SUPREME COURT OF MISSOURI

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

APPEAL FROM THE CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI

34TH JUDICIAL CIRCUIT

HONORABLE FRED W. COPELAND

SUBSTITUTE REPLY BRIEF OF APPELLANTS

For Appellants:
Shaun D. Hanschen #56821
Rachel R. Harris #65953
BLANTON, RICE, NICKELL, COZEAN & COLLINS, LLC
219 S. Kingshighway, P.O. Box 805
Sikeston, MO 63801
Tel: 573-471-1000 Fax: 573-471-1012
Email: shanschen@blantonlaw.com

APPELLANTS REQUEST ORAL ARGUMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Rules & Regulations

SUMMARY OF REPLY BRIEF

Respondents argue that whether a duty exists is a question of law entirely for the court. However, Respondents fail to address the holding in *Leeper v. Asmus*, 440 S.W.3d 478, 488-89 (Mo.App. W.D. 2014), which found that, in co-employee cases, whether the injury resulted from a breach of an employer's non-delegable duty or from a breach of a personal duty must be determined by a jury before the question of law can be answered by the court. Accordingly, the Trial Court should not have entered summary judgment on the question of law before a jury made a determination on the fact issue of non-delegable versus personal duty.

Respondents also argue that, because Mr. Parr had received a medical recertification five months prior to the fatal accident, they had no duty to continue to make sure he was fit to drive. This means they could disregard everything that happened after the certification, including Mr. Parr's additional single vehicle accident seventeen days prior to the fatal accident. Respondents had a personal duty, separate from the employer's non-delegable duty, to investigate the accident including discovering why Mr. Parr fell asleep. By not inquiring further as to Mr. Parr's health history and not investigating the accident on April 11, 2008, Respondents breached their duty.

Additionally, the Respondents' actions fall under the "something more" doctrine. Allowing a truck driver, who had a history of health problems, including narcotic or habit forming drug use, and who had just had an accident because of fatigue, drive a truck

without performing an investigation, is asking the driver to do something a reasonable person would think is more hazardous than normal job requirements.

Respondents essentially concede that Appellants set forth evidence sufficient on each of the other elements of negligence.

REPLY TO RESPONDENTS' BRIEFING ON ARUGMENT

A. Whether Mr. Parr's death was caused by a breach of an employer's non-delegable duty is a question of fact for the jury.

Respondents' main argument is that they had no duty to Mr. Parr as a matter of law because the alleged negligence arose from an employer's non-delegable duty. This question, however, cannot be determined by the court on a motion for summary judgment.

By failing to address the Western District decision which caused this case to be transferred to this Court, *Leeper v. Asmus*, 440 S.W.3d 478 (Mo.App. W.D. 2014), Respondents have tacitly admitted that its holding is sound and that this Court should adopt its reasoning. Appellants thoroughly discussed *Leeper*, and the case law underpinning it, in their Substitute Brief and will not do so again here. However, Respondents continue to argue that the Trial Court was correct in finding that Respondents owed no personal duty to Mr. Parr. The Western District in *Leeper* dealt directly with how the trial court should make this critical determination. Before the trial court can resolve the question of law as to whether the co-employee owes a common law duty, the jury must determine which duty was breached. *Id.* at 488-89. The *Leeper* court held that "[d]etermining whether a workplace injury is attributable to a breach of the

employer's nondelegable duties is a question of fact." *Id.* at 493-94. While not binding on this Court, *Leeper* is good law. Further, *Leeper's* holding is in line with this Court's recent decisions which give deference to a jury's duty to decide facts. *See Watts v. Lester E. Cox Medical* Centers, 376 S.W.3d 633, 640 (Mo. banc 2012)("Like any other type of damages, the amount of noneconomic damages is a fact that must be determined by the jury."); *Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. banc 2014). Under the *Leeper* holding, if a jury determines that the injury resulted from a breach of the employer's non-delegable duty, then the Court enters judgment against the plaintiff as a matter of law. Appellants were not given this opportunity by the Trial Court. This Court should follow the reasoning in *Leeper* and, on this basis, reverse and remand the case to the Trial Court to allow the finder of fact to determine whether Mr. Parr's death was caused by a breach of the employer's non-delegable duty or, as Appellants contend, the personal duties owed by Respondents.

Appellants' entire first point on appeal is devoted to facts in the record which establish each element of a cause of action for negligence. Respondents do not really contest any of those facts. Respondents' only real argument is that they owed no duty as Mr. Parr's injuries were attributable to the employer's non-delegable duty.

Respondents' personal duties are established by the Federal Motor Carrier Safety Regulations as discussed thoroughly in Appellants' Substitute Brief. *See* Appellants' Substitute Brief, pp. 35-38. Respondents contend that the regulations do not establish a personal duty. They contend that the clear statement in 49 C.F.R. § 392.1 (the

responsibility of the employees, officers and agents of the motor carrier to ensure compliance with the regulations) is limited to only that "part." Similar requirements are contained throughout the different chapters, subchapters and parts of the Federal Motor Carrier Safety Regulations. *See* Appellants' Substitute Brief, p. 37.

Respondents also take issue with the Missouri caselaw which holds the federal regulations constitute evidence of duty. They attempt to distinguish the holdings in *Payne* and *McHaffie*, which recognized that the Federal Motor Carrier Safety regulations provide evidence of duty. Both cases make clear that the federal regulations can be considered in a negligence case. Further, Missouri has long recognized that federal regulations can provide evidence of duty in a common law negligence action. *See Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 821 (Mo. banc 2000)(OSHA regulations); *Schneider v. Union Elec. Co.*, 805 S.W.2d 222, 228 (Mo.App. W.D. 1991)(*overruled on other grounds by Romero v. Kansas City Station Corp.*, 98 S.W.3d 129 (Mo.App. W.D. 2003))(OSHA regulations).

Respondents' primary contention is that no evidence can be used to establish a duty. While Respondents cite cases for the proposition that duty is a question of law, other Missouri cases have found again and again that evidence, including statements by the Respondents, is relevant to determining the issue of duty and can preclude summary judgment. *See Richey v. Philipp*, 259 S.W.3d 1, 13 (Mo.App. W.D. 2008); *Giddens*, 29 S.W.3d at 821; *Schneider*, 805 S.W.2d at 228; *Payne*, 177 S.W.3d at 837-38; *McHaffie*, 891 S.W.2d at 827-28. Given the holding in *Leeper*, which requires a jury to determine

which breach caused the injury, and the caselaw which allows federal regulations and other evidence to be used to establish duty, summary judgment in this case was simply improper.

Respondents contend that even if a duty exists, there is no evidence that they breached that duty. This contention is based primarily on Mr. Parr's medical certification in November 2007, its contents, Respondents' ability to rely on its accuracy and its relation to Respondents' duty. Respondents claim that, following this certification, they were relieved of any further duties. Respondents are not permitted to rely on the medical certification when they have or should have knowledge that there is a problem with a driver. *See* Appellants' Substitute Brief, pp. 17-22. Respondents admitted in their deposition testimony that their duty did not end with the medical certification. (LF 89 – 91, 116-117) In Respondents' Substitute Brief, Respondents argue that they had no ability to inquire as to Mr. Parr's health and, further, that a couple of accidents were not sufficient to raise the issue of Mr. Parr's ability to safely operate a commercial vehicle in Respondents' minds. Respondents are really arguing the weight of factual evidence as to what Respondents' should have known. Only the finder of fact can determine if the evidence in the record establishes that Respondents should have known that Mr. Parr was unsafe.

Appellants do not contend that Respondents were entirely unable to rely on the medical certification. Appellants' contention is that Respondents' duties did not end after they received the medical certification. They had an ongoing duty to monitor the fitness

of their drivers. Part of the evidence that the jury would consider in determining whether Respondents should have known that Mr. Parr was unable to safely operate a truck was his own admission, on the medical recertification form, of using narcotic or habit forming drugs. Respondents argued, again, that it was explained by the statement "smokes." It is up to the jury to make the fact determination as to whether the drug use notation relates to smoking or something else. As the non-movants, Appellants are entitled to have the evidence viewed in the light most favorable to them and receive the benefit of all inferences. *Goerlitz v. City of Maryville,* 333 S.W.3d 450, 453 (Mo. banc 2011). Therefore, a genuine issue of material fact exists as to whether the "yes" box marked by narcotic or habit forming drugs was checked merely for smoking or covered some other habit forming drug, which would have required the Respondents to inquire further into Mr. Parr's condition.

Even if Respondents did not need to delve further into Mr. Parr's complete health history after his recertification in November 2007, they were required by §390.15 of the Federal Motor Carrier Regulations to conduct an investigation following the accident on April 11, 2008. Respondents admitted that the wreck "concerned" them, but that their "investigation" merely consisted of asking Mr. Parr why he fell asleep, and that they did not check his logs or inquire further as to why he fell asleep. (LF 125-127). Respondents' duty regarding the investigation of accidents covers all accidents, regardless of cause. Respondents could not simply disregard the possibility of Mr. Parr developing a new health condition, one that could have arisen in the approximately five month period, or

the worsening of a pre-existing condition, just because Mr. Parr had been recertified and told Respondents that he "dozed off" at the wheel. The issue of whether the accident of April 11, 2008, should have imparted knowledge of Mr. Parr's inability to safely operate a truck is a question of fact for the jury to determine, not for the court on summary judgment. The circumstances of this accident contribute to the "reasonable inferences drawn from the circumstances surrounding the incident" which are used by the jury to determine a party's knowledge. *See, e.g., State v. Buhr*, 169 S.W.3d 170, 177 (Mo.App. W.D. 2005).

Even if, as Respondents contend, Mr. Parr's disqualifying conditions came to light after the fatal accident, had Respondents heeded the multiple red flags, his condition would have been revealed and he would have been disqualified from driving prior to the fatal accident. When boiled down to its base, Respondents' argument is that two accidents and the notation on the medical certification are not sufficient to put them on notice of any problem with their driver. Only "a recent stroke or heart attack …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" are sufficient to require Respondents to even consider anything beyond the medical certification. *See* Respondents' Substitute Brief, pp. 43–44. Essentially, Respondents contend that nothing matters after the certification, and no facts which arise during the interim require any action on their part. This is bad policy as Mr. Parr was

operating an 80,000 tractor trailer which can easily present a serious danger to anyone on the road. Respectfully, this is an issue for the jury.

Though only briefly raised by Respondents, Appellants sufficiently pled personal duties on the part of the Respondents. In the Second Amended Petition, Appellants pled three separate duties: (1) to provide a safe working environment to Kevin Parr; (2) to monitor the physical condition of Kevin Parr to determine whether he was fit to drive a tractor-trailer; and (3) to determine whether Kevin Parr was in compliance with Federal Motor Carrier Safety Administration Regulations. (LF 30) Even if the provision of a safe working environment to Mr. Parr fails to give rise to actionable negligence, the remaining allegations of duty, coupled with the common law and federal regulations, sufficiently allege a duty that falls outside of the employer's non-delegable duties. Judge Francis, in his dissent, acknowledged this as well. *Parr*, page 21-22. Under *Leeper*, Appellants are entitled to have a jury, and not the court on summary judgment, determine the factual issue of whether Mr. Parr's death was caused by the breach of an employer's non-delegable duty or the Respondents' personal duty.

The remaining arguments raised by Respondents in their Substitute Brief were fully addressed in Appellants' Substitute Brief and will not be addressed again here.

B. Something More.

This Court need not even reach the issue of "something more" if it chooses to follow the reasoning in *Leeper*. Additionally, since this case arose between 2005 and 2012, Appellants were not required to prove "something more." However, in the event

this Court chooses to retain the "something more" standard for cases in this time period, Appellants will respond to Respondents' argument.

The "something more" doctrine covers situations where 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). An affirmatively negligent act has been held to describe a situation where the employee is directed to engage in a hazardous or dangerous condition 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). Respondents cite several case examples and state that Appellants have not alleged facts that allow their claim to fit the confines of the "something more" doctrine, because the alleged negligence needs to be extreme. *See* Respondents' Substitute Brief, pp. 48-49.

However, Respondents' primary argument as to why this case does not fit the "something more" doctrine is that the duty in this case was the employer's non-delegable duty to provide a safe workplace. As discussed at length above, Respondents' duty was created by the Federal Regulations, and is not a non-delegable duty of the employer. Additionally, the facts of this case, when compared to the facts of the cases cited by Respondents, are more similar than Respondents admit. For example, in *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922, 927 (Mo. App. W.D. 1995), the Court of Appeals held that the supervisor had a personal duty for arranging to have an employee suspended over

scalding water. *See* Respondents' Substitute Brief, p. 48. There, the employee was working above the water in the scope of his employment duties, but a reasonable person would know that dangling over scalding water is hazardous beyond most normal job descriptions. The facts necessary to support "something more" are akin to the facts necessary to support a claim for punitive damages. Violations of safety rules can be sufficient to submit 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).

In this case it was within the scope of Mr. Parr's job to drive a truck carrying anhydrous ammonia. Mr. Parr had a trucking accident due to falling asleep on April 11, 2008, seventeen days prior to the fatal accident. Respondents had a duty to fully investigate the cause of this accident, including determining what caused Mr. Parr to fall asleep. However, Respondents failed to conduct such an investigation into the underlying cause of Mr. Parr's fatigue and allowed Mr. Parr to drive a truck on April 28th containing a volatile chemical substance. A reasonable person would recognize that allowing Mr. Parr to drive after such an accident without inquiring further as to the cause of the fatigue is hazardous. The underlying cause of Mr. Parr's fatigue is irrelevant, as Respondents had a duty under the federal regulations to investigate. By not doing so, and by letting Mr. Parr drive a truck after the April 11, 2008 accident, they breached that duty. These facts show that the Respondents' actions fall under the "something more" doctrine.

Appellants have set forth sufficient evidence to create a genuine issue of material fact as to whether Respondents owed a duty outside of the employer's non-delegable duty

and breached that duty to Mr. Parr, both under the theories of common law negligence and the "something more" doctrine.

CONCLUSION

The trial court erred in entering summary judgment in favor of Respondents Charles Breeden, Wendy Cogdill, and Melanie Buttry and against Appellants Paige Parr, Jeremy Morehead, and Charles Parr. Under the holding in *Leeper,* only a jury can determine whether Mr. Parr's death was caused by a breach of the Respondents' personal duties or of the employer's non-delegable duty. Further, there is sufficient evidence in the record to create genuine issues of material fact for each of the elements of negligence. 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,

BLANTON, RICE, NICKELL, COZEAN & COLLINS, L.L.C.
219 South Kingshighway
Post Office Box 805
Sikeston, Missouri 63801
PHONE (573) 471-1000 FAX (573) 471-1012
Email: shanschen@blantonlaw.com
Email: rharris@blantonlaw.com

By: _____
Shaun D. Hanschen #56821
Rachel R. Harris #65953

Attorney for Appellants Paige Parr, Jeremy Morehead, and Charles Parr

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, 3,117 exclusive of the cover, certificate of service, this certificate and the signature block.

Respectfully submitted,

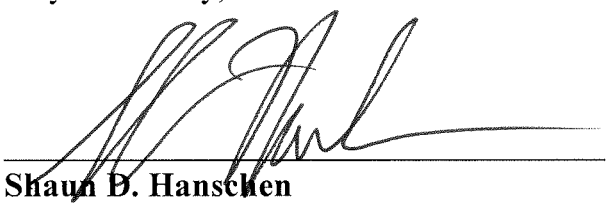
BLANTON, RICE, NICKELL, COZEAN & COLLINS, L.L.C.
219 South Kingshighway
Post Office Box 805
Sikeston, Missouri 63801
PHONE (573) 471-1000 FAX (573) 471-1012
Email: shanschen@blantonlaw.com
Email: rharris@blantonlaw.com

By: _____
Shaun D. Hanschen #56821
Rachel R. Harris #65953

Attorney for Appellants Paige Parr, Jeremy Morehead, and Charles Parr

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 Respondents, Mr. Michael Hamlin, 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 9th day of January, 2015.



Shaun D. Hanschen

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

APPENDIX TO SUBSTITUTE REPLY BRIEF OF APPELLANTS

For Appellants:
Shaun D. Hanschen #56821
Rachel R. Harris #65953
BLANTON, RICE, NICKELL, COZEAN & COLLINS, LLC
219 S. Kingshighway, P.O. Box 805
Sikeston, MO 63801
Tel: 573-471-1000 Fax: 573-471-1012
Email: shanschen@blantonlaw.com

APPELLANTS REQUEST ORAL ARGUMENT

TABLE OF CONTENTS

C

Effective: June 17, 2009

Code of Federal Regulations Currentness
Title 49. Transportation
Subtitle B. Other Regulations Relating to Transportation
Chapter III. Federal Motor Carrier Safety Administration, Department of Transportation (Refs & Annos)
Subchapter B. Federal Motor Carrier Safety Regulations
Part 390. Federal Motor Carrier Safety Regulations; General (Refs & Annos)
Subpart B. General Requirements and Information
→ § 390.15 Assistance in investigations and special studies.

(a) Each motor carrier and intermodal equipment provider must do the following:

(1) Make all records and information pertaining to an accident available to an authorized representative or special agent of the Federal Motor Carrier Safety Administration, an authorized State or local enforcement agency representative, or authorized third party representative within such time as the request or investigation may specify.

(2) Give an authorized representative all reasonable assistance in the investigation of any accident, including providing a full, true, and correct response to any question of the inquiry.

(b) For accidents that occur after April 29, 2003, motor carriers must maintain an accident register for three years after the date of each accident. For accidents that occurred on or prior to April 29, 2003, motor carriers must maintain an accident register for a period of one year after the date of each accident. Information placed in the accident register must contain at least the following:

(1) A list of accidents as defined at § 390.5 of this chapter containing for each accident:

(i) Date of accident.

(ii) City or town, or most near, where the accident occurred and the State where the accident occurred.

(iii) Driver Name.

(iv) Number of injuries.

(v) Number of fatalities.

(vi) Whether hazardous materials, other than fuel spilled from the fuel tanks of motor vehicle involved in the accident, were released.

(2) Copies of all accident reports required by State or other governmental entities or insurers.

(Approved by the Office of Management and Budget under control number 2126–0009)

[58 FR 6729, Feb. 2, 1993; 60 FR 38744, July 28, 1995; 60 FR 44441, Aug. 28, 1995; 69 FR 16719, March 30, 2004; 73 FR 76821, Dec. 17, 2008]

SOURCE: 53 FR 18052, May 19, 1988; 54 FR 7191, Feb. 17, 1989; 59 FR 60323, Nov. 23, 1994;

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 49. Transportation
Subtitle B. Other Regulations Relating to Transportation
Chapter III. Federal Motor Carrier Safety Administration, Department of Transportation (Refs & Annos)
Subchapter B. Federal Motor Carrier Safety Regulations
Part 392. Driving of Commercial Motor Vehicles (Refs & Annos)
Subpart A. General
§ 392.1 Scope of the rules in this part.

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, shall be instructed in and comply with the rules in this part.

[37 FR 26112, Dec. 8, 1972; 53 FR 18057, May 19, 1988; 60 FR 38746, July 28, 1995]

SOURCE: 33 FR 19732, Dec. 25, 1968; 52 FR 27201, July 20, 1987; 53 FR 18057, May 19, 1988; 54 FR 7191, Feb. 17, 1989; 59 FR 34711, July 6, 1994; 59 FR 60323, Nov. 23, 1994; 59 FR 60324, Nov. 23, 1994; 59 FR 63924, Dec. 12, 1994; 66 FR 49874, Oct. 1, 2001; 67 FR 55165, Aug. 28, 2002; 73 FR 76823, Dec. 17, 2008; 76 FR 75487, Dec. 2, 2011; 77 FR 59828, Oct. 1, 2012; 78 FR 52655, Aug. 23, 2013; 78 FR 58923, Sept. 25, 2013, unless otherwise noted.

AUTHORITY: 49 U.S.C. 504, 13902, 31136, 31151, 31502; Section 112 of Pub.L. 103–311, 108 Stat. 1673, 1676 (1994), as amended by sec. 32509 of Pub.L. 112–141, 126 Stat. 405, 805 (2012); and 49 CFR 1.87.

49 C. F. R. § 392.1, 49 CFR § 392.1

Current through Jan. 1, 2015; 79 FR 79066.

END OF DOCUMENT