as the employers. *See* 49 C.F.R. § 390.3; 49 C.F.R. § 390.11; 49 C.F.R. § 392.1; 49 C.F.R. § 395.1; 49 C.F.R. § 396.1; 49 C.F.R. § 397.1.

Federal Motor Carrier regulations specifically require that when a driver has a history of diabetes, hypertension, respiratory dysfunction, or heart disease the driver should be disqualified from operating a motor vehicle or additional steps must be taken by a motor carrier to ensure that driver remains qualified despite the driver's health condition(s). *See* 49 C.F.R. § 391.41(b). The regulations also require a driver to be removed from the road when his ability to operate a vehicle is impaired by fatigue, illness, or any other cause. *See* 49 C.F.R. § 392.3. The regulations require Respondents to perform an investigation of any accident involving its vehicle or driver. *See* 49 C.F.R.

§ 390.15. This includes the requirement that Respondents make an initial decision as to whether a new medical certification is required to determine that the driver is fit after returning from an accident or illness. (LF 168, 185) In short, the regulations specifically prescribe to the employees of the motor carrier, in this case the Respondents, the duty to make certain that other employees comply with the Federal Motor Carrier Safety Regulations.

The Southern District and Respondents have questioned whether the purpose of the Federal Motor Carrier Safety Regulations was to protect drivers of commercial motor vehicles, or to only protect the general public from drivers of commercial motor vehicles. Congress answered this question when it adopted the authorizing statutes for the regulations. Congress specifically stated that one of the purposes of the commercial motor vehicle safety subchapter (49 U.S.C. §§ 31131 et seq) is: "to *minimize the dangers to the health of operators of commercial motor vehicles* and other employees whose employment directly affects motor carrier safety." *See* 49 U.S.C. § 31131(a)(2)(emphasis added). It also found that "enhanced protection of the health of commercial motor vehicle operators is in the public interest." *See* 49 U.S.C. § 31131(b)(3).[3] There is no question that, at minimum, one of the purposes of establishing federal motor carrier

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3 The subchapter referred to in this section, 49 U.S.C. §§ 31131 et seq, is listed as one of the many statutes which provided the authority for the Federal Motor Carrier Safety Regulations contained in 49 C.F.R. Parts 390, 391, and 392.

safety guidelines was to protect the health and welfare of operators of commercial motor vehicles, including Kevin Parr.

In addition to the duties identified by federal regulations, Appellants' expert witness William Hampton further identified the duties owed by Respondents in his deposition.[4] (LF 167 -169) William Hampton is an expert in the transportation industry

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4 Respondents have contended before, and will likely contend again, that the deposition testimony of William Hampton cannot be considered on appeal because it was not filed prior to the entry of summary judgment, and was therefore not a part of the record. Respondents filed their motion for summary judgment on February 17, 2012. The trial court did not rule on the summary judgment motion until December 31, 2012, ten months later. During that ten month period discovery continued, including the deposition of William Hampton, Appellant's expert. Appellants submitted the deposition on January 9, 2013, in support of their Motion to Alter, Amend, Modify, Correct, or Reconsider Judgment and/or for New Trial. It was only appropriate to advise the trial court of the discovery that occurred during the ten month period the summary judgment motion was pending, in order to avoid the need for an appeal if the trial court was not aware of this evidence. Because the trial court offered no opinion as to why it reached its decision, it is only appropriate that this Court consider all of the evidence before the trial court at the time that it entered final judgment, which did not occur until after it ruled on Appellants' Motion to Alter, Amend, Modify, Correct or Reconsider Judgment and/or for New Trial.

with over thirty (30) years of experience, including service as a Missouri Highway Patrol Officer and as a Director of Safety and Maintenance for a nationwide trucking carrier. (LF 167, 180) He now operates a business advising commercial motor carriers on health and safety issues and compliance with federal and state regulations. (LF 167, 180)

Respondents' duties under the federal regulations go well beyond the "non-delegable" duty to maintain a safe workplace. Federal regulations specifically state that the duties conferred by the regulations are to be enforced by "officers, agents, representatives and employees" of the motor carrier. 49 C.F.R. § 392.1. When a specific regulation specifically places the duty of compliance with federal regulations on the shoulders of employees and officers, this Court cannot say that these duties are the employers' "non-delegable" duties. This would be a nonsensical result. The regulations clearly take the duties owed by the employees of the motor carrier outside of the Missouri common law non-delegable workplace safety duties and into the regulatory scheme adopted by the Federal Motor Carrier Safety Administration.

Mr. Hampton identified that the Respondents had a duty, pursuant to 49 C.F.R. § 391, to make certain that a driver was safe to operate a commercial motor vehicle, even if the driver had an approved medical certification. (LF 167, 181) If Respondents had inquired further into Mr. Parr's condition by performing the required and appropriate follow-up with Mr. Parr, at least after the second accident, they would have found that, in addition to fatigue, Kevin Parr was suffering from severe coronary artery disease, hypertension, diabetes, probable sleep apnea, hyperlipidemia, and obesity at the time of

the accident. (LF 93) It would have been easy to identify whether Mr. Parr was suffering from diabetes, for example, because he was prescribed Januvia, an anti-diabetic drug. (LF 93) Melanie Buttry testified that it was part of her individual duty to determine if a driver had a disqualifying health condition, and that she had the right to inquire as to these conditions. (LF 92) Had she simply bothered to ask him about his medications following the accidents, this condition would have been revealed and Mr. Parr could have been evaluated to determine his safety. Mr. Parr's medical conditions disqualified him from driving under 49 C.F.R. §391.41.

Respondents cannot rely on the "I didn't know" defense because the Federal Regulations state that they possess an affirmative duty to be aware of any health conditions from which a driver may be suffering that could disqualify him or her from driving. (LF 88, 93) Melanie Buttry testified that "part of [her] job responsibilities are being aware of if drivers have health conditions that may affect their ability to safely operate." (LF 101-02) As Congress recognized, the motor carrier safety statutes and regulations are in place because of the likelihood of injury to drivers who, for health or other reasons, may be unsafe to operate a commercial motor vehicle.

Respondents' admissions are paradoxical to their defense that the medical certification was all that they had to do. Their admissions also should have precluded entry of summary judgment. Respondents clearly and unambiguously admitted that they had an individual duty to make sure that all drivers for Breeden Transportation were safe to operate a commercial vehicle. (LF 90-91, 114, 116-117) These admissions also show

that Respondents knew that injuries to drivers are a foreseeable result of not abiding by Federal Regulations. Similar admissions were addressed in *Richey v. Philipp*, 259 S.W.3d 1, 13 (Mo.App. W.D. 2008). In *Richey*, the defendant admitted that she had a duty to turn in claims promptly, that the duty existed to protect the insured from harm, and that a violation of the duty could result in injuries. *Id.* In denying the defendant's appeal seeking a directed verdict, the Court stated, "The circuit court was merely presented with the case as tried by the parties, and, given the admissions by [defendant], it could not have directed a verdict in this case in regard to proximate cause or duty." *Id.* at 14. Here, as in *Richey*, the Respondents admitted a duty. Foreseeability of injury is not an issue because Congress passed legislation to specifically address the dangers to the health and safety of drivers' operating commercial vehicles. As the defendants in *Richey* could not receive a directed verdict because of their admissions, the Respondents' own testimony should have precluded entry of summary judgment in their favor in this case.

Kevin Parr was a high risk driver who should not have been allowed to operate a motor vehicle on the date of the accident or after April 11, 2008. (LF 185-86) Mr. Parr's accident history and admission to falling asleep should have made Respondents aware of his inability to operate a motor vehicle. (LF 185-86) Mr. Hampton described the decision by Respondents to put Kevin Parr back on the road following the April 11, 2008, accident as reckless and indifferent to Mr. Parr's safety. (LF 206) If they had not acted in a reckless manner, Mr. Parr would not have been driving the truck on April 28, 2008, and would not have suffered the fatal accident. (LF 206-07) Respondents were required under

section 49 C.F. R. § 390.15 to conduct a follow up investigation after the previous accidents, including additional training and investigation, but completely failed to do so. (LF 183-84) Respondents made no effort to determine whether Mr. Parr was suffering from a disqualifying condition or was unable to safely operate a vehicle—even when they learned that Mr. Parr was using habit forming or narcotic drugs. (LF 166) Respondents also failed to have him medically recertified when he admitted to falling asleep. (LF 183-84)

Respondents, in their summary judgment motion, tried to liken this case to a negligent entrustment case. However, what Respondents fail to appreciate is that federal regulations and their own stated duties require them to go further than merely being unaware that a driver suffered from a disqualifying condition. Further, *Steamron v. Klipsch Holland Co., Inc.*, 789 S.W.2d 158 (Mo.App. E.D. 1990), offers no guidance to the Court because there was indeed sufficient knowledge of narcotic or habit forming drug use, previous accidents, and a failure to inquire into the causes of those previous accidents well before April 28, 2008. Respondents clearly testified that they were aware of both previous accidents, including the one which took place seventeen days prior to Parr's final and fatal accident, yet took no steps to follow up or determine whether Mr. Parr was medically safe to operate a commercial motor vehicle prior to April 28, 2008.

The motor carrier safety regulations clearly establish the "personal" duty recognized in *Tauchert* and *Hansen*. Neither *Hansen* nor *Tauchert* conducted any in-depth analysis of what facts or circumstances would show the existence of a "personal"

duty, however. *See Hansen*, 375 S.W.3d at 216-217 ("As we initially noted in this Opinion, however, it is unnecessary in deciding the matter before us to definitively determine the precise parameters of a co-employee's personal duties to a fellow employee to support an actionable claim of negligence"). The regulations clearly state that employees have the duty to ensure compliance with those regulations by other employees. Appellants contend that this is sufficient, alone, to answer the threshold question of whether the breach involved a non-delegable duty of an employer or a personal duty. However, the factual analysis described in *Leeper* leads to the same conclusion. *Leeper* provided some guidance as to what facts support a personal duty as opposed to the employer's non-delegable duty. *See, supra,* pp. 33-34.

Here, the facts as described in Point I, when viewed in the light most favorable to the non-moving party, create a factual question as to whether Mr. Parr's death resulted from the breach of a personal duty owed by the Respondents. Factors weighing in favor of this result include that the safety regulations being applied were not adopted by the employer, but by the U.S. Department of Transportation and imposed upon Respondents, individually, by operation of the Federal Motor Carrier Safety Regulations. Further, Buttry and Cogdill admitted they had ongoing duties to make sure that drivers are healthy and safe to operate a commercial motor vehicle even after a physician's exam is complete. (L.F. 89, 91) All of the respondents were aware that they had a duty to investigate the causes of all accidents involving their vehicles or drivers. *See* 49 C.F.R. § 390.15. None of the Respondents attempted to determine what caused the previous

accidents of which they were all aware. (L.F. 88-89, 90-92, 94). Respondents made no inquiry as to whether Mr. Parr suffered from a condition that could cause him to fall asleep while driving, even though they admitted that they had authority to do so. (L.F. 92, 94) The nature of Mr. Parr's work involved driving vehicles sufficiently dangerous to warrant Congressional action to protect the safety of drivers.

Judge Francis, in his dissent, pointed out that both Wendy Cogdill and Melanie Buttry had a duty to monitor Mr. Parr's physical condition to determine if he was fit to drive a tractor-trailer and determine if he was in compliance with federal regulations. *Parr, et al. v. Breeden, et al.*, Opinion at p. 21. In addition to his supervisory and monitoring duties, Charles Breeden, as president of Breeden Transportation, was responsible for hiring competent employees, including Melanie Buttry and Wendy Cogdill, and ensuring that they were capable of enforcing the federal regulations. *Id.*

While the Court of Appeals opinion, save the dissent from Judge Francis, did not appear to address any of the factors which *Leeper* found instructive, it did state that

> the only affirmative act by Defendant Co-Employees alleged and supported by the reasonable inferences from the records was the Defendant Co-Employees assigned Parr to deliver goods by driving a commercial motor vehicle. Assigning Part this type of work was a normal job duty necessarily attendant to performing the employer's business as directed by the employer.

Parr, page 8. Respectfully, the Court of Appeals opinion misses the importance of the

duties owed by Respondents. If, as Appellants have alleged and produced evidence to support, Respondents had been mindful of their duties, they would have known that putting Mr. Parr back out on the road, especially after April 11, 2008, was dangerous and likely to lead to his injury or death. The result of Respondents' failure to comply with their personal duties led to the affirmative act of placing Parr back on the road, and subsequently, to his death. The Court of Appeals misconceptions were succinctly described by Judge Francis:

> The majority opinion couches the allegations against Co-Employee Respondents as to whether or not Co-Employee Respondents owed Parr a duty to protect him from his own decisions and conduct with respect to his health and employment as a driver of a commercial vehicle. However, that is not the record before us here. Parr is not filing the lawsuit seeking to protect himself from his own decisions and conduct. Survivors are the plaintiffs in this litigation and they have, in fact, alleged sufficient pleadings and responses in the motion for summary judgment to not only create a material issue of fact, but to establish the legal duty and/or duties owed by Co-Employee Respondents to Survivors. As the majority opinion notes:
>
> In their Second Amended Petition, Plaintiffs alleged that Defendant Co-Employees '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.'

Litigants in our courts every day describe or present evidence where persons who need to support their family, pursue jobs in order to complete that support; unfortunately, these very same people also encounter persons who do not take their jobs seriously and/or have no quarrel with overlooking the duties imposed by the law upon them. Based upon the majority decision here, we will never know if that was the case.

Id. at p. 21 – 22.

The Court of Appeals opinion does not elucidate what types of allegations and evidence establish a personal duty versus a non-delegable duty. It did not address Appellants' contention, and the express language of the regulations, that it was the duty of the employees of the motor carrier to enforce compliance. Nor did it explain why this did not constitute a personal duty. One of the purposes of the regulations is to provide for the safety of those operating commercial motor vehicles, and the regulations specifically identify that employees of motor carriers are charged with this duty. Congress and the Department of Transportation did not use surplusage when they assigned duties to the individual employees.

It has been suggested that if the motor carrier regulations create a personal duty, then the Courts will be flooded with suits against individual employees of trucking

companies following accidents. With all due respect to this argument, the flood gates have long since been opened. Nearly any case involving a commercial motor vehicle accident will involve questions of whether the driver complied with all motor carrier safety regulations and whether the motor carrier, and by operation of the regulations, its employees personally, complied with or ensured compliance with those regulations. Further, the legislature made certain that future claims similar to those made by Appellants here are no longer valid with the 2012 amendments to the Workers Compensation Act.[5]

F. Something More.

In the event that this Court declines to follow the reasoning in *Leeper* and continues to maintain the "something more" doctrine, Appellants alternatively pled and produced evidence of Respondents' affirmative acts which injured Mr. Parr to support a

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[5] Section 287.120.1 was amended in 2012 to include immunity for co-employees. However, this cause of action both arose and was filed prior to this amendment. The Missouri Constitution, Article 1, Section 13, prohibits laws that are retrospective in operation. Retrospective laws "take away or impair rights acquired under existing laws." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993). The version of Section 287.120.1 in effect at the time of Mr. Parr's death did not provide immunity to co-employees. Accordingly, the new version of Section 287.120.1 cannot be applied retrospectively to grant this immunity and eliminate Appellants' cause of action.

"something more" claim.

"Something more" means that a co-employee has committed an affirmatively negligent act outside the scope of the employer's responsibility to provide a safe workplace. *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 621-22 (Mo. banc 2002)(*overruled on other grounds by McCracken v. Wal-Mart Stores East, L.P.*, 298 S.W.3d 473 (Mo. banc 2009). This has been described as "directing the employees to engage in dangerous conditions that a reasonable person would recognize as hazardous and beyond the usual requirement of the employment." *Lyon v. McLaughlin*, 960 S.W.2d 522, 526 (Mo.App. W.D. 1998); *see also Burns v. Smith*, 214 S.W.3d 335, 339 (Mo. banc 2007). In *Hansen v. Ritter*, the Court further found that the "something more" doctrine remains viable even after the amendments to the Workers Compensation law. *Hansen,* 375 S.W.3d 214-17.

The evidence presented by Appellants shows that Respondents placed Mr. Parr back on the road when they were aware, or should have been aware, that he was dangerous and unfit for the operation of a motor vehicle. (LF 167-169) Putting Mr. Parr back on the road without even bothering to ask him about his health following two previous accidents, the most recent of which was only seventeen (17) days before the fatal accident, is more than enough by itself to create a genuine issue of material fact as to whether Respondents did "something more." (LF 165-66, 206) Further, William Hampton testified that this decision was reckless and showed indifference on the part of Respondents to Mr. Parr's safety. (LF 169, 206-07) He described Respondents'

instruction of Mr. Parr to operate a commercial motor vehicle on April 28, 2008, as dangerous and reasonably recognizable by Respondents to be hazardous and beyond the usual requirements of employment. (LF 205-06) If Respondents had not violated these regulations, by putting Mr. Parr back onto the road, the decedent would not have suffered the accident on April 28, 2008. (LF 206) This testimony, and the evidence in the record, establishes, at minimum, a genuine issue of material fact as to whether Respondents did "something more" so as to violate the duties they owed to Mr. Parr under pre-*Robinson* jurisprudence.

Appellants put forth evidence that Respondents should have been aware of the disqualifying conditions suffered by Mr. Parr and his recent unsafe driving record, so as to constitute "something more." (LF 165-66, 206) The evidence in the record, including the testimony of the Respondents and that of Appellants' expert witness William Hampton, establishes the affirmative negligent act, putting Mr. Parr on the road. It also establishes that Respondents should have known, given the ample evidence confronting them that Mr. Parr was not safe to operate a commercial vehicle, that putting him back on the road after the accident of April 11, 2008, subjected him to danger beyond the usual requirements of employment as a truck driver.

Federal regulations require that Respondents make an initial determination of whether a new medical certification is required to determine if a driver is fit after returning from an accident or illness. After Kevin Parr admitted that he fell asleep on the road, Respondents should have required Mr. Parr to be recertified to determine if this was

the result of a serious condition. (LF 185) Since Respondents chose to allow Kevin Parr to operate a motor vehicle after the accident of April 11, 2008, at minimum they were required to provide him with new and additional training in safe operation. (LF 186) Respondents should have developed a safety training program to make Kevin Parr aware of the hazards of roll-overs, speed space management, fatigue, driver awareness and distracted driver training. (LF 187) Respondents' failure to take these obvious steps caused or contributed to cause the accident on April 28, 2008, which resulted in Mr. Parr's death. (LF 169, 188-90, 200)

Appellants have satisfied the requirements for bringing a co-employee negligence action under either *Hansen* or *Leeper*. First, Federal Regulations specifically assign the duties of making certain that drivers are safe to operate commercial motor vehicles at all times to the officers and employees of motor carriers. By this specific assignment, the duties are "personal" and not included in the general, non-delegable duty of an employer to provide a safe workplace. Further, even if the Court finds that the delegation of the duty to comply with the federal regulations is not actually a delegation of a non-delegable duty, Appellants have pled and adduced evidence that Respondents did "something more" and should be held personally liable on that basis. The Trial Court erred in entering summary judgment.

CONCLUSION

The trial court erred in entering summary judgment in favor of Respondents

Charles Breeden, Wendy Cogdill, and Melanie Buttry and against Plaintiffs Paige Parr, Jerimy Morehead, and Charles Parr, because, at minimum, genuine issues of material fact exist on the question of whether Respondents were negligent. There is sufficient evidence in the record to create a genuine issue of material fact on the issues of duty, breach, and causation. There is no dispute regarding the existence of damages. Further, Federal Regulations, the common law, and the Respondents' own testimony establish a clear duty, delegated to employees such as Respondents, to make certain that Kevin Parr was safe to operate a commercial vehicle after April 11, 2008, at the latest. As such, the Trial Court erred in entering summary judgment and this Court should reverse and remand this case for trial by a jury.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants, pursuant to Rule 84.06(c), hereby certifies to this Court that:

1. The brief filed herein on behalf of Appellants contains the information required by Rule 55.03.

2. The brief complies with the format requirements of Rule 30.06 and 84.06(a) and (b).

3. The number of words in this brief, according to the word processing system used to prepare this brief, is 13,620, exclusive of the cover, certificate of service, this certificate and the signature block.

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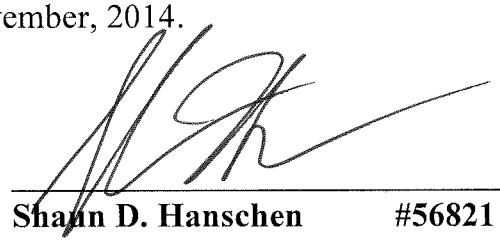
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been sent via the Court's electronic filing system to the attorneys for Defendants, Mr. Chris Meyer, Pitzer & Snodgrass, P.C., 100 South Fourth Street, Suite 400, St. Louis, MO 63102-1821 and Ted L. Perryman, Roberts Perryman, P.C., 1034 S. Brentwood Blvd., Ste. 2100, St. Louis, MO 63117 on the 12th day of November, 2014.



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