Case No. SC 94442

IN THE SUPREME COURT OF MISSOURI

CURT PETERS AND CHERI PETERS,
Plaintiffs/Appellants,

v.

PATRICK TERRIO,
Defendant/Respondent.

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS

On Appeal from the Circuit Court of St. Charles County,
The Honorable Jon Cunningham, Circuit Judge

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ATTORNEYS FOR MISSOURI
ASSOCIATION OF TRIAL ATTORNEYS

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Amicus Curiae, Missouri Association of Trial Attorneys (MATA) submits this Brief in an effort to clarify the development of the law defining the respective, discrete duties of employers and employees insofar as work place injuries are concerned.

Before and since adoption of the Workers' Compensation Act, this Court has repeatedly recognized that coemployees had a personal duty to use ordinary care to prevent injuries to other employees caused by: negligent operation of machinery; conduct that rendered an otherwise safe work place to be unsafe; or caused by ordering subordinates into places of danger. Unfortunately, a 1982 opinion of the Court of Appeals greatly confused counsel and trial judges alike as to what are personal duties of coemployees and what kinds of conduct would render them liable for injuries to other employees. The status of the law degenerated so badly that it prompted an article in the JOURNAL OF THE MISSOURI BAR to observe that:

> Ideally, appellate opinions furnish guidance to the litigants and judges in the trial courts. The law in Missouri on the issue of co-employee immunity does more to confuse than clarify; it is a road map leading everywhere and nowhere at the same time. If we are to find our way out of this maze, we must go back to the beginning.

Passanante & Stock, *Help! We're Lost! Co-Employee Immunity in Missouri*, 57 J. MO. BAR 64, 73 (2001).

This Brief will try to "go back to the beginning" and show how Missouri Courts have gone astray, and how to get out of the maelstrom by restoring common law principles to their proper place.

I. RIGHTS OF EMPLOYEES TO RECOVER FROM EMPLOYERS FOR INJURIES SUFFERED IN THE WORK PLACE BEFORE THE WORKERS' COMPENSATION ERA

At the common law a master was liable for his own personal negligence, both to members of the public and to his own workers, III C. B. Labatt, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 902 at 2396 n. 1 (2d ed. 1913) (hereafter, "MASTER AND SERVANT").[1] What about a master's liability for injuries caused by negligence of servants?

Before 1837 in both Great Britain and the United States, "the rule of *respondeat superior* was extremely broad and firmly entrenched." Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule,* 132 U. PA. L. REV. 579, 584 (1984). In Volume I of his COMMENTARIES ON THE LAWS OF ENGLAND, Blackstone noted the maxim, "He who acts through another acts by himself." Com. 429, 430. Consistent with this

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1 Charles Bagot Labatt's monumental treatise consists of eight volumes and, nominally, 10090 pages. MATA says "nominally" because between pages 8944 and 8945, one finds pages 8944a to 8944yy, which includes 8944k-1 to 18. The table of contents is 205 pages long with a 445 page index. It was an enormously influential text; a Lexis search reveals that in Missouri alone, it has been cited in 251 reported cases.

principle, there was no question that ordinarily a master was liable to third persons for torts committed by a servant while acting in the scope and course of his or her employment, *Gray v. Portland Bank,* 3 Mass. 364, 385 (1807); *Gass v. Coblens,* 43 Mo. 377, 379 (1869). Logically, there was no reason to treat an employee injured by the negligence of another employee any differently than strangers who were the victims of that employee. "In principle, too, a worker might have had an action against his employer for any injury caused by the negligence of any other employee." Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents,* 67 COLUMBIA L. REV. 50, 52 (1967) (hereafter, "*Social Change*"). Section 473 of the original RESTATEMENT OF AGENCY (1933) recognized as much when it said that, "A master is subject to liability to a servant for damage caused by the tortious conduct of his other servants. . . " with one exception.

Unfortunately for workers hurt on the job, that one exception nearly swallowed up the rule. In 1837 the English Court of Exchequer decided *Priestly v. Fowler,* 150 Eng. Rep. 1030, establishing what came to be known as the "fellow servant" or "common employment" doctrine, Hobbs, *Statutory Changes in Employers' Liability,* 2 Harvard L. Rev. 212, 213 (1888),[2] under which an employee could not recover from an employer for injuries caused by the negligence of his or her co-employee under a theory of *respondeat*

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[2] Courts appeared to use the phrases, "fellow servant" and "common employment," interchangeably, *see, e.g., Skulimowski v. Deahl,* 169 Ill.App. 365, 368 (1912). Labatt called it the common employment doctrine, clearly referring to the rule articulated in *Priestly* and its progeny, IV MASTER AND SERVANT, *supra,* §§ 1393 and 1394.

superior. As such, the fellow servant rule constituted an exception to employers' strict liability imposed by *respondeat superior* for negligent acts of employees, *Parker v. Nelson Grain & Milling Co.,* 330 Mo. 95, 48 S.W.2d 906, 908 (1932).

The rule soon crossed the Atlantic Ocean, most famously when the Supreme Judicial Court of Massachusetts adopted it in *Farwell v. Boston & Worcester Rail Road*, 45 Mass. (4 Met.) 49 (1842). *Farwell* reasoned that when a servant voluntarily went to work for a master, he assumed the risks incident to his employment, including the risk of "carelessness and negligence of those who are in the same employment." 45 Mass. (4 Met.) at 57. Additionally, the court reasoned that denying compensation from the master would promote work place safety by encouraging servants to watch out for the negligence of their fellow servants, *Ibid*. at 59.

Nearly all jurisdictions in the United States followed *Farwell* over the next few years, *The Creation of a Common Law Rule, supra,* 132 U. PA. L. REV. at 594-596, including Missouri in 1860, *McDermott v. Pacific Railroad Company*, 30 Mo. 115. It can hardly be gainsaid that, when combined with the doctrines of assumption of risk and contributory negligence, the fellow servant rule made it nearly impossible for a worker to recover from an employer for a work place injury since the negligence causing the injury was usually that of a fellow worker, especially in industrial settings:

> An employee retained the right to sue the employer for injuries, provided they were caused by the employer's personal misconduct. But the factory system and corporate ownership of industry made this right virtually meaningless. The factory owner was likely to be a "soulless" legal entity; even if the owner was an

> individual entrepreneur, he was unlikely to concern himself physically with factory operations. In work accidents, then, legal fault would be ascribed to fellow employees, if anyone.

Social Change, supra, 67 COLUMBIA L. REV., at 53.

The consequences of granting what amounted to immunity to employers for the consequences of work place accidents were not salutary (at least for workers). In the early 20th Century, over 35,000 American workers died annually in industrial accidents and hundreds of thousands were seriously injured, *Ibid.* at 60. To give some perspective to this, 4,383 workers died in industrial accidents in the United States in 2012.[3] Thus, eight times as many workers died in 1900 than in 2012, even though the population of the United States was four times greater in 2012 than in 1900.

Along with courts in other states, Missouri recognized the harshness of the fellow servant rule shortly following its adoption. Nine years after *McDermott* was decided, Judge Wagner said of the rule:

> Were the question *res nova*, I should hesitate long before I would give to the rule an unqualified approbation. In many cases it produces the grossest injustice,

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[3] Occupational Safety & Health Administration, *Commonly Used Statistics*, https___www_osha_gov/oshstats/commonstats_html [Note: Underscores inserted to prevent hyperlink.]

> and grants an immunity or exemption which shocks the moral feelings. But in view of the law being settled for many years in this State, the great weight, respectability, and I might add, uniformity of the authorities in the same way, I consider that we are bound to yield an assent, or at least acquiesce in the doctrine, however reluctant we may be to adopt it.

Rohback v. Pacific Railroad, 43 Mo. 187, 193 (1869). So it is hardly surprising that from the outset courts found exceptions to the fellow servant rule – i.e., exceptions to the exception to *respondeat superior*. Indeed, even the case adopting the rule in Missouri recognized an exception: "If the agents, by whose negligence the injury is occasioned, are not possessed of ordinary skill and capacity in the business entrusted to them, it has been held that an action will be against the principal by the injured party, although he may be one of the agents or servants." *McDermott, supra*, 30 Mo. at 115. In such cases the master was held liable for its own negligence, since the duty to hire competent servants was personal to the master. (As such, the liability was also personal rather than imputed from servants.)

Other exceptions followed, *The Creation of a Common Law Rule, supra,* 132 U. PA. L. REV. at 600. By 1879, when the United States Supreme Court first recognized the fellow servant rule in *Hough v. Railway Co.*, 100 U. S. 213, 217, the Court also noted several exceptions revolving around the master's duty "not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence on the part of the master." In this sense the fellow servant rule was simply a bar

to imputing liability to a master for the torts of its servants, but it did not protect the master from a breach of its own duty, *Pomer v. Schoolman,* 875 F.2d 1262, 1266 (7th Cir. 1989).

Missouri recognized expansive duties by employers to their employees in *Gibson v. Pacific Railroad Co.* 46 Mo. 163, 171 (1870), another opinion by Judge Wagner that featured a thorough review of English, Scottish, and American cases discussing the duty of a "master of men in dangerous occupations. . . to provide for their safety," *citing*, the Scottish case of *Dixon v. Rankin*, 14 Court Sess. Cas. 420 (1852). *Gibson* also quoted the following statement by the New York Court of Appeals in *Wright v. New York Central Railroad Co.*, 25 N.Y. 562, 565-566 (1862):

> The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist in the employment of unfit and incompetent servants and agents, or in furnishing for the work to be done, or for the use of the servants, machinery or other implements and facilities improper and unsafe for the purposes to which they are to be applied.

Cited in Gibson, supra, 46 Mo. at 172. Thus, the Supreme Court recognized an employer's duty to adopt "suitable instruments and means to carry on his business," and "if he fails to do so he is guilty of a breach of duty under his contract, for the consequence of which, in justice and sound reason, he ought to be responsible." 46 Mo. at 169.

Prosser summarizes five classes of duties the common law eventually imposed directly on employers that flowed from the duty not to expose employees to perils against which they could be guarded by proper diligence on the part of employers:

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 in ignorance.
4. The duty to provide a sufficient number of suitable fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

W. Keeton, PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 569 (5th ed. 1984) ("THE LAW OF TORTS"). If an employer breached one of these duties, the fellow servant rule provided no defense precisely because it was a duty *personal to the employer* rather than the fellow servant.

In *Zellars v. Missouri Water & Light Co.*, 92 Mo.App. 107, 125 (1902), the Kansas City Court of Appeals described the primary duty of a master "to furnish the servant a reasonably safe place in which to work," which derived not only from the employment relationship, but "is also imposed upon the employer as owner of the premises by the general law for the protection of all persons lawfully thereon." *Ibid.* at 117.

It was inevitable that employers would try to avoid liability for breaches of these duties by assigning their performance to subordinate employees in order to claim that their negligence could constitute a defense for the employer under the fellow servant rule. This led courts to denominate these employer duties as nondelegable, *English v. Roberts, Johnson & Rand Shoe Co.*, 145 Mo App. 439, 122 S.W. 747, 749-750 (1909) ("it is one of

the absolute duties of a master, which he may not delegate, to furnish his servant a reasonably safe place in which to perform his labor"), thereby precluding an employer from shielding itself from liability by the expedient of passing the duty along to a subordinate to carry out. Even if the subordinate failed to discharge the duty, the employer remained liable in spite of the fellow servant rule because "whoever the master selects to act in his stead, becomes, *as to that duty,* the master himself." *Zellars, supra,* 92 Mo. App. at 125 (emphasis added). In such a case the coemployee acted in the dual capacity of "representative of the employer and as fellow employee." *Ibid.* at 119.

An employee designated to perform the employer's duty was sometimes referred to as a "vice-principal." Whether the employee acted as vice-principal depended entirely on the character of the act and not the rank of the employee, *English, supra*, 122 S.W. at 749. If an employee was injured because of the neglect of *the employer's duty* by another employee designated by the employer to carry out that duty, then the employer was liable because *for that purpose* the coemployee was not a fellow servant, but the vice-principal of the employer. (Recall, the fellow servant doctrine provided no defense to a negligence claim against an employer for *its own* negligence, *Ibid.*) This limitation on the fellow servant rule reflected the reality that by the early 20th Century, with corporations increasingly dominating the work place, most acts were committed by fellow servants:

> [T]he master is not liable to a servant for injuries resulting from the negligence and carelessness of a fellow-servant. *The difficulty in any given case, is to determine whether the person guilty of the negligence is a fellow-servant of the person injured, as that term is defined and applied in law.* In cases of corporations,

> all servants are fellow-servants in the sense that they are in the employ of a common master. But are they fellow-servants in the sense of the term when it is used in fixing liability, or determining non-liability of the common master? Whenever injury happens by the negligent performance, or nonperformance, of any of the master's duties (sometimes called personal or positive duties) to the servant, then the master is liable. And the fact that he has delegated that duty to one of his other servants, high or low, will not excuse him. For, the law is that the master's duties to the servant cannot be laid aside by him, or put upon others in such way as to exculpate him when an injury happens by reason of their non-performance.
>
> Where a corporation is the master, it necessarily must entrust this duty into the hands of servants. *But these, while performing such duties, are not fellow-servants to other servants, in the sense of the law*. And though the corporation has been as careful and painstaking as possible in selecting servants to perform its duties, yet if they should be guilty of a negligent act or omission, which hurts another servant, the corporation would be liable. For when it selects another to perform one of the personal duties which it owes to its servants, that other stands in its stead — is its *alter ego*.

Zellars, supra, 92 Mo.App., at 123-124 (emphasis added).

II. THE RIGHT OF EMPLOYEES TO RECOVER FROM COEMPLOYEES BEFORE AND OUTSIDE THE WORKERS' COMPENSATION ACT

At the common law the liability of employees followed general agency principles. An agent's liability to third persons (not just fellow employees) was described by Justice Story in his influential treatise, COMMENTARIES ON THE LAW OF AGENCY § 308 at 314-315 (1839) (hereafter, "LAW OF AGENCY"):

> The agent is personally liable to third persons, for his own misfeasances and positive wrongs, but he is not in general liable to third persons for his own nonfeasances or omissions of duty, *in the course of his employment*. *His liability in these latter cases, is solely to his principal,* there being no privity between him and such third persons; and the privity exists only between him and his principal.

(Emphasis added.) *Cited* in *Harriman v. Stowe*, 57 Mo. 93, 99 (1874).

As will be seen later, the use of terms like nonfeasance and misfeasance was a source of endless confusion in the law, but THE LAW OF TORTS, *supra*, §56, at 373, has a good discussion of the distinction between misfeasance and nonfeasance and why the former leads to liability more often than the latter:

> [T]here arose very early a difference, still deeply rooted in the law of negligence, between "misfeasance" and "nonfeasance" – that is to say, between *active* misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm. The reason for the distinction may be said

> to lie in the fact that by "misfeasance" the defendant has created *a new risk of harm to the plaintiff,* while by "nonfeasance" he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs. The highly individualistic philosophy of the older common law had no great difficulty in working out restraints upon the commission of *affirmative acts of harm*, but shrank from converting the courts into an agency for forcing men to help one another.

(Emphasis added.) The use of phrases such as "positive wrongs" by Story, and "new risk of harm" and "affirmative acts of harm" in THE LAW OF TORTS are emblematic of misfeasance, even in states that no longer observe the distinction between the two concepts. In such states the use of terms like "affirmative acts" describe the same kind of conduct formerly called misfeasance.

Ordinarily in connection with agency law, nonfeasance involved breach of a duty owed to the employer, which is why an employee was not liable to third persons for nonfeasance, i.e. there was no duty owed to such persons, LAW OF AGENCY, *supra*. But even an omission could involve something other than nonfeasance, if "a servant undertakes the performance of a positive act and wrongfully omits an act essential to the proper performance of the positive act such omission is regarded as misfeasance." *Ryan v. Standard Oil Co. of Indiana,* 144 S.W.2d 170, 172 (Mo.App. 1940).

The confusion generated by the nonfeasance/misfeasance dichotomy was subject to much criticism, *see, e.g., Lambert v. Jones*, 339 Mo. 677, 98 S.W.2d 752, 757 (1936), and cases cited therein; *see also,* VII MASTER AND SERVANT, *supra,* § 2586 at 7973-7975. In one widely-cited Annotation, the author suggested that, "An agent who violates a duty

which he owes to a third person is answerable to such person for the consequences, whether it be an act of malfeasance, misfeasance, or nonfeasance." *Personal Liability of Servant or Agent to Third Person for Injuries Caused by the Performance or Nonperformance of His Duties to His Employer,* 20 A.L.R. § IIa, 97, 99 (1922).

In *Lambert v. Jones, supra*, the Court relied on, *inter alia*, this Annotation in following the lead of other states that abandoned the misfeasance/nonfeasance distinction, 98 S.W.2d at 757. *Lambert* involved a woman hurt in a building; she sued agents hired by its owner to manage the building. The issue before the Court was whether the agents were guilty of misfeasance or nonfeasance. Rather than resolve that question, the Court simply jettisoned the old rule and held that:

> [A] servant is liable for acts or omissions causing injuries to third persons whenever, under the circumstances, *he owes a duty of care in regard to such matters to such third persons.* In short, he would be liable whenever he is guilty of such negligence as would create a liability to another person if no relation of master and servant or principal and agent existed between him and someone else.

Ibid. at 759 (emphasis added).

One of the consequences of this duty-centric approach is that an employee will not be liable to a third person for breach of a duty owed to his or her employer: "[A]n agent's breach of duty owed to the principal is not an independent basis for the agent's tort liability to a third party, and an agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third

party." 2A C.J.S. *Agency* § 399, at 695-696 (2013); *accord*: *Restatement of Agency* § 352 (1933), and *Restatement of Agency, Third* § 7.02 (2006).

While these principles governed liability of employees to third persons, they applied equally to the liability of employees *to other employees*. Labatt wrote: "The doctrine is now fully established that a servant is liable to his fellow servant for negligence whereby the latter is injured." VII MASTER AND SERVANT, *supra*, § 2592, at 8006 n. 9. Similarly, in II T. Shearman & A. Redfield, A TREATISE ON THE LAW OF NEGLIGENCE § 245 (6th ed. 1913) ("LAW OF NEGLIGENCE"), the authors noted: "The authorities are now unanimous in favor of holding a servant liable to his fellow servants for injuries suffered by them through his personal negligence in the performance of those duties which each man owes to his fellow men." The congruence of general agency principles with the law governing coemployee liability was embraced by the first *Restatement of Agency* § 359 (1933), which stated, "An agent is subject to liability to fellow agents of the same principal as he is to third persons." This language was repeated in the *Restatement of Agency, Second*, §359 (1958), which provided an illustration of when a coemployee would be liable: "A, an employee of P, operates a machine in a manner endangering the employees who are near it. B, a fellow employee, is injured by the operation of the machine. A is subject to liability to B."

In describing the liability of one servant to another, the Minnesota Supreme Court said in *Griffiths v. Wolfram*, 22 Minn. 185, 187-188 (1875):

> Whoever was guilty of the negligence, if there was any, is liable to plaintiff, unless there was contributory negligence on his part, for any injury which he

> sustained by reason of it. This liability does not rest upon any duty imposed by privity of contract, for in such cases there may not be, and frequently is not, any such privity. But the duty of each to do the work with proper care grew out of the relation which existed between them as persons engaged in the same work; for where several persons are engaged in the same work, in which the negligent or unskillful performance of his part by one may cause danger to the others, in which each must necessarily depend for his safety upon the good faith, skill and prudence of each of the others in doing his part of the work, then it is the duty of each to the others engaged in the work to exercise the care and skill ordinarily employed by prudent men in similar circumstances.

This Court relied on *Griffiths* in *Steinhauser v. Spraul*, 114 Mo. 558, 21 S.W. 859, 860 (1893), in holding that, "A servant may maintain an action against his fellow-servant for injuries received in the master's service." *Steinhauser* included the following quotation from *Rogers v. Overton*, 87 Ind. 410, 412 (1882):

> It is settled law that a servant shall not be exposed to unnecessary and unusual danger, and if he is so exposed he may recover for injuries resulting to him from the wrongdoer who exposed him to peril. It cannot be that a servant shall have no action against his superior *who unnecessarily sends him to a place of extraordinary danger*, for all sound principles and well-considered laws lead to a different conclusion.

Cited in *Steinhauser, supra*, 21 S.W. at 860 (emphasis added).

Unfortunately, 13 years later, the Court muddied the waters by adopting the misfeasance/nonfeasance test to determine whether a coemployee could be liable to another employee for negligence, *McGinnis v. Chicago, R.I. & P.R. Co.*, 200 Mo. 347, 98 S.W. 590 (1906). (This was, of course consistent with the law existing before *Lambert, supra*.) The Court held that nonfeasance meant the servant negligently failed to do what should have been done, while misfeasance meant negligently doing "what should have been done and properly done." *Ibid.* at 592. A servant would be liable to fellow servants for misfeasance, but not for nonfeasance. *Ibid.* To be liable for misfeasance, of course, the servant had to "do the wrongful act occasioning the injury." *Ibid*.

In the later case of *McCarver v. St. Joseph Lead Co.*, 216 Mo.App. 370, 268 S.W. 687 (1925), the Court applied Justice Story's principle to a case involving an action for the death of an employee caused by the negligence of his coemployee. In that case plaintiff's decedent worked in a lead mine. The mine superintendent, Foster, ordered decedent to take down a loose stone in the roof despite the fact that Foster had not inspected the roof to determine whether it was safe to do what he ordered decedent to do. When decedent did as Foster ordered, the roof collapsed, killing him.

Plaintiff sued the mining company and Foster. As to Foster, the Court noted that it was his duty, as *alter ego* of the mining company, to exercise ordinary care in discovering the extent of the danger into which he ordered decedent, 268 S.W. at 689. Foster argued that his negligence was nonfeasance, for which he could not be personally liable. The St. Louis Court of Appeals disagreed, citing Labatt as follows:

> [N]onfeasance refers to the omission on the part of the agent to perform a duty which he owes to the principal by virtue of the relationship existing between them, but whenever the omission on the part of the agent consists of his failure to perform a duty which he owes to third persons, then, as to such third persons, his omission amounts to misfeasance for which he is responsible.

VII MASTER AND SERVANT, *supra*, § 2586 at 7976, *cited* at 268 S.W. at 690. Once an agent undertakes to perform acts required by his employer and "fails or omits to do certain acts which he should have done, whereby a third person is injured, it is not nonfeasance, but a misfeasance." *Ibid.* The Court concluded that when Foster actually entered upon his duty to his employer to inspect the mine, and in doing so failed to use reasonable care by directing decedent to take down the loose rock, he was guilty of misfeasance rather than nonfeasance so that he was personally liable to plaintiff. *Ibid.*

Courts abandoning nonfeasance/misfeasance and focusing on the existence of a duty applied the new principles to determining the liability of coemployees. Thus, in *Hoeverman v. Feldman*, 220 Wis. 557, 265 N.W. 580 (1936), the president of plaintiff's corporate employer told her to operate a die-cutting machine in a manner that greatly increased the chances of injury. While plaintiff operated the machine in the manner instructed by the president, her right hand was severely injured, and she sued the president individually. Defendant claimed that he breached no duty which he, as an individual, owed to plaintiff. The Wisconsin Supreme Court, disagreed, and in the course of its opinion, it formally abandoned the misfeasance/nonfeasance test: "[I]n cases which involve the right

of a third party to recover from an agent, the latter is individually liable if he has breached

some duty which he owed to such third person," including employees, obviating the need of "considering fictitious distinctions between nonfeasance and misfeasance." *Ibid*. at 582-583.[5]

This principle was part of the black-letter law concerning a coemployee's duty to other employees. Thus, 39 C.J. *Master and Servant* § 1513, at 1312-1313 (1925), said:

> This rule does not rest upon any duty imposed by privity of contract, but depends upon the common law obligation of the servant so to conduct himself as not to cause injury to another; and the doctrine that exempts an employer from liability to his servant does not in any way affect the liability of the servant inflicting the injury.

Of course, this duty was not unlimited. A servant is "never liable for injuries to another servant where he has omitted no duty with which he is personally charged. . .." *Ibid.* at 1313. It followed that, just as was true in cases involving third parties, an employee was "not liable for injuries to another servant because of the failure of the master to furnish a safe place to work or suitable appliances or instrumentalities...." *Ibid.*[6]

[5] Half a century later *Hoeverman* was cited with approval in *Craft v. Scaman*, 715 S.W.2d 531, 537 (Mo.App.E.D. 1986).

[6] The foregoing explication of the black letter law in 1925, described in CORPUS JURIS, reflected the consensus of most commentators by that time, *see* sources cited in *Clark v. Floyd*, 514 So.2d 1309, 1318-1319 (Ala. 1987).

CORPUS JURIS cited *Cincinnati, N. O. & T. P. R. Co. v. Robertson,* 115 Ky. 858, 74 S.W. 1061 (1903), in support of the latter proposition. In that case an engineer sued his employer and his foreman for injuries received as a result of a defect in a glass tube on the engine he was operating. The claim against the employer was based on breach of its duty to provide him with safe machinery. His claim against the foreman was that it was the foreman's job to see to it that the tube was not defective. The issue raised thereby was whether the foreman could be held "liable to one of another grade for the master's failure to provide safe and suitable machinery, although it was the superior's duty to look after the condition of the machinery." 74 S.W. at 1062. The Kentucky Court of Appeals held that the foreman could not be liable because it would mean "every servant is personally charged with the same liability as his master, although the sole fault was that of the master, over whose action the servant. . . had no control." *Ibid.*

To similar effect was *Haynes' Adm'r v. Cincinnati, N. O. & T. P. R. Co.*, 145 Ky. 209, 140 S.W. 176 (1911), in which a fireman was killed when the engine on which he was working exploded. Plaintiff sued the railroad for breach of its duty to provide a safe locomotive, and the engineer for failing to discover that the engine was defective. The court held that the engineer breached no duty:

> It is neither the province nor the duty of the servant to dictate to the master the character of tools, implements or machinery that he shall be provided with. The servant has usually no right of selection or voice in the kind or quality of machinery or implements he must work with. These things are furnished by the master and if they are defective or unsafe the liability attaches to the master and not to the servant.

> It would be a most unreasonable doctrine to hold a person responsible for defects in machinery that he was merely employed to work with under the direction of a superior who possessed the exclusive right to furnish the tools or machinery needed by him in the performance his duties. To hold the servant answerable for the delinquency or wrong-doing of the master would be to put upon him responsibilities that he did not assume in accepting the employment and charge him with conduct that the conditions of employment placed it beyond his power to control. We therefore think it is clear that when as in this case a railroad company furnishes an engine to an engineer and directs him to take it out, that the engineer is not personally liable in an action for damages because injuries are occasioned by some defect in the engine.

140 S.W. at 180.

In *Floyt v. Shenango*, 186 F. 539 (D.Minn. 1911), the plaintiff sued his foreman, Hodgon, for failing to discover a defect in a ladder that caused injury to plaintiff. Plaintiff alleged that Hodgson failed in his duty to maintain the ladder in a safe condition. Hodgson argued that the petition only stated a claim as to him for nonfeasance, so that he was entitled to be dismissed. The court agreed:

> [Hodgson] was charged with the supervision of the mine and the workmen engaged therein, and. . . it was also his duty to see that the appliances used in the mine were in a reasonably safe condition. The only negligence charged against him is simply nonfeasance, in that *he failed to perform the positive duty of the master to properly inspect and repair the ladderway*. Upon well-established principles of the

> common law, Hodgson was not liable to third parties or co-employees for nonfeasance. For that he is liable only to his employer.

186 F. at 540 (emphasis added). *Accord: Richardson v. Southern Idaho Water Power Co*., 209 F. 949, 952 (D.Idaho 1913) (where plaintiff sued the decedent's superintendent for failing to provide decedent with a safe place to work, court held that no viable claim was pled as to the superintendent because he "owed no duty to decedent in this respect; his obligation was to his employer alone"); *Pester v. Holmes*, 109 Neb. 603, 191 N.W. 709, 711 (1923) ("the servant is not responsible for the nonperformance of a duty which the law puts upon the master").

Thus, it was clear at common law that an *employee* could not be liable for breaching his or her *employer's* nondelegable duties.

III. THE TENSION BETWEEN THE MASTER'S DUTY AND THE SERVANT'S DUTY, OR CHARACTERIZATION IS DESTINY

At common law it was critical to determine whether an employer, personally or through a vice-principal, breached one its duties not to expose employees to hazards against which they could be guarded by the diligence of the master, or whether a fellow servant, not assigned to make the work place safe, breached a personal duty to other employees. If an employee was injured by the negligence of a coemployee acting as a vice-principal, then he or she could hold the employer liable; if the coemployee breached a *personal* duty, under the fellow servant rule only the coemployee could be responsible.

When Judge Ellison's Opinion in *Zellars*, *supra*, referred to "the difficulty in any given case... to determine whether the person guilty of the negligence is a fellow-servant of the person injured," *Zellars*, *supra*, 92 Mo.App. at 123, he identified a troublesome question that became a fertile field for litigation in the late 19th through the early 20th Centuries: In a particular case was a coemployee acting as a *vice-principal*, so that his or her conduct was deemed to be a breach of a duty of the employer (for which it was liable), or as a *fellow servant*, so that the employer was not liable.[7] Workers hurt by the negligence of coemployees had an incentive to characterize the actions of the coemployee as those of a vice-principal, since if that coemployee failed to carry out the nondelegable duty of the employer to provide a safe place to work, the employer was responsible for the failings of the coemployee. Employers had a corresponding incentive to characterize subordinates as fellow servants since their negligence would bar liability of the master under the fellow servant rule.

This led to the practice of injured workers claiming that the negligence of coemployees had the *effect* of rendering the work place or instrumentality unsafe so that

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[7] An indication of the volume of litigation generated by the deplorable safety conditions in many American factories in the early 20th Century was provided by Friedman and Ladinsky in *Social Change*, *supra*, where they noted that industrial accident litigation dominated the docket of the Wisconsin Supreme Court after 1905 until workers' compensation laws took effect, with more cases on that subject than any other area of law, 67 COLUM. L. REV. at 59 n. 32.

the *employer's* duty was breached. (Of course, in any case where a coemployee's negligence caused injury to another employee, *for that injured employee* the work place was certainly unsafe.) In trying to ascertain what status the coemployee occupied in a given case, Labatt described the issue this way:

> [T]he essence of the problem is to discover some rational basis upon which the theory that the master is under an absolute obligation to use due care in providing and maintaining a safe environment for his servants shall be adjusted to the practical situation which results from the fact that any delinquency of a servant which actually eventuates in injury to a fellow servant must, in the very nature of the case, operate so as to render the environment of the sufferer unsafe. *It is clear that the problem is not susceptible of the simple solution sometimes explicitly submitted by counsel, and still more frequently repudiated by judges in their opinions, that a delinquency may constitute a breach of the master's duty to furnish a safe place of work, merely because the place of work is thereby made unsafe for the time being. All the authorities are agreed as to the general proposition, that a master who has furnished a reasonably safe place to work in, and reasonably safe appliances to work with, cannot be held liable to a servant whose co-servant has, by his negligence, rendered that place or those appliances unsafe, without the master's fault or knowledge.*

IV MASTER AND SERVANT, *supra*, § 1515, at 4539-4540 (emphasis added).

The key to resolving this conundrum was ascertaining *whose* duty was implicated. In the notes to the foregoing section, Labatt cites to many cases that refused to find a breach

of an *employer's* duty to provide a safe place to work simply because the negligence of a coemployee made the place unsafe, *Ibid.*, at 4540, n. 2-3; *see, e.g., Hermann v. Port Blakely Mill Co.*, 71 F. 853 (N.D.Cal. 1896). Similarly, Labatt notes that negligent use of a safe instrumentality by a coemployee would not impose liability on the employer: "[A master] cannot be held liable for injuries [to a servant] caused by the manner in which the servants use those instrumentalities for the performance of their work." IV MASTER AND SERVANT, *supra,* § 1520, at 4551. This is so because the "*master is deemed to have performed his whole duty,* where he has supplied an instrumentality which is reasonably safe if it is carefully used by the fellow servants of the injured person." *Ibid,* at 4551-4552 (emphasis added).

Cases cited in the notes to this section of MASTER AND SERVANT emphasized that the key to determining whether the master or fellow servant was responsible for injury to another servant depended on whose duty had been breached. Thus, in *St. Louis, I. M. & S. R. Co. v. Needham,* 63 F. 107, 109 (8th Cir. 1894), the court described a "line of demarcation" between an employer's duty to provide a safe instrumentality and the duty of the coemployee to whom the instrumentality is furnished, noting as to the latter: "Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous? If so, it is the *duty of the servants* to perform that act, and they, and not the master, assume the risk of negligence in its performance." *Cited* in IV MASTER AND SERVANT, *supra,* at 4552, n.1 (emphasis added). Similarly, in *Portland Gold Min. C. v. Duke,* 164 F. 180, 182 (8th Cir. 1908), the court held that the duty of *using* a reasonably safe place or *operating* reasonably

safe machinery *in such a way as to not cause injury to other employees* rested on those to whom the work was assigned and was "*no part of the positive duty of the master*." *Cited* in MASTER AND SERVANT, *supra*, 4552 n.3 (emphasis added). *Accord: American Bridge Co. v. Seeds*, 144 F. 605, 611 (8th Cir. 1906) (while master has duty to furnish safe machinery, that duty has rational and legal limits; "risk that machinery will become dangerous is a risk of operation. . . and the duty to protect machinery from dangers arising from negligence in .. . use is a duty of the servants who use them, and not of the master who furnishes them"); *Snow v. Housatonic R. Co.*, 90 Mass. (8 Allen) 441, 447 (1864) (duty to provide safe instrumentalities for performing work does not extend to responsibility for negligence of servants "in using or managing the means and appliances placed in their hands. . . if they are neither defective nor insufficient"); and *Callaway v. Allen*, 64 F. 297, 300-301 (7th Cir. 1894) (where car was overloaded by coemployees, that was not a breach of employer's duty to provide a safe car; "any machine may be made dangerous if wrongfully or negligently used;" overloading was fault of fellow servants, even though effect of their negligence was to render car unsafe).

Cases involving misuse of otherwise safe equipment occupied a prominent place in Labatt's description of when a fellow servant was deemed to have breached a duty rather than the master. He identified four categories of such cases:

1. The delinquent coservant may have handled or placed a safe instrumentality so carelessly as to convert it, for the time being, into an injurious agency.

2. The delinquent may have created the abnormal danger by his negligence in selecting the defective instrumentality from the stock of materials supplied.

3. The delinquent coservant may have failed to use the instrumentalities furnished, and so created the abnormal danger which cause the injury.

4. The delinquent may have been in control of the injured servant, and caused the injury by giving his fellow servants some direction as to the use of the appliances, or by sending the injured servant to work in a specially dangerous place without due warning, or with a positive assurance that he would not be put in peril by complying with the order.

IV MASTER AND SERVANT, *supra*, § 1520, at 4553–4554.

The development of Missouri law was consistent with the rules articulated by Labatt. In *Steffen v. Mayer*, 96 Mo. 420, 9 S.W. 630 (1888), the plaintiff was injured while unloading a wagon because it was not properly secured by a coemployee. Plaintiff argued that this constituted a breach of his employer's duty to guard his employees against extraordinary dangers associated with their work. This Court disagreed, reversing a judgment for the plaintiff and holding that the employer had a right to presume that plaintiff's coemployees would take appropriate measures for their own protection:

> Where a suitable machine is put in the hands of a competent servant, he must exercise his judgment in the use of it; and so here it was *the duty of the servant* to guard against accidents incident to the business in which they were engaged, and which were open to their observation. We can but conclude that the evidence shows, and only tends to show, an injury resulting solely from the want of care on the part of the plaintiff *and his co-laborers*.

9 S.W. at 631 (emphasis added).

Twelve years after *Steffen,* this Court reiterated the limit of an employer's duty to provide safe instrumentalities in *Grattis v. Kansas City, P. & G. R. Co.*, 153 Mo. 380, 55 S.W. 108, 115 (*en banc*. 1900), where an engineer failed to keep a careful lookout and caused injury to the plaintiff: "The master cannot be adjudged guilty of a failure of duty where he furnishes a servant machinery and appliances which are reasonably safe when used in the manner they are intended to be used, but which may become dangerous if their use is perverted by the servant."

These principles were applied in Judge Bland's remarkable opinion in *Schmelzer v. Central Furniture Co.*, 134 Mo.App. 493, 114 S.W. 1043 (1908), a case in which plaintiff's employer was refurbishing the third floor of its factory in St. Louis. As part of that process, defendant's workers had to tear out old wooden flooring and shelving and then chuck it out the third floor windows to the ground below, where it remained, as Judge Bland described it, in "a promiscuous pile."[8] 114 S.W. at 1044. Plaintiff's job was to carry lumber from the "promiscuous pile" into the furnace room for use as fuel.

Defendant's third floor foreman, Koetting, handed a seven foot board to a laborer named Kramer and told him to throw it out the window where it could join the other boards on the aforementioned pile. Just as he pitched out the plank, Kramer looked out and "saw

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[8] A Lexis word search reveals that this is the sole reported case in the history of Missouri jurisprudence in which the word "promiscuous" was used as an adjective to describe a pile, presumably because Judge Bland knew his Homer.

plaintiff under the window in a stooping position, and hallooed to him to look out. . .."[9] *Ibid*. Unfortunately, plaintiff did not have time to avoid the menacing missile and was struck in the head, sustaining an injury.

Plaintiff sued his employer, claiming that Koetting was defendant's vice-principal when he ordered Kramer to launch the lumber out the window without checking to see if anyone was below. Defendant's answer asserted the fellow servant doctrine in defense.

The Court held that there was nothing illegal or improper about Koetting's order, and if Kramer had executed the order with reasonable care, plaintiff would not have been beaned by the board:

> Ordinarily the *master discharges his whole duty* to his servant when he uses ordinary care in the selection of his fellow-servants and provides suitable tools, appliances, etc.; when he has done this the servants must look to each other for protection in the performance of their several duties. [Citations omitted.] The work done by Kramer was not such as required the personal supervision of the master. Koetting was not required to follow Kramer to the window and tell him when to let the boards go; it was *Kramer's duty* to look out for plaintiff, his fellow-servant, and

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[9] Apparently, "hallooed" was a form of local jargon for, "There is a seven-foot plank hurtling toward you."

Tragically, there is no Hall of Fame for members of the Missouri Judiciary, but if there were, Judge Bland could occupy a place of honor, if only for "promiscuous pile" and "hallooed."

> we think plaintiff's injury was caused by the negligence of Kramer, his own negligence concurring therein.

114 S.W. at 1045. (Emphasis added.) Since the duty was personal to Kramer, Central Furniture was not liable for a breach of its duty to provide a safe place to work.

To similar effect is *English, supra,* in which a coemployee of plaintiff negligently activated a machine, injuring plaintiff. The plaintiff was not entitled to recover from his employer for the negligence of his coemployee in operating an otherwise safe machine because there was no breach of the employer's duty, 122 S.W. at 750. *See, also: Van Bibber v. Swift & Co.,* 286 Mo. 317, 228 S.W. 69, 77 (*en banc.* 1921) ("Another kind of dereliction of duty, which is regarded as characteristic of a servant, and not of the master, is that which consists of the failure of a fellow-servant to make use of suitable appliances furnished by the master for the work in hand"), *citing* IV MASTER AND SERVANT, *supra,* § 1534; and *Ryan v. Lea,* 249 S.W. 685, 687 (Mo.App. 1923) (when a master has furnished servant with a safe instrumentality, the master "has performed his whole duty and cannot be held responsible for an untoward happening due solely to the manner in which the fellow servant performed his work"), *citing* IV MASTER AND SERVANT, *supra,* § 1520. In *Kelso v. W. A. Ross Const. Co.,* 337 Mo. 202, 218, 85 S.W.2d 527, 535 (1935), the Court cited III MASTER AND SERVANT, *supra,* § 903, at 2398 for the following proposition:

> 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 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. It is obvious that this is merely an alternative way of stating the effect of the doctrines of contributory negligence and common employment.

(Emphasis in original.)

In *Graczak v. St. Louis*, 356 Mo. 536, 202 S.W.2d 775 (1947), the plaintiff was injured when his coemployee ignored plaintiff's warning to not activate a machine at their work place.[10] He sued his employer for the coemployee's negligence, and (predictably) defendant invoked the fellow servant rule, claiming that the coemployee's negligence was "merely incidental to the work itself, an operative detail, and had no direct relation to the safety of the place of work." *Ibid.* at 776. After reciting the proposition that an employer did not breach its duty to provide a safe work place where it became unsafe solely through the fault of fellow employees, *Ibid.* at 777, this Court said that, as to instrumentalities furnished:

> [W]here an appliance is reasonably safe to operate, and its operation necessarily rests upon the care, intelligence and fidelity of the fellow servants of the

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[10] Although *Graczak* was decided after Missouri adopted its Workers' Compensation Act, in 1947 the Act did not cover employees of municipal corporations, R.S.Mo. § 3693 (1939), so the fellow servant rule still applied. Municipal employees were eventually covered by the Act in 1974, S.B. 417.

> person injured, the master will not be held responsible for an accident the nature of which indicates that it must have been due to the manner in which the appliance was operated by one of those workmen.

Ibid., citing IV MASTER AND SERVANT, *supra,* § 1520. As to warnings, the Court stated:

> "The general principle that the master's duty to provide a safe place to work is not deemed to have been violated where the unsafety is caused solely by the acts of coservants in carrying out the details of the work clearly involves the corollary that the master is not chargeable with the failure of those servants to warn each other as to the existence of dangerous conditions which have already supervened." [IV MASTER AND SERVANT, *supra,* § 1531.] And: "Frequent attempts have been made to bring the negligence of servants deputed to give signals within the scope of the principle that the duty to maintain a safe place of work is nondelegable. But this contention is rejected. . . ." [*Ibid.* § 1537.]

202 S.W.2d at 777. The Court held that the failure of the coemployee to heed plaintiff's warning was the fellow employee's negligence "in an *operative detail of the work* they were engaged in at the time," for which reason the duty breached was that of a fellow servant, precluding recovery against the employer. *Ibid.* at 780 (emphasis added).

The phrase, "operative detail of work," was commonly used in cases discerning whether a particular duty was that of the employer as opposed to that of a fellow servant, illustrated by *Johnson v. Corn Products Refining Co.*, 319 Mo. 958, 6 S.W.2d 568 (1928). In that case Johnson and Bronson were laborers in defendant's factory, responsible for

hauling tinplates from railroad cars into the factory. Access to the factory was through a doorway that included a heavy door. Although the door was usually open, on the date in question it was cold and windy outside, causing some employees to complain about a draft, so an employee named Puckett was specially assigned to keep the door closed except when tinplate haulers were bringing material into the factory or going back outside.[11] After Johnson and Bronson hauled tinplates into the factory, Puckett closed the door on Johnson as he exited the building, striking him and causing injury.

Plaintiff claimed that Puckett's actions breached the employer's duty to provide employees with a safe place to work, while defendant argued that the door was safe and only became dangerous because of Puckett's negligence. The Court initially noted:

> It is often difficult to determine in a given case whether the duty to furnish a safe place, although it is a continuing one, has been breached. It has been said that any negligence which results in injury to someone makes a particular spot or place dangerous or unsafe. But such a view followed to its logical sequence would result in entirely wiping out the fellow-servant doctrine.

6 S.W.2d at 570. The Court said the appropriate test was: "Did the negligent act have a direct relation to the place of work? or was it merely incidental to the work itself -- an 'operative detail?' *Miller v. Centralia Pulp Co.*, 134 Wis. 316[, 113 N.W. 954 (1907)]; *Daves v. Southern Pacific Co.*, 98 Cal. 19[, 32 P. 708 (1893)]." 6 S.W.2d at 961962.

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11 Puckett's usual job was also hauling tinplates, 6 S.W.2d at 569.

In *Miller* the Wisconsin Supreme Court held that an employee's negligent performance of a "function pertaining to a customary operative detail. . . was not the negligence of the master in failing to furnish and maintain a safe place for the employees to work." 113 N.W. at 955. This was a refinement of a larger principle:

> The fact that a working place may be rendered unsafe by reason of the negligent operation by an employee of an appliance furnished by the master does not preclude the master from committing the operation of such an appliance to a competent employee, and *any injury to an employee due to such negligent operation of the appliance is not a failure of duty by the master to furnish a safe place or appliance, but is a negligent act of the servant in the conduct of a common employment.*

Ibid. (emphasis added). In *Daves, supra,* the California Supreme Court held similarly: "It is the duty of the master to provide a suitable switch and competent servants for its operation; when he has done this, *his duty is at an end* and his liability ceases. The keeping of it in position and *its use and operation is a duty belonging to the servant. . . .*" 32 P. at 710 (emphasis added).

In *Johnson* this Court held that keeping the door open was *not* an operative detail of the work; it was not part of the work of moving tin, nor was it incident to that work. Puckett's temporary assignment to opening and closing the door was for the purpose of protecting employees in the building from inclement weather. "In other words, the keeping of the door closed was the measure taken to make the place a safe place. . . ." 6 S.W.2d at 962. Accordingly, opening and closing the door had a direct relation to the place of work,

so that Puckett was performing the master's duties; he was not acting as a fellow servant at the time of Johnson's misfortune, *Ibid.* at 963.

Of course, as will be noted below, the passage of the Workers' Compensation Act made the question of whether an employer could be liable for the acts of a vice-principal moot. But the pre-Act cases are highly relevant because they precisely delineate what constitutes an employer's duty, something that has a direct bearing on the scope and existence of a *coemployee's* duty, since a coemployee could not be held liable solely for a breach of the employer's duty, 39 C.J. *Master and Servant, supra,* § 1513.

When cases examining the respective liabilities of employers and coemployees are examined, certain principles can be gleaned. Duty is always central. The duties to provide a safe place to work, safe instrumentalities, and the like were (and still are) exclusively those of the employer. An employee could not be held liable for a breach of those duties because they were personal to the employer. Thus, an employee assigned the task of making or keeping the work place or work instrumentalities in a safe condition could not be held liable to third persons for failing perform his or her duty owed solely to the employer. Conversely, under the fellow servant rule, an employer could not be held liable for a breach of a duty that an employee owed to his or her coemployee; that was a duty personal to the employee (and under the fellow servant rule, the negligence of the coemployee could not be imputed to the employer). An employer would not be liable just because the *effect* of a fellow servant's breach of his or her duty was to render the work

place unsafe, otherwise the fellow servant rule could never be successfully asserted.[12] Thus, courts became acutely aware of the distinction between employers' and employees' duties, and how a duty was characterized -- as the master's or the servant's -- frequently determined who was liable for a coemployee's negligence. To paraphrase Heraclitus, "Characterization was destiny."[13]

The respective duties of the master and the servant were mutually exclusive. If the conduct of a subordinate was in furtherance of the master's duty, then, perforce, it could not be a breach of the subordinate's personal duty. Conversely, if a breach involved a personal duty owed by the subordinate to other employees, then it could not be a breach of the employer's duties, even if it had the incidental effect of making the work place or instrumentality unsafe. If the duty was the servant's and not the master's, the result was a breach of duty by the former and not the latter.

The interaction of these principles is illustrated by *Chappee v. Gus V. Brecht Butchers' Supply Co.,* 30 S.W.2d 35 (Mo. 1930), in which the plaintiff's decedent was killed in 1926 while riding as a passenger with Wisloh, a coemployee of decedent, who drove the employer's truck into a wagon. Plaintiff sued both the employer and Wisloh. As to the employer, the Court held that there was no evidence that it furnished an unsafe truck

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12 Recall Labatt's statement that any delinquency by a fellow servant is not attributable to the master as a breach of its duty "merely because the place of work is thereby made unsafe for the time being." IV MASTER AND SERVANT, *supra*, § 1515.

13 Apologies to Heraclitus.

to Wisloh, for which reason there was no breach of its duty, and it was entitled to the benefit of the fellow servant rule, 30 S.W.2d at 36. (This was so even though the effect of Wisloh's negligent driving was to render the truck decidedly unsafe for decedent.)

But the fellow servant rule provided no defense to Wisloh because it "applies only when the relation of master and servant between the two litigants exists." *Ibid.* at 37.[14] Since the Court had determined that there was no breach of the employer's duty to provide a safe instrumentality, it followed that Wisloh's breach of his personal duty to decedent to avoid running into the wagon was actionable, *Ibid.*

IV. THE WORKERS' COMPENSATION ACT AND COEMPLOYEE LIABILITY: 1927 TO 1982

In 1925 the Missouri General Assembly adopted the Workers' Compensation Act; after it was approved by voters in 1926, it took effect in 1927, *Gunnett v. Girardier Building and Realty Co.*, 70 S.W.3d 632, 635 (Mo.App.E.D. 2002). The Act provided a no-fault administrative system in which an employer was responsible for compensating workers covered by the Act when they were hurt on the job, even if the employer was not negligent. Defenses such as contributory negligence, assumption of risk, and the fellow servant rule did not apply to claims made under the Act, *Ibid.* The Act provided injured workers with an exclusive remedy so that, for the most part, employers were immune from

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14 *Accord: Clark v. Floyd*, *supra*, 514 So.2d at 1319.

liability for negligence in the court system, *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo.App.E.D. *en banc*. 1982).

But the Act only provided the exclusive remedy for claims against employers. It did not preclude civil actions by covered workers against third parties whose negligence may have injured employees, even if they also had a remedy available under the Act, *Gunnett, supra*, 70 S.W.3d at 636-637.

What about "third parties" who were coemployees of the injured worker? As we have already seen, before 1927 employees could be liable if they breached a personal duty to a fellow servant, *Steinhauser, supra.* The same thing was true after the Act took effect.

The first case to decide the issue was *Sylcox v. National Lead Co.*, 225 Mo.App. 543, 38 S.W.2d 497 (1931), in which the plaintiff was injured by the negligence of a bus driver hired by plaintiff's employer to take employees to work at its mine. As in *Chappee, supra*, plaintiff sued both his employer and the driver. Since the injury occurred after the effective date of the Workers' Compensation Act, the Court held that plaintiff's claim against the employer was barred by its immunity.[15] But his action was not barred as to the driver. The Court reasoned that the driver could not be liable to plaintiff for compensation under the Act, for which reason he was also not entitled to the immunity it afforded, 38 S.W.2d at 501. Since there was "no doubt that at common law one servant is liable to another for his own misfeasance, and there is nothing in the compensation act which

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[15] Even if the injury in *Sylcox* had predated the Act, the employer would not have been liable for the driver's misfeasance under the fellow servant rule, *Chappee, supra*.

destroys such liability," the driver could be held accountable for his negligence, the same as any other third party could, *Ibid.* at 502. The practical effect of the Workers' Compensation Act was to leave undisturbed the well-developed body of law regarding the liability of a coemployee for breach of a personal duty, for which reason the bus driver was regarded as a third party under the Act, "amenable to an action at common law." *Gunnett, supra*, 70 S.W.3d at 637.

In the next half century a total of *three* reported cases involved application of the rule announced in *Sylcox*.[16] Only one of those claims was for negligence; in 1950 the Supreme Court allowed a medical negligence claim to go forward against a physician hired by plaintiff's employer to provide treatment for a work place injury, *Schumacher v. Leslie*, 360 Mo. 1238, 232 S.W.2d 913, 917-918 (*en banc*.), *citing*, *Sylcox, supra*. None of the cases decided after *Sylcox* until 1982 discussed what constituted a personal duty of a coemployee so as to allow recovery by a fellow employee where there was coverage under the Act.

However, there were cases that discussed when an employee would be liable to third persons, including other employees, in cases where there was no workers' compensation coverage. Thus, in *Giles v. Moundridge Milling Co*., 351 Mo. 568, 173 S.W.2d 745, 751 (1943), a premises liability case, this Court described the rules used in assessing an

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16 The other three cases were *Gardner v. Stout*, 342 Mo. 1206, 119 S.W.2d 790 (1938); *Schumacher v. Leslie*, 360 Mo. 1238, 232 S.W.2d 913 (1950); and *Lamar v. Ford Motor Co.*, 409 S.W.2d 100 (Mo. 1966).

employee's liability to a third person injured by defects on her employer's premises, holding that an agent "is not liable to third persons for a mere failure to perform a duty owing to [her] principal only [*citing Restatement of Agency* § 352], but if [she] violates a duty which [she] owes to a third person [she] is answerable to such person for the consequences of [her] negligence (*Devine v. Kroger Grocery & Baking Co*., 349 Mo. 621, 632, 633, 162 S.W.2d 813[, 816-817 (1942)])." 173 S.W.2d at 751. Accordingly, an agent could not be liable for a condition "over which [she] has no control and with respect to which [she] has no duty." *Ibid*. at 752 (internal citations omitted). As we have already seen, the same principles of liability for an employee to third persons governs liability to fellow employees, *Restatement of Agency, supra,* § 359.

While *Giles* involved whether an employee could be liable to a third person for dangerous conditions on her employer's premises, the issue of duty by one coemployee to another was at the heart of *Logsdon v. Duncan*, 293 S.W.2d 944 (Mo. *en banc*. 1956). In *Logsdon* the plaintiff and defendant, Duncan, were both employees of the Kansas City School District, involved in the rehabilitation of an old building belonging to the District. Duncan worked on the roof of the building while plaintiff worked on the ground. Duncan dislodged debris that fell off the roof and struck plaintiff in the head. Plaintiff sued Duncan, claiming he was negligent in shoving the debris off the roof.[17] Duncan denied that he breached any duty to plaintiff.

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[17] Since the incident occurred before 1974, (see note 10, *supra*) the School District was not subject to the Workers' Compensation Act. Perhaps because he realized that

This Court held that the case was governed "by the most elemental principles of tort liability." *Ibid*. at 949. Obviously, the initial question was whether Duncan owed a duty to plaintiff, about which the Court said:

> For their mutual safety all employees are necessarily dependent upon the care they exercise with respect to one another and by reason of their relationship each employee owes to his fellow workman the duty "to exercise such care in the prosecution of their work as men of ordinary prudence use in like circumstances, and he who fails in that respect is responsible for the resulting physical injury to his fellow servant."

Logsdon, supra, 293 S.W.2d at 949, *citing*, 35 AM.JUR. *Master and Servant* §§ 526, 527, at 955–956 (1941).[18] Duncan's duty was necessarily personal to him -- i.e., it was not a duty of his employer that he performed as its vice-principal, otherwise he could not have been held liable to plaintiff. (Recall that under *Giles*, *supra*, Duncan could not be liable to anyone, including plaintiff, for "mere failures to perform a duty owing to his employer," 173 S.W.2d at 751.) While *Logsdon* did not involve a case like *Sylcox*, where workers' compensation benefits were available to the plaintiff, the duties of the negligent coemployees in the two cases were the same.

Duncan's negligence would permit the School District to raise the fellow servant rule as a defense, plaintiff did not sue the District.

[18] This statement was consistent with sources cited earlier, e.g., *Hinds v. Harbou*, 158 Ind. 121 (1877)*; Hoeverman, supra*; 39 C.J. *Master and Servant*, *supra*, § 1513.

One who experienced the tranquil half-century following *Sylcox* might think that the bench and bar had no problem telling when a coemployee had breached a personal duty so as to give rise to liability. The age of tranquility was about to come to an end.

V. THE *BADAMI* SUPREMACY, OR THROUGH THE LOOKING GLASS

In *Badami*, *supra*, the plaintiff worked at Mid-America Fiber Company when his hand was drawn into a shredding machine, resulting in amputation of three of his fingers. He received workers' compensation benefits, and then he sued the president of Mid-America and its production manager, alleging that they had violated their duty of providing employees of the company, including plaintiff, with a safe place to work.[19] He also alleged that the individual employees knew or should have known that the shredding machine was unsafe because of a lack of safety devices. Defendants moved to dismiss for lack of subject matter jurisdiction and for failure of plaintiff's petition to state a cause of action, 630 S.W.2d at 176.[20] As described by the Court, the issue was "whether a supervisory

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[19] Of course, claiming that defendants violated a duty they owed to their employer should have doomed plaintiff immediately, *Giles, supra*, 173 S.W.2d at 751.

[20] At the time of the motion, Missouri courts mistakenly held that circuit courts lacked subject matter jurisdictions over claims covered by the Workers' Compensation Act, a view later repudiated by *McCracken v. Walmart Stores East, L.P.*, 298 S.W.3d 473 (Mo. *en banc*. 2009).

employee, including a corporate officer, may be held personally liable for injuries sustained by a fellow employee covered by workmen's compensation where the injuries occur because of the supervisor's failure to perform the duty, assigned to him by the employer, to provide the fellow employee a reasonably safe place to work." *Ibid*. In resolving this issue, the Court reviewed the common law principles regarding liability of agents to third persons, recognizing that when a master utilized a servant to carry out a duty to keep its premises safe, the agent's failure to perform that duty only constituted a breach of duty to the master -- a/k/a nonfeasance -- resulting in liability to the master and not to third parties, *Ibid*. at 177:

> [U]nder the law as it existed at the time of the enactment of our workmen's compensation law, the duty to provide a safe place to work was upon the employer, not the employee. An employee chosen to implement this duty owed his duty to the employer and he incurred no personal liability for failure to fulfill his duty to provide a reasonably safe place for employees to work.

Ibid. at 178. On the other hand, the Court also noted that employees could be liable to third persons and coemployees only under the common law concept of misfeasance, which required an "affirmative act" of negligence. *Ibid*. at 177.

Badami expressed concern that elimination of the nonfeasance/misfeasance dichotomy by cases like *Giles* and *Lambert* might have the effect of allowing agents to be held liable to other employees for breaches of duties they owed to their principals, *Ibid*. at 178. In retrospect that concern is difficult to understand in light of *Giles'* holding that an agent "is not liable to third persons for a mere failure to perform a duty owing to [her]

principal only... .” 173 S.W.2d at 752. But this concern, mistaken as it was, launched an inquiry into “whether to *fix* our compensation legislation with this independently developed conceptual change.” *Badami*, *supra*, 630 S.W.2d at 178 (emphasis added). The assumption that agents could be held liable to coemployees for breaches owed to their principals -- contrary to the common law that had developed up to that time -- resulted in a solution to a problem that did not exist.

The Court reviewed *Sylcox*, *supra*, which, *Badami* said, “simply articulated the rule that an employee becomes liable to a fellow employee when he breaches a common law duty owed to the fellow employee independent of any master-servant or agent-principal relation.” 630 S.W.2d at 179. Under the principles noted earlier, an employee could only be liable for a breach of duty owed to a fellow employee, which necessarily excluded liability for a breach of a nondelegable duty of the employer. If, under the common law, employees could *not* be held liable to other employees for a breach of the *employer’s* duty, then what was the problem to be solved?[21]

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[21] Twenty years after *Badami*, the Eastern District looked once again at the basis for a coemployee’s liability in negligence cases and observed that the plaintiff in such a case had to “establish the existence of a duty on the part of the defendant to protect plaintiff from injury” in order to recover, *Gunnett, supra*, 70 S.W.3d at 637. Of course, if the employee had no duty to perform his employer’s nondelegable duties, then such failure could not be the basis for a negligence claim against the employee, because “when an

Nonetheless, the Court forged ahead and looked at foreign cases trying to solve the same "problem." *Badami* ultimately adopted the "Wisconsin approach," 630 S.W.2d at 180, which it described as follows:

> [A] corporate officer or supervisory employee performs in a dual capacity. He has immunity under the workmen's compensation law where his negligence is based upon a general non-delegable duty of the employer; he does not have immunity where he does *an affirmative act causing or increasing the risk of injury*. Something "extra" is required beyond a breach of his duty of general supervision and safety, for that duty is owed to the employer, not the employee.[22]

(Emphasis added.) 630 S.W.2d at 179, *citing, inter alia*, *Kruse v. Schieve*, 61 Wis.2d 421, 213 N.W.2d 64 (1973) ("*Kruse I*"); *Kruse v. Schieve*, 72 Wis.2d 126, 240 N.W.2d 159 (1976) ("*Kruse II*"); and *Laffin v. Chemical Supply Co*., 77 Wis.2d 353, 253 N.W.2d 51 (1977). Since *Badami* explicitly adopted the Wisconsin approach, examination of those cases may be helpful in understanding what that approach entailed.

In *Kruse I* the plaintiff was seriously injured when her hand was caught in the rollers of a machine furnished by her employer. She received workers' compensation benefits

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employee fails to perform the employer's non-delegable duty, the failure is that of the employer, not the employee." *Ibid*. at 638.

22 Of course, the highlighted language is almost a textbook recitation of what formerly described misfeasance which, as we have seen, only permitted a coemployee to be held liable for breach of a personal duty.

and then sued two corporate officers for negligence in supervising the engineering and maintenance of equipment in the factory. Defendants filed a motion to dismiss, which the trial court denied, and defendants appealed.[23]

Wisconsin allowed corporate officers to be sued for their own negligence, provided the duty involved was personal to the officers. Under such circumstances, an officer was deemed to have "doffed the cap of corporate officer and donned the cap of a coemployee." 213 N.W.2d at 66. In discussing the particular duty involved, the Court said:

> The duty of proper supervision is a duty owed by a corporate officer or supervisory employee to the employer, not to a fellow employee. Under what circumstances can a duty be owed to a fellow employee additional to and different from the duty of proper supervision that is owed to the employer by a corporate officer or supervisory employee? Clearly *something extra* is needed over and beyond the duty owed the employer. In *Hoeverman* [*v. Feldman*, 220 Wis. 557, 265 N.W. 580 (1936)],[24] that added element was provided by the company president directing a particular employee to operate a particular machine in a particular manner. In *Wasley* [*v. Kosmatka*, 50 Wis.2d 738, 184 N.W.2d 821 (1971)], that additional factor was provided by the corporate officer actually driving the truck

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[23] Unlike Missouri, apparently Wisconsin permitted appeals from interlocutory orders.

[24] Recall from the earlier discussion of *Hoeverman*, the court held that a corporate officer "is individually liable if he has breached some duty which he owed to such third person." 265 N.W. at 582.

> which caused the fatal injury. In both cases we deal not with any general duty or responsibility owed the employer but *an affirmative act which increased the risk of injury.* In both cases the officer's or supervisory employee's *affirmative act of negligence went beyond the scope of the duty of the employer, which is nondelegable, to "provide his employees with a safe place to work,* i.e., safe conditions." If the corporate officer in *Hoeverman,* had not personally directed the particular operation to be done in a particular manner, there would have been no basis for holding that he had become a coemployee and owed a common-law duty to a fellow employee under the circumstances. If the corporate officer, in *Wasley*, had not *driven the truck that caused the injury*, there would have been in that case no factual basis for finding him to have the status and duty of a fellow employee.

213 N.W.2d at 67-68 (emphasis added). As was noted earlier, Wisconsin recognized that the conduct of coemployees that rendered an otherwise safe place to work unsafe, did not constitute a breach of the *employer's* duty, *Miller, supra*, 113 N.W. at 955.[25]

Acts by a corporate officer, such as negligently operating a motor vehicle, as in *Wasley*, clearly and unequivocally involved a *personal duty* of the officer rather than the employer's duty to provide a safe place to work under the Wisconsin approach. Unfortunately, the pleadings were unclear in *Kruse I* as to whether the plaintiff was alleging that the officers were acting in the capacity of coemployees for failing to exercise ordinary

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[25] Recall, this holding was cited with approval by the Missouri Supreme Court in *Johnson v. Corn Products, supra,* 6 S.W.2d at 570.

care "to a fellow employee under common law negligence principles," so the court remanded the case to the trial court to allow plaintiff to clarify her theory in amended pleadings, 213 N.W.2d at 69.

On remand after the pleadings were amended, a second motion to dismiss was filed and overruled, leading to a second appeal, *Kruse II*. Plaintiff's amended pleading alleged, *inter alia*, that Schieve, the employer's vice president, personally directed removal of a guard that would have protected plaintiff from the injury she received, 240 N.W.2d at 161. The court held that this allegation "spells out a cause of action against Schieve for conduct undertaken by him, not as a representative of the employer, but in his conduct as a coemployee who owed Kruse the duty to refrain from negligence." *Ibid*. at 161. Because the pleading alleged a "specific, direct, and personal breach of duty to exercise ordinary care toward the plaintiff," the trial court correctly denied the motion to dismiss. *Ibid*. at 162. While Schieve's alleged act may have had the effect of rendering an otherwise safe piece of machinery unsafe, the duty breached was personal to him, *cf. Miller, supra*, 113 N.W. at 955.

In *Laffin, supra*, the plaintiff was injured when a defective valve burst at his place of employment, Wausau Metals Corporation, allowing the escape of acid that horribly injured him. He sued two Wausau corporate officers involved in the design of the valve, the purpose of which was, among other things, to provide a safe place to work for Wausau employees. The court noted that the duty of corporate officers to supervise employees is one owed to their employer, not fellow employees. On the other hand, officers can become coemployees and be personally liable under some circumstances:

> If a corporate officer or supervisor engages in this affirmative act, he owes the involved employee a duty to exercise ordinary care under the circumstances. This duty is over and beyond the duty of proper supervision owed to the employer. It is the duty one employee owes another. The purpose of allowing third party actions in addition to worker's compensation was to retain "the traditional fault concept of placing responsibility for damages sustained upon the culpable party." [Citation omitted.] If an officer or supervisor breaches a personal duty, it does not offend the policy of the Worker's Compensation Act to permit recovery from the officer or supervisor.

253 N.W.2d at 53-54. Because designing the valve "was not an affirmative act that went beyond the nondelegable duty of the employer to furnish a safe place of employment," it followed that defendants were not acting as coemployees and breached no personal duty plaintiff, for which reason they were not personally liable, *Ibid*. at 54-55.

The holdings in these three cases make it clear that the "something extra" determining whether a supervisor is liable depends on whether, at the time of the incident giving rise to the liability, the supervisor does something more than failing to fulfill a duty inherent in the position of officer or supervisor, or, as *Laffin* describes it, a "duty... over and beyond the duty of proper supervision owed to the employer," 253 N.W.2d at 53-54. Something extra is present when a supervisor steps out of the role of supervisor, acts as a coemployee, and breaches the "duty one employee owes another." *Ibid*.

These holdings were consistent with Missouri cases that determined when the fellow servant rule applied (in which case the coemployee was liable, although the employer was

not), as opposed to when the vice-principal rule applied (in which case the coemployee was not liable because the duty breached was to the employer). Although Missouri did not use the "something extra" nomenclature, the inquiry was directed at whether the supervisors were engaged in acts that implicated personal duties to others, as opposed to their usual duties as supervisors. If it was the latter, the supervisor could not be liable to the plaintiff for a breach of duties owed to the employer in effecting *its* duty to provide a safe work place or instrumentalities.

In the end *Badami* held as follows:

> *In view of the law of this state as to employees which existed at the time our compensation act was passed* and in view of the previously discussed policy considerations, we find the approach developed by the Wisconsin Courts comes closest to defining the intent of our legislature. Charging the employee chosen to implement the employer's duty to provide a reasonably safe place to work merely with the general failure to fulfill that duty charges no actionable negligence. *Something more* must be charged.[26] The extent and nature of the additional charge can only be determined and sorted out on a case-by-case basis. Here plaintiff charges defendant with failing to provide him with a reasonably safe place to work -- nothing more. Thus, plaintiff charged no actionable negligence.

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[26] What *Badami* called "something more," Wisconsin courts called "something extra." The phrases have been used interchangeably in the three decades since *Badami* was decided.

630 S.W.2d at 180-181 (emphasis added).

In commenting on *Badami*, the Western District observed that, by embracing the Wisconsin approach, *Badami* "retained the misfeasance-nonfeasance concepts of co-employee cases announced in prior cases." *Stanislaus v. Parmalee Industries, Inc.*, 729 S.W.2d 543, 545 (Mo.App.W.D. 1987). As evidence of this, *Stanislaus* pointed to the statement in *Badami* that a corporate officer does not enjoy the employer's immunity where he does an affirmative act "beyond a breach of his duty of general supervision and safety," something which connotes misfeasance. *Ibid.*, *citing Badami*, 630 S.W.2d at 179.

Under the circumstances of *Badami*, the Court could easily have held that the officers of Mid-America Fiber were not liable to plaintiff because they owed him no personal duty. Stated slightly differently, applying common law principles, defendants could not be liable to plaintiff, since negligence necessarily requires a *duty* owed to plaintiff by defendants, and the duty they allegedly breached was that of the employer.[27] Instead of taking the simple solution of finding there was no breach alleged of a personal duty, the Court was intent on "fixing" the Workers' Compensation Act and extended the employer's *immunity* under the Act to coemployees who *could not be liable* to plaintiff because they were assigned the job of effectuating their employer's duty to provide a safe place to work, *Gunnett, supra*, 70 S.W.3d at 638.

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[27] In fairness to the Court, it is unlikely that anyone suggested the Court view the facts in *Badami* through the prism of the existing body of law that delineated the respective duties of fellow servants and masters noted, *supra.*

It is a misnomer to describe the basis for not imposing liability on an employee carrying out an employer's duty as "immunity." "When the law grants an immunity, it does not mean that the defendant's conduct is not tortious but rather that the defendant is absolved of liability." 74 AM.JUR.2d *Torts* § 50 (2014). Instead, immunity is a "complete defense that does not negate the tort," *Ibid*. "The concept of immunity presupposes the actor could be found negligent or otherwise at fault," *Culberson v. Chapman*, 496 N.W.2d 821, 825 (Minn.App. 1993). Thus, an *employer* is immune under the Workers' Compensation Act, even if its conduct is negligent, because the employer is absolved of liability by virtue of the Act. Immunity does not mean the employer is somehow not negligent; negligence is simply irrelevant in determining the liability of an employer for a workers' compensation claim. In contrast, an *employee* who breaches no personal duty is, as a matter of law, not negligent; there is no liability to be absolved, so the employee does not need immunity. Before *Badami* an employee could only be liable to third persons, including fellow employees, if he or she breached a personal duty. Ostensibly, *Badami* did not change that principle of law.

When *Badami* was decided, courts were arguably free to liberally construe the Act to effect its purposes, R.S.Mo. § 287.800 (1978), *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App.W.D. 2010), and perhaps the Court believed a grant of immunity to non-negligent employees was the simplest way to proceed, even though the plain language of

the Act only granted immunity to employers and not to employees.[28] But a consequence of *Badami's* determination to "fix" the statute was that it liberated courts from adherence to common law principles that determined whose duty was implicated. One result, as we shall see, was that, over time, duties that were traditionally owed to other employees came to be described as duties to employers within the meaning of the Act, thereby granting such employees immunity, with little or no discussion of the existing common law duties.

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[28] The statute construed in *Badami* was R.S.Mo. § 287.120.1 (1978), which provided that, "Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person ...." This language was interpreted as a grant of immunity to the employer, *Badami,* 630 S.W.2d at 179. But the plain and unambiguous language of the statute said nothing about releasing *employees* or granting them immunity. Hence, applying rules of construction to extend immunity to people who were clearly outside the ambit of the statute was problematic since courts typically only resort to such rules where the terms of a statute: (1) are ambiguous, or (2) are unambiguous, but, when given their ordinary meaning, produce an illogical or absurd result, *Sisco v. Board of Trustees of Police Retirement System of St. Louis,* 31 S.W.3d 114, 119 (Mo.App.E.D. 2000).

Nonetheless, *Badami* correctly concluded that merely charging a supervisor or officer with violating the employer's duty to provide a safe work place (i.e., nonfeasance) was not enough to state a claim for the supervisor's negligence, (which is, of course, exactly why the supervisor needed no immunity).

In essence, the Court invited the conclusion that a coemployee was immune if he or she was *not* negligent, but not immune if he or she *was*. Immunity could only be afforded in those cases where the employee could not be liable to begin with (because of an absence of duty), rendering the concept superfluous. Case-by-case review of whether "something more" was sufficiently pled eventually produced chaos because no one was sure what that meant. Eventually it meant that immunity afforded by a liberal construction of the Act extended to coemployees for negligent performance of what were traditionally considered to be their personal duties, rather than duties of their employer. Indeed, some courts caught up in the world without boundaries of *Badami* indicated that *negligence* was an insufficient basis for holding a coemployee liable.

It is pretty clear what the Wisconsin courts meant by something extra. In *Kruse II*, *supra*, the court said that in order to allege sufficient facts, plaintiff had to allege "a specific, direct, and *personal* breach of duty to exercise *ordinary care* toward the plaintiff." 240 N.W.2d at 132 (emphasis added). *Laffin*, *supra*, clarified that something more was conduct

breaching "the duty one employee owes another." 253 N.W.2d at 54. (*Compare: Logsdon, supra*, 293 S.W.2d at 949.) These were clearly negligence concepts.[29]

Unfortunately, the cases decided after *Badami* showed that "something more," like beauty, was in the eye of the beholder, for which reason courts decided cases inconsistently and, at times, weirdly. Courts departed from the simple common law rules that had provided yeoman service in determining when a duty was the master's, and when it was the servant's. In the 32 years since *Badami,* Missouri courts have decided *over 50* cases trying to discern what "something more" means; this is in contrast to the *three* cases decided in the 51 years after *Sylcox*.

The decay did not set in immediately. Some of the early cases decided after *Badami* continued to recite the old principles predating *Badami*, although the old cases were rarely cited.[30] Thus, in 1986 this Court decided *Craft v. Scaman,* 715 S.W.2d 531, 76 A.L.R.4th 351 (Mo.App.E.D. 1986), which eschewed any suggestion that something extra meant

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[29] It can hardly be gainsaid that ordinary care is, in most cases, an integral part of negligence. In Missouri the failure to exercise "ordinary care constitutes negligence. .. ." *Hines v. Continental Baking Co*., 334 S.W.2d 140, 146 (Mo.App. 1960). The same is true in Wisconsin, *Estate of Becker v. Olson*, 218 Wis.2d 12, 579 N.W.2d 810, 813 (Ct.App. 1998).

[30] Incredibly, from 1982 to 2012, not a single coemployee case cited Labatt's treatise. That is akin to attempting to engage in a comprehensive study of classical piano literature without ever mentioning Mozart.

intentional conduct. In *Craft* the plaintiff worked in a fireworks factory owned by his corporate employer. Scaman was the president of the corporation, and he and his wife owned all its stock. A fuse machine that plaintiff operated broke, and Scaman jury-rigged a repair and then told plaintiff to run the machine at high speed. That operation caused the fuse to ignite, badly burning plaintiff. The plaintiff recovered workers' compensation benefits from his employer, whereupon, he sued Scaman individually for his negligence. Scaman argued that, because his act was not intentional, it could not be something more within the meaning of *Badami*.

In rejecting this argument, this Court reviewed the Wisconsin cases cited by *Badami* for examples of conduct constituting something more, including *Kruse I*and a case it cited, *Wasley v. Kosmatka*, *supra*, where "a corporate officer negligently operated a boom truck which caused the employee's death," 715 S.W.2d at 537. *Craft* concluded that the Wisconsin cases simply required "some affirmative act of the officer or supervisor which increased the risk of injury to the employee." 715 S.W.2d at 537, *citing*, *Laffin*, *supra*, 253 N.W.2d at 53. When a corporate officer engages in such an affirmative act, "he owes the involved employee a duty to exercise ordinary care under the circumstances." *Ibid*. This was part of "the duty one employee owes another." *Ibid*.

This language from Wisconsin was entirely consistent with the common law as it existed before *Badami.* "Affirmative act" is common nomenclature found in cases describing misfeasance, THE LAW OF TORTS, *supra*, at 373; *Barman v. Spencer*, 49 N.E. 9, 13 (Ind. 1898). "[T]he duty one employee owes another," is also a common law concept,

compare *Craft* with *Hinds v. Harbou*,158 Ind. 121, 126-127 (1877), which described the

"common duty of man to man in society generally."[31] *Accord*: *Griffiths, supra*, 22 Minn. at 185 (duty of each employee "to the others engaged in the work to exercise the care and skill ordinarily employed by prudent men in similar circumstances"); *Logsdon, supra*, 293 S.W.2d at 955-956 (each employee owes to fellow employees the duty "to exercise such care in the prosecution of their work as men of ordinary prudence use in like circumstances"); and II LAW OF NEGLIGENCE, *supra*, § 245 (coemployee liable for negligence in performance of duties "which each man owes to his fellow men"). *Craft* may not have cited to the common law, but the opinion certainly channeled it.

After reviewing foreign cases, *Craft* concluded that something extra meant "*any* affirmative act, taken while the officer is acting outside the scope of the employer's responsibility that breaches a personal duty of care the officer owes to a fellow employee." 715 S.W.2d at 537 (emphasis added). The Court held that Scafe violated such a duty:

> In the instant case, the averments in plaintiff's petition indicated that *defendant's affirmative act had caused or increased the risk of the plaintiff's injury*.[32] Plaintiff alleged that "defendant negligently and carelessly applied friction to the spinning reel of fuse," thereby causing the fire that injured plaintiff. This act

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31 Cited in *Steinhauser, supra*, 21 S.W. at 860.

32 The idea that an employee's negligence in connection with a personal duty caused or increased the risk of injury to another employee was also a common law principle used to describe acts by a fellow servant that were outside the scope of an employer's duty to provide a safe work place, *see, e.g., Kelso, supra*, 85 S.W.2d at 535.

did not involve any general, non-delegable duty of the employer, such as the duty to provide a reasonably safe place to work. Rather, defendant breached his common law duty to exercise reasonable care in handling the fuse. This was a duty owed by one employee to another. When defendant assisted plaintiff in attempting to fix the broken machine, he had indisputably doffed his supervisory cap and donned the cap of a co-employee. Given these circumstances, defendant was a "third person" under the Workmen's Compensation Law, and was not, therefore, entitled to immunity from plaintiff's common law tort action.

715 S.W.2d at 537-538 (emphasis added).

In *Stanislaus v. Parmalee Industries, Inc., supra*, the Western District considered an action where plaintiff was injured because of defective safety glasses during the course of his employment with Allis-Chalmers. He sued, among others, Allis-Chalmers' safety manager, claiming that he was negligent in his selection of the kind of safety glasses used by employees at the factory where plaintiff worked. In reviewing the law, the Court held that *Badami* had retained the concepts of misfeasance and nonfeasance in determining whether an employee could be held liable for injuries to another employee. The Court ultimately found that all of the breaches of duty alleged by plaintiff were:

"acts of omission of duties owed by [the safety manager] to his employer, which constituted mere nonfeasance, which duties had been delegated to him. Under the *Badami* decision and its progeny, [the safety manager] is not liable personally for the non-performance of those duties, none of which were independent of his duties to his employer, in whose shoes he stands under the allegations in this case.

729 S.W.2d at 546-547. While *Stanislau* spoke of *Badami and its progeny*, in reality *Badami* did not change the law with regard to the safety manager's liability; under the common law long predating *Badami*, the safety manager was not liable to plaintiff (or anyone else, other than his employer) for mere nonfeasance, *McGinnis, supra*, 98 S.W. at 592; *Floyt, supra*, 186 F. at 540.

Four years after *Craft*, the Western District decided *Biller v. Big John Tree Transplanter Manufacturing and Truck Sales, Inc.*, 795 S.W.2d 630 (Mo.App. 1990), in which plaintiffs sued Jim Meade, the president, owner, and manager of decedent's employer, Moffet Nurseries. Decedent had been hired to operate a machine called a "tree transplanter" that was mounted on a truck bed and was used to plant trees. The truck had stabilizer bars to balance it while the transplanter was being operated. On decedent's second day on the job, he was being trained to operate the transplanter by watching Meade at the controls. At some point decedent moved to a position next to the truck where he could not be seen by Meade as he operated the controls, deploying the stabilizer bars. Meade was interrupted by another man who told him that decedent had been pinned by a stabilizer bar on the opposite side of the truck. Meade found decedent's body under the bar, his skull crushed.

Plaintiffs sued Meade, claiming he was negligent in failing to keep a careful lookout by deploying the stabilizer without ascertaining decedent's location. Meade claimed that the alleged breach of duty to keep a careful lookout "is merely the duty of the employer to provide the employee a safe work place." *Ibid.* at 632-633. Since that was the duty of the

employer, Meade argued that the claim could only be asserted against Moffet Nurseries (which was, of course, immune from liability under the Workers' Compensation Act). *Ibid.*

The Court agreed that an employee injured because the work place was unsafe has no common law suit against an employer's agent, *Ibid.* at 633. But the Court, citing *Craft*, said that an agent *could* be held liable if the duty breached was "personally owed to the injured employee as a fellow employee," 795 S.W.2d at 633.

The Court acknowledged that decedent was in the process of being trained the day he was killed, and training him was a necessary component of providing decedent with a safe place to work. Had decedent been killed because he was not adequately trained, then plaintiffs would have had no cause, *Ibid.* at 634. But that is not what happened:

> According to Meade's own testimony, he was himself operating the tree transplanter when [decedent] was injured and at the time, he had no knowledge of where [decedent] was. For a period of some five to fifteen minutes before the accident, Meade was neither supervising [decedent's] work with the machine nor could Meade have been providing any instruction to [decedent] by showing him the use of the digger controls. The conclusion is inescapable that while [decedent] was presumably away from the job site, Meade simply decided to go ahead and finish the work himself. Regardless of what activity may have preceded the event in the course of [decedent's] training, at the time of the accident, Meade and [decedent] were in the relationship of co-employees.

Ibid. at 634. The Court also discussed the duty owed to decedent:

> [T]he duty of care imposed by the law of negligence arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury. *Lowrey v. Horvath, 689 S.W.2d 625 (Mo. en banc. 1985).* The duty of care imposed on Meade arose because of the hazard inherent in the operation of the tree transplanting machine.

Ibid.

Significantly, to reach this conclusion the Court necessarily rejected Meade's argument that *his* failure to keep a careful lookout constituted a breach of the *employer's* duty to provide decedent with a safe place to work. This was consistent with common law cases that held an employer did not breach its duty to provide a safe work place because fellow servants operated otherwise safe machinery in such a way as to make the work place unsafe, Labatt, IV MASTER AND SERVANT, *supra*, at 4539-4540 (courts repudiate claims that "a delinquency [by fellow servants] may constitute a breach of the master's duty to furnish a safe place of work, merely because the place of work is thereby made unsafe for the time being"); *Kelso, supra*, 85 S.W.2d at 535 (master's duty to see that the environment in which servant works is kept reasonably safe is not applicable "where that environment becomes unsafe solely through the default of . . . fellow servants").

Sanity continued in *Tauchert v. Boatmen's National Bank of St. Louis*, 849 S.W.2d 573 (Mo. *en banc*. 1993), this Court's first foray into the world of coemployee liability after *Badami*. (Interestingly, the Court did not mention *Badami*, and the phrases, "something more" and "something extra," are nowhere to be found in *Tauchert*.) In *Tauchert* the plaintiff was injured when the elevator cab he was standing on fell six floors

to the bottom of the shaft. The cab fell because Ritz, plaintiff's foreman, arranged a makeshift hoist to raise the elevator, and the hoist failed.

After he received workers' compensation benefits, plaintiff sued Ritz for "active negligence" in causing his injuries. ("Active negligence" is synonymous with misfeasance, *Moone v. Kroger Grocery & Baking Co*., 148 S.W.2d 628, 630 (Mo.App. 1941).[33]) The trial court granted Ritz summary judgment because he was a supervisor, 849 S.W.2d at 573. This Court reversed:

> The issue of fact is whether Ritz acted as a supervisor or a co-worker in rigging the elevator hoist system. This Court finds the deposition testimony relied on to support summary judgment failed to remove the fact issue that active negligence by Ritz caused plaintiff's injury. *The creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work.* Defendant's alleged act of personally arranging the faulty hoist system for the elevator may constitute an *affirmative negligent act* outside the scope of his

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[33] To further complicate matters, Missouri courts occasionally use active negligence and affirmative negligence interchangeably, *Cupp v. Montgomery*, 408 S.W.2d 353, 356-357 (Mo.App. 1966), and courts in other states have used active negligence, affirmative negligence, and misfeasance to all mean the same thing, *Bowers v. Bingham*, 159 S.W.2d 576, 578 (Tex.Civ.App. 1942); *Spano v. Incorporated Village ofFreeport*, 93 A.D.2d 858, 461 N.Y.S.2d 362 (1983); and *O'Callaghan v. Waller & Beckwith Realty Co*., 15 Ill.App.2d 349, 146 N.E.2d 198, 203 (1957).

> responsibility to provide a safe work place for plaintiff. Such acts constitute a breach of 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. *Craft v. Scaman*, [*supra*, 715 S.W.2d at 537].

849 S.W.2d at 574 (emphasis added). The highlighted language is important because the Court recognized that a fellow employee's breach of duty *creating* a hazardous condition in the work place was different than a breach of the employer's duty to *provide* a safe work place.

Reason also prevailed in Southwest Missouri one month after *Tauchert* when the Southern District decided *Workman v. Vader*, 854 S.W.2d 560 (Mo.App. 1993), a case arising out of a fall at a Wal-Mart where plaintiff worked in the jewelry department. After making a workers' compensation claim, she sued her supervisor, charging her with negligently spilling debris on the floor that caused plaintiff to fall and receive an injury. The supervisor filed a motion to dismiss, claiming immunity under *Badami*, and the trial court granted that motion.

On appeal the Southern District traced the reasoning of *Badami* and noted the dismissal of the plaintiff's claim in that case because the "only negligence charged in *Badami* was that the individual defendants had failed to provide the plaintiff with a reasonably safe place to work," which implicated the duty of the employer but not the individual defendants, 854 S.W.2d at 562. The Court cited *Craft* for the proposition that to hold the supervisor liable, she had to breach a personal duty of care owed to plaintiff,

854 S.W.2d at 563. The Court also cited *Tauchert, supra*, reiterating that the supervisor's

negligence in dumping debris on the floor without warning of its presence did *not* involve a general non-delegable duty of Wal-Mart to provide a reasonably safe place to work: "Rather, they are charges that the defendant personally breached her common law duty to exercise reasonable care in handling or disposing of the packing materials and cardboard box. [*Craft, supra*, 715 S.W.2d at 537.] 'The creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work.' *Tauchert*, [849 S.W.2d at 574]." Yet again, a Missouri Court implicitly followed the common law principle that an *employee's* negligence in creating a hazardous condition involves breach of a personal duty that is not coextensive with the *employer's* duty to provide a safe work environment.

Although the foregoing cases did not stray far from their common law antecedents, in "fixing" the Workers' Compensation Act by liberally construing it, different Districts of this Court sometimes came to very different conclusions as to what was required to find "something more." Three months after *Badami* was handed down, *McCoy v. Liberty Foundry Co.*, 635 S.W.2d 60, 63 (Mo.App.E.D. 1982), was decided. *McCoy's* language led some to believe the Eastern District was hinting that "something more" might require *intentional* conduct by a coemployee, 635 S.W.2d at 62-63.

A good argument could be made at the time that the Court did *not* intend to say that "something more" meant intentional conduct in *McCoy*, but that did not prevent the Southern District from reaching that conclusion in *Rhodes v. Rogers*, 675 S.W.2d 107, 108 (Mo.App.S.D. 1984), where the Court said: "The plaintiff contends that defendant 'affirmatively increased the risk of injury through an act which was intentional on his

part.' He does not suggest that the [coemployee] intentionally acted with the specific purpose of injuring him. *See McCoy v. Liberty Foundry Co*.," *supra*.

In *Craft, supra*, 715 S.W.2d at 536-537, the Eastern District politely suggested that the Southern District misinterpreted *McCoy*. As was noted earlier, *Craft* revisited the Wisconsin cases to show that they all involved negligence claims, which, if properly pled, were actionable. The Western District seemed to side with the Eastern District in the East-South imbroglio, *Stanislaus, supra*.[34] So did the Supreme Court in *Tauchert, supra*, 849 S.W.2d at 574.

One would think that settled the matter, but in Post-*Badami* dystopia, rarely were things completely settled.

Hints at the mischief to follow started with cases involving operation of motor vehicles. As MATA noted above, a well-established body of law held that negligent operation of machinery, including motor vehicles, breached a personal duty of a fellow servant, *see* § II, *supra.*

Shelter Mutual Insurance Co. v. Gebhards, 947 S.W.2d 132 (Mo.App.W.D. 1997), involved the question of whether the driver of a pickup truck had coverage under Shelter's insurance policy when he injured a passenger while the two were working for an employer

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[34] *Workman,* which was decided by the Southern District after *Craft*, included a footnote in which it denied that it had ever suggested in *Rhodes* that intentional conduct was required, but also said that *Tauchert* concluded the matter when it said that negligence was sufficient, 854 S.W.2d at 564 n. 3.

covered by workers' compensation. The Court held that the passenger did not plead that the driver "did any act which affirmatively increased his risk of injury," per *Badami*, *Tauchert,* and *Felling v. Ritter*, 876 S.W.2d 2 (Mo.App. 1994). It is unclear whether the Court intended to hold that negligent operation of a motor vehicle could *never* constitute an affirmative negligent act; if it did, the Court did not address any of the common law cases holding that fellow servants breached a personal duty by operating vehicles negligently.

In *Collier v. Moore*, 21 S.W.3d 858 (Mo.App.E.D. 2000), the Court held that negligent operation of a baggage tug did not constitute something more within the meaning of the Workers' Compensation Act. Once again, no discussion of the liability of fellow servants for negligent operation of machinery appears in the opinion.

In *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620 (Mo. *en banc*. 2002), the plaintiff in the underlying action alleged that he was injured by the negligence of his fellow employee, the driver of a trash truck. He claimed the driver negligently failed to keep a careful lookout, thereby resulting in a collision that injured him. Defendant claimed that he enjoyed immunity under *Badami* so that the Circuit Court lacked subject matter jurisdiction.[35] The Court agreed with defendant:

> The question of what constitutes an "an affirmative negligent act" has not proven susceptible of reliable definition, and Missouri courts have essentially

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[35] The jurisdictional defect claimed by Defendant was later determined not to exist, *McCracken, supra.*

> applied the rule on a case-by-case basis with close reference to the facts in each individual case. Here, it has been alleged that defendant Taylor: 1) failed to keep a careful lookout; 2) carelessly and negligently struck a mailbox while driving; and 3) carelessly and negligently drove too close to a fixed object. Taken together, these claims amount to no more than the allegation that defendant negligently failed to discharge his duty to drive safely. *This is not the kind of purposeful, affirmatively dangerous conduct that Missouri courts have recognized as moving a fellow employee* ***outside the protection of the Workers' Compensation Law's exclusive remedy provisions****. In other words, an allegation that an employee failed to drive safely in the course of his work and injured a fellow worker is not an allegation of "something more" than a failure to provide a safe working environment.*

73 S.W.3d at 622 (emphasis added).

Taylor cites no case that says that negligently operating otherwise safe machinery is a violation of the *employer's* duty to provide a safe work place, rather than the *employee's* personal duty, nor does it discuss the many cases this Court has previously decided, holding that negligent operation of otherwise safe equipment is a breach of the coemployee's duty rather than the employer's duty, *see, e.g. Steffen v. Mayer*, *supra*, 9 S.W. at 631; *Grattis v. K.C., P. & G. R. Co.*, *supra*, 55 S.W. at 115; and *Chappee v. Gus V. Brecht Butchers' Supply Co., supra*, 30 S.W.2d at 36. This is understandable since the briefs filed with the Court simply did not discuss these cases. To find that the *Taylor* Court intended to overrule such cases by implication, without even mentioning them, would be

contrary to this Court's strong presumption that it does not overrule its own precedents *sub silentio*, *State v. Honeycutt*, 421 S.W.3d 410, 422 (Mo. *en banc*. 2013).

Indeed, the language that describes "moving a fellow employee outside the protection of the Workers' Compensation Law's exclusive remedy provisions" is focused on statutory *immunity* rather than common law *duty*. The effect arguably is to sever any remaining relationship with the common law antecedents of the respective duties of master and servant in determining the extent of immunity necessary to "fix" the Act, the impetus behind finding "something more" in *Badami*. That severance is certainly within the ambit of the Eastern District's powers in construing legislation liberally per the statutory commands of the Act in 1982, but it does not purport to explain why the common law cases were decided incorrectly in describing the respective duties of employers and employees, or why they should be overruled.

Several opinions by the Court of Appeals interpreted *Taylor* as radically altering what was necessary to show "something more" so that an employee was not entitled to statutory immunity under the Act. Some of the early post-*Badami* cases described above were pronounced dead, executed for counter-*Badami* deviationist tendencies, including *Craft*, *Tauchert*, *Biller*, and *Hedglin v. Stahl Specialty Co*., 903 S.W.2d 922 (Mo.App.W.D. 1995). Thus, in *Nowlin v. Nichols*, 163 S.W.3d 575, 579 (Mo.App.W.D. 2005), the Court held that, "An affirmative negligent act is not synonymous with any negligent act, as the law requires a purposeful act 'directed' at a coemployee."[36] The Court went on to declare

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36 *Accord: Risher v. Golden*, 182 S.W.3d 583, 587 (Mo.App.E.D. 2005).

that "negligent operation of machinery or a vehicle is not 'something more' than an allegation of a breach of duty to maintain a safe working environment." *Ibid.* at 580. The Western District pronounced its earlier case of *Biller v. Big John*, *supra*, involving negligent operation of machinery, to be "effectively overruled" in *State ex rel. Larkin v. Oxenhandler, 159 S.W.3d 417, 423 (Mo.App. 2005). Garza v. Valley Crest Landscape Maintenance, Inc.*, 224 S.W.3d 61, 63 (Mo.App.E.D. 2007), similarly announced that several cases, including *Craft*, *Hedglin*, and *Tauchert*, were no longer of precedential value after *Taylor*, which, according to *Garza*, held that "mere allegations of negligence" are not enough to constitute "something more" and thereby avoid the presumptive immunity cloaking coemployees under the Workers' Compensation Act.

Not all courts shared this view of the apocalyptic effects ascribed to *Taylor* by the foregoing cases. In *Groh v. Kohler*, 148 S.W.3d 11, 14-16 (Mo.App. 2004), the Western District cited to both *Tauchert* and *Taylor*, apparently not discerning their intractability. Indeed, *Groh* cited *Tauchert* with approval for the proposition that, "The creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work." *Groh*, *supra*, 148 S.W.3d at 15, *citing*, *Tauchert*, *supra*, 849 S.W.2d at 574. In addition to *Tauchert*, *Groh* also endorsed the approach of *Hedglin* and *Craft*, 148 S.W.3d at 14-15, or three of the cases pronounced as expired by *Garza*, *supra*.

In *Burns v. Smith*, 214 S.W.3d 335 (Mo. *en banc*. 2007), this Court declined an invitation by the defendant to limit coemployee liability to intentional acts, acknowledging that, while "something more" could include intentional acts, it was not limited to them:

> [T]he notion of an affirmatively *negligent* act -- the "something more" -- can best be described as an affirmative act that creates additional danger beyond that normally faced in the job-specific work environment. This description satisfies the concern that although there must be an independent duty to the injured coemployee, that duty cannot arise from a mere failure to correct an unsafe condition and must be separate and apart from the employer's non-delegable duty to provide a safe workplace.

Ibid. at 338 (emphasis added). The Court also declined to denounce *Tauchert*, instead citing it with approval, 214 S.W.3d at 340.

If the Court finds the foregoing is confusing, it should. Many of the *Badami*-era cases were inconsistent with each other, compare *Biller* with *Nowlin*, not to mention with pre-*Badami* cases concerning the common law duties of fellow servants and employers. The Courts were unable to agree on what precedents had been discarded or resurrected. (After *Taylor*, was *Tauchert* good law or not? Depends on who you ask; compare *Groh* and *Burns* to *Garza*.)[37] This is not due to any moral or intellectual failings by the courts involved; it simply reflected the confusing nature of "something more" once it was liberated from the common law and proceeded under the guise of statutory construction.

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[37] The courts could not even agree on whether coemployee (co-employee?) is hyphenated or not, *compare: Sylcox, supra*, with *Badami, supra*, and *Craft, supra*, 715 S.W.2d at 536 ("co-employee"), with *Craft, supra*, 715 S.W.2d at 537 ("coemployee").

If it was confusing to appellate courts, imagine what it was like for lesser mortals, like trial judges and attorneys, trying to figure it out. As one popular article noted, the differences in the way "something more" was analyzed "and the inconsistent results that follow are enough to make a lawyer or trial judge dizzy." Passanante & Stock, *Help! We're Lost!, supra,* 57 J. MO. BAR at 73.[38] These inconsistencies meant that "a litigant can find support in the case law for any position he or she wants to argue." *Ibid*.

VI. *GUNNETT V. GIRARDIER BUILDING*, OR REASON ENJOYS A RENNAISANCE

In *Gunnett v. Girardier Building and Realty Co*., 70 S.W.3d 632 (Mo.App.E.D. 2002), the Court finally looked at coemployee liability in terms of duty. The Court described the issue before it as follows:

> Through the vehicle of this appeal, we have been asked to offer definitive guidance on a question that has long vexed Missouri judges and legal commentators: does the immunity afforded by the workers' compensation law shield a co-employee from a suit by his fellow worker?
>
> Today we offer our answer: it depends.

Ibid. at 635.

In addressing the question of third party liability, the Court noted that since third parties do not share in the burden and obligation of financing the compensation fund, they

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38 Passanante and Stock use both spellings in their article.

are not immune from liability, *Ibid.* at 637. Because the same thing is true of coemployees, *Sylcox* recognized that they would be treated as third parties and be subject to liability, 70 S.W.3d at 637.

The Court observed that the threshold issue – as in any negligence case – was whether a duty existed between coemployees, which led, in *Badami*, to adoption of the Wisconsin approach. That approach focused on "whether the negligence occurred in the performance of a non-delegable duty of the employer as opposed to arising out of an obligation owed to the injured employee." 70 S.W.3d at 637, *citing, Gerrish v. Savard*, 169 Vt. 468, 739 A.2d 1195, 1198-1199 (1999). As we have seen earlier, consistent with Missouri law, when an employee fails to perform the employer's duty (usually to provide a safe place to work), the failure is not that of the employee, *Ibid.* at 638. To recover from a fellow employee, the plaintiff has to show a breach by that employee of "something more," which, under the Wisconsin approach, meant the employee personally owed a duty of care to the plaintiff instead of to the employer. This approach had been articulated in the early post-*Badami* case of *Craft, supra,* 715 S.W.2d at 537, *Gunnett, supra,* 70 S.W.3d at 638. (It was also consistent with Missouri agency law as articulated in *Giles, supra,* 173 S.W.2d at 751.) It was sublimely consistent with the common law in that there must exist "some duty on defendant's part owing to the plaintiff, the observance of which would have avoided the injury." 70 S.W.3d at 639. *Gunnett* concluded:

> What we hold, given the cases from this state, as well as those from other jurisdictions, is that a personal duty will arise out of circumstances where the co-employee engages in an affirmative act, outside the scope of employer's non-

> delegable duties, directed at a worker, increasing the risk of injury. For in engaging in a direct, affirmative act, *the co-employee owes a personal duty to exercise ordinary care under the circumstances and to refrain from conduct that might reasonably be foreseen to cause injury to another*.

Ibid. at 641 (emphasis added).

In *Gunnett* Summerlad was a construction foreman who worked for a statutory employer on a construction project. A hole was made in the roof of a building to install a skylight. In order to protect employees working on the roof from the hazard caused by the hole until the skylight was installed, Summerlad negligently installed a hatch that gave way when plaintiff (a roofer working on the project) stepped on it, causing him to fall. Plaintiff claimed that Summerlad owed him a personal duty to not install a defective hatch.

The Court disagreed. The duty to provide a safe roof was that of the employer. Summerlad was assigned the responsibility of carrying out that duty. In other words he was discharging the employer's non-delegable duty to provide a safe work place. Trying to protect employees generally, not just plaintiff or some other individual, from the consequences of ongoing work on the roof was a non-delegable duty of the employer, not Summerlad. Hence, when he tried, albeit negligently, to make the roof safe for workers generally, "there was no affirmative act directed at Gunnett." *Ibid.* at 642-643. *Gunnett* is consistent, not only with *Badami*, but the common law that existed before adoption of the Workers' Compensation Act. *Gunnett* restored a measure of sanity by returning, momentarily at least, to duty-centric analysis, but in cases like *Nowlin, supra*, holding that negligent operation of a vehicle was a breach of an employer's duty, reason proved

evanescent. Still, *Gunnett* was an indispensable analytical predicate for what would happen ten years later.

VII. *ROBINSON V. HOOKER*, OR THE DEATH OF SOMETHING MORE

In 2005 the legislature profoundly altered the Workers' Compensation Act by enacting Senate Bills 1 and 130. The new law restricted the kinds of cases covered by the Act, thereby greatly expanding the cases that could be heard in the court system since employers have no immunity for injuries not covered by the Act, *Missouri Alliance for Retired Americans v. Department ofLabor and Industrial Relations*, 277 S.W.3d 670, 680 (Mo. *en banc*. 2009). While they were at it, the legislature also altered the construction of the Act. Before 2005, R.S.Mo. § 287.800 (2000), required that "[a]ll provisions of [the Act] shall be liberally construed with a view to the public welfare." The 2005 amendments changed the construction of the Act from liberal to strict.

The 2005 bills did not change § 287.120.1, which provided that: "Every employer subject to the provisions of [the Act] . . . shall be released from all other liability therefor whatsoever...." This section statutorily immunizes employers from common law liability in most cases as a result of the "clear and unambiguous" language of § 287.120.1, *Linsin v. Citizens Electric Co.,* 622 S.W.2d 277, 279 (Mo. App. E.D. 1981).

The careful reader will note that the clear and unambiguous language of § 287.120.1 only immunizes *employers*, not *employees.* Under the guise of the liberal construction formerly afforded the Act, *Badami* held that immunity could be extended to employees despite the plain language of the law. In observing the effect of this construction of

§287.120.1, *State ex rel. Title Loan Co. vs. Vincent,* 239 S.W.3d 136, 138 (Mo. App. E.D. 2007), held that, "The 'something more' test is a limitation on the extent of the co-employee's *court-created immunity*." (Emphasis added.)[39]

Which leads to the obvious question: What was the effect of the 2005 amendment to § 287.800 (2012 Cum. Supp.), which required strict construction of the Act, including § 287.120.1?

That was the issue raised in *Robinson v. Hooker,* 323 S.W.3d 418 (Mo.App.W.D. 2010). In that case defendant negligently released a high-pressure hose which struck plaintiff, a fellow employee, in the right eye, causing blindness. After receiving workers' compensation benefits from his employer, plaintiff sued defendant. The defendant moved to dismiss on the mistaken ground that the trial court lacked subject matter jurisdiction. The trial court granted the motion, and plaintiff appealed. Of course, under *McCracken,* the Court of Appeals held that there was no jurisdictional defect, 323 S.W.3d at 422. The Court then turned to the question of whether defendant could assert his employer's immunity.

The plain and unambiguous language of §287.120.1 only statutorily immunized "employers." Strict construction of the terms of the statute "presumes nothing that is not expressed." *Ibid.* at 423.

The *Badami* Court, having the benefit of the old version of §287.800, felt it was free to judicially extend immunity to coemployees in order "to 'fix' the Act's omission of

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39 *Vincent* was dealing with the pre-2005 law, 239 S.W.3d at 137.

agency principles in determining liability for workplace injuries." 323 S.W.3d at 422-423. This coemployee immunity arose from "a judicial construct in *Badami*" that could not survive strict construction. 323 S.W.3d at 424. This was so, quite simply, because an employee is not an employer. *Ibid.* at 424-425. Out went "something more;" in came... what?

The nomadic Achilpa tribe in Australia believed that an ancient deity ordained that a pole cut from the trunk of a gum tree, called a *kauwa-auwa*, would serve as a "cosmic axis," allowing tribal members to communicate with the divine and providing them direction as to where to go in their nomadic wanderings. Once, when the pole was broken, the tribe was "in consternation; they wandered about aimlessly for a time, and finally lay down on the ground together and waited for death to overtake them." M. Eliade, THE SACRED AND THE PROFANE at 32-33 (1957).

From 1982 to 2010, "something more" was not just a mantra, it was the post-*Badami kauwa-auwa.* When it was broken in *Robinson v. Hooker,* its acolytes were in consternation, wandering about aimlessly for a time. A greatly overwrought Note in the Missouri Law Review was full of consternation, predicting dire consequences from the *Robinson* case: *Trapped: Missouri Legislature Seeks to Close Workers' Compensation Loophole with Some Co-Employees Still Inside*, 77 MO. L. REV. 235 (2012).

Could a new *kauwa-auwa* be found?

VIII. *HANSEN V. RITTER* EXPLAINS IT ALL, OR EVERYTHING OLD IS NEW AGAIN

Hansen v. Ritter, 375 S.W.3d 201 (Mo.App.W.D. 2012), involved a death action in which Robert Hurshman, an employee of Wire Rope Corporation, died when a guard on a wire-stranding machine failed, causing him to become entangled in the machinery. Wire Rope had workers' compensation immunity, so Hurshman's mother filed suit against the corporate safety manager and the operations manager at the factory where he worked, claiming that they failed to find and fix the defective hatch. Defendants filed a motion to dismiss, claiming that they enjoyed their employer's immunity under the Act and that plaintiff's petition failed to state a cause of action. At a hearing on the motion, the trial court asked plaintiff's counsel what the managers' duty to decedent was; counsel responded: "Both employees were assigned the duty to provide a safe workplace. ... [T]hey were given that duty by their employer. And then... they assumed the duty by going to work to provide those things, to provide a safe workplace." *Ibid.* at 206. The trial court granted defendants' motion on the ground that coemployees "do not owe a personal duty to fellow employees to perform the employer's non-delegable duty to provide a safe workplace." *Ibid.*

In a magisterial opinion by Judge Cynthia Martin of the Western District, the Court first took up the question as to how the trial court's judgment was affected by *Hooker v.*

Robinson, supra.[40] The Court found that *Robinson* abrogated *immunity* under the Act for coemployees alleged to have breached their employer's non-delegable duty to provide a safe work place, but it "did not comment on the contours of a co-employee's common law liability for the negligent injury of fellow employees in the workplace." *Hansen, supra*, 375 S.W.3d at 207. Given a strict construction, the Act neither expanded nor restricted whatever *common law* rights were available to persons injured through acts of coemployees. The circumstances in *Hansen*, by contrast, required the Court to "explore the rights and remedies of an injured person against co-employees 'available at common law.'" *Ibid*. 207-208:

> Here, the duties [plaintiff] ascribes to [defendants] are subsumed within the employer's non-delegable duty to provide a safe workplace. We need not determine, therefore, the precise contours of the common law duty co-employees owe to one another in the workplace. Instead, we need only determine whether a duty to perform the employer's non-delegable duty is included within those contours.

Ibid. at 208.

Thus, the Court followed and cited Judge Mooney's thoughtful work in *Gunnett* by recognizing the centrality of duty as the starting point for all analysis, noting that the "threshold matter is to establish the existence of a duty owed by the co-employee." *Ibid.*, *citing Gunnett, supra*, 70 S.W.3d at 637. Of course, the duty to provide a safe work place

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40 The author of the *Hooker* opinion, Judge Lisa White Hardwick, was a member of the panel deciding *Hansen*.

is one of the *employer's* non-delegable duties. An employee assigned to carry out those duties is carrying out the employer's duties rather than a personal duty. If an employee is negligent in performing such a duty, liability does not attach to the employee for injuries to third persons, including fellow employees. This is so because the "non-delegable duties are duties of the employer to his employees *and not of fellow servants to each other*." *Hansen, supra,* 375 S.W.3d at 210, *citing, Kelso, supra,* 85 S.W.2d at 534 (emphasis added). The rationale for not holding fellow employees liable under such circumstance is "grounded in the recognition that said duties 'often concern matters beyond the control of individual employees.'" *Ibid.*[41]

At common law employees were liable to other employees for misfeasance, and this remained true after the Act took effect in 1929, *Sylcox, supra.* This concept was simplified by *Lambert v. Jones, supra,* to a question of whether an employee owed a personal duty to third persons, 98 S.W.2d at 759, *cited* in *Hansen, supra,* 375 S.W.3d at 212. At common law a servant was not liable for nonfeasance the failure to perform a duty "which he owes to the principal by virtue of the relationship existing between them." 375 S.W.3d at 211, *citing* VII MASTER AND SERVANT, *supra,* at 7974. *Hansen* then discussed *when* such a duty is owed, again quoting *Lambert, supra*, 98 S.W.2d at 759: "In short, [an agent or servant] would be liable whenever he is guilty of such negligence as would create a liability

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41 This was the same rationale noted by MATA earlier, when it cited to *Cincinnati, N. O. & T. P. R. Co. v. Robertson, supra*, 74 S.W. at 1062, and *Haynes' Adm'r v. Cincinnati, N. O. & T. P. R. Co, supra*, 140 S.W. at 180.

to another person *if no relation of master and servant or principal and agent existed between him and someone else*." 375 S.W.3d at 212. To this end *Hansen* also cited *Ryan v. Standard Oil Co.*, *supra*, 144 S.W.2d at 173, where the court held that the liability of a servant to a third person resulted from a breach of duty owed to that person under the law, "*without regard to whether he is the servant or agent of another or not.*" 375 S.W.3d at 212-213 (emphasis in original).

While *Lambert* and *Ryan* were not coemployee liability cases, their rationale was fully applicable to exploring whether such an employee could be liable to other employees:

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

Hansen, 375 S.W.3d at 213, *citing Ryan*, *supra* (emphasis in original). Thus, a coemployee who violates an independent, common law duty to another employee is "answerable to such person for the consequences of his negligence. . . ." *Giles*, *supra*, 173 S.W.3d at 751, *cited* in *Hansen*, 375 S.W.3d at 213.

The Court then took up the efficacy of "something more" in light of the General Assembly's repeal of its conceptual underpinnings. This necessarily involved a discussion

of *Badami's* reasoning. *Hansen* notes that *Badami* recognized that, under the existing common law, alleging that the employee chosen to implement the employer's non-delegable duty to provide a safe work environment breached the employer's duty "charges no actionable negligence." *Badami, supra*, 630 S.W.2d at 180, cited by *Hansen,* 375 S.W.3d at 214. *Hansen* ponders *Badami's* "motivation for creating the 'fiction' of immunity when co-employees were already shielded from personal liability at common law. . . ." 375 S.W.3d at 214. *Hansen* ascribed "something more" and all its onerous consequences to a fundamental misapprehension as to the basis for holding a coemployee liable, which led to a determination to provide an unnecessary fix to the Workers' Compensation Act, *Ibid*. So began three decades of confusion, pestilence, and misery.[42]

Judge Mooney foreshadowed (and informed) Judge Martin's opinion in *Hansen*, and she properly quoted *Gunnett* as providing the appropriate paradigm:

> [S]ummarizing, *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 the 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....*

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42 On the other hand, it was shorter than the Cold War, without the threat of nuclear annihilation.

Hansen, 375 S.W.3d at 215 (emphasis in original), *citing Gunnett, supra*, 70 S.W.3d at 641.

Hansen went on to address plaintiff's argument in *Hansen* that *Logsdon, supra*, recognized a duty each employee owes to fellow employees to "exercise such care in the prosecution of their work as men of ordinary prudence use in like circumstances. . . ." 293 S.W.2d at 949. *Hansen* noted that the common law did not extend this duty to carrying out duties owed by an employer, 375 S.W.3d at 217-218. This was, of course, a correct statement of the law, which did not extend the employee's duty to include liability for injuries caused by "the failure of the master to furnish a safe place to work or suitable appliances or instrumentalities. . . ." 39 C.J. *Master and Servant*, *supra*, at 1313; *Floyt, supra*, 186 F. at 540; *Richardson*, *supra*, 209 F. at 952; *Pester, supra*, 191 N.W. at 711.

Hansen affirmed the trial court's dismissal because of plaintiff's frank assertion that she alleged the managers had failed in *their* duty to provide decedent with a safe place to work:

> 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 sufficient to support an actionable claim of negligence.* We need only conclude, as we do, that under common law, a co-employee's personal duties to fellow employees do not include a legal duty to perform the employer's non-delegable duties. Unless a petition asserts a personal duty owed by a co-employee that exists independent of the employer's non-delegable duties, and thus a duty that would exist independent of the master-

servant relationship, the petition will not survive a motion to dismiss for failure to state a cause of action for negligence.

375 S.W.3d at 216-217 (emphasis added).

If *Hansen* has any flaws, it is in *dicta* that says cases since *Badami* "remain instructive in defining a co-employees' personal duties to fellow employees, albeit in the context of a common law negligence claim." *Ibid.* at 216, *citing, inter alia, Taylor* and *Tauchert, supra*. Since *Hansen* eschewed any purpose to determine the precise parameters of a co-employee's personal duties to a fellow employee, this language is *dicta*, *Calvert v. Plenge*, 351 S.W.3d 851, 857 (Mo.App.E.D. 2011).

It is nearly impossible to reconcile *Taylor* with *Tauchert*. Indeed, before the abrogation of *Badami*, *Garza* held that *Taylor* overruled *Tauchert*, 224 S.W.3d at 63. Language in *Tauchert* to the effect that "creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work," 849 S.W.2d at 574, cited in *Hansen*, 375 S.W.3d at 216, is not consistent with *Taylor's* apparent holding that negligent acts of a coemployee which create an unsafe environment are simply a breach of the employer's duty to provide a safe work environment.

Hansen also asserts that post-*Badami* cases are indistinguishable from pre-*Badami* cases that "described the line between liability and no liability for co-employees." *Ibid.* Some of those cases are indistinguishable, e.g. *Tauchert* and *Biller*, but not cases where hazards created by affirmative negligent acts of fellow employees are conflated with a violation of the employer's duty to provide a safe work place.

IX. *BADAMI* STRIKES BACK, OR THE EASTERN DISTRICT CLINGS TO SOMETHING MORE

In the year following *Hansen*, the Eastern District continued to hold on to concepts originating in the *Badami* era.

In *Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W.3d 293 (Mo.App.E.D. 2013), the plaintiffs were employed by Gilster-Mary Lee Corporation ("GML") at a factory where they were exposed to a chemical called diacetyl that plaintiffs alleged caused them health problems. They sued, *inter alia*, four GML employees for ordinary negligence (Count III) and under the "something more" doctrine (Count II). The employee defendants were GML's President, its Corporate Sanitarian, its Plant Manager, and the Plant Safety Director.[43] Among other things, the trial court dismissed the employee defendants on the ground that plaintiffs failed to allege facts demonstrating that they breached any duty other than GML's nondelegable duty to provide a safe work environment, 408 S.W.3d at 297.

The Court affirmed the dismissal of the ordinary negligence claim since, "charging the employee chosen to implement the employer's duty to provide a reasonably safe place to work merely with the general failure to fulfill that duty charges no actionable negligence." *Ibid.* at 303, citing *Hansen*, 375 S.W.3d at 208. This was a perfectly reasonable and correct statement of the law.

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[43] These job titles do not appear in the *Amesquita* Opinion, but they are in the Amended Petition that is part of the Legal File filed in that case (*Amesquita* L.F. 9), found on casenet.

The trial court also dismissed plaintiff's "something more" claim, and the Eastern District affirmed that dismissal as well. Since "something more" was superannuated by the 2005 amendment to the Act, the significance of that part of the opinion is doubtful, but the Court used a dubious rationale in so doing that arguably could restrict claims against coemployees, holding that "[i]n order for an employee to become personally liable to a coemployee for injuries suffered in the scope and course of employment, the employee must have done 'something more' beyond performing or failing to perform normal job duties." 408 S.W.3d at 303. This was a troubling statement since it is the first time a case suggested that liability could not arise out of the performance of normal job duties (as opposed to performing nondelegable duties of the employer). None of the cases cited by *Amesquita* supported that conclusion.[44]

The other Eastern District case is far more troubling. In *Carman v. Wieland*, 406 S.W.3d 70 (Mo.App.E.D. 2013), plaintiff was a firefighter injured on the job when another firefighter backed over her while driving a fire truck. She sued the driver, claiming he negligently operated the truck. The trial court denied the driver's motion for summary judgment in which he claimed that he had no personal duty to operate the truck safely, but granted his motion on the basis of the statute of limitations.

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[44] As will be seen, *infra*, the Western District was sharply critical of that reasoning, *Leeper v. Asmus*, 440 S.W.3d 478, 494-495 (Mo.App. 2014).

On appeal the Court found that plaintiff's claim was not time-barred, but, relying on *Taylor, supra*, ruled against her on the issue of whether the driver breached a personal duty:

> [A] co-employee owes to a fellow employee no common-law duty to exercise ordinary care and safety requiring the co-employee to refrain from operating a vehicle in a negligent manner when driving in the course of his work. As a matter of law, that responsibility is subsumed within an employer's nondelegable duty to provide a safe working environment.

406 S.W.3d at 79. As has already been noted, reliance on *Taylor* is questionable since *Taylor* was deciding an issue of immunity rather than duty. More importantly, *Carman* simply ignores the many cases previously cited *supra* in which Missouri courts, including this Court, have held that negligent operation of machinery, including motor vehicles, implicates a personal duty of the operator.

Even momentary reflection demonstrates why that should be so. If Carman had been a pedestrian not employed by the fire department when the driver backed over her, would anyone seriously claim that he could not be held to have breached a duty to a pedestrian? In that case the breach would not have been a consequence of some duty the driver owed his employer, but the duty all drivers have to keep a careful lookout when operating their vehicles.

In defense of the *Carman* Court, the briefs filed with that Court (as found on casenet) made no mention of cases articulating common law duties that antedated the adoption of

workers' compensation in Missouri. Hence, the Eastern District fell victim to incomplete briefing.

X. THE WESTERN DISTRICT REFUSES TO FOLLOW THE EAST

In the year following *Amesquita* and *Carman*, the Western District strongly disagreed with their holdings in *Leeper v. Asmus*, 440 S.W.3d 478 (Mo.App. 2014), a case in which the plaintiff alleged he was injured when his coemployee failed to use ordinary care in operating a drilling rig by lifting a 500-pound pipe without ensuring that the cable was tight, thereby allowing the pipe to fall and crush plaintiff's arm. The trial court dismissed plaintiff's petition for failure to adequately allege "something more," and plaintiff appealed.

The Western District reversed the trial court in an opinion written by Judge Martin, the author of *Hansen v. Ritter*, *supra*. *Leeper* reiterates *Hansen's* view as to the effect of the 2005 Amendment to the Workers' Compensation Act: "The judicial construct of 'something more,' which evolved over time to sweep most co-employee conduct into the exclusivity of the Act, was abrogated, restoring co-employee negligence claims '***as existed at common law***.'" 440 S.W.3d at 491 (emphasis in original).

Leeper cites some of the same cases noted by MATA, *supra*, 440 S.W.3d at 484-487. The Court observes that at the time *Badami* was decided, its practical effect was essentially identical to the common law concept of employee liability; *i.e*. as has already been noted, an employee could be liable to others *only* for breach of a personal duty and *not* for breach of a duty owed to his or her employer, *see*, e.g., *Carson v. Quinn*, 127

Mo.App. 525, 105 S.W. 1088, 1090-1091 (1907). When *Badami* construed the Workers' Compensation Act to immunize coemployee conduct "except conduct beyond the scope of the employer's non-delegable duties," its effect was virtually indistinguishable from the common law, 440 S.W.3d at 490. That was the "something more" test "as ***originally*** announced in *Badami*." *Ibid*. (Emphasis in original.)

But *Leeper* also observes that post-*Badami* refinements of "something more" came to mean something very different than the common law duties predating *Badami*, 440 S.W.3d at 490. Thus, the Court observed that *Taylor*, 73 S.W.3d at 622, required "purposeful, affirmatively dangerous conduct" in order to satisfy "something more" as a condition for avoiding the fiction of immunity. The new requirement of "purposeful conduct" had no common law origin, 440 S.W.3d at 492.

Leeper details the practical effect of the long, strange trip after *Badami:* "The post-*Badami* refinements of the 'something more' test operated to immunize co-employees from liability for ordinary negligence by narrowing recovery outside the exclusivity of the Act to outrageous or reckless conduct directed at a particular employee." 440 S.W.3d at 491. This shift away from holding coemployees liable for negligence was a consequence of the liberal construction of the Act, *Ibid*., something that came to an abrupt end in 2005 when the General Assembly required its strict construction. "The judicial construct of 'something more,' which evolved over time to sweep most co-employee conduct into the exclusivity of the Act, was abrogated, restoring co-employee negligence claims ***as existed at common law."*** *Ibid.* (emphasis in original).

Leeper acknowledges that *Hansen* discussed the similarity of the effect of "something more" to the common law "as ***originally*** announced in *Badami*." 440 S.W.3d at 490 (emphasis in original). But the Court contrasted the radical changes "something more" underwent as a result of the post-*Badami* refinements, 440 S.W.3d at 491. And while *Leeper* concedes *Hansen's* observation as to the similarity between the original "something more" test and the common law, that "observation did not resolve whether the post-*Badami* refinements to the 'something more' test continued to align with the common law. Our discussion herein plainly reveals they do not." 440 S.W.3d at 492. The Court contrasts the "something more" test for avoiding immunity with earlier cases where a common law duty by a coemployee *was* recognized, *Ibid*. at 492-493, concluding: "The refined 'something more' test. . . *can fail to impose a duty when a duty would have been imposed at common law*." *Ibid*. at 494 (emphasis added).

Leeper goes on to criticize both *Amesquita* and *Carman, supra*, expressly declining to follow them, 440 S.W.3d at 494. As to *Amesquita's* holding that in order for a coemployee to be liable, he or she "must have done 'something more' beyond performing or failing to perform normal job duties," 408 S.W.3d at 303, *Leeper* says:

> The principle that the performance or failure to perform a job duty will never support a duty of care independent of the employer's nondelegable duties has no support at common law. Nearly every co-employee negligence case will involve the co-employee's performance, or failure to perform, a job duty. Applied literally, *Amesquita* will abrogate co-employee negligence at common law by requiring a co-

> employee to act outrageously, recklessly, or intentionally--and thus in a manner that is effectively outside the scope and course of his duties.

440 S.W.3d at 494.

As to *Carman's* holding that a fire truck driver owes no personal duty in connection with the safe operation of a vehicle, 406 S.W.3d at 79, *Leeper* says:

> The absolute nature of this holding abrogates co-employee negligence in ***all*** motor vehicle cases, (and arguably in all cases involving the operation of any instrumentality of the employer's work). At common law, it is possible that a co-employee's operation of a motor vehicle (or other instrumentality of the work) will support a personal duty of care independent of the employer's nondelegable duties.

440 S.W.3d at 495.

Leeper's holding is not flawless. After determining that plaintiff adequately pled the existence of a personal duty by the drilling rig operator -- which was the issue before the Court -- the Court goes on to opine as to what plaintiff would have to prove on remand in order to make a submissible case -- an issue that was *not* before the Court:

> It will remain Leeper's obligation to prove that the employer performed all of its nondelegable duties such that a reasonably safe workplace, a safe instrumentality of work, and safe methods of work, became unsafe solely through the fault of Asmus,[FN16] a determination that depends on the facts and circumstances of the workplace injury. Though it may be difficult in most cases to establish that a workplace injury is not attributable to breach of an employer's nondelegable duties, given the inherently factual nature of that determination, dismissal of a petition for

failure to state a claim will be premature if the petition alleges facts which would support that conclusion.

> FN16. "Solely" refers to responsibility as between the employer and the co-employee. If a workplace injury is attributable in any manner to the employer's breach of its non-delegable duties, then a co-employee can owe no duty of care in negligence and the co-employee's negligence is chargeable to the employer. Conversely, if a workplace injury is in no way attributable to the employer's breach of its non-delegable duties, then a co-employee may owe a duty of care in negligence. *The reference to "solely" clarifies that an employer and a co-employee cannot be jointly and severally liable in negligence for a workplace injury.*

440 S.W.3d at 496 (emphasis added).

This suggests a rule (albeit in the form of *dicta*) that the plaintiff must prove that the sole proximate cause of his injury was the negligence of the coemployee. That position is not supported by the cases that discuss the relative common law duties of employers and employees, as is illustrated by *Jewell v. Kansas City Bolt & Nut Co.*, 231 Mo. 176, 132 S.W. 703 (1910).

In that case the plaintiff was injured in a rolling mill when he operated a piece of equipment called "the shears" that was unsafe because it was defective. He sued his employer for failing to furnish a safe machine in contravention of its common law duty. He also sued his supervisor, claiming that he was negligent in ordering plaintiff to operate the shears even though the supervisor knew the machine was defective. This Court agreed

that, "So ordering [the plaintiff] into such a place of danger, if it was a dangerous place, was a positive wrong or misfeasance on the part of [the supervisor]" for which the supervisor was "jointly liable with the [employer] for the injuries sustained by him in consequence thereof." 132 S.W. at 711. *Accord: Davis v. Standard Oil Co. of Indiana*, 47 F.2d 48, 50 (8th Cir. 1931) (applying Missouri law); *State ex rel. v. Falkenhainer*, 316 Mo. 651, 291 S.W. 466, 468 (*en banc*. 1927).

It can hardly be gainsaid that an employer and an employee can be jointly liable for breaches of different and separate legal duties, *Hansen, supra*, 375 S.W.3d at 213, *citing Devine v. Kroger, supra*, 162 S.W.2d at 818. Where two tortfeasors are concurrently negligent and each contributes to cause plaintiff's injury, both can be held liable even though neither tortfeasor's conduct is the sole proximate cause of plaintiff's injury, *Carlson v. K-Mart Corp.*, 979 S.W.2d 145, 147 (Mo. *en banc*. 1998). Suggesting that the defendant in *Leeper* could only be liable if his employer was not negligent is unsound.

Nonetheless, Leeper is light years ahead of any case decided since 1982 in providing a cogent exegesis of the common law duties of coemployees.

XI. APPLYING THESE PRINCIPLES TO THE INSTANT CAUSE

In their First Amended Petition filed in the trial court in the case *subjudice*, plaintiffs alleged that defendant, Terrio, was a project manager for Curt Peters' employer, Tramar Contracting; that Tramar provided "dowel baskets" used on construction projects; that the baskets were manufactured by Wady Industries, Inc. and shipped to Tramar; that the way Wady stacked the baskets when they were provided to Tramar was unsafe; that Terrio knew

that the way the baskets were stacked was unsafe (L. 7. 10-11). Despite this knowledge, plaintiffs allege Terrio was negligent by ordering Curt Peters to unload the baskets, with the result that they fell on him, causing him serious injuries (L. 7. 11, 17).[45] When Plaintiffs' First Amended Petition is allowed "its broadest intendment, treating all facts alleged as true and construing all allegations favorably to [Plaintiffs]," their pleading set forth facts that would, if proven, entitle them to relief. *Doss v. Doss*, 822 S.W.2d 427, 428 (Mo. *en banc.* 1992); *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. *en banc.* 2008).

This is so because at common law Terrio had a personal duty to not order Peters to perform tasks he (Terrio) knew to be hazardous. Pre-*Badami* cases so held as is illustrated by *Jewell v. Kansas City Bolt, supra*, 132 S.W. at 711, and *McCarver v. St. Joseph Lead Co.*, 216 Mo. App. 370, 268 S.W. 687 (1925). *Jewell* and *McCarver* were cited by *Hansen, supra*, as illustrative of common law cases where supervisory employees were guilty of a

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[45] Plaintiffs' First Amended Petition is not a model of legal draftsmanship because some of the breaches of duties pled are, arguably, not personal to Terrio. (MATA does not say this to be critical of Plaintiffs' attorneys. The law has been so confused since *Robinson v. Hooker*, that the different districts of the Court of Appeals cannot agree as to what constitutes an actionable duty personal of coemployees, so it is understandable when counsel throws the kitchen sink into pleadings.) If there are insufficient allegations, they should be looked upon as surplusage and disregarded in determining the sufficiency of the well-pleaded allegations in Plaintiffs' First Amended Petition, *State ex rel. Jefferson County v. Sheible*, 163 S.W.2d 559, 561 (Mo. 1942).

positive wrong or misfeasance, constituting breach of "a personal duty owed to a fellow employee independent of the employer's nondelegable duties" by ordering a subordinate into a place of danger, 375 S.W.3d at 218 n. 19.

When the proper standard is applied, Plaintiffs adequately allege violation of a common law duty by Terrio.

CONCLUSION

The time has come for this Court to articulate clear rules as to the liability of coemployees for breaches of personal duties so that counsel and trial judges can have some notion of what will and will not support a cause of action. The long nightmare of the *Badami* can be definitively brought to an end, and the schism between East and West healed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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