Supreme Court No.: SC94442

SUPREME COURT OF MISSOURI

CURT PETERS AND CHERI PETERS, APPELLANTS

V.

PATRICK TERRIO, RESPONDENT

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

APPELLANTS' SUBSTITUTE BRIEF

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Jurisdictional Statement

Plaintiffs, now Appellants, Curt Peters and Cheri Peters, sued Wady Industries, Inc., for strict products liability and negligence and Patrick Terrio for negligence in the Circuit Court of St. Charles County, Missouri for causing Curt Peters to sustain serious and permanent injuries. The claims against Wady Industries were dismissed without prejudice and are not at issue here.

The issue on appeal is whether the Appellants stated a cause of action for negligence against Terrio. The trial court dismissed the petition holding that the petition failed to plead that Terrio had a duty to Appellants independent of the employer's non-delegable duty to provide a safe workplace. L.F. 69-73. Appellants appealed that decision to the Missouri Court of Appeals-Eastern District. L.F. 76-80.

On September 9, 2014, the Court of Appeals issued its opinion affirming the dismissal. However, Judge Norton filed a dissenting opinion, certified that the majority opinion was contrary to *Leeper v. Asmus*, 440 S.W.3d 478 (Mo.App. 2014), and pursuant to Rule 83.03 ordered the case transferred to this Court. This Court has jurisdiction over this cause pursuant to Article V, Section 10 of the Missouri Constitution which permits a dissenting judge of the Court of Appeals to certify an appeal to the Supreme Court.

Statement of Facts

On September 24, 2008, Appellant Curt Peters was employed by Tramar Contracting, Inc., a company specializing in providing a variety of road building services and products to general contractors as well as to municipalities, industrial, and commercial clients including Dowel baskets, concrete barriers, temporary traffic barriers, concrete pavement accessories, and boom truck services. L.F. 10, ¶¶ 6, 8. Respondent Patrick Terrio ("Terrio") was also employed by Tramar in a supervisory capacity as Appellant's project manager. L.F. 10, ¶ 7. Wady Industries, Inc. is a manufacturer of fabricated wire products including Dowel baskets which are used in concrete road construction and which weighed approximately 200 pounds each. L.F. 10-11, ¶¶ 9, 13. Wady shipped these heavy baskets one on top of the other to Tramar without any warning, bracing or other precautionary measure. L.F. 10-11, ¶ 10. Once at Tramar, the baskets were kept in a staging area until needed at a construction site wherein they would be re-stacked on a Tramar truck and taken to the work site. L.F. 10-11, ¶ 10.

Prior to September 24, 2008, Terrio had received warnings from Tramar employees that the baskets were being stacked dangerously which posed safety hazards to Terrio's co-workers. L.F. 11, ¶ 11. Terrio ignored these warnings. L.F. 11, ¶ 12. On September 24, 2008, Terrio ordered that the Dowel baskets be stacked on a Tramar truck for transit to the job site in the same known dangerous condition and that they be unloaded by Appellant and other workers when they arrived at the site. L.F. 11, 16-17 ¶¶ 12, 41. While unloading the stacked baskets, a row of them fell from the stack onto Appellant causing him permanent and catastrophic injuries. L.F. 11, ¶ 13. After

September 24, 2008, Terrio issued a directive to all Tramar employees to no longer stack the baskets in the fashion which the employees had previously complained about to Terrio. L.F. 11, ¶ 14.

Appellants sued Terrio alleging that he was negligent in ordering and directing Appellant to stack and unload the Dowel baskets in a known dangerous condition which caused them to fall from the stack onto Appellant. L.F. 16-17, ¶¶ 41-42. Terrio filed a motion to dismiss alleging that he was immune from civil liability because his alleged negligence occurred while he was at work and the petition failed to allege that he had a duty independent of the employer's non-delegable duties. L.F. 26-27. The trial court agreed finding that the petition failed to allege a breach of a duty independent of the employer's non-delegable duty to provide a safe workplace and dismissed Terrio from the action. L.F. 69-73. Appellants filed their notice of appeal on November 11, 2013. L.F. 76-80. The Court of Appeals affirmed in a 2-to-1 decision. App. A1-A16. Judge Norton filed a dissenting opinion, and transferred the cause to this Court pursuant to Rule 83.03. *Peters v. Wady Industries, Inc.*, No. ED100699 (Mo.App. E.D. Sept. 9, 2014) (Norton, J., dissenting); App. A7-A16.

Points Relied On

I. The trial court erred in dismissing Appellants' co-employee negligence claim against Respondent Terrio since Appellants pled facts sufficient to support a common law negligence action by alleging that Terrio was individually negligent in ordering and directing Appellant to stack and unload the Dowel baskets in a known dangerous manner thereby creating the hazardous condition which directly resulted in Appellants' injuries.

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

Marshall v. Kansas City, 296 S.W.2d 1 (Mo. 1956);

McCarver v. St. Joseph Lead Co., 268 S.W. 687 (Mo.App. 1925);

Graczak v. City of St. Louis, 202 S.W.2d 775 (Mo. 1947).

Argument

I. The trial court erred in dismissing Appellants' co-employee negligence claim against Respondent Terrio since Appellants pled facts sufficient to support a common law negligence action by alleging that Terrio was individually negligent in ordering and directing Appellant to stack and unload the Dowel baskets in a known dangerous manner thereby creating the hazardous condition which directly resulted in Appellants' injuries.

A. Standard of review applicable to motions to dismiss.

Appellate review of a trial court's grant of a motion to dismiss is reviewed *de novo*. *Thomas v. A.G. Elec., Inc.*, 304 S.W.3d 179, 182 (Mo.App. E.D. 2009). The pleadings are liberally construed and all alleged facts are accepted as true and construed in a light most favorable to the pleader. *Id*. at 183. In making a determination, the court may not address the merits of the case or consider evidence outside of the pleadings. *Id*.

B. Co-employee immunity is gone and the common law controls.

The 2005 amendments to the Workers' Compensation Act stripped co-employees of the immunity they had enjoyed from negligence claims by fellow employees. *Robinson v. Hooker*, 323 S.W.3d 418, 424-25 (Mo.App. W.D. 2010). The question became what law controlled these claims. Missouri courts addressing the issue have reached a consensus that it is the common law, as it existed prior to the development of co-employee immunity and the 1982 *Badami* "something more" test, that controls. *Robinson*, 323 S.W.3d at 424-25; See also *Hansen v. Ritter*, 375 S.W.3d 201, 207 (Mo.App. W.D. 2012); *Carman v. Wieland*, 406 S.W.3d 70, 76-77 (Mo.App. E.D. 2013);

Amesquita v. Gilster-Mary Lee Corp., 408 S.W.3d 293, 303-04 (Mo.App. E.D. 2013); *Leeper v. Asmus*, 440 S.W.3d 478, 480, 483 (Mo.App. W.D. 2014); *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo.App. 1982). The lesson from these authorities is that as a result of the 2005 amendments to the Workers' Compensation Act, injured employees may pursue negligence actions against a co-employee if the co-employee owed the injured employee a duty of care at common law. *Leeper*, 440 S.W.3d at 483.

C. Co-employee liability under the common law.

At common law, a co-employee who violated a duty independent of the employer's non-delegable duties was answerable to an injured fellow employee for the consequences of his or her negligence. See *Giles v. Moundridge Milling Co.*, 173 S.W.2d 745, 751 (Mo. 1943); *Kelso v. W.A. Ross Const. Co.*, 85 S.W.2d 527, 535-36 (Mo. 1935); *Lambert v. Jones*, 98 S.W.2d 752, 757-58 (Mo. 1936).

As in all other common-law actions, the threshold matter is the existence of a duty owed by the co-employee. *Gunnett v. Giardier Bldg. and Realty Co.*, 70 S.W.3d 632, 637 (Mo. App. E.D. 2002). The employer is responsible for furnishing its employees with safe tools and a reasonably safe place to work. *Marshall v. Kansas City*, 296 S.W.2d 1, 3 (Mo. 1956). These duties are non-delegable, meaning the employer is liable if an injury is caused by a defective tool or by a dangerous work environment which was unsafe through no fault of an employee. *Kelso*, 85 S.W.2d at 534-35. However, an employer's obligation to protect his employees does not extend to protecting them from the transitory risks which are created by the negligence of the employees themselves in carrying out the details of the work. *Id.* Summarizing these principles of common law

co-employee liability, this Court stated:

> "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 his fellow employees."

Id. at 536.

Thus, a co-employee's duty is triggered when he or she has independently and negligently created an unsafe workplace.

C.1. At common law, the application of these principles routinely led to findings of submissible cases against co-employees for negligence.

In *Marshall v. Kansas City*, the supervisor-employer directed the co-employee to connect a hose to a compressor. *Marshall*, 296 S.W.2d at 2. The co-employee then shook the hose to remove kinks and in the process caused the plaintiff to trip. *Id*. In finding a submissible case against the co-employee for negligence, this Court focused on the fact that the danger was not caused by any defect in the hose itself, rather, the danger was created by the co-employee's handling of the hose which was an independent act in that the employer did not direct him to shake out the kinks. *Id*. at 3.

In *Graczak v. City of St. Louis*, this Court illustrated the law of co-employee liability from the perspective of an employer's alleged negligence. *Graczak v. City of St. Louis*, 202 S.W.2d 775 (Mo. 1947). There, the plaintiff was a blacksmith and was injured when his co-employee slammed a steam hammer on his hand. *Id*. at 776.

Plaintiff sued his employer only alleging that the employer breached its non-delegable duty to provide a safe workplace based solely on the co-employee's failure to give customary warning signals. *Id.* In reversing the judgment against the employer, the Court found the injury attributable to the negligence of the co-employee, not the employer. *Id.* at 780. The Court held that where an appliance is reasonably safe to operate and its operation rests upon the care and intelligence of the employees, the employer is not 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 the co-employees. *Id.* at 777.

In *Sylcox v. National Lead Co.*, the plaintiff was injured while exiting a company bus driven by a co-employee when the driver suddenly accelerated causing the plaintiff to be thrown from the bus. *Sylcox v. National Lead Co.*, 38 S.W.2d 497, 498-99 (Mo.App. 1931). Plaintiff sued both the employer and the co-employee for negligence. *Id.* The Court found that plaintiff made a submissible case for negligence against the co-employee. *Id.* at 501.

In *McCarver v. St. Joseph Lead Co.*, the plaintiff was a mine driller and was ordered by his superintendent to take down a loose rock from the roof of the mine and in doing so was killed when the roof collapsed. *McCarver v. St. Joseph Lead Co.*, 268 S.W. 687, 688 (Mo.App. 1925). The superintendent gave this order without properly inspecting the roof. *Id.* Discussing his legal duty, the Court stated that as the superintendent with superior knowledge of the perils attending the workplace, he had a duty to exercise ordinary care in discovering the extent of the danger into which he

ordered the plaintiff and to see that every reasonable precaution was taken. *Id*. at 689. The Court concluded that the superintendent's order amounted to actionable negligence. *Id*.

The foregoing authorities illustrate the straight forward approach the common law requires in these cases. That is, when the defendant co-employee creates the danger, has superior knowledge of the danger, or through his or her actions or inactions otherwise causes the plaintiff co-worker to encounter the danger and the plaintiff is injured, the defendant co-worker is subject to suit.

This is entirely consistent with one of the fundamental principles of negligence law; whether a duty exists in a given situation depends upon whether the risk was foreseeable. *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 156 (Mo.banc 2000).

Appellants respectfully submit that the trial court and the Majority Opinion failed to follow the common law and instead allowed the employer's non-delegable duty to provide a safe workplace to swallow the common law.

In this regard, the trial court and the Majority Opinion took the simplistic approach that since a negligent personal injury at work by its nature involves an allegation of an unsafe workplace, then it must be part of the employer's non-delegable duty to provide a safe workplace. And if it is part of the employer's duty, the reasoning goes, it cannot constitute an independent duty on the part of the defendant co-employee.

However, this is not consistent with the common law approach which allowed the employer's duty to provide a safe workplace to co-exist with suits against co-employees

for their specific and independent negligent conduct at the workplace. Again, as this Court succinctly described it:

> "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 his fellow employees."
>
> *Kelso*, 85 S.W.2d at 536

D. Appellants pled facts sufficient to support a claim for common law negligence against Terrio.

Appellants pled that Terrio controlled the manner in which the Dowel baskets were to be stacked and handled. L.F. 11, ¶¶ 12, 14. Terrio was previously warned by the employees handling the baskets that the manner in which Terrio was arranging for the baskets to be stacked was dangerous and was in violation of OSHA Regulations. L.F. 11, 17, ¶ ¶ 11, 41. Terrio ignored these warnings and directed Appellant to stack, transport, and handle the baskets in this known dangerous condition on September 24, 2008, when the baskets fell onto Appellant causing catastrophic injuries. L.F. 11, 16-17, ¶¶ 12, 41-42. Following Appellant's accident, Terrio issued a directive to all employees to no longer stack the baskets in this fashion. L.F. 11, ¶ 14.

These allegations demonstrate that Terrio was personally responsible for creating the dangerous condition of the stacked baskets and thus caused the workplace to become unsafe. Similar to the superintendent's duties in *McCarver*, Terrio, being in control of how the baskets were to be stacked, had a duty to exercise ordinary care in discovering

the extent of the danger into which he ordered Appellant and to see that every reasonable precaution was taken. Terrio was well aware of the dangers of stacking the baskets too high, yet he ordered Appellant into this place of danger without taking any precautionary measures. Terrio's specific knowledge of the danger and his responsibility for exposing Appellant to the danger establishes his independent duty to Appellant and is sufficient to support a cause of action against him for common law negligence.

Conclusion

Co-employee liability at common law was not an anomaly. While an employer was responsible for furnishing a reasonably safe place to work, the employer was not responsible for dangers that were independently created by an employee. Accordingly, when a co-employee's independent negligent acts created a danger he was answerable to a fellow employee injured by that danger.

Those simple common law principles were held in abeyance for decades while the fog of co-employee immunity and the many iterations of "something more" descended on this area of the law. That fog has lifted and the common law is back.

Here, Appellants pled sufficient facts to show that Terrio individually created the dangerous condition of the stacked baskets and thus caused an otherwise safe workplace to become unsafe. Despite his knowledge of these dangers and the foreseeability of a resulting injury, Terrio ordered Appellant Curt Peters to stack and unload the baskets while in this dangerous condition which caused his injuries. Such conduct is sufficient to state a cause of action against Terrio for common law negligence. Therefore, the trial court's Judgment dismissing Appellants' cause of action against Terrio should be reversed.

Certificate of Compliance

I hereby certify pursuant to Rule 84.06(c) that this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 2,935 words, exclusive of the sections exempted by Rule 84.06(b).

/s/ James M. Dowd
James M. Dowd

Certificate of Service

I hereby certify that Appellants' Substitute Brief was filed on November 13, 2014, with the Clerk of the Missouri Supreme Court using the electronic filing system for service by the Court.

_/s/ James M. Dowd_____
James M. Dowd